

THE CHARACTER OF LAW: A NORMATIVE CRITIQUE OF SOCIAL-EMOTIONAL LEARNING LAWS

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ABSTRACT—This Note examines a widespread but barely acknowledged phenomenon within education law: the recent enactment, in all fifty states, of statutes and standards regarding students’ social and emotional learning within public schools. Despite significant empirical evidence that curricular and disciplinary interventions targeting students’ social and emotional skills are effective at building these skills and, in turn, enhancing students’ academic and long-term outcomes, this Note argues that social and emotional learning should not be legislated. Drawing on James Scott’s seminal critique of processes of state rationalization and Jal Mehta’s application of this critique to education policy, this Note shows that the push to enact, implement, and enforce social-emotional learning laws should be questioned and, where possible, reversed: first, because it is counterproductive; and second, because it infringes upon longstanding constitutional protections of parental rights and familial autonomy. Recognizing that the repeal of these laws is unlikely, however, the Note also provides recommendations for how their enforcement may be cabined so as to minimize harmful legal and social effects. More broadly, this Note is a case study of the fluid boundaries between law and policy, providing a preliminary theoretical framework to understand the relationship between the two and a set of critical analytics for determining when one is preferable to the other.

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INTRODUCTION

At a public charter middle school on the near south side of Milwaukee in the fall of 2017, a seventh-grade teacher wondered why she could not convince her students—otherwise diligent, bright children who paid attention in the classroom—to do their assigned homework.¹ Their grades suffered as a result, despite their apparent capacity to master the material. The teacher and her aide diagnosed the problem as one of self-discipline and motivation, and used one of the school’s recommended “social-emotional learning interventions” to try to inculcate a better work ethic in the students, explaining to them the importance of grit, perseverance, and focus in improving their academic attainment. Nonetheless, most of the students still returned to school each morning with their homework untouched.

Eventually, the teacher spoke with the students’ parents to try to secure their help in the matter, and was surprised to learn that the parents in question—most of whom had emigrated from Mexico—viewed homework not as an essential component of academic success, but as a sign of the teacher’s inefficiency during the school day. The parents explained that they

¹ This story was relayed to the author by the teacher’s aide (Dec. 2017).

had alternate plans for their children on evenings and weekends, which they considered sacrosanct family time: many of the students were busy helping elderly relatives, cooking dinner with their families, attending religious services, and playing with younger siblings.

Whose vision—the teacher’s or the parents’—is more likely to lead to successful life outcomes for these seventh-grade students? Should the school define “successful life outcomes,” or should the parents or the students themselves—especially where the parents’ priorities are not only not harmful, but often considered quite positive? And once stakeholders have settled on a normative vision of success, which means are appropriate and effective in seeking to achieve this vision?

The above vignette raises, but does little to clarify, these questions. On one hand, if the school’s vision wins out, students will likely improve their grades and test scores; their increased academic success could help them get into selective high schools and make them more likely to attend college. But something may also be lost: their parents will lose some of their ability to pursue their vision of the good life and to pass along a certain set of family values, and students’ family relationships risk losing some depth. On the other hand, if the parents’ vision wins out, students will likely have a richer family life and some of their cultural distinctiveness will be preserved, but the students’ academics may suffer. Not only will this diminished academic attainment affect the individual students’ own futures, but it may continue to exacerbate the achievement gap² between white and nonwhite students.³

Autonomy and equality ideals are in tension here: the school’s approach promotes equality of individual student academic achievement while encroaching on familial autonomy in a way that may have a disparate impact on families whose preferences or cultural norms are not aligned to those advanced by the school. By contrast, the parental approach promotes adult autonomy, asserting an equal role for familial and parental norms at the

² See GREAT SCH. P’SHIP, *Achievement Gap*, GLOSSARY EDUC. REFORM: FOR JOURNALISTS, PARENTS, & COMMUNITY MEMBERS (last updated Dec. 19, 2013), <https://www.edglossary.org/achievement-gap> [<https://perma.cc/QR4T-DEEU>] (“[T]he term achievement gap refers to any significant and persistent disparity in academic performance or educational attainment between different groups of students, such as white students and minorities, for example, or students from higher-income and lower-income households. Generally speaking, *achievement gap* refers to outputs—the unequal or inequitable distribution of educational results and benefits—while *opportunity gap* refers to inputs—the unequal or inequitable distribution of resources and opportunities. *Learning gap* refers to relative performance of individual students—i.e., the disparity between what students have actually learned and what they were expected to learn at a particular age or grade level.”).

³ This anecdote can be viewed as an example of the mismatch between school and family social norms that child psychiatrist and progenitor of the SEL movement James Comer identified as a core driver of poor student academic performance. See *infra* notes 29–56 and accompanying text for a discussion, and some critique, of this theory and the empirical evidence grounding it.

possible expense of individual and system-level equality of educational attainment. This Note engages the question of which vision of equality, if either, a school system should promote and what steps it is legally permitted to take in so doing.

Since the turn of the twenty-first century, all fifty states have enacted educational standards for “social-emotional learning,” commonly abbreviated as SEL, that intervene onto these questions.⁴ In enacting these standards, states have taken the position that it is not only empirically possible, but also normatively appropriate, for the state to institute a set of priorities for the social and emotional development of students; to take steps to conform students to these priorities; and to do so in a way that shapes students’ selves in their private lives and over the long term as opposed to simply managing their behavior during the school day.

Social-emotional learning has emerged, since the turn of the twenty-first century, as the new answer to an old set of problems: How can the academic achievement gap be closed, or at least explained, beyond differential academic inputs and the material circumstances in which students find themselves? Might the answer lie in the behaviors and orientations of students and their families toward schooling? Can schools, by changing students themselves, improve student academic performance and post-secondary outcomes?

One of the leading SEL advocacy organizations defines SEL as “the process through which children and adults acquire and effectively apply the knowledge, attitudes, and skills necessary to understand and manage emotions, set and achieve positive goals, feel and show empathy for others, establish and maintain positive relationships, and make responsible decisions.”⁵ Such SEL skills include self-awareness, emotion regulation, social awareness, relationship skills, and demonstration of responsible decision-making.⁶ Many SEL skills have been empirically correlated to academic attainment: for example, students with the ability to regulate their emotions are often better able to stay on task in completing academic work.⁷ But SEL is also normatively fraught. For example, what constitutes a “positive goal”? Is it more “responsible” to do one’s homework or to be a full, active participant in one’s family’s home life? The connotations of

⁴ See *infra* notes 71–85 and accompanying text for examples of these standards and how they are implemented.

⁵ *SEL FAQ*, COLLABORATIVE FOR ACADEMIC, SOCIAL, AND EMOTIONAL LEARNING (CASEL), <http://www.casel.org/faqs> [https://perma.cc/3M2F-UR2P].

⁶ *Id.*

⁷ See, e.g., JENNY NAGAOKA ET AL., THE UNIV. OF CHI. CONSORTIUM ON CHI. SCH. RESEARCH, FOUNDATIONS FOR YOUNG ADULT SUCCESS: A DEVELOPMENTAL FRAMEWORK 27, 60 (2015); see also *infra* notes 38–58 and accompanying text.

adjectives like “positive” and “responsible” vary greatly from person to person—yet are taken for granted in the above definition.

Over the past ten to fifteen years, education decision-makers have begun to engage with SEL and to extol its potential as a solution to these persistent problems of academic performance: districts and educators nationwide have adopted SEL strategies;⁸ researchers have developed an extensive body of work seeking to ascertain and prove the relationship between various kinds of inputs and positive SEL outcomes;⁹ and policy entrepreneurs¹⁰ have advocated that districts and states adopt and enact formalized SEL policies.¹¹ After many years of policy success, law is now the frontier for the SEL movement for both pragmatic and expressive reasons: law formalizes and mandates SEL where policy can only suggest it, and the process and act of legislating also represents and expresses consensus support. SEL advocates have pushed for the enactment of SEL laws at the state level, with increasing success: all U.S. states now mandate that SEL play a role in their education systems, whether as formally promulgated curricular or co-curricular standards,¹² as part of the accountability program,¹³ or both.

This Note contends that despite the strong empirical and policy evidence that a number of SEL strategies are effective at improving academic outcomes,¹⁴ these strategies should not be codified into law. States, school districts, and SEL advocates have generally viewed SEL laws through a policy lens—but SEL means something different *as law*, and these

⁸ See, e.g., *CASEL Partner Districts*, CASEL, <https://www.casel.org/partner-districts> [<https://perma.cc/C694-R8R5>].

⁹ See *SEL Impact*, CASEL, <https://www.casel.org/impact> [<https://perma.cc/47SL-V42R>]; STEPHANIE M. JONES & JENNIFER KAHN, THE ASPEN INST. NAT’L COMM’N ON SOC., EMOTIONAL, & ACAD. DEV., THE EVIDENCE BASE FOR HOW WE LEARN: SUPPORTING STUDENTS’ SOCIAL, EMOTIONAL, AND ACADEMIC DEVELOPMENT: CONSENSUS STATEMENTS OF EVIDENCE FROM THE COUNCIL OF DISTINGUISHED SCIENTISTS (2017).

¹⁰ Following Jal Mehta’s importation of idea-centered political science scholarship into the education literature, this Note uses the term “policy entrepreneurs” to indicate people and organizations who offer policy solutions within the context of a broader constellation of “problem definitions” and “policy paradigms.” See JAL MEHTA, THE ALLURE OF ORDER: HIGH HOPES, DASHED EXPECTATIONS, AND THE TROUBLED QUEST TO REMAKE AMERICAN SCHOOLING 19–20 (2013).

¹¹ See, e.g., *Policy*, CASEL, <https://www.casel.org/policy> [<https://perma.cc/6CPM-GZQT>]. See *infra* Part I for a discussion of how SEL policies have been implemented.

¹² *State Scan Scorecard Project*, CASEL, <https://www.casel.org/state-scan-scorecard-project> [<https://perma.cc/A5AL-THMS>] (assessing the development of SEL programs across the United States); see also *infra* Section II.B for a case study of Illinois’s SEL laws.

¹³ Accountability programs generally use quantitated testing to determine how well a centrally-administered set of state education standards is or is not being met. See MEHTA, *supra* note 10, at 6–7, 30–31.

¹⁴ See *infra* notes 38–58 and accompanying text for discussion of this evidence.

differences must be taken seriously. SEL as law, rather than as policy, paradoxically distorts the ability of educators to respond with sensitivity to students' social and emotional needs, instead subsuming interpersonal interactions under a logic of state rationalization. Furthermore, SEL laws infringe upon the constitutional rights of parents to make child-rearing decisions, and we should be particularly suspicious of such infringement given the vexed history of the SEL movement with regard to race and class.

Policy entrepreneurs¹⁵ have had little incentive to ask such questions, believing that if SEL is a good thing, then making it mandatory with the force and effect of law must also be good. And educators and districts required to comply with such laws are primarily interested in questions of implementation and efficacy: since they have little ability to contest SEL laws and generally seem to approve of SEL as policy, their primary focus has been on how best to enhance students' SEL competencies, rather than on whether enhancing students' SEL competencies is an appropriate or desirable activity to undertake through state action (and if so, under what conditions).

But SEL laws raise serious normative concerns. They diminish the autonomy of parents, and even students themselves, in determining who students should become and what constitutes the good life. In tandem, these laws expand the state's role in education in a way that is likely disproportionately to stigmatize and affect poor families and families of color.

SEL laws represent state efforts to rationalize—to measure and control—the interpersonal interactions and emotional dimensions that are inherent in the social practice of schooling. It is inevitable that students will be shaped in some way by interacting with their peers and with their teachers. It is not inevitable, however, that these interactions will be directed from afar. This Note contends that there is a qualitative and legally meaningful difference between state and local control of the affective experience of schooling. What may be valuable as practice or policy can become suspect as law.

SEL laws also represent a qualitative shift in the balance of power in the state–child, state–parent, and parent–child relationships expressed via the legislative design of our educational systems, and present constitutional questions that cannot simply be subsumed into the state's plenary power over public school curricula. Though the state has long had wide latitude to dictate *what students learn* in the public schools, SEL laws represent an attempt to dictate *who they become*. Thus, though formally these laws look similar to

¹⁵ See *supra* note 10.

the establishment and promulgation of, say, state reading standards, functionally they make a rather different intervention into the life of the student and the political construction of that student's family. As such, SEL laws may be constitutionally problematic in their encroachment onto longstanding jurisprudential protections of parental autonomy in child-rearing—especially with regard to the impact they may have on low-income families and families of color, where SEL laws raise the question of whether “parenting while poor” will be further stigmatized, problematized, and made a matter of public concern, with possible consequences for school discipline, special education, and curricular allocation.

The rush toward the legislation of SEL has conflated the empirical with the normative, though it is crucial in the legal context to parse the one from the other. SEL laws seem to many in the education field to be relatively unremarkable, susceptible only to technocratic questions of efficacy—and this is precisely the problem.

SEL advocates often make claims about how particular strategies and tools lead to enhancements in students' capacity for citizenship, democracy, and moral and pro-social behavior¹⁶ and have woven these claims into SEL laws and their implementation. Furthermore, even where explicit claims are not made, language around things like “successful life outcomes” hints at the normative. But the normative ends of these SEL means are taken as a given—SEL research, policy, and law tends to assume a generally shared set of desired normative outcomes that are neither questioned, theorized, nor problematized. Such normative claims should not be assumed. Rather, they should be made explicit and open to public debate. Further, any SEL law or policy framework should, in implementation, be porous and open to pluralistic use: some of the normative spaces should be left blank so that different actors (e.g., students and families or particular school communities) can define normative ends for themselves.

This Note proceeds in three parts. The first Part lays out SEL policy interventions as they have taken the form of law, with particular emphasis on the laws and administratively promulgated standards of the state of Illinois—long recognized as a leader in the legal formalization of SEL.¹⁷ This Part is descriptive, providing a brief landscape analysis of SEL in research, policy, and law across the United States and exploring some of the possible

¹⁶ See, e.g., *SEL Impact*, *supra* note 9 (“SEL programming can have a positive impact up to 18 years later on academics, conduct problems, emotional distress, and drug use.”).

¹⁷ As discussed *infra* in Part I, the State of Illinois is the national leader in the comprehensive enactment of SEL laws, and Chicago Public Schools has the most robust implementation program of any major school district. Both are looked to as models by other state legislatures and public school districts. Thus, their emerging SEL enforcement model is likely to be highly influential.

enforcement scenarios within the State of Illinois and Chicago Public Schools (CPS) as grounding for Parts II and III. The second Part critiques SEL laws *qua* law, opening with a critique of SEL laws grounded in theoretical constructs of the social function of state power drawn from political anthropology, the sociology of professions, and the political science of education. This critique is essentially scalar, contending that the translation of SEL from on-the-ground practice to state-level laws and standards is a process of rationalization that creates counterproductive incentives for schools, teachers, students, and lawmakers alike. This Part then reads SEL laws against the parental rights doctrine, which has long been the primary rubric by which the balance of power among the state, the parent, and the child has been constitutionally established, and argues that these laws raise serious questions of infringement onto familial autonomy and privacy. Though SEL laws would likely survive a facial challenge under the parental rights doctrine, situating these laws in this doctrinal context is nonetheless important because it raises critical questions of the role, and legal and social construction, of parents with regard to SEL laws.

The third Part provides recommendations for the constitutional, democratic, and egalitarian enforcement of SEL laws as this becomes a more urgent issue for educators and lawmakers. Part III critiques SEL lawmaking on processual grounds, arguing in essence that empirical research alone does not suffice to ground this exercise of state power without a more robust normative justification. Conceding that these laws are unlikely to be repealed any time soon, this Part suggests how they can be enforced and implemented in ways that address many of the issues raised here, cabining SEL as a means only to normatively-permissible ends.

This Note is the first scholarly work to address the meaning of SEL as law, and to suggest a skeptical view of the endeavor. Though I do not wish to discount the benefits that SEL strategies may provide in the classroom given the emerging body of empirical work that demonstrates some positive effects for students,¹⁸ it is important that the purported benefits of these strategies do not blind actors within the system to the need to proceed critically, reflectively, and cautiously with respect to issues of race, culture, and class—not to mention law.¹⁹ The Note concludes with reflections on the

¹⁸ See *infra* notes 38–58 for citations to some of this literature; see also *SEL Research*, CASEL, <https://casel.org/research> [<https://perma.cc/CTS2-UW42>], providing a comprehensive bibliography of research studies.

¹⁹ As Appell cautions, “In the context of the continuum of family privacy, this imposition [of state norms] will primarily affect value production in poor and other nondominant families because they are most vulnerable to surveillance and intervention. However, . . . the state is not sufficiently representative of economic, cultural, racial, and sexual minority groups and does not respect those values of minority groups that do not mirror dominant norms. Thus, increased intervention also undermines the role of these

role of empiricism in the exercise of legal authority and state power over education.

I. AN OVERVIEW OF SOCIAL-EMOTIONAL LEARNING IN LAW, POLICY, AND PRACTICE

This Part traces the development of SEL research and policy interventions, and then examines Illinois’s recently promulgated legislation and administrative standards that codify SEL policy into law.

A. *SEL Becomes Law: From Policy to Statute to Standards*

Educational inequality, particularly by race and class, has long been a feature of American society. Inequality in American education has taken the form both of unequal “inputs” and of unequal “outputs.”²⁰ In the era of de jure school segregation, it was easy, at least conceptually, to trace the cause of educational inequality through discriminatory laws and practices around schooling to segregation itself: before the 1960s, the American education system was assessed largely in terms of quality and quantity of inputs rather than outputs, making the inequality of resources flowing to black schools as opposed to white schools particularly stark, powerful both as description and as explanation.²¹

After *Brown v. Board of Education*, it was broadly hoped and expected that school desegregation would solve the educational equality problem, ensuring an equitable resource flow to all schools and equality of outcomes

families in creating independent citizens because intervention would minimize or eliminate these families as sites of production of values that diverge from that status quo.” Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 785 (2001).

²⁰ Inequality of “inputs” can be conceived broadly as the unequal distribution of resources to different schools and/or populations of students. Inequality of “outputs” consists of a gap in measured achievement between different schools and/or populations of students. See MEHTA, *supra* note 10, at 3–4, 30–31, 156–57.

²¹ See MEHTA, *supra* note 10, at 39–63; see also a number of pre-*Brown* cases applying and assessing the separate but equal doctrine, finding that “specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications”: *Brown v. Bd. of Educ.*, 347 U.S. 483, 492 (1954) (discussing *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938)); *Sweatt v. Painter*, 339 U.S. 629 (1950) (ruling that the Equal Protection Clause required that a black applicant be admitted to the University of Texas Law School); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950) (ruling that the Equal Protection Clause forbids racial segregation within the facilities and institutions of colleges and universities); *Sipuel v. Bd. of Regents of the Univ. of Okla.*, 332 U.S. 631 (1948) (forbidding a state university from denying admission to a qualified applicant because of her race). *Brown* itself hinged on the effects of segregation rather than equality of inputs: “Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.” 347 U.S. at 492.

as a result.²² However, inequality persisted, both because inputs have not been equalized and because equal inputs do not always lead to equal outputs. A variety of scholars have discussed how and why resource inputs remained unequal;²³ furthermore, the rise of accountability politics in the 1960s meant that educators, researchers, politicians, and the public increasingly had quantitative output measures of inequality available.²⁴ A decade after *Brown*, with de jure segregation no longer able to account fully for educational inequality, politicians, thinkers on education, and the public demanded alternate explanations and solutions.²⁵

The contemporary SEL movement, like many of the most potent education policy initiatives, represents a confluence of different philosophical and political streams, offering a set of explanations and solutions that can simultaneously satisfy many different audiences. First, SEL is an effort to achieve racial equality in educational outcomes and flows from movements for racial justice in education that date back to the nineteenth century, gaining particular momentum as part of the civil rights movement. Second, on the one hand, SEL reflects strains of conservative thought locating the roots of racial inequality in the cultural behaviors and social values of communities of color—most notably, the Moynihan Report and the work of Charles Murray.²⁶ On the other, aspects of the SEL movement can be traced to philosophies of political self-determination locating agency in individual members of communities of color.²⁷ Third, SEL encompasses a wide range of holistic child development and character-

²² See *Brown*, 347 U.S. at 493 (“Such an opportunity, where the state has undertaken to provide it, [education] is a right which must be made available to all on equal terms.”); see James E. Ryan, *The Real Lessons of School Desegregation*, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 73, 73–96 (Joshua M. Dunn & Martin R. West eds., 2009) (discussing desegregation and the lessons of *Brown*).

²³ See, e.g., DAVID K. COHEN & SUSAN L. MOFFITT, THE ORDEAL OF EQUALITY: DID FEDERAL REGULATION FIX THE SCHOOLS? 17–24 (2009) (arguing that enhanced federal support for and standardization of public education has done little to achieve equality); CHARLES M. PAYNE, SO MUCH REFORM, SO LITTLE CHANGE: THE PERSISTENCE OF FAILURE IN URBAN SCHOOLS 153–69 (2008) (arguing that most education policy reform efforts are doomed to be unsuccessful because they do not take account of the weak social infrastructure and culture issues in many struggling schools).

²⁴ See MEHTA, *supra* note 10, at 64–83 (tracing the attractiveness of quantitated accountability reforms through the twentieth century).

²⁵ *Id.* (discussing accountability reforms as an attempt to close achievement gaps).

²⁶ DANIEL PATRICK MOYNIHAN, U.S. DEP’T OF LABOR, OFFICE OF POLICY PLANNING & RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION 19 (1965) (attributing the persistence of black poverty to “pathology” in African-American families); RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269–272, 317 (Paperback ed., Free Press Paperbacks 1996) (1994) (arguing for ethnic and class-based differences in IQ).

²⁷ Comer’s work and approach can be placed in this tradition. See *infra* notes 29–35 and accompanying text.

building movements, ranging from the philosophy and practice of John Dewey to religious value systems.²⁸

The most direct progenitor of today's SEL movement, ideologically encompassing racial justice, holistic child development, and respectability politics, was a program begun in 1968 at Yale University's Child Study Center.²⁹ Noted child psychiatrist James P. Comer, the director of the Center's School Development Program, started and ran an intervention project at two schools in New Haven serving predominantly low-income, African-American families.³⁰ Comer grew up in East Chicago, Indiana and was one of only a few African-American students at his elementary school.³¹ He attributed his personal success, as compared with the life experiences of his childhood peers who had experienced alcoholism, imprisonment, and psychiatric hospitalization, to the social skills instilled in him by his parents.³²

Drawing on his own experiences as he searched for an explanation for educational inequality in New Haven and other urban areas, Comer hypothesized that

the contrast between a child's experiences at home and those in school deeply affects the child's psychosocial development, and that this in turn shapes academic achievement. The contrast would be particularly sharp for poor minority children from families outside the mainstream. If my hunches were correct, then the failure to bridge the social and cultural gap between home and school may lie at the root of the poor academic performance of many of these children.³³

Accordingly, Comer and his team designed a multifaceted intervention program that encompassed a mental-health team, a governance and management team, a parents' group, and a set of social activities, special projects, and classroom and curricular supports. This program had the ultimate objective of aligning students' attitudes and behaviors to the

²⁸ See, e.g., JOHN DEWEY, *DEMOCRACY AND EDUCATION: AN INTRODUCTION TO THE PHILOSOPHY OF EDUCATION* (1916); see also Maurice J. Elias et al., *Social and Emotional Learning, Moral Education, and Character Education: A Comparative Analysis and a View Toward Convergence*, in *HANDBOOK OF MORAL AND CHARACTER EDUCATION* 248 (Larry P. Nucci & Darcia Narvaez eds., 2008) (discussing the evolution and implications of social and emotional learning).

²⁹ See JAMES P. COMER, *SCHOOL POWER: IMPLICATIONS OF AN INTERVENTION PROJECT* (1980) [hereinafter *COMER, SCHOOL POWER*]; see also JAMES P. COMER, *WHAT I LEARNED IN SCHOOL: REFLECTIONS ON RACE, CHILD DEVELOPMENT, AND SCHOOL REFORM* (2009) [hereinafter *COMER, WHAT I LEARNED IN SCHOOL*].

³⁰ James P. Comer, *Educating Poor Minority Children*, 259 *SCI. AM.* 1, 42 (1988).

³¹ *Id.*

³² *Id.* at 42–43.

³³ *Id.* at 43.

normative cultural expectations of the school and, crucially, more fully engaging families in the educational process.³⁴ The standardized test scores of the students at the treatment schools increased steadily; despite their significantly below-average achievement scores prior to the start of the program, both schools achieved well above grade-level norms by the early 1980s.³⁵

Following Comer's work in the New Haven public schools, between 1987 and 1992 then-Yale psychology professor Roger Weissberg and New Haven Public Schools educator Dr. Timothy Shriver established the K–12 New Haven Social Development Program to institutionalize the interventions developed from the 1960s to the 1980s.³⁶ Alongside this work, Weissberg, along with Maurice Elias, co-chaired the W.T. Grant Consortium on the School-Based Promotion of Social Competence, which provided an influential definition of the emotional competences that schools should seek to inculcate: “identifying and labeling feelings, expressing feelings, assessing the intensity of feelings, managing feelings, delaying gratification, controlling impulses, [and] reducing stress.”³⁷

This definition marked a turning point in attempts to define, predict, and control problematized youth behavior. Whereas scholars and policymakers in the 1980s had focused on individual behaviors (such as teen pregnancy, drug use, and school truancy) that were often highly stigmatized

³⁴ *Id.* at 45; *see also* COMER, SCHOOL POWER, *supra* note 29, at 13 (“Families excluded the most in the past and thus under the greatest economic and social stress today have the greatest difficulty promoting the level of social and psychological development their children will need to function well in the world of today and tomorrow. While the poor hurt more, the well-educated and affluent are not unaffected.”); COMER, WHAT I LEARNED IN SCHOOL, *supra* note 29, at xiv (“Evidence suggests that education has failed to adequately prepare students because scientific and technological advances have changed the way we live but schools and many families and communities have not adequately changed the way they prepare our young people to learn and live in this more complex age.”) Regarding parent involvement, *see id.* at 243 (“Improving schools in communities experiencing severe social stress is almost impossible without influential parent involvement.”).

³⁵ Comer, *supra* note 30, at 47.

³⁶ *Social and Emotional Learning: A Short History*, EDUTOPIA (Oct. 6, 2011), <https://www.edutopia.org/social-emotional-learning-history> [<https://perma.cc/YUD5-8FTC>]. Roger Weissberg moved to the University of Illinois at Chicago in 1992 and has been a professor there since; he is also the Chief Knowledge Officer at CASEL, which he has directed since 1996. *See Board of Directors*, CASEL, <https://casel.org/board-of-directors/roger-weissberg> [<https://perma.cc/AZL5-27YT>]; *see also* Roger Weissberg, THE ASPEN INST., <https://www.aspeninstitute.org/our-people/roger-weissberg> [<https://perma.cc/KX24-YTB6>]. Timothy Shriver now chairs the Special Olympics in addition to his role with CASEL. *See Tim Shriver*, THE ASPEN INST., <https://www.aspeninstitute.org/our-people/timothy-p-shriver-ph-d> [<https://perma.cc/9SXX-52HQ>].

³⁷ The W.T. Grant Consortium on the School-Based Promotion of Social Competence, *Drug and Alcohol Prevention Curricula*, in J. DAVID HAWKINS ET AL., COMMUNITIES THAT CARE 136 (1992); *see also* *Social and Emotional Learning: A Short History*, *supra* note 36. Note that even these relatively more specific goals encode normative judgments. The notions that one should or should not express feelings or delay gratification, for example, are not necessarily universally shared.

in advance of the empirical inquiry into their nature and causes, by the 1990s youth development researchers had begun to advocate holistic models that positively provided aspirational behaviors as opposed to moralizing proscriptions.³⁸

Critically, the scholarly consensus located the school, rather than the family, as the optimal site of inculcation of social and emotional competencies for the contemporary historical moment. As an influential mid-1990s source stated, “Changes in socialization forces that have historically nurtured the development of children especially in the family necessitate reconceptualization of school and community practices to support the family in its mission to raise successful children.”³⁹ In other words, the school was tasked with supporting the family in areas where the family had been identified, or presumed, to be deficient. Combined with Comer’s theory of social-norm mismatch between the school and poor and/or minority families⁴⁰—and the New Haven program’s undeniable success in closing the academic achievement gap—it was almost inevitable that the school would soon come to be identified as the prime site of intervention into problematized familial practices and children’s behaviors.⁴¹

³⁸ RICHARD F. CATALANO ET AL., U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING AND EVALUATION, POSITIVE YOUTH DEVELOPMENT IN THE UNITED STATES: RESEARCH FINDINGS ON EVALUATIONS OF POSITIVE YOUTH DEVELOPMENT PROGRAMS (1998), <https://aspe.hhs.gov/report/positive-youth-development-united-states-research-findings-evaluations-positive-youth-development-programs> [<https://perma.cc/X5Z7-CREY>]; see also Elias et al., *supra* note 28, at 250.

³⁹ CATALANO ET AL., *supra* note 38 (citing Donald J. Hernandez, *Changing Demographics: Past and Future Demands for Early Childhood Programs*, 5 FUTURE CHILD. 145–60 (1995)).

⁴⁰ The terms “poor” and “minority” families are conflated here not because these categories are in fact coterminous, but because they are frequently, though not universally, construed as such in the SEL literature.

⁴¹ Comer’s theory of school improvement, discussed *supra* in notes 29–35 and accompanying text, attributes poor school performance (whether by individual students or school populations as a whole) to a disconnect between the social skills and norms that students learn at home and those that are required to succeed in school and an inability on the part of school staff to bridge this divide. See COMER, WHAT I LEARNED IN SCHOOL, *supra* note 29, at 17 (“The difficult interaction between underdeveloped or differently developed students and school staffs not prepared to support development led to the low-performing schools we encountered [in the New Haven School Development Program].”), 77 (“Children who are not doing well in school or whose families are not well connected to the mainstream view themselves as different from those in it—their teachers and fellow students with higher levels of achievement. When called on to achieve, they are being asked, in a very real sense, to be different from their parents and their own network culture.”). Comer discusses the relative success that middle-class students have in school as a result of observing their parents’ behaviors around and attitudes toward work from a young age:

Various aspects of middle-income living, such as goal setting, time orientation, and expectation of stability, give a direction and discipline to living that develop goal-directed and problem-solving behavior. The capacity for sustained work in our society is, for better or for worse, also developed through mastering the basic academic skills and maneuvering through the social system

The current institutional formation of today's SEL movement began in the mid-1990s as a synthesis of the youth development efforts of the era, such as drug prevention, sex education, and, crucially, character and moral education—a pivot toward more conservative rationales for and means of social and emotional development through the public schools.⁴² In 1994, the Fetzer Institute⁴³ hosted a convening that brought together representatives from a number of youth development programs to discuss improved coordination of such programs at the school level.⁴⁴ The attendees of this meeting, including Weissberg, Shriver, and other figures in SEL progenitor movements, quickly formed CASEL—initially the Collaborative to Advance Social and Emotional Learning, now the Collaborative for Academic, Social, and Emotional Learning⁴⁵—and began to engage in research development activity, coordinating the efforts of and directing funding toward academics in psychology, human development, and education.⁴⁶ Though originally conceived at the 1994 meeting as a “framework” that would “align and coordinate school programs and programming,”⁴⁷ by 1997 SEL had become a full-fledged curricular approach with the publication of the book *Promoting Social and Emotional Learning: Guidelines for Educators*.⁴⁸

The Chicago-based CASEL has led SEL research and advocacy since its founding in 1994. With support from private funders and the Department of Education's Institute of Education Sciences, CASEL has seeded dozens of research studies supporting the use of SEL in schools and articulating the connections between particular educational inputs and particular SEL outcomes.⁴⁹ The story of SEL is in large part a subset of the broader story of

of a public school. The child who can maneuver with relative success wins praise, develops a sense of adequacy and a need to be involved in productive activities. Failure in school may do just the opposite.

Id. at 39–40. Thus, Comer's theory requires both that students and families learn different sets of social norms and skills *and* that schools change their environment to better serve students whose development may have proceeded differently than the school originally anticipated to see sustained improvements in school and student performance. *See, e.g.*, COMER, *SCHOOL POWER*, *supra* note 29, at 232–33.

⁴² *History*, CASEL, <http://www.casel.org/history> [<https://perma.cc/RU8H-RE5N>]; *see also* Elias et al., *supra* note 28, at 252.

⁴³ *See Our Mission*, FETZER INST., <http://fetzer.org/about-us/mission> [<https://perma.cc/8W9N-4UXD>].

⁴⁴ *See History*, *supra* note 42.

⁴⁵ *Id.*

⁴⁶ *Id.*; *see also* Elias et al., *supra* note 28, at 248.

⁴⁷ *Id.*

⁴⁸ MAURICE J. ELIAS, JOSEPH E. ZINS & ROGER P. WEISSBERG, *PROMOTING SOCIAL AND EMOTIONAL LEARNING: GUIDELINES FOR EDUCATORS* (1997).

⁴⁹ *SEL Research*, CASEL, <http://www.casel.org/research> [<https://perma.cc/6ZKN-WT8S>]. CASEL's private funders have included the 1440 Foundation, the Einhorn Family Charitable Trust, the Ewing Marion Kauffman Foundation, the McCormick Foundation, the Novo Foundation, the Overdeck

the impact of private philanthropy on education law and policy from the 1990s to the present.⁵⁰

CASEL’s own research is largely implementation-oriented, beginning with its above-mentioned 1997 book.⁵¹ The organization conducts, publishes, and disseminates evidence-based reviews of SEL programs in practice around the country, providing educational decision-makers with recommendations for effective programs.⁵² CASEL also provides research support to school districts and other polities that have implemented SEL programming, helping them to conduct program evaluations and developing insights for future implementation work from these evaluations.⁵³ Finally, CASEL’s Assessment Work Group, comprised of distinguished researchers in the field, developed and released an SEL Assessment Guide in 2019, allowing educators to find, tailor, and use valid and actionable SEL assessment tools.⁵⁴

Empirical research in SEL has expanded far beyond CASEL’s early (and continued) work. This research can roughly be divided into what I call “core SEL” and “SEL-adjacent” work. Research in the first category accepts the SEL construct as a given, using it as a point of departure to investigate how “it” (or subcategories thereof) might work most effectively to improve student academic and “life” outcomes (e.g., crime participation or college graduation rates).⁵⁵ Consensus evidence from this body of work demonstrates that “major domains of human development—social, emotional, cognitive, linguistic, academic—are deeply intertwined in the brain and in behavior” and that “[a]ll are central to learning.”⁵⁶ SEL skills, therefore, are viewed as a set of competencies that should be optimized both for their own sake (in

Family Foundation, Pure Edge, Inc., the Raikes Foundation, the Robert Wood Johnson Foundation, the Rockefeller Philanthropy Advisors, the S.D. Bechtel Jr. Foundation, the Spencer Foundation, the Stuart Foundation, the Surdna Foundation, and the Wallace Foundation. *Id.*

⁵⁰ Though a fuller examination of this topic is beyond the scope of this Note, scholars of education are beginning to trace and critique this history. *See, e.g.*, AMY BROWN, *A GOOD INVESTMENT? PHILANTHROPY AND THE MARKETING OF RACE IN AN URBAN PUBLIC SCHOOL* (2015); SARAH RECKHOW, *FOLLOW THE MONEY: HOW FOUNDATION DOLLARS CHANGE PUBLIC SCHOOL POLITICS* (2013); *see also* PAYNE, *supra* note 23; Meredith R. Aska McBride, *Private Policy: Mechanisms of Accountability for Private Foundations in Education Policymaking* (forthcoming) (on file with author).

⁵¹ ELIAS, ZINS, & WEISSBERG, *supra* note 48.

⁵² *Current CASEL Research*, CASEL, <http://www.casel.org/from-casel> [<https://perma.cc/2MVF-268F>].

⁵³ *Id.* (See, in particular, the case studies of Oakland, Nashville, and Chicago.)

⁵⁴ *Assessment Guide*, MEASURING SEL: USING DATA TO INSPIRE PRACTICE, <https://measuringcel.casel.org/assessment-guide> [<https://perma.cc/B3AR-3MNG>] (providing “guidance on how to select an assessment and use student SEL data, a catalog of SEL assessments equipped with filters and bookmarking, and real-world accounts of how practitioners are using SEL assessments”).

⁵⁵ *See* the comprehensive bibliography provided and discussed in JONES & KAHN, *supra* note 9.

⁵⁶ *See id.* at 4.

no small part because such development “is crucial to preparing the future workforce with the life skills employers increasingly need and value”) and because they are critical to the achievement of learning outcomes that are valued for other reasons.⁵⁷

“SEL-adjacent” research, by contrast, may not engage or evaluate SEL per se as a construct, but provides basic science for and/or develops areas of inquiry that SEL advocates place under the broader SEL umbrella. For example, neurological research on cognitive functioning and psychological research on concepts like “grit” and “executive functioning” fall into this category.⁵⁸ Almost definitionally, this latter category is far larger than “core SEL” research, simply because the range of educational interventions that might be considered “SEL” is so broad that research in many different fields might be considered relevant.

In parallel and in tandem with the development of empirical research on SEL, members of the SEL movement have pressed for the codification of SEL into state education law. In 2002, CASEL formed the Illinois Advisory Council to advocate, in partnership with the Children’s Mental Health Task Force, for the adoption of SEL standards as part of the Illinois Learning Standards.⁵⁹ The Task Force issued its report, *Children’s Mental Health: An Urgent Priority in Illinois*,⁶⁰ in April 2003. Drawing on its partnership with the Council, one of the Task Force’s strongest recommendations in the report was that the Illinois legislature pass legislation to “create a mandate for addressing children’s mental health in this manner and to codify a number of key task force recommendations.”⁶¹ The Illinois legislature subsequently passed the Illinois Children’s Mental Health Act of 2003,⁶² becoming the

⁵⁷ *Id.*

⁵⁸ See, e.g., ANGELA DUCKWORTH, GRIT: THE POWER OF PASSION AND PERSEVERANCE (2016); EXECUTIVE FUNCTION IN PRESCHOOL-AGE CHILDREN: INTEGRATING MEASUREMENT, NEURODEVELOPMENT AND TRANSLATIONAL RESEARCH (P. McCardle et al. eds., 2016); ADOLESCENTS’ PREPARATION FOR THE FUTURE: PERILS AND PROMISE (Reed W. Larson et al. eds., 2002); Adele Diamond & Daphne S. Ling, *Conclusions About Interventions, Programs, and Approaches for Improving Executive Functions That Appear Justified and Those That, Despite Much Hype, Do Not*, 18 DEVELOPMENTAL COGNITIVE NEUROSCIENCE 34 (2015).

⁵⁹ Rachel A. Gordon et al., *Social and Emotional Learning for Illinois Students: Policy, Practice and Progress*, in THE ILLINOIS REPORT 68, 71 (2011), available at https://igpa.uillinois.edu/sites/igpa.uillinois.edu/files/reports/IR11-Ch6_SEL.pdf [<https://perma.cc/5FAB-X5DY>] (reporting findings of a committee working together with CASEL and the Illinois State Board of Education to develop and implement SEL standards in Illinois).

⁶⁰ KAREN VANLANDEGHEM, ILLINOIS CHILDREN’S MENTAL HEALTH TASK FORCE, CHILDREN’S MENTAL HEALTH: AN URGENT PRIORITY FOR ILLINOIS (2003).

⁶¹ See Gordon et al., *supra* note 59, at 70.

⁶² See *infra* notes 71–81 for a discussion of this Act in greater detail.

first state to require the promulgation and adoption of comprehensive standards for SEL.⁶³

Since 2003, and in large part due to CASEL's continued advocacy, every state has come to expressly require or at least support SEL in the schools through the promulgation of learning standards.⁶⁴ Four states (Illinois, Kansas, Maine, and West Virginia) have comprehensive SEL learning goals accompanied by developmental benchmarks across the full K–12 spectrum.⁶⁵ An additional seven states (Connecticut, Idaho, Ohio, Massachusetts, Pennsylvania, Vermont, and Washington) have enacted such standards and benchmarks through the early elementary grades.⁶⁶ The remaining thirty-nine states articulate SEL standards for the preschool years.⁶⁷ In short, every single U.S. state has mechanisms that could operate with the force and effect of law to mandate SEL in public schools.

The current normative framework of SEL is best understood as comprising a symbiotic relationship among research, advocacy (including media coverage of SEL), and law.⁶⁸ Advocates interested in equality (beginning in the 1960s) and in character education (beginning in the 1980s) established a research agenda by the mid-1990s, which then in turn supported a policy strategy that began to be effective in making real legal change by the early 2000s. Since SEL began to become law, its implementation in school districts has been informed by research and advocacy, which serve to flesh out the relatively bare contours of the laws and standards themselves and help educational actors choose among the many competing options for complying with such laws. Thus, in understanding how children, families, and educators actually experience SEL laws and standards, it is important to view research and advocacy not only as efforts that succeeded in codifying SEL into law, but also as ongoing activities that continue to shape the reception and implementation of, and practice and enforcement norms around, these laws, standards, and policies.

⁶³ *Id.*; Children's Mental Health Act of 2003, 405 ILL. COMP. STAT. 49 (2003).

⁶⁴ See *State Scan Scorecard Project*, *supra* note 12.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ For media coverage, see, for example, Victoria Clayton, *The Psychological Approach to Educating Kids*, ATLANTIC (Mar. 30, 2017), <https://www.theatlantic.com/education/archive/2017/03/the-social-emotional-learning-effect/521220> [<https://perma.cc/7TCE-TJJC>]; Tara García Mathewson, *Can This Game-Like App Help Students Do Better in School?*, WIRED (Nov. 29, 2017, 6:00 AM), <https://www.wired.com/story/can-this-game-like-app-help-students-do-better-in-school> [<https://perma.cc/AZ2Z-WHBS>].

B. Illinois's SEL Laws: A Case Study

Illinois was the first state to adopt SEL laws, and its statutes and standards remain the most comprehensive.⁶⁹ This is not a coincidence but rather a result of CASEL's location in Chicago. Members of the SEL movement hold up Illinois SEL law as a model, and policy entrepreneurs in other states look to Illinois to provide a template not only for the content of their hoped-for laws, but also for the political strategy that will lead to their successful passage.⁷⁰ Thus, Illinois's laws and curricular standards are an ideal case study by which to understand SEL law on paper and in practice. This Section first describes the state statute, then proceeds to an examination of the SEL standards promulgated by the Illinois State Board of Education (ISBE) and a discussion of how these standards are then implemented at the district level. The Section closes with a discussion of how Illinois's SEL laws may be further enforced in the near future.

As described above, the Illinois legislature passed the Children's Mental Health Act of 2003 in August of that year.⁷¹ Current SEL discourse often elides discussions of mental health pathology; thus, the preamble to the Act is notable by comparison for its emphasis on serious mental health issues and their cost to the public fisc. The preamble begins: "Untreated mental health problems in children have serious fiscal consequences for the State because they affect children's ability to learn and increase their propensity for violence, alcohol and substance abuse, and other delinquent behaviors that are extremely costly to treat," and continues with a discussion of the prevalence of mental health issues among children in Illinois and an assertion that it would be most cost-effective to treat such issues in childhood.⁷² The preamble then states that "[c]hildren's social development and emotional development are essential underpinnings to school readiness and academic success," then moves back to a discussion of the benefits of a coordinated approach to children's mental health.⁷³

The statute includes four substantive sections (not numbered sequentially). Section 5, "Children's Mental Health Plan," is the longest and

⁶⁹ By "comprehensive," I mean covering the broadest age range, and elaborating goals and standards in the greatest detail. See Gordon et al., *supra* note 59, and *State Scan Scorecard Project*, *supra* note 12.

⁷⁰ Personal communication to the author from attendees at the Spencer Foundation Arts and SEL Convening (Chicago, Oct. 5, 2017). The reader may wonder why policy entrepreneurs are still active at the state level given that all fifty states have some form of SEL law or administrative standards. However, thirty-nine states' SEL standards apply at the preschool level only; thus, the SEL movement continues to advocate for the expansion of state standards for the full K–12 grade band.

⁷¹ See Gordon et al., *supra* note 59; see also Children's Mental Health Act of 2003, 405 ILL. COMP. STAT. 49 (2003).

⁷² Children's Mental Health Act of 2003, 405 ILL. COMP. STAT. 49 (2003).

⁷³ *Id.*

provides in some detail for a coordinated, state-run Children’s Mental Health Plan covering prevention, intervention, and treatment services.⁷⁴ Section 10 provides, quite briefly, for an “Office of Mental Health services [*sic*].”⁷⁵ Section 15, “Mental health and schools,” requires the promulgation and adoption of SEL standards.⁷⁶ Section 95 provides for additional children’s mental health services under Medicaid.⁷⁷

Thus, the statutory scheme rather sharply bifurcates how children’s mental health is addressed *out of* schools and how children’s mental health is addressed *in* schools. Out of school, the statute contemplates mental health promotion as a matter of early intervention into pathology via existing modes of health service delivery and via state agencies such as the Departments of Children and Family Services, Public Health, Corrections, and the like. However, the statute promotes children’s mental health in school exclusively via SEL.⁷⁸

Section 15, “Mental health and schools,” provides in full:

(a) The Illinois State Board of Education shall develop and implement a plan to incorporate social and emotional development standards as part of the Illinois Learning Standards for the purpose of enhancing and measuring children’s school readiness and ability to achieve academic success. The plan shall be submitted to the Governor, the General Assembly, and the Partnership by December 31, 2004.

(b) Every Illinois school district shall develop a policy for incorporating social and emotional development into the district’s educational program. The policy shall address teaching and assessing social and emotional skills and protocols for responding to children with social, emotional, or mental health problems, or a combination of such problems, that impact learning ability. School social workers may implement a continuum of social and emotional education programs and services in accordance with students’ needs. Each district must submit this policy to the Illinois State Board of Education by August 31, 2004.⁷⁹

The plain text of Section 15(b) somewhat confuses the possible purposes of the law. Whereas Section 15(a) clearly states that the social and emotional standards should be promulgated “for the purpose of enhancing

⁷⁴ *Id.* § 5.

⁷⁵ *Id.* § 10.

⁷⁶ *Id.* § 15.

⁷⁷ *Id.* § 95.

⁷⁸ This is not, of course, the only means by which public schools address student mental health—for example, Illinois schools also have professionals like counselors and social workers, which makes it perhaps all the more notable that a statute entitled the “Children’s Mental Health Act” does not make reference to these professionals.

⁷⁹ Children’s Mental Health Act of 2003, 405 ILL. COMP. STAT. 49/15 (2003).

and measuring children’s school readiness and academic success”—a justification that in theory would apply to all Illinois children—Section 15(b) directs district policies to “respond[,]” in particular, “to children with social, emotional, or mental health problems . . . that impact learning ability.” The purpose and focus of the law thus changes at scale, moving from a universalist conception of SEL at the statewide level to a particularized conception at the district level that focuses, by implication, on remedying students deemed deficient.⁸⁰

Pursuant to the Children’s Mental Health Act of 2003, ISBE first adopted its Social and Emotional Learning Standards in December 2004.⁸¹ The standards are arranged at increasingly-granular levels of scale, comprising three Goals, which are defined by ten Learning Standards, which are specified by Benchmarks for different grade bands, each of which encompass a detailed set of Performance Descriptors.⁸²

Below are the Goals with their associated Learning Standards:

Goal 1: Develop self-awareness and self-management skills to achieve school and life success.

1A: Identify and manage one’s emotions and behavior.

1B: Recognize personal qualities and external supports.

1C: Demonstrate skills related to achieving personal and academic goals.

Goal 2: Use social-awareness and interpersonal skills to establish and maintain positive relationships.

2A: Recognize the feelings and perspectives of others.

2B: Recognize individual and group similarities and differences.

2C: Use communication and social skills to interact effectively with others.

2D: Demonstrate an ability to prevent, manage, and resolve interpersonal conflicts in constructive ways.

Goal 3: Demonstrate decision-making skills and responsible behaviors in personal, school, and community contexts.

⁸⁰ See Beth Harry & Janette Klingner, *Discarding the Deficit Model*, 64 EDUC. LEADERSHIP 16 (2007), <http://www.ascd.org/publications/educational-leadership/feb07/vol64/num05/Discarding-the-Deficit-Model.aspx> [<https://perma.cc/3XX5-VESV>] (providing a succinct explanation and critique of the deficit model in education).

⁸¹ See Gordon et al., *supra* note 59, at 74.

⁸² ILLINOIS STATE BOARD OF EDUCATION (ISBE), SOCIAL/EMOTIONAL LEARNING STANDARDS, <https://www.isbe.net/Pages/Social-Emotional-Learning-Standards.aspx> [<https://perma.cc/D4F8-8XTB>]. This case study focuses on the Goals and Learning Standards, as the Benchmarks and Performance Descriptors provide a level of detail that is beyond the scope of this Note.

3A: Consider ethical, safety, and societal factors in making decisions.

3B: Apply decision-making skills to deal responsibly with daily academic and social situations.

3C: Contribute to the well-being of one's school and community.⁸³

The Benchmarks and Performance Descriptors vary sequentially by grade band,⁸⁴ articulating age-appropriate ways of realizing the Learning Standards and describing the specific actions that students should be able to do at each level.⁸⁵

Illinois Classrooms in Action has developed a series of resources to support educators in the implementation of the SEL Learning Standards.⁸⁶ These include posters articulating behavioral norms for the classroom and “strategy documents” that organize SEL Goals, Learning Standards, Benchmarks, and Performance Descriptors in more visually appealing ways by grade band.⁸⁷ Little information is publicly available from the State of Illinois or from districts themselves regarding which districts are in compliance with the statutory mandate to develop district-level SEL policy and what these policies entail. For example, the CPS “Departments and Office Listing” lists a central Office of Social and Emotional Learning (OSEL), but OSEL—unlike most other CPS central departments—does not have its own website.⁸⁸ CPS’s central listing simply states: “Social and Emotional Learning works with schools to establish multi-tiered systems of support for students’ social, emotional and behavioral development. OSEL ensures school-based staff use the most effective strategies to foster a safe learning climate and maximize student engagement and achievement.”⁸⁹ Future research in this area will need to rely on ethnographic and archival methods to determine precisely how SEL standards are being implemented in practice in Illinois. For the time being, the best source of information about CPS’s practices is CASEL itself, which has put out a variety of reports and

⁸³ *Id.*

⁸⁴ I.e., ranges of school-year grades (such as “third through sixth grade” or “high school grades”).

⁸⁵ All of the Illinois SEL Benchmarks, Goals, and Descriptors are available at ISBE, *Social/Emotional Learning Standards*, <https://www.isbe.net/Pages/Social-Emotional-Learning-Standards.aspx> [https://perma.cc/D3GC-4J8J].

⁸⁶ *Classrooms in Action*, ILLINOIS CLASSROOMS IN ACTION, <http://www.ilclassroomsinaction.org> [https://perma.cc/4EED-YJPQ].

⁸⁷ *Social Emotional Learning*, ILLINOIS CLASSROOMS IN ACTION, <http://www.ilclassroomsinaction.org/sel.html> [https://perma.cc/D3L4-LQLF].

⁸⁸ *Departments and Office Listing*, CPS, http://cps.edu/About_CPS/Departments/Pages/Departments.aspx [https://perma.cc/KKD3-3DBU].

⁸⁹ *Id.*

bulletins highlighting the district's SEL work, though this information tends to be advocacy-oriented and must be read as such.⁹⁰

The Goals and Learning Standards are facially neutral, even banal. They reflect a developmentalist and constructivist approach to what students are expected to know and be able to do, pegging SEL practices to established stages of child development.⁹¹ Much could be said about the standards, but at this juncture I wish to highlight two themes in particular: vagueness with respect to enforcement, and the framing of SEL standards as “knowledge and skills,” rather than as values, beliefs, or dimensions of identity. Vagueness is potentially problematic because of the wide latitude it gives decision-makers to level consequences on the grounds of illegible or unshared notions of desirable social behavior. This latitude holds potential for cultural projection in the exercise of discretion,⁹² and the standards' focus on process and action obscures how student achievement of these SEL standards might actually be assessed in much more concrete terms with respect to the desired policy outcomes and purposes behind the legislation.

Describing SEL standards as “knowledge and skills” functions rhetorically to neutralize political or value-oriented critique, removing them from democratic contestability and muddying the qualitative difference between the work that SEL standards do and the work that other kinds of academic standards do in the triangular relationship among state, parent, and child. But such “skills” are different in kind from knowing one's multiplication tables or being able to conjugate verbs—skills that are firmly within the state's plenary power over public school curriculum. Rather, SEL “skills” constitute a habitus, a way of carrying oneself through the world,

⁹⁰ See Chicago, CASEL, <http://www.casel.org/partner-districts/chicago-public-schools> [https://perma.cc/TFX2-VKQ9]. CASEL's reporting is discussed in greater detail with respect to CPS's implementation and projected enforcement plans *infra* in Part I.

⁹¹ See, e.g., DEVELOPMENTALISM IN EARLY CHILDHOOD AND MIDDLE GRADES EDUCATION: CRITICAL CONVERSATIONS ON READINESS AND RESPONSIVENESS (Kyunghwa Lee & Mark D. Vagle eds., 2010); L.S. VYGOTSKY, MIND IN SOCIETY: THE DEVELOPMENT OF HIGHER PSYCHOLOGICAL PROCESSES (1978); see also Bernadette Baker, *The Dangerous and the Good? Developmentalism, Progress, and Public Schooling*, 36 AM. EDUC. RES. J. 797, 798 (1999) (“Developmentalism . . . proffered a view of human life in which new abilities and proficiencies were thought to unfold in set steps or be acquired in a series of stages. Generally, it has, in its variety of theoretical forms, guided descriptions of children, selection of classroom content for different grade levels, preparation of teachers, and judgments of excellence in educational endeavors.”). Constructivism is “[a]rguably . . . the dominant theoretical position in science and mathematics education,” see Denis Phillips, *How, Why, What, When, and Where: Perspectives on Constructivism in Psychology and Education*, 3 ISSUES EDUC. 151, 152 (1997); Kenneth Tobin & Deborah Tippins, *Constructivism as a Referent for Teaching and Learning*, in THE PRACTICE OF CONSTRUCTIVISM IN SCIENCE EDUCATION 3, 3–21 (Kenneth Tobin ed., 1993) (viewing science “as a set of socially negotiated understandings . . .”).

⁹² See, e.g., David Simson, *Exclusion, Punishment, Racism and Our Schools: A Critical Race Theory Perspective on School Discipline*, 61 UCLA L. REV. 506, 535–51 (2014).

that, if achieved in full, cannot necessarily be turned on and off or used at will.⁹³ A student who has met all of the SEL benchmarks will become a particular kind of person, rather than a person who knows particular kinds of things. The SEL standards represent a more intimate remodeling of the student's self than do academic standards and merit a closer level of scrutiny as a result. Such remodeling is perhaps an inevitable result of any sufficiently immersive educational experience, but its inevitability is all the more reason to take care in designing its aims and methods.⁹⁴

C. SEL from "Implementation" to "Enforcement": New Tactics and New Questions

Though Illinois passed its SEL statute in 2003, district-level implementation of the standards promulgated pursuant to that law did not begin in earnest until some years later. Chicago Public Schools, Illinois's largest and most visible public school district, began comprehensive SEL implementation in 2012 and has since pivoted to a discussion of what SEL "enforcement" may entail, as a complement to or perhaps supersession of the implementation concept. This Section is intended to give the reader a flavor of the many strategies that educators and district administrators use to implement the Illinois SEL laws and standards and to ground the critiques raised and recommendations provided in subsequent Parts of this Note.

The Chicago Public Schools' initial SEL implementation strategy revolved around three identified SEL "pillars": "(1) creating a positive and proactive school climate in which SEL is present in all practices and procedures; (2) adult awareness, modeling, and integration of social-emotional competencies in their teaching practices; and (3) explicit and integrated student instruction in social-emotional competencies."⁹⁵ In 2012, the CPS central office convened a task force to develop a comprehensive, district-wide strategy for SEL implementation. Initially rooted in the Department of Youth Development and Positive Behavior Supports, by 2013

⁹³ See PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 72 & 214 n.1 (Richard Nice trans., Cambridge Univ. Press 1977) (1972) ("The word *disposition* seems particularly suited to express what is covered by the concept of habitus (defined as a system of dispositions). It expresses first the *result of an organizing action*, with a meaning close to that of words such as structure; it also designates a *way of being*, a *habitual state* (especially of the body), and, in particular, a *predisposition*, *tendency*, *propensity*, or *inclination*.").

⁹⁴ See DEWEY, *supra* note 28 (advocating a careful and intentional holistic model of child development through education); see also MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS?* 24 (2005) ("It is impossible to raise children without teaching them at the same time. Moreover, it is inconceivable to teach them anything without shaping their values and outlook on life.").

⁹⁵ CASEL, *CASE STUDY: CHICAGO PUBLIC SCHOOLS (CPS) 1* (Mar. 2015), http://financialsustainability.casel.org/wp-content/uploads/2015/06/Chicago_CaseStudy.pdf [<https://perma.cc/CE36-SEUW>] [hereinafter CASEL, CASE STUDY].

the department was reorganized into the Office for Social and Emotional Learning (OSEL) and given a mandate to integrate SEL across the district.⁹⁶ The name change is telling: OSEL positions SEL as *the* comprehensive and normative framework for youth development and behavioral management, rather than, for example, one option among many.

During the 2013–2014 and 2014–2015 school years, OSEL implemented explicit SEL instruction, incorporated SEL into disciplinary standards and behavior management systems, and sought to integrate SEL into academic instruction.⁹⁷ Explicit SEL instruction varied by grade and school, including “evidence-based”⁹⁸ programs like Second Step for K–8 students,⁹⁹ Responsive Classroom and Positive Action,¹⁰⁰ Methodologies for Academic and Personal Success class for ninth graders,¹⁰¹ and the PATHS program in a limited number of elementary schools.¹⁰² During the 2014–2015 school year, OSEL hired fourteen SEL specialists who worked with administrators to increase their “SEL expertise,” making connections between empirical SEL research and “evidence-based” SEL programs and existing pedagogical and disciplinary frameworks like the Common Core standards and Multi-Tiered Systems of Support (MTSS) (CPS’s “framework for delivering high-quality, differentiated instruction and targeted support for all students’ academic, social and emotional, and health/wellness needs in all school and classroom settings”).¹⁰³

⁹⁶ *Id.* at 2.

⁹⁷ *Id.*

⁹⁸ See, e.g., *Principles of Evidence-Based Policymaking*, EVIDENCE-BASED POLICYMAKING COLLABORATIVE, <https://www.evidencecollaborative.org/principles-evidence-based-policymaking> [perma.cc/BG3W-7KQU] (“Evidence-based policymaking has two goals: *to use what we already know* from program evaluation to make policy decisions and *to build more knowledge* to better inform future decisions.”). I use the term “evidence-based” here in quotes not to be dismissive of the concept, but to show that it is a term of art.

⁹⁹ CASEL, CASE STUDY, *supra* note 95, at 1; see also *Teach Children the Skills They Need to Thrive*, SECOND STEP, <http://www.secondstep.org/social-emotional-learning> [https://perma.cc/BWS3-HV3W].

¹⁰⁰ See CASEL, CASE STUDY, *supra* note 95, at 1–2; see also *About Responsive Classroom*, RESPONSIVE CLASSROOM, <https://www.responsiveclassroom.org/about> [https://perma.cc/V382-YAG4].

¹⁰¹ See CASEL, CASE STUDY, *supra* note 95, at 2; see also R. Keeth Matheny, *MAPS (Methodologies for Academic and Personal Success)*, CASEL (2012), <https://casel.org/wp-content/uploads/2016/09/FRI-3-Austin-High-MAPS.pdf> [https://perma.cc/84SV-66L2].

¹⁰² See CASEL, CASE STUDY, *supra* note 95, at 2; see also *PATHS® Program*, PATHS PROGRAM, <https://pathsprogram.com> [https://perma.cc/Z5JY-3YLL] (an initiative supported and studied by a federal Investing in Innovation (I3) grant); *Investing in Innovation (i3)*, U.S. DEP’T OF EDUC. OFFICE OF INNOVATION & DEV., <https://innovation.ed.gov/what-we-do/innovation/investing-in-innovation-i3> [https://perma.cc/U6M9-AWY5].

¹⁰³ See CASEL, CASE STUDY, *supra* note 95, at 1–2; see also CHICAGO PUBLIC SCHOOLS (CPS), MULTI-TIERED SYSTEM OF SUPPORTS (MTSS) THEORY OF ACTION SCHOOL YEAR 2016–2017 (2016), http://www.rti-innovations.com/uploads/1/0/8/2/10825600/mtss_theory_of_action__1_.pdf [https://perma.cc/5TM8-DFS9].

In short, depending on their school, grade level, and identified personal needs, CPS students might receive explicit, dedicated classroom instruction in SEL skills; might experience SEL teaching strategies and/or explicit SEL instruction in the context of their standard academic classes; and are likely subject to school culture, behavior management, and disciplinary systems infused with SEL research and/or based on existing SEL programs developed by research and advocacy organizations. The latter include, for example, behavioral and mental health teams on-site at certain schools that base their work in part on empirical SEL research and coaching in restorative practices by trained members of community organizations, including the use of restorative justice principles in the adjudication of expulsions.¹⁰⁴

During the 2017–2018 school year, some CPS district and school administrators, as well as classroom educators, began to discuss the concept of “SEL enforcement” in addition to existing implementation strategies.¹⁰⁵ “Enforcement,” as compared with “implementation,” carries connotations of consequences. Whereas “implementation” implies that decision-makers are thinking about SEL as policy or best practice, “enforcement” implies that decision-makers are thinking about SEL as law or mandate. Though this enforcement has not yet begun, it is worth hypothesizing how it might play out in order to develop an analysis and critique of these laws—and to provide timely recommendations for the enforcement actions that should or should not be taken.

I should note here that I have been engaged in empirical qualitative research on SEL in CPS for nearly five years, most recently in the context of a collaboration between Ingenuity (an arts education policy think tank) and the University of Chicago’s Consortium on School Research, funded by the Spencer Foundation, investigating the empirical connections between arts education pedagogical strategies and SEL outcomes.¹⁰⁶ The factual information in this Section is drawn from ethnography undertaken in the course of this research and my dissertation fieldwork and conversations with professional collaborators in the field. In keeping with best ethical practices for such research, all interlocutors have been anonymized. In what follows, I have endeavored to draw clear distinctions between the empirical data available, and informed speculation and legal analysis.

¹⁰⁴ CASEL, CASE STUDY, *supra* note 95, at 2–3; *see, e.g.*, Emily Richmond, *When Restorative Justice in Schools Works*, ATLANTIC (Dec. 29, 2015), <https://www.theatlantic.com/education/archive/2015/12/when-restorative-justice-works/422088> [<https://perma.cc/SKT9-QFJQ>].

¹⁰⁵ Personal communications with author (Oct. and Nov. 2017).

¹⁰⁶ *See The Thinking Behind Arts Learning*, INGENUITY, <https://www.ingenuity-inc.org/about> [<https://perma.cc/GA5H-8G35>]; *Funders & Supporters*, U. CHI. CONSORTIUM ON SCH. RES., <https://consortium.uchicago.edu/about/funders-supporters> [<https://perma.cc/55AY-XBQ2>].

First, SEL may soon come to play a role in how students are graded.¹⁰⁷ Several CPS high schools have begun to consider an explicit role for SEL in student assessment and evaluation and ways in which such assessment and evaluation might be represented on report cards. In particular, these schools envision that students will receive both an “SEL grade” and an “academic grade” in each class—the academic grade representing their performance on graded coursework, tests, and projects, and the SEL grade representing their performance on grade-level SEL competencies, presumably as defined by the state standards and, perhaps, any benchmarks inherent in the particular third-party SEL program or framework that the given high school has adopted. In its initial year or years, the SEL grade would serve as a “shadow grade” that would not be computed as part of the student’s grade point average and could eventually be reported on transcripts sent to college admissions offices and the like.

Second, SEL attainment will soon be assessed and evaluated—and thus perhaps reported—via quantitated testing, just like academic attainment. In large part, this has not yet happened because researchers have not historically felt confident enough in the psychometric tools available to recommend their widespread use in schools to measure students’ SEL processes, skills, and outcomes, much less as a tool for decision-making and the direction of resources.¹⁰⁸ However, this is about to change. In 2015, CASEL convened a three-year working group to evaluate the effectiveness of existing assessment frameworks and to design new ones as needed.¹⁰⁹ As a result of this initiative, in early 2019, CASEL published an Assessment Guide for Educators, which recommends validated SEL assessment methods and strategies ready for immediate implementation by educators, schools, and districts.¹¹⁰

It seems plausible, if not inevitable, that CPS could now begin to implement such assessments. And once there is a critical mass of student SEL attainment data available, the district—not to mention state and local politicians and policymakers—will likely make financial, curricular, and perhaps normative decisions based on this data.¹¹¹ Broadly speaking, they might direct more resources to schools with low SEL attainment or, conversely, deprive such schools of resources in an effort to mandate compliance.

¹⁰⁷ Personal communication with author (Nov. 2017).

¹⁰⁸ Personal communication with author (Oct. 2017).

¹⁰⁹ *Our Initiative*, MEASURING SEL, <https://measuringSEL.casel.org/our-initiative> [<https://perma.cc/2SMM-ES7G>].

¹¹⁰ *Assessment Guide*, *supra* note 54.

¹¹¹ Personal communications with author (Oct. and Nov. 2017).

Data invites analysis and surveillance.¹¹² Populations that perform poorly on such assessments, whether defined as schools, students, demographic groups, CPS networks, community areas, and/or districts, will certainly become the objects of additional interventional strategies. Speculatively, these might include anything from additional SEL curricular hours to individualized SEL benchmarks that need to be met in order to move up a grade level or graduate from high school. Regardless of the ultimate form such assessments take, the history of academic testing and its role in educational lawmaking and policymaking, crystallized most recently in the saga of the No Child Left Behind and Race to the Top initiatives, will be instructive to observers and critics.¹¹³

Third, SEL is likely to play an increased role in school discipline. Since 2012, SEL has already been integrated into decision-making around school discipline in CPS—for example, over 100 CPS schools now use restorative justice principles in their behavior management, school culture, and school disciplinary systems, even using restorative justice in the context of adjudication of expulsions.¹¹⁴ SEL principles and practices are also integrated into the school culture and climate expectations that each school sets. Thus, students' behavior already is, and will increasingly be, judged in substantial part against standards set by empirically-based SEL programming and frameworks—thus, making violation of SEL-inflected norms the grounds for disciplinary action. Furthermore, the subsequent disciplinary consequences in terms of both substance and process already are, and similarly will increasingly be, infused with SEL strategies.

Fourth and finally, SEL is likely to play an increased role in special education and analogous individualized interventions. Under the MTSS framework, CPS educators and administrators are already empowered to differentiate students according to their academic and SEL needs, and to provide targeted interventions at varying levels of intensiveness to students who are deemed to need support.¹¹⁵ OSEL also operates behavioral and mental health teams at a number of CPS schools.¹¹⁶ Taken together, it seems likely that CPS students may already be receiving interventions as a result of

¹¹² JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 11 (1998).

¹¹³ See, e.g., MEHTA, *supra* note 10, at 248–68.

¹¹⁴ Restorative justice, though a philosophy and set of practices with its own long history and independent trajectory is considered within CPS to be a type of SEL intervention and is administered under the SEL umbrella. See CASEL, *CASE STUDY*, *supra* note 95, at 3. To be clear, I am not against restorative justice and in fact believe it to be one of the normatively optimal types of SEL intervention; it is used here simply as an example of the penetration of SEL interventions into school systems in CPS.

¹¹⁵ See CPS, *supra* note 103.

¹¹⁶ See CASEL, *CASE STUDY*, *supra* note 95, at 2–3.

their academic performance and/or behavior that are deemed necessary because of their noncompliance with SEL norms, policies, practices, and/or standards; it also seems likely that the form and content of these interventions in many cases rests on SEL strategies and programming.¹¹⁷ It is unclear from available data whether these individualized interventions have taken the form of a legally cognizable Individualized Education Program (IEP) under the meaning of the Individuals with Disabilities Education Act (IDEA).¹¹⁸ Nonetheless, the nature and granularity of the MTSS plans can be analogized to that of an IEP.¹¹⁹ Further, as SEL measurement becomes more sophisticated in the very near future, it seems plausible that such assessments could be used to diagnose a student with a social or emotional disability (or to exclude such a diagnosis, whether properly or improperly), governing that student's placement in, and access to, special education services.

In summary, CPS is actively engaged in determining what increased “enforcement” of SEL laws would entail—which implies consequences for students, families, educators, and schools. Based on the observations and opinions of CPS educators and administrators, combined with informed speculation, such enforcement mechanisms might entail grading; testing; school discipline interventions; and special education or closely analogous programming and services. These mechanisms already have real consequences for students, determining everything from their likelihood of remaining in school to their post-secondary options to the amount of funding, resources, and attention—positive or negative—that their schools are likely to receive.¹²⁰ SEL involvement in these mechanisms and systems is by no means necessarily a bad thing, but the very fact of the empirical efficacy of many SEL strategies in combination with such mechanisms means that a hard look at the likely magnitude of the shift and its normative implications is warranted: because SEL interventions are able to change student behaviors and outcomes, they cannot be dismissed as innocuous.

¹¹⁷ This sentence represents informed speculation on the part of the author, as aggregated student-level data is unfortunately not available at this time.

¹¹⁸ See OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., U.S. DEP'T OF EDUC., A GUIDE TO THE INDIVIDUALIZED EDUCATION PROGRAM 1 (2000), <https://www2.ed.gov/parents/needs/spced/iepguide/index.html> [<https://perma.cc/5DEJ-WFW9>] (“To create an effective IEP, parents, teachers, other school staff—and often the student—must come together to look closely at the student’s unique needs. These individuals pool knowledge, experience and commitment to design an educational program that will help the student be involved in, and progress in, the general curriculum. The IEP guides the delivery of special education supports and services for the student with a disability.”); see also Pub. L. No. 101-476, 104 Stat. 1141 (1990) (codified as amended at 20 U.S.C. §§ 1400–1482 (2012)).

¹¹⁹ For more information on how IEPs function, see OFFICE OF SPECIAL EDUC. AND REHAB. SERVS., *supra* note 118, at sections 3 and 5.

¹²⁰ See DANIEL KORETZ, THE TESTING CHARADE: PRETENDING TO MAKE SCHOOLS BETTER (2017) (discussing the consequences of testing and how testing has become an end in itself).

II. WHY SEL MAY BE GOOD PRACTICE BUT IS BAD LAW

The shift from policy to law is in many senses a shift from the empirical to the normative. Research-informed policymaking seeks to establish that *X* is likely effective at achieving a particular end, and that it is good enough, as opposed to other options for addressing the same problem, to warrant an investment of resources. What pure technocratic empiricism *cannot* do is determine what constitutes a problem worth solving, nor articulate the ultimate ends to which solutions should be put. Furthermore, when policy becomes law, even the most careful normative articulations of problems and outcomes are still subject to an analysis of whether the intended means and ends are permitted exercises of governmental authority. The enforcement of SEL laws, even more than the implementation of SEL policies, invites such analysis. But though SEL laws rest on a strongly, if largely implicitly, normative foundation, SEL advocates and education decision-makers have generally elided normative discussions about the ends of SEL law and policy in favor of empirical discussions of strategic efficacy.

Here, I largely bracket the question of the empirical validity of SEL research, policy, and law. Like any field of empirical research, both “core SEL” and “SEL-adjacent” research are subject to interrogations of method and the ultimate conclusions that researchers draw; some of these studies are, of course, stronger than others. However, for purposes of argument here, I simply accept the empirical strength and validity of the SEL research that has garnered consensus support, in order to reach the normative legal questions of interest in this essay.

Accordingly, this Part explores how the legal apparatus of SEL fares *as law*. The first section shows that SEL laws are qualitatively and analytically different from SEL policies and practices despite their often substantially similar content. I argue, following James Scott and Jal Mehta, that state efforts at rationalization of what are essentially intimately local and interpersonal behaviors make for intrusive law and bad policy. The second section argues that SEL laws and standards, on their face, shift normative power away from students and families and toward the state. This shift contravenes deep-seated cultural and legal prerogatives of parental autonomy and familial privacy, and positions the school, rather than the family, as the normative site of child socialization. Recognizing the magnitude of this shift implies that SEL laws should be more tightly cabined to permissible exercises of state power in both their drafting and enforcement.

A. Laws as Accountability Reform: A Scalar Critique

Social-emotional learning laws and standards are an attempt by state legislators and policy entrepreneurs to exert more control over the interpersonal dimensions of schooling, working under the theory that a faithful implementation of such standards—and thus a changed set of interpersonal interactions among school administrators, teachers, and students—will result in improved academic and “life” outcomes for students. As such, they are an example of the kind of standards-based accountability reform that has characterized American education policy interventions since the Progressive Era.¹²¹ In his book *The Allure of Order*, Jal Mehta has both modeled this approach to reform and shown both empirically and normatively why standards-based accountability reforms are doomed to fail, drawing substantially on James Scott’s pioneering *Seeing Like a State*.¹²² This Section applies Mehta’s model to the SEL movement and shows why the project of state rationalization of the social practices inherent in schooling will inevitably be unsuccessful—both because it cannot achieve the ends it seeks on its own terms, and because such an expansion of state power will conflict with the existing sphere of parental and familial autonomy rights.

Mehta argues that “[n]ot once, not twice, but three different times”—in the Progressive Era, in the 1960s and 1970s, and from the 1980s to the present—“school reformers have hit upon the same idea for how to remake American schools.”¹²³ In all three eras, reformers have “sought to use methods of rational administration,” namely district-, state-, and federal-level “standards, assessments, and accountability[,] to clarify goals and improve school performance.”¹²⁴ In the Progressive Era, reformers implemented the model of school administration that is familiar across the country today, moving from largely independent individual public schools to the school district model, characterized by a superintendent and central administrative staff.¹²⁵ In the 1960s and 1970s, models of quantitative analysis imported from the U.S. Department of Defense were used to “highlight[] the ways in which educational inputs did not translate into educational outputs and thus motivated legislators to see schooling as a production function that needed to be made more efficient,” leading to the passage of “more than 70 state laws seeking to create educational

¹²¹ MEHTA, *supra* note 10, at 1–2.

¹²² See MEHTA, *supra* note 10; see also SCOTT, *supra* note 112, at 11 (showing that centrally managed policy initiatives inevitably fail without sufficient care taken for local customs and conditions).

¹²³ MEHTA, *supra* note 10, at 2.

¹²⁴ *Id.*

¹²⁵ *Id.*

accountability,” as well as the creation of a significant research literature relying on sophisticated quantitative techniques to describe and critique the relationship between resource inputs to schools and their academic and social outputs.¹²⁶ In the late twentieth and early twenty-first centuries, the famous 1983 report *A Nation at Risk* sparked another “crisis” leading ultimately to the federalization of education standards in the form of the George W. Bush-era No Child Left Behind and Obama-era Race to the Top initiatives.¹²⁷

Mehta traces how each of these three periods of reform has followed a “remarkably similar trajectory.”¹²⁸ The first step is “the declaration of a crisis of quality that destabilize[s] the existing educational status quo.”¹²⁹ The second is “the elevation of an external ‘technocratic’ logic of efficiency,” followed, third, by “the rallying of ideologically diverse powerful actors external to the schools behind a commensurating logic that promised control and improvement over an unwieldy school system,” and, fourth and finally, the “failed efforts of teachers and their representatives to resist these movements”¹³⁰

The SEL movement has thus far followed this trajectory through step three; it remains to be seen whether step four will come to pass. First, the SEL movement has been driven by a widespread sense of crisis: in Comer’s formulation, that the families of students who struggle academically or interpersonally are raising their children with norms, values, and behaviors that are a mismatch for those expected in the public schools,¹³¹ or in the formulation of influential 1990s policy researchers, that “[c]hanges in socialization forces” require policymakers now to view the school, rather than the family, as the appropriate, effective, and normative site of child socialization.¹³² In short, and as discussed in Part I, the “master narrative or paradigm around the problem of schooling”¹³³ for the SEL movement locates the “crisis” in families themselves, attributing academic and disciplinary problems to students’ resultant inability to function in the social environment

¹²⁶ *Id.* at 3–4.

¹²⁷ *Id.* at 84 (citing Nat’l Comm’n on Excellence in Educ., *A Nation at Risk: The Imperative for Educational Reform*, 84 *ELEMENTARY SCH. J.* 112 (1983)).

¹²⁸ *Id.* at 35, 250–51.

¹²⁹ *Id.* at 250–51.

¹³⁰ *Id.* at 251.

¹³¹ See *supra* notes 29–35 and accompanying text.

¹³² See CATALANO ET AL., *supra* note 38; Hernandez, *supra* note 39, at 145–60.

¹³³ MEHTA, *supra* note 10, at 35.

of the public school.¹³⁴ This definition of the problem then constrains the field of possible solutions that policy actors can offer in response.¹³⁵

In step two of Mehta's model, policy entrepreneurs offer solutions to the problem that are grounded in disciplines outside of education. Notably, these disciplines are always of higher social status than education itself¹³⁶: "Taylorism in the Progressive Era, systems analysis from the Defense Department in the 1960s, and business management strategies from the 1980s to the present."¹³⁷ The SEL movement draws its intellectual strength and epistemological credibility from psychology and psychiatry (which provided the impetus and analytic framework for James Comer's early work in New Haven, and continue to be influential via CASEL, which is headed by a psychologist and continues to support research in psychology and child development); the quantitative social sciences (which provide empirical support for SEL implementation in schools); and the persistent "elevation of an economic view of schooling"¹³⁸ in society and education policy more generally, in which schooling is considered of value primarily for its ability to make students long-term participants in, and contributors to, the economy. This conception of the value of education is founded upon a normative judgment; thus, even nonnormative SEL goals become normative when in service to this goal.

Until recently, SEL has largely been confined to stages one and two of Mehta's model. For fifty years, proponents of SEL have pursued research to define, and propose solutions to, the perceived crisis, and have implemented SEL initiatives in a largely ad hoc manner in individual schools (for example, Comer's work in a handful of schools in New Haven).¹³⁹ SEL was arguably confined to stage two even after Illinois and other states passed their statutes and developed their standards in the early 2000s; as discussed in Part I, even

¹³⁴ See *supra* notes 29–41 and accompanying text.

¹³⁵ MEHTA, *supra* note 10, at 18–19 ("A problem definition is a particular way of understanding a complex reality. For example, homelessness can be seen as the product of a housing shortage, high unemployment, or a lack of individual gumption. Problem definitions resist efforts to separate the normative and the empirical, as they generally evoke both normative and empirical descriptions in ways that are mutually reinforcing. The way a problem is framed has significant implications for the types of policy solutions that will seem desirable, and hence much of the political argument is fought at the level of problem definition.").

¹³⁶ *Id.* at 23 ("Particularly for an issue like schooling, in which everyone is at least putatively 'in it for the good of the children,' the struggle over who can claim power is in large part a struggle over whose views are taken as legitimate and worthy of respect. In this struggle, the failure of education to crystallize as a stronger profession has proven to be a substantial liability, one which has permitted other fields to take control of schooling.").

¹³⁷ *Id.* at 35.

¹³⁸ *Id.* at 116–17.

¹³⁹ See *supra* notes 29–35 and accompanying text.

CPS did not begin to implement these standards in a systematic way until approximately 2012, and the implementation still seems to vary widely from school to school.¹⁴⁰

The third step in Mehta's model is "the rallying of ideologically diverse powerful actors external to the schools behind a commensurating logic that promised control and improvement over an unwieldy school system."¹⁴¹ Mehta defines "commensurating logic" with regard to education policy as "the ways in which quite various entities (schools) could be both guided and measured by a simple set of metrics that would be visible from outside the school."¹⁴² SEL has undertaken a long, slow, and fitful transition toward this "commensurating logic." The passage of state SEL laws—by a diverse coalition of mental-health professionals, child advocates, and state lawmakers, as described in Part I—and the development of state SEL standards is the critical first step in the move toward Mehta's "commensurating logic," in that laws and standards express and enable a top-down approach to control and a model of ideal practice. SEL is now fully realizing its potential for commensuration with CASEL's 2019 release of a quantitative assessment framework for implementation in schools,¹⁴³ and the corresponding push toward an "enforcement" model of SEL that will rely on quantitative measurement of student and school attainment of SEL standards.¹⁴⁴ The assessment framework provides the technical capacity for commensuration; the combination of state statute plus state standards provides the political and legal capacity.

It remains to be seen whether the fourth step in Mehta's model will come to pass for SEL. Thus far, there has been little evidence of resistance to this paradigm among rank-and-file educators, though this may change with the advent of quantitative testing. In the present moment, SEL can be seen as a project of state rationalization of the interpersonal social and emotional dimensions that are inherent in schooling as a social practice. Because schooling inherently involves constant interactions among teachers and students, schooling has social and emotional dimensions regardless of whether they are formally labeled or systematized. There have been countless attempts at such systematization over the long history of education—one might think of the posting of classroom rules as an example of rudimentary formalization of the inevitable interpersonal interactions that

¹⁴⁰ See *supra* notes 95–105 and accompanying text.

¹⁴¹ MEHTA, *supra* note 10, at 251.

¹⁴² *Id.* at 253–54.

¹⁴³ See *supra* notes 105–110 and accompanying text.

¹⁴⁴ See *supra* Section I.C.

go along with schooling, and of course many philosophies of education make recommendations as to how teachers and students should interact.

What makes SEL, *as law*, different from, say, philosophical perspectives about how teachers and students should interact is that SEL laws function as a “technology of distance”: that is, one of a set of “reforms that deny the power of those on the scene to make qualitative judgments of worth in favor of quantitative measures that can be wielded by those not present at the local site.”¹⁴⁵ An individual teacher who posts a list of classroom rules on the wall, or who carefully chooses how to interact with a student who seems to be having a bad day, is making localized, qualitative judgments about the types of social and emotional interactions that seem most appropriate to his or her particular set of students at the time. A set of state-mandated standards, *even if they say much the same things as the teacher’s classroom rules*, is a type of deracinated, externalized measure that can be used as an instrument of control from afar: bureaucrats who may never have set foot in a given school can determine, through assessment data, how well individual teachers, students, and schools are measuring up against the standards, and take action accordingly to try to get them to conform.

In his seminal work of the same name, James Scott called this process “seeing like a state.”¹⁴⁶ For Scott, social life is inherently complex and context-sensitive; for a state to control any given sphere of social life from afar, it must collect a simplified set of data upon which it can make bureaucratic and political decisions. However, that logic of legibility can then impose its own distortions. State bureaucracies wishing to “read” complex social realities from afar often force those realities to simplify themselves in order to better conform to the state’s system of data-gathering. Scott gives the example of the development of land registration systems. Prior to the development of centralized bureaucracies seeking to collect property taxes, societies had a number of different ways of allocating land, many of which were quite complex—for example, in certain rural communities in Russia, agricultural lands were allocated according to a method called “interstripping,” which provided each household with numerous micro-parcels of land within the village’s common fields such that each household ultimately received a diverse set of parcels in different micro-climates that were suitable to growing a full range of crops. Such systems could function only due to interpersonal relationships and local knowledge about which tiny strip of land belonged to which family; it would

¹⁴⁵ MEHTA, *supra* note 10, at 115.

¹⁴⁶ MEHTA, *supra* note 10, at 253–54 (“Rationalizing schooling is a form of what James Scott calls ‘seeing like a state’—namely, a way of making an extremely messy reality into a set of legible categories that can be externally measured and potentially manipulated.”); *see also* SCOTT, *supra* note 112, at 1–8.

have been nearly impossible to draw a map of the crazy quilt of parcels across the village, let alone to quantify how much land each family was allocated. Village residents had no need to do so, so this did not present a problem until the state bureaucracy sought to impose a property tax. All of a sudden, it became very important for the state to know exactly which parcels belonged to whom; where they were located; and precisely how much land each family unit had control over. This led to the development of land registration systems that recorded land transfers on deeds, which enabled the tracing of specific parcels to specific owners. In turn, because it was easier to record data about and monitor tax payments from large and contiguous plots of land, this approach to land allocation became prevalent despite the fact that it often made families less productive farmers (because their plot may have had a uniform micro-climate not as suitable to growing the desired variety of crops).¹⁴⁷

In much the same way, SEL laws, combined with assessment frameworks, impose a simplifying set of categories on the complex and nuanced reality of the social lives of schools. Out of the range of possible goals that teachers and students might have for their shared social life, the ISBE standards select three, each of which is elaborated by four individual standards at most.¹⁴⁸ Out of a broad set of normative values that might be inculcated in the after-school hours—such as, in the anecdote that opened this Note, helping elderly relatives or spending time with family—SEL interventions select and measure a narrow subset, such as completing homework. SEL assessments are similarly likely to collect data on a relatively small subset of the infinite range of social and emotional affordances of schooling; policymakers, because they cannot possibly develop intimate personal knowledge of the social life of every school within their purview, will necessarily rely on this narrow data set in exercising control over schools. And this narrow set of affordances about which data is collected will, in turn, narrow the range of social and emotional interactions and behaviors that is desirable or permissible in school—a form of teaching to the test.¹⁴⁹

The processes of rationalization inherent in “seeing like a state” mean that actors at different levels of scale have different interests which emerge from their vantage points rather than their political priors. With regard to SEL in particular, policymakers see the “things that can be counted and measured from afar” whereas those on the ground in schools “may know

¹⁴⁷ This paragraph summarizes SCOTT, *supra* note 112, at 39–47 (discussing one case study of cadastral mapping).

¹⁴⁸ See *supra* Section I.B.

¹⁴⁹ See MEHTA, *supra* note 10, at 116–17.

little to nothing about the school landscape as a whole, but they know much, including much that is not easily measured, about the schools in which they sit.”¹⁵⁰ The shift to “SEL enforcement,” rooted in quantitative and scalable practices of assessment, primarily serves and necessarily privileges the interests of those at a distance from schools—state-level legislators and bureaucrats, and perhaps district administrators—over those of the teachers, students, and families in individual public schools on a day-to-day basis.

Of course, it is possible to agree with every point made in this Note but nonetheless conclude that implementing SEL policies from the top down is better than not doing it at all. But given the range of educational approaches in this country, such a conclusion seems premature at best. At minimum, policymakers should consider the arguments against SEL presented here far more carefully than they have until now before deciding so emphatically in favor of this strategy.

B. State Power and Parental Rights

The process of state rationalization of the social and emotional dimensions of schooling through the lens of SEL has not only *channeled* state power over public education toward greater standardization and control of these dimensions but has *expanded* the reach of this power. This expansion has not been into a void. Instead, it bumps up against the private domain of family life that has historically been constitutionally protected against state incursion by the parental rights doctrine. This Section begins by using Mehta’s theory of jurisdictional expansion to show how “seeing like a state” in the SEL context has substantively increased state power; discusses how the parental rights doctrine prohibits this expansion; and makes the normative case for the rehabilitation of parental rights in this racially and socioeconomically fraught context.

The parental rights doctrine holds that parents have the right to make child-rearing decisions independent of state surveillance and control, unless these decisions affirmatively harm the child.¹⁵¹ That is, “[g]overnment gets to set the boundaries at the outer limits of what is acceptable parenting,” but does not get to enforce an ideal vision of parenting no matter how well-intentioned or empirically founded that vision may be.¹⁵² The U.S. Supreme Court has consistently recognized this concept of parental rights as constitutionalized, despite the fact that there is no specific constitutional text in which to ground it.¹⁵³

¹⁵⁰ *Id.* at 30–31.

¹⁵¹ GUGGENHEIM, *supra* note 94, at 36–37.

¹⁵² *Id.*

¹⁵³ *Id.* at 18 (citing numerous cases in discussing parental rights doctrine).

Two cases in particular are the foundation of the parental rights doctrine, and though they are *Lochner*-era cases that might otherwise have been discredited by their bedfellows and the passage of time, they remain good law today, relied on in major decisions as recent as *Obergefell v. Hodges*.¹⁵⁴ These cases are *Meyer v. Nebraska* and *Pierce v. Society of Sisters*.¹⁵⁵ Together, they establish that family life is a private realm, not to be interfered in by the state without a finding of harm. Both cases protect the rights of minority groups to self-governance and a degree of idiosyncrasy even where the state has good reason for attempting to exercise its *parens patriae* power in a particular way; they connect our core democratic values with the ability and need of families to develop children as they see fit. For Guggenheim, “[t]he legal system’s insistence on private ordering of familial life,” expressed via the parental rights doctrine, “ultimately guards against state control of its citizens”;¹⁵⁶ for Driver, *Meyer* in particular signals that “states could not unilaterally control elementary and secondary education within their jurisdictions,” and cannot infringe on parents’ and students’ civil liberties via the school system.¹⁵⁷

In *Meyer v. Nebraska*, the Supreme Court considered a challenge to a state law that forbade the teaching of foreign languages to students who had not completed the eighth grade. Meyer was a teacher in a Catholic school populated mainly by students of German descent; he continued to teach classes in German even after the statute was passed. Defining the due process liberty interest as

denot[ing] not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men,

¹⁵⁴ *Id.* at 25; JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* 57 (2018) (“It is a testament to how widely accepted these two decisions are that—even though their reliance on substantive due process marks them as part of a notorious era at the Supreme Court—legal thinkers as varied as Judge Robert Bork, Justice William O. Douglas, and Justice Anthony Kennedy have all at various times sought not to dismantle the precedents but instead to place the opinions on sturdier textual foundations Today, rejecting the outcomes in those foundational school opinions, which have become pillars of our modern legal framework, places one well outside the constitutional mainstream.”); see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2590 (2015).

¹⁵⁵ *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

¹⁵⁶ GUGGENHEIM, *supra* note 94, at 27.

¹⁵⁷ DRIVER, *supra* note 154, at 49.

the Court struck down the statute as an impermissible exercise of the state's police power even as it noted that "[p]erhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means."¹⁵⁸

The Court in *Meyer* thus upheld the right of parents to go against the grain of the state. Even though the state may at times have the superior claim to expertise, the Court implied, parents have the autonomy to ignore, contradict, or challenge this epistemological claim due to the nature of their relationship with their children and the primacy of that bond as against the state's interest. The state may infringe upon this autonomy in cases of emergency or where its intervention into parental rights is reasonably related to "some purpose within the competency of the state to effect"—though the Court's finding that the language statute was unconstitutional shows that the reasonableness of such relationship was interpreted strictly.¹⁵⁹

Similarly, in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, the Court struck down an Oregon statute requiring that all students attend public schools, holding that the law "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."¹⁶⁰ But the Court went further than this, holding that "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state."¹⁶¹

The fact that the Illinois SEL laws and standards (and SEL laws and standards generally) are research-backed does not make them impervious to normative or constitutional critique. As *Meyer* and *Pierce* teach, the state may have well-founded reasons for its prescriptions and proscriptions, and it may be better for society, say, to have universal competency in the same language (as in *Meyer*) or to lay the groundwork for social integration by requiring everyone to attend the same public schools (as in *Pierce*). Illinois students may in fact have easier lives if they follow the path that the SEL standards lay out for them—studies show that students with these skills and behaviors are more likely to complete high school, earn higher grades, and attend and complete college, which of course has many attendant benefits.¹⁶² But students and parents are free to differ and are free to claim their right not

¹⁵⁸ *Meyer*, 262 U.S. at 399–401.

¹⁵⁹ *Id.* at 400, 403.

¹⁶⁰ 268 U.S. at 534–35.

¹⁶¹ *Id.* at 535.

¹⁶² NAGAOKA ET AL., *supra* note 7, at 27, 60.

to follow this path. For better or for worse, for example, parents may not feel that it is important for their children to attend college; the children themselves may feel this way too. Under the parental rights doctrine, parents and students are free to disagree with the state's assertion of epistemological superiority in educational decision-making, so long as this disagreement does not overtly cause harm. As Guggenheim observes: "For most parents, the point is less that their choices must be *best* for their children than that they ought not to be *bad* for them. Remarkably enough, this is precisely the constitutional rule in the United States."¹⁶³

But parents who merely have "difficulty promoting the level of social and psychological development their children will need to function well"¹⁶⁴ are not in violation of existing laws, nor are they engaged in the kind of behavior that is typically defined as abusive. Indeed, some parents, like those described in the vignette that opened this Note, may be "deficient" with respect to a school's SEL policies not because they are failing to inculcate positive developmental norms in their children, but because these norms differ from or conflict in implementation with the school's practices. Regardless of *how* one defines the type of harm that would be sufficient to justify state incursion into parental child-rearing prerogatives via SEL law and policy, a definition of harm, and findings that such a definition has been met, are necessary in order to rebalance child-rearing power away from parents and toward the state.

We should be particularly cautious about the possibility that SEL laws will disproportionately infringe on the parental and familial autonomy rights of people whose families are in some way outside of the mainstream—however that term is defined by the jurisdiction implementing these laws—precisely because SEL was designed as a way of conforming such families to the social norms of the school, as discussed in Part I. Annette Appell argues that because the parental rights doctrine offers "relatively determinate and objective standards for creation and dissolution of families," it "protects

¹⁶³ GUGGENHEIM, *supra* note 94, at 48 ("The unfitness rule announced in *Stanley v. Illinois* means that it is wrong to have to prove that a parent has the right to custody of his or her child before showing that the child is in danger of being harmed."); see also *Wisconsin v. Yoder*, 406 U.S. 205 (1972), in which the Court affirmed the right of Amish parents to remove their children from school after completing the eighth grade. Though *Yoder* was decided largely on the grounds that Amish parents' objection to compulsory schooling was a valid exercise of religion, *id.* at 215, the majority echoed themes from earlier cases like *Meyer* and *Pierce*, noting that the goals of education may differ among individuals, families, and communities, and that ways of life outside the mainstream might still be "productive," *id.* at 213–14, 221–25. By contrast, the *Yoder* dissent emphasized that Amish children may choose a way of life different from the one envisioned by their parents, and that the proper analysis is one that does not assume that parental and child interests are aligned. *Id.* at 242 (Douglas, J., dissenting in part).

¹⁶⁴ COMER, SCHOOL POWER, *supra* note 29, at 13; see also *supra* notes 29–35 and accompanying text.

families who are most vulnerable to intervention or dissolution.”¹⁶⁵ She notes that although there has been substantial criticism of this doctrine, “dismantling family privacy while leaving in place the larger political scheme that permits autonomy-limiting income and power disparities will effectively target poor and non-dominant families who already must struggle to maintain their integrity.”¹⁶⁶

Claims about children are always, in some way, claims about adults, by other adults.¹⁶⁷ The legal construct of the child, then, is most productively analyzed in relation to the legal construct of a child’s parents or other caregivers; “[a] young person’s rights ultimately are inseparable from the duties, responsibilities, and . . . rights of the adults upon whom they rely.”¹⁶⁸ Implicit within the claim of the state to reshape the child’s social and emotional self through the process and practice of schooling is the claim that other caregivers are perhaps less suited to do so than is the public school. Indeed, the rhetoric of protecting children’s rights has often been used to serve the interests of some adults over others.¹⁶⁹

The alternative to the parental rights doctrine is a “fiduciary” or “best interests” model, which “treats children’s interests as the principal and casts the parents as fiduciaries who serve those interests.”¹⁷⁰ In this model, “the state fills the role of identifier and promoter of children’s current and future interests, rather than the protector of children.”¹⁷¹ SEL standards, as a means of state intervention into parental child-rearing practices that are deemed less than optimal, are a clear example of the fiduciary model in action. But the fiduciary model is not the relevant constitutional standard.¹⁷² Laws premised on such a model are, therefore, likely unconstitutional.

¹⁶⁵ Appell, *supra* note 19, at 686.

¹⁶⁶ *Id.*

¹⁶⁷ See GUGGENHEIM, *supra* note 94.

¹⁶⁸ GUGGENHEIM, *supra* note 94, at 17.

¹⁶⁹ *Id.* at xi–xiii. Custody determinations in divorce may be the context which readers are most familiar with this standard in practice.

¹⁷⁰ Appell, *supra* note 19, at 716.

¹⁷¹ *Id.*; see also *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (“The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court. . . . [I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).

¹⁷² GUGGENHEIM, *supra* note 94, at 43 (“Said provocatively but accurately, parents are free to raise their children as they see fit even when their choices would be defended by few reputable experts as good for the child so long as the decision cannot be said to be extremely bad for the child. This wide range of parental freedom is not intended to allow parents the opportunity to inflict harm upon their children (so long as it happens to be above the level of *impermissible* harm). But the rule has this consequence. It is for this reason that some children’s rights advocates condemn the parental rights doctrine.”); see also *id.* at 48.

SEL laws represent an expansion of state power into an area traditionally reserved for parents: the ability to shape the values, beliefs, and norms to which children will be exposed. In short, constitutionally, parents have the prerogative to socialize their children as they see fit, which preserves diversity of thought, belief, and practice in our democracy.¹⁷³ Though the state may have good reason to believe that children ought to be raised differently and may seek to use schools as instruments of conformity, it cannot infringe on the parental right of socialization unless the parent's approach does not meet the minimum level of care expected of all parents (i.e., unless the parent is legally abusive, itself a fraught category). Further, to the extent that SEL focuses on families deemed outside the mainstream—working-class families¹⁷⁴ or families of color¹⁷⁵—it is especially important that our constitutional tradition protecting familial autonomy and diversity be upheld regardless of state claims to epistemic superiority.

III. RECOMMENDATIONS FOR THE IMPLEMENTATION AND ENFORCEMENT OF SEL LAWS

The complexity of SEL as a movement and body of research, and the breadth of implementation and enforcement options upon which educators and school administrators may draw, counsel both caution and optimism as Illinois school districts move toward a more robust SEL enforcement paradigm—which in turn is likely to be influential nationwide. Since it is unlikely that SEL laws will be repealed, this Section outlines recommendations for educational decision-makers that attempt to thread the needle of enforcing these laws to provide benefit without doing harm: an enhanced role for parents and students; awareness of the potential for implicit and explicit bias; a tighter coupling of SEL strategies to appropriate normative ends; and a rethinking of the relationship between empirical and normative thinking within the SEL research agenda.

Educators and administrators should articulate and ensure a robust role for parents, students, and the school and broader community in the particularized implementation of SEL policies and practices. As a school develops its general implementation strategies, it can use listening and discussion processes to engage parents and community members, as well as

¹⁷³ *Id.* at 27; *see also* Appell, *supra* note 19, at 761–62, 765–66, 784–85.

¹⁷⁴ *See* ANNETTE LAREAU, *UNEQUAL CHILDHOODS: CLASS, RACE, AND FAMILY LIFE* (2003) (showing that working-class and middle-class families differ in their attitudes toward though not necessarily prioritization of schooling and child-rearing, and that working-class families are often marginalized at school as a result).

¹⁷⁵ *See* COMER, *SCHOOL POWER*, *supra* note 29; COMER, *WHAT I LEARNED IN SCHOOL*, *supra* note 29.

students in an age-appropriate manner, in answering the normative questions, such as: What kinds of life outcomes constitute “success”? What values are most important and why? What is the right balance of authority and responsibility among parents, students, and the school in making normative child-rearing decisions?

When educators feel the need to bring SEL strategies to bear more heavily and concretely on particular students, as in a CPS MTSS escalation¹⁷⁶ or in behavioral health, disciplinary, or special education determinations, the student and parent should be engaged in a consultative process similar to the way in which IEPs are developed,¹⁷⁷ where all parties can outline and come to consensus on normative goals for the child.¹⁷⁸ With rare exception (e.g., if the school suspects abuse), the student and parent should be able to determine the normative goals, with the school providing technical expertise on the particular SEL mechanisms and strategies that would best help the student to achieve those normative goals. Such a parent–school partnership would have foreclosed the type of conflict detailed in the anecdote that opened this Note: the school would have been aware of families’ priorities and practices and would not have jumped to the conclusion that the students were lacking in discipline or work ethic. Rather, the teacher would have been able to reach out to the parents immediately to come up with a workable homework solution. Alternatively, the parents may not have been responsive to communication, or be interested in developing a partnership with their children’s teacher and school around normative goal-setting. Under the paradigm advocated herein, this is a risk—the trade-off of increased latitude and respect for familial privacy—and one that the school will not be able to address unless parents’ lack of interest rises to the level of abusive neglect. However, this risk seems unlikely in most cases to come to pass if schools and teachers are diligent in relationship-building.

Educators and administrators should also become aware of the potential for both implicit and explicit bias inherent in the broad discretion that the Illinois SEL laws and standards afford to school officials. Because the risk of bias in SEL implementation is strongest with respect to disciplinary action and special education decision-making,¹⁷⁹ educators and school

¹⁷⁶ See CPS, *supra* note 103.

¹⁷⁷ See OFFICE OF SPECIAL EDUC. & REHAB. SERVS., *supra* note 118.

¹⁷⁸ The model I advocate is fully consistent with Comer’s original vision, which rested on deep and sustained parent involvement in school management and school improvement programs. See COMER, SCHOOL POWER, *supra* note 29, at 70, 126, 243–44. Comer also noted that school staff and administrators are often reluctant to welcome parents as equal partners in decision-making, *see id.* at 232–33, 243–44, and may disdain the contributions they are able to make. *Id.* at 126.

¹⁷⁹ See Sarah E. Redfield & Jason P. Nance, *American Bar Association: Joint Task Force on Reversing the School-to-Prison Pipeline*, 47 U. MEM. L. REV. 1 (2016); Simson, *supra* note 92.

administrators should receive targeted training on how to reduce the role of implicit bias in such subjectivized determinations. For example, in the anecdote that opened this Note, was implicit bias at play in the characterization of Mexican-American students as lacking discipline and drive? One can imagine that the Milwaukee students may have been alienated by the teacher's approach to the situation. Furthermore, schools and districts should keep student-level data on SEL-based escalations—for example, CPS could do this with regard to its MTSS interventions—and regularly audit this data to determine if any patterns that might indicate bias or disparate impact are emerging.

Education administrators should ensure that SEL strategies are tightly cabined to normative objectives that are clearly within the permissible exercise of state power over education. For example, the state has a well-established legitimate interest in ensuring that students attain a level of mastery over the academic curriculum, so SEL strategies that train students in “academic readiness skills” like focus, perseverance, and time management¹⁸⁰ are clearly tailored to achieve this permissible end. By contrast, SEL curricula that are more loosely moralistic¹⁸¹ may begin to stray into a normative realm that is more properly the purview of the child and family, or at minimum may invite normative alignment among child, family, and school before implementation.

Researchers in core-SEL and SEL-adjacent fields should consider three shifts to the overall research agenda to generate a more pluralistic and holistic empirical knowledge base for educators, administrators, and policymakers. First, SEL researchers should commit to a holistic vision of SEL that seeks to support the development of all children, not just children whose upbringing has been deemed lacking in some respect. In education-speak, SEL research should conclusively shift from a deficiency model to a strengths-based model.¹⁸² The field has, in general, been moving toward such a model in recent years, with much empirically robust work in this vein.¹⁸³ Thus, it would be neither difficult nor, likely, particularly controversial to consummate such a shift.

Second, researchers should more clearly parse out empirical from normative claims. In much SEL research, normative claims go unmarked—for example, casual references to “successful life outcomes” or “responsible

¹⁸⁰ See, e.g., NAGAOKA ET AL., *supra* note 7, at 27, 60.

¹⁸¹ See, e.g., *Focus on Character*, KNOWLEDGE IS POWER PROGRAM (KIPP), <http://www.kipp.org/approach/character> [<https://perma.cc/8FSZ-DZPQ>].

¹⁸² See Harry & Klingner, *supra* note 80.

¹⁸³ See, e.g., JONES & KAHN, *supra* note 9.

decision-making.”¹⁸⁴ Scholars should be aware of such normative claims, should specify them—for example, in what might successful life outcomes consist?—and should justify them, by reference to political consensus, philosophical traditions, and theories of education, for example.

Third, researchers should undertake studies which are designed to surface a variety of stakeholder perspectives on SEL and the normative ends to which SEL techniques should be put. For example, interview- and ethnography-based studies would bring parent and student normative perspectives to the fore, adding these critically important voices to the conversation. Community-engaged research design would also be promising, empowering students, families, and members of local school communities to articulate their own understandings of human social and emotional development and opening up new avenues for new school–community and school–family collaboration in supporting students’ social and emotional learning.

These knowledge-generating initiatives would lay the foundation for a more rigorous academic and public debate around which normative ends are desirable and why, and which means, can and should be used to achieve such ends.

CONCLUSION

It is inevitable that children’s educational experiences will shape them in ways that go beyond their cognitive or academic skills. Indeed, nearly every human interaction could be said to have social and emotional dimensions. Schooling, then, will have a formative social and emotional effect on children whether or not there is a law in place mandating a particular scheme for doing so. It is precisely because this effect is inevitable that we should be cautious and intentional in considering the ramifications of any scheme that any actor in the system might want to implement.

The formalization of SEL as law invites a new set of questions not only for the field of SEL, but for education law and policymaking more broadly. The field of education enjoys a robust dialogue among researchers, practitioners, and decision-makers. It is a field where research has a substantial real-world effect, often via the mechanism of lawmaking (both legislative and decisional).¹⁸⁵ Because the translation from research to law is

¹⁸⁴ *Id.*

¹⁸⁵ With respect to decisional lawmaking on education, consider in particular *Brown*, which is often cited for being an equality case that rests on social science evidence. It is worth thinking about whether the substantive role that *education*, specifically, played in the case opened the door for this kind of evidence to be credible. That is, is education particularly susceptible to lawmaking that is justified on blended empirical and normative grounds?

so often possible in education, it has become too easy simply to identify empirically robust findings and suggest that they become legally mandated, without considering the different valences, incentives, and epistemological claims of research, policy, and law.

Researchers, ideally, know more than other kinds of people about their topic of expertise. SEL experts can claim superior knowledge about the processes and mechanisms of children's social and emotional development and can provide validated strategies that will likely work in inculcating particular life outcomes in students. It is certainly reasonable for lawmakers to rely on the best information available in deciding how to run a public education system. But this transition from knowledge to law invites the question of whether a claim to epistemic superiority necessarily translates into a superior right and responsibility to make certain decisions. Under the law, it often does not. The Supreme Court has held that child-rearing is a fundamental right that inheres in parents unless the state can prove some kind of harm or unfitness; the mere epistemic superiority of another entity with regard to child-rearing practices is not enough to abrogate this right.

As applied to SEL, it seems plausible that school officials often know more about processes of student social and emotional development than parents and students might. However, our jurisprudential tradition provides that parents and students themselves have the right to substantial, though not unbounded, decision-making power in this arena. This right is not based on claims to epistemic competence but rather on fundamental ideas about the role of autonomy in a democratic polity. As the Supreme Court noted in *Bellotti v. Baird*, the “affirmative process of teaching, guiding, and inspiring by precept and example is essential to the growth of young people into mature, socially responsible citizens. We have believed in this country that this process, in large part, is beyond the competence of impersonal political institutions. Indeed, affirmative sponsorship of particular ethical, religious, or political beliefs is something we expect the State *not* to attempt in a society constitutionally committed to the ideal of individual liberty and freedom of choice.”¹⁸⁶

In the SEL context, autonomy and equality interests are potentially in fundamental tension. Put another way, individual (largely parental) interests in equality of treatment during the process of schooling are not entirely aligned with potential individual (largely student) and state interests in equality of long-term life outcomes. SEL invites us to consider whether and under what conditions the latter interests might win out over the former, and whether epistemic claims may permissibly put a thumb on the scale. This

¹⁸⁶ 443 U.S. 622, 638 (1979).

framework may be productively applied to many other areas of political concern—consider not only other areas of education policy, but also, for example, public health, safety regulation, and other areas where claims of expertise may lead to arguments for control.

This connection between expertise and increased state control is not *per se* a bad thing. In fact, this mechanism has been responsible for huge improvements in American life over the past century or more: consider, for example, food inspection, clean water, product safety, and the near eradication of many infectious diseases. However, the political case for this tradeoff should be made transparently, and citizens, especially those most closely affected, should have a voice in determining the normative ends to which this technical expertise is put. In short, the empirical argument for translating knowledge into law should be accompanied by a normative argument about why such a translation is not only permissible but also beneficial. In many circumstances that normative argument will be convincing. In others it may not.

In Illinois, and likely in many other states where SEL laws have been passed, that normative argument has not been fully aired even though the empirical argument has been well established. School officials can take the simple step of engaging parents and students in conversations around the outcomes they hope to garner from their education. In the process, educators can provide families with additional information about SEL and its potential benefits, using the tools of persuasion to align parent, student, and school interests; in turn, schools will learn what matters to the constituents they serve and be able to adjust the education they provide accordingly. Many schools are likely already doing this—the best-case scenario for SEL implementation and enforcement is a positive one. These schools can serve as models to others so that SEL enforcement does not take the form of the worst-case hypotheticals outlined here.

But such familial engagement needs to go beyond what leaders in the SEL movement currently recommend. Though CASEL highlights the importance of school–family partnerships in SEL implementation, its “[s]uggested practices . . . include informing families of the SEL program’s goals and how these are implemented, defining clear roles for parents regarding how they can reinforce socio-emotional competencies at home, and having parents be active participants in planning and implementing SEL activities at school.”¹⁸⁷ This vision is one in which the school sets the terms for families, rather than one in which familial normative perspectives are afforded the opportunity to change, complement, or critique what the school

¹⁸⁷ Gordon et al., *supra* note 59, at 70.

offers. Instead, I advocate a more egalitarian dialogue between school officials and families, with particular attention to and respect for the needs and values of low-income families and families of color, who may be especially susceptible to normative intrusion.¹⁸⁸ Such a partnership between schools and families was in fact advocated by James Comer, the founder of the SEL movement.¹⁸⁹

Another seminal education law case, *West Virginia State Board of Education v. Barnette*, teaches that “[w]e can have intellectual individualism and the rich cultural diversities that we owe to exceptional minds only at the price of occasional eccentricity and abnormal attitudes. When they are so harmless to others or to the State as those we deal with here, the price is not too great. But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.”¹⁹⁰

The SEL movement, in law and practice, invites a searching inquiry into the substance and boundaries of the intellectual and cultural freedom that *Barnette* suggests is a cornerstone of our democracy—for students themselves as well as for their parents. “Properly understood, . . . the tradition of parental authority is not inconsistent with our tradition of individual liberty; rather, the former is one of the basic presuppositions of the latter.”¹⁹¹ Decades of research has shown that students’ social and emotional development matters tremendously. This is precisely why we must be so careful.

¹⁸⁸ Appell, *supra* note 19, at 766–79 (“[F]amily privacy is elusive for many mothers and children. Some women must overcome significant financial and social barriers to becoming and being mothers. Some do not meet dominant norms of motherhood because they are poor, non-White, not married, or otherwise fail to resemble mothers. Their experience of public life is not particularly welcome or helpful. On the contrary, it exposes families to further intervention and ultimate dissolution.”).

¹⁸⁹ COMER, SCHOOL POWER, *supra* note 29, at 243.

¹⁹⁰ 319 U.S. 624, 641–42 (1943).

¹⁹¹ *Bellotti*, 443 U.S. at 638.

