
EDUCATION CONTRACTS OF ADHESION IN THE COVID-19 PANDEMIC

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Stuck inside our house with our young children during the COVID-19 pandemic, we have a newfound appreciation for the vital role that elementary, middle, and high schools play in youth development and the successful functioning of both home and workplace. Today, primary and secondary (K-12) schools and local school districts in the United States hold the key to workforce re-entry for parents. These school systems are positioned to impose an exacting price if they re-open for in-person instruction. Some are doing so by attempting to shift legal responsibility for student campus safety to parents using a device that we call an “education contract of adhesion.” Grounded in terms that are non-negotiable and arcane, this device demands that parents waive their rights to bring suit if their minor children become ill or die due to COVID-19 acquired at school. In this article, we examine this “education contract of adhesion” in the context of K-12 public and private schools re-opening partially or fully residentially during the current pandemic. Our hope is that this essay will bring greater attention to the problematic dynamic that “education contracts of adhesion” pose in this context; in general, a “contract of adhesion” describes so-called “contracts” prepared by one party, to be signed by the party in a weaker position, with the weaker party having little to no choice about the terms. We see these “education contracts of adhesion” as driven by motives in conflict with the core, traditional, and advertised aims of school: to nurture and cultivate students and to prepare them to become members of a liberal democracy facing serious, growing threats from authoritarian forces, both private and public.

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INTRODUCTION

Desperation defines the plight of millions of parents and their children, shut-in together during the spring, summer, fall, and now winter of 2020 due to our national failure to respond effectively to the COVID-19 pandemic.¹ Youth are anxious, stressed, dislocated, and behind academically.² Parents, working to support the United States economy during global disruption, are simultaneously trying to teach the students sitting at home after schools shut their doors to in-person K-12 education.³

Other parents, who have had to return to work outside of the home while their children remain out of school, have been put into no-win situations.⁴ Should they enlist elderly grandparents for help, at risk to those family members? Should they send their children to the home of a neighbor, friend, or ad-hoc daycare, arrangements grounded in relationship bonds rather than regulation through some combination of governmental structure and private contract? Should they leave their children home alone? Should they quit their jobs, jeopardizing their families' economic stability?

For parents who have lost jobs involuntarily, these choices approach even closer to the existential.⁵ These parents have obligations that can be even more time-consuming than so-called "working parents." They must search for jobs in a pandemic economy. They must navigate the unemployment insurance system. They must search for new housing if evicted. They must secure healthcare for themselves and their dependents—all of these when interactions outside of home could result in contracting a potentially fatal disease.

Still other parents, who were not in the workforce or who voluntarily left the workforce to prioritize domestic obligations during the pandemic, likely find themselves with greater time and singularity of focus on providing remote schooling and related supports for their children.⁶ For this group (willingly not

1. See, e.g., Sarah Garland, *Desperate Parents Need Help as Coronavirus Upends Our Lives*, THE HECHINGER REPORT (Mar. 27, 2020), <https://hechingerreport.org/desperate-parents-need-help-as-coronavirus-upends-our-lives/> [https://perma.cc/AU2H-MR5B] ("I've heard the same thing from dozens of parents across the country. It's a universal cry: HELP US!").

2. See, e.g., Elizabeth Landeau, *Stress over Pandemic Makes OCD Symptoms Worse in Some Children*, WASH. POST. (Sept. 13, 2020), https://www.washingtonpost.com/health/ocd-kids-covid-worsens-symptoms/2020/09/11/500ecbbc-f1d6-11ea-999c-67ff7bf6a9d2_story.html [https://perma.cc/2Y4T-N5DF].

3. See, e.g., Stephanie Marken and Jessica Harlan, *45% of Parents Very Worried Kids Will Get COVID-19 at School*, GALLUP NEWS (Oct. 8, 2020), <https://news.gallup.com/poll/321512/parents-worried-kids-covid-school.aspx> [https://perma.cc/3VXB-ANJN] ("Almost half (45%) of U.S. parents report they are 'very worried' that their children will contract COVID-19 at school or in childcare facilities.").

4. See Anya Kamenetz, *What Are Parents Doing for Child Care? Here Are Three Options (with Trade-Offs)*, NPR (July 31, 2020), <https://www.npr.org/2020/07/31/897164159/what-are-parents-doing-for-child-care-here-are-3-options-with-trade-offs> [https://perma.cc/MVQ8-P29K].

5. See, e.g., Mitchell Harman, *This Fall, Back-to-School May Block Back-to-Work for Many Parents*, NPR MARKETPLACE (Aug. 18, 2020), <https://www.marketplace.org/2020/08/18/back-to-school-may-block-back-to-work-for-many-parents/> [https://perma.cc/KFD5-J4F6] ("Almost nothing is going right" for out-of-work parents, according to the "director of the Center on Poverty and Inequality at Georgetown Law School").

6. See, e.g., Hannan Adely, *The Pandemic Is Driving Moms Out of the Workforce, COVID-19 Child Care Crisis Persists*, USA TODAY (Oct. 22, 2020), <https://www.usatoday.com/story/news/nation/2020/10/22/coronavirus-women-leaving-jobs-droves-amid-child-care-crisis/3727447001/> [https://perma.cc/365D-8WUQ].

working), the emotional, physical, and logistical challenges of life in a global pandemic (such as caring for ill relatives) remain.

The “kids as co-workers” phenomenon has warped the economy in ways that will have long-lasting effects.⁷ Parent-age women appear to be leaving the workforce or falling behind within it at higher rates than their male counterparts.⁸ Adolescents moving into early adulthood have had the experiences of graduating from high school and beginning (or continuing) higher education or employment delayed or destroyed by the threats posed by the risks of in-person interactions typical of these transitions.⁹ Younger children learning outside of school are suffering major setbacks in their educations.¹⁰ The urge to move forward and the frustration and fear around the many barriers to doing so defines the moment for many.¹¹ Everyone wants to turn the page on what has been a nightmare for so many.

Trapped as we are, if we have primary and secondary school age children, the opportunities for in-person K-12 education are coveted.¹² Schools and school districts hold the key to re-entry. They are positioned to impose an exacting price. Some have done so by proposing terms for reentry that purport to shift all legal responsibility for on-campus student safety and well-being to parents.¹³ While there has been public debate around the re-opening decisions of our K-12 school systems (both public and private), the issue of school liability for doing so and the attempts to shift risk to parents, a lagging phenomenon in our process of recovery, has not yet received widespread scrutiny from legal scholars or in the

(“Across the nation, mothers have had to make the difficult choice to slash work hours or quit jobs as they strain under child care and homeschooling obligations.”).

7. See, e.g., Ellie Mystal, *Congratulations, Your Kids Are Now Your Co-Workers*, THE NATION (Mar. 27, 2020), <https://www.thenation.com/article/society/working-home-kids/> [<https://perma.cc/DRH2-SE78>] (offering advice to parents newly working from home).

8. See *Covid-19 and Its Economic Toll on Women: The Story Behind the Numbers*, UN WOMEN (Sept. 16, 2020) <https://www.unwomen.org/en/news/stories/2020/9/feature-covid-19-economic-impacts-on-women> [<https://perma.cc/2MCV-3XZC>] (describing the current and projected future disparate impacts of COVID-19 on women). But see Rakesh Kochhar, *Fewer Mothers and Fathers in the U.S. Are Working Due to COVID-19 Downturn; Those at Work Have Cut Hours*, PEW RSCH. CTR. (Oct. 22, 2020), <https://www.pewresearch.org/fact-tank/2020/10/22/fewer-mothers-and-fathers-in-u-s-are-working-due-to-covid-19-downturn-those-at-work-have-cut-hours/> [<https://perma.cc/WNH2-T6JE>] (“A new Pew Research Center analysis of government data finds that in the first six months of the pandemic, the workplace engagement of mothers and fathers with children younger than 18 at home has been affected about equally.”).

9. See, e.g., Scott Jaschik, *The Online Risk*, INSIDE HIGHER ED (May 19, 2020), <https://www.insidehighered.com/admissions/article/2020/05/19/one-third-high-school-seniors-say-they-will-defer-or-cancel-rather> [<https://perma.cc/X8QF-JGPJ>] (reviewing study from data firm Civis Analytics that found almost 50% of parents “reporting a change in their child’s post high-school plan”).

10. Laura Meckler and Hannah Natanson, *‘A lost generation’: Surge research reveals students sliding backward, most vulnerable worst affected*, WASH. POST. (Dec. 6, 2020), https://www.washingtonpost.com/education/students-falling-behind/2020/12/06/88d7157a-3665-11eb-8d38-6aea1adb3839_story.html [<https://perma.cc/SL7M-3NDG>] (“After the U.S. education system fractured into Zoom screens last spring, experts feared millions of children would fall behind. Hard evidence now shows they were right.”).

11. See, e.g., Marken & Harlan, *supra* note 3 (“As school systems struggle, so do parents who are juggling work and the reality of remote learning and the unpredictability of in-person school.”).

12. See *id.* (“Most parents who have one or more children enrolled in school would prefer that their child’s school have some level of in-person learning, either full time or part time, with some distance learning.”).

13. See *infra* note 29.

popular press.¹⁴ This phenomenon requires close examination for many reasons, not the least of which is that it signals moves by schools to shed the standard commitments schools make to parents and families to care for the nation's children while being funded (on public or private dollars) to do so.

In this period, through a sharpened legal device, some schools and school districts have assumed a hard-edged, arm's-length posture toward students and parents, one that is much more broadly and overtly adversarial. This device takes the form of what Americans have come to call a "contract." It is replete with terms that are non-negotiable and arcane. Its central features demand that parents and students waive rights to bring suit for getting sick or being killed by COVID-19, acquired through participation in school. The device thus introduces a new price of admission into the American education, a price foisted upon parents and students by schools purporting to offer an education that is nurturing and beneficial to students of all ages.

In this article, we call the device the "education contract of adhesion." We examine it here in the context of primary and secondary (K-12) public and private schools in the United States re-opening partially or fully residentially during the COVID-19 pandemic.¹⁵ A contract of adhesion is a term American law developed to describe "contracts" prepared by one party, to be signed by the party in a weaker position, with the weaker party having little to no choice about the terms.¹⁶ The law has traditionally viewed these devices with suspicion, though with wavering suspicion over time, even as scholars and public commentators have described them as sources of domination.¹⁷

Our hope is that this essay will bring greater attention to the problematic dynamic contracts of adhesion pose when schools offer them to students and

14. See Stephen Sawchuck, *Schools May Get Sued Over COVID-19. 7 Things to Know About Managing That Risk*, EDUCATION WEEK (Sept. 3, 2020), <https://www.edweek.org/ew/articles/2020/09/03/schools-may-get-sued-over-covid-19-7.html> [<https://perma.cc/HNA2-YZ78>] ("Though largely missing from mainstream news coverage, liability remains an issue of significant uncertainty for school districts that's certain to factor into their decisions about whether or not to reopen for in-person learning, even on a partial basis.").

15. Some colleges and universities are also using education contracts of adhesion, which we do not unpack in this piece. See, e.g., Daniela Allee, *Some UNH Students Uneasy About 'Consent Agreement' Assuming Risks Around Coronavirus on Campus*, NEW HAMPSHIRE PUBLIC RADIO (July 20, 2020), <https://www.nhpr.org/post/some-unh-students-uneasy-about-consent-agreement-assuming-risks-around-coronavirus-campus#stream/0> [<https://perma.cc/445F-F5S9>] (reporting perception that "informed consent" document was actually liability waiver). For a sophisticated analysis of overarching contract law principles in the post-secondary space, see Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 657 (2001). For an empirical study of the use of liability waivers in youth sports, a related domain, see Alfred C. Yen and Matthew Gregas, *Liability and Participation Rates in Youth Sports: An Empirical Investigation*, 10 ASU SPORTS & ENT. L. J. 1, 2 (2020) ("Legally, doctrinal reasons exist to doubt the enforceability of these releases. They are contracts of adhesion, and allowing those responsible for children's safety to disclaim duty to discharge those responsibilities reasonably is possibly unconscionable or against public policy."). For a treatment of these devices during the pandemic outside of the education context, see Zahra Takhshid, *Nonessential Business and Liability Waivers in the Time of COVID-19*, 105 MINN. L. REV. HEADNOTES 42 (2020).

16. See BLACK'S LAW DICTIONARY 318–19 (7th ed. 1999) (defining contracts of adhesion); see also Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176–77 (1983) (adopting similar definition).

17. See *infra* Section II.

parents. We see these education contracts of adhesion as driven by motives in conflict with the core, traditional, and advertised aims of school: to cultivate students and to prepare them to become citizens within a liberal democracy facing serious and growing threats from authoritarian forces,¹⁸ both private and public.

In Part I of this article, we offer a snapshot of some of the legal devices being used by K-12 schools (public and private) and school districts in the United States to shift legal responsibility for student safety to parents while re-opening during the COVID-19 pandemic, which media or other sources have brought to the public's attention. In Part II, we explain why these devices are best understood as "education contracts of adhesion," and we identify the manner in which these devices undermine the stated mission of American primary and secondary schools. In Part III, we develop the view that courts should refuse to enforce these devices and, at the least, require schools to explain and defend them in the course of discovery that may take place in litigation where the devices are offered by schools to limit their liability.

We argue that invalidating education contracts of adhesion on numerous available grounds will ensure that schools serve the mission of cultivating students, consistent with their stated purposes and with their acknowledged, underlying mission in a liberal democracy. We are skeptical about so-called adhesion "contracts" generally. We have a heightened concern when schools use these devices ultimately to extract concessions from youth (through transactions with their parents), while undermining the status of students as people and consumers of services central to their personal and professional cultivation.¹⁹

If "contracts" of this sort held a tenuous position with regard to enforceability in normal times, the same devices proposed within a pandemic, affecting the rights and interests of children, where choices are constricted and subject to unique pressures, weaken even further their standing as the products of any exchange credibly described as "free" and "voluntary".

This point must be made even more forcefully in the current environment for consumers, where entities as powerful as the American Law Institute ("ALI") have proposed that the law of contracts should adopt a standard of "blanket assent" for consumers, more generally.²⁰ This general, dismissive attitude toward the traditional bilateral (or multilateral) dynamic of a contract has signaled a decay in the law of contracts where contracts stand to serve the function of ensuring that a free people may chart their own course without surrendering their autonomy to forces that would seek to dominate them.²¹ In a context where the rights

18. See STEVEN LEVITSKY & DANIEL SIBLATT, *HOW DEMOCRACIES DIE* 1–10 (2018) (summarizing facts that suggest that the United States risks falling prey to forces that have converted democracies to authoritarian regimes in recent decades).

19. See generally Michael S. Lewis, *Pervasive Infancy: Reassessing the Contract Capacity of Adults in Modern America*, 19 U.N.H. L. REV. 69 (2020).

20. See Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 370 (2020) (critiquing ALI's adoption of "blanket assent," a concept that "creates a presumption that consumers conducting transactions online will be bound to standard contract terms").

21. See *infra* notes 62 and 63.

of minor students are at stake, it would seem that a system seeking some semblance of integrity and intelligibility would draw the line in circumstances such as those we face today.

I. SCHOOL SYSTEMS DEMAND THE ERASURE OF RIGHTS AS THE PRICE OF IN-PERSON ATTENDANCE

COVID-19 wrapped its way around the globe in the winter of 2020. In the United States, millions of Americans, both parents and students, returned from school vacations in March with no clear direction regarding the risks of sending children back to school.²² As governments—local, state, and federal—sent mixed messages and balked at coordinating a tailored response, the entire system of education remained in flux.²³ Eventually, a “near total shut-down” of in-person K-12 schools occurred, with schools converting to remote learning for the duration of the 2019-2020 school year.²⁴

Millions of American parents were put out of work or put in the position of working to save the economy from collapse from their kitchen tables.²⁵ As a society, we witnessed how dependent our economy is on childcare and education, as parents assumed the double-duty of supporting households as commercial actors while proctoring the education of children displaced from brick and mortar schools.²⁶

Students suffered in the United States and worldwide. In August 2020, the United Nations reported that the “COVID-19 pandemic has created the largest disruption of education systems in history, affecting nearly 1.6 billion learners in more than 190 countries and all continents.”²⁷ The brunt of this disruption has been borne by lower and middle income parents, who cannot afford to supplement their children’s education.²⁸ For millions of Americans, the reopening of

22. See *The Coronavirus Spring: The Historic Closing of U.S. Schools*, EDUC. WK. (Sept. 16, 2020), <https://www.edweek.org/ew/section/multimedia/the-coronavirus-spring-the-historic-closing-of.html> [<https://perma.cc/N6HN-D6RR>].

23. See *id.*

24. See *Map: Coronavirus and School Closures in 2019-2020*, EDUC. WK. (Sept. 16, 2020), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html> [<https://perma.cc/4WBM-DJ2X>] (“The coronavirus pandemic forced a near-total shutdown of school buildings in the spring of 2020—an historic upheaval of K-12 schooling in the United States.”).

25. See Kochhar, *supra* note 8; Misty L. Heggeness & Jason M. Fields, *Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. CENSUS BUREAU (Aug. 18, 2020), <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html> [<https://perma.cc/KN4X-Q674>].

26. See Emiliana Vargas & Rebecca Winthrop, *Beyond Reopening Schools: How Education Can Emerge Stronger Than Before COVID-19*, BROOKINGS INST. (Sept. 8, 2020), <https://www.brookings.edu/research/beyond-reopening-schools-how-education-can-emerge-stronger-than-before-covid-19/> [<https://perma.cc/3788-QEMQ>] (reporting that “public recognition of the essential caretaking role schools play in society has skyrocketed” during COVID-19).

27. United Nations, *Policy Brief: Education During COVID-19 and Beyond* (Aug. 2020), https://www.un.org/development/desa/dspd/wp-content/uploads/sites/22/2020/08/sg_policy_brief_covid-19_and_education_august_2020.pdf [<https://perma.cc/US43-YAY7>].

28. See Vargas & Winthrop, *supra* note 26.

K-12 schools will alleviate a series of pressures and will reopen the nation's central mechanism for upward mobility, as well as individual and societal progress. The price of delaying access to education is enormous and compounding, for student advancement and parental employment.

In this environment, reports have emerged regarding waiver and consent forms developed by K-12 schools.²⁹ The forms purport to reassign risk between students and education systems.³⁰ We include an example of one form from a New Hampshire private school (preK-8th grade) for the current academic year.³¹

29. There does not appear to be definitive, comprehensive national data collected around the number, location, and type of K-12 school requiring or requesting education contracts of adherence for in-person instruction during the COVID-19 pandemic. National media has reported that “some districts [across the country] are asking parents to sign similar [to field-trip liability] waivers as a condition of attending in-person classes.” Sawchuk, *supra* note 14. For some publicly available instances of use of these forms. *See, e.g.*, David Caltabiano, *Queen Creek Parents Voice Concern Over COVID-19 Liability Waiver*, ARIZONA'S FAMILY (Sept. 25, 2020), https://www.azfamily.com/news/continuing_coverage/coronavirus_coverage/queen-creek-parents-voice-concern-over-covid-19-liability-waiver/article_a6486ffa-ffa1-11ea-9a08-cf581b8c1222.html [<https://perma.cc/L7BK-2XJX>] (adding COVID-19 waiver language to standard field trip permission form requested as part of back-to-school paperwork in an Arizona school district); Hannah Catlett, *Northeast Ohio Private Schools Requiring Students, Parents to Sign New COVID-19 Form Before Returning to Classroom*, 19 NEWS (Aug. 14, 2020), <https://www.cleveland19.com/2020/08/14/northeast-ohio-private-schools-requiring-parents-students-sign-new-covid-form-before-returning-classroom/> [<https://perma.cc/64ZL-BRH8>] (confirming “that many private schools in Northeast Ohio are asking parents to sign one for any student returning to in-person learning this fall” after the region saw “‘COVID waivers’ required this summer for extracurricular activities and sports”); Kaitlin Stansell, *Berkeley Co. School District Requires Parents to Sign COVID Waiver for In-Person Instruction*, LIVE 5 NEWS (July 20, 2020), <https://www.live5news.com/2020/07/20/berkeley-co-school-district-requires-parents-sign-covid-waiver-in-person-instruction/> [<https://perma.cc/4JD2-ZN7Z>] (requiring parents in a South Carolina school district to sign COVID waiver for “their children to return to schools for in-person instruction during the coronavirus pandemic”). *See also* Cassidy Alexander, *Volusia County Schools Recalls Coronavirus Liability Waivers for Coaches, Students*, THE DAYTONA BEACH NEWS J. (July 14, 2020), <https://www.news-journalonline.com/story/news/education/2020/07/14/volusia-county-schools-recalls-coronavirus-liability-waivers-for-coaches-students/42037481/> [<https://perma.cc/VKQ5-CKTP>] (recalling requirement that coaches and parents sign COVID waiver for extracurricular participation following cease & desist letter from teachers union); Hamilton (Missouri) School District, *Parent Permission and Waiver of Liability for Student Participation*, [http://www.hamilton.k12.mo.us/MUSIC%20-%20Waiver%20for%20Parent%20on%20Behalf%20of%20Student%20\(2\)%20\(1\).pdf](http://www.hamilton.k12.mo.us/MUSIC%20-%20Waiver%20for%20Parent%20on%20Behalf%20of%20Student%20(2)%20(1).pdf) [<https://perma.cc/79EK-SWRN>] (setting forth waiver and release for participation in summer programs); Idaho High School Activities Association, *Assumption of the Risk and Waiver of Liability Relating to Coronavirus/COVID-19*, <https://idhsaa.org/asset/HOME%20PAGE/COVID-19%20Waiver.pdf> (providing for waiver and release for extracurricular activities) [<https://perma.cc/XZ4R-RECU>]; Naaz Modan, *COVID-19 Language in Waivers for Extracurriculars Heighten Reopening Safety Concerns*, EDUC. DIVE (July 16, 2020), <https://www.educationdive.com/news/covid-19-language-in-waivers-for-extracurriculars-heighten-reopening-safety/581636/> (profiling several athletic or extracurricular forms [<https://perma.cc/G7FV-C84N>]; Notus School District (Idaho), *Assumption of the Risk and Wavier of Liability Relating to Coronavirus/COVID-19*, http://www.notusschools.org/UserFiles/Servers/Server_6060275/File/District%20Folder/District%20Misc.%20Info/COVID-19%20Participant%20Waiver.pdf [<https://perma.cc/C75P-X9UY>] (requesting waiver for athletic/extracurricular participation); Notus School District (Idaho), *Notus School District Fall Opening Plan 2020-2021*, [http://www.notusschools.org/UserFiles/Servers/Server_6060275/File/District%20Folder/COVID/NSD%20Fall%20Opening%20Plan%202020_2021%20To%20Public%20\(1\).pdf](http://www.notusschools.org/UserFiles/Servers/Server_6060275/File/District%20Folder/COVID/NSD%20Fall%20Opening%20Plan%202020_2021%20To%20Public%20(1).pdf) [<https://perma.cc/W89L-JXFP>]; Nebraska School Activities Association, *Parent Waiver and Release*, <https://nsaastatic.s3.amazonaws.com/text-file/covid/Parent+Waiver+and+Release.pdf> [<https://perma.cc/Y8K4-Z92Z>] (providing for release of potential claims arising from use of school athletic facilities).

30. *See, e.g.*, Stansell, *supra* note 29 (setting forth wavier terms for a public school district in South Carolina that “any parent that signs it [the form for in-person student instruction] assumes the risk and responsibility if their child gets sick or even dies from COVID-19”).

31. Santi Bani School, Enrollment Contract (on file with authors).

The form is called an “Enrollment Contract.” It includes the following mandatory terms:³²

I/we individually, and on behalf of my child, to the fullest extent permitted by law, agree to release and hold harmless the School, its agents and employees from claims, damages, losses, or other liabilities for injuries to my child not resulting from gross or willful negligence by the School, its agents or employees. I also agree to indemnify the School for all damage caused by my child. I understand that the School is not responsible for the loss or damage to the property of students.

...

I/we agree to pay the School for any and all legal fees and expenses that the School may reasonably incur to enforce this Agreement against me/us, and will indemnify and defend the school from litigation or other claims or threatened claims caused by my/our child or child’s actions or failures to act or arising from this or any other Agreement or decision, determination, or statement of the school regarding or affecting us or our child or another family member.

The School thus shifts enormous financial and legal risk upon the parents as the terms of the partnership. The School demands that parents assume the risks, it limits its liability to gross or wanton negligence, and it shifts the burden of its own legal costs to parents. In effect, the School proposes to take responsibility for students while taking almost no responsibility for them as a matter of law. It is not even willing to guarantee that it will care for children in a non-negligent fashion. The form leaves no room for negotiation.

The form demonstrates the influence of attorneys and insurance companies to limit school risk through this cost and legal responsibility shifting mechanism. Schools will either carry policies that include coverage for COVID-19-related suits, exclude coverage, or provide partial coverage (include but carry substantial limits on liability).³³ When coverage is excluded or limited, school administrators and school boards must think about their risks more as insurers would: what can be done to limit exposure to claims and litigation for which the school or school district might have to bear all or part of the costs (in the contexts of excluded or partial coverage)?³⁴

32. *Id.*

33. *See, e.g.*, AASA (School Superintendents Ass’n), AESA (Ass’n of Ed. Serv. Agencies), NSBA (Nat’l School Boards Ass’n), *Targeted Liability Coverage During the COVID-19 Pandemic* (July 8, 2020), [https://aasa.org/uploadedFiles/AASA_Blog\(1\)/LEA%20COVID-19%20Liability%20Coverage%20NSBA%20AASA%20AESA%202020%20final%20.pdf](https://aasa.org/uploadedFiles/AASA_Blog(1)/LEA%20COVID-19%20Liability%20Coverage%20NSBA%20AASA%20AESA%202020%20final%20.pdf) [<https://perma.cc/4SRW-Q9S6>] (explaining that “some school districts that self-insure may have sufficient coverage for losses resulting from inclement weather or other Acts of God . . . [but] may not have the capacity to cover losses due to an unprecedented, exceptional, and emergency circumstance(s) resulting from a massive international pandemic such as COVID-19”). *See generally* KATHERINA PISTOR, *THE CODE OF CAPITAL 6–7* (2019) (describing the role of sophisticated attorneys in drafting legal documents that code assets in a manner that generates substantial inequality).

34. *Cf.* Kevin Carey, *Risky Strategy by Many Private Colleges Leaves Them Exposed*, N.Y. TIMES (May 26, 2020), <https://www.nytimes.com/2020/05/26/upshot/virus-colleges-risky-strategy.html> (describing how many schools have taken risks with tuition in order to ensure enrollment levels remain high enough to keep doors open) [<https://perma.cc/J4QW-FTVZ>].

While school leaders must be mindful of limiting risk and attendant liability—to protect their students and other stakeholders and be responsible stewards of resources—the uncertainty, high stakes, and new insurance landscape of the pandemic indicate that the “administrator as insurer” mindset is likely to prevail over alternative attitudes. The mission of insurers, however, differs from the stated mission of schools in important ways that, if forgotten, would undermine the special harms caused by the education contracts of adhesion that have emerged as the sine qua non of a student’s reengagement with school. Indeed, there is little about the business of insurance that suggests an affinity between the aims of insurance and those of education.³⁵ When considering the contracts schools develop in this environment, we argue that the school as insurer, like the wolf in sheep’s clothing, should draw serious scrutiny from courts.

Even as schools should be mindful of not stepping into the role of insurer, schools must answer to their insurers to operate. Thus, the requirements that insurers place on schools are crucial for determining the possibilities for instruction.³⁶ There does not appear to be a definitive nationwide survey currently available around the approaches to COVID-19 liability being taken by insurers of K-12 schools or school districts. A handful of reported accounts of available insurance products are illustrative of attempts to use liability waivers to mitigate against the potential for litigation by parents and students in the event a student contracts COVID-19 on campus.³⁷

For instance, in establishing new liability coverage for COVID-19 to member districts, the Arizona School Risk Retention Trust is requiring “that districts ask parents and guardians to sign a liability waiver or an ‘acknowledgment of risks’ form.”³⁸ The Trust identifies several purposes for the imposition of the form as a “coverage precondition,” including to “inform parents of the risks inherent in in-person education during the COVID-19 outbreak” and “limit unfunded district liabilities for COVID-19 exposures.”³⁹

The Trust informs districts that, despite the requirement that districts ask parents to complete the waivers, “[p]arents, however, cannot be required to

35. *See In re Nature’s Classroom*, INS. 13-033, Proposed Decision and Order on Hearing June 9, 2014 Findings and Order (N.H. Ins. Dept. Sept. 4, 2014), https://www.nh.gov/insurance/pc/workerscomp/documents/14-09-04_fo.pdf [<https://perma.cc/6RP4-PJJY>] (rejecting conclusions by the National Council on Compensation Insurance regarding the “educational” qualities of an outdoor educational program as without foundation in fact or credible expertise).

36. Courts have invalidated instances in employment contracts where schools have overreached in a manner incompatible with their role. *See, e.g.*, *Arrowhead School Dist. No. 75, Park Cnty v. Klyap, Jr.*, 79 P.3d 250 (Mont. 2003) (invalidating liquidated damages provision of contract as between school and teacher on public policy grounds).

37. *See also* Modan, *supra* note 29 (identifying a Missouri school district where, “the [COVID-19] waiver [for participation in school athletics] was created by its insurance provider and distributed to all other schools under the same insurance program”).

38. “Arizona School Risk Retention Trust . . . provides Arizona public school districts and community colleges with property and liability coverages and related services.” The Arizona School Risk Retention Trust, *About Us* (last visited Feb. 4, 2021), <https://www.svc.the-trust.org/Home/AboutUs> [<https://perma.cc/U3EW-QL9T>].

39. The Arizona School Risk Retention Trust, *COVID-19 Liability Coverage Solution Approved by Board* (Aug. 4, 2020), <https://www.svc.the-trust.org/Event/128> [<https://perma.cc/VDL4-HZMJ>].

sign.”⁴⁰ While the publicly accessible guidance from the Trust does not elaborate on why parents cannot be required to sign, presumably the rationale is that parents sending their children to public K-12 schools cannot be required to assume an unprecedented, unknown set of risks for accessing a public institution—in which their children are obligated to participate.⁴¹ Even if a state were to attempt to establish a new statutory or regulatory cover for a school to use COVID-19 waivers, such a provision would be unlikely to withstand legal challenge, given the constitutionally or statutorily protected nature of the right to a public K-12 education at the state level nationwide,⁴² as well as other potential sources of protection.⁴³ Instead of relying on the device of the contract, the Trust’s guidance instead looks to acculturation, requiring that its members pressure parents to agree to sign a waiver, in part, so that there will be less of a price tag for “district liabilities for COVID-19 exposures.”⁴⁴

In at least one state (Oklahoma), the state department of education has directed a local school district to do the opposite of what the Trust is requiring: not to ask parents to sign a liability waiver as a condition of their children attending school in that district (whether the attendance is in residential, remote, or hybrid mode).⁴⁵ According to general counsel for the Oklahoma State Department of Education:

We don’t think it’s appropriate for a district—and we have seen and heard of examples across the country [to ask parents to sign a waiver]. The ability to attend public school free of charge—that is a right that is embedded in Oklahoma in the constitution and in state law.⁴⁶

40. *Id.*

41. *See, e.g.,* Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 972 (Wash. 1988) (stating that judicial assessment of when “exculpatory agreement” or liability waiver is void as against public policy includes assessment of whether “party seeking exculpation is engaged in performing a service of great importance to the public”). Not only is education a matter of “great importance,” parents are legally obligated to send primary and secondary school children to school and have a right to fulfill this obligation by sending them to public schools (absent specific extenuating circumstances, such as a child who has been expelled from public school pursuant to legitimate legal process). *See generally* Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 816 (2011) (tracing origins of contemporary “compulsory schooling” laws to “political and constitutional movements in the United States” in the 1800s).

42. To exclude children whose parents refuse to sign a COVID-19 waiver, or even to put pressure on parents to sign without enforcing exclusion, would deny or effectively deny these children their right to public education. *See* Kristine L. Bowman, *The Inadequate Right to Education: A Case Study of Obstacles to State Protection*, in KIMBERLY JENKINS ROBINSON, *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 66, 66 (2019) (“All fifty states have a right to education in their state constitutions. However, the language of the right varies significantly, and the interpretation of that language varies even more.”).

43. “[T]here is no positive right to education in federal law.” *Id.* at 76. However, federal constitutional rights are implicated by a total denial of public education to a discrete population. *See Plyler v. Doe*, 457 U.S. 202, 221 (1982) (explaining that “education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.”).

44. The Arizona School Risk Retention Trust, *supra* note 39.

45. Andrea Eger, *Beggs Public Schools Requiring Parents to Sign COVID-19 Liability Waiver; State Officials Say Such Forms Not “Appropriate or Allowable,”* TULSA WORLD (Aug. 18, 2020), https://tulsa-world.com/news/local/education/beggs-public-schools-requiring-parents-to-sign-covid-19-liability-waiver-state-officials-say-such/article_06bba7a3-edbc-534a-9be1-d47dcbd6a1db.html [https://perma.cc/ARQ8-LE52].

46. *Id.*

Oklahoma is not an outlier: “State constitutions uniformly make some provision of public education, sketching the contours of that right and directing state legislatures to provide it.”⁴⁷

In addition to the inherent flaw of being unable to condition access to a public service to fulfill a legal obligation on a waiver of liability for that access, these waivers are also vulnerable due to limitations in many states on parents’ legal ability to waive pre-participation liability claims for some or all activities on behalf of their children.⁴⁸ In these states, to the extent that these “education contracts of adhesion” purport to limit a minor student’s recovery for illness, injury, or death resulting from acquiring COVID-19 through school participation, the parent may be legally prohibited from contracting away their minor child’s claims. Indeed, at last count, almost all states refuse to enforce parental agreements on behalf of the child to waive liability for harm caused through that child’s participation in an activity sponsored by a non-profit.⁴⁹ Of the handful of states that will enforce these waivers, enforcement is due to public policy considerations—specifically, the public good of having that non-profit operate.⁵⁰

In these states, then, schools may contend that keeping their doors open is a public good justifying enforcement of the parental pre-participation waiver. This line of argument should be rejected on public policy grounds because of its fundamental incompatibility with the legal principles and social value of our primary and secondary school system, both for individuals (children and families) and the broader citizenry.

II. ADHESION, DOMINATION AND THE LIBERAL EDUCATION

When assessing “education contracts of adhesion” with an eye toward enforceability as a matter of public policy, the source and mission of education in the United States bears reiterating. By and large, education in the United States is a product of institutions. This country relies on schools—separate and apart from families, places of worship, and other communal structures—to provide education.⁵¹ Schools educate our children from kindergarten through high school graduation or, for some students, college or graduate school.⁵² They are public

47. Julie F. Mead, *The Right to an Education or the Right to Shop for Schooling: Examining Voucher Programs in Relation to State Constitutional Guarantees*, 42 *FORDHAM URB. L.J.* 703, 704–05 (2015).

48. See Brendan Sullivan, *Kentucky’s Stance on Non-Profit, Parental Liability Waivers: How Everyone Can Profit from Their Enforceability* (Note), 47 *N. KY. L. REV.* 75, 76 (2020) (explaining that “[s]tates generally fall into three categories [for enforcement of pre-injury parental liability waivers on behalf of minors]: (1) those enforcing all parental liability waivers, regardless whether the entity is for profit or non-profit; (2) those finding all parental liability waivers invalid; and (3) those enforcing parental liability only in the non-profit context.”).

49. See *id.* at 80 (stating that only “[f]our jurisdictions enforce parental liability waivers in the non-profit context because of state public policy.”).

50. See *id.*

51. See Martha Minow, *Education and Democracy*, *HARV. L. REV. BLOG* (Oct. 17, 2017), [https://blog.harvardlawreview.org/education-and-democracy/\[https://perma.cc/69V2-NQ6X\]](https://blog.harvardlawreview.org/education-and-democracy/[https://perma.cc/69V2-NQ6X]) (“The American movement for ‘common schools’ initiated in the 1830s sought to promote political stability, equip more people to earn a living, and enable people to follow the law and transcend differences in religion and background.”).

52. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local government . . . It is the very foundation of good citizenship.”).

entities subject to rules governing municipalities and states. They are private entities formed as corporations. They assume various forms of responsibility over students of all ages, including a primary role in all aspects of a student's life for residential education. They are charged with heightened legal duties across a number of domains as a result of the singular role they play to impart knowledge, foster skill development and, at minimum, provide a baseline level of safety to minor students.⁵³

Generally, schools aim to cultivate and enrich the student with respect to one value system or another.⁵⁴ In a system described as a liberal democracy embracing the virtues of freedom and equality (or life, liberty, and the pursuit of happiness), the development of a student's capacity for self-reliance, autonomy and, with regard to relationships, mutuality and respect, is a central aim of schooling.⁵⁵ It stands to reason, then, that the relationships that schools cultivate with students and parents should run parallel to, and reinforce, these goals.⁵⁶ It also stands to reason that schools, in cultivating students along these lines, would not foster environments in which students are encouraged to accept legal arrangements that cow them into submission with regard to important rights.⁵⁷ Schools typically advertise themselves as standing for a very different set of values—

53. Despite schools' various obligations to students, students nationwide do not have equitable experiences across schools. *See, e.g.*, KIMBERLY JENKINS ROBINSON, *Introduction*, in KIMBERLY JENKINS ROBINSON, *A FEDERAL RIGHT TO EDUCATION: FUNDAMENTAL QUESTIONS FOR OUR DEMOCRACY* 1, 4 (2019) ("Research and data confirm that minority and low-income children receive inferior educational opportunities.").

54. *See* ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 26 (25th anniversary ed. 2012) ("Every educational system has a moral goal that it tries to attain and that informs its curriculum. It was to produce a certain kind of human being Always important is the political regime, which needs citizens who are in accord with its fundamental principle."); JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION AND OF THE CONDUCT OF UNDERSTANDING* 8 (Ruth W. Grant & Nathan Tarcov eds., 1996) ("The well educating of their children is so much the duty and concern of parents, and the welfare and prosperity of the nation so much depends on it, that I would have everyone lay it seriously to heart and, after having well examined and distinguished what fancy, custom, or reason advises in the case, set his helping hand to promote everywhere the way of training up youth . . . which is the easiest, shortest and likeliest to produce virtuous, useful and able men in their distinct callings. . . ."). *See also* JOHN DEWEY, *DEMOCRACY AND EDUCATION* 81 (1916) ("The devotion of democracy to education is a familiar fact Since a democratic society repudiates the principle of external authority, it must find a substitute in voluntary disposition and interest; these can be created only by education.").

55. *See, e.g.* N.H. CONST. pt. II, art. LXXXII ("Knowledge and learning, generally diffused through a community, being essential to the preservation of a free government; and spreading the opportunity and advantages of education through the various parts of the country, being highly conducive to promote this end; it shall be the duty of the legislature and magistrates, in all future periods of this government, to cherish the interest of literature and the sciences, and all seminaries and public schools"); *see also* DEWEY, *supra* note 54, at 87 ("Upon the education side, we note that the realization of a form of social life in which interests are mutually interpenetrating, and where progress, or readjustment, is an important consideration, makes a democratic community more interested than other communities have cause to be in deliberate and systematic education.").

56. *See* DEWEY, *supra* note 54, at 83 ("Any education given by a group tends to socialize its members, but the quality and value of socialization depends upon the habits and aims of the group.").

57. PHILIP PETTIT, *REPUBLICANISM, A THEORY OF FREEDOM AND GOVERNMENT* 57 (1997) (describing "domination" as the antithesis of republicanism and defining "domination" the power to "remove any option that the agent does not like or . . . impose unbearable costs on the person's choice of those options. Such an agent will enjoy absolute power of arbitrary interference over that person.").

empowerment, self-actualization, and the like—as they compete for student enrollment or present themselves to their communities for other purposes.⁵⁸

In American law, the legal mechanism of the contract is structured to serve similarly liberal ends. It is the mechanism by which we agree to circumscribe our liberty by exchanging promises that convey benefits as price for impositions upon our freedom.⁵⁹ Whether conceived in these more modern terms, or in terms more ancient, the contract has value to the extent it improves our lot through cooperation.⁶⁰ It is distinguishable from other sources of obligation, such as criminal law or the law of torts, to the extent it permits individuals and entities to define specific relationships among and between themselves through tailored rule sets (contract terms), that impose mutual obligations above and beyond the rules sets that these other areas of law impose upon society in general.⁶¹

“The underlying and essential elements in a contractual relationship are [1] that two or more autonomous individuals with capacity [2] voluntarily agree (consent) to be bound by [3] some mutually bargained for benefit or trade (exchange).”⁶² The closer the law adheres to these requirements, the likelier the law of contracts assures those agreements limiting agency are accomplished at a level of agency and rational understanding, consistent with a strong commitment to individual liberty.⁶³ As Justice Cardozo said of the proper application of contract law and its demands: “[w]e are not to suppose that one party was to be placed at the mercy of the other.”⁶⁴

The centrality of the device of the contract to mediating freedom and self-control in our society indicates that when anything called a contract (or constituting a contract, even if that label isn’t affixed) is deployed between schools and students or their parents (when students are minors), the manner of deployment will convey an educational message about what the school deems an appropriate and virtuous form of social action generally. Some liability-shifting or liability-

58. Cf. Genevieve Shaw Brown, *After Gen Z, Meet Gen Alpha. What to Know about the Generation Born 2010 to Today*, Good Morning America (Feb. 17, 2020), <https://www.goodmorningamerica.com/family/story/gen-meet-gen-alpha-generation-born-2010-today-68971965> [<https://perma.cc/8RBC-G8P5>] (“In the last five years, almost half of parents [of kids 10 and under] have increased their expectations of their child’s school to support well-being. More than one in four have significantly or somewhat increased their expectations.”).

59. See, e.g., N.H. CONST. Part I, Art. III (“When men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others.”).

60. See Lewis, *supra* note 19, at 84 (citations and footnotes omitted).

61. See *id.* (citations and footnotes omitted).

62. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 219–20 (2004); see also *id.* at 225 (“In private contract theory, one is legitimately bound because one has agreed to be bound by the terms of the contract. Content to terms usually is expressed, but may be implied from one’s actions.”) (citation omitted).

63. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 50 (reprt. ed. 2013) (“A person’s shaping of his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity so to shape his life can have or strive for a meaningful life.”).

64. *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917); see also *Morin Bldg. Products Co. v. Baystone Const. Inc.*, 717 F.2d 413, 415 (7th Cir. 1983) (Posner, J.) (acknowledging that “paternalism” may be appropriate “to protect the weaker party” to a contract); see also PETTIT, *supra* note 57, at 52–54 (describing freedom dependent upon a state’s capacity to eliminate power imbalances that permit one party to dominate another).

abdicated devices being used by schools are being called waivers, releases, or other labels without the term “contract” on their face.⁶⁵ These devices (written agreements between parties to allocate spheres of responsibility, rights, and potential future recovery) are of course contracts.⁶⁶

The use of a contract also will signify the nature of the relationship between the school and the student. In other educational domains, notably controlling violence on campus, the demands of consent have taken on vital importance.⁶⁷ Important work by philosophers such as Martha Nussbaum and Amartya Sen have further raised important challenges to the standard story about the capacity to consent, including in societies that embrace liberal principles, where power dynamics render one’s capabilities a nullity.⁶⁸

Education contracts of adhesion convey a series of values that subvert the aims of a liberal democratic or republican-oriented education when viewed in this light. Rather than signal mutual respect and care for cultivating the student and capacity for individual bargaining and choice by the student’s parents (on the student’s behalf), the use of education contracts of adhesion signals a desire to dominate and obtain the submission of students at great cost.⁶⁹ It does so where commentators have already raised substantial concerns about the ways in

65. See, e.g., Eger, *supra* note 45.

66. See Mary Ann Connell & Frederick G. Savage, *Releases: Is There Still A Place for Their Use by Colleges and Universities?*, 29 J.C. & U.L. 579, 579–80 (2003) (“Courts use a plethora of terms in referring to written documents by which a party seeks to be excused from future liability The most commonly used term is ‘release,’ which has been defined as a contract in which one party agrees to release or exculpate another from potential tort liability for future conduct covered in the agreement.”).

67. See Thomas R. Frieden, Debra E. Houry & James A. Mercy, Nat’l Ctr. for Inj. Prevention & Control, Ctr. for Disease Control, *Sexual Violence on Campus: Strategies for Prevention* 15 (2016), <https://www.cdc.gov/violenceprevention/pdf/campusvprevention.pdf> [<https://perma.cc/6QFC-XF78>] (“Campuses are teaching students about healthy sexuality practices and providing definitions of consent. One way that campuses are doing so is by lamenting affirmative consent policies. Affirmative consent means that consent to agreed-upon sexual activity is freely given by all parties involved by words or actions. An affirmative consent policy outlines the definition of consent and makes it known to students, staff and faculty.”).

68. MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 25 (2011); see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 75 (1999) (“A person’s ‘capability’ refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations.”).

69. See SHOSHANNA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 219–20 (2019) (describing the use of contracts of adhesion in the e-commerce space as the “annihilation of contract” and the “invention of the uncontract” which rely on “compulsion” rather than consent to obtain one party’s desired outcome); see also Tenerowicz, *supra* note 15, at 686 (“The importance of recognizing the adhesiveness nature of the contract cannot be overstated: courts should acknowledge that these contracts are generally executed unilaterally, contain boilerplate language and do not provide opportunity for meaningful negotiation of any of the terms.”). Cf. LEAH A. PLUNKETT, *SHARENTHOOD: WHY WE SHOULD THINK BEFORE WE TALK ABOUT OUR KIDS ONLINE* 79–81 (2019) (discussing norm of parents’ accepting click-wrap agreements for digital devices and services through which they then share their children’s private information). For a history of the use and invalidation of exculpatory clauses on public policy grounds, see Zahra Takshid, *Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, 42 *CARDOZO L. REV.* (forthcoming 2021) (describing how the doctrine of unconscionability fails to protect larger societal interests at stake in cases involving efforts to eradicate tort liability through adhesion contracts).

which the education bureaucracy has bred students ill-equipped to navigate the complexities of American society.⁷⁰

To understand why, it is important to outline the differences between contracts and those devices the law has defined, more generally, as adhesion contracts. An adhesion contract is drafted by a party whose power in a negotiating dynamic is sufficiently strong so as to permit it to demand that the party with whom it is doing business must accept the terms the powerful party offers.⁷¹ An adhesion contract views the weaker party as fungible and replaceable.⁷² It sets terms and turns a deaf and unyielding ear on any response or effort to negotiate a different bargain.⁷³ It is thus a disempowering device.⁷⁴ Calling it this device a “contract” compounds the injury to freedom and autonomy the device causes to people, who, having already been conditioned to accept this sort of domination, now may even assume a sort of self-hatred derived from bearing moral responsibility for accepting the terms within this device.⁷⁵

Efficiency and, even, necessity, have been the strongest arguments deployed in support of the enforcement of these devices. These arguments have taken on heavy water in the aftermath of the financial crisis of 2008 and in the midst of COVID-19, as the cost of an overheated economy driven by thoughtless consumerism are being imposed, all at once, upon a world, governed for decades, by the notion that relentless, fast pace, cross-border commerce, has far fewer costs than we have come to learn.⁷⁶ Many powerful arguments along the same lines can be made with regard to concerns about environmental degradation. In the context of education during COVID-19, they will be defended on the ground that schools must use them to limit risk and additional exposure, including to attorney’s fees, in a time of great financial distress.

70. See GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND* 9 (2018) (“Stated simply: Many university students are learning to think in distorted ways, and this increases their likelihood of becoming fragile, anxious, and easily hurt.”); see also *id.* at 197 (describing how schools have come to be run by administrators who are not educators, but employees trained to pursue non-educational goals).

71. See ZUBOFF, *supra* note 69, at 219–20.

72. *Id.* at 220.

73. *Id.*

74. See Matthew A. Seligman, *Moral Diversity and Efficient Breach*, 117 MICH. L. REV. 885, 887 (2019) (“[B]ecause people also tend to think that breaking a promise is wrong, they think they are subject to a corresponding moral obligation to perform the contract.”).

75. See *id.*; see also MARGARET JANE RADIN, *BOILERPLATE* 19 (2013) (describing involuntary contracts as a contradiction in terms).

76. See Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage Conundrums and How to Fix Them*, 46 CONN. L. REV. 497, 502 (2013) (“By selling adjustable-rate mortgages to millions of people who could not afford to pay them back, the banks inflicted novel individual and systemic risks.”); see also Tomasz Piskorski & Amit Seru, *Mortgage Market Design: Lessons from the Great Recession*, BROOKINGS PAPER ON ECON. ACTIVITY 430 (Spring 2018) (“A series of papers have argued that a number of factors related to the rigidity of contract terms . . . hindered efforts to restructure or refinance household debt, exacerbating the foreclosure crisis.”); BINYAMIN APPELBAUM, *THE ECONOMISTS’ HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY* 7 (2019) (“The medicine [of unconstrained free-market capitalism initiated in the late 1970s focused on wealth maximization] did not work.”).

Insurance policies are the paradigmatic examples of contracts of adhesion.⁷⁷ They are drafted and proposed by insurers. The purchaser has almost no power to negotiate terms. Because of this power imbalance, and because in many circumstances, insurance is mandated by law and heavily regulated to protect consumers, the law has developed canons of term construction that favor purchasers where questions of coverage are litigated.⁷⁸ Insurance contracts are construed against their drafters; they are construed so as to effectuate their purpose; and they are construed so as not to result in absurdities.⁷⁹ They are also subject to substantial regulation, including by insurance bureaucracies which may and often do render terms a nullity as a matter of public policy.⁸⁰

In the context of contracts that mediate the legal dynamic between children and adults, the harms caused by the conditioned, thoughtless “acceptance” of commercial terms affecting the legal rights of children and teenagers (in their role as students) through adhesion contracts are compounded. Parents and students, out of desperation, or thoughtlessly, are required or encouraged to trade away important rights to obtain educational nurturance, through “agreements” they do not and could not understand and could not negotiate, implicating the future of students in ways well beyond the competency of the standard adult to understand or predict. As the harms caused by the development of commercial life along these lines become more obvious by the day, the role of schools and educators in training students to become stronger and more sophisticated takes on a new dimension of urgency.⁸¹

While such labels are accurate to the extent they reflect that the parent is being asked to waive future rights to sue (their own and their children’s) or to release the school and its employees from future liability due to COVID-19 injury or death, these terms fail to capture the scope of the purported bargain into which schools are seeking to have parents enter. Schools are not only seeking “to be excused from future liability” through waiver or release language, they are effectively abdicating current responsibility for measures to limit future risk, re-writing or at least eroding their traditional obligation to protect the young people whom they serve.

77. See Christopher C. French, *COVID-19 Business Interruption Insurance Losses: The Cases for and Against Compliance*, 27 CONN. INS. L.J. 1, 10 (2020) (“Insurance policies arguably are not really contracts because they are non-negotiable, and the purchaser generally does not get a chance to review the policy before purchasing it.”); see also *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 173–74 (Iowa 1975) (“With respect to those interested in buying insurance, it has been observed that . . . [h]is chances of successfully negotiating with the company for any substantial change in the proposed contract are just about zero.”) (citing 7 WILLISTON ON CONTRACTS § 900, at 29–30 (3d ed. 1963)).

78. See French, *supra* note 77, at 9–12.

79. See *id.* at 12–13.

80. See *id.* at 10.

81. See ZUBOFF, *supra* note 69, at 31 (describing “the decades-long elaboration and implementation of the neoliberal economic paradigm: its political economics, its transformation of society, and especially, its aim to reverse, subdue, impede, and even destroy the individual urge toward psychological self-determination and moral agency.”).

III. A QUESTION OF ENFORCEMENT

Despite the obvious theoretical problems that arise from treating contracts of adhesion as “contracts,” the law of contracts has permitted the enforcement of contracts of adhesion in numerous, dubious circumstances.⁸² The proliferation of decisions enforcing contracts of adhesions caused the American Law Institute to attempt to recognize “blanket assent” as a concept in the most recent draft Restatement proposal.⁸³ “Blanket assent” would entrench the practice of obtaining the enforcement of terms within a contract of adhesion as a default position under the law.⁸⁴ This attempt elicited a furor of negative reaction from some of the nation’s most respected scholars in the field as well as from public officials with consumer protection enforcement jurisdiction.⁸⁵

Two influential and profoundly flawed decisions in the area, *ProCD, Inc. v. Zeidenberg*,⁸⁶ and *Hill v. Gateway 2000*,⁸⁷ illustrate how far courts will go to permit commercial actors to control the contracting dynamic as between businesses and consumers.⁸⁸ In *Pro-CD*, the Seventh Circuit ruled that terms not visible to the purchaser when the purchaser bought the software were terms the consumer accepted as a matter of contract law.⁸⁹ In *Hill*, the Seventh Circuit ruled that terms proposed to the consumer by telephone after the parties entered a contract was executed were given the same treatment.⁹⁰ Scholars have described these decisions as “subverting . . . what is natural and traditional in contract law” and rendering a decision that is contrary to governing law.⁹¹

These decisions nevertheless had substantial influence on the development of the law of consumer contracts in succeeding decades, including with respect to how contracts are proposed to consumers who purchase goods and services on-line, through e-commerce.⁹² Some courts have resisted the pull of these decisions and have reaffirmed the doctrine of assent in consumer contracts.⁹³ During the same time, courts have continued to recognize the centrality of the capacity

82. See Lewis, *supra* note 19, at 88–90.

83. See *id.* at 100–02.

84. See Budnitz, *supra* note 20, at 2 (describing “blanket assent” as an approach that “creates a presumption that consumers conducting transactions online will be bound to standard terms.”).

85. See Allison Frankel, *State AGs protest ALI consumer contract restatement ahead of May 21 vote*, Reuters.com (May 21, 2019, 8:13 AM), <https://www.reuters.com/article/us-otc-ali/state-ags-protest-ali-consumer-contract-restatement-ahead-of-may-21-vote-idUSKCN1SL2VB> (“Twenty-three state attorneys general sent a letter Tuesday to members of the American Law Institute, criticizing a draft restatement of law of consumer contracts that is set for a final vote next week at ALI’s annual meeting.”).

86. 86 F.3d 1447 (7th Cir. 1996).

87. 105 F.3d 1147 (7th Cir. 1997).

88. See Budnitz, *supra* note 20, at 10–11 (describing ALI’s selection of the *Pro-CD* framework as the governing position with regard to proposed positions within the Restatement of Laws series).

89. *ProCD*, 86 F.3d at 1449.

90. *Hill*, 105 F.3d at 1149–50.

91. Shubha Ghosh, *Where’s the Sense in Hill v. Gateway 2000?: Reflections on the Visible Hand of Norm Creation*, 16 TOURO L. REV. 1125, 1135 (2015); see also *id.* at 1131–32 (noting divergence from applicable provisions of the Uniform Commercial Code).

92. See Meyer v. Uber Tech., Inc., 868 F.3d 66 (2d Cir. 2017).

93. See, e.g., Kauders v. Uber Tech, Inc., 486 Mass. 557, 559 (2021) (invalidating terms and conditions in online form contract on contract formation grounds).

to consent (and so to choose) to the exercise of fundamental freedoms in other contexts.⁹⁴ In these non-contract contexts where the centrality of individual consent (and therefore choice) are more robustly protected, such as reproductive health, courts have also recognized the suppressive effect of oppressive environmental circumstances on the individual's ability to engage in meaningful choice.⁹⁵

Generally speaking, the law regarding the dynamics of power, capacity and choice between students, parents and schools is no less muddled.⁹⁶ Over the past fifty years, the United States Supreme Court has sent mixed messages regarding the existence of *in loco parentis*, the English Common Law doctrine that either means that trusted institutions, are given power over students equivalent to what parents traditionally wielded.⁹⁷ Some observed that the law reposed power through this mechanism without demanding explicit duties.⁹⁸ Theorists who took up the call to identify a source for duties sought to ground duties in contract, the law of fiduciary duty, or the law of torts.⁹⁹

Some drew distinctions regarding the scope of duties by looking at differences in status with reference to age and advancement of students, arguing that a college student stands in a different relationship to a school than does a student attending school from kindergarten through twelfth grade.¹⁰⁰ Some, frustrated with a view of the law projected norms too authoritarian in nature to serve the true interests of children, proposed a new approach that would demand greater recognition of broader public duties to nurture and cultivate children consistent with the recognition of children as humans with interests to be recognized and protected in their own right.¹⁰¹ Normatively, the law has not rested on any one set of principles when mediating the relationships this paper discusses.

Whatever the normative framework, courts have not treated schools as ordinary commercial actors subject to the sort of analysis displayed in *ProCD* or *Hill*. Notably, the Washington Supreme Court, in an en banc decision, *Wagenblast v. Odessa School District*,¹⁰² acknowledged the special relationship that exists between educators and students in its decision to render void on public policy grounds a release limiting school liability for negligence with regard to

94. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) (identifying individual capacity to make “choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution”).

95. See, e.g., *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (identifying in the abortion access context that an “abortion regulation” that “plac[es] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” will not survive constitutional scrutiny).

96. See generally Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change*, 78 U. CIN. L. REV. 969 (2010).

97. See generally Theodore C. Stamatakos, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L.J. 471 (1990); Mark Fidanza, *Aging out of In Loco Parentis: Towards Reclaiming Constitutional Rights for Adult Students in Public Schools*, 67 RUTGERS U. L. REV. 805 (2015)

98. Stuart, *supra* note 96.

99. *Id.*

100. Fidanza, *supra* note 97.

101. See Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448 (2018).

102. 758 P.2d 968, 973–74 (Wa. 2012).

interscholastic athletics.¹⁰³ The court acknowledged that it had enforced adhesion releases in a number of circumstances in past decisions, generally where the party releasing obligations was engaging in risky recreational activity.¹⁰⁴ Under circumstances in which the underlying activity included a public duty, however, the court acknowledged precedents in which that special duty required the invalidation of adhesion contracts.¹⁰⁵

Citing a decision of the California Supreme Court, the court identified six factors it would consider in determining whether an adhesion contract fell into one or the other category.¹⁰⁶ These are whether:

- 1) the agreement covers an activity suitable for public regulation,
- 2) whether the party seeking exculpation is engaging in conduct of public performance, deemed a matter of practical necessity for some members of the public,
- 3) whether the party seeking exculpation holds themselves out as performing services at standardized level,
- 4) whether the party seeking exculpation has a decisive bargaining advantage by virtue of its relative strength,
- 5) the party seeking exculpation makes no provision by which the counterparty may negotiate a better deal, including by agreeing to pay for greater protections, and
- 6) the counterparty is under the control or care of the furnisher of the adhesion contract.¹⁰⁷

The Washington Supreme Court found that all of the factors favored a ruling that the release proposed by the school and signed by parents was void for public policy reasons. The reasoning of the court turned on the centrality of interscholastic sports to student well-being and the public interest, the heavy standardization of interscholastic sports, and the substantial bargaining power schools had when compared to student athletes and parents.¹⁰⁸

The same factors would appear to apply broadly across the public and private education system and with even greater force during COVID-19. Primary and secondary education is not only suitable for public regulation, but takes place in a strong, well-established system of state and federal laws that pertain to both its private and public forms. The school, in seeking exculpation, is performing conduct that is deemed a “matter of practical necessity” for all “members of the public.”¹⁰⁹ Indeed, all members of the public falling within the range of primary through secondary school age have a legal right to attend public school.¹¹⁰

Private schools, while not required to accept all students as are public schools, nonetheless meet the threshold of providing a service that is a “matter

103. *Id.* at 970.

104. *Id.* (including toboggan sliding, scuba diving, mountain climbing, and other activities).

105. *Id.* (listing bailees, public utilities, and public housing releases as carrying such duties).

106. *Id.* at 971–72.

107. *Id.*

108. *Id.* at 973.

109. *Id.* at 971.

110. *See* Bowman, *supra* note 42, at 66. A student can temporarily or permanently lose that right through out-of-school suspension or expulsion as a result of a school discipline proceeding that comports with due process requirements. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (explaining school discipline due process requirements).

of practical necessity for some members of the public”¹¹¹—those parents who exercise their constitutionally-protected right to send their children to private schools for religious, moral, or other reasons.¹¹² Inherent in a school (public or private) having its doors open for students is holding itself out as fulfilling baseline standards of legal and regulatory compliance or applicable accreditation (such as through independent school accreditation entities).¹¹³

Public schools have a completely dominant bargaining position: parents are required to send their minor children to school, and the public school to which they are assigned is typically the only institution that they have a legal right to access to fulfill their legal obligation. Private schools have, at minimum, a “decisive bargaining advantage”¹¹⁴ (especially in pandemic life, as in-person or hybrid public school options may be more limited) by virtue of their status as options (sometimes the best options) for parents to access to fulfill their legal obligation to send their minor children to school, as well as to exercise their constitutional right to direct their children’s upbringing.

Schools do not appear to be offering any room for individual parent bargaining over terms (although some schools, like the Arizona example, are ostensibly not requiring a signature¹¹⁵—although this represents not bargaining but still the complete “take it or leave it” mentality). Indeed, schools do not appear to be making clear to parents what the terms are such that bargaining could even take place around them.¹¹⁶ Children (and by extension their parents) are under the control of the school (when they are enrolled) and, in the case of public schools, arguably before they are enrolled because of the parent’s legal obligation to send the child to school and the public school’s status as (typically) the only option that the parent has the legal right to access to fulfill this obligation.

Despite the overwhelming case against enforcing education contracts of adhesion, especially during this pandemic, it remains an open question what courts will do when confronted with disputes around these devices.¹¹⁷ There is precedent in some states for upholding devices in which parents have waived rights on behalf of minor children for participating in school activities.¹¹⁸ The

111. *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 971 (Wash. 1988).

112. *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (protecting parental right to choose private education).

113. *See, e.g., About ISACS*, ISACS, <https://www.isacs.org/about-isacs> (last visited Jan. 25, 2021) [<https://perma.cc/3AJF-8ZZG>] (working with over “240 member schools, serving over 90,000 students . . . for high quality accreditation services”).

114. *Wagenblast*, 758 P.2d at 971.

115. *See supra* note 38 and accompanying text.

116. *See Carolyn Buppert, What if a Child Gets COVID at School? School Liability Waivers*, MEDSCAPE (Sept. 14, 2020), <https://www.medscape.com/viewarticle/937063> [<https://perma.cc/8PZ9-ULVL>] (identifying COVID-19 school waivers as contracts of adhesion and advising parents to ask schools and districts what measures the educational setting will be taking to protect health before signing).

117. This question has yet to receive widespread attention in the legal academy or in the popular press. One education attorney who has offered an analysis in the press has assessed as follows: “‘there’s a good legal argument that it’s against public policy to compel students to go to school and compel them to waive liability in order to comply with the law.’” *See Sawchuck, supra* note 14.

118. *See Doyice J. Cotten & Sarah J. Young, Effectiveness of Parental Waivers, Parental Indemnification Agreements, and Parental Arbitration Agreements as Risk Management Tools*, 17 J. LEGAL ASPECTS SPORT 53,

pandemic represents uncharted territory, both for legal application and for schools themselves.¹¹⁹ Especially where schools are giving parents an option to have their children participate in education remotely, schools have a non-frivolous argument that in-person attendance is more analogous to participation in an optional, extra-curricular activity rather than the core of the educational experience. This argument is weakened, however, by the persistent digital divide with respect to accessing the Internet and having reliable devices. For families with these resource constraints, which render remote learning a limited possibility or impossible, there may be no actual choice between modalities.¹²⁰

Schools may also argue that, in upholding contracts that limit liability in individual disputes, courts would be upholding broader benefits within public policy by permitting schools to keep their doors open to be there to serve students who are in heightened need of in-person attendance, cohorts that may include children with disabilities, English Language Learners, and students without adequate resources or safe adults within their homes.¹²¹ In this line of argument, individual student and family concerns would be relegated to a lesser status than communitarian (serve the vulnerable) and also utilitarian (keeping the doors open for some is utility maximizing and therefore the superior choice) aims.

This argument is vulnerable on several grounds. First, in many jurisdictions, existing or new state laws already limit school liability for parental COVID-19 suits.¹²² As general counsel for the Oklahoma State Department of Education observed in reining in the local school district that was engaged in overreach with its parental waiver request: “If a district is adhering to established guidelines and protocols for COVID-19, you [district] are afforded an exemption (from liability) in state law, so there would be no need to have in place or to force any type of signing of a waiver, which we [State Department of Education] don’t think is appropriate or allowable.”¹²³ General counsel here “was referring to [Oklahoma] Senate Bill 1946, passed at the onset of the pandemic, which protects an individual or school district that is adhering to official COVID-19 safety guidance. Also, the Oklahoma Governmental Tort Claims Act affords

59 (2007) (identifying that the “first state to hold that parental waivers were enforceable was California. The landmark case, *Hohe v. San Diego Unified School District* (1990), involved a 15-year-old high school student who was injured while under the effects of hypnosis at a school assembly.”)

119. *But see* Andrew A. Schwartz, *Contracts and COVID-19*, 73 *STAN. L. REV. ONLINE* 48 (2020) (describing generally applicable contract defenses while noting: “This coronavirus is new, but wars, floods, and even other pandemics have upset innumerable contracts over the years.”).

120. *See* Sawchuck, *supra* note 14 (explaining that “[n]ot all families have the technology or broadband access to be able to meaningfully participate in remote learning, raising questions about whether they truly are offered a choice about whether to sign a waiver.”).

121. *Cf.* *Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (1998) (upholding an athletic waiver signed by parents for their child’s participation in non-profit athletic club on public policy grounds).

122. *See* Sawchuck, *supra* note 14 (identifying that “[i]n more than half the states, lawmakers have introduced proposals or signed executive orders to extend liability protection. Some of those new rules appear to cover only businesses or health providers, however. New laws in Tennessee and Ohio do specifically mention schools. Ohio, for instance, bars COVID-19 tort claims unless a district or other entity has acted “recklessly, intentionally, or with wanton misconduct.”).

123. Eger, *supra* note 45.

protections to school districts that may face a claim relating to COVID-19 exposure.”¹²⁴

CONCLUSION

We urge schools, insurers, courts, and other stakeholders considering the use of education contracts of adhesion during the pandemic to reject them. Purporting to release schools from liability at a time when many schools do not even have fully developed safety protocols fails as a matter of basic drafting because: “A valid release must be simple enough for a layperson to understand and additionally give notice of its import. A drafter of such a release faces two difficult choices. His Scylla is the sin of oversimplification and his Charybdis a whirlpool of convoluted language which purports to give notice of everything but as a practical matter buries its message in minutiae.”¹²⁵

More fundamentally, education contracts of adhesion subvert the imperative of liberal education: to develop a strong person, sensitive to domination and prepared to stand among his/her/their peers in a society that values individual freedom and republican self-control.¹²⁶ To the extent that schools are legitimately concerned about establishing and enforcing public health measures, there are devices other than education contracts of adhesion that can further these goals without accompanying waiver or assumption of risk language. Schools can set out rules for campus safety that students (and their parents) must agree to prior to return and, if violated, will result in student removal from campus.¹²⁷

Establishing behavioral norms and requirements for students on school grounds is a reasonable, familiar use of school authority. Going from the use of safety requirements and discipline codes to the “self-loathing” or cognitive dissonance fostered by an education contract of adhesion in a school setting not only harms students and families in the present but undermines the very attributes schools are supposed to be fostering—and impedes societal continuation of learning, which is more imperative than ever during a time of crisis.¹²⁸

124. *Id.*

125. *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647, 650 (Cal. Ct. App. 1990).

126. *See supra* Part II.

127. *See, e.g., COVID-19 Student Health Agreement*, LISBON REGIONAL SCH., http://www.lisbon.k12.nh.us/uploads/4/6/0/3/4603503/covid-19_behavior_contract_agreement.pdf (last visited Jan. 14, 2021) [<https://perma.cc/72MX-5GB3>] (requiring students to sign written agreement for safe behavior or face disciplinary consequences, including removal from campus).

128. *See, e.g., A.C. v. Raimondo*, No. 18-645, 2020 WL 6042105 at *2 (D.R.I. Oct. 13, 2020) (stating that public school plaintiffs in civics education adequacy suit “seem to recognize is that American democracy is in peril. Its survival, and their ability to reap the benefit of living in a country with robust freedoms and rights, a strong economy, and a moral center protected by the rule of law is something that citizens must cherish, protect, and constantly work for.”).