How Antiracist Lawyers Can Produce Power and Policy Change

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> *Critiquing racism is not activism. Changing minds is not activism. An activist produces power and policy change, not mental change. If a person has no record of power or policy change, then that person is not an activist.*[1]

I. INTRODUCTION

During the summer of 2020, a considerable number of white Americans finally heard "the simple but radical truth of [Black and Brown] humanity and worthiness . . . ."[2] With a nation in crisis over the coronavirus and police violence—both of which disproportionately affect Black and Brown lives[3]—some Americans have declared themselves antiracists[4] and offered actions they will take to serve the cause of racial equality.[5] Advocates must find ways to fix racist policies that are "systemic, widespread, and entrenched."[6] They must act now to protect civil rights and liberties—especially regarding equal treatment under the law.

Contemporary legal mobilization emphasizes constituent accountability and integrated advocacy.[7] Integrated advocacy calls upon lawyers and co-

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[1] IBRAM X. KENDI, HOW TO BE AN ANTIRACIST 209 (1st ed. 2019) [hereinafter Kendi, HOW TO BE AN ANTIRACIST].

[2] Erin Aubry Kaplan, *Everyone's an Antiracist. Now What?*, N.Y. TIMES OPINION (July 6, 2020), [https://perma.cc/TBG3-L8FJ].

[3] Sheryl G. Stolberg, *'Pandemic Within a Pandemic': Coronavirus and Police Brutality Roil Black Communities*, N.Y. TIMES (June 8, 2020), [https://perma.cc/KL4J-TXE5].

[4] *See infra* Section I.A; *see also* Kaplan, *supra* note 2.

[5] *See infra* text accompanying notes 23-24; *see also* Kaplan, *supra* note 2.

[6] Deborah N. Archer, *Political Lawyering for the 21st Century,* 96 DENV. L. REV. 399, 408 (2019). Dr. Ibram X. Kendi explains why the phrase "racist policy" works better than "institutional racism" or "structural racism". Kendi, HOW TO BE AN ANTIRACIST *supra* note 1, at 18. He writes that racism itself is institutional, structural, and systemic, so the phrases that include "institutional" and "structural" are redundant. *Id.* By contrast, "racist policy" says exactly what (and where) the problem is. This Article will use the phrase "racist policy" unless quoting someone who uses different phraseology.

[7] Scott L. Cummings, *Law and Social Movements: Reimagining the Progressive Canon*, 2018 WIS. L. REV. 441, 441 (2018) [hereinafter Cummings, *Law and Social Movements*]. Lawyers use different labels to describe contemporary approaches to legal mobilization, including political lawyering, movement lawyering, creative lawyering, rebellious social movement lawyering, social justice lawyering, and community lawyering. All share the same broad goal—using law and additional tools to promote social justice and produce power and policy change. *See generally* Raymond H. Brescia, *Creative Lawyering for Social Change*, 35 GA. ST. U.L. REV. 529, 532 (2019) (emphasizing "creative problem solving [as] a necessary element of social change now and in the future

collaborators to use a range of tools to produce change.[8] These tools include litigation, legislative advocacy, media engagement, community organization, and interdisciplinary collaborations.[9] Integrated advocacy assumes that legal and non-legal advocates will maximize their impact when they work collaboratively and use a combination of strategies to create meaningful and sustainable change. Depending on the challenge, some tools work better than others to obliterate discriminatory policies and promote social justice.[10]

This Article applies integrated advocacy to three distinct social justice challenges: (1) prohibiting hair discrimination (especially against Black Americans),[11] (2) abolishing standardized testing for college admissions,[12] and (3) providing comprehensive protection for LGBTQ individuals—especially those in the community who face additional race-based equal opportunity barriers.[13] These three important issues were chosen because they raise difficult questions about the role legal advocates can play in producing significant power and policy change.

This Article proceeds in five parts. Part I presents brief descriptions of antiracism and integrated advocacy and explains their significant relationship. Parts II, III, and IV apply an integrated advocacy model to the three social justice challenges, which involve issues of race, class, gender, and their intersections,[14] in order to offer insight about which tools lawyers and their co-

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. . . ."); Scott L. Cummings, *Movement Lawyering*, 27 IND. J. GLOBAL LEGAL STUD. 87, 98 (2020) (describing movement lawyering as "the mobilization of law through deliberately planned and interconnected advocacy strategies, inside and outside of formal law-making spaces, by lawyers who are accountable to politically marginalized constituencies to build the power of those constituencies to produce and sustain democratic social change goals that they define"); Artika R. Tyner, *Planting People, Growing Justice: The Three Pillars of New Social Justice Lawyering*, 10 HASTINGS RACE & POVERTY L. J. 219, 220 (2013) (describing social justice lawyering as "lawyering [that] moves beyond the traditional notions of lawyering to a transformative paradigm which focuses on working collaboratively across professional sectors, geographical boundaries, and community borders to create change").

[8] Archer, *supra* note 6, at 402, 431.

[9] *Id.*

[10] *See* Cummings, *Law and Social Movements*, *supra* note 7 (showing examples of how lawyers have used integrated advocacy. Cummings offers analysis of the following movements: marriage equality, immigration rights, and #BlackLivesMatter.).

[11] *See* discussion *infra* Sections II.A, II.B.

[12] *See* discussion *infra* Sections III.A, III.B.

[13] *See* discussion *infra* Sections IV.A, IV.B. The Human Rights Campaign (HRC), the largest national LGBTQ advocacy group, has pointed out that LGBTQ individuals need protection now more than ever in light of the COVID-19 pandemic. Elizabeth Bibi, *Human Rights Campaign: Supreme Court is On Right Side of History for LGBTQ Rights*, HUM. RTS. CAMPAIGN (June 15, 2020), [https://perma.cc/5LWT-TDYN]. The organization describes concerns about unemployment, health care protections, and violence. *Id.*

[14] *See* Jordan Curry Carter & Ian Snyder, *A Beginner's Guide to Intersectionality*, NAT'L LEAGUE OF CITIES (Sept. 3, 2020), [https://perma.cc/KN76-LY2C]. Carter and Snyder point out that

collaborators have used effectively. Part V offers three recommendations to contribute to conversations about integrated advocacy as an antiracism strategy. Finally, this Article concludes that lawyers[15] concerned about social change must use all available tools to change racist policies.

II. ANTIRACISM AND INTEGRATED ADVOCACY

Section A outlines steps antiracist lawyers should take when engaging in problem-solving. Section B suggests that lawyers pursue these steps using integrated advocacy. This approach combines a variety of strategies to achieve social justice goals.

A. Antiracism

"Racism is a marriage of racist policies and racist ideas that produces and normalizes racial inequities."[16] According to Dr. Ibram X. Kendi, a leading scholar of American race discrimination, the term non-racist is a term of denial.[17] When someone expresses a racist idea or supports racist polices, they often offer the defense, "I am not racist."[18] Antiracists, by contrast, do more than defend themselves while supporting racist ideas or policies. Antiracists take actions that assume and work toward racial equality.[19] Dr. Kendi explains that, in American society, racial inequity is the norm.[20] Allowing the norm to persist by doing nothing is to essentially be racist.[21] By contrast, antiracists challenge the norm of racial inequality by using their skill to change or eliminate racist policies.[22] Antiracist steps include: (1) defining terms such as "racist policy,"[23] (2) using definitions to assess our ideas, institutions, and communities, (3) admitting when policies are racist, and (4) seeking to change racist policies.[24] Social justice lawyers can change racist policies using integrated advocacy.

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people who experience harm based upon their identity, in more than one system, face increased oppression from each system compounded together. *Id.* Thus, oppression exists at the intersection of race, class, gender, and more. *Id.*

[15] Brescia, *supra* note 7, at 533.

[16] Kendi, HOW TO BE AN ANTIRACIST, *supra* note 1, at 17.

[17] *See id.* at 17–18.

[18] *Id.* at 9.

[19] *Id.* at 22.

[20] *See id.*

[21] *Id.* at 9.

[22] Kendi, HOW TO BE AN ANTIRACIST, *supra* note 1, at 209.

[23] *Id.* at 18.

[24] *Id.* at 231–232.

B. Integrated Advocacy

Lawyers that strive for social change have always combined multiple strategies and tactics to achieve their goals.[25] For example, in the mid-1990s, activists combined litigation, media strategy, and the organization of workers as part of a Los Angeles anti-sweatshop campaign.[26] The campaign improved working conditions in the Los Angeles garment industry[27] and changed policies to improve the lives of garment workers (many of whom were exploited by employers that took advantage of their immigrant status).[28] Over the last twenty years, lawyers have modified their approach to social justice work by: (1) making their clients' goals central to their work,[29] and (2) applying more sophisticated and strategic judgment about which avenues to pursue in a particular context.[30] In applying the modifications of social justice work, the Marriage Equality Movement—between 2001 and 2015—combined state law victories with a "hearts and minds" media campaign, which set the stage for a Supreme Court decision that supported the freedom to marry across the United States.[31] Lawyers call the new approach to social justice work *movement lawyering*. Movement lawyering's distinguishing features are constituent accountability and integrated advocacy.[32]

This Article will impose a structure on the messy variety of integrated advocacy tools antiracist lawyers and their collaborators use to produce change. For each of the three distinct social justice challenges that are highlighted, this Article starts by analyzing the traditional integrated advocacy

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[25] *See generally* Susan D. Carle, *Ethics and the History of Social Movement Lawyering*, 2018 WIS. L. REV. FORWARD 12 (emphasizing the ethical problems that arise in social movement lawyering).

[26] *Id.* at 22.

[27] Cummings, *Law and Social Movements*, *supra* note 7, at 460 (describing that the campaign provided "several million dollars [that were] collected on behalf of garment workers between 1995 and 2005" and that "there were industry-wide changes and movement-specific gains"). *See also* Kenneth B. Noble, *Los Angeles Sweatshops Are Thriving, Experts Say*, N.Y. TIMES (Aug. 5, 1995), [https://perma.cc/YNH9-U468]. Noble pointed out that "[a]lmost one-fifth of the garment industry workers in Los Angeles, many of them foreigners . . . are toiling in unregulated, sweatshop conditions." *Id.* Employers can take advantage of the immigrant workers because of "their legal status, naivete and cultural alienation." *Id.*

[28] Cummings, *Law and Social Movements*, *supra* note 7, at 460. *See also* Noble, supra note 27.

[29] Carle, *supra* note 25, at 17. Carle points out that social justice lawyers have sometimes lost sight of their clients' priorities. *Id.* For instance, she writes that the NAACP Legal Defense Fund (LDF) in *Brown v. Board of Education* ignored some of their clients' goals, including the goal of obtaining more resources for their local schools. *Id.* at 16.

[30] *Id.* at 16-17.

[31] HAAS JR., *Marriage Equality Timeline*, LGBT EQUALITY, [https://perma.cc/RW7Q-MSMB] (last visited June 8, 2021) (describing that advocates for marriage equality discovered that the idea of marriage equality worked better than the idea of same-sex marriage). Sometimes, change is more likely when lawyers refrain from highlighting laws and rights.

[32] Carle, *supra* note 25, at 21 (indicating that, since the 2000s, scholars have embraced the phrase "movement lawyering," instead of public interest or poverty lawyering).

tools: litigation and legislative advocacy.[33] When attorneys litigate, they take claims to court and hope to achieve results for their clients. Sometimes, these cases "spark a movement[34] and "raise the public profile of injustice."[35] When public affairs teams engage in legislative advocacy, they introduce bills that further a specific cause, such as civil rights.[36] Next, this Article analyzes less traditional integrated advocacy tools: media engagement, community organizing, and interdisciplinary collaboration. Advocates can produce change through media engagement,[37] pairing legal expertise with on-the-ground relationships,[38] and drawing upon the knowledge of social scientists, historians, and more[39] to enrich social justice narratives and increase the likelihood of change.[40]

III. PROHIBITING HAIR DISCRIMINATION

At a high school wrestling match in 2019, referee Alan Maloney left 17-year-old wrestler Andrew Johnson with ninety seconds to make a choice: Johnson needed to cut his "unnatural" hair (styled in locs) or forfeit the match.[41] A viral video of Johnson's locs being cut from his head incited national conversation surrounding grooming discrimination and control of the Black body.[42] New Jersey Governor Phil Murphy responded by signing the "Create a Respectful and Open Workplace for Natural Hair Act" ("CROWN Act"). The CROWN Act updates the state "Law Against Discrimination" and prohibits discrimination against race-related hairstyles.[43] This New Jersey legislation now ensures a broader type of discrimination protection that social

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[33] *Id.* at 22.

[34] Cummings, *Law and Social Movements*, *supra* note 7, at 105.

[35] *Id.* at 459.

[36] Archer, *supra* note 6, at 412 ("[C]ivil rights lawyers worked to enshrine litigation victories into legislation.").

[37] *Id.* at 430 (noting that when media experts craft messages, they may want to minimize legal arguments and focus instead of on seeking dignity and respect.).

[38] *Id.* at 402.

[39] *See* Brescia, *supra* note 7, at 574 (highlights collaborations with sociologists, historians, political scientists, educators, and anthropologists). This Article adds the idea that social-change lawyers should collaborate with corporations. *See infra* Sections II.B, IV.B, V.B.

[40] Brescia, *supra* note 7, at 583.

[41] Jesse Washington, *The Untold Story of Wrestler Andrew Johnson's Dreadlocks,* THE UNDEFEATED (Sep. 18, 2019), [https://perma.cc/4RJD-4CDX].

[42] *See id.*

[43] Press Release, Phil Murphy, Governor of New Jersey, Governor Murphy Signs Legislation Clarifying that Discrimination Based on Hairstyles Associated with Race is Illegal (Dec. 19. 2019), [https://perma.cc/4RA8-JKBH].

justice lawyers have been seeking from the courts and legislatures since Congress passed Title VII of the Civil Rights Act of 1964 ("Title VII").[44]

Although Congress created Title VII with the intent to prohibit "discrimination against employees on the basis of race, color, religion, sex, or national origin,"[45] the Supreme Court has determined that anti-discrimination law protects immutable, but not mutable, characteristics.[46] The Supreme Court first distinguished immutable and mutable characteristics in *Frontiero v. Richardson*.[47] In *Frontiero,* the Court determined that some characteristics, like sex, race, and national origin, are immutable because they are determined accidently at birth and are unchangeable. [48] Lower federal courts have adopted the immutability/mutability standard for Title VII.[49] Since hairstyles are mutable, Title VII generally gives employers wide latitude to place restrictions on employee hairstyles.[50] The following Section discusses case law that sits at the intersection of Title VII and hair. It also describes the CROWN Act—a legislative tool embraced by social-change lawyers that prohibits race-based hair discrimination.

A. Litigation and Legislative Advocacy

Employer grooming codes cover a range of standards for hair length, male facial hair, uniforms, and other dress codes.[51] Although the Supreme Court has not yet ruled on race-based hair discrimination,[52] federal courts have considered a wide range of complaints involving employees who

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[44] *See id*; Civil Rights Act of 1964, P.L. 88-353, 78 Stat. 241 (1964) (codified as amended in the scattered sections of 2, 28, and 42 in the United States Code).

[45] Martin Childs IV, *Who Told You Your Hair Was Nappy?: A Proposal for Replacing an Ineffective Standard for Determining Racially Discriminatory Employment Practices*, 2019 MICH. ST. L. REV. 287, 290 (2019). *See also* 42 U.S.C. § 2000e-2 (2020).

[46] Frontiero v. Richardson, 411 U.S. 677, 678–79 (1973).

[47] *Id.* at 686.

[48] *Id.*; *see* Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 2, 14 (2015).

[49] *See, e.g.*, Willingham v. Macon Tel. Pub. Co., 507 F.2d 1084, 1091 (5th Cir. 1975) (considering hair length in the context of sex discrimination); Garcia v. Gloor, 618 F.2d 264, 269 (5th Cir. 1980) (applying immutable characteristic limitation to national origin).

[50] 42 U.S.C. § 2000e-2 (2020); *see* EEOC, *CM-619 Grooming Standards* (1989), [https://perma.cc/2DVA-47G8] (describing grooming standards from the EEOC in 1989).

[51] EEOC, supra note 50. *See* Lus Laboris, *The Legal Landscape on Employer Dress Code and Appearance Polices: a U.S. and European Prospective*, LEXOLOGY (May 30, 2017), [https://perma.cc/3XVJ-72ZV].

[52] Imani Gandy, *The U.S. Supreme Court Decided to Ignore Black Hair Discrimination,* REWIRE NEWS GROUP (May 16, 2018), [https://perma.cc/GH84-UZZW] (explaining that Chastity Jones asked the United States Supreme Court to hear her case, but the United States Supreme Court rejected the opportunity to address it); *see* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1156 (11th Cir. 2016), *cert. denied*, 138 S.Ct. 2015 (2018).

challenge employer grooming standards.[53] The most significant case in this range is *Willingham v. Macon Telegraph Co.*, which focused on a sex-discrimination claim.[54] Alan Willingham, a copy layout artist, alleged that an employer refused to hire him because of his shoulder-length hair.[55] He argued that the length of his hair would be acceptable, but for his gender.[56] The Fifth Circuit Court of Appeals rejected Willingham's claim and ruled that different hair length restrictions for male and female employees do not constitute sex discrimination under Title VII.[57] Since hair length is an "immutable characteristic" (i.e. a person can easily cut their hair), an employer is free to maintain different hair length standards for males and females.[58] The Fifth Circuit decision in *Willingham v. Macon Telegraph Co.* set the precedent that hairstyles are mutable characteristics.[59] Therefore, Title VII does not protect them.[60]

Employers must apply the same standard to employees of different races.[61] For example, an employer cannot allow white female employees to wear their hair in ponytails and prohibit Black female employees from wearing the same style.[62] In most states, employers have discretion to decide that cornrows, all-braided hairstyles, and dreadlocks are unprofessional and consequently prohibited.[63] Finally, a workplace policy that attempts to control

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[53] *See, e.g.*, Cooper v. Am. Airlines Inc., 149 F.3d 1167 (4th Cir. 1998) (dismissing a claim based on a grooming policy that required braided hairstyles to be secured to the head at the nape of the next); Eatman v. United Parcel Serv., 194 F. Supp. 2d 256 (S.D.N.Y. 2002) (affirming an employer's right to prohibit unconventional hairstyles, including dreadlocks); Wofford v. Safeway Stores, Inc., 78 F.R.D. 460 (N.D. Cal. 1978) (affirming an employer's right to engage in even-handed application of grooming regulations); Thomas v. Firestone Tire & Rubber Co., 392 F. Supp. 373 (N.D. Tex. 1975) (affirming an employer's grooming policy regulating hair length and facial hair); Brown v. D.C. Transit Sys., 523 F.2d 725 (D.C. Cir. 1975) (rejecting an employee claim that an employer's grooming policies regarding facial hair was discriminatory).

[54] *Willingham*, 507 F.2d at 1086.

[55] *Id.*

[56] *Id.* at 1088.

[57] *Id.* at 1092.

[58] *Id.*

[59] *Id.*

[60] Willingham v. Macon Telegraph Co., 507 F.2d 1084, 1086 (5th Cir. 1975).

[61] *See* Hollins v. Atl. Co., 993 F. Supp. 1097 (N.D. Ohio 1997), *aff'd in part*, *rev'd in part*, 188 F.3d 652 (6th Cir. 1999).

[62] *Id.*

[63] *See, e.g.*, Pitts v. Wild Adventure, No. 7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (indicating that employers may disapprove of all braided hairstyles including cornrows, two-strand twists, and dreadlocks); Lewis v. United Parcel Serv., Inc., No. C 05-02820 WHA, 2005 WL 2596448, at *1–2 (N.D. Cal. Oct. 13, 2005) (indicating that a delivery driver who wanted to wear dreadlocks that bulged outside his cap was unprofessional); *see generally* Rogers v. Am. Airlines, 527 F. Supp. 229 (S.D.N.Y. 1981) (approving an employer's policy against all-braided hairstyles because the policy applied equally to men and women,

Black hair texture, rather than hairstyle, likely violates Title VII because hair texture is presumably immutable.[64]

Courts' reliance on an immutability standard for race and hair is strained, as evidenced by the Eleventh Circuit Court of Appeals decision in *EEOC v. Catastrophe Mgmt. Solutions* in 2016.[65] In *Catastrophe Mgmt. Solutions*, the Equal Employment Opportunity Commission ("EEOC") filed a complaint on behalf of Chastity Jones after Catastrophe Management Solutions rescinded a job offer when she refused to cut her dreadlocks.[66] At the federal district court level, the EEOC argued that: (1) "race 'is a social construct and has no biological definition,'" (2) "race is not defined by or limited to immutable physical characteristics," and (3) dreadlocks are a racial characteristic—just like skin color.[67] The District Court rejected these arguments by relying on past cases that made it clear that a grooming policy based on a mutable characteristic, such as hairstyle, is not racially discriminatory.[68] They distinguished hair texture by stating that these characteristics are immutable.[69] The District Court also affirmed an employer's freedom to decide how to run a business, especially regarding the grooming policies used to shape the employees that project the employer's chosen image.[70] The Eleventh Circuit affirmed the lower court's decision to dismiss the case.[71] According to the Eleventh Circuit, Title VII protects natural hairstyles like Afros because they are defined by hair texture, which is immutable.[72] However, the court held that wearing

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Black or white and supports the employer's discretion to determine what a business-like image means to them). Employees have much more freedom in the seven states that have passed the CROWN Act. *See also infra* text accompanying note 87.

[64] Ronald Turner, *On Locs, "Race," and Title VII*, 2019 WIS. L. REV. 873, 897 (2019).

[65] *See generally* EEOC v. Catastrophe Mgmt. Sols., 852 F.3d 1018, 1034-35 (11th Cir. 2016) (responding to a quote in RICHARD FORD, RACIAL CULTURE: A CRITIQUE 103 (2005) that critiques the immutability standard, the Court states that "[o]ur point is not to take a stand on any side of this debate—we are, after all, bound by *Willingham* and *Garcia*—but rather to suggest that, given the role and complexity of race in our society, and the many different voices in the discussion, it may not be a bad idea to try to resolve through the democratic process what 'race' means (or should mean) in Title VII.").

[66] *Id.* at 1020.

[67] Turner, *supra* note 64 at 877; *Catastrophe Mgmt. Sols.*, 852 F.3d at 1022.

[68] *See Catastrophe Mgmt. Sols.*, 852 F.3d at 1022, 1023 (quoting EEOC v. Catastrophe Mgmt. Sols., 11 F.Supp.3d 1139 (S.D. Ala. 2014)) ("The district court dismissed the initial complaint, and concluded that the proposed amended complaint was futile, because 'Title VII prohibits discrimination on the basis of immutable characteristics, such as race, color, or natural origin,' and '[a] hairstyle, even one more closely associated with a particular ethnic group, is a mutable characteristic.'").

[69] *Catastrophe Mgmt. Sols.*, 11 F.Supp.3d at 1144.

[70] *Id.*

[71] *Catastrophe Mgmt. Sols.*, 852 F.3d at 1021.

[72] *Id.* at 1030–32.

dreadlocks, while being "culturally associated with race," is not an "immutable characteristic" and is thus not protected under Title VII.[73]

Scholars have criticized the Eleventh Circuit's decision for failing to rely on contemporary views that race is a social construct rather than a biological fact.[74] They criticize the Eleventh Circuit for relying on dictionary definitions of race from the 1960s to see how Congress would have defined "race" when it passed Title VII.[75] These definitions refer to biological and not social constructions of race.[76] For example, the court looked at how *Webster's Dictionary* defined "race" in 1961.[77] Among other things, the dictionary defined "race" as "anthropological and ethnological in force, usu[ally] implying a distinct physical type with certain underlying characteristics, as a particular color of skin or shape of skull."[78] The Eleventh Circuit indicated that race "referred to common physical characteristics shared by a group of people and transmitted by their ancestors over time."[79] Race referred to "characteristics [as] a matter of birth, and not culture."[80] The court thought it was clear that Congress in 1964 did not intend for Title VII to protect "individual expression . . . tied to a protected race."[81]

Scholars have asserted that we need a new concept of immutability—one that asks, "not whether a characteristic is strictly unchangeable, but whether the characteristic is a core trait or condition that one cannot or should not be required to abandon."[82] Similarly, as a dissenting Eleventh Circuit judge pointed out in the denial of rehearing *en banc*, the "appearance of a person's

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[73] *Id.* at 1032. The Eleventh Circuit could have embraced the standards that lower courts have adopted that offer a more inclusive understanding of immutability. *See, e.g.*, Wolf v. Walter, 986 F.Supp.2d 982, 1013 (W.D. Wis. 2014) ("Rather than asking whether a person *could* change a particular characteristic, the better question is whether the characteristic is something that the person *should be required* to change because it is central to a person's identity."); Pedersen v. Off. of Pers. Mgmt., 881 F. Supp.2d 294, 326 (D. Conn. 2012) ("Where there is overwhelming evidence that a characteristic is central and fundamental to an individual's identity, the characteristic should be considered immutable and an individual should not be required to abandon it.").

[74] Turner, *supra* note 64, at 873. *See* Nadijah Campbell, *Protecting the Black Crowning Glory: Why Legislation is Needed to Make Up for Federal Discrimination Statutes' Failure to Protect Black Hair*, 13 DREXEL L. REV. 143 (2020); Crystal Powell, *Bias, Employment Discrimination, and Black Women's Hair: Another Way Forward*, 2018 B.Y.U. L. REV. 933 (2018).

[75] *Catastrophe Mgmt. Sols.*, 852 F.3d at 1026–27.

[76] Turner, *supra* note 64, at 873.

[77] *Catastrophe Mgmt. Sols.*, 852 F.3d at 1027 (citing *Race*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1870 (unabridged 1961)).

[78] *Id.*

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] Turner, *supra* note 64, at 901 (quoting Jessica Clarke, *Against Immutability*, 125 YALE L. J. 2, 9 (2015)) (internal quotations omitted).

hair is always capable of change—hair can be cut, straightened, curled, or covered. The question is whether Title VII protects a black employee's choice to wear her hair in its natural state."[83]

Social-change lawyers seek to enact a new standard that expands Title VII's protection through their case work.[84] Proposals for the new standard regarding grooming policies involve: (1) prohibiting any policy that has a disparate impact on the employment opportunities of Black Americans, (2) determining if this disparate impact is due to "a characteristic that is historically or culturally associated with . . . race," and (3) determining if this policy is objectively essential to the functioning of a business.[85] This new standard would allow Title VII to achieve its ultimate purpose of providing all individuals with the "same opportunity to obtain employment."[86] It would directly benefit Black people from employer rejection based upon grooming policies that forbid their natural and cultural hairstyles.

Advocates are not waiting for courts to accept contemporary race definitions and standards. Legislators have proposed and adopted the CROWN Act in eight states.[87] The CROWN Act prohibits employers and schools from discriminating based on race or ethnicity, with "race . . . inclusive of traits historically associated with race, including, but not limited to, hair texture and protective hair styles," including "braids, locks, and twists."[88] The CROWN Act uses language that demonstrates respect for Black identity.[89] As more states adopt the CROWN Act, Black people will be free to wear their hair in a range of styles, including twists, braids, cornrows, Afros, Bantu knots, fades, and/or locs.[90] Over time, employers will likely accept that a wider range of hairstyles are professional.

B. Media Engagement, Community Organizing, and Interdisciplinary Collaborations

Today, media is a tool to amplify the stories of Black individuals who experience racist policies. Filmed racism, including the video of Andrew Johnson's locs being cut,[91] often grows to form a powerful narrative that can

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[83] EEOC v. Catastrophic Mgmt. Sols, 876 F.3d 1273, 1289 (11th Cir. 2017) (Martin, J., dissenting).

[84] Childs IV, *supra* note 45, at 327.

[85] *Id.* at 328-29.

[86] *Id.* at 329-330.

[87] THE CROWN ACT, [https://perma.cc/PSY2-2K43], (last visited June 8, 2021). The eight states are California, New York, New Jersey, Virginia, Colorado, Washington, Connecticut, and Maryland. *Id.*

[88] *E.g.*, N.J. REV. STAT §§ 10:5-5(vv)-(ww) (2020).

[89] *See id.*

[90] Turner, *supra* note 64, at 908.

[91] Washington, *supra* note 41.

open a "window of opportunity" for legislating and lawyering.[92] Lawyers act as "policy entrepreneur[s]" to direct the mobilization and education of a community in preparation for these moments, which provide space for prepared solutions to be presented.[93] Social-change lawyers are intentional about case and client selection in order to uplift stories of marginalized communities and compel others into action.[94] Powerful narratives, such as Andrew Johnson's, attach to cases that bring the realities of injustice to the forefront of the minds of "the public, judges, politicians, and government administrators."[95] Moreover, a media campaign that considers the wide range of hairstyles that should be classified as professional may inspire employers to decide to allow braided hairstyles.[96]

Social-change lawyering involves community education and empowerment.[97] The CROWN Coalition acts as a force that educates the public about the history of hair discrimination and advocates for solutions.[98] Along with advocating for legislation, the CROWN Coalition partners with celebrities, like Keke Palmer, and uses storytelling, which can be seen in the short film, "Hair Love," to mobilize communities into action.[99] Community education involves emphasizing Black hair discrimination as "the lingering consequences" of the dehumanization of enslaved Africans.[100] Community empowerment contributes to the modern-day Natural Hair Movement[101] to

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[92] *See* Tyner, *supra* note 7, at 254 (stating that policy entrepreneurs wait for "a window of opportunity to open in order to engage reform efforts," which occurs when they can bring their research and passion for a particular issue to the forefront). *Id.* Filming can create a window of opportunity for viewers to see racist acts. Ed Pratt, *Ed Pratt: Racism Has Always Been Around. Now It's Being Filmed For All to See.*, ADVOCATE (May 29, 2020 12:30 PM), [https://perma.cc/QT3X-4DSR].

[93] *See* Tyner, *supra* note 7, at 254.

[94] *See id.* at 257.

[95] Archer, *supra* note 6, at 428.

[96] Employers can take their cues from the military. *See, e.g.*, Christopher Mele, *Army Lifts Ban on Dreadlocks, and Black Servicewomen Rejoice*, N.Y. TIMES (Feb. 10, 2017), [https://perma.cc/V84K-S7YD] ("The Marine Corps . . . approved lock and twist hairstyles in late 2015.").

[97] Tyner, *supra* note 7, at 231.

[98] *See* THE CROWN ACT, *supra note* 87 (showing that the Official Campaign of the CROWN Act highlights Instagram stories).

[99] *Id.*

[100] Dawn D. Bennett-Alexander & Linda F. Harrison, *My Hair Is Not Like Yours: Workplace Hair Grooming Policies for African American Women as Racial Stereotyping in Violation of Title VII*, 22 CARDOZO J.L. & GENDER 437, 444 (2016). For more information about the history of racial assumptions about hair, see Ibram X. Kendi, STAMPED FROM THE BEGINNING: THE DEFINITIVE HISTORY OF RACIST IDEAS IN AMERICA (2016). Kendi explains the history of good hair (straight and white) and bad hair ("matted" and Black). *Id.* at 188-89. He also explains how "[r]acist Americans considered Afros, braids, locs, and other 'natural' styles unprofessional." *Id.* at 421.

[101] Childs IV, *supra* note 45, at 305.

reshape public opinion about the radical idea of Black self-love.[102] Unions could possibly use on-the-ground strategies to bargain for grooming policies that respect a wide range of hairstyles.[103]

Lawyers and activists call upon social scientists, historians, educators, and more to offer interdisciplinary perspectives on specific issues.[104] These interdisciplinary perspectives enrich social justice narratives and increase the likelihood of change, especially regarding hair discrimination.[105] Historians bridge the direct connection between hair discrimination and the destruction of African-identity hair as a process of the Transatlantic slave trade.[106] A historical perspective of hair discrimination reveals it as a systematic way to control the Black body—whether it was during enslavement, the Civil Rights Movement, or the workplace today.[107] Psychologists emphasize that hairstyles, especially those of Black individuals, influence interpretations of an individual's intelligence, attractiveness, and professionalism.[108]

Advocates can look to corporations that partner with non-governmental organizations ("NGOs") that fight for justice to enrich the story and produce change.[109] In 2019, Dove co-founded[110] the CROWN Coalition "to advance efforts to end hair discrimination and to create a more equitable and inclusive beauty experience for Black women and girls."[111] Dove works to not only reshape Eurocentric beauty standards, but drives a mission to produce legislative change and achieve protection for women of color.[112] Corporations

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[102] *Id.* at 290.

[103] *See* Kamika S. Shaw, *Hair and Employer Regulations: Redefining Race-Based Discrimination,* ONLABOR (Mar. 9, 2017), [https://perma.cc/4UAJ-C7CC].

[104] Brescia, *supra* note 7, at 582.

[105] *Id.* at 583; Childs IV, *supra* note 45, at 304-05.

[106] Childs IV, *supra* note 45, at 302-03.

[107] *Id.* at 302-307.

[108] Tedx Talks, *The Psychology of Black Hair | Johanna Lukate | TedxCambridgeUniversity*, YOUTUBE (Apr. 26, 2018), [https://perma.cc/VU7Y-FA6J].

[109] In the wake of George Floyd's death, companies are ramping up partnerships with NGOs, especially making donations to elevate NGO justice work. For example, The Coca-Cola Foundation provided $2.5 million in grants to The Equal Justice Initiative, NAACP Legal Defense and Education Fund, and National Center for Civil and Human Rights. Amazon donated $10 million to social justice organizations including the Thurgood Marshall College Fund and Year Up. See David Hessekiel, *Companies Taking A Public Stand In The Wake of George Floyd's Death,* FORBES (June 4, 2020), [https://perma.cc/82QA-9CH6].

[110] THE CROWN ACT, *supra* note 87. Dove co-founded the CROWN coalition with the National Urban League, Color of Change, and Western Center on Law & Poverty. DOVE, *The Crown Act: Working to Eradicate Race-Based Hair Discrimination* [hereinafter DOVE, *The Crown Act*], [https://perma.cc/SHT9-M7PN] (last visited June 8, 2021).

[111] DOVE, *The Crown Act*, *supra* note 110.

[112] DOVE, *Our Commitment to Ending Systemic Racism*, [https://perma.cc/VSD8-QHWB] (last visited June 8, 2021).

have the power to influence national conversation and pressure those in power to embrace change.

IV. ABOLISHING BIASED STANDARDIZED TESTING FOR COLLEGE ADMISSIONS

In 2018, over two million students took the Scholastic Assessment Test ("SAT") and the American College Test ("ACT").[113] Test preparation companies that help students earn higher scores have thrived in recent years.[114] Parents are willing to spend money with the hope of test scores that will increase their child's chances of admission into elite universities.[115] Universities, especially the most prestigious, use standardized tests as a factor in admission to higher education.[116]

SAT/ACT requirements are controversial and have faced scrutiny ever since universities first adopted them. Proponents of the tests view them as objective measures of merit that predict academic potential.[117] Proponents also believe that any disparities in test scores reflect inequality in society in general, rather than a biased test.[118] Opponents view the tests as discriminatory against the least privileged students.[119] They claim that admissions processes that require applicants to submit SAT or ACT scores create barriers for "deserving students from low-income families, students from historically underrepresented racial and ethnic groups, and students with disabilities."[120] Today, university admissions offices can go in three different directions regarding the need for applicants to submit test scores. The three options are to: (1) eliminate the test requirement, (2) use the score as one factor amongst

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[113] College Board, *More Than 2 Million Students in the Class of 2018 Took the SAT, Highest Ever*, NEWSROOM (Oct. 25, 2018), [https://perma.cc/TS9A-J8QM]. An alternative to the SAT is the American College Test (ACT). The same approximate number took the ACT in 2018. THE ACT, *The ACT Profile Report - National*, [https://perma.cc/NFD2-XLWF] (last visited June 8, 2021).

[114] James Wellemeyer, *Wealthy Parents Spend up to $10,000 on SAT Prep for Their Kids*, MARKETWATCH (July 7, 2019), [https://perma.cc/W3MF-K9LF]. This Article states that "A March 2019 report from IBISWorld valued the tutoring and test preparation industry at $1.1 billion, with exam prep services making up 25% of the industry." *Id.*

[115] Jillian Berman, *Here's How Much Wealthy Parents Spend to Legally Give Their Kids an Edge in the College Acceptance Race*, MARKETWATCH (Mar. 19, 2019), [https://perma.cc/UL72-DM54].

[116] *See Standardized Testing in College Admissions*, ACT, [https://perma.cc/52G9-73Q8] (last visited June 8, 2021) ("[R]esearch has shown that the combination of high school grades and test scores provide the single best predictor of a student's first-year college success, which is why standardized testing is widely used in college admissions decisions.").

[117] Jonathan D. Glater, *A Prison of the Imagination: Higher Education in Bakke,* 52 U.C.D. L. REV. 2451, 2473 (2019).

[118] *See* Complaint at 3, Kawika Smith v. Regents of the Univ. of Cal., No. RG19046222 (Cal. App. Dep't Super. Ct. Dec. 10, 2019) [hereinafter Smith Complaint].

[119] *Id.*

[120] *Id.* at 4.

other parts of an application, or (3) rely heavily on the score in the admissions decisions-making process.[121] Advocates who want to eliminate use of the SAT/ACT test requirement aim to eliminate biased tests that create obstacles for students seeking higher education.[122] Social-change lawyers have played a vital role in fighting for change using litigation that relies on the Constitution and, notably, anti-discrimination laws.[123]

In December 2019, social-change lawyers filed a lawsuit in *Kawika Smith v. Regents of the University of California.*[124] This lawsuit challenged California public universities that required standardized testing for college admission to end their practices that discriminate based on race, class, and disability.[125] Already, this lawsuit has forced the University of California to stop using the SAT and ACT test scores in admissions decisions.[126] This Section examines this lawsuit in a historical context. It considers the possibility that standardized test developers designed[127] and revised[128] the test over time to provide a systematic advantage to white, wealthier test-takers.[129]

This Section argues that biased standardized tests keep students of color, especially low-income Black and Brown students of color, out of high-quality colleges and universities, thereby re-segregating them.[130] When colleges and universities rely on biased tests to make decisions, they undermine landmark

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[121] *See* Glater, *supra* note 117, at 2487–93.

[122] Smith Complaint, *supra* note 118, at 3.

[123] *See, e.g.*, *id.* (utilizing the California equal protection clause, and California anti-discrimination laws in education, business, and housing to fight for change); *see also* Brescia, *supra* note 7 (highlighting social-change lawyers who fought to abolish slavery in the United States, end the Jim Crow system, and attain marriage equality for the LGBTQ community using several legal tools including litigation); ReNika Moore & Rakim Brooks, *To End Systemic Racism, Ensure Systemic Equality,* ACLU (February 9, 2021), [https://perma.cc/HJ2G-BAQS] (promising that in the years ahead, the ACLU will use legal advocacy to dismantle systemic barriers to equality); Blair Chavis, Kevin Davis & Liane Jackson, *Is This a Moment or a Movement? 6 Civil Rights Lawyers Reflect on Recent Demands for Social Justice*, ABA JOURNAL (Oct. 1, 2020), [https://perma.cc/B7JX-VJN2] (describing how lawyers have relied on lawsuits and litigation since the early 1960s to dismantle institutional racism); Eva Shang, *6 Lawsuits That Can Drive Social Change and Protect Personal Rights*, FORBES (January 11, 2018), [https://perma.cc/D8X3-NU29] (encouraging millennials to recognize the ways in which litigation can create social change).

[124] *Id.* at 1.

[125] *Id.* at 4.

[126] *See infra* note 150 and accompanying text.

[127] Allen Calvin, *Use of Standardized Tests in Admissions in Postsecondary Institutions of Higher Education,* 6 PSYCH. PUB. POL'Y & L. 20, 25 (2000).

[128] Ibram X. Kendi, *Why Standardized Tests Have Standardized Postracial Ideology,* AAUP (Dec. 2016) [hereinafter Kendi, *Postracial Ideology*], [https://perma.cc/E3TR-SZRJ] (highlighting Black and white questions).

[129] *Id.*

[130] *Id.*

legal decisions and civil rights laws. It is time to re-write an agenda for activists who want to ensure equal access to opportunities at the university level.[131] This agenda includes reviving conversations about race,[132] implementing class-conscious admissions policies[133] (such as affirmative action), eliminating legacy admissions,[134] and increasing federal spending to support low-income college students, so they can graduate from college with less debt.[135]

A. Litigation and Legislative Advocacy

The landmark Supreme Court decision in *Brown v. Board of Education* was supposed to end "separate but equal" segregation in public education.[136] Although the 1954 *Brown* decision inspired the modern Civil Rights movement,[137] *Brown*'s core equal opportunity mission remains unfinished. For example, white students still finish college at higher rates than Black and Hispanic students.[138] This is especially true for white students from affluent families.[139] Individuals who attain a college degree raise their incomes over a

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[131] *See* Priscilla A. Consolo, *A Single Score No More: Rethinking the Admissions System for New York City's Specialized High Schools to Preserve Academic Excellence and Promote Student Diversity*, 94 N.Y.U. L. Rev. 1244 (2019) (describing standardized tests used for admission to specialized high schools).

[132] *See generally* Nancy L. Zisk, *The Future of Race-Conscious Admissions Programs and Why the Law Should Continue to Protect Them*, 12 NE. U. L. Rev. 56 (2020) (discussing the efficacy of admissions policy that consider race).

[133] *See generally* Katelyn P. Dembowski, *The Case for Socioeconomic Affirmative Action: A Jurisprudential Examination at the Disparity Between Privilege and Poverty in Higher Education Admissions*, 31 HASTINGS WOMEN'S L. J. 129 (2020) (describing the strength of class-conscious admissions policies).

[134] *See* T. Liam Murphy, *Scrutinizing Legacy Admissions: Applying Tiers of Scrutiny to Legacy Preference Policies in University Admissions*, 22 U. PA. J. CONST. L. 315, 328 (2019).

[135] *See* Joan Coaston, Opinion, *Cancel America's Student Loan Debt! But How?*, N.Y. TIMES (Mar 10, 2021), [https://perma.cc/W5TJ-P7X3]. For example, the federal government could increase the size of the Pell Grant, a form of financial aid for low- and moderate-income students, who do not need to repay the grants. *See* Phillip B. Levine, *The Economic Case for Doubling the Pell Grant*, BROOKINGS INSTITUTION (Feb. 17, 2021), [https://perma.cc/4V3S-GXER].

[136] Brown v. Bd. of Ed., 347 U.S. 483 (1954).

[137] Sherrilyn Ifill, *A Reflection on the 60th Anniversary of Brown v. Board of Education*, NAACP LEGAL DEF. FUND, [https://perma.cc/UZL4-EZLF] (last visited June 8, 2021).

[138] DOUG SHAPIRO, ET AL., NATIONAL STUDENT CLEARINGHOUSE RESEARCH CENTER, A NATIONAL VIEW OF STUDENT ATTAINMENT RATES BY RACE AND ETHNICITY – FALL 2020 2 (2017), [https://perma.cc/3VKF-KATE] ("Among students who started in four-year public institutions, black students had the lowest six-year completion rate (45.9 percent). The completion rate of Hispanic students was almost 10 percentage points higher than that of black students (55.0 percent). Over two-thirds of white and Asian students completed a degree within the same period (67.2 percent and 71.7 percent, respectively).").

[139] *See* ANTHONY P. CARNEVALE & JEFF STROHL, GEORGETOWN PUBLIC POLICY INSTITUTE, CENTER ON EDUCATION AND THE WORKFORCE, SEPARATE & UNEQUAL: HOW HIGHER EDUCATION REINFORCES THE INTERGENERATIONAL REPRODUCTION OF WHITE RACIAL

lifetime.[140] If students were truly able to enjoy equal opportunity with regard to higher education admission and completion, the racial income gap would narrow.[141] For many college-bound students, the SAT and ACT tests present the first of many barriers to equal opportunity. Social justice advocates jumpstart change when they start with a significant barrier to equality: standardized tests as part of college admissions decisions.[142]

Kawika Smith v. Regents is important because the lawsuit shows how social-change lawyers are using the California equal protection clause and anti-discrimination law to eliminate the SAT and ACT as barriers to equal opportunity. Lawyers for Public Counsel, Scheper Kim & Harris LLP, Equal Justice Society, and Miller Advocacy Group[143] sued on behalf of four named plaintiffs,[144] including Kawika Smith and six nonprofit organizations.[145] Lawyers argued that the requirement for all applicants to submit SAT or ACT scores systematically and unlawfully denies talented and qualified students with less accumulated advantage a fair opportunity to pursue higher education at University of California (UC) schools, thereby violating California's equal protection clause and anti-discrimination law.[146]

In particular, the plaintiffs claim that "[e]very UC admissions cycle that evaluates applicants based on their SAT and ACT scores irreparably damages the future of tens of thousands of students who are capable of excelling at

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PRIVILEGE 7 (Nancy Lewis & Stephanie Soutouras Schlick eds., 2013), [https://perma.cc/W6FG-DNTK] ("Affluent white students as well as prestige seeking four-year colleges are flowing to the top tiers of selectivity while lower income minority students are flooding low tuition, open-access, two- and four-year institutions.").

[140] Association of Public & Land-Grant Universities, *How Does a College Degree Improve Graduates' Employment and Earnings Potential?*, [https://perma.cc/H3MK-F2LJ] (last visited June 8, 2021).

[141] *Higher Education is the Major Force in Closing the Black-White Income Gap*, THE JOURNAL OF BLACKS IN HIGHER EDUCATION (2007), [https://perma.cc/AZH2-VPY5] ("New figures released by the U.S. Census Bureau unequivocally show that possession of a four-year college degree not only greatly increases the incomes of African Americans but goes almost all the way in closing the economic gap between blacks and whites.").

[142] For example, Attorney Kendra Johnson has highlighted the types of bias in standardized testing: (1) labeling bias, which happens "when a test claims to measure one thing but really measures something else," (2) content bias, which happens when a test contains questions that favor one group over another, (3) methodological bias, which happens when a test assesses mastery of a skill using a method that miscalculates the capability of one group relative to another, and (4) prediction bias, which occurs when a test is used to predict the performance of an individual in the future. Kendra Johnson, *Racially Bias SAT I/ACT Blocks College Access: Is It Constitutional for College Officials to Condition Admission on a Racially Bias Assessment?*, 33 U. BALT. L. F. 1, 3 (2003).

[143] Smith Complaint, *supra* note 118, at 1-2.

[144] *Id.* at 1 (noting the four named plaintiffs: Kawika Smith, Gloria D., Stephen C., and Alexandra Villegas).

[145] *Id.* (noting the six nonprofit organizations: Chinese for Affirmative Action, College Access Plan, College Seekers, Community Coalition, Dolores Huerta Foundation, and Little Manila Rising).

[146] *Id.* at 1-8.

the UC campuses of their choice and benefiting from the opportunities and support a UC education provides."[147] The court filing describes Kawika Smith as a good student in a Jesuit-Catholic school who did not have the opportunity to participate in the costly private coaching that some of his classmates could afford.[148] When lawyers filed the lawsuit, Smith hoped to attend UC Berkeley or UCLA, but he would not be able to unless his test scores increased substantially.[149] This suit was filed while a UC faculty task force was examining the future of standardized testing requirements.[150] At the time, the task force was deciding whether to recommend that UC "drop the exams, seek to change or replace them, or to continue their requirements, possibly giving standardized test scores less weight in admissions decisions."[151]

Recently, the Regents of UC schools decided to phase out the use of the SAT and ACT in admissions decisions.[152] Moreover, a court enjoined UC from using the SAT and ACT while they figure out how to revise their admissions process.[153] The Regents must now look at options beyond employing standardized tests as a factor in admissions. The possibilities include: (1) relying on the state-mandated Smarter Balanced tests, which are aligned with the Common Core and given in all California high schools, or (2) relying more heavily on high school grades and class rankings.[154] In the meantime, the College Board, a not-for-profit organization that develops and administers the SAT, defends the test by claiming it is still the best predictor of college readiness.[155] Furthermore, the SAT offers administrative convenience

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147 *Id.* at 4.

148 *Id.* at 8-9.

149 Smith Complaint, *supra* note 118, at 10.

150 Larry Gordon, *Lawsuits Seek to End University of California's SAT or ACT Test Requirement for Freshman Admission,* EDSOURCE (Dec. 10, 2019), [https://perma.cc/CN8W-FU83].

151 *Id.*

152 Scott Jaschik, *University of California Board Votes Down SAT,* INSIDE HIGHER ED (May 26, 2020), [https://perma.cc/2UWS-D3U5].

153*UC System No Longer Allowed to Consider SAT and ACT Scores in Admissions*, PUBLIC COUNCIL (Sept. 1, 2020), [https://perma.cc/Q45L-RBWQ]. The court that issued the injunction recognized that UC's "test optional" policy would have given privileged, non-disabled students who submitted SAT and ACT scores a "plus factor" or "second look" in the admissions process. *Id.* Students who were unable to access the test, especially disabled students and less privileged students, would lack the plus factor and be unlikely to enjoy a second look. *Id.*

154 Felicia Mello, *If the University of California Drops the SAT, What Would Take its Place?* CAL MATTERS (Dec. 10, 2019), [https://perma.cc/MWU7-RCFF].

155 Elissa Nadworny, *Lawsuit Claims SAT and ACT are Illegal in California Admissions*, NPR (Dec. 10, 2019 5:01 AM), [https://perma.cc/7ASJ-ZFG9]. The College Board, which develops and administers the SAT, asserts that grades and test scores together provide insight into a student's potential to succeed in college. *Id.* The ACT defends its test and says that "[b]laming standardized tests for differences in educational quality and opportunities that exist will not improve educational outcomes." *Id.*

because college and university admissions can rely on a cutoff score, thereby lowering the number of applications they must review holistically.[156]

The COVID-19 pandemic has wreaked havoc on the SAT and ACT tests since high school closures have reduced the number of available testing sites.[157] Disabled students have had an especially difficult time finding testing sites that can accommodate them.[158] Moreover, students put themselves at risk taking an in-person standardized test during a pandemic.[159]

As admissions policies evolve, the UC schools may experience unintended consequences as they eliminate tests and judge applications based solely on grades and extracurricular activities. Critics warn of pressure on high school teachers to give higher grades and ask whether some unethical applicants might feel they have to fabricate extracurricular activities.[160] Undoubtedly, the college admissions process will remain complicated and imperfect. As the process evolves, decisionmakers must continually consider who is most impacted by current and changing policies. Plus, they must "develop targeted strategies to achieve equitable outcomes for" all applicants.[161]

B. Media Engagement, Community Organizing, and Interdisciplinary Collaborations

Lawyers who pursue integrated advocacy must encourage media that report on college admissions to understand the context in which they create stories. For example, lawyers should urge media to refrain from generating stories that celebrate perfect SAT/ACT scores because these stories reinforce the false assumption that these standardized tests measure merit and potential.[162] Lawyers must continually call attention to key elements of an antiracist strategy for increasing equity in higher education by asking the media to instead cover powerful stories of high school students who get into college after facing significant obstacles, find a way to pay for it, and graduate.

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[156] It is possible that admissions algorithms will offer admissions offices a new form of convenience, but algorithms can be as biased as standardized tests. Rebecca Koenig, *As Colleges Move Away From the SAT, Will Admissions Algorithms Step In?*, EDSURGE (July 10, 2020), [https://perma.cc/6VYR-3RU6].

[157] Stephanie Sarkis, *Unexpected Pandemic Outcome: The Demise of the SAT Exam*, FORBES (Jan. 24, 2021), [https://perma.cc/9QDE-29EC].

[158] Scott Jaschik, *Admissions Without Tests,* INSIDE HIGHER ED (Sept. 14, 2020), [https://perma.cc/J3DY-MXWK].

[159] *Id.*

[160] *See* Anemona Hartocollis, *'They're Not Fact-Checking': How Lies on College Applications Can Slip Through The Net*, N.Y. TIMES (Dec. 16, 2018), [https://perma.cc/5N42-LFZP]; *see also* Amelia Wu et al., *You Can Lie on Your College Application. . . and Get Away With It (Probably)*, M-A CHRONICLE (Mar. 16, 2020), [https://perma.cc/G24U-N6TD].

[161] Carter & Snyder, *supra* note 14.

[162] *See, e.g.*, WCPO Staff, *Walnut Hills Students Impress with 17 Earning a Perfect Score on ACT*, WCPO CINCINNATI (Apr. 23, 2019), [https://perma.cc/89GQ-Q54S].

Individuals who read about Kawika Smith[163] are likely to want to know more about him. Currently, Kawika Smith is an undergraduate student at Morehouse College,[164] a private historically Black men's liberal arts college in Atlanta, Georgia with notable alumni including Martin Luther King, Jr. and newly elected Georgia Senator Raphael Warnock.[165] People who read about Kawika Smith as a named plaintiff may be interested in learning how his dream of attending UC evolved into his decision to attend Morehouse College. How will this decision affect the trajectory of his life? Will he graduate from Morehouse College with debt, or will he enter the working world unencumbered by student loan debt? Is Kawika Smith's story a reminder of the power of historically Black colleges and universities ("HBCUs") in meeting the needs of students that are low-income, first-generation, and/or students of color?[166] Kawika Smith's ongoing story could inspire bold action around equity in higher education. Media outlets should follow Smith's story and other stories of students who face barriers to higher education, including those with disabilities and who speak English as a second language.[167]

In January 2020, The Education Trust ("Ed Trust"), a national nonprofit organization that works to close opportunity gaps that disproportionately affect students of color and students from low-income families,[168] articulated a plan for dismantling racism in higher education.[169] This organization's work is important because it provides an example of the ways in which community organizations collaborate with social-change lawyers to enact change. Ed Trust presents arguments that support the maintenance of race-conscious programs such as affirmative action. The organization states that these programs are the only way to fix racism in higher education. Ed Trust argues that "[h]istorically, higher education has used racist policies,

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163 Teresa Watanabe, *California Groups Demand UC Drop the SAT, Alleging it Illegally Discriminates Against Disadvantaged Students*, L.A. TIMES (Oct. 29, 2019), [https://perma.cc/2C2M-AANG].

164 Kawika Smith, LINKEDIN, [https://perma.cc/UD6Q-8F72] (last visited June 8, 2021).

165 Gerren K. Gaynor, *Rev. Raphael Warnock Says Dr. King's Spirit 'Recruited' Him to Morehouse College*, YAHOO!SPORTS (Dec. 1, 2020), [https://perma.cc/R3NX-TMM2].

166 Dr. Michael L. Lomax, *Six Reasons HBCUs Are More Important Than Ever,* UNITED NEGRO COLLEGE FUND (Dec. 14, 2015), [https://perma.cc/ZD97-7SYG].

167 *See* Smith Complaint, *supra* note 118, at 10–14. Other plaintiffs from *Kawika Smith v. Regents* include plaintiff Gloria D., who "is a 17-year old Latinx student" with Spanish as a first language. *Id.* at 10. She "is a strong student . . . [who] aspires to be a doctor." *Id.* Another plaintiff, Stephen C., "is a 16-year-old student . . . with a history of disabilities that affect his test . . . performance." *Id.* at 12. Plaintiff Alexandra Villegas "is an 18-year-old . . . first-year student in the Honors Transfer Program at Pasadena City College." *Id.* at 13. As a high school student, she was "strong and motivated" despite experiencing "significant family responsibilities." *Id.* All three of these students' stories are interesting because each has already overcome significant barriers to equal opportunity.

168 *Who We Are*, THE EDUC. TR., https://edtrust.org/who-we-are/ (last visited Apr. 26, 2021).

169 *Leaders Who Ignore Race in Higher Education Perpetuate Racial Injustice*, THE EDUC. TR. (Jan. 15, 2020), [https://perma.cc/E8CN-JE9P].

such as providing unequal funding, to exclude students."[170] The organization also argues that "[r]acial inequalities remain, and in some cases, have worsened because leaders have eliminated [affirmative action policies]."[171] Finally, the organization argues that "[p]olicies that rely on proxies for race, such as income, have not improved opportunities or outcomes for students of color."[172] Antiracist advocates who use integrated advocacy must breakdown silos and work collaboratively with organizations like Ed Trust.

African American Studies scholars have engaged in work to eliminate racist policies in higher education regarding interdisciplinary collaborations in the higher education equity space. Dr. Ibram X. Kendi's work is especially important. He explains that opponents to race-conscious admission programs, like affirmative action, claim the policies discriminate against white people and are not necessary. Consequently, affirmative action opponents use legal action to eliminate the policies, thereby closing off opportunities for Black students.[173] Dr. Kendi points out that everyone who fights in court for/against affirmative action ignores standardized tests and the role they plan in the admissions process.[174] He questions why affirmative action cases have generated so much attention, while biased standardized tests have remained unchallenged (until *Kawika Smith v. Regents*).[175]

Overall, Dr. Kendi's work exposes the harsh reality that people are working to eliminate affirmative action, while maintaining the standardized testing requirements that keep minority students out of higher education. This combination is detrimental to campus diversity.[176] Dr. Kendi analyzed the landmark case *Regents of the University of California v. Bakke*[177] and explained that when the Supreme Court denounced the use of racial quotas, no one challenged the use of standardized tests and GPA scores.[178] This dynamic continues to reinforce the racial inequities that inspired affirmative action policies in the first place. When Princeton psychologist Carl C. Brigham created the SAT, he did so with a belief of white supremacy.[179] He wanted to find an "'objective' way to rule nonwhites . . . [as] intellectually inferior."[180] The SAT continues with its white supremacist roots, yet until recently, colleges and

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[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] Kendi, *Postracial Ideology*, *supra* note 128.

[174] *Id.*

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] Kendi, *Postracial Ideology*, *supra* note 128.

[180] *Id.*

universities have relied on this test without acknowledging bias. Standardized testing supports white power—the same power that has crippled affirmative action.[181] Standardized tests, such as the SAT and ACT, have failed to do what they were supposed to do—measure intelligence and predict success. Dr. Kendi concludes that "[t]he tests, not the black test-takers, have been underachieving."[182]

V. PROVIDING COMPREHENSIVE PROTECTION FOR LGBTQ INDIVIDUALS

In June 2020, LGBTQ individuals and their allies celebrated a watershed victory when a majority of the Supreme Court ruled that Title VII protects LGBTQ employees from workplace discrimination.[183] Lawyers and non-lawyers worked together for decades to set the stage for this decision.[184] They used the tools of integrated advocacy to produce change. This Section presents a concise summary of the litigation, legislative advocacy, media engagement, community organizing, and interdisciplinary collaborations that pushed this movement forward.

Title VII covers employment discrimination, but not discrimination in housing, credit, or public spaces and services.[185] Today, "[i]n 29 states, Americans can still be evicted, be thrown out of a restaurant, or be denied a loan because of who they are, or whom they love."[186] Moreover, current anti-discrimination law fails to recognize intersectionality—compounded oppression

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[181] *Id.*

[182] *Id.*

[183] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1737 (2020).

[184] Legal scholars have played a significant role in moving the LGBTQ agenda forward. *See, e.g.*, Lisa Bornstein, *Married on Sunday, Fired on Monday: Approaches to Federal LGBT Civil Rights Protections,* 22 WM. & MARY J. WOMEN & L. 31 (2015) (providing a comprehensive analysis of the history of Federal LGBT protections); Shalyn L. Caulley, *The New Frontier to LGBT Equality: Securing Workplace-Discrimination Protections*, 2017 U. ILL. L. REV. 909 (2017) (describing the need for Federal LGBT protections in the workplace); Alexandria Esposito, *The Trend Towards Equality: How Sexual Orientation Discrimination Continues to Evolve Under Title* VII, 44 U. DAYTON L. REV. 295 (2019) (examining LGBT protections from a Title VII perspective); Elizabeth Kristen & David Nahmias, *The Writing on the Wall: The Future of LGBT Employment Antidiscrimination Law in the Age of Trump,* 39 BERKELEY J. EMP. & LAB. L. 89 (2018) (discussing the impact of President Trump on LGBT protections); Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012) (analyzing the need for equal health and retirement benefits for the LGBT community); Ronald Turner, *Title VII and the Unenvisaged Case: Is Anti-LGBTQ Discrimination Unlawful Sex Discrimination?,* 95 IND. L. J. 227 (2020) (examining a federal circuit-split of Title VII before Bostock).

[185] THE HUMAN RIGHTS CAMPAIGN, *The Equality Act*, [https://perma.cc/6C4R-ZPN4] (last updated Mar. 13, 2021).

[186] The Editorial Board, *Last Year Was Good for LGBTQ Rights. Congress Can Make This One Even Better,* WASH. POST (Feb. 21, 2021, 7:00 AM), [https://perma.cc/HF4N-CXGN] (quoting Rep. David N. Cicillene, Democrat from Rhode Island's 1st Congressional District).

that sits at the intersection of race, class, gender, and sexuality.[187] The law fails to "secur[e] the full and undeniable civil rights of LGBTQ people, especially those in [the] community who are Black, Indigenous, and people of color for whom their sexual orientation or gender identity is only one of the many barriers to equal opportunity in this country."[188] Consequently, antiracist lawyers must continue to advocate for change. This Section considers which tools hold the most promise for achieving comprehensive protection for LGBTQ individuals, especially regarding those who face race-based barriers alongside gender and/or sexual identity barriers.

A. Litigation and Legislative Advocacy

In *Bostock v. Clayton County,* Supreme Court Justice Neil Gorsuch declared for the majority of the Supreme Court that an employer who fires an individual merely for being gay or transgender violates Title VII of the Civil Rights Act of 1964.[189] This statute, which prohibits employment discrimination "because of sex"[190] encompasses discrimination based upon sexual orientation and gender identity.[191] Justice Gorsuch stated that "[t]hese cases involve no more than the straightforward application of legal terms with plain and settled meanings."[192]

The majority of the Supreme Court was able to see three cases before the court[193] in the context of what "sex" means today.[194] Prior to the Court's *Bostock* decision, several federal courts had already ruled that "discrimination on the basis of sexual orientation [and] gender identity is, by definition,

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[187] Alexander M. Nourafshan, *The New Employment Discrimination: Intra-LGBT Intersectional Invisibility and the Marginalization of Minority Subclasses in Antidiscrimination Law*, 24 DUKE J. GENDER L. & POL'Y 107, 108 (2017).

[188] *Victory at Last! Supreme Court Confirms Workplace Protections for LGBTQ Employees,* LAMBDA LEGAL (June 15, 2020) [hereinafter Lambda Legal], [https://perma.cc/VSD2-7Y2Z].

[189] Bostock v. Clayton Cty., 140 S. Ct. 1731 (2020).

[190] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on five specific grounds: race, color, religion, sex, and national origin. Civil Rights Act of 1964, 42 U.S.C. §2000e (2012).

[191] *Bostock*, 140 S. Ct. at 1743.

[192] *Id.*

[193] *Id.* at 1737. The Supreme Court heard three cases at the same time: (1) *Bostock v. Clayton County,* (2) *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, and* (3) *Altitude Express Inc. v. Zarda. Id.* In the *Bostock* case, Clayton County fired Gerald Lynn Bostock from his job as a county child welfare services coordinator when his employer learned he was gay. *Id.* at 1737-38. In *R.G. & G.R*, a funeral home fired a transgender woman, Aimee Stephens, when she dressed as a woman. *Id.* at 1738. In *Zarda*, Altitude Express fired Donald Zarda from his job as a skydiving instructor based on his sexual orientation. *Id.*

[194] Linda Greenhouse, *What Does 'Sex' Mean? The Supreme Court Answers*, N.Y. TIMES Opinion (June 18, 2020), [https://perma.cc/7ARV-YRH5].

discrimination on the basis of sex and therefore prohibited by federal law."[195] Two federal cases were especially important as precursors to the Supreme Court's *Bostock* decision in furthering conversations about equal opportunity in employment for LGBTQ employees. In *Hively v. Ivy Tech Community College,*[196] the United States Court of Appeals for the Seventh Circuit ruled that sexual orientation is a protected class under Title VII.[197] A lower court had dismissed Kimberly Hively's case that alleged that Ivy Tech Community College, where she worked as a part-time adjunct professor for 14 years, denied her fulltime employment because she is a lesbian.[198] The Seventh Circuit reversed that decision, stating that "the common-sense reality [is] that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex . . . ."[199] The parties ultimately resolved this case through mediation.[200]

In *Glenn v. Brumby*, the United States Court of Appeals for the Eleventh Circuit affirmed the rights of a transgender woman after she was fired due to her transgender status.[201] Vandy Beth Glenn, a transgender woman, was fired from her job as a legislative editor at the Georgia General Assembly after she informer her supervisor, Brumby, of her transgender status.[202] Glenn was successful in her Equal Protection Clause sex-based discrimination case at the district court level.[203] The Eleventh Circuit affirmed the district court's decision, upholding the employee's Constitutional right to equal protection under the law.[204] Although the Glenn case was an equal protection case, the district and appellate courts referenced Title VII in their analysis. [205] *Glenn*, along with *Hively*, paved the way for the Supreme Court to delineate LGBTQ anti-discrimination employment law.

Justice Gorsuch's decision in *Bostock* was straightforward. The decision focused on the plain meaning of "sex" to hold that "discrimination based on

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[195] Lambda Legal, *supra* note 188. *See generally* Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017); Glenn v. Brumby, 663 F.3d. 1312 (11th Cir. 2011).

[196] *Hively*, 853 F.3d at 339.

[197] *Id.* at 340-41.

[198] *Id.* at 341.

[199] *Id.* at 351.

[200] *Joint Mediation Summary Statement* at 1, Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339 (7th Cir. 2017) (No. 3:14-CV-1791-JD-MGG), LAMBDA LEGAL (Aug. 6, 2018), [https://perma.cc/6JT7-RSKJ].

[201] Glenn v. Brumby, 724 F.Supp.2d 1284 (N.D.Ga. 2010); *aff'd*, 663 F.3d. 1312 (11th Cir. 2011).

[202] *Id.* at 1314.

[203] *Id.*

[204] *Id.* at 1321.

[205] *Id.* at 1317.

homosexuality or transgender status necessarily entails discrimination based on sex."[206] Gorsuch relied on the express language of Title VII alone and determined that this language properly encompasses sexual orientation and gender identity.[207] He stated:

> [a]n employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids. Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. . . . Only the written word is law, and all persons are entitled to its benefit.[208]

Social-change lawyers cheered the Supreme Court's decision in *Bostock*, but made it clear that the LGBTQ agenda still has significant items on the list. The highest priority is to get Congress to pass the Equality Act,[209] which

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[206] Bostock v. Clayton Cty., 140 S. Ct. 1731, 1747 (2020).

[207] *Id.* at 1754.

[208] *Id.* at 1737. It is important to note that Alito's dissent in *Bostock* highlighted the belief that we must look at the intentions of the law's drafters, not simply the plain meaning of language. *Id.* at 1755 (Alito, J., dissenting). Justice Samuel Alito, writing for himself and Justice Clarence Thomas, indicated that the concepts of sexual orientation and gender identity were unknown in the early 1960s, so Congress could not have intended for Title VII to cover sexual orientation and gender identity. *Id.* at 1756-78. Justice Alito called the majority opinion "legislation" and indicated that the majority had overstepped its bounds. *Id.* at 1754. Justice Brett Kavanaugh wrote a separate dissent that relied on the separation of powers between the legislative and judicial branches of government. *Id.* at 1822 (Kavanaugh, J., dissenting). He indicated that Congress, not the Supreme Court, should add sexual orientation and gender identity to Title VII. *Id.* at 1822-37. The disagreement among the Court's conservative justices sparked a debate about what it means to embrace textualism in interpreting statutes. Justice Gorsuch relied on the plain meaning of sex beyond the intentions of Title VII's drafters. *Id.* at 1738-39. Justice Alito, by contrast, insisted on considering the intentions of Title VII's drafters. *Id.* at 1755 (Alito, J., dissenting). Readers interested in considering the Bostock decision through the lens of textualism may want to read Nelson Lund's analysis, which criticizes Justice Gorsuch's majority opinion as "indefensible." *See* Nelson Lund, *Unleashed and Unbound: Living Textualism in Boston v. Clayton County*, 21 FEDERALIST SOC'Y REV. 158, 162 (2020). Lund calls Bostock "an outlandish judicial performance." *Id.* at 167. By contrast, those who support LGBTQ rights view Justice Gorsuch's opinion as a correct textualist decision. *See* Ian Millhiser, *The Supreme Court's Landmark LGBTQ Rights Decision, Explained in 5 Simple Sentences,* VOX (June 15, 2020), [https://perma.cc/8EWB-YGWW].

[209] The Equality Act "would codify protections for LGBTQ people in employment, housing, credit, education and jury service as well as much-needed protections for sex, sexual orientation and gender identity in public spaces and services, as well as federally-funded programs." *Take Action, Pass the Equality Act Now*, HUM. RTS. CAMPAIGN (June 18, 2020), [https://perma.cc/DDA3-5H5S]. *See also* Bibi, *supra* note 13. Bibi writes that the Equality Act was reintroduced in Congress in March. *Id.* She states that "the bipartisan legislation has growing, unprecedented support, from nearly 70 percent of Americans, hundreds of members of

will "affirm[] comprehensive LGBTQ nondiscrimination protections in virtually every area of life."[210] The Equality Act would codify protections that ensure that LGBTQ people are free from discrimination in housing, credit, education, and jury service.[211] Additionally, the law would provide protections for sex, sexual orientation, and gender identity in both public spaces/services and federally funded programs.[212]

Activists must embrace an intersectional lens as they pursue change. Intersectionality refers to "[t]he complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect especially in the experiences of marginalized individuals or groups."[213] An intersectionality agenda recognizes that Congress has not designed anti-discrimination law for individuals who experience more than one form of discrimination.[214] LGBTQ individuals of color who experience discrimination assert allegations in the context of laws that recognize one form of discrimination at a time.[215] Because of *Bostock*, a gay man can now assert that an employer discriminated against him due to his sexual orientation.[216] But what if he is Black too, and the employee believes that racism influenced an employment decision? The law regarding intersectional discrimination is evolving. The EEOC recognizes intersectional discrimination.[217] The EEOC has offered guidance indicating that "Title VII prohibits

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Congress, more than 250 major businesses, more than 500 social justice, religious, medical and child welfare organizations, and more than 60 national trade associations including the U.S. Chamber of Commerce, National Association of Manufacturers and the Business Roundtable." *Id.* Bibi explains that the U.S. House of Representatives passed the bill on a strong, bipartisan vote of 236 to 173 in May of 2019. *Id.* If both the House and Senate pass the Equality Act, this federal legislation would make different state laws consistent, including the 17 states that currently offer no protection for LGBTQ individuals. For a history of legislation prior to the Equality Act, see Alex Reed, RFRA v. ENDA: Religious Freedom and Employment Discrimination, 23 VA. J. SOC. POL'Y & L. 2, 4-7 (2016); Alex Reed, *Redressing LGBT Employment Discrimination via Executive Order*, 29 NOTRE DAME J.L. ETHICS & PUB. POL'Y 133, 134–36 (2015). *See generally* Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277 (2014) (describing the legislative history on ENDA).

210 Adam Peck, *Release: LGBTQ Groups Build Momentum for the Equality Act,* CTR. FOR AM. PROGRESS (July 17, 2020), [https://perma.cc/5SHX-H5T5].

211 HUM. RTS. CAMPAIGN, *supra* note 209.

212 *Id.*

213 David Hessekiel, *How Brands Can Appeal to the LGBTQ Community Through an Intersectional Lens*, FORBES (July 6, 2020), [https://perma.cc/X49W-G62S].

214 The EEOC does provide guidance for claimants with multiple protected bases or those alleging intersectional discrimination. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, *EEOC Enforcement Guidance on National Origin Discrimination* (Nov. 18, 2016), [https://perma.cc/B686-SATD].

215 For a comprehensive review of intersectionality, see generally Nourafshan, *supra* note 187.

216 Bostock v. Clayton Cty., 140 S. Ct. 1731, 1747 (2020).

217 U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Section 15 Race and Color Discrimination* (Apr. 19, 2006), [https://perma.cc/GSM4-KSPS].

discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex)."[218]

Recently, in *Frappied v. Affinity Gaming Black Hawk*, the Tenth Circuit Court of Appeals became the first federal appellate court to acknowledge a sex-plus-age Title VII claim.[219] This decision is important because it furthers a conversation about what intersectional discrimination cases might look like in the decision-making stage. The case involved female casino employees whose employer terminated them.[220] The employees, all over forty years old, sued using two theories: (1) Title VII on the basis of sex-plus-age, and (2) a separate Age Discrimination in Employment Act ("ADEA") claim.[221] The court held that Title VII prohibits sex-plus discrimination, even when the "plus" (age) is not protected by Title VII.[222] The court also followed EEOC guidance and asserted that Title VII prohibits discrimination at the intersection of two bases (sex and age).[223] The Tenth Circuit said that plaintiffs must show they would not have been terminated but for their sex.[224] In addition to courts offering frameworks in support of intersectional claims, as the Tenth Circuit did, the EEOC could offer a suggested framework.[225] Moreover, Congress could revise Title VII's language to make it clear that plaintiffs may pursue claims that highlight two or more protected classes.

B. Media Engagement, Community Organizing, and Interdisciplinary Collaborations

Currently, individuals who work in or with media can move the LGBTQ agenda forward by understanding the history of Black Lives Matter

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[218] *Id.*

[219] Frappied v. Affinity Gaming Black Hawk, LLC, 966 F.3d 1038, 1045–46 (10th Cir. 2020).

[220] *Id.* at 1044-1045.

[221] *Id.* at 1044.

[222] *Id.* at 1046.

[223] *Id.* at 1047–48.

[224] *Id.* at 1056.

[225] Yvette Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff,* 22 U. PA. J. L. & SOC. CHANGE 1 (2018). Pappoe encourages the EEOC to adopt the frameworks the Ninth Circuit articulated in *Lam v. University of Hawaii*. *Id.* at 17-18 (discussing Lam v. University of Hawaii, 40 F.3d 1551 (9th Cir. 1994)). In *Lam*, the Ninth Circuit considered a plaintiff's claim that a university discriminated against her based upon her race, sex, and national origin. Lam v. University of Hawaii, 40 F.3d 1551, 1554-5 (9th Cir. 1994). The court "held that it is necessary for courts to consider a plaintiff's claim of discrimination based on a combination of two or more protected categories rather than focus solely on whether an employer discriminates based on one category or another." Yvette Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff,* 22 U. PA. J. L. & SOC. CHANGE 1, 15 (2018). Pappoe also urges Congress to amend Title VII to add these words after the list of protected categories: "or any combination thereof." *Id.* at 23. This addition would "explicitly demonstrate Congress's intent to permit claims based on multiple characteristics . . . ." *Id.*

("#BLM")—a movement that embraced intersectionality from the start.[226] Two of the movement's three Black founders identify as queer.[227] Increasingly, Black LGBTQ voices are central to debates about race, discrimination, and police violence.[228] This centrality of Black voices harkens back to the Stonewall Riots of 1969, when transgender people of color helped lead the fight for the modern gay rights movement.[229] In the past 20-plus years, the LGBTQ movement morphed into an era of gay celebrity power and media visibility—inspired by Ellen DeGeneres coming out on national television in 1997.[230] This era focused on new rights for gay and lesbian couples—first, same-sex unions and then, same-sex marriages.[231] During this era, Black LGBTQ voices were on the margins of significant conversations.[232] The movement leaders often failed to recognize the needs and interests of individuals with less money and power, especially Black and Brown people, immigrants, and trans people.[233] Now, the LGBTQ and #BLM movements are united in fighting police brutality, violence, discrimination, and more.[234] Media coverage, especially coverage of the #BLM movement, has offered greater exposure to leadership change. New leaders pursue their work through an intersectionality lens.

As workplace advocates Out & Equal have stated:

> [m]any of our organizations have made progress in adopting intersectionality as a core value and have committed to be more diverse, equitable, and inclusive. But this moment requires us to go further—that we make explicit commitments to embrace anti-racism and end white supremacy, not as

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[226] Sony Salzman, *From the Start, Black Lives Matter Has Been About LGBTQ Lives*, ABC NEWS (June 21, 2020), [https://perma.cc/3SGL-SEAV]. *See also* Stephanie Simon, *LGBTQ and Black Lives Matter Activists Show Solidarity*, NY1 (June 18, 2020), [https://perma.cc/T23G-US4F].

[227] Salzman, *supra* note 226. The three founders are Alicia Garza, Patrisse Cullors, and Opal Tometi. *Id.* They founded the movement in 2013. *Id.*

[228] *Id.*

[229] Simon, *supra* note 226. In the 1960s and 70s, anti-establishment sentiment inspired a number of causes, including the Civil Rights and LGBTQ movements. *Id.*

[230] Bonnie J. Morris, *History of Lesbian, Gay, Bisexual and Transgender Social Movements*, AM. PSYCHOL. ASS'N, [https://perma.cc/75ES-M8BE] (last visited June 8, 2021).

[231] Simon, *supra* note 226.

[232] *Id.*

[233] Abi Turner, *The Intersectionality of Black Lives Matter and the LGBTQ+ Community*, KEKE MAGAZINE (June 6, 2020), [https://perma.cc/5LXD-WYU7]. Turner points out that, historically, Black members of the LBGTQ community were leaders in fighting systemic racism and sexism. *Id.*

[234] Simon, *supra* note 226.

> necessary corollaries to our mission, but as integral to the objective of full equality for LGBTQ people.[235]

Advocates from the LGBTQ and #BLM movements have engaged in community organizing to take actions in favor of redirecting federal funds away from the criminal justice system and into underserved communities, to promote reproductive justice, fair housing, and environmental justice.[236]

Regarding interdisciplinary collaborations, antiracist advocates should reach out to corporations that have a vested interest in embracing intersectionality. Corporations can (and should) work with non-governmental organizations to act upon their statements of support for social justice.[237] In the aftermath of George Floyd's murder, corporate America has already pledged millions to support social justice initiatives.[238] While corporations are recognizing Juneteenth,[239] making commitments to increased equity and inclusion in hiring and promotion practices,[240] placing moratoriums on providing police officers with facial recognition technology that may be abused,[241] and barring Confederate flags from events,[242] now might be a good time to ask for more (and more specific) actions. Corporations that have been silent about the Equality Act could support it. They could voluntarily meet the healthcare needs of their LGBTQ employees and grant parental leave to gay men. By doing so, corporations would be acting upon their belief for equal dignity and respect to all employees.

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[235] OUT & EQUAL, *LGBTQ Organizations Unite to Combat Racial Violence* (May 29, 2020), [https://perma.cc/ME4Q-BTFL].

[236] *Id.* Out & Equal writes that "[t]he LGBTQ community . . . understand[s] what it means to rise up and push back against a culture that tells us we are less than, that our lives don't matter. Today, we join together again to say #BlackLivesMatter and commit ourselves to the action those words require." *Id.* For examples of these actions, see Maya King, *Black Lives Matter Goes Big on Policy Agenda*, POLITICO (Aug. 28, 2020), [https://perma.cc/GPP8-JGL3].

[237] Hessekiel, *supra* note 213 (discussing Macy's partnership with The Trevor Project).

[238] Lily Zheng, *We're Entering the Age of Corporate Social Justice,* HARV. BUS. REV. (June 15, 2020), [https://perma.cc/YK6J-VPLY]. Lily Zheng encourages companies to articulate a justice-oriented goal, "situate [the] company within the broader ecosystem surrounding [the] goal," "[b]uild . . . working groups that connect the company with its stakeholders," "[t]ake a stance," and engage in regular assessment. *Id.* (emphasis omitted).

[239] Yelena Dzhanova, *Here's a Running List of All The Big Companies Observing Juneteenth This Year*, CNBC (June 17, 2020, 4:19 PM), [https://perma.cc/D2RN-VK6K].

[240] Laurent Belsie, *Corporate America Confronts Racism. Why This Time May be Different*, CHRISTIAN SCI. MONITOR (June 18, 2020), [https://perma.cc/7N6F-B9U3].

[241] Hannah Klein, *IBM Says It Will Stop Developing Facial Recognition Tech Due to Racial Bias*, SLATE (June 9, 2020, 6:14 PM), [https://perma.cc/D9QF-AEBN].

[242] Belsie, *supra* note 240.

VI. RECOMMENDATIONS

Social justice advocates will produce power and policy change by following the recommendations provided in this Section. Section V suggests that social justice advocates should: (1) set bold, anti-racist agendas, (2) maximize the potential of interdisciplinary collaborations, and (3) get out the vote. These actions will promote positive change.

A. Recommendation One: Social Justice Advocates Should Set Bold, Antiracist Agendas

Social justice advocates should set these bold, antiracist agendas by promoting and practicing integrated advocacy. As described in the previous social justice challenges, integrated advocacy combats discrimination and promotes antiracism. One of the first steps to promoting antiracism is explaining what it requires. This Article find the steps Dr. Ibram X. Kendi envisions thorough and thought-provoking. He highlights the need for antiracist advocates to follow certain steps, including: (1) "[f]igur[ing] out who or what group has the power to institute antiracist policy,"[243] (2)"[w]ork[ing] with sympathetic antiracist policymakers to institute … antiracist polic[ies],"[244] and (3) engaging in assessment to "ensure . . . antiracist policy reduces and eliminates racial inequality."[245] In essence, Kendi suggests strategic planning, action, and evaluation.

Lawyers and collaborators from Dove's CROWN coalition could design a nationwide strategy that first targets states with legislatures that are more likely to pass the CROWN Act. Members of the National Urban League, Color of Change, and Western Center for Law & Poverty, all part of the CROWN coalition, could shape a media campaign to define what an unbiased standard for determining which hairstyles are professional. They should communicate with Senator Cory Booker and decide when state laws have reached a tipping point. With more states that pass the CROWN Act, the more likely it is that federal legislators will succeed in passing it at the federal level, thereby eliminating hair discrimination against Black Americans throughout the country.[246] Collaborators must continually determine how they are doing at achieving their goal and consider which integrated advocacy tools are the most promising at a specific moment.

In reference to standardized testing, this Article has asked colleges and universities to stop using the SAT and ACT in the admissions process.

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[243] Kendi, HOW TO BE AN ANTIRACIST, *supra* note 1, at 232.

[244] *Id.*

[245] *Id.*

[246] In December 2019, Senator Cory Booker introduced the CROWN Act at the federal level. Marina Pitofsky, *Booker Unveils Legislation for Federal Bill to Ban Discrimination Against Natural Hair,* THE HILL (Dec. 6, 2019 3:50 PM), [https://perma.cc/J6E5-TMYX].

Antiracist advocates need to make this agenda bolder. Social-change lawyers and their collaborators could advocate for a lottery system that gives all qualified students an equal chance to be admitted to selective colleges and universities.[247] Advocates could also look at ways to level the playing field regarding how students finance higher education. Generational wealth, or the lack of it, affects student borrowing. Advocates might imagine a world in which all students leave college debt-free and are able to support themselves. Finally, regarding LGBTQ rights, social-change lawyers and their collaborators must continue work to promote comprehensive protections for LGBTQ individuals. Advocates must also make intersectionality a cornerstone of the next round of changes.

B. Recommendation Two: Antiracist Activists Should Maximize the Potential of Interdisciplinary Collaborations

Antiracist activists who want to produce power and policy change using integrated advocacy should maximize the potential of interdisciplinary collaborations. As this Article has indicated, advocates who reach outside law for knowledge and ideas discover that colleagues with unique backgrounds can lend expertise that increases the likelihood and pace of change.[248] For example, the Supreme Court relied on testimony from psychologists to reject "separate, but equal" education for students in *Brown v. Board of Education*.[249] In particular, psychologists testified that as early as age six, a child accepts negative stereotypes about their own group.[250] Based on this research, lawyers in *Brown* were able to argue that their segregated schools affected children's development negatively.[251] More recently, social justice advocates used sociology and psychology expert witnesses to challenge California's Proposition 8, which banned same-sex marriage.[252] In addition to relying on social scientists, this Article recommends that antiracist activists look to historians and corporate social justice supporters.

As this Article has described, Dr. Ibram X. Kendi, a scholar with expertise in Black history and discrimination, has engaged in work that can help us reframe policy priorities. Regarding standardized tests, for instance, Dr. Kendi's work has been especially important in explaining how racism has,

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[247] *See* Calvin, *supra* note 127, at 29-31. Psychologist Allen Calvin highlights the positive attributes of the Dutch lottery system of admission into higher education and encourages the United States to adopt a similar system. *Id.* ("When a selective program in the Netherlands cannot take all the qualified applicants, the applicants are placed in a pool, and a lottery is held. Applicants who are unsuccessful in the lottery are automatically placed in their second choice.")

[248] *See* Brescia, *supra* note 7, at 574 n.212; *see also supra* notes 39-40 and accompanying text.

[249] *Segregation Ruled Unequal, and Therefore Unconstitutional*, AM. PSYCH. ASS'N (July 2007), [https://perma.cc/NH2S-7J78].

[250] *Id.*

[251] *Id.*

[252] Brescia, *supra* note 7, at 574.

and continues to shape, the SAT. This Article has also pointed out how Dr. Kendi's work supports race-conscious policies in higher education, which will dismantle racist policies.

Advocates can also reach outside the law to discover which voluntary actions corporations have taken to promote equality. Advocates can rely on business expertise combined with action. At the time this Article was written, some corporations considered expanding their corporate social responsibility ("CSR")[253] to encompass corporate social justice initiatives. "Corporate Social Justice [("CSJ")] is a reframing of CSR that centers the focus of any initiative or program on the measurable, lived experiences of groups harmed and disadvantaged by society."[254]

When corporations act voluntarily, they offer a perspective about what they are willing to do in the absence of legal mandates. This Article has described how the Dove brand[255] has collaborated with non-profit organizations to advance the CROWN Act. The brand has every incentive to support race-neutral beauty standards, especially regarding societal standards for hair texture and hairstyle. Another example comes from the actions corporations have taken to promote equality for the LGBTQ community. More than 250 corporations have provided strong support for the Equality Act—a law that will provide comprehensive protections for members of the LBGTQ community.[256]

Finally, it is possible our analysis will inspire corporations to take a careful look at ways in which their policies and practices might be racist. For instance, our analysis of standardized tests in college admissions should inspire business actors to look at tests they use in the hiring process. Employers sometimes screen applicants using "cognitive tests, personality tests, medical examinations, credit checks, and criminal background checks."[257] Corporations that embrace CSJ must evaluate each of these tests and check to see how they can eliminate bias and act to produce racial equality.

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[253] Corporate social responsibility ("CSR") is a dynamic, context-driven idea or set of societal expectations. JEREMY MOON, CORPORATE SOCIAL RESPONSIBILITY: A VERY SHORT INTRODUCTION (2014). It may also include a set of business practices. *See id.* Definitions of CSR include these features: (a) business responsibility *to* society (accountability), (b) business responsibility *for* society (compensating for negative impacts), and/or (c) responsible behavior (a business needs to be operated ethically, responsibly, and sustainably). *Id.* CSR overlaps with other concepts, including ethics, sustainability, and citizenship. *See id.* Its meanings, assumptions, and implications for business and society are dynamic.

[254] Zheng, *supra* note 238.

[255] *See* DOVE, *The Crown Act*, *supra* note 110 and accompanying text.

[256] Bibi, *supra* note 13.

[257] U.S. EQUAL OPPORTUNITY EMP. COMM'N, *Employment Tests and Selection Procedures*, [https://perma.cc/GZ2G-5JUD] (last visited June 8, 2021).

C. Recommendation Three: Antiracist Activists Should Get Out the Vote

An antiracist advocate must be a regular, informed voter to exhaustively produce power and policy change. In American democracy, voting at the local, state, and federal level affects legislation and litigation—an antiracist lawyer's two major concerns. Antiracist advocates must assume responsibility to help mobilize the communities they work in to get out the vote. Social-change lawyers are individuals well-versed in community outreach and empowerment and can harness these skills to increase voter turnout in elections. Lawyers must make fighting voter suppression a top priority. An antiracist advocate's capacity to fight voter suppression may look like a partnership with an existing organization to litigate cases on behalf of disenfranchised voters or increase community education.[258]

Elections for legislative officials at the local, state, and federal level are significant and consequential for all Americans. Increased voter turnout is a vital goal of antiracist activism to ensure that antiracist legislators are voted into office. When antiracist legislators hold office at the local, state, and federal level, they set agendas that align with antiracist goals. Voting directly affects the legislative agendas that are set, but antiracist advocates should also be concerned with an election's impact on litigation. The presidential election, for example, is one of high stakes, since the president acts as the nation's agenda setter, but also holds the power to nominate judges to lifetime positions on the Supreme Court, Court of Appeals, and District Court.[259] It is important to note that a president's influence will linger in the courts long after that person leaves office. The nomination process for these positions is also highly influenced by powerful Senators who often recommend judges for the position and the Senate in its entirety, which then votes to confirm nominated judges.[260]Antiracist advocates should be concerned with the appointment of judges because they hold power to dismiss or pursue social justice cases.

Antiracist advocates can reverse the historic lack of voter participation among young voters by highlighting the importance of voting for social justice issues. When social-change lawyers work towards community education and increased voter turnout, they should emphasize the social justice issues that are at stake in every election. Involving young people in social movements and elections is critical for long lasting change, as "they can be an

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[258] Claire L. Parins, *How to Help Protect Our Elections and Get Out the Vote*, A.B.A. (Feb. 9, 2020), [https://perma.cc/M9J9-V5E3].

[259] *FAQs: Federal Judges*, U.S. COURTS, [https://perma.cc/Q6RZ-6DBD] (last visited June 8, 2021).

[260] *Nomination & Confirmation Process*, GEO. L. LIBR., [https://perma.cc/BN5K-736C] (last visited June 8, 2021).

inexhaustible source of energy and passion for social change."[261] Throughout history, American youth have led and sustained social movements. We need young people to move the antiracist movement forward.

VII. CONCLUSION

As the coronavirus was starting to circulate in the United States, state legislators considered adopting the CROWN Act to limit employer control over Black bodies. As high school students prepared to take the SAT and ACT tests, they did not know that a pandemic would provide an opportunity for college admissions offices to realize they can admit a class without the use of biased standardized tests. When the pandemic was in full swing, the Supreme Court—for the first time—recognized the rights of the LGBTQ community to work in discrimination-free workplaces.

Right now, both good and bad energy are swirling around us, and a spotlight shines on racial disparities in education, healthcare, employment, and accumulated wealth. In this time of upheaval, social-change lawyers must continue to use integrated advocacy involving the law, legislation, media, community organizing, and interdisciplinary collaborations to produce power and policy change. We must set bold agendas, utilize interdisciplinary collaborations, and maximize voter participation. Doing so will jumpstart the change that antiracism demands.

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[261] *Why is Youth Civic Engagement Important?*, TUFTS TISCH COLL., [https://perma.cc/7ZYD-NLBD] (last visited June 8, 2021).