

# What Is the University-Student Contract?

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## Abstract

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## ESSAY

# What is the University-Student Contract?

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**Abstract.** Courts readily accept that the university-student relationship is fundamentally contractual but face difficulties discerning the agreement. This paper develops a coherent framework to discern the university-student contract in traditional four-year universities and colleges and then applies that framework to ongoing and highly contentious litigation arising from higher education’s response to COVID-19. The paper begins by considering the three most salient models of higher education: the human capital, sorting, and consumption models. Next, the paper explores how courts implicitly rely on these models to frame their contract analysis in university litigation over issues as varied as student misconduct, affirmative action, and COVID-19 remote learning. The paper demonstrates that the human capital model of higher education, under which students acquire knowledge and complex skills in a residential environment, is the best positive description of the university-student contract as well as the model emphasized in university writings. Next, the paper applies the human capital model to assess the contractual issues raised by higher education’s response to COVID-19. The paper argues that, under the human capital model, almost all universities promised in-person instruction. However, universities also have reserve powers under the contract to protect the learning environment, and consequently COVID-19 vaccine mandates imposed during contract performance were permissible when vaccines were reasonably thought to facilitate in-person instruction. Finally, the paper considers the broader normative issues raised by the human capital model and concludes that the model appropriately recognizes and enforces university promises while leaving universities discretion in zones that require it.

## Introduction

There is a complex nexus of regulations and institutional arrangements that explicitly and implicitly govern universities, including accreditation organizations, federal anti-discrimination laws, market pressures from tuition, and internal governance provided by boards, faculty and student representatives, and alumni. Courts today readily accept that the university-student relationship is fundamentally contractual, making the university-student contract an important but understudied part of this regulatory nexus. However, courts struggle to define the contract, a fact brought into sharp relief during the pandemic.<sup>1</sup> In a set of cases

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<sup>1</sup> See WILLIAM A. KAPLAN ET AL., THE LAW OF HIGHER EDUCATION 372 (6th ed. 2019) (summarizing cases and concluding that the university-student relationship is basically contractual.). See, e.g., *Shaffer v. Geo. Wash. Univ.*, 27 F.4th 754, 763 (D.C. Cir. 2022); *Gociman v. Loyola Univ. of Chi.*, 41 F.4th 873, 883 (7th Cir. 2022); *Doe v. Univ. of Scis.*, 961 F.3d 203, 211 (3d Cir. 2020); *Mangla v. Brown Univ.*, 135 F.3d 80, 83 (1st Cir. 1998); *Basch v. George Washington Univ.*, 370 A.2d 1364, 1366 (D.C. 1977) (per curiam) (considering as a general rule “that the relationship between a university and its students is contractual in nature”); *Zumbrun v. Univ. of S. California*, 25 Cal. App. 3d 1, 10 (Ct. App. 1972) (“[t]he basic legal relation between a student and a private university of college is contractual in nature). *But see Sheppard v. Visitors of Virginia State Univ.*, 993 F.3d 230, 239 (4th Cir. 2021) (finding no Virginia state law to support a theory of an implied contract theory); *Doe v. White*, 859 F. App’x 76, 77–78 (9th Cir. 2021) (noting the California Supreme Court has never categorically embraced a contractual

with little qualitative difference on the facts, courts in multiple jurisdictions issued divided opinions over campus closures and remote instruction. Some courts found that the promise of in-person instruction was obvious,<sup>2</sup> while others held that representations of in-person instruction were either too uncertain to constitute a contractual promise or that no such promise was made.<sup>3</sup> Put another way, some courts held that universities promised residential students a multifaceted in-person learning experience, while other courts held that universities merely promised students a course of study that would lead to a college degree.<sup>4</sup>

Some contractual uncertainty is not surprising given that the university-student contract is a relational contract involving complex joint production of education benefits over an extended period.<sup>5</sup> In such circumstances, the contract is necessarily incomplete – many terms are specified as standards and one party must retain discretion to modify the contract in good faith as circumstances warrant. Nonetheless, standards and reserved discretion are potentially costly and open to exploitation, especially by the more sophisticated party. Courts must tradeoff individual student interests and expectations while preserving power for universities to enact

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characterization of the student-university relationship); *Mittra v. Univ. of Med. & Dentistry of New Jersey*, 719 A.2d 693, 694 (App. Div. 1998) (“the relationship between the university and its students should not be analyzed in purely contractual terms”).

<sup>2</sup> See, e.g., *Rynasko v. New York University*, \_\_\_ F.4th \_\_\_ (C.A.2 (N.Y.), 2023) (student plausibly alleges an implied contract between NYU and its students to deliver an in-person student experience); *Qureshi v. Am. Univ.*, No. 20-CV-1141 (CRC), 2023 WL 2387811 (D.D.C. Mar. 7, 2023) (holding that plaintiffs' complaint adequately alleges representations made by American that a reasonable person would have understood to bind it “to providing in-person education in exchange for retaining Plaintiffs' entire tuition payments for traditional on-campus degree programs”); *Gociman v. Loyola Univ. of Chicago*, 41 F.4th 873 (7th Cir. 2022) (recognizing a possibility of an implied contract promising in-person instruction and access to on-campus facilities in its online registral portal and course catalog); *Hiatt v. Brigham Young Univ.*, 512 F. Supp. 3d 1180, 1186–87 (D. Utah 2021); *Little v. Grand Canyon Univ.*, 516 F. Supp. 3d 958 (D. Ariz. 2021); *Nguyen v. Stephens Inst.*, 529 F. Supp. 3d 1047 (N.D. Cal. 2021); *Williams v. Corporation of Mercer University*, No.: 5-20-CV-361 LAG, 2021 WL 2328009 (M.D. Ga. 2021); *Gibson v. Lynn Univ., Inc.*, 504 F. Supp. 3d 1335, 1339 (S.D. Fla. 2020); *Metzner v. Quinnipiac Univ.*, 528 F. Supp. 3d 15, 21 (D. Conn. 2021) (denying a motion to dismiss a contract claim after finding sufficient evidence of in-person instruction from numerous university writings).

<sup>3</sup> See, e.g., *In re Univ. of Miami COVID-19 Tuition & Fee Refund Litig.*, No. 20-22207-CIV, 2022 WL 18034457 at \*3 (S.D. Fla. Dec. 30, 2022) (despite recognizing the possibility of an in-person contract existing, the plaintiffs here did not meet their burden to sustain their claims); *Polley v. Nw. Univ.*, 560 F. Supp. 3d 1197, 1208 (N.D. Ill. 2021) (dismissing a contract claim and finding the university's writings promised “an education generally . . . and not a specific contractual promise of location.”); *Abuelhawa v. Santa Clara Univ.*, No. 20-CV-04045-LHK, 2021 WL 5584759 (N.D. Cal. Nov. 29, 2021) (concluding the plaintiffs did not present a “definite, specific, or explicit” promise of on-campus instruction); See also *Student "C" v. Anne Arundel Cnty. Cmty. Coll.*, 513 F. Supp. 3d 658, 664 (D. Md. 2021); *Oyoque v. Depaul Univ.*, No. 20 C 3431, 2021 WL 1837399 at \*2 (N.D. Ill. May 7, 2021) (declining to consider promotional materials or other publications as “amount[ing] to evidence . . . a contractually enforceable promise to provide an in-person education”).

<sup>4</sup> One of the clearest illustrations of this dichotomy can be found in *Zwiker v. Lake Superior Univ.*, 340 Mich. App. 448 (2022), which consolidated actions requesting refunds at three Michigan state universities based on loss of campus amenities and in-person learning. The majority held that the short tuition agreement constituted the entire agreement between the parties, and applied the parol evidence rule to conclude that university fulfilled its contract when the students registered or were provided with “credits.” The dissent disagreed, arguing that the “university defendants did not fulfill their end of the bargain merely by providing the opportunity for the student plaintiffs to register” or “merely by awarding credits....Although credits are an important component of educational services, the credits alone are not sufficient to satisfy the provision of [educational] services. I am not yet cynical enough to conclude that students go to university solely to gather credits for a diploma....”).

<sup>5</sup> For a recent discussion of relational contracts, see David Frydinger, Oliver Hart & Kate Vitasek, *A New Approach to Contracts: How to Build Better Long-Term Strategic Partnerships*, 97 Harv. Bus. Rv. 116., 120-26 (2019).

good faith modifications to maintain a reasonably regulated learning environment. Getting these tradeoffs right is critical. Higher education expenditures now exceed \$650 billion annually,<sup>6</sup> universities are sophisticated and well-counseled institutions, and students and their families make large and often debt-financed investments in higher education.<sup>7</sup>

The uncertainties and ambiguities that naturally attend complex, relational contracts are greatly exacerbated in the university context for three related reasons. First, most universities leave unspecified which writings constitute the contract.<sup>8</sup> In these cases, courts must discern which numerous and lengthy university writings matter, sifting through student handbooks, disciplinary procedures, institutional websites, public statements, acceptance letters, course catalogs, etc. Second, to the extent that universities recognize the contract potential of their writings, it is most often to disclaim them as such (except for the typically short tuition agreement). When universities issue broad contract disclaimers, courts that respect the disclaimers are left with very little in writing and must find ways to fill in large gaps in the promise. Finally, courts disagree about the underlying purpose of the university-student relationship – is it just a degree or is it an educational experience? This disagreement is partially attributable to the universities’ choice of silence or disclaimer regarding the contractual status of university writings.

The goal of this paper is to provide a coherent framework to assess the student-university contract in traditional, four-year universities and colleges, and then apply that framework to legal issues arising from the COVID pandemic. The paper considers three competing, but not mutually exclusive, conceptions of higher education: the human capital, sorting, and consumption models. The human capital model views the university-student relationship as one in which an individual student participates in a collective endeavor with other students and faculty to acquire complex “human capital.” The sorting model views the university-student relationship as not primarily about skill acquisition but about degree attainment.<sup>9</sup> Students benefit primarily from what the degree signals to the marketplace, as opposed to the actual skills they acquire. The consumption model views the university-student relationship in terms of the discrete consumption goods – for example, enjoyable classes, social events, athletic facilities, and well-appointed residences – promised by universities to their students.

The relevance of sorting versus human capital or consumption in higher education is not merely a theoretical exercise. Canonical contract law holds that an agreement should be interpreted in light of all the circumstances relevant to it, and “if the principal purpose of the

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<sup>6</sup> See *Annual Reports and Information Staff (Annual Reports), Postsecondary Institution Expenses*, NAT’L CTR. EDUC. STAT (May 2022), <https://nces.ed.gov/programs/coe/indicator/cue> <https://perma.cc/34UW-2ZXA>.

<sup>7</sup> See *id.* (finding that average debt at graduation among those with federal loans was \$29,000 for private non-profit institutions and \$26,000 at public institutions).

<sup>8</sup> The authors surveyed the writings of 40 universities. See *infra* Part II.A.

<sup>9</sup> Credentialism and sorting are sometimes confused. The modern economics literature distinguishes credentialism from a sorting model by making the extreme assumption that the credential itself is actually uncorrelated with underlying skill. See, e.g., Andrew Weiss, *Human Capital vs. Signaling Explanations of Wages*, 9 J. ECON. PERSP. 133, 150 (1995) (defining credentialism as a model “in which wage differences [by credential] are independent of productivity differences....”). Sorting, by contrast, occurs through either signaling or screening by a credential that is correlated with underlying productivity even if obtaining the credential does not itself improve productivity. In signaling, students achieve an expensive credential to show their particular type. In screening, employers establish a credential requirement to get workers of a particular type.

parties is ascertainable it is given great weight.”<sup>10</sup> The paper demonstrates that the human capital model of higher education, under which students acquire knowledge and complex skills in a residential environment, is the best positive description of the university-student contract, and, as a normative matter, it is the proper model for courts to use when construing university-student contract claims. On this view, universities promise a reasonably regulated environment in which students can participate in a collective endeavor to acquire complex “human capital,” and thus in-person instruction within a community is clearly part of that deal.

As a result of lack of clarity in the contract and underlying purpose of the relationship, universities claim adherence to different models of higher education as context and self-interest demands. When faced with COVID litigation over remote learning, universities clung to the sorting model and claimed that they had only contracted to deliver a degree. But such strategic position shifting complicated the imposition of vaccination requirements. The obvious basis for a mid-course contract modification to require COVID vaccinations is that vaccination would facilitate the return to essential in-person instruction during the pandemic. But universities were affirmatively advised *against* relying on the importance of in-person instruction as a justification lest they undermine their previous position in the litigation over remote learning.<sup>11</sup> Previously, when confronted with student misconduct or challenges to affirmative action admissions policies, universities have readily emphasized the necessity of community, collaborative learning, and varied interactions in a university education.

One can hardly blame a defendant for adopting a theory that best fits their present circumstances. However, in construing the university-student contract, courts should not allow universities to hide behind, or use opportunistically, ambiguities they have created. A proper understanding of the relationship will hold universities to their bargain of creating a well-regulated academic community for the acquisition of human capital.

One concern about adopting the human capital model as the basis for interpreting the university-student contract is that it might overregulate the university-student relationship. Could, for example, students sue over a poor classroom experience or the lack of social life on campus? We agree that courts should tread carefully in this space. Properly understood, however, the human capital model will not make the university-student relationship more legalistic than it presently is. The human capital model simply recognizes, as of necessity, that universities are regulating an educational environment to produce an intangible benefit. Specific promises must be enforced, but zones of discretion, subject to a good faith requirement, necessarily remain.<sup>12</sup>

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<sup>10</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 202 (AM. L. INST. 1981).

<sup>11</sup> See, e.g., Fischer Philips, LLC, *Higher Education Decides Whether To Mandate COVID-19 Vaccine For Next School Year: What Should Your Institution Consider?* <https://www.jdsupra.com/legalnews/higher-education-decides-whether-to-2397266/> (“To the extent possible, an institution should be cautious that its justification for a COVID-19 vaccination requirement does not negatively affect any litigation currently pending against it. For example, an epidemiological-based justification that emphasizes the higher and more efficient rate of COVID-19 transmission among the typical age group for higher education students may be preferable to one that emphasizes the value of a student’s campus life experience.”).

<sup>12</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 204 (AM. L. INST. 1981) (“When the parties . . . have not agreed with respect to a term that is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.”).

The paper proceeds as follows. The first part describes the theory behind and evidence for the human capital, sorting, and consumption models of higher education. The second part explores the sources of university-student contracts. More specifically, it identifies common and divergent features of university student handbooks, considers when they should be treated as part of the university-student contract, and assesses how courts define default rules when terms are left unspecified or because of disclaimers. Perhaps more controversially, the paper expresses skepticism that contract disclaimers and reservations of rights should always be controlling. The third part applies the human capital framework to litigation around COVID and remote learning as well as return-to-campus regulations and vaccine requirements. The paper concludes that students have a remedy under the human capital model for a move to remote learning even if in-person instruction was impracticable, and that restrictions imposed after colleges reopened must be reviewed for good faith and reasonableness.

## I. Human Capital, Sorting, and Consumption in Higher Education

In the modern economy, the wealth stored in society is tied up mostly in human, not physical, capital. Worldwide, roughly 64% of wealth is held as human capital (as measured by expected future income from wages), and this percentage is even higher for wealthy nations such as the United States.<sup>13</sup> Higher education is an important component of earnings in developed economies. At present in the United States, college graduates out earn high school graduates by roughly 67%.<sup>14</sup> The correlation of higher education with other positive life outcomes is also well-established. For example, those with college degrees live about three years longer on average.<sup>15</sup>

These correlations are not necessarily causal, and there is some reason to suppose that the measured effect of university educations on life outcomes are overstated. While high school graduation rates exceed 90%, only one-third of American adults hold a college degree.<sup>16</sup> Higher education is thus a considered choice for most, and colleges select for the highest skilled and most diligent – those most likely to have high earnings and better life outcomes independent of higher education. However, the consensus view is that the college earnings premium is not driven solely by selection, but rather a substantial portion of the college earnings premium is caused by college attendance and, for the great majority of college graduates, the investment pays off.<sup>17</sup> Indeed, there is some evidence that the financial returns to college, at least for some groups, may be understated. A large body of work makes use of plausibly random sources of variation in college attendance (such as distance to a college or Vietnam draft avoidance), and this work tends to find even higher returns to education than naïve comparisons between the

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<sup>13</sup> See THE WORLD BANK, *THE CHANGING WEALTH OF NATIONS 2021: MANAGING ASSETS FOR THE FUTURE* 10 (2021).

<sup>14</sup> See Elka Torpey, *Education Pays, 2020, Career Outlook*, U.S. BUREAU LAB. STAT., (June 2021).

<sup>15</sup> See Ann Case & Angus Deaton, *Life Expectancy in Adulthood is Falling for Those Without a BA Degree, but as Educational Gaps have Widened, Racial Gaps have Narrowed*, 118 *PROC. NAT'L ACAD. SCI.* 1, 6 (2021) (documenting a two to three year longer life-expectancy for college graduates over the last three decades).

<sup>16</sup> See Camille L. Ryan & Kurt Bauman, *Educational Attainment in the U.S.: 2015*, Current Population Reports, U.S. CENSUS BUREAU, (Mar. 29, 2016) <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p20-578.pdf> [https://perma.cc/F2CK-FJTW].

<sup>17</sup> See generally Lisa Barrow & Ofer Malamud, *Is College a Worthwhile Investment?* 7 *ANN. REV. ECON.* 519 (2015).

college and non-college educated.<sup>18</sup> Other work uses similar quasi-random statistical strategies to study college's broader causal impacts and finds that college has favorable impacts on health and mortality.<sup>19</sup>

Although the large causal wage gains resulting from university education are not in question, the mechanism by which college graduation causes those gains is up for some debate. There is a large theoretical and empirical literature on whether higher education's benefits are mostly attributable to human capital acquisition or mostly attributable to sorting. Neither theory is mutually exclusive, and almost all observers accept that each has some explanatory power. However, as we shall see, the prevailing wisdom is that college is valuable mostly because it increases human capital, broadly defined. There is also a much smaller literature discussing the consumption value of higher education, and such consumption is often not readily distinguishable from human capital investment. Most people enjoy at least some aspects of learning and even seemingly obvious amenities, such as a high-quality gymnasium, may contribute to aspects of student life that are linked to human capital, such as persistence and network formation. The purpose of this section is not to resolve these ongoing debates, but rather explain the theoretical underpinnings of each model and the evidence concerning them in order to ground the legal analysis of university-student contracts.

Human capital, as defined by its leading theorist Gary Becker, are the characteristics of a person that influence future monetary and psychic income.<sup>20</sup> Human capital investments are therefore any investment that leads to more economically productive, happier, and healthier people. These outcomes, moreover, are often inextricably intertwined. For example, economically productive people tend to be healthier and vice versa. A broad range of activities are investments in human capital, including parental nurturing, health care, and work experience, but formal education looms large among them.

Higher education as an *investment* in human capital implies that higher education imparts skills and attributes that affect the student's monetary and psychic income in the future. Because higher education is correlated not only with higher labor income, but also with better health, marital stability, and life satisfaction, both monetary and psychic income are emphasized.<sup>21</sup> Thus, human capital in higher education encompasses not only specialized

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<sup>18</sup> See David Deming, *Four Facts about Human Capital*, 36 J. ECON. PERSP. 75, 77 (2022) ("The bottom line is that naïve cross-sectional comparisons and studies with strong quasi-experimental research designs yield very similar estimates of the economic return to education."). See also David Card, *The Causal Effect of Education on Earnings*, HANDBOOK LAB. ECON., 1802, 1834–1842 (1999) (summarizing pre-2000 studies and arriving at the same conclusion).

<sup>19</sup> See Kasey Buckles et al., *The Effect of College Education on Mortality*, 50 J. HEALTH ECON. 99 (2016). However, there remain challenges to the validity and interpretation of these empirical strategies. For example, some have hypothesized that relying on subgroups affected by some policy or circumstance selects on a subset of individuals for whom college may have high returns. For a detailed discussion, see David Card, *Estimating the Return to Schooling: Progress on Some Persistent Econometric Problems*, 69 ECONOMETRICA 1127, 1155–57 (2001).

<sup>20</sup> See GARY S. BECKER, HUMAN CAPITAL 11 (3d ed. 1993). For a discussion of different metrics used to assess human capital (particularly in the development economics context) see WORLD BANK, WORLD DEVELOPMENT REPORT 2019: THE CHANGING NATURE OF WORK 50–64 (2019), <https://documents1.worldbank.org/curated/en/816281518818814423/pdf/2019-WDR-Report.pdf>.

[<https://perma.cc/UJJ3-CAUX>] *Psychic* income, as opposed to monetary income, is simply the income.

<sup>21</sup> See e.g., Philip Oreopoulos & Kjell G. Salvanes, *Priceless: The Nonpecuniary Benefits of Schooling*, 25 J. ECON. PERSP. 159, 163, 167, 170 (2011) (discussing the strong positive relationship between education and health, marital stability, parenting style, job satisfaction, law abiding behavior, and employment).



knowledge and problem-solving skills acquired in the college environment, but also on-campus opportunities for socialization and networking, dating and marriage, and positive habit formation.<sup>22</sup> The human capital model thus places importance on joint production in education, and there is a growing social science literature on how peers may influence individual academic and social success.<sup>23</sup> Under this view, higher education provides its benefits via a reasonably regulated environment in which students can participate in a collective endeavor to acquire complex “human capital.”

Recent work has also emphasized college as imparting information on ability to the *student* (as opposed to the employer).<sup>24</sup> In other words, college courses help students uncover their aptitude and abilities regarding a particular field as well as acquiring skills in that field, thereby revealing that skill to employers and college students alike. For example, students might discover from attempting a chemistry course that they are not cut out for medical school but discover that a non-science field holds promise.

The sorting model of higher education is the main alternative to the human capital model. Under sorting, “degrees and education convey information about the underlying abilities, persistence, and other valuable traits of people.”<sup>25</sup> Thus, the earnings of college graduates exceed those of high school graduates “not because college education raises productivity but because more productive people go to college.”<sup>26</sup> Sorting takes place through signaling or screening. Under signaling, students achieve an expensive credential to show that they are a particular type. Screening is the flip side to signaling, wherein employers establish a credential requirement to get workers of a particular type.

The social science consensus is that the financial return to college is imparted primarily through human capital acquisition broadly construed.<sup>27</sup> This conclusion, however, is hard to base on direct evidence, but mostly relies on inductive reasoning. Many point to the size of the college earnings premium, 67% or more since the 1990s, to argue that skills must be acquired because a return of this magnitude, year-over-year, is unlikely to be primarily due to sorting for several reasons.

First, there is evidence that employers could screen workers much more cheaply than college by applying their own screening mechanisms via exams, training, and on the job

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<sup>22</sup> As a recent survey of the human capital field concluded, although their production is poorly understood, “higher-order skills such as problem-solving and teamwork are increasingly economically valuable.” David Deming, *Four Facts about Human Capital*, 36 *J. ECON. PERSP.* 75, 76 (2022).

<sup>23</sup> For an extensive literature survey on the importance of peers in higher education, see Bruce Sacerdote, *Peer Effects in Education: How Might They Work, How Big Are They and How Much Do We Know Thus Far?*, 3 *HANDBOOK ECON. EDUC.*, 249, 269–271 (2011).

<sup>24</sup> See Peter Arcidiacono, Patrick Bayer & Aurel Hizmo, *Beyond Signaling and Human Capital: Education and the Revelation of Ability*, 2 *AM. ECON. J.: APPLIED ECON.* 76, 76–104 (2010); Ofer Malamud, *Discovering One's Talent: Learning from Academic Specialization*, 64 *IND. LAB. REL. REV.* 275 (2011) (finding value to later specialization in college and interpreting the result as improved matching); Lange & Topel, *supra* note 28.

<sup>25</sup> See BECKER, *supra* note 16 at 19–20. At other times, the economics literature distinguishes credentialism from a sorting model by making the extreme assumption that the credential itself is actually uncorrelated with underlying skill. See, e.g., Weiss, *supra* note 6 at 150 (defining credentialism as a model “in which wage differences [by credential] are independent of productivity differences . . .”).

<sup>26</sup> See BECKER, *supra* note 16 at 19–20.

<sup>27</sup> For a discussion and critique, see CAPLAN, *supra*, note 25 at 15 (“[W]hen empiricists study the real world, signaling [theory of education] is lucky to get a footnote.”)

experience instead.<sup>28</sup> Tuition and room and board cost the average undergraduate student around \$35,000 per year.<sup>29</sup> The opportunity costs of time spent in college is high, as students forgo market income they could be earning. Presumably, market mechanisms should push firms to implement a cheaper screening system if possible. There are some legal risks to testing employees, and this may marginally deter some employers.<sup>30</sup> But these risks can be managed and, even absent employer-sponsored testing, new workers could start with lower wages until employers observed worker ability and made subsequent choices on retention and promotion.

Second, there is some evidence that the labor market sorts workers by skill fast enough to greatly diminish the signal value, if any, provided by a college degree.<sup>31</sup> Thus, the informational value of the college credential diminishes with worker experience, as workers who lack the credential eventually advance and relatively unproductive workers who nonetheless have the credential are identified.

Third, if sorting is the predominant factor explaining the market returns to higher education, then increasing college attainment should not be strongly associated with national-level economic well-being. In fact, if education is purely signaling, it should inhibit wealth creation because it is costly and does not change underlying human capital. However, there is ample evidence linking educational attainment at all levels to economic growth over time within the United States<sup>32</sup> and across the globe.<sup>33</sup>

Nonetheless, the sorting model has relevance. Perhaps the strongest evidence in favor of signaling is the so-called “sheepskin effect.”<sup>34</sup> Attending college but not finishing the degree is associated with increased earnings for each year of college completed. However, the labor market returns to college graduation are twice as large as the returns to three years of college combined. But in the strict form of the human capital model, dropping out the semester before graduation should hardly affect future earnings. At that point, almost all coursework is completed and social networks cohered. Nonetheless, defenders of the human capital model contend that selection effects are likely strong for those who drop out. Therefore, while college completion may not be a strong signal, dropping out in the third year may be a strong negative signal indicating a breakdown of physical or psychological health.<sup>35</sup> Estimates of the sorting value of a college degree suggest that 10 to 30 percent of the earnings differential between college and non-college workers is attributable to the value of the degree apart from skills.<sup>36</sup>

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<sup>28</sup> See Fabian Lange & Robert Topel, *The Social Value of Education and Human Capital*, 1 HANDBOOK ECON. EDUC. 459 (2006).

<sup>29</sup> See Melanie Hanson, *Average Cost of College & Tuition*, EDUCATION DATA INITIATIVE, (Oct. 24, 2022) <https://educationdata.org/average-cost-of-college> [<https://perma.cc/X7XC-UUFD>]. A critique of these numbers is that living costs are included, some of which would have been expended anyway. The average out-of-pocket tuition expenditures are closer to \$9,700 for in-state tuition at state schools and \$37,000 for tuition at non-profit private schools. *Id.*

<sup>30</sup> See *Griggs v. Duke Power*, 401 U.S. 424 (1971).

<sup>31</sup> See Joseph G. Altonji & Charles R. Pierret, “Employer learning and the signaling value of education,” in *Internal Labour Markets, Incentives and Employment*, 159-195 (1998).

<sup>32</sup> See Lange & Topel, note 28 at 459.

<sup>33</sup> See THE WORLD BANK, *supra* note 9 at 48.

<sup>34</sup> See BRIAN CAPLAN, *THE CASE AGAINST EDUCATION: WHY THE EDUCATION SYSTEM IS A WASTE OF TIME AND MONEY* 96–101 (2018).

<sup>35</sup> See *id.*

<sup>36</sup> See Lange & Topel, *supra* note 28; Altonji & Pierrett, *supra* note 31 (finding a 70/30 split).

In addition to human capital formation and sorting, some part of the value of a university educational experience is present consumption. To the extent college is consumption, it means that the consumer is simply buying goods and services from the university, though some of the nature of the exchange still relies on the creation of a community in which shared consumption takes place. There is wide variation in how much colleges spend on student amenities, although as a percent of expenditures relatively less selective private colleges spend more on student amenities than state schools or selective private schools. One assessment found that student willingness to pay for amenities was quite high, with amenity expenditures increasing the pricing power of large universities.<sup>37</sup> Some seemingly egregious examples include the introduction of water parks and lazy rivers at some public universities, financed with student fees.<sup>38</sup> But this is not to deny the possibility of a return to future income, monetary or psychic, from these investments. At least one paper has found that there are market returns to university amenity investments, with increased student persistence and graduation as a likely mechanism,<sup>39</sup> though this result may not extend to all amenities (such as athletics).<sup>40</sup>

In short, the human capital, sorting, and consumption models are not mutually exclusive – an investment may provide an innate skill, a positive signal, and be a consumption good. Students may acquire both signaling credentials and skills at university while enjoying their time, and the relative importance of these attributes may vary by context or be observationally equivalent. Universities regulate courses of study, grading, and credit requirements for graduation, thereby protecting the signal value of the credential, but such regulation also facilitates the acquisition of skills.<sup>41</sup> Nonetheless, the academic consensus is that traditional, four-year college degrees increase earnings primarily by increasing human capital. Under the human capital model, in-person instruction is clearly part of the community-based skills acquisition made by universities. Skills are broadly defined in the human capital model, and the human capital model implicates the importance of joint production in the educational production function through peers and experiential learning.

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<sup>37</sup> See Brian Jacob, Brian McCall, & Kevin Strang, *College as Country Club: Do Colleges Cater to Students' Preferences for Consumption?* 36 J. Lab. Econ. 309, 310-312 (2018).

<sup>38</sup> See James V. Koch, *No College Kid Needs a Water Park to Study*, New York Times (Jan. 9, 2018) (criticizing colleges financing on-campus water parks through student fees).

<sup>39</sup> See *Id.*

<sup>40</sup> See generally Jason M. Lindo, Isaac D. Swensen & Glen R. Waddell., *Are Big-Time Sports a Threat to Student Achievement?* 4 AM. ECON. J.: APPLIED ECON. 254 (2012).

<sup>41</sup> The relevance of each model may also be contextual. For example, in some professional schools, signaling and credential acquisition may take precedence. Law schools and medical schools carefully guard their accreditation status and build courses around professional licensing standards. Our present discussion is limited traditional four-year institutions for that reason.

## II. The University-Student Contract, the Promise of Human Capital, and Student Handbooks

Until the 1960s, universities were largely able to govern their student affairs without much fear of legal intervention, including in contract litigation, thanks to two legal doctrines.<sup>42</sup> First, courts in some states applied the *in loco parentis* doctrine to the university-student relationship, giving universities broad parental-like authority.<sup>43</sup> But when states gradually reduced the age of majority from 21 to 18 beginning in the 1960s, the *in loco parentis* doctrine could no longer ground the university-student relationship.<sup>44</sup> Second, courts broadly applied an abstention doctrine pertaining to issues of academic standards, on the grounds that courts were ill-equipped to scrutinize the rarified academic world.<sup>45</sup> But as college education became increasingly expensive, increasingly common, and increasingly important for entry into the middle class, courts chipped away at the abstention doctrine, particularly in student disciplinary cases.<sup>46</sup> Though it is hard to pinpoint a precise date for the shift, it is clear that by the 1990s the university-student relationship was widely accepted by courts as contractual, without a gloss of *in loco parentis* and with less tendency toward abstention. Instead, courts

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<sup>42</sup> See ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISKS OF COLLEGE LIFE? 7 (1999) (concluding that before 1960 “a university was rarely, if ever, subject to a lawsuit”); Robert D. Bickel & Peter F. Lake, *The Emergence of New Paradigms in Student-University Relations: From In Loco Parentis to Bystander to Facilitator*, 23 J.C. & U.L. 755 (1997).

<sup>43</sup> See AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION 37–38 (2009); ROBERT D. BICKEL & PETER F. LAKE, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY 7 (1999) (describing the pre-1960 world in which university principles were emphasized as opposed to the post-1960 world, emphasizing student freedom).

<sup>44</sup> See, e.g., *Bradshaw v. Rawlings*, 612 F.2d 135, 139 (3d Cir. 1979) (declining to apply *in loco parentis* explaining regulation of student life on and off campus “has become limited” due to rights demanded by students and the “taking place almost simultaneously with legislation and case law lowering the age of majority, produc[ing] fundamental changes in our society.”). But even under *in loco parentis*, contract principles were still referenced. See *Koblitz v. Western Reserve Univ.*, 21 Ohio C.C. 144, 155 (1901) (holding that a student “contracts to submit” to reasonable discipline while university promises not to “impose on him penalties which he is no wise merits”); *Gott v. Berea Coll.*, 161 S.W. 204, 206 (1913) (“A college or university may prescribe requirements for admission and rules for the conduct of its students, and one who enters as a student impliedly agrees to conform to such rules of government.”).

<sup>45</sup> See J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L. J. 251, 323 (1989) (surveying the doctrine and collecting cases). A leading case in this regard is *Connelly v. University of Vermont*, 244 F. Supp. 156 (D. Vt. 1965), in which the court held that the question of “was a student in fact delinquent in his studies” was in general “not a matter for judicial review,” instead limiting the analysis of an expulsion to whether it was in bad faith or pretextual. See also *Doherty v. Southern College of Optometry*, 862 F.2d 570, 577 (6th Cir. 1988) (noting that the student-university relationship may be contractual in nature but “courts have adopted different standards of review when educators’ decisions are based upon disciplinary versus academic criteria – applying a more intrusive analysis of the former and a far more deferential examination of the latter”).

<sup>46</sup> See, e.g., *Vurimindi v. Fuqua Sch. of Bus.*, 435 F. App’x 129, 133 (3d Cir. 2011) (refusing to find actionable the university’s “desire to provide the ‘highest quality education’” as a binding contractual term); see also *Ryan v. Temple Univ.*, 535 F. Supp. 3d 356, 363 (E.D. Pa. 2021) (stating the same); *Gociman v. Loyola Univ. of Chicago*, 41 F.4th 873, 882 (7th Cir. 2022) (“deciding whether the university contractually promised to provide students an in-person educational experience, and whether the university breached that promise,” does not implicate the challenges of evaluating quality of education that education malpractice claims pose).

willingly analyzed an increasing array of student claims based on fairly standard contract theories.<sup>47</sup>

The move toward a university-student relationship grounded on contract was inexorable. A relationship based on *in loco parentis* status could, theoretically, have been replaced by some other status relationship – but in practice there was no plausible status-based alternative. Students are not employees or agents of the university. Courts have, moreover, (almost) uniformly rejected the university as a fiduciary.<sup>48</sup> Nor, given the term of the relationship and large investments by both sides, can the relationship be treated as at-will, which would obviate the need for a contractual analysis.

In substance and form, the university-student relationship is contractual. Students pay substantial tuition or borrow for access to a service for which there is a well-known course of study, and even those on full scholarship are forgoing opportunities at other universities and in the labor market. The agreement is typically understood to be renewable at the student’s option, provided the student meets certain benchmarks, thus creating a term. There is without question an exchange, students pay tuition and universities provide an opportunity to acquire skills and a formal credential.<sup>49</sup>

Identifying the contract, however, has not been easy. The university-student contract, to the extent it is written, does not exist in one place. To assemble the contract, courts have looked across a variety of sources, including tuition agreements, student handbooks, acceptance letters, university webpages, course catalogs, and the like. Tuition agreements (sometimes called “enrollment agreements” or “financial responsibility agreements”) are, for the most part, unambiguously contracts but are typically only a couple of pages and do not describe the services to be provided by the university with any detail. Courts have been skeptical that, even with an integration clause, a tuition agreement could constitute the whole contract.<sup>50</sup>

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<sup>47</sup> See, e.g., *Mangla v. Brown University*, 135 F.3d 80, 83 (1st Cir. 1998) (“The student-college relationship is essentially contractual in nature.”); WILLIAM A. KAPLAN ET AL., *THE LAW OF HIGHER EDUCATION* 910–15 (6th ed. 2019) (collecting cases and discussing contract theories).

<sup>48</sup> There are very few instances wherein the university has been discussed as having a fiduciary role, involving graduate dissertation advisors and sexual harassment. See *Kaplan supra* note 41, at 597-598; 600-603 (collecting the few cases and concluding a limited role for fiduciary obligation).

<sup>49</sup> Under such circumstances there is no reason to deny a contract and rely on less certain equitable doctrines such as promissory estoppel or restitution.

<sup>50</sup> See, e.g., *King v. Baylor Univ.*, 46 F.4th 344 (5th Cir. 2022) (reversing a district court’s dismissal of a student covid tuition lawsuit on the grounds that “educational services” could not be further interpreted due to an integration clause in a tuition agreement and remanding to the district court with instructions to interpret the phrase “in light of the circumstances surrounding the contract” including the student handbook.); *Levin v. Bd. of Regents of the Univ. of Colo.*, 2021 Colo. Dist. LEXIS 365 (2021). Almost all cases we have reviewed discuss the handbook in light of intent, definiteness, or disclaimers, leaving aside parol evidence issues. We found only one case wherein an appeals court accepted that at tuition agreement was a full statement of the parties’ contract. See *Zwiker v. Lake Superior Univ.*, 340 Mich. App. 448 (2022) (finding that the scope of the tuition agreement was to “deal with the issue of tuition, and [they] do not constitute a contract governing its [other breach of contract] claims....” and “use of parol evidence, such as the school’s marketing and other materials provided to students may be proper to clarify exactly what was promised in the [tuition agreements].”). See also *Hannibal-Fisher v. Grand Canyon Univ.*, 523 F. Supp. 3d 1087 (D. Ariz. 2021) (refusing to find an implied contract for in-person instruction where “the Enrollment Agreement constitutes an express contract on the same subject matter”).

Student handbooks are provided by almost all universities in varying forms, are by far the most comprehensive written statement of university-student relations,<sup>51</sup> and are increasingly looked to as a source of contractual obligations.<sup>52</sup> Student handbooks (which go by other names as well, such as “manual” or “bulletin”) often cover codes of conduct, statements of student “rights,” university investigatory procedures around student conduct violations, tuition and payment policies, and residence hall regulations. Most often, the handbook is a single document and designated as such; at other times various policies that comprise a “handbook” are found across multiple webpages.

Given the level of detail, equivocal and broad language, and (at times) disclaimers and reservations of rights in such materials, courts have struggled to determine whether the promises set forth in student handbooks are enforceable contracts, illusory promises, or not promises at all but mere advertisements or unenforceable understandings. This section describes the propensity of handbooks to use disclaimers and absolute reservations of rights. It identifies common features of student handbooks and then looks to the handbooks of Georgetown and Northwestern Universities to highlight important differences. The section next describes how courts have responded to student claims asserting handbook-based contractual rights. Finally, the section provides a normative account of how courts *should* rely on student handbooks in assessing contractual claims. The section next argues that, absent clear disclaimers, handbooks are contracts the terms of which must be interpreted in light of their statements of purpose, which uniformly embrace the human capital model of higher education. Similarly, though perhaps more controversially, the section contends that even when universities disclaim any contractual effect of their handbooks, there exists a default set of obligations between universities and students that should be construed in light of the human capital purposes articulated in the handbooks and mission statements.<sup>53</sup>

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<sup>51</sup> See *id.* at 913.

<sup>52</sup> See KAPLAN, *supra* note **Error! Bookmark not defined.**, at 365 (surveying the litigation landscape and concluding that “courts are increasingly inclined to view the student handbook or college catalog as a contract, either express or implied.”). See also *Havlik v. Johnson & Wales Univ.*, 509 F.3d 25, 34 (1st Cir. 2007) (“[t]he relevant terms of the contractual relationship between a student and a university typically include language found in the university’s student handbook”); *Dean v. Chamberlain Univ., LLC*, No. 21-3821, 2022 WL 2168812 at \*3 (6th Cir. June 16, 2022) (defining terms of a student-university contract by reference to “the college or university’s catalog, handbook, and/or other guidelines supplied to students”); *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 242 (D. Vt. 1994) (construing the terms of the student-university contractual relationship pursuant to enumerated terms in the college’s handbook). Cf. *Shaffer v. George Washington Univ.*, 27 F.4th 754, 763 (D.C. Cir. 2022) (stating that “the mere fact that the bulletin contain[s] language . . . is not enough to support a finding that the language amounted to a contractual obligation”); *Basch v. George Washington Univ.*, 370 A.2d 1364, 1368 (D.C. 1977) (“[a]t best, . . . words that expressed an expectancy” regarding future conduct is not “a promise susceptible of enforcement”).

<sup>53</sup> The idea of interpreting contracts, particularly relational contracts, in light of a statement of purpose has solid theoretical foundations. See *Frydlinger, supra* note 5, at 116 (discussing the successful use in relational contracts of enforceable statements of purpose). However, at least one court has rejected a university’s mission statement as a basis of contractual enforcement. See *Knelman v. Middlebury Coll.*, 898 F. Supp. 2d 697, 709 (D. Vt. 2012) (“[l]anguage in a college handbook or other official statement that is merely aspirational in nature, or that articulates a general statement of a school’s ‘ideals,’ ‘goals,’ or ‘mission,’ is not enforceable”).

## A. The Handbooks

Student handbooks are surprisingly diverse, even among universities that are in roughly the same tier. Some universities, such as the University of Chicago,<sup>54</sup> explain that their student handbooks intentionally avoid great detail because the nature of the university-student relationship eludes a clear definition. Other universities, such as Georgetown, embrace detail, with handbooks running to hundreds of pages.

To provide a systematic assessment of student handbooks, we sampled 30 student handbooks from the top 200 four-year universities in the country and 10 from among the top 50 liberal arts colleges according to U.S. News & World Report 2020 rankings of national universities and liberal arts colleges.<sup>55</sup> Handbooks were searched for (1) disclaimers of contract; (2) broad reservations of rights; (3) use of contract-like language (“rights,” “responsibilities,” “promise,” etc.); and (4) statements of purpose.

Of significant interest is the presence of broad reservations of rights or contract disclaimers. Courts have used both to conclude that the student handbook is not a contract. One-quarter of student handbooks sampled (10 out of 40) have explicit contract disclaimers, while 38 percent (15 out of 40) have apparently absolute reservations of right to alter the handbook at any time. Of the 15 universities with absolute reservations of rights, five also disclaimed contract. Thus, exactly one-half of the sampled schools disclaim contract, provide that they can alter handbooks for any reason at any time, or both. The other half do not disclaim contract and, concerning amendment, are (1) silent on student handbook amendment, (2) allow student handbooks to be amended annually, or (3) specify processes by which the student handbook can be amended.

There are other common features. No handbook provided against a class action or for arbitration (which are common in all for-profit university contracts<sup>56</sup>). Almost all handbooks frequently (more than ten times) used words of exchange, such as the “rights” and “obligations” that the university and students have toward each other in a variety of contexts. Even those handbooks that disclaimed contract were replete with statements suggesting elements of exchange referencing mutual “rights” and “obligations,” though handbooks do tend to avoid the word “promise.”

Finally, almost all student handbooks had a statement of purpose that, while worded differently, clearly fit into the human capital model of education. Those universities that did not include a statement of purpose in their handbooks, provided such statements on their university website or in other documents. These statements, consistent with universities’

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<sup>54</sup> See *2017-2018 Student Manual: University Policies and Regulations*, UNIVERSITY OF CHICAGO, at 5. (“Policies and regulations are to be understood in the larger context of the functioning of the University .... Rigid conformity to and narrow application of policies and regulations without taking into account the larger context of the functioning of the University are not appropriate in our academic community).

<sup>55</sup> More details will be made available in an upcoming online appendix.

<sup>56</sup> Tariq Habash & Robert Shireman, *How College Enrollment Contracts Limit Students’ Rights*, 7-9 (2016) (finding that majority of contracts of for-profit colleges contain arbitration clauses and agreements not to participate in class actions) available at <https://production-tcf.imgix.net/app/uploads/2016/04/11155339/how-college-enrollment-contracts-limit-students-rights.pdf>.

arguments defending affirmative action in admissions, emphasized that theirs was an educational environment in which people socialized with and learned from a diverse community of people.<sup>57</sup> This is a straightforward embrace of an expansive human capital theory of the university and a clear indication that universities embrace much more than a sorting model.

## 1. Georgetown's Handbook

Georgetown's 2021-22 student handbook includes a new and explicit disclaimer of contract, but it also includes language suggesting a binding exchange of rights and obligations. Indeed, the handbook uses the word "rights" and "responsibilities" with respect to students and Georgetown University over 100 times. The handbook makes clear, for example, that in exchange for classroom instruction and the chance to earn a degree, students are required to pay tuition. "The University reserves the right," the handbook instructs, "to cancel the registration of any student during the semester if the account has not been paid in full."<sup>58</sup> Yet, the handbook also disclaims that any of its terms are binding. The handbook provides that the University may change any policy at any time with no advance notice.<sup>59</sup> In other words, via its handbook, Georgetown contends that it makes no promises as to courses or content, in-person or remote instruction, community behavioral standards, disciplinary procedures, or even the amount of tuition.

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<sup>57</sup> In defending affirmative action from constitutional or statutory challenge, universities have argued that diversity is essential to the academic experience, namely that socializing and learning with people from varied backgrounds, including varied racial backgrounds, contributes to the development of all. In *Regents of University of California v. Bakke*, Justice Powell's plurality opinion relied heavily on the educational benefits of diversity as a compelling interest that justified race-conscious admission, writing that an "atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body." 438 U.S. 265, 312 (1978). This reasoning was affirmed by court majorities in later cases. For example, the University of Michigan's law school admission policy at issue in *Grutter v. Bollinger* specified the school would pursue, "achiev[ing] that diversity which has the potential to enrich everyone's education." *Grutter v. Bollinger*, 539 U.S. 306, 315 (2003). Some have pointed out that universities are boxed into the diversity-benefits argument by the Supreme Court's reasoning. However, it was Harvard, Columbia, Stanford, and the University of Pennsylvania in an amicus brief that presented the diversity as education argument to the Court, and Justice Powell's controlling opinion relied heavily on that amicus brief. *Regents of Univ. of California v. Bakke*, 438 U.S. at 316 (quoting approvingly from the amicus brief that a "farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer" and "a black student can usually bring something that a white person cannot offer.").

<sup>58</sup> 2021-2022 *Undergraduate Bulletin*, GEORGETOWN UNIVERSITY, at 47.

<sup>59</sup> Georgetown's handbook provides that the University can:

[U]pdate its policies, procedures, admissions requirements, curriculum, course offerings and requirements, course delivery modes or methods (including whether virtual or in person), arrangement of courses, academic and semester calendar, schedule, and duration graduation or degree requirements, conditions for eligibility for financial aid, tuition rates and fees, and resources and programming offered to students at any time for any reason. Any updates made to the *Undergraduate Bulletin* will be communicated to students. It is the responsibility of each student to keep well-informed with respect to the policies and requirements in the *Undergraduate Bulletin* and all other policies of the University, school, and program in which they are enrolled.

*Id.* The pre-Covid bulletin was less specific and provided a clause on updating the handbook. It provided that "Georgetown University reserves the right to change without notice the *Undergraduate Bulletin*, including all rules, policies, fees, curricula, courses, graduation requirements, or other matters contained therein." 2019-2020 *Undergraduate Bulletin*, GEORGETOWN UNIVERSITY, at 1.



Georgetown's statement of purpose flows from its "identity as a student-centered research university rooted in the Jesuit and Catholic tradition." Georgetown "sees its own function as being the service of humankind through teaching, research, and other activities that properly flow from these...it believes that, as far as possible, the relationships among faculty, students, and administrators should be personal ones."<sup>60</sup> The statement of purpose for the common core classes, which all students at Georgetown take, states that Georgetown identifies the "basic purpose of general education" as "the development of fundamental abilities such as inquiry, analysis, research, critical reading, creative thinking and expression, and communication...." The goal of Georgetown's common core educational requirements is to have students "participate creatively in an intellectual community," "address complex issues and problems," "develop a worldview that is both intellectually grounded and personally compelling" and "engage responsively with the world."<sup>61</sup> Each school within Georgetown has an additional statement of purpose.

## 2. Northwestern University's Handbook

Like Georgetown's handbook, Northwestern's handbook is replete with contract-like language specifying "rights" or "responsibilities" of the student and Northwestern in roughly 250 instances often imbued with a fairly clear element of exchange. For example, "The University affords students a number of rights that are fundamental to membership in our shared community. But along with these privileges and rights, membership also requires students to meet and uphold community standards." While behavioral standards are not specified for every situation, a "reasonableness" standard is referred to, but not defined, in the handbook and is mentioned at least 25 times. For example, when addressing how the University will approach allegations of discrimination, the handbook acknowledges that such claims "can sometimes raise challenging new issues" and the University "reserves discretion to take *reasonable* actions to address those issues in a manner *consistent with the spirit of the applicable policies and procedures*, while preserving fairness for both parties and maintaining the integrity of the complaint resolution process (emphasis added)."<sup>62</sup>

In contrast to Georgetown's handbook, Northwestern's handbook does not contain a contractual disclaimer. Nor does Northwestern reserve the right to amend the handbook unilaterally. Instead, Northwestern's handbook states that it was "collaboratively developed by students, faculty, and staff and is reviewed each year with the input of a student review committee to ensure it reflects the changes to our community over time."<sup>63</sup> This review and modification process, combined with the fact that there is no general contract disclaimer, suggests that at Northwestern, the student handbook, or at least sufficiently definite portions of it, is a binding contract.<sup>64</sup>

Despite these differences, with regard to their statements of purpose there is little daylight between Northwestern's and Georgetown's handbooks, even though Northwestern is avowedly secular, while Georgetown is a Jesuit institution. Northwestern's handbook provides

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<sup>60</sup> *See id.* at 1.

<sup>61</sup> These goals are referenced more obliquely in Georgetown's official student handbook. *See id.*

<sup>62</sup> *See 2020-21 Student Handbook*, NORTHWESTERN UNIVERSITY, at 166.

<sup>63</sup> *See 2020-21 Student Handbook*, NORTHWESTERN UNIVERSITY, at 2.

<sup>64</sup> We think the same is true based on our review of the handbooks of other elite schools, including Stanford, Harvard, and Princeton, which similarly do not provide for contract disclaimers and lack clear reservations of rights.

a statement of “community values” which set forth that Northwestern is a “place where faculty, staff, and students engage in COLLABORATION, partnering to achieve success together” and where learning is through “DISCOVERY, growing ourselves as we seek to enrich our community. And where “life outside the classroom is an integral part of the educational process.”<sup>65</sup>

## B. Courts’ Assessments of Student Handbooks

Courts in different states have taken a range of positions on student handbooks, from declaring them to be presumptively enforceable contracts to completely ignoring them as illusory promises. For example, Massachusetts has developed a strong policy in favor of contractual enforcement of student handbooks, while acknowledging the need to preserve some university discretion.<sup>66</sup> On the other end of the spectrum, Virginia has a long line of cases holding that student manuals cannot constitute contracts because of their indefinite nature, lack of mutuality of obligation, and the difficulty for courts of assessing the delivery of educational content.<sup>67</sup> Thus, even without a contract disclaimer, Virginia courts are reluctant to interpret any language in handbooks, even specific procedural provisions, as contractual promises. Other courts interpret strong reservation of rights language in a student handbook to create a lack of mutuality, thereby making them unenforceable even without a contract disclaimer.<sup>68</sup> Other states fall in between these bookends. For example, Minnesota courts, while equivocating at times on what comprises the university contract, have stated the university process should be reviewed for substantial (not strict) compliance with procedures set forth in the handbook, given the complexity of the university’s undertaking.<sup>69</sup>

Prior to COVID, these decisions had been made mostly in the context of the enforceability of student disciplinary procedures outlined in private university handbooks. Students at public universities have a constitutionally mandated level of procedural protections and cannot be deprived of a state benefit (such as university enrollment) without due process of law. The COVID cases exposed another fault line. Handbooks and university writings, implicitly, and at times explicitly, promised in-person instruction.

Yet even courts that rejected handbooks as contracts, still needed to determine the scope of and obligations within the university-student relationship. Courts that disregarded

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<sup>65</sup> See *2020-21 Student Handbook*, NORTHWESTERN UNIVERSITY, at 8.

<sup>66</sup> See *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601, 603 (D. Mass. 2016) (holding that Brandeis University had a “contractual obligation to follow the rules it set forth in the Handbook” and holding that Brandeis University had to follow “basic and fundamental components of due process of law.”). In addition, the court suggested a mandatory core of student disciplinary procedures that cannot be contracted away, such as “basic and fundamental components of due process of law.” See *id.*

<sup>67</sup> See *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 587-88 (E.D. Va. 2018) (“Under Virginia law, a University’s student conduct policies are not binding, enforceable contracts; rather, they are behavior guidelines that may be unilaterally revised by Marymount at any time.”). It appears that even if the university called the handbook a contract, Virginia courts would decline to enforce them as such.

<sup>68</sup> See *Jackson v. Liberty Univ.*, No. 6:17-CV-00041, 2017 WL 3326972, at \*5 (W.D. Va. Aug. 3, 2017) (dismissing a contract claim based on handbook procedures by holding “that Virginia law requires an absolute mutuality of engagement between the parties to a contract such that each party is bound and has the right to hold the other party to the agreement.”).

<sup>69</sup> See *Rollins v. Cardinal Stritch University*, 626 N.W.2d 464, 471 (Minn. Ct. App. 2001) (holding that a student handbook “did not constitute a contract between the school and the student that required strict compliance with every provision.”)

handbooks and other university documents needed to either find default rules in the university-student contract, or, less tenably, find that no contract exists. Consider Georgetown University. If the handbook is not a contract, then what specifies Georgetown's relationship to students? Are students at Georgetown students-at-will comparable to employees-at-will? Can Georgetown expel a student with impunity simply because the university has decided it does not like a particular student (absent grounds explicitly prohibited by statute) or would prefer to fill the student's spot with another? Intuitively, the answer is no, a university cannot expel a student arbitrarily. Indeed, courts do impose default rules and obligations on schools, but the default rules vary. In the case of discipline, for example, Virginia and Minnesota courts suggested that there is an implicit and enforceable promise by universities not to engage in arbitrary behavior in student discipline. Thus, the default rule in Virginia and Minnesota sets a very low bar for universities. By contrast, other states, including Massachusetts and California, assume a much higher standard as the default, and may grant federal Constitutional-level protections in cases of contractual disclaimer.<sup>70</sup>

If courts accept that a student handbook provides contractual terms, they then need to determine what language is binding and how to interpret it. In doing so, courts should grant universities a wide lane. Universities, as the handbooks make clear, are regulating a community of scholars and students to produce human capital that resists precise measurement and definition. Moreover, universities have different methods, reputations, and comparative advantages in providing this service. A school focused on science and engineering may have different community expectations than one focused on creative arts. Moreover, maintaining a community requires making tradeoffs among constituencies. Excessive intervention by courts deprives universities of the flexibility they need to create the environments they promise.

### C. A Better Approach to Student Handbooks

While student handbooks to some extent reflect the priorities and culture of their institutions, for our purposes, handbooks come in three flavors. First, there are handbooks with no contractual disclaimer that are either silent on an amendment process or specify an amendment process, such as an annual committee with student representation. Second, there are handbooks with blanket contract disclaimers.<sup>71</sup> Third, there are handbooks with no contractual disclaimer but with a very broad reservation of rights to unilaterally amend. This part considers how courts should analyze university obligations in each scenario. To do so, we look to the Restatement (Second) of Contracts and the draft Restatement of Consumer Contracts for guidance and for general contractual legal principles. In particular, the American Law Institute's ongoing project on a Restatement of Consumer Contracts (Draft Restatement), begun in 2017 and the most current draft of which is from 2022, is highly informative.<sup>72</sup> After all, the

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<sup>70</sup> See *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601, 603 (D. Mass. 2016) (holding Brandeis University had to follow "basic and fundamental components of due process of law" separate from its explicit contractual obligations); *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 130-31 (finding the default rule for private universities to "mirror the due process protections at public universities.").

<sup>71</sup> Some of the handbooks with broad disclaimers also contain broad unilateral rights to amend, which would be superfluous if the handbook had no contractual force anyway.

<sup>72</sup> The methodology of the drafters of the Draft Restatement was based on a formal empirical assessment of the case law with an explicit goal of stating the majority rule. See Oren Bar-Gill, Omri Ben-Shahar, & Florencia Marotta-Wurgler, *The American Law Institute's Restatement of Consumer Contracts: Reporters' Introduction*, 15 EUR. REV. CONT. L. 91 (2019). This methodology has been contested. See Adam J. Levitin et. al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. REG. 447, 466 (2019) (criticizing coding choices made by

university-student contract is, arguably, a standard-form business-consumer contract between a consumer (student)<sup>73</sup> and a business (university),<sup>74</sup> and the handbook and related writings constitute standardized contracts.<sup>75</sup>

### 1. No disclaimer and limited reservation of rights

When university handbooks include no disclaimer and specify an amendment process, the application of canonical contract law is straightforward. Sufficiently definite terms within the handbook and the documents it incorporates by reference should be part of the contract. This approach is consistent with judicial interpretation of employee handbooks. In the employment context, courts have regularly held that, absent clear disclaimers, sufficiently definite elements of employee handbooks are promises enforceable as contracts. The fact that universities may retain the ability to alter the handbook from time to time does not make the handbook's promises illusory. A contract may be "reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance"<sup>76</sup> especially if "performance has begun,"<sup>77</sup> and if students have acted "in reliance on an agreement."<sup>78</sup> In the employee handbook context, courts sometimes monitor notice of handbook changes and even require additional consideration for alterations to take effect.<sup>79</sup>

Likewise, treating student handbook terms as contractually binding does not eliminate university discretion in areas where it arguably should be retained (as will be discussed in greater detail in Section III). Indeed, courts that have treated student handbooks as contracts have also accepted doctrines that recognize the complexities of the student-university relationship, particularly in areas of academic standards.

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Draft Restatement drafters and concluding that the empirical foundations were incorrect, typically erring on the side of less consumer protection); Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. REG. 45 (2019) (offering a replication analysis of the empirical work of the Restatement drafters and contesting their results). The substance of the Draft Restatement has also been criticized. See Adam J. Levitin et. al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. REG. 447, 466 (2019) (criticizing coding choices made by Restatement drafters and concluding that the empirical foundations were incorrect, typically erring on the side of less consumer protection); Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. REG. 45 (2019) (offering a replication analysis of the empirical work of the Restatement drafters and contesting their results). But we see no reason to resolve these disputes here, but are merely taking one view of consumer contracts, however limited, and applying it to the student-university context. We suspect that accepting a more interventionist approach to consumer contracts, as suggested by critics of the Draft Restatement, would only buttress our ultimate conclusions.

<sup>73</sup> See *id.* at § 1(4) ("Consumer contract" – A contract between a business and a consumer, other than an employment contract."). Consumer is defined by reference to Unif. Commercial Code § 1-201 ("Consumer" means an individual who enters into a transaction primarily for personal, family, or household purposes").

<sup>74</sup> See *id.* cmt 2. ("A 'business' is an individual or entity that regularly participates in or solicits, directly or indirectly, transactions with consumers" and such a business "may deal in services.")

<sup>75</sup> See *id.* at § 5 ("Standard contract term" – A term, relating to a consumer contract, that has been drafted prior to the transaction for use in multiple consumer contracts."). Employment relationships are specifically exempted from the Restatement of Consumer Contracts, but we do not believe that the university-student relationship fits the basic elements of an employment contract. See *id.* § 4.

<sup>76</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (AM. L. INST. 1981).

<sup>77</sup> See *id.* at § 202(2).

<sup>78</sup> See *id.* at § 202(3).

## 2. Disclaimer of Contract

Courts at present are mixed in their views of how much weight a disclaimer of contract should carry.<sup>80</sup> In cases where student handbooks include a general disclaimer of contract, courts are left with three options – (1) conclude that the university is bound by no obligations, (2) impose a baseline standard of conduct on universities as default rules, or (3) disregard the broad disclaimer and enforce the handbook. This section considers all three options and argues in favor of the last, namely enforcing a student handbook, regardless of disclaimer, under a standard that is deferential to a university’s control of its academic standards.

Consider first the option of treating disclaimers as freeing universities from all obligations to students. Disregarding all university obligations due to a handbook disclaimer would result in a student-university relationship similar to that of employment-at-will. In its well-known formulation, employees-at-will (absent statutory limitations) can be fired for a good reason, a bad reason, or no reason at all. Controversial with respect to employment, the at-will doctrine is indefensible as a default for the university-student relationship. The academic term is for one year, and students pay a significant amount of their tuition in advance to the university. Treating the university-student relationship as at-will would mean that the university could dismiss a student at any time, for any reason not otherwise prohibited by statute, and simply refund the student a pro-rata share of their tuition. Even under the *in loco parentis* approach of early courts, students were not at-will and universities could not act arbitrarily. Only a pure consumption theory of higher education could possibly be consistent with such an outcome. Moreover, the costs to a student of dismissal go well beyond lost or deferred consumption. A transfer can interrupt progress to a degree and breaks up the social networks formed by students. Moreover, the university-student contract includes an understanding that students have an option to return the following year if they meet basic requirements of academic performance and progress, though the university retains the right to increase tuition. Not surprisingly, no courts have treated the default university-student relationship as at-will.

The second option is the imposition of a baseline contract on universities in light of their disclaimers of their handbooks and other writings as contract.<sup>81</sup> However, as discussed previously, some courts assume that the baseline contract is that the university cannot act arbitrarily. This is a shockingly low standard for the large and often debt-financed investment students make. Better, normatively and doctrinally, would be to set the default by considering

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<sup>80</sup> See *Aubrey v. New Sch.*, No. 21-CV-4915 (KMK), 2022 WL 3867832 at \*12 (S.D.N.Y. Aug. 30, 2022) (allowing specific disclaimers to “excuse the university from a specific promise that would otherwise be a contractual obligation); *Freeman v. New York Univ.*, No. 21 CIV. 01029 (GBD), 2022 WL 445778 at \*2 (S.D.N.Y. Feb. 14, 2022); *Romankow v. New York Univ.*, No. 20 CIV. 4616 (GBD), 2021 WL 1565616 at \*3 (S.D.N.Y. Apr. 21, 2021); *Davis v. George Mason Univ.*, 395 F.Supp.2d 331, 337 (E.D.Va.2005). See also *Michel v. Yale Univ.*, 547 F. Supp. 3d 179, 190 (D. Conn. 2021) (finding Yale’s explicit reservation to suspend its operations as an exercise of authority that cannot constitute a breach of contract). But see *Patel v. Univ. of Vermont & State Agric. Coll.*, 526 F. Supp. 3d 3, 20 (D. Vt. 2021) (construing online disclaimers by the university to “relate to the performance or functionality of the website” and not the contractual terms between the university and student) and *Behne v. Union Cnty. Coll.*, No. CV146929JMVMF, 2018 WL 566207 at \*1 n.2 (D.N.J. Jan. 26, 2018) (refusing to consider “subject to change” language as “constituting a sufficient disclaimer as to the applicability of the handbooks”).

<sup>81</sup> For example, while Virginia courts reject handbooks as contracts they nonetheless find an implicit promise that universities will not act arbitrarily.

the reasonable expectations of the parties in light of the purposes of the contract.<sup>82</sup> The handbook, even with disclaimer, would serve as a useful guide to the parties' intentions and the chief purpose of the contract. Given that handbooks are replete with human capital language and a focus on a community experience, the default should assume that the goal of the relationship is human capital acquisition within an academic community and determine baseline obligations accordingly.

Alternatively, courts could look to law regarding state universities to establish the baseline for private universities. California and Massachusetts courts, for example, have protected student expectations regarding student disciplinary procedures by holding private universities to the standards imposed on public schools by constitutional law unless private universities state otherwise. Such a rule may push universities away from blanket disclaimers, and toward greater particularity about which parts of their handbooks are meant to be enforceable.<sup>83</sup> In other words, clear notice would be required to reduce process from the norms expected or the higher standard set by state schools.<sup>84</sup>

The third option—to disregard a blanket disclaimer and enforce the handbook—is the most straightforward and is consistent with the Draft Restatement. If the handbook creates a “reasonable expectation” about attributes it “becomes part of the consumer contract.”<sup>85</sup> “[C]ontract terms that purport to negate or unreasonably limit the obligations arising from affirmations of fact or promises” are not enforceable.<sup>86</sup> Handbooks imbued with contractual language (such as *agrees, obligations, rights, and responsibilities*) create a reasonable impression of a contract or promise. Disregarding a blanket disclaimer and enforcing handbook provisions allows the court to look to the university itself for guidance rather than looking to external sources of guidance as a source of custom and practice. Handbook promises should be assessed and interpreted through the lens of universities' own self-professed goal of human capital formation.

### 3. Handbooks with no disclaimer but broad reservation of rights

Although some courts have treated student handbooks with broad reservation of rights as illusory, this approach is neither required as a doctrinal matter nor wise as a policy matter. Courts should treat student handbooks with broad reservations as contracts, subjecting any alterations or additions to them to a good faith analysis.

The law does not automatically make contracts with broad reservations of rights illusory. In the case of employee handbooks, for example, a broad reservation of rights would not make the handbook unenforceable as it must be changed prospectively and with some notice to the employee. In the consumer context, the law is hostile to the enforcement of broad

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<sup>82</sup> The methodology of the drafters of the Restatement was founded on a methodical review of case law with a goal of stating the majority rule. *See* Bar-Gill, *supra* note 60, at 96.

<sup>83</sup> Such a rule may be thought of as a penalty default rule—imposing a stricter standard on the party who was silent but could have chosen a more relaxed standard.

<sup>84</sup> As a point of clarity, Massachusetts courts could be taken to suggest that the due process standard is a mandatory contract standard under state law.

<sup>85</sup> *See* RESTATEMENT OF THE LAW, CONSUMER CONTRACTS § 8(a) (AM. LAW INST., Tentative Draft, No. 2, 2022) (“A ‘business’ is an individual or entity that regularly participates in or solicits, directly or indirectly, transactions with consumers” and such a business “may deal in services.”).

<sup>86</sup> *See id.* at § 8(c).

reservations of rights. The Draft Restatement emphasizes the protection of reasonable consumer expectations, making disclaimers that interfere with expectations unenforceable and subjecting modifications to a good faith test. The Draft Restatement acknowledges that businesses “sometimes include, in their standard terms, a clause that purports to grant the business unrestricted discretion to modify the terms of service.”<sup>87</sup> Such clauses are not per se unenforceable but “such clauses should be interpreted to allow only good-faith modification.”<sup>88</sup> As a result, a consumer contract is not transformed into an illusory promise by reservations of rights, rather reservations are made reviewable for good faith modification.

As a matter of policy, declaring contracts illusory creates either contractual uncertainty or deprives students of a reasonable expectation of a term contract. If a handbook promise is “illusory,” a court must either (1) decide what the contract terms actually are or (2) decide that students are students-at-will. Neither option is good, fortunately nor is either necessary.

#### D. Conclusion

The most straightforward approach to the university-student contract is to enforce handbooks and other writings as having created reasonable student expectations, while allowing universities the flexibility necessary to deal with unforeseen circumstances. However, neither accepting nor rejecting a handbook and associated writings as a contract resolves all questions or disputes. If a handbook is accepted as a contract, ambiguities remain. Courts still need to fill in gaps by looking to statements of purpose and overarching principles. If, however, a handbook is rejected as a contract, courts need to supply even more background law. Application to the COVID cases in the next part bring these points into sharper relief.

### III. Application to the COVID Cases

In March 2020, a group of elite universities including Harvard, MIT, Cornell, and Duke, announced that they would move to remote learning following their spring break vacations.<sup>89</sup> In the cascade of closures that followed, almost all colleges and universities in the United States closed campuses for in-person learning for the remainder of the spring semester. In most circumstances, this was done pursuant to (or later validated by) executive orders from governors and local health authorities or based on advice from the federal government.<sup>90</sup> In Fall 2020, most colleges at least partially reopened for in-person instruction under a variety of different restrictions. However, large public universities were more likely to remain fully remote.<sup>91</sup> Thus, about two-thirds of college students in the United States remained “mostly”

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<sup>87</sup> See *id.* at § 5.

<sup>88</sup> See *id.*

<sup>89</sup> See Elizabeth Redden, *Harvard, Cornell, MIT and Others Ask Students to Leave Campus Due to Coronavirus*, INSIDE HIGHER EDUCATION, (Mar. 11, 2020), <https://www.insidehighered.com/news/2020/03/11/harvard-cornell-mit-and-others-ask-students-leave-campus-due-coronavirus> [https://perma.cc/43ZP-QGKG].

<sup>90</sup> See Jennifer Kates, Josh Michaud & Jennifer Tolbert, *Stay-at-Home Orders to Fight COVID-19 in the United States: The Risks of a Scattershot Approach*, Kaiser Family Foundation (Apr. 5, 2020), <https://www.kff.org/policy-watch/stay-at-home-orders-to-fight-COVID19/> [https://perma.cc/5SJJ-XUMW] (detailing state and federal stay-at-home orders and guidances).

<sup>91</sup> *Id.*

remote in Fall 2020, which was true even in many places where there were no closure mandates or recommendations.<sup>92</sup>

In the 2020-2021 academic year, some schools remained partially remote in the fall and operated under significant restrictions in the spring. A few universities enacted significant restrictions on student behaviors that went far beyond masking, regular testing, and bans on large gatherings. These included restrictions on dining out, travelling, and mandates for vaccinations and boosters (when they became available). But in the spring semester of 2021, 90% of colleges reported that instruction would be “primarily” in person, and 98% reported they would start on time.<sup>93</sup>

By the end of 2021, over 300 lawsuits, many class actions, had been filed by students asking for contract-based damages for the original move to remote learning, almost all based on the closures occurring in Spring 2020.<sup>94</sup> The lawsuits made uneven progress in the district courts, and were often dismissed at the pleading or summary judgment stage.<sup>95</sup> But the cases have been more successful on appeal, with many appeals courts sending back cases that were dismissed on the pleadings.<sup>96</sup> Additionally, some district courts, recognizing that they were too dismissive early on, have accepted amended complaints framed as contract claims.<sup>97</sup>

In addition, litigation is pending or threatened over current vaccination and booster requirements.<sup>98</sup> A data set of over 1,167 leading universities shows that almost 45% enacted requirements that students be vaccinated against COVID.<sup>99</sup> No state governments mandated

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<sup>92</sup> *The Pandemic and Student Engagement: Trends, Disparities, and Opportunities*, NAT’L SURVEY STUDENT ENGAGEMENT, <https://nsse.indiana.edu/research/annual-results/2021/story1.html> [https://perma.cc/3XWU-GF76].

<sup>93</sup> See Josh Moody, *Most Colleges Resume In-Person Classes*, INSIDE HIGHER ED. (Jan. 6, 2022), <https://www.insidehighered.com/news/2022/01/06/colleges-resuming-person-classes-amid-omicron> [https://perma.cc/3DU4-2XVU].

<sup>94</sup> Brief for Amici Curiae American Council on Education and 18 Other Higher Education Associations in Support of Defendant-Appellee at 1, *Crawford v. Presidents & Directors of Georgetown Coll.*, 537 F. Supp. 3d 8 (D.D.C. 2021).

<sup>95</sup> See Avalon Zoppo, *‘Watching the Outcome Like a Hawk’: COVID-19 Tuition Refund Fights Heat Up in Appeals Court*, NAT’L L. J. (Feb. 1, 2022), <https://www.law.com/nationallawjournal/2022/02/01/watching-the-outcome-like-a-hawk-covid-19-tuition-refund-fights-heat-up-in-appeals-courts/?slreturn=20230202135232> [https://perma.cc/6L3U-24B7].

<sup>96</sup> *Id.*

<sup>97</sup> See *Hassan v. Fordham Univ.*, 533 F. Supp. 3d 164, 167 (S.D.N.Y. 2021) (reversing an earlier opinion *sua sponte* and allowing an amended complaint to be filed alleging breach of contract against a university for failure to provide in-person instruction).

<sup>98</sup> Some lawsuits have been dismissed because universities under pressure have created many opportunities for exemptions. We are unaware of any litigation concerning restrictions on student activities after a return to in-person learning, perhaps because university enforcement and penalties in this regard did not give rise to serious litigation. But universities maintained these restrictions under a threat of expulsion and exploring their limitations will help us further understand the university-student contract.

<sup>99</sup> *List of colleges with and without vax mandates for undergraduates*, (last visited Jan. 17, 2023), <https://docs.google.com/spreadsheets/d/11BrDadiUGN-vQBe7JolcBaWhLT7S2AkWokSX49M40/edit#gid=1749035539> [https://perma.cc/GB5F-SDCX]. No College Mandates is an interest group opposed to vaccination mandates. We believe the data base it maintains, which is extensively documented, is reliable. It contains COVID vaccine information on about 1,800 colleges and universities, approximately one-half the total in the U.S.



that college students receive the vaccine as a condition of in-person attendance, leaving the COVID vaccination decision up to the universities.<sup>100</sup>

The availability of a booster vaccine in January of 2022 and the introduction in October of that year of a so-called bivalent booster designed to address new variants of COVID raised a much more challenging contractual question for universities. First, the evidence for the benefits of boosting for college-aged persons was much more tenuous than that of the primary series.<sup>101</sup> Second, the CDC at that point had recognized that a rare health complication involving heart tissue was relatively more common in young people, especially men.<sup>102</sup> Finally, it was clear at that point that vaccination would not prevent the spread of COVID. Of the 527 universities that required the original vaccination, 293 (56%) also mandated the first booster in 2022.<sup>103</sup> As of January 2023, the bivalent booster was mandated only by 18 universities, though they include elite institutions such as Harvard University, Yale University, University of Notre Dame, Wellesley College, and Smith College.<sup>104</sup> As of summer 2023, the majority of universities dropped any COVID vaccine requirement.<sup>105</sup>

The remainder of this section sketches out an analytical framework for the three basic contractual issues that arose under the COVID closures: (1) campus closures in March 2020 that were mandated or recommended by government authorities; (2) campus closures and restrictions beginning in Fall 2021 not required or recommended by public health authorities; and (3) vaccine and booster mandates.

#### A. Campus Closures Mandated or Recommended by Government Authorities in March 2020

The March 2020 contract analysis comes down to basically two questions. First, was there a contractual promise of in-person learning? Second, if there was such a promise, do remedies arise under contract or restitution for a failure to deliver on this promise?

The answer to the first question is a clear yes, there was a contractual promise of in-person learning in universities' endorsement of the human capital model in their literature and mission statements.<sup>106</sup> But this does not end the analysis. Generally, a contract that has become illegal or impracticable is enforced against a party only if that party can be shown to have accepted the risk of impossibility, implicitly or explicitly.<sup>107</sup> The promise of in-person instruction

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<sup>100</sup> See NATIONAL CONFERENCE OF STATE LEGISLATURES, *State Vaccine Requirements for College Entry*, (Sept. 1, 2021), <https://www.ncsl.org/research/health/state-vaccine-requirements-for-college-entry.aspx> [<https://perma.cc/52FV-SF7G>].

<sup>101</sup> See, e.g., Paul Offit, *COVID-19 Boosters — Where from Here?* 386 N. Engl. J. Med. 1661 (2022).

<sup>102</sup> See *Use of mRNA COVID-19 Vaccine After Reports of Myocarditis Among Vaccine Recipients: Update from the Advisory Committee on Immunization Practices — United States*, 70 *Morbidity & Mortality Weekly Review* 977 (2021) (continuing to recommend vaccination of those aged 12 and older and assessing myocarditis risk at 40 per million).

<sup>103</sup> Author's calculations from No College Mandate data. See NO COLLEGE MANDATES, *supra*, note 101.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> If true, the ability to obtain the credential was not materially diminished by remote learning (especially when salvaged reduced grading stringency such as pass/fail options and waivers of the mandatory curve).

<sup>107</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 264 (AM. L. INST. 1981). (defining a government regulation making performance impracticable as an event “the non-occurrence of which was a basic assumption on which the contract was made”).

was overridden by the executive actions of some governors and, even if not expressly overridden, it arguably became impracticable under the circumstances created by a pandemic of uncertain lethality and duration. Thus, in order for ordinary contract damages to be available for the March 2020 closures, a student would have to show that the unwritten agreement was to deliver in person education *regardless of government orders and recommendations from health authorities*, transferring all the risk of impracticability or illegality to the university.<sup>108</sup> Courts addressing the issue have, appropriately, viewed these assignment-of-risk claims skeptically.<sup>109</sup> There is nothing in any of the three models of higher education or our survey of the university handbooks that suggests the university accepted all risk of impracticability, which would potentially open the door to expectation damages as the measure of student loss.<sup>110</sup>

However, the conclusion that the contract was not breached in light of unanticipated circumstances does not mean there is no remedy. Although a party may not retain the full benefit of the contract if it is ended due to impracticability,<sup>111</sup> at least some courts correctly recognized the existence of a remedy premised on unjust enrichment or restitution because the promise of in-person instruction and campus life generally was not fulfilled, even if it was impossible to do so due to COVID.

In the event of partial impracticability, the promisor must render the part of its performance that is possible if there can still be substantial performance,<sup>112</sup> and refund the value of the remaining performance rendered impracticable.<sup>113</sup> Thus, the promisee is not made whole as in expectation damages, but instead is refunded the portion of value attributable to the performance rendered impracticable.

The better approach, however, is to consider the move to online learning to be a material change to the contract, not partial impracticability. The in-person component is intertwined with and essential to the human capital model of education represented in student handbooks. Moreover, there is mounting evidence that remote learning had serious weaknesses at all levels of education.<sup>114</sup> If a change to remote learning was a material change to the contract, universities should have offered students the choice between a semester's refund and online learning as a

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<sup>108</sup> *Id.*

<sup>109</sup> *See, e.g.*, *Shaffer v. George Washington Univ.*, 27 F.4<sup>th</sup> 754, (2022) (stating that “the Universities may still have strong arguments that the pandemic and resulting government-issued shutdown orders discharged their duties to perform” but noting the defense was not raised in the present case).

<sup>110</sup> Such damages would face some hurdles of proof as well, because lost income will be of a speculative nature given the challenges of measuring lost human capital and its relation to market income.

<sup>111</sup> RESTATEMENT (SECOND) OF CONTRACTS § 272(b) (AM. L. INST. 1981).

<sup>112</sup> *See id.* at § 270(a).

<sup>113</sup> *See id.* at cmt. b (“[I]f the obligor can render a reasonable substitute performance in place of the impracticable part, he must do so under the duty of good faith performance” and “if the obligee has a claim in restitution...the adequacy of this claim as compensation for the obligee must also be considered in determining [substantial performance].”)

<sup>114</sup> *See* Stephanie R. Cellini, *How Does Virtual Learning Impact Students in Higher Education?*, BROOKINGS INST. (Aug. 13, 2021) <https://www.brookings.edu/blog/brown-center-chalkboard/2021/08/13/how-does-virtual-learning-impact-students-in-higher-education/> [<https://perma.cc/T9RZ-JES6>]; Michael Kofoed et al., *Zooming to Class?: Experimental Evidence on College Students' Online Learning During COVID-19*, IZA Discussion Paper 14356 (2021); Eric Bettinger et al., *Virtual Classrooms: How Online College Courses Affect Student Success*, 107 AM. ECON. REV. 2855, 2875 (2017) (“Taking a course online also reduces student grades in future courses by one-eighth of a standard deviation, and reduces the probability of remaining enrolled a year later by over ten percentage points (over a base of 69 percent)”).

new contract. Alternatively, a university could have treated the closures as a “temporary impracticability”<sup>115</sup> and allowed students the option of deferral until in-person learning resumed. But very few universities took either approach. Harvard arguably did, at least for some of its units, and this influenced the analysis of the closure lawsuits against Harvard strongly in Harvard’s favor.<sup>116</sup> Most universities simply transitioned students to online learning, without an option to defer or end the contract with a semester’s reimbursement. Standard contract analysis holds that these universities should remain liable for the difference in market value of these services provided to what was promised.

The value of restitution, like other remedies, must be assessed to a reasonable degree of certainty. For those schools that offered online content at a different price, there is a readily available market measure of restitution. Some universities, prior to COVID, even offered the same degree programs at separate prices to residential and on-line participants, with the online program often steeply discounted.<sup>117</sup> For those schools that did not offer online components, restitution could be assessed as the average tuition discount afforded to students for online coursework in higher education generally, though perhaps the university could offer a rebuttal to this measure based on its unique circumstances. Additionally, student activity fees paid for access to campus spaces such as gymnasiums and fees for room and board should clearly be refunded, on a pro-rata basis, under a restitution theory.<sup>118</sup>

## B. Contract Modifications Beginning in Fall 2020

In-person instruction in the Fall 2020 was not generally impracticable both as a matter of practice and official guidance. The vast majority of four-year colleges were open for in-person learning in some form (including hybrid).<sup>119</sup> About two-thirds of college students remained “mostly” remote.<sup>120</sup> However, large public universities were more likely to remain remote. On an institutional basis, about one-quarter of universities were fully or primarily in-person, almost another quarter were hybrid, 34% were “mostly” online, and only 10% were exclusively

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<sup>115</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 269 (AM. LAW INST. 1981) (allowing for temporary impracticability to “suspend the obligor’s duty to perform while the impracticability or frustration exists”).

<sup>116</sup> Harvard University appears to have roughly aligned with this approach, and a district court dismissed the first complaint on that basis. See *Barkhordar v. President & Fellows of Harvard Coll.*, 544 F. Supp. 3d 203, 207 (D. Mass. 2021) (“Harvard gave students the option to continue their Spring 2020 classes remotely or take a leave of absence and receive a partial refund of the semester’s tuition”). A different district court later accepted an amended complaint based solely on contract. See *Barkhordar v. President & Fellows of Harvard Coll.*, No. 20-cv-10968-AK, 2022 BL 68145, at \*4 (D. Mass. Mar. 1, 2022). Harvard later settled this claim for an undisclosed sum. See *Miles J. Herszenhorn & Claire Yuan, Harvard Settles Class Action Lawsuit Demanding Partial Tuition Reimbursement*, *The Harvard Crimson* (Jan. 12, 2023) <https://www.thecrimson.com/article/2023/1/12/COVID-tuition-suit-settled/> [<https://perma.cc/MD2W-TX7U>].

<sup>117</sup> For example, Quinnipiac University charged up to 75% less for online courses. See *Metzner v. Quinnipiac Univ.*, 528 F.Supp.3d 15, 23 (2020).

<sup>118</sup> In our survey of cases, restitution or refunds of activity fees or room and board were awarded. But at least one court also declined to award any refunds for on-campus fees on the grounds that the contract did not provide for such a refund and allowed removal from student housing. See *Zwiker v. Lake Superior State Univ.*, 340 Mich. App. 448 (2022).

<sup>119</sup> See *Here’s Our List of Colleges’ Reopening Models*, CHRONICLE HIGHER ED. (Oct. 1, 2020) [https://www.chronicle.com/article/heres-a-list-of-colleges-plans-for-reopening-in-the-fall/?cid=gen\\_login\\_refresh&cid=gen\\_sign\\_in](https://www.chronicle.com/article/heres-a-list-of-colleges-plans-for-reopening-in-the-fall/?cid=gen_login_refresh&cid=gen_sign_in) [<https://perma.cc/6HMA-XVCE>].

<sup>120</sup> See NAT’L SURVEY OF STUDENT ENGAGEMENT, *The Pandemic and Student Engagement: Trends, Disparities, and Opportunities* (2021) <https://nsse.indiana.edu/research/annual-results/2021/story1.html> [<https://perma.cc/7HSY-MNBK>].

online.<sup>121</sup> One analysis concluded that financial need, particularly for smaller private schools dependent on student housing revenues, likely explained some of the differences in the reopening decisions.<sup>122</sup> The CDC did not advise and state officials did not mandate fully remote learning.<sup>123</sup> CDC guidance focused on advice regarding testing, ventilation, and limitations on activities instead of a closure of dormitories and a return to online learning.<sup>124</sup> Likewise, guidelines created by the American College Health Association focused on tailored approaches to each university's unique needs based on local conditions and did not recommend continued online learning as a general response.<sup>125</sup>

In anticipation of reopening (and possibly having to revert to remote learning again), most universities placed provisions in their student handbooks or elsewhere stating that they could impose COVID restrictions as circumstances warranted. To take a few examples, Northwestern's handbook provided that "in accordance with the Illinois State reopening plan and CDC guidelines, these polices (*sic*) and regulations below are subject to change at the discretion of Northwestern University until further notice."<sup>126</sup> Harvard provided that it "retain[s] the discretion to apply its considered judgment to the question of how best to pursue its educational programs during the COVID-19 crisis....local conditions and/or public health guidance may shift suddenly and require us to adapt how the school operates."<sup>127</sup>

Thus, the university-student contract beginning in the Fall 2020 could be viewed as follows: we will use best efforts to offer an in-person experience to the extent we *reasonably can in light of COVID* and will implement additional *reasonable* restrictions thereafter. Indeed, given the widespread knowledge of COVID and its consequences after March 2020, such an explicit provision may not even have been necessary.

But this raises the question of what is reasonable and how such a reasonableness analysis should be conducted. The human capital model, focused on community and campus environment, supports reasonable university measures that increase the viability of in-person learning. The trade-off is that restrictions--from masking to dining hall closures-- almost always undermine the quality of the in-person experience from both a consumption and human capital perspective. In addition, universities could not always provide advance notice of specific

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<sup>121</sup> See CHRONICLE HIGHER ED., *supra* note 120. Perhaps universities could have assessed that the student community favored a continuance of remote learning. Given the community nature of the in-person enterprise, the university could have concluded that the collective endeavor promised remained infeasible because of student unease. We are unaware of any universities who reached this conclusion, and are skeptical that it was widespread given the general trend toward at least hybrid instruction.

<sup>122</sup> See Kristen Broady et al., *Higher Education's Reopening Decisions Affected the Most Vulnerable Students*, BROOKINGS INST. (Jan. 11, 2021) <https://www.brookings.edu/blog/up-front/2021/01/11/1342345/> [<https://perma.cc/N7GS-A755>].

<sup>123</sup> See Elizabeth Redden, *CDC Issues New Guidance to Colleges*, INSIDE HIGHER ED. (May 21, 2020) (noting that "While the guidance does not address when or whether colleges should resume in-person classes, it describes practices colleges can put in place to reduce coronavirus spread and promote a healthy student body and workforce").

<sup>124</sup> Centers for Disease Control, *Considerations for Institutions of Higher Education* (May 21, 2020) available at <https://stacks.cdc.gov/view/cdc/88260>.

<sup>125</sup> AM. COLL. HEALTH. ASS'N., *Considerations for Reopening Institutions of Higher Education* (May 11, 2020), [https://www.acha.org/documents/resources/guidelines/ACHA\\_Considerations\\_for\\_Reopening\\_IHES\\_in\\_the\\_COVID-19\\_Era\\_May2020.pdf](https://www.acha.org/documents/resources/guidelines/ACHA_Considerations_for_Reopening_IHES_in_the_COVID-19_Era_May2020.pdf) [<https://perma.cc/768H-D977>].

<sup>126</sup> *2020-21 Student Handbook*, NORTHWESTERN UNIVERSITY, at 5.

<sup>127</sup> *Student Handbook Academic Year 2020-2021*, HARVARD COLLEGE, at 8.

restrictions but did so through a reservation of rights to impose them. Such restrictions were then enforced with a threat of sanctions up to and including expulsion.

We divide our analysis into two categories: (1) contractual modifications based on government recommendations concerning in-person instruction, and (2) those modifications adopted by universities based on their own analysis.

### 1. Modifications Based on Government Recommendations

Government guidance is largely outside the hands of the university and represents a level of consensus, and consequently additional legal analysis of good faith or reasonableness is largely mooted. For this reason, university regulation of student behavior based on government recommendations concerning controlling community spread of COVID should be treated as presumptively reasonable. Moreover, after March of 2020, returning students were put on general notice that should guidance be issued by health authorities, their university may resort to a variety of contractual modifications to control community spread, including continued or episodic remote instruction, masking, restrictions of on-campus activities, and (possibly) mandatory vaccines should they be authorized and universal vaccination recommended. This notice was usually explicit, but even if not or if notice were untimely, the COVID pandemic was general knowledge. Under the circumstances, students returning in Fall 2020, in contrast to March 2020, arguably accepted the risks of disruptions, even disruptions in-person instruction, once based upon the recommendation of government officials.

### 2. Modifications not Recommended by Public Health Authorities

The permissibility of restrictions beyond those recommended by government officials should be grounded on what is reasonable and in good faith in light of promises of human capital acquisition obtainable only in a residential community. This would be distinct from an analysis focused on an absolute standard of community safety. An absolute standard of safety, such as simply minimizing COVID spread, could be grounded on an *in loco parentis* theory but not on a contract theory premised on a promised access to a community experience.

After the 2020/2021 school year, most universities were fully in-person, though at times subject to masking, testing, and vaccination requirements. But a handful of universities enacted restrictions not recommended by national and local governments. For example, elite universities, including Yale, Columbia, and Princeton, banned students from eating out, congregating, and traveling, and kept gyms and dining halls closed.<sup>128</sup> Such restrictions were not generally advised by federal or local health authorities, particularly in light of a near universal vaccination among college students at schools imposing such restrictions and the

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<sup>128</sup> See, e.g., YALE UNIVERSITY, *Returning to Campus Letter* (Jan. 4, 2022) <https://yalecollege.yale.edu/get-know-yale-college/office-dean/messages-dean/returning-campus-january-4-2022> [<https://perma.cc/U7LB-VA7A>]; PRINCETON UNIVERSITY, *Change in Winter Return Dates* (Dec. 27, 2021) <https://COVID.princeton.edu/news/2021/change-winter-break-return-dates-undergraduate-students> [<https://perma.cc/L8GW-LKUG>]. For a discussion of additional university restrictions, see Vinay Prasad, *Why are Highly-Vaxxed Colleges Implementing Strict COVID Policies?* MEDPAGE TODAY (Sept. 30, 2021) <https://www.medpagetoday.com/opinion/vinay-prasad/94785> [<https://perma.cc/V29C-GVHU>]. We were unable to find significant litigation concerning these restrictions. The absence of litigation challenging these restrictions may mean that universities dropped the policies or declined to take significant enforcement actions.

vanishingly low risk of COVID to young persons.<sup>129</sup> Faculty and staff, who as older persons were at higher risk, were not subject to such restrictions and could freely travel for work or personal reasons. In addition, some universities began Winter/Spring 2022 with two or more weeks of remote learning, on the theory that COVID spread over the holidays, even though such a recess from in-person instruction was not recommended by any public health agencies.<sup>130</sup>

Indoor masking and testing, whether or not recommended by health authorities, were of a relatively low level of intrusion and could be easily defended as in line with student expectations and university discretion. It is less likely that other restrictions imposed in the Spring 2022 could have survived contractual scrutiny, particularly the restrictions on student off-campus activities such as dining out, going to a gym, or travelling home to visit family on weekends. Such restrictions were not recommended and were not widely adopted among universities.

Universities enacting restrictions on student life did not likewise restrain professors or staff, who were free to attend conferences in the 2021/2022 school year. Nor were their off-campus activities regulated, such as prohibitions on dining out or attending large gatherings, sports or musical events. Given that the risk to COVID is primarily concentrated among those much older than college students, universities had difficulty justifying why restrictions imposed on their students were also not imposed on their employees, naturally raising questions of whether the burdens imposed on students were enacted in good faith. Universities also created some exceptions for students that appeared not to be based on a community protection motive. For example, Princeton and other schools continued their participation in team sporting events, thus choosing to allow their sports teams to travel and compete while effectively banning students who were not part of intercollegiate athletics from traveling off campus without permission.

Some universities asserted that students congregate more than older faculty and staff, and reducing such interactions would reduce spread.<sup>131</sup> To the extent the university was claiming to protect a broader community with student restrictions, the university would have to show under the contract how they could reduce the value of their product to their students to benefit a separate constituency. Protection of the local community or another university constituency, by itself, does not constitute good faith grounds to modify the university-student contract. On the contrary, the university could be acting in bad faith by privileging the interests of other constituencies or non-parties. On the other hand, a contract-based analysis could favor

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<sup>129</sup> See Benjamin Wallace-Wells, *How Soon Will COVID be "Normal"?*, THE NEW YORKER (Jan. 8, 2022), <https://www.newyorker.com/news/annals-of-inquiry/how-soon-will-covid-be-normal> [<https://perma.cc/PXC7-9BMR>] (discussing shifting positions of public health authorities and Biden Administration in favor of a return to normal for those who are vaccinated). The future White House COVID advisor, dean of the Brown University School of Public Health, at the time strongly recommending a full return to school in spite of omicron. See Ashish K. Jha, *Don't Panic About Omicron. But Don't Be Indifferent Either.*, THE ATLANTIC (Dec. 19, 2021). In a later interview, Professor Jha went so far as to say that closures should not even be part of the discussion. See Ron Blitzer, *Health Expert: School Closures 'Shouldn't Even Be on the Table' Despite Omicron*, FOX NEWS (Dec. 26, 2021) [https://www.foxnews.com/politics/health-expert-school-closures-shouldnt-even-be-on-the-table-despite-omicron?cmpid=fb\\_fnc](https://www.foxnews.com/politics/health-expert-school-closures-shouldnt-even-be-on-the-table-despite-omicron?cmpid=fb_fnc) [<https://perma.cc/SL8R-L82P>].

<sup>130</sup> See *supra*, note 128.

<sup>131</sup> Jesse Hellman, *Student Gatherings, Congregate Living Contribute to Rapid Coronavirus Spread at Universities: CDC*, THE HILL (Sept. 29, 2020), <https://thehill.com/policy/healthcare/518781-student-gatherings-congregate-living-contribute-to-rapid-coronavirus-spread/> [<https://perma.cc/S53B-89SW>].

restrictions if the university could point to reasonable concerns about faculty safety affecting the university's mission, a concern that would look most genuine if faculty were at least subject to the same personal restrictions as students.<sup>132</sup>

We have only sketched an analysis here and raised colorable legal questions. We cannot delve into every university policy, and we are inclined to put a thumb on the scale in favor of university restrictions given the complexities and uncertainty of the situation. Moreover, the sanction for student violations of COVID restrictions (expulsion versus a mark on the transcript) should also play into the analysis. Expulsion or suspension would typically be permitted only for a material breach of the contract, which is hard to make out for violations of bans on off-campus travel or dining out. Our point, however, is that COVID did not provide universities a blank check to run their students' lives. University power is still constrained by contract, and it is not enough under the contract to point to student safety as a basis for mid-course modifications. Instead, the contractual power to modify campus regulations must be grounded in protecting the community nature of the enterprise.

## B. Vaccination and Booster Requirements

We divide our analysis here into three parts, roughly aligning with different circumstances of the pandemic and different prevailing knowledge regarding the consequences of vaccination. First, this section considers the original vaccination available for college-aged students over the summer of 2021. Over one-half of universities required an FDA-approved vaccine prior to in-person attendance in Fall 2021, a time when a fairly virulent strain of COVID was dominant. Second, this section considers the introduction of boosters in Fall 2021 and the requirement that students receive such boosters prior to class attendance in the Spring 2022 semester, when the highly contagious Omicron variant was rampant. About one-quarter of universities required the booster. Finally, this section addresses the much more controversial bivalent boosters, designed with later COVID strains in mind, authorized in Fall 2022 and required by only a handful of universities.

### 1. The original vaccination series in Fall 2021

In mid-2021, CDC guidance stated that the COVID vaccines would create a broad-based immunity that would reduce spread and, if widely used, may even eliminate COVID.<sup>133</sup> On the basis of randomized controlled trials, the vaccines clearly prevented severe illness and death.<sup>134</sup>

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<sup>132</sup> However, universities would have to point to some contractual power enabling them to prohibit their employees from travel, parties, and dining out.

<sup>133</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, *Benefits of Getting a COVID-19 Vaccine* (Apr. 12, 2021) (“A growing body of evidence suggests that fully vaccinated people are less likely to be infected without showing symptoms (called an asymptomatic infection) and potentially less likely to spread the virus that causes COVID-19 to others. However, further investigation is ongoing”). Dr. Anthony Fauci, as chief medical advisor to President Biden, recommended dropping masking requirements for the vaccinated in May of 2021, saying that vaccinated people become “dead ends” for the virus and are “extremely unlikely” to transmit it. See Joseph Choi, *Fauci: Vaccinated People Become ‘Dead Ends’ for the Coronavirus*, THE HILL (May 16, 2021), <https://thehill.com/homenews/sunday-talk-shows/553773-fauci-vaccinated-people-become-dead-ends-for-the-coronavirus/> [<https://perma.cc/NB9D-AUDF>].

<sup>134</sup> See Sara E. Oliver et al., *The Advisory Committee on Immunization Practices’ Interim Recommendation for Use of Pfizer-BioNTech COVID-19 Vaccine — United States*, 69 MORBIDITY & MORTALITY WEEKLY REV. 1922 (2020)

The FDA approved and the CDC recommended vaccinations for all persons aged 12 and older, and this recommendation continued even after U.S. health authorities acknowledged a mild safety signal of heart muscle inflammation called myocarditis in July 2021.<sup>135</sup> Undoubtedly, this guidance, backed by strong evidence, motivated most universities to adopt vaccination as a condition of enrollment in Fall 2021.

But were such vaccination requirements contractually valid?<sup>136</sup> The human capital framework provides an answer. Given the state of the knowledge of vaccination, reflected in CDC guidance, university officials reasonably believed that vaccination would likely create a basis for a full and unrestricted return to in-person education. Thus, in Fall 2021, universities, with or without notice, could require vaccines under the human capital contractual analysis. One could even colorably argue that universities had an affirmative duty to impose vaccination mandates in order to create viable in-person instruction and community life. Ironically, if in-person learning is not central to the university-student contract, as some universities argued in the lawsuits over remote learning, it is hard to justify the vaccine mandate.

Should the CDC guidance be dispositive to the contractual analysis? The CDC guidance is an important component of the reasonableness and good faith analysis concerning the exercise of university discretion to mandate a vaccine. Practically speaking, courts have a reasonable reluctance to second guess university administrators charged with maintaining student health and such decisions may have to be made quickly, sometimes mid-year, with no opportunity to provide students with notice. Courts may wish to avoid a contentious case regarding scientific evidence by simply pointing to CDC guidance, especially if schools craft limited exceptions for students asking for religious or medical accommodations. For example, in defense of its COVID bivalent booster mandate, Fordham University stated that it is not “in a position to choose among the various COVID studies – no small number of which are in conflict with each other” but rather relies on CDC guidelines because the CDC distills the “work of many researchers, virologists, and epidemiologists.”<sup>137</sup>

Nonetheless, there are two reasons why courts should not treat changes to CDC guidelines as per se enabling university contract modifications. First, the CDC makes many

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(noting the “[c]onsistent high efficacy ( $\geq 92\%$ ) was observed across age, sex, race, and ethnicity categories and among persons with underlying medical conditions”).

<sup>135</sup> See Julia W. Gargano et al., *Use of mRNA COVID-19 Vaccine After Reports of Myocarditis Among Vaccine Recipients: Update from the Advisory Committee on Immunization Practices — United States*, 70 MORBIDITY & MORTALITY WEEKLY REV. 977 (2021) (continuing to recommend vaccination of those aged 12 and older and assessing myocarditis risk at 40 per million).

<sup>136</sup> Under the circumstance prevailing in Spring 2021, we do not think that the universities needed to provide notice to students of the impending vaccination mandate because the evidence supporting the university intervention was so strong as it should have been an implied right under the contract. But even if notice were required one could argue that students had it constructively. By the summer of 2021, students were on some notice that universities could follow CDC guidance. Moreover, the large majority of universities require some vaccinations, and many states by law require vaccinations for meningitis and hepatitis B for college enrollment or on-campus living.

<sup>137</sup> See Isabel Danzis, *Fordham Faces Potential Litigation over Booster Mandate*, THE FORDHAM RAM (Nov. 2, 2022) <https://thefordhamram.com/88234/news/litigation-over-vaccine-mandate/> [<https://perma.cc/7JWC-TFP4>] (quoting Fordham University’s associate vice president for communications).



recommendations, including those concerning alcohol,<sup>138</sup> meat temperatures,<sup>139</sup> and physical exercise<sup>140</sup> that universities decline to mandate mid-performance. Meat, alcohol, and exercise mandates, absent clear and noticed contractual provisions concerning them, would university-student contract absent a particularly expansive view of *in loco parentis*. Second, as we shall see in the booster discussion, the CDC guidance does not always reflect scientific consensus. As we shall explain in greater detail, during Covid the CDC at times rejected the view of other government-appointed expert bodies, and its guidance departed from that of other nations' public health bodies. What made the initial COVID vaccines different was the community protections they were reasonable thought to offer, and the CDC guidance was a sufficiently reasoned basis under the circumstances to impose mandates.

## 2. The first booster

The community protection rationale fell away by late 2021, when it was clear that vaccines would at best slow but not eliminate the spread of COVID. Health authorities acknowledged in January 2022 that virtually the entire country would contract COVID regardless of vaccination status.<sup>141</sup> Nonetheless, the vaccines continued to dramatically reduce the risk of death and hospitalization.<sup>142</sup>

In light of the limited efficacy of the vaccines at preventing transmission and infection, federal health authorities in mid-2021 began to discuss the possibility of administering a third dose of the vaccine as a “booster” shot. The FDA’s vaccine advisory committee, the Vaccine and Related Biological Products Advisory Committee (VRBPAC), concluded in the Summer 2021, on a 16 to 2 vote, that boosters should only be approved for those over the age 65 or who had comorbidities placing them at high risk.<sup>143</sup> Members of VRBPAC pointed to the lack of clinical evidence that the booster would benefit people outside the high-risk groups,<sup>144</sup> and evidence of the vaccine’s link to myocarditis, especially for college-aged men, had grown stronger.<sup>145</sup>

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<sup>138</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, *Alcohol Use and Your Health*, <https://www.cdc.gov/alcohol/pdfs/alcoholyourhealth.pdf> [https://perma.cc/BP7C-FEXW] (recommending that people who “don’t drink alcohol should not start for any reason” and defining heavy drinking as more than 8 drinks a week for women).

<sup>139</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, *Four Steps to Food Safety* <https://www.cdc.gov/foodsafety/keep-food-safe.html> [https://perma.cc/59PW-R5JJ] (recommending against any beef cooked less than medium well, and that ground beef should be well-done).

<sup>140</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, *How Much Physical Activity do Adults Need?* <https://www.cdc.gov/physicalactivity/basics/adults/index.htm> [https://perma.cc/63LA-33HE] (recommending 150 minutes of physical activity each week).

<sup>141</sup> See, e.g., Travis Cladwell et al., *The Highly Contagious Omicron Variant Will ‘Find Just About Everybody,’ Fauci Says, But Vaccinated People Will Still Fare Better*, CNN (Jan. 12, 2022) <https://www.cnn.com/2022/01/11/health/us-coronavirus-tuesday/index.html> [https://perma.cc/3NEZ-3NCW].

<sup>142</sup> See *id.*

<sup>143</sup> Sara G. Miller, Reynolds Lewis & Erika Edwards, *FDA Advisory Group Rejects COVID Boosters for Most, Limits to High-Risk Groups*, NBC NEWS (Sept. 17, 2021) <https://www.nbcnews.com/health/health-news/fda-advisory-group-rejects-COVID-boosters-limits-high-risk-groups-rcna2074> [https://perma.cc/3CY4-W5ZN] (reporting that the FDA vaccine advisory committee voted 16 to 2 against authorizing the booster vaccine for those under 65 without comorbidities).

<sup>144</sup> See *id.*

<sup>145</sup> See *id.* (“The FDA advisory committee also raised questions about the safety of an additional dose, particularly in regard to the risk of [myocarditis](#), a rare side effect that’s been seen primarily in males younger than 30”). See also Katie A. Scharff, *Risk of Myopericarditis Following COVID-19 mRNA Vaccination in a Large Integrated Health System: A Comparison of Completeness and Timeliness of Two Methods*, 31 PHARMACOEPIDEMOLOGY DRUG SAF.

The factors relied on by VRBPAC in declining to recommend the booster for all are relevant to our contract analysis: the risks associated with COVID for college students were always very low, but by the 2021/22 school year that risk was further reduced by near-universal vaccination and prior infection. In short, there was no evidence presented to VRBPAC that benefits exceeded the harms to individuals outside high-risk groups, especially for college-aged men who bore the highest risk of myocarditis as a side effect.<sup>146</sup> In spite of this reasoning, the FDA, in a move with little precedent,<sup>147</sup> disregarded the advice of its own VRBPAC and approved the booster anyway for all persons aged 12 and older.<sup>148</sup> The two top vaccine regulators at the FDA reportedly left the agency in protest of this decision.<sup>149</sup> Nonetheless, the CDC followed the FDA's authorization by *recommending* boosters for all persons aged 12 and older.<sup>150</sup> In response, Paul Offit, a leading immunologist and long-time member of VRBPAC, went public with the fact that he advised his own 20-something son not to get the booster dose.<sup>151</sup>

A bare majority of universities that had previously mandated the vaccine also mandated the booster dose, but their contractual basis for doing so is not so straightforward. First, the booster would not control community spread in the long run as acknowledged by the CDC and, second, there was an admitted lack of clinical evidence on whether, at an individual level, the harms outweighed the benefits for those of college age. Thus, both the community benefit and the cost-benefit calculus to individual young persons had changed from the first vaccination. Moreover, even though the FDA approved, and the CDC recommended, the booster, the facts and circumstances of its approval and recommendation undermined its weight. Moreover, the booster requirement came in the middle of the year, with little ability for students concerned about the booster to opt to transfer to another college.

Nonetheless, a colorable argument can be made that boosters provided community benefits in the Spring 2022. A university could argue that receiving the booster in December or January could delay COVID infections for a few months. Given the concerns about a large campus outbreak necessitating a return to remote learning, or illnesses disrupting classes because of increased student absences, the booster could be defended on human capital grounds. This would have to be weighed against costs, including the consequences of rare myocarditis incidents and the much more frequent periods of mild illness, such as fever and

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921 (2022) (published in August of 2022 but available as a preprint in January 2022, finding a myocarditis risk for college aged men of 537 per one million doses, over ten times the CDC's prior estimate).

<sup>146</sup> See *supra*, note 143.

<sup>147</sup> See *supra*, note 143.

<sup>148</sup> See CDC Press Release, *CDC Recommends the First Updated COVID-19 Booster*, (Sept. 1, 2022), <https://www.cdc.gov/media/releases/2022/s0901-COVID-19-booster.html> [<https://perma.cc/DA8A-TLYN>].

<sup>149</sup> See Noah Weiland & Sharon LaFraniere, *Two Top F.D.A. Vaccine Regulators Are Set to Depart During a Crucial Period*, NEW YORK TIMES (September 22, 2021) (reporting that “[n]either believed there was enough data to justify offering booster shots yet ... and both viewed the announcement, amplified by President Biden, as pressure on the F.D.A. to quickly [authorize](#) them.”).

<sup>150</sup> See *id.*

<sup>151</sup> See Rachel Gutman-Wei, *Should Teen Boys Get Boosted?*, THE ATLANTIC (Jan. 11, 2022), <https://www.theatlantic.com/health/archive/2022/01/should-teens-get-booster-omicron/621222/> [<https://perma.cc/7ST4-XM23>] (reporting that FDA advisor Paul Offit “advised his own son, who is in his 20s, not to get a third dose”).

lethargy, that result from receiving the booster dose.<sup>152</sup> Moreover, if short-run immunity were the point, universities should have made allowances for students who were recently infected by COVID, as many were during omicron, and provide reasons why (as was often the case) the mandate did not apply to faculty and staff. But the analysis would have to turn on *community* benefits, not individual protections.

### 3. The Bivalent Booster

The bivalent booster became available after September 2022 and was recommended by the CDC for all persons over the age of 12.<sup>153</sup> Like the original booster, the approval process of the bivalent booster was fraught. The evidence for the initial recommendation did not rely on randomized controlled trials on humans to measure efficacy and safety, but on laboratory evidence regarding the vaccine's ability to induce antibody production in mice, with later evaluations showing less promise in humans.<sup>154</sup> The reliance on mice antibody response for booster approval generated significant controversy among experts.<sup>155</sup> Moreover, although the VRBPAC recommended the development of a bivalent booster, it was not allowed to weigh in with age recommendations.<sup>156</sup> VRBPAC member Dr. Paul Offit publicly stated his belief that the bivalent should not be recommended, let alone mandated, to young persons on the basis of lack of existing evidence that it provides benefits in excess of harm.<sup>157</sup>

The CDC's broad recommendation of a second, bivalent booster stood in contrast to that of the European health agencies. For example, the Danish and Norwegian agencies did not recommend *any* boosters except for those whose health conditions or age placed them at higher risk.<sup>158</sup> The United Kingdom and Germany recommended only one booster for the college aged.<sup>159</sup> The European Union's health agency authorized the bivalent booster for those over 12

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<sup>152</sup> Well-financed large universities with their own medical and public health schools, with access to data provided to the VRBPAC, could have conducted such an analysis. Indeed, the costs of such an analysis could have been spread by creating an inter-university panel to make such an assessment. Given the booster was authorized in September 2021 and most universities did not mandate it until the end of the year, there was plenty of time for such an assessment.

<sup>153</sup> See Hannah G. Rosenblum et al., *Interim Recommendations from the Advisory Committee on Immunization Practices for the Use of Bivalent Booster Doses of COVID-19 Vaccines — United States, October 2022*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 11, 2022) <https://www.cdc.gov/mmwr/volumes/71/wr/mm7145a2.htm> [<https://perma.cc/T6VB-8J5F>].

<sup>154</sup> See Qian Wang et al., *Antibody Response to Omicron BA.4–BA.5 Bivalent Booster*, 388 N. ENGL. J. MED. 567 (2023) (reporting disappointing results in human antibody trials but cautioning on low sample size).

<sup>155</sup> See Rob Stein, *What's Behind the FDA's Controversial Strategy for Evaluating New COVID Boosters*, NPR ONLINE (Aug. 2, 2022) (interviewing experts with conflicting views on the reasonableness of approving the bivalent booster solely on mouse data).

<sup>156</sup> See Offit, *supra* note 103.

<sup>157</sup> See Paul Offit, *Bivalent Covid-19 Vaccines — A Cautionary Tale*, N. ENGL. J. MED. PERSP. (Feb. 9, 2023).

<sup>158</sup> HELSE NORGE, *COVID-19 Vaccination in Norway*, (Nov. 18, 2022) <https://www.helsenorge.no/en/coronavirus/COVID19-vaccination/#who-should-get-the-COVID19-vaccine> [<https://perma.cc/PC5Q-N3F2>]; DANISH HEALTH AUTH., *Vaccination Against Covid-19*, (Sept. 13, 2022) <https://www.sst.dk/en/english/corona-eng/vaccination-against-COVID-19> [<https://perma.cc/NBB5-3J34>].

<sup>159</sup> NHS, *How to Get a Coronavirus (COVID-19) Vaccine Booster Dose*, (Feb. 13, 2023). <https://www.nhs.uk/conditions/coronavirus-COVID-19/coronavirus-vaccination/how-to-get-a-coronavirus-vaccine/how-to-get-a-booster-dose/> [<https://perma.cc/5DKX-G3BS>]; FED. MINISTRY HEALTH, *Current Information on Coronavirus Vaccination*, (Dec. 31, 2022) <https://www.bundesgesundheitsministerium.de/en/coronavirus/faq-COVID-19-vaccination.html> [<https://perma.cc/7J6V-WVM5>].

but recommended that the use of it be targeted toward high-risk populations.<sup>160</sup> The U.S. public generally was not enthusiastic about the bivalent booster. As of December 2022, less than 20% of the eligible U.S. population had received it.<sup>161</sup> Moreover, only a handful of universities mandated it, which suggests that unlike the previous vaccinations, there was no custom and practice in favor of the bivalent booster.

The CDC did not provide a cost-benefit study or tailor its recommendations by age or health status.<sup>162</sup> A presentation by CDC director Rochelle Walensky suggested that boosting one million college-aged students would save between zero and one life. One peer-reviewed cost-benefit analysis of the bivalent booster found that over 40,000 doses would have to be administered to college-aged students to prevent one hospitalization.<sup>163</sup> A later cost-benefit analysis, published in the same journal, contested the numbers used in the first study and suggested that a reasoned analysis could show a net benefit.<sup>164</sup>

What is important for this paper, however, is that while there was debate over whether there is a small overall benefit or a small overall health risk from the booster, there was general agreement that boosting provided no lasting community benefit. As a result, the university lacked a reserved contractual power to mandate the booster, at least without sufficient notice to students. Nonetheless, university officials have tried to marshal arguments in this regard. In response to the negative cost-benefit analysis cited above, the health directors at Boston, MIT, Tufts, and Stanford Universities published a letter to the editor.<sup>165</sup> Their response accepted that hospitalization in young adults was a “rarity,” but criticized the use of hospitalization as an outcome metric precisely because it was so rare.<sup>166</sup> Instead, the letter writers favored other metrics such as missed classes, mental health problems, long COVID, and the avoidance of “severe” disease as reasonable outcomes to measure.<sup>167</sup> Most telling, perhaps, the letter authors did not argue that the bivalent booster could reduce transmission.

Under the human capital approach, a vaccine that improved attendance could possibly provide a community benefit, justifying an intervention. Of course, a good faith analysis would ask whether the university had other tools to monitor and improve class attendance but did not use them. The university should explain, for example, why faculty and staff, who are at higher

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<sup>160</sup> EUR. CTR. DISEASE PREVENTION Control, *ECDC-EMA Statement on Booster Vaccination with Omicron Adapted Bivalent COVID-19 Vaccines*, (Sept. 6, 2022) [https://www.ema.europa.eu/en/documents/public-statement/ecdc-ema-statement-booster-vaccination-omicron-adapted-bivalent-COVID-19-vaccines\\_-0.pdf](https://www.ema.europa.eu/en/documents/public-statement/ecdc-ema-statement-booster-vaccination-omicron-adapted-bivalent-COVID-19-vaccines_-0.pdf) [<https://perma.cc/ML43-5XCN>].

<sup>161</sup> See Alyssa H. Sinclair et al., *Reasons for Receiving or Not Receiving Bivalent COVID-19 Booster Vaccinations Among Adults — United States, November 1–December 10, 2022*, 72 *Morbidity & Mortality Weekly Rpt.* 73 (2023) (finding an adult uptake of 18% as of the dates indicated).

<sup>162</sup> See Offit, *supra* note 103 (discussing studies of the boosters and concluding, “Unfortunately, these studies did not stratify patients according to whether they had coexisting conditions. Therefore, it was unclear who among these younger age groups most benefited from an additional dose”).

<sup>163</sup> See Kevin Bardosh et al., *COVID-19 Vaccine Boosters For Young Adults: A Risk Benefit Assessment and Ethical Analysis of Mandate Policies at Universities*, *BMJ J. MED. ETHICS* 1 (2022).

<sup>164</sup> See Leo L. Lam & Taylor Nichols, *Ethics of College Vaccine Mandates, Using Reasonable Comparisons*, *BMJ J. MED. ETHICS* 1 (2023).

<sup>165</sup> Judy Platt et al. *Need to Consider Other Benefits of COVID-19 Vaccine Boosters in College Students*, *BMJ J. MED. ETHICS*, (Dec. 19, 2022) <https://jme.bmj.com/content/early/2022/12/05/jme-2022-108449.responses> [<https://perma.cc/YF2S-5Z2T>].

<sup>166</sup> See *id.*

<sup>167</sup> See *id.*

risk to COVID and whose absence would be much more disruptive than that of an individual student, were not likewise compelled to take the booster. Any analysis of class attendance should also trade off reduced illness from COVID against the well-known short-run reactions to the shot which can lead students to miss class for fatigue, fevers, and other common, well-known mild side effects.

The letter writers opined that universities could mandate the vaccination because it reduced long-COVID and the time out of class, perhaps with additional benefits to mental health. However, mandatory treatment of infected students with Paxlovid, an anti-viral drug recommended by the CDC, would do the same. Could, however, a university mandate a course of treatment as well or should that decision be left for student and their doctors to resolve?<sup>168</sup> So too would closer control over students' alcohol and marijuana consumption. But such requirements would clearly exceed the university's power to regulate the university-student relationship absent an expansive *in loco parentis* theory.

In contrast, a sufficiently noticed vaccination or booster requirement, prior to enrollment, should be enforceable, just as pledges not to consume alcohol or drugs would be enforceable. Human capital is complex, universities differentiate their product, and students select an environment most suited to them. For example, Brigham Young University prohibits pre-marital sexual relations (and enforces it),<sup>169</sup> Wheaton College, a prominent evangelical Christian college, prohibited dancing until 2003.<sup>170</sup> Such regulations, if noticed by contract and included in a sufficiently prominent manner, would typically be enforceable. It is possible that these elements can be related to a character-building version of the human capital model, community regulation, and peer group selection. But they do not fit the standard expectations around the university's human capital endeavor and, under consumer contract principles, would have to be clearly noticed in advance.

#### IV. Conclusion

The university-student contract is only one part of a complicated nexus of regulations, governance arrangements, and market pressures that govern and constrain universities. But contract remains an important and under-analyzed factor in this nexus. Apart from mandatory campus closures, government regulations had little to say about how universities handled COVID, what was owed to students, or what additional restrictions universities could impose. The focus here has been to draw attention back to the contractual nature of the university-student relationship.

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<sup>168</sup> See FOOD & DRUG ADMIN., *PAXLOVID Patient Eligibility Screening Checklist Tool for Prescribers*, (accessed Feb. 15, 2023) <https://www.fda.gov/media/158165/download> [<https://perma.cc/6HBN-BGKZ>]; CTRS. FOR DISEASE CONTROL & PREVENTION, *Underlying Medical Conditions Associated with Higher Risk for Severe COVID-19: Information for Healthcare Professionals* (Feb. 9, 2023) <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-care/underlyingconditions.html> [<https://perma.cc/J2BS-ZS74>].

<sup>169</sup> See Report: *Brandon Davies Case about Sex*, ESPN (Mar. 1, 2011) <https://www.espn.com/mens-college-basketball/news/story?id=6175090> [<https://perma.cc/LW7A-X9YA>] (reporting on suspension of star basketball player for consensual pre-marital sex).

<sup>170</sup> See Ted Olsen, *Wheaton College Allows Dancing for All, Drinking and Tobacco for Non-Undergraduates*, CHRISTIANITY TODAY (Feb. 1, 2003) <https://www.christianitytoday.com/ct/2003/februaryweb-only/2-17-32.0.html> [<https://perma.cc/VD2N-TDHJ>].

A coherent contractual analysis necessitates an understanding of the purpose of the university-student contract. As a positive matter, the human capital model of higher education is the best description of the university-student contract and, as a matter of policy, the proper model for courts to emphasize when confronted with novel questions not explicitly addressed in the university-student contract. Universities endorse this idea, especially in comprehensive student handbooks and statements of purpose, emphasizing transformative experiences inside and outside the classroom.

The enforceability of promises, review of actions for good faith, and availability of remedies, if properly executed, are generally understood to be an important backdrop to most market relationships – and should be of particular concern given the present system of debt-financed higher education. Higher education enrollments fell during COVID and remained reduced thereafter.<sup>171</sup> Undoubtedly this reduction had multiple causes, but students held reasonable concerns that universities would not be able to provide the services promised or held accountable for their failure to do so.

While there may be concern that adopting the human capital model as the basis for interpreting the university-student contract could introduce an overly zealous legal regulation of the university-student relationship. In fact, the human capital model will not make the university-student relationship more legalistic than it presently is. The human capital model recognizes as of necessity that universities are regulating an educational environment to produce an intangible benefit. Moreover, there is no single valid university contract; differentiation of education models should be permitted when specified in advance in a prominent manner. Specific promises should be enforced, but universities should retain broad discretion within the zones that require it and when universities reserve such discretion subject to judicial review under standard contract theories. The basic framework developed here would have worked well when applied to the contract issues arising from the response of universities to Covid, holding universities to their promise of in-person learning while grounding the analysis of any subsequent exercise of their discretion.

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<sup>171</sup> *First Look Fall 2022 Enrollment (As of Sept 29)*, NAT'L STUDENT CLEARINGHOUSE RSCH. CTR. (Oct. 20, 2022) <https://nscresearchcenter.org/stay-informed/> [<https://perma.cc/SBB2-SNLZ>] (reporting a 4.2% drop in enrollment between 2020 and 2022, with a disappointing post-COVID recovery).