

1989

Book Review: Gender Justice. by David L. Kirp,
Mark G. Yudof, Marlene S. Franks.

Suzanna Sherry

Follow this and additional works at: <https://scholarship.law.umn.edu/concomm>



Part of the [Law Commons](#)

Recommended Citation

Sherry, Suzanna, "Book Review: Gender Justice. by David L. Kirp, Mark G. Yudof, Marlene S. Franks." (1989). *Constitutional Commentary*. 1059.

<https://scholarship.law.umn.edu/concomm/1059>

Charged with indifference to women's interests, Gilder would reply that the female's true interests depend on allowing the male to develop a healthy sexual identity. This will not sound strange to the millions of women in this and past generations who have spent their lives following the advice that Gilder offers. But sociology and economics tell us that if current trends threaten to dissolve the bonds that check male aggression, we will have to find other ways to preserve those bonds. Today's small families do not occupy anyone's full-time attention for more than a brief period. Even if the woman happily accepts the role of mother in the home, she will naturally seek other outlets eventually, and jobs are society's measures of worth. In any event, women have been entering the workforce in increasing numbers since 1964, and it was predictable that as one-earner families became two-earner families, living costs and new minimum standards of the good life would rise to meet new income levels. For most families, the choices Gilder urges are not realistically available. Still, it is not easy to resist the thought that Gilder is on to something when one sees the divorce statistics, and the daily reports linking the persistence of poverty and high crime rates to single parent families. We can learn from Gilder even while rejecting some of his arguments and innuendoes.

GENDER JUSTICE. By David L. Kirp,¹ Mark G. Yudof,² Marlene S. Franks.³ Chicago, Il.: University of Chicago Press. 1986. Pp. x, 296. \$19.95.

*Suzanna Sherry*⁴

Gender Justice is an avowedly liberal tract on the problems of gender discrimination in our society. It seeks to provide an alternative to the visions of both conservatives and radical feminists. The book fails in its liberal mission for some of the same reasons that the new breed of Democrats cannot seem to raise much of a challenge to the Republican ideology currently sweeping the country. The authors endorse many of the policies advocated by conservatives—they reject affirmative action and comparable worth, for example—but they do so by means of a liberal, process-oriented approach.

1. Professor, Graduate School of Public Policy, and Lecturer, School of Law, University of California, Berkeley.

2. Dean and James A. Elkins Centennial Chair, University of Texas Law School.

3. Ph.D. candidate, University of California, Berkeley.

4. Professor of Law, University of Minnesota.

The book thus fails to engage either conservative or radical feminist critics of liberalism on their own terms. The result is a watered-down liberalism which neither satisfies the needs of women nor meets the conservative anti-feminist premises head-on.

The authors explicitly set out their traditional liberal approach in chapter one. Liberal society is process oriented in that results matter less than the method by which results are obtained, and individualist in that the correct process is unfettered personal choice. What is most important is that the government "should not be fostering . . . 'good lives' by imposing a particular conception of virtue on the minority."⁵ In other words, "[l]iberty is concerned with the process of choice, not its outcomes"⁶ The authors describe both conservative and radical feminist theories, by contrast, as result oriented: such a society "deliberately defines the good life for its members."⁷

This dichotomy between a pluralist society in which each individual chooses among competing visions of the good and virtuous life, and a society in which the community itself shapes and enforces a dominant view of the good life, is the paradigmatic difference between modern Lockean liberalism and classical pre-Enlightenment republicanism. Two major features distinguish classical republicanism from its ideological successor, liberalism. First, republicans conceived of the society in organic terms, as an independent entity, apart from its members. The common good was thus distinct from, and paramount to, the good of individuals, who might be expected to repress their own selfish desires for the common good. To foster the self-restraint necessary for individuals to subordinate their own interests to the good of the state, republicanism relied on its second distinguishing feature: an emphasis on individual capacity for civic virtue, on which public virtue ultimately rested. Republicanism thus reflected a moral theory congruent with that of Aristotle and Aquinas, and rarely invoked by modern philosophers. It is a theory of individual virtue and aspiration, an example of what Ronald Dworkin calls a "goal-based" theory: the goal for which both individuals and governments strive is the attainment of virtue. Virtue, or the good life, is both identifiable and attainable. Government is a deliberative process engaged in the conscious selection of values.

Modern liberalism—especially as portrayed in this book—rejects both community and virtue, placing the individual and indi-

5. D. KIRP, M. YUDOF & M. FRANKS, *GENDER JUSTICE* 135 (1986) [hereinafter *GENDER JUSTICE*] (quoting Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 117 (S. Hampshire ed. 1978)).

6. *Id.* at 134.

7. *Id.* at 23.

vidual rights at the center. The community is merely a collection of individuals. The end of government is not to promote virtue but to secure individual liberty, allowing each individual to define his own values. A liberal society is thus quintessentially individualist and pluralist, and the authors of *Gender Justice* repeatedly stress the importance of governmental nurturance of diverse individual value choices. Unfortunately, they do not provide a convincing justification for preferring radical individualism to virtue. Instead, they take refuge in moral relativism, the last resort of those who seek to reject teleological moral theories. The first chapter canvasses the myriad "principled" approaches that various contemporary philosophers apply to the problems of gender, and concludes that because there is no consensus as to the correct approach, the search must be abandoned in favor of individual resolution.⁸

This failure to meet the challenge of the conservative and feminist reliance on teleological or virtue-based morality is the book's greatest weakness. Those who agree with the authors that neither the conservative nor the radical feminist vision of gender policy is truly gender justice must first recognize the increasing bankruptcy of the liberal paradigm. The liberal emphasis on autonomy to the virtual exclusion of community, and its insistence that only individual moral choices count, leads to an impoverished perception of human beings. We are inescapably both autonomous individuals and members of communities, and any approach that fails to accord sufficient attention to our social nature is thereby inadequate. Perhaps the growing dissatisfaction with liberalism, and the concomitant growth of the far left and the far right (both of which de-emphasize individualism), stems in part from this inadequacy.⁹ A truly persuasive description of gender justice would recognize that because we are inevitably communal, some moral decisions must be made communally. The task would then be to outline and defend particular results against the results proffered by conservatives and radicals.

Ironically, the authors themselves recognize this dual nature of humanness in one context: the family. They warn against any policy on family life which "turn[s] the aspiration of individualism into a too-simple slogan."¹⁰ What these good liberals fail to notice is that individualism can be elevated into a distorting force outside the

8. *Id.* at 23-26.

9. In keeping with their masquerade as neo-liberals with something new to offer, the authors declaim in general terms about the need to recognize more than the primacy of the individual and individual choice. See, e.g., *id.* at 65-66, 69. Their more specific suggestions, however, rely on individual autonomy to the virtual exclusion of any other value.

10. *Id.* at 176.

context of the family as well.¹¹ Moreover, in the context of the family, the book advocates certain moral positions beyond the neutral "individual choice" of the marketplace. They propose that in addition to tolerating and encouraging the diverse family structures that result from unfettered individual choice, the government ought to offer economic support to families—but *only selectively*. They propose that the government should subsidize "those family forms that offer long term benefits to society," but not "those that promise only immediate benefits to their present participants," because the latter, "while doubtless nurturing to the partners, further no strong societal goal."¹² It is difficult to fathom which family forms might meet the authors' criteria (the surrounding passages suggest that all and only those engaged in childrearing would do so), but it is clear that they are advocating a particular vision of virtuous behavior to be encouraged and subsidized.

Even if the reader accepts the paradigm of individual choice, the book's particular translation of it into gender policy suffers from serious flaws. The authors suggest four "choice-enhancing" elements of "sound gender policy":

Individuals must have the *opportunity* to choose, the *capacity* to make choices, *information* on which to base preferences, and a climate of *tolerance* in which to explore alternatives.¹³

These four elements, although they have the ring of a panacea for gender injustice, essentially reduce to a lack of governmental restraints, prohibitions on overt discrimination by employers and other organized entities, plus a sufficient economic "safety net" and a little publicity about equal opportunity.¹⁴ Following the liberal tradition of Isaiah Berlin, the authors of *Gender Justice* envision liberty primarily as "negative liberty" or freedom from restraint; to the extent that the required capacity to choose encompasses "positive liberty," it does so only in non-gender aspects. The capacity to choose is enhanced by "assurances that the basic social and economic wants of persons have been satisfied,"¹⁵ but such remedies as guaranteeing a minimum number of positions for women in tradi-

11. Liberals, of course, are not the only ones who find such distinctions between the family and the marketplace. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

12. GENDER JUSTICE, *supra* note 5, at 175. Thomas Grey has suggested that the Supreme Court has implicitly adopted this principle insofar as it safeguards from governmental interference any type of relationship which, like the traditional family, serves as a stabilizing force in society. Grey, *Eros, Civilization and the Burger Court*, 43 LAW & CONTEMP. PROB. 83 (1980).

13. GENDER JUSTICE, *supra* note 5, at 135 (emphasis in original).

14. *Id.* at 131-35.

15. *Id.* at 133.

tionally male occupations are not seen as choice enhancing, and are therefore rejected.¹⁶

Moreover, in a brief, uninformative, and unconvincing discussion of how courts differ from legislatures, the authors conclude that, in general, positive liberty should be left to legislatures to impose:

For instance, a court should not condemn government failure to enrich choice by not supplying free child care for working parents, since whatever the merits of this idea, failure to implement it does not instance disrespect to individual autonomy premised on sex.¹⁷

In a society where most of the responsibility for child care falls on women, limiting their opportunities to participate in the workforce, it is ignoring reality to say that governmental neglect of the problem is not an example of "disrespect to individual autonomy premised on sex."

This narrow description of what constitutes an opportunity and a capacity to choose reflects a naive and uncritical viewpoint. The authors fail to explore perhaps the most difficult issue of gender discrimination: the interaction of societal pressures and individual choice. For example, in contending that the largely gender-segregated workforce is at least partly the result of individual choice rather than discrimination, the authors suggest that women choose certain low-prestige jobs for three reasons. Such work enables women to "shape work around the demands of home life," to "stop working or work part time while raising a family," and to relocate easily in order to accommodate their husbands' career paths.¹⁸ There is not even a hint that the individual woman's choice to subordinate her own life to her husband's (taking over responsibility for the children and the home) is not, in fact, wholly her own

16. See, e.g., *id.* at 136, 159-67. The authors engage in the usual semantic games when they discuss affirmative action, referring to such programs as "quotas." Regardless of the merits of affirmative action, there is an important distinction between a quota, which limits the *maximum* number of women, and most affirmative action programs, which simply guarantee a *minimum* number of positions available to women. The book's main criticism of affirmative action is that it is designed "to equalize the distribution of male and female workers throughout the workforce." *Id.* at 160. This might be true of quotas, but the goal of most affirmative action programs is simply to ensure that women who have been excluded from certain occupations in the past are able and encouraged to choose those occupations today, and that the subtlest vestiges of discrimination are eliminated. The contours of the notion of ability to choose are discussed in the text.

17. *Id.* at 112. The authors discuss the role of the courts generally at page 85.

18. *Id.* at 150-51. While the authors recognize that not all women who are in low-prestige jobs fit this pattern, they do suggest that the women who fit the pattern are making free choices. Even if true, the discontinuity in employment caused by these family responsibilities accounts for only one-third of the wage gap between white men and white women, and only one-quarter of the wage gap between white men and black women. G. DUNCAN, *YEARS OF POVERTY, YEARS OF PLENTY* 161-63 (1984).

choice. From liberalism's individualist vantage point, any decision made with sufficient knowledge and a superficial absence of restraints is an individual choice. An approach which integrates individual selves and their social context would find it necessary to explore the more subtle societal forces that influenced the particular choice, before concluding that it *was* the individual's choice.¹⁹

In another passage, the book's failure to recognize the subtleties that lie between individual choice and coercion is even more explicit. In noting that pervasive discrimination does affect individual choices, the authors suggest that " 'I don't want to' is sometimes hard to distinguish from 'You can't' ": as the latter diminishes, choice becomes more open.²⁰ In reality, choice can be as constricted by "You shouldn't," or "You may, but these are the consequences," as by the simple "You can't." Like Richard Posner, the authors rely on individual choice as the basis for law and morality, but, like Posner, they have a utopian view of what it means to choose.²¹

The book also naively overstates the degree to which overt discrimination ("you can't") has been reduced, painting a rosy picture of an almost gender-neutral society. Chapter two documents the history of gender discrimination, although with little attention to detail and devoted largely to distinguishing gender discrimination from race discrimination. Paternalism toward women, unlike paternalism toward blacks, was motivated by benevolence, and "undertaken with the human worth of women in mind."²² The authors thus revive the distinction between pedestal and cage, a distinction long abandoned by all but conservatives and, apparently, their neo-liberal imitators.

Moving into the present, the authors find gender discrimination mostly eradicated, maintaining that "[t]he evidence of the past decade gives cause to believe that, offered the opportunity, men and women will take more control over their own lives."²³ In support of this statement and of their general attitude that only minimal changes are necessary to achieve gender justice, the authors rely on inaccurate and inconsistent "facts." In the context of the market-

19. For a brief exploration of this issue in the course of another scholar's review of *GENDER JUSTICE*, see Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice* 96 *YALE L.J.* 914, 931-40 (1987).

20. *GENDER JUSTICE*, *supra* note 5, at 152. The authors do recognize one way in which society affects individual choices: where an individual perceives her choices as limited, she will do less to protect what choices she has. *Id.* at 146-47.

21. See West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 *HARV. L. REV.* 384 (1985).

22. *GENDER JUSTICE*, *supra* note 5, at 43-44.

23. *Id.* at 137; see also *id.* at p. 47.

place, for example, they allege that “[t]he work force is more sexually integrated in particular fields.”²⁴ This conflicts with both their own statement ten pages later—“[i]n 1980, three-quarters of all women crowded into occupations where women made up a majority of the work force”²⁵—and with the findings of other researchers.²⁶ Moreover, despite the fact that they conclude that sex segregation in the workplace causes “much of the disparity” between men’s and women’s wages,²⁷ they do not view either segregation or the wage gap as cause for concern or for much government intervention. While flexible or part-time work schedules “appeal[] intuitively to the proponent of choice,” government should not mandate such innovations, because employers will simply circumvent them. Instead, government can offer firms information about flexible working schedules.²⁸ While “[n]on-discrimination is . . . essential to securing choice,” government options to combat discrimination are similarly limited. In addition to existing proscriptions on overt discrimination, the authors advocate prohibiting employers from enforcing dress codes or from discriminating against homosexuals.²⁹ The former is so trivial as to be almost deliberately belittling of working women’s needs; the latter, while a laudable goal, has little to do with gender discrimination. What government may *not* do to combat gender discrimination, according to the authors of *Gender Justice*, is mandate or condone either affirmative action programs or comparable worth. Affirmative action is wrong because “[q]uotas deny the primacy of individuals.”³⁰ Comparable worth is both impossible to achieve and unnecessary: “Reliance on a market rid of its discriminatory elements enhances individual choice and equity for men and women more effectively than manipulating the wage structure.”³¹ These arguments have been made before, but not often by self-proclaimed liberals and not often so superficially.

In further support of their position that recent gains by women indicate little further governmental intervention is necessary, the authors point to a number of changes within the family. “Nearly one household in seven is now headed by a woman,” “[m]ore than half the populace believes that husbands as well as wives should

24. *Id.* at 173.

25. *Id.* at 147.

26. See, e.g., SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES (B. Reskin ed. 1984); Beller, *Occupational Segregation and the Earnings Gap*, in COMPARABLE WORTH: ISSUE FOR THE 80'S 26-27 (U.S. Comm'n on Civil Rights 1984).

27. GENDER JUSTICE, *supra* note 5, at 147.

28. *Id.* at 155-56.

29. *Id.* at 158.

30. *Id.* at 166; see generally *id.* at 159-67.

31. *Id.* at 168-69.

care for small children," and "[t]here is now overwhelming support for women who opt to work."³² The phenomenon of women heads of households has contributed only to the feminization of poverty, not to the liberation of women.³³ The fact that half the population believes men should have childcare responsibilities does not mean that very many men fulfill such responsibilities: childcare is still primarily a woman's responsibility even in two-career families.³⁴ And while there may be popular support for women who work, even the authors themselves recognize that the crushing burden of family responsibilities keeps many women from full participation in the workforce.³⁵

Gender Justice not only presents a naively optimistic view of the progress toward equality, it is strikingly unfair to its adversaries. Presentation of the radical feminist viewpoint ranges from simplistic to deliberately distorted. The authors reduce much of the feminist scholarship to tirades against a male conspiracy: "Marxist feminists . . . explain the earnings gap as a plot by men to retain their superiority."³⁶ The feminist view of the segregated workforce is similarly described: "The radical feminist envisions a male plot to turn women workers into a kind of ladies auxiliary for the human race."³⁷ This simplistic view is very likely derived from the same shortcoming that informs the authors' view of women's "choices": an inability to recognize a spectrum between fully intentional choices ("plots") and acts utterly beyond control of the individual.

This failure to recognize the mixed nature of prejudice is most apparent in the authors' brief criticism of the feminist explanation of segregation in the workplace, employers' prejudice. The authors suggest that such an explanation "strain[s] credulity":

If one sees men as "homo-social" beings—that is, interested in working with other men, not women—who have created segregated working conditions in order to associate with one another, the theory acquires a certain bite. Yet this is a couple-oriented, not a "night out with the boys (or girls)," society; why should work and

32. *Id.* at 137.

33. See, e.g., G. DUNCAN, *supra* note 18, at 48-52; L. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 323-56 (1985).

34. See, e.g., Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 SIGNS: J. WOMEN IN CULT. & SOC. 366, 388-93 (1981); Kay, *Legal and Social Impediments to Dual Career Marriages*, 12 U. CAL. DAVIS L. REV. 207, 220 (1979); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 995-96 n.158 (1984).

35. *GENDER JUSTICE*, *supra* note 5, at 150-51 (women choose less demanding occupations in order to accommodate family responsibilities); see *id.* at 190-94 (some type of childcare allowance is necessary).

36. *Id.* at 145.

37. *Id.* at 148.

leisure preferences differ?³⁸

In fact, the prejudice that feminists suggest creates segregated workplaces is not a desire to *associate* only with one's own gender, it is a desire to *treat as peers* only one's own gender. It strains credulity to believe that the authors of *Gender Justice* are unaware of this basic distinction.

Gender Justice is excellently researched, and exhibits an astounding familiarity with the literature in numerous diverse fields. Despite this, the authors manage to ignore reality in creating their gender policy.³⁹ They call for vigorous enforcement of current antidiscrimination laws, but oppose policies designed to combat the more subtle general discrimination that pervades society. Government interference with the forces that influence individual discrimination is kept to a minimum. The only real change suggested is government encouragement and subsidization of childraising alternatives, but the authors' justification for that policy is less to free women from the choice-constraining burdens of childrearing than simply to recognize the reality that most mothers work out of economic necessity: "[P]olicy must contend with the reality that many children now receive care outside the home."⁴⁰ Moreover, the suggestion of a cash allowance directly to parents rather than government support of day care is apparently designed to encourage one parent to stay at home.⁴¹ The authors, in keeping with their failure to recognize that individual choices are heavily influenced by institutionalized discrimination and stereotypes, apparently believe that which parent chooses to stay home will be a gender-neutral individual decision. In light of the thoroughness and breadth of the authors' knowledge, it is difficult to believe that all these analytical and informational lapses are inadvertent. In the end, *Gender Justice* is little more than an apology for the status quo.

38. *Id.* at 149 (footnotes omitted).

39. Others have noticed that *GENDER JUSTICE* also ignores much recent scholarship, especially feminist scholarship. See Finley, *supra* note 19, at 914-15; Menkel-Meadow, *Gendered Justice*, 2 *BERKELEY WOMEN'S L.J.* 258, 265 (1986).

40. *GENDER JUSTICE*, *supra* note 5, at 193.

41. *Id.* at 192-94.