Toward Everyday Justice: On Demanding Equal Educational Opportunity in the New Civil Rights Era

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This Article discusses everyday disputes between ordinary Americans over defining and addressing racial discrimination in education today. These disputes were encountered during the author's work experience in the Federal Department of Education's Office for Civil Rights circa 2000. (Note: the author is no longer an employee of OCR and does not represent the agency). This Article contends that in what the author calls "the new civil rights era," the quest for racially equal educational opportunity takes place in a new social context of resistance to equal opportunity claims. The new civil rights era argument against equal opportunity demands is that racially equal opportunity in the abstract is warranted, but that additional opportunities for people of color in particular instances cannot be provided, are not warranted, or are not wanted for particular reasons.

The author contends that to meet the challenge of Grutter *in the new civil rights era, advocates for racially equal educational opportunity must consider carefully how best to convince fellow Americans to consider how ordinary, everyday moves in K-12 educational settings provide or deny young people of color equal opportunities to succeed and thrive.*

My research analyzes everyday struggles over race and educational opportunity in contemporary American education. For my first book, I conducted research on everyday talk and silence about race and racial inequality in a diverse United States high school and district in the mid-1990s.[1] This Article reports early findings from a second book on the everyday disputes over race and educational opportunity I encountered during a work experience in the Federal Department of Education's civil rights wing circa 2000.[2] Having analyzed everyday U.S. "race talk" and "colormuteness" in my first book, I am interested here in how Americans

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[1] MICA POLLOCK, COLORMUTE: RACE TALK DILEMMAS IN AN AMERICAN SCHOOL (2004).

[2] *See* MICA POLLOCK, EVERYDAY JUSTICE: DISPUTING EDUCATIONAL DISCRIMINATION IN THE NEW CIVIL RIGHTS ERA (forthcoming) [hereinafter EVERYDAY JUSTICE]. A number of passages in this Article appear in the introduction to this book. *See also* Mica Pollock, *Keeping on Keeping on: OCR and Complaints of Racial Discrimination 50 Years After* Brown, 107 TCHRS. C. REC. 2106 (2005) (special issue on the anniversary of *Brown v. Board of Education*) [hereinafter *Keeping On Keeping On*].

today, both inside and outside legal spaces, are arguing about racial inequality and opportunity in education. I have found that the way we argue about equal opportunity has a great deal to do with how we act or do not act to provide it.[3]

I thus have an ethnographically based response to the legalistic K-12 challenge launched in *Grutter v. Bollinger*.[4] To meet the challenge of *Grutter*, we must carefully consider how best to convince fellow Americans to make the civil rights logic of equal opportunity a daily educational reality. *Grutter*'s challenge to make affirmative action unnecessary in twenty-five years[5] really is a challenge to get the nation's children of color equally prepared for college admission: equally prepared both in comparison to common academic standards and in comparison to the nation's white children. *Grutter* essentially launches a challenge for racial equality of K-12 opportunity, and for racial equality of K-12 outcome. Achieving such racial equality will require that policymakers pursue the big policy moves of providing resource adequacy,[6] improving teacher recruitment and retention,[7] and the like. Yet my own research[8] also leads me to contend that in the current era, reaching true racial equality in K-12 opportunity and outcome will also require fostering a stance and practice of what I am calling "everyday justice" in the life of each teacher or administrator whose moves affect children of color in United States schools. To meet the challenge of *Grutter*, both educators and policymakers will have to ask themselves the following questions regarding each ordinary move affecting children:

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[3] My forthcoming book focuses on the disputes over race and educational opportunity which I negotiated and mediated at OCR, including arguments over defining discrimination, determining its existence, discussing discrimination, and disallowing discrimination. *See* POLLOCK, EVERYDAY JUSTICE, *supra* note 2. Through arguing over discrimination, the complainants coming to the office, the recipient districts and schools who received their complaints on official OCR stationary, and I and other employees of OCR snarled ourselves in central disputes of understanding, discussing, and achieving racially equal opportunity in the current era. The two years of arguments over educational discrimination that I participated in while at OCR indicated a need for newly sharpened analytic tools and newly sensitive social tools for analyzing, discussing, and addressing precisely which adult behaviors in schools and districts produce and allow racially unequal educational opportunity today.

[4] Grutter v. Bollinger, 539 U.S. 306 (2003).

[5] *Id.* at 343.

[6] *See* PETER SCHRAG, FINAL TEST: THE BATTLE FOR ADEQUACY IN AMERICA'S SCHOOLS (2003).

[7] *See* SUSAN MOORE JOHNSON, FINDERS AND KEEPERS: HELPING NEW TEACHERS SURVIVE AND THRIVE IN OUR SCHOOLS xiii (2004).

[8] *See* POLLOCK, EVERYDAY JUSTICE, *supra* note 2; *see also* Pollock, *Keeping on Keeping on*, *supra* note 2.

• Am I offering equal access to the opportunities and benefits of education, rather than denying it?

• Am I moving this student closer to opportunity rather than farther away from it?[9]

Because children of color are still more typically denied opportunities to learn in the United States than are white children,[10] the stance and practice of everyday justice in education particularly will require monitoring and revising ordinary acts affecting children of color so that acts always provide educational opportunity rather than deny it. This requires that educators put on a personal "race lens" to avoid and remedy racially patterned opportunity denials and to ensure that opportunities are racially equal in the classroom, school, and district spaces they control. While policymakers must focus on creating the basic structures for providing equal opportunity—indeed, my forthcoming book has much to say about how the U.S. Department of Education's Office of Civil Rights (OCR) itself can pursue equal opportunity more actively[11]—educators (including teachers and administrators) must also attend to whether their ordinary acts are enabling students of color to truly enjoy equal access to educational opportunity (equal in comparison to common standards, equal in comparison to the opportunities enjoyed by white children, and even equal in comparison to the opportunities educators would consider humane for their own children). Whenever they are not, each educator must make ordinary equalizing efforts to ensure equal opportunity provision to members of all groups—affirmative actions.

This is a tall order and probably, for most readers, a utopian suggestion. Yet it is essentially what much of the education profession has been hoping for from its new teachers and administrators, just stated more explicitly. The United States education profession hopes (at its best) that educators not only

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[9] One commentator relatedly argues that lawyers and policymakers in education should ask similar questions about policies, pursuing a practice of "preventive law" that could prevent legal battles in education. *See* Merle Steven McClung, *Preventative Law and Public Education: A Proposal*, 10 J.L. & EDUC. 37, 37 (1981). McClung suggests that policymakers and their legal counsel designing new education policies ask about potential "injury" to any person or persons, and more specifically about potential aggregated "injury" to groups. *Id*. at 39. "[W]ill the policy cause disproportionate effects among any racial, linguistic, ethnic or other protected minority group? . . . [R]acially disproportionate effects provide the classic trigger for judicial analysis. Such disproportionate effects by themselves usually do not constitute illegal action, but raise the legal issues that need to be evaluated. . . ." *Id.* Of course, as McClung notes, "preventive law assumes a good faith intent, sometimes absent, to design and implement policy consistent with legal requirements." *Id.* at 41.

[10] *See* JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA 11 (2005) (commenting on the destructive consequences of "our acceptance of a dual education system").

[11] POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

will be excellent at their craft, but that they will treat students equitably while educating.[12] Indeed, such behavior is what American school systems today typically request rhetorically from their educators in their mission statements about achieving "excellence" for "all."[13] Yet making a stance and practice of everyday justice a reality rather than just rhetoric requires in part *convincing* American teachers and administrators that ordinary equalizing moves are needed from them as well as from policymakers. Thus, I want to focus here on some tactics suggested by my research for convincing teachers and administrators (at both the school and district levels) that their own everyday equalizing acts will be necessary to help produce K-12 racial equality of opportunity and outcome.

I define successful argument as argument that: (1) eventually serves to convince educators to move children of color closer to opportunity rather than farther away from it, (2) has educators acting in ways that make children and parents of color feel better rather than worse about how schools serve their needs, and (3) makes educators generally more committed to assisting children of color as a common good. As I found working at OCR,[14] arguing with educators by using the argumentative tools of law both enables such successful argument and botches the task.

The question of why Americans generally, especially white Americans (the majority of today's teaching and administrator force), would even *care* about the opportunities of children other than their own children—literally their own children, or the children of their racialized group—is a fundamental contemporary issue. While such caring for "other people's children"[15] is natural, so is self-interest; Nusseibeh suggests that only if people see that a move for others is in their and their children's self-interest will they work toward it.[16] Long ago, Bell recognized the same phenomenon regarding white Americans in his work on interest convergence; he argued that white Americans would only pursue policies assisting black Americans if those policies served white people as well.[17] Accordingly, many in

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[12] *See* LINDA DARLING HAMMOND, THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK 7–36 (1997).

[13] On pervasive contemporary talk of education for "all" students, see POLLOCK, *supra* note 1.

[14] POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

[15] *See* LISA DELPIT, OTHER PEOPLE'S CHILDREN: CULTURAL CONFLICTS IN THE CLASSROOM (1995).

[16] Sari Nusseibeh, Rita E. Hauser Fellow, Philosophy, Al-Quds University, Public Lecture at the Radcliffe Institute for Advanced Study: What is the Palestinian State Worth? (Mar. 23, 2005).

[17] Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest Convergence Dilemma*, *in* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT 20, 22 (Kimberlé Crenshaw et al. eds., 1995).

education are trying to make the argument to white people that racially diverse schools benefit white children as well as children of color, such that white parents will want to commit to desegregated public schools.[18] Some writers, analogously, are now trying to convince white American parents and/or homebuyers that diversity in neighborhoods is in their interests.[19] In this Article, I am concerned not so much with how to convince other Americans generally (or educators in particular) to *want* equal opportunity in the first place, but rather how to convince them (and educators in particular) to actually provide it through their everyday actions once they profess an ideological commitment to it. This is especially important because we are at a moment in American history in which Americans across racial lines profess a belief in the necessity of racially equal opportunity, but in which many people make ordinary moves that counter this ideology.[20] For reasons I will explain shortly, I call this moment the "new civil rights era."[21]

Researchers studying contemporary American life have found that white Americans—who seem to believe wholeheartedly (at least as stated in surveys) in racially equal opportunity as an American right—still exhibit particular resistance to actual opportunity equalization in specific instances. Capturing the gist of much of this research, Hochschild writes pointedly of "whites' simultaneous endorsement of the norm of equality *and* rejection of steps that could promote it."[22] A core of well-broadcast public intellectuals and politicians of color, too, resist specific forms of equal opportunity provision for people of color, even while arguing more rhetorically that equal opportunity is each American's due.[23] More oppose the provision of equalizing opportunities at the end of the K-12 pipeline (for example, affirmative action in college admissions) than the provision of equal

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[18] *See, e.g.*, john powell, An "Integrated Theory" of Integrated Education 7–8 (Aug. 2002) (unpublished manuscript, given at Center for Civil Rights, University of North Carolina) (on file with author).

[19] *See* SHERYLL CASHIN, THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM 185–201 (2004).

[20] *See* EDUARDO BONILLA-SILVA, RACISM WITHOUT RACISTS: COLOR-BLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2003).

[21] *See* POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

[22] Jennifer Hochschild, Ambivalence About Equality in the United States or, How Did Tocqueville Get it Wrong and Why Should We Care? (June 1, 2004) (unpublished paper, prepared for conference on "Interrupting Oppression and Sustaining Justice" at Teachers College) (on file with author), *available at* http://www.tc.columbia.edu/icccr/IOSJ%20Papers/Hochschild_IOSJPaper.pdf.

[23] *See generally* JOHN H. MCWHORTER, LOSING THE RACE: SELF-SABOTAGE IN BLACK AMERICA 82–136 (2000); Glenn Loury, *Performing Without a Net*, *in* THE AFFIRMATIVE ACTION DEBATE 49, 49–64 (George E. Curry ed., 1996); Linda Chavez, *Promoting Racial Harmony*, *in* THE AFFIRMATIVE ACTION DEBATE 314, 314–25 (George E. Curry ed., 1996).

opportunities along the pipeline's course.[24] But all endorse the *idea* of racially equal opportunity, while typically denouncing particular ways of *making* opportunity equal using a "race lens." This dynamic of endorsing the idea of equal opportunity but resisting the provision of opportunities in specific instances is central to the arguments explored in my forthcoming book on the disputes over race and opportunity I encountered while working at OCR.[25]

OCR is an environment full of arguments over race and opportunity; indeed, it is a place that exists to argue about race and opportunity and to resolve ordinary Americans' arguments about it. With twelve regional offices across the United States and headquarters in Washington, D.C., OCR investigates complaints of educational unfairness filed by anyone who can find an application form and frame a complaint about local school or district practices so that it falls acceptably within the jurisdiction of the federal civil rights laws that OCR enforces. Agency employees are guided by thick books of federal regulations spelling out working definitions of educational discrimination and internal procedures for implementing the nation's civil rights laws in schools and districts. These employees take on Americans' allegations of educational unfairness at multiple scales. Complaints range from large-scale "class complaints" asserting that entire categories of children in a school district—students of color, English language learners, girls, or the disabled—are receiving unequal treatment via ordinary practices and policies,[26] to complaints involving individual children's needs.[27] OCR also occasionally (though rarely, now) undertakes uninvited compliance reviews of entire districts and universities; it gives policy guidance to educational institutions informing them of the agency's current interpretation of civil rights laws in education.

Arguments over race and opportunity in education take place both within OCR, and between OCR staff and the people they encounter in schools and districts.[28] Within OCR, all such arguments take place within and across

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[24] For an argument in favor of equalizing opportunity *before* college application and against affirmative action in college admissions, see Loury, *supra* note 23, at 53–56.

[25] *See* POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

[26] For example, advocates for such categories of children can complain that students are being disproportionately denied access to Advanced Placement (AP) classes, assigned to untrained teachers, or expelled without sufficient cause.

[27] For example, (i) a parent of a Latino student may allege the student was disciplined unfairly for a disputed infraction, (ii) a parent of a deaf student may complain the student was denied a promised interpreter, or (iii) the parent of a girl may complain the student was unequally barred from a sports team.

[28] The latter type of argument often simply amplifies preexisting arguments over race and opportunity between parents who complain to OCR and the administrators who run local schools.

racial lines. All the people filing the Title VI complaints I saw at OCR were people of color. All the administrators and educators I met who argued against specific equal opportunity claims at the school and district level were white.

The racial discrimination disputes between ordinary American complainants, recipients, and federal employees that I navigated (and, at times, instigated) at OCR were sometimes over analyzing, discussing, and achieving *Brown*'s basic rights to equal educational resources and facilities.[29] Yet more often than not, the racial discrimination disputes I saw at OCR were actually over less obvious, more ordinary rights to normal, everyday equal treatment for young people from protected groups in classrooms, schools, and districts. These disputes included both obliquely academic arguments over how children should be treated interpersonally in schools[30] and directly academic arguments over how children should be offered opportunities to learn.[31] There were always disputes over how and whether students' race group membership mattered to the treatment in question. The disputes always displayed the social tension and resistance sparked by the very suggestion of racial discrimination in the United States circa 2000. Navigating these disputes successfully—in ways that convinced (predominantly white) educators to provide additional opportunities to students of color or to remedy harm experienced by such students—required both sharp analytic tools and sensitive social tools, some of which were at my disposal then and many of which I have discovered only in retrospect.

In an era that lacks the explicitly discriminatory laws of the previous century, racial inequality is more than ever built by ordinary people at all levels of the system—us. Yet not all of us, particularly educators, who currently struggle within seemingly overwhelming educational systems, are convinced of our everyday roles in producing racially unequal orders—or of the everyday possibilities for helping to make opportunity equal in grades K-12. Much of my own work is an attempt to demonstrate to educators just how their ordinary, everyday moves in educational settings can help provide or deny young people of color opportunities to succeed and thrive.[32] I am not unaware of "big" "systemic" inequities;[33] rather, I am interested in how

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[29] *See* Brown v. Board of Education, 347 U.S. 483, 483 (1954).

[30] An example of an interpersonal treatment argument may involve discipline or peer harassment.

[31] An example of an argument over how learning opportunities should be offered may involve placement in AP classes or special education.

[32] EVERYDAY ANTIRACISM: CONCRETE WAYS TO SUCCESSFULLY NAVIGATE THE RELEVANCE OF RACE IN SCHOOL (Mica Pollock ed.) (forthcoming 2007) [hereinafter EVERYDAY ANTIRACISM].

[33] For systemic analyses of such structural inequities, see JEAN ANYON, GHETTO SCHOOLING: A POLITICAL ECONOMY OF URBAN EDUCATIONAL REFORM (1997); and see

ordinary people connected to schools and districts (both educators and policymakers) might also provide equal opportunity today in their own everyday ways. Today, it takes not just revisions of high-level funding and resource distribution or retention of end-of-the-pipeline affirmative action policies to create racial equality of opportunity in education. It also takes ordinary people making everyday moves to ensure that educational life in classrooms and hallways and reading groups and science labs is enabling to students (and particularly students of color) rather than harmful to them.

Many analysts are calling the current moment—the moment of *Grutter*[34] and its fraternal twin, *Gratz*[35]—a "post civil rights era."[36] The framing describes our temporal moment, as the marches and victories of the civil rights movement are now a distant memory to many. The phrase is also meant to describe the nation's current set of ideological stances regarding race and equality. According to scholarship attempting to characterize this era ideologically, we are a nation burned by the experience of integration, burned by experiments toward equal opportunity, and burned by the never-materializing reality of true racial equality and reconciliation. Among Americans of color in post-civil rights America, scholars say, pessimism about equality reigns, as does distrust of white Americans. According to one scholar, regarding young African-Americans, for example, "a fourth of the post-civil rights generation feel that blacks will never achieve racial equality, compared with only a fifth of the civil rights generation."[37] Among post-civil rights white Americans, in turn, anger reigns: today's white people, scholars argue, are resentful and anxious about opportunities they feel have been or will be stolen by undeserving people of color, via policies like affirmative

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generally PEDRO NOGUERA, CITY SCHOOLS AND THE AMERICAN DREAM: RECLAIMING THE PROMISE OF PUBLIC EDUCATION (2003); RICHARD ROTHSTEIN, CLASS AND SCHOOLS: USING SOCIAL, ECONOMIC, AND EDUCATIONAL REFORM TO CLOSE THE BLACK-WHITE ACHIEVEMENT GAP (2004).

[34] Grutter v. Bollinger, 539 U.S. 306 (2003).

[35] Gratz v. Bollinger, 539 U.S. 244 (2003).

[36] *See, e.g.*, Theresa A. Perry, *Achieving in Post-Civil Rights America: The Outline of a Theory*, *in* YOUNG, GIFTED, AND BLACK: PROMOTING HIGH ACHIEVEMENT AMONG AFRICAN-AMERICAN STUDENTS 87 (Theresa Perry, Claude Steele & Asa G. Hilliard III eds., 2003); BONILLA-SILVA, *supra* note 20, at 4; CASHIN, *supra* note 19; CIVIL RIGHTS AND RACE RELATIONS IN THE POST REAGAN-BUSH ERA (Samuel L. Myers Jr. ed., 1997) [hereinafter POST REAGAN-BUSH ERA].

[37] ANDREA Y. SIMPSON, THE TIE THAT BINDS: IDENTITY AND POLITICAL ATTITUDES IN THE POST-CIVIL RIGHTS GENERATION 20 (1998). Simpson writes that "[t]he post-civil rights generation, the 'integration generation,' may not have had the same experiences, but they have come face-to-face with a different kind of racism, one that is more subtle but just as powerful," *id.* at 22, caused by the failure of white-controlled and dominated institutions to fully welcome and include students of color. *See id.* at 24.

action and (often imagined) strategies like "quotas."[38] Scholars also contend that today's white people continue to feel innately superior to people of color and, accordingly, still treat people of color poorly in both everyday interactions and policy making.[39] White people do so, scholars contend, even while their harmful actions are often more "subtle" than in previous eras and even while whites continue to believe that people of color now receive opportunities equal to or even preferable to their own.[40]

While many argue that ordinary Americans harm, resent, and fear one another across racial lines in the current era, legal scholars note further that the current era demonstrates a policy-level departure from racial equality efforts.[41] Such commentators note that beginning even in the 1960s and 1970s, as the civil rights movement came into its own, the nation saw "the breakdown of the national consensus for the use of law as an instrument for racial redistribution."[42] In the 1980s, key reforms and programs from the civil rights era were actively dismantled, while in the 1990s, critics attacked the "very principle of racial antidiscrimination" as itself racist.[43] Such legal scholars also characterize the 1990s as marking a "rejection of the always fragile civil rights consensus and the renunciation of by federal, state and city authorities (indeed, of the American people themselves) that government not only can but must play an active role in identifying and eradicating racial injustice."[44]

I accept these colleagues' findings, but I remain more optimistic than many about the possibilities for convincing educators today (specifically, white educators) to utilize some concrete strategies for achieving racial equality of opportunity.[45] My conviction is that because the ideology of equal opportunity reigns generally in the nation even under hostilities about

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[38] *See* POST REAGAN-BUSH ERA, *supra* note 36.

[39] Joe R. Feagin, *Fighting White Racism: The Future of Equal Rights in the United States*, *in id.*

[40] On "subtle" (to perpetrators) "microaggressions" today, see Daniel Solórzano et al., *Critical Race Theory, Racial Microaggressions, and Campus Racial Climate: The Experiences of African American College Students*, 69 J. OF NEGRO EDUC. 60, 60 (2000). For survey and interview studies suggesting increasing white hostility to race-based equality efforts, see BONILLA-SILVA, *supra* note 20; RACIALIZED POLITICS: THE DEBATE ABOUT RACISM IN AMERICA (David O. Sears et al. eds., 2000) [hereinafter RACIALIZED POLITICS]. For a sampling of such essays analyzing current racial dynamics in what the editor calls the "post Reagan-Bush era," see POST REAGAN-BUSH ERA, *supra* note 36.

[41] *See generally* CRITICAL RACE THEORY, *supra* note 17.

[42] *Id*. at xvii.

[43] *Id.* at xxxii.

[44] *Id.*

[45] *See* POLLOCK, *supra* note 1; Pollock, *Keeping on Keeping on*, *supra* note 2; POLLOCK, EVERYDAY JUSTICE, *supra* note 2; EVERYDAY ANTIRACISM, *supra* note 32.

perceived opportunities denied, this ideology can still be capitalized upon in education in some crucial ways by convincing educators (like other actors whose acts affect children) of the need for specific forms of opportunity equalization that they themselves can accomplish. Rather than lament a "post civil rights era," then, I wonder about the possibilities of capitalizing upon its still-pervasive equal opportunity logic in education; for two reasons I instead call the current moment the "new civil rights era."

First, I do so because the civil rights project of demanding equal opportunity for groups long disadvantaged in American society has not yet succeeded in actually providing students of color with truly equal K-12 opportunity via our schools, either between segregated schools or within desegregated ones.[46] Thus, speaking of a "post civil rights era" falsely suggests that the equal opportunity battle is over, having been either won or lost. As Lakoff argues more generally of rhetoric, even using such language accepts its premises.[47] I thus argue that contemporary America is still in a civil rights era precisely because the quest for racially equal opportunity—particularly in education—rumbles on in the United States.[48]

Second, I believe it is a *new* civil rights era because the quest for equal opportunity takes place in a new social context of resistance to equal opportunity claims. What could be called the old civil rights era, that of the 1950s and 1960s (which historians argue was rooted in much earlier struggles, both domestically and globally),[49] involved some Americans fighting for equal opportunity from other (white) Americans who argued bluntly that equal opportunity was simply not deserved. While the old civil rights era response to equal opportunity demands was simply "no," I find that the new civil rights era response falls into the structure of "yes, but." The new civil rights era argument against equal opportunity demands is that racially equal opportunity in the abstract is warranted, but additional opportunities for people of color in particular instances cannot be provided, are not warranted, or are not wanted for particular reasons.

This is the peculiar era into which the challenge of *Grutter* has been launched, and advocates for racially equal K-12 opportunity in education must navigate this new era with analytic and social awareness. I believe that

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[46] *See generally* KOZOL, *supra* note 10.

[47] GEORGE LAKOFF, DON'T THINK OF AN ELEPHANT: KNOW YOUR VALUES AND FRAME THE DEBATE 33 (2004).

[48] *See also* ROBERT MOSES, RADICAL EQUATIONS: CIVIL RIGHTS FROM MISSISSIPPI TO THE ALGEBRA PROJECT (2001).

[49] Barbara Savage, civil rights historian, notes that this argument is increasingly pervasive among American historians. Conversation with Barbara Savage, Professor, University of Pennsylvania, at the Radcliffe Institute for Advanced Study (2005). Her own work examines the religious and social science roots of the American civil rights battles.

we must now seek to understand how our very arguments over race and fairness in the current era do and do not convince other Americans (parents, policymakers, educators, and politicians alike) to assist children of color in enjoying truly equal opportunities and in learning and thriving in education. This is why I am analyzing the ways in which the specific arguments for equal opportunity that were cycling through OCR circa 2000 seemingly succeeded and failed in actually getting others (both within the government and in local schools and districts) to sign on to local versions of the racial equal opportunity project.[50]

Historians demonstrate that in response to the old civil rights era's blunt rejections, Americans of color, white allies, and later, those who argued that they were denied opportunities along other axes—women, children of immigrants, and the handicapped—worked through the channels of law and civil disobedience to keep demanding and obtaining more equal opportunities from fellow white Americans who hoarded opportunity with a sense of moral and political righteousness. This civil rights struggle was waged through a strategy that was part moral confrontation (via spectacular nonviolent resistance and memorable speeches), part forceful confrontation (via riots), part legalistic quest (via court cases and legislative proposals), and part everyday, ordinary confrontation with fellow Americans in stores and school courtyards and streets.[51]

Through everyday local confrontations with those holding the keys to local opportunity systems[52] and through national legal and legislative victories, civil rights workers and their "everyday activist" counterparts[53] (who struggled on streets and at schoolhouse doors) succeeded in embedding the logic of equal opportunity in American life. These civil rights workers and activists embedded the logic of the civil rights movement into laws and into bureaucracies like my eventual workplace, the Department of

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[50] POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

[51] S*ee generally* RICHARD KLUGER, SIMPLE JUSTICE (1975); MELBA BEALS, WARRIORS DON'T CRY: A SEARING MEMOIR OF THE BATTLE TO INTEGRATE LITTLE ROCK'S CENTRAL HIGH (1995); MOSES, *supra* note 48; CHARLES J. OGLETREE, ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004). Valencia argues that Americans of Mexican descent, for example, have long pushed for equal educational opportunities through five channels: the work of individual activists, the work of advocacy organizations, political demonstrations, legislation, and litigation. Richard R. Valencia, *The Mexican American Struggle for Equal Educational Opportunity in* Mendez v. Westminster*: Helping to Pave the Way for* Brown v. Board of Education, 107 TCHRS. C. REC. 389 (2005).

[52] MOSES, *supra* note 48; BEALS, *supra* note 51.

[53] On "everyday activism," see Jane Mansbridge & Katherine Flaster, The Cultural Politics of Everyday Discourse: The Case of "Male Chauvinist" (unpublished manuscript, Kennedy School of Government, Harvard University) (on file with author).

Education's Office for Civil Rights, which was charged from 1967 on to enforce the concept of equal opportunity in education via the enforcement of civil rights laws.[54] Such individuals even infused the everyday rhetoric of the United States with the logic and language of the "dream" of equal opportunity.[55] Today, then, the logic and language of racially equal opportunity reigns in the United States, but full racially equal opportunity itself does not yet. Even OCR itself, as others have chronicled historically and I chronicle in the current moment,[56] has made many moves that *prevent* students of color from receiving equal, adequate, and even necessary opportunities to learn and thrive in schools. This prevention has occurred both through the heated resistance of various presidential administrations to directly assist students of color (a resistance particularly noted, for example, under Nixon, again under Reagan, and again under George W. Bush)[57] and

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[54] OCR's website states its government mandated purpose is to "ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights." United States Department of Education, Office of Civil Rights, Home Page, http://www.ed.gov/about/offices/list/ocr/index.html?src=oc (last visited Jan. 20, 2006).

[55] *See* RACIALIZED POLITICS, *supra* note 40; BONILLA-SILVA, *supra* note 20, at 30–52; JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, THE AMERICAN DREAM AND THE PUBLIC SCHOOLS (2003); Eduardo Bonilla-Silva, *Rethinking Racism: Toward a Structural Interpretation*, 62 AMER. SOCIOL. REV. 465, 470 (1997).

Taylor argues that how Americans think about inequality was fundamentally and permanently altered by the civil rights movement:

> [T]he movement for black civil rights has played an important role in spawning similar legal and political movements that have asserted the rights of women, Hispanic Americans, the disabled, the elderly, and other minority groups. Most of us have become more aware of the unjust limitations that government and society have imposed on minority citizens, women, the disabled and others and how our own prejudices and stereotypes have contributed to these barriers. Once aroused, this consciousness of injustice does not fade easily, even under the prod of regressive leadership. Thus, the progress that has been made is not likely to evaporate.

William Taylor, Brown*, Equal Protection, and the Isolation of the Poor*, 95 YALE L. J. 1700, 1734 (1986).

[56] Pollock, *Keeping on Keeping on*, *supra* note 2; POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

[57] For a discussion of OCR's history in these eras, see MICHAEL A. REBELL & ARTHUR R. BLOCK, EQUALITY AND EDUCATION: FEDERAL CIVIL RIGHTS ENFORCEMENT IN THE NEW YORK CITY SCHOOL SYSTEM 62–64 (1985); and see generally Gary Orfield, *The Civil Rights Act and American Education*, *in* LEGACIES OF THE 1964 CIVIL RIGHTS ACT 89 (Bernard Grofman ed., 2000); LEON PANETTA & PETER GALL, BRING US TOGETHER: THE NIXON TEAM AND THE CIVIL RIGHTS RETREAT (1971); *see also* Kenyon D. Bunch & Grant B. Mindle, *Judicial Activism and the Administration of Civil Rights Policy*, 1993 BYU EDUC. & L.J. 76, 78–90 (1993); HARRELL R. RODGERS, JR. & CHARLES S. BULLOCK, III, COERCION TO COMPLIANCE: OR HOW GREAT EXPECTATIONS IN WASHINGTON ARE

through OCR employees' own ordinary arguments over civil rights with ordinary Americans that fail in the task of convincing educators and administrators to do the everyday work they can do of providing equal opportunity and remedying harm. Arguing successfully for racially equal opportunity today is a particularly complex social task, for we have arrived at a moment in which most Americans seem to agree in principle (or at least say they do) that children's educational opportunity *should* be racially equal, but in which we do not agree on whether we can, will, or want to do the equalizing—or even, in some cases, on whether opportunities are currently unacceptably unequal at all.

Hence, the "new civil rights era" is thus about some Americans (more often, though not exclusively, people of color) fighting to receive equal opportunity from other Americans (more often, though not exclusively, white people) who agree in principle that equal opportunity is now deserved, but who argue in a myriad of ways that offering specific forms of racially equal opportunity or reparations for harm is impossible, unwarranted, or unjustified—or even in some cases, that opportunity is already equal.[58] Thus, the challenge of demanding equal K-12 educational opportunity for students of color in the new civil rights era is a challenge of getting Americans who share an equal opportunity logic to collaborate both within and across racial lines in a practice of equal opportunity provision, and even to agree on definitions of what unequal opportunity actually looks like.

I want to spend the rest of this Article suggesting several initial findings from my research regarding the process of demanding equal opportunity for students of color in the new civil rights era. I want to limit my discussion to the question of interacting with educators, but my suggestions can be taken as analyses of broader U.S. dynamics of arguing over race and equal opportunity. As my analysis of my experience at OCR has demonstrated most broadly,[59] the new civil rights era is characterized by three phenomena that must be navigated by anyone trying to argue with any other American for equalizing K-12 educational opportunity racially.

First, racially unequal opportunity is now produced through an aggregation of ordinary practices and policies, in the typical absence of explicitly, unabashedly discriminatory laws. Payne calls this a "fragmented" system, in which it is harder to find specific perpetrators to blame because inequality is produced through the interaction of countless individuals, many

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ACTUALLY REALIZED AT THE LOCAL LEVEL, THIS BEING THE SAGA OF SCHOOL DESEGREGATION IN THE SOUTH AS TOLD BY TWO SYMPATHETIC OBSERVERS: LESSONS ON GETTING THINGS DONE (1976); Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act's Race-Conscious Accountability*, 47 HOW. L.J. 243 (2004).

[58] BONILLA-SILVA, *supra* note 20; Hochschild, *supra* note 22.

[59] POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

of whom do not even realize that they play a role in inequality production.[60] In the arena of race (as with gender), the new civil rights era is an era in which opportunity denials are routine, normalized, and embedded in everyday experience, rather than (as in the old civil rights era) loudly or proudly announced as by design. In our desegregated, still segregated, and resegregated schools, opportunities to learn are denied to children of color through ordinary practices and policies that harm them as race group members, but that often do so unintentionally and are often not clearly marked as actions "because of race." Those Americans claiming that opportunities are racially unequal are thus in the position of needing to *prove* such unequal opportunity, and they will always be countered by other Americans arguing that they cannot see racially organized harm in ordinary circumstances. Proving racial inequality today requires coming equipped with precise evidence as to how harm patterns out in racial ways or harms children as race group members.

Second, given that the new civil rights era is characterized by everyday acts that are often racially harmful without explicitly stated intention and at times indirectly racially harmful (such as when a decision to end housing assistance disproportionately harms a school's black children), a deeply controversial (and deeply legalistic) American question rears its head routinely in American educational life: when and how children are harmed or disadvantaged *because* of race. Particularly in interracial educational settings (that is, schools with white teachers and students of color, or with a racially diverse student body), this question takes shape as a question of when and how race matters to conflictual social relationships between educators and students/parents in schools.[61] In a policy context, this question often takes shape as a debate over whether and how students are disadvantaged "because of poverty" rather than "because of race," despite the fact that orders of race and poverty have always been deeply intertwined in the United States.[62] In both policy contexts and in the everyday world of schools and districts, therefore, people claiming that race plays a role in the harmful treatment of students of color during the new civil rights era inevitably engage in routine heated debates over if and when everyday harms and disadvantages to

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[60] CHARLES PAYNE, GETTING WHAT WE ASK FOR: THE AMBIGUITY OF SUCCESS AND FAILURE IN URBAN EDUCATION (1984); *see generally* Philomena Essed, *Everyday Racism: A New Approach to the Study of Racism*, *in* RACE CRITICAL THEORIES: TEXT AND CONTEXT 176 (Philomena Essed & David Theo Goldberg eds., 2002).

[61] *See* POLLOCK, *supra* note 1.

[62] *See generally* Manning Marable, *Staying on the Path to Racial Equality*, *in* THE AFFIRMATIVE ACTION DEBATE 3 (George E. Curry ed., 1996); TOMAS ALMAGUER, RACIAL FAULT LINES: THE HISTORICAL ORIGINS OF WHITE SUPREMACY IN CALIFORNIA (1994); ROTHSTEIN, *supra* note 33.

students have taken shape "because of race." Those claiming that harm is racially organized must thus carefully consider which evidence of harm is most convincing to skeptics with power over children's futures.

Third, given that harm is ordinary and aggregated and the skeptical observer will always question the racial nature of harm in any particular instance, this era is characterized by widespread resistance to claims of "discrimination," and more generally to any specialized efforts to equalize opportunity or remedy past harm for students of color. Indeed, since any claim that race group members experience unequal treatment as race group members will be resisted in this era, so too will most calls for equalizing opportunity for members of racial groups as such. Any affirmative or enabling actions for race group members are sure to be resisted in some form (particularly by people of other "groups"), either through arguments that such enabling actions are unwarranted or that such enabling actions are impossible. Those claiming the need for equal K-12 opportunity for students of color thus need to be prepared to navigate this inevitable resistance, using tools of convincing, collaboration, and when useful, angry confrontation. (I say "when useful" because while angry demands often succeed in acquiring resources from reluctant policymakers, such results are not as common among educators, who have control over the provision of opportunities within ordinary schools and classrooms. These educators are the individuals who will actually help provide K-12 students with the full set of daily opportunities to learn and thrive, and I am finding that ordinary educators often respond better to convincing than to angry confrontation.)[63] Wielding legal tools like OCR's to accuse educators of "discrimination" is at times essential—particularly for forcing high-level decision makers to provide what one OCR colleague called the basic skeleton of educational opportunity. However, mandating equal opportunity on the ground by solely using an adversarial legalistic orientation can be too blunt a social strategy for achieving the everyday equal treatment, assistance, and caring that is necessary to create the daily student and parent experience of equality in the nation's classrooms, hallways, and administrative offices.

I want to argue, then, four strategies for making successful demands for racially equal opportunity in the new civil rights era. I will ground my analysis in the problem of convincing white educators in particular to provide everyday justice to the K-12 students of color they serve, though I am also concerned with convincing the various local, state, and federal actors with power over children to assist those children.[64] First, in this era, I contend, arguments do best when they provide precise evidence of academic opportunities denied children of color (and social harm experienced by

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[63] POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

[64] *See generally* POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

children of color), rather than simply denouncing treatment, outcomes, or institutions as racially unequal. Second, I contend that in this era, arguments do best when they avoid insinuations about adults' racist intentions to harm children *because* of race. Instead, arguments must provide evidence as to how children are harmed *as* race group members. Third, I suggest that in making complaints of racial injustice, advocates do best when they compare the experience of children of color not only to the opportunities of white children but also to opportunities deemed academically adequate and even humane. Fourth and finally, I contend that advocates need to enable and inspire a "rights discourse" among educators. As activists throughout the country are noticing, framing racially equal opportunities to learn in school as a civil right and even as a human right may be an effective tactic for promoting a stance of everyday justice in the new civil rights era.

I. STRATEGY ONE: PROVIDE PRECISE EVIDENCE OF HARM TO CHILDREN OF COLOR, RATHER THAN JUST DENOUNCING OUTCOMES

Advocates for equal opportunity often say that things are racially unfair in contemporary education systems without adequately showing *how* this claim is true. In an era in which many Americans are resistant to claims of unequal opportunity, showing unequal opportunity in action will be far more effective than simply summarizing its existence. It is essential today to provide educators with an analysis of what concrete and ordinary inequality of opportunity in education actually looks like. For example, rather than simply complaining that there are no Latino students in Advanced Placement (AP) physics, advocates for racially equal K-12 opportunity need to zoom in to analyze *how* no Latino students ended up being in AP physics. While this analysis might well implicate structural orders of unequal opportunity that must also be tackled by other players,[65] advocates hoping to make headway in a school and district context need particularly to demonstrate how the ordinary moves that ordinary school and district adults make toward ordinary children are also the building blocks of such unequal orders. In another example, one commentator has argued that a key move necessary for producing more mathematicians of color is to teach elementary school teachers more math.[66] It is necessary to zoom in analytically on such concrete

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[65] For a thorough example of such systemic analysis, see Richard Valencia, *The Plight of Chicano Students: An Overview of Schooling Conditions and Outcomes*, *in* CHICANO SCHOOL FAILURE AND SUCCESS: RESEARCH AND POLICY AGENDAS FOR THE 1990S 3 (Richard Valencia ed., 1991).

[66] *See* Patricia Clark Kenschaft, *Racial Equity Requires Teaching Elementary School Teachers More Mathematics*, 52 NOTICES OF THE AMER. MATHEMATICAL SOC'Y 208 (2005).

ordinary acts and social interactions in education in order to prove how such moments provide or deny specific educational opportunities to students of color, or—in the case of interpersonal interactions between adults and young people—to demonstrate how such moments are the building blocks of hostile environments felt by children of color.

In the past, racial inequality was built through a triumvirate of explicitly racist laws, indirectly racist policies, and ordinary explicit racist practices. The underfunded segregated black school pre-*Brown*, for example, was a result of laws enforcing segregated schools, school board practices of funneling money away from black schools, and the individual white principal standing at his schoolhouse door denying individual black children entry. Today, the explicitly racist laws officially enforcing racially unequal opportunity in so many words are gone; remaining are our ordinary behaviors and policies that harm children *as* race group members, sometimes actively, sometimes unintentionally, and often through passive acceptance of inequitable opportunity. Indeed, at the turn of the twenty-first century, even blatant racial disparities in resources and achievement between classrooms, schools, and districts are often taken for granted as normal.[67] Successful arguments in the new civil rights era, thus, will need to *show* more rather than just *tell* about racial inequality. Such arguments will need to examine actual practices, policies, and processes in education that deny specific opportunities, and explain how these practices, policies, and processes disadvantage or harm children *as* young individuals of color, by denying them specific opportunities to learn or specific social opportunities to thrive.

At the symposium that prompted this Article, Professor Roslyn Mickelson provided such specific evidence of harm by demonstrating that in Charlotte, North Carolina, racially harmful tracking takes shape in part through an exceedingly ordinary act: the publication of inaccurate enrollment requirements suggesting that a student must be tested as "gifted" before he or she can enroll in Advanced Placement courses.[68] Such false information, neutral on its face, has a racially disparate impact on the district's black students who—in another racially unfair ordinary practice—are less likely to be tested as "gifted" in the first place. While such analysis demonstrates how certain acts harm kids of color all at once, in other cases advocates need to show precisely how individual kids of color are harmed *as* kids of color one

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[67] Kozol presents an excellent illustration of how many Americans now normalize unequal opportunity in American schooling—either by not being too bothered by it (more typically the stance of white Americans, who less often experience egregiously unequal resource) or by not protesting it. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 7–39 (1991).

[68] Roslyn Mickelson, Professor of Sociology at the University of North Carolina at Charlotte, Address at the Ohio State Law Journal Symposium: Meeting the Challenge of *Grutter*: Affirmative Action in Twenty-Five Years (Feb. 24, 2005).

at a time. As Theresa Perry's work shows, the narratives of successful black public figures are filled with descriptions of such ordinary moments when educational careers were temporarily stunted—or painfully spurred on—by the ordinary disparaging statements and everyday treatment of teachers and administrators toward individual young black people.[69] My own work concentrates even further on the ordinary actions educators that take that help or harm children in racial terms: things as ordinary as the words one puts in the school mission statement or what one says or does not say about who is wandering in the hallways.[70]

Advocates for equal opportunity also need to be more skilled at unpacking the constitutive practices that are building more systemic patterns of harm. Often, advocates simply denounce harmful patterns. For example, an analyst might simply denounce, to a group of district educators, the drastic overrepresentation of black students in the district's special education classroom.[71] However, it may be much more successful in the new civil rights era to pinpoint a succession of (often unintentionally harmful) ordinary moments that produced the pattern denounced. For example, one could analyze retrospectively the literacy experiences of one black boy, Johnny, who is not taught to read adequately within a class of children of color, where his teacher is less trained and tutoring resources are less available than in a neighboring classroom or school serving predominantly white children. In doing so, one may find (as have many researchers studying the production of "disability")[72] a spiral of consequential moments. For example, Johnny, frustrated that he could not read, perhaps argued with his teacher and was disciplined several times within a week for defiance. Perhaps he was then evaluated for special education as someone with an emotional disability and placed in special education, where still, no one adequately monitored his reading experience. Arguments pinpointing the specific acts that produce racially disparate outcomes in the aggregate or in individual lives like Johnny's are not just necessary for navigating the resistance of critics. To fix the racially aggregated outcome like the special education demographic, educators actually will have to reorder ordinary acts toward individual black

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[69] *See generally* Theresa Perry, *Freedom for Literacy and Literacy for Freedom: The African-American Philosophy of Education*, *in* YOUNG, GIFTED, AND BLACK, *supra* note 36, at 11.

[70] POLLOCK, *supra* note 1.

[71] Evidence of such disparities can be found generally in RACIAL INEQUITY IN SPECIAL EDUCATION (Daniel Losen & Gary Orfield, eds. 2002).

[72] *See* Hugh Mehan, *Beneath the Skin and Between the Ears: A Case Study in the Politics of Representation*, *in* UNDERSTANDING PRACTICE: PERSPECTIVES ON ACTIVITY AND CONTEXT 241, 244–68 (Jean Lave & Seth Chaiklin eds., 1996). *See generally* HERVÉ VARENNE & RAYMOND MCDERMOTT, SUCCESSFUL FAILURE: THE SCHOOL AMERICA BUILDS (1998).

children. Educators themselves will have to zoom in and examine their processes of teaching specific black children to read, their processes of referring black students to special education, and black students' literacy experiences in special education.[73] Such analysis is an example of what I am calling the stance and practice of "everyday justice." Such analysis attempts to investigate and *show*, rather than just *tell*, how kids of color might be harmed or disadvantaged (and conversely, aided or assisted) by ordinary educational treatment.

While one could simply call the end state of this special education disparity "discriminatory," in the new civil rights era—where no policy explicitly enforces this pattern—advocates need to prove the ordinary and disadvantaging moves that made the pattern. Otherwise critics will argue simply that the end state disparity is not "discriminatory" on its face and they will thwart analysis of the disparity's production. Unfortunately, this very argument has been made at OCR under the George W. Bush administration. In 2001, George W. Bush temporarily appointed Gerald A. Reynolds as the head of OCR via a congressional recess appointment. Mr. Reynolds had previously openly argued that he did not believe in using the long legacy of "disparate impact" analysis to open civil rights investigations based on end-state statistics showing racially disproportionate student assignment or outcomes. For example, Mr. Reynolds was not in favor of opening cases triggered by statistics showing that suspiciously high proportions of a district or school's black students were placed in special education or suspended. As Losen described, after Reynolds's appointment, some top OCR officials actually distributed internal memoranda to employees instructing them to avoid investigating cases in which complainants primarily supplied OCR with troublingly racialized or gendered statistics.[74] I have accordingly urged that complainants arrive at OCR equipped not only with end-point comparative evidence of how harm to children has patterned out racially (the racial special education demographics), but also with evidence identifying some concrete practice, policy, or process that is *causing* the harm.[75] Today's advocates for racially equal opportunity will do best by getting equipped with evidence of specific practices *creating* racial patterns and with an argument about specifically how these practices are unfair to students of color.

Equal opportunity analysis today is like effective work against cavities: we need sharp analytic tools, like plaque removers, to pinpoint and excavate specific actions that undeservedly harm children of color. This brings us to

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[73] For a discussion of the last issue, see Twakia Martin, *The Literacy Experiences of Two Third-Grade Black Males in Inclusive Special Education Settings* (qualifying paper, Harvard Graduate School of Education, 2005) (on file with author).

[74] Losen, *supra* note 57.

[75] Pollock, *Keeping on Keeping on*, *supra* note 2.

my second recommendation for successful argument for racially equal K-12 opportunity in the new civil rights era: I contend that advocates should avoid insinuations about malicious educator intent entirely.

II. STRATEGY TWO: ANALYZE HARM TO CHILDREN OF COLOR, NOT THE INTENTIONS BEHIND IT.

The text of Title VI of the 1964 Civil Rights Act states that: "No person in the United States shall, *on the ground of* race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[76]

Title VI's logic demonstrates the legalistic need to prove that discrimination has occurred "on the ground of" or because of race. Yet when Americans interact and make policies today, it is now often unclear to many people in schools and districts whether specific actions are even racialized, much less exclusionary to children or benefit-denying in purposeful racial terms. Indeed, it is now often unclear to many Americans when race *should* matter to how we interact, much less when race has mattered to ordinary harmful and disadvantaging acts toward children.[77] While lawyers feel that they must seek intent as a disciplinary requirement,[78] I contend that in education, the real task is to avoid or remedy acts that are harmful to children *as* children of color. Successful argument against racial harm in education, I contend, may need to jettison the legalistic search for intent altogether, and turn from analyzing racial intent to analyzing racial harm.

In the field of education, racism is already described too exclusively as an interior, attitudinal phenomenon of bad intentions, just as it is in the law, which presumes that "real" discrimination lurks within hearts and minds.[79] Social science has the same problem: as formal Jim Crow laws fade into memory and ordinary racial inequality remains, many social scientists

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[76] Civil Rights Act of 1964, Pub. L. No. 88-352, Title VI, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (2000)) (emphasis added).

[77] Pollock, *supra* note 1; *see also* EVERYDAY ANTIRACISM, *supra* note 32; Mica Pollock, *Race Wrestling: Struggling Strategically with Race in Educational Practice and Research*, 111 AMER. J. EDU. 67 (2004) [hereinafter *Race Wrestling*].

[78] *See* COMM. ON NAT'L STATISTICS, DIV. OF BEHAVIORAL AND SOC. SCI. AND EDUC., MEASURING RACIAL DISCRIMINATION: PANEL ON METHODS FOR ASSESSING DISCRIMINATION (Rebecca M. Blank, et al. eds., 2004) [hereinafter MEASURING RACIAL DISCRIMINATION]; CHARLES A. SULLIVAN, ET AL., EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE (3d. ed. 2002); Linda Hamilton Krieger, *The Content of our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L.R. 1161 (1995).

[79] Krieger, *supra* note 78, at 1167.

attempting to analyze such ordinary discrimination in contemporary American life still often veer into a quest primarily for discriminatory attitudes, framing contemporary discrimination as the "covert" presence of discriminatory ideologies lurking "under" ordinary people's "colorblind" talk.[80] Even though such social science pinpoints important contemporary behaviors, when analysis of racial harm to children seeks to probe exclusively into educators' minds and hearts, educators always react negatively to claims about harm to children. Far more socially successful, I argue, are analyses of how and when specific, concrete, and ordinary educator actions even unintentionally deny kids of color equal opportunities to succeed.

In the OCR complaint process, for example, insinuations about intent always ravaged educational communities and girded educators to resist claims that students were even harmed at all, much less harmed because of race. Complainants' arguments that past acts had been racially discriminatory almost always insinuated, or even claimed directly, that these acts had been *intentionally* harmful; complainants often spoke of educators' "racist" attitudes. When processed through OCR's legal apparatus, these insinuations about racist intent often became amplified even further. OCR lawyers seek intent obliquely, asking whether recipients can justify their actions as based on reasons *other* than race; yet even such indirect investigation of educators' intentions always produced recipient rebuttals that their actions were not intended to harm children, were not racially harmful to children, or were not even "racial" at all. With evidence of harm "on the ground of race" presumed legalistically to lie inside educators' heads, arguments over proof and findings regarding racial discrimination always raised rebuttal claims of insufficient evidence.

Legalistic arguments even obliquely demanding proof of intentions also often increased local controversy over the reasons behind acts from the past, rather than promoting educator-parent-advocate collaboration toward fair treatment in the future. Indeed, in their resistance to all insinuations about their bad intentions, educators wound up resisting making the very changes that would keep parents of color from complaining again to OCR. While it was clear that educators wanted better relations with complainants of color

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[80] For a discussion on the presence of discriminatory attitudes or logics "under" "colorblind" statements, see Bonilla-Silva, *supra* note 55, at 476. *See also generally* BONILLA-SILVA, *supra* note 20; Lawrence Bobo, *Race, Public Opinion, and the Social Sphere*, 61 PUB. OPINION Q. 1 (1997). I myself have written of colormuteness, the self-conscious deletion of race labels from talk. *See* POLLOCK, *supra* note 1. In my work with educators, however, I frame colormuteness as an action with often *unintentionally harmful* consequences rather than evidence of internal racist attitudes.

(particularly parents), instead of fixing educational practices and broadcasting that they would be equitable, all players simply debated OCR's anticipated findings. As complainants and districts ended up arguing over whether anyone intended to hurt children because of race, it often started to seem that the point was not—as it should be—to improve the lives of children, but rather to determine whether a district or school was full of good or bad people. While complainants typically had approached OCR originally asking for a more basic recognition that the acts in question had caused harm to children (or themselves) as people of color, both complainants and recipients often ended up disputing the intentions behind or under the adult acts taken toward children, more than the empirical consequences of those actions on children. The sense of seeking racism "under" the actions of educators drove recipients to resist all allegations of "discrimination" with insistences that "race" had nothing at all to do with their ordinary actions.

My research leads me to suggest that if advocates talk more about harms that students experience as race group members and less about the intentions of those adults harming them, many educators will be more apt to remedy past harm and to analyze their own practice to prevent future harm. This result is likely because most educators enter the field of education determined to help children rather than to harm them.

This suggestion to steer away from intent analysis is echoed in much current scholarship on the law. In critiquing legal habits of analysis, scholars argue not only that analysis of discriminatory behavior must transcend reductive notions of conscious intent,[81] but also that lawyers must comprehend the unintentional ordinariness of discrimination rather than framing discrimination as the aberrational acts of intentionally harmful people. Critical race theorists who have denounced the constrictions of civil rights law have long argued that American law, in its intent framings, has been unable to contend with the ordinariness of racial discrimination. As some commentators have observed, the American legal order played a central role in the very deradicalization of racial liberation movements by its very framing of intentional harm as a rare thing, and one increasingly imagined as a thing of the past:[82]

> Along with the suppression of explicit white racism (the widely celebrated aim of civil rights reform), the dominant legal conception of racism as a discrete and identifiable act of "prejudice *based on* skin color" placed

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[81] A cluster of social scientists and lawyers, Mahzarin Banaji, Anthony Greenwald, and Linda Krieger, were working on this argument at the Radcliffe Institute in 2004–2005. *See also* Krieger, *supra* note 73. For related prior arguments in this vein, see Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[82] *See* CRITICAL RACE THEORY, *supra* note 17.

> virtually the entire range of everyday social practices in America—social practices developed and maintained throughout the period of formal American apartheid—beyond the scope of critical examination or legal remediation.[83]

Further, legal ideas of discrimination, focused on pinpointing "intention," have themselves aided the rhetorical rebuttal that in any particular case, something called "discrimination" has not likely occurred because it has not been intended:

> The [law's] construction of "racism" from what Alan Freeman terms the "perpetrator perspective" restrictively conceived racism as an intentional, albeit irrational, deviation by a conscious wrongdoer from otherwise neutral, rational, and just ways of distributing jobs, power, prestige, and wealth. The adoption of this perspective allowed a broad cultural mainstream both explicitly to acknowledge the fact of racism and, simultaneously, to insist on its irregular occurrence and limited significance.[84]

Many legal analysts fault the intent requirements of American law for constricting the entire civil rights project in American life; they argue that judges focused civil rights attention too narrowly on punishing only the most explicit, aberrational, and purposefully cruel acts perpetrated against people of color, rather than also dismantling as discriminatory the full range of normalized unequal opportunities that people of color were suffering on an ordinary basis.[85] They particularly lament the law's failure to reengineer ordinary behaviors, pointing out that judges and courts over the decades following the civil rights movement have become unwilling to call discriminatory most of the ordinary activity that actually produces racial inequality.[86] Scholars note that particularly since the 1980s, American civil rights law (in education and other arenas) gradually relinquished the full study of Americans' discriminatory behaviors for a fundamentally limited analysis of Americans' discriminatory attitudes. American race law gradually

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[83] *Id.* at xv (emphasis added).

[84] *Id.* at xiv.

[85] *See, e.g.*, Lani Guinier, *From Racial Liberalism to Racial Literacy:* Brown Versus Board of Education *and the Interest-Divergence Dilemma*, 91 J. AM. HIST. 92, 92–118 (June 2004); *see also* Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, *in* CRITICAL RACE THEORY, *supra* note 17; Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, *in id.* at 5–19; *see also* Krieger, *supra* note 78.

[86] For a useful overview of these critiques, see generally CRITICAL RACE THEORY, *supra* note 17.

constricted analysis of racial discrimination to include as "discriminatory" only the intentionally harmful actions of atypical, individual "racists." "Racism was identified only with the outright formal exclusion of people of color; it was simply assumed that the whole rest of the culture, and the de facto segregation of schools, workplaces, and neighborhoods, would remain the same."[87] Accordingly, the law has failed at equipping Americans with the tools to address how racism really works—through ordinary, systemic, and often unintentional disadvantaging acts. Many social scientists attempting to measure racial discrimination today, thus, urge explicitly that definitions of discrimination must go beyond the restrictive definitions of American law.[88] As Lawrence argues, notably of children:

> Does the black child in a segregated school experience less stigma and humiliation because the local school board did not consciously set out to harm her? Are blacks less prisoners of the ghetto because the decision that excludes them from an all-white neighborhood was made with property values and not race in mind?[89]

Those arguing for retaining the tool of "disparate impact analysis," Lawrence notes, argue that "the 'facts of racial inequality are the real problem'"; they urge that racially disproportionate harm should trigger heightened judicial scrutiny without consideration of motive.[90]

In the new civil rights era, then, looking primarily inside heads for intentions or attitudes may be less effective analytically and socially than demonstrating how and when specific, concrete, and ordinary actions deny race group members equal opportunities to succeed.[91] The legalistic search for discriminatory intent may be a particular dead-end in education, both analytically (because intentions are often impossible to ascertain) and socially (because the search for discriminatory intentions makes people defensive rather than collaborative). At OCR, I found that quests to evaluate

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[87] *Id.*

[88] A "Panel on Methods for Assessing Discrimination" convened by the Committee on National Statistics in 2001 argued pointedly that, "we do not believe that a social science research agenda for measuring discrimination should be limited by . . . legal definitions." MEASURING RACIAL DISCRIMINATION, *supra* note 78, at 41.

[89] Lawrence, *supra* note 81, at 319–20.

[90] *Id.* Advocates (such as the National Women's Law Center) for using disparate impact analysis to analyze gender discrimination have made similar arguments. *See, e.g.*, Letter from Marcia D. Greenberger, Co-President of the National Women's Law Center, to Senator Edward M. Kennedy, Chairman of the Health, Education, Labor and Pensions Committee (Mar. 4, 2002), http://www.nwlc.org/pdf/ReynoldsOppositionLetter.pdf (last visited Jan. 21, 2006).

[91] POLLOCK, EVERYDAY JUSTICE, *supra* note 2.

harm *because of* race always consumed district and school employees' energies in resisting the very claim of racial harm, deflecting the real educational task of repairing harms felt by children. The more socially and analytically fruitful task—and indeed, the educational task—was to begin to analyze how children had been harmed *as* race group members, to remedy whatever harm they had experienced, and to prevent such harm or feelings of harm from happening again. Because if children and parents experienced schooling as harmful in some way, then some move toward repair was the only way forward to improved social and educational relations.

The everyday justice task in K-12 education is not just to reshape educators' beliefs and internal biases regarding children, but to reorganize behaviors to not be racially harmful to children. Far more profitable in the new civil rights era, I contend, will be analysis that demonstrates with clear evidence just how harm to children *patterns out racially*, how harm is experienced by children and parents *as racial*, and how children from some racialized groups are harmed in ways that children from other racialized groups typically do not experience. From the advocate side, this again requires evidence that identifies some concrete practice, policy, or process that is causing the harm. From the lawyer side, it also requires accepting evidence that children have been harmed as race group members by specific actions, regardless of the perpetrators' conscious intention.[92] This in turn requires listening to what Freeman called the "victim perspective" simply to understand the experience of harm.[93] In the world of K-12 education, the real educational problem is that harm is experienced by children and parents of color, even if this harm might not be found to actually rise to the level of a legal violation by intent-focused lawyers. OCR work demonstrated that in educational settings, if children are to be protected, it is crucial to analyze any racially harmful effects of ordinary behavior, in part by analyzing environments in which kids and parents feel discouraged, disadvantaged, disliked, or devalued as race group members.

Supporting claims that children experience harm as race group members, however, also requires comparison to some treatment that is better. To be fair to educators, not all claims of racial harm can be accepted as fact and used immediately to make fundamental changes in school or district practices. Complainants of color, unsurprisingly, found everyday interactions far more damaging than white educators imagined them to be. But complainants of color often offered concrete comparative evidence supporting their claims of harm, rather than assuming that OCR would take their claims of harm at face value. Indeed, they had to provide such evidence of harm to even have their complaints accepted at OCR. OCR cases, filed by American parents,

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[92] *Id.*

[93] *See* Freeman, s*upra* note 85.

guardians, and advocates, always requested important comparative analysis of how school and district adults acted toward students of various race groups on an ordinary basis—how they disciplined students, taught them, placed them in programs, wrote policies regarding them, diagnosed them, and talked to them and their families—and of the potentially harmful effects for children of these acts. While they did complain informally about educator "racism," complainants typically did not request explicitly that OCR uncover whether discriminatory attitudes lurked covertly in the minds of educators or administrators; rather, they requested comparative analysis of whether educators' ordinary, normalized actions actually disadvantaged group members in concrete ways that members of other groups did not experience. And while in a contemporary court setting—as a colleague at OCR conveyed to me—lawyers must basically "do a 'Perry Mason' on districts to get them to confess that they hate all black kids," OCR's administrative laws and regulations at least offer the comparative tool of seeking intent obliquely. This is done by comparing the actual ordinary harms experienced by members of different race groups and asking whether any different treatment could be at all justified. OCR's work thus sometimes offers what critics of the law have long been calling for: a basic view of discrimination today as ordinary, comparatively harmful behavior.[94]

Once again though, legalistic comparison of race group experience was essential, but also itself analytically flawed at times. OCR's legal tools offered some crucial analyses of comparative harm and opportunity other than just the dead-end search for intent, but processing claims of discrimination through the OCR apparatus always required some self-defeating forms of legalistic proof that were impossible to find. As OCR analysis zoomed in to compare the treatment of children of different racial groups in specific incidents, for example, analysis of isolated events one at a time sometimes demonstrated that no one incident could be deemed egregiously different treatment in legalistic terms. This was the case even though, in the aggregate, students had clearly experienced treatment that they found racially harmful. At other moments, the required comparison to the better treatment of students of other race groups (particularly whites) was simply not available given the demographics of the school district. In other cases, missing evidence on the superior treatment of white students (typically unrecorded in schools) could easily gut a legal claim of discrimination against a student or students of color.

This is why, in the new civil rights era, those claiming racial harm might need to both use and transcend current legal tools to analyze the experience of harm felt by students and parents of color. While zooming in to analyze isolated acts to compare race group members' experience of those acts is

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[94] *See generally* CRITICAL RACE THEORY, *supra* note 17.

essential, advocates for racially equal opportunity today must also examine the treatment of children of color in comparison not just to the treatment of white children, but also to the educational treatment considered standard, adequate, and humane for any child. I suggest this tripartite comparison (to the treatment of whites, to standard treatment, and to humane treatment) for both analytic and rhetorical reasons. In the new civil rights era, advocates for racially equal opportunity must make comparisons that successfully prove unequal opportunity to skeptics with power over children's lives; advocates must also make comparisons that inspire others to work toward opportunity equalization.

III. STRATEGY THREE: COMPARE CHILDREN OF COLOR'S SPECIFIC OPPORTUNITIES TO STANDARD, ADEQUATE, AND HUMANE OPPORTUNITIES, AS WELL AS TO THOSE EXPERIENCED BY WHITE CHILDREN.

When analyzing discrimination complaints at OCR, I typically compared the acts taken toward children of color both to standard practice in a school or district, and to acts taken toward children of other racialized groups, typically white children. As stated earlier, OCR's tools always required certain kinds of evidence that was impossible to find (e.g., evidence of the treatment of white students in isolated comparative incidents), either because no data existed on white students experiencing comparable incidents, because—as in many resegregated or never desegregated districts—no white students existed at the school, or because no one kept records on standard practices. It is rare for educators to keep records on white students being treated well, not being given detention, or being offered standard opportunities. Further, many public schools and districts in the new civil rights era contain no white students at all. And in most cases, educators could explain away poor treatment as not unfair or not comparatively bad.

While analysts sometimes importantly compare the opportunities of various groups of color to one another,[95] the comparison to whites undergirding *Brown* and Title VI is still necessary. This is why many people within OCR during my time there were attempting to push the agency to do both intradistrict and interdistrict comparisons of resource distribution between schools and districts of different demographics, and advocates for desegregation continue to argue that desegregation plans should be metropolitan in order to equalize resources and clout between cities and

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[95] *See, e.g.*, POLLOCK, *supra* note 1, at ch. 4 (commenting on multiracial inequality systems); Pollock, Race Wrestling, *supra* note 77 (commenting on the specific treatment of black students within diverse all-of-color schools, for example).

suburbs.[96] Yet OCR's legalistic analysis often shoots itself in the foot by enforcing a search for the very compared-to-white "proof" that is impossible to find using OCR's current comparative tools.

Also difficult was our tactic of evaluating the comparative racial harmfulness of isolated events. While zooming in on each small social move to analyze and evaluate its comparative racial equitability was a core aspect of determining the existence of discrimination (indeed, I am advocating for such an analysis in my first suggestion[97]), when we zoomed in on any given action toward a student or parent, it often became hard to evaluate the isolated action's racial nature in comparison to other groups' experience. At the zoomed-in level of focus, the comparisons to other-group experience typically sought for evaluating different or unfair treatment of race-group members were often no longer available; the question of harm in racial terms often boiled down to one person's word against another's.

Yet still, OCR's Title VI analysis also caused all players to examine harm comparatively; it pushed the analysis of the crucial question of how ordinary actions might have hurt children along racial lines. The analysis also provided the important tool of comparing the treatment of children to the treatment presumed appropriate by common standards. For example, a suspension could be judged harmful if it exceeded the consequences of the school handbook and could not be explained away as deserved.

Most successful analytically was combining the law's habit of carefully evaluating individually small acts for comparative racial fairness with analysis of the aggregated harm complainants said they experienced when these individual acts combined over time. To judge harm, it was necessary to both zoom in on particular incidents to evaluate them comparatively and to zoom out again to evaluate the social and educational climate experienced by complainants and their children.

Still, in education in the new civil rights era, the most effective way to analyze the harm that children experience *as* race group members could be to compare the specific experiences of children of color not only to the specific experiences of white children, but also to the specific opportunities deemed essential by common standards (the linchpin of the adequacy movement).[98]

While I was at OCR, a special "Early Learning" project that colleagues and I participated in attempted to institutionalize this dual comparative logic at OCR. Considering the specific schooling opportunities denied to many K-3 students of color in the United States (certified teachers, up-to-date curricula, and facilities for learning science, for example), we reasoned that students of color's opportunities to learn could be deemed unequal, both in

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[96] *See, e.g.*, powell, *supra* note 18.

[97] *See supra* Part I.

[98] *See* SCHRAG, *supra* note 6.

comparison to white children's and in comparison to the opportunities deemed necessary by common standards. We reasoned that if states, districts, and the federal government are increasingly articulating what students are supposed to know and be able to do in the early grades, and if they are penalizing or advancing students based on the high-stakes demonstration of such knowledge and skills on tests, then these standards are a concrete benchmark against which advocates can measure whether young students of color actually receive equal opportunities to learn the fundamental skills, content, and concepts for which they are being held accountable. This dual comparative logic—comparing the opportunities given students of color both to those given white children *and* to those opportunities conventionally deemed adequate—is essential in the new civil rights era.

As I want to conclude, the new civil rights era may demand inspiring fellow Americans with a "rights discourse" that compares opportunities given to children of color to opportunities considered standard and even to the treatment that any American would deem humane for his or her own child. This "rights discourse" may best inspire educators, too, to collaborate with parents and advocates in their own acts of everyday justice. My final and related suggestion, then, is to inspire the contemporary discourse of educational rights by framing educational opportunity not only as a compared-to-white problem, but also as a basic civil right of an American child—and a human right.

IV. FINAL STRATEGY: INSPIRE A "RIGHTS DISCOURSE" IN EDUCATION

Advocates tend to work toward equal opportunity in education by demanding it, more often than by inspiring others to provide it. Those making arguments for equal opportunity need to consider carefully when to frame listeners as opponents who need to be pushed angrily to provide equal opportunity, and when to frame listeners as colleagues who need to be convinced and inspired to collaborate in providing it. Considering carefully when conflict or collaboration will better assist children is particularly important when interacting with K-12 educators. One superintendent told me that being accused of discrimination is a shock to the system; the question for education is when and how this shock to the system works to commit educators to serving children equitably, and when it keeps people from analyzing ordinary disadvantaging processes. As Gloria Ladson-Billings, now President of the American Educational Research Association, said to me when I interacted with her during the OCR's Early Learning project, educators will perhaps only work toward racial equality when they want it; when there are no rules. Back to the cavity analogy, then, advocates for equal opportunity could need at times to treat K-12 educators using a sensitive toothbrush: brushing gums until they bleed does not make them cleaner. This

became particularly clear to me while working at OCR: even when OCR succeeds in enforcing a written legalistic vision of equality through its complaint resolutions or compliance reviews, ordinary educators remain in charge of what happens to children on a daily basis.

Adversarial relations between educators and advocates must thus be used strategically in the new civil rights era. A stance of collaboration between educators, parents, and even equity-minded federal officials often succeeds best in embedding a civil rights logic into everyday K-12 life. At other times, the legalistic enforcement stance is necessary for ordering the redistribution of basic resources, or for simply stating loudly the fact that equal opportunity is actually required. Law particularly can force the higher-up redistribution of resources, and it must be used as such in the new civil rights era, as in recent adequacy cases.[99] But law cannot force people to analyze equal opportunity locally and routinely, nor can it force or inspire educators to actually act affirmatively in everyday ways to enable children to succeed.

Part of what is necessary, I believe, is to inspire a contemporary educational effort toward equal opportunity by framing the ordinary educator act of providing adequate educational opportunity K-12 as an American civil rights project for American children[100] and, more broadly, as a human rights project. Such a framing asserts that children of color deserve equal opportunity because they are children. While I was at OCR circa 2000, a multiracial coalition of advocacy groups outside the agency increasingly raised the argument that equitable opportunities to learn should be educational civil rights in the contemporary United States. Others even transcend the logic of race-group assistance by arguing for education as a fundamental constitutional right and even as a basic human right.[101] These arguments may be catching hold. We never have framed education as a human right for children in the United States (or even, constitutionally, a fundamental one), even though our ambassadors often frame education that way for children elsewhere in the world. While post-apartheid South African children now march to school buoyed by human rights logic, in the United States the idea that all children have the right to adequate learning opportunities in their schools oddly seems to be a question for debate.

Today, however, advocates for equal opportunity are increasingly framing students in the United States as having civil and human rights to learn, as a purposeful strategy for convincing other Americans to provide

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[99] *See id.*

[100] For a particularly successful attempt at framing the issue as such, see MOSES, *supra* note 48.

[101] *See id.* Jeannie Oakes at UCLA, and Goodwin Liu at University of California, Berkeley have also been collaborating on formulating such an argument.

equitable opportunity.[102] For we are realizing that if education is not framed as a "right," then access to adequate, humane, and decent opportunities to learn and thrive is framed as a result of chance and luck, not as a necessity. Caring Americans often look at crumbling schools, overcrowded classrooms, and students learning in basements as unfortunate; some of us even get extremely angry. But we too rarely frame such circumstances as civil rights violations or, even more broadly, as violations of children's human rights. As Loewen suggests, a sense of a "right" to educational opportunity (or a "right" to be free from racially organized harm in school) prompts a sense of necessary repair for opportunities denied: "Once a right has been declared, someone deprived of that right does not have to prove, through some kind of social science reasoning, that the deprivation caused measurable injury."[103]

In the end, I believe, a stance of education as a civil right or human right of children is what will truly inspire the stance of "everyday justice" in education that I contend is a necessary component of meeting the challenge of *Grutter*. Meeting this challenge requires everyday acts of opportunity equalization and provision from ordinary Americans, and everyday acts of opportunity equalization and provision cannot be manufactured only by force or law. I believe that people can be convinced to provide and equalize opportunity for students of color if they are (1) convinced that (and how) children of color are being harmed and denied opportunities to learn and thrive undeservedly, even if unintentionally, through ordinary activity, and (2) convinced that adequate educational opportunity is not just a civil right for children of color, but a human one. While the question of promoting good will from the other ordinary decision makers outside education whose acts affect children of color is a question for another paper,[104] the possibility of directing the will of educational decision makers toward providing everyday justice seems less remote.

V. CONCLUSION: TOWARD EVERYDAY JUSTICE

Monitoring and revising ordinary acts in education so that acts always provide—rather than deny—educational opportunity to children of color constitutes what I call "everyday justice." Alongside calling for overtly

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[102] *See generally* LINDA DARLING HAMMOND, THE RIGHT TO LEARN: A BLUEPRINT FOR CREATING SCHOOLS THAT WORK (1997).

[103] JAMES W. LOEWEN, SOCIAL SCIENCE IN THE CLASSROOM: STATISTICAL TECHNIQUES AND RESEARCH METHODS FOR WINNING CLASS-ACTION SUITS 8 (1982).

[104] For example, white middle-class parents deciding whether to leave cities when their children reach school age are another key group of decision makers that affect all children in a community; so are mayors, businesspeople, and state lawmakers.

"big," "structural" policy moves,[105] advocates trying to meet the challenge of *Grutter*[106] also need to enact a grounded movement for racial equality in educational opportunity through weighing each ordinary act affecting students that is taken in classrooms, schools, and districts. I contend that such a stance and practice of ensuring that children's (and particularly children of color's) daily, normal opportunities to learn and succeed in school are adequate and equitable is an essential, ongoing partner to the more "structural" work of past and present civil rights social movements.[107]

To meet the challenge of *Grutter*, advocates for truly racially equal opportunity in K-12 education must embed and enact the civil rights logic of equal opportunity not just in national education policy, but also in the everyday actions of the ordinary K-12 educator. Advocates can do so only by working to convince while they demand.

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[105] An example of such high-level policy moves is to provide adequate funding, resources, and teachers for students in each district and state.

[106] Grutter v. Bollinger, 539 U.S. 306, 343 (2003).

[107] On such movements past and present, see *supra* note 51 and accompanying text.