Criminalizing Gender Diversity

What Jeff Sessions and Tom Price mean for the trans* community

“I have the right to exist in public space.” –Laverne Cox, on The Late Show with Stephen Colbert

The growing Trump Cabinet poses several concerns for gender equality and the recognition and support of gender diversity. Many Americans are especially dismayed by the nomination of Cabinet members with a recorded history of anti-LGBTQ statements, business practices, and Congressional votes. For gender-based criminal justice policies, such as hate crime laws and anti-transgender “bathroom bills,” the confirmations of Attorney General Jeff Sessions, III and Health & Human Services Secretary Tom Price have important implications.

Transgender people are disproportionately targeted for violent hate crimes.

The Williams Institute estimates that transgender individuals comprise approximately 0.6% of the U.S. population, yet gender identity bias is the cause of 2% of reported hate crime incidents. Of the 24 hate-motivated homicides reported by the 2015 National Coalition of Anti-Violence Programs Report on Hate Violence Against Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Communities, 16 involved transgender or gender non-conforming victims, 13 of which were trans women of
color. Trans women of color face especially high rates of harassment and violent victimization, not only from their fellow citizens, but from police officers, as well[iii]. While members of Congress, both Sessions and Price voted against the 2009 Hate Crimes Protection Act that expanded federal hate crime protections to include sexual orientation and gender identity, and allowed for the Department of Justice (DOJ) to intervene and assist in incidents where a state is either unable or unwilling to investigate.

During hearings and debate in the Senate leading up to the passage of the Act, then Senator Sessions shared that he did not think the problem of hate-motivated violence against the LGBTQ community was significant enough for federal government involvement.

That attitude indicates that as Attorney General he is unlikely to make enforcement of the law a priority, or to pursue prosecutions in the 30 states that fail to address gender identity in their hate crime statutes and the 5 states that have no hate crime laws.

Transgender and genderqueer individuals across the country must deal with several forms of harassment, bullying, and abuse simply because they fail to conform to heterocisnormative expectations regarding gender identity and presentation.

One of the primary locations of this harassment and abuse is public restrooms that are designated for a single sex. The 2015 U.S. Trans Survey found that 12% of respondents had been verbally harassed, physically assaulted, or sexually harassed in a public restroom in the previous year. Twenty-four percent had their presence in a restroom challenged or questioned, 9% had been denied access, and 59% reported avoiding public restrooms for fear of negative confrontations.
Several states are currently debating the passage of anti-transgender “bathroom bills” aimed at preventing transgender individuals from using public facilities that correspond with their gender identity.

According to the National Conference of State Legislatures, 14 states have introduced a “bathroom bill” in 2017. While the specifics of each law vary, the intended social consequences are the same. Making it a criminal, and sometimes also civil, offense for a person to use a public restroom designated for a sex/gender not specified on their ID sends the message that transgender and non-binary persons are second-class citizens whose very existence in public places puts them at risk for victimization and criminalization. Supporters of these bills perpetuate damaging and inaccurate myths about transgender people and violent crimes. They contend that women and children must be protected from sexual predators, an argument that has long been used when portraying LGBTQ individuals as deviants and criminals[iii]. They create and distribute advertisements that promote the “stranger danger” myth about sex crimes and sex offenders in the U.S[iv]. Official crime statistics and scholarly research both show that the vast majority of sex crimes are committed by known persons, not strangers, and are just about as likely to occur in private places as in public spaces.

The Texas version of a bathroom bill, the Texas Privacy Act or SB6, would increase criminal penalties for individuals who commit crimes in public restrooms, and incur civil penalties upon schools and public agencies that allow individuals to use a facility “designated for the biological sex opposite to the person’s biological sex.” Like North Carolina’s infamous HB2, the bill unnecessarily targets transgender persons who haven’t had gender confirmation surgery and/or haven’t been able to change their legal gender. The choice to physically transition through surgery is a personal one, and not every transgender person wants or needs to take that step.
However, many transgender people who require confirmation surgery in order to align their body with their identity are unable to attain it because of the financial costs involved. A lack of guaranteed health insurance coverage for transgender individuals, and specifically for gender confirmation surgeries, is a significant factor.

Several insurance companies, including United HealthCare in Texas, failed to provide coverage for gender confirmation procedures until forced to do so by a Department of Health & Human Services (HHS) non-discrimination rule implemented in 2016. A new HHS Secretary could repeal that policy, and many fear that Secretary Price will do just that. Reversing the rule would allow insurance companies to refuse coverage based upon sex or gender identity, putting the physical well-being and safety of transgender and non-binary individuals across the country in jeopardy.

Some of the bathroom bills represent a backlash to the 2016 “Dear Colleague” letter from the DOJ and the Dept. of Education that was reversed by the Trump administration. The letter explained that discriminating against transgender students and preventing them from using facilities that match their gender identity constituted sex discrimination under Title IX. Twelve states responded by suing, resulting in a partial stay of the order in those states until litigation concluded. Within 48 hours of being sworn-in, Attorney General Sessions’ DOJ withdrew the request for a partial stay and canceled oral arguments scheduled for February 17. Sessions has gone on to overturn the federal directive and significantly roll back protections for transgender students. The protections were rescinded, reportedly over the objections of Education Secretary Betsy DeVos, effectively leaving decisions on the matter to states and schools, and paving the way for the 14 state laws already introduced.

In sum, if, and likely when, Secretary Price rescinds the
non-discrimination rule, obtaining surgery and legal gender changes will become increasingly difficult, if not impossible, for thousands of transgender Americans. This will open them up not only to the harassment that already occurs in public facilities, but to criminalization and possibly arrest, as well, that the DOJ is unlikely to prevent or oppose.

Our cultural understandings of gender and crime are heavily influenced by our laws and public policies, and vice versa[v]. When stigmatizing policies enter into public discourse, and messages are sent that demonize or denigrate a social group, hate crimes can and often do result. There is recent evidence of this with the spike in hate crimes in Britain following Brexit, and in the U.S. following the 2016 Presidential election. The passage of a bathroom bill will increase fear and anxiety for trans* people, and the inflammatory rhetoric regarding gender identity used by the bills’ proponents may embolden some to commit acts of hate-motivated violence against them.

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[i] Because of the social and legal tendency to equate the term gender with the study of cisgender women’s issues, and the term gender identity with trans* and non-binary persons, it must be emphasized that every human being performs gender and possesses an internal sense of gender identity.

