

UNSAFE AT ANY CAMPUS: DON'T LET COLLEGES BECOME THE NEXT CRUISE SHIPS, NURSING HOMES, AND FOOD PROCESSING PLANTS

PETER H. HUANG* AND DEBRA S. AUSTIN**

The decision to educate our students via in-person or online learning environments while COVID-19 is unrestrained is a false choice, when the clear path to achieve our chief objective safely, the education of our students, can be done online. Our decision-making should be guided by the overriding principle that people matter more than money. We recognize that lost tuition revenue if students delay or defer education is an institutional concern, but we posit that many students and parents would prefer a safer online alternative to riskier in-person options, especially as we get closer to fall, and American death tolls rise. This Article argues the extra stress of trying to maintain safety from infection with a return to campus will make teaching and learning less effective. While high density classrooms promote virus transmission and potentially super-spreader events, we can take the lessons we learned during the spring and provide courses without the stressors of spreading the virus. We argue the socially responsible decision is to deliver compassionate, healthy, and first-rate online pedagogy, and we offer a vision of how to move forward into this brave new world.

INTRODUCTION

This Essay addresses the issue of whether colleges and universities should reopen their campuses in the fall of 2020 in the midst of the COVID-19 pandemic.¹ Ralph Nader famously wrote *Unsafe at Any Speed*,² that helped launch the consumer-rights movement and create the National Highway Traffic Safety Administration (NHTSA),³ whose self-described “mission is to save

** Professor and Laurence W. DeMuth Chair of Business Law, University of Colorado Law School, J.D., Stanford Law School; Ph.D., Harvard University; A.B., Princeton University. Thanks to the University of Colorado Office of the Chancellor and Center for Leadership for a leadership research seed grant. Thanks to the University of Colorado Law School for summer research support. Thanks to Karl Schellscheidt, John Solow, Maxwell Stearns, and Jane Thompson for helpful comments.*

*** Professor of the Practice, University of Denver Sturm College of Law, J.D., University of San Francisco; Ph. D., University of Denver; B.M.E, University of Colorado.*

¹ Dennis Wagner, *Colleges Race to Create ‘a New Sense of Normalcy.’ Will New Rules, COVID-19 Testing Be Enough?*, USA TODAY (July 5, 2020, 4:45 PM), <https://www.usatoday.com/story/news/education/2020/07/05/covid-testing-colleges-race-campus-safe-reopen-fall/3283734001/> [<https://perma.cc/AV8Y-54NM?type=image>].

² RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (25th anniversary ed. 1991).

³ Christopher Jensen, *50 Years Ago, ‘Unsafe at Any Speed’ Shook the Auto World*, N.Y. TIMES (Nov. 27, 2015), <https://www.nytimes.com/2015/11/27/automobiles/50-years-ago-unsafe-at-any-speed-shook-the-auto-world.html> [<https://perma.cc/FJF2-CTHZ>].

lives, prevent injuries, and reduce economic costs due to road traffic crashes, through education, research, safety standards, and enforcement.”⁴ U.S. Senator from Massachusetts Elizabeth Warren, as a Harvard Law School (HLS) professor, famously wrote *Unsafe at Any Rate*,⁵ that helped focus attention on consumer financial protection through a federal regulatory agency and create the Consumer Financial Protection Bureau (CFPB),⁶ which “regulates the offering and provision of consumer financial products or services under the federal consumer financial laws and educates and empowers consumers to make better informed financial decisions.”⁷ We write that reopening colleges and universities to in-person classes this fall is *Unsafe at Any Campus* and sincerely hope that our Article triggers critical thinking, evidence-based decision-making, and mindful reflection.⁸

We are certainly not alone.⁹ Others who raise similar concerns include the deans of these six Harvard graduate and professional schools: Divinity School, Graduate

⁴ *NHTSA’s Core Values*, NHTSA, <https://www.nhtsa.gov/about-nhtsa/nhtsas-core-values> [<https://perma.cc/5Y2Q-6WVV>].

⁵ Elizabeth Warren, *Unsafe at Any Rate: If It’s Good Enough for Microwaves, It’s Good Enough for Mortgages. Why We Need a Consumer Product Financial Safety Commission*, DEMOCRACY (Summer 2007), <https://democracyjournal.org/magazine/5/unsafe-at-any-rate/> [<https://perma.cc/896G-GM6M>].

⁶ Eric J. Mogilnicki & Melissa S. Malpass, *The First Year of the Consumer Financial Protection Bureau: An Overview*, 68 BUS. LAW. 557 (2012).

⁷ CFPB, About Us, <https://www.consumerfinance.gov/about-us/> [<https://perma.cc/GM34-P8AZ>].

⁸ Christina Maxouris, *Penn State is Tracking Those in Contact with a 21-Year Old Student who Died of COVID-19 Complications*, CNN (July 5, 2020, 6:18 AM), <https://www.cnn.com/2020/07/05/us/penn-state-student-dies-coronavirus/index.html> [<https://perma.cc/97ZP-5XGR>]; Megan Zahneis, *A Ph.D. Student Simulated a Day in the Life of a Covid 19-Era Campus. It Went Viral, but It Wasn’t Pretty*, CHRON. HIGHER EDUC. (July 1, 2020), <https://www.chronicle.com/article/A-PhD-Student-Simulated-a/249106> [<https://perma.cc/664G-VF33>].

⁹ Daniel W. Drezner, *I’m a College Professor. Here is What I Think About College Preparations for the Coronavirus this Fall.*, WASH. POST (July 6, 2020), <https://www.washingtonpost.com/outlook/2020/07/06/im-college-professor-here-is-what-i-think-about-college-preparations-covid-19-this-fall/> [<https://perma.cc/64J5-XVWK>]; Tim Duane, *Teaching Law in the Time of COVID-19* (July 5, 2020), <http://ssrn.com/abstract=3642820> [<https://perma.cc/V8XS-FBSL>]; Anemona Hartocollis, *Colleges Face Rising Revolt by Professors*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/2020/07/03/us/coronavirus-college-professors.html> [<https://perma.cc/L6KD-AT2B>]; Paul Kellermann, *I Love Teaching at Penn State, But Going Back This Fall Is a Mistake. 1,000 of My Colleagues Agree.*, ESQUIRE (June 26, 2020), <https://www.esquire.com/news-politics/a32973676/penn-state-university-covid-19-petition-professors/> [<https://perma.cc/65SW-NX9R>]; John Kroger, *The Coming Fall Crisis: A Tragedy*, INSIDE HIGHER EDUC. (July 5, 2020), <https://insidehighered.com/blogs/leadership-higher-education/coming-fall-crisis> [<https://perma.cc/EA3N-EA9H>]; Kevin R. McClure, *College Leaders Must Explain Why—Not Just How—to Return to Campus*, EDSURGE (June 25, 2020), <https://www.edsurge.com/>

School of Design, Graduate School of Education, Kennedy School, Law School, and T.H. Chan School of Public Health.¹⁰ Former Yale University president Richard Levin said: “We’re in a global pandemic, and the idea that college life is going to be normal if we do reopen is just a fantasy.”¹¹ Stanford University Law School professor Henry Greely wrote, “Life may be unfair, but we don’t have to be. That is true at the largest scale, but it is even more true at smaller scales, where we have a realistic opportunity to make a difference. That’s a chance we, as faculty and administrators can and should seize.”¹² Princeton University president, Christopher Eisgruber, is “asking faculty members to begin planning now under the assumption that their classes will be online in the fall.”¹³

Barnard College professor Wadda C. Rios-Font makes the case for a virtual fall semester based on considerations about higher education precedent, quality, morality, and likely behavior of students and their parents.¹⁴ Macalester College president Brian Rosenberg says colleges and universities are “not far behind cruise ships and assisted-living facilities” in being exemplary hot spots “as ideal theaters of

news/2020-06-25-college-leaders-must-explain-why-not-just-how-to-return-to-campus [https://perma.cc/834A-SURE]; Daria Roithmayr, Gregg Gonsalves, Anthony Paul Farley, Keeanga-Yamhitta Taylor & Eduardo Bonilla-Silva, *Universities Should Stay Closed to Protect Workers of Color*, BLOOMBERG L. NEWS, (June 25, 2020, 4:01 AM), <https://news.bloomberglaw.com/us-law-week/insight-universities-should-stay-closed-to-protect-workers-of-color> [https://perma.cc/S63K-WMJ2].

¹⁰ Colleen Walsh, *Six Graduate and Professional Schools to Remain Online for Fall*, HARV. GAZETTE (June 3, 2020), <https://news.harvard.edu/gazette/story/2020/06/several-of-harvards-schools-announce-fall-plans/> [https://perma.cc/63A6-EP4A]; see also Kevin Carey, *What Harvard and Your Local Commuter College Now Have in Common*, N.Y. TIMES (July 8, 2020), <https://www.nytimes.com/2020/07/08/upshot/virus-colleges-harvard-reopening.html> [https://perma.cc/9NZA-5JME].

¹¹ Emily Bazelon, *What Will College Be Like in the Fall?*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/magazine/covid-college-fall.html> [https://perma.cc/95J9-5CPD].

¹² Henry T. Greely, *Pandemic Fairness and Academia*, J.L. & BIOSCIENCES (May 20, 2020), <https://academic.oup.com/jlb/advance-article/doi/10.1093/jlb/ljaa030/5840522> [https://perma.cc/RKL8-5V9C].

¹³ The Office of Communications, *President Eisgruber to University Community: At These Times of Economic Stress, Our Priorities Are Clear — We Need to Invest in the Quality of our Teaching and Research*, PRINCETON U. (May 4, 2020), <https://www.princeton.edu/news/2020/05/04/president-eisgruber-writes-princeton-community-about-state-university-and-planning> [https://perma.cc/T8AJ-VES3].

¹⁴ Wadda C. Rios-Font, *Professor Makes Her Case for a Virtual Fall Semester*, ROAD2COLLEGE (June 2, 2020), <https://www.road2college.com/professor-makes-her-case-virtual-fall-semester/> [https://perma.cc/XA54-M5A8].

contagion.”¹⁵ Laurence Steinberg,¹⁶ a renowned adolescent psychological development expert, says campus reopening “plans are so unrealistically optimistic that they border on delusional.”¹⁷

Assistant professor in sociology and legal studies at St. Jerome’s University Honor Brabazon wrote a compelling critique of neoliberal assumptions by and about colleges and universities.¹⁸ Brabazon laments the reductive vision of higher education as only a commodified business transaction. Students are more than customers buying scarce job credentials and mere “content delivery” from only formally equal, fungible, and interchangeable faculty who also do expendable research.

Many faculty feel an uneasy divisiveness permeating administrators’ failure to acknowledge reopening campuses is contentious and causing open and not-so-open “warfare between administrators and faculty.”¹⁹ Some faculty are feeling subtly and not-so-subtly intimidated, pressured, and threatened by administrators, who choose to construe being willing to teach in-person as being a good university citizen, while raising the public health implications of reopening campuses as exemplifying selfish and shameful bad university citizenship.²⁰

¹⁵ Frank Bruni, *The End of College as We Knew It?*, N.Y. TIMES (June 4, 2020), <https://www.nytimes.com/2020/06/04/opinion/coronavirus-college-humanities.html> [<https://perma.cc/GMD3-Y6S9>].

¹⁶ Laurence Steinberg, <https://www.laurencesteinberg.com/about> [<https://perma.cc/884N-AFYF>].

¹⁷ Laurence Steinberg, *Expecting Students to Play It Safe if Colleges Reopen Is a Fantasy*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/opinion/coronavirus-college-safe.html> [<https://perma.cc/8EDH-URBP>]. See also Sarah Brown, *Colleges Say They Can Reopen Safely. But Will Students Follow the Rules?*, CHRON. HIGHER EDUC. (June 16, 2020), <https://www.chronicle.com/article/Colleges-Say-They-Can-Reopen/248995> [<https://perma.cc/4STP-URTK>].

¹⁸ Honor Brabazon, *The Academy’s Neoliberal Response to COVID-19: Why Faculty Should be Wary and How We Can Push Back*, ACAD. MATTERS (May 29, 2020), <https://academicmatters.ca/neoliberal-response-to-covid-19/> [<https://perma.cc/3Z35-N8S3>]. See also Honor Brabazon, *Commentary / Faculty Should Push Back During COVID-19*, CAN. ASS’N U. TCHR. BULL. (May 28, 2020), <https://www.caut.ca/bulletin/2020/05/commentary-faculty-should-push-back-during-covid-19> [<https://perma.cc/G8LN-4YCG>].

¹⁹ Bruni, *supra* note 15.

²⁰ Deirdre Fernandes, *Faculty Grow Uneasy as Universities Scramble to Bring Students Back to Campus*, BOSTON GLOBE (Updated June 11, 2020, 5:07 PM), <https://www.bostonglobe.com/2020/06/11/metro/faculty-grow-uneasy-universities-scramble-bring-students-back-campus/> [<https://perma.cc/FU8H-NWEH>]; Colleen Flaherty, *Mounting Faculty Concerns About the Fall Semester*, INSIDE HIGHER EDUC. (June 30, 2020), <https://www.insidehighered.com/news/2020/06/30/faculty-concerns-about-fall-are-mounting> [<https://perma.cc/G273-AJEZ>]; John I. Jenkins, *We’re Reopening Notre Dame. It’s Worth the Risk.*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/opinion/notre-dame-university-coronavirus.html> [<https://perma.cc/8ED8-4NXG>]; Letters, *The Risks When Colleges Reopen*, N.Y. TIMES (June 13, 2020), <https://www.nytimes.com/2020/06/13/opinion/letters/coronavirus-college-reopening.html>

As of the writing of this Article, about two-thirds of the more than nine hundred American colleges and universities intend to reopen their campuses this fall to large groups of students in August or September.²¹ In addition to, or even instead of, public health and safety, partisanship and politics have become considerations in decisions about whether to reopen college and university campuses.²² Other understandable factors are density, endowment, selectivity, and size.²³

Seton Hall University associate professor of higher education Robert Kelchen believes that no college or university leader desires “to be among the first presidents to announce that classes will be fully online in the fall. The financial and political risks can't be ignored. But the scenario is almost a certainty, and the risks will be even greater for colleges that take too long to prepare for it.”²⁴ Kelchen thinks politicians and public-health officials ultimately “are going to determine when colleges are allowed to open. Higher education will be one of the last industries to resume business as usual, because of concerns with social distancing, contact tracing, and the intermingling of younger students and older faculty and staff members.”²⁵ Kelchen concludes “that a full reopening of most colleges in the fall almost certainly won't happen.”²⁶ These reopening proclamations are examples of what game theorists call “*cheap talk*.”²⁷ Kelchen hypothesizes higher education leaders are saying they plan to reopen for these reasons, “to keep students enrolled,” “political posturing,” and “sheer optimism.”²⁸ Kelchen cites preliminary research evidence suggesting, higher education “institutions may have responded to external coercive isomorphic pressures from state governments and may have relied on a heuristic of peer institution closures to inform their decisions.”²⁹ We are less confident than

[<https://perma.cc/8CE8-C72C>]; Lia Paradis, *A Day in the Life This Fall (Faculty Edition)*, INSIDE HIGHER EDUC. (June 3, 2020), <https://www.insidehighered.com/digital-learning/views/2020/06/03/envisioning-day-life-faculty-member-campus-fall-opinion> [<https://perma.cc/9AS9-B2UR>].

²¹ Chronicle Staff, *Here's a List of Colleges' Plans for Reopening in the Fall*, CHRON. HIGHER EDUC. (Updated June 30, 2020, 5:13 PM), <https://www.chronicle.com/article/Here-s-a-List-of-Colleges-/248626> [<https://perma.cc/U4U3-U2XW>]. *But see* Anemona Hartocollis, *Colleges Plan to Reopen Campuses, but for Just Some Students at a Time*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/07/06/us/coronavirus-universities-colleges-reopening.html> [<https://perma.cc/Q7MJ-8U67>].

²² Chronicle Staff, *Has Reopening Become a Partisan Issue?*, CHRON. HIGHER EDUC. (June 5, 2020), <https://www.chronicle.com/article/Has-Reopening-Become-a/248932> [<https://perma.cc/M3W8-J5V3>].

²³ *Id.*

²⁴ Robert Kelchen, *Colleges Aren't Reopening in the Fall*, CHRON. HIGHER EDUC. (May 18, 2020), <https://www.chronicle.com/article/Colleges-Aren-t-Reopening-in/248803> [<https://perma.cc/UES3-VRP4>].

²⁵ *Id.*

²⁶ *Id.*

²⁷ Joseph Farrell & Mathew Rabin, *Cheap Talk*, 10 J. ECON. PERSP. 103 (Summer 1996).

²⁸ *See* Kelchen, *supra* note 24.

²⁹ Christopher Marsicano, Kathleen Felten, Luis Toledo & Madeline Buitendrop, *Tracking Campus Responses to the COVID-19 Pandemic* (Davidson C. Educ. Stud. Working Paper, Apr.

Kelchen because public statements about reopening may bind colleges and universities to do so if politicians and public-health officials abdicate responsibility and do not override such publicly announced intentions.

According to the Centers for Disease Control and Prevention (CDC), the lowest risk is for students and faculty to “engage in virtual-only learning options, activities, and events.”³⁰ The lowest risk also means residence “halls are closed, where feasible.”³¹ There is more risk for even undersized “in-person classes, activities, and events. Individuals remain spaced at least 6 feet apart and do not share objects (e.g., hybrid virtual and in-person class structures or staggered/rotated scheduling to accommodate smaller class sizes).”³² More risk also happens when residence “halls are open at lower capacity, and shared spaces are closed (e.g., kitchens, common areas).”³³

The CDC guidance “means going virtual is the safest option,”³⁴ and reopening campuses this fall is “an experiment for college and university leaders.”³⁵ A helpful mnemonic to guide reopening in general is to remember these four (actually five) C’s: Close Contact, Confined spaces, Crowds, and Choices.³⁶ In preparing to reopen their campuses, some colleges are preparing to host, isolate, and quarantine contagious students.³⁷

In a controversial, high-profile *New York Times* op-ed,³⁸ Brown University president and economist, Christina Paxson, made the argument that American colleges and universities have a duty now to reopen campuses this fall, safely, as soon as possible for the sake of students and local economies.³⁹ Even within the communities on Brown University’s campus, there were mixed reactions to Paxson’s

27, 2020) <https://preprints.apsanet.org/engage/apsa/article-details/5ea72f8f8be9a920012537e66> [<https://perma.cc/J7BN-UCAC>].

³⁰ *Considerations for Institutes of Higher Education*, CDC (Updated May 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html> [<https://perma.cc/K4KY-2N47>].

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Dr. Delaram J. Taghipour, *Reopening Schools in the Fall, an Experiment for College and University Leaders*, ABC NEWS (June 4, 2020), <https://abcnews.go.com/Health/reopening-schools-fall-experiment-college-university-leaders/story?id=70932562> [<https://perma.cc/AR3U-ZUT2>].

³⁵ *Id.*

³⁶ Roni Caryn Rabin, *How to Navigate Your Community Reopening? Remember the Four C’s*, N.Y. TIMES (June 6, 2020), <https://www.nytimes.com/2020/06/06/health/virus-reopenings.html> [<https://perma.cc/R4DF-93PM>].

³⁷ Fred Thys, *To Reopen Campus, Colleges Prepare To Take On Contagious Students*, WBURNEWS (June 5, 2020), <https://www.wbur.org/edify/2020/06/05/college-plan-contagious-students> [<https://perma.cc/S8RS-SR3A>].

³⁸ Christina Paxson, *College Campuses Must Reopen in the Fall. Here’s How We Do It.*, N.Y. TIMES (Apr. 26, 2020), <https://www.nytimes.com/2020/04/26/opinion/coronavirus-colleges-universities.html> [<https://perma.cc/3BVJ-VS27>].

³⁹ *Id.*

interesting argument.⁴⁰ For example, a Brown University alumnus pleaded for “no dead students,” a reference to a phrase he heard a Brown University administrator say repeatedly during freshman orientation in 2005, when imploring students to call an ambulance or dial 911 whenever fellow students become too drunk or otherwise impaired on campus.⁴¹

Some colleges and universities may be willing to experiment with the lives of students, staff, local communities, and faculty.⁴² These essentially large-scale biomedical clinical research studies have been neither approved, nor even reviewed by any Institutional Review Board (IRB) as is legally required.⁴³ We strongly believe that educators are similar to parents and should always choose to act in the best interests of students.⁴⁴

We share some of our many serious concerns and offer another safer and saner path forward. We agree with physician, immunologist, and director of the National Institute of Allergy and Infectious Diseases since 1984, Dr. Anthony S. Fauci, who testified in comments before the Senate Committee on Health, Education, Labor and Pensions (HELP) that the idea of a treatment or vaccine available to facilitate re-entry of college students in the fall is “a bit of a bridge too far. Even at top speed that we’re going, we don’t see a vaccine playing in the ability of individuals to get back to school, this term. What they really want is to know if they are safe.”⁴⁵ We also agree with Hans Taparia, clinical associate professor at the New York University Stern School of Business, who believes the future of higher education is online and

⁴⁰ Katie Chen, *Paxson’s NYT Op-ed on Fall Reopening Met with Mixed Reactions from Brown Community*, BROWN DAILY HERALD (May 4, 2020), <https://www.browndailyherald.com/2020/05/04/paxson-nyt-op-ed-fall-reopening-met-mixed-reactions-brown-community/> [<https://perma.cc/F4QK-9UL8>].

⁴¹ Thane Richard, “No Dead Students”: A Response to Christina Paxson’s NY Times Op-ed on Opening Colleges this Fall, MEDIUM (Apr. 28, 2020), <https://medium.com/@thanerichard/no-dead-students-a-response-to-christina-paxsons-ny-times-op-ed-on-opening-colleges-this-fall-bea354d967c8>. See also Norman Clark, *The Physically Distanced Classroom: A Day in the Life*, INSIDE HIGHER EDUC. (May 27, 2020), <https://www.insidehighered.com/digital-learning/views/2020/05/27/envisioning-day-life-physically-distanced-classroom-opinion> [<https://perma.cc/SP4K-5VUB>].

⁴² Shawn Hubler, *Campus Life in the Fall? A Test With No Clear Answer*, N.Y. TIMES (Updated May 19, 2020), <https://www.nytimes.com/2020/05/14/us/college-coronavirus-fall.html> [<https://perma.cc/5G9A-6AVN>].

⁴³ Institutional Review Boards, 21 C.F.R. § 56 (2009).

⁴⁴ See Peter H. Huang, *Tiger Cub Strikes Back: Memoirs of an Ex-Child Prodigy About Legal Education and Parenting*, 1 BRIT. J. AM. LEGAL STUD. 297, 302–03 (2012); Peter H. Huang, *From Tiger Mom to Panda Parent*, 17 UCLA ASIAN PAC. AM. L.J. 40 (2011).

⁴⁵ Bart Jansen & Maureen Groppe, *Fauci Says Vaccine ‘Likely,’ But Not in Time for School: 5 Takeaways from the Senate Coronavirus Hearing*, USA TODAY (Updated May 13, 2020), <https://www.usatoday.com/story/news/politics/2020/05/12/coronavirus-fauci-vaccine-timing-during-senate-hearing/3117915001/> [<https://perma.cc/DV8N-E9YV?type=image>].

will be cheaper.⁴⁶ Ironically, we actually concur with an earlier vision of Paxson, four months after she became the President of Brown University when she said: “We need to find ways of untethering students from campus through technologies of online education and better methods of video conferencing. We need to redefine community and realize that it is not just physical.”⁴⁷

I. WELL-BEING IS OUR PRIMARY DUTY

We do not advocate to never reopen campuses.⁴⁸ Instead, we advocate to reopen campuses only when it is genuinely safe and realistically practical to do so, with a hybrid model that combines the best from our remote teaching experiences and traditional in-person education experiences. We believe rushing to reopen campuses involves wishful thinking⁴⁹ and magical thinking,⁵⁰ reflecting the comforts from path dependence⁵¹ and status quo bias.⁵² While optimism is admirable, so are honesty and realism. Sometimes, defensive pessimism is more adaptive, appropriate, functional, helpful, and useful than unbridled positivity.⁵³ We are only in the second inning of

⁴⁶ Hans Taparia, *The Future of College Is Online, and It's Cheaper*, N.Y. TIMES (May 25, 2020), <https://www.nytimes.com/2020/05/25/opinion/online-college-coronavirus.html> [<https://perma.cc/WLC3-KXCC>].

⁴⁷ Norman Boucher, *Who is Christina Paxson?*, BROWN ALUMNI MAG. (Nov. 27, 2012), <https://www.browncollegealumni.com/articles/2012-11-27/who-is-christina-paxson> [<https://perma.cc/PV35-YL8U>].

⁴⁸ Dr. Amina, *Letter to My Beloved Students: Why I Will be Offering My Courses Remotely This Fall Semester (Hint: Pandemic)*, MEDIUM (June 16, 2020), <https://medium.com/@womanistpsych/letter-to-my-beloved-students-why-i-will-be-offering-my-courses-remotely-this-fall-semester-hint-afab70e2fa8b> [<https://perma.cc/C7QN-Q74N>].

⁴⁹ Andrew Caplin & John Leahy, *Wishful Thinking*, (Nat'l Bureau Econ. Res. Working Paper No. 25707, Mar. 2019) <https://www.nber.org/papers/w25707> [<https://perma.cc/Q45A-YSY5>].

⁵⁰ Elizabeth Warren: *'The Time For Magical Thinking Is Over,'* NBCPHILADELPHIA (May 12, 2020), <https://www.nbcphiladelphia.com/news/national-international/elizabeth-warren-the-time-for-magical-thinking-is-over/2393431/> [<https://perma.cc/E6G9-J9NS>].

⁵¹ S.J. Liebowitz & Stephen E. Margolis, *Path Dependence, Lock-In, and History*, 11 J.L. ECON. & ORG. 205 (1995).

⁵² Kendra Cherry, *How the Status Quo Bias Affects Your Decisions*, VERYWELLMIND (Updated May 11, 2020), <https://www.verywellmind.com/status-quo-bias-psychological-definition-4065385> [<https://perma.cc/DK83-U79W>].

⁵³ Peter H. Huang & Corie Rosen Felder, *The Zombie Lawyer Apocalypse*, 42 PEPP. L. REV. 727, 740–41 (2015).

COVID-19,⁵⁴ with testing extremely confusing⁵⁵ and statistically unreliable.⁵⁶ Rushing to reopen campuses offers only the illusion of safety. In contrast, offering an effective online alternative provides the reality of safety. Just because it is different, online education is not necessarily inferior.

Paxson is not alone in advocating reopening campuses as soon as possible.⁵⁷ We engage Paxson's arguments, not because of her being a female leader, but in spite of it, as we believe that we should put more women in charge.⁵⁸ A male leader advocating reopening is chairman of the U.S. Senate Committee on HELP, Lamar Alexander, who is also a former president of the University of Tennessee.⁵⁹ Alexander states "the question for administrators of the nation's roughly 6000 colleges and 100,000 schools is not whether to reopen in August, but how to do it safely."⁶⁰ Alexander implicitly assumes that it is safe to reopen campuses in August. How does Alexander know this? We do not know this, nor does anyone else. Also, what does Alexander mean by safely? How many students becoming sick, or dying, from COVID-19 contracted on campus does Alexander consider to be safe? If Alexander's answer is zero, then we know that campuses can only be reopened safely once a vaccine is available to the masses and enough people are willing to take the vaccine. If Alexander's answer is NOT zero, then Alexander should clarify how many lives impacted, or lost, fall within his notion of safe?

Alexander says that "parties are out."⁶¹ How realistic and enforceable is a ban on parties on- or off-campus? Alexander says that "all of Tennessee's 127 higher education institutions will open in person, but they want governments to create

⁵⁴ *Coronavirus Epidemiologist Q&A: 'We're Just in the Second Inning of a Nine-Inning Game'*, USA TODAY (Updated May 13, 2020),

<https://www.usatoday.com/story/opinion/2020/05/12/coronavirus-epidemiologist-were-just-second-inning-qa-opinion/3114615001/> [<https://perma.cc/ZA5S-69G7?type=image>].

⁵⁵ Brian Resnick, *What Covid-19 Antibody Tests Say — And Don't Say — About Immunity*, VOX (Apr. 28, 2020), <https://www.vox.com/science-and-health/2020/4/28/21237922/antibody-test-covid-19-immunity> [<https://perma.cc/7ADX-VSB5>].

⁵⁶ Todd Haugh & Suneal Bedi, *Just Because You Test Positive for Antibodies Doesn't Mean You Have Them*, N.Y. TIMES (May 13, 2020),

<https://www.nytimes.com/2020/05/13/opinion/antibody-test-accuracy.html> [<https://perma.cc/8N2E-B94R>].

⁵⁷ Melissa Korn, *Colleges Spend Millions to Prepare to Reopen Amid Coronavirus*, WALL ST. J. (June 24, 2020, 5:30 AM), <https://www.wsj.com/articles/colleges-spend-millions-to-prepare-to-reopen-amid-coronavirus-11592991000> [<https://perma.cc/G6KE-QQTH>].

⁵⁸ Peter H. Huang, *Put More Women in Charge and Other Leadership Lessons from COVID-19* (Univ. of Colo. L. Legal Stud. Research Paper No. 20-21, May 19, 2020), <https://ssrn.com/abstract=3604783> [<https://perma.cc/54K8-6AYV>].

⁵⁹ Lamar Alexander, *The Surest Step Toward Normalcy*, INSIDE HIGHER EDUC. (May 28, 2020), <https://www.insidehighered.com/views/2020/05/28/key-issue-isnt-whether-colleges-should-reopen-fall-how-do-it-safely-opinion> [<https://perma.cc/39TZ-T6L5>].

⁶⁰ *Id.*

⁶¹ *Id.*

liability protection against being sued if a student becomes sick.”⁶² The fact that colleges are asking Congress for liability protections reveals concerns by college administrators that reopening campuses will cause students to become infected with COVID-19 and possibly die. Senator Patty Murray, top Democrat of the Senate Committee on HELP, opposes granting a “liability shield” because it would essentially say, “it’s okay if students or employees get sick.”⁶³ This request also reflects a flawed or lacking Cost-Benefit Analysis (CBA) about human lives.⁶⁴ We say flawed or lacking CBA because as economics Nobel laureate,⁶⁵ Paul Krugman,⁶⁶ said about calls to reopen our economy,

What, after all, is the economy’s purpose? If your answer is something like, “To generate incomes that let people buy things,” you’re getting it wrong — money isn’t the ultimate goal; it’s just a means to an end, namely, improving the quality of life.

Now, money matters: There is a clear relationship between income and life satisfaction. But it’s not the only thing that matters. In particular, you know what also makes a major contribution to the quality of life? Not dying.⁶⁷

Krugman’s point also applies to reopening campuses because if you say that higher education’s purpose is something like, “to teach students and support local economies,” you are sadly wrong—education of students and money injected into local economies are not ultimate goals; they are both just means to an end, namely to improve the well-being or qualities of people’s lives. Education and local economies matter to well-being. What also matters, and more so, is not being dead.

⁶² Ted Mitchell, *Re: COVID-19 Limited Liability Protections*, AM. COUNCIL ON EDUC. (May 28, 2020), <https://www.acenet.edu/Documents/Letter-Congress-pandemic-liability-052820.pdf> [<https://perma.cc/7M4B-HSTS>].

⁶³ Kery Murakami, *Senator Murray Opposes Request by College Groups for Liability Protection*, INSIDE HIGHER EDUC. (May 29, 2020), <https://www.insidehighered.com/quicktakes/2020/05/29/senator-murray-opposes-request-college-groups-liability-protection> [<https://perma.cc/2J55-ETCE>].

⁶⁴ A Yale University Student, *A Pyrrhic Victory?*, INSIDE HIGHER EDUC. (June 10, 2020), <https://www.insidehighered.com/views/2020/06/10/student-writes-open-letter-administrators-her-concerns-about-reopening-campus> [<https://perma.cc/G8T3-ZE5Q>]; Irina Mikhalevich & Russell Powell, *The Misguided Rush to Reopen Universities*, INSIDE HIGHER EDUC. (May 21, 2020), <https://www.insidehighered.com/views/2020/05/21/rush-reopen-colleges-fall-ignores-harsh-scientific-and-ethical-realities-opinion> [<https://perma.cc/8CP8-UUHU>].

⁶⁵ *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2008*, NOBEL PRIZE (Oct. 13, 2008), <https://www.nobelprize.org/prizes/economic-sciences/2008/press-release/> [<https://perma.cc/QBW8-SJ89>].

⁶⁶ *Paul Krugman Biography*, The Graduate Ctr. C. U. of N. Y., <https://www.gc.cuny.edu/Faculty/Core-Bios/Paul-Krugman> [<https://perma.cc/WKU2-F76L>].

⁶⁷ Paul Krugman, *On the Economics of Not Dying*, N.Y. TIMES (May 28, 2020), <https://www.nytimes.com/2020/05/28/opinion/coronavirus-economy-death.html> [<https://perma.cc/94K2-E4LF>].

Dr. Michael J. Sorrell, president of Paul Quinn College, a Historically Black College or University,⁶⁸ believes colleges and universities are “deluding themselves” about reopening campuses this fall.⁶⁹ Sorrell said “rushing to reopen our society and our schools is a mistake that will ultimately result in hundreds of thousands of citizens falling sick and worse. We should not let our own financial and reputational worries cloud our judgment about matters of life and death.”⁷⁰ Sorrell added, “we face fair questions about higher education’s business model, cost, and long-term prospects—and about whom higher education ultimately serves. Do we serve the students and families who appear at our doors each fall full of hope and faith? Or does self-preservation come first?”⁷¹ Sorrell advised that, “administrators at colleges and universities should harbor no illusions. In the absence of a vaccine or much more widespread testing, our institutions are the perfect environment for the continued spread of COVID-19.”⁷²

Sorrell warned that “we do not yet have the ability to bring students and staff back to campus while keeping them safe and healthy, we simply cannot return to business as usual. To do so constitutes an abdication of our moral responsibility as leaders.”⁷³ Sorrell then asked: “What would make leaders gamble with human life this way? The answer is twofold: fear and acquiescence—both of which, when left unchecked, lead down a path to moral damnation.”⁷⁴ Sorrell explained that “fear of the fiscal damage associated with empty campuses in the fall is the primary reason that schools are exploring every option to avoid that possibility.”⁷⁵ Sorrell continued: “Exploring options to avoid financial ruin does not make you a bad leader. On the contrary. However, if a school’s cost-benefit analysis leads to a conclusion that includes the term acceptable number of casualties, it is time for a new model”⁷⁶

About acquiesce by leaders of colleges and universities, Sorrell noted, many students, staff, alumni, faculty, and other stakeholders (such as local economies) may have unrealistic expectations.⁷⁷ Sorrell expressed empathy towards leaders of colleges and universities because “right now, not everyone is going to like what you do. But if you are fair, honest, and transparent, you will be respected; and it is always better to be respected than liked.”⁷⁸ About honesty Sorrell noted, “our rush to reopen

⁶⁸ Safiya Charles & Byron Dobson, *Historically Black Colleges Fight for Survival, Reopening Amid Coronavirus Pandemic*, USA TODAY (June 9, 2020),

<https://www.usatoday.com/story/news/education/2020/06/09/coronavirus-hbcu-colleges-fall-semester-2020/5286165002/> [<https://perma.cc/4U3K-5UK8>].

⁶⁹ Michael J. Sorrell, *Colleges Are Deluding Themselves*, ATLANTIC (May 15, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/colleges-that-reopen-are-making-a-big-mistake/611485/> [<https://perma.cc/39YX-58Z6>].

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

is going to set us back in our fight against COVID-19 even more. The sacrifices that we must make to restore order and safety will make us a stronger, more resilient society. For college students, those sacrifices will include long periods of remote learning.”⁷⁹ Sorrell concluded by stating, “coronavirus is our test. Whether we pass will not only determine our testimony, but also shape our legacy. May history judge us kindly.”⁸⁰

Lafayette College associate professor of history and Africana studies, Christopher J. Lee, wrote: “Short-term fiscal goals should not outweigh the long-term lives of students, staff, and faculty.”⁸¹ We are reminded of the Ford Motor Company’s infamous Pinto, which was very hastily produced to compete with foreign sub-compact cars.⁸² Achieving product safety is costly in terms of time and money. Ford knew from preliminary crash tests that the Pinto “carried a high risk of bursting into flame on impact, and continued to do so for years.”⁸³ Ford also knew that the Pinto’s flawed product design meant “the Pinto’s fuel tank and rear end made it vulnerable to crashes, even at low speeds, in which the fuel tank would suffer extreme damage and catch on fire, often trapping the car’s occupants inside. Twenty-seven people died in Pinto fires and countless others suffered serious burns.”⁸⁴ Shockingly, “Ford said they could fix the Pinto for about \$11 per car, but it would cut into their profit too much. It was later revealed that Ford presented flawed data and bad math to hide even cheaper options to fix the Pinto.”⁸⁵ The Pinto earned the unenviable sarcastic marketing jingle of “the barbecue that seats four.”⁸⁶ By reopening campuses, leaders of colleges and universities would be further failing their duties and violating the trust of their students, staff, local communities, and faculty.⁸⁷

While Paxson,

waxes nostalgic about “the fierce intellectual debates that just aren’t the same on Zoom.” Believe me, I miss the dynamism of the classroom, too.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Christopher J. Lee, *Higher Education in the Age of Coronavirus: The Right Not to Work*, BOS. REV. (Apr. 30, 2020), <https://bostonreview.net/forum/higher-education-age-coronavirus/christopher-j-lee-right-not-work> [<https://perma.cc/D3FY-VA9Z>].

⁸² William H. Widen, *The Only Question for Law School Re-Openings*, JURIST (June 29, 2020, 4:56 PM), <https://www.jurist.org/commentary/2020/06/william-widen-law-schools-reopening/> [<https://perma.cc/3GUH-7KH8>].

⁸³ Cherise Threewitt, *Did Pintos Really Explode in the 1970s?*, HOWSTUFFWORKS <https://auto.howstuffworks.com/car-driving-safety/auto-safety-testing/did-pintos-really-explode-in-the-1970s.htm> [<https://perma.cc/SA68-G3CN>].

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *The Pinto Memo: ‘It’s Cheaper to let them Burn!’*, SPOKESMAN-REV. (Oct. 17, 2008), <https://www.spokesman.com/blogs/autos/2008/oct/17/pinto-memo-its-cheaper-let-them-burn/> [<https://perma.cc/JGF3-AA97>].

⁸⁷ François Furstenberg, *University Leaders Are Failing*, CHRON. HIGHER EDUC. (May 19, 2020), <https://www.chronicle.com/article/University-Leaders-Are-Failing/248809> [<https://perma.cc/7NQV-H8EC>].

But is it worth risking my life over? Hell, no! In a global pandemic, fierce in-person intellectual debates cannot take priority over safety and health. What good is winning a debate if you're ill, or dead?⁸⁸

Colleges and universities are not food processing plants⁸⁹ and administrators should not treat them as such. Students, staff, local communities, and faculty are not and should not be cannon fodder, to be sacrificed for the sake of reopening campuses. Reopened college and university campuses can become locations for superspreading events (SSEs).⁹⁰ Recent research implies “strict adherence to healthcare infection prevention and control measures” is crucial to limit SSEs.⁹¹ Strict adherence to non-pharmaceutical interventions on campuses is unlikely. A 2019 study found that people breathe out more particles when they speak louder.⁹² Professors who lecture to large classes are likely to cause SSEs.

Recent research suggests “social distancing and masks don’t prevent infection if exposure, even in low doses, happens over a prolonged period of time.”⁹³ Researchers caution the “importance of viral dose is being overlooked in discussions of the coronavirus. As with any other poison, viruses are usually more dangerous in larger amounts. Small initial exposures tend to lead to mild or asymptomatic infections, while larger doses can be lethal.”⁹⁴ COVID-19 is a pathogen “proving a familiar adage: The dose makes the poison.”⁹⁵

⁸⁸ Maggie Levantovskaya, *Faculty Are Not Cannon Fodder*, CHRON. HIGHER EDUC. (May 28, 2020), https://www.chronicle.com/article/Faculty-Are-Not-Cannon-Fodder/248879?cid=wsinglestory_40_1 [<https://perma.cc/3YG8-XRFB>].

⁸⁹ Stephanie Soucheray, *U.S. Food Processing Plants Become COVID-19 Hot Spots*, CTR. INFECTIOUS DISEASE RES. & POL’Y, U. MINN. (Apr. 27, 2020), <https://www.cidrap.umn.edu/news-perspective/2020/04/us-food-processing-plants-become-covid-19-hot-spots> [<https://perma.cc/WAB9-TBVJ>].

⁹⁰ Kai Kupferschmidt, *Why Do Some COVID-19 Patients Infect Many Others, Whereas Most Don’t Spread the Virus All?*, SCI. (May 19, 2020), <https://www.sciencemag.org/news/2020/05/why-do-some-covid-19-patients-infect-many-others-whereas-most-don-t-spread-virus-all> [<https://perma.cc/7LTS-UTYY>].

⁹¹ Thomas R. Frieden & Christopher T. Lee, *Identifying and Interrupting Superspreading Events—Implications for Control of Severe Acute Respiratory Syndrome Coronavirus 2*, 26 EMERGING INFECTIOUS DISEASES J. (June 2020), https://wwwnc.cdc.gov/eid/article/26/6/20-0495_article [<https://perma.cc/EF3K-P5LL>].

⁹² Sima Asadi, Anthony S. Wexler, Christopher D. Cappa, Santiago Barreda, Nicole M. Bouvier & William D. Ristenpart, *Aerosol Emission and Superemission During Human Speech Increase with Voice Loudness*, 9 NATURE SCI. REP. 2348 (2019).

⁹³ *Id.*

⁹⁴ Joshua D. Rabinowitz & Caroline R. Bartman, *These Coronavirus Exposures Might Be the Most Dangerous*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/opinion/coronavirus-viral-dose.html> [<https://perma.cc/P6G8-NXYU>].

⁹⁵ Apoorva Mandavilli, *It’s Not Whether You Were Exposed to the Virus. It’s How Much.*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/health/coronavirus-transmission-dose.html> [<https://perma.cc/8VLC-BUR5>].

An epidemiologist and professor of infectious disease epidemiology warn of the importance of stopping the superspreading of COVID-19.⁹⁶ They discuss how essentially Japan “adopted an anti-superspreading strategy.”⁹⁷ Researchers from Tohoku University “concluded that most of the primary cases that touched off large clusters were either asymptomatic or had very mild symptoms.”⁹⁸ A virologist and public health expert said, “It is impossible to stop the emergence of clusters just by testing many people.”⁹⁹

A number of colleges and universities plan to reopen their campuses in August yet also send their students home just before Thanksgiving and continue with remote learning after that, including Saint Louis University, Syracuse University, University of Notre Dame, University of North Carolina at Chapel Hill, University of South Carolina, and University of Virginia.¹⁰⁰ At the University of Colorado, Boulder, a group of graduate students and faculty wrote an open letter to the chancellor and campus community opposing the chancellor’s plan to reopen the campus in late August and complete the semester remotely after Thanksgiving.¹⁰¹ Reopening campuses is a public bad (because of multiple negative externalities to students, staff, local communities, and faculty), inequitable (to immunocompromised, older, disabled, and at-risk groups), and an inferior option (in terms of educational efficacy) to socially responsible higher education. A number of professors have expressed ongoing serious concerns over the health of their students and themselves.

The general well-documented gender and racial inequalities¹⁰² of the impacts of COVID-19 would be exacerbated by reopening campuses because “women already

⁹⁶ Dillon C. Adam & Benjamin J. Cowling, *Just Stop the Superspreading*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/06/02/opinion/coronavirus-superspreaders.html> [<https://perma.cc/Y9TS-RN3K>].

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Dennis Normile, *Japan Ends Its COVID-19 State of Emergency*, SCI. (May 26, 2020), <https://www.sciencemag.org/news/2020/05/japan-ends-its-covid-19-state-emergency> [<https://perma.cc/F63C-NZ59>].

¹⁰⁰ Nick Anderson, *Home by Thanksgiving: An Emerging Strategy to Reopen College Campuses in the Fall*, WASH. POST (May 29, 2020), https://www.washingtonpost.com/local/education/colleges-reopening-fall-thanksgiving/2020/05/29/a308afde-a0e3-11ea-9590-1858a893bd59_story.html [<https://perma.cc/6Y9X-4JB8>].

¹⁰¹ *Id.*; see also Valerie Strauss, *Many Colleges Are Bringing Students Back to Campus this Fall. Why Some Faculty Are Very Concerned.*, WASH. POST (June 16, 2020, 6:00 AM), <https://www.washingtonpost.com/education/2020/06/16/many-colleges-are-bringing-students-back-campus-this-fall-why-some-faculty-are-very-concerned/> [<https://perma.cc/3L2Z-VVM2>]; see also Accessible Campus Action Alliance, *Beyond “High-Risk”: Statement on Disability and Campus Re-openings* (June 5, 2020), https://docs.google.com/document/d/11RiCYNb-4EV11ikpBeqO8RY-Dup2kT_ioCf_8sxV1MU/edit# [<https://perma.cc/BP87-VEZV>].

¹⁰² See Titan M. Alon, Matthias Doepke, Jane Olmstead-Rumsey & Michèle Tertilt, *The Impact of COVID-19 on Gender Equality*, (Nat’l Bureau Econ. Res. Working Paper No. 26947, Apr. 2020), <https://www.nber.org/papers/w26947> [<https://perma.cc/FYJ2-7ZUT>]; Greg Rosalsky, *How the Crisis Is Making Racial Inequality Worse*, NPR PLANET MONEY (May 26, 2020),

juggled more domestic and affective, or emotional, labor with their actual work prior to the pandemic.”¹⁰³ Parents, particularly mothers, face stochastic, labor-intensive, time-consuming child care responsibilities,¹⁰⁴ now known as the childrearing penalty,¹⁰⁵ or mom penalty.¹⁰⁶ Women faculty not only take more care of their personal family’s children¹⁰⁷ and parents,¹⁰⁸ female professors also take more care of their academic family in terms of internal service loads¹⁰⁹ and entrenched status hierarchies.¹¹⁰ Women and minorities are more likely to be more stressed and less voiced as untenured faculty,¹¹¹ while minority women faculty face multiple burdens.¹¹²

We believe that online higher education, including professional education, is cheaper, more customizable, and the future. Universities that are not agile and nimble enough to adapt, lead, or follow in this brave new world of digital higher education

<https://www.npr.org/sections/money/2020/05/26/860913793/how-the-crisis-is-making-racial-inequality-worse> [<https://perma.cc/SRT8-ELE2>].

¹⁰³ See Colleen Flaherty, *No Room of One’s Own*, INSIDE HIGHER EDUC. (Apr. 21, 2020), <https://www.insidehighered.com/news/2020/04/21/early-journal-submission-data-suggest-covid-19-tanking-womens-research-productivity> [<https://perma.cc/5MVL-2F9Y>].

¹⁰⁴ See Alessandra Minello, *The Pandemic and the Female Academic*, NATURE (Apr. 17, 2020), <https://www.nature.com/articles/d41586-020-01135-9> [<https://perma.cc/JR4R-4XAQ>].

¹⁰⁵ See MARY ANN MASON, NICHOLAS H. WOLFINGER & MARC GOULDEN, *DO BABIES MATTER? GENDER AND FAMILY IN THE IVORY TOWER* (2013); Cathy Sandeen, *If A Female President is Good for the Ivy League, Why Not for the Rest of Us?*, CONVERSATION (Aug. 6, 2015), <https://theconversation.com/if-a-female-president-is-good-for-the-ivy-league-why-not-for-the-rest-of-us-45148> [<https://perma.cc/5VLC-SQC7>].

¹⁰⁶ See Colleen Flaherty, *The Mom Penalty*, INSIDE HIGHER EDUC. (June 6, 2013), <https://www.insidehighered.com/news/2013/06/06/new-book-gender-family-and-academe-shows-how-kids-affect-careers-higher-education> [<https://perma.cc/3JHF-XBNV>]; See MASON ET AL., *supra* note 105.

¹⁰⁷ See VANESSA LOBUE, *9 MONTHS IN, 9 MONTHS OUT: A SCIENTIST’S TALE OF PREGNANCY AND PARENTHOOD* (2019).

¹⁰⁸ See Rebecca J. Erickson, *Why Emotion Work Matters: Sex, Gender, and the Division of Household Labor*, 67 J. MARRIAGE & FAM. 337 (2005).

¹⁰⁹ See Cassandra M. Guarino & Victor M. H. Borden, *Faculty Service Loads and Gender: Are Academic Women Taking Care of the Academic Family?*, 58 RES. HIGHER EDUC. 672 (2017).

¹¹⁰ See Kathryn M. Stanchi, *Who’s Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467 (2005); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 3 (2001).

¹¹¹ See, e.g., Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996); Robert J. Menges & William H. Exum, *Barriers to the Progress of Women and Minority Faculty*, 54 J. HIGHER EDUC. 123 (1983); Juantia L. Merchant & M. Bishr Omary, *Underrepresentation of Underrepresented Minorities in Academic Medicine: The Need to Enhance the Pipeline and the Pipe*, 138 GASTROENTEROLOGY 19 (2010).

¹¹² Lorraine K. Bannai, *Challenged X 3: The Stories of Women of Color Who Teach Legal Writing*, 29 RES. BERKELEY J. GENDER L. & JUST. 275 (2014).

are dinosaurs who are doomed to become extinct. Higher education is facing an inflection point. Many areas of life will change after COVID-19. For example, car dealerships are going to change for the better or disappear.¹¹³ The largest technology companies, Apple, Facebook, Microsoft, and Twitter, are all embracing remote work and preparing for it to become the new normal post-pandemic.¹¹⁴ The future of medicine will definitely include telemedicine in routine medical care, which increased because of the pandemic, to provide faster diagnoses and treatments as well as increase the efficiency of care and reduce patient stress.¹¹⁵ Other areas of life that are likely to undergo change and modification include banking, bookstores, commuting, grocery shopping, lawyering, restaurants, retail, theaters, transportation, and white-collar professions. As the fictional Borg from *Star Trek: The Next Generation* say, “resistance is futile.”¹¹⁶ A wish for higher education to go back to normal is just a wish that will not be fulfilled.¹¹⁷ The times are changing regardless of the wishes of college and university administrators. When former California Governor Jerry Brown was asked what he thought of progress, he quipped that what he thought didn’t matter because progress was inevitable.¹¹⁸

This is an opportunity for passionate, dedicated educators to improve their capacity to deliver their courses online. Let us create a better, individualized, and more humane higher education that is akin to the *Minerva Project*,¹¹⁹ which develops a thoughtful and innovative vision for transformational cognitive tools and habits of mind. For example, *ChartaCourse*,¹²⁰ which is a group of full-time, tenured law professors, has formatted complete law school courses as customizable, interactive,

¹¹³ Jamie L. LaReau, *COVID-19 is Changing How We Buy Cars with Online Sales, Home Delivery and More Transparent Pricing*, USA TODAY (May 28, 2020), <https://www.usatoday.com/story/money/cars/2020/05/28/coronavirus-car-buying-pandemic-home-deliveries-online-sales/5274230002/> [<https://perma.cc/2BXD-FVLT>].

¹¹⁴ Barbara Ortutay, *Working from Home Post-COVID-19? Facebook, Apple, Twitter and Microsoft Embracing Remote Work*, USA TODAY (Updated May 27, 2020), <https://www.usatoday.com/story/tech/2020/05/22/coronavirus-remote-work-post-pandemic/5242420002/> [<https://perma.cc/9LKE-RTUJ>].

¹¹⁵ Jane E. Brody, *A Pandemic Benefit: The Expansion of Telemedicine*, N.Y. TIMES (May 11, 2020), <https://www.nytimes.com/2020/05/11/well/live/coronavirus-telemedicine-telehealth.html> [<https://perma.cc/Y2Z8-3QM8>].

¹¹⁶ Resistance is futile, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=resistance%20is%20futile> [<https://perma.cc/RP8L-LL4W>].

¹¹⁷ Tomás Mier, *USC Reverses Robust Fall Reopening Plans, Asks Students to Stay Home for Online Classes*, L.A. TIMES (July 2, 2020, 1:46 PM), <https://www.latimes.com/california/story/2020-07-02/usc-will-move-most-undergraduate-classes-online-cancels-reopening> [<https://perma.cc/QU6V-4ZQK>]; Ken Stern, *Coronavirus Is Blowing Up America’s Higher Education System*, VANITY FAIR (July 8, 2020), <https://www.vanityfair.com/news/2020/07/coronavirus-is-blowing-up-americas-higher-education-system> [<https://perma.cc/SHE2-V7CU>].

¹¹⁸ SAN FRANCISCO 2.0 (HBO Films 2015).

¹¹⁹ MINERVA PROJECT, INC. <https://www.minervaproject.com/> [<https://perma.cc/ES5P-KWVQ>].

¹²⁰ *ChartaCourse*, <https://chartacourse.com/> [<https://perma.cc/SJJ6-6MF7>].

online concept charts that embed cases, statutes, rules, practice problems, videos, diagrams, essential explanations, and syllabi. *ChartaCourse* also has started to offer interactive online study guides.¹²¹

Our paramount duty is and should be ensuring the health, safety, and well-being of our students, staff, local communities, and faculty. Our decision-making should be guided by this overriding principle: people matter more than money. As New York Governor Andrew Cuomo's grandfather, Andrea Cuomo, told him, "If you have your health, you can figure out anything else. If you don't have your health, nothing else matters."¹²² Paxson's objective is reopening campuses subject to public health constraints.¹²³ We believe this is backwards because it conflates constraints with objectives. Whether campuses reopen should be determined after mindful analysis, not assumed to be an objective before doing so.

In a different New York Times op-ed with a sardonic phraseology, Krugman, says, "[t]he U.S. right long ago rejected evidence-based policy in favor of policy-based evidence — denying facts that might get in the way of a predetermined agenda."¹²⁴ Krugman also pointed out how it has been a long fourteen years after stand-up comedian and current late-night television show host Stephen Colbert joked, "reality has a well-known liberal bias."¹²⁵ We implore the leaders of colleges and universities to engage in evidence-based decision-making about whether to reopen campuses this fall, instead of decision-based evidence.

¹²¹ *ChartaCourse Study Guides: Created by Law Professors for Law Students, ChartaCourse*, <https://chartacourse.com/chartacourse-study-guides/> [<https://perma.cc/53AH-5FEW>].

¹²² *Andrew Cuomo New York COVID-19 Briefing Transcript April 28*, REV.COM <https://www.rev.com/blog/transcripts/andrew-cuomo-new-york-covid-19-briefing-transcript-april-28> [<https://perma.cc/WLE5-ZNZW>].

¹²³ Paxson, *supra* note 38.

¹²⁴ Paul Krugman, *Covid-19 Reality Has a Liberal Bias*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/opinion/trump-covid-experts.html> [<https://perma.cc/2FFG-8N3T>].

¹²⁵ *Id.*; see also Stephen Colbert, Remarks at the 2006 White House Correspondents' Dinner (Apr. 29, 2006), <https://www.c-span.org/video/?c4698442/user-clip-reality-liberal-bias> [<https://perma.cc/M26Y-NBX8>].

II. SOCIALLY RESPONSIBLE HIGHER EDUCATION

Much remains unknown about COVID-19's transmission dynamics,¹²⁶ testing,¹²⁷ and tracing efficacy.¹²⁸ We do know¹²⁹ that high density classrooms facilitate transmission.¹³⁰ We do know that COVID-19 super-spreader events share such similar features as being at indoor events with many people.¹³¹ We do know that mere speech can expel thousands of miniscule droplets that can remain suspended in the air for up to fourteen minutes.¹³² We do know that some colleges and universities have campus buildings that “don't have women's bathrooms on every floor, so the idea that everyone could just wash their hands between classes seems implausible.”¹³³ Humility implies a precautionary, better-safe-than-sorry approach.

¹²⁶ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-20-545SP, SCIENCE & TECH SPOTLIGHT: SOCIAL DISTANCING DURING PANDEMICS (2020), <https://www.gao.gov/assets/710/706916.pdf> [<https://perma.cc/8FQ9-N4LQ>].

¹²⁷ Elizabeth Lopatto, *The Disappointing Truth About Antibody Testing*, VERGE (May 7, 2020), <https://www.theverge.com/2020/5/7/21248734/coronavirus-antibody-tests-explained-covid-19-immunity-accurate> [<https://perma.cc/2PW8-MJR2>].

¹²⁸ Yasmin Tayag, *So You Got Your Antibody Test Results Back. Now What?*, MEDIUM (May 4, 2020), <https://coronavirus.medium.com/so-you-got-your-antibody-test-results-back-now-what-9630c633ffb1> [<https://perma.cc/NQC7-V9RA>].

¹²⁹ Erin Bromage, *The Risks - Know Them - Avoid Them*, ERIN BROMAGE: COVID-19 MUSINGS (May 6, 2020), <https://www.erinbromage.com/post/the-risks-know-them-avoid-them> [<https://perma.cc/U63W-82VQ>].

¹³⁰ Lilah Burke, *Simulating COVID Spread in College Setting*, INSIDE HIGHER EDUC. (June 22, 2020), <https://www.insidehighered.com/news/2020/06/22/working-paper-models-covid-spread-university>; Philip T. Gressman & Jennifer R. Peck, *Simulating COVID-19 in a University Environment* (June 30, 2020), <https://arxiv.org/pdf/2006.03175.pdf> [<https://perma.cc/V6G3-VZNS>]; Elizabeth Redden, *Degrees of Separation*, INSIDE HIGHER EDUC. (Apr. 14, 2020), <https://www.insidehighered.com/news/2020/04/14/sociologists-say-their-findings-student-interconnectedness-suggest-caution-needed> [<https://perma.cc/7XFB-6K3S>]; Kim A. Weeden & Benjamin Cornwell, *The Small World Network of College Classes: Implications for Epidemic Spread on a University Campus*, OSF (Updated June 5, 2020, 8:14 AM), <https://osf.io/6kuet/> [<https://perma.cc/WQ2R-FWSN>].

¹³¹ Aylin Woodward, *Coronavirus Super-Spreader Events All Have Notable Similarities — And They Reveal the Types of Gatherings We Should Avoid for Years*, BUS. INSIDER (May 14, 2020, 1:53 PM), <https://www.businessinsider.com/coronavirus-super-spreader-events-reveal-gatherings-to-avoid-2020-5> [<https://perma.cc/3VLB-7ZC7>].

¹³² Knvul Sheikh, *Talking Can Generate Coronavirus Droplets That Linger Up to 14 Minutes*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/health/coronavirus-infections.html> [<https://perma.cc/QGH7-CMKM>]; Valentyn Stadnytskyi, Christina E. Bax, Adriaan Bax & Philip Anfinrud, *The Airborne Lifetime of Small Speech Droplets and Their Potential Importance in SARS-CoV-2 Transmission*, 117 PROC. NAT'L ACAD. SCI. 11875 (2020), <https://www.pnas.org/content/early/2020/05/12/2006874117> [<https://perma.cc/QDX9-XKFD>].

¹³³ Lee Gardner Emma Dill, Emma Pettit & Michael Vasquez, *The New Communication Plan? Overcommunication*, CHRON. HIGHER EDUC. (May 27, 2020),

The well-being of students, staff, local communities, and faculty is irreplaceable. Death is irreversible. During COVID-19, online higher education is socially responsible higher education.

In 2018, to help incoming law students feel more confident and better prepared to thrive, HLS designed and created a novel online, pre-law school, self-paced course,¹³⁴ known as Zero-L, taught by leading HLS faculty and offering engaging video lessons, optional knowledge checks, and vocabulary flashcards.¹³⁵ HLS originally intended to sell the Zero-L course for a fee to other law schools in the summer of 2020.¹³⁶ Due to COVID-19, HLS decided instead to provide it free now to all interested U.S. law schools as a way to assist those law schools and their entering students.¹³⁷ HLS hopes the Zero-L materials will bolster law student engagement, enthusiasm, and learning, in addition to helping incoming students conquer any of their COVID-19 related pre-matriculation anxieties, concerns, and jitters.¹³⁸ The future of legal education is online learning.¹³⁹ Many professions already employ what are known as serious games to teach contextualized decision-making skills, including emergency personnel management; on-call, overnight, hospital ward physician differential diagnosis; and intelligence analyst recognition and mitigation of cognitive biases in decision-making.¹⁴⁰ Playing humane games teaches empathy, emotion regulation, kindness, and social consciousness, while developing a knowledge base in students.¹⁴¹ Medical school education currently includes high-fidelity simulations of an intern physician responding to medical

<https://www.chronicle.com/article/The-New-Communication-Plan-/248836>
[<https://perma.cc/7KKM-SJ9P>].

¹³⁴ *Prepare Incoming Law Students for Success with Zero-L*, HARV. L. SCH., <https://online.law.harvard.edu/> [<https://perma.cc/C7W9-JJHZ>].

¹³⁵ *Zero-L by Harvard Law School*, HARV. L. SCH., <https://online.law.harvard.edu/course-overview/> [<https://perma.cc/8KT2-3HND>].

¹³⁶ *Harvard Makes Online Course for Incoming Students Available to All Law Schools for Free this Summer*, HARV. L. TODAY (May 20, 2020), <https://today.law.harvard.edu/harvard-makes-online-course-for-incoming-students-available-to-all-law-schools-for-free-this-summer/> [<https://perma.cc/WY4X-U3NE>].

¹³⁷ *Id.*

¹³⁸ *Professor Glenn Cohen Discusses How Harvard Law Course Can Help Prepare Incoming Law Students Across America*, HARV. L. TODAY (May 20, 2020), <https://today.law.harvard.edu/professor-glenn-cohen-discusses-how-harvard-law-course-can-help-prepare-incoming-law-students-across-america/> [<https://perma.cc/786Q-47PV>].

¹³⁹ Nina A. Kohn, *Online Learning and the Future of Legal Education*, 70 SYRACUSE L. REV. 1 (2020).

¹⁴⁰ Peter H. Huang, *Boost: Improving Mindfulness, Thinking, and Diversity*, 10 WM. & MARY BUS. L. REV. 139, 184–87 (2018).

¹⁴¹ *Id.* at 187–90; *Professor Huang's Workshop Targets Stress, Anxiety in Legal Field*, U. COLO. L. BOULDER (June 5, 2017), <https://www.colorado.edu/law/2017/06/05/professor-huang-s-workshop-targets-stress-anxiety-legal-field> [<https://perma.cc/XN4L-FMQN>].

emergencies during a night on call in a hospital,¹⁴² interactive medical cases,¹⁴³ online COVID-19 treatment simulations,¹⁴⁴ and a COVID-19 interactive primer.¹⁴⁵ Economics education already includes video games and television soap operas teaching financial literacy.¹⁴⁶

Harvard Medical School moved classes online for all first-year students in its medical, dental, and graduate programs this fall.¹⁴⁷ Timothy P. White, the chancellor of California State University (CSU), America's largest four-year public university system, announced that CSU will continue remote teaching, keeping all of its 23 campuses closed this fall.¹⁴⁸ White said to the CSU Board of Trustees that the risks are just too great for the 481,000 undergraduates at CSU to return to campus this fall.¹⁴⁹ McGill University, the University of British Columbia, and the University of Ottawa will all continue remote teaching this fall.¹⁵⁰ The University of Cambridge will keep its campuses closed for the entire 2020-2021 academic year, holding all lectures online until the 2021 summer session and foregoing any face-to-face lectures.¹⁵¹ The University of Manchester will also have online-only lectures in the fall.¹⁵²

¹⁴² David Wald, Alisa Peet, Jane Cripe & Michaela Kinloch, *A Simulated Night on Call Experience for Graduating Medical Students*, 12 MED. ED. PORTAL 1 (2016), https://www.mededportal.org/doi/10.15766/mep_2374-8265.10483 [<https://perma.cc/SP2R-KXQW>].

¹⁴³ See, e.g., Nicholas Yozamp Jason L. Hornick, Christopher P. Chiodo, Amy L. Miller & Joseph Loscalzo, *The Game Is Afoot*, 382 NEW ENG. J. MED. 2249 (2020), <https://www.nejm.org/doi/full/10.1056/NEJMimc1914302> [<https://perma.cc/9R5L-X2V4>].

¹⁴⁴ Raja-Elie Abdunour, *COVID-19 Rx Treatment Simulation*, NEW ENG. J. MED. (May 20, 2020), <https://covid19rx.nejm.org/landing/index.html> [<https://perma.cc/9VLU-8T2K>].

¹⁴⁵ Robert M. Hayden, *COVID-19 Primer Virtual Patient Simulation*, NEW ENG. J. MED. (May 20, 2020), https://interactives.nejm.org/external/covid_simulation/index.html [<https://perma.cc/MJ83-2S9L>].

¹⁴⁶ Peter H. Huang, *Achieving American Retirement Prosperity by Changing Americans' Thinking About Retirement*, 22 STAN. J.L. BUS. & FIN. 189, 191–93 (2017).

¹⁴⁷ Virginia L. Ma, *Harvard Medical School Moves Fall Semester Online for First-Year Students*, HARV. CRIMSON (May 14, 2020), <https://www.thecrimson.com/article/2020/5/14/harvard-medical-school-coronavirus-online-fall/> [<https://perma.cc/52GH-KU9Q>].

¹⁴⁸ Shawn Hubler, *Fearing a Second Wave, Cal State Will Keep Classes Online in the Fall*, N.Y. TIMES (May 12, 2020), <https://www.nytimes.com/2020/05/12/us/cal-state-online-classes.html> [<https://perma.cc/WQ8X-E6FG>].

¹⁴⁹ *Id.*

¹⁵⁰ Canadian Press, *Some Canadian Universities Say Fall Classes Will Be Offered Primarily Online*, CBC NEWS (MAY 12, 2020, 10:01 AM) (Updated May 13, 2020), <https://www.cbc.ca/news/canada/covid-universities-online-1.5565810> [<https://perma.cc/TZU8-QFB9>].

¹⁵¹ *Cambridge University: All Lectures to be Online-Only Until Summer of 2021*, BBC NEWS (May 19, 2020), <https://www.bbc.com/news/education-52732814> [<https://perma.cc/Q57M-JGNA>].

¹⁵² *Id.*

Even if schools deem campuses safe, many students, staff, local communities, and faculty will remain anxious about contracting or spreading COVID-19. A poll found sixty percent of parents are likely to seek at-home learning possibilities rather than send their children in grades K-12 back to reopened classrooms, with about 30 percent “very likely” to do so.¹⁵³ Another poll found twenty percent of K-12 teachers are unlikely to return to in-person teaching in reopened classrooms.¹⁵⁴ COVID-19 has led to some phobias¹⁵⁵ and many anxieties.¹⁵⁶

Students sitting in classrooms (or negotiating hallways or going to restrooms), concerned about becoming infected or bringing an infection home to at-risk loved ones, are under greater anxiety and stress than usual. Anxiety is a transient learning disability interfering with a student’s working memory, learning, recall, and capacity to complete tasks.¹⁵⁷ Additionally, some students, staff, and faculty may experience mask anxiety,¹⁵⁸ due to their inability to breathe because of a pre-existing condition, such as asthma, or a snug face covering. Either possibility can lead people to take their masks off unsafely causing COVID-19 transmission risks.¹⁵⁹ Some students, staff, and faculty could be unaware or forget there is a safe way to remove a face mask in public,¹⁶⁰ including carrying a brown paper bag to safely store a mask when outside of the home.¹⁶¹ Some students, staff, and faculty might also struggle to manage their anxieties about wearing masks.¹⁶² Many college students are

¹⁵³ Susan Page, *Back to School? 1 in 5 Teachers Are Unlikely to Return to Reopened Classrooms this Fall, Poll Says*, USA TODAY (Updated May 27, 2020), <https://www.usatoday.com/story/news/education/2020/05/26/coronavirus-schools-teachers-poll-ipsos-parents-fall-online/5254729002/> [<https://perma.cc/A3GA-QCE3?type=image>].

¹⁵⁴ *Id.*

¹⁵⁵ Peter H. Huang, *COVID-19 Phobias About Health, Finances, Law, Leadership, and Loneliness*, NULR OF NOTE BLOG (May 15, 2020), <https://blog.northwesternlaw.review/?p=1408> [<https://perma.cc/RT88-MAUD>].

¹⁵⁶ Peter H. Huang, *Pandemic Emotions: The Good, the Bad, and the Unconscious — Implications for Public Health, Financial Economics, Law, and Leadership*, (U. OF COLO. L. LEGAL STUDIES Research Paper No. 20-14 2020), <https://ssrn.com/abstract=3575101> [<https://perma.cc/4MV8-YWCF>].

¹⁵⁷ Jessica Minahan, *Helping Anxious Students Move Forward*, 75 EDUC. LEADERSHIP 44 (2017), <http://www.ascd.org/publications/educational-leadership/dec17/vol75/num04/Helping-Anxious-Students-Move-Forward.aspx> [<https://perma.cc/M6QU-H8GW>].

¹⁵⁸ Ashley Abramson, *How to Safely Take a Mask Off in Public If You're Anxious or Having Trouble Breathing*, ALLURE (May 6, 2020), <https://www.allure.com/story/mask-anxiety-trouble-breathing-remove-mask-cloth-face-covering-in-public> [<https://perma.cc/VLY8-25FC>].

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Kate Mooney, *11 Tips From Therapists on Coping With Anxiety During the Novel Coronavirus Pandemic*, ALLURE (Mar. 23, 2020), <https://www.allure.com/story/therapist-tips-anxiety-coronavirus> [<https://perma.cc/T2WW-UNMK>]; Abdalnour, *supra* note 144.

particularly anxious, stressed by COVID-19, and feel their universities just do not seem to appreciate or understand that.¹⁶³

Where we teach is not as important as how and why we teach. John Solow, at his investiture ceremony upon his receiving the prestigious Kenneth White and James Xander Professorship in Economics at the University of Central Florida College of Business, good-naturedly said

Another person who influenced my perspective on teaching was an anonymous student in my Principles of Microeconomics class who, obviously unhappy with me, wrote on a course evaluation, ‘I learned more on my own than I ever learned from you.’ It was such a great line that I started off next year’s class by putting it up on the screen. Of course, I tell my students, you will learn on your own – it’s the only place that learning occurs. ... [professors] help you learn it, much like a coach or a fitness instructor.¹⁶⁴

Education only truly succeeds when our students become lifelong, self-motivated, and self-taught learners, who are inspired by the mentoring of their teachers to always practice the habits of compassion, curiosity, empathy, humility, kindness, and open-mindedness about themselves, other people, and the world. Too often, especially in professional schools, there is an essentially anti-intellectual mentality and very narrow construal of how and what students are learning from professors. Faculty are not in the so-called business of mere information transfer. Instead, we are hopefully empowering our students to be critical thinkers who can and want to teach themselves how to be better at critical thinking and problem-solving. Life is effectively about good judgment and superior decision-making. Good teaching is not easy online or in-person and requires the participation of students who are interested in and willing to learn. Different students thrive in different modalities of learning.

Austin Sarat, Amherst College William Nelson Cromwell Professor of Jurisprudence and Political Science,¹⁶⁵ believes “[b]y creating an intellectual and social community for students, colleges and universities are instilling the values of listening generously, of staying with difficult problems until they are solved and of taking into account the experiences of peers and teachers in the shared work of creating new knowledge.”¹⁶⁶ Sarat also believes that a lot of this process continued

¹⁶³ Anemona Hartocollis, *Scattered to the Winds, College Students Mourn Lost Semester*, N.Y. TIMES (May 27, 2020), <https://www.nytimes.com/2020/05/27/us/coronavirus-college-mental-health.html> [https://perma.cc/VS7E-493T].

¹⁶⁴ UCF College of Business, *The Investiture Ceremony of Dr. John Solow*, YOUTUBE (Nov. 20, 2019), <https://www.youtube.com/watch?v=ae5sKYChh8E> [https://perma.cc/SCP5-733W].

¹⁶⁵ Austin D. Sarat, *William Nelson Cromwell Professor of Jurisprudence and Political Science; Associate Provost and Associate Dean of the Faculty; Chair of Law, Jurisprudence, and Social Thought*, AMHERST C., <https://www.amherst.edu/people/facstaff/adsarat> [https://perma.cc/MW8Q-3PZ5].

¹⁶⁶ Austin Sarat, *The Best in Education Wasn’t Lost When Colleges Went Online*, INSIDE HIGHER EDUC. (May 20, 2020), <https://www.insidehighered.com/advice/2020/05/20/many-key-benefits-higher-ed-did-not-stop-when-faculty-taught-online-spring-opinion> [https://perma.cc/RRF6-UTTQ].

with remote learning.¹⁶⁷ Sarat concludes, “teachers have to be ever more intentional about connecting with students and communicating their investment and belief in them.”¹⁶⁸

As with any novel teaching, development takes time and improves with experience. We learned a great deal in the spring transition to online course delivery and those lessons will improve the fall term. And we can provide fall courses without the stressors of spreading the virus. Chronically stressed brains cannot think as effectively as healthy brains. Stress hormones damage or kill brain cells in the memory-processing hippocampus, while simultaneously slowing new brain cell birth. The hippocampus is simply not as functional under chronic stress, making learning, memory formation, and recalling information very challenging. Chronic stress triggers inflammation in the body and brain, increasing heart disease and diabetes risks. Inflammation in the brain can impair motivation and mental agility. Elevated stress hormone levels disrupt sleep and increase the risk of anxiety, depression, and burnout. Chronic stress can also impact serotonin, a neurotransmitter that is important to mood regulation, cognition, and well-being.¹⁶⁹

III. SOME ECONOMICS OF HIGHER EDUCATION

Paxson worries that students may forgo starting college or delay completing their degrees if campuses do not reopen this fall.¹⁷⁰ Instead, we wonder if students and parents would prefer a safer, socially responsible online alternative to riskier in-person options, especially as we get closer to fall, and American death tolls rise. We believe that many parents will be uncomfortable with risking their children living on campuses this fall. Paxson is concerned that lost tuition revenues, only partially recoupable from online teaching, would be catastrophic, particularly for pre-COVID-19 financially fragile colleges and universities. Instead of too big to fail, Paxson seems to fret over too frail to succeed. Whether the current number and variety of colleges and universities are socially optimal is unclear. Instead, what is clear is that colleges and universities are heterogeneous instead of being one-size-fits-all.¹⁷¹

Some students pursue higher education’s in-person aspects for the fun parties, instead of the challenging problem sets.¹⁷² Some colleges and universities are

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ Debra S. Austin, *Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance*, 59 LOY. L. REV. 791, 820–22 (2013).

¹⁷⁰ Paxson, *supra* note 38.

¹⁷¹ Peter H. Huang, *Adventures in Higher Education, Happiness, and Mindfulness*, 7 BRIT. J. AM. LEGAL STUD. 425, 432–56 (2018).

¹⁷² William R. Johnson, *Parties or Problem Sets: Review Article on How College Works and Paying for the Party*, 55 J. ECON. LITERATURE 136 (2017) (reviewing ELIZABETH A. ARMSTRONG & LAURA T. HAMILTON, *PAYING FOR THE PARTY: HOW COLLEGE MAINTAINS INEQUALITY* (2013); DANIEL F. CHAMBLISS & CHRISTOPHER G. TAKACS, *HOW COLLEGE WORKS* (2014)).

engaged in a resort-style facilities arms race¹⁷³ to cater to these consumption preferences,¹⁷⁴ with lazy rivers,¹⁷⁵ luxury dormitory suites,¹⁷⁶ and water theme parks.¹⁷⁷ Colleges and universities do not and should not have to become country clubs, luxury hotels, and amusement theme parks to compete for attendance and tuition dollars of students. Professor of education, public policy and economics Susan Dynarski at the University of Michigan, believes reopening college campuses creates “enormous risks for society but comparatively little educational benefit.”¹⁷⁸

Some elite schools are effectively hedge funds¹⁷⁹ attached to a less profitable legacy business of being a university.¹⁸⁰ Victor Fleischer, law professor at the University of California, Irvine, estimated that in 2014, Yale University spent about \$480 million on compensation to private equity fund managers (about \$137 million in annual management fees and \$343 million in performance fees) to manage about \$8 billion, which is a third of Yale’s endowment.¹⁸¹ Of the \$1 billion that Yale’s endowment contributed to its operating budget, only \$170 million was allocated to tuition assistance, fellowships, and prizes.¹⁸² Private equity fund managers also received more money in their compensation than students did in scholarships at Princeton, Harvard, Stanford, and the University of Texas.¹⁸³

¹⁷³ Courtney Rubin, *Making a Splash on Campus*, N.Y. TIMES (Sept. 19, 2014),

<https://www.nytimes.com/2014/09/21/fashion/college-recreation-now-includes-pool-parties-and-river-rides.html> [<https://perma.cc/ZRR7-F56V>].

¹⁷⁴ Brian Jacob, Brian McCall & Kevin Stange, *College as Country Club: Do Colleges Cater to Students’ Preferences for Consumption?*, 36 J. LAB. ECON. 309 (2018).

¹⁷⁵ Jack Stripling, *The Lure of the Lazy River*, CHRON. HIGHER EDUC. (Oct. 15, 2017),

<https://www.chronicle.com/article/The-Lure-of-the-Lazy-River/241434> [<https://perma.cc/VV5J-5TFW>].

¹⁷⁶ Katie Yu & Lauren Effron, *Tricked-Out College Campuses, From Water Parks to Luxury Dorms*, ABC NEWS (Oct. 13, 2014, 6:54 PM), <https://abcnews.go.com/Lifestyle/tricked-college-campuses-water-parks-luxury-dorms/story?id=26164491> [<https://perma.cc/Z7HK-L6U5>].

¹⁷⁷ 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> [<https://perma.cc/NY5Z-5ZVY>].

¹⁷⁸ Susan Dynarski, *College is Worth It, but Campus Isn’t*, N.Y. TIMES (June 29, 2020),

<https://www.nytimes.com/2020/06/29/business/college-campus-coronavirus-danger.html> [<https://perma.cc/H7EJ-7GZF>].

¹⁷⁹ Thomas Gilbert & Christopher Hrdlicka, *A Hedge Fund That Has a University*, WALL ST. J.

(Nov. 13, 2017), <https://www.wsj.com/articles/a-hedge-fund-that-has-a-university-1510615228> [<https://perma.cc/C8B4-W2Z6>].

¹⁸⁰ Bob Samuels, *How America’s Universities Became Hedge Funds*, HUFF POST (May 25,

2011), https://www.huffpost.com/entry/how-americas-universities_b_440954

[<https://perma.cc/S6MX-ZCDG>].

¹⁸¹ Victor Fleischer, *Stop Universities From Hoarding Money*, N.Y. TIMES (Aug. 19, 2015),

<https://www.nytimes.com/2015/08/19/opinion/stop-universities-from-hoarding-money.html> [<https://perma.cc/S7YF-U434>].

¹⁸² *Id.*

¹⁸³ *Id.*

Well-known author Malcolm Gladwell tweeted, “I was going to donate money to Yale. But maybe it makes more sense to mail a check directly to the hedge fund of my choice.”¹⁸⁴ Gladwell fumed over the inequity of such a skewed wealth distribution among American higher educational institutions. Potential conflicts of interest between the governing boards of many universities and hedge funds are concerning.¹⁸⁵ Many wealthier educational institutions adopted the high-risk, high-reward, and so-called *Endowment Model of Investing*¹⁸⁶ that created illiquid portfolios; radically diversified asset allocations with exposure to alternative investments (such as venture capital, private real estate, commodities, and timberland); systemic risks; excessive compensation to financial officers; highly leveraged risk-taking; speculative behavior; and socially irresponsible investing.¹⁸⁷

Paxson cites financial statistics of employment and expenditures to demonstrate the significance of American higher education. Instead, we advocate utilizing the alternative metrics of students’ character development; creativity; cultural and emotional intelligence; ethical decision-making; imagination; personal growth; resilience; and well-being. We do concur with Paxson that higher education and research drive innovation, technological progress, and economic growth.¹⁸⁸ Paxson mentions the often-made claim that higher education permits upward mobility, presumably economic and social. A high-profile study conducted by Harvard University provided supporting evidence,¹⁸⁹ while critiques of that study find the study’s evidence troubling in many ways.¹⁹⁰

¹⁸⁴ Malcolm Gladwell, TWITTER (Aug. 19, 2015, 2:06 PM),

<https://twitter.com/Gladwell/status/634063927069024256> [<https://perma.cc/WK84-UZA5>].

¹⁸⁵ Astra Taylor, *Universities Are Becoming Billion-Dollar Hedge Funds With Schools Attached*, NATION (Mar. 8, 2016), <https://www.thenation.com/article/archive/universities-are-becoming-billion-dollar-hedge-funds-with-schools-attached/>.

¹⁸⁶ DAVID F. SWENSON, PIONEERING PORTFOLIO MANAGEMENT: AN UNCONVENTIONAL APPROACH TO INSTITUTIONAL INVESTMENT (rev. ed. 2009).

¹⁸⁷ Joshua Humphreys, *Educational Endowments and the Financial Crisis: Social Costs and Systemic Risks in the Shadow Banking System*, CTR. SOC. PHILANTHROPY, TELLUS INST., (Revised May 27, 2010), <https://www.tellus.org/pub/Tellusendowmentcrisis.pdf> [<https://perma.cc/TCZ5-9W6U>].

¹⁸⁸ Robert M. Solow, *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1987*, FACTS <https://www.nobelprize.org/prizes/economic-sciences/1987/solow/facts/> [<https://perma.cc/76CZ-EBGJ>].

¹⁸⁹ Raj Chetty, John Friedman, Emmanuel Saez, Nicholas Turner, Danny Yagan, *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility*, OPPORTUNITY INSIGHTS, HARV. UNIV. (Revised Dec. 2017), <https://opportunityinsights.org/paper/mobilityreportcards/> [<https://perma.cc/87F6-YL9J>].

¹⁹⁰ See, e.g., Brian Fleming & Allison Dulin Salisbury, *Let’s Focus Innovation on Social Mobility*, INSIDE HIGHER EDUC. (May 30, 2018), <https://www.insidehighered.com/digital-learning/views/2018/05/30/using-innovation-deliver-higher-eds-promise-social-mobility> [<https://perma.cc/4GHC-BLE5>]; Brian Manno, *Inside the College Mobility Report Cards That Track Economic Success for Low-Income Students — With Lots to Say About Access, Earnings & Race*, THE 74 (Apr. 9, 2019), <https://www.the74million.org/article/manno-inside-the-college-mobility-report-cards-that-track-economic-success-for-low-income-students-with-lots-to-say->

In economic research (including research conducted by four Nobel laureates), higher education can function simultaneously as human capital investment,¹⁹¹ (research by Gary S. Becker);¹⁹² a costly job market signaling credential,¹⁹³ (research by A. Michael Spence);¹⁹⁴ a filter,¹⁹⁵ (research by Kenneth J. Arrow);¹⁹⁶ and an employer screening mechanism,¹⁹⁷ (research by Joseph E. Stiglitz).¹⁹⁸ These models typically conclude that, to sort themselves out from others, people may overinvest in high education (from the perspective of social welfare).

We have never been good at reading people's minds, though others try, such as Paul Orlando, who teaches entrepreneurship at the University of Southern California.¹⁹⁹ In a blog post,²⁰⁰ on a website about complexity, second-order thinking, and systems,²⁰¹ titled *Unintended Consequences*, Orlando offers an intriguing analysis of Paxson's op-ed. Orlando quotes "the paragraphs that might be called tone deaf are these."²⁰²

The basic business model for most colleges and universities is simple — tuition comes due twice a year at the beginning of each semester. Most colleges and universities are tuition dependent. Remaining closed in the fall means losing as much as half of our revenue.

about-access-earnings-race/ [https://perma.cc/M6DF-EJ8B]; Dewayne Matthews, *Does Higher Education Really Increase Economic Mobility?* LUMINA FOUND. (Apr. 10, 2017), <https://www.luminafoundation.org/news-and-views/does-higher-education-really-increase-economic-mobility/> [https://perma.cc/GR5J-7TRC].

¹⁹¹ GARY S. BECKER, *HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION* (3rd ed. 1994).

¹⁹² Gary S. Becker, *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1992*, FACTS, <https://www.nobelprize.org/prizes/economic-sciences/1992/becker/facts/> [https://perma.cc/CEJ9-ZBEX].

¹⁹³ Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973).

¹⁹⁴ Michael Spence, *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2001*, FACTS, <https://www.nobelprize.org/prizes/economic-sciences/2001/spence/facts/> [https://perma.cc/FY8P-6M9B].

¹⁹⁵ Kenneth J. Arrow, *Higher Education as a Filter*, 2 J. PUB. ECON. 193 (1973).

¹⁹⁶ John R. Hicks & Kenneth J. Arrow, *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1972*, SUMMARY, <https://www.nobelprize.org/prizes/economic-sciences/1972/summary/> [https://perma.cc/BX79-W6EP].

¹⁹⁷ Joseph E. Stiglitz, *The Theory of "Screening," Education, and the Distribution of Income*, 65 AM. ECON. REV. 193 (1975).

¹⁹⁸ Joseph E. Stiglitz, *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2001*, FACTS, <https://www.nobelprize.org/prizes/economic-sciences/2001/stiglitz/facts/> [https://perma.cc/9XBT-G7RP].

¹⁹⁹ Paul Orlando, UNINTENDED CONSEQUENCES, <https://www.marshall.usc.edu/personnel/paul-orlando>.

²⁰⁰ Paul Orlando, UNINTENDED CONSEQUENCES, <https://unintendedconsequenc.es/on-campus-reopening/> [https://perma.cc/DSP2-8QBL].

²⁰¹ Paul Orlando, UNINTENDED CONSEQUENCES, <https://unintendedconsequenc.es/> [https://perma.cc/8VJL-ST3Y].

²⁰² *Id.*

This loss, only a part of which might be recouped through online courses, would be catastrophic, especially for the many institutions that were in precarious financial positions before the pandemic. It's not a question of whether institutions will be forced to permanently close, it's how many.²⁰³

Orlando observes that: "But campus openings don't depend on Op-ed readers. So why write this and why write it now?"²⁰⁴ The section titled "*Why write an Op-ed?*"-conjectures, "I actually don't have a problem with Paxson's Op-ed, but that's because **I view it as the opening gambit in a larger negotiation** rather than a literal intent to open universities in the fall." Orlando hyperlinks to page 13 of the Brown University Financial Report for the fiscal year 2018,²⁰⁵ where there is a discussion of operating revenues accompanied by a pie chart. "Brown's net tuition and fee revenue of \$353.4 million represented 37 percent of total University revenues in FY18," or "\$951.7 million in Fiscal Year 2018."²⁰⁶

Orlando considers how, "if we instead look at the Op-ed as the start of a negotiation, it looks more interesting to me."²⁰⁷ Orlando believes that Paxson's op-ed really is asking, "how are you going to support us so that we don't need to open our campuses in the fall? Because we may have to open before we're ready. And that would potentially spread new cases of coronavirus."²⁰⁸

In another blog post on *Unintended Consequences*, Orlando stated his belief "that if online education replaces in-person classes for long, we'll see more arguments against the hike in US college tuition prices, even though only a small percent of US university tuition goes toward paying for the education itself."²⁰⁹ In yet another blog post about the college admissions scandal, Orlando explained: "My rough calculation of what the needed four-year college credits would cost if students just directly paid adjunct professors: around \$10,000. Make that \$20,000 to \$30,000 for only full time professors. Bear in mind that a four-year degree often costs around \$250,000 today."²¹⁰ Orlando quotes Will Hunting, the character Matt Damon plays in the movie *Good Will Hunting*,²¹¹ who says: "You wasted \$150,000 on an education you coulda got for \$1.50 in late fees at the public library."²¹² Orlando continues: "The other general calculation you'll often see is that only around 20% of tuition goes

²⁰³ Paxson, *supra* note 38.

²⁰⁴ Orlando, *supra* note 200.

²⁰⁵ Brown University Financial Report, Fiscal Year 2018, 13, https://www.brown.edu/about/administration/president/sites/president/files/Presidents_Financial_Report_FY18.pdf [<https://perma.cc/T7V8-V3BU>].

²⁰⁶ *Id.*

²⁰⁷ Orlando, *supra* note 200.

²⁰⁸ *Id.*

²⁰⁹ Paul Orlando, *Changing Minds on Coronavirus*, UNINTENDED CONSEQUENCES (Mar. 9, 2020) <https://unintendedconsequenc.es/changing-minds-on-coronavirus/> [<https://perma.cc/3K87-YNFQ>].

²¹⁰ Paul Orlando, *College Admissions Scandal*, UNINTENDED CONSEQUENCES, <https://unintendedconsequenc.es/college-admissions-scandal/> [<https://perma.cc/DQ9A-4CMD>].

²¹¹ GOOD WILL HUNTING (Be Gentleman Limited Partnership 1997).

²¹² *Id.*

toward the teaching and education — a higher figure which I believe includes not only paying professors, but also related administrators, building and facilities and other expenses.”²¹³ Orlando details how,

Taking inflation into account (but not increases in interest payments) tuition at the private schools involved in the scandal is today around 70% more expensive than it was 20 years ago. Much of that increase supports adding luxury facilities, fancy buildings, holding large events, and adding many more staff and administration positions. Much of the rest of it is there for another reason.²¹⁴

Orlando cites Bryan Caplan’s book, *The Case Against Education*,²¹⁵ for the argument that only about 20 percent of college is a human capital investment in the sense of Becker,²¹⁶ while 80 percent of college is a costly job market signaling in the sense of Spence.²¹⁷ Orlando reveals that:

As college tuition rates increased at rates well beyond inflation every year over the last 35 years, those increases were not matched it all by increases in pay to professors. And at the same time, colleges have ended up relying more on adjunct professors as a way of cutting costs.²¹⁸

Orlando believes that, “**elite colleges are doing just what they should do strategically.** That is, keep their prices high, increasing every year, and acceptance rates low. The fact that parents paid bribes to get their kids into school shows that they believe there is value. That value should be there for others.”²¹⁹ Orlando quotes Kevin Carey of the New America Foundation who explained that MOOCs (Massive Open Online Courses) failed to disrupt colleges and universities not because they were of poor or inferior quality, as many MOOCs are very good and still improving.²²⁰ Instead, MOOCs failed because, unlike MOOCs which offer access to education from world-class professors at low or zero prices, higher educational institutions also provide a certification function by awarding degrees that enable their graduates to obtain jobs.²²¹

Orlando says: “**Universities are machines for building bigger, more enjoyable universities.** They are like a kind of paperclip maximizer in that regard. Why would a college charge less?”²²² The *paperclip maximizer* phrase refers to the dystopian possibility of an advanced artificial intelligence, that is programmed to make paper

²¹³ Orlando, *supra* note 210.

²¹⁴ *Id.*

²¹⁵ BRYAN CAPLAN, *THE CASE AGAINST EDUCATION: WHY THE EDUCATION SYSTEM IS A WASTE OF TIME AND MONEY* (2018).

²¹⁶ BECKER, *supra* note 191.

²¹⁷ Spence, *supra* note 193.

²¹⁸ Orlando, *supra* note 210.

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

clips and not also programmed to value human lives, deciding “it would be much better if there were no humans because humans might decide to switch it off. Because if humans do so, there would be fewer paper clips. Also, human bodies contain a lot of atoms that could be made into paper clips.”²²³ Colleges and universities must value human lives above all else, including their own unrestrained obsession for growth for the mere sake of growth. Finally, Orlando notes the irony of colleges and universities being viewed as victims of the college admissions scandals because,

the victimhood view comes from the university being excluded from the payments. If those parents had gone through official channels and made donations of 10x to 20x what they paid in bribes, and by doing so increased the acceptance rate of their children, we never would have heard about this scandal at all.²²⁴

As the fictional *Star Trek The Original Series* character, Spock, would often say, “fascinating.”

IV. REIMAGINING BETTER, SAFER HIGHER EDUCATION

We suddenly find ourselves living in strange times, which are offering us opportunities to develop compassionate, healthy, and first-rate online pedagogy. As professors, we each play a role in curating our students’ intellectual development. Classrooms have been traditional meeting spaces to deliver courses and frame educational experiences. In an emergency transition this spring, COVID-19 hastily threw courses out of classroom doors and into the online space.²²⁵ We now have opportunities to provide well-organized, thoughtful, and safe education experiences for our students this fall. We can redesign our courses to teach the agency (motivation to pursue a goal) and pathway (capacity to brainstorm multiple strategies to achieve the goal) thinking in our disciplines to develop academic self-efficacy in our students in online environments. We can expressly teach the process of learning how to learn (the domain knowledge and skills in our fields of expertise), but leverage online tools in this process.

Purdue University president and Indiana’s Republican former governor, Mitch Daniels, wrote in a message addressed to the people of Purdue: “It could be argued that a college campus will be among the most difficult places to reopen for previously regular activities[] Literally, our students pose a far greater danger to others than the virus poses to them.”²²⁶ A reporter about faculty issues wrote, “Daniels’s letter

²²³ Kathleen Miles, *Artificial Intelligence May Doom The Human Race Within A Century*, *Oxford Professor Says*, HUFFPOST (Aug. 22, 2014) (interviewing and quoting Nick Bostrom), https://www.huffpost.com/entry/artificial-intelligence-oxford_n_5689858 [<https://perma.cc/7THP-LDN6>].

²²⁴ Orlando, *supra* note 210.

²²⁵ Ryan Weber, *Welcome to Your Hastily Prepared Online College Course*, MCSWEEEY’S INTERNET TENDENCY (Mar. 16, 2020), <https://www.mcsweeneys.net/articles/welcome-to-your-hastily-prepared-online-college-course> [<https://perma.cc/H868-5PVR>].

²²⁶ Mitchell E. Daniels, Jr., *A Message from President Daniels Regarding Fall Semester*, Apr. 21, 2020, <https://www.purdue.edu/president/messages/campus-community/2020/2004-fall->

mentioned a number of ways Purdue might seek to protect its population over 35 and those especially vulnerable to the virus due to underlying medical issues. But his comments were still criticized as hurtful and oblivious to the needs of the overwhelming majority of faculty members over 35.²²⁷ Suzette Hackney of the *Indianapolis Star* found Daniel's letter "stunning" and thought "Daniel's thought-process is short-sighted, discriminatory and downright frightening."²²⁸ Hackney had just this single question of Daniels: "Who is going to teach these healthy young people? I would think the university's faculty and staff would warrant at least a specific mention, seeing as under this plan they'll be separated or adhering to minimized contact with all those hearty youngsters they are charged to somehow teach."²²⁹

Hackney believes "Daniels' letter screams of opportunism. It screams of chasing dollars. That sentiment is not only irresponsible, it is dangerous."²³⁰ Hackney detailed that:

But the assertion that Purdue officials can successfully place limitations on visitors to and away from campus is ludicrous. Let's think for a minute: Students who had their spring semester cut short because of coronavirus closures would be expected to skip the bars (assuming they are open), parties and other back-to-class festivities they cherish. They're expected not to go home to visit their parents or to do laundry. Good luck with that.

Daniels jumped out of the gate too soon with this half-baked proposal. It's embarrassing and reckless. Hit reset with this one, sir. Boiler up, indeed.²³¹

Daniels also stated: "We will look to protect the more vulnerable members of our community by allowing (or requiring, if necessary) them to work remotely."²³² Daniels continued by saying: "Whatever its eventual components, a return-to-operations strategy is undergirded by a fundamental conviction that even a

message.php [https://perma.cc/L87E-72PT]. See also Frank Chambers, *Letters: Purdue Alum: Not Convinced Mitch Daniels Has a Safe Campus Reopening Plan*, J. & COURIER (June 30, 2020), <https://www.jconline.com/story/news/opinion/letters/2020/06/30/purdue-alum-not-convinced-mitch-daniels-has-safe-campus-reopening-plan/5353534002/> [https://perma.cc/CB6N-8RFT].

²²⁷ Colleen Flaherty, *The 'Right Not to Work,'* INSIDE HIGHER EDUC. (May 4, 2020), <https://www.insidehighered.com/news/2020/05/04/plans-fall-assume-professors-will-be-willing-teach-will-they> [https://perma.cc/6Y2F-BF2S].

²²⁸ Suzette Hackney, *Purdue's President Floats Frightening Plan for Opening Campus this Fall*, USA TODAY (Apr. 22, 2020), <https://www.indystar.com/story/opinion/columnists/suzette-hackney/2020/04/22/mitch-daniels-chasing-tuition-dollars-instead-reasonable-solutions-writes-columnist-suzette-hackney/3004588001/> [https://perma.cc/7KLU-4TX2].

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² Daniels, Jr., *supra* note 226.

phenomenon as menacing as COVID-19 is one of the inevitable risks of life.”²³³
Except, the risks of COVID-19 can be mitigated by remote learning and exacerbated by reopening campuses.

Daniels concluded by declaring:

The COVID-19 virus will remain a fact of life this autumn. Natural immunity, which has been slowed by the shutdown, will not yet have fully developed. No vaccine can be counted on until 2021 at the soonest. It is unclear what course other schools will choose, but Purdue will employ every measure we can adopt or devise to manage this challenge with maximum safety for every member of the Boilermaker family, while proceeding with the noble and essential mission for which our institution stands.²³⁴

Maximum safety equals remote learning instead of reopening campuses. The incoming chair of Purdue’s chapter of the American Association of University Professors (AAUP) and Purdue associate professor of engineering education, Alice Pawley, “said it’s not possible to practice social distancing in the classrooms where she teaches her undergraduate engineering courses. It’s also impossible to, say, halve the number of students in the room because the program’s teaching hours are already so onerous.”²³⁵ Pawley expressed concerns over having to teach evenings and weekends without childcare support. Pawley also shared that “she’s uncomfortable with the idea of any face-to-face teaching in the fall, given that she and her small family are still figuring out how to safely shop for groceries and what to do if both she and her partner get sick.”²³⁶ Pawley said: “I don’t want to think about face-to-face teaching the hordes of students I usually teach until there is a vaccine,” and believes that students share her concerns.²³⁷ Pawley concluded by asking: “Why would I want to add the pressure of required face-to-face interactions to what is already a stressful learning environment?”²³⁸

The outgoing president of Purdue’s AAUP chapter and an associate professor of women’s, gender, and sexuality studies, T. J. Boisseau, expressed her concern that it did not “seem prudent to promise or predict what will be the best course of action three months from now.”²³⁹ Boisseau explained that faculty want to teach, “but they also want to know they can teach well and teach safely. We should all be laser focused on planning to do whatever it takes to achieve those twinned goals.”²⁴⁰

The national legal office of the AAUP confirmed that it has received inquiries about professors’ legal rights concerning teaching this fall.²⁴¹ The AAUP *Principles*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ Flaherty, *supra* note 227.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

and Standards for the COVID-19 Crisis²⁴² references the AAUP *Statement on Government of Colleges and Universities*,²⁴³ which states “the faculty exercises ‘primary responsibility’ for decision-making on academic matters, including ‘curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process.’”²⁴⁴ Hans-Joerg Tiede, AAUP senior program officer, stated: “We take the position that these principles apply just as much in exigent circumstances, such as those presented by the pandemic.”²⁴⁵ Letitia Silas, former counsel at Howard University and now a labor attorney with Fisher and Phillips, said colleges and universities have to make “decisions about the fall on a case-by-case basis, taking faculty concerns -- including those about accommodations for disabilities and equal employment law -- into account.”²⁴⁶

The State Council of Higher Education for Virginia, surveyed 1018 students at Virginia public and private higher education institutions, conducted from April 20th to May 4th.²⁴⁷ About 76 percent of the Virginia college students surveyed reported feeling anxiety, worry, or other challenges to their mental health due to COVID-19; 80 percent are struggling with school; and another 45 percent are facing work issues. In responding to open-ended questions, students revealed anxieties caused by overall uncertainty from COVID-19, fears over the well-being of friends and loved ones, and melancholy over missing milestones. Around 10 percent also experienced challenges with childcare, food insecurity, or housing insecurity. Another 18 percent worried over their financial aid status. Another 19 percent faced issues over physical well-being, whether directly from COVID-19 or indirectly from challenges caused by COVID-19 due to managing other healthcare concerns.

There were some silver linings in the survey data, including many students reporting they were handling the transition to remote learning successfully or

²⁴² AAUP, *Principles and Standards for the COVID-19 Crisis*, <https://www.aaup.org/aaup-principles-and-standards-covid-19-crisis> [<https://perma.cc/P5SN-DWSC>].

²⁴³ AAUP, *Statement on Government of Colleges and Universities*, <https://www.aaup.org/report/statement-government-colleges-and-universities> [<https://perma.cc/RU75-X5Q9>].

²⁴⁴ AAUP, *supra* note 242.

²⁴⁵ Flaherty, *supra* note 227.

²⁴⁶ *Id.*; see also Danielle Douglas-Gabriel, *As Young People Drive Infection Spikes, College Faculty Fight for the Right to Teach Remotely*, WASH. POST (July 1, 2020), <https://www.washingtonpost.com/education/2020/07/01/college-professors-fall-remote-teaching/> [<https://perma.cc/UZA4-S4BL>]; Arlene S. Kanter, *Can Faculty Be Forced Back on Campus?* INSIDE HIGHER EDUC. (June 15, 2020), <https://www.chronicle.com/article/Can-Faculty-Be-Forced-Back-on/248981> [<https://perma.cc/95WB-FVJN>]; Emma Pettit, *Who Gets to Teach Remotely? The Decisions Are Getting Personal*, CHRON. HIGHER EDUC. (June 22, 2020), <https://www.chronicle.com/article/Who-Gets-to-Teach-Remotely-/249035> [<https://perma.cc/6MYC-PYGS>].

²⁴⁷ Tom Allison, *Virginia College Students Shed Light on Challenges Related to COVID-19*, INSIGHTS (May 28, 2020, 12:37 PM), <https://schev.edu/index/reports/insights/insights/2020/05/28/virginia-college-students-shed-light-on-challenges-related-to-covid-19>.

preferring online classes over in-person instruction. Numerous students also conveyed gratitude over the resources they had or for the support they received. Even more students voiced optimism, embracing a philosophy of taking things one day at a time. The surveyed students also exhibited amazing resilience, creating alternative work areas, maintaining new schedules, and appreciating the larger societal context of demanding times.

Overall, the polling results show that students are dealing with a lot, including tremendous stress. University leadership would be more effective if they stated (like the CSU system) that instruction is going to be online and that educators are going to help you thrive as a student and find resources to help with your other challenges. College and university administrators seem to be most concerned about new students: freshmen and new graduate students, who think they want to be on campus. These desires are likely due to youth and not appreciating what being on a socially distanced campus will be like, and feelings of being least at risk, if not inaccurate invincibility, from COVID-19.

In the paradigm of socially responsible online-education, professors help students thrive and persist with their educations when we are explicit about the conceptual framework of the content; we are deliberate about exposing the categories of information within the framework; and we design class readings, discussions, exercises, and homework assignments that develop the ideas within the categories of information. Through this process, we model breaking goals down into tasks, tracking progress, and reaching milestones.

Students who are educated in agency and pathway thinking are likely to realize greater academic achievement and higher graduation rates, but also to experience increased satisfaction with their learning and achieve greater well-being. They will excel at divergent thinking, able to devise strategies to deal with challenges and to problem-solve. They will become motivated, self-regulated, and life-long learners motivated to learn, cognizant of the knowledge and skills they have or must develop, and able to devise strategies for acquiring or implementing expertise.

Semantic memory is the knowledge-base that education enhances, such as the acquisition of terminology, facts, and concepts. It is declarative memory because it requires conscious thought to be recalled, and it is stored in a neural network of brain cells that loops between the memory-processing hippocampus and the cerebral cortex.

When students work to develop expertise in a course or discipline, the brain is consolidating information for later retrieval. The life cycle of declarative memory has four stages: encoding, storing, retrieving, and forgetting. Encoding begins when information in the form of memory traces enters the cerebral cortex via the senses, and travels to the hippocampus for processing. The hippocampus starts to encode the information for permanent storage along chains of firing neurons. The strongest information travels back to the cerebral cortex where it was first registered by the senses. During a university course, consolidation (enhanced by class discussions, exercises, homework, and faculty feedback) makes temporarily stored fragile information (from reading and lecture) more stable for later retrieval (on final exams, papers, presentations, or projects) by strengthening neural connections of the information circuit between the hippocampus and the cortex. The memory retrieval process, used by students during exams or presentations, relies on the same circuit of

brain cells that is used for memory consolidation, demonstrating the need for a healthy hippocampus.²⁴⁸

V. COMPASSIONATE AND HUMANE HIGHER EDUCATION

There are two kinds of stress: acute stress where the fight-or-flight system is initiated to marshal resources to deal with a physical or psychological challenge; and chronic stress where long-lasting life challenges prolong fight-or-flight system activation. The fight-or-flight stress response evolved to help humans escape from predators, and the rest-and-digest system curbs the stress response, calming the body and brain.

The stress response begins in the brain's panic button, the amygdala, which signals the hypothalamus to release the stress hormones adrenalin (epinephrine) and glucocorticoids (primarily cortisol). Stress hormones mobilize energy and elevate heart rate and blood pressure to help students deal with challenges, while at the same time suppressing digestion and immune response.

Chronic stress damages our brains.²⁴⁹ Chronic stress can cause psychological problems such as irritability, anxiety, panic attacks, and depression; and physical effects including increased blood pressure, heart palpitations, breathlessness, dizziness, chest pain, digestive problems, muscle tension, sweating, and chills. Long-term elevated levels of stress hormones are associated with impaired immune response; increased appetite, food cravings, and body fat; and decreased muscle mass and bone density.

One of the brain's superpowers is its ability to grow new brain cells in the hippocampus in a process called neurogenesis, which is suppressed during the stress response. The hippocampus is also extremely vulnerable to damage from stress hormones because it has extensive glucocorticoid receptors. Chronic high levels of glucocorticoids cause hippocampal neuron degeneration and death. The hippocampal brain cells remaining after damage from stress are not as effective, and the complexity of neural networks is degraded as the connections at the synapses are weakened or disconnected.

Research reveals that cognitive performance deteriorates during the stress response. The negative effects of stress on cognition include impaired concentration, memory, problem-solving capacity, and language and mathematics processing. Motivation, creativity, and curiosity are also inhibited.

Brain cells in the hippocampus, critical to memory processing and recall, can be weakened or killed by exposure to stress hormones creating significant implications for students. Brain scans show hippocampi shrink in people who experience stress, depression, and Post Traumatic Stress Disorder.²⁵⁰

²⁴⁸ See Debra S Austin, *Positive Legal Education: Flourishing Law Students and Thriving Law Schools*, 77 MD. L. REV. 649 (2018).

²⁴⁹ Barbara Jacquelyn Sahakian, Christelle Langley & Muzaffer Kazer, *How Chronic Stress Changes the Brain – and What You Can Do to Reverse the Damage*, CONVERSATION (Mar. 11, 2020, 11:13 AM), <https://theconversation.com/how-chronic-stress-changes-the-brain-and-what-you-can-do-to-reverse-the-damage-133194> [<https://perma.cc/4CGR-YXE3>].

²⁵⁰ See Austin, *supra* note 169.

Reopening campuses this fall to resume in-person teaching is fraught with dangerous logistical and physical complications.²⁵¹ President of Hamilton College,²⁵² David Wippman, and Cornell University dean of the school of continuing education and summer sessions since 1991,²⁵³ Glenn C. Altschuler (who also served from 2009 to 2013 as vice president for university relations, with responsibilities for articulating and overseeing strategies related to communications and government relations) makes reference to the occasional description of residential colleges as “landlocked cruise ships.”²⁵⁴ Wippman and Altschuler also refer to and provide the hyperlink for the American College Health Association Guidelines: *Considerations for Reopening Institutions of Higher Education in the COVID-19 Era*.²⁵⁵ These guidelines call for testing all students upon their arriving on campus, then a week or two later, and regularly thereafter.²⁵⁶ As Wippman and Altschuler note parenthetically, “(though where colleges will get all these tests and the personnel to administer them remains a mystery).”²⁵⁷

Wippman and Altschuler admit that implementing, enforcing, and maintaining a regime of frequent handwashing, good hygiene, testing, contact tracing, physical distancing, wearing face masks, repeated disinfection of surfaces, quarantine of those infected (perhaps in blocks of rooms reserved in local hotels), and restricting travel to and from campus “is much easier said than done.”²⁵⁸ Wippman and Altschuler also make reference to and provide the hyperlink for a report prepared for Connecticut Governor Ned Lamont by the Higher Education Subcommittee of Reopen Connecticut.²⁵⁹ As Wippman and Altschuler say,²⁶⁰ this report “notes with considerable understatement that:”

²⁵¹ See generally David Wippman & Glenn Altschuler, *How Colleges Can Keep the Coronavirus Off Campus*, N.Y. TIMES (June 1, 2020), <https://www.nytimes.com/2020/06/01/opinion/coronavirus-colleges-reopen-safely.html> [https://perma.cc/UEB9-D64T].

²⁵² David Wippman, *Office of the President*, HAMILTON C., <https://www.hamilton.edu/offices/president> [https://perma.cc/5U38-V4YE].

²⁵³ Glen C. Altschuler, CORNELL U., *School of Continuing Education and Summer Sessions*, <https://sce.cornell.edu/sce/about/altschuler> [https://perma.cc/K65M-T2BW].

²⁵⁴ Wippman & Altschuler, *supra* note 250.

²⁵⁵ AM. C. HEALTH ASS’N. GUIDELINES, *Considerations for Reopening Institutions of Higher Education in the COVID-19 Era*, https://www.acha.org/documents/resources/guidelines/ACHA_Considerations_for_Reopening_IHEs_in_the_COVID-19_Era_May2020.pdf [https://perma.cc/W3B3-363J].

²⁵⁶ *Id.*

²⁵⁷ Wippman & Altschuler, *supra* note 251.

²⁵⁸ *Id.*

²⁵⁹ OFFICE OF THE GOVERNOR CONN., REPORT OF THE HIGHER EDUC. SUBCOMM. REOPEN CONN. (May 8, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/News/20200506-Recommendations-to-Governor-Lamont-for-a-phased-reopening-of-colleges-and-universities.pdf?la=en> [https://perma.cc/V323-HKWL].

²⁶⁰ Wippman & Altschuler, *supra* note 251.

Whether boarding school and college undergraduate populations will observe physical distancing is another matter to consider. Whereas graduate and professional students on residential campuses as well as older students at community colleges have the maturity, we presume, to practice physical distancing, it is not clear that undergraduates and boarding school students can be relied upon to do so. Evidence from one major university on the west coast, as well as the much-publicized behavior of students during spring break in Florida, suggests skepticism about full compliance with behavioral norms.²⁶¹

Wippman and Altschuler conclude that: “Whether students will abide by the protocols needed to keep campuses safe remains an open question.”²⁶² Wippman and Altschuler also assert about students, “few, if any, want to return to Zoom classes in their parents’ basement.”²⁶³ We are not aware of polling data proving that few students, parents, staff, local communities, and faculty want to continue remote teaching. We are aware of a friend who helped his daughter move out of a Berkeley apartment noting that the campus was a ghost town. It is much better for campuses and their local communities to be figurative rather than literal ghost towns.

The extraordinarily complex, hopefully well-intentioned, likely vetted by general counsel, and untested nature of the guidelines and protocols required to reopen campuses underscores the tragedy of administrators’ failing and raises the fundamental question of: why are colleges and universities insisting on going through all the trouble of doing this? Is it public-spiritedness or private greed? Is it education or economics? Is it other-regarding or selfishness? Of course, we do not and may never know the answers to such questions about unobservable motivations. Instead we know the observable actions and statements of those rushing to reopen campuses. We also know the likely sad consequences for students, parents, staff, local communities, faculty, and ultimately the bottom line and reputation of colleges and universities that cause avoidable sickness and death on a massive scale.

We think of a 13-year-old eighth grader learning more remotely than before,²⁶⁴ a 61-year-old professor enjoying a break from office politics and noisy colleagues,²⁶⁵ introverts and others,²⁶⁶ who with millions of Americans, are happier, more efficient,

²⁶¹ OFFICE OF THE GOVERNOR CONN., *supra* note 259.

²⁶² Wippman & Altschuler, *supra* note 251.

²⁶³ *Id.*

²⁶⁴ Veronique Mintz, *Why I’m Learning More With Distance Learning Than I Do in School*, N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/opinion/coronavirus-pandemic-distance-learning.html> [<https://perma.cc/KRB7-46U3>].

²⁶⁵ Maria Cramer & Mihir Zaveri, *What if You Don’t Want to Go Back to the Office?* N.Y. TIMES (May 5, 2020), <https://www.nytimes.com/2020/05/05/business/pandemic-work-from-home-coronavirus.html> [<https://perma.cc/YWC7-UQML>].

²⁶⁶ Joanne Kaufman, *Loving the Lockdown*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/realestate/coronavirus-lockdown-coping.html> [<https://perma.cc/S6KH-M74Z>].

and prefer working remotely.²⁶⁷ We believe remote learning has many virtues,²⁶⁸ and that it can provide a safe, high-quality online learning experience.²⁶⁹ In response to many of our students' anxieties,²⁷⁰ we can and should learn to practice a calming,²⁷¹ inclusive,²⁷² trauma-informed,²⁷³ pedagogy of kindness,²⁷⁴ based upon learning theories²⁷⁵ and the neuroscience of learning.²⁷⁶

VI. A BRAVE NEW WORLD: SUPERIOR, ONLINE HIGHER EDUCATION

We face a brave new educational world where two of the fundamental questions about higher education—What do we want from higher education? How might we get it?—are no longer hypothetical and scholarly questions. These are instead pressing and pragmatic questions because the familiar paths on which we have become dependent are now blocked. Nostalgia, precedent, and tradition are not sufficient reasons for our choices in higher education. We now have the opportunity to make better decisions. Higher education (and life itself) should be evidence-based and science-driven. What is higher education all about?

Higher education is about the intellectual, emotional, and personal development of students and while other aspects of our economy may have to deal with the tension

²⁶⁷ *Id.*

²⁶⁸ Michelle D. Miller, *5 Takeaways From My Covid-19 Remote Teaching*, CHRON. HIGHER EDUC. (May 6, 2020), <https://www.chronicle.com/article/5-Takeaways-From-My-Covid-19/248713> [<https://perma.cc/8LKW-VEHW>].

²⁶⁹ Flower Darby, *How to Be a Better Online Teacher*, CHRON. HIGHER EDUC., <https://www.chronicle.com/interactives/advice-online-teaching> [<https://perma.cc/DJW8-69LW>].

²⁷⁰ Sarah Brown, *Students Are Showing Up at Counseling Centers in Droves. But They Don't Always Get the Treatment They Need*, CHRON. HIGHER EDUC. (Jan. 14, 2020), <https://www.chronicle.com/article/Students-Are-Showing-Up-at/247844> [<https://perma.cc/NWY5-TR82>].

²⁷¹ Michelle Miller, *Tending, Befriending, and Coping with Upending: Takeaways from the First Month of Mass Emergency Remote Education*, MICHELLE MILLER BLOG (Apr. 21, 2020), <https://www.michellemillerphd.com/first-month-of-mass-emergency-remote-education/> [<https://perma.cc/43DC-QLDQ>].

²⁷² Viji Sathy & Kelly A. Hogan, *Here's How to Make Your Teaching More Inclusive*, CHRON. HIGHER EDUC. (July 22, 2019), https://www.chronicle.com/interactives/20190719_inclusive_teaching [<https://perma.cc/G77Y-2UCP>].

²⁷³ Rebecca Mushtare & John Kane, *Trauma-Informed Pedagogy*, TEA FOR TEACHERS (Apr. 22, 2020), <http://teaforteaching.com/131-trauma-informed-pedagogy/> [<https://perma.cc/BN5A-ZKBK>].

²⁷⁴ Catherine Denial, *A Pedagogy of Kindness*, HYBRID PEDAGOGY (Aug. 15, 2019), <https://hybridpedagogy.org/pedagogy-of-kindness/> [<https://perma.cc/8XP6-AU2U>].

²⁷⁵ Grant Wiggins & Jay McTighe, *Backward Design*, LEARNING THEORIES (Sept. 16, 2017), <https://www.learning-theories.com/backward-design.html> [<https://perma.cc/SK96-YW36>].

²⁷⁶ THOMAS J. TOBIN & KIRSTEN T. BEHLING, REACH EVERYONE, TEACH EVERYONE: UNIVERSAL DESIGN FOR LEARNING IN HIGHER EDUCATION (2018).

between public health and economic health, higher education does not and should not. While we look forward to at some point returning to our working with students in person when it is safe, higher education has the socially responsible capacity to move forward in the online space, without exposing students, staff, local communities, and faculty to the risks of COVID-19 infections.

We are sympathetic to the many private colleges that might go bankrupt.²⁷⁷ For example, La Salle University is a 157-year-old Roman Catholic, medium-size school in Philadelphia, with 5,000 students, some Division I sports programs, and a business school that in 2016 opened a new \$35 million, 87,000-square-foot building.²⁷⁸ La Salle in 2018 had \$115 million in expenses against \$118 million in revenues, meaning a 2.6 percent profit margin.²⁷⁹ For another example, Trinity Washington University is a Catholic women's college that the Sisters of Notre Dame de Namur founded in Washington, D.C.²⁸⁰ The president of Trinity Washington University, Patricia McGuire, kept both its expenses and tuition low by “avoiding unnecessary debt and focusing on academics instead of amenities” and practicing the habit of frugality they learned from their founding nuns.²⁸¹ While La Salle and Trinity Washington University are financially healthy,

other private colleges used borrowed money and statistical leverage to gamble on a strategy of spending more to compete for a shrinking pool of wealthy students. For some of these colleges — if collegians desert or delay higher education in large numbers this fall — that may prove to be a fatal mistake.²⁸²

In fall 2019, college enrollments dropped by over a quarter of million students compared to 2018.²⁸³ The decline of college students was not a first, because in “the past eight years, college enrollment nationwide has fallen about 11 percent. Every sector — public state schools, community colleges, for-profits and private liberal arts schools — has felt the decline, though it has been especially painful for small private colleges.”²⁸⁴ The National Student Clearinghouse Research Center, which keeps track of college enrollments, reported for “fall 2019, overall postsecondary enrollments decreased 1.3 percent or more than 231,000 students from the previous fall to 17.9 million students. For the first time in the decade, the nation's fall unduplicated enrollments fell below 18 million students and declined by more than

²⁷⁷ Kevin Carey, *Risky Strategy by Many Private Colleges Leaves Them Exposed*, N.Y. TIMES: THE UPSHOT (May 26, 2020), <https://www.nytimes.com/2020/05/26/upshot/virus-colleges-risky-strategy.html> [<https://perma.cc/XDU3-68R7>].

²⁷⁸ *Id.*

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² *Id.*

²⁸³ Elissa Nadworny & Max Larkin, *Fewer Students Are Going to College. Here's Why That Matters*, WBURNEWS (Dec. 16, 2019), <https://www.wbur.org/npr/787909495/fewer-students-are-going-to-college-heres-why-that-matters> [<https://perma.cc/XTE8-SJC7>].

²⁸⁴ *Id.*

2 million students.”²⁸⁵ College student enrollment dropped about 2.3 million since 2011.²⁸⁶ This precipitous decline was due to a strong economy, changing demographics, and huge cuts in state funding for higher education during the Great Recession.²⁸⁷

The majority of America’s flagship public universities have become unaffordable to students from low- or middle- income families.²⁸⁸ The pandemic is likely to exacerbate this inequitable trend, endangering public higher education.²⁸⁹ Starving states of federal funding support will reduce classes, courses, degree programs, staff, and professors, just when public higher education could help millions of unemployed Americans attend schools.²⁹⁰ The vacuum left by public colleges and universities would likely allow predatory for-profit schools to swoop in and sell desperate students worthless debt-financed degrees and an epidemic of student loan defaults.²⁹¹ Partisan politics could also drive public colleges and universities to compete with private ones for students by spending on luxury amenities instead of academic necessities.²⁹²

The fact that colleges and universities will lose revenues if they do not reopen campuses is not a justification for society to recklessly expose students to COVID-19 infections. Just as the fact that airlines will lose revenues if they do not fill airplanes is not a justification for society to recklessly expose passengers to COVID-19 infections. Just as the U.S. federal government financially rescued the airline and other industries, the U.S. federal government can financially rescue higher education institutions. Finances differ from returning to normal. We do not know when COVID-19 will end,²⁹³ if ever.²⁹⁴ In the meantime, life goes on, to a brave new world. COVID-19 may become the most stressful events in our lifetimes.

Governor Cuomo advocates learning lessons from (responses to) COVID-19 to “ensure we are thinking outside the box and improving and modernizing our systems

²⁸⁵ *Fall 2019 Current Term Enrollment Estimates*, NAT’L STUDENT CLEARINGHOUSE RESEARCH CTR. Dec. 16, 2019, <https://nscresearchcenter.org/current-term-enrollment-estimates-2019/> [<https://perma.cc/ZC7V-TG2M>].

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ Michael Mitchell, Michael Leachmen, Kathleen Masterson & Samantha Waxman, *Unkept Promises: State Cuts to Higher Education Threaten Access and Equity*, CTR. BUDGET & POL’Y PRIORITIES (Oct. 4, 2018), <https://www.cbpp.org/research/state-budget-and-tax/unkept-promises-state-cuts-to-higher-education-threaten-access-and> [<https://perma.cc/PK35-596H>].

²⁸⁹ Kevin Carey, *The ‘Public’ in Public Colleges Could Be Endangered*, N.Y. TIMES: THE UPSHOT (May 5, 2020), <https://www.nytimes.com/2020/05/05/upshot/public-colleges-endangered-pandemic.html> [<https://perma.cc/ET7V-MJZR>].

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ Sayuri Gavaskar, *COVID-19 Is Here. Now How Long Will It Last?* YALE SCH. MED. (Mar. 27, 2020), <https://medicine.yale.edu/news-article/23446/> [<https://perma.cc/YDC7-MVF7>].

²⁹⁴ Nathaniel Scharping, *Could We Be Living With COVID-19 Forever?* DISCOVER (Mar. 30, 2020, 12:14 PM), <https://www.discovermagazine.com/health/could-we-be-living-with-covid-19-forever> [<https://perma.cc/3QN4-KHAX>].

for the future.”²⁹⁵ While Cuomo’s good idea, *New York Forward: A Guide to Reopening New York and Building Back Better*,²⁹⁶ is about moving forward creatively, we believe that Cuomo’s prescription would also mean safely reopening campuses to be better. While Paxson longingly reminisces about going back to things as they were before COVID-19, we choose to not look back and instead to look forward to hybrid forms of higher education and improving on in-person and remote instruction.

CONCLUSION

Our individual and societal responses to COVID-19 will determine our individual and societal well-being. We can grow to become better versions of ourselves. The extra stress of trying to maintain safety from infection with a return to campus will make teaching and learning less effective. We will be purposefully choosing to transmit a transient learning disability to many, if not all of our students by stressing them in this way. We will intentionally make learning more difficult.

The decision to educate our students via in-person or online learning environments is a false choice, when the clear path to achieve our chief objective safely, the education of our students, can be done online. Online teaching and learning have been criticized, but that is likely because most college and university faculty do not have experience teaching in this way. Just because it is a different modality, does not mean it is ineffective. Dedicated educators can provide connection and consistency, as well as develop community, in the online learning environment.²⁹⁷ And making the decision for fall, and future terms while COVID-19 is unrestrained, with early notice to the faculty will ensure professors create, and improve over time, the best online courses to help students persist with their educational goals during this unprecedented public health tragedy. When we are all able to return to campus safely, faculty and students can bring the lessons we learned back to the classroom.

Just as Presidential candidate Joe Biden stated about the leadership necessary from the President of the United States, that leadership requires serving the needs of

²⁹⁵ *Amid Ongoing COVID-19 Pandemic, Governor Cuomo Announces Schmidt Futures Will Help Integrate NYS Practices and Systems with Best Advanced Technology Tools to Build Back Better*, N.Y. STATE GOVERNOR’S OFFICE (May 6, 2020),

<https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-schmidt-futures-will-help-integrate-nys> [<https://perma.cc/CB46-Y7H3>].

²⁹⁶ *New York Forward: A Guide to Reopening New York and Building Back Better*, N.Y. STATE GOVERNOR’S OFFICE (May 2020),

<https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYForwardReopeningGuide.pdf> [<https://perma.cc/XPN5-AEVJ>].

²⁹⁷ Doug Lederman, *What Kept Students Studying Remotely Satisfied This Spring? Well-Designed and -Delivered Courses*, INSIDE HIGHER EDUC. (July 8, 2020), <https://www.insidehighered.com/digital-learning/article/2020/07/08/what-kept-students-studying-remotely-satisfied-spring-well> [<https://perma.cc/J48F-J4S4>].

the people.²⁹⁸ “For that’s what the presidency is: the duty to care.”²⁹⁹ College and university leaders also have “the duty to care” about the primary needs of their students, staff, local communities, and faculty. This unprecedented challenge, the education of our students during the COVID-19 pandemic, calls for courageous caring.

Our last point is from Governor Cuomo and that is to practice humanity. We don’t talk about practicing humanity, but now if ever there is a time to practice humanity the time is now. The time is now to show some kindness, to show some compassion to people, show some gentility. . . . We have a problem. Yes, we will deal with it. Yes, we will overcome it. But let’s find our better selves in doing it.³⁰⁰

²⁹⁸ Katie Glueck, *Joe Biden Laces into Trump for Fanning ‘the Flames of Hate’*, N.Y. TIMES (Jun. 2, 2020), <https://www.nytimes.com/2020/06/02/us/politics/joe-biden-philadelphia-protests.html> [<https://perma.cc/AQY8-2S7C>].

²⁹⁹ *Id.*

³⁰⁰ Andrew M. Cuomo, *Video, Audio, Photos & Rush Transcript: Governor Cuomo Urges New Yorkers to Practice Humanity in the Face of COVID-19 Pandemic*, N.Y. STATE GOVERNOR’S OFFICE (Mar. 21, 2020), <https://www.governor.ny.gov/news/video-audio-photos-rush-transcript-governor-cuomo-urges-new-yorkers-practice-humanity-face> [<https://perma.cc/4NMF-CPH2>].