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Mi (Amy) Tang Dec. 5, 2017

The Theory And Practice of Confidentiality Agreements in American Democracy: An Investigation of the Legal Norms Underlying the Apprentice Agreement in the Trump Tape Case

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Abstract

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By Mi (Amy) Tang

Confidentiality agreements used in an employment context were originally intended to prevent disclosure of trade secrets. By the end of the nineteenth century, courts had expanded the scope of confidentiality agreements' use to protect a wide range of information. Expansion on the use of confidentiality agreements turns out to be problematic in cases where the information being suppressed by the agreement is of great public interest. One high-profile instance that exemplifies this is the Trump Tape case. In October 2016, leaked footage from the 2005 TV show Access Hollywood was published, in which the then presidential candidate Donald Trump was having a vulgar conversation about women. Following the Access Hollywood leak, it was reported that in some outtakes of another TV show, The Apprentice, Trump behaves even worse toward women and people of color. However, publication of these outtakes was obstructed due to a confidentiality agreement, signed between entertainment company MGM and the Apprentice production team, which purportedly prevents disclosure of the outtakes.

In this thesis, I investigate the legality of the Apprentice agreement in the Trump Tape case. First, I examine the current law's status on the agreement. Second, I turn to a normative analysis and consider the Apprentice agreement in relation to the deeper normative structures that inform our understanding of what the legal system is designed to do. Specifically, in the normative analysis, I draw on three social political theories, i.e., utilitarianism, contract theory, and rights theory, as the lens to consider the legality of the "Apprentice" agreement. Based on the normative analysis, I conclude that strong arguments can be made for which the law can and should warrant disclosure of the outtakes in the Trump Tape case. The discrepancy between the normative conclusion of how the law should function and the fact of how the law does function, to a large extent, points to the understanding that change and reform of the current law on confidentiality agreements will be necessary.

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Introduction

On Oct. 6th, 2016, the Washington Post published footage of the 2005 Access Hollywood show. The video recorded the then presidential candidate Donald Trump and the TV host Billy Bush having "an extremely lewd conversation about women" on a bus with the show's name written on its side.[1] Trump's attitude towards women had long been a subject of criticism throughout his campaign, and the Access Holly tapes seem to largely fall in line with some of Trump's derogatory comments about women in his previous TV and live radio appearances.[2] As the Washington Post reported, multiple women publicly accused Trump for his sexual advances in wake of the debate surround the Access Hollywood tapes.[3] Candidate Trump's potential sexist inclination, and even potential sexual harassment history, again became the center of the public's attention.

Among the huge outcry about the Access Hollywood footage, actor Tom Arnold revealed that he had some outtakes featuring Trump in another TV show, the Apprentice, in which the candidate had made remarks that are much more obscene and demeaning regarding women and people of color than in the Access Hollywood tapes. In response to this message, the Apprentice tapes were demanded to be released by media and some civil

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[1] Paul Farhi. "NBC waited for green light from lawyers before airing Trump video," *The Washington Post*, October 08, 2016, accessed November 27, 2017, https://www.washingtonpost.com/lifestyle/style/nbc-delayed-publication-of-lewd-trump-tape-because-of-lawsuit-fears/2016/10/08/a3c6850e-8db9-11e6-875e-2c1bfe943b66_story.html?utm_term=.7a50196f6c0a.

[2] David A. Fahrenthold. "Trump recorded having an extremely lewd conversation about women in 2005," *The Washington Post*, October 08, 2016, accessed November 27, 2017, https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eeed4_story.html?utm_term=.7f91c95a9a35.

[3] Jose DelReal and Sean Sullivan. "Trump calls women's claims of sexual advances 'vicious' and 'absolutely false' ." *The Washington Post*. October 13, 2016. accessed November 27, 2017. https://www.washingtonpost.com/politics/multiple-women-accuse-donald-trump-of-making-sexual-advances/2016/10/13/3862fab0-9140-11e6-9c52-0b10449e33c4_story.html?tid=a_inl&utm_term=.b179cfc41ff5.

rights lawyers.[4] However, people who allegedly had access to the Apprentice outtakes, including the actor and other employees who worked on the set of the Apprentice show, all claimed that a confidentiality clause prevented them from releasing the outtakes. In the end, despite the consistent search for these footages, the Apprentice outtakes were never released to the public.

At the heart of the Trump Tape case is the legality of the confidentiality agreement that purportedly prevents the disclosure of the Apprentice outtakes. Non-disclosure agreements signed in an employment context were originally used by employers to protect their commercial advantage through forestalling employees' disclosure of trade secrets. However, at the end of 19th century, courts had expanded the scope of non-disclosure agreements' protection from merely trade secrets to a wide range of information.[5] For a long time, it has been accepted that non-disclosure agreement between employers and employees prevent employees from disclosing confidential information. Trade secrets are largely uncontroversial examples of confidential information that are protectable through confidentiality agreement. However, beyond trade secrets, nondisclosure agreements that aim to prevent release of confidential information that "is proprietary to the employer, revealed in confidence, and is not of general knowledge" also have real binding powers.[6]

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[4] Carla Marinucci, "Feminist attorney Allred demands that Trump, MGM release 'Apprentice' tapes," *Politico*, Oct 11, 2016, "https://www.politico.com/blogs/on-media/2016/10/gloria-allred-womens-groups-to-protest-for-release-of-apprentice-footage-229606

[5] Catherine L. Fisk, *Working Knowledge Innovation and the Rise of Corporate Intellectual Property, 1800-1930*. (Chapel Hill, N.C.: University of North Carolina Press, 2009). 1-19.

[6] Examples of common law protection of confidential information that are not trade secrets: *Torrence v. Hewitt Associates*, 493 N.E.2d 74, 78 (Ill. App. 1986), in which the court supported protection of financial data, future business plans, client lists, confidential reports regarding flexible compensation"; *Diversified Fastening Systems, Inc. v. Rogge*, 786 F. Supp. 1486 (N.D. Iowa 1991), in which the court protected company's client information. *See* Carol M. Bast "At What Price Silence: Are Confidentiality Agreements Enforceable?" *William Mitchell Law Review* 25, no.2 (1999): 637, http://open.mitchellhamline.edu/cgi/viewcontent.cgi?article=1914&context=wmlr.

However, courts' recognition of the *prima facie* binding power of non-disclosure agreement turns out to be problematic in cases where the information being silenced through the agreement are of great public interest. One example that illustrates this situation is the settlement that are used by Catholic Church to conceal priests' sexual abuse scandal.[7] As these non-disclosure agreements conceal the identity of the priests, these agreements enable the abusive priests to "remain anonymous and perhaps continue in [their] positions."[8] Another recent high profile instance is Harvey Weinstein's use of these agreements to silence women who were sexually harassed by him during their employment. In this case, the lack of disclosure of such information jeopardized the public not only because it resulted in injury of the first victim, but also in that it allowed the perpetrators to continue to harm other victims.

In light of the damage to public interest caused by confidentiality agreements that suppress information of great public concern, there is an increasing interest in challenging the *prima facie* enforceability of the confidentiality agreements. For instance, in response to the Weinstein's sexual assault case, California state representative Connie Leyva has announced that she will "introduce legislation to ban secret settlements (confidentiality provisions in settlement agreements)" in sexual assault related cases.[9] In one law review *The Case For Workplace Transparency*, it has been argued that, for courts to decide on the enforceability of confidentiality agreements, it is inadequate to apply the balancing test that

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[7] For example, in 1997, the Roman Catholic Diocese of Albany paid a confidential settlement of just under one million dollars to a man who alleged that "he had been sexually abused for six years" by a priest "who regularly plied him with drugs and alcohol." *See* Ryan M. Philp, "Silence at Our Expense: Balancing Safety and secrecy in Non-disclosure Agreements." *Seton Hall Law Review*. 33 (2011): 845, http://scholarship.shu.edu/cgi/viewcontent.cgi?article=1286&context=shlr.

[8] Ibid., 845.

[9] Connie M. Leyva, *Senator Leyva: Ban Secret Settlements in Sexual Assault and Harassment Cases*, online, Oct 19, 2017, http://sd20.senate.ca.gov/news/2017-10-19-senator-leyva-ban-secret-settlements-sexual-assault-and-harassment-cases.

they currently employ, i.e. weighing the interest in promoting legitimate public welfare through disclosure against the strong presumption of enforcing the agreement. Rather, the courts "should also limit the nature of those interests" in considering the enforceability of non-disclosure agreements.[10]Essentially, there is a growing trend of questioning the justifiability of insulating information of great public interest from the people.

The objective of this thesis is to examine the legality of the Apprentice agreement in consideration of these evolving concerns regarding the confidentiality agreement. In the first part, I will introduce the current law's status on the issue, that is, whether a suit filed to challenge the legality of the confidentiality agreement - that purportedly prevents publication of the Apprentice outtakes - would be successful based on existing law. Then, I will delve into issues of jurisprudence and the social and political philosophical theories that inform it. I draw on three legal philosophies, utilitarianism, contract theory, and rights theory, to examine how disclosure could possibly be justified and whether the law should warrant disclosure in the Trump Tape case. Finally, I will compare the theoretical conclusions based on the three philosophies and discuss possible considerations the possible considerations regarding improving the non-disclosure agreement we might have hereafter.

[10] Cynthia Estlund, "Just the Facts: The Case for Workplace Transparency" *Stanford Law Review* 63, Issue 2 (2011): 148, http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2011/01/Estlund-63-Stan-L-Rev-351.pdf .

I. Status of Current Law

In this chapter, I will examine the status of the current law on the Trump tape case: if a suit had been filed to challenge legality of the confidentiality agreement that purportedly prevents publication of the Apprentice outtakes, how likely is it to succeed based on existing law. In other words, according to the current law, how likely would a court be to rule in favor of disclosing the Apprentice outtakes. I will discuss two approaches applicable to considering this question. First, I will consider a contractual approach, in which the court would view the Apprentice confidentiality agreement as a business contract that is by default enforceable according to the law. For a court to decide in favor of disclosing the outtakes, we must established that there are conditions that render the contract unenforceable. Second, I will discuss a First Amendment approach. In this way of thinking, a court would not begin with the presumption that the Apprentice confidentiality agreement is an enforceable contract as is assumed in the contractual approach. Rather, the court would consider the confidentiality agreement as a form of suppression of the information contained in the outtakes. Therefore, the contract would be by default invasive of the First Amendment and would not be enforced. The key issue to be addressed in this approach is whether enforcing the Apprentice confidentiality agreement would indeed trigger the First Amendment.

I will begin with the contractual approach. The confidentiality agreement question can be understood as a regular business contract signed between Mark Burnett, who served as executive producer of The Apprentice, and MGM, which owns Burnett's production company. The contract affects not only Mark Burnett, but also his associates

and employees that worked for the Apprentice's production.[11] Usually, non-disclosure agreements created in such business settings serve the purpose of preventing the leaking of a corporation's confidential information that would disadvantage the company's ability to compete in the market. For instance, corporations often draft non-disclosure agreement to protect their trade secrets. In the context of the Apprentice confidentiality agreement, it is would be reasonable for MGM and Burnett to sign such a confidentiality agreement, because it can function to prevent "spoilers" or leaks before the show is aired.[12] Thus, it is reasonable to assume that a court would consider the Apprentice agreement to be by default a legitimate and enforceable contract.

There are in general two kinds of regulation that a court might employ to regulate business contract: regulation based on directly policing a contract's content or content-neutral regulation.[13] In content-based regulation, a court might fully or partially deny the enforceability of the confidentiality agreement in question if the court find the contract's content to violate public policy.[14] This power of the court to deny enforcement of a contract on public policy grounds is stated in the *Restatement (Second) of Contracts*. As is clearly stated in Chapter Eight of the Restatement, "[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or

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[11] Kelsey Sutton. "Gloria Allred, women's groups plan protest to push for release of ''Apprentice' footage," *Politico,* October 11, 2016, https://www.politico.com/blogs/on-media/2016/10/gloria-allred-womens-groups-to-protest-for-release-of-apprentice-footage-229606.

[12] Harold Brook. "Trump Tapes: The Legal Hurdles To Leaking 'Apprentice' Footage," *Forbes*, Oct 13, 2016, https://www.forbes.com/forbes/welcome/?toURL=https://www.forbes.com/sites/legalentertainment/2016/10/13/trump-tapes-the-laws-behind-leaking-more-footage/&refURL=https://www.google.com/&referrer=https://www.google.com/.

[13] Alan E. Garfield, "Promises of Silence: Contract Law and Freedom of Speech" *Cornell Law Review*, 83, Issue 2 (1998): 276, http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2716&context=clr.

[14] Garfield, 294.

the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[15]

This doctrine in the Restatement provides two ways for a court to find a contract unenforceable on public policy grounds. One is that "if legislation provides that it is unenforceable," that is, if the making of the contract itself contravenes legislation explicitly.[16] For example, a court would find contracts that stipulate concealment of crime to be unenforceable because the content violates legislations that explicitly prohibit such action, such as the Model Penal Code provision.[17] *Allen v. Jordanos' Inc* is a case that illustrates this point. The case concerns the enforceability of a contract between former employer and employee to conceal the employee's alleged theft and other dishonest behaviors. California Court of Appeal ruled that "[a] bargain which includes as part of its consideration nondisclosure of discreditable facts is illegal."[18] The contract is unenforceable because establishing such a contract is itself an illegal act.

When there is no legislation that explicitly bars the making of a contract, the other way that a court might find a contract to be unenforceable on public policy ground is when "the interest in [the contract's] enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms."[19] This means that, a court could find a contract unenforceable when the content of the contract violates public policy interest. The Restatement does not point to any specific source from which a court's understanding of

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[15] Restatement (Second) of Contracts § 178 (Am. Law Inst. 1981).
[16] Garfield, 294-298.
[17] "Most states and the Model Penal Code recognize the crime of 'compounding,' or accepting consideration in return for a promise to refrain from reporting a crime. The Model Penal Code provision states that: 'A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense.'" *see* Garfield 307.
[18] Bast, 653-654.
[19] Restatement (Second) of Contracts § 178 (Am. Law Inst. 1981).

public policy interest can be derived, and the basis of public interest that a court can consider could be "relevant legislation, case law, or and its own perception of the public welfare."[20] One example that illustrates court's employment of this standard to deny contract enforceability is *Tatman v. Space Coast Kennel Club, Inc.* In this case, the plaintiff signed an entry form to a dog show by the Kennel Club that agreed to not hold the company liable for any accident or injury and was later bitten by an "100-pound, non-neutered male Akita" during the event.[21] Based on precedents, the Florida appellate court decided that the exculpatory clause is unenforceable because "[these] clauses are by public policy disfavored in the law because they relieve one party of the obligation to use due care, [shifting] the risk of injury to the party who is probably least equipped to take the necessary precautions to avoid induity and beat the risk of loss."[22]

Although the Restatement does not restrict the basis of a court's consideration of public policy interest, in reality, successful public policy defenses usually invoke closely related legislation and case laws. As is shown by a study based on actual court cases concerning public policy challenges to contract enforceability, public policy defenses that provide an argument based on closely related statutes or precedents are about twice as successful as those that appeal to public interest broadly.[23] According to the author of the study, "[it] appears that courts are most willing to let a contract stand unless an express rule or strongly established case law dictates otherwise."[24]

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[20] Garfield, 297.
[21] David Adam Friedman, "Bringing Order to Contracts Against Public Policy" *Florida State University Law Review* 39 (2012): 603, http://www.law.fsu.edu/docs/default-source/journals/law-review/spring-2012.pdf?sfvrsn=4.
[22] Friedman, 603.
[23] Friedman, 586.
[24] Friedman, 612.

One reason that could explain this pattern might be that judicial denial of contract enforceability fundamentally contradicts the principle that underlies the institution of contract. It has been argued that "[contract] law exists in recognition of the benefits of private contracting."[25] These benefits include, for instance, that contracting between private parties in a free market would foster economic growth. When a court denies to enforce a contract, it "frustrates the expectation" of the contracting parties, and by extension, might in the long run cause citizens' distrust of the institution of contract.[26] Therefore, courts "should be reluctant to deny enforcement on public policy ground" and to only exercise such denial when the public policy interest "clearly outweigh" the interest advanced by enforcing the contract.[27] In the absence of regulation that explicitly prohibits the making or the content of a contract, a broad appeal to public policy interest is unlikely to qualify as an interest that "clearly outweighs" the fundamental interest to enforce a contract.

Having clarified the approach courts use to deny contract enforceability on public policy ground, we can now apply this approach to the Apprentice outtakes case. Is it possible for courts to deny the confidentiality agreement preventing the disclosure of the outtakes based on public policy ground? First, it is clear that courts would unlikely deny the enforceability of the confidentiality agreement based on illegality of the making of the contract. It is legitimate and common for corporations to protect their business interest through signing confidentiality agreements. An entertainment corporation would have a legitimate interest to protect its production by barring release of its production's outtakes,

[25] Garfield, 298.
[26] Garfield, 298.
[27] Restatement (Second) of Contracts § 178 (Am. Law Inst. 1981); analysis on the importance of the "clearly outweigh" requirement *see* Garfield, 299.

as such practice can prevent "spoilers" of the show, and by extension, loss of audience rating and profit.

To a certain extent, it seems reasonable to argue that the legality of the making of the contract can be questioned in this context, since it is wrong to use NDA to prevent disclosure of information that are might be at least borderline sexual harassment behaviors (based on the content of the Access Hollywood outtakes). In *Allen v. Jordanos' Inc*, a contract that conceals discreditable facts has been decided to be unenforceable because the act of bargaining a contract to conceal discreditable facts is itself illegal. It seems reasonable to contend that the making of the Apprentice agreement, which likely functions to suppress borderline sexual harassment behaviors, can also be questioned on its legality.

However, in my view, there is a crucial distinction between the *Allen* contract and the Apprentice contract. Whereas both contracts might function to conceal discreditable facts, only the making of the *Allen* contract is an act of explicit intentional concealment: in the *Allen* contract, a "substantial part of the bargain is to allow the plaintiff to obtain unemployment benefits," which is an explicitly illegitimate interest.[28] In contrast, the making of the Apprentice contract, at least on the surface, can be interpreted as an act to protect legitimate corporate interest. Certainly, we might question the true intention behind the contracting, and we might challenge the legality of the contract based on its content. However, the making on the contract on its surface is not evidently illegal. Thus, it is unlikely that a court would deny the enforceability of the Apprentice contract on the legality of the making of the contract.

[28] Allen v. Jordanos' Inc, 52 Cal. App. 3d (1975).

On that account, regarding the possibility for a court to deny the confidentiality agreement's enforceability on public policy grounds would involve finding its content contradictory to public policy interest. Importantly, if we regard the contract in question as an ordinary business contract, then establishing its content as violative of public policy would be difficult, since it is a legitimate practice for entertainment corporations to control release of their production through confidentiality agreement. Nevertheless, there is a way to view the nature of the contract differently, i.e. by regarding it as a contract that conceals information essential for the public to learn about a presidential candidate. Through interpreting the nature of the confidentiality in this way, the relevant public policy interest that a court must consider is no longer limited to corporate interest in protecting confidential and proprietary information. Rather, the court must also take into account public policies related to the democratic necessity for the public to know the character and qualification of presidential candidates.

One important public policy interest related to such democratic necessity is transparency in presidential elections. Election transparency ensures that stakeholders (political parties, election observers and voters) are able to independently scrutinize the election process.[29] Presidential election transparency is essential in that it is necessary for an election to achieve its purpose, namely, the peaceful transfer of power.[30] Without transparency of information regarding the election process and candidates' actions, there is no way for the public to be confident in electoral outcomes. By extension, the public would not trust and accept the elected officials' governance. Therefore, transparency in election is

[29] The National Democratic institute. "Transparency." nid.org. https://www.ndi.org/e-voting-guide/transparency.
[30] Rebecca Green, "Rethinking Transparency in U.S. Elections" *William & Mary Law School Research Paper* (2014): 784, http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=2763&context=facpubs.

fundamental to "[ensure] public confidence in electoral outcomes" and the effective functioning of the new administration.[31]

The public interest in presidential election transparency is grounded in laws that dictate disclosure of information on various aspects of presidential elections. Ranging from "federal transparency requirements for voter registration forms, to poll watcher and recount observer statutes, to voting machine audit requirements," and etc..[32] Election transparency laws exist to police voter eligibility, the election's procedural compliance with federal laws, and many other aspects concerning the legitimacy of the election process.

In light of the fact that Trump Tape case pertains to disclosure of information relevant to a candidate's character, we need to particularly focus on regulations that target disclosure of information about the candidate's character. Campaign finance law is an example of this form of regulation that serves to disclose information concerning candidate character. Campaign finance law, such as the Federal Election Campaign Act, requires disclosure of money raised and spent by candidate committees, party committees and PACs.[33] Such requirements also exists in court opinions. In *Citizens United v. FEC* (2010), the Supreme Court endorses the requirement for candidates to disclose their records of campaign finance. The fact that such a disclosure requirement is grounded on recognition of the necessity for voters to know the candidates is demonstrated in Justice Kennedy's justification for finance disclosure in *Citizens United.* As Justice Kennedy explained, finance disclosure "provide[s] the electorate with information" and makes sure "that voters are

[31] Green 783
[32] Green, 781.
[33] "The FEC and the Federal Campaign Finance Law," *FEC.gov,* last updated February, 2017, https://transition.fec.gov/pages/brochures/fecfeca.shtml#Disclosure.

fully informed about the person or group who is speaking."[34] By exposing the sources that could influence a candidate's inclinations and opinions on policy issues, people are thus "able to evaluate the arguments to which [candidates] are being subjected."[35] Essentially, eight out of nine Supreme Court Justices agree on this rationale that campaign finance disclosure serves the important function of informing the public about the candidate.[36]

On that account, we might establish the rationale for disclosure of the Apprentice outtakes as following: disclosing the outtakes will function to foster the public policy interest of election transparency, specifically, transparency concerning candidate's character. Such transparency is essential for the public to evaluate a candidate's argument and his or her qualification of being a president. This public policy interest of transparency concerning candidate's character is indicated in statute and court opinions concerning campaign finance disclosure requirements. Therefore, it is reasonable for a court to deny enforceability of the Apprentice confidentiality agreement, which prevents disclosure of vital information about a presidential candidate's character, on public policy grounds.

However, our argument has two weaknesses that could impede our rationale from prevailing in court. First, the legal basis we appeal to, i.e. election transparency law, in general, and campaign finance disclosure law, in particular, do not directly speak to the issue in the Trump tape case. Although campaign finance disclosure law expresses the need to release information concerning a candidate's character, the character that would be revealed by one's campaign financial involvement is technically different from that which would be revealed by the Apprentice outtakes, i.e. a candidate's potential sexist and racist

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[34] "Why Our Democracy Needs Disclosure," *Campaign Legal Center,* June 21, 2016, http://www.campaignlegalcenter.org/news/blog/why-our-democracy-needs-disclosure .

[35] Citizens United v. Federal Election Commission 558 U.S. 310 (2010).

[36] Citizens United v. Federal Election Commission 558 U.S. 310 (2010).

inclination. As a matter of fact, there is no statute or case law that dictates the disclosure of information concerning a candidate's inclination on social justice issues. Thus, our rationale is at best based on an analogy between the two kinds of disclosure in terms of their significance: disclosure of campaign finance crucially provides the context for the public to assess a candidate's argument on policy issues; similarly, disclosure of information concerning a candidate's potential sexist or racist inclination provides the context essential for the public to assess a candidate's stance on social justice issues. Nevertheless, it is in the end undeniable that campaign finance disclosure law is not a direct source for the kind of disclosure in the Trump tape case. Thus, it is likely that a court would consider our argument to fall under the category of a broad appeal to public policy interest, which is much less likely to prevail compared to interests supported by express statute or clearly established precedents.

Second, it is important to recognize that for our appeal to the public policy interest to prevail, the public policy interest must "clearly outweigh" the presumed robust interest to enforce the contract.[37]This context renders our justification for disclosure of the Apprentice outtakes disanalogous to that for campaign finance. In the situation of campaign finance, the Supreme Court supported the disclosure, but the disclosed information was not prevented from release by a prior contract. In other words, despite the Supreme Court precedent that supports disclosure of campaign finance disclosure, it is unclear whether a court would still support disclosure of financial information when such information is met with the constraint of a contract that prevents its release. The only conclusion we might infer from the campaign finance disclosure law is that, in the context where there is no

[37] Restatement (Second) of Contracts § 178 (Am. Law Inst. 1981).

competing interest against disclosure, a court is likely to support information disclosure. On that account, the likelihood for our claim for the outtakes' disclosure is even dimmer, as we face the requirement to overcome a robust interest in enforcing the confidentiality agreement in the first place. Thus, it is improbable for a court to rule in favor of disclosing the outtakes through content-based regulation of the Apprentice confidentiality agreement.

Would it be possible for a court to deny the contract's enforceability based on content-neutral regulation? With the content-neutral approach, a court could decide to not enforce a contract based on problems in forming of the contract before it consider the contract's substance.[38] There are many content-neutral bases that a court might invoke to un-enforce a contract. For instance, a contract can be decided as void based on flaws in the procedure of a contract's formation,[39] if the language of the contract is not definite, if one party is fraudulently induced into entering the contract, etc.[40] Essentially, all these grounds allow courts to declare a contract as unenforceable without considering or even knowing what the contract is about.

For many content-neutral approaches, employing them to challenge the legality of a contract requires examining the specific language of the contract, yet the Apprentice confidentiality agreement is currently not available to the public. However, there is one approach that could be useful which does not require study of the specific contract: unconscionability. Unconscionability occurs in contexts in which one contractual party has "significantly greater bargaining power" than the other, thereby resulting in the weaker

[38] Restatement (Second) of Contracts § 178 (Am. Law Inst. 1981).

[39] This is different from the content-based approach of un-enforcing a contract because the act of forming the contract itself is illegal. To reach the decision of the illegality of the act of forming the contract, the court must have known and considered the content of the contract. The content-neutral approach of voiding contract focuses on the procedure of forming the contract, i.e. whether the process misses essential elements such as consideration, mutual assent, lack of written evidence, etc.

[40] More examples of content-neutral regulations of contract, *see* Garfield, 277-89.

party accepting oppressive terms in the contract.[41] Courts would void contracts when there is proof of unconscionability as these contracts "oppress the party making the promise."[42]

Considering the contractual context of the Apprentice confidentiality agreement, i.e. Hollywood, it seems largely probable that oppression could be an issue in the formation of the confidentiality agreement. As is widely recognized, Hollywood is an environment in which oppression of employees is highly probable because of the enormous power entertainment industry leaders and companies have over their subordinates. For example, according to some investigation reports on the the issue of Apprentice outtakes, Mark Burnett, the eminent producer of the Apprentice and many other shows, had the history of "once [suing] someone for leaking Survivor secrets" and had warned to sue anyone who would release the Apprentice outtakes.[43]As is described by the reporters, most of the employees that worked for the Apprentice's production are freelancers, and "there is no one that is going to protect them" and they may end up no longer being able to get any job on the sets of other reality programs.[44]

Although whether Burnett had in fact issued the warning is unknown, it is clear that the employees who had worked for the Apprentice's production had low statuses and significantly less bargaining power in comparison to MGM and its producer. Based on the vulnerable position of these employees, it is reasonable to infer that these employees accepted the terms of the contract not based on their complete free will, but rather, because not accepting this kind of contract would lead to unemployment and future

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[41] Garfield, 285-86.
[42] Garfield, 286.
[43] Nick Bilton. "Inside the Desperate, Year-long Hunt to Find Donald Trump's Rumored Apprentice Outtakes," *Vanity Fair*, Dec 20, 2016, https://www.vanityfair.com/news/2016/12/donald-trump-apprentice-outtakes.
[44] Ibid.

difficulty of development in Hollywood. Thus, we might suspect that the context in which the confidentiality agreement is formed is highly one-sided and unfair and could potentially oppress the employee into entering the contract.

However, our inferences thus far would be insufficient to justify voiding the contract based on unconscionability. As we have previously explained, the basis of unconscionability is used by courts for striking contracts that oppress the party in making the contract. Although we might be able to point to elements of oppression in the process of forming the Apprentice confidentiality agreement, this form of oppression is different from directly oppressing the employees' interests through the contract. In other words, despite the possibility that employees of the Apprentice production entered the contract not fully based on their willingness, the term of the contract, i.e. not being able to disclose the outtakes even after the show had long been aired, does not harm these employee's own interests. Although the public's interest would be compromised through non-disclosure, the employees themselves would not suffer from any physical, mental, or monetary injury due to the restriction on their ability to disclose the information. In rare cases, an individual might regard their personal interests to be exactly in line with the public's interest, and he or she might consider harm to public interest as no different from harming themselves in their view. However, such altruistic attitude would not describe most people and thus, a court is unlikely to recognize restriction on one's ability to disclose information as real oppression. Therefore, the doctrine of unconscionability would thus not be applicable to nullifying the confidentiality agreement at issue.

On that account, with either content-neutral or content-based way of thinking, it would be unlikely for a court to find the Apprentice agreement unenforceable. Essentially,

if a court adopts a contractual approach in considering the legality of the Apprentice confidentiality agreement, it is probable that the court would not rule in favor of disclosure of the outtakes.

In addition to the contractual approach, another possible way for a court to rule in favor of disclosure is through recognizing that enforcement of the Apprentice confidentiality agreement would implicate the First Amendment. In this approach, the confidentiality agreement at issue, by its prevention of release of information in the Apprentice outtakes, would thus constitute suppression of free speech. In contrast to the contract regulation approach, a First Amendment approach would lead to a much higher likelihood for a court to decide on disclosing the outtakes. This is because, in the contractual approach, the court begins with the strong presumption of enforceability and is at the outset reluctant to deny this presumption. However, with an First Amendment approach, the court would begin with the presumption of a robust defense of the First Amendment. This means that, a court would be by default in a position of not enforcing the confidentiality agreement. Thus, the heavy burden would then fall on advocates for enforcing the agreement to justify the restriction on free speech.[45]

If a court adopts a First Amendment approach in deciding the Trump Tape case, then it is highly likely for the court to rule in favor of disclosure of the outtakes. With the presumption of defending free speech and release of the outtakes, enforcing the confidentiality agreement between MGM and Burnett must yield substantial state interest

[45] "while a purely contractual approach would begin with a strong presumption of enforceability, to be overcome only by the unpredictable application of the public policy exception, a First Amendment defense would require a more rigorous showing that enforcement of the contract is necessary to further state interests substantial enough to justify the restrictions placed on speech" *See* Brian Stryker Weinstein, "In defense of Jeffrey Wigand: A First Amendment Challenge To The Enforcement of Employee Confidentiality Agreements Against Whistleblowers" *South Carolina Law Review* 49, (1997-1998): 132, http://heinonline.org/HOL/Page?handle=hein.journals/sclr49&div=14&g_sent=1&casa_token=&collection=journals.

for the court to justify enforcing the agreement and suppressing the information. It seems likely that a court would find a company's business interest secured by the confidentiality agreement to be sufficiently substantial to warrant suppression of free speech. Moreover, it can be argued that the business interest that would be protected by the Apprentice agreement is extremely limited, since the show had been aired long ago, and there is no longer any commercial loss that would be incurred by effects of breaching the agreement, such as spoiler of content and loss of audience rating. On that account, if a court would adopt a First Amendment approach in deciding the Trump Tape case, then it would be probable for it to decide on disclosure of the outtakes.

In order to establish that the Trump Tape case triggers First Amendment, the greatest obstacle we face is prove that state action is involved in this case, since the confidentiality agreement at issue is between two private parties, MGM and its producer. However, there is evidence that disputes between private parties could implicate state action. For instance, in *New York Times Co. v. Sullivan* (1964), the Supreme Court has decided that Alabama state court's enforcement of libel law to resolve dispute between two private parties constitutes state action.[46] This ruling is adopted by subsequent common law cases to establish that court enforcement of tort law to involve state action, even in the context of dispute between private parties.[47]

However, despite the clear common law evidence that court enforcement of tort law in private dispute does constitute state action, there is no definite answer to whether judicial enforcement of contract law also involves state action. There has been one Supreme Court case suggesting that court enforcement of private contract would amount to state action: in

[46] Weinstein, 134.
[47] Weinstein, 134.

Shelley v. Kraemer (1948), the Court had decided that "if an individual or organization sues to judicially enforce a contractual right...it is state action."[48] However, *Shelley* had rarely been cited thereafter, and the case has essentially been viewed as "one of the most controversial and problematical decisions in all of constitutional law"'by commentators.[49] Moreover, there is also evidence suggesting the Supreme Court's reluctance to extend the recognition of state action from tort law cases to other areas. For instance, in *Cohen v. Cowles Media Co.* (1991), the Court did not find state enforcement of promissory estoppel to trigger the First Amendment.[50]

It has been argued that court enforcement of private contract *should* be considered as state action and should be interpreted as a First Amendment issue, especially in cases concerning confidentiality agreements that function to suppress release of information. Scholars such as Weinstein and Garfield who advocate this position recognize that, for courts to decide on the legality of these confidentiality agreements, merely adopting a contractual approach is insufficient to address cases in which information of important public interest are prevented from release by contract, such as cases concerning whistleblowers . As the contractual approach sets a strong presumption of enforcing the contract, it is highly probable for courts in these cases to decide in favor of enforcing the confidentiality agreements, and by extension, suppression of information of great public concern. To ensure adequate protection of free speech to a large extent requires courts to

[48] Weinstein, 135.
[49] Weinstein, 135.
[50] Garfield, 348.

view confidentiality agreements that could suppress important information with a First Amendment approach.[51]

However, although arguments can be made that the existing law is inadequate, we must recognize that enforcement of contract does not trigger the First Amendment in existing law. Because there has not yet been any Supreme Court case that recognizes judicial enforcement of contract as state action. To the extent that our evaluation in this section is concerned with where current law stands in relation to the Trump Tape case, we must recognize that it is unlikely for a court to deny enforcement of the Apprentice confidentiality agreement, and by extension, to grant disclosure of the outtakes.

To summarize, we have thus far considered two possible approaches that a court might employ to decide on the legality of the Apprentice confidentiality agreement. With the first contractual approach, it is improbable that a court would conclude the agreement to be unenforceable. The content of the contract does not violate any clearly established statute or precedent, and there is conceivable evidence that would lead a court to strike down the agreement on a content-neutral ground. If a court views the Trump Tape case with a First Amendment approach, it is also unlikely for the court to support disclosure, as the Apprentice confidentiality agreement does not clearly trigger First Amendment concern. On that account, based on the existing law, a court would not rule in favor of disclosing the outtakes.

[51] Weinstein, 131, 141.

II. Viewing the Apprentice Agreement Through Utilitarianism

In the previous chapter, we have concluded that it is highly probable that the current law on confidentiality agreement might not support disclosing the outtakes in the Trump Tape case at least on first impression. However, what if we explore the deeper normative structures, which inform our understanding of what the legal system is designed to do, and how it relates to justice more generally? Or in other words, all things considered, should the legal system be designed so that confidentiality agreements function to bar the outtakes' release in this case? To evaluate the justifiability of the Apprentice confidentiality agreement, we will apply three political theories that are commonly used as the basis for justifying law or policy to the Trump Tape case. In this chapter, we will begin with considering the Apprentice agreement through utilitarianism.

Utilitarianism has been recognized one of the most powerful theories in contemporary moral and political philosophy. As an area of moral philosophy, it has been argued that utilitarianism is uniquely preeminent for being "the moral theory, that, more than any other, shapes the discipline of moral philosophy and forms the background against which rival theories are imagined, refined, and articulated."[52] As a political theory, utilitarianism has a unique place of importance in American jurisprudence. The theory accounts for the political and social institutions and structures of American legal system. It is also one of the leading theoretical bases to justify major American policy changes. According to Ben Eggleston, associate professor of philosophy at University of Kansas and a co-editor of *The Cambridge Companion to Utilitarianism*, utilitarian theory is "the most well-suited way of thinking in political philosophy to make sound large-scale policy decisions."[53]

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[52] Ben Eggleston and Dale E. Miller, "Introduction: Utilitarianism's place in moral philosophy," in *The Cambridge companion to utilitarianism,* (New York: Cambridge University Press , 2014), 1.

[53] "Professor studies how utilitarianism provides framework for major policy decisions," The University of Kansas, June

Given the preeminence of the theory, we will thus begin our normative analysis by considering the legality of the Apprentice agreement through utilitarianism.

Utilitarianism stipulates that the rightness or wrongness of an action depends on the consequences it produces. An action is right and ought to be performed if it produces maximum utility as a result, that is, if its yielded benefits outbalance its damages. In this thesis, I will primarily rely on the utilitarianism articulated by philosopher J.J.C. Smart, an Australian philosopher and a leading expert in the study of utilitarian theory. Smart posits that utilitarianism can be divided into two kinds: act- and rule-utilitarianism. The former dictates that an action "is to be judged by the consequences...of the action itself."[54] The rightness or wrongness of the action relies on its ramification under the particular circumstances, independent of whether performing such action would still be "optimific," or utility-maximizing, in similar contexts.[55] In contrast, proponents of rule-utilitarianism contend that for an act to be good requires the action to produce more utility than disutility in all like situations. In other words, an action is good when it is beneficial to perform it as the general rule for this kind of scenario in the long run. Following rule-utilitarianism, conformity to the rule and achievement of long-term benefit trumps temporary wellbeing. This means that, one ought to choose an action that is not optimific for a situation, when the action that would be benefit-maximizing in this particular case is contradictory to the rule of what is the right thing to do for this kind of circumstances. Essentially, for rule-utilitarian, consequences for the current case is "not relevant...when we are deciding what

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16, 2014, https://today.ku.edu/2014/06/02/professor-studies-how-utilitarianism-provides-framework-major-policy-decisions.

[54] Smart, J. J. C. *Utilitarianism: for and against*. New York: Cambridge University Press, 2008, 9.

[55] Smart, J. J. C. "Extreme and Restricted Utilitarianism" *The Philosophical Quarterly,* 6, No. 25, (1956): 347, http://www.jstor.org/stable/pdf/2216786.pdf?refreqid=excelsior%3A88cadaf9df902d0580ec1b323406b9ac.

to do" in this case.[56]

Allow me to further clarify the difference between these two forms of utilitarianism with an example. Consider homicide. From a rule-utilitarian perspective, the question to consider is whether the general act of killing produces more benefit than harm in the long term. Under this calculation, killing is most likely to produce more overall harm than benefit, and is thus, a wrong action. Following the rule, rule-utilitarian would stick to the understanding that killing is wrong even in particular situations where the utility of killing someone outweighs the disutility, for instance, killing a kidnapper to save a child.

On the contrary, act-utilitarian judges the normativity of actions on a case-by-case basis. If an act-utilitarian encounters the choice of killing a kidnapper to save a child, he would calculate the utility of killing versus the disutility of the action in terms of the specific case, while consideration of whether killing is generally right or wrong would be irrelevant for him. Thus, in contrast to a rule-utilitarian, an act-utilitarian is likely to conclude that killing the kidnapper is the right thing to do.

Smart is a defender of act-utilitarianism. From his act-utilitarian perspective, the fallacy of rule-utilitarianism is essentially its "rule-worship."[57] Rules are indeed useful for making many decisions in life, such as when one has no time to calculate the overall utility of the circumstances. However, rules are only beneficial when they are followed as "rules of thumb,"[58] but there is nothing "sacrosanct"[59] about obeying the rules. In a particular circumstance in which the utilitarian calculation specific to the situation points to an action

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[56] Smart, "Extreme and Restricted Utilitarianism," 348. In this thesis, I use the word "good" and "right" loosely as equivalent in these two paragraphs and not in the technical sense that distinguishes between describing motivation versus results in Smart's account.

[57] Smart, *Utilitarianism: for and against,* 20.

[58] Smart, "Extreme and Restricted Utilitarianism," 346.

[59] Ibid, 346.

that is contradictory to the rule, such as the kidnap scenario, it is "monstrous" to blindly follow a rule when one knows that breaking the rule would produce better results.[60] To a large extent, rule-utilitarians who completely conform to general rules are no longer strictly utilitarian any more, for they have essentially given up the practice of determining action's normativity based on the utility of its yielded consequences.

One objection to Smart's criticism of rule-utilitarianism is that rule-utilitarian does not unconditionally follow rules to the extent of neglecting consequences in specific circumstances, and rules do not have to be as rigid as Smart describes. Rule-utilitarians might create rules that take into account the exceptions. For instance, considering the overriding utility of killing in the kidnap situation, a rule-utilitarian might develop the rule for homicide as killing being wrong except when one can save children.

In response to this modified version of rule-utilitarianism, Smart points out that such modification amounts to turning rule-utilitarianism into act-utilitarianism. If the rules were to encompass all exceptions to a general principle, then rule-utilitarian must create a huge number of rules. With each rule providing calculation specific to a particular circumstance, a rule for one situation is no longer any different from an act-utilitarian calculation of the situation.

Despite Smart's suggestion that the boundaries between act- and rule-utilitarian thinking could be blurred at some point in theory, act- and rule-utilitarianism remain two distinct ways of thinking that are committed to different priorities: whereas the former emphasizes consideration specific to each scenario, the latter focuses on the effect of an action in general and in the long term. Thus, ordinarily, act- and rule-utilitarians would

[60] Smart, "Extreme and Restricted Utilitarianism," 348.

approach the decision of the rightness or wrongness of an action differently, and thereby derive different conclusions. In the context of determining whether disclosure or nondisclosure is the right thing to do in the Trump tape case, act-utilitarians would take into account Trump's special identity as presidential candidate rather than an ordinary person, as this information is important to this particular case. In contrast, rule-utilitarian would consider the circumstance in a generalizable manner and formulate the question to be whether granting disclosure of confidential information that is of great public interest would be optimific in the long run.

However, in this case, the rule-utilitarian question would in fact coincide with the act utilitarian thinking to a large extent. This is because the relevant rule-utilitarian thinking in this case would have to consider Trump's special identity as a presidential candidate. If Trump were an ordinary citizen, then the confidential information concerning whether Trump has sexist or racist inclinations would not be of great public concern in the first place. The confidential information in question is only significant for the public and the rule-utilitarian question only arises because Trump had become a presidential candidate. Thus, the relevant rule-utilitarian question in this case must be one that considers this special identity. Importantly, to take into account this special identity, rule-utilitarian might recognize the presidential candidate as a category of people that is generalizable, as opposed to a quality that is only specific to this case. Thereby, rule-utilitarian thinking avoids the danger of collapsing into act-utilitarianism suggested by Smart, because it remains committed to consideration of the normativity of disclosure in a generalizable way and in the long term. On that account, rule- and act-utilitarian approaches would to a large extent overlap for this case.

Although the theoretical approaches would be similar for utilitarians, utilitarian philosophers might still debate about the empirical question of whether disclosure or nondisclosure is the right thing to do in this case. That is, performing which action would result in more overall social utility. The primary benefit that disclosure would bring about is securing the public's right to know. The public's right to know is valuable because it is an essential for the functioning of democracy. In a democratic society, all citizens are entitled to vote and choose their own leaders. For the people's consent to be meaningful, it is essential for the people to have knowledge of the candidates' true character. Thereby, the people can make an informed decision about whether a candidate is qualified to be the president. Ensuring that the people's decisions are informed is crucial to ensure the validity of the election. This is because people's judgment about the qualifications of the presidential candidate, which is represented through their voting, would not necessarily be an accurate representation of their will. In other words, the election result would be unreliable, as it is probable that the people might make a different decision and cast their votes differently if they were better informed. On that account, protecting the public's right to know about presidential candidates is a fundamental value to ensuring the validity of people's consent, and by extension, the operation of democracy.

In contrast, non-disclosure would foster two aspects of social utility. One is the presidential candidate's personal privacy. Privacy has important values for both the candidate and the public. Psychologically, being able to maintain a zone of privacy has "functional and developmental significance" to an individual.[61] This means that, when a

[61] Stanley Renshon, "Some Observations on Character and Privacy issues in Presidential Campaign," *Political Psychology,* 13, no. 3 (1992): 576, https://www.jstor.org/stable/pdf/3791615.pdf?refreqid=excelsior:52a51c015b681afa25294ea9d02760c5.

candidate can maintain a zone of privacy and preserve separation between his public and private lives, he has a better chance of testing the "relationship between his private and public identity" and developing an appropriate balance.[62] For the public, ensuring a candidate's privacy and health is also beneficial, because the candidate would have stronger mental strength to serve and address the public.

Moreover, safeguarding current candidates' privacy would also be valuable for the sustainable functioning of democracy. Intrusion into current candidates' privacy would not only cause immediate harm to the candidates and their family but also greatly diminish the chances for the candidates to resume their normal lives after the campaign. Consequently, qualified candidates would be discouraged from running for the president in the future because of the risk of ruining their lives. Therefore, protecting candidates' privacy would also be valuable for ensuring that future well-qualified candidates are not deterred.

The second aspect of interest that non-disclosure would advance is the interest associated with the NBC's confidentiality agreement with its employees prohibiting their release of the outtakes. There are two primary benefits of protecting corporate confidentiality agreements similar to the one in question. First, confidentiality agreements are valuable in that the institution can effectively safeguard corporations' information asset.[63] Confidentiality agreements are effective in preventing employees from disclosing important data such as trade secrets, intellectual property, etc. Through protecting critical corporate information, confidentiality agreements promote fairness of business practice. For instance, one way in which fairness is fostered is that a confidentiality agreement

[62] Ibid, 576.
[63] Ronald L Goldfarb. *In confidence: when to protect secrecy and when to require disclosure* (New Haven: Yale University Press, 2009), 156.

prevents competitors of a company from easily obtaining the result that the company only acquired through costly research and investment. Without the confidentiality agreement with its employees, the company might easily lose its trade secrets and research results if its competitors hired one of its former employees. The confidentiality agreement essentially grants the company protection of the competitive advantage it deserves. Thus, confidentiality agreement is an important institution to ensure fair business practice, and by extension, fair competition in the free-enterprise system.

In addition to shielding corporation's' information assets and fostering the free-market system, confidentiality agreements are also valuable for preserving the integrity of businesses' self-regulation, as these agreements insulate internal decision of a corporation from direct public examination.[64] Encouraging organizations to set up regulatory rules that govern its operations and actively comply with legal standards is an important social policy goal.[65] The utility of corporate self-regulation includes facilitating the "candor and free exchange of ideas"within the institution.[66] By extension, self-regulation promotes the creative production and development of the organization, as the businesses are spared the publicity cost resulting from experimenting with innovation or having internal disagreement. Furthermore, self-regulation by organizations also reduces the cost of external regulation by law, especially when enforcing the law incurs the cost of violating other values in the society.[67]

In order to choose which interests to protect and, by extension, which action to

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[64] Goldfarb, *In confidence,* 172.
[65] Ibid., 172.
[66] Ibid., 175.
[67] John C. Ruhnka and Heidi Boerstler, "Governmental Incentives for Corporate Self-Regulation," *Journal of Business Ethics*, 17, no.3, (1998): 309, https://www.jstor.org/stable/pdf/25073080.pdf?refreqid=excelsior%3A533f6d45d70c30853a645b92a3f7d119.

perform, utilitarian philosophers would henceforth weigh the importance of each of these interests. How would a utilitarian determine how important an interest is? To answer this question, we might begin by considering utilitarian thinking on the notion of "right." In this section on the utilitarian understanding of "right", I rely on the account of John Stuart Mill. Mill is one of the most influential British philosophers of the nineteenth century and a leading proponent of utilitarianism. His work has been a major influence on the creation of the American Constitution, and his thinking on concepts such as individual liberty also contributed to the formation and interpretation of the Bill of Rights. For utilitarians like Mill, a right is the form of interest that warrants the most protection. As Mill describes, a right is something "guaranteed" to an individual by society, and his possession of the right is independent of his own effort or chances.[68] Protection of rights have a "character of absoluteness" that protection of other interests based on expediency do not warrant.[69]

For a utilitarian, to determine if a value should have the status of a right depends on the result of weighing the value, such as, if protecting the value would produce the "extraordinarily important and impressive kind of utility"[70] that could justify the "character of absoluteness"[71]of a right. In Mill's account, one example that illustrates this standard is the right to security. As Mill explains, unlike many benefits that are either disposable or substitutable, security is a value that "no human being can possibly do without."[72] Guarantee of security is the "most indispensable of all necessaries," because it prevents us from constant threat by others and thus renders possible achievements beyond

[68] Mill. *Utilitarianism*. Auckland: The Floating Press, 2009, 97.
[69] Ibid., 98.
[70] Ibid., 97.
[71] Ibid., 97.
[72] Ibid., 98.

momentary ones.[73] As assurance of security is the foundation of "the whole value of all and every good" of each individual's existence, security has the status of a right.[74]

Does the public's right to know, privacy interest, or the integrity of business confidentiality qualify for the status of a right by the utilitarian standard? That is, does protecting these interests also yield the extraordinary kind of utility that is "most indispensable of all necessaries"?[75] Securing these three values is indeed not indispensable to society in the sense of being indispensable to people's survival, as protecting security is. However, there is evidence that Mill does not restrict the meaning of indispensable to that concerning basic survival only, but also toward other fundamental commitments of society. For instance, in *On Liberty*, Mill defends the liberty of thought and discussion to be a right. According to Mill, no restriction should be placed on expression of any opinion, irrespective of whether the opinion is true of not, because expression of any opinion would be conducive to discovering and maintaining the truth. Even when an opinion is false or merely partially true, the assertion of it would lead to debate and consideration over the subject it concerns, and thus promotes the searching of the truth. Restricting any instance of expression of opinion would deprive the public a chance to receive contentions and opposite views, which is necessary for the truth to emerge. [76] To the extent that obtaining truth is a fundamental commitment of society, and circumscribing freedom of speech necessarily causes disutility towards searching for the truth, free speech deserves the status of a right.

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[73] Mill, 98.
[74] Ibid., 98.
[75] Ibid., 98.
[76] Irene M. Ten Cate, "Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses," *Yale Journal of Law & the Humanities* 22, Issue 1 (2013): 38, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1354&context=yjlh.

Thus far, we have deduced that the utilitarian criterion for a value to qualify for the protection of a right is that the value must produce an impressive kind of utility concerning a fundamental commitment of society. Based on this criterion, we might find a strong justification for the public's access to information to qualify the high level of protection granted to rights. To begin with, protection of public's access to candidate information intimately pertains to a fundamental commitment of society, namely democracy. Moreover, it is possible to construct a justification for the public's access to candidate information that is largely similar to the one for free speech in Mill's account. Mill argues that an individual's ability to assert any opinion warrants protection, because expression of any opinion will be useful for obtaining the truth. Similarly, we might argue that the public's access to any information concerning a presidential candidate warrants safeguarding, because such access is fundamental to the functioning of democracy. Without the public access to information about candidates, there would be no assurance that voters' choices of presidents are informed decisions. Ensuring the people's decisions are informed ones is crucial in order to guarantee the validity of the people's consent to be governed. Essentially, if there were no guarantee that the decisions are informed, then it would be dubious whether the election result can truly represent people's agreement for the elected president to be their leader, as many people might have voted differently if they had more adequate information regarding the candidate.

Indeed, not all the information about the candidate would be equal in usefulness for evaluating the qualification of candidates. Just as not all thoughts and expressions protected by freedom of speech would be equal in conduciveness to the search for truth. However, insofar as the information is about the candidate, it must provide some insight

regarding the candidate that helps the public to learn more about who he or she is. Moreover, no information about the candidate would cause a decrease in public's knowledge of him or her. On that account, granting public access to information about candidate would result in either advancement or *status quo* and barely any harm in informing the public about the candidate. Thus, it is possible that utilitarian philosophers would find public access to information deserving of the status of a right because of its fundamental importance for fostering democracy.

Does protecting candidate privacy and the integrity of business confidentiality also produce the impressive kind of utility concerning a fundamental commitment of society? To a large extent, utility yielded by safeguarding candidate privacy does not. We might argue that some benefits secured by assurance of privacy, such as protection of individual's mental health, is as fundamental to society as securing physical survival and search of truth.

Nevertheless, we might still question to what extent guarding privacy is important in protecting an individual's mental health. In Mill's defense of free speech, Mill explains that free expression is of paramount importance to searching for the truth, because expression of any opinion, regardless of the opinion's truth or falsity, would always result in utility to searching for truth. To a large extent, it is difficult to make the same argument for informational privacy. Unlike the case for free speech, it is not true that restricting people's ability to insulate any private information would result in damage to their mental health. It is unclear how limiting individual's ability to conceal information such as "income, the state of his or her marriage, and health" [77] would necessarily cause damage to their

[77] Examples of individual privacy information according to W.A.Parent's definition of privacy.

psychological health. Essentially, some limitation on individual privacy would not necessarily impede the social commitment that protecting privacy would serve. Thus, privacy is not imperative to a fundamental social commitment. On that account, although utilitarians will still concede that individual privacy interest would warrant some level of protection, individual privacy will not be considered to be sufficiently important to warrant the status of right.

Would the utilitarian consideration for the importance of protecting presidential candidate privacy be different from that of protecting the privacy interests of ordinary citizens? On the surface, utilitarian philosophers would contend that the amount of privacy protection granted to all individuals should be equal. In Mill's account, the guarantee of equal treatment that "one person's happiness...is counted for exactly as much as another's" underlies the "very meaning" of the utilitarian principle.[78] Without the basic condition of "the equal claim of everybody to happiness," it would be impossible to perform any utilitarian calculation.[79]By extension, the utilitarian principle of maximizing "Greatest-Happiness" for the society would have no "rational signification."[80] Thus, as equality of treatment is a "right" and basic guarantee to all individuals in society, each individual should receive the same privacy protection.[81] On that account, it seems that utilitarian philosophers would argue that a presidential candidate should enjoy the equal amount of privacy protection as an ordinary citizen.

However, this apparent conclusion might be challenged. To the extent that utilitarian

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See W.A.Parent, "Privacy, Morality, and the Law," *Philosophy & Public Affairs*, 12, no.4, (1983): 270, http://drsjohnsoneducation.com/wp-content/uploads/2013/01/Parent-Privacy.pdf.

[78] Mill, 111-12.

[79] Ibid., 112.

[80] Ibid., 111.

[81] Ibid., 112. I deleted the italicization.

justification for a right is based on the extraordinary kind of utility produced by defending the right, if granting equal privacy protection to a specific group of people would consistently yield overall social disutility, then it would be reasonable to create a special category of unequal treatment for the group. Mill has considered this possibility, as he explains that everyone's happiness is supposed to be equal in degree - "with the proper allowance made for kind."[82] In the end, as Mill describes, equal treatment is a right to all persons, "except when some recognized social expediency requires the reverse."[83] Essentially, if granting presidential candidates an unequal amount of privacy protection would result in more overall social utility, then such unequal treatment would be justified.

To a large extent, we might argue that treating presidential candidates as equal would promote more overall social disutility than it would to treat them as a special kind that deserves less privacy protection. Allowing a presidential candidate to insulate information about himself from the public has serious consequences concerning democracy and society at large, consequences that do not occur by allowing an ordinary person to insulate information about himself. The more information a candidate can conceal from the public, the less the public is able to know about the candidate and evaluate his or her qualifications. However, such consequences would not result in protecting an ordinary citizen's informational privacy.

Previously, we have explained two benefits of granting presidential candidates privacy, namely, advancing candidates' psychological well being and their ability to address the public, and ensuring future candidates to not be discouraged from campaigning. Would providing candidates a weaker form of privacy result in disutility by offsetting these

[82] Mill, 112.
[83] Ibid., 112.

benefits? I argue that the compromise of these two forms of benefits is limited. First, there would be little disutility resulting from causing presidential candidates more mental stress. Although having less privacy protection does mean that presidential candidates would have more mental stress, the disutility caused by such harm can be avoided. This is because being a presidential candidate is not a quality that is inherent, but rather it is a status that is chosen by people. As the entrance into this special class is voluntary, they would have the chance to consider whether such arrangement would be acceptable for themselves. In the end, individuals who consider the harm of having lesser privacy too great have the choice of not participating in the campaign at the outset. Thus, the disutility caused by more psychological pressure is to a certain extent avoidable.

Moreover, there would be limited cost from losing future qualified candidates due to the weaker privacy protection, because candidates who are unable to handle the extra pressure resulting from the compromise of privacy are not qualified in terms of their mental strength in the first place. This is because the role of the president requires that the person in the position be able to cope with more psychological pressure resulting from exposure to the public. The president of the United States is the "representative of [people's] ideals."[84] He or she is not only the political leader of the country, but also the role model that embodies American values. Due to the nature of the role of president, the president's actions and life would be under tremendous public scrutiny. When it comes to the president, issues that would be considered as private for ordinary citizens, such as one's drinking behavior and relationship status, would be considered of public concern because being someone that embodies people's ideals is an integral part of the president's

[84] Renshon, 575.

role. For many voters, if a person exemplifies excessive drinking behavior or is involved in a sexual scandal, then her or she will not be qualified to be a president. Even though having these aspects do not necessarily entail that the person lacks the ability to perform many principal duties of a president, such as making rational decisions, the person would still be disqualified because he or she fails to represent an ideal. Thus, to the extent that the ability to cope with less privacy protection and extra public scrutiny is part of one's presidential qualification, providing less privacy protection to presidential candidates would not deter candidates who are truly qualified. On that account, there would be limited disutility resulting from injuring candidates' mental health and deterring future candidates because of weaker privacy protection. Essentially, the importance of granting presidential candidates robust privacy protection would be even less than protecting ordinary citizens' privacy.

Having discussed the importance of protecting the public's right to know and presidential candidate privacy by utilitarian standard, we shall turn to the interest associated with business confidentiality agreements. As I have explained, business confidentiality is valuable for primarily two reasons. The first is that the institution of confidentiality agreements is important for fostering the free-enterprise system. To a large extent, we might concede that ensuring the operation of free-market is a fundamental social commitment. However, the importance of the institution of business confidentiality to fostering free-market is questionable. This is because business confidentiality can easily be used to suppress important information of great public concern, such as information related to public security and health. For example, in 1993, the tobacco company Brown & Williamson (B&W) signed a confidentiality agreement with its employee Jeffrey Wigand

that prohibited Wigand from speaking of his experiences at B&W. It turns out that the agreement prevents Wigand from disclosing the knowledge that B&W was using an addictive, coumarin, which was shown to have carcinogenic effect in its product, as well as the knowledge regarding the company's use of chemicals, such as ammonia, to facilitate absorption of nicotine in the lungs, so that it can affect the brain and nervous system faster and create addictive effects.[85]

In this case, the confidentiality agreement is utilized to promote B&W's advantage at the expense of concealing information that reveals risks of its products. Such practice is harmful to the consumers in the market, and thus adverse to the free market. To the extent that confidentiality agreements can easily be manipulated to limit corporate employees' ability to share information, the benefit of protecting confidentiality agreement for fostering free-market is not absolute. Moreover, it might even be argued that the use of confidentiality agreements could be detrimental too, since it enables companies such as B&W to gain an advantage against its competitors at the expense of consumers' wellbeing. Thus, from a utilitarian perspective, the importance of protection of confidentiality agreement is limited.

Moreover, when we limit the scope of discussion to only confidentiality agreements concerning presidential candidates, there is even less disutility associated with rendering the protection of these agreements not absolute. The reason is that presidential candidates are and will remain a small group of people. By extension, there will be a extremely limited number of business confidentiality agreements with information concerning a presidential candidate that are crucial for evaluating the candidate's qualification. Thus, due to the small

[85] Jeffrey S. Wigand, "Public Hearings for the Framework Convention on Tobacco Control." Oct 13, 2000. http://www.jeffreywigand.com/who.php

amount of confidentiality agreements that would be impacted, there would be little risk of damaging the system of free-market.

Furthermore, another utility of confidentiality agreements is its function to advance organizations' self-regulation. However, the benefit of organizations' self-regulation is not absolute. Maintaining organizational self-regulation with confidentiality can be more harmful than beneficial by condoning injustice within the institution. The Supreme Court case *University of Pennsylvania v. Equal Employment Opportunity Commission* (1990) is an example that illustrates this kind of situation. The case involved Professor Rosalie Tung accusing University of Pennsylvania of denying her tenure because of her gender and race, and important information from the faculty committee's internal deliberation that could support her case was held in confidentiality by the university. Despite the claim that the integrity of confidential peer review is essential for the university's academic freedom, the Supreme Court decided in favor of breaching the confidentiality, because the harm of enduring sexual and racial discrimination in universities is greater than the benefit of maintaining confidentiality.[86]

Essentially, unlike values such as freedom of speech, organizations' self-regulation is not an absolute value that always generates utility. Whether organizations' self-regulation is beneficial or not depends on the context of the action. As the Court pointed out in the ruling of *University of Pennsylvania v. EEOC,* for "institutions of higher learning," the costs "associated with [tolerating such injustice]...are very substantial" because of universities' role of leading the thinking on social and political issues and shaping the opinion of the

[86] Goldfarb,175.

younger generation.[87] To a large extent, the context of selecting presidential candidates is similar to the *University of Pennsylvania v. EEOC* case in terms of the high stakes involved in condoning injustices. Due to the president's extremely significant role as the leader of the country, the damage of withholding highly relevant information concerning a president candidate's dubious inclination on social justice issues would be especially consequential. In the end, as concealing accusatory information of presidential candidates is always of extremely consequential, the utility of protecting organization self-regulation should always be limited when the confidentiality agreements concern important information for evaluating candidates.

In the end, the utility for defending the two interests that would be secured by non-disclosure is limited. Neither presidential candidate privacy nor business confidentiality agreement concerning presidential candidates would produce sufficient utility to warrant the robust form of protection granted to rights for utilitarians. In contrast, the interest that would be advanced by disclosure, the public's right to know, is possible to qualify as a right for the utilitarian due to its fundamental importance to ensuring the functioning of democracy. Moreover, compromising either presidential candidate privacy or business confidentiality agreements concerning presidential candidates would cause disutility only to a small amount of people, whereas the public's right to know concerns a significantly larger group. Therefore, choosing disclosure and protecting the public's right to know would produce greater overall utility. On that account, from the utilitarian perspective, the right thing to do in the Trump tape case would be to disclose the outtakes.

[87] University of Pennsylvania v. EEOC, 493 U.S. 182 (1990).

III. Viewing the Trump Tape Case Through Contract Theory

In this chapter, we will evaluate the justifiability of the Apprentice confidentiality agreement by applying contract theory to the Trump Tape case and consider whether contract theory would endorse disclosure or nondisclosure of the outtakes. My analysis in this section is primarily based on the accounts of contract theory by John Locke and Robert Nozick. John Locke, similar to John Stuart Mill, is among the most influential English political philosophers in history. Locke's political philosophy, especially his thinking on the basis of legitimate government articulated in the *Second Treatise of Government*, is one of the most important foundations of the Constitution of the United States. Robert Nozick is a renowned Harvard philosopher, whose work *Anarchy, State, and Utopia* will be one of the primary basis for our discussions of contract theory. Nozick, similar to Locke, emphasizes the importance of legitimacy of governmental regulation and the role of individual consent in defining the state power in a constitutional state.

According to contract theorists such as Locke and Nozick, a government's legitimacy to rule is based on people's consent to be ruled. According to these philosophers, people do not naturally live in a state with government and political authority. Prior to the establishment of political state, humans live in the state of nature, in which everyone is subject only to "the law of nature."[88] The natural law stipulates that all men are inherently entitled to the preservation of his or her "property," that is, "one's life, liberty and possessions."[89] This means that, in the state of nature, any person is free to act according to his will. When a person creates possessions for himself through mixing his labor with natural resources, he is entitled to the possession by the mandate of the natural law. Essentially, an individual is the "absolute lord of his own person and possessions" and is

[88] John Locke, *Second Treatise of Government*, 3, http://www.earlymoderntexts.com/assets/pdfs/locke1689a.pdf.
[89] Ibid., 28.

entitled to preserve his property as best as he can.[90]

Although all individuals can act according to their own will in the state of nature because everyone has "a right to perfect freedom,"[91] one cannot act to violate another person's right. This is because the natural law also prescribes that all men are equal. Thus, a person can justly punish another who interferes with his liberty. For instance, if someone destroys or robs one of his properties, the offender might be justly punished. For to seize another individual's property by force would amount to treating the person as an unequal, and thus contravenes the prescription of the natural law. Moreover, a single person might not use up natural resources to the extent that there are no longer sufficient resources for other individuals, as such action violates other individuals' right to produce possessions.

If one's natural right to property is violated in the state of nature, the victim might justly seek retribution for the transgression. In Locke's description, a person is entitled to punish an offender "in the manner he thinks the offence deserves, even punishing with *death* crimes that he thinks are so dreadful as to deserve it."[92] Similarly, Nozick believes that if a person's right is invaded, he or she can justly pursue compensation for the offense. However, because some forms of transgression can be so severe that finding a reasonable compensation for them would be impossible. For instance, if an individual took away another person's life, there would be no sensible way to compensate for such tremendous loss. Thus, the right to life or other equally fundamental rights cannot be infringed upon in the first place.

Importantly, as there is no public authority in the state of nature, the enforcement of

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[90] Locke, 40.
[91] Ibid., 28.
[92] Ibid., 28.

punishment or compensation for rights violation depends on the people themselves. It is up to each individual to determine what kind of punishment is warranted for infringement of his rights, and it also depends on the person himself to pursue the remedy. The fact that rights protection is privately enforced entails that the enforcement is not guaranteed. For example, the weaker individuals would not have the power to impose sanctions on the stronger, or to prevent the transgression from taking place at the outset. Essentially, although all individuals equally have rights in the state of nature, there is no guarantee that everyone's rights will in fact be meaningfully protected.

The need to guarantee protection of individual rights gives rise to institutions that provide services for protection of rights. In Nozick's account, initially, there would be numerous right protective institutions in the state of nature. As the state of nature without government and regulation amounts to a perfect free market, different rights protection service providers would compete for offering better services at enforcing individual rights. Through the process of institutions' negotiation with each other to resolve disputes, the boundaries of individual rights and the procedure for resolving disputes would gradually be established. Eventually, the network of various providers of rights protection service would form a "dominant protective association" and a minimal state that functions to enforce individual rights.[93]

To protect individual rights, the minimal state "claims a monopoly on deciding who may use force."[94] Therefore, the individuals might no longer seek restitution for rights violation on their own. The state "will punish everyone whom it discovers to have used force without its express permission,"and the people who have joined the state must

[93] Robert Nozick, Anarchy, State, and Utopia (New York: Basic Books, Inc., Publishers, 1974), 15.
[94] Ibid., 24.

comply with the state's dictate.[95]

In Locke's description, the need to guarantee protection of individual rights leads to the foundation of the political state. As all individuals recognize, the establishment of one political authority with the power to enforce rights protection would ensure all individuals' rights to "*the preservation of their property.*"[96] This recognition leads them to contract with each other to relinquish part of their perfect freedom to form the political state. Specifically, the people lose the right to pursue sanction after right violation, and the government has a monopoly on the use of force in the established political state.

Importantly, in both Locke's and Nozick's accounts, the legitimate political state is only established upon people's consent. As Locke describes, "all men are naturally in the state of nature, and remain so until they *consent* to make themselves members of some political society."[97] This is because people inherently have rights in the state of nature, and the establishment of a political state without people's consent to renounce part of their perfect natural freedom would certainly infringe on people's natural rights. Therefore, it is crucial that people's entering into the social contract to found the political state and individuals' joining of rights protection association are voluntary in contract theorists' accounts.

Essentially, the contract theorists differ from utilitarians in terms of the understanding of the basis for governmental functioning in a political state. For the utilitarians, the consideration behind a government's decision should be about what benefits the society most. As the rationale behind government decision making is to generate the greatest social benefit, then individuals and their rights would not be *per se* inviolable. Thus, in

[95] Nozick, 24.
[96] Locke, 40.
[97] Ibid.,7.

utilitarians' view, an individual would have rights and these rights would warrant robust protection insofar as defending these rights would be socially optimizing. When protecting a certain right is not useful for society's benefit, then there would be no such "right." Essentially, for utilitarians, individuals' interests and rights might be sacrificed, because the ultimate basis for governmental functioning is to promote overall social good.

In contrast, contract theorists believe that basis for a commonwealth's operation would be its legitimacy. This means that, the deliberation behind a governmental decision-making would be what kind of functioning it would have the legitimate authority to do. For the contract theorists, the ultimate source of legitimacy for a government to rule resides in the people, as the political state is only established by the people transferring part of their power to enforce rights to a common authority. It follows that the primary basis for a government's operation in a commonwealth is to protect individuals and their rights.

Thus, contract theorists would disagree with the utilitarian thinking that individual's' interests might be sacrificed insofar as such compromise would promote the overall social utility. Rather, they emphasize that a legitimate state must defend individual rights, independent of consideration for whether or not defending the rights would be useful for the social welfare. For an individual to have a right means that he or she would be protected even when such protection would not promote total social utility, or even be socially inexpedient.

Furthermore, in contract theorists' view, for a government to be legitimate, its power must be confined to the minimum of what is necessary for safeguarding individual rights. Importantly, contract theorists' notion must not be understood merely in the sense that the government only has the authority to enforce protection of a specific set of unenumerated

natural rights, namely, one's life, liberty, and possessions. Rather, the contract theorists believe that the legitimate government power must be in principle minimal because the source of authority fundamentally resides in the people.

To a large extent, the creation of the Bill of Rights illustrates this notion. It is agreed that the intention of establishing the Bill of Rights is to prevent the federal government from overreaching its authority and intruding on the state power and individual rights. However, when the idea was initially proposed, there were competing positions for whether the Bill would in effect achieve this purpose. On the one hand, supporters of the Bill of Rights argued that although the Constitution prescribes structural limitations on the federal government through federalism and separation of powers, the structural restriction is insufficient. Because they were aware of numerous historical instances in which the structural limitation in effect did not prevent governmental transgression. They believed a Bill of Rights would compensate for the inadequacy of mere structural limitation, because a Bill of Rights would lay out "rights provisions in which the government was specifically prevented from acting in specific areas."[98] By clearly stating in the Constitution that the federal government does not have the authority to invade in these areas, the Bill of Rights would effectively save the bulwark of state power and individual rights.

On the other hand, opponents of the Bill of Rights were concerned that enumeration of specific rights would in fact have the counter-effect of licensing more power than the federal government warrants. According to the opponents, the Bill of Rights could lead to an interpretation "of the Constitution as creating a national legislative body of 'general'

[98] Patrick M. Garry, "Liberty through Limits: The Bill of Rights as Limited Government Provisions," *SMU Law Review*, 1745 (2009): 7, http://scholar.smu.edu/cgi/viewcontent.cgi?article=1211&context=smulr

powers, subject only to the specific limitations imposed by the bill of rights."[99] In other words, the Bill of Rights could be understood as delineating the only area that the federal government might not interfere. If the Bill of Rights were so interpreted, then it would amount to an authorization of the government to interfering in all areas that are not specifies in it. Thereby, the Bill would in effect grant vast amounts of power to the federal government beyond what it is legitimately entitled to, rather than limiting the federal power.

Although the advocates and opponents of the Bill or Rights diverged on the empirical effect of the Bill of Rights, their debate essentially reveals that the Bill is not intended to enumerate which specific natural rights people have that the government should function to safeguard. Rather, the intention behind the Bill is to serve as a limitation of federal power in principle. Essentially, the history behind the Bill of Rights instantiates contract theories' thinking that a legitimate government's power is necessarily limited. The government is limited not only in the sense that the government may only use its power for the purpose of preserving specific natural rights of individuals. Moreover, it is also limited in that the source of legitimacy ultimately belongs to the people, so that the federal government's functioning must be in principle in accordance with people's consent.

Applying contract theorists' thinking to the Trump tape case, the main consideration would be whether the government could legitimately enforce disclosure for the purpose of informing the public. In other words, contrary to the utilitarians, the contract theorists' reasoning would not be whether disclosure or nondisclosure could lead to a better result.

[99] Garry, 6.

Rather, their central concern would be whether the government has the legitimate authority to govern this area.

On the surface, it appears that the government does not have such authority. According to contract theorists, the legitimacy for a government to rule is originated from people's partial transference of their natural rights to the government. Therefore, a legitimate state only has authority to exercise power toward areas which people have relinquished their rights in exchange for governmental protection. In Locke and Nozick's accounts, these areas are primarily security and preservation of possessions. Rendering the public informed in a democracy is not one of these areas. Moreover, unlike the right to punish the crimes committed against the Law of Nature, the right to privacy has not been renounced by the people upon the formation of the political state. Thus, the government would not have the legitimacy to exercise power towards fostering an informed public by whatever means it thinks fit within the bounds of natural law, including interfering with individual privacy, as it would for preserving individual security and possession.

However, it can also be argued that a government would have the legitimate authority to regulate Trump's privacy for the purpose of informing the public. As we have previously discussed, the enumerated rights in a political state's original social contract, such as the Bill of Rights, should not be understood as an exhaustive list of areas of which the government can legitimately enforce protection. The social contract functions to limit governmental power in principle - to what the people have consented to. Essentially, the basis for governmental authority to regulate is consent by the people. Therefore, although the right to privacy is not one of the natural rights that was explicitly renounced upon the foundation of the country, if it can be established there is consent by Trump to renounce

his right against governmental regulation, then the government would still have the legitimate authority to compel disclosure of the outtakes.

Before we discuss whether any of Trump's act can be interpreted as consent to waive his rights against non-disclosure of the outtakes, it is important to clarify what kind of action amounts to consent for contract theorists. In Locke's account, there are two forms of consent, express and tacit.[100] Although Locke does not provide a clear characterization of express or tacit consent, Locke does provide examples that are useful for distinguishing the two: when a person takes oath to become a member of the new country, the oath is an express consent as the person explicitly indicates his will. This situation would apply to any immigrant who was not born in a country but become a citizen by choice.

In contrast, for individuals who were born in a country and are thereby naturally citizens, it is unlikely that they have ever taken an action to explicitly announce their willingness to be part of this country. However, in Locke's views, most of these citizens also have the obligation to comply with the law of the country, and the government of the country has the legitimacy to govern these people. This is because these individuals have given their tacit consent by their actions, that is, through possessing or enjoying "part of the Dominions of the Government."[101] For instance, in Locke's view, the act of residing in the country, owning part of its land, or merely traveling on the highway constructed by its government amounts to tacit consent to obey the government's regulation. To the extent that there is always a choice to exit the country through emigration, and the people who

[100] Locke, 17.

[101] "[Every] Man, that hath any Possession, or Enjoyment, of any part of the Dominions of any Government, doth thereby give his tacit Consent, and is far forth obliged to Obedience to the Laws of that Government, during such Enjoyment, as any one under it; whether this his Possession to be of Land, to him and his Heirs for ever, or a Lodging only for a Week, or whether it be barely traveling freely on the Highway; and in Effect, it reaches as far as the very being of anyone within the Territories of the Government." Locke, 38.

were born and are still living in the country clearly have not exercised this choice, their residence within the country can be interpreted as tacit consent to conform to the government's regulation.

In the context of the Trump tape case, there is little evidence that Trump had at any point given express consent to waive his privacy rights and to release the outtakes. However, it is possible to argue that some of Trump's actions, for instance, his decision to run for the president, would amount to tacit consent to partially waive his privacy right that licenses the disclosure. Does Trump's act to run for the president fit in with the characterization of tacit consent? To answer this question, we must understand the elements that need to be considered in evaluating whether an action amounts to valid tacit consent.

To a large extent, Locke scholar John Simmons's argument provides much insight to what these elements are. Simmons has proposed that there are two essential requirements that render a consent valid, that is, the consent must be "deliberate and voluntary."[102] Applying these standards to Locke's example of residence, he argues that residence in fact fails to meet these standards and thus would not constitute valid consent. By deliberate, Simmons means that consent is only effective when it is "given knowingly and intentionally.[103] For most citizens born in a country, they have never been in a position where the individuals must deliberately choose between either continuing to remain in a country to leaving the country. Consequently, for them, residence is not a result of choice. They simply reside by default. In the end, unless there is a mandatory process with which

[102] John A. Simmons, "'Denisons' and 'Aliens'," in *Justification and Legitimacy: Essays on Rights and Obligations*, (Cambridge; New York: Cambridge University Press): 165.
[103] John A. Simmons, "Consent, Free Choice, and Democratic Government," *Georgia Law Review*, (1987): 802.

the government requires each individual to go through the choice between residing and leaving, the mere fact of one's residence cannot be held as valid consent to the government's regulation.[104]

Moreover, Simmons argues that the action also needs to be the result of a voluntary choice for the consent to be valid. As he describes, even if the government does mandate citizens to go through the choice of residence or exit, people's action of residence still would not suffice to be a valid consent. This is because the price of emigrating to another country is often too high to the extent that emigration is not a realistic possibility for many people.[105] The fact that choosing emigration is highly costly for individual, as an individual must leave behind his properties and must face potential separation from his or her family, can significantly deter the individual from opting for exit. In light of this fact, a person's choice to remain "only show that changing states is not worth the price...[but not that really] choose to put up with these features [of the state]."[106] In light of the biased condition for choosing, it is questionable whether an individual's act to remain in the political state can be considered as a voluntary choice.

In the end, we nevertheless do not need to be overly concerned with the question of whether or not residence can be interpreted as valid tacit consent. Although Simmons

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[104] "Continued residence cannot be taken to ground political obligation unless residence is understood as one possible choice in a mandatory decision process. Residence must be seen as the result of a morally significant choice. It is not enough that the choice is available; it must be understood by each man to be a required choice, with mere residence not constituting, for instance, a way of declining to choose." *See* John A. Simmons, "Consent, Free Choice, and Democratic Government," 802.

[105] "Even when citizens understand the significance of the choice between residence and emigration...emigration is not an option that is open to many citizens. Those who are poor or unskilled, for instance, could not emigrate without suffering disastrous consequences. And if a person is required to 'choose' between two courses of action, only one of which is a real possibility, that person cannot be understood to have chosen freely. In the absence of a genuine choice on his part, the exercise of his only option does not have the moral significance that a bona fide choice would have." *See* Simmons, Ibid., 810.

[106] Lea Brilmayer, "Consent, Contract, and Territory," *Yale Law School Faculty Scholarship*, (1989): 22, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3635&context=fss_papers.

objects to Locke's specific example of residence as a form of tacit consent, he shares Locke's essential view that meaningful consent is necessary for political obligation. Simmons's challenge to Locke's example is useful for us to the extent that it helps us to identify the specific standards by which we evaluate what renders an action valid tacit consent. Regardless of whether Locke's example of residence might or might not fail these standards, the standards themselves remain an effective guide for our consideration.

Does Trump's action to run for president constitute valid consent to waive his privacy right according to the "deliberate and voluntary" standard? First, for Trump's decision to campaign to qualify as consent, the decision must be done with the candidate's knowledge and intention that the choice to run amounts to waiver of at least part of his privacy right. On the surface, it seems reasonable to assume that Trump would have such knowledge, because the requirement for presidential candidates to disclose private information has been a customary practice. There are numerous instances in which presidential candidates are expected to disclose information that would be considered as private for ordinary citizens. For instance, it has been accepted as customary practice that a presidential candidate would need to disclose his tax return and medical information. Essentially, the fact that presidential candidates would have a weaker right to privacy is certainly knowable for potential candidates participating the 2016 campaign.

However, it can be argued that knowledge of the abovementioned customary practices of disclosure is insufficient as proof of a candidate's consent. Because while we can agree that candidates do indeed waive part of their privacy rights, the scope of the kind of private information which they have relinquished rights toward sometimes appears unclear. For instance, it is to a large extent debatable whether, or which, medical

information is important for evaluating candidacy and could be disclosed. There are numerous historical instances in which presidential candidates had hidden their problematic medical condition while nevertheless becoming presidents. For example, the public had limited information about Franklin Delano Roosevelt's paralytic illness when he ran for president in 1932, whose disability was "carefully concealed not only from the media, and thus the public, but also from some members of his own family."[107]John F. Kennedy, who was secretly afflicted by serious medical problems, including the possibly fatal Addison's disease, also concealed the information, while providing a vigorous image of himself in front of the public.[108] During the era of these presidents while they were candidates, there were hardly expectations for candidates to publicize their medical condition.

Although there are conflicting evidence for expectations regarding which private information a candidate had consented to disclose by running for president, we can still determine the scope of privacy rights that candidates have partially waived. To a great extent, the contradictory expectations concerning disclosure of candidates' medical information provides us the insight that the scope of the waiver is fundamentally restricted to what is actually important for evaluating candidates' qualification. A major reason that there had been constant debates and different expectations regarding disclosure of candidate's medical condition is that there had been no general consensus on whether medical information is indeed significant, or even relevant, for evaluating one's

[107] Christopher Clausen, "The President and the Wheelchair," *The Wilson Quarterly*, vol.29, no. 3, (2005): 26, http://www.jstor.org/stable/pdf/40233058.pdf.
[108] Garvey Goodman, *Money and Health: A Study of American Social Values*, vol. 2 (Indianapolis: Dog Ear Publishing LLC, 2005), 340.

qualification.[109] As is shown by the examples of past presidents, the understanding that one's medical condition is crucial to one's capacity to serve as the president has only been a recent development. In the end, it remains controversial whether one's medical status is essential information for the public to determine his or her candidacy. This fact explains why the mandate for candidates to disclose medical information has been a disputable issue, as many candidates would not know that running for president amounts to consenting to disclosing their medical information.

The requirement for candidates to disclose tax returns also demonstrates the scope of candidates' waiver of privacy to be information that is essential for evaluating one's candidacy. In contrast to the controversial status of the medical condition disclosure requirement, there has been much less disputes over the mandate for candidates to release their tax return. In fact, "for nearly a half century prior to the current administration, U.S. presidents and most serious candidates for the presidency have released their tax returns for public inspection." [110] This is largely because it has been accepted that release of tax returns is essential to demonstrate transparency, as tax disclosure provide "important

[109] There are competing arguments on whether a candidate's medical information is truly essential for evaluating his or her candidacy. Example of argument supporting medical disclosure: "The health of presidential candidates is of particular concern, both because of the unique position of the president, and the inordinate pressures inherent in the office that can negatively impact physical and psychological health...We propose that candidates are morally required to disclose information about any medical conditions that are likely to seriously undermine the candidate's ability to fulfill what we will call the core functions of the office." *See* Robert Streiffer, Alan P. Rubel and Julie R. Fagan, "Medical Privacy and the Public's Right to Vote: What Presidential Candidates Should Disclose." *Journal of Medicine and Philosophy*, (2006), http://www.tandfonline.com/doi/full/10.1080/03605310600860825.
Example of argument supporting non-disclosure: "[given] the fact that a President or Supreme Court justice's life could end abruptly even if they were in apparently perfect health (e.g. sudden heart attack, auto accident, plane crash, assassination), it is unclear why being able to compute actuarial survival based on age, medications, family history and co-morbid conditions such as cancer history should even matter. It is also unclear why access to private medical records ofPresidential candidates should have become such an important issue during this election." *See* Bruce Patsner, "Access to Medical Records of Presidential Candidate, " *University of Houston Law Center Health Law Perspectives*, (2008), https://www.law.uh.edu/healthlaw/perspectives/2008/%28BP%29%20prez.pdf.

[110] Danielle Lang, " Candidate Disclosure and Ballot Access Bills: Novel Questions on Voting and Disclosure." *UCLA Law Review* 46 (2017): 48. https://www.uclalawreview.org/wp-content/uploads/securepdfs/2017/11/Lang-65.pdf.

insights into...presidential candidate's potential conflicts of interest," as well as to establish good faith through "[instilling] public confidence in the honesty, integrity, and transparency of presidential administration."[111]

Apparently, Trump has managed to make an exception to this established tradition, since he has not and seemingly does not intend to disclosure his tax returns. However, it can be argued that his defiance of the tax returns disclosure norm to a large extent has not been regarded as acceptable. In response to Trump's stubborn refusal to release his tax returns even after winning the election, the Congress has passed in September, 2017, to "require presidential candidates to release their five most recent years of tax returns to get on the ballot," so that Trump would no longer be able to continue maintaining confidentiality of his tax returns if he chooses to run again in 2020.[112] In one law review published in May 2017, Daniel Hemel, assistant professor of Law at Chicago University, argued that the state of New York can and should publish the Trump's state tax returns immediately. [113] To a great extent, these emerging actions of protest about Trump's lack of disclosure of tax returns testify to fact that there is a general agreement among the public that disclosing tax returns is an important requirement for being the President. Given the extensive disapproval of Trump's departure from the tax disclosing norm, we might even contend that, suppose a person were to disclose Trump's tax returns anonymously, then such action would probably be regarded as appropriate rather than deleterious by the general public. On that account, we can argue that, there is a general understanding in American society that being the President requires releasing of one's tax returns. Thus, it is

[111] Land, 48.
[112] Ibid., 63.
[113] Daniel J. Hemel, "Can New York Publish President Trump's State Tax Returns." *The Yale Law Journal Forum* (2017), https://www.yalelawjournal.org/pdf/Hemel_hcpha29m.pdf.

fair to assume that a presidential candidate would know that he is expected to release his tax return and has consented to the legitimacy of such expectation by his action of running for the president.

In the end, there is in general agreement that presidential candidates would have the knowledge that, by running for president, they have consented to renounce part of their rights to privacy of information. Specifically, the private information that they have consented to disclose is that which is essential for the public to assess their qualification. Admittedly, in many circumstances, there would be controversy over whether certain information is indeed important, such as a person's medical condition. However, a strong argument can be made for the importance of the information in the Trump tape case. Information in the Apprentice outtakes concerns the candidate's potential sexist and racist inclination, and it can be contended that these kinds of discriminations are fundamentally against American values and many people would disqualify a candidate if they were found to be true. Thus, there can hardly be any doubt that such information is essential for evaluating a candidate's qualification. On that account, the Apprentice outtakes are the kind of information that a candidate would have known that he is consenting to disclose the information by his decision to run for the president.

Having established that Trump's decision to run for the president would satisfy the "deliberate" requirement of consent, we should consider whether the action also meet the "voluntary" standard. A candidate's decision to run for the president would meet this standard because the situation in which he made the choice was not one between two unbalanced alternatives. According to Simmons' description, a decision is involuntary when the situation is set up in a way that choosing one alternative is significantly more

likely than the other. One way that would cause such imbalance between alternatives is that the price of choosing one option could incur a cost that is significantly larger than the other. For instance, the choice of emigration is unrealistic for many people, as the price of such decision would be too high. Thus, a citizen's action to reside in a country as opposed to emigrate would not be a voluntary choice. The situation of a presidential candidate's choice of whether to run for president is largely different from the residence example. Essentially, the choice of whether or not to campaign would not entail an overwhelming price that is unrealistic for the potential candidates. It is unlikely that by not running for the president, a potential candidate would suffer from severe consequences. Therefore, it is reasonable to believe that a candidate's action to run for the president is a result of a voluntary choice.

Another factor that could result in asymmetry between alternatives is that a person will by default begin with one alternative, while opting for another alternative requires active change. In the case of residence, a person who was naturally born in a country by default resides in this country. Thus, there are reasons to believe that remaining in this country would not be a voluntary choice, because continuing residence does not require any active move of choosing. Thus, the lack of active course of action can be seen as a lack of indication for voluntary choice. Applying this distinction between active and passive course of action to the situation of running for president, we can argue that there is strong reason to believe that the move of running for president is a voluntary action. All citizens begin with the status of not being a presidential candidate. However, turning into a presidential candidate requires a person to take the active move to opt out his default status. Essentially, since becoming a presidential candidate takes an active move, it is

reasonable to think that that a candidate's action to run for the president is a result of a voluntary choice.

On that account, Trump's action to campaign for the president can be considered as a valid consent to renounce his right against disclosing the Apprentice outtakes. First, he would have the knowledge that the decision to run for president amounts to consent to waive part of one's informational privacy, specifically, the kind of information that would be crucial for the public to assess his qualification. As the Apprentice outtakes would clearly satisfy this criterion, then it can be assumed that he would know that the public would expect him to release such information. Second, his act to run for the president would be a voluntary decision, as there are is no obvious burden that would compel him to participate in the campaign against his will. Thus, his decision to run for the president would be a deliberate and voluntary consent for disclosure, and the state would have the legitimate authority to disclose the outtakes.

Thus, based on contract theory, we can conclude that a court should decide that the Apprentice confidentiality agreement should not be enforced. Although Trump has a legitimate right to nondisclosure of the outtakes prior to his choice of running for President, his decision to become a presidential candidate essentially amounts to consent to waive that. Therefore, from the perspective of contract theory, there is no legitimate barrier that would impede disclosure, and disclosing the outtakes to inform the public would be a legitimate course of action.

IV. Viewing The Apprentice Agreement Through Rights Theory

Ronald Dworkin's rights theory provides another approach to consider the Trump Tape case. Ronald Dworkin is a prominent philosopher and scholar of constitutional law. One of his most influential philosophical stance is his rejection of utilitarianism and emphasis on rights-based doctrines. As Dworkin has once claimed, "[despite the preeminence of utilitarianism's ascendency over the rights-based doctrines in the nineteenth century," now the wheel is turning again: utilitarianism ism is giving away once again to a recognition of individual rights."[114] In this thesis, we will examine his notion of rights-based claims as the basis for judicial decisions, as is articulated in his work *Taking Rights Seriously*.

Essentially, Dworkin postulates a distinction between making decisions based on policy consideration, which a court should refrain from, and making decisions based on principle as courts are supposed to. According to Dworkin, for a court to decide based on policy consideration means that the court is concerned with which course of action would advance or protects the collective goal of the community as a whole. For example, policy-based considerations could be advancement of a society's economic efficiency, military strength, and etc. In Dworkin's view, deliberation based on policy is appropriate for legislature, but not the judiciary. Essentially, the rationale behind legislation is not to protect the welfare of any particular individual, although individuals of the community might benefit from the legislation based on policy considerations.

Dworkin contends that, in contrast to legislation, judicial decision "should characteristically be generated by principle and not policy."[115] Whereas policy-based

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[114] Ben Eggleston and Dale E. Miller, "Introduction: Utilitarianism's place in moral philosophy," in *The Cambridge companion to utilitarianism,* (New York: Cambridge University Press, 2014). 1.
[115] Dworkin, Ronald. *Taking Rights Seriously*. (Cambridge. Mass.: Harvard University Press, 1978). 84.

considerations that are concerned with promoting community's collective goal, principle-based deliberation focuses on securing "individuated political aim" or individual's political right.[116] In Dworkin's description, an individual "has a right... if [the right] counts in favor of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the right, even when no other political aim is served."[117] This means that, when a court makes a decision based on consideration for an individual's right, it does so without regard for the consequence that would be produced in this particular decision. Essentially, rights are characteristically more robust than policy considerations and have the "power to withstand...competition" with policy goals in ordinary cases.[118]

Dworkin provides three compelling reasons for why judges should rule in consideration of principle. The first is that judges are non-elected officials. Essentially, policy decisions should be made based on accurate estimation of the different groups' interests in the community. However, judges would not be confronted by lobbyists or pressure groups, as elected officials of legislature would. Consequently, judges would both be bereft of accesses to public opinions and lack the pressure to accurately reflect the public's will in their decisions. Thus, non-elected judges are ill-equipped to making decisions based on policy considerations. [119]

Second, if a judge rules based on deliberation of policy, then the duty created for the defendant would be created retroactively, because it is improbable for the defendant to predict what policy considerations a judge would have in mind in deciding the case. Thus, the defendant would essentially be taken by surprise, and imposing duty on him or her

[116] Dworkin, 91.
[117] Ibid., 91.
[118] Ibid., 92.
[119] Ibid., 85.

would be unjust. In contrast, if a decision was made on the basis of the plaintiff's right, which is a longtime institution within the constitutional scheme, then it is reasonable to expect the defendant to know that he or she has a duty corresponding to the plaintiff's right. Unlike the form of duty that would be created based on policy concerns, a defendant's duty that correlates with the plaintiff's right is "not some new duty created in court."[120]Therefore, it is justified to impose the duty upon the defendant.

The third reason is that judges have a political responsibility to issue consistent decisions. That is, the decision a judge makes must be justifiable within a political theory that can also be used to justify other decisions made in the same political regime. Principles have the quality of "[insisting] on distributional consistency from one case to the case."[121] This means that, rights have a distributional character: if a judge believes that a form of liberty is a right, then he must ensure that all members within the community are granted the same protection of this form of liberty. All individuals must be treated alike with respect to this right. In contrast, policy allows for "a strategy that may be better served by unequal distribution of the benefit in question."[122] Based on policy consideration, a judge might grant different level of protection to different individuals and groups. On that account, a principle-based approach is necessary for judges to fulfill their responsibility to rule in a consistent manner.

Based on these three reasons, Dworkin has established that judicial decisions should be driven by deliberation of principle, i.e. rights that competing parties have, rather than that of policy. Protection of rights always override policy considerations in deciding

[120] Dworkin, 85-86.
[121] Ibid., 88.
[122] Ibid., 88.

ordinary cases. However, Dworkin also recognizes an exception to this general rule of rights taking priority over policies. In Dworkin's description, while rights "cannot be defeated by appeal to any of the ordinary routine goals of political administration," there are special circumstances that would warrant curtailing rights for policy concerns.[123] An example that illustrates rights being outweighed by "a goal of special urgency" is the Supreme Court's decision of *Brown v. Board of Education* (1954).[124] The *Brown* decision, which establishes that it is unconstitutional to separate public schools for students of different races, serves to safeguard the individual right to equal education. However, in the *Brown* decision, the Supreme Court did not order to end segregation of schools immediately, but rather, "with all deliberate speed."[125] The Supreme Court's deliberation behind this slight postponing of *Brown* is that it is highly probable to result in disruption and danger in community if the decision were applied immediately. The slight delay would function to ensure there to be peace as the decision was implemented. Essentially, in the case of *Brown*, the Supreme Court's urgent concern for the general security justifies the temporary act of superseding protection of rights by consideration of policy.

Based on Dworkin's rights theory, both the utilitarian and contract theory analysis discussed in the previous chapters would be flawed. The utilitarian analysis would be fallacious in that utilitarians regard the basis of judicial decision to be the consideration of which course of action would lead to the result of the greatest utility. In an utilitarian approach, both principle and policy are evaluated by the amount of utility they could lead to. However, Dworkin would point out that principle or rights are qualitatively different

[123] Dworkin, 92.
[124] Ibid.,92.
[125] Brown v. Board of Education, 347 U.S. 483 (1954).

from policy, and a court that has found one party has a right should protect party and override any policy consideration absent competing rights of the other parties. The utilitarian approach to weigh Trump's privacy right and contractual right based on how much utility they could produce essentially falsely treats rights as identical to policy. To correctly recognize Trump's rights as rights, one should acknowledge that Trump's rights warrant protection regardless of how much utility could be generated through not protecting those rights. In the end, the misunderstanding of the meaning of rights renders the utilitarian method flawed and causes the utilitarian conclusion to be wrong.

Dworkin's rights theory approach also differs from the contract theory approach. According to contract theory, the only situation in which the government can legitimately regulate one's rights is when the individual has consented to such regulation. In the Trump Tape case, this entails that Trump can no longer expect the form of robust protection for his right to privacy to be as warranted as is for individuals who are not presidential candidates. A rights theory approach to the Trump Tape case would be different in that it would not place emphasis on whether or not an individual has issued consent. Rather, the primary concern for Dworkin would be whether a strong principle-based argument can be established for or against disclosure. In other words, for Dworkin, even if no argument can be established that Trump has issued any consent for the government regulation of the outtakes, a court might still legitimately compel disclosure - as long as the court can find strong rights claims supporting disclosure that would override claims for non-disclosure.

What should a court do based on the Dworkin's rights' theory then? On the surface, applying Dworkin's rights theory to the Trump Tape case would lead to the conclusion that the court should not compel disclosure of the outtakes. According to the rights theory, the

judicial decision should aim to protect the individual rights implicated in this case. There are two sources of rights that Trump could rely on to advocate for non-disclosure. First, the contractual right acquired through the confidentiality agreement also supports non-disclosure. As a court recognizes the right of individuals to have their contract honored within the political regime, the court will derive the conclusion that the outtakes should not be disclosed because of the binding force of the confidentiality agreement. The second source of right that would support non-disclosure is Trump's right to privacy. Similar to any other member of the American society, Trump, by being a citizen of this political state, has the constitutional right to privacy that allows him to control information of himself and to not disclose tapes of him that is not yet in the public domain. Thus, contrary to the utilitarianism and contract theory, it seems that Dworkin's rights theory would endorse maintaining confidentiality rather than disclosure.

However, although a court would be able to establish principle-based argument for non-disclosure, it is still possible to argue for disclosing the information. First, a court might also find rights claim for disclosure in this case. For instance, a court might find that maintaining confidentiality would violate the voters' rights to knowing the presidential candidate, as the agreement functions to conceal important information about the qualification of the candidate. The right of the voters to know the candidate is a fundamental right that must be distributional to all citizens in a democratic society. This is because having knowledge of the candidate is necessary to ensure voters' ability to make informed choice, and by extension, the validity of the election result. Certainly, to acknowledge that voters have a fundamental right to know the candidate does not entail that voters have the right to know everything about the candidate. Nevertheless, the

information concealed by the Apprentice outtake is particularly important for the public's right to know because it concerns an aspect of the candidate that is crucial but had remained dubious up until the Trump Tape case. Since the beginning of Trump's campaign, his stance on women's rights and the equal rights for people of all races had been equivocal. There had been numerous reports on Trump's past behaviors that evidence contradiction to his verbal commitment to minorities' equality. The leaked Access Hollywood tape is a good example of this. On that account, many voters could not have a certain conclusion regarding Trump's commitment to equality. As it is highly probable that the Apprentice outtakes would contain information that could further inform the public about this aspect of Trump, not disclosing the tapes would effectively hinder public's ability to make informed decision about the candidate, and thus, might infringe voters' right to know.

If a judge could find rights claims for both disclosure and nondisclosure, then the Trump Tape case would become a "hard case" in Dworkin's account.[126] A hard case is one that involves two principle-based arguments competing against each other, rather than a principle-based rationale against a policy-based one. Thus, there is no clear answer as to which position should prevail. According to Dworkin, to decide a hard case justly requires the judge to consider the relative weight of different legal principles and precedents. In other words, the judge must make the decision for the particular case in a way that the decision can consistently fit with other decisions based on the principles within the legal system.

[126] Dworkin, 102.

Within the legal system of America, there are numerous instances in which the right to privacy had been overridden by other rights. As legal scholar Richard Posner has pointed out, although privacy has been recognized as a constitutional right, the Supreme Court's protection of the right had been uncertain in numerous areas. Appealing to privacy has been proven ineffective to exclude individuals from exposure to information, to protect secrecy relationships such as bank-secrecy, and in many other areas in which the right to privacy seem relevant at first glance.[127] In fact, as Posner observes, the only area in which the court has given relatively robust protection to privacy is one that "[has] nothing to do with privacy in any precise or principled sense of the term," which is sexual-freedom cases about women's right to abortions, unmarried couples' access to contraceptives, and etc.[128] Trump's privacy rights in question evidently do not fall within the category of sexual-freedom cases. Thus, given the Supreme Court's established "little regard for the protection of privacy"[129] in areas other than the sexual-freedom cases, it would be reasonable for a court to override Trump's privacy rights with other rights considerations, such as the voters' right to be informed, to remain consistent with the legal history.

Similar to the right to privacy, contractual right is also not a robust right and can be trumped by principle-based considerations. For example, in *Allen v. Jordano's' Inc*, an employer and employee sign a contract to conceal the employee's alleged theft and other dishonest behaviors. The contract was judged to be unenforceable and both parties were

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[127] "[The] Court has evinced little regard for the protection of privacy as that term is ordinarily, even expansively, understood. Privacy in the sense of seclusion has fared particularly poorly, as cases like *Erznoznik* make clear; privacy in the sense of secrecy has also generally fared badly, as the bank-secrecy and undercover-agent cases make clear. *Cox and Hill* indicate the Court's reluctance to give much weight to the specific privacy values embodied in state tort law." Richards A. Posner, "The Uncertain Protection of Privacy by the Supreme Court." *The Supreme Court Review* (1979), 213-214. https://www.jstor.org/stable/pdf/3109570.pdf.

[128] Posner, 214.

[129] Ibid., 214.

denied the rights that they thought they had acquired through the contract, because the making of the contract is in contradiction of a principle, i.e. that the act of concealing discreditable facts through nondisclosure agreement is criminal. Although the Apprentice agreement does not involve the principle of forestalling criminal behavior, the principle involved in this case is no less important. The right of the electorate to make informed decisions is essential to ensure the validity of election, which is one of the most important processes in democracy. Without adequate knowledge about aspects of presidential candidate that are essential for evaluating his or her qualification, the act of voting would not be meaningful, and the result of the election would not be reliable. In the end, the principle of not tolerating criminal behavior is essential in that it serves the fundamental social good of security. Similarly, the principle of ensuring the voter's rights, which entails providing voters with important information about the candidate, also serves a fundamental social value, namely, democracy. Thus, it is reasonable for a court to consider overriding individual rights acquired through contract, i.e. the rights to not disclose the outtakes in this case, when such right is in competition with rights that are fundamental to ensuring democracy, such as voters' rights to know.

In addition to viewing the Trump Tape case as a situation of competing rights, a Dworkinian court might also rule in favor of disclosure by recognizing the case to be a situation of special urgency. As I have previously explained, in Dworkin's account, a court might make decision in cases of special urgency to curtail rights for policy considerations, as the *Brown* decision exemplifies. In the Trump Tape case, the decision of whether to disclose the Apprentice outtakes concerns giving the public important information to evaluate if the presidential candidate has a potential sexist and racist inclination. If the

candidate were elected as president, then he would have the power to influence policies that would either foster or deter gender and racial equality for the subsequent four years and perhaps many years more due to the president's legacy. Thus, the danger of not adequately informing the people about the Trump's character is largely comparable to the threat to peace and security in *Brown* in terms of magnitude. On that account, it is reasonable for a court to consider the Trump Tape case as a special circumstance. Disclosing the outtakes would therefore be justified by overriding consideration for rights with policy concern.

On that account, based on Dworkin's rights theory, strong arguments can be made for a court to rule in favor of disclosure. A court might arrive at this decision through two approaches. First, a court might view the Trump Tape case as a situation in which principle-based arguments can be established both for and against disclosing the Apprentice outtakes. Thus, the Trump Tape case would be a "hard case" in which privacy right and contractual right that support non-disclosure are competing against the voters' right to know the presidential candidate. Based on the established political theory of American law, a court could establish a reasonable rationale to override the rights supporting maintaining confidentiality that is consistent with the American jurisprudence. Second, a court might understand the Trump Tape case as a case of special urgency, which warrants curtailing the rights for non-disclosure in the special circumstance of presidential election. Essentially, with both Dworkinian approaches, a court could establish compelling arguments to decide on disclosure over nondisclosure.

V. Moving Forward

In this final chapter, we will return to the initial question regarding the legality of the Apprentice agreement, and by extension, confidentiality agreement in general. Before we discuss the implication of our analysis, let me briefly summarize our conclusions thus far.

In the first chapter on the current law's status, we have concluded that it is highly unlikely for a court to rule in favor of disclosing the Apprentice outtakes based on existing law. After having examined the current law's status, we turned to the normative question of whether non-disclosure is indeed what the court should do. To answer this question, we have applied three social political theories to the Trump Tape case.

First, we have examined the case through utilitarianism. In this approach, we weigh the utility that would be produced through disclosure versus nondisclosure, and we have concluded that disclosing the outtakes would in effect generate more overall social utility. Thus, according to utilitarianism, the right thing to do in the Trump Tape case would be to disclose the outtakes.

Second, we have applied contract theory approach to consider the legality of the Apprentice agreement. According to the contract theory, a government only has the legitimate authority to regulate areas in which the people have consented to, as the source of legitimacy belongs to the people. Under this view, only if Trump has consented to governmental regulation of his rights against disclosure, such as his privacy rights, would disclosure then be justifiable in this case. Since a strong argument can be made that, by the decision of campaigning for president, Trump has at least partially waived his rights against non-disclosure, we conclude that there is no legitimate barrier for a court to compel disclosure in the Trump Tape case.

Third, we have considered the legality of the Apprentice agreement through Dworkin's rights theory. In the rights theory, arguments based on consideration of principle trumps arguments based on consideration of policy. To a certain extent, the Trump Tape case can be viewed as a "hard case," in which two arguments based on principle considerations compete against each other. However, in the end, we can establish a plausible rationale for the argument supporting disclosure based on voters' rights to know trumping the argument supporting non-disclosure, which would be grounded on Trump's privacy right and the right derived through contract. Moreover, the rights theory also suggest that, individual rights might be curtailed in cases of special urgency. Considering the importance of the role of the President, The Trump Tape case might be interpreted as such a case of special urgency, which thus warrants curtailing of the rights against disclosure.

Essentially, our normative analysis has led to the understanding that, based on three political theories, strong arguments can be made to support disclosing the outtakes in the Trump Tape case. The discrepancy between what the current law of confidentiality agreement does endorse, i.e. non-disclosure, and our conclusion of what the law should support, which is disclosure, to a large extent can be seen as evidencing that the legality of the Apprentice agreement is questionable: the current law of confidentiality agreements, which allows the use of agreements such as the Apprentice NDA, to a large extent cannot be justified by three of the most political theories in American jurisprudence.

The questionable legality of the Apprentice agreement gives rise to the understanding that change and reform of the law on confidentiality agreement might be necessary. This change might occur in two ways. The first is how a court should determine the enforceability of non-disclosure agreements. In the existing law, it is highly unlikely for

challenges toward the enforceability of confidentiality agreement to prevail, even when such agreement is used to suppress information of great importance to the public. As evidenced by the Trump Tape case, the use of the Apprentice Agreement can entail harm to public interest such as causing hindrance for the electorate to be informed.

The second way in which the law regarding confidentiality agreement might change is that the legal system might consider re-defining which non-disclosure agreement should be permitted to be made in the first place. As we have previously discussed, in the Trump Tape case, one great difficulty is that there was no legal battle at all, because the parties involved in the contracts had too little incentive to bring up challenges to the confidentiality agreement or to release the outtakes. For the people who had access to the Trump Tape, to bring up such challenges would entail tremendous cost to themselves, such as the potential loss of prospect to survive in the industry and the monetary cost incurred through lawsuit, and etc. In contrast, not initiating any challenge to the non-disclosure agreement would not necessarily result in any harm to their personal interests. In the end, while disclosure might be a good cause for the public, the parties involved in the non-disclosure might have limited motivation to initiate such challenges. Essentially, the absence of an Apprentice agreement lawsuit to a large extent informs us that, if changes were to be made regarding the confidentiality agreement, then merely reforming the way in which the contract would be considered in court might be insufficient. It might also be necessary to consider what kind of confidentiality agreement should be permitted to be established at the outset.

I shall clarify that my support for potential reform is not a rejection of confidentiality agreement completely. I do not deny the many benefits of the confidentiality agreement as

a means to serve important social good, such as facilitating fair competition within the free market through protecting corporate trade secret. What I do advocate is to reconsider the permissibility of a specific category of non-disclosure agreement among confidentiality agreements in general, which can be used to suppress information of great public interest and cause severe social harm without being checked by the current law.

Of course, to define the scope of the agreements to be reformed as merely "non-disclosure that are used to suppress information of great public interest" would be unsatisfactory. Although the examples that I have discussed in this thesis do seem to fall in this definition, i.e. the Apprentice agreement and (as I have briefly explained in the introduction) the non-disclosure agreement that silence victims of sexual harassment, this definition would be too vague and broad to be useful. For example, it would be unclear what kind of information would be considered as being of great public interest. Moreover, if reforms were to be, then the scope of the confidentiality agreement to be reformed must be cautiously considered so that the law does not infringe on other fundamental rights, such as the individual right to contract.

Essentially, given the scope of this thesis, we can only arrive at the conclusion that it is necessary to initiate reform about the law of confidentiality agreement, whereas the discussion of how such change should be made would be the topic of another article. Nevertheless, I hope this thesis can serve as the foundation for further reconsideration on the issue of the legality of non-disclosure agreement, and possibly, reforms on the institution of confidentiality agreement in law.