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Recommended Citation
Mary Anne Case, "No Male or Female, but All Are One " (University of Chicago Public Law & Legal Theory Working Paper No. 266, 2009).

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NO MALE OR FEMALE

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June 2009

This paper can be downloaded without charge at the Public Law and Legal Theory Working Paper Series: http://www.law.uchicago.edu/academics/publiclaw/index.html and The Social Science Research Network Electronic Paper Collection.
I take the invitation to contribute to this volume to be to speak very personally about how I came to feminist legal theory and what I made of it. I take my title from the New Testament, from Galatians 3:28, because I came to my own radical take on sameness feminism through youthful engagement with the Catholic Church’s radical past and repressive future on matters of sex equality and through engagement in college and graduate school with arguments for the equality of the sexes made from the Middle Ages through the French revolution by otherwise conservative women defending their own right to participate in male-dominated enterprises and otherwise radical men willing to call all received ideas into question, even those concerning women’s place. I brought this engagement with long history to the legal academy with me, as I shall explain.

My essay will be in part a reminder that there are far more generations than three who have sought to transcend the boundaries of the law through feminist theory. Feminists, male and female, have been making their case for centuries. It will also be in part an elegy for potential alliances lost: though many of the women who in prior centuries sought to bring their sex beyond the boundaries of the law were self-described conservatives on other matters, in my lifetime feminism and conservatism have come to be seen as antithetical, something I dealt with on a daily basis as a faculty member in two of the nation’s most conservative law schools, Virginia and Chicago. Also in my lifetime, the Church that brought me to sameness feminism at first repudiated sex equality and then turned to an embrace of difference, as official guardian of doctrinal purity Joseph Ratzinger, now Pope Benedict XVI, in official pronouncements explicitly rejecting the sort of sex and gender theory to which I am committed, came close to suggesting that even souls have a sex (Ratzinger and Amato 2004).

Because the 25th Anniversary conference at which I presented an initial version of this chapter took place close to Halloween, the prelude to the feast of All Saints, I appeared at it in something like a costume, to wit in the by now somewhat moth-eaten cadet blue pantsuit I wore when I first spoke at Martha Fineman’s Feminism and Legal Theory Workshop in June 1994, as a commentator on Katherine Franke’s draft on the Meaning of Sex. At that time, Katherine and I and others, such as Frank Valdes, were wrestling with questions of what I have called gender discrimination, as compared and contrasted with sex discrimination, that is to say with questions of discrimination in favor of or against qualities coded masculine or feminine, sometimes irrespective of and at other times inflected by whether the person exhibiting those qualities is male or female. Katherine and I had different analytic approaches to this topic, but shared normative goals, including interrogation of and resistance to what Katherine described in her 1994

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1 The difference in our approaches is clear from a comparison of the titles of the lengthy law review articles we eventually published on the subject. Mine was “Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence” (Case 1995a). Hers was “The Central Mistake of Sex-Discrimination Law: The Disaggregation of Sex from Gender” (Franke 1995).
draft as the “sartorial bureaucracies [which] have been [among] the institutional venues in which the struggle for sexual identity has been fought as a factual rather than a legal matter” (Franke 1994: 13). Central to my own analysis of gender discrimination is that in the U.S. today, sartorial and other norms are tilted sharply toward the masculine: “Women today are found in the work force, in pants, and in the outfield far more often and with far less comment than men are found in the nursery, in dresses, or in ballet class” (Case 1995a: n. 64). In the cocktail hour after our presentations, I made this point to Katherine Franke by claiming that the pantsuit I was wearing was very close to what a man might wear. Katherine, who is the sort of butch who knows her way around a men’s wear department, correctly observed that no man would be caught dead in pants like mine, with a zipper on the side, a high waist, and flared legs. Her deconstruction of my attire did not stop there, however. She went on to say that, because I was wearing a high white mock turtleneck underneath a black sweater, I looked like a cleric. What’s up with that, she asked? The rest of this chapter can be seen as an answer to her question.

I grew up Catholic in the immediate aftermath of Vatican II, and that, I think, says more about the kind of feminist I am than anything else. In many respects my vision of sex equality resembles that set forth in the Equal Protection jurisprudence developed by the U.S. Supreme Court in the last third of the twentieth century. Like the Court, I have set my face against “fixed notions concerning the roles and abilities of males and females” (Miss. Univ. for Women v. Hogan (1982) 458 U.S. 718: 725). Critics have suggested that this makes me no more than a product of the legal culture in which I grew up. These critics may not realize that I am just old enough to have developed an opposition to sex stereotypes before the Supreme Court did. The cultural roots of my views are in my Catholic at least as much as in my American upbringing.

The nuns who taught me through my thirteen years of Catholic school were women who in the fancy terminology of today had rejected repronormativity. Many of them were old enough to have come to the Church, not because of a particular vocation to the religious life, but because they felt called to do something other than be wives and mothers, and the Church gave them an opportunity to be scholars and teachers. Even the males who taught me, the priests and monks I encountered, were a model for men talking seriously with women about something other than their families and their sex life. This commingling of the sexes for purposes other than sexual or familial and the opportunity for a women’s role beyond that of wife and mother has been part of the Church from its beginnings.

The Gospel of Luke tells the story of the sisters Mary and Martha welcoming Jesus into their home. Martha, who resented Mary’s sitting at the feet of Jesus listening to him preach while she herself was busy serving, “stood and said: Lord, hast thou no care that my sister hath left me alone to serve? Speak to her therefore, that she help me. And the Lord answering, said to her: Martha, Martha,
thou art careful, and art troubled about many things: But one thing is necessary. Mary
hath chosen the best part, which shall not be taken away from her” (Luke 10:40-42,
Douay-Rheims trans.).

Generations of girls like me with ambitions beyond housework took this passage to heart:
their Savior had given them a choice. Among those who chose this better part were
fourth century aristocratic Roman women such as Jerome’s associates Paula, Eustochium
and Melania the Elder, who “took the initiative in rejecting marriage and motherhood,
fleeing the confines of the old family system and pursuing a life that offered them more
autonomy and self-expression than their ancestresses had ever known” (McNamara 1984:
14). Although several did marry and bear heirs early in life, they later could “embark on
a life of study, travel, charity, religious devotion and community administration that was
closely akin to that enjoyed by male ascetics” (McNamara 1984: 20). Collaboration
between the sexes on terms of spiritual equality not bound by fixed sex roles continued in
the twelfth century Benedictine double monasteries where “[f]or the first time in history,
significant numbers of women and men together studied and discussed philosophy”

Among the saints I grew up with were a number of medieval women who themselves
firmly rejected “fixed notions concerning the roles and abilities of males and females,”
including Joan of Arc who successfully led an army and in the end was executed for
wearing male attire and Catherine of Alexandria who according to legend was executed
after besting in argument all the great scholars the Emperor had sent to persuade her out
of her Christian faith. Not all of these sex-role-transgressive female saints came to a bad
end, however. My personal favorite at the time, Catherine of Siena, died a natural death,
honored and respected by the popes and princes with whom she corresponded. When at
the age of 8, like other young Catholics, I was asked to choose for myself a confirmation
name and with it a patron saint, I chose the name Catherine. I could easily have done it
for Catherine of Alexandria - after all, disputing with men who might want to kill me
when they lose the argument has been a favorite activity of mine from early youth. In
fact, I did it for Catherine of Siena. Why? Not for her so-called holy anorexia or other
ascetic practices (Bell 1985), about which I did not know at the time and which I would
have found problematic, but because she told off the Pope. She wrote the Pope a letter
saying, “Here’s what you do,” and he did it (Catherine of Siena 1993: 37). That has
always seemed to me an appropriate thing for a woman to do.

In 1970, Catherine of Siena and Teresa of Avila became the first women to be declared
Doctors of the Church, that is to say authoritative teachers of Catholic doctrine. To
understand the significance this had for me as a budding feminist, consider the Litany of
the Saints, an extended chant of petition in which the congregation asks a long list of
named saints in turn to “pray for us.” These saints are grouped into categories, such as
“All ye Holy Angels and Archangels” and “All ye holy Apostles and Evangelists.”
Before 1970, the only category in which female saints appeared by name was “All ye
holy Virgins and Widows.” (Although numerous female saints, many of them also

3 Specifically, she urged Pope Gregory XI to return to Rome from Avignon, thus ending the so-called
Babylonian Captivity of the papacy.
virgins or widows, were in fact martyred, the enumerated list of “all ye holy Martyrs” traditionally is all male.) Now, for the first time, women were included in another category, “All ye holy Doctors.” Although I rarely these days have occasion to hear a litany, I still invariably tear up every time I hear, “St. Ambrose, St. Augustine, St. Jerome” followed by “St. Catherine of Siena, St. Teresa, All ye Holy Doctors of the Church.” Yet even before the inclusion of women on non-gendered terms in a prestigious category of saints, the litany had lessons for a budding sameness feminist. The default category for women was not “all ye holy Wives and Mothers,” but “all ye holy Virgins and Widows.” It is women apart from motherhood, liberated from the confines of the female role by their liberation from men.

In addition to the story of Martha and Mary, another biblical proof text for Christianity’s commitment to the equality of the sexes and to the repudiation of enforced sex differences is the one from which I took the title of this chapter, Paul’s Epistle to the Galatians 3:28: "There is no Jew or Greek, no slave or free, no male or female, for you are all one in Christ Jesus" (Douay-Rheims trans.). I have previously suggested a potential relationship between this embodiment of a Christian concept of equality and American constitutionalism, noting that, while a group or difference based vision of equality is certainly imaginable, the U.S. legal system has moved beyond a jurisprudence of status or group rights or of equality in separate spheres to one of abstract universalism and individualism in ways important to our current constitutionalizing of women’s equality and consistent with this Pauline text (Case 2002). Whatever its impact on U.S. constitutionalism, the text from Galatians certainly influenced my own development as a feminist.

My first scholarly paper as a teenager was on the question of the admission of women to the ministerial priesthood of the Catholic Church. At the time, in the early 1970s, there was a lot of talk about women’s ordination and no really extensive and authoritative explanation of Catholic doctrine against it. So I did everything from having a friend whose name – Frances – could be made to look like a boy’s name with the switch of a single letter from “e” to “i” write letters with alternate spellings to see which seminaries wrote her back when she said, “I’m thinking of becoming a priest” to researching the early Church and its presentation of women in leadership roles in then recently published books like Joan Morris’s *The Lady Was a Bishop* (Morris 1973).

But I wept a different sort of tears than those prompted in me by the Litany’s inclusion of female doctors when, late in my Catholic high school days, we visited a grade school catechism class in which children preparing a skit were casting the role of Jesus. When a little girl volunteered for the role, the catechism teacher said to her, “No, no, you can’t be Jesus. You’ll have to be somebody’s wife or mother.” Unfortunately, very shortly

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4 “Lapsed Catholic” is far too weak a description of my distance from the Church, as I will explain below.
5 What I mean by “sameness feminism” is not a claim that men and women are identical, but precisely the repudiation of “fixed notions concerning the roles and abilities of males and females” and of sex-respecting rules. (Case 1995a, Case 2000).
6 The Catholic debate paralleled a similar debate in the Episcopal Church that came to a head with the 1974 irregular ordination of the so-called “Philadelphia Eleven.”
thereafter, this became the official position of the Catholic Church. That is to say, in 1976, just when the U.S. Supreme Court had started declaring that there should be no “fixed notions concerning the roles and abilities of males and females” embodied in law,\(^7\) the Catholic Church did an about face and reinforced fixed notions concerning the roles and abilities of males and females. The 1965 Vatican II encyclical Gaudium et Spes (Joy and Hope)\(^8\) had urged in a rather feminist way universal acceptance of “the fundamental personal rights” of a woman “to choose a husband freely, to embrace a state of life or to acquire an education or cultural benefits equal to those recognized for men” (Gaudium et Spes 1965: Sec. 29). Although it did insist that “children, especially the younger among them, need the care of their mother at home” it also stressed the need for “joint deliberation of spouses” and “active presence of fathers” before concluding, “This domestic role of [the mother] must be safely preserved, though the legitimate social progress of women should not be underrated on that account” (Gaudium et Spes 1965: Sec. 52). According to Gaudium et Spes, the “legitimate social progress of women” included their full and active participation in the public sphere:

> “Women now work in almost all spheres. It is fitting that they are able to assume their proper role in accordance with their own nature. It will belong to all to acknowledge and favor the proper and necessary participation of women in the cultural life” (Gaudium et Spes 1965: Sec. 60).

Although Vatican II argued for women’s equality in the secular public sphere, a decade later, in 1976, Pope Paul VI, prompted by the ecumenical questions raised by the Episcopal Church’s official acceptance of ordination without regard to sex, firmly rejected the possibility of women’s equality in the hierarchy of the Church when he promulgated a Declaration on the Admission of Women to the Ministerial Priesthood, for the first time in Church history marshalling extensive authoritative arguments against the possibility of women’s ordination to the priesthood. The Declaration, titled Inter Insigniores (Among the Signs), went far beyond merely dashing the hopes of Catholic feminists for what they termed Equal Rites. It could be seen as denying women any place in the scheme of salvation. Although it acknowledged the authority of Galatians 3:28 as to the “equality of rights of the human person” and for the proposition “that there are no more distinctions between … male and female,” it insisted “this passage does not concern ministries” (Inter Insigniores 1976: Sec. 6). Instead, because the sacramental function of a priest was “taking the role of Christ, to the point of being his very image” and Christ was a male, it was essential that the priest, too, be male (Inter Insigniores 1976: Sec. 5). Women simply could not embody “this ‘natural resemblance’ which must exist between Christ and his minister… in such a case it would be difficult to see in the minister the image of Christ” (Inter Insigniores 1976: Sec. 5). Inter Insigniores did have many nice things to say about women and about the opportunities Christ had opened to them, but, it insisted that, in the end, facts were facts: The “fact…that the Incarnation of the Word took place according to the male sex,… while not implying an alleged natural

\(^7\) See e.g. Frontiero v. Richardson (1973) 411 U.S. 677 and Weinberger v. Wiesenfeld (1975) 420 U.S. 636.

\(^8\) Encyclicals and similar papal documents traditionally take their titles from their opening words in the official Latin version.
superiority of man over woman, cannot be disassociated from the economy of salvation” (Inter Insigniores 1976: Sec. 5).

The difficulty with this line of argument, as Catholic supporters of women’s ordination promptly pointed out, is that the “economy of salvation” also depended on Christ’s being able to represent those he died to redeem: if women could not represent Christ, how could Christ represent women? And if he could not, how, then could women be said to have a place in the economy of salvation? How could they be redeemed? The St. Joan’s International Alliance, a U.N. observer group of Catholic feminists, marked this occasion by adding to their selection of slogans for buttons, which also included “Sexism is a Heresy: Anathema Sit” and “Equal Rites,” the telling demand: “Ordain women or stop baptizing them.”

Inter Insigniores ended whatever hope there might have been of my remaining a Catholic, but it strengthened my commitment to feminism and my interest in its history. As a Yale college student, I began looking at arguments for the equality of the sexes in Western Europe from the Middle Ages to the French Revolution, arguments that often relied on scriptural passages and saints’ lives like those cited above because they were made by people in an environment where arguments made from Christian theology were the best of all possible arguments. I learned that concern that Christ as a male might not have redeemed women and for this purpose a female Messiah might be required had arisen from time to time since the Middle Ages. Some even thought to have identified this female Messiah. For example, the twelfth century Guglielmites saw Guglielma of Milan as “a female incarnation of the Holy Spirit” sent to “establish a new church ruled by a female pope and female cardinals” which was the pre-condition for worldwide salvation (Wessely 1978: 289), and in the sixteenth century Guillaume Postel identified a Venetian woman named Jeanne as the new redeemer (Postel 1547). I also learned that when Paul VI’s explained why Inter Insigniores was the Church’s first comprehensive justification of women’s exclusion from the priesthood by saying the “Magisterium has not felt the need to intervene in order to formulate a principle which was not attacked, or to defend a law which was not challenged,” (Inter Insigniores 1976 Sec.1) he was glossing over challenges such as those by Michel de Montaigne’s covenant daughter and literary executor Marie le Jars de Gournay, who in the early seventeenth century marshaled arguments from world history, the Fathers of the Church and Church practice in favor of women’s ordination. (Gournay 2002: 91).

As for broader arguments for the equality of the sexes before 1800, I was particularly interested to note that the people who made these arguments in the course of a centuries-long debate often called the “querelle des femmes” fell largely into two groups: there were women, including Christine de Pizan around 1400, Marie Le Jars de Gournay around 1600 and Olympe de Gouges around 1800, who were by the standards of their own time by and large conservative - whether it was about issues of war and peace, monarchical politics, or the state of the French language - who wanted first of all to make their conservative voice heard in the general discourse, and then discovered that because they were women, no one was going to listen to them (Case 1993). They could be dismissed with "merely a smile or some slight shaking of [the] head [that says with] mute
eloquence . . . 'It's a woman speaking'" (Gournay 2002:101). Thus, before they could make whatever point they wanted to make about whatever non-sex-specific topic they were interested in, they first had to defend the ability and the right of women to make such points, in order to be heard. They became radicalized by the fact of being women, and then started thinking more broadly in radical terms. So Christine de Pizan begins by saying, “If it were customary to send little girls to school like boys, and if they were then taught the sciences, they would learn as thoroughly and understand the subtleties of all the arts and sciences” and ends by concluding that similarly peasants and primitive peoples, if they, too, were given the opportunity, could learn as well as the bourgeois (Pizan 1999: 1.27.1). Similarly, Marie de Gournay concludes that the differences between men and women are no greater than those among men “according to the training they receive, according to whether they are brought up in a city or a village, or according to nationality” (Gournay 2002: 81).

The men, on the other hand, tended to be relatively radical at the outset, and then to take women’s issues as an example for their radicalism. They had generally revolutionary ideas, challenging received ideas, and the most firmly entrenched received idea they could think of was the inequality of the sexes. If they could overturn that, well then everything else was up for grabs, too, because the prejudice in favor of the inequality of the sexes was the most firmly fixed and difficult to combat. While the women were clearly in earnest, for many of the men arguments in favor of sex equality seemed to have been somewhat of a game or a joke, a way of showing off their rhetorical skills (Case 1993).

After writing a senior essay on Marie de Gournay, I continued my study of the early history of feminism at the University of Munich and at Harvard Law School. I brought an engagement with long history to the legal academy with me, with a job talk on political rights for women in the French Revolution, a first published paper comparing medieval feminists with those who added "sex" to Title VII (Case1993), and a tenure piece looking to the early modern period for gender bending terminology (Case 1995a: 24-36).

Critics accused me of writing about the medieval feminists because I was interested in them and bringing in contemporary comparisons only to get tenure. I take very seriously, however, the comparison I drew between the Continental European men and women who wrote in defense of women and in favor of sex equality before 1800 and the Congressmen and women responsible for adding prohibitions on sex discrimination to Title VII (Case 1993: 124). The conventional wisdom is that the word “sex” was introduced into Title VII as something of a joke, by the racist Chair of House Rules Committee, Virginian Howard Smith, who hoped thereby to help defeat the Civil Rights Act in its entirety. Although Smith was unquestionably a racist and would have been delighted to see Title VII as a whole fail, he was also something of a feminist, who had been a sponsor of the Equal Rights Amendment since 1946 and was known as the “Rock of Gibraltar” to the National Women’s Party (Freeman 1991), a group of sameness feminists generally seen as conservative because, unlike progressives, they had historically disfavored protective labor legislation for women and were seen aligned with
upper middle class business interests. The typical NWP member, like the typical female advocate for sex equality in the period before the French Revolution, was a woman quite radical on women’s issues, but moderate to conservative on virtually all others; one whose chief complaint with the system was simply that it excluded her and differentiated her on grounds of sex.

I have previously argued (Case 2002:767) that Smith’s racism interacted in important ways with his support for women’s rights: Smith understood quite well that, as Congresswoman Martha Griffiths put it in floor debate, "a vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister" (110 Cong. Rec. 2580). That is to say, Smith and other legislators who supported the addition of "sex" understood what the legal academy has subsequently come to call intersectionality. For Smith, the quintessential intersectional category was not poor black lesbian, but white Anglo-Saxon Christian male. As he and other conservative white Southerners saw it, unless Congress included prohibitions on sex discrimination with those on grounds of race, color, religion and national origin, "the white woman of mostly Anglo-Saxon or Christian heritage [would be deprived of] equal opportunity before the employer" (110 Cong. Rec. 2583) compared, not only with Anglo-Saxon Christian men (the intersectional category assumed to be virtually every employer's first choice) but also with men and women of every other race, ethnicity, and religion. Smith may have been a racist, but he did not want "his" women to take second place to men and women of other races.

Although on the House floor Smith insisted nearly half a dozen times that he was "serious" in proposing a ban on sex discrimination in employment, the joking way in which Smith introduced the word “sex” – by reading a letter from a constituent who asked that Congress help spinsters by taking steps to remedy the post-war imbalance in the sex ratio and going on to suggest that if Congress couldn’t find women husbands it could help them find jobs instead – is generally seen to call his motives into question. There is, however, no basis for questioning the motives of the Congresswomen who immediately backed Smith up, the majority of whom were, like so many of the women participants in the querelle des femmes, moderate to conservative on issues apart from women’s rights. I had the opportunity before she died to interview one of these women, moderate Republican Congresswoman Catherine May, who later became Catherine Bedell. “Of course we were serious,” she told me. “We had been planning this all the time and we were willing to let Smith get the credit so long as we got what we wanted.” It is worth noting that not caring about the credit as long as things get done may be a quintessentially feminine way of proceeding.

It is also worth noting that the only woman in the House who spoke against the addition of “sex” was also the one farthest to the left on the political spectrum – New York Democrat Edith Green. Although instrumental in the passage of the Equal Pay Act a few years earlier, Green took the position that discrimination against women could not be compared with discrimination against blacks and should not be allowed to "clutter up" (110 Cong. Rec. 2581) a bill designed to remedy race discrimination. But other women in the House applied the lessons of intersectionality to point out that, without the
inclusion of “sex” as a forbidden ground, Negro women as well as white women would be excluded from jobs and from protection against discrimination.

Among those who stressed intersectionality most eloquently was Martha Griffiths, the Michigan Democrat whose activism on behalf of women’s rights included the successful filing of a discharge petition to get the Equal Rights Amendment onto the floor of the House, out of the Judiciary Committee where its fierce opponent Emmanuel Celler, an otherwise progressive New York Democrat who also objected to the addition of “sex” to Title VII, had kept it bottled up for years. Griffiths was not above playing to the prejudices of House Southerners by insisting that “a vote against this [sex] amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister,” (110 Cong. Rec. 2580) because, in the absence of a prohibition on sex discrimination, “white women will be last at the hiring gate” (2778) “at the bottom of the list …with no rights at all” (2279). But she also stressed that Negro women needed a prohibition on sex discrimination were they to have any hope of equal employment opportunity, illustrating her point with examples from every class of employment, from a Negro female dishwasher seeking to move from “a greasy spoon” to a “very good restaurant which employed only …white men” to a “a colored woman political scientist” seeking a job at a university where there “has never been a woman political scientist employed” (2579). Her final example illustrated, not only intersectionality, but the gendering of jobs:

Supposing a little 100-pound colored woman arrives at the management's door and asks for the job of driving a haulaway truck, and he says, "Well, you are not qualified," and she says, "Oh, yes, I am. During the war I was the motorman on a streetcar in Detroit. For the last 15 years I have driven the schoolbus." Surely, Mr. Chairman, we are hiring the best drivers to drive the most precious cargo. Of course, that woman is qualified. But he has only white men drivers. Do you not know that that woman is not going to have a right under this law? (2579)

Unfortunately, although some petite black women may today, thanks to Title VII, have the opportunity to drive haulaway trucks, we are still tend to pay those who drive our children less than those who drive our less precious cargo, consistent with a tendency to pay those jobs gendered masculine and most often held by men more than those gendered feminine and held by women (Case 1995a).

Among those who supplemented Griffiths’s work on the floor of the House with lobbying efforts stressing intersectionality was Pauli Murray, who wrote a memo distributed to President Johnson and key Senators speaking from her own experience as a victim of both race and sex discrimination (Freeman 1991; Murray 1987:356). Murray, the author, with Mary Eastwood, of Jane Crow and the Law, and an active member of both the NAACP and the National Organization for Women (NOW), ended her life as an ordained Episcopal priest. It is likely she, too, found in Galatians 3:28 the message of equality she spent a lifetime promulgating.
On the House floor, Griffiths stressed the long history of cooperation between blacks and whites, men and women, in support of women’s rights, noting that

“the 19th amendment gave women the right to vote. But white women alone did not secure that right. White men voted for that right; but white people alone did not secure that right. Colored men voted for that right, and colored women were among the suffragettes. Sojourner Truth, a Detroit woman, was the greatest of all of these.” (110 Cong. Rec. 2580)

This brings me to the lessons that I draw from my own past and from my study of early feminists. The first is that many more generations than three have sought to transcend the boundaries of the law through feminist theory. This is both good news and bad news. Christine de Pizan around 1400, Cornelius Agrippa of Nettesheim around 1500, Marie de Gournay around 1600, Francois Poulain de la Barre just before 1700, Olympe de Gouges just before 1800 all thought what they were arguing for was so obvious and so right that all that had to done was to put the arguments out there and people would be persuaded and things would get better. Obviously, that didn’t happen. Worse yet, one generation’s arguments tended to be lost to succeeding generations, leaving them to reinvent the wheel rather then building on the foundation of those who preceded them. But the good news here is that feminism is not a new thing under the sun, a historical oddity or a passing fad. It has a long past and we stand with many, many generations, not only of women, but also of men.

Secondly, I want to highlight my disappointment at seeing how in my lifetime, feminism and conservatism have come to be seen as antithetical by both feminists and conservatives in the United States. A few examples from my personal experience may illustrate the point. When I was a student at Harvard Law School, I attended the National Conference on Women and the Law and was treated to row upon row of presentations on such issues as nuclear power – not feminist approaches to nuclear power, not the effect of nuclear power on women’s health, not the equivalent for nuclear reactors of the Greenham Common women’s approach to nuclear weapons, but just the sort of generic opposition to building or continuing to operate more nuclear reactors common in those years following the incident at Three Mile Island. There may be well be feminist approaches to or feminist implications of nuclear power, but that was not what I was hearing. The message I took away was that Women and the Law was a left-progressive event and was therefore going to talk about everything of interest to left-progressives without even bothering to tie it in to sex or gender.

I encountered the opposite problem when I began teaching at the University of Virginia Law School, which, when I taught there in the 1990s, had a more diverse array of conservative scholars than perhaps any other U.S. law school – as I used to say teasingly to my colleagues, it could be seen to resemble a zoo dedicated to the creatures of the night, running the full conservative spectrum from the sort of libertarians who found public roads objectionable and the sort of corporate scholars who thought securities regulation was a bad idea, through Borkeans to Christian social conservatives and New Sovereigntists A mark of how established feminist legal theory had become in the legal
academy was that the Virginia faculty hired me specifically because they felt the need to add a feminist theorist to the mix. Thus, I went to the University of Virginia as something of a missionary for feminism, and, as I kept saying to anyone who would listen for the first few years I was there, the thing I had forgotten was that missionaries often end up boiled in oil. (Even in my Catholic youth, I may have aspired to be a Doctor of the Church, but never a martyr.) Before they knew much more about me than my commitment to feminism, some of my Virginia colleagues reflexively assumed that I must of course be on the far left-progressive side of all other issues. When she heard, for example, that I was scheduled to teach Property, my conservative colleague Lillian BeVier’s reflexive response was, “I don’t see why you’re going to teach Property, Mary Anne, when you don’t believe in it.” In fact, unlike Robert Bork, I am not now nor have I ever been a socialist. I even, as a Harvard Law Student, shocked those running the Landlord/ Tenant clinic by saying that I wanted to work on the problems of small landlords.

While at Virginia, I was invited to speak at the Federalist Society conference on feminism. This was the occasion for my first meeting with Martha Fineman, my fellow panelist, and the first of many occasions in which Martha and I modeled disagreement among feminists: Using arguments developed in her book on divorce reform, The Illusion of Equality (Fineman 1991), she was the only participant in the conference to challenge my call for the equality of the sexes as an unproblematically shared normative goal. Like all the panels at the conference, the one to which Martha and I were assigned was structured in a way I repudiated, as a debate between the feminists and the federalists, as if the two points of view were antithetical. As the long history of the querelle and the more recent history of the participation of the National Women’s Party and the moderate to conservative Congresswomen in the addition of “sex” to Title VII should indicate, the mutually exclusive nature of feminism and conservatism may today be a political reality but, at least in my view, it is not an inevitable truth. Because I was at the University of Virginia, I was also invited in March 1996 to speak at a conference on the Legal Rights Affecting Women sponsored by the Rutherford Institute, a conservative group principally dedicated to defending religious liberty which would a year later gain notoriety for helping to represent Paula Jones against Bill Clinton. In speaking to this devoutly Christian audience, I sought to make use of my Catholic religious training to reach them on behalf of feminism by pointing out, for example, ways in which Jesus could be seen as a gender bender, embodying traditionally feminine traits such as gentleness. But, as at the Federalist Society conference a few years earlier, although there were receptive people in the audience who apologized to me for what was going on on the podium, the conference itself was structured as a fight to the finish with feminism rather than a search for common ground.

Over the course of the last decade, therefore, I had gradually been resigning myself to the fact that the idea of a feminist conservative was off the table – until, of course, 2008, when Katie Couric asked staunchly conservative Republican Vice-Presidential candidate and Alaska governor Sarah Palin the following questions and Palin responded with the most coherent answers she gave to any questions asked of her in the course of the 2008 Presidential campaign:
Couric: Do you consider yourself a feminist?

Palin: I do. I'm a feminist who believes in equal rights and I believe that women certainly today have every opportunity that a man has to succeed and to try to do it all anyway. And I’m very, very thankful that I've been brought up in a family where gender hasn't been an issue. You know, I've been expected to do everything growing up that the boys were doing. We were out chopping wood and you’re out hunting and fishing and filling our freezer with good wild Alaskan game to feed our family. So it kinda started with that. With just that expectation that the boys and the girls in my community were expected to do the same and accomplish the same. That's just been instilled in me.

Couric: What is your definition of a feminist?

Palin: Someone who believes in equal rights. Someone who would not stand for oppression against women” (Couric 2008).

Although Palin’s description of her beliefs sounds in sameness feminism, her definition is an inclusive one. It is the standard dictionary definition and one I have always personally endorsed. As I explained to the Federalist Society in my effort to persuade them that it was possible to be both a feminist and a federalist, “Dictionary definitions generally talk about a commitment to the equality of the sexes, a commitment to women's rights and the removal of restrictions that discriminate against them. I hope that there are few who, using this terminology, would not be feminists” (Case 1995b).

Unfortunately, when Brian Williams asked Palin exactly the same question (“Governor, are you a feminist?”) less than a month later, she did not give the same answer. Much less articulately, she said instead, “I'm not gonna label myself anything, Brian….And I think that's what annoys a lot of Americans, especially in a political campaign, is to start trying to label different parts of America different, different backgrounds, different...I'm not going to put a label on myself. But I do believe in women’s rights, I believe in equal rights, and I am so thankful I was brought up in a family where really gender has never been an issue….” (Erbe 2008).

I realize there are many on both the left and right who might be more comfortable with Palin’s second answer. On the left are many who think Palin has no right to claim the title “feminist” if she does not hold certain substantive policy positions and act on them in her political life. For some, an organization like “Feminists for Life,” the anti-abortion group to which both Palin and the wife of Chief Justice John Roberts have ties, is a contradiction in terms. It seems to me, however, far preferable to have debates on such matters as abortion policy – matters related to sex and gender, but as to which there is strong difference of opinion even among those generally committed to the liberty and equality of the sexes – from within feminism than to seek to enforce a monolithic feminist orthodoxy and excommunicate from the feminist fold those who disagree. The movement will be far more vital if there is room within it for reasonable disagreement. As to matters not directly related to sex and gender, I have already expressed my view
that there is room both for a diversity of opinion among people otherwise committed to feminism, and for the development of a diversity of feminist approaches – if, as I see it, feminists need not agree on abortion, they a fortiori need not agree on the desirability of drilling in the Arctic National Wildlife Refuge. On the other hand, I find useful Palin’s highlighting positions shared by feminists of otherwise diverse politics that distinguish them from the opponents of feminism. For example, Palin has repeatedly said that she is “a product of Title IX in our schools” and has praised Title IX for having “opened more than doors to just the gymnasium. It allowed us to view ourselves, and our futures, in a different way.” Even today, not everyone on the right would share Palin’s enthusiasm. When a speaker at a recent University of Chicago Law and Economics workshop presented evidence that the participation in sports facilitated by Title IX had kept girls in school and in the workforce longer, at least one of my colleagues asked why we should regard this as necessarily a good thing. I am prepared to work toward building a coalition with Sarah Palin in support of a robust interpretation of Title IX, even if it is one of the very few political issues on which the two of us may agree.

I certainly don’t want to endorse Palin. I would no more support her because she claims to be a feminist that I would support her, as some argued that I should, simply because she is a woman. I also agree with Palin’s critics that it is important to highlight any hypocrisy or inconsistency in her politics on women’s issues and to prevent her from cynically exploiting a feminist label. I don’t want to get involved in labeling Palin or anyone else, but I do want to get involved in starting a conversation on feminism that does not preclude any view on any other thing unrelated to sex and gender, the equality of the sexes and the oppression of women, and I hope that this will once again be possible. Moreover, as my own Catholic girlhood demonstrates, inspiration for commitment to the cause of feminism can spring from the most unpredictable of sources, and if even one young girl growing up in a conservative family can feel more comfortable calling herself a feminist because Sarah Palin has done so too, I am left more hopeful for future generations making it beyond the boundaries of the law.

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