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2023

FLORIDA PRE-LAW REVIEW

AT THE UNIVERSITY OF FLORIDA

Opening Remarks

The Maiden Voyage of *Florida Pre-Law Review*.....*Dalia Dooley*

Articles

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from a Legal Perspective.....*Natalia Cappellaro*

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OPENING REMARKS

Dalia Dooley

The Maiden Voyage of Florida Pre- Law Review

Dalia Dooley
Editor-in-Chief

I am thrilled to extend a warm welcome to you as we proudly present the inaugural edition of the Florida Pre-Law Review. It is with great excitement and a sense of historic significance that we introduce this publication as the first undergraduate law review at the University of Florida.

The journey to the publication of this journal has been one of collaboration, dedication, and a shared commitment to the advancement of legal scholarship. From its inception this semester, the Florida Pre-Law Review has been driven by the vision of providing a platform for undergraduate students to engage in rigorous academic inquiry, explore complex legal issues, and contribute to the scholarly discourse.

In this inaugural edition, we have curated a collection of pieces that reflect the diverse interests and intellectual pursuits of our undergraduate student body— completely written and edited by University of Florida students. As we celebrate this inaugural edition, we also look ahead with anticipation to the future of the Florida Pre Law Review. With each successive edition, we are committed to fostering a dynamic community of scholars, promoting interdisciplinary dialogue, and contributing to the advancement of legal knowledge.

On behalf of the editorial team, I extend my heartfelt gratitude to our contributors, reviewers, advisors, and supporters who have played a vital role in bringing this vision to fruition. Your dedication and enthusiasm have been instrumental in making this inaugural edition a reality.

INTELLECTUAL PROPERTY

Name, Image, and Likeness from a Legal Perspective

NATALIA CAPPELLARO

Abstract

The scope of the National Collegiate Athletic Association (NCAA), an organization with historically high autonomy, now faces a dilemma of acting as either an authoritative unit or allowing athletes and universities to be at the center of legal control. Though a plethora of reasons contribute to this change and indecision, the main topic spearheading controversy within the association is Name, Image, and Likeness (NIL). The issues regarding NIL are prevalent in many areas of the NCAA. However, one area often overlooked yet of utmost importance is the correlation between NIL and the law. It is important to understand that there is great indecision within the NCAA because of the lack of sufficient regulation, as well as the current laws addressing NIL which vary nation-wide, state-wide, university-wide, and within the NCAA. Throughout this research paper, the effects of NIL are observed through a comprehensive legal lens exploring the legal impact NIL has on universities, athletes, and legal practices across America.

Historical Timeline

June 21, 2021 signified the inception of the modern-day era in college athletics when the Supreme Court unanimously ruled that the NCAA must uphold antitrust laws in *National Collegiate Athletic Association (NCAA) v. Alston*. This insinuates that the association could no longer restrict student-athletes from profiting under education-related benefits.¹ Though the specifics of this case are elaborated in Legal Perspective, it is crucial to recount the timeline of events subsequently leading to the NCAA's current position. Before *NCAA v. Alston* reached the Supreme Court, student-athlete Shawne Alston expressed discontent, claiming a violation of the Sherman Antitrust Act (Section 1) by the NCAA in 2014.² After this original complaint was filed, the Northern District of California did not address the case until 2019, where the court ordered the NCAA to "make their rules less restrictive regarding financial compensation" via a

1 National Collegiate Athletic Assn. v. Alston, 594 U. S. (2021)

2 Cate Charron, "Everything We Know about Nil Law & Policy (so Far)," Student Press Law Center, February 23, 2023, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/>.

permanent injunction.³

Upon this, the NCAA appealed the decision several times. First, they appealed the injunction to the Ninth Circuit in 2019, where it was decided that antitrust laws were violated. Thereafter, they appealed the Ninth Circuits' decision and took the case to the Supreme Court. In the Supreme Court, the same decision stood, and it became federal law that the NCAA had to change or "loosen" their rules for all states.⁴ This decision quickly prompted an interim NIL policy that remains ever changing. The continuous evolution is illustrated through the revision and progression of NIL policy since its creation in 2021, its clarifying changes in late 2022, and its state by state adaptations thereafter.⁵ Thus, acknowledging this timeline of events acts as a baseline of information that will be helpful in recognizing the progression of NIL.

NIL Process

To better analyze the legal, university, and student-athlete perspectives, NIL must be understood as a process. In the simplest of terms, NIL stands for Name, Image, and Likeness. However, as seen in the Historical Timeline section, NIL encompasses much more under its purview. As a process, NIL is the idea that "Student athletes in Division I, Division II, and Division III [schools] generally hold the right to engage in NIL activities to the extent that this complies with the state law."⁶ In other words, NCAA student-athletes are allowed to engage in and

3 Cate Charron, "Everything We Know about Nil Law & Policy (so Far)," Student Press Law Center, February 23, 2023, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/>.

4 Cate Charron, "Everything We Know about Nil Law & Policy (so Far)," Student Press Law Center, February 23, 2023, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/>.

5 Meghan Durham, "DI Board Approves Clarifications for Interim Nil Policy," NCAA., October 26, 2022, <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx>.

6 "College Athlete Name, Image, and Likeness Rights under the Law," Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

profit from their Name, Image, and Likeness regardless of the athletic division they compete in. However, it is important to note that only NCAA student-athletes have this privilege; any student-athletes in high school or being recruited to play for a given university are not allowed to participate in or be recruited through NIL.⁷ It is crucial to emphasize that the process and benefits of NIL solely apply to university-enrolled student-athletes, as the remainder of this research is centered around what each party can, can not, and will possibly do within NIL.

Legal Perspective

With Name, Image, and Likeness, there are three key areas of law to elaborate on: intellectual property, contracts, and antitrust. Firstly, antitrust laws are most prevalent within NIL as they were the main claim in *NCAA v. Alston*. Throughout this lawsuit, the plaintiff (Alston) declared that Section 1 of the Sherman Act, “contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce,” was violated by the NCAA.⁸ Specifically, the association violated Section 1 because they restricted players from receiving compensation for their Name, Image, and Likeness. This argument of restricted compensation quickly evolved into an overarching issue of universities withholding students from accessing certain benefits. Ultimately, Alston won the case as the Ninth Circuit and the Supreme Court agreed that the NCAA prevented athletes from receiving “education-related benefits,” a violation of antitrust laws.⁹

Another area of law addressed through NIL is contract law, due to the abundance of contractual agreements associated with the rapidly developing process and rules surrounding NIL. For example, when an athlete partners with a new brand, company, or individual, a contract must be written, negotiated, and signed prior to any agreement. Though

7 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

8 *National Collegiate Athletic Assn. v. Alston*, 594 U. S. (2021).

9 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

this is standard in most cases, these contracts are fundamental because athletes are prohibited in making “agreements that conflict with school or team contracts,” per NIL laws.¹⁰ In 26 states, including Florida, athletes must also report their contracts and future NIL earnings to the university, meaning that the proper formation of a contract is crucial.¹¹ If the contract is not satisfactory, it could bring about issues, such as contractual non-performance claims and poor NIL contract practices.¹²

Furthermore, when discussing antitrust and contract law through the perspective of NIL, it is equally important to discuss intellectual property (IP). In regards to IP, descriptive clauses are often found within contracts and rules set by the NCAA that work to protect an institution’s intangible properties.¹³ These properties include areas such as the school’s colors, mascot, logo, or even its stadium. While contracts often state the right of a sponsor to legally utilize an athlete’s intellectual property through their Name, Image, and Likeness, the contractual arrangement

10 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

11 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

12 Cate Charron, “Everything We Know about Nil Law & Policy (so Far),” Student Press Law Center, February 23, 2023, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/>; “DI Council Introduces Proposals to Boost Student-Athlete Nil Protections,” NCAA, October 4, 2023, <https://www.ncaa.org/news/2023/10/3/media-center-di-council-introduces-proposals-to-boost-student-athlete-nil-protections.aspx>.

13 4 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

“may not cover use of the school’s IP.”¹⁴ Granted, it is also significant to note that IP laws vary from university to university and state by state, as many NIL-related laws do. Due to this, a legal discrepancy may be created for sponsors where one of their signed athletes plays for an institution that allows the use of their IP in agreements while another signed athlete is playing for an institution that does not provide the right to utilize their IP.

University Perspective

Over the past years, collegiate institutions across the nation have gained a significant voice with regards to NIL. Whether it’s defending their own intellectual property or requiring student-athletes to disclose their agreements, as discussed previously, universities have gained a lot of discretionary power when it comes to NIL. Despite this, there are also additional standards set by the NCAA that all universities are required to follow. The first standard rule is that universities are who exercise NIL rights.”¹⁵ With this, anything from academic scholarship, financial aid, and playing time cannot be revoked due to an athlete maximizing their NIL. Two other significant NCAA laws express that schools must “provide financial literacy training for athletes” and have the ability “to prohibit athletes from engaging in NIL activities during official team activities.”¹⁶ Both NCAA standards are principal for maintaining NIL accountability on both ends; athletes can hold universities responsible for not providing financial literacy, while universities can hold athletes

14 Drew Kastner , “Name, Image & Likeness (Nil): Three Key Legal Issues Facing Businesses in College Athlete Endorsement Deals to Date,” Offit Kurman , August 31, 2023, <https://offitkurman.com/blog/2021/12/29/name-image-likeness-nil-three-key-legal-issues-facing-businesses-in-college-athlete-endorsement-deals-to-date/>.

15 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

16 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

accountable for not separating NIL activities from their athletic duties.

The fourth and possibly most manipulated rule set by the NCAA is that schools are not allowed to not allowed to “withhold[...] scholarships or eligibility to participate in athletics from athletes or use[...] NIL agreements as recruiting inducements”.¹⁷ By technicality, this rule is typically kept by universities. Yet, when it comes to recruiting athletes, there is a common manipulation of the rule that occurs in the form of collectives. In short, NIL collectives are independent organizations that offer large sums of money to both current and prospective student athlete.¹⁸ They attain these funds through the vast network of boosters, alumni, and fans who simultaneously run the collectives. From the university perspective, a given institution is legally allowed to create collectives, request donors’ financial contributions to collectives, and further support NIL entities in their fundraising efforts.¹⁹ On the other hand, the university is not allowed to directly provide money to collectives, be placed on a collective’s payroll as an official employee, or have a stake in the collective as an owner.²⁰ Though this is considered a national standard for all universities part of the NCAA, some states have taken it upon themselves to create statutes or state bills (SB) that directly address this rule. In Florida, for instance, SB 646 declares that the only groups able to provide athletes with NIL

17 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

18 Cate Charron, “Everything We Know about Nil Law & Policy (so Far),” Student Press Law Center, February 23, 2023, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/>.

19 Meghan Durham, “DI Board Approves Clarifications for Interim Nil Policy,” NCAA., October 26, 2022, <https://www.ncaa.org/news/2022/10/26/media-center-di-board-approves-clarifications-for-interim-nil-policy.aspx>.²¹; Cate Charron, “Everything We Know about Nil Law & Policy (so Far),” Student Press Law Center, February 23, 2023, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/>.

20 Cate Charron, “Everything We Know about Nil Law & Policy (so Far),” Student Press Law Center, February 23, 2023, <https://splc.org/2023/02/everything-we-know-about-nil-law-policy-so-far/>.

compensation are those unaffiliated with the university.²¹ With this rule and the three others previously discussed, it has provided universities with the much needed guidelines and flexibility to combat the growing process of NIL.

Athlete Perspective

Student-athletes across the NCAA have been drivers of NIL from the very beginning, as seen in *NCAA v. Alston*. In this new era, they have received the opportunity to exercise their rights of Name, Image, and Likeness in various areas surrounding their sport of practice. Specifically, athletes can now do a plethora of profit-generating actions, like using their persona in products such as jerseys or video games and signing sponsorship deals with outside companies to advertise said products.²² To exercise and profit from NIL, there are certain laws and regulations designated for student-athletes similar to those of universities. First, all athletes are permitted to hire a legal representative or a sports agent to help create or negotiate contracts with potential business partners.²³ These representatives, however, must meet specific criteria and requirements set by the NCAA when working with the athlete. Due to the newness of NIL, the specific criteria that representatives must meet is still being determined. Furthermore, another rule set by the NCAA is that athletes must “disclose NIL agreements to schools and prohibiting agreements that conflict with school or team contracts.”²⁴ This guideline addresses that when athletes sign a legally drafted contract committing to a university, their contract establishes specific terms which the athlete

21 *Intercollegiate Athletic Compensation and Rights*, Fla. S.B. 646 (2023).

22 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

23 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

24 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

cannot breach. Thus suggesting that the commitment contract athletes signed with their university trumps any other NIL-related contract. Hence, athletes ought to disclose agreements so that universities can be certain there are no conflicts of interest. The final rule discussed that athletes must abide by is that they cannot promote “morally questionable activities,” which includes drugs, adult entertainment, and gambling.²⁵ Although this rule tends to be standard among universities in their commitment contract, its specific phrasing by the NCAA is cardinal, as laws on these activities vary based on state of residence and legal age. Through these NCAA laws, athletes across the nation are afforded the opportunity to profit from their intellectual property and exercise their NIL rights.

Conclusion

With many rules, issues, and discrepancies, NIL is evolving to encompass the holistic needs of universities, their respective athletes, and the ever-changing law. Years ago, *NCAA v. Alston* allowed athletes to exercise their legal rights of NIL on the basis of antitrust laws. Currently, the NCAA is actively adjusting regulations that provide universities and athletes with guidelines on how to manage contracts and utilize intellectual property at their highest capacity. For future considerations, there are many areas within NIL rights that the NCAA has yet to address; for example, the consistent prevention of contractual nonperformance, the legality behind NIL agreements of transfer and international athletes, and even averting any other antitrust violations. Ultimately, these future considerations and any other regulations created for the purpose of NIL require the adequate implementation of legal practices. Approaching NIL through a legal perspective, as seen throughout this paper, is necessary for the overall advancement of NIL for universities, athletes, and legal practices across the nation.

25 “College Athlete Name, Image, and Likeness Rights under the Law,” Justia, August 19, 2023, <https://www.justia.com/sports-law/name-image-and-likeness-rights-for-college-athletes/>.

LAW and POLITICS

Corruption, Lobbying, and Capture: A Comprehensive Review of Corruption in the United States

HENRY DAVIS

ABSTRACT

This Article attempts to identify the mechanisms by which corruption occurs in the US as well as the legal precedent that has given rise to these mechanisms. Gaps in campaign finance laws and ambiguous definitions have allowed corruption to flourish. Outlined here is a comprehensive definition of corruption that accounts for the nuances and loopholes that exist in the law. As well as two practices that act as conduits for corruption, lobbying for which, disclosure is suggested as a remedy, and Regulatory Capture. Lobbying being the process of special interests changing regulation to suit the needs of the firms they represent. Regulatory capture being the phenomena of regulated entities exerting undue influence on their regulators at a cost to the public. Both mechanisms complement each other and have resulted in an ineffective and inefficient bureaucracy that serves only a small minority of the country. Addressing these features will be essential for maintaining the integrity of the American system.

Defining Corruption

It is important to establish a working definition of corruption. In the case of corruption, this is especially pertinent because scholars define corruption in several different ways. Etzioni lays out competing definitions in his review and helps to illustrate both how they differ and where each one falls short.

The first is too narrow, defining corruption as the *illegal* use of public office and resources for private gain.¹ This presents problems. The definition does not account for the abilities of firms and lobbyists to identify legal loopholes to achieve the same result, where they do not break any existing laws or regulations. Moreover, it does not consider the fact that lobbying and capture are lawful substitutes for traditional forms of

1 Amitai Etzioni, *Political Corruption in the United States: A Design Draft*, 47 POL. SCI. & POL. 141–144. (2014) (hereinafter Etzioni, *Political Corruption*).

corruption such as bribery.² This is the central premise of the literature, examining how institutions, like a legislature, are influenced, and how different tactics are used based on a country's economic development. Some describe lobbying as “an activity that makes bribing irrelevant if it succeeds in influencing policy . . . [,] mak[ing] bribing easier if it succeeds in undermining law enforcement.” Thus, “lobbying can be a substitute for, or a complement to, corruption.”³ If lobbying, and subsequently capture, are both legal substitutes and complements to bribery, then one can see how the first listed definition lacks robustness.

The second definition goes as follows; “an illegal use of public power and resources for private gain...includ[ing] not only or even primarily personal gain, but the deflection of public resources and use of public power to advance the causes of one or more private (special interest) groups.”⁴ This definition includes the idea of *public power or public interest*. This is an important presupposition to make seeing as public officials or civil servants by law are beholden to the public interest and the interests of their broader constituency.

The core here is that a “power-holder”, such as a legislator or a regulator, receives an illegal or extra-legal reward, monetary or otherwise, in exchange for action that favors the private entity that provided the reward. This entails awarding financial compensation, directly or indirectly, to a power-holder in exchange for favorable public policy. In other words, using public resources for private gain at the cost of the public, or against the public interest. This includes, *alia*, regulators creating frivolous barriers to entry for sectors to discourage competition to the benefit of legacy firms.⁵ This is an example of regulatory capture which refers to the ability of regulators to use and diffuse public resources for the benefit of the firms they regulate.

2 Nauro F. Campos, & Francesco Giovannoni, *Lobbying, Corruption, and Political Influence*, 131 PUB. CHOICE 1– 21 (2007).

3 Nauro F. Campos, & Francesco Giovannoni, *Lobbying, Corruption, and Political Influence*, 131 PUB. CHOICE 1– 21 (2007).

4 Etzioni, *Political Corruption*, 142

5 Legacy firm being a firm that is already well established in a particular industry.

The job of regulators, naturally, is to serve the public first rather than private firms. When a legislator or regulator consistently engages with the functions of their positions in a way that is unnecessarily costly to the public, one can consider this institution to be corrupt.⁶

The third definition; is “encompass[es] the use of public power and resources for legal but illicit (some write “unethical”) purposes.”⁷ Over the past several decades, things that would have otherwise been considered both illegal and corrupt behavior have become normalized in past decades. In *Buckley v. Valeo*, 424 U.S. 1 (1976), The Court determined restricting independent candidate expenditures would be a direct restriction on political speech.⁸ Following *Citizens United v. Federal Elections Commission* U.S. 310 (2010),⁹ The Court ruled against restricting labor unions and corporations’ donation limits for campaigns.¹⁰ Both cases created legal avenues for corruption to occur, by incentivizing politicians to seek out corporate backing and making it harder for the courts to identify what is and is not corrupt behavior. These cases made what was once considered illegal and unethical, an influx of money from special interests, protected under the first amendment. It is because the law allows for corruption to occur that traditional definitions of corruption are circumvented.

Illegal use of public office for private gain still occurs in politics, such as bribery and blackmail, which is using leverage (political and otherwise) to extort favorable results. These forms of blatant corruption are less common in high-income countries and are exchanged for more

6 Sidney A. Shapiro, *The Complexity of Regulatory Capture: Diagnosis, Causality, and Remediation*, 101 ROGER WILLIAMS U. L. REV. 221–258 (2012) (hereinafter Shapiro, *Complexity of Regulatory Capture*).

7 Warren, M. (2006). *Political Corruption as Duplicious Exclusion*. 39 POL. SCI. & POL. 803-807 (2006). doi:10.1017/S1049096506060975

8 Etzioni, *Political Corruption*.

9 Abby K. Wood, *Learning from Campaign Finance Information*. 70 EMORY L. J. 1091–1142, 1091 (2021) (hereinafter Wood, *Learning from Campaign Finance*).

10 Etzioni, *Political Corruption*.

subversive forms such as lobbying and capture.¹¹

Regulatory capture, and lobbying, are not included in the first definition due to their insufficiency in addressing the question of the objective functions of certain offices, and the legality of certain crimes when those in these positions misuse them. Campos and Giovannoni identify lobbying as a substitute for bribery, where in most cases lobbying is found to be more effective than bribery.¹² If the courts can agree that bribery is illegal and considered to be morally abhorrent, then it would be logical to assume that a practice such as lobbying, which is both a substitute and a complement for bribery, would and should be thought of in the same way. Policymakers in collusion with corporate entities can use these mechanisms to maintain legal carve-outs that allow them to continue engaging in corrupt practices.

For the purpose of this review, I use a combination of Etzioni's second and third definitions. Each is more comprehensive than the first but in different ways. Thus, I feel the need to use both in discussing corruption. Corruption here is defined as the illegal or legal means of using public resources for private gain.

Lobbying

With the definition of corruption established, it is time to outline the methods by which it occurs. Lobbying is the broadest mechanism by which corruption can occur. To understand how this happens, it is necessary to contrast and compare lobbying with its “evil” counterpart, bribery. Primarily because to understand why lobbying allows for corruption to occur one must first understand how it functions differently from its predecessor bribery. Both bribery and lobbying are “rent-seeking”¹³ ac-

11 Campos, N.F., Giovannoni, F. *Lobbying, corruption and political influence*. *Public Choice* 131, 1–21 (2007). <https://doi.org/10.1007/s11127-006-9102-4>.

12 Campos, N.F., Giovannoni, F. *Lobbying, corruption and political influence*. *Public Choice* 131, 1–21 (2007). <https://doi.org/10.1007/s11127-006-9102-4>.

13 Manipulating the social or political environment to increase one's wealth without creating anything new.

tivities that attempt to achieve influence over legislators.¹⁴ However, the two differ in one keyway, bribery attempts to circumvent existing laws and regulations by providing a monetary reward to the legislator, or a person with some kind of authority, office, or ability to exchange services for the bribe. The purpose of lobbying, however, is different in that it aims to change existing laws or regulations to better benefit the firm, or group of firms, that are engaging in lobbying. In other words, changing the rules instead of circumventing them.¹⁵

Early courts in America deemed lobbying both a corrupt, and corrupting practice. “It involved the sale of what should be unsellable, [this being] the citizenship privilege of petitioning government”, “corrupting, because lobbyists would necessarily be looking for ways to give favors to lawmakers to get their clients’ goals achieved.”¹⁶ Despite the courts’ explicit statements that lobbying could be a corrupt activity that they themselves would not participate in, they still did not feel convicted to make the distinction between legal services and corrupt lobbying. After Buckley, The Court’s definition of corruption was narrowed tremendously.¹⁷ Citizens United further exacerbated the situation, claiming only to include only “explicit deals”, “cut[ting] off... any broader political philosophy about the obligation to serve public ends in public offices.”¹⁸ In other words, public interest was no longer of foremost concern. Buckley established money as speech, and Citizens United made unions, corporations, and non-governmental organizations equivalent to individuals by law.

14 Bård Harstad & Jakob Svensson, *Bribes, Lobbying, and Development*, 105 AM. POL.SCI. REV. 46–63, 46 (2011).

15 Bård Harstad & Jakob Svensson, *Bribes, Lobbying, and Development*, 105 AM. POL.SCI. REV. 46–63, 46 (2011).

16 Zephyr Teachout, *The “New” Corruption and the Unhelpful Supreme Court*, 76 PUB. ADMIN. REV. 12–13, 12 (2016).

17 Zephyr Teachout, *The “New” Corruption and the Unhelpful Supreme Court*, 76 PUB. ADMIN. REV. 12–13, 12 (2016).

18 Zephyr Teachout, *The “New” Corruption and the Unhelpful Supreme Court*, 76 PUB. ADMIN. REV. 12–13, 12 (2016).

“The Court ruled that money is speech, and therefore speech and giving money are protected under the constitution. Corporations were considered to have the same status as all other citizens, the only difference being that their free speech largely comes from what they can spend.”¹⁹

Corrupt lobbying comes in the form of money which can be divided into two categories. Gray money is money that has passed through, a corporation, a venture capital firm or hedge fund, or a foreign government. Then transferred to a non-profit, lobbying firm, or strategic consulting firm. Dark money is grey money that has been passed through two or more non-profits, lobbying firms, or strategic consulting firms. The idea of ‘dark money’ which Wood defines as “the anonymous political spending facilitated by gaps in our campaign finance disclosure laws after Citizens United.”²⁰ Dark money has accounted for about 1 billion dollars of campaign finance since the case.²¹ Undisclosed money in politics is, arguably, the primary means by which corruption occurs.

Grey money allows corporations to make independent campaign contributions, and donations from an individual’s wallet, such that existing disclosure laws would not apply to them.²² For instance, if a person works for a corporation, like an LLC or a 501(c)(3) organization, he or she can bypass disclosure law by routing their campaign contributions through the firm. It is in this way that policymakers and lobbyists launder and conceal any money that they think may indicate a conflict of interest and prove disfavorable for outcomes on bills and policies for firms. The money that flows through these firms into SuperPACs, political committees, or other non governmental organizations (NGO) are

19 Rebecca C. Martinez, Unit 9: Political Participation: Political Parties and Elections (Oct. 29, 2021) (lecture notes, delivered by Orin Kirshner at Florida Atlantic University) (on file with author).

20 Abby K. Wood, *Learning from Campaign Finance Information*. 70 EMORY L. J. 1091–1142, 1091 (2021) (hereinafter Wood, *Learning from Campaign Finance*).

21 Abby K. Wood, *Learning from Campaign Finance Information*. 70 EMORY L. J. 1091–1142, 1091 (2021) (hereinafter Wood, *Learning from Campaign Finance*).

22 Kenneth P. Vogel & Shane Goldmacher, *Democrats Decried Dark Money. Then They Won With It In* 2020, THE NEW YORK TIMES, <https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html> (last modified Aug. 21, 2022).

what is known as “Dark money”; this is money that is untraceable and has no origin other than an NGO or PAC.²³

The only way to rectify this situation would be to close the gaps in existing disclosure law making it possible to trace every dollar of campaign finance back to its original source. The argument against this approach is that creating more, specific, disclosure laws would unconstitutionally discourage speech. However, a system with a lack of disclosure regulation allows for corruption and comes at a cost to the public. Disclosure laws are politically salient for voters, without them, it is more difficult to understand the intentions, motivations, and characters of individuals, and make decisions on whom they should vote for. “Voters glean much more information from disclosures than the Court envisions.”²⁴ Disclosure improves, or “enhance[s] voter competence”; “[i]t is not just the information contained in the disclosures that informs voters[, but also] the quality of the disclosures themselves, and the amount of information disclosed, [that] provide additional information.”²⁵ The quality of disclosure now available to the public is not sufficient to curb endemic corruption in the United States. This is primarily because, in the case of lobbying, there are still legal avenues for undisclosed finances to remain undisclosed.

Dark money is of great benefit to lobbyists and policymakers because lobbyists can use funds that would otherwise not be able to be used, and policymakers are, in turn, able to receive private donations from people who would otherwise not donate to their campaign for optical reasons. Wood cites deterrence theory when explaining the benefits of more robust disclosure laws stating, “deterrence theory teaches us [that] when the probability of detection increases, the likelihood of realizing the costs associated with being caught violating the rules also increases. In turn, the net benefit of breaking rules decreases.”²⁶ Here

23 Kenneth P. Vogel & Shane Goldmacher, *Democrats Decried Dark Money. Then They Won With It In 2020*, THE NEW YORK TIMES, <https://www.nytimes.com/2022/01/29/us/politics/democrats-dark-money-donors.html> (last modified Aug. 21, 2022).

24 Wood, *Learning from Campaign Finance*, 1102.

25 Wood, *Learning from Campaign Finance*, 1102.

26 Wood, *Learning from Campaign Finance*, 1111.

Wood illustrates an inverse relationship between levels of disclosure and levels of illicit money and corruption that appear in political campaigns. Improving existing disclosure laws has the potential to curb levels of endemic corruption that occur in the United States.

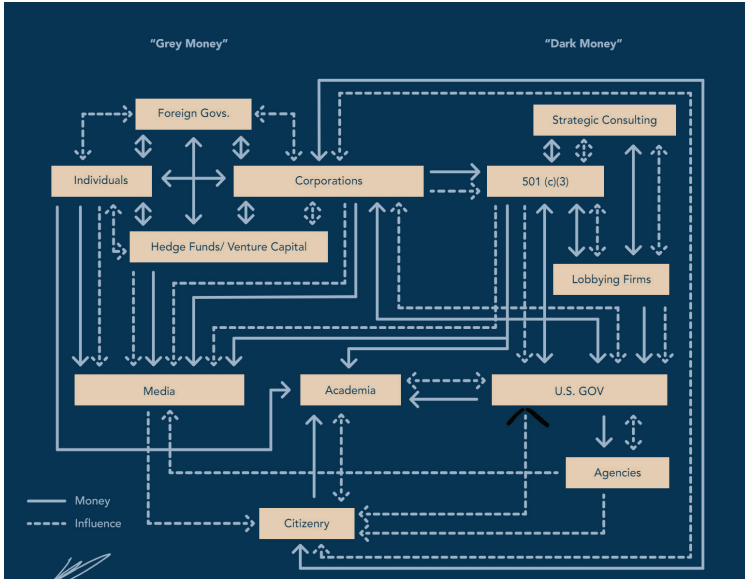


Figure. 1 *Simplified Illustration of the flows of money and influence in US politics and the sources of Dark and Grey Money.*

Capture

Regulatory capture is the phenomenon that occurs when a regulated entity, a firm or group of firms, in a specific sector, has undue influence over the regulatory agency. For this paper, I define capture as a regulatory body that consistently passes a policy that results in favorable outcomes for firms that are subject to its regulation.²⁷ This results in a situation where existing firms can shape the regulatory landscape for their own benefit or to increase barriers to entry for new firms. Regulatory capture is “the way . . . regulated interests influence their regulators to unjustifiably weaken regulation of their activities, at the expense of the

²⁷ Shapiro, *Complexity of Regulatory Capture*.

broader public interest.”²⁸

Capture is commonly viewed as a dichotomous phenomenon,²⁹ this is incorrect. It is more appropriate to look at capture on a spectrum. There are levels of how ‘captured’ a regulatory body may be. One side being completely captured and the other completely independent from the firms they regulate. Whether or not an agency suffers from capture is not clear-cut. It is likely that most regulatory bodies lie somewhere between these poles.

It is the assumption that a firm’s private interest will always be to avoid as much regulation as possible, where a regulatory body cannot serve the interests of firms and the public simultaneously, the assumption is, that they are contradictory to one another.³⁰ This does not mean that if a regulatory agency enacts any regulation that favors a regulated entity we consider the agency to be captured. Therefore, only consistent efforts that favor regulated entities constitute capture. Some policy that favors a regulated entity can have little to no effect on the public.³¹ Moreover, there is a stark distinction between capture and a regulatory body simply responding to the public or policymakers.³² Hypothetically, if there was a situation where the energy price was so high that the public suffered, especially for those who make an already unlivable wage, due to public

28 Justin Rex, *Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remediating Capture*, 14 REGUL. & GOVERNANCE 271-294, 271 (2018) (hereinafter Rex, *Anatomy of Agency Capture*).

29 Justin Rex, *Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remediating Capture*, 14 REGUL. & GOVERNANCE 271-294, 271 (2018) (hereinafter Rex, *Anatomy of Agency Capture*).

30 Justin Rex, *Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remediating Capture*, 14 REGUL. & GOVERNANCE 271-294, 271 (2018) (hereinafter Rex, *Anatomy of Agency Capture*).

31 Justin Rex, *Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remediating Capture*, 14 REGUL. & GOVERNANCE 271-294, 271 (2018) (hereinafter Rex, *Anatomy of Agency Capture*).

32 Justin Rex, *Anatomy of Agency Capture: An Organizational Typology for Diagnosing and Remediating Capture*, 14 REGUL. & GOVERNANCE 271-294, 271 (2018) (hereinafter Rex, *Anatomy of Agency Capture*).

pressure for a response, a regulatory body may enact policies that allow energy providers to operate with fewer restrictions to produce energy at a lower cost. An especially pro-business Congress or President could also cause a regulatory body to enact policies favorable to firms. Neither situation would make the regulatory agency considered captured.

The FDA, when approving drugs for sale in the market, tends to favor older, larger, and more, or better, established firms, simply because these firms have a stronger reputation and closer relationship with the agency, due to previous interaction. Neutral regulators can favor larger and older firms and create more barriers and obstacles to entry for smaller, less established firms.³³ This is important to acknowledge because it prevents misdiagnosing an agency as being captured. The model has one flaw: it does not account for the fact that regulatory agencies will not always act rationally. Perverse incentives baked into the structure of the government can cause these regulatory bodies to function irrationally.

Regulatory capture is broken into four factors: lobbying, political salience, institutional design, and intellectual capture.

The primary reason that firms have a stronger political voice, over the mass public, is due to their increased political organization and homogenous political beliefs.³⁴ Compounded by the monetary and intellectual wealth of firms, results in intense lobbying pressure on an underpowered and underpaid regulator.³⁵ This concept is especially evident in the case of the market crash of 2008. In the late 90s and early 2000s, the banking sector was subject to very little regulation.³⁶ For this reason, banks were able to find creative ways in which to cut and repackage risky assets so that they disguise them as lower-risk securities

33 Daniel P. Carpenter, *Protection Without Capture: Product Approval by a Politically Responsive, Learning Regulator*, 98 AM. POL. SCI. REV. 613-631 (2004).

34 Shapiro, *Complexity of Regulatory Capture*.

35 Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT'L AFF. 647-663 (2010) (hereinafter Baker, *Restraining Regulatory Capture*).

36 Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT'L AFF. 647-663 (2010) (hereinafter Baker, *Restraining Regulatory Capture*).

for immense profits. Subsequently, increased profits and financial booms led to the increased credibility of the bank's models by regulators, which created a positive feedback loop between the public, the banks, and the regulators. The banks' increased power due to financial success, the lack of public support for regulation due to a booming economy, and the lack of a motivated regulator due to the unprecedented financial success provided the necessary conditions for capture to occur. The public desired regulators to allow banks to continue with these unsustainable practices to maintain the financial boom, unaware that the practices would most likely end in a catastrophic crash. Increased profits in the banking sector caused their political influence over regulators to increase, allowing the banks to hamstring regulators from taking a deeper look into their models and practices.³⁷ As these practices continued, the market became increasingly unstable, leading eventually to mass liquidation of assets, causing intense drops in asset prices. The bailouts of the banking sector came at a massive cost for the American taxpayer, leaving thousands of once middle-class Americans homeless.³⁸ The bailouts were structured so that the banks were made whole while debt-ridden homeowners were left out to dry, many of whom had to foreclose or go bankrupt.

The second mechanism that plays a role in regulatory capture is the political salience of a particular subject. The financial crisis of 2008 serves again as an example. During financial boom periods, the political salience of financial regulation is at its lowest. This was the case up until the crash of 2008. Due to increased profits and low mortgage rates, the public had little incentive to pay attention to the unsustainable practices that the banks were engaging in. Since the public is kept happy, this kept pressure off the banks, allowing them to continue to lobby against

37 Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT'L AFF. 647–663 (2010) (hereinafter Baker, *Restraining Regulatory Capture*).

38 Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT'L AFF. 647–663 (2010) (hereinafter Baker, *Restraining Regulatory Capture*).

any reforms that may cause a decrease in profits.³⁹ This defangs the regulatory agency, in this case, the Securities and Exchange Commission (SEC), because both the banks and the public are incentivized to push for deregulation.

The third mechanism of capture is institutional design and the revolving door phenomenon.

The Deepwater Horizon oil spill in 2010 was the largest marine oil spill ever recorded. It came at an immeasurable cost to the public for both the mess on the beaches and the great ecological damage. The agency that was responsible for regulating this sector was the Minerals Management Service (MMS). This case is interesting because it is an example of a regulatory agency exhibiting symptoms of capture without the direct influence of the firms that it regulated. Instead, the cause for regulatory failure was due to the institution's design itself. The MMS operated under a dual mandate system which allowed it to lease land for drilling and collect profit, while also being responsible for drilling safety.⁴⁰ This created a situation where the agency was captured due to its incentive structures and institutional design,⁴¹ meaning essentially that the agency was captured by itself. The incentive structures were designed in a way that the agency favored the industry unequivocally but was under no pressure from regulated entities.

The revolving door phenomena is “the flow of people between public and private sectors in both directions, leading to ‘colonization’ of regulatory agencies and dysfunctional incentive structures for regulators.”⁴² A majority share of policymakers in the United States come

39 Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT'L AFF. 647–663 (2010) (hereinafter Baker, *Restraining Regulatory Capture*).

40 Rex, *Anatomy of Agency Capture*.

41 Rex, *Anatomy of Agency Capture*.

42 Andrew Baker, *Restraining Regulatory Capture? Anglo-America, Crisis Politics and Trajectories of Change in Global Financial Governance*, 86 INT'L AFF. 652, (2010) (hereinafter Baker, *Restraining Regulatory Capture*).

directly from a corporate management background.⁴³ According to public choice literature, officials at an agency will act out of self-interest.⁴⁴ Regulators are incentivized to pass pro-business regulations in exchange for promises of lucrative careers once they leave the agency.⁴⁵

Goldman Sachs is a great example, where many alumni of the firm now hold positions in the U.S. Federal Reserve and the Treasury.⁴⁶ This mechanism of capture essentially makes an entire regulatory body bogged down by conflicts of interest that hamstring the regulatory process and come at great cost to the public, resulting in events like the 2008 recession. In this situation, the white-collar workforce, who were the driving factor behind the crash, were bailed out and returned to business as usual, while a large portion of middle-class Americans were uprooted from their homes and forced to bear the financial consequences caused by the banking sector and a lack of regulation.

The fourth, and final mechanism, is intellectual and cognitive capture. This mechanism is more nuanced and subversive than the other three because it is indirect. Cognitive capture is to convince a regulator that a regulated entity can regulate itself.⁴⁷ This can occur when regulated entity personnel have a strong enough personal relationship with the personnel of a regulator so that they can shape the thinking and mindset of a regulator. This, again, is true for the market crash of 2008. The strong relationship between the banks and the SEC, due to the increased credibility following years of financial success meant that the banks were able to shape the mindset of the SEC, to the point of allowing them to adhere only to their own risk models.⁴⁸ Because the SEC believed that the success was a result of smart banking, they were further disincentivized from regulatory intervention.

43 Thomas J. McCormick, *America's Half-Century: United States Foreign Policy in the Cold War*: Second Edition (1989).

44 Shapiro, *Complexity of Regulatory Capture*.

45 Baker, *Restraining Regulatory Capture*.

46 Baker, *Restraining Regulatory Capture*.

47 Baker, *Restraining Regulatory Capture*.

48 Baker, *Restraining Regulatory Capture*.

Closing

Lobbying and capture are still not fully understood given that empirical research on the two is so difficult. Still, efforts need to be made to understand the two mechanisms and the larger phenomena of corruption. Empires throughout history have suffered from corruption and all met their end, at least in part, because of it. The U.S. will be no different if it does not adjust course. Bad actors, whether they be rival states or individuals, will leverage the corruptibility of the system to their own benefit. Corruption comes at cost to the country as a whole and its people. It is unsustainable long-term, eventually the masses will become fed up with the status quo and rebel. In the short-term corrupt practices can yield huge rewards for the very few who are able to take advantage. Long-term, corrupt practices destroy the very system that made those practices possible. Catastrophic implications like in the fall of Rome and the French revolution will ensue. This paper does not do corruption its full justice, but attempts start the groundwork for future empirical research. To solve a problem one must know about its existence, this paper is the first step in solving the problem of corruption. Curbing it will be an immense task, as mentioned, disclosure will be one aspect, but much more will have to be done to assess what other legal changes must be made to truly eliminate the problem of corruption.

The Constitutional Fabric: Impeachment, Presidential Immunity, and Legal Precedent

RYAN LANG-ANTONOPOULOS

ABSTRACT

This article investigates the complex structure of constitutional law surrounding impeachment and presidential immunity within the framework of the United States Constitution to argue why presidents cannot act outside the confines of the law. Beginning with the foundational principles outlined by James Madison and expanded on with landmark cases like *Marbury v. Madison* (1803) and *Burr v. United States* (1807), how constitutional interpretation has evolved and how the courts have played a role in maintaining the rule of law is examined. The Supreme Court has also defined the bounds of presidential immunity in cases such as *Nixon v. United States* (1974) and *Clinton v. Jones* (1997) and further with ongoing cases like *Trump v. U.S.A.* (2024). Dissecting legal doctrines and significant Supreme Court rulings regarding historical impeachments emphasizes the imperative nature of presidential accountability and the immutable principle that no one, not even the president, is above the law. This includes Andrew Johnson, Richard Nixon, Bill Clinton, and Donald Trump. These impeachment occurrences show how such events impact the executive powers that the President wields and further the legislative and judicial branches. The article's purpose is twofold: to elucidate the importance of the impeachment procedure as a safeguard against executive overreach and to allow an understanding that presidents are subject to the law, as shown by the Supreme Court and precedent-setting cases. Through rigorous analysis, the article serves to preserve democratic ideals and focus on an enduring practice of maintaining the rule of law in the American political landscape.

Introduction

The question of impeachment and presidential immunity stands at the cornerstone of constitutional law and political theory, where legal precedent and an American notion of judicial review are rooted in the United States Constitution.¹ James Madison, often regarded as the “Father of the Constitution,” played a pivotal role in the founding governance of America. He believed that the purpose of the Constitution would be fixed over a “regular course of practice” in a process he referred

1 *Constitution of the United States*. U.S. Senate: Constitution of the United States. <https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution.html>.

to as liquidation.² This concept ascribes that the Constitution would be unhurriedly altered and refined as a living document that would evolve and adapt through practical application. With the addition of amendments to the Constitution, it is further important to understand the judicial interpretation of the law from the Supreme Court. Portrayed by *Marbury v. Madison* 5 U.S. 137 (1803)³ was the Supreme Court's authority to interpret both congressionally enacted laws and the Constitution, laying the groundwork for the judiciary to protect constitutional principles and uphold the rule of law.

This enters into the notion of impeachment law, surrounded by constitutional debate, mirroring ongoing discussion about the premise of presidential power, the balance of authority among government branches, and the application of legal doctrines in holding government officials accountable. As per *Article II, Section 4* of the *U.S. Constitution*,⁴ "The President, Vice President and all civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."⁵ The latter of that quote invokes an understanding that refers to misconduct and abuse of power that can undermine by Alexander Hamilton, impeachments are "of a nature which may with peculiar propriety be denominated political, as they relate chiefly to injuries done immediately to the society itself."⁶

The Framers of the Constitution deliberately included impeachment as an instrument for assessing presidential authority to preserve

2 Legal Information Institute. (n.d.). *The power of impeachment: Doctrine and practice*. Legal Information Institute.

3 *Marbury v. Madison* (1803). National Archives and Records Administration. <https://www.archives.gov/milestone-documents/marbury-v-madison> .

4 *Article II, Section 4*. Legal Information Institute. (n.d.-a). <https://www.law.cornell.edu/constitution/articleii#:~:text=Section%204.,other%20high%20crimes%20and%20misdemeanors.>

5 *Article II, Section 4*. Legal Information Institute. (n.d.-a). <https://www.law.cornell.edu/constitution/articleii#:~:text=Section%204.,other%20high%20crimes%20and%20misdemeanors.>

6 *The Federalist Papers: No. 65*. The Avalon Project: Federalist no 65. (n.d.). https://avalon.law.yale.edu/18th_century/fed65.asp

the character of the federal government. The House of Representatives⁷ initiates impeachment proceedings. Once approved, the Senate votes on whether the incumbent should be expelled from office based on a two-thirds majority vote.⁸ Impeachment stands as a constitutional precaution against executive abuse of power. Presidents must uphold the nation's Constitution to the absolute fullest as elected by the American people. By citing the Constitution and rulings from the Supreme Court, this article aims to sustain the argument that the president is subject to the law. It attempts to provide a broader awareness of the legal implications surrounding the President by offering a thorough explanation of presidential immunity, impeachment, and judicial precedents.

Presidential Immunity

Within the complex tapestry of the U.S. Constitution, conditions involving presidential immunity stand as critical aspects of American governance. In the case of *Nixon v. Fitzgerald* 457 U.S. 731 (1982)⁹, Justice Powell argued that the president is "entitled to absolute immunity from damages liability predicated on his official acts."¹⁰ This delivers a broad interpretation of executive privilege. Richard Nixon was entitled to absolute immunity from civil suits to preserve the integrity of the executive branch. This statute gave the president the belief to act with impunity, as if to be protected from the outcomes of their actions. However, this does not equip the incumbent with free reign exceeding the law. It is important to recognize that the Constitution and Supreme Court decisions place clear limits on presidential power and provide mechanisms for accountability. Although the president retains certain powers, such as the power to grant pardons, these powers are not absolute and subject to statutory limitations.

7 House of Representatives. <https://www.house.gov/>

8 Legal Information Institute. (n.d.). *The power of impeachment: Doctrine and practice*. Legal Information Institute.

9 *Nixon v. Fitzgerald*. (1982). <https://www.oyez.org/cases/1981/79-1738>

10 *Nixon v. Fitzgerald*. (1982). <https://www.oyez.org/cases/1981/79-1738>

Subsequent judicial pronouncements displayed by the Supreme Court¹¹ ruling in *Clinton v. Jones* 520 U.S. 681 (1997)¹² stressed the doctrine of presidential immunity further by denying assertions of immunity from civil litigation for actions undertaken before assuming office. Setting a precedent that the commander-in-chief was above the law and must be held legally accountable within the confines of the Constitution. This plays into the case of *Trump v. Vance*¹³, when Donald Trump pushed to stop a subpoena, asserting he was immune from state criminal proceedings as president. The Supreme Court ruled that the incumbent president does not have full immunity from state criminal subpoenas.

Correspondingly to that notion, in *United States v. Burr*, 159 U.S. 78 (1895)¹⁴, Chief Justice John Marshall determined that President Thomas Jefferson may be called as a witness in Vice President Burr's trial for treason. This is relevant because it provides a precedent that the president can be subject to a subpoena in federal criminal proceedings and is not immune from such acts. This follows the hearing of *Trump v. United States*, Dkt. No.23A745 (2024),¹⁵ President Trump claims that he has immunity from criminal prosecution that occurred in office and that his acquittal by the United States Senate renders the pursuit of such unqualified because he was not found guilty by the Senate. However, the Court makes the argument that the Constitution “does not explicitly provide immunity to sitting or former presidents,” further adding that a president “may be in-

11 *Supreme Court of the United States*. <https://www.supremecourt.gov/>

12 Legal Information Institute. (1997, May 27). *Clinton v. Jones*, 520 U.S. 681 (1997). <https://www.law.cornell.edu/supct/html/95-1853.ZS.html>

13 Legal Information Institute. (2020, July 9) *Trump v. Vance*. <https://www.law.cornell.edu/supremecourt/text/19-635>

14 *Arron Burr v. United States* 25 F. Cas. 55 (C.C.D. Va. 1807). National Constitution Center – constitutioncenter.org.

15 *President Donald Trump v. United States of America*. Docket No. 23A745. (2024). Supreme Court of the United States (.gov).https://www.supremecourt.gov/DocketPDF/23/23A745/300576/20240214121000117_23A745%20Trump%20v.%20USA_Amicus%20Brief.pdf

dicted and punished” after “commit[ting] crimes against the state.”¹⁶ The Court clarifies that a President who is no longer in office can be involved in a case arising from events that happened while in office.

Similarly, the claim of immunity for former presidents is as follows: in *Nixon v. Fitzgerald*, a sitting president may have immunity from damages and responsibility that does not go to criminal prosecution.¹⁷ The court holds that “there is no basis for immunity of a former president from criminal prosecution.” In compar immunity from damages and civil liability, though this does not extend to criminal prosecution involving a former president and expressing that a former president has no constitutional foundation to be immune from prosecution. ison, an incumbent president enjoys immunity from damages and civil liability, though this does not extend to criminal prosecution involving a former president and expressing that a former president has no constitutional foundation to be immune from prosecution.

In the larger context of presidential responsibility and immunity, the case of *Morrison v. Olson* 487 U.S. 654 (1988)¹⁸ provides legal precedence. The Supreme Court’s decision supported the constitutionality of the *Independent Counsel Reauthorization Act of 1987*¹⁹ (repealed in 1999), which authorized a special prosecutor to investigate government officials. This included the president for suspected misbehavior, as was done in the impeachment proceedings against President Bill Clinton with the appointment of independent counsels, such as Kenneth Starr. While the statute no longer exists, its interpretation of presidential powers remains a major precedent. This case examined how the executive branch will be held accountable for its activities. It spurred other judicial inquiries to

16 *President Donald Trump v. United States of America*. Docket No. 23A745. (2024). Supreme Court of the United States (.gov), [https://www.supremecourt.gov/DocketPDF/23/23A745/300576/20240214121000117_23A745%20Trump %20v.%20USA_Amicus%20Brief.pdf](https://www.supremecourt.gov/DocketPDF/23/23A745/300576/20240214121000117_23A745%20Trump%20v.%20USA_Amicus%20Brief.pdf)

17 *Nixon v. Fitzgerald*. (1982). <https://www.oyez.org/cases/1981/79-1738>

18 *Morrison v. Olson*, 487 U.S. 654 (1988). Justia Law. <https://supreme.justia.com/cases/federal/us/487/654/>

19 *Independent counsel*. National Archives and Records Administration. <https://www.archives.gov/about/laws/independent-counsel.html>

confirm that the president and all government officials are susceptible to legal scrutiny.

The Impeachment of President Andrew Johnson

Following the 16th President Abraham Lincoln's assassination in 1865, President Andrew Johnson took over the White House as the 17th president. He blundered heavily with Congress, governed by Republicans, and overtly suppressed reconstruction initiatives in the South. He vetoed legislation such as the *Civil Rights Act of 1866*,²⁰ which granted citizenship and rights to all persons born in the United States. As well as the *Freedmen's Bureau Act*,²¹ which President Abraham Lincoln signed into law in 1865 to facilitate the transition from slavery to freedom for millions of African Americans. Johnson further fueled tensions between the executive and legislative branches when he transgressed the *Tenure of Office Act of 1867*²² and kicked Secretary of War Edwin Stanton out of office, omitting permission from the Senate. He argued that the act barred his presidential freedom to appoint and remove members of his cabinet. The House of Representatives provoked impeachment inquiries into President Johnson on February 24th, 1868. Eleven articles of impeachment were adopted. Of the eleven, nine impeachment allegations included his violation of the Tenure of Office Act. Johnson also breached two additional constitutional standards governing presidential power. However, the Senate acquitted Johnson after failing to convict him, falling short of the two-thirds majority by one singular vote.²³ The impeachment of President Johnson was not just a legal technique but also the pinnacle of the American government's authority, emphasizing the problems between

20 *Civil Rights Act of 1866*, "an Act to protect all persons in the United States in their civil rights, and furnish the means of their vindication." National Constitution Center.

21 *Freedmen's Bureau Acts of 1865 and 1866*. U.S. Senate: Freedmen's Bureau Acts of 1865 and 1866. (2023, August 8). <https://www.senate.gov/artandhistory/history/common/generic/FreedmensBureau.htm>

22 *Impeachment trial of President Andrew Johnson*, 1868. U.S. Senate: Impeachment Trial of President Andrew Johnson, 1868.

23 *Impeachment trial of President Andrew Johnson*, 1868. U.S. Senate: Impeachment Trial of President Andrew Johnson, 1868.

rival branches of the American political structure. While Johnson's acquittal represents a missed opportunity for accountability, it underlines the enduring significance of dialogue and cooperation among government officials.

The Watergate Scandal and Nixon's Impeachment

The impeachment proceedings of the 37th President Richard Nixon amidst the Watergate Scandal²⁴ was one of unprecedented parallel. It occurred on June 17th, 1972, when a group of individuals broke into the Democratic National Committee (DNC) Headquarters at the Watergate Complex in Washington, D.C. The men involved planned to acquire documents and intel on the opposing candidacy. They were ultimately arrested for their conduct, and their purported links to the president's re-election campaign team sparked national attention. Instead of being upfront about the scandal, Nixon opted to cover it up, although he was not directly involved. The Federal Bureau of Investigation (FBI)²⁵ investigated this matter, and the conventional understanding of Nixon's conviction became apparent. This prompted the House to summon impeachment charges against Nixon. The *United States v. Nixon* 506 U.S. 224 (1974)²⁶ case answered whether Nixon had the executive authority to withhold White House tapes from a prosecutor investigating the Watergate scandal. These recordings included crucial information on Nixon and his advisors, notably discussions about Watergate and the cover-up. Nixon had installed auto-recording software in the White House to record his conversations. As a result, the prosecution subpoenaed the tapes for evidence. However, Nixon refused to disclose the tapes. Nixon claimed he had executive privilege, which averted this type of action, arguing that conversations between him and his advisors are confidential information the executive branch preserves.

24 *Watergate*. FBI. (2011, July 8). <https://vault.fbi.gov/watergate/>

25 *FBI Records*. FBI. (2011a, January 18). <https://vault.fbi.gov/>

26 *Nixon v. United States*, 506 U.S. 224 (1974). Legal Information Institute. (1993, January 13). <https://www.law.cornell.edu/supct/html/91-740.ZS.html>

"Citing Executive Privilege, the White House argued that releasing private recordings by one branch of the U.S. government to a separate, co-equal branch of the U.S. government, and then making those recordings public, would infringe on the constitutional system of checks and balances and refused to release the tapes."²⁷

When this issue reached the Supreme Court, they acknowledged that presidential privilege exists; nevertheless, it is not absolute and must follow the rule of law. The court ordered Nixon to release the recordings. This was known as the "smoking gun" tape. Following this disclosure, Nixon faced impending expulsion by impeachment. The articles of impeachment were *Article I: Obstruction of Justice* for being defiant in the Watergate investigation, *Article II: Abuse of Power* for misusing federal agencies, and *Article III: Defiance of Subpoenas* for denying documentation that he was required to disclose.²⁸ "In all of this, Richard M. Nixon has acted in a manner contrary to his trust as President and subversive of constitutional government, to the great prejudice of the cause of law and justice, and the manifest injury of the people of the United States."²⁹ Nixon took it upon himself to avoid impeachment by resigning from office in unprecedented fashion on August 8, 1974, evoking Vice President Gerald Ford to assume command of the White House. President Gerald Ford would subsequently pardon Nixon in a contentious move roughly one month after Nixon's resignation.³⁰ This case demonstrated that no one has precedence over the law. Despite Nixon's assertions of executive privilege, the Supreme Court effectively established accountability on the principles of legal candor in the *United States v. Nixon* case.

27 *Watergate Explained*. Richard Nixon Foundation. (2022, August 9).

<https://www.nixonfoundation.org/watergate-explained/>

28 *Articles of impeachment*. Watergate.info. (1974a, January 27). <https://watergate.info/impeachment/articles-of-impeachment>

29 *Articles of impeachment*. Watergate.info. (1974a, January 27). <https://watergate.info/impeachment/articles-of-impeachment>

30 *Nixon Pardon*. Gerald R. Ford Presidential Library and Museum. (1974). <https://www.fordlibrarymuseum.gov/library/exhibits/pardon/pardon.asp>

Clinton v. Jones and Impeachment

The Supreme Court heard the case *Clinton v. Jones* 520 U.S. 681 (1997) in 1997.³¹ In 1994, a former employee of Bill Clinton, Paula Jones, filed a lawsuit alleging that he had abused her while he was governor. Clinton's legal defense asserted that the sitting president should not be subjected to civil lawsuits while in office because it would distract him from his duties and contravenes constitutional immunity. In a unanimous judgment, the Supreme Court ruled against Clinton, maintaining that he was not immune from civil lawsuits arising from previous behavior. The court reaffirmed that he is susceptible to lawsuits and the authority of law.

In addition, just because a citizen issues a subpoena against the president doesn't hinder the president from carrying out their duties as required. The president has various privileges while in office; however, immunity from civil actions based on official obligations is not immunity according to the courts. Meaning the ruling assured that a position of authority does not offer a pedestal of power to use against the laws of society.³² However, stemming from this lawsuit, evidence emerged indicating that Bill Clinton had an affair with Monica Lewinsky, a White House intern. Clinton refuted this accusation under oath during a deposition, stating that he had no sexual interactions with her. The Independent Counsel Kenneth W. Starr investigated matters related to Clinton, which exposed the information that Clinton was involved with Lewinsky after a recorded conversation between Lewinsky and a confidant was investigated.³³ Later on, Clinton confessed to the grand jury that he did have sexual relations with Monica Lewinsky. This prompted the House of Representatives to compose articles against Clinton. The articles were as follows: *Article I: Perjury Before the Grand Jury*, *Article II: Perjury in a Civil Deposition*, *Article III: Obstruction of Justice*, and *Article IV: Abuse of Power*. The House voted on charges that Clinton had committed

31 Legal Information Institute. (1997, May 27). *Clinton v. Jones*, 520 U.S. 681 (1997). <https://www.law.cornell.edu/supct/html/95-1853.ZS.html>

32 Legal Information Institute. (1997, May 27). *Clinton v. Jones*, 520 U.S. 681 (1997). <https://www.law.cornell.edu/supct/html/95-1853.ZS.html>

33 Legal Information Institute. (1997, May 27). *Clinton v. Jones*, 520 U.S. 681 (1997). <https://www.law.cornell.edu/supct/html/95-1853.ZS.html>

perjury and obstructed justice. However, on February 12, 1999, the Senate acquitted Clinton.³⁴ A Republican senator named Richard G. Luger voted to convict the president on both charges because the president “lied to a federal grand jury and worked to induce others to give false testimony.”³⁵ However, another Republican senator named Olympia Snowe voted to acquit on both charges because there was “insufficient evidence of the requisite untruth and the requisite intent.”³⁶

There were complaints for lack of merit in these impeachments for the accusations laid by the House because he was later cleared by the Senate – which was controlled by Democrats who voted in accordance with party politics, particularly to keep their incumbent president in power. This case and the impeachment procedures are current examples of how constitutional ideals are tested and protected, reinforcing that judicial scrutiny and transparency are essential to the president's office and the country.

Modern Implications: Donald Trump’s Impeachments and the Balance of Powers

Through a modern lens, there is an example of the extent of presidential power in the boundaries of the executive and the impeachment mechanisms, even though executive privilege in the context of Nixon was examined. The breadth of presidential immunity was detailed in the contents of Bill Clinton and President Andrew Johnson’s case. Donald Trump, the 45th president of the United States, had two unprecedented impeachments. His impeachments during his tenure of office sparked debate about the balance of power within the government and the degree

34 Library of Congress. (n.d.-b). Artii.s4.4.8 *President Bill Clinton and impeachable offenses*. Constitution Annotated. https://constitution.congress.gov/browse/essay/artII-S4-4-8/ALDE_00000696/

35 Library of Congress. (n.d.-b). Artii.s4.4.8 *President Bill Clinton and impeachable offenses*. Constitution Annotated. https://constitution.congress.gov/browse/essay/artII-S4-4-8/ALDE_00000696/

36 Library of Congress. (n.d.-b). Artii.s4.4.8 *President Bill Clinton and impeachable offenses*. Constitution Annotated. https://constitution.congress.gov/browse/essay/artII-S4-4-8/ALDE_00000696/

of executive authority. His first impeachment came from a phone call he conducted with President Volodymyr Zelenskyy of Ukraine. During this conversation, Donald Trump asked questions about his opponent in the 2020 U.S. Election. “At the time of the call, the Office of Management and Budget had frozen \$400 million in military aid to Ukraine at the direction of the President.”³⁷ The House of Representatives initiated their impeachment inquiry into the president. At the same time, the White House objected to such proceedings, due to the investigation lacking “the necessary authorization for a valid impeachment proceeding.”³⁸ After a series of hearings, the Committee investigating the President decided on two articles of impeachment. First, *Article I: Abuse of Power* in using Ukraine to interfere with the 2020 U.S. Election, where he “engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit.”³⁹ The second article charged Trump with *Article II: Obstruction of Congress* for “unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives,”⁴⁰ where he allegedly abused the powers of the office. Donald Trump was later acquitted in the Republican-controlled Senate on a vote of 48-52 for *Article I* and 47-53 for *Article II*.⁴¹

37 *President Donald Trump and impeachable offenses*, (n.d.). Legal Information Institute. <https://www.law.cornell.edu/constitution-conan/article-2/section-4/president-donald-trump-and-impeachable-offenses>

38 *President Donald Trump and impeachable offenses*, (n.d.). Legal Information Institute. <https://www.law.cornell.edu/constitution-conan/article-2/section-4/president-donald-trump-and-impeachable-offenses>

39 *President Donald Trump and impeachable offenses*, (n.d.). Legal Information Institute. <https://www.law.cornell.edu/constitution-conan/article-1/section-3/president-donald-trump-and-impeachable-offenses>

40 *President Donald Trump and impeachable offenses*, (n.d.). Legal Information Institute. <https://www.law.cornell.edu/constitution-conan/article-2/section-4/president-donald-trump-and-impeachable-offenses>

41 *President Donald Trump and impeachable offenses*, (n.d.). Legal Information Institute. <https://www.law.cornell.edu/constitution-conan/article-2/section-4/president-donald-trump-and-impeachable-offenses>

The second impeachment against Donald Trump occurred due to the Capitol protest on January 6, 2021. At the federal U.S. Capitol building, a number of Trump supporters interfered with the legislative validation of the 2020 U.S. presidential election. Due to this incident, the House of Representatives drafted new articles of impeachment against Trump. The article was *Incitement of Insurrection*.⁴² It addressed the events that preceded the events of January 6th, during which the president said several times that there would be electoral fraud for which he was the legitimate winner. Due to this unprecedented situation, Donald Trump was impeached by the House before he departed from the White House but was later acquitted by the Senate after he had left office. This made him the first President to face impeachment twice. There was more to this second impeachment as it also touched on the application of the First Amendment.⁴³ Trump's lawyers argued that what Trump said at his rallies was "core free speech under the *First Amendment*."⁴⁴ The House impeachment directors touted back that "The First Amendment has no application in an impeachment proceeding" and further that the First Amendment would not "protect President Trump's calls to violence." After this stormy event, Trump was acquitted in the Senate on a vote of 57-43.

These impeachments show the importance of the rule of law and presidential accountability. This demonstrates even more how impeachment is an infrequent yet distinct implement that guarantees legal doctrine and keeps the executive branch answerable. The impeachment process is not straightforward. It requires conclusive evidence of wrongdoing and adherence to legal principles. Despite the demanding nature of impeachment, politicians in the Senate tend to align their views with those of their party leader irrespective of charges brought by the House.

42 *President Donald Trump and impeachable offenses*, (n.d.). Legal Information Institute. <https://www.law.cornell.edu/constitution-conan/article-2/section-4/president-donald-trump-and-impeachable-offenses>

43 *The United States Government*. (2021, January 20). *The Constitution - The First Amendment*. The White House. <https://www.whitehouse.gov/about-the-white-house/our-government/the-constitution/>

44 *FBI Records*. FBI. (2011a, January 18). <https://vault.fbi.gov/>

Although partisan politics hampers impeachment protocol, it is still a safeguard against excessive executive interference and abuse of power. Subjecting elected officials to legal scrutiny or potential removal from office allows impeachment to strengthen the office of the presidency and democratic governance.

Conclusion

In conclusion, precedent and the rule of law have their root in impeachment and presidential immunity. From the republic's founding to the present, the ideas included in the United States Constitution have developed and led to established norms and principles of law. The framers designed the concept of impeachment to prevent abuse of power and hold the executive branch accountable. By examining seminal cases such as *Marbury v. Madison* (1803), *Burr v. United States* (1807), *Nixon v. United States* (1974), *Nixon v. Fitzgerald* (1982), *Morrison v. Olson* (1988), *Clinton v. Jones* (1997), *Trump v. Vance* (2020), and *Trump v. United States* (2024), the Supreme Court clarified the boundaries of presidential immunity or impeachment proceedings based on circumstances that occurred before, during, or after incumbency. The Court demonstrated that no one is above the law, even though presidents have believed otherwise. The impeachment instances involving Andrew Johnson, Richard Nixon, Bill Clinton, and Donald Trump provide evidence of the importance of the rule of law and presidential accountability. Impeachment is essential to maintaining democratic values and securing the White House's integrity, regardless of the political debates surrounding it. Impeachment should serve as a tool – not a weapon – to protect the long-standing dedication of our elected leaders to be accountable and represent the rule of law this country requires while ensuring that the government continues to be of, by, and for the people.

Chinese Foreign Direct Investment, Addressing Structural Issues Within to Combat Threats from Without

HENRY DAVIS

ABSTRACT

US-China relations have become a focal point of American foreign policy in the 21st century. The country is now the most serious threat to Western hegemony since the Union of Soviet Socialist Republics (USSR). However, the threat of China differs greatly from that of Soviet Russia in terms of approach. The USSR chose to operate independently from the US-led world order, whereas China has instead opted to leverage the system from the inside to challenge the US. The primary mechanism by which they have accomplished this is economic. Vast amounts of land, labor, and capital have allowed them to not only be one of the world's biggest exporters of consumer goods but has also allowed them to influence US politics from the inside. The Chinese Communist Party (CCP) has done this primarily through foreign domestic investment (FDI). This paper will examine the US-China relationship and how China has utilized FDI to influence the US. It will then propose a slate of policy options and solutions to address this issue. First, by addressing structural problems in US financial disclosure laws, and second, by using the US power position to leverage China to make policy concessions.

Introduction

China and the United States are opposed in almost every way. The United States is a Western-style, Christian, democratic capitalist republic, and China is a far Eastern, Confucian, authoritarian capitalist republic. The one thing they have in common is capital. Both are, or once were, the leaders in industry across the globe. Since the mid-20th century, China has been slowly building its economic power by taking advantage of the status quo set by a U.S.-led world order. China has used its massive supply of cheap labor to be the preeminent consumer goods manufacturer.¹ Many popular clothing brands, phones, tablets, and

1 Zeihan, P. (2016). *The absent superpower: The shale revolution and a world without america*. Zeihan on Geopoli

computers are, in large part, produced in China.² Companies like General Electric³, Caterpillar⁴, and Microsoft⁵ all have locations in China, both retail and industrial.

Despite China's financial leverage, the country does not seriously threaten the United States. However, this does not mean China could not jeopardize U.S. hegemony in the future. Given the current state of Western politics, the U.S. and its allies may soon face the prospect of a China capable of eclipsing them. This paper examines China's position, U.S. policy toward China, and the structural issues that must change to avoid the prospect of a new, China-led world order. It aims to provide a policy plan for the U.S. in dealing with China by first addressing internal structural problems and then using its superior leverage to extort concessions from Beijing.

Context and Theoretical Approach

Increased foreign direct investment through mergers and acquisitions (M&A)⁶ and greenfield purchases have allowed the Chinese government access to politically powerful individuals within the U.S.,

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- 2 Sestric, L. (2019, November 7). *All-american brands that are actually made abroad*. Yahoo life. <https://www.yahoo.com/lifestyle/american-brands-whose-products-actually-090000490.html>
 - 3 General Electric. (2008, November 4). *GE Aviation's presence in China continues to grow*. GE Aerospace. <https://www.geaerospace.com/press-release/other-news-information/ge-aviations-presence-china-continues-grow>
 - 4 Caterpillar. (n.d.). *Caterpillar in China*. Caterpillar Asia Pacific Locations. <https://www.caterpillar.com/en/company/global-footprint/apd/china.html>
 - 5 Microsoft. (2015, September 23). *About Microsoft's presence in China*. Stories. <https://news.microsoft.com/about-microsofts-presence-in-china/>
 - 6 Tingley, D., Xu, C., Chilton, A., & Milner, H. V. (2015). The Political Economy of Inward FDI: Opposition to Chinese Mergers and Acquisitions. *The Chinese Journal of International Politics*, 8(1), 27–57. <https://doi.org/10.1093/cjip/pou049>

allowing China to influence policy from within.⁷ This paper will propose a twofold approach: first will be closing loopholes in financial disclosure laws within the United States, and second will be using America's leverage to impose costs on China that ensure its continued reliance and relationship with the United States and diminish its power position in the Asian sphere of influence.

U.S. Policy Towards China

The United States and China have had a somewhat passive-aggressive relationship since the end of the Second World War. They have engaged in indirect conflict several times, including proxy wars in both Korea and Vietnam. Loose ties have persisted through these engagements; they have continued to grow due to China's need for access to Western markets and the United States' addiction to cheap Chinese labor and consumer products.

The Nixon Administration set the stage for U.S.-China ties in the modern era. Relations had previously gone relatively cold between the two countries because of proxy conflicts in Korea and Vietnam. Nixon's visit to China in 1972 reopened a previously non-existent dialogue between the two countries that continues today.⁸

Relations continued to warm during the Clinton administration with China's entrance into the World Trade Organization.⁹ Both Bill and Hillary Clinton had a generally close relationship with the country

7 He, L., Jiang, R., & Bennett, M. M. (2020). *The rise of Chinese foreign direct investment in the United States: Disentangling investment strategies of state-owned and private enterprises*. *Growth and Change*, 51(4), 1562–1587. <https://doi.org/10.1111/grow.12440>

8 The Richard Nixon Presidential Library and Museum. (n.d.). *Nixon's trip to China*. *Nixon's Trip to China* | Richard Nixon Museum and Library. <https://www.nixonlibrary.gov/nixons-trip-china>

9 Dusen, L. V. (2020, August 16). *The tragic legacy of Bill Clinton's China doctrine*. *Policy Magazine*. <https://www.policymagazine.ca/the-tragic-legacy-of-bill-clintons-china-doctrine/>

through both official and unofficial channels.¹⁰ It is also reasonably safe to say that the American Democratic Party has strong ties to the regime, given China's contributions to the Democratic National Committee and their fondness for the Clinton campaign in 2016.¹¹

The Bush administration's focus on the Middle East in the aftermath of the attack on the World Trade Center put China in a strategically advantageous position. China had just been granted entry into the WTO and gained unfettered access to Western markets. Additionally, China was not subject to the public's attention like it is today, which allowed it to make moves that may have otherwise been seen as a threat to the United States' interests. China kept its currency pegged artificially low to maintain a sizeable competitive advantage for exports.¹² A bulk of American manufacturing was outsourced to China, which summarily dismantled the United States' industrial base and shrunk the American middle class. During this period, China also took centralized control of all of its state-owned enterprises (SOEs) through the State-owned Assets Supervision and Administration Commission (SASAC).¹³ China consolidated its economic power during the Bush administration, setting the tone for the relationship far into the future.

The Obama Administration was by far the most permissive towards China. Obama's approach was described as "Soft-Glove," not wanting to antagonize China any more than necessary.¹⁴ He saw positive

10 Los Angeles Times. (2002, September 21). 1996 *fund-raising scandals bring stiff penalty*. Los Angeles Times. <https://www.latimes.com/archives/la-xpm-2002-sep-21-na-fec21-story.html>

11 Rogin, J. (2022). *Chaos under heaven: America, China, and the battle for the twenty-First Century*. Mariner Books.

12 Blustein, P. (2019, October 4). *The untold story of how George W. Bush Lost China*. *Foreign Policy*. <https://foreignpolicy.com/2019/10/04/the-untold-story-of-how-george-w-bush-lost-china/>

13 Blustein, P. (2019, October 4). *The untold story of how George W. Bush Lost China*. *Foreign Policy*. <https://foreignpolicy.com/2019/10/04/the-untold-story-of-how-george-w-bush-lost-china/>

14 Rogin, J. (2022). *Chaos under heaven: America, China, and the battle for the twenty-First Century*. Mariner Books.

relations with China as critical to maintaining this legacy. The 2008 recession put Obama in a tenuous position. He needed to appease China to incentivize them to continue holding U.S. assets while simultaneously managing the crash's domestic fallout. China's large ownership stakes in the American financial sector may also partially explain the structure of the bailouts, which is discussed further in the case study section.

The prior two administrations largely determined the nature of the Trump Administration's relationship with China. Trump's China policy aimed to restore the United States' economic independence and re-negotiate loop-sided trade agreements to prevent China from taking advantage of the United States. He sent a shock through the upper levels of the CCP when he won the 2016 presidency. The CCP had expected Hillary Clinton to win and continue the status quo of the Obama Administration.¹⁵ Even though his cabinet has many China hawks like Peter Navarjo and Steve Bannon, Trump was bogged down by the existing framework established long before he came into office. China nullified Trump's approach through backchannels and clever political maneuvers. China has used its immense capital reserves to invest in American enterprises. Insiders in the United States partner with Chinese investors to fund their business ventures in exchange for influence within the government. The money they invest is classified as FDI, which China has used to infiltrate U.S. politics from the inside. American insiders, acting out of self-interest, cannot resist the easy access to Chinese capital.

Chinese FDI: M&A and Greenfield Investments

Chinese FDI has increased dramatically since the turn of the Century. Their investment strategies vary depending on the circumstances. China can launder its investments through private enterprises (PEs) and State-owned enterprises (SOEs). Investments are either mergers or acquisitions (M&A) or greenfield investments. M&A are investments in existing entities like China's investment in private equity giant Black-

15 Rogin, J. (2022). *Chaos under heaven: America, China, and the battle for the twenty-First Century*. Mariner Books.

stone or Fannie Mae and Freddie Mac.¹⁶ Greenfield investments include new facilities or property purchased in the United States. Much of China’s greenfield investment is in agriculture.

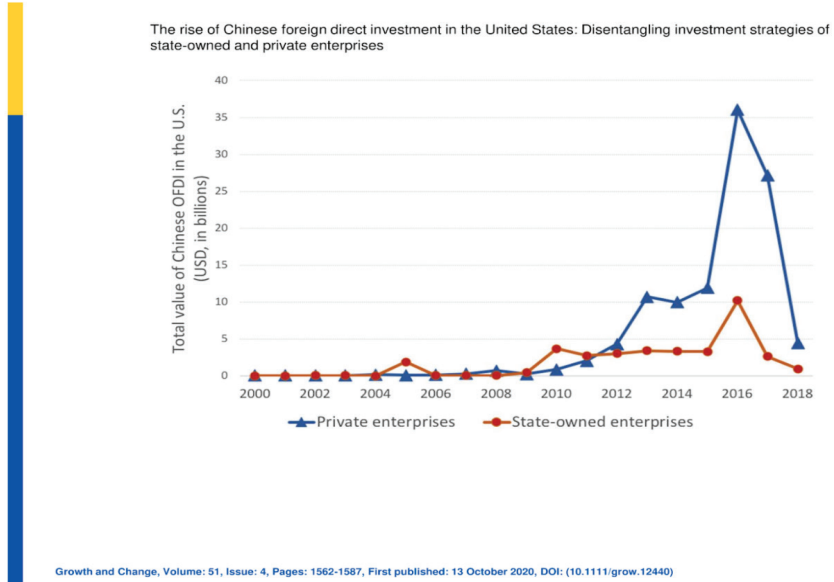


Figure 1: He, L., Jiang, R., & Bennett, M. M. (2020). The rise of Chinese foreign direct investment in the United States: Disentangling investment strategies of state-owned and private enterprises. *Growth and Change*, 51(4), 1562–1587.

The above graphic shows the quantity of Chinese FDI through SOEs and PEs. PEs are the preferable mechanism by which China invests in American projects. PEs allow China to skirt many financial disclosure laws otherwise required for FDI in the United States.

16 Drezner, D. W. (2009). Bad Debts: Assessing China’s Financial Influence in Great Power Politics. *International Security*, 34(2), 7–45. <https://doi.org/10.1162/isec.2009.34.2.7>

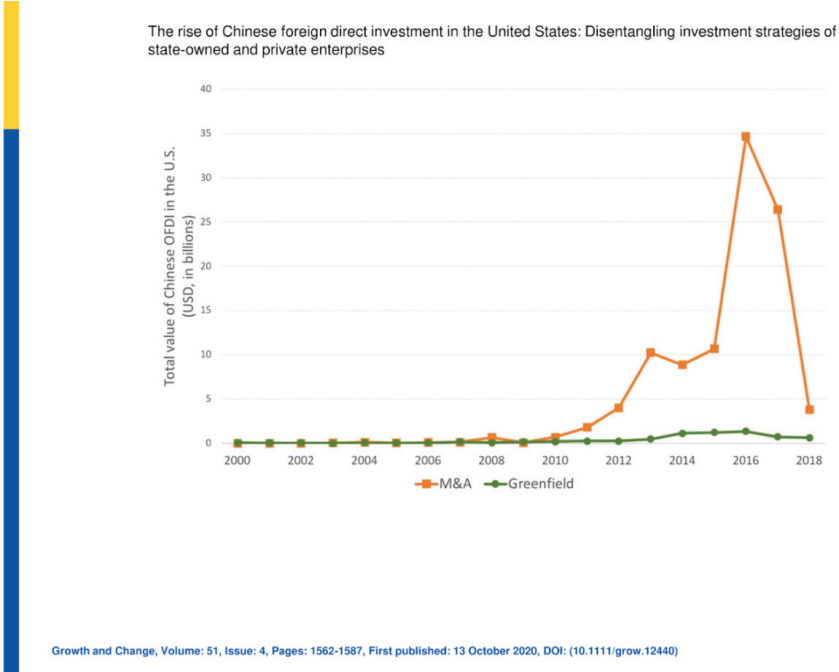


Figure 2: He, L., Jiang, R., & Bennett, M. M. (2020). *The rise of Chinese foreign direct investment in the United States: Disentangling investment strategies of state-owned and private enterprises.* *Growth and Change*, 51(4), 1562–1587.

Figure 2 looks at the categories of Chinese FDI in the United States, M&As vs greenfield projects. Again, one can see a preferred method based on the number of M&As that have far exceeded new greenfield investments.

Much of the greenfield investment seen in the U.S. centers around agriculture.¹⁷ Greenfield projects are more blatant than M&As, drawing more public attention, which Chinese and American officials do not like. The total value of Chinese investment reached an all-time high in 2016 at

17 Tzinova |, A. I., Friedman, R. A., O'Brien, M. V., & Hubner, S. K. (n.d.). CFIUS says Chinese investment in North Dakota agricultural land is outside its jurisdiction: Insights. Holland & Knight. <https://www.hkclaw.com/en/insights/publications/2023/01/cfius-determines-chinese-greenfield-investment-in-north>

around 10 billion.¹⁸

The Political Power of a Creditor

The literature is unclear about how much of an effect China's investment has on power politics generally. To what extent does China's position as a creditor influence power politics, and is it significant enough to seriously threaten U.S. hegemony?

Creditors generally have clear and significant power to leverage policy in developing countries.¹⁹ Corruption, discussed below, also increases the likelihood that FDI will result in political leverage. There has yet to be a real consensus on the exact role of a creditor in the international system. There is ample evidence that high-income creditors exert political power on low-income debtors. However, the extent of high-income creditors' political power over high-income debtors is still unclear. Still, some generally agreed-upon factors determine whether or not the position yields results.

Four main factors determine a creditor's effectiveness in extorting concessions from a debtor state.²⁰ The first factor is other sources of credit. To effectively coerce or extort, the Creditor must be the lender of last resort. The power of this factor is evident in the developing world; the Chinese One Belt One Road initiative and lending from international financial institutions like the World Bank or International Monetary Fund (IMF) are great examples of how creditors can impose conditions on countries that seek credit. In both cases, debtor countries must make

18 He, L., Jiang, R., & Bennett, M. M. (2020). The rise of Chinese foreign direct investment in the United States: Disentangling investment strategies of state-owned and private enterprises. *Growth and Change*, 51(4), 1562–1587. <https://doi.org/10.1111/grow.12440>

19 Omogbemi, S. K. (2021). The Influence of China's Foreign Direct Investment on the Economic and Political Framework of Africa (A Case Study of Nigeria). *Studia Universitatis Babes-Bolyai. Studia Europaea*, 66(2), 93–118. <https://doi.org/10.24193/subbeuropaea.2021.2.05>

20 Drezner, D. W. (2009). Bad Debts: Assessing China's Financial Influence in Great Power Politics. *International Security*, 34(2), 7–45. <https://doi.org/10.1162/isec.2009.34.2.7>

concessions because no other sources of credit are immediately available. The U.S. frequently engages in this behavior in developing countries such as Indonesia, Ecuador, Columbia, Panama, and Iraq. It launders credit through international financial bodies like the World Bank and the IMF with conditions to award contracts to American engineering and construction firms like Bechtel.²¹ China has followed suit using this strategy but incorporated far more state control. “Debt-trap diplomacy” has proven effective in many of these cases because debtor countries have no other sources of financing. Fortunately for the United States, China is not the sole source of credit, so it is unlikely that China’s creditor status to the U.S. will allow them to affect policy this way.

The second factor is the low cost of retaliation; the debtor countries must not be able to retaliate with costly sanctions.²² Economic leverage among great powers is only sometimes successful. Developing countries do not have a sufficient export economy to enact painful sanctions, nor do they have the military might to retaliate in force. In both these regards, the United States has more than enough economic and military power to make this factor null and void.

The third factor is the expectation of future conflict between the creditor and the debtor. In line with the last element, if the debtor country can retaliate, along with a high likelihood of choosing so, the creditor’s ability to force political concessions is low. Again, in this regard, the U.S. not only has an extraordinary ability to retaliate, but tensions between the two countries have never been higher, making the likelihood of direct or indirect conflict much more likely.

The fourth and final factor is a fixed exchange rate, as described by Drezner: “In a fixed rate regime, sender countries can try to provoke a run on the currency, forcing the government to expend its reserves to

21 Perkins, J. (2004). *Confessions of an economic hit man* (1st ed.). Berrett-Koehler Publishers.

22 Drezner, D. W. (2009). Bad Debts: Assessing China’s Financial Influence in Great Power Politics. *International Security*, 34(2), Pg. 19. <https://doi.org/10.1162/isec.2009.34.2.7>

defend par value.”²³ Countries with a floating exchange rate can be pressured in this way, but only if there is an overvaluation of the debtor’s currency. Again, the U.S. is still reasonably safe in this sense. The United States is still seen as a haven for investment and has enough control over its currency to mitigate against overvaluation. Considering these key factors, it indicates that China’s economic leverage will only be marginally effective, and all else will be equal, against the United States.

The Western Corruption Problem

Corruption is a salient factor in determining a creditor country’s effectiveness in extorting political concessions. The definition of corruption is as follows: The legal or illegal use of public resources for private gain. Corruption is a helpful prerequisite for economic leverage to be effective, as corrupt officials are motivated primarily by money. Creditors can exploit these officials by offering lucrative investment propositions or direct payouts. In exchange, corrupt officials use their political power to lobby for policies favorable to the creditor.

Although corruption is hard to measure empirically because most scholars cannot agree on a definition, evidence suggests that levels have risen in the U.S. since the mid-20th century. Numerous mechanisms contribute to corruption levels, two of which are lobbying and regulatory capture. Western societies have become increasingly corrupt, allowing creditor states like China undue influence over their internal politics. If this trend continues, it will not matter how materially powerful the United States or its allies are. China can manipulate politics from the inside out by leveraging bad actors with lucrative business deals. Gaps in financial disclosure laws in the United States have allowed China to launder money into the pockets of American officials in exchange for these political concessions.

For corruption to occur, there needs to be an exchange of resources. In the case of political corruption, money is exchanged for influence. Individuals in positions of power leverage that power for financial gain at the expense of the public. This phenomenon has plagued American

23 Drezner, D. W. (2009). Bad Debts: Assessing China’s Financial Influence in Great Power Politics. *International Security*, 34(2), 7–45. <https://doi.org/10.1162/isec.2009.34.2.7>.

politics for decades and is the primary threat to its hegemony. Endemic corruption causes states to act irrationally, leaving them vulnerable.

Undisclosed finance in Western politics fuels corruption. American politics harbors two types of undisclosed finance: gray money, originating from gray money entities, and dark money, stemming from dark money entities.²⁴

Gray money is defined as finances that flow directly from gray or dark sources to entities or individuals inside or around the government. These usually come as direct campaign contributions or lucrative business deals. Politically or economically powerful individuals, private equity funds, hedge funds, venture capital operations, multinational corporations, and foreign governments are all gray money entities. Money is shuffled between these entities and then funneled into government in exchange for a favorable policy for each party.

Dark money is gray money that has passed through two or more dark money entities. These entities include strategic consulting firms, lobbying firms, or 501(C)(3) non-profit organizations like PACs, think tanks, or private foundations.

Gray money, although problematic, is less insidious than dark money because it can be vaguely traced back to its source. Still, internal exchanges between gray money entities make it nearly impossible to trace the money back to an individual. Despite this is much easier for the public to deduce who and why cash is awarded in the case of gray money. For example, Ron Desantis, Governor of Florida, took over two thousand dollars from the American Bankers Association in October of 2017. It is impossible to trace that money back to an individual bank, but the motivations behind the donation are apparent.

In the case of China, a contemporary example of gray money involves Ivanka Trump and her business ventures.²⁵ China exchanges financial support or favorable business arrangements with Ivanka's clothing brand in return for policy concessions. Ivanka, a senior advisor in the Trump cabinet, not only held a formal position with the president

24 Wood, A. K. (2021). *LEARNING FROM CAMPAIGN FINANCE INFORMATION*. Emory Law Journal, 70(5), 1091-1142.

25 Rogin, J. (2022). *Chaos under heaven: America, China, and the battle for the twenty-First Century*. Mariner Books.

but also wielded informal influence due to her familial ties with Trump. Ivanka was granted 18 patents for items manufactured in China.²⁶

Dark money is completely untraceable, and its origins stop right where they begin. The source disappears once money has flown from a gray entity through two or more dark money entities. Most of the money in U.S. politics today is either dark or gray. At the time of her writing, Wood notes that dark money has accounted for one billion dollars of campaign finance since the *Citizens United* case in 2010.²⁷ Because of its nature, it would be extremely difficult to measure how much dark money comes from whom and even harder to find concrete examples of these funds being transferred. One can surmise that these funds are indeed flowing, but from whom, where, and for what is impossible to know given the current regulatory landscape.

Case Study: 2008 Crash

During the Great Recession of 2008, China actively used its economic power to extract political concessions. The crisis underscored the “U.S. dependence on continued Chinese capital inflows.” China had an increasingly extensive portfolio of American investments before the crisis. Treasury bills, municipal and agency bonds, and equity in American companies like Fannie Mae, Freddie Mac, and Blackstone.²⁸ Collectively, these holdings amounted to a multibillion-dollar portfolio of dollar-denominated assets. China wanted to maintain the value of its portfolio and ensure continued access to American markets. As a significant policy concession, the United States placed Fannie Mae and Freddie Mac under state conservatorship to effectively safeguard them from insolvency with government support. China also got frequent briefings from the Treasury Department during the crisis.

26 AP News. (2021, April 20). China grants 18 trademarks in 2 months to Trump, daughter. AP News. <https://apnews.com/article/0a3283036d2f4e699da4aa3c6dd0172>.

27 Wood, A. K. (2021). LEARNING FROM CAMPAIGN FINANCE INFORMATION. *Emory Law Journal*, 70(5), 1091-1142.

28 Drezner, D. W. (2009). Bad Debts: Assessing China’s Financial Influence in Great Power Politics. *International Security*, 34(2), Pg. 31-39. <https://doi.org/10.1162/isec.2009.34.2.7>

Although China could not secure explicit guarantees from the U.S., it could still impose legitimate costs on the United States' business. Despite not extracting as many political concessions as some experts anticipated, China successfully influenced policy to some extent. The Chinese issue likely affected the structure of recovery policy, specifically bailouts. The large amount of Chinese holdings in the American finance sector meant that allowing big banks to go under would pose severe problems for China. The 2008 crash is just the start; China will continue to poke and prod until another opportunity arises to use its leverage, this time more effectively. Looking forward, the more pronounced a crisis will be, the more effective China's leverage over U.S. policy will be. Making policy moves to mitigate and reduce this leverage will be essential as the geopolitical landscape becomes increasingly fraught.

Policy Options and Analysis

The U.S. has several options regarding a policy position. Some have merit, some don't. This is not an exhaustive list, but it outlines three general pathways the United States could take to deal with Chinese influence via foreign direct investment.

Status Quo

First and foremost is the status quo, continuing to appease China while gorging on cheap consumer products and a seemingly limitless supply of investment for American business. This strategy may work for a while but will inevitably end badly for the United States. Eventually, the debt burden will get so high that China will be forced to collect in one way or another. China will leverage corrupt officials; the U.S. will pay by compromising national security. China may feel that its only choice is to engage with the U.S. militarily. They are not likely to engage in outright conflict but would use proxy conflicts to undermine U.S. positions in the South Pacific and, in the worst case, the Western hemisphere. The U.S. would have no legitimate diplomatic will to end China's encroachment on the U.S. sphere of influence, forcing military action. China will slowly bloodlet the United States with proxy conflicts until it eventually collapses.

Outright Ban on FDI

The second option would be to ban all Chinese foreign direct investment under the auspices of National Security. Doing so would solve the economic leverage problem by no longer allowing politically influential individuals, corporations, and hedge funds to continue taking money or materials from China in exchange for political concessions or to lobby for a particular policy position.

It solves the problem on the surface level but would pose problems not only in its implementation but would be too disadvantageous for the U.S. to be a viable option. Although Many do not like to admit it, doing business with China is vital to the United States. Access to markets is one thing, but keeping China in the fold is the most important. Cutting off ties with China would not only deal a devastating blow to the country but leave them desperate and alone. It could put China in such a bind that they take rash action. Even setting that prospect aside, cutting ties would also deal an unnecessary blow to the United States. Tensions would be higher than ever as relations become unreconcilable, and aggregate capital would drop dramatically, forcing rapid economic contractions.

Additionally, logistical issues for this course of action would make it untenable. China's approach to FDI is both public and private. Banning investment for SOEs would be reasonably straightforward, but doing the same for PEs sponsored by China would be impossible. Not only are there constitutional issues with restricting a PE's ability to invest, but distinguishing state-sponsored PEs from those operating independently will not be effective.

Financial Disclosure

The third avenue is a twofold approach, which this paper advocates for. It involves closing loopholes in financial disclosure rules and adding additional disclosure requirements for Dark and Grey money entities engaged in politics. Then, it uses America's superior geostrategic and economic position to impose strict conditions on China to curb authoritarianism, reduce civil rights abuse, and limit Chinese influence in the East.

Sunlight is the best disinfectant; in the case of political corruption, disclosure is that sunlight. Adequate disclosure ensures that every dollar exchanged between political actors, grey and dark money entities,

is accounted for. Disclosure eliminates dark money from politics by making flows of capital public information. Not only does this discourage corruption, but it also improves voter competence, which translates directly into effective policy. If voters can better understand and track these flows, they will better understand the loyalties and motivations of their respective representatives, voting accordingly.

Once adequate disclosure is implemented, it is time to deal with China in phase two. Of course, it will take time to cycle out corrupt candidates compromised by China, likely one or two election cycles. Once corrupt officials have been removed and new representatives are elected or appointed, phase two can begin.

China needs the United States more than the United States needs China. Policymakers have been bogged down by Chinese influence, inhibiting the U.S. from using its position of power. Once this influence is eliminated, the U.S. can unleash its soft power on China as it does in many other places. Imposing conditions on China is the first step, followed by implementing targeted sanctions and tariffs until political concessions are made. China will be forced to cow-tow to the United States to ensure regime stability because of the high cost of U.S. sanctions. From here, the U.S. can do what China has been doing to the U.S. for all these years—Force China to reform from within, using transparency instead of secrecy. For China to maintain its much-needed relationship with the Western world, it must reform, increase human rights, decrease authoritarianism, and eliminate its revisionist goals. Failure to do so will not be an option for China if it wants to maintain the current regime.

Implementation

The primary mechanism for disclosure is auditing. The intricacies will need to be fleshed out by a carefully assembled legal team, but it will likely involve rigorously auditing grey and dark money entities engaged in political spending. Auditing can be done through the Federal Elections Commission(FEC), which must increase its budget to audit these entities effectively.

Phase two will involve a comprehensive dialogue between the U.S. Administration and Beijing. Boundaries and conditions will have to be decided by Washington and then agreed upon by Beijing. If China is not cooperative, policymakers will have to impose costs on China that maximize damage and minimize impacts on the United States.

Conclusion

Understandably, this relatively short article needs to give the issue of Chinese influence on U.S. politics the justice it deserves. It aims to outline the main problem and provide a cursory solution. More research must be done on the implementation logistics and gathering the political will to get legislation voted on. How the U.S. decides to proceed will have severe implications for world politics. Continuing the status quo will harm the United States and could ultimately bring the country down.

The U.S. is on solid footing at the moment. This footing will not be permanent if the United States does not proactively take steps to deal with China. Our current trajectory will lead to a new Chinese-led world order. An order where the ideals of a representative government are null and void, replaced by totalitarian control by party-states. It will be the job of the next generation of American diplomats and business leaders to change that trajectory.

LAW and CRIME

True Crime Media: The Effects and Ethical Implications of Sensationalism

ISABELLA WEBER

ABSTRACT

The true crime genre has become increasingly popular, depicting real crime stories through media such as television shows, documentaries, and podcasts. While true crime media can bring awareness towards certain cases and help in delivering justice, the genre raises significant ethical concerns when these stories are presented in a sensationalized manner, prioritizing emotionally charged content over accurate reporting of facts. This paper explores the ethical concerns raised by sensationalized true crime media for its lack of required consent may lead to violations of victims' rights, exploitation of vulnerability, and reinforcement of negative stereotypes. These ethical dilemmas are also discussed in the context of their legal implications as consumers of true crime media can develop unrealistic perceptions of crime and the justice system, affecting their judgment and decision making as potential jurors. This paper highlights the need for recognition of the significant effects of true crime media on viewers, victims, and the criminal justice system as a whole while considering the implications of real case stories being presented in a dramatized fashion using sensationalist tactics.

True crime is a genre of media that involves analyzing and describing certain elements of real life crimes. The genre has continued to grow in popularity as it allows consumers to become invested in and follow along with these cases as they unfold. In their attempts to explain these stories with factual accuracy, producers of true crime media often implement sensationalist tactics as they seek to entertain their viewers and provoke emotional responses. Sensationalism is a method of presenting information in a way to attract the most consumers by including certain word choices and thrilling details intended to evoke an emotional response. However, the use of sensationalist tactics can serve to exaggerate or diminish the accuracy of the information being presented, affecting those included in the story as well as potential consumers. In this paper, I will argue that the sensationalist nature of true crime media for entertainment purposes raises ethical concerns as well as having an effect on its viewers and the victims of these crimes.

The true crime genre raises ethical concerns for its violation of

the right of publicity by using victims' names and stories for commercial media without their consent. Although the law is not universally recognized in many countries, the right of publicity is an intellectual property right that protects individuals from the use of their name, likeness, or other identity indicators being used without their consent for trade purposes. One article describing how the right of publicity ought to be universally accepted outlines that, "any depiction, positive or negative, without consent of the individual whose likeness is being used constitutes a violation."¹ True crime media may uphold that they are respecting the dignity of the victims by portraying them in a positive light, but this distinction does not serve to absolve producers of their violation of victims' right of publicity if they did not initially ask them for consent to use their name or likeness. Other than the right of publicity, there are little to no regulations protecting victims from the use of their names or identifying features in media productions that aim to retell their story for commercial entertainment purposes. For instance, in America, only around half of the states recognize the right of publicity either as its own right or encompassed within other state laws. In the states without explicitly outlined right of publicity protections, certain disputes may serve as precedents for future related cases, but this requires the case to go to court and face the uncertainty of the ruling decision. Because the right is not widely upheld, victims are left in a vulnerable position where their stories can easily be used in the media without their consent or even their knowledge for anyone to consume as producers profit from it.

In addition, producers may even be aware of the fact that the right of publicity is not firmly acknowledged in their country or state and see it as an advantage that they are able to legally commercialize victims' stories without needing consent. This lack of universal recognition of the right of publicity should not entail that it is ethical for someone to violate it as victims can be forced to relive their tragedy without consent or any awareness that it would be adapted into media from which other people are extracting profit. Therefore, regardless of whether or not the media uses sensationalism tactics, the violation of victims' right of pub-

1 Williams, A. (2020). *Shockingly Evil: The Cruel Invasive Appropriation and Exploitation of Victims' Rights of Publicity in the True Crime Genre*. *Journal of Intellectual Property Law*, 27(2), 303–327. <https://digitalcommons.law.uga.edu/jipl/vol27/iss2/6/>

licity through the use of their story without their consent demonstrates an ethical concern within the true crime genre even if the right is not universally protected.

The use of victims' stories by true crime media production companies with or without their consent is a form of exploitation due to the asymmetrical relationship between the two parties from which media producers seek to unethically profit off of. Erik Malmqvist and András Szigeti outline two necessary conditions for an exploitative situation known as the Vulnerability Clause where "the exploitee is vulnerable, needy, or in a weak bargaining position with no access to reasonable or non-prohibitively burdensome alternatives to transacting with the exploiter," and the Advantage Clause where the exploiter uses this asymmetrical relation to extract an excessive or inappropriate gain.² Because there exist limited rights for protecting victims of crime from their names or stories being used for entertainment purposes, they are left with little to no alternative options when contacted by a producer who wants to turn their story into some kind of media adaptation. Since the facts of the case are not the original creations of the producers, they are not subject to copyright laws, so producers can simply use the details of the victim's story that have already been made public without gaining any consent. Producers can also be granted copyright protections over certain dramatized aspects of their true crime media adaptations, such as their own original footage or interviews with people linked to the crime, making it harder for victims to take legal action against how their likeness may have been portrayed. As a result, the victim's already vulnerable position from having been the target of a crime subjects them to even more vulnerability in relation to the producer who wants to use their story for entertainment media. Because media producers can extract profit from victims' vulnerability, this represents the exploitative relationship that occurs within true crime productions which is unethical considering victims have limited options in preventing the media adaptation or dramatization of their story.

The use of sensationalism tactics in true crime media raises ethical issues as it can lead creators to sacrifice accuracy or over-exaggerate

2 Malmqvist, E., & Szigeti, A. (2021). *Exploitation and Remedial Duties*. *Journal of Applied Philosophy*, 38(1), 55–72.

these stories in an attempt to better appeal to potential consumers, and this places an additional burden on victims to ensure reporters are using accurate information. In a study collecting data from multiple P-12 schools regarding how news reports are handled after the event of a school crisis such as shootings or other acts of violence, researchers found that sensationalism was one of the main challenges faced by these schools when dealing with the portrayal of the crisis in the media. The article argues that schools and children can be subjects of sensationalist media reports, and this renders them vulnerable to “negative framing, reporting of misinformation, or manipulative ways of accessing information from children and parents.”³ The media’s interest in these crisis events coupled with their interests in sensationalized reporting attaches the school organizations, students, and families of these students to media reports using their names to spread false, negatively charged information which they may have little to no control over. While reporters are encouraged to receive the consent of individuals whose stories they write about, consent is not required for news outlets to share stories about people associated with certain crimes as long as they do not share private information or misinformation that harms the individual, both of which could have legal consequences. Nevertheless, this protection against reporting of private information is only limited to information about the crime that the local police department decides not to share, which will always vary among cases based on what details they are responsible to inform the public. Additionally, the people included in the report may argue that it is misinformation, but the news outlet may not be subject to any legal consequences if they can prove that there was no malicious intent behind the publication. As a result, sensationalist media reporting of true crime raises ethical implications for how it places an unnecessary burden on these individuals who may have experienced tragedy to deal with the representations of misinformation or inaccurate exaggerations that can be reported without requiring their consent.

True crime media raises ethical considerations because of how displays of injustice can disproportionately affect viewers with high

3 Payne, H. J., Jerome, A. M., Thompson, B., & Mazer, J. P. (2018). *Relationship building and message planning: An exploration of media challenges and strategies used during school crises at the P-12 level*. *Public Relations Review*, 44(5), 820–828.

levels of victim justice sensitivity as opposed to those with low levels of justice sensitivity, and people high in victim justice sensitivity may react negatively towards injustice with the goal of punishing the perpetrator. Justice sensitivity (JS) refers to one's increased tendency to be responsive to and significantly affected by perceived injustices. Victim justice sensitivity is a perspective of justice sensitivity where one feels that they themselves are a victim of injustice, while people with observer justice sensitivity feel that they have perceived injustice.

In a study conducted examining the relationship between justice sensitivity and decisions of punishment in criminal cases, it was found that, "individuals with high victim sensitivity have a stronger desire to punish a perpetrator, whereas individuals with high observer sensitivity have an urge to restore justice by repairing harm between the perpetrator and victim."⁴ Because individuals with high levels of victim justice sensitivity are more likely than others to seek punishment for a perpetrator, true crime media can significantly exacerbate this desire by using sensationalist tactics to evoke a stronger negative reaction towards the criminal. In addition, individuals with high victim justice sensitivity may be more likely to inappropriately perceive something as an injustice when that may not be the case, causing them to unnecessarily retaliate. As a result, when true crime media is sensationalized to over-exaggerate a story, this may serve to inflate the alleged injustice that occurred, warranting a stronger desire for punishment in those with high victim justice sensitivity as opposed to those with low justice sensitivity or observer justice sensitivity. These differences in their desired responses to injustice can have significant legal implications as potential jurors with high levels of victim justice sensitivity may argue that a perpetrator should receive harsher punishment or a longer sentence. Depictions of real life injustices within the true crime genre, whether sensationalized or not, can raise ethical implications in terms of how people with high levels of victim justice sensitivity tend to have stronger desires to punish criminals, and this increased desire to punish perpetrators can serve to influence juror decision making.

Sensationalized true crime media that does not value accuracy

4 Weinberger, Emily C., "Assigning Legal Punishment: Individual Differences in Justice Sensitivity and Selective Attention" (2015). *Honors Projects*. 28.

can have ethical implications in society as a whole by establishing and reinforcing negative stereotypes towards certain social groups. The article “ ‘He Just Snapped’ ” outlines a study comparing data from over 20 years of cases where children are murdered by their parents to examine the prominence of gender-related bias presented in reports. It states that news reporting of filicide and infanticide often fails to recognize the full context of these murders, such as the potential for postpartum psychosis, and may reinforce a myth “that violence by fathers is implicitly of no fault of their own, certainly not articulated as ‘evil’ as it is in the case of mothers.”⁵ By failing to recognize the complexities of the murder, certain media reports further gender bias myths that serve to excessively villainize mothers while treating fathers with compassion. Although this gender biased reporting style may have resulted from one’s belief in certain stereotypes that already exist towards mothers or women in general, this consistent pattern observed in the media represents how this stereotype can be reinforced, especially if the contextual factors that may have led up to the murder are not considered. In addition, in cases where both parents share responsibility for the murder, the media still does not equally place blame or negatively portray the father in the same way as it does the mother. In these cases, the woman is seen as more violent and deadly than her male counterpart who may have actually contributed more to the murder of their child.

This could significantly affect jury verdicts and sentencing decisions by offering more severe punishment towards mothers who have been portrayed by the news in a disproportionately negative fashion compared to fathers who are equally responsible. Since mothers who kill their children are portrayed much more negatively in the media than fathers who commit the same crime, this reinforces a gender-based stereotype which can affect people’s attitudes towards women in general as it continues to be presented in news reports that also fail to gather the contextual facts about the case. For instance, potential jurors may come across these news reports and fail to recognize the gender bias exhibited in the report, believing them to be accurate representations of the facts of the case. Additionally, news outlets may also fail to realize their reports contain gender bias which would serve to absolve them of the legal con-

5 Niblock, S. (2018). “He Just Snapped.” *Journalism Studies*, 19(16), 2451–2469.

sequences of defamation as they can claim there was no malicious intent behind the publication. Therefore, the way certain social groups are portrayed in sensationalist true crime media raises ethical concerns due to how it can create or reinforce harmful stereotypes that can influence people's attitudes when considering legal repercussions.

The true crime genre can have significant legal consequences by establishing unrealistic expectations of the criminal justice system, affecting jurors' perceptions of forensic evidence and judgments of conviction. The CSI effect is a theory that suggests crime television programs may distort viewers' perceptions of reality, specifically regarding the reality of forensic science and evidence.

A study was conducted to analyze the decisions of mock juror participants who displayed a potential CSI effect, determined by a pretrial screening of their forensic evidence bias. In cases where participants were introduced to a case scenario that used DNA evidence of weak probative value, results found that, "a pre-trial pro-prosecution bias exists which partially predicts how strong a juror will perceive the forensic evidence to be, and in turn how probable they think it is that the defendant is guilty."⁶ Pro-prosecution bias refers to how the CSI effect can make a person have more faith in prosecutors to gather accurate forensic evidence that would prove the defendant's guilt beyond a reasonable doubt. However, in these scenarios where there was reasonable doubt due to weak DNA evidence, those with pro-prosecution bias still perceived the forensic evidence to be stronger than those who did not display pro-prosecution bias. As a result, their decision to acquit or convict the defendant in this case was significantly influenced by their biased perceptions of the strength of forensic evidence in general. This can have significant legal implications as jurors' biases towards the reliability of forensic evidence can impact their decisions or their confidence in their decisions in cases where the forensic evidence is too weak to be the single determining factor of guilt. In addition, their biases are only exacerbated through watching crime television shows, but specifically fictional programs that create unrealistic expectations of the credibility and accuracy of forensic evidence. The

6 Smith, L. L., & Bull, R. (2012). Identifying and measuring juror pre-trial bias for forensic evidence: development and validation of the Forensic Evidence Evaluation Bias Scale. *Psychology, Crime & Law*, 18(9), 797–815.

true crime genre raises legal implications as it can misrepresent certain aspects of the criminal justice system, such as forensic science, resulting in biased jurors who have inflated views on the strength of forensic evidence which then influences their judgment of conviction.

Sensationalist tactics being used in true crime media can raise significant ethical concerns for how cases are selectively chosen for media adaptations which can cause other injustices to be overlooked. In “Fear, Justice, and Modern True Crime,” author Dawn Cecil uses examples from various true crime media adaptations to explain why the genre has grown in popularity and its potential for affecting legal systems. When describing true crime media that focuses on wrongful convictions, she states that, “these extreme examples of injustice can shock people into acknowledging that there is an issue; however, in doing so, more typical instances are overshadowed.”⁷ While stories of wrongful convictions can educate people on flaws within the justice system and help deliver justice in some cases, these stories are strategically selected for true crime media based on their ability to evoke emotional responses from consumers. These stories are also told in a sensationalized manner as the unusual details of the case, which set it apart from most others, are repeatedly addressed and their impacts are over-exaggerated.

Although it would be extremely difficult for every wrongful conviction case to be adapted into a form of true crime media, specific cases being chosen based on the prevalence of shocking details can lead to a lack of awareness about other wrongful conviction cases as the uncommon story grows in popularity. This can significantly affect the wrongfully convicted individuals who have not had their case transformed into popular media by delaying the process of them seeking justice, causing them to spend more time incarcerated for crimes they did not commit. In addition, many wrongfully convicted individuals have been sentenced to death, necessitating more immediate action towards their fight for justice and exoneration. Certain cases made popular by true crime media may also serve to outshadow the efforts of organizations, such as The Innocence Project, that work towards and have helped in freeing other wrongfully convicted individuals. As a result, sensationalism within the true crime genre raises significant ethical implications because of how

7 Cecil, D. K. (2020). *Fear, Justice, and Modern True Crime*. Lynne Rienner Publishers.

cases are chosen for media based on details intended to shock consumers and this can lead to decreased societal awareness regarding more common occurrences of injustice.

The true crime genre raises ethical concerns because of how it can be perceived differently across cultures with varying crime rates, leading certain individuals to disregard the potential negative effects of true crime media consumption. A study was conducted using Colombian participants who live in a culture with a high murder rate and Singaporean participants who live in an area with a low murder rate to compare their thoughts after viewing the same true crime documentary (TCD). When asked if true crime programs should be aired or restricted, “Colombian participants reflect on the social responsibility of TV networks and the need to consider their potential harmful effects on audiences,” while Singaporean participants “would air TCDs as long as they are economically profitable and do not damage the TV network’s reputation.”⁸ While most Colombian participants were sensitive to the effect that true crime media may have on both victims and viewers, many Singaporean participants failed to recognize the potential for true crime to affect society as they were more concerned with economic effects. Because people from cultures with high crime rates are able to realize the effects of true crime that people from cultures with low crime rates could not, this represents a significant cultural difference in consumers’ perception of the genre since those from high crime rate cultures can better understand the real-life consequences of the cases depicted in the media. This cultural disparity can have legal implications when considered in the context of potential jurors who come from various cultures with different crime rates. For instance, those from cultures with high crime rates could approach cases with more empathy and understanding than people from cultures with low crime rates who may not be able to fully comprehend the gravity of the crime that occurred. In addition, the results of the study suggest that people from cultures with high crime rates are more likely to recognize the need for responsible true crime programs that consider their potential effect on viewers and victims which could lead to the enforcement of

8 Soto-Sanfiel, M. T., & Montoya-Bermúdez, D. F. (2023). Consumption of true crimes and perceived vulnerability: Does the cultural context matter? *International Communication*

content restrictions that would incur penalties if certain media did not comply. Consumer perceptions of true crime being significantly affected by cultural differences represents an ethical implication of the genre because of how people from cultures with high crime rates are able to realize the effects of the genre on viewers and victims, allowing them to display greater empathy, whereas those from low crime rate cultures may not fully understand the consequences of the case depicted in the media.

Sensationalist true crime media that values entertainment over accurate reporting can have significant ethical implications for how our society perceives crime and its victims, impacting the criminal justice system as a whole. Often, victims are not consulted before their names and stories are used in true crime media adaptations, and these adaptations may not hold factual accuracy as they might prioritize dramatization over informative storytelling. Consumers may also be affected by sensationalized true crime media in various ways based on the way the crime story is presented, their culture, or their overall sensitivity to injustice.

Notes on Contributors

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NATALIA CAPPELLARO is a rising Sophomore from Miami, Florida who currently attends the University of Florida. Since she could remember, she has always had a keen interest in sports and the law. These passions have transpired from her younger years into her collegiate academics where she is a pre-law student, double majoring in Business Administration and Sports Management. She has channeled these varied interests throughout a plethora of activities in her collegiate career, which includes her work in the University of Florida's Preview staff, Chi Omega's Philanthropy team, Student Legal Services, as well as Florida Athletics' Gator Football and Gator Experience teams. From these various experiences, she has gained a unique perspective and appreciation for collegiate athletics which she ultimately combined with her passion in legal aspects throughout her research supported by the Student Legal Services.

HENRY DAVIS is a senior Political Science student at the University of Florida. His interests include, but are not limited to: corruption, foreign and domestic policy, energy and agriculture systems. He hopes to go to law school in the coming years and eventually work in government helping to develop American public policy.”

ISABELLA WEBER is a third-year student at the University of Florida currently pursuing her bachelor's degree in psychology with a minor in philosophy. She has a passion for forensic psychology research geared towards the effectiveness of criminal rehabilitation methods and reducing the political, social, and cultural stigmas surrounding mental illness. After completing her undergraduate studies, she intends to pursue law school to obtain her J.D. degree with a focus on criminal law and victim advocacy.

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