REVIEW ESSAY

Gender Justice and Its Critics

GENDER JUSTICE. By David L. Kirp,† Mark G. Yudof,‡ & Marlene S. Franks.‡‡ Univ. of Chicago Press 1986.

*Reviewed by Neal Devins**

Four years ago, two essays that I authored on school desegregation were published at approximately the same time. The first argued that one must consider community desires as well as legal principle when fashioning a desegregation remedy.[1] The other criticized the Reagan Department of Justice for misinterpreting Supreme Court doctrine in this area.[2] A short time after each piece was published, I confronted one of the harsh realities of working on such a highly charged topic: People not only care, they take it personally. Acquaintances on both extremes of the political spectrum shunned me. While liberals thought my "community desires" article validated racism, conservatives considered my Justice Department piece an overt attack on the administration.

David Kirp, Mark Yudof, and Marlene Strong Franks, the authors of *Gender Justice*, are probably undergoing a similar experience. Over the past two years, their book has been harshly criticized by reviewers in the *Georgetown Law Journal*,[3] the *Yale Law Journal*,[4] the *Texas Law*

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1. Devins, *Integration and Local Politics* (Book Review), 73 PUB. INT. 175 (Fall 1983).

2. Devins, *Closing the Classroom Door on Civil Rights*, 11 HUM. RTS. 26 (Winter 1984).

3. Burns, *Apologia for the Status Quo* (Book Review), 74 GEO. L.J. 1791 (1986).

4. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice* (Book Review), 96 YALE L.J. 914 (1987).

Review,[5] and the *Berkeley Women's Law Journal.*[6] No positive scholarly criticism has yet been published.[7]

Why the negative reviews? Is the book so terrible that it should be panned? I think not. I find *Gender Justice,* while not faultless, reasonable and well done. Its critics, I think, have decided to kill the messenger because they don't like the message, namely, that "justice means enhancing choice for individuals, securing fair process rather than particular outcomes for the community" (p. 12). The book's "liberty-enhancing model"[8] surely does not sit well with those who perceive that freedom of choice is impossible for many members of society. Indeed, the principal concern of the reviewers has been to demonstrate the model's failure to respond adequately to pervasive gender inequality.

I do not dispute the feminists'[9] critiques of the liberty-enhancing model.[10] At the same time, I think the feminist reviews of *Gender Justice* are unfair; they attack the book largely for what it is not, and thus overlook many of the authors' valuable insights.[11] This review attempts a more equitable approach by placing the book and its critics in the larger context of feminist jurisprudence. In so doing, it assesses the book's success in advancing a coherent model of gender equality.

My purpose then is not to advance the liberty-enhancing model as the answer to all gender questions. Rather, I will evaluate the book's application of that model and demonstrate that it provides a useful and invigorating way to examine gender classifications. In the end, however, I find the book stimulating yet disappointing. While the book provides a

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5. Fishkin, *Liberty and Sexual Equality* (Book Review), 65 TEX. L. REV. 1441 (1987).

6. Menkel-Meadow, *Gendered Justice* (Book Review), 2 BERKELEY WOMEN'S L.J. 258 (1986).

7. *Gender Justice* has fared somewhat better in the popular press. *See* Schwarzschild, *Liberty and Autonomy for All,* N.Y. Times, June 15, 1986, § 7 (Book Review), at 27. *But see* Gordon, *Feminist Rhetoric and Academic Skirmishes,* Wash. Post, Feb. 2, 1986, (Bookworld), at 10; Tong, *Liberty, Equality — Community?* (Book Review), WOMEN'S REV. BOOKS, Jan. 1986, at 1.

8. The liberty-enhancing model deviates somewhat from the classic liberal vision of the nineteenth century. For example, the authors at one point argue that "[i]n a just world, we would not only remove barriers but also give support, for liberty has no appeal when it promises only the freedom to starve" (p. 21).

9. Throughout this review, I refer to the ever-growing and diverse body of feminist jurisprudence. *See infra* notes 17-75 and accompanying text. Occasionally, however, I use the generic phrase "feminists." I do so not to describe feminism as a single way of thinking, but rather to contrast that wide-ranging body that constitutes feminist thinking with those who disagree with all feminists.

10. This is not to say that I agree with these feminist interpretations. Instead, I think that one need not repudiate this vision to find *Gender Justice* worthwhile.

11. Rather than consider *Gender Justice* on its own terms and evaluate the book within the context of the liberty-enhancing model, the reviewers focus their criticisms on the authors' equation of justice with choice and fair process. Nevertheless, many of the reviewers' narrow criticisms are well taken, particularly those expressed by Lucinda Finley. *See* Finley, *supra* note 4; *see also infra* notes 78-109.

provocative conceptual framework to explore gender issues, the authors' endorsement of liberalism—and with it the foundations underlying their liberty-enhancing model—ultimately is superficial.

This review is divided into four Parts. Part I describes *Gender Justice*'s liberty-enhancing model. Part II considers the book's place in feminist thought. Part III evaluates the feminist criticisms of the book. Finally, Part IV presents my assessment of the book.

I

GENDER JUSTICE DESCRIBED[12]

When it comes to gender, activists on both the left and the right believe that government should play an instrumental role in implementing their particular vision of social justice. On the right, naturalists consider gender-specific identities a biological imperative and advocate the use of government resources to encourage traditional sex roles (pp. 53-57). On the left, the more politically active feminists seek government-mandated equality (of earnings, of childrearing, and other familial responsibilities) to overcome pernicious sexism (pp. 48-53, 58-61).

These extreme visions mischaracterize differences in status and treatment between men and women (pp. 61-65). Nevertheless, gender-related policies often advance one of these visions. Denial of federal abortion funds and the marital tax deduction further the naturalist model (pp. 108-11). Maternity leave requirements and comparable worth proposals advance the feminist vision (pp. 168, 190). The viability of these policies exemplifies the central dilemma in this area—the perception that the status of women is explained by either biology or discrimination and acquiescence to biologically defined gender roles.

Gender Justice seeks to solve this dilemma. Rather than supporting social outcomes based on paradigms rooted in the belief that either biology or sexism defines women's role in society, *Gender Justice* stresses the primacy of self-determination.[13] The authors' view is that "justice means enhancing choice for individuals . . . ." (p. 12). Consequently, the authors generally endorse public policies that either protect or encourage free choice, while criticizing those policies designed to produce particular outcomes.

The authors premise their embrace of the liberty-enhancing model on the belief that "[i]ndividuals can usually best decide what is in their best interests, because they are the ones with the greatest incentives to

12. For a fuller description of the book, see Finley, *supra* note 4, at 914-23.

13. A healthy dose of distrust of governmental intervention is closely tied to this embrace of liberty-enhancing public policy. For example, in rejecting feminist proposals to have government transform gender roles, the authors argue that "[w]hat is remarkable about this litany is the implicit expectation that anyone, let alone government, might accomplish all those things . . ." (p. 125).

weigh highly personalized costs and benefits." (p. 21). Their model is consistent with the principle of equal opportunity, which holds that persons of equal ability and motivation should have equal chances to achieve their personal life plans (pp. 22, 105).[14] Viewed in the abstract, men and women must be deemed similarly situated since both are capable of choice. As a result, the authors argue that men and women should have the freedom to make choices and exercise opportunities without regard to gender.

In arguing for gender-neutral policies, the authors emphasize that individual choice and ability are instrumental in determining outcomes. Consequently, result-oriented feminists are wrong to conclude that freedom of choice alone does not lead to just results. Contending that "variations between the sexes are attributable, not just to noxious discrimination, but also to factors such as personal taste and voluntary obligations" (p. 27), the authors criticize result-oriented feminists: "To insist . . . that a world where some women stay in their homes and raise children is an unjust world implies that those women have made the wrong choice . . . . [O]n what moral basis can anyone stand outside as judge, condemning the mothers for their decision?" (p. 22).

Like the outcome-based ideologies it criticizes, however, *Gender Justice* proceeds on a conception of women in society. In advancing the free-choice model, the authors underscore the traditional treatment and current condition of women, including a discussion of the historic segregation of women in public policy. Using as examples both protective labor laws (mandating minimum wages and maximum work periods) and laws specifying that husbands administer their wives' assets, they conclude that "women were victimized by policies designed to protect them—policies that, for this very reason, denied them the chance to make basic decisions for themselves" (p. 29). The authors emphasize that, in contrast to such "benevolent" legislation, remedial acts such as the prohibition of sex-based discrimination in employment contained in the 1964 Civil Rights Act[15] and the Equal Pay Act[16] have enabled women to make substantial inroads in the male-dominated marketplace (pp. 158, 171). Although acknowledging that discrimination still contributes to the earnings gap between men and women, *Gender Justice* concludes that discrimination is less significant than in the past and is but one of many sociological factors affecting gender equality (pp. 142-53).

The authors, as noted, do not dismiss the wage gap. They note that

14. According to the authors, "[h]onoring individual choice ultimately enables the individual to define his or her own identity in one of its most fundamental aspects" (p. 22). *See also* Bell, *On Meritocracy and Equality*, 29 PUB. INT. 29 (1972).

15. 42 U.S.C. § 2000e (1982).

16. 29 U.S.C. § 206 (1985).

past discriminatory practices and employee choice *have* created "distinct career lines with different rewards for men and women" (p. 145), and thus they advocate government leadership in developing recruitment and training programs to encourage women to enter male-dominated professions (p. 165).[17] Unlike quotas—which in their view treat individuals as interchangeable units—such programs recognize the primacy of individual autonomy (p. 136).[18] These programs would ensure that men and women are treated equally in the public sphere of work and community (pp. 166-72). With respect to the private sphere of home and family, *Gender Justice* asserts that government generally should not interfere with private choices (pp. 81, 201).[19]

Using individual liberty as a benchmark, the authors consider many other gender-related issues, including sex-based variances in the computation of actuarial tables (acceptable because they reflect a biological truism) (pp. 3-4), the marital tax deduction (unacceptable because it rewards the traditional family at the expense of alternative family arrangements) (pp. 186-90), the abolition of gender-specific minimum wage laws (acceptable because it protects a woman's right to compete equally for jobs) (p. 119), and the exclusion of women from draft registration (unacceptable because women and men should be equally obligated to defend the nation) (pp. 104-05). Because the authors' principal inquiry is whether choice is unjustifiably restricted, *Gender Justice* is able to move quickly from issue to issue.

Gender Justice's liberty-enhancing model differs substantially from Supreme Court approaches to sex discrimination. Since 1976, the Court has applied so-called "middle tier" review to gender-based distinctions, requiring that such policies "must serve important governmental objectives and must be substantially related to achievement of those objectives."[20] When applying this standard, however, the Court has often adopted a determinist vision of gender equality and insisted that gen-

17. Similarly, the authors support programs encouraging men to enter traditionally female professions. *Gender Justice* offers the following model for effective gender-based policy: "Removing the formal impediments to volition, securing the basic requisites of choice, [and] encouraging tolerance for the divergent choices of others . . . will lead to change" (p. 28).

18. The authors state that "quotas withhold from individuals the right of self-determination that is critical for self-respect" (p. 136).

19. According to the authors, "[t]he public sphere is the world of political and economic affairs, the private sphere refers to relationships in which personal satisfactions or interests, not the public good, are determinative" (p. 17).

20. Craig v. Boren, 429 U.S. 190, 197 (1976) (invalidating Oklahoma law prohibiting sale of beer to males under 21, while permitting such sales to 18-year-old females). *See generally* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-37 (1972) (explaining the Court's abandonment of a two-tier model of equal protection doctrine by adding an intermediate or "middle tier" approach in the early 1970s).

der-based classifications conform to perceived biological differences.[21] Thus, male-only draft registration is appropriate because Congress has determined that women are physically disadvantaged and therefore should be ineligible for combat duty.[22] Similarly, criminalizing sexual relations with a minor female, but not a minor male, correctly recognizes that women and men are "not similarly situated with respect to the problems and risks of sexual intercourse."[23] In commenting on this naturalist emphasis on real sex differences, Anne Freedman has written: "The adjective 'real' implies not only that these differences are caused by nature or biology, but also that the impact of sex differences on people's lives is natural and inevitable, rather than culturally determined."[24]

The Court's validation of special treatment programs endorsed by many feminists appears equally deterministic. An example is its recent approval of a qualified right to reinstatement in conjunction with unpaid pregnancy leave.[25] While emphasizing that "a State could not mandate special treatment of pregnant workers based on stereotypes or generalizations about their needs and abilities,"[26] the Court upheld a law allowing female employees up to four months to recover from childbirth.[27] Undoubtedly, the allowance for such extended leave was premised on the view that women—but not men—need a sufficient period of time to reorganize their lives as parents and workers. The Court's special treatment of women has been attacked by some scholars as reinforcing the cultural norm of women as homemakers. Professor Wendy Williams, for example, criticizes "feminists who seek special recognition for pregnancy,"[28] since "[m]aternity leave was always based upon cultural constructs and ideologies rather than upon biological necessity, upon role expectations rather than irreducible differences between the sexes."[29]

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21. *See generally* Freedman, *Sex Equality, Sex Differences, and the Supreme Court,* 92 YALE L.J. 913, 922-43 (1983) (tracing concept of "real" sex differences in Rehnquist-Stewart approach).

22. *See* Rostker v. Goldberg, 453 U.S. 57, 77 (1981) (" 'The principle that women should not intentionally and routinely engage in combat is fundamental. . . .' ") (quoting S. REP. No. 826, 96th Cong., 2d Sess. 157 (1980)).

23. Michael M. v. Superior Court, 450 U.S. 464, 471 (1981).

24. Freedman, *supra* note 21, at 945.

25. *See* California Federal Savings & Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987) (upholding the California Fair Employment and Housing Act).

26. *Id.* at 691 n.17.

27. CAL. GOV'T CODE § 12945(b)(2) (West 1980). *But cf.* Wimberly v. Labor and Indus. Relations Comm'n, 107 S. Ct. 821 (1987) (state may disqualify unemployment compensation claimants who leave their jobs because of pregnancy, because the statutory coverage excludes all claimants who leave their jobs for reasons not causally connected to their work or their employers). *See generally* Minow, *Foreword: Justice Engendered,* 101 HARV. L. REV. 10, 38-43 (1987) (arguing that *Wimberly* was based on a male standard whereas *California Federal* did not rely on gender-based presumptions).

28. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism,* 7 WOMEN'S RTS. L. REP. 175, 195 (1982) [hereinafter Williams, *The Equality Crisis*].

29. *Id.* at 197.

Gender Justice is highly critical of so-called naturalist and feminist visions. In order to depart from deterministic sex-stereotyping, the authors suggest that the Court adopt a two-part test in which it considers: (1) whether a gender-based classification serves to sustain autonomy or reduce liberty by maintaining historical distinctions; and (2) whether there exists a less gender-specific alternative (p. 101).[30]

One of the most striking features of this liberty-enhancing model is the authors' recognition that gender-based policy no longer can ignore classifications that are harmful to men. They advocate the father's right to be informed of the mother's wish for an abortion (p. 111), the right of husbands to be eligible for alimony (p. 102), and the impropriety of the presumption—sometimes used in custody battles—that the mother is better able to care for her child than is the father (pp. 183-85).

By applying the free-choice model equally to men and women, the authors also distinguish gender justice from racial justice. Contrasting the paternalistic "benefit motivation" of gender-based classifications with the invidious oppression of blacks by whites, they argue that their analysis should not be applied to racial policy (p. 87).[31] With respect to race, "where 'different' is almost always a euphemism for 'worse' " (p. 87), equality means indistinguishability. In contrast, Kirp, Yudof, and Franks consider indistinguishability a poor formula for gender equality. Their preferred constitutional approach treats gender equality "as securing equal liberty and equal rights of public participation for men and women" (p. 87).

While preferring that government perform a limited role in transforming gender roles, *Gender Justice* does not repudiate state involvement. The authors recognize that government "cannot avoid affecting men's and women's choices" (p. 129); however, they advance a host of reform proposals designed to reduce government-imposed gender distinctions. These include providing federal funds for childcare to give parents flexibility in selecting the appropriate mix between work and home (pp. 190-94) and the adoption of an individually based tax system that does

30. In applying this equal liberty principle, Kirp, Yudof, and Franks take issue with numerous Supreme Court decisions. Noting that women can at least carry out noncombat duty, they dispute the holding of Rostker v. Goldberg, 453 U.S. 57 (1981), because it signifies women's diminished civic role (pp. 104-05). The authors' criticism is not confined to case outcomes, but extends equally to the Court's reasoning. Consequently, they take issue with Taylor v. Louisiana, 419 U.S. 522 (1975), a case insisting on sexually diverse jury rolls because "a flavor, a distinct quality is lost if either sex is excluded." *Id.* at 532. The authors argue that the case turned on stereotypical gender differences: The Court inappropriately emphasized the "distinct quality" of women, rather than premising its decision on civic responsibility as an essential element of liberty and respect (pp. 103-04).

31. Indeed, the authors suggest that greater government intervention may be necessary to overcome the consequences of historic racial discrimination (p. 137).

not encourage certain types of familial relationships over others (pp. 186-90).[32]

Kirp, Yudof, and Franks never insist, however, that the government remain completely gender neutral. They endorse "benign" discrimination when it is truly remedial and thus liberty enhancing. Accordingly, Social Security Act provisions favoring women are permissible because they respond to historic discrimination that reduced women's earnings and forced them into early retirement (pp. 102-03).[33] The authors also advocate differences in treatment which respond to biological sex differences. Unlike the Supreme Court's approach, which permits gender distinctions substantially related to important government objectives, *Gender Justice*'s authors would permit nonremedial distinctions only when based on immutable sex differences. For example, the computation of actuarial tables may take into account statistical disparities between the life expectancies of men and women (p. 114). In contrast, sex-based variances in auto insurance rates are rejected because such "[s]ex-based differentials create categories from which careful men cannot escape and which benefit reckless women" (p. 114).

The authors are not uncompromising in their emphasis on choice. They apparently approve of some gender classifications in the name of fiscal expedience. This exception assumes that if a sexual stereotype is almost universally true, reliance upon it will not be demeaning. For example, in determining whether wives—but not husbands—are given military dependents' benefits without proof of their dependence, the authors view as a toss-up the conflicting concerns of administrative convenience (since the husband is chief breadwinner in almost ninety percent of military households) and sexual stereotyping (since such presumptions reinforce women's status as secondary wage earners) (p. 115).

II

GENDER JUSTICE AND FEMINIST JURISPRUDENCE

Gender Justice pays little attention to the burgeoning body of feminist jurisprudence.[34] Instead, the authors debunk two jurisprudential

32. The authors also propose modifying social security retirement benefits to recognize women's dual responsibilities at home and in the market (pp. 195-99).

33. *See* Califano v. Webster, 430 U.S. 313 (1977) (per curiam). The authors also support sex-based classifications in education, arguing that sex-segregated schools often enhance choice. The authors therefore disagree with a 1982 Supreme Court ruling which required a state-run nursing school to admit men. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982). Contending that the real issue is the impact of the school admission policy on plaintiff's life choices, the authors feel that the majority erred in its absolutist view that such sex-segregation "perpetuate[s] the stereotyped view of nursing as an exclusively woman's job." *Id.* at 729 (p. 106).

34. Several critics have attacked the book for presenting an oversimplistic view of feminist thinking. *See* Burns, *supra* note 3, at 1793 ("The authors virtually ignore the more interesting and productive source of contrasts and comparisons available in emerging feminist legal theory . . . ."));

caricatures—"naturalists" and "leftist feminists." This oversimplification serves the authors well. Their purpose is not to offer a comprehensive critique of thinking on gender policy, but rather to contrast their liberty-enhancing theory with deterministic visions on both extremes of the political spectrum.[35] Some understanding of the richness of feminist thinking, however, is necessary to appreciate *Gender Justice* and its critics. Three approaches dominate feminist thinking: equality, special treatment, and inequality.[36] This Part separately considers each of these models.

A. Equality

The equality approach most closely resembles the liberty-enhancing model advanced in *Gender Justice.* Grounded in mid-seventies efforts to ratify the Equal Rights Amendment[37] and push for heightened judicial review in gender cases, equality proponents speak of "the nation's moral and legal commitment to a system in which women and men stand as full

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see also Finley, *supra* note 4, at 915 ("[T]he work seems barely touched by the recent profusion of feminist writings on gender issues.").

35. Kirp, Yudof, and Franks argue that the common underlying weakness of naturalist and leftist feminist paradigms is that they "stress what happens to women, rather than attributing to them any significant part in shaping their circumstances" (p. 63).

36. *See generally* Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate,* 86 COLUM. L. REV. 1118, 1142-63 (1986) (summarizing the equality/special treatment debate in the context of critiquing equality theory); Note, *Childbearing and Childrearing: Feminists and Reform,* 73 VA. L. REV. 1145 (1987) (examining the theoretical debate over social policies). Other feminist perspectives include antisubordination, equal acceptance, and communitarian theories. *See* Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection,* 61 N.Y.U. L. REV. 1003 (1986) (antisubordination); Littleton, *Restructuring Sexual Equality,* 75 CALIF. L. REV. 1279 (1987) (equal acceptance); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication,* 72 VA. L. REV. 543 (1986) (communitarian).

Many feminists also subscribe to Carol Gilligan's notion that gender defines the approaches taken by men and women to resolve moral and legal problems. *See* C. GILLIGAN, IN A DIFFERENT VOICE (1982). Those promoting this feminist approach, known as the "ethic of care," seek "a community and a judiciary that relies on nurturant, caring, loving, empathic values rather than exclusively on the rule of reason . . . ." West, *Jurisprudence and Gender,* 55 U. CHI. L. REV. 1, 65 (1988); *see also* Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559, 1568 (1987) (arguing that an ethic of care methodology "supplants the formal and abstract thinking entailed in the liberal ethic of justice and rights with an approach to moral problems that is contextual and narrative"). While feminists like Bartlett, Sherry, and West make use of Gilligan's theory, other feminists worry that the attributes of the ethic of care are male-defined and hence capable of serving as a "mechanism for keeping women from true knowledge or good theory by limiting them to 'feminine' modes of discourse." Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Policies of Authenticity* (Book Review), 68 B.U.L. REV. 217, 243 (1988); *see also* C. MACKINNON, FEMINISM UNMODIFIED 39 (1987) (Gilligan's theory reinforces women's powerlessness).

37. The substantive section of the Equal Rights Amendment reads: "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex." H.R.J. Res. 1, 98th Cong., 1st Sess. § 1 (1983); S.J. Res. 10, 98th Cong., 1st Sess. § 1, 129 CONG. REC. 5529-30 (1983).

and equal individuals under the law."[38] Its chief contemporary proponent is Professor Wendy Williams. According to Williams, "sex-based generalizations are generally impermissible whether derived from physical differences such as size and strength, from cultural role assignments such as breadwinner or homemaker, or from some combination of innate and ascribed characteristics, such as the greater longevity of the average woman compared to the average man."[39] In language strikingly similar to that in *Gender Justice,* she claims that "a dual system of rights inevitably produces gender hierarchy and, more fundamentally, treats women and men as statistical abstractions rather than as persons with individual capacities, inclinations and aspirations—at enormous cost to women and not insubstantial cost to men."[40] Consequently, Williams fears that the state may "lay claim to an interest in women's special procreational capacity"[41] and thus argues against special rules for pregnancy-related disabilities.[42] Instead, she advocates comprehensive disability plans that provide equally for men and women. By refusing to label early childrearing as an exclusively feminine domain, Williams hopes to encourage greater male involvement in childrearing.[43]

Gender Justice similarly views special maternity benefits as "the latest version of paternalism, with all its debilitating consequences for working women" (p. 41). However, the book's formulation departs substantially from that offered by Williams. Whereas Williams insists that any rule having a disparate effect on one sex be reasonably necessary to business operations,[44] Kirp, Yudof, and Franks suggest no such limitation when disparate impact is rooted in choice. In the case of pregnancy, application of the liberty-enhancing model is not necessarily inconsistent with gender-based classifications, since "[u]nlike other disa-

38. Ginsberg, *Gender in the Supreme Court: The 1973 and 1974 Terms,* 1975 SUP. CT. REV. 1, 24. These mid-seventies litigation efforts—undertaken principally by the American Civil Liberties Union—"sought to show that women were similarly situated, but that society had treated them differently because of stereotypical 'old notions' and 'archaic assumptions' about sex roles." Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World,* 2 LAW & INEQUALITY 33, 55 (1984). *See also* Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics,* 24 UCLA L. REV. 581, 603-15 (defending the ideals of equality theorists) (1977).

39. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate,* 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329 (1984-1985) [hereinafter Williams, *Equality's Riddle*].

40. *Id.* at 329-30.

41. Williams, *The Equality Crisis, supra* note 28, at 196.

42. *Id.* Professor Williams further justifies her position by arguing that: (1) treating pregnancy as a special case allows for both unfavorable and favorable treatment; (2) focusing on pregnancy draws attention away from the larger concern of reforming disability programs; and (3) favorable treatment of pregnancy increases the costs of hiring women and therefore may ultimately harm women's economic position. *Id.*

43. *See* Williams, *Equality's Riddle, supra* note 39, at 354-55.

44. *See id.* at 331-32 (following approach of disparate-impact title VII analysis).

bilities . . . pregnancy is usually voluntary and welcomed . . . ." (p. 109).[45] Moreover, *Gender Justice*'s liberty-enhancing model also differs from the Williams' disparate-impact model by accepting gender-based rules rooted in administrative convenience or alleged natural sex differences.[46]

B. Special Treatment

Gender Justice departs more substantially from the work of special treatment feminists Herma Hill Kay and Sylvia Law. Professor Kay argues that biological, reproductive sex differences should be legally significant only in the context of procreation-related activities.[47] For Kay, equality analysis "does not adequately solve the legal problems raised by reproductive differences, primarily because the comparison between men and women does not fit those cases."[48] As a result, she endorses gender-specific laws that require the granting of extended maternity leave, because such laws ensure equal employment opportunity by recognizing immutable differences between men and women.[49] For similar reasons, Kay implies that equality analysis fails in cases involving printed warnings on cigarette packages about the dangers of smoking during pregnancy, court orders that safeguard fetal development against maternal neglect, and access to abortions by indigent women.[50]

Professor Law's model varies slightly from Kay's approach in that it concentrates solely on laws impeding female reproductive freedom.[51] Rather than having courts limit special treatment to instances where there are procreation-related differences between men and women, Professor Law—apparently unconcerned with laws impeding male reproduc-

45. The authors do recognize, however, that complicated childbirth operations, as contrasted with the costs of normal pregnancy which "the ordinary family" can plan for, should be included in disability plans (p. 109).

46. For an equality-based criticism of these features of the liberty-enhancing model, see *infra* notes 101-107 and accompanying text.

47. Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 22 (1985) [hereinafter Kay, *Equality and Difference*]. Professor Kay argues that "biological reproductive sex differences are not comparable to other traits or characteristics that are shared by both sexes, and cannot adequately be analyzed within a framework that turns on differential treatment of two comparable groups." *Id.* at 33. Consequently, she proposes conceptualizing the debate in terms of an "episodic analysis" which limits the legal significance of reproductive sex differences to pregnancy. *Id.*

48. Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 87 [hereinafter Kay, *Models of Equality*]. The special treatment model is comparable to the equality approach in its treatment of risks to fertility that men and women share equally, such as exposure to toxic materials. According to Kay, such risks do not justify differences in treatment. *Id.* at 85.

49. Kay, *Equality and Difference*, *supra* note 47, at 20-38. For the equality critique of this proposition, see *supra* note 42 and accompanying text.

50. Kay, *Models of Equality*, *supra* note 48, at 83-84.

51. *See* Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (arguing for a stronger focus on biological reproductive differences).

tive freedom[52]—proposes that courts reviewing the constitutionality of laws governing reproductive biology[53] ensure that "(1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or (2) if the law has this impact, it is justified as the best means of serving a compelling state purpose."[54] In advancing her proposal, Law emphasizes the judiciary's inability to distinguish between biology and its accompanying social consequences.[55]

By viewing pregnancy as "voluntary," *Gender Justice*'s liberty-enhancing model is not sympathetic to the underlying concern of special treatment advocates. Like the equality theorists, Kirp, Yudof, and Franks view gender-based maternity leave as harmful paternalism (p. 140). At the same time, the liberty-enhancing model recognizes that Congress should provide funds for medically necessary abortions when government offers "men and women every other kind of medically essential treatment" (p. 110).[56] Finally, *Gender Justice* is not insensitive to the needs of working mothers, but—like the equality model—its proposed solution is to offer parental benefits to both men and women.

It is important to note that the liberty-enhancing, equality, and special treatment models all share a strong belief in individual decisionmaking.[57] The ultimate objective of all models is to ensure the fair treatment of men and women in the public sphere.[58] While the special treatment model is built around the special circumstances of pregnancy, it is generally highly critical of gender-based decisionmaking. Indeed, Professor Law refuses to extend her model beyond reproductive biology—believing instead that constitutional adjudication in this area should simply seek

52. *See* Kay, *Models of Equality, supra* note 48, at 84-85 (discussing Law's method for analyzing statutes regulating reproductive biology).

53. Law contrasts regulation concerning reproductive biology with legislation that reflects sex-based classifications, such as those "based on what the government perceives to be the ability and willingness of certain citizens to care for children . . . ." Law, *supra* note 51, at 1034 (comparing statute requiring women to inform sexual partner of her pregnancy with statute providing child care leave to nursing mothers).

54. *Id.* at 1008-09.

55. *Id.* at 1002-13. Professor Law criticizes cases in which the Court relied on sex stereotypes of male aggression and male combat-readiness in order to underscore her view that attention to differences should be limited to laws implicating reproductive biology and to legislation which may negatively affect women. *Id.* at 1014 n.217.

56. For further discussion of abortion-funding decisions, see *id.* at 985 n.15.

57. *See generally* Finley, *supra* note 36, at 1159-63.

58. Differences among the models then are best understood as little more than the use of varying means to accomplish similar objectives. Williams' insistence upon "pure" equality, for example, is principally based on her belief that special treatment accommodation will ultimately harm the social and economic status of women. *See* Williams, *The Equality Crisis, supra* note 28, at 196-97. Moreover, Williams believes that "pure" equality is within reach. *See* Williams, *Equality's Riddle, supra* note 39, at 380. For an examination of the "pure" version of equality, see Van Alstine, *Rights of Passage: Race, the Supreme Court, and the Constitution,* 46 U. CHI. L. REV. 775 (1979).

"formal comparative equality with its relatively more reliable standards."[59] All three models, therefore, reflect the liberal vision that society be built around rules equally applicable to men and women. *Gender Justice,* "[b]y opting for process over outcome, . . . value[s] self-determination over collective determinations of sex roles" (p. 12). Equality theory similarly speaks of "a commitment to a vision of the human condition which seeks to uncover commonalty rather than difference."[60] Finally, special treatment advocates claim that "where reproductive sex differences are not at issue . . . one can compare women and men without distortion."[61]

C. Inequality

Inequality theory rejects the propositions that individual choice in the free market is the true measure of justice and that the private (home) and public (work) spheres are distinct. Inequality theorists consider these presumptions fuel for male-dominated norms which deny a distinct feminine identity and set "being like a man" as the outer bounds of a woman's potential. According to Lucinda Finley, "[t]he role of men in defining the standard of normalcy and in assigning significance to female differences, means that the whole premise of our equality jurisprudence is whatever is male is the norm."[62]

Catherine MacKinnon is the leading proponent of the inequality model. She argues that the inequality approach "is marked by the understanding that sex discrimination is a system that defines women as inferior from men, that cumulatively disadvantages women for their

59. Law, *supra* note 51, at 1012.

60. Williams, *Equality's Riddle, supra* note 39, at 326.

61. Kay, *Models of Equality, supra* note 48, at 87.

62. Finley, *supra* note 36, at 1155. Recent articles by Martha Minow, Ann Scales, Christine Littleton, and Robin West espouse a similar vision. Professor Minow argues that the work of leading feminists "exposes the dominance in field after field of conceptions of human nature that take a male as the reference point and treat women as 'other,' 'different,' 'deviant,' 'exceptional,' or baffling. Feminist work has thus named the power of naming and has challenged both the use of male measures and the assumption that women fail by them." Minow, *supra* note 27, at 61 (footnote omitted). Professor Minow also notes that to avoid applying one particular view to stand for all women, feminists must also consider race and class in any account of gender relations. *See id.* at 63. For Professor Scales, the underlying philosophical basis of the legal system has "made maleness the norm of what is human, and [has done] so sub rosa, all in the name of neutrality." Scales, *The Emergence of Feminist Jurisprudence: An Essay,* 95 YALE L.J. 1373, 1377 (1986); *see also id.* at 1394 (arguing that the law must focus on the effects of male domination rather than on the differences between the sexes). Professor West aptly summarizes this feminist critique: "The human being assumed or constituted by legal theory precludes the woman described by feminism." West, *supra* note 36, at 42. This is wrong. Echoing this perception, Professor Littleton argues that male domination—or "phallocentrism"—has "created a self-referencing system by which those things culturally identified as 'male' are more highly valued than those identified as 'female'. . . ." Littleton, *supra* note 36, at 1280.

differences from men, as well as ignores their similarities."[63] Correlatively, she criticizes liberal visions, proclaiming that "it is not only lies and blindness that have kept women down. It is as much the social creation of differences, and the transformation of differences into social advantages and disadvantages, upon which inequality can *rationally* be predicated."[64]

This pervasiveness of male domination makes the application of rules impossible, for when the state "is most ruthlessly neutral, it will be most male; when it is most sex blind, it will be most blind to the sex of the standard being applied."[65] Since neutrality and male dominance are inseparable, the liberal vision of choice is therefore impossible. Because of liberal transgressions, MacKinnon views as objectionable discrimination policies or practices that contribute to "the maintenance of an underclass or a deprived position because of gender status."[66]

The inequality model likewise rejects liberal distinctions between public and private spheres. This rejection is best illustrated by Frances Olsen.[67] Claiming that this dichotomy treats "[a]ctual inequality and domination in the family . . . as private matters that the state did not bring about,"[68] Professor Olsen argues that men have retained "excessive" power both by restricting state regnlation of the family and by using the state's coercive power "to reinforce and consolidate their

63. C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 116 (1979). For an excellent liberal critique of this book, see Taub, Book Review, 80 COLUM. L. REV. 1686 (1980).

64. C. MACKINNON, *supra* note 63, at 105.

65. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence,* 8 SIGNS 635, 658 (1983). Similarly, Lucinda Finley argues that the absence of values such as interconnectedness and care in our system of rights reflects the male experience:

> It is the male aspect of human experience because men are generally removed from bodily concerns such as preparing food for the table and assuring clean clothes in the drawer, and have been removed from human experiences that can foster a sense of interconnectedness, such as birth and childrearing. Thus, it is much easier for men to conceive of themselves as disconnected, autonomous beings.

Finley, *supra* note 36, at 1161. *See also* Freedman, *supra* note 21 (arguing that equality analysis, based upon perceived "natural" sex differences, is often used to uphold discriminating laws); Note, *Toward a Redefinition of Sexual Equality,* 95 HARV. L. REV. 487, 495 (1981) ("the idea that sexual equality means assimilating women into the status quo [has] blocked the courts' view of changes in the status quo that might help make room for women").

66. C. MACKINNON, *supra* note 63, at 117.

67. *See* Olsen, *The Family and the Market: A Study of Ideology and Legal Reform,* 96 HARV. L. REV. 1497 (1983). Olsen writes that "[t]he state as it now exists must be ended at the same time that civil society as it now exists is ended; and when we transform the contemporary family, we must simultaneously transform the market." *Id.* at 1568. *See also* Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law,* in THE POLITICS OF LAW 117, 118-22 (D. Kairys ed. 1982) (arguing that the limits the law places on female participation in the public sphere, coupled with the nearly complete absence of law in the private sphere, operates to promote male dominance in society); Teitelbaum, *Family History and Family Law,* 1985 WIS. L. REV. 1135 (rejecting separate-sphere approach because of historic state encroachment on the family).

68. Olsen, *supra* note 67, at 1506.

authority over wives and children."[69] Liberal solutions such as the recognition of marital property[70] and no-fault divorce[71] are considered inadequate to correct this power imbalance. Such solutions either "foster individual selfishness" or "legitimate actual inequality by individualizing and particularizing it."[72] The solution, therefore, is not "to patch up and refine the liberal theory of the state," but to "challenge and disintegrate it."[73]

Inequality theorists also offer a pragmatic critique of the liberal vision. For example, pointing to the competing cost-benefit framework of the equal treatment-special treatment debate, Lucinda Finley argues that both positions fail due to their reliance on the liberal doctrinal framework: "[T]he [liberal] theory of equality and the legal analysis that implements the theory cannot tell us how to define or identify what is a relevant difference and what is a relevant similarity in any given situation."[74] Finley also argues that the liberal theorists' emphasis on autonomy limits reform, for the conception of detached autonomy as self-definition "is challenged by the recoguition that our desires and values are often socially constructed."[75] By focusing on the individual, therefore, the liberal vision gives short shrift to features of human development emphasized by feminists.

Inequality theory and the liberty-enhancing model advanced in *Gender Justice* are clearly irreconcilable.[76] Inequality writers view the liberal

69. *Id.* at 1510.

70. *Id.* at 1540.

71. *Id.* at 1534.

72. *Id.* at 1560. *Compare* Note, *supra* note 65, at 502 ("[I]f raising children and, say, drafting contracts were compensated equally (in money and status), women who will not or cannot adopt the typical male role of minimal parental responsibility would not be economically handicapped.").

73. Olsen, *supra* note 67, at 1562. *See also* Finley, *supra* note 36, at 1163 ("A central aspect of the [gender hierarchy] problem that eludes equality analysis is the maintenance of separate spheres of work and home . . . ."). It is also worth noting that feminist theorists are not the only group rejecting the liberal dichotomy between public and private spheres. The New Right, as Professor Law points out, seeks to replace this dichotomy with "a culturally and legally enforced ideal of the patriarchal family." Law, *Equality: The Power and Limits of the Law,* 95 YALE L.J. 1769, 1778 (1986).

74. Finley, *supra* note 36, at 1149.

75. *Id.* at 1161.

76. Nevertheless, the sweeping rejection of liberalism by inequality theorists is probably overly broad. Liberalism takes on many forms, including some that at least potentially reject the notion that men and women are now ready to compete equally. John Rawls' emphasis on fair equality of opportunity, for example, recognizes that "those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system . . . ." J. RAWLS, A THEORY OF JUSTICE 73 (1971). According to Rawls, "[t]he consistent application of the principle of fair opportunity requires us to view persons independently from the influences of their social position." *Id.* at 511. If fair outcomes are predicated on the existence of a fair process, then inequalities that influence social position must be taken into account. While admitting that Rawls himself has only "barely hinted at" applying his theories to feminist jurisprudence, Susan Okin has argued that "a consistent and wholehearted

definition of choice and the separation between public and private spheres as male constructs and sources of male domination. For inequality writers, "[t]he liberal humanist goal of protecting 'the untrammelled exercise of capacities central to human rationality' not only does not apply to disenabled persons, but often requires the systematic deprivation of the freedom of others."[77] Kirp, Yudof, and Franks dismiss this viewpoint as failing to attribute to women any significant role in shaping their environment (p. 63). In advancing the liberty-enhancing model, they make this classic liberal argument: "By opting for our own plan of life rather than imagining it imposed on us, we engage in a uniquely human enterprise that expresses our moral dignity" (p. 64). Needless to say, this formulation does not sit well with inequality visionaries. They see this formulation as problematic in a world where, they maintain, the individual will is often shaped by social conditioning and context.

III

GENDER JUSTICE AND ITS CRITICS

Scholarly criticism of *Gender Justice* must be understood in its context. The ferocity of the book's critics derives in large part from their rejection of the book's acceptance of the liberal vision. Lucinda Finley,[78] Sarah Burns,[79] and Carrie Menkel-Meadow[80] assess the book in a manner often analogous to the inequality model's critique of liberalism. James Fishkin argues that the authors' complete faith in the process approach cannot be justified when these procedures produce systematic patterns of unequal outcomes.[81] For the most part, these criticisms fail to evaluate *Gender Justice*'s actual application of the liberty-enhancing model, but concentrate instead on criticizing the model itself. Indeed, much of the criticism of *Gender Justice* concerns the book that the authors should have written rather than the one that they did write. It is thus important to explore how the reviewers approach gender issues from a perspective different from *Gender Justice*'s authors.

The inequality-based critiques consider *Gender Justice* analytically

application of Rawls' liberal principles can lead us to challenge fundamentally the gender system of our society." Okin, *Justice and Gender,* 16 PHIL. & PUB. AFF. 42, 44 (1987). Rawls is not the only liberal who deviates from inequality theorists' caricature of liberalism. *See* S. HOLMES, BENJAMIN CONSTANT AND THE MAKING OF MODERN LIBERALISM 3, 241-61 (1984) (arguing that Constant's ideas are not injured by criticisms of liberalism's emphasis on private rights and blindness to social context); Sunstein, *Feminism and Legal Theory* (Book Review), 101 HARV. L. REV. 826, 835 n.39 (1988) (criticizing MacKinnon's remarks about liberalism as "too casual" because she identifies all of liberalism with the ideas of a narrow aspect of that school of thought).

77. Scales, *supra* note 62, at 1389 (footnote omitted).

78. Finley, *supra* note 4.

79. Burns, *supra* note 3.

80. Menkel-Meadow, *supra* note 6.

81. Fishkin, *supra* note 5.

flawed because it emphasizes decontextualized autonomy. According to these writers, the book fails to recognize that gender roles and other societal pressures greatly affect the significance of choice.[82] For example, Professor Finley argues that a truly free society requires "far more than refrain[ing] from interfering with existing 'choices' that grow out of the currently prevailing power structure, roles, and expectations of our society."[83] Professor Burns similarly criticizes the book for its failure to recognize pervasive discrimination in society's distribution of resources and opportunities: "At home and at work, by embedded cultural meanings and practices, women generally are secondary to men."[84] Finally, for Professor Menkel-Meadow *Gender Justice* and its liberty-enhancing model fall back on "several old, liberal, middle-class, white, and male saws—choice, 'equal liberty,' individualism, process, freedom, and autonomy . . . ."[85]

Inequality-based critiques thus reject *Gender Justice*'s reliance on free choice as the source of reform. Professor Menkel-Meadow points to actual social conditions that formulate choices, and asks, "Can a woman who does not have sufficient education to 'freely choose' between American achievement on the job and traditional familial socialization to get married, have children, and stay home really be considered as having expressed a choice?"[86] Indeed, both Menkel-Meadow and Finley recount personal experiences that illustrate problems with *Gender Justice*'s concept of choice. Professor Menkel-Meadow discusses a woman in her exercise class having a breast enlargement "because to her husband and to herself she was 'nothing' with her small breasts."[87] Professor Finley speaks of a friend's young daughter "already attuned to the dangers and difficulties of breaking out of conventional social roles" in her desire to be a stewardess and not a pilot.[88] Professor Fishkin, while not explicitly endorsing the inequality model, also criticizes *Gender Justice* for its reliance on choice. He argues that because women operate at such a disadvantage, choice is illusory and outcomes must be scrutinized to ensure fair process.[89]

Menkel-Meadow and Finley also disavow *Gender Justice*'s endorsement of the public-private distinction. As Menkel-Meadow asserts,

82. Finley, *supra* note 4, at 940-41.

83. *Id.* at 943; *see also id.* at 923 ("Is there any role in the liberty theory for moral outrage over . . . the many other indignities faced by women?").

84. Burns, *supra* note 3, at 1795; *see also id.* at 1794 (criticizing the authors' adherence to the liberal model despite the conflicting goal of "achieving genuine gender equality").

85. Menkel-Meadow, *supra* note 6, at 259.

86. *Id.* at 265.

87. *Id.*

88. Finley, *supra* note 4, at 932 n.87.

89. *See* Fishkin, *supra* note 5, at 1448-49.

"[w]hat well-schooled feminist aspires to a government policy that perpetuates sharp market-family distinctions and leaves individuals 'free' to do as they will, in a present world largely constructed out of past 'official' policies which largely pre-ordain those 'choices'?"[90] Given this view of reality, Finley advocates the attainment of fundamental political and social change through "[g]lobal attention to the intricate interweavings of family, market, and politics . . . ."[91]

The debunking of liberal thinking—rather than an assessment of *Gender Justice* within the context of liberal ideology—is the raison d'etre of all four reviews. Professor Menkel-Meadow recommends the book, "but only if you want to see where you belong in a world constructed by a limited liberal vision."[92] Professor Burns is pained by the authors' failure to consider adequately contemporary feminist thinkers, and argues that such consideration might have made the authors' own analysis "more thoughtful and self-aware."[93] Professor Finley likewise finds fault with the book because it "seems barely touched by the recent profusion of feminist writings on gender issues."[94] Professor Fishkin's review, meanwhile, presents a summary critique of the book's process-based liberalism.[95]

Gender Justice is criticized for two generalizations that set the tone of its analysis: 1) the liberty-enhancing model is sufficient to overcome past discrimination because "[r]ules governing the conduct of women were adopted in what was honestly seen as women's best interest" (p. 30); and 2) the "leftist feminist" theory is too deterministic to contribute to the liberty-enhancing model (p. 48). Finley criticizes these propositions because she believes that a theory of gender justice must include "analysis of the ways in which women are oppressed [in order to understand] how the options, choices, and dignity of women have been systematically constrained by their powerless positions throughout history."[96]

That a book is either incomplete in its consideration of a topic or inadequate to the task of drawing meaning from some phenomenon certainly are appropriate grounds for criticism.[97] *Gender Justice*'s critics do

90. Menkel-Meadow, *supra* note 6, at 260; *see also* Burns, *supra* note 3, at 1797 (arguing that women's individual autonomy and ability to make free choices is impaired in a culture that often places them in precarious economic circumstances).

91. Finley, *supra* note 4, at 918.

92. Menkel-Meadow, *supra* note 6, at 272.

93. Burns, *supra* note 3, at 1816; *see also id.* at 1793 n.9 (criticizing *Gender Justice*'s failure to discuss feminist interpretations of Supreme Court sex discrimination cases).

94. Finley, *supra* note 4, at 915.

95. *See* Fishkin, *supra* note 5, at 1445-50.

96. Finley, *supra* note 4, at 934.

97. Indeed, I have written critical reviews along these lines. *See* Devins, *Defining Effective Civil Rights Enforcement in Education*, 86 COLUM. L. REV. 1093 (1986) (reviewing M. REBELL & A. BLOCK, EQUALITY AND EDUCATION (1985)); Devins, *Centralization in Education: Why Johnny*

more than this, however. By portraying the book as an exemplar of liberalism's larger failure, *Gender Justice*'s fate is effectively sealed from the start. Since repudiation of the liberal vision underlies much of contemporary feminist thought, it is understandable that *Gender Justice* provokes strong negative feelings.[98]

This is not to say that *Gender Justice* is a perfect book—far from it. Many of the criticisms leveled at the book attack not only the premises of the authors' model, but also its application. As revealed by the discussion in the balance of this Part, some of these narrow criticisms are poignant.[99]

The narrow criticisms of *Gender Justice* are mostly directed at the authors' approval of various gender-specific classifications. For example, the authors argue that in some instances sex-segregated public schools are justified because they "afford a richer mix of choices to everyone" (pp. 106-07). However, Burns argues that dramatic differences in the quality of education and prestige of diplomas exist at such schools.[100] Similarly, Finley criticizes *Gender Justice*'s apparent approval of differential disability benefits for "voluntary" pregnancy as "entrench[ing] the stereotypical and choice-constraining views of women's place in the home."[101] Finally, Burns contends that the authors' endorsement of differential retirement ages for men and women under the Social Security Act (pp. 102-03) fails to search out less gender-specific alternatives.[102]

The reviewers also criticize *Gender Justice*'s recognition of actual sex differences. For example, while the authors feel that differences between men's and women's life expectations justify sex-based differences in pension and life insurance plans (p. 114), critics note that reduced pension payments unfairly constrain the choices of retired women.[103] Likewise, integrating women into the workforce may adversely affect

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Can't Spell Bureaucracy, (Book Review), 75 CALIF. L. REV. 759 (1987) (reviewing D. KIRP & D. JENSEN, SCHOOL DAYS, RULE DAYS: THE LEGALIZATION AND REGULATION OF EDUCATION (1986)).

98. Not only does the book espouse liberalism, but also it understates feminist concerns and approves of various sex-based classifications in the name of natural differences and administrative convenience. *See supra* notes 33-35 and accompanying text.

99. These reviews, on rare occasion, note meritorious features of the book. Professor Menkel-Meadow describes as "generally laudable" the book's advocacy of "government support of many different family forms." Menkel-Meadow, *supra* note 6, at 270. Professor Burns also supports some of the book's analysis and proposals. *See* Burns, *supra* note 3, at 1793 n.15 (praising the authors for, among other things, "insightful" criticism of Justice Rehnquist's gender decisions).

100. *See* Burns, *supra* note 3, at 1801-04. Burns' disagreement with the authors on this issue is ultimately over priorities: "Excusing such sex segregation, with the explanation that the motivation for it is to preserve educational 'choice' or 'diversity,' is to decide that separation of the sexes is more important than affording full access to quality education regardless of sex." *Id.* at 1804.

101. Finley, *supra* note 4, at 929.

102. Burns, *supra* note 3, at 1806-08.

103. Finley, *supra* note 4, at 925.

their life expectancy.[104] Thus, the reviewers ridicule *Gender Justice* for "discounting" women's changing social status[105] by imposing another generation's social roles on today's working women. Correlatively, critics attack the authors' acceptance of administrative convenience as a justification for sex-based classifications, such as the military's previous practice of automatically giving wives of servicemen dependents' benefits, while requiring the husbands of servicewomen to prove dependency.[106] As Finley wryly observes, "[i]t is surprising that such strong individualists as the authors are not more suspicious about the use of statistical generalizations that treat women as a class."[107]

Finally, *Gender Justice* is criticized for resorting to arguments beyond the scope of the liberty-enhancing model in order to avoid reforms. For example, Finley notes that the authors' rejection of comparable worth is premised on their wariness of the accuracy of job evaluation systems, a position that has little to do with their liberty principle.[108] Such wariness is characterized as "hostility towards the transformation of values and roles that is the deeper aspiration of the comparable worth movement."[109]

This sense of distrust and perceived hostility connects the narrow criticisms of the book with the reviewers' broader complaints of liberalism's failure. For the reviewers, the combination of the authors' application of the liberty-enhancing model with their depiction of feminists as "leftist" and "result oriented" (pp. 48-53) is too much. The reviewers are not content merely to criticize Kirp, Yudof, and Franks as "bad" liberals. Their attacks, instead, are designed to expose liberalism's nearly inevitable support of the male-dominated status quo. The principal target of these reviewers then is the liberal model itself, not its application by Kirp, Yudof, and Frank.

IV
ASSESSING *GENDER JUSTICE*

Gender Justice is an important, worthwhile, and flawed book. By providing a literate, fast-moving, and thoughtful overview of an incredi-

104. *See id.* at 926; *see also* Menkel-Meadow, *supra* note 6, at 268 (noting that life expectancy is not completely uncontrollable).

105. Finley, *supra* note 4, at 926.

106. *See* Burns, *supra* note 3, at 1809-10 (stating that the authors' emphasis on efficiency-based distinctions is incompatible with "equal liberty"); *see also* Finley, *supra* note 4, at 924-25 (arguing that such regulations invade the privacy—and thus liberty—of servicewomen by forcing them to submit their family economic affairs to public scrutiny).

107. Finley, *supra* note 4, at 925.

108. *Id.* at 928.

109. *Id.*; *see also* Burns, *supra* note 3, at 1812 (suggesting that the authors' rejection of job-evaluation systems places "the cost and burden of overcoming historic discrimination entirely on women").

ble range of issues, the book serves as an excellent primer on gender justice. The authors' provocative applications of the liberty-enhancing model encourage the reader to think through the issues (and even disagree with the authors). Their account of the causes of gender segregation and their assessments of feminist thinking and the economic status of women present a lively point of comparison for the reader. Also, through its insistence that the liberty-enhancing model applies equally to men and women, the book offers a new perspective on the concept of gender justice.[110]

Gender Justice does have three principal shortcomings, however. First, in applying their free-choice model, the authors' calculus often seems ill-founded. Second, their embrace of liberalism is not entirely consistent. Finally, the authors fail to address adequately feminist thinking and the separation between public and private spheres. Discussion of such issues as the Equal Rights Amendment, the rights of homosexuals, and antipornography legislation would improve the book's comprehensiveness in this regard. This Part considers the significance of each of these shortcomings.

A. Ill-founded Calculations

Kirp, Yudof, and Franks' application of their liberty-enhancing model does not always seem reasonable. This is especially the case in those instances where the authors approve of sex segregation. Critics of the book are therefore correct in questioning the authors' approval of sex segregation in education, pension payments, and pregnancy-related disability.[111] Such segregation does not enhance choice; it limits it. Sex segregation in education, as Sarah Burns and others have shown, may well constrain or foreclose opportunities to enter select fields of employment.[112] Disparities in pension payments, as Lucinda Finley has argued, improperly presume that women's changing role in the work force will not affect life expectancies.[113] Finally, pregnancy-related disability—

110. *Gender Justice,* while broadening the focus of the sex equality issue, pays little attention to the manner in which males seek to assume traditionally female roles. For example, men have been somewhat successful in challenging laws which—for the purposes of custody determinations—view women as primary caretakers. For more comprehensive treatments of this issue, see Law, *supra* note 51, at 987-1002 (discussing Supreme Court decisions reviewing laws that discriminate against men); Kay, *Models of Equality, supra* note 48, at 69-70 (discussing sex discrimination suits brought by men).

111. *See supra* notes 100-107 and accompanying text.

112. Burns, *supra* note 3, at 1800-05.

113. *See supra* notes 103-104 and accompanying text. Finley observes:

> If a retired woman receives less in pension payments each month than the man she worked alongside for an equal number of years, isn't her liberty being constrained in relation to his? . . . To say that she *may* live longer than her male co-worker, and thus may receive the same or more over the long run is no answer to the choice-constraining standard-of-living problem . . . .

while perhaps not entitled to special beneficent treatment[114]—clearly should not be singled out for unfavorable treatment. Whether or not pregnancy is voluntary, it is a condition that limits a woman's opportunities.

Gender Justice does not hinge on such calculations, however. Kirp, Yudof, and Franks freely admit that the liberty-enhancing model is subject to variable application, dependent in part on one's values and other circumstances surrounding a particular issue. For example, in their assessment of military dependents' benefits, the authors are unable to determine whether administrative convenience or sexual stereotyping concerns should prevail (pp. 114-15). The linchpin of this ambivalence is that the military's sexist presumption may be "almost universally true" (p. 115). This particular calculation is troubling; it is disingenuous to suggest that the sex-stereotyping of women as secondary wage earners can secure "fair processes rather than particular outcomes" (p. 12). Nevertheless, value-based variability in results is not inherently bothersome.

Many other situations can be imagined in which thoughtful people would disagree as to whether a particular outcome furthers or undermines gender equality. For example, although the court in the *Baby M* litigation declared surrogacy contracts void,[115] one may argue that disallowing such contracts improperly denies women the ability to earn money through such endeavors. Yet enforcing such contracts creates an irrebuttable presumption that the child's best interests cannot be served by a custody decision favoring the mother. Kirp, Yudof, and Franks' proposal is not the only one that raises the spectre of inconsistent application. Sylvia Law's and Catherine MacKinnon's proposals both hinge on determinations of what is oppressive to women—determinations that are often subjective and unclear. Indeed, any proposal not hinged to a fixed rule (for example, gender distinctions are always pernicious) is necessarily subject to varying application.

Critics should not focus too much attention on the authors' use of the liberty-enhancing model. Their calibrations are best understood as a device to think through the application of the free-choice model and not as distinct social policy proposals. In fact, because *Gender Justice* advances a comprehensive methodology, the authors need not produce overwhelming evidence demonstrating the soundness of each recommendation. The authors can instead move from issue to issue, concerned only that they frame the question in accordance with their analytical model.

The authors' methodology serves *Gender Justice* well. Their

Finley, *supra* note 4, at 925.

114. *See generally supra* notes 47-61.

115. *In re* Baby M., 109 N.J. 396, 537 A.2d 1227 (1988).

detailed application of the free-choice model leaves the reader with substantially more than an abstract moral imperative. Furthermore, using this latitude, the book highlights the range of issues that define gender justice. As stated in the introduction, "Because gender influences so many aspects of our lives, policies that ostensibly aren't about gender at all nonetheless have evident relevance" (p. 1).

The broad focus of *Gender Justice* is a breakthrough, for conceptions of gender inequality have changed dramatically. Consider the following: Prior to December 1977, the Social Security Act demanded that men—but not women—seeking spousal benefits demonstrate dependency on their wage earner wives for one-half of their support.[116] Whom did this classification injure, the surviving male spouse who was denied benefits or put through an additional procedural obstacle, *or* the female wage earner whose income provided less protection to her family than that of her husband?[117] The answer, of course, is that the classification injured both. The couple's relationship is symbiotic, and thus, so must be the effect of the Act. With 23 million households now dependent on the earnings of working wives,[118] the life choices of both men and women are greatly affected by women's access to traditionally male-dominated professions, as well as pregnancy leave, day care, pay equity, and a range of other issues. Consequently, gender equality is no longer solely a question

116. *See* Heckler v. Mathews, 465 U.S. 728 (1984).

117. *See* Miller, *Constitutional Remedies for Underinclusive Statutes: A Critical Appraisal of Heckler v. Mathews,* 20 HARV. C.R.-C.L. L. REV. 79 (1985).

118. *See* Fader, *Men Lose Freedom if Women Lose Ground,* Wall St. J., Feb. 2, 1987, at 22, col. 3 (discussing benefits to men married to women with salaried jobs). This fact, of course, does not mean that wage parity exists between men and women. Kirp, Yudof, and Franks recognize the wage gap, noting that "in several critical respects, women are not men's equal in the marketplace" and that in addition to the exercise of choice, "[d]iscrimination is at work in the creation of the wage gap" (pp. 144-45). *See generally* U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S (1984) (discussing wage gap and comparable worth doctrine); Hantzis, *Is Gender Justice a Completed Agenda?* (Book Review), 100 HARV. L. REV. 690 (1987) (discussing condition of women in the marketplace).

The adequacy of liberal antidiscrimination measures is the remaining question. Kirp, Yudof, and Franks feel these measures are sufficient (p. 172). However, proponents of comparable worth and statistical measures of discrimination disagree. *See* Hartman, *Pay Equity for Women: Wage Discrimination and the Comparable Worth Controversy* in THE MORAL FOUNDATIONS OF CIVIL RIGHTS 167 (R. Fullinwider & C. Mills eds. 1986); Finley, *supra* note 4, at 937-40 (discussing statistical proofs of discrimination).

Comparable worth is significant on another level. Feminists critical of the current liberal model are divided on this issue. For example, Catherine MacKinnon apparently rejects comparable worth reforms. As divined by Cass Sunstein in her analysis of MacKinnon's work: "By increasing salaries in traditional female jobs, comparable worth remedies might reinforce women's preferences for those jobs or distort the employment market." Sunstein, *supra* note 76, at 838. In contrast, Christine Littleton argues that "[e]quality as acceptance makes the broad[ ] claim that *all* behavioral forms that the culture (not just the employer) has encoded as 'male' and 'female' counterparts should be equally rewarded." Littleton, *supra* note 36, at 1312.

of women's rights.[119] Instead, the focus must be on the status of both men and women, and on the existence of artificially imposed distinctions between them.

Gender Justice's critics find its broad methodology troublesome. Noting that outcomes are determined by "what factors are selected for emphasis and who is evaluating the relative strengths of the respective liberties," Finley argues that the liberty-enhancing model may "simply be an invitation for the perspective and preferences of the traditionally powerful to triumph once again."[120] This criticism is similar to inequality theorists' contention that liberalism is not value-neutral, but in fact presupposes and perpetuates male-dominated norms.[121] In other words, this criticism is not so much about the book as about liberalism.

Liberals are willing to risk such unjust application either because they believe that the locus of decisionmaking is properly lodged in the individual[122] or because they fear that special treatment will ultimately prove harmful to the benefited class.[123] Moreover, the proposals of inequality feminists are equally fraught with the danger of subjective application.[124] For example, in urging such a standard of review Professor MacKinnon fails to appreciate that the "determination of what reinforces or undermines a sex-based underclass is exceedingly difficult."[125]

Consider the cases of *Kahn v. Shevin*,[126] upholding a small tax exemption for widows as compensation for past discrimination, and *Schlesinger v. Ballard*,[127] allowing Navy servicewomen more time than their male counterparts to seek a promotion due to their exclusion from

119. In a series of cases dealing with unwed fathers, the Supreme Court has ruled that such men must "earn" their custodial rights. Distinguishing between "a mere biological relationship and an actual relationship of parental responsibility," the Court has held that the "significance of the biological connection is that it offers the natural father an opportunity no other male possesses to develop a relationship with his offspring." Lehr v. Robertson, 463 U.S. 248, 259-60, 262 (1983). Consequently, irrebuttable presumptions denying an unwed father any right to custody once the mother dies are invalid, Stanley v. Illinois, 405 U.S. 645 (1972), as are laws which deny to an unwed father (but not an unwed mother) veto power over his child's adoption. Caban v. Mohammed, 441 U.S. 380 (1979). On the other hand, statutes which place substantial obstacles in front of an unwed father are permissible. *See* Quilloin v. Walcott, 434 U.S. 246 (1978) (unwed father need not possess absolute veto power over adoption); *see also* Lehr, 463 U.S. 248 (unwed father must comply with state procedures to preserve right to object to adoption). *Gender Justice* would benefit from a discussion of this body of case law. *See supra* note 110.

120. Finley, *supra* note 4, at 931; *see also id.* at 924 (arguing that what is liberty-enhancing depends upon the outcome desired).

121. *See supra* notes 62-77 and accompanying text.

122. *See supra* text accompanying notes 13-14.

123. *See, e.g.*, Williams, *The Equality Crisis, supra* note 28, at 196-97 (summarizing disadvantages of the special treatment model in the context of pregnancy and maternity policy).

124. *See supra* note 62 and accompanying text.

125. Law, *supra* note 51, at 1005; *see also* Taub, *supra* note 63, at 1691 (criticizing MacKinnon on these grounds).

126. 416 U.S. 351 (1974).

127. 419 U.S. 498 (1975).

sea duty. Professor MacKinnon lauds these decisions for implicitly recognizing that sex discrimination cumulatively penalizes women based on their differences from men.[128] Yet, as Nadine Taub has recognized, these decisions can be criticized "because the crude brand of compensation they purport to offer women is both inadequate and a distraction from the real problems women face."[129] Moreover, Taub has suggested, and MacKinnon must recognize, that it is exceedingly unlikely that a supposedly male-dominated court system can successfully apply MacKinnon's suggested standard of review.[130]

Gender Justice's miscalculations, while disappointing, do not undermine the liberty-enhancing model. The critical question is whether, given a liberal model, its proposal offers a useful approach to reducing gender injustice. The validity of liberalism itself is not a question that *Gender Justice* purports to answer (p. 4). The book presupposes that the liberal model, with its emphasis on autonomy, is appropriate.

B. Gender Justice *and the Liberal Vision*

The authors' emphasis on the benevolence of male domination and its concomitant delineation of racial and gender justice raises doubts about the book's fidelity to the liberal vision. Presumably, if the authors' perception that sex segregation is rooted in paternalism were shaken, they instead might advocate an interventionist strategy.

Kirp, Yudof, and Franks argue that "women were victimized by policies designed to protect them—policies that, for this very reason, denied them the chance to make basic decisions for themselves" (p. 29).[131] Although this vision is highly critical, the authors incorrectly conclude that the husband-wife relationship is analogous to parent-child, not owner-slave. While laws affecting a woman's earnings and working conditions can be justified as beneficent paternalism,[132] many other gen-

128. *See* C. MACKINNON, *supra* note 63, at 116-17.

129. Taub, *supra* note 63, at 1692.

130. *Id.* at 1691-92.

131. As this part will demonstrate, the authors are clearly mistaken in suggesting that beneficent paternalism is the source of sex segregation. *See infra* text accompanying notes 130-137. The obviousness of this mistake is bothersome. It suggests that the liberty-enhancing approach is premised on an optimistic assessment of women's present condition. At this level, the liberty-enhancing model can be criticized as little more than a smoke screen for a diminished governmental role in addressing gender issues. I believe that *Gender Justice*'s critics would argue that the authors' conclusion that most sex discrimination was "benevolent" illustrates their inability to develop an acceptable theory of gender justice. My view is somewhat different. I strongly feel that the authors are truly committed *in principle* to their liberty-enhancing model. For me, their line drawing between race and gender discrimination, *see supra* note 31 and accompanying text, is best understood as a tacit recognition that *as applied* the liberty-enhancing model is subject to attack.

132. Some evidence even suggests that there is reason to question the beneficence of protective labor legislation. *See* B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 247-68 (1975) (discussing actual negative effects of such legislation).

der-specific classifications are not amenable to such justification. Under the common law, where divorce was impossible, the wife was always her husband's chattel.[133] The children of the relationship were always to be in the father's custody (p. 184),[134] the husband controlled the domicile (pp. 177-78), and, if the wife was involved in an adulterous relationship, the husband could sue her lover for infringing on his property rights to her fidelity.[135]

Differences between husband-wife and parent-child relationships are also exemplified by the conflicting legal standards governing marital rape and child abuse. As of 1984, forty states retained some form of marital exemption for rape.[136] These laws derive from the common law notion that "the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[137] In sharp contrast, laws that allow the state to take custody of children date back to the sixteenth century.[138] These laws, first enacted in this country in the nineteenth century, are grounded in the state's *parens patriae* authority to ensure a certain modicum of care in the upbringing of children.[139] This power presumes both an independent state interest in the well-being of children and that the right to parental custody may be limited by the child's age and the nature of parental care.

I do not contend that the husband-wife relationship is analogous to that of owner-slave. But beneficent paternalism is an inadequate justification for differing theories of justice for women and racial minorities. Moreover, since *Gender Justice* claims that justice ensures fair processes rather than particular outcomes, it is unclear why the authors' analysis of gender issues varies significantly from their approach to race. Consider-

133. *See generally* Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Towards Equality*, 47 N.Y.U. L. REV. 1033 (1972) (discussing unequal treatment of married women).

134. *See Ex parte* Devine, 398 So. 2d 686, 688-91 (Ala. 1981) (describing evolution of gender-based presumptions affecting custody).

135. *See* Lippman, *The Breakdown of Consortium*, 30 COLUM. L. REV. 651, 654-60 (1930) (discussing the tort of "criminal conversation"); Kavanagh, *Alienation of Affection and Criminal Conversation: Unholy Matrimony in Need of Annulment*, 23 ARIZ. L. REV. 323 (1981) (discussing torts of criminal conversation and alienation of affection).

136. *See generally* Schwartz, *The Spousal Exemption From Criminal Rape Prosecution*, 7 VT. L. REV. 33 (1982).

137. People v. Liberta, 64 N.Y.2d 152, 162, 474 N.E.2d 567, 572, 485 N.Y.S.2d 207, 212 (1984), *cert. denied*, 471 U.S. 1020 (1985) (quoting 1 HALE, HISTORY OF PLEAS OF THE CROWN 629). Protecting marital privacy and encouraging reconciliation are the contemporary justifications. *Id.* at 165, 474 N.E.2d at 574, 485 N.Y.S.2d at 214.

138. *See* Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 894-910 (1975) (summarizing history of child neglect laws).

139. *See* Devins, *A Constitutional Right to Home Instruction?*, 62 WASH. U.L.Q. 435, 443-56 (1984).

ing the authors' firm opposition to quotas (p. 136)[140] and their support of both process-based affirmative action (recruitment, training) (pp. 134-35) and the vigorous enforcement of antidiscrimination laws (p. 153), their visions of gender and racial justice should be parallel. The authors' suggestion that they are building upon a conception of justice therefore seems misleading. Instead, because the authors build their proposal around the "beneficent" character of gender classifications, varying conceptions of women's status—not visions of justice—explain the principal differences between *Gender Justice* and the naturalist and feminist perspectives it criticizes.

C. Comprehensiveness

Kirp, Yudof, and Franks forthrightly acknowledge in their introduction that their "aim is to test an argument and not to produce an encyclopedia; along the way, some matters of substantive importance undoubtedly receive short shrift" (p. 4). This is true in light of *Gender Justice*'s failure to give fuller treatment to failed efforts to ratify the equal rights amendment and the controversy over antipornography legislation. These issues, in varying ways, reflect divisions both within the feminist community and between feminist and nonfeminist women.

Recent studies of the ERA demonstrate that conflict between feminists and homemakers was a principal cause of the amendment's demise.[141] Recognition of these studies would bolster *Gender Justice*'s conclusion that choice plays a large role in understanding women's social status.

Discussion of the antipornography debate also would fit nicely in the book. This debate sets inequality feminists, who view pornography as part of "the power of men over women in society,"[142] against civil libertarians and equality feminists.[143] On this issue, inequality feminists live up to their deterministic caricature by advocating "[t]he paternalistic notion that women can never freely consent to pose for sexually explicit pictures or films."[144] In an ironic twist, antipornography efforts also fit the interventionist naturalist caricature, for such legislation has been

140. For the authors, "quotas withhold from individuals the right of self-determination that is critical for self-respect" (p. 136).

141. J. MANSBRIDGE, WHY WE LOST THE ERA 98-112, 216 (1986). *See generally* Rhode, *Equal Rights in Retrospect*, 1 LAW & INEQUALITY 1 (1983).

142. C. MACKINNON, *supra* note 36, at 5; *see also* Sunstein, *supra* note 74, at 840-46 (describing and assessing MacKinnon's writings on pornography).

143. *See* WOMEN AGAINST CENSORSHIP (V. Burstyn ed. 1985); *see also* Shrossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate* (Book Review), 62 N.Y.U. L. REV. 201 (1987).

144. Shrossen, *supra* note 143, at 210.

championed by those who wish to " 'restore ladies to what they used to be.' "[145]

Gender Justice could also have been enhanced by discussing the rights of homosexuals. Discrimination on the basis of sexual orientation, such as antisodomy statutes and the prohibition of homosexual marriages, deserves mention because it raises the fundamental question of what role—if any—social norms should play in limiting the free-choice model.[146] Although such an exploration necessarily raises knotty issues, the sweep and risks of free-choice requires such a full exploration. Otherwise, the many guideposts set up by the application of the free-choice model are not fully instructive.

More troubling is the authors' failure to recognize the difficulties of maintaining a public-private distinction. While the authors recognize both the breadth of gender policy and that "[t]he boundary between public and private is blurred" (p. 17), they fail to consider whether the separation of public and private spheres makes sense when the state controls the intimate details of family life. Until twenty years ago, domestic relations laws were exclusively based on sexual stereotypes. For example, there was a presumption in favor of maternal custody,[147] courts could award alimony only to the wife,[148] and unwed fathers had no parental rights.[149]

The evolution of equal protection and due process review has undermined some of the force of such presumptions. Yet marriage and family remain essentially state-sanctioned relationships.[150] In fact, in cases limiting the scope of the spousal testimonial privilege[151] and rejecting a requirement of spousal consent to abortion,[152] the Supreme Court did not base its decisions on the rights of a spouse as an individual.[153] Instead, the Court emphasized that, before limiting the spousal testimo-

145. Duggan, Hunter & Vance, *False Promises: Feminist Antipornography Legislation in the U.S.*, in WOMEN AGAINST CENSORSHIP, *supra* note 143, at 133 (quoting legislative sponsor of antipornography bill).

146. *See* Watkins v. United States Army, 847 F.2d 1329 (9th Cir. 1988), *reh'g granted* (holding that homosexuals constitute a suspect class for purposes of equal protection analysis); *cf.* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia sodomy statute).

147. *See supra* note 134.

148. *See* Orr v. Orr, 440 U.S. 268 (1979) (holding such laws unconstitutional).

149. *See* Stanley v. Illinois, 405 U.S. 645 (1972) (holding statutory denial of hearing on fitness to unwed fathers unconstitutional).

150. For a defense of preferred legal status for—and insulation of—marriage, see Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy: Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463 (1983).

151. *See* Trammel v. United States, 445 U.S. 40 (1980) (holding that witness spouse alone can assert privilege to refuse to testify).

152. *See* Planned Parenthood v. Danforth, 428 U.S. 52 (1978).

153. The Court in *Danforth* nevertheless recognized that concern for the pregnant woman's right of privacy supported its ruling. *Id.* at 70 n.11.

nial privilege, the marriage must be in such disrepair that it is beyond preservation.[154] This notion also underlies contemporary no-fault divorce, where—in theory—divorce is awarded only if the state is convinced that the marriage is irreparable.[155]

The question of where to draw the line separating public from private concerns still remains.[156] Of course, one can reject—as inequality feminists do—the drawing of such lines.[157] *Gender Justice*'s liberty-enhancing model avoids this issue. While we are told that sex-based presumptions governing custody and domicile are improper (pp. 183-86), that settlement agreements should be used in the dissolution of marriage (p. 183), and that husbands should have some voice in the abortion decision (p. 111), the book never relates these concerns to some larger conception of the public and private spheres. Although the authors argue that the spheres should remain separate, they never confront the complexity and pervasiveness of this disjunction.

Finally, Kirp, Yudof, and Franks err in describing feminist thinking in sweeping terms. Perhaps, for their purposes, such an approach made sense because they sought merely to explain that by rejecting the liberal model, leftist feminists must embrace deterministic government intervention (pp. 48-61). By mischaracterizing feminist thought, however, the authors touched a nerve in the feminist community, as evidenced by the highly critical reviews attacking the book on this count.[158] This result was unfortunate for it has obscured the debate over the many important issues raised by the book.

CONCLUSION

Gender Justice, despite its limitations, is a worthwhile contribution to gender jurisprudence. Its broad view of gender-based policy frees the reader from the traditional equation of gender policy with women's rights. Using the liberty-enhancing model, *Gender Justice* offers salient information and insights on an unexpectedly wide range of significant policy questions. Granted, the book does not fulfill its promise of advancing a theory of justice. But, when viewed as a starting point for

154. "When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve." *Trammel*, 445 U.S. at 52.

155. *See* THE 1966 REPORT BY THE GOVERNOR'S COMMISSION ON THE FAMILY, *reprinted in* J. AREEN, FAMILY LAW 267-70 (2d ed. 1985). For an analysis of the detrimental impact of no-fault divorce and other reforms on women's economic status, see L. WEITZMAN, THE DIVORCE REVOLUTION 15-51 (1985).

156. *See generally* Mnookin, *The Public/Private Dichotomy: Political Disagreement and Academic Repudiation,* 130 U. PA. L. REV. 1429 (1982) (comparing political support for the dichotomy with legal scholarship challenging its legitimacy).

157. *See supra* notes 67-73 and accompanying text.

158. *See supra* notes 78-98 and accompanying text.

understanding gender-based policy, *Gender Justice* admirably serves its purpose.

It is unfortunate that reviewers have used the book as a vehicle to attack liberal thinking.[159] Admittedly, *Gender Justice* invites such criticism through trivialization of feminist thinking and its approval of some sex-based classifications. But *Gender Justice* should not be judged solely on the applications of its liberty-enhancing model. It is intended as an opening round in a dialogue, not as a be-all-and-end-all to thinking on this subject. Ironically, the very ferocity of its critics may ultimately further the book's purpose by drawing attention to *Gender Justice* and the debate about sexual equality.

159. In suggesting that *Gender Justice* has been treated unfairly, I do not mean to insinuate—by way of contrast—that critics have widely praised the works of inequality feminists. Catherine MacKinnon's *Feminism Unmodified*, for example, has been subject to fairly critical review. *See* Bartlett, *supra* note 36, at 1566 ("MacKinnon's faith in some authentic reality of womanhood that will emerge once women have thrown off the yoke of male domination is in direct contradiction to her heavy reliance upon the role of social construction in explaining male hegemony."). Even authors sympathetic to MacKinnon's views find some deficiencies in her analysis. *See, e.g.*, Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry Into the Politics of Authenticity*, 68 B.U.L. REV. 217, 250 (1988) ("MacKinnon [improperly] discounts descriptions of [women's] freedom but not subordination"); Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U.L. REV. 352, 379-80 (1988) (MacKinnon "overlooks the incredible strength, and creative ability to nurture hope . . . that women have displayed throughout history."); Sunstein, *supra* note 76, at 830 (criticizing a generally praiseworthy book for relying on "discussion [that] is sometimes too polemieal").