

2023

'More Than a Woman to Me': The Need for Gender Inclusive Language in Court Opinions and Statutes Relating to Abortion and Reproductive Health

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Murphy Cavanaugh, *'More Than a Woman to Me': The Need for Gender Inclusive Language in Court Opinions and Statutes Relating to Abortion and Reproductive Health*, 102 Neb. L. Rev. 453 (2023)
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Murphy Cavanaugh*

‘More Than a Woman to Me’: The Need for Gender Inclusive Language in Court Opinions and Statutes Relating to Abortion and Reproductive Health

ABSTRACT

*After the Supreme Court of the United States returned authority to regulate abortion to the state level in *Dobbs v. Jackson Women’s Health Organization*, many states began to redraft their statutes, either protecting or eliminating abortion access. In doing this, the Supreme Court intensified demands for gender-inclusive language in reproductive healthcare legislation and court opinions. The ongoing shift in discourse acknowledges the reproductive healthcare needs of transgender and nonbinary (“TGNB”) people, given the already limited access to general healthcare. This comment emphasizes the importance of gender-inclusive language in the American legal system, arguing for a departure from anatomy-centered language in legal contexts and advocating for adopting gender-inclusive language in statutes and court opinions relating to reproductive issues.*

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* J.D. Candidate University of Nebraska College of Law, 2024, B.S. Mathematics, Loyola University of Chicago, 2021. This article is dedicated to my family, the Core Four, who have supported and cheered me on in writing this article since the very beginning, and the LGBTQIA+ community in Nebraska and across the country: you are seen, you are heard, and you are valid. Many thanks to my mentor, Ciara Coleman, who encouraged me to enter the Nebraska Law Review write-on competition and has continued to lift me up throughout my law school journey. An additional thanks to Executive Editor Maddie Eppler, Editor-in-Chief Matias Cava, and the members of Nebraska Law Review for helping me prepare this article for publication. Finally, thank you to my loving friends and family who have contributed to my success, grounded me, and kept me laughing throughout this journey – you know who you are.

The analysis examines the language of the leading Supreme Court cases on reproductive healthcare and compares state laws relating to reproductive healthcare with criminal and tort statutes. Further, the comment discusses the impact of heteronormative language in the broader healthcare landscape for TGNB individuals while highlighting the role of the legal community in this issue.

While acknowledging potential counterarguments from differing perspectives, ultimately, this article underscores the urgency of language reconstruction to ensure the inclusivity of the LGBTQIA+ community in the ongoing fight for reproductive rights acknowledgment within the legal community and beyond.

TABLE OF CONTENTS

I. Introduction	455
II. The Evolution of Gender-Inclusive Language	457
A. The Historical Development of Gendered Language in American Culture	457
B. Comparing The States' Use of Gender-Inclusive Language in Criminal Statutes, Tort Statutes, and Abortion Statutes	459
C. Principal Supreme Court Decisions Relating to Abortion Lack Gender-Neutral Language	464
III. How Failing to Use Gender-Inclusive Language Affects TGNB People	468
IV. Why Courts and State Legislatures Must Use Gender-Neutral and Gender-Inclusive Language When Drafting Opinions and Statutes Related to Abortion	469
A. Legal Writing, Using "They/Them" Pronouns, and Fairness in the Law	470
B. Using Gender-Inclusive Language in Abortion Opinions Ensures that All People with the Reproductive Capacity to Become Pregnant Receive Access to Needed Care	473
C. Using Gender-Inclusive Language in Abortion Opinions Prevents Furthering Discrimination in Broader Healthcare Access	475
V. Counterargument: Some Feminists Do Not Want Gender-Inclusive Language Because It Erases The Feminist Movement's Fight for <i>Roe</i>	477
A. Some Argue Against Gender Inclusive Language Because It Potentially Jeopardizes Pregnant Patient's Rights and The Traditional Role of the Mother	479
VI. The Fate of LGBTQIA+ Reproductive Rights	480
APPENDIX A.	482

I. INTRODUCTION

On September 18th, 2021, the American Civil Liberties Union (“ACLU”) tweeted a famous quote from Justice Ruth Bader Ginsburg regarding abortion rights to mark the first anniversary of the late Supreme Court Justice’s death.¹ At her confirmation hearing in 1993, Ginsburg famously expressed:

The decision whether or not to bear a child is central to a woman’s life, to her well-being and dignity. It is a decision she must make for herself. When the government controls that decision for her, she is being treated as less than a full adult human responsible for her own choices.²

In the ACLU’s tweet, they replaced the gendered terms in the quote to read:

The decision whether or not to bear a child is central to a [person’s] life, to [their] well-being and dignity. . . . When the government controls that decision for [people], [they are] being treated as less than a fully adult human responsible for [their] own choices.³

The tweet garnered significant backlash, forcing the executive director of the ACLU, Anthony Romero, to issue an apology on behalf of the organization.⁴ However, Romero pointed out that altering the tweet “was not a mistake without a thought” as some people seek abortions or become pregnant and do not identify as women.⁵ Romero went on to explain, “In today’s America . . . language sometimes needs to be rethought.”⁶

Currently, most schools of mainstream thought recognize the cisgender⁷ experience only, and anything divergent tends to be ignored.⁸ However, there is a shift underway in how LGBTQIA+ individuals,⁹ progressive

1. Michael Powell, *A.C.L.U. Apologizes for Tweet That Altered Quote by Justice Ginsburg*, N.Y. TIMES (Sept. 27, 2021), <https://www.nytimes.com/2021/09/27/us/aclu-apologizes-ginsburg-quote.html>. [<https://perma.cc/5LTN-QHXQ>].

2. *Id.*

3. *Id.*; ACLU (@ACLU), TWITTER (Sept. 18, 2021, 11:07 AM) (alterations in original) <https://twitter.com/aclu/status/1439259891064004610?lang=en> [<https://perma.cc/3BWQ-V7MQ>].

4. Powell, *supra* note 1.

5. *Id.*

6. *Id.*

7. *See infra* Appendix A, at 6.

8. Cheryl Chastine, *Cisgender Women Aren’t the Only People Who Seek Abortions, and Activists’ Language Should Reflect That*, REWIRE NEWSGROUP (Mar. 18, 2015, 12:09 PM), <https://rewirenewsgroup.com/article/2015/03/18/cisgender-women-arent-people-seek-abortions-activists-language-reflect/> [<https://perma.cc/8CSU-YZFD>].

9. This Comment uses the acronym “LGBTQIA+” in the broadest sense to include the lesbian, gay, bisexual, transgender, queer, intersex, and asexual communities. However, this Article recognizes that the acronym is not all encompassing and uses the terms “transgender,” “nonbinary,” and “TGNB” in the broadest sense while recognizing the terms fail to fully reflect every TGNB person’s identity, experience, and expression. *See* Laura Palk & Shelly Grunsted, *Born Free: Toward an Expansive Definition of Sex*, 25 MICH. J. GENDER & L., 4 n.4 (2018); *See also* Ido Katri, *Transgender Intrasexuality: Rethinking Anti-Discrimination Law and*

activists,¹⁰ and state officials like governors and congressional representatives¹¹ discuss reproductive rights. This shift is toward acknowledging that transgender and non-binary (“TGNB”) people also seek reproductive healthcare and abortion procedures.¹² The Supreme Court’s 2022 decision to return to states the power to legalize or ban abortion has opened the floodgates to legislation and judicial opinions regarding the regulation of reproductive rights.¹³ In the wake of this, many LGBTQIA+ individuals are demanding gender-inclusive terms in abortion decisions because of the TGNB community’s lack of access to reproductive healthcare.¹⁴ This Comment discusses eliminating gender bias in the language of the American legal system, acknowledges the power of language and emphasizes the

Litigation, 20 U. PA. J. L. & SOC. CHANGE 51, 56–57 (2017) (explaining that our society is accustomed to distinguishing between two opposed sexes in the traditional masculine and feminine sense, but expression can exist outside of the two binaries).

10. See also Evan Nicole Brown, *Abortion Rights Create a New Debate Surrounding Inclusive Language*, THE HOLLYWOOD REP. (July 8, 2022), <https://www.hollywoodreporter.com/lifestyle/lifestyle-news/abortion-rights-inclusive-language-1235175675/> [<https://perma.cc/7FM8-TS7M>]. In 2017 the Abortion Care Network adopted a values statement addressing the connection between oppression and language, “Some of our clinic members offer gender-affirming care to cis, nonbinary and transgender people across this country. Unfortunately, many of our members experience the negative impact of anti-abortion and anti-transgender legislative and political interference that impacts their relationships with their patients and their community When we include all people, our movements, conversations and impact broaden. When we have more voices and experiences that can authentically talk about abortion and access to reproductive health as a human right, we can work together as communities that deserve a future. And, we can provide more nuance to who has abortions, pregnancy care, fertility treatment and our shared need for access to essential health services and why.” *Id.*
11. See Jennifer Gerson, *These Lawmakers Want Less Gendered Language in the Law*, THE 19TH (July 25, 2023, 5:00 AM), <https://19thnews.org/2023/07/equality-laws-act-gender-neutral-legal-code/> [<https://perma.cc/Y7A8-WSS8>]; Michael Powell, *A Vanishing Word in Abortion Debate: ‘Women’*, N.Y. TIMES (June 8, 2022), <https://www.nytimes.com/2022/06/08/us/women-gender-aclu-abortion.html> [<https://perma.cc/8X6Z-Q3SC>]; Amanda Elyse & Sarah J. Keaton, *Gender-Inclusive Language and Abortion Protections*, 4 COMMON HEALTH 11, 11–12 (2023).
12. Irin Carmon, *You Can Still Say ‘Woman’ But You Shouldn’t Stop There.*, INTELLIGENCER (Oct. 28, 2021), <https://nymag.com/intelligencer/2021/10/abortion-law-trans-inclusive-advocacy.html> [<https://perma.cc/KT8S-ZK8R>]; *Gender-Inclusive Language*, UNITED NATIONS, <https://www.un.org/en/gender-inclusive-language/> [<https://perma.cc/4WPF-Z3LJ>] (last visited May 27, 2022); See *infra* Appendix A at 7-8. Further, this Comment uses the phrase “TGNB people” as an all-encompassing term to include transgender and non-binary people, as well as people require reproductive healthcare who do not identify as cis-gender women.
13. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2239 (2022) (“The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. The Court overrules those decisions and returns that authority to the people and their elected representatives.”).
14. Carmon, *supra* note 12. This Comment uses “gender-inclusive language” and “gender-neutral language” interchangeably.

change it can bring, while offering methods for making these revisions.¹⁵ If courts continue to build a set of legal, cultural, and political assumptions about who needs access to reproductive healthcare, they enhance legal and cultural barriers for TGNB people in the reproductive context.¹⁶ This lack of access in the reproductive context consequently spills over to all aspects of healthcare for TGNB people.¹⁷

This Comment argues that courts must reject anatomy-centered language and use gender-inclusive language in drafting opinions and statutes related to abortion. The continuing effects of heteronormative language in discussions around reproductive rights essentially shut out an entire community that requires access to this type of healthcare. By illustrating the access disparity for TGNB people, this Comment highlights the importance of language in statutes and court opinions.

Part II provides background about the English language and gender identity¹⁸ and discusses Supreme Court opinions about abortion and reproductive healthcare access. Additionally, Part II compares the language of state statutes relating to abortion to criminal and tort statutes which use gender-neutral terminology such as “person.” Part III discusses why the gendered language in reproductive healthcare affects the TGNB community’s healthcare access. Part IV recommends gender-inclusive language in abortion statutes and decisions through the viewpoint of the TGNB community and LGBTQIA+ advocates. In contrast, Part V provides the argument against language reconstruction. Finally, Part VI frames the LGBTQIA+ movement’s current access to reproductive healthcare and the state of the fight for acknowledgment from the legal community.

II. THE EVOLUTION OF GENDER-INCLUSIVE LANGUAGE

Part II provides the necessary background to trace the history of gendered language in the American legal system. First, section II.A delves into the English language’s gendered history by comparing gender-biased and gender-inclusive language. Next, section II.B analyzes the gendered language of Supreme Court opinions about abortion and reproductive healthcare access. Finally, section II.C compares the language of state statutes relating to abortion to criminal and tort statutes that use gender-neutral terminology such as “person” and “victim”.

A. The Historical Development of Gendered Language in American Culture

To understand the discourse around using gender-inclusive language in the context of abortion, judges and drafters must understand

15. See Carmon, *supra* note 12

16. *Id.*

17. *Id.*

18. See *infra* Appendix A, at 4.

the difference between gender-biased language and gender-inclusive language. Gender-biased language uses the masculine form of words as default and actively diminishes genders¹⁹ other than males.²⁰ Continued use of gender-biased language in academia and daily conversations increases accepted use of sexist vocabulary, where words and expressions exploit the differences between the male and female sexes²¹ while excluding or demeaning genders other than male.²²

Many languages have a linguistic history rooted in gendered vocabulary that directly connects to sex.²³ In the English language, male-linked words which refer to all genders,²⁴ gender-marked terminology,²⁵ and historical phrasing present themselves in conversation and formal vernacular.²⁶ Numerous terms for daily activities are unnecessarily gendered, such as “chairman” or “waitress.”²⁷ These terms could be replaced with gender-neutral terminology, as people of different genders can perform in the same position.²⁸

On the other hand, using gender-inclusive language means using written and oral language that does not identify an individual’s gender identity or sex.²⁹ Further, gender-inclusive language aims to prevent the perpetuation of gender stereotypes and eradicate gender bias.³⁰ Gender-inclusive language has gained popularity, but it has also been subject to scrutiny over the past few years as debates

19. *See infra* Appendix A, at 3.

20. Judith D. Fischer, *Framing Gender: Federal Appellate Judges’ Choices about Gender-Neutral Language*, 43 U.S.F. L. REV. 473, 475 (2009).

21. *See infra* Appendix A, at 1.

22. Fischer, *supra* note 20, at 475; *See also* Janet B. Parks & Mary Ann Robertson, *Explaining Age and Gender Effects on Attitudes Toward Sexist Language*, 24 J. OF LANGUAGE & SOC. PSYCH., 401, 402 (2005) (describing sexist language as language used to diminish, exclude, or trivialize “either gender”).

23. ANNE PAUWELS, *WOMEN CHANGING LANGUAGE* 37–38 (Addison Wesley Longman, 1998).

24. Fischer, *supra* note 20, at 476–78 (using examples of “mankind” and “man” for words which group all genders together and explaining how pseudo-generic masculine terms cause the pronoun problem where writers use the male pronoun to refer to a person whose sex is unknown).

25. *Id.* at 478 (arguing gender neutral terminology such as “server” and “chair” should replace unnecessarily gendered position titles such as “waitress” or “chairman” are because people of all genders can perform the same position); *See also* Ann Weatherall, *Women and Men in Language*, 25 HUM. COMM. RES. 275, 277 (1998) (explaining gendered position titles erase the importance of women as an existing and capable social group).

26. Fischer, *supra* note 20, at 476–480; CASEY MILLER & KATE SWIFT, *THE HANDBOOK OF NONSEXIST WRITING* 9, 22 (1980) (illustrating that phrases such as “man and wife” and traditional pet names for women such as “sweetie” and “honey” constitute gender-biased language.).

27. *Id.* at 478.

28. *Id.*

29. *Gender-Inclusive Language*, *supra* note 12.

30. *Id.*

regarding transgender rights in legal and political communities continue.³¹ Although terms related to gender are constantly evolving and the conversations related to gender, sex, and sexual orientation³² are ongoing, more academics and casual English speakers are beginning to use gender-inclusive language.

However, many critics question why they bother using gender-inclusive language at all. Currently, transgender people reportedly make up approximately 0.6% of the United States population.³³ Nevertheless, that percentage is likely higher because a survey found that 12% of 18 to 34-year-old individuals identified as gender-nonconforming, demonstrating that younger generations are increasingly rejecting the traditional iterations of sex and gender.³⁴ As younger generations question the gender binary, the language used by courts grows increasingly outdated as more TGNB people begin to make up the population.³⁵

B. Comparing The States' Use of Gender-Inclusive Language in Criminal Statutes, Tort Statutes, and Abortion Statutes

Most states already use gender-inclusive language in criminal and tort statutes unrelated to abortion, which begs the question of why states will not amend the wording of abortion statutes.³⁶ Historically, the United States did not begin to shift towards gender-neutral terms in statutes until the 1980s. Legal scholars in the late 1970s and early 1980s began to publish writing materials pushing for language changes that highlighted sexism within legal writing.³⁷ As a result, some state constitutions began to adopt gender-neutral language based on reports

31. See Kim Elsesser, *How to use Gender-Neutral Language, and why it's Important to try*, FORBES MAG. (July 8, 2020), <https://www.forbes.com/sites/kimelsesser/2020/07/08/how-to-use-gender-neutral-language-and-why-its-important-to-try/?sh=78649d126bab> [<https://perma.cc/CAF2-S7JK>].

32. See *infra* Appendix A, at 5.

33. See Heidi Moseson et al., *Abortion Experiences and Preferences of Transgender, Nonbinary, and Gender-Expansive People in the United States*, 224.4 AM. J. OBSTET. GYNECOL. 376.e1, 376.e1 (Apr. 2021).

34. *Id.* (“a recent study found that 2% of 18- to 34-year-olds identified as transgender; 8% identified as agender, bigender, genderfluid, or genderqueer; and another 2% identified as unsure or questioning.”).

35. See Elsesser, *supra* note 31.

36. See, e.g., CAL. PENAL CODE § 4023.8 (California’s penal code has a statute outlining prenatal care for incarcerated persons, which uses “a person incarcerated in a county jail who is identified as possibly pregnant or capable of becoming pregnant”); See also ME. REV. STAT. tit. 17-A, § 208-C (criminal statute in Maine describes the crime of elevated assault against a pregnant person. This statute uses the term “pregnant person” instead of woman but uses the pronouns she and her).

37. See RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 59–61 (1979) (this publication includes a section entitled “Sexism in Legal Writing” where the author provided gender-neutral alternatives to gendered language).

examining the treatment of women in the American legal system.³⁸ These reports detailed the gendered writing of statutes, legal opinions, and other legal writing.³⁹ In recognizing that the legal system applied equally to men and women, its language began to shift. One example of this trend was the shift from the “reasonable man” standard to the “reasonable person” standard in tort law.⁴⁰

This change has occurred, and continues to occur, gradually. For example, a study by Pat Chew and Lauren Kelly-Chew compared two two-year periods, 2004 to 2006 and 1994 to 1996.⁴¹ Chew and Kelly-Chew found that judges, lawyers, and legal scholars did not significantly increase their use of gender-neutral terminology from the end of 1996 to the start of 2004.⁴² These historical cisgender roots noted in section II.B make eliminating gender bias in each language challenging.⁴³ Additionally, as Dr. Krystal Redman of SPARK: Reproductive Justice NOW points out, “historically, legislation in the U.S. has been created by cisgender white people.”⁴⁴ These practices, Dr. Redman argues, cultivate and perpetuate a worldview of binary gender in a cisgender world *created* by cisgender people and *for* cisgender people.⁴⁵

Nevertheless, rethinking the language used in the legal system is an ongoing process that requires constant assessment of the makeup of society, the legal system, and their relationship with one another. The conversation around language in reproductive healthcare and the legal system is also continuous. As interim director of communications at Physicians for Reproductive Health, Kelsey Rhodes expresses, “the language we use when we do this work will continue to evolve over time because we as humans will continue to evolve our own language

38. See Sandra Petersson, *Gender Neutral Drafting: Historical Perspective*, 19 STATUTE L. REV. 93, 103 (1998).

39. *Id.*

40. See Pat K. Chew & Lauren K. Kelly-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 674 (2007) (discussing the history behind the shift from “reasonable man” to “reasonable person”).

41. *Id.* at 659.

42. *Id.*

43. *Id.*

44. Alanna Vagianos, *Women Aren't The Only People Who get Abortions*, HUFFINGTON POST (June 6, 2019), https://www.huffpost.com/entry/women-arent-the-only-people-who-get-abortions_n_5cf55540e4b0e346ce8286d3 [https://perma.cc/E9JF-H2LX].

45. *Id.* (“Just based on the history of how these laws were created, naturally the narrative and the conversations behind it become this cis-het [cisgender, heteronormative] centered narrative.”); Moseson et al., *supra* note 33, at 376.e9 (“most abortion care research in the United States focuses almost exclusively on the experience of cisgender women, despite these and other recent findings that demonstrate that TGE [TGNB] people want, seek, and obtain abortions. These results emphasize the need for greater awareness and sensitivity to the inclusion of TGE [TGNB] people in the research on abortion preferences and experiences, and there is growing operation guidance toward these aims.”).

to reflect our experiences and the care we need.”⁴⁶ Society’s understanding of gender, sex, and identity has evolved drastically since *Roe v. Wade* initially solidified the right to abortion.⁴⁷ Language continues to grow in parallel to societal changes; it is one of the most powerful tools to reflect our experiences, can be weaponized, and can ostracize.⁴⁸ While the law has a long way to go to correct its language choices, this slow shift matches its history of gradual adjustment.

Many states, however, do not use gender-inclusive terminology or pronouns in abortion or reproductive healthcare statutes. In laws or code sections related to abortion, states regularly use “pregnant woman,” “pregnant female,” or “woman” and she/her pronouns when referring to those seeking an abortion procedure.⁴⁹ Yet, the drafters of Virginia’s abortion statutes felt the need to clarify that abortion is the termination of a human pregnancy, as opposed to a different type of pregnancy.⁵⁰

On the other hand, Colorado, Connecticut, the District of Columbia, Illinois, New York, Oregon, Rhode Island, Vermont, and Washington use gender-neutral terminology such as “individual,” “patient,” or “those

46. Brown, *supra* note 10.

47. *Id.*

48. *Id.* (Adrienne Verrilli, the Planned Parenthood Vice President of communications and culture explains the power of language, “it can be used to educate and foster community, but it can also be weaponized to mislead, spread misinformation and deny belonging.”).

49. ALA. CODE § 26-22-3; ALASKA STAT. ANN. § 18.16.010; ARIZ. REV. STAT. § 36-2159; ARK. CODE ANN. § 5-61-102; CAL. HEALTH & SAFETY CODE § 123462 (); DEL. CODE ANN. TIT. 24, § 1790 (); FLA. STAT. ANN. § 390.01112 (); GA. CODE ANN. § 16-12-141; HAW. REV. STAT. ANN. § 453-16; IDAHO CODE ANN. § 18-505; IND. CODE ANN. § 16-34-2-1; IOWA CODE ANN. § 146B.2; KAN. STAT. ANN. § 65-6703; KY. REV. STAT. ANN. § 311.723; LA. STAT. ANN. § 40:1061.10 ME. REV. STAT. ANN. tit. 22, § 1598; MD. CODE ANN., HEALTH-GEN. § 20-209; MICH. COMP. LAWS ANN. § 750.323; MINN. STAT. ANN. § 145.412; MISS. CODE ANN. § 97-3-3; MO. REV. STAT. § 188.017; MONT. CODE ANN. § 50-20-104, 109; NEB. REV. STAT. § 28-326 (Supp. 1991); NEV. REV. STAT. ANN. § 442.250–253; N.H. REV. STAT. ANN. § 329:43; N.J. STAT. ANN. § 2A:65A-6; N.M. STAT. ANN. § 30-5A-3; N.C. GEN. STAT. ANN. § 90-21.81–82; N.D. CENT. CODE ANN. § 14-02.1-05.2; OHIO REV. CODE ANN. § 2919.11; OKLA. STAT. tit. 63, § 1-730–731.3; 18 PA. STAT. AND CONS. STAT. ANN. § 3211, 3203; S.C. CODE ANN. § 44-41-650; S.D. CODIFIED LAWS § 22-17-5.1; TENN. CODE ANN. 39-15-216; TEX. HEALTH & SAFETY CODE ANN. § 171.204; UTAH CODE ANN. § 76-7a-201; VA. CODE ANN. § 18.2-72–74; WIS. STAT. ANN. § 940.15; WYO. STAT. ANN. § 35-6-101(a).

50. VA. CODE ANN. § 18.2-72. The Statute reads:

Notwithstanding any of the provisions of § 18.2-71 it shall be lawful for (i) any physician licensed by the Board of Medicine to practice medicine and surgery or (ii) any person jointly licensed by the Boards of Medicine and Nursing as a nurse practitioner and acting within such person’s scope of practice to terminate or attempt to terminate a human pregnancy or aid or assist in the termination of a human pregnancy by performing an abortion or causing a miscarriage on any woman during the first trimester of pregnancy.

Id.

who become pregnant” in their abortion statutes.⁵¹ Interestingly, while statutes use gendered language such as “pregnant woman” to refer to those who seek abortions, many statutes use gender-neutral terminology or titles for those performing the abortion procedure itself, such as “person who administers or performs,”⁵² “practitioner,”⁵³ “individual,”⁵⁴ or “physician.”⁵⁵

In most states, the statutes describing first-degree murder or capital murder use the terms “person,”⁵⁶ “defendant,”⁵⁷ “offender,”⁵⁸ “actor,”⁵⁹ or “individual”⁶⁰ to describe the subjects to which the statute pertains. While the author does not believe abortion is murder, the statutory language for murder in the first degree demonstrates that even the most severe crime in the criminal justice system mainly uses gender-neutral language and lacks gendered terms. Additionally, some statutes do not even use nouns, only explaining actions constituting first-degree

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51. COLO. REV. STAT. ANN. § 25-6-403; CONN. GEN. STAT. ANN. § 19a-602; D.C. CODE ANN. § 2-1401.06; 775 ILL. COMP. STAT. ANN. 55/1-15; N.Y. PUB. HEALTH LAW § 2599-bb; OR. REV. STAT. ANN. § 659.880; 23 R.I. GEN. LAWS ANN. § 23-4.13-2; VT. STAT. ANN. tit. 18, § 9493; WASH. REV. CODE ANN. § 9.02.110.
 52. See ALA. CODE § 26-22-3; ALASKA STAT. ANN. § 18.16.010; ARIZ. REV. STAT. ANN. § 36-2159(B); ARK. CODE ANN. § 5-61-102; IDAHO CODE ANN. 18-505; KAN. STAT. ANN. § 65-6703; ME. REV. STAT. tit. 22, § 1598(3); MICH. COMP. LAWS ANN. § 750.323; S.D. CODIFIED LAWS § 22-17-5.1; MISS. CODE ANN. § 97-3-3(1); MO. ANN. STAT. § 188.017(2); TENN. CODE ANN. 39-15-216(b)(1); UTAH CODE ANN. § 76-7a-201(3); W. VA. CODE ANN. § 16-2M-4(a).
 53. See ARIZ. REV. STAT. ANN. § 36-2159(A); N.Y. PUB. HEALTH LAW § 2599-bb(1).
 54. See N.D. CENT. CODE ANN. 14-02.1-05.2.
 55. See ALA. CODE § 26-22-3(a); ARIZ. REV. STAT. ANN. § 36-2159(C); CONN. GEN. STAT. ANN. § 19a-602(c); FLA. STAT. ANN. § 390.01112; HAW. REV. STAT. ANN. § 453-16(a); IND. CODE ANN. § 16-34-2-1(1); IOWA CODE ANN. § 146B.2; KAN. STAT. ANN. § 65-6703; KY. REV. STAT. ANN. § 311.723; LA. STAT. ANN. § 40:1061.10; MINN. STAT. ANN. § 145.412(1); TEX. HEALTH & SAFETY CODE ANN. § 171.204(b); UTAH CODE ANN. § 76-7a-201(2); VA. CODE ANN. § 18.2-72; WASH. REV. CODE ANN. § 9.02.110; W. VA. CODE ANN. § 16-2M-4; WIS. STAT. ANN. § 940.15(1)-(6).
 56. See ALASKA STAT. ANN. § 11.41.100; ARIZ. REV. STAT. ANN. § 13-1105; ARK. CODE ANN. § 5-10-102; CAL. PENAL CODE § 189; COLO. REV. STAT. ANN. § 18-3-102; CONN. GEN. STAT. ANN. § 53a-54a; DEL. CODE ANN. tit. 11, § 636(a); D.C. CODE ANN. § 22-2104; FLA. STAT. ANN. § 782.04; GA. CODE ANN. § 16-5-1; HAW. REV. STAT. ANN. § 707-701; IDAHO CODE ANN. 18-4003I-(f); 720 ILL. COMP. STAT. ANN. 5/9-1; IND. CODE ANN. 35-50-2-9(a); IOWA CODE ANN. § 707.2; KY. REV. STAT. ANN. § 507.020; ME. REV. STAT. tit. 17-A, § 201; MD. CODE ANN., CRIM. LAW § 2-201; MISS. CODE ANN. § 97-3-19; MONT. CODE ANN. § 45-5-102; NEV. REV. STAT. ANN. § 200.030(4); N.C. GEN. STAT. ANN. § 14-17(a); N.D. CENT. CODE ANN. § 12.1-16-01; OHIO REV. CODE ANN. § 2903.02; OKLA. STAT. tit. 21, § 701.7; S.C. CODE ANN. § 16-3-20; S.D. CODIFIED LAWS § 22-16-4; WYO. STAT. ANN. § 6-2-101(b).
 57. D.C. CODE ANN. § 22-2104; IND. CODE ANN. 35-50-2-9(b); MICH. COMP. LAWS ANN. § 750.316; N.C. GEN. STAT. ANN. § 14-17(a1); OR. REV. STAT. ANN. § 163.107; TENN. CODE ANN. § 39-13-202; W. VA. CODE ANN. § 61-2-1; WIS. STAT. ANN. § 940.01.
 58. LA. STAT. ANN. § 14:30.
 59. N.J. STAT. ANN. § 2C:11-3; UTAH CODE ANN. § 76-5-203(2).
 60. MINN. STAT. ANN. § 609.185.

murder.⁶¹ In contrast, abortion statutes continue to use gendered language. However, even some of the criminal laws outlining first-degree murder use “he or she” as the pronouns for gender-neutral terms like “actor,” “defendant,” or “individual.”⁶² The disuse of the singular “they” is pervasive throughout all statutes, regardless of the states’ language choice in abortion legislation.

Comparing state abortion statutes with those outlining trespass in civil law further illustrates the gendered disparity between abortion statutes and all other statutes. Most states use gender-neutral terms in trespass tort statutes as well, including words such as “person,”⁶³ “whoever,”⁶⁴ “individual,”⁶⁵ or “defendant.”⁶⁶ In addition, similar to the first-degree murder statutes, some states only describe the act of trespass and do not give a term to the person committing the offense.⁶⁷ Yet, some of these gender-neutral statutes continue to use “he or she” while still using a gender-neutral term to describe the offender.⁶⁸

Criminal and tort statutes aim to be comprehensive and therefore use gender-inclusive terms to hold everyone in that State and society accountable.⁶⁹ These statutes deliberately and intentionally use gender-neutral language to ensure the regulation covers everyone to show no one is above the law and it applies to everyone equally.⁷⁰ Moreover,

61. See KAN. STAT. ANN. § 21-5402; 18 PA. STAT. AND CONS. STAT. ANN. § 2502; S.C. CODE ANN. § 16-3-10; VT. STAT. ANN. tit. 13, § 2301; VA. CODE ANN. § 18.2-32.

62. See, e.g., ALA. CODE § 13A-6-2; GA. CODE ANN. § 16-5-1; 720 ILL. COMP. STAT. ANN. 5/9-1; KY. REV. STAT. ANN. § 507.020(1); MO. ANN. STAT. § 565.020; NEB. REV. STAT. § 28-303 (Supp. 1991); N.H. REV. STAT. ANN. § 630:1(I); N.M. STAT. ANN. § 30-2-1(B); N.Y. PENAL LAW § 125.27(1)(a); 11 R.I. GEN. LAWS ANN. § 11-23-1; TEX. PENAL CODE ANN. § 19.03; WASH. REV. CODE ANN. § 9A.32.030(1).

63. ARIZ. REV. STAT. §§ 37-501–502; CAL. CIV. CODE § 1708.8; COLO. REV. STAT. § 18-4-502; DEL. CODE ANN. tit. 7, § 714; D.C. CODE § 22-3302; GA. CODE ANN. § 51-9-3; HAW. REV. STAT. ANN. § 708-815; IDAHO CODE ANN. § 6-202(2); IND. CODE ANN. § 35-43-2-2; IOWA CODE ANN. § 716.7; KAN. STAT. ANN. § 21-5808; KY. REV. STAT. ANN. § 381.230; LA. REV. STAT. ANN. § 14:63; ME. REV. STAT. ANN. tit. 12, § 10657; MD. CODE ANN., CRIM. LAW § 6-402; MASS. ANN. LAWS ANN. ch. 266, § 120; MICH. COMP. LAWS ANN. § 750.552; MONT. CODE ANN. § 45-6-203; NEV. REV. STAT. ANN. § 207.200; N.H. REV. STAT. ANN. § 227-J:8; N.M. STAT. ANN. § 30-14-1.1; N.Y. PENAL LAW § 140.17; N.C. GEN. STAT. ANN. § 38B-4(3); OHIO REV. CODE ANN. § 2911.21; OKLA. STAT. ANN. tit. 21, § 1768; R.I. GEN. LAWS ANN. § 34-20-1.1; S.C. CODE ANN. § 16-11-610; TENN. CODE ANN. § 39-14-405; TEX. PENAL CODE ANN. § 30.05; UTAH CODE ANN. § 76-6-206; VT. STAT. ANN. tit. 12, § 4921; VA. CODE ANN. § 18.2-119; W. VA. CODE ANN. § 61-3B-2; WIS. STAT. ANN. § 943.13(1m).

64. DEL. CODE ANN. tit. 7, § 714; FLA. STAT. ANN. § 810.08; MINN. STAT. ANN. § 561.04.

65. N.D. CENT. CODE ANN. § 12.1-22-03.

66. ARK. CODE ANN. §§ 18-60-204–206; OR. REV. STAT. ANN. § 105.700.

67. ALA. CODE § 6-5-262; ALASKA STAT. ANN. § 09.45.730.

68. 720 ILL. COMP. STAT. ANN. 5/21-3; MO. ANN. STAT. § 569.140; NEB. REV. STAT. § 28-520 (Reissue 2016); S.D. CODIFIED LAWS § 22-35-5; WASH. REV. CODE ANN. § 9A.52.070.

69. See also Jocelynn A. Scutt, *Reforming the Law of Rape: The Michigan Example*, 50 AUSTL. L.J. 615, 616–17 (1976) (“A principle of criminal law is, surely, that all persons should be protected equally from harm of like degree”).

70. See Debora Schweikart, *The Gender Neutral Pronoun Redefined*, 20 WOMEN’S RTS. L. REP. 1, 2 (1998) (quoting 73 AM. JUR. 2D *Statutes* § 219 (1974 and Supp. 1997)

using gender-neutral terms gives victims a cause of action against all offenders.⁷¹

By not drafting an abortion statute neutrally like a civil or criminal offense statute, an entire section of the population is excluded from the codified law that pertains to them.⁷² Additionally, it is not a difficult word change; many states already use gender-inclusive language in criminal and tort statutes. Terms like “person,” “defendant,” and “actor” encompass the group of people covered under the law. Given that, states could efficiently and effectively rewrite their statutes to put the status of the person the statute applies to first by using terms such as “patient,” “individual,” or “pregnant person.” Nevertheless, abortion has always been framed as an issue that pertains only to cisgender women, a framing which spills over into worldviews and laws governing our population.⁷³ Therefore, legislatures seeking to codify abortion protections must be mindful of their language in drafting laws protecting abortion.

C. Principal Supreme Court Decisions Relating to Abortion Lack Gender-Neutral Language

Many court decisions and statutes do not use gender-inclusive language in abortion-related matters. In 1973, the Supreme Court of the United States held in *Roe v. Wade* that the substantive due process right to privacy included a “woman’s right” to choose to abort “her” pregnancy because the states’ interests are not vital enough to support a complete prohibition of abortion or allow the states to implement a substantial obstacle.⁷⁴ The Court reasoned that the right to personal privacy granted in the Due Process Clause of the Fourteenth Amendment encompassed the right to abortion.⁷⁵ However, the Court concluded that states could regulate abortion procedures after the first trimester so long as it reasonably relates to preserving and protecting “maternal health.”⁷⁶ The decision refers to primarily cisgender women

(citations omitted)) (“The basic principle of statutory interpretation remains, ‘[g]enerally the masculine, but not the feminine, is considered to include all genders . . . In conformance with this principle, lawmakers maintain the pseudogeneric [sic].’”).

71. See Schweikart, *supra* note 70, at 2–8.

72. See AC Facci, *Why We Use Inclusive Language to Talk About Abortion*, ACLU (June 29, 2022), <https://www.aclu.org/news/reproductive-freedom/why-we-use-inclusive-language-to-talk-about-abortion> [<https://perma.cc/7ALL-668H>].

73. See also Chastine, *supra* note 8 (explaining that our society’s mindset continues to erase TGNB people and leave them vulnerable because it assumes, based on the gendered framework of abortion, that every person seeking an abortion is a cisgender woman).

74. *Roe v. Wade*, 410 U.S. 113, 162–63 (1973).

75. *Id.* at 155.

76. *Id.* at 163.

by using terms like “pregnant woman” and uses she/her pronouns.⁷⁷ Nevertheless, a small part of *Roe’s* opinion uses gender-neutral language:

This means, on the other hand, that, for the period of pregnancy prior to this ‘compelling’ point, the attending physician, in consultation with his *patient*, is free to determine, without regulation by the State, that, in his medical judgment, the *patient’s* pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free interference by the State.⁷⁸

The Court mainly frames the issue of abortion and legality as applicable only to cisgender women; however, this Section deviates from the Court’s use of she/her pronouns and “pregnant woman” terms.⁷⁹ Additionally, the use of male pronouns when referring to physicians or doctors further emphasizes the gendered language because it implies the Supreme Court thought of the physicians or performers of the abortion procedure as solely male.⁸⁰

Two decades later, the Supreme Court reaffirmed *Roe’s* central holding in *Planned Parenthood v. Casey*. The Court in *Casey* held that abortion is not prohibited because the state’s interests are not vital enough to entirely ban abortion or impose restrictions that substantially obstruct the right to choose the procedure.⁸¹ First, the Supreme Court held that “women” have the right to decide to abort their pregnancy before the fetus’s viability and without undue government interference.⁸² Further, the constitutional protection of a “woman’s right” to terminate “her” pregnancy, according to the Supreme Court, stems from the Due Process Clause of the Fourteenth Amendment.⁸³

Additionally, the states have the power to restrict abortions after the first trimester if the law contains exceptions for situations where

77. *Id.* at 129 (“The principal thrust of appellant’s attack on the Texas statute is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy.”); *id.* at 140 (“Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.”). *Id.* at 148–49 (“When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman . . . Thus, it has been argued that a State’s real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy”). *Id.* at 150 (“Thus, the State retains a definite interest in protecting the woman’s own health and safety when an abortion is proposed at a late stage of pregnancy”). *Id.* at 164 (“The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, ‘saving’ the mother’s life, the legal justification for the procedure.”).

78. *Id.* at 163 (emphasis added).

79. *Id.* at 129, 140, 148–50, 164.

80. *Id.* at 163.

81. *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992).

82. *Id.*

83. *Id.*

pregnancies endanger the “woman’s life or health.”⁸⁴ The Supreme Court consequentially enacted the “undue burden” standard where states are permitted to pass pre-viability restrictions for abortion procedures so long as the limits do not unduly burden a “woman’s freedom” to decide whether to terminate “her” pregnancy.⁸⁵ Finally, the states have a legitimate interest from the outset of the pregnancy in protecting the health of the “woman” and the fetus’s life.⁸⁶ As illustrated herein, the Court’s decision in *Casey* primarily uses “women/woman” and she/her pronouns.⁸⁷ Presumably, the decisions in *Roe* and *Casey* use this gendered language because, at the time of these holdings, the notion of non-women giving birth was not a familiar concept, and therefore the gendered language reflects the customs and norms of the time.

In contrast to *Roe* and *Casey*, the Supreme Court’s holding in *Griswold v. Connecticut* does not use any pronouns or gendered terminology in the majority opinion. The Court held that the Constitution prevents states from making contraception by married couples illegal.⁸⁸ Instead of gendered language, Justice Douglas uses terms such as “married persons,” “couples, and “relationship” when discussing the right to contraception. Justice Douglas only uses gendered language like “woman” and uses she/her pronouns when giving the facts surrounding the case.⁸⁹ This is because, at the time, this holding related to married heterosexual couples, and therefore the language needed to be gender neutral as the right to contraception applied to both spouses. Nevertheless, access to contraception is still a right that pertains to TGNB individuals and cisgender females. This aspect of the *Griswold* holding creates a foothold for TGNB people in the legal conversation surrounding reproductive healthcare.

Recently, the Supreme Court overturned the holdings of *Roe* and *Casey* in *Dobbs v. Jackson Women’s Health Organization*.⁹⁰ In doing so, the Supreme Court declared that the Constitution does not protect the right to abortion under the Due Process Clause of the Fourteenth Amendment and simultaneously returned authority to regulate

84. *Id.* at 846, 873.

85. *Id.* at 874.

86. *Id.* at 875–76.

87. *Id.* at 875 (“All abortion regulations interfere to some degree with a woman’s ability to decide whether to terminate her pregnancy . . . even in *Roe*’s terms, in practice it undervalues the State’s interest in the potential life within the woman.”); *id.* at 876 (“In our view, the undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”); *id.* at 878 (“Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.”).

88. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

89. *Id.* at 480–81.

90. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242–43, 2279 (2022).

abortion to the states and their elected officials.⁹¹ The Supreme Court reasoned that they had to overturn *Roe* and *Casey* because the analysis in those opinions was weak, the legalization of abortion led to damaging consequences, and abortion itself is different from the rights the Fourteenth Amendment grants because it directly destroys a fetus.⁹² Justice Alito opined on behalf of the majority, “Our decision returns the issue of abortion to those legislative bodies, and it allows women on both sides of the abortion issue to seek to affect the legislative process by influencing public opinion, lobbying legislators, voting, and running for office. Women are not without electoral or political power.”⁹³

In their joint dissent, Justices Breyer, Sotomayor, and Kagan continue using gender-biased language, only referring to cisgender women and using she/her pronouns.⁹⁴ As the Justices conclude their dissent, they reaffirm the cisgender framing of the abortion issue, “With sorrow—for this Court, but more, for the many millions of American women who have today lost a fundamental constitutional protection—we dissent.”⁹⁵ However, there are a few instances when the Supreme Court refers to rights generally granted by the Constitution using gender-neutral language, “It was settled at the time of *Roe*, settled at the time of *Casey*, and settled yesterday that the Constitution places limits on a State’s power to assert control over an individual’s body and

91. *Id.*

92. *Id.* at 2243.

93. *Id.* at 2277.

94. *Id.* at 2317 (Breyer, Sotomayor, & Kagan, JJ., dissenting) (“For half a century, *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), have protected the liberty and equality of women. *Roe* held, and *Casey* reaffirmed, that the Constitution safeguards a woman’s right to decide for herself whether to bear a child. . . . Respecting a woman as an autonomous being, and granting her full equality, meant giving her substantial choice over this most personal and most consequential of all life decisions.”); *id.* at 2318 (“Under those laws, a woman will have to bear her rapist’s child or a young girl her father’s—no matter if doing so will destroy her life . . . Across a vast array of circumstances, a State will be able to impose its moral choice on a woman and coerce her to give birth to a child.”); *id.* (“As of today, this Court holds, a State can always force a woman to give birth, prohibiting even the earliest abortions.”); *id.* at 2323 (“The majority would allow States to ban abortion from conception onward because it does not think forced childbirth at all implicates a woman’s rights to equality and freedom.”); *id.* at 2338 (“Many women, however, still do not have adequate healthcare coverage before and after pregnancy; and, even when insurance coverage is available, healthcare services may be far away.”); *but see id.* at 2345 (“Even with *Roe*’s protection, these women face immense obstacles to raising the money needed to obtain abortion care early in their pregnancy . . . they will lose any ability to obtain safe, legal abortion care . . . Many will endure the costs and risks of pregnancy and giving birth against their wishes. Others will turn in desperation to illegal and unsafe abortions. They may lose not just their freedom, but their lives.”).

95. *Id.* at 2350.

most personal decision[-]making.”⁹⁶ Nevertheless, the language of the Supreme Court remains mainly binary and solely illustrates abortion as a cisgender women’s issue, leaving the TGNB community out of a conversation in which they must be present.

III. HOW FAILING TO USE GENDER-INCLUSIVE LANGUAGE AFFECTS TGNB PEOPLE

LGBTQIA+ people, advocates, and politicians continue to call for gender-inclusive language in abortion and reproductive healthcare laws.⁹⁷ “[N]ot every person with the capacity for pregnancy identifies as a woman” or uses she/her pronouns.⁹⁸ Currently, most conversations frame abortion and reproductive health as cisgender women’s issues or for people with the cisgender physical capabilities of carrying pregnancies.⁹⁹ While these discussions exclude TGNB and intersex individuals,¹⁰⁰ they also exclude cisgender women who experience fertility issues and Two-Spirit¹⁰¹ individuals who can become pregnant.¹⁰² As ACLU social media manager AC Facci articulates, “Centering who gets to have opinions about abortion around whether or not people are currently able to become pregnant excludes people from our understanding of abortion rights, rather than expanding it.”¹⁰³

One of the most significant barriers that TGNB people with the reproductive capacity to become pregnant face in accessing reproductive services is a lack of access to primary healthcare.¹⁰⁴ The Center for American Progress (“CAP”) released a report addressing health disparities and discrimination transgender people face

96. *Id.* at 2327. *See also id.* at 2320 (“Even in the face of public opposition, we upheld the right of individuals—yes, including women—to make their own choices and chart their own futures. Or at least, we did once.”).

97. Facci, *supra* note 72.

98. *Statement on Language*, NAT’L ABORTION FED’N, <https://prochoice.org/about/statement-on-language/> [<https://perma.cc/TDK2-HJZ8>] (last visited May 29, 2022).

99. Facci, *supra* note 72.

100. *See infra* Appendix A, at 2.

101. *See also* David Oliver, *What does ‘Two-Spirit’ mean? What to know about Two-Spirit indigenous LGBTQ identities*, USA TODAY (Dec. 10, 2021), <https://www.usatoday.com/story/life/health-wellness/2021/12/10/two-spirit-everything-know-indigenous-lgbtq-identities/6415866001/> [<https://perma.cc/U3V6-TKA9>] (“Two-Spirit” is a term in traditional Native American and Indigenous Tribes which describes someone who has a masculine and feminine spirit., typically differs by tribe, and often refers to the spirit of one’s connection to their land, culture, community, and family.).

102. *Id.*

103. Facci, *supra* note 72.

104. *Key Facts on Abortion*, AMNESTY INT’L, <https://www.amnesty.org/en/what-we-do/sexual-and-reproductive-rights/abortion-facts/> [<https://perma.cc/G8LE-VP9D>] (last visited on May 29, 2022).

in accessing healthcare.¹⁰⁵ CAP found that two in three transgender individuals and 65% of transgender people of color have experienced some form of healthcare discrimination in the year prior.¹⁰⁶ Further, 47% of transgender adults and 68% of transgender people of color report having harmful or discriminatory experiences with a health-care provider.¹⁰⁷

When TGNB people attempt to access healthcare, they are likely to face discrimination, refusal of care, or providers who do not have the adequate competency to provide them with the care they need.¹⁰⁸ Additionally, the LGBTQIA+ community's rights are currently under attack across the country. State legislatures continue to flood their governments with proposed anti-transgender and anti-LGBTQIA+ legislation to restrict the rights of LGBTQIA+ people.¹⁰⁹ In 2022 alone, state legislatures proposed over three hundred anti-LGBTQIA+ bills across the country, with twenty becoming law.¹¹⁰ At the same time, 541 abortion restrictions were presented, with thirty-eight of such becoming law.¹¹¹

While anti-LGBTQIA+ legislation does not restrict the rights of cisgender women and access to reproductive healthcare, anti-LGBTQIA+ legislation and abortion restrictions both profoundly affect TGNB people. States intend to restrict the access cisgender women have to abortion procedures by enacting abortion and reproductive healthcare restrictions.¹¹² However, the TGNB community's lack of access to reproductive healthcare is a byproduct of the push for restricting cisgender women's access. These barriers will continue to grow until the legal profession and policymakers recognize and document the existence of TGNB people by making specific drafting choices that show these reproductive healthcare issues can apply to a multitude of people and not just cisgender women.¹¹³

105. CAROLINE MEDINA ET AL., PROTECTING AND ADVANCING HEALTH CARE FOR TRANSGENDER ADULT COMMUNITIES (Ctr. for Am. Prog. 2021); see Jo Yurcaba, *Nearly half of trans people have been mistreated by medical providers, report finds*, NBC NEWS (Aug. 19, 2021, 5:52 AM), <https://www.nbcnews.com/nbc-out/out-health-and-wellness/nearly-half-trans-people-mistreated-medical-providers-report-finds-rcna1695> [<https://perma.cc/G4P6-B63N>].

106. MEDINA ET AL., *supra* note 105, at 4.

107. *Id.* at 17.

108. Yurcaba, *supra* note 105.

109. Facci, *supra* note 72.

110. *Id.*

111. *Id.*

112. See Chastine, *supra* note 8.

113. *Id.*

IV. WHY COURTS AND STATE LEGISLATURES MUST USE GENDER-NEUTRAL AND GENDER-INCLUSIVE LANGUAGE WHEN DRAFTING OPINIONS AND STATUTES RELATED TO ABORTION

Courts and state legislatures must redraft their statutes and opinions related to abortion to create a more inclusive area of the law that encompasses all who need access to care. While the fate of abortion access for cisgender women varies from state to state, the time to discuss the word choice in reproductive healthcare law is now. The topic of abortion is still highly debated and remains a top priority for many state governments and areas of the court system. Those in power can and should redraft their laws or court opinions to utilize the singular “they/them” and gender-neutral terms that put the person’s reproductive status before their gender.

The main goal of this redrafting would be to ensure that those with the reproductive capacity to get pregnant have representation, prevent further discrimination toward TGNB people, and provide assurances that TGNB people can seek healthcare in all aspects of their personal health.¹¹⁴ However, some argue that using gender-inclusive language instead of cisgender female pronouns erases the long history of the women’s movement against gender discrimination and threatens the autonomy of cisgender women.¹¹⁵ Nevertheless, the TGNB community continues to grow and fight for their rights, putting pressure on those who attempt to ignore them.

A. Legal Writing, Using “They/Them” Pronouns, and Fairness in the Law

Courts and legislatures can easily use gender-inclusive pronouns and terms in abortion and reproductive healthcare because using “they/them” in the singular form or other gender-neutral terms like “patients” or “individuals” is grammatically proper in the legal community.¹¹⁶ In addition, many legal scholars, writers, and academics

114. Chanel Dubofsky, *Why Trans and Non-Binary People Must Be Included in the Abortion Conversation*, HELLOFLO (Feb. 23, 2018), <https://helloflo.com/trans-and-non-binary-folks-must-be-part-of-conversations-about-abortion/> [https://perma.cc/VU8K-3SQ8].

115. Brooke Migdon, *Experts Warn Gender-Neutral Language Like ‘Pregnant People’ May Put Mothers at Risk*, THE HILL (Feb. 1, 2022), <https://thehill.com/changing-america/respect/diversity-inclusion/592335-experts-warn-gender-neutral-language-like/> [https://perma.cc/5K28-GFEB].

116. Brad Charles & Thomas Myers, *Evolving They*, 18 SCRIBES J. LEG. WRITING 81, 81–87 (2018–2019) (discussing the history of using “they” in the singular form). *See also* Fischer, *supra* note 20, at 487–88 (explaining how the use of gender-neutral language benefits the writer’s cause by illustrating their intention to include everyone in their writing, whereas gender-biased language can hurt their credibility).

have begun to push for using the singular “they” in academic and legal writing.¹¹⁷ Using “they/them” and gender-neutral language promotes fairness and upholds the clarity the legal profession prides itself on.¹¹⁸

Members of the legal community often further emphasize the need for accuracy in legal writing and drafting due to the legal community’s heavy involvement in harnessing the power of speech.¹¹⁹ According to legal academics, adopting gender-neutral pronouns would support the legal community’s ethical duty to promote fair speech and representation.¹²⁰ Scholar Debora Schweikart argues, “the legal profession is arguably the vocation most significantly involved in the power of language. The legal profession devotes great energy to the precise interpretation of words.”¹²¹ The singular “they” fulfills this role of a gender-neutral pronoun, and it is becoming more popular in non-legal writing as well.¹²² Further, English speakers use “they” more commonly now instead of gendered singular pronouns like “he” or “she” because the pronoun helps speakers and writers avoid making assumptions about gender. Likewise, using “he or she” or simply “he” creates clarity issues and potentially hinders the writer’s credibility or cause.

Many studies and publications have already argued for the use of gender-neutral language in statutes, legal writing, and judicial opinions.¹²³ In the legal profession, judges, scholars, and attorneys continue to push for gender-neutral language to accurately reflect the current makeup of society, prevent excluding an entire part of the population, and promote accuracy and clarity.¹²⁴ Moreover, the legal

117. Fischer, *supra* note 20, at 487–88.

118. *Id.*

119. *Id.*

120. *Id.*

121. Schweikart, *supra* note 70, at 6 (citing ROSALIE MAGGIO, *DICTIONARY OF BIAS FREE USAGE* 8 at 3 (1991)).

122. *Id.*; see also Colin Dwyer, *Merriam-Webster Singles Out Nonbinary ‘They’ For Word Of The Year Honors*, NEB. PUB. MEDIA (Dec.10, 2019, 4:26 PM), <https://www.npr.org/2019/12/10/786732456/merriam-webster-singles-out-nonbinary-they-for-word-of-the-year-honors#:~:text=Press-,Merriam%2DWebster's%202019%20Word%20Of%20The%20Year%20Is%20The%20Singular,a%20good%20gender%2Dneutral%20alternative> [https://perma.cc/ZF52-X9JH] (Merriam-Webster’s Dictionary deemed “they” the 2019 word of the year).

123. Fischer, *supra* note 20, at 486 n.98; see, e.g., OHIO JOINT TASK FORCE ON GENDER FAIRNESS, *FINAL REPORT* 6 (1995) (arguing parties in the justice system should prepare their materials for court using gender-neutral language and for the use of gender-neutral language in jury instructions, rules, and canons of construction); *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 658 (1993) (encouraging judges and clerks to use gender-inclusive language in their opinions and official publications); see also NEW YORK STATE JUDICIAL COMM. ON WOMEN IN THE COURTS, *FAIR SPEECH: GENDER NEUTRAL LANGUAGE IN THE COURTS* 4 (2d ed. 1997) (emphasizing their recommendation for courts to implement a requirement that jury instructions use gender-neutral language).

124. Fischer, *supra* note 20, at 487 (citing William B. Hill, *A Need for the Use of Nonsexist Language in the Courts*, 49 WASH. & LEE L. REV. 275, 275–76 (1992)); see DALE

field continues to have a duty to lead people and industries to promote equality.¹²⁵

One counterargument against using gender-inclusive pronouns is that “they” is not a singular pronoun, and judges traditionally use the phrase “he or she” or simply “he” instead.¹²⁶ The legal profession has used “he” to include the cisgender male and female genders in legal writing for over 170 years.¹²⁷ However, many judges likely do not understand the experiences of TGNB people and why using “they/them” is essential to their community. Instead, many judges and legislators use “he or she” in their opinions or statutes in an attempt to be inclusive.¹²⁸ Judges also argue that “he” refers to males and females together.¹²⁹ Nevertheless, “he or she” assumes that all individuals the opinion or statute covers identify as cisgender male or female.¹³⁰

Additionally, some argue that the singular “they” is informal and unacceptable in legal writing.¹³¹ Nevertheless, many solutions to the gender-neutral terminology issue exist, including (1) using nouns like humans or persons,¹³² (2) changing an antecedent noun to the plural, so the plural pronoun is appropriate,¹³³ (3) rewriting the sentence to avoid pronoun usage,¹³⁴ (4) using the passive voice,¹³⁵ (5) alternate pronouns,¹³⁶ (6) using paired pronouns,¹³⁷ (7) repeating the noun,¹³⁸ and (8) using a synonym to avoid pronouns.¹³⁹ As previously discussed, Courts use gender-inclusive language with the term

SPENDER, *MAN MADE LANGUAGE* 162 (2d ed. 1985).

125. Fischer, *supra* note 20, at 486 (citing Judith S. Kaye, *A Brief for Gender-Neutral Brief-Writing*, N.Y. L.J., Mar. 21, 1991, at 2); *see also* Schweikart, *supra* note 70, at 5 (arguing against legal writers and statute drafters using the pseudo generic because it discriminates against participants on the basis of sex, and renunciation would “result in fairer treatment of participants in the legal system in compliance with the ethical code”) (citing Daniel T. Kobil, *Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 576 n.31 (1991)).

126. Charles & Meyers, *supra* note 116.

127. Schweikart, *supra* note 70, at 2.

128. Fischer, *supra* note 20, at 495.

129. *Id.* at 488.

130. *See* Anne Branigin, *A Guide to the Words we use in our Gender Coverage*, THE WASH. POST (Apr. 1, 2022), <https://www.washingtonpost.com/lifestyle/2022/04/01/gender-identity-glossary/> [https://perma.cc/REE6-YLT7].

131. ANNE ENQUIST & LAUREL CURRIE OATES, *JUST WRITING* 206 (2d ed. 2005).

132. *Id.* at 492.

133. *Id.* at 491 (example is “Lawyers should file their briefs on time”).

134. *Id.* (example is “A lawyer who files a brief late may be sanctioned.”).

135. *Id.* (example is “Briefs should be filed on time.”).

136. *Id.* (example is “If a lawyer does not file his brief on time, a judge may lose her temper.”).

137. *Id.* at 491–92 (example is “A lawyer should file her or her brief on time.”).

138. *Id.* at 492 (Example is “If a lawyer does not file a brief on time, the lawyer may be sanctioned.”).

139. *Id.* (example is “The clerk keeps the court calendar. That is the person who can schedule your hearing.”).

“reasonable person” in hypotheticals and penal codes; when referring to an unspecified person, courts should use the singular “they” to cover all genders.¹⁴⁰

B. Using Gender-Inclusive Language in Abortion Opinions Ensures that All People with the Reproductive Capacity to Become Pregnant Receive Access to Needed Care

According to a study reviewing the experiences and preferences of TGNB people in accessing abortion procedures, “a substantial proportion of TGE [TGNB] individuals who were assigned female sex at birth may need pregnancy and/or abortion care during their lives.”¹⁴¹ Using terms like “pregnant people” or “patients” provides legal coverage to the broadest degree for people who could get pregnant.¹⁴²

These gender-neutral terms demonstrate inclusivity and help reduce the healthcare disparity for TGNB people because they would access care more often when they are confident clinics know how to care for their community and can understand their experience.¹⁴³ A study conducted in 2017 by Rachel K. Jones, Elizabeth Witwer, and Jenna Herman found that between 462 and 530 TGNB people obtained abortion care in 2017, and only 23% of responding clinics provided TGNB-specific care.¹⁴⁴ In 2017, the United States had 1,069 non-hospital facilities performing abortion procedures; only 85 of those facilities provided abortions to 230 TGNB individuals.¹⁴⁵ This study illustrates that both cisgender females and TGNB people access abortion procedures, indicating that reproductive clinics and abortion providers

140. Steve Klepper, *The Singular “They” Reaches the White House, But Not the Appellate Courts*, MD. APP. BLOG (Feb. 22, 2021), <https://mdappblog.com/2021/02/22/the-singular-they-reaches-the-white-house-but-not-the-appellate-courts/> [<https://perma.cc/BMZ4-EUAF>].

141. Moseson et al., *supra* note 33, at 376.e1.

142. Emma Green, *The Culture War Over ‘Pregnant People’*, THE ATL. (Sep. 17, 2021), <https://www.theatlantic.com/politics/archive/2021/09/pregnant-people-gender-identity/620031/> [<https://perma.cc/D6RD-ASQM>].

143. Olivia McCargar et al., *POV: Who Is Forgotten in Our Discussion of Abortion?*, BU TODAY (Sept. 11, 2021), <https://www.bu.edu/articles/2021/pov-nonbinary-people-and-trans-men-need-abortion-care-too/> [<https://perma.cc/NQ6T-FVLT>]. See also Moseson et al., *supra* note 203, at 376.e7–e8 (explaining that several studies found gaps in provider knowledge about TGE healthcare).

144. See Rachel K. Jones et al., *Transgender abortion patients and the provision of transgender-specific care at non-hospital facilities that provide abortions*, 2 CONTRACEPTION: X, Jan. 2020, at 1–2 (collecting survey data from all known healthcare facilities that provided abortion procedures). See *supra* Appendix A, at 10.

145. Jones et al., *supra* note 144.

“must ensure that systems serve the abortion needs of people with varying gender identities and experiences.”¹⁴⁶

Moreover, the study’s findings justify courts’ choice to change their language regarding reproductive healthcare. Finally, the study concluded that primarily non-hospital facilities without TGNB-specific care provided hundreds of abortions to TGNB people, suggesting more efforts are needed to implement and expand gender-inclusive care and abortion procedures.¹⁴⁷ Specifically, 73% percent of abortion providers not affiliated with a hospital did not provide TGNB-specific care.¹⁴⁸ The study further estimated that only 30% of abortions performed on TGNB patients were administered by facilities that provided TGNB-specific care.¹⁴⁹

Using gender-inclusive language in a platform like legal decisions and statutes helps alleviate this disparity by demonstrating that the legal community recognizes that TGNB individuals require abortion access. Further, these decisions likely incentivize abortion providers to implement TGNB-specific care. Currently, many clinics do not have TGNB-specific care procedures or practices because the clinics lack (1) knowledge about the TGNB community and TGNB-specific healthcare, (2) experience with providing TGNB healthcare, (3) knowledge about what methods of abortion TGNB individuals prefer, and (4) confidence or a sense of preparation in dealing with the TGNB community.¹⁵⁰ In addition, many healthcare workers express additional discomfort in communicating with transgender people about their health and claim they lack the resources on what questions to ask TGNB patients.¹⁵¹

Nevertheless, clinics can explore training options to help alleviate this knowledge gap and feel prepared to work with TGNB patients.¹⁵² A study found that only 20% of reproductive health providers receive formal education or training about TGNB patients, suggesting they do not “know clinical requirements following gender reassignment or

146. Moseson et al., *supra* note 33, at 376.e7 (arguing that to serve the abortion needs of TGNB people, clinics can begin by “Revising clinic intake forms to assess capacity and desires for pregnancy in a gender-neutral way and systematically incorporating similar questions in conversations between providers and patients may help to identify patients capable of pregnancy and prompt pregnancy options counseling.”).

147. Jones et al., *supra* note 144, at 2.

148. *Id.*

149. *Id.*

150. Moseson et al., *supra* note 33, at 376.e8. *See also* Catherine Paradiso & Robin M. Lally, *Nurse Practitioner Knowledge, Attitudes, and Beliefs When Caring for Transgender People*, 3.1 TRANSGENDER HEALTH, 48, 49 (April 26, 2018) (explaining that healthcare staff needs to be competent in TGNB reproductive health because that community has unique needs and education, and reduction of stigma reduces the barriers to care).

151. *See* Paradiso & Lally, *supra* note 150, at 49.

152. Moseson et al., *supra* note 33, at 376.e8.

routine health maintenance.”¹⁵³ Many experts assert healthcare staff’s knowledge and attitudes towards TGNB patients improve after education or training programs that include exposure to TGNB people in person or through video training.¹⁵⁴ Courts and legislatures can use gender-inclusive language when referring to patients because they currently do so in other contexts, as demonstrated by the statute survey in section II.C. By not using gender-inclusive language, courts are fundamentally erasing an entire population of people who need access to abortion procedures and giving facilities the option to refuse care or ostracize TGNB people.¹⁵⁵

C. Using Gender-Inclusive Language in Abortion Opinions Prevents Furthering Discrimination in Broader Healthcare Access

Courts and state legislators must use gender-inclusive language in legal decisions regarding reproductive healthcare because, without this usage, TGNB people continue to face discrimination in accessing routine healthcare and insurance coverage issues. Consequently, TGNB individuals also face accessibility issues, including: (1) doctors refusing medical care, (2) doctors or staff members misgendering them, (3) receiving inaccurate care and diagnoses, and (4) facing judgment or discrimination from the medical staff.¹⁵⁶ These issues create “delays, denials, and extra charges for care. These same barriers likely hinder access to abortion care.”¹⁵⁷

Insurance coverage for general and reproductive healthcare of cisgender individuals differs vastly from coverage for TGNB people.¹⁵⁸ Currently, private and public healthcare insurers actively discriminate against transgender people by refusing to cover or help compensate the healthcare of transgender patients.¹⁵⁹ Insurers routinely deny

153. Paradiso & Lally, *supra* note 150, at 49.

154. *Id.* at 49–50.

155. *See* Facci, *supra* note 72.

156. Courtney Cooper, *Trans & nonbinary people get abortions, too*, HEY JANE (Feb. 28, 2023) <https://www.heyjane.co/articles/nonbinary-trans-abortions> [<https://perma.cc/2EJF-M5ST>]; *See also* Moseson et al., *supra* note 203, at 376.e2 (“There are well established barriers to general healthcare for TGE [TGNB] people, including discrimination based on gender identity in clinics, limited provider knowledge, refusal of care provision, lower levels of insurance coverage than the general United States population, and frequent discrepancies between gender presentation/identity and sex/gender indicated on administrative documents.”).

157. Moseson et al., *supra* note 33, at 376.e2.

158. *See* Derek Waller, *Recognizing Transgender, Intersex, and Nonbinary People in Healthcare Antidiscrimination Law*, 103 MINN. L. REV. 467, 468 (2018).

159. SANDY E. JAMES ET AL., NAT’L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 95 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [<https://perma.cc/>

transgender people access to medically necessary care.¹⁶⁰ In 2015, the National Center for Transgender Equality (“NCTE”), an advocacy group dedicated to ending discrimination and violence against transgender people, conducted a survey examining the experiences of transgender people in the United States.¹⁶¹ 55% of participants in the 2015 U.S. Transgender Survey reported that their insurance denied coverage for gender-affirming procedures and care.¹⁶²

Likewise, 13% of survey participants reported coverage denial of reproductive care thought to be gender-specific, including Pap smears, mammograms, and prostate exams.¹⁶³ Moreover, healthcare workers’ perception of a patient’s gender often prevents individuals from receiving care.¹⁶⁴ Because of fear, discrimination, and coverage issues, 23% of participants in the 2015 survey reported they avoided seeking out healthcare they needed in the past year.¹⁶⁵

Additionally, transgender people experience health issues which only affect their community and not the cisgender community, including psychological distress and increased suicidal tendencies.¹⁶⁶ The consequences of using gendered language include TGNB individuals not seeking regular or preventive healthcare and increased risk of health issues that could become long-term or fatal.¹⁶⁷ Moreover, misinformation about the risk of pregnancy while on hormone therapy affects transgender men when their practitioner doesn’t inform them of their risks or if the person seeking care doesn’t seek medical care because of fear of discrimination.¹⁶⁸

However, these consequences and harmful practices are preventable by patients receiving the TGNB-specific care that they need and

ZDE3-UVS3] (finding transgender individuals experienced issues with insurance coverage for reproductive health).

160. *Id.*

161. *Id.* at 4. (NCTE reported 27,715 respondents from all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and the U.S. military bases overseas).

162. *Id.* at 95.; *See infra* Appendix A at 9.

163. *Id.*

164. Olivia McCormack, *Transgender advocates say the end of Roe would have dire consequences*, THE WASH. POST (May 6, 2022), <https://www.washingtonpost.com/politics/2022/05/06/transgender-men-nonbinary-people-abortion-roel/> [https://perma.cc/V66X-QR6T].

165. JAMES ET AL., *supra* note 159, at 98.

166. *Id.* at 106 (explaining that thirty-nine percent of participants reported currently experiencing serious psychological distress whereas the overall U.S. population reports five percent); *Id.* at 112–13 (“Forty percent (40%) of respondent have attempted suicide at some point in their life, compared to 4.6% of the U.S. population . . . [s]even percent (7%) of all respondents attempted suicide in the past year, nearly twelve times the rate of attempted suicide in the U.S. population in the past year (0.6%).”).

167. Jones et al., *supra* note 144, at 2.

168. *Id.*

the support from their families.¹⁶⁹ According to the 2015 Transgender survey:

Respondents who had transitioned ten or more years prior to participating in the survey (24%) were substantially less likely to be currently experiencing serious psychological distress, in contrast to those who had transitioned within the past year (41%) . . . Respondents who were out to their immediate families and described them as supportive (31%) were less likely to report serious psychological distress than those whose families were neutral (42%) or unsupportive (50%).¹⁷⁰

Gender-affirming services and access to TGNB-specific care improve the quality of life of TGNB individuals and ensure they have an enjoyable life.¹⁷¹ Gender-inclusive language in statutes and court opinions related to abortion leads to better access to healthcare for TGNB people and promotes healthcare practitioners to incorporate TGNB-specific care into their practice.¹⁷² Better visibility in these legal decisions guides doctors and medical staff who lack the education to incorporate better practices in the future.¹⁷³ As Emmett Schelling, the executive director of the Transgender Education Network of Texas, describes,

What happens when you leave out any people who are affected and impacted directly and deeply, by any piece of policy? . . . It produces gaps in strategy, it produces gaps in the understanding of the impact and the effects, and it produces gaps in galvanizing cohesive power.¹⁷⁴

V. COUNTERARGUMENT: SOME FEMINISTS DO NOT WANT GENDER-INCLUSIVE LANGUAGE BECAUSE IT ERASES THE FEMINIST MOVEMENT'S FIGHT FOR *ROE*

While LGBTQIA+ community members and advocates advance the argument for implementing gender-neutral terminology into the abortion discussion, many cisgender women resist. Some cisgender women refuse to use gender-neutral language because they want to keep the issue of reproductive health focused on cisgender women to prevent (1) erasing the work of the feminist movement, (2) recategorizing cisgender women as a class or group, and (3) dehumanization of people

169. JAMES ET AL., *supra* note 159, at 107.

170. *Id.*

171. Waller, *supra* note 158, at 469–70; See also Dean Spade et al., *Medicaid Policy & Gender-Confirming Healthcare for Trans People: An Interview with Advocates*, 8 SEATTLE J. SOC. JUST. 497, 498–99 (2010) (Transgender people who do not have access to or receive gender-affirming care can experience mental health issues, contracting HIV, and even face incarceration if they break the law to obtain healthcare services).

172. Waller, *supra* note 158, at 469–70.

173. Chastine, *supra* note 8.

174. McCormack, *supra* note 164.

with the ability to give birth.¹⁷⁵ As a result, the National Abortion Federation and many feminists maintain the use of ‘women’ or ‘woman’ in discussions related to abortion to acknowledge the long history of gender discrimination and the fight for women’s right to choose.¹⁷⁶ William Leap, professor of Anthropology at American University, accurately expresses the issues with this framework:

Some of these women, I think, remember when women had to struggle to get women into the foreground of the conversation. And that’s a very difficult memory to suppress . . . that’s a generational thing I can understand . . . But the argument and the struggle moves on, and the rhetoric evolves and changes . . . You can’t deal with these issues in terms of identity politics the way we did in the ‘80s when we were just chipping away at conversations that just dealt with men and women. Now we’ve got to think more inclusively.¹⁷⁷

Those who advocate for continuing to use “women” and she/her pronouns are often considered trans-exclusionary radical feminists or “TERFs.”¹⁷⁸ TERFs are people who exclude and do not recognize transgender women as women and believe transgender women are not included in the feminist movement.¹⁷⁹ This group worries about the broader implications of having TGNB people in this conversation and claims cisgender women serve the TGNB community’s agenda instead of promoting only their own.¹⁸⁰

Moreover, TERFs claim the implementation of gender-neutral pronouns in this reproductive discussion would erase women as a biological category.¹⁸¹ However, the TGNB community is not aiming to erase cisgender women; if anything the language change further encompasses their community.¹⁸² The language change simply reflects that this issue applies to multiple groups of people whose reproductive system they

175. See Pamela Paul, *The Far Right and Far Left Agree on One Thing: Women Don’t Count*, N.Y. TIMES (July 3, 2022), <https://www.nytimes.com/2022/07/03/opinion/the-far-right-and-far-left-agree-on-one-thing-women-dont-count.html?smid=url-share> [https://perma.cc/S24C-7TYC].

176. *Id.* (“Women didn’t fight this long and this hard only to be told we couldn’t call ourselves women anymore. This isn’t just a semantic issue; it’s also a question of moral harm, an affront to our very sense of ourselves.”); See also NAT’L ABORTION FED’N, *supra* note 98 (“While we do make an effort to use gender-inclusive language (person/people/they/them/patient) throughout our website, we do also use woman/women in some cases. We do so in order to acknowledge the long history of gender discrimination targeting women, the specialized health care that many of our members provide, and the need to be clear to various audiences.”).

177. Brown, *supra* note 10.

178. Kelsie Brynn Jones, *Trans-Exclusionary Radical Feminism: What Exactly Is it, and Why Does it Hurt?*, HUFFPOST (Feb. 2, 2016), https://www.huffpost.com/entry/transexclusionary-radical-terf_b_5632332 [https://perma.cc/PU95-VCWP].

179. *Id.* See also Paul, *supra* note 175 (describing TERF as a woman who believes transgender women are different from biological women).

180. Paul, *supra* note 175.

181. *Id.*

182. See Chastine, *supra* note 8.

were born with requires them to be part of the conversation.¹⁸³ While many cisgender women concede respect to TGNB communities, they wish to keep them in a separate category with their own specific needs and prerogatives.¹⁸⁴ However, the same group conveys, “Tolerance for one group need not mean intolerance for another.”¹⁸⁵ Tolerance may mean merely acknowledging the TGNB community as a legitimate group of people.

A. Some Argue Against Gender Inclusive Language Because It Potentially Jeopardizes Pregnant Patient’s Rights and The Traditional Role of the Mother

The TERF community further argues gender-neutral language redrafting would promote a misogynist agenda because it denies women their humanity, reduces them to their body parts, and promotes gender stereotypes.¹⁸⁶ Researchers argue using gender-neutral language in medical research can reduce the visibility of cisgender women and dehumanize them by referring to those with the ability to get pregnant using anatomy-specific language.¹⁸⁷ In some cases, this language may suggest that other family members have rights regarding a person’s decisions before, during, and after the birthing process.¹⁸⁸ Additionally, using terms such as “parents” or “families” as replacements for “mothers” can be construed to refer to other members of the family, like the father, and can have an “othering effect” on “women” from their unique experience of pregnancy and birth.¹⁸⁹

Journalist Helen Lewis argues that shying away from using “women” in abortion discussions erases women as a gender and as a class:

But something is lost when abortion-rights activists shy away from saying women. We lose the ability to talk about women as more than a random collection of organs, bodies that happen to menstruate or bleed or give birth. We lose the ability to connect women’s common experiences, and the discrimination they face in the course of a reproductive lifetime. By substituting people for women, we lose the ability to speak of women as a class. We dismantle them into pieces, into functions, into commodities.¹⁹⁰

183. *Id.*

184. Paul, *supra* note 175.

185. *Id.*

186. *Id.*

187. Migdon, *supra* note 115.

188. *Id.*

189. *Id.*

190. Helen Lewis, *The Abortion Debate is Suddenly About ‘People,’ Not ‘Women’*, THE ATL. (May 14, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/abortion-rights-debate-women-gender-neutral-language/629863/> [https://perma.cc/9S55HFMB].

Many conservative critics further argue against using gender-neutral language because the number of cisgender women seeking reproductive care outweighs the number of TGNB people seeking similar care (meaning the TGNB community to whom this issue applies) is too small to justify an entire vocabulary shift.¹⁹¹ While that may be true for the statistics today, the ability to give birth does not define a woman, and the capacity to become pregnant is not restricted to cisgender women.¹⁹²

Courts can use gender-inclusive language when referring to patients, and a “pregnant person” likely does not dehumanize someone because it speaks to their condition and not their anatomy. As mentioned in section II.B, many statutes already use language depicting the experience of the people the statute aims to cover. By not using gender-inclusive language, courts and legislatures are effectively erasing an entire population of people who need to access abortion procedures and giving facilities the option to refuse care or ostracize TGNB people. Additionally, the LGBTQIA+ community and activists are not advocating to erase cisgender women who obtain abortions from the conversation—they are simply asking courts and lawmakers to make room for a marginalized group who needs care.¹⁹³

VI. THE FATE OF LGBTQIA+ REPRODUCTIVE RIGHTS

Weighing the interests of TGNB people with the tradition of using gendered language in established abortion decisions proves to be complicated. However, courts and legislatures should utilize gender-inclusive language because they already use it in drafting criminal and tort statutes, and they can utilize the singular “they/them” or use terms that describe condition, but not gender. Moreover, using gender-inclusive pronouns ensures a legally broad opinion that allows all people with the reproductive capacity to become pregnant access to care and prevents further discrimination from spilling over to other healthcare services. Nevertheless, some argue that using gender-neutral language erases the feminist movement and strips pregnant patients of their autonomy and humanity.¹⁹⁴

In determining the fate of reproductive healthcare rights in a country post *Dobbs*,¹⁹⁵ the LGBTQIA+ community and cisgender women

191. Paul, *supra* note 175; See also Matt Lavietes, *Is the word ‘women’ being erased from the abortion rights movement?*, NBC NEWS (July 11, 2022), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/word-women-erased-abortion-rights-movement-rcna37298> [<https://perma.cc/CAU8-TD6U>] (arguing that removing the word “women” to make room for a small number of TGNB individuals who have the capacity to get pregnant is not enough for a complete language shift).

192. Chastine, *supra* note 8.

193. Vagianos, *supra* note 44.

194. Paul, *supra* note 175.

195. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

must work together to advocate for the expansion of reproductive healthcare rights for all groups at the state and federal levels. As articulated in section IV.A, the legal community wholistically sets the example for other industries and society in general to reflect the current makeup of the population.¹⁹⁶ The current makeup of the population includes TGNB people, and that group will continue to grow as the younger generations become more open about varying gender identities.¹⁹⁷ To continue the promotion of clarity and fairness in the legal field and prevent the exclusion of the LGBTQIA+ community in legal areas applicable to them, the legal community must recognize the LGBTQIA+ community's experiences and specific needs by being precise in their use of language.

Notwithstanding, while we live in a world that recognizes the experiences of cisgender people above others, everyone has a right to access the care they need, regardless of their gender identity.¹⁹⁸ As Cheryl Chastine, an abortion provider illustrates,

The category “women” doesn’t map neatly onto the category of “people who can get pregnant,” and not just because people who aren’t women can and do get pregnant. Many [cisgender] women are unable to get pregnant. Some of those women are trans [TGNB], and others have reproductive tract anomalies that make pregnancy impossible . . . A trans [TGNB]-inclusive worldview is one that acknowledges that there are women and nonbinary people who have testes and penises, and men and nonbinary people who have vulvas and vaginas.¹⁹⁹

196. Fischer, *supra* note 20, at 487.

197. Moseson et al., *supra* note 33, at 376.e1.

198. Chastine, *supra* note 8.

199. *Id.*

APPENDIX A

Sex: given by doctors or midwives at birth based on the appearance of the genitalia, categorized as male, female, or intersex.²⁰⁰

Intersex: people born with reproductive organs or sexual anatomy that do not fit into traditional male or female anatomy concepts.²⁰¹

Gender: the behavioral, cultural, and psychological characteristics related to a person's sex.²⁰² Many think of gender only in terms of male or female, but people further identify as nonbinary, genderfluid, or gender non-conforming.²⁰³

Gender Identity: someone's internal understanding of their own gender.²⁰⁴

Sexual orientation: the physical, romantic, or emotional attraction to another person of the same or different gender.²⁰⁵

Cisgender: people whose gender identity aligns with the sex they were assigned at birth.²⁰⁶

Transgender: people whose gender identity differs from the sex assigned to them at birth.²⁰⁷

Nonbinary: people whose gender identity does not align with the male or female gender.²⁰⁸

Gender-Affirming Care: healthcare that recognizes or affirms the gender identity of the person receiving treatment.²⁰⁹ This type of care

200. See Julie A. Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANSGENDER RIGHTS* 51, 52 (Paisley Currah et al. eds., 2006); Branigin, *supra* note 130.

201. See Greenberg, *supra* note 200, at 57–61 (Intersex people are assigned a sex at birth depending on how they anatomically present, but that does not impact their gender identity or sexual orientation).

202. Branigin, *supra* note 130. See also 18 U.S.C. § 249(a)(2)(A) (2012) (The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act (HCPA) states someone cannot willfully cause bodily injury to another because of that person's "actual or perceived . . . gender, sexual orientation, [or] gender identity . . ." The Act further defines gender identity, "actual or perceived gender-related characteristics"), *id.* at (c)(4).

203. See Moseson et al., *supra* note 33.

204. See also Branigin, *supra* note 130 (describing how people express their gender differently through outward characteristics such as pronouns, clothing, names, makeup, and behavior).

205. *Id.*

206. See Moseson et al., *supra* note 33, at 376.e1 ("Cisgender describes a person whose gender identity aligns with the gender identity commonly associated with the sex they were assigned at birth.").

207. Greenberg, *supra* note 200, at 61.

208. *Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT'L CTR. FOR TRANSGENDER EQUAL. (July 9, 2016), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [<https://perma.cc/M64H-LBCG>].

209. Anne E. Silver, *An Offer You Can't Refuse: Coercing Consent to Surgery Through the Medicalization of Gender Identity*, 26 COLUM. J. GENDER & L. 488, 500 n.59 (2014) (listing examples of gender-affirming care) (citing *Birth Certificate Sex*

can relate to procedures or treatments such as puberty or hormone blockers, hormone therapy, various surgical procedures, such as breast removal or top surgery, speech therapy, genital reconstruction, and facial plastic surgery.²¹⁰

Transgender and nonbinary (“TGNB”) Specific Care: care relating to general and reproductive healthcare, which includes (1) clinics adopting gender-neutral intake forms, (2) intake forms and clinic employees that affirm patients’ gender and sexual orientation, (3) clinic employees who use gender-neutral language, (4) increasing the ability of TGNB-affirming abortion care, and (5) increasing patient privacy in and out of health facilities.²¹¹

Designation: An Overview of the Issues, SYLVIA RIVERA L. PROJECT, <https://srp.org/resources/birth-certificate-sex-designation-overview-issues/> [<https://perma.cc/6LKD-KWTS>].

210. *Id.*

211. *See* Moseson et al., *supra* note 33, at 376.e6.