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## Abolishing Capital Punishment: A Feminist Outlook and Comparative Analysis of the Death Penalty Using Equal Protection and Gender Discrimination Law

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# ABOLISHING CAPITAL PUNISHMENT: A FEMINIST OUTLOOK AND COMPARATIVE ANALYSIS OF THE DEATH PENALTY USING EQUAL PROTECTION AND GENDER DISCRIMINATION LAW

YEEMEE CHAN\*

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## I. INTRODUCTION

The law has historically treated women differently than men.<sup>1</sup> One area in which women continue to receive preferential treatment is capital punishment.<sup>2</sup> Even though women commit one out of eight homicides,<sup>3</sup> only 2.1% of them receive the death penalty at trial, and only 1.4% are currently on

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1. See, e.g., Sheila J. Kuehl, *Why a Women's Law Journal / Law Center Experience: Episode XV / The Sequel / The Movie / Film at 11:00*, 1 *UCLA WOMEN'S L.J.* 11, 12 (1991).

2. Elizabeth Rapaport, *Equality of the Damned: The Execution of Women on the Cusp of the 21st Century*, 26 *OHIO N.U. L. REV.* 581, 582 (2000). See also Andrea Shapiro, *Unequal Before the Law: Men, Women and the Death Penalty*, 8 *AM. U.J. GENDER SOC. POL'Y & L.* 427, 431 (2000). Joan Howarth characterizes capital jurisprudence as a "hidden battleground of gender." Joan Howarth, *Deciding to Kill: Revealing the Gender in the Task Handed to Capital Jurors*, 1994 *WIS. L. REV.* 1345, 1347 (1994).

3. Rapaport, *supra* note 2, at 582.

death row.<sup>4</sup> Further, only 1.1% of female death row inmates are actually executed.<sup>5</sup> In addition, of the 157 death sentences imposed on women since 1973, only forty-nine of them remain in effect.<sup>6</sup> On the other hand, 1018 men have been executed since 1976, and there are currently 3309 men on death row.<sup>7</sup> Because women on death row receive preferential treatment to the detriment and, ultimately, the demise of male death row inmates, capital punishment should be abolished.<sup>8</sup>

This article will address the death penalty of female offenders in terms of Martha Chamallas's three stages of feminist legal theory. Part II of this article will define the three stages of feminist legal theory: the Equality Stage, the Difference Stage, and the Diversity Stage. Part III will analyze the death penalty for women according to the three theories in order to determine whether capital punishment is compatible with feminist legal theory. This section will reveal that the three stages of feminist legal theory do not entirely correlate with the pattern of female executions. In addition, Part III will offer suggestions as to why feminist legal theory can or cannot explain the disparities in capital sentencing. Part IV is a comparative analysis of the death penalty utilizing equal rights and discrimination law with respect to women's equality within the three stages. Part V will discuss the possible comeback of the Equality Stage as a result of the recent female executions.

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4. Victor L. Streib, *Death Penalty for Female Offenders, January 1, 1973, Through June 30, 2006* 3, [http://www.law.onu.edu/faculty\\_staff/faculty\\_profiles/FemDeath-June2006.pdf](http://www.law.onu.edu/faculty_staff/faculty_profiles/FemDeath-June2006.pdf) [hereinafter Streib, *Death Penalty*]. Murderers rarely receive death sentences and capital punishment has been on the decline since 1999. See Rapaport, *supra* note 2, at 582; see also Death Penalty Information Center, *Facts About the Death Penalty*, <http://www.deathpenaltyinfo.org/FactSheet.pdf> (last visited Mar. 29, 2007).

5. Streib, *Death Penalty*, *supra* note 4, at 9. Mitigating factors such as the defendant's background, character, and past criminal history result in the female defendant's clemency from execution. See 18 U.S.C. § 3592(a)(5), (8) (2000).

6. Streib, *Death Penalty*, *supra* note 4, at 9. This means that 59% of women who received death sentences after the death penalty was reinstated had their sentences commuted or reversed by the judiciary. Rapaport, *supra* note 2, at 584. However, at the end of 1998, about one third of all death row inmates receiving death sentences between 1973–98 had their sentences reversed by the courts. *Id.*

7. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *DEATH ROW U.S.A.: SUMMER 2006*, 1, 10, [http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA\\_Summer\\_2006.pdf](http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Summer_2006.pdf) [hereinafter *DEATH ROW U.S.A.*].

8. Capital punishment also discriminates against blacks and often captures the innocent. Death Penalty Information Center, *History of the Death Penalty, Part II*, <http://www.deathpenaltyinfo.org/article.php?scid=15&did=411> (last visited Mar. 29, 2007) [hereinafter *History of the Death Penalty, Part II*]. Amnesty International is also an advocate of abolishing the death penalty. Amnesty International, *The Death Penalty*, <http://web.amnesty.org/pages/deathpenalty-index-eng> [hereinafter *Amnesty International, The Death Penalty*] (last visited Mar. 29, 2007).

Finally, Part VI will summarize and conclude that the death penalty should be abolished due to its disparate effect of punishing more death-eligible men than death-eligible women.

## II. DEFINING THE THREE STAGES OF FEMINIST LEGAL THEORY

Chamallas based her feminist legal theory stages—the Equality Stage of the 1970s, the Difference Stage of the 1980s, and the Diversity Stage of the 1990s—on Patricia A. Cain’s demarcation lines.<sup>9</sup> The three stages of feminist legal theory are used to “make sense of the diverse and sometimes contradictory arguments of feminist scholarship.”<sup>10</sup> In the Equality Stage, feminist legal theorists saw women and men as similar beings; thus, feminist theorists advocated that women should be subjected to and protected by the same laws as men.<sup>11</sup> In contrast, feminist theorists in the Difference Stage emphasized the differences between women and men, thereby advocating for particularized treatment of the two sexes.<sup>12</sup> Finally, the Diversity Stage saw women, as a group, as having distinct and unique personalities.<sup>13</sup> This stage emerged because certain groups of women, such as women of color and lesbians, were being discriminated against.<sup>14</sup>

## III. INTEGRATING THE THREE STAGES WITH FEMALE DEATH SENTENCES

Currently, there are forty-nine women on death row in the United States.<sup>15</sup> Since 1976, 1018 male executions occurred,<sup>16</sup> whereas only eleven

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9. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 15 n.1 (2d ed. 2003). Stage One occurred in the late 1960s and it advocated women’s equality—“that women should be treated the same as men.” Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191, 199 (1989–90). Stage Two of Cain’s feminist theory highlighted the differences between men and women. *Id.* at 199–200. Women were seen as having a “different voice” and laws should reflect women’s dissimilarities. *Id.* at 200. Stage Three is the Postmodernist theory. *Id.* at 204. Postmodern feminist theory reflects the idea that every person has a “subjective, concrete, and particular” view of life marked by personal experiences. *Id.*

10. CHAMALLAS, *supra* note 9, at 16.

11. *Id.*

12. *Id.* at 17.

13. *Id.* at 19.

14. *See id.*

15. Streib, *Death Penalty*, *supra* note 4, at 9.

16. DEATH ROW U.S.A., *supra* note 7, at 10.

women were executed.<sup>17</sup> Even though women commit death-eligible crimes,<sup>18</sup> judges, jurors, and governors spare their lives for various reasons.<sup>19</sup> Because the gender gap is devastatingly prevalent in capital punishment, it is difficult to reconcile the number of female executions with the three stages of feminist legal theory.<sup>20</sup> The subsequent sections will explain the compatibility of feminist legal theory with capital punishment.

### A. *The Equality Stage*

For the purposes of this article, the Equality Stage will incorporate the executions of the 1960s and the 1970s because the women's movement of the 1960s also emphasized the equality of women.<sup>21</sup> Another reason these two decades are grouped together is because executions were at an all-time low due to the abolishment of capital punishment during this time period.<sup>22</sup>

The Equality Stage saw few executions for both men and women.<sup>23</sup> Although both men and women sat on death row in the 1960s and 1970s,<sup>24</sup> only one female execution occurred during the 1960s,<sup>25</sup> and no female executions

17. Death Penalty Information Center, *Women and the Death Penalty*, <http://www.deathpenaltyinfo.org/article.php?did=230&scid=24#facts> (last visited Mar. 29, 2007).

18. Melinda E. O'Neil, Note, *The Gender Gap Argument: Exploring the Disparity of Sentencing Women to Death*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 213, 218–19 (1999). When women kill, they often kill their loved ones, including their children. Streib, *Death Penalty*, *supra* note 4, at 10; Lorraine Schmall, *Forgiving Guin Garcia: Women, the Death Penalty and Commutation*, 11 WIS. WOMEN'S L.J. 283, 301 (1996). However, states often characterize capital crimes as felony murder or homicide by and against strangers, as opposed to domestic homicide. Victor L. Streib, *Rare and Inconsistent: The Death Penalty for Women*, 33 FORDHAM URB. L.J. 609, 615 (2006) [hereinafter Streib, *Rare and Inconsistent*]. Therefore, female murderers rarely receive death sentences because states do not consider domestic homicide as deserving of capital punishment. *Id.*

19. See O'Neil, *supra* note 18, at 218–19. Decision-makers mitigate female death sentences because they believe that more women than men are capable of rehabilitation, they view women as “childlike” and victims of abuse, and women often do not have violent pasts. *Id.* at 218, 232; Rapaport, *supra* note 2, at 583.

20. See generally Streib, *Death Penalty*, *supra* note 4, at 7–8.

21. See Cain, *supra* note 9, at 198.

22. History of the Death Penalty, Part II, *supra* note 8.

23. See Samuel R. Gross, *Still Unfair, Still Arbitrary—But Do We Care?* 26 OHIO N.U. L. REV. 517, 519 (2000).

24. See Streib, *Death Penalty*, *supra* note 4, at 4. Approximately twenty-two death sentences were imposed on women in the 1970s. *Id.*

25. *Id.* at 7–8. California executed Elizabeth Ann Duncan on August 8, 1962 for conspiracy to commit murder. Death Penalty Information Center, *Executions in the U.S. 1608–1987: The Espy File, Executions by Date*, <http://www.deathpenaltyinfo.org/ESPYdate.pdf> 602 (last visited Mar. 29, 2007) [hereinafter *Executions in the U.S.*].

took place in the 1970s.<sup>26</sup> In contrast, 192 men were executed in the 1960s and three men were executed during the 1970s.<sup>27</sup> Relatively speaking, very few executions occurred during this time period because public opinion on the death penalty shifted towards disapproval.<sup>28</sup> During this stage, the United States Supreme Court vigorously faced the constitutionality of the death penalty:

The 1960s and 1970s saw several challenges to the imposition of the death penalty, including challenges involving disproportionality of the punishment to the crime committed, the state of mind of the defendant at the time of the crime, the age of the offender, the mental capacity of the offender, and the race of the offender.<sup>29</sup>

Moreover, the judicial invalidation of the death penalty took place in 1972 with the United States Supreme Court's decision of *Furman v. Georgia*.<sup>30</sup> Although the death penalty was reinstated in 1976, no executions, male or female, occurred that year.<sup>31</sup> The first execution after the reinstatement of the death penalty took place in 1977.<sup>32</sup>

Chamallas characterizes the Equality Stage as emphasizing the similarity of women and men.<sup>33</sup> Legal feminists during this period maintained that laws protecting women only served to "restrict women's lives to the home and family."<sup>34</sup> Women gained much ground in the political arena during this time.<sup>35</sup> Nonetheless, in terms of capital punishment, decision-makers did not see women and men as equals during the Equality Stage, as only one female was executed for her capital crime.<sup>36</sup> Theoretically speaking, equality theo-

26. See Streib, *Death Penalty*, *supra* note 4, at 7–8.

27. See Executions in the U.S., *supra* note 25, at 596–604.

28. See Gross, *supra* note 23, at 517. "The last execution in this period was in 1967; and there were none from 1968 until 1977." *Id.* at 519. However, public approval of the death penalty increased in the late 1970s. *Id.* at 521.

29. Shapiro, *supra* note 2, at 439.

30. 408 U.S. 238 (1972) (per curiam). Although the United States Supreme Court found that many states' death penalty statutes violated the Eighth and Fourteenth Amendments of the United States Constitution, the Court left the door open for states to rewrite their death penalty statutes to comply with the *Furman* decision. See History of the Death Penalty, Part II, *supra* note 8.

31. History of the Death Penalty, Part II, *supra* note 8; Executions in the U.S., *supra* note 25, at 604.

32. History of the Death Penalty, Part II, *supra* note 8. Utah executed Gary Gilmore on January 17, 1977. DEATH ROW U.S.A., *supra* note 7, at 12.

33. CHAMALLAS, *supra* note 9, at 16.

34. *Id.*

35. See *id.* at 17.

36. See Streib, *Death Penalty*, *supra* note 4, at 7–8.

rists would have liked to see comparable treatment of women and men for similar crimes.<sup>37</sup> Ultimately, however, the gender gap prevented the equal treatment of women and men.<sup>38</sup> Nonetheless, the constitutional challenges that arose in the 1960s and 1970s, causing the number of overall executions to drop, helps to reconcile the fact that only one female execution took place during this period.<sup>39</sup>

### B. *The Difference Stage*

In contrast to the Equality Stage, legal feminists during the Difference Stage embraced the differences between women and men.<sup>40</sup> In the 1980s, difference theorists analyzed gender differences in terms of “cultural attitudes, ideology, socialization, [and] organizational structures.”<sup>41</sup> Accordingly, since women were thought to value human relationships and possess positive values such as compassion and understanding,<sup>42</sup> in theory, female executions during the Difference Stage should have been the lowest out of the three stages. However, the number of female executions in the Difference Stage is the same as in the Equality Stage—one female execution.<sup>43</sup> Nonetheless, the sole female execution complements the feminist legal theory espoused during this time.<sup>44</sup> In all likelihood, the female execution of the Equality Stage matches the single female execution of the Difference Stage due to the overall sentiment towards capital punishment during the Equality Stage.<sup>45</sup> As such, feminist legal theory can draw a parallel with capital punishment after all.

### C. *The Diversity Stage*

Because the Diversity Stage highlights the differences amongst women, the number of female executions during the 1990s should theoretically fall

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37. See generally CHAMALLAS, *supra* note 9, at 16.

38. See generally *id.* at 17.

39. See Streib, *Death Penalty*, *supra* note 4, at 7–8.

40. CHAMALLAS, *supra* note 9, at 17–18.

41. *Id.* at 18. Chamallas states that in order for women to be treated as equals, we should change social norms by accounting for the differences between men and women. *Id.*

42. *Id.* at 19.

43. See Streib, *Death Penalty*, *supra* note 4, at 8. North Carolina executed Velma Barfield in 1984 for murder. Executions in the U.S., *supra* note 25, at 605. One hundred and seventeen males were executed during this timeframe. See DEATH ROW U.S.A., *supra* note 7, at 12–14.

44. See CHAMALLAS, *supra* note 9, at 17–18.

45. See History of the Death Penalty, Part II, *supra* note 8.

between the number of female executions during the Equality Stage and the number during the Difference Stage.<sup>46</sup> However, since the number of female executions during the Equality and Difference Stages is despairingly low, the two female executions that did occur during the Diversity Stage merely equal the total amount of executions that took place during the previous two periods combined.<sup>47</sup>

In theory, the Diversity theorists would have liked for capital decision-makers to see the differences amongst women instead of viewing all women as a “weaker, submissive, dependent, and more passive sex.”<sup>48</sup> Capital punishment may have turned out differently if the decision-makers recognized that not all women possess the same character traits.<sup>49</sup> For example, after serving ten years of her twenty-year sentence for murdering her eleven-month-old daughter, the parole board released Guinevere Garcia from prison.<sup>50</sup> However, after her release, to obtain money for alcohol, she went to her ex-husband’s house with a .357 Magnum and killed him.<sup>51</sup> The jury sentenced Garcia to death, but Jim Edgar, the governor of Illinois, granted Garcia clemency because he did not think that Garcia was the “worst of the worst.”<sup>52</sup> Although Governor Edgar denied granting clemency to Garcia based on her gender, Garcia was as death-eligible as any other felony murderer with a violent criminal history.<sup>53</sup>

Between 1973 and 1999, 129 women were sentenced to death, but only two executions occurred during the Diversity Stage.<sup>54</sup> Then again, more women received capital sentences during this stage than the previous stages.<sup>55</sup> In addition, the public disapproval of capital punishment during the Equality Stage most likely caused the lack of correspondence of executions with feminist legal theory for this time period.<sup>56</sup> Although the two executions do not entirely correlate with the Diversity theory, the fact that more

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46. See CHAMALLAS, *supra* note 9, at 19–20.

47. In 1998, Florida executed Judias Buenoano and Texas executed Karla Faye Tucker. Streib, *Death Penalty*, *supra* note 4, at 7–8.

48. O’Neil, *supra* note 18, at 218.

49. See *id.*

50. *Id.* at 219.

51. *Id.*; see Schmall, *supra* note 18, at 295.

52. O’Neil, *supra* note 18, at 219–20.

53. See *id.* Guin Garcia most likely escaped death because the governor sympathized with her tumultuous past. See Schmall, *supra* note 18, at 289. As an infant, Guin saw her mother commit suicide. *Id.* at 293–94. As a child, her uncle raped her, and as a teenager, Guin became a pregnant drug addict. *Id.* at 294.

54. Streib, *Death Penalty*, *supra* note 4, at 4, 7.

55. *Id.* at 4. During the 1980s, fifty-one women received death sentences, whereas during the 1990s fifty-six women received death sentences. *Id.*

56. See generally *id.*



executions occurred in this stage than in the previous stages may indicate that female executions are becoming less deplorable.<sup>57</sup>

#### IV. COMPARATIVE ANALYSIS

During the latter part of the Equality Stage, the women's movement won a big battle in the courts with the judicial recognition of sexual harassment.<sup>58</sup> In addition, the Equal Pay Act of 1963, which prohibited employers from engaging in pay discrimination on the basis of sex, also occurred during this stage.<sup>59</sup> Like the 1960s and 1970s, the women's movement in the 1980s flourished.<sup>60</sup> During the 1980s, the National Organization for Women vehemently sought ratification of the Equal Rights Amendment and fell only six votes short of ratification.<sup>61</sup> Further, in 1981 Congress decided to celebrate women's history by establishing the National Women's History Week, which later expanded to the National Women's History Month in 1987.<sup>62</sup> In addition, the Difference Stage saw an increase of women in undergraduate and graduate studies.<sup>63</sup> The 1990s saw the enactment of the Family Medical Leave Act, which allows most federal employees up to twelve weeks of unpaid leave for the birth or care of a child, or the care of the employee, parent, child, or spouse with a serious health condition.<sup>64</sup> The dramatic increase in women's equality and success in education, the workplace, and politics demonstrates that women are no longer the weaker of the two sexes, eliminating the need for their preferential treatment under the law.<sup>65</sup> The sections that follow discuss landmark cases regarding the equality of women involving equal rights and discrimination law.

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57. *See id.* at 7–8.

58. *See Williams v. Saxbe*, 413 F. Supp. 654, 661 (D.D.C. 1976) (mem.), *rev'd on other grounds*, 587 F.2d 1240 (D.C. Cir. 1978); Julianne Scott, *Pragmatism, Feminist Theory, and the Reconceptualization of Sexual Harassment*, 10 UCLA WOMEN'S L.J. 203, 215 (1999).

59. *See* 29 U.S.C. § 206(d) (2000).

60. *See* Nat'l Org. for Women, Chronology of the Equal Rights Amendment, 1923–1996, <http://www.now.org/issues/economic/cea/history.html#1980> (last visited Mar. 29, 2007).

61. *Id.*

62. Clara Cobb, *Celebrating Women and Their Contributions*, DAILY TOREADOR, Mar. 1, 2005.

63. In 1984, women accounted for 49% of all undergraduate and masters degrees and approximately 33% of all doctoral degrees. Women's International Center, Women's History in America Presented by Women's International Center, <http://www.wic.org/misc/history.htm> (last visited Mar. 29, 2007). In addition, in the mid-1980s, more women than men were college students. *Id.*

64. 5 U.S.C. § 6382(a)(1)(A)–(D) (2000).

65. *See supra* notes 58–64 and accompanying text.

### A. *Equal Protection*

The major equal protection case from the Equality Stage is *Reed v. Reed*.<sup>66</sup> In 1967, Richard Reed, an adopted minor, died intestate.<sup>67</sup> Both of his parents, who were separated at the time, sought competing petitions to be appointed as the administrator and administratrix of his estate.<sup>68</sup> Although both parents were equally entitled to administer their son's estate, a state law enumerated a preference for males over females in the event that both parents shared equal entitlement.<sup>69</sup> The United States Supreme Court struck down the Idaho statute as violative of the Fourteenth Amendment because "giv[ing] a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."<sup>70</sup> For the first time ever, the Court "struck down a sex-based [statute] on the ground that it denied a woman equal protection of the laws."<sup>71</sup>

Next, *Kirchberg v. Feenstra*<sup>72</sup> is the leading equal rights case from the Difference Stage. In *Kirchberg*, a husband and wife owned a home together; however, the husband executed a mortgage on the home without his wife's knowledge to pay for legal services after the wife filed a criminal complaint against him.<sup>73</sup> The complaint alleged that he molested their minor child.<sup>74</sup> A Louisiana statute gave husbands "the unilateral right to dispose of [jointly owned community property] without his spouse's consent."<sup>75</sup> The wife challenged the constitutionality of the Louisiana statute but the District Court upheld the statute's validity.<sup>76</sup> During the appeal, the Louisiana Legislature revised the statute, but it was not to take effect until the new year.<sup>77</sup> Therefore, the Court still faced the question of whether the statute violated the United States Constitution.<sup>78</sup> The Court of Appeals for the Fifth Circuit held that the statute explicitly discriminated against women.<sup>79</sup> Since the State did

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66. 404 U.S. 71 (1971).

67. *Id.* at 71.

68. *Id.* at 71–72.

69. *Id.* at 73.

70. *Id.* at 76.

71. Shanti Hubbard, ACLU's Women's Rights Project: Annual Report 2005, ix, available at <http://www.aclu.org/pdfs/wrannualreport2005.pdf>.

72. 450 U.S. 455 (1981).

73. *Id.* at 456–57.

74. *Id.* at 456.

75. *Id.*

76. *Id.* at 458.

77. *Kirchberg*, 450 U.S. at 458.

78. *Id.*

79. *Id.* at 459.

not show that the regulation furthered any substantial governmental interest, the statute violated the Equal Protection Clause of the Fourteenth Amendment.<sup>80</sup>

Finally, during the Diversity Stage, Justice Ginsburg issued a landmark ruling in *United States v. Virginia (VMI)*.<sup>81</sup> In this case, a female high school student sought admission to the state-funded Virginia Military Institute (VMI), a prestigious all-male school which sought to produce “citizen-soldiers” and prepare men for “leadership in civilian life and in military service.”<sup>82</sup> Graduates of VMI often became national leaders in the military and in politics.<sup>83</sup> However, VMI never responded to the 347 female applications it received within the two years prior to the lawsuit.<sup>84</sup> VMI claimed that its rigorous training, constant regulation of behavior and living conditions, and adversative methods were unsuitable for women.<sup>85</sup> The District Court ruled against the United States and in favor of VMI.<sup>86</sup> The Court of Appeals for the Fourth Circuit disagreed and ordered VMI to either start admitting women into its school, become a private institution, or start a comparable school for women.<sup>87</sup> VMI chose to institute a parallel program for women on a separate campus, called the Virginia Women’s Institute for Leadership (VWIL).<sup>88</sup> However, VWIL seriously lacked the prestige and benefits that VMI offered.<sup>89</sup> When the case reached the United States Supreme Court, Justice Ginsburg noted that the real issue was whether the unique opportunity afforded only to men at VMI violated the Equal Protection Clause.<sup>90</sup> Justice Ginsburg argued that VWIL’s program was in no position to afford women the same type of opportunities and advantages that men received at VMI.<sup>91</sup> Thus, she held that VMI unconstitutionally denied women equal protection of the laws.<sup>92</sup>

Notwithstanding the great strides that the women’s movement made between the 1960s and the 1990s with regard to obtaining equal protection of the laws, sex-based discrimination continued to occur in the area of capital

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80. *See id.* at 459–61.

81. 518 U.S. 515 (1996).

82. *Id.* at 520, 523.

83. *Id.* at 520.

84. *Id.* at 523.

85. *Id.* at 525.

86. *VMI*, 518 U.S. at 524.

87. *Id.* at 525–26.

88. *Id.* at 526.

89. *Id.* at 526, 529.

90. *Id.* at 530–31.

91. *See VMI*, 518 U.S. at 551–53.

92. *See id.* at 558.

punishment during this time.<sup>93</sup> At one point in time, sparing women's lives from execution may have been understandable due to the status of women and society's perception of them.<sup>94</sup> However, today women and men are, for the most part, regarded as equals.<sup>95</sup> Therefore, female death row inmates should not be permitted to escape death because of their gender.

In addition, the United States Supreme Court has disapproved of executing the insane<sup>96</sup> and the mentally retarded,<sup>97</sup> indicating a shift in the Court's outlook on capital punishment. Back in 1989, Justice O'Connor held in *Penry v. Lynaugh*<sup>98</sup> that there was a lack of national consensus to ban the executions of mentally retarded death row inmates.<sup>99</sup> However, after the *Penry* decision, many state legislatures took action and exempted the mentally retarded from execution.<sup>100</sup> In 2002, prompted by the increase in legislative action regarding this issue, the United States Supreme Court found, in *Atkins v. Virginia*,<sup>101</sup> that a national consensus against executing the mentally retarded existed.<sup>102</sup> Therefore, the Court provided the mentally retarded with a categorical exemption from the death penalty.<sup>103</sup> The apparent change in the Court's viewpoint regarding the death penalty warrants a revisited look at the disparate impact of capital punishment on male death row inmates. Because the Court found in *Atkins* yet another flaw with capital punishment,<sup>104</sup> it should also find that the death penalty's effect of disparately and disproportionately impacting males is unconstitutional and therefore should abolish capital punishment.

### B. Gender Discrimination

Another area of the law in which the women's movement improved greatly during the three stages of feminist legal theory is sex discrimination. The Equality Stage saw a great victory for the women's movement in the

93. See Shapiro, *supra* note 2, at 440.

94. *Id.* at 462 n.268.

95. See *id.* at 462–63.

96. *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986).

97. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

98. 492 U.S. 302 (1989).

99. *Id.* at 334. However, in 1988, the federal government prohibited the execution of the mentally retarded. *Atkins*, 536 U.S. at 314.

100. *Atkins*, 536 U.S. at 314. States such as Maryland, Tennessee, Kentucky, Georgia, Arkansas, Colorado, Washington, New Mexico, Indiana, New York, and Kansas enacted statutes exempting the mentally retarded from the death penalty. *Id.*

101. *Id.* at 304.

102. *Id.* at 316.

103. *Id.* at 318.

104. *Atkins*, 536 U.S. at 318–19.

decision of *Phillips v. Martin Marietta Corp.*<sup>105</sup> In *Phillips*, a female job applicant filed a sex discrimination suit after the defendant told her that the company did not accept “applications from women with pre-school-aged children.”<sup>106</sup> However, the defendant accepted applications from men with pre-school-aged children.<sup>107</sup> The United States Supreme Court held that having two different hiring policies on the basis of sex violated Section 703(a) of the Civil Rights Act of 1964.<sup>108</sup> In addition, Justice Marshall, in the concurring opinion, expressed his concern that employers could assert that different parenting roles would make one sex more or less qualified for the job than another, under the “bona fide occupational qualification” (BFOQ) exception to the Act.<sup>109</sup> Justice Marshall argued that employers should only consider gender-neutral employment qualifications with respect to performance characteristics.<sup>110</sup>

Next, the leading gender discrimination case from the Difference Stage is *Meritor Savings Bank, FSB v. Vinson*.<sup>111</sup> In *Vinson*, a female bank employee brought a sexual harassment suit against the bank and her supervisor after the supervisor “made repeated demands . . . for sexual favors, . . . fondled her in front of other employees, followed her into the women’s restroom, . . . exposed himself to her, and . . . forcibly raped her on several occasions.”<sup>112</sup> Because the female employee was afraid that she would lose her job, she consented to sexual relations with her supervisor, but ended it after she entered into a relationship with another man.<sup>113</sup> The District Court found that the female employee’s relations with her supervisor were voluntary and irrelevant of her employment at the bank.<sup>114</sup> In contrast, the Court of Appeals for the District of Columbia Circuit found that the female employee had a valid claim for sexual harassment based on a hostile working environment.<sup>115</sup> The United States Supreme Court held that the supervisor’s actions were sufficiently severe and pervasive to constitute a hostile working environment.<sup>116</sup> As a result of this decision, the Court broadened the definition

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105. 400 U.S. 542 (1971).

106. *Id.* at 543.

107. *Id.*

108. *Id.* at 544.

109. *See id.* at 544–47 (Marshall, J., concurring).

110. *Phillip*, 400 U.S. at 547.

111. 477 U.S. 57 (1986).

112. *Id.* at 60.

113. *Id.*

114. *Id.* at 61.

115. *Id.* at 62.

116. *Vinson*, 477 U.S. at 67.

of sexual harassment to include hostile working environment in addition to quid pro quo.<sup>117</sup>

Finally, the primary gender discrimination case for the Diversity Stage is *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*<sup>118</sup> In *Johnson Controls, Inc.*, female employees of a battery manufacturing plant challenged the employer's discriminatory policy of barring all women, except those whose infertility was medically documented, from jobs that involved actual or potential lead exposure exceeding the Occupational Health and Safety Administration standard.<sup>119</sup> Occupational lead exposure leads to certain health risks, including harm to a fetus.<sup>120</sup> The United States Supreme Court held that the employer's policy was "facially discriminatory because it require[d] only a female employee to produce proof that she [was] not capable of reproducing."<sup>121</sup> Additionally, the Court argued that the employer's policy did not fall within the BFOQ exception to Title VII because parents should make decisions regarding the welfare of their children, not employers.<sup>122</sup>

The women's movement was very successful in the area of gender discrimination during the three stages of feminist legal theory.<sup>123</sup> The United States Supreme Court struck down a state statute<sup>124</sup> and an employer's discriminatory work policy as violative of the Civil Rights Act of 1964.<sup>125</sup> In addition, the Court recognized that a hostile working environment constitutes sexual harassment.<sup>126</sup> Nonetheless, discriminatory practices still occurred with regards to capital punishment.<sup>127</sup> Therefore, the death penalty should be brought to an end because it results in the deaths of many more male capital murderers than female, due to the unequal sentencing and execution practices of judges, jurors, and governors who grant clemency.<sup>128</sup>

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117. *See id.* at 65, 67.

118. 499 U.S. 187 (1991).

119. *Id.* at 191–92.

120. *Id.* at 190.

121. *Id.* at 198.

122. *Id.* at 206.

123. *See generally* CHAMALLAS, *supra* note 9.

124. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam).

125. *Johnson Controls, Inc.*, 499 U.S. at 198.

126. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986).

127. *See Shapiro*, *supra* note 2, at 431.

128. *See id.* at 470.

## V. THE REEMERGENCE OF THE EQUALITY STAGE

The new millennium saw a vast increase in the number of female executions.<sup>129</sup> Since 2000, five states have executed eight women.<sup>130</sup> The number of female executions in the last six years doubles the total amount of executions that occurred between 1960 and 1990.<sup>131</sup> In 2001, three women were executed—the highest number of female executions in any year since 1953.<sup>132</sup> Since 2000, twenty-eight female inmates received death sentences.<sup>133</sup> In addition, governors are denying clemency to women without any damage to their political reputations.<sup>134</sup>

When applying the feminist legal theories to the recent executions, the eight female executions appear to fall within the confines of the Equality Stage—where men and women should be treated equally.<sup>135</sup> Although the increase in female executions is not a cause for celebration, it seems to be an improvement in terms of gender equality. However, this may mean that the country has experienced a shift in sentiment towards executing females.<sup>136</sup> Since it appears as though society is unsettlingly becoming complacent with executing men and women while bias still prevails in the system, the overall increase in executions is a cause for concern.<sup>137</sup>

## VI. CONCLUSION

During the three stages of feminist legal theory, women gained tremendous ground in the areas of equal protection and gender discrimination law.<sup>138</sup> Nevertheless, capital punishment remained permeated with gender bias during that period.<sup>139</sup> The relatively high number of female executions during recent times suggests that capital punishment's discriminatory effects may be diluting; however, this ultimately means that the United States seems to be at ease with capital punishment.<sup>140</sup>

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129. See Streib, *Death Penalty*, *supra* note 4, at 9.

130. *Id.*

131. See *id.* at 7–9.

132. Streib, *Rare and Inconsistent*, *supra* note 18, at 623.

133. Streib, *Death Penalty*, *supra* note 4, at 4.

134. See, e.g., Rapaport, *supra* note 2, at 581–82. Governor George Bush denied clemency to Karla Faye Tucker in 1998 without jeopardizing his bid for the 2000 presidential election. *Id.*

135. CHAMALLAS, *supra* note 9, at 16.

136. See Rapaport, *supra* note 2, at 582.

137. See *id.*

138. See generally CHAMALLAS, *supra* note 9.

139. See Streib, *Rare and Inconsistent*, *supra* note 18 at 613–15.

140. See generally Streib, *Death Penalty*, *supra* note 4, at 7–9.

In contrast, more and more countries are finding that the death penalty is cruel and unusual.<sup>141</sup> The leaders of many countries are following the trend to put an end to capital punishment.<sup>142</sup> Currently, 129 countries do not exercise capital punishment.<sup>143</sup> Additionally, Amnesty International abhors capital punishment: “[It] is the ultimate cruel, inhuman and degrading punishment. It violates the right to life. It is irrevocable and can be inflicted on the innocent. It has never been shown to deter crime more effectively than other punishments.”<sup>144</sup> In June 2006, President Gloria Macapagal Arroyo of the Philippines signed a law abolishing capital punishment in her country.<sup>145</sup> Similarly, eighty-eight countries including France, Germany, Italy, Canada, and Ireland have legally abolished the death penalty for any crime.<sup>146</sup> Because sex-based discrimination continues to occur in capital punishment, sentencing and executing a disproportionate amount of males over females, the United States should follow the lead of many other countries and abolish the death penalty.

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141. See Amnesty International, *The Death Penalty*, supra note 8.

142. See *id.*

143. *Id.*

144. *Id.*

145. *Legislation Is Enacted Ending Death Penalty*, L.A. TIMES, June 24, 2006, at A16.

146. Amnesty International, *Abolitionist and Retentionist Countries*, <http://web.amnesty.org/pages/deathpenalty-countries-eng> (last visited Mar. 29, 2007).