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BATTERED WOMAN'S SYNDROME AND PREMENSTRUAL SYNDROME: A COMPARISON OF THEIR POSSIBLE USE AS DEFENSES TO CRIMINAL LIABILITY

The imposition of criminal liability is premised upon the prosecution establishing that a defendant acted voluntarily,¹ and possessed the requisite criminal intent.² Thus, individuals whose criminal acts are not manifestations of free will because of mental incompetence, or whose actions are justified because of extraordi-

¹ See *Morissette v. United States*, 342 U.S. 246, 250 & n.4 (1952) (citing Pound, *Introduction*, in F. SAYRE, A SELECTION OF CASES ON CRIMINAL LAW (1927)); *Ex parte Trombley*, 31 Cal. 2d 801, 807-08, 193 P.2d 734, 739 (1948); *People v. Grant*, 71 Ill. 2d 551, 558-59, 377 N.E.2d 4, 8 (1978). Because of the requirement of voluntariness, courts have held that there can be no criminal responsibility for acts committed while unconscious, *see, e.g.*, *Corder v. Commonwealth*, 278 S.W.2d 77, 79 (Ky. 1955), or while involuntarily intoxicated, *see, e.g.*, *People v. Carlo*, 46 App. Div. 2d 764, 764, 361 N.Y.S.2d 168, 170 (1st Dep't 1974). The defense of "automatism" was developed at common law to address criminal conduct resulting from "involuntary act[s] performed in a state of unconsciousness not amounting to insanity." N. MORRIS & C. HOWARD, *STUDIES IN CRIMINAL LAW* 62 (1964). Acts resulting from a concussion, epilepsy, hypnotism, and sleepwalking have been included within the scope of the defense of automatism. Brady, *Strict Liability Offenses: A Justification*, 8 CRIM. L. BULL. 217, 218 n.7 (1972). Such conditions are expressly excluded from being voluntary under the Model Penal Code. *See* MODEL PENAL CODE § 2.01 (2), *reprinted in* 10 U.L.A. 464 (1968). Similarly, the defense of justification, defenses based on insanity, intoxication or delusions, and defenses of duress or self-defense all excuse criminal liability based on the absence of a voluntary act. *See* Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 220-26 (1982).

Even strict criminal liability statutes require that the sanctionable conduct be done voluntarily. *See* Brady, *supra*, at 217-18; *see also* MODEL PENAL CODE § 2.01 (1), *reprinted in* 10 U.L.A. 464 (1968) (minimal requirement for criminal liability is person's performance of voluntary act or omission of act of which he is physically capable).

² *See* *Dennis v. United States*, 341 U.S. 494, 500 (1951); *Rent v. United States*, 209 F.2d 893, 900 (5th Cir. 1954); *Tift v. State*, 133 Ga. App. 455, 456-57, 211 S.E.2d 409, 410 (1974); *Dowden v. State*, 638 S.W.2d 85, 87 (Tex. Crim. App. 1982). *Mens rea*, or criminal intent, is not a constitutional prerequisite to criminal liability. *See* *Powell v. Texas*, 392 U.S. 514, 535 (1968).

Thus, many states have imposed strict criminal liability for certain acts. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 63-67 (1933). Strict liability occurs when conduct is made punishable without requiring the defendant to have acted with any particular mental state. W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* § 31, at 218 (1972); Note, *Liability Without Fault: Logic and Potential of a Developing Concept*, 1970 WIS. L. REV. 1201, 1201-02.

nary circumstances, are shielded from criminal liability.³ The gradation of offenses incorporated into criminal codes ensures that criminal punishment is properly correlated to the relative intent of the accused, and the operative circumstances of the crime.⁴ The concepts of criminal liability, firmly rooted in English common law,⁵ were developed by male judges and legislators⁶ largely for

³ See, e.g., *United States v. Brawner*, 471 F.2d 969, 973 (D.C. Cir. 1972) (en banc) (no responsibility if actor lacks substantial capacity to appreciate wrongfulness of conduct); *Fare v. Ramon M.*, 22 Cal. 3d 419, 424, 584 P.2d 524, 527, 149 Cal. Rptr. 387, 390 (1978) (en banc) (defendant must be of sound mind to be criminally responsible); *People v. Rockmann*, 79 Ill. App. 3d 575, 582, 399 N.E.2d 162, 167 (1979) (insane person not responsible for criminal acts); see W. LAFAVE & A. SCOTT, *supra* note 2, §§ 47-57, at 356-413. Defendants may plead insanity as a total bar to prosecution, see *Bumgarner v. Lockhart*, 361 F. Supp. 829, 833 (E.D. Ark. 1973), or as a basis for mitigating sentencing or punishment, see *Saddler v. United States*, 531 F.2d 83, 86-87 (2d Cir. 1976).

Punishment is generally aimed at either retribution, deterrence, reform, or some combination thereof. See C. MERCIER, *CRIMINAL RESPONSIBILITY* 34 (1981). Since mentally incompetent individuals are unable to control the actions that inflicted harm upon their victims, punishment designed to provide retribution is inappropriate. See A. KENNY, *FREEWILL AND RESPONSIBILITY* 72 (1978). Nor would punishment aimed at deterrence be appropriate when imposed against a person incapable of controlling her behavior. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 13 (1967).

Among the traditional defenses that may excuse criminal liability because of extraordinary circumstances are duress, see, e.g., *Nall v. Commonwealth*, 208 Ky. 700, 702, 271 S.W. 1059, 1059 (1925), self-defense, see, e.g., *People v. Toledo*, 85 Cal. App. 2d 577, 580, 193 P.2d 953, 955 (1946), and defense of property, see, e.g., *State v. Couch*, 52 N.M. 127, 137-38, 193 P.2d 405, 411 (1948).

⁴ See, e.g., ALASKA STAT. §§ 11.41.100—11.41.130 (1983); N.J. STAT. ANN. §§ 2C:11-3 to -5 (West 1982); MODEL PENAL CODE §§ 210.1—210.4, reprinted in 10 U.L.A. 532-34 (1968); see Keedy, *History of the Pennsylvania Statute Creating Degrees of Murder*, 97 U. PA. L. REV. 759, 766-73 (1949). In the United States, the gradation of crimes was first instituted in response to a general movement for reform of the penal law and moderation of punishment. See, e.g., Pennsylvania Act of 1794, 1794 Pa. Laws, ch. 257, §§ 1-2; see Keedy, *supra*, at 764-73. The purpose of the reform was to mitigate the harshness of the death penalty and reserve it only for the most serious crimes. See Danforth, *The Model Penal Code and Degrees of Criminal Homicide*, 11 AM. U.L. REV. 147, 149 (1962). Under the Model Penal Code, for example, criminal homicide can be labelled murder, manslaughter, or negligent homicide, based upon the degree of culpability involved. MODEL PENAL CODE §§ 210.1—210.4, reprinted in 10 U.L.A. 532-34 (1968); Danforth, *supra*, at 147.

⁵ See *Patterson v. Winn*, 30 U.S. (5 Pet.) 233, 241 (1831); W. LAFAVE & A. SCOTT, *supra* note 2, § 9, at 58-59; 1 E. MCCLAIN, *TREATISE ON THE CRIMINAL LAW* 2 (1974). Generally, the English common law that existed at the time of the founding of the American colonies remains the law of each state unless expressly or impliedly repealed by statute. See, e.g., *Associated Students of Univ. of Ariz. v. Arizona Bd. of Regents*, 120 Ariz. 100, 103, 584 P.2d 564, 567 (1978), cert. denied, 440 U.S. 913 (1979); *People v. Rehman*, 253 Cal. App. 2d 119, 150, 61 Cal. Rptr. 65, 85 (1967), cert. denied, 390 U.S. 947 (1968).

⁶ See 2 W. ALEXANDER, *THE HISTORY OF WOMEN* 318-20 (1976); A. JONES, *WOMEN WHO KILL* 311 (1980). In 18th century England, women were "excused" from serving in all public offices because of their "weakness" and man's effort "to preserve the modesty of their sex." See 2 W. ALEXANDER, *supra*, at 320.

male defendants.⁷ Even today, only a small fraction of criminal defendants are women,⁸ and relatively few violent crimes are committed by women.⁹ Thus, female criminal defendants charged with violent crimes are an aberration to the criminal justice system,¹⁰ and must depend upon the same legal defenses that traditionally have been applied to men.¹¹

Battered woman's syndrome¹² and premenstrual syndrome

⁷ See A. JONES, *supra* note 6, at 4. In every country during all periods of history, men have committed far more crimes than women. *Id.*; see S. DATESMAN & F. SCARPITTI, *WOMEN, CRIME & JUSTICE* 4-8 (1980).

⁸ See UNITED STATES DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS 176, 186 (1983) [hereinafter cited as 1983 REPORTS]. According to the FBI's 1983 REPORTS, women accounted for approximately 13% of those arrested for murder and manslaughter, and 29.5% of those arrested for larceny and theft in 1983. *Id.* at 186. Of the 29 categories of crimes listed in the FBI report, women comprised the majority of those arrested in only two categories — runaways (58%), and prostitution and commercialized vice (70%). *Id.* Overall, 83.4% of those arrested for the indexed crimes in 1983 were male. *Id.*

⁹ See *id.* at 186. Although the percentage of females arrested has risen steadily from 11.4% in 1963, to 12.9% in 1968, to 15.3% in 1973, to 15.8% in 1978, and to 16.6% in 1983, see UNITED STATES DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS 109 (1963) [hereinafter cited as 1963 REPORTS]; UNITED STATES DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS 118 (1968) [hereinafter cited as 1968 REPORTS]; UNITED STATES DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS 131 (1973) [hereinafter cited as 1973 REPORTS]; UNITED STATES DEP'T OF JUSTICE, FBI UNIFORM CRIME REPORTS 197 (1978) [hereinafter cited as 1978 REPORTS]; 1983 REPORTS, *supra* note 8, at 186, the percentage of females arrested for violent crimes has remained at about 10% for the last 10 years. Compare 1983 REPORTS, *supra* note 8, at 186 (10.8%), with 1973 REPORTS, *supra*, at 131 (10.2%).

¹⁰ See A. JONES, *supra* note 6, at 311; *supra* notes 8 & 9 and accompanying text; see also Rasche, *The Female Offender as an Object of Criminological Research*, in A. BRODSKY, *THE FEMALE OFFENDER* 10-11 (1975) (far smaller numbers of women than men are arrested or incarcerated, and, thus, are often overlooked by system). The small percentage of female criminals frequently is omitted from statistical surveys because of the insignificant size of the figure. See Rasche, *supra*, at 11. This omission often results in women being denied access to rehabilitative or experimental programs. *Id.* Moreover, new programs often are designed exclusively for males and only extended to women when possible. *Id.*

¹¹ Cf. *supra* notes 6 & 7 and accompanying text (criminal justice system developed to deal with male defendants).

¹² Battered woman's syndrome is a psychological theory that identifies the common characteristics of women in abusive relationships and explains why women subjected to recurrent beatings are psychologically unable to terminate these relationships. Note, *The Admissibility of Expert Testimony on the Battered Woman Syndrome in Support of a Claim of Self-Defense*, 15 CONN. L. REV. 121, 121 n.1 (1982). The constant battering results in feelings of guilt, helplessness, and low self-esteem, making the victim passive and unable to help herself. See L. WALKER, *THE BATTERED WOMAN* 31 (1979); Hilberman & Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 464-65 (1977-1978). These psychological effects, compounded by external social and economic factors, cause the battered woman to remain with her abusive mate despite the obvious danger. See L. WALKER, *supra*, at 128. Commentators have suggested using evidence of the syndrome to prove the reasonableness of the battered woman's actions when she strikes back at her abuser. See, e.g., Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895, 927-28 (1981); Schneider, *Equal*

(PMS),¹³ two psycho-medical theories peculiar to women, occasionally have been asserted as defenses to criminal liability, but have met with varying degrees of success.¹⁴ While battered woman's syndrome has been asserted successfully on occasion,¹⁵ the use of PMS as a defense, although yet untried in the American courts,¹⁶ has drawn substantial criticism.¹⁷

This Note will examine the use of battered woman's syndrome

Rights to Trial for Women: Sex Bias in the Law of Self-Defense, 15 HARV. C.R.-C.L. L. REV. 623, 634-35 (1980). But see Comment, *Jury Instructions Given on Subjective Standard of Reasonableness in Self-Defense Do Not Require a Specific Instruction on Battered Woman Syndrome*, 60 N.D.L. REV. 141, 151 (1984) (subjective self-defense standard sufficient to account for battered women).

¹³ Premenstrual syndrome (PMS), sometimes referred to as "premenstrual tension" or "premenstrual tension syndrome," Perr, *Medical, Psychiatric & Legal Aspects of Premenstrual Tension*, 115 AM. J. PSYCHIATRY 211, 211 (1958), is a condition marked by a wide variety of physical and psychological ailments that recur regularly at the same phase of the menstrual cycle. Wallach & Rubin, *The Premenstrual Syndrome & Criminal Responsibility*, 19 UCLA L. REV. 209, 212-13 (1971). The symptoms include tension, anxiety depression, and various physical maladies such as headaches and breast tenderness. Sanders, Warner, Backstrom & Bancroft, *Mood Sexuality, Hormones and the Menstrual Cycle*, 45 PSYCHOSOMATIC MED. 487, 487 (1983); Wallach & Rubin, *supra*, at 212-13. PMS symptoms usually disappear with the onset of menstrual flow and do not begin again until the second half of the menstrual cycle. See Muse, Cetel, Futterman, & Yen, *The Premenstrual Syndrome*, 311 NEW ENG. J. MED. 1345, 1345 (1984); Reid & Yen, *Premenstrual Syndrome*, 139 AM. J. OBSTETRICS & GYNECOLOGY 85, 86 (1981). It has been argued that the severe effects of the syndrome should negate or mitigate the criminal responsibility of those who suffer from it. See Wallach & Rubin, *supra*, at 233.

¹⁴ See, e.g., *State v. Thomas*, 66 Ohio St. 2d 518, 521-522, 423 N.E.2d 137, 140 (1981) (expert testimony of battered woman's syndrome held inadmissible on issue of self-defense in murder trial); *Buhrle v. State*, 627 P.2d 1374, 1378 (Wyo. 1981) (exclusion of evidence of battered woman's syndrome was proper in murder trial); Bird, *Defense Linked to Menstruation Dropped in Case*, N.Y. Times, Nov. 4, 1982, at B4, col. 4 (criminal defendant pleads guilty to a lesser charge after asserting PMS as a defense).

¹⁵ See, e.g., *State v. Kelly*, 97 N.J. 178, 202, 212, 478 A.2d 364, 376, 381 (1984) (exclusion of battered woman's syndrome testimony required reversal and remand for new trial); *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984) (en banc) (expert's testimony on battered woman's syndrome held admissible). Nine of the 14 jurisdictions that have been presented with evidence on the battered woman's syndrome in criminal cases have allowed the testimony. See *infra* note 68.

¹⁶ See Note, *Premenstrual Syndrome*, 6 HARV. WOMEN'S L.J. 219, 223 (1983). Defenses based on PMS have been asserted successfully in Britain, see *id.* at 219, and Canada, see *infra* notes 57-59 and accompanying text.

¹⁷ See, e.g., Bird, *supra* note 14, at B4, col. 4; Brozan, *Premenstrual Syndrome: A Complex Issue*, N.Y. Times, July 12, 1982, at C16, col. 2. Brooklyn District Attorney Elizabeth Holtzman, commenting on a case in which the PMS issue was raised, argued that while certain symptoms may accompany the menstrual cycle, they were not enough to support a legal defense. See Bird, *supra* note 14, at B4, col. 4. Other critics have voiced fears that any use of PMS as a defense could deter women's advancement in society. See Brozan, *supra*, at C16, col. 5; *infra* notes 164-166 and accompanying text.

and PMS as bases for defenses to criminal behavior. Previous applications or attempted applications of battered woman's syndrome and PMS as defenses will be considered and the reluctance of the judiciary to accept these theories will be investigated. The legal effect, scientific acceptance, and social and policy considerations behind the theories — all factors relevant to their admissibility as evidence — will be discussed. The Note will suggest permitting the use of both theories to the extent required by traditional justice and substantial fairness.

I. A DESCRIPTION OF THE THEORIES OF BATTERED WOMAN'S SYNDROME AND PREMENSTRUAL SYNDROME

Because sociologists find it difficult to determine the number of women that are physically abused by their husbands or male companions, varying estimates have been set forth.¹⁸ Although abusive spouses have been subject to criminal liability for many years,¹⁹ only recently have sociologists and attorneys begun to study the scope and ramifications of the abuse itself.²⁰ "Battered

¹⁸ See, e.g., R. GELLES, *THE VIOLENT HOME* 47 (1972); D. MARTIN, *BATTERED WIVES* 10-13 (1976). Either isolated or repeated instances of physical violence between spouses were found in more than one-half of the eighty families studied by Gelles. See R. GELLES, *supra*, at 48. Moreover, in 26% of the violent homes studied, incidents of recurrent assaults were noted. See *id.* Commentators have predicted that one-third to one-half of all women living with male companions will experience some form of abuse, whether in the form of threats or physical beatings. See Russell, *Introduction* in, L. WALKER, *supra* note 12, at ix; Schneider, *supra* note 12, at 624-25.

¹⁹ See D. MARTIN, *supra* note 18, at 31. Blackstone wrote that since a husband must answer for his wife at law, it was reasonable to entrust him with the power of restraining her by domestic chastisement. See 1 W. BLACKSTONE, *COMMENTARIES* 432 (R. Welsh & Co. ed. 1897). During the reign of Charles the Second, wives were given the right of "security of the peace" against their husbands, but husbands were still permitted to restrain their wives liberty in instances of "gross misbehavior." *Id.* at 433. American courts initially adopted the common law rule allowing husbands to impose physical discipline on their wives. See, e.g., *Bradley v. State*, 2 Miss. (1 Walker) 73, 73 (1824) (husband may give wife "moderate correction" because he is answerable for her misbehavior), *overruled*, *Harris v. State*, 71 Miss. 462, 14 So. 266 (1894). By the late 19th century, however, most United States jurisdictions had made wife-beating illegal. See D. MARTIN, *supra* note 18, at 31. Although stressing that husbands did not have an absolute right to beat their wives, later decisions required a showing of malice or permanent injury before imposing sanctions on the husband. See, e.g., *State v. Oliver*, 70 N.C. 60, 61-62 (1874) (usually it is better "to draw the curtain, shut out the public gaze, and leave the parties to forget and forgive").

²⁰ See, e.g., M. ROY, *THE ABUSIVE PARTNER* (1982) (considered various factors precipitating violence in 4,000 cases of spousal abuse in New York City area); S. STEINMETZ, *THE CYCLE OF VIOLENCE* (1977) (57 families studied to determine reaction to and solution of conflicts); Gayford, *Wife Battering: A Preliminary Survey of 100 Cases, 1975* 1 BR. MED. J. 194 (100 women who received severe and repeated injuries from their husbands were studied to

woman's syndrome" is the name given to the characteristics that abused women display and to the effects that regular beatings have on them.²¹ The typical battering relationship consists of a three-stage cycle: first, a tension-building stage; second, a violent stage; and third, a contrite, loving stage.²² The cyclical nature of the relationship allows the battered woman to anticipate oncoming violence,²³ and entices her to remain with her abuser after the violent stage is over.²⁴

determine similarity of background and effects of violence); Rounsaville, *Theories in Marital Violence: Evidence from a Study of Battered Women*, 3 VICTIMOLOGY 11 (1978) (considered various theories of marital violence as applied to 31 victims of battering); Yllo, *Sexual Equality and Violence Against Wives in American States*, 14 J. COMP. FAM. STUD. 67 (1983) (studied relation between legal sexual equality and incidence of wife-beating in United States). The focus of this research has only recently begun to shift from "family" violence to the battered woman. See, e.g., D. MARTIN, *supra* note 18, at 1-8, 72-85.

²¹ See *supra* note 12.

²² L. WALKER, *supra* note 12, at 55; Eber, *supra* note 12, at 927; Note, *supra* note 12, at 130. During the tension-building stage of the battering relationship, minor abuse often occurs and the woman may try to make peace with her husband; she may even blame herself for her husband's conduct. Eber, *supra* note 12, at 927. Acute battering occurs in the violent stage during which the woman feels powerless to stop her husband's actions. *Id.* When the violent stage is over, the husband generally is contrite and loving, thus causing the woman to feel a sense of relief and to forgive her assailant. *Id.*

²³ See L. WALKER, *supra* note 12, at 57; Note, *supra* note 12, at 130 n.47. During the tension-building stage of the battering relationship, the abusive husband maintains some control over his violent tendencies and the woman may try to placate or avoid her husband. L. WALKER, *supra* note 12, at 56-57. Women who have been beaten regularly in the past learn to estimate when the violence eventually will escalate, and will try to postpone the escalation through exceptionally passive behavior. *Id.* at 57. The tension-building stage may continue for a long period of time, and only be escalated into severe battering because of external circumstances, such as the husband experiencing a work-related problem. *Id.* at 58.

Most women treat the initial battering incident as an isolated occurrence and do not expect further abuse. J. GILES-SIMS, *WIFE BATTERING: A SYSTEMS THEORY APPROACH* 59 (1983). After a second or more significant battering incident, however, most women realize that the violence is part of a pattern which will continue. *Id.*

²⁴ See L. WALKER, *supra* note 12, at 65-70. The psychological impact of the abuse results in the battered woman feeling incapable of leaving her husband and functioning on her own. Hilberman, *Overview: The "Wife Beater's Wife" Reconsidered*, 137 AM. J. PSYCHIATRY 1336, 1341-42 (1980); Note, *supra* note 12, at 131. Additionally, once the husband returns to the loving, contrite stage of the cycle, the battered woman tries to convince herself that the violence will end and be replaced by a normal relationship. L. WALKER, *supra* note 12, at 67. Therefore, even though they have the strength and courage to leave their husbands, many women are enticed to stay because of their spouse's behavior during the loving, contrite phase. See *id.* at 68. Finally, flight is not always an adequate solution because the abusive husband may follow his wife, and continue to threaten and abuse her. Eber, *supra* note 12, at 929.

Many wives will rationalize their husband's behavior by trying to convince themselves that they deserved to be struck or that it was for their own good. See R. GELLES, *supra* note 18, at 59. One battered woman studied by Gelles considered her nagging to be the cause of

Battered women typically live in a constant state of fear, and have a very diminished sense of self-worth.²⁵ Frequent and recurrent beatings create a state of "learned helplessness," characterized by extreme passivity and submissiveness.²⁶ Generally, the battered woman is reluctant to report the battering, because she and her children are economically dependent upon her abusive husband,²⁷ and because she fears that the police and the courts will fail to provide her with adequate protection.²⁸ As a result, a feeling of isolation develops, which further reinforces the sense of helplessness.²⁹ Eventually, frustration and lack of recourse may leave the battered women with only two alternatives—to submit to further

her husband's attacks. *Id.* at 158. Studies have shown, however, that a variety of factors unrelated to the wife's behavior may lead to marital violence. *See, e.g., id.* at 30, 145-47 (high degree of violence during wife's pregnancy); Corenblum, *Reactions to Alcohol-Related Marital Violence*, 44 J. STUD. ON ALCOHOL 665, 672 (1983) (linking alcohol use to violence); Gayford, *supra* note 20, at 196 (finding correlation between family violence during childhood and later marital violence). Thus, the battered woman's syndrome demonstrates that the abused spouse neither deserves nor enjoys the violence. *See* L. WALKER, *supra* note 12, at 20, 29.

²⁵ *See* Eisenberg & Seymour, *The Self-Defense Plea and Battered Women*, 14 TRIAL 34, 36-41 (July 1978); Comment, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crimes Code*, 26 VILL. L. REV. 105, 110-12 (1980-1981).

²⁶ Note, *supra* note 12, at 121 n.1. After living with her abuser for some time, the battered woman realizes that the abuse may occur at any time, and feels powerless to prevent the violence. *See* Eisenberg & Seymour, *supra* note 25, at 36, 41. Thus, the battered woman loses all motivation to avoid the beatings, and perceives herself as incapable of performing even the simplest of tasks. Note, *supra* note 12, at 121 n.1; *see* Hilberman, *supra* note 24, at 1341-42.

²⁷ *See* L. WALKER, *supra* note 12, at 129-30; Steinmetz, *Wife Beating: A Critique and Reformulation of Existing Theory*, 6 BULL. AM. ACAD. PSYCHIATRY & L. 322, 328-29 (1978). Women who have been receiving government subsidies may be willing to leave a battering relationship because they know they will continue to receive support from the state. L. WALKER, *supra* note 12, at 127-28. The middle class or wealthy woman, however, may feel trapped in the relationship due to a fear of becoming poor. *Id.* at 128-29.

²⁸ *See, e.g.,* Woods, *Litigation on Behalf of Battered Women*, 5 WOMEN'S RTS. L. REP. 7, 9-11 (1978); Hilberman, *supra* note 24, at 1338. The criminal justice system has been accused of ignoring the plight of the battered woman by failing to protect her. *See* Eber, *supra* note 12, at 929; Hilberman *supra* note 24, at 1338. Typically, the battered wife will have called the police on several occasions, but these calls rarely result in an arrest. Eber, *supra* note 12, at 929. Even if the battered wife can convince the police to arrest her husband, she may often be pressured to drop the charges. *Id.* If the case goes to trial, the husband will usually receive a light sentence, and a temporary restraining order directing him not to see the wife will be issued. *Id.* Such orders generally fail to provide the battered wife with adequate protection. *Id.*

²⁹ *See* Comment, *supra* note 25, at 111. The combination of fear, isolation, helplessness, and guilt leaves the battered woman in a state of total emotional dependency on her husband. *See id.* at 111-12.

beating and pain with the possibility of resultant death,³⁰ or to strike back and thus risk criminal liability themselves.³¹

PMS is a disorder affecting some women during the period immediately prior to menstruation.³² The disorder is characterized by a striking variety of behavioral and emotional symptoms, including headaches, nausea, lethargy, depression, mood swings, and clumsiness.³³ The symptoms of PMS are so varied, some scientists have

³⁰ L. WALKER, *supra* note 12, at 75; Eber, *supra* note 12, at 928. One study indicates that 41% of all female murder victims are killed by their husbands. Schneider, *supra* note 12, at 626.

³¹ See Note, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPPERDINE L. REV. 213, 219 (1978). Data indicates that the victims of female murderers are generally men with whom they have had relationships, and that these killings are often either in self-defense or precipitated by the victim. Schneider, *supra* note 12, at 624 n.3; see D. MARTIN, *supra* note 18, at 14.

³² See Perr, *supra* note 13, at 211. Researchers disagree over the length of time that should be identified as the premenstrual phase. See, e.g., A. BECK, CHRONOLOGICAL FLUCTUATIONS OF SIX PREMENSTRUAL TENSION VARIABLES AND THEIR RELATION TO TRADITIONAL-MODERN SEX ROLE STEREOTYPES 17 (1970) (three to four days); J. DELANEY, M. LUPTON & E. TOTH, THE CURSE: A CULTURAL HISTORY OF MENSTRUATION 73 (1976) (two or three days); Perr, *supra* note 13, at 211 (one to two weeks). Two researchers have asserted that PMS is a "cyclical syndrome" with regular symptoms that can occur at any time. See Sutherland & Stewart, *A Critical Analysis of the Premenstrual Syndrome*, 1965 LANCET 1180, 1183.

In studying and defining PMS, a distinction must be made between the symptoms that occur shortly before menstruation and the physical and emotional disturbances that occur throughout the entire menstrual cycle. See A. BECK, *supra*, at 22-23. If a woman suffers from the same symptoms throughout her monthly cycle, it is unlikely that they are linked to the particular physiological changes occurring during the premenstruum, *see id.* at 22, and her problems, therefore, may be linked to some other disorder, *see id.*

³³ Perr, *supra* note 13, at 212; *The Premenstrual Enigma*, 9 HARV. MED. SCH. LETTER 1, 1 (August 1984) [hereinafter cited as *Premenstrual Enigma*]. PMS sufferers also complain of fatigue, bloating, breast swelling and tenderness, junk-food binges, constipation, insomnia, joint pain, and thirst. Perr, *supra* note 13, at 211-12; *Premenstrual Enigma*, *supra*, at 1. Approximately 60%-70% of sufferers experience irritability—the most frequently mentioned PMS symptom. A. BECK, *supra* note 32, at 18. About 50%-60% of those afflicted suffer from depression, and 40%-50% experience tension, headaches, and pelvic discomfort. *Id.* Virtually all the symptoms temporarily disrupt the woman's interpersonal relationships and job effectiveness. Reid & Yen, *supra* note 13, at 96-97.

The myriad of seemingly unrelated symptoms displayed by PMS sufferers have led some researchers to look for an underlying psychogenic disorder. Reid & Yen, *supra* note 13, at 89. These researchers allege that the physical and psychological symptoms associated with PMS are a result of a disturbed attitude toward sex and sexuality. See, e.g., 1 H. DEUTSCH, THE PSYCHOLOGY OF WOMEN 173-74 (1944-1945) (premenstrual depression reflects pre-pubescent fear that something terrible is about to occur); Daly, *The Role of Menstruation in Human Phylogenesis and Ontogenesis*, 24 INT'L J. PSYCHO-ANALYSIS 151, 167-68 (1943) (premenstrual anxiety is linked to woman's frustrated sexual desires toward her father); Silbermann, *A Contribution to the Psychology of Menstruation*, 31 INT'L J. PSYCHO-ANALYSIS 258, 261 (1950) (hormonal upheaval in menstrual cycle depends on woman's sexual development). Additionally, researchers have reported that a wide variety of emotional and behavioral disturbances accompany the premenstrual period. See, e.g., Dennerstein & Bur-

estimated that between 70% and 90% of all women experience some symptoms of the syndrome.³⁴ Despite the diversity of PMS symptoms and the large number of women who suffer from them, scientists have distinguished ordinary premenstrual discomfort, experienced by most menstruating women, from PMS.³⁵ Although PMS and premenstrual discomfort are characterized by many of the same symptoms, only PMS sufferers experience the physical, psychological, and behavioral symptoms to such a severe degree that their ability to function normally is disrupted.³⁶ While researchers have linked PMS to hormonal changes occurring throughout the menstrual cycle,³⁷ great uncertainty remains re-

rows, *Affect and the Menstrual Cycle*, 1979-1980 J. OF AFFECTIVE DISORDERS 77, 84; Moos, *Typology of Menstrual Cycle Symptoms*, 103 AM. J. OBSTETRICS & GYNECOLOGY 390, 393 (1969); Sanders, Warner, Backstrom & Bancroft, *supra* note 13, at 498. The syndrome has been identified as a possible contributing factor in almost every kind of aberrant social behavior and psychological phenomena. Notman, *The Psychiatrist's Approach*, in PREMENSTRUAL TENSION: A MULTIDISCIPLINARY APPROACH 58 (C. Debrovner ed. 1982); Dalton, *Menstruation and Accidents, 1960* (2) BRIT. MED. J. 1425, 1426 (women accident prone during premenstrual period); Dalton, *Menstruation and Acute Psychiatric Illnesses, 1959* (1) BRIT. MED. J. 148, 149 (menstruation relates to onset of acute psychiatric episodes).

Despite the apparent plethora of symptoms and scientific observations, most researchers define PMS to include both physical and psychological symptoms. See, e.g., Stewart, *Psychotic Aspects of Premenstrual Tension*, 6 CLEV.-MAR. L. REV. 410, 410 (1957) (physical and emotional disturbances are connected with menstrual cycle); *Premenstrual Enigma*, *supra*, at 1 (some symptoms are physical, others emotional); Note, *Premenstrual Stress Syndrome as a Defense in Criminal Matters*, 1983 DUKE L.J. 176, 176 (physical and psychological symptoms of PMS can range in severity).

³⁴ See Perr, *supra* note 13, at 211; see also *Premenstrual Enigma*, *supra* note 33, at 1 (Harvard Medical School experts estimate that PMS affects 40% of women to some degree); Note, *supra* note 16, at 220-21 (25% to 100% of women of childbearing age suffer PMS symptoms).

³⁵ Wallach & Rubin, *supra* note 13, at 212-13.

³⁶ *Id.* at 213 n.12. Recent surveys indicate that between five and six million women experience premenstrual symptoms to a degree severe enough to disrupt their everyday routines. See *Premenstrual Enigma*, *supra* note 33, at 1. Based on questionnaire data, 20%-40% of women report some degree of temporary mental or physical incapacitation during the premenstrual stage. Reid & Yen, *supra* note 13, at 86.

³⁷ See Muse, Cetel, Futterman & Yen, *supra* note 13, at 1348; *Premenstrual Enigma*, *supra* note 33, at 2. The menstrual cycle is regulated by several different hormones, released in varying amounts throughout the cycle. See A. Beck, *supra* note 32, at 2; *Premenstrual Enigma*, *supra* note 33, at 2. The most widely accepted hypothesis for the cause of PMS appears to be an improper balance of these hormones during the premenstrual phase. See A. Beck, *supra* note 32, at 3-9; *Premenstrual Enigma*, *supra* note 33, at 2. A recent study has demonstrated that PMS symptoms are greatly diminished by eliminating the cyclical variations in hormonal levels. See Muse, Cetel, Futterman & Yen, *supra* note 13, at 1348.

Some researchers have theorized that PMS is caused by premenstrual water retention, see A. Beck, *supra* note 32, at 11-12, sodium retention, see Wallach & Rubin, *supra* note 13, at 221, vitamin deficiency, see Reid & Yen, *supra* note 13, at 87-88, or psychogenic disor-

garding the cause of the syndrome and why the symptoms vary so greatly.³⁸ Thus, there has been little success in treating and preventing PMS.³⁹

Among the behavioral disorders related to PMS is an increased propensity to commit crimes during the premenstrual phase.⁴⁰ PMS may not actually cause increased criminal behavior, however, the adverse physical effects of PMS, such as slower reac-

ders, *see supra* note 33.

³⁸ See Reid & Yen, *supra* note 13, at 97; Rubinow & Roy-Byrne, *Premenstrual Syndromes: Overview from a Methodological Perspective*, 141 *MED. J. PSYCHIATRY* 163, 163 (1984); *Premenstrual Enigma*, *supra* note 33, at 1. It is very difficult to determine the causes of PMS and to decide on a course of treatment because of the disparate collection of symptoms that affect sufferers. *Premenstrual Enigma*, *supra* note 33, at 1. Proper research requires many subjects to compensate for the individual traits of specific sufferers, and each woman studied must be examined from cycle to cycle. *Id.*

³⁹ See Muse, Cetel, Futterman & Yen, *supra* note 13, at 1345; *Premenstrual Enigma*, *supra* note 33, at 2, 5. The most popular medical treatments of PMS are based on the premise that PMS is caused by hormonal fluctuations. Muse, Cetel, Futterman & Yen, *supra* note 13, at 1345; *Premenstrual Enigma*, *supra* note 33, at 2. The hormonal-suppression treatment designed by Muse, Cetel, Futterman, and Yen, perhaps the most successful to date, is not, however, recommended for long-term use. See Muse, Cetel, Futterman, & Yen, *supra* note 13, at 1348. Suppression of prolactin, a hormone affecting the fluid balance of the body, also has proven to be partially effective. See Benedek-Jaszmann & Hearn-Sturtevant, *Premenstrual Tension and Functional Infertility*, 1 *LANCET* 1095, 1097 (1976). Drugs which have been successful in alleviating dysmenorrhea, or painful menstruation, have not been equally effective against PMS. *Premenstrual Enigma*, *supra* note 33, at 2. Popular "home remedies" include exercise, stress management techniques, and various diets. *Id.* In addition, psychotherapy may be helpful for some women. *Id.*

⁴⁰ See Dalton, *Menstruation & Crime*, 2 *BRR. MED. J.* 1752, 1752 (1961) [hereinafter cited as *Menstruation and Crime*]. Dr. Katharina Dalton, one of the leading researchers in the field of PMS, has been studying the disorder since 1953. Note, *supra* note 16, at 220 n.6. In connection with a study on menstruation and crime, Dalton, over a period of six months, interviewed 386 newly convicted female inmates at a British prison. *Menstruation and Crime*, *supra*, at 1752. Dr. Dalton found that 49% of the crimes committed by regularly menstruating women were committed in the four-day period prior to menstruation or during the four days following the onset of menstruation. *Id.* The probability of such a distribution occurring by chance was less than one in a thousand. *Id.*

Dr. Dalton found that PMS affected 27% of the prisoners who committed crimes during the eight-day period before and during menstruation. *Id.* at 1752-53. In addition, 63% of the PMS sufferers committed their crimes while suffering from various symptoms. *Id.* at 1753. Dalton concluded that these results showed a "highly significant relationship" between menstruation and crime. *Id.* In further studies, Dalton found a correlation between criminal activity and menstruation even among women who suffered none of the physical symptoms of PMS. See Dalton, *Cyclical Criminal Acts in Premenstrual Syndrome*, 2 *LANCET* 1070, 1071 (1980). One woman studied was reported to have thrown a knife at one man, escaped from confinement, made a false emergency call and assaulted three police officers, all on the day before she began menstruating. *Id.* A similar study of inmates in a New York State prison conducted in 1953 found that 62% of all violent crimes were committed in the premenstrual week. Stewart, *supra* note 33, at 414.

tions and increased clumsiness, may increase the likelihood that female criminals may be caught.⁴¹ Alternatively, the mental and emotional disturbances associated with PMS, which may interfere with a woman's ability to behave rationally, may result in the increased propensity toward criminal behavior.⁴² Regardless of whether the mental disorders related to PMS are pre-existing conditions aggravated by hormonal changes occurring prior to menstruation,⁴³ or are directly linked to the physiological aspects of PMS,⁴⁴ many sufferers are so affected by PMS that they commit criminal acts that they otherwise would not commit during other points in their menstrual cycle.⁴⁵

II. PAST AND RECENT LEGAL APPLICATIONS OF BOTH THEORIES

Battered woman's syndrome and PMS are very different psycho-medical theories, however, each involves important legal ramifications—the treatment of battered women by the criminal justice system⁴⁶ and, the mental competence of PMS sufferers in relation to criminal culpability.⁴⁷ Even before research identified

⁴¹ See *Menstruation & Crime*, *supra* note 40, at 1753.

⁴² See *id.* The irritability, lethargy, and depression accompanying PMS may be directly responsible for certain criminal acts. *Id.* Irritability and loss of temper may result in violent behavior and assault; lethargy may result in child neglect; and depression may cause suicide. See *id.*

⁴³ See Perr, *supra* note 13, at 216. PMS is based on physiological stress which may upset the equilibrium and result in various unpleasant bodily feelings. *Id.* at 216. Any pre-existing psychological conditions, especially those of a "neurotic" variety, would be aggravated at this time. *Id.* Under this theory, sources of stress other than PMS, such as domestic difficulties and illness, should cause the same symptoms and behavioral responses that are exhibited during periods of PMS suffering. *Id.* Therefore, the type of emotional reactions and behavior resulting from PMS will be determined by the woman's personality rather than being triggered by endocrine changes. *Id.*

⁴⁴ See Reid & Yen, *supra* note 13, at 89. Although personality factors and environmental settings probably are important to the development of PMS symptoms, *id.*, the physiological changes resulting from hormonal fluctuations generally precede and may determine the resultant psychic reactions, *id.*; see Israel, *Premenstrual Tension*, 110 J. AM. MED. A. 1721, 1721-23 (1983).

⁴⁵ See *Menstruation & Crime*, *supra* note 40, at 1753. The hormonal changes occurring during menstruation seem to make women less amenable to discipline during the premenstrual stage. See Dalton, *Schoolgirls' Behavior and Menstruation*, 2 BRIT. MED. J. 1647, 1648-49 (1960). Consequently, the PMS sufferer may display an inability to conform to lawful standards of conduct, and, thus, engage in criminal behavior. See *Menstruation and Crime*, *supra* note 40, at 1753.

⁴⁶ See Note, *supra* note 31, at 214-19. The very fact that women develop battered woman's syndrome suggests that police training and procedure, and prosecution policies related to domestic violence, are inadequate. *Id.* at 215-16.

⁴⁷ See Stewart, *supra* note 33, at 415. In addition to bearing on criminal responsibility,

the battered woman's syndrome and PMS, mental disorders associated with the menstrual cycle and the psychological scars left by spousal abuse occasionally were used to excuse a woman's criminal behavior or to mitigate her punishment.⁴⁸ During the 19th century, menstrual irregularities often were considered a source of mental illness and a basis for applying the insanity defense.⁴⁹ Increased research about both syndromes, and the advent of the women's movement,⁵⁰ have resulted in the suggestion that battered woman's syndrome and PMS may provide novel bases for defenses to criminal liability.⁵¹

the effects of PMS, such as impaired motor coordination and emotional disturbances, may limit the civil tort liability of sufferers. See Stewart, *Premenstrual Tension in Automobile Accidents*, 6 CLEV.-MAR. L. REV. 17, 18 (1957).

⁴⁸ See *Reid v. Florida Real Estate Comm'n*, 188 So. 2d 846 (Fla. Dist. Ct. App. 1966), *overruled*, *Van Eaton v. State*, 205 So. 2d 298 (Fla. 1967); *People v. Giacalone*, 242 Mich. 16, 217 N.W. 758 (1928); *Kress v. State*, 176 Tenn. 478, 144 S.W.2d 735 (1940). In *Reid*, the Florida Real Estate Commission had suspended defendant's real estate license because she was charged with shoplifting. 188 So. 2d at 848. Finding that the defendant was suffering from emotional problems related to menopause, the court reversed the commission's decision. *Id.* at 855-56. Although *Reid* and its underlying acceptance of the irresistible impulse test of insanity was later overruled, it is submitted that the court's determination that menopause is a legally recognizable mental defect is still valid.

⁴⁹ See A. JONES, *supra* note 6, at 158-66. Physicians in the late 1800's agreed that menstruation could trigger various nervous ailments, kleptomania, pyromania, homicide, and suicide. *Id.* at 161; see C. LOMBROSO, *THE FEMALE OFFENDER* 295 (1895). The mental frailty associated with women by society made insanity the ideal plea for female criminal defendants. A. JONES, *supra* note 6, at 158. Indeed, insanity induced by menstruation became a popular defense, especially for upper-class women, in the 1860's. See *id.* at 204.

⁵⁰ See, e.g., A. HEMPHILL & C. HEMPHILL, JR., *WOMANLAW* 44-51 (1981) (discussion of prevalent social problem of wife-beating); R. LANGLEY & R. LEVY, *WIFE BEATING: THE SILENT CRISIS* 6-10 (1977) (same); E. PIZZEY, *SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR* 5 (1977) (same); Note, *supra* note 16, at 226 (same). While the first description of PMS as a cyclical disorder occurring prior to menstruation was made in 1931, see Frank, 26 ARCH. NEURO. PSYCHIATRY 1053, 1054 (1931), only recently has the work of modern researchers like Dr. Dalton brought the syndrome to the attention of the public, see Gray, *Raging Female Hormones in the Courts*, 94 MACLEANS 46, 46 (June 15, 1981). Similarly, only within the last decade has a significant amount of research on battered women been conducted. See D. MARTIN, *supra* note 18, at 8; E. PIZZEY, *supra*, at 7; L. WALKER, *supra* note 12, at ix.

Feminist legal theory has focused on these two issues in an attempt to achieve equal judicial treatment for women. See A. HEMPHILL & C. HEMPHILL, JR., *supra*, at 44-51; Note, *supra* note 16, at 226.

⁵¹ See Oleck, *Legal Aspects of Premenstrual Tension*, 166 INT'L REC. MED. 475 (1953); Stewart, *supra* note 33, at 415; Note, *supra* note 31, at 229. Evidence of the repeated verbal and physical abuse leading to the development of battered woman's syndrome can be admitted in connection with an assertion of self-defense. See Note, *supra* note 12, at 122 n.2. Other possible legal strategies that battered women could use include proving provocation or extreme emotional disturbance as mitigating circumstances, or pleading temporary insanity. *Id.* Similarly, a severe case of PMS could be analogized to temporary insanity or incompetency. Stewart, *supra* note 33, at 415.

Commentators have predicted the use of PMS in conjunction with insanity and diminished capacity defenses,⁵² but PMS has yet to be asserted successfully in a single case in the United States.⁵³ In a recent New York State decision, a woman accused of assaulting her four-year-old daughter asserted a defense of diminished capacity based on PMS.⁵⁴ Ruling on a motion to dismiss in the Criminal Court, Judge Becker concluded that a defense based on PMS was admissible.⁵⁵ However, since the defendant chose to plead guilty to harassment, a lesser charge, the PMS issue was never litigated.⁵⁶

Notwithstanding the reluctance of courts in the United States to accept PMS as a defense to criminal charges, a PMS defense has been asserted successfully in British and Canadian courts.⁵⁷ Shoplifting charges against an Ottawa woman were dropped when medical evidence established that she had suffered from PMS since her teens.⁵⁸ Subsequent Canadian decisions have considered PMS as a basis for mitigating sentences.⁵⁹ In Great Britain, courts have mitigated the sentences of PMS sufferers charged with violent crimes.⁶⁰ In *R. v. Smith*,⁶¹ defendant Sandie Smith, a recidivist with thirty prior convictions, was charged with threatening to

⁵² See Gray, *supra* note 50, at 49; Stewart, *supra* note 33, at 427.

⁵³ See Note, *supra* note 16, at 223.

⁵⁴ Chambers, *Menstrual Stress as a Legal Defense*, N.Y. Times, May 29, 1982, at 46, col. 5. A defendant in a New York case, Shirley Santos, was charged with beating her daughter for refusing to be quiet. *Id.* Santos, described as "distraught and remorseful," stated that at the time of the beating she had just begun to menstruate, and felt tired and depressed. *Id.*; see Brozan, *supra* note 17, at C16, col. 2.

⁵⁵ See Tell, *PMS' United States Court Debut: Hint of Future Success*, 4 NAT'L L.J., May 10, 1982, at 5, col. 2; Press Release by Stephanie Benson, attorney for defendant Shirley Santos (Nov. 1982). In a bench order, Judge Becker noted that temporary mental problems often lead to mitigation of criminal charges. Press Release by Stephanie Benson, *supra*.

⁵⁶ Bird, *supra* note 14, at B4, col. 4. After pleading guilty to harassment, Santos was given a conditional discharge with the stipulation that she would undergo counseling. *Id.*

⁵⁷ See Gray, *supra* note 50, at 46.

⁵⁸ *Id.* Canadian courts have dismissed criminal charges for minor offenses based on evidence that the defendant suffered from hormonal changes resulting from menopause or postnatal psychosis. *Id.*

⁵⁹ See *id.* Two cases heard in Toronto resulted in probation and conditional discharge based upon PMS evidence. *Id.*

⁶⁰ See Tybor, *Women on Trial: New Defense*, 4 NAT'L L.J., Feb. 15, 1982, at 1, col. 5; *British Legal Debate: Premenstrual Tension and Criminal Behavior*, N.Y. Times, Dec. 29, 1981, at C3, col. 5 [hereinafter cited as *British Legal Debate*].

⁶¹ *R. v. Smith*, No. 1/A/82 (Crim. App. April 27, 1982) (available June 10, 1985, on LEXIS, Enggen library, Cases file).

kill a police officer.⁶² Because she was suffering from PMS at the time of the criminal acts Smith was sentenced to only three years probation.⁶³ Another British defendant used evidence of her PMS affliction to defend successfully against a murder charge.⁶⁴ The defendant, after quarreling with her lover, ran him over with a car.⁶⁵ Allegedly suffering from "an extremely aggravated form of premenstrual condition,"⁶⁶ the defendant pleaded guilty to the reduced charge of manslaughter by reason of diminished responsibility, and was conditionally discharged.⁶⁷

Unlike PMS defenses, criminal defenses based upon battered woman's syndrome have been asserted successfully in many American jurisdictions.⁶⁸ The crucial issue in these cases is whether battered woman's syndrome is a proper subject for expert testimony.⁶⁹

⁶² *Id.*

⁶³ Tybor, *supra* note 60, at 1, col. 5. In *Smith*, the court refused to grant an acquittal because such a disposition would have required relinquishing all control over the defendant. *R. v. Smith*, No. 1/A/82 (Crim. App. April 27, 1982) (available June 10, 1985, on LEXIS, Enggen library, Cases file). The court concluded that an acquittal would create too great a danger to society. *Id.*

⁶⁴ See *British Legal Debate*, *supra* note 60, at C3, col.5.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626, 635-39 (D.C. 1979) (court should allow expert testimony on battered woman's syndrome), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983). The courts in the following cases all determined that expert testimony should be allowed in battered woman's syndrome. See *Hawthorne v. State*, 408 So. 2d 801, 806 (Fla. Dist. Ct. App. 1982); *Smith v. State*, 247 Ga. 612, 618-19, 277 S.E.2d 678, 683 (1981); *People v. Minnis*, 118 Ill. App. 3d 345, 358, 455 N.E.2d 209, 217-18 (1983); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981); *State v. Baker*, 120 N.H. 773, 776, 424 A.2d 171, 173 (1980); *People v. Torres*, N.Y.L.J., April 26, 1985, at 13, col. 4 (Sup. Ct. Bronx County, April 25, 1985); *State v. Kelly*, 97 N.J. 178, 204, 478 A.2d 364, 377 (1984); *State v. Leidholm*, 334 N.W.2d 811, 819 (N.D. 1983); *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984). *But see* *State v. Griffiths*, 101 Idaho 163, 165, 610 P.2d 522, 524 (1980) (court refused to admit evidence of battered woman's syndrome); *State v. Thomas*, 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 139 (1981) (same); *Buhrle v. State*, 627 P.2d 1374, 1378 (Wyo. 1981) (same). The recent New York decision, *People v. Torres*, N.Y.L.J., April 26, 1985, at 13, col. 4 (Sup. Ct. Bronx County, April 25, 1985), was based, in part, on the Appellate Division decision in *People v. Emick*, 103 App. Div. 2d 643, 481 N.Y.S.2d 552 (4th Dep't 1984), see N.Y.L.J., April 26, 1985, at 14, col. 2 n.2. The trial court in *Emick* allowed extensive testimony on the battered woman's syndrome, a decision which was not considered by the appellate court. See *People v. Emick*, 103 App. Div. 2d at 654-55, 481 N.Y.S.2d at 559.

⁶⁹ See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626, 628 (D.C. 1979) (determining whether trial court's exclusion of expert testimony on subject of battered women was error), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983); *State v. Kelly*, 97 N.J. 178, 206, 478 A.2d 364, 378 (1984) (central issue is whether expert testimony on battered woman's syndrome is admissible); *Buhrle v. State*, 627 P.2d 1374, 1375 (Wyo. 1981) (excluding testimony of psychologist offered by defense was not reversible error).

When admissible, the testimony is aimed at establishing that the defendant's reaction to an apparently non-threatening situation was in fact self-defense.⁷⁰

In *People v. Minnis*,⁷¹ an Illinois woman was charged with murdering her husband.⁷² Defense counsel sought to offer evidence on the battered woman's syndrome to explain both the murder and the subsequent dismemberment of the victim's body.⁷³ Reversing the lower court's ruling to exclude the evidence,⁷⁴ the Illinois Circuit Court concluded that "[t]he defendant had a right to present evidence relevant to her explanation of her conduct, no matter how far-fetched it might appear to the average individual."⁷⁵ In *State v. Kelly*,⁷⁶ the defendant was indicted for murdering her husband by stabbing him with a scissors as he ran toward her.⁷⁷ Asserting that she acted in self-defense, the defendant offered expert testimony on battered woman's syndrome to establish that at the time of her husband's approach she believed she was in imminent danger of death or serious bodily harm.⁷⁸ The Supreme Court of New Jersey concluded that the expert testimony was "directly relevant" to the issue of the defendant's state of mind.⁷⁹

Courts which have accepted expert testimony on battered woman's syndrome have held that the reasonableness of the battered woman's acts is beyond the average juror's ability to understand,⁸⁰ and that the syndrome is sufficiently accepted in the scientific community to allow admission of the expert testimony.⁸¹ Since

⁷⁰ See *Ibn-Tamas v. United States*, 407 A.2d 626, 631 (D.C. 1979), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983); *State v. Allery*, 101 Wash. 2d 591, 595, 682 P.2d 312, 315 (1984).

⁷¹ 118 Ill. App. 3d 345, 455 N.E.2d 209 (1983).

⁷² *Id.* at 346, 455 N.E.2d at 211.

⁷³ *Id.*

⁷⁴ *Id.* at 357, 455 N.E.2d at 218.

⁷⁵ *Id.*

⁷⁶ 97 N.J. 178, 478 A.2d 364 (1984).

⁷⁷ *Id.* at 189-90, 478 A.2d at 369.

⁷⁸ *Id.* at 201, 478 A.2d at 375.

⁷⁹ *Id.* at 202, 478 A.2d at 375.

⁸⁰ See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626, 634-35 (D.C. 1979) (battered woman's syndrome "beyond the ken" of the ordinary juror), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983); *Hawthorne v. State*, 408 So. 2d 801, 807 (Fla. 1982) (jury would not understand defendant's circumstance without expert testimony); *State v. Allery*, 101 Wash. 2d 519, 595, 682 P.2d 312, 316 (1984) (appropriate for jury to hear helpful testimony on battered woman's syndrome).

⁸¹ See *Ibn-Tamas v. United States*, 407 A.2d 626, 638-39 (D.C. 1979), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983); *State v. Allery*, 101 Wash. 2d 591, 596-97, 682 P.2d 312, 315-16 (1984).

many cases in which a battered woman's syndrome defense is raised involve situations in which the woman did not strike out against her abuser until after his attack had ended or before it had begun,⁸² only through an explanation of the effects and nature of battered woman's syndrome can the jury understand how the defendant honestly and reasonably believed that her life was in danger.⁸³ Although evidence of battered woman's syndrome may not necessarily result in acquittal,⁸⁴ the majority of jurisdictions that have considered the testimony have determined that it is necessary for a fair trial.⁸⁵

Courts refusing to admit evidence of battered woman's syndrome generally have found that the defendant's state of mind and the reasonableness of her actions could be determined adequately by the jury without the aid of expert testimony.⁸⁶ Evidence of battered woman's syndrome also has been denied admission based on the courts' conclusion that the syndrome has not gained sufficient acceptance among the scientific community.⁸⁷

⁸² See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 813-14 (N.D. 1983) (defendant stabbed husband with butcher knife after he had fallen asleep); *State v. Kelly*, 97 N.J. 178, 189-90, 478 A.2d 364, 369 (1984) (defendant stabbed husband as he came running toward her after attack); *State v. Allery*, 101 Wash. 2d 591, 592-593, 682 P.2d 312, 313-14 (1984) (defendant shot husband while he was lying on couch after he threatened to kill her); *Buhrle v. State*, 627 P.2d 1374, 1376 (Wyo. 1981) (defendant shot husband after argument, through partially closed door).

⁸³ See *State v. Kelly*, 97 N.J. 178, 204, 478 A.2d 364, 377 (1984). Permitting the defendant to introduce evidence on battered women's syndrome enables the jury to perceive the situation from the point of view of the defendant, and to reach a fully informed decision on whether her fear was reasonable. See *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984).

⁸⁴ See, e.g., *State v. Leidholm*, 334 N.W.2d 811, 813, 819 (N.D. 1983) (evidence of battered woman's syndrome admitted at trial resulted in reduction of charge of murder to conviction of manslaughter); see also *People v. Minnis*, 118 Ill. App. 3d 345, 356-57, 455 N.E.2d 209, 217 (1983) (defendant sought to introduce evidence of battered woman's syndrome to rebut prosecution's evidence of her consciousness of guilt).

⁸⁵ See *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981) (defendant entitled to new trial because suppression of evidence of battered woman's syndrome may have affected jury's consideration of self-defense claim); *State v. Kelly*, 97 N.J. 178, 202-03, 478 A.2d 364, 376 (1984) (expert testimony was central to defendant's claim of self-defense, therefore, exclusion cannot be harmless error); *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984) (evidence is central to defendant's claim of self-defense).

⁸⁶ See *State v. Griffiths*, 101 Idaho 163, 165, 610 P.2d 522, 524 (1980); *State v. Thomas*, 66 Ohio St. 2d 518, 521, 423 N.E.2d 137, 139 (1981); *Buhrle v. State*, 627 P.2d 1374, 1378 (Wyo. 1981).

⁸⁷ See *State v. Thomas*, 66 Ohio St. 2d 518, 521-22, 423 N.E.2d 137, 139 (1981); *Buhrle v. State*, 627 P.2d 1374, 1377 (Wyo. 1981). The test for admission of scientific evidence was announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923): Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is

III. BATTERED WOMAN'S SYNDROME AND PREMENSTRUAL SYNDROME: A THREE-LEVELED COMPARISON

It is submitted that there are three bases of comparison for criminal defenses based on the battered woman's syndrome and defenses based on PMS: first, the underlying theory of the defense involved; second, the stage of scientific acceptance and knowledge that each of the syndromes has reached; and third, the social and policy implications arising from the legal use of each syndrome. The remainder of this Note will examine the distinctions that have arisen from these bases and determine whether such distinctions are valid and warrant the disparate judicial treatment that has been given to PMS and battered woman's syndrome.

A. *The Traditional Legal Defenses Involved*

Evidence of battered woman's syndrome generally is offered in conjunction with self-defense pleas.⁸⁸ The self-defense plea, unlike the plea of insanity, pursuant to which PMS evidence is offered, is more susceptible to the use of a novel psychological theory for two reasons.⁸⁹ First, evidence of a victim's reputation for violence and aggression can generally be introduced to support a plea of self-defense if the defendant knew of the victim's reputation.⁹⁰ In the past, women attempting to justify their violent conduct as self-defense have been permitted to testify to their husband's history of

difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id. at 1014. The *Frye* test is the most commonly relied on standard for determining the admissibility of scientific evidence. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1200 (1980).

⁸⁸ See, e.g., *Ibn-Tamas v. United States*, 407 A.2d 626, 628 (D.C. 1979), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983); *Hawthorne v. State*, 408 So. 2d 801, 805 (Fla. Dist. Ct. App. 1982); *Smith v. State*, 247 Ga. 612, 612, 277 S.E.2d 678, 678 (1981); *State v. Thomas*, 66 Ohio St. 2d 518, 519, 423 N.E.2d 137, 138 (1981). *But cf.* *State v. Baker*, 120 N.H. 773, 775-76, 424 A.2d 171, 173 (1980) (evidence of battered woman's syndrome properly admitted to rebut defendant's insanity plea in trial for wife's murder).

⁸⁹ Compare *infra* notes 90-109 and accompanying text (battered woman's syndrome and self-defense) with *infra* notes 110-127 and accompanying text (PMS and insanity).

⁹⁰ See *Smith v. United States*, 161 U.S. 85, 88 (1896); *Brooks v. State*, 263 Ala. 386, 389, 82 So. 2d 553, 555 (1955); *Karr v. State*, 100 Ala. 4, 5, 14 So. 851, 852 (1894); *Lowe v. State*, 612 S.W.2d 579, 580-81 (Tex. Crim. App. 1981).

brutal behavior.⁹¹ Thus, before evidence of battered woman's syndrome ever was offered in court, the concept that prior spousal abuse might be used to justify subsequent domestic violence already was entrenched firmly in the law.⁹² Second, the regular pattern of abuse that battered women experience and anticipate⁹³ is relevant to establishing the elements required to prove self-defense⁹⁴—the genuine and reasonable belief that the defendant was in imminent danger of death or serious injury,⁹⁵ and that the degree of force used was reasonable.⁹⁶

The utility of evidence on battered woman's syndrome in determining the reasonableness of the woman's fear will depend or whether the jurisdiction uses a subjective or objective evidence test in determining reasonableness.⁹⁷ Evidence of battered woman's

⁹¹ See, e.g., *United States v. McIntire*, 461 F.2d 1092, 1092 (5th Cir. 1972); *People v. Adams*, 71 Ill. App. 3d 70, 75, 388 N.E.2d 1326, 1329-30 (1979). In *McIntire*, the Fifth Circuit concluded that the trial court erred by not allowing corroborating evidence on defendant's testimony that her husband beat her when he was intoxicated. 461 F.2d at 1092. The defendant had claimed that while her husband was intoxicated she killed him in self-defense. *Id.* In *Adams*, an Illinois appellate court held that the defendant, who had lived with her victim for five and one-half years, should have been allowed to testify that she knew he had killed someone in the past. 71 Ill. App. 3d at 75, 388 N.E.2d at 1329-30.

⁹² See *supra* note 91.

⁹³ See Walker, Thyfault & Browne, *Beyond the Juror's Ken: Battered Women*, 7 Vt. L. REV. 1, 4, 6 (1982); Schneider, *supra* note 12, at 634-35. The cyclic theory of violence used to explain battered woman's syndrome demonstrates that battering follows a pattern and becomes increasingly more severe with time. Walker, Thyfault & Browne, *supra*, at 6. The battered woman usually believes that the battering incident that immediately preceded her striking back was more severe or life-threatening than prior incidents. Schneider, *supra* note 12, at 634.

⁹⁴ See, e.g., *People v. Minnis*, 118 Ill. App. 3d 345, 356, 455 N.E.2d 209, 217 (1983). Courts that have admitted expert testimony on battered woman's syndrome have done so to allow an explanation of why the woman reasonably believed that her life was in danger and why deadly force was required to escape her batterer. See *id.* at 356, 455 N.E.2d at 217; Note, *supra* note 12, at 130-32.

⁹⁵ See Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615, 618 (1982). The syndrome can be used to explain why the seemingly unreasonable degree of fear experienced by the battered woman was not truly unreasonable in light of her past experience with her attacker. See *id.*

⁹⁶ See *id.* A battered woman's attempts to use unarmed self-defense often trigger increased violence on the part of her abuser. Schneider, *supra* note 12, at 632. However, a defendant may only use deadly force when she reasonably believes it necessary to avoid imminent threat of death or serious bodily injury. Note, *supra* note 95, at 622-23; see Schneider, *supra* note 12, at 632-33. Thus, under a strict interpretation of the deadly force rule, the battered woman's use of a deadly weapon is unreasonable unless she can introduce evidence of the syndrome to demonstrate that her actions were justified. See Schneider, *supra* note 12, at 633.

⁹⁷ See Eber, *supra* note 12, at 927. An objective standard of reasonableness requires the factfinder to consider the acts of the accused and the surrounding circumstances that ex-

syndrome would be less acceptable in objective evidence jurisdictions in which the unique physical and psychological characteristics of the particular defendant generally are not considered.⁹⁸ It is submitted that legislative change may be required in an objective jurisdiction to create classes of defendants, such as battered women, to whom a different standard of reasonableness would be applied.⁹⁹ Under a subjective evidence test, expert testimony on the syndrome could be used to demonstrate the genuineness of the woman's belief in the immediacy of the danger,¹⁰⁰ and to demonstrate whether the amount of force used by the woman was reason-

isted at the time of the killing from the perspective of a reasonable and prudent person. See *State v. Leidholm*, 334 N.W.2d 811, 817 (N.D. 1983). The law, of course, does not require a perfect calculation of what reasonableness under the circumstances involves. See *Brown v. United States*, 256 U.S. 335, 343 (1921) ("[d]etached reflection cannot be demanded in the presence of an uplifted knife"); Note, *supra* note 95, at 623.

Under the subjective standard, the jury must decide whether the circumstances faced by the accused were sufficient to induce an honest and reasonable belief in the individual defendant's mind that the degree of force used was necessary to defend herself against imminent harm. See *Leidholm*, 334 N.W.2d at 817.

⁹⁸ See *State v. Leidholm*, 334 N.W.2d 811, 818 (N.D. 1983); Eber, *supra* note 12, at 927-28; Note, *The Admissibility of Expert Testimony on the Subject of Battered Woman*, 4 CRIM. JUST. J. 161, 176 (1980); Note, *supra* note 95, at 619. Under the objective test the defendant is judged on the basis of how a reasonable person would have behaved in the same circumstances. Note, *supra* note 95, at 618-19. Therefore, expert testimony on battered woman's syndrome aimed at demonstrating the individual defendant's state of mind is irrelevant. See *id.* at 619.

⁹⁹ A legislative exception to the deadly force rule would be required to allow juries in objective evidence jurisdictions to apply a lower standard of reasonableness to a battered woman using force against an unarmed attacker. See *State v. Leidholm*, 334 N.W.2d 811, 817 (N.D. 1983). An objective rule could be phrased to allow a battered woman to use deadly force against an assailant who previously had abused her. Cf. CAL. CIV. PROC. CODE § 545 (West 1985) (upon proof of past acts of abuse by spouse, court may issue temporary restraining order). Thus, battered women would be allowed to introduce expert testimony to the extent necessary to establish that they are afflicted with the syndrome. Cf. James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 701-02 (1952) (applying particular standard of care to professionals in negligence cases requires expert testimony). The jury would be required to determine if the defendant was in fact a "battered woman," and whether she acted reasonably within the limitations permitted by the special exception to the deadly force rule. Cf. *McPherson v. Ellis*, 305 N.C. 266, 270, 287 S.E.2d 892, 895 (1982) (physician judged by particular standard of care must show adherence to standards of medical community).

¹⁰⁰ See Eber, *supra* note 12, at 928; cf. *Crawford v. State*, 363 So. 2d 107, 108 (Ala. Crim. App. 1978) (deceased's threatening words and gestures were admissible on issue of defendant's apprehension of immediate danger); *Byrd v. State*, 626 P.2d 1057, 1058-59 (Alaska 1980) (evidence of victim's violent nature admissible on issue of defendant's apprehension of imminent danger, if such nature is known to defendant); *State v. Lui*, 603 P.2d 151, 154 (Hawaii 1979) (evidence of victim's violent character admissible to show reasonableness of defendant's apprehension of immediate danger).

able under the circumstances.¹⁰¹

In *State v. Wanrow*,¹⁰² the Washington Supreme Court noted the unfairness of judging the acts of female defendants asserting a plea of self-defense under the traditional, objective standards of reasonableness.¹⁰³ The *Wanrow* court concluded that under a subjective self-defense standard, women would have their conduct judged in light of their individual physical abilities and perceptions,¹⁰⁴ which may have been colored by being the victims of years of sex discrimination.¹⁰⁵ Although there was no pre-existing relationship between the defendant and victim in *Wanrow*, the principles applied in the decision should be equally applicable when considering the admissibility of evidence of battered woman's syndrome.¹⁰⁶ Relying on the subjective test of *Wanrow*, the Wash-

¹⁰¹ See *Schneider*, *supra* note 12, at 631-33; *Note*, *supra* note 95, at 623. Generally, the amount of force that a person may use must reasonably be related to the harm sought to be avoided. W. LAFAVE & A. SCOTT, *supra* note 2, § 53, at 392. Under the "equal force rule," deadly force may justifiably be used in self-defense only if one reasonably believes that one's attacker is about to exert deadly force, and such force is necessary to repel the attack. See *Schneider*, *supra* note 12, at 631-32. Thus, evidence of battered woman's syndrome would be especially relevant in situations in which a deadly weapon was used to repel an unarmed attacker. See *Easterling v. State*, 267 P.2d 185, 188 (Okla. Crim. App. 1954); *Walker, Thyfault & Browne*, *supra* note 93, at 5; *Note*, *supra* note 95, at 623. Many battered women resort to deadly weapons in resisting unarmed aggressors because of their disadvantage in size and strength. See *Schneider*, *supra* note 12, at 632-33. The inadequacy of a woman's physical strength to repel an attack is accentuated by the fact that such defensive efforts often result in increased violence against her. *Id.* at 632. The application of the traditional deadly force rule often severely damages a woman's claim of self-defense in cases in which she has used deadly force against an unarmed aggressor because such force will often be deemed unreasonable. *Id.* at 633. The equal force rule has been reinterpreted, in one jurisdiction, to suggest that a woman's ability to defend herself against a man is so inadequate that the law will allow her to use a deadly weapon. See *State v. Wanrow*, 88 Wash. 2d 221, 239, 559 P.2d 548, 559 (1977) ("care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual physical handicaps which are the product of sex discrimination"); see also *Easterling*, 267 P.2d at 188-89 (disparity in size and strength between sexes may justify woman's use of weapon against unarmed male attacker).

¹⁰² 88 Wash. 2d 221, 559 P.2d 548 (1977).

¹⁰³ *Id.* at 240-41, 559 P.2d at 558-59. In *Wanrow*, the Washington Supreme Court affirmed a lower appellate court's reversal of the defendant's murder conviction. *Id.* at 224, 559 P.2d at 550. The defendant shot and killed a man who she believed had molested her friend's daughter and had tried to molest her son, when the victim would not leave the house where the defendant was staying. *Id.* at 224-25, 559 P.2d at 550-51.

¹⁰⁴ *Id.* at 239-40, 559 P.2d at 559.

¹⁰⁵ *Id.*; *Reed v. Reed*, 404 U.S. 71, 77 (1971).

¹⁰⁶ See *Eber*, *supra* note 12, at 926. The *Wanrow* decision recognized that additional considerations are present in a battering situation that are not found in traditional self-defense situations. *Id.* These considerations include the wife's dependency on her husband, inadequate legal remedies available to the woman, and the traditional notion that women

ington Supreme Court later adopted a subjective test to justify the acceptance of evidence on battered woman's syndrome in *State v. Allery*.¹⁰⁷ In *Allery*, the defendant shot her unarmed husband while he was lying on a couch.¹⁰⁸ Testimony on battered woman's syndrome was deemed necessary to explain the defendant's mental state, and to "overcome stereotyped impressions" about battered women who stay with their mates.¹⁰⁹

The doctrines of insanity and diminished capacity that underlie defenses based on PMS¹¹⁰ lack some of the factors that have permitted battered woman's syndrome to gain legal acceptance.¹¹¹ The belief that menstruation is a source of mental illness, common in the 19th century,¹¹² has long since dissipated.¹¹³ Additionally, insanity defenses recently have been subjected to intense scrutiny and debate, and have been sharply criticized by both the legal and lay communities.¹¹⁴ Use of the PMS defense is handicapped further by the fact that the elements of the insanity defense are not well-settled.¹¹⁵ Most modern jurisdictions apply either the tradi-

should not engage in physical confrontations. *Id.*

¹⁰⁷ 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984).

¹⁰⁸ *Id.* at 593, 682 P.2d at 314. The defendant had been subjected to consistent physical abuse by her husband. *Id.* at 592, 682 P.2d at 313. On the night of the homicide, the defendant entered her house and unexpectedly confronted her husband, who previously had been served with a restraining order to keep away from her. *Id.* After the husband threatened to kill the defendant, she went into the bedroom and tried unsuccessfully to escape through a window. *Id.* The defendant heard a metallic noise and believed her husband was getting a knife from the kitchen. *Id.* at 593, 682 P.2d at 313-14. The defendant then shot her husband as he was reclining on a couch. *Id.* at 593, 682 P.2d at 314.

¹⁰⁹ *Id.* at 597, 682 P.2d at 316.

¹¹⁰ See Wallach & Rubin, *supra* note 13, at 233; Stewart, *supra* note 33, at 415. Insanity and diminished capacity defenses have been predicated on extreme depression and anxiety, frequently occurring symptoms of PMS, when such symptoms are presented in connection with other mental defects and diseases. See Stewart, *supra* note 33, at 415.

¹¹¹ See *infra* notes 112-115 and accompanying text.

¹¹² See *supra* note 49 and accompanying text.

¹¹³ See Wallach & Rubin, *supra* note 13, at 233.

¹¹⁴ See, e.g., N. MORRIS, MADNESS AND THE CRIMINAL LAW 32 (1983) (plea of incompetency to stand trial and insanity defense should be abolished); Smith, *Limiting the Insanity Defense: A Rational Approach to Irrational Crimes*, 47 Mo. L. Rev. 605, 615 (1982) (eliminate insanity as special defense and consider mental competence only in considering state of mind needed for crime charged).

¹¹⁵ See Smith, *supra* note 114, at 607-09. The methods for determining legal insanity lack uniformity. See W. LAFAYE & A. SCOTT, *supra* note 2, § 36, at 269. There are four different definitions of insanity for the purposes of substantive criminal law. See Smith, *supra* note 114, at 607-09. The terms of the various standards are so vague as to invite "semantic jousting" and "metaphysical speculation." W. LAFAYE & A. SCOTT, *supra* note 2, § 36, at 272, (citing 1 NATIONAL COMM'N ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 249 (1970)). Suggested insanity defense reforms have included the recognition of a

tional *M'Naghten* rule¹¹⁶ or the American Law Institute's Model Penal Code rule¹¹⁷ to determine whether the defendant's conduct can be excused by reason of mental incompetence.¹¹⁸

Under the *M'Naghten* test, an insanity defense is established by clear proof that at the time of the criminal act, the defendant suffered from a defect of reason, or disease of the mind, to render her incapable of knowing the nature and quality of her acts, or that her acts were wrong.¹¹⁹ Thus, to satisfy the *M'Naghten* test, a PMS sufferer would have to establish that her infirmity gave rise to the existence of a legally acceptable "disease of the mind," and a resultant inability to know the nature and quality of her act or that it was wrong.¹²⁰ The concept of "disease of the mind" as used in the *M'Naghten* test is narrower than the psychiatric concept of mental disease, and generally is limited to disorders such as psychosis, schizophrenia, and paranoia.¹²¹ Since these mental disorders frequently are associated with PMS, evidence of PMS would seem relevant to the mental disease requirement of the *M'Naghten* test.¹²² However, under a strict interpretation of the *M'Naghten*

"guilty but mentally ill" verdict, the use of bifurcated trials in which guilt and insanity are determined separately, and the adoption of diminished capacity as a mitigating factor. See Robitscher & Haynes, *In Defense of the Insanity Defense*, 31 EMORY L.J. 9, 13-29 (1982).

¹¹⁶ See *M'Naghten's Case*, 8 Eng. Rep. 718 (1843).

¹¹⁷ MODEL PENAL CODE § 4.01, reprinted in 10 U.L.A. 490-91 (1962).

¹¹⁸ W. LAFAVE & A. SCOTT, *supra* note 2, § 36, at 269. This analysis will not consider the irresistible impulse test or the *Durham* rule, each of which is followed in only a minority of jurisdictions. The irresistible impulse test, which holds that a defendant should not be found guilty by reason of insanity if he could not control his conduct, is used in conjunction with the *M'Naghten* rule. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 67 (1967). The *Durham* approach, which holds that the defendant is not criminally liable if his unlawful act was the product of mental disease or defect, see *Durham v. United States*, 214 F.2d 862, 874-75 (D.C. Cir. 1954), has been abandoned in the jurisdiction that created it, see *United States v. Brawner*, 471 F.2d 969, 970 (D.C. Cir. 1972).

¹¹⁹ *M'Naghten's Case*, 8 Eng. Rep. at 722; see *Reese v. Wainwright*, 600 F.2d 1085, 1090 (5th Cir.), *cert. denied*, 444 U.S. 983 (1979); *Zamora v. State*, 361 So. 2d 776, 779 (Fla. Dist. Ct. App. 1978); *State v. Johnson*, 223 Kan. 237, 240, 573 P.2d 994, 997 (1977).

¹²⁰ See Wallach & Rubin, *supra* note 13, at 246.

¹²¹ See *State v. Nuetzel*, 61 Hawaii 531, 543-44, 606 P.2d 920, 928 (1980); *State v. Pagano*, 294 N.C. 729, 735, 242 S.E.2d 825, 829 (1978); *Commonwealth v. Bruno*, 268 Pa. Super. 15, 19, 407 A.2d 413, 416 (1979). The *M'Naghten* test does not require the precise definition of the mental disease involved as long as some organic or functional factor is identified as responsible for the defendant's conduct. Wallach & Rubin, *supra* note 13, at 239; A. GOLDSTEIN, *supra* note 118, at 47. Any mental abnormality such as psychosis, neurosis, organic brain disorder, or congenital intellectual deficiency will suffice if it rendered the defendant incapable of knowing the nature and gravity of his acts, or that they were wrong. See *State v. Edmon*, 28 Wash. App. 98, 107-08, 621 P.2d 1310, 1315-16 (1981).

¹²² See Wallach & Rubin, *supra* note 13, at 241. PMS is sometimes manifested by seri-

rule, only the most severely psychotic individuals can meet the requirement of an "inability to know the nature of the act or that it was wrong,"¹²³ thus making it difficult for PMS sufferers to satisfy the *M'Naghten* test.¹²⁴ It is possible, however, that a severe case of PMS would render the defendant entirely incapable of knowing right from wrong, and thus satisfy the standards even in a strict *M'Naghten* jurisdiction.¹²⁵ Many *M'Naghten* jurisdictions have broadly construed this requirement,¹²⁶ however, and under such flexible standards, evidence of PMS is more likely to satisfy the *M'Naghten* criteria.¹²⁷

The Model Penal Code test relieves the criminal responsibility of a person who at the time of her criminal acts, due to mental disease or defect, lacked substantial capacity either to appreciate the criminality (wrongfulness) of her conduct, or to conform her conduct to the requirements of law.¹²⁸ An insanity defense based

ous mental diseases capable of causing total cognitive disorientation. *Id.* Once it is accepted that PMS can interfere with cognitive abilities, defense counsel must then prove that the syndrome actually caused such an interference in his client. *See id.*

¹²³ *Id.*; A. GOLDSTEIN, *supra* note 118, at 49; *see also* Bryant v. State, 207 Md. 565, 588-94, 115 A.2d 502, 512-15 (1955) (defendant found capable of distinguishing right from wrong, although bordering mental deficiency and afflicted with neurosis). Under a restrictive interpretation of the *M'Naghten* rule, defendants who are mentally ill, but whose illness does not fall squarely within the parameters of traditionally diagnosable infirmities, may be held criminally liable. *See, e.g.,* Reece v. State, 212 Ga. 609, 609-10, 94 S.E.2d 723, 725 (1956).

¹²⁴ *See* Wallach & Rubin, *supra* note 13, at 246.

¹²⁵ *Id.* at 248. It is suggested that severe PMS should be treated like temporary insanity resulting from insane delusions. Courts have allowed evidence relating to insane delusions as the basis for a successful defense of insanity. H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 32 (1979); *see* Bethea v. United States, 365 A.2d 64, 80 (D.C. 1976), *cert. denied*, 433 U.S. 911 (1977); Rozier v. State, 185 Ga. 317, 320, 195 S.E. 172, 174-75 (1938); State v. Nicholson, 1 Wash. App. 853, 855, 466 P.2d 181, 182 (1970). To satisfy the *M'Naghten* test, an insane delusion must be the result of a mental disease, and the facts, as the defendant in her deluded state perceived them, must be sufficient to justify the defendant's act. *See* Bidby v. State, 138 Ga. App. 4, 8, 225 S.E.2d 448, 450 (1976).

¹²⁶ *See, e.g.,* State v. Schantz, 98 Ariz. 200, 207, 403 P.2d 521, 525-26 (1965), *cert. denied*, 382 U.S. 1015 (1966); Thompson v. State, 159 Neb. 685, 691, 68 N.W.2d 267, 271 (1955); *see* Wallach & Rubin, *supra* note 13, at 247.

¹²⁷ *See* Wallach & Rubin, *supra* note 13, at 248. A broader interpretation of the knowledge requirement allows mental conditions other than extreme psychosis to be the bases for an insanity defense. *Id.* at 249. Thus, to the extent that these additional conditions are symptoms of PMS, the likelihood that PMS evidence will be admitted is increased. *Id.*

¹²⁸ MODEL PENAL CODE § 4.01(1), *reprinted in* 10 U.L.A. 490 (1974). The Code test utilizes the same elements as the *M'Naghten* and irresistible impulse tests, but sets them forth in broader terms. W. LAFAVE & A. SCOTT, *supra* note 2, § 38, at 293. Insanity, as defined by the Code, excludes mental diseases or defects that are manifested only by "repeated criminal or otherwise anti-social behavior." MODEL PENAL CODE § 4.01(2), *reprinted*

on PMS would probably be more successful in jurisdictions using the Model Penal Code test because the Code test ameliorates many of the harsh *M'Naghten* requirements.¹²⁹ While the *M'Naghten* prerequisite to establishing legal insanity is a total lack of cognitive or behavioral capacity, the Model Penal Code requires only a lack of substantial capacity to appreciate criminality or to conform behavior.¹³⁰ Additionally, a requirement that the defendant merely "appreciates," rather than "knows," the nature of her criminal acts allows the admission of evidence of the defendant's intellectual, and *emotional* state at the time of the act.¹³¹ Therefore, to the extent that PMS causes an individual to lack the substantial capacity to appreciate the criminality or wrongfulness of her act, or to conform her conduct to the requirements of law, evidence of PMS will be relevant to establishing a defense of insanity under the Code test.¹³²

Although PMS may not satisfy the insanity test in certain jurisdictions, evidence of the syndrome generally will be relevant on the issue of diminished capacity.¹³³ The doctrine of diminished capacity permits evidence of an abnormal mental condition, not amounting to legal insanity, to be admitted whenever it is relevant to prove that the defendant did not have the requisite mental state

in 10 U.L.A. at 491. This limitation has been criticized, *see, e.g.,* Weihofen, *The Law and the Mentally Ill: The Definition of Mental Illness*, 21 OHIO ST. L.J. 1, 6-7 (1960), and as a result, several jurisdictions have adopted the Code test without it, *see, e.g.,* MO. ANN. STAT. § 552.030 (Vernon 1966); N.Y. PENAL LAW § 40.15 (McKinney Supp. 1985). The restriction may make it difficult for PMS sufferers whose only behavioral symptom is recurrent criminal behavior to enter evidence concerning the syndrome. *See* Dalton, *Cyclical Criminal Acts in Premenstrual Syndrome*, 2 LANCET 1070, 1071 (Nov. 1980). Most sufferers, however, experience a group of symptoms evidencing the underlying disorder, and these symptoms result in behavioral abnormalities other than criminal psychopathy. *See supra* note 33.

¹²⁹ *See* Wallach & Rubin, *supra* note 13, at 258; A. GOLDSTEIN, *supra* note 114, at 87; Smith, *supra* note 114, at 608.

¹³⁰ Compare *M'Naghten's Case*, 8 Eng. Rep. at 722 (defendant must not know nature of her act or that it was wrong) with MODEL PENAL CODE § 4.01(1), *reprinted in* 10 U.L.A. at 490 (defendant must not appreciate criminality of her conduct).

¹³¹ *See* W. LAFAVE & A. SCOTT, *supra* note 2, § 38, at 293; Wallach & Rubin, *supra* note 13, at 259; *see also* State v. Johnson, 121 R.I. 254, 268, 399 A.2d 469, 477 (1979) (test requiring appreciation of wrongfulness allows more expansive view of whether defendant understood nature of her acts).

¹³² *See* Wallach & Rubin, *supra* note 13, at 260.

¹³³ *See* Note, *supra* note 33, at 190. The diminished capacity doctrine has also been referred to as "diminished responsibility," *see* People v. Gallegos, 628 P.2d 999, 1002 (Colo. 1981); McCarty v. State, 372 A.2d 180, 182 (Del. Super. Ct. 1977), or "partial responsibility," *see* State v. Strubberg, 616 S.W.2d 809, 816 (Mo. 1981); State v. Booth, 284 Or. 615, 618, 588 P.2d 614, 615 (1978).

necessary to commit the crime charged.¹³⁴ Establishing that the defendant acted with diminished capacity will mitigate, but not excuse, criminal liability.¹³⁵ Thus, evidence establishing that the defendant could not form the requisite state of mind for the crime because of PMS certainly would be relevant to a diminished capacity defense.¹³⁶

B. *Stage of Acceptance of the Theories*

There is some disparity between the degree of acceptance that PMS and battered woman's syndrome have reached in the scientific community.¹³⁷ PMS, having been studied for more than fifty years, appears to have reached a significant level of acceptance among doctors and psychiatrists.¹³⁸ While the causes of the syndrome have not been determined,¹³⁹ most researchers agree on the existence of the syndrome and certain of its identifiable symptoms.¹⁴⁰ Battered woman's syndrome, however, has been studied

¹³⁴ See *State v. Collins*, 305 N.W.2d 434, 436 (Iowa 1891); *Commonwealth v. Walzack*, 468 Pa. 210, 221, 360 A.2d 914, 919-20 (1976). Diminished capacity is not intended to serve as an alternative definition of legal insanity, see *State v. Collins*, 305 N.W.2d at 436-37; *Long v. Brewer*, 253 N.W.2d 549, 557 (Iowa 1977), rather, the doctrine of diminished capacity concerns the admissibility of psychiatric or psychological evidence for the purpose of determining whether a particular degree of a crime was committed, see *Hensel v. State*, 604 P.2d 222, 232 (Alaska 1979); *State v. Sikora*, 44 N.J. 453, 472, 210 A.2d 193, 203 (1965); *State v. Pressler*, 16 Wyo. 214, 222-23, 92 P. 806, 809 (1907).

¹³⁵ See Note, *supra* note 33, at 191. British defendants have used PMS-based diminished capacity defenses successfully to mitigate the crime charged or the sentence imposed. See *id.*

¹³⁶ See *id.* at 193; Note, *supra* note 16, at 224.

¹³⁷ See *infra* notes 138-144 and accompanying text.

¹³⁸ See Stewart, *supra* note 33, at 410-11. Study of PMS began in the 1930's and focused on a description and definition of the syndrome. See, e.g., Frank, *The Hormonal Causes of Premenstrual Tension*, 26 ARCH. NEUROL. PSYCHIATRY 1053, 1054 (1931); Israel, *Premenstrual Tension*, 110 J. AM. MED. ASS'N 1721, 1723 (1938). Studies performed in the late 1950s sought to link PMS to underlying psychiatric disorders. See, e.g., Dalton, *Menstruation and Acute Psychiatric Illness*, 1 BRIT. MED. J. 148, 149 (1959); Perr, *supra* note 13, at 216.

¹³⁹ See *supra* notes 37 & 38 and accompanying text.

¹⁴⁰ See, e.g., Brozan, *supra* note 17, at C16, col. 2; Stewart, *supra* note 33, at 413. Researchers generally agree that PMS may be defined as a variety of physical, psychological, and behavioral symptoms occurring in the second half of the menstrual cycle. See Muse, Cetel, Futterman & Yen, *supra* note 13, at 1345; Rubinow & Roy-Byrne, *supra* note 38, at 163; Sanders, Warner, Backstrom & Bancroft, *supra* note 13, at 487. Recent studies have concluded that PMS is related to hormonal cycles. See, e.g., Backstrom, Sanders, Leash, Davidson, Warner & Bancroft, *Hormone Levels and their Relationship to the Premenstrual Syndrome*, 45 PSYCHOSOMATIC MED. 503, 505 (1983). Scientists believe that regulation of hormonal fluctuations may hold the key to successful treatment of PMS. See Muse, Cetel,

only for the last ten years.¹⁴¹ Although the syndrome currently is gaining increased acceptance,¹⁴² courts have been hesitant to accept evidence about it because research on battered woman's syndrome is still in its infancy.¹⁴³

The current level of acceptance that a particular theory has achieved among the scientific community is crucial to determine the admissibility of evidence regarding that theory in jurisdictions using the *Frye v. United States*¹⁴⁴ standard for admissibility.¹⁴⁵ Although the admissibility of PMS under *Frye* has never been tested, there appears to be sufficient acceptance of PMS as a medical theory to support its admissibility under the *Frye* test.¹⁴⁶ Battered

Futterman & Yen, *supra* note 13, at 1348.

¹⁴¹ See Hilberman, *supra* note 24, at 1336. Lenore Walker's work, *THE BATTERED WOMAN*, credited with naming and defining battered woman's syndrome, was published in 1979. See L. WALKER, *supra* note 12. Other works published in the mid to late 1970's examined domestic violence and wife battering, but did not specifically identify the syndrome. See, e.g., R. LANGLEY & R. LEVY, *supra* note 50, at 111-25. R. GELLES, *supra* note 18, at 47-53; D. MARTIN, *supra* note 18, at 10-13.

¹⁴² See Gayford, *supra* note 20, at 196; Hilberman, *supra* note 24, at 1336; Steinmetz, *supra* note 27, at 322.

¹⁴³ See Hilberman, *supra* note 24, at 1336. Hilberman believes that while sociological and feminist literature on the syndrome is expansive, not enough traditional clinical and psychiatric research has been performed. *Id.* The primary thesis of Steinmetz' study is that more recent findings on wife abuse require a reformulation of the theories of the causes and effects of the abuse. See Steinmetz, *supra* note 27, at 322.

Most courts that have refused to accept evidence on battered woman's syndrome have noted the lack of acceptance of the syndrome in the scientific community. See *Buhrle v. State*, 627 P.2d 1374, 1378 (Wyo. 1981); *State v. Thomas*, 66 Ohio St. 2d 518, 520-21, 423 N.E.2d 137, 139 (1981); see also *Hawthorne v. State*, 408 So. 2d 801, 806 (Fla. Dist. Ct. App. 1982) (holding testimony on battered woman's syndrome relevant subject to finding that study is accepted); *State v. Kelly*, 97 N.J. 178, 211, 478 A.2d 364, 380-81 (1984) (case remanded to trial court to determine acceptance of expert's methodology in studying battered woman's syndrome); *Ibn-Tamas v. United States*, 407 A.2d 626, 640 (D.C. 1979) (case remanded to trial court for further consideration of scientific acceptability), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983).

¹⁴⁴ 293 F. 1013 (D.C. Cir. 1923).

¹⁴⁵ See *supra* note 87 and accompanying text. Under *Frye*, a novel scientific technique must pass into a demonstrable stage, that is, it must be shown to be generally accepted by the relevant scientific community. See Giannelli, *supra* note 87, at 1205. Admittedly, some PMS research has been criticized as suffering from methodological problems, such as the omission of certain relevant groups from the study, or relying on potentially subjective self reports. See Notman, *supra* note 33, at 58; Rubinow & Roy-Byrne, *supra* note 38, at 163. While these problems hamper the development of scientific knowledge about PMS they do not prevent finding a correlation between mental illness and the menstrual cycle. Rubinow & Roy-Byrne, *supra* note 38, at 168.

¹⁴⁶ See Wallach & Rubin, *supra* note 13, at 236; Note, *supra* note 33, at 185-89. In applying the *Frye* standard to PMS, a court should not focus on whether there is agreement on the cause of PMS within the scientific community, for no such agreement exists. See

woman's syndrome has been subjected to far less scientific scrutiny than PMS, yet has passed the *Frye* test in several jurisdictions.¹⁴⁷ Since PMS has been the subject of more research and documentation by the medical community than battered woman's syndrome, it is submitted that PMS should be deemed at least as admissible as battered woman's syndrome under the *Frye* test.

The District of Columbia Court of Appeals, in *Ibn-Tamas v. United States*,¹⁴⁸ created a modification of *Frye* that would increase the likelihood that both PMS and battered woman's syndrome evidence would be admitted.¹⁴⁹ In *Ibn-Tamas*, a battered wife, on trial for the murder of her husband, attempted to introduce expert testimony on battered woman's syndrome to establish her perception of imminent danger at the time of the fatal shooting.¹⁵⁰ The court stated that the acceptability of a scientific theory should be determined by whether the methodology used in studying and identifying the theory is generally accepted, not whether the concept derived from the study is accepted.¹⁵¹ Since battered woman's syndrome and PMS theories have been developed through conventional psychological and medical studies, it is submitted that under the *Ibn-Tamas* interpretation of the *Frye* standard, both theories should be admissible.

In the minority of non-*Frye* jurisdictions, scientific evidence is admissible whenever it is relevant to the facts in issue, unless substantial reasons exist for its exclusion.¹⁵² Since it already has been

Note, *supra* note 33, at 188. Rather, the focus should be on whether there is general acceptance among the scientific community that PMS can impair mental functions to a degree sufficient to either meet the standard for legal insanity, or negate the specific state of mind required for criminal responsibility. *Id.* at 189.

¹⁴⁷ See *supra* note 85 and accompanying text.

¹⁴⁸ 407 A.2d 626, 638 (D.C. 1979), *rev'd on other grounds on remand and aff'd*, 455 A.2d 893 (D.C. 1983).

¹⁴⁹ See *infra* notes 151 & 152 and accompanying text.

¹⁵⁰ 407 A.2d at 634.

¹⁵¹ *Id.* at 638. The court concluded that a rejection of a certain theory on the basis that the state of scientific knowledge in the area is incomplete actually indicates that the court has determined that no reliable methodology for making the inquiry has been discovered. *Id.*

It is undetermined whether the *Frye* standard merely requires general acceptance of the scientific techniques employed in studying the theory, or acceptance of both the underlying theory and the techniques utilized. See Giannelli, *supra* note 87, at 1211. If the technique is generally accepted, any theory generated by it should be valid although not fully understood or explainable. *Id.* at 1212.

¹⁵² See, e.g., *United States v. Baller*, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980); *State v. Williams*, 388 A.2d 500, 504 (Me. 1978). Under the relevancy approach, a court would have discretion to exclude

suggested that both battered woman's syndrome and PMS are relevant to the elements of self-defense, insanity, and diminished capacity pleas respectively,¹⁵³ no basis exists for treating the theories dissimilarly in jurisdictions using the general relevancy approach.¹⁵⁴

C. Policy and Social Implications

PMS and battered woman's syndrome can be validly distinguished based on the policy implications associated with each theory.¹⁵⁵ Both theories have been criticized for granting preferential treatment to women,¹⁵⁶ however, such criticism is unfounded in light of the relevancy of PMS and battered woman's syndrome as valid legal defenses.¹⁵⁷ Any preferential treatment resulting from the use of these theories may be necessary to overcome past incidences of sexual discrimination and to provide substantial justice and fairness to afflicted female defendants.¹⁵⁸

Policy considerations actually have fostered the legal acceptability of battered woman's syndrome.¹⁵⁹ The admissibility of evidence on battered woman's syndrome is partially attributable to a growing societal awareness of the plight of abused women.¹⁶⁰ While physical retaliation by abused women has not been hailed as a cure to the problem of domestic violence,¹⁶¹ the admittance of testi-

evidence if its probative value was outweighed by considerations of undue prejudice, misleading the jury, and undue consumption of time. *See United States v. Hearst*, 412 F. Supp. 893, 895 (N.D. Cal. 1976), *aff'd*, 563 F.2d 1331 (9th Cir. 1977); *Williams*, 388 A.2d at 504.

¹⁵³ *See supra* notes 88-136 and accompanying text.

¹⁵⁴ *Cf. Giannelli, supra* note 87, at 1204 (under relevancy approach, scientific evidence treated same as other evidence and will be admitted if technique valid and results relevant). Under the relevancy approach, novel scientific evidence is treated like all other types of evidence. *See United States v. Baller*, 519 F.2d 463, 466 (4th Cir.), *cert. denied*, 423 U.S. 1019 (1975); *State v. Williams*, 388 A.2d 500, 503-04 (Me. 1978). Disagreement concerning the degree of acceptance a principle has achieved affects the weight of the evidence, and not admissibility. *See State v. Hall*, 297 N.W.2d 80, 85 (Iowa 1980).

¹⁵⁵ *See infra* notes 160-167 and accompanying text.

¹⁵⁶ *See, e.g., Gray, supra* note 50, at 49; Margolick, *Court Allows Defense to Call Experts on Battered Women*, N.Y. Times, July 25, 1984, at A1, col. 3. Gray quotes a Canadian attorney stating, "I regret that PMS is being taken seriously in legal systems anywhere, and I hope it won't be imported into our courts." Gray, *supra* note 50, at 49.

¹⁵⁷ *See supra* notes 88-130 and accompanying text.

¹⁵⁸ *See Wanrow*, 88 Wash. 2d at 240-41, 559 P.2d at 559; *Eber, supra* note 12, at 917; *Woods, supra* note 28, at 11.

¹⁵⁹ *See infra* notes 161-163 and accompanying text.

¹⁶⁰ *See Walker, Thyfault & Brown, supra* note 93, at 1; *Note, supra* note 31, at 213.

¹⁶¹ *See Note, supra* note 31, at 219.

mony on battered woman's syndrome indicates a concern that the abused woman as a criminal defendant should receive fairer treatment.¹⁶²

The acceptability of defenses based on PMS, however, has been hindered by various social and policy implications arising from such acceptance.¹⁶³ Defenses based on PMS have been criticized by many women as a retreat from equitable treatment.¹⁶⁴ Critics fear that the public will perceive all women as suffering from disorders related to menstruation, and will therefore attempt to keep women out of positions of authority and control.¹⁶⁵ Some feminists, because of the possible deleterious effects that would result from the acceptance of PMS evidence, deny the very existence of the syndrome.¹⁶⁶ However, by limiting the availability of defenses based on PMS to only those women most severely affected by the disorder, and by requiring a thorough and accurate diagnosis of the defendant as a chronic sufferer, the concerns raised by these feminists can be dispelled.¹⁶⁷ In the interest of fairness and

¹⁶² See *State v. Kelly*, 97 N.J. at 225-26, 478 A.2d at 388 (Handler, J., concurring). Expert opinions and literature increasingly have recognized battered woman's syndrome as both a contributing cause and a devastating consequence of domestic and familial violence. *Id.*; see *State v. Allery*, 101 Wash. 2d at 597, 682 P.2d at 316.

¹⁶³ See *infra* notes 165-167 and accompanying text.

¹⁶⁴ See Brozan, *supra* note 17, at C16, col. 2; Press & Clausen, *Not Guilty Because of PMS?*, 100 NEWSWEEK 111, 111 (November 8, 1982); Note, *supra* note 16, at 227. Concern has been raised that PMS and the theory that women can be biologically exculpated for their actions will be used to discriminate against women. Press & Clausen, *supra*, at 111. For years, the menstrual cycle has been a basis for sexual discrimination. Note, *supra* note 16, at 226. Some women's rights groups warn, therefore, that women must be wary of any theory fueling the public perception that women go crazy every month. *Id.*

¹⁶⁵ See Brozan, *supra* note 17, at C16, col. 2. PMS may possibly be asserted as a basis for denying women child custody. See Angier & Witzelben, *Dr. Jekyll & Ms. Hyde*, 122 READER'S DIGEST 119, 123 (Feb. 1983). In *In re H.*, a British woman was prevented from regaining custody of her child because she suffered from PMS. [Jan. 31, 1983] AA 77 of 1981 (Civ. App. 4) (available on LEXIS, Enggen library, Cases file). *But see* Tingen v. Tingen, 251 Or. 458, 460-61, 446 P.2d 185, 186-87 (1968) (mother diagnosed as having PMS awarded custody of child).

¹⁶⁶ See Chambers, *supra* note 54, at 46, col. 5; Bird, *supra* note 14, at B4, col. 4; Transcript of MacNeil-Lehrer Report at 5 (Dec. 23, 1983) (interview with Barbara Newman, Brooklyn ADA on *Santos* case). Elizabeth Holtzman, the Brooklyn district attorney, was quoted as saying that there is no scientific evidence proving the existence of a syndrome that causes women to become insane or violent in connection with their menstrual periods. Bird, *supra* note 14, at B4, col. 4.

¹⁶⁷ See Tybor, *supra* note 60, at 17, col. 5. Dr. Katharina Dalton, who has testified in several British trials involving PMS sufferers, requires detailed charting of a woman's menstrual cycle and a diary of symptoms and behavior experienced over time by the defendant before testifying for her. See *id.* It is suggested that a certification process similar to Dr. Dalton's could be used to limit the availability of the PMS defense to only those defendants

substantial justice, PMS sufferers should be entitled to enter as evidence information regarding the special physical, psychological, and behavioral characteristics that may relieve them of criminal responsibility, regardless of the serious policy concerns asserted by certain women's rights groups.¹⁶⁸

CONCLUSION

Scientific research on both PMS and battered woman's syndrome is of keen interest to the legal community because of the ramifications of these theories on the criminal liability of the sufferers of both syndromes. Novel scientific theories, however, are entitled to recognition in criminal law only if they are relevant to underlying legal principles and are grounded adequately in scientific fact. This Note has suggested, through a comparison of PMS and battered woman's syndrome, that each of these theories has satisfied the two prerequisites of legal recognition. Only conflicting social implications arising from these theories can be offered as a justification for their disparate legal treatment. Such social implications, however, place speculative and attenuated social concerns above the right of the individual defendant to a fair trial. Since it has been suggested that these theories can be used to minimize their societal impact, it would be unjust to deny a defendant a fair trial and substantial justice because of an unfounded fear that the basis of her relief from criminal liability could possibly harm broader social interests.

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properly entitled to its use.

¹⁶⁸ See Wallach & Rubin, *supra* note 13, at 238. The benefits available to the group of women who might be able to raise a defense based on PMS must be weighed against the potential setback to the women's movement caused by the possible perception that all women are violent and irrational during the premenstrual phase. Note, *supra* note 16, at 227.