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## IF YOU CAN'T BEAT 'EM, JOIN 'EM (VIRTUALLY): INSTITUTIONALLY MANAGING LAW STUDENTS AS CONSUMERS IN A COVID WORLD

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**IF YOU CAN'T BEAT 'EM, JOIN 'EM  
(VIRTUALLY): INSTITUTIONALLY MANAGING  
LAW STUDENTS AS CONSUMERS IN A COVID  
WORLD**

**Debra Moss Vollweiler<sup>1</sup>**

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I. INTRODUCTION

In early 2020, I published an article that examined how law schools—with rising costs, pressure on performance metrics, and

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competitive high-profile rankings—were being judged more than ever before on a consumer satisfaction basis by both students and the public.<sup>2</sup> While that perception has been growing throughout the past two decades, it had, by early 2020, seemingly reached a crisis point in legal education. It had become clear that when students have their choice of educational institutions, they often act like consumers and choose to spend their tuition money based on metrics that satisfy them as buyers.

However, once the COVID-19 crisis hit universities and law schools nationwide, it became clear that the issue of students as consumers had reached new heights, and the issues previously addressed in my recently published work were now unfolding in new ways, some yet unseen.<sup>3</sup> As per my earlier work, this article does not debate whether law students treat their institutions with a consumer mindset.<sup>4</sup> Rather, it presumes they do and seeks to identify and solve, for institutions, these new problems stemming from the COVID-19 crisis. Part II of this article summarizes how this mindset arose in the shadow of this crisis and where the student consumer mindset now stands in light of the ongoing health crisis. Part III revisits the different areas of law school operations where the traditional academic mindset and student consumer mindset have previously experienced clashes, identifies new conflicts due to COVID-19, offers new solutions and strategies of embracing consumer pressure to make institutional changes in compliance with COVID-19 mandates, and highlights where consumer pressure should not result in changes because they are not in students' best long-term interests. Part IV offers some conclusions on these approaches.

## II. EDUCATION AS A CONSUMER PRODUCT: THE COVID-19 CRISIS REVEALS THE REALITIES

As previously written, consumerism has various meanings, but in relation to higher education, being a consumer “implies

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2. Debra Moss Vollweiler, *Law School as a Consumer Product: Beat 'Em or Join 'Em?*, 40 PACE L. REV. 1 (2019).

3. *See id.*

4. *See id.*

that students will want to see obvious, tangible benefits from their studies . . . .”<sup>5</sup> “Students who are consumers want to put their efforts into aspects of their education that will return tangible results[,] and they are ready to challenge” any obstacles they perceive the university placing in their paths.<sup>6</sup>

While education has always been something that money could buy, the current global health crisis put the costs into a sharp focus. Many universities and affiliated law schools followed the same or a similar timeline in making changes to its very existence as we did at my home institution, Nova Southeastern University Shepard Broad College of Law. While we were hearing about the COVID-19 crisis throughout February 2020, the reality of it came to us late in the week of March 2, 2020.

While our students were on Spring Break the week of March 2, 2020, on Friday, March 6, we received a notice from university administration of the need for students who had travelled internationally to quarantine themselves upon their return, and that colleges would need to accommodate these students who were now unable to attend in-person classes. The College of Law immediately began a conversation of how to do so, which included making class recordings available to self-identified quarantined students, as well as effectuating the simultaneous delivery of classes to both in-person students and those attending remotely. We had no inkling, at that point, that this was a foretelling of widespread future plans and where we would be six months later.

For the next week, many of us attended extended meetings on planning—in retrospect, unfortunately crowded into rooms that, as we now know, were far too small, with far too many people—and continually made minor adjustments to our procedures, created faculty training, and generally crafted some modest plans for an altered delivery of the curriculum. Such planning continued for a few days until March 12, when the full reality hit, and as was happening nationwide, in-person classes were suspended for a week, and then the remainder of the semester would be completed entirely through remote online delivery.

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5. *Id.* at 3.

6. *Id.*

For all law schools nationwide, the next few weeks were consumed with chaos, messaging, planning, and training. Attendance policies were abandoned. Many law schools changed their grading structures to pass/fail, while others made a point of refusing to make any changes at all.<sup>7</sup> While it is unquestionable that all schools sought to make the best decisions they could at the time, students reacted very differently to them. Colloquially, some students were happy that universities and law schools were being so proactive in keeping students safe, shutting down in-person classes, and providing grade and policy relief. Alternatively, some thought there was not enough action by schools, and others thought everything should simply stay the same and that schools were overreacting. Across the board, students seemed to silently (and not so silently) ask the same question: *Am I still getting my money's worth with all of these changes?*

In my previous work, I wrote about the fact that:

Universities contribute to the idea that a student experience is something for which a customer should pay, rather than selling the idea 'that higher education is about knowledge growth and development,' through their extensive marketing and outreach, through the leveraging of rankings and using other tactics to effectively compete in the current higher education marketplace.<sup>8</sup>

It is now clear that this product-based marketing of universities may have backfired on them when the product changed suddenly midstream and resulted in dissatisfied consumers.

The key question that many have been asking is whether education is a "commodity," and what is the core, or most valuable, component that is being bought?<sup>9</sup> It has been argued

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7. Joe Patrice, *Every Law School Grading Policy Change in One Chart*, ABOVE THE LAW (Apr. 1, 2020, 10:01 AM), <http://abovethelaw.com/2020/04/every-law-school-grading-policy-change-in-one-chart/?rf=1>.

8. Vollweiler, *supra* note 2, at 4.

9. See Matthew Wong, *Do Online Classes Diminish the Value of Higher Education?*, CHINA.ORG.CN (June 9, 2020),

that the “thing” that one would be buying with the most value is the degree itself—although that credential does not account for the actual skills and relationships acquired in the process.<sup>10</sup> If one is judging just by the degree or the credits earned for the degree, then it would appear there should be no complaint by students still graduating and progressing in their studies during these difficult times. However, students are digging deeper to look at what is happening during this crisis in the earning of those credits, and widely claiming that what they are now getting is inferior.

#### A. Student Dissatisfaction Generally with Pandemic Responses by Schools

It is clear students have gone public with their dissatisfaction with their universities during the COVID-19 crisis. Of course, they are also being frequently asked about their thoughts, increasing the platform to express these thoughts and making them very public. In one of many surveys given to students in Spring 2020, 1,000 students were asked: “how their college courses have changed after campuses were shut down.”<sup>11</sup> The results were not encouraging; about three out of four students who were surveyed said “they were disappointed with the learning experience” after classes moved online.<sup>12</sup> More specifically, they indicated they were not “receiving a quality e-learning experience.”<sup>13</sup> In additional surveys, eighty-six percent of students found the transition disruptive, and only about one in three were feeling extremely or very prepared for the new online learning environment.<sup>14</sup>

In other polls, there were additional concerns expressed

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[http://www.china.org.cn/opinion/2020-06/09/content\\_76141297.htm](http://www.china.org.cn/opinion/2020-06/09/content_76141297.htm).

10. *See id.*

11. *75% of College Students Unhappy with Quality of eLearning During Covid-19*, ONECLASS (Apr. 1, 2020), <http://oneclass.com/blog/featured/177356-7525-of-college-students-unhappy-with-quality-of-elearning-during-covid-19.en.html>.

12. *Id.*

13. *Id.*

14. Erin Pinkus, *SurveyMonkey Poll: Distance Learning for College Students During the Coronavirus Outbreak*, SURVEYMONKEY (Mar. 30, 2020), <https://www.surveymonkey.com/curiosity/surveymonkey-poll-distance-learning-college-students-covid/>.

about returning for future semesters: 3,089 higher education students in North America were polled to reveal that they were anxious and concerned about finishing their semester and passing their courses moving forward.<sup>15</sup> Three quarters or more indicated that students find the online class experience unengaging and that they miss face-to-face interaction, even as a majority of students rated their schools' and professors' responses to the crisis as good or excellent.<sup>16</sup>

Students have a growing frustration with online classes that were created quickly with sudden closures.<sup>17</sup> Students have been complaining of feeling diminished, while also expressing contempt for the decrease in quality and academic rigor.<sup>18</sup>

A different, more in-depth, survey aimed to correlate student concerns in the online transition with other factors that might impact perceptions. In one such study in Wisconsin, taken at the beginning of the emergency conversion, student anxiety clearly correlated with findings that their online learning was less appealing.<sup>19</sup> Students were most anxious about learning less and their class performances, even with grading scale changes.<sup>20</sup> When polled again at the end of the term, students reflected that communication, flexibility, and structure were the most important qualities of their professor.<sup>21</sup> Such a dynamic structure—clear expectations and clear due dates—with the flexibility granted to students with particular life circumstances, helped relieve those concerns.<sup>22</sup>

Student newspapers have issued opinion pieces about their dissatisfaction and the belief that refunds are in order, further

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15. *Adrift in a Pandemic: Survey of 3,089 Students Finds Uncertainty About Returning to College*, TOP HAT (May 1, 2020), <http://tophat.com/blog/adrift-in-a-pandemic-survey-infographic/>.

16. *Id.*

17. See Collin Binkley, *Does Online Learning Work? College Student Lawsuits Say No.*, CHRISTIAN SCI. MONITOR (May 4, 2020), <http://www.csmonitor.com/USA/Education/2020/0504/Does-online-learning-work-College-student-lawsuits-say-no>.

18. *Id.*

19. Doug Lederman, *How College Students Viewed This Spring's Remote Learning*, INSIDE HIGHER ED (May 20, 2020), <http://www.insidehighered.com/digital-learning/article/2020/05/20/student-view-springs-shift-remote-learning>.

20. *Id.*

21. *Id.*

22. *Id.*

laying the groundwork for the many individual claims since.<sup>23</sup> Along with pleas for facilities and services not used, as early as March 23, 2020, some students established a claim in that “a refund is evident in the clear drop in the quality of education since moving online”<sup>24</sup> as numerous students have published personal accounts of their challenges, acknowledging what works and what does not, including concerns over the material organization and communications.<sup>25</sup>

Some students have true concerns about their timeline of degree completion where research is necessary and access to labs and libraries is limited.<sup>26</sup> Others complain that the lack of hands-on projects, such as building an airplane by a senior engineering student at Purdue University, prevented him from learning the actual skills he needed.<sup>27</sup>

Various other informal group-oriented means of expressing dissatisfaction have emerged. At the University of Chicago, students submitted a letter refusing to pay their quarter tuition due April 29 without a fifty percent reduction in tuition, seeking to have it kept at that level throughout the crisis, however long that may endure.<sup>28</sup>

A Reddit thread asked students who were struggling with online courses to share their personal stories.<sup>29</sup> These concerns and dissatisfaction centered around professors’ technological capabilities, unstable home environments, personal health concerns, being taught by YouTube videos, distractions at home,

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23. See Kim Pham, *Students Deserve Refunds After Quality of Education Dwindles*, DAILY TITAN (Mar. 23, 2020), [http://dailytitan.com/opinion/students-deserve-refunds-after-quality-of-education-dwindles/article\\_fd18b906-468b-5871-864d-7df03fe311c9.html](http://dailytitan.com/opinion/students-deserve-refunds-after-quality-of-education-dwindles/article_fd18b906-468b-5871-864d-7df03fe311c9.html).

24. *Id.*

25. See Chloe Konrad, *The Remote Learning Diaries: Embracing the New Normal*, EDTECH (Apr. 28, 2020), <http://edtechmagazine.com/higher/article/2020/04/remote-learning-diaries-embracing-new-normal>.

26. Terry Nguyen, *Students Are Filing Lawsuits and Organizing Strikes Against Universities*, VOX (Apr. 29, 2020, 7:00 AM), <http://www.vox.com/the-goods/2020/4/29/21239846/students-tuition-refund-lawsuits-striking-universities>.

27. Binkley, *supra* note 17.

28. *Id.*

29. See oneletterzz, *What Are Your Thoughts on Remote Learning so Far?*, REDDIT (Apr. 3, 2020, 12:40 AM), [http://www.reddit.com/r/portlandstate/comments/fu1v4f/what\\_are\\_your\\_thoughts\\_on\\_remote\\_learning\\_so\\_far/](http://www.reddit.com/r/portlandstate/comments/fu1v4f/what_are_your_thoughts_on_remote_learning_so_far/).



professors pacing, and the connection with them.<sup>30</sup>

Other issues emerged that were narrower in focus and unrelated to specific instructional changes. One such issue concerned graduate students scheduled to graduate in 2020 who sought the extension of university health insurance coverage past July 31.<sup>31</sup> The reality of delayed bar exams and post-graduation job insecurity for law students made this a key issue in their concerns.<sup>32</sup> Another specific problem is privacy concerns, particularly noted in the early days of using Zoom.<sup>33</sup>

Interestingly, although general dissatisfaction from a consumer viewpoint is widespread, students and their parents do not always agree on this issue. In one instance, a University of Miami parent, after hearing the university president explain that money was not being returned because faculty and staff needed to be paid, understood the school's decision, while the UM student acknowledged the argument, but felt there was enough money to compensate both personnel and students.<sup>34</sup>

It is no question that the speed in which colleges had to take action in the Spring 2020 term—akin to triage—may have contributed to these low opinions expressed,<sup>35</sup> but these actions by the universities have set the stage for future semesters. Based on their experiences, will students now be wary and demanding of the “product” they receive after their initial disappointment?

These surveys, editorials, posts, and complaints reveal that the seed has been planted for students to be concerned about Fall 2020 and how the planned online or hybrid semester will be

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30. *See id.*

31. Callia A. Chuang, *Graduate Students Advocate for Tuition Reimbursements, Extended Health Insurance Coverage Due to Remote Learning Transition*, HARV. CRIMSON (Apr. 6, 2020), <http://www.thecrimson.com/article/2020/4/6/grad-students-tuition-reimbursements>.

32. *Id.*

33. Marlyse Vieira, *Classes Online: Student Perspectives and Privacy Concerns About Zoom*, VA. L. WKLY (Mar. 25, 2020), <http://www.lawweekly.org/front-page/2020/3/25/classes-online-student-perspectives-and-privacy-concerns-about-zoom>.

34. Jimena Tavel, *'Some Sort of Reparation': Should Colleges Refund Tuition, Fees After Coronavirus?*, MIA. HERALD (Apr. 9, 2020, 7:00 AM), <http://www.miamiherald.com/news/local/education/article241864961.html>.

35. *See 75% of College Students Unhappy with Quality of eLearning During Covid-19*, *supra* note 11.

different from the past one in which they did not feel engaged or where their learning experience was not what it should have been.<sup>36</sup>

### B. Lawsuits

Students have not stopped at making complaints with general expressions of consumer dissatisfaction. They have also responded, fairly swiftly, with lawsuits seeking compensation for their perceived harms, even though many of the students acknowledged that campuses did “the right thing” in closing.<sup>37</sup> As of May 5, 2020, more than thirty cases have been filed against colleges and universities, seeking “refunds” for monies spent “for educational and related services not delivered.”<sup>38</sup> As of May 15, 2020, the number had risen to over seventy-five class action suits.<sup>39</sup> As of June 4, 2020, there were over one hundred lawsuits against universities, and that number continues to rise.<sup>40</sup>

Some of these potential suits were or may be preempted by legislation mandating refunds for housing and board by state universities, or by requiring more detailed preemptive plans by states in the future offering relief moving forward.<sup>41</sup> However, for many schools, the suits are moving forward against them.

Many of the suits, at their heart, seek monetary refunds from tuition and fees paid for the Spring 2020 term. The refund policies of colleges from the revamped semester vary greatly

36. See *Adrift in a Pandemic: Survey of 3,089 Students Finds Uncertainty About Returning to College*, *supra* note 15.

37. Barry Burgdorf & Jeffrey Metzler, *A Close Study of the Latest University ‘Refund’ Class Actions*, LAW360 (May 5, 2020, 3:33 PM), <http://www.law360.com/articles/1269983/a-close-study-of-the-latest-university-refund-class-actions>.

38. *Id.*

39. Molly Moriarty Lane et al., *Colleges & Universities Hit with Refund Class Actions While Struggling with COVID-19 Effects*, MORGAN LEWIS (May 18, 2020), <http://www.morganlewis.com/pubs/colleges-universities-hit-with-refund-class-actions-while-struggling-with-covid19-effects-cv19-lf>.

40. Daisy C. F. Karlson & Mark A. Baugh, *From the Classroom to Court: Tuition Reimbursement Lawsuits*, BAKER DONELSON (June 4, 2020), <https://www.bakerdonelson.com/from-the-classroom-to-court-tuition-reimbursement-lawsuits>.

41. See Andrew Smalley, *Higher Education Responses to Coronavirus (COVID-19)*, NCSL (July 27, 2020), <https://www.ncsl.org/research/education/higher-education-responses-to-coronavirus-covid-19.aspx>.

from school to school, with many institutions offering a wide range of relief, from no refunds, to tuition and fees prorated, to partial refunds for room and board or other fees, but not tuition refunds.<sup>42</sup> The lawsuits have been framed as having three fundamental questions—first, “what did students pay for and on what terms;” second, did students receive something less than that, that can be quantified; and third, can these questions be answered on a class wide basis?<sup>43</sup> These breach of contract cases generally fall into two categories: (1) claims for tuition refunds, and (2) claims for fees for specific services, such as housing, library, or labs.<sup>44</sup> In either case, a key claim is the experience of the semester was “diminished.”

There are two sides to the debate. On the one hand, it has been pointed out that the move to online classes in the Spring 2020 term was a shift due to necessity, not a decision chosen by universities, while also raising the fact that schools have real, fixed costs to pay from this revenue in delivering education in any mode.<sup>45</sup> On the other hand, students also are experiencing financial hardship related to fees paid for some activities and services they no longer received.<sup>46</sup>

In instances of claims alleging the services received were simply not up to par, the doctrine of educational malpractice will likely bar those which attack the quality of the education provided.<sup>47</sup> In the absence of a formal agreement between students and a university creating an express contract governing their relationships, courts have used different

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42. Lane et al., *supra* note 39.

43. Thomas H. Wintner & Mathilda S. McGee-Tubb, *COVID-19 Tuition and Fees Lawsuits: Defending University Practices and Defeating Class Claims*, MINTZ (June 26, 2020), <http://www.mintz.com/insights-center/viewpoints/2206/2020-06-25-covid-19-tuition-and-fees-lawsuits-defending-university>.

44. Burgdorf & Metzler, *supra* note 37.

45. Susan Snyder, *Charging Full Tuition for Online Classes? No, Say Some Students, Despite the Coronavirus.*, PHILA. INQUIRER (Apr. 16, 2020), <http://www.inquirer.com/health/coronavirus/coronavirus-tuition-university-of-the-arts-temple-drexel-west-chester-lawsuit-refund-20200416.html>.

46. *Id.*

47. Charles E. Harris, II et al., *COVID-19 Higher Ed Litigation: The Educational Malpractice Doctrine Bars Students' Online Learning Claims*, MAYER BROWN (May 12, 2020), <http://www.mayerbrown.com/en/perspectives-events/publications/2020/05/covid19-higher-ed-litigation-the-educational-malpractice-doctrine-bars-students-online-learning-claims>.

doctrines to analyze the obligations between the two.<sup>48</sup> The courts have been reluctant to mechanically apply “textbook type” contract principles when one of the parties is an academic institution.<sup>49</sup> In some colleges’ motions to dismiss, this lack of an express contract has been a key initial point of defense because it is likely needed to overcome sovereign-immunity protections by public institutions and allowing the students to establish the claim.<sup>50</sup>

However, even in an informal contract generally implied between the parties, it has been held that the “catalogs bulletins, circulars and regulations of the university” do become part of that contractual relationship, and as such may be examined for promises.<sup>51</sup> However, many states have adopted the “educational malpractice doctrine,” which can bar a claim in either tort or contract that “raises questions about the reasonableness’ of a school’s conduct in ‘providing educational services’” or performs an analysis of the quality of that education.<sup>52</sup> Previous claims that institutions breached their duties or provided inadequate or substandard education have been unsuccessful as a result of this theory.<sup>53</sup>

There are several reasons why courts have rejected claims seeking to establish the delivery of educational services, including a lack of a clear standard of care, uncertainties about the cause and nature of damages, the potential for a flood of litigation, and the need for schools and not courts to manage a university’s daily operations.<sup>54</sup>

Generally, there are only two situations in which a court will consider a breach of contract claim pertaining to educational services: (1) where the program “failed in some fundamental respect, as by not offering any of the courses necessary” in the field specified, and (2) where there is an “identifiable contractual

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48. *Id.*

49. *Id.*

50. See Jim Saunders, *University of Florida Fights Suit over COVID-19 Student Refunds*, TAMPA BAY TIMES (June 18, 2020), <http://www.tampabay.com/news/health/2020/06/18/university-of-florida-fights-suit-over-covid-19-student-refunds/>.

51. Harris, II et al., *supra* note 47.

52. *Id.*

53. *Id.*

54. *See id.*

promise” that the university failed to honor.<sup>55</sup>

In this instance, students who paid tuition and fees in Spring 2020 are focusing on the specific contractual promise to provide “in-person instruction” in hopes of finding a potential cause of action.<sup>56</sup> Most claims have failed to point to the source of this promise of an exclusive modality in any express materials.<sup>57</sup> As such, the claims then turn to the position that the subsequent online delivery was “subpar” to the promised instruction, but this portion of the claim then becomes easily subject to the educational malpractice doctrine, and is likely barred as a result.<sup>58</sup>

In some lawsuits, students also point to guidelines and principles issued by accrediting bodies.<sup>59</sup> For example, the recommendation from the Commission on Accreditation of the American Psychological Association is that a doctoral program conducted remotely is not accredited because the “face to face’ . . . interaction between faculty and students is critical . . . specifically for ‘socialization and peer interaction, faculty role modeling, and the development and assessment of competencies.’”<sup>60</sup> As such, students are trying to use these standards to prove online teaching is inferior thus supporting their claims for relief.<sup>61</sup> Nevertheless, many suits are still moving forward.

### 1. Claims for Tuition

As indicated, claims for tuition refunds that have been based on the “quality of education lacking” have often been rejected by courts.<sup>62</sup> It has been indicated that “courts are not willing to interject their opinion over that of educational experts,

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55. *Id.*

56. *Id.*

57. *Id.*

58. *See id.*

59. Christopher Gavin, *Grad Student Files Class Action Lawsuit Against Northeastern University over Coronavirus Campus Shutdown*, BOSTON.COM (May 4, 2020), <http://www.boston.com/news/coronavirus/2020/05/04/northeastern-university-class-action-lawsuit-coronavirus>.

60. *Id.*

61. *Id.*

62. *Id.*

faculty and career higher education administrators” regarding the quality of education.<sup>63</sup> “The key to the lawsuit will be whether students can prove that online courses are worth less than in-person instruction” due to the limits on professors, facilities, co-curricular, and social opportunities.<sup>64</sup> However, the actions currently filed generally argue one of two things to counter that presumed deference, both concerning COVID-19-related changes and student consumer viewpoints: either that the benefits of in-person education, including access to professors and students, facilities, activities, and campus life, is itself a superior educational experience, or that there exists specific language, that constitute promises, from websites or other information which was not delivered.<sup>65</sup>

One recovery premise proffered is breach of contract; alternatively, others include unjust enrichment, or some combination of the foregoing indicating that schools failed “to fulfill their contracts when they moved classes online and then enriched themselves with tuition revenue they should have returned to students,” and conversion.<sup>66</sup> Many schools argue that contracts were fulfilled because students earned their valuable credentials, once again raising that key question of the core item “purchased” by the consumer.<sup>67</sup> Additionally, some argue in the alternative that the doctrine of impossibility in contract law could apply here; the pandemic made it impossible for schools to provide on-campus instruction, or even related on-campus events which students missed and have complained of missing, and as such cannot be expected to perform under a contract.<sup>68</sup> Contract law has, in the past, made allowances for “unforeseeable and unusual events” which can change the obligations under the contract and negate the claims that

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63. Burgdorf & Metzler, *supra* note 37.

64. Aaron Bayer et al., *Students Demand Tuition Reimbursement for COVID-19 Learning Disruptions*, NAT'L L. REV. (May 4, 2020), <http://www.natlawreview.com/article/students-demand-tuition-reimbursement-covid-19-learning-disruptions>.

65. See Burgdorf & Metzler, *supra* note 37.

66. Susan Adams, *Will Lawsuits Help College Students Get Coronavirus Refunds?*, FORBES (May 5, 2020, 2:02 PM), <http://www.forbes.com/sites/susanadams/2020/05/05/will-lawsuits-help-college-students-get-coronavirus-refunds/#44fd156871c4>.

67. *Id.*

68. *Id.*

students did not receive what they bargained for.<sup>69</sup>

Although some students admit that their faculty are doing a good job with teaching, they indicate that online learning is inherently not the same as in-person learning, and students should not be charged under the same business model.<sup>70</sup> In a lawsuit against Emory University, students alleged that lecture-based classes immediately decreased in quality as they went from in-person to pre-recorded lectures, and the real opportunities for professors to adapt to student understanding was lost.<sup>71</sup> As such, there was a tangible, measurable change in services to students.

Notably, the cases to date are not necessarily claiming misrepresentation of services or any tort related to the handling of the COVID-19 crisis, but are rather claiming a breach of contract, focusing on what they were promised in their education and what they actually received.

The continued belief is that courts do not generally weigh in on how education is delivered, and whether it was of the value promised is a major theme.<sup>72</sup> More specifically, students who sue might be on stronger grounds if there was a tuition strata for online/in-person courses before the pandemic, setting up such an expectation.<sup>73</sup> Schools that have had a tuition schematic that offers different rates for in-person versus online education may find their defense of the delivery of all courses in one modality harder to defend—they by their own design have set up different expectations for students learning in different modalities.<sup>74</sup> Others have continued to insist the core issue is that the promised education is being delivered, but that they made no

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69. Nguyen, *supra* note 26.

70. Nick Anderson, *College Students Are Rebellious Against Full Tuition After Classes Move Online*, WASH. POST (Apr. 16, 2020, 6:00 AM), <http://www.washingtonpost.com/education/2020/04/16/college-students-are-rebellious-against-full-tuition-after-classes-move-online/>.

71. Maureen Downey, *In Lawsuits Against Emory and Other Schools, Students Lament Online Classes*, AJC (May 12, 2020), <http://www.ajc.com/blog/get-schooled/lawsuits-against-emory-and-other-schools-students-lament-online-classes/nRyon941zswHtVbBRJmTSO/>.

72. See Stephanie Francis Ward, *Harvard Law Student Sues for Spring 2020 Tuition; Some Lawyers Doubt He Will Prevail*, ABA J. (July 7, 2020, 10:22 AM), <http://www.abajournal.com/web/article/harvard-law-student-sues-for-spring-2020-tuition-some-lawyers-doubt-he-will-prevail>.

73. *Id.*

74. Burgdorf & Metzler, *supra* note 37.

promises about the delivery, including professors, books, or pedagogy used.<sup>75</sup>

Wherever the source of conflict, lawyers are actively seeking to represent students against many universities. A law firm in Charleston, South Carolina is one of several pursuing claims against multiple universities, claiming the universities had “blown off the students,”<sup>76</sup> and as of May 2020, had itself filed eighteen class actions against universities nationwide, as well as set up a website dedicated to allowing aggrieved students to request a lawyer for concerns regarding refunds.<sup>77</sup> The suits are both to recover part of the tuition during the emergency concessions, and for future terms with any changes to the delivery of the program of education.<sup>78</sup> Another law firm is trying to capitalize on the dissatisfaction of students directly by publicly advertising the question: “are you a college student who was forced to leave campus? You may be entitled to compensation.”<sup>79</sup> In addition to claiming that a reimbursement is owed because students paid for on-campus classes, the lawsuits also claim the use of the pass/fail grading system has “diminished the value of the degrees” from the institutions, and other measurable changes in service.<sup>80</sup>

The resulting suits have been filed by all kinds of students, including law students. In June, Harvard Law School announced that it will be delivering the Fall 2020 term online only, prompting a 2L to file suit demanding that “tuition should be discounted.”<sup>81</sup> The suit alleges several causes of action including breach of contract, unjust enrichment, and conversion.<sup>82</sup> The conversion claim again connects to that of unjust enrichment, as students have indicated that universities “converted that money that was for tuition into a benefit for themselves without actually giving the benefit to the

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75. Ward, *supra* note 72.

76. Adams, *supra* note 66.

77. *Id.*

78. *Id.*

79. Greta Anderson, *Students Turn to Courts for Refunds*, INSIDE HIGHER ED (Apr. 20, 2020), <http://www.insidehighered.com/news/2020/04/20/students-sue-universities-tuition-and-fee-refunds>.

80. *See id.*

81. Ward, *supra* note 72.

82. *Id.*



students.”<sup>83</sup>

A class action lawsuit filed by a Vanderbilt freshman sought to include all students enrolled during the Spring 2020 semester who paid any tuition, fees, and/or housing, and “were denied in-person instruction and/or campus facilities.”<sup>84</sup> The suit alleged that while the school refunded housing and dining costs on a pro-rated basis and set up a one million dollar financial aid fund, the university had not refunded other fees or tuition to which they are entitled for the changes made.<sup>85</sup>

Likewise, a student at Drexel sued for a refund of his tuition and fees due to the abrupt shutdown.<sup>86</sup> Although the school continued online classes, the lawsuit alleges that “depriving students of face-to-face interactions with professors, access to campus facilities, as well as activities, athletics and more justifies a refund in the tuition.”<sup>87</sup> Furthermore, the lawsuit argued that the quality of the pass/fail online classes were not equivalent to the instruction they were receiving previously, and the value of a degree issued on this basis was diminished “for the rest of the students’ lives.”<sup>88</sup> In short, the lawsuits alleged that the universities were simply keeping money for services and access that they were not providing.<sup>89</sup>

In a lawsuit by a parent of a University of Connecticut student, it was alleged that:

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83. Lauren Lantry, *ABC News Exclusive: Harvard Law Student Sues University over Tuition Prices as Classes Remain Online*, ABC NEWS (June 22, 2020, 9:32 PM), <http://abcnews.go.com/US/abc-news-exclusive-harvard-law-student-sues-university/story?id=71345292>.

84. Immanuel John Milton, *Vanderbilt Student Files Class-Action Lawsuit Against the University for Its Reimbursement Policy*, VANDERBILT HUSTLER (Apr. 30, 2020), <http://vanderbilthustler.com/31647/featured/vanderbilt-student-files-class-action-lawsuit-against-the-university-for-its-reimbursement-policy>.

85. *Id.*

86. Allie Miller, *Drexel Student Sues for Tuition Refund Following University’s Abrupt Shutdown Due to Coronavirus*, PHILLY VOICE (Apr. 18, 2020), <http://www.phillyvoice.com/drexel-university-student-coronavirus-lawsuit-class-action--tuition-refund-online-classes-coronavirus-covid-19/>.

87. *Id.*

88. *Id.*

89. *See Students File Lawsuits Against Universities After Dissatisfaction with Online Classes During Remote Learning*, BET (May 5, 2020), <http://www.bet.com/news/national/2020/05/05/students-file-lawsuits-against-universities-after-dissatisfactio.html>.

As a result of the closure of a defendant’s facilities, defendant has not delivered the educational services, facilities, access and/or opportunities that plaintiff and the putative class contracted and paid for[.] . . . Plaintiff and the putative class are therefore entitled to a refund of all tuition and fees for services, facility, access and/or opportunities that [UConn] has not provided

and additionally that the school improperly retained funds.<sup>90</sup> The university maintains that it is continuing its program of education and therefore will not issue refunds.<sup>91</sup> Student claims of this kind clearly articulate the consumer mindset in play—the belief that the tuition is purchasing a specific, promised *level* and *type* of service, which was not delivered satisfactorily—including the face-to-face interactions, activities, social development, and independence.<sup>92</sup> Clearly the very essence of the consumer product is in dispute.

Other suits followed in the same vein. A Brown student challenged the university’s “decision making regarding its refund policy” which included a fifty percent refund for room and board, but no tuition.<sup>93</sup> Brown’s position was that the core value of a Brown education had not changed.<sup>94</sup> A lawsuit against DePaul University complained that the university was asking students, already burdened, to bear the financial brunt of the pandemic.<sup>95</sup> A similar suit against Rutgers was more technical,

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90. David Owens, *Student’s Father Sues UConn for Tuition Refund, Claiming Online Learning Is Not Worth What He Paid*, HARTFORD COURANT (May 7, 2020, 12:58 PM), <http://www.courant.com/coronavirus/hc-news-coronavirus-uconn-sued-over-refunds-20200506-mkrrqg4ilzd2lc5suzgzwir7hm-story.html>.

91. *Id.*

92. *Id.*

93. Olivia George, *Brown Student Files Class-Action Lawsuit Against University for Tuition, Fee Refunds*, BROWN DAILY HERALD (May 1, 2020), <http://www.browndailyherald.com/2020/05/01/brown-student-files-class-action-lawsuit-university-tuition-fee-refunds/>.

94. *Id.*

95. Erin Shaak, *Class Action Claims DePaul University Unlawfully Retained Tuition, Fees for COVID-19-Shortened Spring Terms*, CLASSACTION.ORG (June 16, 2020), <http://www.classaction.org/news/class-action-claims-depaul-university-unlawfully-retained-tuition-fees-for-covid-19-shortened-spring-terms>.

claiming that students “lost the benefit of the education for which they paid and/or the services for which their fees paid.”<sup>96</sup> In additional suits, the “quality of instruction” argument was made repeatedly.<sup>97</sup> Similarly, Northeastern University students sued the school for fifty million dollars after the school closed campus, arguing that “online courses offered by the school are inferior,” and that the school breached its contracts and enriched itself.<sup>98</sup>

Another common complaint in some lawsuits is the many changes to the grading system that universities promulgated, which included a switch to an entirely pass/fail system that some student plaintiffs assert “diminish” the value of their degrees “for the rest of plaintiffs’ life.”<sup>99</sup>

Some lawsuits have been even more aggressive, comparing universities’ behavior to a “bait-and-switch” in the delivery of education.<sup>100</sup> One perspective seems to be based on an expectancy theory, asking whether “the value of the remainder of the semester and how we thought it would [be] align[ed] with what we thought it would be like.”<sup>101</sup>

The question is whether a predominant theory of recovery will emerge, as between claims for breach of contract and unjust

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96. Corrado Rizzi, *Class Action Says Rutgers Owes Tuition, Fee Refunds for COVID-19-Shortened Semester*, CLASSACTION.ORG (July 30, 2020), <http://www.classaction.org/news/class-action-says-rutgers-owes-tuition-fee-refunds-for-covid-19-shortened-semester>.

97. Binkley, *supra* note 17.

98. Katelyn Flint & Mary Markos, *Students Sue Northeastern Univ. for \$50 Million over ‘Inferior’ Distance Learning*, NBC BOS. (May 4, 2020, 7:22 AM), <http://www.nbcboston.com/news/local/students-sue-northeastern-univ-for-50-million-over-inferior-distance-learning/2118001/>.

99. Tom McParland, *Lawsuit Targets Columbia University for Tuition Refunds After COVID-19 Closure*, N.Y.L.J. (Apr. 24, 2020, 1:36 PM), <http://www.law.com/newyorklawjournal/2020/04/24/lawsuit-targets-columbia-university-for-tuition-refunds-after-covid-19-closure/?slreturn=20200805092752>.

100. Mark Johnson, *MSU Sued for Refunds After Classes Move Online Due to COVID-19 Concerns*, LANSING STATE J. (Apr. 21, 2020, 3:59 PM), <http://www.lansingstatejournal.com/story/news/2020/04/21/coronavirus-student-milberg-phillips-grossman-sues-msu-refunds-classes-online-covid-19/5166959002/>.

101. Eric Stirgus, *Emory Student Sues University for Refund over COVID-19 Coursework*, AJC (May 12, 2020), <http://www.ajc.com/news/local-education/emory-student-sues-university-for-refunds-over-covid-coursework/5HBro7bagkhsIKOKgr2pyH/>.

enrichment.<sup>102</sup> In order to quantify loss, some suits by students used a proportionate time of the term formula to make their breach claims specific. In a lawsuit against Auburn University, arising out of its decision to cancel in-person education and move to remote learning, a student claimed they were promised in-person learning and that the university failed to deliver on forty-four percent of that promise.<sup>103</sup> As such, they are seeking damages equal to the forty-four percent they claimed they missed.<sup>104</sup>

In sum, the deference given to schools as to the quality and method of educational delivery will likely be a significant obstacle to students seeking tuition refunds for changes made during past semesters. However, the claims are not limited to only this type; they also seek compensation for more tangible and direct cost reimbursement.

## 2. Causes of Actions for Fees, Services, and Reputation

These cases are different from an evaluation of the quality of education by schools. Instead, they are far more straightforward contract claims regarding unused services paid for—such as housing, meal plans, and other university services—which seek direct refunds for the students.<sup>105</sup> Although historically there has been a contractual relationship between students and universities, universities are generally afforded more deference in their manner of performance than they are in other contract situations.<sup>106</sup> The question will be asked however, whether the marketing type materials that students received regarding these costs will be considered “specific promises,” such that they can be enforced under

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102. *Monitoring Class Claims Filed Against Colleges and Universities for COVID-19-Related Interruptions*, ROGERS & HARDIN (Apr. 2020), <http://www.rh-law.com/NewsandInsights/Publications?find=61902> [hereinafter *Monitoring Class Claims*].

103. Wesley C. Redmond & Dawn Siler-Nixon, *Lawsuits Against Colleges and Universities for Transitioning from In-Person to Online Classes: The Latest Wave of COVID-19 Litigation*, FORDHARRISON (July 7, 2020), <http://www.fordharrison.com/lawsuits-against-colleges-and-universities-for-transitioning-from-in-person-to-online-classes-the-latest-wave-of-covid-19-litigation>.

104. *Id.*

105. Burgdorf & Metzler, *supra* note 37.

106. *Monitoring Class Claims*, *supra* note 102.

contract law.<sup>107</sup> But even if an express contract is not established, an implied contract may be found which may render it easier to pinpoint terms regarding specific fees enumerated, and as such, these claims may proceed differently.<sup>108</sup>

Lawsuits are using the marketing points made by universities as promises upon which to base their specific breach claims. For example, the University of Miami represents “a world of interaction with other students and Drexel promotes as ‘experiential learning.’”<sup>109</sup> One basis by which to establish a contract has come from universities’ marketing materials. In the class action suit against Baylor, plaintiffs alleged that the university justified its “high cost” because of marketing which indicated that “students are challenged to think beyond the classroom by actively participating in domestic and global research, engaging in study abroad opportunities, and utilizing the resources of the university.”<sup>110</sup> Plaintiffs go on to argue that the cost was no longer justified when these opportunities were removed.<sup>111</sup> The plaintiffs asserted that the advertising emphasizes the beautiful campus, the strong relationship with instructors, the volunteer opportunities, state of the art facilities, and the urging to partake in traditions—none of which the university delivered.<sup>112</sup>

Even if there is no contract established, an unjust enrichment claim may be proved if there was a benefit to the universities that they should not retain in equity.<sup>113</sup> Other suits seek relief by this route, trying to avoid having to directly prove breach of any specific individual term.

The language in these suits clearly reflects a consumer mindset. One suit by a UNC Asheville student suing the school, the UNC Board of Governors, and the entire UNC system, alleges that the remote operations have “stolen invaluable campus opportunities including networking, participating in

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107. Burgdorf & Metzler, *supra* note 37.

108. See *Monitoring Class Claims*, *supra* note 102.

109. Anderson, *supra* note 79.

110. Complaint at 5, *Camarena v. Baylor Univ.*, No. 3:20-cv-01436 (N.D. Tex. June 5, 2020), *withdrawn*, (July 15, 2020) [hereinafter *Complaint*].

111. *Id.*

112. *Id.*

113. See *Monitoring Class Claims*, *supra* note 102.

extracurricular activities, and achieving personal growth.”<sup>114</sup>

Some lawsuits go so far as to explicitly compare education to other businesses, asserting colleges and universities are not unlike other businesses in America and they too have to tighten their belts when not selling specific services during this unprecedented time. “They are not any more entitled to keep money for services they are not delivering than the mom and pop bakery on Main Street.”<sup>115</sup> Such a blatant comparison to business sales is a position on education that has not been embraced historically, but it is clear in this new era.<sup>116</sup>

There has been an effort by the “Coronavirus Litigation Task Force”—a group of law firms casting their net to “target ‘suspected wrongdoing related to the COVID-19 pandemic’”—to find those exploiting the situation.<sup>117</sup> Such claims include social injustice due to profiting, as well as schemes to monopolize markets on face masks and medical supplies.<sup>118</sup> These claims are serious, specific ones that stand apart from the majority of suits for general student reimbursements.

The lawsuits to recover fees will likely rest on the ability of the plaintiffs to demonstrate either the services specifically paid for were completely unavailable or schools improperly profited from the aggregation of fees collected in the academic year. Either claim may escape the educational malpractice doctrine by being rooted in different contract principles.

### 3. Defenses by Universities, Generally

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114. Brian Gordon, *UNCA Student Sues College to Reimburse Tuition After COVID-19 Concerns Closed Campuses*, ASHEVILLE CITIZEN TIMES (Apr. 30, 2020, 11:49 AM), <http://www.citizen-times.com/story/news/local/2020/04/29/coronavirus-unc-asheville-student-sues-tuition-reimbursement/3047304001/>.

115. Dave Stafford, *Purdue Faces Second Student Lawsuit Seeking Refunds Due to COVID-19*, IND. LAW. (May 21, 2020), <http://www.theindianalawyer.com/articles/purdue-faces-second-student-lawsuit-seeking-refunds-due-to-covid-19>.

116. See Vollweiler, *supra* note 2.

117. Dave Bangert, *Coronavirus: With Lawsuit Targeting Purdue as Profiteer, Student Suing Not Only One Grousing About Tuition Refunds*, LAFAYETTE J. & COURIER (Apr. 18, 2020, 3:36 PM), <http://www.jconline.com/story/news/2020/04/18/coronavirus-indiana-lawsuit-targeting-purdue-profiteer-student-suing-not-only-one-grousing-tuition-r/5144012002/>.

118. *Id.*

There are essentially three defenses to a breach of contract claim, such as the claims these students are bringing. First, a narrow definition of the contract does not determine what the terms are that may have been breached.<sup>119</sup> Without those terms, courts would need to look at a reasonable expectation of what the university would provide, and many have explicit policies that tuition and fees are nonrefundable.<sup>120</sup> Second, “traditional breach of contract defenses could excuse performance,” including impossibility, impracticability, and frustration of purpose, or a force majeure clause or sovereign immunity.<sup>121</sup> Lastly, the traditional deference of judgment courts give to institutions regarding academic quality, and the adoption by many jurisdictions of prohibitions of relief based on educational malpractice.<sup>122</sup>

Additionally, there are defenses to the damages demanded under these breach of contract claims, which generally fall to “deprivation of benefits/services, and diminished value of the degree.”<sup>123</sup> To quantify the damages for deprivation, the plaintiffs would need to be able to specifically lay out the differences between the value of in-person and online courses, a task further exacerbated by the deference courts give to educational institutions.<sup>124</sup> Regarding the diminished value of the degree, it is hard to determine what metrics could be used to measure any purported decline in value, particularly given the global span of these changes.<sup>125</sup>

There are additional questions regarding whether claims by the plaintiffs can be certified for class actions, as differences in degree programs within universities throw into question whether common issues predominate over individual ones by students claiming breach.<sup>126</sup> Further, differences among individual student plaintiffs, such as course load and utilization of services, may also impact the ability for these claims to move

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119. Wintner & McGee-Tubb, *supra* note 43.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

forward as class actions.<sup>127</sup>

Universities reply that it would be difficult, given the circumstances, to support any claim of enrichment by universities. The general counsel for the American Council on Education stated “campus closures have been a ‘financial catastrophe’” for colleges, and the belief that schools are benefitting from the situation is “wildly out of touch.”<sup>128</sup> A letter to Congress from the organization indicates that “the impact on the operations and revenues of many institutions has been catastrophic.”<sup>129</sup> Some universities have publicly stated the cost of remote education is higher than in-person education, while also citing these increased costs for the rationale of not issuing refunds.<sup>130</sup>

In short, unless students can demonstrate a failure by schools to use their best efforts to ensure a high-quality education under the circumstances, many believe students are unlikely to win in these suits.<sup>131</sup> Schools defend their efforts fully, even while acknowledging the teaching is different, and perhaps not ideal.<sup>132</sup> In defending their best efforts and their standards, they allege no breach, while acknowledging the difficult times for everyone.<sup>133</sup>

The University of California and California State University system indicates lawsuits against the universities for fees misstate the facts. Not only did campuses continue to provide instructions, but they also provided services generally covered by the fees, including “[c]ounseling, advising, faculty office hours, disability student services and telehealth medical

127. *See id.*

128. Adams, *supra* note 66.

129. Letter from Ted Mitchell, President, Am. Council on Educ., to Nancy Pelosi, Speaker of the House, U.S. House of Representatives, Kevin McCarthy, Minority Leader, U.S. House of Representatives, Mitch McConnell, Majority Leader, U.S. Senate, and Chuck Schumer, Minority Leader, U.S. Senate (May 28, 2020), <https://cdn.ymaws.com/aiccu.edu/resource/resmgr/covid-19/letter-congress-pandemic-lia.pdf>.

130. Emma Kerr, *Why Students Are Seeking Refunds During COVID-19*, U.S. NEWS & WORLD REP. (Apr. 22, 2020), <http://www.usnews.com/education/best-colleges/paying-for-college/articles/college-tuition-refunds-discounts-an-uphill-battle-amid-coronavirus>.

131. Adams, *supra* note 66.

132. Binkley, *supra* note 17.

133. *Id.*



care,” although these services were offered remotely.<sup>134</sup>

Some colleges believe the lawsuits seem to be driven by “a small number of ‘opportunistic’ law firms.”<sup>135</sup> Additionally, some believe the student plaintiffs may find it difficult to prevail “given that the universities have maintained instruction, taught by the same faculty.”<sup>136</sup>

At issue is the tension between the financial strain the pandemic has placed on colleges and universities, where some are estimating up to a one-billion-dollar loss from fallout from the pandemic, versus whether it is fair to pass those losses onto students.<sup>137</sup> Plaintiffs assert that schools with endowments in the hundreds of millions are passing the costs onto students, who are taking on massive debt already.<sup>138</sup>

Consumerism is clearly recognized by colleges. One school noted, “[i]t’s disappointing that people feel compelled to sue amid a global pandemic, barely a month after we moved to remote teaching to protect the health and safety of students, faculty and staff.”<sup>139</sup>

Schools are additionally arguing students will continue to get their full credits earned, and they also argue tuition and fees go directly to costs that reflect progress to a degree, including the cost to ensure instructors are adapting.<sup>140</sup> Some schools did cut tuition for Summer 2020, including American University in Washington D.C. that cut its summer per credit tuition by ten percent compared to its schedule rate before the crisis, which may set precedent for future needed actions.<sup>141</sup>

The bottom line is that universities will defend these suits

134. Teresa Watanabe, *Students Sue UC, Cal State, Demanding Coronavirus-Related Refunds of Campus Fees*, L.A. TIMES (Apr. 28, 2020, 5:34 PM), <http://www.latimes.com/world-nation/story/2020-04-28/lawsuit-california-universities-owe-virus-related-refunds>.

135. Binkley, *supra* note 17.

136. Snyder, *supra* note 45.

137. Binkley, *supra* note 17.

138. Anderson, *supra* note 79.

139. *Id.*

140. Greta Anderson, *Feeling Shortchanged*, INSIDE HIGHER ED (Apr. 13, 2020), <http://www.insidehighered.com/news/2020/04/13/students-say-online-classes-arent-what-they-paid>.

141. Nick Anderson, *College Students Are Rebellious Against Full Tuition After Classes Move Online*, WASH. POST (Apr. 16, 2020, 6:00 AM), <http://www.washingtonpost.com/education/2020/04/16/college-students-are-rebellious-against-full-tuition-after-classes-move-online/>.

by simply contending there was no breach of contract because educational services were provided.<sup>142</sup> Few suits can identify a specific promise for in-person learning; thus, the evaluation is forced to be one of the quality of learning, a question not generally tackled by the courts.<sup>143</sup>

The entire existence of lawsuits stemming from the emergency decisions schools made in unprecedented times may result in many different outcomes, but one thing is clear: the student consumerism in how they view the education they are purchasing is unquestionable.

### III. THE CONSUMER MINDSET BY STUDENTS IN THE COVID-19 ERA: HOW TO MAXIMIZE SATISFACTION WITHOUT COMPROMISING INSTITUTIONAL STANDARDS

In my previous work, I pointed out a student-consumer model is not *entirely* a negative one for law schools, and many much-needed legal education reforms have come about from this mindset.<sup>144</sup> Such additional opportunities exist in these COVID-19-times and exist to help plan for post-COVID-19 times in how law schools work with student demands.

The COVID-19 consumer mindset is not something schools can consider a thing of the past. Law schools are rolling out information for the 2020–2021 Academic Year, and perhaps beyond, that takes into account this heightened scrutiny, evidencing that students are giving schools their consumer lens regarding changes to their programs. At the time of this writing, many students were considering amending their complaints to include a claim for relief for the Fall 2020 semester, but in some states, the initial complaint could not include a term not yet begun because there cannot be suits for anticipated breach of contract.<sup>145</sup> Therefore, it is clear schools will be facing consumer claims for relief for some time to come, and as such must be considering both short-term solutions and long-term plans

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142. See Anjelica Cappellino, *More Than 70 Universities Sued for Refunds Following COVID-19 Campus Closures*, EXPERT INST. (June 25, 2020), <http://www.expertinstitute.com/resources/insights/universities-sued-for-covid-19-refunds-following-campus-closures/>.

143. See *id.*

144. Vollweiler, *supra* note 2.

145. Lantry, *supra* note 83.

regarding these concerns.

States have been tackling their concerns for liability head on. In June, the North Carolina legislature passed a bill to provide immunity for public, private, and community colleges and universities for legal claims related to the closure in the Spring 2020 term, including protecting the universities that have already been sued.<sup>146</sup> Similar legislation was in the works in Louisiana.<sup>147</sup> Likewise, other states are in the process of debating this relief for universities or enacting legislation to protect employers and businesses more generally.<sup>148</sup> There is also hope that federal protections will be forthcoming, but this robust debate in Congress may not be resolved quickly.<sup>149</sup> By contrast, other states have abandoned measures to offer such protection and may face insurance or other liabilities moving forward, making planning for student needs both a practical and public relations necessity.<sup>150</sup>

Throughout Summer 2020, schools were updating students

146. Kate Murphy, *NC Legislature Passes a Bill Protecting Universities from COVID-19 Tuition Refunds*, NEWS&OBSERVER (June 26, 2020, 3:35 PM), <http://www.newsobserver.com/news/local/education/article243770867.html>.

147. Will Sentell, *Louisiana House Votes to Protect School Systems, Colleges from Coronavirus Lawsuits*, ADVOCATE (June 23, 2020, 5:00 PM), [http://www.theadvocate.com/baton\\_rouge/news/politics/legislature/article\\_18c50064-b562-11ea-b2ef-9fcc08433c9f.html](http://www.theadvocate.com/baton_rouge/news/politics/legislature/article_18c50064-b562-11ea-b2ef-9fcc08433c9f.html).

148. Brit Merrill & Mickell Jimenez, *Utah Legislation Shields Employers and Businesses from COVID-19 Civil Lawsuits*, HOLLAND & HART (May 14, 2020), <https://www.hollandhart.com/utah-legislation-shields-employers-and-businesses-from-covid-19-civil-lawsuits>; Dan Neumann, *Maine Universities Seek to Shield Themselves from Legal Liability for COVID-19 Spread*, ME. BEACON (June 24, 2020), <https://mainebeacon.com/maine-universities-seek-to-shield-themselves-from-legal-liability-for-covid-19-spread/>; Ana Radelat, *Looking Toward Fall, Connecticut Colleges Seek Shield from COVID-19 Lawsuits*, CONN. MIRROR (June 3, 2020), <https://ctmirror.org/2020/06/03/looking-toward-fall-connecticut-colleges-seek-shield-from-covid-19-lawsuits/>.

149. See Jeremy Bauer-Wolf, *Colleges Turn to States for Coronavirus Liability Protection*, EDUC. DIVE (June 30, 2020), <https://www.educationdive.com/news/colleges-turn-to-states-for-coronavirus-liability-protection/580818/>; Wesley Whistle, *Colleges Want Coronavirus Liability Protection. Senator Warren Says Not So Fast.*, FORBES (June 10, 2020, 8:00 AM), <https://www.forbes.com/sites/wesleywhistle/2020/06/10/colleges-want-coronavirus-liability-protection-senator-warren-says-not-so-fast/#32a6e3f41cd7>.

150. John O'Brien, *Arizona Passes the Buck on Protection from COVID-19 Lawsuits, Finds Its Schools Without Insurance*, LEGAL NEWSLINE (Aug. 3, 2020), <https://legalnewsline.com/stories/544602075-arizona-passes-the-buck-on-protection-from-covid-19-lawsuits-finds-its-schools-without-insurance>.

regarding their reopening and return to campus plans for Fall 2020.<sup>151</sup> Unfortunately, however, many plans well-made and meticulously thought out quickly changed as the Fall 2020 semester approached and as schools rolled back their “optimistic proclamations” of in-person or hybrid fall semesters.<sup>152</sup> Many schools moved from full or hybrid plans to remote starts or even complete conversions back to online learning.<sup>153</sup> Students are quite vocal about letting schools know that they are not getting what they are paying for and pushing back.<sup>154</sup> Despite these pressures, many schools have announced no tuition or fee restructures even with these continued changes to the delivery of the semester.<sup>155</sup> Regardless of this tension, schools can consider and embrace the consumer mindset in a variety of areas to ensure they meet student needs and expectations without compromising the important principles that guide educational organizations.

#### A. Admissions

Due to the global crisis, there have been two big changes to the law school admissions world from previous years, in both the LSAT and the event calendars for prospective students that offices usually create. The responses to these changes to ensure the continuation of the law school admissions process have been focused and productive. As a result, law school admissions are up for Fall 2020 for many schools, even after the initial cause for

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151. Joey Hadden, *What the Top 25 Colleges and Universities in the US Have Said About Their Plans to Reopen in Fall 2020, from Postponing the Semester to Offering More Remote Coursework*, BUS. INSIDER (July 28, 2020, 3:11 PM), <http://www.businessinsider.com/how-major-us-colleges-plan-reopen-for-fall-2020-semester-2020-5>.

152. Elissa Nadworny, *Colleges Spent Months Planning for Fall, but a COVID-19 Surge Is Changing Everything*, NPR (July 22, 2020, 5:19 AM), <http://www.npr.org/2020/07/22/893525083/colleges-spent-months-planning-for-fall-but-a-covid-19-surge-is-changing-everyth>.

153. *Id.*

154. Bianna Golodryga et al., *Students Call for Colleges to Cut Tuition Costs as School Year Begins Online*, CNN (Aug. 18, 2020, 1:03 PM), <https://www.cnn.com/2020/08/18/us/college-online-tuition-costs-coronavirus-wellness/index.html>.

155. Brianna McGurran, *COVID-19 and College: Here's What the Fall Will Look Like*, FORBES (Aug. 19, 2020, 12:10 PM), <http://www.forbes.com/sites/advisor/2020/08/19/covid-19-and-college-heres-what-the-fall-will-look-like/#2a6ec8743ec9>.

concern.<sup>156</sup>

Due to the crisis, one of the biggest changes in law school admissions is the ability for students to now take a remote, online LSAT test, providing more accessibility for students in the admissions process.<sup>157</sup> Such a streamlined test not only allows for more flexibility in the date of testing, but promises the same rigor in a shorter test, and a quicker turnaround time for scoring.<sup>158</sup> Other graduate-level tests have moved online—even if done previously at testing centers. This necessity has brought the LSAT in line with student demands in these areas.<sup>159</sup> Student wishes can be met here, while still meeting institutional needs—a win/win for all parties and one that may not have come about any time soon without the crisis. The LSAC indicates it plans to return to the regular in-person LSAT testing when possible, although many would endorse a permanent switch to allow this flexible remote testing, which would improve student control over their experience. This is one area in which the consumer-minded wishes of applicants can demonstrably be met, with little downside institutionally.

Although there was initial concern that the ceasing of in-person activity would stunt the admissions processes for many law schools, personalization of the admissions experience has been a positive side effect, both appeasing the consumer mindset in the COVID-19 world and producing results. The ability, born out of necessity, to work with potential students and admitted students one-on-one, through phone calls, emails, and individual or small group online meetings, has *improved* the customer service aspect of admissions, rather than diminished it. Surveys have indicated that this personalized trend is national across many levels of education; sixty-two percent of campuses added video conferences and forty-six percent added social media live

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156. Karen Sloan, *Law Schools See Late Applicant Boost After Spring COVID-19 Slowdown*, LAW.COM (July 14, 2020, 1:59 PM), <https://www.law.com/2020/07/14/law-schools-see-late-applicant-boost-after-spring-covid-19-slowdown/>.

157. *About the LSAT-Flex*, LAW SCH. ADMISSION COUNCIL, <http://www.lsac.org/update-coronavirus-and-lsat/lSAT-flex> (last visited Dec. 9, 2020).

158. *See id.*

159. *See generally GRE*, ETS, <http://www.ets.org/gre> (last visited Dec. 9, 2020).

events in the wake of the ceasing of in-person programming.<sup>160</sup>

While before, passive information disseminated through websites and scheduled group events generally informed and “sold” students uniformly on a program of legal education, this new world of personalized onboarding programs clearly worked. Among concerns of enrollment during a pandemic, admissions offices taking a “buyer” centric approach of meeting each applicant where they are and bringing them along individually on their journey toward committing to matriculating has been a success. This successful experiment may forever change the way students expect to be handled in the future, and prospective students are probably right to expect this personalization moving forward.

At the same time, international students with F1 Visas have experienced whiplash in their enrollment journey. Federal law first allowed students to continue their studies exclusively online, then prohibited them from attending online only with their status, then having relief granted to attend online, at least for Fall 2020.<sup>161</sup> Although ultimately these decisions may not have entirely driven operations, the conversation between admissions and international students became less about what the school could offer students in the big-picture of education, and instead whether they could meet their technical legal needs and allow them to actually enroll.

As a result of these overall pressures, some admissions marketing has even changed. One Canadian university’s admission pitch is to provide a full-tuition reimbursement “to all full-time and part-time students who are unsatisfied with the fall 2020 university experience.”<sup>162</sup> Ontario Tech, a technology enabled school which will be offering a blended learning approach, is offering this money-back guarantee, clearly taking a page from the consumer satisfaction handbook.<sup>163</sup> This approach, explicitly treating the applicant as a consumer, could

160. Smalley, *supra* note 41.

161. Anayat Durrani, *Updated Visa Guidelines International Students Should Know*, U.S. NEWS & WORLD REP. (July 16, 2020, 11:37 AM), <http://www.usnews.com/education/best-colleges/articles/updated-visa-guidelines-international-students-should-know>.

162. *Canadian University Offers Full Tuition Refund*, STUDY INT’L (June 11, 2020), <http://www.studyinternational.com/news/canadian-university-tuition-2020-fall/>.

163. *See id.*

further change the admissions world moving forward for an indeterminate amount of time and have long lasting implications.

In sum, admissions changes to the pandemic were extremely student-centric, but in this instance, improved the experience for so many. Prospective students today seem far happier with flexibility and intimate virtual conversations—something that many of a different generation would consider an oxymoron—than being put into a one size fits all process. The result is generally positive because students can learn whether an institution is personally right for them, setting them up for success. Law schools can and should reallocate their admissions office budgets to allow them to continue these practices and give students the information in the way that they want it to allow students to feel satisfied with their educational purchase from the beginning.

## B. Academic Matters

Some assert that online education on a massive scale results in many students performing more poorly than in face-to-face classes, and that “the most vulnerable students are the most negatively affected.”<sup>164</sup> In one lawsuit, it was alleged that in the past term, “Baylor students were on the receiving end of a weeks-long, glorified trial and error of online instruction, which was far from the award winning and highly touted teaching for which Plaintiff and Class members paid.”<sup>165</sup> Two areas in which student consumerism and academic issues came to a head, as a result of law schools making what many consider concessions to students, regarding grades and exam administration in the conversion to the online delivery of their education.

### 1. Grades

One of the biggest student consumer mindset fallouts from the COVID-19 crisis in law schools was the great number of grading scale changes that were effectuated. Given the

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164. Justin Reich, *The Case for Shutting Schools Down Instead of Moving Classes Online*, EDSURGE (Mar. 12, 2020), <http://www.edsurge.com/news/2020-03-12-the-case-for-shutting-colleges-down-instead-of-moving-classes-online>.

165. Complaint, *supra* note 110, at 12.

emergency conversion to online teaching during the Spring 2020 term, a number of law schools converted to pass/fail or pass/no credit grading for that term, or some alteration of the normal grading scale to allow some relief in an unprecedented, scary time.<sup>166</sup> Interestingly, although many who promulgated these changes viewed them as consumer centric, such as not holding students to earning a letter grade that would impact their GPA and adding further stressors on suffering students, many students were nevertheless dissatisfied with these changes or concerned about the impact on their futures.

Students who had lower, or close to benchmark, GPAs and wanted the opportunity to raise them, and who were confident that they could do despite conditions, were sorely disappointed by any changes in grading imposed on them. Some competitive students were disappointed at the loss of opportunity to distinguish themselves from their peers, many of whom were accused of taking advantage of the “free grading pass.” Other schools removed curves or normalizations, or reportedly had what some would more informally call “softer” grading evaluations. Other students thought some schools did not go far enough with grade relief by simply providing automatic passes for all students.

Initially, when grading changes began to be implemented, some faculty also reportedly pushed back at these proposals amid concerns that employers would look down on any grade forgiveness in the form of “P grades” or other changes to the rigor and hurt students and the school reputation at large. However, as the pandemic grew and lasted, it became objectively clear that the Spring 2020 semester would not be something that students would have to explain away on their transcripts. The impact was so great on so many students there would be a collective understanding that this term was like no other—neither students’ achievements nor schools’ rigor would rest on this semester.

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166. Karen Sloan, *With Pass/Fail Now the Norm, Outlier Law Schools Face Student Backlash*, LAW.COM (Mar. 31, 2020, 2:19 PM), <https://www.law.com/2020/03/31/with-passfail-now-the-norm-outlier-law-schools-face-student-backlash/>. Some schools made other grading paradigms, such as allowing high grades to count on a transcript, while providing grade relief for grades under a certain benchmark or allowing students to choose their grading option.



However, changes to grades will have an impact on students as consumers more than any grade relief given in the past term. Opportunities that stem from cumulative GPAs, as well as specific grades, will be viewed through a student consumer lens as well—scholarship eligibility, co-curricular opportunities, and job placement eligibility. It is yet to be seen how the grade relief efforts by many schools will fully impact the long-term educational experiences of students who have had opportunities granted, or taken away, as driven by this grading change.

The emergency conversion reopened the conversation on grading in law schools for many; are they necessary, are they important, and even, are they what students want? One lesson that became clear was that there is no uniform student mindset on grading in law schools. The consumer perspective includes such perspectives as, we deserve not to earn letter grades, to we deserve the right to earn letter grades in any circumstance. While the discussion on how grading fits into an excellent legal education may be continuing, this is not an area where the student consumer belief should be the most relevant player. Schools must hold firm to grading rigor, whether actual letter grade relief is given, and must be prepared to be thoughtful about their grading systems moving forward. While they should be giving support to students by assisting them in explaining any emergency relief that was implemented, schools must consider the long-term effects of these decisions, both on their academic programs and the students affected individually.

## 2. Exam Administration

Another academic area that was adjusted for student needs during COVID-19 was how exams were administered. As soon as law schools transitioned on an emergency basis to remote learning, it became very clear that traditional in-person exam administration was not going to be possible. Student consumerism responses weighed in swiftly from here forward, which may have continued to shape policy as decisions were made.

It quickly became apparent that some students felt they had the “right” to not take exams—that their tuition had earned them the right to dictate what the best solution would be for closing out the semester—while others believed they had the

“right” to dictate what their final assessment should look like, including whether it was remotely proctored or not, what materials they could use, and how in detail the assessment should be. The phenomenon was an interesting one, as student input on final exams is not usually an area in which consumerism historically has crept into in a meaningful way. Whether traditions of law school expectations have simply governed, or years of facing standardized assessments have shaped compliance, law students have rarely done much but accept their fate at final exam time. However, once the online conversion happened, student demands in this area flowered.

Law schools generally handled exams in a variety of ways. While it appears that all exams were administered remotely, some were converted to entirely “take home,” un-proctored versions of exams, bearing little resemblance to many pre-COVID-19 assessments. Other classes attempted to replicate the in-person exam style through remote proctoring services on timed exams, while largely meeting those goals for faculty seeking an assessment as close to “normal” as possible.

Student consumerism reared up in response to these varying scenarios. Remotely proctored exams through software carry a host of challenges (as Boards of Bar Examiners would discover shortly after the term ended).<sup>167</sup> As plans emerged from law schools, students were more and more clear in expressing their dissatisfaction in these plans, thus setting the stage for conflict.

Moving forward, it is clear that the Fall 2020 term, and perhaps beyond, will bring remote exams in some format, and for some, exams that need to be administered both remotely and in-person. Academically, schools must back off the emergency conversion mindset in assessment and plan for exams that are pedagogically sound regardless of the modality, ensuring fair and rigorous assessment for all. The reimagining of assessments in format, such as rethinking the traditional law school closed-book exam, may be necessary, but it is still something that faculty likely do not wish to voluntarily undergo. While it has become clear for some time that the traditional

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167. Jackie Winchester, *Software Issues Spell Problems for Law Students Hoping to Take Bar Exams*, WINK (Aug. 13, 2020, 4:50 PM), <https://www.winknews.com/2020/08/13/software-issues-spell-problems-for-law-students-hoping-to-take-bar-exams/>.

ways to assess learning have likely needed reformation in the law school setting, those discussions were often limited to groups of forward-minded educators, and is a very different conversation from this one—the reality of almost all faculty being forced into making choices about exam formats and administration immediately.

The student consumer mindset, that they are purchasing a product in education, should not include the right to dictate the framework of their assessments and should not be a consideration in those decisions by schools. Students in Fall 2020 chose to return to a semester that they knew would be unlike others, including remote testing that may include assessments requiring the downloading of software, a quiet place to take it, or conversely, allowing for open book analysis quite different from the timed pressure exams of the past. Whatever decisions professors, under the guidance of the administration to ensure fairness among the program, make regarding the best educational practices, student beliefs of what their tuition buys, regarding what their exams should look like, should be left out of this important aspect of academic planning. However, changes are necessary, and should be made quickly so that students keep their confidence in the grading and exam schematic by their schools and believe they are getting the rigor and academic fidelity that they deserve.

### C. Curriculum and Delivery of the Program of Legal Education

Out of necessity in the past year, many schools have promulgated, either informally or in their lawsuit defenses, that online education provides a comparable experience to in-person education. Such a position may come back to haunt law schools, and universities in the future, as they may find themselves in difficult positions moving forward in justifying the cost of maintaining in-person experiences.<sup>168</sup>

Not everyone agrees on this equivalency in modality of delivery. As recently as 2019, a report from George Mason University indicated that online education “has not lived up to

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168. See Vollweiler, *supra* note 2; Burgdorf & Metzler, *supra* note 37.

its potential” in the delivery of education.<sup>169</sup> The report indicated that fully online course work contributes to socioeconomic and racial achievement gaps for students.<sup>170</sup> While some have countered that this report was based on out-of-date data, there were many concerns focusing on one key determinant of good education—the regular and substantive student-instructor interactivity.<sup>171</sup> Overall, there have been five major concerns identified in the rush to online learning: security, ergonomics, privacy, isolation, and effectiveness.<sup>172</sup> These issues have come to a head in the current transition to online education in various ways.

Given much of the debate about online education, many law schools are making the decision (or had it made for them by their universities) to return to campus in-person for all or some of their curriculums. While some schools are entirely remote, others are holding in-person classes with options for students to attend either in-person or remotely. These decisions are in part being driven by what university leadership perceives as one of consumerism—the fear that without an in-person reopening, students will not perceive that they are getting what they paid for and not return as new or continuing students. Part of this reason for the physical, in-person return appears to be what some are calling “splashy” reopening announcements by institutions, fueling enrollment and budget goals.<sup>173</sup>

To accomplish in-person learning, the “Blendflex” or “Hy-Flex” model is being used by many law schools. These models posit an in-class teacher in a classroom while providing students with the choice to attend in-person or remotely. Such choice is not fixed, but rather students can float between in-person and

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169. Paul Fain, *Takedown of Online Education*, INSIDE HIGHER ED (Jan. 16, 2019), <http://www.insidehighered.com/digital-learning/article/2019/01/16/online-learning-fails-deliver-finds-report-aimed-discouraging>.

170. *Id.*

171. *Id.*

172. Valerie Strauss, *Five Concerns About the Mass Rush to Online Learning that Shouldn't Be Ignored*, WASH. POST (Mar. 30, 2020, 2:22 PM), <http://www.washingtonpost.com/education/2020/03/30/five-concerns-about-mass-rush-online-learning-that-shouldnt-be-ignored/>.

173. See John Villasenor, *Online College Classes Are Here to Stay. What Does that Mean for Higher Education?*, BROOKINGS INST. (June 1, 2020), <http://www.brookings.edu/blog/techtank/2020/06/01/online-college-classes-are-here-to-stay-what-does-that-mean-for-higher-education/>.

remote learning as the classroom space allows.

Law schools that have adopted this delivery mode are clearly trying to meet the consumer mindset by allowing students to choose how to utilize the product for which they have paid. However, many delivery difficulties have very quickly become apparent, such as technology interruptions, difficulty in students remotely hearing students in the classroom, and the necessity of faculty to manage their teaching with two different simultaneous modes of students attending, both during class and in assessments and materials.

Additionally, there are clear pedagogical problems caused by this combination approach. While a well-planned online course can put everyone on an even playing field from day one, attempting to optimize in-person and online participation and interactions, particularly in experiential learning, is a challenge that is difficult for even the most dedicated faculty member to overcome.<sup>174</sup> As per the ABA Standards, the interaction and feedback required in experiential education requires personalized attention that can be more easily met with students in-person, or online, but the combination is quite a challenge, and runs the risk of detracting the attention of the faculty member from both groups.

The question remains whether the approach of class delivery, being driven by student consumerism demands, will be successful. The lack of choice by faculty in their delivery mode, combined with the burdens and challenges put on them, and the clear pedagogical and practical concerns, are a concern for all teachers. Moving forward, universities must thoughtfully review this grand experiment they have created in their classrooms and make decisions for the future based on the best interests of the students and faculty and not merely for the convenience or satisfaction for some.

#### D. Faculty-Student Issues

As written previously on this topic, the issue of academic freedom for faculty colliding with students' consumerism is a major issue in the world of education.<sup>175</sup> It is important to define

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<sup>174</sup>. *See id.*

<sup>175</sup>. Jordan J. Titus, *Pedagogy on Trial: When Academic Freedom and*

academic freedom because in the new post COVID-19 teaching world, the concerns have once again arisen. The AAUP defines academic freedom as follows: “[t]eachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties,” and “teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter that has no relation to their subject.”<sup>176</sup> Such rights have extended to several areas of focus, including speech in the classroom, pedagogy, assessment, and the effect of student reviews in higher education.<sup>177</sup> Because courts have applied law inconsistently in the balance between universities and professors, it is difficult to gauge the potential damage that consumerism by students pressuring universities may have caused.<sup>178</sup>

The issue of academic freedom is one that has many concerns in today’s world for a variety of reasons,<sup>179</sup> but has also come to a head in the COVID-19 crisis; what are faculty *required* to do in the teaching of their classes? For example, teachers may be required to teach in-person or online, conduct online classes synchronously, or record their classes, without input from the faculty member or any choice in the educational delivery. Of course, many faculty members are concerned with this lack of choice being much more than one of the concepts of academic freedom but being literally life and death concerns. However, at the heart of the conflict is also the belief that faculty should have these decisions in their purview.

As in other times, there has been pushback from students in these decisions made regarding their education, but here, the faculty members can be caught in the middle, defending their teaching in a way that they did not choose. In more than one instance, students have expressed dissatisfaction with chosen

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*Education Consumerism Collide*, 38 J.C. & U.L. 107 (2011).

176. Donna R. Euben, *Academic Freedom of Professors and Institutions*, AM. ASS’N UNIV. PROFESSORS (May 2002), <http://www.aaup.org/issues/academic-freedom/professors-and-institutions>.

177. Titus, *supra* note 175, at 110.

178. *Id.*

179. See John McWhorter, *Academics Are Really, Really, Worried About Their Freedom*, ATLANTIC (Sept. 1, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/academics-are-really-really-worried-about-their-freedom/615724/>.

modes of teaching, such as in lawsuits and other complaints as detailed above. For example, in a lawsuit against Brandeis University, students asserted that the teaching was inferior due in part to “[a] total lack of online lectures by one professor, the cancellation of a week of lectures by another and revision of the syllabus and expectations of students were among the issues that made the online learning experience ‘disruptive and ineffective.’”<sup>180</sup> In other times, how faculty members delivered a lecture or their student expectations would be fully discretionary for most faculty, who could then take responsibility for and explain their choices, and yet, in these times, it is becoming clear that certain lockstep requirements must be met, even if the teachers cannot rationalize or explain those choices.

In addition to teaching modalities, academic freedom has come to a head in this crisis-operating world in other areas, with universities dictating grading relief and assessment formats again, in some instances without faculty input. The consumerism of students, pushing to have their education delivered to them in a certain way, is at odds with faculty wanting to make these choices, but unable to, whether for their own health and safety, or to ensure good pedagogy. For example, law faculty may opt for an entirely online class to better manage the student experience, rather than engage in blended teaching, where having students in different modalities can change the fundamental dynamic of the lessons they are trying to facilitate. However, students may demand in-person opportunities, and catering to that consumerism, universities may require this from faculty. These types of decisions, driven by the consumerism of students, can and are directly impacting the academic freedom of faculty. In fact, some are already speculating that the crisis may have an impact on reviving faculty power and governance.<sup>181</sup>

This direct conflict is not productive. While universities may be pleased with the bottom line that comes from meeting

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180. Kerry Feltner, *Student Files Class-Action Suit Against Waltham’s Brandeis University*, METROWEST DAILY NEWS (June 6, 2020, 3:40 PM), <http://www.metrowestdailynews.com/news/20200606/student-files-class-action-suit-against-walthams-brandeis-university>.

181. Emma Pettit, *Will Covid-19 Revive Faculty Power?*, CHRON. HIGHER EDUC. (Aug. 26, 2020), <https://www.chronicle.com/article/will-covid-19-revive-faculty-power>.

student consumerism demands, such as ensuring enrollment goals, faculty disenfranchisement will have long-term effects on the atmosphere and success of an institution. A better balance must be struck to ensure not only that the students' concerns are met, but that academic freedom can still be respected in these difficult times. Schools must have productive conversations about their programs of legal education with faculty to develop plans moving forward that respect academic freedom and allow for the full partnership of faculty into decisions that impact good teaching.

#### E. Regulations and Requirements

Previous codes of academic conduct and other regulatory documents for students have been examined for the relationship between students in the academic environment and their viewpoint as consumers. One new requirement now being put on students in many universities is a COVID-19 waiver, and it is important to consider the impact of the waiver on the relationship between students and the universities and how consumerism may be driving or hampering the use of such waivers.

The American Council on Education, who represents more than 1,700 colleges and universities, sent a letter to congressional leadership in May, asking Congress to “enact ‘temporary and targeted liability protections’” on behalf of their constituents against “excessive and speculative lawsuits” related to the pandemic.<sup>182</sup> This request was seen as a necessary move to protect universities and in the absence of action, sparked the use of waivers by them until and unless other action is taken.

Universities are required to exercise ordinary care in their operations to make them safe, but in these unusual times, they are seeking to change that standard in order to shield themselves from liability claims related to the pandemic, except in cases of gross negligence.<sup>183</sup> This robust debate has no

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182. Jillian Berman, *Should Colleges Be Protected from Lawsuits if Students Catch Coronavirus on Campus?*, MARKETWATCH (June 9, 2020, 1:59 PM), <https://www.marketwatch.com/story/should-colleges-be-protected-from-lawsuits-if-students-catch-coronavirus-on-campus-2020-06-08>.

183. *Id.*



uniform support as to what the new standard should be or whether there should be one.<sup>184</sup> This question remains unanswerable at this time, leaving schools with uncertainty.<sup>185</sup>

In law schools, many students in external clinical placements are being asked to sign waivers acknowledging their risks of exposure and relieving schools of liability related to their practical work experience, and in colleges across the country, athletes are being asked to similarly do so to participate in sports.<sup>186</sup> The question will soon come to a head as to whether these documents are enforceable, as well as whether the coverage for these claims could fall otherwise under general liability policies.<sup>187</sup> In some instances, there are barriers to effective waivers by students, including state laws that do not permit them, the inability of parents to sign on behalf of minor children, and the unknown of what the standard of care is in determining whether an institution is negligent in COVID-19 exposure.<sup>188</sup>

Further questions exist regarding students signing these documents without representation, as well as any bargaining power given to students in the signing of them.<sup>189</sup> Waivers must be voluntary, which is hard to determine with regard to these COVID-19 waivers and the situation at hand.<sup>190</sup> In legal education, experiential education is a mandatory graduation requirement.<sup>191</sup> While every law school has an ABA-driven requirement to provide six credits of experiential education to graduate students, some schools have mandatory live client clinical experiences, and others allow students to engage in

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184. *Id.*

185. Kery Murakami, *Colleges Worry They'll Be Sued if They Reopen Campuses*, INSIDE HIGHER ED (May 15, 2020), <https://www.insidehighered.com/news/2020/05/15/colleges-seek-protection-lawsuits-if-they-reopen>.

186. See Judy Greenwald, *Student Athlete COVID-19 Waivers Likely Won't Block Lawsuits*, BUS. INS. (July 21, 2020), <http://www.businessinsurance.com/article/20200721/NEWS06/912335697/Student-athlete-COVID-19-waivers-likely-won%E2%80%99t-block-lawsuits#>.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. STANDARDS & RULES PROC. FOR APPROVAL L. SCHS. § 303(a)(3) (AM. BAR ASS'N 2020–2021).

these credits through simulations.<sup>192</sup> Where live client education is still being required, schools need to be thoughtful about how they treat students engaging in these necessary parts of their educational experiences. Schools need to ensure both parties are protected and that students do not feel alienated by their educational institutions in their quest to protect themselves.

Student pushback could require schools to rethink these waivers and the requirement to complete them in conjunction with their studies moving forward. Some students may view their enrollment in legal education as having the right to complete live client education, and the waiver a necessary part of it, while others may bristle at the waiver in conjunction with this educational requirement. Others may demand alternative ways to satisfy their experiential education or other accommodations stemming from the pandemic. The bottom line is there is no one way to approach this additional requirement for all students, and, viewing through the consumer lens, each student is surely of the belief that they have the right to “buy” something different that meets their needs for a quality successful legal education.

One solution to the potential dissatisfaction that may stem from required waivers by students is to reframe these waivers as an acknowledgment of risks, making students partners in promoting safe environments and a community-minded approach to the problem.<sup>193</sup> Some assert the best practices dictate that these new waivers should be formulated very differently from the traditional legalese waivers, instead prepared as simple documents consisting of routine acknowledgments of registering for or joining the experiences involved, rather than being framed as adversarial legal ones.<sup>194</sup> Such an approach not only helps to potentially reduce liability, but it also reframes the conversation from looking like a coercive one against students to a cooperative one, treating the student as a partner in the new world of education that everyone is facing. This approach from schools can help students make choices for their educational and participation options in

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192. *Id.* § 303(b).

193. *See* Greenwald, *supra* note 186.

194. *Id.*

constructive and not confrontational ways, meeting the consumer needs while maintaining necessary protections.

#### F. Student Services

Before COVID-19 altered the way we all interact, a hallmark of a consumer-oriented student services department was the focus on face-to-face hours available to students enrolled in flexible time programs; later weeknight and Saturday hours ensured that students received the personal, one-on-one services they demanded. In the remote work era, providing individual and flexible student services is one area in which law schools can continue to meet student demand, while allowing staff the flexibility and safety measures they need.

Virtual service hours can be one of the best improvements to the student services experience that law schools can provide. Rather than requiring staff to stay late and keep offices open, flexible shifts with remote hours can provide excellent service to students and allow staff to adjust their lives to the pandemic demands as well. Allowing employees to take shifts or “on-call” requests from students can allow them to flex their work time and improve service regarding all measures of student services that students may be seeking. Much like the personalized admissions process discussed above, acknowledging the consumer view of students seeking services such as grad review, assistance in registering, transferring questions, and the like, can improve both the student and employee experience. This change of service delivery may have been forced by the pandemic, but it may be a positive, lasting one. Reimagining the connections benefits all.

Specific attention has been given to thinking about the financial aid process in law school and how it will be impacted in this crisis. While most systems have remained the same, some changes to the previous face-to-face ones, such as the ability to securely upload sensitive documents so that matters can be processed remotely, are another positive step forced upon us.<sup>195</sup> Rather than spending time photocopying or manually

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195. Gisele Joachim, *How the COVID-19 Crisis Is Affecting Law School Financial Aid*, LAW SCH. ADMISSION COUNCIL (June 2, 2020), <http://www.lsac.org/blog/how-covid-19-crisis-affecting-law-school-financial-aid>.

entering data, this push to handle sensitive, protected information in appropriate ways is sure to outlast the current crisis, changing how students can do business for the better in the long run.

In these difficult times, students are asking for more financial aid than ever before. Many schools will want to respond to these needs and requests as generously as possible and many have in fact reached out to create emergency funds to help students and make awards.<sup>196</sup> Federally held student loans had their interest rates set at zero percent for at least sixty days, and the Department of Education issued guidance to allow institutes to continue paying students receiving federal work study.<sup>197</sup> Other schools have sought to have requirements to receive certain kinds of aid waived where it would be difficult to meet benchmarks of GPA or hours served.<sup>198</sup> It is important that administrators work more closely than ever with their financial aid offices to understand the impacts that gifts may have on their larger financial aid, such as a reduction in grants received by students to offset any further gifts.

Flexibility by schools regarding deadlines, which may have been previously strict but are entirely in a school's control, is also an excellent consumer-centric response during this crisis. At very late dates, students may wish to switch between part-time and full-time programs, due to unexpected personal situations, to defer, or to make other changes in their program of legal education.<sup>199</sup> In the past, some schools have had very strict rules and deadlines about the ability to do this, but in these times, allowing this flexibility is an easy student-centric fix that can be made, often only involving re-shaping internal rules to accommodate the wishes of these students. While different law schools may have differing abilities to make these decisions,<sup>200</sup> it is important to allow decisions to be made as freely as possibly for the student good.

These decisions may have an impact on schools in the

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196. *Id.*

197. Smalley, *supra* note 41.

198. *Id.*

199. *See* Joachim, *supra* note 195.

200. *See* Nate Herpich, *The Outlook for Harvard Online Learning*, HARV. GAZETTE (June 12, 2020), <http://news.harvard.edu/gazette/story/2020/06/the-outlook-for-harvards-online-learning/>.

immediate future, but they will hopefully pay off in having satisfied students in the long run. As long as accreditation standards for finishing their degrees, along with the proper academic support for students returning, can be put into place, these flexibilities, which may have only been limited by internal bureaucracy, must be loosened to meet student needs to help ensure long-term success.

### G. Career Development

One expectation of law students is that their career services office will provide them with opportunities to interview on campus with employers. Traditionally, this process begins for rising 2L students late in the summer before their 2L year, but 2020 is proving to be different. In conjunction with employers, many law schools are pushing off the on-campus program until likely January 2021, delaying from its usual Fall semester focus.<sup>201</sup>

Separate from the practical issues of finding a job, consumer-oriented students also see the “right” to interview on campus as a consumer-oriented issue, another service for which they are paying. However, given that this is not just an issue controlled by the law schools, but from the law firms themselves facing economic uncertainty, it is not generally one that schools can independently reverse to meet student demand.<sup>202</sup> The reality of this suspended service is not just a long-term job uncertainty, but immediately dissatisfied students.

Students have made it clear in these consumer driven times that they are unhappy they are not getting the full level of service for which their tuition and fees are paying. Additional concerns about future employment in these uncertain times when they complete their education has students further demanding a return on their investment from the law school administration. The question then becomes how law schools can

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201. Karen Sloane, *Top Law Schools Say Firms Are Pushing to Delay Summer Associate Hiring*, LAW.COM (Mar. 23, 2020, 11:48 AM), <https://www.law.com/2020/03/23/top-law-schools-say-firms-are-pushing-to-delay-summer-associate-hiring/>.

202. Karen Sloane, *‘Nobody Is Recruiting Over the Summer’: OCI Season Postponed*, LAW.COM (Apr. 2, 2020, 12:47 PM), <https://www.law.com/2020/04/02/nobody-is-recruiting-over-the-summer-oci-season-postponed/>.

respond appropriately to the student demand for this service when it is impossible or is at the very least imprudent to do so.

The answer is that they cannot, at least not literally, provide the traditional services students have come to expect, but they need to plan for others instead. Career services offices will need to reinvent their services for the upcoming year. With a disrupted delivery schedule of interview opportunities, they will need to provide other tangible services in its place, such that students are fully engaged with the office and satisfied that their needs are being met. In addition to more one-on-one flexible counseling and review, offices can institute more flexible remote programming to bring more information to students, as well as individualized coaching and preparation for the upcoming job market when it does reopen. Additionally, much like trial advocacy programs nationwide are refocusing their training on new skills needed to represent clients virtually, career services offices should be rolling out new programming to train students to both interview for and begin the job process in new virtual formats.

For example, in the past, having volunteers dedicate a night to physically coming in-person to a school on a set schedule and performing mock interviews for students is both standard for many schools and logistically burdensome for all. However, pairing students with alumni volunteers one-on-one for *virtual* interview and feedback sessions can be more flexible and more productive, providing students with new skills and individualized attention and satisfying their desire for service from this office. Many students will be interviewing virtually in the first few months of 2021—and perhaps years to come—and reformulating the process to not only accommodate everyone's schedules, but teach new skills is another win/win all around. Helping employers both teach and learn is also helping alumni master new job-related skills, cementing connections. Much like student services, this new flexibility can be harnessed to ensure students receive services they need in ways that make sense. Responding to consumerism in this instance with innovation can lead to student satisfaction and ensure tangible benefits to students.

#### H. Bar Preparation

Legal education has experienced quite a change in recent years as to the expectations of institutions regarding their students' success on the licensing exam. In recent years, the ABA Standard for measuring ultimate bar passage, as well as the surveys promulgated by the ABA measuring first-time, one year, and ultimate bar passage, drove school involvement in student bar prep, mostly relating to academic success programming or facilitating information regarding character and fitness requirements. However, the COVID-19 chaos of the administration of the bar exam pushed law schools into a different role of responsibility: helping their graduates navigate the changes of a frequently changing remotely administered bar exam.

As of August 2020, many states had delayed their bar exam from its usual end of July administration, some more than once, and of those delayed, changes to the format and scope abound.<sup>203</sup> In the wake of the conversion to online or delayed (or both) exams, with many rule changes about who could sit, or stumbling blocks in technology or logistical needs, schools have been stepping up to intervene with Boards of Bar Examiners to ensure their graduates are being treated fairly and access to the exam is granted appropriately, based on real student needs. Much has already been written deeming the handling of this problem nationwide by the state bars as an epic failure, but students are not only holding the bars accountable—they are measuring the responses from their schools in offering the support that they seek as well.<sup>204</sup>

A debate can ensue as to the source of this additional responsibility placed on the schools themselves for assistance navigating this exam, over which they have no control substantively or administratively. The additional responsibility asked of schools could be a natural extension of the ABA Standard and holding schools accountable, the culmination of a

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203. *July 2020 Bar Exam Status by Jurisdiction*, NCBE (Oct. 7, 2020, 2:53 PM), <https://www.ncbex.org/ncbe-covid-19-updates/july-2020-bar-exam-jurisdiction-information/status-table/>.

204. See Paul Caron, *Epic Fail: How Bar Examiners Screwed the Law School Class 2020*, TAXPROF BLOG (July 26, 2020), [https://taxprof.typepad.com/taxprof\\_blog/2020/07/epic-fail-how-bar-examiners-screwed-the-law-school-class-2020.html](https://taxprof.typepad.com/taxprof_blog/2020/07/epic-fail-how-bar-examiners-screwed-the-law-school-class-2020.html); E-mail from Kevin Cieply, President & Dean, Ave Maria Sch. Law, et al., to Sup. Ct. Fla. et al. (Apr. 7, 2020).

helicoptered generation reaching bar admission age, or the truly atrocious failure of many bar examiners to properly consider the implications of their actions, for which anyone would be pleading for help from any source. The reality is that because bar prep and information is something students have long bought from private vendors, and because that function has now become part of the norm sold to students from law schools, students viewing the schools' bar prep efforts as a commodity was only a matter of time, and this year more than ever, they are seeking a full range of services never before needed for the cost they have paid.

Law schools are, in fact, working hard to provide the services students expect from them in this time of crisis regarding bar exams. Students can and should expect the substantive support in their studying they were promised, even with the new, never before considered studying timeline. Additionally, law schools can and should further intervene by ensuring that students' concerns, both short-term and long-term, as to their needs in the administration of the exam and how the decisions made by bar examiners are heard. However, students' anger at law schools for not "fixing" the problem or otherwise ensuring that they can get licensed is a misdirection of their consumer power. Students should view law schools as partners in harnessing and directing their personal consumer power. The assumption and demand that the schools themselves have independent dominant power against the bar examiners and courts to whom they answer is unhelpful. Worse is the assumption schools have that power and are refusing to wield it, or wielding it, astonishingly, against their own graduates. Schools must work to reframe that energy.<sup>205</sup>

There is no question that students are consumers of substantive bar prep materials, and there is no question they are consumers of the right to take a fair licensing exam from their respective states. Unfortunately, the poor way in which many states have handled this issue is causing students to seek solutions from, and lash out at, those whom they have directed their consumerism at for three to four years, because that is what they know. The unbridled lashing out of student

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205. See neversunnyinphila, *The Fl Deans, the FBBE, Supreme Court and ILG Failed Us*, REDDIT (Aug. 17, 2020, 2:10 AM), [https://www.reddit.com/r/FloridaBarExam/comments/ib8q0o/the\\_fl\\_deans\\_the\\_fbbe\\_supreme\\_court\\_and\\_ilg/](https://www.reddit.com/r/FloridaBarExam/comments/ib8q0o/the_fl_deans_the_fbbe_supreme_court_and_ilg/).



consumers, who view their schools as against them, is both unproductive and potentially damaging in the long run. The problem must be addressed with clear, frequent, and supportive communication which clarifies what schools are doing to help and explains the limits of their ability to help. Being proactive in making students understand what a law school can and cannot do as they pursue their professional licensure and become professional individuals, untethered from their legal education institutions, will become necessary as the aftereffects of the Summer 2020 bar exam fiascos will resonate for a long time. In the short-term, there will be some rocky fallout from this bar crisis from law schools, but schools can use the opportunity to build longer term connections based on the support they did give.

#### IV. CONCLUSIONS

The student-as-consumer paradigm has, in the past, impacted the legal education experience for students, faculty, and staff. However, in both this current, and a post, COVID-19 world of legal education, the impacts can be different and potentially more intense. As such, we must reimagine the student-institution relationships learned from this new world, ensure that the lessons learned from these emergency situations are properly learned, and ensure that the best of student-centric initiatives are preserved, finding a balance by schools in managing the student consumer mindset.

As written previously, ignoring students as consumers of education is not a productive use of time in managing the legal education challenges. Instead, knowing how to manage that mindset with these additional concerns while maintaining the institutional program's integrity is critical. Additionally, learning how to capitalize on changes that can become benefits in this new remote world can actually pave the way for a smoother relationship with students in many areas.

Imaginative, up to date thinking, careful planning, transparency, and communication are the best weapons law schools have in order to leverage student consumer attitudes and to minimize distracting complaints by concerned, unsure, and unhappy students. Law schools should be looking back at the lessons learned from 2020 and using them moving forward.