COVID, Contracts, and Colleges

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JOHN K. SETEAR*

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* Class of 1962 Professor of Law, University of Virginia School of Law. Olivia Livolsi, Hannah Navon, and Sarah Walsh provided helpful research assistance. The author greatly appreciates the prompt and generous comments of his colleagues, George Cohen, Andrew Hayashi, Deborah Hellman, Mike Livermore, and Ruth Mason. Errors, ambiguities, and rhetorical excesses remain the author’s responsibility.

As the Article went to press, the author became aware of a forthcoming piece on student-college contracts, with applications to COVID-related issues. See Max M. Schazenbach & Kim Yuracko, What Is the University-Student Contract?, Ariz. L. Rev. (forthcoming). Given the press of time, an extended comparison of that piece with this Article is not possible. The two works are generally consistent in their broad conclusions. This Article, however, is more doctrinal; it analyzes only tuition refunds rather than other COVID issues (e.g., vaccination mandates); and it treats damages extensively. Those interested in COVID and collegiate contracts will benefit from reading both pieces.
I. INTRODUCTION

Millions of college students recently paid through the nose to receive a half-assed education—that is, they tendered full tuition to an institution of higher education that, because of its concerns about COVID-19, provided them with much less in-person instruction than they would otherwise have received. This

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1 Dickersin summarizes the factual backdrop:

At the beginning of the COVID-19 pandemic, the vast majority of public and private universities switched from in-person to online learning. This dramatic shift happened quickly, interrupting the Spring 2020 semester. But, by making the transition to online learning during a semester in which tuition and other costs had already been paid, universities exposed themselves to class action litigation. As of the date of publication, over two hundred and sixty-one actions have been filed alleging wrongdoing during the transition to online learning.

Article is about whether those students can successfully bring suits for breach of contract or unjust enrichment against some of those educational institutions to recover some of that tuition. (An action for breach of contract, which lies at law, provides compensation to a contractual party for the other party’s failure to keep a binding promise, while unjust enrichment is an equitable claim against a party who has wrongfully retained property originally in the hands of the complainant.)

Hundreds of such lawsuits are in progress. This Article seeks to bring some clarity and consistency to an area where courts have failed to achieve a consensus and where scholarly analysis has ignored potentially important

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2 The claim requires an agreement reached without undue bargaining asymmetry between the parties on such dimensions as cognitive capacity and available alternatives, a promise that the defendant has failed to keep, and the ability of the plaintiff to show some objective harm from the breach of promise. For further discussion of breach of contract, see infra Sub-section III.B.1.

3 Unjust enrichment, sometimes also known as “restitution” or, in more specialized cases, as “in quantum meruit” or “quasi-contract,” occurs when a party obtains a benefit from another where no legal duty justifies the benefit, as when a party mistakenly conveys money to another when no contract or other obligation exists. See Restatement (Third) of Restitution and Unjust Enrichment § 1 (Am. L. Inst. 2011) (stating that a “person who is unjustly enriched at the expense of another is subject to liability in restitution”); see also Developments in the Law: Unjust Enrichment: Introduction, 133 Harv. L. Rev. 2062, 2063–64 (2020) (discussing terminology of unjust enrichment and restitution). For further discussion of the doctrine, see infra Sub-section III.A.1.

4 See Doug Lederman, Courts Skeptical on COVID-19 Tuition Lawsuits, Inside Higher Educ. (May 5, 2021), https://www.insidehighered.com/news/2021/05/06/courts-view-covid-19-tuition-refund-lawsuits-skeptically (stating that “lawyers have filed more than 300 cases on behalf of students and parents demanding refunds of tuitions for educations they deemed to be either substandard or not what they were promised”); Dickersin, supra note 1 (asserting that over 261 actions “alleging wrongdoing during the transition to online learning” had been filed as of late November of 2021); Avalon Zoppo, “Watching the Outcome Like a Hawk”: COVID-19 Tuition Refund Fights Heat Up in Appeals Courts, 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=20230803155912#:~:text=NEWS-,"Watching%20the%20Outcome%20Like%20a%20Hawk%3A%20COVID%2D19%20Tuition,S ekond%2C%20Fifth%20and%20Seventh%20circuits ("More than 250 lawsuits were filed for unpaid refunds after March 2020").

5 In reviewing motions to dismiss on the pleadings, federal appellate courts have reached differing results. Courts in several circuits have allowed students’ claims to go forward. Gociman v. Loy. Univ. of Chi., 41 F.4th 873 (7th Cir. 2022) (holding that students adequately alleged breach of implied contract promising in-person instruction in exchange for tuition); Jones v. Tul. Educ. Fund, 51 F.4th 101 (5th Cir. 2022) (holding that students stated a claim for breach of contract and unjust enrichment under Louisiana law, despite signing agreement-and-disclosure statement asserted by college to bar claim); see Shaffer v. Geo. Wash. Univ., 27 F.4th 754, 765 (D.C. Cir. 2022) (holding that students adequately alleged breach of implied-in-fact contract, though not of express contract, and that associated reservation of rights by college “does not specifically address emergencies or other force majeure events”). Other circuits have dismissed the claims or remanded them for further analysis of the documents. King v. Baylor Univ., 46 F.4th 344 (5th Cir. 2022) (holding that students may have stated a claim for breach of contract under Texas law, but remanding case in light of ambiguity in “financial responsibility agreement” that might bar claim);
differences between the general effects of COVID-19 on contracts, on the one hand, and the specific ramifications of COVID-19 for contracts between colleges and students deprived of in-person instruction, on the other hand. This Article advances three fundamental conclusions. First, the law governing the liability phase favors students, especially because of the starkness of the deprivation visited upon them. Second, the law governing the remedies phase favors educational institutions. The law of damages strongly prefers

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see Zhao v. CIEE, Inc., 3 F.4th 1 (1st Cir. 2021) (dismissing breach of contract claim seeking tuition refund for classes canceled mid-semester, where agreement expressly stated refunds were a remedy for classes canceled before they began, but set out no such remedy in clause addressing classes canceled during semester); cf. Theile v. Bd. of Trustees of Ill. State Univ., 35 F.4th 1064 (7th Cir. 2022) (university’s failure to remit all mandatory fees during COVID pandemic did not raise questions under federal takings or due-process clauses).


Courts in New York, chiefly in the Second Circuit, have accumulated a preponderance of rulings dismissing student claims for tuition refunds. See Suzanne M. Messer, COVID-19 Student Refund Lawsuits: Has the Tide Turned in New York?, HIGHER EDUC. L. REP. (Dec. 21, 2021), https://www.bsk.com/higher-education-law-report/covid-19-student-refund-lawsuits-has-the-tide-turned-in-new-york (listing more than a dozen cases dismissing claims that failure to provide in-person instruction breached contract involving tuition payments, while setting out only a few allowing suits to proceed).

Columbia University, which lost an appeal that sought to dismiss a proposed class action by students, has since settled the proposed class action for more than $12 million. See Josh Moody, Columbia Settles COVID-19 Refund Case, INSIDE HIGHER EDUC. (Nov. 28, 2021), https://www.insidehighered.com/quicktakes/2021/11/29/columbia-settles-covid-19-refund-case.

The Article uses the phrase, “in-person instruction,” as something of a defined term. In the twenty-first century, it would be presumptuous to assume that any college offers exclusively in-person instruction. Instructors generally have some leeway to include electronic materials in their courses. (Of course, students can presumably condition their course selection in part on the degree of in-person instruction.) The phrase, “predominantly in-person instruction,” would therefore be more accurate. The Article omits the qualifier for the sake of rhetorical clarity.

In contrast, “remote instruction” as used in the Article does mean exclusively remote instruction. Institutions abandoned in-person instruction in its entirety. (To do otherwise would at least partially defeat the anti-contagion rationale for the switch.)

The Article uses “hybrid” instruction to denote a program of instruction that allows students to choose between (predominantly) in-person instruction and (exclusively) remote instruction. See infra text accompanying notes 19–25.
market-oriented measures of loss, but COVID\textsuperscript{8} caused colleges\textsuperscript{9} to unbundle a certain aspect of their services, i.e., in-person instruction, that they have historically only provided simultaneously with room and board and various education-adjacent activities. The recency and rapidity of that unbinding hinders a market-oriented valuation of the components. This Article assumes that, subjectively, in-person instruction is superior to remote instruction,\textsuperscript{10} at least for those students attending what was originally a college offering in-person

\textsuperscript{8} The balance of the Article refers to COVID-19 simply as COVID and does not seek to distinguish variants of the virus.

\textsuperscript{9} The Article generally uses the word college to describe the educational institution that charged tuition but failed to provide its typical, in-person instruction. Some of the cases involve graduate students, however. University would then be more accurate, but college possesses a ready identifier of those in attendance, collegian, and produces a generally pleasing alliteration when paired with COVID or contract. University lacks these characteristics.

\textsuperscript{10} One review of the literature on the educational shortcomings of online instruction states:

Online coursework generally yields worse student performance than in-person coursework. The negative effects of online course-taking are particularly pronounced for less-academically prepared students and for students pursuing bachelor’s degrees. New evidence from 2020 also suggests that the switch to online course-taking in the pandemic led to declines in course completion.

Stephanie Riegg Cellini, \textit{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/; see also infra note 111 (taking a dim view of Zoom); George Orlov et al., \textit{Learning During the COVID-19 Pandemic: It’s Not Who You Teach, It’s How You Teach}, 202 ECON. LETTERS, May 2021, at 2 (“[our] results suggest that student outcomes did suffer in the pandemic semester and the magnitudes of the declines in learning were not trivial”); Members of the National Council for Online Education, \textit{Emergency Remote Learning Is Not Quality Online Learning}, INSIDE HIGHER EDUC. (Feb. 2, 2022), https://www.insidehighered.com/views/2022/02/03/remote-instruction-and-online-learning-aren’t-same-thing-opinion (“Most faculty have too little training, support or time to effectively pivot their face-to-face course to one we would characterize as high-quality online learning.”); cf. Robert Ubell, \textit{Why College Students Turned From Being Down on Remote Mostly Learning to Being Mostly in Favor of It}, EDSURGE (Dec. 20, 2022), https://www.edsurge.com/news/2022-12-20-why-college-students-turned-from-being-down-on-remote-learning-to-mostly-in-favor-of-it (arguing that “the often lackluster [lecture-oriented] college classroom is not much better than what usually happens online”); John Villasenor, \textit{Online College Classes Can Be Better than In-Person Ones. The Implications for Higher Ed Are Profound}, BROOKINGS INST. (Feb. 10, 2022), https://www.brookings.edu/blog/techtank/2022/02/10/online-college-classes-can-be-better-than-in-person-ones-the-implications-for-higher-ed-are-profound/ (arguing that increasing familiarity over time with remote-learning software means that those aspects of remote learning that are superior can now be discerned). Some college presidents also believe that students prefer in-person instruction. See Rebecca Natow, \textit{College Presidents’ Public Messaging During the COVID-19 Pandemic: An Analysis of Published Opinion Pieces as Crisis Communications}, AMER. BEHAV. SCI. 8 (Aug. 21, 2022) https://journals.sagepub.com/doi/10.1177/0002764222118267 (quoting Dillard University president stating that “traditional students . . . overwhelmingly . . . prefer the brick-and-mortar educational experience”); Id. (quoting Anderson University president as saying that “a full semester totally online is not likely to be attractive to today’s traditional students”).
Market-oriented evidence, however, often undercuts an objective showing of that superiority. Third, this rapid unbundling reveals a difficulty—which can extend beyond the specifics of colleges offering education in a time of COVID—in the law’s pervasive use of market-oriented measures of damages even when change in the marketplace is rapid and improvisational.

As to the first fundamental conclusion of this Article, disappointed students should rarely lose on the question of liability. If in-person education is superior to remote instruction, then students should prevail, because they suffered a significant and obvious deprivation of benefits that their college should have provided them in exchange for tuition. Students may wish to pursue a suit for restitution seeking the return of that portion of their tuition attributable to unoffered, in-person instruction—a suit that does not depend upon a showing of fault or failure to keep a promise. Alternatively, a suit by students for breach of contract—which also does not require a showing of blameworthiness but does requiring showing a failure to keep a (contractual) promise—should also lead to liability on the part of the college, although students must surmount various questions of contractual interpretation to show that the college made a contractually enforceable promise of in-person instruction. While there are superficially plausible defenses available to the college for breach of contract, such as impracticability of performance, a closer analysis shows that such defenses are unlikely to protect the college, except in special circumstances involving “legal impossibility”—a doctrine that excuses parties from their contractual duties when performing contractual promises becomes illegal as of the time of performance. Likewise, although a doctrine known as “educational malpractice”—a doctrine that courts have used to bar suits against an educational institution sued by students in tort for negligently failing to provide them with a remotely effective education—may tempt courts to bar the students’ claims as

11 Students contemplating college in the twenty-first century have a choice to attend schools with predominantly in-person instruction or schools with exclusively remote instruction. See generally infra notes 40, 45–51 (discussing varieties of collegiate education in terms of instructional delivery). Students who attend a college with predominantly in-person instruction have thus demonstrated that, all other things being equal, they value in-person instruction over remote instruction; furthermore, they do in the face of a significant premium in price and convenience for predominantly in-person instruction.

12 There may, however, be interactions between contract law and the law of unjust enrichment that reduce the chances of recovery in restitution. See infra Sub-section III.A.2.

13 “Physical” impossibility, in contrast, excuses parties from their contractual duties when physical destruction of property allocated to the contractual exchange makes performance impossible. For an extended discussion of both types of impossibility, see infra Sub-section III.B.2.ii.

14 In Peter W. v. S.F. Unified Sch. Dist., 60 Cal. App. 3d 814, 818 (Cal. App. 1st Dist. 1976), for example, a student graduated from high school with only a fifth grade reading level. The court nonetheless barred recovery on the grounds that a school, at least in the eyes of the law, faces such a complex set of pedagogical concerns that it simply could not commit educational malpractice.
delving too deeply into the pedagogical choices of educators, that doctrine is inapt. The doctrine originated in tort claims making wide-ranging assertions about the outcome of an educational process, while the COVID-related cases involve claims about breach of promises (rather than about a tort) and a narrow assertion about the shortcomings of collegiate decision-makers in clearly failing to provide one form of pedagogy, i.e., in-person instruction (rather than a broad assertion that a student’s entire education was deficient).

Colleges could, however, avoid liability, under either a cause of action for restitution or for breach of contract, by showing that a valid contract allocates to students the risk that unusual circumstances would make in-person instruction impracticable. A so-called force majeure provision, for example, typically excuses parties from liability for breach of contract when events outside of the parties’ control, such as an “Act of God,” prevent performance. If a valid contract between student and college clearly allowed the college to substitute remote services for in-person instruction in the event of a health emergency, then the colleges would not be liable for failing to provide in-person instruction during the COVID crisis.\(^\text{15}\) (One assumes that colleges re-drafted their agreements to assign students the risk of such occurrences in semesters beginning after the sudden, mid-semester appearance of COVID.\(^\text{16}\)) If such an agreement allocating such risks to students exists, then students must show that the contract to be invalid if they are to prevail. Students might, for example, successfully argue that their college misled them into thinking that in-person education is valuable, even though it is not. Such a factual showing would raise the possibility of (a) invalidating the contract on the grounds of collegiate misrepresentation and then (b) prevailing on a claim of unjust enrichment.

The second fundamental conclusion of this Article is that, although liability against the colleges may well lie in one form or another, the issue of damages favors the colleges.

One might therefore more precisely call the doctrine “educational malpractice immunity.” For further discussion of the doctrine, see infra Sub-section III.C.

Some courts hearing COVID-related contracts claims have ruled on the doctrine’s applicability. Gociman v. Loy. Univ. of Chi., 515 F.Supp.3d 861 (N.D. Ill. 2021), rev’d, 41 F.4th 873 (7th Cir. 2022) (holding that plaintiffs’ claims were not claims of educational malpractice); See Lindner v. Occidental Coll., No. CV 20-8481-JFW(RAOx), 2020 WL 7350212, at *7 (C.D. Cal. Dec. 11, 2020) (dismissing plaintiffs’ claims because they “are the type of educational malpractice claims that . . . courts throughout the country . . . have rejected”).

\(^\text{15}\) See Amy Sparrow Phelps, Comment, Contract Fixer Upper: Addressing the Inadequacy of the Force Majeure Doctrine in Providing Relief for Nonperformance in the Wake of the COVID-19 Pandemic, 66 VILL. L. REV. 647, 651 (2021) (stating that force majeure provisions are “invoked when unforeseeable circumstances prevent one party from fulfilling its contractual duties”).

\(^\text{16}\) Cf. Charlotte West, Colleges Are Telling Students They Won’t Get Housing Refunds if Colleges Close Again for Coronavirus, MONEY (July 9, 2020), https://money.com/colleges-dorms-refunds-coronavirus/ (as of July 2020, “a handful of large institutions have now added language to their housing contracts saying refunds aren’t guaranteed if students have to once again leave campus midway through the academic term”).
The law of damages poorly handles some harms that are plainly experienced by the victim of a breach but not transparently reflected in the marketplace, such as goods with sentimental value or custom goods. The recency of the unbundling of in-person instruction from other services traditionally offered by residential colleges obscures—although it does not render opaque—the value of in-person instruction. Before COVID, residential colleges did not offer exclusively remote instruction, so no market comparison between remote instruction and in-person instruction was available. Indirect or non-market methods to determine the relationship between the costs and benefits of in-person instruction, on the one hand, and remote instruction, on the other, yield imprecise, ambiguous, or even contradictory results. The brevity of the period of remote instruction introduces some amortization-related complexities as well. Finally, if students must invalidate a contract that would otherwise bar their claim (as through force majeure), then their argument that their college exaggerated the value of in-person education reduces their likely recovery, even as it improves a student’s chances of showing liability.

The third fundamental conclusion of this Article is that the potential mismatch between an intuitively fair outcome (compensation to students) and one potential doctrinally plausible outcome (no compensation to students) stems from an inability of the law to adjust to rapid, dramatic shifts in the options proffered to students. This mismatch is a recurring, although not pervasive, problem in the law: If what this Article calls an assumption of “consistent variation” goes unmet, as it has in the case of COVID and colleges, then recovery for injured parties will founder on a market-oriented approach to the calculation of damages. Other examples of the phenomenon include telephone services before the break-up of “the Bell system” and the introduction of personal-computer systems, both of which occurred in the 1980s. These examples illustrate a short-term shortcoming in the utility of law as a method of social regulation, although the problem is likely to be self-correcting in the long run as the market adjusts to provide a broader menu of options.

The contribution of this Article to the literature on COVID and contracts lies in the specificity and depth of its analysis. Salkin and Ko have authored a useful discussion of the legal issues facing educational institutions as a result of COVID, but this work is descriptive, not analytical. Its treatment of suits seeking tuition refunds is, in any case, relatively brief. A short piece by Birnbaum and others likewise confines itself mostly to description and, where it does not, sometimes misapprehends the relevant law. The authors, who list themselves as holders of doctoral rather than law degrees, generally confine themselves to description and some litigation-related options. Matt Birnbaum, Spencer C.

18 Id. at 380–83 (describing litigation involving universities in Florida, Massachusetts, Arizona, and Maryland).
19 The authors, who list themselves as holders of doctoral rather than law degrees, generally confine themselves to description and some litigation-related options. Matt Birnbaum, Spencer C.
Weiler & Philip Westbrook, Public Institutions of Higher Education, Students’ Lawsuits, and the COVID-19 Pandemic, 377 EDUC. L. REP. 1 (2020). They do argue, however, that, in comparison to the purchase of different models of an automobile, “it is difficult to compare the different modes of educational delivery and determine differences in value.” I take up this worthwhile point below in discussing both damages, see infra Part IV, and “educational malpractice,” see infra Section III.C.

Less persuasively, they argue that “the standard contractual exchange of ‘if I do X, you will do Y’ breaks down in educational settings because both the learner and the instructor actively participate in the product of learning.” Id. They are correct that there are contracts in which performances are completely independent, such as the typical contract for the sale of goods, but an interdependent agreement can still be a contract: An artist who agrees to paint a client’s portrait from life depends upon the active participation of both the subject and the artist if the work is to be a success, but that interdependence does not invalidate the agreement.

Finally, they argue that, even though students concededly received a different educational experience compared to what students expected, the colleges are blameless so long as the circumstances that led institutions of higher education to suspend in-person instruction were beyond the institutions’ control. I take up a variation of this point in the context of impossibility of performance, see infra Sub-section III.B.2.ii, but they seem to imply that difficult circumstances invariably excuse breaches of promise, which is simply not the case.

Andrew A. Schwartz, Contracts and COVID-19, 73 STAN. L. REV. 48 (2020). To Schwartz, impossibility of performance is clearly relevant, see id. at 49–50, especially given that COVID is likely to meet the doctrine’s unforeseeability requirement. See id. at 50–51. Schwartz acknowledges that the doctrine generally “is given a narrow scope and rarely applied, as it undermines the very nature of a contract as a legally enforceable promise,” id. at 49, and he is generally hesitant to make predictions about how courts will treat claims of impossibility or the related notion of “impracticability”: Cases involving COVID may “render[] performance much more difficult or expensive, but not literally or legally impossible,” which will present a “difficult” case. Id. at 53. Likewise, if “performance is legally possible . . . but the pandemic remains prevalent” and thereby presents a physical danger to those performing their obligations, then this situation also presents “a difficult type of case.” Id. Similarly, the “force majeure” clauses common in contracts, and addressing essentially the same issues as impossibility, are applicable, but their application will depend on their wording and the nature of the associated claim. Id. at 55–58.
to treat educational institutions specifically, however, while this Article teases out the particular (and often quite different) implications of these doctrines in the context of colleges and COVID. Phelps, for her part, doubts that force majeure clauses will help those who seek excuse from performance on COVID grounds, although she is more sanguine about excuse based on defenses in the common law, such as impossibility of performance. Hoffman and Hwang argue that a concern for social harm should lead courts to excuse individuals from performance that would have led to risks of contagion. Both Phelps, the pessimist in terms of excuse, and Hoffman and Hwang, the optimists, undertake only general analyses of COVID and contracts, as opposed to this Article’s specific examination of students seeking compensation for a dearth of in-person instruction caused by the colleges’ response to COVID.

The value of this Article’s more specific analysis is manifold. Given the hundreds of cases seeking tuition refunds based on a shortfall of in-person instruction, the topic warrants a detailed examination. Furthermore, defenses such as impossibility of performance have struck scholars as generally promising for cases involving COVID and contracts, but such defenses are not likely to be useful in the specific context of students seeking tuition refunds from colleges that failed to provide continuous, in-person instruction.

Schwartz’s article is in the so-called “Essay” form, and he typically sets out hypothetical fact patterns rather than closely analyzing specific court cases. Cf. infra Sub-section III.B.2.ii (undertaking detailed analysis of cases on impossibility and impracticability).

Phelps, supra note 15, at 663 (“Courts have historically interpreted force majeure clauses extremely narrowly; courts frequently reject claims of force majeure and rarely [allow them to excuse non-performance]”). Indeed, the clauses are “useless in a crisis,” id. at 669; even though courts have been willing to acknowledge that COVID is the kind of phenomenon covered by the clauses, id. at 666, courts additional requirements beyond the text of the clause, id. at 666–68, and force majeure clauses are mutually exclusive with more promising defenses like impossibility. Id. at 669, 671–76.

David A. Hoffman & Cathy Hwang, The Social Cost of Contract, 121 COLUM. L. REV. 979 (2021). Hoffman and Hwang argue that social regulation, such as legislative and administrative regulations, as well as various doctrines such as subject-matter limitations, usually minimize potential harm to third parties from contractual enforcement. Id. at 983, 991. A “relatively nascent literature on the externalities of contracts,” id. at 988, however, raises the possibility that third parties suffer harm more frequently than one might imagine. Id. at 988–90. Their own argument is that, if risks to the public arise unexpectedly, then courts may excuse or interpret contracts to protect the public interest. Id. at 985.

Exceptionally, the argument of Hoffman and Hwang would support excusing the colleges from an obligation to provide in-person instruction. Their argument depends only on the possibility of social harm, i.e., the spread of disease, flowing from performance. Id. at 997–1005 (discussing “anti-canon” of cases excusing performance, or interpreting away need for performance, in cases where effects on public health are prominent).

One must also qualify the argument in the text that “impossibility of performance” is unlikely to allow colleges to avoid liability. Impossibility of performance may be “legal” or “physical.” See supra note 13. Physical impossibility is unlikely to help the colleges, but they may well avoid
As for the Article’s structure, Part I examines the long-term, medium-term, and short-term backgrounds to current litigation involving college students deprived by COVID of in-person instruction. Historically, colleges offered in-person education; somewhat recently, some colleges emphasized remote education while others continued to offer in-person pedagogy; very recently, the COVID crisis led colleges that previously offered in-person education to make a dramatic shift to remote instruction.

Part II parses the elements of the two causes of action—breach of contract and unjust enrichment—that students have employed thus far in their suits against their colleges before examining the various defenses that colleges might advance to avoid liability. This Part argues that “legal impossibility” is the colleges’ best, and perhaps only, defense to liability for breach of contract; unfortunately for the colleges, this defense requires particular facts unlikely to be persistently present in most U.S. jurisdictions, although collegiate locales likely vary in the duration and strictness of bans on communal gatherings. Colleges may also successfully argue, depending upon the particulars of the documents at issue, that the college never promised the students in-person instruction, or that the contract between student and college allocates the risk of absorbing reductions in face-to-face instruction to the student. Students may in turn be able to defeat these contractual arguments by voiding the agreement on the grounds of “mutual mistake” or fraud concerning an implicit overestimate of the value of in-person instruction—although both of these lines of argument are not straightforward applications of the relevant doctrines, and both may also lead students to undercut their own claim for compensation in order to succeed in a claim for liability.

Part III emphasizes barriers to significant recoveries by a student even if colleges are liable for their failure to provide in-person instruction. The law of damages is more hospitable to plaintiffs when they can show market-based measures of their losses, while the market for collegiate education has not typically provided a sufficiently rich menu of options to allow the inference of a market-based measure of in-person instruction. The Part nonetheless explores alternative methods for valuing in-person instruction, such as analogies to custom goods or simply allowing the finder of fact to determine a “reasonable” valuation. Additionally, the doctrine of “educational malpractice,” which is effectively a limitation on damages where educational services are at issue, may prevent recovery of damages for disappointed students even if they succeed in holding colleges liable for failing to provide in-person instruction. The Part argues, however, that educational malpractice is inapt with respect to the collegiate COVID cases.

* * *

liability in the narrower circumstances involving legal impossibility. For further discussion, see infra Sub-section III.B.2.ii.
Part V builds upon the largely doctrinal analysis of the previous sections to discuss a more general aspect of the collegiate COVID cases. First, the section discusses the notion of “consistent variation” and its implications for law as a method of social regulation. The section then argues that, when change is temporally sudden and qualitatively dramatic, the law is poorly equipped to reach morally intuitive outcomes. The section provides examples beyond COVID’s impact on collegiate contracts and speculates on the prevalence of the phenomenon. Part VI concludes.
II. COLLEGIATE EDUCATION IN THE UNITED STATES

This Part of the Article provides the necessary factual background for the analysis of subsequent parts. After providing an abbreviated history of higher education in the United States, including relatively recent but pre-COVID developments in online instruction, the Part sketches out the contours of the COVID crisis and the resulting litigation. Finally, for ease of later exposition, this Part sets out a prototypical fact pattern and notes various limits of the analysis.

A. Traditional Collegiate Instruction26

For decades, if not centuries, the relationship between colleges and students was stable. Institutions of higher learning provided centralized, in-person education by professors who possessed doctorates, substantial teaching loads, and roots in the surrounding community. In exchange, the hundreds or thousands of students in attendance at private colleges paid those institutions substantial sums to study in relative isolation from the currents of big business and big government. From the mid-nineteenth century onwards, public colleges, each focused on students within its state, grew in importance until they enrolled tens of thousands of students.27 Remote higher education, for its part, existed in the form of “correspondence courses” that employed the all-weather delivery services of the United States Postal Service as the link between student and

26 For descriptions of collegiate education before the rise of online instruction, the unfootnoted descriptions in this section draw upon JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION (3d ed. 2019); AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY (Michael N. Bastedo et al. eds., 2019); FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY (2d ed. 1991).
27 “Land grant” universities, which were the result of federal land grants and which we now call “state” schools, began in the mid-nineteenth century. See JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 75–81 (2d ed. 2011) (placing creations of colleges under 1862 Morrill Act in context of earlier land grants to institutions of higher education). Stagnation followed initial growth. See id. at 105 (“by 1890, state support for higher education was uneven at best and usually uncertain”). A second wave of indirect federal involvement led to a renaissance. See id. at 135 (stating that, in 1910, which was towards tail end of “second wave” of federal interest in land-grant colleges, “the most successful state universities enrolled between three thousand and four thousand students each”). By the 1930s, “[t]he most prominent statue universities were in the Midwest and West,” with the multi-campus University of California system enrolling 25,000 students and Ohio State University educating almost 20,000 students on a single campus in Columbus, Ohio. Id. at 245. As to the current status of state schools as collegiate colossi, see Rohit Mittal, Top 10 Biggest Colleges in the U.S., STILT LOANS BLOG (Aug. 9, 2023), https://www.stilt.com/blog/2018/01/americas-10-largest-universities-enrollment/ (showing that smallest of ten largest colleges in the U.S. enrolls over 50,000 undergraduates and that only one of ten largest, Liberty University, is not a state school).
institution.\textsuperscript{28} Some such courses had a narrow, vocational focus, which do not directly concern us here, but others sought to replace the traditional collegiate model, especially for marginalized groups.\textsuperscript{29}

As World War II ended, higher education in the United States was about to experience a “golden age” that would last roughly a quarter of a century. Various forms of federal largesse—the GI Bill, large research grants to university professors in basic and applied science, and federally backed student loans—and generous support from state legislatures drove an extraordinary growth in enrollment and funding for institutions of higher education. For state schools, the golden age ended when increasingly tight-fisted legislatures reduced subsidies and thus effectively cut revenue, while increasingly expensive athletic programs increased costs to the colleges.\textsuperscript{30} Other factors increased costs for both private and public institutions. As with other services dependent upon highly educated providers in a steadily more sophisticated economy, the salaries of Ph.D. faculty grew in parallel with lawyers and “real” doctors. Federal funding and loan programs spawned clutches of administrators to monitor compliance with increasingly complex federal regulations. Rising student expectations led to lavish, competitive expenditures on physical plant: classrooms and laboratories for on-site education, dormitories for those consuming on-site education, and social and recreational facilities for students not directly related to on-site education at all—especially since an increasing number of increasingly wealthy mega-donors preferred to see their names carved in stone rather than associated with chairs for faculty or scholarship for students.

\textsuperscript{28} See Hope E. Kentnor, *Distance Education and the Evolution of Online Learning in the United States*, 17 CURRICULUM & TEACHING DIALOGUE 21, 23 (2015) (discussing changes in distance education associated with development of parcel post, radio, television, and internet).

\textsuperscript{29} Elizabeth Robinson Cole, *The Invisible Woman and the Silent University* (2012) (Ph.D. dissertation, University of Southern Mississippi), https://aquila.usm.edu/dissertations/538/ (detailing Society To Encourage Studies at Home aimed at educating women and its oft-neglected ties to later, more prominent distance-learning program of Chautauqua Literary and Scientific Circle); see Irena Frączek, *A History of Correspondence Course Programs* (July 25, 2019), https://courses.dcs.wisc.edu/wp/linstructors/2019/07/25/a-history-of-correspondence-course-programs/ (describing early non-degree efforts, which included schools serving women and miners, in the U.S., UK, and Poland). Degree-granting correspondence schools in the mid-twentieth century were often the same state schools that had pioneered more broadly available in-person instruction. See Francis Lee, *Technopedagogies of Mass-Individualization: Correspondence Education in the Mid-Twentieth Century*, 24 HIST. & TECH. 239 (2008) (departing from post-Foucauldian approach to employ “dispositif” in creating construct inspired by Foucault, Deleuze, and Actor-Network theory).

\textsuperscript{30} More recent diminutions in funding from state legislatures have led some state schools to complain, but those schools have not restrained their expenditures concomitantly. See Melissa Korn, Andrea Fuller & Jennifer S. Forsyth, *Colleges Spend Like There’s No Tomorrow. “These Places Are Just Devouring Money,”* WALL ST. J. (Aug. 10, 2023), https://www.wsj.com/articles/state-university-tuition-increase-spending-41a58100 (“For every $1 lost in state support at [public] universities over the two decades [between 2002 and 2022], the median school increased tuition and fee revenue by nearly $2.40, more than covering the cuts”).
Universities decided to emulate the successful American corporation by cutting labor costs. An underclass of itinerant instructors, lacking a tenure-track position and sometimes even a doctoral degree, came to carry much of the teaching load once carried by tenure-track PhDs. Rich colleges begat richer alumni and reaped richer returns from their hefty endowments, while poorer colleges struggled to attract students and to live off meager endowments. For public institutions, legislatures that had slashed subsidies insisted on keeping in-state tuitions low, but statehouses did allow colleges to pursue the admission of a dramatically higher proportion of out-of-state and international students, who paid dramatically higher, out-of-state tuitions. Big-time athletic programs not only helpfully lured some of those out-of-state students but also generated breath-taking revenues from over-the-air, and later from cable, television contracts. Both faculty research and the creation of various graduate schools came to serve corporate and governmental interests with attendant funding opportunities. Sometimes schools simply sold sponsorships to the highest-bidding makers of athletic shoes or soft drinks.

Even as these changes occurred, and as collegiate education became yet more popular, the fundamental exchange of large sums in tuition for intensive, exclusively in-person instruction continued.


33 For soft drinks, see, e.g., Deanne Estrada, Coca-Cola is New Campus Soft-drink Vendor, RADFORD UNIV. (Aug. 14, 2011), https://www.radford.edu/content/radfordcore/home/news/releases/2011/july/coca-cola-new-vendor.html (“As the official soft drink of Radford University, Coca-Cola will be acknowledged on athletic scoreboards, in sports programs and other printed materials.”) (emphasis added); Chris Branam, UA Starts Shift to Pepsi Drinks, NW. ARK. DEMOCRAT GAZETTE (July 3, 2012), https://www.nwaonline.com/news/2012/jul/03/ua-starts-shift-pepsi-drinks-20120703/ (stating that Pepsi will receive exclusive access to over 200 soda machines on campus, with athletic departments to receive over $10 million and rest of university to receive $10 million over 10-year contract with profit participation and some in-kind on-campus investments by Pepsi).


35 The cost of attending college has increased in recent decades compared to other consumer goods. Compare Melanie Hanson, Average Cost of College & Tuition, EDUC. DATA INITIATIVE
B. Online Instruction in the Modern, Pre-COVID Period

In the past few decades, technological developments have allowed some institutions of higher education to offer extensive instruction that occurs online rather than in person. Some existing not-for-profit colleges retained in-person instruction for residential students but spun up large, online, degree-granting, remote education in parallel, such as Liberty University, or set up separate but related institutions offering remote learning exclusively to distance learners, such as the University of Maryland and New York University. Some brand-new
institutions—such as the University of Phoenix, with its somewhat checkered history\(^{39}\)—came into existence, offering exclusively remote instruction.\(^{40}\) (As an illustration of the possible permutations, one might observe that a not-for-profit, state university recently purchased the most prominent, for-profit, previously independent institution of exclusively online learning in order to convert it into a not-for-profit enterprise affiliated with, but independent from, the state university.\(^{41}\) The Massively Open Online Course (“MOOC”) created a wave of initial enthusiasm\(^{42}\) that has since crashed upon the shores of indistinctness.\(^{43}\)

\(^{39}\) The University of Phoenix opened in 1976 as an exclusively brick-and-mortar institution, beginning online instruction only in 1989. Amy Tikkanen, University of Phoenix, BRITANNICA (Sept. 1, 2021), https://www.britannica.com/topic/University-of-Phoenix. In 2010, it enrolled more than 400,000 students. Id. One might fairly describe the institution’s subsequent progress as “downhill,” with enrollment in 2023 of under 100,000 students, the settlement of a complaint from the Federal Trade Commission (of misleading students into enrollment) of nearly $200 million, and a six-year graduation rate at its online campus in 2010 of 5%. See Natalie Schwartz, What the Potential Acquisition of University of Phoenix Says About the For-Profit Sector, HIGHER ED DIVE (Jan. 26, 2023), https://www.highereddive.com/news/university-phoenix-acquisition-arkansas-system-for-profit/641378/ (enrollment and complaint); Frank Donoghue, Serious Revelations About For-Profits and the Republican Party, CHRON. OF HIGHER EDUC. (Mar. 26, 2012), https://www.chronicle.com/blogs/innovations/serious-revelations-about-for-profits-and-the-republican-party (completion rates at online and physical campuses). For a comparison of primarily online institutions against traditional institutions in the aggregate, see infra note 45.

\(^{40}\) The pursuit of undergraduate degrees exclusively online is significant but hardly dominant. See Education Intelligence Unit, $74B Online Degree Market in 2025, Up from $36B in 2019, HOLONIQ (Apr. 30, 2020), https://www.holoniq.com/notes/74b-online-degree-market-in-2025-up-from-36b-in-2019 (describing online-only undergraduate students as 15% of market).


\(^{43}\) MOOCs, “born without a business model,” are now generally free only to audit; over time; MOOCs that lead to the receipt even of certificates of completion, let alone entire degrees, have come to require payment. See Dhawan Shah, A Decade of MOOCs: A Review of Stats and Trends for Large-Scale Online Courses, EDSURGE (Dec. 28, 2021), https://www.edsurge.com/news/2021-12-28-a-decade-of-moocs-a-review-of-stats-and-trends-for-large-scale-online-courses-in-2021. Payment makes MOOCs difficult to distinguish from other forms of online education, especially since not-for-profit universities are now far from the only providers of MOOCs. See id. (discussing MOOCs from for-profit entities); see also Justin Reich & José Ruizpérez-Valiente, The MOOC Pivot: From Teaching the World Online Professional Degrees, 363 SCI. 130 (2019) (stating that
Compared to traditional instruction, a very small percentage of students finished MOOCs, while for-fee online instruction sees roughly the same attrition as traditional instruction. These alternatives to residential instruction also offer a few of the social and intellectual benefits of the college campus. Traditional colleges must also have begun to offer students in residence a choice between exclusively face-to-face courses and courses including at least some online instruction, although the fact that colleges tend to give instructors discretion about whether to use such “blended” or “flipped” approaches makes difficult even an estimate of their frequency.

Primarily online institutions grant degrees to roughly eight percentage points fewer bachelor’s students than traditional institutions. At four, five, and six years from the start of instruction, full-time students receive bachelor’s degrees 37%, 53%, and 58% of the time from online institutions and 47.5%, 61%, and 65% of the time from traditional institutions. Non-public, non-profit institutions do even better as a sub-class of traditional institutions, with analogous completion rates of 57%, 66%, and 68%.

Data shows MOOCs chiefly help universities with previously established business model of “outsource[ing] online master’s degrees for professionals”).

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Digest of Education Statistics: Table 311.33—Selected Statistics for Degree-Granting Postsecondary Institutions that Primarily Offer Online Programs, by Control of Institution and Selected Characteristics: Fall 2020 and 2019–20, NAT’L CTR. FOR EDUC. STATS. (2021), https://nces.ed.gov/programs/digest/d21/tables/dt21_311.33.asp. (Note that these statistics end as COVID began but are sufficiently lagged—by between four and six years—that COVID should not have contaminated them.)

Even the difference between attending a residential college and living on campus for the first year of college, on the one hand, and attending a residential college but living off-campus for that first year, on the other, can affect a student’s future. See Philippe Bou Malham & Brian Clark, Where Ducks Live: Student Success and Housing Within the Context of the Division of Student Life, UNIV. OF OR., DEV. OF STUDENT LIFE, https://studentlife.uoregon.edu/student-success-and-housing-report (last visited Oct. 7, 2023) (“First-time, full-time freshmen from the US have higher GPAs, higher retention rates, higher graduation rates, and faster graduating times when they spend their first academic year living in University Housing at the University of Oregon.”); BYU University Communications News, Living on Campus Associated with Higher Grades for BYU Freshmen, BYU (Sept. 16, 2012), https://news.byu.edu/news/living-campus-associated-higher-grades-byu-freshmen (stating that BYU senior’s honors economics thesis showed first year on campus improved GPA by 0.09); see also id. (in terms of “academic failure,” “those living off campus are 1.7 times more likely than on-campus dwellers to fall into an academically at-risk group”).

Two-thirds of post-secondary-school students did not take even one online course in the fall semester of 2012. See Kentnor, supra note 28, at 22 (“as of fall 2012, . . . a staggering one-third of higher-education students enrolled in online courses”); see also supra note 40 (online degrees are 15% of the undergraduate-degree market).

In the context of residential instruction before COVID, individual collegiate faculty decided the form and content of their courses. A faculty member might therefore eschew online instruction
Despite the proliferation of varieties of instruction in higher education, the four-year collegiate market generally fell, and still falls, into two categories: a residential model, in which students receive in-person instruction while they live on or near the collegiate campus, and a remote model, in which students receive remote instruction and may thus live anywhere. For all the brouhaha over MOOCs and online degrees, it is the traditional, residential, in-person model that still predominates. One may also note that the most prestigious institutions have been the most likely to retain the residential model, at least for customers seeking full-fledged, undergraduate degrees. Implicitly, the failure of online instruction to “disrupt” higher education à la Amazon or the smartphone shows that in-person instruction—especially at a particularly prestigious institution—is still better than remote instruction, especially since in-person instruction almost always costs more than online education.

After discussing the impact of COVID on colleges, this Article moves to analyze whether a student has a viable legal claim to compensation if their college responded to COVID by mandating that the student receive instruction remotely rather than in person.

entirely or blend face-to-face instruction with electronic materials. In the absence of centralized, administrative direction about the form of classes, and given the discretion of faculty to adopt any mix of face-to-face and remote instruction that they choose, the determination of how much collegiate instruction occurred outside of the classroom is essentially impossible.

See Sean Gallagher & Jason Palmer, The Pandemic Pushed Universities Online. The Change Was Long Overdue, HARV. BUS. REV. (Sept. 29, 2020), https://hbr.org/2020/09/the-pandemic-pushed-universities-online-the-change-was-long-overdue (“According to U.S. Education Department data, while one-third of all U.S. college students had some type of online course experience before the pandemic, the other two-thirds remained traditional campus-based lectures.”).

See supra note 40 (online degrees are only 15% of the undergraduate-degree market).

If one uses membership in the Ivy League as a proxy for prestige, then one might note that only one Ivy, the University of Pennsylvania (“Penn”), appears to offer an online bachelor’s degree. Bianca Villagomez, Do Any Ivy League Schools Have Online Degrees?, INTELLIGENT (Mar. 2, 2023), https://www.intelligent.com/best-online-degrees/do-any-ivy-league-schools-have-online-degrees/ (examining each Ivy League school in turn and finding that, although many Ivies have online master’s programs, Penn is still the only Ivy with an online bachelor’s degree). One might also note that Penn’s online program awards a Bachelor of Applied Arts and Sciences, while its College of Arts and Sciences awards undergraduates a Bachelor of Arts. See Degree Options, COLL. OF ARTS & SCI., UNIV. OF PA., https://wwwcollege.upenn.edu/degree-programs (last visited Oct. 7, 2023); Beth McMurtrie, U. of Pennsylvania Says It Will Be First Ivy to Offer Online Bachelor’s Degree, CHRON. OF HIGHER EDUC. (Sept. 18, 2018), https://www.chronicle.com/article/u-of-pennsylvania-says-it-will-be-first-ivy-to-offer-online-bachelors-degree/ (stating that Penn claims its online program for a bachelor of applied arts and sciences, oriented towards adults, is first online Ivy bachelor’s degree).
C. COVID

The COVID virus swept through the United States. The results thoroughly pulverized some sectors of the economy, while others benefited. In the aggregate, however, the economy suffered greatly in the United States and around the globe.

Given that there are thousands of colleges in the United States, the responses of colleges to the COVID crisis were sure to take many forms. Some colleges previously operating under the residential model shifted precipitously to the remote model, while other colleges continued with in-person instruction.


57 See Undergraduate Enrollment, NAT’L CTR. FOR EDUC. STAT., https://nces.ed.gov/programs/coe/pdf/2022/cha_508.pdf (last visited Oct. 7, 2023) (“The number of undergraduate students exclusively enrolled in distance education courses was 186 percent
The policies of a particular college in the spring semester of 2020, when COVID burst on the scene like a plague of frogs to occupy every nook and cranny of social space, may well have been different from policies in place in the fall semester of 2020, when acclimation and adaptation evoked a more familiar plague along the lines of, say, a locust infestation. Some colleges eliminating in-person instruction refunded some tuition, while others did not. An apparently greater number of colleges refunded dining and residential charges—services for which colleges charged separately from tuition and from each other, and which mandatory remote instruction clearly rendered useless.

For colleges that abandoned in-person education, the commonalities were extensive:

[H]igher education institutions pivoted to remote instruction and closed their campuses to all but essential employees. College

higher in 2020 than in 2019”); see also id. (in fall 2020, “44 percent (7.0 million) of all undergraduate students exclusively took distance education courses”); Jane Nam, How Has COVID-19 Affected College Students?, BEST COLLS. (Mar. 10, 2023), https://www.bestcolleges.com/research/how-has-covid-affected-college-students/ (“[o]ver 1300 colleges canceled in-person classes or moved to online learning in spring 2020”); id. (by fall 2020, 44% of institutions fully online and 21% more not primarily using in-person instruction); Andrew Smalley, Higher Education Responses to Coronavirus (COVID-19), NAT’L CONF. OF STATE LEGIS., https://www.ncsl.org/education/higher-education-responses-to-coronavirus0covid-19 (last visited Oct. 7, 2023) (“The outbreak of the coronavirus has become a major disruption to colleges and universities across the country, with most institutions canceling in-person classes and moving to online-only instruction”). Although the sources rhetorically emphasize colleges that changed to exclusively online instruction, the statistics make clear that a substantial number of colleges did not do so.

See also cases cited supra note 49 (describing cases in which students seek portion of unrefunded tuition). See supra note 16 (“most institutions offered refunds to students who had to vacate dorms in the spring”). For reports of refunds from specific colleges, see Emma Whitford, Coronavirus Closures Pose Refund Quandary, INSIDE HIGHER EDUC. (Mar. 12, 2020), https://www.insidehighered.com/news/2020/03/13/students-may-want-room-and-board-back—after-coronavirus-closures-refunds-would-take (Harvard College and Smith College to offer pro-rated refunds of room and board); Kelly Hinchcliffe, Many NC Colleges Refunding Housing, Dining Fees Due to Crisis, CAROLINA PUB. PRESS (Apr. 13, 2020), https://carolinapublicpress.org/30280/many-nc-colleges-refunding-housing-dining-fees-dueto—crisis/ (reporting that several North Carolina colleges, both public and private, are refunding, or plan to refund, unused dining credits and pro-rated housing fees).
leaders undertook the difficult task of determining how to respond to the crisis, including how to protect their affiliates from illness . . . and how to continue providing education and working to fulfill their organization’s mission in what had abruptly become a new and very different “normal.” At the same time, these leaders were faced with mounting costs and revenue losses associated with the pandemic due to moving instruction online, threatened budget cuts by state government, and loss of revenues from housing, food services, and conference space rentals.62

In their public communications, colleges emphasized their desire to protect the public health,63 including attention to data, public guidelines, and masks and social distancing.64 They did so despite the financial risks to the institutions from their decisions.65

Clearly, if a college charged students the same tuition for the vastly different amount of in-person instruction that they received before and during the crisis, then students received a different education during COVID than before COVID. Assuming that in-person instruction is more valuable than remote instruction66 then the students also received less value for their tuition dollars during COVID than before COVID. Deprived of these benefits, students at colleges that issued no refunds sued in large numbers.67

As the balance of this Article argues, these students might, but will not necessarily, recover some monetary compensation for the shortfall in in-person instruction that they suffered.68 Of course, students may find their expectations for their collegiate experience unmet in any number of ways. A “rock star” professor69 may disappoint in the classroom, may be on leave, may have no slots

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62 See supra note 10, at 2. The authors imply that all institutions changed to wholly remote instruction, but this is untrue. See supra note 57.
63 A study of op-ed pieces by college presidents early in the pandemic concluded that “the most common theme . . . was promoting public health” Natow, supra note 10, at 7. In deciding whether to re-open campuses in the fall of 2020, public health was an important rationale for both those who re-opened and those who remained closed. Id.
64 See Michael O’Shea, Leping Mou, Lu Xu & Ross Aikins, Communicating COVID-19: Analyzing Higher Education Institutional Responses in Canada, China, and the USA, 35 HIGHER EDUC. POL’Y 629, 640–41, 645 (2022). The study examined roughly 230 communications from nine U.S. colleges to their students. Id. at 633 (Table 1). The sample consisted of three doctoral-awarding universities, three selective liberal-arts colleges, and three multi-campus community colleges. Id. at 640.
65 Natow, supra note 10, at 8–9.
66 See supra note Error! Bookmark not defined.; supra text accompanying note 51.
67 See supra notes 4, 5 (discussing litigation by students).
68 See infra Sections III–IV.
69 The term seems generally to denote some combination of campus renown and exciting lecture classes. See Decca Aitkenhead, Michael Sandel: “We Need to Reason About How to Value Our Bodies, Human Dignity, Teaching and Learning,” THE GUARDIAN (May 27, 2012), https://www.theguardian.com/books/2012/may/27/michael-sandel-reason-values-bodies
A student may find that the parties at a chosen “party school” are lame, or that Greek life leads neither to life-long philiæ with other members of the house nor to short-term erōs with those who attend its parties, or that a powerhouse football program fails, in every year of a student’s matriculation, to yield a berth in the Bowl Championship Series (BCS). These disappointments, however, seem unlikely to be actionable. The entire absence of in-person instruction, however, differs from these other disappointments in the sharpness of the change from plentiful in-person instruction to no in-person instruction, the magnitude of the loss, and the centrality of instruction to the educational experience. As this Article argues, the provision of in-person instruction is sufficiently important that its delivery is a binding, formal promise made by a college to its students, and the college owes those students compensation if it delivers no in-person instruction; and the value to the student of in-person instruction is of sufficient gravity to sustain a claim of unjust enrichment when such instruction entirely disappears.

No consensus has emerged among the courts hearing such cases. Some courts have endorsed the students’ claims to recompense, while others have not. Some courts have focused on theories of breach of contract; some courts have considered unjust enrichment to be the pivotal claim; some courts have ruled that the doctrine of “educational malpractice” bars both types of claims. No scholarly work of any depth or breadth has emerged. This Article undertakes to improve this state of affairs by undertaking a comprehensive analysis of these issues. First, however, this Article sets out a prototypical fact pattern for the sake

(asserting that Sandel, who teaches at Harvard, “is often described as a rock star professor, such is the excitement his lectures command” and that one of his courses is “said to be the single most popular university course on the planet”); Harvard “Rock Star” Professor Returns to Alma Mater, BRUNSWICK SCH. (Feb. 8, 2019), https://my.brunswickschool.org/news-detail?pk=1003403 (describing David Malan, subject of headline, as teaching Harvard College’s largest class and edX’s largest course).

Attaching the phrase “rock star” to indifferently attired academics who spend most of their time penning scholarly tomes may strike some as anomalous. See id. (observing that “[i]n person, there is nothing terribly rock star about” Sandel). I am unaware of any “rock star” professors who trash their offices, light their lecture notes on fire, or tour across the country filling sports arenas with their fans. One might also note that thinking a “rock star” is the apotheosis of public admiration may imply that the university personnel promoting the metaphor are not quite au courant, since their student body is more likely to idolize tech billionaires like Elon Musk or Jeff Bezos than octogenarian actual-rock-stars like Mick Jagger or Paul McCartney.


My colleague George Cohen encouraged me to distinguish an absence of in-person instruction from lesser disappointments, and he provided me with some examples less floridity described than those set out here.

See infra Section III.B.1 (contractual promise); infra Section III.A.1 (unjust enrichment).

See supra notes 4, 5 (discussing litigation by students).

See infra Section III.B.1 (contractual promise); infra Section III.A.1 (unjust enrichment); infra Sub-section III.C (educational malpractice).
of making this Article’s assumptions transparent and its later exposition more economical.

D. A Prototypical Fact Pattern

Some of the differences from college to college, and among students at a given college, are relevant to any litigation for breach of contract or unjust enrichment. The amount of a student’s tuition is one obvious variable. The percentage of pre-COVID, face-to-face instruction is another factor that may vary from college to college. The amount of intra-COVID, face-to-face instruction may vary not only from college to college but even, for a given college, from semester to semester. For ease of exposition, however, the Article sets out a prototypical situation that is both representative and sufficient for purposes of this Article:

Imagine a time several years ago. An accredited, four-year college charges a substantial tuition to a large fraction of its students. (Some students receive scholarships and so pay little or no tuition.) This institution offers an education to its students in which instructors are predominantly present in the same physical space as students (“in-person instruction”75). Many students live in communal housing, and many students eat in communal dining halls.

Suddenly, a hitherto-unknown, potentially lethal, contagious disease (“COVID”) arises at the college’s campus. In response, the college cancels all in-person instruction and quickly undertakes successful efforts to modify all of its instruction so that the students and their instructor do not occupy the same physical space (“remote instruction”). Instructors at the institution either undertake their (remotely) interactive meetings in pursuit of (remote) learning, or they abandon all pretense of interactive instruction and simply present recorded material to the students for consumption at the time and place of the students’ choosing. The breadth and depth of course offerings, however, continue as before; students accumulate credits as before; and students graduate according to the same criteria as before. (Students generally receive grades as before, although some or all courses may employ pass/fail grading.)

75 One might call various versions of these sessions “classroom instruction” or “labs” or “practica” or “tutorials.” Some classroom instruction might be “lectures,” while others are “seminars.” For our purposes, the terminology is not important, so long as the students gather on a schedule in a physical place also occupied by an instructor who leads the proceedings.
In a subsequent semester, the institution subsequently restores its in-person offerings but allows a student instead to receive remote instruction ("hybrid instruction").

After a time, the institution returns to exclusively in-person instruction for students to whom it grants a degree.

Throughout the periods of remote and hybrid instruction, the college continues to collect the full amount of the tuition previously charged for in-person instruction and denies any requests for any tuition refunds of any amount.

There are many situations that are not part of this example and that this Article chooses not to treat. Among colleges, this Article concentrates on what one might call “four-year” schools, even though community colleges and “junior” colleges account for a significant percentage of students undertaking higher education.\textsuperscript{76} This Article examines only colleges, not secondary schools or graduate schools or professional schools. This Article does not generally distinguish between private and public universities in the not-for-profit sector of higher education.\textsuperscript{77} This Article generally omits discussion of for-profit colleges, although this Article does sometimes compare events or fees in for-profit colleges with those in not-for-profit institutions.

* * *

This Part recounted the history of collegiate education in the United States. Once upon a time, all colleges were residential colleges offering only in-person education. Recently, some colleges have offered some degree of remote instruction. Very recently, COVID drove many—but hardly all—colleges to offer exclusively online instruction. Although colleges and students are all special and different, this Article has set out—and will shortly analyze—a


\textsuperscript{77} One salient difference between public and private colleges is that governmental immunity may protect what are, after all, often called “state schools.” Edward W. Taylor, A Re-Examination of Sovereign Tort Immunity in Virginia, 15 U. RICH. L. REV. 247 (1981) (arguing that courts make “hair-splitting” decisions about tort immunity); see Rector & Visitors of the Univ. of Va. v. Carter, 591 S.E.2d 76, 77–79 (Va. 2004) (noting that the state has, by statute, waived its sovereign immunity in tort cases but holding that waiver does not extend to agencies of the state, i.e., state university’s hospital). Virginia, however, has waived all sovereign immunity against suits for breach of contract. See Bell Atlantic-Va. v. Arlington Cnty., 486 S.E.2d 297, 298 (Va. 1997) (citing Jenkins v. Cnty. of Shenandoah, 436 S.E.2d 607, 609 (Va. 1993)). See generally Editors, Educational Malpractice, 124 U. PENN. L. REV. 755, 801–02 (1976) (discussing differences between policy considerations for public and private schools).
prototypical situation in which a college campus threatened by COVID changes from in-person instruction to remote instruction, and then to a blend of in-person and remote instruction, and then returns to offering only in-person instruction. This Article does not much otherwise distinguish among types of colleges nor among colleges of the same type, despite their many potentially relevant differences.

III. COLLEGES, CONTRACTS, AND RESTITUTION

For the disgruntled student, there are two legal avenues that might bring some recompense. Both flow from the incomplete exchange of full tuition for only some portion of the promised, in-person instruction.

First, under the law of equity, a party, i.e., the college, that receives something of value from another party, i.e., the student, should either reciprocate with something of roughly equal value or should return the original item, or its monetary equivalent, to the original possessor. Tuition is plainly valuable, and in-person instruction is presumably valuable. A college failing to provide in-person instruction in exchange for full tuition, under this reasoning, owes the student something in restitution.

Second, under the law of contracts, a party, i.e., the college, failing to keep its commercially oriented promise owes the disappointed party, i.e., the student, the monetary equivalent of the unkept promise’s value. A college that fails to keep its promise to provide in-person instruction, under this reasoning, owes the student the monetary equivalent of the undelivered, in-person instruction.

Causes of action sounding in restitution and in breach of contract both have a lengthy history. A contract, of course, requires two parties to exchange promises with one another. Suits for unjust enrichment, in contrast to contractual claims, need not stem from promises, or indeed from any pre-existing relationship, between two parties. Nonetheless, in the context of colleges and

78 See supra text accompanying note 10 (describing educational inferiority of remote instruction). But see infra Sub-section IV.B.2.ii. (arguing that market-oriented valuations of in-person instruction suggest it may provide no more value than remote instruction).


80 A suit for unjust enrichment may also lie between two individuals with no prior relationship, as when a person mistakenly sends a check, intended for someone known to the check-writer, to a stranger. See Emily Sherwin, Reparations and Unjust Enrichment, 84 B.U. L. Rev. 1443, 1449 n. 33 (2004) (noting that there are “many forms of mistaken payment of money for which restitution is commonly available”). The suit between strangers is not relevant here, however, since students and colleges have an ongoing relationship. This relationship also means that, if a valid contract bars recovery for the failure to provide in-person instruction, then students will not recover in
COVID, a suit in restitution does involve such a relationship: The college (allegedly) enriches itself unjustly by keeping the entirety of its tuition charges while failing to provide in-person instruction to the student, and the student seeks the disgorgement of an amount equal to the difference in value between full tuition and the lesser value of services actually received.

Both causes of action reflect an aspect of the general legal outcome that, if one party to an agreement keeps its promises but the other does not, then the non-performing party owes the performing party some money in recompense. The compensation may flow from the validation of contractual (“expectation”) interests in a suit for breach of contract, or it may flow from the validation of equitable (“restitution”) interests in a suit at law for breach of contract or a suit at equity for unjust enrichment, but compensation will flow in either event.

There are, of course, potential defenses to either category of claim, which this Article examines as well.

The facts and potentially relevant law in the situations under examination here generate many potentially applicable arguments, which range across the legal landscape from contracts to equity and even, occasionally, to tort. Additionally, because the cases have thus far largely involved the resolution of assertions by colleges that the students’ complaints have failed to state a claim for relief, a host of more fact-intensive features of that landscape have gone.

81 The seminal analysis of the idea that contracts law protects one or more of three kinds of “interests”—the “expectation” interest, the “reliance” interest, and the “restitution” interest—is Lon Fuller & William Perdue, Jr., The Reliance Interest in Contract Damages, 46 YALE L.J. 52 (1936); see also James Gordley, The Myth of “Expectation Interest,” 52 U. PAC. L. REV. 77, 78 (2020) (calling Fuller-Perdue article “one of the most influential law review articles ever written about contract law,” although disputing some of its conclusions). Expectation interests generally validate the expectation of the non-breaching party that the contract would be performed, while reliance and restitution interests seek to return the non-breaching party to the status quo ante pactum.

82 Somewhat confusingly, a suit for breach of contract may also lead to an award denominated as “restitution.” See Fuller & Perdue, supra note 81, at 71–73. This road to recovery involves demonstrating the elements of a breach of contract but pursuing damages calculated as returning the disappointed party to the actual status quo ante pactus, rather than placing the disappointed party in the financial equivalent of a hypothetical, post-performance world. See infra Part IV.

Just as one may style a suit, and calculate the remedy, in restitutionary terms even though such suits might also proceed in the absence of a contract, the third commonly elucidated contractual interest, reliance, may also be the basis of an award for a cause of action grounded either in a contract or, absent a contract, in promissory estoppel. See RESTATEMENT (SECOND) OF CONTS. § 90 cmt. a (AM. L. INST. 1981) (discussing numerous appearances of reliance in the law).

83 The Article generally treats causes of action for breach of contract as validating only the expectation interest, while treating causes of action for unjust enrichment as offering validation of the restitution interest that, in this case, may overlap with the expectation interest. See infra Section IV.B. In their full complexities, both causes of action offer many variations on potential awards of damages.
unexplored by courts. This Article, unconstrained by the incremental nature of litigation, examines all of the claims and defenses potentially at issue in the contest between students and colleges over unprovided, in-person instruction.

This Part takes up the equitable claim of restitution, including potential defenses to such a claim, before examining the possibility of contractual claims, including potential defenses against them.

A. Restitutionary Claims

1. The Affirmative Claim for Restitution

The basic case for liability stemming from unjust enrichment is straightforward. Students provided colleges with full tuition but did not receive a full panoply of in-person instruction. Some tuition therefore bought the students nothing. This situation presents the fundamental grounds for liability for restitution for unjust enrichment: “‘one person should not be permitted unjustly to enrich himself at the expense of another, but should be required to make restitution of or for property or benefits received . . . where it is just and equitable that such restitution be made.’” With respect to liability, the core of the case could hardly be simpler.

2. Defenses to a Restitutionary Claim

Although the prima facie case for restitution is clear, there are defenses to such a claim. Given that many style the associated cause of action as “unjust enrichment,” it is unsurprising that one precondition for recovery is that the retention of the claimant’s property must create an injustice. If the students actually paid full tuition and otherwise comported themselves in good faith, such as by attending online classes and turning in assigned work of reasonable quality, then there seems little reason to suspect “unclean hands,” or other behavior by the students that would undermine their claim to an injustice.

A college, however, might attempt to convince a court that the college’s own behavior was sufficiently exemplary that it has effectively earned the right to keep the relevant tuition. Perhaps, a college can show that its response to COVID was perfectly reasonable, even heroic, in light of the rapid spread of

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84 The appellate cases, partly because they involve only motions for failure to state a claim, have thus far focused on only two issues involving agreements between student and college. See cases cited supra note 5. First, is there an express or implied-in-fact contract between college and student that promises in-person instruction? Second, does some agreement, or the doctrine of educational malpractice, insulate colleges from liability by giving them the right to change their pedagogical methods as they wish? As this Article shows, there are many opportunities for missteps in the analysis of the relevant facts and law, and courts do not always seem to tread carefully.

contagion in society at large and the uncertainty surrounding both COVID’s lethality and what countermeasures might succeed. Perhaps the college selflessly and successfully pivoted from in-person to remote instruction, rather than shutting down operations, so that the students could continue their education. Administrators presumably worked long hours; professors struggled with unfamiliar software and a foreign style of instruction; and, custodial staff implemented rigorous and time-consuming cleaning protocols. The colleges might then argue that it would create an injustice, not repair one, for the college to disgorge the portion of tuition associated with unprovided, in-person instruction.

Finally, colleges might avoid restitutionary liability by asserting that a valid contract between student and college relieves the college of the need to provide in-person instruction in the exigent circumstances presented by COVID’s impacts. If a valid contract resolves the obligations of the parties, then the terms of that contract override any assertion of unjust enrichment. The success of a restitutious claim then becomes a matter of either contractual interpretation, which this Article takes up in the next section below, or a matter of invalidating the contract between student and college, which this Article takes up presently.

3. Invalidating Student-College Contracts to Preserve a Suit in Restitution

This Article will undertake a lengthy examination of the requirements for, and a college’s defenses against, a putatively valid agreement between a student and a college involving the exchange of tuition for education. Here, this Article sketches out two contractually oriented defenses that a student might assert to avoid enforcement of such an agreement and, thereby, in a situation where the contract would otherwise block a suit for restitution, proceed with a suit for unjust enrichment. One defense involves “mutual mistake,” while the other asserts “innocent misrepresentation.” Neither approach seeks to assign blameworthiness. Both approaches offer the students a colorable, but hardly unassailable, method for eventually reaching a recovery in restitution. Both involve variations on the traditional formulations of the doctrines that a court may find unduly convoluted. Students who eschew these possibilities, however,
would concede to the colleges any case in which the college could show that the contract between student and college allocated to the student the risk that unusual events might lead to cancellation of in-person instruction.

i. **Mutual Mistake**

“Mutual mistake” is a doctrine that voids an agreement made when both parties are mistaken as to a material or fundamental fact regarding the transaction. The classic case is the sale of a cow, thought by both parties to be barren, but in fact, fertile.91 The difference in value of the good between its assumed and its actual state was roughly an order of magnitude.92 Claims for mutual mistake must involve the state of the good at the time of transaction,93 so students cannot claim that they and the colleges were mistaken as to future performance regarding in-person instruction, nor can students assert that both the student and college failed to anticipate COVID. The only viable factual assertion to support a claim of mutual mistake would be that, at the time of making their agreement and thus a time prior to COVID, the parties were both mistaken about the value of in-person instruction. Both parties believed that in-person instruction was a highly valuable part of the collegiate experience, but events proved its value to be minimal.94 Such an argument presents an obvious risk to the students, of course. If in-person instruction is not a cent more valuable than remote instruction, for example, then the students have argued themselves out of any recovery in damages. Striking the proper balance between arguing that the parties over-valued in-person instruction, on the one hand, and that the failure to provide in-person education harmed students, on the other hand, will be a challenging balance for the students to strike.

The mis-valuation of in-person education would serve the role that bovine fecundity played in the classic case of mutual mistake. Unprovided, the potential for in-person education reduces the value of that side of the exchange, just as barrenness would have reduced the value of the cow.95 The potential for

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92 *Id.* at 920, 923 (cow sold for $80 when market value of fertile cow was between $750 and $1000).
94 On the argument that market-oriented measures show in-person instruction has no greater value than remote instruction, see infra Section IV.B.
95 Possibly, the students could argue that in-person education proved to have *less* value than both parties had anticipated. This undercuts the claim of materiality, see infra Sub-section III.A.3.i, and, if the students are to be consistent, also reduces their recovery in restitution compared to an assertion that in-person education has great value. If the alternative for the students
in-person education is one, but not the only, component in one side of the exchange, so the students would need to show that the mistake was material to the transaction as a whole.\textsuperscript{96}

The colleges have some counterarguments. Some have asserted that mutual mistake is only available when the contractual exchange has yet to occur.\textsuperscript{97} Here, the college is in possession of the tuition, and the students are in possession of whatever education they did receive in exchange.

Alternatively, the college might assert that the difference in value between an in-person education and a remote education is much smaller than the order of magnitude between the value of a barren cow and a fertile cow. If the two modes of education were roughly equivalent, for example, then there may have been a mistake of fact, but that mistake would presumably not be sufficiently dramatic to justify unwinding the transaction. This Article discusses the valuation of in-person education much more extensively below,\textsuperscript{98} but the college would not be foolhardy, as a matter of litigation strategy, to attempt to show in-person education is of insufficient value to allow the application of mutual mistake.\textsuperscript{99} Furthermore, in contrast to the clashing incentives facing students, a college can argue to its consistent advantage that in-person education is not particularly valuable in both the liability \textit{and} the damages portions of the lawsuit.

Finally, the college might argue that the students are attempting to bend the doctrine beyond the convolutions that the doctrine can absorb. The accurate valuation of in-person education required the occurrence of a \textit{future} event, i.e., COVID, while the colleges can argue that mutual mistake must involve an \textit{already-extant} condition, such as the fecundity of a cow at the time of sale. One may not convert the doctrine, the college would argue, into an excuse available

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\textsuperscript{96} For a discussion of materiality, see \textit{infra} Section III.A.3.iii.

\textsuperscript{97} The seller in \textit{Sherwood} still had possession of the cow when the court heard the case. \textit{Sherwood v. Walker}, 33 N.W. 919, 920, 923 (Mich. 1887). On the general point that how far the exchange has proceeded is important, see \textit{Restatement (Third) of Restitution and Unjust Enrichment} § 34 cmt. e (Am. L. Inst. 2011) (“Barriers to relief become nearly insuperable once the exchange has been fully performed.”).

\textsuperscript{98} \textit{See infra} Part IV.

\textsuperscript{99} A reasonable litigation strategy might be an unwise position for purposes of public relations or institutional integrity, however. Does a prestigious residential college really want to argue that remote instruction provides just as much value as in-person instruction? Assuming that a residential college and an online-only institution have faculty of equivalent quality, then the superiority of in-person instruction (and on-campus experiences) over remote learning is precisely the feature that the residential college must use to argue that it is superior to the online-only college. If consistency matters to would-be students and positions taken in litigation become widely known, then there is a danger to a residential college in arguing that in-person instruction and remote learning are rough equivalents. The author is grateful to his colleague George Cohen for pressing the author on this point. \textit{See also infra} Section III.A.3.iii (discussing materiality of difference between in-person and remote instruction).

\end{small}
in any situation in which the parties were mistaken about how the future would unfold. To allow mistakes about the future to invalidate an agreement would open virtually any contract to invalidation.\(^\text{100}\)

If the contract by its terms prevents the students from claiming that the college owes them something for failing to provide in-person instruction, then the students must succeed in voiding the agreement or fail to recover on restitutionary grounds. If the students succeed in a claim for mutual mistake, however, then any contractual limitation on their recovery falls, and the claim for restitution can proceed apace.

\textit{ii. Innocent Misrepresentation}

The students might also assert that the colleges made an “innocent misrepresentation” that allows the students to void the contract.\(^\text{101}\) An innocent misrepresentation involves a false statement,\(^\text{102}\) made with negligence, but without malice or intent to deceive, about a material portion of the exchange.\(^\text{103}\) The misrepresentation, as in the discussion of mutual mistake, would be with respect to the value of an in-person education. The evidence of the overall misrepresentation would be the myriad of representations in brochures and websites in which a college portrays itself as a site of valuable, in-person education. Its materiality, as with mutual mistake, would depend on the relevance of that valuation to a student’s decision to matriculate. As with mutual mistake, the colleges can plausibly, though not inarguably, assert that an excusing misrepresentation must be about facts known to the speaker at the time of the misrepresentation, and that the improper valuation of in-person education was apparent (to both parties) only in the future, after COVID had reared its spherical, spiky head.

As to the negligence of the misrepresentation, the argument would be that colleges carelessly presented in-person education as valuable when they should have been more cautious, either by not making the representation in the first place or by checking their facts more carefully.

\(^\text{100}\) The author’s colleague George Cohen emphasized to the author this aspect of the transaction and its implications.

\(^\text{101}\) For the conclusion that it is “well recognized that fraudulently obtained contracts are voidable as a matter of law,” see Steven J. Tourek, Thomas H. Boyd & Charles J. Schoenwetter, \textit{Bucking the “Trend”: the Uniform Commercial Code, the Economic Loss Doctrine, and the Common Law Causes of Action for Fraud and Misrepresentation}, 84 \textit{IOWA L. REV.} 875, 882 (1999). The representation here is innocent rather than fraudulent, but the outcome is the same.

\(^\text{102}\) As to the existence of a statement or representation of the value of in-person instruction, see \textit{infra} Sub-section III.B.1.i.

\(^\text{103}\) On innocent misrepresentation generally, see Redgrave v. Hurd, 20 Ch D 1 (1881), a leading English case. In the United States, see Hoffman v. Connall, 736 P.2d 242 (Wash. 1987); Barrer v. Women’s Nat’l Bank, 761 F.2d 752 (D.C. Cir. 1985).
iii. **Issues Common to Mutual Mistake and Innocent Misrepresentation**

This Article now discusses features common to claims of both mutual mistake and innocent misrepresentation: materiality, the effect of voiding the agreement between student and college exchanging tuition for in-person instruction, and the degree of informational asymmetry between the parties with respect to the triggering facts.

In both mutual mistake and innocent misrepresentation, the court must determine that the mistake or misrepresentation was material to the agreement. The question with respect to materiality is easy. Institutions plainly used their representations about in-person instruction to encourage students into attendance. Considering competition from online-only institutions, such a representation makes attendance at any institution offering in-person instruction much more appealing. (The house-bound and anti-social might disagree, but we assume that they are much in the minority in the relevant audience.) If we take account of competition from other institutions offering extensive in-person instruction, then a given institution’s emphasis on its own provision of classrooms and labs with instructors and other students also seems obviously intended to encourage students to pick the institution making the representation. To think otherwise is to imagine that colleges spout information about class size, student-faculty ratios, tutorials, and “intimate” academic settings for no particular reason.

In both mutual mistake and innocent misrepresentation, a court that gives effect to the defense allows the voiding of a contract between two parties that are blameless (for mutual mistake) or merely negligent (for innocent misrepresentation) with respect to the factual error. Given the relative lack of blameworthiness, courts may be sensitive to the comparative informational advantages of the parties. If a party is in a vastly superior position with respect to checking the veracity of an assertion, then perhaps that party should not be able to avoid enforcement of the agreement on grounds related to the error.\(^{104}\)

This requirement, if it is one, should present no problem for the students, however. The college is clearly the party with superior information about the value of in-person instruction. Colleges, with decades or even centuries of experience in the classroom, obviously possess much more information helpful in valuing in-person education than the students, who have at most a few semesters of collegiate experience. Colleges that had no experience with online education might be no better off than students in determining the value of remote instruction, but on balance, one can assume that colleges will better be able to

\(^{104}\) For a discussion of informational asymmetries in the context of mutual mistake, see Janet Kiholm Smith & Richard L. Smith, *Contract Law, Mutual Mistake, and Incentives to Produce and Disclose Information*, 19 J. LEGAL STUD. 467 (1990).
value modes of instruction than students.\textsuperscript{105} As to the value of in-person instruction after graduation, colleges track the success of their graduates. Students have access to lists of prominent alumni and to some data about employer preferences, but a student’s data about post-graduation success seems likely to fall short of a college’s information. Colleges therefore have a strong advantage in valuing in-person instruction as it improves the college experience and a moderate advantage in valuing in-person instruction as it improves the post-collegiate experience.\textsuperscript{106} The informational advantage regarding the value of online instruction may be slight for colleges that previously offered only in-person instruction, but a significant advantage regarding in-person instruction and a minimal advantage regarding online instruction still yields an informational advantage for the colleges. These asymmetries in favor of the colleges should satisfy informational concerns about allowing the students to claim mutual mistake. These informational asymmetries favor students claiming innocent misrepresentation as well, but even innocent misrepresentation requires negligence, and a mere asymmetry does not automatically give rise to negligence, so the outcome of any claim for innocent misrepresentation will depend upon the particulars of each college’s situation.

\textit{B. Breach of Contract}

This section of this Article argues that the contract between student and college\textsuperscript{107} likely contains a promise of in-person instruction, and that the only plausible defense for a college to interpose between students and their recovery is legal impossibility.

1. A Contract Promising In-Person Instruction

Does the contract between collegian and college, which clearly exists at some level of specificity, include a promise of in-person instruction? This issue has troubled some courts.\textsuperscript{108} The relevant judges, it would appear, have never thought about how colleges have offered in-person instruction for decades, have never been on a campus tour, have never visited a college’s website, and have never observed the strong distinction that many colleges draw between paid-and-in-person instruction, on the one hand, and free-and-remote-instruction or

\textsuperscript{105} My colleague, Andrew Hayashi, brought to my attention the possibility that colleges without experience in remote instruction might know little more about its value than students.

\textsuperscript{106} This Article does not claim that such valuation is simple. Indeed, Part IV shows that the valuation is complex. This Article claims only that colleges have a relative advantage in valuing in-person education compared to their students.

\textsuperscript{107} This Article assumes that some valid contract exists between students and colleges. As in the cases, the focus here is on whether that contract includes a promise of in-person instruction and on defenses that the colleges might use to void the contract.

instruction without degree credit, on the other hand. Courts have apparently
failed to notice that colleges afflicted by COVID treated the absence of in-person
instruction as a temporary and highly undesirable situation.\(^{109}\) Additionally, a
variety of situations useful in contractual interpretation—course of performance,
course of dealings, and usage of trade—all imply that the payment of tuition
entitled the student to in-person instruction.

\textit{i. Express Statements by the Colleges}

The author has children who attended college in the 2000s, and thus, like
any “good” parent, the author has been on numerous campus tours. The glib,
backwards-walking guides universally stressed in-person instruction as the
predominant, indeed implicitly exclusive, mode of instruction. Training manuals
for tour guides, which should be available as evidence, are likely to show that,
from the very first impression that a would-be student might receive of a college,
the institution of higher education seeks to impress the potential matriculant with
the breadth and depth of in-person instruction. The remotely offered marketing
of colleges also emphasizes the in-person nature of education upon actual arrival.
Collegiate websites never display a student parked in front of a computer, with
an eerie blue glow illuminating the happy face of a student receiving remote
instruction. The marketed, and thus at least implicitly promised, experience is
always an illustration of a classroom or lab in which we simultaneously see an
instructor teaching apparently enraptured, or at least engaged, students. To take
an example of verbal as opposed to photographic description, Yale’s website
describes, even now, an “immersive” and an “intimate” academic experience,\(^{110}\)
which hardly seems an accurate description of endless Zoom sessions plagued
by intermittent connectivity\(^{111}\) and a lack of student interest.

One might also note the glaring contrast between those colleges that
promote online courses when such offerings are free of charge but do not tout
the remote mode of instruction when students are actually paying the college to

\(^{109}\) \textit{See supra} text accompanying note 10.

\(^{110}\) \textit{Undergraduate Study}, YALE UNIV., https://www.yale.edu/academics/undergraduate-study

\(^{111}\) \textit{See} Justin Krug, \textit{Zoom School Sucks: College Life in a Pandemic}, CHAPMAN & CO. BLOG
(May 5, 2021), https://www.chapmanandcompany.co/blog/zoom-school-sucks (discussing lack of
engagement, at-home distractions, internet problems, privacy concerns, and inability of “[e]ven the
most Zoom proficient professors” to “replicate the superior learning experience one gets while
physically in the classroom”); \textit{see also} Editorial Board, \textit{What We’ve Learned From One Year of
Zoom University}, THE GW HATCHET (Mar. 8, 2021, 12:14 AM),
https://www.gwhatchet.com/2021/03/08/what-weve-learned-from-one-year-of-zoom-university/
(“If we have learned anything from the past year, it’s that Zoom University sucks”); Ana
Pietrewicz, \textit{Online Classes Can Have an Impact on Mental Health: Long Hours on Zoom Can Be
classes-can-have-an-impact-on-mental-health/ (“If there is one thing college students nationwide
can agree on, it’s that Zoom classes suck.”) (lede).
obtain a degree. Some top-flight institutions brag about the ability of the unpaying customer to receive online instruction, sometimes even with some interactivity or self-paced examination involved. (These offerings, as it turns out, rarely prove sufficiently engaging for the non-paying, remote students to finish them, but the colleges offer them nonetheless.) The colleges do not, however, offer free, in-person instruction, even to locals for whom lodging would not be an issue. Paying customers receive the intimate, immersive, engaging, and in-person experience that the tour guides and websites represent. Non-paying customers do not. For colleges that operated before COVID on the basis of exclusively in-person instruction, there could hardly be a clearer demonstration of what colleges intend as their mode of instruction for students with whom they make a contract exchanging tuition for educational services.

If one required further proof, however, one could find it in the fact that only COVID led to large-scale, remote instruction by institutions with a long history of in-person instruction, and that those institutions have treated remote instruction as an embarrassing deviation to be banished back into the attic at the earliest opportunity. For years and years, or in the case of some institutions even for centuries and centuries, students received exclusively in-person instruction. Colleges have not over the years mandated some contractually promised, varying mix of modes of instruction, with one year at 80% in-person instruction, the next at 50%, the next at 70%, and so on. These colleges offered exclusively in-person instruction and then—wham!—COVID hit and they offered exclusively remote instruction; as the crisis eased, they then undertook some mongrel’s mix of in-person and remote instruction. As COVID receded and effective vaccines became widely available, these schools did not evince great enthusiasm for a continuation of substantial remote instruction. Certainly, there is little evidence that colleges, relieved of the burdens of COVID, will double down with online pedagogy and proceed from hybrid instruction to fully remote instruction. Their general tone seems to be that they have proceeded from what was, in their view, the unfortunate necessity of remote instruction, through the intermediate stage of

112 Some colleges offer students the opportunity to choose between in-person and remote instruction while the students are in residence, and some colleges have set up online-only degree programs in parallel with residential degree-granting programs. See supra text accompanying note 36–48. These colleges are less subject to the argument by students that the colleges themselves plainly consider online instruction to be inferior to in-person instruction.

113 See Gallagher & Palmer, supra note 49 (discussing low completion rates for online courses); See McMurtrie, supra note 51 (discussing low completion rates for online degrees).

114 See supra note 54 (one must qualify the notion of “exclusively in-person instruction” with the fact that individual instructors may have chosen to offer some portion of their pedagogy with online resources, with students free to choose courses based on the amount of such instruction. The difference between pre-COVID and post-COVID instruction in such instances is that the administration mandated exclusively remote instruction during the COVID crisis).
intermediately remote (i.e., hybrid) instruction, and that they will now be able to return to the norm of entirely in-person instruction.\footnote{See infra note 211 (discussing Princeton’s attitude towards various modes of instruction). As with the pre-COVID era, the post-COVID era will see some institutions that enthusiastically offer credit towards undergraduate degrees in the form of both in-person and remote instruction. See supra text accompanying notes 36–48 (describing varying proportions of in-person and remote instruction among different institutions, including some that offer both in-person and online learning to resident students). The arguments of this paragraph do not apply to those institutions that have offered online instruction for some time, just as arguments based on the provision of free remote instruction but only for-fee in-person instruction, see supra text accompanying note 113, do not strictly apply to them.}{115}

\textit{ii. The Past as Prologue: Course of Performance, Course of Dealings, and Trade Usage}

To undertake a related analysis at a more granular level, one may note that contract law includes many doctrines in which, despite textual ambiguity, the repetition of performance leads to a contractual interest in that repeated performance.\footnote{U.C.C. § 1-303(a) (A.M. INST. & UNIF. L. COMM’N 1990) (defining course of performance as “sequence of conduct between the parties to a particular transaction” with repeated occasions for performance and acquiescence to conduct; see Nanakuli Paving & Rock Co. v. Shell Oil Co., 664 F.2d 772, 795 (9th Cir. 1981) (“Express terms . . . do not constitute the entire agreement, which must be sought also in evidence of usages, dealings, and performance of the contract itself.”); see also U.C.C. § 2-208(2) (A.M. INST. & UNIF. L. COMM’N 1990) (discussing relationship for interpretive purposes of express terms, course of performance, course of dealing, and usage of trade).}{116} The “course of performance” is the rubric for such a doctrine when the parties involved are parties to the very contract at issue and when the contract at issue is the very contract with respect to which the parties performed in a particular way.\footnote{See Nanakuli, 664 F.2d at 794 (“Course of performance under the Code is the action of the parties in carrying out the contract at issue.”). References to UCC Article 1-303 are to the revised version, which were sections 1-205 and -208 in the original version. See Keith A. Rowley, The Often Imitated, But Not Yet Duplicated, Revised Uniform Commercial Code Article 1, 38 U.C.C.L.J. 195 (2006).}{117} If a party allows wildly varying payment dates within the month, that party cannot suddenly demand payment on a particular date.\footnote{U.C.C. § 2-208(1) (A.M. INST. & UNIF. L. COMM’N 1990) (discussing course of performance); see Margolin v. Franklin, 270 N.E.2d 140 (Ill. App. 1971) (holding that acceptance of half a dozen payments, each roughly ten days after contractually promised date, constituted waiver, and perhaps mutual reformation, of right to collect on original date); see also Metro Area Transit, Inc. v. Nicholson, 463 F.3d 1256, 1260 (Fed. Cir. 2006) (holding that since “the parties’ course of performance makes clear that both [parties] believed that the contract was for wheelchair patient transportation, and did not include taxi or litter patient transportation,” plaintiff lacked right to provide taxi and litter transportation).}{118} The “course of dealings” is the rubric for a custom-oriented doctrine when the particular contractual relationship is a prior (rather than contemporaneous) relationship, but the parties to both contracts are the same parties (and the text of
both contracts is similar). The “course of trade” or “trade usage” are the rubrics for a custom-oriented doctrine whether the practice is neither between the parties to the contract at issue nor involves the contract at issue, but merely the general custom of those parties engaged in a similar trade. Generally speaking, a party seeking to use custom as a means of interpreting an ambiguous contract is better off with a more immediate connection to the contract and parties at issue. Course of performance is thus the best source, followed by course of dealings, and lastly course of trade.

All three of these doctrines are likely to be relevant for COVID-era contracts between students and colleges. Because the COVID crisis arose during a single semester in the typical college’s calendar, students often began a semester experiencing in-person instruction only to face a sudden shift to exclusively remote instruction. Given that partial performance of the particular contract between the parties to that contract had occurred, the doctrine of course of performance would apply. Because in-person instruction was the predominant mode of initial instruction, the resolution of any ambiguity would favor an interpretation of the contract that promised in-person instruction. Because the COVID crisis lasted long enough to encompass multiple semesters, and later contracts were between the same parties as earlier contracts, i.e., between a particular student and college, then the doctrine of course of dealings would apply. Here, too, the customary mode of instruction in previous contracts was in person, and thus the resolution of any ambiguity would favor a promise of in-person instruction. Finally, there have, over many years, been millions of

119 U.C.C § 1-303(b) (AM. L. INST. & UNIF. L. COMM’N 1990) (defining course of dealing as “sequence of conduct concerning previous transactions between the parties to a particular transaction”); see Nanakuli, 664 F.2d at 794 (“[C]ourse of dealing consists of relations between the parties prior to signing that contract”).

120 Nanakuli, 664 F.2d at 779 (holding that trial court did not abuse its discretion in defining applicable trade at issue “as the asphaltic paving trade in Hawaii, rather than the purchase and sale of asphalt alone,” based on its reading “of the [Uniform Commercial] Code Comments as defining trade more broadly than transaction and as binding parties not only to usages of their particular trade but also to usages of trade in general in a given locality”); see Hollywood Foreign Press Ass'n v. Red Zone Cap. Partners II, 870 F.Supp.2d 881, 917 (C.D. Cal. 2012) (quoting Midwest Television, Inc. v. Scott, Lancaster, Mills & Atha, Inc., 205 Cal.App.3d 442, 451 (1988)) (stating that “industry custom binds those engaged in the business even though there is no specific proof that the particular party to the litigation knew of the custom”); see also U.C.C. § 2-208(2) (AM. L. INST. & UNIF. L. COMM’N 1990) (mentioning “usage of trade”).

121 See Nanakuli, 664 F.2d at 795 (stating that “[c]ourse of dealings is more important than usages of trade” because it involves the “specific usages between the two parties to the contract”).

122 See U.C.C. § 2-208(2) (AM. L. INST. & UNIF. L. COMM’N 1990) (setting out hierarchy as express terms, course of performance, course of dealings, and usage of trade).

123 The doctrine of course of dealings, as with course of performance and usage of trade, are tools for resolving ambiguity. If the contract is clear, then these doctrines have no place. If, for example, the college had re-drafted its offer to students in the summer between the onset of COVID in the spring of 2020 and the fall semester of 2020, and the new offer clearly allocated the risk of exclusively remote instruction to the student, then the student’s acceptance of such an offer would
students making contracts with thousands of colleges. While there may be some sub-segments of the collegiate marketplace in which the “trade” differs from one to another—as with respect to for-profit colleges offering highly specific paths of trade-oriented instruction as opposed to not-for-profit, liberal-arts colleges—there are certainly great swaths of institutions of higher education engaging in the same trade for purposes of the doctrine of trade usage. For a traditional, liberal-arts college that has offered in-person instruction in exchange for tuition payments, the resolution of the ambiguity about the mode of instruction would favor a finding that the contract between student and college included the promise of in-person instruction for those contracts in force as the COVID crisis began. All three of the custom-oriented doctrines of contracts law thus favor the inference of a promise of in-person instruction.

2. Defenses for the Colleges

The prima facie case for a breach of contract by the college therefore exists. A prima facie case is not necessarily a winning case, however. Are there any general defenses available to the college to defeat the existence of the contract or excuse its failure to provide the relevant sub-service? If the college can win this argument, that is the end of the contractually oriented arguments. Apart from a claim of legal impossibility, however, the answer is, “no.”

i. Defenses of Impossibility or Impracticability

The potential for colleges to avoid their contractual obligation to provide in-person instruction rests in doctrines excusing parties from a contract when circumstances have changed dramatically between the making of a contract and its performance date. If an event outside the control of the parties dramatically undercuts their parties’ previous expectations about the (commercial) environment in which the parties will operate, then courts will excuse both parties from performance. These doctrines generally fall under the rubrics such as “impossibility,” “impracticability,” and “frustration of purpose.” Courts require quite exceptional circumstances in order to excuse parties from their contractual obligations under these doctrines, but of course, COVID created an exceptional environment.\footnote{Even if these doctrines operate to relieve colleges of contractual liability, students may be able to sue for unjust enrichment and recover substantial sums from colleges on grounds other than contractual liability. See supra Sub-section III.A.; infra Sub-section IV.A.1, IV.B.2.}

Courts are generally loath to excuse a party from its contractual promises on the grounds that circumstances have changed between the making of a contract unambiguously favorable to the college. The lack of ambiguity would render irrelevant the trio of doctrines under discussion.
contract and the time for its performance. After all, the fundamental purpose of contract law is at least arguably to allow parties to protect themselves against such fluctuations. A contract, once formed, is usually either performed or breached. Performance obviously validates the expectations of the parties laid out in the contract and thus protects them against changes in commercial conditions. Breach entitles a party to compensation for the commercial losses incurred because of non-performance and the resultant need for the victim of the breach to enter the marketplace to obtain substitute performance; the compensation places the victim in the same world, commercially, as if the contract had been performed and thus again insulates the party from market fluctuations.

Occasionally, however, the change in circumstances between the formation and potential performance of a contract is so dramatic that courts are willing to excuse parties from their contractual obligations. “Impossibility” excuses a party when performance has become physically or legally impossible. “Impracticability” excuses a party when performance remains possible but only at impracticably high costs. “Frustration of purpose” excuses a party when performance has become utterly pointless.

Frustration of purpose is not applicable here. To employ that doctrine as an excuse from contractual obligations requires that the performance of the contract be fruitless, as when an individual rents a room with a view of a coronation before unanticipated events cancel the coronation. The receipt of

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125 See Bolin Farms v. Am. Cotton Shippers Ass’n, 370 F.Supp. 1353, 1359 (W.D. La. 1974) (quoting Mitchell-Huntley Cotton Co. v. Fulton Benson, Civil Action 2902 (M.D. Ga. 1973)) (stating that, in granting summary judgment to defendants arguing validity of contracts despite approximate doubling of price between making and date of performance, that “when we make bargains that turn out to be good for us that we keep them and then when we make bargains that turn out to be bad for us that we also keep them”).


both tuition money by the colleges and an education by their students continued to be a fruitful pursuit during the COVID crisis. If COVID had brought civilization to an end, perhaps an education would have been as useless an intellectual or future-oriented pursuit as any other. As events unfolded, however, COVID may have drastically modified social interactions, but it did not destroy the fundamental utility of money nor of knowledge.\textsuperscript{128}

Impossibility or impracticability of performance,\textsuperscript{129} however, are highly relevant doctrines, given the characteristics of the COVID crisis. Impossibility of performance excuses a party when its performance objectively becomes legally or physically impossible.\textsuperscript{130} A government might legally prohibit the activity that constitutes the core of one party’s performance in a contract, which would render performance legally impossible.\textsuperscript{131} An Act of God might destroy

[for frustration of purpose] because changed conditions have rendered the performance bargained from the promisee worthless.”). On the so-called “Coronation Cases,” see John D. Wladis, supra note 79, at 1608 (comparing Coronation Cases, which involved non-occurrence of a British king’s coronation, to cases involving hiring out cab and steamboat to view a canceled horse race and naval review, respectively).

\textsuperscript{128} A comment to the Restatement (Second) of Contracts uses the phrase, “makes one’s performance virtually worthless,” to describe the standard for excuse. Restatement (Second) of Contracts § 265 cmt. A (Am. L. Inst. 1981). A lack of in-person instruction may substantially reduce the value of a college education, but it would be difficult to maintain that such a reduction renders that education “virtually worthless.”

\textsuperscript{129} This article distinguishes impossibility, where performance is legally or physically precluded, from impracticability, where performance is merely very onerous. Article Two of the Uniform Commercial Code likewise distinguishes impossibility from impracticability. Section 2-613 applies where a “contract requires for its performance goods identified . . . and the goods suffer casualty without fault of either party”, which is its version of impossibility. U.C.C. § 2-615(a) (Am. L. Inst. & Unif. L. Comm’n 1961). Section 2-615 covers a contract when “performance as agreed has been made impracticable.” Id. § 2-615(a). The drafters were quite clear that the two concepts are distinct. See id. § 2-615 cmt. 1 (“The destruction of specific goods . . . treated elsewhere in this Article, must be distinguished from the matter covered by this section.”); id. cmt. 3 (“The additional test of commercial impracticability (as contrasted with ‘impossibility’ [and frustration of purpose is] to call attention to the commercial character of the criterion [of] this Article.”) (emphasis added). The Restatement (Second) of Contracts, in contrast, uses “impracticability” to include impossibility: “Although the rule is sometimes phrased in terms of ‘impossibility,’ it has long been recognized that it may operate to discharge a party’s duty even though the event has not made performance absolutely impossible.” Restatement (Second) of Contracts § 265 cmt. D (Am. L. Inst. 1981).

\textsuperscript{130} For examples of the stringency of the doctrine, one may consult Direct Supply, Inc., 935 F.Supp.2d at 142 (impossibility doctrine “relieves a promisor of its obligation to perform in only the most extreme circumstances”) (emphasis added); E. Cap. View Cmty. Dev. Corp. v. Robinson, 941 A.2d 1036, 1040 (D.C. 2008) (quoting Bergman v. Parker, 216 A.2d 581, 583 (D.C. 1966)) (party seeking excuse for impossibility must prove “a real impossibility and not a mere inconvenience or unexpected difficulty [and] performance [must be] objectively impossible—that is, the contract is incapable of performance by anyone” and not just subjectively impossible to party seeking excuse).

\textsuperscript{131} See Organizacion JD Ltda. v. U.S. Dep’t. of Just., 18 F.3d 91, 95 (2d Cir. 1994) (stating that “private intermediary banks cannot be subject to a damage action because the intervening government actions in ordering the seizures of the EFTs rendered any enforceable contract
the unique good that is the subject of a sales contract, which would render performance physically impossible.132 If performance is impossible—and, in the case of physical impossibility, so long as the destruction of the promised services or property is not the fault of the party seeking excuse133—then the relevant contractual obligations disappear.

The best situation for colleges would be where governmental decrees made traditional, in-person instruction legally impossible. If a government prohibited any public gatherings, or any gatherings of any unrelated persons, or ordered the closure of a particular college, then a college could not conduct in-person instruction.134 Limitations, rather than bans, on public gathering might also prevent in-person education.135 If governmental entities limited gatherings

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impossible to perform"), see also RESTATEMENT (SECOND) OF CONTS. § 264 (AM. L. INST. 1981) (describing excuse when performance “made impracticable by having to comply with a domestic or foreign governmental regulation or order”).

132 See Cent. Baptist Theological Seminary v. Enter. Commc’ns, Inc., 356 N.W.2d 785, 787–88 (Minn. App. 1984) (holding as matter of law that, because subject of contract was destroyed by windstorm through no fault of either party, performance was impossible and thus excused); see also RESTATEMENT (SECOND) OF CONTS. § 263 (AM. L. INST. 1981) (describing “failure to come into existence, destruction, or . . . such deterioration as makes performance impracticable” as grounds for excuse when “existence of a specific thing is necessary for” performance). The doctrine may also excuse performance from a contract for services if, in the words of the Restatement (Second) of Contracts, “the existence of a particular person is necessary for the performance of a duty” under the contract. Id. § 262.

133 The Restatement (Second) of Contracts, which generally treats impossibility and impracticability simultaneously, states that the supervening event must not be the fault of the party seeking excuse. See RESTATEMENT (SECOND) OF CONTS. § 261 (AM. L. INST. 1981) (“Where . . . a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption [of] the contract, his duty to render that performance is discharged.”) (emphasis added). For an analysis that goes far beyond than simply discussing “fault,” see Christopher J. Bruce, An Economic Analysis of the Impossibility Doctrine, 11 J. LEGAL. STUD. 311 (1982) (exploring comparative and optimal levels of parties’ purchases of precautions to minimize or insure against non-performance).


135 For example, a city ordinance in Charlottesville, Virginia, which is the home of the University of Virginia, prohibited public and private gatherings of more than fifty people, although it exempted religious gatherings, weddings, and certain public “expressive activity.” Charlottesville City Council, An Ordinance to Prevent the Spread of the Novel Coronavirus, SARS-CoV-2, and the Disease It Causes, Commonly Referred to as COVID-19, sub-sections 5A and 5B (July 27, 2020) (available at https://www.charlottesville.gov/DocumentCenter/View/3710/July-27-2020-Emergency-Ordinance-to-Control-Spread-of-COVID-19) (the date of the document is
in localities to no more than ten unrelated individuals, for example, then a college could hardly hold a 100-person lecture class in the usual way. (Teaching ten sections of ten students each would likely place the endeavor in the realm of impracticability of performance, which this Article discusses below.136) Here then, for the first time, we see in legal impossibility a defense plausibly open to colleges that would defeat a contractual claim by students. A comprehensive survey of state law in the context of collegiate practices is difficult to conduct, but colleges seem well advised to explore this avenue of defense.137

Physical, as opposed to legal, impossibility is a superficially appealing tack for colleges to take. COVID seemed to make so many things impossible that had once been possible, after all. Classically, however, the doctrine of physical impossibility involves the destruction of a good, such as cotton138 or a horse,139 or the decisive disappearance of a necessary party, such as a potential spouse.140 In the classic and perhaps generative example of impossibility, the parties agreed upon a particular concert hall as the venue for a performance;141 given the lack of fault and given that “the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given [as] essential to their performance,” the court excused the parties from their obligations when the hall burned down through no fault of either party.142

COVID, however, did not physically destroy much of anything. Certainly, it did not reduce colleges across the country to heaps of smoking ruins, in contrast to cases in which fire destroyed a music hall specified as the venue available by entering the search term, “an ordinance to prevent the spread,” at https://www.charlottesville.gov/).

See infra text accompanying notes 147–161.

136 See infra text accompanying notes 147–161. The complexity of the data is dizzying, but there are online compilations of restrictions in the United States. See KFF Covid-19 Data Repository, Kaisers Fam. Found., https://github.com/KFFData/Covid-19-DataKFF (last visited Oct. 7, 2023); Thomas Hale et al., A Global Panel Database of Pandemic Policies (Oxford COVID-19 Government Response Tracker), Nature Hum. Behav. (Mar. 8, 2021), https://doi.org/10.1038/s41562-021-01079-8. U.S. data for the latter is available at https://github.com/OxCGRT/covid-policy-tracker/tree/master/data/United%20States. Of course, the defense is only applicable during the time that the regulation was in effect, which may be a period much shorter than the time covered by the unrefunded tuition payment.

137 Dexter v. Norton, 47 N.Y. 62, 64 (N.Y. Ct. App. 1871) (involving cotton specifically identified to contract with physical markings). Cases about agricultural products may turn on whether the contract contemplates a particular farm as the site of growth, although some courts are hesitant to excuse performance even in that situation. For the wide variety of judicial outcomes and approaches, see Comment, Crop Failures and Section 2-615 of the Uniform Commercial Code, 22 S.D. L. Rev. 529 (1977).


See Dexter, 47 N.Y. at 66 (dicta) (death of a party to promise to marry); Restatement (Second) of Conts. § 262 (Am. L. Inst. 1981) (describing standard for excusing non-existence of necessary person).


142 Id.
for the contractually promised performance\textsuperscript{143} or specially marked bales of cotton promised for sale.\textsuperscript{144} There do not seem to be court cases in which a structure still stands but admits no safe entry, as might be true in the aftermath of a nuclear accident. Such contamination, without destruction, would seem a candidate for an excuse of impossibility, at least if the radiation levels were sufficiently high to defeat radiation suits. An unchecked risk of contracting COVID through in-person education might make the provision of educational services unsafe in a similar way, and thus give rise to an excuse of physical impossibility. In contrast to high-level radiation, however, the risk of COVID transmission is susceptible to mitigation through social distancing,\textsuperscript{145} personal protective equipment such as masks, and, at least in the minds of some, rigorous sanitary measures. Significant protective measures are, in a word, possible.\textsuperscript{146} If the resultant risk of transmission is low, and the likelihood of harm from contracting the disease is judged sufficiently low, then in-person instruction would be possible (if inconvenient or costly). If in-person instruction is thereby possible, then a claim of physical impossibility is unlikely to prevail.

Absent legal impossibility stemming from governmental orders prohibiting even relatively small gatherings, therefore, the doctrine of impossibility is likely not available to colleges wishing to avoid contractual liability for their failure to provide in-person educational services during the COVID crisis.

Even if neither legal nor physical impossibility is available as a viable defense to colleges, however, the doctrine of commercial impracticability is a potential substitute. Impracticability excuses an inability to perform because of a dramatic increase in the cost of performance, even though performance remains physically and legally possible.\textsuperscript{147} Courts distinguishing impracticability from

\textsuperscript{143} Id.; see Wladis, supra note 79, at 1594–1603 (discussing case and its progeny in English common law).

\textsuperscript{144} Dexter, 47 N.Y. at 64.


\textsuperscript{146} Not every protective measure was a viable option instantly, of course, whether because of a lack of information or a lack of supply. Courts must analyze not only the facts related to a particular college but to that college at a particular time.

\textsuperscript{147} For an example of excuse when performance was clearly not rendered impossible, at least by operation of the law or by destruction of the subject matter of the contract, see Whelan v. Griffith Consumers Co., 170 A.2d 229 (D.C. Mun. App. 1961) (describing valiant efforts by truck driver to deliver heating oil that nonetheless went adrift when extraordinary snowfall along route and at delivery site prevented access).
impossibility make clear that, while the difficulties of performance necessary to support excusing impracticability may be short of physical or legal impossibility, the situation must nonetheless be much more dire than inconvenience or a mere modicum of increased costs. In the leading case, the practical impossibility involved an increase in costs of “ten or twelve times as much as the usual cost.” Courts have declined to allow excuse when the additional costs imposed by the unpredicted event were only a 12% increase over the contract price or even a 30% increase, and have likewise enforced the contract when prices of an input rose 23% in four months after having risen only 12% during the previous four years.

There is obviously quite a range of situations between a 12% or 23% or 30% increase, on the one hand, and a 1,000% or 1,200% increase, on the other, and courts have not been especially helpful in telling parties where the line might be, or even if the proper way to draw the line is highly dependent on the rise in costs. (There are other factors, which vary widely but include whether the parties contemplated the risk that occurred or whether the contract implicitly allocated the risk between the parties.) The increase in costs from offering in-person instruction during the COVID crisis—assuming, of course, that the endeavor  

Proponents of law and economics have treated the doctrine. George G. Triantis, Contractual Allocations of Unknown Risks: A Critique of Commercial Impracticability, 42 U. TORONTO L.J. 450 (arguing that parties can efficiently allocate narrowly unforeseeable risks between themselves by pricing broader categories of risk and that judicial intervention on behalf of producer-party is unwarranted); see also Wright, supra note 126, at 2200–15 (applying behavioral law and economics to foreseeability requirement of impracticability doctrine). But see Robert Birmingham, Why Is There Taylor v. Caldwell? Three Propositions About Impracticability, 23 U. S.F. L. REV. 379, 379, 381 (1989) (stating that “[l]aw and economics cannot answer the question that Taylor presents at all,” thereby leading to an “immense and disquieting” explanatory deficit).


149 Transatlantic Fin. Corp. v. United States, 363 F.2d 312 (D.C. Cir. 1966) (discussing 12% increase in shipping costs resulting from closure of Suez Canal by Egyptian government after invasion of Canal Zone by Great Britain and France in 1956); see also Linda Ebin, Note, UCC § 2-615: Defining Impracticability Due to Increased Expense, 32 U. Fla. L. REV. 516, 525 (1980) (noting that Transatlantic Financing is “most widely followed interpretation of the scope of section 2-615 [of the UCC on impracticability, even though it did not involve the sale of goods"]).

150 Am. Trading & Prod. Corp. v. Shell Int’l Marine Ltd., 453 F.2d 939 (2d Cir. 1972) (discussing 30% increase in shipping costs resulting from closure of Suez Canal as result of the Six-Day War in 1967 between Egypt, among other Arab nations, and Israel).


152 Ebin collects more than half-a-dozen U.S. cases, decided between 1916 and 1974, in which courts concluded that the parties had assumed, and thus had implicitly included in the contract a pre-condition of performance that, the situation eventually encountered would not occur. Ebin, supra note 149, at 519 n.21. Given the implicit conditioning of performance on the non-occurrence of a situation, its occurrence relieved the parties of their contractual obligations. Id. Ebin argues that the doctrine of frustration of purpose evolved to reduce such contortions of inference. Id. at 521.

153 Id. at 522–23 (discussing cases on frustration of purpose as precursors to impracticability cases).
would not have required steps that were illegal—are difficult to calculate in the abstract. COVID is not, however, a real-life version of an unstoppable Godzilla. Colleges could have attempted in-person instruction with required personal protective equipment (“PPE” or, to the careful observer, “masks”), screens, social distancing, and heightened sanitary measures. Testing, sometimes without the need for actual interaction with the test subject, might have been possible. The precise increase in cost from these measures is difficult to determine.

We do, however, have extremely strong circumstantial evidence that these costs are not prohibitive: Many colleges never ceased in-person instruction at all. These colleges thereby proved that in-person learning was possible at a reasonable cost, even in the earliest stages of the crisis. Other colleges returned to in-person learning after a brief interlude of remote instruction but before the development of an effective COVID vaccine. Sometimes the in-person

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154 See supra Sub-Section III.B.2.i.
156 As with many aspects of the hypothesized collegiate response relevant to claims of commercial impracticability, issues of timing are important with respect to testing. As colleges were in the early stages of scrambling to decide upon their mode of instruction, the United States was testing about 100,000 people a day. See Greg Slabodkin, Massive Coronavirus Testing Ramp-Up Needed for US To Reopen: Report, MedTechDive (Apr. 20, 2020), https://www.medtechedive.com/news/massive-coronavirus-testing-ramp-up-needed-for-us-to-reopen-report/576342/ (giving current U.S. testing capacity as about 120,000 daily). The U.S. first tested 1,000,000 people in one day in September of 2020. See Lisa Shumaker, US Sets Record with Over One Million Coronavirus Tests in a Day, Reuters (Sept. 20, 2020), https://www.reuters.com/article/us-health-coronavirus-usa-testing/us-s-sets-record-with-over-one-million-coronavirus-tests-in-a-day-idUSKCN26B0O1; see also The Covid Tracking Project at The Atlantic, Totals for the US, The Atlantic, https://covidtracking.com/data/national (last visited Oct. 7, 2023) (testing column) (showing daily tests in U.S. were between 1 million and 2.3 million from Oct. 13, 2020, to March 7, 2021, when data ends).
A study that advocated testing, contract tracing, and isolation of the infected to replace rather than supplement social distancing set a requirement of 5 million daily tests to deliver “a safe social reopening” and 20 million daily to “fully remobilize the economy.” See Danielle Allen, Sharon Block, Joshua Cohen & Peter Edkersley, Edmond J. Safra CTR. FOR ETHICS AT HARV. UNIV. 6, 10 (Apr. 20, 2020), https://ethics.harvard.edu/files/center-for-ethics/files/roadmaptopandemicresilience_updated_4.20.20_0.pdf.
157 See supra note 57 (gathering sources indicating substantial minority of colleges retained in-person instruction).
158 The eventual existence of an effective vaccine against COVID illustrates yet another complexity in the issues at hand: the passage of time and the concomitant improvement in the availability of preventive measures. In the spring of 2020, a vaccine was not available at any cost; by the summer of 2021, roughly a million vaccinations occurred in one day in the United States. See Ian Fisher, U.S. Vaccine Doses Rise to Almost 1 Million a Day Amid New Surge, Bloomberg (Aug. 21, 2021), https://www.bloomberg.com/news/articles/2021-08-14/u-s-vaccine-doses-rise-to-almost-1-million-a-day-amid-new-surge. Available preventive measures, and their costs, were
learning was of a “hybrid” form that allowed remote learning and in-person instruction simultaneously, but even hybrid learning shows that at least some in-person instruction is practicable. Offering both in-person instruction and remote instruction can hardly have been cheaper than offering remote instruction alone, so the colleges employing hybrid instruction proved definitively that some in-person instruction during COVID was practicable. Colleges of all sorts appear to have kept their tuition rates constant throughout the timespan of the pre-COVID environment, remote-only instruction, hybrid instruction, and the return to in-person instruction, which constitutes further evidence that the various versions of instruction were all practicable.\textsuperscript{159}

One escape route from the colleges’ self-defeating demonstration of practicable, in-person instruction is the possibility that some remote instruction was necessary to relieve the capacity constraints imposed by the need for distancing. Such a substitution of remote instruction for in-person instruction during a period of hybrid instruction would assist colleges in showing that the costs of in-person instruction would have been impractically high. There do not appear to be any colleges, however, that required some students in some courses to consume remote instruction in the hybrid environment so that other students might consume in-person instruction as a result. This escape route thereby appears blocked.

For impossibility or impracticability or frustration of purpose, the post-contractual change in circumstances must be unanticipated by both parties. COVID was in some ways novel, but it was not without precedent. Just as there are many music halls and many shipping destinations, however, there are many coronaviruses. The SARS virus arose in Asia in 2003 and spread to more than two dozen countries.\textsuperscript{160} The SARS (Severe Acute Respiratory Syndrome) virus is a corona-virus. Indeed, in some nomenclature, the SARS virus is “SARS-CoV” and the COVID virus is “SARS-CoV-2.” (The CoV is for “coronavirus,” obviously.) Likewise, Middle East Respiratory Syndrome (MERS) arose in Saudi Arabia in 2012, probably infected humans via intermediary camels, and spread to more than two dozen countries. The MERS virus is a coronavirus, often designated MERS-CoV.

The possibility that a coronavirus would arise in a foreign country, infect humans via an animal intermediary, and spread to more than two dozen

\textsuperscript{159} Some colleges offered tuition discounts during the period of remote-only instruction, which did change their effective rate of tuition. See supra note 60. Given that costs to provide instruction had presumably risen for colleges that introduced online-only learning, one assumes that the discount reflected an acknowledgment by the college that exclusively in-person instruction provided the student with an inferior experience to in-person learning, rather than, as might more commonly be the source of a discount, a passing-along by the college of cost savings to the consumer.

countries, is not a novel event. Its non-occurrence would thereby not be an implicit condition of the applicability of the college’s representation. The college would thus reasonably have known about the possibility of a corona-virus pandemic, and a student could show fraud on the part of the college (if the student could also demonstrate the applicability of all the other elements of the test for fraud, of course).

Moving further along the spectrum of generality, one might note that there are many viruses besides coronaviruses. Bacteria and fungi are microscopic entities that can cause infectious diseases but are not viruses. Anyone ever repulsed by graphic portrayals of worm infestations in people knows that various phyla of these invertebrates can cause infectious diseases in a human being as well, even though they can become visible to the naked eye. The world is full of germs and creatures who can inhabit a human host and cause it harm. People and goods travel so extensively and with such rapidity that infections are highly likely to spread. One might well consider a situation like that inflicted upon the world by the COVID-19 virus to be inevitable rather than unpredictable.

The level of generality that a court will adopt is crucial but unpredictable. Specificity favors the college, as we have shown, while generality favors the students. A court that, in contracts cases, emphasizes the hypothetical and monetary nature of contracts damages should be more likely to adopt a general view, since that view minimizes the necessity of physical performance. A court that emphasizes the importance of keeping promises, in contrast, will presumably take a narrower view. There is no clear consensus on either these ancillary matters or the question itself.

ii. A Defense of Contractual Modification

A college advancing a defense of impossibility or impracticability hopes that a court will excuse the college from the contract between student and college that governed their relationship at the start of the contractual period. Another avenue open to colleges is to argue that a new contract arose during the semester by virtue of a mutual modification of the original agreement, and that this new contract limited the college’s obligations to the provision only of remote, rather than in-person, instruction.

The basic idea with contractual modification, as with the origination of the contract at issue, is that courts will enforce agreements between two parties freely giving their consent and unencumbered by issues like mutual mistake,

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161 Triantis argues that the availability of higher levels of generality allows the parties rationally to allocate the risk of unanticipated events and thus that the primary justification of the doctrine is unpersuasive. Triantis, supra note 147, at 452.

an absence of consideration, or the illegality of the contract’s performance.\textsuperscript{163} This Sub-section sets out a hypothetical modification almost certain to be enforceable and then speculates on whether the situation regarding COVID and remote instruction might have led to an enforceable modification that relieves the college of any liability for refunding any tuition.

Let us imagine circumstances in which a college and student agree to an unobjectionably enforceable modification to their original agreement. Suppose, mid-semester, that the college opens a new dining hall, unimaginatively dubbed The New Place, which features food options not available elsewhere on campus. Suppose further that some of the dining halls, but not all, allow students to spend “meal plan dollars” that the students purchase at the beginning of the semester and can spend on a one-to-one ratio to purchase food and beverages at prices posted at each dining hall. (Those not spending meal plan dollars may spend actual dollars.) Suppose also that the contract in place at the start of the semester is silent about whether The New Place is a facility accepting meal plan dollars. Silence on the matter, we will assume, means that students do not have the ability to use their meal plan dollars at The New Place under their original agreement with the college.

Imagine that the college makes a mid-semester announcement to its students:

Meal dollar plans can be valid at The New Place, but, because we also hope that The New Place will attract individuals from the community at large, and we don’t want The New Place to be overrun with eager students, any student must expend meal plan dollars in a ratio of 1.5 : 1 to purchase items at the posted prices in The New Place. For example, if the posted price at The New Place is $5, then purchase of that item will require the expenditure of $7.50 in meal plan dollars. If you wish to be able to spend your meal plan dollars at The New Place, you must also visit the Meal Plan Dollar website and electronically sign an online document setting out these terms.

Imagine that a student duly visits the proper website and electronically signs the document with the terms, and that the document notes expressly that signature indicates a modification to the original agreement between college and student.

The student and college have now modified their original agreement to include the terms of meal plan dollars at The New Place. The student gains something with the modification (the ability to use meal plan dollars at The New Place at the 1.5:1 ratio), and the college gains something as well (the potential to modifications.”) (citations omitted generally U.C.C. § 2-209(2)(b)(1)–(2)(b)(4) (AM. L. INST. & UNIF. L. COMM’N 1990)) (setting out general rules of modification).

\textsuperscript{163} Hillman, supra note 162, at 681 n. 6 (“All of the usual policing doctrines of contract law should also apply to modification agreements.”).
gain indirect revenue from meal plan dollars at The New Place). The college’s offer of modification was express, and the student likewise expressly accepted the offer of modification. Nothing in the description suggests fraud, coercion, a lack of capacity on the part of the student, or any other barrier to enforcement. A modified contract is now in place between the student and the college.

The situation with respect to a COVID-driven, mid-semester change at a college from in-person instruction to entirely remote instruction differs substantially from the hypothetical modification relating to meal plan dollars. These differences may defeat an argument that student and college modified their agreement, but the college will presumably find the argument worth making.

The college would argue that the events of the mid-semester transition to remote learning were a modification of its original agreement with the student.

The college, in its view, offered the students a modification of the original agreement. On the part of the college, the modified agreement presumably allows (and obliges) the college to offer fully remote instruction rather than fully in-person instruction. The modified agreement pledges the college to exert itself to make the difficult transition as smooth as possible. The modified agreement guarantees the student full credit for the online classes—the same classes that the student was taking in person, with the same amount of credits and the same instructors, before COVID upended the college and the world at large.

The college would argue that students who agree to the modification, for their part, agree to make reasonable accommodations to the scheme, such as installing necessary software, complying with any reasonable changes to course requirements necessitated by the change to remote learning, and—crucially for purposes of this Article—accepting that the change to remote instruction is the receipt by the student of full value for the student’s tuition payment.

The students have three counterarguments to the notion that students and colleges agreed to modify their original agreement so that entirely online instruction was a full substitute for in-person instruction. First, the college never made a clear and concrete offer on the terms discussed above, and the students never expressly accepted the offer anyway, so no contractual modification occurred. Second, the college gave the students no choice but to withdraw precipitously from school with rampant uncertainty as to what would happen with their already-paid tuition, and this lack of choice invalidates any modification even if offer and acceptance of a modification appeared to occur. Both counterarguments depend upon factual assumptions of a certain amount of chaos and coercion, which seems at least plausible. Nonetheless, students will need to prove the relevant facts, and some colleges may be able to show that their particular situation undercuts the counterarguments of the students. A third argument, more formalistic, is that the putative modification fails for want of “independent consideration”—that is, the modification is completely one-sided in favor of the college and thus unenforceable for a failure to meet the requirements of contractual consideration.
In the hypothetical involving meal plan dollars, the offer and acceptance were both explicit. If colleges can show an explicit offer of modification and an explicit acceptance on the same terms as the offer, then the colleges can at least make a *prima facie* case for modification. (There is still an argument, discussed immediately below, that such a modification is, in the end, invalid as coercive.) Implicit communication is sometimes sufficient to form a contract as well, however. Certainly, an explicit offer and implicit acceptance could support a *prima facie* case for modification. A college could explicitly set out the offer suggested above. Remaining enrolled and submitting written work in connection with the online courses might then constitute acceptance of the offer by the student; the student’s acceptance would be implied (by behavior, i.e., continuing the student’s enrollment) rather than express (by communication, i.e., online signature).\(^{164}\)

Implicit acceptance presents a problem in the situation at hand, however. If colleges provide online instruction going forward, and students attend those sessions and take the resulting examinations, then one can reasonably infer that the students expect to pay the college *some* money for the education that they receive. The mere completion of an online course, however, does not seem sufficient to conclude that students felt that they received *full* value for the tuition that they had tendered under an expectation of in-person instruction. If a passenger entered a cab and stated a destination, and the driver precipitously announced at the mid-point of the trip that the passenger needed to take over as the driver, the cabbie should not expect full payment at the end of the trip simply because passenger did not immediately abandon the enterprise. Put another way, we may infer some expectations based on what has happened (i.e., attending online courses) but should be cautious in inferring expectations about how a participant *characterizes* what has happened (i.e., whether attendance at online courses constituted full, or instead less than full, value for the already-paid tuition).

A second potential counterargument by students to a collegiate assertion of modification is that the college so constrained the student’s choices that any putative consent to the modification by the students is invalid.\(^{165}\) Contracts should represent a voluntary exchange of promises between two parties. An offer at gunpoint of “your money or your life” is not a pair of alternatives sufficiently

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\(^{165}\) See Hillman, *supra* note 163, at 682 (“[V]oluntariness is crucial to determining whether [the modification] should be enforced,” and “literally hundreds of cases . . . confirm that this is the paramount, although rarely articulated, concern of courts.”).
broad and uncoerced to lead to a binding contract. Colleges did not physically threaten their students to force them to take online courses, of course. The situation did not, however, lend itself to much freedom of choice for the students. The students were already at their chosen college in the middle of the semester. The overall situation regarding COVID was unclear. The colleges were presumably not offering the students a full tuition refund if the student chose to disenroll. The colleges instead presented the student with the choice between switching to exclusively online instruction or disenrolling—with the latter choice possibly causing them to sacrifice all of their tuition for that semester with no credits earned in exchange. In these circumstances, the students have a plausible argument that the putative modification was involuntary and thus unenforceable as either economic duress or an unreasonable contract of adhesion or a failure to be “fair and equitable.”

A third counterargument available to the students carries independent weight under older doctrines about modification and supplemental weight under current views of excessive constraints upon choice: None of the modifications makes the student better off. Tuition, and tuition per credit, remain the same. The modified instruction (remote instead of in-person) is inferior.

Older cases required “independent consideration” on both sides of a transaction in support of a valid modification. In a classic case, fishermen headed for Alaskan waters agreed with the boat owner to one wage in San Francisco but insisted on nearly double those wages when they arrived in Alaska. The fisherman offered the boat owner nothing new in exchange for the higher

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166 The limitation of alternatives is starkest if a change to online instruction was occurring in the middle of a semester. If tuition-for-instruction agreements expire at the end of an academic year, then discussion of the agreement made between student and college at the beginning of an academic year involve a new contract, rather than modification, and involve a presumably greater range of practical alternatives for the students, such as taking the entire school year off and not paying any tuition.

167 Such an offer is logically possible. Perhaps some colleges made such an offer while simultaneously telling students that continued enrollment meant that there would be no refund of any tuition owing to the change from in-person to online instruction. Such an offer would certainly be relevant to a determination of whether students faced such a narrow range of options that any putative modification is invalid.

168 See Hillman, supra note 163, at 683–84 (discussing economic duress as superior approach).


170 The “fair and equitable” standard is necessity for enforcement under the Restatement, Restatement (Second) of Contracts, § 89(a) (Am. L. Inst. 1981). Hillman analyzes and criticizes this and related standards. See Hillman, supra note 163, at 692–701 (discussing not only section 89 of the Restatement but also its sections 73 and 74).

171 Alaska Packers’ Ass’n v. Domenico, 117 F. 99, 100–01 (9th Cir. 1902).
wage. The court refused to enforce the proposed modification for lack of independent consideration on both sides. On this view, which is not universally held by modern courts, the college occupies the position of the fishermen and the students that of the boat owner. The college proposes modifications to its benefit but offers the students no modification favorable to them compared to the original agreement.

The asymmetry of the proposed modification also relates to whether the colleges coerced the students to accept the modification. Coercion can persuade a party to accept a very bad deal; indeed, some versions of coercive excuse require that the party accept a very bad deal. A modification in which only one side benefits from the modification is not a good deal for the other party. The difference in value between in-person instruction and remote instruction is the degree to which the students were accepting an inferior deal compared to the original agreement. (With the onset of COVID, circumstances had of course changed between the making of the original agreement and the making of the modification. The students might be better off in a world with the modified agreement in comparison to a world with no agreement at all. That is not the relevant comparison, however. The promises made in the original agreement—the provision of in-person instruction, without any contingency relating to unusual events—are the relevant comparison. With respect to these promises, the modification is uniformly inferior from the point of view of the student.)

iii. A Defense Based on Public Policy

A third defense for colleges that wish to avoid liability is that enforcement of the original agreement to provide in-person instruction would violate public policy. Hoffman and Hwang have ably argued for the idea that sometimes society does not want to enforce contracts, because the usual assumption that contracts impose minimal effects on non-parties is occasionally untrue, and that COVID presents such an occasion. This Article has little to add to their perspective, which does not much depend upon the facts specific to collegiate contracts with their students. If contagion is a reasonable fear—and

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172 Id.
173 Id. Hillman both criticizes the rule of Alaska Packers’ and notes that many courts, and the Uniform Commercial Code (at least for sales of goods), have effectively abandoned it. See Hillman, supra note 163, at 685–86.
174 See Hillman, supra note 163, at 682–83 (“[E]conomically rational persons do not give up something for nothing.”). But see id. at 683 n.19 (listing various reasons why economically rational parties “might agree to a substantial increase in the gains to the other party without a concomitant immediate increase in the first party’s wealth”).
175 If there were such a contingency in the original agreement, of course, then there is no need for the college to make an argument about modification. The college would simply rest on the original agreement to escape liability.
176 See supra notes 24–25.
certainly it was for residential colleges offering exclusively in-person instruction—then a party to an agreement may assert this defense.

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Looking back over the various excuses open to colleges for avoiding their contractual liability—capacity, coercion, information, and changes in circumstances occurring after the making of the contract—for their unmet instructional promises, it would appear as if the colleges’ only reliable source of avoiding their obligations is legal impossibility. Because many governmental entities at the state and local levels may have issued such bans, and because of the usual lack of centralization in governance in the United States, one cannot readily know how many colleges might avoid contractual liability on the grounds of legal impossibility. Clearly, some will be able to make the argument plausibly, while others will not.177

Colleges operating where local or state governments issued no bans on public gatherings, however, have only the thin reed of impracticability as an excuse for their breach of promise. To use this defense successfully would likely require either the demonstration of a manifold cost increase for offering in-person instruction during the COVID crisis or an innovative deployment of a concern for the utility of extra-contractual parties. The widespread use of hybrid instruction, however, is likely to bend the reed of impracticability beyond the ability of colleges to meet its requirements: Colleges demonstrated the potential practicability of in-person instruction by actually engaging in it during the COVID crisis. Contractual liability for breach of a promise to provide in-person, instructional services is therefore the likely outcome in a suit by a tuition-paying student.

C. Educational Malpractice

After 12 years in the San Francisco public schools, a man graduated from high school able to read only at the fifth-grade level. He had an average attendance record and at least an average level of intelligence. He asserted that his stunted reading ability was due to the negligence of the teachers in the school system. He sued in tort for half a million dollars in damages.178 A California state

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177 For a sense of the complexity of generalizing about bans on large gatherings, see KHN Morning Briefing, States Declare Emergencies, Ban Large Gatherings as Coronavirus Sweeps the Nation, KFF Health News (Mar. 12, 2020), https://khn.org/morning-breakout/states-declare-emergencies-ban-large-gatherings-as-coronavirus-sweeps-the-nation/ (discussing efforts by states and localities to restrict size of public gatherings by suasion or fiat).

appellate court upheld the trial court’s dismissal of the case.\textsuperscript{179} To the appellate court, there was no workable standard for a duty of care, no sufficiently clear demonstration of an injury to the plaintiff, and no sufficiently clear causal connection between the teachers’ conduct and the plaintiff’s condition.\textsuperscript{180} Furthermore, allowing tort suits on such allegations would generate a flood of litigation against schools already beset by lawsuits on other issues.\textsuperscript{181} “Educational malpractice” has come to be the name attached to this insulation of educators from tort suits that allege inadequacy in their pedagogical work.\textsuperscript{182}

For several courts facing lawsuits by students seeking recovery of their tuition because their college failed to provide them with promised, in-person education, the impassable barrier to their recovery is this doctrine of “educational malpractice,” which, in the case above and others, results in a dismissal of a tort case alleging systematic incompetence in the choice and application of the school system’s pedagogical methods. This Article argues that the use of this doctrine to bar recovery in such cases is inapt. The doctrine arose in a dramatically different context from the instant cases, and the differences mean that extension of the doctrine to suits by collegians who did not receive in-person instruction is inappropriate.

The doctrine of “educational malpractice” originated when students from public high schools alleged that their education had been so inadequate that their instructors and administrators had committed professional malpractice.\textsuperscript{183} As a result, they alleged, they lacked even an “adequate” degree, including some assertions that the degree was “worthless.”\textsuperscript{184} The students argued that, as a result of educational malpractice, they should be able to recover a variety of tortious damages for the harms that they had suffered from their educators’ failure to employ the skill and care required of any professional educator.

Courts have been decidedly cool to such claims.\textsuperscript{185} Their reasoning distinguishes both the inputs and outputs of education from the analogous concepts in other professions, such as medical care, where courts have long allowed suits for professional malpractice to go forward.\textsuperscript{186} Education, say these

\textsuperscript{180} Id. at 826.
\textsuperscript{181} Id.
\textsuperscript{182} For an early use of the term in the legal literature, see Comment, Educational Malpractice, 124 U. PENN. L. REV. 755, 755 (1976).
\textsuperscript{183} Id. at 756 (setting out parameters of analysis for claims made against pre-collegiate public schools at time when there was “virtually no law in this area”); see id. at 755 (describing a few cases).
\textsuperscript{185} See Kimberly A. Wilkins, Educational Malpractice: A Cause of Action in Need of a Call to Action, 22 VAL. U. L. REV. 427, 431 n. 31 (1988) (gathering cases denying claims).
courts, involves resources and pedagogical decisions that are many, varied, individuated, and (sometimes) even inspired. Courts reasoned further that measuring the value of educational services was also a subtle and subjective task. Given the nature of both the inputs and outputs of education, courts held that educational malpractice was impossible—or at least, that it was so difficult to determine with sufficient rigor that it was unfair to expose educational institutions to suits alleging such malpractice. Courts have thus imposed a nearly categorical ban on suits by individual students alleging that institutions of K-12 education had failed grievously in their pedagogical task. (Somewhat confusingly, the doctrine banning suits for educational malpractice became known as the doctrine of educational malpractice.)

The doctrine of educational malpractice may make sense in its original context. The many years from entrance into kindergarten to graduation from high school involve a myriad of resource inputs and pedagogical decisions. Public schools must take their students as they find them, and their funding is often less than ample. The value of education seems plainly positive but must surely vary widely, and subtly, from one educated individual to another. The doctrine may therefore be sensible as an effort to insulate hard-pressed educators from complex, wide-ranging claims about their inadequacies.

Nonetheless, courts are wrong to extend the doctrine to suits involving collegians suing their institutions for the failure to provide in-person education. To apply the doctrine of educational malpractice to these cases serves none of the rationales that justify the doctrine in the older fact patterns. Educational malpractice is a complex claim about the entirety of a student’s education (said to produce a woefully inadequate outcome) and therefore the entirety of the educational techniques employed. Suits alleging educational malpractice claim

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that the individual’s *entire* education has been a failure despite the application of an *entire range* of educational techniques.

Suits by students against their colleges for failure to provide in-person education, in contrast, are about one, relatively brief period of education and about only one aspect of that education. There is no danger of disturbing a complex, long-term, individuated endeavor. Furthermore, the colleges had already promised to provide one form of education, i.e., in-person instruction, whereas the educational-malpractice claims involve a gamut of pedagogical techniques without any indication that schools would provide a particular mix of pedagogical tools. Furthermore, students in the COVID-related cases are not criticizing the level of effort exerted by their instructors but rather arguing that the use of an entirely different method of instruction is problematic regardless of the instructors’ degree of effort.

Additionally, educational malpractice is a tort involving general duties and professional judgment, while the cases seeking refunds of tuition are about a breach of promise that involves only an isolated decision not to provide in-person instruction. Indeed, one cannot be entirely sure that collegiate instruction is even a profession in the first place: Educators in K-12 public schools almost invariably face individual licensing requirements, as do doctors or lawyers, while collegiate instructors do not.

Some of the same concerns that motivated the doctrine of educational malpractice are manifest in the cases involving in-person instruction, however. The difficulties of calculating damages from a failure to receive in-person instruction stem from some of the same complexities that led courts to the doctrine of educational malpractice. Education at any level involves multiple approaches and instructors, and education is cumulative. Any effort to tease out the harm from depriving a student of in-person instruction must acknowledge that the student nonetheless benefited from many other factors present both in remote and in-person instruction. The instructors, as opposed to the method of instruction, remained essentially the same before, during, and after the COVID crisis. The student, whether receiving remote or in-person instruction, covered the same topics in their courses, used the same textbooks, and probably took the same examinations. A determination of the harm from a failure to provide in-person instruction therefore requires an acknowledgment of the complexity of education and of the many factors that did not change in collegiate education during the COVID crisis. We turn now to the potentially complex calculation of that harm.
IV. REMEDIES FOR FAILURE TO PROVIDE IN-PERSON INSTRUCTION

The first fundamental conclusion of this Article, and the subject of the previous part, is that rules of liability favor students seeking redress for the failure of COVID-wracked colleges to provide in-person instruction, whether as a matter of restitution or breach of contract. The second fundamental conclusion of this Article, and the subject of this part, is that the relevant rules of damages may nonetheless allow a college to escape the payment of significant monies to the plaintiffs.

As discussed, many students who paid full tuition but received less than a full complement of in-person instruction have plausible claims that their colleges are liable either for unjust enrichment or for breach of contract. The different causes of action involve different standards of recovery for a successful plaintiff. A suit for restitution seeks to return the situation to the status quo ante by requiring the defendant to disgorge its unjustly gotten gains. To provide an example, a buyer who made an advance payment to another party of $100 for goods never received would be able to recover the $100 from the (supposed) seller.

Damages for breach of contract, in contrast, seek to place the plaintiff in the never-achieved position that the plaintiff would have occupied if the defendant’s breach had never occurred. To provide an example, imagine that a future plaintiff enters into an agreement to purchase fifty shirts from a future defendant for $1,000. If the buyer offers to pay the seller $1,000, but the seller refuses the payment and announces that delivery of the shirts will never be forthcoming, then the buyer should recover the additional expenditures, if any, that the buyer must make to obtain 50 shirts of a quality similar to the shirts promised by the seller. If the buyer must pay $1,200 for a “cover” purchase and has no other expenses, then the buyer should recover $200 from the seller. That payment will leave the buyer with 50 shirts, as promised, and a net expenditure of $1,000 ($1,200−$1,000), as promised.

Because of the particular facts involved in the collegiate COVID contracts, however, the calculation of damages for the two causes of action may not be as distinct from one another as the mere statement of the relevant rules would imply. As a remedy for unjust enrichment, the colleges may be liable for the net gain to them from providing remote rather than in-person instruction; they collected the entirety of the tuition payment but, by failing to provide in-person instruction, thereby retained the value of the resultant savings. Alternatively, depending upon the method for calculating the restitutionary payment, they may be liable for the difference in value to the student between the promised, in-

\[191\] See supra Section III.A.
\[192\] See supra Section III.B.
\[193\] If the buyer had also paid $1,000 to the seller while still not receiving any shirts, then the buyer should recover an additional $1,000 from the seller in a suit for breach of contract, as part of the buyer’s reliance of restitutionary interest. See Perillo, supra note 88, at 1022.
person instruction and the delivered, remote instruction; this difference is the deprivation to the student, which is the student’s entitlement under some theories of restitution. As a remedy for breach of contract, the college is likewise liable for the difference in value between the promised, in-person instruction and the delivered, remote instruction, because this difference reflects the loss to the students from the breach. The remedy for breach of contract, in other words, is a sub-set of the remedies for unjust enrichment. Restitution may result in either a student-oriented or a college-oriented measure to determine the proper value of a judgment for the student, while a suit for breach of contract only involves a student-oriented calculation.

Section A of this Part examines those damages unique to liability resting on restitutionary grounds. This sum proves to be a measurement of the net cost savings to colleges from providing remote instruction rather than in-person instruction. The most promising avenue open to colleges seeking to minimize such damages is to argue that suddenly offering remote instruction caused the colleges to incur significant costs and brought little in the way of savings.

Section B explores the calculation of damages potentially at issue in both suits for unjust enrichment and breach of contract. This sum proves to be a measurement of the putative net benefits to the students if they had received in-person instruction rather than remote instruction. Unless the students can convince courts that simple assertions of subjective value are sufficient, the students will need to show that some external indicator demonstrates the value of in-person instruction, such as a difference in price in the market between remote and in-person instruction. There are, however, significant difficulties in disaggregating the value of unprovided, in-person instruction from those services that the colleges did provide even in the face of COVID, such as the instruction that its faculty did (remotely) furnish or the (mediated) interactions among students at the college that did occur.

A. Damages Unique to Unjust Enrichment

As discussed above, 194 the elements of liability for unjust enrichment are (a) a loss to the plaintiff, (b) a gain by the defendant, and (c) injustice in allowing matters to stand as they are upon commencement of the lawsuit. By way of example, imagine that the plaintiff pays a deposit to the defendant under the assumption that the payment is an obligation under a valid contract. Imagine further that the agreement proves to be invalid and, as a result, no further exchange occurs. Imagine finally that the defendant refuses to refund the deposit to the plaintiff. Without a contractual relationship between the plaintiff and defendant, the latter has no claim upon the deposit. Given the utility of money, the plaintiff suffers an obvious loss from having surrendered possession of the money, while the defendant gains. With no contract and no other exchange

194 See supra Sub-section III.A.1.
between the parties, the defendant’s retention of the money is a pure windfall. On a theory of unjust enrichment, courts will require the defendant to return the money to the plaintiff.\textsuperscript{195} (This assumes that an injustice occurs if the defendant keeps the windfall.)

1. An Initial Calculation of Damages

In the situation involving students, colleges, and COVID, there are overlapping theories of unjust enrichment.

If we emphasize the gain to the defendant\textsuperscript{196}—as in traditional cases emphasizing unjust enrichment\textsuperscript{197}—then the college collected tuition in full but did not have to provide a full complement of in-person instruction. The college gains by retaining that portion of the tuition that, by providing exclusively remote education, it would otherwise have expended if it had provided in-person instruction. Absent a compelling excuse for this retention of funds derived from tuition payments, the defendant should disgorge the ill-gotten savings to the plaintiff. To do otherwise would leave the college unjustly enriched. (The Article treats below the situation, common to both restitution and breach of contract, where the emphasis is on the plaintiff’s loss rather than the defendant’s gain.\textsuperscript{198})

As with liability, this statement of one outcome of a restitutionary case is straightforward. As with liability, the straightforward view favors the students.

2. Collegiate Counterarguments to the Initial Calculation

A straightforward view of the exchange between students and colleges—an exchange of tuition for in-person instruction—leads to the conclusion that colleges should disgorge retained tuition in an amount equal to that portion attributable to providing in-person, rather than remote, instruction. More complex statements of the exchange, however, can lead to more favorable outcomes for college. First, colleges may argue that they in fact provided exactly what the students paid for: an education, not a particular mode of education, i.e., in-person instruction. Second, colleges may (also) argue that their provision of exclusively remote instruction on a crash basis was sufficiently expensive that no quantum of unspent monies remains, and thus no unjust enrichment has occurred.


\textsuperscript{196} Perillo, supra note 88, at 1008 (Restatement (3d) of Restitution and Unjust Enrichment favors theory of unjust enrichment, which emphasizes gains by defendant).

\textsuperscript{197} Id.

\textsuperscript{198} See infra Section IV.B.
One counterargument to the straightforward view that restitution applies for unprovided, in-person instruction simply slices the salami more thickly. The mode of instruction, in this view, is too narrow a view of the nature of the bargain. A student, the argument goes, pays for an education, not to sit in a classroom. In this view, the students who paid full tuition received instruction from highly qualified faculty and their coterie of graduate students, just as the students did in previous (and would in subsequent) semesters. Colleges presented students with the same menu of courses in the COVID semester as in other semesters. Indeed, some of the students’ instruction was in person, at least where COVID interrupted in-person instruction after the semester has started.

Additionally, the colleges might argue, the variation in instruction from semester to semester can dwarf the difference between the provision of remote rather than in-person instruction. A student might spend a semester taking only large lecture classes or only intimate seminars; surely the size of a class affects the resulting education. Students at a large state university may see their course selection so constrained by capacity limits that they must prolong their time at college simply to take courses required for a chosen major.199 Suffering while an instructor mismanages a Zoom session can hardly compare, for both inconvenience and expense, to enrolling for an additional semester.

The gain to the college from charging full tuition and providing only remote instruction is the cost differential between providing entirely in-person instruction and whatever degree of in-person instruction that the college provided during the COVID crisis. The loss to colleges from failing to offer in-person instruction should be relatively straightforward to measure. The colleges’ savings and outlays were, after all, financial, not psychological, like at least some of the benefits to students that might have accrued from receiving in-person instruction. If providing remote instruction proved to be dramatically cheaper, then the colleges charged full tuition but did not expend anything like the entirety of those revenues on the provision of educational services. Much as a business should disgorge a deposit that it has retained despite not providing any of the goods or services that the deposit preserves, a college should then disgorge the

199 Cf. Meredith Kolodner, Six Reasons You May Not Graduate on Time (and What to Do About It), N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/education/edlife/6-reasons-you-may-not-graduate-on-time.html (noting, under heading of “Major Problem: Don’t Veer Off Course,” that students may wait too long to decide on a major, not understand a course is offered only in a particular semester, or may face required classes that are full).
savings that it has retained despite not providing in-person educational instruction.

In addition to the argument that students paid for education and the college provided them with an education, the college has at least one other argument available. A college may also be able to argue that the provision of remote instruction led to increased costs in the short run—even if offering remote instruction for an indefinite, planned-for period might be cheaper than offering in-person instruction for that same period—and that the college therefore derived no surplus from its receipt of a full tuition payment.200

The foundation of the dizzying rise in online retail sales is the ability of centralized, virtual stores to avoid the expenses associated with their brick-and-mortar equivalents.201 They face no costs from paying rent on retail space or paying wages to sales associates. There is no chain of middlemen to soak up revenues from endpoint sales. Inventory costs fall when orders from across the country present a more uniform need for products in stock than the vagaries of local demand. In the language of collegiate instruction, “remote” retail is much cheaper than “in-person” retail.

Harvard is not Amazon, however. In the long run, this is a matter of choice. Harvard could permanently become an entirely virtual university. (It did become an entirely virtual university during COVID.) Before COVID, however, Harvard had consistently chosen to require in-person instruction for those seeking a Harvard degree. A consistent policy to remain a residential college with in-person instruction left Harvard with certain investments incompatible with a rapid conversion to less expensive, remote education. Harvard owns a great deal of real estate in an expensive urban center. Harvard Yard is not just a no-parking zone but also at the center of Harvard’s brand and identity. Faced with COVID, Harvard College could hardly have cut costs by selling off all its property and educating the future leaders of America in a warehouse in some remote, low-rent, rural area. Furthermore, a consistent adherence to in-person instruction meant that converting to entirely remote instruction was a hurried endeavor and thus presumably more expensive than a carefully managed transition. The subsequent decision by Harvard and other colleges to lurch back, as soon as possible, to exclusively in-person instruction meant that the conversion process yielded few durable, and thus valuable, improvements in Harvard’s physical and intellectual infrastructure.

Students may not have received the full complement of in-person instruction, therefore, but they may have received full value for their outlays in light of the higher costs of staying open during COVID. Colleges were stuck in

200 There is an upper bound on the additional expenses involved in providing remote instruction. Colleges did not close because of the provision of remote instruction. Remote instruction must therefore not have been so costly that colleges risked huge losses by staying open while eschewing in-person instruction.

the short run with both the vast square footage usually used for in-person instruction and with the need to provide remote instruction. Collegiate expenses—the carrying costs of impressive building projects, as well as salaries for professors and staff and administrators—might thereby have remained essentially fixed in the relatively brief period when colleges were providing remote or hybrid instruction. If the colleges can show that they spent sufficiently large sums to train the multitudes to use Zoom, and to pay administrators to conduct endless meetings that yielded no direct educational utility but did allow the college to roll out remote instruction and address concerns of public health, then the institutions of higher education may have been justified in retaining the entirety of tuition payments.  

Not every college sailed on with a full crew during COVID, but those that did might attempt to evade restitutionary liability on the grounds that they have spent every penny of collected tuition to help each student receive remote instruction rather than to enrich themselves unjustly.

In summary, as this Article argued in Part II, colleges face an uphill battle when it comes to avoiding liability for their retention of full tuition while providing mostly remote instruction, but, as we have seen in this section, they are more likely to triumph in the fight over restitutionary remedies based on cost to the colleges. This Article turns now to consider the benefits-oriented perspective common to suits in restitution and breach of contract.

Colleges do not seem to have paid a premium to instructors for the extra effort necessary to understand, and perhaps excel at, online instruction. Whether these victims of collegiate cost externalization have a cause of action against their employers is beyond the scope of this Article.


An example of the complexities that may arise in calculating collegiate costs is the treatment of its fixed costs. Consider a dormitory that goes unfilled because of the COVID crisis. Does the college thereby save only the variable costs of cleaning the dormitories and providing climate control? Does the college also save a year’s worth of wear and tear on the building in terms of longer-run maintenance? Similar questions will arise with respect to the buildings ordinarily used for instruction, such as classrooms and libraries, and perhaps also for the facilities ordinarily employed either for intramural and inter-collegiate athletics.
B. Damages Involving Valuation of In-Person Instruction

The relevant remedy for breach of contract in suits between students and colleges is compensatory damages. An award of compensatory damages for breaching a promise to provide in-person instruction would compensate a student for the difference in value between the world as it was after the breach, i.e., remote instruction, and the world as it should have been if there had been no breach, i.e., in-person instruction. Such a calculation obviously involves determining the value of the unreceived instruction.

With respect to restitution, this Article has already examined the calculation of a restitutionary award based upon the perspective of the defendant. If we instead emphasize the loss to the plaintiff—which is the focus of restitution styled as involving “receipt of benefit” or “quantum meruit”—then the student has paid full tuition without receiving full value. The student loses the entire benefit of the tuition but does not receive a full complement of in-person instruction. The college’s retention of full tuition, while providing only partial value, leaves the college unfairly in possession of that quantum of tuition that instantiates the difference to the students between what would have been their value from the unprovided, in-person and the value of exclusively remote instruction. Under the rationale for causes of action for unjust enrichment, the student-plaintiff should receive that quantum in a judgment against the college. To do otherwise would be unjustly to deprive the students of the benefits of their expenditure.

Both an award of compensatory damages for breach of contract and a plaintiff-oriented award for restitution depend, therefore, upon the valuation of the deficit between the value of remote instruction compared to in-person instruction. Because the student has already received whatever value that the

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205 See Anthony Kronman, Specific Performance, 45 UNIV. CHI. L. REV. 351, 354 (1978) (“normal remedy for breach of contract is, of course, money damages,” while specific performance is “exceptional”). Specific performance is especially inapt in cases involving services, on the grounds that such an order in such a case may constitute involuntary servitude. Michael A. Schmitt & Michael Pasterczyk, Specific Performance Under the Uniform Commercial Code: Will Liberalism Prevail?, 26 DEPAUL L. REV. 54, 57 (1976) (“a decree for specific performance would be denied at common law [for] a contract that involved personal services”). Liquidated damages, which are a specification in the contract itself of the remedy for its breach, may substitute for compensatory damages. See Restatement (Second) of Conts. § 356 (Am. L. Inst. 1981) (describing liquidated damages). Cases on the student-college contract do not seem to mention such damages, however, so the Article assumes that there are no such clauses in the relevant contracts.


207 Rendleman, supra note 206, at 1009.

208 Id. at 1009–10.

209 Id. at 1011–12.
remote instruction contained, the award in both cases is simply the hypothesized value to the student of the additional benefits of in-person instruction in comparison to the value of remote instruction.\textsuperscript{210}

1. Difficulties with Market Valuations of In-Person, Compared to Remote, Instruction

The existence of some loss to the plaintiff from the receipt of remote rather than in-person instruction is inarguable. Students paid full tuition, which assumed in-person instruction, but they did not receive that in-person instruction. The provision of in-person instruction must have some value. Students who attend in-person colleges presumably do so in part because the schools are in-person colleges. Colleges would not use in-person instruction to distinguish themselves from other universities, nor would they have rushed to reinstate in-person instruction as the COVID crisis receded, if in-person instruction were no more valuable to their potential customers as a group than remote instruction. Students who attend online-only colleges, for their part, presumably do so, at least to some extent, because they are online-only colleges. Some students desire the in-person collegiate experience, while other desire the convenience (and potentially lower cost) of remote instruction.

Unfortunately for the students, however, the benefits of the unprovided, in-person instruction may be difficult to value because collegiate behavior has not resulted in a market valuation of the difference between in-person and remote instruction. There appear to be no generally available pairs of market prices for two collegiate educations, differing only in terms of the provision of in-person versus remote instruction. A market valuation for the additional benefits of in-person instruction therefore does not exist.

The difficulty in valuation stems from the long-standing policies of colleges rather than from any inherent inability of a hypothetical market to reveal the difference in value between in-person and remote education. Prestigious residential colleges have traditionally offered only in-person instruction, rather than remote instruction in any form, as the method of pedagogy. Additionally, colleges have always offered in-person instruction in exchange for tuition in conjunction with a variety of other relevant factors, such as instruction by highly qualified faculty. A disaggregated value for in-person instruction alone is thus difficult to determine. Traditionally, for example, one obtained a Princeton education in person and from Princeton’s faculty and in the company of other...

\textsuperscript{210} For the sake of economy in exposition, this Article emphasizes that the move to exclusively remote instruction involves a loss in the quality of instruction. Students might also argue, however, that they chose a residential college partly for intellectual stimulation outside of the classroom. Surrounding oneself with intelligent, inquisitive peers can lead to a great deal of auto-didacticism. COVID dispersed the student body. If remote communications like social media and texting have not entirely displaced face-to-face interactions, then students suffered this extra loss from COVID, beyond its effects on instruction.
As to Princeton’s passion for in-person instruction, which is a characteristic relevant to much of the analysis of this article, the pairing of “diversity” and “full, in-person teaching” in a recent article about Princeton’s graduate schools implies that both are desiderata, at least. See Denise Valenti, Office of Commc’ns, Graduate School Welcomes Most Diverse Class in History and Resumes Full, In-Person Teaching, PRINCETON UNIV. (Aug. 30, 2021, 10:10 AM), https://www.princeton.edu/news/2021/08/30/graduate-school-welcomes-most-diverse-class-school-history-princeton-resumes-full. Additionally, Princeton’s president was said to have “expressed jubilation for Princeton’s return to full, in-person teaching.” Id.


213 An award of the cost of completion is possible in construction contracts. See Restatement (Second) of Conts. § 348(2)(b) (Am. L. Inst. 1981) (stating that, for construction contracts, court may award “reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to [injured party.]”). Compare Groves v. John Wonder Co., 286 N.W. 235 (Minn. 1939) (awarding cost of completion for grading contract), with Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 102 (Okla. 1962) (refusing to grant completion costs for contract to fill in and smooth holes left after mining on land).
unprovided, in-person instruction. First, one may simply consider the relevant value to be whatever “reasonable value” that a finder of fact judges to be such. Second, one may examine the reaction of “downstream” consumers of students with college degrees, such as employers and graduate schools, to see if these entities treated differently the students who received remote instruction in place of the promised, in-person pedagogy. The reasonable-value avenue has some promise for disappointed students, while the downstream-value avenue appears to favor the colleges’ position.

i. “Reasonable” Value

In cases in restitution where one party performs a service for another without benefit of contract, the finder of fact may determine a “reasonable” value for the service as the award.214 Presumably, in the absence of a market valuation,215 such a determination of the additional value of in-person instruction would include evidence about the costs of providing such instruction, as well as the benefits to students of such instruction in comparison to remote instruction. To the degree that courts allow subjective valuation by the disappointed student to play a role, the student may convince the court that there were deprivations from a failure to receive in-person instruction, such as disappointment or discouragement, that went beyond effects that would be captured in a market that did allow distinctions between remote and in-person instruction.

A similar standard might apply in a suit for breach of contract. A “pure” service is valuable to its purchaser even though there may be no easily calculable impact on earning potential.216 The service, once rendered, is also not tradeable, which further removes it from a situation where market valuation is sufficient.217 Courts are nonetheless open to awards of non-pecuniary damages in such

214 The relevant doctrine may characterize the damages as quantum meruit. See Marta v. Nepa, 385 A.2d 727, 730 (Del. 1978) (“Quantum meruit . . . is the reasonable worth or value of services rendered for another.”). See generally Candace Kovacic-Fleischer, Quantum Meruit and the Restatement (Third) of Restitution and Unjust Enrichment, 27 REV. LITIG. 127 (2007) (discussing doctrine).
215 See Kovacic-Fleischer, supra note 214, at 133–34 (discussing non-monetary benefits in restitution cases).
216 See Adam Kramer, The Law of Contract Damages 25 (2d ed. 2017) (“Pure services are those that do not provide the promisee with a marketable residue, such as a piece of property or an increase in the value of property.”). Kramer, who writes about the law of the United Kingdom, notes that the typical rules of damages for breach of contract apply to services, such as “lost profits, lost increase in the value of property, damage to property, liability to third parties, and non-pecuniary loss.” Id. at 27 (footnotes omitted). Only non-pecuniary loss would seem to be directly helpful to students seeking damages for undelivered, in-person instruction.
217 Id. at 37.
cases, even though non-pecuniary loss generally plays a much greater role in torts rather than contracts cases.

The thin market for custom goods displays similarities to the non-existent market for in-person instruction unbundled from other educational services. Courts wrestling with custom goods generally turn to some objective measures as the basis for an award of damages, however.

ii. Reactions of Downstream Consumers of College-Educated Students

A collegiate education may be an end in itself, but many students presumably value their college degree for its enhancement of their career prospects. Employers, as well as graduate and professional schools, provide an alternative to a marketplace for the degrees themselves. If employers, for example, pay holders of Ivy League degrees more than holders of degrees from

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218 Id. at 537 (“The vast majority of non-pecuniary loss awards have been made in cases of either pure services (such as holidays) or services related to property (such as domestic building works or surveying.”) (discussing UK law); cf. id. at 535 (discussing loss of comfort and convenience to tenants deprived of promised living conditions) (discussing UK law).

219 Calfee and Rubin, for example, use “non-pecuniary loss” as synonymous with “non-pecuniary loss in tort cases.” See John E. Calfee & Paul H. Rubin, Some Implications of Damage Payments for Non-Pecuniary Losses, 21 J. LEGAL STUD. 371, 371 (1992). Non-pecuniary losses such as punitive damages, or recovery for pain and suffering, are not available in suits for breach of contract. Ehrlich v. Menezes, 981 P.2d 978, 981 (Cal. 1993) (holding that damages for emotional distress not available for breach of contract, unless breach was independently a tort); see William S. Dodge, The Case for Punitive Damages in Contracts, 48 DUKE L.J. 629, 630 (1990) (“Traditionally, punitive damages have not been available for breach of contract.”).

220 Like in-person instruction, custom goods present a situation where market valuation of the goods involved is difficult. Courts nonetheless award damages for a breach by the seller of associated contracts. See, e.g., Lieberman v. Templar Motor Co., 140 N.E. 222 (N.Y. 1923) (awarding lost profits for breach involving custom-designed auto bodies since no market valuation existed); Conditioned Air v. Rock Island Motor Transit, 114 N.W.2d 304, 308 (Iowa 1962) (noting, in case about custom-designed aluminum panels, that “[e]vidence of the price for which personal property sells at a bona fide sale is competent evidence of its value” but allowing other evidence to show damages in this case); Precision Mirror & Glass v. Nelms, 797 N.Y.S.2d 720 (N.Y. Civ. Ct. 2005) (awarding contract price, less deposit, to maker of glass table designed to customer’s pattern and dimensions after customer refused to accept delivery because customer became unsure that own specification of glass’ thickness was suitable). For provisions of the Uniform Commercial Code that may be relevant to custom goods, see U.C.C. § 2-709(1)(b) (AM. L. INST. & UNIF. L. COMM’N 1990) (stating that seller may recover contract price if “seller is unable after reasonable effort to resell them at a reasonable price or situation indicates “such effort will be unavailing”); id. at § 2-708(2) (stating that, when market-oriented cover sale is “inadequate,” seller may recover lost profit and reasonable overhead). Services and custom goods do not present the only difficulties in valuation. Absent a robust futures market, one faces similar issues after if a buyer breaches a long-term contract before final performance is due. See Victor P. Goldberg, Reckoning Contract Damages: Valuation of the Contract as an Asset, 75 WASH. & LEE L. REV. 301, 325–37 (2018) (analyzing “take-or-pay” contracts in highly regulated natural-gas markets as example of long-term agreements where valuation of mid-contract breach is difficult).
other colleges, then the value of the Ivy League education is greater than it would otherwise be.

On this view of the value of in-person education, there is anecdotal evidence that its value is . . . nothing at all. The question turns on the reaction of employers and graduate schools to the difference between an undergraduate degree obtained exclusively through in-person instruction and an undergraduate degree obtained in part through unanticipated, remote instruction. The evidence is scanty but, from the point of view of litigious students, not encouraging. Employers and graduate schools do not seem to give a whit about the fact that recent graduates have what one might (metaphorically) call COVID-contaminated degrees. Proving a negative is always difficult, but there seem to be no reports of employers offering lower salaries to very recent graduates, as compared to slightly less recent graduates, because of concerns about remote instruction. There are of course reports of lower salaries for all sorts of workers because of larger economic currents playing out in the wake of the COVID crisis.

Likewise, graduate and professional schools do not seem to have treated COVID-contaminated degrees differently in their admissions processes. There are slots in these schools to fill, after all, and graduate and professional schools seem content to fill them with the most recent crop of students, just as they would fill any year’s entering class largely with the most recently graduated, post-collegiate students. In the law, graduate schools face an additional concern, which is that administration of the LSAT occurred in an abbreviated and at-home form, which some believe has led to a compression of scores at the top end. As with other factors, however, this does not seem to have deterred law schools from proceeding as normal with their admissions processes.

Indeed, the students themselves may have chosen a residential college because of an initial preference for in-person instruction but may not, in the aggregate and in the wake of COVID, care much about the mode of instruction that they receive. Enrollment in four-year colleges increased in the fall of 2020, the first full semester in the COVID era. If remote instruction were grossly repellent to students who contracted initially for in-person instruction, then those students would presumably have deserted (or deferred their attendance at) schools that continued to offer remote instruction instead of in-person education. The data is not sufficiently fine-grained to know what choices the students at precisely those schools made in the fall of 2020, but they did not drop altogether out of college at rates that led to a decline in overall enrollments.

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222 See supra note 57.
Let us now recap the situation regarding students, colleges, and COVID from top to bottom.

Students may attempt a suit, sounding in equity, based upon a claim of restitution from the defendant or its cousin, a claim to avoid unjust enrichment by the defendant. Students might use the exchange of tuition for educational services to support suits in equity attempting to compel colleges to disgorge the difference in value between the full-fledged education that colleges should have provided when collecting full tuition, on the one hand, and the incomplete education that colleges actually provided, on the other hand. These suits may founder if colleges can show that the associated contracts did not require the provision of in-person instruction, or if colleges can show that they needed to spend all the funds collected in order to lurch between in-person and remote education, or if courts limit students to theories of recovery oriented towards objective valuations and such losses are too difficult to prove.

A suit for breach of contract provides the other major avenue of approach for students deprived of in-person instruction by the COVID crisis. The students provided the colleges with tuition, while the colleges moved from providing students with exclusively in-person instruction to providing students with predominantly remote instruction. Because the exchange between students and colleges constituted a contract in which the colleges (probably) promised to provide exclusively in-person education, the colleges are potentially liable at law for breach of that contract. Legal impossibility, or perhaps commercial impracticability, may defeat such claims. The commercial orientation of compensatory damages in such cases may make it difficult for students to recover significant amounts from the colleges even if the colleges are held liable for breach of promise, but resort to reasonable or subjective valuations may rescue the case for damages.
V. THE DIFFICULTIES OF UNBUNDLING WITHOUT A MARKET

This Article has established that students seeking tuition refunds because of unreceived, in-person instruction have the advantage in the liability stage of litigation, but that colleges have the advantage in the remedial stage of such litigation. This Part develops the third fundamental conclusion of the Article: An examination of colleges and the COVID crisis suggests other important lacunae in the ability of the law to regulate social interactions in a time of rapid and unanticipated change.

Much of the utility of this Article depends on its granularity. The Article undertakes a careful matching of doctrine to the fact patterns common to contracts involving tuition exchanged for the promise of in-person instruction, rather than analyzing COVID cases generally or even contracts generally. This Part, however, inverts the microscope to examine how the difficulty in calculating damages for students deprived of in-person instruction might reflect a systematic, although hardly pervasive, lacuna in the law of contracts and restitution: When a party fails to keep its promises with respect to a component of performance that has not historically been offered separately in the marketplace, the victims of the breach may find themselves without a remedy, even if they have clearly suffered a loss.

In the case of COVID, the relevant component is in-person instruction. Prestigious colleges, which are almost invariably residential colleges, have not jumped aboard the online bandwagon for remote instruction counting towards a degree at those institutions. Historically, the provision of in-person instruction accompanied the provision of that instruction by a highly trained faculty and by residence on a campus thick with members of a high-achieving student body. COVID severed in-person instruction from this trio of benefits. With no pre-existing market for in-person instruction provided on its own, and a rapid return by colleges to the pre-COVID model, a separate market valuation of in-person instruction is not possible, and plaintiffs in suits for breach of contract or unjust enrichment are likely to have a difficult time obtaining compensation for their losses. In the case of telecommunications against a backdrop of monopoly in local and long-distance phone service that persisted until the mid-1980s, the relevant component is either unprovided, local telephone service or unprovided, long-distance telephone service. In the case of the initial stages of the personal computer, the relevant component is hardware.

A. COVID and “Constant Variation”

The law relating to damages for breach of contract,\(^{223}\) and sometimes for restitution,\(^{224}\) implicitly assumes that parties interact against a background of

\(^{223}\) See supra Section IV.B.
\(^{224}\) See supra Section IV.A.1, IV.B.
what one might call “constant variation”—a phrase that, despite its oxymoronic implications, this Article uses simply to describe a world where there is stability in the menu of options relevant to the parties’ relationship. 225 The COVID crisis has undermined that assumption. The calculation of damages—especially where money, i.e., tuition, changes hands—operates most effectively when a well-established, “thick” market provides valuations for a wide range of characteristics potentially involved in an exchange. 226 If, in contrast, there is a rapid and dramatic change in one characteristic of a transaction—i.e., the provision of in-person, collegiate instruction—then there may be no readily available market valuations of that characteristic, even though the characteristic clearly has significant value. This is the situation with respect to collegiate COVID contracts, and damages as a result may be real but unrecoverable. The requirement of a well-developed market to provide valuation disserves a genuinely injured plaintiff. 227 The same uniformity of approach that makes a finding of some breach of promise or unjust enrichment relatively easy to demonstrate also makes placing a particular value on that fraud or breach of

225 Those familiar with the calculus will see an analogy to, but not an actual example of, the difference between first order and second order derivatives. Compared to one choice, the menu of options displays more “movement,” analogous to a positive first-order derivative. The menu of options can be unchanging, however, like a non-positive (zero) second-order derivative. See JAMES STEWART, DANIEL C. KLEGG, & SALEEM WINSTON, CALCULUS 107–32 (9th ed. 2020) (derivatives).

226 Scholars who examine when specific performance is more optimal than compensatory damages often consider the degree to which the contract involves fungible vice unique goods, because specific performance gains in attractiveness if the market cannot provide a ready substitute. For discussions of markets in this context, see Anthony T. Kronman, Specific Performance, 45 U. CHI. L. REV. 351 (1978) (arguing that specific performance optimal only if goods unique); Melvin A. Eisenberg, Actual and Virtual Specific Performance, the Theory of Efficient Breach, and the Indifference Principle in Contract Law, 93 CALIF. L. REV. 975, 1029–34 (2005) (discussing variation in preferred remedy depending on whether contract is for homogenous goods, semi-homogenous goods, or highly non-homogeneous goods). But cf. Steven Shavell, Specific Performance vs Damages for Breach of Contract: An Economic Analysis, 84 TEX. L. REV. 831 (2006) (arguing that crucial determinant in desirability of specific performance is whether subject of contract already in existence). Of course, no matter how unique one’s labor might be, a court will not award specific performance against a particular individual’s service out of concerns relating to the Thirteenth Amendment’s prohibition on slavery and involuntary servitude. See Nathan B. Oman, Specific Performance and the Thirteenth Amendment, 93 MINN. L. REV. 2020, 2020 n.2 (2008) (“Under current law, of course, specific performance of a personal-service contract is not available”).

227 Any contractual situation involving thin markets presents this difficulty of valuation. The argument of the Article, however, is that the collegiate COVID crisis is an example of a particular sub-species of these difficulties resulting from rapid social change. COVID’s sudden appearance occurred when collegiate contracts with students for in-person instruction indivisibly offered many other features. The pace of events was too rapid for unbundled agreements to evolve, and thus no separate market valuation exists for in-person instruction, which was not provided, as differentiated from, say, instruction by highly qualified faculty, which was provided. Given enough time, colleges might come to offer a collegiate experience that allowed students to choose from a broad menu of options, with separate charges for each component. (They do so currently with respect to room and board.) Such a menu would solve the problem of valuation discussed in this Article.
promise difficult: Colleges have promised in-person instruction so universally that one is hard pressed to obtain disaggregated data on the price of such instruction as opposed to excellent faculty, lovely facilities, and a benign tolerance for underaged drinking. The recent proliferation of institutions offering at least some online instruction for degree credit may provide some assistance. Unfortunately, market segmentation undercuts some of the utility of the comparison: Many schools that offered online-only instruction in the wake of the COVID pandemic had not offered such instruction previously and seem not to wish to offer such instruction once in-person instruction returns. No market for online-only versions of those schools has existed, exists, or (apparently) will exist in parallel with traditional, in-person instruction from the same school, which will make the calculation of compensatory damages challenging.

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228 The current poster child for excess along these lines is the “lazy river,” a.k.a. water park. Compare James V. Koch, No College Kid Needs a Water Park To Study, N.Y. TIMES (Jan. 9, 2018), https://www.nytimes.com/2018/01/09/opinion/trustees-tuition-lazy-rivers.html (opining that “latest trend is lazy rivers [which are] the last thing students should be paying for”), with Michael B. Horn, Why Lazy Rivers Have Their Place on College Campuses—And Yet Still Might Just Be Lazy, FORBES (Nov. 14, 2019), https://www.forbes.com/sites/michaelhorn/2019/11/14/why-lazy-rivers-have-their-place-on-college-campuses-and-yet-still-might-just-be-lazy/?sh=4d27a28340f7 (noting that students desire, and colleges seek to provide, “lifestyle” experiences from colleges and not just a job). Horn also argues that students “want the ‘classic’ college experience that they’ve been led to expect.” Id. The meaning of the quotation marks around classic is open to interpretation, but one classic and Classical work on education omits any mention of water parks. See PLATO, THE REPUBLIC, bks. III and IV (trans. G.M.A. Grube & rev. C.D.C. Reeve 1992) (describing ideal education as including physical education in curriculum to promote physical health). One might note that, while a lazy river is one thing, some colleges have many things that might be seen as excessive, duplicative, or more about lifestyle than actual learning. Silliman College, which is one of Yale University’s fourteen residential colleges, “boasts a tremendous array of facilities, including a movie theater, media center, art gallery, library, kitchen, aerobics and dance studio, art studio, basketball court, weight and fitness room, sound studio, game room, and a buttery.” Silliman Coll., History, YALE.EDU, https://silliman.yalecollege.yale.edu/about-silliman/history (last visited Oct. 7, 2023). Of course, in terms of butteries, Yale’s arch-rival has been there and done that. See Christina J. Hodge, Consumerism and Control: Archaeological Perspectives on the Harvard College Butterly, 42 NE. HIST. ARCHAEOLOGY 54, 54 (2013) (discussing how Harvard College’s operation of a buttery between 1650 and 1800 “functioned both as a technology of social control and an opportunity for individual agency”).

229 For the evolution of remote instruction from correspondence courses to online for-profit colleges that have a 70% market share of online degrees, see Ryan Craig, A Brief History (and Future) of Online Degrees, FORBES (June 23, 2015), https://www.forbes.com/sites/ryancairg/2015/06/23/a-brief-history-and-future-of-online-degrees/. Elite colleges historically relegated remote instruction to extension and continuing-education courses, although not-for-profit institutions at all levels of reputation have achieved a 30% market share. Id.

230 Anti-trust law wrestles with an analogous difficulty of disaggregation. A plaintiff may succeed at showing that a series of incidents over time by a single defendant that cumulatively harmed the plaintiff, but courts nonetheless require the plaintiff to show, to some extent, the harm from each incident. James R. McCall, The Disaggregation of Damages Requirement in Private Monopolization Actions, 62 NOTRE DAME L. REV. 643 (1987); see M. Sean Royall, Disaggregation of Antitrust Damages, 65 ANTITRUST L.J. 311 (1997); cf. Dan Markel, How Should Punitive
B. The “Phone Monopoly and the Personal Computer

There are other examples of the phenomenon. In the early 1980s, telephone services in the United States were essentially the exclusive purview of the American Telephone & Telegraph (AT&T), sometimes known colloquially as “Ma Bell.”231 Given the extraordinary proliferation of telecommunications options for the contemporary customer, and the ready availability of “unlimited” plans, one may have a difficult time imagining an era when there were per-call charges for “long-distance” telephone calls and when “local” calls required their own plan of one sort or another. (Without smartphones, data charges and texting fees were not even on the table.) Ma Bell, a near-monopolist, bestowed both long-distance and local access to nearly everyone with a phone.232 (Local access was necessary to use long-distance service.) Although local and long-distance service each had a separate menu of plans, AT&T in fact engaged in a complex cross-subsidization of local residential service at the expense of long-distance residential service and services to business.233 A failure by AT&T to provide a consumer one of either local or long-distance service would therefore involve losses that had a price in the market, but that price would not reflect the value of the unprovided service for purposes of restitution. The gap between market price and actual cost would likewise complicate—but not step dead in its tracks—a suit for breach of contract by a disappointed customer. A price in a competitive market, after all, sets a presumptive floor on the loss to a customer from a failure to provide the relevant good. (The price is not the ceiling, of course, as consumer surplus and the potential for consequential damages may lead to losses well beyond the expenditure necessary to purchase the good.)

The mid-1980s saw not only the end of the AT&T monopoly but also the beginning of widespread use of personal computers. Given the extraordinary proliferation of hardware options for the contemporary owner of a Windows or Mac OS machine, one may have a difficult time imagining an era when the manufacturer of a given computer bundled together all of its hardware and when no after-market for that hardware existed. The failure of a personal-computer maker to provide some piece of hardware would therefore present the same decomposition problem as in-person instruction and land-line telephony. No market existed to price the unprovided component, and so the remedy for

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231 For an insider’s view of AT&T’s break-up in the mid-1980s, see Brooke Tunnell, Disconnecting Parties: Managing the Bell System Breakup, An Inside View (1985). For an impassioned case from two former employees that the break-up was a mistake, see Constantine Raymond Kraus & Alfred W. Duerig, The Rape of Ma Bell: The Criminal Wrecking of the Best Telephone System in the World (1988).

232 A phone at this time was always a land-line phone.

successful suits for both restitution and breach of contract would have been significantly more complicated.

For all these examples, the passage of time led before too long to their own irrelevance. Colleges, at least for the moment, are back to providing the entire bundle of educational services in exchange for tuition. Students do not need, for the moment, to suffer a loss from an unprovided component of a bundled service. Users of telephones and of personal computers now have a dizzying array of services and goods, respectively, that they can purchase. They do not need to suffer a loss from an unprovided component of a service or good for which no market price is available. The decomposition problem has proven transitional.

VI. CONCLUSION

This Article should be of practical interest because of the possibility that the causes of actions discussed herein, which number in the hundreds, will lead millions and millions of dollars to flow from thousands of institutions of higher education back to the millions of individual students who initially paid out those dollars as tuition. Trial courts do not appear to have found a consistent approach to the problem; appellate courts are just beginning to address the problem; and scholarly analysis of the issue is spotty at best. By conducting a careful and comprehensive doctrinal analysis of the causes of action for unjust enrichment and breach of contract, this Article hopes to give all the participants some helpful guidance.

Although COVID is central to the story of whether paying full tuition for less than a full complement of in-person instruction, a myriad of circumstances distinguish the analysis here from more general debates about contracts and COVID. The failure of one party, i.e., the college, to live up to its obligations is clear. The other party, i.e., the student, is blameless. The informational advantage of one party, i.e., the college, over the other, i.e., the student, is likewise apparent. This pair of asymmetries allows a focus on the doctrinal complexities themselves of a variety of doctrines at issue in restitution or breach of contract.

Because few colleges offered remote instruction as a method of degree-oriented pedagogy before COVID, and because few colleges continued to offer remote instruction for degree credit after COVID receded, the period at issue is discrete, with remote instruction only a flash in the pan. As a result, many potential collegiate claims of commercial impracticability, or of rough equivalency between in-person and remote instruction, ring hollow.

Additionally, the collegiate COVID cases provide a useful contribution to the ideas of “law in action” or “law and society”: these cases provide a useful example of how the law implicitly assumes a “constant variation” in the marketplace and how reasonable outcomes are more difficult for society to achieve when drastic and discrete change upsets that assumption.
All told, then, COVID created a collegiate crisis that led many colleges to offer much less in-person instruction than they had traditionally provided and likely promised. One might assume that legal recompense is available to disappointed students in such a situation. A suit by a student against their college for breach of contract or for unjust enrichment in fact stands an excellent chance of prevailing on the issue of liability, although a pre-emptive contractual clause or legal impossibility may excuse colleges for the shortfall in education. On the issue of compensation, however, the students face a much more difficult task: their choices and much expert opinion indicate that in-person instruction is superior to remote instruction, but the market’s valuation of the difference is at best complex and at worst dispositively indifferent. The rapid onset of COVID at the social level exposes the difficulty of the student’s task in obtaining damages as a systemic if temporary flaw with relying on market valuation in a period of rapid change. All the parties involved can certainly hope that this higher-level flaw, and the more doctrinal difficulties that the collegiate COVID cases present, will not manifest themselves again in some future round of deadly and divisive disease.