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Premenstrual Syndrome As A Criminal Defense: The Need For A Medico-Legal Understanding

I. INTRODUCTION

Premenstrual Syndrome (PMS), while still controversial within the medical community, has now transgressed the legal profession. Women who are affected by the disorder are becoming more assertive in demanding the same medical and legal rights accorded those who suffer from similar diseases and defects. PMS, one of the most common disorders affecting the female population, generally is referred to as a "disease of progesterone deficiency."¹ However, because of the variety of symptoms associated with PMS and the ease of categorizing its sufferers as "neurotics," the disorder too often goes undiagnosed and untreated.² Instead of a woman's "lot" in life, PMS is a hormonal disorder worthy of understanding by both the medical and legal professions.

Not only does a need exist for greater education and awareness of PMS itself, but its appreciation must extend to the relationship between PMS and crime. If PMS is truly a factor affecting criminal behavior in women,³ the legal profession must form a better understanding of the meaning of PMS to ensure that its use as a criminal defense will not be abused. Such use of PMS would require evidence of recurrent symptoms for at least the last three premenstrual cycles prior to the alleged crime.⁴ The fate of PMS in the courts, therefore, depends in part on the fate of PMS within the scientific community.⁵ While PMS has been used successfully as a criminal defense in England, no similar United States precedent exists. As PMS becomes an important issue for women in this country, and if acceptance of the disorder increases within the medical community, American courts and legal scholars likely will face a defendant who will attempt to raise and litigate PMS as a defense to criminal conduct.

A PMS defense probably will have widespread social consequences for

1. Frank, *The Hormonal Causes of Premenstrual Tension*, 26 ARCH. NEUROL. PSYCHIATRY 1053 (1931).

2. Morton, *The Treatment of Premenstrual Tension*, 166 INT'L REC. MED. & G.P. CLINICS 505 (1953).

3. MacKinnon & MacKinnon, *Hazards of the Menstrual Cycle*, 1 BRIT. MED. J. 555 (1956).

4. K. DALTON, *ONCE A MONTH* 203 (1983).

5. Sommer, *Premenstrual Syndrome in the Courts: Are All Women On Trial?*, PSYCHOLOGY TODAY, Aug. 1984, 36, 36-38. See also W. RECKLESS & B. KAY, *THE FEMALE OFFENDER* 4-12 (1967); K. MILLET, *SEXUAL POLITICS* 26 (1970).

PMS sufferers and, indeed, for all women. The recognition of PMS by the legal profession may trigger unrest within the feminist community because the use of a female-oriented disorder as a criminal defense may serve to disqualify women as a class. Such fears are unwarranted and premature and the legal profession should not be guided by these concerns. All women do not suffer from PMS, all PMS sufferers are not necessarily likely to commit violent and criminal acts, and all women defendants are not necessarily PMS sufferers. Identification of bona fide PMS sufferers for criminal defense purposes requires discrimination within the class of women.

Part II of this Comment discusses PMS' present status in the medical and legal arenas. Part III analyzes the cases in which women have asserted PMS as a criminal defense. Part IV compares the use of PMS as a criminal defense with the established defenses of insanity, automatism, and diminished capacity. Part V examines the evidentiary requirements for admissibility of necessary expert testimony pertaining to PMS, and Part VI discusses factors which may impede the recognition of PMS as a defensive device. This Comment concludes that although the disorder should not be asserted as a complete defense of criminal conduct, PMS should be used as a factor in mitigation of culpability.

II. PMS: ITS PRESENT DIAGNOSES

Research conducted in the United States and England indicates a significant relationship between PMS and antisocial behavior.⁶ One study shows psychiatric hospital admissions doubling during menstruation⁷ while other studies indicate an increase in hospital admissions of suicidal, depressed and schizophrenic patients during their menstruation.⁸ Correlations between aggressive conduct of women inmates and the premenstrual and early menstrual phases of the menstrual cycle also have been

6. Dalton, *Cyclical Criminal Acts and PMS*, 2 LANCET 1070 (1980); Dalton, *Menstruation & Accidents*, 2 BRIT. J. 1425 (1960) [hereinafter cited as Dalton, *Accidents*]; Dalton, *Menstruation & Crime*, 2 BRIT. MED. J. 1752, 1753 (1961); Ellis & Austin, *Menstruation & Aggressive Behavior In A Correction Center for Women*, 62 J. CRIM. L.C. & P.S. 388 (1971) (N.C. CORRECTIONAL CENTER FOR WOMEN); Endicott, Halbreich, Schacht, & Nee, *Premenstrual Changes and Affective Disorders*, 43 PSYCHOSOM. MED. 519 (1981) [hereinafter cited as Endicott]; Gonzalez, *PMS: An Ancient Woe Deserving of Modern Scrutiny*, 245 J.A.M.A. 1393, 1393 (1981); Janowsky, Gorney, Castelnovo-Tedesco, & Stone, *Premenstrual Increases in Psychiatric Hospital Admission Rates*, 103 AM. J. OBSTET. & GYN. 189 (1969) [hereinafter cited as Janowsky]; Wallach & Rubin, *The Premenstrual Syndrome and Criminal Responsibility*, 19 U.C.L.A. L. REV. 209 (1971); Note, *Recent Developments, Premenstrual Syndrome*, 6 HARV. WOMEN'S L.J. 219 (1983). See also Reid v. Florida Real Estate Comm'n, 188 So. 2d 846 (Fla. Dist. Ct. App. 1966) (the defendant successfully defended license revocation proceedings as a result of a shoplifting charge by raising a defense of premenstrual tension and change of life).

7. Dalton, *Menstruation and Acute Psychiatric Illness*, 1 BRIT. MED. J. 148 (1959). See Wallach & Rubin, *supra* note 6, at 191.

8. Wallach & Rubin, *supra* note 6, at 226-28. See also Mandell-Mandell, *Suicide and the Menstrual Cycle*, 200 J.A.M.A. 792 (1967).

discovered.⁹ Further studies link PMS to automobile accidents and various criminal acts.¹⁰ Despite these findings, PMS has not been widely recognized by members of the legal profession and "until the medical profession reaches broad agreement that PMS can influence violent and criminal action, the legal profession is most likely to view the defensive use of PMS with skepticism."¹¹

A. PMS Within The Medical Community

PMS, a physiological defect,¹² knows no geographical, social, racial, or economic boundaries. The disorder affects women evenly throughout our society.¹³ However, a consensus is lacking within the medical profession as to the percentage of PMS sufferers.¹⁴ The most recent research indicates that between seventy to ninety percent of the female population experiences some symptoms of PMS with between twenty to forty percent of the same population experiencing severe symptoms.¹⁵ The figures for the incidence of the disorder fluctuate depending upon the definitional boundaries applied by the medical profession.¹⁶ For most suffer-

9. Ellis & Austin, *supra* note 6, at 388-90. A study conducted in a N.C. Correctional Center for Women indicates that hormonal products have an effect upon aggressive behavior; forty-one percent of all aggressive acts occur during the prisoner's paramenstruum. *Id.*

10. Wallach & Rubin, *supra* note 6, at 212 n.11. See also Gonzalez, *supra* note 6, at 1393; K. DALTON, *supra* note 4, at 144-48.

11. R. NORRIS, PMS: PREMENSTRUAL SYNDROME 271 (1983).

12. *Id.* at 3.

13. K. DALTON, *supra* note 4, at 1.

14. Dalton & Greene, *The Premenstrual Syndrome*, 1 BRIT. MED. J. 1007 (1953); O'Brien, *The Premenstrual Syndrome: A Review of the Present Status of Therapy*, 24 DRUGS 140, 140-41 (1982); Sutherland & Stewart, *A Critical Analysis of Premenstrual Syndrome*, 1 LANCET 1180, 1182 (1965). See also Gonzalez, *supra* note 6, at 1393 (twenty percent of all women may require treatment, and perhaps eighty-five percent of all the female population experiences symptoms of PMS).

15. R. NORRIS, *supra* note 11, at 3 (In extreme cases, the effects of PMS are so far reaching that separating the syndrome from personality may be difficult. For most women, PMS occurs as mild complaints; perhaps eighty-five percent of the menstruating population have experienced symptoms of PMS in the days preceding their menstrual period.); Reid & Yen, *Premenstrual Syndrome*, 139 AM. J. OBSTET. & GYNECOL. 85, 86 (1981). See also Perr, *Medical, Psychiatric, and Legal Aspects of Premenstrual Tension*, 115 AM. J. PSYCHIATRY 211, 211-12 (1958).

16. The percentage of women sufferers diminishes when the definition is limited to identification of severe symptoms. Seminar with Dr. Katharina Dalton, Director of the PMS Clinic, London, England (Sept. 11, 1984) (the seminar was held at the Governor's Inn, Durham, N.C., and was sponsored by the National PMS Society of Durham in conjunction with Duke University) [hereinafter cited as Seminar]. Dalton indicates that PMS is limited to three conditions: (a) presence in each of the three previous menstrual cycles; (b) symptoms severe enough to require medical advice and treatment; and (c) occurrence at specific phases of the menstrual cycle confirmed by calendar to the premenstrual, or paramenstruum days. *Id.* The basic monitoring routine to follow requires tracking one's weight, temperature, and physical, psychological, and emotional symptoms over a two to three month period. R. NORRIS, *supra* note 11, at 188. See generally Dalton & Greene, *supra* note 14; Dalton, *Similarity of Symptomatology of PMS and Toxemia of Pregnancy and Their Response To Progesterone*, 1954 BRIT. MED. J. 1071 (1954); Brozan, *PMS: A Complex Issue*, N.Y. Times, July 12, 1982, at C16, col. 2; Berlins & Smith, *Should PMS Be A Woman's All Purpose Excuse?*, The Times (London), Nov. 12, 1981, at 12, col. 1.

ers, PMS elicits mild complaints, including irritability, headaches, bloating, and tension, which signal that the menstrual flow will commence at any time within a few days.¹⁷ Severe sufferers complain of more serious symptoms. For these women, the days prior to menstruation are stressful as the symptoms intensify, rendering many victims unable to control and cope with their professional and personal responsibilities.¹⁸

PMS is defined by Dr. Katharina Dalton¹⁹ as "the presence of recurrent symptoms before menstruation,²⁰ the paramenstruum phase,²¹ with the complete absence of symptoms after the onset of menstrual flow".²² The medical profession, however, has not reached a consensus in defining PMS.²³ Tension exists amongst the members of the medical profession with respect to setting forth definitional guidelines,²⁴ with one researcher stating that any such attempt to reach a consensus within the medical profession would be a "nightmare."²⁵ Some researchers and doctors

17. R. NORRIS, *supra* note 11, at 3.

18. *Id.* See also Abramowitz, Baker & Fleisher, *Onset of Depressive Psychiatric Crises and the Menstrual Cycle*, 139 AM. J. PSYCHIATRY 475 (1982).

19. Dalton, English pioneer of and leading authority on PMS, is herself a sufferer of the disorder. She began researching PMS in 1953. As director of the PMS Clinic at London's University College Hospital, Dalton works closely with directors of PMS clinics throughout the U.S. and has been an expert witness in several criminal cases wherein PMS was used as a criminal defense. Telephone interview with Lindsay Leckie, President of the National PMS Society, Durham, N.C. (Sept. 1984) [hereinafter cited as Telephone Interview].

20. "[Menstruation] recurs in the great majority of cases with regularity, most commonly at intervals of twenty-eight days or thirty days, and less often with intervals of twenty-one or twenty-seven days . . ." BLACK'S MEDICAL DICTIONARY 579 (1981).

21. The last four days before and the first four days of menstruation, the period in which premenstrual symptoms are present is commonly referred to as the "paramenstruum." See d'Orban & Dalton, *Violent Crime and the Menstrual Cycle*, 10 PSYCHOLOGICAL MED. 353, 354 (1980).

22. K. DALTON, *supra* note 4, at 203. Severe symptoms appear several days before the onset of menstruation and reach peak intensity during the last days before the actual menstrual flow begins; the most common symptoms include headache, breast swelling, abdominal bloating, edema of the extremities, fatigue, increased thirst and appetite, acne, and constipation. Reid & Yen, *supra* note 15, at 85-86.

23. PMS has been further defined as "any condition of emotional or physical features which occur(s) cyclically in a female before menstruation and which regress(es) and disappear(s) during menstruation . . ." Sutherland & Stewart, *supra* note 14, at 1182; Reid & Yen, *supra* note 15, at 86. "PMS is a complex disorder apparently linked to the cyclic activity of the hypothalamic pituitary ovarian axis." R. NORRIS, *supra* note 11, at 3. Further disagreement within the medical profession is evidenced by yet another definition of PMS that stresses "changes in mood, behavior, and physical symptoms in relation to the menstrual cycle with an increase in intensity with the onset of menstruation." Sampson & Prescott, *The Assessment of the Symptoms of PMS and Their Responses to Therapy*, 138 BRIT. J. PSYCHIATRY 399, 399 (1981).

24. Taylor & Dalton, *Premenstrual Syndrome: A New Criminal Defense?*, 19 CAL. W.L. REV. 269 (1983); Wallach & Rubin, *supra* note 6, at 236; Note, *Premenstrual Stress Syndrome As A Defense in Criminal Cases*, 1983 DUKE L.J. 176 [hereinafter cited as Note, *Premenstrual Stress Syndrome*]; Note, *Premenstrual Syndrome: A Criminal Defense*, 59 NOTRE DAME L. REV. 253 (1983) [hereinafter cited as *Premenstrual Syndrome*]; Note, *supra* note 6, at 221.

25. *Premenstrual Tension Defense Prompts Debate*, Int'l Herald Trib., Dec. 30, 1981, at 1, col. 1 (Comment by London psychiatrist Dr. Anthony Clare).

completely deny the existence of PMS²⁶ although the disorder was first recognized in medical literature in 1931.²⁷

PMS should be distinguished from other forms of menstrual distress such as premenstrual tension,²⁸ which is only one of many components of PMS.²⁹ Menstrual distress includes symptoms present during the menstrual cycle which intensify before or during menstruation.³⁰ These menstrual distress symptoms may be intermittent or continual throughout the menstrual cycle.³¹ However, PMS requires not only the presence of symptoms related to menstruation, but also a complete absence of these symptoms at any other time of the menstrual cycle.³² A complete absence of symptoms after menstruation is crucial to the diagnosis of PMS.³³

The cyclical nature of PMS lends itself to accurate documentation. A PMS diagnosis depends on timing and an accurate charting of symptoms.³⁴ Dalton suggests that an accurate diagnosis is possible by carefully examining at least three previous menstrual cycles.³⁵ Because PMS has been associated with a deficiency of progesterone in the blood, researchers have hypothesized that PMS symptoms will occur only in the second half of the menstrual cycle when adequate amounts of progesterone are required.³⁶ After menstruation and until ovulation, progesterone is not present in the blood; therefore, PMS symptoms will not occur after the menstrual flow begins.³⁷

The symptoms of PMS encompass various body systems.³⁸ Symptoms,

26. Jeanne Brooks-Gunn, a psychiatrist with Educational Testing Services in Princeton, N.J., is quoted as saying, "There is no such thing as premenstrual syndrome." *Arizona Republic*, Oct. 24, 1982, at D1, col. 4. *But see* Abramowitz, *supra* note 18, at 475.

27. Tybor, *Women on Trial: New Defense*, Nat'l L.J., Feb. 15, 1982, at 12, col. 1.

28. TAYLOR & DALTON, *supra* note 24, at 271.

29. R. NORRIS, *supra* note 11, at 24. Several subcategories of premenstrual tension that should be distinguished from PMS include the major depressive syndrome, the impulsive syndrome, the water retention syndrome, and the general discomfort syndrome. Endicott, *supra* note 6, at 519.

30. Dalton, *supra* note 4, at 12-13.

31. *Id.*

32. *Id.*

33. *Id.* See also Seminar, *supra* note 16.

34. R. NORRIS, *supra* note 11, at 3-24; K. DALTON, *supra* note 4, at 13-17. See also Taylor & Dalton, *supra* note 24, at 272.

35. K. DALTON, *supra* note 4, at 212.

36. *Id.*

37. *Id.*

38. Dalton suggests that an accurate diagnosis of PMS involves examination in many fields of medicine such as gynecology, endocrinology, psychiatry, neurology, and allergy. Dalton indicates that accurate diagnosis of PMS simply is not a high priority within the medical profession and that many doctors view PMS as a normal part of a woman's burden. An increased emphasis in training at the medical school level and an increase in the number of PMS clinics could lessen this shortsightedness. K. DALTON, *THE PREMENSTRUAL SYNDROME AND PROGESTERONE THERAPY* 33 (1977). Dalton has also emphasized that problems in accurate diagnosis of PMS are complicated by the fact that "no tissues in the body are exempt from the cyclical changes of the menstrual cycle" *Id.* at 20; R. NORRIS, *supra* note 11, at 21.

other than those earlier stated,³⁹ include depression, lethargy, food cravings, constipation, and asthma.⁴⁰ Severe symptoms peak in intensity before the onset of menstruation, or in the paramenstruum phase of the fertility cycle.⁴¹ Alcohol is more intoxicating during the paramenstruum,⁴² and stress is associated with an increase in symptom intensity.⁴³ The symptoms abruptly end at the onset of the menstrual flow, a process which has been described as similar to a "cloud lifting."⁴⁴ PMS tends to begin at puberty, after pregnancy, after termination of the use of the birth control pill, or after an episode of amenorrhea (a phase of no menstruation).⁴⁵ After an episode of amenorrhea, symptoms tend to increase in severity.⁴⁶

Several medications and treatments have been used in cases of PMS. However, medications such as diuretics, oral contraceptives, tranquilizers, antidepressants, lithium, vitamins, and psychotherapy do not alone, or in combination, eliminate the PMS problem.⁴⁷ While attention to diet, reduction of anxiety, and strenuous exercise help all PMS sufferers, the mild or moderate sufferers find that only minor changes in routine are effective treatments.⁴⁸ For severe PMS sufferers, a simple change in lifestyle alone will not relieve their suffering.⁴⁹ Presently, progesterone therapy is the most effective treatment method for severe cases of PMS.⁵⁰ This treatment method seems to alleviate the greatest number of symptoms with the fewest side effects.⁵¹ Usually, progesterone is administered

39. See *supra* text accompanying notes 17-18.

40. K. DALTON, THE LEGAL IMPLICATIONS OF PMS 1 (1982); Reid & Yen, *supra* note 15, at 86. In addition, other symptoms include epilepsy, migraine headaches, dizziness, hives, hoarseness, sore throat, sinusitis, rhinitis, cystitis, child abuse, alcohol abuse, assaults, panic attacks, psychotic episodes, and suicidal attempts. R. NORRIS, *supra* note 11, at 4.

41. Reid & Yen, *supra* note 15, at 86.

42. K. DALTON, *supra* note 4, at 24, 32, 49, 58, 112, 166-70, 182-83.

43. Reid & Yen, *supra* note 15, at 86-87.

44. K. DALTON, *supra* note 4, at 22.

45. R. NORRIS, *supra* note 11, at 10.

46. *Id.* at 11.

47. R. NORRIS, *supra* note 11, at 15.

48. *Id.*

49. *Id.*

50. Dalton uses natural progesterone injections that are administered intramuscular; many women cannot tolerate this form of treatment because the injections are extremely painful. Other forms of treatment include ingestion of synthetic progesterone such as is present in the birth control pill. The synthetic progesterones are called "progestogens." Seminar, *supra* note 16. Progesterone was first used successfully for treatment of PMS in 1934. R. NORRIS, *supra* note 11, at 245-46.

51. This emphasis on the difference of opinion with regard to the treatment of PMS is relevant in a legal sense because these conflicts contribute to the disorder's "general acceptability within the medical community." Sletton & Gershon, *The PMS: A Discussion of its Pathophysiology & Treatment with Lithium Ions*, 7 COMPREHENSIVE PSYCHIATRY 197 (1966). However, research other than that conducted by Dalton supports the use of progesterone therapy. Whitehead, Townsend, Gill, Collins & Campbell, *Absorption & Metabolism of Oral Progesterone*, 281 BRIT. MED. J. 825 (1980) [hereinafter cited as Whitehead]. Latest research at the University of California at San Diego indicates the possibility of PMS treatment with a drug called "gonadotropin releasing hormone agonist."

approximately two days before the expected onset of the patient's symptoms.⁵² Neither significant side effects of progesterone, nor any adverse reaction between progesterone and other drugs has been reported, and research indicates that an overdose of progesterone would be almost impossible.⁵³ While progesterone therapy is widely accepted in England,⁵⁴ this treatment has not received widespread acceptance in the United States.⁵⁵ The Food and Drug Administration has yet to approve progesterone suppositories of more than fifty milligrams⁵⁶ while many doctors are reluctant to use medications and treatments of which they have not yet been persuaded as to their safety and effectiveness.

B. PMS And The Grudging Legal Community

Traditionally, the willingness on the part of the legal profession to accept certain disorders as defenses to certain crimes is due to the acceptance of these disorders by the medical profession.⁵⁷ Why the medical profession as a whole is indecisive regarding PMS is speculative; lack of

This drug works to overstimulate the pituitary gland so that the ovaries cease making estrogen. No indication of possible harmful side effects from the drug has been found. *Researchers Testing Drug That Appears To Help Treat Premenstrual Syndrome*, Raleigh News & Observer, Nov. 22, 1984, at A1, col. 3.

52. Progesterone treatment given intravenously is extremely painful, and many women cannot withstand the pain. This method, however, allows the progesterone to reach the bloodstream directly; hence, the dosages tend to be smaller. Progesterone treatment by suppository form allows the progesterone to be absorbed through the mucus membranes of the vagina or the rectum. With this method, however, not all of the progesterone is absorbed, and much of its effectiveness is lost in the absorption process. Progesterone by suppository form is therefore proscribed at levels of 200 milligrams to 400 milligrams. Despite the Food and Drug Administration's delay in approving massive dosages of progesterone by suppository form (as is the common practice in England), the suppository form of treatment still is the most effective method in which to raise the blood level of progesterone significantly. See Seminar, *supra* note 16. See also R. NORRIS, *supra* note 11, at 249.

53. R. NORRIS, *supra* note 11, at 246. British endocrinologist, Dr. Charles Lloyd of the Worcester Foundation for Experimental Biology stated: "If I were looking for an innocuous substance to take, it would be progesterone. There are no side effects, except in some cases, there is a reduction in the sex drive." Dalton, *Comparative Trials of New Oral Progesterone Compounds in Treatment of PMS*, 59 BRIT. MED. J. 1307-09 (1959).

54. In 1958, the English government approved the use of progesterone for PMS treatment and indicated that it was "a reasonable and necessary treatment for PMS." K. DALTON, *supra* note 38, at 1.

55. Injectable progesterone in oil is commonly produced in the United States but progesterone suppositories are not produced in this country; in addition, massive dosages have not been approved. FDA approval of massive dosages of progesterone appears to depend on the research and outcome of studies conducted at Duke University in conjunction with L. D. Collins, Ltd., a British manufacturer of progesterone suppositories. See Seminar, *supra* note 16. See also R. NORRIS, *supra* note 11, at 250-51. At this point, no evidence that progesterone carries any characteristics of a carcinogen has been found. K. DALTON, *supra* note 4, at 184.

56. See Seminar, *supra* note 16. See also R. NORRIS, *supra* note 11, at 252. According to the President of the National PMS Society, Lindsay Leckie, the FDA has approved research into the use of progesterone therapy for PMS to be conducted by the National Institute of Health. Telephone interview, *supra* note 19.

57. Some countries have accepted certain defenses to criminal acts such as automatism, epilepsy, and diabetic hypoglycemia. See *People v. Grant*, 46 Ill. App. 3d 125, 360 N.E.2d 809 (1977),

funding for research may be one explanation. Certainly, more research has been done in the areas of epilepsy and diabetic hypoglycemia than in the area of PMS. The medical profession has established the definitional boundaries of these disorders, and the legal profession has not been reluctant to accept them as potential criminal defenses. Because of the preponderance of PMS in this country, our courts likely will confront the difficult task of deciding whether a defendant who suffered from PMS at the time the criminal act was committed should be held any more responsible for her behavior than any sufferer of a form of insanity, automatism, or diminished capacity. Traditionally, defendants have been held responsible for their actions "unless they can prove that a disability prevented them from conforming to society's accepted standards of behavior."⁵⁸ The troublesome issue, therefore, is whether the courts should include PMS in the category of diseases which impair and prevent a criminal defendant from the use of rational faculties such that the defendant should be totally or partially relieved of any responsibility for her actions.⁵⁹ Increased publicity and recognition of PMS, both in England and the United States, may prompt more criminal defendants to assert the defense of PMS. France now recognizes the existence of PMS as a complete defense to criminal acts by recognizing PMS as a form of legal insanity.⁶⁰

Because the cyclical nature of PMS lends itself to careful documentation, the disorder can be diagnosed with little difficulty. From a legal point of view, the severe, bona fide sufferer of PMS needs to be accurately identified.⁶¹ Many fear, however, that the use of PMS as a criminal defense may open up a "Pandora's Box" with the disorder becoming a universal defense for females. Certain feminist leaders believe that biology should not be an excuse for criminal behavior⁶² while others fear that the recognition of PMS by the legal profession will substantiate views of male superiority and prompt job discrimination.⁶³ To allay such fears, the diagnosis of PMS should be substantiated with incontrovertible evidence to ensure that a PMS plea will not be abused.⁶⁴

rev'd on related grounds, 71 Ill. 2d 551, 377 N.E.2d 4 (1978); *Regina v. Quick*, 3 All E.R. 347 (1973); *Dalton, Accidents*, *supra* note 6.

58. R. NORRIS, *supra* note 11, at 270-71.

59. *Id.*

60. Taylor & Dalton, *supra* note 6, at 279. See generally Gonzalez, *supra* note 6, at 1395; Oleck, *Legal Aspects of PMS*, 166 INT'L REC. MED. 492 (1953).

61. K. DALTON, *supra* note 4, at 191-96; see also R. NORRIS, *supra* note 11, at 270-74.

62. R. NORRIS, *supra* note 11, at 272-75; Mehren, *The Premenstrual Syndrome Debate*, L.A. Times, May 13, 1982, at V1, col. 5. See also Bermel, *An Unsettling Criminal Defense: Premenstrual Syndrome Does Women a Diservice?*, L.A. Times, Jan. 11, 1983, at X17, col. 3; Nat'l L.J., May 10, 1982, at 5, col. 2.

63. Note, *supra* note 6, at 226-27.

64. R. NORRIS, *supra* note 11, at 276; Seminar, *supra* note 16. Dr. Dalton indicated that the law should require more than a mere statement that a woman was in her paramenstruum at the time

Widespread recognition within the legal and medical professions will be an uphill battle. Until the medical profession firmly asserts and establishes by scientifically acceptable methods that PMS can influence criminal and violent behavior, the legal profession may justifiably remain indifferent to this disorder. Those researchers who have dedicated much time and energy studying the disorder accept and specifically define PMS. No reasonable assumption can be made that widespread consensus within the medical profession concerning the cause, definition, and treatment of PMS will ever be reached. The topic has become one more of political concern rather than the recipient of serious debate by the medical profession at large. For this reason, the legal profession may be hasty in disregarding the thorough research and findings of those members of the medical profession who have managed to keep abreast of current findings in the area of PMS. Meanwhile, numerous PMS sufferers may be punished for acts over which they had no control with punishment continuing to be imposed without regard for their disability. The medical profession is not in the business of ensuring that justice be done; this task is left to the legal profession. Therefore, the legal profession somehow needs to incorporate the PMS theory in the criminal law to avoid any needless abuse of PMS defendants.

A PMS defense could be utilized in several situations. PMS could be utilized as a type of insanity defense which would afford the defendant an affirmative defense to the criminal charge. However, the PMS defendant would likely face institutionalization. At the other extreme, PMS could be rejected as a criminal defense, but this would tend to stigmatize and categorize PMS defendants as culpable individuals and disregard their disability.⁶⁵ A reasonable compromise would be using PMS as a factor in mitigation of the charged offense. Such a use, in appropriate cases, would not totally relieve the defendant of criminal responsibility, but would give the court the power and discretion to reduce the sentence and impose conditions for treatment and observation.⁶⁶ Such a defense will most likely be raised by an alert, courageous, and accomplished attorney versed not only in the area of criminal law, but in the field of legal profes-

her crime was committed. Regular symptoms that have been accurately charted over a three-month period are necessary for accurate diagnosis. She also stressed the fact that the United States needs more specialized training in the area of PMS and more clinics to help reduce the number of undiagnosed cases of PMS. During her presentation, she emphasized that more time and money will be needed to ascertain whether PMS is one or a combination of several disorders. Dr. Dalton characterized the typical profile of a PMS defendant as one who usually acts alone; the crime is not premeditated; usually no clear motive is ascertainable for the crime, and no clear plan for escape exists. *Id.* See also R. NORRIS, *supra* note 11, at 277.

65. See generally Taylor & Dalton, *supra* note 6, at 284. Note, *Premenstrual Syndrome*, *supra* note 6, at 269.

66. R. NORRIS, *supra* note 11, at 279-80.

sional responsibility as well.⁶⁷

III. THE PMS DEFENDANT IN THE COURTROOM

A. *The English Cases*

In a recent English case, *Regina v. Craddock*,⁶⁸ PMS was argued and used as a mitigating factor in sentencing.⁶⁹ The thirty-year-old defendant had been convicted of several minor criminal offenses and had attempted suicide on several occasions between the years of 1970 and 1979.⁷⁰ In 1979, while working in an English pub, Craddock stabbed a fellow barmaid to death⁷¹ and was convicted by a jury the following year.⁷² However, during Craddock's pre-trial prison term, Dr. Katharina Dalton diagnosed the defendant as a PMS sufferer and treated her with massive doses of progesterone.⁷³ Dalton testified that the defendant had exhibited PMS symptoms in at least three premenstrual cycles prior to her crime. Her evidence was well documented and submitted for the jury's consideration. Because evidence was presented on the issue of diminished capacity,⁷⁴ Craddock was convicted not of murder, but of manslaughter. Dalton's expert testimony in this case may have influenced the jury to return a guilty verdict for a lesser offense. Ultimately, the defendant was released and placed on probation for three years with the stipulation that she continue to receive progesterone treatments.⁷⁵

After this trial, the defendant changed her name to Sandra Smith.⁷⁶ All had been going well for Smith until she began receiving reduced dos-

67. The American Bar Association Model Rule 3.1 states the following: "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. . ." MODEL RULES OF PROFESSIONAL CONDUCT 3.1. See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR7-102(A)(1); ethical considerations, EC 6-2, EC 7-4, EC 7-22, EC 8-1, EC 8-2, and EC 8-9. The role of counsel in representing a PMS defendant should not be taken lightly. Possibly a PMS defendant may not know of her disorder, and she may be reluctant to speak with her attorney concerning her menstrual disorders; therefore, attorneys should take the initiative in raising all reasonable defenses on behalf of the client.

68. *Regina v. Craddock* (1981) 1 C.L. 49.

69. *Id.*

70. R. NORRIS, *supra* note 11, at 269; see also Note, *Premenstrual Syndrome*, *supra* note 24, at 262.

71. R. NORRIS, *supra* note 11, at 269.

72. *Id.* at 269-70 (Craddock was convicted of a lesser charge of manslaughter).

73. *Id.*

74. Diminished responsibility is a statutory mitigation in England which grants the judge discretion in sentencing a defendant charged with murder who has been affected by an abnormality of the mind arising from arrested development, inherent causes, disease or injury, and which results in substantial impairment of mental responsibility. G. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 622-23 (1978).

75. R. NORRIS, *supra* note 11, at 269.

76. *Regina v. Smith*, 1/A/82 at ¶ 7 (C.A. Crim. Div. Apr. 27, 1982). See also Appellant's Perfected Grounds of Appeal at 2, *Regina v. Smith*, (1982) Crim. L.R. 531 (C.A.).

ages of progesterone injections.⁷⁷ In 1981, she threatened to kill a police officer with a knife.⁷⁸ Smith was charged with threatening to kill a police officer and carrying an offensive weapon in public without authority and was found guilty on all counts.⁷⁹ Smith was ultimately given three-years probation because PMS again was raised successfully as a mitigating factor.⁸⁰

Shortly after the *Smith* case, PMS was raised as a mitigating factor in the unreported case of *Regina v. English*.⁸¹ In *English*, the thirty-seven year old defendant, following an extended argument, deliberately drove her car towards the victim, pinning him to a street lamp.⁸² The defendant was charged with murder,⁸³ but with evidence that she had suffered from PMS for fourteen years prior to the incident, English pled guilty to a reduced charge of manslaughter.⁸⁴ The court placed her on twelve-months probation and suspended her driving privilege for one year.⁸⁵

B. *The American Case*

The first attempted use of PMS as a criminal defense in the United States was in an unreported New York case, *People v. Santos*.⁸⁶ The defendant was charged with first degree assault against her infant daughter.⁸⁷ At the pre-trial hearing, the defendant alleged PMS as a complete defense⁸⁸ while the State indicated that "no basis for the use of a PMS defense existed."⁸⁹ Although PMS was raised at the pre-trial hearing, the defendant's attorney submitted no information that her client had PMS or had experienced PMS episodes in previous menstrual cycles. The defendant's attorney further failed to submit evidence that the de-

77. Brush, *The Possible Mechanisms Causing The Premenstrual Tension Syndrome*, 4 CURRENT MED. RESEARCH OPIN. 9, 12 (Supp. 1977). See also R. NORRIS, *supra* note 11, at 269.

78. Transcript of Official Shorthand Notes at 9-10, *Regina v. Smith* (1982) Crim. L.R. 531 (C.A.).

79. *Id.*

80. *Id.* Smith had the same attorney on appeal where her sentence of three years probation was sustained. Her attorney, however, argued the substantive defense of uncontrollable impulse in favor of her acquittal. The English court, however, stuck to its mitigation theory as the court sought to protect society as well as the needs of the individual defendant. *Id.*

81. Tybor, *supra* note 27, at 1. This case was decided by the Norwich Crown Court on November 10, 1981. See also Bennett, *Premenstrual Tension: Excuse or Reason?*, Police Rev., Jan. 29, 1982, at 168; R. NORRIS, *supra* note 11, at 280.

82. Note, *Premenstrual Syndrome*, *supra* note 24, at 261. Bennett, *supra* note 81, at 168.

83. *Id.*

84. *Id.*

85. Mehren, *supra* note 62, at 1, col. 3.

86. *Santos*, No. 1K046299 (N.Y. Crim. Ct., Nov. 3, 1982); see also Bird, *Defense Linked to Menstruation Dropped in Case*, N.Y. Times, Nov. 4, 1982, at B4, col. 4; Chambers, *Menstrual Stresses as a Legal Defense*, N.Y. Times, May 29, 1982, at 46, col. 5.

87. The original charges were assault and endangering the welfare of a child, both of which were felonies. Note, *Premenstrual Syndrome*, *supra* note 24, at 253.

88. Berreby, *PMS Case Ends With Guilty Plea*, Nat'l L.J., Nov. 15, 1982, at 36, col. 1.

89. R. NORRIS, *supra* note 11, at 278.

fendant had ever been treated for recurring cyclical occurrences of PMS.⁹⁰ One can only speculate as to whether Santos actually suffered from PMS at the time of her crime. The case resulted in a plea bargain; the defense attorney, therefore, had no opportunity to present evidence of the defendant's PMS condition.

The *Santos* case was burdensome from the start. In interviews the defendant was quoted as saying that "PMS [is] not my defense . . . but it's my lawyer's My nerves are not that bad that I'm just going to beat up on my kids because my period comes."⁹¹ The defendant, therefore, did little to aid her own cause. Either the defendant did not understand and have knowledge of her condition, or her attorney may have hastily attempted to use a PMS defense.⁹² The defendant's attorney ultimately withdrew the PMS defense after lengthy negotiations in exchange for the prosecutor's promise to drop felony charges whereby the defendant pled guilty to a lesser included offense of harrasment.⁹³ The defendant was given a conditional discharge with the stipulation that she participate in a counselling program. Santos received neither an active sentence, probation, nor a fine; however, she did lose custody of her child.⁹⁴ The defendant's attorney later stated that "the fact the felony charges were all dropped was a testament to the validity of the defense My hope is that in the future, women will be able to recognize and receive appropriate treatment free of social stigma or ill-conceived fear of economic reprisal."⁹⁵ In contrast, the prosecutor indicated that "the withdrawal of the PMS defense . . . [was] a signal that PMS is a defense without merit."⁹⁶

Because *Santos* ended in a plea, the merits of a PMS defense were not heard. Although the defense went untested at trial, Judge Donald Jacobi suggested that "since psychological disturbances are admissible as evidence relating to criminal intent, physiological disturbances, such as PMS, might likewise be admitted."⁹⁷ To date, no United States prece-

90. *Id.* at 278-80.

91. *Id.* at 278.

92. Misunderstanding on the part of the defendant was not the only problem with the *Santos* case. The case was postponed because of a local Legal Aide strike; this strike may have led to a mutual decision to settle the case. Benson, *Letters to the Editor*, N.Y. Times, Nov. 15, 1982, at 18, col. 4.

93. *Id.*

94. *Id.*

95. "The fact that the initial charges were dropped is a testament to its validity, and it may have encouraged the early disposition of the case." Clausen, *Not Guilty Because of PMS?*, Newsweek, Nov. 8, 1982, at 111. The pretrial motion to dismiss was denied without prejudice, but the defendant's attorney indicated that she would argue PMS as a complete defense if the case proceeded to trial. *Id.*

96. R. NORRIS, *supra* note 11, at 278-79.

97. Berreby, *supra* note 88, at 36, col. 1.

dent on this novel defense exists.⁹⁸

As evidenced by *Craddock*,⁹⁹ *Smith*,¹⁰⁰ and *English*,¹⁰¹ PMS may be more widely accepted in England; consequently, juror acceptance of expert testimony with respect to PMS may be less of an obstacle in England than in the United States. The British medical community, as a result of its own good faith research and study of PMS, may accept the notion of PMS as a bona fide medical disorder more than the American medical community. At a minimum, the PMS topic is worthy of detailed study and research in the United States. After sincere and independent studies are conducted, the American medical community will be free to accept or reject the validity of PMS; however, a total rejection of the results of detailed research in England and should not be tolerated.¹⁰²

III. ALLEGING AND PROVING A PMS DEFENSE

A crime consists of both an act, or omission, and a requisite mental state.¹⁰³ An act, or *actus reus*, differs with each criminal offense. Generally, *actus reus* is defined as "voluntary bodily movement."¹⁰⁴ Without a voluntary act, no crime is committed."¹⁰⁵ The mental element of the crime, or *mens rea*, may be general or specific.¹⁰⁶ A defense raised by a criminal defendant serves to either nullify or mitigate the specific mental

98. Premenstrual symptoms have been discussed in several United States civil cases. Note, *Premenstrual Syndrome*, *supra* note 24, at 253 n.4; see, e.g., *Hoffman-LaRoche v. Kleindienst*, 478 F.2d 1 (3d Cir. 1973) (review of a federal order to control distribution of drugs aimed at relieving PMS); *Crockett v. Cohen*, 299 F. Supp. 739 (W.D. Va. 1969) (review of HEW discussion disallowing disability benefits to a woman suffering from PMS); *Reid v. Florida Real Estate Comm'n*, 188 So. 2d 846 (Fla. Dist. Ct. App. 1966) (reversing Real Estates Commission order which suspended broker's license of a woman who had been arrested for shoplifting while suffering from PMS); *Edwards v. Ford*, 69 Ga. App. 578, 26 S.E.2d 306 (1943) (wrongful death action in which defense attributed driver's unconsciousness to PMS); *Tingen v. Tingen*, 251 Or. 438, 446 P.2d 185 (1968) (child custody action in which evidence of PMS symptoms was introduced regarding the mother's competency).

99. *Craddock*, (1981) 1 C.L. 49. See also Tybor, *supra* note 27, at 1, col. 1; Mehren, *supra* note 62, at 1, col. 5.

100. *Smith*, (1982) Crim. L.R. 531 (C.A.).

101. *English*, an unreported criminal case, Norwich Crown Court, Nov. 10, 1981. See also R. NORRIS, *supra* note 11, at 280.

102. If the medical profession fails to meet its respectable research burden, perhaps the legal profession should not be so reluctant in taking the initiative to ensure that PMS sufferers will not be needlessly ignored and abused by the legal system.

103. W. LAFAVE & A. SCOTT, CRIMINAL LAW §§ 191-192 (1978).

104. *Id.* at 338.

105. Black's Law Dictionary 122 (rev. 5th ed. 1979). See also *People v. Freeman*, 61 Cal. App. 2d 110, 142 P.2d 435 (1943); W. LAFAVE & A. SCOTT, *supra* note 103, § 44 at 337 n.44; GIFIS LAW DICTIONARY 6 (1975). "A voluntary act or omission is required for every offense. Voluntary act does not include a reflex or convulsion, a bodily movement that otherwise is not a product of the effort of determination of the actor, either conscious or habitual." W. LAFAVE & A. SCOTT, *supra* note 103, § 44 at 337-38.

106. Some crimes, called strict liability crimes, do not require any specific *mens rea*. "*Mens rea*" is the term used for the requisite mental state required for a particular crime. GIFIS, *supra* note 105, at 127.

state required for conviction of a particular crime.¹⁰⁷

A. Comparing Established Defenses

1. Legal Insanity

A criminal defendant may attempt to use PMS as a type of insanity defense.¹⁰⁸ The most widely used test for insanity in American jurisdictions is the *M'Naghten* test.¹⁰⁹ The test has been stated as follows:

To establish a defense on the ground of insanity, it must be clearly proved that at the time of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong.¹¹⁰

"A literal reading of the *M'Naghten* test indicates that insanity is not a behavioral disorder but rather a cognitive disorder."¹¹¹ The law recognizes that certain persons are limited in their reasoning ability.¹¹² Consequently, legal insanity has been made a substantive defense to criminal conduct.¹¹³ For a defendant to successfully use the insanity defense, all of the elements of the test must be satisfied. Hence, the defendant must show that she suffers from a mental disease or defect, and that a causal nexus exists between the mental disease or defect and the criminal conduct.¹¹⁴ While the burden of persuasion on the issue of insanity rests with the prosecution in approximately half of the American jurisdictions, other jurisdictions place the burden of persuasion on the defendant.¹¹⁵

107. Insanity is defined as "not mentally responsible." In criminal law, insanity, by whatever test, may be said to be that degree or quality of mental disorder which relieves one of the criminal responsibility for his actions. GIFIS, *supra* note 105, at 106.

108. Taylor & Dalton, *supra* note 24, at 279.

109. *M'Naghten's Case*, 10 Clark & F. 200, 8 Eng. Rep. 718 (1843). "The test of mental responsibility is the capacity of the defendant to distinguish between right and wrong at the time and in respect to the matter under investigation. The test is not the irresistible impulse test; rather it is the capacity to distinguish right from wrong." W. LAFAVE & A. SCOTT, *supra* note 103, § 37 at 275. See also Moore, *M'Naghten is Dead, Or Is It?*, 3 HOUSTON L. REV. 58, 74 (1965). A few jurisdictions have totally rejected the *M'Naghten* test: *Wade v. United States*, 426 F.2d 64 (9th Cir. 1970); *Blake v. United States*, 407 F.2d 908 (5th Cir. 1969); *United States v. Smith*, 404 F.2d 720 (6th Cir. 1968); *United States v. Chandler*, 393 F.2d 920 (4th Cir. 1968); *United States v. Shapiro*, 383 F.2d 680 (7th Cir. 1967); *Pope v. United States*, 372 F.2d 710 (8th Cir. 1967); *United States v. Freeman*, 357 F.2d 606 (2d Cir. 1966); *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954).

110. *M'Naghten's Case*, 10 Clark & F. at 211, 8 Eng. Rep. at 722.

111. W. LAFAVE & A. SCOTT, *supra* note 103, § 37 at 275. See also Taylor & Dalton, *supra* note 24, at 279.

112. H. HART, PUNISHMENT AND RESPONSIBILITY 28, 35 (1968). See also *United States v. Brawner*, 471 F.2d 969, 995 (D.C. Cir. 1972).

113. W. LAFAVE & A. SCOTT, *supra* note 103, § 37 at 275-76.

114. *Id.* §§ 37-38.

115. W. LAFAVE & A. SCOTT, *supra* note 103, § 40 at 313-15. See also M. SMITH, NORTH CAROLINA CRIMES SUPPLEMENT 18 (1981). In North Carolina, "a defendant is presumed sane and the burden is on the defendant to prove to the satisfaction of the jury that he or she was insane at the time of the act. As a result, uncontradicted evidence of a defendant's insanity does not entitle a defendant to a directed verdict of not guilty by reason of insanity." *Id.* See also S. CLARKE, M.

This latter shift is due primarily to a presumption of "sanity."¹¹⁶ The majority rule with respect to the quantum of evidence required for the defendant to meet his burden is that "it must raise a reasonable doubt of the defendant's mental responsibility for the act."¹¹⁷ In minority jurisdictions, only a "scintilla" of evidence or "some" evidence of the defendant's insanity will satisfy this burden.¹¹⁸

Under the *M'Naghten* test, a PMS sufferer is unlikely to be successful in meeting the burden required to establish a PMS-type insanity defense. PMS sufferers have not been shown to have any psychosis¹¹⁹ nor have they been shown to have the inability to appreciate the nature and quality of their criminal acts or to understand whether their acts are right or wrong.¹²⁰ Because PMS is a physiological problem, not a disease of the mind,¹²¹ PMS fails to meet the requirements for the *M'Naghten* test for insanity.

The "product" rule for insanity states that "an accused is not criminally responsible if his/her unlawful act was the product of mental disease or defect."¹²² Known as the *Durham*¹²³ rule, this test has not been well received by state legislatures¹²⁴ and has not received favorable treatment in state courts.¹²⁵ If scientific evidence established that a PMS defendant's conduct was hormonally induced such that the criminal act was a "product of a mental disease or defect," the defendant might be found "insane" under the *Durham* rule.¹²⁶ The problem with PMS meet-

CROWELL, J. DRENNAR, & M. SMITH, NORTH CAROLINA CRIMES 1-10 (1980) (A person may be found not guilty of a crime if he establishes that when he acted, he had a mental disease, a mental defect, or low intelligence; as a result, he did not know the nature and quality of his act, or as a result, he did not know the act was wrong).

116. W. LAFAVE & A. SCOTT, *supra* note 103, § 40 at 312.

117. *Id.*, at 312-15. See, e.g., *Lilly v. People*, 148 Ill. 467, 36 N.E. 95 (1898).

118. W. LAFAVE & A. SCOTT, *supra* note 103, § 40 at 313. See also *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951); *Flowers v. State*, 236 Ind. 151, 139 N.E.2d 185 (1956).

119. Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 177 nn.13-15, 189 nn.72, 75.

120. "Psychosis" is defined as profound, "sweeping mental disorders characterized by partial or total loss of contact with, or distortion of reality. Psychosis is also characterized by severe disturbances of perception, thought processes, feelings, and behavior retreat from or perversion of social relationships. With psychosis, there is often a disintegration of personality structure leading to the release of processes which ordinarily operate only unconsciously." M. BUNDEE, *PSYCHIATRY IN THE EVERYDAY PRACTICE OF LAW* § 2.1, at 23 (2d ed. 1982).

121. *Brush*, *supra* note 77, at 9, 12. "For all the emotional manifestations of PMS, the consensus is building that it is indeed physiological in origin." HENIG, *Dispelling Menstrual Myths*, N.Y. Times, Mar. 7, 1982, § 6 (Magazine), at 75, col. 1.

122. Henig, *supra* note 121.

123. *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954). Under this test, "an accused is not criminally responsible if his unlawful act was the product of mental disease or defect." *Id.* at 874-75.

124. ME. REV. STAT. ANN. tit. 15, § 102 (1965) (repealed in 1976); V.I. CODE ANN. tit. 14, § 14 (1964).

125. See, e.g., *Thomas v. State*, 206 Md. 575, 588, 112 A.2d 913 (1954).

126. *Taylor & Dalton*, *supra* note 24, at 280 n.69; see also W. LAFAVE & A. SCOTT, *supra* note 103, at 280-90.

ing the requirements of the *Durham* rule is the same as that of the *M'Naghten* test—whether PMS, by whatever definition, qualifies as a mental disease or defect.¹²⁷ To allow the use of PMS as a criminal defense under the *Durham* rule, the meaning of the term “product” must be ascertained.¹²⁸ Criticism of the *Durham* test is that assuming arguendo a criminal act can be the product of a mental disease, this fact alone should not *per se* excuse the defendant from criminal responsibility; rather, the criminal act should be excused as a product of a mental disease or defect only if a “mental disease” affected the defendant so substantially that she could not control her conduct.¹²⁹ Because the disorder has not yet been correlated to a disease or defect of the mind,¹³⁰ PMS is unlikely to survive the *Durham* test for insanity.

A minority of American jurisdictions have adopted the Model Penal Code, or “substantial capacity” test for insanity.¹³¹ This test excuses criminal conduct which results from a mental disease or defect if the defendant “lacked substantial capacity either to appreciate the criminality, or wrongfulness, of his conduct or to conform his conduct to the requirements of the law.”¹³² One commentator suggests that more jurisdictions will adopt the “substantial capacity” test in the future because almost all of the United States courts of appeals, as well as some state courts and legislatures, have already adopted the test in some form.¹³³ Regardless, because a mental disease or defect again is required, a PMS defendant should not expect any more success under the “substantial capacity” test than under any other definition of legal insanity.

The fatal obstacle for the PMS defendant and any potential use of PMS as an insanity-oriented defense is that the same “mental disease” or “defect” is required under each of the above tests for legal insanity.¹³⁴ However, there remains the “irresistible impulse” test for insanity.¹³⁵

127. Taylor & Dalton, *supra* note 24, at 280 n.69.

128. W. LAFAVE & A. SCOTT, *supra* note 103, § 38 at 289-91. See also *Carter v. United States*, 252 F.2d 608 (D.C. Cir. 1957).

129. W. LAFAVE & A. SCOTT, *supra* note 103, § 38 at 286-88. See also *Blocker v. United States*, 288 F.2d 853 (D.C. Cir. 1961) (Burger, J., concurring). “Apart from all other objections the product aspect of *Durham* is a fallacy in this respect: Assuming arguendo that a criminal act can be the product of a mental disease that fact should not *per se* excuse the defendant; it should exculpate only if the condition described as a ‘mental defect’ affected him so substantially that he could not control his conduct.” *Id.* at 862.

130. Taylor & Dalton, *supra* note 24, at 280-81.

131. W. LAFAVE & A. SCOTT, *supra* note 103, § 38 at 294 n.78. See also MODEL PENAL CODE § 4.01 (1955).

132. W. LAFAVE & A. SCOTT, *supra* note 103, § 38 at 292-94.

133. *Id.* § 38 at 294 nn.76, 78.

134. *Id.* § 38 at 294-95.

135. W. LAFAVE & A. SCOTT, *supra* note 103, § 37 at 283-86. This irresistible impulse test “requires a verdict of not guilty by reason of insanity if it is found that the defendant had a mental disease which kept him from controlling his conduct. Such a verdict is called for even if the defendant knew what he was doing and that it was wrong; the defendant’s mental condition need not satisfy

This test indicates that a defendant is "not guilty by reason of insanity if the defendant shows [she] had a mental disease or defect which kept [her] from controlling [her] conduct".¹³⁶ This test differs from the *M'Naghten* test in that a verdict of not guilty by reason of insanity is required when the defendant knew what she was doing but not that what she was doing was wrong.¹³⁷ Whether or not a PMS sufferer would successfully meet the total impairment of volitional capacity required by this "irresistible impulse" test for legal insanity is unknown because the terms "mental disease" or "defect" still must be satisfied.¹³⁸ If further PMS research fails to indicate a correlation between the disorder and any form of psychosis, mental disease, or defect, the practicality of incorporating PMS into the existing definitions of legal insanity will carry little, if any, credibility. However, in the midst of a gloomy future, the possibility of a PMS-based insanity defense is not totally foreclosed. Because of the differences of opinion within the medical profession as to the causes and effects of PMS, further research into the area of menstrual disorders quite possibly will indicate some correlation between PMS and psychological functions.

2. Diminished Capacity

If the PMS defendant cannot satisfy the mental disease or defect requirement of any legal insanity test, she alternatively may seek to establish the defense of "diminished capacity."¹³⁹ This defense allows admissibility of evidence of an abnormal mental condition although the evidence would be insufficient to satisfy any of the insanity tests. The PMS defendant's burden with respect to the diminished capacity defense mandates a showing that she lacked the specific intent required for the particular crime, or that she was incapable of forming the requisite state of mind required for the particular crime.¹⁴⁰ In some jurisdictions, evi-

both the *M'Naghten* and irresistible impulse test." *Id.* § 37 at 283. See also Note, *supra* note 6, at 224-25. An irresistible impulse is "[A]n impulse to commit an unlawful or criminal act which cannot be resisted or overcome because mental disease has destroyed the freedom of will, the power of self-control, and the choice of actions Under the 'irresistible impulse' test, a person may avoid criminal responsibility even though he is capable of distinguishing between right and wrong, and is fully aware of the nature and quality of his acts, provided that he establishes that he was unable to refrain from acting." BLACK'S LAW DICTIONARY 744 (rev. 5th ed. 1979). See generally Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 206 (1982).

136. W. LAFAVE & A. SCOTT, *supra* note 103, § 37 at 283.

137. *Id.*

138. *Id.* See also A. GOLDSTEIN, *THE INSANITY DEFENSE* 45-88 (1967).

139. Note, *supra* note 6, at 224-25.

140. Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 192-93. See also Note, *supra* note 6, at 224-25. Basically, the diminished capacity defense is applicable when a crime is a specific intent crime. W. LAFAVE & A. SCOTT, *supra* note 103, § 42 at 325-28 nn.42-44. This defense is most often argued in first degree murder cases in an effort to determine whether the defendant acted with premeditation and deliberation. Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 177-78. The diminished capacity defense applies in those jurisdictions that have adopted the defense by statute.

dence of diminished capacity is admissible for the purpose of determining if the defendant possessed the requisite mental state for lesser-included offenses.¹⁴¹

A successful plea of the diminished capacity defense does not have the effect of complete exculpation of the defendant; rather, the defendant receives a conviction for a lesser-included offense.¹⁴² In contrast, the effect of a successful insanity plea results in the defendant's institutionalization while completely exonerating the defendant of criminal responsibility. The need to protect society from future criminal conduct of PMS defendants can be achieved without institutionalization or complete exoneration of the defendant if evidence of PMS is allowed for a successful plea of diminished capacity.

The use of the diminished capacity defense in a PMS case requires a determination of whether or not the PMS defendant was capable of forming the specific state of mind for a particular crime. Expert scientific testimony of the defendant's PMS condition would be relevant to show her state of mind at the time she committed the crime. A PMS defendant could utilize the diminished capacity defense to lessen the harshness of a conviction because the punishment for the lesser included offense would be more lenient. A PMS defense used in this manner would be similar to the manner in which the diminished capacity defense was used in the *Craddock*,¹⁴³ *Smith*,¹⁴⁴ and *English*¹⁴⁵ cases. However, applying the diminished capacity defense in a PMS context is problematic because the defendant would still be labelled a "criminal" in the sense that some punishment would be imposed. If the alleged crime contained no lesser-included offense, the ultimate result may be total acquittal; however, the court, in its discretion, still could impose a conditional release that would mandate that the defendant receive treatment and supervision for some period of time. Such use of a PMS defense would, however, be a reasonable and workable compromise between recognizing the disorder as grounds for total acquittal and not recognizing the disorder at all.

Another defense capable of assertion by a PMS defendant is automatism, or unconsciousness. Automatism is defined as "connoting the state of a person who, though capable of action, is not conscious of what [she]

Those jurisdictions that do recognize the defense are as follows: Cal., Colo., Conn., Ind., Iowa, Ky., Neb., N.M., R.I., Va., Wis., and Wyo. W. LAFAVE & A. SCOTT, *supra* note 103, at 325.

141. Note, *The Doctrine of Diminished Capacity and the Use of Mental Impairment to Reduce Degree of Conviction in Massachusetts*, 3 W. NEW ENG. L. REV. 583 (1981). The Model Penal Code supports the diminished capacity defense even though the Code has abolished its distinction between general and specific intent crimes. See MODEL PENAL CODE § 4.02(1) (1962).

142. W. LAFAVE & A. SCOTT, *supra* note 103, § 42 at 326.

143. (1981) C.L. 49.

144. (1982) Crim. L.R. 531 (C.A.).

145. Norwich Crown Court, Nov. 10, 1981.

is doing.”¹⁴⁶ A leading commentator has stated that automatism can be compared to several medical disorders:

Automatism is to be equated with unconsciousness, involuntary action, . . . [and] implies that there must be some attendant disturbance of conscious awareness. Clinically, automatism has been described in a wide variety of conditions including epileptic and post-epileptic states, clouded states of consciousness, concussion states, schizophrenic and acute emotional disturbances, and metabolic disorders such as anoxia, hypoglycemia, as well as drug induced impairment of consciousness. These conditions can be manifested by automatic behavior.¹⁴⁷

A person operating in the automatic state, an “automaton,” cannot be said to possess the requisite mental state for a particular crime unless that person has engaged in a “voluntary” act.¹⁴⁸ Some American jurisdictions recognize automatism as a complete affirmative defense to criminal conduct.¹⁴⁹ Whereas a defendant found not guilty by reason of insanity may be committed to a mental institution, and thereby isolated from society, a defendant who successfully pleads automatism will be acquitted and released.¹⁵⁰

A compromise approach between the extreme views of not recognizing PMS at all and utilizing the disorder as grounds for total acquittal would best serve interests of both society and the individual. A reasonable compromise would be the use of PMS as a factor in mitigation of either the charged offense or the sentence.¹⁵¹ This approach would recognize soci-

146. *Id.* at 337. Automatism has been defined as “[b]ehavior performed in a state of mental unconsciousness or disassociation without full awareness. [The] term is applied to actions or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part; a condition sometimes is observed in persons who, without being actually insane, suffer from an obscuration of mental faculties, loss of volition, or of memory, or kindred affections.” BLACK’S LAW DICTIONARY 122 (rev. 5th ed. 1979).

147. W. LAFAYE & A. SCOTT, *supra* note 103, § 44 at 337-38.

148. An “act” is defined as a “voluntary bodily movement; without an act there can be no crime.” W. LAFAYE & A. SCOTT, *supra* note 103, § 44 at 338. The Model Penal Code § 2.01 supports this view: “A voluntary act (or omission) is required for every offense; a voluntary act does not include a reflex or convulsion, a bodily movement during unconsciousness or sleep; conduct during hypnosis, or a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.” *Id.* at 338 n.12.

149. *See, e.g.,* *People v. Hardy*, 33 Cal.2d 52, 198 P.2d 865 (1948); *Corder v. Commonwealth*, 278 S.W.2d 77 (Ky. 1955); *State v. Caddell*, 287 N.C. 266, 215 S.E.2d 348 (1975). In North Carolina, unconsciousness, or automatism, is an affirmative defense, and the burden rests on the defendant to establish the defense unless the defense arises out of the State’s own evidence. Unconsciousness is not a complete defense under all circumstances, however, such as in cases wherein the unconsciousness is produced by intoxication. Automatism has been defined as action “or conduct of an individual apparently occurring without will, purpose, or reasoned intention on his part.” BLACK’S LAW DICTIONARY 169 (rev. 5th ed. 1979). “The important difference between automatism and insanity is that the defendant found not guilty by reason of automatism or (unconsciousness) is NOT subject to commitment to a mental hospital.” *State v. Cahill*, 287 N.C. 260, 271, 251 S.E.2d 348, 360 (1975).

150. Note, *Premenstrual Syndrome*, *supra* note 24, at 264-65.

151. Taylor & Dalton, *supra* note 24, at 281-83.

ety's need to be protected from those individuals who have committed criminal acts in the past and who are likely to commit criminal acts in the future while protecting a PMS defendant from the stigma of institutionalization.¹⁵² Applying a mitigation principle to cases of PMS defendants alleging a diminished capacity defense would operate to lessen the offense and the punishment imposed. This position also would allow for medical treatment and supervision of the defendant.¹⁵³ In sentencing, the use of PMS as a mitigating factor would give courts the flexibility to supervise the medical care of the defendant, which would reflect the view that the sentence imposed must satisfy the need to treat, not punish, a defendant.¹⁵⁴

In those jurisdictions that recognize the defense of diminished capacity,¹⁵⁵ a PMS defendant convicted of a criminal offense would be found not guilty of the charged offense, but she would be convicted of a lesser-included offense.¹⁵⁶ Where the diminished capacity defense would be rejected, the use of the insanity defense is an all-or-nothing proposition.¹⁵⁷ No middle ground exists because the defendant must establish her insanity to interpose a complete defense; otherwise, the defendant will be held fully responsible for the criminal conduct.¹⁵⁸ One must recognize, however, that although the mitigation aspect of the diminished capacity defense may serve as a workable compromise to the extremes of automatism and insanity defenses, the effect of mitigation may yet be seen as inadequate because the PMS sufferer would still be regarded as a "criminal" by virtue of any degree of sentence imposed.¹⁵⁹

IV. IMPEDIMENTS TO THE RECOGNITION OF A PMS DEFENSE

Under any of the previously discussed defenses, several problems may

152. Note, *Premenstrual Syndrome*, *supra* note 24, at 265-66. See also G. WILLIAMS, TEXT-BOOK OF CRIMINAL LAW 622-23 (1978).

153. Taylor & Dalton, *supra* note 24, at 285-87.

154. *Id.* The automatistic defendant is not responsible for his criminal conduct because he lacks the mental state which the crime requires. MODEL CRIMINAL CODE § 2.01 (Tent. Draft No. 4, 1955). However, one commentator proposes that the "better rationale for not holding the defendant criminally responsible is that the defendant did not engage in a voluntary bodily movement, or an act; without such act, there can be no crime." W. LAFAVE & A. SCOTT, *supra* note 103, § 44 at 338.

155. Taylor & Dalton, *supra* note 24, at 281-82 n.73. Some of the jurisdictions that recognize diminished capacity as a defense include the following: Colo., Utah, Cal., and Alaska. See also Wallach & Rubin, *supra* note 6, at 263 n.241.

156. Note, *Premenstrual Syndrome*, *supra* note 24, at 267. Some crimes may not include lesser offenses, for instance, tax evasion. *Rhodes v. United States*, 282 F.2d 59 (4th Cir. 1960). One scholarly work makes a distinction between diminished capacity and mitigation: "[D]iminished capacity goes to the 'type' of crime or to the 'degree' of crime, whereas mitigation assumes the existence of a certain offense and is used only in the hope of obtaining a lighter sentence when latitude in punishment is available." Wallach & Rubin, *supra* note 6, at 287 n.382.

157. Taylor & Dalton, *supra* note 24, at 282.

158. *Id.* at 281-82 n.77.

159. Note, *Premenstrual Syndrome*, *supra* note 24, at 266-68.

impede the acceptance of PMS as a legal defense.¹⁶⁰ The recognition of PMS as a legal defense would be impeded by the suggestion that the defense would become "universal" and abused by all women defendants.¹⁶¹ Nonetheless, proponents of PMS have suggested that the defense should be subject to a heavy burden of proof.¹⁶² This heavy burden of proof can be accomplished by detailed charting of the woman's previous menstrual cycles, use of diaries and testimony from friends and family, as well as by expert testimony of both an endocrinologist and a psychiatrist.¹⁶³ With such methods of diagnosis, the potential for widespread abuse of a PMS defense would be minimal because justifiable claims could be distinguished from more doubtful claims.¹⁶⁴

Also, many feminists in this country fear that the recognition of PMS as a legal defense would minimize advances women have made over the last twenty years.¹⁶⁵ Many of these women believe that the legal use of PMS would only substantiate longstanding prejudices and notions of male superiority. The underlying premise of this viewpoint is that as women have penetrated positions of responsibility in all professions, a PMS-oriented defense would imply that these women could not be trusted in their current roles. Not all menstruating women suffer from PMS, and of those women who do suffer from the disorder, only severe cases of PMS relate to the proposed use of PMS as a defensive mechanism. Discrimination within the class of menstruating women is important to ascertain that group of women who would qualify for a PMS-oriented defense. While these concerns are legitimate, placing an inordinate amount of emphasis on them to the exclusion of appropriate change and growth in the law indeed would be unfortunate.

Other concerns that may affect the overall acceptance of PMS as a criminal defense include the Food and Drug Administration's reluctance to approve adequate dosages of the most widely used hormonal treatment for PMS, progesterone.¹⁶⁶ When the drug will be approved, if at all, is unknown.¹⁶⁷ Consequently, assuming an American court accepts

160. *Id.* at 267-68.

161. *Id.*; see Note, *supra* note 6, at 226; R. Norris, *supra* note 11, at 271-72.

162. K. DALTON, *supra* note 4, at 212-13.

163. Wallach & Rubin, *supra* note 6, at 234 n.101. See also K. Dalton, *supra* note 4, at 213-214. For a detailed discussion of the admissibility of expert testimony in a PMS case, see Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 176.

164. Wallach & Rubin, *supra* note 6, at 234-35.

165. R. Norris, *supra* note 11, at 272. See also Note, *Premenstrual Syndrome*, *supra* note 24, at 268. Women may very well be who prolong the recognition and acceptance of PMS. If women themselves are doubtful as to the existence of such a syndrome, many men may be persuaded in their opinions concerning PMS. Unfortunately, recognition of a bona fide "syndrome" may legitimately be seen as a threat and obstacle to the continued success of the equal rights movement for women in the United States.

166. Seminar, *supra* note 16. See also R. NORRIS, *supra* note 11, at 251-54.

167. Seminar, *supra* note 16. Telephone interview, *supra* note 19.

evidence of a defendant's PMS, and the PMS defense is successful, the issue arises as to whether or not a court could impose a conditional sentence and order a defendant to submit to treatment procedures that have not yet been approved by the federal agencies.

The most impeding factor to recognizing a PMS defense is the diversity of medical opinions as to the cause, definition, and treatment of PMS.¹⁶⁸ Because of this diversity, the use of PMS as a criminal defense in this country may be premature.¹⁶⁹ Yet, if the legal community awaits clarification from medical researchers, a severe injustice may be served on those bona fide PMS sufferers whose disorders have been well-documented, screened, and supervised.¹⁷⁰ Nevertheless, whether or not the legal profession is justified in following in the sluggish footsteps of the medical profession is a matter of opinion. Hopefully, the legal community will recognize that PMS sufferers deserve as much protection and attention as victims of other legally recognized disorders. Perhaps the legal profession would better serve the needs of society if the profession makes a reasonable independent choice with respect to PMS.

V. THE NEED FOR EXPERT TESTIMONY

Because of its complexities, a defendant suffering from PMS may not sufficiently understand the disorder and its potential as a criminal defense so as to emphasize the disorder in her testimony. Similarly, a jury hearing evidence of PMS may not understand the relevance of the defendant's testimony.¹⁷¹ For these reasons, the use of this defense necessitates the use of expert testimony. A defendant's ability to raise and successfully plead PMS as a defense, therefore, depends upon a court's willingness to admit and be persuaded by expert testimony.¹⁷²

Expert testimony is used when the facts in issue are beyond the common knowledge and experience of the jury.¹⁷³ The Federal Rules of Evidence (FRE) would allow expert testimony concerning PMS upon a proper showing of the following: (a) PMS evidence is beyond the knowledge of the average layman; (b) the expert is qualified to testify and offer an opinion on PMS; (c) the theory or technique has achieved "general acceptance" in the scientific community.¹⁷⁴ The first requirement—that

168. Seminar, *supra* note 16. See also Note, *supra* note 6, at 226-27.

169. Seminar, *supra* note 16.

170. *Id.*

171. C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 13, at 29-34 (E. Cleary 3d ed. 1984).

172. Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 178.

173. See C. McCORMICK, *supra* note 171, at 33-34. Voorhis; *Expert Opinion Evidence*, 13 N.Y.L.F. 651 (1968).

174. See Strong, *Questions Affecting the Admissibility of Scientific Evidence*, 1 U. ILL. L.F. 1, 6-7 n.15 (1970). Ballistic tests, fingerprinting and blood tests are examples of scientific techniques so widely used that their reliability receives judicial notice. Note, *Premenstrual Stress Syndrome*, *supra*

the evidence be beyond the knowledge of the average layman—is satisfied easily. PMS is the subject of debate amongst researchers, much less within the common knowledge of the average layperson. Secondly, qualifying a witness as an expert on PMS would require establishing that the witness knows more than the average layperson about PMS.¹⁷⁵ Although this requirement involves foundation testimony establishing the witness as an authority on PMS, the standard for qualification is not very high;¹⁷⁶ therefore, this requirement should also be satisfied. The final requirement—that the proponent of PMS establish its “general acceptance” in the scientific community—is the hurdle which will be most difficult for the PMS proponent to jump.

The “general acceptance” standard was first established in 1923 in *Frye v. United States*.¹⁷⁷ The *Frye* holding is as follows:

Just when a scientific principle or discovery crosses the line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognize, and while the court 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.*¹⁷⁸

Because the *Frye* court did not define the term, “general acceptance” is open for interpretation¹⁷⁹ and has received much criticism because of its ambiguity.¹⁸⁰ Nonetheless, the *Frye* test has been adopted by many jurisdictions as the volume and complexity of scientific evidence has increased.¹⁸¹ At least one court has stated that the *Frye* test ensures “that a minimal reserve of experts exists who can critically examine the validity of a scientific determination in a particular case.”¹⁸² Another court

note 24, at 179 n.20. See, e.g., *Dyas v. United States*, 376 A.2d 827, 832 (D.C. Cir.), cert. denied, 434 U.S. 973 (1977) (citing C. McCormick, *supra* note 171, at 29-30).

175. FED. R. EVID. 702.

176. *Id.*

177. 293 F. 1013 (D.C. Cir. 1923). The *Frye* case is a landmark case in the field of admissibility of expert evidence. For a thorough discussion of the *Frye* standard, see C. McCormick, *supra* note 171, at 488-91.

178. *Frye*, 293 F. at 1014.

179. C. McCormick, *supra* note 171, at 488-91.

180. *Id.* See also Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385, 395 (1952).

181. C. McCormick, *supra* note 171, at 484-89. See also *United States v. Tranowski*, 659 F.2d 750, 755-57 (7th Cir. 1981); *United States v. Kilgus*, 571 F.2d 508, 510 (9th Cir. 1978); *United States v. Brown*, 557 F.2d 541, 556-57 (6th Cir. 1977); *Kaminski v. State*, 63 So. 2d 339, 340 (Fla. 1952); *Reed v. State*, 283 Md. 374, 431-32, 391 A.2d 364, 403 (1978); *Boeche v. State*, 151 Neb. 368, 377, 37 N.W.2d 593, 597 (1949).

182. *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974). For a detailed discussion of the primary rationale of the *Frye* test in ensuring the reliability of novel scientific evidence, see Note, *Frye Standard of "General Acceptance" for Admissibility of Scientific Evidence Rejected in Favor of Balancing Test*, 64 CORNELL L. REV. 875, 881 (1979).

has stated that the test ensures uniformity,¹⁸³ while yet another considers a benefit of the *Frye* standard to be one of lessening the burden of prolonged examination of experts concerning new techniques.¹⁸⁴ The most important benefit of the *Frye* test, however, is that of the "reliability" of the scientific evidence.¹⁸⁵ Whether these objectives can be served with less constraints on the admissibility of scientific evidence is entirely a matter of opinion.

Jurisdictions adopting the *Frye* test must also define the "particular field," which in a PMS context is the relevant scientific community.¹⁸⁶ This requirement is inherently problematic since PMS permeates various areas of medicine and because the scientific community is not limited to one specialty area.¹⁸⁷ This characteristic of PMS makes reaching a general consensus within the medical profession more troublesome. The differences of opinion as to the cause, treatment, and definition of PMS further complicate the applicability of the *Frye* test in PMS cases.¹⁸⁸ Of utmost relevance is whether the scientific community must generally accept the behavioral manifestations of PMS, its causes, or both.¹⁸⁹ Because so many factors influence the onset of PMS,¹⁹⁰ the main focus of the "general acceptance" standard, as has been suggested, should be on behavioral manifestations of PMS.¹⁹¹ Hence, general acceptance within the medical community would more rapidly occur if the issue of consensus within the medical profession centered around the effects of the PMS disorder rather than the causes and methods of treatment. A further suggestion is that "the main thrust of [the] legal concern should be whether there is general acceptance among experts that PMS can impair mental functions to a sufficient degree so as to negate the specific state of mind required for certain crimes."¹⁹² Another problem with the "general acceptance" standard remains as to what percentage of experts must ac-

183. *Reed v. State*, 238 Md. 374, 381, 391 A.2d 364, 367 (1978).

184. *State v. Cary*, 99 N.J. Super. 323, 332, 239 A.2d 680, 684 (1968).

185. See C. McCORMICK, *supra* note 171, at 489. See also Note, *supra* note 182, at 881-82.

186. While North Carolina has adopted the Federal Rules of Evidence, the courts apparently follow the *Frye* test in "theory." *State v. Peoples*, 311 N.C. 515, 319 S.E.2d 177 (1984) (theory underlying *Frye* decision used). However, North Carolina has adopted Federal Rule of Evidence 401:

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without such evidence."

N.C. GEN. STAT. § 8C-1 (1984).

187. See Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 182-86.

188. *Id.* at 186.

189. *Id.* at 185-89.

190. *Id.* at 188-89; see also Reid & Yen, *supra* note 15, at 96-97; Seminar, *supra* note 16.

191. See Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 189.

192. *Id.* at 188-89.

cept the novel scientific evidence as accurate.¹⁹³ Whether the "general acceptance" standard announced by the *Frye* court requires conclusive unanimity within the medical profession or merely requires that the novel scientific theory be widely shared within the medical community remains unsettled.

Some courts have suggested that the appropriate test for the admissibility of scientific evidence should be one of "substantial acceptance."¹⁹⁴ This test would permit scientists, rather than the courts, to make the final determination as to whether or not certain scientific or novel evidence was substantially accepted within the medical community.¹⁹⁵ However, the term "substantial" may require *more* consensus within the medical community than the "general acceptance" requirement stated by the *Frye* court. While the "general acceptance" standard presents an obstacle for the admissibility of PMS evidence because of the lack of consensus within the medical community concerning the disorder, the "substantial acceptance" test would likely further restrict the admissibility of PMS evidence.

Under either the "general acceptance" or "substantial acceptance" tests, the principle determination depends on the meaning of "medical community." Within the group of PMS researchers, PMS may very well be "generally accepted" or "substantially accepted." If medical community means the medical profession at large, the use of PMS evidence under either the *Frye* test or the substantial acceptance test will be more difficult to achieve. Perhaps then the relevant scientific community should be limited to those experts who have dedicated their time and efforts to the study of PMS.¹⁹⁶ Even those who recognize PMS as a legitimate disorder warn that we must remain "suspicious of women who

193. *Id.* at 189 n.69. Whether the standard of general acceptance requires "conclusiveness," unanimity or a "widely" shared view of acceptance is uncertain. *Id.*

194. *United States v. Baller*, 519 F.2d 463, 465 (4th Cir. 1975), *cert. denied*, 423 U.S. 1019 (1976). See also 3 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* § 702(03), at 702-16; Latin, Tannehill & White, *Remote Sensing Evidence and Environmental Law*, 64 CALIF. L. REV. 1300, 1300 (1976).

195. Much of the PMS research has been conducted by individuals specializing in particular fields of medicine; the concern is that PMS may never meet the *Frye* standard of "general acceptance" within the medical community. If the medical community were narrowed however to the "relevant" medical community, those individuals who are currently involved in researching the disorder, PMS may stand a better chance of gaining popular acceptance at large. One commentator has expressed a similar view:

[I]n light of today's rapid increase of scientific specialization and progress, such a test presents one glaring problem: not only are the courts unable to determine the accuracy of the newest devices, but many of the experts themselves are unable to keep abreast of all the developing techniques. Thus, unless the courts choose to ignore a potentially useful source of information, a new system for determining the accuracy of these developments must be found.

Note, *Evolving Methods of scientific Proof*, 13 N.Y.L.F. 677, 684 (1968); see also Kantrowitz, *Controlling Technology Democratically*, 63 AM. SCI. 505 (1975).

196. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later*, 80 COLUM. L. REV. 1197, 1208-28 (1980).

plead that PMS is a reason for mitigation."¹⁹⁷ Sound diagnostic proof is needed in attempting to use a PMS defense as well as sound evidence in showing that the disorder affected the defendant's functioning to the point of preventing her from forming the requisite mental state required for a particular crime.¹⁹⁸

A minority of jurisdictions have rejected the *Frye* test and instead use a "relevancy" standard to determine the admissibility of expert testimony.¹⁹⁹ Relevant evidence tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."²⁰⁰ FRE 702 provides for the admissibility of expert testimony.²⁰¹ Per the relevancy approach and Rule 702, expert testimony may be admissible under the following conditions: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of opinion or otherwise."²⁰² Under this standard, PMS evidence is admissible if such evidence is relevant and if its admission would not operate to prejudice or mislead the jury, confuse the issues, or otherwise lead to undue delay, waste of time, or needless presentation of cumulative evidence.²⁰³ Experts may rely on facts or data not otherwise admissible as evidence when these facts or data are "reasonably relied upon by experts in [the] particular field."²⁰⁴ Any disagreement within the scientific community concerning the reliability of scientific evidence would affect only the weight of the evidence, not its admissibility, thus making this approach most appealing.²⁰⁵

Even if expert evidence is admissible, the courts should require clear

197. Dalton, *Menstruation & Crime*, 2 BRIT. MED. J. 1752, 1752-53 (1961); see also K. DALTON, *supra* note 4, at 203-11.

198. See Seminar, *supra* note 16; see also R. NORRIS, *supra* note 11, at 277.

199. Whalen v. State, 434 A.2d 1346, 1354 (Del. 1980), *cert. denied*, 455 U.S. 910 (1981); State v. Hall, 297 N.W.2d 80, 84-85 (Iowa 1980); State v. Catanese, 368 So. 2d 975, 980 (La. 1979); State v. Williams, 388 A.2d 500, 503-04 (Me. 1978); State v. Kersting, 50 Or. App. 461, 623 P.2d 1095 (1981), *aff'd*, 292 Or. 350, 638 P.2d 1145 (1982); Watson v. State, 64 Wis. 2d 264, 274, 219 N.W.2d 398, 403 (1974); Cullin v. State, 565 P.2d 445, 453-54 (Wyo. 1977).

200. FED. R. EVID. 401.

201. FED. R. EVID. 702.

202. FED. R. EVID. 702; see generally C. MCCORMICK, *supra* note 171, at 484-97.

203. Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 192; see also FED. R. EVID. 403, 401.

204. Fed. R. Evid. 403, 401. The relevancy theory is the view taken by the Federal Rules of Evidence. Rule 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert . . . may testify thereto. . . ." The limitations placed on Rule 702 are those spelled out in Rule 403 which excludes relevant evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

205. See Note, *Premenstrual Stress Syndrome*, *supra* note 24, at 180-82.

diagnostic proof that a defendant suffers from PMS. "The court should accept nothing less than medical, prison, or other records indicating mental impairment present only during the premenstrual periods over an extended period of time."²⁰⁶ If such safeguards are not recognized, the potential for abuse increases; therefore, the evidence should be prohibited. This balancing approach suggested by the relevancy test would allow a PMS defendant in a diminished capacity jurisdiction to successfully prove that she was incapable of forming a specific state of mind; therefore, the defendant could be convicted of a lesser-included offense and given necessary treatment.

VI. SERVING THE PURPOSES OF PUNISHMENT

The criminal law seeks to punish criminal defendants so as to achieve one or a combination of purposes. These traditional purposes include retribution, deterrence, prevention, and reformation.²⁰⁷ If society wishes to imprison only those who are morally blameworthy, such imprisonment may serve no rehabilitative, deterrent, or retributive value for a PMS defendant.²⁰⁸ For society to seek revenge against a PMS sufferer makes little sense if in fact she can show that she had little or no control over her actions. If a PMS sufferer cannot control her behavior, any threat of punishment may be irrelevant. On the other hand, the threat of punishment may encourage PMS sufferers to seek medical treatment.²⁰⁹ Though imprisonment would isolate a PMS defendant from society, perhaps the rehabilitative goal would be more effectively achieved if such confinement were coupled with medical treatment for the PMS defendant. Therefore, if a defendant could show that she would respond to PMS treatment, the best solution, in light of all purposes for punishment, would be a limited confinement to a medical facility for treatment and observation. Arguably, this confinement could even be limited to those days prior to the onset of menstruation when the symptoms and manifestations of PMS are present.²¹⁰ If a PMS defendant's disability diminishes her capacity to reason and exercise her free choice, society should be interested in curtailing her freedom only to the extent necessary to supervise and treat her disorder.

206. *Id.* at 194. Dalton has warned that to ensure that the plea of PMS will not be abused, every case diagnosis of PMS needs to be substantiated with incontrovertible evidence; for a correct diagnosis of PMS, the precise dates of menstruation and of the alleged crime are essential. See K. DALTON, *supra* note 4, at 206-08; R. NORRIS, *supra* note 11, at 277.

207. Wigmore, *The Judge's Sentence in the Loeb-Leopold Murder*, 19 ILL. L. REV. 167, 168-69 (1924); see also Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

208. Taylor & Dalton, *supra* note 24, at 283-85; see also S. KADISH, S. SCHULTOFER & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 181-99 (4th ed. 1983).

209. Taylor & Dalton, *supra* note 24, at 284-85.

210. Seminar, *supra* note 16; see also Wallach & Rubin, *supra* note 6, at 300-03.

VII. CONCLUSION

As the debate concerning PMS continues within the medical profession and as the disorder becomes more quantifiable, the American legal system should expect to face a criminal defendant who will allege PMS as a defense to a criminal charge. Although an insanity-type defense is improbable, a diminished capacity defense has better chances of success. Nevertheless, PMS sufferers should be held responsible for their acts to some degree. This Comment suggests that using PMS as a mitigating factor would be an appropriate approach since a reduction in sentencing coupled with supervision and medical treatment would best serve the needs of both society and the individual. The legal system is responsible for not only protecting society, but also for aiding and attempting to reform the individual. Confinement of a PMS sufferer should be for treatment purposes and not for the sole purpose of punishment.

As the efforts of that portion of the medical profession involved in the thorough research and study of PMS continues to illuminate the disorder publicly, the responsibility should shift to the legal profession to begin dealing with the potential use of PMS as a criminal defense. Therefore, when the appropriate situation for the use of PMS as a criminal defense arises, the legal profession will be ready. In the meantime, many obstacles must be overcome before PMS can successfully be used as a criminal defense. However, with continuing awareness and debate in the medical and legal professions, PMS may be a viable criminal defense in the future.

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