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Grey Areas in the Higher Education Sector: Legality versus Corruptibility

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Corruption in higher education has long been neglected as an area of research in the United States. Perhaps the relative scarcity of prosecuted cases has made such corruption appear to be a seemingly small problem in the nation’s higher education system, and therefore not significant enough from a researcher’s standpoint to warrant much attention. Because most cases are settled out of court, there is little case law on corruption in higher education. Thus, little to no precedent has been set, which is particularly important for a common law system, such as the U.S. legal system. Another explanation for the lack of attention might be that scholars attended higher education institutions (HEIs), and the majority of those scholars are now employed by colleges and universities. The sense of belonging and close affiliation related to their position in academia may prevent scholars from conducting research on academic corruption. Additionally, the apparent absence of studies about corruption in higher education is an image constructed in both the scholarly community and among the general public because scholars do not use words denoting corruption. Scholars, as well as members of the media, are overly cautious about the language of investigations and usage of such explicit legal terms as “corruption,” “bribery,” and “fraud,” instead choosing to replace them with such terms and euphemisms such as “misconduct” and “breach of integrity.” Finally, the definition of “education corruption” is itself still vague and undeveloped. This vagueness creates uncertainty for prospective research, specifically deciding which approaches and methodologies to employ. The limits of the object of the research (i.e., the locus) also remain unclear for those who wish to study corruption in higher education.
In essence, this paper is a survey and offers general commentary on corruption in higher education. It defines corruption generally, helps to define corruption in higher education in the legal context, and discusses types of corruption in higher education by differentiating between three types of corruption: abuse of academic integrity,\(^1\) corruption in higher education per se,\(^2\) corruption in the higher education sector\(^3\). At the same time, this study looks into so-called grey areas, where acts that are commonly understood as corrupt are not immediately or explicitly qualified as illegal, and challenges the terms of “legality” and “corruptibility” in order to build a better understanding of whether all illegal acts that take place in higher education constitute acts of corruption. Additionally, this paper discusses perspectives on corruption, including legal, economic, social, and moral or ethical responsibility, analyzes records of selected legal cases devoted to corruption in higher education, and discusses trends and practices in the financial industry of educational loans.

II. CORRUPTION IN HIGHER EDUCATION

A. Defining Higher Education Corruption

The research on corruption in higher education is in its infancy. Few attempts have been made so far to theorize corruption in the education sector and to investigate it empirically. Corruption in academia is a global problem.\(^4\)

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1. Academic integrity implies honesty in academic life, including scholarly activities.

2. Higher education per se is built around the processes of teaching and learning and research.

3. Corruption in the higher education sector is more expansive than abuse of academic integrity or corruption in higher education per se. Institutions of higher learning operate numerous other units and facilities including large medical centers, industry oriented research institutes, academic publishing, athletics, and bookstores. From hospitals and construction and development departments to maintenance and supplies, as long as these units are formally included in the universities and operate under their umbrella, they are part of the higher education sector. Therefore, corruption in the higher education sector includes corruption in all of the areas that the institution of higher education controls. The higher education sector is also frequently referred to as the higher education industry.

Nevertheless, a rigorous scholarly investigation into the matter of academic corruption is lacking. Education corruption is detrimental for economic development and growth. The links between economic growth and corruption in higher education in Russia and in Ukraine are established and conceptualized, and the economic impact of higher education corruption on personal income in Central Asia has been investigated quantitatively. In addition, others have drawn some inferences on corruption in universities in the Russian Federation, Azerbaijan, Kazakhstan, Kyrgyzstan, and Georgia, based on interviews. However, no similar work has been done in the United States, and existing research relies heavily on people’s perceptions about corruption rather than facts and hard evidence. The impact of human capital on economic growth can be diminished if educational programs are weak and academic degrees and credentials are bogus.

Higher education corruption remains a definitional problem as well. The definition of education corruption includes abuse of authority for material gain. Education is an important public good, and thus “its professional standards include more than just material goods; hence the definition of education

5. Osipian presents the first comprehensive study of forms of corruption in the US, the UK, and Russia, and finds that economic and structural factors are explanatory in researching the different forms and types of corruption across the nations. Ararat Osipian, Corruption in Higher Education: Does it Differ Across the Nations and Why?, 3 RESEARCH IN COMPARATIVE AND INTERNATIONAL EDUCATION 317, 345-365 (2008), available at http://dx.doi.org/10.2304/rice.2008.3.4.345.


corruption includes the abuse of authority for personal as well as material gain."\(^{10}\) The relativity of the term corruption has been applied to academia:

The notion of a corrupt official or other role occupant exists only relative to some notion of what an uncorrupted occupant of that morally legitimate role consists of. The notion of an academic has at its core the moral ideal, or at least, the morally legitimate role, of an independent truth-seeker who works in accordance with accepted principles of reason and evidence, who publishes in his or her own name only work that he or she has actually done, and so on. So an academic motivated by a desire for academic status who intentionally falsifies his or her experimental results or plagiarizes the work of others is corrupt relative to the ideal or morally legitimate role of an uncorrupted academic. On the other hand, a person occupying an academic position who paid no heed whatsoever to the truth or to principles of reasoning and evidence and who made no pretense of so doing would at some point cease to be an academic of any sort, corrupt or otherwise.\(^{11}\)

The International Institute for Educational Planning (IIEP) defines corruption in education as a "misuse of public office for private gain that influences access, quality, and equity in education."\(^{12}\) Some present a broad social approach to define corruption,\(^{13}\) while others adhere to the legal approach to corruption and apply a narrow definition that regards corruption as such only if it implies illegality.\(^{14}\) National laws differ, and legality and illegality are not universal. Accordingly, there might be not one universal definition of corruption in higher education that would apply equally well to different national systems in different historical periods. Granting access to publicly funded higher education on any premise

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other than academic merit is equated to corruption, as is access to higher education in exchange for a bribe. In the decentralized market-based systems of higher education, gaining access to educational services in exchange for payments is a norm. Depending on the system and legal frameworks laid in the society, certain forms of funding, modes of operation, patterns of behavior, and standards of conduct in higher education may be considered corrupt or non-corrupt. Corruption in higher education is time and place specific, and may be found in public and private colleges.

The solutions that states offer in order to curb corruption are superficial and partial at best, leaving plenty of space for corrupt educators to act. Education vouchers, standardized tests, student loans, and partial privatization of higher education are among the reforms aimed at tackling corruption in the higher education sector. The success of the reforms has yet to be seen. Corruption in higher education becomes institutionalized and develops its own internal hierarchies, resistant to change, and institutional rigidity helps corruption hierarchies in higher education in developing and transition societies. As used in economics, the definition of corruption underlines the role of the state and assumes corruptibility of a government official. However, corruption in higher education presents the need for a more inclusive definition.

The challenge to the understanding of corruption as applied to higher education arises when confronted with cases of


bribery, which can take place in private HEIs as well as public HEIs. The fact that students pay bribes in exchange for good grades independently of the type of HEI urges for more inclusiveness in the definition of corruption. This paper applies the definition of “corruption in higher education as a system of informal relations established to regulate unsanctioned access to material and nonmaterial assets through abuse of the office of public or corporate trust.”

Educators often have incentives to become involved in corrupt activities not due to their natural corruptness or low ethical standards, but due to low salaries. University professors commit corrupt acts in exchange for illicit benefits in order to supplement their income. Indeed, the “feed from the service” way of living in academia can be found throughout the education sector. The opportunistic behavior of professors leads them into conflict of interest and collusion with businesses and political groups. Political graft and education corruption often go hand in hand. This form of collusion perpetuates illicit activities in academia and anticipates benefits for politicians extracted not in monetary form, but in form of academic distinctions, loyalty, compliance, and control. Universities award doctoral degrees to politicians as a sign of respect, often in exchange for patronage, lobbying, and financial support. In fact, the ruling regimes may be interested in corrupt universities for it makes it easier to coerce educators into compliance with the state orders if these

18. Anecdotal evidence from the Former Soviet Bloc indicates that bribery in higher education may be as common in private colleges as in state colleges and universities. See Ararat Osipian, Loyalty as Rent: Corruption and Politicization of Russian Universities, 32 INTERNATIONAL JOURNAL OF SOCIOLOGY AND SOCIAL POLICY (2012) (forthcoming).


educators are involved in corruption.

In Russia, where the judiciary branch is relatively weak, the media pays most attention to bribes paid in exchange for admissions to publicly funded places in HEIs and bribery in the academic process, because these are the most obvious and explicit forms of corruption. Bribes are presumed to have a monetary form, which is traditionally least acceptable and not well tolerated by the society. Conversely, nepotism and cronyism are often overlooked, while these forms of corruption might have more presence in higher education and more impact on the admissions policy than bribes. Forms of corruption in higher education in the United States emphasize state–university relations. Fraud is often the product of grey areas in legislation. At the same time, issues of fraud are relatively easy to move to court, because the state interests are at stake. Therefore, many issues are traditionally decided through the judiciary branch of the government.

B. Corruption as a Grey Area

A grey area is a term used to describe terms that are unclearly defined, or a border that is hard or even impossible to define, or where a dividing line tends to shift. A grey area signifies a problem of sorting reality into clearly cut categories. In legal terms, a grey area is an area where no clear legislation or precedent exists, where it is not clear whether the existing rules are applicable to specific cases and to what extent. A grey area of legislation, as applied to particular industries, sectors, market segments, or areas of social life, signifies an ethical dilemma where the border between corrupt and non-corrupt activities is vague.

The term “grey area” has been used in addressing the economics of corruption. Although economics have advanced significantly in modeling corruption, it experiences difficulties in testing the models due to the lack of large and reliable data.

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datasets. Whatever problem economists might have in explaining corruption is indicated by the definition of corruption as an "allocative mechanism" for scarce resources. The state monopolizes certain allocative functions, be it permissions and licenses, or access to public services. State officials' profiteering is based on abuse of their discretionary powers and monopolistic positions. Some scholars propose a "new . . . explicitly micro-founded definition of corruption":

[Corruption] is viewed as a collusive agreement between a part of the agents of the economy who, as a consequence, are able to swap (over time; we present a repeated game) in terms of positions of power (i.e. are able to capture, together, the allocation process of the economy). This is the idea underlying high-level corruption or "influence", and is broader than the notion of bribery, which corresponds to a particular sharing pattern of the joint payoff from the referred relationship.

The challenge to the domain of bribery in the issues of corruption, however, does not eliminate grey areas that exist in both legislation and scholarly work. Grey areas in legal scholarship and in economics reflect on legislation and the national economy, respectively, and overlap. Tax evasion and fraud as key characteristics of shadow or unofficial economy are good examples of such an overlap. At least two scholars, Georgy Petrov and Paul Temple, have critiqued the grey area notion:

[We find unconvincing the proposition that there exists a continuum from "honest" to "corrupt" behaviour. Such a continuum implies a "grey area". The example given at a recent conference on corruption in education of such a "grey area" was the practice of some US universities of giving the children of alumni preference in admission procedures (Hallak and Poisson, 2002). This example simply adds to our doubts about the "continuum" notion: one may judge this to be an undesirable way of managing university admissions, but a stated institutional policy, presumably adopted with the

26. Rose-Ackerman, at 2.
intention of in some sense benefiting the institution as a whole, cannot, we suggest, sensibly be classified as corrupt.\cite{28}

Clearly, Petrov and Temple are against the notion of grey area. They consider the notion of “honest” as the opposite to “corrupt” and accept these two as the only existing conditions.\cite{29} This paper agrees with the notion of legality and illegality as applied to the problem of corruption, yet considers it necessary to accept the fact that not all types of corrupt activities or forms of corruption are embedded in the national legislations. Furthermore, the legal lens is perfectly applicable to corruption in education, but not sufficient to understand and reflect on the complexity of the issue. The broad scope of the problem explains the vagueness of its borders.

### III. TYPES OF CORRUPTION IN HIGHER EDUCATION

Corruption in higher education is an emerging subfield in the loosely-defined scholarly field of education policy. United States-based scholars have produced few works on the issue of higher education corruption. But while rigorous systematic scholarly research of this issue is lacking, the media has been more generous in its coverage of specific cases of higher education corruption. The news media frequently reports on “blatantly wrongful conduct” in the world of academia.\cite{30} What exactly is this blatantly wrongful conduct that may be found in American colleges and universities?

Higher education corruption should be separated into three categories: corruption of academic integrity, corruption in higher education \textit{per se}, and corruption in the higher education sector. Academic integrity includes misconduct in academic activities, such as research fraud, cheating, and plagiarism. Corruption in higher education is more inclusive than academic integrity; it involves bribery. Bribery is encompassed in the realm of corruption in higher education \textit{per se} (and not in academic integrity) because bribery is an explicit expression of financial incentives; it can have impact on judgment of academics performing certain administrative functions, but it does not carry the academic load. Finally, corruption in the

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29. Id.

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higher education sector includes all forms of corruption related to higher education—not just as an academic activity, but as a functioning industry. Where corruption of academic integrity is on one end of the spectrum, limited to corruption dealing with actual academia, corruption in the higher education sector would be on the opposite end of the spectrum, dealing with corruption beyond just academia. For instance, professional misconduct in university hospitals, which does not qualify as corruption in academic industry, is qualified as corruption in the higher education sector, simply because a university hospital constitutes a part of the HEI. The university hospital example emphasizes the fact that professional misconduct in a university hospital is corruption in the higher education sector by virtue of it being a “university hospital.” At the same time, this same case is not an example of corruption in academic integrity because it does not have anything to do with actual “academics.”

There is a clear trend in the U.S. that gives more attention to fraud and plagiarism than bribery. Media attention reflects growing concern about corruption in academia. More attention is now paid to fraud and plagiarism, rather than possible bribery in admissions. These findings help to determine which aspects of corruption in higher education should be given more consideration in future research and which might be prioritized, as well as how the national systems of higher education can be improved. Specifics of the U.S. higher education industry explain the uniqueness of the types of corruption to the U.S. In particular, “The growing market of private educational loans in the US, which has increased tenfold over the last decade, rising from $1.57 billion to $17 billion, leads to different types of fraud in state-university relations. Fraudulent activities, in their turn, necessitate state and federal investigations.” Many different types of fraud that infiltrate the three areas of corruption in higher education are discussed below.

31. There are also differences in the types of corruption between the United States, the United Kingdom, and the Russian Federation. Some forms of corruption are region-specific, while others are universal; types of corruption are connected to the characteristics of the national systems.


33. Id. at 354.
A. Financial Misconduct

One form of higher education corruption is financial misconduct, which includes HEI’s financial officers participating in financial activities that hurt students and impair the quality of their education. Embezzlement, fraud, and frivolous classes are forms of corruption in the U.S. higher education sector.34 “Other corrupt practices in American higher education include no-show jobs that deplete university budgets, over-billing of the government, prohibited payments to athletes, obstruction of justice, overpayments as a result of no-bid contracts, improper gifts, kickbacks related to student loans, and, occasionally, even bribery of college or university officials.”35 In one instance, the directors of financial aid at three major universities “held shares in a student loan company that each of the universities recommends to student borrowers, and in at least two cases profited handsomely.”36 Presumably, students were the victims of such illicit arrangements. A grey area in legal terms is an area where no clear legislation or precedent exists.37 It is also not clear whether the existing rules are applicable to specific cases and to what extent. Application of laws in certain market segments does not guarantee that they will have a similar or identical application in the higher education sector. A law may be applied successfully to incidences of corruption in the public sector, but have no court precedent in similar practices in the higher education sector. As such, application of laws in unchartered waters of private educational loans and other areas of possible misconduct in the higher education sector de facto faces initial difficulties raised by the existing grey areas.

B. Faculty Wrongdoing

It seems students are being portrayed as victims, not only in regard to unfair dealings of university administrators with

34. Johnson, supra note 30, at 31.
35. Id. at 17-18.
37. Osipian describes grey areas in the higher education sector finance through the prism of legality and corruption. See Ararat Osipian, Grey Areas in the Higher Education Sector Finance: Illegality versus Corruption (Mar. 21, 2009) (unpublished paper, presented at the Annual Meeting of the American Education Finance Association (AEFA)).
student loan providers, but also in regard to academic abuse from university faculty. For instance, one scholar suggests that modern academic practices in some U.S. colleges and universities are deceptive, to a certain extent, and work to disorient students. He makes a strong statement by suggesting that professors and college administrators are cheating students of their future. He point to professors having abandoned the lecture hall and their teaching responsibilities, instead turning over much of their teaching load to unqualified and busy graduate students, and how academic standards in both grading and research have declined to even lower levels:

They are the corrupt priests of America's colleges and universities and, while small in number, their influence is large and pervasive. They are the great pretenders of academe. They pretend to teach, they pretend to do original, important work. They do neither. They are impostors in the temple. And from these impostors, most of the educational ills of America flow. Only when we understand these renegade intellectual priests, and take action against them, can America's full intellectual integrity and power be restored. 38

Another scholar also holds a negative view on college professors' behavior. Pointing to overcrowded classrooms, teaching duties delegated to graduate assistants, and easy to pass courses specifically designed for underperforming tuition-paying students, he notes that professors are most concerned with the publish or perish race and position themselves as experts with the help of sophisticated professional language: “Whatever lofty claims they might make about their ideals . . . academics share the same motives that animate the souls of every bureaucracy and closed guild . . . Every petty bureaucrat recognizes that power rests, in large part, on the ability to cloak his or her knowledge behind a veil of inflated and intimidating jargon,” which the author also calls “profspeak.” 39

While the major perpetrators in student loan schemes appear to be college administrators colluding with private, for-profit student loan providers existing outside the academia world, the academic perpetrators exist within the academia world.


C. Academic Fraud

Another form of higher education corruption is academic fraud. In their book *Fraud and Education: The Worm in the Apple*, authors Harold Noah and Max Eckstein say that, "The major incentive to cheat in school, college, university, and the professions, to plagiarize, fabricate research, and offer false credentials, derives from the intense competitive pressures that have built up everywhere in contemporary societies and their institutions."\(^{40}\) They then continue: "Universities compete vigorously for federal government research contracts, and among researchers themselves the quest for grant money is a major preoccupation."\(^{41}\) The issues of cheating and plagiarism, thought to be widespread among students, also exist among faculty. Arguably the most serious and widespread forms of corruption in academia, cheating and plagiarism are thought to corrupt the purpose and mission of higher education, but they are not easily regarded as corruption in the legal sense. While student loan fraud schemes have identifiable monetary incentives, quantifiable in dollars and cents, cheating and plagiarism erode the core of academia, resulting in exponential social costs.

D. Misconduct in University–Industry Relations

Most scholars of corruption in higher education focus not on financial misconduct, faculty wrongdoing, and academic fraud, but instead concentrate on misconduct in university-industry relations. Indeed, the academic integrity of university researchers appears to be at stake every time corporate interests are involved. This notion and practice of misconduct in university-industry relations may relate to research, scholarship, or even legal scholarship, when it comes to giving expert testimonies on particular issues of importance to corporations, the state, and the general public.

Scholarly misconduct in the sciences, as well as the complex relations between academia and industry, comes in many forms:

The list [of intersections between industry and academia]

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41. *Id.*
includes, for example, contractual arrangements between a corporation and a university, technology transfer, strategic research alliances, and spinoff companies. Despite the literature's broader conceptualization of academic capitalism, its primary reference point remains the exchange of funding and research between a corporation and a university, or variations on this exchange.42

The methodology of investigating corruption in American higher education also falls in the realm of possible abuses of academic integrity where research may be influenced by funding from outside corporations.43 In studying how corporate influence corrupts higher education, one author points out the dangers that arise:

Corporate funding of universities is growing and the money comes with strings attached. In return for this funding, universities and professors are acting more and more like for-profit patent factories: university funds are shifting from the humanities and the less profitable science departments into research labs, and the skill of teaching is valued less and less. Slowly but surely, universities are abandoning their traditional role as disinterested sources of education, alternative perspectives, and wisdom. This growing influence of corporations over universities affects more than just today's college students (and their parents); it compromises the future of all those whose careers depend on a university education, and all those who will be employed, governed, or taught by the products of American universities.44

The funding effect is directly related to the conflict of interest that emerges every time the research is funded by an outside for-profit entity. Moreover, the conflict of interest and the possible bias in reporting research results is not confined to relations between universities and for-profit entities; it can also be found in the relationships between universities and the states.

An example of such a complex conflict of interest is

research on the negative effects of smoking, where researchers, universities, the tobacco industry, the government, healthcare service providers, and the general public are involved. It may well be the case that research universities tailor their findings if their research is funded by the government, healthcare industry, or pharmaceutical companies, and in a way that allows them to cater to their sponsors' needs and expectations. For instance, if a team of researchers have results of a preliminary study showing that tobacco smoking causes reduction in the level of obesity among youth, then they are not likely to receive governmental funding for their major research project, because the government does not want to encourage smoking in order to fight the epidemics of obesity. At the same time, tobacco companies may become interested and eager to fund this kind of research, where certain results, favoring the industry's product, are expected by the company management. The conflict of interest rises not because researchers accept funding from external agencies, but because they have incentives to alter the design of the research plan and/or misreport or underreport the results, while trying to please their sponsors and secure future grants. At the same time, external sponsors are de facto interested parties, expecting certain results from the researchers as a return on their investment, made in the form of grants. The results of the research affect the sponsors, and this effect may be both positive and negative.

Expert credibility and academic honesty are important when it comes to testimonies on cases which involve large companies and significant financial resources. Some scholars, in addressing the issue of wrongdoing in assessing empirical research where interests of major corporations are at stake, have concluded that "[r]eliability, validity, and transparency . . . are the most prominent standards empirical researchers use to assess the integrity of research. Clearly the legal academy has some work to do to better signal its commitment to them. But just as clearly these standards—not the Court’s approach—are the best available criteria to detect bias in research."45 Another scholar, studying the *Exxon Shipping Co. v. Baker* case in the context of academic integrity,46 analyzed

the integrity of sponsored law and economics research used in lawsuits that involve significant potential punitive damages, and made the following remarks:

If the academic enterprise is ultimately a quest for truth and understanding, it should not be receptive to attempts by outsiders to steer the direction of that quest to their ideological or economic advantage. The Exxon-funded punitive damages research is therefore troubling from the perspective of the integrity of the law and economics discipline. Had the academic journals and the university presses that published the research been aware of both the provenance and the narrow pecuniary purpose of its sponsor, they arguably should have declined to publish it out of respect for the integrity of the discipline, just as Justice Souter declined to rely on it out of respect for the integrity of the appellate proceeding. Similarly, as members of the academic discipline, the scholars who conducted and published the research should have, out of respect for the integrity of the discipline, declined to accept Exxon’s support at the outset.47

The not-so-hypothetical question of who the researchers really are—indepedent scholars or hired guns—comes to mind every time significant awards are involved in court disputes. In researching and commenting on this type of corruption, authors use such terminology as “sponsor-controlled research,” “secret sponsorship,” “independence,” “disclosure,” “appearance of control,” “integrity of the discipline,” and so on, all of which point to the presence of the strong influence of corporations on research and researchers.

Another author has studied transparency, objectivity, disclosure, conflict of interest (and potential conflict of interest), and professional ethics in sponsored research. Focusing on physician disclosure of gifts and honoraria, the author identifies “four ethical grounds for managing or proscribing conflicts of interest among university faculty”:

They can be characterized by the terms stewardship, transparency, consequentialism, and integrity of science. Stewardship pertains to the responsibility for the proper management of public funds and resources used in carrying out research. Transparency requires that the methods, sources of materials, background literature, contributions of

authors to the research project, and limitations to the study are made available to the reviewers, journal editors, and readers. Consequentialism refers to the link between a behavior (such as a COI) and the quality of the research outcome (such as bias). Finally, integrity of science speaks to the public confidence in the scientific enterprise, which could be compromised despite complete transparency and an outcome of objective science. 48

Two other scholars argue that corporate manipulation of research is based on similar strategies across five industries: tobacco, pharmaceutical, lead, vinyl chloride, and silicosis-generating industries (mining, foundries, and sandblasting). 49 They argue that, “ultimately, conflicts of interest need to be eliminated, not just managed.” 50

E. Diploma Mills and Degree Fraud

There has been some debate about whether the presence of diploma and degree mills should be considered an area of study of corruption in higher education. On one hand, the issue of diploma mills and degree mills is directly related to the higher education sector and is also considered as a part of corruption. On the other hand, it has little to do with the core function of academia, and thus may oftentimes be omitted from research on corruption in higher education. The diploma mills industry is somewhat similar to the illegal industry of fake IDs; it specializes in production of fake educational certificates, diplomas, transcripts, and other documents that certify educational credentials of their holder. Diploma mills are private on-line operated entities that issue their own worthless degrees or produce fake educational documents that replicate those issued by accredited colleges and universities. The problem of diploma mills must be solved by legislation, largely because “state lawsuits against diploma mills have often been ineffective, doing little more than causing a diploma mill to relocate to a different jurisdiction from which it continues to

50. Id. at 133. For a review of major forms of academic fraud that exist in the modern higher education sector, including its social causes and institutional responses, see Richard Epstein, Academic Fraud Today: Its Social Causes and Institutional Responses, 21 STAN. L. & POL’Y REV. 135 (2010).
sell its product unimpeded.\textsuperscript{51}

\section*{IV. LEGALITY VERSUS CORRUPTIBILITY}

\subsection*{A. Perspectives on Corruption: Legal, Economic, Social, and Moral/ Ethical Responsibility}

Not all illegal acts that take place in higher education constitute acts of corruption. At the same time, not all acts that are commonly understood as corrupt are immediately or explicitly qualified as illegal. Broader conceptual understanding of corruption is needed. Legality and corruptibility may be dominating characteristics of a corrupt agreement. Corruptibility denotes possibilities for abuse and vulnerability of the system overall, while legality implies certain laws set by the public through the state or the ruling regime. The issue of legality versus corruptibility is appealing in the sense that it positions intents, possibilities, opportunities, mere expectations, and public trust against such specific terms as public office, size of a bribe, fact of bribery, etc. It allows for more space for a productive discussion, not limited by the strictly legal terminology and not bound within the limits of legal rationality.

In his article \textit{Conceptualising the Context and Contextualising the Concept: Corruption Reconsidered}, David Arora singles out four perspectives on corruption, including legal, historico-cultural, public interest, and market-centered approaches.\textsuperscript{52} The four perspectives offer a broader scope for understanding responsibility than does a standard legal frame. “According to Arora, the main advantage of adopting a legal perspective on corruption is that it ‘enables an agreement over the definition and . . . scope of its study.’ It therefore involves defining corruption in terms of behavior which deviates from the legal norms of public office.”\textsuperscript{53} Another author presents a review of conceptual approaches to the issue of corruption, outlines primary and secondary corruption, and points to the

\begin{itemize}
\item \textsuperscript{51} George Gollin, Emily Lawrence & Alan Contreras, \textit{Complexities in Legislative Suppression of Diploma Mills}, 21 STAN. L. & POLY REV. 1, 2 (2010).
\item \textsuperscript{52} David Arora, \textit{Conceptualising the Context and Contextualising the Concept: Corruption Reconsidered}, 39 INDIAN J. OF PUB. ADMIN. 1 (1993).
\item \textsuperscript{53} Peter Hodgkinson, \textit{The Sociology of Corruption: Some Themes and Issues}, 31 SOC. 17, 18 (1997).
\end{itemize}
weaknesses and possible pitfalls of marketization in public services. He suggests that:

[the attempt to model public service organizations on private enterprise is meant to align the former with a changed socio-economic environment. The basic premise being that the success of the private sector model can be replicated in the public services. Marketisation has therefore involved a movement from “budgetary” to “for-profit” organizations.]

In addition to legal perspective, there might be numerous other perspectives employed, including historic, cultural, public interest, and market-centered perspectives. Another approach anticipates possible conceptual frames based on legal, economic, social, moral, and ethical responsibilities. The multiplicity of approaches makes it possible to fully appreciate the complexity of legal issues that emerge and develop in the higher education sector in the context of economic, social, and political processes.

Economic processes and determinants are the most influential in any segment of social life, including the higher education sector. The economic responsibility appears to be fundamental for modern HEIs. As applied to higher education, a legal lens uses the existing laws and regulations that highlight complex processes occurring in the education sector in order to sort out legal and illegal ones. It appears to be a simple task, at least in theory, but when it comes to the application of laws and legal precedents to specific circumstances in the higher education sector, the legal frame becomes insufficient. It prevents from fully understanding the underlying structure of incentives that make agents commit certain crimes and the economic and financial context in which these crimes are committed. The economic responsibility anticipates compliance with mutually accepted economic obligations under which violations of such obligations are considered a breach of contract. Reduced class time, increased class size, absence of office hours held by faculty members, and unfavorable lending terms and conditions on educational loans may be considered a breach of contract. While not necessarily specified in laws and legal provisions for higher education, such practices may be interpreted as a violation of economic responsibility.

54. Id. at 27.
The social responsibility frame is even more complex than legal and economic responsibility frames. Some may call it a public interest perspective, as noted by Arora. Public interest perspective refers to the common well-being or general social welfare, and the social responsibility frame implies the dominance of similar priorities. This frame anticipates that the HEI adheres to all legal and economic obligations and, in addition, performs its societal duties. Educational, research, cultural, and other considerations are taken into account. The social responsibility frame views the HEI as an organization that conducts responsible research for the betterment of society, educates members of society in accordance with the best standards available, and disseminates knowledge to those who are in need of it. Monetary transactions and the financial prosperity of an institution of higher learning are secondary in such cases. This is also known as a service for public good that increases total social welfare of the society.

Finally, the moral or ethical responsibility is meant to move HEI to prioritize the issue of equity over the issue of quality, and quality over access. If, under the economic responsibility frame, a university sets its admission criteria and regulates the quality of educational services offered based on demand and supply in the education market, then the ethical responsibility anticipates equality in access to education and the provision of highest quality educational services under the conditions of maximizing the position of learners and the society overall rather than of profit maximization.

While ethical, social, and economic frames are more universalistic, the legal responsibility frame is clearly nation-specific. On the one hand, economic structures in the education sector vary by country and can be assigned to a few basic models. These basic models characterize access to higher education, funding of higher education, involvement of the state in financing and decision-making, organization and financing of research activities and dissemination of research results, and other fundamental aspects of higher education sector organization and functioning. On the other hand, legal perspective can allow for future perspectives rather than simple comparisons. As different national higher education systems develop and their regulation and legislations change,

55. Arora, supra note 52.
laws reflect such changes and developments. Experiences of other nations and comparative perspective as applied to higher education corruption are of little help, because the U.S. higher education system is unique in the way it is organized and funded. The U.S. higher education sector may be described as decentralized, market-oriented, and autonomous. Other developed nations, including the European Union, have centralized higher education sectors that may be characterized by weak links with businesses and slowly emerging market-like practices. Educational loans are becoming more common in these developed nations. Hence, national legislations already reflect such practices and will most likely develop further. Recent dramatic increase in the fees charged in HEIs in the United Kingdom is a good example of such a change. While the process of commoditization of higher education in the United States continues, it is only emerging in Europe.

Corruption is broader than it is defined in legal cases. At the same time, the level of legal responsibility from the set of legal, economic, social, moral, or ethical responsibilities is used to qualify deeds as corrupt. But even this approach does not cover all the areas. There are so-called grey areas that may be judged as corrupt, while not illegal. Norms of contractual behavior accepted by society go ahead of legislation. The series of investigations launched by the New York State Attorney General is a classic example of grey area application. The Attorney General investigated numerous HEIs of the matter of fraud and conflict of interest in the triangle of relations between students as consumers of educational services, financial institutions as providers of student loans, and HEIs' financial officers as facilitators of such transactions. Later, study abroad programs offered by HEIs also fell under the investigation in addition to the student loans schemes and preferred student-loan providers lists. These series of investigations and the ways in which the problems under investigation were resolved leads to new, more precise, specific, and contextual interpretation of existing laws, and results in new provisions, regulations, and codes of conduct.

B. Selection of Cases

The U.S. case law regarding corruption in higher education includes: collusion and fraud in educational lending, questionable quality of educational programs, the manner of
credentials evaluation and accreditation, attempts to monopolize discretion over admissions decisions, research misconduct, embezzlement of university funds, and general fraud.\textsuperscript{56} Some of these cases are broadly publicized in the media and discussed in scholarly literature.\textsuperscript{57} Others are only briefly mentioned in the specialized media sources that focus on problems of higher education, even though they may represent a legal precedent with a potentially large future impact on the industry.\textsuperscript{58} These cases are significant and affect HEIs, as well as educators, students, parents, and the general public. The cases to be analyzed are at the core of the development and reform of the higher education industry. They reflect processes of decentralization, commercialization, and marketization of higher education. The case law also exposes problems with the coordination, quality assurance, and state control in the industry.

The selection criteria restrict the study to significant cases of corruption in higher education, hence preserving a higher degree of relevance for this study, while at the same time maintaining a reasonable level of abstraction to retain clarity of the issues surrounding the cases. For instance, if the \textit{United States Code Service} (U.S.C.S.) reports on a case of embezzlement of public funds committed by an administrative staff member in a public HEI, such a case will not be considered in this study. First of all, embezzlement is not limited to the higher education sector. This practice is not distinct but rather common for all industries, including both public and private sectors. Second, if the case of embezzlement is clear, it is therefore not worthy of study. However, the way the court determined whether the case should be considered under the corruption law may be of interest, as it implies a problem of definitions. In a hypothetical case where a university administrator and a custodian or subcontractor collude in order to unlawfully benefit from a certain operation, a court will only consider the case if the net benefit obtained in

\begin{footnotesize}
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\item See court cases and decisions, \textit{West's Federal Practice Digest} 4th, 18A-18B (1999); and \textit{West's Federal Practice Digest} 4th, 18B, Cumulative Annual Pocket Part (2007).
\item See Sykes, \textit{supra} note 39 (discussing the price fixing investigation of the so-called overlap group in 1991).
\end{enumerate}
\end{footnotesize}
an illegal way sums up to $5,000 or higher. If, however, the net benefit adds up to less than $5,000, the state statutes on corruption will not apply. Hence, if a public university overpaid a private contractor for the services rendered as a result of improper collusion between the administrator and subcontractor, the court will focus on the sum of the immediate damage. This study tends to focus on the nature and essence of a particular misdeed, rather than on the net benefit and the appropriate statutory limitations that may apply, depending on the state legislation. Simply put, for the court, the issue is both illegality and the size of illegally obtained benefit, while for this study the case of corruption exists no matter whether the total benefit was more or less than $5,000. In addition, if an alleged collusion took place between relatives, then this study would classify such a case as an example of embezzlement, nepotism, and fraud. Another limitation is concerned with clear cases of corruption. In such cases, no additional research is needed to establish the case of corruption, since it was already established by the court.

C. Analysis and discussion

Many of the cases of corruption in higher education, including those discussed and analyzed in this paper, were settled out of court. The fact that there are few court cases means rare legal precedents in corruption in higher education can really be drawn out for legal analysis. The analysis and discussion is organized to expand on the notion of grey areas in the higher education sector brought upon by the lack of case law on the matter. The analysis and discussion of the cases presented in this study seek to answer the following questions. First, what is the essence of each case? What are the underlying interests of groups involved, including consumers and providers of educational services, regulatory authorities, legislators, and the state in general? Second, is the case new, or were there earlier precedents or attempts to create a precedent on a similar case? Third, are there new ways to interpret the old rules and laws that are used in the case? Fourth, how is the case positioned in the context of educational reforms and socio-economic processes in society in general?

As demonstrated by the questions above, this study is focused on addressing sequences of events or case law, namely: any existing or possible commonalities or fundamentals,
similar fundamentals, socio-economic context, trends in the education industry, and processes of modernization and reform in society.

There is also an additional set of questions that may be addressed in the analysis and the discussion. First, what is the degree and direction of the governmental interference in each of the cases? Here, we attempt to consider the government in a broader sense than just a legislative branch that includes prosecutors and the court system. Second, what are the possible future implications of the processes, cases, and legal decisions made? Are there any spillovers or potential for spillovers on other national educational systems? Broader spillovers into the European Union and the developing nations may be possible. Third, do the findings support our definition of corruption in higher education?

**D. Discussion of cases**

Several corruption cases involve universities receiving federal funds when they may have been ineligible. These types of cases involve receipt of federal funds when ineligible, loan provider monopolies, corrupt admission practices, federal grant spending, educational quality fraud and research fraud, and false advertising. For example, a case involving the University of Phoenix points to federal funds received by the University in the form of student aid. The University might have been ineligible because of non-compliance with certain federal laws and regulations. The case was developed on the grounds of the False Claims Act and anticipated possible fraud between state and university relations. The University of Phoenix case is not an exception when it comes to allegations and even charges of a large-scale fraud in the higher education sector. A similar case involves Chapman University, which received federal funds in the form of student aid, but might have been ineligible as well. The major challenge in the Chapman University case, considered in 2006, was the instruction time necessary to receive credit hours. As a result, students might have been defrauded because of insufficient instruction time, and the

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60. Id.

61. See Van Der Werf, supra note 77.
state was defrauded as well. The state offers educational loans to students enrolled in accredited colleges. If it were known that the university failed to provide sufficient instruction, it would not be accredited and, hence, its students would not be eligible for state financial aid.\(^{62}\)

Corruption can also take place in student-university relations and in state-university relations. In 2007, New York State Attorney General Andrew Cuomo launched an investigation to uncover some suspicious practices related to the lists of preferred providers of student loans administered by colleges' financial aid officers.\(^{63}\) The government conducted the investigation on the basis of students being defrauded and guided to more expensive loans by college administrators. The case under investigation points to possible attempts to establish a near-monopoly and to defraud students on the local markets of educational loans. Students receive financial educational loans through university financial aid officers. These officers, as university employees, are subject to rules and regulations set by the university in accordance to the federal law. Universities have to comply with the federal government if they receive federal funding in any form. Thus, the state and students may be defrauded by the university due to noncompliance of some of the university's officers—particularly financial aid officers.\(^{64}\)

Another broadly publicized case initially involved Stanford University, but was later joined by a few other colleges.\(^{65}\) The major considerations of the case were overhead payments of up to seventy-four cents on every dollar received in the form of federal grants, and also issues with how some of the federal

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62. Id.


64. Id.

research money was spent, including the centerpiece of the scandal—a yacht.66 The case implied possible fraud in state-university relations. Stanford University reached an out of court agreement with the government and the university reported that “The agreement between the university and the Office of Naval Research (ONR) settles all disputed matters related to the billing and payment of indirect costs of federally sponsored research at Stanford for the fiscal years 1981 through 1992. In addition to finding that the government has no claim for wrongdoing, the settlement upholds the validity of ‘Memoranda of Understanding’ previously reached between the government and the university.”67 The initial allegations and claims made by the government totaled $200 million, which in 2012 would mean around a half-a-billion dollars, but the university eventually paid the government only $1.2 million.68 The culture of denial of any wrongdoing is obviously present in this case, as follows from the letter of the President of Stanford University.69 Along with the culture of denial, the focus on the university’s central mission always comes to play when external allegations are made by the outsiders. Moreover, the university manages to rip the benefit from this apparent crisis, with its president stating that, “As we put this matter behind us, we realize that Stanford did harvest some benefit from this episode. We did obtain a thorough outside review of our internal controls, and we tightened them and improved our systems.”70

66. ANDERSON, supra note 38, at 170-71.
68. “Under terms of the settlement, the university will pay $1.2 million to the government in a final adjustment covering the 12 years and withdraw its own claims that the university had been underpaid during 1991 and 1992... The agreement ends several years of controversy during which allegations were made that the university owed the government as much as hundreds of millions of dollars for incorrectly calculating the indirect costs of doing research. Over the course of these 12 years, Stanford conducted research under nearly 18,000 federally sponsored contracts and grants involving many millions of transactions and dollars.” Id.
69. “We regret the errors and inappropriate charges. But we also regret irresponsible accusations questioning the intentions and integrity of Stanford and university officials. Throughout this controversy, we asserted that Stanford has done no wrong. This settlement confirms that belief. We conclude this settlement with a sense of relief. With it behind us, Stanford can devote its attention fully to its ongoing mission of teaching and research on the frontiers of knowledge.” Id.
70. Id.
Cases built on the grounds of anti-trust regulation have also been considered. One of the major cases that attempted to establish possible corruption in admissions involved the Massachusetts Institute of Technology and a number of Ivy League colleges in 1990. The colleges were making agreements with each other prior to admitting graduate students in order to reduce the total cost of offerings in the form of scholarships and financial aid. Instead of competing for the best and brightest student candidates among themselves by offering these students highest bids, these universities formed an improvised pool or a cartel. This implies monopoly in admissions, collusion, and consumer fraud. The colleges admitted wrongdoing and stopped the practice. The only exception was MIT, which fought back and won on appeal, pointing to its non-profit status:

All of the Ivy League schools signed a consent decree agreeing to stop the challenged cooperative activity. MIT refused to sign and went to trial. In September of 1992, MIT was found to have violated the Sherman Act. Government investigations against several schools outside of the Ivy League continued. Soon after the trial ended, Congress passed the Higher Education Act of 1992, allowing colleges and universities to engage in certain cooperative conduct aimed at concentrating aid only on needy students. In September of 1993, the court of appeals overturned the district court's verdict and ordered a new trial. The Government subsequently dropped all investigations against other schools and reached a settlement with MIT that allows MIT to engage in most of the conduct that the Government had challenged.

71. "In 1991, the U.S. Department of Justice's Antitrust Division (the Government) sued the Massachusetts Institute of Technology (MIT) and the eight colleges and universities in the 'Ivy League'—Brown University, Columbia University, Cornell University, Dartmouth College, Harvard College, Princeton University, the University of Pennsylvania, and Yale University. According to the Government, the nine schools violated Section 1 of the Sherman Act by engaging in a conspiracy to restrain price competition for students receiving financial aid. The Government claimed that the schools conspired on financial aid policies in an effort to reduce aid and thereby raise their revenues." GUSTAVO E. BAMBERGER AND DENNIS W. CARLTON, ANTITRUST AND HIGHER EDUCATION: MIT FINANCIAL AID 188 (1993), available at http://www.oup.com/us/pdf/kwo/9780195322972_07.pdf.

72. "The schools responded that the Sherman Act did not apply to them because they are not-for-profit institutions. Furthermore, they justified their cooperative behavior by explaining that it enabled them to concentrate aid only on those in need and thereby helped the schools to achieve their socially desirable goals of "need-blind" admission coupled with financial aid." Id.

73. Id. at 189 (internal citations omitted). See also U.S. v. Brown University,
It is within the Attorney General’s purview to prosecute cases that imply monopolistic agreements.\textsuperscript{74}

In their article \textit{Complexities in Legislative Suppression of Diploma Mills}, George Gollin, Emily Lawrence, and Alan Contreras discuss the legislative aspects of the problem of diploma mills, concluding: “We believe that the legal and enforcement components of the solution lag behind, and are deserving of greater attention from federal authorities in the United States.”\textsuperscript{75} They further discuss the federal interest in regulating diploma mills, and the problems that the government faces:

There is a natural federal interest in helping the states suppress the illegal sale of academic degrees. But the only organized federal response to the problem of diploma mills was discontinued by the FBI in 1991, some years before the Internet-driven boom in the degree mill business began. Though it sued the “University Degree Program” in 2003, the Federal Trade Commission did so as a secondary action to accompany its complaint regarding fake international drivers’ licenses that the organization had been selling. The few criminal cases that have been brought in recent years have relied on mail and wire fraud statutes. But degree mill customers generally understand the true nature of the product they purchase. In the recent prosecution of the St. Regis University diploma mill, the defense argued that there was no fraud, since willing customers bought these diplomas knowing they were not legitimate degrees.\textsuperscript{76}

A number of cases involving diploma mills included state-university relations, consumer-university relations, and degree holder-employer relations.\textsuperscript{77} Cases of educational quality fraud

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\item People v. Dorsey, 29 N.Y.S. 637 (N.Y. Co. Ct. 1911) (holding that the attorney general had power to prosecute for offences committed as part of the means, plan, or scheme by which violations of §340, prohibiting monopolies were effected, and any criminal act done in furtherance of a violation of such section was subject to investigation and prosecution by the attorney general).
\item George Gollin, Emily Lawrence & Alan Contreras, \textit{Complexities in Legislative Suppression of Diploma Mills}, 21 STAN. L. & POL’Y REV. 1, 32 (2010).
\item Id. at 3 (internal citations omitted).
\end{enumerate}
\end{footnotesize}
involve consumers or students, providers or colleges, and accreditation agencies. Research fraud involves the state as the major source of funding, while the medical fraud committed in university hospitals involves patients and insurance companies.

The cases of corruption in higher education selected for this study include the most recent developments in college funding, including ties between colleges and the educational loan industry. The investigation initiated by the New York State Attorney General Andrew Cuomo based on the False Claims Act was followed by another twenty-seven states throughout the country. As a result of the massive legal campaign launched by Attorney General Cuomo, dozens of public, private, and private for-profit colleges and about a dozen private student loan providers agreed to comply with the ethics rules offered by the Attorney General.78

Two other cases based on the False Claims Act include Chapman University, a for-profit educational institution based in California,79 which was accused by the state of defrauding its students, playing on the mismatch between students’ financial aid and academic abilities, and the case with the University of Phoenix. The Higher Education Act prohibits colleges and universities whose students receive federal financial aid from paying their recruiters based on the number of students enrolled.80 This provision is intended to discourage

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79. “A federal judge in California on Tuesday cleared the way for three former adjunct professors at Chapman University to sue the institution under the False Claims Act, which permits lawsuits by an individual who believes he or she has identified fraud committed against the federal government, and who sues hoping to be joined by the U.S. Justice Department. (The plaintiff then shares in any financial penalties, which can include trebled damages.) In siding with those who sued Chapman, Judge James V. Selna not only cited the Seventh Circuit’s decision in United States of America ex. rei. Jeffrey E. Main v. Oakland City University as a key precedent, but expanded on it in significant ways. Most notably, the judge concludes that a college can run afoul of the False Claims Act by violating a requirement imposed not directly by the federal government but by an accrediting group—a position the Justice Department endorsed.” Doug Lederman, Ever-Expanding False Claims Act, INSIDE HIGHER ED, May 26, 2006, available at http://www.insidehighered.com/news/20060526/false#ixzz1qLUGDk. See also U.S. v. Chapman University, 2006 WL 1562231 (C.D. Cal. 2004).

recruitment of unqualified students. If this provision is violated, then the False Claims Act may be enacted. In the case of Chapman University, the complaint says that the institution, as part of the accreditation process, certified that it was giving the required amount of classroom instruction in its academic programs, when it was not. If it had revealed the truth, the complaint alleges, Chapman would not have been accredited and would be ineligible to receive federal grants and student loans.

University of Phoenix is the largest private HEI in the United States. This for-profit HEI enrolls over half-a-million students, 80% of which receive federal aid in the form of student loans and grants. In the 2008-2009 academic year, the University of Phoenix hosted 230,774 students recipients of Pell Grants, receiving the revenue of $656,900,000. In 2008, the total sum of financial aid received by the University of Phoenix students amounted to almost $2.5 billion.


81. “The suit (O’Connell, et al. v. Chapman University), which was filed under the federal False Claims Act, alleges that Chapman falsely represented itself during an accreditation review in order to qualify for federal funds. The United States District Court for the Central District of California granted summary judgment in favor of the university in 2007. The plaintiffs appealed to the U.S. Court of Appeals for the Ninth Circuit.

The plaintiffs, who were adjunct faculty members, alleged that because some faculty released students early from some classes, Chapman was not in compliance with accreditation standards. Chapman is fully accredited by the regional accreditor, the Western Association of Schools and Colleges.” ACE Submits Amicus Brief in Chapman University Accreditation Case, THE AMERICAN COUNCIL ON EDUCATION, June 4, 2009, available at http://www.acenet.edu/AM/Template.cfm?Section=Home&CONTENTID=32967&TPLATE=CM/ContentDisplay.cfm. See also U.S. ex rel. O’Connell v. Chapman Univ., 245 F.3d 646 (C.D. Cal. 2007), cert. denied, U.S. v. Chapman University, 131 S.Ct. 2142 (2011).

82. Id.


allegations mounted that the University wrongfully obtained around $3 billion in federal funds.86 This money was at stake under the False Claims Act provision that requires the recovery of triple the full amount of money.87 The plaintiffs (i.e., the whistleblowers) are entitled to 15% or more of the total recovered sum.88 It was unlikely from the very beginning of this affair that the government would try to deprive the University of Phoenix of billions of dollars for this sum is simply way too big. Also, the whistleblower cases based on the False Claims Act may be highly expensive, especially if they proceed to trial.89 The $78.5 million settlement reached in December of 2009 includes $11 million as statutory attorneys’ fees and costs. The whistleblowers received $19 million and the U.S. Department of Education received $48.5 million.90

It is interesting that the government declined to intervene as a party plaintiff in the cases, but nevertheless received its share of compensation money. In theory, all a whistleblower has to do is to blow a whistle on a company that in his/her view is involved in violation by committing fraud against the federal government and then sit and wait to see how the case turns out in order to collect his/her share. In reality, however, a whistleblower has to find a private attorney first and then try to convince the government to join in the legal action. But often even this formula does not work. The government, not the whistleblower, stays aside of the legal action awaiting its outcome in order to collect.

Some cases involving corruption in higher education involved claims of false advertising. For example, Corinthian

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89. The University of Phoenix whistleblower case (U.S. ex rel. Hendow v. Univ. of Phoenix, Civil Action No. 2:03-cv-00457-GEJ-DAD (E.D. Cal. 2006)) settled after the trial team reviewed over a million pages of documents, took or defended close to forty depositions, and had retained several experts. The case was set to be tried in March 2010, before the parties reached settlement in December of 2009. See $78.5 Million Settlement in Whistleblower Lawsuit against University of Phoenix, BUSINESSWIRE, Dec. 14, 2009, http://www.businesswire.com/portal/site/home/normal/?ndmViewId=news_view&newsId=20091214006155&newsLang=en.
Colleges, Inc. agreed to pay $6.5 million to settle allegations that the for-profit operator of vocational schools engaged in false advertising.\(^9^1\) Corinthian Colleges, Inc. allegedly overstated the percentage of its students who obtained employment via its courses, inflated their starting salary information, and used these misrepresentations to persuade potential students to enroll. Of the settlement amount, $5.8 million went to restitution for students.\(^9^2\) Corinthian operates more than one-hundred other schools in the United States and Canada. The settlement required that Corinthian cease offering eleven courses for eighteen months, including the Pharmacy Technician program in Anaheim, CA.\(^9^3\) In the first case, there was a settlement achieved and the university ultimately agreed to a settlement of $6.5 million in restitutions, penalties, fines, and compensatory payments, while the second case was settled at $78.5 million after seven years of litigation.\(^9^4\) The summary of the reviewed cases is presented in Table 1.


\(^9^3\) Id.

\(^9^4\) $78.5 Million Settlement in Whistleblower Lawsuit Against University of Phoenix, BUSINESSWIRE, Dec. 14, 2009, http://www.businesswire.com/portal/site/home/portal/Id=news_view&newsId=20091214006155&newsLang=en. The lawsuit, filed in March 2003, alleged that the University of Phoenix had defrauded the U.S. Department of Education by obtaining federal student loans and federal grants based on false statements of compliance with the Higher Education Act. The University of Phoenix previously already paid $9.8 million to the U.S. Department of Education in 2004 to resolve administrative claims that it was paying improper incentive compensation to its recruiters. In 2005, the trial judge dismissed the action against the University of Phoenix on the ground that the University’s certifications of compliance with the Higher Education Act did not constitute false claims. In 2007, the Ninth Circuit reversed that ruling and the case returned to the trial court.
Table 1: Cases on the Grounds of the False Claims Act, Consumer Protection Act, Higher Education Act, and Anti-Trust Laws after 2000

<table>
<thead>
<tr>
<th>University Plaintiff</th>
<th>Ground</th>
<th>Date Allegations</th>
<th>Date Settlement (in millions)</th>
<th>Total Plaintiff</th>
<th>Allegations Essence</th>
</tr>
</thead>
<tbody>
<tr>
<td>University of Phoenix, former employees</td>
<td>False Claims</td>
<td>Mar. Dec. 2003</td>
<td>$78.5 $28.0</td>
<td>State and pay for consumer recruitment fraud</td>
<td></td>
</tr>
<tr>
<td>Apollo Group</td>
<td>Act admission officers</td>
<td>Mar. July 2007</td>
<td>$5.3 $1.4</td>
<td>Incentive pay for consumer recruitment fraud</td>
<td></td>
</tr>
<tr>
<td>Oakland City University, former employees</td>
<td>False Claims</td>
<td>Mar. July 2003</td>
<td>$5.3</td>
<td>Incentive pay for consumer recruitment fraud</td>
<td></td>
</tr>
<tr>
<td>Chapman University, former employees</td>
<td>False Claims</td>
<td>Mar. Pending 2005</td>
<td>Insufficient State and instruction consumer time fraud</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Corinthian Colleges, Inc.</td>
<td>State on Consumer Protection</td>
<td>July 2007</td>
<td>$6.5 $5.8</td>
<td>False Consumer advertising, fraud unfair business practices</td>
<td></td>
</tr>
<tr>
<td>Education Partners, private</td>
<td>State on Higher Education</td>
<td>Mar. Apr. 207</td>
<td>$2.0 $0</td>
<td>Preferred Consumer student loan fraud, kickback providers list</td>
<td></td>
</tr>
</tbody>
</table>
A few initial observations can be made about the presented legal cases. First, all False Claims Act-based cases with University of Phoenix, Oakland City University, and Chapman University were initiated by former employees. In the case of University of Phoenix, the whistleblowers were two admissions officers. In the Oakland City University case, it was the Director of Admissions. The Chapman University case was initiated by three instructors who worked in precisely the areas which they later targeted as being in violation of federal law. The law does not require plaintiffs or whistleblowers to be employees, or former employees, or have any affiliation; they just need to have knowledge of the violation. Either transparency in operation of HEIs is not very high, and so only immediately involved employees have the knowledge that can potentially form the necessary grounds for a legal challenge, or arguments of outsiders will not even be taken seriously by the court.

Second, in all of the False Claims Act cases the government

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95. University of Phoenix, supra note 89.
96. U.S. ex rel. Main v. Oakland City University, 426 F.3d 914, 916 (7th Cir. 2005). False Claims Act charges related to submission of allegedly false statements to the Department of Education in connection with eligibility to participate in the Federal Student Loan Program.
97. Lederman, supra note 79.
has chosen to stay aside, limiting its involvement with citing its opinion in the form of the prosecutor's statement. The reason for this self-alienation is not particularly clear. Perhaps the government decided that the law firms will do the work of proving the case and seeking their legal fees while the government and the plaintiffs will obtain their share. What appears to be a cost-saving strategy on the side of the government may actually have some repercussions.

Third, all of the lawsuits ended with out-of-court settlements. The sides did not proceed to trial. Even though the HEIs adopted and reinforced some of their compliance policies, precedent has yet to come.

Fourth, plaintiffs in the three False Claims Act-based cases are employees, and not customers whose interests are at stake of being jeopardized. Thus, the current legislation or the factual legal practices do not appear to be sufficiently protective of the customers. Rather than fight for consumer rights, employees initiate such cases in pursuit of their own benefits, which include the incentive of 15% of any recovery. This contradiction will eventually move the existing legislation to the need for updates and improvements. While the essence of each of the three cases is “state and consumer fraud,” it appears that neither the state nor the consumers played the key role in the lawsuits.

Fifth, these cases are complex and take years to settle. For instance, the University of Phoenix case took over six years to come to settlement. The government had little involvement in the case and yet received the lion's share of the settlement money, almost $50 million out of $78.5 million total. At the same time, the potential recovery, at least as follows from the False Claims Act, could have constituted over a billion dollars. Apparently, the government is not willing to pursue False Claims Act cases in higher education to the point where HEIs can be left stranded without cash due to enormously high recovery payments to the government. The government recognizes ipso facto the existence of grey areas in the legislation that it drafts and enforces.


100. Grey areas in this context are understood as referring to conduct that may not be recognized as corrupt, but also pointing to possible loopholes in the existing legislation.
Sixth, the government sued or intended to sue on behalf of consumers in the case of Corinthian Colleges, Inc. and the cases initiated by Attorney General Cuomo, which involved dozens of public, private non-profit colleges, and private for-profit colleges and a dozen of private for-profit student loan providers, including Education Finance Partners. Overall, these cases involve unfair business practices, such as false advertisement and partial monopolization of certain aspects of educational financing, which amounted to consumer fraud and resulted in kickbacks to college officials. Similar to the cases based on the False Claims Act, the pretrial settlements in these cases made it possible to avoid the creation of a legal precedent.

The recent scandals of university financial aid officers, preferred educational loan providers lists, and possible kickbacks, investigated by Attorney General Cuomo, were highlighted in numerous media publications and can be analyzed through the proposed classification frame. Such analysis will help reveal whether the cases represent corruption of higher education and expose the essence of each case. In some cases investigated by Attorney General Cuomo, financial aid officers suggested a particular private bank-lender to students. The bank may not have had the best offerings for the students and would be ruled out otherwise. The non-competitive bank loan offers attract clients, which may constitute an act of fraud, a clear facet of corruption. What follows, then, is a need to determine if this is an intentional fraud or a result of negligence or incompetence.

Intentional fraud takes place if financial aid officers in universities commit it with the expectation of personal or material gain. Material gain can come through holding shares in the bank placed on the preferred loan provider list or by receiving kickbacks in the form of consultation fees, gifts, etc. Thus, kickbacks here are the means of corruption. Banks might pay kickbacks deceptively worded as referral affiliate benefit packages to colleges’ financial aid officers in the form of gifts, meals, accommodations, consulting fees, travel expenses,
registration fees, tuition waivers, and shares of the lending agencies.\textsuperscript{103} Being on the preferred lender list increases the profitability of the bank, the profitability of the shares, and, hence, the revenue of the shareholders. Such practices raise several questions. Does this represent clear conflict of interest? Is this illegal? Is this against the university rules? Are such practices transparent? What rules are established and by whom?

The locus of corrupt activities in this case includes access to higher education and possible breach of contract. The area primarily affected is access to higher education since a loan is intended to fund the recipient's education. Educational loans provided on non-competitive grounds reduce the degree of accessibility of higher education, are more likely to increase student debt, and eventually lead to the withdrawal of more competitive providers of educational loans from the market. The practice of having a list of preferred loan providers may also constitute a breach of contract between the student and the university, if universities are under obligation to provide their current and prospective students with the best possible options in terms of educational loans, both private and public. Even if they are not under such obligation, the legal problem with kickbacks and preferred provider lists remains.

The potentially corrupt interactions in the presented cases, investigated by Attorney General Cuomo, include business-university relations with possible collusion between providers of educational loans and universities or admissions officers. They also include relations between students and college administration, where administrators commit possible fraud by presenting students with the preferred lenders list. Finally, these are potentially corrupt interactions between the state and HEIs, including the investigations conducted and out-of-court settlements achieved, as well as restitutions and voluntary acceptance of the code of conduct set by the state for the future.

\textbf{E. Legal argumentation}

The Higher Education Act of 1965 regulates the sphere of

\textsuperscript{103} Id. See also Charlene Wear Simmons, \textit{Student Loans for Higher Education}, \textit{California State Library Research Bureau}, available at http://www.library.ca.gov/crb/08/08-002.pdf.
educational loans in the U.S.\textsuperscript{104} However, some issues of consumer rights protection as well as state jurisdiction are still not clear. Parents can borrow a PLUS Loan to cover education expenses for dependent undergraduate students enrolled at least half-time in an eligible program at an eligible school.\textsuperscript{105} PLUS Loans are available through the Federal Family Education Loan (FFEL) Program and the William D. Ford Federal Direct Loan Program.\textsuperscript{106} The eligibility of a student requires a high school diploma, the eligibility of parents requires good credit, and eligibility of the program and the college requires accreditation. Conditions apply to all governmental educational loans and to all the participants of this type of contract or transaction. However, colleges are not under any responsibility to provide quality educational services to students, and hence students cannot return the funds received from state loans, if they have not received federal loans.\textsuperscript{107} Student loans made, issued, or guaranteed under the Higher Education Act are also exempt from Federal Trade Commission rules on preservation of consumer defenses.\textsuperscript{108}

The issue of educational loans and all the abuse associated with it extends beyond interactions between students and colleges, since colleges themselves do not hold student loans. The decision in \textit{Veal v. First Am. Sav. Bank} states that the "rule that assignee who is not holder in due course takes instrument subject to defenses against assignor existing at time of assignment could not be used to charge lenders who granted guaranteed student loans with alleged fraudulent


\textsuperscript{106} Id.

\textsuperscript{107} See Higher Education Act of 1965, 20 U.S.C. \S 1070; Veal v. First Am. Sav. Bank, 914 F.2d 909, 913 (7th Cir. 1990) ("Students could not seek rescission of student loans guaranteed by state and private agencies on theory that, because of close connection between solvent business college and lenders and other defendants, defendants were subject to defense based upon college's failure to provide student with education; since loans were guaranteed by private and state agencies, rather than federal government, they were not subject to protections of federal regulations, under which defense might be available in cases involving Federal Insured Student Loans and federal PLUS loans.").

\textsuperscript{108} Veal, 914 F.2d at 914 (holding that student loans, made, issued, or guaranteed, under Higher Education Act are exempt from federal trade Commission rule on preservation of consumer defenses, under which consumer credit contracts must advise holders of such contracts that they are subject to all claims and defenses that debtor has against seller of goods and services).
activities of insolvent business college, since college was never 'holder' of student notes and lenders were never assignees of college." This provision points to the need to better educate consumers about educational and affiliated financial services. Consumers of educational services must be aware of the quality, accreditation level, and the terms and conditions of educational loans.

Attorney General Cuomo’s investigations of educational loans and study abroad programs were based on the deceptive acts and practices provision of the Consumer and Borrower Protection Act. As stated in the New York State legislation, “[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful.” In cases of private educational loans, the consumer and borrower protections consider the borrower to be a consumer of financial services. This requires transparency and full disclosure of the terms and conditions under which the loan is furnished to the student. The essential elements of a violation of New York law prohibiting deceptive acts or practices in the conduct of any business, trade, or commerce or in the furnishing of any service in New York are: “(1) proof that a ‘consumer-oriented’ practice was deceptive or misleading in a material respect, and (2) proof that plaintiffs were injured thereby.” There is, however, safe harbor for lenders and college financial aid officers in the state legislation. Specifically, the court does not accept claims about deceptive practices when such practices have been fully disclosed to the consumer.

The excursion into legal definitions and peculiarities leaves many questions unanswered. For instance, both coercion and extortion are considered in the U.S. legislation. However, the bribe giver in coercion and extortion cases is considered to be a

109. Id.
111. N.Y. GEN. BUS. § 349 (McKinney 2010).
113. Broder v. MBNA Corp., 722 N.Y.S.2d 524, 526 (N.Y. App. Div. 2001) ("There cannot be no section 349 (a) claim when the allegedly deceptive practice was fully disclosed.")
victim. But what about public employees and elected officials who are coerced by their supervisors to solicit bribes and accept bribes? This anticipates the corruption and coercion policy as a mechanism of administrative control. And what about complex systems where bribes are shared with supervisors and further up the hierarchical ladder or the hidden schemes and mechanisms of bribe collection and bribe sharing? The entire legal frame appears to be quite simplistic while the corrupt hierarchical structures, including those in the higher education sector, may be quite complex.¹¹⁴

Legal provisions that exist in the legislation, including the Higher Education Act, False Claims Act, and Consumer Protection Act, cover the following three areas: (1) corruption as related to the state (a private individual bribes a public official in order to obtain unduly benefits); (2) corruption as related to client and business (a client (subcontractor etc.) is abusing a business by bribing the business’ agent); and (3) corruption as related to consumer and business (consumer fraud, when a business deceives a consumer). However, the legal framework is simplistic, while the system of interrelations in the higher education industry is rather complex. The Higher Education Opportunity Act includes provisions for education loans.¹¹⁵ Specifically, the reauthorized Higher Education Opportunity Act furnishes provisions applicable to private student loans and specifies prohibited conduct, preferred lender arrangements, disclosures to borrowers, and self-certification.¹¹⁶


¹¹⁶. ACE Analysis of Higher Education Act Reauthorization, American Council on Education 1, 7 (Aug. 2008), http://www.acenet.edu/AM/Template.cfm?Section=Search&section=Government_Relations&template=CM/ContentDisplay.cfm&ContentFileID=5713 (*Disclosures to borrowers: Lenders of private education loans must make certain disclosures to borrowers in any application (or any solicitation that does not require an application), as well as at the time of loan approval and loan consummation. The disclosures must include information regarding
F. Implications

There is a growing concern that higher education becomes more of a commodity offered to consumers. In one article, authors Tim Kaye, Robert D. Bickel and Tim Birtwistle point out that “[t]here is widespread concern that higher education is being compromised by being turned into a ‘commodity’ to be ‘consumed’.” In their attempt to explore the trends in both the U.K. and the U.S., and to consider how the law has responded to them, they argue that:

There is an important distinction to be drawn between ‘commodification’ and ‘consumerism’. Education has always been a commodity to be bought and sold; the true danger lies in the move to a ‘rights-based’ culture where students (and politicians) see education merely as something to be ‘consumed’ rather than as an activity in which to participate. Whilst the law seems thus far to have been something of a bulwark against this movement, it remains an open question as to whether this will continue to be the case if HEIs do not themselves act more proactively in challenging this damaging view of higher education.

It would be fair to say that when the terms “commodity” and “consumerism” are present, there should also be the term “credit” as well. Consumers routinely use consumer credit to acquire commodities ordinarily called consumer goods.

In the U.S., using credit is a norm. Widespread consumer credit and the use of credit cards have taken place in American society for decades. The average American carries a credit card debt of several thousand dollars and considers it normal. Buying a house through a mortgage with a thirty-year repayment plan is also a norm. This is not the case in many other nations, and some are just turning to the culture of consumer credit. Others have had consumer credit on a limited

the terms the terms of the private loans as well as federal student financial aid.”).

118. Id.
119. Credit Card Debt Statistics, HOFFMAN, BRINKER & ROBERTS, http://www.hoffmanbrinker.com/credit-card-debt-statistics.html (“In 2010, the U.S. census bureau is reporting that U.S. citizens have over $886 billion in credit card debt and that figure is expected to rise to $1.177 trillion this year. More specifically, the report states that each card holder has an average credit card debt of $5,100 and this number is projected to reach $6,500 by the end of this year.”).
scale for many years. Present consumption against future earnings is considered to be risky and a not very rational consumer behavior, especially in traditional societies. Educational loans face challenges in societies accustomed to consumer borrowing and those not accustomed to the culture of consumer credit. In the U.S., people are ready to accept educational loans as a part of their consumer credit culture that anticipates borrowing against future earnings. Moreover, as education is considered to be an investment good rather than consumption good, this type of consumption may be adopted even by the savvy and encouraged by the government. However, there are other loans in addition to educational loans. Lenders of educational loans will have to compete for customers not only among themselves but with the lending industry overall. They will try to attract customers and make them borrow for education instead of borrowing for a car or a house. Educational loans providers will thus clash with providers of car loans, mortgages, and such.

Profit pressure is indeed the key when analyzing modern trends in the U.S. higher education industry and the potential for abuse. When the U.S. government was the sole, or the dominating player in the education loans business, there was no profit pressure on state bureaucrats and thus there might be little fraud. When private for-profit educational loan providers enter the market, their interests in combination with the public sector makes fraud virtually unavoidable. Ideally, students are indifferent to whom they borrow from, the government or private loan providers, as long as the terms and conditions of borrowing are the same.

Private funding of public HEIs is the basis for many corruption-related problems. There is no profit pressure on HEIs, but there is profit pressure on the private lenders. The incentive structure is such that student enrollment becomes the result of profit pressure while consumer protection remains a political activist agenda. One potential safeguard from predatory lending in the higher education sector would be to limit governmental regulations, educate consumers, and encourage responsible consumption. In this three-sided concept, each individual ought to be an educated consumer to make right choices regarding the quality and quantity of education services to consume. At the same time, each individual has to make rational decisions regarding borrowing
from the state and private educational lenders in order to be a responsible customer of the loan industry. The rest is already theorized and well developed in the economic issue of intertemporal choice.\textsuperscript{120}

One can argue about the extent of the consumerist approach in higher education across the nations, but the trend toward presenting the higher education sector as a provider of educational services is obvious.\textsuperscript{121} The market mechanisms that are being introduced on an increased scale in higher education do not free the industry from corruption, including numerous forms of misconduct. In his book on the commercialization of higher education, Derek Bok points out that:

> [t]he recent surge of commercial activity is best understood as only the latest in a series of steps to acquire more resources, beginning with the use of aggressive marketing to attract tuition-paying students in the early twentieth century, and moving on to the determined search for government and foundation funding after World War II, and the increasingly sophisticated and intensive effort over the last fifty years to coax gifts from well-to-do alumni and other potential donors.\textsuperscript{122}

The equilibrium of supply and demand, with consumers voting with their dollars for the best possible choices, does not necessarily lead to the elimination of public sector based

\begin{itemize}
  \item \textsuperscript{120} Intertemporal choice is the study of the relative value people assign to two or more payoffs at different points in time. Most choices require decision-makers to trade-off costs and benefits at different points in time. These decisions maybe about savings, work effort, education, nutrition, exercise, health care and so forth. For nearly 80 years, economists have analyzed intertemporal decisions using the discounted utility (DU) model, which assumes that people evaluate the pleasures and pains resulting from a decision in much the same way that financial markets evaluate losses and gains, exponentially 'discounting' the value of outcomes according to how delayed they are in time. DU has been used to describe how people actually make intertemporal choices and it has been used as a tool for public policy. Policy decisions about how much to spend on research and development, health and education all depend on the discount rate used to analyze the decision. Gregory S. Berns, David Laibson, & George Loewenstein, \textit{Intertemporal choice--toward an integrative framework}, \textit{TRENDS IN COGNITIVE SCIENCES} 482, 482-488 (2007), available at http://dash.harvard.edu/bitstream/handle/1/1551332/Laibson_IntertemporalChoice.pdf?sequence=2.
  \item \textsuperscript{122} Derek Bok, \textit{Universities in the Marketplace: The Commercialization of Higher Education} 10 (2004).
\end{itemize}
corruption. Different forms of corruption exist in the private sector as well. The legal definitions presented earlier explain why the New York State Attorney General launched his investigations under the auspices of consumer protection and fraud rather than corruption and bribery.

The cases investigated by Attorney General Cuomo may necessitate development of certain measures, tools, and even institutions, such as the Consumer Education Fund established by Cuomo himself, as well as changes in legislation, designed to prevent doubtful practices in the future. Provision of private educational loans is a growing industry in the US. It rose sharply from $1.57 billion in 1996 to $17 billion in 2006 and is expected to grow continuously and rapidly in the future. Similar developments may take place in other nations in the future, as commercialization of higher education proceeds. The process of transferring education financing to private educational loans represents the major trend in higher education funding and may soon be borrowed and adopted in other countries. Subsequently, changes in legislation and regulations are necessary as are provisions in universities' codes of conduct not only in the U.S., but also in many other nations.

Some theoretical developments are also possible. The core of the problem of corruption is an intentional restriction of students' access to reliable information about the available educational loans. This situation implies imperfect information, imperfect competition between the educational

123. Andrew Cuomo, now the New York State governor, continues his effort to enhance consumer protection: In the section Merging and Consolidating State Agencies of his proposal entitled "2011-12 Executive Budget Provides Transformation Plan for a New New York," Cuomo suggests that "The Executive Budget proposes to merge or consolidate 11 separate State entities into four agencies to streamline and eliminate duplicative bureaucracy, better align State responsibilities with need and improve services through superior coordination. Proposals include merging the Banking and Insurance departments and the Consumer Protection Board into a new Department of Financial Regulation." Governor Cuomo's 2011-12 Executive Budget Provides Transformation Plan for a New New York, GOVERNOR'S PRESS OFFICE, Feb. 1, 2011, http://www.governor.ny.gov/press/020111/1ransformationplan.


125. See, for instance, Ara control Osipian, Comparing Corruption in Higher Education in the US and the RF (Nov. 19, 2011) (unpublished paper presented at the Annual Conference of the Association for the Study of Higher Education (ASHE)).
lenders, and a certain degree of monopolization of the market of educational loans and eventually brings into fore antitrust law.

The Cuomo cases in higher education are clearly not those of subprime loans and predatory lending. However, this may well be the case in the future, especially with a growing default rate on educational loans, a significant part of which are processed by the fast growing sector of for-profit higher education. The Consumer Education Fund, established by Attorney General Cuomo, is primarily focused on educating constituents on predatory lending issues.\(^\text{126}\) There is a legacy to this issue as well. In 2000, then HUD Secretary Cuomo joined forces with Treasury Secretary Lawrence Summers, former President of Harvard University, to form the National Predatory Lending Task Force.\(^\text{127}\) Investigations in inappropriate lending patterns in higher education are not a surprise but rather a natural development. The investigations of misdeeds in educational loans touch upon broader financial aid issues and then naturally develop into investigations of possible abuses in study abroad programs.\(^\text{128}\) The investigations may eventually address all the areas where

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\(^{127}\) “Recognizing that predatory lending was a multifaceted issue with substantial consequences for many consumers, as well as for the mortgage industry, HUD Secretary Andrew Cuomo joined forces with Treasury Secretary Lawrence Summers in April 2000 to form the National Predatory Lending Task Force. The Task Force drew its members from a wide range of interested consumer, civil rights, and community groups; mortgage lending industry trade associations representing mortgage lenders, brokers, and appraisers; State and local officials; and academics.” Allen Fishbein & Harold Bunce, Subprime Market Growth and Predatory Lending, HOUSING POLICY IN THE NEW MILLENNIUM, available at http://www.huduser.org/publications/pdf/brd/13Fishbein.pdf.

\(^{128}\) “Months after he subpoenaed nearly a dozen private providers of overseas programs about their business practices and financial arrangements with colleges, New York State’s attorney general, Andrew M. Cuomo, has expanded his investigation to college study-abroad offices themselves . . . Mr. Cuomo’s office has sent subpoenas and document requests to 15 colleges, including American, Brown, Columbia, Fordham, Harvard, Northwestern, and Pace Universities; Manhattanville College; and Hobart and William Smith Colleges.” Karin Fischer, Cuomo Expands Investigation of Study-Abroad Programs to Colleges, THE CHRONICLE OF HIGHER EDUCATION, Jan. 21, 2008, http://chronicle.com/article/Cuomo-Expands-Investigation/420.
consumer fraud in higher education has a potential to develop or already takes place.

Even if predatory lending and consumer deception do not fall under the corruption and bribery provisions, kickbacks do. Kickbacks are bribes that are promised in advance and dearly anticipate expectations on the side of the bribe giver. At the same time, they are paid post factum and present certain guarantees to the donor. As the educational loan industry grows, so do the opportunities for abuse. Authorities can no longer ignore this situation and what appears to be a long term trend in the education industry. Higher education loans constitute an $85 billion per year industry, and the industry is growing rapidly. According to the New York State Department of Education, two-thirds of all four-year college graduates nationwide now have loan debt, compared with less than one-third of graduates in 1993. In New York State, 59% of undergraduates took out loans to finance their college education. The average student graduating from a four-year

129. "Payoff is a pay of a certain share or a fixed sum to the educator in authority who allocated funds to the payer of the bribe. Also see kickbacks." Ararat Osipian, Glossary of Higher Education Corruption with Explanations. The Education Resources Information Center (ERIC), 20 (2009), available at http://eric.ed.gov/PDFS/ED505088.pdf.

130. "Kickbacks are bribes paid post ante. State funds allocated to a HEI may require a bribe for the state official who made the allocation decision. Ghost teachers on the payroll can pay a percentage of their salary to the university administrator who listed them on the payroll. Kickbacks are not fixed at 10 percent of the total contract value but vary and may reach to 90 percent of the total value." Id. at 18.

131. Press Release, Attorney General Andrew Cuomo Announces First Legal Action in College Loan Industry Investigation, STATE OF NEW YORK OFFICE OF THE ATTORNEY GENERAL, Mar. 30, 2007, http://www.ag.ny.gov/media_center/2007/mar/mar22b_07.html ("EFP aggressively offered schools cash kickbacks in exchange for business." Cuomo said. "This kickback scheme was widespread and took place from coast to coast, at colleges large and small, public and private. This lawsuit is just the beginning of an investigation that will show that lenders put market share above fair play. A preferred lender ought to mean that the lender is preferred by students for its low rates, not by schools for its kickbacks. With the cost of college rising every day, the last thing students want to hear is that their lender may be muscling aside a more competitive loan package.").


134. Id.
college in New York owes $17,594 on graduation day.\textsuperscript{135}

Lastly, the results of the investigations and intentions to sue point to the practice of what one would define as “admitting without admitting,” when colleges and private providers of educational loans \textit{de facto} admit the wrongdoing or misconduct, but are \textit{de jure} regarded as not guilty. Both the HEIs and the providers of educational loans that are under investigation agree to stop their doubtful practices, sign the Code of Conduct offered by the Attorney General,\textsuperscript{136} and even contribute to the Consumer Education Fund set by the Attorney General.\textsuperscript{137} This “voluntary” contribution, made by for-profit enterprises, along with the refusal to admit any wrongdoing prevents the establishment of a true court-based legal precedent. At the same time, such half-victories achieved through bargaining and negotiations work as political dividends for Attorney General Cuomo, who is an elected official. In a statement regarding the settlement with Nelnet, Attorney General Cuomo said that “by paying for exclusive referrals of their loans, Nelnet violated the trust that students and recent graduates place in their schools and alumni associations.”\textsuperscript{138} The situation reminds one of an aggressive campaign of the state on free enterprises with the demand for money, but even more so seeking protection of consumer rights of the state’s constituents, including students and their parents.\textsuperscript{139} One of

\begin{itemize}
  \item \textsuperscript{135} Id. See also Democratic Members of the Senate Hold a News Teleconference on the Release of the Student Debt Report, \textit{Political Transcript Wire}, June 28, 2006, http://www.accessmylibrary.com/article-1G1-147583833/democratic-members-senate-hold.html.
  \item \textsuperscript{136} Direct Marketing Code of Conduct, supra note 126.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} “Nelnet, the nation’s second-largest student-loan consolidator, has agreed to stop paying alumni associations to recommend its consolidation loans. Under the terms of a settlement agreement with Attorney General Cuomo, Nelnet will cancel its ‘affinity’ agreements with 120 alumni associations and pay $2-million into a consumer-education fund established by Mr. Cuomo. Nelnet previously agreed to pay $1-million as part of a settlement with the Nebraska attorney general, but that agreement did not require the lender to end its referral arrangements... According to Nelnet, the terms of the affinity agreements varied depending on whether the alumni association was independent of or affiliated with the university. Independent alumni associations received payments for every loan consolidation they directed to the lender above a certain threshold, while affiliated associations received an annual fee only. In return, the alumni associations typically promoted the lender on their Web sites and allowed Nelnet to use their college’s logo for advertising purposes.” Id.
\end{itemize}
the settlements illustrates this point:

In recognition of the Attorney General's leadership in improving the circumstances under which education financing is made available to college students and consistent with Sallie Mae's commitment to educating the public about the financial aid process, Sallie Mae agrees to donate $2 million to the New York Attorney General’s national fund for educating high school seniors and their parents regarding the financial aid process.\(^{140}\)

Corinthian, Inc. demonstrated the similar defensive denial-based strategy when it came to a settlement with the state.\(^{141}\) Oakland City University also denied any wrongdoing.\(^{142}\) The offensive campaign of the state is met with the traditional defensiveness of HEIs, in which the tradition of denial of any wrongdoing is certainly at least as strong as their willingness to revise and change current institutional policies.

V. CONCLUSION

The processes of decentralization, marketisation, commercialization, commoditization, and privatization in higher education raise questions of accountability, transparency, quality, and access. Decentralized financing of higher education anticipates cost-sharing based in part on educational loans. The decentralized U.S. higher education

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141. Andrew Calvin, Corinthian to Pay $6.5 Million, ORANGE COUNTY REGISTER, Aug. 1, 2007, http://articles.ocregister.com/2007-08-01/business/21708932_1_corinthian-students-corinthian-colleges-settlement ("Corinthian..., responded in a statement. "We disagree with the Attorney General’s conclusions, but we are pleased to have this matter behind us. The agreement is not evidence of wrongdoing, and the company specifically denied any wrongdoing as part of the settlement. We are fully committed to providing quality education and job placement services for students and to being in compliance with state law and regulation.").

142. Kate Brasher, College Settles Lawsuit, Oakland City Owe $5.3 Million, EVANSVILLE COURIER & PRESS, July 31, 2007, http://www.courierpress.com/news/2007/jul/31/college-settles-lawsuit/ ("Oakland City University responded in a statement: Termination of the lawsuit settles a dispute concerning the propriety of a compensation plan for admissions counselors that was in effect when the lawsuit was initiated and enables OCU, as well as the other parties, to avoid the expense, burden and uncertainty of litigation and administrative proceedings. The Trustees wish to emphasize that the settlement is not punitive and does not imply that any funds were missing or unaccounted for, nor that OCU presently lacks or has previously lacked financial responsibility to participate fully in Higher Education Act programs.").
system that has long been considered an exception among other developed nations now turns into a sector from which inferences are to be drawn. This anticipates spillovers of problems, but not solutions. Forms of corruption that have long existed in the U.S. education sector, including those in quality assurance through accreditation, compliance with state and federal laws, and provision of educational loans, now have a potential to develop in other educational systems as well.

The law and the legislative process in general are central not only to the way the U.S. system is organized, but also to the way it operates and resolves current problems. This fully applies to U.S. higher education. If an individual or an institution wants to resolve a certain problem, the solution may be found primarily within the court system. The judge is to decide, and the decision is to be made based on laws. The majority of suits are settled out of court in order to avoid high cost of a court trial, but the dispute is resolved between the two arguing parties, while state bureaucrats have no much involvement in the dispute resolution. National systems of higher education in other developed and transition countries can be characterized as centralized systems with states often playing a dominating role in most of the issues. Accordingly, the decisive power belongs to the executive branch, including the Ministry of Education and other ministries that impose numerous regulations and restrictions, impose sanctions, and resolve current problems with the help of the army of state bureaucrats structured in a strict hierarchical order. For instance, rarely one will see legal disputes between students, HEIs, and the state in the Russian Federation being resolved in the court of law. When problems emerge, they are being routinely channeled to the bureaucratic hierarchy for the decision or resolution and in most of the instances do not end up in courts or even reach the point of some legal proceedings or out of court settlements. If a HEI does not comply with certain rules and provisions and students’ or state interest are compromised, the institution may well be placed on probation or closed; and the leaders of this institution may be reprimanded or replaced. The so-called administrative resource plays a key role in decision making and dispute resolution. Hence, while the problems faced by the U.S. higher education industry and by national education industries in other countries may be common, the solutions may be found in
different areas. However, this situation may change if both the higher education systems will become more U.S.-like and the balance between the judiciary and executive powers of the state will shift more toward the judiciary branch.

In the cases considered in this paper, the defendants did not admit any wrongdoing while at the same time they agreed to pay compensation. They did not regard such compensation as punitive damages and pointed to unclear legal provisions that regulate certain aspects of the higher education services provision. The government stated that colleges and financial institutions had committed several wrongdoings, but did not rely on this explicitly tough approach and also avoided court trials while opting for out-of-court settlements. By making this choice in each particular case, the government admitted ipso facto the existence of grey areas in the legislation. Although out of court settlements are encouraged due to the expense and time involved with going to trial, no precedent is set by the court ruling simply because the cases are settled out of court. Hence, both the government and the defendants point to the grey areas or not-so-clear legal provisions in the legislation. The application of the appropriate laws is also not very clear when it comes to higher education, which explains the existence of grey areas. This lack of clarity is explained in part by the unclear nature of the product of higher education. The pretrial out-of-court legal settlements prevent the creation of the legal precedent that would be set if the decision were made in a federal court. Applying a legal framework in research of corruption in higher education allows us to avoid the discussion of what is non-corrupt and what would be the ideal uniform ethical standard in the higher education industry, universally applied to different types of HEIs and affiliated entities. But the issue of non-corrupt practices and what constitutes a higher education sector free of corruption remains and may be addressed in future research.