

ANTI-DISCRIMINATION LAWS AND FIRST AMENDMENT ROADBLOCKS: IMPLICATIONS FOR LGBTQ+ KANSANS AND THE ROAD TO RESTORATIVE JUSTICE

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I. INTRODUCTION

All across Kansas, LGBTQ+¹ people are facing discrimination. Anti-LGBTQ+ culture in Kansas is nothing new—its capital city, Topeka, Kansas, is the birthplace of the Westboro Baptist Church, known for the slogan “God Hates F---.”² While Kansas has a long history of discrimination against LGBTQ+ people,³ recent legal gains for LGBTQ+ people in the United States have been

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¹ For the sake of conciseness and consistency, the term “LGBTQ+” in this article refers to lesbian, gay, bisexual, trans[gender], queer, intersex, asexual, nonbinary, pansexual, Two-Spirit, and many other identities that are each encompassed within the LGBTQ+ community. This article explores approaches to anti-discrimination policies in the context of discrimination against the LGBTQ+ community. Unique experiences of discrimination can vary within these identities. Therefore, when relevant, this article will specify if it is discussing the unique experiences of one of these identities—such as the unique needs of trans Kansans. This article intentionally uses the shortened term “trans” rather than “transgender,” because the author prefers to reflect the language that the trans community most commonly uses to refer to itself. As used in this article, “trans” is an umbrella term that includes trans, non-binary, genderqueer, genderfluid, and many other gender-nonconforming identities.

² *Westboro Baptist Church*, S. POVERTY L. CTR. (2023), <https://www.splcenter.org/fighting-hate/extremist-files/group/westboro-baptist-church> [<https://perma.cc/E9YR-XMYC>].

³ For example, KAN. STAT. ANN. § 21-5504—an anti-LGBTQ+ law criminalizing consensual sex between LGBTQ+ adults—is still on the books in Kansas. Even though the Supreme Court in *Lawrence v. Texas* ruled such laws were unconstitutional in 2003, Kansas has refused to repeal this sodomy law that has been unconstitutional for almost two decades. *Lawrence v. Texas*, 539 U.S. 558 (2003); Blaise Mesa, *Laws against gay sex were ruled unconstitutional long ago, but Kansas won't drop its ban*, KCUR (Jan. 22, 2022, 6:30 AM), <https://www.kcur.org/news/2022-01-22/laws-against-gay-sex-were-ruled-unconstitutional-long-ago-but-kansas-wont-drop-its-ban>

met with a modern backlash of anti-LGBTQ+ bigotry.⁴ This backlash is particularly visible with the rise in transphobic legislation introduced both across the country and in the Kansas Legislature. Kansas has introduced a multitude of transphobic bills in recent years. In 2022 alone, five anti-trans bills were introduced in the Kansas Legislature.⁵ In 2023, the Legislature came back for more and succeeded in passing four anti-trans bills.⁶ While Kansas's governor vetoed all four anti-trans bills, the Legislature overrode the veto on three of the bills, forcing their transphobic policies into law.⁷ One of the overridden bills, SB 180, has been labeled as one of the most restrictive pieces of anti-trans legislation in the country.⁸ Deceivingly named "the women's bill of rights," SB 180 changes the definition of biological sex in Kansas, prohibits trans Kansans from updating and maintaining their gender marker on vital identity documents, such as birth certificates and drivers' licenses, and prohibits trans people from accessing sex-segregated spaces that align with their gender identity.⁹

The introduction of anti-trans bills is not a harmless tactic to promote conservative ideals. Studies centering on Kansas youth show that even when these policies are not signed into law, the rhetoric and debate that surrounds the bills creates a destructive environment that increases trans youths' thoughts of

[<https://perma.cc/72WT-M3CC>]; Clay Wirestone, *This Kansas law makes being gay illegal. Legislators could fix it, but homophobia runs deep.*, KANSAS REFLECTOR (Feb. 3, 2022, 3:33 AM), <https://kansasreflector.com/2022/02/03/this-kansas-law-makes-being-gay-illegal-legislators-could-fix-it-but-homophobia-runs-deep/#:~:text=Being%20gay%20is%20illegal%20in,to%20six%20months%20in%20prison> [<https://perma.cc/A4LZ-J2VF>].

⁴ See *Obergefell v. Hodges*, 576 U.S. 644 (2015) (legalizing same-sex marriage in all fifty states); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (holding that employment discrimination based on sexual orientation or gender identity violates Title VII of the Civil Rights Act); see also *Report: The Year in Hate and Extremism*, S. POVERTY L. CTR., 6 (2020), https://www.splcenter.org/sites/default/files/yih_2020_final.pdf [<https://perma.cc/35RB-DV4Z>] (showing an example of modern backlash, as the number of anti-LGBTQ hate groups in America rose by nearly 43% in 2019).

⁵ *Legislative Tracker: Anti-Transgender Legislation*, FREEDOM FOR ALL AMS. (2022), <https://freedomforallamericans.org/legislative-tracker/anti-transgender-legislation/> [<https://perma.cc/HH8H-TBMB>] (discussing HB 2210 ("Making it a crime for a doctor to perform gender reassignment surgery or hormone replacement therapy on minors."); SB 160 ("Enacting the fairness in women's sports act to require that student athletic teams only include members who are of the same biological sex unless designated as coed."); SB 208 ("Creating the fairness in women's sports act to require that female student athletic teams only include members who are biologically female."); SB 214 ("Making it a crime for a physician to perform gender reassignment surgery or hormone replacement therapy on certain children."); SB 484 ("Enacting the fairness in women's sports act to require that student athletic teams only include members who are of the same biological sex unless designated as coed.")).

⁶ See 2023 Kan. Sess. Laws 1230-31; Kan. Sess. Laws 1260-63; KAN. STAT. ANN. § 60-5603 (2023); SB 26, 2023 Reg. Sess. (Kan. 2023).

⁷ John Hanna, *Kansas Gov. Laura Kelly vetoes 4 anti-trans bills as overrides loom*, PBS (Apr. 20, 2023 9:02 PM), <https://www.pbs.org/newshour/politics/kansas-gov-laura-kelly-vetoes-4-anti-trans-bills-as-overrides-loom> [<https://perma.cc/W7L8-XNLA>]; see also Kan. Sess. Laws 1260-63; 2023 Kan. Sess. Laws 1230-31; KAN. STAT. ANN. § 60-5603 (2023).

⁸ Morning Edition, *Lawmakers in Kansas pass a sweeping bill that affects transgender people*, NPR (April 5, 2023 5:13 AM), <https://www.npr.org/2023/04/05/1168116126/lawmakers-in-kansas-pass-a-sweeping-bill-that-affects-transgender-people> [<https://perma.cc/GRT2-PZZM>].

⁹ *Id.*; 2023 Kan. Sess. Laws 1230-31.

suicide and impacts their sense of self-worth.¹⁰ Trans youth in Kansas have expressed that “just the fact that these bills exist . . . is harmful to mental health.”¹¹ These young people have been exposed to transphobic rhetoric at every turn. For example, Kansas school boards have been introducing similar transphobic policies in recent years, including the Gardner-Edgerton School District which passed an anti-trans policy in late 2022.¹²

Anti-LGBTQ+ culture has uniquely serious impacts on the well-being of LGBTQ+ people in rural Kansas. As of 2021, 914,980 Kansans—almost one-third of the state’s population—live in rural communities.¹³ Many LGBTQ+ youth in rural Kansas love their communities but feel that they cannot remain there because being openly LGBTQ+ in their small towns is so difficult.¹⁴ Studies show that LGBTQ+ youth in rural areas face a heightened risk of social isolation and negative mental health outcomes compared to their non-LGBTQ+ peers.¹⁵ Further, LGBTQ+ youth in rural areas are more vulnerable to the risk

¹⁰ Megan S. Pacey, Zosimo A. Dikitsas, Emera Greenwood, Lauren B. McInroy, Jessica N. Fish, Natasha Williams, Michael R. Riquino, Malcolm Lin, Sara Birnel Henderson, & Deborah S. Levine, *The Perceived Health Implications of Policies and Rhetoric Targeting Transgender and Gender Diverse Youth: A Community-Based Qualitative Study*, 00 TRANSGENDER HEALTH 1, 2 (2021).

¹¹ *Id.* Other trans youth in Kansas have shared that “these bills make them ‘feel like I got stabbed.’ [and] ‘you keep hearing all of these people that don’t want you to exist... it’s scary.’” *Id.*

¹² See, e.g., David Medina & Leslie DelasBour, *Dozens testify as Gardner Edgerton school board considers bathroom policy for transgender students*, KSHB 41 (Sept. 12, 2022, 8:24 PM), <https://www.kshb.com/news/local-news/dozens-testify-as-gardner-edgerton-school-board-considers-bathroom-locker-room-policy-for-transgender-students> [<https://perma.cc/K76M-U64X>]; Bek Shackelford-Nwanganga, *Kansas school district bans trans students from preferred sports teams and restrooms*, KCUR (Nov. 8, 2022, 3:06 PM), <https://www.kcur.org/news/2022-11-08/kansas-school-district-transgender-student-ban-gardner-edgerton-pronouns> [<https://perma.cc/VPU3-XRXP>] (“Despite opposition from students and the ACLU, the Gardner Edgerton school board approved a policy that bans transgender students from using their preferred restroom or playing on sports teams that align with their gender identity. ‘You don’t care about teen suicide,’ one student said.”).

¹³ *Population, Income, Food Insecurity, Education, and Employment, State Data: Kansas*, USDA ECON. RES. CTR., <https://data.ers.usda.gov/reports.aspx?StateFIPS=20&StateName=Kansas&ID=17854> [<https://perma.cc/59WH-P5MA>].

¹⁴ See Mike Krings, *Study Determines Needs of LGBTQ Youth in Rural Areas*, UNIV. OF KAN. (June 21, 2016), <https://news.ku.edu/2016/05/06/study-determines-needs-lgbtq-youth-rural-areas-how-social-workers-communities-can-help> [<https://perma.cc/E2KS-TAWC>]; See also Megan S. Pacey, *Gender and Sexual Minority Youth in Nonmetropolitan Communities: Individual- and Community-Level Needs for Support*, 97 FAMILIES IN SOC’Y: J. CONTEMP. SOC. SERV. 77 (2016).

¹⁵ César G. Escobar-Viera, Sophia Choukas-Bradley, Jaime Sidani, Anne J. Maheux, Savannah R. Roberts, & Bruce L. Rollman, *Examining Social Media Experiences and Attitudes Toward Technology-Based Interventions for Reducing Social Isolation Among LGBTQ Youth Living in Rural United States: An Online Qualitative Study*, FRONT. DIGIT. HEALTH (June 27, 2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9271672/> [<https://perma.cc/ABW4-RVCK>].

of suicide, due to a lack of access to life-saving preventive services, such as culturally-competent mental health care.¹⁶

However, not only youth in the LGBTQ+ community are impacted by anti-LGBTQ+ culture. For example, while all kinds of residents in rural areas tend to have limited choices when it comes to public accommodations, such as grocery stores, restaurants, and doctors' offices, "[f]or LGBT people in rural communities, the limited number of businesses and service providers *can be limited even further* if they experience discrimination."¹⁷ Where there may only be two grocery stores in a rural town to begin with, when an LGBTQ+ Kansan risks discrimination at one or both of the grocery stores, their access to these public accommodations can become extremely limited.¹⁸

Discrimination is also amplified for trans Kansans across the state. For example, a 2019 report shows that twenty-two percent of trans Kansans reported experiencing housing discrimination within the past year, and twenty-nine percent of trans Kansans reported being discriminated against or harassed at a public accommodation within the past year.¹⁹

To combat this discrimination, activists often turn to anti-discrimination laws and policies.²⁰ Kansas is no different. Kansas's statewide anti-discrimination law—the Kansas Act Against Discrimination ("KAAD")—does not expressly include sexual orientation and gender identity ("SOGI") protections.²¹ However, the Kansas Human Rights Commission has released guidance that KAAD's protections from sex discrimination should be interpreted in line with *Bostock v. Clayton County*²² to encompass discrimination based on SOGI status.²³ Due to this agency guidance, KAAD is now interpreted

¹⁶ *Suicide Among Specific Rural Populations*, RURAL HEALTH INFO. HUB (2022), <https://www.ruralhealthinfo.org/toolkits/suicide/1/specific-population-concerns> [https://perma.cc/RMP8-BCXZ].

¹⁷ *Where We Call Home: LGBT People in Rural America*, MOVEMENT ADVANCEMENT PROJECT, 35 (Apr. 2019), <https://www.lgbtmap.org/file/lgbt-rural-report.pdf> [https://perma.cc/D66C-ZPE3] (emphasis added).

¹⁸ Justice Sotomayor raised this issue during oral arguments for *Masterpiece Cakeshop*, highlighting how isolated areas such as military bases may have only "two florists or one photographer. Very small number of resources." Transcript of Oral Argument at 28, *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719 (2018) (No. 16-111).

¹⁹ Christy Mallory & Brad Sears, *Report: Discrimination Against LGBT People in Kansas*, UCLA SCH. OF L., 2 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-KS-Jan-2019.pdf> [https://perma.cc/9J46-6UES].

²⁰ In 2016, approximately 200 municipalities in the United States had SOGI-inclusive anti-discrimination policies. Steven Corfman, *Enacting Gender Identity Anti-Discrimination Ordinances: Local Legislation as a Civil Rights Frontier*, 37 WOMEN'S RTS. L. REP. 203, 203 (2016). In 2022, the number has grown to at least 330 municipalities. *Local Non-Discrimination Ordinances*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/non_discrimination_ordinances [https://perma.cc/X3R3-LH2M].

²¹ Mallory, *supra* note 19, at 1.

²² *Bostock v. Clayton Cnty*, 140 S. Ct. 1731 (2020) (holding that the term "sex" in Title VII encompasses "homosexual or transgender status.").

²³ See *Guidance from The Kansas Human Rights Commission on Sex Discrimination in Employment, Public Accommodations, and Housing*, KAN. HUM. RTS. COMM'N (2020),

to include protections against discrimination based on SOGI status.²⁴ Further, one county and nineteen cities in Kansas have implemented their own SOGI-inclusive anti-discrimination ordinances that cover discrimination in private employment, housing, and public accommodations.²⁵ These cities and county encompass forty-eight percent of Kansas's population, but the vast majority of these SOGI-inclusive anti-discrimination ordinances are concentrated in larger Kansas metropolitan areas.²⁶

Anti-discrimination laws and policies have long been championed as the gold star of protections for LGBTQ+ rights.²⁷ However, in a largely rural and conservative state, such as Kansas, First Amendment freedom of speech and religious freedom exemptions have left anti-discrimination policies difficult to enforce when it matters most.²⁸

This article argues that, rather than seeking stricter enforcement of already existing anti-discrimination laws and policies, Kansas should become a leader

<http://www.khrc.net/pdf/KHRC%20Guidance%20on%20Sex%20Discrimination%20in%20Employment,%20Public%20Accommodations,%20and%20Housing%20on%20letterhead%20rev%20dwh.pdf> [https://perma.cc/V2YR-Q9MP]. The Kansas Human Rights Commission—previously known as the “Anti-Discrimination Commission” and the “Kansas Commission on Civil Rights”—(“the Commission”) was created by the Kansas Legislature in 1953 when the Legislature first passed KAAD. *Annual Report Fiscal Year 2007 July 1, 2006 - June 30, 2007*, KAN. HUM. RTS. COMM’N, 6 (2007), <http://www.khrc.net/pdf/AR2007.pdf> [https://perma.cc/5C5S-42PL]. The Commission gradually gained more power as the Legislature broadened KAAD’s scope—the Commission has “gained the ability to initiate complaints and contract compliance programs, as well as the power of subpoena and the ability to use hearing examiners for public hearings.” *Id.* In 1995, KAAD was amended again to allow the Commission, under certain circumstances, to dismiss complaints, establishing that “dismissal would constitute an exhaustion of administrative remedies sufficient to allow a complainant to file the matter in court.” *Id.* at 7.

²⁴ *Guidance from The Kansas Human Rights Commission on Sex Discrimination in Employment, Public Accommodations, and Housing*, KAN. HUM. RTS. COMM’N (2020), <http://www.khrc.net/pdf/KHRC%20Guidance%20on%20Sex%20Discrimination%20in%20Employment,%20Public%20Accommodations,%20and%20Housing%20on%20letterhead%20rev%20dwh.pdf> [https://perma.cc/V2YR-Q9MP].

²⁵ *Kansas’s Equality Profile*, MOVEMENT ADVANCEMENT PROJECT (2022), https://www.lgbtmap.org/equality-maps/profile_state/KS [https://perma.cc/LA3B-8EJ4]. These nineteen cities and one county include: Kansas City (KS), Fairway, Lawrence, Leawood, Lenexa, Manhattan, Merriam, Mission, Mission Hills, Mission Woods, Olathe, Overland Park, Pittsburg, Prairie Village, Roeland Park, Shawnee, Topeka, Westwood, Westwood Hills, Wichita, and Wyandotte County. *Id.*

²⁶ *Id.*

²⁷ “All We Want Is Equality”: Religious Exemptions and Discrimination Against LGBT People in the United States, HUM. RTS. WATCH (Feb. 19, 2018), <https://www.hrw.org/report/2018/02/19/all-we-want-equality/religious-exemptions-and-discrimination-against-lgbt-people> [https://perma.cc/L3N6-7FGE] (“A growing number of US states have sought to address [LGBTQ+ discrimination] by prohibiting discrimination based on sexual orientation and gender identity in various fields.”).

²⁸ See, e.g., *Ricard v. USD 475 Geary Cnty.*, No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742 (D. Kan. 2022) (showing that when Kansas does enforce anti-discrimination policies, it is quickly met with backlash in the form of religious freedom claims); see also *infra* pp. 10-11 (discussing recent SCOTUS precedent).

in using restorative justice²⁹ to heal the individual harm done by discrimination, while also addressing the underlying causes that perpetuate discrimination on a community and state-wide level. Recent studies in Europe have emphasized the positive role that restorative justice can have in instances of LGBTQ+ discrimination and hate crimes.³⁰ However, there are very few studies about how this use of restorative justice for LGBTQ+ discrimination could work in rural America. This article applies a unique lens to the issue by diving deep into the application of restorative justice principles for LGBTQ+ discrimination in the state of Kansas.

This article starts in Part II by discussing the problems that arise when attempting to enforce anti-discrimination laws and policies and explores recent First Amendment roadblocks, queer theory, and abolitionist-based critiques of enforcement. Part III examines the public policy implications of the current state of anti-discrimination laws and policies. Part IV presents a potential solution: using restorative justice practices as an alternative to traditional enforcement of anti-discrimination laws and policies, exploring the public policy rationales and the specific importance of restorative justice practices for LGBTQ+ discrimination in the state of Kansas.

II. ROADBLOCKS TO ENFORCEMENT OF ANTI-DISCRIMINATION LAWS AND POLICIES

This section explores many of the problems that arise when attempting to enforce anti-discrimination laws and policies, examining recent First Amendment roadblocks, as well as queer theory- and abolitionist-based critiques of enforcement. This examination shows, first, that First Amendment religious freedom claims have served as a barrier to enforcing anti-discrimination policies in recent years.³¹ Second, it highlights how many queer theorists question the actual efficacy of anti-discrimination policies, even when they can be enforced.³² Third, it shows that arguments in favor of strengthening anti-discrimination laws

²⁹ Restorative justice is an alternative approach to conflict resolution that seeks to examine the harmful impact of a person's action and determine what can be done to repair the harm, while holding the person who caused it accountable for their actions. *About Restorative Justice*, RESTORATIVE JUST. PROJECT, <https://law.wisc.edu/fjr/rjp/justice.html> [<https://perma.cc/FZW5-XHCX>].

³⁰ See, e.g., Malini Laxminarayan, *Promising Strategies of Restorative Justice in AntiLGBT Hate Crime Cases*, LETSGOBYTALKING (2021), <https://www.euforumrj.org/sites/default/files/2021-11/Promising%20strategies%20booklet%20%281%29.pdf> [<https://perma.cc/R6BC-Z5AA>]; Linda Millington, *Using Restorative Justice in Cases of LGBTI Hate Crime (England and Wales)*, SAFE TO BE HANDBOOK (2020), <https://why-me.org/wp-content/uploads/2020/11/Safe-To-Be-Handbook-2-2.pdf> [<https://perma.cc/6A7X-J7FL>].

³¹ See, e.g., Kyle C. Velte, *All Fall Down: A Comprehensive Approach to Defeating the Religious Right's Challenges to Anti-Discrimination Statutes*, 49 CONN. L. REV. 1, (2016); *Striking a Balance: Advancing Civil and Human Rights While Preserving Religious Liberty*, THE LEADERSHIP CONF. EDUC. FUND (March 2016), <http://civilrightsdocs.info/pdf/reports/Striking-A-Balance.pdf> [<https://perma.cc/DYZ9-CER8>].

³² See, e.g., Dean Spade, *What's Wrong with Rights?*, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW, 38–49 (2015).

and policies through the carceral system are heavily critiqued by abolitionist scholars.³³ Ultimately, a more creative approach—such as restorative justice—is necessary to improve the implementation of anti-discrimination laws and policies moving forward.

A. *First Amendment Roadblocks*

First Amendment religious freedom claims have served as a barrier to enforcing anti-discrimination policies in recent years.³⁴ While Kansas does have some protections for LGBTQ+ people through anti-discrimination laws and local ordinances, Kansas also has one of the “broadest state religious exemption laws in the country.”³⁵ The Kansas Preservation of Religious Freedom Act (“KPRFA”) creates sweeping exemptions from anti-discrimination laws and policies when they “substantially burden a person’s civil right to exercise of religion.”³⁶ The KPRFA is modeled after the federal Religious Freedom Restoration Act (“RFRA”), which Congress passed in 1993 to restrict the government’s ability to “substantially burden religious exercise without compelling justification.”³⁷ Champions of RFRA and its state-law equivalents—such as the Alliance Defending Freedom (“ADF”)—seek to expand religious exemptions from anti-discrimination laws, “effectively allowing them to discriminate against another individual by claiming a personal religious objection.”³⁸ Organizations, like the ADF, that seek to expand religious exemptions to anti-discrimination laws and policies are a very outspoken minority—the reality is that a majority of people in every single U.S. state—as well as sixty-nine percent of the country overall—support LGBTQ+ inclusive anti-discrimination policies.³⁹

³³ Ryan Thoreson, “Discriminalization”: *Sexuality, Human Rights, and the Carceral Turn in Antidiscrimination Law*, 110 CALIF. L. REV. 431, 473 (2022).

³⁴ Velte, *supra* note 31; THE LEADERSHIP CONF. EDUC. FUND, *supra* note 31.

³⁵ D.C. Hiebert, *Patchwork Protections in Kansas: The Rise of Religious Exemption Laws Demands State-Level LGBTQ+ Antidiscrimination Protections*, 30 KAN. J.L. & PUB. POL’Y 128, n.14 (2020).

³⁶ KAN. STAT. ANN. § 60-5303.

³⁷ Religious Freedom Restoration Act, 42 U.S.C.S. § 2000bb(a)(3) (1993).

³⁸ THE LEADERSHIP CONF. EDUC. FUND, *supra* note 31, at 4. The ADF is a legal advocacy organization that is officially classified as an anti-LGBTQ+ hate group by the Southern Poverty Law Center for their legal advocacy on issues including “the recriminalization of sexual acts between consenting LGBTQ adults in the U.S. and criminalization abroad” and “state-sanctioned sterilization of trans people abroad.” *Alliance Defending Freedom*, S. POVERTY L. CTR., <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> [https://perma.cc/2H6U-JFF2]. The ADF also develops “‘religious liberty’ legislation and case law protecting the denial of goods and services to LGBTQ people on the basis of religion.” *Id.*

³⁹ *Why We All Need the Equality Act Now*, MOVEMENT ADVANCEMENT PROJECT 3 (Jan. 2021), <https://www.lgbtmap.org/file/2021-report-equality-act.pdf> [https://perma.cc/RJ5E-SW5J] (“the majority of people living in America, including majorities in every state, overwhelmingly support LGBTQ-inclusive nondiscrimination protections”); Frank Newport, *American Public Opinion and*

1. Freedom of Religion Claims

Litigation from the last decade shows an expansion in courts accepting religious freedom claims at the expense of LGBTQ+ protections.⁴⁰ Kansas is not immune to these claims. In May 2022, a Kansas school teacher filed a lawsuit against Geary County Unified School District 475, claiming that its “Preferred Names and Pronouns Policy” (“Policy”) violated her right to free exercise of religion.⁴¹ The Policy required teachers to refer to students by their preferred first name and pronouns and prohibited teachers from outing student’s identities to their parents without the student’s permission.⁴² In *Ricard v. USD 475 Geary County*, the teacher sued the school district after she was disciplined for violating the Policy by refusing to refer to two of her trans students by their chosen names and pronouns.⁴³ The teacher claimed that she “is a Christian who believes that God immutably creates each person as male or female; these two distinct, complementary sexes reflect the image of God; and rejection of one’s biological sex is a rejection of the image of God within that person.”⁴⁴ She further argued that she “believes that referring to children with pronouns inconsistent with biological sex is harmful because it is untrue”⁴⁵ and that this violated her religion because the Bible prohibits dishonesty and lying.⁴⁶

This case’s outcome has the potential to set a dangerous precedent in Kansas. The District Court in *Ricard* found that the teacher had “a sufficient showing that her free exercise claim merits a preliminary injunction.”⁴⁷ The court then granted a limited preliminary injunction, enjoining the school district from prohibiting its employees from “revealing to parents that a student has requested use of a preferred name or different set of pronouns at school.”⁴⁸ A

the Equality Act, GALLUP (Mar. 19, 2021), <https://news.gallup.com/opinion/polling-matters/340349/american-public-opinion-equality-act.aspx> [<https://perma.cc/2DS7-7R6H>] (“69% of Americans supported ‘laws that ban discrimination based on whether a person is lesbian, gay or bisexual.’”).

⁴⁰ See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1724 (2018) (allowing a baker to refuse to sell a wedding cake for a same-sex couple due to his “religious opposition to same-sex. Marriages” after finding that Colorado had shown religious bias when sanctioning the baker); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1874 (2021) (allowing foster care agencies to refuse same-sex couples seeking to become foster parents due to the agencies’ religious views surrounding marriage).

⁴¹ *Ricard v. USD 475 Geary Cnty.*, No. 5:22-cv-04015-HLT-GEB, 2022 U.S. Dist. LEXIS 83742, at *7 (D. Kan. 2022). The lead attorney for the Plaintiff-teacher was Gregory R. Walters, an Alliance Defending Freedom attorney. *Id.* at *1.

⁴² *Id.* at *2.

⁴³ *Id.* at *4.

⁴⁴ *Id.* at *3.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *3.

⁴⁸ *Id.* at *25, *9–10.

few months later, the school district settled the case, paying the teacher \$95,000 for the alleged violation of her First Amendment rights.⁴⁹

When people in positions of power over youth—such as teachers—succeed on these religious freedom claims, LGBTQ+ youth get caught in the crossfire. The teacher in *Ricard* has taught at least four openly trans students in her classroom alone.⁵⁰ Parents of trans children have said that teachers misgendering trans students actively harms their children and denies these trans children their personhood, their identity, and access to a supportive learning environment.⁵¹

2. Freedom of Speech Claims

Many objections to enforcement of anti-discrimination laws and policies are being asserted in the form of free speech claims as well. For example, *Ricard* included a free speech claim alongside the claim of religious freedom.⁵² In fact, the U.S. Supreme Court recently ruled that applying a public accommodation law to a wedding website designer, who sought to turn away same-sex couples, violated the Free Speech Clause of the First Amendment.⁵³

In *303 Creative LLC v. Elenis*, a Christian website designer, who creates customized wedding websites, sought to post a notice stating that she refused to create websites “that celebrate same-sex marriages.”⁵⁴ Such a notice would have violated the Colorado Anti-Discrimination Act (“CADA”), so she sued, claiming that CADA violated her right to free speech.⁵⁵ The Tenth Circuit Court of Appeals ruled that CADA did not violate the web designer’s First Amendment right to free speech because “enforcing CADA as to Appellants’ unique services is narrowly tailored to Colorado’s interest in ensuring equal access to the

⁴⁹ Sarah Motter, *Fort Riley teacher awarded \$95K after using student’s dead name*, KWCH 12 (Aug. 31, 2022, 11:45 AM), <https://www.kwch.com/2022/08/31/fort-riley-teacher-awarded-95k-after-using-students-dead-name/> [https://perma.cc/T6RR-MSJL].

⁵⁰ See *Ricard*, 2022 U.S. Dist. LEXIS 83742 at *4–6.

⁵¹ Katie Reilly, *This Isn’t Just About a Pronoun: Teachers and Trans Students Are Clashing Over Whose Rights Come First*, TIME (Nov. 15, 2019, 6:00 AM), <https://time.com/5721482/transgender-students-pronouns-teacher-lawsuits/> [https://perma.cc/FG7Q-KXAU]. Trans students are already facing an uphill battle in schools. 50% of trans students surveyed in 2015 said they were prevented from using names or pronouns that align with their gender identity, and 65% had been verbally harassed at school. *Id.* One quarter of trans students also had been physically harassed at school, and 12% had been physically assaulted. *Id.* When facing so much discrimination already, the last thing a trans student should be worried about is whether their own teacher will harm them as well.

⁵² *Ricard*, 2022 U.S. Dist. LEXIS 83742 at *7.

⁵³ *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2321–22 (2023).

⁵⁴ *303 Creative LLC v. Elenis*, 6 F.4th 1160, 1170 (10th Cir. 2021).

⁵⁵ *Id.*

commercial marketplace.”⁵⁶ The Supreme Court reversed the Tenth Circuit’s holding, stating that “no public accommodations law is immune from the demands of the Constitution”⁵⁷ and that CADA violates the First Amendment by seeking to force the website designer “to ‘utter what is not in [her] mind’ about a question of political and religious significance.”⁵⁸

The ruling in *303 Creative*, expanding anti-discrimination exemptions to claims of free speech, will no doubt have devastating implications for LGBTQ+ Kansans’ access to public accommodations. Justice Sotomayor’s dissent argues that “[t]he opinion of the Court is, quite literally, a notice that reads: ‘Some services may be denied to same-sex couples.’”⁵⁹ Such a notice, she continues,

[S]ends the message that we live in a society with social castes. It says to the child of the same-sex couple that their parents’ relationship is not equal to others’. And it reminds LGBT people of a painful feeling that they know all too well: There are some public places where they can be themselves, and some where they cannot.⁶⁰

The bottom line is that in its 6-3 decision, “the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class.”⁶¹

LGBTQ+ legal scholars emphasize that these First Amendment religious freedom and free speech claims are not valid; these claims go well beyond established First Amendment precedent.⁶² Nonetheless, these cases make clear that courts are buying the First Amendment arguments that religious right organizations, like the ADF, are selling—giving merit to legally invalid claims.⁶³ Without conceding to the validity of these First Amendment claims, this article provides a strategic response to the moment we are in when LGBTQ+ rights are being eroded in the name of the First Amendment religious freedoms and free speech.

⁵⁶ *Id.* at 1182. The Court supported this decision by reasoning that “[w]e agree with the Dissent that ‘the protection of minority viewpoints is not only essential to protecting speech and self-governance but also a good in and of itself.’ Yet, we must also consider the grave harms caused when public accommodations discriminate on the basis of race, religion, sex, or sexual orientation. *Combating such discrimination is, like individual autonomy, ‘essential’ to our democratic ideals.*” *Id.* at 1190 (emphasis added) (internal citations omitted).

⁵⁷ *303 Creative*, 143 S. Ct. at 2315.

⁵⁸ *Id.* at 2318.

⁵⁹ *Id.* at 2341 (Sotomayor, J., dissenting).

⁶⁰ *Id.*

⁶¹ *Id.* at 2322 (Sotomayor, J., dissenting).

⁶² See Velte, *supra* note 31 at 35 (“state courts have solid doctrinal ground on which to rule that compliance with anti-discrimination laws in the for-profit, commercial context does not violate the First Amendment.”).

⁶³ See e.g., *303 Creative*, 143 S. Ct. 2298 (holding that that applying a public accommodation law to a wedding website designer who sought to turn away same-sex couples violated the Free Speech Clause of the First Amendment).

B. *Queer Theory-Based Critiques of Enforcement*

Many queer theorists question the actual efficacy of anti-discrimination laws and policies, even when they can be enforced. For example, Dean Spade—a trans man, legal scholar, and law professor—argues that:

The logic of visibility and inclusion surrounding anti-discrimination and hate crime law campaigns is very popular, yet there are many troubling limitations to the idea that these two reforms compromise a proper approach to the problems that trans people face in both criminal and civil law contexts. One concern is whether these laws actually improve the life chances of those who are purportedly protected by them. An examination of categories of identity that have been included in these kinds of laws over the last several decades indicates that *these kinds of reforms have not eliminated bias, exclusion, or marginalization*.⁶⁴

This critique highlights that anti-discrimination laws and policies do not change the underlying conditions that cause discrimination, such as bias, exclusion, and marginalization of LGBTQ+ people.⁶⁵ Therefore, anti-discrimination law and policy in its current state is limited in its ability to materially improve LGBTQ+ people's safety in society.⁶⁶

Further, the current structure of anti-discrimination laws and policies situates anti-LGBTQ+ violence on an interpersonal level. By individualizing a systemic problem, “[r]ights discourse in liberal capitalist culture casts as private potentially political contests about distribution of resources and about relevant parties to decision making.”⁶⁷ Ultimately, anti-discrimination laws and policies convert social problems into instances of *individualized, de-historicized* legal injury and entitlement.⁶⁸ These laws and policies, therefore, convert social problems into matters where there is no harm if there is no legally recognized agent of discrimination and no tangibly violated victim.⁶⁹

⁶⁴ Spade, *supra* note 32 at 40.

⁶⁵ *Id.*; see also Gerald N. Rosenberg, *Constraints, Conditions, and the Courts* in THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?, 72–106, 82 (1991) (“Law and legal decisions operate in a given cultural environment, and the norms of that environment influence the decisions that are made and the impact they have.”).

⁶⁶ See Spade, *supra* note 32 at 40.

⁶⁷ *Id.* at 38 (quoting Wendy Brown).

⁶⁸ *Id.* (emphasis added).

⁶⁹ *Id.*

C. Abolition-Based Critiques of Enforcement

Scholars often argue that the way to strengthen anti-discrimination law and policy is through criminalization, akin to the criminalization found in hate-crime laws.⁷⁰ However, abolitionist scholars heavily critique arguments in favor of strengthening anti-discrimination laws and policies through the carceral system.⁷¹ Applying a queer lens to prison abolition highlights the possibility that everyone—*particularly LGBTQ+ people and other marginalized groups*—has an interest in creating an abolitionist future where the carceral state is not invested in degradation and dehumanization.⁷² Spade argues that approaching anti-discrimination laws and policies in the same manner as hate crime laws is a far less attractive strategy because there is no evidence that increasing the resources and punishment capacity of the criminal punishment system will reduce violence against trans people.⁷³ By legitimizing a criminal punishment system that is actively violent towards trans people, “[w]e participate in the logic that the criminal punishment system produces safety despite the fact that the evidence suggests that it primarily produces violence.”⁷⁴

Criminalizing discrimination also increases the potential for police contact with LGBTQ+ victims of discrimination, further placing their safety into question. LGBTQ+ people have been historically exposed to disparate police violence and have “been targeted while facing bias across every layer of our public safety system.”⁷⁵ Violent crimes are disproportionately committed against LGBTQ+ people,⁷⁶ and one of the contributing factors of this violence is disparate policing enforcement.⁷⁷ Police not only under-serve LGBTQ+ communities but also actively contribute to the violence against them.⁷⁸ This is particularly true for Black and brown LGBTQ+ people, who “have been subject to circumstances where their sexual orientation, gender identity, gender non-conformance, and race have all been used as a pretense for police abuse.”⁷⁹ Increasing the police’s contact with LGBTQ+ victims of discrimination through carceral anti-discrimination policies, therefore, has the potential to further increase LGBTQ+ victims’ exposure to violence. Police abolitionists, like

⁷⁰ See Thoreson, *supra* note 33 at 433 (“The act of criminalization offers both a legal and a symbolic response to homophobia and transphobia. It intends to both deter and punish those who discriminate against LGBT people, and, at the same time, it conveys that the state disapproves of this kind of prejudice, to a degree comparable to racial prejudice.”).

⁷¹ *Id.* at 473.

⁷² *Id.* (emphasis added).

⁷³ Dean Spade, *Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & C.R. L. REV. 353, 358–59 (2009).

⁷⁴ *Id.*

⁷⁵ Ella Wiley & John Guzman, *Rebellion and Pride: How Police Have Failed LGBTQ+ Communities*, LEGAL DEF. FUND, <https://www.naacpldf.org/pride-history-police-violence/> [https://perma.cc/YKG9-J3PS].

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ See *id.* (“[T]he police, and the criminal justice system as a whole, have long denied people safety because of their sexual orientation, gender identity, and gender presentation — and have historically targeted LGBTQ+ people of color in particular.”).

⁷⁹ *Id.*

Derecka Purnell—a Black lawyer, writer, and organizer—point out that police create a false sense of security for victims, yet, the police do not and cannot fix the underlying harms that cause inequalities to begin with.⁸⁰ Calls for increased criminalization of discrimination ultimately “legitimizes systems that harm us and further obscures the causes and consequences of that harm.”⁸¹

III. POLICY IMPLICATIONS OF THE CURRENT STATE OF ANTI-DISCRIMINATION LAWS AND POLICIES

The current state of anti-discrimination laws and policies creates a catch-22 for LGBTQ+ Kansans seeking to avoid discrimination. The conflicts between religious liberty, freedom of speech, and LGBTQ+ rights make it impracticable to enforce anti-discrimination laws and policies without facing erroneous, yet effective, First Amendment claims.⁸² Difficult to enforce anti-discrimination laws and policies leave the LGBTQ+ community with little recourse against discrimination. This issue has grave consequences for the rights of LGBTQ+ people to have access to public accommodations without facing discrimination. However, difficult to enforce anti-discrimination policies have especially dire consequences for LGBTQ+ people in rural Kansas. Where an LGBTQ+ person in metropolitan areas may have opportunities to avoid the person who discriminated against them by frequenting other businesses or transferring schools, rural LGBTQ+ Kansans have significantly fewer options for public accommodations.⁸³ Further, due to the nature of small towns, LGBTQ+ Kansans in rural areas are more likely to suffer frequent and repeated contact with the specific person, who discriminated against them.⁸⁴

LGBTQ+ Kansans are no strangers to discrimination—both in rural and urban communities across the state. Even though LGBTQ+ Kansans in urban areas may have more options when it comes to which public accommodations they frequent,⁸⁵ LGBTQ+ people in all areas still face harm to their dignity just

⁸⁰ Derecka Purnell, *How I Became a Police Abolitionist*, THE ATLANTIC (July 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/07/how-i-became-police-abolitionist/613540/> [<https://perma.cc/8SUH-9Z7R>] (“Police couldn’t do what we really needed. They could not heal relationships or provide jobs. We were afraid every time we called. When the cops arrived, I was silenced, threatened with detention, or removed from my home. Fifteen years later, my old neighborhood still lacks quality food, employment, schools, health care, and air—all of which increases the risk of violence and the reliance on police.”).

⁸¹ Dean Spade, *Conclusion: “This is a Protest, Not a Parade!”* in NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 117, 120 (2015).

⁸² THE LEADERSHIP CONF. EDUC. FUND, *supra* note 31 at 4; *see also supra* note 28.

⁸³ MOVEMENT ADVANCEMENT PROJECT, *supra* note 17 at 35–37.

⁸⁴ Logically, the likelihood of exposure to a single person is much higher in a town of only a few thousand people, compared to a large metropolitan area like Johnson County, with more than half a million people. *QuickFacts Johnson County, Kansas*, U.S. CENSUS BUREAU <https://www.census.gov/quickfacts/johnsoncountykansas> [<https://perma.cc/NX8N-VMMN>].

⁸⁵ *See* MOVEMENT ADVANCEMENT PROJECT, *supra* note 17.

by knowing that “their rights and well-being are not valued and are contingent on the goodwill of others.”⁸⁶ This familiarity with discrimination is especially true for trans Kansans—considering thirty-eight percent of trans Kansans have experienced workplace harassment or general mistreatment, fifteen percent report losing a job because of their identity, twenty-nine percent report being “fired, denied a promotion, or not being hired for a job in the past year due to their gender identity or expression,” twenty-two percent report having experienced housing discrimination, and twenty-nine percent report facing discrimination in public accommodations in the past year alone.⁸⁷ These realities make the need for better-functioning anti-discrimination policies a pressing policy concern for all Kansans.

IV. THE PROPOSED SOLUTION: USING RESTORATIVE JUSTICE PRACTICES AS AN ALTERNATIVE TO TRADITIONAL ANTI-DISCRIMINATION ENFORCEMENT

Rather than seeking enforcement of already existing anti-discrimination laws and policies, Kansas should become a leader in using restorative justice to heal the individual harm done by discrimination while also addressing the underlying causes that perpetuate discrimination on a community and state-wide level. Restorative justice is an alternative approach to conflict resolution that seeks to examine the harmful impact of a person’s action and determine what can be done to repair the harm, while holding the person who caused it accountable for their actions.⁸⁸ For the person causing the discrimination, accountability could mean accepting responsibility and acting to repair the harm done.⁸⁹ Restorative justice outcomes repair the harm that was done and addresses the underlying causes of harm, while reducing the likelihood of reoccurrence.⁹⁰ Unlike criminalization, which focuses its attention on the punishment of the offender, “restorative justice measures results by how successfully the harm is repaired.”⁹¹

⁸⁶ HUM. RTS. WATCH, *supra* note 27. A lesbian pastor in Mississippi, Brandiilyne Mangum-Dear, described this harm to dignity, saying “We’re not being melodramatic. You’re being treated with disrespect, as a second-class citizen—not even a citizen, an outsider. And after a while, that begins to tear a person down, to hurt them emotionally and spiritually. Rejection is hard for everyone, and we get it over and over.” *Id.*

⁸⁷ Mallory, *supra* note 19 at 2.

⁸⁸ RESTORATIVE JUST. PROJECT, *supra* note 29.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* To highlight this distinction, restorative justice asks “*What is the harm that has been done? How can that harm be repaired? Who is responsible for the repair?*” compared to the criminal system, which asks “*What law was broken? Who broke it? How should the offender be punished?*” Andrea Goldblum, *Restorative Justice from Theory to Practice*, in REFRAMING CAMPUS CONFLICT: STUDENT CONDUCT PRACTICE THROUGH THE LENS OF INCLUSIVE EXCELLENCE 209, 214 (Jennifer Meyer Schrage & Nancy Geist Giacomini eds., 2020).

A. *Background on Restorative Justice*

Restorative justice strives to center those most impacted by the harm in the justice process—specifically the victims and survivors.⁹² Restorative justice does so by focusing on those who have been harmed and what they have experienced, rather than focusing on the offender.⁹³ In the restorative justice process, those harmed are empowered to participate in the process much more than in the traditional criminal system.⁹⁴ The larger community plays an important role in restorative justice as well. The community can engage in the restorative justice process by establishing standards of conduct for the interaction between individuals involved, helping to hold an offender accountable after the resolution, and providing support to the parties involved.⁹⁵

Restorative justice has unique benefits for the person harmed by discrimination because it creates an opportunity for the victim to express the harm that they have experienced, participate fully in the decision-making process, and receive support from the community.⁹⁶ For example, in 2018, a teenager assaulted an openly gay British rugby player, Gareth Thomas, because of his sexuality.⁹⁷ After the attack, Thomas specifically requested to meet with the teenager through a restorative justice process because Thomas wanted an opportunity to educate the teenager and bring positive change out of a painful situation.⁹⁸ After meeting, the teenager admitted that his actions harmed Thomas and apologized to Thomas for the pain he had caused, while the larger community also reached out to Thomas with messages of support.⁹⁹ As with Thomas, all of these factors can help promote healing for the person harmed in the aftermath of discrimination.¹⁰⁰

Restorative justice can look many different ways in practice. Due to the very personal nature of restorative justice, each individual process may vary significantly.¹⁰¹ However, certain basic principles are always present. First,

⁹² RESTORATIVE JUST. PROJECT, *supra* note 29.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Access to Justice: Restorative Justice for LGBTQ+ hate crime*, WHY ME?, <https://why-me.org/our-work/our-projects/access-to-justice-restorative-justice-for-lgbt-hate-crime/> [https://perma.cc/2YC6-43SQ].

⁹⁸ *Gareth Thomas: 'I have been the victim of a hate crime'*, BBC (Nov. 18, 2018), <https://www.bbc.com/news/uk-wales-46253256> [https://perma.cc/SV49-YX6N].

⁹⁹ *Id.*

¹⁰⁰ RESTORATIVE JUST. PROJECT, *supra* note 29.

¹⁰¹ See Lindsey Pointer, *Restorative Justice and Radical Creativity*, HARTFORD JUST. CTR. (Apr. 23, 2022), <https://hartfordjusticecenter.org/restorative-justice-and-radical-creativity/> [https://perma.cc/NC9M-G85E].

restorative justice operates on a consent-based model.¹⁰² All parties must consent to participation and can change their mind at any point during the process.¹⁰³ Second, restorative justice processes should always be led by a “trained facilitator who supports and prepares the people taking part and makes sure that the process is safe.”¹⁰⁴ After those basic principles are met, the process can then become more creative to suit the needs of the parties involved. For example, participants might meet face-to-face after the facilitator has laid the groundwork to ensure that all parties are safe and that no further harm will be caused.¹⁰⁵ Or, if participants do not wish to meet face-to-face, the parties might communicate through the use of letters, passing information between them through a mediator, or recorded interviews or videos.¹⁰⁶ Restorative justice specialists emphasize that the best restorative justice outcomes are completely unique to the given situation and include repairs that could only have arisen through a process of deep listening and creative collaboration between everyone involved.¹⁰⁷

B. Public Policy Rationales in Favor of Restorative Justice

Many public policy rationales support the use of restorative justice as an alternative to anti-discrimination enforcement. In this section, some of these rationales in favor of restorative justice will be discussed, including: avoiding First Amendment barriers that come with traditional lawsuits, the cost-savings of restorative justice, increased satisfaction of the parties involved, and restorative justice’s power for cultural change. Restorative justice’s power for cultural change is especially promising, and this section shows that it is furthered both by the economic incentives of an LGBTQ+ inclusive culture, and the fact that fostering an LGBTQ+ inclusive culture will be vital to the long-term success of rural Kansas towns. Ultimately, the public policy rationales described in this section highlight that the state of Kansas is ready for the use of restorative justice to address LGBTQ+ discrimination.

1. Avoiding First Amendment Barriers that Come with Lawsuits

Restorative justice is voluntary, which means that both parties must be open to participating before moving forward.¹⁰⁸ This consent-based model would eliminate any First Amendment claims, which are common under traditional anti-discrimination law and policy enforcement, because both parties have entered into the process willingly. The flexibility and creativity that the

¹⁰² *LGBT Leaflet*, WHY ME? https://why-me.org/wp-content/uploads/2022/11/Why-Me_-LGBT-Leaflet-Young-People-FINAL-PRINT.pdf [<https://perma.cc/V4MF-X2WT>] (“This process is called Restorative Justice and it is completely voluntary. This means that everyone can choose if they would like to be involved. Anyone can change their mind at any time during the process.”).

¹⁰³ *Id.*

¹⁰⁴ Millington, *supra* note 30 at 49.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See Pointer, *supra* note 101.

¹⁰⁸ Millington, *supra* note 30 at 49.

restorative justice process encourages leaves space to find creative incentives for the participation of all parties involved.¹⁰⁹ The state of Kansas could incentivize participation in the restorative justice process through creative and non-punitive solutions. States have already done this in the criminal context by offering lowered criminal penalties or expunction of the crime from the offender's record after successful completion of a restorative process.¹¹⁰ Because a consent-based model would eliminate First Amendment claims that are often asserted in traditional anti-discrimination law and policy enforcement, a restorative justice approach to discrimination would give LGBTQ+ Kansans greater access to justice after being discriminated against.

2. Cost Savings of Restorative Justice

Studies show that restorative justice can lead to nine-to-one savings compared with traditional court costs.¹¹¹ This cost savings is not only beneficial to the state of Kansas by decreasing tax-payer dollars required to fund court operations¹¹² but could also help lower the economic barriers that may prevent LGBTQ+ Kansans from pursuing legal measures after discrimination.¹¹³ LGBTQ+ people in Kansas have poorer socioeconomic outcomes than non-LGBTQ+ Kansans: thirty percent of LGBT adults in Kansas report having a household income below \$24,000, compared to eighteen percent of non-LGBT

¹⁰⁹ See Pointer, *supra* note 101.

¹¹⁰ See Derek M. Cohen, *Reviving Restorative Justice: A Blueprint for Texas*, RIGHT ON CRIME (Dec. 16, 2013), <https://rightoncrime.com/reviving-restorative-justice-a-blueprint-for-texas/> [<https://perma.cc/E5P6-SF65>]; see also Leena Kurki, *Incorporating Restorative and Community Justice Into American Sentencing and Corrections*, U.S. DEPT. OF JUST., 5 (Sept. 1999), <https://www.ojp.gov/pdffiles1/nij/175723.pdf> [<https://perma.cc/28RF-4LNY>]. In Minnesota, agreements reached during the restorative process have been presented to the judge as sentencing recommendations. *Id.* In Vermont, a judge may order “reparative probation” if the offender goes through a restorative process and creates a contract based on restorative principles with the parties involved. *Id.* Fulfilling that contract is then the only condition of the offender’s probation. *Id.* Colorado’s courts have “pre-sentencing alternatives with a restorative process of accountability in which the juvenile agrees to repair the harm by completing an agreement which is signed by all parties and is monitored by a program officer.” Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST. POL’Y J. 1, 11 (2016).

¹¹¹ See Vasso Artinopoulou, *Restorative Justice: A Value for Money Justice?*, 8 REG’L SCI. INQUIRY 107, 118 (2016).

¹¹² Restorative justice can save the state \$1,561 per participant compared to traditional justice approaches. Joe Tabor, *Illinois’ First Restorative Justice Court Will Save Money, Improve Outcomes*, ILL. POL’Y (July 31, 2017), <https://www.illinoispolicy.org/illinois-first-restorative-justice-court-will-save-money-improve-outcomes/> [<https://perma.cc/7LRL-T5J7>].

¹¹³ A few of these barriers include filing fees, court costs, and attorney fees. See, e.g., KAN. STAT. ANN. § 60-2001(a) (“Except as otherwise provided by law, no case shall be filed or docketed in the district court, whether original or appealed, without payment of a docket fee in the amount of \$173 to the clerk of the district court.”). Attorney fees in Kansas average between \$195-\$350 per hour. *Average Attorney Fees by State 2023*, <https://worldpopulationreview.com/state-rankings/average-attorney-fees-by-state> [<https://perma.cc/2RQQ-BNKU>].

Kansans.¹¹⁴ Further, the unemployment rate for LGBTQ+ Kansans is double that of their non-LGBTQ+ counterparts.¹¹⁵ The economic disparities are especially great for trans Kansans—thirty-six percent of trans Kansans report living in poverty and one-third have experienced homelessness at some point in their lives.¹¹⁶ These economic realities make pursuing traditional legal action less accessible to LGBTQ+ Kansans.¹¹⁷ The cost savings of restorative justice would help lower the economic barriers that may prevent LGBTQ+ Kansans from pursuing legal remedies for discrimination while also saving the state of Kansas valuable taxpayer money.

3. Increased Satisfaction

Restorative justice increases satisfaction by allowing the person harmed to define their own concept of justice,¹¹⁸ rather than deferring to what a judge or jury believes is the appropriate remedy.¹¹⁹ What justice looks like for any given victim of discrimination will vary, but often, people who have experienced discrimination simply want their experience *acknowledged*.¹²⁰ Restorative justice can help facilitate this by allowing the victim of discrimination space to express how it has impacted them.¹²¹ Other victims of discrimination might want more actionable results. For example, one victim of an anti-LGBTQ+ hate crime expressed that he wanted an opportunity to meet the person who harmed him through restorative justice, “so that he could challenge their views about his sexuality and discourage them from inflicting hate again.”¹²² Whatever outcome the victim is looking for, restorative justice is more likely to leave all parties

¹¹⁴ Mallory, *supra* note 19 at 6.

¹¹⁵ *Id.* (showing that eight percent of LGBTQ+ adults in Kansas report being unemployed compared to four percent of non-LGBTQ+ Kansans).

¹¹⁶ *Id.*

¹¹⁷ See Sam Bock, *4 Barriers Blocking Access to Justice (and How to Help Break Them)*, RELATIVITY BLOG (Mar. 25, 2021), <https://www.relativity.com/blog/4-barriers-blocking-access-to-justice-and-how-to-break-them/%20> [<https://perma.cc/5PDE-XW2Y>] (showing that the high cost of legal action serves as a barrier to access to justice).

¹¹⁸ See *Success Data*, COMMUNITIES FOR RESTORATIVE JUST., <https://www.c4rj.org/what-is-restorative-justice/success-data> [<https://perma.cc/S4MF-NUHE>].

¹¹⁹ RESTORATIVE JUST. PROJECT, *supra* note 29 (stating that under a traditional criminal justice view, “Justice requires the state to determine blame (guilt) and impose pain (punishment)”).

¹²⁰ See Millington, *supra* note 30, at 52 (explaining that one benefit of restorative justice is allowing victims “to seek answers about why the incident happened, explain how it made them feel, and regain a sense of power and control.”). Studies even show that a sincere apology may increase the likelihood of a settlement in traditional legal cases. See Jennifer K. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH L. REV. 460, 462 (2003) (showing that apologies “may favorably impact the prospects for settlement” although “attention must be paid to both the nature of the apologetic expression and the circumstances of the individual case.”).

¹²¹ Millington, *supra* note 30, at 59.

¹²² *Id.* at 52.

involved feeling satisfied at the end of the process compared to traditional legal measures.¹²³

4. Power for Cultural Change

Possibly the biggest public policy rationale for restorative justice is that it has the power to shift a society's culture, unlike current anti-discrimination systems that merely lead to a slap on the wrist of individual discriminators.¹²⁴ Restorative justice requires more than just a symbolic or punitive interaction between parties.¹²⁵ Because of this deeper level of connection, restorative justice has a unique power to challenge prejudice.¹²⁶ Restorative justice's ability to challenge prejudice is uniquely beneficial for those, who experience LGBTQ+ discrimination, because such discrimination is often motivated by prejudice.¹²⁷ Challenging this prejudice and showing the humanity of LGBTQ+ people to those who discriminate through restorative justice can undermine the beliefs, which drive people to commit discrimination against the LGBTQ+ community in the first place.¹²⁸ Restorative justice can humanize those harmed to the person who did the harm, because it is "much easier for someone to shout obscenities at a gay couple walking down the street, hand in hand, than it is to sit with them and hear that they are suffering from panic attacks as a result."¹²⁹ Restorative justice's ability to undermine prejudice and build mutual understanding between

¹²³ Both victims and offenders rate their satisfaction with the outcomes of restorative justice higher than satisfaction with traditional criminal justice outcomes. *See Success Data*, COMMUNITIES FOR RESTORATIVE JUST., <https://www.c4rj.org/what-is-restorative-justice/success-data> [<https://perma.cc/S4MF-NUHE>].

¹²⁴ Spade, *supra* note 32, at 40 (2015) (showing that anti-discrimination efforts have not actually eliminated bias, exclusion, or marginalization of the communities they were created to protect). *But see* HUM. RTS. WATCH, *supra* note 27 ("Studies suggest that awareness of laws affecting lesbian and gay people is higher and discrimination against lesbian and gay people is lower in municipalities that have inclusive protections in place"); Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67, 111-12 (2020) (quoting Michael Kent Curtis, *A Unique Religious Exemption*, 47 WAKE FOREST L. REV. 173, 187-88 (2012)) (crediting the Civil Rights Movement and civil rights laws for their success in marshalling religious-based arguments in favor of segregation).

¹²⁵ David Newton, *Restorative Justice and Youthful Offenders*, L. ENF'T BULL. (Oct. 16, 2016), <https://leb.fbi.gov/articles/featured-articles/restorative-justice-and-youthful-offenders#:~:text=Restorative%20justice%20entails%20more%20than,resulting%20in%20worse%20criminal%20behavior> [<https://perma.cc/L4Q3-TW5Z>].

¹²⁶ Millington, *supra* note 30, at 52.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

people from different backgrounds has the potential to truly shift a community's culture.¹³⁰

a. Economic Incentives of LGBTQ+ Inclusive Culture

The power to change cultures makes using restorative justice for LGBTQ+ discrimination especially beneficial for the state of Kansas—building more accepting and LGBTQ+ friendly communities can only benefit the state as a whole. Places that support LGBTQ+ rights succeed better economically than places that do not.¹³¹ Legal rights for LGBTQ+ individuals have been shown to reinforce economic growth and improvements in health and labor markets.¹³² This economic growth is supported by the fact that increased legal protections incentivize LGBTQ+ individuals to bring their talents to existing businesses and start-ups and lead to improved economic growth for the state overall.¹³³ It is also supported by the fact that large corporations who believe in LGBTQ+ equality often choose to boycott states that promote anti-LGBTQ+ legislation, bringing their business and job opportunities to more inclusive states instead.¹³⁴ Because restorative justice can change the culture and mindset of communities to be more accepting of LGBTQ+ people, it can further the economic success of the state of Kansas.

b. LGBTQ+ Inclusive Culture Will Strengthen Rural Kansas

Restorative justice's ability for social change will also be vital to the long-term success of rural Kansas towns. Rural towns across the country are experiencing a "brain drain" where small towns struggle to maintain their

¹³⁰ Peta Blood & Margaret Thorsborne, *The Challenge of Culture Change: Embedding Restorative Practice in Schools*, 3 (2005), <https://www.hsredesign.org/wp-content/uploads/2018/07/ChallengeOfCultureChange.pdf> [<https://perma.cc/EQD6-WWLF>] ("Repairing the harm necessarily forces us to learn from the experience that has led to the conflict and examine our attitudes, beliefs and behaviors which have contributed to it. This challenging of mindsets is where true culture change begins.").

¹³¹ International studies show that fuller enjoyment of human rights by LGBTQ+ citizens can contribute to a country's economic development. M.V. LEE BADGETT, KEES WAALDIJK & YANA VAN DER MEULEN RODGERS, *The relationship between LGBT inclusion and economic development: Macro-level evidence*, 120 J. WORLD DEV. 1, 1 (2019).

¹³² Lindsay Mahowald, *LGBTQ+ Nondiscrimination Laws Improve Economic, Physical, and Mental Well-Being*, CTR. FOR AM. PROGRESS (Mar. 24, 2022), <https://www.americanprogress.org/article/lgbtqi-nondiscrimination-laws-improve-economic-physical-and-mental-well-being/> [<https://perma.cc/E66F-PLCP>].

¹³³ *Id.*

¹³⁴ Businesses state that "[t]hese bills would harm our team members and their families, stripping them of opportunities and making them feel unwelcome and at risk in their own communities. As such, it can be exceedingly difficult for us to recruit the most qualified candidates for jobs in states that pursue such laws, and these measures can place substantial burdens on the families of our employees who already reside in these states. Legislation promoting discrimination directly affects our businesses, whether or not it occurs in the workplace." Henry Berg-Brousseau, *200+ Major U.S. Companies Oppose Anti-LGBTQ+ State Legislation*, HUM. RTS. CAMPAIGN (March 31, 2022), <https://www.hrc.org/press-releases/200-major-u-s-companies-oppose-anti-lgbtq-state-legislation> [<https://perma.cc/MV6G-L3WC>].

population as talented young people leave for better opportunities and more progressive communities.¹³⁵ Over the past ten years, many counties in Kansas have lost residents as Kansas's population continues to concentrate in metropolitan centers, like the greater Kansas City area.¹³⁶ Census data shows that eighty of Kansas's 105 counties declined in population since 2010, sixteen of them by more than ten percent.¹³⁷ The majority of these counties that declined in population were rural.¹³⁸ Creating more inclusive communities that are accepting of their LGBTQ+ neighbors could have massive policy implications for the survival and growth of rural Kansas towns by encouraging young people to stay in their communities long-term. Encouraging young people to stay in their communities would not only benefit rural Kansas towns by preventing population decline but would also lead to a stronger state overall by retaining more talented young Kansans across the state.

5. Kansas is Ready for Restorative Justice to Address Anti-LGBTQ+ Discrimination

The state of Kansas is ready for the use of restorative justice to address LGBTQ+ discrimination. Studies show that rural Americans' opinions of the LGBTQ+ community are complex, and rural Kansans are more open to LGBTQ+ rights than some might expect.¹³⁹ For example, while rural Americans are generally more likely than urban Americans to vote for conservative candidates and issues, it is also true that a *majority of rural voters* nonetheless support many pro-LGBTQ+ policies.¹⁴⁰ These statistics suggest that, although it may take patience, there is room for productive conversations about the harm of LGBTQ+ discrimination through restorative justice processes. In fact, one of the most well-established restorative justice projects in the state is the Kansas Institute for Peace and Conflict Resolution ("KIPCOR") based in Newton, Kansas—a town of fewer than 20,000 people.¹⁴¹ The combination of popular support for many pro-LGBTQ+ policies and established restorative justice

¹³⁵ Patrick J. Carr & Maria J. Kefalas, *The Rural Brain Drain*, THE CHRON. OF HIGHER EDUC. (Sept. 21, 2009), <https://www.chronicle.com/article/the-rural-brain-drain/> [https://perma.cc/9WW6-8FDS] (describing how young people have been leaving rural America for bigger cities "in search of good jobs, culture, diversity, and tolerance" for the last three decades).

¹³⁶ John Hanna & Andy Tsubasa Field, *Kansas population more concentrated; 80 counties lose people*, AP NEWS (Aug. 12, 2021, 3:51 PM), <https://apnews.com/article/census-2020-kansas-17f2a5e8643e76f33c0a8af22b78c10a> [https://perma.cc/UGT9-QMRE].

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ MOVEMENT ADVANCEMENT PROJECT, *supra* note 17, at 51.

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Restorative Justice*, KIPCOR, <https://kipcor.org/training-education/restorative-justice/> [https://perma.cc/P6HD-C6U6]; *QuickFacts Newton city, Kansas*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/newtoncitykansas/POP010210> [https://perma.cc/9PYD-FPPT].

efforts in rural Kansas makes it clear that the time is ripe for Kansas to begin exploring the use of restorative justice to address LGBTQ+ discrimination in the state.

C. *Practical Considerations for Implementing Restorative Justice in Kansas*

Kansas should look to other states and localities across the United States for examples of how to best implement restorative justice practices in their communities.¹⁴² In various states, legislatures and local jurisdictions “have implemented policies and legislation to advance their commitment to restorative justice and justice reform.”¹⁴³ For example, in 2013, the Montana legislature established an “Office of Restorative Justice.”¹⁴⁴ Through this office, the state has created a number of restorative justice programs, including victim/offender mediation, sentencing circles, family group conferencing, restitution programs, the use of victim and community impact statements, school expulsion alternatives, victim awareness education, community panels and diversion programs.¹⁴⁵ These existing restorative justice efforts in other states offer valuable insight into the logistics Kansas must consider when it seeks to implement restorative justice solutions in instances of LGBTQ+ discrimination.

Non-governmental organizations in Kansas, such as KIPCOR, are spearheading restorative justice projects across the state.¹⁴⁶ However, the State should not rely solely on non-governmental organizations to carry the load when implementing restorative justice solutions for LGBTQ+ discrimination in Kansas. A survey of states’ restorative justice efforts shows that “[w]hile there is no blueprint for developing and implementing a vision for restorative justice, it is clear that collaboration of system stakeholders is essential in order to achieve desired goals and objectives.”¹⁴⁷ Further, state funding is essential to the long-term success of restorative justice programs—sufficient resources are “considered essential for effective program and policy implementation.”¹⁴⁸ Nevertheless, the knowledge and experience of existing restorative justice programs are invaluable, and the State should seek to form partnerships with

¹⁴² The Department of Justice’s Office of Justice Programs details examples of promising restorative justice programs across the United States, everywhere from California to Tennessee, the Navajo Nation to Idaho. Balanced and Restorative Justice Project, *Balanced and Restorative Justice Practice: Accountability*, OFF. OF JUST. PROGRAMS, <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/implementing/accountability.html> [https://perma.cc/CA8R-TGYC].

¹⁴³ Sandra Pavelka, *Restorative Justice in the States: An Analysis of Statutory Legislation and Policy*, 2 JUST POL 'Y J. 1, 4 (2016).

¹⁴⁴ *Id.* at 8.

¹⁴⁵ *Id.*

¹⁴⁶ See KIPCOR, *supra* note 141. KIPCOR’s projects include initiatives such as The Restorative Schools Initiative, which “trains and supports districts, schools, teachers, and educational personnel in restorative practices.” *RSI Training Information*, KIPCOR, <https://kipcor.org/rsi/> [https://perma.cc/EZ8L-RKE2].

¹⁴⁷ Pavelka, *supra* note 143, at 12.

¹⁴⁸ *Id.* at 13.

such organizations while funding restorative justice solutions for LGBTQ+ discrimination in Kansas.¹⁴⁹

Implementing a restorative justice program is not without its challenges. The current Kansas State Legislature is not only unfriendly but is also openly hostile to LGBTQ+ Kansans.¹⁵⁰ Further, some of the people who discriminate against LGBTQ+ Kansans may never agree to participate in a restorative justice process with the person they harmed. However, there are solutions to these challenges. First, Kansans can push their local counties or municipalities to implement restorative justice solutions for LGBTQ+ discrimination first, while still fighting for state-wide funding. Second, creative incentives may help even the least interested parties in agreeing to participate in the restorative process.¹⁵¹ It is easy to want a one-size-fits-all example of what such an incentive may be. However, what motivates people can vary dramatically—while offering to waive civil fines might motivate one person, another person may be much more swayed by his grandma expressing a desire for him to repair the harm that he inflicted on a person. Seeking creative solutions guided by compassion for what makes each of us human could be the solution to greater participation in the restorative process. With creativity, these challenges do not have to undercut efforts to implement restorative justice in instances of LGBTQ+ discrimination in Kansas.

V. CONCLUSION

Rather than seeking enforcement of already existing anti-discrimination laws and policies, Kansas should become a leader in using restorative justice to heal the individual harm done by discrimination while also addressing the underlying causes that perpetuate discrimination on a community and state-wide level. By approaching the problem of LGBTQ+ discrimination through restorative justice practices, the state of Kansas can avoid the problems that arise when attempting to enforce anti-discrimination laws and policies through traditional means. Erroneous, yet effective, First Amendment arguments—including the most recent blow in *303 Creative LLC v. Elenis*—have left traditional anti-discrimination laws and policies difficult to enforce when it

¹⁴⁹ CATHERINE BARGEN, ALAN EDWARDS, MATTHEW HARTMAN, JENNIFER HASLETT & AARON LYONS, *Serving Crime Victims Through Restorative Justice: A Resource Guide for Leaders and Practitioners*, ALBERTA RESTORATIVE JUST. ASS'N, 48 (2018), <https://www.ccvs.vermont.gov/uploads/Voice%20and%20Choice.pdf> [<https://perma.cc/DNB7-MRQU>] (“diversifying our partnerships can help our programs stay oriented toward a restorative vision of justice rooted in the needs of victims/survivors.”).

¹⁵⁰ See FREEDOM FOR ALL AMS., *supra* note 5 (detailing anti-LGBTQ+ bills introduced during the 2022 Legislative Session); *see also* 2023 Kan. Sess. Laws 1230-31; KAN. STAT. ANN. § 60-5603 (2023).

¹⁵¹ Incentives for offenders to participate in restorative justice often “provide supplementary motivation to engage in the process with good faith.” Cohen, *supra* note 110.

matters most. Moreover, strengthening anti-discrimination laws and policies through carceral means could reinforce the very systems that discriminate against LGBTQ+ people. Instead, restorative justice serves as a way to address individual instances of discrimination, while challenging the culture that normalizes LGBTQ+ discrimination to begin with.

The state of Kansas is uniquely suited to benefit from this restorative justice approach. Certain aspects of restorative justice are beneficial no matter the context, such as, the high cost-savings compared to traditional legal approaches. However, in a state that is largely rural and conservative, restorative justice has the power to truly change the culture of Kansas. Creating more inclusive and accepting communities will improve the state's economy, while incentivizing talented young people to stay in their hometowns instead of leaving rural communities for more progressive urban areas. Ultimately, restorative justice will have powerful implications for LGBTQ+ Kansans and can greatly strengthen the state of Kansas's future.