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## Paternalism or Gender-Neutrality?

Stephen J. Ware

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## Article

### Paternalism or Gender-Neutrality?

STEPHEN J. WARE

*The strong and widely accepted reasons for using gender-neutral language presumptively apply to the gendered word paternalism and its gender-neutral counterpart, parentalism. With these reasons in mind, this Article's thesis is that legal scholars should begin with a presumption for using the gender-neutral word parentalism, while using paternalism only when emphasizing the important relevance of gender or otherwise trying to convey a gendered meaning. Accordingly, many legal scholars define paternalism in an expressly gendered way—such as “the institutionalization of male dominance,” or an “ideology [that] teaches men to minimize women's agency”—or fittingly use paternalism to describe an attitude especially characteristic of men or directed primarily toward women. All these many uses of the gendered word paternalism are supported by the writers' apparent intent to emphasize the important relevance of gender to the writers' points.*

*On the other hand, and despite the spread of gender-neutral language throughout our society and legal profession, many legal scholars continue to use the gendered word paternalism without indicating any important relevance of gender or otherwise manifesting intent to convey a gendered meaning. These many writers use paternalism rather than parentalism to describe laws or policies aiming to protect people (of all genders) by restricting their choices. For example, these writers cite “paternalism” as a standard justification for restrictions on contractual choice or other private ordering, including the unconscionability doctrine, usury laws, the minimum wage, and countless regulations limiting the range of enforceable promises by consumers, borrowers, employees, investors, and others.*

*In each of these contexts, it is better to use the gender-neutral word parentalism, unless the writer emphasizes the relevance of gender or otherwise manifests an intent to convey a gendered meaning. For example, a writer could justify using the gendered word paternalism by arguing that all our laws are gendered male so gendered language should be used to discuss any law, including using paternalism to describe laws aiming to protect people of all genders by restricting their choices. Or a writer could justify using the gendered word*

*paternalism by arguing (after citing sufficient empirical data) that protect-by-restricting-choice parenting is gendered male, so analogous protect-by-restricting-choice laws and policies are also gendered male. Absent one of those two plausible arguments justifying use of the gendered word paternalism, laws or policies aiming to protect people of all genders by restricting their choices are better described as examples of parentalism.*

*In short, a presumption for using the gender-neutral word parentalism to describe laws or policies aiming to protect people of all genders by restricting their choices is well-grounded in the strong and widely-accepted reasons for ordinarily using gender-neutral language. And examining legal scholarship's many uses of paternalism and parentalism illuminates our understandings of gender in both law and parenting.*

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# Paternalism or Gender-Neutrality?

STEPHEN J. WARE \*

## INTRODUCTION

Paternalism's relation to gender memorably impressed me as a law student listening to my classmate respond to our Contracts professor's question. As my classmate argued for a broad unconscionability doctrine to protect vulnerable parties from potentially harsh contract terms, she characterized her own argument as "paternalist" and then, mid-thought, stopped herself and said something like "I guess coming from me it would actually be a 'maternalist' argument." She made what many lawyers would call a *paternalist* argument, but evidently thought that since *she* was making the argument it was perhaps better characterized as *maternalist*.

Perhaps inspired by that law school classmate, and definitely guided by a presumption in favor of gender-neutral language, a 1998 law review article of mine used the word *parentalist* where many others would have used *paternalist*—as a description of "laws that take discretion away from the consumer" to protect the consumer.<sup>1</sup> This use of the gender-neutral *parentalist* where others would have used the gendered *paternalist* was unusual, but not unprecedented, in legal scholarship. For instance, Ian Ayers and Robert Gertner had previously referred to "parentalism" as the justification for rules "displac[ing] freedom of contract . . . [to] protect [] parties within the contract."<sup>2</sup> And Marcy Strauss had written that

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\* Distinguished Professor of Law, University of Kansas School of Law. Thanks to Elizabeth Kronk Warner, Kyle Velte, Melanie DeRousse, Franciska Coleman, Lua Yuille, Chris Drahozal, Nancy Darling, Susan McHale, Jennifer Lansford, David Lancy, Lenore Skenazy, and participants at a Widener University Commonwealth Law School faculty workshop for comments. Thanks also to Bridget Brazil, Matthew Frederick, Munzer Islam, Nick Slovikoski, Ariel Rhines, Alisha Peters, Amanda Feriante, Justin Worthington, and Brandi Spates for research assistance.

<sup>1</sup> Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 214 n.97 (1998) ("Who is to say what information a consumer should acquire before making a decision? Contract law leaves that up to the consumer who can decide how much time and money to invest in the acquisition of information. Mandatory disclosure laws take that discretion away from the consumer. Far from fostering autonomy, mandatory disclosure laws are 'parentalist' restrictions on autonomy.").

<sup>2</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 88 (1989) ("Put most simply, immutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract. The former justification turns on parentalism; the latter on externalities. Immutable rules displace freedom of contract. Immutability is justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves."). See also Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 523 n.73 (1990) ("I say 'parentalism' rather

“[p]arentalism is roughly defined as ‘interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.’”<sup>3</sup> Professor Strauss added that “[t]he term paternalism is sex-linked; it is drawn from the role of the father in the family. Parentalism reflects, in a more egalitarian fashion, the same principles.”<sup>4</sup>

In that egalitarian spirit, a 2017 article of mine used *parentalist* similarly in a draft.<sup>5</sup> However, the very capable Harvard Law School student editors objected: “If [‘parentalist’] is going to be in here, it absolutely needs some explanation of why a ‘gender-neutral’ form of paternalist is necessary here, because ‘paternalist’ is gendered for a reason . . . .”<sup>6</sup> When asked for that reason, the editors wrote: “Paternalism is often used because it stems from male dominance and how men treat people, and thus carries a negative connotation.”<sup>7</sup>

This 2017 view that negative connotations associated with male dominance warrant continued use of the gendered word *paternalism* perhaps contrasts with the view—expressed by Marcy Strauss in 1987—that using the gender-neutral *parentalism*, instead of *paternalism*, was laudably “egalitarian.”<sup>8</sup> And this contrast may reflect broader generational differences across the thirty years from 1987 to 2017. On the other hand, this Article

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than ‘paternalism’ in part to avoid the latter term’s connotations of officious intermeddling, but primarily to use a gender-neutral synonym. At least in my own experience, concern for another’s welfare combined with a claim of superior insight into the other’s needs can come from a parent of either sex.”)

<sup>3</sup> Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 321 (1987) (“The main justification offered for attorney decisionmaking is based on parentalistic assumptions. Parentalism is roughly defined as ‘interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced.’ Thus, the attorney, as parentalist, ‘claims to act on the (client’s) behalf, but not at that person’s behest; indeed, the “beneficiary” of paternalist action may even explicitly repudiate those actions on his behalf.’ Parentalism in the legal profession is based on a belief that nonattorneys are inherently incapable of making informed judgments, and thus need a professional to decide what legal alternatives are best for them. The attorney may even override the client’s wishes for what the attorney believes is in the client’s benefit.”)

<sup>4</sup> *Id.* at 321 n.34; see also Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963, 987 (1986–87) (“[C]ondemnation of paternalism (parentalism) in modern writing on ethics in the professions is the product of the lonely-individual doctrine in philosophical ethics, and of the philosophical distinction between fact and value, particularly in its disposition to turn the parental metaphor into a moral principle.”)

<sup>5</sup> Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29, 113–14 (2017) (“[E]ven consumers who have no complaint with their treatment by a business may have been harmed by the business’s violations of law, but not realize it. So discovering and deterring such violations is an important role for the plaintiffs’ lawyers who bring class actions, and enforcing class waivers hurts consumers who do not realize they would benefit from a class action. Jean Sternlight, for example, opposes enforcement of arbitral class waivers in part on this paternalist (or ‘parentalist’) ground.”); see also *id.* at 114 n.280 (“I prefer ‘parentalist’ to ‘paternalist,’ . . . , but that gender neutrality does not seem to have caught on.”)

<sup>6</sup> On file with Author.

<sup>7</sup> On file with Author.

<sup>8</sup> Strauss, *supra* note 3, at 321 n.34.

argues that each view—for and against using the gendered word *paternalism*—is strong within its field. Specifically, this Article’s thesis is that legal scholars should use the gendered word *paternalism* when they want to emphasize the relevance of gender—including, perhaps especially, male dominance—or otherwise convey a gendered meaning, but they should use the gender-neutral *parentalismism* when they do not articulate any important relevance to gender, as they often do not in scholarship on contract and related areas of law.

This Article’s argument about when to use each word—*paternalism* or *parentalismism*—is both supported by widely-established good practices and illuminatingly novel. This argument for using the gender-neutral word *parentalismism* is supported by widely-established good practices because it is well-grounded in the strong and widely-accepted reasons for ordinarily using gender-neutral language. To its credit, legal scholarship has over the last several decades largely adopted gender-neutral language, except when writers want to convey a gendered meaning. At one level, this Article’s argument is a fairly straightforward application of the prevailing view that gendered words tend to convey gendered meanings. So, we lawyers should use a gendered word (here, *paternalism*) when we intend a gendered meaning, but should otherwise use gender-neutral language (here, *parentalismism*).

While that is a fairly straightforward argument for consistency—for using *paternalism* and *parentalismism* consistently with our other choices between gendered and gender-neutral language—it is also an illuminating argument. It illuminates our understandings of gender in both law and parenting. For example, as a parent of an energetically impulsive toddler, I frequently restricted my child’s choices because I cared for him and was trying to protect him. While I often allowed him to choose which direction to walk on the grass or sidewalk, I did not allow his choice to run into the street before checking for oncoming cars. He made this dangerous choice several times, and each time I grabbed him by the arm to prevent him from running into the street. Was my restriction of his choice *paternalist* because I was his father and acting typically of fathers? Or was my restriction of his choice *parentalist* because I was his parent and acting typically of parents? I believe the latter because I believe nearly all parents of any gender would restrict their toddlers much as I restricted mine. Restricting another person’s choice as a way to protect that person is part of parenting, not just part of fathering, or just part of mothering.<sup>9</sup> But gender differences in such

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<sup>9</sup> The amount and contexts of such protect-by-restricting-choice parenting varies within and across societies and time periods, as, for example, parents restricting children’s “screen time” changes with technology. See, e.g., Anya Kamenetz, *A Guide to Parental Controls for Kids’ Tech Use*, NAT’L PUB. RADIO (June 18, 2018, 6:00 AM), <https://www.npr.org/2018/06/18/620005246/a-guide-to-parental-controls-for-kids-tech-use> (“Ben Zimmerman lives in a suburb of Chicago. Like a lot of 9-year-olds, he’s

parenting may be relevant, so this Article addresses the possibility that empirical studies of such differences show that restricting children to protect them is gendered—that is, more common among fathers than mothers, or vice versa.<sup>10</sup>

Distinct from parents (and others) trying to protect children by restricting children’s choices is the phenomenon of men restricting women’s choices. When that is the sense in which a writer uses *paternalism*, the gendered word fits because the writer conveys a gendered meaning and emphasizes gender’s important relevance. Accordingly, many contemporary legal scholars use *paternalism* in an expressly gendered way, such as by defining it as an “ideology [that] teaches men to minimize women’s agency,”<sup>11</sup> or using it more broadly to refer to an attitude especially characteristic of men or an attitude directed primarily toward women.<sup>12</sup> These writers appropriately use a gendered word when making statements emphasizing gender’s important relevance.

In contrast, many legal scholars continue to use the gendered word *paternalism* without any apparent intent to convey a gendered meaning. Legal scholars do this when discussing laws or policies aiming to protect people (of all genders) by restricting their choices. While gender may be relevant to any legal issue, much legal scholarship does not emphasize or even mention any relevance to gender. For instance, without mentioning gender, several scholars—including leaders in the economic analysis of law—say the “standard justifications for mandatory restrictions on freedom of contract are to protect people inside (paternalism) or outside (externalities) the contract.”<sup>13</sup> And without mentioning gender, many legal scholars cite *paternalism* as a standard justification for restrictions on contractual choice, such as the unconscionability doctrine, usury laws, the minimum wage, and countless regulations limiting the range of enforceable

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fond of YouTube, Roblox, and Minecraft. And, like a lot of parents, his mom and dad wanted to make sure Ben wasn’t spending too much time on those activities. They tried to use Google’s ‘Family Link’ parental control software to limit screen time.”). While in the contemporary United States, toddlers often receive environments “designed for their safety and parents are explicitly warned to ensure that activities like climbing stairs are closely supervised,” in traditional cultures, “good parents . . . let children do what we would see as patently dangerous things,” such as “playing with machetes, running barefoot through fires, and dragging around sharp pieces of rusty metal.” Such “parenting is guided by strongly held beliefs” like “[i]njury is a learning opportunity.” Nancy Darling, *Where Toddlers Play with Knives: Parenting World Views*, PSYCHOL. TODAY (Sept. 30, 2018), <https://www.psychologytoday.com/us/blog/thinking-about-kids/201809/where-toddlers-play-knives-parenting-world-views>; see also David F. Lancy, *Playing with Knives: The Socialization of Self-Initiated Learners*, 87 CHILD DEV. 654, 655 (2016), <https://doi.org/10.1111/cdev.12498> (discussing the tolerance of children engaging in risky behavior as a form of socialization in certain cultures).

<sup>10</sup> See *infra* Section III.D.3.

<sup>11</sup> Courtney Fraser, *From “Ladies First” to “Asking for It”: Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141, 165 (2015).

<sup>12</sup> See *infra* Section II.

<sup>13</sup> See *infra* note 97 and accompanying text.

promises by consumers, borrowers, employees, investors, and others.<sup>14</sup> Scholars in contract and related areas of law often use a non-gendered definition of *paternalism* under which “a policy counts as paternalistic if it is justified on the belief that it will make a person better off than if the person had been left to choose between the available options for him or herself.”<sup>15</sup> Such policies—restricting the choices of a “person” as likely to be a “him” as a “her”—are, this Article contends, better described as *parentalist*, unless the writer indicates any important relevance of gender and thus manifests the writer’s intent to convey a gendered meaning.

This Article’s first section summarizes the strong and widely accepted reasons for ordinarily using gender-neutral language, except when seeking to convey a gendered meaning, as in the common practice of using gendered words like *mother* and *woman* when discussing pregnancy. Section I concludes that legal scholarship’s general presumption in favor of gender-neutral language, but gendered language when emphasizing gender to convey a gendered meaning, should be applied to *paternalism*, so we generally should use that gendered word when conveying a gendered meaning but should otherwise use the gender-neutral *parentalism*. Accordingly, Section II quotes and praises legal scholars’ gendered uses of *paternalism*—such as defining it in an expressly-gendered way or using it to describe an attitude especially characteristic of men or directed primarily toward women.

In contrast, Section III quotes and criticizes legal scholars’ non-gendered uses of the word *paternalism*, such as citing “paternalism” as a standard justification for restrictions on contractual choice, including the unconscionability doctrine, usury laws, the minimum wage, and countless regulations limiting the range of enforceable promises by consumers, borrowers, employees, investors, and others. When law aims to protect vulnerable people by restricting their choices to form potentially harsh contracts, Section III contends, the reasons for ordinarily using gender-neutral language counsel for describing such law as *parentalist* rather than *paternalist*, unless the writer emphasizes the relevance of gender or otherwise manifests an intent to convey a gendered meaning. When a legal scholar wants to write in a gender-neutral way about law limiting freedom of contract to protect contracting parties of all genders, the rationale for those limits is presumptively better described with the gender-neutral word *parentalism* than the gendered word *paternalism*. However, Section III concludes by addressing several plausible arguments for using *paternalism* to describe such laws: (A) all laws are gendered male; (B) restricting people’s choices (even to protect those people) is gendered male; and (C) *paternalism*’s negative connotations attach to men.

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<sup>14</sup> See *infra* notes 100–04 and accompanying text.

<sup>15</sup> Jacob Goldin, *Libertarian Quasi-Paternalism*, 82 MO. L. REV. 669, 669 (2017).

Section IV quotes and praises many legal scholars already doing what this Article advocates—using *parentalism* rather than *paternalism* to describe laws aiming to protect people (of all genders) by restricting their choices. Section IV acknowledges that other legal scholars use the word *parentalist*, in a very different context, to describe views about the primacy of parents (as opposed to government) in raising children. But Section IV concludes that these separate strands of legal scholarship using the word *parentalist* differently rarely produce confusion because context quickly clarifies any ambiguity. So, the case for *parentalist* as the gender-neutral replacement for *paternalist* is not significantly weakened by a separate use of *parentalist* with a different meaning.

The Conclusion reiterates this Article's thesis that we should use the gendered word *paternalism* when emphasizing the important relevance of gender or otherwise manifesting an intent to convey a gendered meaning, but should otherwise use the gender-neutral *parentalism*. In particular, we should use the gender-neutral word *parentalism* to describe protect-by-restricting-choice laws, unless emphasizing the relevance of gender or otherwise manifesting an intent to convey a gendered meaning. The Conclusion reviews two plausible examples of a gendered meaning. One is that a writer could justify using the gendered word *paternalism* by arguing that all our laws are gendered male so gendered language should be used to discuss any law, including using *paternalism* to describe laws aiming to protect people of all genders by restricting their choices. Or a writer could justify using the gendered word *paternalism* by arguing (after citing sufficient empirical data) that protect-by-restricting-choice parenting is gendered male, so analogous protect-by-restricting-choice laws and policies are also gendered male. Absent one of those two plausible arguments justifying use of the gendered word *paternalism*, this Article concludes, laws or policies aiming to protect people of all genders by restricting their choices are better described as examples of *parentalism*.

#### I. THE CASE FOR GENDER-NEUTRAL LANGUAGE, EXCEPT WHEN CONVEYING A GENDERED MEANING

Language matters. The words we use, and the meanings we attach to those words, reflect our thoughts, but they also influence our thoughts and thus our behavior. This power of words to influence is central to scholars of linguistics and rhetoric,<sup>16</sup> as well as to practitioners of rhetoric, like lawyers.

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<sup>16</sup> John A. Lucy, *Linguistic Relativity*, 26 ANN. REV. ANTHROPOLOGY 291, 292 (1997) (describing the ways within the field of linguistics that language is believed to influence thought); Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 900 (2002) (stating that “[t]he modern rhetorical view [is] that language is constitutive of thought”); M. Kienpointer, *Whorf and Wittgenstein. Language, World View and Augmentation*, 10

As one scientist puts it, “changing how people talk changes how they think.”<sup>17</sup> Similarly, a mainstream textbook on legal writing says, “Language does not only reflect reality; it also influences our perceptions of reality. Language, therefore, may be a guiding force to effect changes in reality—in fact, language shapes reality.”<sup>18</sup> That legal writing textbook—*Legal Writing Style*, by Antonio Gidi and Henry Weihofen—did not include that statement in its 1961 first edition. However, by its 1980 second edition, *Legal Writing Style* included part of that statement in the following passage:

Avoid Sexist Expressions (When You Can)

Does the use of the masculine gender to include the feminine invidiously imply male superiority? Some of us have become convinced that it does. Language does not only reflect reality; it also influences our perceptions of reality. Experiments have shown that generic statements of “man” evoke, to a statistically significant degree, images of males only, whereas corresponding statements that avoid using the word “man” evoke images of both males and females.<sup>19</sup>

This contrast between gendered language and gender-neutral language is a paradigmatic example of words’ power to influence. And movement toward gender-neutral language is exemplified by the three editions of *Legal Writing Style*. The 1961 edition used gendered and even “sexist language,”<sup>20</sup> with phrases like:

- “The lawyer must be more precise in his writing than almost anyone else”;<sup>21</sup>

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ARGUMENTATION 475, 492 (1996) (referring to “the strong influence of language on thought and world view”).

<sup>17</sup> Lera Boroditsky, *How Language Shapes Thought*, 304 SCI. AM. 62, 65 (2011) (referring to “demonstrations establishing that language indeed plays a causal role in shaping cognition. Studies have shown that changing how people talk changes how they think. Teaching people new color words, for instance, changes their ability to discriminate colors. And teaching people a new way of talking about time gives them a new way of thinking about it”).

<sup>18</sup> ANTONIO GIDI & HENRY WEIHOFEN, LEGAL WRITING STYLE 23 (3d ed. 2018). *See also* Lucinda M. Finley, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886, 887 (1989) (“Language . . . reflects the world views and chosen meanings of those who have had power to affect definitions and create terms. The selected terms and meanings then shape our understandings of what things are, of the way the world is.”).

<sup>19</sup> HENRY WEIHOFEN, LEGAL WRITING STYLE 19 (2d ed. 1980).

<sup>20</sup> Greg Johnson, *Welcome to Our Gender-Neutral Future*, 42 VT. B.J. 36, 37 (2016) (“Henry Weihofen also says nothing about omitting sexist language in the first edition of his influential *Legal Writing Style* in 1961. Worse, when recommending varying word choice for the same term to ‘avoid ambiguity or excessive repetition,’ Weihofen argues that ‘the substitute should be only a substitute, and not an elegant sobriquet, such as “the weaker sex” for women, “Old Glory” for the flag, or “the staff of life” for bread.’ What is elegant about the sobriquet ‘the weaker sex’?!”).

<sup>21</sup> HENRY WEIHOFEN, LEGAL WRITING STYLE 7 (1st ed. 1961).

- “A letter to a businessman has a different audience from one addressed to a workman with an eighth grade education”;<sup>22</sup> and
- “Some of a lawyer’s most important writings—briefs, for example—are written for busy men.”<sup>23</sup>

In contrast, the 1980 second edition of *Legal Writing Style* includes the above exhortation to “Avoid Sexist Expressions (When You Can)” as part of a page and a half lesson on the topic. Going much further, the 2018 third edition of *Legal Writing Style* expands this lesson to eleven pages under the more absolute exhortation to “Use Gender-Neutral Language.”<sup>24</sup>

This legal writing textbook’s evolution toward gender-neutral language paralleled a similar move toward gender-neutral language throughout our society during the latter part of the twentieth century.

As professionals in various fields began to adopt it, gender-neutral language appeared in employment advertising, textbooks, popular media, dictionaries, and religious publications. Studies reported a decline in the use of masculine nouns and pronouns as generics, with one study finding a notable decline in their use in American newspapers and magazines between 1971 and 1979.<sup>25</sup>

Examples of this move toward gender-neutral language include “chairman,” “mailman,” and “fireman” changing to the gender-neutral terms “chair,” “letter carrier,” and “firefighter,” while “male-female pairs like waiter-waitress and steward-stewardess” changed to “server” and “flight attendant.”<sup>26</sup>

The move toward gender-neutral language very much includes the legal profession. As Judith Fischer recounts,

[I]n the 1980s, a wave of gender task-force studies . . . examined various aspects of women and the law . . . Some of the published reports proposed the use of gender-neutral language in statutes, judicial opinions, and other legal writing.

<sup>22</sup> *Id.* at 5.

<sup>23</sup> *Id.* at 37.

<sup>24</sup> GIDI & WEIHOFEN, *supra* note 18, at 22–34.

<sup>25</sup> Judith D. Fischer, *Framing Gender: Federal Appellate Judges’ Choices About Gender-Neutral Language*, 43 U.S.F. L. REV. 473, 480–81 (2009).

<sup>26</sup> David Ludden, *Talking Like It’s 1984*, PSYCHOL. TODAY (Mar. 23, 2015), <https://www.psychologytoday.com/us/blog/talking-apes/201503/talking-it-s-1984>; *see also* Johnson, *supra* note 20, at 37 (“The drive to omit sexist language went mainstream in the 1980s and 1990s. We now say layperson instead of layman, business executive instead of businessman, reporter instead of newsman, worker’s compensation instead of workman’s compensation, and firefighter instead of fireman. Common idioms and figures of speech like ‘old wives’ tales’ are now considered sexist.”).

Some states adopted gender-neutral language in their constitutions, statutes, or other legal discourse, and sections on gender-neutral language began to appear in legal writing textbooks.<sup>27</sup>

Fischer says, “these changes were based first of all on principles of fairness.”<sup>28</sup> Gender-biased language “relegates girls and women to ‘secondary status,’” and thus “not only reflects but also helps to construct and perpetuate a sexist reality.”<sup>29</sup> “For example, feminist scholars have long decried that masculine generics are androcentric, and make women seem invisible . . . .”<sup>30</sup> In contrast, gender-neutral language can “help construct a frame of the legal system that includes and empowers both genders.”<sup>31</sup> In short, fairly including women—rather than relegating them to a less visible, secondary status below men—is a strong reason for gender-neutral language, and this reasoning has largely prevailed in the legal profession. An additional reason for gender-neutral language is to include people whose gender identity is nonbinary.<sup>32</sup>

Nevertheless, legal scholars sensibly continue to use gendered language to convey a gendered meaning when emphasizing the important relevance of gender. For instance, legal scholars often continue to use gendered

<sup>27</sup> Fischer, *supra* note 25, at 486.

<sup>28</sup> *Id.*

<sup>29</sup> Judith D. Fischer, *The Supreme Court and Gender-Neutral Language: Splitting La Difference*, 33 WOMEN’S RTS. L. REP. 218, 221–22 (2012) (internal quotation marks omitted).

<sup>30</sup> Jennifer L. Prewitt-Freilino et al., *The Gendering of Language: A Comparison of Gender Equality in Countries with Gendered, Natural Gender, and Genderless Languages*, 66 SEX ROLES 268, 270 (2011) (referring to “the power that asymmetries in lexical gender . . . can have on social gender stereotypes and inequities in status between men and women”).

<sup>31</sup> Fischer, *supra* note 25, at 487. *See also* Pat K. Chew & Lauren K. Kelley-Chew, *Subtly Sexist Language*, 16 COLUM. J. GENDER & L. 643, 643–44 (2007) (“Language can be a potent vehicle for subtle sexism. As lawyers, we understand the power of words. What we say and how we say it can perpetuate gender stereotypes and status differences between women and men. In contrast, language also can be used as a constructive tool for reinforcing equality.”); Michela Menegatti & Monica Rubini, *Gender Bias and Sexism in Language*, OXFORD RES. ENCYCLOPEDIA COMM. (Sept. 2017), <https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-470?print=pdf> (“In order to reduce gender bias, it is necessary to change people’s linguistic habits by making them aware of the beneficial effects of gender-fair expressions.”).

<sup>32</sup> *See, e.g.*, Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 896 (2019) (“With stunning speed, nonbinary gender identities have gone from obscurity to prominence in American public life. The use of gender-neutral pronouns such as ‘they, them, and theirs’ to describe an individual person is growing in acceptance.” [People with nonbinary gender identities do not exclusively identify as men or women.]); *Statement on Gender and Language*, NAT’L COUNCIL TEACHERS ENG. (Oct. 25, 2018), <http://www2.ncte.org/statement/genderfairuseoflang/> (“The most common concepts of gender are based on the long-perpetuated notion that gender is a binary matter, and that it always aligns with a binary designation of sex (male/female). Yet contemporary understandings of gender clarify that gender identity and expression occur along a broad spectrum that is not limited to two binary alternatives, such as woman/man or girl/boy. . . . The ‘Statement on Gender and Language’ (2018) . . . recommends usage that moves beyond the gender binary in order to include individuals whose identities might otherwise be unacknowledged or devalued.”).

language (such as “her,” “she,” “mother,” and “woman”) when discussing topics such as pregnancy,<sup>33</sup> abortion,<sup>34</sup> breastfeeding,<sup>35</sup> and menstruation.<sup>36</sup> In sum, prevailing in our profession is a general presumption in favor of gender-neutral language, but use of gendered language when conveying a gendered meaning by emphasizing gender’s important relevance. This preference for gender-neutral language in general, but use of gendered language to convey a gendered meaning, is good and should be applied to the word *paternalism* and its gender-neutral counterpart, *parentalism*. That is, legal scholars generally<sup>37</sup> should use the gendered word *paternalism* when they want to convey a gendered meaning by emphasizing the

<sup>33</sup> Dara E. Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 371 (2017) (“Once a child is born, the mother’s choices such as the food she eats no longer impact her child in the same way, yet social expectations regarding mothers as primary caregivers extend the heightened surveillance of her behavior as a parent.”); Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 190 (2004) (“Pregnancy, like the high-pitched female voice, has no identical cross-sex parallel. . . . Because a pregnant woman could never show that she was being treated worse than a man with precisely the same trait, she could never show that adverse employment actions related to her pregnancy discriminated against her on the basis of sex.”); see also Rona Kaufman Kitchen, *Holistic Pregnancy: Rejecting the Theory of the Adversarial Mother*, 26 HASTINGS WOMEN’S L.J. 207, 208 (2015) (“Rather than presuming the pregnant woman will act in the best interests of her pregnancy and of fetal life, the law assumes that she is hostile to her unborn child and identifies the State as better suited to protect pregnancy and fetal life.”); Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L.J. 947, 965 (2017) (“A woman can be convicted of this crime if she ‘knowingly ingests, injects, consumes, inhales, or otherwise uses a narcotic drug or controlled substance without a prescription’ while she is pregnant or ‘knows or reasonably should have known’ she was pregnant.”).

<sup>34</sup> Jared H. Jones, Annotation, *Women’s Reproductive Rights Concerning Abortion, and Governmental Regulation Thereof—Supreme Court Cases*, 20 A.L.R. Fed. 2d 8 (2007) (“[W]hen a minor becomes pregnant and considers an abortion, the relevant circumstances may vary widely depending upon her age, maturity, mental and physical condition, the stability of her home if she is not emancipated, and her relationship with her parents.”); Lisa R. Pruitt & Marta R. Vanegas, *Urbanormativity, Spatial Privilege, and Judicial Blind Spots in Abortion Law*, 30 BERKELEY J. GENDER L. & JUST. 76, 92 (2015) (“A rural woman may find it impossible to get an abortion if she must travel many hours to reach an abortion provider, especially if she has few transportation options, little money, or is otherwise constrained.”); Morgan Arnett, Comment, *Update: Phasing Out Abortion: One Step Closer to Terminating a Woman’s Constitutional Right*, in *Gonzales v. Carhart*, 24 T.M. COOLEY L. REV. 597, 609 (2007) (“Pro-choice supporters also believe that every child born into the world should be wanted: allowing abortions would reduce child abuse and neglect, so if a woman does not want to continue the pregnancy, she has options.”).

<sup>35</sup> Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL’Y 333, 334 (2010) (“Legislation in nearly every state seeks to protect a woman’s right to breastfeed her child in any public place where she has a right to be.”).

<sup>36</sup> Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WIS. L. REV. 491, 516 (“A woman’s right to be free from discrimination is violated when menstrual hygiene products are subject to sales tax when there are no similar products that men must use because of an involuntary, biological monthly occurrence, and when the closest analogous products used primarily by men are not subject to taxation. Taxing products used primarily, or even exclusively, by women is to tax them on the basis of their sex, something which is prohibited by international human rights norms.”).

<sup>37</sup> For counterarguments potentially justifying exceptions to this generalization, see *infra* Section III.D.

important relevance of gender, but otherwise should use the gender-neutral *parentalism*.

## II. LEGAL SCHOLARSHIP'S GENDERED USES OF THE WORD PATERNALISM

### A. *Gendered Definitions of Paternalism*

It is fitting that legal scholars use the gendered word “paternalism” when apparently intending to convey a gendered meaning. Paternalism came into the English language as a gendered word—from the Latin word for father, “pater.”<sup>38</sup> Paternalism literally means “to act like a father or treat another as a child.”<sup>39</sup>

With its roots in the notion of fatherhood and acting like a father, “paternalism” means making decisions on others’ behalf to protect them from harm or to advance their well-being. Although the motivation for paternalistic intervention may be altruistic, it inevitably involves an element of autonomy-deprivation for the “protected” party.<sup>40</sup>

#### Paternalism’s etymology

reflects the implicit social hierarchies of patriarchal cultures, in which fathers or male heads of families were understood to be authority figures responsible for the welfare of subordinates and dependents. In this tradition, adult members of states, corporations, and communities functioned under the presumably benevolent authority of kings, presidents, and executives.<sup>41</sup>

Questioning this presumption of benevolence in kings, Locke cautioned against confounding “paternal” and “political” power; and Kant similarly warned that “the worst conceivable despotism” would be government “founded on the principle of benevolence toward the people, as a father’s toward his children—in other words, . . . paternalistic government (*imperium paternale*).”<sup>42</sup>

<sup>38</sup> 2 PETER SUBER, *THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA* 632 (Christopher Berry Gray ed., 1st ed. 1999); Lindsay J. Thompson, *Paternalism*, *ENCYCLOPEDIA BRITANNICA* (Dec. 23, 2013), <https://www.britannica.com/topic/paternalism>.

<sup>39</sup> 2 SUBER, *supra* note 38, at 632.

<sup>40</sup> Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 *DUKE L.J.* 848, 889.

<sup>41</sup> Thompson, *supra* note 38; see also Edward A. Fallon, *Charters, Compacts, and Tea Parties: The Decline and Resurrection of a Delegation View of the Constitution*, 45 *WAKE FOREST L. REV.* 1067, 1091 (2010) (referring to “[t]raditional notions of sovereignty that had long viewed the king as a paternalistic father figure”).

<sup>42</sup> IMMANUEL KANT, *ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON’T WORK IN PRACTICE* 58–59 (E.B. Ashton trans., 1974) (1793) (emphasis omitted); Thaddeus Mason Pope,

Consistent with the gendered origin and history of the word paternalism, many contemporary legal scholars continue to define the word in an expressly gendered way. For instance, law review articles over the last fifteen years have defined paternalism as “the institutionalization of male dominance,”<sup>43</sup> or an “ideology [that] teaches men to minimize women’s agency.”<sup>44</sup> Similarly using paternalistic to describe policies reinforcing male dominance or privilege, one law review article refers to “paternalistic sentiments in which men are deemed rulers of their households,”<sup>45</sup> and other articles say:

- “The paternalistic mechanisms supporting colonialism and empire abroad transferred as a model to the paternalistic family at home, serving to both create and reinforce it. This privileging of the dominant group over others . . . constituted white male authority over both family and community”;<sup>46</sup>
- “This regime of guardianship is completely paternalistic, favoring males and neglecting females entirely”;<sup>47</sup> and
- “[D]eferential review of gender classifications mirrored the paternalistic views of a male-dominated society.”<sup>48</sup>

These articles quite sensibly use a gendered word—*paternalism* or *paternalistic*—to convey a gendered meaning, that is, a meaning about male

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*Counting the Dragon’s Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 681–83 (2004) (citing JOHN LOCKE, TWO TREATISES OF GOVERNMENT, 2D TREATISE §§ 52–53, at 170 (Cambridge Univ. Press 1960) (1698)).

<sup>43</sup> Stephen Paul Kennedy, *Sex, Power, and the Claims of Virtue Reflection on the Indefensibility of Sexual Harassment*, 14 TRINITY L. REV. 29, 59 (2007) (describing “paternalism” as “the institutionalization of male dominance”). See also Gila Stopler, “A Rank Usurpation of Power”—*The Role of Patriarchal Religion and Culture in the Subordination of Women*, 15 DUKE J. GENDER L. & POL’Y 365, 380 (2008) (“Dominance is disguised as benevolence, and sexism—the ideology of male supremacy and superiority over women—serves as the ‘factual’ basis that explains to women why they need this form of paternalism while simultaneously allowing men to convince themselves that they are only acting in everyone’s, especially women’s, best interests.”).

<sup>44</sup> Fraser, *supra* note 11, at 165 (“[P]aternalistic ideology teaches men to minimize women’s agency . . .”).

<sup>45</sup> Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 261 (2010).

<sup>46</sup> See Deborah Anthony, *Analyzing the Disappearance of Women’s Surnames and the Retrenchment of their Political-Legal Status in Early Modern England*, 29 HASTINGS WOMEN’S L.J. 7, 23 (2018).

<sup>47</sup> Dan E. Stigall, *Iraqi Civil Law: Its Sources, Substance, and Sundering*, 16 J. TRANSNAT’L L. & POL’Y 1, 68–69 (2006).

<sup>48</sup> Donald E. Lively & Ellen S. Podgor, *Reckoning with the Bluster of Apolitical Jurisprudence*, 19 HASTINGS CONST. L.Q. 715, 718–19 (1992).

dominance or privilege. And these articles may not all presume men's benevolence toward women—that men consistently try to use their dominance or privilege for women's good<sup>49</sup>—any more than Locke and Kant presumed royal benevolence toward subject people—that kings consistently try to use their dominance or privilege for the good of their subjects.

### B. *Paternalism as Attitude Especially Characteristic of Men*

Also consistent with the gendered origin and history of the word paternalism, legal scholars often continue to use the gendered words paternalism and paternalistic to refer to an attitude especially characteristic of men. For instance, one article in a legal journal refers to “the way well-meaning white men might paternalistically treat women and minorities,”<sup>50</sup> and others say:

- “Paternalism in medical practice was practiced by male physicians on male and female patients alike”;<sup>51</sup>
- Sex discrimination “likely reflected a paternalistic view, promoted by men, that the legal state of affairs benefitted both sexes”;<sup>52</sup> and
- “[E]lective share laws are terribly demeaning and paternalistic to women. Male-dominated legislatures, though, continue to perpetuate belittling female stereotypes by saying through elective share laws that women are so incompetent and unable to stand up for themselves that the ‘little missies’ still must be protected by some ancient magical sword.”<sup>53</sup>

<sup>49</sup> See Jessica Knouse, *Mandatory Ultrasounds and the Precession of Simulacra*, 54 SAN DIEGO L. REV. 117, 139 (2017) (“[Women] are subordinated by the inherent paternalism [of mandatory ultrasounds]; they are manipulated by the compromised informed consent procedure and inherent pro-life bias . . . .”); Catherine London, Note, *Advancing a Surrogate-Focused Model of Gestational Surrogacy Contracts*, 18 CARDOZO J.L. & GENDER 391, 405 (2012) (referring to an “attempt by the paternalistic, male-dominated medical establishment to exploit women’s reproductive capabilities to serve its own interests”); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2087 (2003) (“[M]ale bosses reinforce paternalistic authority by harassing or belittling women in traditionally female fields who dared to step out of their proper place.”).

<sup>50</sup> Melissa Mortazavi, *The Cost of Avoidance: Pluralism, Neutrality, and the Foundations of Modern Legal Ethics*, 42 FLA. ST. U. L. REV. 151, 187 (2014).

<sup>51</sup> Ben A. Rich, *Postmodern Medicine: Deconstructing the Hippocratic Oath*, 65 U. COLO. L. REV. 77, 130 (1993).

<sup>52</sup> Charles R. Calleros, *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*, 2015 MICH. ST. L. REV. 1249, 1297.

<sup>53</sup> Terry L. Turnipseed, *Why Shouldn't I Be Allowed to Leave My Property to Whomever I Choose at My Death? (Or How I Learned to Stop Worrying and Start Loving the French)*, 44 BRANDEIS L.J. 737, 793 (2006).

In each of these uses of the word paternalism, the paternalists are exclusively or mostly men, so a gendered word fits. These scholars sensibly use a gendered word, paternalism, to convey gendered meanings.

### C. *Women as Especially Likely Objects of Paternalism*

The previous section praises use of the gendered word paternalism to refer to an attitude especially characteristic of men. Also praiseworthy is the use of this gendered word when the writer emphasizes women as especially likely objects of this “paternalistic” attitude. Such articles are numerous. Several of them address pregnancy:

- “[P]regnancy, like traditional disabilities, has often led to paternalistic policies excluding pregnant women from paid work and other aspects of public life”;<sup>54</sup>
- “[F]eminists have . . . challenge[d] the idea, steeped in paternalism, that pregnant women need to be treated as if infirm or in need of protection”;<sup>55</sup>
- “[F]eminists were able to document and bring voice to workplace paternalism that had systematically excluded and punished pregnant women”;<sup>56</sup>
- “Imposing more stringent regulations on pregnant women is based on paternalistic notions that value the protection of the fetus over the pregnant woman’s health, autonomy, and well-being”;<sup>57</sup>
- “[T]he pending Pregnant Workers Fairness Act, which would secure an asymmetric, pregnancy-specific right to workplace accommodations” “may revitalize exclusionary and paternalistic attitudes toward pregnant employees, signal an incapacity to work, and increase sex discrimination”;<sup>58</sup>

<sup>54</sup> Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 476 (2012).

<sup>55</sup> Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 508 (2013).

<sup>56</sup> Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA’s Pregnancy Exclusion*, 27 WIS. J. L. GENDER & SOC’Y 1, 17 (2012).

<sup>57</sup> Greer Donley, *Encouraging Maternal Sacrifice: How Regulations Governing the Consumption of Pharmaceuticals During Pregnancy Prioritize Fetal Safety over Maternal Health and Autonomy*, 39 N.Y.U. REV. L. & SOC. CHANGE 45, 48 (2015).

<sup>58</sup> Bradley A. Areheart, *The Symmetry Principle*, 58 B.C. L. REV. 1085, 1114–15 (2017).

- “[F]eminists’ concerns that permitting healthy pregnant workers to argue they have ADA disabilities would revive exclusionary and paternalistic attitudes toward pregnancy”;<sup>59</sup> and
- “To argue that surrogates, who willingly enter a contract, can no longer be held to their good faith agreement because of the intervening distress of pregnancy, reinforces a sense of paternalism—minimizing women’s decision-making capabilities due to supposed hormonally-induced unpredictability. Surrogacy contracts should be held to the same requirements under the law as all other contractual agreements.”<sup>60</sup>

Pregnancy is not the only context in which writers sensibly use the gendered word paternalism in emphasizing women as especially likely objects of a “paternalistic” attitude. Other such contexts appear in the following examples:

- “[R]equiring only girls and young women to be vaccinated against HPV . . . discriminates against women because it assumes that they, unlike men, need protection and paternalism”;<sup>61</sup>
- “Opponents to the requirement of women registering [for the draft] espoused paternalistic views on women not serving in combat”;<sup>62</sup>
- “Judicial paternalism posits that judges (as well as other court officials such as prosecutors and probation officers) view females as weak and in need of protection from the harsh environments of jails and prisons”;<sup>63</sup>
- “Although paternalism has occasioned favorable outcomes for individual women in the criminal justice

<sup>59</sup> Cox, *supra* note 54, at 473.

<sup>60</sup> Julia Dalzell, *The Enforcement of Selective Reduction Clauses in Surrogacy Contracts*, 27 WIDENER COMMONWEALTH L. REV. 83, 122 (2018).

<sup>61</sup> Linda C. Fentiman, *Sex, Science, and the Age of Anxiety*, 92 NEB. L. REV. 455, 503 (2014).

<sup>62</sup> Renee Just, Note, *GI Jane: A Comparison of the Legal Framework for Women’s Military Service in Israel and the United States*, 8 CREIGHTON INT’L & COMP. L.J. 165, 176–77 (2017).

<sup>63</sup> Mirko Bagaric & Brienna Bagaric, *Mitigating the Crime That Is the Over-Imprisonment of Women: Why Orange Should Not Be the New Black*, 41 VT. L. REV. 537, 590 n.346 (2017) (quoting Ann Martin Stacey & Cassia Spohn, *Gender and the Social Costs of Sentencing: An Analysis of Sentences Imposed on Male and Female Offenders in Three U.S. District Courts*, 11 BERKELEY J. CRIM. L. 43, 49–51 (2006) (internal footnotes omitted)).

system, it has been defined by feminists as ultimately harmful, because the protection afforded women is based on their presumed inferiority; women are, therefore, less than fully adult, when ‘adult’ is synonymous with ‘male.’ This paternalism spared women’s lives, but it cannot be read uncritically as leniency”.<sup>64</sup>

- “[P]aternalistic views about women’s health cause the FDA to either underestimate the morbidity treated by a women’s health product or overestimate the risks posed by the drug”.<sup>65</sup>
- “The status of motherhood at present is to be subordinated to paternalistic assessments of what is best for children”.<sup>66</sup>
- “[T]he paternalistic world in which these women often feel trapped—a world that finds their sole value in childbearing”.<sup>67</sup>
- “Women summoned the state to challenge patriarchal norms and power arrangements but then found themselves subject to new forms of paternalism”.<sup>68</sup>
- “As enforced, the persistence of the regulation of prostitution may indeed owe to paternalistic state denial of women’s ownership over their bodies”.<sup>69</sup>
- “Paternalism reflects a lack of respect for autonomy and for the individual as a person. A number of the policies adopted to address domestic violence—policies championed by many advocates for women who have been battered—are guided by what seems to be patently paternalistic views of these women as

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<sup>64</sup> Lynsey Black, “*On the Other Hand the Accused Is A Woman . . .*”: Women and the Death Penalty in Post-Independence Ireland, 36 LAW & HIST. REV. 139, 170 (2018) (footnotes omitted).

<sup>65</sup> Mara Sanders, Note, *Sex, Drugs, and Advisory Committees: An Analysis of Pharmaceutical Industry Manipulation of FDA Vulnerability to Sociopolitical Influences on Matters of Women’s Health*, 48 COLUM. HUM. RTS. L. REV. 149, 166–67 (2017).

<sup>66</sup> Dara E. Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 440 (2017).

<sup>67</sup> Torrey McConnell, Note, *The War on Women: The Collateral Consequences of Female Incarceration*, 21 LEWIS & CLARK L. REV. 493, 494–95 (2017).

<sup>68</sup> Jennifer Carlson & Kristin A. Goss, *Gendering the Second Amendment*, 80 LAW & CONTEMP. PROBS. 103, 120 (2017).

<sup>69</sup> V. Noah Gimbel, Note, *Fetal Tissue Research & Abortion: Conscriptio, Commodification, and the Future of Choice*, 40 HARV. J.L. & GENDER 229, 278 (2017).

powerless, limited individuals incapable of acting on their own behalf<sup>70</sup>; and

- “[Women] are subordinated by the inherent paternalism [of mandatory ultrasounds]; they are manipulated by the compromised informed consent procedure and inherent pro-life bias . . . .”<sup>71</sup>

In all these uses of the word paternalism, the writers emphasize women as the objects of paternalist attitudes or policies. So, these writers’ uses of the gendered word paternalism are supported by the good reason that they are conveying gendered meanings.

#### D. *Paternalism as an Attitude Especially Characteristic of Men and Directed Primarily Toward Women*

The previous two sections quote and praise legal articles’ uses of the gendered word paternalism when writers apparently intend to convey a gendered meaning by emphasizing the important relevance of gender. This Section quotes articles combining these gendered meanings, that is, using paternalism to refer to an attitude especially characteristic of men and directed primarily toward women.

For example, several articles use paternalism to describe the attitudes of male judges, as compared to female judges, toward women convicted of crimes. One such article refers to “[e]vidence of a paternalistic bias among male judges that favors female offenders” with lighter sentences.<sup>72</sup> Another says, “theories of paternalism suggest leniency toward women arose out of an implied power dynamic in which male court authorities perceived female offenders as inferior to men both socially and legally.”<sup>73</sup> A third notes, “[t]here is evidence that, as judges, women tend to be . . . less paternalistically forgiving than men to female offenders . . . .”<sup>74</sup> A fourth says: “[S]ome have called judicial paternalism . . . the less stringent sentencing of female offenders by protective and paternalistic male judges . . . .”<sup>75</sup> In all these uses of the word paternalism, the paternalists are men and

<sup>70</sup> Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 28 (2009) (footnotes omitted).

<sup>71</sup> Knouse, *supra* note 49, at 139.

<sup>72</sup> Max Schanzenbach, *Racial and Sex Disparities in Prison Sentences: The Effect of District-Level Judicial Demographics*, 34 J. LEGAL STUD. 57, 57, 63, 75, 80, 89–90 (2005).

<sup>73</sup> Amy Farrell, Geoff Ward & Danielle Rousseau, *Intersections of Gender and Race in Federal Sentencing: Examining Court Contexts and the Effects of Representative Court Authorities*, 14 J. GENDER RACE & JUST. 85, 88–89 (2010).

<sup>74</sup> Ori Aronson, *The Next Forty Presidents*, 24 WM. & MARY J. WOMEN & L. 235, 241 (2018).

<sup>75</sup> Haneefah A. Jackson, Note, *When Love Is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 HOW. L.J. 517, 540 (2003); see also Jody L. King, *Avoiding Gender Bias in Downward Departures for Family*

the objects of their paternalism are women, in this case women convicted of crimes. In short, these scholars fittingly use the gendered word paternalism to convey gendered meanings with gender relevant to their points about parties on each side of the paternalist relationship.

Criminal sentencing is just one of several fields in which legal articles sensibly use the gendered word paternalism (or a variant like “paternalistic”) to refer to an attitude especially characteristic of men towards women. Other such articles refer to:

- “[T]he paternalistic attitudes of male policy makers to women’s human rights”;<sup>76</sup>
- “[A] ‘paternalistic’ attitude of male judges toward female plaintiffs in pregnancy discrimination cases”;<sup>77</sup>
- An “attempt by the paternalistic, male-dominated medical establishment to exploit women’s reproductive capabilities to serve its own interests”;<sup>78</sup>
- “[T]he paternalistic views of male physicians in the nineteenth and early twentieth centuries who declared themselves experts in childbirth and introduced a variety of interventions on the assumption that female weakness required pain medication and other interference with the body’s natural labor process”;<sup>79</sup>
- “[T]raditional sexual paternalism, which dictates that men and women have different virtues, and in many realms, women need to be taken care of”;<sup>80</sup>
- “[P]aternalistic views of the male duty to protect the so-called weaker sex”;<sup>81</sup>

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*Responsibilities Under the Federal Sentencing Guidelines*, 1996 ANN. SURV. AM. L. 273, 287 (“Prior to the Guidelines, there was a wide-spread perception that women received preferential treatment in sentencing decisions. Such preferential treatment was believed to be grounded in the chivalry or paternalism of the predominantly male judiciary.” (footnotes omitted)).

<sup>76</sup> Debdatta Dobe, Note, *Resolution 2122: The “Aborted” Debate*, 24 MINN. J. INT’L L. 175, 211 (2015).

<sup>77</sup> John C. Coughenour et al., *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745, 887 (1994).

<sup>78</sup> London, *supra* note 49, at 405; *see also* Eugene Morgulis, Note, *Juror Reactions to Scientific Testimony: Unique Challenges in Complex Mass Torts*, 15 B.U. J. SCI. & TECH. L. 252, 262 (2009) (asserting that “[m]edicine is male-dominated and paternalistic toward women”).

<sup>79</sup> Elizabeth Kukura, *Obstetric Violence*, 106 GEO. L.J. 721, 775–76 (2018).

<sup>80</sup> Kelly Sarabyn, *Racial and Sexual Paternalism*, 19 GEO. MASON U. C.R. L.J. 553, 564 (2009).

<sup>81</sup> Carolyn B. Ramsey, *Provoking Change: Comparative Insights on Feminist Homicide Law Reform*, 100 J. CRIM. L. & CRIMINOLOGY 33, 41 (2010); *see also* Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 14 WOMEN’S RTS. L. REP. 335, 345 (1992)

- “[M]en[,] accustomed to a paternalistic mode of thinking about women,’ who found it difficult to perceive how a special benefit to women actually harmed them”;<sup>82</sup>
- “[W]eaknesses in current Supreme Court jurisprudence . . . which revived paternalistic ideologies associated with women’s capacity to reason, consent, and make autonomous reproductive healthcare decisions, because historically, the State and courts have been complicit in undermining women’s economic capacities and liberty interests”;<sup>83</sup>
- “[Anti-polygamy] positions [that] bring together philosophies familiar from both the right and left—paternalistic guidance about what’s best for women, and feminist articulations about the extent of women’s power in a society with strong patriarchal roots”;<sup>84</sup>
- “[A] form of gender paternalistic reasoning, which like ‘the old gender paternalism’ is based on ‘stereotypes about women’s capacity and women’s roles’ that serve to ‘deny women agency’ for the ostensible purpose of protecting them from coercion and/or freeing them to be mothers”;<sup>85</sup>
- “[A] list of paternalistic qualifications that would draw quick constitutional invalidation today: ‘*Provided, however, That no female shall be given any task, disproportionate to her strength, nor shall she be*

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(“Especially for men accustomed to a paternalistic mode of thinking about women, it is difficult to grasp that a law which seems to give a special benefit to women actually harms her.”); Jessica L. Cornett, Note, *The U.S. Military Responds to Rape: Will Recent Changes Be Enough?*, 29 WOMEN’S RTS. L. REP. 99, 115 (2008) (associating “[t]he pervasively male-dominated and paternalistic culture of the U.S. military” with “[v]iews such as women in uniform are inferior, which are reinforced by restrictions placed on women’s service opportunities”); Blake J. Furman, Note, *Gender Equality in High School Sports: Why There Is a Contact Sports Exemption to Title IX, Eliminating It, and a Proposal for the Future*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169, 1178 (2007) (“[T]he rationale that females need to be protected from injury and male domination is overly paternalistic.”).

<sup>82</sup> Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 728–29 (1998) (footnote omitted).

<sup>83</sup> Michele Goodwin & Meigan Thompson, *In the Shadow of the Court: Strategic Federalism and Reproductive Rights*, 18 GEO. J. GENDER & L. 333, 337 (2017).

<sup>84</sup> See Sarah Rogozen, Note, *Prioritizing Diversity and Autonomy in the Polygamy Legalization Debate*, 24 UCLA WOMEN’S L.J. 107, 144 (2017) (discussing the importance of true consent in polygynous marriages, and arguments against the presence of consent in such relationships).

<sup>85</sup> J. Shoshanna Ehrlich, *Ministering (In)justice: The Supreme Court’s Misreliance on Abortion Regret in Gonzales v. Carhart*, 17 NEV. L.J. 599, 602 (2017).

employed in any place detrimental to her morals, her health or her potential capacity for motherhood”<sup>86</sup>

- “[G]ender discrimination statutes [that] paternalistically protected women and provided handicap benefits to women that were not shared by men”;<sup>87</sup> and
- “[S]ociety’s paternalistic view of women, not as workers, but as mothers and caregivers, dependent upon the financial largesse of their husbands, fathers, or brothers.”<sup>88</sup>

Also sensibly using the gendered word paternalism to refer to an attitude especially characteristic of men towards women, other such articles say:

- “Muslim women aroused a paternalist instinct in the still largely male [French] political leadership: to *protect* women and girls from their men, their religion, and its ‘archaic’ practices, [French] leaders interpreted France’s republican values, its *valeurs républicaines*, to *exclude* Muslim women’s dress”;<sup>89</sup>
- “The fact that many of the cases Ruth Bader Ginsburg brought to the Court had male plaintiffs, challenging paternalistic laws that favored women in various government benefits, did not make the Court’s job any easier, because to the nine men of the Supreme Court, the premises behind these laws—that women tended to need protection and financial support more than men did—made a good deal of sense and seemed, at the least, well-intentioned if not carefully tailored”;<sup>90</sup>
- “Male bosses reinforce paternalistic authority by harassing or belittling women in traditionally female fields who dared to step out of their proper place”;<sup>91</sup>

<sup>86</sup> David Freeman Engstrom, “Not Merely There to Help the Men”: *Equal Pay Laws, Collective Rights, and the Making of the Modern Class Action*, 70 STAN. L. REV. 1, 32 (2018).

<sup>87</sup> Gabrielle Fromer, Note, *With Equal Opportunity Comes Equal Responsibility: The Unconstitutionality of a Male-Only Draft*, 18 GEO. J. GENDER & L. 173, 188 (2017).

<sup>88</sup> Thelma L. Harmon, *Young v. United Parcel Service, Inc.: The Equal Treatment Fallacy*, 20 J. GENDER RACE & JUST. 97, 99 (2017).

<sup>89</sup> Darren Rosenblum, *Sex Quotas and Burkini Bans*, 92 TUL. L. REV. 469, 475 (2017).

<sup>90</sup> Linda Greenhouse, *Harry Blackmun, Independence and Path Dependence*, 56 HASTINGS L.J. 1235, 1242 (2005).

<sup>91</sup> Schultz, *supra* note 49, at 2087.

- “[T]he epitome of patriarchy and paternalism” is “[m]ostly male physicians encouraging healthy, fertile women to undergo procedures that will help infertile women, at a cost and risk unknown to the donor”;<sup>92</sup>
- “Traditional male paternalism was the primary motivator of the decisions of male labor leaders to represent women”;<sup>93</sup>
- “[W]hen a state chooses to reserve its harshest punishments for men, it offends society’s notions of justice and reinforces paternalistic stereotypes about women. As one editorialist put it, ‘[s]o long as paternalistic, doting men give their “little girls” equal rights but not equal responsibilities, we will continue to nurture deep hatred instead of understanding”’;<sup>94</sup>
- “Both slaves and wives were once subject to the all encompassing paternalistic power of the male head of the house. Arguments justifying different treatment for the sexes on the grounds of female inferiority, need for male protection, and happiness in their assigned roles bear a striking resemblance to the half-truths surrounding the myth of the ‘happy slave”’;<sup>95</sup> and
- “[T]he Court rejected a paternalistic view of marriage and the decision to bear and beget a child when it explained that while a husband has an interest in his unborn child, he ‘has no enforceable right to require a wife to advise him before she exercises her personal choices . . . . A state may not give to a man the kind of dominion over his wife that parents exercise over their children.”’<sup>96</sup>

<sup>92</sup> Kari L. Karsjens, Note, *Boutique Egg Donations: A New Form of Racism and Patriarchy*, 5 DEPAUL J. HEALTH CARE L. 57, 85 (2002).

<sup>93</sup> Catherine T. Barbieri, Comment, *Women Workers in Transition: The Potential Impact of the NAFTA Labor Side Agreements on Women Workers in Argentina and Chile*, 17 COMP. LAB. L.J. 526, 534 (1996).

<sup>94</sup> Wendy Imatani Peloso, Note, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1509–10 (1997) (second alteration in original) (footnote omitted).

<sup>95</sup> Maureen B. Cavanaugh, Note, *Towards a New Equal Protection: Two Kinds of Equality*, 12 LAW & INEQ. 381, 411 (1994) (quoting Note, *Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?*, 84 HARV. L. REV. 1499, 1507 (1971)).

<sup>96</sup> Sophia M. Suarez, Note, *A Woman’s Right to Dignity: Equality, Liberty, and Abortion*, 11 N.Y.U. J.L. & LIBERTY 470, 480 (2017) (second alteration in original) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 898 (1992)).

All the articles quoted in this Section sensibly use the gendered word *paternalism* to convey a gendered meaning.

#### E. *Summary*

Section II began with the gendered origins of the word of paternalism, and then showed that a great many legal scholars continue to use the gendered word paternalism to convey a gendered meaning. Many legal scholars sensibly use this gendered word to describe policies reinforcing male dominance or privilege, an attitude especially characteristic of men, or an attitude directed primarily toward women. All these many uses of the gendered word paternalism are supported by the writers' apparent intent to emphasize the important relevance of gender to the writers' points.

### III. LEGAL SCHOLARSHIP'S NON-GENDERED USES OF "PATERNALISM"

#### A. *Introduction*

While Section II praised legal scholars' gendered uses of the word *paternalism*, this Section criticizes legal scholars' non-gendered uses of *paternalism*. This Section contends that the widely accepted reasons for ordinarily using gender-neutral language (to avoid reducing women's visibility or otherwise relegating women to secondary status) counsel against defining *paternalism* without reference to gender or using the word without mentioning any important relevance to gender or otherwise manifesting any intent to convey a gendered meaning. Counterarguments to these contentions are addressed at the end of this Section.

#### B. *Non-Gendered Definitions of "Paternalism"*

Many legal scholars continue to use the gendered word *paternalism* without indicating any important relevance of gender, and thus without any apparent intent to convey a gendered meaning. While gender may be relevant to any legal issue, much legal scholarship does not emphasize or even mention any relevance of gender. For instance, without mentioning gender in the relevant passages, or otherwise manifesting intent to convey a gendered meaning, several scholars, including leaders in the economic analysis of law, cite "paternalism" as one of only two standard justifications for restricting freedom of contract or other private ordering:

- “The standard justifications for mandatory restrictions on freedom of contract are to protect people inside (paternalism) or outside (externalities) the contract”;<sup>97</sup>
- “A liberal state has two basic rationales for regulating how individuals or groups use private property and enter into contracts: externalities and paternalism”;<sup>98</sup> and
- “There are two justifications for mandatory rules: paternalism and externalities.”<sup>99</sup>

Similarly, not mentioning gender in the relevant passages or otherwise manifesting intent to convey a gendered meaning, many legal scholars cite “paternalism” as a standard justification for restrictions on contractual choice, such as the unconscionability doctrine, usury laws, the minimum wage, and countless regulations limiting the range of enforceable promises by consumers, borrowers, employees, investors, and others. For example, law review articles in recent decades say:

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<sup>97</sup> Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2084 (2012). As noted above, Ian Ayres deserves credit as one of legal scholarship’s pioneers in using *parentalism* rather than “paternalism,” Ayres & Gertner, *supra* note 2, at 88, so it is unclear why his 2012 *Regulating Opt-Out* article uses “paternalism,” especially as it exhibits gender-consciousness in passages unrelated to its use of “paternalism.” See Ayres, *supra*, at 2045 (“[O]nce we see that altering rules can be tailored to impose different altering requirements for different contracting parties, we can more easily identify instances where altering rules discriminate on the basis of race or gender.”); *id.* at 2046 (“[E]xplicitly thinking about altering rules can illuminate unexamined aspects of gender discrimination . . .”); *id.* at 2111 n.214 (“I speak of the spouses-to-be in gendered terms because at that time (as is sadly true today) my home state of Missouri did not see fit to extend equal marriage rights to same-sex couples.”).

<sup>98</sup> Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 267 (2006). This article includes thoughtful points about gender in passages unrelated to its use of “paternalism.” See *id.* at 252 (“[T]o the extent that tastes vary according to attributes such as social class, age, gender, and ethnicity, participants in a household relationship can be expected to show a tendency to cluster accordingly.”); *id.* at 317 (“Ambient norms concerning gender roles, particularly if they have been internalized, are likely to strongly influence the allocation of co-occupants’ tasks. By looking to customary gender roles for guidance about what gifts of labor to make, co-occupants can reduce their transaction costs of coordination.” (footnotes omitted)); *id.* at 311 n.326 (“Critics of the gift exchange process among housemates assert that it systematically advantages the powerful, in particular men over women. . . . These critics do not accept, at least in the context of inter-gender relations, the premise that background legal and social conditions in the United States are liberal—that is, that occupants can use either voice or exit to avoid exploitation within the home.” (citations omitted)).

<sup>99</sup> Steven L. Schwarcz, *Rethinking Freedom of Contract: A Bankruptcy Paradigm*, 77 TEX. L. REV. 515, 535 (1999).

- “Paternalism holds that restrictive contract doctrines are justified for striking down contracts entered by people against their own interests”;<sup>100</sup>
- “Where incapacitation affects the borrower’s ability to participate in the marketplace effectively, paternalism remains a compelling reason for structuring lender-borrower relationships according to an objective standard”;<sup>101</sup>
- “[O]ur current regulatory regime, from minimum wage and maximum hour laws to child labor laws and the Occupational Safety and Health Act are based on paternalism”;<sup>102</sup>
- “The invalidity of contracts of peonage or self-enslavement, of agreements purporting to waive the promisor’s right to obtain a divorce or sue for relief under the bankruptcy laws, of provisions conferring on either party a right to specifically enforce their agreement (where no right of this sort exists as a matter of law); the voidability of most contracts made by infants; and the nonwaivable ‘cooling-off’ period imposed by law in many consumer transactions all also have, at least in part, a paternalistic objective”;<sup>103</sup> and
- “Federal securities regulation contains paternalistic features . . . . For example, no investor can be given the opportunity to purchase a security unless the

<sup>100</sup> Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 296 (1995) (“It is hard to find defenders of such a position in the academic literature, but there is a widespread feeling among contract law scholars that paternalistic attitudes account for some judges’ use of the unconscionability doctrine in certain contract cases.” (footnote omitted)); see also Linda J. Ravdin, *Premarital Agreements and the Uniform Acts*, 39 FAM. ADVOC. 34, 36 (2017) (“The UPAA rejected as paternalistic the prevailing approach that permitted a judge to relieve a party of a bad bargain. The UPMAA rejects a return to pre-UPAA paternalism. It retains the unconscionability standard and the majority rule that unconscionability is determined as of execution.”).

<sup>101</sup> Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 PEPP. L. REV. 151, 158–59 (1988) (“Beyond the larger social interest at stake, the paternalism of usury serves a compelling interest in the case of at least one type of borrower, the incapacitated borrower.”).

<sup>102</sup> Mark A. Rothstein, *Genetics and the Work Force of the Next Hundred Years*, 2000 COLUM. BUS. L. REV. 371, 392–93 (“[A]beit a government paternalism intended to compensate for the inequality in bargaining power between employers and employees.”).

<sup>103</sup> Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 764 (1983) (footnotes omitted).

issuer of the security has filed a registration statement with the Securities and Exchange Commission.”<sup>104</sup>

In sum, scholars in contract and related areas of law often use a non-gendered definition of paternalism under which “a policy counts as paternalistic if it is justified on the belief that it will make a person better off than if the person had been left to choose between the available options for him or herself.”<sup>105</sup> Such policies—restricting the choices of a “person” as likely to be a “him” as a “her”—are better described as *parentalist* unless the writer indicates an important relevance of gender, or otherwise shows the writer’s intent to convey a gendered meaning. In the absence of such manifested intent, writers should apply the strong and widely accepted reasons for ordinarily using gender-neutral language to avoid reducing women’s visibility or otherwise relegating women to secondary status. So, when a legal scholar wants to discuss limiting freedom of contract to protect contracting parties of all genders—such as consumers, borrowers, employees, or investors—the rationale for those limits is better described with the gender-neutral word *parentalism*.

The strong and widely-accepted reasons for ordinarily using gender-neutral language apply as well to variants of “paternalism”—such as “libertarian paternalism”<sup>106</sup> (which should be called “libertarian parentalism”) and “soft paternalism”<sup>107</sup> (which should be called “soft parentalism”)—because these variants are generally defined without mention of any important relevance of gender that would suggest an intent to convey a gendered meaning, and thus justify gendered language. For instance, recent articles contain statements like:

- “Under the philosophy of libertarian paternalism, a person in power seeks to create policies that steer people toward outcomes that should promote their welfare but also allow people ‘to go their own way’”,<sup>108</sup>
- “[P]olicies that engage in soft paternalism—as Richard Thaler and Cass Sunstein characterize it, . . . ‘tr[y] to influence choices in a way that will make choosers better off,’ but still ensure that ‘people

<sup>104</sup> Susanna Kim Ripken, *Paternalism and Securities Regulation*, 21 STAN. J.L. BUS. & FIN. 1, 11 (2015).

<sup>105</sup> Jacob Goldin, *Libertarian Quasi-Paternalism*, 82 MO. L. REV. 669, 669 (2017).

<sup>106</sup> Richard H. Thaler & Cass R. Sunstein, *Libertarian Paternalism*, 93 AM. ECON. REV. 175 (2003), <http://nrs.harvard.edu/urn-3:HUL.InstRepos:12876718>.

<sup>107</sup> Marvin Lim, *Scrutinizing Sex Under Natural Law: Unitive Sex, Self-Gratifying Sex, and Concepts of Harm*, 45 CAP. U. L. REV. 579, 632 (2017).

<sup>108</sup> Gregory Mitchell, *Libertarian Nudges*, 82 MO. L. REV. 695, 695 (2017) (footnote omitted).

should be free . . . to opt out of [specific] arrangements if they [choose] to do so”<sup>109</sup>; and

- “[A] number of behavioral science professors and law professors advocate policies and regulations known as forms of soft paternalism. Examples of soft paternalism are defaulting people into 401(k) retirement plans and cooling-off periods before marriage or divorce and for home-solicitation sales. Types of soft paternalism include libertarian paternalism, which endeavors to preserve people’s freedom of choice, while intending to influence people’s choices to make them better off; asymmetric paternalism, which strives to produce large benefits to people who are prone to decision-making errors, while imposing little or even no costs on those who are not prone to decision-making errors; cautious paternalism, which requires that policymakers determine conditions under which policy benefits outweigh costs; and light paternalism, which attempts to enhance individual choice without restricting it.”<sup>110</sup>

Such policies that “influence people’s choices,” when those people may be of any gender, are better described as *parentalist* unless the writer indicates an important relevance of gender, or otherwise shows the writer’s intent to convey a gendered meaning. In the absence of such manifested intent, writers should apply the strong and widely accepted reasons for ordinarily using gender-neutral language to avoid reducing women’s visibility or otherwise relegating women to secondary status. So instead of creating and discussing variants of “paternalism”—such as “libertarian paternalism” or “soft paternalism”—legal scholars should use the gender-neutral *parentalism*, as in “libertarian *parentalism*” or “soft *parentalism*.”

### C. Non-Gendered Uses of “Paternalism”

The previous subsection quoted legal scholarship defining “paternalism,” and variants thereof, in non-gendered ways and cited those passages as examples of writing in which replacing *paternalism* with *parentalism* seems warranted by the widely accepted reasons for gender-neutral language to avoid reducing women’s visibility or otherwise relegating women to secondary status. This Section continues in that vein by

<sup>109</sup> Lim, *supra* note 107, at 632 (third, fourth, fifth, and sixth alterations in original).

<sup>110</sup> Peter H. Huang, *Achieving American Retirement Prosperity by Changing Americans’ Thinking About Retirement*, 22 STAN. J.L. BUS. & FIN. 189, 228 (2017) (footnotes omitted).

quoting other legal scholarship using *paternalism* without suggesting any important relevance to gender and thus no apparent intent to convey a gendered meaning. Thus, in each of the following quotes replacing *paternalism* with *parentalism* seems warranted by the widely accepted reasons for gender-neutral language.

### 1. “Paternalism” Contrasted with Autonomy or Liberty

Several legal scholars use the word *paternalism* as an opposite of autonomy or liberty:

- [A] “prominent theory of rights . . . imposing limits on the state . . . claim[s] that a person’s autonomy is violated if he is treated on the basis of certain impermissible—that is, moralistic or paternalistic—considerations”;<sup>111</sup>
- “Paternalism is widespread throughout our legal system and is undeniably a restriction on freedom. Our society has decided that in certain situations, the government oversight is worth the restriction. For example, society has rightly decided that paternalistic decisions regarding seat belt laws, or laws that bar riding a motorcycle without a helmet, are worth the restriction on our freedoms”;<sup>112</sup>
- “There is undoubtedly a libertarian flavor to autonomy theories of contract, and certainly such theories provide ample resources to criticize paternalist impulses in contract law. Judges and legislators ought not to substitute their vision of the good for that of the parties to a contract”;<sup>113</sup>
- “Libertarians will generally prefer cash transfer schemes rather than in-kind programs on the grounds that cash transfers promote recipients’ autonomy and self-ownership, whereas in-kind transfers exemplify the type of paternalism that libertarianism abhors”;<sup>114</sup> and

<sup>111</sup> Kapsaski Ifigeneia, *Dignity, Rights, and the Role of Consent in German Criminal Law*, 54 SAN DIEGO L. REV. 401, 417 (2017).

<sup>112</sup> Gregg M. Jacobson, *Unnecessary Paternalism: Why Bad Faith Limitations on Liability Should Be Enforced Between Sophisticated Entities*, 12 J. AM. C. CONSTRUCTION LAW. 103, 105 (2018).

<sup>113</sup> Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn’t Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215, 222 (2017).

<sup>114</sup> Miranda Perry Fleischer & Daniel Hemel, *Atlas Nods: The Libertarian Case for a Basic Income*, 2017 WIS. L. REV. 1189, 1234.

- “If paternalism involves the substitution of one’s judgment with another agent’s, egalitarians may need to acknowledge the role of paternalism in support of a large public sector.”<sup>115</sup>

As the autonomy or liberty of a person of any gender may be at issue, legal scholarship should describe the opposite of autonomy or liberty as *parentalism* rather than *paternalism*, unless the writer indicates some important relevance of gender to justify gendered language.

## 2. “Paternalism” Contrasted with the Autonomy to Control One’s Own Body

Other articles in legal journals contrast “paternalism” with the autonomy or liberty to control one’s own body:

- “Standard examples of . . . paternalist legislation [include] bans on the sale of body parts”;<sup>116</sup>
- “Criminal paternalism, for example, would allow persons to be punished when their acts cause significant harms to the very persons who commit them”;<sup>117</sup>
- “[I]ndividual acts of autonomy impact[ing] on individual well-being (e.g. acts of self-harm)” “is the quintessential clash animating debates between liberals/libertarians and paternalists”;<sup>118</sup>
- “[P]ublic health initiatives that require behavioral changes [such as addressing tobacco use, insufficient physical activity, and poor diet] are vulnerable to criticism that they smack of paternalism or interfere with individual liberty”;<sup>119</sup> and
- “[T]he relationship between paternalism and liberty is a zero-sum game: every paternalistic move to protect persons who are drunk from decisions they may later

<sup>115</sup> Eric Beerbohm, *Must Rawlsians Be Hamiltonians? Small Government and Political Illiberalism*, 62 AM. J. JURIS. 21, 27 (2017).

<sup>116</sup> Gonalo Almeida Ribeiro, *A Pluralist Case for the Harm Principle*, 54 SAN DIEGO L. REV. 361, 361 (2017).

<sup>117</sup> Douglas Husak, *What’s Legal About Legal Moralism?*, 54 SAN DIEGO L. REV. 381, 398 (2017).

<sup>118</sup> John Danaher, *Robotic Rape and Robotic Child Sexual Abuse: Should They Be Criminalised?*, 11 CRIM. L. & PHIL. 71, 78 (2017).

<sup>119</sup> Jessica Mantel, *Tackling the Social Determinants of Health: A Central Role for Providers*, 33 GA. ST. U. L. REV. 217, 234 (2017).

regret does so at the cost of limiting the liberty of persons to decide such matters for themselves.”<sup>120</sup>

As the body at issue in these examples may belong to a person of any gender, legal scholarship should describe policies restricting that person’s autonomy to control that body as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

### 3. *Consumers of Soda, Alcohol, or the Like as Objects of “Paternalism”*

Further, several law journal articles describe consumers of potentially harmful products (like soda, alcohol, or marijuana) as objects of “paternalism”:

- “One academic saw [a court decision overturning New York City’s prohibition on restaurants serving certain sugary drinks in large sizes] as a rejection of an unappealing variety of paternalism, and in some circles Mayor Bloomberg [who proposed the soda regulation] was dubbed ‘Nanny Bloomberg’”;<sup>121</sup>
- “When government is perceived as taking away choice in an area of daily living as basic and fundamental as food and drink, Americans sometimes view such efforts with skepticism, especially if the reasons for the proposed limitations are viewed as paternalistic. When a state or local government proposes to tax soda, paternalism concerns are often compounded by suspicion that citizens who are more vulnerable will be asked to shoulder an unfair tax burden”;<sup>122</sup> and refer to
- “*Paternalistic nudges* (nudges that seek to influence people’s choices in their own interests, such as those aimed at discouraging smoking).”<sup>123</sup>

As the consumer at issue may be of any gender, legal scholarship should describe laws or policies discouraging consumption of soda, alcohol, or

<sup>120</sup> Kimberly Kessler Ferzan & Peter Westen, *How to Think (Like a Lawyer) About Rape*, 11 CRIM. L. & PHIL. 759, 787 (2017).

<sup>121</sup> David Ray Papke & Mary Elise Papke, *A Foe More Than a Friend: Law and the Health of the American Urban Poor*, 44 FORDHAM URB. L.J. 1, 21 (2017) (footnote omitted).

<sup>122</sup> David A. Dana & Janice Nadler, *Soda Taxes as a Legal and Social Movement*, 13 NW. J. L. & SOC. POL’Y 84, 106 (2018) (footnote omitted).

<sup>123</sup> Kiran Iyer, *Nudging Virtue*, 26 S. CAL. INTERDISC. L.J. 469, 472 (2017).

marijuana as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

4. *Consumers of FDA-Regulated Products as Objects of “Paternalism”*

Similarly, several pieces of legal scholarship describe consumers of products (actually or possibly) regulated by the Food and Drug Administration (FDA) or other lawmakers as objects of “paternalism”:

- “The 1962 Amendments [to the Food, Drug, and Cosmetic Act] ushered in a new era of paternalism in drug regulation: the requirement that a sponsor demonstrate a drug’s efficacy before consumers can access it removes the choice from patients and their physicians of whether to take a risk on a drug that might offer important benefits but has not been adequately proven to do so”;<sup>124</sup>
- “[T]he FDA is making a paternalistic value judgment—that it is better to ensure zero negative reactions by limiting consumer access to [genetic testing] information across the board than to allow people to make their own choices about whether the tests are appropriate for them”;<sup>125</sup>
- “Gradually, however, federal law shifted from a focus on empowering patients, to a more paternalistic approach—one that in practice is often preoccupied with erecting roadblocks. This reached fruition in the 1962 Kefauver-Harris Drug Amendments to the Federal Food, Drug, and Cosmetic Act, which required manufacturers to ‘provide substantial evidence of effectiveness for the product’s intended use’”;<sup>126</sup>
- “A fifth argument asserted for the right to promote off-label says that the FDA is acting paternalistically, aiming to protect patients from making poor

<sup>124</sup> Kyle T. Edwards, *The Role of Patient Participation in Drug Approvals: Lessons from the Accelerated Approval of Eteplirsén*, 72 FOOD & DRUG L.J. 406, 413 (2017).

<sup>125</sup> Shelby Baird, Note, *Don’t Try This at Home: The FDA’s Restrictive Regulation of Home-Testing Devices*, 67 DUKE L.J. 383, 424 (2017).

<sup>126</sup> Christina Sandefur, *Safeguarding the Right to Try*, 49 ARIZ. ST. L.J. 513, 515 (2017) (footnote omitted).

consumption decisions based on what they (or their physicians) hear in the promotions”;<sup>127</sup>

- “The motivation for this paternalistic intervention [of a federal prohibition of drugs, such as the Anti-Drug Abuse Acts of 1986 and 1988, which raises prices of these drugs and reduces their availability] is simple: drugs can be bad for users and for their families”;<sup>128</sup> and
- “Eliminating [the FDA’s ability to restrict some methods by which pharmaceutical firms promote their products] could push the FDA to look to other—frequently more paternalistic—options, such as product gatekeeping or restrictions on product use, to achieve its public health mission.”<sup>129</sup>

As consumers of most or all FDA-regulated products may be of any gender, legal scholarship should describe laws or policies restricting such consumers’ choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

##### 5. *Consumer Debtors and Consumers Generally as Objects of “Paternalism”*

Additionally, several pieces in law journals describe consumers, or consumer debtors, as objects of “paternalism”:

- “When it comes to consumer protection, paternalism is not a hot issue in Europe: very few authors feel the need to criticize or, as the case may be, justify paternalism. In consumer law particularly, paternalism goes back such a long way in the national traditions of some of the founding Member States that it is hardly questioned”;<sup>130</sup>
- “[P]rivate paternalism, . . . [b]est articulated by Omri Ben-Shahar, . . . asserts that, regardless of the process

<sup>127</sup> Christopher Robertson, *The Tip of the Iceberg: A First Amendment Right to Promote Drugs Off-Label*, 78 OHIO ST. L.J. 1019, 1044 (2017).

<sup>128</sup> Jonathan P. Caulkins & Peter Reuter, *Dealing More Effectively and Humanely with Illegal Drugs*, 46 CRIME & JUST. 95, 111 (2017), <https://www.journals.uchicago.edu/doi/abs/10.1086/688458>.

<sup>129</sup> Patricia J. Zettler, *The Indirect Consequences of Expanded Off-Label Promotion*, 78 OHIO ST. L.J. 1053, 1060 (2017).

<sup>130</sup> Geneviève Helleringer & Anne-Lise Sibony, *European Consumer Protection Through the Behavioral Lens*, 23 COLUM. J. EUR. L. 607, 611 (2017).

by which boilerplate is created, its content is good for the majority of consumers”;<sup>131</sup>

- “[J]udicial review of a reaffirmation agreement [by a debtor in bankruptcy] is largely a paternalistic endeavor wherein a bankruptcy court is obligated to independently consider and reject, if appropriate, an agreement between private parties”;<sup>132</sup>
- “As a result [of the CARD Act], it is surely true that some consumers are paternalistically prevented from running up credit card debts that they can’t pay”;<sup>133</sup> and
- “When he was in the House, [Rep. Randy Neugebauer (R-TX), who complained that Consumer Financial Protection Bureau regulations restricted access to credit,] opposed actions to regulate payday loans, labeling the effort as ‘paternalistic erosion of consumer product choices.’”<sup>134</sup>

As consumers, including consumer debtors, may be of any gender, legal scholarship should describe laws or policies restricting such consumers’ choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

#### 6. *Consumers of Speech or Information as Objects of “Paternalism”*

Likewise, several law journal articles describe recipients of speech or information as objects of “paternalism”:

- “[M]any [Campbell law students] bridled at what they viewed as the [Campbell law] faculty’s paternalism . . . [such as] the required curriculum”;<sup>135</sup>
- “Rejecting the state’s ‘highly paternalistic’ regulatory approach, the Court argued instead for relying on the

<sup>131</sup> James Gibson, *Boilerplate’s False Dichotomy*, 106 GEO. L.J. 249, 261 (2018).

<sup>132</sup> Ryan W. Johnson, *24 Variations of a Reaffirmation Agreement and the Corresponding Actions Required by the Court*, 37 AM. BANKR. INST. J. 26, 26 (2018).

<sup>133</sup> Jason Scott Johnston, *The Freedom to Fail: Market Access as the Path to Overcoming Poverty and Inequality*, 40 HARV. J.L. & PUB. POL’Y 41, 43 (2017).

<sup>134</sup> *Legislative Highlights*, 36 AM. BANKR. INST. J. 10, 10 (2017); see also *Hearing Before the Subcomm. on Fin. Insts. & Consumer Credit of the H. Comm. on Fin. Servs.*, 114th Cong. 5 (2016) (statement of Rep. Randy Neugebauer, Chairman of the H. Subcomm.).

<sup>135</sup> Richard A. Lord, *In Memoriam: F. Leary Davis: Death of a Dream Salesman*, 40 CAMPBELL L. REV. 13, 23 (2018).

free market as the mechanism that would ensure the best expressive environment for consumers”;<sup>136</sup>

- “[W]hen a government chooses to suppress this free flow of information, [the government acts] in precisely the sort of paternalistic manner that the First Amendment forbids”;<sup>137</sup>
- “[T]he Court has disfavored paternalistic attempts to protect consumers from the possibility of receiving misleading information and has favored allowing more commercial speech”;<sup>138</sup> and
- “[The Court has described the] ‘highly paternalistic approach’ of suppressing speech because of its effects on listeners.”<sup>139</sup>

As recipients of speech or information may be of any gender, legal scholarship should describe laws or policies restricting those recipients’ sources of information as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

#### 7. *Lawyers’ Clients as Objects of “Paternalism”*

Many law review articles also describe lawyers’ clients as objects of “paternalism”:

- “Avoiding lawyer paternalism [toward clients] is arguably a guiding principle of the Model Rules. Toward that end, the Rules require full disclosure to a client to the maximum extent possible”;<sup>140</sup>
- “[T]he blanket ban on nonlawyers’ legal advice that applies in most jurisdictions does not seem to be narrowly drawn . . . . Such paternalistic and

<sup>136</sup> Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1427 (2017).

<sup>137</sup> Daniel D. Bracciano, Comment, *Commercial Speech Doctrine and Virginia’s ‘Thirsty Thursday’ Ban*, 27 GEO. MASON U. C.R. L.J. 207, 238 (2017).

<sup>138</sup> Lauren Myers, Note, *A Picture Is Worth a Thousand Material-Connection Disclosures: Endorsers, Instagram, and the Federal Trade Commission’s Endorsement Guides*, 66 DUKE L.J. 1371, 1400 (2017).

<sup>139</sup> David S. Ardia, *Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1428 (quoting *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 375 (2002)).

<sup>140</sup> Elinor R. Jordan, *Point, Click, Green Card: Can Technology Close the Gap in Immigrant Access to Justice?*, 31 GEO. IMMIGR. L.J. 287, 337 (2017) (footnote omitted).

prophylactic bans have seldom been accepted by the Supreme Court”;<sup>141</sup>

- Scholars have raised “the question of whether lawyers are overly paternalistic to their clients”;<sup>142</sup>
- “[A]ttorneys’ relationships with juveniles have transitioned from an initially more paternalistic model (*i.e.*, best interests) to more of a legal advocacy role (*i.e.*, expressed interest model)”;<sup>143</sup>
- “The cocooning of lawyers from their ethical conscience may, in fact, also harm their clients in that lawyers with anesthetized moral consciences may impose solutions paternalistically on clients who would not have wanted their interest pursued at all costs had they been engaged in a ‘moral dialogue’”;<sup>144</sup> and
- “[T]he tribal lawyer who excessively second-guesses the authority of an authorized agent risks paternalistically depriving the tribe of its autonomy as a political entity and as a client.”<sup>145</sup>

As lawyers’ clients may be of any gender, legal scholarship should describe laws or policies restricting their information or choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

#### 8. *Medical Patients as Objects of “Paternalism”*

A number of law articles describe medical patients as objects of “paternalism”:

- “The paternalism that characterized the past practice of medicine, where physicians were presumed to

<sup>141</sup> Michele Cotton, *Improving Access to Justice by Enforcing the Free Speech Clause*, 83 BROOK. L. REV. 111, 149 (2017).

<sup>142</sup> David Luban & W. Bradley Wendel, *Philosophical Legal Ethics: An Affectionate History*, 30 GEO. J. LEGAL ETHICS 337, 342–43 (2017).

<sup>143</sup> Erika Fountain & Jennifer L. Woolard, *The Capacity for Effective Relationships Among Attorneys, Juvenile Clients, and Parents*, 14 OHIO ST. J. CRIM. L. 493, 499 (2017).

<sup>144</sup> JoNel Newman & Donald Nicolson, *A Tale of Two Clinics: Similarities and Differences in Evidence of the “Clinic Effect” on the Development of Law Students’ Ethical and Altruistic Professional Identities*, 35 BUFF. PUB. INT. L.J. 1, 8 (2017).

<sup>145</sup> Michael J. Lockman, *An Ethical Representation of Sovereign Clients in Debt Disputes*, 30 GEO. J. LEGAL ETHICS 73, 85 (2017).

know what is best for patients, has been replaced with respect for patient autonomy”;<sup>146</sup>

- “Health care providers are shifting away from a paternalistic approach to patient care and moving towards a partnership approach”;<sup>147</sup>
- “Whereas traditionally, physicians would paternalistically make decisions for their patients, patients now have a much greater role in medical decision making”;<sup>148</sup>
- “Nursing homes have historically taken the position that their duty of care to residents requires that, in some quasi-paternalistic view, they err on the side of protecting the ‘vulnerable’ resident from harm”;<sup>149</sup>
- “These approaches [patient-centered, or client-centered, care in helping professions such as doctors and social workers charged with treating their patients, and lawyers charged with representing their clients] actively involve the patient or client in information-gathering and decision-making (in contrast to more paternalistic and traditional approaches to patient care)”;<sup>150</sup> and
- “Even a well-intended physician may be more paternalistic when dealing with elderly and disabled patients.”<sup>151</sup>

As medical patients may be of any gender, legal scholarship should describe laws or policies restricting their information or choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

<sup>146</sup> Jessica Mantel, *Refusing to Treat Noncompliant Patients Is Bad Medicine*, 39 CARDOZO L. REV. 127, 160–61 (2017).

<sup>147</sup> S. Allan Adelman, *The Evolution of Patient Rights: Individual Benefits and Provider Burdens*, 10 J. HEALTH & LIFE SCI. L. 66, 72 (2017).

<sup>148</sup> Hilary Young, *A Proposal for Access to Treatment Contrary to Clinical Judgment*, 11 MCGILL J.L. & HEALTH 1, 5 (2017).

<sup>149</sup> Roy G. Spece, Jr. et al., *(Implicit) Consent to Intimacy*, 50 IND. L. REV. 907, 919 (2017).

<sup>150</sup> Debra Chopp, *Addressing Cultural Bias in the Legal Profession*, 41 N.Y.U. REV. L. & SOC. CHANGE 364, 395 (2017).

<sup>151</sup> Browne Lewis, *A Deliberate Departure: Making Physician-Assisted Suicide Comfortable for Vulnerable Patients*, 70 ARK. L. REV. 1, 41 (2017).

### 9. *Investors as Objects of “Paternalistic” Policies*

Some legal scholarship uses the word “paternalistic” to describe policies designed to protect investors:

- “[M]erit regulation [of securities] is paternalistic, predicated on the notion that investors are unable to determine which investments further their interests and which do not”,<sup>152</sup>
- “Where dissenter’s rights are imposed by statute there is a paternalistic protection afforded a potentially dissenting member to the disadvantage of the LLC and the remaining members”,<sup>153</sup> and
- “Human investors are locked out of direct investments in hedge funds themselves by a variety of paternalistic, if well-meaning, rules, which include requirements that investors must be able to change their allocation of investments in 401(k)s at least once every three months, and by the reality that almost all hedge funds offer only unregistered securities and are thus prohibited from securing investments from anyone who is not a so-called ‘accredited investor’ under Regulation D.”<sup>154</sup>

As investors may be of any gender, legal scholarship should describe laws or policies restricting their information or choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

### 10. *Employees as Objects of “Paternalistic” Policies*

Some articles in law journals describe employees as objects of “paternalistic” policies:

- “Traditionally, employers had a more paternalistic role of defining and funding the benefits that employees most needed.”<sup>155</sup>

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<sup>152</sup> Anita K. Krug, *The Other Securities Regulator: A Case Study in Regulatory Damage*, 92 TUL. L. REV. 339, 378 (2017).

<sup>153</sup> Thomas E. Rutledge & Katharine M. Sagan, *An Amendment Too Far?: Limits on the Ability of Less Than All Members to Amend the Operating Agreement*, 16 FLA. ST. U. BUS. REV. 1, 34 (2017).

<sup>154</sup> Leo E. Strine, Jr., *Who Bleeds When the Wolves Bite?: A Flesh-and-Blood Perspective on Hedge Fund Activism and Our Stranger Corporate Governance System*, 126 YALE L.J. 1870, 1934–35 (2016) (footnote omitted).

<sup>155</sup> Lauren R. Roth, *Redefining “Medical Care”*, 27 CORNELL J.L. & PUB. POL’Y 65, 70 (2017).

- “Railroads commonly adopted paternalistic policies toward their employees.”<sup>156</sup>

As employees may be of any gender, legal scholarship should describe laws or policies restricting their information or choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

#### 11. *Entire Peoples as Objects of “Paternalism”*

Several pieces of legal scholarship describe entire peoples as objects of “paternalism”:

- “The federal government’s ‘paternalistic federal management policies’ and ‘failure to acknowledge the tribes’ sovereign powers’ has allowed others to exploit tribal reservations”,<sup>157</sup>
- “There is at least a healthy dose of skepticism, however, among some about using the trust responsibility [in which the federal government acts as ‘trustee’ over Indian trust lands] to perpetuate what is seen as a paternalistic federal trust structure, and an associated implication of Indian incompetence, rather than using the federal trust relationship as a true platform for indigenous self-governance and self-determination”,<sup>158</sup>
- “The [Hawaiian Home Commission] Act is inherently flawed because it is rooted in racism and shot through with paternalism. . . . Paternalism is reflected in the Act because native Hawaiians become wards of the government by having to pay rent for the lands, instead of being given lands fee simple”,<sup>159</sup> and
- “[W]e tend to paternalistically discard suggestions that most Palestinians might agree with their elected government which we deem extremist (Hamas), and

<sup>156</sup> Robert J. Kaczorowski, *From Petitions for Gratuities to Claims for Damages: Personal Injuries and Railroads During the Industrialization of the United States*, 57 AM. J. LEGAL HIST. 261, 285 (2017).

<sup>157</sup> Jin Hyung Lee, *Establishing Applicable Water Quality Standards for Surface Waters on Indian Reservations*, 66 EMORY L.J. 965, 1000–01 (2017).

<sup>158</sup> Jessica A. Shoemaker, *Complexity’s Shadow: American Indian Property, Sovereignty, and the Future*, 115 MICH. L. REV. 487, 542 (2017).

<sup>159</sup> Troy J.H. Andrade, *(Re)Righting History: Deconstructing the Court’s Narrative of Hawai’i’s Past*, 39 U. HAW. L. REV. 631, 677 (2017) (citations omitted).

so we choose to ignore any Palestinian discourse disconfirming our wishful perceptions.”<sup>160</sup>

As entire peoples may include individuals of any gender, legal scholarship should describe laws or policies restricting or devaluing their choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

## 12. *Children as Objects of “Paternalism”*

Several law review articles describe children as the objects of “paternalism”:

- “[J]uvenile defenders face . . . the challenge of paternalism, which threatens to deprive children of meaningful choice and voice in the delinquency system”;<sup>161</sup>
- “The ‘no excuses’ model sets up charter schools designed to actively address the attributes thought to hold back low income students through a hands-on, paternalistic model of behavioral modification and direction”;<sup>162</sup>
- “The infancy doctrine is a middle ground between complete freedom of contract for youth and a paternalistic prohibition on their entering into binding agreements”;<sup>163</sup> and
- The Convention on the Rights of the Child “pivoted local and international charitable organizations away from paternalistic approaches to child protection and toward the placement of children at the heart of their own human rights recognition.”<sup>164</sup>

As children may be of any gender, legal scholarship should describe laws or policies restricting their information or choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

<sup>160</sup> Sanda Kaufman, Chris Honeyman & Andrea Kupfer Schneider, *Should They Listen to Us? Seeking a Negotiation/Conflict Resolution Contribution to Practice in Intractable Conflicts*, 2017 J. DISP. RESOL. 73, 86.

<sup>161</sup> Kristin Henning, *Race, Paternalism, and the Right to Counsel*, 54 AM. CRIM. L. REV. 649, 650 (2017).

<sup>162</sup> Amy L. Wax, *Educating the Disadvantaged—Two Models*, 40 HARV. J.L. & PUB. POL’Y 687, 693 (2017).

<sup>163</sup> Kevin Lapp, *Taking Back Juvenile Confessions*, 64 UCLA L. REV. 902, 940 (2017).

<sup>164</sup> Janet E. Lord, *Child Rights Trending: Accommodating Children with Disabilities in the Global Human Rights Framework and US Foreign Policy*, 16 WHITTIER J. CHILD & FAM. ADVOC. 1, 3 (2017).

### 13. *Disabled Persons as Objects of “Paternalism”*

Many pieces of legal scholarship describe disabled persons as objects of “paternalism”:

- “Article 12 challenges long-standing paternalistic laws and policies that had deprived people with disabilities throughout the world of their right to make and exercise decisions that people who are not labeled as disabled are free to make every day”;<sup>165</sup>
- “Despite their intensive paternalism and strict rules, home officials [overseeing institutions for disabled veterans] emphasized the home aspect of the institutions in an attempt to differentiate them from other charitable institutions”;<sup>166</sup>
- “The independent living model is part of the larger disability rights movement and social model of disability, which ‘developed as a reaction to the perceived paternalism and oppression that attended a welfare-based response to disability’”;<sup>167</sup>
- “[T]his assumption invites the return of a paternalistic view of disabled persons—an attitude which the disability community has worked long and hard to eradicate: [It] threatens to set back decades of legislative action and social advocacy devoted to the goal of empowering the disabled to take control over every aspect of their lives”;<sup>168</sup> and
- “Disability is viewed socially as a personal trag-edy [sic] or misfortune that requires charitable giving, pity, and paternalism from society.”<sup>169</sup>

As disabled persons may be of any gender, legal scholarship should describe laws or policies restricting their choices as *parentalist* rather than

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<sup>165</sup> Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 575 (2017).

<sup>166</sup> Rabia Belt, *Ballots for Bullets?: Disabled Veterans and the Right to Vote*, 69 STAN. L. REV. 435, 463 (2017) (emphasis omitted).

<sup>167</sup> Andrea Kozak-Oxnard, *Care and Community Empowerment: Coalition-Building Between Home Care Workers and Disability Rights Activists*, 35 COLUM. J. GENDER & L. 70, 80 (2017).

<sup>168</sup> Kathryn L. Tucker, *Building Bridges Between the Civil Rights Movements of People with Disabilities and Those with Terminal Illness*, 78 U. PITT. L. REV. 329, 340–41 (2017) (second alteration in original) (citation omitted).

<sup>169</sup> Doron Dorfman, *Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process*, 42 LAW & SOC. INQUIRY 195, 199 (2017).

*paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

#### 14. *Miscellaneous Objects of “Paternalism”*

Legal scholarship includes a variety of other people, who could be of any gender, described as objects of “paternalism.” Numerous examples include:

- “Poverty regulation actively pressed poor people into the worst jobs . . . . Such [regulation] is . . . paternalistic in its use of authority to manage and monitor poor people’s behaviors”;<sup>170</sup>
- “Congress paternalistically justified BACT [the Best Available Control Technology mandated by the EPA and authorized by the Clean Air Act] by claiming that by imposing BACT, states would have more room for economic growth under the increment because all sources would be required to install state-of-the-art controls”;<sup>171</sup>
- “Some modern scholars believe that African Americans actually became worse off after the Civil War as ‘they lost the paternalistic slave health care system and very little was available to replace it’”;<sup>172</sup>
- “Negating [an individual’s actual expressed] consent [to sexual acts because that individual was intoxicated] may not only result in criminalizing innocuous behaviors, when an actor relies on a partner’s express assent to sex, but it is also notably paternalistic, raising concerns that the law impermissibly interferes with this partner’s sexual behavior in circumstances where the partner might be making less than prudent decisions that [the partner] would not have made had the partner’s judgment not been clouded by intoxication”;<sup>173</sup>

<sup>170</sup> Nantiya Ruan, *Corporate Masters & Low-Wage Servants: The Social Control of Workers in Poverty*, 24 WASH. & LEE J. C.R. & SOC. JUST. 103, 108–09 (2017).

<sup>171</sup> John C. Evans & Donald van der Vaart, *Prevention of Significant Deterioration: A Case for Repeal*, 47 ENVTL. L. REP. 10,742, 10,746 (2017).

<sup>172</sup> Anna Blackburne-Rigsby, *The Importance of a Diverse Judiciary to Closing the Historic “Health” Gap Between Blacks and Whites, and President Obama’s Legacy*, 60 HOW. L.J. 641, 654 (2017) (emphasis omitted).

<sup>173</sup> Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 BROOK. L. REV. 1031, 1067 (2017).

- “[A]lthough court officials and police officers assert that they direct low-income families into the juvenile justice system out of a desire to provide ‘help,’ this paternalistic attitude ultimately allows the state to attain social control over a wider swath of the poor”;<sup>174</sup>
- “[A] strong paternalism argument . . . can arise when there is a reason to believe people will fail to adequately look out for their own interests, such as laws restricting gambling out of concern for the social costs of gambling addictions and the impact on disadvantaged or vulnerable populations; critics of marijuana legalization have raised similar arguments”;<sup>175</sup>
- “One who has violated the law deserves to lose the protection against paternalistic interference that other adult citizens enjoy as a matter of right”;<sup>176</sup>
- “The family [in need of ongoing social services] may truly require assistance but refuse to succumb to the paternalistic notion of state oversight”;<sup>177</sup>
- “[N]udge theory . . . strikes a delicate balance between private and public regulation by paternalistically nudging people through a choice-architecture that does not eliminate or reduce freedom of choice”;<sup>178</sup>
- Prosecuting jaywalkers “can be justified by the idea of paternalism—the idea that people should be protected from their own foolishness and that the State knows better than the individual”;<sup>179</sup>
- “For supporters, basic income does several things: it eliminates poverty; counters rising income inequality; [and] non-paternalistically promotes freedom because

<sup>174</sup> Tamar R. Birkhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B.C. L. REV. 379, 414 (2017).

<sup>175</sup> Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 443–44 (2017) (footnote omitted).

<sup>176</sup> Linda Radzik, *Desert of What? On Murphy’s Reluctant Retributivism*, 11 CRIM. L. & PHIL. 161, 167 (2017).

<sup>177</sup> Rakesh Beniwal, *Implicit Bias in Child Welfare: Overcoming Intent*, 49 CONN. L. REV. 1021, 1037 (2017).

<sup>178</sup> Dana Pugach & Michal Tamir, *Nudging the Criminal Justice System into Listening to Crime Victims in Plea Agreements*, 28 HASTINGS WOMEN’S L.J. 45, 62 (2017).

<sup>179</sup> Michael Lewyn, *The Criminalization of Walking*, 2017 U. ILL. L. REV. 1167, 1194.

recipients are free to use their basic income in whatever way they deem appropriate, in contrast to traditional means-tested and in-kind welfare state policies”,<sup>180</sup> and

- “[A] truly paternalistic copyright regime would provide meaningful protections for authors against one-sided copyright transfers and would rely on more tailored and direct incentives for artistic creation.”<sup>181</sup>

As the relevant people in any of these examples may be of any gender, legal scholarship should describe laws or policies restricting their choices as *parentalist* rather than *paternalist*, unless the writer indicates some important relevance of gender to justify gendered language.

#### D. *Arguments for Using Paternalism to Describe Laws Restricting People of All Genders*

##### 1. *Overview*

The previous two subsections quoted legal scholarship defining and using the word “paternalism” without suggesting any important relevance to gender and thus no apparent intent to convey a gendered meaning. These quotes refer to laws or policies aiming to protect people by restricting their choices. As the objects of these laws and policies may be of any gender, replacing *paternalism* with *parentalism* in each of these quotes is presumptively warranted by the general presumption for gender-neutral language (summarized in Section I) to avoid reducing women’s visibility or otherwise relegating women to secondary status. This argument for the gender-neutral word *parentalism* may prompt several counterarguments, including: (A) all laws are gendered male; (B) restricting people’s choices (even to protect those people) is gendered male; and (C) *paternalism*’s negative connotations attach to men.

##### 2. *Law as Gendered Male*

If one believes that all our laws are gendered male then one might well believe laws or policies aiming to protect people by restricting their choices are gendered male, even if persons of any gender may be the objects of these laws or policies. The belief that all our laws are gendered male might follow from the fairly common feminist view that “law perpetuates patriarchy and

<sup>180</sup> Matthew Dimick, *Better Than Basic Income? Liberty, Equality, and the Regulation of Working Time*, 50 IND. L. REV. 473, 476 (2017).

<sup>181</sup> Kevin J. Hickey, *Copyright Paternalism*, 19 VAND. J. ENT. & TECH. L. 415, 416 (2017).

has done so for centuries, across the globe, and in all aspects of life.”<sup>182</sup> For instance, Deborah Threedy writes:

American law has, until very recently, been constructed almost exclusively by the male gender. Therefore, it should not be surprising that ‘law’ incorporates and reflects male gender traits. Some of these traits are identified as the preference for rationality over other ways of knowing (e.g., intuition); for objectivity over subjectivity; for abstraction over contextualization; and for hierarchical decision-making over consensus or compromise. Contract law, like law more generally, is said to be male-gendered because of the perceived presence of these traits. In other words, contract law is not neutral; it is one of the many social structures that supports a male preference.<sup>183</sup>

Arguments along these lines might plausibly justify using gendered language to discuss any law—including using the gendered word *paternalism* to describe laws aiming to protect people of all genders by restricting their choices—because a writer making such an argument would be manifesting an intent to convey a gendered meaning: all our laws are gendered male. In other words, a writer who says all our laws are gendered male thereby justifies that writer’s use of the gendered word *paternalism* much as a writer is justified in using that gendered word to refer to the institutionalization of male dominance or an attitude especially characteristic of men.<sup>184</sup>

### 3. *Protecting Others by Restricting Their Choices as Gendered Male*

Even a writer who does not argue that all our laws are gendered male might argue that laws aiming to protect people (of all genders) by restricting their choices are gendered male. That is, one might argue that protecting-by-restricting-choice is gendered male, so laws doing this are gendered male.

The propensity to believe that protecting-by-restricting-choice is gendered male may depend on which analogy one makes. One view is that laws aiming to protect people (of all genders) by restricting their choices are analogous to situations, discussed in Section II, in which men purportedly aim (by law or otherwise) to protect women by restricting women’s

<sup>182</sup> Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 *FORDHAM L. REV.* 977, 998 (2018) (describing the “critical claim” of “[f]eminist legal theory from the 1980s and 1990s”). See, e.g., CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 163 (1989) (“The state is male jurisprudentially, meaning that it adopts the standpoint of male power on the relation between law and society.”).

<sup>183</sup> Debora L. Threedy, *Feminists & Contract Doctrine*, 32 *IND. L. REV.* 1247, 1249 (1999) (footnotes omitted).

<sup>184</sup> See *supra* Sections II.A–B.

choices.<sup>185</sup> Under this view, one might plausibly see protecting-by-restricting-choice laws (aiming to protect people of all genders) as gendered male. In this view's analogy, the people protected and restricted by such laws are analogous to women and the lawmakers are analogous to men.

In contrast, the alternative view analogizes protecting-by-restricting-choice laws to parenting, so the people protected and restricted by such laws are analogous to children, while the lawmakers are analogous to parents and other caretakers of children. This seems the better analogy for the same reasons our society and legal profession have largely moved to gender-neutral language: protecting (only) women by restricting (only) women's choices reduces women's visibility, "relegates girls and women to 'secondary status,'" and thus "not only reflects but also helps to construct and perpetuate a sexist reality."<sup>186</sup> In contrast, protecting children (of all genders) by restricting children's choices raises no such concerns, and laws aiming to protect people (of all genders) by restricting their choices raise no such concerns. Sexism is not central to concerns about either laws aiming to protect people of all genders by restricting their choices, or to concerns about protecting children (of all genders<sup>187</sup>) by restricting their choices. In this important respect, laws aiming to protect people of all genders by restricting their choices are more analogous to parents aiming to protect children (of all genders) by restricting their choices than to men purportedly aiming to protect women by restricting women's choices.

Furthermore, while many doubt that men purporting to protect women by restricting women's choices are sincerely trying to protect women, as opposed to privilege men,<sup>188</sup> even libertarians (like me) opposed to many laws restricting people's choices ostensibly for their own good can concede that many supporters of such laws are sincerely trying to protect vulnerable people, much as many parents restricting their children's choices are sincerely trying to protect their children—such as by restraining an impulsive toddler about to run into the street without checking for oncoming cars. So, laws aiming to protect people (of all genders) by restricting their choices should be analogized, not to protecting women by restricting women's choices, but to parents protecting children (of all genders) by restricting children's choices.

And if one analogizes laws aiming to protect people (of all genders) by restricting their choices to parents protecting children (of all genders) by

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<sup>185</sup> See *supra* Section II.A.

<sup>186</sup> Fischer, *supra* note 29, at 222 (citations omitted).

<sup>187</sup> In contrast, sexism may be very relevant to parents treating their sons and daughters differently with respect to protecting them by restricting their choices.

<sup>188</sup> See *infra* note 207.

restricting children's choices, then characterizing such laws as gendered collides with the fact that parents of all genders protect their children by restricting their children's choices.<sup>189</sup> In other words, analogizing protect-by-restricting-choice laws to parenting strengthens the case for describing such laws as (gender-neutral) *parentalism* rather than *paternalism*. In Rob Atkinson's words,

I say "parentalism" rather than "paternalism" in part to avoid the latter term's connotations of officious intermeddling, but primarily to use a gender-neutral synonym. At least in my own experience, concern for another's welfare combined with a claim of superior insight into the other's needs can come from a parent of either sex.<sup>190</sup>

However, while modern life confirms that "concern for another's welfare combined with a claim of superior insight into the other's needs can come from a parent of" any gender, that parental "concern for another's welfare" is not always expressed by parental restrictions on their children's choices.<sup>191</sup> For instance, Peter Huang reports:

I was once asked upon the start of a talk with discussion of some ideas related to paternalism, why the word "maternal" typically evokes positive connotations and emotions, but the word "paternal" usually evokes negative connotations and emotions. A member of that audience suggested that one reason is that mothers frame their interventions (e.g., "let me help you do that") differently than fathers do (e.g., "do this and don't do that"). Another member of the audience volunteered that dads and moms generally engage in different substantive types of parental interventions, perhaps due to a traditional sexual division of labor or outdated gender stereotypes.<sup>192</sup>

These audience members may be suggesting that fathers, more than mothers, protect their children by restricting their children's choices. And perhaps empirical studies would show that "protect-by-restricting-choice" parenting is gendered, that is, significantly more common among fathers than mothers.<sup>193</sup> Such data might plausibly justify using the gendered word

<sup>189</sup> See *infra* Section IV.A.6.

<sup>190</sup> Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 523 n.73 (1990).

<sup>191</sup> *Id.*

<sup>192</sup> Peter H. Huang, *Authentic Happiness, Self-Knowledge and Legal Policy*, 9 MINN. J.L. SCI. & TECH. 755, 779 (2008) (footnotes omitted).

<sup>193</sup> "Research on parenting during adolescence has shown that fathers tend to be less warm and more restrictive than mothers." Matthew F. Bumpus et al., *Parental Autonomy Granting During Adolescence: Exploring Gender Differences in Context*, 37 DEVELOPMENTAL PSYCHOL. 163, 166 (2001) (citing R. D. Parke, *Fathers and Families*, in 3 HANDBOOK OF PARENTING 27, 27–63 (M.H. Bornstein ed., 1995)).

*paternalism* to describe laws or policies aiming to protect people (of all genders) by restricting their choices because such data would support analogizing such laws specifically to fathering, rather than generally to parenting.

On the other hand, perhaps empirical studies would show that “protect-by-restricting-choice” parenting is actually gendered female, that is, significantly more common among mothers than fathers. “Perhaps fathers seek to make their children strong and independent while mothers seek to keep them close to home and safe.”<sup>194</sup> That conjecture by Joseph William Singer would suggest that laws treating parties as “strong and independent” are more paternal, while laws aiming to protect parties (or keep them “safe”) are more maternal.

This suggestion perhaps finds support in Deborah Thredy’s observation of “‘freedom of contract’ being associated with the male gender

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More recent scholarly literature assessing children’s autonomy often refers to parental “monitoring” of children, which may often be different from restricting them. *See, e.g.*, Ann C. Crouter et al., *Conditions Underlying Parents’ Knowledge About Children’s Daily Lives in Middle Childhood: Between- and Within-Family Comparisons*, 70 *CHILD DEV.* 246, 246 (1999) (“Mothers’ knowledge did not vary as a function of how much they worked outside the home, but fathers knew more about their children’s activities, whereabouts, and companions when their wives worked longer hours. . . . Both mothers and fathers knew more about offspring of the same sex than about opposite-sex children. . . . Perhaps because parental involvement and monitoring are more ‘scripted’ for mothers than fathers, fathers’ knowledge was more consistently related to their children’s characteristics than was mothers.”); Nancy Darling & Lauree Tilton-Weaver, *All in the Family: Within-Family Differences in Parental Monitoring and Adolescent Information Management*, 55 *DEVELOPMENTAL PSYCHOL.* 390, 391 (2019) (“In one of the few studies of monitoring that sampled two children per family, Crouter, Helms-Erikson, Updegraff, and McHale [1999] measured parents’ knowledge of children’s routine activities by comparing parent and child reports across 7 days. The correlation between parents’ knowledge of their two children’s activities was relatively high [ $r = .41$  for mothers and  $.65$  for fathers].”); *id.* at 399 (“We were also unable to differentiate maternal from paternal behaviors.”). Studies have compared protect-by-restricting parenting in different societies, *see supra* note 9 (quoting Darling), and within our society of parents with different levels of education, Laura Wray-Lake et al., *Developmental Patterns in Decision-Making Autonomy Across Middle Childhood and Adolescence: European American Parents’ Perspectives*, 81 *CHILD DEV.* 636, 648 (2010) (“Our finding of a positive association between parents’ education and youth decision-making autonomy is consistent with some prior work and with the link between social class and autonomy found in the broader parenting literature. Our findings did not support [the] perspective that parents of lower social status offer more autonomy to encourage ‘natural growth’ in their children. Instead, our findings suggest that parents with less formal education may emphasize parental authority, perhaps to create a safer environment, whereas more educated parents emphasize self-direction.” (citations omitted)).

Studies address gender in comparing protect-by-restricting of boys compared to such parenting of girls. *See, e.g., id.* (“Our results converged with those of several prior studies in documenting that girls have more autonomy in decisions than do boys. Girls may have greater decision-making autonomy as a function of their relative maturity. Our results are inconsistent with studies that found no gender differences or differences favoring boys.” (citations omitted)).

However, research revealed no additional studies (beyond that cited in the first paragraph of this footnote) focused on differences (or lack of differences) between mothers and fathers with respect to protect-by-restricting parenting.

<sup>194</sup> Joseph William Singer, *Anti Anti-Paternalism*, 50 *NEW ENG. L. REV.* 277, 282 (2016).

and ‘paternalism’ with the female gender.”<sup>195</sup> Freedom of contract has long received much of its support from conservatives and libertarians,<sup>196</sup> centered on the Republican Party, which receives most of its votes from men.<sup>197</sup> Legally protecting vulnerable parties from harsh contract terms tends to be emphasized more by progressives and liberals,<sup>198</sup> centered on the Democratic Party, which receives more of its votes from women.<sup>199</sup> This

<sup>195</sup> Debora L. Threedy, *Feminists & Contract Doctrine*, 32 IND. L. REV. 1247, 1261 (1999). Threedy “admit[s] to some disquiet with gendering ‘freedom of contract’ and ‘paternalism’ in this way.” *Id.* at 1261 n.79.

<sup>196</sup> See, e.g., J.M. Balkin, *Too Good to Be True: The Positive Economic Theory of Law*, 87 COLUM. L. REV. 1447, 1454 (1987) (reviewing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987)) (“Since the late nineteenth century, American political conservatism has generally been individualist in economic matters; it has . . . viewed freedom of contract as a fundamentally important value and resisted attempts to regulate it.”); Jean Braucher, *Deception, Economic Loss and Mass-Market Customers: Consumer Protection Statutes as Persuasive Authority in the Common Law of Fraud*, 48 ARIZ. L. REV. 829, 833 (2006) (“[T]he conservative side in the legal culture war believes customers should insist on warranties to protect themselves against deceptive practices, and if they don’t, *caveat emptor* . . . .”); Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 50 (2001) (“[R]ealist/progressive principles such as bad faith and unconscionability crystallized into consumer protection legislation and agency regulation . . . .”); Robert J. Dignam, *There Is More to Fear Than Fear Itself: The National Labor Relations Board’s Attack on Purposeful and Necessary Workplace Conduct Rules Must Be Stopped*, 52 VAL. U. L. REV. 395, 398 n.13 (2018) (“The NLRA was opposed by Republicans and big business, and was challenged as an interference with the ‘freedom of contract’ between employers and employees . . . .”); Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977, 1990 (2017) (“It is certainly true that conservatives and libertarians believe in the freedom of contract . . . .”); Robert Hockett, *Whose Ownership? Which Society?*, 27 CARDOZO L. REV. 1, 22 (2005) (“*Lochner* infamously favored libertarian-liberal freedom of contract over egalitarian-liberal equalizing of de facto bargaining power and consequent opportunity.”); Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller’s “Consideration and Form”*, 100 COLUM. L. REV. 94, 173 (2000) (“[C]ontract doctrine was the site . . . of a[] . . . mildly ideologized debate between conservatives touting freedom of contract, on one side, and liberals advocating policing bargains in the interests of weak parties, on the other.”); Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 738 (2011) (“[T]here is some evidence to suggest that the decision by an elected attorney general to take action in the consumer-protection field is influenced by citizen ideology: Attorneys general from ‘liberal’ states do more, while those from ‘conservative’ states do less.”); Matthew Lister, *Citizenship, in the Immigration Context*, 70 MD. L. REV. 175, 231–32 (2010) (“If there were no limits on what could be bargained for, this would be a serious problem. Such a system would be a libertarian system (rather than liberal) that gives unrestricted freedom of contract a place of pride. Liberal theories rightly reject such unrestricted freedom of contract.” (footnotes omitted)); Amy Widman, *Advancing Federalism Concerns in Administrative Law Through a Revitalization of State Enforcement Powers: A Case Study of the Consumer Product Safety and Improvement Act of 2008*, 29 YALE L. & POL’Y REV. 165, 198 (2010) (referring to “the basic progressive tradition of consumer protection”).

<sup>197</sup> Richa Chaturvedi, *A Closer Look at the Gender Gap in Presidential Voting*, PEW RES. CTR. (July 28, 2016), <http://www.pewresearch.org/fact-tank/2016/07/28/a-closer-look-at-the-gender-gap-in-presidential-voting/>.

<sup>198</sup> See Fitzpatrick, *supra* note 196, at 1991–93 (noting that liberals, more so than conservatives, believe that the government should intervene to regulate the market in efforts to ensure fairness).

<sup>199</sup> Chaturvedi, *supra* note 197.

“gender gap” in voting has continued since 1980,<sup>200</sup> during which time “Americans have come to view the [two major political] parties increasingly in gendered terms of masculinity and femininity.”<sup>201</sup>

Against this background of “[m]asculine Republicans and [f]eminine Democrats,”<sup>202</sup> Deborah Threedy “acknowledg[ing] the irony of labeling ‘paternalism’ as female gendered”<sup>203</sup> might highlight how her plausible reasoning overcomes a misleading label. That is, *paternalist* may be a misleadingly inapt label for the protect-by-restricting-choice laws Threedy plausibly identifies as gendered female. Perhaps *maternalism* better describes the justifications for restrictions on contractual freedom—such as the unconscionability doctrine, usury laws, the minimum wage, and countless regulations limiting the range of enforceable promises by consumers, borrowers, employees, investors, and others—more supported by “feminine Democrats” than “masculine Republicans.”

In sum, empirical and conceptual doubt cautions against confidently concluding that protect-by-restricting-choice parenting is gendered. As noted above, empirical studies might show whether “protect-by-restricting-choice” parenting is gendered, that is, whether it is significantly more common among parents of any particular gender. However, any such data would reflect the social and historical context in which it was gathered.<sup>204</sup> Consequently, reasonable people might disagree

<sup>200</sup> *Id.*

<sup>201</sup> Nicholas J. G. Winter, *Masculine Republicans and Feminine Democrats: Gender and Americans’ Explicit and Implicit Images of the Political Parties*, 32 POL. BEHAV. 587, 587 (2010), <https://doi.org/10.1007/s11109-010-9131-z>.

During the past three decades Americans have come to view the parties increasingly in gendered terms of masculinity and femininity. Utilizing three decades of American National Election Studies data and the results of a cognitive reaction-time experiment, this paper demonstrates empirically that these connections between party images and gender stereotypes have been forged at the explicit level of the traits that Americans associate with each party, and also at the implicit level of unconscious cognitive connections between gender and party stereotypes.

*Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Threedy, *supra* note 195, at 1261 n.79.

<sup>204</sup> Huang, *supra* note 192, at 778–80 (“Surely, differing perceptions about what being maternalistic versus being paternalistic mean reflect cultural and social conventions about gender roles.”); Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 198 n.414 (1992) (quoting Cathy J. Jones, *Sexist Language: An Overview for Teachers and Librarians*, 82 LAW LIBR. J. 673, 679 n.18 (1990) (“A word that I now use consistently is *parentalistic* in place of *paternalistic*. . . . While, historically, *paternalism* may not have been inaccurate, given that most perceived authority figures in either the public or private realm were (white) men, the meaning to be conveyed has also always connoted the relationship between a parent-figure and a child-figure. Therefore, *parentalism* is both accurate (in terms of the meaning I wish to convey) and gender-neutral.”)); Singer, *supra* note 194, at 282 (“The concepts of paternalism and maternalism get their meaning from the social and historical context in which fathering and mothering occur. The family has changed over time as have the relations between parents and children.”).

on how much data across time and place would be sufficient to show that “protect-by-restricting-choice” parenting is sufficiently gendered to justify gendered language when analogizing protect-by-restricting-choice laws to parenting. Our usual presumption for gender-neutral language counsels for using the gender-neutral *parentalist* to describe such laws and policies aiming to protect people (of all genders) by restricting their choices in the absence of sufficient data showing that the analogous parenting behavior is sufficiently gendered to justify gendered language (“paternalism” or “maternalism”) to describe such laws.

#### 4. *Paternalism’s Negative Connotations Exclude It from Case for Gender-Neutral Language*

Even one who does not believe all our laws are gendered male, or that protecting-by-restricting-choice is gendered male, might believe that describing laws aiming to protect people (of all genders) by restricting their choices with the gendered word *paternalism* is consistent with the reasons driving our society’s move toward gender-neutral language because paternalism’s connotations are negative.<sup>205</sup> In other words, one might believe that, while gendered words attaching positive connotations to men (such as *chairman* or *fireman*) tend to relegate women to secondary status, because *paternalism* attaches negative connotations to men it does not relegate women to secondary status.

However, the strong and widely accepted arguments for ordinarily using gender-neutral language are not only that gendered language relegates women to secondary status, but also that gendered language reduces women’s visibility. “For example, feminist scholars have long decried that masculine generics are androcentric, and make women seem invisible . . . .”<sup>206</sup> Language reducing women’s visibility thereby relegates women to secondary status, not only with respect to positive associations (such as *chairman* or *fireman*) but with respect to any associations of being capable adults, including negative associations.

It is perhaps entirely appropriate for men to bear the burdens of negative connotations associated with the plainly gendered *paternalism* (discussed in Section II) of male dominance or an attitude especially characteristic of men

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<sup>205</sup> Negative connotations of the word *paternalism* stretch from at least as far back as Locke and Kant to a contemporary law student editor’s observation that “[p]aternalism is often used because it stems from male dominance and how men treat people, and thus carries a negative connotation.” See *supra* note 7; see also Jeremy A. Blumenthal & Peter H. Huang, *Positive Parentalism*, NAT’L L.J. (Jan. 26, 2009), <https://www.law.com/nationalallawjournal/almID/1202427700551/?id=1202427700551> (“Paternalism is a dirty word. The ‘nanny state,’ ‘Big Brother’ and similar terms invoke the dire specter of government intruding on individuals’ thoughts, behavior and choices.”).

<sup>206</sup> Prewitt-Freilino et al., *supra* note 30, at 270.

or directed primarily toward women.<sup>207</sup> But if any negative connotations encumber *parentalism*—the gender-neutral description of laws aiming to protect people (of all genders) by restricting their choices—then using that gender-neutral word appropriately spreads the burden of those negative connotations on women who enact or support those laws, as well as on men who enact or support those laws.

Moreover, negative connotations associated with protect-by-restricting-choice laws may be reduced by shifting our descriptions of them from *paternalist* to *parentalist*. Peter Huang contrasts the negative connotations of *paternalism* with the positive connotations of *maternalism* and the relatively neutral connotations of *parentalism*:

Interestingly, an on-line dictionary and thesaurus defines maternalism as “1. the quality of having or showing the tenderness and warmth and affection of or befitting a mother” and “2. motherly care; behaviour characteristic of a mother; the practice of acting as a mother does toward her children.” In contrast, another on-line encyclopedia defines paternalism, as “the interference of a state or an individual with another person, against their will, and justified by a claim that the person interfered with will be better off or protected from harm.” Therefore, in what follows, the word paternalism is utilized following convention, but a better gender-neutral term is that of parentalism, which should evoke more neutral connotations and emotions than either maternalism or paternalism does.<sup>208</sup>

Huang’s conclusion is strong: “a better gender-neutral term is that of parentalism,” in part because it “evoke[s] more neutral connotations and emotions than either maternalism or paternalism.”<sup>209</sup> In short, a virtue of using the word *parentalism* is that its relatively neutral connotations help discussions of protect-by-restricting-choice laws to assess those laws on their merits with a minimum of distractingly loaded rhetoric, while nevertheless concisely capturing the similarities between such laws and

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<sup>207</sup> Several uses of *paternalism* in this plainly-gendered sense seem to have accentuated the negative connotations of *paternalism* by removing even the pretext that the paternalists restrict choice to protect. In the following examples, the male paternalists seem to be described as seeking to harm, rather than protect, women. See Knouse, *supra* note 49, at 139 (“[Women] are subordinated by the inherent paternalism [of mandatory ultrasounds]; they are manipulated by the compromised informed consent procedure and inherent pro-life bias . . . .”); London, *supra* note 49, at 405 (referring to an “attempt by the paternalistic, male-dominated medical establishment to exploit women’s reproductive capabilities to serve its own interests”); Schultz, *supra* note 49, at 2087 (“[M]ale bosses reinforce paternalistic authority by harassing or belittling women in traditionally female fields who dared to step out of their proper place.”).

<sup>208</sup> Huang, *supra* note 192, at 779–80 (footnotes omitted).

<sup>209</sup> *Id.* at 780.

parenting. Both such laws and parenting aim to protect people by restricting those people's choices.

#### IV. THE CASE FOR *PARENTALISM* AS THE GENDER-NEUTRAL SUBSTITUTE FOR "PATERNALISM"

##### A. *Many Legal Scholars Already Use Parentalism as a Gender-Neutral Substitute for "Paternalism"*

###### 1. *Introduction*

Thus far, this Article has summarized the widely accepted reasons for ordinarily using gender-neutral language, except when seeking to convey a gendered meaning and argued that this approach should be applied to *paternalism*. So, we should use that gendered word when conveying a gendered meaning, but otherwise, we should use a gender-neutral word. While writers could suggest a different gender-neutral word—anything from "protectivism" to "dictatorship"<sup>210</sup>—to describe laws or policies that protect people by restricting their choices, it is better to stick with *parentalism* in part because many legal scholars already use it as the gender-neutral replacement for *paternalism*. As the English language evolves through the word choices of millions of individual speakers and writers,<sup>211</sup> and decades of those choices have made significant progress toward a good outcome (*parentalism* replacing *paternalism* as the usual word for laws protecting people by restricting them), prudence counsels for encouraging that progress by "going with the flow" of *parentalism* rather than trying to "turn back the tides" in its favor and diverting gender-neutral writers toward some different word. In other words, don't let the perfect be the enemy of the good.

###### 2. *Articles Citing Gender-Neutrality as the Reason for Using Parentalism*

This Article has argued that the widely accepted reasons for using gender-neutral language apply to the gendered word *paternalism*, so writers should use this word only when manifesting an intent to convey a gendered meaning and otherwise should use the gender-neutral *parentalism*. Fortunately, many legal scholars already do this, and several have cited gender-neutrality as their reason for using *parentalism* rather than *paternalism*. This perhaps began in 1987 with Marcy Strauss defining

<sup>210</sup> See also Singer, *supra* note 194, at 282 ("Why 'paternalism'? Why not 'maternalism'? Or better yet, something gender-neutral like 'dictatorship'? What is being conveyed by the paternalism moniker is control—the idea that decisions are being made by someone else. If that is the core notion, then a gender-neutral term would do as well.")

<sup>211</sup> JOHN MCWHORTER, *WORDS ON THE MOVE: WHY ENGLISH WON'T —AND CAN'T—SIT STILL* (LIKE, LITERALLY) 1–5, 9–10 (1st ed. 2016).

parentalism “as ‘interference with a person’s liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced,’”<sup>212</sup> and explaining “[t]he term paternalism is sex-linked; it is drawn from the role of the father in the family. Parentalism reflects, in a more egalitarian fashion, the same principles.”<sup>213</sup>

Several other legal scholars also cite gender-neutrality as their reason for using the word *parentalist* rather than *paternalist*:

- “A word that I now use consistently is *parentalistic* in place of *paternalistic*. As I use these words, I mean to convey a policy or practice of regulation by one person (or entity) of another, based on the belief that the authority figure, rather than the individual affected, can better determine what is in the best interests of the individual affected and can better make decisions for and protect that individual. While, historically, *paternalism* may not have been inaccurate, given that most perceived authority figures in either the public or private realm were (white) men, the meaning to be conveyed has also always connoted the relationship between a parent-figure and a child-figure. Therefore, *parentalism* is both accurate (in terms of the meaning I wish to convey) and gender-neutral.”<sup>214</sup>
- “I say ‘parentalism’ rather than ‘paternalism’ in part to avoid the latter term’s connotations of officious intermeddling, but primarily to use a gender-neutral synonym. At least in my own experience, concern for another’s welfare combined with a claim of superior insight into the other’s needs can come from a parent of either sex.”<sup>215</sup>
- “The first objection one might have to paternalism, as used here, is that it reproduces a highly gendered picture of power. It is possible, of course, to speak of *parentalism* rather than *paternalism*. Indeed, Locke himself suggests just such a formulation. The model

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<sup>212</sup> Marcy Strauss, *Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy*, 65 N.C. L. REV. 315, 321 (1987).

<sup>213</sup> *Id.* at 321 n.34.

<sup>214</sup> Cathy J. Jones, *Sexist Language: An Overview for Teachers and Librarians*, 82 LAW LIBR. J. 673, 679 n.18 (1990).

<sup>215</sup> Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 523 n.73 (1990).

of power suggested by the relation of parents and children is manifestly one to which women are clearly equal (if not stronger) claimants.”<sup>216</sup>

- “[O]ut of paternalism (the gender-neutral version of ‘paternalism’) . . . there are surely cases in which such paternalism is justified, such as when parents try to inculcate in their children a taste for education or classical music.”<sup>217</sup>

In addition, a great many other legal scholars also use the gender-neutral *parentalism* to describe laws or policies aiming to protect people by restricting their choices. Several are quoted in the following subsections.

### 3. *Parentalism in Restricting Contractual Choices*

Many legal scholars use the word *parentalism* to describe laws or policies aiming to protect people by restricting their choices of contract terms:

- “From early on, there was basic agreement that mandatory restrictions on freedom of contract could only be justified by efforts to protect parties inside the contract (*parentalism*) or parties outside the contract (*externalities*). Important disagreements remained as to the appropriate scope of these ‘exceptions.’”<sup>218</sup>
- “[I]mmutable rules are justifiable if society wants to protect (1) parties within the contract, or (2) parties outside the contract. The former justification turns on *parentalism*; the latter on *externalities*. Immutable rules displace freedom of contract. Immutability is justified only if unregulated contracting would be socially deleterious because parties internal or external to the contract cannot adequately protect themselves.”<sup>219</sup>
- “[B]argains between contracting parties are not always Pareto efficient. Immutable contract rules are generally justified precisely for this reason, on

<sup>216</sup> Jonathan Simon, *Power Without Parents: Juvenile Justice in a Postmodern Society*, 16 CARDOZO L. REV. 1363, 1373 (1995) (footnote omitted).

<sup>217</sup> Jonathan Baron, *Value Analysis of Political Behavior—Self-Interested: Moralistic: Altruistic: Moral*, 151 U. PA. L. REV. 1135, 1147 (2003).

<sup>218</sup> Ian Ayres, *Valuing Modern Contract Scholarship*, 112 YALE L.J. 881, 886 (2003) (footnote omitted).

<sup>219</sup> Ayres & Gertner, *supra* note 2, at 88 (footnote omitted).

grounds of either parentalism or third-party effects.”<sup>220</sup>

- “RUPA reaches a compromise between the ‘libertarians’ who would like to see the parties held to their contracts and the ‘parentalists’ who support mandatory fiduciary duties . . . .”<sup>221</sup>
- “RUPA was drafted with the intention of replacing parentalism with freedom of contract as the overarching principle of the Act. In doing so, the drafters assumed that, in most cases, partnership agreements are not adhesion contracts involving inequality of bargaining power.”<sup>222</sup>
- “Anti-contractarians, called parentalists by some, argue that fiduciary duties owed by partners should be both broad and non-waivable.”<sup>223</sup>

As the relevant contracting parties may be of any gender, these articles rightly use the gender-neutral *parentalist* rather than *paternalist* to describe the laws or policies aiming to protect them by restricting their choices.

#### 4. *Parentalism in Restricting Consumers’ Choices*

Other law review articles use *parentalism* to describe laws or policies aiming to protect consumers or investors by restricting their choices:

- “[L]aws [that] take that discretion away from the consumer” are “‘parentalist’ restrictions on autonomy.”<sup>224</sup>
- “[I]ndividuals are not autonomous subjects, but are highly susceptible to manipulation and persuasion. If individuals are so suggestible that some will predictably engage in clearly self-destructive behavior . . . then perhaps a more parentalist approach is in

<sup>220</sup> Daniel K. Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Domestic Anti-Dumping Decisions*, 34 LAW & POL’Y INT’L BUS. 109, 175 (2002).

<sup>221</sup> Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3, 44 (2004) (footnote omitted).

<sup>222</sup> Elisa Feldman, *Your Partner’s Keeper: The Duty of Good Faith and Fair Dealing Under the Revised Uniform Partnership Act*, 48 SMU L. REV. 1931, 1946–47 (1995).

<sup>223</sup> Samuel J. Samaro, *The Case for Fiduciary Duty as a Restraint on Employer Opportunism Under Sales Commission Agreements*, 8 U. PA. J. LAB. & EMP. L. 441, 487 (2006) (footnote omitted).

<sup>224</sup> Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With A Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 214 n.97 (1998).

order. Regulation of cigarette advertising is among the best examples.”<sup>225</sup>

- Risk of “hedge fund failures . . . can be an acceptable part of the larger array of risks investors understand to be a coincident part of their participation in the financial markets. Americans have never been fond of paternalism in law and the subprime mortgage situation does not present a compelling reason to now move against the grain.”<sup>226</sup>
- “[R]etirement plan funding still operates under the substantial control of employers. Young employees especially . . . ought to bristle against the effective paternalism (employers and government have become co-parents) that still serves as the basic premise for the American retirement plan system. Many employees apprehensively wonder whether full Social Security benefits will exist when their turn to retire arrives.”<sup>227</sup>

As the relevant consumers or investors may be of any gender, these articles rightly use the gender-neutral *parentalist* rather than *paternalist* to describe the laws or policies aiming to protect them by restricting their choices.

##### 5. *Parentalism in Restricting Medical Patients’ Choices*

A variety of legal scholars use *parentalism* to describe laws or policies aiming to protect medical patients by restricting their choices:

- “[One of] several ways of interpreting this possible exercise of exclusive power in withholding treatment [is] . . . as a parentalist exercise of professional power on behalf of the patient and/or family.”<sup>228</sup>
- “Some critics maintain that, when doctors seek to determine medical futility unilaterally, they are engaging in an unjustifiable *parentalist exercise of power*.”<sup>229</sup>

<sup>225</sup> Laura W. Brill, Note, *The First Amendment and the Power of Suggestion: Protecting “Negligent” Speakers in Cases of Imitative Harm*, 94 COLUM. L. REV. 984, 1007 n.152 (1994).

<sup>226</sup> Carl Hasselbarth, *How Should We Regulate Hedge Funds?*, 16 PIABA B.J. 233, 264 (2009).

<sup>227</sup> Richard J. Kovach, *A Critique of SIMPLE—Yet Another Tax-Favored Retirement Plan*, 32 NEW ENG. L. REV. 401, 437 (1998).

<sup>228</sup> William F. May, *Testing the Medical Covenant: Caring for Patients with Advanced Dementia*, 40 J.L. MED. & ETHICS 45, 46 (2012).

<sup>229</sup> *Id.* at 47.

- “In the view of many clinicians, a reasonable risk-benefit calculation would not favor a decision to release an acutely psychotic patient without treatment, notwithstanding the patient’s own competent advance instructions. Releasing the patient would seem to require quite strong support for the value of patient autonomy over beneficent parentalism.”<sup>230</sup>
- “[A physician healer] distinguished himself clearly from the other specialists [the patient] had seen, who said only, ‘You should immediately do what I recommend.’ But he also distinguished himself from the many physicians who mistakenly believe that the only way to avoid that brand of parentalism is to provide a raft of information at arms’ length—‘it’s your choice’—because they are afraid that they may unduly influence the patient’s decision simply by making a recommendation.”<sup>231</sup>
- “[I]t would be beneficent parentalism at its worst to prejudge the likely outcome for a particular patient who could be given the opportunity to try protease inhibitors. Thus, all patients must be given a chance to benefit from the new therapies, as well as the support system necessary to make a chance worth taking.”<sup>232</sup>

As the relevant medical patients may be of any gender, these articles rightly use the gender-neutral *parentalist* rather than *paternalist* to describe the laws or policies aiming to protect them by restricting their choices.

#### 6. *Parentalism in Restricting Children’s Choices*

Some articles in law journals use *parentalism* to describe laws or policies aiming to protect children by restricting their choices:

- “The right to marry can be limited if the state has a strong justification for doing so. A fourteen-year-old girl’s right to marry can be limited for standard parentalism reasons: the adolescent’s decisionmaking capacities are not fully developed, and she is prone to

<sup>230</sup> Jeffrey W. Swanson et al., *Overriding Psychiatric Advance Directives: Factors Associated with Psychiatrists’ Decisions to Preempt Patients’ Advance Refusal of Hospitalization and Medication*, 31 LAW & HUM. BEHAV. 77, 86 (2007).

<sup>231</sup> Nancy M. P. King, *The Reasonable Patient and the Healer*, 50 WAKE FOREST L. REV. 343, 358–59 (2015).

<sup>232</sup> Linda C. Fentiman, *AIDS as a Chronic Illness: A Cautionary Tale for the End of the Twentieth Century*, 61 ALB. L. REV. 989, 1007–08 (1998).

poor choices, especially if made under the influence of an older lover.”<sup>233</sup>

- “Bans on the tattooing of minors of course present a more complicated problem. In general, the state is permitted to exercise parentalism toward children. However, parentalism toward children is highly problematic with respect to freedom of dress because the exercise of freedom of dress is crucial as a child, given its special role in the development of social identity for children. . . . However, certain forms of body modification are rather long-lasting and, as a result, the experimentation that is normally associated with adolescent freedom of dress is fraught with permanence when it comes to tattooing, as well as body modifications more permanent than simple piercings.”<sup>234</sup>
- “[P]arentalist legislation [that is intended to protect children (using the internet) in spaces where parents may not necessarily regulate online or in-game activity] is likely to disrupt speech and ultimately break up virtual world communities. . . . [T]his balkanization will isolate children from the very communities that protect them. . . . [T]he virtual worlds industry may be able to avoid this by developing better filters to protect children in virtual worlds.”<sup>235</sup>

As the relevant children may be of any gender, these articles rightly use the gender-neutral *parentalist* rather than *paternalist* to describe the laws or policies aiming to protect them by restricting their choices.

#### 7. *Parentalism in Restricting Choices by a Wide Variety of Other Parties*

Many other examples of legal scholarship use *parentalism* to describe laws or policies aiming to protect various types of people by restricting their choices:

- “We teach, perhaps too much, that lawyers should respect their clients’ autonomy and that lawyers

<sup>233</sup> William N. Eskridge, Jr., *Three Cultural Anxieties Undermining the Case for Same-Sex Marriage*, 7 TEMP. POL. & C.R. L. REV. 307, 314 (1998).

<sup>234</sup> Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 77 (2006).

<sup>235</sup> Joshua A.T. Fairfield, *Virtual Parentalism*, 66 WASH. & LEE L. REV. 1215, 1217 (2009).

should protect their clients' rights to determine their own objectives. Parentalism is 'out.' Client autonomy and self-actualization are 'in'—not merely as matters of the ethics of lawyering but also as a practical result of the economic nature of the attorney-client relationship."<sup>236</sup>

- “[R]ather than focusing on people’s poor judgment and decision making, governments should develop legal policy to foster people’s flourishing. Instead of working to stop an individual from making mistakes or suffering from cognitive biases, such positive parentalism seeks to build on people’s signature strengths and character virtues. The literature on loss aversion suggests that people might perceive interventions more favorably when they are framed not as an intrusion into one’s autonomy but instead as encouragement toward, or in aid of, a beneficial outcome.”<sup>237</sup>
- “[A scholar] contrasted the independence that accompanies earning with the dependence of welfare beneficiaries who are ‘treated with that mixture of parentalism and contempt that has always been reserved for the dependent classes.’”<sup>238</sup>
- “Requiring deeper or more detailed rational understanding [by a criminal defendant, waiving the right to counsel or pleading guilty, of the circumstances and consequences of those actions] risks parentalism, but requiring less risks an unjust outcome. I have a preference for limiting parentalism as much as possible and perhaps the Court’s recognition that the [criminal] defendant must actually waive his rights knowingly partially remedies the vagueness of the general test. On the other hand, defining knowing or intelligent is as vulnerable to manipulation as defining competence itself. In short,

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<sup>236</sup> Peter G. Glenn, *Some Thoughts About Developing Constructive Approaches to Lawyer and Law Student Distress*, 10 J.L. & HEALTH 69, 71–72 (1996).

<sup>237</sup> Peter Henry Huang, *Happiness Studies and Legal Policy*, 6 ANN. REV. L. & SOC. SCI. 405, 422 (2010).

<sup>238</sup> Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523, 570 (1997).

evaluating any competence case is a normatively fraught and difficult enterprise.”<sup>239</sup>

- “Some disabled individuals certainly face a possibility of neglect or abuse if left on their own. The problem is that, taken too far, professional behavior driven by the desire to help and protect disabled clients can diverge widely from the client’s goals of choice and satisfaction, reinforce learned helplessness, and amount to parentalism rather than support.”<sup>240</sup>
- “Which of the two evils is more damaging? Proponents of outing assert that secrecy is more damaging than revelation, both to individual and community. But the parentalism of that argument marks the question as the wrong one to ask. Whether one is entirely open about his or her sexual orientation should be a personal choice made after an individual determination of the costs and benefits of each.”<sup>241</sup>
- “Peck’s testimony reflects the Pentagon’s new ‘kinder, gentler’ homophobia, which now justifies the gaylesbian exclusion as at least in part designed to protect lesbians and gay men. But beneath this perhaps sincere parentalism is the intimation that the armed forces cannot or will not control or regulate the violent impulses of their own troops. A gaylegal perspective contributes the insight that the violence Peck predicts is a self-fulfilling prophecy, a result of the military’s own policies.”<sup>242</sup>
- “I argue against the use of autonomy as a basis for property-like fundamental rights in the body or any other form of property that would trump typical political concerns such as public health or even parentalism.”<sup>243</sup>

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<sup>239</sup> Stephen J. Morse, *Mental Disorder and Criminal Law*, 101 J. CRIM. L. & CRIMINOLOGY 885, 918 (2011).

<sup>240</sup> Marshall B. Kapp, *Enhancing Autonomy and Choice in Selecting and Directing Long-Term Care Services*, 4 ELDER L.J. 55, 73 (1996).

<sup>241</sup> Kathleen Guzman, *About Outing: Public Discourse, Private Lives*, 73 WASH. U. L. Q. 1531, 1549 (1995).

<sup>242</sup> William N. Eskridge, Jr., *Gaylegal Narratives*, 46 STAN. L. REV. 607, 640 (1994).

<sup>243</sup> Gowri Ramachandran, *Against the Right to Bodily Integrity: Of Cyborgs and Human Rights*, 87 DENV. U. L. REV. 1, 24 (2009).

- “Perhaps the most difficult issue presented by sadomasochism is the legitimacy of parentalism: can the state regulate conduct that does physical harm to an individual, even if the individual has freely consented? The same issue is presented by the regulation of suicide, and a wide range of other personally harmful conduct.”<sup>244</sup>
- “[T]he greater the coercion needing to be justified (say, in terms of how much liberty it undermines), the more important the behavior in question must be; and parentalism, for normal adults, is ruled out. According to this view, then, we may coerce people to do only what they would autonomously do if appropriately informed and fully rational.”<sup>245</sup>
- “[A] true regulatory maze, representing parentalism, rigidity, and top-down regulation. In Atlantis, [by contrast,] the Queen has always favored individual freedom, flexibility, and self-regulation.”<sup>246</sup>
- “Allowing [faculty with non-traditional appointments] to vote in committees and not in faculty meetings, as some schools do, simply smacks of parentalism.”<sup>247</sup>

As the relevant protected-and-restricted parties may be of any gender, these articles rightly use the gender-neutral *parentalist* rather than *paternalist* to describe the laws or policies aiming to protect them by restricting their choices.

#### 8. Summary

This Section has shown that a great many scholars use *parentalism* rather than *paternalism* to describe laws or policies aiming to protect people by restricting their choices. While one writer may be read to denigrate the gender-neutrality of *parentalism* as “politically correct,”<sup>248</sup> several scholars

<sup>244</sup> David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L. L. REV. 319, 351 (1994).

<sup>245</sup> Robert Audi, *The Place of Religious Argument in a Free and Democratic Society*, 30 SAN DIEGO L. REV. 677, 689 (1993).

<sup>246</sup> Jerry Kang & Benedikt Buchner, *Privacy in Atlantis*, 18 HARV. J.L. & TECH. 229, 236 (2004).

<sup>247</sup> Susan P. Liemer, *The Hierarchy of Law School Faculty Meetings: Who Votes?*, 73 UMKC L. REV. 351, 369 (2004).

<sup>248</sup> Diana Nordlund, *Form Reform: Documenting Emergency Department Informed Consent*, 12 T.M. COOLEY J. PRAC. & CLINICAL L. 415, 419 (2010) (“As late as the 1950s, the pervasive attitude was ‘doctor knows best.’ This attitude is also known as paternalism (or, in politically correct circles, parentalism) and exceeds the bounds of beneficence entailed by the doctor-patient relationship. Paternalism has been widely discredited by modern scholarship.” (footnotes omitted)).

have cited gender-neutrality as their reason for using the gender-neutral word, and many other writers—perhaps accustomed to the norm of gender-neutral language—use parentalism without needing to explain their choice of words. This progress will hopefully continue as *parentalism* replaces *paternalism*, much as *flight attendant* is replacing *stewardess* and *firefighter* is replacing *fireman*.

### B. *Legal Scholarship's Other Use of the Word Parentalism*

While many legal scholars now often use *parentalism* to describe laws or policies that protect people by restricting their choices, other legal scholars use *parentalism* in a very different context, to describe views about the primacy of parents (as opposed to government) in raising children. A leading example is Stephen Gilles' *On Educating Children: A Parentalist Manifesto*,<sup>249</sup> which “provides a broad conception of parental authority [based on beliefs] that parents are more likely to act in their children’s best interest and that parental control over their children’s values must be superior to the state’s interest.”<sup>250</sup> Several other scholars use the word “parentalist” similarly, for instance, explaining that “[f]or many parentalists, the right to parent is considered a time-honored staple of personal liberty deeply rooted in the common law and guaranteed by core constitutional principles,”<sup>251</sup> or referring to “the disagreement between statist and ‘parentalists’” “when it comes to government regulation of education.”<sup>252</sup>

<sup>249</sup> Stephen Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 1033–34 (1996) (concluding that “individual parents should be free to pass on their values to their children [through reasonable educational choices] and to reject state efforts to try to inculcate contrary values”). See also Stephen G. Gilles, *Liberal Parentalism and Children’s Educational Rights*, 26 CAP. U. L. REV. 9, 9 (1997) (“The central tenet of liberal parentalism, as I conceive it, is that as a matter of liberal political theory states should defer to parents’ educational choices unless they are plainly unreasonable. This is parentalism because it gives parents primary authority over and responsibility for their own children, while relegating government to the important but secondary role of backstop against parental wrongdoing. It is liberal both because it sharply limits the state’s role in the upbringing of children, and because it limits parents’ educational and custodial authority over them.” (footnotes omitted)).

<sup>250</sup> Courtenay E. Moran, *How to Regulate Homeschooling: Why History Supports the Theory of Parental Choice*, 2011 U. ILL. L. REV. 1061, 1079 (discussing Gilles, *On Educating Children*, *supra* note 249).

<sup>251</sup> Jeffrey Shulman, Meyer, Pierce, and the History of the Entire Human Race: *Barbarism, Social Progress, and (the Fall and Rise of) Parental Rights*, 43 HASTINGS CONST. L.Q. 337, 344 (2016).

<sup>252</sup> Richard W. Garnett, *Taking Pierce Seriously: The Family, Religious Education, and Harm to Children*, 76 NOTRE DAME L. REV. 109, 119 (2000). See also Josh Chafetz, *Social Reproduction and Religious Reproduction: A Democratic-Communitarian Analysis of the Yoder Problem*, 15 WM. & MARY BILL RTS. J. 263, 266 (2006) (“I reject the parentalism case as incomplete because it fails to consider the complex web of social relations that constitutes a child’s value set. It is only by misunderstanding the complexity of social relations that parentalism theorists can conclude that the parents are the only legitimate source of values for the child or that compulsory public schooling will stifle social dissent.”); B. Jessie Hill, *Constituting Children’s Bodily Integrity*, 64 DUKE L.J. 1295, 1320 (2015) (“The birth of children’s constitutional rights, as distinct from those of their parents, may be loosely viewed as an outcropping or extension of the liberal view, which emphasizes the state’s role in shaping future citizens

Consequently, separate strands of legal scholarship use the word *parentalist* differently, with one strand using *parentalist* to refer to laws or policies aiming to protect people, usually adults, by restricting their choices, while another strand uses *parentalist* to describe supporters of parents (over government) in raising children. Fortunately, these two uses of the same word are unlikely to produce confusion because context quickly clarifies any ambiguity. If the context surrounding a particular use of *parentalist* does not involve children, then *parentalist* refers to laws or policies aiming to protect people, usually adults, by restricting their choices. And even if the context surrounding a particular use of *parentalist* involves children, that context nearly always quickly reveals whether *parentalist* describes: (A) a law restricting children's choices, or (B) supporters of parents (over government) in raising children. In sum, the case for *parentalist* as the

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and promoting liberal values, while still leaving room for parents to inculcate their own values. Familial rights, by contrast, fit more comfortably within the parentalist tradition, which embodies a traditional view, grounded in natural law, of the family as existing outside of, and largely beyond the reach of, the state.”); Linda C. McClain, *Against Agnosticism: Why the Liberal State Isn't Just One (Authority) Among the Many*, 93 B.U. L. REV. 1319, 1343 (2013) (“[One scholar] rejected these sorts of parentalist manifestos [that parents may control their children’s education entirely] because they are contrary to a model of divided or fractured power and multiple sources of authority.”); Linda C. McClain & James E. Fleming, *Foreword: Legal and Constitutional Implications of the Calls to Revive Civil Society*, 75 CHI.-KENT L. REV. 289, 295 (2000) (“[A]t least where the education of children is involved, [one scholar] cautions against a ‘parentalist’ approach to strengthening the institutions of civil society against the state, and suggests that, for children to reap the benefit of multiple repositories of power, both schools and parents should play a role in shaping and educating children.”); Sean T. McLaughlin, *Some Strings Attached? Federal Private School Vouchers and the Regulation Carousel*, 24 WHITTIER L. REV. 857, 870 (2003) (“From the parentalist perspective, subjecting a private school’s entire administration and curriculum to state approval threatens religious freedom and parental autonomy over their child’s best interests.”); Eric Rassbach, *Coming Soon to a Court Near You: Religious Male Circumcision*, 2016 U. ILL. L. REV. 1347, 1357 (“In its most extreme form, the anti-parentalist school would eliminate parental rights altogether. For example, Yale Law School scholar Samantha Godwin has challenged the very existence of parental rights, including, but not limited to, parental rights concerning religious upbringing.”); Shulman, *supra* note 251, at 344 (“[P]arentalists argue that state interference with parental decision-making erodes the historical—and perhaps timeless—bedrock of fundamental personal liberties.”); Jeffrey Shulman, *The Parent as (Mere) Educational Trustee: Whose Education Is It, Anyway?*, 89 NEB. L. REV. 290, 299 (2010) (“The law has long recognized that the state’s duty to educate children is superior to any parental right. Indeed, the ‘parentalist’ position to the contrary rests on an inflation of rights that is, in fact, a radical departure from longstanding legal norms.”); Jeffrey Shulman, *Who Owns the Soul of the Child?: An Essay on Religious Parenting Rights and the Enfranchisement of the Child*, 6 CHARLESTON L. REV. 385, 426–27 (2012) (“Parentalists who paint the public education system as ideologically monolithic and propose greater educational choice rarely purport to be the guardians of the child’s educational options. What the parentalist seeks to protect is *the parent’s* choice ‘to reject schooling that promotes values contrary to their own.’” (citation omitted)); Aviam Soifer, *Federal Protection, Paternalism, and the Virtually Forgotten Prohibition of Voluntary Peonage*, 112 COLUM. L. REV. 1607, 1633 (2012) (“Yet we ought to recognize that our parents and teachers exercise paternalism toward and for us repeatedly, to both good and ill effect. Even if the letters of ‘paternalism’ were rearranged to become ‘parentalism,’ however, the question of how to ascertain genuine consent looms large and lasts for a long time in most families as well as in the law. This typically is the case on both sides of the parent-child equation.”).

gender-neutral replacement for *paternalist* is not significantly weakened by a separate use of *parentalist* with a different meaning in other contexts.

### CONCLUSION

The strong and widely accepted reasons for using gender-neutral language presumptively apply to the gendered word *paternalism* and its gender-neutral counterpart, *parentalism*. So, we should begin with a presumption for using the gender-neutral word *parentalism*, while using *paternalism* only when emphasizing the important relevance of gender or otherwise trying to convey a gendered meaning. Accordingly, many legal scholars define *paternalism* in an expressly gendered way—such as “the institutionalization of male dominance,”<sup>253</sup> or an “ideology [that] teaches men to minimize women’s agency”<sup>254</sup>—or fittingly use *paternalism* to describe an attitude especially characteristic of men or directed primarily toward women. All these many uses of the gendered word *paternalism* are supported by the writers’ apparent intent to emphasize the important relevance of gender to the writers’ points.

On the other hand, and despite the spread of gender-neutral language throughout our society and legal profession, many legal scholars continue to use the gendered word *paternalism* without indicating any important relevance of gender or otherwise manifesting intent to convey a gendered meaning. These many writers use *paternalism* rather than *parentalism* to describe laws or policies aiming to protect people (of all genders) by restricting their choices. For example, these writers cite “paternalism” as:

- one of only two standard justifications for restricting freedom of contract or other private ordering;
- a standard justification for restrictions on contractual choice, including the unconscionability doctrine, usury laws, the minimum wage, and countless regulations limiting the range of enforceable promises by consumers, borrowers, employees, investors, and others; and
- the basis for variants of like “libertarian paternalism” and “soft paternalism.”

In each of these contexts, it would be better to use the gender-neutral word *parentalism*, unless the writer emphasizes the relevance of gender or otherwise manifests an intent to convey a gendered meaning. For example, a writer could justify using the gendered word *paternalism* by arguing that all our laws are gendered male so gendered language should be used to

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<sup>253</sup> Kennedy, *supra* note 43, at 59.

<sup>254</sup> Fraser, *supra* note 11, at 165.

discuss any law, including using *paternalism* to describe laws aiming to protect people of all genders by restricting their choices. Or a writer could justify using the gendered word *paternalism* by arguing (after citing sufficient empirical data) that protect-by-restricting-choice parenting is gendered male, so analogous protect-by-restricting-choice laws and policies are also gendered male.

Absent one of those two plausible arguments justifying use of the gendered word *paternalism*, laws or policies aiming to protect people of all genders by restricting their choices are better described as examples of *parentalism*. While other legal scholars use the word *parentalist*, in a very different context, to describe views about the primacy of parents (as opposed to government) in raising children, this use of *parentalist* rarely produces confusion with use of *parentalist* to refer to laws or policies aiming to protect people, usually adults, by restricting their choices, because context quickly clarifies any ambiguity. So, the case for *parentalist* as the gender-neutral replacement for *paternalist* is not significantly weakened by a separate use of *parentalist* with a different meaning.