

## Equity or Dworkin's Egalitarianism:

### Principles that Incorporate Policies Versus Principles that Stand on Their Own

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Ronald Dworkin contended that the process of judicial interpretation in the United States and the United Kingdom is and should be regulated by egalitarian principles that are partially constitutive of the law. While he also referred to policies, principles, in the form of legal rights, trump legal policies in situations of conflict. The sharp differentiation Dworkin drew between principle and policy derived from the inability of (his) interpretative theory to examine the outcomes of legal decisions social scientifically. In consequence, in a fashion analogous to interpretative theories in the social sciences and humanities, a discussion of social practices, social policies, and their consequences dropped from his theoretical agenda.

In contrast, I develop the rudiments of a theory of judicial activity that maintains the autonomy of principles, while recognizing that their very meaning is dependent on the consequences of their implementation. While principles retain their deontological status, they are necessarily integrated with their policy consequences, if only to clarify their meaning. It is crucial to remember that if law is constituted as a set of legal norms, it is also a form of social action and that the two are not always congruent; this simple insight will turn out to be helpful in selecting the legal principles that we should endeavor to implement.

To make my argument manageable within the context of this paper, I contrast Dworkin's notion of equality, which is essentially procedural, with an image of equity that merges formal and substantive claims, recognizes that the implementation of egalitarian norms may accentuate inequality, and mandates actions to enhance substantively egalitarian outcomes. I contend that while Dworkin's image of law as integrity is capable of understanding (making coherent) and normatively justifying the movement from *Plessy v. Ferguson*<sup>1</sup> to *Brown v. Board of Education*,<sup>2</sup> it cannot explain and justify systematically the further development manifest in *Griggs v. Duke Power Co.*<sup>3</sup> While *Brown* enunciated a procedural model of equality that might be understood solely at the level of doctrine, *Griggs* began the process of enunciating a substantive (and procedural) model of equity (in the disparate impact doctrine) that requires an examination of the specifics of each case, an evaluation of legal principles in terms of their consequences, and thus the articulation of equitable principles, which take into account the socially-structured positions of actors and the potentially differential consequences for them of a procedurally-rational and universalistic policy. In an equitable jurisprudence, principles, procedures, and substantive outcomes are united doctrinally as the gap between formal and substantive rationality is closed.

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1 163 U.S. 537 (1896).

2 347 U.S. 483 (1954).

3 401 U.S. 424 (1971). Dworkin does endeavor to justify *Griggs*; see *Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution* (1996), ch. 6.

## I. Law as Articulated Principle

Dworkin’s jurisprudence is best understood as an attempt to justify his contention that the Supreme Court’s 1954 decision in *Brown v. Board of Education* declared what was law instead of articulating new law.<sup>4</sup> If past Supreme Court decisions indicated that “separate, but equal” segregation of the races was “legal,” in what sense did Dworkin argue that the *Brown* decision declared that the “law,” properly understood, barred segregated schooling? Dworkin contended that courts interpret the Constitution, statutes, and past court decisions constructively; courts “show legal practice as a whole in its best light, to achieve equilibrium between legal practice as they find it and the best justification of that practice.”<sup>5</sup> Courts extract from past legal practices the principles, the legal obligations, which make them coherent and, at the same time, provide the best justification for them. Rights and responsibilities flow from past decisions; they count as legal not only when they are stated explicitly in those decisions, but also when they follow from principles of morality that the “decisions presuppose by way of justification.”<sup>6</sup> Such interpretative arguments, when applied to the equal protection clause of the 14th Amendment, lead Dworkin to the conclusion that the Constitution, as a matter of law, prohibits racial segregation;<sup>7</sup> thus the Warren Court, in adjudicating *Brown*, simply declared the law.

There are several important contentions implicit in this argument. First, it constitutes the law in terms of legal values<sup>8</sup> while, at the same time, contending that those values legitimate the law. Dworkin’s jurisprudence integrates a descriptive with a normative argument. Second, policies, questions of social welfare, are trumped by the legal principles that underlie legal rights; policies have no legitimating force.<sup>9</sup> Third, Dworkin’s argument depends on an interpretation that makes the law a coherent whole. As such, his understanding may read out of the law cases and statutes inconsistent with the principles that make the law the best that it can be. Mistakes, according to Dworkin, do happen; we must recognize them for what they are: errors in judgment with no legal force. Fourth, Dworkin presumed that the moral values that evaluate when the law is the best it can be are implicit in the law of the United States and the United Kingdom. The tension others find between what is and what ought to be is largely absent in Dworkin’s discussions.

### A. Legal Values are the Law

Many images of the law convey the expectation that law is found in the plain text of the Constitution, statutes or judicial decisions – that legal rules may be read more or less transparently from these texts. In contrast, law as integrity, Dworkin’s theory, also regards as law the principles that constitute the best legitimation of these past decisions.<sup>10</sup> Dworkin made

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4 Dworkin’s focus was, of course, broader than *Brown*, but *Brown* is exemplary. *Roland Dworkin, Law’s Empire* (1986), pp. 6, 30, 262.

5 *Ibid.*, p. 90.

6 *Ibid.*, p. 96.

7 *Ibid.*, p. 30.

8 Social values define what is morally obligatory and desirable for a system as a whole and, ideally, for all of its members, not what is desired, preferred, by individuals.

9 A partial exception is found when courts interpret statutes.

10 *Ronald Dworkin, A Matter of Principle* (1985), p. 71; *Dworkin* (n. 4), pp. 119–120.

the force of this contention clear when he commented that a conventionalist judge “could say that when explicit convention runs out, people have a moral right to what law as integrity claims as their legal rights. Then he would decide difficult lawsuits exactly as his integrity-minded brethren do.”<sup>11</sup>

Integrity demands that the law be seen as expressive of a single, coherent scheme of justice and fairness. In light of this ideal, judges may depart from a narrow interpretation of past decisions to manifest fidelity to more fundamental principles regulative of the law as a whole.<sup>12</sup> If legal principles function as law, if the standards that may be derived from legal principles function as legal rules, then law expands organically as these principles are applied in new circumstances.<sup>13</sup> A citizen’s political obligation is not to her community’s discrete political decisions, but rather to the set of value-orientations that provide the best interpretation of those decisions.<sup>14</sup>

Dworkin believed that law in the United States is constituted by an abstract egalitarian principle, requiring that citizens be treated as equals, with equal care and concern.<sup>15</sup> This egalitarian value serves as the standard of consistency, characterizing for Dworkin justice, fairness, and procedural due process.<sup>16</sup> Making the law the best that it can be inheres in it interpretation when regulated by the egalitarian principle.<sup>17</sup> A judge tests her interpretation of any part of the law by asking whether it could form part of a coherent moral theory legitimating the law as a whole.<sup>18</sup> According to Dworkin, a successful interpretation both fits the law and legitimates the judge’s decision.<sup>19</sup>

## B. Principles and Policies

According to Dworkin, jurisprudential questions are, at their core, issues of moral principle.<sup>20</sup> Principles should be observed, Dworkin believed, because they enunciate requirements of justice, fairness or some other moral obligation.<sup>21</sup> Policies, conversely, set out goals to be reached communally.<sup>22</sup> In contrast to the individual rights that a government recognizes as a matter of principle, policies constitute collective, governmental strategies used to secure the general interest. In general, rights trump policies.<sup>23</sup>

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11 *Dworkin* (n. 4), p. 135. This contention blurs, as much of Dworkin’s argument blurs, the distinction between legal values and more general societal values. For Dworkin’s understanding of the distinction between morality and law (i.e., legal values); see *Dworkin* (n. 4), p. 97. See also his later work where he advocated more overtly a moral reading of the law: *Dworkin* (n. 3), *Ronald Dworkin, The Moral Reading of the Constitution*, New York Review of Books 43:50 (1996); *Ronald Dworkin, Justice in Robes* (2006); *Ronald Dworkin, Justice for Hedgehogs* (2011).

12 *Dworkin* (n. 4), p. 219. This is, of course, what happened in *Brown*; see *Dworkin* (n. 4), p. 221.

13 *Ibid.*, pp. 188–189.

14 *Ibid.*, pp. 190, 217.

15 *Ronald Dworkin, Taking Rights Seriously* (1978 [1977]), pp. xii, 273.

16 Dworkin provided terse characterizations of justice, fairness and procedural due process at *Dworkin* (n. 4), pp. 404–405.

17 *Ibid.*, p. 381. Law as integrity is, in principle, consistent with any set of moral value orientations (*Dworkin* [n. 4], p. 239). Dworkin argued that the correct interpretation of law in the United States and the United Kingdom requires its articulation in terms of egalitarian values. See *Roland Dworkin, Sovereign Virtue: The Theory and Practice of Equality* (2000).

18 *Dworkin* (n. 4), p. 245.

Arguments of policy warrant legal decisions by showing them to advance some collective goal; arguments of principle legitimate legal decisions by showing them to respect or secure some individual or group right,<sup>24</sup> by showing them to be consistent with legal values.<sup>25</sup> While policy decisions should represent the interests of citizens,<sup>26</sup> principles and rights define moral obligations that regulate the legitimacy of political interests.<sup>27</sup> In constitutional and common-law cases, judges must make their decisions on grounds of principle, not policy.<sup>28</sup> In interpreting statutes, matters of policy are relevant in the determination of which rights the statute is understood to have created.<sup>29</sup>

Principles exist autonomously from rules;<sup>30</sup> they validate – make binding – rules.<sup>31</sup> In contrast to Hart, who finds legal obligations only for (constituted) rules generated from within (constitutive) secondary rules (legal procedures), Dworkin emphasized the derivation of primary rules from principles.<sup>32</sup> In the absence of a commonly recognized set of procedures validating legal rules, Dworkin found no clear distinction between legal and moral principles.<sup>33</sup>

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19 *Dworkin* (n. 4), p. 285; *Dworkin* (n. 3), p. 38. Dworkin’s contention was somewhat contradictory. In one voice, he suggested that his argument tracked the Constitution (legislation and common law) (*Dworkin* [n. 4], pp. 397–398); in a second voice, he recognized that interpretation begins from some Archimedian point of moral principle that exists outside the law (*Roland Dworkin*, *Foundations of Liberal Equality*, in: Grethe B. Peterson [ed.], *The Tanner Lectures On Human Values XI* [1990], 1–119, p. 34). This ambivalence is played out in Dworkin’s discussion of the possibility of making the law purer and in his characterization of the distinction between inclusive and pure integrity (*Roland Dworkin*, “Natural” Law Revisited, *Florida Law Review* 34 [1982], 165–188, p. 187; *Dworkin* [n. 4], pp. 400ff). See below, pp. 13ff.

A related ambiguity in his discussion concerns the place of personal convictions in, most especially, constitutional interpretation. Dworkin has emphasized that judges ought not to read their own moral convictions into the Constitution (*Dworkin* [n. 3], pp. 2, 10; see also *Dworkin* [n. 19 1982], p. 186). He noted, for example, that law as integrity reaches conclusions that run contrary to his own commitment to equality of resources (*Dworkin* [n. 3], pp. 11, 36). He nonetheless emphasized that personal convictions are integral to every judge’s determination of the principles she finds in the Constitution (pp. 2–4, 11, 36–37). (Earlier discussions of the same and related points, including the role of public values in judicial decision making, include *Dworkin* (n. 15), pp. 118, 123, 128; *Dworkin* (n. 19 1982), pp. 177–178; *Dworkin* (n. 10), pp. 327–328; *Dworkin* (n. 4), pp. viii–ix, 75, 86, 123, 179, 219, 231, 239, 249, 256–262, 397.)

20 *Dworkin* (n. 15), p. 7.

21 *Ibid.*, pp. 22, 90, 147.

22 *Ibid.*, pp. 22, 90.

23 *Ibid.*, pp. xi, 92, 138–139, 146; *Dworkin* (n. 4), p. 381.

24 *Dworkin* (n. 15), p. 82.

25 *Ibid.*, p. 118, 123, 128.

26 *Ibid.*, p. 85.

27 *Ibid.*, p. 87.

28 *Ibid.*; *Dworkin* (n. 10), p. 69; *Dworkin* (n. 4), p. 244; *Roland Dworkin*, *What is Equality? Part 4: Political Equality*, *University of San Francisco Law Review* 22 (1987), 1–30, pp.29–30.

29 *Dworkin* (n. 10), p. 327; *Dworkin* (n. 4), p. 447, n. 1.

30 *Dworkin* (n. 15), p. 40.

31 *Ibid.*, pp. 38, 43.

32 For a discussion of the relationship between procedural justification and value legitimation, see *Mark Gould*, *Legitimation and Justification: The Logic of Moral and Contractual Solidarity in Weber and Durkheim*, in: Ben Agger (ed.), *Current Perspectives in Social Theory* (1993), 205–225; *Herbert L. A. Hart*, *The Concept of Law*, (1965 [1961]); *Dworkin* (n. 19 1982), p. 178.

33 *Dworkin* (n. 15), p. 46. Cf. Dworkin’s discussion of the distinction between background and institutional, and abstract and concrete, rights *Dworkin* (n. 15), pp. 93ff., 126–128.

### C. Mistakes

Imagine yourself sitting in a linguistics class at MIT. A student proposes a model of English syntax for the class. Others in the class try to demolish it by showing it incapable of modeling some English sentence. So far the model has withstood all criticisms. Someone in the front row stands and proposes the following sentence: “The dog cow ate what yes.” He contends that the proposed model is invalid because it cannot generate his sentence. Everyone stares at him until someone explains that his proposal is not an acceptable English sentence. Others in the room nod their heads. Native speakers of English know that the proposed sentence is not grammatically correct. It is not a valid exception to the proposed rule.

Another student proposes a well-formed English sentence. All acknowledge its inconsistency with the proposed model and the student who originated the model goes back to the drawing board, hoping to modify her suggestion to account for this counter-example.

Now imagine yourself in an English Literature class discussing a poem by Yeats. A student proposes a model of the poem and others test the model by examining portions of the poem to determine if they are consistent with the proposed model. One student suggests that the simile in line 10 seems inconsistent, and the student who proposed the model concedes that that image is irreconcilable with her model of the logic of the poem. She argues, however, that it is an exception, a “mistake,” and that her model cannot be expected to cover the entire poem, as most poems, even great ones, contain images irreconcilable with their logic. Another student points to a second inconsistency, and once again the response is that even if this image is incongruous with the proposed model, it is also an aberration. Finally, after most of the poem has been labeled incompatible with the model, the students recognize that the standard for labeling images exceptions, mistakes, is the same model proposed as a characterization of the poem. Textual exceptions to the model appear incapable of refuting it, as the model characterizes them, by definition, as mistakes. There is no tacitly known independent criterion, separate from the proposed model, of a poem’s structure, and there appears to be no metric determining how many mistakes are needed to refute the logic of the proposed model.<sup>34</sup> The students appear to have been arguing in a circle. Even so, no one is willing to contend that there are no inconsistencies in poems, even in great poems. How are the students to proceed?

These two highly stylized examples point to a significant problem in Dworkin’s argument. His theory of interpretation depends on his ability to make the law a coherent whole, to make the law consistent and intelligible in light of a set of legal principles, but he acknowledges, as he must acknowledge, that there are mistakes in the law,<sup>35</sup> e.g., common-law cases that are inconsistent with those principles.<sup>36</sup> Sometimes he wrote as if these mistakes were transparent, as if we did have a tacit knowledge of the logic of the law, comparable to our tacit knowledge of our native language, which would provide an independent criterion assessing the veracity of a particular construction of legal principles from within a “law as

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34 For some types of model there may justifiably be more exceptional than conforming cases. If, for example, the model attempts to capture a tendency within a social structure or cultural system, that tendency may be predominant, it may control the development of the system, without being descriptively dominant of the units in the system. Cf., *Mark Gould*, *Revolution in the Development of Capitalism: The Coming of the English Revolution* (1987) pp. 113–118; *Karl Marx*, *Capital* (1981); *Max Weber*, *The Protestant Ethic and the Spirit of Capitalism* (1958 [1904–1905]); *Dworkin* (n. 4), p. 247.

35 *Dworkin* (n. 19 1982), p. 1983; *Dworkin* (n. 4), p. 99.

36 *Dworkin* (n. 15), p. 119.

integrity” framework. In truth, Dworkin never provided us and indeed could not provide us with any such independent criterion;<sup>37</sup> mistakes are deviations from Dworkin’s proposed model of the law, the very model that defines the law as coherent. Many of his arguments are, in other words, tautologies.<sup>38</sup>

Dworkin attempted to address this problem in two ways. While neither is satisfactory, the second points to a resolution of the conundrum. The first suggests that mistakes are either regretted within the relevant branch of the legal profession or unfair in light of principles of political morality.<sup>39</sup> Neither of these is satisfactory because, in Dworkin’s theory, principles have no legal authority unless they constitute the law. Legal principles are enunciated in an attempt to construct a consistent interpretation of the law; repentance is defined in regard to those principles.<sup>40</sup> This recreates the problem of a tautologous argument.

His more successful strategy draws on the image of a chain novel.<sup>41</sup> Imagine a set of authors, each asked to write a chapter of a book.<sup>42</sup> One is selected to begin the book and each of the others writes a chapter that continues the story. Each has the responsibility to both maintain continuity and to extend the text in new directions. If the novel is to be coherent, each chapter must be consistent with those that preceded it. If the novel is to be illuminating, each writer must work creatively within the framework the earlier authors have bequeathed her.

Roland Barthes provides a theoretical discussion of this process as a form of criticism when he distinguishes between “readerly” (or classic) and “writerly” texts.<sup>43</sup> The former are texts we study passively, historically; the latter are texts where evaluation is linked to practice, texts that we continue in our own writing (or are continued in the contemporary period in the writing of others). In earlier work, I have developed this argument by suggesting that our capacity to interpret a text successfully is dependent on our ability to extend the text in our own work.<sup>44</sup> Put a bit differently, this suggests that the third author’s understanding of the first two chapters is manifest in her own chapter, in her extension of the text while main-

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37 He cannot provide us with such an independent criterion because to do so would regress into a form of “conventionalism,” a contention that the meaning of the Constitution, statutes and common-law decisions was transparent and not in need of interpretation. The core element of his theory is a refutation of this contention.

38 A few of the more blatant instances of such tautologous arguments are found at *Dworkin* (n. 15), pp. 35–36, 92, 99, 122–123; *Dworkin* (n. 19 1982), p. 182; *Dworkin* (n. 4), pp. 91, 247.

39 *Dworkin* (n. 15), pp. 122–123.

40 Dworkin recognized independent bases for moral principles and wrote extensively to articulate and defend them (*Ronald Dworkin, What Is Equity? Part 1: Equality of Welfare, Philosophy and Public Affairs* 10 [1981a], 185–246; *Ronald Dworkin, What Is Equality? Part 2: Equality of Resources, Philosophy and Public Affairs* 10 [1981b], 283–345; *Ronald Dworkin, What Is Equality? Part 3: The Place of Liberty, Iowa Law Journal* [1988], 1–54; *Dworkin* [n. 19 1990]; the first two are reprinted in *Dworkin* [n. 17]). He, nonetheless, refused to accord them legal validity unless they are embedded in the law (*Dworkin* [n. 4], p. 404; *Dworkin* [n. 3], p. 11).

41 *Dworkin* (n. 19 1982), pp. 166–168; *Dworkin* (n. 4), pp. 228ff.

42 For an example, see *Loren D. Estleman, Ed Gorman, W. R. Philbrick, Robert J. Randisi, L. J. Washburn, The Black Moon* (1989).

43 *Roland Barthes, S/Z* (1974 [1970]), pp. 3–4.

44 *Mark Gould, Voluntarism versus Utilitarianism: A Critique of Camic’s History of Ideas, Theory, Culture and Society* 6 (1989), 637–654; *Mark Gould, The Structure of Social Action: At Least Sixty Years Ahead Of Its Time*, in: *Roland Robertson and Bryan S. Turner (eds.), Talcott Parson: Theorist of Modernity* (1991), 85–107.

taining its consistency. Extending the text entails a selective process whereby certain portions of what preceded are defined as “mistakes”; the warrant for this process is the integrity of the text as extended. In other words, the meaning of what preceded is partially defined by its extension; the extension is included in what must be understood as coherent.

In this image of “integrity,” the principles extracted from a text are not necessarily descriptive of all units of that text. They are not generalizations of components of the text that might be described phenomenologically. Instead they are constituted as tendencies of development. Marx, for example, retains the Hegelian “notion” in his analyses of each stage, structure, of social development. His characterizations of these stages are tendential, and the primary way to determine whether the analysis of a stage is empirically acceptable is to focus on this tendency.<sup>45</sup>

Dworkin expressed a similar insight concerning the relationship between precedent and fairness, recognizing that “fairness fixes on institutional history, not just as history but as a political program that the government proposed to continue into the future.”<sup>46</sup> Missing from this comment, however, is any set of criteria for the integration of political principles and political programs. Later in the essay, I argue that it is ultimately this integration that diminishes the arbitrary nature of interpretation, even when constituted as a tendential analysis, but only by integrating understanding with social action and interpretation with social science.<sup>47</sup>

#### D. Normative and Descriptive Analyses

Dworkin attempted to rebut the contention that law as integrity is incapable of purifying the law. If, a critic might argue, actual law consists in the principles that provide the best justification for the law as a whole, does this not imply that there is no room in law as integrity to make the law purer than it already is? If the law may be made more coherent, the critic might continue, is not this more coherent system the actual, current law?<sup>48</sup> Dworkin’s response suggested that there are specific institutional constraints on judges that preclude their inserting into the law principles that would provide the most coherent account of the substantive decisions of judicial practice.<sup>49</sup>

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45 One problem with this type of analysis – focusing on one structural model of principle – involves the necessity of differentiating between tendencies and counter-tendencies. The counter-tendencies may, in certain historical conjunctures, be more powerful than the predominant tendencies. Thus, extensions of law may pollute the law. In such cases and especially when looking at contemporary materials, it is very difficult to distinguish between a moral argument – this tendency ought to predominate – and an empirical argument – this tendency is predominant.

Within the context of an historical analysis, it may be easier to determine if a structure is predominant, if it constitutes tendencies that generate a transition to another stage of social development. By linking a structural model to a functional theory of disorder, one may demonstrate the structure’s presence through an explanation of a set of variables that result from its predominance. In *Revolution in the Development of Capitalism I* provide this type of a structural model for the pre-revolutionary social formation in 17th century England, demonstrating that it is responsible for the genesis of key variables explaining the central phase of the Revolution (Mark Gould, Prolegomena to Any Future Theory of Societal Crisis, in: Jeffrey C. Alexander [ed.], *Neofunctionalism* [1985]; Gould [n. 34]). A more theoretical examination of the relevance of this argument to history and historical sociology is found in Gould (n. 19 1990).

46 Dworkin (n. 15), p. 122.

Judges practice “inclusive integrity,” which requires them to take into account all of the component virtues of the law. In contrast, “pure integrity” abstracts from these various constraints (fairness and due process) and allows for the consideration of coherence solely in terms of principles of justice, albeit the principles of justice already embedded in legal decisions.<sup>50</sup> Justice indicates what the community, abstracting from all institutional responsibilities, ought to achieve. In contrast to what law as integrity demands, justice points to the future.<sup>51</sup>

Naively, one might think that this argument implies that legislators might purify the law by enunciating a clearer, more coherent set of principles (and practices) as law.<sup>52</sup> Instead, Dworkin turned to philosophers to work out law’s ambitions for itself. In doing so they find in present law (marked by inclusive integrity) another law, which is defined by pure integrity. “It consists in the principles of justice that offer the best justification of the present law seen from the perspective of no institution in particular and abstracting from all the constraints of fairness and process that integrity requires.”<sup>53</sup>

If this “utopian” image differs from the standard characterization of law as integrity, it is because the utopian interpretations have not yet won over the legal community.<sup>54</sup> What is not clear is the relationship between these forms of pure integrity and the moral principles that Dworkin felt might be philosophically justified even though they are not (yet) embedded in the law. Inclusive integrity settles for an image of equality that is less satisfactory, Dworkin believed, than his own characterization of “equality of resources”.<sup>55</sup>

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47 There is one additional facet to this argument that I do not consider explicitly in this essay. So far I have presumed that the maintenance of the integrity of the law involves understanding its structure as a tendential development. In addition, one might argue that there are discontinuities in the development of a legal system, even as that legal system maintains its identity. In such a formulation, stages in the development of the law are understood as tendencies, but the developmental progression is understood as a stage-sequential development where each stage represents a different tendency. Such a developmental model is necessary if we wish to ground more fundamental criticisms of the law within a determinate theoretical framework. I have discussed the relationship between structural, functional and developmental theory in *Gould* (n. 45), and I have formulated and used these three varieties of theory in an historical analysis in *Gould* (n. 34).

From within a simple tendential model, such as law as integrity, it is difficult to explain the dominance of “bad decisions,” like *Adarand Constructors, Inc. v. Peña* (515 US 200 [1995]), and the Supreme Court’s refusal to hear and over-rule *Hopwood v. Texas* (78 F.3d 932 [5th Cir. 1996]). From within a stage-sequential model it may make sense to argue that while the dominant tendency in the current period is a color-blind egalitarianism requiring formally-equal opportunity, the dominant principle of the next period will be equity, which, as I will demonstrate in the sections that follow, results in a different answer to these hard cases, one mandating affirmative action policies as a matter of principle. When a developmental model is used, it is crucial to see the later periods as fulfilling the promises implicit in earlier periods, e.g., equity as the realization of the promises for blacks and women implicit in *Brown’s* egalitarianism.

48 *Dworkin* (n. 4), p. 400.

49 *Ibid.*, pp. 400–401.

50 *Ibid.*, pp. 405–406. If this distinction makes sense, (inclusive) integrity calls for an institutional analysis of the legal system of the sort that Dworkin never provided, and it calls into question much of the analysis that he did provide under the rubric of “integrity.”

51 *Ibid.*, p. 406.

52 *Ibid.*, pp. 400–140. This is, I take it, the implication of Dworkin’s suggestion that “other officials and institutions” are not subject to the special constraints of judges (*Dworkin* [n. 4], p. 401).

53 *Ibid.*, p. 407.

54 *Ibid.*, p. 409.

55 *Ibid.*, p. 403.

Is “equality of resources” a principle in pure integrity? If so, does this mean that it is “latent” in the law? I do not believe that Dworkin provided satisfactory answers to these questions. If the principles that he wished to articulate are embedded in the law, why cannot law as integrity excavate them? If the answer is that those principles are not dominant, then they are not constitutive of law and their validity is dependent on non-legal arguments. In the first instance, as the criticism cited earlier suggested, the law is already pure; it needs only the proper interpretation by the judges. In the second instance, the law is impure and our ambitions for it derive from outside its compass, requiring, one may presume, legislation and/or constitutional amendment for the law’s purification.

There is, I believe, a reason why Dworkin did not find it necessary to address this set of questions more adequately. Dworkin’s model is viable only from within a liberal legal system. As Habermas argues, “Constructive interpretation [Dworkin’s theory] can issue in success only to the extent that a piece of ‘existing reason,’ however fragmentary, has been deposited in the history out of which a concrete legal order has emerged. As an American, Dworkin has more than two centuries of ongoing constitutional development behind him; as a liberal, he favors a rather optimistic assessment and finds the development of American law to be driven mainly by learning processes.”<sup>56</sup> Law as integrity makes sense only if the tradition one is extending through its reinterpretation is seen to be viable, only if one can find in the tradition principles that allow one to make the law the best that it can be,<sup>57</sup> only if one believes that implicit in the law are principles seeking to purify themselves.<sup>58</sup>

## II. *The Integration of Principle and Policy*

Dworkin argued that there are two criteria used to evaluate an argument from principle. The first concerns the fit of the argument to the cases, statutes, and Constitution; the second concerns a judgment about the cases, statutes, and Constitution and, implicitly, the principle that fits. In his argument the two are entangled, as his judgment of what fits (at least in the instances of the United States and the United Kingdom) is that it is good; thus the necessity of an independent criterion to evaluate the moral principle disappears. What is, at least at the level of constituting and legitimating principle, is good.<sup>59</sup>

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56 Jürgen Habermas, *Between Facts and Values: Contributions to a Discourse Theory of Law and Democracy* (1996 [1992]), pp. 214–215.

57 This is true, I believe, even of Dworkin’s understanding of “equality of resources.” While he often told us that it is not embedded in the law, he also suggested that his examination of the common law of accident resulted in a conception of equality that “If allowed to run freely across the American political and economic structure, to its natural limits, would require dramatic changes in the distribution of property and other resources generally” (*Dworkin* [n. 4], pp. 407–408). (The discussion of accident law is in chapter 8, where there are also discussions of equality of resources at 297–310; see also, for a more extended discussion of equality of resources, *Dworkin* [n. 40 1981b].)

58 Habermas argues explicitly that there is an autonomous development of moral principles that may be retarded by institutional distortions in any society (*Jürgen Habermas, Legitimation Crisis* [1975 {1973}]). Dworkin adopted this argument, in an unsystematic way, but while for Habermas it is a universal of the human condition, for Dworkin its applicability was limited to liberal democracies.

59 A partial exception to this contention is Dworkin’s belief in “equality of resources,” but the relationship between that principle and his jurisprudence is not clear. I have not found this clarification made satisfactorily in *Sovereign Virtue: The Theory and Practice of Equality*.

In Dworkin’s argument, the use of a principle to challenge concrete instances of the law, implicitly and ultimately enunciates a claim about what the law really is. This process is strictly an interpretative one. Understanding is constituted as explanation<sup>60</sup> and justification, where the veracity of one’s understanding is tested in one’s capacity to extend the narrative of the law. Jurisprudence reduces to hermeneutics.<sup>61</sup>

In contrast, within what I call an equitable jurisprudence, the certification of the veracity of an interpretation comes in the integration of theory and practice. The interpretation is a component of an explanation, but not the explanation itself. Explanations are embedded in social science theories that incorporate both normative (interpretative) and situational variables. From this social science perspective, while the meaning of a principle cannot be reduced to its consequences, the meaning of a principle cannot be specified accurately without considering the consequences of its application. In Dworkin’s terms, one cannot interpret a text, a statute, or an article of the Constitution to be the best it can be without being aware of the consequences of this interpretation.<sup>62</sup>

Equitable jurisprudence recognizes that experience, conceptualized from within a hermeneutic or phenomenological framework, may be self-confirming. In consequence, it contends that a satisfactory assessment of principles is dependent on an (at least quasi) experimental assessment of their consequences. As such, it presumes that courts may serve as quasi-experimental bodies allowing for a process of learning that is embedded in an assessment of the consequences of implementing some set of legal principles. While it is naive to believe that courts always, or even often, function in this way (as legal institutions, much less than scientific ones, are embedded in, not isolated from, political currents and assumptions), it remains the case that the application of equitable principles generates different conclusions from those manifest in Dworkin’s jurisprudence. In the next section, we will see that sometimes this difference is manifest in the way a decision is validated and, in consequence, in our argument for the principle that underlies it. Sometimes the difference is in the nature of the decision. In the final section, we will reflect on how this mode of analysis allows us to break out of the hermeneutic circle within which Dworkin’s work is situated.

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60 *Dworkin* (n. 15), pp. 87, 123; *Dworkin* (n. 4), p. 91.

61 I have analyzed and criticized this process, wherein understanding comes to have explanatory force, in considerable detail in an examination and critique of Habermas’s jurisprudence (*Mark Gould, Law and Philosophy: Some Consequences for the Law Deriving From the Sociological Reconstruction of Philosophical Theory*, *Cardozo Law Review* 17 [1996], 3001–3124, pp. 3010–3016).

62 Some early legal realists and some current “law and economics” theorists commit the opposite mistake. They reduce legal rules and principles to the situational sanctions that support them; for them a viable social science is not empirical, but empiricist. Dworkin implicitly assumed this image of social science when articulating a philosophical, humanistic, theory of meaningful activity (*Ronald Dworkin, Social Science and Constitutional Right – The Consequences of Uncertainty*, *Journal of Law and Education* 6 [1977], 3–12; *Dworkin* (n. 15), pp. 5, 50–51). My assessment of legal realism in this regard may be found in *Mark Gould, Unconscionability in Contract Law: Durkheim, Llewellyn and the Limits of Legal Realism*, in: *International Sociological Association* (ed.), *Proceedings of the 1995 Annual Meeting of the Research Committee on the Sociology of Law* (1995). My assessment of “law and economics” is in *Mark Gould, Social Norms: A Critique of Law and Economics Formulations and a Guide to their Correct Conceptualization*, presented at the Joint Meeting of the Law and Society Association and the Research Committee on the Sociology of Law, *International Sociological Association* (2001).

### A. *From Plessy to Brown*

In this and the following sections, I argue that Dworkin’s image of law as integrity is able to make intelligible and legitimate the movement from *Plessy* to *Brown*, but not the movement from *Brown* to *Griggs*. Granting Dworkin’s ability to legitimate *Brown* itself entails an acceptance of his contention that *Brown* might be rewritten satisfactorily from within an interpretative framework, as it is possible to argue persuasively that as written, *Brown* depends on contentions incapable of formulation from within Dworkin’s theory (see below).

According to Dworkin, *Brown* depends not on an argument from social science research in support of the contention that segregated schools are inherently unequal but rather on the interpretative judgment that segregation is degrading or insulting to the black minority. We do not need evidence for what we know, that segregation is an insult, and is, in consequence, a violation of the equal protection clause of the Fourteenth Amendment. “It [that segregation is an insult] is an interpretative fact,” something that judges understand commonsensically.<sup>63</sup> In contrast to law as integrity, Dworkin believes that judicial strategies that use social science as a basis of judgment rest on correlations and not on an understanding of the mechanisms that constitute relationships. Such correlations are fragile; the “behaviour” that constitutes them can change very quickly.<sup>64</sup> Further, in contrast to interpretative judgments, social science arguments require that judges make sense of statistics, an arcane skill that falls outside of their area of competence.<sup>65</sup>

According to Dworkin, *Brown*, in interpreting the equal protection clause of the Fourteenth Amendment, grants the right to treatment as an equal, but not to equal treatment. Equal treatment means that over a range of goods, of which education might be one, “each person gets the same as the next,”<sup>66</sup> which Dworkin later defines as “the right to an equal distribution of some opportunity or resource or burden;”<sup>67</sup> treatment as an equal “is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as anyone else.”<sup>68</sup> Treatment as an equal appears to entail treating

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63 *Dworkin* (n. 62), pp. 4–6, 11–12 quotation at p. 5.

64 *Ibid.*, p. 6.

65 *Ibid.*, pp. 5–6. Dworkin’s discussion of *The Shape of the River* (cf. William G. Bowen and Derek Bok, *The Shape of the River: Long-term Consequences of Considering Race in College and University Admissions* [1998]) attempted to grapple with a social scientific analysis of the effects of affirmative action programs at elite colleges and universities. In this discussion he blurred the distinction between policy, where he could argue such an empirical analysis is relevant, and principle, where his life’s work constructing an interpretive jurisprudence suggests that it is irrelevant (even when, as in this case, the conclusions Bowen and Bok reach are convenient for his analysis) (*Dworkin* [n. 17], ch. 11).

66 *Dworkin* (n. 62), p. 10.

67 *Dworkin* (n. 15), p. 227. Taken together the two characterizations of equal treatment are, at best, ambiguous. They conflate equal opportunity (the equal distribution of some opportunity) with equal outcomes (the equal distribution of some resource, each person getting the same as the next). I believe that to make sense of the distinction between equal treatment and treatment as an equal we must understand equal treatment as presuming that the outcome for equals is equal.

68 *Dworkin* (n. 15), p. 227; *Dworkin* (n. 10), p. 190. Dworkin also commented that the right to treatment as an equal “is the right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how these goods and opportunities are to be distributed” (*Dworkin* [n. 15], p. 273; see also *Dworkin* [n. 4], p. 381). This is one basis for excluding prejudiced opinions in the articulation of public policies.

equals equally. Thus, “[i]f I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug.”<sup>69</sup> If the two children are not the same, are not equal in some relevant respect, they may be, must be, treated differently.<sup>70</sup>

Dworkin recognized that this abstract image of equality, requiring that persons be treated as equals, is hollow until specified through an account of the right against racial discrimination. In his analytically most complete discussion he distinguished three ways that the right against racial discrimination might be specified:

(1) “Suspect classifications” treats the right against discrimination as derivative from the more general right to be treated as equals “according to whichever conception of equality their state pursues.”<sup>71</sup> It has the possibility of justifying a separate but equal standard if integration would outrage the sentiments of the majority population and if the damage to white children outweighs the benefit to black children.<sup>72</sup>

(2) “Banned categories” disallows the use of certain categories, e.g., race or gender, as bases for the different treatment of persons, even when such treatment would advance the general interest. This conception makes the Constitution colorblind and it serves as a satisfactory justification for *Brown*.<sup>73</sup>

(3) “Banned sources” insists that preferences that are rooted in prejudice against a group cannot count in favor of a policy that disadvantages that group. Like banned categories, it prohibits racially segregated education. It differs from the “suspect classifications” theory in that it excludes certain conceptions of equality, those that disadvantage legally protected minorities.<sup>74</sup> It differs from the “banned categories” theory in that it distinguishes between programs that advantage and disadvantage legally protected minorities and allows the former while banning the latter.<sup>75</sup>

Both “banned categories” and “banned sources” theory justify *Brown*.<sup>76</sup> However, while “banned categories” theories bar affirmative action programs that Dworkin believes disadvantage whites, “banned sources” theories may justify affirmative action, both because whites are not a disadvantaged group<sup>77</sup> and because the disadvantage affirmative action programs create for whites does not stem from a prejudice against them. “Banned categories” is, Dworkin believed, too arbitrary to stand as a viable interpretation under law as integrity. “It must be supported by some principled account of why the particular properties it bans are

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69 *Dworkin* (n. 15), p. 227.

70 This manifests the rudiments of an understanding of equity as a principle of distributive justice, where unequal persons are treated differently to maximize equality (of outcomes), but equity as a principle of law is premised, in addition, on the possibility that it may be necessary to treat equals differently to maximize equality. Cf. *Mark Gould*, *Law and Sociology: Some Consequences for the Law of Employment Discrimination Deriving From the Sociological Reconstruction of Economic Theory*, *Cardozo Law Review* 13 (1992), 1517–1578; *Gould* (n. 61 1996), pp. 3116–3122 and pp. 32ff., below, with *Dworkin* (n. 10), p. 190.

71 *Dworkin* (n. 4), pp. 382–383.

72 *Ibid.*, p. 383.

73 *Ibid.*, pp. 383–384, 388.

74 “Racially discriminatory legislation is unjust in our own circumstances because no prejudice-free justification is available, or, in any case, because we cannot be satisfied that any political body enacting such legislation is relying on a prejudice-free justification” *Dworkin* (n. 10), p. 66.

special, and the only principle available is that people must never be treated differently in virtue of properties beyond their control.”<sup>78</sup> Dworkin contended that this proposition is far too broad because it includes attributes like intelligence, physical ability and health that are used as bases of classification legitimately and frequently in the U.S. law.<sup>79</sup>

Dworkin’s argument holds that judicial decisions should be grounded in principle and not policy. Dworkin agreed with (his interpretation of) Ely’s justification for judicial review and “holds that the rights created by the due process or equal protection clauses of the Constitution include rights that legislation not be enacted for certain reasons, rather than rights that legislation not be enacted with certain consequences.”<sup>80</sup> Racially discriminatory laws are inegalitarian and unprincipled

“... because it is unacceptable to count prejudice among the interests or preferences government should seek to satisfy. In this case we locate the defect of the legislation in the nature of the justification that must be given for it, not in its consequences conceived independently of this justification. We concede that laws having exactly the same economic results might be justified in different circumstances. Suppose there were no racial prejudice, but it just fell out that laws whose effect was specially disadvantageous to blacks benefited the community as a whole. These laws would be no more unjust than laws that cause special disadvantage to foreign car importers or Americans living abroad, but benefit the community as a whole. Racially discriminatory legislation is unjust in our own circumstances because no prejudice-free justification is available, or, in any case, because we cannot be satisfied that any political body enacting such legislation is relying on a prejudice-free justification.”<sup>81</sup>

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75 Dworkin’s contention that “Racially segregated schools do not treat black schoolchildren as equals under any competent interpretation of the rights the Fourteenth Amendment deploys in the name of racial equality” (*Dworkin* [n. 4], p. 389) presumes that we know intuitively which sources, preferences, to ban as prejudicial. The immorality of racially segregated schools is an interpretative fact (*Dworkin* [n. 62], p. 5) because of “America’s growing sense that racial segregation was wrong in principle, because it was incompatible with decency to treat one race as inherently inferior to another ...” (*Dworkin* [n. 4], p. 388). Such an argument is problematic on at least two grounds: (1) This is not how a sophisticated apologist would present “separate but equal” doctrine. (2) Dworkin’s argument selects one moral principle instead of another based on a “growing sense” on the part of the populace, which contradicts the logic of much of his discussion of rights and principles (*Dworkin* [n. 62], pp. 4–6, quotation at pp. 5, 11–12) as well as his understanding of democracy (*Ronald Dworkin, Equality, Democracy, and Constitution: We The People In Court, Alberta Law Journal* 28 [1990], 324–346; *Ronald Dworkin, Constitutionalism and Democracy, European Journal of Philosophy* 3 [1995], 2–11; *Dworkin* [n. 3], ch. 1; *Dworkin*, [n. 11 1996], 50; *Dworkin* [n. 17], chs. 11 and 12).

76 *Dworkin* (n. 4), p. 388.

77 *Ibid.*, p. 386.

78 *Ibid.*, p. 394.

79 In addition to the discussion I have used in the text, Dworkin articulated this argument, with some variations, in *Dworkin* (n. 62); *Dworkin* (n. 15), ch. 9; *Dworkin* (n. 10), pp. 195–204, chs. 14–16; *Dworkin* (n. 3), ch. 6.

80 *Dworkin* (n. 10), p. 66.

81 *Ibid.*, p. 66.

In other words, Dworkin argued that racial discrimination is not a matter of the consequences of laws (and, we may presume, private actions), but rather a matter of the intent of the lawmaker (and, we may presume, the private citizen).<sup>82</sup> As such, we need not inquire social scientifically into the consequences of those actions, but instead when we know intuitively that they are insulting to some disadvantaged group, we must prohibit them under the “banned sources” theory of discrimination. If this strategy justifies *Brown*, does it suffice to justify *Griggs*?

## B. From *Brown* to *Griggs*

### 1. Affirmative Action

Treatment as an equal, as we have seen, requires that blacks be treated with the same respect and concern as whites. It is not a right to an equal distribution of some good but to equal concern and respect when distributive decisions are made.<sup>83</sup> Further, Dworkin proposed “that individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights.”<sup>84</sup>

Given these premises, Dworkin argued that legislatures may require affirmative action on policy grounds and that there is no right, under the treatment as an equal standard, barring such policies. “The Equal Protection Clause gives constitutional standing to the right to be treated as an equal, but he [DeFunis] cannot find, in that right, any support for his claim that the clause makes all racial classifications illegal.”<sup>85</sup> Affirmative action programs treat whites as equals<sup>86</sup> and they do not disadvantage a protected group,<sup>87</sup> even though, Dworkin contended, they disadvantage whites.

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82 “Discrimination of the conventional sort, practiced against blacks in the United States for centuries, is wrong. But why? Is it wrong because any race-conscious distinction is always and inevitably wrong, even when used to redress inequality? If so, then it would be correct, under the coherence theory of legislation, to interpret Title VII as outlawing all such distinctions in employment. Alternatively, is traditional discrimination wrong because it reflects prejudice and contempt for a disadvantaged group, and so increased the disadvantage of that group? In that case, it would be sounder to attribute to Title VII the different program of outlawing such malign discrimination, and seeking to remove its inegalitarian consequences, and it would be perverse, rather than sensible, to understand the statute to bar private efforts in that direction.” Cf. *Dworkin* (n. 10), pp. 329–330.

83 “In the case of economic policy, therefore, we might wish to say that those who will be injured if inflation is permitted have a right to treatment as equals in the decision whether that policy would serve the general interest, but no right to equal treatment that would outlaw the policy even if it passed that test.” (*Dworkin* [n. 15], p. 273).

84 *Dworkin* (n. 15), pp. 273–274.

85 *Ibid.*, p. 229.

86 Dworkin believed that the only legal value relevant in *The Regents of the University of California v. Allan Bakke* was “the principle that no one should suffer from the prejudice or contempt of others” (*Dworkin* [n. 10], pp. 298, 302). While relevant, that principle was not violated in *Bakke* because, even if Bakke was rejected from Davis’s Medical School because of his race, he was not kept out because his race made him an object of prejudice and contempt (p. 301). Thus, for Bakke race is akin to intelligence (he would have been admitted if more qualified academically), while for a black, disqualification on grounds of race would be an expression of prejudice (pp. 301–302, 318).

87 *Dworkin* (n. 10), pp. 301–302.

Dworkin believed that “An individual’s right to be treated as an equal means that his potential loss must be treated as a matter of concern, but that loss may nevertheless be outweighed by the gain to the community as a whole.”<sup>88</sup> He also believed that judges have no business second-guessing the efficacy of policies that are not in violation of legal principles.<sup>89</sup> This entails he must argue that courts have no business inquiring into the consequences of affirmative action policies.<sup>90</sup> This argument allows affirmative action programs, but it does not require them as a matter of principle.<sup>91</sup>

## 2. *Griggs*

The disparate impact standard announced in *Griggs*, while not focused on affirmative action,<sup>92</sup> mandates activities, like affirmative action, that go beyond Dworkin’s characterizations of treating persons as equals. Further, it disallows procedures treating persons as equals that private firms might adopt in violation of the principles the disparate impact standard enunciates.

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88 *Dworkin* (n. 15), pp. 227, 232. Dworkin conceded that preferential admission policies may not make a more equal society and that a debate about their efficacy is called for. “But we must not corrupt the debate by supposing that these programs are unfair even if they do work. We must take care not to use the Equal Protection Clause to cheat ourselves of equality” *Dworkin* (n. 15), p. 239; see also *Dworkin* (n. 10), p. 295. One wonders if this might mean that such programs are unfair if they do not work. If so, then their “morality” appears to depend on their consequences and this suggests that courts must inquire about their consequences to determine their morality. Cf. *Dworkin* (n. 17), chs. 11–12. (See, however, the following text.)

89 *Dworkin* (n. 15), pp. 224, 226; *Dworkin* (n. 10), p. 297.

90 The one exception to this rule appears to be when the gains attributed to a policy outweigh the losses only because the gains include the satisfaction of prejudices (*Dworkin* [n. 15], p. 228 n. 1, pp. 235–238). Dworkin alluded to the fact that affirmative-action programs may be considered as grounded in an altruistic, external preference (i.e., prejudice) in favor of blacks (p. 239), but he never provided a satisfactory response to such a criticism of his argument. He only said that other grounds in support of such programs might suffice (p. 239). Elsewhere he appeared to weigh heavily his belief that affirmative-action programs use racially explicit criteria in the short-run to reduce the importance of race in US society (*Dworkin* [n. 10], p. 294).

91 *Dworkin* (n. 10), pp. 317, 325; *Dworkin* (n. 3), p. 156. Contending that Dworkin’s argument allows affirmative-action programs is correct only if we accept the logic of his argument and the “principles” that ground it. If, instead, we articulate a set of egalitarian principles contending that all must be given equal opportunity, that folks must be treated as if they are equal, we can defeat his argument *in principle*. See Lawrence Bobo, James R. Kluegel, Ryan A. Smith, Laissez Faire Racism: The Crystallization of a Kinder, Gentler, Anti-black Ideology, in: S.A. Tuch, J.K. Martin (eds.), *Racial Attitudes in the 1990s: Continuity and Change* (1997), pp. 15–44; Lawrence Bobo and Ryan A. Smith, From Jim Crow Racism to Laissez-Faire Racism: The Transformation of Racial Attitudes in America, in: W. Katkin, N. Landsman, A. Tyree (eds.), *Beyond Pluralism: the Conception of Groups and Group Identities in America* (1998), 182–220; Mark Gould, The New Racism in United States Society, in: Paul Colomy (ed.), *The Dynamics of Social Systems* (1992), 154–174; Mark Gould, Race and Theory: The Culture of Poverty and Adaption to Discrimination in Wilson and Ogbu, *Sociological Theory* 17 (1999), 171–200; Gould (n. 62 2001); Mark Gould, More Than Just Social Structure: The Poverty of Cultur(al) Analysis, *The Du Bois Review* 8 (2011), 476–488; James R. Kluegel and Lawrence Bobo, Opposition to Race-Targeting: Self-Interest, Stratification Ideology, or Racial Attitudes, *American Sociological Review* 58 (1993), 443–464; James R. Kluegel and Eliot R. Smith, Affirmative Action Attitudes: Effects of Self-Interest, Racial Affect, and Stratification Beliefs on White’s Views, *Social Forces* 61 (1983), 797–824; James R. Kluegel and Eliot R. Smith, Beliefs About Inequality: Americans’ Views of What Is and What Ought to Be (1986); Seymour M. Lipset and William Schneider, The Bakke Case: How Would it Be Decided at the Bar of Public Opinion? (1978), 38–44.

92 Dworkin linked the disparate impact standard to affirmative action by claiming that both are directed towards the elimination of “structural discrimination” *Dworkin* (n. 3), pp. 155, 158.

When Dworkin comes to discuss *Griggs*, there is a subtle change in his argument.<sup>93</sup> He now contends that in the 1970s and early 1980s the Supreme Court interpreted Title VII of the Civil Rights Act of 1964 as an attack on both subjective and structural discrimination. In addition to the permissive “principle” allowing affirmative action to combat structural discrimination, the Court declared illegal any screening device that perpetuated structural discrimination. *Griggs* banned facially neutral screening devices if they had the consequence of perpetuating prior discriminatory practices.<sup>94</sup>

Dworkin’s argument presumes that both disparate impact and disparate treatment are policies mandated by Congress in the Civil Rights Act of 1964.<sup>95</sup> He further contended that they are not in violation of constitutional principles, and, in consequence, Congress may mandate their enforcement. My question is whether Dworkin may reasonably use the same legal principles to legitimate *Griggs* that he used to legitimate *Brown* and affirmative action.

I contend that Dworkin’s arguments cannot legitimate *Griggs* for three reasons: (1) Any satisfactory grounding of the notion of structural discrimination requires the utilization of social science theory and techniques and law as integrity restricts itself to interpretative tools. (2) Treatment as an equal requires that blacks be treated with equal respect and concern and such treatment is consistent with the discriminatory consequences banned in *Griggs*. (3) The “banned sources” specification of the right against racial discrimination is irrelevant to an image of discrimination (disparate impact) not grounded in preferences.

### 3. Structural Discrimination

Most persons in the United States believe that blacks and whites deserve equal opportunities and most persons believe that blacks and whites have equal opportunities. Their interpretive judgment remains consistent with the one Dworkin highlighted in his discussion of *Brown* and, perhaps, extends that judgment towards the vision of a society where all racial groups have an equal opportunity to succeed.

Unfortunately, for most people, this judgment results in the conclusion that affirmative action programs that disadvantage whites are illegitimate. People seem to prefer that blacks and whites be treated the same, that facially neutral procedures be used to evaluate them, and that they be judged fairly in terms of those procedures. Put in terms of the law, they believe that disparate treatment is illegitimate, but they do not understand the import of disparate impact (insofar as blacks and whites have what appears to be, at least on the interpretive surface, equal opportunities).<sup>96</sup>

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93 As far as I know Dworkin’s only discussion of *Griggs* occurred in a 1991 article, in the *New York Review of Books*, on “The Reagan Revolution and the Supreme Court.” This essay, a review of Charles Fried’s *Order and Law: Arguing the Reagan Revolution*, is reprinted as chapter 6 in Dworkin’s 1996 collection, *Freedom’s Law: The Moral Reading of the American Constitution*.

94 Dworkin (n. 3), pp. 155–156. Dworkin referred to these positions as “fundamental principles” (Dworkin [n. 3], p. 155), but it is not clear to me what moral values, what rights, he understands them to enunciate. We have seen that Dworkin explained why, in his view, the principles that constitute the Constitution permit affirmative action; to my knowledge, he nowhere provides a comparable discussion of *Griggs*.

95 Congress has reaffirmed them in the face of Supreme Court decisions in the Civil Rights Act of 1991. For Dworkin’s discussion of two of those cases (*Ward’s Cove Packing Co. v. Alioto* [490 U.S. 642 [1989]] and *City of Richmond v. Croson* [488 U.S. 469 [1989]]) see Dworkin (n. 3), pp. 156–159. My discussion of *Griggs* and *Ward’s Cove* is found in Gould (n. 70), pp. 1564–1577.

These apparently commonsensical conclusions are mirrored in a growing body of legal and popular literature that draws on contemporary neoclassical theory to argue that labor-market discrimination is driven out of a competitive economy. What remains is a form of idiosyncratic disparate treatment that cannot be sustained. Thus, some believe that disparate treatment, but not disparate impact, should be outlawed, while others believe that laws against employment discrimination are a violation of the right to free contract.<sup>97</sup> One might suggest that these intuitions, held by many who are in no conventional sense racists, are as good as the ones Dworkin articulates.

What is needed to sustain the principle that establishes *Griggs* is a theory of structural discrimination. This is not the place to articulate that theory, which I have discussed extensively elsewhere,<sup>98</sup> but it is clear that we must be able to explain how labor-market discrimination is sustained in a competitive labor market. The key to this explanation is, I believe, that economically homogeneous blacks and whites may perform differently in the same organization. This occurs not because of the inferiority of black workers but instead because of the discriminatory consequences for black (and women) workers of apparently neutral organizational forms.<sup>99</sup> This insight provides not only a social scientific rationale for disparate impact doctrine; it also generalizes its influence. I have articulated the relevant standard as follows:

“[A]n organizational form may have a disparate [impact on economically homogeneous black and white workers, and when it does, that organizational form should be subject to legal sanction. Disparate-impact theory should not only be ... a check on facially neutral hiring practices that actually discriminate, it should be extended to include facially neutral organizational forms that discriminate.”<sup>100</sup>

#### 4. *Treatment as an Equal*

In regards to the relevance of the standard that all persons should be treated as equals, we might make two arguments. The first suggests that it is irrelevant to *Griggs*; the second suggests that it negates *Griggs*, voiding the disparate impact standard.

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96 These contentions are grounded in *Gould* (n. 91 1992), and in the sources cited therein (see also the citations in n. 91, above). Also relevant is *Jennifer L. Hochschild, Facing Up to the American Dream: Race, Class, and the Soul of the Nation* (1995). In “The New Racism” article, I argue that the combination of a commitment to equal opportunity, the belief that blacks have equal opportunity, and the recognition that blacks do less well than whites has generated a “New Racism” grounded in egalitarian values.

97 Richard Epstein is the most prominent exponent of the latter, more theoretically consistent position; his most sustained defense of it is *Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws* (1992). Citations to some of his other discussions along with a comprehensive critique of both his argument and the social scientific and philosophical grounds for his argument may be found in *Mark Gould, Unconscionability, Free Contract and the Law Against Employment Discrimination: Richard Epstein On and Against the Government’s Fiduciary Responsibility for Contract Regulation*, presented at the Annual Meeting of the Law and Society Association (1995).

98 *Gould* (n. 70), pp. 1354–1360.

99 If an organizational form has discriminatory consequences, a screening device may accurately predict success or failure within that organization. Thus, the problem is not primarily screening devices that have a disparate impact because they are “biased” (in the psychometric sense of the term), but screening devices that have a disparate impact because they are unbiased and because the organization itself has a disparate impact on economically homogeneous black and white workers. See, for a development of the argument in the text, *Mark Gould, The Reproduction of Labour Market Discrimination in Competitive Capitalism*, in: Abebe Zegeye, Leonard Harris, Julia Maxted (eds.), *Exploitation and Exclusion: Race and Class in Contemporary US Society* (1991), 102–129; *Gould* (n. 70); *Gould* (n. 97); *Gould* (n. 91 1999).

For blacks, treatment as an equal is the right to be treated with the same respect and concern as whites. Equals must be treated equally. This is exactly what is problematized by the disparate impact standard. As Chief Justice Burger wrote in *Griggs*, “The [Civil Rights] Act [of 1964] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in practice.”<sup>101</sup> Treatment as an equal seems to imply treatment that is fair in form; as the Court recognized, such treatment, even when neutral in terms of intent,<sup>102</sup> may have discriminatory consequences.

The second argument suggests that *Griggs* required a violation of the Treatment as an Equal standard. This standard mandates treating equals equally, while *Griggs* mandates treating equals unequally. The disparate impact standard refers only to persons who meet the relevant job qualifications,<sup>103</sup> economically homogeneous workers, “equals” in terms of the relevant criteria, yet it recognizes that formal equality of opportunity may have discriminatory consequences, a situation it labels “discrimination” and bans legally.<sup>104</sup> *Griggs* recognizes that economically homogeneous blacks may be different from whites in ways that require them to be treated differently to realize the equality latent in their individual attributes.<sup>105</sup>

##### 5. *Banned Sources*

The Treatment as an Equal standard is vacuous until it is specified through an account of the right against discrimination. As we have seen, Dworkin specifies it through the “banned sources” standard. The use of racial categories is acceptable to Dworkin unless their selection is rooted in prejudice. In our current social situation in the United States, a program that advantages blacks may be permissible. In contrast, if it advantages whites, it is presumed to derive from prejudicial preferences.

The “banned sources” theory appears to permit legislation that mandates activities implementing the disparate-impact standard, but it does not appear to ban, as a matter of principle, the activities condemned by the disparate-impact standard. “Banned sources” locates the defect of activities in the justification for them, not in their consequences, conceived independently of that justification. As such, it focuses on intent. If an actor treats blacks and whites equally, in a facially neutral way, with no intent to discriminate, the “banned sources” theory cannot condemn her actions.

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100 *Gould* (n. 70), pp. 1574–1575. See also the following pathbreaking articles *Vicki Schultz*, Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, *Harvard Law Review* 103 (1990), 1749–1843; *Vicki Schultz and Stephen Petterson*, Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation, *University of Chicago Law Review* 59 (1992), 1073–1181; *Susan Sturm*, Second Generation Employment Discrimination: A Structural Approach, *Columbia University Law Review* 101 (2001), 458–568.

It may also be worth mentioning that the legal determination of disparate impact usually draws on “arcane” statistical techniques.

101 *Griggs*, p. 431.

102 *Griggs*, p. 430.

103 *Griggs*, p. 434.

104 The second interpretation of the relevance of the Treatment as an Equal standard to *Griggs* suggests that it might also ban affirmative action. Dworkin avoids this conclusion by interpreting this abstract image of equality through the banned sources, instead of the banned categories, theory. I discuss the relevance of the banned sources theory to *Griggs* in the next section.

105 *Gould* (n. 91 1999).

In contrast to the “banned sources” standard, *Griggs* focuses not on intent, but on consequences: “... Congress directed the thrust of the [Civil Rights] Act [of 1964] to the consequences of employment practices, not simply the motivation.”<sup>106</sup> The whole point of the disparate-impact standard is that intent is irrelevant. It does not ban activities motivated by prejudicial preferences (as does the disparate-treatment standard), but those that have adverse consequences for protected groups, even when motivated by the best of intentions.

If a legislature mandates a program that treats whites and blacks as equals, even if it has deleterious consequences for whites, the program is acceptable, according to Dworkin, on grounds of principle, and the court has no business second-guessing the legislature on grounds of policy, in terms of the consequences of its legislation. Thus, it is fair to conclude that while Dworkin’s understanding of legal principles does not require the implementation of the disparate-impact standard, and thus he cannot extract it from constitutional principles to enable courts to articulate it, those principles do allow its implementation by the legislature.

Perhaps, in terms of this one (of three) criteria, Dworkin would have been satisfied with our result. Disparate-impact theory, as found by the Court in the Civil Rights Act of 1964 and as written more clearly by the legislature into the Civil Rights Act of 1991, passes muster, but the activities that it bans are in violation of no principle Dworkin recognizes as constitutive of the law. In the next section of this essay, I enunciate a principle that legitimates the disparate-impact standard, as I understand it, arguing it to be law even apart from its legislative enactment; this principled argument also allows us to break out of the hermeneutic circle constructed by Dworkin’s interpretative methodology.

### *III. Equity as Principle and as Method*

#### *A. Hierarchy, Egalitarianism, and Equity*

The principle of equality, that equals should be treated equally and unequals unequally, is meaningless unless we have a standard of equality.<sup>107</sup> We have encountered at least three such standards: (1) separate but equal, which Dworkin suggests may be legitimated by the “suspect classifications” theory; (2) equal opportunity, as construed in Dworkin’s “treating persons as equals” theory and consistent with both his “banned categories” and his “banned sources” theories; (3) equity, as found in the disparate-impact standard.

Each of these may be understood as an attempt to achieve equality. This is, of course, misleading in terms of “separate but equal,” which was formulated to maintain and reinforce hierarchical relations between whites and blacks. If, however, we presume, with the Court in *Brown*, that good-faith attempts were being made to provide black and white organizations with equal resources, the judgment in *Brown* may be understood as determining that the sep-

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106 *Griggs*, p. 432; see also *Texas Department of Housing and Community Affairs et al. v. Inclusive Communities Project, Inc., et al.* (576 U. S. \_\_\_\_ [2015]).

107 *Hart* (n. 32), p. 155. For more a comprehensive discussion, see *Peter Westen, Speaking of Equality: An Analysis of the Rhetorical Force of ‘Equality’ in Moral and Legal Discourse* (1990). Peters misconstrues the importance of Hart’s point, which he takes from Westen, as he seeks to make the notion of equality vacuous (*Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis, Yale Law Journal* 105 [1996], 2031–2117).

arate but equal standard, even when implemented in good faith, did not achieve an egalitarian outcome and thus was unacceptable. *Brown* sought to provide blacks and whites with equal opportunity and determined that the consequences of separate but equal denied that opportunity to blacks.

Much of the history of civil rights activity in the US since *Brown*, and more particularly since the late 1960s, may be explained in light of a similar conclusion, now applied to the notion of formal equality (equal opportunity). Treating blacks as equal, treating persons of all races and ethnic groups as if they were the same, has not resulted in equal results.<sup>108</sup> In contrast, in equitable relationships, the circumstances of each individual and/or group of individuals must be taken into account, and equals must be treated differently, in light of those circumstances, to attain equality. If, in egalitarian relationships, the storks and foxes must drink from the same dish (even though its opening affords access to only one of them), in equitable relationships, as the Court wrote in *Griggs*, “the posture and condition of the job-seeker must be taken into account.”<sup>109</sup> It is important to remember that those jobseekers were presumed to be economically homogeneous in respect to the job offered, but it is sometimes necessary to treat them differently if equality is to be obtained.

The equitable standard requires that our theory of equality be assessed in light of the likelihood of its successful implementation. In this sense, I have taken the argument actually made in *Brown* and identified *Griggs* as its logical extension, one indicating that the Court recognized, if only for a fleeting moment, that the theory *Brown* articulated was inadequate because it did not result in equal outcomes and because, in consequence, it needed to be subsumed under a more adequate principle. My argument presumes a deontological standard, but it recognizes that the meaning and nature of that standard is, at least in part, constituted through its implementation.<sup>110</sup>

If it is true that the principle of equality is meaningless unless we have a standard of what counts as equal, I have tried to provide a criterion for assessing candidates for that standard. The criterion is the results of implementing the standard for equalizing outcomes in whatever institutional context one is examining. The problem with the separate but equal standard was that it maximized hierarchy, not equality; the problem with a “treating persons as equals” standard is that it, too, results in inequality (among presumed equals). The realization of this outcome has led to many policies, including various types of affirmative action and disparate impact, to remedy this result. What has been missing is a principled defense of those programs and thus a way to differentiate between those that are legitimate and those that are illegitimate. Equitable principles provide a way to legitimate both disparate impact and affirmative action.

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108 This should come as no surprise. We have long understood the notion of a formally free labor market, one that disadvantaged workers even if they had “equal rights” with employers. The socialist movement was, in large part, geared to overcoming the deleterious consequences of formal equality.

109 *Griggs*, p. 431.

110 I have provided a fuller discussion of equity in a number of places, including *Gould* (n. 61 1996). That paper also contains a related discussion, a critique of Habermas’s and Günther’s contention that the justification of norms (principles) must be separated clearly from their application (*Gould* [n. 61 1996], pp. 1346–1343).

### **B. *Sociology or Philosophy: Breaking Out of the Hermeneutic Circle***<sup>111</sup>

Dworkin advocated that we use our intuitions to set standards for the meaning of equality. He contended that the process is interpretative, both of the relevant law and of the moral values that interpenetrate the law. I have suggested instead that while interpretation is crucial – all social action is meaningful and the law incorporates a set of normative constructs in need of interpretation<sup>112</sup> – we must also be concerned with the practical consequences of the legal principles that we advocate to make the law the best that it can be.

There are two reasons why a philosophical, interpretive jurisprudence is inadequate. The narrow one concerns the movement from egalitarian to equitable values. We have seen that while an assessment of policies in light of egalitarian values, where persons are treated as if they were the same, may be consistently interpretive, this is not so when our standards are equitable.

An assessment in light of equitable values forces the recognition that there is no contradiction between being equal and being different. Economically homogeneous workers may differ in respects significant to their ability to produce within particular organizational settings. The assessment of the consequences of these differences in those settings is not interpretive, but rather has recourse to a social science examination of those consequences. The application of equitable values necessarily implicates the use of social scientific theory and methods. If we are to treat equals differently, to take account of their differences, to move closer to equal outcomes, we must assess the consequences of our actions social scientifically. This is a matter of *both* principle and policy.

There is, however, a broader issue meriting brief discussion, the relationship between the justification of principles and their application. Habermas and Günther argue explicitly for a differentiation between the two, contending that principles must be justified independently of their application. I have argued elsewhere<sup>113</sup> that this distinction makes no sense. Habermas acknowledges that the meaning of a principle is constituted, at least in part, through its application, yet he contends that we must justify principles in a process that removed them from social practice. It is not clear, however, what it means to justify a principle that has no meaning. If, to the contrary, we acknowledge the interpenetration between a principle and its application, we are once again forced to recognize the necessity of integrating social science theory and methods into any viable jurisprudence, into any jurisprudence grounded in legal principles; this includes the jurisprudences advocated by both Habermas and Dworkin.

A jurisprudence rooted in social science allows us to break out of the hermeneutic circle (where our preconceptions have too great a role in the determination of our conclusions), but only in social situations where theory and practice may be integrated meaningfully. We have to be able to both formulate social science theories as guides to action and evaluate them systematically in light of their consequences. This can occur satisfactorily only in a democratically controlled system where those on whom the consequences impinge possess the power to reconstitute the theory and the practices that it controls, and thus to replace persons in political and, if only by way of future appointment, judicial positions. Within this social order, people would have to think like scientists evaluating the consequences of experiments, of social activities organized, in part, to break down preconceptions.<sup>114</sup>

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111 This section draws on and quotes from *Gould* (n. 61 1996).

112 A more complete discussion of this point is found in my critique of Habermas (*Gould* [n. 61 1996]).

113 *Gould* (n. 61 1996), pp. 1346–1353.

Needless to say, no such system exists, and I contend, no such system in US society can exist without fundamental structural changes. We can, nonetheless, recommend ways to move towards it from within our currently constituted legal system. In the following paragraphs I want to suggest, in very general terms, how I believe appellate judges should approach the interpretation and implementation of law to direct our judicial system to one grounded in the experimental evaluation of the implementation of legal principles and thus of the legal principles themselves.

Generally, appellate judges are restricted to discussions about texts. The actual events under discussion are secondary to the interpretations they have received from lower courts. As such, their discussions seem to typify the hermeneutic process.<sup>115</sup> Their task is to construct a model of the law that makes sense of their decision in the concrete case they are deciding. As Dworkin suggested, their interpretation should make the law coherent and give it integrity. They are constrained by the legal tradition within which they work; extensions of the law must constitute tendencies that they discover in the law as already constituted. In Dworkin’s terms, they define what the law is; they do not transform it.

My suggestion is a simple one. I propose that an additional narrative be introduced into the model, that one more story be told that must be made coherent within the legal text. This narrative focuses on, but is not reduced to, a social scientific examination of the consequences of the law’s application. Within the hermeneutic of the law, it takes the form of an explanatory theory of general applicability. It entails the recognition, with Cardozo, that the aim of the law is the welfare of society and that a rule that misses this aim is unjustified. At the same time, Cardozo recognized that the quest for social welfare interpenetrated the quest for justice.<sup>116</sup> Judges cannot separate policy from principle because the way a principle is implemented (partially) constitutes its meaning. Judges must be concerned with the consequences of their action, judged in light of the principles they seek to apply. They should make decisions in the hope that their conclusions will be subject to constant testing and retesting, hoping that what is good in their work endures and that what is erroneous perishes.<sup>117</sup>

A judge’s task, in collaboration with her colleagues, is to generate a logically coherent image of the law integrated with a body of empirical material relevant to the application of each aspect of the law.<sup>118</sup> In the nature of the case, both because common law adjudication is, at best, no more than a quasi-experiment and because the judge is dependent on information provided by others, the empirical materials must remain almost as suspect as the theories we

114 In *Mark Gould, Experts and the Law: Rational Myths in Custody Litigation*, prepared for the Annual Meeting of the Law and Society Association (1999), I discuss the inappropriate use of feigned expertise in custody hearings. There, supposedly expert witnesses create rational – or not so rational – myths that protect the rear ends of masters and judges when they adhere to the “expert’s” advice.

115 But cf. *Gadamer*, who writes as follows: “It [application] is not the subsequent applying to a concrete case of a given universal that we understand first by itself, but it is the actual understanding of the universal itself that the given text constitutes for us” (*Hans-Georg Gadamer, Truth and Method* [1975 {1965}], p. 305).

116 *Benjamin Cardozo, The Nature of the Judicial Process* (1964 [1921]), pp. 66, 102–103.

117 *Ibid.*, pp. 47–48, 136, 178.

118 This may be a bit misleading. The concrete application of the same principle may differ in form and substance if the situations to which that principle is applied vary. A good example of the failure to recognize this is manifest in the, perhaps unintended, consequences for blacks and whites of applying higher sentences for the possession and sale of crack versus powdered cocaine. For more general analyses, see the discussion of the unconscionability principle in contract law in *Gould* (n. 61 1996) and the discussion of the operationalization of concepts in *Mark Gould, Gould Replies to Blalock*, in: Jon Clark, Celia Modgil, Sohan Modgil (eds.), *Robert K. Merton: Consensus and Controversy* (1990), pp. 420–422.

utilize to explain them. This hermeneutic representation, akin to the creation of a seamless narrative (and thus as problematic as the notion that the law may be made totally coherent), applies not only to the judge’s decision and to the empirical consequences of those decisions but also (contrary to most hermeneutic arguments) to the articulation of the theory that helps her to determine those consequences.

Unlike traditional jurists who follow Dworkin and try to tell a meaningful story based on their singular interpretations of the particular data at hand, we have a way of breaking into, or maybe out of, the hermeneutic circle. The coherence of our story, as it relates the “law” to its consequences, must be consistent with and thus certified by the theory we utilize, just as the validity of that theory must be confirmed by the adequacy of our explanations. If our theory is general, it must also affirm the coherence of other empirical stories and in consequence provide a considerable warrant for believing each individual explanation, just as each coherent explanation provides a bond for the theory’s veracity. When this is accomplished in regard to a particular principle, such as equity, it provides a strong justification for our characterization of the nature of the principle in light of what is required for its successful implementation.

Some earlier empiricist attempts to integrate law and sociology, just like current empiricist attempts to integrate law and economics, were flawed by their inability to provide a satisfactory conceptualization of the variegated levels of normative orientation within the law. The perspective I am advocating demands that this integration be two-dimensional. In the first instance, the law must be made the best it can be in terms of enunciated principles. This allows us to create a coherent image of “the law” as a normative order. But this is not sufficient; in addition, we must integrate this perspective into one that enables us to assess the consequences of implementing those principles in particular (types of) situations. This understanding is derived from both their theoretical conceptualization within a general sociological theory and the empirical assessment of the theory’s predictions about the consequences of regulating actions by the principles we have enunciated. A viable image of the law must necessarily incorporate both principle and policy as two sides of the same coin.

This theory must consider moral values as an aspect of the factual analysis of any legal system and any society, as part of the social world relevant in assessing the consequences of juridical or legislative formulations of the law.<sup>119</sup> Judges must construct a hermeneutics that analyzes the place of law in the social world, where one aspect of their analysis is the need to maintain theoretical consistency in understanding the role that legal values play within the law, and that moral values play in mediating the law’s effect in the larger society. At the same time, they cannot abstract from the effects the law has in economic, political, familial (etc.) action; nor can they abstract from the way non-legal systems constrain and control the effects of the law. Thus judges will be contributing to the theoretical analysis of the law as they construct the law, and the consequences of their applications of their analyses will allow for the redemption, or not, of those analyses.<sup>120</sup>

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119 *Gould* (n. 62 1995).

120 I discuss this procedure in greater detail in *Mark Gould, The Interplay of General Sociological Theory and Empirical Research*, in: Jon Clark, Celia Modgil, Sohan Modgil (eds.), *Robert K. Merton: Consensus and Controversy* (1990), pp. 499–516. I discuss its application in the historical social sciences in *Mark Gould, Theory and History: Comments on Roberts Wuthnow’s Communities of Discourse, Theory and Society* 21 (1992), 445–460.

Such a process is fallible. All hermeneutic analyses must be constituted from within their own assumptions, and a hermeneutic incorporating theoretical argumentation is subject to similar failings. Nonetheless, if those theoretical arguments are formulated as propositional arguments, seeking to explain the consequences of a wide range of legal activities, their acceptance will require their evaluation in diverse settings. For example, the argumentative basis for the acceptance of an equitable principle will have to include the (perceived) consequences of its implementation. These consequences will have to be examined across a wide array of situations, and, at least in the United States, across a variety of actors from different gender, class, and cultural backgrounds. This makes the disconfirmation of the theory more likely and in consequence makes the problematizing of the (applications of the) principles more probable.

From the perspective of a social scientist, the common law looks like a suitable, if not an exemplary place for this to happen. The codification required is already an integral component of the legal process, one built into the adversary system: each side wants to cite precedents and facts to support its contentions. Judges, however, have to formulate arguments that are coherent not in terms of the interests of the adversaries but rather in terms of the law, the policies that it enunciates and the principles that regulate it. It would be naive to believe that the law is the experimental social science that Cardozo hoped for and some of the legal realists prophesied, but it is the task of jurisprudence to provide guidance for the realization of that ambition.

#### IV. Conclusion

In prior work, I have drawn a sharp distinction between “legitimation” and “justification.” Norms, activities, decisions, and outcomes are legitimate when subsumed under, consistent with, relevant social values. Decisions are justified when the due process outcome of some set of procedures. For procedures to justify effectively, the procedures themselves must be legitimate, consistent with the relevant social values. Further, even if a decision is justified from within a legitimate procedure, if the social system is to function stably, it must also be legitimate.<sup>121</sup> Simply, a social relationship is valid when it is legitimate *and* when it is the justified outcome of legitimate procedures.

Dworkin’s critique of positivism emphasizes the importance of processes of legitimation.<sup>122</sup> His major contribution to jurisprudence was to emphasize the autonomous importance of legal values (principles) in the constitution of the law, in validating legal rules.<sup>123</sup> Less prominent in his work is his distinction between justice, fairness, and procedural due process, which may be interpreted as paralleling the distinctions that I have drawn between legitimation and justification: justice concerns the decisions a system ought to make, or less strongly, asks if the outcomes of decisions are legitimate in terms of shared values; due pro-

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121 *Gould* (n. 32).

122 *Dworkin* (n. 15), ch. 2. Often when Dworkin discussed the capacity of principles to “justify,” he was referring to what I have labeled legitimation. When he wrote about “legitimation,” his discussion focused on associative obligation and was often descriptive: “A state is legitimate if its constitutional structure and practices are such that its citizens have a general obligation to obey political decisions that purport to impose duties on them. An argument for legitimacy need only provide reasons for that general state” (*Dworkin* [n. 4], p. 191). For associative or communal obligations, see pp. 196–206.

123 *Dworkin* (n. 15), pp. 38, 43.

cess concerns the procedural justification of decisions, and fairness concerns the legitimacy of procedures.<sup>124</sup> At his most subtle, when linking justice to outcomes, Dworkin transcends his limited focus on normative nature of principles and inquires about the consequences of their application.

It is, nonetheless, the case that when writing about his more concrete understanding of the principles embedded in the law, and thus about his image of egalitarianism, his discussion does not realize the promise embedded in these distinctions.<sup>125</sup> A purely egalitarian standard reduces to the justificatory procedures adopted to implement it. Treating persons as equals focuses on the intentions of actors and ultimately judges those intentions in light of the nature of the process adopted to treat all persons with equal concern and respect, even if the outcome disadvantages some of them. As such, egalitarian standards are consistent with a reduction of the law to a set of principles, even though they have the paradoxical consequence of reducing those principles to constitutive, procedural norms.<sup>126</sup>

In contrast, equitable standards articulate principles irreducible to procedures but, nonetheless, require for their successful implementation the adoption of a particular type of procedure. Implicit in their very nature is an assessment of the consequences of their application and a call for a specific type of (experimental) procedure to facilitate this judgment. This concern for consequence, when coupled with the nature of the procedure required to assay the legitimacy of the outcome, calls for a unity of principle, social science theory, and practice in both the articulation and implementation of a viable jurisprudence. It emphasizes that the same principle may require different implementations in various contexts if it is to maintain its identity and its integrity. In this essay I have outlined a jurisprudence that points in these directions.

In addition, I hope to have convinced my readers that the differences that I have highlighted between jurisprudence grounded in sociology and one premised on philosophy are significant. Dworkin’s philosophical jurisprudence formulates an image of equality of treatment from within the law. When the consequences of its application were not to Dworkin’s liking, he created epicycles in his theory, but he was unable to legitimate the policies and judicial decisions necessary to rectify the unacceptable consequences. In contrast, I have formulated a notion of equity that is emergent in contemporary law, even when it loses contests with more conventional notions of equality (as when courts ban affirmative action policies). Elsewhere I have argued that equity represents a stage of social development that transcends equality;<sup>127</sup> here I will be happy if my argument has convinced some of my readers that an equitable jurisprudence is better able to ground the movement from *Brown* to *Griggs* than are the arguments put forward by Dworkin.

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124 *Dworkin* (n. 4), pp. 164–165, 177, 180.

125 The situation is somewhat different in his more philosophical writings, where he defends a notion of equality that focuses on the distribution of resources (*Dworkin* [n. 40 1981a]; *Dworkin* [n. 40 1981b]; *Ronald Dworkin*, In Defense of Equality, Social Philosophy and Policy 1 [1983], 24–40; *Dworkin* [n. 28]; *Dworkin* [n. 40]; *Dworkin* [n. 75 1990]; *Dworkin* [n. 19 1990]). In a future essay, I hope to consider more systematically the philosophical argument Dworkin makes in *Justice for Hedgehogs*, especially as it relates to the construction of a defensible theory of natural law.

126 *Dworkin* (n. 75 1990). The same problem is manifest more clearly in Habermas’s work. See *Gould* (n. 61 1996).

127 *Gould* (n. 34), ch. 8.