

Winter 12-31-2021

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Recommended Citation

L. Burke Files, Roger E. Meiners, and Andrew P. Morriss, *Corruption in University Admissions and the Administrative Allocation of Scarce Goods*, 47 BYU L. Rev. 1 (2021).

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Corruption in University Admissions and the Administrative Allocation of Scarce Goods

L. Burke Files,* *Roger E. Meiners*** & *Andrew P. Morriss****

The Varsity Blues investigation uncovered a seamy side of university admissions. Multiple wealthy parents were indicted for securing their children's admission to selective institutions through bribery. Despite the publicity the indictments and guilty pleas received, and the public schadenfreude over the sight of celebrities being arrested, the investigation is most notable for what it did not do: it did not deploy the federal government's arsenal of anti-money laundering and anti-corruption tools against the universities involved. This represents a significant missed opportunity to address the serious problems that arise from rationing access to selective institutions via opaque, easily manipulated admissions processes designed to benefit university constituencies. Without deploying the same tools used routinely against other for- and non-profit organizations, the chances for real reform are significantly reduced. We call for universities and their boards to be held to the standards applied to other institutions with respect to corruption and money-laundering in their oversight of admissions programs.

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INTRODUCTION

On his last day in office, Donald Trump issued 74 pardons.¹ One was to Robert Zangrillo, a parent charged with “fraud, bribery and money laundering conspiracy in connection with the Varsity Blues college-admissions scandal.”² This pardon highlights the failure of Varsity Blues prosecutors to go the root of the problem by employing anti-corruption and anti-money laundering tools.³ At the heart of the case was a lack of transparent admissions practices, which makes universities vulnerable to corruption.

News accounts of Varsity Blues focus on Rick Singer, a college admissions consultant, and wealthy and celebrity parents who hired him to secure admission for their children to elite colleges. Singer and others used a range of tactics, including falsifying

1. Rebecca Ballhaus & Byron Tau, *Trump Issues 74 Pardons, Including to Ex-Aide Steve Bannon*, WALL ST. J. (Jan. 20, 2021, 11:39 AM), <https://www.wsj.com/articles/trump-pardons-former-chief-strategist-steve-bannon-11611120199>.

2. *Id.* Zangrillo was accused of paying \$200,000 to the bogus foundation called KWF, discussed below, and \$50,000 to the athletics department at USC to get his daughter into the school.

3. Investigators named the project *Varsity Blues* after a 1999 film about a small-town Texas high school athlete seeking admission to Brown University. Jami Ganz, *FBI Names College Admissions Cheating Scandal ‘Operation Varsity Blues’ – and Social Media Has Questions*, N.Y. DAILY NEWS (Mar. 12, 2019, 12:45 PM), <https://www.nydailynews.com/news/national/ny-news-operation-varsity-blues-name-criticism-20190312-story.html>.

admissions tests, having ringers take tests for applicants, and bribing athletic coaches to designate applicants as desirable athletic recruits. Because the parents paid Singer and his foundation, and Singer then paid other participants, federal authorities were able to bring a variety of financial criminal charges. Some parents negotiated plea bargains and short jail times; others held out for trial. These accounts frame the scandal as one concerning a rogue actor and his wealthy clients.⁴

What is most notable about Varsity Blues is what the prosecutors did not do.⁵ While the headlines focused on arrests and charging celebrity parents such as Felicity Huffman and Lori

4. A 204-page affidavit by the FBI describes assorted activities of many parties. See Affidavit in Support of Crim. Complaint, (March 11, 2019), <https://www.justice.gov/file/1142876/download>; see also *Arrests Made in Nationwide College Admissions Scam: Alleged Exam Cheating & Athletic Recruitment Scheme*, U.S. DEP'T JUST. (Mar. 12, 2019), <https://www.justice.gov/usao-ma/pr/arrests-made-nationwide-college-admissions-scam-alleged-exam-cheating-athletic>. Varsity Blues is hardly the only current admissions saga to capture public attention. The elite Sidwell Friends School experienced "a fantastical, *Real Housewives of the Independent Schools* cavalcade of hideous parental behavior" which included "secretly taping conversations" with college counselors and trying to obtain copies of other students' records, both potentially involving criminal conduct. Caitlin Flanagan, *The Fury of the Prep-School Parents*, ATLANTIC (June 26, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/sidwell-friends-parents-are-behaving-badly/592408/>. Varsity Blues also led to a Netflix documentary (an R-rated one!), OPERATION VARSITY BLUES: THE COLLEGE ADMISSIONS SCANDAL (Netflix Mar. 17, 2021), a Lifetime film, FRAUD: THE COLLEGE ADMISSIONS SCANDAL (Lifetime 2021), and a novel, JULIE BUXBAUM, ADMISSION (2020). The latter's Amazon blurb summarizes the plot as

Lie. Cheat. Bribe. How far would you go to get into your dream school? How far would your *parents* go? Inspired by the recent college admissions scandal, this ripped-from-the-headlines YA novel by the *New York Times* bestselling author of *Tell Me Three Things* sees one teenage girl's privileged world shatter when her family's lies are exposed.

Admission Hardcover - December 1, 2020, AMAZON, <https://www.amazon.com/Admission-Julie-Buxbaum/dp/1984893629> (last visited Sept. 2, 2021).

5. Singer's racket collapsed due to an unrelated FBI investigation into a stock scam rather than by any law enforcement focus on college and university admissions. One target of the investigation, Morrie Tobin, seeking to get charges or penalties reduced for unrelated securities law violations, volunteered to investigators in the Boston office what he heard about people buying a way into preferred schools for their children. Joel Rubin, Matthew Ormseth, Suhauna Hussain & Richard Winton, *The Bizarre Story of the L.A. Dad Who Exposed the College Admissions Scandal*, L.A. TIMES (Mar. 31, 2019), <https://www.latimes.com/local/lanow/la-me-morrie-tobin-college-admissions-scandal-20190331-story.html>. Tobin was sentenced to 12 months in prison. Jennifer Levitz, *Original Tipster in College-Admissions Case Gets Year in Prison*, WALL ST. J. (Aug. 12, 2020), <https://www.wsj.com/articles/original-tipster-in-college-admissions-case-gets-year-in-prison-11597268684>. See also MELISSA KORN & JENNIFER LEVITZ, UNACCEPTABLE: PRIVILEGE, DECEIT & THE MAKING OF THE COLLEGE ADMISSIONS SCANDAL 228-33 (2021).

Loughlin,⁶ prosecutors did not bring charges against the universities involved or the officials in charge of admissions. Had federal prosecutors characterized the corrupt admissions processes they uncovered as money laundering, both the universities and many university officials would have been at risk of serious criminal and civil penalties. With that leverage, the Department of Justice could have secured sweeping reforms of college admissions at those schools, increasing transparency and fairness by forcing universities to adopt the compliance programs routine in the financial sector.

Universities fail to employ compliance measures that are routine in other complex for-profit and non-profit industries. The solution to the problems uncovered by the Varsity Blues investigation is to reduce the opportunities for corruption in the process going forward, not simply arrest those clumsy enough to be caught. Here we explore how application of anti-money laundering and anti-corruption measures to universities as organizations, and to their boards, would address the problem created by using nontransparent admissions processes to allocate scarce and highly valued admission to selective institutions.

That this problem goes beyond Singer-style corruption of a few bad actors is seen in the details of Harvard's admissions process as revealed in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corp.)*.⁷ Harvard, like other schools, relies on secret subjective personality scores. Examples include lower subjective scores given to Asian applicants and substantial advantages for legacy applicants and desired athletes. These are difficult to explain as anything other than intentional manipulation

6. Typical media coverage is seen in Tom Cleary, *Operation Varsity Blues: 5 Fast Facts You Need to Know*, HEAVY (Mar. 12, 2019, 9:37 PM), <https://heavy.com/news/2019/03/operation-varsity-blues>.

7. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. (Harvard Corp.)*, 397 F. Supp. 3d 126 (D. Mass. 2019). The court held Harvard's admissions process survived strict scrutiny because it served a compelling interest and was narrowly tailored to achieve diversity. Applicants were afforded a holistic review. Diversity included a range of qualities and experiences. Race was used as a plus factor, in a flexible way. For background, see Delano R. Franklin & Samuel W. Zwickel, *Harvard, SFFA Dispute 'Discrimination' in Lower Personal Scores for Asian American Applicants*, HARV. CRIMSON (June 16, 2018), <https://www.thecrimson.com/article/2018/6/16/admissions-suit-arguments/>; Shera S. Avi-Yonah & Molly C. McCafferty, *Asian-American Harvard Applicants Saw Lowest Admit Rate of Any Racial Group from 1995 to 2013*, HARV. CRIMSON (Oct. 19, 2018), <https://www.thecrimson.com/article/2018/10/19/acceptance-rates-by-race/>.

of results by admissions offices.⁸ Varsity Blues could have opened the door to a broader evaluation of elite institutions' admissions practices. We examine the problem through the lens of economic theory, drawing on experiences of how corruption can infect discretionary allocation of scarce goods, to show why even high-profile prosecutions of celebrity parents will not solve the problem.⁹ Ending corruption in college admissions and providing real equality of opportunity that makes the advantages of an elite education available to a diverse population of applicants requires a structural change within higher education focusing on greater transparency about the decision-making process, and a frank discussion about the distribution of access to elite networks. In Varsity Blues, the Department of Justice missed an opportunity to use its resources to push higher education in the direction of greater transparency.

The economics of access to elite educational institutions is straightforward. Such colleges provide a good for which the demand far exceeds available supply. The limited supply of places at these schools is crucial to their desirability.¹⁰ The schools to which the Varsity Blues parents sought admission for their children could admit freshman classes many times their current sizes without reducing the objective measures of quality of the entering

8. The policy is similar at other elite schools; we use Harvard as an example. See Delano R. Franklin & Molly C. McCafferty, *Here's How the Harvard Admissions Process Really Works*, HARV. CRIMSON (Oct. 29, 2018), <https://www.thecrimson.com/article/2018/10/29/how-to-get-in-to-harvard>.

9. For ease of exposition, we refer to higher education as a "good" here rather than use the more cumbersome economic term of "combination of goods and services" that would be more accurate.

10. JEROME KARABEL, *THE CHOSEN: THE HIDDEN HISTORY OF ADMISSION AND EXCLUSION AT HARVARD, YALE, AND PRINCETON* 8 (2006) ("Though often viewed as forward-looking and driven by their commitment to high ideals, the Big Three were more often deeply conservative and surprisingly insecure about their status in the higher-education pecking order and intensely preoccupied with maintaining their close ties to the privileged."). While the University of Southern California may not be of Harvard quality, it was particularly popular with the children of the rich and famous involved in Varsity Blues. The admission rate at USC is low at 11.4 percent at the time the Varsity Blues matter was underway. (Note that Karabel's B.A. and Ph.D. are from Harvard; he is a Professor of Sociology at UC Berkeley.) See also Allen Grove, *University of Southern California: Acceptance Rate and Admissions Statistics*, THOUGHTCO. (Apr. 10, 2020), <https://www.thoughtco.com/usc-university-of-southern-california-admissions-787246>.

class.¹¹ The schools manipulate prices, of which tuition need only be a part, in a nontransparent manner, much as they do with admission criteria. We argue that the stakeholders in these institutions seek to maximize the institutions' prestige and revenue over time, which requires rationing of opportunities to attend to preserve the institutions' elite character.¹² Stakeholders—faculty, alumni, administration, and students—all benefit by limiting access as this increases the value of the signal their affiliation with the institution sends to others.¹³ Rationing highly valued slots in elite colleges occurs through a mysterious-to-outsiders, opaque

11. Harvard usually admits about five percent of its applicants. Delano R. Franklin & Samuel W. Zwickel, *Record-Low 4.59 Percent of Applicants Accepted to Harvard Class of 2022*, HARV. CRIMSON (Mar. 29, 2018), <https://www.thecrimson.com/article/2018/3/29/harvard-regular-admissions-2022/>. Many denied admission have superlative SAT and ACT scores. Allen Grove, *Harvard University: Acceptance Rates and Admission Statistics*, THOUGHTCO. (Mar. 26, 2020), <https://www.thoughtco.com/harvard-university-admissions-787621>.

12. See JEFFREY SELINGO, WHO GETS IN AND WHY: A YEAR INSIDE COLLEGE ADMISSIONS 11 (2020) (“[I]t’s important to know that the baffling process you [the applicant] face is ultimately not a judgment about you or your potential.”). Selingo is a longtime reporter who focuses on higher education and was editor of the *Chronicle of Higher Education*. He spent a year embedded in several universities prior to publishing this book.

13. Economists have developed a large literature on signaling theory. It plays a large role in most human interaction in which education is prominent. Numerous Nobel prize winners in economics contributed to this large literature. In education, this includes Kenneth J. Arrow, *Higher Education as a Filter*, 2 J. PUB. ECON. 193 (1973); Paul Krugman, *And Now for Something Completely Different: An Alternative Model of Trade, Education, and Inequality*, in THE IMPACT OF INTERNATIONAL TRADE ON WAGES 15 (Robert Feenstra ed., 2000); and A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES (1974). When Spence was awarded the Nobel prize for his work on signaling, the committee noted, “[a]n important example is education as a signal of high individual productivity in the labor market. It is not necessary for education to have intrinsic value. Costly investment in education as such signals high ability.” A. Michael Spence – Facts, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/2001/spence/facts/> (last visited Oct. 2, 2021). When employers are screening for potential employees, the information is imperfect about on-the-job performance, so it is natural to look for signals of ability. Signals are imperfect but some signal is better than none. For a survey of the literature on point, see John G. Riley, *Silver Signals: Twenty-Five Years of Screening and Signaling*, 39 J. ECON. LIT. 432 (2001).

A decade or so ago it was thought that the Internet would allow free, quality education to be made available globally, thereby allowing most anyone the chance to have a Harvard-quality education and possibly gutting colleges. While MOOCs (Massive Open Online Courses) are widely available with instructors of sterling qualifications and ability, the courses have not swept away traditional residential colleges because employers are looking for complex signals that go well beyond demonstrating mastery of specific bits of knowledge. Colleges provide such signals; successful completion of online courses do not. Elite colleges, of course, provide the most valuable signals.

admissions process rather than through a transparent mechanism. Those seeking the benefit of that signal (the “demanders” in this market) are infrequent participants in the admissions market and so unfamiliar with how it operates. That makes corrupt methods, such as those provided by Singer and other costly admissions counselors who need not be involved in bribery, effective.¹⁴

Fixing the problem requires more than prosecuting individuals caught by occasional investigations. As discussed below, the leading statement of guidance for anti-bribery and corruption compliance, issued by the Wolfsberg Group, an association of global banks that develops frameworks and guidance for management of financial crime risks, requires that active efforts be taken to prevent exactly the types of activities engaged in by Singer and his coconspirators.¹⁵ Under federal law, agents of entities receiving federal program benefits of more than \$100,000—a category that includes every selective university—are criminally liable for soliciting, accepting, or agreeing to accept bribes involving “any thing of value of \$5,000 or more.”¹⁶ Similarly, the person paying the bribe is also criminally liable.¹⁷ Financial entities are routinely sanctioned, often heavily, for violation of anti-bribery and corruption rules. For example, between 2008 and 2019, global regulators issued \$36 billion in fines to financial institutions for such violations, with \$4.3 billion in fines issued by U.S. regulators between October 2018 and December 2019, up from \$1.5 billion in fines between July 2017 and September 2018.¹⁸ Fines of that magnitude would surely get the attention of even the wealthiest university. Holding universities to account for their laxity in permitting the type of behavior uncovered by Varsity Blues, and engaging in other behavior that would be held to be corrupt

14. Think of other markets in which people are infrequent buyers of costly goods, such as housing. We may pay a fee to a realtor for assistance in searching the market, but the process is not mysterious and there are no stories of high-priced “consultants” *a la* Singer who make deals happen.

15. WOLFSBERG ANTI-BRIBERY AND CORRUPTION (ABC) COMPLIANCE PROGRAMME GUIDANCE, WOLFSBERG GROUP (2017), <https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/3.%20Wolfsberg-Group-ABC-Guidance-June-2017.pdf>.

16. 18 U.S.C. § 666(a)(1)(B).

17. *Id.* § 666(a)(2).

18. *Another Fine Mess—Global Research Report on Financial Institution Fines and Enforcement Actions*, FENERGO (2019), <https://www.fenergo.com/report/global-research-report-on-financial-institution-fines-and-enforcement-actions-2/>.

in other industries, requires no more of colleges than is required of other institutions dealing in valuable services. One could argue that we should hold institutions of higher education to *higher* standards than banks. Instead, we allow them to behave at the level of fly-by-night finance companies.

The focus on compliance should be on boards of trustees that have the ability to establish safeguards for admission processes. They should be held to the same standards as other entities' boards. For example, corporate boards have a duty of loyalty that includes the responsibility to exercise sufficient oversight to prevent regulatory problems analogous to those present in Varsity Blues. Delaware's *Caremark* doctrine—"one of the few judicial decisions that professionals will know by name"¹⁹—imposes a duty of oversight on boards "to exercise oversight" and to monitor a business' "operational viability, legal compliance, and financial performance."²⁰ The Delaware Supreme Court recently reaffirmed this in *Marchand v. Barnhill*, where it held that "[a] board's 'utter failure to attempt to assure a reasonable information and reporting system exists' is an act of bad faith in the breach of the duty of loyalty."²¹ Given the obvious potential for problems in the distribution of valuable offers of admission to selective institutions through opaque admissions processes, it would be odd not to hold college and university boards to a similar duty.²² The Varsity Blues

19. Paul E. McGreal, *Caremark in the Arc of Compliance History*, 90 TEMP. L. REV. 647, 648 (2018).

20. *In re Caremark Int'l Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

21. *Marchand v. Barnhill*, 212 A.3d 805, 809 (Del. 2019) (quoting *Caremark*, 698 A.2d at 971.). The Delaware court's refashioning of *Caremark* from a duty of care issue into a duty of loyalty issue suggests that boards that were asleep at the switch might be able to escape liability. See Stephen M. Bainbridge, Star Lopez & Benjamin Oklan, *The Convergence of Good Faith and Oversight*, 55 UCLA L. REV. 559, 599–600 (2008). We agree with Bainbridge and his coauthors that this is an absurd result. Note that the Delaware courts have not recognized a breach of duty for failure to monitor when the board's inaction results only in harm to the business but only where there are, as in Varsity Blues, wrongful acts or violations of the law. See Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine*, 38 FLA. ST. U. L. REV. 209, 212 (2011).

22. Of course, few, if any, universities are organized as Delaware corporations. But *Caremark* and its progeny are valuable guideposts, emitting as they do what Claire Hill has termed "a considerable penumbra" that influences our understanding of "soft law" norms. See Claire A. Hill, *Caremark as Soft Law*, 90 TEMP. L. REV. 681, 683–84 (2018). As Prof. Hill notes:

In many spheres, corporate law has a considerable penumbra. Forces that shape the penumbra include dicta in judicial opinions and other pronouncements by the judiciary in various contexts, both of which the Delaware judiciary is

investigations, the scholarly literature on college admissions, and the evidence of nontransparent processes that have emerged from litigation over admissions suggest that many selective institutions lack even a minimal “reasonable information and reporting system” concerning their processes.

In this Article, we use Varsity Blues to illustrate the conditions that produce corruption. We first provide accounts of Varsity Blues and two other instances in which the curtain was pulled back to reveal how admissions works in selective institutions. Next, we discuss the college admissions process, showing how it is, especially at elite schools, a substitution of pliable, opaque administrative processes for clear standards. We critique Varsity Blues’ sole reliance on *individual* criminal sanctions as a deterrent for corruption and suggest a framework for identifying where corruption is most likely to occur and a strategy for reducing its role in the allocation of scarce goods that includes institutional criminal sanctions. Finally, we offer an alternative approach based on identifying where corruption is likely to emerge as an acceptable solution to the absence of markets in the allocation of goods and services.

I. THE VARSITY BLUES AND OTHER STORIES

Operation Varsity Blues uncovered, as Senator Elizabeth Warren said, an “example of how the rich and powerful know how to take care of their own.”²³ As of January 2021, more than fifty people had

particularly known for; law firm memoranda to clients that tell those clients, including the companies’ directors and officers, what they *should* do, rather than telling them the minimum they *must* do to avoid liability; and pressure from various constituencies, sometimes from the shareholders in the form of shareholder proposals, and sometimes from expressed or perceived customer and regulator sensitivities to certain conduct or messaging. The penumbra affects what companies do, and the effect is recursive, insofar as what companies do creates norms that come to be part of the penumbra.

Id. at 684.

23. Aaron Katersky, Bill Hutchinson & Mike Levine, *Massive College Admissions Cheating Scandal Snares Hollywood Stars Lori Loughlin, Felicity Huffman*, ABC NEWS (Mar. 13, 2019, 3:49 AM), <https://abcnews.go.com/US/hollywood-actors-ceos-charged-nationwide-college-admissions-cheating/story?id=61627873>. Sen. Warren is reputed to be worth \$18 million and holds a seat in the U.S. Senate, which could be interpreted as making her one of the rich and powerful. *Elizabeth Warren Net Worth 2020*, NET WORTH PORTAL (Jan. 13, 2020), <https://thenetworthportal.com/wiki-2018-2019-2020-2021/politician/elizabeth-warren-net-worth/>. As Selingo notes:

been indicted in connection with the Varsity Blues investigation, most for mail fraud, honest services fraud, and money laundering.²⁴ In addition to Varsity Blues, recent litigation over whether Harvard's admissions process discriminated against Asian American applicants, and earlier litigation over the role of race-based preferences in higher education, provide additional insight into the process beyond the legality of specific university measures.²⁵ Finally, several universities were caught having fabricated admissions data in pursuit of higher rankings. These examples provide considerable evidence of how institutions manage admissions.

A. Varsity Blues

Varsity Blues is the story of an entrepreneur who spotted an opportunity and took a wrong turn. At the center was Rick Singer, who worked his way up in the world of college admissions to run a successful and apparently mostly legitimate admissions counseling business. After holding jobs in different organizations and coaching non-revenue generating sports at colleges and high schools,²⁶ he founded a college admissions counseling business: Future Stars.²⁷ However, Singer "wasn't getting rich" and was looking to boost his income.²⁸ The buyer of his business recalled

Figuring out the rules of the game of selective admissions is a relentless pursuit in economically privileged communities among parents who want their kids to go to what they define as the best colleges. They don't necessarily see higher education as a public good designed to benefit society as a whole but one that should serve their own specific ambitions and goals.

SELINGO, *supra* note 12, at 108.

24. Many plea bargains have been reached; more criminal cases are underway at the time of this writing. Most guilty pleas are for fraud, not money laundering. See *Investigations of College Admissions and Testing Bribery Scheme*, U.S. DEP'T JUST., <https://www.justice.gov/usao-ma/investigations-college-admissions-and-testing-bribery-scheme> (last visited Oct. 4, 2021).

25. Harvard will be discussed below. Yale has also been sued for race discrimination in admissions. See *Justice Department Finds Yale Illegally Discriminates Against Asians and Whites in Undergraduate Admissions in Violation of Federal Civil-Rights Laws*, U.S. DEP'T JUST. (Aug. 13, 2020), <https://www.justice.gov/opa/pr/justice-department-finds-yale-illegally-discriminates-against-asians-and-whites-undergraduate>.

26. The discussion here draws on E.J. Dickson, *Who is Rick Singer, the Mastermind Behind the College Admissions Scam?* ROLLING STONE (Mar. 13, 2019), <https://www.rollingstone.com/culture/culture-news/rick-singer-college-admissions-scam-807736/>.

27. KORN & LEVITZ, *supra* note 5, at 15-16.

28. *Id.* at 20-21.

that families told him Singer wrote a child's application essays and advised a white applicant to list himself as Hispanic.²⁹ After selling that company, Singer worked for other admissions counseling firms before founding "The College Source" in 2004.³⁰

The College Source charged parents a fee to coach their high school students in preparing college applications.³¹ Customers praised Singer's ability to motivate their children to do what was needed to get into a desired college, such as studying for the SAT. The company brought in over a million dollars the first year with only one person besides Singer on the payroll.³² The demand for Singer's services was growing as the University of California System schools became more competitive due to a growing applicant pool.³³ Singer began to advise clients to have their children tested for learning disabilities to gain advantages on the SAT and

29. *Id.*

30. *Id.* at 20–22.

31. Singer charged \$1,500 a year if the student started with him as a high school freshman, \$2,000 per year if the student began as a sophomore, and \$2,500 a year if the student started with him as a junior or senior. Kathy Robertson, *Thousands Turn to College-Prep Coach*, SACRAMENTO BUS. J. (Feb. 6, 2005), <https://www.bizjournals.com/sacramento/stories/2005/02/07/story7.html>. The descriptions available of these operations do not suggest Singer was engaged in any illegal activities in this period. It seems he was providing cheerleader services to high school students, not running substantive SAT or ACT preparation courses, but these were voluntarily contracted services.

32. Part of Singer's success with the College Source came from clever marketing as well. His initial "advisory group" included the president-emeritus of Stanford, the president of the Carnegie Foundation, and the president of Occidental College; the latter said, "Rick is really great at getting at the heart of what kids and families want—and finding the right match." *Id.* However, Singer was unable to maintain his elite academic advisory board; the former Stanford president was not on the advisory board for long and Singer was unable to draw in replacement big names. Mentions occur in various stories of big names being involved, but there appears to be no evidence of such. The boards of entities in IRS filings do not show big-name outsiders. Like many promoters, Singer liked to talk and drop names. See, e.g., Joel Rubin & Matthew Ormseth, *Rick Singer Had Grand Plans Beyond College Admissions. Then Scandal Brought Him Down*, L.A. TIMES (Apr. 29, 2019, 8:01 PM), <https://www.latimes.com/local/california/la-me-college-admissions-scandal-rick-singer-business-20190429-story.html>. One report claimed, "[h]e had a board stuffed with former presidents of Princeton, Stanford . . . as well as the former Chancellor of UCLA." Cory Doctorow, *How the 'Varsity Blues' Admissions Scam Punished Deserving, Hard-Working Kids so that Mediocre Kids of the Super-Rich Could Prosper*, BOINGBOING (Oct. 8, 2019, 9:02 AM), <https://boingboing.net/2019/10/08/michelle-janavs.html>. This claim is not seen elsewhere, so the claim may be incorrect. See, e.g., Meghna Chakrabarti & Allison Pohle, *'Mistake' To Suggest 'Everyone's Using the Side Door,' Former Stanford Admissions Officer Says*, WBUR (Mar. 13, 2019), <https://www.wbur.org/onpoint/2019/03/13/college-admissions-scandal-doj-stanford>.

33. KORN & LEVITZ, *supra* note 5, at 32.

ACT by being given more time.³⁴ And Singer began to brag about using athletics to get non-athletes into selective colleges, telling a “skeptical friend” that colleges did not audit athletics claims.³⁵

In 2007 Singer founded his third venture in college admissions counseling: The Edge College & Career Network, LLC (The Edge).³⁶ He described it as “the world’s largest private Life Coaching and College Counselling Company” and claimed more than ninety thousand clients.³⁷ Singer brought on a network of remote workers to help counsel high school students around the country, splitting fees with counselors.³⁸ Singer established the non-profit Key Worldwide Foundation (KWF), approved by the IRS in 2013.³⁹ He moved his base of operations from Sacramento to tonier Newport Beach.⁴⁰ KWF claimed in its mission statement: “The Key Worldwide Foundation endeavors to provide education that would normally be unattainable to underprivileged students, not only attainable but realistic. . . . Our contributions to major athletic university programs, may help to provide placement to students that may not have access under normal channels.”⁴¹

The second sentence was partially true given that Singer donated to athletic programs as part of his scheme, but the first likely is not. While there were claims in Singer’s IRS filings of help for less privileged students, whether any occurred is disputed.⁴²

34. *Id.* at 33.

35. *Id.* at 37.

36. See *The Edge College & Career Network, LLC*, BIZAPEDIA, <https://www.bizapedia.com/ca/the-edge-college-and-career-network-llc.html> (updated Mar. 14, 2021).

37. KORN & LEVITZ, *supra* note 5, at 59.

38. *Id.* at 62–63.

39. See Sam Brunson, *Key Worldwide Foundation and College Admissions Scams*, SURLY SUBGROUP (Mar. 13, 2019), <https://surlysubgroup.com/2019/03/13/key-worldwide-foundation-and-college-admissions-scams/> (containing links to the IRS filing and other documents).

40. When things came apart, he had to sell his Newport Beach home. Marilyn Kalfus, *Rick Singer, College Admissions Scandal Ringleader, Sells Newport Beach House for \$2.52 Million*, ORANGE CNTY. REG. (Apr. 5, 2019), <https://www.oregister.com/2019/04/05/rick-singer-college-admissions-scandal-ringleader-sells-newport-beach-house-for-2-52-million/>.

41. See *Key Worldwide Foundation*, GREATNONPROFITS, <https://greatnonprofits.org/org/key-worldwide-foundation?express=1> (last visited Oct. 4, 2021).

42. For example, KWF claimed it made a gift of \$19,000 to Friends of Cambodia, but that foundation denies it received such a transfer. Stephen Stock & Kevin Nious, *College Admissions Scam: Follow the Money Behind the Key Worldwide Foundation*, NBC BAY AREA (Mar. 13, 2019), <https://www.nbcbayarea.com/news/local/college-admissions-scam-follow-the->

KWF allowed some of the money parents paid to Singer to gain their children admission to an elite school to be charitable gifts, reducing their net cost via a tax deduction.⁴³ This also enabled parents to pretend that they were not engaged in bribery but were being philanthropic, perhaps lowering the psychological costs of their actions.

Singer appears to have started making payments at least by 2008 to relevant university employees, mostly coaches, to get his clients' children admitted.⁴⁴ From then until his arrest, Singer took in about \$25 million.⁴⁵ Assisting Singer in the internal operation at The Edge and KWF was Steven Masera, an accountant,⁴⁶ who pleaded guilty to racketeering conspiracy charges.⁴⁷ By the time his operation had become a scam, Singer offered to doctor children's standardized test scores.⁴⁸

money-behind-the-key-worldwide-foundation/160340/. IRS filings showed zero payments to Singer or others involved with KWF. *Id.*

43. Korn and Levitz quote a parent as saying "Oh, even better!" upon learning she could write off the fee for cheating on her son's ACT. KORN & LEVITZ, *supra* note 5, at 156. Singer's Indictment lists racketeering, money laundering, fraud, and obstruction of justice. See Information at 1, United States v. Singer, No. 19-CR-10078-RWZ (D. Mass. Feb. 5, 2020), <https://www.justice.gov/file/1142901/download>.

44. KORN & LEVITZ, *supra* note 5, at 42-43.

45. Jennifer Levitz, *More Parents Enter Guilty Pleas in College Admissions Cheating Case*, WALL ST. J. (Oct. 21, 2019, 4:43 PM), <https://www.wsj.com/articles/new-wave-of-parents-begin-entering-guilty-pleas-in-college-admissions-cheating-case-11571673455>.

46. Indictment at 3, United States v. Ernst, 502 F. Supp. 3d 637 (D. Mass. 2019) (No. 19-CR-10081-IT), <https://www.justice.gov/file/1142881/download>.

47. Darrell Smith, *Folsom Accountant Pleads Guilty in 'Varsity Blues' College Admission Scam*, SACRAMENTO BEE (June 27, 2019), https://account.sacbee.com/paywall/subscriber-only?resume=232025827&intcid=ab_archive.

48. Singer could arrange for the SAT or ACT to be taken by a third party, who would get a score which was high enough (but not so high as to arouse suspicions) that would be reported to universities as the applicant's score. Payments to Singer for this service ran \$15,000 to \$75,000. Indictment, *supra* note 46, at 8. In some instances, Singer arranged for the student to claim a medical condition to allow the exam to be taken at a special location where the student could be coached or given assistance. Assisting in this were Igor Dvorskiy and Lisa Williams. See Kate Taylor, *Fallout from College Admissions Scandal*, N.Y. TIMES (Mar. 13, 2019), <https://www.nytimes.com/2019/03/13/us/college-admissions-probe.html>. Both were named in the same indictment. Indictment, *supra* note 46, at 1. Dvorskiy was director of the West Hollywood College Preparatory School, where his mother was principal, and he was an administrator of SAT and ACT exams. He pled guilty to charges that he allowed exams to be rigged for \$10,000. *West Hollywood School Head to Plead Guilty in Admissions Scandal*, CBS L.A. (Oct. 2, 2019, 8:41 AM), <https://losangeles.cbslocal.com/2019/10/02/west-hollywood-school-head-igor-dvorskiy-to-plead-guilty-in-admissions-scandal/>. Williams worked at a public high school in Houston and was an administrator of SAT and ACT exams. She would allow Riddell to sit to take exams under the names of Singer's clients'

For elite schools, high standardized test scores are not enough to secure admission, so Singer fabricated ties to athletics.⁴⁹ Parents made payments to KWF, Singer then paid a coach at the preferred school, either personally or to the coach's program. Most coaches were in non-revenue generating sports (not football or basketball).⁵⁰ These coaches helped with admission by designating applicants as athletes and so getting special consideration by the admissions department.⁵¹ Singer referred to this as the "side door"

children. Indictment, *supra* note 46, at 8. Similarly, Mark Riddell, who worked at IMG Academy in Florida, a high-end boarding school that focuses on intensive athletic training and academics, as "director of college entrance exam preparation" was experienced in preparing students to take college admissions tests. Matt Baker, *IMG Academy Suspends Mark Riddell After College Admissions Bribery Scandal*, TAMPA BAY TIMES (Mar. 13, 2019), <https://www.tampabay.com/sports/high-schools/2019/03/13/img-academy-suspends-mark-riddell-after-college-admissions-bribery-scandal/>. Riddell took SAT or ACT exams for students in special locations arranged due to students' alleged health problems; he did this at least twenty-five times at \$10,000 per exam. Joey Garrison, *Mark Riddell, Test Taker Ace in College Admissions Cheating Case, Pleads Guilty in Court*, USA TODAY (Apr. 12, 2019, 6:26 AM), <https://www.usatoday.com/story/news/nation/2019/04/12/mark-riddell-test-taker-college-admissions-cheating-scandal-court/3445143002/>; Information, *United States v. Riddell*, No. 19-CR-10074-NMG (D. Mass Feb. 5, 2020), <https://storage.courtlistener.com/recap/gov.uscourts.mad.207170/gov.uscourts.mad.207170.1.0.pdf> (filed on Riddell for mail fraud and money laundering). He pled guilty. Doha Madani, *Mark Riddell, College Admission Scandal Test-taker, Pleads Guilty*, NBC NEWS (Apr. 11, 2019, 1:26 PM), <https://www.nbcnews.com/news/us-news/harvard-alum-who-took-exams-students-college-admissions-scandal-pleads-n993956>.

49. Joey Garrison & Maria Puente, *Some Faked Athletic Profiles in Largest-Ever Bribery Case to Get Kids into College*, USA TODAY (Mar. 12, 2019, 3:26 PM), <https://usatodayhss.com/2019/college-bribery-case-fake-athletic-profiles>. Reliance on coaches has long been a part of elite school admissions. *See, e.g.,* KARABEL, *supra* note 10, at 525. In 1979, the Princeton admissions dean wrote:

Because the admission staff alone cannot determine which of the applicants are likely to make the greatest contribution to the athletic programs of the University, we rely upon the assessments of the various coaches. The Department of Athletics provides names of athletically talented candidates in each sport, with an assessment of each individual's athletic ability. As in all other cases, the Admission Committee is not bound by these evaluations, but they are referred to frequently as we make fine distinctions among fairly similar candidates.

Id.

50. Scholarships in sports such as football have been aimed at lower middle class and minority athletes, but in total, they tilt toward the wealthy with scholarships for sports such as crew, lacrosse, squash, tennis, horseback riding, skiing, sailing, and fencing, or even polo. These scholarships are made to order for sale. *See* SELINGO, *supra* note 12, at 148 ("Singer recognized that the majority of college athletes play in relative obscurity on teams few spectators ever go to see.").

51. Even where a coach cannot designate a student for admission, they can confer substantial advantages. *See id.* at 152-53.

of admissions.⁵² Singer's applicants did not receive athletic scholarships, and most never went near the team for which they were allegedly recruited, minimizing negative impacts on the coach's win/loss record.⁵³ Bribes to coaches were insufficient, however. Presenting the applicants as athletes required Singer to help create false resumes showing students to be star athletes worthy of a spot on a college team.⁵⁴ Similarly, non-test academic credentials were sometimes bolstered.⁵⁵

In March of 2019, the first complaint focused on parents was filed in federal court in Boston. It named thirty-two parties to the

For athletes, getting into a selective school is a matching game played with coaches rather than a lottery played with the admissions office. Athletes and coaches must first find each other and be a good match. Once that happens, the coach becomes the applicant's guide and advocate, assisting him through the admissions process.

Id.

52. KORN & LEVITZ, *supra* note 5, at 67. As Korn and Levitz note, the "side door" was "a fancy way of referring to bribery and cheating." *Id.* at 82.

53. Coaches liked Singer's "side door" as it eliminated any pressure from the donor/parents to have their children actually play. KORN & LEVITZ, *supra* note 5, at 120–21. The list of indicted coaches, by school, appears in the Appendix. Singer also used intermediaries to get to coaches. For example, Gordon Ernst, a former tennis coach for the Obamas, was president of a private tennis academy in Houston. Singer paid Fox hundreds of thousands of dollars to help get the tennis coach at the University of Texas at Austin on board and for help getting an applicant labeled a possible recruit for the University of San Diego. Laurel J. Sweet, *Ex-Obama Tennis Pro Pleads Not Guilty to 'Varsity Blues' Conspiracy*, BOSTON HERALD (Mar. 25, 2019, 4:19 PM), <https://www.bostonherald.com/2019/03/25/ex-obama-tennis-pro-pleads-not-guilty-to-varsity-blues-conspiracy/>. Ernst agreed to plead guilty. Anemona Hartocollis, *Former Georgetown Tennis Coach Agrees to Plead Guilty in Admissions Scandal*, N.Y. TIMES (Sept. 15, 2021), <https://www.nytimes.com/2021/09/15/us/georgetown-tennis-coach-guilty-varsity-blues.html>. Similarly, Martin Fox, another key figure in the scandal, apparently has a long history of behind-the-scenes activity in college sports. See Pat Forde, Pete Thamel & Dan Wetzel, *Meet Martin Fox, the Mysterious Houston Sports Figure Caught Up in the College Bribery Scandal*, YAHOO! SPORTS (Mar. 13, 2019), <https://sports.yahoo.com/a-whole-new-world-of-corruption-how-houston-middleman-martin-fox-fit-into-operation-varsity-blues-011841886.html>; Stephanie Pagones, *Varsity Blues: Four More Plead Guilty to College Cheating Scandal*, FOX BUS. (Oct. 22, 2019), <https://www.foxbusiness.com/money/varsity-blues-guilty-college-cheating>. Likewise Martin Riddell, a former tennis pro, took tests on behalf of Singer's clients. Milton J. Valencia, *Test Taker in College Admissions Scam Pleads Guilty in Boston*, BOSTON GLOBE (Apr. 12, 2019, 9:54 AM), <https://www.bostonglobe.com/metro/2019/04/12/test-taker-college-admissions-cheating-scam-slated-plead-guilty-friday-boston/NWnRQq3slzuQ12BHmsxG0L/story.html>.

54. See Chris Quintana, *Fake Disabilities, Photoshopped Faces*, USA TODAY (Mar. 12, 2019, 3:35 PM), <https://www.usatoday.com/story/news/education/2019/03/12/felicity-huffman-lori-laughlin-how-college-admissions-scam-worked/3142160002/>.

55. This was one function apparently provided by Key and KWF employee, Mikaela Stanford, who helped falsify grades. Indictment, *supra* note 46, at 3, 9.

scheme and included allegations of the use of ringers to take the SAT or ACT tests on behalf of clients' children as well as coaching during the tests. Parents paid Singer, usually via his foundation, to generate high scores and to bribe coaches for obtaining admission.⁵⁶

The "Singer as criminal entrepreneur" account of Varsity Blues ends here and is straightforward: well-meaning educational institutions were duped by a clever fraudster who undermined thoughtful admissions processes by tempting coaches of minor sports, engaging in outright fraud, and subverting the test security measures taken by unsuspecting administrators of the SAT and ACT.⁵⁷ Scams involving admissions tests had been prosecuted by November 2011, which should have been sufficient to alert both testing organizations and admissions departments of the need for greater security.⁵⁸ Federal law enforcement caught and punished the kingpin and his henchpersons (if only as a result of an accident),⁵⁹ and the culpable parents were chastened and punished. The institutions vowed no future Rick Singer would be able to repeat his subversion of their meritocratic allocation of the scarce seats in their freshman classes.⁶⁰

This is a familiar narrative when corruption is uncovered.⁶¹ However, when one looks inside a corrupt organization, it becomes

56. The list of all parents, as of August 2021, is in Affidavit in Support of Crim. Compliant, *supra* note 4.

57. Selingo notes that the College Board, which administers the SAT, sold 80 million names of prospective students to colleges in 2010, although there were only 5.2 million SAT and PSAT takers. The College Board refuses to disclose the current sales. SELINGO, *supra* note 12, at 26. This has "changed the dynamics of student recruiting" and shifted colleges' efforts to direct mail and targeted recruiting. *Id.* at 31. This makes them more like financial firms and strengthens our argument that the process should be subjected to the same regulations as govern that sector.

58. KORN & LEVITZ, *supra* note 5, at 50-51.

59. See *supra* text accompanying note 5.

60. The University of California System, like many others, audited admissions processes after the fact. New controls were to be put in place. See Nanette Asimov, *Audit Finds Troubling Errors in UC Admissions, in Wake of Varsity Blues Scandal*, S.F. CHRON. (Mar. 18, 2020, 9:43 PM), <https://www.sfchronicle.com/education/article/Audit-finds-troubling-errors-in-UC-admissions-in-15141448.php>.

61. Korn and Levitz report that UCLA had discovered that UCLA's tennis program had been inappropriately trading designation as an athlete for donations, leading to a review of tennis recruits between 2004 and 2014 that showed the families of "a relatively high percentage" of men's tennis recruits who proved to have limited tennis skills made significant donations to the tennis program. Just two of these had used Singer. As they note, the result was a "[f]act pattern found. Eyebrows raised. Then lowered." KORN & LEVITZ, *supra* note 5, at 86-87. An investigation into favoritism in admissions at the University of

clear how the operations were perverted to serve multiple private interests. The story's familiarity reveals the problem—simply catching and punishing individual perpetrators does not prevent it from being repeated again. Only substantive changes in operations and governance limits repetition.

Singer's scheme is not merely an embarrassment for Duke, Georgetown, San Diego, Southern California, Stanford, Texas, UCLA, Wake Forest, and Yale for being duped;⁶² a personal tragedy for the students admitted under false pretenses (who faced embarrassment, damaged relationships with their parents, and in some cases, expulsion);⁶³ or an opportunity for the rest of us to enjoy some *schadenfreude* when considering the various elites (e.g. law partners, actors, and executives) headed for jail sentences and felony records.⁶⁴ Varsity Blues illustrates the vulnerability of nonmarket allocations of scarce goods to corruption. Focusing on the thrill of watching our social betters being hauled up for tawdry crimes misses the critical lesson: nonmarket allocations of scarce goods requires safeguards against corruption to replace the disciplining role of market institutions. Varsity Blues teaches that even presumptively well-meaning institutions such as elite educational institutions need substantive controls and oversight to prevent corruption in their processes. Leaders of institutions must hold their institutions accountable for operations and compliance to the laws and in turn must be held accountable when they fail to do so. With a narrow focus on low-level participants in the corruption, there will not be lasting change. The Varsity Blues

Texas at Austin found a pattern suggesting "affirmative action for the advantaged." *Id.* at 87–88. UT's president, William Powers, responded to the report by an outside investigative agency, "[i]t is my observation that some similar process exists at virtually every selective university in America, and it does so because it serves the best interests of the institutions." *Id.* at 88.

62. See Appendix for list of schools and the scams involved.

63. See, e.g., 2 Student "Athletes" Have Now Been Expelled in the College Admissions Scandal Fallout, *VOGUE* (Apr. 8, 2019), <https://www.vogue.com/article/stanford-college-admissions-scandal-fallout-expelled>; see also Jenna Lemoncelli & Allison Swan, *Olivia Jade & Other Students in College Scandal Will Have Difficult Time Getting into Other Universities*, *HOLLYWOOD LIFE* (Apr. 1, 2019), <https://newsneednews.com/lifestyle/olivia-jade-other-students-in-college-scandal-will-have-difficult-time-getting-into-other-universities/>.

64. Among media pundits poking fun at the defendants was Rex Huppke, *College Cheating Scandal Unfairly Targets the Wealthy, to Whom We Owe So Much*, *CHI. TRIB.* (Mar. 13, 2019, 9:10 AM), <https://www.chicagotribune.com/columns/rex-huppke/ct-met-college-admissions-bribery-varsity-blues-huppke-20190312-story.html>.

university board members and executives appear to have been willfully ignorant or to have failed in the discharge of their duties. In short, Varsity Blues shows how corruption appears when the honest markets (or market substitutes) are deeply flawed.

B. What Suits over Admissions Teach Us About Admissions

Selective universities' admissions policies are subjected to periodic attacks by unsuccessful applicants, interest groups, and public authorities concerned about discrimination.⁶⁵ For example, the Department of Justice recently alleged systematic discrimination in admissions by Yale University against Asian Americans and whites.⁶⁶ After almost fifty years of litigation over the hotly contested issue of the role of race and ethnicity in college admissions, the legalities of considering race in admissions remain unclear (and well beyond the scope of this Article).⁶⁷ What is relevant here is what these cases have revealed about the admissions processes at the institutions that have been sued. The recent lawsuit (currently on appeal) by Asian American applicants against Harvard led to a "treasure trove" of documents being made public.⁶⁸ Courts have struggled to articulate clear standards for evaluating such challenges, in part because admission practices are murky.⁶⁹ In reviewing the claims and defenses, the courts have not

65. See *Regents of the Univ. of Cal. v. Bakke*, 429 U.S. 1090 (1977); *DeFunis v. Odegaard*, 416 U.S. 312 (1974); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Fisher v. Univ. of Tex. at Austin*, 136 S. Ct. 2198 (2016). The Court upheld carefully constructed programs to achieve sufficient racial diversity.

66. Melissa Korn, *Yale Discriminated by Race in Undergraduate Admissions, Justice Department Says*, WALL ST. J. (Aug. 14, 2020), <https://www.wsj.com/articles/justice-department-finds-yale-discriminated-based-on-race-in-undergraduate-admissions-11597351675>. The Biden Administration dropped the lawsuit in February 2021. Tucker Higgins, *Justice Department Drops Suit Accusing Yale of Discriminating Against White and Asian Applicants, in Reversal from Trump Era*, CNBC (Feb. 3, 2021, 10:56 PM EST), <https://www.cnbc.com/2021/02/03/doj-drops-suit-accusing-yale-of-discriminating-against-white-asian-students.html>.

67. Every Supreme Court decision in the area results in a judgment that the law remains unclear. See Rachel F. Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201 (2006) (reviewing pre-*Grutter* cases).

68. SELINGO, *supra* note 12, at 160. The suit was rejected by the First Circuit. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 980 F.3d 157 (1st Cir. 2020).

69. Schools may use *Bakke* and other race-based admission cases as a cover for "holistic" admissions processes. Affirmative action admissions for underserved groups need not conflict with transparent admissions processes subject to critical inspection, so we wish to set that issue aside.

endorsed the opacity of the admissions procedures. Rather, they have stressed the need for data. As Justice Kennedy noted in *Fisher v. University of Texas at Austin*, “The type of data collected, and the manner in which it is considered, will have a significant bearing on how the University must shape its admissions policy to satisfy strict scrutiny in the years to come.”⁷⁰

Most importantly for our purposes, one of the most striking features of these schools’ defenses of their admissions practices is their insistence on preserving highly subjective elements in admissions.⁷¹ For example, former Solicitor General, Archibald Cox, argued in Harvard’s amicus brief in the *DeFunis* challenge to the University of Washington’s affirmative action policies that:

Harvard’s long experience in the area of undergraduate education . . . highlights the dangers of substituting an iron rule of law for the discretion of academic authorities to make a conscious selection of qualified students from the greatest variety of cultural, social, and economic backgrounds in order to improve the educational experience of the whole student body.⁷²

Cox contended that “if promise of high scholarship were the sole or *even predominant* criterion, Harvard College would lose a great deal of its vitality and the quality of the educational experience offered to all students would suffer.”⁷³

This is strong language that is not supported by what actually happens in admissions. For example, in his assessment, Karabel concluded that an elite school’s vigorous defense of discretion in admissions “was far more than an expression of their rather recent commitment to racial and ethnic minorities; it was also a self-conscious attempt to defend the discretion that permitted them to favor key constituencies—some of them relatively weak in

70. *Fisher*, 136 S. Ct. at 2210.

71. Karabel made this point in his analysis of the response of the elite schools to the attacks on their use of affirmative action:

The decision by elite private universities to intervene in *Bakke* was far more than an expression of their rather recent commitment to racial and ethnic minorities; it was also a self-conscious attempt to defend the discretion that permitted them to favor key constituencies—some of them relatively weak in academic merit—whom it wished to admit for institutional reasons.

KARABEL, *supra* note 10, at 492.

72. *Id.* at 488.

73. *Id.* at 488–89 (emphasis added).

academic merit—whom it wished to admit for institutional reasons.”⁷⁴ Despite Cox’s lofty rhetoric, the actual commentary in admissions files suggested that the reality was less exalted and likely did not influence “vitality” or the “intellectual experience” much. Karabel quotes comments from Harvard interviews: “short with big ears,” “coffee house intellectual type,” “offbeat, eccentric,” “Ken is driven, almost compulsive,” “a young man with spiked hair,” and “seems a tad frothy.”⁷⁵ These hardly reveal a thoughtful effort to maintain Harvard’s “vitality” and “quality of the educational experience.”

Moreover, a significant part of the public relations battle between Harvard and the plaintiffs in the recent *Students for Fair Admissions* litigation concerned whether Harvard was biased in how it rated the *personalities* of Asian American applicants.⁷⁶ (Harvard prevailed at the district court and court of appeals levels; the plaintiffs have petitioned for certiorari to the Supreme Court.)⁷⁷

74. *Id.* at 492; see also SELINGO, *supra* note 12, at 106 (“College admissions is a constant balancing act, to please the bosses, as well as other constituents – faculty, coaches, alumni, donors, and at public universities, politicians.”); *id.* at 111 (Schools “don’t want to lose the ability to choose a freshman class however they like.”).

75. KARABEL, *supra* note 10, at 509-10; see also B. ALDEN THRESHER, COLLEGE ADMISSIONS AND THE PUBLIC INTEREST 56 (1966) (Selective schools see subject-matter requirements as minimum qualifications, so “the really difficult policy decisions involve selection from a group already ‘qualified.’ The grounds on which [this] decision is made may seem arbitrary and capricious to one observer, while to another they may seem natural reflections of values deeply and sincerely held. In any case there are few guidelines, and the scope for disputation is vast.”).

76. The plaintiffs argued that the personality scores were systematically lower for Asian American applicants than for other racial and ethnic groups and that this showed bias. See SELINGO, *supra* note 12, at 112 (describing plaintiffs’ claims about the subjective scores).

77. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2021 WL 1224145 (U.S. Mar. 2021). When the applicant pool was examined purely based on the criteria of test scores and GPAs, the admissions rate for Asian American applicants was significantly lower than their peers with comparable objective criteria.

Harvard sends . . . recruiting letters to black, Hispanic, and Native American students with top grades who hit at least 1100 on the combined math and verbal SAT score (the top score is 1600). To receive such letters under similar circumstances, Asian American men must have a combined score of 1380, and Asian American women, a combined score of 1350.

Joan Biskupic, *Harvard Trial Opens with Challenge to Recruitment Practices*, CNN (Oct. 15, 2018, 8:04 PM), <https://www.cnn.com/2018/10/15/politics/harvard-affirmative-action-opening-arguments/index.html>. Despite high scores, the Asian American applicants had the lowest acceptance rate of any racial group. Avi-Yonah & McCafferty, *supra* note 7. Collin Binkley, *Appeals Court Clears Harvard of Racial Bias in Admissions*, AP NEWS

What is relevant here is not whether Harvard was discriminating but that it thought that a subjective assessment of “personality” was a reasonable factor to be a major criterion for admission. In employment discrimination litigation, this would not get past a competent defense attorney and would likely lead to an immediate surrender to an individual plaintiff or the EEOC.⁷⁸ Heavy reliance on subjective factors delegates almost unreviewable discretion and untraceable power to the admissions office, leaving boards reliant on overall class statistics. Outside higher education, reliance on a similarly subjective component in, for example, hiring employees would be virtually unthinkable today at any business large enough to consult employment law attorneys or HR consultants.⁷⁹ Indeed, the most important trends in employment best practices today focus on getting subjectivity *out* of the process while achieving quality hires.⁸⁰

In preserving highly discretionary areas of its admissions process, such as the athletic preferences, Harvard (and other schools) opens the process to manipulation. Indeed, we argue that these schools deliberately sought to make their admissions process capable of being manipulated. The Varsity Blues schools just

(Nov. 12, 2020), <https://apnews.com/article/appeals-court-clears-harvard-racial-bias-4e3eb42d20ee675887e02bcec57ab412>.

78. The advice provided by the “HR Hero Line” through a 2010 newsletter characterizes the view of subjective factors: “Most employers understand that they should discourage the use of subjective criteria to make hiring, advancement, and severance decisions.” North Dakota Employment Law Letter, *Making ‘Subjective’ Employment Criteria ‘Objective’*, HR DAILY ADVISOR (Dec. 9, 2010), <https://hrdailyadvisor.blr.com/2010/12/09/making-subjective-employment-criteria-objective/>. The newsletter concludes by advising,

Don’t allow managers and supervisors in your organization to whine that subjectivity is critical to evaluating an employee’s performance. To the contrary, terms such as “attitude,” “reliability,” “initiative,” and “team player” need remain subjective only if a manager is simply too lazy to identify the objective performance criteria that can be used to measure the “subjective” categories he wants to evaluate.

Id. We do not think the people behind opaque admissions processes are lazy; the problem is, as we describe below, that they are focused on maximizing the payoffs to internal constituencies.

79. See Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 744–45 (2005).

80. Employers search for ways to minimize such problems while attempting to increase diversity as noted in Kimberly A. Houser, *Can AI Solve the Diversity Problem in the Tech Industry? Mitigating Noise and Bias in Employment Decision-Making*, 22 STAN. TECH. L. REV. 290 (2019).

wanted that ability for their own admissions staffs rather than Rick Singer.⁸¹ It was Singer's understanding of the combination of a discretionary process, its opacity, and its incentives that gave him the opportunity to manipulate the process on behalf of his clients. If elite institutions wish to preserve subjective procedures in pursuit of "vitality," it is not unreasonable to require them to also create processes that prevent abuses, just as we require financial institutions to develop safeguards against other forms of corruption or corporations generally to implement anti-money laundering and other compliance programs. Indeed, the federal government already requires universities to undertake multiple, burdensome compliance programs in many areas, from Title IX⁸² to the Cleary Act⁸³ to the Family Educational and Privacy Rights Act.⁸⁴

C. Implications of Fabrications in Pursuit of Rankings for Admissions

As rankings have assumed a greater importance in higher education,⁸⁵ scandals at several prestigious universities revealed significant cheating in efforts to gain higher rankings.⁸⁶ Some brief examples illustrate the problem. In 2011 the University of Illinois College of Law admitted to the American Bar Association that it had inaccurately reported admissions statistics (students' LSAT and undergraduate GPAs) over six years, blaming the problem on

81. SELINGO, *supra* note 12, at 116 ("[L]egal challenges and political debates have turned admissions deans into Rube Goldbergs, forced to build increasingly intricate systems to take into account ever more factors. They may wish for an easier and less convoluted selection process, but the contraption they have designed has too many overlapping and incompatible parts to work efficiently. The mechanism may ultimately serve the interests of their institutions, but a convenient by-product is a vague process that keeps applicants in the dark.").

82. 20 U.S.C. §§ 1681–1688.

83. *Id.* § 1092f.

84. *Id.* § 1232g.

85. See ELIZABETH A. DUFFY & IDANA GOLDBERG, CRAFTING A CLASS: COLLEGE ADMISSIONS AND FINANCIAL AID 1955–1994, at 71 (1998) ("Where a college ended up in the rankings could strongly affect its admissions performance. In 1984, after Amherst was ranked the number one national liberal arts college, Dean Bedford ordered 25,000 copies of the *U.S. News Report* and sent them to applicants all over the country. In 1990/91, applicants to the College of the Holy Cross dropped 11 percent from the previous year [after a fall in rankings]. At the same time, the quality of the students who chose to enroll fell precipitously. Admissions officials attributed these declines to national rankings.").

86. See WENDY NELSON ESPELAND & MICHAEL SAUDER, ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION AND ACCOUNTABILITY 3 (2016) ("This pressure to produce the best numbers possible also motivates those in charge of the numbers to cheat.").

a rogue admissions dean and a lack of adequate controls over the rogue employee's reporting of numbers at the law school.⁸⁷ Temple University's business school provided false admissions data for at least 2014–18 that led to higher rankings for its MBA programs. The investigation blamed the business school dean and unspecified underlings, who, it concluded, had inadequate controls on the data and had dismantled existing controls.⁸⁸ After the Temple data scandal, eight other business schools were discovered to have also submitted inaccurate data in pursuit of higher rankings.⁸⁹

Some rankings scandals involve submission of data about other areas as well. In 2018, the IE Business School was dropped from the *Financial Times* rankings for submitting inaccurate data, which the school blamed on lower level staff while expressing "full support and confidence" in the dean.⁹⁰ The University of Oklahoma admitted twenty years of submitting incorrect data to *U.S. News* in spring 2019.⁹¹ Later that year, *U.S. News* removed the University of California, Berkeley and four other schools from its 2019 ranking for providing inaccurate data that inflated their rankings.⁹² Less egregious, but perhaps even more troubling, another study coauthored by one of this Article's authors found that law schools that created part-time programs gained a rankings edge during the period that *U.S. News* did not count part-time students' grades and

87. Mark Hansen, *U of Illinois Law School Admits to Six years of False LSAT/GPA Data*, ABA J. (Nov. 8, 2011, 12:21 AM), <https://www.abajournal.com/news/article/illinois-law-admits-to-six-years-of-false-lsat-gpa-data>. Full disclosure: one author (Morris) was on the UIUC faculty during part of the period when this was occurring. He played no role in admissions.

88. *Findings and Recommendations from Jones Day Investigation into Rankings Information Provided by Fox School to U.S. News*, https://news.temple.edu/sites/news/files/images/findings_and_recommendations.pdf (last visited Oct. 1, 2021).

89. Sara Hoover, *After Temple Scandal, More Colleges Misreport Data, Stripped of U.S. News Rankings*, WHY? (Sept. 5, 2018), <https://why.org/articles/after-temple-scandal-more-colleges-misreport-data-stripped-of-u-s-news-rankings/>.

90. John A. Bryne, *Heads Roll at IE Over Loss of FT Ranking*, POETS & QUANTS (Feb. 5, 2018), <https://poetsandquants.com/2018/02/05/heads-roll-at-ie-over-loss-of-ft-ranking/?pq-category=business-school-news&pq-category-2=international-business-school-news>.

91. Eric Levenson, *University of Oklahoma Gave False Data to U.S. News College Rankings for 20 Years*, CNN, (May 24, 2019, 1:20 PM), <https://www.cnn.com/2019/05/23/us/university-oklahoma-best-colleges-ranking/index.html>.

92. Robert Morse, Matt Mason & Eric Brooks, *Updates to 5 Schools' 2019 Best Colleges Rankings Data*, U.S. NEWS (July 25, 2019, 2:00 PM), <https://www.usnews.com/education/blogs/college-rankings-blog/articles/2019-07-25/updates-to-5-schools-2019-best-colleges-rankings-data>.

LSAT scores in calculating its rankings. The authors interpreted this as evidence of gaming the system.⁹³

There are four important implications of these episodes for our purposes. First, the extraordinary lengths to which university personnel are willing to go in seeking advantages and the willingness of some administrators to engage in dishonest behavior should be sufficient to put college and university boards on notice that admissions (and reporting data on admissions) is not something that can be left to the staff but an area that demands systematic oversight. Note that these problems occurred at “reputable” schools, including flagship state universities and well-regarded private ones.

Second, the ease with which efforts to rig admissions data succeeded (for a time) at multiple schools shows that controls are lacking. In each data misrepresentation case noted above, the university involved blamed rogue administrators and a lack of sufficient compliance infrastructure. Despite the history of such problems in higher education, Temple University had even allowed its “rogue” dean to dismantle the rather minimal checks and balances it had in place. Moreover, as one of us has discovered in his practice, when there is one type of fraud present in an organization there is often more fraud as well.

Third, these examples illustrate the problem of bad incentive structures within colleges and universities. Illinois blamed its problem on the admission dean’s desire for advancement (and he did indeed advance before he was caught, significantly increasing his salary); Temple’s dean was attempting to improve his reputation by advancing the school’s ranking. Similar motives likely existed in the other cases. The incentives in these cases are similar in kind to the sales force incentive structure at issue in *Caremark*, where the court found that a corporate board should have understood the regulatory compliance problem that company policies on compliance created.⁹⁴ More recently, the Delaware Supreme Court allowed claims against Blue Bell Creameries USA, Inc.’s directors where the plaintiffs alleged that the board had no committee overseeing food safety, no board-level process to

93. William D. Henderson & Andrew P. Morriss, *Student Quality as Measured by LSAT Scores: Migration Patterns in the U.S. News Rankings Era*, 81 IND. L.J. 163 (2006).

94. *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959 (Del. Ch. 1996).

address food safety, and no protocol for informing the board of food safety reports or developments.⁹⁵ Shareholders seeking compensation for a food company's failure to address food safety at the board level could pursue their claims. Similarly, Boeing shareholders are currently suing that company's board for lax supervision of safety issues concerning the 737MAX.⁹⁶ Admissions is as central to universities' business as food safety is to an ice cream maker or aircraft safety is to a plane manufacturer. *Caremark*, as we discuss below, imposed liability on Delaware corporate board members personally for failing to adequately oversee business practices analogous to those uncovered in Varsity Blues. Why are university and college boards not held to the same standard?

Finally, falsifying admission data to game the system is a fraud, just like falsifying inventory, revenue, or water quality test results. Ignoring this at colleges indicates a more *laissez-faire* approach to the application of rules and regulations than is appropriate. It is time for law enforcement to pay attention to such fraud.

* * *

We now turn to a more in-depth look at college admissions as an example of the nonmarket allocation of scarce goods.

II. NONMARKET ALLOCATION OF SCARCE GOODS

Markets allocate scarce goods through the price mechanism. If the demand for a good exceeds supply, prices rise. This usually leads to additional supply of the good as existing suppliers expand production and new suppliers enter the market. Such reactions can take time and until supply increases, existing suppliers may earn additional profits by allocating the goods to those willing to pay the most. This produces an "efficient" result, in the sense that the goods are matched to the buyers with the highest valuation (subject to being able to fund the purchase).⁹⁷ There are factors, such as when long-term contracts are involved or the availability of credit for those wishing to bid more than their assets allow, that complicate

95. Marchand, *supra* note 21, at 809.

96. Andrew Tangel & Andy Pasztor, *Boeing Board Accused in Lawsuit of Lax Oversight During 737 MAX Crisis*, WALL ST. J. (Sept. 25, 2020, 4:35 PM), <https://www.wsj.com/articles/boeing-board-accused-in-lawsuit-of-lax-oversight-during-737-max-crisis-11601054531>.

97. See AUSTAN GOOLSBEE, STEVEN LEVIIT & CHAD SYVERSON, *MICROECONOMICS* 595 (2d ed. 2016).

the process,⁹⁸ but the crucial point is that markets generally operate based on a willingness to pay and movements in prices create signals about the relative desirability of goods that lead to changes by both consumers and producers.⁹⁹ Market distribution works so well that quasi-markets often spring up in seemingly unlikely places (POW camps, prisons, socialist economies).¹⁰⁰ If price is removed as the means of distribution of scarce goods, some alternative is necessary. Potential mechanisms include lotteries,¹⁰¹ force (as within a criminal enterprise),¹⁰² requiring other resource expenditures (homesteading),¹⁰³ queuing (as in the former Soviet Union),¹⁰⁴ and administrative allocation (such as the wireless spectrum).¹⁰⁵

Nonmarket decisions about the allocations of goods, including college admissions, could be done in a manner most would consider to be fair. Consider this account of how a legitimate college admissions consultant describes what most would agree would be a fair admissions process:

Your grades *will* matter, and colleges like to see As and Bs regardless of your class level. It is important to prioritize your grade point average and class rank and make certain that the difficulty of a class will not prevent you from achieving good test grades. Make sure you can handle the work you sign up for . . . Many private schools are looking to see evidence that you took a challenging high school curriculum. They will look at your grades

98. *Id.* at 606.

99. *Id.* at 22–24.

100. The classic article on point is R.A. Radford, *The Economic Organization of a P.O.W. Camp*, 12 *ECONOMICA* 189 (1945). See also Stephen Lankenau, *Smoke 'Em If You Got 'Em: Cigarette Black Markets in U.S. Prisons and Jails*, 81 *PRISON J.* 142 (2001); Michael V. Alexeev, *The Underground Market for Gasoline in the USSR*, 30 *COMPAR. ECON. STUD.* 47 (1988).

101. John R. Boyce, *Allocation of Goods by Lottery*, 32 *ECON. INQUIRY* 457 (1994).

102. H. Richard Friman, *Drug Markets and the Selective Use of Violence*, 52 *CRIME L. & SOC. CHANGE* 285 (2009).

103. Richard Stroup, *Buying Misery with Federal Land*, 57 *PUB. CHOICE* 69 (1988).

104. Michael Alexeev, *Microeconomic Modeling of Parallel Markets: The Case of Agricultural Goods in the USSR*, 11 *J. COMPAR. ECON.* 543 (1987).

105. See generally THOMAS WINSLOW HAZLETT, *THE POLITICAL SPECTRUM: THE TUMULTUOUS LIBERATION OF WIRELESS TECHNOLOGY, FROM HERBERT HOOVER TO THE SMARTPHONE* (2017).

for each in high school and look for any dips or unusual patterns.¹⁰⁶

The problem is that Singer (and presumably others like him) are able to manipulate the process due to the lack of control by universities over their admissions programs.

There are plenty of fair nonmarket allocations of scarce goods. For example, places in medical residencies are allocated through a complex matching process in which both applicants and residency programs rank each other, and an algorithm is applied to maximize the “fit” between applicants’ and institutions’ preferences.¹⁰⁷ In 2020, this process had 40,084 applicants seeking placement into a total of 37,256 positions. The National Resident Matching Program (NRMP) initially filled 35,258 positions in its first round and then an additional 1,586 through a supplemental match, giving an

106. JILL MADENBERG & AMANDA MADENBERG, *LOVE THE JOURNEY TO COLLEGE: GUIDANCE FROM AN ADMISSIONS CONSULTANT AND HER DAUGHTER* 15 (2017). The Madenbergs offer a list of what colleges consider that reflect what most people would think described an honest (if perhaps biased toward people wealthy enough to afford hiring someone like Ms. Madenberg) process: academics (rigor of high school record, class rank, academic GPA, standardized test scores, essays, recommendations), nonacademic (personal qualities/characteristics), interviews, extracurricular activities, talent/ability, first generation status, alumni relations, geographical residence, racial/ethnic status, volunteer work, work experience, demonstrated interest, and social networking. *Id.* at 84–93. Their advice does not differ significantly from Singer’s in his admissions book, *Getting In*:

To the admissions committee, you start out as a cow. You’re just like all the other cows. Your job is to show them that you’re not just any cow – you’re a Bar W cow (whatever that means). Maybe Bar W cows are only of the Short Horn Waguyu Breed, fed on organic open-range grass, without growth hormones but sprinkled with pixie dust. That’s what branding means. You can sum up all your unique qualities (like academic ability, artistic talent, or passion for helping others) in a few words and images that tell them exactly who you are and what you are about. You can tell your story, and live a life that supports it. The students who stand out are the ones who get in. You can stand out from the herd. This book will show you how.

RICK SINGER, *GETTING IN: PERSONAL BRANDS* 7 (2014). Most of Singer’s advice is straightforward (“Keep your hair neatly trimmed, bathe regularly, wear clean and well-kept clothes, and stand up straight.”) *Id.* at 34. Interestingly, he did note that a “public arrest record” was the type of mistake “legends can’t hide.” In those circumstances, Singer advised prospective college students to “own” their mistakes. *Id.* at 54. It may be, however, that admissions offices do not actually have a clear definition of what makes a good applicant. THRESHER, *supra* note 75, at 63 (“Recruiting implies that one knows a good candidate when one sees him. The judgments involved in this process are heavily loaded with personal and class predilections, prejudices, and assumptions, all held with such conviction that they seem, to the holder, to be self-evident truths or laws of nature.”).

107. See Alvin E. Roth, *The Origins, History and Design of the Resident Match*, 289 J. AM. MED. ASS’N 909 (2003).

overall “fill rate” of ninety-nine percent.¹⁰⁸ While not free of problems,¹⁰⁹ the NRMP is widely believed to be a successful example of a transparent administrative allocation of scarce goods.¹¹⁰ Similarly, China allocates university positions through a competitive national examination process (“probably the largest centralized matching system in the world”),¹¹¹ although the fairness of the process has been questioned.¹¹²

What distinguishes an honest administrative allocation process from one where corruption is a problem? We argue that when three factors are all present, administrative processes are more vulnerable to corruption. First, the greater the scarcity of the good allocated, the more likely it is for someone to want to circumvent the process through corruption. If 99 out of a 100 people will be allocated the good, the incentive to make an end run is relatively low compared with when only 10 out of 100 will receive the good. Second, when the process is opaque, participants will be more likely to invest resources in seeking an end run. Not only will they not necessarily know how to succeed honestly in the process, and so be inclined to look for alternatives, they will have little faith in the fairness of a process they do not understand and be unwilling to accept the results: “Trust us, you aren’t worthy” is a difficult message to sell. Together, shortages and opaqueness create a demand for alternatives including corruption. Third, the absence of meaningful oversight of the process to limit abuse of discretion lowers the risk and cost of engaging in corruption for those operating the process. As a result, they will be more willing to engage in corruption. It thus enables the supply of corrupted

108. National Resident Matching Program, *Results and Data: 2020 Main Residency Match* (May 2020), https://mk0nrmp3oyqui6wqfm.kinstacdn.com/wp-content/uploads/2020/05/MM_Results_and-Data_2020.pdf.

109. Kathleen Crapanzano & Bilal Ahmad, *We Must Prevent Fraud in the Residency Recruitment and Match Process*, 94 ACAD. MED. 155 (Feb. 2019), https://journals.lww.com/academicmedicine/Fulltext/2019/02000/We_Must_Prevent_Fraud_in_the_Residency_Recruitment.10.aspx.

110. Binzhen Wu & Xiaohan Zhong, *Fairness of the Boston Matching Mechanism in China’s College Admissions* (Dec. 1, 2016), at 1, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902729 (“China, as well as many other countries, have long used centralized admissions systems, which have been widely believed to be able to improve fairness.”).

111. *Id.*

112. See, e.g., Yiqin Fu, *China’s Unfair College Admission System*, ATLANTIC (June 19, 2013), <https://www.theatlantic.com/china/archive/2013/06/chinas-unfair-college-admissions-system/276995/>.

mechanisms. Together these three criteria parsimoniously account for the demand for the scarce good, the incentive to supply it, and the opportunity to circumvent formal processes. We now review these criteria with respect to college admissions.

A. Significant Scarcity

Competition across colleges to attract students and tuition revenue is strong and may be becoming even tougher.¹¹³ The National Center for Education Statistics reports that as of 2017–18 there were 750 public four-year degree-granting colleges and 1,590 private nonprofit four-year colleges.¹¹⁴ In 2017–18, 12,133,000 full-time students enrolled in four-year colleges. Eliminating the approximately 1.098 million at for-profit colleges and dividing total enrollment by four (and so overestimating freshman enrollment, since some students take longer to finish), there were approximately 2,758 million first-time students in four-year degree granting schools, roughly three-quarters in public institutions and one-quarter in private nonprofit colleges.¹¹⁵

Admission to a four-year college is not a scarce good;¹¹⁶ many schools are desperate for paying customers to fill their classes.¹¹⁷

113. SELINGO, *supra* note 12, at 12 (“[I]t’s actually never been easier to get into college.”).

114. National Center for Education Statistics, *Digest of Education Statistics: 2019* tbl.105.50, https://nces.ed.gov/programs/digest/2019menu_tables.asp.

115. *Id.*

116. Many four-year colleges will admit nearly anyone with a high school diploma. Two-year colleges admit almost everyone. See *Digest of Education Statistics*, *supra* note 114, at tbl.305.40. Completion at those schools generally guarantees admission to a four-year school. For first-year students applying to four-year schools, there are many schools easy to get into. In Michigan, for 2017–18, the University of Michigan took only 23 percent of applicants, followed by Grace Bible College, but Michigan State University took 78 percent and Western Michigan University took 81 percent. See Collegesimply, *Michigan Colleges Rank by Lowest Acceptance Rate*, <https://www.collegesimply.com/colleges/rank/colleges/lowest-acceptance-rate/state/michigan/>. Some of the authors know from personal experience that schools can increase their “selectivity” score by declaring that first-year students who attend but did not meet the official admission standards are on “probation” and so are not counted as admitted. If they pass courses in their first year, then they become regular students. Colleges play many games to increase their ranking scores, especially the one from USNEWS, one of the most commonly cited ranking sources.

117. This is particularly true in 2020, as the uncertainties created by COVID have had an impact on college applications. See Jessica Dickler, *College Acceptance Rates May Go Higher as Schools Start Aggressively Courting Applicants*, CNBC (May 12, 2020), <https://www.cnbc.com/2020/05/12/college-acceptance-rates-rise-nearly-across-the-board-amid-coronavirus.html>.

Even without taking into account the COVID-19 related uncertainties, this situation will worsen (from colleges' point of view) and improve (from applicants' point of view) as the demographics of the U.S. population shift, with fewer high school-age graduates who could apply to college in the future.¹¹⁸ In some states, the number of high school graduates are falling more than ten percent from 2008–09 to 2021–22.¹¹⁹

Admission to the subset of selective institutions is a scarce good, however.¹²⁰ *U.S. News & World Report's* list of the schools with the lowest acceptance rates includes schools admitting from four percent (Stanford and Harvard) to thirty-one percent (Brandeis University, California State University-Long Beach, Milwaukee Institute of Art and Design, and Smith College).¹²¹ Scarcity benefits institutions by helping promote an exclusive image, facilitating educational signaling, and adding to the prestige of institutions.¹²²

118. The number of people age 15–19 will fall between 2020 to 2030. Statista, *Population Projections for the United States from 2015 to 2060*, at <https://www.statista.com/statistics/611644/united-states-population-projection-by-age/>.

119. National Center for Education Statistics, *Projections of Education Statistics to 2021* tbl. 15, <https://nces.ed.gov/programs/projections/projections2021/tables.asp>. That includes Maine, New Hampshire, Vermont, Michigan, and Ohio. *Id.*

120. Selingo estimates that less than ten percent of schools are what he terms “sellers,” schools that can afford to be selective. SELINGO, *supra* note 12, at 50. However, from the applicant's point of view, admission to a particular school could be desirable because the school offered:

- a better education (leaving the definition of “better” undefined for now);
- a better alumni network, providing improved post-graduation opportunities;
- a better collegiate experience (a winning football team, nicer facilities, more exclusive social life); and/or
- a better signal to future employers.

For these reasons (and others, such as location or availability of a desired degree program), applicants view some schools as preferable to others. The 200 most selective schools each admit under half their applicants. SELINGO, *supra* note 12, at 39. The most selective schools account for a third of all applications, even though they are just twenty percent of the colleges and universities. *Id.* This has long been true. KATHERINE KINKEAD, *HOW AN IVY LEAGUE COLLEGE DECIDES ON ADMISSIONS* 6 (1961) (noting Yale had more than three applicants for each place in the late 1950s).

121. *U.S. News, Top 100 – Lowest Acceptance Rates*, <https://www.usnews.com/best-colleges/rankings/lowest-acceptance-rate> (last visited Nov. 2, 2021) (using 2018 entering class data).

122. *See, e.g., Madenberg & Madenberg, supra* note 106, at 52 (“The first thing you need to understand is that the single most important statistic to a college is its *Yield* number.”); Duffy & Goldberg, *supra* note 85, at 69 (“The hierarchy among the colleges reflected in admit rates, applications per enrolled student, and overall admissions situations reflects an increasing concern with status and prestige.”).

[S]carcity has the added benefit of increasing an institution's prestige. The more students who apply, and the fewer students who get in, the more selective an institution becomes, and, subsequently, the more prestigious. And parents are clawing over one another to get a taste of the social capital that comes with that.¹²³

There is thus significant scarcity—and reasons for institutions to maintain it—in part of U.S. higher education.¹²⁴ Indeed, scarcity grew in the 1990s as schools launched efforts to recruit more applicants to make themselves appear more selective.¹²⁵ Desirability and scarcity increase the intensity of the demand for the allocated good and encourages an environment where side agreements can be crafted.

Varsity Blues fits this description. Acceptance rates at the colleges and universities targeted by Singer and his clients were

123. Adam Harris, *One Way to Stop College-Admission Insanity: Admit More*, ATLANTIC (Mar. 13, 2019), <https://www.theatlantic.com/education/archive/2019/03/stop-college-admission-cheating-admit-more-students/584749/>. Selingo notes that parents seek elite educations for their children in part out of a sense of economic insecurity. Selingo, *supra* note 12, at 7 (“For well-off and middle-class parents, their economic state is a precarious position to be preserved for their children.”).

124. Note that greater scarcity alone does not suffice to open the doors wide to corruption. Despite medical residency slots in more desirable locations (with opportunities for training with a star staff, live in a high quality of life area, and so on) being fiercely sought by highly competitive medical school graduates, the matching system has avoided corruption issues. Selectivity has increased since the 1990s. Selingo provides several examples, comparing 1990 and current numbers for Washington University (62% vs. 14%), the University of Pennsylvania (38% vs. 9%), and Johns Hopkins University (53% vs. 11%). Selingo, *supra* note 12, at 9. See also JACQUES STEINBERG, *THE GATEKEEPERS: INSIDE THE ADMISSIONS PROCESS OF A PREMIER COLLEGE* 6–7 (2002) (“Other than those fortunate enough to be accepted, the most immediate beneficiaries of all this wooing would be Wesleyan’s professors. Like gardeners, the university’s faculty members needed fertile minds in which to plant the seeds of knowledge, and when they weren’t satisfied with the quality in a given year—if there were too few Russian majors or not enough budding microbiologists, for example—the professors were never shy about telling the administration. Also paying close attention to Ralph’s [the admissions director] efforts were the university’s alumni, who were particularly gratified when Wesleyan snagged a hot prospect—academic, as well as athletic—from a competitor. That swelling pride was often all it took to nudge a willing alumnus to contribute upward of a million dollars to his alma mater, which in turn made it possible for the institution to seek to attract even better applicants.”); Duffy & Goldberg, *supra* note 85, at 32 (“Self-studies and strategic plans from the 1990s, like those from the 1980s, are peppered with references to the size/quality trade-off In the short term, some of the colleges in our study have been willing to weather budgetary pressures in order to preserve their academic standards.”).

125. KORN & LEVITZ, *supra* note 5, at 72–73.

among the most selective. Singer's clients' children may not have had the credentials (or their parents feared they did not) to gain admissions even if they had objectively high credentials or the accoutrements of celebrity that normally open doors.

B. Opacity

Opacity is a critical element in enabling corruption, a source of the common claim that "[s]unlight is the best disinfectant."¹²⁶ Many anti-corruption efforts rely on transparency as a means to expose existing corruption and, hopefully, to forestall it.¹²⁷ Opacity facilitates corruption by allowing corrupt behavior to go unnoticed by the press and the public. Particularly for allocation of prestige goods, such as higher education, it is critical that the process of selection not be perceived as corrupt.¹²⁸ To date, keeping as much as possible behind closed doors helps keep the focus on ivy-covered walls and successful alumni. And U.S. higher education's opacity is remarkable compared with higher education in other countries. Prof. Jerome Karabel's in-depth study of Harvard, Yale, and Princeton's admissions policies over time begins by announcing that "viewed from both a historical and a comparative perspective, the admission practices of America's top colleges and universities are exceedingly strange."¹²⁹ Jeffrey Selingo similarly concluded in his account of admissions that "[t]he more selective the institution, the murkier its process often is."¹³⁰ Similarly, Jacques Steinberg

126. Justice Brandeis actually said, "Sunlight is said to be the best of disinfectants." LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY* 92 (1914).

127. Transparency International is the most prominent NGO to expose corruption. For an overview, see *What Is Corruption?*, TRANSPARENCY INT'L, <https://www.transparency.org/en/what-is-corruption> (last visited Oct. 6, 2021). Some corruption probes are spectacular, such as Operation Car Wash in Brazil that took down numerous top government leaders. See Anderson Cooper, *Brazil's "Operation Car Wash" Involves Billions in Bribes, Scores of Politicians*, CBS NEWS (May 21, 2017), <https://www.cbsnews.com/news/brazil-operation-car-wash-involves-billions-in-bribes-scores-of-politicians/>. Transparency International's data (available on its website) suggests corruption is common globally. Numerous stories are reported at the Organized Crime and Corruption Reporting Project available at <https://www.occrp.org/en/>.

128. See Niro Sivanathan & Nathan C. Pettit, *Protecting the Self Through Consumption: Status Goods as Affirmational Commodities*, 46 J. EXPERIMENTAL SOC. PSYCH. 564 (2010). The authors review several studies on "self-integrity" involved in obtaining high-status goods.

129. KARABEL, *supra* note 10, at 1.

130. SELINGO, *supra* note 12, at 86. Selingo is former editor of the CHRONICLE OF HIGHER EDUCATION and a professor at Arizona State University. See also Kinkead, *supra* note 120, at

noted that “Colleges make their admissions decisions behind a cordon of security befitting the selection of a pope. The reasons why one applicant was accepted, while another was rejected, are closely held by the few people permitted in the room at the time the choices are made.”¹³¹

College applicants seeking to obtain admission to their top choice are poorly equipped to be careful consumers.¹³² Among other things, few explicitly consider cost in deciding where to apply.¹³³ Most families choose a college for a family member only once per child.¹³⁴ Parents who are themselves college graduates have been students at only a handful of institutions at most and perhaps at only one, and their experiences are many years past.¹³⁵ As a result, higher education is a market dominated by first time buyers (applicants), advised by family members and friends whose own college experiences may be decades out of date. Such information comes mostly from other infrequent purchasers of

6 (“To a thoughtful outsider, the spectacle of the Yale admissions procedure is a heartening one. For in spite of the hundreds of qualifying youngsters applying, Yale’s selection remains an individual and personal process.”).

131. STEINBERG, *supra* note 124, at ix.

132. Selingo’s account of a year spent with the admissions staff at Emory, Davidson, and the University of Washington enabled him to describe aspects of admissions that few outside higher education understand, such as the “shaping” of a class, a process that means “for a tiny slice of applicants there isn’t just one look, but many.” SELINGO, *supra* note 12, at 2. Even with multiple looks, however, files have to be dealt with quickly. He notes that the longest the admissions team spent on a file while he sat with them on one day was twelve minutes. *Id.* at 4. Elsewhere, Selingo notes that “[t]he fate of most students is sealed in the first evaluation of their materials” which takes five to ten minutes. *Id.* at 182.

133. SELINGO, *supra* note 12, at 33; *see also* CAITLIN ZALOOM, *INDEBTED: HOW FAMILIES MAKE COLLEGE WORK AT ANY COST* 61 (2019) (discussing a family who sent their son to a “selective private college in the Northeast” for a liberal arts program, which they saw as “a gift to their child who had always been so dedicated to both his sports and his studies,” despite serious financial pressure); *id.* at 112 (discussing a student who persuades her parents that despite financial issues she should go to Princeton by saying, “‘If I go here I’m going to get this amazing Ivy League education and I’m going to be able to do whatever I want with it.’ How could they argue with that?”).

134. Selingo classifies college as an experience good, that is one whose quality can only be judged by actually experiencing it. SELINGO, *supra* note 12, at 55. We think applicants could be much better consumers but agree with Selingo that the incentive structure does not encourage investing in learning about the process.

135. SELINGO, *supra* note 12, at 229 (“The parents of today’s teenagers didn’t encounter the price competition between schools when they applied to college, and thus they largely underestimate it, to their disadvantage.”).

higher education.¹³⁶ This aspect of the market is what allowed Rick Singer to prosper as a legitimate college application coach before he turned to criminal methods. There is a robust market in concierge-like help with admissions, ranging from guidebooks and test preparation courses to advisors who help fill out application materials and brief applicants on what to say at interviews.¹³⁷

Inexperienced potential buyers confront a process at elite institutions that is willfully obscure.¹³⁸ Beyond high school transcripts and test scores, applicants and their families know little about how it operates. We say it is willfully obscure because colleges and universities, particularly highly selective ones, do little to dispel the mystery surrounding the admissions process.¹³⁹ For example, Harvard's statement on its admissions page is remarkably vague:

We seek promising students who will contribute to the Harvard community during their college years, and to society throughout their lives.

136. There are small signs of hope that technology may help disrupt the admissions process. Naviance is a software platform that helps students match their objective credentials against colleges' records in accepting students like them. Madenberg & Madenberg, *supra* note 106, at 114–15. Of course, it doesn't include data on how much other applicants' parents paid coaches to get their child designated as an athlete. See also SELINGO, *supra* note 12, at 230 (describing TuitionFit and Edmit, which crowdsource data to allow applicants to compare aid offers).

137. An online search provides links to many college admission advisors with glowing testimonials from happy Ivy League students they assert to have helped. See, e.g., *Find a College Application Professional Near You*, THUMBSTACK, https://www.thumbstack.com/k/college-application-assistance/near-me/?irgwc=1&utm_campaign=impact27795&utm_content=Wlywm5WpsxyLUh8wUx0Mo37BUkBTwPofU2koz40&utm_medium=affiliate&utm_source=cma-affiliate (last visited Oct. 6, 2021); Madenberg & Madenberg, *supra* note 106.

138. Selingo charitably describes admissions as a “holistic process based on a complicated rating system.” SELINGO, *supra* note 12, at xii.

139. Selingo argues that it is fruitless to bemoan “the lack of precise signals and information for both the applicant and the school to make timely and knowledgeable decisions.” SELINGO, *supra* note 12, at 10. For example, consider Wesleyan's use of “numerical ratings to applicants in amorphous categories like ‘commitment’ and ‘intellectual curiosity.’” STEINBERG, *supra* note 124, at xxi. These practices have a long history. Duffy & Goldberg, *supra* note 85, at 84 (quoting Harvard institutional research director in 1970 that “[f]or the Classes of ‘59, ‘64, ‘66, ‘68 the weight of the personal attributes factor increased markedly. During this ten-year period the number of applicants more than doubled and the SAT scores of the applicant group increased more than a hundred points. Hence the committee had much more freedom in the decision process and it chose to give more weight to the personal strengths of the students.”).

While academic accomplishment is important, the Admissions Committee considers many other factors—strong personal qualities, special talents or excellences of all kinds, perspectives formed by unusual personal circumstances, and the ability to take advantage of available resources and opportunities.¹⁴⁰

Stanford's and Princeton's explanation of their admissions process are similarly opaque:

At Stanford, we practice holistic admission. Each piece in an application is part of an integrated and comprehensive whole.

One piece tells us about your background and life experiences, another about your school, and your academic achievement. We learn from others about your character and intellectual contributions. In your essays, we learn about your ideas and interests, and what is meaningful to you.

....

In a holistic review, we seek to understand how you, as a whole person, would grow, contribute, and thrive at Stanford, and how Stanford would, in turn, be changed by you.¹⁴¹

The [Princeton] University's admission process involves a holistic review of each applicant's entire file. No particular factor is assigned a fixed weight; rather, the process involves a highly individualized assessment of the applicant's talents, achievements, and his or her potential to contribute to learning at Princeton.¹⁴²

Indeed, universities sometimes admit that their processes are not even consistent. Douglas Bennet, president of Wesleyan, responded to a complaint about admissions by explaining that, as Steinberg summarized,

admissions was a process in which the objective criteria were always changing, depending on the particular candidate and the institution's specific need at that moment. In these two cases, the committee's stated goal of being consistent within the same high

140. *First-Year Applicants*, HARV. UNIV. <https://college.harvard.edu/admissions/apply/first-year-applicants> (last visited Oct. 25, 2021).

141. *Our Selection Process*, STAN. UNIV. <https://admission.stanford.edu/apply/selection/> (last visited Oct. 25, 2021).

142. *How to Apply*, PRINCETON UNIV., <https://admission.princeton.edu/how-apply> (last visited Oct. 6, 2021).

school was outweighed, at least in part, by other concerns: the sliding grades and limited extracurricular interests of one applicant, and the risk of alienating the family of another. Such calculations become even more complicated when the objective of diversity was introduced into the mix.¹⁴³

It is not just the most academically selective schools that describe their admissions methodologies in such vague terms. The University of Southern California, a school for which a number of Varsity Blues defendants sought Singer's help in their children's applications, does as well:

We look for those students we believe will thrive at USC. Our application process is designed to discover your individual story, so that we might see how you would take advantage of the many opportunities available at USC. Like many highly selective universities, we conduct a comprehensive, holistic review of your application to consider academic and personal characteristics. We will review your performance in school, the rigor of your program, writing skills and test scores. We also consider personal qualities, as revealed in community involvement, leadership and achievements.¹⁴⁴

Faced with such confusing descriptions and a lack of clear criteria, it is little wonder that many applicants and their families seek outside help.¹⁴⁵ The information parents have about top schools is that they are difficult to get into and there is no fixed formula.¹⁴⁶

Why do schools use such vague descriptions of their admissions processes? A "holistic" approach to university admissions is appealing to multiple constituencies within elite institutions. It gives applicants hope that even if they lack the

143. STEINBERG, *supra* note 124, at 100-01.

144. *Apply: What We Look For*, UNIV. OF S. CAL., <https://admission.usc.edu/apply/our-admission-process/> (last visited Oct. 6, 2021).

145. STEINBERG, *supra* note 124, at xv ("Like well-paid psychologists, college consultants also began hanging out their shingles, offering to give middle-class students at public high schools the sort of strategic edge that previously had been reserved for students at elite private schools.").

146. SELINGO, *supra* note 12, at 10 ("The cloak of 'holistic admissions,' a procedure that considers factors beyond grades and test scores is nearly ubiquitous among selective schools."); see Thresher, *supra* note 75, at 21 ("The selection principle raises deeper social and educational issues about which most people have strong views but little real knowledge. Each college is busy selecting among applicants – some very vigorously select a minority of applicants in, others rather loosely select a minority out.").

highest grades or test scores, they nonetheless have a chance to get into top schools.¹⁴⁷ That has the benefit of increasing applications for the schools, which contributes to the school's brand by lowering their acceptance rate, thus boosting their exclusivity. Selectivity is a component of many college ranking systems.¹⁴⁸ It also gives admissions departments greater opportunities to shape the incoming class to meet their preferences.¹⁴⁹ It offers administrators ways to ease the delivery of bad news about admissions to applicants and families complaining about the failure of an applicant to gain admission, and it allows the administration to shape freshman classes to meet the demands of competing stakeholders (alumni, faculty, and other constituencies).¹⁵⁰ As Karabel notes, these admission processes appear "strange" to most of the world:

147. Applicants and their families "want a formula. . . . They want this transparency until they find out that they don't have the right grades and test scores to get in. That's when they favor a process that considers the 'whole person,' one including what they think are their best attributes." SELINGO, *supra* note 12, at 87; see also Kinkead, *supra* note 120, at 7 ("Unfortunately there is a trend today toward judging college candidates from paper data – from the results of multiple-choice tests whose answers are written out in the questions themselves and which permit the elements of personality, of creativity, and of individual talents little chance of showing through – and from school records and teacher resumés pre-digested for admissions officers by the secondary-school guidance men.").

148. CATHY N. DAVIDSON, *THE NEW EDUCATION: HOW TO REVOLUTIONIZE THE UNIVERSITY TO PREPARE STUDENTS FOR A WORLD IN FLUX* 213–14 (2017) ("One criterion underlies all of the others: selectivity. And, for most institutions, selectivity is based on grades and test scores of individual students."). Rankings are important, even to elite schools. *Id.* at 49 ("The single fastest way a president can improve a university's ranking is to become more selective, because a chief factor in rankings is the admittance rate."). They are extremely important for those selling rankings. Selingo notes that college rankings are the "linchpin of the *U.S. News* brand, generating 29 million unique visitors to its website in 2019." SELINGO, *supra* note 12, at 77.

149. KARABEL, *supra* note 10, at 485–86 ("This extraordinary emphasis on highly subjective qualities – pursued right down to the assignment of a single number reflecting the institution's summary assessment of the candidate as a human being – was central to the admissions process of the Big Three. Though peculiar from the perspective of many faculty, the system had important institutional advantages. Apart from permitting the admissions office to act on its not unjustified belief that brains alone were a poor predictor of success later in life, the weight given to nonacademic factors permitted gatekeepers to balance interest groups against one another in selecting a class. To do this, they needed to protect their autonomy and their discretion, both of which were well served by a complex admissions process designed to be flexible, subjective, and opaque.").

150. KINKEAD, *supra* note 120, at 12 ("[M]uch of the popularity of the appellations can be traced to the way they protect a guidance man when he breaks the news to querulous parents that their child will have to be content with admission to what he calls 'an excellent little liberal-arts institution,' which the parents have never heard of.").

Americans, for example, accept as normal that highly subjective qualities such as “character” and “personality” should figure centrally in the admissions process—a policy that seemed to many at the time it was invented to be an open invitation to prejudice and discrimination. Americans also take for granted that the ability to throw, kick, or hit a ball is a legitimate criterion in determining who should be admitted to our greatest research universities—a proposition that would be considered laughable in most of the world’s countries. And Americans tolerate a system in which our most selective institutions of higher education routinely grant preferences to the children of alumni and major donors—a practice that viewed from a distance looks unmeritocratic at best and profoundly corrupt at worst.¹⁵¹

Opacity is necessary but not sufficient for corruption to take root in an administrative allocation scheme. Without obscuring how programs are run, administrators’ decisions can be harder to defend, particularly where a selective institution could fill its entering class multiple times over with equally well-objectively credentialed applicants.¹⁵² Moreover, knowing that there is an alumni preference or desire to limit or to expand the presence of a particular group on campus is different from being confronted with the reality of the tradeoffs in objective characteristics made to promote other goals.¹⁵³

C. Constraints

Even an opaque process distributing a scarce good may operate fairly if the discretion of those within the process is subject to effective constraints that prevent them from making corrupt decisions. One possible source of constraints on colleges’

151. KARABEL, *supra* note 10, at 135.

152. As former Harvard president Drew Gilpin Faust once said, “We could fill our class twice over with valedictorians.” Pierre Hugué, *How to Get Into Top Colleges: Create Your Student Brand*, FORBES (Jan. 15, 2019, 5:12 PM), <https://www.forbes.com/sites/noodleeducation/2019/02/15/how-to-get-into-top-colleges-create-your-student-brand/?sh=6d51c71e78b5>.

153. Somewhat optimistically, in our view, Madenberg cautions applicants that “[a]s powerful as it is in college admissions to have a legacy, you need to first fulfill the school’s requirements before that will help you; legacy will distinguish you from your other classmates applying to the same school, but it will not make you a stronger student.” Madenberg & Madenberg, *supra* note 106, at 95. *But see* AFFIRMATIVE ACTION FOR THE RICH: LEGACY PREFERENCES IN COLLEGE ADMISSIONS (Richard D. Kahlenberg, ed.) (2010).

admissions processes are the agencies that accredit institutions of higher education.¹⁵⁴ Accreditors are supposed to protect consumers of higher education by, in theory, holding the colleges and universities to account for their actions.¹⁵⁵ Different bodies accredit universities as a whole and individual programs within them. Even the routine periodic accreditation visits are major events for most institutions, requiring months of preparatory work, assembling thousands of pages of documentation, and hosting a team onsite with access to records and personnel.¹⁵⁶

Accreditation standards for colleges stress values such as transparency. For example, the Southern Association of Colleges and Schools touts “Core Values” that include “integrity,” “accountability,” and “transparency.”¹⁵⁷ However, these standards are soft, making few specific demands on admissions departments. For example, the admissions guidance from the Standards for Accreditation and Requirements of Affiliation of the Middle States Commission on Higher Education Standard II—Ethics and Integrity, says only: “honesty and truthfulness in public relations announcements, advertisements, recruiting and admissions materials and practices, as well as in internal communications[.]”¹⁵⁸

It is not clear that many universities meet even this weak standard, as none of the published admission guidelines for the many universities we reviewed mentioned carve-outs for “special admissions” categories such as alumni, large donors, or athletics or

154. Whether accreditation is effective is a subject of long-running debate. Davidson, *supra* note 148, at 4 (accreditors originally created by elites to as effort to “systematize[] and enshrine[] their values.”).

155. U.S. Department of Education, *Overview of Accreditation in the United States*, <https://www2.ed.gov/admins/finaid/accred/accreditation.html> (“The goal of accreditation is to ensure that institutions of higher education meet acceptable levels of quality.”).

156. The debate about accreditation and quality is not new. See William Troutt, *Regional Accreditation Evaluative Criteria and Quality Assurance*, 50 J. HIGHER EDUC. 199 (1979); Terrel Rhodes, *Show Me the Learning: Value, Accreditation, and the Quality of the Degree*, 40 PLANNING FOR HIGHER EDUC. 36 (2012).

157. Southern Accreditation of Colleges and Schools Commission on Colleges, *About SACSCOC*, <https://www.sacscoc.org/> (last visited Oct. 4, 2021).

158. This is the sixth point in the MSCHE’s Standard II on Ethics and Integrity. *Standards*, MSCHE, <https://www.msche.org/standards/> (last visited Aug. 30, 2021). Handbooks on accreditation and reaccreditation published by SACS say a school must have an admission policy, but nothing more. See, e.g., Southern Association of Colleges and Schools Commission on Colleges, *Handbook for Institutions Seeking Initial Accreditation* 13 (Feb. 2020), <https://sacscoc.org/app/uploads/2020/02/Handbook-for-Initial-Accreditation.pdf>.

provided the level of detail routinely required by consumer protection standards for the similarly expensive purchases such as real estate.¹⁵⁹

Any admissions process is “discriminatory” in that schools are making choices among applicants. Universities routinely discriminate against low grades and low standardized test scores. This is commonly expressed in the process. What is not disclosed are the biases in favor of the children of alumni and for the progeny of large donors and powerful parents.¹⁶⁰ As Selingo notes, this was “one reason Harvard fought so hard to keep certain documents under seal in the discrimination lawsuit filed by Asian-American applicants.”¹⁶¹ Compared to an overall admissions rate of 6%, 34% of Harvard legacies who applied were admitted between 2009 and 2015.¹⁶² That is, universities discriminate on the basis of grades and standardized test scores, unless the admissions staff recognized the relationship to a wealthy family that leads to a decision to admit under remarkably elastic and opaque standards.

The issue is not simply one of truth in advertising, however. Admissions departments’ ability to engage in such favoritism is what created the opportunity for Singer. In our view, higher education institutions are welcome to favor the children of potential donors, particular demographic groups, alumni children, or superb flute players so long as they are clear and transparent

159. The admissions statements provided by most universities are vague and reasons for rejection are too. Contrast that to applications for mortgages when houses are purchased. One meets certain income criteria or not. The metrics are quite clear and multiple firms compete to offer that service. Complaints that minorities are discriminated against in mortgage offerings by redlining are common and, as a result, the decisions are subject to strict scrutiny by regulators. See Christopher Brooks, *Redlining’s Legacy: Maps Are Gone, but the Problem Hasn’t Disappeared*, CBS NEWS (June 12, 2020, 8:25 AM), <https://www.cbsnews.com/news/redlining-what-is-history-mike-bloomberg-comments/>. Rejected applicants are due an explanation focused on specific criteria, unlike rejected applicants to universities.

160. Biases in favor of donors run back into private high schools. Flanagan describes how private schools “have two honor codes, two community-standards contracts, and two disciplinary codes. One is for everyone, and the other is for big donors.” Flanagan, *supra* note 4.

161. SELINGO, *supra* note 12, at 159.

162. *Id.* The legacy issue has become more problematic as schools increased their selectivity. Daniel Golden, *An Analytic Survey of Legacy Preference*, in AFFIRMATIVE ACTION FOR THE RICH 81 (“When a college rejects only a small proportion of candidates, legacy preference hardly matters, since most alumni children would get in regardless. As a school becomes more choosy in admissions, it needs to exercise legacy preference more often if it wants to satisfy alumni.”).

about their processes and have in place the compliance systems to ensure that their admissions offices operate as described and within the law. This includes the constraints imposed by laws to prevent discrimination on race, sex, and other protected characteristics, constraints that are themselves murky because of the confused jurisprudence in this area.¹⁶³

In reviewing the admission standards at University of California Los Angeles (UCLA),¹⁶⁴ University of California San Diego (UCSD),¹⁶⁵ University of Southern California (USC),¹⁶⁶ Chapman University,¹⁶⁷ Georgetown University,¹⁶⁸ and Northwestern University,¹⁶⁹ all involved in operation Varsity Blues, we could find no reference to “special admittance” based upon athletics, or based on large donations by famous and powerful parents.¹⁷⁰ Athletics can be staggeringly important at selective schools: “In the fall of 2018, Amherst enrolled 676 athletes over its four classes of undergraduates, thirty-six *more* athletes than the University of Alabama overall.”¹⁷¹ Nor did we see preferences

163. Rachel Moran, *Of Doubt and Diversity: The Future of Affirmative Action in Higher Education*, 67 OHIO ST. L.J. 201, 201 (2006) (“The jurisprudence of affirmative action in higher education has been plagued by ambivalence and ambiguity.”).

164. *Application Review Process for Freshmen*, UCLA, <https://admission.ucla.edu/apply/freshman/freshman-requirements/application-review-process> (last visited Oct. 4, 2021).

165. *First-Year Student Application Requirements*, UNIV. OF CAL., SAN DIEGO, <https://admissions.ucsd.edu/first-year/application-requirements.html> (last visited Oct. 4, 2021).

166. *Apply: First-Year Students*, UNIV. OF S. CAL., <https://admission.usc.edu/apply/first-year-students/#/additional-application-requirements> (last visited Oct. 4, 2021).

167. *First Year Application Instructions*, CHAP. UNIV.: UNDERGRADUATE ADMISSION, <https://www.chapman.edu/admission/undergraduate/how-to-apply/first-year.aspx> (last visited Oct. 4, 2021).

168. *First Year Applicant*, GEORGETOWN UNIV.: OFF. OF UNDERGRADUATE ADMISSIONS, <https://uadmissions.georgetown.edu/applying/first-year/> (last visited Oct. 4, 2021).

169. *The First Step in Your Northwestern Direction is Learning How to Apply*, NW. UNIV., <https://admissions.northwestern.edu/apply/> (last visited Oct. 4, 2021).

170. Selingo provides a careful description of how Emory admitted an applicant with athletic credentials but lower academic credentials than other students, quoting the admissions staff member as saying “He can definitely do the work here, . . . I don’t love him, but the team does.” Selingo concludes that this student “had a hook—he was an athlete the coach wanted. He got in.” SELINGO, *supra* note 12, at 92. There is no mention of any verification of the student’s athletic prowess beyond the coach’s endorsement. Korn and Levitz report that Singer told parents that the “back door” of making a donation directly to the university would cost \$45–\$50 million for entrance to Harvard or Stanford. KORN & LEVITZ, *supra* note 5, at 82.

171. SELINGO, *supra* note 12, at 154. As a result, it becomes harder for non-athletes to get in. The athletic preference largely benefits a white, well-to-do group of students. SELINGO,

mentioned for the children of former graduates. However, as an audit of the University of California System showed, schools routinely admitted students based on undefined “special talent admissions” and records of these admissions were conveniently not kept.¹⁷²

The missing ingredient in higher education is the application of sufficient constraints to ensure that admissions offices stick to implementing the mission with which they are charged by the institution’s board. Those constraints include both more transparency than currently exists at most selective institutions and more board involvement in the operations of the institution. Such constraints will only come when outside pressures force them to be adopted, which is why Varsity Blues is a significant missed opportunity. In Varsity Blues, the accreditation bodies played a role similar to the rating agencies in the financial crisis – they were in a position to identify and prevent the problem, but they failed to do so.

D. Creating a Problem

The combination of a scarce good with an opaque nonmarket allocation process subject to few constraints creates excellent conditions for allowing corruption to occur. What is surprising from Varsity Blues and the evidence uncovered in admissions litigation and rankings scandals is that college and university

supra note 12, at 156. More generally, former Princeton President William Bowen found that a student’s probability of entering rose from forty percent to seventy percent if the applicant was an athlete in a review of nineteen highly selective schools’ admissions records. *Id.* at 157.

172. Eric Quintanar, *UC System Reveals Admissions Records for Student Athletes Incomplete, ‘Basic Data’ Unavailable*, DAILY WIRE (Feb. 19, 2020), <https://www.dailywire.com/news/uc-system-reveals-admissions-records-for-student-athletes-incomplete-basic-data-unavailable>; see also RICHARD D. KHALENBERG, *Introduction*, in AFFIRMATIVE ACTION FOR THE RICH, *supra* note 153, at 1-2 (noting that legacy status at “elite colleges” is worth the equivalent to a 160 point higher score the SAT on a 400-1600 scale); *id.* at 1 (noting that three-quarters of research universities and “virtually all” liberal arts schools grant legacy preferences); Peter Schmidt, *A History of Legacy Preferences*, in AFFIRMATIVE ACTION FOR THE RICH, *supra* note 152, at 57 (“A separate analysis of data from the 1991-92 academic year found that, among the top seventy-five universities in the *U.S. News & World Report* rankings, just one, the California Institute of Technology, has no legacy preferences at all.”); DUFFY & GOLDBERG, *supra* note 85, at 47 (“Admissions officers have always carefully considered applications from alumni children. At many of the colleges, prior to the tidal wave all alumni children who could demonstrate a minimum level of ability were admitted.”).

general counsels have not demanded board-level review of admissions practices. The examples noted from Varsity Blues, admissions litigation, and rankings scandals partially lift the lid on the seeming mystery of admissions and gives us a glimpse of the problems. It is clear from the market in top schools that admission is valuable and that universities seek to unlock that value for themselves. Wealthy parents are willing to pay large sums.¹⁷³ What distinguishes Varsity Blues is not the corruption, but that Singer and his accomplices were able to discount admission far below what universities' own prices appeared to be by putting their thumbs on the scale, and often the schools received nothing in these instances.

How much does it cost to buy your way into a selective college?¹⁷⁴ Indeed, according to some educational consultants, donating as little \$20,000 would be enough to gain an applicant attention even at a college with an endowment worth hundreds of millions.¹⁷⁵ "At an exclusive college, it can take at least \$50,000 with some assurance that future donations will be even greater."¹⁷⁶ At

173. President Trump's son-in-law Jared Kushner's admission provides one data point. His admission to Harvard happened to be accompanied by a \$2.5 million donation to a library in 1998. Daniel Golden, *The Story Behind Jared Kushner's Curious Acceptance into Harvard*, PROPUBLICA (Nov. 18, 2017), <https://www.propublica.org/article/the-story-behind-jared-kushners-curious-acceptance-into-harvard>. Korn and Levitz report emails from the dean of the Kennedy School at Harvard to an admissions dean for some "big wins" in admissions that had led to pledges of a building and fellowship funding. KORN & LEVITZ, *supra* note 5, at 83.

174. One high price, involving a colorful student, seemed to involve the son and, later, brother, of the emir of Qatar. He initially was enrolled at a community college twenty-five miles from his suites in the Beverley Wilshire Hotel. His scholarly work there eventually led to his application to USC (after being rejected by UCLA). Members of his family and friends visited with the president of the school, which he then attended. He was often on the Dean's list despite rarely being seen on campus. Faculty members were given expensive gifts; required classes were waived. Appreciating his undergraduate degree, he later entered a master's program at USC and was allowed to study "remotely." How much, if anything, was donated to USC, is unclear. The story is recounted in Harriet Ryan & Matt Hamilton, *Column One: The True Story of the Heartthrob Prince of Qatar and His Time at USC*, L.A. TIMES (July 16, 2020), <https://news.yahoo.com/true-story-heartthrob-prince-qatar-120033827.html?guccounter=1>.

175. DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 60 (rev. ed. 2019). Golden, who attended Harvard, was awarded a Pulitzer Prize for his work on college admissions. See Daniel Golden of the Wall Street Journal, PULITZER PRIZES, <https://www.pulitzer.org/winners/daniel-golden> (last visited Oct. 4, 2021).

176. GOLDEN, *supra* note 175, at 60.

least \$100,000 is needed at the top 25, at least \$250,000 at the top 10, and amounts can even exceed a million.¹⁷⁷ Consider this description of Duke's admissions process, which makes clear the routine nature of the consideration of special connections in admissions:

Twice a year, after evaluating Duke's first and second round of applicants, Ms. Scott would lug a box . . . from the admissions building to President Terry Sanford's spartan office on the second floor of the administration building. There, she would unpack its contents: applications of candidates whom she had intended to reject but who were on the list of students the president had sent her for special consideration. He had chosen them not because they showed academic promise he feared might otherwise go unnoticed but because they were children of corporate titans expected, in the event of a favorable decision, to contribute to the university endowment. Duke, one of the South's best universities, aspired to national preeminence—and it needed money to get there.¹⁷⁸

This is part of schools' unspoken business model. It is natural to want the children of the rich and famous. These parents can give or help raise money, raise the school's visibility, and allow talented children of non-famous people to hobnob with famous people, thereby making the school more desirable to attend. Administrators and faculty will enjoy socializing with these parents at university gatherings. While universities project an image of an egalitarian mission based on merit, not money or influence, the application and acceptance process contradict such

177. *Id.* at 60. This may be ineffectual. Chad Coffman, Tara O'Neil & Brian Starr, *An Empirical Analysis of the Impact of Legacy Preferences on Alumni Giving at Top Universities*, in *AFFIRMATIVE ACTION FOR THE RICH*, *supra* note 153, at 118 ("Our findings cast serious doubt on the financial justification for legacy preference policies. Using an OLS regression model with controls for size, public/private, income, wealth, year, and fraction of alumni solicited, we show that the presence of legacy preference policies does not result in significantly higher alumni giving. Moreover, we show that prior to controlling for wealth, there is a strong correlation between alumni giving and legacy preferences. This suggests that greater alumni giving at elite schools with legacy preferences is driven by the school's ability to over-select from their own wealthy alumni populations—not a result of the preference policies themselves inducing additional giving.").

178. GOLDEN, *supra* note 175, at 51; Golden, *supra* note 162, at 83–84 ("Legacy preference in college admissions is an almost exclusively American custom. Foreign universities typically depend on government support, eliminating the financial incentive to admit alumni children.").

claims and accreditors' alleged standards of integrity and transparency.

Golden's explanation of the donations common to help secure admission indicates an economically rational allocation of scarce goods by universities. Tuition at many elite schools, such as USC, is posted at about \$60,000 per year.¹⁷⁹ While highly desirable students will be admitted with scholarships, in effect a discount,¹⁸⁰ the children of Varsity Blues' parents were unlikely to be admitted even if they offered to pay full tuition. That is not unique to them; as Golden discovered, colleges often expect to receive "donations" above and beyond tuition. At the selective schools involved in Varsity Blues, Golden reports the common donation needed to assist in admission to be \$100,000 and up.¹⁸¹ That is, parents of children who may not make the cut academically pay more than the posted price.

In economics, this is called first degree price discrimination.¹⁸² It occurs when a seller attempts to extract the highest price different customers are willing to pay for the same service. That is, once admitted, one is a USC student whether paying \$100,000 a year (\$60,000 a year tuition plus a donation) and another is paying zero dollars a year. The seller attempts to identify where on a demand curve a potential buyer is. In case of college admissions, one way

179. See *Learn: Cost and Financial Aid*, UNIV. OF S. CAL., <https://admission.usc.edu/learn/cost-financial-aid/> (last visited Oct. 4, 2021). Room and board are listed separately and reflect the market value of such services as off-campus alternatives are usually easily available, limiting the prices that can be charged for those services. Tuition, however, is at the discretion of administrators.

180. Calling a price cut a "scholarship" is brilliant marketing. The school can claim to be honoring the student when in fact it has calculated the price it must offer to possibly attract a desirable student given the competition from other schools for such students.

181. GOLDEN, *supra* note 175, at 60. Golden's work is the most comprehensive but there are other reports of donations leading to admissions. See Christopher Rim, *Recent Scandal at Brown Highlights How the Ivy League Grants Special Treatment to Children of Donors*, FORBES (Feb. 27, 2019), <https://www.forbes.com/sites/christopherrim/2019/02/27/recent-scandal-at-brown-highlights-how-the-ivy-league-grants-special-treatment-to-children-of-donors/?sh=2660ba0b1abf>.

182. See GOOLSBEE ET AL., *supra* note 97, at 380–82. Price discrimination is common but is not evidence of monopoly power. Airlines sell similar seats on the same flights at different prices in an effort to earn higher revenue, but that does not generate monopoly profits in that competitive industry. (Selingo analogizes the college admissions process to airline pricing practices. SELINGO, *supra* note 12, at 209.) Colleges similarly face many competitors. As Selingo notes, "Nowadays, college leaders talk about pricing strategies like airline executives and retailers do." *Id.* at 221.

buyers send signals is by making donations. The result is the seller captures higher total revenue, extracting much of the consumer surplus¹⁸³ from the demanders by selling at the highest price thought likely to be acceptable to each one. In practice, it allows less qualified students to help subsidize more desirable students and allows the university to capture higher total revenue than if they sold slots to students based *only* on posted tuition.

However, schools are not attempting to maximize current net revenue. USC might be able to charge, say, \$100,000 a year rather than the posted price of \$60,000 a year, and sell every slot at full price. But, like other elite schools, it balances revenue against student body quality and the long-run reputation of the school. If it sold all student positions to the highest bidders, it could end up with a less able student body, which would become known not only by the unhappy faculty but by employers and prospective students. It would also be less diverse, causing unfavorable publicity and changing the experience its students would have. In the future, selling slots to academically able students (and persuading them to accept offers of admission) would become increasingly difficult. Administrators setting tuition balance many factors, including competition from other schools, in working to bring in revenue and enhance reputation.¹⁸⁴

183. Consumer surplus is the difference between the highest price a given demand would have been willing to pay and the price actually paid. See GOOLSBEE *ET AL.*, *supra* note 97, at 380–82. Some parents might be willing to pay \$100,000 a year for their child to be at, say, USC, but only have to pay \$60,000, thereby allowing the parent to “capture” the \$40,000 in value they would have been willing to pay. First degree price discrimination is rarely seen in practice because it requires the seller to have a lot of information about the demander. Schools have that—they know the financial status of applicants’ families. They also have information about how anxious prospective students are to attend. Schools spend significant resources in the recruitment process, so know potential customers well. They face competition from other schools. That helps limit the prices they could charge.

184. The price of slots at private universities is not regulated. Higher education is, however, highly regulated in general. SELINGO, *supra* note 12, at 253. Schools charge what they think the market will bear, given their costs, the competition, and other factors. The Varsity Blues defendants were indicted primarily for mail fraud, honest services fraud, and money laundering. The various schemes employed reduced average student quality and allowed other parties, such as coaches, to capture revenue that could have gone to the schools. What we cannot know is if the students in question might have been admitted if their parents had given a sizable donation to the school, rather than bribe an employee, but Golden’s work indicates that is a common practice with, rationally, higher donations being employed at more selective schools. See also DUFFY & GOLDBERG, *supra* note 85, at 195 (“Another reason that institutions, particularly prestigious colleges and universities, were able to raise tuition so sharply in the 1980s was that parents and students began to view the

The government charged parents who paid bribes, ringers who took part in the standardized test scam, and university employees who accepted bribes.¹⁸⁵ None of the universities and none of their executives or boards were charged or received any sanction. None of the presidents or boards resigned. All escaped the consequences of their failures of oversight. Prosecuting just the parents, coaches, and Singer and his associates is like prosecuting bank tellers for accepting deposits from drug dealers but not demanding the banks enact money laundering compliance programs. Embarrassment aside, schools are happy to have such practices limited as they divert revenue away from the “voluntary donations” that Golden explained to be a common *quid pro quo* for admission. By only going after non-admissions officials at universities, the prosecutors protected the non-transparent pricing schemes at the schools.¹⁸⁶ The prosecutions help thwart one corrupt route to admissions but not others.¹⁸⁷

While many universities suggest their admissions policy is based upon multiple factors, vague “holistic” approaches provide room for accommodating students on whose behalf contributions

price of a college as an indication of its quality. This so-called ‘Chivas Regal phenomenon’ emerged as colleges adopted marketing strategies and practices from business in order to compete for the shrinking number of college-age students.”).

185. See Indictment, *supra* note 46, for the charges against the defendants.

186. We are not contending these schemes should be illegal, but a lack of transparency generates more opportunities for corruption that can be viewed as violations of money laundering rules.

187. While we focus here on the elite private schools involved in Varsity Blues, that does not mean that is the only place improper payments have been made. Texas Southern University is not selective but unqualified students paid bribes to get in the law school. See Shannon Najmabadi, *Alleged Bribes, Kickbacks for Law School Admission at Heart of Texas Southern University Turmoil*, TEX. TRIB. (March 11, 2020), <https://www.texastribune.org/2020/03/11/admission-bribes-kickbacks-heart-texas-southern-university-turmoil/>. Perhaps even more common is influence peddling. Stories are common of special favors being done for the children of legislators or friends of members of the board of regents at state universities. Few come to light as retribution can be significant, as occurred at the University of Texas at Austin when one board member blew the whistle and was run out of the board. See Kevin Lokuwaduge, *Former UT System Regent Wallace Hall Speaks on Admission Scandal*, DAILY TEXAN (June 18, 2019), <https://thedailytexan.com/2019/06/18/former-ut-system-regent-wallace-hall-speaks-on-admission-scandal/>. A similar incident was exposed at the University of Illinois some years ago. See Jodi S. Cohen, Stacy St. Clair & Tara Malone, *Clout Goes to College*, CHI. TRIB. (May 29, 2009), <https://www.chicagotribune.com/news/chi-uofi-clout-story.html>. As with the Varsity Blues incidents, such favoritism means scarce seats are given to students who otherwise would not be admitted, thereby denying more deserving, but less well connected, students.

are made. Such policies may be effective *if properly supervised*. Colleges, their boards, and their executive teams thus failed to exercise the level of care that the admissions policies they approved demanded.¹⁸⁸ Living up to the level of care to which the legal system holds corporate boards and financial institutions does not seem an unreasonable demand to put on boards supervising institutions whose decisions affect thousands of lives and whose massive endowments help insulate them from market discipline. Indeed, as all boards of organizations of the size of these universities, charitable or commercial, are held to the same standard of care as public companies, it is not just reasonable, it is required.¹⁸⁹ Corporate boards must not only assure the existence of information and reporting systems but also take action when these systems raise red flags.¹⁹⁰

III. CONTROLLING CORRUPTION IN NONMARKET ALLOCATIONS OF SCARCE GOODS

Corruption in admissions involves money laundering.¹⁹¹ Since law enforcement began to focus on (and to define) money laundering in the 1970s in the course of the war on drugs, a vast compliance industry has arisen to address concerns over money laundering in everything from banking to real estate to car sales.¹⁹² Anti-money laundering obligations are internationally recognized.

188. See McGreal, *supra* note 19, at 678 (noting that in *Gantler v. Stephens*, 965 A.2d 695 (Del. 2009), the Delaware Supreme Court held corporate officers to the same fiduciary duties as directors).

189. For a discussion on point, see Nancy B. Rapoport, *Managing U.S. News & World Report – The Enron Way*, 48 GONZ. L. REV. 423 (2012). The author argues that falsification of data for rankings purposes, which does not appear to be uncommon, should result in liability for senior administrators at board members at universities.

190. John Armour, Jeffrey Gordon & Geeyoung Min, *Taking Compliance Seriously*, 37 YALE J. REG. 1, 7 (2020).

191. KORN & LEVITZ, *supra* note 5, at 276 (quoting Singer at his sentencing telling the judge, “I am absolutely guilty of that [money laundering] as well, ma’am.”).

192. Grand View Research, ANTI MONEY LAUNDERING MARKET SIZE, SHARE & TRENDS ANALYSIS REPORT BY COMPONENT (SOFTWARE, SERVICES), BY PRODUCT TYPE, BY DEPLOYMENT, BY END USE (BFSI, GOVERNMENT, HEALTHCARE, IT & TELECOM), AND SEGMENT FORECASTS, 2019-2025 (2019).

According to the Vienna Convention and the Palermo Convention, money laundering can include three distinct types of behavior:

- (i) the conversion or transfer, knowing that such property is the proceeds of crime[;]
- (ii) the concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime; and
- (iii) the acquisition, possession or use of property, knowing, at the time of the receipt, that such property is the proceeds of crime.¹⁹³

Ensuring compliance with money laundering rules is aimed at the top of organizations. The administrators and trustees of universities cannot absolve themselves from responsibility. For example, federal guidelines for Bank Secrecy Act (BSA) compliance state that

[t]he board of directors is responsible for ensuring that the BSA compliance officer has appropriate authority, independence, and access to resources to administer an adequate BSA/AML compliance program based on the bank's ML/TF and other illicit financial activity risk profile. The BSA compliance officer should regularly report the status of ongoing compliance with the BSA to the board of directors and senior management so that they can

193. *Anti-Money Laundering/Combating the Financing of Terrorism – Topics*, INT'L MONETARY FUND, <https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm> (last visited Oct. 25, 2021). The definition of property includes intangible assets, such as admissions to a university. *See also* PAUL ALLAN SCHOTT, REFERENCE GUIDE TO ANTI-MONEY LAUNDERING AND COMBATING OF THE FINANCING OF TERRORISM Annex VI-9 (2006) (“The term *funds* or *other assets* means financial assets, *property of every kind, whether tangible or intangible*, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such funds or other assets, including, but not limited to, bank credits, traveler’s cheques, bank cheques, money orders, shares, securities, bonds, drafts, or letters of credit, and any interest, dividends or other income on or value accruing from or generated by such funds or other assets.” (third emphasis added)); OFF. FOREIGN ASSETS CONTROL, RISK FACTORS OF OFAC COMPLIANCE IN THE SECURITIES INDUSTRY 2 (2005) (“Property is anything of value and property interests may be direct, indirect, present, future, or contingent. When proving that property is the proceeds of crime, it should to be necessary that a person be convicted of a predicate offense.”); *see* FIN. ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION 33 (2021).

make informed decisions about existing risk exposure and the overall BSA/AML compliance program.¹⁹⁴

These rules also apply to non-profit organizations, including universities. For example, in 2009 several rabbis were among forty-four people arrested for laundering money generated from narcotics trafficking and bribery. The rabbis laundered the money through non-profit religious institutions they controlled.¹⁹⁵ The scheme was similar to Operation Varsity Blues as the money was moved as a donation to a charity. Schools are a known recipient of laundered funds so are required to abide by the AML laws.¹⁹⁶ In particular, students coming from high-risk nations are being recruited, admitted, and paying school fees.¹⁹⁷ The fees are being paid by parents who need not explain their sources of wealth, a key component of modern anti-money laundering efforts (as anyone who has applied for a mortgage in the United States knows well).¹⁹⁸

Charities and non-profits can be used as a mechanism for bribery. Charitable donations, community investment projects, and sponsorships can all be employed. The donations are made to buy the decision-making power over contracts or regulations that affect the company. They can also “be used to channel funds to front organisations controlled by a bribery recipient.”¹⁹⁹ The core of Varsity Blues is the bribery of university officials and employees by parents for admission to the university’s educational programs for their children. Instead of just handing officials cash, the parents

194. FED. FIN. INSTS. EXAMINATIONS COUNCIL, BSA/AML MANUAL, <https://bsaaml.ffiec.gov/manual/AssessingTheBSAAMLComplianceProgram/04>.

195. Linda McGlasson, *Money Laundering at the Heart of NY/NJ Arrests*, BANK INFO SEC. (July 24, 2009), <https://www.bankinfosecurity.com/money-laundering-at-heart-ny-nj-arrests-a-1652>.

196. David Prosser, *Money Laundering Goes Back to School*, ARACHNYS (Nov. 5, 2019), <https://www.arachnys.com/money-laundering-goes-back-to-school/>.

197. Yojana Sharma, *International HE Fuels Corruption in Student Admissions*, UNIV. WORLD NEWS (Oct. 5, 2013), <https://www.universityworldnews.com/post.php?story=20131004142900721>.

198. See, e.g., Charles Russell Speechlys, *Unexplained Wealth Orders: Playing the Trump Card*, LEXOLOGY (Nov. 16, 2020), <https://www.lexology.com/library/detail.aspx?g=60d90f5e-9b4a-4da4-ae9-f7ebc86ab7e7>; Bret Hood, *Money Laundering and Mortgages: How to Keep Yourself Safe*, NAT’L MORTGAGE PRO. (Feb. 24, 2020), <https://nationalmortgageprofessional.com/news/73941/money-laundering-mortgages-keep-yourself-safe>.

199. See TRANSPARENCY INT’L UK, *Sponsorship, Donations & Community Investment*, in ANTI-BRIBERY GUIDANCE (Peter van Veen ed., 2018).

used intermediaries. The first was the “fixer,” Singer, who arranged the bribes. The second was using a charity such as KWF or an athletic or other university-connected foundation through which the bribe was laundered. In essence, the universities sold admission for laundered cash, which was laundered through organizations the schools controlled.

Money laundering charges often carry heavy sentences – and, in part, it was the threat of the addition of such charges that likely motivated many of the Varsity Blues defendants to plead guilty.²⁰⁰ Similarly, admissions based on allowing a wealthy applicant’s family to bypass the published admissions requirements and secure admission for their child by making a donation are (at least arguably) illegal. To see why, change the parties involved: A company makes inferior concrete not up to standards required by a city’s bid requirements. However, if the owner donates \$100,000 to the mayor’s reelection campaign, the company gets the contract to supply the city concrete. Admission as *quid pro quo* for a donation is no different.

When is a charitable donation a bribe? According to the Global Infrastructure Anti-Corruption Centre: “Charitable donations are the giving or providing, directly or indirectly, of cash, venues, equipment, personnel time or other benefit to a charity, or to an individual or organisation who is nominated by or connected with a charity.”²⁰¹ That is, a donation could be considered to be a bribe if it is given or received with the intention of influencing someone to act improperly, or as a reward for having acted improperly.²⁰² Making a donation to get admission appears to be an implicit part of selective schools’ admission policies.²⁰³ Indeed, these admissions

200. In the case of public universities, bribery charges under the USA PATRIOT ACT are also a possibility. See *Compliance with Laws when Conducting University Activities Overseas: Anti-Bribery, Economic Sanctions, Foreign Boycotts, Anti-Terrorism and Foreign Laws*, GEO. WASH. U., <https://compliance.gwu.edu/compliance-laws-when-conducting-university-activities-overseas> (last visited Oct. 4, 2021).

201. *Political and Charitable Donations*, GIACC, <https://giaccentre.org/gifts-political-donations/> (last visited Oct. 4, 2021).

202. *Id.*

203. Peter Sacks, *The Political Economy of Legacy Admissions, Taxpayer Subsidies, and Excess “Profits” in American Higher Education: Strategies for Reform*, in *AFFIRMATIVE ACTION FOR THE RICH*, *supra* note 153, at 215 (“If we are to believe Harvard’s claim – that it needs to provide legacy preferences in order to create good will and to entice donations – then alumni donors are essentially investing in shares of the Harvard enterprise on the expectation of some future economic benefit.”).

schemes are similar to the facts that led to pharmaceutical giant Novartis settling claims arising from the use of illegal charities to funnel payments in a kickback scheme. Novartis agreed to pay \$51.24 million to settle the claims that the firm used illegal charities to pay co-payments of Medicare patients taking Novartis' drugs Gilenya and Afinitor, as part of an overall \$642 million settlement. Novartis used charities to funnel money as a "kickback" to increase usage of its drugs by paying patients' co-payment obligations.

The Novartis scheme worked like this: Patients enrolled in a free drug program, which provided them with Gilenya and Afinitor donated by Novartis, thus costing Novartis potential sales. These patients were then shifted to Medicare, which would then pay Novartis for the drugs. However, because Medicare required a co-pay for the prescriptions, patients would object to the change. To solve this problem, Novartis arranged for a charity to cover the co-pays and then provided the charity with the funds to do so via a tax-deductible contribution. Novartis made sure that the intermediary and "charity" coordinated the applications for payments so the "charity" was sure to select their potential Novartis patients.²⁰⁴ From the patients' point of view, there was no change: they continued to receive the drugs for free. From Novartis' point of view, the company went from donating the drugs to receiving payment for them.

At an elite university, when a coach is given authority to designate a certain number of candidates for admission as athletes who will receive special consideration, the coach is being given

204. *Novartis Pays Over \$642 Million to Settle Allegations of Improper Payments to Patients and Physicians*, U.S. DEP'T JUST. (July 1, 2020), <https://www.justice.gov/opa/pr/novartis-pays-over-642-million-settle-allegations-improper-payments-patients-and-physicians>. Novartis was the only contributor to the charity for co-pay assistance. Novartis told the charity that it would donate money to the fund/charity only if the eligibility definition was crafted to make sure that patients using Novartis' drugs would receive most of the co-pay assistance. The charity agreed and Novartis patients received a greater proportion of assistance. *Novartis Resolves Legacy Litigation Matters, Finalizing Settlement of Speaker Program Litigation with Government in the US and Positioning Company for the Future by Scaling Its Next-Generation Digital Enhancement Technologies*, NOVARTIS (Jul. 2, 2020), <https://www.novartis.com/news/media-releases/novartis-resolves-legacy-litigation-matters-finalizing-settlement-speaker-program-litigation-government-us-and-positioning-company-future-fully-scaling-its-next>.

something valuable to distribute.²⁰⁵ In theory, these designations are to be used for the benefit of a program, such as water polo, and the university as a whole. The temptation, as Varsity Blues demonstrates, is that the designations can be used for substantial private gain.²⁰⁶ That is a private profit from the sale of a designation at the expense of the university, which, of course, is why the coaches were charged with crimes.

University employees are agents who must adhere to the law relevant to their duties, and universities must take steps to have in place systems to ensure that their employees do so. This is true with respect to Title IX, FERPA, and the Cleary Act. It follows that a university has a duty to supervise and to conduct a reasonable due diligence investigation of the facts. If the applicant has been awarded a scholarship for fencing, the application will come with material on the student's fencing prowess. In Varsity Blues, the applicants submitted fabricated accomplishments.

Fixing such problems is not rocket science nor does it require intrusive government intervention into admissions processes.²⁰⁷ What is needed is for robust, internal compliance programs, which should be run outside the department in which a coach is employed, to check the veracity of the information presented. This can involve simply calling the high school from which the applicant will graduate, getting copies of matters related to fencing at the school, and speaking to the fencing coach. While it is not intellectually difficult to create such systems, compliance requires thought and effort.²⁰⁸ Such a program should be no more burdensome than the current practice of many selective schools of having multiple readers for each file to guard against biases and errors.²⁰⁹ A comprehensive compliance program within

205. KORN & LEVITZ, *supra* note 5, at 121 (noting that coaches of non-revenue sports "had that one particularly useful perk: minimal oversight of recruiting and major influence with the admissions office").

206. *Id.* at 122 (noting that the Georgetown tennis coach received \$2.7 million from Singer between 2012-18).

207. DUFFY & GOLDBERG, *supra* note 85, at 196 ("The Chivas Regal phenomenon continued to operate throughout the 1980s. A 1988 Gallup poll of 1,000 students between the ages of 13 and 21 found that 38 percent of them agreed that 'the higher the tuition costs of a college, the better the quality of education a student will receive.'").

208. L. Burke Files, *Due Diligence for the Financial Professional*, AEGIS J. 69-110 (2010).

209. SELINGO, *supra* note 12, at 101. Selingo compares his experience sitting in with three admissions departments to the Varsity Blues story and concludes that even where readers

universities will reduce the kind of corruption uncovered in Varsity Blues. Such programs need not disrupt colleges' efforts to "shape" their classes according to legitimate factors (e.g. excluding bribes). These programs will cost money, but the burden they impose on the \$10 billion admissions business will be no more disproportionate to the size of the market than what we already ask of car dealers, jewelry stores, and banks.²¹⁰

However, this does not address the use of above-board donations to universities that influence admissions. As one of the authors has previously explained: "So what is a corrupt transaction? A corrupt transaction is when a person chooses to use their powers delegated to them to enter into an unauthorized agreement to the detriment of the one(s) who delegated the power of choice."²¹¹ Making donations to universities to obtain admission is not substantively different than GlaxoSmithKlein bribing doctors and hospitals to recommend their drugs over others. GlaxoSmithKlein's conviction for bribery led to a \$490 million fine²¹² because legitimate funds were used for illegitimate purposes. The drug company, like the parents, used legitimate

flagged a file for "absent pieces of information or other inconsistencies, the issues were usually minor. . . . Even in those cases, the readers usually didn't have time to search the Internet for additional information, so they moved on, assuming, perhaps, that these were oversights and nothing more." *Id.* at 146. He found that applicants who provided unverified details of activities could enhance their chances with "an overburdened admissions reader." *Id.* at 155. Although Selingo concludes that "admissions counselors are not hired to be detectives" and the "high volume of applications and small number of staff leave the process vulnerable to embellishment or outright lying," *id.* at 146-47, we believe both the high volume and the small staff are the result of deliberate choices by selective universities. Other businesses are denied the option of having a "small staff" that cannot keep up with the demands of compliance problems and we see no reason to exempt universities from that obligation. *See also* KINKEAD, *supra* note 120, at 57 ("For years, Johnston said, Yale has had a rule that no athletic coach can institute recruiting, but if a young athlete has written to a coach, or has formally applied for admission, the coach is free to correspond with him—to send him monthly department letters and game programs, keep him aware of the admissions-committee deadlines he must meet, and urge on him the virtues of Yale.").

210. One of us has previously argued that cost-benefit analysis deserves an important role in evaluating anti-money laundering legislation. *See* Richard Gordon & Andrew P. Morriss, *Moving Money: International Financial Flows, Taxes, and Money Laundering*, 37 HASTINGS INT'L & COMP. L. REV. 1, 101 (2013).

211. L. Burke Files, *Commencement Address*, University of Ibadan Nigeria, Joint Venture in Anti-Corruption Training with the American Anti-Corruption Institute (Feb. 26, 2020) (on file with authors).

212. *GlaxoSmithKline Fined \$490m by China for Bribery*, BBC NEWS (Sept. 19, 2014), <https://www.bbc.com/news/business-29274822>.

income for improper purposes, which constitutes a bribe and money laundering.

One path to admission is buying it. An applicant may have a weak record or substandard test scores. Such applicants are unsuited for admission, except for one special attribute: they come from a wealthy family. A family member or related party, by donating money to the university, buys the applicant's admission. A donation allows the substandard application to jump the queue of qualified students and exclude from admission an otherwise qualified applicant.

No school has a stated "admission by donation" or "friends of a regent or legislator" category. If they did, it at least would be an above-board transparent transaction, albeit one that would reduce the prestige of the university. Instead, the transactions are cloaked in deception. They use a third party. With a wink and a nod, the money is sent to a university foundation, as the conduit for the bribe, and the exchange is understood. Without the payment, there would be no admission for the otherwise substandard applicant. As one of the authors has noted previously, "[c]orruption is also a fix. Corruption is an effective risk and profit management tool. A bit of wealth spread out amongst the decision-makers, and the decisions go your way. The decision-makers could be politicians, judges, law enforcement, those who award contracts, buyers, sellers, shippers, regulators, or college admission staff."²¹³

As we have discussed, elite universities have highly sought after (scarce) admissions offers. These qualities create value in admissions that gives rise to opportunities for corruption.²¹⁴ Items of value, tangible or intangible, over \$10,000 are subject to a variety of anti-money laundering regulations. The Bank Secrecy Act,²¹⁵ the

213. Files, *supra* note 211. For another example, see the suit against Baptiste and Bony for making tax-deductible donations to a charity as a conduit for funds to be paid to Haitian officials to get contracts for a project at a port. Superseding Indictment, United States v. Baptiste, 2019 U.S. Dist. LEXIS 91120 (D. Mass. May 31, 2019) (No. 17-cr-10305-ADB), <https://www.justice.gov/criminal-fraud/file/1109781/download>.

214. One of the few papers on this point is Myra E. J. B. Williamson, *Contract Cheating and Academic Integrity in Higher Education: What Can Universities, Quality Assurance Agencies and Governments Do to Understand, Prevent and Respond to the Challenge?*, 7TH INT'L ANN. CONF. LEGAL REG. FOR INV. DEV. (Oct. 2020), <https://kilaw.edu.kw/annualConference/contract-cheating-and-academic-integrity-in-higher-education-what-can-universities-quality-assurance-agencies-and-governments-do-to-understand-prevent-and-respond-to-the-challenge/>.

215. 31 U.S.C. §§ 5311-5332.

USA PATRIOT ACT,²¹⁶ and the Money Laundering Control Act²¹⁷ all apply to money laundering tied to the crime of bribery. All parents in Varsity Blues who purchased admissions to universities paid over \$10,000. Thus, all universities created an intangible asset in excess of \$10,000. As a result, the universities were (and are) required to have specific and written guidelines on how to deal with these valuable assets. The guidelines (AML Manual) must be approved by senior management and/or the board.²¹⁸ Further, they are required to have policies and procedures to prevent bribery and corruption.²¹⁹ They did not. Additionally, these universities are highly dependent on federal funding.²²⁰

Why should AML rules apply to university admission procedures as they do to financial institutions and the sellers of valuable goods?²²¹ Because:

216. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8 U.S.C., 12 U.S.C., 15 U.S.C., 18 U.S.C., 20 U.S.C., 31 U.S.C., 42 U.S.C., 47 U.S.C., 49 U.S.C., and 50 U.S.C.).

217. 18 U.S.C. §§ 1956-1957.

218. Stephanie Brooker & Linda Noonan, *The Complete Compliance and Ethics Manual 2021*, COSMOS, <https://compliancecosmos.org/anti-money-laundering-compliance-programs-financial-institutions-and-other-businesses> (last visited Oct. 4, 2021).

219. See WOLFSBERG GROUP, WOLFSBERG ANTI-BRIBERY AND CORRUPTION (ABC) COMPLIANCE PROGRAMME GUIDANCE 2 (2017), <https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/wolfsberg-standards/3.%20Wolfsberg-Group-ABC-Guidance-June-2017.pdf>.

220. Sacks, *supra* note 203, at 213 (“Harvard, by contrast [to the University of Phoenix], is so dependent upon federal largesse that Harvard would not be Harvard were its financial ties to the federal government to be severed. First, Harvard receives hundreds of millions of dollars per year from the government to do research in medicine, science, and other fields. Harvard’s second tether to the federal government is related to the university’s ‘nonprofit’ status. As a nonprofit educational institution, Harvard receives tax-free gifts from private donors who use the ‘charitable deduction’ rules of the federal tax code to reduce the amount of incomes taxes they owe the government.”).

221. Selingo comments:

The use of numerical ratings in holistic admissions makes it seem that admissions officers are like actuaries at a bank assessing someone’s credit score, income, and debt obligations to approve a loan. But unlike bank underwriters, who work with specific guidelines, admissions officers are more akin to Wall Street brokers predicting future performance of a stock based on past results.

SELINGO, *supra* note 12, at 100. We don’t want to push the financial analogy too far, but that an important analyst of the industry reaches for financial industry analogies seems to strengthen our argument.

1. Admissions is a “big business,” with colleges spending “an estimated \$10 billion annually on recruiting students.”²²²
2. Applicants gained admission by bribing university employees.
3. Applicants gained admission by bribing universities with charitable donations.
4. A university with applicants likely to offer to engage in such bribes, in effect to pay more than stated tuition valued at over \$10,000, should be required to have an AML compliance and reporting program.
5. Payments to an employee or gifts to the university that are linked to admissions can be considered bribes. For public universities, offering, requesting, paying, or accepting a bribe can be a federal crime.²²³
6. Moving money in concert with a crime is a form of money laundering.²²⁴
7. The universities failed to supervise employees who accepted bribes. As Varsity Blues showed, universities fail to have even minimal levels of due diligence or compliance programs to address bribery or money laundering, as is commonly required of virtually all organizations handling large amounts of cash.

Varsity Blues also exposed the hypocrisy of colleges and universities in their admissions processes and their failure to live up to the standards they require of their applicants. Most applications for college admission include an attestation to the truthfulness and accuracy of the submission like this one from the Common Application:

222. SELINGO, *supra* note 12, at 21. Selingo quotes Richard Whiteside, former admissions dean at Tulane as saying, “Colleges are a business . . . and admissions is its chief source of revenue.” *Id.* at 40.

223. 18 U.S.C. § 201; *see* LEGAL INFO. INST., *Bribery*, <https://www.law.cornell.edu/wex/bribery> (last visited Oct. 4, 2021) (“Proof of bribery requires demonstrating a ‘quid pro quo’ relationship in which the recipient directly alters behavior in exchange for the gift.”).

224. *See* 18 U.S.C. § 1956.

I certify that all information submitted in the admission process – including this application and any other supporting materials – is my own work, factually true, and honestly presented, and that these documents will become the property of the institution to which I am applying and will not be returned to me. I understand that I may be subject to a range of possible disciplinary actions, including admission revocation, expulsion, or revocation of course credit, grades, and degree should the information I have certified be false.²²⁵

When admissions can be conducted through a *quid pro quo* option, the fidelity only goes one way – from applicant to the university. Herein lies the grave weakness of the opaque admissions process – and part of why it is intentionally opaque at selective schools. Payments, such as donations to the school from wealthy parents and special treatment for the children of famous people, allow schools to structure the student body to increase demand for the school (so one can go to school with the children of high-profile parents) and increase gross revenue from multiple sources by tying admission to donations outside of tuition payments.

While Varsity Blues is a satisfying populist spectacle of celebrities brought low, as high-profile people discovered the rules apply to them too, the criminal charges brought exclusively against only the parents, intermediaries, and coaches makes clear that the legal requirements of honest behavior in the market for admission to selective schools, as implemented, apply only to parents and low-level employees. Left untouched are those with the power to solve the problem, the people who designed the admission processes and who have oversight over them, those who are at the executive and board levels of top universities. Sadly, it also seems to have reinforced the idea that brand-name schools matter because “[t]here were people willing to risk going to jail to get their kids into a top school.”²²⁶

In Varsity Blues, federal law enforcement officials devoted considerable resources to catching parents and fraud merchants

225. COMMON APPLICATION, FIRST-YEAR APPLICATION 5, https://commonapp.my.salesforce.com/sfc/p/#d0000000eEna/a/0V000001AvzW/QhEpCB7Yq_XEzgZAJjKvEF446j7K6_V82DikZi6SReU (last visited Oct. 25, 2021).

226. SELINGO, *supra* note 12, at 162.

such as Singer in what was portrayed as a unique scam.²²⁷ Some of these individuals were charged with money laundering. However, the *schools*, multimillion-dollar tax-exempt organizations selling valuable services,²²⁸ were not held accountable for their failure to provide the level of integrity demanded of financial institutions and the sellers of goods such as cars, yachts, and jewelry. Much as money-laundering rules arose as a separate focus of law enforcement because of the lack of success in controlling underlying criminal acts in the illegal drug market, the application of criminal laws to the parents, coaches, and third parties but not the universities or their boards and leadership results in a failure to address the source of the flaws in college admissions. This is a problem wherever the combination of scarcity, opacity, and lack of constraints applies to a nonmarket process. Fixing the Varsity Blues problem will not solve all the problems with elite college admissions practices, but it will fix some important ones.²²⁹

The universities suffered only minor, temporary public embarrassment from Varsity Blues. They were mostly portrayed as victims.²³⁰ Yet these institutions should have been held liable for not taking steps to prevent the bad behavior. This is not a case of amateur oversight by bumbling professors running universities in between teaching and research; that era of university governance is long gone. As Korn and Levitz noted, Singer's scheme worked because of "inertia, idiocy, and an innate trust by admissions officials and guidance counselors that nobody would ever even cook up a scheme as brazen as his."²³¹ The lack of even minimal due diligence can only have been intentional because universities value

227. *Id.* at 148 ("In many ways, Varsity Blues was an egregious case of something that has been going on in private high schools and suburban public schools in a more widespread, and legal, way for years.").

228. *Id.* at 12 ("What I hope to do in this book is show you that college admissions is a business—a big one—that you have very little control over.").

229. Consider just one staggering statistic from Selingo's analysis:

In 2019, 67 percent of freshmen at Harvard reported that they took AP Calculus in high school, and another 30 percent took some kind of calculus class. That's *all* first-year students at Harvard, no matter their major. But consider this: only half of American high schools offer a calculus course.

Id. at 168.

230. Korn and Levitz note that prosecutors cast the universities and testing agencies as victims in part because they needed victims harmed by the individual defendants' behavior to justify jail terms for the individual defendants. KORN & LEVITZ, *supra* note 5, at 296, 302-03.

231. *Id.* at 201.

admissions processes that allow coaches discretion and rely on subjective “personality” scores, and other easy-to-manipulate criteria because it allows them to avoid hard questions from applicants and society as a whole about how they distribute the benefits of elite education.²³² Similarly, testing organizations’ security procedures were easily circumvented by bribing a single individual. This again reflects a failure of governance: when an organization whose primary mission is administering tests flubs security measures this basic, it seems axiomatic that the board has failed to exercise effective oversight.²³³

When business organizations’ boards fail to exercise proper governance, they risk liability for their failure to live up to the board’s duty of loyalty. As noted previously, in the landmark *Caremark* decision the Delaware Chancery Court interpreted the duty of care to require proper oversight.²³⁴ An analogous duty imposed on boards of universities would put the focus where it belongs – the parties who can most effectively address the problem. Moreover, it would empower the university employees charged with preventing corruption in admissions to bring issues to the attention of the board. As Jon Smollen noted, from his “prior vantage point as a practitioner, the landmark status of *Caremark* is unassailable and provided a standing invitation [to Smollen] as a Chief Compliance Officer to enter board rooms as opposed to being summoned only when problems arose.”²³⁵

The application of anti-money laundering laws to admissions corruption – as revealed in *Varsity Blues* – provides the hook to require such action without additional legislation. That is, universities offer an intangible asset of “special admission” through discretionary admissions policies including athletics admissions, alumni preferences, personality scores, and so on. Admission to selective schools is valuable; the data points from

232. There is an increasing debate over the benefits of elite educations. See SELINGO, *supra* note 12, at 245–47 (suggesting that data supports value of skill acquisition over elite institutions).

233. The parent of a classmate of a Singer client tried to report the decidedly irregular process of a Singer client taking the ACT in his own home with his mother as a proctor (a ruse to conceal from the child that a professional test taker was actually taking his test) and was unable to “make it past the first-line receptionist.” KORN & LEVITZ, *supra* note 5, at 257.

234. *In re Caremark Int’l Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

235. Jon Smollen, *Introduction*, 90 TEMP. L. REV. 597, 597 (2018).

Operation Varsity Blues alone set the “market prices” for admission at elite schools between \$15,000 and \$600,000 (above tuition), in line with the prior discussion on securing admission with donations. These sums put the value of admission to an elite school in excess of the \$10,000 threshold for non-financial institutions to be required to implement and administer an anti-money laundering program and the corresponding compliance regimen under current federal law.²³⁶ Indeed, in general, “Designated Non-Financial Business Professions” are considered attractive channels for money laundering, financial crime, and terrorist financing operations.²³⁷ The required compliance regimen also includes reporting obligations for suspicious transactions to FinCEN on a Suspicious Transaction Report.²³⁸ In Varsity Blues, bribery tied to a transaction is a crime by the seller of the service and should have been treated as such.²³⁹

A quick way for the government to spur action would be for the Department of Justice or state attorneys general to investigate university admissions for the schools where Varsity Blues uncovered problems, focusing on the failure to have an adequate (or, indeed, any) AML program. The Department of Education could require accrediting bodies to report on the effectiveness of the schools they oversee at implementing AML procedures, which would spur a nationwide scramble to develop such procedures.²⁴⁰

236. See FINANCIAL ACTION TASK FORCE, INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS 10 (June 2021), <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>. In addition, all charitable organizations that solicit money from the public are required to file IRS Form 990 with the Attorney General’s Office of the state in which they are domiciled each and every year. IRS, *Providing Copies of Form 990-PF* (Sept. 23, 2021), <https://www.irs.gov/charities-non-profits/private-foundations/providing-copies-of-form-990-pf-to-state-officers>.

237. FINANCIAL ACTION TASK FORCE, NATIONAL MONEY LAUNDERING AND TERRORIST FINANCING RISK ASSESSMENT, FATF GUIDANCE (Feb. 2013), https://www.fatf-gafi.org/media/fatf/content/images/National_ML_TF_Risk_Assessment.pdf.

238. OFF. COMPTROLLER CURRENCY, SUSPICIOUS ACTIVITY REPORTS (SAR), <https://www.occ.treas.gov/topics/supervision-and-examination/bank-operations/financial-crime/suspicious-activity-reports/index-suspicious-activity-reports.html>.

239. See FINANCIAL CRIMES ENFORCEMENT NETWORK, FINCEN SUSPICIOUS ACTIVITY REPORT (FINCEN SAR) ELECTRONIC FILING INSTRUCTIONS (Oct. 2012), <https://www.fincen.gov/sites/default/files/shared/FinCEN%20SAR%20ElectronicFilingInstructions-%20Stand%20Alone%20doc.pdf>.

240. Selingo concluded that colleges and universities already “operate like a cartel.” SELINGO, *supra* note 12, at 253. If he is correct, this increases the need for outside intervention.

AML compliance requires comprehensive due diligence on each customer as well as control of the highly valued items. It will produce clear and transparent controls on the administrative allocation of admissions. Such an approach would help avoid the next Varsity Blues by forcing shareholders to think the problem through. Moreover, it is clear from their subsequent behavior that universities have not gotten the message that their admissions processes are broken. Korn and Levitz quote “insiders” speaking at a post-Varsity Blues admissions conference as saying “again and again” that “[t]his was not an admissions scandal.”²⁴¹

As Claire Hill notes in her discussion of *Caremark*’s penumbra, a reason to draw lines short of the minimum required by the law is that “steering clear of actual lawbreaking should be harder if one allows” practices that violate the spirit of the law while honoring the letter. “People apt to go up to the line sometimes go over it, especially insofar as the harms that motivate the law are largely present in near-the-line cases.”²⁴²

As Varsity Blues demonstrates, the universities involved utterly failed in this regard.²⁴³ Coaches were able to sell the “special

In an earlier antitrust suit, the Department of Justice charged the eight Ivy League schools and M.I.T. of colluding to fix prices. The schools settled the case without admitting liability but did stop sharing financial aid decisions with one another. Lyle Denniston, *U.S., Ivy League Agree to Settle Antitrust Suit; MIT, Also Charged, to Stand Its Ground*, BALT. SUN (May 23, 1991), <https://www.baltimoresun.com/news/bs-xpm-1991-05-23-1991143102-story.html>; Robert L. Jackson, *MIT Agrees to Settle Antitrust Suit, U.S. Says*, L.A. TIMES (Dec. 23, 1993, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1993-12-23-mn-4834-story.html>.

241. KORN & LEVITZ, *supra* note 5, at 321. Some schools did adopt minor reforms to check on athletic admissions. *See id.* at 322. California also enacted legislation to require schools to disclose admissions preferences for donors. *Id.* at 323.

242. Hill, *supra* note 22, at 689.

243. As Paul E. McGreal, one of the experts on *Caremark* duties, notes, the duty involves two components: an initial duty to establish an ethics program and an ongoing duty to monitor the operation of that program. The standard for the initial duty is stated by the courts in “remarkably deferential terms,” suggesting that violation requires “a complete absence of action.” McGreal, *supra* note 19, at 676–77; Universities might argue their violations of AML laws were inadvertent as a result of lax oversight. *See* Mark Reilly, *Feds Fine Former U.S. Bank Risk Officer, Cite Poor Oversight of Anti-Money Laundering Rules*, MINNEAPOLIS/ST. PAUL BUS. J. (Mar. 6, 2020), <https://www.bizjournals.com/twincities/news/2020/03/06/feds-fine-former-u-s-bank-risk-officer-cite-poor.html>. However, as many financial institutions have discovered, ignorance of AML rules is not a defense. Nor is it a defense for those paying the bribes. *See* Anthony Diosdi, *Does Lori Loughlin Have an “Ignorance of the Law” as a Defense to a Charge of Money Laundering?*, SF TAX COUNSEL (Apr. 29, 2019), <https://sftaxcounsel.com/does-lori-loughlin-have-an-ignorance-of-the-law-a-defense-to-a-charge-of-money-laundering-by-anthony-diosdi/>.

admission” athletic designations with little or no oversight.²⁴⁴ Further, after the sale of admission, universities did not have a process to review the bona fides of the applicants – even at the most basic level of asking whether the applicants really played the sport in which they claimed high-level accomplishments. Universities are responsible for the actions of their agents, such as coaches, in these matters. Several of the purchased “special admission” designations were awarded to students with falsified credentials using programs most accessible to the wealthy and privileged: tennis, volleyball, crew, water polo, and lacrosse.²⁴⁵

Nonprofit entities have no shareholders to bring such claims. However, state attorneys general have oversight responsibilities for nonprofits and state universities and could provide an alternative institutional actor capable of forcing the development of an effective compliance regime.²⁴⁶ News reports on the shareholder suit against Boeing’s board for *Caremark* duty violations in connection with the 737 MAX jet’s failures describe the plaintiffs as having had access to “more than 44,000 internal company documents.”²⁴⁷ Even the thought of sharing documents on admissions on that scale with their states’ attorneys general should be highly motivating to university boards to establish procedures with reasonable safeguards. One relatively straightforward means of addressing such problems would be to provide safe harbors and

244. KORN & LEVITZ, *supra* note 5, at 95 (describing athletic admissions as “[T]he coaching staff determines its top picks and puts the names forward to the admissions office.”). Since admissions offices spend only a few minutes on most applications, “even if they understand the difference between a setter and a middle hitter [in volleyball], they don’t have the time to check out how good a potential athletic recruit really is.” *Id.* at 96. At USC, Singer developed a “highly organized and systematic at every step” process, working with a corrupt athletics official, who even provided edits of the profiles Singer crafted for his clients. *Id.* at 114.

245. Some of these programs may even exist to solicit contributions; these sports, unlike football and basketball, are not revenue generators. On non-revenue vs. revenue sports, see Craig Garthwaite, Jordan Keener, Matthew J. Notowidigdo & Nicole F. Ozminkowski, *Who Profits From Amateurism? Rent-Sharing in Modern College Sports* 1 (Nat’l Bureau of Econ. Rsch. Working Paper 27734, 2020), <https://www.nber.org/papers/w27734>; Emma Healy, *The Hidden Revenue Behind Non-Revenue Sports*, HEIGHTS (Feb. 8, 2021), <https://www.bcheights.com/2021/02/08/importance-of-non-revenue-sports/>.

246. Each state handles such matters slightly differently; the relevant offices are listed by the National Association of State Charity Officials. See NAT’L ASS’N STATE CHARITY OFFS., STATE GOVERNMENT, <https://www.nasconet.org/resources/state-government/> (last visited Oct. 4, 2021).

247. Tangel & Pasztor, *supra* note 96, at 2.

public oversight through the relevant state attorney general until each institution establishes an independent, ombudsperson position with authority to investigate, publicize, and challenge board decisions and lack of action.

CONCLUSION

USC's Code of Ethics asserts:

We recognize that the fundamental relationships upon which our university is based are those between individual students and individual professors; thus, such relationships are especially sacred and deserve special care that they not be prostituted or exploited for base motives or personal gain.

When we make promises as an institution, or as individuals who are authorized to speak on behalf of USC, we keep those promises, including especially the promises expressed and implied in our Role and Mission Statement. We try to do what is right even if no one is watching us or compelling us to do the right thing.²⁴⁸

While such pious language is common, there is no more reason to think multibillion-dollar, tax-exempt institutions, such as USC, will act any more ethically or, more importantly, legally than for-profit institutions such as banks. And, while universities fail to clean up their admissions processes, "little incentive will exist for high school seniors – or whoever's filling out their applications – to think twice before signing an affirmation on the Common Application that submitted material 'is my own work, factually true, and honestly presented.'"²⁴⁹ We want to believe college admissions is a meritocracy, but even if we recognize that, as Jeffrey Selingo concludes, "it never was that, and likely never will be,"²⁵⁰ we can at least insist that the process be resilient to bribery and money laundering. Moreover, we can protect the innocent victims of universities' failures to take the steps necessary to have admissions processes with integrity – such as those whose athletic

248. *Code of Ethics*, UNIV. OF S. CAL.: POLICIES AND POL'Y GOVERNANCE (Feb. 18, 2014), <https://policy.usc.edu/ethics/>.

249. KORN & LEVITZ, *supra* note 5, at 324.

250. SELINGO, *supra* note 12, at 8. As Selingo notes later, everyone struggles to define "merit." *Id.* at 93.

profiles were misappropriated by Singer to make his clients look better.²⁵¹

The lack of transparency in university admission standards makes selective colleges ripe for corruption, as exposed in Varsity Blues. Even the head of the College Board calls for stopping “the madness that has arisen around college admissions.”²⁵² We showed that the Department of Justice addressed only part of the problem. Investigators uncovered bad actors but let university administrations off the hook. The laws that govern financial institutions, including AML rules and processes, apply to universities selling valuable services. College administrators and boards know influence is used to secure highly valued admissions. They do not want slots being distributed by corrupt minor officials at the schools or due to falsified information provided by applicants assisted by knowledgeable parties such as Rick Singer.

There is no reason to think this is a “black swan” event²⁵³ and that now schools are more diligent to ensure only the most capable students are admitted.²⁵⁴ Because of the intentional nontransparent nature of admissions and pricing, the problem continues. Parties making donations help secure admission for selected students in *quid quo pro* arrangements. Only when the institutions and individuals who create the opportunities for corruption are held accountable will students not from privileged backgrounds have better opportunities to be admitted on individual merit. As Eric Pan noted, “the duty to monitor serves as the best means the law has to ensure that directors are attentive and vigilant against the occurrence of harm to the corporation.”²⁵⁵ The same is true of college and university boards. In Varsity Blues, everyone was prosecuted

251. KORN & LEVITZ, *supra* note 5, at 216 (quoting a lower income high school’s principal as saying that people like Singer were “plagiarizing a life” by using photos of their athletic successes to bolster his clients’ false credentials).

252. SELINGO, *supra* note 12, at 178.

253. NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* (2d ed. 2010). This refers to rare, surprising events with major effects that, after the fact, some people claim could not have been forecast.

254. They need to be. Once a red flag has been raised, our *Caremark* analogy suggests a breach of the ongoing duty to address compliance and ethics. See Paul E. McGreal, *Corporate Compliance Survey*, 73 *BUS. LAW.* 817, 834 (2018) (“The director breaches this branch of the *Caremark* duty if she learns of a specific gap or weakness in the organization’s compliance and ethics program, but takes no action to address that failing.”).

255. Pan, *supra* note 21, at 210.

except the institutions that generally benefit from their failure to take the straightforward steps to prevent such corruption.²⁵⁶

In her discussion of *Caremark* as “soft law,” Professor Claire Hill asked, “[w]hy is it unacceptable for companies to approach compliance narrowly and formalistically, as merely a means to avoid lawbreaking?”²⁵⁷ She answered the question she posed by suggesting that there were both instrumental (formalism might not be profit maximizing) and moral reasons for avoiding formalism. In announcing the Varsity Blues investigations, the lead federal prosecutor declared that “[t]here can be no separate college admissions system for the wealthy and, I’ll add, there will not be a separate criminal justice system either.”²⁵⁸ Except that there is. The universities got off scot-free; no financial institution, car dealer, or jewelry store would be treated so leniently by federal prosecutors if they were caught being similarly cavalier about their obligations under federal anti-money laundering laws. This needs to change.

256. Even if we are wrong that these duties directly apply to universities, university officials, and university boards, the process can be improved by considering these factors as if the laws do apply.

257. Hill, *supra* note 22, at 687.

258. KORN & LEVITZ, *supra* note 5, at 270.