Florida Law Review

Volume 41 | Issue 2 Article 4

April 1989

Battered Child Syndrome: Evidence of Prior Acts in Disguise

Michael S. Orfinger

COMMENTARY

BATTERED CHILD SYNDROME: EVIDENCE OF PRIOR ACTS IN DISGUISE

*Michael S. Orfinger**

I. INTRODUCTION

In 1987, 1100 children across the United States died of child abuse;[1] the 1988 death toll may be even higher. While the naked statistics alone are shocking, they cannot begin to reflect the unreported quantum of physical, sexual, and emotional abuse that children endure each year.[2] Child abuse is a social epidemic that requires the joint efforts of the medical and legal communities; the former must recognize and

---

*Associate, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Orlando, Florida. B.A., 1986, Wake Forest University; J.D., 1989, University of Florida. The author thanks Professor Teree E. Foster, Professor Toni M. Massaro, and Dr. Michael C. Bell for their contributions to this commentary. The author is eternally grateful to his parents, Judge and Mrs. Melvin Orfinger, for their enduring support.

1. NATIONAL CENTER FOR THE PROSECUTION OF CHILD ABUSE UPDATE, May 1988, at 1 (on file).

2. There were 606,600 cases of child neglect and abuse reported nationwide in 1978. By 1985, that figure jumped to 1,299,400. Bureau of the Census, U.S. Dep't of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 164 (1988) [hereinafter 1988 STATISTICAL ABSTRACT]. *But see* Fontana, *To Prevent the Abuse of the Future*, TRIAL, May-June 1974, at 14 (statistics grossly understate the problem of child abuse because only a fraction of abused children ever receive recognition or medical attention); Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 806 n.7 (1985) (two out of every three victims of child sexual abuse never report the abusive act (citing D. FINKELHOR, SEXUALLY VICTIMIZED CHILDREN 106 (1979))).

treat it, while the latter must deter it. The medical community has responded with trained physicians and nurses able to recognize the indicia of child abuse. The legal community, on the other hand, has responded with mandatory reporting statutes for child abuse,[3] as well as stiff penalties for convicted abusers.[4]

Despite these laudable objectives and accomplishments, child abuse remains difficult to prosecute.[5] The young victim, if alive, often does not testify,[6] and rarely can the prosecution find a nonparty witness to the crime.[7] That a parent or guardian would intentionally harm a child is a difficult notion for many to accept.[8] Moreover, parents or those standing *in loco parentis* to the child are often able to fabricate plausible explanations for the child's injuries.[9] Thus, a child abuse prosecution may pit evidence of the child's injuries against the fabricated testimony of the alleged abuser, the plausibility of which may make the prosecutor's burden of proving guilt beyond a reasonable doubt insurmountable.

In this arena, as in many others, prosecutors have turned to expert testimony in an attempt to bolster child abuse prosecutions. The expert witness testifies as to whether the victim displays "battered child

---

3. *See, e.g.*, ALA. CODE § 26-14-3 (1986); CAL. PENAL CODE § 11166 (West 1982 & Supp. 1989); FLA. STAT. § 415.504 (1987); MINN. STAT. ANN. § 626.556(3) (West 1983 & Supp. 1989); TEX. FAM. CODE ANN. § 34.01 (Vernon 1986 & Supp. 1989). Under all these statutory schemes, anyone who is required to report child abuse and fails to do so commits a misdemeanor. For a discussion of the Florida statute, see Comment, *The Battered Child: Florida's Mandatory Reporting Statute*, 18 U. FLA. L. REV. 503 (1965) (analyzing FLA. STAT. § 828.041 (1965), an earlier but similar version of Florida's current statute).

4. For example, under Florida's statutory scheme, child abuse resulting in great bodily harm, permanent disability, or permanent disfigurement is a third-degree felony. FLA. STAT. § 827.04(1) (1987). Sexual abuse of a child is a second-degree felony. *Id.* § 827.071(2)-(5). One who kills a child while committing aggravated child abuse commits a capital felony. *Id.* § 782.04.

5. Morgan v. Foretich, 846 F.2d 941, 943 (4th Cir. 1988).

6. *Id.* at 951 (Powell, J. (retired), concurring in part and dissenting in part); *cf.* Cooper, *Child Abuse and Neglect — Medical Aspects*, in THE MALTREATMENT OF CHILDREN 9, 46-47 (S. Smith ed. 1978) (a child might fail to report child abuse because of "[f]ear of further abuse; loyalty to the family; feeling he deserved it; being overwhelmed by the assault and then by the medical attention; or not having an adequate vocabulary"); Comment, *Expert Medical Testimony Concerning "Battered Child Syndrome" Held Admissible*, 42 FORDHAM L. REV. 935, 939 n.35 (1974) ("Parents generally lie to protect each other, and children usually refuse to testify against their parents, primarily from fear of being removed from a parental figure.").

7. *Morgan*, 846 F.2d at 951 (Powell, J. (retired), concurring in part and dissenting in part).

8. Wasserman, *The Abused Parent of the Abused Child*, in VIOLENCE IN THE FAMILY 222, 223 (S. Steinmetz & M. Strauss eds. 1974).

9. *See* Comment, *supra* note 3, at 507.

syndrome," a term Dr. C. Henry Kempe coined in 1962.[10] Battered child syndrome is a medical diagnosis describing a pattern of serious and otherwise unexplained manifestations of physical abuse.[11] Expert testimony as to battered child syndrome has hardly been a point of judicial contention; every jurisdiction considering such evidence has held it admissible.[12] Nonetheless, this commentary suggests that the admissibility *vel non* of evidence of battered child syndrome deserves greater consideration, as most courts have failed to recognize or properly analyze the evidentiary issues. Careful analysis reveals that evidence of battered child syndrome is actually evidence of a defendant's prior acts. Courts therefore should treat it as such when prosecutors offer it into evidence.

Part II of this commentary traces the development of battered child syndrome and discusses the syndrome itself in detail. Part II also discusses battering parent syndrome, the psychological complement of battered child syndrome. Part III examines three leading cases in which courts have considered evidence of battered child syndrome, and attempts to distinguish cases of fatal and nonfatal child abuse. Part IV sets forth the proper evidentiary analysis under the Federal Rules of Evidence[13] and applies it to the cases examined in part III. The

---

10. Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered-Child Syndrome,* 181 J. A.M.A. 17 (1962) [hereinafter Kempe]. This article is thoroughly discussed in McCoid, *The Battered Child and Other Assaults Upon the Family: Part One,* 50 MINN. L. REV. 1, 9-12 (1965).

11. H. Raffalli, *The Battered Child — An Overview of a Medical, Legal, and Social Problem,* 16 CRIME & DELINQ. 139, 140 (1970).

12. *See, e.g.,* United States v. Bowers, 660 F.2d 527 (5th Cir. 1981); Eslava v. State, 473 So. 2d 1143 (Ala. Crim. App. 1985); State v. Moyer, 151 Ariz. 253, 727 P.2d 31 (Ct. App. 1986); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (Ct. App. 1971); People v. Ellis, 41 Colo. App. 271, 589 P.2d 494 (Ct. App. 1978); State v. Dumlao, 3 Conn. App. 607, 491 A.2d 404 (App. Ct. 1985); People v. DeJesus, 71 Ill. App. 3d 235, 389 N.E.2d 260 (App. Ct. 1979); Bell v. Commonwealth, 684 S.W.2d 282 (Ky. Ct. App. 1984); State v. Conlogue, 474 A.2d 167 (Me. 1984); Commonwealth v. Labbe, 6 Mass. App. Ct. 73, 373 N.E.2d 227 (App. Ct. 1978); People v. Barnard, 93 Mich. App. 590, 286 N.W.2d 870 (Ct. App. 1979); State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973); State v. Taylor, 163 Mont. 106, 515 P.2d 695 (1973); Bludsworth v. State, 98 Nev. 289, 646 P.2d 558 (1982); People v. Henson, 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); *In re* R.W.B., 241 N.W.2d 546 (N.D. 1976); Commonwealth v. Rodgers, 364 Pa. Super. 477, 528 A.2d 610 (Super. Ct. 1987), *appeal denied,* 518 Pa. 638, 542 A.2d 1368 (1988); State v. Best, 89 S.D. 227, 232 N.W.2d 447 (1975); State v. Tanner, 675 P.2d 539 (Utah 1983) (superseded on other grounds by rule in State v. Walker, 743 P.2d 191 (Utah 1987)); State v. Mulder, 29 Wash. App. 513, 629 P.2d 462 (Ct. App. 1981).

13. Because many state evidence codes pattern the Federal Rules of Evidence, this commentary assumes throughout, unless specifically indicated otherwise, that the Federal Rules of Evidence apply.

evidentiary ramifications of battering parent syndrome are discussed briefly in part V. This commentary concludes by suggesting that under the proposed analytical framework, battered child syndrome evidence is usually admissible prior act evidence. In contrast, evidence of battering parent syndrome is merely an attempt to introduce otherwise inadmissible evidence of the defendant's bad character.

II. THE MEDICAL AND PSYCHOLOGICAL PERSPECTIVE

Kempe did not suddenly discover the battered child syndrome. Earlier, several researchers studied unexplained injuries in children, many focusing on physical aspects of the injuries.[14] A survey of these early studies best begins with a 1946 article by Dr. John Caffey.[15] Caffey presented six cases in which children with subdural hematoma, a liquified blood clot on the brain, also exhibited multiple fractures of the long bones in the arms and legs.[16] No case evidenced a history of injury to which the fractures could be attributed, and none of the children had skeletal disease that would predispose them to pathological fractures.[17] Caffey concluded that fractures of the long bones were a common complication of subdural hematoma.[18] While puzzled by the lack of history of previous injury in these children, Caffey refused to attribute these injuries to intentionally inflicted harm.[19] Instead, he concluded that lay observers, who would provide the treating physician with medical history, often misunderstood the significance of childhood accidents such as falls on the head.[20]

Caffey's article posited a causal connection between subdural hematoma and long-bone fractures, but offered no conclusion as to what that connection might be. A 1955 article by Drs. John Woolley and William Evans[21] rejected any clinical or radiological connection between these injuries.[22] Instead, Woolley and Evans focused on the "injury-prone environment" in which the children they studied were

14. McCoid, *supra* note 10, at 4.

15. Caffey, *Multiple Fractures in the Long Bones of Infants Suffering from Chronic Subdural Hematoma*, 56 AM. J. ROENTGENOLOGY 163 (1946).

16. *Id.* at 163-70.

17. *Id.* at 171-72.

18. *Id.* at 173.

19. *Id.* at 172.

20. *Id.*

21. Woolley & Evans, *Significance of Skeletal Lesions in Infants Resembling Those of Traumatic Origin*, 158 J. A.M.A. 539 (1955).

22. *Id.* at 542.

living.[23] They deemed the family of each child they studied unstable, noting that emotionally erratic parents were the rule rather than the exception.[24] Perhaps most importantly, when the subject children were hospitalized and thus removed from their home environments, they suffered no new injuries and their previous injuries healed normally.[25] From this data, Woolley and Evans concluded that the injuries might be attributable to the presence of aggressive, immature, or emotionally ill adults in the household.[26]

Woolley and Evans, unlike Caffey, implicated parents as a cause of their children's injuries.[27] Caffey re-entered the debate in 1957, however, with an article that focused more thoroughly on the cause, rather than the physical manifestations, of unexplained skeletal injuries in children.[28] Caffey's new emphasis traced these injuries to "trauma."[29] In this respect, he followed the lead of Woolley and Evans, who had previously rejected the notion that infants' bones were predisposed to fracture.[30] However, while Woolley and Evans implied misconduct on the part of those standing *in loco parentis* to the child,[31] Caffey appeared more reluctant to do so. He recognized that a history of trauma rarely accompanied skeletal injuries in a child, and that the parent or guardian might be the only one able to furnish such a history.[32] Strangely, however, Caffey reasoned that the parent or guardian "may either omit the story of trauma because it is unknown to him, or conceal it intentionally because a true statement would imply *negligence* on his or her part."[33] Thus, while Caffey cautioned pedia-

---

23. *Id.* at 540-41.

24. *Id.* Woolley and Evans further noted that, with regard to the parents, "divorce, either earlier or following our contact with the cases, was commonplace." *Id.* at 541.

25. *Id.*

26. *Id.* at 542. Without directly accusing anyone, Woolley and Evans summarized their study by stating, "It is difficult to avoid the over-all conclusion that skeletal lesions having the appearance of fractures — regardless of history for injury or the presence or absence of intracranial bleeding — are due to undesirable vectors of force." *Id.* at 543; *see also* Adelson, *Slaughter of the Innocents — A Study of Forty-Six Homicides in Which the Victims Were Children*, 264 NEW ENG. J. MED. 1345, 1346 (1961) ("Frank psychosis in the assailant was the single most common factor in precipitating the fatal incident.").

27. Woolley & Evans, *supra* note 21, at 542-43.

28. Caffey, *Some Traumatic Lesions in Growing Bones Other Than Fractures and Dislocations: Clinical and Radiological Features*, 30 BRIT. J. RADIOLOGY 225 (1957).

29. *Id.*

30. *See* Woolley & Evans, *supra* note 21, at 542.

31. *See id.* at 540-42; *supra* notes 24-26 and accompanying text.

32. Caffey, *supra* note 28, at 226.

33. *Id.* (emphasis added).

tricians to consider the possibility of trauma when faced with an unexplained skeletal injury,[34] he seemed determined to ignore the possibility of intentional child abuse.

The above articles illustrate only two symptoms of child abuse: subdural hematoma and broken bones. But child abuse can manifest itself in countless repulsive ways. To fully appreciate the significance of battered child syndrome, one must recognize the depths to which some abusers can sink. Consider, for example, this summary from one study:

> The forms or types of abuse inflicted on these children is a negative testimony to the ingenuity and inventiveness of man. By far the greater number of injuries resulted from beatings with various kinds of implements [such as] [t]he hairbrush . . . bare fists . . . T.V. aerials . . . fan belts . . . bottles . . . chair legs, and . . . a sculling oar. Less imaginative, but equally effective, was plain kicking with street shoes or with heavy work shoes.
>
> Children had their extremities . . . burned in open flames. Others bore burn wounds inflicted on their bodies with lighted cigarettes, electric irons or hot pokers . . . . Still others were scalded by hot liquids . . . .
>
> Some children were strangled or suffocated by pillows held over their mouths or plastic bags thrown over their heads. A number were drowned in bathtubs and one child was buried alive.
>
> To complete the list — children were stabbed, bitten, shot, electric[ally] shock[ed], . . . stamped on and one child had pepper forced down his throat.[35]

These atrocities, coupled with the studies discussed above, set the stage for Kempe's classic 1962 article, *The Battered-Child Syndrome*.[36] Kempe studied 302 cases from 71 hospitals nationwide,[37] and found several common manifestations that he termed "battered child syndrome." The children, usually under three years of age, were in poor general health, and showed signs of neglect such as poor skin hygiene,

---

34. *Id.* at 227.

35. McCoid, *supra* note 10, at 15 (quoting DEFRANCIS, CHILD ABUSE — PREVIEW OF A NATIONWIDE SURVEY 5-7 (1963)); *see also* Adelson, *supra* note 26, at 1347 (causes of death in the 46 cases studied included gunshot wounds, asphyxiation, manual, pedal, and instrumental assault, stabbing, burning, and starvation).

36. Kempe, *supra* note 10.

37. *Id.* at 17.

malnutrition, and multiple soft tissue injuries.[38] Subdural hematoma was prevalent even in the absence of long bone fractures.[39] X-rays revealed a series of skeletal injuries to the arms and legs, all in various stages of healing.[40] Kempe attributed the frequency of these latter injuries to the fact that a child's arms and legs provided convenient "handles" for rough treatment.[41] As in the Woolley and Evans study, the children developed no new skeletal or soft tissue injuries while in the hospital.[42] Finally, Kempe emphasized that a major diagnostic feature of battered child syndrome was a marked discrepancy between clinical findings and the history provided by the parents.[43]

In short, Kempe advised physicians to consider battered child syndrome whenever a child presented subdural hematoma, unexplained fractures in different stages of healing, soft tissue swelling, skin bruising, signs of general neglect, or whenever the child's injuries clashed with the proffered history.[44] Kempe acknowledged that many physicians would resist believing that parents could be guilty of child abuse.[45] However, he strongly admonished these recalcitrant physicians that their duty to the children required a guarantee against re-injury.[46]

Kempe's analysis, unlike that of many of his predecessors, did not focus exclusively on the child's injuries. Rather, he also attempted to

---

38. *Id.* at 17-18.

39. *Id.* at 18. This finding plainly contradicts Caffey's 1946 finding. *See* Caffey, *supra* note 15, at 173.

40. Kempe, *supra* note 10, at 22.

41. *Id.* "The extremities are the 'handles' for rough handling, whether the arm is pulled to bring a reluctant child to his feet or to speed his ascent upstairs or whether the legs are held while swinging the tiny body in a punitive way or in an attempt to enforce corrective measures." *Id.*

42. *Id.* at 18; *see also* Woolley & Evans, *supra* note 21, at 541 (Woolley and Evans's corresponding findings).

43. Kempe, *supra* note 10, at 18; *cf.* Woolley & Evans, *supra* note 21, at 542 ("A history of injury in any clinical category of skeletal damage may be readily obtained, elicited only with difficulty, or not confirmed at all.").

44. Kempe, *supra* note 10, at 24; *see also* McCoid, *supra* note 10, at 18 (describing battered child syndrome as "multiple injuries in various stages of healing, primarily to the long bones and soft tissue and frequently coupled with poor hygiene and malnutrition, but peculiarly identified by the marked discrepancy between the clinical or physical findings and the historical data provided by the parents"); Cameron, Johnson & Camps, *The Battered Child Syndrome*, 6 MED. SCI. & LAW 2, 10 (1966) (other indicia of battered child syndrome are bruises indicative of fingerprints, and laceration of the skin which connects the upper lip to the gum).

45. Kempe, *supra* note 10, at 24.

46. *Id.*

flesh out the psychiatric aspects of child abusers themselves.[47] Kempe contended that at one extreme were patently psychotic child murderers, usually parents or close relatives of the child.[48] At the other extreme were anxious and guilt-ridden parents, usually mothers, who sought psychiatric help after fantasizing about hurting their children.[49] In the middle were parents whose children had suffered varying degrees of injury, and whose lives and health were at varying degrees of risk. As to these abusers, Kempe stated that

> [t]he parents, or at least the parent who inflicted the abuse, have been found to be of low intelligence. Often, they are described as psychopathic or sociopathic characters. Alcoholism, sexual promiscuity, unstable marriages, and minor criminal activities are reportedly common among them. They are immature, impulsive, self-centered, hypersensitive, and quick to react with poorly controlled aggression.[50]

Kempe emphasized that not all child abusers were poor or psychotic. In his opinion, however, even the well-educated and financially stable abuser possessed a character defect allowing unbridled expression of aggressive impulses.[51] Regardless of educational or socioeconomic status, abusers tended to adhere to a perverse "golden rule": they abused their children as their parents had abused them.[52] Thus, in Kempe's view, one could identify an abused child not only through the physical indicia of battered child syndrome, but also through a psychological assessment of the abusing parent.

The series of psychological traits thought to predispose an individual to abuse children is known as "battering parent syndrome."[53] Although Kempe worked with concededly meager psychological data,

---

47. *Id.* at 18.

48. *Id.*; *see also* Adelson, *supra* note 26 (assailant's psychosis as the most common factor in precipitating fatal assaults on children).

49. Kempe, *supra* note 10, at 18; *see also* Wecht & Larkin, *The Battered Child Syndrome — A Forensic Pathologist's Viewpoint*, in LEGAL MEDICINE 31, 32-34 (1980) (categories of child abusers).

50. Kempe, *supra* note 10, at 18. A national statistical survey of reported child abuse cases between 1976 and 1985 offers some demographic insight into child abusers. The majority of abusers were female, and white abusers far outnumbered blacks. The average abuser was in his or her early thirties; the average victim was slightly over seven years of age. 1988 STATISTICAL ABSTRACT, *supra* note 2, at 164.

51. Kempe, *supra* note 10, at 18.

52. *Id.*

53. *See, e.g.*, People v. Walkey, 177 Cal. App. 3d 268, 276-77, 223 Cal. Rptr. 132, 137 (Ct. App. 1986).

subsequent researchers have reached conclusions similar to his. In general, researchers agree that battering parents are usually former battered children.[54] Statistically, neuroses and psychoses are no more prevalent among battering parents than the population at large,[55] but certain psychological features are conspicuous. Battering parents tend to lack empathy for their children; they can neither recognize nor respond to their children's needs.[56] They also often have unrealistically high expectations of their children. These expectations can lead to the phenomenon of "role reversal," in which the parent treats the child like an adult, expecting the child to service the parent's emotional needs.[57] More generally, parents manifesting battering parent syndrome tend to be emotionally immature and disciplinarian. In addition to low self-esteem, they possess the lowest possible tolerance for inevitable childhood behaviors like crying and soiling diapers.[58]

In the years since Kempe's landmark article, the medical profession has become well-acquainted with battered child syndrome. Although classified as a medical diagnosis, obviously nothing within the victim causes the syndrome. Instead, it is directly attributable to the actions of those standing *in loco parentis* to the child. Its complement, battering parent syndrome, attempts to identify characteristics predisposing a parent to child abuse. An expert witness testifying to the presence of battered child syndrome plays the critical role of removing the rose-colored glasses through which the jury may view an accused parent. The evidentiary ramifications of such expert evidence are best analyzed by discussing the two contexts in which it is commonly used: child abuse prosecutions and homicide prosecutions.

---

54. *See, e.g.*, V. FONTANA, SOMEWHERE A CHILD IS CRYING 68 (1973); B. JUSTICE & R. JUSTICE, THE ABUSING FAMILY 92-93 (1976); Steele, *Psychodynamic Factors in Child Abuse*, in THE BATTERED CHILD 81, 83 (R. Helfer & R. Kempe eds. 1987). One author, writing about battering parents, has said, "The axiom about not being able to love when you have not known love yourself is painfully borne out in their case histories." R. INGLIS, SINS OF THE FATHERS 68 (1978).

55. Steele, *supra* note 54, at 82.

56. *Id.* at 84; *see also* Haynes-Seman, *Developmental Origins of Moral Masochism: A Failure-to-Thrive Toddler's Interactions with Mother*, 11 CHILD ABUSE & NEGLECT 319 (1987) (presenting a case study of one such parent).

57. V. FONTANA, *supra* note 54, at 64; B. JUSTICE & R. JUSTICE, *supra* note 54, at 94; Steele, *supra* note 54, at 85.

58. V. FONTANA, *supra* note 54, at 63-69; R. INGLIS, *supra* note 54, at 69; *see also* Comment, *Deliberate Premeditation, Extreme Atrocity and Cruelty, and the Battered Child Syndrome — A New Look at Criminal Culpability in Massachusetts*, 14 NEW ENG. L. REV. 812, 823 (1979) (outlining these characteristics in a discussion of the use of battering parent syndrome to mitigate guilt in a homicide prosecution).

III. BATTERED CHILD SYNDROME IN THE COURTROOM

A. *Nonfatal Child Abuse*

A California appellate court was the first to approve expert testimony on the issue of battered child syndrome.[59] In *People v. Jackson*,[60] the defendant was the live-in boyfriend of the thirteen-month-old victim's mother.[61] The mother left the child in defendant's custody, and returned home to find the child covered with burns.[62] At the hospital, a pediatrician found burns on twenty-three percent of the child's body, along with a distended abdomen, liver injury, subdural hematoma, bruises indicative of handprints, recent fractures in both forearms, and ten broken ribs.[63] The pediatrician testified at trial that these symptoms, coupled with defendant's inconsistent explanation of the initial burns, led to the diagnosis of battered child syndrome.[64] The defendant appealed his conviction, challenging the admissibility of the pediatrician's expert testimony.[65]

The California District Court of Appeal affirmed the conviction,[66] finding expert evidence of battered child syndrome admissible.[67] Defendant contended that the pediatrician's testimony constituted a personal opinion of defendant's guilt.[68] The court rejected this contention, stating that evidence of battered child syndrome "simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means."[69] In other words, the expert testified only that *someone* had injured the child. From this evidence,

---

59. *See* People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (Ct. App. 1971). At least one earlier appellate court seems to have recognized evidence of battered child syndrome, although not identifying it as such, in Albritton v. State, 221 So. 2d 192 (Fla. 2d D.C.A. 1969). However, its admissibility *vel non* was not an issue before the appellate court. *Id.* at 196-98.

60. 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (Ct. App. 1971).

61. *Id.* at 506, 95 Cal. Rptr. at 920.

62. *Id.*

63. *Id.*

64. *Id.*, 95 Cal. Rptr. at 921.

65. *Id.* at 505-06, 95 Cal. Rptr. at 920. Defendant's counsel did not object to evidence of battered child syndrome at trial, and the court could have disposed of the appeal on that ground. However, the court chose to address the issue and thereby preempt a collateral attack of the conviction based upon the incompetence of counsel. *Id.* at 506, 95 Cal. Rptr. at 920.

66. *Id.* at 509, 95 Cal. Rptr. at 923.

67. *Id.* at 507, 95 Cal. Rptr. at 921.

68. *Id.*

69. *Id.* The expert testified that "'it would take thousands of children to have the severity and number and degree of injuries that this child had over the span of time that we had' by accidental means." *Id.*

the jury logically could conclude that only someone ostensibly caring for the child could inflict these injuries, because "an isolated contact with a vicious stranger would not result in this pattern of successive injuries stretching through several months."[70]

The latter statement from *Jackson* is perhaps the key to the admissibility of battered child syndrome evidence. Under the Federal Rules of Evidence, expert testimony is admissible only if it will help the fact finder understand the evidence or determine a fact in issue.[71] One might initially reject battered child syndrome evidence under this test, arguing that the injuries, once identified, speak for themselves and that the jury can draw upon its common experience and knowledge to determine the source of the injuries. Superficially, this might be an appealing argument. Yet *Jackson* shows that the injuries do not speak for themselves. The jury needs the expert to show that the injuries vary in age and occurred over time. The expert submits that the injuries could not be isolated accidents and that small children could not so injure themselves.[72] The expert testimony thus is valuable because it ties together cause and effect; it suggests a relationship between the injuries that might not otherwise occur to the jury.[73]

B. *Homicidal Child Abuse*

In cases of nonfatal child abuse, the prosecutor uses battered child syndrome evidence primarily to prove that (1) the child could not have suffered the injuries accidentally, and (2) someone intentionally injured the child.[74] In homicide cases, however, its purpose is less clear. For example, in *State v. Tanner*,[75] the defendant was convicted of manslaughter for the death of her three-month-old daughter. The child

---

70. *Id.*

71. FED. R. EVID. 702.

72. By drawing an inference of nonaccidental injury, the expert does not invade the province of the jury. The jury must still decide how much weight the expert's opinion deserves, and most importantly, whether the defendant caused the injuries. *See* State v. Toennis, 52 Wash. App. 176, 185, 758 P.2d 539, 545 (Ct. App. 1988) (citing State v. Mulder, 29 Wash. App. 513, 629 P.2d 462 (Ct. App. 1981)).

73. *Cf.* People v. Clay, 227 Cal. App. 2d 87, 38 Cal. Rptr. 431 (Ct. App. 1964) (expert witness tying together the superficially unrelated acts of two individuals to establish the crime of till-tapping).

74. *See, e.g.*, State v. Dumlao, 3 Conn. App. 607, 491 A.2d 404 (App. Ct. 1985); People v. DeJesus, 71 Ill. App. 3d 235, 389 N.E.2d 260 (App. Ct. 1979); State v. Durfee, 322 N.W.2d 778 (Minn. 1982).

75. 675 P.2d 539 (Utah 1983) (superseded on other grounds by rule in State v. Walker, 743 P.2d 191 (Utah 1987)).

died of "subdural hematoma associated with multiple contusions of the body."[76] Although defendant claimed the child had fallen,[77] the state's expert witness testified that the child's body displayed the characteristics of battered child syndrome, emphasizing the inadequacy of defendant's explanation for the injuries.[78] The trial court also allowed testimony regarding defendant's prior conduct toward the child.[79] On appeal, defendant challenged the trial court's admission of the state's expert testimony.[80]

The Utah Supreme Court affirmed the conviction[81] and held that a properly qualified expert witness could testify to the presence of battered child syndrome.[82] Defendant apparently argued that such evidence suggested her guilt as to prior offenses, and even if relevant, the evidence was far more prejudicial than probative.[83] The court rejected her arguments, reasoning, as did *Jackson*, that battered child syndrome evidence did not suggest the culpability of any particular individual.[84] As to the relevance of battered child syndrome evidence, the court found evidence of past injuries relevant to contradict any claim that the latest injury was accidental.[85] The court stated, however, that the evidence would be admissible whether or not a defendant raised the issue of accident or mistake.[86] Further, the court concluded that once the state established the existence of battered child syndrome, evidence of defendant's prior acts was admissible to show a pattern of conduct toward the child.[87]

Consider further in this regard *People v. Henson*,[88] in which the defendant-parents were convicted of criminally negligent homicide of

---

76. *Id.* at 541 (quoting autopsy report).
77. *Id.* at 544.
78. *Id.*
79. *Id.* at 545.
80. *Id.* at 541.
81. *Id.* at 551.
82. *Id.* at 543-44.
83. *Id.* at 543.
84. *Id.*; *see also* People v. DeJesus, 71 Ill. App. 3d 235, 389 N.E.2d 260 (App. Ct. 1979) (evidence of battered child syndrome describes only the nature of the injuries); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978) (expert did not and would not have been allowed to testify that the child's injuries were caused by any one person).
85. *Tanner*, 675 P.2d at 543; *see also* Ashford v. State, 603 P.2d 1162, 1164 (Okla. Crim. App. 1979) ("The pattern of abuse is relevant to show the intent of the act.").
86. *Tanner*, 675 P.2d at 545. This statement appears to be only dicta, as defendant claimed that the latest injury was due to the child's fall. *Id.* at 544; *accord* People v. Kinder, 75 A.D.2d 34, 428 N.Y.S.2d 375 (App. Div. 1980).
87. *Tanner*, 675 P.2d at 549.
88. 33 N.Y.2d 63, 304 N.E.2d 358, 349 N.Y.S.2d 657 (1973).

their four-year-old son.[89] In *Henson*, the child died of bronchial pneumonia.[90] Defendants had tied the boy on his back in bed, which made it difficult for him to cough up the mucus accumulating in his throat.[91] An examining physician and the autopsy report revealed that the boy looked sallow and that his body was covered with bruises on the arms, legs, abdomen, chest, and genitals.[92] The mother attempted to explain these injuries, claiming that the boy had been falling out of bed for several days before his death, and that he had been stumbling around the house falling into furniture.[93] At trial, the prosecution attempted to introduce expert evidence of battered child syndrome; the court sustained defendants' objections to the questions.[94] The court nonetheless convicted defendants, who argued on appeal that the prosecutor's use of the phrase "battered child syndrome" in unanswered questions prejudiced the jury.[95]

The New York Court of Appeals affirmed the convictions,[96] finding the mere use of the phrase "battered child syndrome" nonprejudicial.[97] The court added that the questions would not have been prejudicial even had the trial court allowed the expert to answer, as the answers would have been relevant to prove that the boy's injuries were not accidental.[98] The court relied on the *Jackson* rationale, reasoning that the evidence would at most indicate that *someone* had injured the child.[99] This evidence of battered child syndrome, coupled with proof that the child was injured while in the sole custody of the parents, would support an inference that the parents inflicted the injuries.[100]

IV. THE EVIDENTIARY ANALYSIS

Despite its ready acceptance by the courts, battered child syndrome presents an evidentiary conundrum. That such evidence is helpful to

89. *Id.* at 65, 304 N.E.2d at 358-59, 349 N.Y.S.2d at 658.

90. *Id.* at 66, 304 N.E.2d at 359, 349 N.Y.S.2d at 659.

91. *Id.* at 70, 304 N.E.2d at 361, 349 N.Y.S.2d at 662. Defendants claimed the restraint "was necessary to prevent Kip [the victim] from 'wander[ing]' around and from 'pick[ing]' at scabs on his head." *Id.* at 67 n.2, 304 N.E.2d at 359 n.2, 349 N.Y.S.2d at 659 n.2.

92. *Id.* at 66, 304 N.E.2d at 359, 349 N.Y.S.2d at 658-59.

93. *Id.* at 67 n.3, 304 N.E.2d at 360 n.3, 349 N.Y.S.2d at 659 n.3.

94. *Id.* at 73, 304 N.E.2d at 363, 349 N.Y.S.2d at 664.

95. *Id.* Defendants also argued that the admission of evidence of previous injuries constituted reversible error because it was introduced to show propensity to commit the acts alleged. *Id.* at 72, 304 N.E.2d at 362, 349 N.Y.S.2d at 663.

96. *Id.* at 74, 304 N.E.2d at 364, 349 N.Y.S.2d at 666.

97. *Id.* at 73, 304 N.E.2d at 363, 349 N.Y.S.2d at 664-65.

98. *Id.*

99. *Id.* at 73-74, 304 N.E.2d at 363, 349 N.Y.S.2d at 665.

100. *Id.* at 74, 304 N.E.2d at 364, 349 N.Y.S.2d at 665-66.

jurors[101] is beyond peradventure. Thus, expert evidence of battered child syndrome should be admissible if relevant and not excluded by another rule of evidence.[102] Herein lies the evidentiary problem. Courts considering the admissibility of battered child syndrome evidence invariably reason that the evidence is relevant to prove that someone intentionally injured the child.[103] No doubt a product of the fervent desire to convict child abusers, the courts' reasoning reflects a result-oriented approach that often ignores rules of evidence. Unfortunately, these well-meaning courts have overlooked the evidentiary import of battered child syndrome.

The evidentiary analysis must first recognize that an expert testifying on the presence of battered child syndrome describes injuries the expert has observed.[104] In the expert's opinion, these injuries are themselves evidence of someone's intentional acts. That opinion without more is useless to the prosecution unless the prosecution can convince the jury that the defendant is the expert's "someone." Accordingly, the purpose of offering battered child syndrome evidence must be to prove that the defendant committed a series of prior acts, manifested by a series of prior injuries.[105]

The ultimate evidentiary issue is the admissibility of evidence of a defendant's prior acts under a given set of facts. Federal Rule of Evidence 404(b) sets forth the general rule:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

---

101. FED. R. EVID. 702.

102. FED. R. EVID. 402.

103. *See, e.g.*, State v. Moyer, 151 Ariz. 253, 727 P.2d 31 (Ct. App. 1986); People v. DeJesus, 71 Ill. App. 3d 235, 389 N.E.2d 260 (App. Ct. 1979); Bell v. Commonwealth, 684 S.W.2d 282 (Ky. Ct. App. 1984); People v. Barnard, 93 Mich. App. 590, 286 N.W.2d 870 (Ct. App. 1979); State v. Goblirsch, 309 Minn. 401, 246 N.W.2d 12 (1976); State v. Wilkerson, 295 N.C. 559, 247 S.E.2d 905 (1978); Commonwealth v. Rodgers, 364 Pa. Super. 477, 528 A.2d 610 (Super. Ct. 1987); State v. Best, 89 S.D. 227, 232 N.W.2d 447 (1975); State v. Mulder, 29 Wash. App. 513, 629 P.2d 462 (Ct. App. 1981).

104. People v. DeJesus, 71 Ill. App. 3d 235, 236, 389 N.E.2d 260, 261 (App. Ct. 1979).

105. *Cf. Tanner*, 675 P.2d at 553 (Stewart, J., dissenting) ("The majority asserts that the battered child syndrome evidence is not accusatory and only describes the cause of death . . . and on the other hand admits that such evidence incriminates the parents."); McCoid, *supra* note 10, at 18 (battered child syndrome "is really descriptive of a pattern of conduct on the part of the parents or others who are to guard the welfare of the child").

> intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[106]

Clearly, the prosecution cannot use evidence of prior acts to establish that the defendant has a criminal character and therefore more likely committed the act in question.[107] The prosecution may, however, introduce evidence of prior acts to establish motive, intent, or any of the other elements listed in Rule 404(b), provided that one of those elements actually is at issue.[108] Finally, the evidence must have sufficient probative value to outweigh its potential prejudice to the defendant.[109]

Viewing battered child syndrome as evidence of prior acts demonstrates the correctness of *Jackson*. The statute under which Jackson was convicted of child beating provided, in pertinent part:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully *causes or permits any child to suffer*, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully *causes or permits the person or health of such child to be injured*, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment . . . .[110]

Under this statute, defendant may have been guilty of willfully causing the child to suffer, or causing injury to the child's health. These offenses do not necessarily arise from a single act; rather, the statutory language suggests offenses of a continuing nature. Thus, the injuries upon which the expert in *Jackson* based the diagnosis of battered

---

106. FED. R. EVID. 404(b).

107. *Id.*; Michelson v. United States, 335 U.S. 469 (1948); C. MCCORMICK, EVIDENCE § 190 (3d ed. 1984); *see also* United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977) ("a defendant must be tried for what he did, not for who he is"), *cert. denied*, 439 U.S. 847 (1978).

108. C. MCCORMICK, *supra* note 107, at § 190.

109. *Id.*; FED. R. EVID. 403.

110. CAL. PENAL CODE § 273a(1) (West 1973) (amended 1976, 1980, 1984) (emphasis added) (cited in *Jackson*, 18 Cal. App. 3d at 505, 95 Cal. Rptr. at 920). The opinion is unclear as to whether defendant was convicted under this subsection or subsection (2), which proscribes the same acts under circumstances or conditions other than those likely to produce great bodily harm or death. *See id.* § 273(a)(2); *Jackson*, 18 Cal. App. 3d at 505-06, 95 Cal. Rptr. at 920. Defendant also faced conviction under § 273d, which punished "[a]ny person who willfully inflicts upon any child any cruel or inhuman corporal punishment or injury resulting in a traumatic condition." CAL. PENAL CODE § 273d (West 1973) (cited in *Jackson*, 18 Cal. App. 3d at 505, 95 Cal. Rptr. at 920).

child syndrome were not prior acts in relation to the offense charged. Instead, the injuries manifested the very acts constituting the offense. The *Jackson* court therefore correctly reasoned that the expert evidence was relevant to prove that someone intentionally injured the child.[111] By proving that defendant ostensibly was caring for the child at the time the injuries were inflicted,[112] the prosecution could establish defendant's guilt under the relevant statute.[113]

Although the reasoning of *Henson* is blurrier than *Jackson*, one can square the *Henson* court's admission of battered child syndrome evidence on the same grounds. In *Henson*, the state's medical expert testified that while pneumonia was the "terminal event" causing the boy's death, the several injuries he suffered in his last days contributed to his death.[114] This testimony indicates that a series of acts, manifested by the injuries, caused the boy's death. Therefore, just as in *Jackson*, evidence of battered child syndrome would have established the very acts constituting the *actus reus* of homicide. Although the defendants in *Henson* were convicted anyway, evidence of battered child syndrome, coupled with proof that defendants had sole custody of the boy,[115] might have tied defendants even more strongly to the abusive acts.[116]

Although not addressed in the opinion, the excluded evidence arguably was admissible on at least two other grounds. First, defendants were convicted of criminally negligent homicide,[117] which the court defined as "'a culpable failure to perceive a substantial and unjustifiable risk' of death, constituting 'a gross deviation from the standard of care that a reasonable [parent] would observe.'"[118] Thus, the "intent" the prosecution had to prove was defendants' failure to perceive the

111. *Jackson*, 18 Cal. App. 3d at 507, 95 Cal. Rptr. at 921.

112. *Id.*

113. *Id.*; *see also* State v. Dumlao, 3 Conn. App. 607, 491 A.2d 404 (App. Ct. 1985), in which the prosecution used expert evidence of battered child syndrome to support a conviction under CONN. GEN. STAT. § 53-21 (1983). That statute proscribed causing or permitting a child under the age of 16 "'to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured,'" as well as doing "'any act likely to impair the health . . . of any such child.'" *Id.* at 608 n.2, 491 A.2d at 408 n.2 (quoting CONN. GEN. STAT. § 53-21 (1983)).

114. *Henson*, 33 N.Y.2d at 71, 304 N.E.2d at 362, 349 N.Y.S.2d at 662.

115. *Id.* at 74, 304 N.E.2d at 364, 349 N.Y.S.2d at 665-66.

116. Whether this actually would have been necessary is another matter altogether, as the court found the evidence of guilt "overwhelming." *Id.* at 68, 304 N.E.2d at 360, 349 N.Y.S.2d at 660.

117. *Id.* at 65, 304 N.E.2d at 358-59, 349 N.Y.S.2d at 658.

118. *Id.* at 69, 304 N.E.2d at 361, 349 N.Y.S.2d at 661.

risk while under a legal duty to do so.[119] By showing defendants' conduct toward the child in the days immediately prior to his death, the prosecution might have established the indifference with which defendants viewed their son's plight. Of course, the court would then have had to conclude that the probative value of the evidence outweighed its prejudice.[120] The *Henson* court obviously was willing to reach this conclusion,[121] thus the evidence should have been admissible to prove defendants' intent.

Second, evidence of battered child syndrome should have been admissible to prove that the boy's injuries were not caused accidentally.[122] This issue arose in *Henson* when the defendant-mother insisted the boy was accident-prone.[123] The trial court admitted the testimony of several witnesses regarding the boy's injuries of previous years and the mother's constant claims of accidental injury.[124] If evidence of previous injuries was admissible to refute a claim of accidental injury, then evidence of battered child syndrome should have been admissible to prove the same thing.

In short, the New York Court of Appeals' analysis in *Henson*, while somewhat simplistic and incomplete, was correct. In contrast, the Utah Supreme Court's decision in *Tanner* reflects a hopelessly flawed analysis of battered child syndrome evidence. The autopsy report in *Tanner* stated that the child died of "'subdural hematoma associated with multiple contusions of the body.'"[125] This statement reflects that the child died from the subdural hematoma, and that the subdural hematoma and contusions somehow were related. The statement does not say the child died of multiple contusions. Therefore, the act constituting manslaughter in *Tanner* was the act causing the subdural hematoma, not the acts causing the contusions. The evidence of battered child syndrome, which in effect indicated that defendant intentionally inflicted these other injuries, thus was evidence of defendant's prior acts. The court therefore should have assessed its admissibility under Utah's equivalent of Rule 404(b).[126]

---

119. *Id.*, 304 N.E.2d at 360, 349 N.Y.S.2d at 660-61 (quoting People v. Haney, 30 N.Y.2d 328, 333, 284 N.E.2d 564, 567, 333 N.Y.S.2d 403, 407 (1972)).

120. *See* FED. R. EVID. 403.

121. *See Henson*, 33 N.Y.2d at 73, 304 N.E.2d at 363, 349 N.Y.S.2d at 664.

122. FED. R. EVID. 404(b); *see also supra* text accompanying note 106 (text of rule).

123. *Henson*, 33 N.Y.2d at 71, 304 N.E.2d at 362, 349 N.Y.S.2d at 663; *see also supra* text accompanying note 93 (describing mother's claims regarding cause of injuries).

124. *Henson*, 33 N.Y.2d at 71-72, 304 N.E.2d at 362, 349 N.Y.S.2d at 663.

125. *Tanner*, 675 P.2d at 541.

126. *See id.* at 552-53 (Stewart, J., dissenting) (quoting UTAH R. EVID. 55 (amended 1983, current version at UTAH R. EVID. 404(b), which permitted evidence of a defendant's prior acts

Instead, the *Tanner* court's analysis circumvented whether evidence of prior acts was admissible under the facts of the case. The court cited *Jackson* for the proposition that the evidence was relevant to show that the injuries did not occur accidentally.[127] The court reasoned that once a court admitted battered child syndrome evidence, it could also admit specific prior acts to prove a pattern of conduct toward the child.[128] In child abuse cases, the court contended, evidence of specific prior acts established a defendant's abusive pattern of conduct, rather than a general propensity for violence.[129]

Two flaws exist in the *Tanner* court's analysis. First, contrary to the court's assertion, *Tanner* was a homicide case, not a "child abuse" case. Unlike *Jackson* and *Henson*, the abusive acts to which the *Tanner* court referred did not constitute the offense for which defendant was convicted. In *Tanner*, evidence of battered child syndrome truly was "prior act" evidence; the majority's failure to recognize this was its second analytical flaw. A court engaged in more thoughtful evidentiary analysis would have asked whether evidence of battered child syndrome was relevant to prove something other than defendant's propensity for violence. Instead, the court's bootstrapping rationale allowed evidence of prior acts, masquerading as evidence of battered child syndrome, to create an issue justifying the admission of more prior acts.

Had the *Tanner* court correctly analyzed the evidentiary issue, not only would it have reached the same result, it would have provided future courts with an analytically sound point of departure. Battered child syndrome evidence should have been admissible in *Tanner*, as in *Henson*, to prove either absence of accident or intent.[130] The *Tanner* court upheld the trial court's admission of defendant's specific prior acts toward the child, reasoning that defendant's claim to physicians and police that the child had fallen raised the issue of accident.[131] Had the court recognized that battered child syndrome evidence really described defendant's prior acts, it would have upheld its admissibility on that basis.

---

to be admitted to prove "some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity" and arguing that the admission of battered child syndrome evidence violated this rule)).

127. *Tanner*, 675 P.2d at 542.

128. *Id.* at 549.

129. *Id.* at 546.

130. *See supra* note 126 (quoting pertinent provisions of UTAH R. EVID. 55, allowing admission to prove, among other things, intent or absence of accident or mistake).

131. *Tanner*, 675 P.2d at 547-48.

As to intent, defendant's manslaughter conviction under Utah law meant she recklessly caused the death of another.[132] Thus, the prosecution had to prove that defendant consciously disregarded a substantial and unjustifiable risk that the child would die.[133] Evidence of the way in which defendant acted in the face of an ever-increasing risk to the child's life should have been relevant to prove defendant's conscious disregard of that risk. Indeed, battered child syndrome evidence could have been the only way to prove the requisite intent, absent evidence of defendant's specific prior abusive acts. This evidentiary subtlety unfortunately was lost on the *Tanner* court; it admitted the battered child syndrome evidence to prove only that someone intentionally injured the child.[134]

A blanket application of the *Jackson* court's rationale will not apply in every case involving an abused child. In cases that involve continuing offenses, the *Jackson* analysis, although perhaps less lucid than it could be, is essentially correct. In cases that involve noncontinuing offenses, however, courts must apply Rule 404(b) or the state equivalent to reach the right result for the right reasons. While this analysis occasionally may result in the exclusion of battered child syndrome evidence,[135] courts must uniformly apply the rules of evidence. Having analyzed the evidentiary wrinkles of battered child syndrome, one must next consider those of its complement, battering parent syndrome.

V. BATTERING PARENT SYNDROME

Battering parent syndrome differs from battered child syndrome by describing character traits considered common in child abusers rather than manifestations of the abuse itself.[136] The two types of

---

132. *See* UTAH CODE ANN. § 76-5-205(1)(a) (1978) (amended 1985).

133. *Id.* § 76-2-103(3).

134. *Tanner*, 675 P.2d at 543.

135. For example, if the defendant concedes from the outset that the child has been battered, but claims not to have been the abuser, battered child syndrome evidence arguably would be admissible only to prove the identity of the assailant. To prove identity by prior acts, courts generally require that the acts be so identical as to be like the accused's signature. *See, e.g.*, United States v. Beasley, 809 F.2d 1273, 1277 (7th Cir. 1987); United States v. Myers, 550 F.2d 1036, 1045-46 (5th Cir. 1977), *cert. denied*, 439 U.S. 847 (1978); C. MCCORMICK, *supra* note 107, at § 190. A battering parent might not resort to any one particular technique of abuse. As a result, the injuries the child manifests may be so dissimilar that the court would refuse to admit them into evidence.

136. *See supra* notes 53-58 and accompanying text.

evidence are similar, however, in that they trigger rules proscribing the use of character evidence.[137] Because battering parent syndrome evidence describes character traits rather than prior acts, Federal Rule of Evidence 404(a) governs its admissibility. The rule states that "evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion . . . ."[138] An important exception to this rule is that a criminal defendant may introduce evidence of his or her good character. If the defendant so chooses, the prosecution may then introduce evidence of the defendant's bad character.[139] Battering parent syndrome and Rule 404(a) thus appear to be at loggerheads; a plain reading of the rule seems to bar the prosecution from introducing such evidence in its case-in-chief.

Guided by the precepts of this rule, every appellate court considering the issue has held that the prosecution cannot introduce evidence of battering parent syndrome unless the defendant first raises the issue of his or her own good character.[140] These courts uniformly reason that the prejudicial nature of battering parent syndrome evidence renders it inadmissible.[141] Despite this recognition of prejudice, how-

---

137. For a discussion of the general problems that psychological profile evidence presents, see Note, *The Syndrome Syndrome: Problems Concerning the Admissibility of Expert Testimony on Psychological Profiles*, 37 U. FLA. L. REV. 1035 (1985) (suggesting that the admissibility of novel psychological profile evidence turn on factors concerning relevance, that the "helpfulness" requirement of expert evidence be interpreted liberally, and that the fear of invading the jury's province affect weight rather than admissibility).

138. FED. R. EVID. 404(a).

139. FED. R. EVID. 404(a)(1); FED. R. EVID. 404 advisory committee's note.

140. *See* People v. Walkey, 177 Cal. App. 3d 268, 223 Cal. Rptr. 132 (Ct. App. 1986); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983); Duley v. State, 56 Md. App. 275, 467 A.2d 776 (Ct. Spec. App. 1983); State v. Loebach, 310 N.W.2d 58 (Minn. 1981); *cf. In re* Cheryl H., 153 Cal. App. 3d 1098, 200 Cal. Rptr. 789 (Ct. App. 1984) (expert testimony that defendant possessed character traits predisposing him toward sexual abuse was inadmissible character evidence); State v. Maule, 35 Wash. App. 287, 667 P.2d 96 (Ct. App. 1983) (admission of expert testimony that defendant was a member of a class predisposed toward child sexual abuse constituted reversible error).

141. *See, e.g.*, People v. Walkey, 177 Cal. App. 3d 268, 223 Cal. Rptr. 132 (Ct. App. 1986); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983); Duley v. State, 56 Md. App. 275, 467 A.2d 776 (Ct. Spec. App. 1983); State v. Loebach, 310 N.W.2d 58 (Minn. 1981). Minnesota seems initially to have required evidence of battering parent syndrome to render evidence of battered child syndrome admissible. State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973). The Minnesota Supreme Court disclaimed any such requirement three years later in State v. Goblirsch, 309 Minn. 401, 246 N.W.2d 12 (1976). Finally, in 1981, the same court found battering parent syndrome evidence inadmissible unless the defendant placed his character at issue. *Loebach*, 310 N.W.2d at 58.

ever, the courts consistently have upheld convictions of defendants against whom such evidence is introduced on the grounds of harmless error.[142]

In no reported case has the defendant placed his or her character in issue, thereby allowing the prosecution to introduce evidence of battering parent syndrome. Should it arise, such a case would present a far more interesting issue: whether evidence of battering parent syndrome should be admissible at all. The Federal Rules of Evidence attempt to resolve this issue by asking whether such evidence would be helpful to the fact finder.[143] To be helpful, of course, the evidence must be relevant to a fact in issue,[144] and the relevancy of scientific testimony is a function of its reliability.[145] Thus, if the defendant opens the door to the admission of bad character evidence, the specific issue becomes whether the underlying theory of battering parent syndrome is reliable enough to be relevant to prove a particular defendant committed a particular act of child abuse.

Even in the absence of guiding precedent, courts must answer this question in the negative. To admit the evidence would be to concede that human beings are so much a product of their background that they cannot help but behave according to statistical prediction. Such evidence would render the defendant a mere automaton in the jury's eyes. Certainly, the prosecution should be able to introduce evidence of the defendant's temper, emotional maturity, and manner of responding to the child.[146] After all, the defendant has opened the door to this evidence. However, lay testimony on these points should be sufficient to allow the jury to resolve any issue concerning the defendant's character. An expert's opinion would add little probative value to the equation.[147]

On the other hand, such testimony obviously has prejudicial effect. By identifying the defendant as one who manifests characteristics of battering parents, the expert places the defendant in a most loathsome

---

142. People v. Walkey, 177 Cal. App. 3d 268, 223 Cal. Rptr. 132 (Ct. App. 1986); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983); Duley v. State, 56 Md. App. 275, 467 A.2d 776 (Ct. Spec. App. 1983); *Loebach*, 310 N.W.2d at 58.

143. FED. R. EVID. 702.

144. *See* FED. R. EVID. 402.

145. P. Gianelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *A Half-Century Later*, 80 COLUM. L. REV. 1197, 1235 (1980).

146. *See supra* notes 50-58 and accompanying text.

147. *See* Duley v. State, 56 Md. App. 275, 281, 467 A.2d 776, 780 (Ct. Spec. App. 1983) ("Such evidence is totally irrelevant because it does not tend to prove that [defendant] committed the acts of abuse attributed to him.").

class.[148] Theoretically, the evidence is irrelevant because it does no more than associate the defendant with a class of persons who, in the expert's opinion, often abuse children.[149] Realistically, however, the evidence simply stamps the defendant with the scientific community's imprimatur of guilt. The expert's opinion forces into a statistical framework the collected character traits upon which laypersons commonly base their character judgments.[150] Unfortunately, a jury confronted with such evidence may be dazzled by the expert and forget the impossibility of predicting human behavior beyond a reasonable doubt.[151]

VI. CONCLUSION

Battered child syndrome is a well-accepted medical diagnosis in both the physician's office and the courtroom. Every court considering the issue has admitted expert evidence of battered child syndrome,[152] yet almost all have done so on faulty reasoning. Courts have failed to recognize that such evidence is really disguised evidence of prior acts, the admissibility of which depends on evidentiary rules relating to proof of character. This sounder analytical framework usually would yield the same result and would provide courts initially considering the issue with the proper analytical point of departure.

Battering parent syndrome stands on another evidentiary footing. Expert evidence on this syndrome is inadmissible at least until the defendant raises the issue of his or her good character. No court has

---

148. *See id.*

149. *Id.*

150. *Cf. id.* (battering parent syndrome evidence "is no different than allowing an expert to testify that most homicides are committed by men. From that point of reference, only a dolt would not include [defendant] within the scope of the comment.").

151. *But see* State v. Conlogue, 474 A.2d 167 (Me. 1984), which on different facts flies in the face of the foregoing analysis. In *Conlogue*, defendant attempted to introduce evidence of battering parent syndrome in the victim's mother to prove that her earlier confession of guilt had been true and her subsequent recantation false. *Id.* at 172. The trial court excluded this evidence under Maine's identical counterpart to FED. R. EVID. 404(a). *Id.* The Supreme Judicial Court of Maine reversed the conviction, holding that the defendant's proffer was not of character evidence. *Id.* The holding seems grounded in the court's desire to give defendant every opportunity to exculpate himself. From an evidentiary standpoint, however, the dissent made the better argument. *See id.* at 173 (Scolnik, J., dissenting). The dissent recognized that the excluded evidence was offered to prove that the mother was an abusive parent who acted in conformity with her character on a given occasion. *Id.* at 174. *Conlogue* is perhaps best described as an aberration, and is offered here as such.

152. *See supra* note 12 and cases cited therein.

had the opportunity to consider whether such evidence should be admissible at all. As such evidence places the defendant within a class of typical child abusers, however, it provides the quintessential example of trying defendants for who they are, rather than for what they have done.[153] The expert can add nothing positive to the jury's understanding of defendants' character traits, but can tremendously prejudice these defendants by statistically declaring them child abusers.

In their laudable fervor to punish child abuse, courts still must adhere to fundamental rules of evidence. The rules exist to guarantee fair results based on objective standards. The odium with which the public views certain offenses cannot justify deviating from evidentiary norms. Accordingly, while courts should almost always admit evidence of battered child syndrome, they should not admit evidence of battering parent syndrome. Although the suggested analytical framework may change few results, the integrity of the adversary process requires that proper reasons support proper results.

---

153. *See* United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977) ("a defendant must be tried for what he did, not for who he is"), *cert. denied*, 439 U.S. 847 (1978).