HOW FOR-PROFIT STUDENT LOAN SERVICERS HAVE EXPLOITED THE FACADE OF THE AMERICAN DREAM – A CASE FOR HOLDING STUDENT LOAN SERVICERS CRIMINALLY LIABLE FOR FRAUDULENT PRACTICES AS NECESSARY DETERRENCE

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CONTENTS

INTRODUCTION

As the amount of student debt in America approaches $1.8 trillion, the need to carefully examine the business practices of for-profit student loan servicers has never been more urgent. This Article considers how for-profit student loan servicers have exacerbated the student debt crisis by prioritizing profits and deceiving borrowers. Specifically, this Article explores how for-profit student loan servicers have exploited borrowers of federally held student loans since they gained access to the student loan market and how the federal government has enabled such corporate misconduct.

Accordingly, this Article asserts that servicers routinely defraud borrowers and must be held criminally accountable. The plethora of evidence of fraud within the student loan servicing industry, the government's failure to regulate this industry, and the ineffectiveness of civil settlements as a deterrent underscores that borrowers need greater protection. Criminally prosecuting for-profit servicers for defrauding borrowers would provide recourse to borrowers, as there is considerable evidence that civil settlements do not meaningfully deter these profitable corporations. Part I of this Article details the implementation of the Federal Direct Loan Program and the cultural context surrounding student loans in America. Part II discusses the widespread fraud within the student loan industry and the resulting harm to borrowers. Part III analyzes the government's role in this situation and considers the signs of regulatory capture within the Federal Student Aid Office of the Department of Education. Finally, Part IV illustrates potential avenues for criminal prosecution by arguing there is a compelling case against major student loan servicer, Navient, for wire fraud.

I. HOW WE ENDED UP HERE: A NATION THAT WAS OVERLY OPTIMISTIC OR TRAGICALLY NAÏVE?

A. Brief Overview of Financing Higher Education in America

The Higher Education Act ("HEA") was enacted in 1965 to "strengthen the educational resources of colleges and universities and provide financial assistance for students in postsecondary and higher education."[1] The HEA dramatically expanded funding available for students in need of financial support to cover the

[1] Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended 20 U.S.C. §1001 et seq.).

cost of college.[2] Since 1965, the HEA has undergone several changes beyond the scope of this Article. Accordingly, this section briefly analyzes some of the essential changes to the program in recent years. Following the enactment of the HEA, the infamous Student Loan Market Association ("Sallie Mae") emerged as a government-backed organization designed to distribute federal and private student loans.[3] However, under the Clinton administration, Sallie Mae went private.[4] The consequences of privatization of the student loan industry are explored further in parts II, III and IV.

The William D. Ford Federal Direct Loan Program replaced the Federal Family Education Loan Program ("FFELP") in 2010.[5] During this transition, the government adopted the role as the originator of federal student loans. The Obama administration purported that the government would save $62 billion over ten years by becoming a direct lender.[6] Thus, the government created the Direct Loan Program, offering four types of federal student loans: Direct Subsidized Loans, Direct Unsubsidized Loans, Direct Plus Loans, and Direct Consolidation Loans.[7] The office of Federal Student Aid ("FSA") describes the difference between subsidized and unsubsidized loans as: " hav[ing] slightly better terms to help out

[2] *See id.*; Jeffrey P. Naimon et al., *School of Hard Knocks: Federal Student Loan Servicing and the Looming Federal Student Loan Crisis*, 72 ADMIN. L. REV. 259, 269 (2020).

[3] Naimon et al., *supra* note 2, at 269.

[4] *Id.* at 268 n.34.

[5] *Id.* at 270.

[6] Gene Fox, *The Government Takeover of Student Lending*, FORBES (May 11, 2010), https://www.forbes.com/2010/05/10/student-loans-hcera-leadership-education-fox.html?sh=3eb626f16edd [https://perma.cc/25SQ-TMQV]*; see also* Naimon et al., *supra* note 2, at 270.

[7] *Understand What Type of Loans are Available,* U.S. DEP'T EDUC., https://studentaid.gov/understand-aid/types/loans [https://perma.cc/ZWH2-LZEP] (last visited May 8, 2023). The FSA website explains that Direct subsidized loans are "for undergraduates who demonstrate financial need." Unsubsidized loans are available for "undergraduate, graduate and professional students but is not based on financial need." PLUS loans are for "graduate and professional students and parents of dependent undergraduate students to help pay for education expenses not covered by other financial aid." It is critical to note that the PLUS loan is the only loan that requires a credit check. The Direct Consolidation Loan allows students to consolidate all federal loans into one loan managed by a "single servicer."

students with financial need."[8] However, a critical difference between Subsidized Loans and the remaining three federal loans, is that the Department of Education pays the interest on Subsidized loans while borrowers are enrolled in school full time, in a six month grace period, or deferment. [9] In contrast, students must pay interest accumulated under Unsubsidized Loans, Direct PLUS Loans, and Consolidated Loans. For these loans, interest begins to accrue at the date of disbursement. [10] These loans allow student loan servicers to *capitalize* on unpaid interest. "Capitalized interest is when 'interest will be added to the principal amount of the loan' which leads to paying interest on interest."[11] Accordingly, Subsidized Loans are preferred because borrowers can avoid servicers *capitalizing* on any outstanding interest on their accounts.[12]

The growing student loan debt can be partially explained by the relaxed student loan eligibility requirements and the lack of education available to high school students about the financial realities and consequences of obtaining a loan. Although the government's expansion of funding available for college has been critical for millions of Americans, it has also come with consequences. It is critical to highlight that the only loan that requires a credit check is the Direct PLUS loan.[13] Accordingly, 18-year-old high school graduates can borrow thousands of dollars if they meet the basic eligibility requirements. Some of the basic requirements include being a U.S. citizen and completing the Free Application for Federal Student Aid (FAFSA). The ramifications of such a relaxed eligibility system are illustrated in the following section.

B. How an Entire Generation Was Sold on the Idea College Was a Prerequisite to Success

In the wake of the Great Recession, American politicians tried to shift the cultural narrative away from the bleak realities of economic devastation following

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[8] *Subsidized and Unsubsidized Loans,* U.S. DEP'T EDUC., https://studentaid.gov/understand-aid/types/loans/subsidized-unsubsidized [https://perma.cc/92UB-WEBM] (last visited May 8, 2023).

[9] *Id.*

[10] *Id.*

[11] Chris Ciciora, *Student Loan Debt for the Millennial Generation and Ineffectiveness of the Federal Student Loan Program,* 50 J. MARSHALL L. REV. 139, 143 (2016).

[12] *Id.*

[13] *Grad PLUS Loans,* U.S. DEP'T EDUC., https://studentaid.gov/understand-aid/types/loans/plus/grad [https://perma.cc/CSN3-NT8P] (last visited May 8, 2023).

the subprime mortgage crisis. The government acknowledged its role in the subprime mortgage crisis and vowed to do more to protect consumers from corporate misconduct.[14] Simultaneously, there was a shift in American attitudes toward higher education and its value.[15] In what seems to have been a collective shift—Congress, the Department of Education (DOE), state governments, employers, teachers, parents, and the rest of society adopted the notion that college was a prerequisite for success in America.[16] High schools across the nation embraced the assumption that the role of high school was to prepare students for college.[17] The push for students to go to college was grounded in the theory that college was a responsible investment to secure a gainful future. School officials and policymakers overemphasized the opportunities associated with a college degree- such as high wages, job security, benefits, and work-life balance. The notion was that the short-term economic risk was *worth* it.[18] There was an implicit understanding that students who received degrees would be able to pay off their loans because of the income potential that would follow.[19] Moreover, whether an applicant graduated from college became a key criterion for employers. While society over-glorified the benefits of a degree, it also belittled workers without college degrees.

Seth Frotman, founder of the Student Borrower Protection Center, illuminates the harm derived from this messaging by stating, "the college wage premium does not persist across generations because things are getting better for college educated workers—it persists because things are worse for those without a

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[14] Seth Frotman, *Broken Promises: How Debt-Financed Higher Education Rewrote America's Social Contract and Fueled a Quiet Crisis*, 2018 UTAH L. REV. 811, 814 (2018).

[15] *See generally id.*

[16] *See generally* Elizabeth Tandy Shermer, *Indentured Studenthood: The Higher Education Act and the Burden of Student Debt*, Vol. 24, No. 3 SAGE PUBLICATIONS INC. 76–81 (2015).

[17] *See generally* Suzie An, *Pushing Beyond the Idea That College Is Always the Answer*, NPR (Feb. 3. 2020), https://www.npr.org/local/309/2020/02/03/802228885/pushing-beyond-the-idea-that-college-is-always-the-answer [https://perma.cc/T9WF-QND4]; Michael Price, *How Over-Hyping a College Education Destroyed the Millennial*, HUFFINGTON POST (Oct. 17, 2014, 10:54 AM), https://www.huffpost.com/entry/how-overhyping-a-college-_b_6000134 [https://perma.cc/3MJ5-42JN]; Jennifer Liu, *Almost Half of Older Millennials Wish They'd Chosen a Different Career Path- What They'd Do Differently,* CNBC (June 17, 2021, 9:30 AM), https://www.cnbc.com/2021/06/17/nearly-half-of-older-millennials-wish-theyd-chosen-a-different-career.html [https://perma.cc/7NZZ-FZWU].

[18] Frotman, *supra* note 14, at 828.

[19] *Id.*

degree."[20] There is growing evidence showing that the benefits associated with college degrees were overly optimistic. For example, a recent study from Georgetown University's Center on Education and the Workforce reported that at thirty percent of postsecondary institutions, more than half of students in the ten years following enrollment earn less than their peers that only have a high school degree.[21] The increased pressure society placed on students to go to college is visible via the disproportionate impact of student debt across generations.

Several studies have found that Millennials are postponing key milestones because of the financial stress caused by student loan debt.[22] The following statistics paint an alarming illustration of how student debt inhibits borrowers' major life decisions. Due to the economic stress caused by student loans, forty-seven percent of Millennials have reported they are delaying buying their first homes, forty percent are waiting to start saving for retirement, and thirty percent are waiting to move out of their parent's homes.[23] One small study found that "thirty percent of millennials would sell an organ to get rid of student loans."[24] Despite all the efforts to prepare students for college and the relaxed requirements for obtaining student loans—four out of five states do not require any curriculum teaching students about the financial logistics of obtaining a college degree.[25]

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[20] *Id.* at 829.

[21] *Ranking 4,500 Colleges by ROI*, GEO. UNIV. CTR. ON EDUC. AND THE WORKFORCE, https://cew.georgetown.edu/cew-reports/roi2022/ [https://perma.cc/94GK-SJ5Q] (last visited May 8, 2023); Emma Whitford, *Report When College Doesn't Pay Off*, INSIDE HIGHER EDUC., https://www.insidehighered.com/news/2022/02/15/college-doesnt-always-result-higher-earnings-data-show [https://perma.cc/R7T9-P8VL] (last visited May 8, 2023).

[22] Megan Leonhardt, *For Older Millennials Student Loan Debt Delayed Buying Homes, Starting Families and pursuing Careers*, CNBC (Apr. 6, 2021, 6:59 PM), https://www.cnbc.com/2021/04/06/student-loans-affected-older-millennials-homes-families-careers.html [https://perma.cc/R8VR-9JBX]; Ciciora, *supra* note 11, at 139.

[23] Zack Friedman, *50% of Millennials are Moving Back Home with Their Parents After College*, FORBES, (June 6, 2019, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2019/06/06/millennials-move-back-home-college/?sh=9e01344638ad [https://perma.cc/79PW-TBGE].

[24] Maggie McGrath, *Desperate and in Debt: 30% of Millennials Would Sell an Organ to Get Rid of Student Loans*, FORBES, (Sept. 9, 2015, 5:32 PM EDT), https://www.forbes.com/sites/maggiemcgrath/2015/09/09/desperate-and-in-debt-30-of-millennials-would-sell-an-organ-to-get-rid-of-student-loans/?sh=1770fa23d0c6 [https://perma.cc/ML9S-UUJH]; Ciciora, *supra* note 11, at 140.

[25] John Pelletier, *Why Higher Ed Must Advocate for Mandatory Personal Finance Education in Highschool*, INSIDE HIGHER EDUC., (Mar. 18, 2022),

Students would benefit immensely from in-depth courses covering topics including: developing a credit score, the various loan types, the impact of debt on future purchases, interest, loan forgiveness programs, laws governing student loan servicers, and the extent to which corporations profit off student loan debt.[26] Nevertheless, students are encouraged to take out astronomical amounts of loans at the ripe age of 18. Indeed, as of April 2022, the outstanding student loan debt reached $1.8 trillion.[27]

II. THE STUDENT LOAN INDUSTRY

A. History of the Student Loan Servicer Industry—a Playground for Predatory Lending

Although the DOE originates federal student loans, it distributes them among contracted student loan servicers. After the subprime mortgage crisis, the DOE entered into contracts with for-profit corporations to manage the servicing of federal student loans. These corporations are referred to as Title IV Additional Servicers (hereinafter TIVAS). The most prominent TIVAS are Navient (formerly Sallie Mae), Nelnet Servicing, Great Lakes Education Services, and Pennsylvania Higher Education Assistance Agency (PHEAA). [28] As of 2020, TIVAS managed 88% of the nation's outstanding student loans.[29] The DOE grants TIVAS broad authority to manage all stages of the student loan transaction and all communications with student borrowers. Notably, student borrowers cannot choose their loan servicer and do not have the authority to switch servicers. Under the DOE contracts, servicers have several responsibilities including, but not limited to: communicating with borrowers; informing borrowers about federal loan

https://www.insidehighered.com/views/2022/03/18/ensure-young-people-understand-college-debt-opinion [https://perma.cc/PM3Q-86AA].

[26] *Id.*; *see generally* Shermer, *supra* note 16, at 76–81.

[27] Student Debt Crisis Center (@DebtCrisisOrg), Twitter (Apr. 24, 2022, 5:01 AM), https://twitter.com/DebtCrisisOrg/status/1518198329959718913?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Etweet [https://perma.cc/TX9N-MSW8].

[28] *See generally Loan Servicing Contracts*, FED. STUDENT AID, https://studentaid.gov/data-center/business-info/contracts/loan-servicing (last visited May 8, 2023).

[29] John R. Brooks et al., *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L.J. 5,52 (2020) (citing OFFICE OF FED. STUDENT AID, U.S. DEP'T OF EDUC, SERVICER PORTFOLIO BY LOAN STATUS (2020), https://studentaid.gov/sites/default/files/fsawg/datacenter/library/servicer-portfolio-by-loan- status033120.xls [https://perma.cc/CMC9-KVXU]).

forgiveness programs such as Total Permanent Disability (TPD), Income Driven Repayment (IDR), and Public Service Loan Forgiveness (PSLF); allocating loan payments; supplying important notices; processing applications; responding to borrower concerns; and helping borrowers understand the terms of their loans.[30]

Unfortunately, corporate self-interest has led servicers to disregard these responsibilities and adopt a distorted perception of their role in the student loan industry. A quote from Navient's CEO Jack Remondi illustrates this point; while Remondi was the CEO of Sallie Mae, he complained to investors that servicing federal student loans was expensive work. Then, as an example, he cited enrolling borrower[s] into income-based repayment, noting that the company "does not get paid for outperformance in 'that side of the equation."[31] Remondi's statement characterizes helping borrowers enroll in programs, like IDR, as a non-essential task and a charitable act, yet, he is describing the exact purpose the DOE contracts with servicers in the first place-*helping borrowers*.

Ironically, this corporate greed is enabled by the systemic design in which the DOE compensates servicers. The government pays contracted servicers a monthly rate per federal loan, depending on the loan's status. For example, servicers earn $2.85 per month for each loan in repayment and $1.46 per month for each federal loan in delinquency.[32] The problem with this payment structure is that the difference in compensation between loans in good standing and loans in poor standing is negligible. One commentator highlights the issues inherent in this structure stating, "delinquency results in a decline of $1.39 in monthly income for the servicer . . . [if] cur[ing] the delinquency requires an hour of [employee] time . . . whose compensation is $30 per hour . . . it will take the servicer over twenty-one months of continuing loan performance to recoup its expenses." [33] Therefore, it is more cost-effective for servicers to cut call times with borrowers and increase the volume of calls per hour. In this way, the servicer reduces its operational costs and steadily generates monthly revenue from the government.[34]

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[30] Alexandra Hegji & Henry B. Hogue, CONG. RSCH. SERV., R46143, THE OFFICE OF FEDERAL STUDENT AID AS A PERFORMANCE BASED ORGANIZATION (2019).

[31] Deanne Loonin, *The Sallie Mae Saga: A Government Created, Student Debt-Fueled Profit Machine*, NAT'L CONSUMER L. CTR. (Jan. 2014), https://www.studentloanborrowerassistance.org/wp-content/uploads/File/report-sallie-mae-saga.pdf [https://perma.cc/Y825-2DH2].

[32] Brooks et al., *supra* note 29, at 53; Prentiss Cox et al., *Student Loan Reform: Rights Under the Law, Incentives Under Contract, and Mission Failure Under ED*, 58 HARV. J. ON LEGIS. 357, 396 (2021).

[33] Brooks et al., *supra* note 29, at 53-54; *see also* Cox et al., *supra* note 32, at 396.

[34] Brooks et al., *supra* note 29, at 54-55; *see also*, Cox et al., *supra* note 32, at 396.

Furthermore, it takes time for customer service representatives to help borrowers make sense of complex loan terms. It is highly unlikely that representatives can adequately explain borrowers' eligibility for complicated programs like TPD, PSLF, and IRD in a matter of minutes.[35] Additionally, albeit obvious, the goal behind these programs is forgiveness, which limits the servicer's ability to collect interest in the long term. On the other hand, representatives can place students in programs like forbearance in minutes, allowing the servicer to continue collecting interest over the long term.[36] Thus, student loan servicers have developed their business strategies around cutting operational costs, and steering borrowers into unfavorable programs like forbearance.[37]Unfortunately, borrowers bear the brunt of the consequences flowing from these business strategies—they receive insufficient customer service and inaccurate information from employees trying to conform to corporate profit-enhancing tactics. Moreover, student borrowers are left to rely on information, assistance, and advice from a servicer (and its representatives) with masked intentions.

Borrowers placed in forbearance face significant costs, including the accumulation of unpaid interest and the capitalization of that unpaid interest to the principal balance of the loan. In some cases, a loan in forbearance may be re-amortized, meaning the monthly payments are recalculated, which can lead to an increase in the borrower's monthly payment. These costs generally increase the longer a borrower is in forbearance. [38]

Still, for-profit servicers exploiting borrowers is nothing new. To the contrary, there has been consistent evidence of federal student loan servicers defrauding borrowers since they gained access to the student loan market. The government ignored early warning signs about the risk of incorporating TIVAS into the massive student loan market. Just two years prior to the DOE's decision

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[35] *An Examination of State's Efforts to Oversee the $1.5 Trillion Student Loan Servicing Market. Hearing Before the Subcomm. On Oversight and Investigations of the Comm. On Financial Services*, 116TH CONG. (2019), https://www.congress.gov/116/chrg/CHRG-116hhrg39450/CHRG-116hhrg39450.pdf [https://perma.cc/8MP3-UU8A] [hereinafter *Hearings Before the Subcomm.* 116th Cong.].

[36] First Amended Complaint at 9, California v. Navient Corp., No. CGC-18-567732 (Cal. Super. Ct. Nov. 1, 2018), 2018 WL 3199474 [hereinafter *CA AG 2018*] ("Long-term placement in forbearance can permanently increase the borrower's monthly payment after the forbearance period ends and increase the total amount the borrower repays over the life of the loan. Forbearance is therefore unsuitable for borrowers experiencing a long-term or chronic inability to make their monthly payments under a standard repayment plan.").

[37] *Id.*

[38] *Id.* at 8–10.

to incorporate more TIVAS into the student loan market, Sallie Mae entered a $2.5 million settlement with New York Attorney General Andrew Cuomo for deceptively marketing federal student loans.[39] The settlement revealed that Sallie Mae paid colleges cash kickbacks, instructed its employees to pose as financial aid advisors at universities to steer students into picking Sallie Mae as its preferred lender, appointed college officials to the executive board, and sent college officials on all-expenses-paid vacations to resorts.[40] That same year, a Sallie Mae internal email had the subject title "Subprime lending workgroup meeting attachments."[41] The email referred to predatory loans as "the baited hook to gain FEEL volume."[42] In 2008, Federal Deposit Insurance Corporation issued a cease-and-desist order demanding Sallie Mae Bank, "ensure . . . loan products marketed to students and/or serviced through agreements with affiliate or third-parties, comply with all federal and state consumer protection laws . . ." The order also demanded Sallie Mae implement additional rules, regulatory guidance, and statements of policy.[43]

Correspondingly, between 2009 and 2012, Sallie Mae overcharged the federal government $22.3 million dollars.[44] A 2013 OIG audit cited several alarming issues with Sallie Mae's servicing of federal loans including errors transitioning borrowers into repayment, improper billing and repayment terms, and due diligence issues.[45] As discussed in section IV the predatory servicing practices

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[39] *See* Press Release, New York Attorney General Andrew Cuomo Announces Settlement with Sallie Mae Over Student Lending Practices (Apr. 11, 2007), https://ag.ny.gov/press-release/2007/cuomo-announces-settlement-student-loan-company [https://perma.cc/2KSU-BHN9] [hereinafter Cuomo Press Release].

[40] Amanda Ernst, *Sallie Mae Settles Student Loan Kickback Charges*, LAW360, (Apr. 11, 2007), https://www.law360.com/articles/22415/sallie-mae-settles-student-loan-kickback-charges [https://perma.cc/A2AY-PTB2]; Cuomo Press Release *supra* note 39. *See also* Loonin, *supra* note 31, at 2.

[41] Mike Pierce, *Five Things We Learned About Navient's Plot to Cheat Student Borrowers,* STUDENT BORROWER

(Sept. 19, 2019), https://protectborrowers.org/five-things-we-learned-about-navients-plot-to-cheat-student-borrowers/ [https://perma.cc/2JAR-YYRD].

[42] *Id.*; *see also Illinois Complaint Against Navient,* N.Y. TIMES (Apr. 9, 2017), https://www.nytimes.com/interactive/2017/04/09/business/dealbook/illinois-navient-student-loan-complaint.html [https://perma.cc/PPG9-ZM7C].

[43] Order to Cease and Desist at 3, Sallie Mae Bank, FDIC-08-086b (FDIC Utah Dep't of Fin. Insts. Aug. 19, 2008), https://www.fdic.gov/bank/individual/enforcement/2008-08-10.pdf [https://perma.cc/AN54-27V4].

[44] Loonin, *supra* note 31, at 2.

[45] *Id.*

have persisted since Sallie Mae re-branded as Navient in 2014. Navient and its predecessor Sallie Mae are repeat offenders, but unfortunately, they are not the only TIVAS that have engaged in harmful practices. Every for-profit TIVA contracted with the DOE has been sued for deceptive practices, including Great Lakes Education Services, Nelnet, Navient, Sallie Mae, and Federal Student Loan Servicing which operates under the name of Pennsylvania Higher Education Agency (PHEA).[46]

Nevertheless, the student loan industry continues to operate with sheer disregard for borrowers and the rule of law. The harm to student borrowers is exacerbated by the political forces that make regulation exceedingly difficult among changing administrations. Corporate criminal liability has the potential to create the deterrent effect regulation alone has failed to accomplish. This notion is explored below by discussing the government's role in regulating the student loan industry.

III. REGULATORY CAPTURE

Administrative agencies are not immune to political pressure and at times, the agencies responsible for safeguarding borrowers and overseeing private student loan servicers have shown symptoms of regulatory capture.[47] Regulatory capture refers to the theory that independent agencies are often so interconnected to private corporations, that regulators begin to align with the interest of the private corporation at the public's expense.[48] Under this view, private industries can "capture" regulators via consistent efforts to "persuade the regulator to adopt or retract regulations in a manner that benefits the private corporation."[49] A related

[46] *See* Lawson-Ross v. Great Lakes Higher Educ. Corp., 955 F.3d 908 (11th Cir. 2020); Pennsylvania Higher Educ. Assistance Agency v. Perez, 457 F. Supp. 3d 112 (D. Conn. 2020); Olsen v. Nelnet, Inc., 392 F. Supp. 3d 1006 (D. Neb. 2019); Pennsylvania v. Navient Corp., 967 F.3d 273 (3d Cir. 2020); Johnson v. Sallie Mae Servicing Corp., 102 F. App'x 484 (7th Cir. 2004); *see also* Kate Sablosky Elengold & Jonathan D. Glater, *The Sovereign Shield*, 73 STAN. L. REV. 969, 1019 n.262 (2021) (collecting cases).

[47] Elengold, *supra* note 46, at 1033 (discussing regulatory capture and the troubling relationship between federal regulators and contracted student loan servicers).

[48] Lawrence G. Baxter, Understanding Regulatory Capture: An Academic Perspective from the United States, in *The Making of Good Financial Regulation: Towards a Policy Response to Regulatory Capture* 31–39 (Stefano Pagliari, ed., 2012), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=5262&context=faculty_scholarship [https://perma.cc/W5U6-AK6P] (describing regulatory capture as, "private distortion of a public purpose").

[49] Hadar Y. Jabotinsky, *Revolving Doors—We Got It Backwards*, 89 U. CIN. L. REV. 432, 437 (2021).

issue, termed the revolving door, refers to the practice of public officials transitioning to the private sector after public service and former employees of private corporations becoming members of public office. [50] The circumstances that led to the 2008 mortgage crisis illustrate a tragic example of regulatory capture when big banks convinced SEC regulators to remove regulations that led to the global financial crisis.[51] Several lawyers, scholars, and commentators have compared the lack of regulation of federal student loan servicers to the lack of regulation that preceded the subprime mortgage crisis. [52]

Under the Trump administration and the leadership of the former secretary of education, Betsy Devos, the DOE exhibited signs of regulatory capture and the revolving door.[53] Indeed, Devos received well-deserved criticism for her ties to the student loan servicing industry and her actions which appeared to protect

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[50] *Id.* at 432. As an example, former president George Bush appointed the former CEO of Goldman Sachs as the Treasury Secretary.

[51] INSIDE JOB (Sony Pictures Classics 2010); Daniel Kaufmann, *Corruption and the Global Financial Crisis*, FORBES (Jan. 27, 2009, 2:58 PM), https://www.forbes.com/2009/01/27/corruption-financial-crisis-business-corruption09_0127corruption.html?sh=15d5890161b3 [https://perma.cc/6S7U-ZCFL] (For example, major investment banks convinced the SEC to remove regulations that ultimately led to a global financial crisis).

[52] *See generally* Ted Wegner, *Student Loan Servicing Standards; Should the Government Look to Other Markets to Better Protect Student Borrowers,* 42 J. CORP. L. 749, 762-65 (2017); Christopher K. Odinet, *The New Data of Student Debt*, 92 S. CAL. L. REV. 1617 (2019); Cox et al., *supra* note 32, at 363; Jamie P. Hopkins & Katherine A. Pustizzi, *A Blast from the Past: Are the Robo-Signing Issues That Plagued the Mortgage Crisis Set to Engulf the Student Loan Industry?*, 45 U. TOL. L. REV. 239, 242 (2014); Andrew A. Sexton, *The Education Loan Bubble: How the Discharge Student Loans in Bankruptcy Act of 2017 and Legislation Alike Is the Only Answer to the Student Loan Crisis,* 54 CAL. W. L. REV. 323, 340 (2018).

[53] *See e.g.*, Elengold & Glater, *supra* note 46, at 132 (a former PHEAA executive, Robert Cameron, was named the CFPB's private student-loan ombudsman, a job that has been called 'the federal government's top [student-loan] watchdog.'"); Michael Stratford, *Student-Loan Behemoth Tightens its Ties to Trump and DeVos*, POLITICO (Sept. 09, 2019, 05:03 AM EDT), https://www.politico.com/story/2019/09/09/student-loans-donald-trump-betsy-devos-1712812. For further examples of regulatory capture see Cory Turner, *Betsy DeVos Overruled Education Dept. Findings on Defrauded Student Borrowers*, NPR (Dec. 11, 2019, 5:00 AM) https://www.npr.org/2019/12/11/786367598/betsy-devos-overruled-education-dept-findings-on-defrauded-student-borrowers [https://perma.cc/W3BH-SMCJ] (Betsy Devos ignored findings of DOE personnel and the Student Borrower's Defense Unit regarding defrauded borrowers claims for student loan forgiveness).

servicers ability to exploit borrowers.[54] The rise of consumer harms at the hands of student loan servicers prompted state initiatives to adopt stricter servicing regulations and strengthen borrowers' legal protections.[55] However, Devos sought to dismantle states efforts and "[in] attempt to curtail oversight and regulation of student loan servicers by the states . . . issued a memorandum arguing that federal law preempts state efforts to regulate student loan servicers."[56] This effort was undoubtedly motivated by the loyalty to student loan servicers exhibited by Devos and prominent figures within the DOE at that time. For example, Former Deputy Chief Operating Officer (COO) at Federal Student Aid, Kathleen Smith who issued guidance to try to preempt state's protections for student loan borrower is not only a former employee of a large student loan servicer, but she "also led the Education Finance Council, a lobbying group representing student loan industry participants."[57] When her position ended in 2018, she returned to work for PHEAA.

There is further evidence that we cannot rely on the regulatory regime alone to end student loan servicers' exploitation of borrowers considering the paper trail over the last decade from agencies like the CFPB, DOJ and the Office of Inspector General outlining the need for additional oversight.[58] Student loan servicers must

[54] Elengold & Glater, *supra* note 46, at 132.

[55] Cox et al., *supra* note 32, at 403-07.

[56] Camilla E. Watson, *Federal Financing of Higher Education at a Crossroads: The Evolution of the Student Loan Debt Crisis and the Reauthorization of the Higher Education Act of 1965,* MICH. ST. L. REV. 883, 942 (2019). *See generally* Pennsylvania v. Navient Corp., 967 F.3d 273, 294 (3d Cir. 2020) (holding HEA does not preempt state law on the ground that "if we were to hold that the Education Act preempts state-law consumer protection claims, consumers would be left with no protection against unfair or deceptive acts or practices by loan servicers because the Education Act contains no general prohibition against those practices.").

[57] Julie Margetta Morgan, *Who Pays? How Industry Insiders Rig the Student Loan System—and How to Stop It*, ROOSEVELT INST., (June 26, 2018), https://rooseveltinstitute.org/wp-content/uploads/2020/07/RI-Who-Pays-Insiders-Rig-Student-Loan-System-201806.pdf [https://perma.cc/6FEH-DW8Q].

[58] *See generally* CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING: ANALYSIS OF PUBLIC INPUT AND RECOMMENDATIONS FOR REFORM, (Sept. 2015), https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf [https://perma.cc/RJ4B-B2DZ]; OFF. OF INSPECTOR GEN., U.S. DEPT OF EDUC., ED-OIG/A20I0001 : FINAL AUDIT REPORT (2009), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2009/a20i0001.pdf [https://perma.cc/4YCM-QCNU] [hereinafter *OIG 2009 Report*]; Press Release 15-690, U.S. DEP'T OF JUST., Nearly 78,000 Service Members to Begin Receiving $60 Million

abide by numerous consumer protection laws including but not limited to: HEA, Dodd- Frank Wall Street Reform and Consumer Protection Act, and the Fair Debt Collection Practices Act. Yet, the OIG has public reports dating back to 2009, raising concerns about servicers' widespread non-compliance with federal servicing requirements. Of the many issues in these reports include detailed accounts of servicers refusing to cooperate with FSA about non-compliance, taking adverse action against borrowers without proper notice and submitting "independent annual compliance reports" which were "ineffective."[59] Despite these warning signals from OIG, CFPB, and GAO, not much has changed. In 2019, the OIG released an audit urging regulators to take further action to "mitigate the risk of servicer non-compliance for federally held student loans."[60]

The 2019 report OIG found "noncompliance by all nine servicers and recurring instances of noncompliance by some servicers."[61] The non-compliance issues involved failure to conduct due diligence, consumer protection issues, forbearance practices, IDR practices, and interest rates. Moreover, the report revealed that regulators had "routinely" found servicers in violation of federal requirements.[62] Between 2015 and 2017 sixty one percent of FSA's supervision measures found servicer non-compliance. [63]

Although the government had the authority to end contracts, reduce compensation, and reduce the number of loans in the servicers' portfolios,[64] it did not utilize those mechanisms to hold servicers accountable. The OIG report found that at most regulators would require servicers to correct borrowers' accounts.

Under Department of Justice Settlement with Navient for Overcharging on Student Loans (May 28, 2015), https://www.justice.gov/opa/pr/nearly-78000-service-members-begin-receiving-60-million-under-department-justice-settlement [https://perma.cc/UJU2-DDNS] [hereinafter DOJ Service Member Settlement]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-663, FEDERAL STUDENT LOANS, (Aug. 25, 2015), https://www.gao.gov/products/gao-15-663 [https://perma.cc/ZGP3-JJHF].

[59] *OIG 2009 Report, supra* note 58, at 20.

[60] OFF. OF INSPECTOR GEN., U.S. DEPT OF EDUC., ED/OIG A05Q0008, FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICERS NONCOMPLIANCE WITH REQUIREMENTS FOR FEDERALLY HELD STUDENT LOANS 5–6 (2019), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf [https://perma.cc/N2UC-EUC9] [hereinafter *OIG Report 2019*].

[61] *Id.* at 4.

[62] *Id.* at 2.

[63] *Id.* at 2.

[64] *Id.* at 15–17.

Alarmingly, the government did not reduce the volume of loans distributed to non-compliant servicers.[65] Moreover, the OIG report contained additional troubling findings including that regulators had not implemented a system to track non-compliance or repeat offenders. As to the information the government did track, it did not review the data to spot patterns of predatory behavior.[66] Rather, employees accepted servicers policies to cure conduct violations but did not follow up to see if the servicers adopted such policies.

Thus, the lack of oversight, conflicts of interest, and corruption within the student loan industry shows criminal prosecution is necessary to hold servicers accountable. As illustrated above, the current framework of the federal student loan system makes it exceedingly difficult to hold for-profit companies like Navient accountable. Further, when agencies like the CFPB surpass the systemic obstacles to holding servicers responsible, the million-dollar civil settlements are followed by repeat violations. The need for corporate criminal liability is illustrated via further analysis of one of the nation's worst predatory lenders- Navient.

IV. VIABLE AVENUES FOR CRIMINALLY PROSECUTING STUDENT LOAN SERVICERS – WIRE FRAUD

A. Case Example – Navient's History of Unrelenting Abuse

At the outset, it is important to acknowledge that Navient's fraudulent and illegal practices are extensive and routine. Thus, this section highlights only a few of the most egregious instances and supplies an example of how Navient's forbearance steering scheme meets the requisite elements of federal wire fraud. However, Navient's forbearance scheme is just one example of fraudulent scandals that Navient could be prosecuted for under the federal wire fraud statute. This point is illustrated via Navient's track record after acquiring Sallie Mae. In 2015, just a year after assuming Sallie Mae's loan portfolio, Navient entered into a $60 million settlement with the DOJ for overcharging service members in interest in violation

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[65] *Id.* at 3.

[66] OFF. OF INSPECTOR GEN., U.S. DEPT OF EDUC., ED/OIG A05Q0008, FEDERAL STUDENT AID: ADDITIONAL ACTIONS NEEDED TO MITIGATE THE RISK OF SERVICERS NONCOMPLIANCE WITH REQUIREMENTS FOR FEDERALLY HELD STUDENT LOANS 3 (2019), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf [https://perma.cc/N2UC-EUC9] [hereinafter *OIG Report 2019*].

of the Servicemembers Civil Relief Act (SCRA).[67] In 2017, Navient was sued by 39 state attorneys general for "failing borrowers at every stage of repayment." [68]

In 2022, the corporation entered a $1.85 billion settlement to put an end to those complaints.[69] In addition to the forbearance steering discussed in the following section, the 2022 settlement revealed Navient intentionally concealed material information from borrowers about critical deadlines for loan forgiveness programs like IDR.[70] To notify borrowers of upcoming deadlines, Navient sent out emails with vague subject lines and did not supply the specific date the recertification was due. Navient did not explain to student borrowers the significant consequences that would ensue if they did not recertify by the deadline. For students to access the recertification documents, they had to click on an external link embedded in the email which then prompted the borrower to login the Navient website. Consequently, 60% of borrowers eligible for IDR missed the recertification deadlines and lost eligibility for low monthly payments. [71]

Navient did more than just prey on borrowers in poor standing. It also deceived student borrowers making extra payments on their loans. Its website included misrepresentations about the allocation of extra payments, leading borrowers to believe it would all go to lowering the principal balance.[72] Navient did not explain that the incentive only applied if borrowers made the extra payment on the exact day traditional payments were due. So, if student borrowers' payments did not align with one specific date, Navient would use the extra payment toward unpaid interest and fees. If there was any remaining amount, it would go toward the principal balance. Consequently, borrowers trying to get a head on their loans had most of their payments go to unpaid interest rather than to their principal loan balance as Navient advertised.[73] The government must put an end to unfair business practices that are hindering the futures of an entire generation. Accordingly, in the following section I argue that a federal prosecutor has a compelling case against servicers like Navient for federal wire fraud, via its forbearance steering scheme.

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[67] DOJ Service Member Settlement, *supra* note 58.

[68] KCRA News, *Attorney General Bonta is Announcing Multistate Settlement Against Student Loan Servicer Navient*, YOUTUBE (Jan. 13, 2022), https://www.youtube.com/watch?v=feu_zdJ9DnM [https://perma.cc/P67V-QMCZ].

[69] The People of the State of California v. Navient Corporation, et al., 2022 WL 635515 (Cal. Super. Ct. Jan. 25, 2022).

[70] *CA AG 2018*, *supra* note 36, at 65.

[71] *Id.* at 71.

[72] *Id.* at 76.

[73] *Id.* at 55.

The elements of federal wire fraud can be summarized as: "(1) a scheme to defraud involving a material deception; (2) foreseeable use of the mail, a private commercial carrier, or a wire or radio communication in furtherance of said scheme; and (3) intent to defraud another of (4) money, property, or honest services."[74] As for the first element, "Generally, . . . the scheme to defraud element contemplates … conduct reasonably calculated to deceive."[75] In the case of Navient, the corporation carefully orchestrated a corporatewide forbearance steering scheme that unnecessarily placed 1.5 million borrowers into prolonged forbearance periods. Most of the borrowers placed into prolonged forbearances were eligible to enroll in loan forgiveness programs like IDR. Navient's forbearance steering resulted in a staggering $4 billion in interest.[76] On average, this practice added $2,700 in unjustified interest per borrower. [77]

There is substantial evidence that Navient's forbearance steering was a calculated, corporate-wide scheme. Navient employees were trained to tell borrowers that forbearance was the only available option.[78] In fact, Navient provided manuals to its employees with flow charts representing forbearance as the only option for students struggling to make payments, when eligible borrowers could have enrolled in $0 IDR payments.[79] Correspondingly, Navient adopted an "incentive compensation plan."[80] This is a "reward strategy that compensates employees based on criteria other than pay for time worked . . . [it] is designed to supplement base pay and drive behaviors that align the employee's interests with the strategy of the company."[81] The rewards program was designed to induce employees to place borrowers in a *worse* situation, which underscores the toxicity embedded in the corporate culture at Navient. Moreover, former employees have revealed the extent to which the corporation instilled these unethical tactics into the minds of employees. One former employee reported that he was often "pulled aside" by upper-level management because his calls exceeded the recommended call time.[82]

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[74] Michael A. Foster, CONG. RSCH. SERV., R45479, BRIBERY, KICKBACKS, AND SELF-DEALING: AN OVERVIEW OF HONEST SERVICES FRAUD AND ISSUES FOR CONGRESS (2020); 18 U.S.C.A. § 1343 (West 2008).

[75] *Id.*

[76] *Hearings Before the Subcomm.*116th Cong., *supra* note 35.

[77] *Id.*

[78] *CA AG 2018*, *supra* note 36, at 11–13.

[79] *Id.*

[80] *Id.*

[81] *Id.* at 12.

[82] *Hearings Before the Subcomm.*116th Cong., *supra* note 35.

In an oral deposition, another former employee revealed the corporation's lack of urgency and motivation to correct the agent's fraudulent conduct. The deponent was asked, "Have you ever had a situation where someone was placed into forbearance without any contact whatsoever? . . . In other words, it was fraudulently done without the borrower's permission, without any call whatsoever?" The deponent responded, "Yeah, I mean at some point there has been agents who have done something of that nature."[83] In terms of discipline for agents who engaged unauthorized forbearance placement, the deponent suggested the responsible agent might receive "coaching" depending on the severity of the action.[84] Moreover, the scheme to defraud must involve material deception "the misrepresentation or concealment at issue must have 'a natural tendency to influence, or [be] capable of influencing,' the person 'to [whom] it was addressed.'"[85] Navient's deception is material in that Navient portrayed its representatives as being available to help student borrowers. Navient's website had misleading quotes stating, "Navient is here to help. [¶] We've found that, 9 times out of 10, when we can talk to a struggling federal loan customer, we can help him or her get on an affordable payment plan and avoid default."[86] The terms of student loans are complex, and repayment programs are convoluted. Thus, Navient's deception had a naturally tendency to influence borrower's decisions about financial decisions that are essential to ensuring a stable future.

In addition, the second element is easily established as Navient's primary method of contact is over the phone. Navient's primary form of contact for borrowers is via the phone, and electronic communications. In fact, by 2015, "75% of Navient's federal student loan borrowers consented to receiving electronic communications." Here, again, the deposition of a former Navient employee exhibits its use of wire communications in furtherance of its forbearance scheme. In an oral deposition, a formal Navient employee revealed that there was a threshold call expectation of three minutes and thirty seconds. He admitted that most phone calls that met this threshold resulted in students being placed in forbearance.[87] The former employee a described troubling tactics Navient used to

[83] Pierce, *supra* note 41, at 70.

[84] *Id.*

[85] Foster, *supra* note 74, at 4 (quoting Neder v. United States, 527 U.S. 16, 119 (1999)).

[86] *CA AG 2018*, *supra* note 36, at 10; *see also Hearings Before the Subcomm.*116th Cong., *supra* note 35.

[87] Pierce, *supra* note 41, at exhibit 11.

induce such behavior- such as ranking employees based on call times and emphasizing how employees compared to the threshold phone call expectations.[88]

The third element of the federal wire fraud statute requires "the specific intent to deceive or cheat, usually for the purpose of getting financial gain for oneself or causing financial loss to another."[89] Perhaps the most compelling argument for criminally prosecuting corporations like Navient is the sheer disregard for borrowers' rights and wellbeing. A 2010 internal memo had the following statement describing the corporation's forbearance strategy, "our battle cry remains *'forbear them, forbear them make them relinquish the ball.'* In other words, we are very liberal with the use of forbearance . . . ."[90] There is additional evidence of intent in Navient's incentive structures, misleading manuals, and call thresholds that were designed to deceive borrowers. Moreover, there is clear intent via representatives routinely lied to borrowers that they were not eligible for programs like TPD, PLSF, and IDR even after borrowers had made it apparent for several years that they could not afford payments. Navient's intent to deceive borrowers is illuminated via the following quote by a Navient representative to a federal judge, "there is no expectation that the servicer will act in the interest of the consumer."[91]

Finally, the scheme must intend to defraud another of money, property, or honest services. [92]Again, this element is easily established as Navient's

[88] *Id.*; Plaintiff's Brief in Support of its Motion to Defer the Deadline for its Response to Defendant's Motion for Partial Summary Judgment and to Prohibit Further Motions for Summary Judgment before the Close of Discovery, Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101, at *9–10 (M.D. Pa. Mar. 26, 2019), https://protectborrowers.org/wp-content/uploads/2019/09/CFPB-Reply-to-Motion-for-Summary-Judgment-w-Exhibits.pdf [https://perma.cc/9HXD-TEJ7].

[89] Foster, *supra* note 74, at 4–5; United States v. White, 737 F.3d 1121, 1130 (7th Cir. 2013) (quoting United States v. Britton, 289 F.3d 976, 981 (7th Cir. 2002)).

[90] Pierce, *supra* note 41.

[91] Pierce, *supra* note 41; Memorandum of Law in Support of Defendant's Motion to Dismiss Plaintiff's Complaint under Rule 12(b)(6) or, in the Alternative, for a More Definite Statement Under Rule 12(e), Consumer Fin. Prot. Bureau v. Navient Corp., No. 3:17-CV-101 (M.D. Pa. Mar. 24, 2017); *see also* Press Release, Student Borrower Prot. Ctr., Student Borrower Protection Center Statement on Navient's Settlement with 39 States Cancelling $1.7 Billion in Predatory Private Student Loans (Jan. 13, 2022), https://protectborrowers.org/student-borrower-protection-center-statement-on-navients-settlement-with-39-states-cancelling-1-7-billion-in-predatory-private-student-loans/ [https://perma.cc/FF7F-8ZN5].

[92] 18 U.S.C. § 1343.

forbearance scheme has generated it at least $4 billion in profit.[93] In addition to unnecessary interest being tacked onto borrowers' bills, Navient's practices robbed them of the benefits from programs like IDR and PSLF. There are several reports of scenarios when borrowers were eligible for $0 IDR monthly payments—which after 20–25 years can lead to loan forgiveness.[94] Yet, Navient representatives placed them in forbearance letting interest accrue, and ensuring that it would not count toward the requisite number of payments for loan forgiveness.[95]

CONCLUSION

The preceding analysis reveals that student loan servicers are not deterred via settlements, or bad publicity. An empirical analysis of corporate criminal liability analyzed consumer complaints involving student loan servicers and found an increase in borrower complaints involving moderate and severe misconduct.[96] The study emphasizes that the current federal enforcement practices are not working as adequate deterrence for large corporations. In the rare instances corporations are criminally prosecuted, they avoid trial and receive fines lower than the revenue that can be earned via criminal conduct. Research suggests that prosecutors are hesitant to impose fines proportionate to the corporations' revenue due to political pressures. "The consequence, however, is that for the largest firms, even sky-high penalties are likely viewed as just another cost of doing business—more of a pinprick than a meaningful deterrent."[97]

Although Navient's actions following the latest settlement remain to be seen, the student loan industry's characteristics and its consistent efforts to defraud Americans emphasize that criminal accountability is needed to protect borrowers. The Maximus (Aidvantage) corporation is a prime example; less than a year after acquiring Navient's massive student loan portfolio and becoming the largest student loan servicer in the world, disturbing allegations have come to light. A 2022 SBPC report revealed Maximus' history of predatory tactics, such as illegally garnishing wages from low-income borrowers, debt from victims of for-profit colleges, and supplying false information as to borrower's right to reverse

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[93] *Hearings Before the Subcomm.*116th Cong., *supra* note 35, at 34.

[94] *Id.* at 5, 38.

[95] *Id.*

[96] Dorothy S. Lund & Natasha Sarin, *Corporate Crime and Punishment: An Empirical Study*, 100 TEX. L. REV. 285, 324 (2020).

[97] *Id.* at 340–41.

delinquent loans.[98] Maximus has tried to escape liability for its abuse by exploiting its relationship with the government by arguing sovereign immunity. Thus, it is clear that for-profit servicers' exploitation of debt-ridden borrowers will persist without criminal responsibility. The government must take responsibility for its role in the student debt crisis and protect students against billion-dollar corporations exploiting the facade of the American dream.

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[98] STUDENT BORROWER PROT. CTR., CUSTOMER DISSERVICE: EXAMINING MAXIMUS, THE FEDERAL CONTRACTOR THAT JUST BECAME THE LARGEST STUDENT LOAN COMPANY IN THE WORLD 12, 16 (Mar. 2, 2022), https://protectborrowers.org/wp-content/uploads/2022/03/CWA_SBPC_MAXIMUS.pdf [https://perma.cc/E8T7-KHX6].