

BOXING WOMEN: REGULATION, WOMEN AND MENTAL HEALTH

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A glance at the title and one may be forgiven for thinking that this article is out of place in a journal concerning the impact of the law on women. The title, however, is deliberately ambiguous. It is meant to signify the uncertainties which face many women who offend: are they mad or just plain bad?¹ It is meant to represent both law and psychiatry's attempt to pigeon hole women into categories² and to represent a fight between women and those who define womanhood a fight which I believe women are currently losing.

This article considers the ways in which law and psychiatry interact to define, codify and legitimate a set of constructs which are used to treat or punish the female offender.³ It traces the involvement both of the law and psychiatry in their independent and joint dealings with women. To highlight this interaction, it considers their influence with reference to two fairly recent medico-legal phenomena: pre-menstrual tension⁴ and battered wife's syndrome.⁵ Examining the treatment of women who break the law demonstrates how these influences transcend judico-medical boundaries affecting the lives of women in a wider social context.

The first part of this article gives a broad background, showing how women are viewed in social, legal and psychiatric discourse. It gives an overview of the theoretical and empirical literature, highlighting the British and North American legal and psychiatric systems. This is followed by a discussion of the suggested benefits and

¹ ANNE WORRALL, *OFFENDING WOMEN: FEMALE LAWBREAKERS AND THE CRIMINAL JUSTICE SYSTEM* 114 (1990) (considers this argument when applied to women on probation).

² Anne Worrall, *Out of Place: The Female Offender in Court*, 28 PROBATION J. 91 (1981). The categories for this research concern the mad/bad dichotomy for female offenders. This is analogous to the dichotomy of female behaviour which sociologists have realized.

³ In this country, this includes the Mental Health Act 1983, the Criminal Procedures Insanity Act 1957, and the Homicide Act 1964, under which the home secretary has the right to detain offenders in secure "special hospitals." There are three "hospitals" in England which cover Wales and another in Scotland which covers Northern Ireland.

⁴ K. Dalton, *Menstruation and Crime*, 2 BRIT. MED. J. 1752 (1964). Pre-menstrual tension is described as a biological condition whereby changes in the hormone levels incur changes in psychological functioning.

⁵ A relatively new concept whereby women are alleged to suffer a psychological condition as a result of abuse, be this physical, emotional or sexual. This "condition" can result in the "slow burn" syndrome whereby women act violently towards their abusers often without any immediate provocation.

possible disadvantages of perpetuating medical intervention in the legal setting. Finally, it aims to show how recent attempts to redress the balance for women of predominantly hitherto male preserves, such as the provocation rule⁶ may in fact simply create or recreate a multitude of problems for both women offenders and women in general. By continuing a separatist, often reductionist, approach, supporters of this line merely perpetuate the psycho-biological view of womanhood which has been so damaging in the past. The article concludes by suggesting a system of legal and social justice sensitive to gender, race, class and sexuality.

SECONDS OUT! WOMEN AND SOCIAL CONTROL

It has been argued that for women to stand as equal before the law they must first have acquired social equality.⁷ There has, however, been an abundance of literature which has shown that even now, one hundred years after the birth of the women's movement,⁸ and twenty years after the "second wave" of feminism, women have still to win equality.⁹ Social inequality has been shown to run through the fabric of women's everyday lives and is based on three key concepts: the socialization of women; the social role and status of women; and sexism and discrimination.

Every culture socializes its participants in a particular way,¹⁰ and this has been shown to be a gendered process.¹¹ For women in western society, certain behaviours have been, through the process of assimilation, classed as "normal."¹² One of these "normal behaviours" is femininity. In order to be feminine, women must acquire through a complex web of social and environmental factors, a set of behaviours and beliefs. Paramount among these is the view that women must be of service to others,¹³ putting others'

⁶ This allows a reduction in the charge of murder to manslaughter on the grounds that the defendant was "provoked" into the assault. The usual benchmark of the provocation rule is the "rational man," which has caused consternation among many writers who write on the subject of women.

⁷ Frances Heidensohn, *Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice*, 14 INT'L J. SOC. & L. 287, 297 (1986).

⁸ The rise of modern feminism can be traced to various early writings of women. See, e.g., A. TURKES, *WOMANKIND* (1543); MARY WOLENSTONECRAFT, *THE VINDICATION OF THE RIGHTS OF WOMEN* (1799); SIMONE DE BEAUVIOR, *THE SECOND SEX* (1942).

⁹ ANN OAKLEY, *WOMEN CONFINED* 5 (1984); G. GREER, *THE FEMALE EUNUCH* 11 (1976); A. EDWARDS, *Sex, Gender, Sexism and Some Criminal Justice Questions*, 17 INT'L J. SOC. & L. 165, 171 (1989).

¹⁰ MARGARET MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1935).

¹¹ ANN OAKLEY, *SEX, GENDER, AND SOCIETY* 172 (1972).

¹² J. SHARPE, *JUST LIKE A GIRL* (1976).

¹³ C. NEW & M. DAVID, *FOR THE CHILDREN'S SAKE: MAKING CHILDCARE MORE THAN A WOMAN'S BUSINESS* 13-14 (1985).

needs above their own. Another "behaviour" is the discouragement and punishment of aggression, either natural assertiveness or the proclamation of negative feelings.

Thus, if a woman is feminine, she does not become angry (at least outwardly) and does not contradict people in power, particularly men.¹⁴ As we shall see later, rejection of this image of the normal feminine woman has many implications for those in contact with psychiatric and legal discourses.

The second concept, the social role and social status of women, also has profound effects upon a woman's self image and the way women are treated socially, which often provokes stereotypes.¹⁵ Here, women are denied access to positions of power in the hierarchy¹⁶ and are confined to the private domestic sphere of the home and family.¹⁷ Women are said to be dependent economically upon men and are thus socially controlled. Denied a public arena, or the financial power to make decisions, women are seen as second class citizens.¹⁸ Women's work, the domestic burden of housework, care giving and child raising, is also relegated to a non-work status, just something women "do," a duty which is emphasised by a lack of social recognition¹⁹ or remuneration.²⁰

This is not to deny that in recent years women have found employment outside the home. What has not changed, however, is where women work²¹, or the wages they re-

¹⁴ Edwards, *supra* note 9, at 171.

¹⁵ These stereotypes can be profoundly damaging to women who deviate from them. See PAT CARLEN, *ALTERNATIVES TO WOMEN'S IMPRISONMENT* 1 (1990); JANE M. USSHER, *WOMEN'S MADNESS: MISOGYNY OR MENTAL ILLNESS?* 20 (1992). Both authors have shown that both women offenders and women who are diagnosed as mentally ill suffer adversely because of these "normal" images.

¹⁶ GILLIAN PASCALL, *SOCIAL POLICY: A FEMINIST ANALYSIS* 28 (1986).

¹⁷ E. WILSON, *WOMEN AND THE WELFARE STATE* 8 (1977); NEW & DAVID, *supra* note 13, at 55-56.

¹⁸ PASCALL, *supra* note 16, at 9.

¹⁹ This denial of a woman's important role in the household is apparent only until there is a social crisis. If politically expedient to do so, women can be blamed for social ills such as juvenile delinquency. See ALLISON MORRIS, *WOMEN, CRIME AND CRIMINAL JUSTICE* 199 (1987). Another example can be found in the New Right's (the political right wing of the Conservative party dominant in the 1980's and associated with Thatcherism) attack on the disintegration of family values. See F. MOUNT, *THE SUBVERSIVE FAMILY* 38-61, 219-47 (1986).

²⁰ ANN OAKLEY, *THE SOCIOLOGY OF HOUSEWORK* 226 (1974).

²¹ Women are predominantly employed in para-domestic spheres such as nursing, cleaning, social work, secretarial work, food serving or elementary teaching. When women enter the semi-professions, it is usually at, and continues to remain, the lower level of salary grade. This has been found to be true even of female dominated professions such as nursing and teaching. See J. LEASE & J. GRAY, *WOMEN AND MEDICINE* 12 (1978); J. Burkett, *Women and Education* (1993) (unpublished M.A. dissertation, Leicester University). This has also been found to be true in developing and communist countries. See M. Molyneux, *Women in Socialist Societies: Problems of Theory and Practice*, in *OF MARRIAGE AND THE MARKET*

ceive,²² leading to the feminization of poverty.²³ What many women now face is a double burden of work, trapped in domestic tasks within and without the home, without any support from a partner²⁴ (if there is one). They are rarely given the opportunity to advance in power, status or education.²⁵ For many women the burden of this socially ascribed role, coupled with the stress of poverty²⁶ and monotonous work,²⁷ can lead to either a breakdown in physical or mental health, or criminal activity, thus resulting in contact with the medical or legal paradigm, as considered later.

Finally, women encounter sexism and discrimination in many aspects of their lives. Negative images of womanhood pervade western societies, displaying women as weak, unknowing, inexperienced and childlike.²⁸ Similarly, women face discrimination in many areas of their lives. In education, women are primarily restricted to appropriately feminine tasks such as domestic education.²⁹ In work, women are discriminated against in pay and conditions.³⁰ It is by these processes, and their reaffirmation, that women are effectively "boxed." Despite legislation intended to guard against this entrapment, these practices occur in virtually all aspects of a woman's life. It is towards the law and its powers to regulate and redress that we shall now turn.

THE LEFT HOOR? WOMEN AND THE LAW

In recent times, the law has been shown to discriminate against women both procedurally and in its inception. In 1978, Sachs and Hoff Wilson gave an overview of the history of the women's movement in both the U.S.A. and Britain. Women struggled

(K. Young ed., 1981); C. White, *Socialist Transformations of Agriculture and Gender Relations: The Vietnamese Case*, 13 IDS Bulletin (1987).

²² B. THORN, FEMINIST RETHINKING OF THE FAMILY (1982) (woman earn only 59% of that of men in America) quoted in P. ABBOTT & C. WALLACE, SOCIOLOGY: FEMINIST PERSPECTIVE 75 (1983). Similar studies in Britain (SOCIAL TRENDS 1990) have shown that women earn only 69% of men engaged in similar occupations.

²³ It has been suggested that this is a direct attempt to keep women under control. As women rely on welfare benefits, they conform to socially accepted norms. See K. Chadwick & C. Little, *The Criminalization of Women*, in LAW ORDER AND THE AUTHORITARIAN STATE (P. Scratton ed., 1987); CARLEN, *supra* note 15, at 1; PAT CARLEN, WOMEN'S IMPRISONMENT 30-33 (1983).

²⁴ It has been suggested that heterosexual relationships are becoming more egalitarian; however, this has not been the case for the majority of women.

²⁵ CAROL SMART & BARRY SMART, WOMEN, SEXUALITY AND SOCIAL CONTROL 2 (1978).

²⁶ D. COOK, RICH LAW, POOR LAW, A DIFFERENT RESPONSE TO TAX AND SOCIAL SECURITY FRAUD 28-42 (1989).

²⁷ Chadwick & Little, *supra* note 23, at 60.

²⁸ B. HUTTER & G. WILLIAMS, CONTROLLING WOMEN THE NORMAL AND THE DEVIANT 12 (1981).

²⁹ Burkett, *supra* note 21.

³⁰ PASCALL, *supra* note 16, at 47-51.

to be defined as persons or citizens under the law, in order to gain access to legal redress.³¹ Despite this, women have been marginalized and discriminated against whenever they come into contact with the law.³²

When considering women's place in the domestic sphere, the theory and practice of welfare law is of fundamental importance. In England, legislation has focused on the family as the site to foster and restore its ideological underpinnings.³³ Changes in social security, usually revolving around the male breadwinner,³⁴ and the dependence of women and their availability to perform domestic tasks³⁵, has resulted in vulnerable women³⁶ becoming progressively poorer.³⁷ Women suffer a myriad of inequalities concerning access to benefits such as: care for the disabled, child benefits, unemployment benefits, old age pensions and so on. Reductions in the amount and scope of benefits in recent years have particularly affected women.³⁸

Concerning housing legislation, Aries noted that "the concept of the home is another aspect of the concept of the family"³⁹ and as such Pascall suggests that housing legislation consists of "a powerful set of ideas which link house, home and the family in the ideology of domesticity and of a woman's place within this."⁴⁰ Thus the ideology of domesticity connects women's needs for housing with their membership in particular kinds of families, predominantly male breadwinner families. Despite legislation to the contrary,⁴¹ a "landmark in social legisla-

³¹ ALBIE SACHS & JOAN HOFF WILSON, *SEXISM AND THE LAW: A STUDY OF MALE BELIEFS AND LEGAL BIAS IN BRITAIN AND THE UNITED STATES* 1-67 (1978).

³² CAROL SMART, *WOMEN, CRIME AND CRIMINOLOGY: A FEMINIST CRITIQUE* 176-85 (1976).

³³ United Kingdom Inter-Departmental Comm'n on Social Ins. and Allied Servs. (report by Sir William Beveridge), (HMSO) 1942.

³⁴ In England the infamous "co-habitation rule" was introduced into legislation to counteract the freedom of unmarried but co-habiting women to claim benefits independently from male partners. This has been seen as a further measure of social control and ideological repression. PASCALL, *supra* note 16, at 213-19.

³⁵ J. Radford and S. Jeffries, *Contributory Negligence of Being a Woman*, in *CAUSES FOR CONCERN* 74 (P. Scratton and P. Gordon eds., 1983).

³⁶ PAT CARLEN, *WOMEN, CRIME AND POVERTY* 1-12 (1988) ("vulnerable women" include older women single parent families, homeless women and young school dropouts).

³⁷ BEATRIX CAMPBELL, *WIGAN PIER REVISITED: POVERTY AND POLITICS IN THE EIGHTIES* (1984); PASCALL, *supra* note 16; PETER TOWNSEND, *POVERTY IN THE UNITED KINGDOM: A SURVEY OF HOUSEHOLD RESOURCES AND STANDARDS OF LIVING* (1979); D. BULL & P. WILDING, *THATCHERISM AND THE POOR* (1983).

³⁸ PASCALL, *supra* note 16, at 203-06.

³⁹ P. ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 390 (1973).

⁴⁰ PASCALL, *supra* note 16, at 132.

⁴¹ The Housing (Homeless Persons) Act 1977 is said to have been changed from a bill designed to give the homeless rights to one which presents them with a series of obstacles to overcome. These include the need to prove homelessness, priority need, unintentional

tion,⁴² women still experience difficulties. Older women, ethnic minority women,⁴³ abused women⁴⁴ and lone parents⁴⁵ all face problems in claiming their rights.⁴⁶

In education, the alleged egalitarian aims of non-discriminatory legislation⁴⁷ have proven mythical.⁴⁸ This has included young women being denied career advice, and despite gaining more and better qualifications, do not continue to further their education.⁴⁹ This has also resulted in further sex-role stereotyping, emphasizing domesticity and feminine pursuits such as language.⁵⁰

Certain sex stereotyped behaviours discussed throughout this piece are mirrored in legislation. For example, the Community Care Act 1990,⁵¹ rather than representing care of the sick and elderly by the community, it has been suggested to represent care at home. However, care in the home represents care by women,⁵² which is often unpaid and unrecognized.⁵³

In family law, women have been seen to have differential experiences on the basis of their womanhood. Sachs and Hoff Wilson have shown the progress of family law in Britain and the U.S.A. over the last century, highlighting inadequacies in both systems.⁵⁴ More specifically, Brophy has shown how women are discriminated against in custody disputes.⁵⁵ Bottomly has shown how women may

homelessness and a local connection, which are liable to discretion on the part of individual authority. See P.W. Robson & P. Watchman, *The Homeless Persons' Obstacle Race*, 3 J. Soc. WELFARE L. 1, 1-15 (1981).

⁴² *Id.*

⁴³ PASCALL, *supra* note 16, at 135.

⁴⁴ V. Binney et al., *Domestic Violence: Battered Women in Britain in the 1970's*, in WOMEN IN SOCIETY 115-26 (1981); J. Webb, *Housing for Battered Women?* (1983) (unpublished B.A. dissertation, Nottingham).

⁴⁵ Mavis Maclean and Diana Kuh, *The Long Term Effects for Girls of Parental Divorce*, in WOMEN'S ISSUES IN SOCIAL POLICY 161, 176 (Maclean and Groves eds., 1991) [hereinafter WOMEN'S ISSUES].

⁴⁶ Robson & Watchman, *supra* note 41, at 1-15.

⁴⁷ In England, the Education Acts of 1944 through 1990 have all stated the aim of non-discrimination in education on the grounds of sex, colour or religion. C. Skelton, *Women and Education*, in WOMEN'S STUDIES 330-31 (Richardson & Robinson eds., 1998).

⁴⁸ J. WHYLD, *SEXISM IN THE SECONDARY CURRICULUM* 82 (1983); Skelton, *supra* note 47, at 325-32.

⁴⁹ SHARPE, *supra* note 12.

⁵⁰ Burkett, *supra* note 21.

⁵¹ A piece of legislation designed to take the old, infirm and mentally ill out of the large impersonal institutions and for them to be "cared" for by and in the "community."

⁵² PASCALL, *supra* note 16, at 85-87; H. Land, *Time to Care*, in WOMEN'S ISSUES, *supra* note 45, at 9; J. FINCH & D. GROVES, *A LABOUR OF LOVE: WOMEN WORK AND CARING* 494 (1980).

⁵³ Sally Baldwin and Julia Twigg, *Woman and Community Care: Reflections on a Debate*, in WOMEN'S ISSUES, *supra* note 45, at 70, 117-33; Land, *supra* note 52, at 9.

⁵⁴ SACHS & HOFF WILSON, *supra* note 31, at 133-47.

⁵⁵ J. Brophy, *Child Care and the Growth of Power*, in WOMEN AND THE LAW 97-117 (Brophy & Smart eds., 1985) [hereinafter WOMEN & LAW].

be discriminated against in conciliation cases after divorce.⁵⁶ Watson has shown how the intersection of property and material goods has been erratic after divorce in Australia.⁵⁷ Graycar has shown the prominence of masculine ideals in the care cases of Australia.⁵⁸ David shows how women have been ignored in the Children Act 1989.⁵⁹

Even in employment law, the much heralded Sex Discrimination Act 1975, the Equal Pay Act 1975 and the creation of the Equal Opportunities Commission in England have brought few results for women.⁶⁰ Pascall suggests that the benefits of such legislation are peripheral for two reasons.⁶¹ Firstly, the legislation is restrictive in its own terms. Secondly, the legislation has too small a scope to deal with the profound character of gender divisions. If women cannot expect equality in legislation specifically designed for that purpose, what is the experience of women who come into contact with the more overtly regulatory branch of criminal law? It is to this that we shall now turn.

THE UPPER CUT: WOMEN AND THE CRIMINAL LAW

What of women who come into contact with criminal justice agencies? Until recently it was fashionable to start any discussion on women and the criminal law by noting the relative dearth of literature on the subject.⁶² Whilst this has changed, as there is now a comparative abundance of research on the subject,⁶³ "what remains the same is that the picture of women's crime remains distorted and incomplete."⁶⁴ Although sex differentials are sometimes pursued, explanations for the differing levels of female crime still focus upon the comparative rarity of the female offender,⁶⁵ often perceiving her as a helpless victim of adverse psychological,

⁵⁶ A. Bottomly, *A Feminist Critique of Conciliation*, in *WOMEN & LAW*, *supra* note 55, at 162-87.

⁵⁷ Sophie Watson, *Erratic Bureaucracies: the Intersection of Housing, Legal and Social Policies in the Case of Divorce*, in *DISSENTING OPINIONS* 70-79 (R. Graycar ed., 1990).

⁵⁸ REGINA GRAYCAR, *DISSENTING OPINIONS* 59-69 (1990).

⁵⁹ Miriam David, *Putting on an Act for Children?*, in *WOMEN'S ISSUES*, *supra* note 45, at 95-116.

⁶⁰ PASCALL, *supra* note 16, at 32.

⁶¹ *Id.*

⁶² SMART, *supra* note 32, at 66.

⁶³ WORRALL, *supra* note 1, at vii.

⁶⁴ LORRAINE GELSTROPE, *SEXISM AND THE FEMALE OFFENDER* 125 (1989).

⁶⁵ Women represent only 3-4% of the total prison population and 7% of those charged with indictable offences. [HOME OFFICE, 1990.] The small percentages are themselves a valid reason to study why women conform. Are women more law abiding? Are laws enforced selectively? Or are women more socially controlled?

physiological and environmental difficulties and "only peripherally in terms of social forces and influences."⁶⁶

When considering the relative causes of female crime, much attention has been given to the idea that female offences have increased⁶⁷ as a direct result of female emancipation.⁶⁸ This follows from role theory, where it is alleged that the tensions and to some extent opportunities to commit crime increase in proportion to women's greater political and social opportunities.⁶⁹ This theory has been criticised as inferring female crime is a masculine⁷⁰ pursuit which has previously been denied to women on the grounds of lack of opportunity⁷¹ and as being ahistorical.⁷² What appears more likely is that the definition of female crime has changed and the increase may be illusory, accounted for by the rise in attention given to women's crime.⁷³

One must also consider the practice of criminal law and its dealings with women. The criminal justice system has been described as the "criminal injustice system" by Eaton.⁷⁴ Heidensohn viewed the criminal justice system as an interconnecting series of institutions and systems which are juxtaposed and work in concert to the detriment of women who offend.⁷⁵ This has been known as the Portia vs. Persephone debate.⁷⁶

⁶⁶ Lorraine Gelsthorpe, *Towards a Skeptical Look at Sexism*, 14 INT'L J. SOC. L. 125 (1986).

⁶⁷ OTTO POLLACK, *THE CRIMINALITY OF WOMEN 8-9* (1961) (suggests that women's crime has been merely masked in the past).

⁶⁸ FRED A ADLER, *SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL* (1975).

⁶⁹ SMART, *supra* note 32, at 70-76.

⁷⁰ Cook and others have shown how women more often commit crime as a result of poverty rather than of white collar opportunity or boredom. See Cook, *supra* note 26, at 35-42. Carlen has suggested that the impact of feminism and emancipation can well be applied to middle class and white women. See Marcia Rice, *Challenging Orthodoxies in Feminist Theory: A Black Feminist Critique*, in *FEMINIST PERSPECTIVES IN CRIMINOLOGY* (L. Gelsthorpe and A. Morris eds., 1990). But in reality the majority of female offenders do not come from these populations. This implies an overcriminalization of poor, working class and black women. See CAROL SMART, *FEMINISM AND THE POWER OF LAW* (1990).

⁷¹ It has been alleged that women are mostly confined to the domestic sphere of the home and so lacked the opportunity to commit crime. Similarly, when women work, their environment is more regulated, thus again denying the opportunity to commit crime. See MORRIS, *supra* note 19, at 63-75.

⁷² Austin has shown that the female crime rate has indeed decreased in the last century. See, M. Austin, *Women's Liberation and Increases in Major, Minor and Occupational Offences*, 20 *CRIMINOLOGY* 407 (1982). See also Helen Boritch, *Gender and Criminal Court Outcomes: An Historical Analysis*, 30 *CRIMINOLOGY* 293 (1992) (suggesting that the increase in the crime rate in general is due to differing criminalization and an increase in formal and informal mechanisms of social control and regulation).

⁷³ SMART, *supra* note 32, at 72.

⁷⁴ MARY EATON, *JUSTICE FOR WOMEN?* 97 (1984).

⁷⁵ EDWARDS, *supra* note 9, at 68.

⁷⁶ Heidensohn, *supra* note 7, at 289 (Heidensohn sees two systems of justice. The male dominated Portia system dominated by rule and procedure, and the more flexible Persephone approach where individual differences are acknowledged).

These jurisprudential matters have yet to be resolved and have been criticised on the grounds of separatism and for ignoring other factors. What research has shown, however, is an over-criminalization of certain offences particular to women, such as prostitution and civil defence issues,⁷⁷ such as the Greenham Common Peace Campaign.⁷⁸

More fruitfully, many studies have considered the sentencing practices of the courts as applied to women. Studies have suggested that chivalry, discrimination and sexism⁷⁹ characterise women's sentencing experiences. The hithertofore assumed leniency of non custodial sentences⁸⁰ have been shown in reality to be mere chimera, as they are more invasive and result in increased social control⁸¹ over women.⁸² Such sentences have been found to be dependant on a woman's domestic situations⁸³ and are aimed at increasing the domesticity⁸⁴ and control of women in the private sphere of the home.⁸⁵

To compound this, many studies have shown that once women have been incarcerated in prison, the expectations of the regime are that women will return to the domestic sphere upon release.⁸⁶ These institutions have been criticised for: degrading women; being damaging and debilitating⁸⁷ and causing disorientation for regulating women with many unnecessary rules and regulations⁸⁸ aimed at inducing conformity for concentrating on feminizing, in-

⁷⁷ Many studies viewed the way women who protested against nuclear weapons were treated in court. Often imprisonment was the sentence for sit down protests which raises issues of discrimination. See A. COOK & G. KIRK, GREENHAM WOMEN EVERYWHERE 47-48 (1983).

⁷⁸ R. Fletcher, Greenham Common Women: A Crime of Political Protest (1985) (unpublished M.A. dissertation, Edge Hill College (Liverpool)); B. HARTFORD & S. HOPKINS, GREENHAM COMMON: WOMEN ON THE WIRE 9 (1985).

⁷⁹ SMART, *supra* note 32, at 108-45; MORRIS, *supra* note 19, at 80-94.

⁸⁰ ADLER, *supra* note 68 (suggests that women are cautioned more often and not convicted or imprisoned as often as men for the same offences); *But cf.* David P. Farrington & Allison M. Morris, *Sex Sentencing and Reconviction*, 23 BRIT. J. CRIMINOLOGY 229 (1983).

⁸¹ Here the inclusion of women in the realm of the psych professionals. See J. DONZELOT, POLICING THE FAMILY (1980). Usually through their connection with children and family educational psychologists, health visitors have increased the control of the state in the realm of the family. See S. COHEN, VISIONS OF SOCIAL CONTROL 78-79 (1986).

⁸² SMART, *supra* note 32, at 136; EDWARDS, *supra* note 9, at 182.

⁸³ EATON, *supra* note 74, at 97; D. Farrington & A. MORRIS, *Sex Sentencing and Reconviction*, 23 BRIT. J. CRIMINOLOGY 246 (1983).

⁸⁴ *Id.* Eaton suggests that the non custodial sentences usually involve probation or psychiatric involvement.

⁸⁵ WORRALL, *supra* note 1, at 160-62; MORRIS, *supra* note 19, at 82-93.

⁸⁶ Elaine Genders & Elaine Player, *Women in Prison: The Treatment, the Control and the Experience*, in Gender, Crime and Justice 161, 162-63 (Pat Carlen and Anne Worrall eds., 1987).

⁸⁷ CARLEN, *supra* note 15, ch. 2; SMART, *supra* note 32, at 140-45.

⁸⁸ EATON, *supra* note 74, at 26-29.

fantilizing and pathologizing women's behaviour⁸⁹ and for being sexist.⁹⁰ Eaton has shown that the problems encountered by women in prison, particularly the de-skilling and domestication processes, affect women long after they are released.

Thus the social controls women face in society are mirrored in prison. What seems odd then is that women who have obviously rejected gendered norms are in a sense re-gendered, prison redomesticates them. Women are then effectively repackaged. The criminal justice system does not achieve this result in isolation; instead there are other systems which achieve this. Paramount to our study is the role of psychiatry, to which we shall now turn.

THE BODY BLOW? WOMEN AND PSYCHIATRY

Women have long been the subject of psychiatric intervention. Porter has shown the impact of psychiatry on women dates back to the seventeenth century.⁹¹ Others have considered whether the modern day power of psychiatry to control and define women represents medical opinion or misogyny.⁹² Additionally, some have considered the specific diagnoses ascribed to women, such as hysteria, and have shown discriminatory practices, which include sexism, sex-stereotyping and individual pathologization of various stress, to have their roots in social relationships.⁹³

Research has illustrated how the social role of women, and the stresses that this role produces, can cause mental ill health. For example, Brown and Harris have examined how the isolation of women within the private sphere of the family can, in conjunction with other factors, cause depression.⁹⁴ They believe this is evidence that life events peculiar to women can cause problems such as post-partum depression. This has, however, been criticised by feminist analysis which suggests that psychological problems are caused by the social reaction to life events, rather than the event *per se*. For example, Oakley on childbirth, suggests that post-natal depression is caused by the modern handling of childbirth with a highly medicalized routine which disempowers women.⁹⁵ Simi-

⁸⁹ PAT CARLEN, *WOMEN'S IMPRISONMENT* 71-115 (1983); SMART, *supra* note 32, at 140-45; Genders & Player, *supra* note 86, at 161-71; CARLEN, *supra* note 15, at 1; MORRIS, *supra* note 19, at 63-75; Pat Carlen, *Law, Psychiatry and Women's Imprisonment*, 46 *BRIT. J. PSYCHIATRY* 18-21 (1986).

⁹⁰ MARY EATON, *WOMEN AFTER PRISON* 55-78 (1992).

⁹¹ ROY PORTER, *MIND-FORG'D MANACLES* 331 (1989).

⁹² USSHER, *supra* note 15, at 19.

⁹³ E. SHOWALTER, *THE FEMALE MALADY* 18-19 (1987).

⁹⁴ GEORGE W. BROWN AND TIRRIH HARRIS, *SOCIAL ORIGINS OF DEPRESSION: A STUDY OF PSYCHIATRIC DISORDER IN WOMEN* 270 (1970).

⁹⁵ ANN OAKLEY, *ESSAYS ON WOMEN MEDICINE AND HEALTH* 127-30 (1993).

larly, New and David suggest it is caused by the abandonment of a woman's social function and her subsequent confinement to the home, which causes distress.⁹⁶

Once in contact with psychiatric services, women have been found to encounter difficulties. Broverman found that the diagnostic categories employed by psychiatrists refer to womanhood as being the equivalent of mental illness.⁹⁷ Women were also found to be represented disproportionately in vague catch all categories such as psychopathy,⁹⁸ and in chronic mental health diagnoses.⁹⁹

In addition, evidence suggests that factors affecting women's mental health have not been acknowledged during the diagnostic process, which may affect the subsequent outcome of the interaction. These include the specific needs of ethnic minority women,¹⁰⁰ lesbian women,¹⁰¹ homeless women,¹⁰² older women¹⁰³ and abuse victims.¹⁰⁴

When women are deemed in need of treatment, there is evidence that women receive medication¹⁰⁵ in preference to other forms of treatment. For example, in 1987 there were 46 million prescriptions for psychotropic drugs for a population of 55 million, 66% of whom were women.¹⁰⁶ Other forms of treatment have also caused concern. Studies have found that Electro Convulsive Therapy (ECT) is two to three times more likely to be prescribed for female patients than for male patients.¹⁰⁷ Furthermore, more women than men have their consent overruled, or are deemed unfit

⁹⁶ NEW & DAVID, *supra* note 13, at 14.

⁹⁷ K. Broverman, *Sex Role Stereotypes and Clinical Judgements in Mental Health*, 34 J. CONSULTING AND CLINICAL PSYCH. 1 (1970). Here a questionnaire was distributed among professionals in the mental health field. The results found that women were viewed as being weak, displaying disturbed behavior such as weeping easily.

⁹⁸ N. Russo & S. Sobel, *Sex Differences and the Utilization of Mental Health Facilities*, PROF. PSYCH. 7 (1981); A. Hiller, *ILLNESS, CRIME AND THE FEMALE SICK ROLE* 9 (1982).

⁹⁹ M. Potier, *Giving Evidence: Women's Lives at Ashworth Maximum Security Psychiatric Hospital*, 3 FEMINISM & PSYCHOL. (1992).

¹⁰⁰ S. Holland, *From Social Abuse to Social Action*, in GENDER ISSUES ON PSYCHIATRY (J. Ussher & P. Nicholson eds., 1992).

¹⁰¹ E. Rothblum, *Depression Amongst Lesbians: An Inevitable and Unresearched Phenomenon*, 3 J. GAY & LESBIAN PSYCHIATRY 1, 67-87 (1990).

¹⁰² Stephen Crystal et al., *Multiple Impairment Patterns in the Mentally Ill Homeless*, 14 INT'L J. MENTAL HEALTH 61, 67-73 (1986).

¹⁰³ J. Wallen, *Psychiatric Consultations in Short Term General Hospitals*, 44 ARCHIVES GEN. PSYCHIATRY 163-68 (1987).

¹⁰⁴ E. Carmen et al., *Inequality in Women's Health: An Overview*, 138 AM. J. PSYCHIATRY 378-83 (1984).

¹⁰⁵ It has been alleged that this does not correspond with a higher incidence of illness among women. It has also been alleged that this may represent a medicalization of social problems. See PASCALL, *supra* note 16, at 91-194.

¹⁰⁶ H. Ashton, *Psychotropic Drug Prescribing for Women*, 158 BRIT. J. PSYCHIATRY 30 (1991).

¹⁰⁷ Leonard Roy Frank, *Electroshock: Death, Brain Damage, Memory Loss, and Brain Washing*, 11 J. MENTAL HEALTH 489 (1990).

to give consent, and receive ECT.¹⁰⁸ Compounding this, studies have shown that black, ethnic minorities and older women are more likely to receive ECT than other forms of therapy such as counselling.¹⁰⁹

Other problems experienced by female psychiatric patients include the non-diagnosis of physical symptoms¹¹⁰ or the misdiagnosis of symptoms.¹¹¹ This can have disastrous consequences, as illustrated by the permanent disfigurement rates of severe Tardative Dyskinesia¹¹² resulting from psychotropic medication,¹¹³ and more dramatically, from the high mortality rates for female patients.¹¹⁴ Women are more likely to die in psychiatric care,¹¹⁵ and these are more likely to be prolonged and distressed.¹¹⁶

Psychiatry has thus been seen as a method of social control which reinforces, by diagnosis and treatment, how women are compartmentalized. It frames women in a certain way. There are, however, certain occasions when psychiatry works in conjunction with more formal regulatory bodies, and it is to this contrast that we now turn.

THE DOUBLE WHAMMY? PSYCHIATRY AND THE LAW

How do psychiatry and the law interact and what are the consequences of this for women? Theoretically, there is a strong history of interaction concerning the alleged causality of female crime. For Lombroso and Ferro, women were "atavistic,"¹¹⁷ more primitive than the rest of society.¹¹⁸ This view has been criticized

¹⁰⁸ P. Fennell, Consent to Treatment Under the Mental Health Act 1983, KENT LAW SCHOOL SYMPOSIUM, UNIVERSITY OF KENT (1993).

¹⁰⁹ SHOWALTER, *supra* note 93, at 206-09.

¹¹⁰ A. D'Ercole, *Diagnosis of Mental Illness in Psychiatric Patients Using Axis III and a Standardised Medical History*, 42 HOSPITAL & COMMUNITY PSYCHIATRY 395-400 (1991).

¹¹¹ Ashton, *supra* note 106, at 34.

¹¹² A medical term, loosely speaking it involves chemical changes in the brain, in these cases as a side effect of drug use, which prevent a patient from keeping their mouth and tongue still. The patient therefore pulls grotesque faces, dribbles saliva and gives the appearance of permanent mastication. Once contracted this condition is permanent. This can happen with only minimal drug use and is impossible to predict before prescription.

¹¹³ M. V. Seaman, *Current Outcome in Schizophrenia: Women vs. Men*, 73 ACTA PSYCHIATRICA SCANDINAVICA 609-17 (1986).

¹¹⁴ *Id.*; N. Casadebaig & E. Quemada, *Mortality in Psychiatric Hospitals*, 79 ACTA PSYCHIATRICA SCANDINAVICA 257-64 (1989).

¹¹⁵ HMSO, 1987; Casadebaig & Quemada, *supra* note 114.

¹¹⁶ D. Black & D. Joley, *Death in Psychiatric Care*, 6 INT'L J. GERIATRIC PSYCHIATRY 489-95 (1991).

¹¹⁷ These authors developed a theory which was based on psycho-biology of womanhood and asserted that women who offend display certain masculine physical characteristics and were less evolved than men. They were also viewed as "more vile" and capable of "degraded acts."

¹¹⁸ LOMBROSSO AND FERRO, *THE FEMALE OFFENDER* (1897).

for confusing sex with gender, for overlooking historical and anthropological evidence, for being empirically isolated and for merely representing the ideological needs of society at that time. Yet the road from Lombroso and Ferro seems surprisingly straight, as other criminologists continued this classical trend. For example, Thomas asserted physiological reasons for the differential crime rate;¹¹⁹ Pollak saw women as the masterminds of crime in a rather biblical¹²⁰ theory of female criminality which stressed the inherently deceitful nature of the female psyche.¹²¹ More recently, Cowie *et al.* saw female criminality as a sign of pathology¹²² and Konopka looked to individual pathology as opposed to social functions as the cause of female crime.¹²³ Womens' crime, therefore, has remained squarely in the realms of psycho-biological traditions and is said to represent an "intellectual Falklands"¹²⁴: remote, unvisited and embarrassing.¹²⁵

A paradox remains concerning the idea that mental illness is an alternative to crime, which is particularly the case for women. In essence, it suggests that men commit crimes as a result of stress, whereas women commit crimes because they have become mentally ill, thus assuming a functional equivalence between the two.¹²⁶ Turk, for example, saw mental illness as an alternative arrest category for women.¹²⁷ Chesler saw that behaviour was sex stereotyped and so women were conditioned into "acting out" in certain sex stereotyped ways.¹²⁸ Other writers have tried to redress the balance by suggesting that the differing responses represent a reaction to differing stresses.¹²⁹ Research has suggested that women's social role, or the rejection of this role, is more stressful, thus causing more illness.¹³⁰ This does not, however, answer the question why proportionately more women are deemed to be mentally ill than criminal. What seems a more likely explanation is that differences reflect the way controls are enacted and statistics constructed.

119 E. THOMAS, *THE UNADJUSTED GIRL* (1967).

120 SMART, *supra* note 32, at 47. Suggests that this theory is reminiscent of Adam and Eve in the Bible and Christianity's vilification of Eve and Womanhood as a subversive force.

121 POLLACK, *supra* note 67.

122 JOHN COWIE ET AL., *DELIQUENCY IN GIRLS* (1968).

123 GISELA KONOPKA, *THE ADOLESCENT GIRL IN CONFLICT* (1966).

124 The Malvinas are a south Atlantic set of Islands whose sovereignty has been disputed between Britain and Argentina resulting in the Falklands conflict in 1982.

125 Interview with Frances Heidensohn (1990).

126 MORRIS, *supra* note 19, at 52-57.

127 A. TURKS, *CRIMINALITY AND THE LEGAL ORDER* (1969).

128 PHYLISS CHESLER, *WOMEN AND MADNESS* 56 (1989).

129 M. BARRET & M. McINTOSH, *THE ANTI SOCIAL FAMILY* (1982).

130 SMART, *supra* note 32, at 172-75.

The interaction between the law and psychiatry is also apparent in the sentencing process of female crime. For example, Allen has shown how female offenders are more readily ascribed a psychiatric diagnosis¹³¹ and sentence. Worrall has shown how this is the case with women on probation.¹³² Carlen has shown how women in prison who, whilst deemed sane (thus imprisoned), are treated once in prison as though they are mentally ill by being given psychiatric medication.¹³³ Similarly, Casale has given an account of women in a psychiatric wing of a prison and questions the convergence of the two systems (legal and psychiatric), especially concerning the criticisms of the Prison Medical Service.¹³⁴

To take a step back, however, recent years have seen the interaction of medico-legal discourses in the defence of women's crime. These lie in the renewed discussion of Pre Menstrual Syndrome ("PMS") and the rise in Britain of Battered Wives Syndrome. These will be considered separately.

PRE-MENSTRUAL SYNDROME¹³⁵

The concept of Pre-Menstrual Syndrome ("PMS") and its symptomology has a long history. Here it is alleged that the disturbance to progesterone levels during menstruation heralds changes in women's mental state and physical well being. As early as 1840, women's crime has been linked to this phase in their menstrual cycle.¹³⁶ Classical criminologists reinvented the concept which has found much favour even to the present day.¹³⁷

This concept has been successfully used in mitigation to homicide.¹³⁸ For women, PMS is used as a defence similar to automa-

¹³¹ Allen has shown that this may have negative effects for men who are genuinely in need of psychiatric intervention but are instead imprisoned. H. ALLEN, *JUSTICE UNBALANCED* 119-20 (1987).

¹³² WORRALL, *supra* note 1, ch. 6.

¹³³ PAT CARLEN, *CRIMINAL WOMEN: AUTOBIOGRAPHICAL ACCOUNTS* 18-21 (1985).

¹³⁴ SILVIA CASALE, *WOMEN INSIDE: THE EXPERIENCE OF WOMEN REMAND PRISONERS IN HOLLOWAY* 88-93 (1989); *See also* J. SIMM, *MEDICAL POWER IN PRISON* (1990).

¹³⁵ This is a recognized clinical syndrome (Dalton 1964) as opposed to the more commonly known Pre-Menstrual Tension. This latter phenomenon is said to be a common experience for many women. The changes in behavior, however, are not regularly experienced or as pronounced as the clinically recognized syndrome. An analogy would be depression. *See* BROWN, *supra* note 94, at 22-28.

¹³⁶ S. Edwards, *Pre-Menstrual Tension*, 146 *JUSTICE OF THE PEACE* 476-79 (1982).

¹³⁷ POLLACK, *supra* note 67; LOMBROSSO AND FERRO, *supra* note 118; W. Cook, *The Differential Psychology of the American Woman*, 49 *AM. J. OBSTETRICS & GYNAECOLOGY* 457 (1945); T. GIBBENS & J. PRINCE, *SHOPLIFTING* (1962).

¹³⁸ DALTON, *supra* note 4. *See* R. v. Craddock, 1 *Current Law Review*, January 1981, 41. Craddock successfully pleaded not guilty to the murder of a fellow barmaid on the ground of PMS. During a three month deferment, she received hormone treatment which improved her behaviour. She was given a probation order with a condition to continue treatment.

tism but with little success. Hypoglycemia or epileptic blackouts, are recognised analogous defences.¹³⁹ PMS has had an impact on sentencing decisions,¹⁴⁰ but the arguments still continue about its legal viability.¹⁴¹

There are, however, problems with the concept. Many of the studies which have argued in favour of PMS have been criticised for their methodology and the interpretation of their findings. For example, Morris suggests that pre-menstrum and para-menstrum periods are often confused and used interchangeably; evidence is based on 28-day cycles, when in reality few women have such regular cycles, and finally considering women spend half their adult life in this phase it is not surprising that some women commit crimes during this time.¹⁴² What has not been shown, however, is a causal relationship between the two. The research data is also retrospective and so possibly unreliable.

Research so far has pointed out that the adherence to PMS merely represents a reinterpretation of the original psycho-biological theories that have been recently vilified on the grounds of sexism.¹⁴³ Smart and Smart have argued that this is an apt illustration of the way a woman's sexuality is used to show evidence of pathology.¹⁴⁴ Morris also suggests that "menstruation *per se* may not affect women's lives, but rather it is its social construction which is a cause for concern."¹⁴⁵ The appeal of PMS is that it justifies the status quo and it does so "scientifically," by reinforcing and maintaining certain roles and expectations as natural and unchangeable.¹⁴⁶ It re-encapsulates women within a set of rules, the transgression of which carries severe penalties. While women may indeed have benefited individually in the past from the use of this as a defence, there nonetheless remains the concern that this serves to reinvent the stereotype of women as helpless victims of their own biology. As Heidensohn points out "what is striking about this image of deviant women is how profoundly damaging it is, once attached to any women or any group of women."¹⁴⁷

¹³⁹ See *R. v. Quick*, 3 Q.B. 910 (1973).

¹⁴⁰ See *R. v. English*, *The Times*, 12/11/81. Defendant successfully plead not guilty to murder (she crushed her former lover against a telegraph pole with a car). The judge concluded that PMS represented special circumstances and she received a conditional discharge.

¹⁴¹ See *R. v. Smith* (1981), *The Guardian* 4/28/82.

¹⁴² MORRIS, *supra* note 19, at 48-49.

¹⁴³ PAT CARLEN & ANNE WORRALL, *GENDER, CRIME AND JUSTICE* 6-8 (1987).

¹⁴⁴ SMART & SMART, *supra* note 25, at 2.

¹⁴⁵ MORRIS, *supra* note 19, at 50.

¹⁴⁶ CARLEN & WORRALL, *supra* note 143, at 6-9.

¹⁴⁷ FRANCES HEIDENSOHN, *WOMEN AND CRIME* 95 (1985).

BATTERED WOMEN'S SYNDROME

Battered Women's Syndrome ("BWS") is a recent addition to jurisprudential arguments, whereby women offer a defence to homicide under the self defence or provocation rule. There is a burgeoning literature on this subject in the U.S.A., whereas in Britain the subject is just receiving attention.¹⁴⁸ Work on this subject usually begins by stating that women commit few homicides and those that take place are usually domestic,¹⁴⁹ in the context of domestic violence.¹⁵⁰ In order to justify the case protagonists, such as Walker, have argued that women who experience continual violence become subject to "learned helplessness,"¹⁵¹ which is an adaptation of Seligman's 1968 work.¹⁵²

In this argument, a woman presents a belief in her helplessness as a form of depression (as a psychiatric symptom) which is accompanied by passivity and submissiveness. This continues until a woman retaliates, often without the usual provocation or self defence requirements.

Concerning self defence,¹⁵³ Blackstone notes that the murder of a husband by a wife was traditionally viewed as more serious than a wife by a husband,¹⁵⁴ indicating that double standards may operate. However, at present, for a defendant to invoke this defence it must be proven that the attack was imminent, the force used was proportionate, only sufficient to stop the attack, and the defendant

¹⁴⁸ C. Wells, *Domestic Violence and Self Defence*, 140 NEW L.J. 127 (1990); J. Hoarder, *Sex, Violence and Sentencing Domestic Provocation Cases*, CRIM. L.R. 546 (1990); Katherine O'Donovan, *Defences For Battered Women Who Kill*, 18 J.L. & Soc. 219 (1991).

¹⁴⁹ The cultural argument can also be taken one step farther to suggest that both domestic violence and domestic murder take place within a set of gender constructs, whether these be male or female. These enter the law through the court process. Gender also influences the outcome of the court process as (especially in the case of provocation) law is male oriented and sentencing passed down and constructed by men.

¹⁵⁰ This subject therefore crosses many socio-legal boundaries concerning women and their position in society. See L. Taylor, *Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self Defence*, 33 UCLA L. REV. 1681, 1697 (1986); V. Bernard, *Till Death Do Us Part*, 10 BULL. AM. ASS'N L. & PSYCHIATRY 271 (1982).

¹⁵¹ LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 96 (1984).

¹⁵² Martin E. P. Seligman et al., *Alleviation of Learned Helplessness in the Dog*, 78 J. ABNORMAL PSYCHOL. 256 (1968).

¹⁵³ In British common law, this entitles one to defend oneself against an attack.

¹⁵⁴ 4 WILLIAM BLACKSTONE, *COMMENTARIES* *204.

must retreat¹⁵⁵ if possible.¹⁵⁶ Again, these cases have been subjected to the criticism that they are culturally specific to men.¹⁵⁷

In the U.S.A., Walker has shown how defences using BWS have been successful.¹⁵⁸ There are however problems with this. Methodologically Walker has been criticised.¹⁵⁹ Others have criticised BWS for sex stereotyping women and increasing the popular view of women as victims.¹⁶⁰ O'Donovan has suggested that this concept inevitably leads women to be viewed as abnormal and in danger of psychiatric sanctions.¹⁶¹

In Britain, provocation after *Ballard*¹⁶² was a defence to homicide, reducing the charge to manslaughter, whenever possible. However when related to women's homicidal acts, provocation has been unsuccessful thus far, and courts have failed to recognise the effects of cumulative violence over a long period of time. They have also failed to accept the time delay, usual in the context of the killing of a batterer, and fail to classify this as provocation.¹⁶³

Once again, double standards re-enter the argument, which is clearly illustrated in *Davies*,¹⁶⁴ where a husband was allowed to use this defence, although unsuccessfully. Here the denotation of the wife's behaviour as provocative rather than the husband's as vengeful is revealing, for it suggests that there is one standard for women¹⁶⁵ and another for men,¹⁶⁶ displaying once again a clear inconsistency.¹⁶⁷ There have been attempts to overcome this,¹⁶⁸ but adapting women's crimes to fit in with the provocation rule has

¹⁵⁵ Although the formal requirement was abolished, there remains nonetheless for women the common idea that this should be the first or only option available to women. See, O'Donovan, *supra* note 148.

¹⁵⁶ The problem for women is owing to their smaller stature than men, being less likely to have training in controlled aggression than men, the requirement of reasonable force to counter an attack may be inappropriate.

¹⁵⁷ This is rather different to suggesting a double standard, rather the existing standard excludes women's behavior patterns and experiences.

¹⁵⁸ See discussion of *State v. Kelly*, 478 A.2d 364 (N.J. 1984), in WALKER, *supra* note 151 at 224.

¹⁵⁹ David L. Faigman, Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 636-39 (1986); L. SMITH, DOMESTIC VIOLENCE 22 (1989).

¹⁶⁰ Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 198 (1986).

¹⁶¹ O'Donovan, *supra* note 148.

¹⁶² Ballard, 1961.

¹⁶³ See, *R. v. Duffy*, 1 All E.R. 932 (1949); *R. v. Ibrams*, 74 Crim. App. 154 (1981).

¹⁶⁴ *R. v. Davies*, 60 Crim. App. 253.

¹⁶⁵ *Duffy*, 1 All E.R. at 932.

¹⁶⁶ *Davies*, 60 Crim App. at 253.

¹⁶⁷ *Id.*

¹⁶⁸ *R. v. Camplin*, 1 All E.R. 1236 (1978) (court attempted to consider ethnicity and age). See, O'Donovan, *supra* note 148 (criticizing whether ethnicity and age can be taken into consideration as a particular temperament).

been problematic.¹⁶⁹ In any case, such attempts to make women's crimes fit in to this model may be counterproductive and result in pathologisation.¹⁷⁰

A further defence for women who invoke BWS is diminished responsibility under the Homicide Act 1957 § 2,¹⁷¹ and so far some pleas have been successfully used as a defence by women.¹⁷² When a woman uses this defence instead of putting herself before the court as responsible for her own actions, she asserts an abnormality of mind. The focus is then on her mental state, and her personality and character go on trial. The danger is that rather than being viewed as a criminal, the woman is seen as mentally ill and so in need of psychiatric intervention.

In answer to this, another attempt to redefine women's behaviour within existing parameters of law has been put forward by Ewing and his psychoanalytically based theory of self defence for women who kill.¹⁷³ "psychological self defence."¹⁷⁴ In his book, Ewing attempts to reconstruct the requirements of both imminent danger and proportional response. On imminent danger, Ewing regards the self as encompassing psychological as well as physical processes. From this an immediate response to physical attack may be de-emphasised in the doctrine of self defence, which indeed has happened in some American jurisdictions. With proportional response, Ewing argues that a gross and enduring attack on one's psychological functioning can be interpreted as a threat to one's physical existence and so justify the use of force as a response.¹⁷⁵ In order to distinguish between force and homicide, Ewing uses the concept of the experienced threat of psychological death. Here cumulative violence poses the "disintegration anxiety", a fear of the break up of the self. Relying on Laingian theory of the divided self¹⁷⁶ and victimology studies which highlight the depression caused by cumulative violence, Ewing sees the threat caused to the physical and social self by abuse results in actions leading to

¹⁶⁹ R. v. Thorton, 15 Crim. App. 22 (1993).

¹⁷⁰ O'Donovan, *supra* note 148.

¹⁷¹ Here it is said that the accused must be "suffering from an abnormality of mind (whether arising from an arrested or retarded development of mind of any inherent causes or induced by disease or surgery) as substantially impaired his responsibility for his acts or omissions in doing or being party to a killing."

¹⁷² R. v. Robinson, Crim. L.R. 804 (1990).

¹⁷³ C. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF DEFENCE AS LEGAL JUSTIFICATION 62 (1987).

¹⁷⁴ O'Donovan, *supra* note 148.

¹⁷⁵ EWING, *supra* note 169, at 96.

¹⁷⁶ Here, the battered woman is seen as being ontologically insecure, feeling more unreal than real, more dead than alive, differentiated from the rest of the world with her identity and autonomy continually in question.

homicide, and that such killing should be seen in terms of self defence. This, however, has been criticised for not confronting the basic problem with the law. It merely attempts to remould women to fit rigid concepts and again relies on psychological theories to explain women's behaviour, thus possibly increasing the likelihood of psychiatric intervention.

ON THE ROPES?

The danger with labelling cases as "syndromes" and "psychological harms" is that an analysis of the legal doctrine can be successfully avoided. This in turn may allow psychiatric interventions to be more readily adopted, particularly where women are concerned. Rather than clarifying matters, theories such as PMS and BWS merely attempt to individualize and pathologise women's behaviour.¹⁷⁷ The language and sentences of the court in such cases have been criticised as being paternalistic and sexually discriminating.¹⁷⁸ When adding the likelihood of psychiatric intervention, the trial process and the sentencing options for women are often doubly controlled.

For these reasons, O'Donovan has called for the need of the law to recognise and focus upon women's experiences, especially concerning relationships and their unequal economic standing.¹⁷⁹ By adapting legislation to recognise and legitimize differences without individualizing or pathologizing, women may benefit from existing models and thus avoid the more damaging psychiatric measures.

BOXED INTO A CORNER? CONCLUSION

This article has shown how the law and psychiatry act both independently and interactively to create a set of parameters which are used to judge the female offender. These judgements are often crudely formulated and in effect "box" women into certain categories, whether they are classed as simply deviant and imprisoned, or as simply mad and hospitalized,¹⁸⁰ or a mixture of both. Which ever it is, this will have an impact upon their future and the future of all women.

¹⁷⁷ *But cf.* State v. Wanrow, 559 P.2d 548 (Wash. 1977).

¹⁷⁸ O'Donovan, *supra* note 148.

¹⁷⁹ *Id.*

¹⁸⁰ S. Wesley & P. Taylor, *Madness and Crime: Criminology vs. Psychiatry*, 1 CRIM. BEHAV. & MENTAL HEALTH (1991) (suggests that crime has nothing intrinsically to do with mental illness).

The law and psychiatry do indeed appear to interact in very definite ways to create and recreate expectations of gendered behaviour. Institutions with specialist functions in this area¹⁸¹ show very clearly how law and psychiatry have the power to define what is acceptable and what is expected of "normal" women by their treatment of deviant women. Here many women who have, for whatever reason, rejected their socially ascribed roles, and are thus described as being without womanhood, without citizenship and in many cases without humanity¹⁸² are re-boxed, redrawn into a very definite and defining view of femininity. During the process of law these women have had their pasts explained and encased, their present prescribed and portfolioed, and their futures codified and parcelled in terms of a medico-legal discourse whose power to reconfine is all pervading.

As an illustration of this process we have seen how the medicalized concepts of PMS and BWS have slipped their medical moorings to become codified in legal doctrine. These are then used to consider legal culpability or clinical need. This cyclical process legitimates the way women are viewed as being helpless victims, coded at the behest of their own biology and locked in psychological processes. It may be that individual women have benefited from this distinction¹⁸³ and indeed it is hard to suggest that in reality women should not use the law to their best advantage. It may be true that for many women a psychiatric disposal is appropriate or the lesser of many evils. Add to this the persuasive arguments of barristers, social work reports and pressure groups advocating the separatist approach, and women may well find that to continue fighting against the stereotype is impossible. Nevertheless there is a "double bind" inherent in this course of action. Women may be damned if they are deemed psychiatrically ill, and damned if they are not.¹⁸⁴

What, however, seems likely is that following this course of action may merely perpetuate the problems which enclose women. The individualized and separatist approach may simply encase women in a medico-biological viewpoint. The effects of this are not

¹⁸¹ In Britain there exist three special hospitals to provide detention for those deemed dangerous to themselves and to the public. Of those detained, some had committed a criminal offence, others had not. These hospitals were created by the Mental Health Act 1959 and provisions were later updated by the Mental Health Act 1983 and the National Health Service Act 1977.

¹⁸² The women who are held in these institutions are guilty of the most serious crimes and are often vilified as a result.

¹⁸³ R. AHLAWALIA, *THE TIME* (1992).

¹⁸⁴ See *R. v. Allitt*, *The Guardian*, 9/23/93.

confined to those who have transgressed medical or legal boundaries for in reality the conditions and processes which enfold and determine the fate of deviant women are intrinsically no different from the ways in which "conventional" women are enveloped, controlled or "re-packaged." The authorization of professionals to frame, define or confine certain women as the type which require detention, management, treatment or punishment merely serves to perpetuate the caging or control of all women. Women will remain boxed, will they continue boxing?

