Introduction

Society places great hope in youth. They are seen as pivotal for addressing society’s ills, as they will be responsible for its future. For this reason, there is deep concern about the values that we as a society instill in our youth. The task of preparing them to live in a diverse society plays a crucial role in the nation’s commitment to ensuring equality and fostering justice.

The legal system figures prominently in these efforts. The legal system addresses issues of equality and helps to instill key values, as it has the power to regulate all socializing institutions. No institution, just like no person, can escape the law’s reach. With regard to efforts to end discrimination, the legal system’s most comprehensive and revolutionary efforts have focused on institutions devoted to the socialization of youth. Regrettably, however, societal and legal ideals often go unrealized. The legal system often fails in its control of the institutions that serve as the sites that inculcate values. Public schools offer an important example of these challenges.

Public schools serve as the center of the legal system’s efforts to end discrimination, but these efforts arguably have not produced their intended outcomes. For example, the U.S. Supreme Court’s most famous case addressing discrimination, Brown v. Board of Education (1954), centered on school segregation. It did so not only on the rationale that the law had played a role in segregating students on the basis of race but also on the belief that desegregation was needed given the way schools shaped people’s hearts and minds and so heavily influenced their eventual place in society. On the basis of those rationales, Brown formally ended segregation based on race. Yet, rampant disparities in the racial compositions of public schools continue. Schools are even more “segregated” now than they were before Brown (Clotfelter 2004). More than 70% of all African American and Latino students in the United States
now attend largely minority schools (Frankenberg, Lee, & Orfield 2003). And segregation typically returns when courts end oversight of desegregation efforts (see Reardon et al. 2012). This continued and increasing segregation raises questions about how much progress has been made toward properly addressing discrimination. As it has developed, the legal system has become an increasingly ineffective tool with which to address racial and ethnic disparities among schools.

Schools also have been charged with instilling values that foster the ability to live effectively in a diverse society. But again, schools have failed to do as hoped. Schools have developed programs to address diversity, embrace multicultural understandings, and reduce group tensions. These programs seek to encourage dispositions supportive of equality. In addition, education itself—the major project of schools—continues to be relied on to enhance economic and other outcomes associated with social success and access to social opportunities. Yet societal discrimination continues, as do differential access to higher education, economic security, residential options, and a myriad of other social opportunities and resources (and much research identifies schools as the root of these outcomes; see Mickelson, Bottia, & Lambert 2013). The legal system, which guides the work of schools, ineffectively shapes schools’ efforts to instill values that counter societal forces that lead to differential outcomes.

Moreover, schools have been tasked with addressing discrimination by socializing youth in contexts free from discrimination. Yet, again, schools routinely fail to provide effective environments. The legal system assumes that unprejudiced and equitable school environments serve as breeding grounds for the development of attitudes and dispositions favoring equality. That assumption rings true. But the legal system has trouble producing such environments. Positive outcomes cannot emerge when adolescents experience rampant differential treatment while in school, either from school staff or from each other. Some of that treatment results from school policies themselves, and sometimes it occurs despite them. Formally integrated schools can become functionally segregated through the implementation of academic tracks, ability grouping, special education, zero-tolerance initiatives, alternative schooling, and high-stakes testing (Walsemann & Bell 2010). Integrated schools and classrooms may experience higher levels of racial and ethnic ten-
sion, and hence produce fewer positive interracial relationships than environments with relatively small minority populations (see, e.g., Ver- 

voort, Scholte, & Overbeek 2010). And students continue to experience “microaggressions” as a result of such factors as their race, ethnicity, sexual orientation, gender, religious commitments, and socioeconomic sta-


t, see, e.g., Huynh 2012). The legal system’s efforts to address youths’ day-to-day experiences have yet to produce broad hoped-for changes.

The experience of public schools illuminates the challenges facing the legal system. By regulating public schools, the legal system controls the socialization of youth. Yet, despite its overt commitment to equality, the legal system remains unable to overcome circumstances that challenge youth’s development of the values associated with a more just society. That inability continues mainly because youth continue to experience prejudice, differential treatment, and unequal outcomes as they develop in an institution meant to foster the opposite.

Unequal treatment and its associated failures are not, of course, re-

stricted to public schools. Youth experience discrimination in other key socializing institutions, including those purportedly dedicated to equality and presumed to be instilling values supportive of equal treatment. The criminal justice system reveals pervasive differential treatment of minority youth (Levesque 2006). Minority youth also are at increased risk for more intrusive interventions from child welfare and juvenile justice sys-


tems, and are at risk for receiving disproportionately ineffective health services (Levesque 2014a). A strong case could be made that the benefits of legal developments protecting youth from unjust interactions with the government unevenly go to those already privileged, typically middle-


class white students. But even assumed-to-be-privileged middle-class white youth may suffer from discrimination. The legal status of all youth renders them dependent on others who can subject them to differential treatment. When allocating resources, for example, families can differentially treat their children on the basis of such factors as gender, birth order, intelligence, weight, illegitimacy, sexual orientation, religious beliefs, and physical attractiveness (Levesque 2008). In a variety of ways, youth rou-


tinely experience being treated differently from others due only to the fact that they are deemed different and unworthy of equal treatment.

Remarkably, the legal system condones much unequal treatment even though it owes each individual equal protection. This is so for a
number of reasons. The legal system does not deem all inequalities and disparities to be discrimination worth addressing. Whether the law will allow differential treatment turns on a variety of factors, such as the government’s relative involvement, the target of the differential treatment, the extent of the differential treatment, the rationale for the differential treatment, the availability of alternatives for addressing the disparity, the nature of the involved rights, and the social context. But the major reason why the legal system allows differential treatment is that it seeks to remain neutral when addressing claims of discrimination. In a real sense, much of the differential treatment we may witness or experience is becoming defined as not being the legal system's business.

This focus on neutrality to address claims of discrimination—on the need for the legal system to simply remove itself from supporting one group over another—follows the Supreme Court’s increasing acceptance of an “anticlassification” approach to implementing the Constitution’s mandate of equal protection. This approach aims to ensure that the legal system neither privileges nor disfavors individuals who could be classified into particular groups. It essentially seeks to be blind to group status. The Court even adopts the anticlassification approach to address claims involving race. For example, it acts in a “color-blind” fashion by treating people of different races the same way. It does not take any account of racial stigmatization, subjugation, or other disadvantage that contributes to inequality in a particular situation. Instead, neutrality serves as the Court’s vehicle for increasing equality.

The Supreme Court’s favored approach attracts controversy, but no one doubts the Court’s commitment or the dramatic change from earlier approaches that it entails. The legal system’s increasing allegiance to formal equality, which resists making accommodations in order to achieve equal treatment for some, is viewed by many as anathema to the civil rights movement. Others counter that the social experiment of ensuring equality through laws, championed by the civil rights movement, fostered important progress but also rampant failures. They argue that change was long overdue. Yet others argue that current directions may diverge from the civil rights mandate of the 1960s and ‘70s but that the increasingly dominant approach of neutrality actually retains the most legitimate claim to civil rights and its fullest commitment to equality for all. Even members of the Supreme Court itself express these vary-
ing views (see Parents Involved in Community Schools v. Seattle School District No. 1, 2007).

In any event, the legal system seems to have stalled in its efforts to foster aggressive reform to ameliorate the plight of those traditionally deemed disadvantaged and subordinated. Buoyed by recent Supreme Court jurisprudence, the legal system increasingly removes itself from addressing inequality. It must do so because the Court’s understanding of the Constitution sets the parameters for all legal developments. Following these parameters, the Court has developed a legal system that remains neutral to the classifications of groups heretofore deemed to be in need of special recognition, care, and protection. We seem to have reached an end to the pursuit of equality as we knew it.

This book approaches equality jurisprudence from a different angle. Rather than focus solely on whether to remain neutral to claims of discrimination, equality jurisprudence also must focus on the values that the legal system seeks to instill. Opposing the Court’s commitment to neutrality is not only an exercise in futility but also unnecessary, especially because that approach can prove useful. Equality jurisprudence simply needs to broaden its reach. It needs to concern itself with the inculcation of values supporting equality and shape socializing institutions accordingly.

The impetus for this different approach to contemporary equality jurisprudence comes from three sources. The first source involves the difference between goals and the practical realities leading to their realization. The legal system may champion ideals of neutrality in the goals it sets itself for treating individuals. But the legal system cannot remain neutral in the values it supports and imparts. Neutrality toward groups may be possible in doctrinal formulations, but not necessarily in practice. Even seeking to remain neutral requires adopting the value of neutrality over other values. The values that shape notions of equality and the experience of inequality provide no exception to the impossibility of neutrality. The legal system routinely takes sides in disputes, including those involving claims of inequality.

The legal system’s now-resolute commitment to maintaining neutrality in order to foster equality makes it important to consider how the ideal of neutrality may falter in practice. Examples from adolescents’ everyday experiences again illustrate well the gap between formal law and the realities
that come from neutral stances. Minority students seeking more effective schools experience a sense of discrimination when required to return to underperforming schools because their districts no longer can consider a student's race when making school assignments. Students in integrated schools feel discriminated against when they cannot wear Confederate flag–styled belt buckles to demonstrate pride in their heritage or are barred from sporting Malcolm X t-shirts because they might disquiet students and administrators. Religiously conservative students feel discriminated against for not being able to express their views about homosexuality, while gay youth feel discriminated against by their school's failure to protect them from disparaging remarks about their sexuality. These examples all come from real-life cases, and all result from efforts to treat members from different groups the same way as those from other groups. Scholarly and empirical articles and newspaper accounts report similar results based on youth's views, expressions, and experiences relating to numerous other markers of identity, such as their immigration status, weight, attractiveness, disabilities, socioeconomic status, physical prowess, and gender (see Levesque 2014a). Formally treating groups the same way when they have different needs does not readily lead to a sense of equality for those who must live with the imposed value.

The second source that spurs a broader approach to equality jurisprudence stems from a simple observation about empirical research. Even as the legal system now stalls in its efforts to confront gaps in the ideals and realities of equality, empirical research has made important strides in showing how to achieve greater equality. The developmental sciences offer considerable hope for reducing prejudice, increasing tolerance, and addressing inappropriately unequal treatment. Indeed, much of the recent research has strong roots in theoretical underpinnings first developed during the court battles involving Brown (see Allport 1954; Williams 1947). They have the ability to connect closely to practical attempts to implement appropriate interventions and procedures for combating conflict and reducing both prejudice and the discrimination that can accompany it. The now-vast literature on the meaning, causes, expression, and reduction of prejudice is teeming with ideas, so much so that this area of study has few rivals in size, breadth, and vitality.

Regrettably, the legal system has yet to take more fully into account the insights and understandings revealed by empirical research, particu-
larly developmental science. Some empirical findings have found their way into court opinions, but beyond focusing on the narrow legal disputes at hand, the legal system has yet to determine how to translate a fuller empirical understanding into effective policies. The general failure to embrace empirical findings more fully may derive from the reality that efforts to reduce prejudice and increase tolerance and equality face dismaying challenges. But a central reason for those challenges is that the ways known to reduce prejudice and disparate treatment have gone without the legal system’s adequate support. Potential ways to offer robust support have been largely ignored. They simply have not been part of contemporary equality jurisprudence.

The third source that led to seeking a broader equality jurisprudence comes from dramatic developments reshaping the law’s inculcative powers. Just as the legal system has moved away from aggressive reforms to address inequalities, so it has moved toward supporting the values it deems fitting. The legal system can favor its messages over others. It even can enact programs that just happen to favor one religious group’s views, programs, and messages over those of another group. This is an incredible development given traditional views that the state should avoid supporting religious groups, that a wall must separate church and state (Levesque 2014b). This power transfers to other domains devoted to inculcating values. The government can shape the values instilled by the media, community groups, and families, just as it shapes those of its own systems—those of child welfare, criminal justice, juvenile justice, welfare, and education. That the legal system can influence all of these systems’ efforts to inculcate preferred values and influence societal change emerges as one of the most important developments in modern legal history. Yet it remains unheralded and ignored by equality jurisprudence. Indeed, it has been ignored even though it addresses the central challenge of fostering equality: how to instill preferred values.

That equality jurisprudence has played down the inculcative function of law is not surprising. This area of law still has no cohesive core and essentially no champions. It perhaps lacks advocates because much of it derives from contexts that permitted what some view as blatant discrimination, such as in situations that supported only conservative sexuality education programs (Bowen v. Kendrick, 1988), used public funds to support schools that could avoid civil rights protections (Zelman v.
Simmons-Harris, 2002), allowed community groups to discriminate (Boy Scouts of America v. Dale, 2000), and permitted families to raise children outside of mainstream social influences (Wisconsin v. Yoder, 1972). These now-leading cases, all of which involved the inculcation of youth and their socializing institutions, may have supported inequality. But they also created the foundation for the opposite. They consistently affirmed the government's power to shape socializing institutions. They supported the government's power to pursue its own preferred values, support those of private groups, or counter those that it does not favor with its own vast resources. A close look at doctrine in this area reveals impressive developments that can be fashioned into workable policies that support the inculcation of values conducive to increased equality. The legal system may require the neutral treatment of groups, but it still permits governments to embark on efforts that instill preferred values toward groups.

The above three observations lead to the central point of this book. Rather than accept the Supreme Court’s confidence that a neutral stance best leads to equality, this book champions the opposite: legal systems need to recognize that they regulate the systems that influence the development of values and that they can foster values conducive to increased equality. The Constitution may demand neutrality to ensure formal equality, but the legal system still permits the development of laws that take stances on difficult issues that go to the core of individuals’ values and their sense of self. The pages that follow provide the basis for thinking through changes in the way the legal system approaches discrimination and the way it can face the key challenges that lie ahead. The analysis draws from empirical understandings of ways to foster equality and charts ways to foster youth’s development of values that reduce invidious discrimination and its harms. It champions enlisting the socializing and inculcative powers of the law to shape institutions so that they can instill values consistent with ideals of equality.

Chapters Ahead

Chapter 1 begins our discussion by examining the general parameters of contemporary equality jurisprudence, which is the manner by which the legal system addresses discrimination and seeks to ensure equality
of treatment. The discussion centers on the foundations of equality jurisprudence by examining its fundamental tension: the need to treat everyone the same way as well as the need to treat some differently so that they can be in positions to be treated equally to others. Stated differently, contemporary equality jurisprudence seeks to discern whether to treat people differently so that they actually are treated the same way in terms of, for example, the ability to take advantage of similar opportunities—and if so, when such differential treatment is appropriate. After exploring that tension, the discussion highlights current directions in equality jurisprudence by describing the central holdings and rationales of key cases addressing inequality. That discussion necessarily focuses on cases of racial inequality, as that area of law has been central to the jurisprudence dealing with equality. That discussion concludes that current jurisprudential trends move toward formally treating everyone the same way, toward an “anticlassification” approach that seeks to rid the system of efforts to protect individuals by classifying them into protected groups. The chapter ends with an examination of the inherent limitations of that approach. To do so, it necessarily also considers the limitations of an alternative model that seeks to offer added protections to individuals from subjugated groups, aptly known as the antisubordination approach. These limitations lead us to look at alternative ways to approach inequality.

Chapters 2 through 5 craft the argument for refocusing equality jurisprudence. They do so by looking at empirical research to gain a better understanding of discrimination and to think through how the legal system can benefit from that understanding. Chapter 2 provides an overview of the empirical understanding of the nature and extent of prejudice and discrimination, their developmental roots, and their potential alleviation. The analysis centers on the implications that arise from recognizing that youth shape their environments and respond to multiple social forces as they develop judgments about others and determine whether to act on those judgments. Although research findings have long underscored the importance of pathological aspects of prejudice and actions relating to them, this area of study now emphasizes even more how prejudice and discrimination emerge as expected outcomes of normal social categorization, social identity, and group processes. Building on these findings, the discussion explores how in-
fluent social sources can be structured in ways that increase the likelihood of fostering dispositions, relationships, and institutions marked by tolerance, inclusion, and a sense of equity. These areas of research lay the foundation for thinking through the legal and policy analyses presented in the remaining chapters.

Chapter 3 begins to develop a refocused equality jurisprudence. The chapter provides a foundation for the next chapter as it addresses the government’s broad role in inculcating values and in shaping people’s dispositions. The analyses gain significance given the prevailing view that the government must resist such intrusions. Although admittedly framed to limit the government’s role in our lives, the legal system actually evinces important contrary impulses. These contrary impulses must become key components of equality jurisprudence. They provide the rationales for the legal system’s power to harness developmental science’s insights and foster the structuring of institutions in ways that alleviate prejudice, discrimination, and inequity.

After chapter 3’s broad introduction to the government’s role in shaping the inculcation of values, chapter 4 moves the analysis to actual sites where inculcation occurs and addresses the question of how to capitalize on them. The chapter begins by focusing on families and schools. It then moves on to other institutions critical to shaping adolescent development, such as religious groups, justice systems, health organizations, media, and community groups. At this point, the focus narrows to determining and respecting the rights of adolescents. That focus emerges from the recognition of the need to balance societal interests with those of adolescents’ right to exercise their fundamental freedom to develop their own thoughts and dispositions regarding how they will treat others. Throughout, the analysis reveals much that remains unregulated and ignored. These gaps gain particular significance in that analyses of discrimination law have not sought to explore key socializing institutions’ ability to inculcate values even though these institutions remain central to addressing the root causes of prejudice and discrimination.

Chapter 5 builds on the notion that a close look at laws regulating the various sites of inculcation reveals multiple ways in which social institutions can serve as an impetus and guide for change, furthering the ideals of equality jurisprudence. It examines how the legal system can balance the immense freedom retained by socializing institutions
and private individuals with the need to foster civic development that embraces a sense of equality, tolerance, and just opportunities, which brings us closer to the ideal hallmarks of modern civil society. It articulates broad principles grounded in empirical evidence, such as the need to clarify the values of different socializing systems, the need to provide guidance in determining responsibilities and obligations, and the need to focus on local implementation that can support structural change. While doing so, it provides concrete examples to demonstrate how the legal system can fail and how it can succeed in shaping the values that alleviate invidious discrimination.

The conclusion revisits the book's central arguments and highlights their implications. It champions the need to take seriously what the Supreme Court recognized so well in Brown. The legal system necessarily plays a deeply inculcative role in our lives. Legally, that understanding has contributed to two important developments. One resulted in what we recognize as antidiscrimination law. The other resulted in something that still does not even have a name and remains virtually ignored in efforts to address equality. That unnamed and unheralded development involves the manner in which the legal system actually can favor some values over others. The conclusion underscores the need for embracing these developments to create a more effective equality jurisprudence.

This book's broad scope brings with it notable limitations and strengths. This text cannot cover all legal cases and empirical findings dealing with the very wide breadth of topics relating to this area of law. It particularly cannot do so given its central argument that the laws addressing discrimination need to take a much broader view of equality than the current narrow focus on the Constitution's equal protection of laws mandates. Taking a broader look means selecting examples of trends and principles, rather than providing analyses steeped in string citations and spreading across multiple jurisdictions. Yet another key limitation relates to the recognition that no magic bullets exist for the problems plaguing this area of jurisprudence, public policy, and society. Instead of providing simple solutions, this text develops broad principles and suggests ways of implementing them. Thus, the book expands our knowledge in important ways while remaining mindful of the law's limitations, particularly of deep-rooted controversies.
This book details and responds to dramatic shifts in the legal system’s understanding of equality. Rather than stopping at demonstrating how the increasingly dominant legal approaches to equality pervasively fail to address the roots of prejudice and discrimination, the analysis moves forward by using the current empirical understanding of prejudice and discrimination as a springboard to expand jurisprudence relating to equality. That expansion provides a foundation for crafting law and policy reforms. Those reforms emerge not only in response to limitations of existing approaches but also with knowledge of broader issues that underlie those limitations and of how to counter them. In the end, this book argues for a shift in current thinking relating to laws addressing equality, a shift necessitated by dramatic developments in the legal formulations relating to equality and spurred by cutting-edge developmental science relating to discrimination and its alleviation. A close analysis of this complex area of law leaves this simple message: effectively addressing inequality requires a legal system that is doubling down, not backing down.