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Recommended Citation

Washington, Derrius (2019). "What Will Happen To Black Transgender People?," *Kansas State University Undergraduate Research Conference*. <https://newprairiepress.org/ksuugradresearch/2019/posters/23>

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WHAT WILL HAPPEN TO BLACK TRANSGENDER PEOPLE?

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Abstract

In this project, I asked what was likely to happen to black transgender people if federal civil rights law no longer formally protected transgender people from discrimination. To answer this question I explored what the potential ramifications might be for black transgender Kansans and black transgender folks nationally if the Supreme Court were to reverse the U.S Sixth Circuit Court of Appeals' ruling in *Harris Funeral Homes v. EEOC* (a case that held anti-transgender discrimination was against the law because of Title VII of the 1964 Civil Rights Act, a law that bans discrimination based on sex).¹ I studied the case and the legal implications as well as the available national and state data on discrimination transgender people experience. I worked to tease out how black transgender folk specifically experience lessened life chances by pulling information from the 2015 U.S. Transgender Survey. What became obvious is that while anti-discrimination laws are an important tool for objecting to discrimination, they are not doing enough to remedy the remarkable levels of unemployment, homelessness, or violence experienced by black transgender people. If the U.S. Supreme Court were to overturn the Sixth Circuit's ruling in *Harris Funeral Homes v. EEOC* then it would structurally permit discrimination and abuse while federally declaring black transgender people as unworthy of state protections.

Methods

I engaged in an intersectional legal analysis of previous court holdings, friend-of-the court briefs, and various federal department policies germane to the interpretation of federal civil rights law as well as analyzed the U.S. Transgender Survey for the impacts anti-transgender discrimination has on the black community in Kansas and nationally. Drawing on Feminist and Critical Race Legal Theory, I worked to problematize the law's purported color-blindness, avowed neutrality, and supposed objectivity by exploring how a singular word is defined, without any specific connection to race, yet has gendered racialized motivations and implications.²

Context and Results

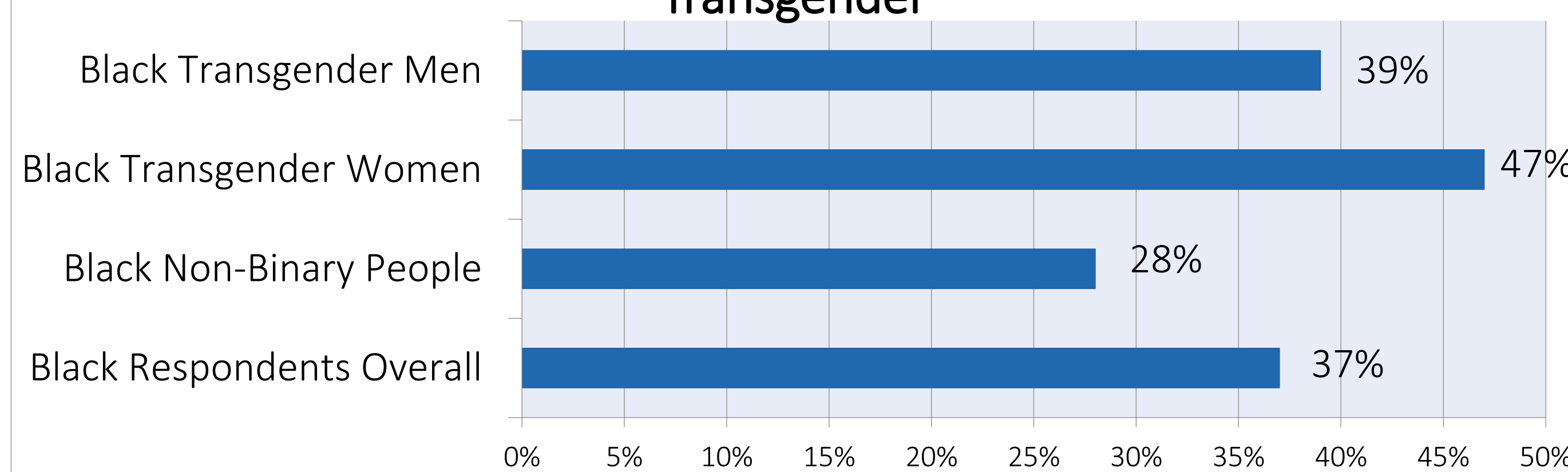
In August 2018, Kansas was one of 16 states that collectively filed an amicus brief, also known as a "friend-of-the-court-brief" urging the U.S. Supreme Court to hear an appeal to a lower court's decision in the *Harris Funeral Homes v. EEOC* case.³ Previously, the U.S Sixth Circuit Court of Appeals ruled that the firing of a transgender funeral home worker had been unlawful, concluding that workers cannot be terminated for being transgender.⁴ The amicus brief encouraged the reversal of this decision with the ultimate goal of narrowly defining "sex" in federal anti-discrimination law that would allow for discrimination based on gender identity and sexual orientation.⁵

This question of what "sex" covers in federal civil rights law has dramatically shifted between the last two presidential administrations. Under the Obama administration the Equal Employment Opportunity Commission ruled that discrimination on the basis of gender identity is discrimination on the basis of sex.⁶ Former Attorney General's of the U.S., Eric Holder and Loretta Lynch both played key roles in ensuring the LGBTQ community had

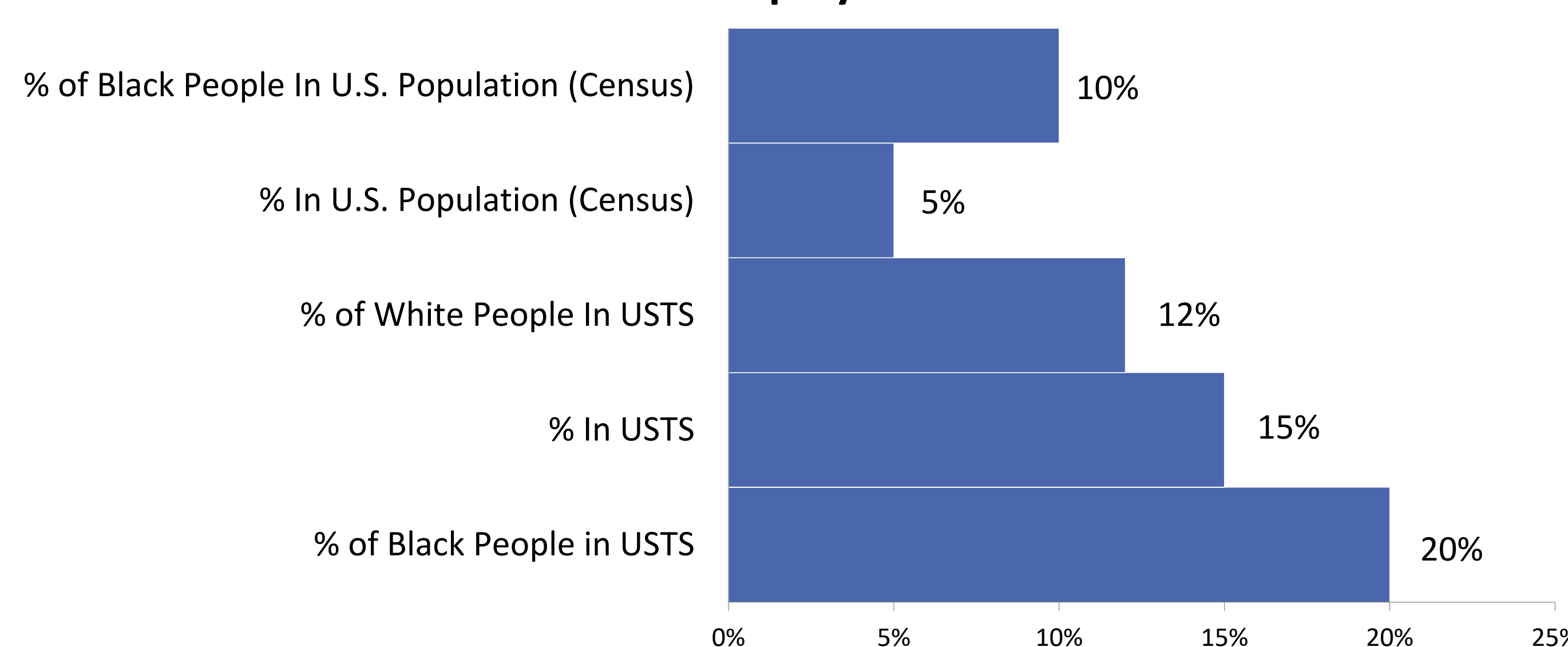
the support of the federal government. In 2014, Holder stated in a memo that "Title VII's prohibition of sex discrimination...encompasses discrimination based on gender identity, including transgender status."⁷ Lynch also expressed federal support of the LGBTQ community following the North Carolina bathroom ban by stating "we see you; we stand with you; and we will do everything we can to protect you going forward."⁸ However, under the current Trump administration, federal support for LGBTQ discrimination protections are being actively dismantled. On July 26, 2017, the U.S. Department of Justice, under the leadership of then Attorney General Jeff Sessions, filed a brief stating that "Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation."⁹ For Obama's administration prohibitions of sex discrimination cover issues of discrimination based on sexual orientation and gender identity, however the Trump administration continues to advocate through the Justice Department, Department of Education, and Health and Human Services that "sex" does not cover sexual orientation or gender identity.

While this might seem like a debate over the meaning of a word that has little significance, it has profound implications for black transgender people. The impacts of discrimination are clear in the education, employment, poverty, and homelessness statistics: In 2014, 37% of black transgender respondents who held or applied for a job during that year reported experiencing workplace discrimination, including: being fired, denied promotions or advancement opportunities, or being denied employment because of being transgender, compared to 27% in the USTS sample overall. 22% of black respondents who have ever been employed reported losing a job because they were transgender.

Workplace Discrimination:
 Fired, Denied Promotion, or Not Hired for Being Transgender



Unemployment



| K-12 Negative Experiences in School of Those Perceived to be Transgender | % of black people in USTS | % in USTS |
|--|---------------------------|-----------|
| Physically attacked because people thought they were trans | 28% | 24% |
| Left school because treatment was so bad | 22% | 17% |
| Expelled from school | 10% | 6% |
| Sexually assaulted because people thought they were trans | 19% | 13% |
| Disciplined for fighting back against tormentors | 34% | 36% |

The connection between employment discrimination and unemployment is thorough. 20% of Black transgender respondents report being unemployed, which is twice the rate among Black people in the general U.S. population. 38% of Black transgender respondents were living in poverty, in comparison to 24% of the general U.S. Black population. 42% of Black transgender respondents report experiencing homelessness in their lifetime, compared to the 30% experienced by transgender populations overall. 22% of Black transgender populations experienced homelessness in the previous year because they were transgender (ie: employment and housing discrimination among other gender related reasons) and nearly a fourth of those experiencing homelessness avoid shelters because of histories of discrimination, physical assaults, and verbal harassment that occur because they are transgender.

Unfortunately, only 197 of the 27,715 respondents in the US Transgender Survey were from Kansas and available documents do not track state responses by race. However, what we do know is 36% of transgender respondents from Kansas report living in poverty, and in the last year 29% reported experiencing employment discrimination involving being fired, not hired, or denied advancement opportunities. Those able to maintain employment reported hostile work climates because of their gender identity and expression, which included verbal harassment, physical assault, and sexual assault.¹¹

Conclusion

It is important to note that this study was done on the impact of gender identity being covered under the Civil Rights Act. If the U.S. Supreme Court were to rule Title VII did not include gender identity, the impacts of the anti-trans discrimination would likely be much worse for black transgender individuals than what the 2015 statistics reflect. Presently, black transgender people face some of the highest levels of discrimination and lessened life chances because existing laws do not work to protect them. The laws that are currently in place force people to choose between race-based and sex-based discrimination when seeking a legal remedy to structural violence. But what little effect those laws have could be stripped away by redefining sex to preclude coverage of gender identity. Ultimately, the problem of systemic and structural oppression of black transgender people cannot be fixed overnight. There are steps that can be implemented that could, overtime diminish the impacts on black queer populations. A short-term solution is fighting the redefinition of sex. Longer term, laws must explicitly protect gender identity from an intersectional perspective. Courts must understand intersectionality and actively protect and value the lives of black transgender people.

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