Another Parallel With Silicon Valley: Non-Compete Clauses under Israeli Law

Edo B Royker
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“For there could not have been a first egg to give a beginning to birds, or there should have been a first bird which gave a beginning to eggs; for a bird comes from an egg.” - Aristotle

By Edo Royker

Over the years a number of articles and books have attempted to pinpoint the cause of Silicon Valley’s unprecedented success as a focal point for technological innovation, venture capital financing, and start-up companies. Explanations for the environment in Silicon Valley have

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1 Theosophy, Vol. 27, No. 11, 483-91 (September, 1939) (citing Isis Unveiled I, 428), available at http://www.blavatsky.net/magazine/theosophy/ww/additional/ancientlandmarks/PlatoAndAristotle.html. This old philosophical quandary illustrates a circular reference paradox in which both factors necessitate the existence of the other. Ironically, Aristotle’s quandry is not paradoxical when interpreted literally. Darwin’s theory of evolution establishes that the egg came before the bird because the predecessor to the bird was an egg-laying animal that laid an egg that later became a bird.

2 B.S. Biology, University of Southern California 2007; J.D., UC Hastings College of the Law 2010. The author thanks Amit Almagor for providing invaluable research assistance with Israeli Case law and the Hastings Intellectual Property Concentration Seminar for providing a nurturing scholarship environment, without which this paper would not have been born.

3 See, e.g. ANNALEE SAXENIAN, REGIONAL ADVANTAGE, CULTURE AND COMPETITION IN SILICON VALLEY AND ROUTE 128 (Harvard University Press 1994). See also, Ronald J. Gilson, The Legal Infrastructure of High Technology Industrial Districts: Silicon
varied from the unique culture of Northern Californians.  

Stanford University, California Business Code Section 16600, California courts’ treatment of trade secret law, and any number of combinations of these factors. A majority of the scholarship has focused on the differences between Route 128 in Boston and Silicon Valley in Northern California. Why does Silicon Valley continue to experience an exuberance of start-up companies and venture capital financing when Route 128 has evolved into an infrastructure of mature companies, without a second wave of start-up companies? An understanding of the true answer to this question has great importance because it not only helps provide guidelines for other geographic locations on how to establish a similar environment, but

Valley, Route 128, and Covenants Not to Compete, 74 N.Y.U. L. Rev. 575 (1999) (These works have compared Route 128 in Boston to Silicon Valley and formulated different, but related, theories explaining why Silicon Valley continues to experience renewed waves of start-up companies, while Route 128 has seen a steady decline in the number of start-up companies.).

4 See, e.g. AnnaLee Saxenian, Regional Advantage, Culture and Competition in Silicon Valley and Route 128 (Harvard University Press 1994).
5 Id.
also provides guidelines for how Silicon Valley can maintain its successful atmosphere.

The scholarship on the differences between Silicon Valley and Route 128 is extensive, yet the literature has primarily focused on those two locations alone. As Professor Trebilcock warned, such an analysis may merely constitute “casual empiricism that proves nothing.” To address this concern, it would be useful to evaluate other locations similarly situated to Silicon Valley. This is problematic because Silicon Valley is, well, Silicon Valley and there are no exact replicas, which makes finding a comparable location difficult. Fortunately, even though it is not an exact replica, numerous scholars have drawn parallels between Silicon Valley and Israel.

Israel has the largest number of start-ups per capita in the world and continues to receive fresh infusions of venture capital financing. The entire country of Israel only measures 8,019 square miles, with a width ranging between 70 miles (at the widest point) and 9.3 miles (at the narrowest point). A majority of the population is concentrated within the

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8 Gilson, supra, note 6, at 621 (citing Michael J. Trebilcock, The Common Law of Restraint of Trade: A Legal and Economic Analysis 152-53 (1986)).
Gush Dan-Tel Aviv area, holding approximately 3,150,000 people. As such, Israel serves as a good third location to compare to Silicon Valley. If certain factors are present in Silicon Valley, but not present in Israel then this would indicate that the factors absent in Israel (but present in Silicon Valley) are less likely to be the reason for Silicon Valley’s success. Although such an evaluation still maintains similar limitations as the initial comparison between Route 128 and Silicon Valley, the addition of a third location helps add empirical evidence to the current scholarship.

Part I of this Article reviews the current literature and sets the stage for the development of industrially dense locations like Route 128 and Silicon Valley. Generally speaking, economists believe that there is a relatively uniform cycle leading to the development of dense industrial locations like Route 128 and Silicon Valley. Part II reviews the current literature and presents two main theories for the perpetual ubiquity of start-ups in Silicon Valley: Professor AnnaLee Saxenian’s cultural theory and Professor Gilson’s legal analysis covering the unique non-compete restriction in California. This Section explains proposed theories for why Silicon Valley continues to experience waves of success as a start-up hub, while Route 128 has seen a noticeable decline. Part III then explains a number of factors that make Israel a valuable third location for this

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analysis. Part IV explains the state of the law in Israel – statutorily and case law wise – and then tackles the two separate theories espoused in Part I of this article, as applied to Israel. Finally, the paper concludes that both Israel and Silicon Valley have many causes (eggs) in common and that sustaining a perpetual development of start-up companies (an omelet) requires more than one egg.

PART I. AGGLOMERATION ECONOMICS

“(T)he object of the investigation is the presence of industrial districts: why firms in an industry locate in geographic proximity to each other.” 11 The focus of this section is to set the stage for the causes of the first wave of industry agglomeration. Professor Gilson eloquently explores the literature and adds his own personal take on this interesting issue; I will try to summarize his explanations.

Gilson begins by exploring Alfred Marshall’s focus on economies of scale external to the firm in explaining the beginning of an industrially dense geographic location. 12 The concept of economies of scale traditionally refers to internally decreasing expenses to a company by increasing its production – it is cheaper (per person) to cook a dinner for three as opposed to a dinner for one. Marshall took the concept of

11 Gilson, supra, note 6, at 580.
12 Id.
economies of scale a step further and applied it to external factors. He explained that as firms aggregate in a single location that the number of skilled laborers in that industry also increases.\textsuperscript{13} As the supply of skilled laborers increases the price for hiring skilled laborers decreases, thus the external factor of increased laborers decreases expenses for the company.\textsuperscript{14} Similarly, as one industry begins to aggregate in a single area, secondary service industries also begin to develop alongside. These secondary industries including lawyers, accountants and even financiers further decrease external costs to the aggregated industry by increasing the supply of the secondary services. Thus, an aggregate economy helps decrease external expenses to the company by increasing the availability of certain external factors.

Although Marshall’s external factor analysis explains the agglomeration affect once it has begun (it is basically a domino effect of decreased costs caused by increased supplies), it does not address why a specific geographic location initially serves as the starting point for agglomeration. Professor Gilson explains that the initial input for agglomeration is knowledge. Indeed, there is sufficient empirical evidence supporting that the location of high tech industry

\textsuperscript{13} Id.

\textsuperscript{14} Id. (citing Paul A. David et al., Marshallian Externalities and the Emergence and Spatial Stability of Technological Enclaves 1 (July 1996)).
agglomerations is associated with major university complexes.¹⁵ Some specific knowledge is created at the university and then an industry begins to evolve in that geographic location. Gilson points to how this may seem counterintuitive at first because in the modern age information is available across the planet in the blink of an eye.¹⁶ Gilson argues that even though information is readily available over the Internet, there is a certain type of knowledge that is contained within individuals.

This is the focal part of Gilson’s explanation because it is this particular knowledge contained within individuals – know-how – that necessitates the initial geographic agglomeration of an industry. Know-how can be understood as information that an individual learns through experience.¹⁷ It is the particular training necessary to efficiently run a certain reaction, to operate a machine or in choosing the optimal layout

¹⁵ Id. at 585 (citing to David B. Audretsch & Maryann P. Feldman, Innovative Clusters and the Industry Life Cycle, 11 Rev. Indus. Org. 253, 271(1996) (finding that university research leads to clustering of innovative activity at early and late stages of industry life cycles); David B. Audretsch & Maryann P. Feldman, R&D Spillovers and the Geography of Innovation and Production, 86 Am. Econ. Rev. 630, 638 (1996) (arguing that innovative activities tend to cluster where knowledge spillovers are high and where new know- ledge is important)).

¹⁶ Id.

¹⁷ BLACK’S LAW DICTIONARY (8th ed. 2004) (“The information, practical knowledge, techniques, and skill required to achieve some practical end, esp. in industry or technology. Know-how is considered intangible property in which rights may be bought and sold.”).
in code development. Gilson argues that one of the primary ways in which this knowledge is shared amongst the agglomerated industry is through employee mobility.\textsuperscript{18} I will return to this point when addressing Gilson’s proposed explanation for the continuing success of Silicon Valley.

Up to this point, the Article has summarized some potential explanations for the first wave of an agglomeration economy. Both Route 128 and Silicon Valley experienced a similar beginning. Both Geographic locations are situated near major university complexes (Harvard and MIT in Boston, and Stanford and Berkeley near Silicon valley), so the development of the high technology agglomerations in those geographic regions should not be surprising. However, the interesting factor is what has lead Silicon Valley to experience continued success with start-up companies (second and third waves), while Route 128 has not seen the same success. Section II of this Article will now explain two potential theories that have been expressed by scholars to explain this discrepancy.

**PART II. EXPLAINING THE SUCCESS OF SILICON VALLEY**

There is no reason to reinvent the wheel, nor to be overly repetitive, so I will try to keep Part II of this article to a minimum and only explore the fundamentals of the proposed theories for the continued success of high technology start-ups in the Silicon Valley area. The analysis will proceed in

\textsuperscript{18} Gilson, supra, note 6, at 581.
chronological order of the two theories, beginning with AnnaLee 
Saxenian’s cultural account and ending with Gilson’s focus on California 
Business Code Section 16600. These two theories are not mutually 
exclusive. Professor Gilson explains: “the legal rules governing employee 
mobility are a causal antecedent of Saxenian’s construction of a Silicon 
Valley business culture that supports job hopping and a Route 128 
business culture that discourages it.” Nevertheless, each author claims 
that his or her theory is the initial cause of the perpetual success in Silicon 
Valley.

A. ANNALEE SAXENIAN’S CULTURAL EXPLANATION

“(I)mportant organizational and cultural differences continue to 
define the divergent fortunes of Silicon Valley and Route 128 
economies.” Saxenian’s account for the continued success of Silicon 
Valley focuses on the efficient exchange of knowledge between different 
companies in the Valley. She explains that the high volatility of employees 
has lead to an increased cross-pollination of knowledge amongst firms in 
Silicon Valley. Saxenian attributes the high volatility of employees in 
Silicon Valley to “differences in social structures and industrial practices 
(that) laid the foundation for the creation of two distinct industrial

19 Id. at 578.
20 Saxenian, supra, note 4, at Preface Page IX.
21 Id.
systems.” According to Saxenian, Silicon Valley’s unique community and culture endorsed job mobility, epitomized by job-hopping engineers, which more efficiently transfer knowledge than Route 128’s vertical integration model. It is this cultural difference between tie-wearing east coasters and flip-flop bearing Californians that accounts for high employee mobility, and consequently, the marked difference between Silicon Valley and Route 128 today.

B. GILSON’S LEGAL EXPLANATION

As stated earlier, Professor Gilson argues: “the legal rules governing employee mobility are a causal antecedent of Saxenian’s construction of a Silicon Valley business culture that supports job hopping and a Route 128 business culture that discourages it.” As will be explained below, Gilson attributes the continued success of Silicon Valley to the restriction on non-compete agreements in California, specifically California Business Code section 16600, as the initial cause for the continued success of Silicon Valley. Before delving into the specifics of the California legislation it is important to keep in mind the purpose of Business Code Section 16600.

Until now, this Article has discussed a common feature in both Saxenian and Gilson’s account for the continued success of Silicon Valley

22 Id. at 29.
23 Gilson, supra, note 6, at 578.
the efficient exchange of knowledge (know-how) amongst firms in the area. Saxenian argues that the culture in the Bay Area is more conducive to employee mobility, which enables greater cross-pollination of know-how amongst firms in that area. Gilson, on the other hand, argues that it is the specific legal structure in California (regarding non-compete agreements), which is the egg that has lead to increased employee mobility and the continued success of the Valley.

Employee non-compete agreements are contractual provisions often inserted within employment agreements. These provisions state that the employee will not work for a competitor or in the same industry for a number of months (often 18 months) after leaving the original employer. The purpose of such agreements is to protect the original employer’s trade secrets, proprietary information and know-how from being acquired by competitors. This can be very important for start-up companies, which may be neck-to-neck in breakthroughs, thus making the idea of non-compete agreements important to employers.

California has adopted a markedly different approach to non-compete agreements than Massachusetts and most other states. California Business and Professions Code section 16600 provides that “every contract by which any one is restrained from engaging in a lawful
profession, trade, or business of any kind is to that extent void.”

California courts have construed this provision broadly and have failed to enforce non-compete provisions in almost all situations. Massachusetts, on the other hand, does not have a broad restriction on non-compete agreements and employs more of a rule of reason analysis on non-compete agreements. Gilson explains that in his evaluation of ten preliminary injunction cases for non-compete agreements in Massachusetts, eight were granted. This is a marked difference from California and Gilson argues that this is the primary reason for the continued success in California. He explains that the freedom to seek employment granted by the California legislature, and its current interpretation by the judiciary, has lead to increased employee mobility. He further argues that it is the state of the law in California, which has lead to a distinct culture endorsing high employee mobility.

I think Gilson makes the important and accurate observation that the freedom of employment granted within California has played a pivotal role in the continued success of California. However, whether or not the unique state of employment law in California has lead to high

24 See Cal. Bus. & Prof. Code § 16600 (West 2007). This section has two exceptions that are aligned with the rest of the country.
26 Gilson, supra, note 6, at 604-608.
27 Id. at 627.
employee mobility, or whether there were other cultural factors that lead to high employee mobility is in my opinion an impossible question to ascertain with certainty. Nevertheless, the remainder of this Article will focus on a third location that has experienced similar success to Silicon Valley. If the state of the law in this third location differs markedly from that present in Silicon Valley then one can conclude that Gilson’s analysis may have been misplaced. However, if the state of the law is similar to that in Silicon Valley then Gilson’s analysis merits additional credibility. In fact, this Article will demonstrate that Gilson’s focus on the unique non-compete law within California is not misplaced and that the state of the law in Israel favors Gilson’s analysis.

**PART III. ** **ISRAEL AS A VALUABLE COMPARISON TO SILICON VALLEY**

Israel has the greatest number of high technology start-ups in the world, after the United States, and ranks number 16 in patents per capita globally.\(^{28}\) Israel also receives substantial venture capital (VC) financing: “Previous work has described the Israeli VC industry as modeled along America’s Silicon Valley to the point of considering it the most successful transplant of the Silicon Valley model outside of North America.”\(^{29}\) The


\(^{29}\) Avishai Friedman, The nature of interaction between Israeli entrepreneurs and investment capital available within and from outside Israel, at 6, (2008) (unpublished Masters of Business dissertation, Auckland University of Technology)
population for the entire country of Israel is approximately 7,308,000, while the population for the San Francisco Bay Area is approximately 7,702,331. Additionally, both Israel and the San Francisco Bay Area have a number of world-renowned university complexes located within them.

The numerous parallels between Israel and Silicon Valley scream out at even the least clairvoyant observer. Nevertheless, there are a number of important differences between Israel and Silicon Valley that should be taken into account. Most notably, venture capital financing in Israel was nonexistent until around sixteen years ago.30 In 1994, the Office of the Chief Scientist31 in Israel initiated a government program to encourage VC funds to come to Israel.32 “The unique feature was that the Israeli government agreed to subsidize the success of the funds in addition to sharing the risk. This was done by contracting with the non-government partners in the fund to sell them the part of the government at the initial


31 This office is a subset of the Ministry of Industry Trade and Labor.
32 Agmon and Kallir, supra, note 28.
investment cost plus nominal interest after ten years in case of a success.  

Although these differences may at first glance appear to push against the comparison between Israel and Silicon Valley, for the purposes of this Article the differences are not detrimental. The first discrepancy is the apparent young age of VC funding to Israel. One could potentially argue that because Israel has only experienced rampant VC funding over the past sixteen years that it is not a valid comparison with Silicon Valley. Although it is true that Israel has only over the past sixteen years begun experiencing the current VC success, it has experienced continuous waves of success. Sixteen years is an ample period of time and there have been multiple waves of start-up companies during this time period. Therefore, this factor is not detrimental to the comparison.

The more difficult discrepancy to rationalize away is the level of government funding given to VC funded start-up companies. I do not think this discrepancy can be completely rationalized away and I think this aspect may contribute to the continued success of start-up companies in Israel. However, I think the comparison between Israel and Silicon Valley is still acceptable for the purposes of this article and for a

33 Id.
number of reasons. For starters, one discrepancy does not destroy a valuable comparison because a comparison need not be 1:1 in order to function as a valid comparison. Additionally, one should note that there are numerous government-funding options within the United States, such as National Institute of Health grants for biomedical research and National Science Foundation grants in all other fields of science. These grant options are different from the government investment in Israel, but are nevertheless, forms of government funding. Finally, and most importantly, one can argue that the government funding sixteen years ago initiated Israel’s success as a start-up hub, but that the continued success of Israel today is a result of other factors, such as the culture in Israel’s technology sector and the particular state of the law in the country.

In closing, even though there are some discrepancies between Israel and Silicon Valley, the multitude of similarities make the comparison between the two locations ideal for the purpose of this article.

PART IV. THE CULTURE AND STATE OF THE LAW IN ISRAEL

A. ISRAELI CULTURE IN THE HIGH TECHNOLOGY SECTOR

Many accounts for the success of Israel’s technology sector focus on the unique government grants, tax incentives and military funding provided by the Israeli government, however, these explanations fail to explain why other countries with similarly situated incentives have not
experienced the same successful boom. Although I believe that Israel’s success may partially be attributed to the unique government funding projects with VCs, as discussed in Part III, Saxenian points to another variable: “the connection to technology centers in the United States.”

“Between 1978 and 2000, more than 14,000 professional and technical workers emigrated from Israel to the United States... Today some 500,000 Israelis are living in the United States and a large proportion have settled in California.” Many of these Israeli immigrants came to the United States for jobs and graduate degrees in the technology sector. Interestingly, a number of these Israeli immigrants returned to Israel as entrepreneurs with strong ties to technology centers in the United States. These ties were primarily with technology centers in California, namely Silicon Valley. As Saxenian accounts in her book:

Tremendous amounts of information and know-how are transferred as engineers and entrepreneurs travel between Silicon Valley and Israel, yet there is a minimum of institutionalization. In contrast with the mechanisms for information exchange within a large hierarchical corporation, information travels through the decentralized and informal networks created by venture capitalists, service providers, consultants, and suppliers.

34 See, e.g. ANNALEE SAXENIAN, THE NEW ARGONAUTS, REGIONAL ADVANTAGE IN A GLOBAL ECONOMY, 104 (Harvard University Press 2006).
35 Id. at 105.
36 Id. at 105 (citing to Cohen and Haberfeld 2001; Paltiel 2001; deFontenay and Carmel 2004; Mahroum 1998).
37 Id. at 112 (emphasis added).
Although Saxenian does not explicitly state this, one can extrapolate that the strong ties with Silicon Valley may have extended beyond the presence of VC funding to the actual core of the business culture in Israeli start-ups. Israeli entrepreneurs likely borrowed the decentralized and horizontal business culture that epitomizes Silicon Valley and brought it back to their homeland. If this is in fact the case, then Saxenian’s cultural account provides a valuable explanation for the continued success of start-up technology companies in Israel.

Saxenian’s cultural explanation may offer a valuable theory for explaining the continued success of start-up companies in Israel. However, like most things, there are likely multiple factors at play. The next portion of this Article explores a second factor - the unique legal landscape in Israel.

B. **The Basic Laws of Israel**

The State of Israel declared its independence on May 14, 1948.\(^{38}\) The declaration itself stated that Israel should formulate and adopt a constitution by October 1, 1948.\(^{39}\) Unfortunately, as is often the case in Israel, there were initial problems with adopting a formal constitution

\(^{38}\) Declaration of the Establishment of the State of Israel, published in the Official Gazette, No. 1 of the 5th, Iyar, 5708 (May 14th, 1948).

\(^{39}\) Id.
because of a discrepancy in ideology amongst the country’s constituency. The orthodox constituency felt that it was unacceptable for a secular constitution to be declared the supreme law of the land and placed above the old Jewish doctrines (the five books of Moses, the Talmud and other rabbinical opinions). As such, Israel was unable to adopt a formal constitution by October 1, 1948, or at any time since then. Nevertheless, the first Knesset of Israel came to a decision known as the Harari decision.\textsuperscript{40} Instead of adopting a formal constitution, the Knesset was charged with adopting piecemeal chapters addressing fundamental laws. These chapters became known as the Basic Laws of Israel and were adopted in a number of areas. Subsequently, in 1998, Aharon Barak, the Chief Justice of the Supreme Court of Israel declared a “constitutional revolution,” assigning the Basic Laws of Israel with the same powers as a would-be constitution.\textsuperscript{41} To date, there are currently eleven basic laws of Israel, most relevant for this discussion is the Basic Law: Freedom of Occupation.\textsuperscript{42}

The current Basic Law of Freedom of Occupation was passed on March 9\textsuperscript{th}, 1994 replacing the original Basic Law of Freedom of

\textsuperscript{40} United Mizrahi Bank plc v. Migdal Cooperative Village (1995) 49 (iv) P. D. 221.
\textsuperscript{41} Id.
\textsuperscript{42} http://www.knesset.gov.il/description/eng/eng_mimshal_yesod2.htm.
Occupation from 1992. The 1994 law has a number of additional provisions that broaden the scope of freedom of occupation. As a first point of difference, the current law begins by explaining that “(t)he purpose of this Basic Law if (sic) to protect freedom of occupation.” However, this can be seen as mere “fluffery” because it does not really explain what should be done. The more influential change between the old and new law comes from another provision. Both laws state that “(e)very Israel national or resident has the right to engage in any occupation, profession or trade.” However, the 1992 law then states:

There shall be no limitation on this right except by a Law enacted for a proper purpose and on grounds of the general welfare.

The 1994 provision, on the other hand, states:

There shall be no violation of freedom of occupation except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required, or by regulation enacted by virtue of express autorisation (sic) in such law.

The Basic Law of Freedom of Occupation, on its face, seems more in line with the Massachusetts statute than the California statute. Under California Business and Professions Code Section 16600, there are only a limited number of enumerated exceptions that override the right to freedom of occupation. The Israeli statute on the other hand, does not


\[44\] Id.
limit the exceptions that may apply to the freedom of occupation.

Nevertheless, the Israeli statute does have the limiting language indicating that a law may limit an individual’s right to freedom of occupation but to an extent no greater than is required. Although this qualifying language does not broaden the Israeli statute to the same degree as the California statute, it provides greater power to the judiciary, by vesting additional decision power in the judges who must determine this issue. This brings the discussion to the next logical point, how exactly have courts interpreted the Israeli Basic Law of Freedom of Occupation?

C. NON-COMPETE AGREEMENTS IN THE ISRAELI COURT SYSTEM: DAN FRUMER V. RADGUARD

1. STRUCTURE OF THE ISRAELI COURT SYSTEM

The Israeli court system is structured in a noticeably different fashion from the American court system. In Israel, like the United States, there are small claims courts and district courts that handle cases from the onset. The Israeli court system also has a Supreme Court with final authority on all legal issues that merit the Court’s attention, similar to the Supreme Court in the United States. Unlike the United States, however, Israel has specialized lower courts, including: traffic courts, admiralty

\[\text{45} \text{ Israel does not have a jury system and relies exclusively on judges to find both questions of fact and law.}\]

\[\text{46} \text{ Beit HaMishpat HaElyon, Supreme Court of Israel,}\]

courts and labor courts. Most relevant to the discussion here are the specialized labor courts. These labor courts consist of regional (district) labor courts and the National Labor Court. The National Labor Court is reminiscent of the Federal Circuit in the United States, in that it handles all appeals from the regional labor courts concerning employment matters. Of course, the decision of the National Labor Court may be appealed to the Supreme Court of Israel, but this seems to happen rarely.

2. Visiting the Frumer Decision

Now to the heart of the discussion, how exactly has the Israeli court system interpreted the Basic Law of Freedom of Occupation, as it relates to non-compete clauses in employment agreements? Based on a survey of current Israeli case law, the most cited and on-point decision for this issue is the 2006 National Labor Court decision Dan Frumer and Checkpoint Software Technologies v. Radguard. The remainder of this Section will evaluate this thoughtful decision starting with the cases

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48 Id.
49 E-mail correspondence with Amit Almagor (on file with author).
procedural history and ending with the reasoning of the decision. I will show that Israeli courts rely heavily on California judicial decisions regarding non-compete agreements, even though the Basic Law of Freedom of Occupation in Israel does not coincide identically with California’s Business Code Section 16600.

This case begins at the Tel Aviv District Labor Court (regional court), where Radguard Company filed suit against its former employee Dan Frumer. Radguard is a small company consisting of approximately 60 employees. It primarily develops hardware Firewall/VPN solutions and integrates the hardware with software it buys from other companies.\(^{51}\) Frumer worked at Radguard as a Research Manager for a number of years, but quit after Radguard decided to transfer him to a new (and less appealing) position. A few months after ending his employment at Radguard, Frumer began employment at CheckPoint Technologies\(^{52}\) as a Research Manager/Coordinator. Frumer’s new position at CheckPoint required essentially the same responsibilities Frumer had at Radguard, but was not in exactly the same field; Radguard specializes in developing the computer (hardware) and purchases the Operating System from other

\(^{51}\) Id. at 2.

\(^{52}\) CheckPoint is a larger company consisting of 200 employees in Israel and 300 employees in the United States. Id. at 3.
companies, while Checkpoint develops the Operating System and buys the computer.

Nevertheless, Radguard felt that its proprietary information and trade secrets were at risk because of Frumer’s new employment and filed for injunctive relief barring Frumer’s employment with CheckPoint for a period of 18 months from the day Frumer quit. Radguard pointed to the employment agreement that Frumer had entered into with Radguard on May 23, 1994. The employment agreement contained a specific provision stating that Frumer would not use any information acquired from Radguard at a new job for a period of 18 months from the last date of employment. The District Labor Court found the non-compete provision binding on Frumer, regardless of the Basic Law Freedom of Occupation, and granted Radguard’s request for injunctive relief.

Frumer appealed the decision to the National Labor Court arguing that the court should not enforce the non-compete agreement because it violated his Basic Right of Freedom of Employment. The National Labor Court reversed the District Labor Court, holding that Frumer’s Right of Freedom of Employment trumped the non-compete provision in this

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53 *Id.* at 1.
54 *Id.*
55 *Id.*
56 *Id.*
situation because there was no actual threat of trade secret misappropriation. The Court began its analysis focusing on two distinct questions: (1) what weight should be given to the employment contract, and (2) is there a high chance that Frumer would use a trade secret in his new employment?\footnote{Id. at 10.} In addressing these two questions, the Court balanced whether the interest to the employee outweighed the potential harm to the original employer. The Court ultimately held that in this particular situation there was little risk of the employee using Radguard’s trade secrets in conjunction with his new employment. As such, the non-compete provision was unreasonable and should not be enforced.

Before reaching a final holding, the Court went through a lengthy analysis evaluating United States, English and Canadian law. The Court explained that in a majority of these jurisdictions, the Courts utilize a balancing test:

The prevailing view in most jurisdictions is that covenants not to compete are enforceable only if reasonable – and reasonableness turns upon an assessment of whether it is greater in duration, scope of employment, and geographic area than is necessary to protect the employer’s legitimate interests; imposes an undue hardship on the former employee’s ability to earn a living or practice a profession; and the extent to which the public interest is affected...

In some jurisdictions, a finding of unreasonableness makes the covenant totally unenforceable, on the theory that a judicial narrowing of the covenant will only encourage employers to write broader covenants hoping to trench closer to (or transgress) the line
of reasonableness. Others allow the courts to ‘blue pencil’ the covenant, narrowing the duration, geographic scope, and nature of the work, in an effort to achieve a fair balance of competing interests.\textsuperscript{58}

The Court then cited to California Business Code Section 16600 and its specific exception for trade secrets:

\begin{quote}
this provision (is an) expression of public policy to ensure that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice. Section 16600 has specifically been held to invalidate employment contracts which prohibit an employee from working for a competitor when the employment has terminated, unless necessary to protect the employer’s trade secrets... ‘the interests of the employee in his mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change...’\textsuperscript{59}
\end{quote}

Along the way the Court raised Professor Gilson’s article \textit{The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley} and on Professor Hyde’s article \textit{The Wealth of Shared Information Information: Silicon Valley’s High Velocity Labor Market, Endogenous Economic Growth, and the Law of Trade Secrets} explaining that prominent American scholars believe there are economic benefits in restricting non-compete agreements.

\textsuperscript{58} \textit{Id.} at 12 (citing Matthew W. Finkin, \textsc{Legal Protection for the Individual Employee}, at 186-87 (West Pub. Co.) (3d ed. 2002) (with Alvin Goldman, Clyde Summers, and Kenneth Dau-Schmidt)).

\textsuperscript{59} \textit{Id.} at 21 (citing Application Group, Inc v. Hunter Group, 61 Cal.App.4th 881, 901 (citing Diodes Inc v. Franzen, 260 Cal App. 2nd 244 (1968))).
3. Comparing the Frumer Decision to California and Massachusetts Law

The lengthy discussion in the decision leaves a number of questions open: Does the Frumer decision align more closely with California law or with the laws in other jurisdictions, such as Massachusetts? Would Israeli courts enforce non-compete provisions in other situations?

In answer to the first quandary, it appears that the Frumer decision is more aligned with California law than Massachusetts law. The National Labor Court ultimately held that the non-compete provision was unenforceable, even though the employee was taking a similar position in a competing company. Although the Israeli decision applied a balancing test, the dicta in the decision emphasized the importance of freedom of employment and cited to a number of California authorities. Thus, even though the actual law in Israel may call for a balancing test, it seems that the balancing test utilized is skewed in favor of the departing employee. Not only is the law skewed in favor of the employee, but the employer also carries the heavy burden of showing highly probable and detrimental potential damages in order to succeed in enforcing non-compete agreements. Therefore, the Frumer decision, and Israeli law on this issue as a whole, seems more closely aligned with the law in California.

60 Id. at 36.
As to the second quandary, the simple answer is yes. Yes, the Israeli Court would enforce a non-compete agreement if a particular factual situation called for it. The more difficult question though is determining what factual situation would call for enforcement of a non-compete provision. Here, the facts did not call for enforcing the non-compete provision because Frumer was working for a competitor that specialized in a slightly different field and consequently the court found there was a minimal chance of trade secret exposure. However, had the factual situation been different, the Court may have also held differently. It is difficult to predict how the Court would hold in other situations, but based on a thorough evaluation of the decision, it seems that the risk of trade secret exposure would have to be quite high and detrimental to the previous employer. As stated in the previous paragraph, it appears under Israeli jurisprudence the employer carries the heavy burden of showing highly probable and detrimental potential damages in order to succeed in enforcing non-compete agreements. In closing, even though the law in Israel does not fully align with California, the law leans heavily in favor of employee mobility and in favor of employee rights.

**CONCLUSION**
It appears that Israel shares similar cultural and legal infrastructures with Silicon Valley. As explained in Part IV(A), many Israeli entrepreneurs have bonds with Silicon Valley and it is reasonable to conclude that the high mobility and horizontal job culture from Silicon Valley bled into the Israeli start-up culture as well. Similarly, as explained in Part IV(B), the National Labor Court’s interpretation of the Basic Law of Freedom of Occupation also coincides with the California approach to non-compete provisions in employment contracts.

My take on these observations is that both a culture endorsing high employee mobility and a legal infrastructure enabling such mobility without legal ramifications are necessary to nurture an optimal atmosphere for start-up companies. If both elements are necessary, it helps explain why Israel is seen as the most successful transplant of the Silicon Valley model. Consequently, the Author recommends that Israel continue mimicking Silicon Valley to the same degree the country has so far, especially in the realm of employee mobility jurisprudence. Israel

61 Professor Robin Feldman explains that this analysis is incomplete because it fails to explore the impact of legal decisions on business practices in Israel. The Author agrees that a further exploration of the degree that business practices in Israel coincide with legal decisions would be helpful in this discussion. However, the Author feels that such a broad criticism applies not only to this analysis as it pertains to Israel, but also to Gilson’s analysis as it relates to the legal landscape in California. This Article will not explore this issue, but the Author acknowledges it merits further attention.
should continue to resist enforcement of non-compete agreements and to utilize a balancing test that favors employee mobility.

Similarly, California jurisprudence should continue fostering an environment supporting employee mobility, and encourage that decisions like *Edwards* remain the norm in California. As evidenced by the success of Israel’s high technology industry, both the current culture and legal infrastructure of California are important in maintaining the correct environment for start-up companies. As the old English idiom goes, “if it ain’t broken, don’t fix it.”

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