Premenstrual Syndrome as a Substantive Criminal Defence

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INTRODUCTION

It is now over twenty years since the criminal trials of two women caught the attention of the British media.[1] Sandra Craddock (later Smith) and Christine English both raised a successful defence of diminished responsibility based on premenstrual syndrome to a murder charge. In these cases the Court of Appeal apparently determined that PMS is a factor that can limit criminal responsibility. However, this has been the subject of an intense debate amongst legal academics in most western jurisdictions for several decades. Although this thesis concentrates on the situation as it exists in English law, many of its conclusions are equally relevant to other legal systems, particularly those in common law jurisdictions.

The issues that are likely to arise in a criminal trial in which a defendant wishes to base a substantive defence on premenstrual syndrome can be condensed into five central questions:

i) Does premenstrual syndrome exist at all?

ii) If so, does the defendant suffer from the condition?

iii) Did PMS cause or contribute to the defendant's actions?

iv) If the answer to (iii) is yes, should the act be excused?

v) If so, under what category of excuse?

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[1] *R v Craddock* 1 Current Law, January 1981, 49; *R v English* (unreported), Norwich Crown Court, 10/11/1981; *R v Smith* [1982] Criminal Law Review 531.

This thesis will discuss the way in which these questions might best be approached. The first two questions will be addressed in chapter 1. This chapter aims to show that the current lack of agreement within the medical profession as to whether or not the syndrome exists and, if so, how it may be diagnosed and cured is not terribly relevant to raising a defence based on PMS. This is because what is important for such purposes is the nature and degree of the particular symptoms experienced by the individual in question as this is what will determine whether the legal requirements of a particular defence have been satisfied. Since the symptoms that are often linked to PMS are identical to those of many other disorders, diagnosing whether the offender suffers from such a condition should be no more problematic here than in other cases if the courts take a symptom-based approach. Chapter 2 examines the most pertinent cases and legislation in this area and chapter 3 addresses the current literature on the subject. In this chapter, I suggest that the current so-called feminist objection to the legal recognition of PMS is in fact irrelevant to whether or not the courts should acknowledge it. In chapter 4, I examine studies that have investigated a link between PMS and crime and conclude that, again, they do not directly help a court to determine whether a particular defendant was experiencing premenstrual symptoms that contributed to her actions. In chapter 5 discusses the current legal situation in which I argue that at present the courts are failing to adequately address the five questions listed above. There appears to be a persistent willingness to assume that a diagnosis of PMS automatically amounts to a diminution in criminal responsibility. Chapter 6 addresses the issues raised by question iv. In order to determine if and when a condition should be a factor that reduces criminal responsibility, it is necessary to consider the meaning of criminal liability itself. I focus on the two

leading theories in this area, namely capacity and character theories. The final two chapters deal with question (v). Although I argue that the unsatisfactory nature of the current law is largely due to the unworkable structure of the diminished responsibility defence, I suggest that this type of defence is still the most appropriate for PMS cases, given my findings in chapter 6. I therefore conclude by arguing that the diminished responsibility provision should be reformed and then extended to cover all other offences since there is no logical reason why offenders whose medical condition affects their capacity for self-control should only have a defence to a murder charge.

WHAT IS PMS?

Central to the argument in this thesis is the proposition that the enormous amount of medical uncertainty surrounding premenstrual syndrome means that the law cannot regard the condition as sufficiently well understood to form the basis of a criminal defence. One of the pioneers of the medical recognition of the condition, Dr Katharina Dalton, has described the syndrome as "the recurrence of symptoms in the premenstruum with absence of symptoms on the postmenstruum".[2] The aim of this chapter is to demonstrate that such a broad definition is controversial, imprecise and inherently problematic for the law when dealing with defendants who claim to have suffered from PMS.

One of the principal areas of debate relates to the cause of PMS. Carney and Williams list the suspected causes as including an excess in oestrogen or prolactin, hypoglycaemia, fluid retention, progesterone deficiencies or deficiencies in vitamin B6 and vitamin A.[3] An often-cited study by Reid and Yen concluded that PMS is in fact the result of a combination of psychological, neurological and glandular factors[4] and in a separate work Robert Reid considers theories relating to abnormalities in oestrogen levels or in prostaglandin metabolism, allergies to endogenous hormones and endogenous opiate withdrawal.[5]

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[2] K. Dalton, *The Premenstrual Syndrome and Progesterone Therapy, 2nd edn* (London: Heinemann Medical, 1984) at 3.
[3] R.M. Carney and B.D. Williams (1983) Premenstrual Syndrome: A Criminal Defense, Notre Dame Law Review 59, 253 at 256.
[4] R. L. Reid and S. S. C. Yen, 'Premenstrual Syndrome', Clinical Obstetrics and Gynaecology 26, 710.
[5] R. L. Reid, 'Etiology: Medical Theories' in W. R. Key (jr) (ed) *The Premenstrual Syndrome* (Philadelphia: W. B. Saunders Company, 1988).

Perhaps more significant as far as the law is concerned is the disagreement over the symptoms of premenstrual syndrome. Donald Nicolson, adopting the position that the dubious medical status of PMS and the potentially negative implications for women in general of its recognition by the law means that the law should jettison the concept altogether, refers to the fact that around 150 symptoms of PMS have been identified.[6] Among the most commonly recognised symptoms are anger, depression, headaches, nausea, breast swelling and tenderness, amnesia, abdominal pains and bloating, uncontrollable violent impulses, fatigue, hunger and thirst and edema of the extremities. The more unusual symptoms include alcoholism, herpes and a sense of peacefulness.[7]

The disagreement over the symptoms and causes of PMS has inevitably lead to corresponding disagreement over how it might be treated. Dr Katharina Dalton has pioneered a treatment using injections of the hormone progesterone, based on her theory that PMS is a recognizable disease caused by a deficiency in this hormone.[8] Although there is evidence that treatment with progesterone can help to alleviate symptoms, the consensus in the medical profession appears to be that successful treatment does not amount to proof of the aetiology of the condition. Hilary Allen has famously pointed out that headaches are not caused by a deficiency in paracetamol.[9] In any case, it has been suggested that the effectiveness of progesterone therapy is due to the hormone's sedative qualities when it is administered in sufficiently large amounts.[10] There have also been

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[6] D. Nicholson 'What the Law Giveth, it also taketh away' (in D. Nicholson and L. Bibbings, *Feminist Perspectives on Criminal Law*) (London: Cavendish Publishing, 2000) at 166.
[7] Nicolson, *ibid* at 166.
[8] *The Premenstrual Syndrome and Progesterone Therapy, supra* note 2.
[9] H. Allen 'At the Mercy of Her Hormones' (1984) M/F 19 at 20.
[10] R. L. Reid, 'Etiology: Medical Theories' in W. R. Keye (Jr) (ed), *supra* note 5.

numerous studies that have found progesterone to be no more effective than the placebo drug used to assess the effectiveness of progesterone therapy.[11]

Although there have been some successes in the treatment of PMS, including psychotherapy, hormone therapy, diuretics, vitamins and treatment with oral contraceptives, studies to evaluate such treatments remain inconclusive. This is partly because with such wide-ranging symptoms, it is difficult to state with any degree of certainty that a particular treatment will alleviate all or most symptoms. In addition, the studies in question have often lacked the scientific controls and methods necessary to convince the critics. Thus, for example, it has been pointed out that many of Dalton's patients included prisoners awaiting sentence. The motivation for such women to show some improvement or even full recovery from their symptoms clearly cannot be understated.[12]

Rubinow and Roy-Byrne conducted one of the most comprehensive analyses of the contradictory theories in this field.[13] They conclude that the ambiguous results arise from the failure of investigators to define PMS with any degree of precision, or to formulate a set of answerable questions and select a representative research population. However, as Judith Osborne points out, the effect of such criticisms is still to render PMS legitimate rather than deny its existence, since the implication of this conclusion is that PMS is

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[11] S. Maddocks, P. Hahn, F. Moller et al 'A double-blind placebo-controlled trial of progesterone vaginal suppositories in the treatment of premenstrual syndrome', (1986) American Journal of Obstetrics and Gynecology 154, 578; Sampson, G. A. Premenstrual syndrome: a double-blind controlled trial of progesterone and placebo, (1979) *British Journal of Psychiatry 135, 209.*

[12] N.Z. Hilton (1987) Against using PMS in criminal court cases, Justice of the Peace, March 7, 152 – 154.

[13] D. Rubinow and P. Roy-Byrne (1984) Premenstrual Syndromes: Overview from a Medical Perspective, *141 American Journal of Psychiatry 163.*

believed to exist but simply requires a more effective method for diagnosis and treatment.[14]

The lack of consensus regarding the aetiology, incidence, symptoms and treatment of this condition lead some experts to question whether it in fact exists at all. A number of authors, particularly those who would be described as feminist writers, have argued that PMS is a social rather than a biological construct. Sophie Laws, for example, argues that PMS is a creation of the medical profession and that it has come to act as a filter through which women interpret their actual felt experiences. At this stage, however, the general consensus appears to be that although the existence of PMS is not universally recognised, it is a scientific reality.[15] That this is the current position of most of the scientific community is largely due to the work of Katharina Dalton.

The aim of this chapter has been to demonstrate the widespread disagreement within the medical profession as to the existence, causes and symptoms of premenstrual syndrome. If one accepts the broad definition of the syndrome proposed by Dalton, it is possible to say that most women suffer from PMS.[16] Where, then, does this leave the English criminal law when faced with a woman who claims that her PMS should reduce her culpability for a criminal act or mitigate her sentence? The remainder of this thesis shall be devoted to an examination of the issues relevant to answering this question.

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[14] J. A. Osborne 'Perspectives on Premenstrual Syndrome: Women, Law and Medicine' (1989) 8 Canadian Journal of Family Law 165 at 169.

[15] S. Laws 'Who needs PMT? A feminist approach to the politics of premenstrual tension' (in Laws, S; Hey, V and Eagan, A (eds) *Seeing Red: The Politics of Premenstrual Tension*)(London: Hutchinson, 1985) at 33-34; B. McSherry 'The return of the raging hormones theory: premenstrual syndrome, postpartum disorders and criminal responsibility' (1993) Sydney Law Review 292.

[16] Donald Nicolson suggests that, depending on different theories, the incidence of PMS in women is anything from 5% - 95%, *supra* note 6 at 166.

THE LEGAL FRAMEWORK

Premenstrual syndrome has been relied on by defendants to plead diminished responsibility. This partial defence to murder is found in section 2 of the Homicide Act 1957 which reads as follows:

(1) Where a person kills or is a party to a killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially imparied his mental responsibility for his acts and omissions in doing or being a party to the killing.

Section 2(2) and 2(3) of the Act then go on to explain that this defence reduces murder to manslaughter. The sentence for manslaughter is at the discretion of the court, and can range from life imprisonment to an absolute discharge (s 5 Offences Against the Person Act 1861).

One of the most well-known recent cases was that of Sandra Craddock who was tried in 1980 for the murder of a fellow barmaid.[17] At her trial, Katharina Dalton gave evidence that Craddock was suffering from PMS, allegedly caused by a deficiency of the hormone progesterone. Craddock was found guilty of manslaughter on the basis of diminished responsibility and sentenced to three months' probation, after Doctor Dalton had provided further evidence that she had responded well to a course of progesterone injections.

[17] *R v Craddock supra* note 1.

In the case of *R v English*, the prosecution accepted a plea of guilty to manslaughter on the ground of diminished responsibility, and the evidence of Doctor Dalton that the defendant was suffering from PMS was accepted as a mitigating factor in sentencing.[18] Christine English had deliberately driven her car at the deceased, her lover, after he had threatened to end their relationship. The trial evidence of Katharina Dalton who told the court that PMS would make English "irritable, aggressive, impatient and confused, with loss of self-control" was widely reported in the press.[19] The defendant was granted a conditional discharge on the condition that she received progesterone therapy.

The other 'mental health' defences are potentially open to a defendant suffering from PMS. The defence of insanity is based on the *M'Naghten rules* which require that, at the time of the offence, the accused "was labouring under such a defect of reason, from a 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"[20]. The initial problem appears to be that a 'disease of the mind' must be due to an inherent cause rather than a reaction to external pressures[21]. Bernadette McSherry suggests that this may be problematic since the biological theories of PMS remain unproven and in conflict.[22] However, it is tentatively submitted that, since the nature of PMS means the cause is unlikely to be external, the lack of consensus regarding the biological theories need not

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[18] *R v English, supra* note 1.
[19] See, for example, The Sun, Wednesday 11/11/81 at page 5.
[20] Tindal CJ reporting for the House of Lords, 1843. This was in response to a House of Lords enquiry following the acquittal of Daniel M'Naghten due to insanity. Parliament had feared that this acquittal might encourage crime so sought clarification on certain points from senior members of the judiciary.
[21] *R v Radford* (1985) 20 Crim R 388; An inherent cause is one that occurs from physiological processes due to the defendant's condition and is not influenced in any way by the defendant's own actions or by external events to which the defendant is subject.
[22] McSherry, *supra* note 15.

be an insurmountable obstacle. The main hurdle is likely to be the requirement that the defendant lacked understanding of the nature of the act or did not know that it was wrong. It is unlikely that premenstrual syndrome could affect cognition to this extent.[23]

The defence of automatism applies when a defendant commits an involuntary act that is not caused by a disease of the mind. A defendant who successfully raises this defence will be fully acquitted. Sandra Craddock (who had by this time changed her name to Smith) attempted to rely on automatism due to her premenstrual syndrome when she was charged with twice threatening to kill a police officer. The Court of Appeal, however, held that automatism did not apply where evidence of PMS was raised.[24] This case therefore suggests that PMS does not satisfy the requirements of either the automatism defence or insanity. However, in this case Smith's counsel conceded that she acted consciously but simply could not control her behaviour as a result of her PMS. This case does not entirely rule out a defence of automatism in PMS cases since it was held that "automatism as a defence applied within narrow and prescribed limits and was not applicable *in this case*".[25]

Furthermore, a number of authors have suggested that automatism is the most appropriate defence within which to frame premenstrual syndrome. Carney and Williams argue, for example, that:

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[23] McSherry, *supra* note 15. See also Gannon, F L (1981) Evidence for a Psychological Etiology of Menstrual Disorders: A Critical Review, 48 Psychiatric Reports 287.
[24] *R v Smith supra* note 1.
[25] *Supra* note 1 at 531, emphasis added.

> Although a PMS sufferer may be conscious of her actions and devoid of any mental disease or defect, she is no more able to control her actions than the automaton or the legally insane. Physiological anomalies render the PMS sufferer unable to control her actions during the short time PMS symptoms surface.[26]

However, it must be noted that an inability to control one's behaviour does not by definition amount to the involuntary conduct that is required of the automatism defence.[27]

Premenstrual syndrome is also frequently used in mitigation. Most notably when Sandra Smith/Craddock's defence of PMS failed, she was able to raise her PMS in mitigation of sentence.[28] At the sentencing stage, the court may have regard to a wider range of factors than may be considered at the trial stage.[29] This often includes a great deal of material relating to the background of the accused and any social, economic and other 'external' circumstances in her life. Consequently the criteria for admitting factors in mitigation will be far less rigid than those that relate to the substantive defences.

In the case of *Smith,* the Court expressed the view that by recognising PMS as a mitigating factor, it could retain control over the defendant, whereas allowing a substantive defence would have forced the courts to release her without any form of supervision.[30] However, Carney and Williams have argued, correctly in my view, that this amounts to the Courts acknowledging that a defendant may be morally blameless and yet she must still be labelled as a criminal.[31] They take the view that, until an alternative

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[26] Carney and Williams, *supra* note 3 at 265.
[27] The meaning of involuntary will be discussed in some detail in subsequent chapters.
[28] *Supra* note 1 at 532.
[29] A. Ashworth, *Sentencing and Criminal Justice, 3rd edition* (London: Butterworths, 2000).
[30] *Supra* note 1 at 532.
[31] Carney and Williams, *supra* note 3 at 265.

mechanism has been devised to allow sufficient supervision and treatment for such women, the law must choose between recognising their moral blamelessness and protecting society and that at present, mitigation appears to provide the most workable compromise.

Indeed, if a defendant is successful in raising PMS in mitigation of sentence, it is often the case that the punishment that is meted out to her by the court is conceptualized as a form of treatment rather than a penalty. This was the case in *Smith* where the Court of Appeal found that Smith had been "dealt with mercifully by being put on probation with provision for medical treatment".[32] This of course is likely to raise objections in the feminist camp as discussed in detail in the next chapter. Lloyd has suggested that it could be that "PMS is just a modern name for the old myth that women are inherently unstable".[33] She fears that this leads to the risk that hormones will be used to explain all female behaviour. It is not enough to say that because a woman has PMS, her behaviour is automatically explained; still less does it excuse wrongdoing.

Since the seminal cases of Sandra Craddock and Christine English, most PMS cases in the English courts have involved either a defence of diminished responsibility or the use of PMS in order to plead mitigation. We are therefore left with the paradox that, for the crime of murder, premenstrual syndrome can reduce culpability but the same cannot be

[32] *Supra* note 1 at 532.
[33] A. Lloyd, *Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women* (London: Penguin Books, 1995).

said of other 'lesser' crimes.[34] Although it may be used to mitigate sentence in such cases, judges may still be bound by minimum sentencing guidelines for the crime in question. In addition, one might argue that the symbolic value of a conviction in a case where moral guilt may not warrant such a finding of guilt, and the accompanying record, threatens the legitimacy of the criminal justice system.

Aside from mitigation, the main way in which PMS appears to be used at present is to raise the partial defence of diminished responsibility. This is a complex and arguably unsatisfactory area of the law even when the mental abnormality in question is not itself controversial. This thesis therefore concentrates on the theoretical issues surrounding the use of PMS as a substantive defence rather than cases in which it might be used in mitigation of sentence.

[34] The same is true of the provocation defence. It defies logic that provocation can reduce a murder charge to a conviction for manslaughter but not, for example, reduce the crime of assault to a lesser charge.

THE DEBATE SO FAR

Biological Positivism

The female reproductive system has long been blamed for female criminality. Writing at the end of the nineteenth century, Lombroso and Ferrero hypothesised that a woman's biology predisposes her to be passive, obedient and law-abiding. According to these authors, although women are apparently naturally jealous and vengeful, these traits are suppressed by a woman's "want of passion, sexual coldness, by weakness and an undeveloped intelligence".[35] They also suggest that biological factors account for the presence, as well as the absence, of female criminality. Their study of the skeletons of convicted female criminals apparently revealed that women who committed crimes showed certain deformities in their skulls that were not present in the general population, and so the idea of the 'criminal type' was born. Many critics of the use of premenstrual syndrome in criminal cases support their arguments by drawing an analogy between PMS and these antiquated and quite clearly misinformed nineteenth-century theories.[36]

Susan Edwards, however, has argued that it is a mistake to suggest that the "particular branch of pseudo-scientific theorizing" that has grown out of the work of Lombroso and Ferrero has been the most significant factor influencing the present-day criminological and legal approaches to female criminality.[37] She suggests that medical professionals have also had a significant impact on this particular subject since well before Lombroso

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[35] C. Lombroso and W. Ferrero, *The Female Offender* (New York: Specially Published for the Brunswick Subscription Co. by D. Appleton, 1915) at 151.
[36] See, for example, B. McSherry, *supra* note 15.
[37] S. Edwards, *Women on Trial* (Manchester: Manchester University Press, 1984) at 81.

and Ferrero developed their theory. However, the theories postulated by the medical profession, like that of Lombroso and Ferrero, also demonstrate a belief in notions of biological positivism:

> "From the beginning of the nineteenth century, medical practitioners, mental health physicians and gynaecologists conceded rather more specifically that criminality in women could be explained by the physiological episodes to which they were subject. Thus menstruation, pregnancy, lactation and the climacteric were regarded as 'crisis periods' when a woman might behave erratically or criminally."[38]

The fears surrounding biological positivism are not helped by the fact that Katharina Dalton, one of the most well-known voices on the subject of PMS, insists that the widest variety of symptoms imaginable can be attributed solely to hormonal fluctuations and consequently are easily cured by progesterone therapy. Dalton is probably the most vocal supporter of the view that women's behaviour and indeed their entire personality at certain times is governed by their biological makeup, and consequently wholly outside the woman's control:

> "During an outburst of irritability the woman may become violent and is prone to hit out at anyone within reach, often the nearest and dearest. She is generally completely unaware of the seriousness of her actions and is quite unable to prevent them. It is in this situation that the husband and/or children, can and do, get battered".[39]

The fact that one of the most prolific writers on the subject of PMS has linked women's behaviour so inextricably with their reproductive biology does little to endear the concept to feminist critics. However, this appears to be the very heart of the problem: critics dislike the idea and the implications, imagined or otherwise, of accepting that women

[38] S. Edwards, *Women on Trial, ibid* at 82.
[39] K. Dalton, *supra* note 2 at 68.

cannot control a certain aspect of their lives. The question of whether, or the extent to which, this may or may not be a realistic description is often ignored.

Most authors writing on the subject of premenstrual syndrome therefore draw comparisons with the old arguments that linked biological positivism and offending by women. Jane Ussher, for example, has identified a connection between the modern association of menstruation and crime and historical fears concerning witchcraft:

> "There are many explanations for man's fear of women's sexuality and fecundity and in particular man's fear of menstrual blood. One of the most easily identifiable in the context of the witch trials is the fear of impotence and castration. The association of sex and menstruation has traditionally evoked terror and dread, the sight of blood on the penis a foretaste of the horrors imagined, making sex during menstruation taboo in many cultures".[40]

Writing elsewhere, specifically about the now widespread acceptance of premenstrual syndrome as an explanation for female behaviour, she expresses the fear that such acceptance will "result in women being controlled, dismissed, and tied to their biology, in the same way as the hysteric or the neurasthenic were in the past".[41]

It is submitted, however, that such an approach, though undoubtedly effective, is not wholly convincing. The fact that biological theories that have since been disproven were once favoured as an explanation for female criminality is not in itself evidence that premenstrual syndrome should have no place in the criminal justice system. Moreover, many of the authors who raise this argument appear to do so as a secondary point to

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[40] J. Ussher, *Women's Madness: Misogyny or Mental Illness?* (London: Harvester Wheatsheaf, 1991) at 50.
[41] J. Ussher, *The Psychology of the Female Body* (London: Routledge, 1989) at 69.

reinforce the view that it is undesirable to suggest that a condition relating to the female reproductive system is in any way responsible for a woman's behaviour.

Gender Politics

The principle objection of feminist authors appears to be founded on the fear that the use of premenstrual syndrome in this way serves to reinforce stereotypes concerning female behaviour, and in particular regarding longstanding notions of the incongruity of the female offender.[42] Following on from this belief is the widely held idea that if a woman commits a crime she must be either 'mad or bad'. Sophie Laws suggests that it is "central to the male view of women that there are Good women and Bad women. Premenstrual tension isolates the badness in women to a part of them that is only sometimes present and results from circumstances (hormones) beyond their control".[43] Maintaining this belief therefore allows judges, lawyers and society as a whole to believe that women are never 'natural' criminals but that they may commit criminal acts when in this 'unnatural' premenstrual state. An explanation such as this is therefore desirable and convenient as it does not threaten the existing *status quo*.

This approach, however, is dependent upon the idea that premenstrual syndrome is an illness which leads women to act in ways that are out of character and contrary to the

[42] Anne Worrall, for example, has suggested that "[w]omen are seen to be 'out of place' in the criminal justice system". She argues that it is as a direct result of this that when women do appear in court they are more likely to be "processed according to their ability to fulfil a certain traditional role in their lives outside the court than according to their offence." A. Worrall (1981) Out of Place: Female Offenders in Court, Probation Journal 28(3), 90 at 90.

[43] S. Laws 'The Sexual Politics of Pre-Menstrual Tension' (1983) Women's Studies International Forum, Vol. 6(1) 19 at 21.

popular stereotype of passive female behaviour. It is upon this characterization of menstruation as a source of illness that feminist authors tend to focus.

Jane Ussher examines the ways in which menstruation has throughout history and across many different cultures been regarded as a taboo subject.[44] She suggests that this taboo is still a powerful force in perpetuating stereotypes of women as governed by their hormones. The result, she argues, is that women are regarded as having a debilitating illness for approximately one sixth of their reproductive lifetime. Furthermore, she refers to research suggesting that both men and women continue to believe these stereotypes.[45]

Ussher believes that classifying the symptoms that many women experience prior to menstruation as a 'scientific' syndrome is simply an illustration of the same popular myths surrounding menstruation in a more sophisticated form.[46] This in turn enables any out-of-role female behaviour to be characterised as a form of pathology. Like many authors she objects to the way in which this focuses attention on the individual woman and suggests that the problem is inherent within her rather than the result of wider social and environmental factors. This in turn leads to a dependence on the (male) expert as psychologists and psychiatrists are brought in as the only people deemed capable of treating this female 'madness'.[47]

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[44] *Supra* note 40 chapter 3.
[45] *Supra* note 40 at 44.
[46] *Supra* note 40 at 45.
[47] *Supra* note 40 at 133.

One of the main opponents of any approach which allows a woman's natural physiological being to be characterised as a form of illness is Hilary Allen. Her analogy with the idea of a 'post-breakfast syndrome', where all the symptoms that one experiences early in the morning are also compared to an illness, has been adopted by many authors who have since written on this subject.[48] Sophie Laws usefully sums up this argument:

> "[t]he presence of a symptom does not necessarily lead us to define ourselves as ill. A great number of other factors come into play in the decision as to whether or not to treat ourselves as ill. This is why it can make sense to talk about the creation and the history of premenstrual tension. We can choose whether or not to label the feelings we have premenstrually [as] signs of illness or not, but that choice is not made individually: cultural definitions, doctors and individual men may take that choice out of our hands". [49]

It is therefore not difficult to understand how feminist authors have come to object to the use of PMS in a way that allows the legal system to support this ideology that roots menstruation in the discourses of psychiatry and sickness. The Law as a discourse played out to society in the courtroom is a powerful social tool and consequently is able to play a significant role in the normalization of gender roles. Legal discourse therefore provides a legitimating social voice in support of the idea that a female criminal is a victim of her own pathological reproductive system.[50]

Carol Smart has written specifically on the subject of the courts legitimating the ideologies surrounding female behaviour. She describes it as a form of 'legal

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[48] H. Allen 'At the mercy of her hormones', *supra* note 9.
[49] Laws, *supra* note 43 at 23.
[50] V. Hey 'Getting away with murder: PMT and the press' in Laws, S; Hey, V and Eagan, A, *Seeing Red: The Politics of Premenstrual Tension*(London: Hutchinson, 1985) at 76.

imperialism'.[51] The nature of the law and its origins allows it to claim a degree of legitimacy when making legal pronouncements. However, claims about the truth of the law are inextricably linked with more general claims about society. As Smart has pointed out, a judge does not remove his wig when commenting on sexual morals in a rape case.[52] As a result of the special status of legal discourse, it is able to claim a superior position over competing discourses in any particular narrative. Smart thus suggests that law "claims to have the method to establish the truth of events",[53] and suggests that by aligning itself to other powerful discourses, such as those of medicine and psychiatry, the law's discursive power may be further enhanced. In this case, the law's superior knowledge allows female criminals to be reduced to little more than their reproductive organs and functions.

The characterization of female biology as pathological, and the reinforcement of this view by the law and the criminal justice system have been at the centre of feminist authors' objections to the use of premenstrual syndrome in criminal court cases. The notion of female reproductive biology as a determining factor in the lives and behaviour of women is regarded as inherently undesirable by a number of authors. Sophie Laws identifies two apparently anti-female attitudes to this subject, the first being that women are 'mad' and cannot be held responsible for their actions for a significant amount of time over their lifetimes.[54] Alternatively, Laws suggests that allowing PMS to be used in this

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[51] C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) at 13.
[52] *Ibid* at 13.
[53] *Ibid* at 10.
[54] S. Laws 'Who needs PMT? *supra* note 15 at 23.

way is simply an example of judicial leniency towards female defendants.[55] The latter argument suggests that there is a feeling that women are not genuinely affected by PMS and it is simply used as a convenient excuse by female defendants and their lawyers. The desire not to encourage such attitudes is therefore the basis of authors' claims that premenstrual syndrome should not be available to female defendants as part of a defence or in mitigation.

A particular preoccupation of a number of authors seems to be that premenstrual syndrome is a political construct, providing a patriarchal society with yet another way to control women.[56] Hey conducts an analysis of the way in which the high-profile cases in this area have been reported in the press.[57] In doing so, she claims to find evidence that society is indeed presented with the idea that the courts support the view that women are inherently unstable and inferior as a result of their reproductive biology. She identifies an underlying tendency to pathologise female defendants and examines the way in which attributing women's behaviour to their biology rewards a patriarchal society. Commentating on reports of the Christine English case she notes that:

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[55] Hilary Allen has conducted research on the frequent use of psychiatric measures in cases involving a female defendant. Findings of a psychiatric disorder tend to lead to a rehabilitative sentence which is likely to be perceived as an example of judicial leniency towards female criminals, H. Allen *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions,* (Milton Keynes: Open University Press, 1987).

[56] See, for example, Laws, 'Sexual Politics', *supra* note 43 at 20. Further, Mike Redmayne has suggested that it is seen as politically desirable to label PMS as a syndrome in order to justify a significant degree of control and intervention by the courts and the medical profession. He describes this as one of the more sinister aspects of control and intervention, suggesting that it can lead to certain conditions being pathologised where they would not otherwise be regarded as a medical issue: M. Redmayne 'Review: The Implicit Relation of Psychology and Law: Women and Syndrome Evidence' (2001) International Journal of Evidence and Proof 5, 267.

[57] *Supra,* note 50.

> "No perspective is placed on these events. Within the reports, they [her lover's violent acts towards her] are offered as bits of personal biography. It was *she* who 'snapped'. His provocative gestures, language and demeanour, as well as his physical assaults, retain the status of background 'colour'. The result is an acquittal for Christine English on the grounds of diminished responsibility, a consequent problematizing of women's body and a *non*-problematizing of male behaviour".[58]

By using concepts such as the recurring motif of 'Jekyll and Hyde' and constructing female defendants as the pathological 'other', the idea that women are unreliable and governed by their hormones is subtly sustained in the minds of the public. Some commentators take this argument further and contend that allowing the courts to legitimate this conception of female behaviour risks setting a dangerous precedent. Hilary Allen, for example, believes that the use of PMS in this way encourages attitudes and beliefs "which justify discriminatory treatment of women in employment, education, political life...under the insidiously patriarchal control of the medical establishment."[59]

Having identified the principal concerns of authors in this field, the central thesis of this paper is founded on the contention that the issue identified by many critics is not in fact a justified objection to the use of premenstrual syndrome in criminal court cases. Donald Nicolson identifies the dichotomy that many believe forms the heart of this debate:

> "While female-specific defences potentially allow individual female defendants to escape or reduce criminal liability, and so deliver just results for the women concerned, at the same time, they also resonate with damaging and normalizing stereotypes about women's biology and appropriate social role".[60]

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[58] *Supra* note 50 at 78. Hey is of course mistaken have describe the diminished responsibility verdict as an acquittal. To ignore the fact that English was found guilty of manslaughter is clearly misleading.
[59] H. Allen 'At the mercy of her hormones', *supra* note 9 at 29.
[60] Nicolson 'What the Law Giveth, it also taketh away', *supra* note 6.

In other words, Nicolson suggests that it is necessary to choose between allowing individual female defendants to raise PMS in defence or mitigation or not allowing them to do so in order to avoid perpetuating the damaging stereotypes that he and other authors find so undesirable. However, in this paper I wish to suggest that there is in fact no such choice.

A Change in Focus

The purpose of the criminal law is to determine, at least beyond all reasonable doubt, the degree of a defendant's culpability. The aim of introducing a condition such as PMS in a criminal case is surely to provide the defendant with a means of defending herself if that describes the reality of her situation. If such a defendant genuinely suffers from a condition that, when applied to the relevant legal tests and standards, negates or diminishes her *prima facie* guilt, then surely this must be taken into consideration. Precisely what those legal tests or standards should be will be discussed in more detail in chapter six. However, at this stage all that needs to be noted is that to discount such relevant information because admitting it may have politically undesirable consequences would subvert the aims and intentions of the criminal law.

If such an approach were to be acceptable, what critics of the PMS defences would in fact be saying is that the condition should not be acknowledged in criminal cases for the simple reason that only women can suffer from PMS. In other words, if a different, gender-neutral condition were to generate identical symptoms, and the relevant legal standards that determine culpability were satisfied in any particular case, then there

would apparently be no problem with admitting the symptoms in question to found a defence. However, since PMS is not gender-neutral, the normal standards of culpability are, according to opponents of PMS-based defences, irrelevant. Such an approach is, I would suggest, thoroughly unacceptable and inappropriate.

If further evidence in support of this point of view is required, Donald Nicolson draws on the work of some relatively well-known feminist authors to identify the 'ethic of care' that is apparently inherent in feminist ethics.[61] He suggests that part of this ethic of care entails that:

> [I]n resolving moral dilemmas, men tend to rank ethical principles, whereas women attempt to meet everyone's concrete needs and to ensure that if anyone is going to suffer, it should be those who can best bear the pain.[62]

If we are to accept that this is indeed the case, surely the most appropriate way to 'meet everyone's concrete needs' according to the ethics of caring is to allow individuals a legal defence if their condition would seem to require it. The needs of the majority of women can be met by rigorous debate and the policing of attitudes that may be interpreted as fostering demeaning stereotypes. However, given that these means are always available to those, including myself, who are concerned with how women are perceived in society, it does seem that the faceless majority of women are indeed better able to 'bear the pain' that may arise from acknowledging gender-specific conditions in the criminal courts. A

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[61] Nicolson, *supra* note 6 referring in particular to the work of Nel Noddings and Carol Gilligan: Noddings, N. *Caring: A Feminist Approach to Ethics and Moral Education* (Chicago: Chicago University Press, 1984); Gilligan, C. *In a Different Voice: Psychological Theory and Women's Development, revised edition* (Cambridge, MA: Harvard University Press, 1993).
[62] *Supra* note 6 at 173.

situation where we must all work a little harder to rebut negative stereotypes of femininity is surely preferable to one that allows morally innocent women to be convicted of criminal offences.

The second part of this paper therefore focuses in part on whether PMS is being applied in criminal cases in a way that describes the reality of a defendant's situation. Based on the assumption just stated, namely that if an issue is legally relevant then it should be considered regardless of political consequences, I look at whether the considerations that come into play in cases where a defendant relies on PMS are genuinely relevant to the law. Thus, for example, I examine whether, when women rely on PMS-based defences, the courts do in fact use this information to perpetuate negative and untrue stereotypes of women, or, alternatively, whether there is evidence of excessively lenient treatment of female defendants. However, I suggest that the problem here is not the fact that a condition, if genuine, is relied upon but the fact that such stereotypes are apparently being promoted by criminal justice personnel. Moreover, I shall examine the extent to which the requirements set out by the law for constructing a particular defence are fulfilled in cases involving PMS. To summarise, I shall assess the degree of success with which such cases enable the true extent of a defendant's guilt to be established, since it is this alone that can satisfy the requirement that the criminal law be applied legitimately.

THE PMS-CRIME LINK

There is a considerable degree of uncertainty as to whether or not PMS actually causes crime. Katharina Dalton is firmly of the opinion that it does. She argues that "[a]mong the premenstrual symptoms which may result in criminal charges are a sudden and momentary surge of uncontrollable emotions resulting in violence, confusion, amnesia, alcoholism, nymphomania and attention-seeking episodes, which represent cries for help".[63]

In order to advance this thesis, Dalton suggests that PMS-driven crimes tend to exhibit certain specific characteristics, namely that offenders often act alone, the crime is not premeditated and has no apparent motive.[64] She also suggests that the women concerned may not make any attempt to escape detection and that their actions may appear to be a cry for help.

There has been a significant amount of research investigating the alleged link between premenstrual syndrome and female criminality. Studies of female prisoners have found that almost half committed their offences during the week preceding menstruation.[65] When considering only violent crimes the figure rose to 62%.[66]

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[63] K. Dalton, *The Premenstrual Syndrome and Progesterone Therapy, supra* note 2 at 236.
[64] I would question the accuracy of the latter claim. It seems more likely that the effect of PMS would simply reduce a woman's ability to react to a particular situation in a law-abiding way. Christine English, for example, apparently 'snapped' when her partner told her he wished to end their relationship, *supra* note 1.
[65] K. Dalton 'Menstruation and Crime' (1961) *British Medical Journal, 2 1752;* J. Lever, *PMT: The Unrecognised Illness* (London: Melbourne House, 1979).
[66] Lever, *ibid.*

However, a number of objections have been raised to such findings. Hilton draws our attention to the possibility that stress or anxiety (such as the trauma surrounding an offence and subsequent arrest) may cause the onset of menstruation rather than vice versa.[67] It is almost impossible in most cases to confirm the presence of PMS symptoms or dates of menstruation at the time of an offence. Consequently it is difficult to separate cause and effect.[68] Furthermore, she points out that although Dalton claims that some of her case studies exhibited cyclical patterns of crime, what they actually showed was that these women were imprisoned periodically. She stops short, however, of relating cycles of admissions to cycles of actual criminal behaviour. Hilton appears to be suggesting in this case that it might have been preferable to include a study that examines whether criminal behaviour is related to these women's menstrual cycles. Since the time lapse between the commission of a crime and the point at which a woman is taken into custody will vary from one case to another, it seems premature to conclude that cyclical patterns of admission to prison prove a link between PMS and criminal behaviour.

Moreover, since these studies involve retrospective diagnoses of PMS, they are not necessarily reliable. It is not usually possible to confirm the presence of premenstrual symptoms, or their influence, at the time of the offence. As Hilton has put it, "[t]he dependence of the diagnosis upon retrospective self-reports may also distort medical understanding. Women remanded in custody for medical reports typically receive

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[67] Hilton, *supra* note 12.
[68] This may explain why Dalton's results were equally applicable to prostitution. Since this is an ongoing occupation, it is unlikely to be influenced by transitory emotional fluctuations, J. Horney 'Menstrual Cycles and Criminal Responsibility' (1978) *Law and Human Behaviour 2(1) 25 – 36.*

treatment during detention, removing the opportunity to obtain more reliable diagnoses based on daily reports".[69] If women were not so treated, presumably they could be monitored and evidence of their premenstrual symptoms observed.[70] In any case, the knowledge that a finding of PMS is likely to reduce or mitigate liability may distort retrospective studies that rely on self-reporting since the incentive to self-report that one was premenstrual at the time of the offence is obvious.[71]

However, I would suggest that the main problem with studies such as these is that they do not actually answer the relevant question. McSherry has objected that their focus is on showing that women as a group are more likely to commit crimes during the premenstrual phase and not that a small percentage of women suffering from PMS are more likely to commit crimes than are the majority of women.[72] It is surely the latter question alone that is relevant to this issue. Furthermore, these studies do not generally inquire as to whether the women in question were suffering from PMS as opposed to simply in the premenstrual phase of their cycle. Such evidence is therefore of little value to the issue of whether it is legitimate to raise evidence of PMS in criminal cases. As I outlined in the introduction to this thesis, the question for the court should be whether a particular woman suffered from PMS at the time of her offence and whether her PMS caused or contributed to her offence. If so, they must consider whether it should affect

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[69] Hilton, *supra* note 12 at 152.
[70] My own view, however, is that environmental factors may well come into play when it comes to the nature and intensity of the symptoms of PMS. A woman who has been imprisoned and is awaiting trial may well have a heightened susceptibility to such symptoms.
[71] A. Morris, *Women, Crime and Criminal Justice* (Oxford: Basil Blackwell, 1987).
[72] McSherry, *supra* note 15 at 299.

the judgement of her culpability for that offence.[73] Alison Morris argues that "showing that women who commit crimes are more likely to be in a certain part of their menstrual cycle does not mean that women generally in this phase are more likely to commit crimes".[74]

Research to determine whether premenstrual syndrome causes criminal or violent behaviour in women diagnosed as suffering from the condition has been fairly sparse. Even if a propensity to commit crimes associated with the menstrual cycle is proven to exist in some women, that does not in itself imply that their behaviour is legally excusable or that they could not resist the desire to offend. Many authors draw a parallel with the fact that male criminality is arguably linked to testosterone levels and yet there is no suggestion that this should reduce their liability.[75]

[73]It will be argued below that at present the courts erroneously confine themselves to asking only the first limb of this question.
[74] Morris, *supra* note 71 at 49.
[75] Donald Nicolson, for example, argues that men are most likely to offend in their late teens and early twenties when testosterone levels are at their highest. Nicolson, *supra* note 6 at 168.

PMS IN THE CRIMINAL COURTS

The aim of this section is to demonstrate that the way in which premenstrual syndrome is currently dealt with in criminal cases is unsatisfactory. By manipulating both the concept of PMS and the legal categories to which it is most frequently applied, judges and lawyers can obtain verdicts which do not represent the 'truth' of a defendant's situation. Once it has been shown that this is the case, the objections of authors who claim that the availability of such a defence is undesirable because of its negative implications for women as a group may be regarded as justified.

Even if it were shown that a woman was suffering from PMS and that this had induced her to commit criminal acts in which she might not otherwise have engaged, it does not necessarily follow that she should not be held legally responsible for her conduct. Much of the analysis in this thesis will be devoted to the question of when PMS might justify an offender's conduct being excused.[76] Premenstrual syndrome appears to incorporate an impossibly broad range of symptoms and any medical condition can lead to different degrees of impairment. This is clearly recognised by Donald Nicolson:

> Currently, criminal law constructs responsibility in terms of cognition and control. Thus, in order to make PMS relevant to the defences of automatism, insanity or diminished responsibility, it would have to be established that it acts to remove or reduce a woman's awareness of the nature of her actions and their legal or moral status, and/or her ability to control her actions. The courts have readily accepted that defendants would not have acted criminally had it not been for PMS, but this does not necessarily mean that they should be legally excused.[77]

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[76] This is question (iv) as set out in the introduction.

[77] Nicolson, *supra* note 6 at 167 – 168. The effects of PMS on criminal behaviour, and their relevance to criminal liability, may be analogous to the effects of intoxication, although the fact that intoxication usually occurs voluntarily would be a distinguishing feature. The similarities and differences between the two conditions will be discussed in more detail in a later chapter.

The 'Mad versus Bad' Dichotomy

To date, most cases in which PMS is used to successfully found a substantive defence have involved a plea of diminished responsibility. However, it has already been noted that this defence is founded on legal rather than medical concepts. This makes it particularly vulnerable to manipulation by defendants and their lawyers. Bell and Fox have suggested that the nature of this defence, combined with a lack of institutional regulation of sentencing practices allows appellate judges, as well as defence lawyers and sympathetic medical witnesses, to manipulate the facts of a case in order to ensure a 'desirable' outcome.[78] The malleability of this defence therefore provides a means of resolving seemingly inexplicable crimes and allows judges, lawyers and society to maintain their beliefs of the incongruity of female violent criminals.

Many of the cases which result in a verdict of diminished responsibility due to premenstrual syndrome might be better categorized as provocation cases.[79] The case of Julie Campbell provides a paradigmatic example of this problem.[80] Campbell was convicted in 1994 for the murder of her husband with whom she had a volatile relationship. In the evening that preceded the killing, the pair had had a vicious row which had lasted several hours. Campbell then allegedly poured turpentine over her husband and set fire to him as he slept. A similar point may be made concerning the case of Christine English. In that case, the deceased had allegedly been violent and abusive towards English and the argument which preceded the killing had concerned his relationship with another woman. Both cases, however, resulted in a diminished

[78] C. Bell and M. Fox (1995) Telling stories of women who kill, 5 Social and Legal Studies, 471 – 487.
[79] A similar observation is made by Nicolson, *supra* note 6 at 171.
[80] *R v Campbell* Court of Appeal Criminal Division, 30/07/1999, unreported.

responsibility verdict rather than a finding of provocation. There are several cases involving male defendants in which the offender has killed his partner after learning of her infidelity and then successfully pleaded the partial defence of provocation.[81]

That the default position in this case appears to be that defendants and their lawyers rely on diminished responsibility rather than provocation provides evidence in support of the claims of many authors that the courts prefer to label women as 'mad rather than bad'. Throughout history the majority of defendants, particularly where violent crime is concerned, have been male. The criminal law has correspondingly taken 'typical' male behaviour to be the norm. The sudden and immediate burst of aggression in response to provocation is far more typical of men than of women. For a long time, this fact effectively barred many women from being able to rely on the provocation defence even in situations where they had lost control following a provocative event.[82] However, in the case or *R v Ahluwalia,* Lord Taylor CJ recognised that a loss of control that occurs some time after the provocative event does not of necessity preclude a woman from successfully raising a defence of provocation.[83] Consequently there is in theory no reason why women should not raise a defence of provocation if such a plea is warranted by the facts of the case.

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[81] See, for example, *R v Duffy* [1949] 1 All E.R. 932. Following the case of *R v Smith* (not to be confused with Sandra Smith/Craddock) the defence of provocation would appear to be even more appropriate for cases in which women kill and wish to raise a defence based on premenstrual syndrome.[81] In *Smith,* the House of Lords held that a defendant who was suffering from severe depression when he fatally stabbed an acquaintance during an argument was entitled to have his depression taken into account by the court in considering the gravity of the provocation. Although premenstrual syndrome is a condition which occurs periodically rather than being constantly present, I would suggest that this does not necessarily prevent it from being a condition that has the necessary degree of permanence to satisfy the provocation defence, see *R v Smith* [2001] 1 A.C. 146. The provocation defence, s. 3 Homicide Act 1957 requires a loss of self-control in a situation where a reasonable person could be expected to lose control.

[82] *R v Thornton* [1992] 1 All ER 306.

[83] *R v Ahluwalia* [1992] 4 All ER 889.

An additional reason for the preference of diminished responsibility as a defence over provocation may be that anger resulting in a loss of control is seen as an acceptable facet of the male psyche, whereas women are not seen as capable of becoming legitimately angry; rather, any such loss of control must be the result of a woman's inherent mental instability. In this type of case, a woman's anger must be driven entirely by her uncontrollable hormones in order to be excusable.

Selective Reporting

Although it is beyond the scope of this thesis to conduct a detailed empirical survey of criminal cases in which premenstrual syndrome is raised, there is some evidence that the facts of these cases are being suppressed and strained in order to make them 'fit' the existing defences. The most striking example of this is the way in which there appears to be no explanation in individual cases of how and why the offender's PMS influenced the commission of the crime. This results in a legal discourse which implies that everyone suffering from PMS has exactly the same symptoms and will be affected in exactly the same way. It is clear from the chapter entitled 'What is PMS?' that this could not be further from the truth. Typically, the syndrome will be referred to in court as if its contribution to the offence is self-explanatory. The case of *R v Criminal Cases Review Commission ex parte Pearson* demonstrates this.[84] The woman in question was challenging the decision of the CCRC not to grant her leave to appeal against her conviction for the murder of the girlfriend of her former partner. She wished to argue that she had been suffering from diminished responsibility at the time in question. The

[84] Court of Appeal Criminal Division (18/05/99),

Lord Chief Justice described her circumstances as follows: "The appellant suffered a miscarriage on the 12 October 1986 not long before the alleged murder on 18 October 1986 and was apparently suffering from both post natal depression and pre-menstrual syndrome at the time of the event."[85]

In its eagerness to portray this woman's crime as the result of a recognizable and commonly understood medical disorder, the Lord Chief Justice is apparently unaware of the elementary point that a woman is unlikely to be premenstrual so soon after a miscarriage.[86] Whilst the woman in question may well have been depressed following these life events, it appears that standard 'depression' was insufficient for these purposes. The overenthusiasm for linking female deviance to the woman's reproductive system has never been more obvious.

The Oversimplification of a Complex Disorder

Perhaps even more significantly, there is no elaboration on this point. It is assumed that these syndromes have commonly agreed meanings and that both the fact that they will affect an offender's behaviour in a way relevant to the commission of the offence and the manner in which they will do so are universally understood. The effect, as Hey has argued, is that the law constructs a single condition of PMS and a single category of sufferers.[87] However, the disagreement regarding the diagnosis, incidence, aetiology, symptoms and treatment identified in the previous section means that it is inappropriate

[85] *Ibid* at para 5; The court is quoting from her original application for leave to appeal against the conviction.
[86] Similarly, the implication that postnatal depression could follow a failed pregnancy is equally mistaken.
[87] Hey, *supra* note 50.

to do this; whilst some sufferers may respond to hormone injections, for example, others may not. The courts must look beyond the label 'PMS' to avoid the implication that all sufferers should be sentenced in the same way.

It would be unthinkable, for example, that a judge might claim that the fact that an offender suffered from diabetes should provide a ground for diminished responsibility if it were not also stated that the offender was suffering from hyper- or hypoglycaemia at the time of the offence and that this was the cause of his actions. Without this causative link, the offender's diabetes has no relevance to his or her crime. Likewise, no lawyer or medical witness would suggest that an offender's personality disorder should serve as a mitigating factor without also disclosing the nature of the condition.

Similar concerns, particularly the failure to consider how and why an offender's suffering from PMS may reduce her responsibility for a crime, arise when considering moral guilt, as opposed to legal guilt. The purpose of mitigation is to ensure that a sentence reflects as closely as possible the actual moral guilt of an offender. However, the way in which PMS is considered in mitigation suggests that judges are too ready to focus on a medical or psychiatric explanation of deviant female behaviour. The effect of this is that PMS is assumed to be the underlying cause of an offender's conduct without any real examination of whether or not this is so. Alison Richardson appealed against her sentence for attempting to pervert the course of justice, arguing that her four month sentence was excessive because of her troubled background which included a history of sexual abuse and the fact that the offence related to a false allegation against her partner

with whom she was in an extremely violent relationship. Even though this was the basis of her appeal, the judgment of the Court of Appeal focused on her PMS:

> She said that she was subject to violent mood swings, for which she was on medication, and suffered from premenstrual tension. She said that two years previously she had been arrested for violence to him and one year previously she had stabbed him, examples of her behaviour when her moods swung violently..... She claimed to have taken 10 grammes of Valium and to have had a few cans of lager before she made the false statement.[88]

The juxtaposition of the reference to the offender's premenstrual tension and the discussion of her violent mood swings implies a connection between the two that does not necessarily exist. This effect is enhanced by the lengthy and detailed description of her behaviour due to these moods. Had the actual symptoms of her PMS been made more explicit, it may have been demonstrated that the condition was unlikely to operate as a cause of the offence. By glossing over the exact nature of the offender's PMS, however, it is easier to imply that this was the cause of her mood swings.

The effect becomes one of implying that her premenstrual tension and violent mood swings were the principal cause of her offence, even though it was an offence of making a false allegation to the police and not of violence. The fact that she had taken Valium and consumed alcohol shortly before making the false allegation, factors that would arguably provide a far more plausible explanation for her behaviour, is relegated to a single sentence at the end of the paragraph. No reference is made to the reasons for Richardson's troubled background until the end of the judgment. Not only does this

[88] Court of Appeal Criminal Division (01/03/01), para 8.

suggest, therefore, that the offender's behaviour is governed entirely by her hormones, but it has the effect of suppressing other potentially mitigating factors.

The result of this failure once again to consider the precise effects of a particular offender's premenstrual symptoms is that the ultimate sentence meted out to these women may be more or less severe than it would otherwise be. This is arguably borne out of the desire to prefer the medical explanation for female offending. As Hilary Allen has recognised, the tendency to do this occurs across all types of case in which a woman is charged with a violent crime.[89] She contends that legal and moral discourses work together to construct a woman who, although apparently guilty of a violent offence, cannot in fact be guilty because such an offence is fundamentally incongruous with how society perceives femininity. Consequently, the situation is resolved by the medicalisation of the subject.[90]

The above case also demonstrates the way in which the medicalisation of female crime allows the court, and indeed society as a whole, to ignore other difficult issues.[91] Allen has therefore questioned the oversimplistic link between PMS and crime, suggesting that

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[89] H. Allen, *Justice Unbalanced, supra* note 55.
[90] *Supra* note 55.
[91] A similar situation is true of cases involving battered women's syndrome. English courts now routinely allow evidence of this syndrome to found a plea of diminished responsibility in cases where a battered woman kills and is tried for the murder of her violent partner. See, for example, *R v Ahluwalia* [1992] 4 All ER 889 and *R v Thornton (No 2)* [1996] 2 All ER 1023. However, many authors have objected to the way that this attributes responsibility for the killing to the woman's mental condition rather than to the abuse perpetrated by the deceased. See, for example, L. Radford 'Pleading for Time: Justice for Battered Women who Kill' in Birch, H. (ed) *Moving Targets: Women, Murder and Representation* (London: Virago Press, 1993). At least where Battered Women's Syndrome is concerned, however, there is hope that the English courts may soon follow the approach of the Supreme Court of Canada. In *R v Lavallee* [1990] 1 S.C.R. 852 a finding of BWS was used in a successful plea of self-defence.

it neglects the complex relationship between biology, medicine and social causes.[92] Factors such as the sexual abuse in Alison Richardson's case are ignored and so the law is able to divert attention away from society's complicity in the causes of this offence and instead construct it as the direct result of the defendant's medical condition.

The 'Feminist' Objection

Although one of the central arguments of this thesis is that gender politics are irrelevant to the question of whether or not PMS should be the foundation of any criminal defence, there are a number of 'feminist' objections that might therefore be raised regarding the current situation as outlined in this chapter. Most significantly is the way in which a mental disorder defence is chosen in preference to the more appropriate defence of provocation in many cases. Whilst this approach may help to reinforce entrenched gender stereotypes and maintain the view that the female violent criminal is in opposition to established social norms, the indignity of falsely portraying a woman as mentally unbalanced is clear. The most blatant portrayal of a woman relying on PMS as being biologically inferior and governed by her hormones is found in the case of Christine English, who was described by her own defence counsel as "not responsible for herself" as a result of her PMS.[93] This, as Valerie Hey observes, means that:

> [i]n separating Christine English from the consequences of her actions an effective defence was built around her susceptibility to PMT. It was established by her defence counsel that the prime determinant of her actions was her uncontrolled body, the hormonal imbalances of which defeated the rational control of her mind.[94]

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[92] H. Allen, 'At the mercy of her hormones', *supra* note 9.
[93] Hey, 'Getting away with murder', *supra* note 50 at page 73, quoting James Rant QC, cited in *The Guardian,* 11November 1981. *The Sun* newspaper on reports, also on 11/11/1981, that Sandra Smith was described at her contemporaneous Old Bailey trial as a "raging animal".
[94] Hey, *supra* note 50 at 73.

This approach can only serve to encourage a perception of women that reinforces arguments for their exclusion from fully participating in society. This attitude is particularly damaging in PMS cases because of the aforementioned tendency to label all women suffering from the syndrome as if they had identical symptoms to exactly the same degree. In fact, many women may have symptoms which do not necessarily affect their behaviour at all. Furthermore, the lack of any discussion as to how and why PMS is relevant gives the courtroom actors a wider margin of appreciation within which to interpret events as they choose. This in turn can result in the promulgation of the sorts of myths about female behaviour in general and female criminality in particular that have led critics to call for the use of PMS in court to be avoided.

Similarly, the condition of treatment that often accompanies a mental disorder verdict is particularly objectionable in cases where the defendant's PMS is not sufficient to actually justify such a verdict.[95] Nicolson objects to the fact that cases in which PMS is used to establish diminished responsibility or in mitigation may become conditional on defendants undergoing progesterone therapy.[96] As well as being painful and having side-effects that are as yet unknown, Nicolson argues that the therapy in itself makes women passive and compliant. Even in cases where a female defendant is not subjected to compulsory treatment as a condition of leniency, Anne Worrall has argued that "the replacement of moral or legal censure by a vague pseudo-medical label is no less

[95] It is not unusual, in such cases, for a defendant to be given a conditional discharge with the condition that she undergo progesterone therapy or other treatment for her PMS. See for example, Sandra Craddock, *supra* note 1.
[96] Nicolson, *supra* note 6 at 169.

controlling in its effects".[97] She further suggests that once a woman has been given a psychiatric label she may have difficulty in having her behaviour taken seriously in future.

[97] Worrall, *supra* note 42 at 92.

THEORIES OF CULPABILITY

Central to the question of whether or not PMS should be acknowledged as a possible basis for a substantive criminal defence is whether the symptoms of the condition might reduce an individual defendant's legal culpability. It is therefore necessary to examine the leading theories of culpability and excuses.

These theories ask when conduct might be morally excusable, since this is the basis upon which legal excuses must be founded. If an offender is judged to be morally blameworthy, she should not be entitled to a legal excuse, although of course there is a distinction between legal and moral justice.

The Moral Code of Our Society

The reasoning common to most of the theories underlying blameworthiness and excuses tends to be that if the offence resulted from the defendant's reaction to exceptional circumstances, and, plausibly, most other members of society might have reacted to similar events in a similar way, the conduct in question might be excusable. Such reasoning is based, in the words of the Canadian judge Dickson J, on "a realistic assessment of human weakness".[98] His reasoning is based on the work of Fletcher, who describes such criminal actors being compelled by circumstances.[99] In order to be

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[98] *Perka v The Queen* [1984] 2 S.C.R. 232 at 248; Although Dickson J is arguing that the defence of necessity should be conceptualized as an excuse rather than a justificatory defence, his analysis has a much wider significance. He argues that the law cannot justify holding people responsible for their actions in emergency situations "where normal human instincts ... overwhelmingly impel obedience", at p. 248.

[99] G. Fletcher, *Rethinking Criminal Law* (Boston and Toronto: Little, Brown and Company, 1978). Both Dickson J. and Fletcher argue that an individual cannot be punished in circumstances where he had no realistic alternative other than to behave as he did. In cases where a defendant suffers certain symptoms of PMS or another mental disorder, surely the issue of whether there is a viable alternative course of conduct must be a subjective question.

regarded as providing an excuse, therefore, the events surrounding the act in question must be truly exceptional.

As the victim of such events, we can disown and distance ourselves from our actions but under normal circumstances, we are held responsible if we do not resist the temptation to break the law. Wilson thus concludes that "[r]ather than acting to effect a politically motivated closure upon the possible range of criminal excuses, as some would have it, the basic defence formula operates largely as a reflection of limits placed upon excuses and justifications at the level of general morality".[100]

There are three main theories of how moral justice might be interpreted and formalised in the defences available in any given system of criminal justice. Jeremy Bentham argued in favour of the utilitarian position: that the rationale for excuses is that they apply in cases where punishment could not act as a deterrent and so it would be pointless. The theory most closely reflected in the current criminal legal doctrine is that based on the offender's capacity to obey the law. This theory is often attributed to Kantian ethics and the idea that an act that could not have been avoided does not merit penal sanctions. This type of argument has recently been taken up by H. L. A. Hart who argues that an individual should not be punished if she lacks the capacity to obey the law.[101] Finally, certain theorists have argued that excuses should reflect a judgment of the offender's character.[102] Character-based theories state that an actor should only be condemned if the

[100] W. Wilson *Central Issues in Criminal Theory* (Oxford: Hart Publishing, 2002) at 330.
[101] H.L.A. Hart, *Punishment and Responsibility* (New York: Oxford University Press, 1968).
[102]Most notably Hume. See, for example, M. D. Bayles, 'Hume on Blame and Excuse,' Hume Studies 2, 1 (1976), 17.

circumstances surrounding his offence indicate a disposition to break the law. In other words, such theories suggest that punishment is a response to the identification of particular personality traits that have apparently caused an individual to act in a way that contravenes the law. Thus, an individual who loses her temper and commits a violent act is punished not for the act but for her lack of self control or her aggressive personality. The extent to which an individual has the capacity to conform is therefore irrelevant to a judgment of her guilt.

This chapter focuses on the two most commonly discussed of theories, namely those based on character and those based on capacity. Having examined each theory in greater detail, I shall go on to investigate how they might be used in the context of premenstrual syndrome. Ultimately, I intend to argue that both of these theories suggest that this condition should only be recognised by the criminal law in the most extreme cases.

Capacity Theory

This theory is founded on the notion that the ability to choose whether or not to act is a prerequisite to criminal liability. Hart has formulated a 'doctrine of fair opportunity' on which he bases his theory of excuses.[103] The doctrine of fair opportunity states that the criminal justice system is not morally entitled to punish an individual unless that person has had a fair opportunity to obey the law. This includes the capacity to make a rational decision not to break the law. A practical example of such a situation is found in the case of Alison Richardson that was discussed in the previous chapter.[104] Richardson is cited

[103] Hart, *supra* note 101 at 181.
[104] *R v Richardson (Alison Shirley), supra* note 88.

by the court as saying that: "At the time I was totally out of my mind. I was just so full of anger and everything. All reality seemed distorted to me".[105] It is this sort of scenario that, if such a defendant is to be believed, may justify a finding that she did not have the capacity to be held criminally responsible.

I do not talk of lack of capacity or voluntariness/ involuntariness in the narrow sense, namely that if an individual is not an automaton, and can physically control her actions, such actions must be voluntary. Rather, by lack of capacity I mean situations where an individual does not have an effective choice of whether or not to break the law.[106] Hart clearly did not mean to imply that liability only exists when the actor has made an actual choice to break the law. This would exclude liability for crimes of negligence and recklessness. In order to be criminally liable, the actor will be judged as having the capacity to obey the law only if she would obey the law if she made the choice to do so. The offender will be regarded as having a fair opportunity to conform only if she has an effective choice as to whether or not to do so. The offender must have had the capacity to make a moral choice at the time of the offence. For this reason, theories of capacity are also referred to as choice theories.

An analogy may be drawn with the defence of necessity. In these cases, an individual can physically control whether he harms another individual, albeit that it is 'necessary' that he does so to prevent a greater harm.[107] However, this is not an effective choice and so that person is not regarded as morally culpable for his acts. In cases where an offender

[105] *Supra* note 88 at para 5.
[106] This approach is outlined in Fletcher, *Rethinking Criminal Law, supra* note 99.
[107] This point was made by Dickson J. in *Perka v The Queen supra* note 98.

suffers from a mental disorder, he may perceive that the reason for breaking the law far outweighs the competing reasons for conforming to the extent that he has no realistic choice as to how they act. Fletcher argues that there is nothing to be gained from punishing such individuals, suggesting that "involuntary conduct cannot be deterred and therefore it is pointless and wasteful to punish involuntary actors".[108]

Similarly, and bearing in mind the fact that the law should reflect our general ideas of moral responsibility, such notions do not lead us to believe that, for example, it is morally excusable to steal from someone simply because they might have more material wealth. However, our everyday moral code does recognise that an individual should not be held responsible if, for example, she commits a crime under duress. In the latter situation, the actor has no effective choice.

Wilson argues that the way in which the current law has been formulated supports the idea that theories of choice and capacity best reflect the way in which we think about culpability.[109] He refers to the way in which the mens rea element of crimes whose rationale is the censuring of moral wrongs is usually based on cognition. He cites violent crimes as an example since these generally require proof of intention or recklessness as their mental element.

An actor may have certain attributes that make it harder for her to conform to the criminal

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[108] Fletcher, *supra* note 99 at 813. This argument, however, assumes that one accepts 'deterrance' as the only rationale for punishment. If one were to take a retributive, incapacitative or even, perhaps, a rehabilitative stance, punishment is not necessarily without merit. What is important in all cases, however, is that the law does not judge an individual any more or less harshly than their moral guilt deserves.
[109] *Supra* note 100 at 333.

law, such as impatience, violent impulses or a hot temper, but still be able to make a choice as to whether or not to break the law. Leaving aside for a moment the types of excuse that stem from impaired capacity (and the accompanying mental incapacity defences), it has been suggested that "the rational actor's choices may be modified or eliminated by events but not circumstances".[110]

The apparent reason for this approach is that, if an individual commits criminal acts because of his personal circumstances, such as his genetic or biochemical makeup or because he is the victim of social deprivation, it is likely that these circumstances will persist and could cause him to reoffend. By arguing that such circumstances should not therefore have an exculpatory effect, the courts can retain a degree of control over potentially dangerous offenders. Smith and Wilson defend this view by arguing that, although our characters our formed as a result of any number of biological, social, environmental and historical influences, we must still be responsible for them.[111] To some extent, this is certainly true. However, the aspects of our personalities that inform our decision-making are vast, varied and extremely numerous. Whilst it is true that some degree of dispositive control should be maintained over potentially dangerous individuals, to label an individual as a criminal, with the accompanying stigma and penal sanctions, is unjust if the basis for doing so is simply whether their capacity was diminished by ongoing circumstances or by a one-off event for it will not necessariliy reflect their moral culpability. In any case, there is no guarantee such a unique event

[110] K. J.M. Smith and W. Wilson, 'Impaired Voluntariness and Criminal Responsibility: Reworking Hart's Theory of Excuses – the English Judicial Response' (1993) Oxford Journal of Legal Studies, 13(1), 69 at 78.
[111] *Ibid.*

would not have persistent and recurring consequences, and so make the individual concerned just as likely to reoffend as if her reduced capacity had an internal cause.

Smith and Wilson appear to take a similar approach when referring to the types of excuse that arise out of conditions of impaired mental capacity. They cite the apparent reluctance of juries to accept a plea of diminished responsibility on the grounds of psychopathology:

> While from the abstract point of view the claim that an actor could not help what he did has prima facie excusing force in popular morality, in concrete terms internal pathologies are not necessarily treated as diminishing a person's moral responsibility. On the contrary, they may be said to constitute it. What is not clear, in other words, is how far the contradictions in excuse doctrine derive from their social counterparts rather than from the politics of penal control.[112]

I would suggest that such a clear-cut approach reflects neither moral justice nor current legal practice. The question should be one of degree. At a certain point, an offender's condition or circumstances cease to be something that he can be expected to 'override' in making decisions about his conduct.

Capacity-based theories are therefore best interpreted as drawing a distinction between individuals who fail to resist the urge to do a wrongful act but whose acts can still be attributed to them as their own, and those whose situation causes them to fail to resist the impulse to commit an offence but who could not reasonably be expected to do so, as a reflection of when an individual is regarded as morally culpable. In the latter case, we cannot say that the acts of the accused are their own; rather, their circumstances or

[112] *Ibid* at 91.

condition 'took over' and caused them to act in this way. However, it is too simplistic to draw a distinction between events and circumstances. Rather, it is the individual facts of a case that determine at what point an actor can be said not to have the capacity to make a free choice about her behaviour. The point at which this may be said to be the case and the criteria to be applied will be examined in more detail below and in the next chapter.

Capacity/Choice Theories and Premenstrual Syndrome

In the previous section I discussed how, according to capacity theory, an individual is only entitled to be excused from criminal liability if he somehow lacked the capacity to make a rational moral choice. It is clear that many of the symptoms of premenstrual syndrome identified in the chapter entitled 'What is PMS?' will not fulfil this requirement. It is simply too great a stretch of the imagination to suggest that symptoms such as headaches, fatigue, feelings of bloatedness or excessive hunger and thirst can negate an actor's free choice as to whether to conform to the law. Indeed, these are clearly examples of the natural vicissitudes of life that capacity/choice theorists contend, quite rightly in my view, should not be regarded as an excuse for committing criminal acts. A whole spectrum of so-called causes may reduce an individual's capacity to conform to the law but it is only at a certain point on that spectrum that her condition justifies a full or partial excuse.

However, given the range of symptoms and the enormous variation in their severity in different patients with PMS, it is not implausible to suggest that certain women may have symptoms that are linked to their menstrual cycle and that are sufficiently severe so as to

negate the actor's capacity to exercise free will. The most likely PMS symptoms to fall within this criterion include anxiety, depression, confusion, stress and extreme tension. That this may be the case was suggested by Julie Campbell's defence team.[113] Dr Katharina Dalton, who had been called upon by the defence to act as an expert witness, apparently said of Campbell's PMS that "[I]t caused diminished responsibility, and confusion with inability to form a rational intent and to appreciate the consequences of her action on the night of the crime".[114] The claim that the defendant lacked the ability to form 'a rational intent and to appreciate the consequences of her action' is a clear evocation of the choice/capacity approach.

The result of this approach is that capacity theory renders the conundrum of whether or not a condition known as premenstrual syndrome in fact exists irrelevant. It is the symptoms themselves that are relevant to capacity. Although the 'mental health defences' look to whether the symptom has an internal or an external cause, I have argued that this in itself is does not affect capacity. Similarly, the fact that the symptoms of PMS occur periodically and are related to the menstrual cycle is irrelevant.

Character Theory

Character-based theories of criminal responsibility differ from the capacity-based approach in that they focus on an assessment of responsibility derived from character

[113] *R v Campbell (Julie Christine), supra note* 80.
[114] *Supra* note 80 at para 14.

traits rather than from actual deeds. Michael Bayles provides one of the most detailed accounts of what he calls the Humean position:

> On this view, 'character trait' is not, as in the Aristotelian view, restricted to traits which people can voluntarily control possessing or manifesting in behaviour. Instead, it refers to any socially desirable or undesirable disposition of a person. Acts may or may not indicate character traits. If an act does indicate an undesirable character trait, then blame is appropriate; if it does not, then blame is inappropriate; if it does not, then blame is inappropriate although measures to prevent such conduct in the future might be taken.[115]

In other words, in deciding whether to attribute blame to a particular individual, one must enquire about the context in which she acts. An individual is punished for the undesirable character traits that caused her to act as she did. As with capacity theory, character theorists argue that this is the most appropriate way to reflect an individual's moral wrongdoing.

That a character-based theory of responsibility reflects, in some situations, the moral reasoning that society would apply to determine that an offender should not be held legally responsible for her conduct is evident from the case of Julie Campbell.[116] Although Campbell's defence team attempted to argue that her PMS was the underlying cause of her actions, a number of witnesses are quoted by the court describing how Campbell was "a nice enough person until she had a drink" and how "when she has had a drink her personality changes completely and she becomes very abusive".[117] These comments were made by friends and neighbours of the defendant and suggest that such individuals were willing to attribute blame to this particular aspect of Campbell's

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[115] M. D. Bayles, 'Character, Purpose, and Criminal Responsibility', (1982) Law and Philosophy (1), 5 at 7.
[116] *R v Campbell (Julie Christine), supra* note 80.
[117] at para 2.

character. Whilst there is a clear attempt to separate her drunken behaviour from the rest of her personality, such witnesses do not suggest that this particular character trait was not a facet of that personality since there was no question that the defendant was involuntarily intoxicated.

In many respects, being involuntarily intoxicated may be comparable to suffering from premenstrual syndrome when it comes to whether or not liability for criminal behaviour should be negated. Both apparently cause individuals to behave in ways that are foreign to them and commit acts that they would not normally commit. However, this was not considered to be adequate grounds for a defence in the case of *R v Kingston.*[118] In this case, the defendant had allegedly had narcotics added to his coffee by an acquaintance who wished to blackmail him.[119] The result of these drugs was that the defendant's homosexual paedophilic tendencies that he had always successfully suppressed led him to sexually abuse a fifteen-year old boy. Although the Court of Appeal felt that the fact that the narcotics had prompted criminal behaviour that would not otherwise be present justified a finding of excuse, the House of Lords reversed this decision and upheld the defendant's conviction. They held that the relevant fact was that the defendant had formed the intention to commit this act. It was this character trait that was regarded as dangerous and so this is what justified his punishment. The standard view that involuntary intoxication may be an excusing condition did not apply if the necessary intent was present at the time the offence was committed and that the absence of moral fault on the part of the defendant did not negate the *mens rea* for the offence. They

[118] [1995] 2 AC 355.
[119] *Ibid.*

considered it irrelevant, therefore, that he was also disposed not to break the law unless intoxicated.

Once again, such reasoning is attributed to how and when society would regard an individual's conduct as morally excusable. Two individuals may have an identical capacity to resist doing wrong and yet the background and circumstances surrounding their similar acts of wrongdoing may evoke clearly opposite moral reactions. William Wilson gives the example of the contrast between the one-off reaction of an oppressed and long-suffering carer who finally 'snaps' and reacts to provocative behaviour on the part of the person for whom he cares, and the action of a psychologically fragile non-carer, such as someone who loses her temper easily even without any significant difficulties in her personal circumstances.[120] The latter, according to this theory, would be more deserving of punishment for it is she who displays a natural propensity to react aggressively. Someone whose life has known extraordinary pressure and loses control only as a result of this would, on the other hand, apparently be entitled to an excusatory defence. As Wilson points out, current criminal doctrine may be seen to reflect this in the provocation defence which can only be successfully relied upon if the behaviour in question was out of character rather than reflecting a settled disposition. However, character-based theories are less easily identified than theories of capacity in the current criminal law.

In a convincing article, Anthony Duff argues that the distinctions between choice/capacity based theories and character theories of criminal liability actually amount

[120] Wilson, *supra* note 100.

to very little.[121] Duff suggests that the question of whether someone has the capacity to choose to obey the law is dependent on their character in any case. Although Hart and other capacity theorists contend that an individual can choose to conform to the law only if she has the capacity and a fair opportunity to do so, this does not answer the question of how one determines when these criteria are satisfied. In other words, Duff suggests that we have no way of knowing whether an individual offender gave in to a threat or temptation because the strength of that threat or temptation negated his ability to choose or because he had a choice but chose to break the law. Therefore, capacity must be a normative question, focusing on whether society would expect an individual sharing the characteristics of the offender to have withstood the threat. This in turn implies that criminal liability ultimately depends on character.

It is in the realm of mental disorders as excuses that the reflexive and interlocking nature of the two theories is most apparent. The current law reflects most closely a capacity-based view of criminal liability. Most excusatory defences are based on a lack of capacity to have acted otherwise. The reason for this approach is probably that character-based theories present some inherent difficulties. The obvious question raised by such theories is whether an individual who commits a crime whilst suffering from a mental disorder should be convicted if it can be said that the disorder forms a part of their character? Given that the rationale for this type of theory is that it reflects the aims of the criminal justice system in constraining those individuals who are judged to be a danger to society, one might assume that the answer to this question must be yes. To argue that this is not important since one could determine that such individuals should be treated rather

[121] R. A. Duff, 'Choice, Character, and Criminal Liability' (1993) Law and Philosophy 12, 345.

than punished in any case ignores the symbolic importance of a criminal conviction. It surely cannot be seen as desirable that an individual is left with the stigma of a conviction for conduct that society would, in all likelihood, not perceive to be her fault. Furthermore, as Duff points out, to do this renders it pointless to talk in terms of *criminal* liability.[122] It avoids distinguishing significantly between wrongdoers whose actions deserve punishment and treating those whose medical condition makes them a danger to society.

Duff suggests that, if the criminal law were to be restructured to reflect a character-based approach to liability, this difficulty might be avoided by determining that a mental disorder is not the kind of character trait that merits condemnation. One could say that an offender should be excused if she was suffering from a mental disorder at the time in question and this disorder was such that her conduct does not suggest a disregard for the law. An individual is not liable if her conduct was not motivated by any intelligible attitudes or beliefs. However, does this not then amount to something very similar to capacity theories? An individual is not liable because she did not have the mental state that could lead her to choose to break the law.

Character Theory and Premenstrual Syndrome

[122] *Ibid.*.

As is the case with capacity/choice-based theories of liability, the majority of the symptoms identified in a previous chapter would probably not amount to a defence according to character-based theories of liability.

In the majority of cases studied where premenstrual syndrome is relied upon, defence lawyers apparently assume that a claim that the offender was suffering from PMS is synonymous with a statement that she would not have offended but for this fact. In other words, they claim that her behaviour was 'out of character' and so she should not be held responsible for the conduct in question. That this is the case is supported by the failure in most cases to explain how and why this condition should negate the offender's responsibility for her crime.

However, drawing an analogy with *Kingston,*[123] if premenstrual syndrome causes an individual to give in to a temptation or impulse that she would normally override if it were not for her premenstrual syndrome, is the inability to overcome the desire to do this not equally part of her character? It would appear to reveal something about her attitudes to the values that the criminal law seeks to uphold. Whilst she may be able and willing to overcome the temptation or impulse in question most of the time, at a certain time of the month it is apparently less important for her to do this. As long as an individual is still aware of her actions and that they break the law, it is difficult to argue that a woman behaved as she did because she felt unusually tense or irritable and so she deserves to be excused. That she felt this way still reveals something about her character and her moral commitment to the importance of not harming others.

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[123] *Supra* note 118.

The argument outlined above will not necessarily apply in every case of premenstrual syndrome. The House of Lords in *Kingston* reasoned that the narcotics did not cause him to form his paedophilic intentions; they merely released them. Likewise, the same reasoning applies only to cases where a woman's PMS causes her to lose her self-control and reveal character traits that she has always held but suppressed under normal circumstances. Consequently, in cases where a woman's premenstrual syndrome truly causes her to lose control, she might only be excused if her actions were in fact not part of her general, underlying character at all.

Once again, therefore, we see the reflexive nature of theories of liability based on character and capacity. It would seem that for an action to be truly out of character, and so allow an offender to be excused from criminal liability, the action must not have been freely chosen. This is of course exactly the same condition that a choice/capacity theorist would require for an action to be excused. As with capacity theory, only the most extreme cases of premenstrual syndrome will meet this requirement. If the requirement of an absence of free choice is satisfied, an offender has not been judged to have the kind of attitude to the criminal law and to social harms that the law seeks to condemn. She does not possess the character flaws that merit punishment.

Furthermore, some of the more common symptoms of PMS are those that, in any other context, would indicate a mental illness. Therefore, there is a strong argument that a woman with the same symptoms, albeit that they are related to her menstrual cycle,

should be afforded the same treatment as an offender with that particular illness. It is therefore necessary, as with capacity theory, to consider the implications of cases in which PMS is the equivalent of a mental disorder.

As discussed in the previous section, excuses which pertain to mental incapacity do not appear to have a place in character theory. Rather than being excused, mentally disordered individuals are exempt from liability.[124] This must therefore be the case when an individual with premenstrual syndrome has symptoms that effectively amount to a mental disorder. Although she should not be left with the stigma of a criminal conviction, according to character theories it is desirable that there be some form of social response, namely whatever treatment is deemed appropriate. This is likely to be relevant only in the most extreme cases. Therefore, as with capacity theory, we are left with the question of where to 'draw the line'. At what point is an offender said to be suffering from a mental disorder? The problems inherent in answering this question will be discussed in more detail in the next chapter.

To conclude, neither capacity nor character-based theories of criminal liability will exclude a defence based on premenstrual syndrome absolutely. However, this analysis has revealed problems with the way the condition is currently being used in court. Both types of theory suggest that it is only in the most extreme cases that an individual

[124] The dissenting judgment of McLachlin J. in the Canadian case of *R v Chaulk,* [1990] 3 S.C.R. 1303 makes a similar point. Referring to the Canadian Criminal Code, she argues that "[t]he insanity provisions of the *Code* relate to the basic preconditions for criminal responsibility rather than to essential elements or defences to criminal offences. The latter approach ignores the historical and philosophical origins of the fundamental precept of the criminal law system that the attribution of criminal responsibility and punishment is justifiable only for those who have the capacity to reason and choose between right and wrong. The accused must be sane before any consideration of the essential elements of the offence or exculpatory defences becomes relevant", at pp 1305 – 1306.

suffering from PMS should be entitled to a substantive defence. This will be dependent upon the individual symptoms and their severity. This suggests two immediate problems with the current law itself. Firstly, if there are cases in which this condition deems that an individual should not be liable for her criminal acts, why is it that only defendants charged with murder appear to have a substantive defence available to them, and that that is only the partial defence of diminished responsibility? Secondly, given that the symptoms of PMS are so varied, why does the law apparently allow a successful defence without any consideration of the nature and effects of the particular symptoms experienced by the individual defendant? These questions will be addressed in the following chapters.

PREMENSTRUAL SYNDROME AS DIMINISHED RESPONSIBILITY

In the previous chapter I attempted to demonstrate that, in order for the criminal law to reflect the moral code of the society it purports to serve, only the most severe cases and symptoms of premenstrual syndrome should qualify as the basis of a substantive criminal defence. The current state of the law suggests that the only substantive defence whose requirements might be met by a defendant suffering from PMS is diminished responsibility.[125] The aim of this chapter, however, is to argue that neither the structure of this defence nor the way in which it has developed in recent years allow the requirements of justice to be met in cases involving premenstrual syndrome.

PMS and Diminished Responsibility

Nothing that is written in this chapter is meant to imply that premenstrual syndrome cannot or should not be employed to raise a successful defence of diminished responsibility. However, this must be consistent with the idea that the criminal law should aim to reflect the idea that individuals should be punished if and only if they commit morally culpable acts.

The incidences of mental abnormality that society will regard as sufficient to negate an individual offender's moral culpability will of course vary with time and developments in medical knowledge. The fact that an increasingly wide spectrum of mental disorders has come to be regarded as falling within the 'abnormality of mind'[126] requirement is

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[125] *R v Craddock* and *R v English, supra* note 1 and subsequent unreported cases.
[126] See s. 2(1) Homicide Act 1957.

therefore not necessarily incompatible with the need to respect the doctrine of moral culpability.

A number of cases have seen conditions such as personality disorders and severe depression fall within the ambit of section 2.[127] This broad-based definition of 'abnormality of mind' was reaffirmed more recently in a case involving a teenager who strangled his girlfriend after she told him she wished to end the relationship.[128] This case is relevant to the context of premenstrual syndrome because the court confirmed that the abnormality of mind requirement included perception, judgement and will as well as recognised mental illness. This followed a recommendation by the Judicial Studies Board which approved the language used by the Court of Appeal in *Byrne.*[129] In this case, the Court felt that such a direction was vital "otherwise there were dangers that a jury might take a mistaken view of the criteria by which they were to judge abnormality of mind".[130] In some cases it may be that the effect of PMS is to alter a woman's judgement of what constitutes appropriate behaviour.

In the previous chapter I conducted an examination of the two leading theories of criminal responsibility, namely capacity and character theories and concluded that there is ultimately very little difference between the two theories when it comes to determining the guilt or innocence of an individual. Broadly speaking, both theories appear to be

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[127] Personality disorders: *R v Walden* (1986) 23 A Criminal Law Review 242; *R v Turnbull* (1977) Criminal Appeal Reports 242; Depression: *R v Harvey and Ryan* [1971] Criminal Law Review 664; *R v Fenton* (1975) 61 Criminal Appeal reports 261; In these cases the emphasis appears to have been on the need for the depression to have arisen from a internal cause: *R v Lloyd* [1967] 1 QB 175; The ultimate relevance of this issue will be discussed in more detail below.
[128] *R v Brown* [1993] Criminal Law Review 961.
[129] *R v Byrne* [1960] 2 QB 396.
[130] *Supra* note 128 at 962.

concerned with the notion of impaired voluntariness. While it may be acceptable to expand the concept of diminished responsibility to incorporate new disorders, it is this concept that should be the guiding principle for the courts in doing so.

Impaired Voluntariness

Smith and Wilson have provided one of the most detailed analyses of the concept of impaired voluntariness.[131] They list a number of circumstances in which the principle requires that a defendant is completely or partially excused. Of these circumstances, they suggest that conditions which interfere with an individual's rule-following response are the most relevant to the diminished responsibility defence. This is consistent with the idea that defendants who seek to rely on PMS should only be able to do so if their condition has made rule-following significantly more difficult, although the meaning of 'significantly' will almost certainly have to be determined according to the individual case.

Smith and Wilson go on to suggest that the reason that the courts have tended to focus on cognitive rather than volitional incapacities is likely to stem from the desire to avoid a proliferation of mental-health based excuses:

> Recognising mental abnormality in so far as it affects a person's cognitive capacity holds the excuse much more firmly within reasonable bounds. In particular it is controlled by the definitional parameters of each offence, particularly, as has been seen, by the mens rea requirements. If volitional abnormality were an excuse superimposed upon these definitional elements the defence might easily run out of control.[132]

[131] Smith and Wilson, *supra* note 110.
[132] *Supra* note 110 at 89.

However, I would suggest that the requirements of justice already enunciated should take priority over policy-based motives. Although the efficiency of the criminal justice system is important, consistency and fairness are surely more so. Smith and Wilson themselves acknowledge that "the force of such a justification diminishes when the actor's inability to control himself derives from mental disease, particularly where that disease has an organic route".[133] Although there is relatively little agreement on the causes of PMS, it is likely that it may fall within this category. However, this reasoning still appears to be based on the demands of penal policy, particularly that diseases with an organic cause are more easily identified as being beyond the offender's control. It is central to the argument in this thesis that this internal/external method of classification is inappropriate since it does not necessarily reflect moral blameworthiness. An offender's ability to respond appropriately to a given situation, his volitional capacity, is what should determine criminal liability. This applies not only where the charge is murder and the diminished responsibility plea may be available but indeed to any offence other than those of strict liability.

Consequently, I wish to argue that in a severe case of premenstrual syndrome, if the individual symptoms experienced by an offender interfere to a sufficient degree with her 'rule-following response', there is no reason why she should not be excused. Currently, the most appropriate defence available to do this is diminished responsibility, albeit that it is only available as a partial defence to murder. As Carney and Williams have argued, "[a]lthough a PMS sufferer may be conscious of her actions and devoid of any mental

[133] *Supra* note 110 at 90.

disease or defect, she is no more able to control her actions than the automaton or the legally insane".[134] However, it must be remembered that this will always depend on the nature and intensity of an individual's symptoms. It is for this reason that the courts should take a symptom-based approach in PMS cases.

Although this section has attempted to argue that there is no inherent difficulty in acknowledging that PMS might, in appropriate circumstances, amount to diminished responsibility, the remainder of this chapter will be devoted to demonstrating that the flaws inherent in the defence itself may lead to the types of injustice already identified.

An Inadequate Defence

The current partial defence of diminished responsibility has many flaws. I hope to demonstrate that it is the structure of the defence itself that allows the currently unsatisfactory way in which PMS is handled by the criminal courts to persist. The defence can be divided into three elements. The first requirement that must be met before an offender can successfully plead diminished responsibility is that she must have been suffering from an 'abnormality of mind'. Secondly, the abnormality must be the result of one of the four 'causes' listed in brackets in section two, namely "arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury".[135] Finally, the abnormality of mind must have resulted in a substantial impairment of the offender's mental responsibility. The difficulties that have arisen from the interpretation of this statute are relevant to the issue of premenstrual

[134] Carney and Williams, *supra* note 3 at 265.
[135] section 2(1) Homicide Act 1957.

syndrome because, I will attempt to demonstrate, these problems are the root cause of the undisciplined way in which PMS is used by defendants and their lawyers.

Taking first the requirement of an 'abnormality of mind', these words were initially construed as having a relatively limited scope. However, in the case of *R v Byrne* Lord Parker CJ applied a definition to these words that has subsequently determined the development of the defence:

> 'Abnormality of mind', which has to be contrasted with the time-honoured expression in the *M'Naghten* rules, 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise the will-power to control physical acts in accordance with that rational judgment.[136]

It is therefore easy to understand how it is that premenstrual syndrome has come to be accepted as a relevant 'abnormality of mind'. Based on this definition, it is irrelevant to the defence of diminished responsibility whether or not a condition prevents the actor from knowing whether an act is right or wrong.[137] That this definition of an abnormality of mind apparently sets the bar very low in terms of when a disorder may come within the diminished responsibility paradigm. This in turn probably goes some way to explaining why there is very little discussion in the reported cases of the exact nature and intensity of an offender's premenstrual symptoms. The *Byrne* case apparently paved the way towards the recognition of an extremely wide variety of mental disorders being

[136] *R v Byrne, supra* note 129 at 403.
[137] Of course the same is not true of all mental disorder defences. One element of the *M'Naghten* rules is that a defendant did not know the difference between right and wrong as a result of his mental disorder.

included within the definition of 'abnormality of mind'. The facts of the case itself apparently imply that the supposedly discarded idea of an irresistible impulse might indeed still be recognized as a defence at criminal law. The fact that PMS is a relatively minor mental condition does not of itself, therefore, automatically preclude its falling within the concept of diminished responsibility.

On the other hand, this situation gives some cause for concern for it reinforces the suggestion that judges, juries and prosecutors are willing to accept a plea of diminished responsibility where there is little or no evidence that the defendant suffers from a mental disorder.[138] If this is indeed the case, it is difficult to see how the requirements laid down in both the capacity and character-based theories of criminal liability will be satisfied.

Similar problems arise when considering the four prescribed aetiologies for the abnormality of mind. In order to understand the subsequent development of this element of the defence, we must again go back to the dictum of Lord Parker in *Byrne* who said that the four clauses in brackets were a matter to be determined by expert evidence but that the presence of an abnormality of mind was ultimately a matter for the jury.[139] Once again, an expansive definition appears to have been fostered. In this case there is almost no statutory or judicial guidance as to what these words mean. This is inevitably problematic when one is attempting to determine if and how a relatively new condition such as PMS should be used as the basis for a criminal defence.

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[138] This tendency will probably, if anything, be even more evident in the 80% of cases that are dealt with by a guilty plea and so do not go to trial, S. Dell, *Murder into Manslaughter* (Oxford and New York: Oxford University Press, 1984).

[139] *R v Byrne, supra* note 129 at 403. Perhaps it was indeed intended that judges and/or juries should be able to exercise compassion in this area.

The difficulty where these clauses are concerned appears to be that they are neither fully acknowledged as legal concepts nor clearly defined medical concepts. Consequently, although the approach of the courts following *Byrne* has been to rely on expert psychiatric opinion to determine whether this element of the defence is satisfied, there is a distinct lack of consistency in the way these clauses are interpreted. Susanne Dell carried out extensive research on the way in which medical witnesses apply these aetiological labels to individual cases and found that different doctors classified identical conditions in numerous different ways.[140] The reason for such findings can be attributed again to the fact that these are not recognised medical terms. However, as Mackay points out, the resulting situation is highly unsatisfactory since the law has failed to provide any guidance for doctors on how these terms should be interpreted.[141]

The lack of legal guidance in this area is yet another unsatisfactory facet of the diminished responsibility defence. I do not intend to dwell on this particular problem as it is unlikely that it will make a great deal of difference as to whether a case of PMS will

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[140] *Supra* note 10 at pages 33 and 35. Susan Edwards also observes that, although diminished responsibility is more of a moral than a medical issue, the boundaries of the defence are clearly being determined by psychiatrists, S. Edwards, *Sex and Gender in the Legal Process* (London: Blackstone, 1996).

[141] R. D. Mackay, 'The Abnormality of Mind Factor in Diminished Responsibility', [1999] Criminal Law Review 117. Mackay does, however, acknowledge that "this gap in judicial scrutiny has now begun to be filled by two Court of Appeal decisions, which have at least started to address the aetiological complexities of section 2" (at p.121). The cases concerned are *R v Sanderson* (1994) 98 Cr. App. R. 325 and *R v O'Connell* [1997] Criminal Law Review 683; In Canada, the case of *R v Chaulk supra* note 124 distinguishes between the notion of a 'legal wrong' and a 'moral wrong'. The majority in this case determined that the reference to knowing that an act is wrong in s. 16(2) of Canada's Criminal Code, which is a similar provision to the *M'Naghten* rules in English law, referred to moral wrong rather than legal wrong. They argue convincingly that "[a] person may well be aware that an act is contrary to law but, by reason of disease of the mind, is at the same time incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society", at p. 1308. Similar reasoning may be applied to the diminished responsibility defence: if it is more realistic to say that the mental disorder in question diminished the defendant's moral responsibility, then surely this is a matter for a jury to determine.

amount to a defence of diminished responsibility: it seems to be beyond doubt that, if PMS does satisfy the other elements of the defence, it would be regarded either as an 'inherent cause' or as 'induced by disease'. However, the fact that legal and medical personnel would probably neither know nor be particularly concerned which of these aetiologies is the most appropriate for PMS is in itself worrying. This is probably largely the result of the widespread disagreement regarding the causes of PMS within the medical profession. Nevertheless, this uncertainty is symptomatic of the lack of consideration that is apparently given to the question of whether or not the facts of a particular case satisfy the requirements of the defence.

In order to successfully plead a defence of diminished responsibility, a defendant must show that his condition 'substantially impaired his mental responsibility'. It is this clause that is the most likely cause of injustice in cases where an offender wishes to rely on premenstrual syndrome. Once again, no legal guidance is offered on the meaning of 'substantial impairment' and, as the Butler Committee remarked in its Report, "[i]t seems odd that psychiatrists should be asked and agree to testify as to legal or moral responsibility".[142]

I would suggest that whether there is a 'substantial' impairment is more of a moral question than one that can be applied scientifically or determined by a psychiatrist. It is a question of degree that ideally should be left to a jury to determine, also taking into

[142] Home Office, Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders* (1975) (Cmnd. 6244), para 19.5.

account all of the "facts and circumstances of the case".[143] Since 'substantial' is not a medical term, it seems odd that expert witnesses are asked to testify on this matter. It is unlikely that legislators intended this to be a matter of scientific testimony and consequently the current approach is subverting the role of the jury to a certain degree. Once again, therefore, this is an area where one would expect some judicial guidance. Griew compares the issue to that of defining what is meant by 'grievous' in the offence of grievous bodily harm: although a surgeon can describe an injury and how long it will take to heal, she cannot be expected to be any more competent than a lay person in determining whether or not the injury in question is 'grievous'.[144]

I have already discussed in some detail the extent to which both the symptoms of PMS and the degree to which they are felt can vary. It is therefore crucial that this is acknowledged in court and that this fact is applied to a consideration of whether or not an individual's symptoms cause her mental responsibility to be 'substantially' impaired. Otherwise, there is a significant risk that, in treating all PMS cases as if every sufferer experiences the same symptoms, diminished responsibility pleas will succeed when, in fact, the mental impairment, such that it might exist, was in fact extremely minor. This clearly flouts the original intentions of Parliament in passing this Act since Parliamentary debates on the Homicide Bill show that it was intended to reflect the Scottish defence on which it was based.[145] The Scottish defence has always been a common law defence and

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[143] E. Griew 'The Future of Diminished Responsibility', [1988] Criminal Law Review 75 at 83, citing *Walton v R* [1978] A.C. 788 at 793; However, as previously discussed, research by Dell shows that in most cases involving diminished responsibility the plea of guilty to manslaughter will be accepted by the prosecution. This means that the matter will usually be determined by medical experts and prosecution lawyers, *supra* note 138.
[144] Griew, *ibid* at 83.
[145] The Butler Report, *supra* note 142 at para 19.17.

is limited to conditions "bordering on, though not amounting to, insanity".[146] This, as Mackay points out, is a far more limited approach than that that has been developed in England.[147] Menstrual cramps and headaches are neither a 'substantial impairment of mental responsibility' nor cases of borderline insanity.

Finally, the concept of 'mental responsibility' is likewise problematic, both in general and in the particular context of PMS. As with the other elements of the diminished responsibility plea, not every case of PMS will be relevant to the question of mental responsibility. The problems outlined in relation to the need for a legal, rather than a medical definition of other elements of the plea are no less applicable here. Regarding 'mental responsibility', the Butler Committee observed that "it is either a concept of law or a concept of morality; it is not a clinical fact relating to the defendant".[148]

Edward Griew has pointed to the difficulty inherent in a defence that appears to imply that there is a sliding scale of responsibility, so that different degrees of mental disorder lead to different degrees of mental responsibility. A similar point is made by Morse who questions firstly whether it is possible to measure the extent to which it was possible for an individual to restrain herself from committing a criminal act, and secondly whether the type and extent of a mental problem suffered by a defendant can be determined empirically.[149] I would suggest that these issues are at the heart of the problems relating

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[146] Lord Allness in *HM Advocate v Savage* 1923 JC 49 at 50, quoted in R. D. Mackay 'Diminished Responsibility and Mentally Disordered Killers' in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000) at 65.
[147] Mackay, *ibid* at 66.
[148] *Supra* note 142 at para 19.5.
[149] S.J. Morse, 'Undiminished Confusion in Diminished Capacity' (1984) 75 Journal of Criminal Law and Criminology 1. Once again the problem can be traced back to dicta in *R v Byrne,* where it was stated that

to pleas of diminished responsibility based on premenstrual syndrome. Whilst it is true that no two individuals will experience the same symptoms to the same degree, it is equally true that it is difficult to scientifically determine the point at which an individual's 'mental responsibility' is 'substantially impaired'. The best solution to this problem is for more detailed legal guidelines, based on the theories of culpability outlined in the previous chapter.

The aim of this section has been to demonstrate the flaws inherent in the structure of the diminished responsibility plea as a partial defence to murder. Although the problems outlined here are not unique to cases concerning PMS, I have attempted to show that the issues are magnified in such cases, due to the apparent inability of the courts to question whether or not the particular facts of a case meet the requirements of the defence. Ultimately, this section provides far too much leeway for defendants and their lawyers. The exceptionally poor wording of section 2 allows the statute to be manipulated by expert witnesses. The result of this is that expert witnesses are able to exercise compassion and broaden the range of cases to which diminished responsibility is found to apply. However, the fact remains that it would be infinitely preferable to have a less oblique defence and one that genuinely reflects society's views on when an offender should be held responsible for her actions. It is therefore likely that the cornerstone of the philosophical theories of culpability, namely that criminal defences should reflect situations in which social morality would judge that an offender should be excused, will not be satisfied in these cases.

"there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses", *supra* note 129 at 403.

Of course, an alternative view might be that the flexibility and uncertainty created by the wording of this defence exists so that a jury can use its discretion to get the 'right' result in an individual case. This is a common phenomenon in jury trials known as jury nullification. However, the uncertainty and inconsistencies created by such a scenario may be yet another flaw inherent in section 2. Furthermore, research by Susan Dell has indicated that, in fact, over 80% of diminished responsibility cases do not go to trial.[150] If legislators had been relying on juries to do justice in such cases, clearly this intention has not been realized.

A Malleable Defence

It is perhaps unsurprising, given the discussion in the previous section, that there is substantial evidence of the way in which the diminished responsibility plea has been extended and manipulated by defendants in order to do apparent justice. This is most obvious in the way the defence has been used successfully in relation to conditions that have been recognised as mental disorders only relatively recently. These include reactive depression, alcoholism, post-traumatic stress disorder, and of course premenstrual syndrome itself.[151]

There is a definite perception amongst the academic commentators that lawyers and medical witnesses have used the flexibility and uncertain wording of section 2 to tailor

[150] Dell, Murder into Manslaughter, *supra* note 138.
[151] See discussion in Smith and Wilson, *supra* note 110 at 89.

the available evidence in order to obtain a desirable result. The work of Edward Griew is particularly revealing:

> It is, of course, doubtful whether all decisions apparently turning on the section can plausibly be explained as guided by a careful reading of its language; there must be many cases in which the section is rather to be seen as legitimizing an expression of the decision-maker's personal sense of the proper boundary between murder and manslaughter.[152]

Griew goes on to say that he believes that many of the decisions that are arrived at apparently by careful application of the constituent elements of the defence still demonstrate a widespread variation in the outcomes of cases with apparently similar facts. This is further evidence of the inconsistencies that arise when juries are given the power to interpret a statute with such broad wording as that in section 2. As far as medical witnesses are concerned, he suggests that "[s]ome, indeed, have been less aware than others of the section's potential for flexible reading at the hands of an authoritative practitioner and with the encouragement of a responsive court".[153] It is further contended that the lawyers involved in such cases are willing to accept any medical diagnosis that might give rise to the possibility of arguing that the defendant satisfies the requirements for this defence. Their sympathy for a defendant or the desire to get the best result for their client may lead them to pay less attention than is perhaps required to the particular elements of the defence.[154] It has also been suggested that the current phenomenon,

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[152] Griew, *supra* note 143 at 78.
[153] *Supra* note 143 at 79.
[154] This problem is not confined to England and Wales. Two American authors have made similar observations in relation to the use of PMS to raise a defence of diminished capacity: "[w]hile the case law is replete with references to manic depression, neurosis and psychosis, which loosely describe the states of mind of the majority of defendants invoking the diminished capacity defence, it is abundantly clear that such generic labels are insufficient *per se* to successfully plead diminished capacity.... Since these same imprecise conclusionary labels have made their way into medical studies of the premenstrual syndrome, a thorough comparative analysis is necessary to determine if the precise mental conditions which have

where medical witnesses feel compelled to give an opinion on matters that are outside their competence, must be understood against the background of the mandatory life sentence.[155] If a murder conviction did not automatically carry this penalty, the pressure to allow a diminished responsibility plea to succeed would be far less significant. If the mandatory life sentence were abolished, the need to stretch the evidence to obtain a verdict of manslaughter, with its discretionary sentencing powers, would be significantly diminished.

This section has sought to argue that it is not enough to assume that any diagnosis of a medical abnormality will satisfy the requirements of the diminished responsibility defence. The tendency to assume otherwise is clearly not limited to cases concerning PMS. However, once again, the fact that there remains such a high degree of medical uncertainty as to the symptoms and aetiology of PMS, inconsistencies are even more likely to occur in these cases.

An Inconsistent Defence

As I demonstrated in a previous chapter, the evidence relating to a potential link between premenstrual syndrome and female criminality is far from conclusive. However, leaving this debate aside, it does seem slightly strange that women who claim that their crime is attributable to PMS, or indeed many other mental abnormalities that do not amount to

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successfully supported a diminished capacity defence are found among the symptoms of the syndrome", A. Wallach and L. Rubin, 'The premenstrual syndrome and criminal responsibility' (1972), *UCLA Law Review,* vol. 19, p.209 at 264. They go on to suggest that the reason for this might be that the elements of diminished capacity (In the United States there is no statutory diminished responsibility defence; a finding of diminished capacity results in the negation of *mens rea*) are harder to determine than, for example the constituent elements of the insanity defence which are more concerned with "standards of general morality and metaphysics which most persons can identify", at p. 267.

[155] By Susanne Dell, *Murder into Manslaughter, supra* note 138 at 59.

insanity, have access to a partial defence when charged with murder and yet the same cannot be said of other crimes. The inconsistency is clear: the law seems to be implying that the same mental condition can reduce a defendant's culpability for one crime but not for others. Although the rationale for the diminished responsibility defence was originally to allow mentally disordered defendants to avoid the death penalty attached to a murder conviction, and now, as already discussed, it does the same as regards the mandatory life sentence, the current situation is clearly unsatisfactory.

Women, whether they suffer from PMS or not, are likely to be disproportionately affected by this inconsistency since it is well known that women commit a relatively high proportion of economic crimes and comparatively few crimes of violence including homicide.[156]

Of course, it might be thought that the requirement that an offender be proven to have formed the *mens rea* of a particular offence in order to secure a conviction would provide a way for women with PMS to avoid liability, given that I have argued that such women should be excused only in the most serious cases. However, the most common requirements of *mens rea,* such as intention or recklessness, are unlikely to be compromised by the symptoms of PMS. It may be that a woman knows what she is doing, is aware of the consequences, and intends those consequences at the time. However, this does not necessarily mean that she has the capacity to make a rational choice at the moment in question. The diminished responsibility defence has a wider

[156] See, for example, H. Kennedy, *Eve Was Framed: Women and British Justice* (London: Vintage Press, 1992).

scope than simply incorporating cases where a defendant may not have formed the requisite *mens rea* and indeed, diminished responsibility 'only comes into play when all the ingredients of murder are established against the defendant'.[157]

The Criminal Law Revision Committee have recommended that the plea of diminished responsibility be retained as a partial defence to murder even if the mandatory life sentence is eventually abolished.[158] The reasons for this, they argue, are that if it were not available, juries may be inclined to acquit a defendant altogether rather than condemn her as a murderer and, secondly, that, if the defences of diminished responsibility and provocation were not available, the offence of murder would apply to an extremely broad spectrum of behaviour, from mercy killings to the acts of a cold-blooded serial killer. However, Susanne Dell has argued, correctly in my view, that in fact both of these arguments are arguments in favour of extending the defence to offences other than murder.[159] The CLRC did, however, also recommend that the diminished responsibility plea should be extended to cover the offence of attempted murder. However, as Mackay argues, it is illogical that they stop at this point. Why not take the argument a step further and extend it to other offences? I would suggest that there is a clear, principled argument that, if the diminished responsibility plea is to be retained in any form, it should apply to all crimes.

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[157] *R v Antoine* [1999] 3 WLR 1204 at 1214.
[158] Home Office, *Criminal Law Revision Committee, Fourteenth Report. Offences Against the Person,* Cmnd 7844 (London, HMSO, 1980), para 76.
[159] S. Dell, *supra* note 138.

It has been the aim of this section to demonstrate that, in addition to the many flaws in the wording and structure of the partial defence of diminished responsibility, it is inconsistent and, based on the theories of criminal responsibility enunciated in this thesis, unjust, that such a defence should be available only to defendants charged with murder. I have also sought to demonstrate that this defence is clearly unsatisfactory and in need of reform. If and when such reform takes place, it will be an ideal opportunity to develop a defence that is better equipped to accommodate relatively new medical concepts such as PMS. The final chapter will therefore be devoted to an examination of how the law might be developed so that defendants suffering from PMS, and indeed any mental disorder, are dealt with in a manner that is more consistent with the requirements of justice.

PMS AS A SUBSTANTIVE DEFENCE: WHERE NEXT?

In this thesis I have attempted to draw three main conclusions: firstly, that the current way in which PMS operates to found a substantive defence in the English criminal courts is inconsistent and unsatisfactory; secondly, that the issue is one of moral culpability, and thirdly, that the existing defence of diminished responsibility, although more responsive to PMS than are other excusatory defences, is also unsatisfactory. At least where a condition such as PMS is concerned, this plea cannot meet the requirements set out by the theories of culpability outlined previously.

Mitigation

One solution to this problem might be to abandon the use of premenstrual syndrome to found a substantive defence altogether. It may be easier to simply allow the condition to be raised in mitigation of sentence where the courts have greater scope to consider a wide variety of factors relating to the defendant's character and background.[160] This is described by McArthur as 'an attractive compromise' between the need to reduce a defendant's accountability for her actions and the current medical uncertainty over the status of PMS and the conflicting need to retain some control over a defendant whose condition may make her a danger to society.[161] However, such a solution is undesirable since it may still lead to blameless defendants being convicted and labelled as criminals.[162] The symbolic importance of a finding of guilt or innocence, as well as the

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[160] This was the solution favoured by the Court of Appeal in *R v Smith, supra* note 1. See also the cases mentioned in S. Edwards 'Mad, bad or premenstrual' (1988) 138 New Law Journal 456; and the Canadian cases in Osborne, *supra* note 14.

[161] K. M. McArthur 'Through Her Looking Glass: PMS on Trial' (1989) University of Toronto Faculty of Law Review, vol 47, Supplement, 827 at 856.

[162] But see, *contra,* Carney and Williams, *supra* note 3. These authors argue that since a substantive defence would compel a court to release an offender unsupervised, mitigation amounts to the best

practical consequences of a criminal record, demand that the criminal law only allows 'genuinely' guilty individuals to be convicted as far as that is possible.

In order for the legal system to maintain its legitimacy, the outcome of criminal trials should reflect as closely as possible the truth of how society has judged someone whose behaviour appears to have transgressed the law. If an individual has a medical condition that demands that she be excused, the law should reflect this.

Many of the more severe symptoms associated with premenstrual syndrome, such as depression commonly operate to reduce an offender's criminal liability.[163] Since it is the mental state of an individual at the time she commits an offence that is morally relevant for the purpose of criminal defences, there is no reason why the same symptoms should not excuse when they occur premenstrually. This suggests that a substantive defence should be available in relevant cases.

A Substantive Defence

The inherent problems in the use of a PMS-based defence, particularly the medical uncertainty that continues to persist, might therefore suggest that references to PMS are superfluous and hence it would be better to address each symptom separately[164].

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compromise between respecting an offender's moral blamelessness and protecting society, at least until a suitable alternative mechanism is found to reduce the risks to society.

[163] See, for example, *R v Smith supra* note 81 (depression). In this case, depression was held to be relevant to whether the defendant should be entitled to a manslaughter verdict on the ground of provocation.

[164] As suggested by Zoe Hilton, *supra* note 12. Elsewhere it has been argued that, in the case of premenstrual syndrome, the absence of any defining symptoms and the lack of consensus as to the cause of the syndrome reinforces the view of women as inherently inferior: L. Luckhaus 'A plea for PMT in the criminal law' in S. Edwards (ed), *Gender, Sex and the Law* (London: Croom Helm, 1985).

Nevertheless, the fact remains that women do experience cyclical change. As Bernadette McSherry has argued: "There is no doubting that many women experience physical changes in the premenstruum. The problem lies in determining what are "normal" changes and what are pathological changes".[165] Therefore, a number of arguments mitigate against taking a purely symptom-based approach.

Firstly, acknowledging the individual symptoms as if they were not part of a syndrome could lead to the unnecessarily and unjustifiably harsh treatment of the individual offender by the courts.[166] Although there is no general agreement as to the causes of PMS, effective treatments such as Dalton's progesterone therapy have been found to work in some cases. Unless the nature of a disorder is acknowledged, it is impossible to recommend treatment.[167] If the cause of her disorder is ignored, an offender may be considered to have a serious psychiatric illness and therefore receive a more invasive sentence than would otherwise be required. Susan Edwards, for example, describes a case that she observed during fieldwork in which a diagnosis of PMS directly enabled an offender to avoid being placed in a psychiatric hospital for an indefinite period.[168]

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[165] McSherry, *supra* note 15 at 295.

[166] This refers to incapacitation-based theories of sentencing. As Donald Nicolson has argued, the fact that PMS sufferers may be capable of control in the future with the help of hormone injections is irrelevant to their culpability for past acts, *supra* note 6 at 168.

[167] A similar argument may be raised in response to the popular argument that to describe premenstrual symptoms as amounting to a syndrome is the equivalent of grouping together problems that people commonly experience early in the morning and calling it 'post-breakfast syndrome'. Whilst it is true that it is the effect of the symptoms rather than their cause that determines the degree of responsibility for an act that can be attributed to the actor, it is both intellectually dishonest and potentially unjust not to acknowledge the cause.

[168] S. Edwards, 'Premenstrual Tension' (1982) Justice of the Peace 476.

Even if premenstrual syndrome does have a hormonal cause, it is necessary to acknowledge this in the interests of treating like cases alike. Diabetes, for example, is caused by an imbalance of the hormone, insulin.[169] It would not be acceptable to say that an actor's culpability is diminished because he or she suffers from diabetes; it is necessary to acknowledge the particular operative symptoms but also the fact that these symptoms were manifestations of diabetes.[170]

Consequently, if premenstrual syndrome is to be a substantive defence when certain conditions are satisfied, it is necessary to consider how this might be achieved in a way that is more satisfactory than the situation as it presently stands. The means by which this might be done include using a reformed version of one of the existing excusatory defences, or establishing a substantive defence based solely on premenstrual syndrome. The defences of insanity and automatism were discussed in chapter 2 where I concluded that, in most cases, premenstrual syndrome will not lead to the degree of involuntariness required by the defence of automatism.[171] I shall therefore limit the discussion in this chapter to the possibility of using the defence of insanity or diminished responsibility, or the aforementioned separate defence of PMS.

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[169] The striking similarities between the symptoms and treatment of PMS and diabetes are best illustrated by a description of the treatment of Sandra Smith: "She (Katharina Dalton) is able to control Sandie's bizarre behaviour by hormone injections. But there are still problems. One day, Sandie's period fell on a Sunday and a new district nurse forgot to give the treatment on schedule. Sandie threw a brick through a window and phoned the police. On another occasion, she did not eat for two days; this brought on symptoms despite the injections and she committed another offence". (Oliver Gillie in the Sunday Times (15/11/81), quoted in Hey, supra note 50 at 75.

[170] As in R v Quick [1973] QB 910; R v Hennessy [1989] 2 All ER 9.

[171] For the automatism defence to succeed, the defendant must have lost all control of his actions, per Lord Goddard CJ in *Hill v Baxter* [1958] 1 QB 277.

Insanity

Even if PMS were to meet the requirements of a 'disease of the mind',[172] insanity is not necessarily the most appropriate vehicle through which to develop a satisfactory PMS-based defence. One of the most significant barriers to allowing premenstrual syndrome to fall within the insanity defence is in the wording of the defence itself. To recap, the *M'Naghten* Rules require either that the defendant did not "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".[173] This definition refers to the cognitive skills of a defendant, whereas I have argued that PMS is more likely to interfere with a woman's volition, as opposed to her knowledge and understanding of her situation. The distinction is between a woman's ability to control her behaviour and her ability to appreciate the significance of her conduct. The situation is described by Karen McArthur:

> Essentially, this definition focuses on cognitive ability rather than on behaviour. In other words, the insanity defense is not concerned with whether the woman could control her behaviour, but whether or not she could appreciate its significance. Evidence shows that although some premenstrual women have mood swings and may behave irrationally, they *still comprehend the consequences of their actions.* Thus, premenstrual women do not fit within the insanity concept as they do not fail to appreciate the nature of their acts but rather just *fail* to *control* such acts. Until such time as there is medical proof that cognitive abilities are affected during the premenstrual phase, premenstrual criminals will probably be unsuccessful in pleading the insanity defense.[174]

Consequently, although irrational behaviour, which I have argued is characteristic of PMS, may appear to call for a defence such as that of insanity, in fact the way in which

[172] See previous discussion in chapter 2.
[173] Tindal CJ, House of Lords, 1843.
[174] McArthur, *supra* note 161 at 852.

the current insanity defence is structured requires the defendant to have made a mistake about her actions rather than to have behaved irrationally.[175]

This discussion reveals what might be regarded as a flaw in the *M'Naghten Rules*: although volitional incapacity might be regarded as irrationality, or as a condition that should fall within the insanity defence, it does not. Helen Howard argues, convincingly, that "where an individual feels overwhelmingly compelled to act, the excuse should be based on his irrationality rather than compulsion since a person whose desires are in conflict is not rational".[176] This might therefore be a plausible way in which to reform the outdated *M'Naghten Rules*. However, Howard suggests that it might be better to include volitional incapacity within the diminished responsibility defence because this leads only to a partial reduction of responsibility for an offence. Although Howard fails to explain why volitional defects only merit a partial defence, she may be wise to recommend that these issues remain separate from the question of insanity. This is because, viewed in the context of premenstrual syndrome, it seems disproportionate and unduly draconian to label a premenstrual woman as insane. A number of authors are concerned by the stigma that attaches to the insanity label and regard such a label as inappropriate for a woman who claims that her actions were caused by her PMS.[177] Therefore, even if the offence were to be reformed, it would remain undesirable to defendants wishing to rely on PMS.

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[175] Although Fingarette and Hasse believe that making a mistake in itself implies some capacity for rationality, I would suggest that this is not necessarily the case where the insanity defence is concerned; cognition and volition simply represent two different mental processes, H. Fingarette and A. F. Hasse, *Mental Disabilities and Criminal Responsibility* (Berkeley: University of California Press, 1979).

[176] H. Howard 'Reform of the Insanity Defence: Theoretical Issues' (2003) Journal of Criminal Law 67(1), 51 at 64.

[177] See, for example, Carney and Williams, *supra* note 3.

Of course, building on the arguments already raised in this thesis, this issue will always depend on the individual woman's symptoms. If a woman were to experience premenstrual symptoms that are analogous to those associated with illnesses that are severe enough to affect her cognitive behaviour, then the insanity defence should apply.[178] Otherwise, it seems likely that it will not. While some form of the insanity defence should be retained in order to deal adequately with the most seriously disordered offenders,[179] there seems to be some merit in maintaining a separation between those whose illness affects their very knowledge and understanding of reality, and those whose medical conditions simply affect their reasoning and volitional skills.

A Separate Defence of Premenstrual Syndrome

Many of the arguments in this thesis have tended to demonstate that PMS does not fit easily into any of the existing defences. As Osborne has described:

> If premenstrual syndrome is to have a life in the law as it now stands, it will be an uncomfortable one, with limited benefit. Current criminal defences relating to internal factors are absolutist, cognitively-oriented and weakened by the pragmatic requirement that the defence should be reserved for those individuals in whom the disease is not likely to recur. There is virtually no room for the humane accommodation of cyclical, recurrent, predictable and possibly dangerous behaviour which occurs over a relatively short time span.[180]

[178] as is the case, for example, in cases such as those where a defendant suffered from arteriosclerosis which affected his cognitive behaviour, *R v Kemp* [1957] 1 QB 399.
[179] N. Walker 'Butler v the CLRC and Others' [1981] Criminal Law Review 596.
[180] Osborne, *supra* note 14 at 179.

Perhaps the simplest solution, therefore, would be to construct a separate PMS-based defence exclusively for these cases just as postnatal depression is afforded special recognition in the offence/defence of infanticide, albeit that such a defence was rejected by the Court of Appeal in the *Smith* case.[181] Such an approach would be in line with feminist writings on the subject of criminal liability. For example, Boyle et al. have argued that, if criminal law does not recognise a factor that may be relevant to a significant amount of female criminality, the law should be altered accordingly.[182] If PMS is such a relevant factor, perhaps a special legal category should be created.

However, given the current degree of medical uncertainty, it seems unlikely that either the medical or the legal profession would support the creation of such a specific defence. Since there remains a great deal of disagreement as to whether the condition in fact exists at all, it is difficult to conceive of PMS receiving such formal legal recognition.

Moreover, the greatest objection to the idea of a specific defence is that raised by the central argument of this thesis, namely that it is essential to consider the specific symptoms experienced by an individual woman before assuming that her PMS should amount to a valid excuse. If a defence of PMS itself were available to defendants, surely the problems outlined earlier in this thesis are at risk of being amplified rather than reduced. If defendants, lawyers and experts are willing to take the approach that a

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[181] *R v Smith, supra* note 1 at 531-32. The Court of Appeal held that allowing such a defence would mean that society would not be adequately protected from acts of violence by women claiming to suffer from PMS.

[182] C. Boyle et al., *A Feminist Review of Criminal Law* (Ottawa: Supply and Services, 1985) at 45.

diagnosis of premenstrual syndrome automatically satisfies the requirements of the diminished responsibility defence and thus provides an individual with a partial excuse, it seems likely that the availability of a PMS defence will only encourage such reasoning. Clearly only the most severe cases of PMS should entitle a woman to any excuse at all. Whilst it may be possible to structure a defence in a way that reflects this, it remains the case that the individual symptoms, and not the diagnosis of PMS itself, will be what determines whether an offender should be excused.

Diminished Responsibility

The failings of the current law of diminished responsibility have already been discussed in detail. However, as far as providing a suitable substantive defence for PMS sufferers is concerned, the defence does have two important advantages: firstly, diminished responsibility is not confined to defects in cognition but could work equally well where an offender suffers from a condition that affects her capacity to choose whether or not to obey the law; secondly, the law is already developing in this direction, in that all the cases on record where PMS has been used to plead a substantive defence have concerned diminished responsibility. Any legal reform that was able to build on this would presumably have a greater chance of success than a solution that does not take account of the way the law has evolved to date.

I have argued throughout that any substantive defence that incorporates the condition of PMS must recognise that some medical conditions can impair an individual's capacity to

make the 'right' choice to conform to the law. The defence must also recognise that only the severest impairments of capacity, those where an individual is incapable of making a free choice as to how she behaves, should amount to an excuse. These are the cases where an individual cannot resist the compulsion to act as she does.

However, the problem remains that, as Mackay has observed, it is difficult to apply a scientific test to measure problems of lack of control.[183] This will always be problematic, particularly with a disorder such as PMS where a line needs to be drawn between sufferers who should be entitled to an excuse and those who should not. Smith and Wilson suggest that the criminal justice system has been reluctant to allow such excuses because "[t]he distinction between the unresisted and the irresistible impulse is conceptually ephemeral and likely to prove evidentially indeterminable".[184] Consequently, the boundaries of any such excuse would be difficult to police and may result in a proliferation of conditions for which an excuse is available, which in turn would subvert the notion of moral responsibility. Their argument is based on what they describe as overriding considerations of public policy. However, although these considerations are important, the definitional and evidential difficulties should not prevent a defence from being made available when this is required to do justice.[185]

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[183] Mackay, *Diminished Responsibility and Mentally Disordered Killers, supra* note 146 at 71. Mackay also suggests, however, that such difficulties need not be so insuperable that the diminished responsibility defence should be abandoned altogether.

[184] *Supra* note 100 at 89.

[185] Moreover, even Smith and Wilson acknowledge that the public policy considerations are less convincing when the offender's lack of capacity is the result of a mental disease, particularly one with an organic route, as would appear to be the case with PMS. They suggest, although they do not elaborate, that in such cases it is less difficult to differentiate the mad from the bad, *supra* note 110.

One possibility would be to rely on the notion of irresistible impulse. This apparently applies in circumstances where the offender understands the significance of his acts but is still unable to refrain from criminal behaviour. Examples might include pyromania and kleptomania and other forms of compulsive behaviour.[186] It applies where a defendant experienced an impulse that was so strong as to render her incapable of conforming to the law.

The views of commentators differ on this subject. For example, Brahams suggests that the *Craddock* and *English* cases, in which PMS was held to be an 'abnormality of mind' within the meaning of diminished responsibility, amounted to the recognition of a defence of irresistible impulse. However, this seems somewhat implausible when one considers that in the later case of Sandra Smith, the defence of automatism was rejected precisely because the court feared that to allow such a defence would revive the notion of irresistible impulse.[187]

Moreover, it may be that the irresistible impulse test is just too narrow, both for the incorporation of certain types of PMS and for other conditions that may result in a loss of control. The notion of irresistible impulse suggests a sudden loss of control accompanied by an equally sudden action. Consequently it would not apply to an act that is not sudden and unplanned. Until more reliable research is available, it is impossible to say whether this would preclude any cases in which PMS might be an excusatory condition.

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[186] Wallach and Rubin, *supra* note 154 at 249.
[187] *R v Smith (Sandie), supra* note 1 at 531.

Consequently, it would not be appropriate to simply regard irresistible impulse as the only control test. A loss of control and the absence of free will, a necessary element of a criminal offence, can occur in a far broader range of situations than those covered by this test.

Given my extensive criticism of the way in which the current diminished responsibility defence is structured, it is clear that, if this defence is to be useful in the future, significant legal reforms will be desirable. A number of authors have formulated alternative ways in which the defence might be worded. It is clear that the four specified aetiologies serve no useful purpose and should be abolished. The approach of a number of Australian states would appear to represent a progressive step. Queensland, for example, has abolished the ambiguous term 'mental responsibility' and replaced it with the notion of capacity. This would appear to be a far better reflection of when a mental condition justifies a legal excuse, based on the discussion in the previous chapter, although of course further clarification would be required on what, exactly, constitutes 'capacity'. Thus the Queensland statute requires a substantial impairment of 'his capacity to understand what he is doing, or his capacity to control his actions, or his capacity to know that he ought not to do the act or make the omission'.[188] Moreover, Edward Griew suggests that the term 'abnormality of mind' in section 2 of the Homicide

[188] Queensland Criminal Code, s. 304A; Incidentally, if this wording were adopted and extended to cover offences other than murder, it would also subsume cases in which an offender would otherwise have to rely on the arcane and stigmatized provisions of the *M'Naghten* rules.

Act could be substituted by the term 'mental disorder' as defined in the Mental Health Act 1983.[189]

As far as any requirement as to how the disorder was caused is concerned, Mackay favours an approach where no such conditions are specified. He refers to the Criminal Code of the Northern Territory of Australia which simply requires an 'abnormality of mind'.[190]

It does not appear necessary to formulate a defence that demands total incapacity for an offender to be excused. Mackay[191] favours the approach of the Model Penal Code which provides an example of how such a defence might be drafted:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of the law.[192]

Clearly the incapacity need only be 'substantial', rather than total, for this defence to succeed. Whilst such an approach seems reasonable and indeed attractive, it does not answer the question of where and how to draw the line. One of the most detailed

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[189] Griew, *supra* note 143. S. 1(2) of the Act specifies that 'mental disorder' refers to 'mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind'. If, as I have suggested, the courts take a symptom-based approach in cases of PMS, then presumably a condition that is severe enough to interfere with an individual's capacity and free will would at least fall within 'any other disorder or disability of mind'.

[190] Criminal Code of the Northern Territory, s. 37.

[191] Mackay, *supra* note 146 at 71.

[192] S. 4.01(1) Model Penal Code.

analyses of this problem is that conducted by Mackay.[193] He suggests that, given that there is no exact test that can determine whether or not an offender was able to resist the compulsion to commit a criminal act, the question to ask should be whether the accused experienced a lack of self control that was significantly greater than society would expect of an individual faced with equivalent circumstances but who did not have a mental abnormality.[194] This has the advantage in that it looks at the degree of difficulty experienced by the offender rather than the 'impulses' that he was experiencing and whether they could be overcome. Mackay observes that this would lead to offenders whose impulse was not irresistible being granted an excuse. From the wording of his proposal, I do not believe that this is necessarily the case. The question of whether or not it should be must again be answered by looking at the principles underlying criminal responsibility. This ties in with my conclusions about the idea of a defence based on irresistible impulse, namely that an impulse that is genuinely irresistible is not the only way that a lack of self-control might justify an excusatory defence. Furthermore, as Mackay himself points out, this approach would appear to resemble that of the defence of provocation.[195] The wording of the provocation defence requires a loss of self-control but there is nothing to suggest that this loss of control must result in total incapacity.[196] Although many of the evidential problems remain, they are no worse than those that presumably accompany the provocation defence in many instances.[197]

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[193] Mackay, *supra* note 146 at 71 – 73.
[194] Mackay adopts the argument initially formulated by Professor J. C. Smith in *Smith and Hogan: Criminal Law,* 9th edn. (London: Butterworths, 1999) at 213.
[195] Mackay, *supra* note 146 at 73.
[196] s. 3 Homicide Act 1957.
[197] The difference between the two is that while provocation has an objective element, with the 'reasonable person' test, diminished responsibility does not since it is based around the defendant's mental disorder and so any test must be subjective by definition. The reasonable person test is unlikely to make a great deal of difference to the evidential issue because, as Mackay contends, most of us do not know what it is like to be

However, if this is true then the arguments in favour of extending the availability of some form of diminished responsibility defence to offences other than murder are greatly strengthened. This is also the view of Nigel Walker who strenuously rebuts the common objection that it would be logically impossible to allow such an extension because other charges cannot be reduced to a lesser offence as easily as murder can be reduced to manslaughter.[198] Walker suggests that this obstacle may be overcome simply by using the finding of diminished responsibility to limit the type or severity of sentence. He draws a comparison with Italian law where a finding of 'partial defect of mind' reduces the maximum prison sentence available for an offence. Walker goes on to propose various formulae by which prison sentences could be reduced if British legislation were amended accordingly, such as, for example, halving fines and prison sentences.

However, he does acknowledge that this would not take away the stigma of a criminal conviction. I have argued throughout this thesis that the outcome of a trial should reflect, as accurately as possible, the true extent of the offender's guilt. It is thoroughly inappropriate that an offender should carry a conviction for an offence of which she was not fully guilty. I would therefore prefer Walker's alternative suggestion, which is that, in appropriate cases, a diminished responsibility verdict should be recorded as 'a finding of guilt but with diminished responsibility.

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in such extreme circumstances, Mackay, *supra* note 146. Furthermore, the House of Lords decision in *R v Smith, supra* note 81 has significantly all but destroyed the objective test.

[198] Walker, *supra* note 179.

Finally, it is worth pointing out that there is no reason to assume that all diminished responsibility cases, whether involving a homicide or another offence, should necessarily result in a finding of partial responsibility. As previously discussed, the diminished responsibility defence may be responsive to disorders that affect volition and self-control but the insanity defence will not be available unless an offender suffered from a disorder that affected her knowledge and understanding of the circumstances of the offence. If diminished responsibility is only a partial defence, what happens to an offender whose incapacity was sufficiently serious that she should not be regarded as even partially responsible? Unless she can satisfy the strict requirements of automatism, she will not be entitled to an acquittal. Although further information would be required before we could state that such situations would in fact arise, it is worth remembering that there may be cases where justice requires a full acquittal on grounds of diminished responsibility. Consequently, any legal reforms should not preclude such an outcome.

CONCLUSION

Most of the literature to date that has dealt with the issue of PMS being used in criminal court cases has centred around what I have called the 'feminist objection', namely that by granting the condition formal legal recognition, the courts risk encouraging the promulgation of dangerous female stereotypes. I have argued that this issue is in fact irrelevant to the question of whether women should be entitled to rely on the condition in criminal cases. Since the purpose of a criminal trial is to determine whether and to what extent a defendant should be held responsible for a criminal act, an individual must be entitled to rely on a condition that, according to the principles that underlie the criminal law, might genuinely diminish her moral guilt. Political concerns should not outweigh this consideration. If female behaviour is genuinely determined by their reproductive biology in certain instances, then there is no justification in denying this fact.

However, I have also attempted to demonstrate that the courts fail on the whole to address the questions that I outlined in the introduction. There is an overwhelming tendency to assume that, if an offender claims to have been premenstrual at the time of an offence, then the offence by definition caused or contributed to her act and so she is therefore automatically entitled to an excuse. My discussion of the wide-ranging disagreement as to the symptoms and causes of this condition shows that such an approach is erroneous and this leads to the outcome of such trials being distorted. Moreover, it may lead to a distorted view of female behaviour that is not in fact justified by the circumstances of individual cases. The tendency to opt for a diminished

responsibility plea in cases where there is evidence of provocation, thereby preferring the medical explanation for female behaviour above all alternatives, is just one example.

The aim of this thesis has been to determine how the five questions discussed in the introduction should best be answered. I have argued that the current disagreement over whether or not PMS exists and its symptoms and causes need not concern the criminal courts. The evidence suggests that the symptoms of PMS are extremely wide-ranging. However, it is the symptoms themselves, rather than a label that is given to the collectively, that will determine the culpability of a defendant. Her own particular symptoms are what may or may not affect her behaviour. Since these symptoms are common to many other disorders, they should be analysed in the same way. Thus, if a woman's premenstrual syndrome causes her to experience feelings of depression, the approach of the court need only differ from other cases of depression if the cause of the depression or potential dangerousness of the individual is regarded as relevant. It is necessary to acknowledge the fact that this resulted from PMS in the interests of presenting an accurate picture to the court and avoiding unnecessarily harsh sentencing. For this reason the idea of PMS is still meaningful. However, these factors do not go to the actual moral guilt of an offender.

Once it has been determined whether or not an offender was suffering from premenstrual symptoms at the time of her offence (question ii), the tendency of the courts is to assume that the answers to questions iii and iv should be affirmative. In order to demonstrate that this approach is inappropriate, I turn to the philosophical debate on theories of

culpability. This, it is to be hoped, provides some guidelines and underlying principles beyond those found in the actual criminal defences themselves. These principles, which are used to determine moral guilt, on which the notion of legal guilt is based, provide an independent assessment of when an offender should be wholly or partially excused.

The current consensus appears to be that the so-called capacity theory is the most appropriate way to assess criminal guilt. This theory is based on the notion of free will and whether the defendant had the capacity to make a free choice. Once again we are reminded of the importance of taking a symptom-based approach to liability in PMS cases. The majority of PMS symptoms would not, by either their nature or their severity, be sufficient to diminish an offender's capacity to the extent that it could be said that she could not exercise free will. Based on this theory, only the most severely affected women might be entitled to an excusatory defence.

Character-based theories of liability also, ultimately, look to lack of self-control and free will. I have argued that, ultimately, character theorists and capacity theorists do not differ significantly in their approach to liability. This is because, logically, whether someone has the capacity to obey the law will be determined by the broad-based definition of character that character theorists adopt.

To summarise, both theories support the view that a lack of self-control or capacity to obey the law does not amount to an automatic excuse. Neither entirely excludes the recognition of a substantive excuse based on PMS but both theories seem to suggest that

this is a question of degree. Consequently, most women with PMS will not be entitled to an excuse. The current legal approach to questions iii and iv, whether an offender's PMS caused her to act and whether she should be entitled to an excuse is clearly wrong.

Since the only English cases to date in which PMS has been used to found a substantive defence involve diminished responsibility, I then went on to look at this defence in more detail. I concluded that the ill-defined wording and structure of section 2 of the Homicide Act is largely responsible for the fact that the diminished responsibility defence is so malleable. This malleability in turn is what makes the defence prone to manipulation by defendants, witnesses and legal personnel. This, I have argued, is therefore the cause of many of the problems outlined in chapter five. If the defence were not so poorly structured, it would be harder for the courts to ignore vital questions relating to an offender's guilt and it would also be more difficult to manipulate the facts of a case so as to employ a mental health defence in cases where other factors may have contributed more to the commission of an offence. Finally, I have argued that, given the conclusions reached in chapter 6 concerning when an offender should be regarded as morally guilty, it is unjust to allow this type of defence only in cases of murder. Defendants charged with other crimes may be equally entitled to recognition of their lack of volition and free will.

However, after having considered alternative substantive defences that might be raised in PMS cases, I conclude that a reformed version of diminished responsibility is the most appropriate solution, perhaps taking the wording of the Queensland statute, referred to in the previous chapter, as a starting point. The description or 'label' of diminished

responsibility or diminished capacity is the most accurate description of the effects of PMS symptoms. No other defence, including insanity, appears to recognise that some forms of incapacity can interfere with free choice.

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