

# THE POLITICAL ECONOMY OF PANDEMIC PODS

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*More than a response to a temporary health crisis, the pandemic pods that emerged in the wake of COVID-19's onset are an illustration of larger problems in American education. Grounded in a broader social architecture of risk in education and contextualized against neoliberal policies inside and outside of education, the rise of pandemic pods was both predictable and inevitable. Needed are interventions that both undercut the inherent inequality of pandemic pods in the short term and reorient the political economy of education such that education stability and equality can be secured in the long term.*

INTRODUCTION.....	89
I. THE RISE OF PANDEMIC PODS.....	92
II. THE POLITICAL ECONOMY OF PANDEMIC PODS .....	94
A. <i>Education as Privilege</i> .....	95
B. <i>Pandemic Pods in an Era of Risky Education</i> .....	96
III. PODS IN THE SHORT- AND LONG-TERM.....	103
CONCLUSION .....	105

## INTRODUCTION

As COVID-19 raged across the United States in the summer of 2020, large school districts began announcing that they would open the 2020-21 school year online.<sup>1</sup> After mid-semester transitions to remote learning the

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<sup>1</sup> See, e.g., Howard Blume & Sonali Kohli, *L.A. Unified Will Not Reopen Campuses for Start of School Year amid Coronavirus Spike*, L.A. TIMES (July 13, 2020, 7:31 PM), <https://www.latimes.com/california/story/2020-07-13/l-a-unified-will-not-reopen-campuses-start-of-school-year>; Colleen Wright, *Miami-Dade County Public Schools to Begin School Year Online Only and Later Aug. 31 Date*, MIA. HERALD (Aug. 6, 2020, 2:33 PM), <https://www.miamiherald.com/news/local/education/article244544787.html>; Shawn Hubler & Dana Goldstein, *Los Angeles and San Diego Schools to Go Online-Only in the Fall*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/13/us/lausd-san-diego-school-reopening.html>; Vanessa McCray, *Atlanta Public Schools to Start Year with Virtual Learning*, ATLANTA J.-CONST. (July 10, 2020), <https://www.ajc.com/news/local-education/atlanta-public-schools-start-year-with-virtual->

previous spring, school districts had been optimistic about in-person reopenings in the fall. The continuing absence of a coordinated federal and state response to the coronavirus, however, facilitated the virus's continued spread,<sup>2</sup> leading to announcements across the country that school reopenings would be significantly delayed.<sup>3</sup> Announcements about online teaching in the fall understandably prompted consternation about extensive student learning loss,<sup>4</sup> as well as about parents' nearly impossible task of keeping students at home while working full-time.<sup>5</sup> But some parents, particularly those who were wealthy and white,<sup>6</sup> had a plan: pandemic pods.

Small homeschooling groups taught by children's parents or a paid teacher,<sup>7</sup> the pandemic pods are likely to have a significant and negative impact on equal education, undermining equitable school finance,<sup>8</sup> intensifying

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learning/aNaJsQVMxfowv9egYTTfPL; Hannah Natanson, *Arlington Public Schools Switches to Remote Learning for Fall, Reversing Course*, WASH. POST (July 14, 2020, 10:45 PM), [https://www.washingtonpost.com/local/education/arlington-public-schools-switches-to-remote-learning-for-fall-reversing-course/2020/07/14/aabe4d3c-c605-11ea-a99f-3bbdfb1af38\\_story.html](https://www.washingtonpost.com/local/education/arlington-public-schools-switches-to-remote-learning-for-fall-reversing-course/2020/07/14/aabe4d3c-c605-11ea-a99f-3bbdfb1af38_story.html).

<sup>2</sup> Drew Altman, *Understanding the US Failure on Coronavirus*, BMJ (Sept. 14, 2020), [www.bmj.com/content/370/bmj.m3417](http://www.bmj.com/content/370/bmj.m3417).

<sup>3</sup> See Dana Goldstein & Eliza Shapiro, *Most Big School Districts Aren't Ready to Reopen. Here's Why.*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/14/us/coronavirus-schools-fall.html> (noting that only two of the nation's largest school districts had achieved key benchmarks that would make it safe to return to schools).

<sup>4</sup> See Dana Goldstein, *Research Shows Students Falling Months Behind During Virus Disruptions*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/05/us/coronavirus-education-lost-learning.html>; see also Megan Kuhfeld, James Soland, Beth Tarasawa, Angela Johnson, Erik Ruzek & Jing Liu, *Projecting the Potential Impacts of COVID-19 School Closures on Academic Achievement 2* (Annenberg Inst. at Brown Univ., EdWorkingPaper No. 20-226, 2020) (projecting that students would return to school in fall 2020 with diminished gains in math and reading compared to a typical school year).

<sup>5</sup> See Eliza Shapiro & Patrick McGeehan, *Big New Obstacle for Economic Recovery: Child Care Crisis*, N.Y. TIMES (July 10, 2020), <https://www.nytimes.com/2020/07/10/nyregion/nyc-school-daycare-reopening.html> ("Business and union leaders . . . said there was no way the economy . . . could fully return to normal if parents had no choice but to stay at home to watch their children.").

<sup>6</sup> Although this Essay takes as its point of departure white parents with more resources who turned to the pods, minoritized parents can also turn to private resources to manage insecurity and exclusion in the school and caregiving system, including depending on elders and fictive kin. As scholars explain, however, the impact of the pandemic on communities of color as well as the elderly has undercut this caregiving network. See, e.g., ERICA O. TURNER ET AL., EQUITY IN PANDEMIC SCHOOLING 1 (2020).

<sup>7</sup> Melinda Wenner Moyer, *Pods, Microschools and Tutors: Can Parents Solve the Education Crisis on Their Own?*, N.Y. TIMES (Aug. 18, 2020), <https://www.nytimes.com/2020/07/22/parenting/school-pods-coronavirus.html>.

<sup>8</sup> See *id.* ("[I]f students leave public schools to join pods, funding for already starved public schools could drop further.").

school segregation,<sup>9</sup> and exacerbating sexism, ableism, and racism.<sup>10</sup> The pandemic pods, however, are just the latest in a political economy that has prioritized individual capacity in a market model of education, unevenly distributing access, power, and privilege in ways that benefit the upper class in the United States. This phenomenon is scaffolded by a body of law that prioritizes individual “choice” while absolving the state of responsibility for quality education.

A neoliberal trend prioritizing personal choice and responsibility in education is neither novel nor disconnected from the same phenomenon in other spheres of American life. This Essay, however, uses the rise of pandemic pods specifically to illustrate the trend in American education and situate the problem in a larger tapestry of insecurity and instability in American life, even among wealthier and whiter Americans. Although framing the pods as a response to risk naturally lends itself to solutions that contemplate the pooling of resources in response to risk, solutions that engender a “shared fates” approach to policy are not readily forthcoming, in education or elsewhere.

Part I of this Essay further details the pandemic pods phenomenon, canvassing the immediate events that led to their creation and forecasting their short- and long-term impact. In addition to undercutting school district funding, the pods only aggravate race and class segregation in American schools. Part II situates the pods in a larger political economy of risk in American education. Contextualized against neoliberal policies and norms, inside and outside of education, that emphasize choice and individual responsibility, the rise of pandemic pods was both predictable and inevitable, foreboding a future in which a system of public education is vulnerable to collapse. Indeed, if rising segregation rates are any indication, public education is already in a state of collapse for students of color and their families. Part III closes with analysis of interventions that undercut the inherent inequality of pandemic pods in the short term, while also engaging larger fixes to the political economy of education that can secure equality in education in the long term. Pandemic pods are both a consequence and a catalyst of an unjust political economy, the addressing of which must be central to short-term commitments to

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<sup>9</sup> See Clara Totenberg Green, *The Latest in School Segregation: Private Pandemic ‘Pods,’* N.Y. TIMES (July 22, 2020), <https://www.nytimes.com/2020/07/22/opinion/pandemic-pods-schools.html> (explaining how pods will exacerbate inequities, racial segregation, and the opportunity gap within schools).

<sup>10</sup> See Rebekah Bastian, *How Educational Inequality in America Could Be Impacted by the Homeschooling Pod Frenzy*, FORBES (July 19, 2020, 7:47 PM), <https://www.forbes.com/sites/rebekahbastian/2020/07/19/how-educational-inequality-in-america-could-be-impacted-by-the-homeschooling-pod-frenzy/?sh=1a31865b72cb> (explaining how pods will exacerbate classism, racism, ableism, and sexism).

“build back better” after the pandemic is over,<sup>11</sup> and long-term commitments to improve and maintain the American school system.

## I

### THE RISE OF PANDEMIC PODS

As the start of the 2020-21 academic year approached, few public school systems met the public health criteria to open for in-person learning. Epidemiologists generally agreed that to control the community spread of coronavirus, the average daily infection rate among those tested should not exceed five percent.<sup>12</sup> By mid-July, however, only two of the ten largest school districts in the country, New York City and Chicago, had achieved that public health goal, while districts like Miami-Dade were in counties reporting rates more than four times greater than the five-percent threshold.<sup>13</sup> Given a failure to reach benchmarks, it became increasingly obvious that many school districts would be unable to safely open on time, if at all. The Los Angeles Unified School District, the nation’s second-largest school district, for example, opted for online learning until further notice.<sup>14</sup>

Delays or continued closings meant a return to remote learning, an experience that produced mixed results in the spring; in some states, distance learning was not even mandated in the immediate wake of the pandemic’s onset.<sup>15</sup> Studies suggest that full-time online learning does not generally produce the academic results of in-person teaching and learning.<sup>16</sup> Although the impacts of learning loss from virtual schools have been less severe on wealthier white students, the average student could fall seven months behind academically.<sup>17</sup> Even among districts and schools with successful virtual

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<sup>11</sup> Used as a slogan in Joe Biden’s 2020 presidential campaign, “build back better” is a strategy designed to reduce societal risk and insecurity in the wake of social and economic crises. Asma Khalid & Barbara Sprunt, *Biden Counters Trump’s ‘America First’ with ‘Build Back Better’ Economic Plan*, NPR (July 9, 2020, 12:39 PM), <https://www.npr.org/2020/07/09/889347429/biden-counters-trumps-america-first-with-build-back-better-economic-plan>. The phrase was first introduced in the UN’s Sendai Framework for Disaster Risk Reduction and took on particular salience in the United States as it grappled with the social and economic impact of the coronavirus pandemic. See United Nations Office for Disaster Risk Reduction, *Sendai Framework for Disaster Risk Reduction 2015-2030*, at 5 (Mar. 18, 2015).

<sup>12</sup> Goldstein & Shapiro, *supra* note 3.

<sup>13</sup> *Id.*

<sup>14</sup> Blume & Kohli, *supra* note 1; Hubler & Goldstein, *supra* note 1.

<sup>15</sup> See *Coronavirus and Learning: What’s Happening in Each State*, EDUC. WK. (July 24, 2020), <https://www.edweek.org/policy-politics/coronavirus-and-learning-whats-happening-in-each-state/2020/04> (describing that many states did not directly order districts to establish remote learning programs and that others offered districts options for levels of remote learning to use).

<sup>16</sup> See CTR. FOR RSCH. ON EDUC. OUTCOMES, *ONLINE CHARTER SCHOOL STUDY 62* (2015) (summarizing results from an empirical study and concluding that online charter school students showed weaker academic growth than similar students at in-person charter schools).

<sup>17</sup> See EMMA DORN, BRYAN HANCOCK, JIMMY SARAKATSANNIS & ELLEN VIRULEG,

offerings, the specter of inadequate childcare loomed. Virtual learning requires children to stay at home, a problem for parents of young children, even those with job flexibility. And the pressure that both federal and state government placed on school districts to open, despite having failed to properly manage the pandemic, only exacerbated the sense that school would be unsafe even if districts did reopen.<sup>18</sup>

Pandemic pods provided a solution to the instability. Small home-schooling groups outside of the school system could be taught by children's parents or even a paid teacher. For parents capable of paying sometimes as much as \$25,000,<sup>19</sup> private companies offered support services for pod organization, including connecting groups of families with potential teachers, providing remote support, and even negotiating pod agreements.<sup>20</sup> Other parents banded together with other families to create their own pods, hire their own teachers, and set their own curricula.

The potential impact of the pods on inequality was immediately

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MCKINSEY & CO., COVID-19 AND STUDENT LEARNING IN THE UNITED STATES: THE HURT COULD LAST A LIFETIME 5–6 (2020), [www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime](http://www.mckinsey.com/industries/public-and-social-sector/our-insights/covid-19-and-student-learning-in-the-united-states-the-hurt-could-last-a-lifetime) (finding that while the average student could fall seven months behind academically due to pandemic closures, Black and Latinx students could experience learning loss equivalent to approximately ten and nine months, respectively); *see also* Kuhfeld et al., *supra* note 4, at 2 (concluding that the average student could begin the fall 2020 academic year having lost as much as a third of the expected progress from the previous year in reading and half the expected progress in math). Indeed, a lawsuit regarding the quality, or lack thereof, of distance learning for students of color in California has already been filed. Complaint for Injunctive and Declaratory Relief, Cayla J. v. State, No. sf-4360445 (Cal. Super. Ct. Nov. 30, 2020). *But see* Eliza Shapiro, *12,000 More White Children Return to N.Y.C. Schools than Black Children*, N.Y. TIMES (Dec. 8, 2020), <https://www.nytimes.com/2020/12/08/nyregion/ny-schools-reopening-inequality.html> (detailing how Black students in New York City have been forced to continue learning remotely as white peers return to the classroom in part due to the disproportionate impact of COVID-19 on their respective communities).

<sup>18</sup> *See generally* Peter Baker, Erica L. Green & Noah Weiland, *Trump Threatens to Cut Funding if Schools Do Not Fully Reopen*, N.Y. TIMES (July 24, 2020), <https://www.nytimes.com/2020/07/08/us/politics/trump-schools-reopening.html>; Valerie Strauss, *After Pressure from Florida Governor, Miami Will Open Some Schools More than Two Weeks Earlier than Planned*, WASH. POST (Sept. 29, 2020, 7:45 PM), <https://www.washingtonpost.com/education/2020/09/29/after-pressure-florida-governor-miami-will-open-some-schools-more-than-two-weeks-earlier-than-planned>.

<sup>19</sup> David Zweig, *\$25,000 Pod Schools: How Well-to-Do Children Will Weather the Pandemic*, N.Y. TIMES (July 30, 2020), <https://www.nytimes.com/2020/07/30/nyregion/pod-schools-has-tings-on-hudson.html>.

<sup>20</sup> *See, e.g.*, Moyer, *supra* note 7; *Learning Pod Services for Families*, SELECTED FOR FAMS., <https://families.getselected.com/services> (last visited Feb. 14, 2021) (offering to help parents find teachers and providing remote support as part of their services); *Kickstart Your Own Microschool with Other Families You Know and Trust*, SCHOOLHOUSE, <https://www.getschoolhouse.com> (last visited Feb. 14, 2021) (including a dedicated counselor to assist parents with onboarding); *Make This Year Your Child's Best Year of Learning*, LEARNING PODS, <https://www.learning-pods.com> (last visited Feb. 14, 2021) (helping to connect parents to teachers available for small-group learning).

apparent. Racial and class segregation within school districts often informs the social networks upon which parents were likely to draw in forming their pods: Wealthier white parents were likely to choose other wealthy white parents to join their pod.<sup>21</sup> In a country where the pandemic has had a disproportionate impact on communities of color in general, and Black and Latinx communities in particular,<sup>22</sup> white parents are likely to develop pods with other families who are at lower risk for exposure to the virus.<sup>23</sup> In the longer term, because public school budgets are directly reduced for each child no longer attending public schools, this would mean a reduction in financing for school districts already under resource constraints.

The pandemic pods sit at the intersection of private schooling and homeschooling, decidedly apart from the nation's public education system.<sup>24</sup> In a survey conducted by Forbes in October of 2020, between four and five percent of families contacted reported that they were in or seeking a pod as a replacement for traditional K-12 schooling.<sup>25</sup> Although a seemingly small number, it is slightly below the number of children enrolled in Catholic schools or charter schools, and about the same as the number of children presently homeschooled—and amassed in only a few months.<sup>26</sup>

## II

### THE POLITICAL ECONOMY OF PANDEMIC PODS

Pandemic pods are borne out of instability in American childcare, labor, and education systems that existed long before the pandemic. Inflexibility regarding virtual work limited the options of even some of the most privileged parents. The absence of comprehensive, high-quality childcare and

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<sup>21</sup> Green, *supra* note 9.

<sup>22</sup> Richard A. Oppel Jr., Robert Gebeloff, K.K. Rebecca Lai, Will Wright & Mitch Smith, *The Fullest Look Yet at the Racial Inequality of Coronavirus*, N.Y. TIMES (July 5, 2020), <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latinos-african-americans-cdc-data.html>.

<sup>23</sup> See Green, *supra* note 9 (suggesting that more privileged families with limited exposure to the virus will be less likely to willingly establish pods including the children of essential workers, who are both more vulnerable to contracting the virus and less likely to be able to afford the costs of the pod).

<sup>24</sup> The education system in the United States consists of roughly 100,000 public schools, plus 34,000 private schools educating about ten percent of the nation's children. *Fast Facts: Educational Institutions*, U.S. DEP'T EDUC. (2019), <https://nces.ed.gov/fastfacts/display.asp?id=84>; *Digest of Education Statistics: Table 205.10*, U.S. DEP'T EDUC. (2016), [https://nces.ed.gov/programs/digest/d16/tables/dt16\\_205.10.asp](https://nces.ed.gov/programs/digest/d16/tables/dt16_205.10.asp). In this same system, about 1,690,000 students, or around three percent of the school-aged population, are homeschooled. *Digest of Education Statistics: Table 206.10*, U.S. DEP'T EDUC. (2018), [https://nces.ed.gov/programs/digest/d18/tables/dt18\\_206.10.asp](https://nces.ed.gov/programs/digest/d18/tables/dt18_206.10.asp).

<sup>25</sup> Mike McShane, *How Popular Are Pandemic Pods After All?*, FORBES (Nov. 11, 2020, 8:49 AM), <https://www.forbes.com/sites/mikemcshane/2020/11/11/how-popular-are-pandemic-pods-after-all/?sh=195db3396f51>.

<sup>26</sup> *Id.*

early-childhood education, particularly relative to other developed countries, privatizes childcare in the United States, leaving parents to their own devices. And not only do disparities in the school system mean that the quality of virtual offerings will vary depending on zip code, but that even parents in resource-rich districts are increasingly anxious about an education system that no longer seems capable of delivering long-term economic security. It is against this backdrop that the pandemic pods must be assessed.

### A. Education as Privilege

Access to education provides both individual and societal benefits that render it highly valuable. Broad access to education increases civic engagement, including resident propensity to vote, and also lowers both public health costs and unemployment rates.<sup>27</sup> Like adequate healthcare and physical security, education is recognized among some scholars as a necessary precondition for deliberative democracies and well-functioning societies.<sup>28</sup>

Sociologists further note that education is an important form of currency in systems of social stratification. Accordingly, education opens avenues for mobility, operating as a form of cultural capital and motivating parents to seek a “quality education” in order to maximize a child’s life chances.<sup>29</sup> The richer educational opportunities that white students are more likely to access result in a “racial monopoly surplus” that ensures better cognitive development and employment networks.<sup>30</sup> The surplus creates a feedback loop that provides white students with opportunity and security. Further, the networks deepened by this feedback loop manifest geographically, delineating neighborhoods and accompanying resources to which some will

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<sup>27</sup> See, e.g., Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 638 (1992) (arguing that a right to education contemplates a quality level that prepares graduates for full participation in the economic life of a country as well as its political processes); Denise A. Hartman, *Constitutional Responsibility to Provide a System of Free Public Schools: How Relevant Is the States’ Experience to Shaping Governmental Obligations in Emerging Democracies?*, 33 SYRACUSE J. INT’L L. & COM. 95, 96 (2005) (questioning whether democracy in the United States could have survived without a system of public education); James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1340 (2000) (suggesting that public education has always had a socializing function); Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 155–56 (1995) (describing the importance of teaching children cultural values so they can develop republican citizenship).

<sup>28</sup> AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 137 (2004). But see Erika K. Wilson, *Blurred Lines: Public School Reforms and the Privatization of Public Education*, 51 WASH. U. J.L. & POL’Y 189, 224–25 (2016) (arguing that as a tool for social mobility, education ceases to serve a democratic purpose and instead serves private striving in a stratified society).

<sup>29</sup> David Sikkink & Michael O. Emerson, *School Choice and Racial Segregation in US Schools: The Role of Parents’ Education*, 31 ETHNIC & RACIAL STUD. 267, 270–71 (2008).

<sup>30</sup> Daria Roithmayr, *Them That Has, Gets*, 27 MISS. COLL. L. REV. 373, 386–88 (2008).

find access, and from which others will be excluded. Unsurprisingly, this informs the stratification of neighborhoods by race and class, such that Black and Latinx people become socially and economically isolated and can escape that isolation only on pain of displacement.<sup>31</sup>

As such, education—high-quality education in particular—functions as a valuable social good, the unequal distribution of which maintains and symbolizes status hierarchies. From legally mandated segregated schooling,<sup>32</sup> to racialized disparities in access, American education has functioned to maintain the superordinate status of white people.

### B. *Pandemic Pods in an Era of Risky Education*

The rise of the pandemic pods, then, reflects not only the continued expression of racial inequality in the school system but also the ways in which that expression finds traction in the neoliberal<sup>33</sup> landscape in which education increasingly operates. This landscape has been undergirded by a body of law that privileges and prioritizes individual choice and control despite the obligation of the state to manage education.

In *Meyer v. Nebraska* in 1923, the Supreme Court acknowledged the “natural duty” of parents to give their children an education “suitable to their station in life.”<sup>34</sup> Two years later, in *Pierce v. Society of Sisters*, the Court struck down an Oregon statute requiring all children to attend public schools,

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<sup>31</sup> See *id.* at 384–88 (describing a feedback loop which reproduced inequality through geography and space, in which disparities in school financing are a key factor).

<sup>32</sup> Through substandard facilities, limited resources, and inferior educational opportunity, the de jure exclusion of Black students from white schools conferred advantages on insiders—white students—while denying Black students access to those advantages. Segregated schools, however, also signaled the inferior status of Black students, separating not just white and Black students, but white students from Black students, the implication being that proximity to blackness was degrading to superior white people. See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 439–40 (“*Brown [v. Board of Education]* held that segregated schools were unconstitutional primarily because of the message segregation conveys . . . that black children are an untouchable caste, unfit to be educated with white children.”); see also Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1, 20 (2000) (explaining that those at the bottom of the hierarchy, primarily Black people, embody a stigmatized identity); Paul Gowder, *Racial Classifications and Ascriptive Injury*, 92 WASH. U. L. REV. 325, 328, 339–54 (2014) (using a cognitive hierarchical model to argue that the notion of whiteness being more valuable than blackness is built into the American psyche); Jeremy Fiel, *Closing Ranks: Closure, Status Competition, and School Segregation*, 121 AM. J. SOCIO. 126, 131 (2015) (“In the context of school segregation, whites monopolize access to high-status schools, and when competing [racial] groups threaten their monopoly, they resist or flee.”).

<sup>33</sup> See Angela P. Harris, *From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1558–60 (2006) (listing the core tenets of neoliberalism: market regulation is better than government regulation; individual choice and “personal responsibility”; the devolution of issues formerly considered collective to individual families; and a focus on the “intimate public sphere” in an attempt to discipline and define “proper” citizenship).

<sup>34</sup> 262 U.S. 390, 400 (1923).

recognizing a parental liberty interest in directing the upbringing and education of their children<sup>35</sup> and concluding that children were not “mere creature[s] of the [s]tate.”<sup>36</sup>

Despite subsequent cases like *Prince v. Massachusetts*<sup>37</sup> and *Wisconsin v. Yoder*,<sup>38</sup> which affirmed the state’s legitimate interest in overseeing and controlling education, considerable authority is delegated to parents in the control of their children’s education, often at the expense of countervailing state obligations. Address falsification, for example, criminalizes the attempts of parents to gain access to superior educational opportunities by enrolling their children in better-resourced school districts to which they are not assigned.<sup>39</sup> Criminalization reinforces near-exclusive parental responsibility, while deemphasizing the state’s failure to ensure access to quality education irrespective of zip code. Similarly, truancy laws that punish parents for failing to ensure student attendance reflect similar impulses, rendering parents solely responsible for poor school attendance that is caused in part by factors outside of parental control but within state control.<sup>40</sup>

Education laws meant to secure individual rights also render parents excessively responsible for access to education. The Individuals with Disabilities Education Act,<sup>41</sup> for example, rightfully broadened access to public education for students with disabilities by requiring states to provide a “free

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<sup>35</sup> 268 U.S. 510, 534–35 (1925).

<sup>36</sup> *Id.* at 535.

<sup>37</sup> 321 U.S. 158 (1944) (holding in a child labor case that parental authority is not absolute).

<sup>38</sup> 406 U.S. 205, 233–36 (1972) (exempting Amish children from compulsory school attendance law but nevertheless reaffirming that compelling state interests could overcome the interest of parents in controlling education).

<sup>39</sup> See, e.g., Kyle Spencer, *For Some Parents, Search for Better Schools Could Lead to Jail*, SEATTLE TIMES (May 16, 2015, 6:18 PM), <https://www.seattletimes.com/nation-world/for-some-parents-search-for-better-schools-could-lead-to-jail> (documenting a trend in which parents are fined, criminally charged, and in some cases jailed for lying about their address); Timothy Williams, *Jailed for Switching Her Daughters’ School District*, N.Y. TIMES (Sept. 26, 2011), <https://www.nytimes.com/2011/09/27/us/jailed-for-switching-her-daughters-school-district.html> (interviewing an Ohio mother convicted of falsifying documents to enroll her children in a higher performing school district).

<sup>40</sup> In addition to reflecting individual and family risk factors, dropout rates, truancy, and absenteeism reflect school alienation. See Isabelle Archambault, Michel Janosz, Jean-Sébastien Fallu & Linda S. Pagani, *Student Engagement and Its Relationship with Early High School Dropout*, 32 J. ADOLESCENCE 651, 666 (2009) (noting that school discipline policies contribute to negative student perceptions regarding school investment); Kimberly L. Henry, *Who’s Skipping School: Characteristics of Truants in 8th and 10th Grade*, 77 J. SCH. HEALTH 29 (2007) (finding that improving school engagement, school environment, and perceptions of safety at school, in addition to addressing individual student risk factors, may have beneficial effects on truancy); Julia Wilkins, *School Characteristics that Influence Student Attendance: Experiences of Students in a School Avoidance Program*, 91 HIGH SCH. J. 12 (2008) (identifying four factors, including school climate, academic environment, discipline, and relationships with teachers, as influencing truancy).

<sup>41</sup> 20 U.S.C. §§ 1400–1482.

appropriate public education” to all students.<sup>42</sup> Nevertheless, the Act placed a significant burden on parents, demanding they step into a detailed and complex enforcement and implementation role.<sup>43</sup> And “school choice” initiatives,<sup>44</sup> touted as a way to expand parental control and guarantee opportunities for improved education, suggest that there are better and worse alternatives among which to choose, and that a parent’s obligation is to choose well or risk education failure. Combined with the state abdication of public-school management and school inequality,<sup>45</sup> parents navigate a landscape of “risky education”<sup>46</sup> in which responsibility for educational quality

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<sup>42</sup> Education for All Handicapped Children Act of 1975, Pub. L. No. 94-142, § 612, 89 Stat. 773, 780 (codified as amended at 20 U.S.C. § 1412).

<sup>43</sup> In addition to inclusion in the assessment and evaluation process, parents are “empowered” to: request a school district pay for an independent evaluation (and pay for one privately if the school district opposed the request); provide input and articulate concerns when developing the IEP; file a due process complaint to obtain a hearing or an administrative complaint to obtain an investigation; enter mediation; and file a civil action in state or federal court and represent themselves. 20 U.S.C. §§ 1414–1415; *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988, 999–1001 (2017) (holding that the IDEA requires schools to create IEPs “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances”); 34 C.F.R. §§ 300.151–.153 (2020) (requiring that state education agencies provide minimal procedures allowing parents to file complaints against the state).

<sup>44</sup> Typically manifesting as voucher programs, school choice initiatives operate on the assumption that “broad democratic guidance [combined with] radical decentralization of resources and choice” is a school system alternative that would make public schools more effective. John E. Chubb & Terry M. Moe, *Politics, Markets, and the Organization of Schools*, 82 AM. POL. SCI. REV. 1065, 1066–70, 1085 (1988). School choice, then, contemplates an education market where the ability of parents to enter that market in search of the best educational opportunities not only allows for greater educational customization but incentivizes school improvement. For more on the problems with subjecting a public school system to market principles, see Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083 (2014) [hereinafter James, *Opt-Out Education*].

<sup>45</sup> States as well as the federal government have largely abandoned the project of integration, continued to rely on school financing schemes that track race and class and produce accompanying disparities, and adopted market principles as the primary form of school reform. See Will Stancil, *School Segregation Is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://www.theatlantic.com/education/archive/2018/03/school-segregation-is-not-a-myth/555614> (describing how hundreds of court orders compelling integration plans have been terminated since the turn of the century, and few have been created since then); see also GARY ORFIELD, ERICA FRANKENBERG, JONGYEON EE & JOHN KUSCERA, THE C.R. PROJECT, *BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE 2* (2014) (arguing that segregation increased substantially in many school districts once Supreme Court precedent dismantled desegregation court orders from the Civil Rights Movement); Alvin Chang, *The Data Proves that School Segregation Is Getting Worse*, VOX (Mar. 5, 2018, 1:50 PM), <https://www.vox.com/2018/3/5/17080218/school-segregation-getting-worse-data> (concluding that while segregation between cities is getting worse over time, segregation within cities is at the same extremely high level it was in the 1980s); KERN ALEXANDER, RICHARD G. SALMON & F. KING ALEXANDER, *FINANCING PUBLIC SCHOOLS: THEORY, POLICY, AND PRACTICE* 181 (2015) (explaining how school districts are often funded by local taxes, thus generally indexing school funding to local wealth); James, *Opt-Out Education*, *supra* note 44, at 1093 (describing the market-based rationales of the school choice movement).

<sup>46</sup> For a more detailed interrogation of this phenomenon in the context of school choice, school

and academic outcomes is placed directly at their feet.

Middle-class parents, in particular, experience high levels of anxiety in their attempts to ensure academic achievement and select the “right school,”<sup>47</sup> and they respond to that anxiety in ways that infringe on the security and equality interests of less powerful peers. Research suggests, for example, that white parents operating in a school choice market do not necessarily make decisions based on the best academic options for their children, but rather select schools on the basis of race.<sup>48</sup> In fact, some literature indicates that as much as seventy-five percent of the variation in school choice preferences can be explained by the percentage of Black students in the schools.<sup>49</sup>

White middle-class families, moreover, use school choice systems to hoard resources and specialized programs in ways that exclude students and families of color from the same.<sup>50</sup> Ultimately, white parents use race as a heuristic for quality, attempting to insulate themselves from the risk of sub-par education by selecting “white” schools, and thus perpetuating segregation that intensifies that risk for nonwhite students.<sup>51</sup> The stakes seem higher

admissions, and school management, see Osamudia R. James, *Risky Education*, 89 GEO. WASH. L. REV. 101 (forthcoming 2021).

<sup>47</sup> MARGARET K. NELSON, PARENTING OUT OF CONTROL: ANXIOUS PARENTS IN UNCERTAIN TIMES 31 (2010) (documenting both parents’ efforts to maintain class distinctions and their vulnerability to modern technology, which makes constant parenting possible, as sources of parental anxiety); see also Rachel Pain, *Paranoid Parenting? Rematerializing Risk and Fear for Children*, 7 SOC. & CULTURAL GEOGRAPHY 221, 224 (2006) (finding that “paranoid parenting” or fear for children can sometimes be seen to have a material basis); Carolyn Sattin-Bajaj & Allison Roda, *Opportunity Hoarding in School Choice Contexts: The Role of Policy Design in Promoting Middle-Class Parents’ Exclusionary Behaviors*, 34 EDUC. POL’Y 992, 1004 (2020) (finding that parents expressed high levels of anxiety about school placements, which prompted them to engage in opportunity hoarding activities despite the financial and time investment that school choice processes demanded of them); Frank Furedi, *Paranoid Parenting*, GUARDIAN (Apr. 26, 2001, 8:25 AM), <https://www.theguardian.com/education/2001/apr/26/highereducation.socialsciences> (documenting the strong social pressures placed on parents to adopt a precautionary approach to child-rearing).

<sup>48</sup> See, e.g., Chase M. Billingham & Matthew O. Hunt, *School Racial Composition and Parental Choice: New Evidence on the Preferences of White Parents in the United States*, 89 SOCIO. EDUC. 99, 108 (2016) (showing that white parents prefer “white” schools to “Black” schools even when other factors germane to education quality and resources are equal).

<sup>49</sup> Salvatore Saporito & Annette Lareau, *School Selection as a Process: The Multiple Dimensions of Race in Framing Educational Choice*, 46 SOC. PROBS. 418, 424 (1999); see also Susan L. DeJarnatt, *School Choice and the (Ir)rational Parent*, 15 GEO. J. ON POVERTY L. & POL’Y 1, 17–19 (2008) (surveying literature demonstrating this phenomenon).

<sup>50</sup> “Opportunity hoarding” describes behavior that reserves for one’s own child the best educational opportunities and resources, while excluding others from the same opportunities. Sattin-Bajaj & Roda, *supra* note 47, at 996.

<sup>51</sup> See generally Tim Walker, *Racial Isolation of Charter School Students Exacerbating Resegregation*, NEA TODAY (May 4, 2018), <https://www.nea.org/advocating-for-change/new-from-nea/racial-isolation-charter-school-students-exacerbating> (reporting that charter schools were among the most racially segregated in the nation); ERICA FRANKENBERG, GENEVIEVE SIEGEL-

than ever, given that disparate long-term outcomes are on the rise even among people with the same number of years of schooling, laying waste to the belief that education is a sure bet. In such an atmosphere, opportunity hoarding starts to seem like good parenting.

The pandemic pods are a new manifestation of the same risk-driven opportunity hoarding. Uncertain about whether and when schools can safely reopen, or instructional quality even after reopening, and aware of their near-exclusive responsibility for quality education, parents with resources turn to the pods as a way to manage education risk during the pandemic.<sup>52</sup>

That the pods are operating during a time of rising instability in other spheres of American life is no coincidence. Rather, the educational crisis to which the pods respond works in lockstep with a general childcare crisis, borne of the United States' weak early-childhood education and childcare system<sup>53</sup> compared to other industrialized countries.<sup>54</sup> The crisis of the pandemic, borne of the failure of federal and state governments to manage virus transmission and to prioritize schools and daycare centers for reopenings, only compounded that preexisting instability.<sup>55</sup>

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HAWLEY & JIA WANG, THE C.R. PROJECT, CHOICE WITHOUT EQUITY: CHARTER SCHOOL SEGREGATION AND THE NEED FOR CIVIL RIGHTS STANDARDS 4–5 (2010) (reporting that charter schools are more segregated than public schools in a way that disproportionately harms the learning prospects of minority students); James, *Opt-Out Education*, *supra* note 44, at 1104–05 (noting that, in relying on racial composition as a metric for school quality, parents perpetuate segregation and its harmful impacts on education while inaccurately assuming they are making the most rational choice for their children); Shelley McDonough Kimelberg & Chase M. Billingham, *Attitudes Toward Diversity and the School Choice Process: Middle-Class Parents in a Segregated Urban Public School District*, 48 URB. EDUC. 198, 225 (2013) (finding that the process by which white parents select schools may contribute to an increase in racial segregation across districts).

<sup>52</sup> Green, *supra* note 9.

<sup>53</sup> In a 2018 survey, 83% of parents of children under five said finding affordable, quality care in their communities was a serious problem. RASHEED MALIK, KATIE HAMM, LEILA SCHOCHET, CRISTINA NOVOA, SIMON WORKMAN & STEVEN JESSEN-HOWARD, CTR. FOR AM. PROGRESS, AMERICA'S CHILD CARE DESERTS IN 2018, at 3 (2018), <https://childcaresdeserts.org/index.html>. The pandemic only aggravated the trend. *See, e.g.*, NAT'L ASS'N FOR THE EDUC. OF YOUNG CHILD., FROM THE FRONT LINES: THE ONGOING EFFECT OF THE PANDEMIC ON CHILD CARE (2020), [https://www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/resources/topics/naeyc\\_coronavirus\\_ongoingeffectsonchildcare.pdf](https://www.naeyc.org/sites/default/files/globally-shared/downloads/PDFs/resources/topics/naeyc_coronavirus_ongoingeffectsonchildcare.pdf) (reporting that in early April 2020, almost half of the nation's childcare facilities were closed in response to the pandemic).

<sup>54</sup> *See* Melissa Murray & Caitlin Millat, *Pandemics, Privatization, and the Family*, 96 N.Y.U. L. REV. ONLINE 106, 113–16 (2021) (describing the social democratic welfare state model, exemplified by the Netherlands and much of Scandinavia, the corporatist welfare state model, exemplified by France and Germany, and the liberal welfare state model, typically associated with the United States).

<sup>55</sup> *See* Jennifer B. Nuzzo & Joshua M. Sharfstein, *We Have to Focus on Opening Schools, Not Bars*, N.Y. TIMES (July 1, 2020), <https://www.nytimes.com/2020/07/01/opinion/coronavirus-schools.html> (reporting that prolonged online education disproportionately harms children without access to resources that make remote learning possible); *see also* German Lopez, *Close the Bars. Reopen the Schools*, VOX (July 1, 2020, 11:30 AM), <https://www.vox.com/future-perfect/2020/7/1/21306816/coronavirus-pandemic-reopen-schools-economy-social-distancing>

As described by authors Hugh Gusterson and Catherine Besteman, American life is increasingly shaped by “downward mobility” and “collapsing support systems.”<sup>56</sup> Whereas New Deal and Great Society protections once helped insure Americans against the risk of poverty in retirement, unemployment and disability,<sup>57</sup> American policy increasingly demands Americans confront the risk of illness, labor instability, or old age on their own.<sup>58</sup> The pandemic pods are a manifestation of this social and political reality—the response of parents with means to the state’s failures to provide family support and education.

That pandemic pods aggravate race and class disparities is not an anomaly, but rather the result of “how we choose to distribute wealth, power, safety, and care.”<sup>59</sup> The inevitable disparities in access to pods exist in a school system already beset by race and class disparities in teacher quality,<sup>60</sup>

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(criticizing the government’s approach to reopening for prioritizing restaurants over schools); Michelle R. Smith & Carla K. Johnson, *Schools or Bars? Opening Classrooms May Mean Hard Choices*, ASSOCIATED PRESS (July 9, 2020), <https://apnews.com/article/3635a94a058d515d03da479e216f1c99> (same). In the absence of state support in the form of funding to stay open and proper virus management, childcare programs, typically funded by tuition, experienced precipitous drops in enrollment. See NAT’L ASS’N FOR THE EDUC. OF YOUNG CHILD., HOLDING ON UNTIL HELP COMES (2020) (finding that due to a 67% drop in student enrollment, more than 70% of childcare programs were incurring additional costs and only 18% of such programs were expected to last longer than a year without help). This will only aggravate inadequate childcare options even after the pandemic ends. Moreover, the way in which parents, and mothers in particular, have been forced to manage this crisis both mirrors isolated parental obligations for education and is also the product of a larger cultural and political pattern in which private norm creation and decisionmaking replace state governance in matters of the family. See Melissa Murray, *Family Law’s Doctrines*, 163 U. PA. L. REV. 1985, 2012–17 (2015) (arguing that inconsistent case law is made more coherent when understood as the state’s attempt to maintain the family’s role in “privatizing dependency”); see also Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444 (describing the trend of increased privatization of the costs and burdens of education and child-rearing); Claire Cain Miller, *Nearly Half of Men Say They Do Most of the Home Schooling. 3 Percent of Women Agree*, N.Y. TIMES (May 8, 2020), <https://www.nytimes.com/2020/05/06/upshot/pandemic-chores-homeschooling-gender.html> (reporting the toll the pandemic education crisis has taken on mothers in particular).

<sup>56</sup> Hugh Gusterson & Catherine Besteman, *Introduction*, in *THE INSECURE AMERICAN: HOW WE GOT HERE AND WHAT WE SHOULD DO ABOUT IT* 1, 2 (Hugh Gusterson & Catherine Besteman eds., 2010).

<sup>57</sup> Protections included the G.I. Bill, tax deductions for mortgages, federal spending that fueled the economy, cheaper energy, employer-subsidized health insurance, unemployment insurance, Social Security, and Medicare. *Id.*

<sup>58</sup> See Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 220 (2017) (observing that there is a strong expectation in U.S. policy that families will “go it alone”).

<sup>59</sup> Mari Matsuda, *The Flood: Political Economy and Disaster*, 36 HOFSTRA L. REV. 1, 2, 9 (2007) (arguing that the fallout of disasters like Hurricane Katrina is often due to “the flood before the flood” resulting from structural issues that render a community particularly vulnerable to unexpected catastrophes).

<sup>60</sup> Majority-minority schools are disproportionately assigned novice teachers with fewer credentials. See CAMILLE E. ESCH ET AL., CTR. FOR THE FUTURE OF TEACHING & LEARNING, *THE STATUS OF THE TEACHING PROFESSION* 2005, at 70 (2005) (finding that in 2004-2005, 20% of

discipline,<sup>61</sup> special education,<sup>62</sup> school finance,<sup>63</sup> and even the broadband access on which virtual learning necessarily depends.<sup>64</sup> The acquiescence, if not outright facilitation, of the pandemic pods is the latest in a long line of education policies that are hostile to the concerns of poor people, of people of color, and of poor people of color. Like increasing school segregation that excludes and isolates Black and brown people,<sup>65</sup> or school reform solutions that subject minoritized people to the vagaries of the market,<sup>66</sup> the pandemic pods perpetuate and aggravate the dispossession and social precarity of

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California's teachers serving majority-minority populations were unprepared or novice, compared to only 11% of California's teachers serving schools with few or no minority students); *see also* JOHN WIRT, SUSAN CHOY, PATRICK ROONEY, STEPHEN P. A. SEN & RICHARD TOBIN, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC., THE CONDITION OF EDUCATION 2004, at 73 (2004) (finding that high schools with at least 75% low-income students employed three times as many uncertified out-of-field teachers in English and science than wealthier schools).

<sup>61</sup> Black students are overrepresented in public school suspensions and corporal punishment, and schools are more likely to implement extremely punitive discipline and zero-tolerance policies as the percentage of Black students increases. *See generally* Kelly Welch & Allison A. Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25 (2010).

<sup>62</sup> Black children are overrepresented in the more stigmatizing and subjectively assessed disability categories like intellectually impaired or "emotionally disturbed," but underrepresented in the less stigmatized and more objectively assessed disability categories like deafness or blindness. Daniel J. Losen & Kevin G. Welner, *Disabling Discrimination in Our Public Schools: Comprehensive Legal Challenges to Inappropriate and Inadequate Special Education Services for Minority Children*, 36 HARV. C.R.-C.L. L. REV. 407, 416–17 (2001); *see also* Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1251–52 (noting that, in 1995, though Black children constituted 16% of elementary school students, they made up 32% of students in the stigmatizing disability categories).

<sup>63</sup> According to a 2019 study, non-white school districts received \$23 billion less in funding than white school districts, with non-white school districts spending \$2,226 less per student than white districts. EDBUILD, \$23 BILLION, at 4 (2019), <https://edbuild.org/content/23-billion/full-report.pdf>.

<sup>64</sup> *See* Tony Romm, 'It Shouldn't Take a Pandemic': Coronavirus Exposes Internet Inequality Among U.S. Students as Schools Close Their Doors, WASH. POST (Mar. 16, 2020, 6:22 AM), <https://www.washingtonpost.com/technology/2020/03/16/schools-internet-inequality-coronavirus> (reporting that the existing inequality in internet access has been further exposed during the pandemic); Pia Ceres, A 'Covid Slide' Could Widen the Digital Divide for Students, WIRED (Aug. 7, 2020, 7:00 AM), <https://www.wired.com/story/schools-digital-divide-remote-learning>; Emily A. Vogels, 59% of U.S. Parents with Lower Incomes Say Their Child May Face Digital Obstacles in Schoolwork, PEW RSCH. CTR. (Sept. 10, 2020), [www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in-schoolwork](http://www.pewresearch.org/fact-tank/2020/09/10/59-of-u-s-parents-with-lower-incomes-say-their-child-may-face-digital-obstacles-in-schoolwork).

<sup>65</sup> *See* Stancil, *supra* note 45 (reporting data from the National Center for Education Statistics showing that the number of segregated schools—defined as schools where less than 40% of students are white—doubled between 1996 and 2016, with the percentage of Black children attending such schools rising from 59% to 71%); ORFIELD ET AL., *supra* note 45, at 11 (concluding that Black students in the South are less likely to attend a school that is majority white than about fifty years ago); Chang, *supra* note 45 (explaining that although the United States is racially distributing students about as well as the country did a few decades ago, Black students are increasingly isolated in poor, segregated neighborhoods).

<sup>66</sup> *See* James, *Opt-Out Education*, *supra* note 44, at 1134–35 (documenting the ways in which school choice initiatives, including charter schools and voucher programs, perpetuate racial subordination).

people of color. The dynamics to which the pods were responsive, however, breach the levees of race and class, sparing only those with enough wealth and resources to counter the flood each time.

### III

#### PODS IN THE SHORT- AND LONG-TERM

Short-term solutions to the problems created by the pandemic pods focus on managing the pods such that they work for more people, even within the public school system. The Adams 12 school district in Colorado, for example, worked to coordinate school-run pods for each grade level at all forty-one elementary, middle, and K-8 schools. Pods are staffed by teacher aides, substitutes, and school district employees. In a district where about 40% of children are eligible for subsidized meals, this extends the pods idea such that even those who are not wealthy might benefit.<sup>67</sup> Individual schools like the Rooftop School in the San Francisco Unified School District made similar efforts.<sup>68</sup> Other districts experimented with virtual learning centers staffed with volunteers, sometimes in partnership with nonprofit and religious institutions.<sup>69</sup> These are attempts to retain the families and educators for whom the pods can become an incentive to leave the school system<sup>70</sup> and to counter the policy momentum in favor of school choice that policymakers either fear or pray the pods will animate.<sup>71</sup>

Ultimately, however, the sort of problems that prompted the pods require greater state engagement. Even after the pandemic ends, the problem of “risky education” will remain, prompting parents across the wealth and security spectrum to make decisions that maximize options for their children while exacerbating education risk for their less powerful peers.<sup>72</sup> Pods will

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<sup>67</sup> Ann Schimke & Marta W. Aldrich, *Pods for All? Some Districts and Nonprofits Are Reimagining the Remote Learning Trend*, CHALKBEAT (Aug. 10, 2020, 5:18 PM), <https://www.chalkbeat.org/2020/8/10/21362268/pods-for-all-some-districts-and-non-profits-are-reimagining-the-remote-learning-trend>.

<sup>68</sup> Moyer, *supra* note 7.

<sup>69</sup> See Schimke & Aldrich, *supra* note 67 (reporting on initiatives by nonprofits and other organizations to extend pods to low-income students).

<sup>70</sup> See, e.g., Nancy Keates, *Teachers Find Higher Pay and Growing Options in Covid Pods*, WALL ST. J. (Sept. 27, 2020, 7:00 AM), <https://www.wsj.com/articles/teachers-find-higher-pay-and-growing-options-in-covid-pods-11601204400>.

<sup>71</sup> See Juliana Kaplan, *Pandemic Pods Are Inequitable and Inevitable—and a Dream Come True for the School Choice Movement*, BUS. INSIDER (July 26, 2020, 8:45 AM), <https://www.businessinsider.com/pandemic-pods-are-inequitable-inevitable-a-dream-for-school-choice-2020-7> (documenting the attempts of school choice advocates to use the pandemic and school pods as a moment on which they might capitalize). For an example of the use of pods by proponents of school choice, see Frederick Hess, *Learning Pods Aren't the Problem, They're Part of the Solution*, FORBES (Aug. 24, 2020, 6:30 AM), <https://www.forbes.com/sites/frederickhess/2020/08/24/learning-pods-arent-the-problem-theyre-part-of-the-solution> (characterizing pods not as a problem, but as a solution with promising systemic implications for school reform).

<sup>72</sup> James, *supra* note 46.

not necessarily disappear after the pandemic, but rather may join home-schooling and private schools<sup>73</sup> in a larger undercutting of public education.<sup>74</sup> Decreasing school enrollment during the pandemic already portends this trend.<sup>75</sup>

Robust state reengagement with education, then, will be needed to counter these impulses, as well as the insecurity that prompts them. This includes ending school choice initiatives in favor of economic and racial integration among all schools, the adoption of equalized funding for all schools, and the development of policies that encourage more privileged parents to return to and remain in the public school system<sup>76</sup>—all admittedly ambitious goals given the Supreme Court’s hostility to race-conscious school assignment plans<sup>77</sup> and the incentives for opportunity hoarding among whiter and wealthier communities. The development of an anti-subordination

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<sup>73</sup> Naomi Martin, *A Rush to Private Schooling Options: Families Wary of Return to Public Classrooms and Remote Learning*, BOS. GLOBE, Aug. 9, 2020, at A1.

<sup>74</sup> See Jessica Calarco, *What Is Betsy DeVos Thinking?*, N.Y. TIMES (July 15, 2020), <https://www.nytimes.com/2020/07/15/opinion/coronavirus-school-reopen-devos.html> (describing the pandemic as an “opportunity” for then-Secretary of Education DeVos to compel privileged families to abandon public schools in accordance with her commitment to destabilizing public options in favor of private ones).

<sup>75</sup> See Anya Kamenetz, *All Things Considered: Pandemic Seems to Be Driving School Enrollment Down*, NPR INVESTIGATION SHOWS, NPR (Oct. 7, 2020, 4:06 PM), <https://www.npr.org/2020/10/07/921287309/pandemic-seems-to-be-driving-school-enrollment-down-npr-investigation-shows> (reporting that at the time of reopening, the Miami-Dade School District’s enrollment was down by sixteen thousand students, Los Angeles Unified by eleven thousand, and Charlotte-Mecklenburg in North Carolina by five thousand); Alex Zimmerman, Amy Zimmer & Gabrielle LaMarr LeMee, *NYC Schools Have Lost 31,000 Students This Fall, Preliminary Data Show*, CHALKBEAT (Nov. 11, 2020, 6:52 PM), <https://ny.chalkbeat.org/2020/11/11/21561651/nyc-school-enrollment-drop>.

<sup>76</sup> The return of privileged parents, however, must be facilitated without simultaneously marginalizing minoritized students and their families. Past reintegration efforts serve as cautionary tales. See, e.g., MAIA BLOOMFIELD CUCCHIARA, *MARKETING SCHOOLS, MARKETING CITIES: WHO WINS AND WHO LOSES WHEN SCHOOLS BECOME URBAN AMENITIES* 1–5 (2013) (documenting how Philadelphia’s Center City Schools Initiative lured middle-class families at the expense of lower-class families); R. L’HEUREUX LEWIS-MCCOY, *INEQUALITY IN THE PROMISED LAND: RACE, RESOURCES, AND SUBURBAN SCHOOLING* 10 (2014) (arguing that opportunity hoarding by affluent, white parents makes educational resources inaccessible to the families who most need them); Elizabeth McGhee Hassrick & Barbara Schneider, *Parent Surveillance in Schools: A Question of Social Class*, 115 AM. J. EDUC. 195, 217–22 (2009) (documenting informal teacher surveillance benefitting middle-class parents but not poor and working-class parents); Sattin-Bajaj & Roda, *supra* note 47, at 995, 998 (concluding that white, middle-to-upper class parents use race, financial status, and social networks to secure advantage at the expense of their economically disadvantaged peers).

<sup>77</sup> Osamudia R. James, *Closing the Door on Public School Integration: Parents Involved and the Supreme Court’s Continued Neglect of Adequacy Concerns*, in *OUR PROMISE: ACHIEVING EDUCATIONAL EQUITY FOR AMERICA’S CHILDREN* 215, 216 (Maurice R. Dyson & Daniel B. Weddle eds., Carolina Acad. Press 2009).

commitment<sup>78</sup> in education law would further buttress these efforts, countering the tendency of education case law to champion liberty and choice in education at the expense of equality.

Finally, so too must cultural norms about education shift, no easy feat in a society dominated by notions of individualism and independence. A “shared fate” approach to education is one in which we adopt policy in recognition that citizens are in webs of relationships with other human beings in ways that “profoundly shape our lives.”<sup>79</sup> Rather than necessarily being bound by individual values or moral commitments, shared fate is instead defined by “relations of interdependence.”<sup>80</sup> It will be those notions of interdependence that can save the American school system, if it can be saved at all.

### CONCLUSION

The pandemic pods are just the latest in a series of moves, both individual and by the state, that privatize education, shifting responsibility for education outcomes to parents and absolving the state of its responsibility for the proper management of the school system. More than unfortunate happenstance, the pods are part of a larger policy infrastructure of risk and abandonment in the United States. The systemic problems the pods highlight will require more than stop-gap measures meant to extend the benefits of the pods to less privileged families. Rather, the problems demand instead a significant shift in the norms regarding the interdependence of students and families in the American school system, norms that can make way for policy solutions that finally address the education risks that race, space, and class currently pose.

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<sup>78</sup> An anti-subordination approach to equality imposes on the state an affirmative obligation to dismantle unequal conditions between racial groups created by systems of inequality and domination, thus permitting, without regard to intent, the elimination of policies that reinforce political, social, or economic marginalization of historically disadvantaged groups. Darren Lenard Hutchinson, “Unexplainable on Grounds Other than Race”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 622–24; see also Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 345 (1987) (referring to this approach as “the process defect theory,” arguing that courts should affirmatively protect those “unable to protect themselves politically”).

<sup>79</sup> Melissa S. Williams, *Citizenship as Identity, Citizenship as Shared Fate, and the Functions of Multicultural Education*, in CITIZENSHIP AND EDUCATION IN LIBERAL-DEMOCRATIC SOCIETIES: TEACHING FOR COSMOPOLITAN VALUES AND COLLECTIVE IDENTITIES 208, 229–30 (Kevin McDonough & Walter Feinberg eds., 2003); see also Sigal Ben-Porath, *Citizenship as Shared Fate: Education for Membership in a Diverse Democracy*, 62 EDUC. THEORY 381 (2012) (defining shared fate as a form of citizenship education that develops a significant shared dimension while respecting deep differences within a political community); Cong Lin & Liz Jackson, *From Shared Fate to Shared Fates: An Approach for Civic Education*, 38 STUD. PHIL. & EDUC. 537 (2019) (recasting the concept of a singular “shared fate” to plural “shared fates” to provide a more inclusive platform that acknowledges multiple fates of multiple stakeholders).

<sup>80</sup> Williams, *supra* note 79, at 229–30.