THE CASE FOR ETHICAL NON-COMPETE AGREEMENTS: EXECUTIVES VERSUS SANDWICH-MAKERS

Lauren E. Aydinliyim, JD, PhD
Assistant Professor of Strategic Management
Baruch College, the City University of New York

ABSTRACT: Human capital, the knowledge, skills, and abilities of employees, can be a powerful driver of firm performance, yet the mobility of human capital raises questions over how to protect it. Employee non-compete agreements, which limit an employee's ability to start or join a rival firm, have received recent attention. While past research considers whether non-competes are effective tools at limiting employee mobility, few have considered if non-competes *should* be used. Filling this gap, I propose a normative schema for when employee non-competes can be considered ethical. A review of the limited existing literature on the ethics of employee non-competes finds that prior research has mostly focused on questions of property rights, which I propose as being nested within other ethical constructs. Analysis of two real-world illustrative examples of employee non-competes (an executive at Amazon and a Jimmy John's sandwich-maker) leads to a three-prong approach to evaluating non-competes based on ethical dimensions of power, autonomy, and fairness. I end by proposing – although further research is warranted – a measure of employee-level absorptive capacity, which is closely coupled with an employee's pre-employment human capital, as an employee-level attribute independent of, although likely coincidental with, the tripartite requirements of power/autonomy/fairness for ethical employee non-compete agreements.

KEYWORDS: non-compete, employment contract, contract formation, ethics, power, autonomy, fairness

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INTRODUCTION

"The ability to use the talents of other persons depend[s] not on coercion but rather on consent—including consent that [is] purchased in voluntary transactions."

(Epstein, 1992, p. 21)

An employee gives his employer "but a temporary power over him, and no greater, than what is contained in the contract between 'em." (John Locke, 1690, emphasis omitted)

The value of human capital, a key strategic asset for firms, comes largely from the firm knowledge contained within the "tacit knowledge" of firm employees, demonstrated through general "know-how" such as hands-on experience and similar on-the-job learning (Garmaise, 2011; Gilson, 1999). But employees are inherently mobile, and firms wishing to reduce the risks of employees departing to join or start a competitor often turn to employee non-compete agreements. The classic legal theory and justification for employee non-compete agreements derives from the notion that firm knowledge belongs to the firm and is therefore a type of employer intellectual property subject to property rights (Fisk, 2009; Hyde, 2012). This perspective views employees as vehicles of firm knowledge, and the protections afforded by non-competes are due to the ability to keep employees from departing the focal firm to work for (or start) a competitive entity. The rapidly growing stream of management research on employee non-compete agreements presents a clear tension of normative values between the employer's interests in protecting its confidential information and the interests of employees in being fully – and unrestrictedly – mobile in their choice of careers.

Non-competes are common in the United States, occurring in nearly 50% of all firms (Colvin and Shierholz, 2019), and affecting up to 70% of workers in some occupations (Garmaise, 2011). In the U.S., enforcement of non-competes is at the state level, and there has been a host of judicial and legislative efforts to clarify the enforcement of non-compete agreements in these states; since 1980, at least 24 states have changed their enforcement policies on non-competes through either judicial or legislative action, and many of these states incurred multiple changes (AUTHOR 2018). Many more states have pending legislation address non-compete reform. Attention has also been brought to non-competes at the federal level (*e.g.*, White House, 2016), including most recently a full-day workshop at the Federal Trade Commission in January, 2020 (FTC, 2020), and hearings in front of the Senate Committee on Small Business and Entrepreneurship in November, 2019 (U.S. Senate, 2019). Despite this relatively recent increased interest, non-competes have been litigated since the 15th century (Marx, et al. 2009), and concerns over non-compete enforcement are unlikely to be resolved anytime in the near future.

Employee non-competes should be seen as a tool that firms utilize to protect firm knowledge. However, the majority of business and management research almost exclusively regards non-competes as a simple limitation on employee mobility, and, at best, mentions knowledge protection only in passing. As a result, non-competes have been almost universally maligned within business literature and the popular press, perhaps because most empirical research has shown that non-competes do keep employees at firms. Because such agreements limit worker mobility (Garmaise, 2011; Marx et al., 2009), studies have claimed a host of negative implications, such as reduced investment human capital (Garmaise 2011), loss of valuable inventors to non-enforcing states (Marx et al., 2009), reduced venture capital funding

(Samila and Sorenson, 2011), and reduced instances of entrepreneurship (Marx and Fleming, 2012; Starr et al., 2019b; Stuart and Sorenson, 2003). Non-competes have been labeled as "harmful" to workers and competition (Colvin and Shierholz, 2019), as "unfair intrusions on worker's rights" and "threats to [firm] growth" (Muro, 2016), and responsible for the "brain drain" of talent (Marx et al., 2015).

I do not challenge the empirical findings of this literature, but rather seek to clarify how a growing stream of business research makes normative judgments about the ethics of employee non-compete agreements that, I believe, may not be justified in all cases. I propose an alternative framework in order to clarify open issues and avenues for further research. In particular, I assert that the espoused core ethical tension of non-competes over questions of *property rights* (such as, "who owns or has rights to the knowledge contained within a departing employee's mind?") is better understood as arising from underlying concerns of power, autonomy, and fairness. I suggest that an ethical employee non-compete agreement can exist when there has been appropriate consideration within the employment contracting process by the firm and employee to these three central attributes. Non-compete agreements are therefore an example of what Edwin Epstein cautioned when he notes that "sometimes conflicting, values as success, freedom, justice, equity, efficiency, contractualism, communitarianism, utilitarianism, and individualism, together with deeply ingrained notions of personal and property rights, influence our concepts of ethical and responsible behavior" (1987, p. 361).

This paper proceeds as follows. First, I examine the existing literature on the ethics of employee non-compete agreements, which has not differentiated the ethics of non-compete *enforcement* from the ethics of the *formation* of such agreements, and which has not fully considered the perspective of the firm or different types of employees. While prior non-compete

research has predominantly considered questions of property rights, I detail my proposal that the ethical issues with non-competes are better understood as arising from concerns of power, autonomy, and fairness. I next describe two real-life illustrative examples where the "ethics" of an employee non-compete differ: an executive at Amazon and a sandwich-maker at Jimmy John's. By identifying a set of attributes on which these two examples differ, I analyze three core ethical issues of employee non-compete agreements facing employers and employees during the process of non-compete agreement formation: power, autonomy, and fairness. Throughout, I outline potential avenues for such research as well as practical suggestions and implications for firms and policy makers, although I do not claim to provide an exhaustive practical guide. "To be clear, I do not advocate for unfettered and indiscriminate use of non-competes" (Gomulkiewicz, 2015, p. 258), but rather, I propose that there exists (at least) one framework under which employee non-competes can be considered ethical.

EXISTING LITERATURE AND CLARIFICATIONS

Most existing literature on employee non-competes answers the question of "are employee non-compete agreements good or bad?" with a clear or implied "bad." Non-competes have been equated with "[government] sanctioned monopolies" (Marx et al., 2009, p. 888), and a recent article states, "policymakers, economists, and legal scholars… overwhelmingly conclude that the harms of noncompetes far outweigh their potential benefits…" (Morrow, 2018, p. 265). Yet this literature oftentimes only considers one part of the puzzle of non-competes, often positing ambiguous relationships regarding the dual nature of employee non-competes as *both* an employee mobility limitation and a firm knowledge protection mechanism. Consider investments in human capital by firms and employees, where the relationship between non-compete enforcement and net human capital investment remains unclear because non-competes are

proposed as both reducing employee-sponsored investments in human capital and increasing firm-sponsored investments in that same human capital (Garmaise, 2011; Ghosh and Shankar, 2016). Adding to this uncertainty are the impact non-competes have beyond just the parties involved. For instance, Starr, Frake, and Agarwal (Starr et al., 2019a) demonstrate that the job mobility of "non-signers" (those who are not subject to non-compete agreements for any reason) is adversely impacted by non-competes due to a "vacancy chain" effect as a result of "signers" staying with their firms and thus a lack of available positions for non-signers. Additionally, non-competes also affect competing firms since they simultaneously "prevent the loss of human capital to a competitor" and "block the firm's ability to poach from a competitor" (Younge and Marx, 2016, p. 652; see also Belenzon and Schankerman, 2013).

Thus, "are non-competes good or bad?" must be decomposed into separate questions: (1) *why* is a non-compete is good or bad, and (2) *who* is the non-compete good or bad for? The first question can be broken down even further by asking what is meant by "good or bad" – economically or ethically? Empirical literature on the *economic* impact of non-competes coalesces around the notion that employee non-competes may be good for firms (Lavetti et al., 2019; Younge et al., 2015) but bad for employees (Marx, 2011; Starr, 2019). Scholarship on the *ethics* of non-competes has been limited, with two notable exceptions, and is therefore the focus of this paper. Bishara and Westermann-Behaylo (2012) critique non-competes, garden leave, and the inevitable disclosure doctrine from the rights, utilitarian, and fairness perspectives, finding them unethical under all three. They primarily focus on potential abuses in the enforcement of such provisions. Kafker (1993) considers the ethics of using non-competes in partnership agreements for professionals, such as lawyers, doctors, or accountants, and concludes that

absolute non-competes should not be permitted, but finds agreements with fiduciary obligations that form similar requirements acceptable.

An issue with the limited prior research on the ethics of non-competes is a lack of specificity over exactly what is being discussed. As noted above, we must clarify *from whose perspective* we are discussing the ethics of non-competes. It is also critical to recognize issues of temporality because the ethical issues and conclusions may be quite different at various points in times. While the multiple points in time issue is recognized by Bishara and Westermann-Behaylo (2012) in their initial discussion of employee non-competes, their ethical analysis loses this distinction. They focus on the ethics of the *enforcement* of non-compete agreements, but their analysis is mixed with temporal questions such as when an employee signed an agreement and the duration of the employment relationship. This is an important conversation because analysis over “what is ethical?” should be explicit on considerations of perspective (ethical for whom?) and sensitive to the temporal issues (ethical when?). This is well reflected in the large body of research on the ethical decision-making process, but prior research on the ethics of employee non-competes largely ignores the fact that the “non-compete process” is actually a complex set of decisions involving multiple stakeholders, including the firm, the (prospective, current, or eventually separated/terminated) employee, policy makers, and possibly a judicial decision-maker, that occur in a temporal sequence, on exception is Arnow-Richman who raises concerns with bargaining power in non-compete contracting practices that are felt at the point of contract formation (2006). As an initial foray into clarifying such issues, I describe a “non-compete process” in Figure 1. I caution that this is not meant as a step-by-step guide to determine when a non-compete is ethical, but rather represents a simplification of a complex, highly-individualized decision process.

In this paper, I focus predominantly on the contract formation stage, or what occurs prior to the decision node of "[p]arties sign and employment relationship commences." This focus on the contracting stage limits the stakeholders involved to the employee and the employer, removing questions of state policy/enforcement or judicial involvement. Thus, I address the *who* question above. Moving to the end of Figure 1, for example, litigation over a non-compete will involve judicial actors that take over the decision-making process for all involved, while questions of state-level enforceability involve policy makers, up to and including the White House (White House, 2016). Such post-employment issues are outside the scope of this paper, but present interesting avenues for future exploration. Additionally, I presume the existence of a non-compete being offered to the prospective employee – that is, I also leave normative questions of "should a firm use non-compete agreements?" or "should non-competes be allowed at all?" to future research. I also assume that the employee is aware of the non-compete (meaning, it is not hidden in an employee handbook or otherwise (Stone, 2000)).

----INSERT FIGURE 1 ABOUT HERE-----

We thus begin at the initial node of Figure 1, the decision of the employer that it would like to have an applicant sign a non-compete. The next steps are to consider whether state policy will allow the firm to have such an agreement and what permissible terms may be. A handful of states, such as California, Oklahoma, North Dakota, and Montana, explicitly prohibit non-compete agreements (although even these states may allow them under some circumstances), while many others place restrictions on their use. There are at least five methodologies presented in academic literature for determining whether – or how strongly – a state enforces non-competes,[i] but there is questionable consistency among some of these scales. Therefore, using Figure 1, I speak only in generalities without specifics to any particular non-compete agreement.

A base requirement is that the employer have a legitimate business interest that it seeks to protect, and that the employee, if hired, have access to this interest. Any non-compete agreement without both of these elements is unethical, providing protections to the firm to which it is not entitled at the expense of employee freedom. Beyond this, legal enforceability of non-competes generally depends on whether the terms are "reasonable" based on (i) industry limitations (that is, what or who is a competitor and what activities would be considered competitive?), (ii) geographic/regional limitations, and (iii) the duration of the restriction (Graves and DiBoise, 2006). Legal enforceability is therefore a (perhaps bare) minimum standard for an ethical non-compete agreement under this framework. Simply, a non-compete cannot be ethically justified if the employer lacks any legitimate business interest.

If the hurdle of legal enforceability has not been cleared and the firm decides to proceed with a non-compete, it is likely the firm desires to benefit from the *in terrorem* effect of such clauses (Sullivan, 2009), desiring that the employee "voluntarily" comply with the non-compete out of fear of future consequences, such as litigation. This is a real concern with non-competes, as employees cite the existence, not the enforceability, of non-competes as reasons for turning down job offers (Starr et al., 2019c). Thus, non-enforceable non-competes still produce changes in employee behavior. An employer intending to utilize a non-compete agreement without consideration towards its actual enforceability, who therefore is using the agreement solely for its potential "chilling effect" on the employee's future activity (Marx and Fleming, 2012), is, I assert, blatantly unethical. Under the majority of philosophical ethical theories (except perhaps under a utilitarian analysis)[ii], such a decision motivated solely by a desire to chill employee mobility would be unethical as a violation of legal requirements, and may violate the rights of

employees as well as "the principle of keeping skilled labor in the public domain" (Marx et al., 2009, p. 876).

Moreover, the existence of contracts (such as an employment contract) depends on the idea that should a dispute occur, courts will enforce *valid* agreements – that is, it will hold the parties to what they had previously agreed upon. This answers the two questions raised earlier: I am focusing on the ethics of non-competes from the perspective of those involved (*i.e.*, the employee and the employer – *who*?) in the formation the non-compete (*when*?). Moreover, there is a rich literature on negotiation which I seek to connect to the strategic human capital literature on employee non-compete agreements.

Returning to the central question of "are non-competes good or bad?", the core tension underlying research on both the economic and ethical impact of employee non-compete agreements has long been focused on questions of property rights: Who owns human capital? Who owns the knowledge that is contained in an employee's mind – the employee or the firm? If the firm owns the knowledge, does it have the right to limit the employee's mobility in order to prevent that knowledge from being used at a competitive firm? Does it matter if the firm paid to develop the employee's human capital, through training or educational benefits?

Management research is clear that worker mobility is a key source for potential knowledge transfer among firms, but since knowledge is a quasi-public good (Arrow, 1962), possession by one party does not exclude possession by another party. Due to the risk of proprietary firm knowledge being taken by employees to competitive firms, a firm may be reluctant to invest in or develop human capital of its employees via training or other methods if the firm's property rights in such human capital are not secured. Employee non-competes are a method by which a firm can secure its property rights in its human capital development of

employees (Marx et al., 2009), and non-compete enforceability at the state level has been found to be positively related to firm-sponsored investments in human capital (Cooper, 2001; Garmaise, 2011; Starr, 2019). Simply, non-competes allow firms to not worry that their employees are going to take valuable knowledge to competitors.

Some scholars claim that non-compete agreements give firms greater property rights than they are entitled, noting, "[n]on-compete agreements enable companies to convert general training into firm-specific human capital by denying workers the opportunity to apply those skills outside the firm" (Marx, 2011, p. 698). If employees recognize their external employment opportunities are limited due to such agreements, they may invest less in their own human capital development. Empirical results on this point are mixed, with some scholars (Garmaise, 2011) finding a negative relationship between non-compete enforceability and employee-sponsored training while others (Starr, 2019) find no relationship. An intuitive economic perspective on employee non-competes would conclude that such agreements increase employee wages (welfare) because the employee has the ability to negotiate the non-compete and should, in theory, receive compensation for the exchange of property rights (Callahan, 1985; Rubin and Shedd, 1981). However, empirical evidence indicates employee non-compete enforceability reduces employee wages (Garmaise, 2011; Starr, 2019), likely due to suppressed elasticity in the labor market. Better educated employees are able to offset this reduction in wages, possibly due to increased bargaining power, and also gain more firm-sponsored training (Starr, 2019).

I therefore suggest the focus on property rights as the key underlying ethical issue with non-competes is potentially incomplete. For instance, Bishara and Westermann-Behaylo conclude their analysis of non-competes under property rights theory stating:

> [T]he weaknesses of noncompetes from the rights-based perspective include (1) a failure to resolve the issues of employee consent versus coercion to protect against employer overreaching, (2) questions about the employee's ability to develop herself and make a living from her property rights in her own productive capability, and (3) a failure to gain certainty about protection of the employer's property rights to competitive information such as trade secrets. (2012, p. 39)

Similarly, Haws notes that, "it is unjust for the employer to assert indefinite ownership over this 'competence' of their employees, or to assert rights to the general training or education that an employee already had when the employment relationship commenced" (2004, p. 5). Unpacking these concerns, however, indicates ethical issues not with property rights per se, but rather with other ethical constructs, specifically, I propose, autonomy, power, and fairness. Concerns of consent/coercion or the (in)ability to make a living implicitly contain trepidations over employee autonomy and power, while those dealing with worries over indefinite ownership indicate concerns with justice and fairness. This unpacking of the property rights concerns over non-competes is akin to Werhane's conceptualization of property rights as secondary to other fundamental moral rights, such as freedom, security, subsistence, and life (Werhane, 1985; see also Werhane et al., 2008). Donaldson and Preston similarly propose property rights as embedded within human rights, stating, "Unless property rights are regarded as simple, self-evident moral conceptions, they must be based on more fundamental ideas of distributive justice" (1995, p. 84).

Property rights are inherently linked to concerns of autonomy and fairness, as supported by an exploration of the roots of deontological property right theories. Lockean property rights depend first on the ability of individuals to own themselves, that is, the natural law concept of

self-ownership (Locke, 1690), or what I describe below as autonomous personhood. I assert, as have others (*e.g.*, Kershnar, 2002), that there is an autonomy-based justification for private property rights, particularly in the context of the employment relationship. Said differently, there are multiple layers of ethics, with the base layer – and all that is required in any society – being the ethics of respect (Nozick, 2001). Thus, individuals have moral rights against certain things being done to them (negative rights), which then leads to the "entitlement theory" of property rights (Nozick, 1974). Under Nozickian entitlement theory, the acquisition of property, and therefore the development of property rights, requires the item in question (here, the employee's right to trade his or her labor) be *justly* acquired in the first place. Nozick's theory necessitates that individuals have the right to *justly* transfer property (or property rights) provided no other individuals are coerced, defrauded, or otherwise threated unjustly in the process. As Donaldson and Preston note, "the contemporary theoretical concept of private property clearly does not ascribe *unlimited* rights to owners" (1995, p. 84, emphasis added).

In employment relationships, both Epstein (1984) and Maitland (1989) put primacy on the freedom of employees and employers to contract freely. Under this argument, the autonomy of the parties is violated if there is interference with the free ability to create contracts among consenting parties. If the terms of a contract are unacceptable to a party, (s)he bears any responsibility, provided that such a contract was freely entered into. This "freedom to contract" can be contrasted against an employee's "freedom to trade." "Freedom to contract" is supported by empirical evidence that, under certain conditions, non-competes can result in positive net gains for both parties (Starr, 2019). The latter argument views non-competes as parallel to servitude, and prioritizes the right of employees to have free choice of whom they work for – that is, with whom they will trade their labor in exchange for wages (Blake, 1960). Scholars here

voice concerns focused almost entirely on disparities of bargaining power between the firm and the employee, particularly workers "forced" to sign such agreements or to whom such agreements are presented after they have already accepted a job offer (Marx, 2011; Starr et al., 2019b).To be clear, I do not disregard the importance of property rights for non-compete agreements; instead, I view property rights as nested within human rights, providing a grounding for principles of power, autonomy, and fairness in the non-compete process.

ILLUSTRATIVE EXAMPLES

I propose one way ethical concerns related to employee non-competes can be avoided at the contract formation stage is to satisfy three core ethical issues: power, autonomy, and fairness. In this section, I provide two illustrative examples where the "ethics" of employee non-competes differs, and then I proceed with a pseudo-inductive analysis to illuminate the primacy of these core principles. First – as an example of an ethical non-compete agreement – I propose the case of Arthur Valdez, an executive at Amazon who left Amazon to work at Target. The second – as an example of an unethical non-compete agreement – is the case of sandwich-making employees at the national sandwich chain Jimmy John's.

Illustrative Example #1: The Executive

Arthur Valdez worked for Amazon for over 16 years (*Amazon v. Valdez* Complaint, 2016). When hired in 1999, he signed his first non-compete agreement, and in 2009, was promoted to Vice President in a series of roles related to supply chain and logistics management. In 2012, Valdez reaffirmed his non-compete. The two non-compete agreements contained identical terms, and required an 18-month "time out" after leaving Amazon before Valdez could work in a comparable position for a competitive company (*Amazon v. Valdez* Complaint, 2016, p. 2).

In February 2016, Valdez was employed as an Amazon Vice President at a salary of over a million dollars a year (*Amazon v. Valdez* Complaint, 2016), and was tasked with managing "the Seattle-based company's supply chain, fulfillment centers and transportation operations, in addition to expansion in developing countries" (Bishop, 2016). Later that month, Valdez's attorney informed Amazon that Valdez would be leaving the e-commerce firm for a position with Target. Valdez told Amazon that the new position was not competitive to his work with Amazon because he would only be "working on delivering products from warehouses to stores" (*Amazon v. Valdez* Complaint, 2016, 17); that is, that his work with Target would not be competitive because it would deal only with physical stores, not online retail. However, it was public knowledge and reported in news outlets that Target was attempting "to step up its e-commerce game to better compete with Amazon and take advantage of the growth in the online retail sector. Target's hiring of Valdez was viewed as another key step in that effort" (Bishop, 2016). The press release announcing Valdez's hire "stated that Mr. Valdez would be Target's Executive Vice President, Chief Supply Chain and Logistics Officer leading 'Target's supply chain transformation including planning, distribution and transportation" (*Amazon v. Valdez* Complaint, 2016, p. 3). Amazon subsequently sued to enforce the non-compete agreement.

Illustrative example #2: The Sandwich-Maker

In early October 2014, the sandwich chain Jimmy John's made headlines when it was revealed that most of its employee sandwich-makers had signed non-compete agreements as a condition of employment (Jamieson, 2014). This non-compete stated:

> Employee covenants and agrees that, during his or her employment with the Employer and for a period of two (2) years after … he or she will not have any direct or indirect interest in or perform services for … any business which derives

> more than ten percent (10%) of its revenue from selling submarine, hero-type, deli-style, pita and/or wrapped or rolled sandwiches and which is located with three (3) miles of either [the Jimmy John's location in question] or any such other Jimmy John's Sandwich Shop. (Jamieson, 2014)

In some areas of the country, this covenant may not have been an issue for employees, as there were not a significant number of Jimmy John's locations in the area. For instance, Figure A-1 in the Appendix demonstrates the radius of prohibited activity in the New York City area around a single location in Hoboken, New Jersey. In contrast, Figure A-2 in the Appendix demonstrates the areas of prohibited activity in the greater Chicago area – due to the number of Jimmy John's locations in the area, nearly the entire Chicago metropolitan area is covered. The chain was lambasted on the Internet for having its workers sign such an agreement, and the company faced investigations in multiple states (Whitten, 2016). The non-compete prevented sandwich-makers from working not only at direct sandwich-making competitors, such as Subway or Quizno's, but even Greek restaurants serving gyros or grocery stores with active delis. It was later revealed that the non-compete clauses had been included in an employment contract template provided by the firm to its franchisees, a practice that was stopped in late 2016 (Whitten, 2016).

Comparing the examples

These examples raise a basic question: do firms treat executives and sandwich-makers differently regarding the usage of non-compete agreements? The answer is an emphatic yes. "Approximately 15 percent of workers without a college degree are currently subject to non-compete agreements, and 14 percent of individuals earning less than $40,000 are subject to them" (White House, 2016). In contrast, Schwab and Thomas find that approximately "two-thirds of the CEO employment contracts contain explicit do-not-compete clauses" (2006, p. 234),

while at least 70.2% of executives at publicly-traded firms signed non-competes in another study (Garmaise, 2011).

I delineate a set of key differences between the executive and the sandwich-maker in Table 1, which I have divided into phases of pre-contract, contract negotiation, employment, and post-employment. Although the focus of this normative ethical analysis is the pre-employment phases, I believe it is important to include the last two phases in order to fully explore the differences between such types of employees.

--INSERT TABLE 1 ABOUT HERE---

Pre-contract: Before engaging with potential employers, the executive and the sandwich-maker start from unique positions. The executive possesses significant resources, and may already be employed. In addition, the executive likely has many more years of work experience and thus a larger stock of human capital. In contrast, the sandwich-maker is likely to be an entry-level employee, perhaps student, looking for a first or summer job.

Contract negotiation: An important distinction to make is that employees generally do not negotiate their non-competes. The most recent statistics from the 2014 Noncompete Survey demonstrate that while 40% of employees indicate having signed a non-compete in the past, only 10% report negotiating their non-compete (Starr et al., 2019b). Employees with bachelor's degrees or higher were twice as likely to negotiate their non-compete, and only 17% of employees consulted a friend, family member, or lawyer about their non-compete. These results suggest that executives are much more likely to negotiate over a non-compete than sandwich-makers.

Why might this be the case? First, an executive is likely to already be employed, so there may be a significant opportunity for a tripartite, three-party bargaining scenario (Starr et al.,

2019a), increasing the executive's bargaining power. An executive is therefore likely to negotiate the terms and conditions of employment, and is a "rare find" for which a firm would be willing to make concessions (see Van Buren and Greenwood, 2008). By contrast, a sandwich-maker would be unlikely to negotiate, and any terms and conditions are likely to be presented as-is, in a take-it-or-leave-it fashion. Such a contract is known as a "contract of adhesion,"[iii] which raise important questions of both fairness and bargaining power (Van Buren and Greenwood, 2008). This relates strongly to the notions regarding human capital in the prior phase: the executive possesses a higher level of human capital than the sandwich-maker, and this gives the executive greater bargaining power. Moreover, the "freedom to contract" viewpoint stresses the autonomy of individuals to voluntarily agree to restrictive terms. Consistent with this viewpoint are empirical studies demonstrating increased compensation or increased firm investments in human capital when using non-competes (Starr et al., 2019b).

Additionally, the executive and the sandwich-maker differ regarding their anticipated length of employment. An executive is generally hired with the intention that the executive will remain with the company for years. By contrast, a sandwich-maker is more likely to be hired for a limited period of time, such as a summer job. That is, a line-level Jimmy John's employee is unlikely to spend his entire career at Jimmy John's.

Finally, and perhaps most importantly, is the question of firm intent. While academic literature has hinted at the dual intents of a post-employment non-compete agreement to, at least temporarily, limit both employee mobility and the diffusion of the employee's tacit knowledge within the competitive industry, I propose firm intent as a primary distinction between non-competes for executives and sandwich-makers. In the case of sandwich-makers, such agreements are predominantly a restraint on employee mobility, which is arguably the dominant viewpoint in

management literature (see, *e.g.*, Marx et al., 2009). Non-competes for the sole purpose of restraining employee mobility are not only unethical, but also generally unenforceable as it indicates a lack of protectable interest (Stone, 2000), thereby not meeting the requirements of Figure 1. In contrast, the case of the executive indicates that employee non-competes are measures a firm takes to protect its proprietary firm information. Such proprietary information may include trade secrets, customer lists or relationships, tacit knowledge, organizational structures, or future business plans. This distinction over intent is born about by the access each type of employee has to confidential information during the employment relationship.

During employment: Once the employment relationship commences, and the non-compete signed, the executive has extensive access to a firm's confidential information, while a sandwich-maker has limited, if any, access to the sandwich chain's confidential information. The two differ also in terms of their compensation, with the executive making considerably more, and differ over the duties and loyalties they owe to the firm. The Restatement (Third) of Agency define the duties that executives, as agents of the employer, owe to employers, including, most importantly, a duty of loyalty, a duty of care, a duty not to mislead, and, especially in the case of executives, other fiduciary duties. Only the duty of loyalty is considered to apply broadly beyond executives; in some cases, courts "have concluded that the duty of loyalty applies to all employees, regardless of status as an officer, director or manager of the firm" (Lee, 2006, p. 7). Thus, the executive owes more duties to the employer than the sandwich-maker.

In some cases, the duties an employee owns to an employer can extend beyond the end of the employment relationship. Even in the absence of a non-compete agreement, post-employment competition with a former employer "may constitute a breach of fiduciary duty if it is based on information gained during the employment relationship" (Smith, 2014), a risk unique

to the executive in my framework. Beyond such legal requirements, there may be implied duties created by the relationship between the employee and the person negotiating the non-compete on behalf of the firm, frequently who will be the employee's manager. As Haws notes, "We may work for companies, but the employee/employer (worker/manager, if you'd prefer) relationship is between individuals" (2004, p. 4). The employment relationship, when viewed through an agency theory lens, supports the notion of the reciprocal obligations that engender duties on both the part of the firm and the part of the employee (Werhane et al., 2008). Is it therefore surprising that Bishara and Westermann-Behaylo (2012) state that there are not deontological ethical issues for employee non-competes. In contrast, I suggest that the norms of this psychological relationship between manager and employee (Rousseau, 1998) such as trust and even feelings of loyalty, are important considerations at this employment-stage.

Post-Employment: After the termination of the employment relationship, the executive has higher transferability of skills to external industries, since skills such as managing others, reading balance sheets, or running a business, are transferable to other industries, and are significantly more transferable than the skills a sandwich-maker develops during employment. Moreover, while a firm incurs costs to replace any employee (Tziner and Birati, 1996), such search costs will be much higher to replace the executive as opposed to the sandwich-maker. An executive also likely has resources upon which (s)he can rely if needed to "wait out" a non-compete agreement after termination of employment, or to even challenge the validity of a non-compete in court, a so-called declaratory judgement. A sandwich-maker is unlikely to have such resources or even be aware of the legal options for doing so.

In brief, firms should encourage the human capital development and make investments in developing the skills of their employees, but at the same time, employees need to respect the

investments the employer makes in anticipation of a continued employment relationship (Haws, 2004), particularly once that relationship has ended.

A NORMATIVE SCHEMA FOR ETHICAL NON-COMPETES

I propose the ethical status of these two illustrative examples diverges due to differences in the contract formation process over issues of power, autonomy, and fairness. While these three constructs are closely related, I differentiate them by focusing on bargaining power derived from resource and information asymmetries, an understanding of autonomy as the ability act as one's own self, and a notion of fairness driven by concerns over distributive justice. In this section, I explain each of these ethical constructs in detail and apply them to employee non-compete agreements.

Power

Power is defined broadly in business literature. At a micro-level, power can be viewed under either exchange (Blau, 1964) or dependency theory (Emerson, 1962), while at a macro-level, power has political, economic, and social aspects (Bierstedt, 1950). Since the formation and negotiation of an employee non-compete involves an exchange, I adopt exchange theory, as represented by Emerson (1972) as my understanding of "power." Under this theory, power originates from resource value (does each party have something the other wants?) and resource availability (can one party can get the same resource from alternative sources?) (Emerson, 1972). The more dependent a party is on the other in terms of these attributes, the greater power the other possess. While employment is ultimately about creating a relationship, the formation of the employment contract determines the terms of such a relationship between a firm and the employee, and is influenced by the power of the parties involved. The negotiations between the firm and the prospective employee at the time of contracting set the stage not just for the written

employment contract, but also the psychological contract created between a firm and its employee.

Under psychological contract theory, there are implicit, reciprocal rights and obligations that individuals perceive within exchange relations such as the relationship between a firm and an employee (Hannah, 2005; Rousseau, 1998). In such relationships, when an employee believes he/she has a high-trust relationship with his/her employer, the employee will feel more personal obligations towards the employer (Fox, 1974; Hannah, 2005). Thus, employees who believe themselves to be in a high-trust relationship, as demonstrated through access to confidential information, are more likely to feel a personal obligation to protect their employer's confidential information (Hannah, 2005). In fact, this research indicates that the very existence of privacy or access-restrictive language in employment contracts "signals to employees that their employers trust them sufficiently to provide them with access to trade secrets" (Hannah, 2005, p. 74). Thus, instead of indicating that the employer does not trust or otherwise wants to impair an employee, a non-compete agreement could actually be seen as a tool to develop trust – and reduce ambiguity and asymmetries in power – between a firm and the employee. The terms of an employee non-compete are particularly interesting as there is not pure freedom to contract on the part of either the firm or the employee due to legal requirements or even industry norms that will govern the terms of such a contract.

It is clear from the extant literature that power affects ethical behavior in contract formation and negotiations, or as Arnow-Richman states, "[e]very contracting relationship involves bargaining disparities" but what is most concerning are when "a stronger party abuses his or her position of strength" (2006, p. 976). Crott, Kayser, and Lamm (1980) found that parties with more power than the other "bluffed" more frequently, and communicated less than

those with lower power. This is likely because those with more power consider themselves as more deserving of a higher portion of the benefits of negotiation (Kabanoff, 1991), or to use strategy language, those with more power appropriate more rent. The risk of this greater power is that, as Melé notes, ‘‘Power can foster opportunism’’ (2012, p. 154). In the context of the employment relationship, power is not equal. “Most employees – unless their skills are perceived to be so rare and valuable that they possess significant market power or are covered by a union contract – are unable to bargain over basic elements of the employment relationship (Van Buren and Greenwood, 2008, p. 209).

Power is a central concern with non-competes. “Lori A. Ehrlich, a Massachusetts representative who has sought to curb non-compete agreements” stated, “‘We’re trying to balance a situation where workers have so much less power than the corporations that employ them’” (Lohr, 2016, n.p.). Bargaining power is relevant for all types of employees, including executives, due to issues with timing, as at the time of negotiation of a non-compete, an employee may not “appreciate how it will affect future flexibility” (Arnow-Richman, 2006, p. 975). However, at issue is what causes these power differences among parties negotiating employee non-compete agreements? In this context, I suggest that power differences arise due to inequalities or asymmetries in the contract formation process, not just between the firm and the employee, but also between different types of employees. In the employment relationship, the employer is generally regarded as having more power than the employee (Blades, 1967; Van Buren and Greenwood, 2008), but this overlooks the fact that different types of employees may have very different types of power. As noted above, the “freedom to trade” argument would assert that non-competes are an unethical restraint on an employee’s ability to switch employers; in this view, non-competes are not very different from indentured servitude (Blake, 1960).

Scholars asserting this view (*e.g.*, Marx, 2011) focus on a worker's lack of bargaining power, with particular emphasis on low-skilled workers, such as our sandwich-maker. In contrast, it is widely recognized that executives possess extensive bargaining power (Schwab and Thomas, 2006). Thus, the power imbalance that appears between firms and employees is complex, with distinct resource asymmetries between a firm and an executive, and a firm and a sandwich-maker. These asymmetries result in the executive having greater bargaining power than the firm, with the sandwich-maker having less. Thus, an executive can require the firm negotiate the terms and conditions of employment, and is a "rare find" for which a firm is willing to make concessions. By contrast, a sandwich-maker is unlikely to negotiate, and any terms and conditions are likely to be presented as-is, in a take-it-or-leave-it fashion, indicative of a contract of adhesion. This "denial of voice" risks exploitation of the sandwich-maker (Van Buren and Greenwood, 2013, p. 715).

Resource asymmetries arise in the non-compete negotiating process because the executive and the sandwich-maker start from unique positions, with stark differences in their education, resources, and experience. Under human capital theory, "[i]t is believed that individuals choose an occupation or employment that maximizes the present value of economic and psychic benefits over their lifetimes" (Gimeno et al., 1997, p. 754). The executive possesses years of experience and thus has accrued a large stock of human capital; these skills increase the power such an employee has over an employer (Olsen, 2016). Moreover, an executive likely has sufficient financial resources, and will be able to afford legal review of the contract. The executive is more likely than the sandwich-maker to be currently employed, there may be a significant opportunity for a tripartite, three-party bargaining scenario (Starr et al., 2019a) between the executive, his/her current employer, and his/her prospective new employer. An

executive also has higher transferability of skills to external industries, since the value of the executive's human capital is strongly linked to the executive's expertise and skills, and "may be less concerned with job security in a given job" (Olsen, 2016, p. 393). In contrast, the sandwich-maker is likely to be an entry-level employee, perhaps a high school or college student, working a first job, with limited human capital or work experience. Such less educated workers are widely regarded as vulnerable (Muffels and Luijkx, 2008; Olsen, 2016). Moreover, while there are recruitment costs to the firm to hire any type employee (Tziner and Birati, 1996), such search costs will be much higher to identify a prospective executive as opposed to a sandwich-maker – giving the executive even more bargaining power over the firm.

The asymmetries between the executive and the sandwich-maker indicate that the executive's bargaining power exceeds the sandwich-maker's. The executive can therefore request compensation or other concessions in exchange for agreeing to a non-compete agreement. This resolves a major ethical concern with employee non-competes: they appear unjust when an employee has limited bargaining power and receives no separate compensation for the agreement (Arnow-Richman, 2006). Moreover, this is consistent with Starr's (2019) empirical findings that more educated employees, such as executives, receive wage premium, while lesser-educated employees experience wage losses when signing non-compete agreements. Linking directly to the illustrative examples, Arthur Valdez reaffirmed his non-compete agreement on multiple occasion and negotiated a salary of over a million dollars, indicating significant bargaining power. Such was not the case with the Jimmy John's workers. Practically speaking, non-competes should only be allowed for employees that possess both high resource value and low resource availability. This could be measured via individual-level human capital, defined as the employee's knowledge, skills, and abilities (Coff and Kryscynski, 2011), or as

suggested by Campbell and colleagues, employee "relative bargaining power" can be seen as a "function of whether the firm's complementary assets are important for value creation, and of whether the employee can walk away with these complementary assets or recreate them at low cost after exit" (2012, p. 67). In terms of strategic management, the employee should have something akin to an employee-level competitive advantage, with human capital that is valuable, rare, inimitable, and non-substitutable (VRIN) (Barney, 1991). Those with low measures of this kind of human capital will have diminished bargaining power (Campbell et al., 2012) and should not be taken advantage of in the non-compete negotiation process, as discussed more below.

Autonomy

In this paper, I define autonomy as the ability act as one's own self. Applied to non-compete agreements, viewing employees simply as vehicles of firm knowledge violates this notion of autonomy – they must be recognized and treated as individuals. The illustrative examples raise concerns that the two types of workers were treated differently by the firm during the negotiating process in regards to this definition of autonomy. Kantian ethics require autonomy as the foundation for both rationality and morality (Budd and Scoville, 2005). To operate as autonomous agents, parties must possess sufficient knowledge such that they may rationally make suitable decisions (Boatright, 2010). In a negotiation it is therefore important that the parties share sufficient information so that they can bargain to a fair outcome, and the parties must treat each other as autonomous, responsible human beings, during the contracting process, and not as means-to-an-end. I clarify that I am not talking about *freedom*, although there is substantial overlap in the two constructs (Berlin, 1969). The primary distinction here is that I want to separate concerns with "freedom" over resources that provide to the *ability* to act, which I assert are better categorized under "power" in my normative schema, from the respectful

treatment that serves as precursor to the ability to act, which I define as "autonomy." Thus, the type of autonomy discussed here is that of autonomous personhood – specifically, the capacity of the employee to operate as an unrestricted party in the non-compete contract formation process. This notion of autonomy is similar to the concept of "employee voice," defined by Van Buren and Greenwood (2008) as the ability of employees to negotiate the terms of their employment relationship with (prospective) employers.

A common violation of autonomy occurring during the non-compete formation process revolves around the issue of timing. Starr and colleagues (2019b) find that nearly one-third of workers are asked to sign non-competes *after* they have accepted a job offer. If a job has already been accepted and the terms are then changed, there has not been adequate respect for the employee as an autonomous agent (that is, there is no bargaining, and no treating the employee as an agent capable of making his/her own decisions).

Moreover, in the context of employee non-competes, a central ethical concern is whether employees are providing consent that is both voluntary and informed (Bishara and Westermann-Behaylo, 2012). This "consent-based" approach requires both actual consent and disclosure of all relevant terms of non-competes (Stone, 2000).I next analyze these elements separately and provide consolidated guidance.

<u>Voluntary Consent:</u> A practical challenge is that "consent comes very close to coercion when one agrees to go along with an action… simply because no other feasible option is available," (Bishara and Westermann-Behaylo, 2012, p. 33). This is of particular concern for employees who have no other job offers at the time they are requested to sign a non-compete. This raises an interesting dichotomy with the illustrative examples: there are likely more jobs for which the sandwich-maker's generic, and perhaps underdeveloped, human capital may be suited

for – that is to say, there are lots of jobs for the aspirant sandwich-maker to apply for, whereas there are generally fewer job openings for executives. For example, a search on the job site Indeed.com for jobs in New York state in February 20202 yielded over 9,000 lists for fast food employment and only 1,333 jobs for "chief executive" positions, a sizable portion of which were for "assistant to the chief executive". This is where the element of bargaining power also matters – despite a lesser number of options, the executive is likely voluntarily joining the new firm, whereas the sandwich-maker is simply looking for a job, any job.

Feelings of coercion are common with non-competes, with 20% of employees asked to sign non-competes choosing not to negotiate over fear of creating tension with the employer or fear of the job offer being revoked (Starr et al., 2019b). Forty-one percent of these employees assumed negotiation was not possible, indicative that such agreements may be contracts of adhesion, as discussed above. Concerns over the voluntariness of consent suggests firms should engage in the negotiation process with *all* potential employees, not just executives.

<u>Informed Consent:</u> Informed consent in the context of non-competes requires both that employees possess knowledge about *what* they are signing as well as *whether* it is legally enforceable. Empirical evidence on both of these aspects is alarming, highlighting the need to consider sandwich-makers separately from executives. Starr, Prescott, and Bishara (2019b) find almost 30% of employees are not certain whether they have ever signed a non-compete, and that this percentage varies dramatically by education level: approximately 20% of employees with at least a bachelor's degrees were unaware of whether they had ever signed a non-compete, while this number rose to 45% for workers with less than a bachelor's degree. This indicates significant concerns with the autonomous treatment of lesser-educated, lower-earning workers as there cannot be informed consent if employees do not know what they have signed.

Moreover, there are potential concerns over autonomy and timing. An (aspiring) employee signs a non-compete at the time of hire, giving away a right to compete against the employer after the end of the employment relationship, which could be years away. Thus, the employee gives away a future right. At hiring, this may not seem problematic, as it seems unlikely that an applicant would already have plans to start or join a competitive entity, but circumstances may change. In terms of property rights, non-competes extend the firm's property rights in the knowledge contained in the mind of former employees beyond the duration of the employment relationship (Bishara and Westermann-Behaylo, 2012). Such concerns are mitigated only when the negotiating process ensures that the employee fully understands the implications of the contract and is providing voluntary and informed consent. This shouldn't imply society not allow such waivers of future rights, which are incredibly common (*e.g.*, consent to treatment in the medical field).A possible suggestion can be found by requiring eemployees have time to consider whether or not they agree to a non-compete before the job begins. For example, Oregon requires a two week waiting period between when a non-compete can be offered and the employee's start date (Bureau of Labor and Industries, n.d.), Massachusetts similarly requires ten business days (Harwath, 2018), while Maine requires at least three business days (Nyhan, 2019).

There are also concerns about what employees know about non-compete enforceability. While an executive can afford to consult an attorney for advice on this point, recent research has found that just being informed about enforceability is insufficient to change *beliefs*, particularly for lesser educated workers; that is, even when told their non-compete was not enforceable, lesser educated employees were still concerned about the non-compete (Starr and Prescott, 2019). This implies that providing a notice of non-compete enforceability along with the offer of employment may be insufficient to guarantee informed consent from employees. One option

may be for policy makers to adopt California's approach to voiding such provisions if they are overbroad (an amusing, if dramaticized example, is given in the Season 2 finale of the HBO television show *Silicon Valley*). That is, rather than allowing reformation of non-competes, using what are commonly referred to as the red pencil and blue pencil approaches, clauses that violate state policy on non-competes could be voided in their entirety.

I suggest that we can have autonomous treatment of employees when firms obtain the voluntary and informed consent of employees to the terms of a non-compete during the negotiation process. How would this come about? As a first step, a firm must explain to the employee *why* a non-compete has been requested. In Table 1, there were distinct differences between why a firm would want employee to sign a non-compete: in the case of executive, it was protection of proprietary firm knowledge, while for the sandwich-maker, it was to keep the employee from moving to a competitor. This links concerns over employee autonomy to the question of why a firm chose to use a non-compete in the first place. If a non-compete is used as a knowledge protection mechanism, that is, to prevent knowledge from being taken to a competitor, and this purpose is communicated to an employee, we mitigate concerns with autonomy. In the illustrative examples, however, such a situation only arises with an executive, who has sufficient resources to obtain legal review of the contract and for whom such legal review would be the norm. Thus, the executive provides voluntary and informed consent. In contrast, the sandwich-maker was likely asked to sign a non-compete in order to limit the employee's mobility, and is therefore unable to provide voluntary or informed consent.

Thus, firms must ensure that employees are aware of what they are being asked to sign, and negotiation over the terms of a non-compete must be standard. Additional suggestions would be that employees be encouraged, or perhaps required, to consult their own legal counsel, and

that employees be given time to consider their acceptance, denial, or re-negotiation of the terms of a non-compete before a job offer deadline (which presupposes that non-competes are included with the initial job offer and *not* presented afterwards).

A final note is that I propose it is also necessary to respect the autonomy of firms to choose who can have access to proprietary firm information; that is, I believe a firm should be allowed to choose how – and with whom – its information may be shared. A firm will not know at the outset of the employment relationship what an employee's intent is, and thus a non-compete agreement protects the firm from an employee with potential malicious intent (or later hard feelings after termination).

Fairness

Finally, employee non-competes raise inherent issues of fairness which, in business ethics literature, equates with "organizational justice" (Cropanzano and Stein, 2009). Research on organizational justice focuses on perceptions of and reactions to business decisions, and has categorized the fairness of outcomes, processes, interpersonal reactions, and information (Cuguerό-Escofet and Fortin, 2014). These first two are perhaps the most well-known, and are referred to as distributive justice (fair outcomes) and procedural justice (fair process). For the reasons explained below, my categorization of fairness in the context of employee non-competes adopts the view of distributive justice. I believe a key step in determining whether a non-compete is ethical is whether the result of the negotiations between the firm and the employee lead to a fair outcome, or, said differently, is in accordance with principles of distributive justice.

The primary reason for the focus on distributive over procedural justice is a goal to create clear boundaries among the elements of the tripartite schema. I suggest that notions of procedural justice, particularly regarding negotiations over employee non-competes, are intertwined with

concerns of power and autonomy. For example, the information asymmetries discussed above in relation to power also raise issues over the fairness of a negotiation, with parties facing tensions "over the desire to use information strategically while also [ideally] trying to treat the other party fairly and ethically" (Aquino, 1998, p. 210). This is akin to the notion of procedural justice in the negotiation process, and it is well recognized by scholars that fairness is an important consideration in the negotiation *process* (Tripp et al., 1995). Moreover, concerns over a fair process, particularly in the context of negotiation, are entangled with notions of autonomy, or how people are treated during a process. Thus in my categorization, it became difficult to hypothesize a non-compete negotiation that would meet the requirements of procedural justice but violate requirements of autonomy. Scholars have only recently recognized this overlap, with procedural justice seen as functional to regulating an individual's need for autonomy (van Prooijen, 2009).

The most famous justice scholar is likely John Rawls, who defines a just act as one that would be selected by those unware of the details of their social conditions and individual psyches (Rawls, 1971). The Rawlsian "thought experiment" therefore requires each party to place himself behind a "veil of ignorance" and decide what (s)he would want to do without knowing his or her role in a given situation (Donaldson and Werhane, 2002). A Rawlsian thought experiment for an employee non-compete negotiation requires determination from behind a veil of ignorance for what a reasonable agreement would be that both lets "employers to protect valuable firm assets, such as strategic knowledge and information from unfair competition" and which also "protect[s] an employee's ability to sell her labor services in an open market where they would be utilized at their highest value" (Bishara and Westermann-Behaylo, 2012, p. 51). In the case of the illustrative examples, the fact that the duration of the sandwich-makers non-compete exceeds

that of the executive raises questions of distributive justice. From an egalitarian justice standpoint, this imbalance indicates either that the executive has too short of a non-compete or the sandwich-maker has too long of a non-compete. Therefore, the fact that the duration of the sandwich-makers non-compete exceeds that of the executive is indicative of an unfair outcome in the case of the sandwich-makers.

An additional requirement for a fair outcome for an employee non-compete must be that a firm to recognize – and therefore relinquish – any "rights to the general training or education that an employee already had" prior to the negotiation of the employment relationship (Haws, 2004, p. 5). This is something that may be missing even in the employment contract of an executive, since the executive arrives at the firm with a supply of general human capital that (s)he should be free to use outside of the firm. In the case of the sandwich-maker, there has likely not even been a negotiating process over the terms of a non-compete, much less a fair one.

This raises realistic questions over how a non-compete can be judged to be fair. One guideline may be the reasonableness criteria frequently used by courts for enforcement of employee non-competes mentioned previously. Thus, a non-compete that is overbroad on its face, vague in terms, or would otherwise be clearly unenforceable should it be taken to court is a non-compete that would not meet this requirement for distributive justice. Similarly, at an organizational level, the terms of a non-compete should be adjusted to reflect the realities of an employee's role and access to confidential information. In no case should an executive have a less restrictive non-compete than a sandwich-maker (or a janitor, or a receptionist, or any other class of similarly situated employees).

CONCLUSION

Employee non-competes are an ethically charged topic within management literature, due predominantly to espoused issues over property rights. I suggest in this paper that these issues over property rights are better understood as arising from underlying concerns of power, autonomy, and fairness, and that an employee non-compete agreement can be ethically formed when there has been adequate consideration during the contract formation process to these three central attributes, as represented in Figure 2:

---INSERT FIGURE 2 ABOUT HERE---

An ethical non-compete can exist at the three-way intersection of these dimensions, or the darkest area at the center of Figure 2. It is therefore possible, under my categorization, to have an employee non-compete that might be objectively regarded as fair, and therefore possibly even enforceable by the courts, but that which would still be considered unethical under this framework if the negotiating process by which the non-compete was derived did not respect the autonomy of the employee, or was forced upon the employee by a firm with greater bargaining power. In contrast, an ethical non-compete can exist via, for example, the case of an executive with who goes into a contract formation process with bargaining power, whose autonomy is respected in the negotiating process and who provides both voluntary and informed consent, and whose non-compete would be objectively deemed as fair at the end of the negotiation process.

The illustrative examples in this paper raises an important question over what types of workers are those that may be best positioned to be the subject of ethical non-competes. That is, what is the ultimate distinction driving the different ethical conclusions between the illustrative examples of an executive and a sandwich-maker? The two real life examples provided were selected because they are dichotomous examples which are easy to analyze, and thus a more

difficult question is what do these examples actually represent in terms of broad classifications of workers? This is important work to finalize as we try to determine when non-competes can be ethical.

Such a distinction does not lie with the marketability of skills, as a sandwich-maker may have much higher marketability of his/her generic skills than the executive. One possibility may lie in this pre-existing skillset, or human capital, of such workers, particularly if it is combined with the firm's intent in requesting the non-compete in the first place: knowledge protection or mobility limitation? Use as a knowledge protection mechanism, which feels inherently more ethical, requires an employee possess sufficient absorptive capacity (Cohen and Levinthal, 1990) to make use of his/her own pre-existing human capital to ingest, assimilate, absorb, and make use of the firm's knowledge base once the employment relationship begins. Thus, one proposal for such a categorization of workers for which non-competes are more ethical could be a continuum of pre-existing, absorptive capacity-based, knowledge-intensive human capital, with the low-skilled sandwich-maker on one end and the highly-skilled executive on the other. This attribute of the worker would therefore be something independent of, although likely coincidental with, my tripartite schema of power/autonomy/fairness for ethical employee non-compete agreements. In line with this, Gambardella, Panico, and Valentini (2015) explicitly discuss how autonomy can be used to incentivize employees engaged in knowledge-intensive activities.

A potential objection to existence of an ethical non-compete agreement is whether non-disclosure agreements ("NDAs" or confidentiality agreements) are a better tool than non-competes for the purpose of protecting firm information. Non-disclosure agreements are assumed to be one of the most widely used terms in employment contracts in the United States (Bishara et al., 2015; Dworkin and Callahan, 1998) and do not restrict employee mobility like a non-

compete. Rather, they provide written confirmation that proprietary firm information remains the exclusive property of the employer should the employee leave the firm – even if the knowledge is contained in the employee's mind (Bishara et al., 2015). As such, they are a clear application of property rights theory. Proponents of the superiority of NDAs over non-competes, such as Dworkin and Callahan (1998) or Bishara, Martin, and Thomas (2015) note that non-disclosure agreements are "an unambiguous declaration that the employer views firm matters as confidential" (Dworkin and Callahan, 1998, p. 57) and do not make limitations on employee mobility. Moreover, they assert that it is easier to enforce a non-disclosure agreement than a non-compete agreement (Bishara et al., 2015). In contrast, other scholars, including myself, would assert that non-disclosure agreements are more difficult to enforce than non-compete agreements, since proving "ownership" or the source of knowledge is complex (Gomulkiewicz, 2015), and litigation over such issues is therefore costly and unpredictable (Pooley, 2008). Moreover, violations of a non-disclosure agreement can be difficult for a firm to even become aware of (Hyde, 2012) and may therefore not be able to be resolved before harm has occurred to the firm. A main benefit of a non-compete agreement is that it is significantly more unambiguous than a non-disclosure, and may even bolster the intent of non-disclosure agreements when the two are used in conjunction (Whaley, 1999). Moreover, I believe that the perpetual ownership of firm knowledge contained in a non-disclosure agreement could potentially violate the aspects of power, autonomy, and fairness identified above. Despite this debate, future research should explore how non-competes can ethically function when used in conjunction with other doctrines, contracts, or policies, specifically nondisclosure agreements, trade secrets protections, patents, and/or the inevitable disclosure doctrine. In practice, non-competes rarely operate independently,

and employees may be confused over the differences between, for instance, non-competes and non-disclosures (Starr et al., 2019b)

The conclusion of this paper raise practical questions of how such three core attributes can be ensured by policy makers. Future empirical research should explore this question, although I propose that the state of Oregon's recently revised requirements for employee non-competes may be an informative starting point. In the state of Oregon, non-competes will only be enforced for "white collar" employees given at least two weeks' notice in advance of the start date (Bureau of Labor and Industries, n.d.). Moreover, at termination, the employee's annual salary must be greater than the median U.S. income for a family of four, and the firm must be trying to use the non-compete for knowledge protection purposes.

One limitation of this paper is that I have skipped over the first decision node in Figure 1, and therefore eliminated the ability of the firm to choose to use a non-compete agreement, perhaps without regard the legal enforceability of such agreements. The question of whether or not an employer chooses to utilize non-competes for its employees may be as ethically charged than a discussion of whether non-competes themselves are actually ethical or not. Thus, the motivations behind why a specific employer chooses to utilize non-competes should be examined in future research.

APPENDIX

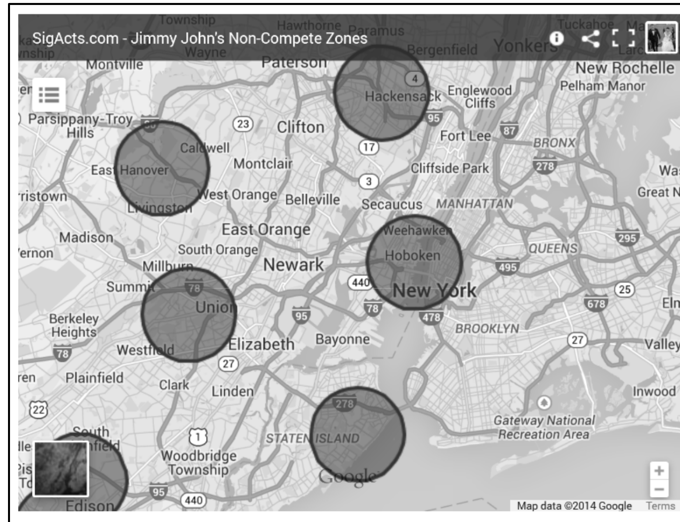

Figure A-1: Jimmy John's non-compete zones around New York City (SigActs, 2014).

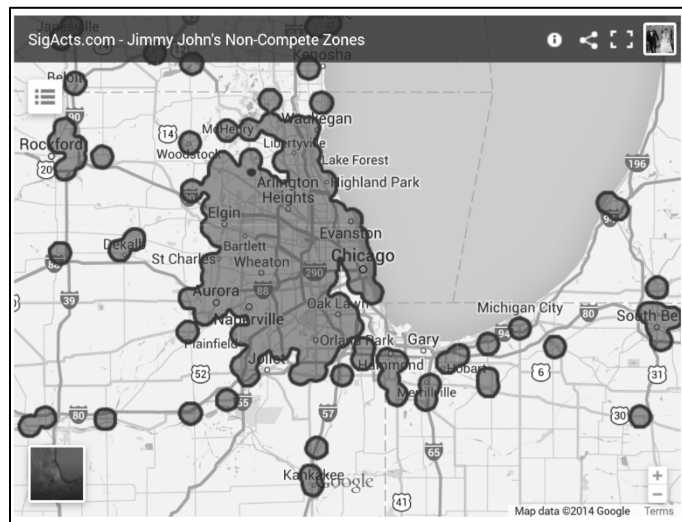

Figure A-2: Jimmy John's non-compete zones around Chicago, IL (SigActs, 2014).

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[i] These include a dummy variable indicator for 10 states used by Stuart and Sorenson (2003); a binary scale used by Marx and colleagues (2009); a 12-factor additive scale use by Garmaise (2011) based on Malsberger (2004); a weighted version of that scale used by Bishara (2011); and a reweighted using factor analysis version developed by Starr (2019).

[ii] Although Bishara and Westermann-Behaylo (2012) analyze non-competes under a utilitarian analysis and find them to be unethical, they do not specifically discuss the *in terrorem* issues with non-enforceable non-compete agreements being requested of employees.

[iii] I thank an anonymous reviewer for this point. "A contract of adhesion is an agreement whose terms are standardized by dominant parties; weaker (adhering) parties are usually given little room to negotiate but are offered the deal on a take-it-or-leave-it basis" (Keeley, 1995, p. 247).

COMPLIANCE WITH ETHICAL STANDARDS

Conflict of Interest: The author declares that there is no conflict of interest.

Research involving Human Participants and/or Animals: This article does not contain any studies with human participants or animals performed by the author.

Informed consent: Informed consent was obtained from all individual participants included in the study.

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FIGURES AND TABLES

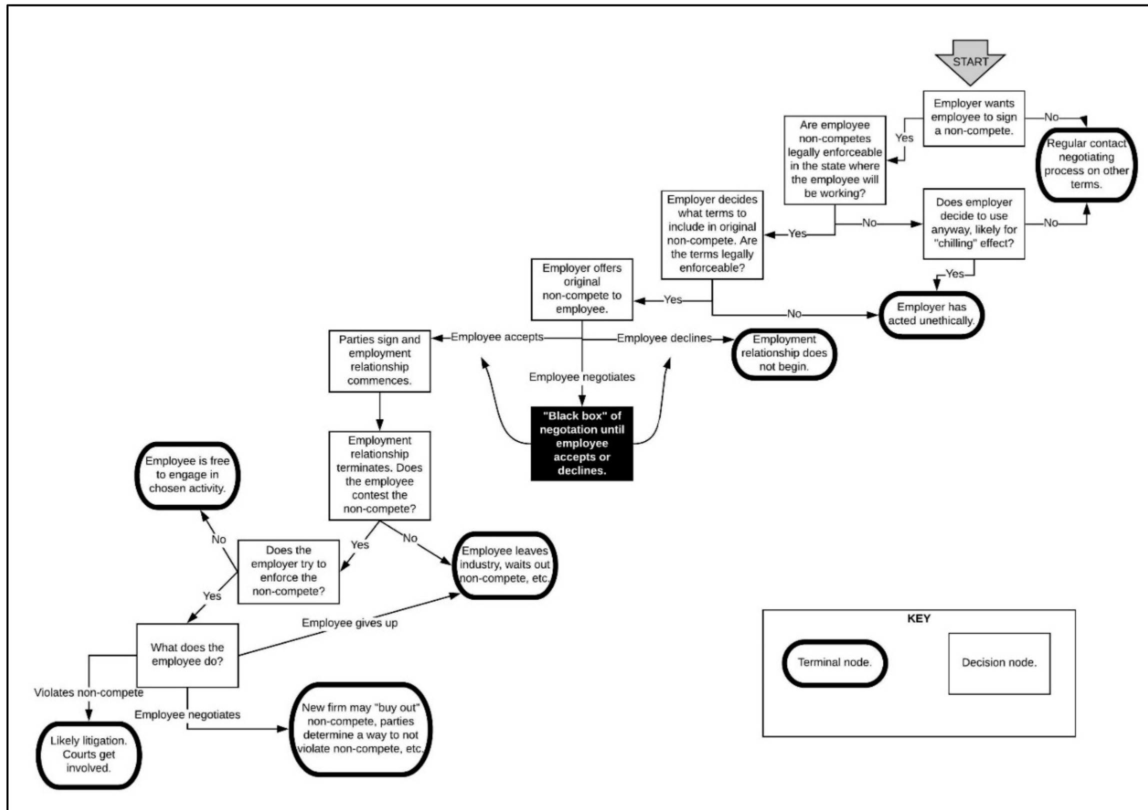

Figure 1: The employee non-compete process.

Table 1. A comparison of the executive versus the sandwich-maker

Phase	*Dimension*	*Executive*	*Sandwich-maker*
Pre-contract	Resources/information	Can afford legal review of agreement; likely familiar with the process of employment negotiation; superior to the sandwich-maker.	Limited resources; probably can't afford an attorney or wouldn't even think to hire an attorney to review
	Current employment status	Likely already employed	May not currently be employed; current employer low prestige
	Available job opportunities	Few, specialized	Many, generic
	Pre-existing human capital	Significant (experience, education, etc.)	None or minimal; entry-level skills
Contract negotiation	Contracting/hiring process	Negotiation is standard; firm willing to negotiate terms; potential for third party negotiating	Limited or no negotiation; take-it-or-leave-it
	Bargaining power	High	Low
	Likely firm intention/motivation	Protect firm's confidential information or investments the firm makes in the executive (firm-focused)	Restrict mobility in order to damage competitors ability to hire (competitor-focused)
	Anticipated length of employment	Long; turnover unusual	Short or time-limited; turnover is routine for the firm
During employment	Compensation/Consideration	Significant annual salary, up to millions of dollars	Low wage, hourly, likely near minimum wage
	Likelihood of being "poached" by competitor	High; non-compete may even be a signal of value	Low
	Access to confidential information during employment	Extensive	Limited, if at all
	Duties of employee to firm	Fiduciary duties associated with role above what is expected of all employees	None beyond those normal to all employees

	Cost to firm should employee leave	Significant recruitment costs to replace/train, potential impact with investors or the public	Minimal costs for new hire (not substantial; training is routine)
Post-employment	All else equal, likelihood of enforceability as written	High	Low – likely overreaching
	Skill transferability across industries	Management skills highly transferable across industries	Skills unlikely to transfer across industries
	Resources	Can afford to initiate a lawsuit to challenge non-compete; can afford to "wait out" agreement	Limited, can't afford to file suit or pay costs should employer file; can't afford to "wait out" agreement

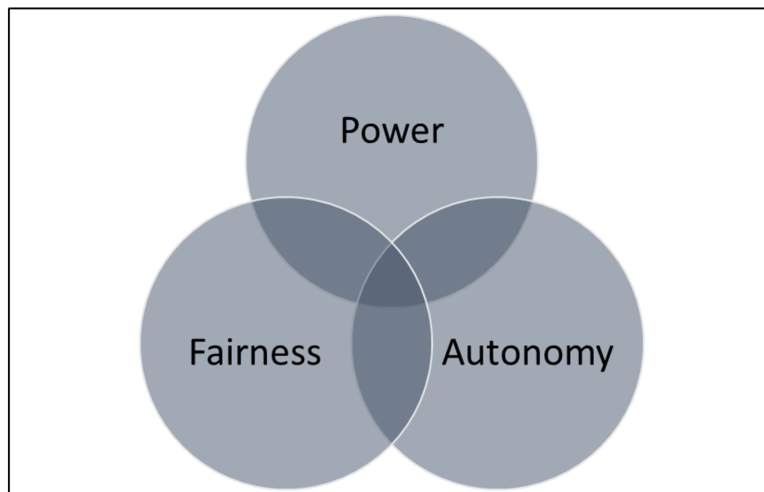

Figure 2: Ethical dimension of employee non-competes.