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## It's Alright, Ma, It's Life and Life Only: Have Universities Been Meeting Their Legal Obligations to High-Risk Faculty During the Pandemic?

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# It's Alright, Ma, It's Life and Life Only: Have Universities Been Meeting Their Legal Obligations to High-Risk Faculty During the Pandemic?<sup>1</sup>

Gary J. Simson,\* Mark L. Jones,\*\*

Cathren K. Page,\*\*\* and Suzianne D. Painter-Thorne\*\*\*\*

## *Abstract*

*Even those universities most firmly committed to returning to in-person instruction in fall semester 2020 recognized that for health reasons some exceptions would need to be made. The CDC had identified two groups—people age sixty-five and over and people with certain medical conditions—as persons "at increased risk of severe illness from COVID-19," and it had spelled out various special precautions they should take to avoid contracting the virus. Given the CDC's unique stature, universities very reasonably could have been expected to grant exceptions to faculty falling into either group, but*

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1. For those not well-versed in Dylanology, we note that the portion of the title preceding the colon is the final line—and one of many timeless lines—in BOB DYLAN, *It's Alright, Ma (I'm Only Bleeding)*, on BRINGING IT ALL BACK HOME (Columbia Records, Warner Bros. Inc. 1965).

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*that's not what many universities did.*

*We argue that, properly understood, four separate legal sources required universities to exempt high-risk faculty in the past academic year from any in-person teaching requirement. Two of the four sources are federal statutes that qualify as major statements of national policy—the Americans with Disabilities Act and the Age Discrimination in Employment Act. The other two sources are important state-law doctrines with strong support in the American Law Institute's most recent torts restatement—protection from intentional infliction of physical harm, and protection from intentional infliction of emotional distress.*

*A high-risk faculty member who was denied an exemption may well find this article helpful in trying to decide whether to bring suit. Our primary objective in writing the article, however, is not to encourage people to sue. Instead, it is to drive home to universities that, going forward, they need to be considerably more conscious of, and conscientious about, their legal obligations than many of them were in formulating policies affecting high-risk faculty in the past academic year. And by "going forward," we mean not only for the remainder of this pandemic, but also for any crises that the future may hold.*

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## I. INTRODUCTION

After hurriedly transitioning to online learning when the coronavirus pandemic burst onto the scene midway through the spring semester of 2020, universities<sup>2</sup> across the United States spent much of the spring and summer deciding how to proceed in the fall. Should all courses continue to be taught entirely online? Should all return to in person? Is the best answer instead some sort of hybrid curriculum—some courses in person and others online, or perhaps some in person, others online, and still others partly in person and partly online?

As fall semester 2020 got under way and as the virus, apparently unimpressed by then-President Trump's sunny prediction that warm weather would prove its undoing,<sup>3</sup> continued infecting U.S. residents at an alarming rate, universities' teaching plans for the semester ran the gamut.<sup>4</sup> And because the pandemic was defying prediction at every turn, those universities that decided not to go entirely online at the start of the fall semester couldn't help but be aware that at any point during the semester they might suddenly be forced to do so.

Even those universities most firmly committed to returning to in-person instruction in fall semester 2020 recognized that some exceptions would need to be made to allow faculty to teach online who, for health reasons, could not reasonably be required to teach in person during the pandemic. Well before

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2. For brevity, we use the term “university” throughout this article to encompass any institution of higher education. It is not uncommon to see the term used more narrowly to refer to an institution that “offers undergraduate and graduate degrees,” including “graduate programs leading to a master’s degree or a Ph.D.” and perhaps “professional degrees” in law or medicine. Moreover, when used more narrowly, “university” is commonly distinguished from “college,” which, in such instances, is generally used to mean an institution that “offers undergraduate degrees,” including “bachelor’s degrees” or two-year “associate degrees” or both. See *What’s the Difference Between a College and a University?*, BEST VALUE SCHOOLS. (Dec. 17, 2020), <https://www.bestvalueschools.com/faq/what-is-the-difference-between-a-college-and-a-university/>. However, “[i]n the United States, the two terms are often used interchangeably to refer to higher education institutions,” and unless specifically indicated otherwise, “university” is used throughout the article in that broad sense. Tyler Epps, *College v. University: What’s the Difference?* BEST COLLS. (July 24, 2020), <https://www.bestcolleges.com/blog/difference-between-college-and-university/>.

3. James Gorman, *Summer Heat May Not Diminish Coronavirus Strength*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/health/coronavirus-summer-weather.html>; Bess Levin, *Trump Claims Coronavirus Will “Miraculously” Go Away by April*, VANITY FAIR (Feb. 11, 2020), <https://www.vanityfair.com/news/2020/02/donald-trump-coronavirus-warm-weather>.

4. For a survey of almost three thousand institutions, see *Here’s Our List of Colleges’ Reopening Models*, CHRON. HIGHER EDUC. (Oct. 1, 2020), <https://www.chronicle.com/article/heres-a-list-of-colleges-plans-for-reopening-in-the-fall/>.

the start of classes in the fall, the Centers for Disease Control and Prevention (CDC) had identified two groups of people—people age sixty-five and older and people with certain medical conditions—as persons "at increased risk for severe illness from COVID-19," with "severe illness" meaning that "the person with COVID-19 may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die."<sup>5</sup> In addition, the CDC had spelled out various special precautions that anyone falling into either group should take to avoid contracting the virus.<sup>6</sup>

Given the stature of the CDC as a uniquely authoritative national voice on infectious diseases, it would have been very reasonable to expect that, in granting exceptions for fall semester 2020, universities would grant them at a minimum to faculty falling into either of the two high-risk groups identified by the CDC—faculty whom we'll call "CDC high-risk faculty." As numerous CDC high-risk faculty across the country are all too aware, however, many universities defied such expectations. Instead, perhaps emboldened by the absence of a federal law expressly requiring universities in particular or employers in general to give special deference to the CDC's findings and recommendations,<sup>7</sup> they went their own way and denied permission to teach online to a significant proportion of CDC high-risk faculty.<sup>8</sup> The principal

5. See *CDC Newsroom: CDC Updates, Expands List of People at Risk of Severe COVID-19 Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 25, 2020), <https://www.cdc.gov/media/releases/2020/p0625-update-expands-covid-19.html>; *COVID-19: People at Increased Risk for Severe Illness*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/index.html>. For discussion of the serious long-term effects that those who survive a bout with the virus may endure, see Bill Hathaway, *Rogue Antibodies Wreak Havoc in Severe COVID-19 Cases*, YALE NEWS (May 19, 2021), <https://news.yale.edu/2021/05/19/rogue-antibodies-wreak-havoc-severe-covid-19-cases>; Roxanne Khamsi, *The Mysterious Aftermath of Infections*, N.Y. TIMES (Apr. 6, 2021), <https://www.nytimes.com/2021/04/06/opinion/covid-infections.html>; Fiona Lowenstein & Hannah Davis, *Long Covid Is Not Rare. It's a Health Crisis*, N.Y. TIMES (Mar. 17, 2021), <https://www.nytimes.com/2021/03/17/opinion/long-covid.html>.

6. See *People at Increased Risk*, *supra* note 5.

7. Another emboldening force may well have been the many communications from the Trump Administration sending mixed messages (at best) about the seriousness of the virus and the respect due to the CDC. See Peter Baker, *Trump Scorns His Own Scientists over Virus Data*, N.Y. TIMES (Sept. 16, 2020), <https://www.nytimes.com/2020/09/16/us/politics/trump-cdc-covid-vaccine.html>; Nicholas Kristof, *America and the Virus: 'A Colossal Failure of Leadership'*, N.Y. TIMES (Oct. 22, 2020), <https://www.nytimes.com/2020/10/22/opinion/sunday/coronavirus-united-states.html>.

8. Universities that have gone their own way often differ from one another in the criteria that they use for exempting individual faculty members from an in-person teaching requirement. An important, and in some instances virtually exclusive, component of their approach, however, has been accommodating disabilities virtually always treated as covered by the Americans with Disabilities Act (ADA). See Raga Justin, *"We're Being Treated as Guinea Pigs": Faculty Members Fear In-Person*

thesis of this article is that any university that, for fall semester 2020, refused to exempt from in-person teaching requirements any CDC high-risk faculty failed to live up to its legal obligations to those faculty.

As the weeks passed in fall semester 2020, periodic reports of encouraging progress in the development of a vaccine sparked hope that, before long, life might begin to resemble pre-pandemic times. By December 2020, two vaccines had been developed in record time and had been given emergency approval by the Food and Drug Administration.<sup>9</sup> Nevertheless, for reasons ranging from too little available vaccine, to too little advance planning to ensure efficient vaccine distribution, to too little public education about the vaccines' safety, it soon became clear that it would be at least another few months before the vaccine could reduce dramatically the health threat posed by the virus.<sup>10</sup>

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*Return to Texas Universities*, TEX. TRIB. (Aug. 19, 2020), <https://www.ksat.com/news/texas/2020/08/19/were-being-treated-as-guinea-pigs-faculty-members-fear-in-person-return-to-texas-universities/> (recounting remarks of higher education professor Robert Kelchen); Richard K. Neumann, Jr., *Violations During the Pandemic of Law School Faculties' Authority to Decide Methods of Instruction* 39 (Hofstra Univ. Legal Stud. Rsch. Paper Series, Paper No. 2020-11, Dec. 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3754456](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3754456) (noting two universities that treat qualifying for an ADA accommodation as determinative of one's qualification for an in-person teaching exemption). Among other things, old age, in and of itself, is generally not treated as a disability under the ADA. See *Aging and the ADA*, ADA NAT'L NETWORK, <https://adata.org/factsheet/aging-and-ada#:~:text=Although%20people%20who%20are%20aging,a%20person%20has%20a%20disability> (last visited June 25, 2021) ("People may have disabilities under the definition in the ADA when age-related changes in function make it more difficult to get around at home, participate in their community, or go to work.") As a result, universities that made qualification for special treatment under the ADA a necessary condition for receiving an exemption typically denied exemptions from in-person teaching requirements to one sizable group of CDC high-risk faculty—those age sixty-five and older. For the view that the ADA in fact required otherwise, see *infra* Part III. As fall semester drew near, there were widespread faculty petitions and demonstrations protesting administration statements and policies (on exemptions and more) as insensitive to faculty health. See, e.g., Danielle Douglas-Gabriel, *As Young People Drive Infection Spikes, College Faculty Members Fight for the Right to Teach Remotely*, WASH. POST (July 1, 2020), <https://www.washingtonpost.com/education/2020/07/01/college-professors-fall-remote-teaching/>; Justin, *supra*; Emma Marris, *US University Workers Fight a Return to Campus as COVID-19 Cases Grow*, NATURE (Sept. 4, 2020), <https://www.nature.com/articles/d41586-020-02557-1>.

9. See Denise Grady et al., *F.D.A. Authorizes Moderna Vaccine, Adding Millions of Doses to U.S. Supply*, N.Y. TIMES (Dec. 18, 2020), <https://www.nytimes.com/2020/12/18/health/covid-vaccine-fda-moderna.html>; Katie Thomas et al., *F.D.A. Clears Pfizer Vaccine, and Millions of Doses Will Be Shipped Right Away*, N.Y. TIMES (Dec. 11, 2020), <https://www.nytimes.com/2020/12/11/health/pfizer-vaccine-authorized.html>.

10. See Anne Flaherty & Soo Rin Kim, *COVID-19 Vaccine Rollout Falls Short of Expectations, Raising Questions About 2021 Timeline*, ABC NEWS (Dec. 30, 2020), <https://abcnews.go.com/Politics/covid-19-vaccine-rollout-falls-short-expectations-raising/story?id=74970647> (discussing timeline and reasons); Janice Hopkins Tanne, *Covid-19: US Cases Surge But Vaccine Distribution Is*

As spring semester got under way in January 2021, the virus was still infecting people, and causing serious illness and death, at alarming rates.<sup>11</sup> Ultimately, although the good news about vaccines initially may have tempted universities with broad mandates for in-person instruction to adopt for spring 2021 a more restrictive approach to granting exemptions than they had been using, they generally seemed to recognize that any such tightening of exemption requirements needed to wait.<sup>12</sup>

As this article goes to press soon after the close of the 2020–2021 academic year, there is reason to be hopeful that, by the time fall semester 2021 gets underway, the great majority of faculty at high risk of severe illness from the virus will be in a much different and better position than they were in a year earlier.<sup>13</sup> By then, faculty across the United States will have had

*Slow*, BRIT. MED. J. (Jan. 7, 2021), <https://www.bmj.com/content/372/bmj.n42> (“Cases of covid-19 have continued to surge in the US as only five million people were vaccinated by the end of 2020, against the 20 million promised by President Donald Trump.”).

11. See Frank Diamond, *Goodbye to January 2021, COVID-19's Worst Month (So Far)*, INFECTION CONTROL TODAY (Feb. 1, 2021), <https://www.infectioncontrolday.com/view/goodbye-to-january-2021-covid-19-s-worst-month-so-far> (“January was the cruelest month for COVID-19 in the United States, when more than 95,000 people died from the disease.”); Jennifer B. Nuzzo & Emily N. Pond, *Covid Vaccines Aren't Enough. We Need More Tests*, N.Y. TIMES (Mar. 12, 2021), <https://www.nytimes.com/2021/03/12/opinion/need-covid-tests.html> (“The nation reached record highs for daily cases in January, with more than 300,000 cases reported on Jan. 8.”).

12. The final weeks of fall 2020 on campuses largely offering in-person instruction were hardly the sort to encourage tightening of exemption requirements. See Lilah Burke, *Colleges End In-Person Instruction Early Due to COVID-19 Spread*, INSIDE HIGHER ED (Nov. 17, 2020), <https://www.insidehighered.com/news/2020/11/17/colleges-end-person-instruction-early-due-covid-19-spread> (“Experts have . . . predicted that the wave would not bypass American colleges and universities. In response to skyrocketing cases this week and last, higher ed institutions have been transitioning to online learning in great numbers.”); Jennifer Harlan, *Coronavirus Cases at U.S. Colleges Have Hit a Quarter Million*, N.Y. TIMES (Nov. 5, 2020), <https://www.nytimes.com/live/2020/11/05/world/covid-19-coronavirus-updates> (“[M]ore than 38,000 new cases [have been] reported in the last two weeks alone. And the numbers are almost certainly an undercount.”). By early January, universities generally were feeling that the state of the pandemic required them to be more cautious, rather than less. See Scott Jaschik, *Colleges Adjust Calendars, Again*, INSIDE HIGHER ED (Jan. 4, 2021), <https://www.insidehighered.com/print/news/2021/01/04/colleges-adjust-calendars-again> (“Rising COVID-19 infection and death rates are prompting colleges and universities that are hoping for in-person instruction in 2021 to again shift their calendars and push back the start of the spring semester.”).

13. We say “the great majority” of high-risk faculty, rather than “all” such faculty, because some high-risk faculty will feel compelled to refuse the vaccination for health or religious reasons, some will elect not to be vaccinated for other reasons, and some will not get the usual protection from the vaccination because they are immunocompromised. With regard to people in the last category, see Apoorva Mandavilli, *Vaccines Won't Protect Millions of Patients with Weakened Immune Systems*, N.Y. TIMES (Apr. 15, 2021), <https://www.nytimes.com/2021/04/15/health/coronavirus-vaccine-immune-system.html>; Candida Moss, *I'm a Vaccinated Transplant Recipient. I Don't Have*



ample opportunity to be vaccinated, and even though getting vaccinated is no guarantee that people won't contract the virus, it does mean they are much less likely to suffer severe illness if they do contract it.<sup>14</sup>

The outlook, however, is not quite as rosy as all of us aching for a return to the pre-pandemic classroom experience would like to believe. Most obviously, variants of the coronavirus have emerged. Some have proved even more contagious than the strain of the virus prevalent in the United States throughout 2020 and at least one appears to be more deadly.<sup>15</sup> Although the available evidence suggests that the vaccines that people have been receiving are highly effective against existing variants,<sup>16</sup> it is unclear whether the vaccines retain their potency for more than about six months or a year; if not, booster shots may be needed, which would mean a whole other set of practical obstacles and costs.<sup>17</sup> Furthermore, with the coronavirus raging in India, South America, and other parts of the world where the vaccines have been in woefully short supply,<sup>18</sup> there is also the all too real possibility that new and

*Antibodies. Now What?*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/opinion/organ-transplant-covid-vaccine.html>.

14. See *COVID-19: Vaccine Effectiveness*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 10, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness.html>.

15. See Josh Holder et al., *Rise of Variants in Europe Shows How Dangerous the Virus Can Be*, N.Y. TIMES (Apr. 9, 2021), <https://www.nytimes.com/interactive/2021/04/09/world/europe/europe-coronavirus-variants.html> ("Europe, the epicenter of the coronavirus pandemic last spring, has once again swelled with new cases. . . . The rise in new cases is being propelled by a coronavirus variant first seen in Britain and known as B.1.1.7. The variant is not only more contagious than last year's virus, but also deadlier."); Benjamin Mueller, *New Variant Posing Threat, as Global Vaccine Drive Falters*, N.Y. TIMES (May 24, 2021), <https://www.nytimes.com/2021/05/24/world/europe/india-uk-variant-vaccine-coronavirus.html> ("The variant, known by evolutionary biologists as B.1.617.2, is 'highly likely' to be more transmissible than the variant behind Britain's devastating wintertime surge, government scientists have said. That earlier variant, known as B.1.1.7, was itself considerably more contagious than the one that first emerged last year in Wuhan, China.").

16. See *COVID-19 Vaccines Work*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 20, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/effectiveness/work.html>; Tara Parker-Pope, *Vaccinated and Confused? Answers About Masks, the Delta Variant and Breakthrough Infections*, N.Y. TIMES (June 30, 2021), <https://www.nytimes.com/2021/06/30/well/live/delta-variant-vaccines-masks.html>.

17. For discussion of the possibilities, see Carolyn Y. Johnson, *Yes, We'll Probably Need Coronavirus Booster Shots, But Which One?*, WASH. POST (May 27, 2021), <https://www.washingtonpost.com/health/2021/05/27/covid-vaccine-booster-shots/>; Kathy Katella, *How Long Will Your Coronavirus Vaccination Last?*, YALE MED. (May 20, 2021), [https://www.yalemedicine.org/news/how-long-will-coronavirus-vaccine-last?utm\\_source=YaleToday&utm\\_medium=Email&utm\\_campaign=YT\\_Yale%20Today%20Alum%20no%20Parents\\_5-28-2021](https://www.yalemedicine.org/news/how-long-will-coronavirus-vaccine-last?utm_source=YaleToday&utm_medium=Email&utm_campaign=YT_Yale%20Today%20Alum%20no%20Parents_5-28-2021); Apoorva Mandavilli, *Immunity to the Coronavirus May Persist for Years, Scientists Find*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/2021/05/26/health/coronavirus-immunity-vaccines.html>.

18. See Bryan Pietsch, *As the Virus Threatens Southeast Asia, the Spread of New Variants*

more dangerous variants may be yet to emerge elsewhere and make their way to the United States.<sup>19</sup> In fact, given the sizable contingent of unvaccinated people who have indicated that, for one or another reason, they are opposed to getting vaccinated or at least not eager to do so,<sup>20</sup> it is entirely possible that the United States may be victimized by new and more dangerous variants grown right here at home.<sup>21</sup>

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*Continues to Be a Danger Everywhere*, N.Y. TIMES (May 26, 2021), <https://www.nytimes.com/live/2021/05/10/world/covid-19-coronavirus> (“[W]hile the virus recedes in wealthy nations with robust vaccination campaigns, it is pummeling India and threatening to swamp Southeast Asian countries that until now had largely kept the virus at bay.”); Daniel Politi, *Uruguay Has the World’s Highest Death Toll Per Capita*, N.Y. TIMES (May 14, 2021), <https://www.nytimes.com/2021/05/14/world/americas/uruguay-cases-deaths-coronavirus.html> (“Six out of the 11 countries with the highest death rates per capita are in South America, a region where the pandemic is leaving a brutal toll of growing joblessness, poverty and hunger. For the most part, countries in the region have failed to acquire sufficient vaccines to inoculate their populations quickly.”).

19. See Michael V. Callahan & Mark C. Poznansky, *The Vaccines We Have Are Good, but They Could Be So Much Better*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/06/10/opinion/covid-vaccine-strategies.html> (“The initial vaccine strategy . . . prioritized getting safe, effective vaccines into bodies as quickly as possible, it did not consider how to prevent variants or subsequent waves of the virus. . . . The next danger is the further evolution of variants that can overcome the immunity provided by existing Covid-19 vaccines and prior infections.”); Apoorva Mandavilli & Benjamin Mueller, *Virus Variants Threaten to Draw out the Pandemic, Scientists Say*, N.Y. TIMES (Apr. 3, 2021), <https://www.nytimes.com/2021/04/03/health/coronavirus-variants-vaccines.html> (“Public health officials are deeply worried that future iterations of the virus may be more resistant to the immune response, requiring Americans to queue up for regular rounds of booster shots or even new vaccines. ‘We don’t have evolution on our side,’ said Devi Sridhar, a professor of public health. . . . If significant pockets of the globe remain unprotected, the virus will continue to evolve in dangerous new ways.”); Pietsch, *supra* note 18 (“Scientists warn that if the virus is allowed to spread unchecked in parts of the world with lower vaccine coverage, dangerous variants will continue to evolve, threatening all countries.”); Noah Weiland & Carl Zimmer, *The White House Details a Nearly \$2 Billion Plan to Enhance the Tracking of Variants*, N.Y. TIMES (Apr. 16, 2021), <https://www.nytimes.com/2021/04/16/us/coronavirus-variant-track.html> (“The White House on Friday announced an almost \$2 billion plan for expanding and improving the nation’s ability to track coronavirus variants, an effort that public health experts have said is desperately needed to fight against variants that could drive another wave or potentially undermine the effectiveness of vaccines.”).

20. For discussion of the various reasons, see David Brooks, *Our Pathetic Herd Immunity Failure*, N.Y. TIMES (May 6, 2021), <https://www.nytimes.com/2021/05/06/opinion/herd-immunity-us.html>; Liz Hamel et al., *KFF COVID-19 Vaccine Monitor—April 2021*, KAISER FAM. FOUND. (May 6, 2021), <https://www.kff.org/coronavirus-covid-19/poll-finding/kff-covid-19-vaccine-monitor-april-2021/>; Judd Legum & Tesnim Zekeria, *The Economic Obstacles to Vaccination*, POPULAR INFO. (May 25, 2021), <https://popular.info/p/the-economic-obstacles-to-vaccination>; Sema K. Sgaier, *Meet the Four Kinds of People Holding Us Back from Full Vaccination*, N.Y. TIMES (May 18, 2021), <https://www.nytimes.com/interactive/2021/05/18/opinion/covid-19-vaccine-hesitancy.html>; Sheryl Gay Stolberg & Annie Karni, *Nation Faces ‘Hand-to-Hand Combat’ to Get Reluctant Americans Vaccinated*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/us/politics/coronavirus-vaccine-rates.html>.

21. As Drs. Faust and Rasmussen have explained:

If there is any one lesson that perhaps everyone can agree the pandemic has taught us, it is not to underestimate how unpredictable the pandemic can be. Hopefully, the pandemic will be much less menacing in fall semester 2021 than it has been for the past year, but no one knows for sure what it will look like then. For that reason, rather than try to answer specifically what universities will need to do to meet their legal obligations to CDC high-risk faculty under the still-to-be-determined state of the pandemic in fall semester 2021, this article will focus on the more concrete question of what universities needed to do to comply with their legal obligations to those faculty in the 2020–2021 academic year.

An obvious value of assessing whether universities have been living up to their legal obligations to CDC high-risk faculty is as a guide to possible litigation. A CDC high-risk faculty member who was denied an exemption from in-person teaching requirements in the 2020–2021 academic year may well find this article helpful in trying to decide whether to bring suit. If this article prompts any faculty to sue their university, so be it, but our primary objective in writing this article isn't to encourage people to sue. If it were, we would be remiss not to discuss in considerable detail a number of procedural and tactical matters.

Instead, we write primarily with the future in mind. By looking back and shining a light on the fundamental legal inadequacy of the exemption policies that many universities adopted when confronted with the pandemic, we seek to drive home to those universities that, even if for no other reason than

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[T]he most important and least recognized reason to vaccinate all children quickly is the possibility that the virus will continue to spread and mutate into more dangerous variants, including ones that could harm both children and adults.

. . . So far, the vaccines still appear to work well against [the variants].

But we might not be so fortunate with future variants. Viruses acquire mutations as they spread. The more infections there are, the more chances the coronavirus has to mutate.

This increases the likelihood that a more dangerous strain could emerge. . . .

Jeremy Samuel Faust & Angela L. Rasmussen, *We Can't End the Pandemic Without Vaccinating Kids*, N.Y. TIMES (Mar. 29, 2021), <https://www.nytimes.com/2021/03/29/opinion/covid-vaccines-kids.html>. Among the other factors obviously clouding the picture for fall semester 2021 is uncertainty as to the appropriate timing for relaxing or removing pandemic-induced restrictions. In response to a public increasingly weary of, and impatient with, such restrictions, many state and local governments and private businesses may dismantle them sooner than may prove wise from a health perspective. The matter has already sparked heated debate. *See, e.g.*, Julie Bosman & Mitch Smith, *Michigan's Virus Cases Are Out of Control, Putting Gov. Gretchen Whitmer in a Bind*, N.Y. TIMES (Apr. 25, 2021), <https://www.nytimes.com/2021/04/10/us/coronavirus-michigan-gretchen-whitmer.html>; Michael D. Shear et al., *Biden Calls States' Relaxing Virus Restrictions, Including Mask Mandates, 'Neanderthal Thinking'*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/live/2021/03/03/world/covid-19-coronavirus>.

avoiding potentially crushing legal liability, they need to adopt a very different mindset going forward. We sincerely—indeed, fervently—hope that universities draw the lesson from this article that, in formulating health-related policies for the campus community, they need to be considerably more conscious of, and conscientious about, their legal obligations than many of them were in formulating policies affecting CDC high-risk faculty in the past academic year.

With the 2020–2021 academic year now behind us, the stage is set for a new series of questions about universities' obligations to CDC high-risk faculty: Will a university be fulfilling its legal obligations to CDC high-risk faculty in fall semester 2021 if it insists that they teach their classes in person but does not require students to be fully vaccinated in order to matriculate at the school?<sup>22</sup> Would it suffice for the university to require students *either* to be fully vaccinated or to wear a mask whenever in class? Would that approach

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22. The debate thus far has centered on the question whether universities should be requiring students to be vaccinated as a condition for matriculating at the school. As of late May 2021, more than four hundred universities—about ten percent of universities nationwide—had announced that they were imposing such a requirement for fall semester 2021. See Rukmini Callimachi, *For Colleges, Vaccine Mandates Often Depend on Which Party Is in Power*, N.Y. TIMES (May 22, 2021), <https://www.nytimes.com/2021/05/22/us/college-vaccine-universities.html>. Various health experts have argued strongly in favor of mandating student vaccination, see, e.g., Aaron E. Carroll, *Vaccine Mandates Are Coming. Good.*, N.Y. TIMES (June 28, 2021), [https://www.nytimes.com/2021/06/28/opinion/covid-vaccine-mandate.html?campaign\\_id=39&emc=edit\\_ty\\_20210629&instance\\_id=34114&nl=opiniontoday&regi\\_id=87354418&segment\\_id=62031&te=1&user\\_id=8fb142cd6a7c4bdf33b6353acbd5e909](https://www.nytimes.com/2021/06/28/opinion/covid-vaccine-mandate.html?campaign_id=39&emc=edit_ty_20210629&instance_id=34114&nl=opiniontoday&regi_id=87354418&segment_id=62031&te=1&user_id=8fb142cd6a7c4bdf33b6353acbd5e909) (the author, Dr. Carroll, is Indiana University's chief health officer and a research scientist at the Regenstrief Institute); Ezekiel J. Emanuel et al., *These People Should Be Required to Get Vaccinated*, N.Y. TIMES (Apr. 14, 2021), <https://www.nytimes.com/2021/04/14/opinion/coronavirus-vaccinations-mandate.html> (the lead author, Dr. Emanuel, is a professor of medical ethics and health policy at the University of Pennsylvania), and there is good reason to believe that universities can lawfully require students to get vaccinated against the virus as long as the universities accommodate students who have substantial medical or religious grounds for an exemption. Among other things, the Equal Employment Opportunity Commission has assured employers that they can require employees to get vaccinated against the virus as a condition of employment, see *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws: Vaccinations*, EEOC (May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#K>; Lauren Hirsch, *E.E.O.C. Says Companies Can Mandate Vaccines, but Few Push Ahead*, N.Y. TIMES (June 1, 2021), <https://www.nytimes.com/2021/06/01/business/workplace-vaccine-requirements.html>, and universities would seem to have at least as much leeway in that area with regard to students as employers have with regard to employees. Nonetheless, there is no doubt that vaccine mandates, whether at the workplace or at universities, currently face strong opposition. See Isaac Stanley-Becker, *Resistance to Vaccine Mandates Is Building. A Powerful Network Is Helping*, WASH. POST (May 26, 2021), <https://www.washingtonpost.com/health/2021/05/26/vaccine-mandate-litigation-siri-glimstad-ican/>.

suffice only if the university put in place an effective mechanism to ensure that any students not wearing a mask in fact have been fully vaccinated?<sup>23</sup> It is beyond the scope of this article to address specifically these and other questions bearing on universities' potential legal liability to CDC high-risk faculty for policies that they put in place for fall semester 2021. We submit, however, that much of the analysis in this article of universities' legal obligations to CDC high-risk faculty in the 2020–2021 academic year will prove highly relevant—and should be treated by universities as highly relevant—to the proper resolution of those questions.

We also underline that, in saying above that universities "need to adopt a very different mindset going forward," we mean by "going forward" much more than simply "for the remainder of this pandemic." The possibility is all too real of future crises chillingly reminiscent of the one that we have been enduring since March 2020. According to various health experts, the big surprise is not that a pandemic struck in 2020 but rather that one didn't strike much earlier. A great deal needs to be done to guard against the possibility of another pandemic in the not too distant future.<sup>24</sup>

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23. Although some people have argued that a federal statute, the Health Insurance Portability and Accountability Act (HIPAA), precludes asking anyone whether he or she has been vaccinated, there appears to be a broad consensus among experts to the contrary. See, e.g., Allyson Chui, *Explaining HIPAA: No, It Doesn't Ban Questions About Your Vaccination Status*, WASH. POST (May 22, 2021), [https://www.washingtonpost.com/lifestyle/wellness/hipaa-vaccine-covid-privacy-violation/2021/05/22/f5f145ec-b9ad-11eb-a6b1-81296da0339b\\_story.html](https://www.washingtonpost.com/lifestyle/wellness/hipaa-vaccine-covid-privacy-violation/2021/05/22/f5f145ec-b9ad-11eb-a6b1-81296da0339b_story.html).

24. See Zachary D. Carter, *The Coronavirus Killed the Gospel of Small Government*, N.Y. TIMES (Mar. 11, 2021), <https://www.nytimes.com/2021/03/11/opinion/coronavirus-economy-government.html> (“[M]aintaining state-of-the-art information, transportation, and medical infrastructure through sustained public investment could prevent a problem from becoming a calamity.”); Thomas L. Friedman, *One Year Later, We Still Have No Plan to Prevent the Next Pandemic*, N.Y. TIMES (Mar. 16, 2021), <https://www.nytimes.com/2021/03/16/opinion/covid-pandemic.html> (recounting the view of “wildlife veterinarians and other conservationists” that not only would it be “NOT surprising” if the pandemic originated with a virus passed from “an animal living in the wilderness to humans,” but unless certain practices emblematic of “our broken relationship with wild nature” change, “a similar outbreak could happen again soon”); Bob Menendez & Susan Collins, *There Will Be Another Pandemic—Are We Prepared for It?*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/opinion/collins-menendez-covid-commission.html> (underlining the urgent need for Congress to create “a blue ribbon commission to investigate the vulnerabilities of our public health system and issue guidance for how we as a nation can better protect the American people from future pandemics”); Zeynep Tufekci, *Where Did the Coronavirus Come From? What We Already Know Is Troubling*, N.Y. TIMES (June 25, 2021), <https://www.nytimes.com/2021/06/25/opinion/coronavirus-lab.html> (“Years of research on the dangers of coronaviruses, and the broader history of lab accidents and errors around the world, provided scientists with plenty of reasons to proceed with caution. . . . But troubling safety practices persisted. . . . Even if the coronavirus jumped from animal to human without the involvement of research activities, the groundwork for a potential disaster had been laid for years, and learning its lessons is essential to preventing others.”).

Part II of this article highlights several assumptions that are central to the analysis that follows in Parts III through VI. Parts III through VI maintain that universities were legally obligated under four separate sources to exempt CDC high-risk faculty for the 2020–2021 academic year from any in-person teaching requirement. For purposes of simplicity and clarity, we will focus on universities' legal obligations to CDC high-risk faculty for fall semester 2020 and treat universities' legal obligations for spring semester 2021 as essentially the same. Our temporal frame of reference therefore generally will be shortly before the start of fall semester 2020—the point in time at which a university mandating in-person teaching had to make a final decision on which, if any, faculty to exempt from the mandate. In keeping with that frame of reference, we will be discussing faculty within the CDC's two groups of high-risk people at that time and the state of knowledge at that time about the virus and its transmission.<sup>25</sup>

The two legal sources that we will discuss in Parts III and IV are federal statutes that qualify as major statements of national policy—the Americans with Disabilities Act and the Age Discrimination in Employment Act. The two sources discussed in Parts V and VI are important state-law doctrines with strong support in the American Law Institute's most recent torts restatement—protection from intentional infliction of physical harm and protection from

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25. As a practical matter, it is difficult to see how assuming, as we do, that universities' legal obligations to CDC high-risk faculty for spring semester 2021 may fairly be equated to those obligations for fall semester 2020 is likely to lead to overstating universities' legal obligations for spring semester 2021. If anything, it seems likely to lead to understating them. The rate at which the virus was infecting and killing people in the United States hardly suggested the logic of universities having less obligation to safeguard CDC high-risk faculty at the start of spring semester 2021 than at the start of fall semester 2020. At the start of spring semester 2021, the pandemic was still infecting and killing people at frightening daily rates—in fact, at rates substantially higher than at the start of fall semester 2020. In addition, between the start of fall semester 2020 and the start of spring semester 2021, the CDC did not revise its list of high-risk conditions in a way that would militate in favor of a lesser university obligation of this sort. It appears that, since expanding that list substantially in June 2020, the CDC has only added to, and not subtracted from, the list. See Michelle Diamant, *CDC Adds Down Syndrome to COVID-19 'Increased Risk' List*, DISABILITY SCOOP (Jan. 7, 2021), <https://www.disabilityscoop.com/2021/01/07/cdc-adds-down-syndrome-to-covid-19-increased-risk-list/29140/>; Moira McCarthy, *CDC Expands List of Those with Higher COVID-19 Risks*, HEALTHLINE (July 14, 2020), <https://www.healthline.com/health-news/cdc-expands-list-of-those-with-higher-covid19-risks>; *Science Brief: Evidence Used to Update the List of Underlying Medical Conditions That Increase a Person's Risk of Severe Illness from COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 12, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/science/science-briefs/underlying-evidence-table.html>. In addition, in the months between the start of the fall 2020 and spring 2021 semesters, the state of knowledge about the virus and its transmission did not advance in a way that would have justified a university in taking a more relaxed approach to protecting high-risk faculty's health.

intentional infliction of emotional distress. The basic question of universities' legal obligations toward high-risk faculty in a health crisis of the extraordinary magnitude and scope of the one that existed at the start of fall semester 2020 is very much uncharted territory. As will become apparent, we believe that, in thinking about the application at that time of federal statutes adopted, and state tort doctrines developed, without a crisis of the sort that existed even arguably in mind, it is essential to begin by reasoning from the basic principles underlying those statutes and doctrines.

We conclude in Part VII by noting several issues not addressed in the article. They include: legal sources of potential importance to the subject at hand other than the four featured in the article; universities' legal obligations to exempt faculty other than CDC high-risk faculty from in-person teaching requirements; universities' legal obligations to accommodate staff; students' legally enforceable rights; and universities' moral, as opposed to legal, obligations to exempt CDC high-risk faculty. We underline at the outset that our limited discussion of those issues in the article should not be understood as any sort of statement on our part that they don't warrant serious discussion. Instead, it reflects above all an effort to keep our project manageable in scope. For better or for worse—and we strongly suspect that, in the eyes of university administrations, it is decidedly for worse—there is almost no end to the number of novel and important issues raised by this pandemic.

## II. BACKGROUND ASSUMPTIONS

Before turning to our arguments under each of the four sources of legal authority that we will be exploring, we want to be explicit about several assumptions underlying those arguments. We do not claim that all of the assumptions are uncontroversial. In fact, we readily concede that at least the final two are not. For present purposes, however, we believe that a relatively brief defense of each should suffice.

### *A. The Deference Owed to the CDC*

Our first assumption is that, in deciding whom to exempt during the pandemic from a broadly applicable requirement to teach in person, universities have owed special deference to the CDC's findings and recommendations. As even a brief visit to the CDC website makes clear, the CDC is unique. It is hardly simply one among various organizations that can speak to the nature of the coronavirus, how it is contracted, which individuals

are at high risk of severe illness from it, etc. Not only is the CDC "one of the major operating components of the Department of Health and Human Services,"<sup>26</sup> but it can also fairly lay claim to the singular distinction of being "the nation's health protection agency."<sup>27</sup> It "serves as *the* national focus for developing and applying disease prevention and control."<sup>28</sup> As the federal agency "responsible for controlling the introduction and spread of infectious diseases," the CDC "identifies and defines preventable health problems and maintains active surveillance of diseases through epidemiologic and laboratory investigations and data collection, analysis, and distribution."<sup>29</sup>

Does the unique stature of the CDC mean that its findings and recommendations pertaining to the coronavirus are infallible? Of course not, as the CDC would be the first to admit. As the CDC has demonstrated throughout the pandemic,<sup>30</sup> it is constantly updating and reevaluating its findings and recommendations with the ultimate objective of serving as best it can the national interest in safeguarding the American public's health. The CDC's inability to claim infallibility, however, is no reason not to give its findings and recommendations the special deference that, by virtue of its unique stature, they deserve.

### *B. The CDC's List of Who Is Most in Need of Protection from the Virus*

As universities in the late spring and summer of 2020 were formulating and finalizing their criteria for exempting faculty in fall semester 2020 from in-person teaching requirements, the CDC was saying that two groups of people were most in need of protection from the virus—people age sixty-five

26. *About CDC 24-7: CDC Organization*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 17, 2020), <https://www.cdc.gov/about/organization/cio.htm#:~:text=As%20the%20nation's%20health%20protection,and%20responds%20when%20these%20arise>.

27. *Id.* (emphasis added).

28. *About CDC 24-7: CDC Official Mission Statement*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 25, 2018), <https://www.cdc.gov/about/organization/cio-orgcharts/pdfs/CDCfs-508.pdf> (emphasis added).

29. *Id.* For detailed discussion of the CDC's mission, history, and accomplishments, see ELIZABETH W. ETHERIDGE, *SENTINEL FOR HEALTH: A HISTORY OF THE CENTERS FOR DISEASE CONTROL* (1992); BOB KELLEY, *CENTERS FOR DISEASE CONTROL AND PREVENTION* (2015). For an inside perspective on the CDC's role in addressing the current pandemic, see Anne Schuchat, *What I Learned in 33 Years at the C.D.C.*, N.Y. TIMES (June 10, 2021), <https://www.nytimes.com/2021/06/10/opinion/anne-schuchat-cdc-retirement.html>.

30. See, e.g., *COVID-19: Evidence Used to Update the List of Underlying Medical Conditions that Increase a Person's Risk of Severe Illness from COVID-19*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 17, 2020), <https://stacks.cdc.gov/view/cdc/90729>; *Science Brief, supra* note 25.



and over and people with one or more of various specified medical conditions. Concededly, the CDC could have communicated that message more clearly. However, a reasonably careful reading of obviously relevant and readily accessible materials on the CDC website was all that was needed to ascertain that the CDC indeed was singling out those two groups for special concern. We will assume in Parts III through VI that, in planning for fall semester 2020, universities understood, or at a minimum should have understood, that the CDC was singling out those groups. To buttress that assumption, we offer the following short guided tour of the relevant CDC materials.

On June 25, 2020, the CDC announced in a press release that it had just "updated and expanded the list of who is at increased risk for getting severely ill from COVID-19."<sup>31</sup> Under the heading of "People at Increased Risk for Severe Illness," the CDC's June 25 materials had two subheadings: "Older Adults" and "People with Underlying Medical Conditions." The "Older Adults" subheading replaced a preexisting age-65-and-over one. The CDC's discussion under the new subheading, like its discussion under the prior one, made clear that the CDC regards age as an independent risk factor.<sup>32</sup> In the CDC's view, age, in and of itself, is sufficient to establish that some people are at increased risk for severe illness from COVID-19, and "[i]t is especially important" for those people "to protect themselves from getting COVID-19."<sup>33</sup>

You may be wondering whether the CDC, in changing the subheading, perhaps was signaling that it had changed its thinking about people sixty-five and older and had decided that they are not always high-risk. The CDC's June 25 press release, however, makes clear that that's not what was on the CDC's mind. In the press release, the CDC stated, "CDC has removed the specific age threshold from the older adult classification. CDC now warns that among adults, risk increases steadily as you age, and *it's not just those over the age of 65 who are at increased risk for severe illness.*"<sup>34</sup> That statement clarifies that the CDC changed the subheading to "Older Adults" because it wanted to establish that age represents a continuum, a sliding scale, of increasing risk. The statement confirms that, in changing the subheading's title, the CDC was not tacitly conceding that it had erred in characterizing sixty-five and over as high risk. Instead, it was simply acknowledging that for it to say no more than

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31. See *CDC Newsroom*, *supra* note 5.

32. See *COVID-19: Older Adults*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html>.

33. *Id.*

34. See *CDC Newsroom*, *supra* note 5 (emphasis added).

that sixty-five and over is high risk could be misleading.

Under the "People with Underlying Medical Conditions" subheading, the CDC on June 25 published two lists.<sup>35</sup> One list specified underlying medical conditions that identify people who **"are at increased risk"** of severe illness from COVID-19.<sup>36</sup> That list included conditions such as chronic kidney disease and serious heart conditions.<sup>37</sup> The second list specified underlying medical conditions that identify people who **"might be at an increased risk"** of severe illness from COVID-19.<sup>38</sup> That list included conditions such as asthma, pregnancy, and hypertension.<sup>39</sup>

Because the CDC provided two separate lists and highlighted, by use of boldface, that one identifies people who *are* at increased risk of severe illness if they contract the coronavirus and that the other identifies people who only *might be* at such risk, it's tempting to assume that the CDC was signaling that people with conditions on the former list should be treated differently from people with conditions on the latter list. The CDC's statement at the time of recommended behaviors for people having conditions on the two lists, however, strongly suggests otherwise. Most obviously, having declared that people with certain conditions *are* at increased risk and people with other

35. See *COVID-19: People of Any Age with Underlying Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 25, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

36. *Id.* (boldface in original).

37. By mid-August, when fall semester 2020 classes were getting underway on many campuses, the CDC had expanded the list somewhat. The conditions on the updated list were: cancer; chronic kidney disease; COPD; immunocompromised state from solid organ transplant; obesity (BMI of thirty or above); serious heart conditions; sickle cell disease; and type two diabetes mellitus. *COVID-19: People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Aug. 14, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC\\_AA\\_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html](https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fneed-extra-precautions%2Fgroups-at-higher-risk.html).

38. *People with Underlying Medical Conditions*, *supra* note 35 (boldface in original).

39. As fall semester 2020 was getting started, the list included the following conditions: moderate-to-severe asthma; cerebrovascular disease; cystic fibrosis; high blood pressure; immunocompromised state from blood or bone marrow transplant, immune deficiencies, HIV, or use of other immune-weakening medicines; neurologic conditions; liver disease; pregnancy; pulmonary fibrosis; smoking; thalassemia; and type one diabetes mellitus. See *People with Certain Medical Conditions*, *supra* note 37. In late March 2021, the CDC stopped maintaining the two separate lists of conditions identifying people who "are" at increased risk and conditions identifying people who "might be" at increased risk. Instead, essentially merging the two lists, it began publishing a single list of conditions that **"can make you more likely"** to get severely ill from COVID-19." *COVID-19: People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 29, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (boldface in original).

conditions *might be* at increased risk, the CDC went on to say that "[i]t is especially important for people at increased risk"—meaning people with a condition on *either* list—"to protect themselves from getting COVID-19."<sup>40</sup> Similarly, without drawing any distinction between people having a medical condition on the first list and people having a medical condition on the second, the CDC offered people with medical conditions detailed advice to bear in mind—almost two full pages in small print of things "to consider"—before "[v]enturing out into a public setting," undertaking "in-person visits with family and friends," or "participating in an event or gathering."<sup>41</sup>

In essence, the CDC on June 25 rather clearly was saying: We know enough about the conditions on the first list to say right now that if you have one of those conditions, you *are* at increased risk. Based on the "limited data and information"<sup>42</sup> we have at this time with regard to the conditions on the second list, we can't speak with as much confidence about whether having one of those conditions puts you at increased risk. However, *given that we're talking about a risk of "severe illness"*—that is, a risk that "the person with COVID-19 may require hospitalization, intensive care, or a ventilator to help them breathe, or they may even die"<sup>43</sup>—*our best advice for anyone having one of those conditions is to be every bit as cautious as we're telling people with conditions on the first list to be.*

### C. *The Nature of the Risk to CDC High-Risk Faculty of Teaching in Person*

A third assumption that we make is that a university's requiring CDC high-risk faculty to teach in person in the fall 2020 semester put those faculty at higher risk than the CDC considered appropriate. We make that assumption even if the university employing the faculty member conscientiously implemented the various "strategies" that the CDC, in a portion of its website entitled "Considerations for Institutions of Higher Education" ("Considerations"), was advising universities to take at that time.<sup>44</sup> Those strategies included: (1) "strategies to encourage behaviors that reduce the

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40. *People with Underlying Medical Conditions*, *supra* note 35.

41. *Id.*

42. *Id.*

43. *People at Increased Risk*, *supra* note 5.

44. *COVID-19: Considerations for Institutions of Higher Education*, CTRS. FOR DISEASE CONTROL & PREVENTION (May 30, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html>.

spread of COVID-19," such as "[r]ecommend and reinforce use of cloth face coverings among students, faculty, and staff"; (2) "strategies to maintain healthy environments," such as "[c]lean and disinfect frequently touched surfaces . . . at least daily or between use as much as possible"; (3) "strategies to maintain healthy operations," such as "promote social distancing of at least 6 feet between people if events are held"; and (4) "strategies to prepare for when someone gets sick," such as "[c]lose off areas used by a sick person and do not use these areas until after cleaning and disinfecting."<sup>45</sup>

The most obvious source of support for our assumption is language in the "Considerations" expressly directed to universities' treatment of CDC high-risk faculty: "Offer options . . . that limit their exposure risk (e.g., telework and modified job responsibilities)."<sup>46</sup> Although "telework" was not defined in the "Considerations," the term is one that the federal government appears to use synonymously with "working remotely" and as including "virtual meetings."<sup>47</sup> The CDC in the quoted directive therefore appears to be advising universities to offer CDC high-risk faculty the option to teach online.

That understanding of the CDC's thinking about CDC high-risk faculty and in-person vs. online teaching is supported by the CDC's general advice at the time for people "at increased risk for severe illness" from the virus. The CDC was emphatic that it is "especially important" for people at increased risk to "protect themselves from getting COVID-19" and that a crucial means of protection is to "[l]imit [their] interactions with other people as much as possible."<sup>48</sup> In addition, the CDC warned those at increased risk that "the more people you interact with, the more closely you interact with them, and the longer that interaction, the higher the risk," and it instructed them to "think about" the size of the anticipated group, the indoor vs. outdoor nature of the venue, and the length of time of the interaction.<sup>49</sup>

Ultimately, however, to establish the validity of our assumption that requiring CDC high-risk faculty to teach in person in fall semester 2020 was at odds with the CDC's approach, it seems inadequate to rely entirely on the quoted directive in the "Considerations" and on the CDC's general advice. Among other things, if the offer-telework-options directive is understood in

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45. *Id.*

46. *Id.*

47. *Telework*, U.S. GEN. SERVS. ADMIN. (June 16, 2020), <https://www.gsa.gov/governmentwide-initiatives/telework>.

48. *Older Adults*, *supra* note 32; *People with Underlying Medical Conditions*, *supra* note 35.

49. *Older Adults*, *supra* note 32; *People with Underlying Medical Conditions*, *supra* note 35.

light of the heading under which it appeared, it is more ambiguous than it seems when read alone. That heading stated that universities "may consider implementing several strategies to maintain healthy operations."<sup>50</sup>

In support of our assumption, we therefore also offer below a number of reasons that in combination strongly suggest that, to be consistent with the CDC's thinking, universities should not have required CDC high-risk faculty to teach in person in fall semester 2020. First and foremost, classes traditionally take place indoors, and they almost unavoidably would take place indoors that fall.<sup>51</sup> Because "[t]he virus lingers in the air indoors, infecting those nearby,"<sup>52</sup> the chances of contracting the virus in classrooms would be much greater than the chances of contracting it at an outdoor venue.<sup>53</sup>

Second, even if students sit socially distanced—six feet apart—they often would be sufficiently numerous in a small enough space to constitute the kind of "crowd" that the CDC was telling high-risk individuals to avoid.<sup>54</sup> The students might well be occupying only about a third or a half of all the seats in the room, but they frequently would span the length and breadth of the room.

Third, being in a classroom for a class typically means being in that crowd for fifty or sixty minutes or more. That would entail prolonged exposure to whatever is lingering in the air, including not only virus particles released by those currently in the room but also perhaps ones already there from the class

50. *Considerations*, *supra* note 44 (emphasis added).

51. For discussion of a creative break with tradition inspired by the pandemic, see David Leonhardt, *Get Out*, N.Y. TIMES (July 13, 2020), <https://www.nytimes.com/2020/07/13/briefing/coronavirus-china-iran-kelly-preston-your-monday-briefing.html> ("Rice University, in Houston, is building nine big new classrooms this summer, all of them outdoors. Five are open-sided circus tents that the university is buying, and another four are semi-permanent structures that workers are building in an open field near dorms. . . .").

52. Apoorva Mandavilli, *239 Experts with One Big Claim: The Coronavirus Is Airborne*, N.Y. TIMES (July 4, 2020), <https://www.nytimes.com/2020/07/04/health/239-experts-with-one-big-claim-the-coronavirus-is-airborne.html>.

53. See Linsey C. Marr, *Yes, the Coronavirus Is in the Air*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/opinion/coronavirus-aerosols.html> ("Especially avoid crowds indoors, where aerosols can accumulate."); Zeynep Tufekci, *We Need to Talk About Ventilation*, ATLANTIC (July 30, 2020), <https://www.theatlantic.com/health/archive/2020/07/why-arent-we-talking-more-about-airborne-transmission/614737/> ("[I]t's not only COVID-19's super-spreader events that are indoors. The rest of the pattern of spread of COVID-19—when it is spreading slowly, in small numbers—is also overwhelmingly through indoor transmission.").

54. See Marr, *supra* note 53 ("Avoid crowds. The more people around you, the more likely someone among them will be infected.").

before.<sup>55</sup>

Fourth, even if everyone in the class wears a mask, transmission and contraction of the virus would remain all too possible. As researchers have explained, whenever we "talk or just breathe," we "naturally release droplets (small particles of fluid) and aerosols (smaller particles of fluid) into the air,"<sup>56</sup> and some of the particles—the aerosols in particular—are apt to escape despite the mask.<sup>57</sup> What happens if the wearer coughs or sneezes? The potential for sending particles of both sizes well beyond the confines of the mask is, to put it mildly, greatly enhanced. Very simply, wearing a mask in the classroom hardly ensures that the wearer won't breathe in enough viral particles to get sick.<sup>58</sup>

Fifth, even if the university mandates that all students must wear masks in class, that hardly would ensure that all or almost all of them would (a) consistently arrive at class wearing masks and (b) take care throughout the class to wear the masks as they need to be worn to provide maximum protection to others. Although the large-scale mid-semester rush online in spring semester 2020 deprived university leaders of the opportunity to observe student mask-wearing habits in classrooms prior to fall semester 2020, it didn't take a lot of imagination for them to anticipate some less than exemplary displays of mask-wearing in classes in the fall. After all, in the spring and summer of 2020 they couldn't help but notice some creative, but frightfully

55. See Apoorva Mandavilli, *The Coronavirus Can Be Airborne Indoors, W.H.O. Says*, N.Y. TIMES (July 9, 2020), <https://www.nytimes.com/2020/07/09/health/virus-aerosols-who.html> ("[M]ounting evidence has suggested that in crowded indoor spaces, the virus can stay aloft for hours and infect others and may even seed so-called superspreader events.").

56. Marr, *supra* note 53.

57. See Katharine J. Wu, *Masks May Reduce Viral Dose, Some Experts Say*, N.Y. TIMES (July 27, 2020), <https://www.nytimes.com/2020/07/27/health/coronavirus-mask-protection.html>:

Linsey Marr, an expert in virus transmission at Virginia Tech . . . and other researchers are still sussing out exactly how much inbound or outbound virus different types of masks block. But based on a wealth of past evidence and recent observations, the amount that's filtered out is probably high—perhaps 50 percent or more of the larger aerosols being sent in both directions, Dr. Marr said. Certain coverings, like N95 respirators, will do better than others, but even looser-fitting cloths can waylay some viral particles.

58. See *id.* ("Wearing a face covering doesn't make people impervious to infection."). As to how many particles are enough to cause illness, see Apoorva Mandavilli, *It's Not Whether You Were Exposed to the Virus. It's How Much*, N.Y. TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/health/coronavirus-transmission-dose.html> ("A few viral particles cannot make you sick—the immune system would vanquish the intruders before they could. But how much virus is needed for an infection to take root? What is the minimum effective dose? A precise answer is impossible. . . . [Masks] can cut down the amount you receive, and perhaps bring it below the infectious dose.").

inadequate, methods of mask-wearing in doctors' offices, supermarkets, and other venues where the group is largely made up of those a generation or more *older* than the typical university student. Now factor in the much greater proclivity for risk-taking of those of university age.<sup>59</sup>

Sixth, precisely because of that greater proclivity for risk-taking, the students who would be occupying the classroom in fall semester 2020 couldn't realistically be expected to be tremendously conscientious about taking proper precautions *outside* of class to avoid contracting the virus or passing it along to others.<sup>60</sup> Even if a university was intent on getting students to take such precautions, it had to recognize the high likelihood that anyone teaching in its classrooms would be exposed to a significant number of carriers of the virus.

Seventh and lastly, perhaps the most powerful reason for concluding that universities couldn't reasonably require CDC high-risk faculty to teach in person in fall semester 2020 is the wisdom of erring on the side of health and safety when confronting a deadly virus that is transmitted in ways that at the time were still hardly understood. Basically, under the circumstances, the most sensible course of action by far was to adopt what some experts have called a "precautionary principle"—specifically, "the idea that even without definitive evidence, [one] should assume the worst of the virus, apply common sense and recommend the best protection possible."<sup>61</sup> As Dr. Trish Greenhalgh, a British primary care doctor at Oxford, memorably put it in arguing for opting for a precaution that may or may not ultimately prove necessary: "So at the moment we have to make a decision in the face of uncertainty, and my goodness, it's going to be a disastrous decision if we get it wrong. So why not . . . just in case?"<sup>62</sup>

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59. See Laurence Steinberg, *Expecting Students to Play It Safe if Colleges Reopen Is a Fantasy*, N.Y. TIMES (June 15, 2020), <https://www.nytimes.com/2020/06/15/opinion/coronavirus-college-safe.html> ("Most types of risky behavior—reckless driving, criminal activity, fighting, unsafe sex and binge drinking, to name just a few—peak during the late teens and early 20s. Moreover, interventions designed to diminish risk-taking in this age group . . . have an underwhelming track record.").

60. Writing in June 2020, psychology professor Laurence Steinberg, a noted scholar on adolescence, put the matter more bluntly. Among his predictions was that students will "hug old friends they run into on the way to class" and "get drunk and hang out and hook up with people they don't know well." See *id.*

61. Mandavilli, *supra* note 52.

62. *Id.*

*D. The Online vs. In-Person Experience for University Students*

To justify broadly requiring in-person instruction in fall semester 2020, university administrations typically relied heavily on the relative merits of online and in-person instruction. In their view, it was clear that in-person teaching would provide students with a substantially better educational experience. Purdue President Mitch Daniels, who has been described as "one of the earliest and most vocal proponents of an in-person return to campus,"<sup>63</sup> strongly affirmed the superiority of in-person teaching in a widely discussed *Washington Post* op-ed. Writing at the end of the spring 2020 semester—one that, at Purdue and so many other universities, had been entirely online after mid-March—Daniels left no doubt that he saw no ambiguity in the matter. "[F]ailure to take on the job of reopening," he maintained, "would be not only anti-scientific but also an unacceptable breach of duty."<sup>64</sup>

The fourth and final assumption that we make in Part II of this article is that any universities that, in planning for fall semester 2020, took as a given that in-person teaching would provide students with a substantially better educational experience than online instruction simply lacked adequate justification for doing so. In our view, there was sufficient uncertainty as to whether in-person or online instruction would deliver a higher quality educational experience *in a pandemic that already had presented an array of unprecedented challenges to the educational enterprise* that universities could not reasonably predicate their planning on the premise that in-person would be substantially superior.

Before defending that assumption, we would like to mention a few matters to put our defense in proper perspective. First, when we refer in the discussion below to "online instruction," we are referring to *synchronous* online instruction—online instruction that is a live exchange between the faculty member and the students in the class. Although asynchronous online instruction—online instruction that is not live—has its merits, the case for asynchronous online instruction as a substitute for in-person instruction is not, in our view, as strong as the case for synchronous, and for present purposes, we see no reason to explore asynchronous further.

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63. Tom Bartlett, *Mitch Daniels Has Not Changed His Mind*, CHRON. HIGHER EDUC. (Aug. 7, 2020), <https://www.chronicle.com/article/mitch-daniels-has-not-changed-his-mind>.

64. Mitch Daniels, *Why Failing to Reopen Purdue University This Fall Would Be an Unacceptable Breach of Duty*, WASH. POST (May 25, 2020), [https://www.washingtonpost.com/opinions/why-we-have-a-responsibility-to-open-purdue-university-this-fall/2020/05/25/da3b615c-9c62-11ea-ac72-3841fcc9b35f\\_story.html](https://www.washingtonpost.com/opinions/why-we-have-a-responsibility-to-open-purdue-university-this-fall/2020/05/25/da3b615c-9c62-11ea-ac72-3841fcc9b35f_story.html).



Second, we are addressing only the relative merits *for university students* of online and in-person instruction during this pandemic. Much has been written and said about the relative merits for younger students of online and in-person instruction during this pandemic.<sup>65</sup> We readily concede that the relevant considerations can be quite different for younger, and especially much younger, students,<sup>66</sup> and our discussion below should not be understood as taking any position in that debate.

Third and lastly, we should note that, much as we value the benefits that online instruction can bring, we *ordinarily* would not maintain that universities would be wrong to take as a given that in-person teaching would provide students with a substantially better educational experience than online instruction. In part, that may simply be a reflection of our tremendous enjoyment over the years of in-person teaching. More broadly, it reflects our belief that in-person instruction allows us to forge with our students, and our students to forge with one another, a type of connection that enriches the learning experience in ways that online instruction can't hope to achieve.

There is nothing *ordinary*, however, about teaching in a pandemic. As university administrations tacitly acknowledged in March 2020 when they ordered a prompt, large-scale transition mid-semester from in-person to online

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65. For a sampling, see Sophie Bushwick, *Schools Have No Good Options for Reopening During Covid-19*, SCI. AM. (Sept. 5, 2020), <https://www.scientificamerican.com/article/schools-have-no-good-options-for-reopening-during-covid-19/>; Nora Fleming, *Why Are Some Kids Thriving During Remote Learning?*, EDUTOPIA (Apr. 24, 2020), <https://www.edutopia.org/article/why-are-some-kids-thriving-during-remote-learning>; Juliana Menasce Horowitz & Ruth Igielnik, *Most Parents of K-12 Students Learning Online Worry About Them Falling Behind*, PEW RSCH. CTR. (Oct. 29, 2020), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/10/PSDT\\_10.29.20\\_kids.edu\\_full.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/10/PSDT_10.29.20_kids.edu_full.pdf); Bob Musinski, *Coronavirus and Schools: What Parents Should Know for the Fall*, US NEWS (Aug. 6, 2020), <https://www.usnews.com/education/coronavirus-and-schools-guide>.

66. See, e.g., *Schools Should Prioritize Reopening in Fall 2020, Especially for Grades K-5, While Weighing Risks and Benefits*, NAT'L ACADS. OF SCIS., ENG'G & MED. (July 15, 2020), <https://www.nationalacademies.org/news/2020/07/schools-should-prioritize-reopening-in-fall-2020-especially-for-grades-k-5-while-weighing-risks-and-benefits>. In highlighting the principal findings and recommendations of the National Academies' 2020 report, *Reopening K-12 Schools During the COVID-19 Pandemic: Prioritizing Health, Equity, and Communities*, the latter news release noted:

While it will be impossible for schools to entirely eliminate the risk of COVID-19, the report says, young children in particular will be impacted by not having in-person learning and may suffer long-term academic consequences if they fall behind as a result. In grades K-3, children are still developing the skills to regulate their own behavior, emotions, and attention, and therefore struggle with distance learning. Schools should prioritize reopening for grades K-5 and for students with special needs who would be best served by in-person instruction.

*Id.*

instruction, teaching in person during a pandemic can't happen without major changes from business as usual. Accordingly, prior to the start of fall semester 2020, administrations intent on returning to in-person instruction extensively discussed, and ultimately put in place, plans for in-person classes that included various safeguards to help minimize the likelihood that students or faculty would contract the virus from exposure to an infected person during class. Given the kind of safeguards that university leaders were putting in place, it hardly took much imagination for them to recognize that those safeguards were apt to alter the classroom experience profoundly and diminish significantly the usual benefits of in-person instruction. Any university leaders who didn't see that simply weren't giving the entire matter the thought it deserved.

If that seems harsh, think back to the start of fall semester 2020 and consider a few of the ways in which in-person teaching during the pandemic would very predictably leave quite a bit to be desired as compared to in-person teaching in pre-pandemic times. For example, when speaking to the class, many faculty find it important, as a means of holding the students' attention, to maintain eye contact with a large proportion of the class. In fall semester 2020, however, with students spread across much, if not all, of the length and breadth of the room to achieve social distancing—six feet apart in all directions—it would be immeasurably more difficult to take advantage of that technique. By the same token, the many faculty who ordinarily rely on looking around the room at students' facial expressions to help gauge whether they are catching on would be out of luck in fall semester 2020. Try reading students' facial expressions when you're looking around the room at a class of students wearing masks!

It is not uncommon for faculty teaching large classes to have to interrupt the flow of the class now and then to ask a student who is speaking to speak up or repeat him- or herself so everyone can hear. As long as such interruptions don't happen often, they probably won't detract much from the classroom experience. But wouldn't such interruptions in fact be likely to happen quite often in large classes in fall semester 2020 with students speaking into masks and spread around the room? To borrow the words of a classic tort doctrine, *res ipsa loquitur*.<sup>67</sup> And in case you're thinking that the problem could simply be remedied by providing the students with a hand-held

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67. The phrase, which is in Latin, literally means “the thing speaks for itself.” *Res ipsa loquitur*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014).

microphone to pass around, think again. After all, in terms of trying to prevent transmission of the virus, telling students to pass *anything* around would be one of the most important things *not* to do.<sup>68</sup>

Audibility problems in in-person classes in fall semester 2020 promised to be not quite as bad as far as students hearing what the professor would have to say, but the problems hardly promised to be trivial. The professor, like the students, would need to speak through a mask for health reasons. Although the professor could be equipped with a microphone without creating the sort of health risks entailed in students passing a microphone around, amplification would be only a partial solution to the students' problems in hearing the professor speak. A mask not only diminishes the volume of someone's speech; it also can make the person's individual words less distinct. Practice helps, but even with practice, speaking through a mask is a decidedly less than ideal means of communication.

Finally, in thinking about the quality of the educational experience that in-person teaching would be apt to yield in fall semester 2020, university leaders could not reasonably ignore certain psychological realities. Consider, in particular, the anxiety triggered for students and professors alike—especially ones in a CDC high-risk category—by spending an hour or more in a room with vivid reminders, in all the masked faces and in the socially distanced seats, of the deadly virus that everyone is trying to stave off. Isn't it highly likely that such anxiety would negatively affect students' ability to focus on the material presented in class and faculty members' ability to present the material most effectively?

If university leaders were doing their best, as fall semester 2020 approached, to assess objectively the relative merits of in-person versus online instruction for the upcoming semester, they also had to be impressed by certain advantages of online instruction. Consider, for example, how much more feasible it promised to be when teaching online rather than in person in fall semester 2020 for the professor to hold the students' attention by maintaining eye contact with the class. True, a professor teaching online can't really look at more than a few students at a time when looking at the students as they appear in little boxes on his or her computer screen. But because the students in an online class can't tell whom the professor is looking at, as long

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68. See *Considerations*, *supra* note 44 (listing, as two of various “strategies” for universities to “consider implementing . . . to maintain healthy environments,” (1) “[d]iscourage sharing of items that are difficult to clean or disinfect” and (2) “[a]void sharing electronic devices, books, pens, and other learning aids”).

as the professor is looking at the screen, each of them has the *illusion* that the professor is looking at him or her—an illusion that provides a nice incentive for all of them to stay focused on the class!

Compared to in-person teaching, teaching online in fall semester 2020 also had a lot to be said for it in terms of the professor's ability to gauge whether students were catching on. True, looking at small faces on a computer screen is hardly ideal as a means of gauging student comprehension, but it is a major improvement over what a professor teaching in person during the pandemic has to do: try to decipher it by looking at faces half-hidden by masks.

Concededly, online classes may suffer at times from technological problems of a sort not present in in-person classes, and such problems may be particularly serious for students who can't afford to pay for a laptop and Internet services that are reasonably reliable. A university intent on ensuring that all students enjoy a good opportunity to learn online, however, can do quite a bit to make that aspiration a reality by providing reliable laptops and Internet access to students of limited means. That of course means spending some money, but hardly an exorbitant amount.<sup>69</sup> In addition, faculty can go a long way toward mitigating the ill effects of technological problems that arise in online classes by recording each class—something that even the least technologically adept among us can easily do—and making the recording available afterward to any students who need it.

Because teaching or attending an online class during this pandemic typically means sitting in a room alone in front of a computer screen, it can be an anxiety-producing reminder for the professor and students alike of the pandemic surrounding all of us. And the resulting anxiety undoubtedly may undermine somewhat the professor's ability to teach and the students' ability to learn. University leaders planning for the fall 2020 semester could not reasonably believe, however, that the online classroom experience would be *as* anxiety-producing as the in-person classroom experience. Assume that you are a professor standing in front of the room and facing lots of masked faces in widely separated seats. Now assume instead that you are a student in the

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69. For an account of one institution that took this approach, see Avery Dalai, *Paul Quinn College to Go Online*, NBC 5 DALLAS-FORT WORTH (July 12, 2020), <https://www.nbcdfw.com/news/local/pall-quinn-college-going-online-in-the-fall/2403706/>. When Paul Quinn College announced in early July 2020 that fall semester 2020 classes would be entirely online, it also announced that it would be providing “Wi-Fi hotspots and laptops to every student who is enrolled full-time and has the need.” *Id.* In addition, it planned to help defray the costs of that and other expanded uses of technology through a student technology fee. *Id.*

class sitting in the midst of, and looking around you at, that scene. Either way, aren't you feeling quite a bit more anxious than you would be feeling if the class were online? After all, at least during the online class you have the comfort of knowing that you're not going to catch the virus then and there from someone else in the room.

The above account of the relative advantages and disadvantages of the two forms of instruction is plainly not exhaustive. For present purposes, however, we believe we have said enough to establish the validity of the assumption that we set out in this section to defend: that as universities were making plans for fall semester 2020, they would have been wrong to take as given that in-person teaching would provide a substantially better educational experience than online.<sup>70</sup>

As indicated at the start of this section, our assumption contradicts one championed by the various universities that broadly mandated in-person instruction for fall semester 2020. As a final point in defense of our assumption, we'll briefly address a question that we suspect may be nagging at some of our readers: Isn't the simple fact that Purdue President Mitch Daniels and various other university leaders relied heavily on a contrary view a good indication that our assumption is not as defensible as we claim?<sup>71</sup> For two reasons, we suggest the answer is "no."

First, although President Daniels and other university leaders who share his view know a great many things about running a university, their insight into the relative merits of on-line and in-person instruction for fall semester 2020 was much more limited. It is hardly unusual for today's university leaders to be individuals with little, if any, recent experience as classroom teachers. Daniels himself came to the Purdue presidency after a career largely in politics and government, including a stint right before as a two-term

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70. In truth, if forced to argue that either in-person or online instruction promised to provide a superior educational experience in fall semester 2020, we would be more inclined to argue in favor of online. For present purposes, however, there is no need for us to press the point, and we are content to leave it at that.

71. The leaders of some universities that opted for online, rather than in-person, instruction for fall semester 2020 made clear that they were unimpressed by the case that their counterparts elsewhere had made for in-person. See, e.g., Lindsay Ellis, *Colleges Hoped for an In-Person Fall. Now the Dream Is Crumbling*, CHRON. HIGHER EDUC. (July 20, 2020), <https://www.chronicle.com/article/colleges-hoped-for-an-in-person-fall-now-the-dream-is-crumbling> (quoting Morehouse College President David A. Thomas as saying, shortly after his announcement in mid-July that Morehouse had decided to change its plans and close campus housing and make all instruction online, "I may have missed it, but I don't see a lot of university presidents out there creating compelling, values-based arguments for reopening").

governor of Indiana. When he landed the presidency at Purdue, his experience in higher education basically consisted of his time, more than two decades earlier, as a Princeton undergraduate and Georgetown law student.<sup>72</sup> As a feature article on Daniels's approach as Purdue president to the pandemic put it, Daniels "didn't have a background in academe" prior to taking on that position.<sup>73</sup> Various university leaders sharing Daniels's view on on-line vs. in-person instruction may well have had more university teaching experience. However, if their teaching experience wasn't relatively recent, they may well have had difficulty putting themselves in the shoes of a faculty member and appreciating the problems that faculty would have in fall semester 2020 when speaking through a mask to a class of masked students sitting six feet apart. Under the circumstances, it would not be all that surprising if they were seeing the advantages and disadvantages of in-person instruction from a perspective more romanticized than real.

One thing is certain: They, unlike the members of their faculties and the authors of this article, didn't spend spring semester 2020 after mid-March getting hands-on experience—ready or not!—in online instruction. If they had, they may have seen it in a much more positive light. Prior to the pandemic, the great majority of faculty had never taught a class online, and the percentage of university leaders who had never done so may well have approached one hundred percent. For many faculty members, and perhaps in particular the more technologically unsophisticated ones—a group that includes as charter members two of this article's authors—teaching online in spring 2020 was a far more positive experience than they ever imagined it could be. Being told in mid-March 2020, as numerous faculty were, to take the coming week or ten days to study up on online instruction and then start teaching online bore for many an unsettling resemblance to being tossed as a child into a pool of water and then told to learn to swim. Nonetheless, once the initial shock wore off, even faculty quite skeptical of online instruction at the start generally came to appreciate the possibilities offered by online instruction and took a more realistic and less exaggerated view of the problems it presents.

Our second reason for suggesting that President Daniels's and likeminded university leaders' accolades for in-person over online instruction should not be given a great deal of weight relates to a criticism that others have leveled

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72. See *Curriculum Vitae for Mitchell E. Daniels, Jr.*, PURDUE UNIV., <https://www.purdue.edu/president/about/curriculum-vitae.php>, (last visited June 15, 2021).

73. Bartlett, *supra* note 63.

against them: that those accolades are insincere—subterfuges aimed at "stringing everyone along to get their money."<sup>74</sup> Although we don't endorse that criticism, we do think it points to a relevant consideration.

There can be no doubt that there were significant financial incentives for universities to opt for in-person over online instruction for fall semester 2020.<sup>75</sup> For instance, some universities already had had the experience of students demanding a partial rebate of their spring semester 2020 tuition for courses that were in person at the start of the semester but then were moved online mid-semester when the dire threat posed by the virus became clear.<sup>76</sup> Broadly mandating in-person instruction was a good way to avoid possible demands for discounted tuition in fall semester 2020. By the same token, when in-person teaching was suspended in spring semester 2020 and students headed home, universities had to reimburse students for payments received for room and board that would go unused.<sup>77</sup> A broad mandate for in-person

74. *Id.*

75. See Thomas Smith, *With COVID-19 Advancing Significantly, Why Are So Many Colleges Forcing People Back to the Campus?*, INSIDE HIGHER ED (Aug. 7, 2020), <https://www.insidehighered.com/views/2020/08/07/covid-19-advancing-significantly-why-are-so-many-colleges-forcing-people-back> (noting that although "some institutional leaders are justifying face-to-face instruction" for fall semester 2020 in terms of benefits to students from the "full in-person experience" that "cannot be replicated online," "[a]nother rationale is financial: some colleges and universities could lose as much as half their revenue from continued campus closures"); Aarthi Swaminathan, *'An Impossible Situation': U.S. Colleges Backtrack on Reopening for In-Person Classes*, YAHOO FINANCE (Aug. 8, 2020), <https://www.aol.com/article/news/2020/08/08/impossible-situation-colleges-backtrack-reopening-in-person-classes/24586437/>. In the latter article, the reporter quotes Jessica Wood, leader of S&P's higher education group, as stating:

We've had the higher education sector on a negative outlook for three years. There's been pressure across the industry for several years, from a competitive standpoint, from an affordability standpoint and from an enrollment standpoint.

When you add in COVID and the pressures that shelter-in-place directives have had on campuses, and then you add in the current recessionary environment, . . . it's likely that weaker institutions will face significant pressure in the coming year or two, and we will see more closures.

*Id.*

76. See Greta Anderson, *Students Sue Universities for Tuition and Fee Refunds*, INSIDE HIGHER ED (Apr. 20, 2020), <https://www.insidehighered.com/news/2020/04/20/students-sue-universities-tuition-and-fee-refunds> (discussing three class action lawsuits that "claim that online classes don't have equal value to in-person classes and are not worth the tuition that students paid for on-campus courses"). For "five reasons, regardless of market pressures, why lowering tuition" was, and would be, unwarranted in response to such arguments, see Robert J. Massa, *Tuition Policy in a Pandemic*, INSIDE HIGHER ED (May 19, 2020), <https://www.insidehighered.com/views/2020/05/19/why-colleges-shouldnt-cut-tuition-online-instruction-during-recent-months-opinion>.

77. See Greta Anderson, *Students Say Online Classes Aren't What They Paid For*, INSIDE HIGHER ED (Apr. 13, 2020), <https://www.insidehighered.com/news/2020/04/13/students-say-online-classes->

classes would ensure that the university would receive those payments for fall semester 2020.<sup>78</sup>

The fact that there were significant financial incentives to mandate in-person classes for fall semester 2020 doesn't mean that the leaders of universities that mandated in-person classes must have been insincere when they publicly touted the merits of in-person over online instruction. The fact that such incentives existed, however, is important nonetheless. On a subconscious, if not conscious, level, those incentives may well have led university leaders to avoid questioning their preconceived notions of the superiority of in-person over online instruction.

### III. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) was the culmination of a decades-long effort by a wide range of groups. As a leader of the disabilities rights movement has noted, the movement "adopted many of the strategies of the civil rights movements before it," and "[t]he underlying principle of the ADA was to extend the basic civil rights protections extended to minorities and women to people with disabilities."<sup>79</sup> When Congress finally enacted this

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arent-what-they-paid (noting that "most colleges have generally been offering refunds on room and board fees, not tuition").

78. With the spring semester 2020 experience firmly in mind, some universities that returned to in-person classes in fall semester 2020 went to considerable lengths to avoid having to offer reimbursements in the event that the virus forced them during the semester to abandon in-person and go online. According to a higher education reporter:

Universities across the country have written addendums into their residence life contracts specifying that refunds will not be issued if a Covid-19 outbreak forces their campuses to close early this fall.

....

[They] felt the sting of refunding housing and dining fees in the spring, coughing up millions of dollars. . . .

"It was painful. It was basically a quarter of revenue for housing and dining that they had to give back," Robert Kelchen, an associate professor of higher education at Seton Hall University, said of colleges' experience in the spring. In many cases, institutions had already committed to spending that money.

Erin Johnson, *Next Candidate for the Fall Chopping Block? Student Housing Refunds*, CHRON. HIGHER EDUC. (July 9, 2020), <https://www.chronicle.com/article/Next-Candidate-for-the-Fall/249155>.

79. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/>. For detailed discussion of the ADA's history and the Act's strengths and weaknesses, see RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* (2005); Ruth Colker, *The Americans with Disabilities Act Is Outdated*, 63



"equal opportunity' law for people with disabilities,"<sup>80</sup> it did so by lopsided majorities in the House and Senate that attested to the magnitude of the movement's success.<sup>81</sup>

The ADA's stated findings and purposes manifest the depth of Congress's commitment, when it enacted the ADA in 1990, to put an end to public and private discrimination against Americans with disabilities. The first finding, for example, affirms that "physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society,"<sup>82</sup> and the first purpose on the Act's list of purposes is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."<sup>83</sup> Even more striking, however, are Congress's stated findings and purposes in 2008, when it adopted a number of amendments to the Act with virtual unanimity.<sup>84</sup> The amendments were designed to negate certain U.S. Supreme Court interpretations of the ADA. In the 2008 statement of findings and purposes, Congress made clear that in its view the Supreme Court had not done justice to Congress's intent in enacting the ADA and that it was adopting the 2008 amendments to override the Supreme Court's unduly narrow interpretations of the Act.<sup>85</sup>

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities of [an] individual."<sup>86</sup> It goes on to say that "major life activities include, but are not limited to, caring

DRAKE L. REV. 787 (2015); Arlene S. Kanter, *The Americans with Disabilities Act at 25 Years: Lessons to Learn from the Convention on the Rights of People with Disabilities*, 63 DRAKE L. REV. 819 (2015).

80. U.S. Dep't of Justice, Civil Rts. Div., *Introduction to the ADA*, ADA.GOV, [https://www.ada.gov/ada\\_intro.htm](https://www.ada.gov/ada_intro.htm) (last visited June 15, 2021).

81. See S.933—*Americans with Disabilities Act of 1990, 101<sup>st</sup> Congress (1989-1990)*, CONG.GOV, <https://www.congress.gov/bill/101st-congress/senate-bill/933/all-actions?q=%7B%22roll-call-vote%22%3A%22all%22%7D> (reporting final House vote of 377–28 on July 12, 1990 and final Senate vote of 91–6 on July 13, 1990).

82. 42 U.S.C. § 12101(a)(1).

83. *Id.* § 12101(b)(1).

84. See S.3406—*ADA Amendments Act of 2008, 110<sup>th</sup> Congress (2007–2008)*, CONG.GOV, <https://www.congress.gov/bill/110th-congress/senate-bill/3406/all-actions?overview=closed#tabs> (reporting Senate passage by unanimous consent on September 11, 2008 and House approval by voice vote on September 17, 2008).

85. See 42 U.S.C. § 12101 note (Findings and Purposes of Pub. L. 110-325). In the statement of findings and purposes, Congress specifically repudiated two Supreme Court decisions, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), and *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002).

86. 42 U.S.C. § 12102(1)(A).

for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and *working*.<sup>87</sup> Notably, the ADA adds as three "[r]ules of construction regarding the definition of disability" that "[t]he definition of disability in this chapter shall be *construed in favor of broad coverage* of individuals under this chapter, *to the maximum extent permitted* by the terms of this chapter," "[t]he term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008," and "[a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability."<sup>88</sup>

The question of whether an impairment qualifies as a "disability" under the ADA can't be answered in the abstract. Rather, it turns on the particular context. A person with serious arthritis in the spine, for example, may well be disabled for purposes of a job that requires frequent lifting but not for a teaching position, while someone whose ability to project as a speaker has been seriously compromised by throat surgery to remove a tumor may well be disabled for purposes of a teaching position but not for a job requiring frequent lifting. In keeping with that context-specific perspective, it is entirely possible that, in the extraordinary circumstances of a pandemic, an impairment may qualify as a disability under the ADA even though in ordinary circumstances it does not. After all, in a pandemic, an impairment that *ordinarily* does not substantially limit someone's ability to perform a key component of his or her job effectively may well have such a limiting effect.

Consider, then, faculty members who, prior to fall semester 2020, requested an exemption from a university in-person teaching mandate based on having one or more of the various "underlying medical conditions" that the CDC had identified as putting people "at increased risk for severe illness from COVID-19." The CDC had emphasized that it is "especially important" for people with those conditions "to protect themselves from getting COVID-19," and that to achieve such protection, they must "[l]imit [their] interactions with other people as much as possible."<sup>89</sup> In the context of a pandemic that, as fall semester 2020 drew near, was giving every indication that it would continue to be a force through 2020 and beyond, a faculty member with one of the

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87. *Id.* § 12102(2)(A) (emphasis added).

88. *Id.* § 12102(4)(A)–(C) (emphasis added).

89. *See People with Underlying Medical Conditions*, *supra* note 35.

underlying medical conditions that, according to the CDC, put him or her at high risk of getting severely ill from COVID-19 therefore plainly had a "disability," as that term is defined in the ADA. Whether or not the particular condition has generally been regarded as covered by the ADA is beside the point.<sup>90</sup>

As a practical matter, the CDC was telling every faculty member who had one of the conditions that, according to the CDC, put him or her at high risk : You have a "physical or mental impairment" that "substantially limits" your "major life activit[y]" of "working" as a faculty member.<sup>91</sup> A key part of your job in normal times is in-person classroom teaching, but these are not normal times. If you value your life and health, you will limit your interactions with others as much as possible during this pandemic and not teach in person. Tell the university where you work that, as much as you enjoy and value in-person teaching, you don't feel you have a real choice in the matter. You can only carry out your teaching responsibilities by teaching online.

Much the same argument can be made for treating the other major category of CDC high-risk faculty—faculty members sixty-five years of age and older—as "disabled" under the ADA *in the context of the pandemic*. True, it is somewhat awkward to call old age a "physical or mental impairment." In using the words, "physical or mental impairment," to define "disability," Congress was not being careful to use language that would obviously encompass old age as a disability. Furthermore, we readily concede that old age is not generally regarded as covered by the Act.<sup>92</sup> The question at hand, however, isn't what Congress may have intended for the generality of circumstances. Instead, it is what Congress is most reasonably understood as intending for an extraordinary circumstance—this pandemic—that was not in its specific contemplation at the time of enactment. Moreover, that question must be addressed with the following express instruction by Congress in its 2008 ADA amendments firmly in mind: "The definition of disability shall be construed in favor of broad coverage of individuals" to the "maximum extent

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90. The regulations adopted to implement the ADA do not "provid[e] a list of impairments that would 'consistently,' 'sometimes,' or 'usually not' be disabilities" covered by the ADA, but they do provide rules of construction "to help determine what impairments constitute a disability," as well as a "list of examples of impairments that should easily be concluded to be disabilities." *Frequently Asked Questions*, ADA NAT'L NETWORK, <https://adata.org/faq/what-if-any-are-new-specific-disabilities-are-covered-under-revised-ada-regulations> (last visited June 25, 2021).

91. 42 U.S.C. §§ 12102(1)(A), (2)(A).

92. *See supra* note 8.

permitted by the terms" of the Act.<sup>93</sup>

From that perspective, it is no stretch at all to treat age sixty-five and older as encompassed by the ADA definition of "disability." After all, the reason that age sixty-five and older is treated as an independent risk factor and as indicative of high risk is because of a physical impairment that inevitably comes with aging—a seriously weakened immune system. In the words of the National Foundation for Infectious Diseases, "Older adults . . . are at higher risk for more serious COVID-19 illness and death. This is because our immune systems grow weaker as we age, which makes it more challenging for older adults to fight off infectious diseases."<sup>94</sup> A leading immunobiologist at the University of Arizona, Dr. Janko Nikolich-Zugich, has pointed to three physical phenomena that occur to all of us as we age and ultimately combine to produce the seriously weakened immune system characteristic of older adults. As an interviewer summarized Dr. Nikolich-Zugich's views:

Our immune systems have two sets of defenses against viruses and other pathogens: a first-line army of cells, called leukocytes, that attack invading microbes within minutes to hours, and a second-line force of precisely targeted antibodies and T cells that surge to the battle front as late as several days after.

With advancing age, the body has fewer T cells, which produce virus-fighting chemicals. By puberty, the thymus is producing tenfold fewer T cells than it did in childhood, Nikolich-Zugich said; by age 40 or 50, there is another tenfold drop.

That leaves the body depleted of T cells that have not yet been programmed to defend against a specific microbe. Fewer such "naïve T cells" means fewer able to be deployed against a never-before-seen

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93. 42 U.S.C. § 12102(4)(A).

94. *Common Questions and Answers About COVID-19 for Older Adults and People with Chronic Health Conditions*, NAT'L FOUND. FOR INFECTIOUS DISEASES (June 25, 2020), <https://www.nfid.org/infectious-diseases/common-questions-and-answers-about-covid-19-for-older-adults-and-people-with-chronic-health-conditions/>; see also Rachel Nania, *Coronavirus and Older Adults: Your Questions Answered*, AARP (Mar. 27, 2020), <https://www.aarp.org/health/conditions-treatments/info-2020/cdc-covid-19.html> (transcript of interview with Dr. Nancy Messonnier, Director of the CDC's National Center for Immunization and Respiratory Diseases) ("Older adults experience a gradual deterioration of their immune system, making it harder for their body to fight off diseases and infection.").

microbe.

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Another age-related change keeps T cells away from battle. Even before T cells enter the fray, other cells recognize invaders and dispatch natural killer cells and other soldiers to destroy as many as possible in the first few hours after infection. Then these same front-line cells literally show the virus to T cells, saying in essence, *this is the enemy; produce virus-killing compounds.*

"But this communication doesn't work as well as we get older," Nikolich-Zugich said. The instructor cells grow scarce and start to do the biological equivalent of mumbling. T cells therefore respond too late and too little. Antibodies are made by B cells. . . . But old B cells, like old factories, can't produce as much of their product—antibodies—as when they were new. . . .

As if old age weren't cruel enough, it brings one more change to the immune system: It slows down how quickly natural killer cells and other first responders hand off the defense to activated T cells and B cells. . . .<sup>95</sup>

The ADA prohibits any employer from "discriminat[ing] against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment."<sup>96</sup> Although, as discussed above, a CDC high-risk faculty member who applied for an exemption from in-

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95. Sharon Begley, *What Explains Covid-19's Lethality for the Elderly? Scientists Look to 'Twilight' of the Immune System*, STAT (Mar. 30, 2020), <https://www.statnews.com/2020/03/30/what-explains-coronavirus-lethality-for-elderly/>. To similar effect, see Peter J. Delves, *Overview of the Immune System*, MERCK MANUALS (Apr. 2020), <https://www.merckmanuals.com/professional/immunology-allergic-disorders/biology-of-the-immune-system/overview-of-the-immune-system#>.

96. 42 U.S.C. § 12112(a). Under the ADA, the Equal Employment Opportunity Commission (EEOC) has primary investigative and enforcement authority over charges of disability-based employment discrimination. *Id.* § 12117. For more on the EEOC's role and the prerequisites for a lawsuit by the EEOC or the aggrieved employee, see *Filing a Lawsuit*, U.S. EQUAL EMP. OPPOR. COMM'N, <https://www.eeoc.gov/filing-lawsuit#:~:text=In%20most%20cases%2C%20the%20EEOC,which%20charges%20to%20litigate%20if> (last visited June 15, 2021); *How to File a Charge of Employment Discrimination*, U.S. EQUAL EMP. OPPOR. COMM'N, <https://www.eeoc.gov/how-file-charge-employment-discrimination> (last visited June 15, 2021).

person teaching in fall semester 2020 had a "disability" under the ADA, the university's refusal to grant him or her the exemption therefore did not violate the Act's prohibition on disability-based employment discrimination unless two conditions were met: first, there must have been disability-based *discrimination*; and second, a CDC high-risk faculty member must count as a "qualified" individual.

As to the first of those conditions, a university's refusal to exempt a CDC high-risk faculty member from a broad institutional mandate for in-person instruction may not seem, if taken at face value, to be "discrimination" at all. After all, how can a university be faulted for *discriminating* against CDC high-risk faculty—that is, for treating CDC high-risk faculty worse than other faculty—when all that the university has done is refuse to treat CDC high-risk faculty differently than other faculty? The short answer is that the ADA insists that employers treat persons with disabilities no worse than others not only in form but in substance as well: It prohibits employers not only from explicitly treating persons with disabilities worse than others but also from "utilizing standards, criteria, or methods of administration that have the *effect* of discrimination on the basis of disability."<sup>97</sup> By refusing during this pandemic to treat CDC high-risk faculty differently even though, with respect to the risk of severe illness if they contract the coronavirus, CDC high-risk faculty are *not* similarly situated to other faculty, a university discriminates in effect against CDC high-risk faculty. As faculty at increased risk of severe illness from the virus, CDC high-risk faculty are impacted very differently than other faculty by a university's across-the-board mandate for in-person teaching. To fulfill their employment contract, CDC high-risk faculty, unlike other faculty, must be willing every time they step into the classroom to take a risk of severe illness sufficiently high that the CDC, our nation's most authoritative voice on disease prevention, is telling them not to take it.

As to the second of the two conditions, "qualified individual," as defined in the Act, means someone who "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds."<sup>98</sup> Even though scholarship and service are important aspects of serving as a faculty member, a university surely is justified in saying that teaching is at least as important and is an "essential function" of the job. In response, however, CDC high-risk faculty claiming that they were

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97. 42 U.S.C. § 12112(b)(3)(A) (emphasis added).

98. *Id.* § 12111(8).

wrongly denied an exemption from in-person teaching in fall semester 2020 could persuasively argue that, although they couldn't reasonably be expected to provide in-person teaching because of the health risk they would incur in doing so, the "essential function" is teaching, not in-person teaching, and they would have performed that function well if given the "reasonable accommodation" of the latitude to teach online. The persuasiveness of that argument depends on an assumption that we already have defended and see no need to defend at greater length here: that, in the extraordinary circumstances that prevailed as fall semester 2020 was getting underway, teaching in person did not promise to provide a substantially better educational experience than teaching synchronously online.<sup>99</sup>

If allowing CDC high-risk faculty to teach online in fall semester 2020 indeed would have been a "reasonable accommodation," that doesn't settle under the ADA that a university employing CDC high-risk faculty was required to allow them to teach online. The question remains whether allowing the accommodation would have imposed an "undue hardship" on the university's "operation."<sup>100</sup> The Act defines "undue hardship" as "an action requiring significant difficulty or expense, when considered in light of [several] factors," including "the nature and cost of the accommodation," the employer's "overall financial resources," the accommodation's "impact" on the employer's "operation," and the nature of that "operation."<sup>101</sup> Although that definition does not limit "undue hardship" to adverse financial consequences, such consequences obviously lie at the heart of the definition. Moreover, in seeking to fend off a claim by CDC high-risk faculty that the ADA required that they be allowed to teach online in fall semester 2020 as a reasonable accommodation, universities surely could be expected to rely on such consequences. It is entirely another matter, however, whether such reliance would be justified, and we submit that it would not.

Universities could be expected to offer a number of different adverse-financial-consequences arguments, singly or in combination, as a defense to refusing to allow CDC high-risk faculty to teach online in fall semester 2020. For present purposes, we believe it is sufficient to focus on the two arguments that they probably are most apt to offer.<sup>102</sup>

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99. *See supra* Part II.D.

100. 42 U.S.C. § 12112(b)(5)(A).

101. *Id.* § 12111(10).

102. The arguments below draw on our earlier discussion, *see supra* text accompanying notes 74–78, of financial incentives to mandate in-person classes for fall semester 2020.

One argument would proceed basically along the following lines: The overwhelming majority of students crave in-person classes. If we had allowed CDC high-risk faculty to teach online in fall semester 2020, we would not have been able in good faith to promise our students that all or almost all their classes would be in person rather than online. If we hadn't been able to make them that promise, many of them would have either left to go to a university that could or taken an indefinite leave of absence. The negative impact on our operation of all those lost tuition payments and (in the case of undergraduates and others who usually would live on campus) lost room-and-board payments would have been enormous. Even in the short term, we could only have absorbed such losses by taking steps no one wants to see—laying off some faculty and staff, reducing others' salaries, eliminating various course offerings, slashing the athletic budget, and more. Furthermore, for all we knew at the start of fall semester 2020, the pandemic might well persist beyond that semester. We recognized that if it in fact did so, and if we continued to allow CDC high-risk faculty to teach online, we would be forced to take even more drastic measures to compensate for the lost income. We might even be forced to close.

A second argument, probably offered in tandem with the first, would focus on the students who would decide to remain at the university in fall semester 2020 even though the university could not promise them that all or almost all of their classes would be in person. The argument essentially would take the following form: Because students overwhelmingly prefer in-person classes, those who would remain would soon become unhappy about having fewer in-person class options than they would like. To the extent that some required or highly popular courses are only offered online, they would be even more unhappy. They could be expected to demand that we lower tuition to reflect the lesser educational experience that they feel they're getting. To avoid further alienating them and perhaps losing them in spring semester 2021 to transfer or indefinite leave, we would be forced to yield to their demand and then try to make up for the lost income with more of the kind of economizing steps described in the first argument.

The main problem with both arguments, and the principal reason they and other adverse-financial-consequences arguments fall well short of establishing an undue-hardship defense, is that they assume a level of student enthusiasm for in-person over online classes in fall semester 2020 that by all indications simply did not exist. First of all, it is important to recognize how very high a level of student enthusiasm for in-person classes is being assumed.



Keep in mind that the question at hand is *not* whether many students were sufficiently enthusiastic about in-person instruction to leave a university where students typically have taken all their classes in person if the university were to stop offering in-person classes altogether or even if the university were to change its curriculum to fifty percent in-person courses and fifty percent online. Instead, the question is whether many were *so* enthusiastic about in-person instruction that they would leave if the university were to go to roughly twenty-five percent online courses—a percentage that is the approximate percentage of faculty nationwide who are CDC high-risk and that is therefore also the approximate percentage of faculty whom a university adhering to the CDC's recommendations would exempt from in-person teaching.<sup>103</sup>

Second, it is also important to take into account the very unusual situation in which students found themselves as fall semester 2020 drew near. We readily concede that a very high percentage of students ordinarily may see in-person classes as a vital ingredient of their university educational experience. There was nothing ordinary, however, about getting their education in fall semester 2020 in the midst of a pandemic. The likelihood that many students had such unbridled enthusiasm for taking in-person classes in fall semester 2020 that they were prepared to transfer or take a leave of absence if it appeared that only seventy-five percent of their courses would be in person was slim at best.

Universities that assumed otherwise seemed to be proceeding on the basis of a simplistic and stereotypical view of their students' sensitivity to, and readiness to take, risks. Although the typical university student may well be substantially less risk-averse than the average person a generation or two

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103. A study published by the Kaiser Family Foundation in June 2020 included the following findings: “over 90 million adults are at greater risk for severe illness from COVID-19 due to underlying conditions or age”; “about 37.7 million were employed at a job or business in the prior year, including 10 million people age 65 and older”; and “at-risk workers comprise 24% of all adult workers.” Gary Claxton et al., *Almost One in Four Adult Workers Is Vulnerable to Severe Illness from COVID-19*, KAISER FAM. FOUND. (June 15, 2020), <https://www.kff.org/coronavirus-covid-19/issue-brief/almost-one-in-four-adult-workers-is-vulnerable-to-severe-illness-from-covid-19/>. Having located no statistics specifying the percentage of university faculty who are high-risk, we assume for present purposes that it is roughly the same as the percentage of high-risk adult workers. Of course, if that assumption is correct, it does not preclude the possibility that some university faculties are more than twenty-five percent high-risk faculty. However, we suggest that, even assuming that thirty or thirty-five percent of a university faculty is high-risk, a university can probably allow all the high-risk faculty to teach online and still not end up offering more than about twenty-five percent of its courses online. After all, for a variety of reasons, at least some high-risk faculty may decide not to take advantage of the opportunity to teach online.

older,<sup>104</sup> students who had a condition that put them in the CDC's high-risk category or who otherwise had experienced serious health problems surely had to be anything but eager to take the health risks entailed in attending in-person classes in fall semester 2020. Moreover, even if other students were not genuinely fearful of in-person classes, there is a huge difference between their not being fearful and their being so utterly fearless and single-minded in their enthusiasm for in-person teaching that the prospect of spending the coming semester at a university with only seventy-five percent of its courses in person would prompt them to transfer or take a leave.<sup>105</sup>

The likelihood that students were so enthusiastic about taking in-person classes in fall semester 2020 that they were ready to transfer or take a leave if only seventy-five percent of their courses would be in person is also belied by some very concrete evidence of what students were thinking at the time. At a number of universities that broadly mandated in-person classes, there were organized efforts with large numbers of student participants to get the university to rethink its plans. Some of the protests insisted that instruction be entirely online,<sup>106</sup> others called for much greater allowance for online instruction.<sup>107</sup> In addition, although nationwide polling data as fall semester

104. See Steinberg, *supra* note 59.

105. Universities that assumed that students had such enormous enthusiasm for taking in-person classes in fall semester 2020 that they would transfer or take a leave of absence if they realized that only seventy-five percent of their courses would be in person also may have been proceeding on a somewhat different, but also stereotypical and unflattering, view of students—a view of them as too idealistic or naïve or impetuous to recognize that the image of in-person classes that they may have in their minds from less turbulent times bears little relation to what in-person classes would be like during a pandemic. In general, university students may well be less prone than their elders to think through all the details of how one or another course of action will play out before deciding how to act. To assume, however, that as fall semester 2020 approached, with the coronavirus still raging out of control, students would blithely proceed on some Pollyannaish conception of the glories of in-person classes gives them far less credit than they deserve. It did not take a great deal of thought for even the strongest student proponents of in-person classes to recognize that whatever they ordinarily find so stimulating about in-person classes was not apt to be replicated in a classroom with a masked professor up front and masked and socially distanced classmates spread across the length and breadth of the room.

106. See, e.g., Colleen Flaherty, *Iowa Grad Students and Faculty Stage 'Sickout' to Protest Campus Reopening Plan*, INSIDE HIGHER ED (Sept. 3, 2020), <https://www.insidehighered.com/print/news/2020/09/03/iowa-grad-students-and-faculty-stage-sickout-protest-campus-reopening-plan> (recounting the “series of escalating calls” over the summer by undergraduates, graduate students, and faculty “to end face-to-face instruction” at the University of Iowa).

107. See, e.g., Charles Davis, *Protesters Stage 'Die-In' at University of Georgia over Plans for In-Person Classes*, BUS. INSIDER (Aug. 7, 2020), <https://www.businessinsider.com/protesters-stage-die-in-at-university-georgia-over-in-person-classes-2020-8> (“Students, faculty, and campus employees staged a ‘die-in’ . . . [They] laid prone on the grass lawn outside UGA’s administrative building.”).

2020 was approaching suggested that students were more likely than the general public to favor reopening campuses and not continuing the practice of entirely online instruction that was prevalent at universities in the second half of spring semester 2020,<sup>108</sup> the data also indicated broad student receptivity to some online instruction.<sup>109</sup> Under the circumstances, the assumption that a significant contingent of students was ready to uproot if their university offered less than seventy-five percent of courses in person is dubious at best.

Finally, universities' adverse-financial-consequences arguments not only are not very probative of "undue hardship" in and of themselves. They are even less probative when the costs saved by averting potentially very costly lawsuits under the several sources discussed in this article are taken into account.

#### IV. THE AGE DISCRIMINATION IN EMPLOYMENT ACT

Like the ADA, the Age Discrimination in Employment Act (ADEA) takes aim at a type of discrimination that American society increasingly has come to recognize as rooted in unfair and harmful stereotypes.<sup>110</sup> Also like the ADA, the ADEA represents a statement of strong national policy endorsed by overwhelming, bipartisan majorities in both houses of Congress.<sup>111</sup>

108. See Lilah Burke, *College Students Want In-Person Classes Despite Pandemic, Poll Finds*, INSIDE HIGHER ED (Aug. 12, 2020), <https://www.insidehighered.com/print/news/2020/08/12/college-students-want-person-classes-despite-pandemic-poll-finds>.

109. See *id.* (“[Twenty-six] percent of college students said offering ‘only online classes’ was the right way to go. . . . More than half of college students surveyed said they believe universities should bring some students back to campus and run hybrid classes, while 22 percent said universities should allow all students to return for in-person classes.”).

110. As Justice Souter wrote for the Court in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), in describing a report from Secretary of Labor Wirtz to Congress that laid the groundwork for the ADEA, “The Secretary spoke of disadvantage to older individuals from arbitrary and stereotypical employment distinctions. . . . [H]e placed his recommendation against the background of common experience that the potential cost of employing someone rises with age, so that the older an employee is, the greater the inducement to prefer a younger substitute.” *Id.* at 587. Similarly, in describing the testimony at the hearings in the Senate and the House that preceded adoption of the ADEA, Justice Souter pointed out that it “dwelled on unjustified assumptions about the effect of age on ability to work” and “reflect[ed] the common facts that an individual’s chances to find and keep a job get worse over time; as between any two people, the younger is in the stronger position, the older more apt to be tagged with demeaning stereotype.” *Id.* at 588–89.

111. A month after the Senate by voice vote had passed a bill similar to one being considered in the House, the House passed its bill by a 344–13 roll-call vote. By voice vote, the Senate then adopted the House bill with minor amendments, after which the House by voice vote approved the amended bill. See *Age Discrimination*, CQ PRESS (1967), <https://library.cqpress.com/cqalmanac/document.php?id=cqal67-1314937>. For discussion and critical analysis of the history of the ADEA’s

The ADEA protects those forty and older from age-based employment discrimination.<sup>112</sup> Though not immediately apparent from its text, it allows for two basic types of claims of age-based employment discrimination and permits employers a defense against one type of claim that is quite different from the defense permitted against the other type. In relevant part, the Act provides:

#### **Section 4. Prohibition of Age Discrimination**

##### **(a) Employer practices**

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . .

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##### **(f) Lawful practices; age an occupational qualification; other reasonable factors. . .**

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enactment, the Act itself, and related developments, see RAYMOND F. GREGORY, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE (2001); Howard C. Eglit, *The Age Discrimination in Employment Act at Thirty: Where It's Been, Where It Is Today, Where It's Going*, 31 U. RICH. L. REV. 579 (1997); Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers Benefit Protection Act*, 79 VA. L. REV. 1271 (1993); David Neumark, *Reassessing the Age Discrimination in Employment Act*, AARP PUB. POL'Y INST. (June 2008), <https://www.aarp.org/content/dam/aarp/ppi/reassessing-the-age-discrimination-in-employment-act.pdf.pdf>.

112. 29 U.S.C. § 631. The ADEA makes the EEOC the federal agency charged with investigative and enforcement authority of employment discrimination claims under the Act. *Id.* § 626. For more on the enforcement process and available remedies under the ADEA, see Jody Feder, *The Age Discrimination in Employment Act (ADEA): A Legal Overview*, CONG. RSCH. SERV. 10–13 (June 23, 2010), <https://www.llsdc.org/assets/sourcebook/crs-r134652.pdf>; *Filing a Lawsuit*, *supra* note 96; *How to File a Charge of Employment Discrimination*, *supra* note 96.

It shall not be unlawful for an employer. . .—

(1) to take any action otherwise prohibited under subsection[] (a) . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age. . . .<sup>113</sup>

According to the Supreme Court's interpretations of the preceding text, a claim arises under § 4(a)(1) if it alleges that the employer is using age as a basis for classification by treating older job applicants or employees as a group worse in some way than younger job applicants or employees as a group. To defend successfully against such a "disparate treatment" claim, an employer must show that its use of age as a basis for classification is strongly justified in terms of the effective operation of its business.<sup>114</sup> On the other hand, a claim arises under § 4(a)(2) if it alleges that the employer, though not classifying on the basis of age, is acting pursuant to a policy that disproportionately negatively impacts older job applicants or employees relative to younger ones. To defend successfully against such a "disparate impact" claim, an employer must show that its policy is reasonable in light of a factor other than age.<sup>115</sup> The Court has made clear that the latter reasonableness requirement is not only much less demanding than the justification required to defeat an ADEA disparate-treatment claim but also relatively lenient by comparison with the justification required in disparate-impact cases arising under Title VII of the Civil Rights Act of 1964, which protects against employment discrimination "because of" a person's "race, color, religion, sex, or national origin."<sup>116</sup>

As fall semester 2020 drew near, universities seeking to comply with the ADEA needed to recognize as an initial matter that although a general mandate that faculty must teach their classes in person may appear to be age-neutral on its face, it is anything but age-neutral in fact. Taken entirely at face

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113. 29 U.S.C. § 623.

114. *See* *Smith v. City of Jackson*, 544 U.S. 228, 233 n.3 (2005).

115. *See* *Meacham v. Knolls Atomic Power Lab'y*, 554 U.S. 84, 91–96 (2008); *City of Jackson*, 544 U.S. at 239–40.

116. 42 U.S.C. § 2000e-2(a); *see City of Jackson*, 544 U.S. at 240–41 (underlining the significance of Congress's amendment of Title VII in 1991 to "modify" a Supreme Court decision "narrowly constru[ing] the employer's exposure to liability on a disparate-impact theory," while enacting no such amendment to the ADEA).

value, the mandate does appear to be treating all faculty the same regardless of age. It says to everyone, "You are a faculty member. Therefore, you must teach your classes in person." However, taking the mandate entirely at face value for purposes of fall semester 2020—a semester that plainly would begin, and might well end, with the nation locked in mortal combat with a deadly virus—would have ignored the indisputable reality that the mandate would affect faculty age sixty-five and older much differently than younger faculty. By the time that semester was getting under way, the CDC, the federal agency uniquely qualified to speak authoritatively to the people of the United States about the pandemic, had been saying for months that people age sixty-five and older were at increased risk of severe illness if they contracted the virus and that it was therefore "especially important" that they take "extra precautions" to avoid contracting it.<sup>117</sup> Under the circumstances, a university mandate that all faculty teach their classes in person couldn't help but send very different messages to, and make very different demands on, faculty depending on their age. To faculty age sixty-five and older, the university in effect was saying: To be in compliance with your contract, you, unlike younger faculty, don't need simply to teach your classes. You also must be willing to expose yourself to a risk of severe illness that is not only substantially higher than the risk to which your younger colleagues must expose themselves but also higher than the level of risk to which the CDC thinks it is safe for you to be exposed.

Realistically, then, in planning for fall semester 2020, a university had to acknowledge that a broad mandate for in-person teaching would significantly disadvantage faculty age sixty-five and older relative to younger faculty. The crucial question for the university in terms of the ADEA then would have become whether the mandate's disadvantaging effect was best understood as "disparate treatment" or "disparate impact." As discussed above, a great deal turns on whether someone claiming a violation of the ADEA can show disparate treatment, as opposed to disparate impact, because the former requires the employer to provide a much stronger justification. In the context at hand, it probably was tempting for a university to assume that, in insisting on an exemption from the mandate, faculty age sixty-five and older could show no more than disparate impact. After all, the mandate on its face is not explicitly treating anyone disadvantageously on the basis of age; age is not even in the picture. Age only comes into the picture as a consideration when

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117. *See supra* Part II.B.

the mandate's different impact on faculty sixty-five and older and younger faculty is taken into account.

Ultimately, however, any university that assumed that the mandate raised only a disparate impact issue failed to grasp the essence of the discrimination at hand. The disproportionate negative impact that the mandate inevitably would have in fall semester 2020 on faculty age sixty-five and older relative to younger faculty was different in kind, not simply in degree, from the typical disproportionate negative impact in disparate impact cases. Consider, for example, a university's ordering, as an economizing measure, a salary cut of ten percent for faculty in the top quartile of faculty salary earners in the university. The salary cut undoubtedly would disproportionately disadvantage faculty age sixty-five and older relative to younger faculty, because faculty sixty-five and older are those most likely at the institution the longest, and those there the longest are most likely those with the highest salaries. Being sixty-five or older does not necessarily mean, however, that a faculty member will be among those whose salary gets cut. For any number of reasons, some faculty members in that age group may not be in the top quartile of faculty salary earners.<sup>118</sup>

A university mandate for fall semester 2020 that everyone teach in-person classes presented an entirely different kind of problem. The problem was not that the mandate would negatively impact a substantially higher proportion of faculty age sixty-five and older than younger faculty. Instead, it was that the mandate would negatively impact every single faculty member sixty-five or older because of his or her age. Because being sixty-five or older means having a significantly weakened immune system,<sup>119</sup> the mandate invariably required faculty in that age group to make an excruciating choice that younger faculty were spared: bow to the mandate and teach in person despite the CDC's

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118. For example, a faculty member in that age group may have gone into teaching only in the past decade, and when she started, her salary was not much above that of a new assistant professor. Perhaps another came to the university only five years ago after teaching for many years at a university with a much lower salary scale. Perhaps a third has been teaching at the university for several decades but has not had a significant raise in years because he has published very little.

119. When we say that being sixty-five or older "means" having a significantly weakened immune system, we are not saying that it is absolutely impossible for someone sixty-five or older to have an immune system that has not deteriorated quite a bit over the years. As we understand the medical authorities, however, it would be highly unusual for someone sixty-five or older to meet that description, and most importantly for present purposes, it seems exceptionally unlikely that the very rare person sixty-five or older fortunate enough not to have a significantly weakened immune system would be sufficiently aware of, and confident about, that good fortune not to feel that an in-person teaching mandate is putting them to an excruciating choice.

warning that doing so entailed an unreasonable risk of serious illness or death at the hands of the coronavirus; or disobey the mandate and refuse to teach in person despite the prospect of going uncompensated for the semester and perhaps being dismissed. That was disparate treatment, not merely disparate impact. Accordingly, the mandate violated the rights of faculty sixty-five and older under the ADEA unless the university could meet the high standard of justification that the ADEA requires employers to meet when they use age as a basis for classification. For the same reasons that a university could not make the "undue hardship" showing required to justify disability-based discrimination under the ADA, it couldn't make the requisite showing to justify the age-based discrimination at hand under the ADEA.

In our view, a university mandate for in-person classes in fall semester 2020 therefore violated the ADEA unless faculty sixty-five and over were exempted from the mandate. Before leaving this topic, we want to address briefly two possible objections to our characterization of the claim at issue as one of disparate treatment, rather than disparate impact. The first objection might go as follows: Because faculty sixty-five and older are not the only faculty at increased risk according to the CDC, they were not the only faculty whom the mandate forced to make the excruciating choice for fall semester 2020 described above. The mandate had the same effect on younger faculty members whom the university did not exempt from the mandate despite their having a medical condition that, according to the CDC, indicated increased risk. The fact that some faculty under sixty-five faced the same excruciating choice as faculty sixty-five and over means that the claim by those sixty-five and over for an exemption from the mandate was not really an age-based claim and therefore should be judged by the relatively lenient reasonableness standard applicable to disparate impact claims—a standard that the university could much more easily meet.<sup>120</sup>

The fatal flaw in this logic lies in the assumption that the mandate did not treat faculty differently on the basis of age in fall semester 2020 unless the *only* faculty disadvantaged by the mandate were faculty sixty-five and over. That's simply not what treating people differently on the basis of age—or, for that matter, treating people differently on the basis of any characteristic—means. Assume, for example, that a state has a law that no one may practice

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120. Although the university probably would be able to meet that standard, we do not rule out the possibility that it might not be able to do so. As discussed *supra* text accompanying notes 100–109, the university's financial arguments in support of an in-person teaching mandate that does not exempt CDC high-risk faculty are tenuous.



law in the state who is age sixty-five or older. No one would question that the law treats people differently on the basis of age, uses age as a basis for classification, fits neatly into the "disparate treatment" mold, and can't survive the demanding standard of ADEA review thereby triggered. Can the state salvage the law by amending it to specify other characteristics that the state wishes to use as disqualifications to practice law, such as conviction of a felony in the past decade, failure of the state bar exam three times, and violation of the state professional responsibility code's prohibition on commingling a client's funds with one's own? Do those amendments in effect erase the age classification and transform the age discrimination issue at hand into the much more readily defended "disparate impact" form?

As should be apparent, the answer to both questions is "no." In keeping with that reasoning, when a university says to faculty sixty-five and over, explicitly or implicitly, "because of your age, if you want to teach here, you need to take a substantially greater health risk than younger faculty have to take," the university is treating faculty differently on the basis of age, engaging in disparate treatment employment discrimination, and triggering the high standard of justification required by disparate treatment—a standard that it can't even arguably meet. None of that changes simply because the university is also unwilling to give the CDC's warnings about the health risks posed by certain medical conditions the credence that they deserve.

A second possible objection to our characterization of the ADEA claim at issue as one of disparate treatment, rather than disparate impact, might be predicated on the notion that in refusing to exempt faculty sixty-five and over from the in-person teaching mandate, the university didn't have the type of intent required for a disparate treatment claim. As an initial matter, we can quickly dispose of such an objection insofar as it questions whether a university can fairly be charged with knowing that the CDC considers people sixty-five and over to be people at increased risk of severe illness from the virus. Very simply, given the CDC's leadership role during this pandemic and the extensive news coverage that the CDC's guidelines have received, it would be a feat of extraordinary willful ignorance for a university administration to be unaware of the CDC's special concern about people sixty-five and over.

The objection is more difficult to dismiss to the extent that it is instead insisting that, for disparate treatment under the ADEA to exist, the university had to have more than simply awareness that in fall semester 2020 its mandate of in-person classes would distinctly disadvantage one group of faculty because of their age. It might be argued, for example, that there needs to be

some showing of animus on the part of the administration toward those sixty-five and over. Alternatively, it might be argued that there at least needs to be good reason to believe that the administration did not exempt those sixty-five and over because it harbored the kind of negative stereotypes about older people that prompted adoption of the ADEA.

Several decades ago, the Supreme Court in *EEOC v. Wyoming*<sup>121</sup> implicitly rejected the first of those two arguments when it described as follows the understanding of age discrimination that led Congress to enact the ADEA: "Although age discrimination rarely was based on the sort of animus motivating some other forms of discrimination, it was based in large part on stereotypes unsupported by objective fact."<sup>122</sup> Surely animus needn't be a necessary ingredient of an ADEA claimant's showing if, as the Court maintained, Congress enacted a wide-ranging prohibition on age-based employment discrimination while assuming that genuine animus against older people is rarely to be found.

As for the second argument, there is no doubt that, as the Supreme Court has explained, "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."<sup>123</sup> The reality, however, that Congress in the ADEA took aim at age-based employment discrimination out of a concern with underlying unfair stereotypes does not imply that an ADEA claimant has any obligation to prove that such a stereotype is at work in his or her case. In fact, the notion that there is any such obligation is at odds with the way in which the Supreme Court has long dealt with claims of discrimination on the basis of any characteristic that, under federal statutory or constitutional law, is thought to call for more than rational basis review. The Court treats the disparate treatment on the basis of "the protected trait (under the ADEA, age)"<sup>124</sup> as presumptively predicated on an unfair stereotype, but it has not made identification or proof of such a stereotype part of the claimant's burden of proof. Historically, this dynamic is perhaps most obvious in the Court's approach to equal protection challenges to laws disadvantaging racial minorities. Although the Court's characterizing such racial classifications as "suspect" and requiring that they be struck down unless necessary to a compelling state interest is rooted in a deep concern

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121. 460 U.S. 226 (1983).

122. *Id.* at 231.

123. *Hazen Paper Co. v. Higgins*, 507 U.S. 604, 610 (1993).

124. *Id.*

about underlying unfair stereotypes,<sup>125</sup> the Court has not required the claimant to show that such a stereotype explains the existence of the discrimination at hand.

Finally, it is worth noting that, if faculty sixty-five and over had to show that negative stereotyping was at work in order to be successful under the ADEA in challenging a university's holding them to an in-person teaching mandate for fall semester 2020, they almost certainly could do so. First of all, consider employers' longstanding, and not exactly laudatory, tendency to see older employees as increasingly less productive and able. As the Supreme Court has observed, "It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."<sup>126</sup> Second, consider also the reality that as older employees age, the cost of retaining them increasingly tends to outstrip the cost of hiring new ones. As the Court explained in describing the report by the Secretary of Labor that played such an instrumental role in the enactment of the ADEA:

When the Secretary ultimately took the position that arbitrary discrimination against older workers was widespread and persistent enough to call for a federal legislative remedy, he placed his recommendation against the background of common experience that the potential cost of employing someone rises with age, so that the older an employee is, the greater the inducement to prefer a younger substitute.<sup>127</sup>

Now add to those two considerations, which pertain to employers generally, a third one that pertains specifically to universities as employers: universities' special gripe with the ADEA because of the "deeply toxic" effect, as former Harvard president Lawrence Summers so indelicately put it, of eliminating mandatory retirement in an industry—higher education—in which the faculty-employees commonly earn tenure.<sup>128</sup>

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125. See Gary J. Simson, *Racially Neutral in Form, Racially Discriminatory in Fact: The Implications for Voting Rights of Giving Disproportionate Racial Impact the Constitutional Importance It Deserves*, 71 MERCER L. REV. 811, 842–45 (2020).

126. *Hazen Paper Co.*, 507 U.S. at 610.

127. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587 (2004) (citation omitted).

128. See Daniel de Vise, *Larry Summers on Some of Higher Education's "Bad Ideas,"* WASH. POST (Nov. 11, 2011), [https://www.washingtonpost.com/blogs/college-inc/post/larry-summers-on-some-of-higher-educations-bad-ideas/2011/11/09/gIQAdFubCN\\_blog.html](https://www.washingtonpost.com/blogs/college-inc/post/larry-summers-on-some-of-higher-educations-bad-ideas/2011/11/09/gIQAdFubCN_blog.html). For more on the topic, see

In light of those three considerations, is it anything but realistic to think that negative stereotypes, along with a sense of opportunity, was fueling the decisions of those universities that in fall semester 2020 did not exempt faculty sixty-five and older from in-person teaching mandates? Few faculty haven't given some thought by age sixty-five to how many more years they plan to continue teaching full-time. If so, as the fall 2020 semester drew near, weren't faculty sixty-five and older apt to find the prospect of retiring much more inviting than either (a) teaching in person and taking a significant risk of life-threatening illness or (b) refusing to teach in person and risking the humiliation of dismissal? Simultaneously, from the perspective of university administrations worried about keeping the institution financially afloat during a pandemic and long unhappy with the ADEA's elimination of mandatory retirement, didn't it have to be very tempting to give faculty sixty-five and older a firm nudge toward retirement by insisting that they abide by the in-person teaching mandate?

We suggest that, in deciding whether a university violated the ADEA in fall semester 2020 by refusing to exempt faculty sixty-five and over from a broad in-person teaching mandate, it is very helpful to think about the preceding questions even if the university also denied exemptions to various other categories of CDC high-risk faculty. The fewer the other categories denied an exemption, however, the louder these questions seem to cry out "age discrimination." Moreover, if, as fall semester 2020 drew near, a university began offering buyouts or other incentives to retire immediately, the inference that negative stereotypes and opportunism were driving the university's refusal to exempt faculty age sixty-five and over becomes almost impossible to resist.

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Marcella Bombardieri, *Graying of US Academia Stirs Debate*, BOS. GLOBE (Dec. 27, 2006), [http://archive.boston.com/news/education/higher/articles/2006/12/27/graying\\_of\\_us\\_academia\\_stirs\\_debate/](http://archive.boston.com/news/education/higher/articles/2006/12/27/graying_of_us_academia_stirs_debate/); Beverley Earle & Marianne DelPo Kulow, *The "Deeply Toxic" Damage Caused by the Abolition of Mandatory Retirement and Its Collision with Tenure in Higher Education: A Proposal for Statutory Repair*, 24 S. CAL. INTERDISC. L.J. 369 (2015). As enacted in 1967, the ADEA protected employees against age discrimination only until sixty-five. In the 1980s, it was first amended to extend protection until seventy and then amended to eliminate the age limit on protection altogether. When Congress enacted the latter amendment, it simultaneously made special provision for universities. Presumably to allow universities some time to plan for an era of tenured faculty who could not be made to retire because of age, Congress maintained through 1993 the status quo of protecting faculty from age discrimination only until age seventy. See *Age Discrimination*, NOLO, <https://www.nolo.com/legal-encyclopedia/age-discrimination> (last visited June 15, 2021); Earle & Kulow, *supra*, at 369–70.

## V. INTENTIONAL INFLICTION OF PHYSICAL HARM

For many years, an employee's ability to recover from the employer for a workplace injury depended on showing that the injury was the result of the employer's negligence. Absent persuasive evidence that the employer had failed to take reasonable care to provide employees with a safe workplace and that such failure caused the employee to suffer workplace injury, the employee would go uncompensated for his or her loss.<sup>129</sup>

With the adoption in every state of a workers' compensation statute, employees have been relieved of the burden of having to establish the employer's negligence in order to be compensated for workplace injury. Employers, in turn, benefit from workers' compensation statutes in two ways. First, the injured employee no longer has the option of suing the employer for negligence. The employee's exclusive remedy for any workplace injury caused by the employer's negligence is the one afforded by the workers' compensation system. Second, the injured employee's essentially no-fault recovery under workers' compensation typically is substantially less than the employee would have recovered if the employee were still able to sue the employer for negligence and had prevailed.<sup>130</sup>

An employee (or his or her survivors) seeking compensation for illness (or death) caused by contracting the coronavirus at work faces a hurdle not usually faced by workers' compensation claimants: proving that the alleged workplace injury indeed happened at work. That often can be a formidable hurdle because "the virus is difficult to track and widely spread,"<sup>131</sup> but the hurdle is by no means always insurmountable. In particular, "[i]f there is a large cluster of cases in a small workplace, that would increase the probability

129. See, e.g., *Mather v. Rillson*, 156 U.S. 391 (1895); *Holstun & Son v. Embry*, 169 So. 400 (Fla. 1936).

130. Some states allow employers to opt out of their workers' compensation system. If an employer does so, it is subject to negligence suits by employees for workplace injuries, and the state workers' compensation statute may include provisions facilitating employee recovery in such suits by eliminating traditional common-law defenses such as contributory negligence and assumption of risk. See, e.g., TEX. LAB. CODE § 406.033(a); *Austin v. Kroger Texas, L.P.*, 465 S.W.3d 193 (Tex. 2015).

131. See Kristine White, *Can My Employees Sue if They Get Coronavirus?*, BARRON'S (June 3, 2020), <https://www.barrons.com/articles/can-my-employees-sue-if-they-get-coronavirus-51591697293>; see also Alexis Elejalde-Ruiz, *If You Get Sick with COVID-19, Is Your Employer Liable? As Businesses Prepare to Reopen, Worker Safety Is a Priority*, CHI. TRIB. (May 4, 2020), <https://www.chicagotribune.com/coronavirus/ct-coronavirus-employer-liability-workplace-exposure020200501-dye6husnszchpnpaadiensn2ja-story.html> ("[R]equiring employees to prove that their workplace was the cause of the illness . . . can be a high bar given that the highly contagious coronavirus seems to lurk everywhere.").

that the employee caught the virus there."<sup>132</sup> In the university context, it isn't difficult to imagine, for example, a faculty member making a persuasive showing that he or she contracted the coronavirus at work by establishing that, in the relevant time period, an unusually high proportion of students in one of his or her classes was out ill with the virus or tested positive for it.

If a university's potential liability to a faculty member who can prove he or she contracted the coronavirus at work were limited to the workers' compensation recovery, the university might well regard that potential liability as not all that daunting, particularly because universities, like other employers, typically purchase workers' compensation insurance. In the context that is the focal point of this article, however, a university's potential liability frequently is *not* limited to the workers' compensation recovery. As discussed below, if a CDC high-risk faculty member requested, and was refused, an exemption for fall semester 2020 from a university in-person teaching requirement, and if that faculty member then contracted the coronavirus during that semester and can show a high likelihood that he or she contracted it in class, the faculty member can recover under the law of many states for intentional infliction of physical harm.

Although a workers' compensation recovery is an employee's exclusive remedy for any workplace injury caused by the employer's negligence, employees are not barred from seeking compensation in court for harms that employers inflict on them by intentional torts.<sup>133</sup> For many years, courts took a very narrow view of which torts are sufficiently intentional to avoid the workers' compensation system's exclusive-remedy restriction. In essence, the employee needed to show that the employer was seeking to harm him or her.<sup>134</sup> In the context of workplace hazards, unless an injured employee could prove that the employer not only knew of the hazard but concealed or maintained it out of a desire to injure the employee, the court would rule that the employer's behavior was not sufficiently intentional to avoid the restriction.<sup>135</sup> In the late twentieth century, however, some courts began to break away from this

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132. White, *supra* note 131 (paraphrasing Missouri attorney Samantha Monsees).

133. See 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 1 cmt. a, at 4–5 (AM. L. INST. 2009).

134. See *id.* at 5 (“Obviously, if the employer, angry at the employee, punches the employee in the nose, the employer’s tort is intentional in a way that permits a tort claim by the employee against the employer.”); Barbara J. Tucker, Comment, *Tort Liability for Employers Who Create Workplace Conditions “Substantially Certain” to Cause Injury or Death*, 50 MONT. L. REV. 371, 372 (1989).

135. See Tucker, *supra* note 134, at 380–85.

narrow conception of intentional wrongdoing.<sup>136</sup> Instead, often relying on the more expansive conception of intentionality in the American Law Institute's (ALI's) *Second Restatement of Torts*,<sup>137</sup> courts increasingly have taken the view that intentionality exists when the employer acts in a way that the employer knows is "substantially certain"<sup>138</sup> to cause physical harm.<sup>139</sup> The fact that there may be no evidence that the employer wants to harm the employee is treated as beside the point.

Under this view, a university that refused to exempt CDC high-risk faculty in fall semester 2020 from a general mandate to teach in person opened itself to an intentional tort suit by CDC high-risk faculty who can credibly claim that they contracted the coronavirus at work. Such faculty would not need to show that the university was out to harm them when it required them to abide by the in-person teaching mandate. Rather, it would be sufficient for them to show that the university couldn't help but know that requiring CDC high-risk faculty to teach in person was substantially certain to cause at least some CDC high-risk faculty to contract the virus and become severely ill. For reasons already discussed in Part II.C, they are apt to be able to make that showing.

## VI. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

Prior to the 1940s, states allowed recovery for intentional infliction of emotional distress only in very limited circumstances, if at all.<sup>140</sup> However, by the early 2000s, every state had adopted, verbatim or with minor variation, the more expansive approach to intentional infliction of emotional distress that the ALI had taken when it finalized the *Second Restatement of Torts* in

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136. See, e.g., *Beauchamp v. Dow Chem. Co.*, 398 N.W.2d 882 (Mich. 1986); *Jones v. VIP Dev. Co.*, 472 N.E.2d 1046 (Ohio 1984).

137. RESTATEMENT (SECOND) OF TORTS § 8A (AM. L. INST. 1965) ("The word 'intent' is used . . . to denote that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.").

138. *Id.*

139. 1 RESTATEMENT (THIRD), *supra* note 133, § 1 cmt. a, at 5. Although the *Third Restatement* defines "intent" somewhat differently than the *Second Restatement* had done, see *supra* note 137, it retains the "substantially certain" language: "A person acts with the intent to produce a consequence if: (a) the person acts with the purpose of producing that consequence; or (b) the person acts knowing that the consequence is substantially certain to result." 1 RESTATEMENT (THIRD), *supra* note 133, § 1.

140. John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 795–97 (2007).

1965.<sup>141</sup> According to the *Second Restatement*, "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."<sup>142</sup> Almost a half-century later, when the ALI approved, as part of a new *Third Restatement of Torts*, two volumes focusing on liability for physical and emotional harm, it essentially perpetuated the *Second Restatement* approach to intentional infliction of emotional distress. The relevant provision now reads, "An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm."<sup>143</sup> The ALI's approach is generally understood to require the plaintiff to prove four elements: The defendant's conduct was (1) intentional or reckless, (2) extreme and outrageous, and (3) causally connected to the claimed emotional harm. In addition, (4) the emotional harm was severe.<sup>144</sup>

If, for fall semester 2020, a university denied a CDC high-risk faculty member an exemption from a university in-person teaching mandate, the faculty member may well be able to prove all four of those elements. The faculty member's argument would be relatively straightforward and essentially go as follows: The university where I work knowingly and recklessly caused me enormous stress, anxiety, and other emotional harm by requiring me to teach in person in fall semester 2020 even though the CDC, the nation's foremost authority on disease control and prevention, essentially was telling me that if I, a person in a CDC high-risk group, value my life and health, I must not do so. The university forced me to make an agonizing and unwinnable choice: either (a) teach in person and run a risk of severe illness that the CDC was telling me is unacceptably high or (b) refuse to teach in person, go uncompensated for the semester, and risk dismissal for nonperformance of my teaching duties. Meanwhile, at little, if any, cost to itself and the educational process, the university could have avoided forcing me to make that choice by allowing me to teach online.

In terms of the four elements that need to be proved for a claim of

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141. *Id.* at 806.

142. RESTATEMENT (SECOND), *supra* note 137, § 46(1).

143. 2 RESTATEMENT (THIRD), *supra* note 133, § 46.

144. *See, e.g.*, *Phinazee v. Interstate Nationallease, Inc.*, 514 S.E.2d 843, 844–45 (Ga. Ct. App. 1999); Daniel Givelber, *The Right to Minimum Social Decency, and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 46 (1982).



intentional infliction of emotional distress to succeed, it seems apparent that the third and fourth elements—causal connection and severe emotional harm, respectively—are met. The first element—the harmful conduct is intentional or reckless—is perhaps not *as* clearly met, but it very likely *is* met. In official comment *h* to its section stating the elements of the tort, the *Third Restatement* says the following about the requisite showing of the defendant's state of mind:

An actor intends severe emotional harm when the actor acts with the purpose of causing severe emotional harm or acts knowing that severe emotional harm is substantially certain to result. An actor acts recklessly when the actor knows of the risk of severe emotional harm (or knows facts that make the risk obvious) and fails to take a precaution that would eliminate or reduce the risk even though the burden is slight relative to the magnitude of the risk, thereby demonstrating the actor's indifference.<sup>145</sup>

Concededly, in requiring a CDC high-risk faculty member to teach in person in fall semester 2020 even though, according to the CDC's findings and recommendations, he or she should not have been doing so, the university almost certainly was not acting with the *purpose* of causing the faculty member severe emotional harm. Whatever the university's motivation in denying an exemption may have been, it's unfair to assume that it must have been animus or malice toward the faculty member. As indicated, though, in official comment *h*, a defendant needn't be acting with a purpose of causing severe emotional harm to be found to be intentionally causing that harm. Such a finding is also warranted if the defendant acts with the knowledge that severe emotional harm is very likely to result.

In the roughly five months between the pandemic's emergence in March 2020 and the start of the fall 2020 semester, there were countless statements in the media by the CDC, by the longtime director of the National Institute of Allergy and Infectious Diseases, Dr. Anthony Fauci,<sup>146</sup> and by other widely respected public health authorities about the health risks posed by the

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145. 2 RESTATEMENT (THIRD), *supra* note 133, § 46 cmt. h.

146. In truth, it's hard to think of anyone holding public office today, other than President Biden, less in need of identifying citation than Dr. Fauci. In keeping, however, with law review citation traditions: See James A. Wynn, *Human Rights Hero: Dr. Anthony S. Fauci*, ABA HUM. RTS. MAG. (June 2021), [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/the-truth-about-science/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-truth-about-science/).

coronavirus. During that time period, there were also innumerable media accounts of the deaths and serious illness wrought by the pandemic and the terrible strain that the pandemic was placing on the healthcare system.<sup>147</sup> Under the circumstances, it would be quite a stretch for any university to argue that, in requiring CDC high-risk faculty to teach in person in fall semester 2020, it was unaware of the ease with which the virus can be contracted and the dire effects that the virus can have on CDC high-risk persons' health. By the same token, the university couldn't credibly argue that, in insisting that a CDC high-risk faculty member teach in person, it was unaware that it was forcing the faculty member to make a deeply unsettling choice—a choice highly likely to cause him or her to suffer severe emotional harm.<sup>148</sup>

Even assuming, for purposes of argument, that a university could somehow show that, in requiring CDC high-risk faculty to teach in person, it lacked the requisite knowledge to be found liable for *knowingly* inflicting emotional harm, it would be even more of a herculean feat for it to show that it didn't *recklessly* inflict such harm. If "recklessly" is understood in accordance with official comment *h*, the university could avoid a charge of recklessness if it could show that it really had no good alternative to requiring the CDC high-risk faculty member to teach in person. To borrow some of that comment's language: The college or university only acted recklessly if there was a "precaution" that the university could have taken to "eliminate or reduce the risk" of severe emotional harm but "fail[ed] to take," even though doing so would have meant taking on a "burden" that was "slight relative to the magnitude of the risk." Did such a precaution exist? Very simply, yes: Allow every CDC high-risk faculty member the option of teaching online.

Ultimately, whether or not a university's requiring CDC high-risk faculty to teach in person in fall semester 2020 qualifies as intentional infliction of

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147. See, e.g., *Coronavirus News—May 2020*, HARV. SCH. PUB. HEALTH (May 2020), <https://www.hsph.harvard.edu/news/hsph-in-the-news/coronavirus-news-may-2020/> (synopses of, and links to, news stories by media across the United States in the month of May 2020).

148. Professor Givelber has suggested that in some instances a defendant has not knowingly inflicted emotional distress because "the defendant is so insensitive to the feelings of others that it is believable that the defendant had no idea that his or her outrageous behavior toward plaintiff would inflict severe emotional distress." Givelber, *supra* note 144, at 46–47. Although such instances are imaginable with individual defendants, it is harder to conceive of a cogent insensitivity defense of this sort to a charge of knowingly inflicting emotional distress when the defendant is a multimember body like a university administration. In any event, as Professor Givelber notes, *see id.*, and as we suggest in the text immediately below, a defendant whose insensitivity may rescue him or her from a finding of liability for knowingly inflicting emotional distress is apt to be found liable for recklessly inflicting it.

emotional distress almost certainly turns on proof that the second of the four elements listed above—the defendant's conduct is extreme and outrageous—is met. This is not surprising because, as one scholar has noted, "[t]he extraordinary feature of the tort" is "its insistence upon 'extreme and outrageous conduct.'"<sup>149</sup> In official comment *d* to its statement of the tort, the *Third Restatement* makes clear that this element calls for a strong showing. It is not enough to show simply that a defendant acted "for no purpose other than to cause [emotional] harm"; the defendant's conduct must have gone "beyond the bounds of human decency" and been the sort that decent people regard as "intolerable."<sup>150</sup> The comment rejects the notion that the types of conduct that should be regarded as extreme and outrageous can be sensibly captured by a set of rules.<sup>151</sup> Instead, it emphasizes the importance of careful attention to "the facts of each case" and names certain kinds of facts as most apt to be probative: "the relationship of the parties, whether the actor abused a position of authority over the other person, whether the other person was especially vulnerable and the actor knew of the vulnerability, the motivation of the actor, and whether the conduct was repeated or prolonged."<sup>152</sup>

The latter list is very helpful in determining whether a university's requiring CDC high-risk faculty to teach in person in fall semester 2020 was sufficiently offensive to be called extreme and outrageous. It points strongly toward a conclusion that the requirement indeed was extreme and outrageous. The relationship of the university administration to the faculty, in general, and to CDC high-risk faculty, in particular, is very hierarchical, and the particular policy at issue—an in-person teaching requirement with no exemption for CDC high-risk faculty—is one that the administration probably formulated with little opportunity for meaningful input by the faculty, in general, and even less opportunity for meaningful input by CDC high-risk faculty, in particular. The administration's insistence that a CDC high-risk faculty member must teach in person despite the CDC's essentially telling that person through its guidelines that to do so would expose him or her to too high a risk of serious illness or death has a coercive and cruel quality that can fairly be called an abuse of authority.

For many years, academic openings in most fields have been relatively

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149. *Id.* at 46.

150. 2 RESTATEMENT (THIRD), *supra* note 133, § 46 cmt. d.

151. *See id.* ("Specific rules for when conduct is extreme and outrageous cannot be stated, nor can categories of conduct be identified for formulation into universal rules.")

152. *Id.*

few and far between, and faculty members generally have had very limited mobility. That already bleak picture of job opportunities and mobility in higher education became even bleaker in the months leading up to fall semester 2020, as the pandemic cast an increasingly dark cloud over our national economy in general and university budgets in particular.<sup>153</sup> Faculty members—CDC high-risk and not—were especially vulnerable to the dictates of university administrations, and it would be the height of naïvete to suggest that administrations that required CDC high-risk faculty to teach in person in fall semester 2020 were not knowingly taking advantage of that vulnerability. Granted, administrations that required CDC high-risk faculty to teach in person that semester almost certainly didn't do so because they took pleasure in presenting those faculty with an agonizing choice and then watching them suffer. Nevertheless, those administrations' insistence that CDC high-risk faculty teach in person reflected a state of mind that at a minimum qualifies as cruel indifference.

Lastly, with regard to the final item on the list, although an administration's requiring CDC high-risk faculty to teach in person in fall semester 2020 was a single, rather than "repeated," act, the act had "prolonged" effects. On the one hand, a CDC high-risk faculty member who complied with a mandate to teach in person relived daily the anxieties, fears, and even trauma that come with following a course of action that the faculty member knows puts his or her health at unreasonable risk. On the other hand, a CDC high-risk faculty member who refused to comply with such a mandate and sat out the semester relived daily the stresses that come with loss of income and with having defied an employer who, with a faculty job market overflowing with potential replacements, may decide to terminate his or her employment. Those daily stresses probably were substantial for tenured faculty members and even greater for faculty either still on the tenure track or in a contractual, non-tenure-track position.

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153. See Christine Kelly, *Career Planning in a Pandemic*, INSIDE HIGHER ED (Apr. 20, 2020), <https://www.insidehighered.com/advice/2020/04/20/career-advice-getting-through-economic-downturn-caused-pandemic-opinion>; Kimberly Hoang, *Preparing for the Academic Job Market in an Economic Recession*, CHI. MAROON (Apr. 30, 2020), <https://www.chicagomaroon.com/article/2020/4/30/preparing-academic-job-market-economic-recession/>; Zeb Larson, *You Can't Kill It with Kindness*, INSIDE HIGHER ED (June 23, 2020), <https://www.insidehighered.com/advice/2020/06/23/kindness-wont-resolve-core-issues-what-makes-job-hunting-phds-so-demoralizing-and>.

## VII. SOME ISSUES NOT ADDRESSED

In closing, we call attention to several issues we haven't addressed and briefly explain our reasons for not addressing them. First of all, in discussing whether universities have had a legal obligation during the pandemic to exempt CDC high-risk faculty from any in-person teaching requirement, we didn't attempt to be comprehensive in addressing possible legal sources for such an obligation. We addressed in Parts III through VI only the four sources that we believe most strongly establish that universities were legally obliged to grant such an exemption. In limiting our focus to those four, we in no way intended to suggest that they are the only sources that militate in favor of finding that universities were legally obliged to grant the exemption.

We gave serious thought, for example, to the weightiness of a legal argument for an exemption based on a property rights theory—in brief, that a faculty member's achievement of tenure vests in him or her a property right relative to the university and that the university violated that right when it required a CDC high-risk faculty member to teach in person if he or she wished to continue to perform, and be compensated for, his or her teaching responsibilities. The reason we didn't pursue that possible exemption argument and a couple of others wasn't that we concluded they were weak. Rather, it was that (a) we didn't think they were as *strong* as the arguments presented in Parts III through VI and (b) we were trying to keep the article relatively brief (at least for a law review article!) to increase the likelihood that it actually gets read and has some effect.

Second, we didn't examine what, if any, legal obligation universities have had during the pandemic to exempt faculty other than CDC high-risk faculty from any in-person teaching requirement.<sup>154</sup> In doing so, we didn't mean to suggest that no such obligation existed. We simply were seeking to keep the article manageable in scope. Because the various arguments we made on behalf of CDC high-risk faculty depend to some extent on their special vulnerability to the virus according to the CDC, those arguments can't simply be used as-is to argue that universities were legally obligated to exempt faculty other than CDC high-risk faculty. At least some of those arguments, however, can be adapted in ways to state credible arguments on behalf of faculty who are not CDC high-risk.

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154. Members of the group of “faculty other than CDC high-risk faculty” may be situated quite differently from one another. In particular, consider the subgroup consisting of faculty members living with one or more CDC high-risk persons.

In addition, some legal sources that we didn't consider because they don't appear to have special force for CDC high-risk faculty may well be worth exploring with the generality of faculty in mind. Consider, for example, the federal Occupational Safety and Health Act<sup>155</sup> and particularly its General Duty Clause, which provides that every employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."<sup>156</sup> As a leading labor and employment law scholar and his student co-author have noted, employers have a duty under both OSHA and state law to "provide a safe workplace, which includes not exposing job applicants and employees to an unreasonable risk of contracting the COVID-19 virus."<sup>157</sup> Moreover, "[l]ike the virus itself, the circumstances employers face are novel, and [OSHA] will thus need to be applied to essentially novel circumstances."<sup>158</sup>

Third, we didn't discuss what, if any, legal obligation universities had during the pandemic to allow individual students to decide for themselves

155. OSHA was enacted in 1970. It is codified at 29 U.S.C. §§ 651-71. For an account of the tumultuous history of its enactment, see Judson MacLaury, *The Job Safety Law of 1970: Its Passage Was Perilous*, MONTHLY LAB. REV. (Mar. 1981), <https://www.bls.gov/opub/mlr/1981/article/job-safety-law-of-1970-its-passage-was-perilous.htm>.

156. 29 U.S.C. § 654; see Gary J. Simson, *The Occupational Safety and Health Act of 1970: State Plans and the General Duty Clause*, 2 WORKMEN'S COMP. L. REV. 323 (1975).

157. Samuel Estreicher & Elizabeth Campbell, *Agency Guidance May Not Be Enough: Keeping Workers Safe and Avoiding Employer Workplace Liability During the COVID-19 Pandemic*, VERDICT (May 1, 2020), <https://verdict.justia.com/2020/05/01/agency-guidance-may-not-be-enough>.

158. *Id.* Writing a year later, the director during the Obama years of the Occupational Safety and Health Administration offered the following perspective:

The Covid-19 crisis serves as a reminder of the challenges of protecting the nation's workers, millions of whom have risked their lives to provide medical care, stock grocery shelves and operate public transit. After the pandemic began, the Trump administration refused to issue new labor regulations, and [the OSH Administration] did not require employers to take steps to prevent workers from becoming infected with the coronavirus. Countless workers were sickened. Many died and the virus spread from workplaces into communities. During his election campaign, President Biden committed to taking strong action, but thus far has not done so. . . .

David Michaels, *America's Workplaces Are Still Too Dangerous*, N.Y. TIMES (Apr. 28, 2021), <https://www.nytimes.com/2021/04/28/opinion/osha-us-workplace-safety.html>. In June 2021, the OSH Administration released the "first nationwide emergency workplace safety rule requiring health-care employers to protect workers against on-the-job Covid-19 infection." Bruce Rolfsen, *OSHA Limits Long-Awaited Virus Safety Rule to Health Care*, BLOOMBERG LAW (June 10, 2021), <https://news.bloomberglaw.com/health-law-and-business/covid-19-workplace-safety-rule-for-health-care-released-by-osha?context=article-related>. Because the rule's application is limited to the health-care sector, "many [worker] advocates said they were disappointed it wouldn't encompass other sectors also hard hit by Covid-19, such as meatpacking." *Id.*

whether to attend classes in person or online. Our silence about universities' legal obligations to students, like our silence about their legal obligations to the generality of faculty, shouldn't be understood as any sort of suggestion that those obligations weren't substantial enough to be worth discussing. Again, it reflects nothing more than an attempt to keep the article manageable in scope. For students who qualify as high-risk under the CDC guidelines, the legal arguments for CDC high-risk faculty under the ADA and state tort law offer a good head start.

Fourth, we said nothing about universities' legal obligations toward a constituency whose contributions to the success of the educational enterprise are vital even though often behind the scenes: the staff. Once again, our silence on a subject was not a statement that the subject doesn't merit serious discussion, but rather simply reflected a judgment that such a discussion fell outside this project's optimal scope. It is especially difficult to generalize about universities' legal obligations to staff during the pandemic because members of the staff can have such different job descriptions. Some, for example, may work in the admissions office recruiting applicants or in the career services office offering students career guidance, while others are administrative assistants to faculty. Still others may provide medical or nursing care in the student health center, prepare meals in the student dining hall, provide custodial services in classroom and other buildings, and much more. If a university offered few, if any, in-person classes, the need for some of those jobs would disappear. If a university instead opted to offer classes primarily in person, some jobs would require physical presence on campus, while others could be performed effectively by telework.<sup>159</sup>

Fifth and lastly, although we have limited our discussion of universities' obligations to their faculty during the pandemic to obligations that are legal in nature, universities have had important moral obligations as well. Our failure to address those obligations in this article didn't reflect in the least a judgment on our part that the subject of universities' moral obligations to their faculty during this pandemic is unimportant. Quite the contrary. It reflected instead our judgment not only that the subject is important but that it is so inviting a debate that we couldn't do it justice without making this article a much larger project than we envisioned.

Although we haven't attempted to provide the kind of systematic and

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159. See *Considerations*, *supra* note 44 (noting that telework can often be a very viable alternative for CDC high-risk staff).

detailed arguments about universities' moral obligations to faculty probably needed to be fully persuasive, we would like to conclude this article with a brief statement of what we believe those obligations were at the start of fall semester 2020. At a minimum, we hope our statement will have some value in provoking further thought. We also offer it in the spirit of candor—the least that anyone who has read this far in the article deserves!

In the months between the emergence of the coronavirus and the start of fall semester 2020, a great deal was learned about the virus, but much remained to be learned. What environments are most and least conducive to the virus's spread? What means of protecting against contracting it are most effective? What are all the medical conditions and other individual characteristics that put people at greater or lesser risk of severe illness if they contract it? And the list goes on.

In light of those uncertainties and the debilitating and often lethal force with which the coronavirus had already attacked so many people in the United States and around the world, we believe that a university planning to offer any in-person classes in fall semester 2020 had a moral obligation not to require any faculty members to teach in person who, out of concern for their own physical or emotional well-being or for that of another member of their household, asked to teach online instead. We also believe that a university had a heightened moral obligation to grant such a request when it was made by a faculty member who, based on the available knowledge, was among those most vulnerable to severe illness from the virus or who was living with someone who fit that description. Lastly, although we don't take the view that an institution's financial condition had no bearing on its moral obligations, we strongly endorse the position expressed so eloquently early in the pandemic by a longtime college president, Michael Sorrell, who in his first few years as President of Paul Quinn College rescued that historically Black college from economic ruin: "If a school's cost-benefit analysis leads to a conclusion that includes the term *acceptable number of casualties*, it is time for a new model."<sup>160</sup>

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160. Michael J. Sorrell, *Colleges Are Deluding Themselves*, ATLANTIC (May 15, 2020), [https://www.theatlantic.com/ideas/archive/2020/05/colleges-that-reopen-are-making-a-big-mistake/611485/?campaign\\_id=9&emc=edit\\_nn\\_20200618&instance\\_id=19492&nl=the-morning&regi\\_id=87354418&segment\\_id=31211&te=1&user\\_id=8fb142cd6a7c4bdf33b6353acbd5e909](https://www.theatlantic.com/ideas/archive/2020/05/colleges-that-reopen-are-making-a-big-mistake/611485/?campaign_id=9&emc=edit_nn_20200618&instance_id=19492&nl=the-morning&regi_id=87354418&segment_id=31211&te=1&user_id=8fb142cd6a7c4bdf33b6353acbd5e909). For other commentary on universities' moral obligations in planning for fall semester 2020, see *ACHA Guidelines: Considerations for Reopening Institutions of Higher Education in the COVID-19 Era*, AM. COLL. HEALTH ASS'N 2 (May 7, 2020), [https://www.acha.org/documents/resources/guidelines/ACHA\\_Considerations\\_for\\_Reopening\\_IHES\\_in\\_the\\_COVID-19\\_Era\\_May20](https://www.acha.org/documents/resources/guidelines/ACHA_Considerations_for_Reopening_IHES_in_the_COVID-19_Era_May20)



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20.pdf (“Protecting our most vulnerable populations (medically susceptible, undocumented, students of color, uninsured or underinsured, non-traditional, older, DACA, and homeless students, faculty, and staff members) is a moral and ethical obligation.”); David Grant & Mark Meaney, *An Ethical Opening for Higher Ed Institutions*, INSIDE HIGHER ED (Aug. 27, 2020), <https://www.insidehighered.com/views/2020/08/27/colleges-should-consider-reopening-ethical-approach-institutional-review-board> (maintaining that a decision whether or not to “reopen this fall with some level of in-person instruction” is the type of decision that calls for ethical input from an institutional review board (IRB) of the sort that research institutions customarily use before going forward with a “proposed experiment” that “involv[es] human subjects,” and observing that many universities are “working hard to minimize the risks of in-person instruction without first doing” the kind of analysis that an IRB customarily would do “to see if such a reopening is ethical in the first place”); Irina Mikhalevich & Russell Powell, *The Rush to Reopen Colleges This Fall Ignores Harsh Scientific and Ethical Realities*, INSIDE HIGHER ED (May 21, 2020), <https://www.insidehighered.com/print-views/2020/05/21/rush-reopen-colleges-fall-ignores-harsh-scientific-and-ethical-realities-opinion> (acknowledging that “the value of human life is not absolute” and that “risk must always be managed in public policy,” but maintaining that “a return to academic life as normal can only be morally justified if the amount of death and suffering likely to ensue is outweighed by even greater harms” and that “[w]hether staff furloughs, salary reductions or other negative financial impacts can be cast in such weighty moral terms is a case that universities need to make”).