

Too Cruel for School: LGBT Bullying, Noncognitive Skill Development, and the Educational Rights of Students

Jason Lee*

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INTRODUCTION

Though the East Room of the White House was decorated in its usual ornate fashion, many of the individuals filling the room were noticeably younger than those typically in attendance at a White House press event.¹ As high schoolers thrust iPhones above the crowd, First Lady Michelle Obama thanked audience members for joining her and her husband, President Barack Obama, to confront an issue that concerned them “not just as President and as First Lady, but as a mom and a dad.”² The address kicked off the first ever White House Conference on Bullying Prevention — an event organized in the wake of a series of suicides by gay teenage victims of bullying³ that drew national attention to the problem of in-school harassment of lesbian, gay, bisexual, and transgender (“LGBT”) students.⁴

Though the event was the first of its kind for the White House, President Obama launched into a familiar refrain. He universalized the problem of bullying, describing it as something that “touches the lives of young people all across this country” and confessing to the crowd that “with big ears and the name that I have, I wasn’t immune.”⁵ He focused on the most egregious forms and the most obvious consequences of bullying, noting that “almost 3 million students have said they were pushed, shoved, tripped, even spit on,” and that the nation had been “heartbroken by the stories of young people who endured harassment and ridicule day after day at school, and who ultimately took their own lives.”⁶ Finally, he attributed the problem of bullying to a lack of peer tolerance, declaring that the purpose of the conference was to find ways to increase students’ “sense of empathy and their regard for one another.”⁷

¹ Jesse Lee, *President Obama & the First Lady at the White House Conference on Bullying Prevention*, THE WHITE HOUSE (Mar. 10, 2011, 1:05 PM), <http://www.whitehouse.gov/blog/2011/03/10/president-obama-first-lady-white-house-conference-bullying-prevention>, archived at <http://perma.cc/0eGkzr9KTTM>.

² *Id.*; The White House Office of the Press Secretary, *Remarks by the President and First Lady at the White House Conference on Bullying Prevention*, THE WHITE HOUSE (Mar. 10, 2011, 10:25 AM), <http://www.whitehouse.gov/the-press-office/2011/03/10/remarks-president-and-first-lady-white-house-conference-bullying-prevent>, archived at <http://perma.cc/0SFp15Jg4P7>.

³ As defined in the United States Department of Education’s *Analysis of State Bullying Laws and Policies* report and as used in this Note, the term “bullying” refers to “a repeated pattern of aggressive behavior that involves an imbalance of power and that purposefully inflicts harm on the bullying victim,” which can “assume[] a variety of forms including direct physical or verbal actions that cause physical or emotional distress, or indirect acts of social aggression that are used to damage a victim’s personal relationships or social standing.” U.S. DEP’T OF EDUC., *ANALYSIS OF STATE BULLYING LAWS AND POLICIES* (2011), available at <http://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf>, archived at <http://perma.cc/0oKoVbjzNn>.

⁴ Jesse McKinley, *Several Recent Suicides Put Light on Pressures Facing Gay Teenagers*, N.Y. TIMES, Oct. 4, 2010, at A9.

⁵ The White House Office of the Press Secretary, *supra* note 2.

⁶ *Id.*

⁷ *Id.*

Though laudable, the President's address was at once too general and too specific in confronting the problem of LGBT bullying. First, though bullying may indeed touch the lives of all young people, LGBT youth constitute a particularly vulnerable population that faces higher rates and more severe forms of bullying on a daily basis. Second, though the emotional and psychological harms that arise in the immediate aftermath of bullying — including increased risk of depression, substance abuse, and suicidal thoughts⁸ — merit significant concern, incessant school bullying may also result in significant *educational* disadvantages for the targets of bullying that extend far beyond their high school and college years. Finally, though encouraging peer tolerance and student empathy are worthy goals, mutual understanding is not always possible (especially with regard to divisive culture war issues), and schools must be willing to take firm stances against student conduct that disrupts the educational mission of schooling.

Indeed, new findings by education researchers should raise significant alarm for those already troubled by the problem of in-school bullying of LGBT youth. Current education policy focuses on the development of cognitive skills — skills that involve objective calculations and analysis like mathematical computation and scientific reasoning.⁹ Recent education studies, however, stress that students must also develop what have been termed “noncognitive skills” — character traits like “persistence, self-control, curiosity, conscientiousness, grit, and self-confidence”¹⁰ — which researchers argue are critical to the life-long success of children and young adults. Moreover, despite the key role noncognitive skills play, emerging research suggests that the process of acquiring and honing noncognitive skills can be severely disrupted by environmental and social stressors. Studies in this area have thus far largely focused on the impairment of adolescent noncognitive skill development as a result of poverty, family turmoil, and urban violence-related factors.¹¹

Though the impact of bullying on noncognitive skill development is yet unexplored, findings from these existing studies may be relevant and applicable for LGBT targets of bullying.¹² A substantial body of literature suggests that LGBT students face disturbingly high rates of verbal and physical harassment, that such students lack a sense of safety at school, and that fa-

⁸ See, e.g., CAL. SAFE SCHOOLS COAL., SAFE PLACE TO LEARN 9 (2004), available at <http://www.casafeschools.org/SafePlacetoLearnLow.pdf>, archived at <http://perma.cc/07tSTiebFNk>.

⁹ See PAUL TOUGH, HOW CHILDREN SUCCEED xiii (2012).

¹⁰ *Id.* at xv.

¹¹ See *infra* note 69 and accompanying text.

¹² Though the problem of off-campus cyberbullying is an important, emerging concern in the area of education law — one that has attracted a significant amount of attention from legal scholars, see, e.g., Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy That Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 641 (2011); Ari Ezra Waldman, *Tormented: Antigay Bullying in Schools*, 84 TEMP. L. REV. 385, 386 (2012) — this Note focuses primarily on acts of harassment and bullying that take place within the school and its environment.

miliar rejection often deprives LGBT adolescents of the type of emotional support that could mitigate the harmful effects of disruptive environmental stressors. As a result, the potential consequences of persistent in-school bullying for LGBT students extend beyond the external, physical bruising that those students endure — unrelenting acts of bullying may also impair the development of noncognitive skills by LGBT students and limit their long-term educational achievement and professional success.

Given this risk, the key question for education advocates becomes whether any existing federal or state law entitlements to educational opportunity are broad enough to provide some measure of protection for student development of noncognitive skills. Education legal scholars have suggested three potential bases for such protections: federal statutory law (specifically, the No Child Left Behind Act of 2001¹³), federal constitutional law, and state constitutional law. As will be discussed, however, the scope of the protections offered by these three bases is unclear, and thus the ability of each to safeguard student development of noncognitive skills is far from certain. Obtaining relief under federal law (including federal civil rights laws) is extremely difficult, and even many state laws that establish comprehensive regulatory regimes to deal with the problem of bullying lack private causes of action.¹⁴

Granted, many schools have voluntarily adopted antibullying policies that prohibit many forms of verbal and physical bullying. But while disciplining students for physical acts of bullying is relatively uncontroversial, imposing punishment for purely verbal harassment has been more complicated, especially where students are disciplined for speech asserting the immorality or shamefulness of homosexual conduct.¹⁵ Most courts that have considered the issue have held that outside of certain special categories of student speech, schools possess limited authority to suppress student speech unless it threatens a material and substantial disruption of the operation and activities of the school.¹⁶ However, the Court of Appeals for the Ninth Circuit, in a recent case, adopted a notably different approach, focusing on the

¹³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

¹⁴ See *infra* notes 151–154 and accompanying text.

¹⁵ See, e.g., *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 670 (7th Cir. 2008) (student First Amendment challenge to school's efforts to bar him from wearing a t-shirt that read "Be Happy, Not Gay"); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202–04 (3d Cir. 2001) (student First Amendment overbreadth and vagueness challenge to school's antiharassment policy that prohibited "verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation"); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 967–69 (S.D. Ohio 2005) (student free speech challenge to principal's decision to suspend him for wearing a t-shirt that read "Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!"); cf. *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1069–70 (D. Minn. 2001) (student First Amendment challenge to principal's decision to prohibit him from wearing a t-shirt that read "Straight Pride").

¹⁶ See, e.g., *Morse v. Frederick*, 551 U.S. 393, 403–05 (2007); *Saxe*, 240 F.3d at 214.

educational needs and rights of LGBT students as opposed to the potential risk of disruption. This student-centric analysis would permit school officials to bar vitriolic student speech targeting LGBT students *before* disruption is threatened and (hopefully) *before* any negative impact on those students' noncognitive skill development occurs.

Part I of this Note begins by reviewing existing research regarding the importance of noncognitive skill development during adolescence and its sensitivity to environmental and social stressors. It then delves into studies detailing the prevalence and severity of in-school bullying of LGBT students, and posits that such bullying could rise to a level where it impairs those students' acquisition and development of noncognitive skills. Part II goes on to explore whether existing educational guarantees under federal and state law offer any protections for student development of noncognitive skills, looking specifically at the No Child Left Behind Act, federal constitutional case law, and state constitutional education clauses. Part III closes by discussing the Ninth Circuit's decision in *Harper v. Poway Unified School District*,¹⁷ which held that public school officials may restrict student speech that intrudes on the rights of other students, including other students' rights to be secure and to be let alone.¹⁸ This Part argues that *Harper* permits school officials to respond aggressively to verbal peer harassment of LGBT students by focusing on the plight and educational needs of those students. In doing so, the Ninth Circuit deviated from the disruption-focused analysis typically employed in verbal peer harassment cases and enabled school officials to better protect LGBT students' ability to develop noncognitive skills.

I. NONCOGNITIVE SKILL DEVELOPMENT

A. *Emerging Evidence Regarding the Importance of Noncognitive Skill Development*

An inordinate amount of education policy in the United States currently focuses on student acquisition and honing of cognitive skills — those skills that depend on objective reasoning, analysis, judgment, and calculation.¹⁹ In other words, “the kind of intelligence that gets measured on IQ [and other standardized] tests.”²⁰ This approach arose out of the juncture of two historical forces: an expanding post–World War II appetite for standardized intelli-

¹⁷ 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

¹⁸ *Id.* at 1177. The Ninth Circuit's opinion in *Harper* was vacated by the United States Supreme Court once the student-petitioner's claims for injunctive relief became moot. *Harper*, 549 U.S. at 1262.

¹⁹ See James J. Heckman & Yona Rubinstein, *The Importance of Noncognitive Skills: Lessons from the GED Testing Program*, 91 AM. ECON. REV. 145, 145 (2001) [hereinafter Heckman, *Importance*].

²⁰ TOUGH, *supra* note 9, at xiii.

gence testing²¹ and increased national attention during the mid-to-late 1990s on intellectual development during early childhood.²² This emphasis on cognitive skill development culminated in 2001 in the No Child Left Behind Act,²³ which “revolutionized”²⁴ the American approach to standardized testing and mandated yearly assessments of student performance.²⁵

At the same time, however, an education countermovement was brewing, sparked in large part by the work of economist and Nobel laureate James Heckman and his highly influential 2001 paper on the General Educational Development test (“GED”).²⁶ The GED, as it is currently used, enables individuals who fail to finish high school to later obtain a high school equivalency credential.²⁷ In reviewing a substantial body of scholarly literature, Heckman found that although the GED purports to approximate “high school equivalency,”²⁸ individuals who take and pass the GED “are *not* equivalent to ordinary high school graduates,”²⁹ but are rather “equivalent to *uncredentialed* dropouts in terms of their labor market outcomes and their general performance in society.”³⁰ In other words, although individuals who pass the GED possess cognitive skills comparable to those of a standard high school graduate, the professional and societal successes of those individuals nonetheless remain on par with high school dropouts who have *not* proven able to pass the GED.

With lack of cognitive ability ruled out as a possible explanation for the subpar professional performances of those who pass the GED, Heckman concluded that “noncognitive deficits — such as lack of persistence, low

²¹ Marguerite M. Clarke et al., *Retrospective on Educational Testing and Assessment in the 20th Century*, 32 J. CURRICULUM STUD. 159, 164 (2000).

²² See CARNEGIE TASK FORCE ON MEETING THE NEEDS OF YOUNG CHILDREN, STARTING POINTS: MEETING THE NEEDS OF OUR YOUNGEST CHILDREN 59–60 (Apr. 1994), available at <http://carnegie.org/fileadmin/Media/Publications/PDF/Starting%20Points%20Meeting%20the%20Needs%20of%20Our%20Youngest%20Children.pdf>, archived at <http://perma.cc/0Q8S9hAMYBU>; see generally BETTY HART & TODD R. RISLEY, MEANINGFUL DIFFERENCES IN THE EVERYDAY EXPERIENCE OF YOUNG AMERICAN CHILDREN (1995).

²³ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

²⁴ Valerie Strauss, *The Rise of the Testing Culture*, WASH. POST (Oct. 10, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/09/AR2006100900925.html>, archived at <http://perma.cc/0jPqL6rfHjD>.

²⁵ 20 U.S.C. § 6316(a)(1) (2012); see also DIANE RAVITCH, THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM 94–96 (2010) (discussing the political consensus around greater educational testing and accountability that culminated in the No Child Left Behind Act).

²⁶ Heckman, *Importance*, *supra* note 19.

²⁷ James Heckman et al., *The GED*, in 3 HANDBOOK OF THE ECONOMICS OF EDUCATION 423, 424 (Eric A. Hanushek et al. eds., 2011), available at <http://www.nber.org/papers/w16064.pdf>, archived at <http://perma.cc/0SbjXBSXvds> [hereinafter Heckman, *GED*].

²⁸ *Frequently Asked Questions*, GED TESTING SERVICE, <http://www.gedtestingservice.com/educators/2014-faqs> (last visited Sept. 30, 2013), archived at <http://perma.cc/0rJvW5B42Ww>. The difficulty of the GED is set at a level where 60% of high school graduates would be expected to pass. See Heckman, *GED*, *supra* note 27, at 430.

²⁹ Heckman, *GED*, *supra* note 27, at 425.

³⁰ *Id.* (emphasis added).

self-esteem, low self-efficacy, and high propensity for risky behavior — explain the lack of success for many GEDs.”³¹ In reaching this conclusion, Heckman took note of earlier studies underscoring the importance of noncognitive skills — skills such as persistence, optimism, and time management — for advancement in the employment setting.³² He also considered other research indicating that high school dropouts who take the GED “lack the abilities to think ahead, to persist in tasks, or to adapt to their environments.”³³ The combination of these findings suggested to Heckman that despite the cognitive aptitude of those individuals who pass the GED, the noncognitive deficiencies that precipitated their failure to complete high school were continuing to impede their professional and social performances later in life.³⁴

Subsequent studies and articles by other education researchers support Heckman’s conclusions and have shed further light on those noncognitive skills that tend to correlate with educational and career success³⁵ — a list that typically includes traits such as “persistence, self-control, curiosity, conscientiousness, grit, and self-confidence.”³⁶ Two studies in particular illustrate the importance of noncognitive skills to students’ long-term prosperity. In a 2006 article, Angela Duckworth of the University of Pennsylvania conducted six quantitative studies in a variety of settings exploring how “grit” — which she defined as “perseverance and passion for long-term goals”³⁷ — contributed to the success of adults and adolescents in professional, educational, military, sporting, artistic, and extracurricular contexts.³⁸ Among her many findings, Duckworth demonstrated correlations between higher levels of grit and (1) a higher propensity for hard work in school and strong study skills,³⁹ (2) higher levels of educational attainment,⁴⁰ (3) higher undergraduate grade point averages, even when the SAT scores of student-participants were held constant,⁴¹ and (4) a higher likelihood that cadets at the West Point United States Military Academy would complete the school’s rigorous first-year summer training program.⁴² In reviewing the results of her six studies, Duckworth noted that “individual differences in grit ac-

³¹ *Id.* at 426.

³² Heckman, *Importance*, *supra* note 19, at 136.

³³ *Id.*

³⁴ *Id.*

³⁵ See, e.g., MELISSA RODERICK, CLOSING THE ASPIRATIONS-ATTAINMENT GAP: IMPLICATIONS FOR HIGH SCHOOL REFORM 3 (Apr. 2006); Angela L. Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCHOL. 1087, 1100 (2007); Christy Lleras, *Do Skills and Behaviors in High School Matter? The Contribution of Noncognitive Factors in Explaining Differences in Educational Attainment and Earnings*, 37 Soc. SCI. RES. 888, 899 (2008).

³⁶ TOUGH, *supra* note 9, at xv.

³⁷ Duckworth et al., *supra* note 35, at 1087.

³⁸ *Id.* at 1090–98, 1100.

³⁹ *Id.* at 1098.

⁴⁰ *Id.* at 1091, 1093.

⁴¹ *Id.* at 1093.

⁴² *Id.* at 1095–96.

counted for significant incremental variance in success outcomes over and beyond that explained by IQ, to which it was not positively related.”⁴³

Similarly, Carmit Segal of the University of Zurich published an article in 2012 examining the relationship between intrinsic motivation and future economic success. Segal analyzed data from the National Longitudinal Survey of Youth, a nationally representative study of over 12,000 individuals between the ages of fourteen and twenty-two who were first surveyed in 1979, resurveyed annually until 1994, and then resurveyed biennially after that.⁴⁴ The survey tasked participants with the simple but uninteresting clerical assignment of coding a set of words and numbers, with some assignments timed and some not.⁴⁵ Each participant was paid \$50 for completing the survey; no additional incentives were offered for completing the assignments quickly or accurately.⁴⁶ After controlling for participants’ cognitive ability,⁴⁷ Segal discovered that participants’ scores in the timed coding tasks demonstrated an “economically large and statistically significant” correlation with the professional wages those participants were earning *twenty-three years after participating in the survey*.⁴⁸ Noting that the participants’ performances in the coding tasks were wholly unincentivized, Segal found direct and indirect evidence that participants’ higher scores in the timed coding tasks and higher levels of subsequent professional success were “attribut[able] to personality traits associated with *intrinsic motivation*.”⁴⁹

On the one hand, it is unsurprising that the foregoing studies found correlations between professional success and participant development of noncognitive skills like persistence, perseverance, optimism, and intrinsic motivation. On the other hand, it is notable that researchers characterized adolescence and secondary schooling as crucial periods in which students develop such noncognitive skills. As observed by one set of researchers, “although [noncognitive skills] develop throughout childhood, noncognitive attributes developed during adolescence have been shown to have a significant and lasting impact on success in life.”⁵⁰ As described by another set

⁴³ *Id.* at 1098.

⁴⁴ Carmit Segal, *Working When No One Is Watching: Motivation, Test Scores, and Economic Success*, 58 MGMT. SCI. 1438, 1439, 1442 (2012). This survey contained a test called the Armed Service Vocational Aptitude Battery, which functioned as a screening and sorting exam for applicants to the United States military. *Id.*

⁴⁵ *Id.* at 1442.

⁴⁶ *Id.*

⁴⁷ Segal relied on past research demonstrating that participants’ untimed coding scores could be used to control for cognitive ability. *Id.* at 1444.

⁴⁸ *Id.* at 1439, 1444.

⁴⁹ *Id.* at 1439 (emphasis added).

⁵⁰ JEFFREY A. ROSEN ET AL., *NONCOGNITIVE SKILLS IN THE CLASSROOM: NEW PERSPECTIVES ON EDUCATIONAL RESEARCH 1* (2010); see also Giorgio Brunello & Martin Schlotter, *Non Cognitive Skills and Personality Traits: Labour Market Relevance and their Development in Education & Training Systems* 17–18 (Inst. for the Study of Labor, Discussion Paper No. 5743, 2011); cf. Lleras, *supra* note 35, at 889 (“The results from this study indicate that noncognitive behaviors measured in high school have unique and significant effects on both educational attainment and earnings, even after controlling for cognitive skills.”).

of researchers, the most “productive” periods for the development of noncognitive skills “concentrate during secondary schooling and the adolescent years.”⁵¹ As a result, “a high school diploma is as much about a mindset as it is about a skill-set,”⁵² for success in middle school and high school requires students to develop the sort of perseverance, intrinsic motivation, and grit that they need in the real world.

B. The Vulnerability of Noncognitive Skill Development to External Stressors

Despite its great importance, social scientists have found that adolescent development of noncognitive skills can be severely disrupted by environmental and social stressors. Neuroscience research demonstrates that although the human body’s system for managing stress, the hypothalamic-pituitary-adrenal (“HPA”) axis, “evolved to react to brief and acute stresses,” contemporary humans are more generally subject to mental and emotional stresses of longer duration.⁵³ Ongoing or persistent social, personal, professional, and financial concerns can easily overtax the HPA axis.⁵⁴ Moreover, the HPA axis is unable to differentiate between differing levels and types of stresses, triggering a similar set of physiological defense mechanisms regardless of whether the stressor comes in the form of an attack by a predator in the wild, an assault by a bully on the playground, or a speech before a student body audience.⁵⁵

Most alarmingly, frequent activation of the HPA axis can “recalibrate the threshold for activating the stress response system for life.”⁵⁶ When the body’s stress management system is operating normally and faced with an acute environmental demand, it mobilizes to respond to that demand and then rapidly returns to its prior resting state — a process called “recovery.”⁵⁷

⁵¹ Helena Holmlund & Olmo Silva, *Targeting Non-Cognitive Skills to Improve Cognitive Outcomes: Evidence from a Remedial Education Intervention 2* (Inst. for the Study of Labor, Discussion Paper No. 4476, 2009).

⁵² Nathan Thornburgh, *Dropout Nation*, TIME MAG. (Apr. 9, 2006), <http://content.time.com/time/magazine/article/0,9171,1181646-1,00.html>, archived at <http://perma.cc/0TGij7JSw rA>.

⁵³ TOUGH, *supra* note 9, at 12; see also Bruce S. McEwen, *Protection and Damage from Acute and Chronic Stress Allotaxis and Allostatic Overload and Relevance to the Pathophysiology of Psychiatric Disorders*, 1032 ANNALS N.Y. ACAD. SCI. 1, 3 (2004), available at http://www.researchgate.net/publication/8055506_Protection_and_damage_from_acute_and_chronic_stress_allotaxis_and_allostatic_overload_and_relevance_to_the_pathophysiology_of_psychiatric_disorders, archived at <http://perma.cc/OHN9Ass1pfV>.

⁵⁴ TOUGH, *supra* note 9, at 12–13.

⁵⁵ *Id.* at 13.

⁵⁶ CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., *THE FOUNDATIONS OF LIFELONG HEALTH ARE BUILT IN EARLY CHILDHOOD 6* (2010), available at http://developingchild.harvard.edu/resources/reports_and_working_papers/foundations-of-lifelong-health/, archived at <http://perma.cc/07SFYR7iTRf>.

⁵⁷ Gary W. Evans et al., *Cumulative Risk, Maternal Responsiveness, and Allostatic Load Among Young Adolescents*, 43 DEVELOPMENTAL PSYCHOL. 341, 342 (2007).

When, however, “demands from the environment are excessive and/or occur over a prolonged period of time . . . the system becomes overloaded [and] [t]ypical healthy patterns of cardiovascular reactivity and recovery in response to an acute stressor no longer occur.”⁵⁸ A constant stream of environmental stressors can thus permanently alter the way an adolescent’s HPA axis functions, rendering recovery increasingly difficult. Research has shown, however, that high-quality parenting can substantially moderate these effects.⁵⁹

These findings should raise concern for educators given that “the part of the brain most affected by early stress,”⁶⁰ the prefrontal cortex, also plays a critical role in adolescent development of noncognitive skills.⁶¹ The prefrontal cortex influences a person’s ability to concentrate, focus, parse contradictory information, and navigate unpredictable situations.⁶² It affects emotional resiliency, cognitive impulse control, and emotional impulse control⁶³ — important qualities for educational success given that the adolescent mind during the teenage and young-adult years is highly impulsive and emotionally reactive.⁶⁴ The sensitivity of the prefrontal cortex to environmental stressors and the key role it plays in noncognitive skill development thus suggest that a student’s immersion in a setting rife with threats and dangers may negatively impact that student’s stress response system and her acquisition of noncognitive skills.⁶⁵

C. Implications for LGBT Targets of Bullying

Though the researchers discussed above and others have made impressive findings in their study of noncognitive skill development, the field is still somewhat nascent. With less than two decades worth of scientific in-

⁵⁸ *Id.*

⁵⁹ See Clancy Blair et al., *Salivary Cortisol Mediates Effects of Poverty and Parenting on Executive Functions in Early Childhood*, 82 CHILD DEV. 1970, 1971 (2011), available at <http://steinhardt.nyu.edu/semsAdmin/uploads/006/746/Blair%20-%20cortisol%20mediates%20poverty.pdf>, archived at <http://perma.cc/0ah7DJGEp1J>.

⁶⁰ TOUGH, *supra* note 9, at 17.

⁶¹ While I am unaware of any social science studies that specifically explore the impact of stress on the prefrontal cortex in the context of noncognitive skill development, this should not be surprising given the relative newness of this area of research. See ROSEN ET AL., *supra* note 50, at 2 (“Noncognitive skills research is a relative newcomer to the study of factors affecting student achievement and attainment.”). Even “empirical studies which consider the labour market effects of non cognitive skills are still relatively scarce.” Brunello & Schlotter, *supra* note 50, at 8. As such, my intent here (and in the rest of this Part) is limited to proposing that existing research on noncognitive skill development suggests certain risks for LGBT targets of bullying, should give educators pause, and merits further research.

⁶² TOUGH, *supra* note 9, at 17–18.

⁶³ *Id.*

⁶⁴ See Laurence Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-taking*, 28 DEVELOPMENTAL REV. 78, 92 (2008).

⁶⁵ See Blair et al., *supra* note 59, at 1971.

vestigation,⁶⁶ there remain outstanding challenges regarding the measurement of noncognitive skill development,⁶⁷ and open questions regarding how educators should seek to develop noncognitive skills through the educational process.⁶⁸ Thus far, a substantial amount of work has focused on the impairment of noncognitive skill development as a result of poverty-related environmental stressors,⁶⁹ including ongoing concern about the financial stability of one's family, lack of parental support and supervision, substance abuse, physical abuse, and general neglect.⁷⁰ A number of studies have looked specifically at the negative impact on a child's HPA axis as a result of "adverse environmental circumstances early in childhood, [including] neglect, abuse, or severely deprived physical and social stimulation" in the context of urban and low-income communities.⁷¹

Given the findings from these existing studies, research into the potential impact of bullying on LGBT students' HPA-axis functioning could prove fruitful. Past studies that have explored the widespread problem of in-school bullying of LGBT students depict a world fraught with verbal, emotional, and physical harassment, threats of future harassment, and limited familial support. While these environmental stressors are concededly of a different nature than the poverty-related stressors discussed in the studies above, it seems plausible that LGBT students subjected to recurring acts of bullying and harassment in their school environments might also suffer impairment of their noncognitive skill development.

For many LGBT students, in-school bullying is a "pervasive" phenomenon,⁷² with "the simple, daily routine of going to school . . . fraught with

⁶⁶ See Heckman, *Importance*, *supra* note 19, at 149; see also CAMILLE A. FARRINGTON ET AL., THE UNIV. OF CHI. CONSORTIUM ON CHI. SCH. RESEARCH, TEACHING ADOLESCENTS TO BECOME LEARNERS 5 (2012); Carmit Segal, *Classroom Behavior*, 43 J. HUM. RESOURCES 783, 783 (2008).

⁶⁷ Abigail Mackenzie Kerl, *True Grit: Paul Tough on Non-Cognitive Skills Education*, CHI. POL'Y REV. (Nov. 5, 2012) (noting difficulties regarding the measurement of noncognitive skill development), <http://chicagopolicyreview.org/2012/11/05/true-grit-paul-tough-on-non-cognitive-skills-education/>, archived at <http://perma.cc/0CHD36PW4Si>.

⁶⁸ See ABDUL LATIF JAMEEL POVERTY ACTION LAB, YOUTH INITIATIVE REVIEW PAPER EXECUTIVE SUMMARY 1, available at <http://www.povertyactionlab.org/doc/youth-initiative-review-paper-executive-summary>, archived at <http://perma.cc/0L5Ugn1g5Bk>.

⁶⁹ See TOUGH, *supra* note 9, at 7–9, 14–48, 185–97 (discussing quantitative research and case studies relating to children growing up in low-income, violent, and at-risk families and communities). While research on the impact of gender-motivated and/or race-motivated peer harassment on a student's noncognitive skill development would obviously be relevant and highly illuminating for the purposes of this Note, to date, the gross majority of research has focused on poverty-related stressors, even when low income populations overlap with racial minority groups. Evans et al., *supra* note 57, at 342. I am hopeful that future research efforts will explore the under-analyzed area of environmental stressors on minority youth as minority youth.

⁷⁰ TOUGH, *supra* note 9, at 192.

⁷¹ Evans et al., *supra* note 57, at 342.

⁷² Stephen T. Russell et al., *Lesbian, Gay, Bisexual, and Transgender Adolescent School Victimization: Implications for Young Adult Health and Adjustment*, 81 J. SCH. HEALTH 223, 223 (2011), available at http://www.nea.org/assets/docs/ASHA_Article.pdf, archived at <http://perma.cc/0xfpoiGtLPC>.

harassment and victimization.”⁷³ Numerous studies over the past two decades have shown that verbal and physical bullying — including antigay language, verbal teasing, relational aggression, and physical aggression — are “common [occurrences] for the majority of [lesbian, gay, bisexual, transgender, and queer (“LGBTQ”)] students.”⁷⁴ In their 2011 survey of over 8500 LGBT students from all fifty states and the District of Columbia, the Gay, Lesbian & Straight Education Network (“GLSEN”) found that 84.9% of respondents had heard the term “gay” used in a negative way (for example, “that’s so gay”) frequently or often at school, with 91.4% saying that they felt distressed because of the use of that language.⁷⁵ Nearly half of respondents reported being often or frequently subjected to verbal harassment, 11% said that they often or frequently experienced physical harassment, and 5% indicated that they were often or frequently the target of physical assault.⁷⁶ These results parallel those found in a 2004 statewide survey that was open to all middle school and high school students in California, but which specifically targeted LGBT youth. There, 79% of respondents heard negative remarks about sexual orientation “sometimes” or “often,” 65% said they had been harassed based on actual or perceived sexual orientation, and 47% reported repeated harassment.⁷⁷ Other studies indicate that such acts of bullying can often take on sexual overtones, with reported acts of unwelcome physical sexual contact and sexually suggestive remarks or gestures.⁷⁸

With the ever-present possibility of impending verbal or physical violence hanging over so many LGBT students, it is little wonder that many of them lack a sense of security at school. Sixty-three percent of respondents to the 2011 GLSEN study reported that they felt unsafe at school because of their sexual orientation, and 44% said they felt unsafe because of their gender expression.⁷⁹ Similarly, 39% of LGBT-identified respondents in the Cal-

⁷³ *Id.* at 228; see also HUMAN RIGHTS WATCH, HATRED IN THE HALLWAYS 42 (2001) (“For many lesbian, gay, bisexual, and transgender youth, relentless verbal abuse and other forms of harassment are ‘all part of the normal daily routine.’” (quoting an interview respondent)), available at <http://www.hrw.org/sites/default/files/reports/usalbg01.pdf>, archived at <http://perma.cc/095NnguqrBTt>; Stephen T. Russell et al., *Safe Schools Policy for LGBTQ Students*, 24 Soc. POL’Y REP. 3, 3 (2010) (“[H]omophobia and [anti-lesbian, gay, bisexual, transgender, and queer (“LGBTQ”)] prejudice are daily experiences for many students.”), available at http://www.srcd.org/sites/default/files/documents/spr_24_4_final.pdf, archived at <http://perma.cc/0FqYc92YhHW>.

⁷⁴ Russell et al., *supra* note 72, at 6; see also COMM. ON LESBIAN, GAY, BISEXUAL, & TRANSGENDER HEALTH ISSUES & RESEARCH GAPS & OPPORTUNITIES, INST. OF MED., THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 157–58 (2011).

⁷⁵ GAY, LESBIAN & STRAIGHT EDUC. NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY xiv (2011), available at <http://www.glsen.org/sites/default/files/2011%20National%20School%20Climate%20Survey%20Full%20Report.pdf>, archived at <http://perma.cc/0wECvh tqMdf>.

⁷⁶ *Id.* at 24–25.

⁷⁷ CAL. SAFE SCHOOLS COAL., *supra* note 8, at 14.

⁷⁸ HUMAN RIGHTS WATCH, *supra* note 73, at 54–55.

⁷⁹ GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 75, at xiv.

ifornia survey indicated that they did not feel safe at school, with that percentage rising to 42% among LGBT-identified respondents who had experienced harassment based on their actual or perceived sexual orientation.⁸⁰ A 2011 population-based survey of high school students had similar findings, reporting that LGBT-identified youth “are more likely than their heterosexual peers to be threatened or injured with a weapon at school and to skip school because they feel unsafe.”⁸¹

In sum, then, the foregoing studies and surveys sketch a world in which much of the LGBT youth population is immersed in a school environment fraught with threatened and actual danger. Given the social science research discussed above, this type of environment might impair the acquisition of noncognitive skills by LGBT students.

D. Parental Buffering Against Environmental Stressors

As noted earlier, studies have found that high-quality parenting can insulate adolescents against the negative effects of environmental stressors on HPA-axis functioning. Researchers of “attachment theory” have long described the numerous developmental benefits that accrue from parenting that is responsive and sensitive to the emotional needs of young children.⁸² Recent studies, moreover, have found evidence that responsive parenting can also buffer adolescents against environmental stressors that arise during the high school years.

For example, in a study of 207 middle school students by Gary Evans of Cornell University, researchers measured each student’s exposure to a wide range of environmental stressors (including housing quality, exposure to violence, family turmoil, and poverty) and assessed the maternal respon-

⁸⁰ CAL. SAFE SCHOOLS COAL., *supra* note 8, at 13; *see also* Anthony R. D’Augelli et al., *Incidence and Mental Health Impact of Sexual Orientation Victimization of Lesbian, Gay, and Bisexual Youths in High School*, 17 SCH. PSYCHOL. Q. 148, 158 (2002) (study of LGBT youth found 27% of respondents said they were “very or extremely” afraid of being verbally harassed, with 25% of male LGBT respondents saying they were “very or extremely afraid of physical attacks” while at school).

⁸¹ COMM. ON LESBIAN, GAY, BISEXUAL, & TRANSGENDER HEALTH ISSUES & RESEARCH GAPS & OPPORTUNITIES, *supra* note 74, at 158. These conclusions align with the findings of a 2009 survey in Massachusetts, which reported that 17.3% of lesbian, gay, and bisexual (“LGB”) students had been threatened with or injured by a weapon at school in the past year (as compared to 6.4% of non-LGB students), and that 13.9% of LGB students had skipped school because they felt unsafe (as compared to 3.4% of non-LGB students). MASS. DEP’T OF EDUC., MASSACHUSETTS HIGH SCHOOL STUDENTS AND SEXUAL ORIENTATION: RESULTS OF THE 2009 YOUTH RISK BEHAVIOR SURVEY 1 (2009), *available at* <http://www.mass.gov/cgly/YRBS09Factsheet.pdf>, *archived at* <http://perma.cc/0kp61aZXXN2Q>.

⁸² *See, e.g.*, Alan Sroufe & Daniel Siegel, *The Verdict Is In: The Case for Attachment Theory*, PSYCHOTHERAPY NETWORKER, Mar. 10, 2011, *available at* <http://www.psychotherapy.networker.org/magazine/recentissues/2011-marapr/item/1271-the-verdict-is-in>, *archived at* <http://perma.cc/0FTNAagHwV>; *see also* Robert Karen, *Becoming Attached: First Relationships and How They Shape Our Capacity to Love*, ATLANTIC MONTHLY, Feb. 1990, at 35, 36–37, *available at* http://www.theatlantic.com/magazine/archive/1990/02/becoming-attached/308966/?single_page=true, *archived at* <http://perma.cc/08EVt2aLjBT>.

siveness of each student's mother, using a set of subjective and objective criteria.⁸³ Evans found that the greater the number of environmental stressors in an adolescent's life, the higher the adolescent's allostatic load ("an index of chronic physiological stress"⁸⁴) tended to be.⁸⁵ This relationship held *except* in the cases of students with maternally responsive and sensitive mothers; for those students, increases in environmental stressors demonstrated no negative impact on their allostatic loads.⁸⁶ Evans's findings thus suggest that maternal responsiveness can serve as a "buffer" against a wide variety of social, financial, and environmental stressors.⁸⁷

For many LGBT youth, however, this type of maternal support is absent. The relationship between LGBT youth and their parents frequently comes under significant strain once a parent learns that his or her child is LGBT,⁸⁸ which can lead to a variety of dismissive and disdainful behaviors on the part of that parent. Indeed, a 1998 study of 105 lesbian, gay, and bisexual youth between the ages of fourteen and twenty-one found a positive correlation between verbal and physical abuse by a family member and the youth's disclosure and openness about her sexual orientation with her parents.⁸⁹ Similarly, research by Caitlin Ryan, the Director of the Family Acceptance Project, in 2010 found that 42% of LGBT individuals have experienced "rejecting" or "extremely rejecting" behavior from their parents.⁹⁰ Thus, even though maternal responsiveness can insulate adolescents against a wide array of environmental stressors, such refuge is unavailable for the many LGBT victims of bullying who lack familial support.

Even more concerning, recent research suggests an overlap between LGBT youth targeted by peer harassment and LGBT youth rejected by or isolated from their families. A survey by the California Safe Schools Coalition found that students harassed based on their actual or perceived sexual orientation were more likely to report lower levels of family support.⁹¹ This is consistent with the results of a survey by the Human Rights Watch in 2001: LGBT individuals subjected to bullying in the form of sexual harassment reported feelings of isolation from both friends and family.⁹² Simi-

⁸³ Evans et al., *supra* note 57, at 343–44.

⁸⁴ *Id.* at 348.

⁸⁵ *Id.* at 345.

⁸⁶ *Id.* at 346.

⁸⁷ *Id.* at 348.

⁸⁸ See Caitlin Ryan et al., *Family Acceptance in Adolescence and the Health of LGBT Young Adults*, 23 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 205, 206 (2010), available at http://familyproject.sfsu.edu/files/FAP_Family%20Acceptance_JCAPN.pdf, archived at <http://perma.cc/0bBnvjE62HG>.

⁸⁹ See Anthony R. D'Augelli et al., *Lesbian, Gay, and Bisexual Youths and Their Families: Disclosure of Sexual Orientation and Its Consequences*, 68 AMER. J. ORTHOPSYCHIATRY 361, 368 (1998).

⁹⁰ Michael Sadowski, *Beyond Gay-Straight Alliances*, HARV. EDUC. LETTER, Mar./Apr. 2010, at 2, available at http://familyproject.sfsu.edu/files/FAP_Harvard_Edu_Letter_blk.pdf, archived at <http://perma.cc/0bvBJhdXvV1>.

⁹¹ CAL. SAFE SCHOOLS COAL., *supra* note 8, at 10.

⁹² HUMAN RIGHTS WATCH, *supra* note 73, at 57.

larly, work by Caitlin Ryan suggests a correlation between LGBT youth experiencing low levels of familial acceptance and low levels of social support.⁹³ In this way, LGBT victims of pervasive, persistent bullying may face “chronic or overwhelming adversity without the buffering support of caring, consistent, and supportive relationships.”⁹⁴

II. THE EDUCATIONAL RIGHTS OF STUDENTS

The social science research discussed in Part I suggests a new way of thinking about the role of education in adolescent development: while current education policy focuses on the acquisition and measurement of students’ cognitive skills, the cultivation of noncognitive skills through the process of secondary education appears to be crucial to adolescents’ long-term educational and professional success. Noncognitive skill development is vulnerable, however, to disruption by environmental stressors — a finding particularly concerning for LGBT students given their frequent exposure to pervasive, severe in-school bullying. The key question for education advocates then becomes: do students possess any legal rights or entitlements that might safeguard their ability to develop noncognitive skills?

Youth and education legal scholars like Michael Rebell and Susan Bitensky shed light on these questions, contending that adolescents in this country possess federal statutory, federal constitutional, and state constitutional rights to educational opportunity.⁹⁵ Such arguments, if accepted, could provide a basis for obtaining or expanding protections for student development of noncognitive skills. The following sections consider the viability of these three potential sources for a right to educational opportunity and explore whether such a right could include the development of noncognitive skills.

A. *A Federal Statutory Right to Educational Opportunity Under the No Child Left Behind Act*

In searching for a federal statutory right to educational opportunity, the No Child Left Behind Act (“NCLBA”)⁹⁶ presents an obvious potential basis. The NCLBA revised the Elementary and Secondary Education Act

⁹³ See Ryan et al., *supra* note 88, at 208.

⁹⁴ CTR. ON THE DEVELOPING CHILD AT HARVARD UNIV., *supra* note 56, at 6 (internal quotation marks omitted).

⁹⁵ See 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, 553 (1992); Michael A. Rebell, *The Right to Comprehensive Educational Opportunity*, 47 HARV. C.R.-C.L. L. REV. 47, 54–55 (2012).

⁹⁶ No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C.).

(“ESEA”), enacted under President Johnson in 1965,⁹⁷ and has been described as “perhaps the most important federal education law in our nation’s history.”⁹⁸ Prior to the NCLBA, the ESEA had been revised in 1994 to include numerous ideas informed by the emerging standards-based reform movement, with heavy reliance on academic standards and regular student testing.⁹⁹ The NCLBA went a step further, “establish[ing] more ambitious goals and plac[ing] greater constraints on the states.”¹⁰⁰ Specifically, it required that states receiving federal funding under the NCLBA adopt “challenging academic content standards and challenging student academic achievement standards,”¹⁰¹ and implement yearly academic assessments in a variety of subjects.¹⁰² As one commentator notes, “[t]est scores are the fuel that makes the NCLBA run.”¹⁰³

Despite the NCLBA’s overall focus on cognitive skill development and student testing, the Act at times takes a more holistic view of student education, which could offer some hope to those championing noncognitive skill development. In its “Statement of Purpose,” the NCLBA speaks of “promoting schoolwide reform and ensuring the access of children to effective, scientifically based instructional strategies.”¹⁰⁴ The NCLBA also seeks to “clos[e] the achievement gap” between minority and nonminority students,¹⁰⁵ and to “elevat[e] the quality of instruction.”¹⁰⁶ Finally, the NCLBA amended the stated goal of the ESEA: “[T]o ensure that all children have a fair, equal, and *significant* opportunity to obtain a high-quality education.”¹⁰⁷ This contrasts with language used in the 1994 version of the ESEA, which merely stated that students were to be provided “a fair and equal opportunity to obtain [an] education.”¹⁰⁸ In the eyes of education

⁹⁷ The ESEA has been reauthorized periodically since its passage in 1965, with the most recent reauthorization prior to the NCLBA coming in 1994. See *Improving America’s Schools Act of 1994*, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended in scattered sections of 20 U.S.C.).

⁹⁸ James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 932 (2004).

⁹⁹ *Improving America’s Schools Act of 1994*, Pub. L. No. 103-382, § 1111(b)(1)(A), (2)(A), 108 Stat. 3518, 3523–24 (1994) (codified as amended in scattered sections of 20 U.S.C.) (requiring that each state adopt “challenging content standards” and demonstrate “yearly progress” through assessments).

¹⁰⁰ Ryan, *supra* note 98, at 939. Commentators have since noted that the Texas education system that served as the model for the NCLBA, with its apparent education gains and heavy reliance on teacher and student accountability, created a “mirage” that resulted in students in Texas “getting a worse education tied solely to taking the state tests.” RAVITCH, *supra* note 25, at 96.

¹⁰¹ 20 U.S.C. § 6311(b)(1)(A) (2012).

¹⁰² *Id.* § 6311(b)(3)(A).

¹⁰³ Ryan, *supra* note 98, at 940.

¹⁰⁴ 20 U.S.C. § 6301(9) (2012).

¹⁰⁵ *Id.* § 6301(3).

¹⁰⁶ *Id.* § 6301(10).

¹⁰⁷ *Id.* § 6301 (emphasis added).

¹⁰⁸ *Improving America’s Schools Act of 1994*, Pub. L. No. 103-382, § 1001(a)(1), 108 Stat. 3518, 3519 (1994) (codified as amended in scattered sections of 20 U.S.C.).

legal scholar Michael Rebell, this change suggests that Congress intended for the NCLBA to provide students with “*meaningful* educational opportunity.”¹⁰⁹

On the whole, however, these intermittent instances in which Congress expanded its focus beyond standards and testing-based reforms are unlikely to provide any significant protection for noncognitive skill development. Indeed, congressional debates during the bill’s drafting focused primarily on student testing,¹¹⁰ and the most significant parts of the enacted Act deal with mandatory standardized testing and teacher accountability.¹¹¹ Given the NCLBA’s focus on cognitive skill development, those seeking a broader educational entitlement — one inclusive of noncognitive skill development — likely must search elsewhere.

B. A Federal Constitutional Right to Educational Opportunity

Although no fundamental right to education is currently recognized in American constitutional law, Supreme Court precedent and work by various education legal scholars have suggested a number of areas where such a right might be found to reside. The Supreme Court perhaps came closest to announcing a constitutional right to education in 1923 in the case of *Meyer v. Nebraska*,¹¹² which concerned a parochial school teacher convicted of violating a Nebraska statute that forbade the instruction of foreign languages to children in eighth grade and lower.¹¹³ In reversing the conviction, the Court noted, “[t]he American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted.”¹¹⁴ The Court stated explicitly that the Fourteenth Amendment’s guarantee of “liberty” encompassed, *inter alia*, “the right of the individual . . . to acquire useful knowledge,”¹¹⁵ and it concluded as a result that “[the teacher’s] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the Amendment.”¹¹⁶ Though the Court’s decision in *Meyer*, situated in the middle of the *Lochner* era, relied on a now-discredited version of substantive

¹⁰⁹ Rebell, *supra* note 95, at 65 (emphasis added); *see also id.* (“Incorporation of the term ‘significant’ as a modifier of the term ‘opportunity’ here is important.”).

¹¹⁰ Andrew G. Caffrey, *No Ambiguity Left Behind: A Discussion of the Clear Statement Rule and the Unfunded Mandates Clause of No Child Left Behind*, 18 WM. & MARY BILL RTS. J. 1129, 1134 (2010).

¹¹¹ *See* Ryan, *supra* note 98, at 939; Andrew Spitzer, *School Reconstitution Under No Child Left Behind: Why School Officials Should Think Twice*, 54 UCLA L. REV. 1339, 1346 (2007).

¹¹² 262 U.S. 390 (1923).

¹¹³ *Id.* at 396–97.

¹¹⁴ *Id.* at 400.

¹¹⁵ *Id.* at 399.

¹¹⁶ *Id.* at 400.

due process,¹¹⁷ the Court as late as 1986 cited *Meyer* as supporting a right to child rearing and education.¹¹⁸

The Supreme Court squarely confronted the question of whether the Federal Constitution contains a positive right to education in *San Antonio Independent School District v. Rodriguez*,¹¹⁹ a class action suit brought by Mexican American parents of elementary and secondary schoolchildren challenging Texas's system of financing public education.¹²⁰ The Court declined the parents' entreaties to find that education constitutes a fundamental federal constitutional right meriting strict scrutiny — an argument premised on the notion that education provides a foundation for “effective exercise of First Amendment freedoms and . . . intelligent utilization of the right to vote.”¹²¹ The Court did not, however, reject outright the parents' arguments — indeed, the opinion readily acknowledges “the undisputed importance of education.”¹²² Rather, crucial to the Court's heightened scrutiny analysis was its conclusion that “even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to [First Amendment freedoms and the right to vote], we have no indication that *the present levels of educational expenditures in Texas* provide an education that falls short.”¹²³ Thus, though the Court declined to find a positive federal constitutional right to education based on the facts in *Rodriguez*, it left the door open for such a finding in a future case. Indeed, the Court in 1986 mused that “this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review.”¹²⁴

Thus, despite *Rodriguez*, it is possible (albeit unlikely) that a federal constitutional right to education could be found in the Due Process Clauses, the First Amendment, the implied constitutional right to vote,¹²⁵ the Privileges or Immunities Clause, or some combination of them all.¹²⁶ Professor Susan Bitensky, in a masterful work of scholarship, explored the viability of these potential bases and found significant support for such a right, espe-

¹¹⁷ See Bitensky, *supra* note 95, at 563–64, 564 n.83.

¹¹⁸ *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986), *overruled on other grounds by Lawrence v. Texas*, 539 U.S. 558 (2003).

¹¹⁹ 411 U.S. 1 (1973).

¹²⁰ *Id.* at 4–5.

¹²¹ *Id.* at 35.

¹²² *Id.*

¹²³ *Id.* at 36–37 (emphasis added).

¹²⁴ *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

¹²⁵ See Bitensky, *supra* note 95, at 602 (“Although there is no one clause of the Constitution expressly announcing a right to vote per se, the Constitution is filled with references to voting and mandatory federal elections that appear to presuppose the existence of a right to vote in federal elections.” (citations omitted)).

¹²⁶ *Cf. Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (arguing that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance”).

cially in light of “principles of constitutional construction derived from the Ninth Amendment, the role of international human rights law as a source of constitutional values, and from the historical evidences of original intent.”¹²⁷

However, even accepting that a federal constitutional right to education could be found to exist, its applicability to student acquisition of noncognitive skills would likely depend on which constitutional source undergirds the right. For example, a federal constitutional right to education rooted in the First Amendment’s guarantee of free speech and expression would likely look quite different from a right arising from the implied right to vote or one grounded in the “privileges or immunities”¹²⁸ of United States citizenship. All of this is simply to say that even if a federal constitutional right to education were held to exist, the contours of such a right and whether it might offer some protection for student development of noncognitive skills are far from certain.

C. A State Constitutional Right to Educational Opportunity

Unlike the Federal Constitution, almost all state constitutions (forty-nine out of fifty) guarantee some basic level of educational opportunity for students,¹²⁹ though the language employed in these state constitutional education clauses varies greatly.¹³⁰ Sixteen state constitutions merely mandate that their respective state establish a free system of public education, with no requirements regarding the quality of the education offered.¹³¹ Seventeen state constitutions obligate their respective state to provide some minimal quality of education.¹³² The Pennsylvania state constitution, for example, requires that the state afford adolescents “a thorough and efficient system of public education.”¹³³ Nine state constitutions contain comparatively stronger and more specific educational mandates.¹³⁴ These state constitutions frequently direct their respective states to use “all means” to provide for students’ education, and often contain “purposive preamble[s]” that emphasize the importance of education to the welfare and prosperity of the

¹²⁷ Bitensky, *supra* note 95, at 553–54.

¹²⁸ U.S. CONST. amend. XIV, § 1.

¹²⁹ Matt Brooker, Comment, *Riding the Third Wave of School Finance Litigation: Navigating Troubled Waters*, 75 UMKC L. REV. 183, 189 (2006).

¹³⁰ See, e.g., FLA. CONST. art. IX, § 1 (“high quality system of free public schools”); GA. CONST. art. VIII, § 1 (“adequate public education”); IDAHO CONST. art. IX, § 1 (a “general, uniform and thorough system” of education); N.J. CONST. art. VIII, § 4 (“thorough and efficient system of free public schools”); N.Y. CONST. art. XI, § 1 (“[T]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated.”). Credit goes to Michael Rebell for identifying these state constitutional guarantees. See Rebell, *supra* note 95, at 81 n.137.

¹³¹ Brooker, *supra* note 129, at 190.

¹³² *Id.* at 192–93.

¹³³ PA. CONST. art. III, § 14.

¹³⁴ Brooker, *supra* note 129, at 196.

state.¹³⁵ Finally, seven state constitutions elevate their respective state's educational obligation to the highest level, "articulat[ing] a specific fundamental, primary or paramount duty of the State to provide for the education of a given state's children."¹³⁶ Rhode Island's state constitution epitomizes this category, declaring that:

The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.¹³⁷

Although the authors of these various state constitutional education clauses may have intended them to be merely hortatory,¹³⁸ these clauses — especially those that guarantee robust educational rights — offer fertile ground for legal and political actors seeking to protect student development of noncognitive skills.

Indeed, education advocates have successfully relied on state education clauses in litigation challenging public education systems. After *Rodriguez*, advocates suspended their federal constitutional strategy and brought suit instead on the basis of state constitutional education clauses.¹³⁹ Specifically, they sought to equalize disparities in education funding between affluent and lower-income communities by contending that state funding schemes violated state equal protection clauses.¹⁴⁰ These suits met with mixed results, with many state courts upholding state education finance schemes despite significant per-pupil spending differences.¹⁴¹ Starting in the late 1980s, education advocates switched to adequacy-based arguments, contending that public education systems were fundamentally inadequate under their respec-

¹³⁵ *Id.*

¹³⁶ *Id.* at 198.

¹³⁷ R.I. CONST. art. XII, § 1.

¹³⁸ See John Dinan, *The Meaning of State Constitutional Education Clauses: Evidence from the Constitutional Convention Debates*, 70 ALB. L. REV. 927, 939 (2007) ("It turns out . . . that the vast majority of state convention delegates had no intention of drafting education clauses that would empower judges to overturn legislative judgments with regard to the equity, adequacy, and uniformity of school financing.").

¹³⁹ See Joseph S. Patt, Note, *School Finance Battles: Survey Says? It's All Just A Change in Attitudes*, 34 HARV. C.R.-C.L. L. REV. 547, 556 (1999); see also Michael Heise, *State Constitutions, School Finance Litigation, and the "Third Wave": From Equity to Adequacy*, 68 TEMP. L. REV. 1151, 1157–58 (1995); Julie Zwibelman, Note, *Broadening the Scope of School Finance and Resource Comparability Litigation*, 36 HARV. C.R.-C.L. L. REV. 527, 532 (2001).

¹⁴⁰ See, e.g., *DuPree v. Alma Sch. Dist. No. 30*, 279 Ark. 340, 341–42 (1983); Heise, *supra* note 139, at 1153 ("The initial two waves of equity decisions typically sought to reduce spending disparities and focused on traditional input measures such as per-pupil and overall educational spending.").

¹⁴¹ Heise, *supra* note 139, at 1160.

tive state constitutions' education clauses.¹⁴² This approach generally proved more successful than earlier equity-based arguments.¹⁴³

The Kentucky Supreme Court's decision in *Rose v. Council for Better Education*¹⁴⁴ represents perhaps the best-known example of this adequacy-based strategy. The court there invalidated Kentucky's entire public education system, finding that state lawmakers had failed to comply with the state constitution's mandate to "provide an efficient system of common schools throughout the state."¹⁴⁵ In interpreting this language, the court concluded that "all children in Kentucky have a constitutional right to an adequate education."¹⁴⁶ To qualify as "adequate," the court declared that Kentucky's public education system must aim to provide students with seven specific "capacities," including "sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently" and "sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market."¹⁴⁷

By securing a robust educational right under the Kentucky state constitution, the *Rose* litigation suggests that adequacy-based arguments could potentially be used to obtain protections for student development of noncognitive skills. Indeed, based on the social science research and findings discussed in Part I, noncognitive skills certainly seem crucial for student success in "advanced training in either academic or vocational fields"¹⁴⁸ and enable "public school students to compete favorably . . . in the job market."¹⁴⁹ Given the sparse state constitutional text upon which the Kentucky Supreme Court relied in *Rose*, it is possible that other state constitutions containing comparable or stronger educational mandates could prove similarly fruitful for education advocates, especially in light of findings by researchers like Heckman and Duckworth and the success of adequacy-based arguments.

III. ADDRESSING VERBAL PEER HARASSMENT IN THE CONTEXT OF STUDENT SPEECH

Any protections for noncognitive skill development offered by the sources of law discussed in the preceding Part would benefit LGBT students subjected to bullying, given that public schools bear no affirmative duty to

¹⁴² Patt, *supra* note 139, at 556; *see also* Heise, *supra* note 139, at 1162.

¹⁴³ Patt, *supra* note 139, at 556, 561 (noting that advocates met with "much better success" using adequacy-based arguments than equity-based arguments).

¹⁴⁴ 790 S.W.2d 186 (Ky. 1989).

¹⁴⁵ *Id.* at 189 (quoting KY. CONST. § 183).

¹⁴⁶ *Id.* at 213.

¹⁴⁷ *Id.* at 212.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

protect students from peer harassment under the Federal Constitution.¹⁵⁰ In point of fact, though federal civil rights statutes hold public schools liable when they act with “deliberate indifference” to known peer harassment on the basis of certain protected characteristics,¹⁵¹ the threshold for liability has proven “difficult, if not impossible, to satisfy” in practice.¹⁵² And even though many states have passed comprehensive laws requiring schools to respond to and investigate acts of bullying,¹⁵³ such laws often lack a private cause of action.¹⁵⁴

Many schools, to their credit, have voluntarily adopted comprehensive antibullying policies that prohibit peer harassment.¹⁵⁵ But while schools encounter little pushback when disciplining students for acts of physical harassment, policies that impose punishments for verbal harassment alone can raise student free speech concerns,¹⁵⁶ and can invite challenges on First Amendment overbreadth and vagueness grounds.¹⁵⁷

A recent Ninth Circuit decision, however, adopted a notably different approach in considering the circumstances under which a school may restrain vitriolic student speech targeted at LGBT students. The opinion was conspicuously student centric in its consideration of the educational needs of LGBT students, and its holding permits school officials to take affirmative

¹⁵⁰ In *DeShaney v. Winnebago County Department of Social Services*, the Supreme Court held that the Fourteenth Amendment does not impose upon states an obligation to protect individuals from other private citizens absent some special relationship. 489 U.S. 189, 195–96, 198 (1989). Every court of appeals that has considered the question of whether compulsory attendance laws and schools’ physical custody of students create such a special relationship has answered in the negative. *Morrow v. Balaski*, 719 F.3d 160, 170 (3d Cir. 2013).

¹⁵¹ *Davis ex rel. LaShonda v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). These statutes also apply when LGBT students are targeted by peers due to their perceived nonconformity with stereotypical notions of masculinity and femininity. See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Colleague 7–8 (Oct. 26, 2010); cf. Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 436–46 (2012) (discussing the development, moderate success, and drawbacks of the gender nonconformity approach to discrimination).

¹⁵² Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 155 (2009).

¹⁵³ See, e.g., MASS. GEN. LAWS ANN. ch. 71, § 37O(d) (West 2010); N.J. STAT. ANN. § 18A:37-15 (West 2012). For an argument that such laws may disserve the very students they seek to protect, see Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357, 394–401 (2013).

¹⁵⁴ See, e.g., MASS. GEN. LAWS ANN. ch. 71, § 37O(i) (West 2010) (“Nothing in this section shall supersede or replace existing rights or remedies under any other general or special law, nor shall this section create a private right of action.”).

¹⁵⁵ See, e.g., *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 202–03 (3d Cir. 2001) (summarizing the “Anti-Harassment Policy” adopted by the State College Area School District).

¹⁵⁶ See Francisco M. Negrón, Jr., *Maddening Choices: The Tension Between Bullying and the First Amendment in Public Schools*, 11 FIRST AMEND. L. REV. 364, 377–79 (2013) (discussing First Amendment problems in the context of school antibullying policies).

¹⁵⁷ See, e.g., *Saxe*, 240 F.3d at 202–04 (student First Amendment overbreadth and vagueness challenge to school’s antiharassment policy that prohibited “verbal or physical conduct based on one’s actual or perceived race, religion, color, national origin, gender, sexual orientation”).

steps addressing verbal peer harassment before the speech evolves into something potentially more serious. As a result, the rationale of this decision, especially if adopted elsewhere, could allow schools to offer greater protections for LGBT youth specifically and for noncognitive skill development more generally.

A. *Permissible School Responses to Physical and Verbal Peer Harassment*

Efforts by school officials to combat verbal peer harassment, especially in the LGBT context, have been frequently challenged on First Amendment grounds. As one commentator put it, “the most troubling roadblock to effective anti-bully legislation and anti-bully school policies” has come “in the form of legal action [challenging] . . . school policies that target harassing speech . . . on grounds of constitutional free speech.”¹⁵⁸ Attempts by high school administrators to discourage student speech asserting the immorality or shamefulness of homosexuality have been challenged under the First Amendment on multiple occasions.¹⁵⁹ The Supreme Court has noted, after all, that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁶⁰

The Constitution tolerates the suppression of certain types of student speech by school officials. For example, in *Bethel School District No. 403 v. Fraser*,¹⁶¹ the Supreme Court held that school officials may categorically prohibit lewd, vulgar, or profane student speech.¹⁶² Two years later, in *Hazelwood School District v. Kuhlmeier*,¹⁶³ the Supreme Court permitted school regulation of student-authored, school-sponsored speech if the speech would bear “the imprimatur of the school,” and if the speech was suppressed based on a “legitimate pedagogical concern.”¹⁶⁴ Finally, in *Morse v. Frederick*,¹⁶⁵

¹⁵⁸ Matthew Earhart, *Bullying: What's Being Done and Why Schools Aren't Doing More*, 25 J. Juv. L. 26, 30 (2005); cf. Azhar Majeed, *The Misapplication of Peer Harassment Law on College and University Campuses and the Loss of Student Speech Rights*, 35 J.C. & U.L. 385, 432–34 (2009) (discussing cases raising overbreadth challenges in the context of college and university harassment policies).

¹⁵⁹ See, e.g., *Nuxoll ex rel. Nuxoll v. Indian Prairie Sch. Dist. No. 204*, 523 F.3d 668, 670 (7th Cir. 2008) (student First Amendment challenge to school's efforts to bar him from wearing a t-shirt that read “Be Happy, Not Gay”); *Saxe*, 240 F.3d at 202–04 (student First Amendment overbreadth and vagueness challenge to school's antiharassment policy that prohibited “verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation”); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 968–69 (S.D. Ohio 2005) (student free speech challenge to principal's decision to suspend him for wearing a t-shirt that read “Homosexuality is a sin! Islam is a lie! Abortion is murder! Some issues are just black and white!”); cf. *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1069–70 (D. Minn. 2001) (student First Amendment challenge to principal's decision to prohibit him from wearing a t-shirt that read “Straight Pride”).

¹⁶⁰ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹⁶¹ 478 U.S. 675 (1986).

¹⁶² *Id.* at 683.

¹⁶³ 484 U.S. 260 (1988).

¹⁶⁴ *Id.* at 270–71, 273.

the Court suggested that school officials may restrict student speech that can “reasonably be regarded as encouraging illegal drug use.”¹⁶⁶

Outside of these narrow categories, student speech receives substantial protections under the Supreme Court’s seminal decision in *Tinker v. Des Moines Independent Community School District*,¹⁶⁷ which initiated the “modern judicial discussion regarding freedom of expression in public high schools.”¹⁶⁸ The case involved three siblings who were suspended for wearing black armbands to school in silent protest of the Vietnam War.¹⁶⁹ The Court deemed the suspensions unconstitutional, noting that the conduct at issue did not “intrude[] upon the work of the schools or the rights of other students,”¹⁷⁰ and holding that student speech could not be suppressed in the absence of activity that “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”¹⁷¹ Since then, the Supreme Court has ignored the “rights of other students” prong of *Tinker*, focusing exclusively on the “material and substantial interference” aspect of the decision.¹⁷²

While the Supreme Court has not confronted directly the question of what standard applies to school suppression of student speech that also qualifies as verbal bullying or harassment,¹⁷³ courts of appeals have held that such actions must satisfy the demanding standard established by *Tinker* to be permissible under the First Amendment.¹⁷⁴ As such, in the context of verbal bullying on the basis of a student’s LGBT status, courts have looked to whether the speech at issue could have caused a material and substantial interference with school activities.¹⁷⁵ In contrast to this disruption-focused approach, the Court of Appeals for the Ninth Circuit in a recent case em-

¹⁶⁵ 551 U.S. 393 (2007).

¹⁶⁶ *Id.* at 397.

¹⁶⁷ 393 U.S. 503 (1969).

¹⁶⁸ Sylvia Quast, *Student Freedom of Expression in Public High Schools* — Burch v. Barker, 861 F.2d 1149 (9th Cir. 1988), 24 HARV. C.R.-C.L. L. REV. 575, 575 (1989).

¹⁶⁹ *Tinker*, 393 U.S. at 504.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

¹⁷² *Morse v. Frederick*, 551 U.S. 393, 403 (2007).

¹⁷³ Earhart, *supra* note 158, at 34 (“Part of the problem is a lack of firm guidance concerning the specific issue of pure harassing speech in schools because the Supreme Court has not yet decided such a case.”).

¹⁷⁴ See *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1177 (9th Cir. 2006) (“[A]ll other speech . . . is governed by *Tinker*.”), *vacated as moot*, 549 U.S. 1262 (2007); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (“Speech falling outside of these categories is subject to *Tinker*’s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.”). Some scholars, however, have argued for a less onerous standard for judging efforts by school officials to combat anti-LGBT student speech. See, e.g., Earhart, *supra* note 158, at 35 (“Since schools are recognized as a special place where constitutional rights are not eliminated, but relaxed when it comes to searches and drug tests, the same rationale can be applied to cases where anti-bully policies may affect free speech.”).

¹⁷⁵ See, e.g., *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 345 F. Supp. 2d 1096, 1106 (S.D. Cal. 2004), *aff’d*, 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

ployed a notably different analysis in considering anti-LGBT student speech, looking specifically at the potential impact of such speech on LGBT students' "right to learn."¹⁷⁶ In doing so, the Ninth Circuit demonstrated a more solicitous attitude toward the educational needs of students and empowered school officials to take remedial actions before disruption occurs and students' noncognitive skill development is disturbed.

B. The Ninth Circuit's Focus on Student Educational Rights in Harper v. Poway Unified School District

In the 2006 case of *Harper v. Poway Unified School District*, the Ninth Circuit considered a First Amendment claim brought by Tyler Chase Harper, a Christian student with a "firmly held religious belief that homosexuality is immoral."¹⁷⁷ In response to a student-led National Day of Silence (an event organized to draw attention to the problem of LGBT bullying in schools¹⁷⁸), Harper had worn to school a t-shirt with the declaration "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" handwritten on the front, and "HOMOSEXUALITY IS SHAMEFUL 'Romans 1:27'" handwritten on the back.¹⁷⁹ The next day, Harper wore the same t-shirt to school, but with the front of the t-shirt changed to read "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED," while the back retained the same message as the day before.¹⁸⁰ Upon noticing the t-shirt, Harper's teacher sent him to speak with the school's assistant principal.¹⁸¹

Recalling altercations that erupted after the previous year's National Day of Silence event, the Assistant Principal informed Harper that his t-shirt was "inflammatory" and offered that Harper could return to class if he would change his shirt.¹⁸² When Harper refused, the Assistant Principal required him to remain in the school's front office for the remainder of the school day.¹⁸³ Harper subsequently sought injunctive relief in federal district court, alleging, *inter alia*, a violation of his First Amendment rights.¹⁸⁴ The district court denied Harper's motion for a preliminary injunction, citing *Tinker* and finding that school officials had reasonably forecasted substantial disruption or material interference with school activities as a result of

¹⁷⁶ *Harper*, 445 F.3d at 1180.

¹⁷⁷ *Harper*, 345 F. Supp. 2d at 1100.

¹⁷⁸ *Frequently Asked Questions*, GAY, STRAIGHT & LESBIAN EDUC. NETWORK, <http://www.dayofsilence.org/FAQs/#f1> (last visited Dec. 13, 2012), *archived at* <http://perma.cc/OHTMrthXgQQ>.

¹⁷⁹ *Harper*, 445 F.3d at 1171. According to the case record, no school staff member saw Harper's t-shirt the first day he wore it to school. *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 1172–73.

¹⁸² *Id.* at 1172.

¹⁸³ *Id.* at 1172–73.

¹⁸⁴ *Id.* at 1173. Harper alleged violations of his right to free speech, his right to free exercise of religion, the Establishment Clause, the Equal Protection Clause, and the Due Process Clause. *Id.*

Harper's speech.¹⁸⁵ The Ninth Circuit on appeal, however, cited *Tinker* for a wholly different proposition: "[T]hat schools may prohibit speech that 'intrudes upon . . . the rights of other students.'" ¹⁸⁶

Judge Stephen Reinhardt authored the decision and began by recalling that in *Tinker*, the students' actions had neither "intrude[d] upon . . . the rights of other students" nor "colli[d]ed with the rights of other students to be secure and to be let alone."¹⁸⁷ In contrast, Harper's t-shirt, Judge Reinhardt found, collided with the rights of other students "in the most fundamental way"¹⁸⁸: "[P]ublic school students who may be injured by verbal assaults on the basis of a core identifying characteristic . . . have a right to be free from such attacks while on school campuses."¹⁸⁹ Such an entitlement was inherent, Judge Reinhardt argued, in students' right to be secure and to be left alone. Citing studies suggesting that verbal and physical harassment of LGBT students can have a detrimental impact on their psychological health and educational development,¹⁹⁰ Judge Reinhardt concluded that Poway High School possessed a valid and lawful basis for forbidding Harper from wearing his t-shirt, as "his conduct was injurious to gay and lesbian students and interfered with their right to learn."¹⁹¹

Judge Reinhardt's opinion has elicited a mixed reaction among commentators. It represents, according to one writer, the first case to rely solely on the "intru[sion] upon . . . the rights of other students" prong of *Tinker* without applying the substantial disruption test for which *Tinker* is known.¹⁹² The *Harper* decision can thus fall victim to the charge that it lacks support in existing First Amendment case law,¹⁹³ improperly relies on dicta from the *Tinker* opinion,¹⁹⁴ and creates a circuit split on the appropriate scope and application of *Tinker*.¹⁹⁵ Critics of the decision also decry the "inherent mal-

¹⁸⁵ See *Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 345 F. Supp. 2d 1096, 1120 (S.D. Cal. 2004), *aff'd*, 445 F.3d 1166 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007).

¹⁸⁶ *Harper*, 445 F.3d at 1175 (alteration in original) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

¹⁸⁷ *Id.* at 1177 (first and last alterations added, ellipsis in original) (quoting *Tinker*, 393 U.S. at 508).

¹⁸⁸ *Id.* at 1178.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1178–79.

¹⁹¹ *Id.* at 1180.

¹⁹² See Douglas D. Frederick, Note, *Restricting Student Speech That Invades Others' Rights: A Novel Interpretation of Student Speech Jurisprudence* in *Harper v. Poway Unified School District*, 29 U. HAW. L. REV. 479, 493 (2007).

¹⁹³ See, e.g., *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd*, 484 U.S. 260 (1988); *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005). Justice Alito, while a judge on the Third Circuit Court of Appeals, mused that "the precise scope of *Tinker*'s 'interference with the rights of others' language is unclear," and ultimately concluded that "it is certainly not enough that the speech is merely offensive to some listener." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001).

¹⁹⁴ Frederick, *supra* note 192, at 492.

¹⁹⁵ Jerico Lavarias, *A Reexamination of the Tinker Standard: Freedom of Speech in Public Schools*, 35 HASTINGS CONST. L.Q. 575, 582–85 (2008).

leability”¹⁹⁶ of Judge Reinhardt’s “rights of other students” test, predict the decision will chill student religious expression,¹⁹⁷ and accuse the court of sanctioning viewpoint discrimination.¹⁹⁸ Though these accusations carry some force, it must be noted that the applicability of *Tinker* was wide ranging and uncertain even before *Harper*,¹⁹⁹ and post-*Tinker* opinions by the Supreme Court involving student speech evince great concern about the risk of harm to other students.²⁰⁰ Thus, supporters of *Harper* contend that even if the opinion is not supportable under existing precedent, it is, at the very least, justified by compelling policy concerns.²⁰¹

One reason the *Harper* opinion has proven so divisive is its lack of clarity as to the decision’s exact scope and rationale. Judge Reinhardt appears at first to rely on “the rights of other students” language of *Tinker*, even using that phrase as the title of his subsection dealing with *Tinker*.²⁰² Judge Reinhardt then goes on seemingly to rest the decision on the fact that Harper’s t-shirt specifically violated “the rights of other students to be secure and to be let alone,” which he construes as including the right to be free “from psychological attacks that cause young people to question their self-worth and their rightful place in society.”²⁰³ Later in the opinion, however, Judge Reinhardt narrows the scope of the right even further, holding that Poway High School could suppress student speech that “interfered with [gay and lesbian students’] right to learn” without running afoul of the First Amendment.²⁰⁴

¹⁹⁶ Jay Alan Sekulow & Erik M. Zimmerman, *Tinker at Forty: Defending the Right of High School Students to Wear “Controversial” Religious and Pro-Life Clothing*, 58 AM. U. L. REV. 1243, 1281 (2009); see also Frederick, *supra* note 192, at 497.

¹⁹⁷ See Sekulow & Zimmerman, *supra* note 196, at 1282.

¹⁹⁸ See, e.g., Clay Calvert, *Tinker’s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1183–84 (2009); Peter J. Jenkins, *Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities*, 2008 BYU L. REV. 593, 608 (2008); Lavarias, *supra* note 195, at 593–94.

¹⁹⁹ See, e.g., Nuxoll *ex rel.* Nuxoll v. Indian Prairie Sch. Dist. No. 204, 523 F.3d 668, 674–75 (7th Cir. 2008); Calvert, *supra* note 198, at 1175; Frank D. LoMonte, *Shrinking Tinker: Students Are “Persons” Under Our Constitution — Except When They Aren’t*, 58 AM. U. L. REV. 1323, 1351–54 (2009); Sam Winston, Comment, *From Bullying to Pure Political Speech: Updating the Supreme Court’s Student Speech Jurisprudence with a Substantial Harm Rule*, 58 LOY. L. REV. 415, 437–38 (2012).

²⁰⁰ See Nuxoll, 523 F.3d at 674–75; Francisco M. Negrón, Jr., *A Foot in the Door? The Unwitting Move Towards a “New” Student Welfare Standard in Student Speech After Morse v. Frederick*, 58 AM. U. L. REV. 1221, 1224 (2009).

²⁰¹ See, e.g., Holning Lau, *Pluralism: A Principle for Children’s Rights*, 42 HARV. C.R.-C.L. L. REV. 317, 367 (2007); Brian J. Bilford, Note, *Harper’s Bazaar: The Marketplace of Ideas and Hate Speech in Schools*, 4 STAN. J. C.R. & C.L. 447, 473 (2008). One commentator rather convincingly argues that “the substantial disruption standard [of *Tinker*] was never meant to address bullying or attacks on students’ core characteristics. The Court in *Tinker* was primarily concerned with student protests and the havoc that they could wreak on public schools if students were allowed to stage protests en masse.” Winston, *supra* note 199, at 439.

²⁰² Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1177 (9th Cir. 2006), vacated as moot, 549 U.S. 1262 (2007).

²⁰³ *Id.* at 1178.

²⁰⁴ *Id.* at 1180. The Seventh Circuit Court of Appeals — in a decision authored by Judge Posner — adopted this particular position in a factually similar case. The court concluded that

Although *Harper* provides a less-than-crystalline articulation of the source and contours of the right at issue, and although there is some truth to the charge of critics that its application of *Tinker* is somewhat of “a stretch,”²⁰⁵ *Harper* has two redeeming qualities in the context of the issues raised in this Note — one is a legal consequence while the other is a practical consequence. First, in contrast to the standard disruption-focused application of *Tinker*, *Harper* instead emphasizes the educational needs of students in its legal analysis. The opinion cites multiple studies finding that verbal attacks on the basis of students’ sexual orientation can result in academic underachievement, increased truancy, and higher dropout rates among LGBT students.²⁰⁶ Such an approach is welcome in light of the social science findings discussed in Part I, which emphasize the key role that noncognitive skills play in students’ long-term educational and professional success, the sensitivity of noncognitive skill development to environmental stressors, and the pervasive bullying that many LGBT students face. Consequently, Judge Reinhardt’s emphasis on students’ educational needs, as opposed to educators’ anticipation of substantial disruption, could better serve vulnerable LGBT students in the public education system.

Second, and flowing from the first point, the rationale employed in *Harper* permits school officials to take affirmative steps to combat verbal bullying and verbal harassment targeted at LGBT students without requiring those officials to wait until actual disruption is threatened. As such, officials may more freely intervene *before* verbal bullying escalates into something that could threaten a student’s noncognitive skill development. This is important given that LGBT bullying does not always cause or even threaten disruption. LGBT students who feel unsafe as a result of verbal or physical harassment often simply avoid certain common areas on the school campus (like hallways, bathrooms, and athletic facilities) or skip school altogether.²⁰⁷ Moreover, over 60% of LGBT students who experience harassment or assault at school do not report those incidents to school staff.²⁰⁸ Thus, even though the particular student speech at issue in *Harper* was likely not so severe or threatening as to impact other LGBT students’ noncognitive skill development, Judge Reinhardt’s declaration that educators “need not tolerate verbal assaults that may destroy the self-esteem of our most vulnerable teen-

schools may suppress student speech that “will lead to a decline in students’ test scores, an upsurge in truancy, or other symptoms of a sick school,” and confirmed the constitutionality of a school policy forbidding derogatory comments pertaining to “highly sensitive personal-identity characteristics,” including sexual orientation. *Nuxoll*, 523 F.3d at 674. Judge Posner neither cited nor relied on *Harper*, however, in reaching this conclusion. *Id.* Indeed, he did not even mention the “rights of other students” prong of *Tinker*, resting instead on *Morse v. Frederick*, 551 U.S. 393 (2007), and *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). See *Nuxoll*, 523 F.3d at 672–74.

²⁰⁵ Calvert, *supra* note 198, at 1180.

²⁰⁶ *Harper*, 445 F.3d at 1178–79.

²⁰⁷ GAY, LESBIAN & STRAIGHT EDUC. NETWORK, *supra* note 75, at 20–21.

²⁰⁸ *Id.* at 28.

agers and interfere with their educational development”²⁰⁹ allows preemptive action by school officials before such harms come to pass.²¹⁰

CONCLUSION

It was not so long ago that the United States Supreme Court declared in one voice that “education is perhaps the most important function of state and local governments,” and observed that “it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”²¹¹ With the onset of globalization, and with fundamental changes taking place in the domestic labor market and labor force,²¹² these two statements surely remain true today.

As discussed in this Note, recent findings by social science researchers have provided lawmakers, policymakers, and educators with intriguing insight into the way in which a student’s development of noncognitive skills can affect her educational and professional success years and decades later. Additionally, these researchers have warned that this developmental process can be disrupted by environmental stressors. These findings may carry particular pertinence for LGBT youth given the fact that so many LGBT students face severe, persistent bullying in the school environment.

Undoubtedly, there is more work to do. The study of noncognitive skill development is still nascent and additional research is needed to answer a number of outstanding questions, including: What types of educational approaches are most effective for helping students develop noncognitive skills? What effects do non-poverty-related environmental stressors (including bullying and peer harassment) have on students’ noncognitive skill development? And, what can be done to insulate students against such stressors?

There are clear incentives for finding answers to these questions, as greater understanding of noncognitive skill development could bolster arguments supporting federal and state protections of the educational rights and needs of students. This is especially true given the pending reauthorization

²⁰⁹ *Harper*, 445 F.3d at 1179.

²¹⁰ I do not in this Part mean to minimize the importance of student free speech and expression, which are essential for ensuring that the school environment provides a forum for developing the necessary skills for political debate and discussion. My argument in this Part is simply that when certain speech undermines a key function of the educational experience (especially in the context of verbal bullying and peer harassment), that danger should be considered *along with* the risks associated with curbing a student’s right to engage in such speech. On this view, *Harper* does not sanction the suppression of merely “offensive” student speech. *Cf. Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001). Rather, *Harper* is consistent with a string of Supreme Court decisions that weigh student free speech rights against the harm posed by such speech. *See supra* note 200.

²¹¹ *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1955).

²¹² Joshua Meltzer et al., The Brookings Institute, *The United States After the Great Recession: The Challenge of Sustainable Growth* 28 (Global Econ. & Dev. at Brookings, Working Paper No. 60, 2013), available at <http://www.brookings.edu/~/media/research/files/papers/2013/02/us%20post%20great%20recession%20meltzer%20steven/02%20us%20post%20great%20recession%20meltzer%20steven.pdf>, archived at <http://perma.cc/0dXE4dEW8oQ>.

of the No Child Left Behind Act²¹³ and continued litigation under state constitutional education clauses.²¹⁴ Finally, additional information on how and why environmental stressors negatively impact student development of noncognitive skills could help justify judicial approaches that afford significant weight to the plight and educational needs of bullying victims.

This Note, then, represents an initial foray into the legal and policymaking implications of a fascinating new realm of education research. Though social sciences and law have in the past been uneasy partners,²¹⁵ the study of noncognitive skill development seems to be one area where the advancement of one will serve the other. I thus look forward to seeing what future social scientists discover regarding student development of noncognitive skills, and how legal advocates will use those findings to protect and vindicate the educational rights of students.

²¹³ See Joy Resmovits, *No Child Left Behind Reauthorization Revived by Harkin Bill*, HUFFINGTON POST (June 4, 2013, 10:31 AM), http://www.huffingtonpost.com/2013/06/04/no-child-left-behind-harkin-bill_n_3381875.html, archived at <http://perma.cc/0f7U7yfeZGP>.

²¹⁴ See, e.g., *Edgewood Indep. Sch. Dist. v. Williams*, No. D-1-GN-11-003130 (Tex. Dist. Feb. 4, 2013) (finding Texas' public school finance system arbitrary, inequitable, and inadequate under the Texas Constitution).

²¹⁵ See, e.g., Malik Edwards, *Footnote Eleven for the New Millennium: Ecological Perspective Arguments in Support of Compelling Interest*, 31 SEATTLE U. L. REV. 891, 893 (2008) (noting that criticism over the Warren Court's use of social science research in *Brown v. Board of Education* arose "[a]most from the moment the decision was issued").