

The Ethics of Noncompete Clauses

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ABSTRACT

Noncompete clauses (NCCs), or agreements by employees to not work for a competitor or start a competing business, have recently faced increased public scrutiny and criticism. This article provides a qualified defense of NCCs. I focus on the argument that NCCs should be banned because they unfairly restrict the options of employees. I argue that this argument fails because it neglects the economist Thomas Schelling's insight that limiting exit options can be beneficial for a person. This employee-based defense of NCCs does not absolve all their uses, but it does give us a rough test for evaluating the permissibility of NCCs. With this test in hand, I turn to some of the more controversial uses of NCCs. For those who weigh heavily the interests of employees, the question is not whether NCCs, but when.

KEYWORDS

Employees; Employment Ethics; Freedom; Negotiation; Noncompete Clauses

An increasingly scrutinized trend within the United States is the rising use of non-compete clauses, or covenants not to compete, in employment contracts.¹ Noncompete clauses hold that an employee may not work for a competitor or start a competing business within a certain period of time and geographic area after leaving their firm. On their face, such covenants subject employees to restrictions that many find onerous and unfair. Infamously, the sandwich restaurant chain Jimmy John's required its sandwich artists to sign such agreements, a practice they ended in 2016 after much public and legal criticism (Niswanatha, 2016).

Elizabeth Anderson suggests non-compete clauses give employers a way to “imprison workers’ human capital” (2017a, 66). In an op-ed, Paul Krugman similarly suggests “[T]hings like noncompete clauses... don’t just reduce your wages. They also reduce your options if you’re mistreated” (2018). For both Anderson and Krugman, non-compete clauses are symptomatic of the unequal relation between employees and employers. Worse still, such restrictions exacerbate this unequal power relation by restricting the options employees have. In light of such worries, many states are considering passing laws severely limiting the enforceability of non-compete clauses. For example, Pennsylvania is currently considering such a bill.² If this bill were to pass, Pennsylvania would join states such as California and Montana that ban noncompete clauses in all but a few circumstances. More ambitiously, a range of labor groups and politicians seek to

¹ While the focus here and elsewhere in the paper is the United States, NCCs are not unique to the U.S. I will note where my arguments depend on the U.S. context. Later discussions also allude to other contexts.

² Pennsylvania House Bill 1938.

convince the U.S. Federal Trade and Commission to ban noncompete clauses across the United States (Eidelson 2019).

I am sympathetic to the suspicion surrounding non-compete clauses. That being said, I worry that the push to legally abolish such restrictions rests on an incomplete analysis. It is true that such restrictions often serve to advance the interests of employers over those of their employees. Further, I grant that employers tend to exploit market power asymmetries in pressing employees to agree to these restrictions. But this does not allow us to conclude with Anderson, for instance, “Every state should follow California’s example and ban noncompete clauses from work contracts” (2017b). To be justified in reaching the abolitionist conclusion, we need to investigate whether anything can be said *in favor* of such covenants before taking them as evidence of hierarchy and domination within the employment relation as Anderson would have us. If we can find something to say in their favor that takes seriously the worries posed by Anderson and others, this allows us to describe conditions under which such restrictions are permissible.

Despite growing public attention to NCCs, ethicists have yet to place the ethics of noncompete clauses under direct scrutiny. This article seeks to start a conversation on this topic by providing a qualified defense of NCCs, going against the grain of much public skepticism. In the legal scholarship, defenses of NCCs tend to focus on benefits to the employer in the form of retaining clients or protecting confidential business information (see Harlan 1960, 667-674). In contrast, I take as my starting point Adam Smith’s dictum that, in conflicts between the interests of workers and their employers, favoring the interests of workers is “always just and equitable” (Smith 1976, Chapter 10, 158). The idea is that, if we can find a case for NCCs that focuses on the interests of employees generally speaking, this provides a set of conditions under which such

a restriction is permissible. This sort of argument avoids the worries raised by Anderson and Krugman that these clauses unfairly privilege the interests of employers.

Much of the public reaction against NCCs arises from particular cases, such as when companies like Jimmy John's require low-wage, low-skill workers to sign a NCC. However, there are other cases that seem less worrisome. Consider, for example, the high-skill, specialized software engineer who signs a NCC in exchange for a wage premium over the course of her career. It is not obvious anything has gone awry in this sort of a negotiation. If you pay attention to the differences between these two sorts of cases, I suggest, what comes out is that NCCs *as such* are not objectionable. Instead, the problem with NCCs is often *how* they are used.

Ultimately, I argue that the error the abolitionist makes is assuming that restrictions are always bad for the person restricted. In the case of NCCs, for instance, the assumption is that limiting exit options sets back an employee's interests. However, as noted most famously by the economist Thomas Schelling (1960), sometimes limiting an option to exit actually *improves* an agent's position. Based on this, I argue that NCCs can be a tool for employees to advance their interests in the context of bargaining.

The structure of my argument is as follows. Section 1 provides a brief overview of NCCs. Section 2 describes the reasons why many oppose NCCs. Sections 3 through 5 shows that the basic case against NCCs rests on an error. That being said, this allows me in Section 6 to derive a set of ethical conditions to evaluate the use of NCCs. Section 7 provides a conclusion.

1. NONCOMPETE CLAUSES: A PRIMER

As noted in the introduction, a NCC is a clause in a employee contract that an employee will neither work for a competitor nor start a competing business within a certain time frame and

geographical region. NCCs are not a niche piece of legal technology seldom used, but impact a wide range of employees. A recent study of the U.S. labor force suggests that 20% of workers were subject to a NCC in 2014, and that 40% of workers have signed a NCC over their career (Starr, Prescott, and Bishara 2018).

NCCs have not always been so widely permitted. In the common law tradition, there is a presumption against acts and covenants that limit competition, or “restraints of trade” (Blake 1960, 626). While there is only a presumption against restraints on trade, restraints placed by “masters” on their workers faced a particularly high burden. Most notably, the *Dyer’s Case* of 1414 in England held that a covenant forbidding a dyer (the defendant) from competing with the plaintiff was void. Evidence suggests that the defendant was a journeyman or apprentice to the plaintiff (Blake 1960, 636). If this is true, concern with how NCCs treat employees played a key role in public reception from early on. Only in the late 19th and early 20th century did NCCs become permissible in their modern form (Blake 1960, 645-646).

Because NCCs are so restrictive, U.S. courts are very hesitant to enforce them. In particular, courts tend not to enforce NCCs when there is no consideration (Perillo 2003, 656-662). That is, these courts look and see if the employer gives something to the employee in exchange for signing the NCC. If an employer requires an employee to sign an NCC *after* signing an employment contract, and offers no additional benefits or salary, that NCC is likely unenforceable. Further, U.S. courts tend not to enforce NCCs if they are unreasonable in geographic and temporal scope. The burden is on the employer to show that the NCC is narrowly tailored to protect a legitimate business interest. Finally, an employee can avoid an NCC depending on the reasons for leaving a firm. For example, if the employer is guilty of breach of contract or wrongfully terminates the employee, courts will not enforce the NCC.

Beyond these general common law rules, statutory differences between countries and states impact the validity and enforceability of NCCs. In the United States, for example, various states have enacted statutes drastically limiting the use and enforceability of NCCs. California only allows the use of NCCs in very particular circumstances such as the sale of a business. But many states permit and enforce NCCs.³

2. THE BASIC CASE AGAINST NCCS

The common argument in favor of NCCs rests on the employer's interest. Employers use NCCs as a way of protecting themselves from employees taking trade secrets or other vital information with them to a competing firm. Similarly, employers use NCCs as a way of protecting their client list. An employee may leave a firm and take with them those customers the employee interacted with through the firm. Thus, firms argue that NCCs protect legitimate business interests and for that reason are a permissible legal tool to use in the pursuit of profit.

But consider the case of Jimmy John's from the introduction. It is difficult to see how Jimmy John's is protecting itself from the transmission of trade secrets through its NCCs for its sandwich artists. Other details of the case raise further questions about the fairness of these agreements. Employers would have employees sign an NCC after accepting an offer of employment, often on the first day of work. Employees did not have access to legal counsel, and these NCCs tended to be unenforceable either due to violating common law restrictions or

³ For a summary of state by state variation in noncompete laws, see the chart provided by the law firm Beck Reed Riden LLP on the following page: <https://www.beckreedriden.com/50-state-noncompete-chart-2/>.

restrictions set by statute. The particulars of this case do not suggest the protection of legitimate business interests, but instead suggest the abuse of NCCs to intimidate workers.

More generally, there are a variety of ways NCCs set back the interests of employees.⁴

First, NCCs set back employees' interests in general. If an employee is subject to an enforceable NCC, that employee is no longer legally able to seek outside offers without paying a hefty cost of a year or two away from his or her preferred profession. This sets back an employee's interest absolutely to the extent it prevents that employee from seeking alternative, more preferable employment. For example, an employee may accept a job offer they find merely acceptable (the old saw about a bird in the hand) but then, because the job requires an NCC, this employee is now unable to seek a job they would prefer more. This leaves them worse off than they would be sans the NCC.⁵ Let us call this *the objection from general employee welfare*.

Second, NCCs prejudice employees' interests vis-à-vis their employers' interests by tipping the scales of bargaining power. If an employee is subject to an NCC, they are unable to seek offers from other employers. Lacking credible alternative options, an employee is less likely to be successful in pressing their current employers for a raise or other sorts of benefits. You can see this sort of concern with NCCs when Najah Farley, a senior attorney at the National Employment Law Project, states, "non-compete agreements diminish a worker's power to change jobs and bargain for higher wages by stopping workers from moving between jobs" (2019). Indeed, there is some empirical evidence in the U.S. context to believe that NCCs depress wages under certain conditions (Balasubramanian et al. 2018; Starr 2019). This is the

⁴ I do not intend this list of reasons to be exhaustive nor mutually exclusive.

⁵ This argument depends on the assumption that the job would still exist without the NCC.

sort of empirical finding we should expect based on this objection. Let us call this *the objection from tipping the scales*.

Third, NCCs render employees vulnerable to domination. This appears to be Anderson's primary concern regarding NCCs (2017a, 66). When you limit the exit options of employees, this not only improves the employer's bargaining power, but also makes the job more important for the employee. If I know I cannot work for a competitor or set up my own competition, I am going to do what I can to keep my job. This is especially true against a background of at will employment (Anderson 2015, 59). The conjunction of the fact that employees are subject to the will of their employer with the fact that an NCC entails that if they are fired their fundamental interests are dramatically set back means that NCCs subject employees to the arbitrary power of their employers. Such subjection is domination (Pettit 1997; Lovett 2010; Taylor 2017). Let us call this *the objection from domination*.

And finally, and perhaps most simply, NCCs reduce an employees' freedom, understood negatively. On this view of freedom, a person's overall freedom is related to the number of non-interfered options that person has (Carter 1999). NCCs reduce employees' non-interfered options and thus their freedoms. Krugman explicitly raises this worry when discusses how noncompetes clauses "reduce or limit your options" (2018). A number of prominent versions of liberalism hold there is a natural presumption in favor of liberty, or the fact that some course of action restricts freedom is prima facie objectionable (Feinberg 1984, 4; Benn 1988, 87). If these views

are correct, then NCCs are prima facie objectionable just because they limit options.⁶ Let us call this *the objection from limiting options*.

It is important to stress that these objections focus on the adverse effects of NCCs on employees, and not on what possible effects NCCs have on society generally speaking. There may be efficiency concerns for and against NCCs, but I set these aside here as outside the scope of this article. Even if efficiency speaks for or against NCCs, most do not think efficiency alone resolves the ethical issue (Satz 2010, 33-35; Preiss 2014; Singer 2018a; Singer 2018b).

3. MORE CHOICE IS NOT ALWAYS BETTER

I will return to the objections outlined in section 2 in section 5. Before doing so, it is worth scrutinizing a general feature of these objections. Most of the employee-based arguments against NCCs turn on an implicit claim that reducing exit options sets back employees' interests. This is either direct, as in *the objection from limiting options*, or indirect, as in *the objection from tipping the scales*. Simply put: lacking an exit option is worse for the employee. Or so these arguments suggest.

⁶ One rejoinder to this objection is that employees accept this limitation on this option when they accept this contract. If we see employee choice as an expression of autonomy, there is no problem from the perspective of freedom here (Flanigan 2018; Zwolinski 2007). I believe this is a reasonable response, but I forgo it here for the sake of accepting as many premises as I can of the opponent of NCCs. By doing so, I hope to show how their arguments fall short of abolition.

I will argue this move is too quick. The lack of an exit option is not always disadvantageous. Indeed, there can be good reasons to prefer not having an exit option. When bargaining with others, sometimes the fact that one party cannot retreat can allow that party to do better by the bargain than they might otherwise. I suggest that this general principle has some validity in the case of NCCs. This argument will develop over the next two sections. In this section, I draw on work by the economist Thomas Schelling as well as work by the philosophers Gerald Dworkin and J. David Velleman to establish the general principle that an exit option is at times disadvantageous. In the next section, I apply this general point to the case of NCCs. But first, let me explain the general point.

Let me begin with a simple example. Suppose you are in a game of chicken. The game of chicken involves two players on a collision course with one another. Each player has two choices: hold the course or swerve aside. You win if you hold the course while your opponent swerves. You lose if you swerve while your opponent holds the course. You also lose if you swerve while your opponent swerves, but not as badly (both of you are chickens, but at least your opponent does not advance over you). You *really* lose if you hold the course while your opponent does so as well, crashing into each other. A game table with payoffs representing this preference ranking is reproduced in Table 1 below.

A/B	Hold the Course	Swerve
Hold the Course	0, 0	1, 3
Swerve	3, 1	2, 2

Table 1: Chicken

As Schelling points out, one way to get ahead in the game of chicken is to *reduce* your own options (1960, 24). Suppose player A could no longer swerve (he makes a show of throwing his steering wheel out the window). What this means for B is that he either keeps the course and crashes into A (disaster!), or swerves and avoids collision (not good, but better than a disaster!). B, being no dummy, swerves and avoids A. A stays the course while B swerves. A gets his most preferred option.

Common advice says don't burn your bridges. However, this toy game shows that sometimes you *should* burn your bridges. Limiting your options can induce others to act as you would prefer. This is most obviously seen in cases of negotiation. If I am negotiating for a used car on behalf of someone else, and that someone else has authorized me to only go to a certain price point, this knowledge limits what the car salesman can push for compared to the case where I do not have a limit on my budget. By placing limits on a negotiator, a buyer limits her *ex ante* options (the set of prices she is able to offer) in order to capture *ex post* benefits (a lower price than she would have gotten if all prices were available to her).

It is not just in negotiations and adversarial situations that having fewer choices can be advantageous. Consider Prisoner Dilemma type situations, where individual choices can lead to socially suboptimal situations.⁷ One way to solve such problems is to eliminate people's options to defect in the first place. Consider, for example, workers seeking better pay. It may be in

⁷ This is another reason to not rely on the argument that employee choices ought to be respected as expressions of autonomy. Individual choices are made against a background of other choosers. Because of the reality of collective action problems, an individual choice might not be a genuine reflection of autonomy (Kates 2015, 195-199).

workers' collective interest to cooperate with one another to strike for better pay. However, each individual worker has an incentive to work while reaping the benefits of others' striking. But, if every worker acts as such, no one strikes and everyone is worse off than they could be otherwise. Because of this, it is not surprising strikes often utilize coercion to eliminate the option of working as a way of overcoming the collective action problem (Olson 1971, 71).

Finally, as Dworkin points out, having an option can make one worse off outside of strategic bargaining scenarios and collective action problems (Dworkin 1982, 55-56). Velleman uses the example of a night cashier to make this point (1992, 671). The night cashier may not want access to the safe because having that option makes her a target to burglars. Having certain options can simply make a person worse off in this sense. No one wants to be a target for burglary – if granting an option succeeds in accomplishing that (and only accomplishing that), that option is an option we would rather not have.

I could go on, but I hope the general point is clear enough at this juncture: More is not always better than fewer in the land of options. Indeed, more is sometimes *worse*.

4. NCCS AS COMMITMENT DEVICE

The general lesson of the last section was that having more options is not always a good thing for a person. There are even situations where having more options makes a person worse off. To be clear, more options do not always make a person worse off. I am not even sure if having more options often makes a person worse off. Because of this, I do not want to overstate the general point. Nonetheless, the general point stands. What this section does is extend the general point to the case of NCCs. NCCs limit exit options of employees. The question is: Can this be advantageous for employees?

My view is that NCCs can be advantageous for employees for the sorts of reasons outlined in the last section. NCCs can act as a commitment device. In this way, NCCs are very much in the vein of a Ulysses contract (Elster 1979). The name comes from an episode in Greek/Roman mythology where Ulysses asks his sailors to tie him to the mast. Ulysses does this so he can listen to the song of the sirens without succumbing to their song and jumping to his doom. Ulysses' contract eliminates his exit option in order to advance his interests. Similarly, an NCC, by eliminating an exit option, may advance the interests of an employee. I suggest NCCs can do so in two ways.

First, NCCs can act as a *costly signal*. By forgoing the option to seek employment outside the firm, employees take upon a cost to themselves. Further, NCCs do not just impose any old cost, but a *significant* cost. Giving up the chance to seek potentially better offers is a heavy one. Thus, NCCs allow employees to send a credible signal of commitment. Why might this matter?

Firms may have different cultures reflecting different values. You can see this reflected in different pay scales (Moriarty 2011, 40; Moriarty 2016, 445). Some firms operate using a more egalitarian, flat distribution of pay. Others may opt for a more competitive, tournament model, where some get paid much more than others. The idea is that some firms opt for a more “relational” model while others for a more a “transactional” model (Macneil 1995; Kalleberg and Rognes 2000). The former rests on metaphors of friendship and family, and focuses on commitment. The latter is less personal, and treats the firm as “just a job” and nothing more.

Different firms adopt these different models of organization for different reasons, but an important aspect is that these different models seek different sorts of employees. A relational firm wants employees to invest and commit to their firms. Conversely, different employees have different preferences over firm cultures. Some employees just want a job. Others may want a

more relational and egalitarian atmosphere. Others still may want the advantages of being in a relational organization culture (e.g. less turn-over, more benefits), but really want to treat the job in a transactional manner and leave the job when the next better offer comes up.⁸

This last category generates a problem for relational firms. Relational firms want committed employees, but it is difficult to separate out those potential employees who genuinely want a relational firm from those who simply wish to take advantage of a relational firm. It is cheap talk to express a desire to work at a particular sort of firm. Thus, employees and employers face a signaling problem: What counts as a credible signal of commitment by potential employees? This is where an NCC comes in. An NCC, by making exit more expensive, is a costly signal that one is committed to the firm. If an employee was only in it to exploit the benefits of a relational firm, that employee may not be willing to forgo a shot at a better alternative. Willingness to forgo the potential of better options down the line is likely good evidence of commitment.

A critical reader might object to this costly signaling story on the grounds that, because NCCs involve the threat of legal coercion, NCCs do not establish wholehearted commitment. For example, consider a marriage where, prior to wedding, the wife makes the husband sign an agreement that, should he cheat on her, he would owe her damages. Undoubtedly, the threat of coercive sanctions deters adultery, but it does not follow that the husband's commitment is wholehearted. Similarly, one might point out that it does not follow from the fact that a person is willing to sign a NCC that person is committed to the firm in a wholehearted manner. Perhaps

⁸ I do not see why an employee who prefers a relational culture would prefer a transactional firm unless it is as an alternative to unemployment.

the only reason a worker signs a NCC is because that worker has no other employment options. Such a worker would, all things being equal, prefer to work at a transactional firm and avoid signing an NCC, but her options are such that the choice she has is between a firm with a NCC or unemployment. In such a case, it would be a mistake to infer from the fact that this particular worker is willing to sign a NCC that she wishes to work at a firm for many years. Thus, NCCs can fail to separate on type.

In response to the first concern about coercion and commitment: The problem with this objection is that it focuses on the ex post relationship as opposed to the ex ante one.⁹ The question a costly signal answers is: How do we distinguish type before entering into a relationship? Marriage itself is a costly signal in just the manner I am discussing here. When you marry someone, you limit your exit options from a relationship. This is not just in terms of social costs, but also legal ones. You cannot just “break up” with your spouse, but must go through legal proceedings that may end up being coercive in nature. The fact that one is willing to tie one’s hands through marriage provides ex ante evidence of commitment. This remains true even

⁹ This is unrelated to the issue of signaling, but worth noting. One way of reading the objection is that it suggests coercive deterrence is incompatible with genuine commitment. However, this is not necessarily the case, especially if we consider how people manage akrasia or weakness of will. I can be genuinely committed to someone, but know that this commitment may be insufficient to motivate me at times. At those times, relying on external sanctions may be the best way for me to keep my commitment. It is because I care about my commitment wholeheartedly that I subject myself to external sanctions. These sanctions are really just a part of what Joseph Heath and Joel Anderson call “the extended will” (2010).

if tying one's hands subjects one to sanction after the fact. This leads to the second issue raised above: can we really infer from the fact that one is willing to tie one's hands ex ante that one is the committed type?

In response: To say NCCs can function as a costly signal of type does not entail that they are a perfect signal of type. The idea is that, all things being equal, a person's willingness to tie his/her hands to join a firm is evidence that person is committed to that firm in a long-term manner. Of course, all things are not always equal. For example, just because someone is willing to buy an expensive engagement ring (a costly signal!) does not entail that person is wholeheartedly committed to marrying. Perhaps A prefers being in a relationship over being single. A also prefers a non-committal relationship over a committal one. However, only B is willing to be in a relationship with A. Further, B will be in a relationship with A if and only if A proposes to B with an engagement ring. Even if an engagement ring would not be a good signal of commitment in this particular case, it would still be reasonable take engagement rings as a sign of a person's commitment in general. Similarly for NCCs: NCCs as a costly signal may reveal type probabilistically, even if they are not a perfect indicator of type. An interesting implication of going through this case is that, the more options employees have, the more likely a NCC is to separate on type.

Thus, the first way NCCs can benefit employees: NCCs can act as a costly signal to match employees with employers with similar cultural preferences. Employees who prefer a relational culture can credibly signal this preference to firms with a relational culture.

The second way NCCs can benefit employees is that they make it less costly for firms to invest in training for their employees (Rubin and Shedd, 1981).

Suppose a firm hires an employee. Part of the firm's cost in hiring the employee is not just wages, but also the resources it takes to train the employee. The problem is that a firm's investments into training are sunk costs that cannot be recouped. The employee, now equipped with skills, may now command a premium by working with another firm. This is because the other firm can hire the newly trained employee without expending resources on training. Thus, the threat of exit renders training under particular circumstances risky and costly to firms. Under such circumstances, firms may opt for more experienced employees rather than expend resources on a flight risk.

A NCC gives employees a way around this problem. Much like in the case of employees trying to signal their type, an employee requiring training can simply forgo the option of exit through an NCC. If the employee cannot legally work for a competitor without paying significant costs, there is little threat that the employee will exit for greener pastures as soon as training is over. This is advantageous to employees for two reasons.

First, NCCs designed to protect against the risk of poaching after training give opportunities for employees to acquire human capital. By lowering the expected cost of training, NCCs incentivizes employers to train their employees. To the extent that employees value additional skills and human capital, this is a benefit to them. Admittedly, this upside of NCCs is muted by the fact that presumably one of the chief benefits of human capital is the ability to take advantage of the labor mobility that tends to come with it. However, human capital can be advantageous *intrafirm* and not just *interfirm*. Further, increased human capital may be beneficial in of itself. The ability to develop one's own skills, particularly in relation to work, may contribute to one's well-being or self-respect (Rawls 1999, 426; Moriarty 2009).

Second, NCCs may allow employees to get jobs they otherwise could not. Here are two stories as to why this might be the case. First, if a firm is too skittish to hire an employee who lacks the relevant skills absent an NCC, that means the employee who lacks skills is not going to get the job. Thus, for unskilled workers, an NCC can mean the difference between employment and unemployment. Second, by reducing the average expected cost of training, NCCs open up more resources to hire more workers. If a firm knows that some portion of its trainees will be poached by competing firms after training, it will include this expected cost in its hiring decisions. Thus, a firm may expect hiring employees to cost more than it would with an NCC, likely leading to either reducing hiring rates or substituting with technology.

Thus, the second way NCCs function as a commitment device. In light of the cost of training, NCCs give employees a way to credibly commit to firms and incentivize investment in training.

Before moving on to the next section, it is worth acknowledging a possible concern. You may grant that NCCs can act as a commitment device, but wonder about *alternative* commitment devices. For example, you could imagine wage garnishment, or the withholding of wages, playing a similar role to NCCs as a commitment device. If I opt to only receive a portion of my wages for a defined period of time, this suggests I have good reason to work beyond that period of time. The significance of alternative commitment devices to my argument is that they raise the comparative question of how well NCCs act as commitment devices relative to the alternatives.

I cannot fully deal with this question here, but briefly: It is true that a complete evaluation of NCCs would consider comparing NCCs with other alternatives. But before we can engage in such a comparison, we need to grasp what can be said in favor of NCCs on their own terms. This is what I am trying to do in this article. Later work can build on what I say here to develop a full

evaluation of the practice. That being said, the comparative question is much less obvious than presumed. For example, while wage garnishments may be effective for those who can afford to temporarily forgo wages, other individuals may find such a commitment device unavailable or not preferable for them due to their financial situation. In such a scenario, perhaps an NCC would do the necessary work. Thus, the comparative question must always be alive to the context of specific decisions made by specific employees.

5. NCCS FOR THE SAKE OF EMPLOYEES

Once we see how NCCs can act as a commitment device, we are better equipped to respond to the objections to NCCs I noted in section 2.

In response to *the objection from general employee welfare*: NCCs can directly advance the interests of employees. By giving an employee a credible signal of commitment, it allows that employee to be better equipped in seeking the sort of firm he or she desires. Additionally, NCCs can advance employee interests in training by incentivizing firms to invest in training.

In response to *the objection from tipping the scales*: NCCs can advance the bargaining power of employees vis-à-vis their employers. NCCs give employees another bargaining chip in negotiation. As noted, limiting one's exit options is costly, and this is something employees can press in bargaining. In fact, there is some evidence in the U.S. context that, when NCCs are utilized prior to the employee accepting the job and during the negotiation process, employees see an *increase* in their wages (Starr, Prescott, and Bishara 2018). This is not surprising from a bargaining perspective.

One might worry that the option of a NCC as an individual choice for bargaining may generate a problem from the perspective of what Debra Satz calls "choice sets" (2008, 274-281).

The worry is that sometimes giving individuals a choice generates undesirable outcomes for other people. To use Satz's case, giving people the option to sell a kidney might be good for the person who wants to sell his/her kidney, but may impact the choices of others who do not want to sell a kidney. Specifically, the option may increase the price of credit for people who are not willing to use a kidney as collateral. Similarly, one might object that giving the option of a NCC in bargaining will make it more expensive for workers who do not want to sign a NCC to find employment.

Whatever the plausibility of this objection in the case of kidney markets, it is far less compelling in the case of NCCs. The main problem with the objection is that it rules out too much behavior. Almost all commercial activity has pecuniary externalities of the sort described – for example, by giving the option to sell any asset this raises the cost of not selling that asset for those who are unwilling to do. As Satz herself notes, markets in second homes have similar pecuniary externalities (2008, 276). Thus, even if this concern from collateral has bite in the case of kidneys due to the possibly special nature of the body, it is far less plausible in the case of other activities.

In response to *the objection from limiting options*: NCCs, properly understood, can *increase* freedom, understood as the number of opportunities one has. NCCs can grant access to skills and jobs one might not otherwise have. Yes, it is a reduction of one option, but it is in exchange for other, perhaps more valuable options depending on the circumstances.

The only objection that the commitment device model of NCCs seems less well equipped to deal with is *the objection from domination*. Recall that *the objection from domination* rests on the claim that NCCs in conjunction with at will employment render employees vulnerable to domination. Given that each employee's livelihood is at the mercy of his or her employer's will,

this subjects employees to arbitrary power and thus domination. It is not clear that the benefits of NCCs for employees I note above deal with this problem. To this extent, a version of the objection to NCCs from unfairness to employees appears to remain standing.

I have a number of responses to the objection from domination. They all take a similar tack. My basic response is that the objection from domination is not an objection to NCCs *specifically*. Rather, it gets its force either from general, background facts about employment, work, and public policy, or specific features of a particular employee's case.

The objection from domination depends on the claim that being fired threatens an employee's fundamental interests, particularly when that employee is unable to find alternative, comparable employment. A NCC legally makes it the case that an employee is unable to find that alternative employment for a defined period of time and within a defined geographic location. However, NCCs in of themselves do not render losing a job unacceptable.

First, it is important to note that the NCC is often not for nothing – the employee signs an NCC for consideration. Otherwise, the NCC would be unenforceable. The increased wage can blunt the force of being unable to work in one's chosen profession within the parameters of the NCC. Further, the NCC could build into it a provision that the firm covers financially the period of unemployment through generous severance pay.¹⁰ Under these circumstances, the severance pay limits how much firing affects the employee's fundamental interests, blunting the seriousness of arbitrary power wielded by managers.

¹⁰ In England, financial firms will sometimes utilize “garden leave” in lieu of an NCC. An employee on garden leave is essentially paid not to work for a period of time. This is functionally equivalent to an NCC.

Second, generous government-supplied unemployment benefits or perhaps even a universal basic income could serve a similar function (Pettit 2006, 141; Lovett 2010 199-203; Taylor 2017, 53-54). Like generous severance pay, these policies protect the employee interests threatened by at will employment, blunting potential domination.

Relatedly, it is not NCCs on their own that create conditions of domination, but NCCs *in conjunction with* at will employment. But there is nothing in an NCC that requires at will employment to be the norm. Alternative rules of employment, such as attaching just cause requirements to termination, are perfectly compatible with NCCs. Further, placing just cause constraints on employment solves the problem of domination. This is because the problem of domination is being subject to the *arbitrary* power of another. When the managerial power to terminate is constrained by just cause, that power is no longer arbitrary in the sense that it is no longer exercised solely at the discretion of the manager. It is constrained by various rules and norms.

Finally, and on a related theme, it is true that the power of exit is one way to secure a person against arbitrary power. But it is not the only way (Taylor 2017, 11-26). As the economist Albert Hirschmann (1970) famously argued, *voice* is another way of exercising some kind of control. If the problem with NCCs in regards to domination is that they eliminate exit as a check on arbitrary power, a natural response is to substitute exit with voice. Increasing voice appears to be Anderson's preferred solution to the problem of domination within the firm, and is, in fact, the argument republicans make for democracy more generally (Anderson 2017a, 70). By granting formal avenues of voice to those subject to power, one gives those subject to power a way of controlling that power (Pettit 2012). Controlled via voice, this power is no longer arbitrary. Thus, one might think, yet again, it is not that NCCs on their own generate conditions

of domination. But rather, it is that NCCs *plus a lack of voice* that generate domination. If a firm that utilized NCCs were more democratically organized, or offered opportunities for employees to have a say in the operation of the firm, this would act as a check on the power of managers. Or, as Lars Lindblom has recently argued in the context of understanding consent to incomplete contracts, workers can have voice by contesting firm power through the use of unions (Lindblom 2019). With such checks, managerial power would no longer count as arbitrary, and therefore no longer count as an instance of domination.

In summation, the objection from domination is not directly addressed by seeing NCCs as commitment devices. Nonetheless, once we properly understand the objection from domination, we can see that it is not so much an objection against NCCs, but rather an objection against NCCs given particular background facts that are subject to change or how NCCs may be used in a particular case.

This conclusion, however, may not save NCCs from *the objection from domination*. One might worry that linking the dominating character of NCCs to background employment conditions is a pyrrhic victory. After all, many of those background employment conditions presently exist, and many of the policy proposals suggested in remedying them seem far off if not simply unfeasible (e.g. universal basic income). As Joshua Preiss points out, focusing on a package of policy proposals as I do here obscures how policy is made in a piecemeal fashion through a messy political process (Preiss 2018). If my claims that NCCs do not necessarily enable domination are not robust against a wide-range of politically feasible outcomes and conditions, including current employment conditions, one might wonder whether we should be abolitionists after all.

The problem with this objection is that it homogenizes the labor market in a way that conceals important differences between cases. For example, a background of employment at will is the default in common law countries, but not all companies, industries, and countries use this default. Closest to home, universities do not employ their tenured professors at will. Consider further those employees who have significant assets. Such employees' fundamental interests are sheltered from firing in a way that the fundamental interests of the low-wage employee working pay-check to pay-check are not. In regards to the realistic possibility of some of the mitigating concerns for NCCs: I pointed out in an earlier note (note 10), that "garden leave" exists in the UK – firms will pay their employees not work. This is functionally equivalent to an NCC, but also reveals how the conditions under which an NCC is not dominating are not merely utopian. I might also point out that, firms with some worker governance (while full worker cooperatives are relatively rare, partnerships are less so) and unions exist here and now.

Even if I were to concede the most to the objection – that the background employment conditions that give NCCs their dominating character are prevalent and unlikely to change in the near future – I have nonetheless succeeded in providing a qualified defense of NCCs for two reasons. First, granting this premise would provide a reason to be *contingent* abolitionists rather than pure abolitionists. A contingent abolitionist would hold that NCCs are permissible in principle, but are impermissible under current circumstances and likely nearby circumstances. Should circumstances suitably change, this would speak in favor of walking back bans against NCCs for the contingent abolitionist. This is distinct from the standard discussion of NCCs, which assumes NCCs are just a tool for employers to dominate employees. More importantly, my view has given some insight into what the relevant contingencies are. Second, granting this objection primarily cuts against my response to the objection from domination. Unless the only

value we seek to maximize is non-domination, how problematic NCCs are depends on how we are to weigh non-domination against other possible goods. Thus, even if I were to concede the most, my arguments still provide a qualified defense of NCCs that pushes the conversation forward.

To be clear, this response does not defend *all* NCCs. But I think it would be a mistake to do so. I am offering a *qualified* defense of NCCs. The benefit of such a defense is that, not only am I able to draw out the virtues of NCCs from the point of view of the employee, but also give an account of when NCCs fall short and deserve our ire.

6. AN ETHICS OF NCCS

I have argued that NCCs can act as commitment device to advance the interests of employees. To say that NCCs *can* act in this way does not mean they *do* act in this way. In fact, they often do not. In this section, I argue that seeing NCCs as a commitment-device provides a clear vantage point from which to evaluate particular uses of NCCs. This perspective allows us to differentiate between the Jimmy John's worker and the software engineer, and gives a broad sense of when it is wrong for employers to use NCCs. The general rule: *A specific instance or practice of using an NCC is unjustified when it fails to give employees an opportunity to use the NCC as a bargaining tool.* I do not take this rule to provide necessary and sufficient conditions for a NCC to be permissible. The rule works most strongly as a negative test – if the use of a NCC does not provide an opportunity to use the NCC as a bargaining tool, this gives us a strong reason to be suspicious. However, in light of the arguments in the previous section, I also believe the rule works positively, though not as a sufficient condition. In this positive vein, I take the rule to provide something like what David Schmidtz calls a supporting condition, or “a qualified

sufficient condition, qualified in the sense of being a sufficient basis for endorsement in the absence of countervailing conditions” (Schmidt 2008, 118).

Consider the Jimmy John’s case. Our reasons for objecting to the use of NCCs for low-skill, low-wage work are overdetermined. First, these NCCs were given to employees on the first day of work, without access to legal counsel. Second, the NCCs given to Jimmy John’s employees were overly broad, and likely unenforceable. Finally, for low-wage workers, the cost of exit is high as is, exacerbating worries surrounding domination. Let me go through these features in turn to show how they run afoul of the arguments presented earlier.

Many firms will use NCCs in a way that circumvents the bargaining and negotiating process of employment. For example, firms in the U.S. will sometimes make employees sign a NCC on the first day of work without the ability to consult a lawyer. The NCC is often presented to the employee without prior notice in a take-it-or-leave-it fashion (Marx 2011, 706). A recent estimate suggests as many as a third of all NCCs in the U.S. are signed after accepting an offer (Starr 2019). Employees, worried about keeping their new job, tend to sign such NCCs under these unfavorable conditions. Oftentimes, they also do not have opportunity to seek legal advice. This situation is quite different from circumstances where an employee is still in negotiation stages and is still considering alternative options. The cost of leaving a new job is higher than walking away from the negotiating table.

When employers give NCCs *after* the job offer has been accepted, it is difficult to see how the NCC could be used as bargaining tool or as a credible signal of type. After all, the firm already hired the employee. For this reason, it appears that the practice of springing an NCC on an employee the first day is at odds with the model of NCCs as commitment devices. Instead, this practice appears to be a textbook case of employers using NCCs to advantage their own

interests over those of their employees. This not just a theoretical concern as empirical research in the U.S. suggests this sort of practice is correlated with lower wages for at least some employees (Balasubramiun et al. 2018).¹¹ When firms give NCCs to employees to sign on their first day of work or after the employee accepts the offer for employment, they are not giving that employee an opportunity to use the NCC as a commitment device. Firms are in part circumventing that opportunity. Thus, this practice is impermissible from the perspective outlined here.

Another feature of the Jimmy John's case that appears objectionable is that the NCC is almost certainly unenforceable. This sort of behavior is not isolated to Jimmy John's – many different firms will have employees sign NCCs that no court would enforce. We have already mentioned how the practice of giving an NCC after the acceptance of an employment offer is likely unenforceable due to lack of consideration. Further, some firms will use NCCs in states, such as California, where the use of such NCCs is severely restricted. This is far from uncommon. An empirical study suggests that whether or not a particular state enforces NCCs makes no difference to the rate of usage by firms in the U.S. (Prescott, Bishara, and Starr 2016). The worry is that firms use unenforceable NCCs as a way of intimidating employees who may not know better. Unaware that their NCC is unenforceable, employees will act as though it is enforceable.

¹¹ Another study suggests no difference between those who sign NCCs and those who don't under these circumstances (Starr et al. 2018). However, the same study sees decreased levels of job satisfaction where NCCs are utilized in this manner.

As in the case of first day NCCs, common use of unenforceable NCCs often violates the general rule. The reason being is that unenforceable NCCs appear to exploit information asymmetries between employers and employees. Many employees are ignorant or unaware of the legal enforceability of a given NCC. This, in conjunction with the practice of giving an employee an NCC to sign on his or her first day of work without the ability to speak with a lawyer, does not appear to give the employee an opportunity to use the NCC as a bargaining tool. Thus, as in the case of day-of NCCs, unenforceable NCCs are impermissible under the arguments advanced here.¹² This usage of NCCs appears to be a way firms take advantage of their more sophisticated legal knowledge to advance their interests over that of their employees.

I will entertain, however, the possibility that it is *sometimes* permissible to use unenforceable NCCs. Suppose we are speaking about a case in which both parties are aware of the unenforceability of an NCC. Let us also assume the NCC is unenforceable because of a state law, such as in California, that renders NCCs legally invalid except in very unusual circumstances. In such cases, I believe that an NCC can nonetheless play a signaling role. To be clear, the signaling role it plays will be limited. Part of what makes the NCC a commitment device ex ante is that it binds the employee ex post. Nonetheless, as a form of cheap talk, it can be somewhat useful. Cheap talk, because it is cheap, is often not a credible signal. But cheap talk

¹² I suspect using legal technology to push around unwitting employees also falls short of the so-called market failures approach to business ethics because of the way it takes advantage of information asymmetries (Heath 2014).

still can be used as a signal.¹³ For this reason, there is nothing in principle wrong with using unenforceable NCCs so long as they do not exploit information asymmetries between employers and employees regarding the legal validity of such NCCs. This, however, would be quite an unusual situation.

Finally, there are the cases of using NCCs for low-wage work. Much of the public outcry against NCCs seems motivated by their use for low-wage workers. Low-wage work seems the easiest case from an ethical perspective. It is not clear that low-wage workers in firms have access to trade secrets and information that employers are trying to control. Further, low-wage workers tend to already be especially vulnerable to the costs of losing a job. Limiting low-wage employees' ability to find alternative employment only exacerbates this. Because of this, many seem to think that, even if NCCs are permissible under some circumstances, they are not permissible for low-wage work. This concern is reflected in the 2016 Illinois Freedom to Work Act, which specifically targets and prohibits NCCs for low-wage workers.¹⁴

¹³ For an example of how cheap talk can be effective, albeit for morally pernicious ends, realtors in the 1950's and 1960's would advertise racially restrictive covenants, or contracts restricting ownership of property to white people, even after such covenants were declared unenforceable by the U.S. Supreme Court in 1948. The legal scholars Richard Brooks and Carol Rose (2013) suggest that the function of these unenforceable covenants was to signal what sort of neighborhood the property resided in was: a white neighborhood hostile to non-whites. While this is a morally pernicious way in which cheap talk was used, we could imagine cheap talk being used in morally positive ways.

¹⁴ <http://www.ilga.gov/legislation/publicacts/fulltext.asp?Name=099-0860>.

I agree that there are good reasons to criticize the use of NCCs for low-wage workers. Despite this, I do not see anything in principle that rules out NCCs for low-wage work. If part of what an NCC can do is help match employees to firms on the grounds of what sort of culture the employee prefers, I do not see why this cannot happen for jobs with low-wages. Similarly, there is training involved in low-wage work (even if it is limited). For this reason, firms may be hesitant to invest in training on the basis that these low-wage workers may leave for competing firms after receiving training. In fact, NCCs may be particularly capable of signaling commitment for low-wage, low-skill work. There is nothing that dictates that a costly signal must be in the form of limiting options. An alternative form of costly signal might be a significant capital investment. However, for low-wage, low-skill work, this alternative is likely not available. Thus, an NCC might provide a way that an employee can utilize a costly signal of commitment in the absence of significant capital holdings (Posner, Triantis, and Triantis 2004).

The issue with the use of NCCs for low-wage work is not that it is for low-wage work as such. Rather, it is because the position of persons seeking or in low-wage work *exacerbates* the worries noted earlier. Consider the case that has primarily motivated my analysis: Jimmy John's. This section has outlined numerous ways in which Jimmy John's usage of NCCs has fallen short of the standard adopted here. What was objectionable about these NCCs is not the fact they were used for low-wage work, but due to these other features. But, again, this is not about whether the job in question is low-wage or not. The fact that a job is low-wage may exacerbate these issues, but it is not what makes the NCC impermissible in a given case.

That being said, perhaps there are good reasons to follow Illinois's lead and be abolitionists regarding NCCs for low-wage work. Even if the use of NCCs for low-wage work is not in principle objectionable, and there may be certain advantages for using NCCs as a

commitment device for low-wage work, the current background employment conditions may be such that NCCs for low-wage work enable domination. This would push us towards the contingent abolitionism discussed at the end of the previous section, at least for NCCs for low-wage work.

Once we see what motivates the criticism of cases like Jimmy John's, I suggest we are in a better position to appreciate why NCCs appear less worrisome in other cases. Think here of the software engineer, who signs a narrowly tailored, enforceable NCC after legal consultation for additional wages or benefits. There is no information asymmetry or exploitation of ignorance here. There is no surprise NCC on the first day. Rather, the NCC is a part of the ordinary course of bargaining between employee and employer. It is difficult to see anything wrong within this interaction. This is because the NCC played a particular sort of role: It acted as a commitment device that allowed an employee to advance her interests.

7. CONCLUSION

In this article, I investigated the ethics of non-compete clauses or covenants not to compete in employment contracts. Public criticism of these restrictions focuses on how these restrictions appear to set back the interest of employees for the sake of their employers. This article suggested that seeing NCCs as *solely* advancing the interests of employers is myopic. By describing the way NCCs can act as a commitment device within the context of negotiation and bargaining, I have argued that these restrictions can be for the sake of employees, rather than against them.

This argument focused on the particulars of NCCs, but I could imagine analogous arguments for other forms of employment contract restrictions such as non-disclosure

agreements. The upshot is that, once we understand how employment contract restrictions can act as a commitment device, this gives us a critical standard to evaluate such practices. Simply, I argued that where employees have an opportunity to use restrictions in the context of negotiation, this gives good reason to believe such restrictions are permissible.

To be clear, I have not here provided a full account of the ethics of non-compete clauses. As I noted in the introduction, my starting point was Adam Smith's dictum that we ought to give priority to the interests of employees over those of employers where they come into conflict. A full account of the ethics of employment restrictions will require tackling other concerns such as general social welfare or distributive justice. Nonetheless, I hope to have made some progress on a set of issues ethicists have largely neglected.

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