The Battering Parent Syndrome: Inexpert Testimony as Character Evidence

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Since 1962, legislatures and courts have actively attempted to develop solutions to the problem of parental abuse and neglect of children. Because child abuse rarely occurs in the presence of witnesses, prov-

1. In 1962, a team of psychiatrists and other specialists published a now-famous and enormously influential study that first exposed the widespread nature of physical abuse of children by their parents. Kempe, Silverman, Steele, Drogemuller, & Silver, The Battered-Child Syndrome, 181 J.A.M.A. 17 (1962) [hereinafter cited as BATTERED-CHILD SYNDROME]. The study demonstrated that certain common classes of injuries to children were consistent with no other cause but physical abuse by custodial adults. See generally id. at 21-23; Annot., 98 A.L.R.2d 306; McCoid, The Battered Child and Other Assaults upon the Family: Part One, 50 Minn. L. Rev. 1 (1965); Note, Battered Child Syndrome—A Forensic Pathologist's Viewpoint, 28 Med. Trial Tech. Q. 1 (1981). See also D. Gil, Violence Against Children, 1-48 (1970); Light, Abused and Neglected Children in America: A Study of Alternative Policies, 43 Harv. Educ. Rev. 556-562 (1973). For example, during this period, all states enacted mandatory reporting statutes, requiring doctors, teachers and other professionals to report suspected incidents of child abuse to state agencies. I. Sloan, Child Abuse: Governing Law and Legislation 15, 17, 24-25 (1983). Nineteen states require such reporting "by any person" having knowledge or reason to know. Id. at 17, 18, 24-25. Forty-five states impose a criminal penalty for failure to report. Id. at 43-44. In addition, physicians and hospitals may be held liable for injuries sustained by a child returned to her parents if medical personnel negligently failed to diagnose abuse. Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976). For discussion of the usual content of state reporting statutes, see Fraser, A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes, 54 Chi.-Kent L. Rev. 641 (1978); I. Sloan, supra at 15-69.

2. The pitfalls of satisfactorily defining child abuse are well recognized. See generally Berger, The Child Abusing Family (Pt I), 8 Am. J. Fam. Therapy, Fall 1980, at 53, 55 [hereinafter cited as Berger I]; D. Gu, supra note 1, at 35, 134-35; Child Abuse: The Problem of Definition, 8 Creighton L. Rev. 729 (1975). State laws employ varied definitions, many of which rely on parental fault. For example, Minnesota's reporting statute, defines "Physical Abuse" as "any physical injury inflicted by a parent, guardian or other person responsible for the child's care on a child other than by accidental means." Minn. Stat. Ann. § 626.556(2)(c); (West Supp. 1981). The same state's child protection statute, see infra note 10, does not define abuse, but mandates court intervention upon a finding that a child is "neglected" or "dependent." Minn. Stat. Ann. § 260.015(6)(10) (West 1982). An adjudication of dependence must be entered upon a finding that the child is "without proper care because of the emotional . . . disability . . . of his parent." Minn. Stat. Ann. § 269.015(10)(d) (West 1982). While the focus of the reporting statute is on physical injury to the child, the adjudication of dependence may turn on differing notions of "proper care." Because of the possibility of unfettered judicial discretion in making such determinations, some commentators have proposed that all state intervention be limited to cases of demonstrable physical harm. See, e.g., IJA-ABA Joint Comm'n on Juvenile Justice, Standards Relating to Abuse and Neglect (1981). See generally J. Goldstein, A. Freud & A. Solnit, Beyond the Best Interests of the Child (1979).

3. See, e.g., Schleret v. State, 311 N.W.2d 843, 844-45 (Minn. 1981) ("Most cases of felonious assault tend to occur in a single episode, to which there are sometimes witnesses. By contrast, cases that involve" 'battered child syndrome' occur in two or more episodes to which there are seldom any witnesses.") For discussion of these and other evidentiary problems unique to child
ing that a child was injured in a non-accidental manner has presented the state with substantial problems. A child's physical injuries may leave little doubt that she has been beaten, neglected, or sexually molested. In the absence of witnesses, however, the state normally must prove its case by showing that the injuries occurred while the parent had exclusive control of the child. This may be difficult to demonstrate beyond a reasonable doubt.

abuse proceedings, see generally Note, Evidentiary Problems in Criminal Child Abuse Prosecutions, 63 GEO. L.J. 257 (1974) (noting lack of eyewitnesses, inability of child to testify due to age, immaturity, fear, or unwillingness, and urging expanded use of existing evidentiary exceptions such as hearsay and evidence of prior acts of abuse) [hereinafter cited as Evidentiary Problems]. See also Note, Evidence—Child Abuse—Expert Medical Testimony Concerning "Battered Child Syndrome" Held Admissible, 42 FORDHAM L. REV. 935 (1974) (tracing the history of the battered child syndrome diagnosis and its acceptance by courts) [hereinafter cited as Evidence—Child Abuse].


5. For example, in State v. Loebach, 310 N.W.2d 58 (Minn. 1981), the child's injuries, including multiple bruises, rib fractures, and hemorrhaging, were easily identified by the expert witness as the result of physical beating. Id. at 61-62. It would appear that most prosecutions for child abuse result from injuries so serious that the possibility of an accidental cause, typically claimed by the defendant, is easily discounted. See also People v. Jackson, 18 Cal. App. 3d 504, 507, 95 Cal. Rptr. 919, 921 (1971); Sanders v. State, 251 Ga. 70, 303 S.E.2d 13, 15-16. When child neglect or sexual abuse is charged, the physical evidence of the crime may be less clear, although prosecutions likely occur only when the state has a strong case. The problem of proof is most pronounced in civil abuse and neglect proceedings, where judges frequently are called upon to order foster care or other coercive intervention without substantial physical evidence of abuse. See, e.g., MINN. STAT. ANN. § 260.191 (West 1982), requiring a court to intervene upon a finding that the child is neglected or dependent: the former defined in part as "without proper parental care because of the faults or habits of his parent . . . ," MINN. STAT. ANN. § 260.015(10)(b) (West 1982), and the latter defined in part as "without proper parental care because of the emotional, mental . . . disability or . . . immaturity of his parent," MINN. STAT. ANN. § 260.015(6)(d) (West 1982). The broadness of such definitions may lead a family court to enter a finding of dependency or neglect without evidence of any physical harm. E.g., In re Wachlin, 309 Minn. 370, 373-74, 245 N.W.2d 183, 185 (1976) (affirming finding of neglect for handicapped child whose parents had refused to cooperate in efforts to provide speech therapy.)

6. E.g., State v. John, 586 P.2d 410, 411-412 (Utah 1978) (holding that because expert testimony established that injuries were inflicted non-accidentally during a specific period of time, circumstantial evidence that the defendant had exclusive custody during that period was sufficient to sustain a conviction). In other cases, the defendant may not contest the obvious fact of exclusive control. E.g., State v. Loebach, 310 N.W.2d 58, 60 (Minn. 1981). The threshold for sufficient evidence of exclusive control is higher when more adults have contact with the child, and when the timing of the injuries cannot be fixed with certainty. In addition, whenever the defendant is charged with a crime in which premeditation or intent to kill is an element, sufficient circumstantial evidence may be more difficult to obtain. See generally Evidentiary Problems, supra note 3, at 262.

7. For example, in State v. John, 586 P.2d 410 (Utah 1978), the defendant contested his conviction for manslaughter of his 20 month old stepson on grounds that a conviction based on circumstantial evidence must exclude, beyond a reasonable doubt, every other reasonable hypothesis. Id. at 411. The court held that the defendant's undisputed custody of the child during a period of three and one half hours, and the expert witness's testimony that the injuries
Family courts\(^8\) in civil proceedings have responded to this situation by relaxing some rules of evidence and creating a rebuttable presumption of abuse in the face of certain kinds of injuries.\(^9\) In civil child protection proceedings\(^10\) the court determines whether a child is abused or neglected,\(^11\) and if so, determines custody of the child. Because child protection proceedings are designed for the protection of children and impose no criminal penalties on parents,\(^12\) commentators generally approve of these evidentiary changes.\(^13\)
The lack of eyewitness evidence is no less acute in criminal proceedings than in child protection proceedings, and proof that the parent caused the injuries inevitably must come from circumstantial evidence. Accordingly, appellate courts generally refuse to reverse convictions for child homicide, even in the face of arguably prejudicial evidence, where other substantial evidence supports the conviction.

The difficulty of proving child abuse, combined with a perceived willingness of courts to admit otherwise excludable evidence, has led some state prosecutors to attempt to introduce evidence that the defendant parent possesses character traits identifying her with the "battering parent syndrome." Such testimony is introduced to suggest that because this parent fits the psychological and demographic profile of typical abusing parents, she is more likely to be guilty of the particular acts of abuse charged. Some courts have ruled such testimony inadmissible as character evidence. Yet the courts indicate that the battering parent syndrome may be admissible in future cases, given a showing of sufficient scientific accuracy and predictive value.

mitting evidence of instances of past abusive conduct in a criminal proceeding) [hereinafter cited What Protection?].


Since the criminal law is less well-equipped than civil child protection statutes to provide continuing protection of children, the entire case for criminal jurisdiction over abusing parents seems to rest on its deterrent function. The deterrence theory is deprived of some force, however, by the limited possibility of apprehension and prosecution for child abuse falling short of homicide, due to parental control over children. Therefore, many observers argue that criminal prosecution of abusing parents ought to be limited to the most egregious cases of physical harm, primarily homicide. See, e.g., Department of Health and Human Services, Office of Human Development Services, Child Abuse and Neglect Litigation: A Manual for Judges, 142-46 (1981).

15. See supra note 3 and accompanying text.

16. See infra notes 94-96 and accompanying text.

17. Id.

18. Id.

19. See infra notes 26-39 and accompanying text.

20. E.g., Sanders v. State, 251 Ga. 70, 303 S.E.2d 13, 18 (1983) (finding that the profile "could lead a reasonable juror to no other inference than that the state was implying that this parent had a history of violent behavior, and, more important, that this parent fit within the syndrome, and had in fact murdered her baby").


22. See State v. Loebach, 310 N.W.2d at 64 ("We feel this finding is required until further evidence of the scientific accuracy and reliability of syndrome or profile diagnosis can be
the syndrome's conflict with the character evidence rule, its future admissibility will require an explicit exception to that rule. Such an exception, although advancing the strong state policy of eradicating child abuse, would infringe upon the competing interests of defendant parents in a fair adjudication. The important family and societal interests at stake whenever the state attempts to intervene in the parent-child relationship call for scrupulous accuracy in decision-making. An exception to the character evidence rule for the battering parent syndrome would deprive parents of a protection against prejudicial decision-making that the law considers significant enough to grant to all other defendants. These overriding policies mandate that no such exception be created.

This Note proposes that courts refuse to give further consideration to admitting the battering parent syndrome as evidence in both civil and criminal proceedings arising out of child abuse. Part I of the Note describes the syndrome as it appears in the psychological literature. Part II suggests that current judicial attitudes favor the future admissibility of the syndrome, conditioned only on an improved showing of scientific accuracy. Part III demonstrates that regardless of scientific accuracy, the character evidence rule forbids courts from admitting the battering parent syndrome. Part IV argues that the important policies underlying the character evidence rule override the asserted need for an exception to that rule for the battering parent syndrome in child abuse proceedings.

I. THE BATTERING PARENT SYNDROME: DEFINITION

The battering parent syndrome does not appear in the medical literature as a diagnosable mental disorder. Instead, a profile of psychological and demographic characteristics that many experts consider typical of abusing parents emerges from numerous psychiatric

23. See infra notes 85-100 and accompanying text.
24. See infra notes 101-127 and accompanying text. While it may be argued that extensive state intervention interferes with a sort of parental "proprietary" right to discipline children however they see fit, this Note takes the position that the law protects no such right. Rather, parental "rights" are conceived of as necessary correlatives to parental "duties" adequately to care for their children; the rights terminate when the parent's abusive behavior violates those duties. See generally Fraser, The Child and His Parents: A Delicate Balance of Rights, in R. HELPER & C. KEMPE, CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY, 315 (1976); Note, Choosing for Children: Adjudicating Medical Care Disputes Between Parents and the State, 58 N.Y.U. L. REV. 157, 172-73 (1983); 1 W. BLACKSTONE, COMMENTARIES §§ 616-617.
25. See infra notes 74-77 and accompanying text.
26. Unlike the battered child syndrome, which is a recognized medical diagnosis, see, e.g.,
and psychological studies. The major characteristics that compose this profile are generally the same, although the psychiatric and psychological studies which have isolated characteristics have used varied methodologies. Thus, abusing parents seem to have low self esteem, poor impulse control, low empathy, low frustration tolerance, and inadequate knowledge of basic child development and of parenting skills. In addition, they are more likely than non-abusers to manifest

Battered Child Syndrome, supra note 1, the battering parent syndrome does not appear in the medical literature as such, although a number of studies are in agreement about characteristics of abusive parents. See infra notes 27-39. Similarly, the psychiatric profession does not recognize the battering parent syndrome as such. See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (3d ed. 1980) [hereinafter cited as DSM III].

27. Although testimony considered by courts contains no direct disagreement, it is apparent that experts draw their conclusions from personal clinical experience, as well as from the existing psychological literature. Variation exists in the factors which experts cite in their testimony. For example, in Sanders v. State, 251 Ga. 70, 303 S.E.2d 13 (1983) the expert described parents who abuse a child in a life-threatening fashion as parents who were abused as children, and who as adults suffer from chronic environmental stress. The parents' inability to cope with stress causes impulsive or explosive behavior. Id. at 16. In another case, testimony described characteristics of the abusing parent as including role reversal, low empathy, short fuse, low temper, short temper, low boiling point, high blood pressure, strict authoritarianism, uncommunicativeness, low self-esteem, isolation, lack of trust. State v. Loebach, 310 N.W.2d 58, 62-63 (Minn. 1981). The expert in the only other recent case to consider explicitly the battering parent profile indicated that abusing parents:

often are young, somewhat immature, unable to really handle their emotions in a socially acceptable fashion. Frequently they are in a stressful situation, either economic, [or] domestic stresses on them, and subject to sort of flying off when certain added stress is presented. They sometimes have been victims of quite harsh punishment themselves as they were growing up, . . . a pattern which they fall back into.


28. The studies differ significantly in methodology. Several involve clinical observation of abusive parents, performed without the experimental controls necessary to generalize the results to all parents. See, e.g., Steele & Pollock, A Psychiatric Study of Parents Who Abuse Their Children, in HELFER & KEMPE, supra note 24, at 92-93. Clinical studies rely heavily on psychoanalytic concepts which are not universally accepted among mental health professionals. Id. For several profiles of abusing parents drawn by clinicians, see generally D. Gil, supra note 1, at 24-25. Even experimental studies use different definitions of child abuse and neglect or different standards for selecting abusing and "normal" parents. See Berger I, supra note 2, at 55; D. Gil, supra note 1, at 35, 134. Some studies assess parents' attitudes or personality through parents' responses to questions. See, e.g., Milner & Wimberly, Prediction and Explanation of Child Abuse, 36 CLINICAL PSYCHOLOGY 875 (1980). This technique has been criticized by other researchers. See, e.g., Berger, The Child Abusing Family (Pt II), 8 AM. J. FAM. THERAPY, Winter 1980, at 52, 63-65 [hereinafter cited as Berger II].

29. E.g., Friedrich & Wheeler, The Abusing Parent Revisited: A Decade of Psychological Research, 170 J. NERVOUS & MENTAL DISEASE 577, 583 (1982) (summarizing the psychological literature on abusive parents since 1972) [hereinafter cited as Friedrich]; Berger, I, supra note 2, at 58; Berger II, supra note 26, at 63 (noting that this characteristic has been found by the more methodologically sound studies).

30. E.g., Berger I, supra note 2, at 58; Friedrich, supra note 29, at 583, 585.

31. E.g., Berger II, supra note 28, at 63; Friedrich, supra note 29, at 583.

32. E.g., Friedrich, supra note 29, at 582, 583, 585 (calling attention to a "stress-heightening attributional process," through which abusive parents are more easily irritated by child behaviors than non-abusers); B. STEELE, WORKING WITH ABUSIVE PARENTS FROM A PSYCHIATRIC POINT OF VIEW, 26-27 (1975).

33. E.g., Twentyman & Plotkin, Unrealistic Expectations of Parents Who Maltreat Their
diagnosable psychopathology, or other serious emotional problems.34

Apart from such personality characteristics, abusing parents in the reported studies were themselves almost universally abused or neglected as children.35 As adults, they tend to social isolation,36 and are likely to be under environmental stress,37 often belonging to lower socioeconomic groups.38 Finally, clinical studies agree that abusing parents, themselves emotionally starved for acceptance and affection, frequently reverse roles with their children, asking from them maturity and support that the children are incapable of providing.39

This profile, with minor variations, has been introduced as evidence in child abuse proceedings. Every court to consider the profile so far has rejected it. The uncertainty of these rejections, however, portends future admissibility.

II. CURRENT JUDICIAL ATTITUDES TOWARDS THE BATTERING PARENT SYNDROME: THE POSSIBILITY OF FUTURE ADMISSIBILITY

A profile of the typical abusing parent could be of great value to

Children, 38 J. CLINICAL PSYCHOLOGY 497, 501 (1982). Earlier studies were inconclusive on whether abusive parents actually had poorer knowledge of child development and parenting skills. See, e.g., Friedrich, supra note 29 at 579, 585. Abusing parents were thought to be more likely to have unrealistically high expectations for the physical and mental ages of their children. E.g., Steele & Pollock, supra note 28, at 96, (utilizing clinical observation of abusing parents). But see Kravitz and Driscoll, Expectations for Childhood Development among Child-Abusing and Non-Abusing Parents, 53 AM. J. ORTHOPSYCHIATRY 336 (1983) (finding no differences in expectation between the two groups). Twentyman & Plotkin found that abusive parents were more likely both to over and underestimate their childrens' developmental capacities, suggesting that inadequate parental knowledge may be a better predictor of abusive behavior than high expectations, supra at 501-03.

34. E.g., Berger I, supra note 2 at 57; Steele & Pollock, supra note 28 at 94-97.
35. E.g., Berger I, supra note 2, at 59-61; Friedrich, supra note 29, at 577-78; Jayartne, Child Abusers as Parents and Children: A Review, 22 SOCIAL WORK, 5 (1977); Steele & Pollock, supra note 28 at 97-98. While this cross-generational hypothesis that child abuse repeats itself has received much empirical support, most of the reviews note that disagreements over the definition of child abuse and other methodological concerns make such results suspect. Such results are also difficult to explain because of the absence of research support for a causal connection between childhood experience and adult behavior. Friedrich, supra note 29, at 579. Nevertheless, this characteristic is probably the best accepted of all in the literature on characteristics of abusing parents.
36. E.g., Friedrich, supra note 29, at 582-83.
37. E.g., Friedrich, supra note 29, at 583-85; Conger, Burgess & Barrett, Child Abuse Related to Life Change and Perceptions of Illness, 28 FAMILY COORDINATOR, 73 (1979); Justice & Duncan, Life Crisis as a Precursor to Child Abuse, 91 PUBLIC HEALTH 110 (1976).
38. E.g., D. GIL, supra note 1, at 117; Serrano, Zuelzer, Howe & Reposas, Ecology of Abusive and Nonabusive Families, 2 ADVANCES FAMILY PSYCHIATRY 183 (1980). But see Steele & Pollock, supra note 28 at 92-93 (noting that abusers in their study came from all socioeconomic classes, but acknowledging that their haphazard selection process prevents this finding from rising to a level of reliable proof); Berger II, supra note 28, at 60-61 (noting that environmental stress frequently is confounded with low socioeconomic status in the studies, rendering unwarranted any conclusion regarding causation).
39. E.g., Steele & Pollock, supra note 28 at 94-95; Kempe & Kempe, Assessing Family
the state in a child abuse proceeding. For example, following expert presentation of the profile, a witness familiar with the defendant could testify that the defendant possesses one or more of the characteristics identified by the expert. Alternatively, the expert could offer an opinion that the defendant "fit" the profile. In either event, the state would gain the significant advantage of suggesting that because of her psychological make-up, this defendant shows a statistical likelihood of being a child abuser.

Courts justifiably have been troubled by the implications of permitting use of the battering parent syndrome to prove child abuse, and to date, uniformly have forbidden its admission. Several reasons have been advanced for rejecting the syndrome, including general irrelevancy and likelihood of prejudice outweighing probative value. A plurality of opinions, however, exclude the battering parent syndrome for its conflict with the explicit dictates of the character evidence rule. This common law rule, now adopted in the Federal Rules of Evidence, pro-


41. E.g., State v. Loebach, 310 N.W.2d 58, 62 (Minn. 1981) (former case worker testifies that defendant was abused as a child and has a short temper). In one case, no corroborating witnesses were called, but the court held that it was error (though not reversible error) to permit the prosecutor to argue to the jury that the defendant fit the environmental stress component of the syndrome. Duley v. State, 56 Md. App. 275, 467 A.2d 776, 779-80 (1983).

42. The studies described supra notes 26-39 compare the psychological profiles of known child abusers with non-abusing parents. The characteristics reported in those studies have been shown reliably to distinguish between those two groups.

However, the mental health experts disagree about whether instruments developed through studies of known abusers can be reliably adapted for predictive use. One study reported very poor results from such an attempt. Milner & Ayoub, Evaluation of "At Risk" Parents Using the Child Abuse Potential Inventory, 36 J. CLINICAL PSYCHOLOGY 945, 947 (1980) (using a diagnostic instrument that had discriminated reliably between known abusers and non-abusers in earlier research, the authors found that the instrument successfully classified only 45% of mothers judged "at-risk" by clinical observers). These results may be explained in part by the choice of "at risk" criteria, which included virtually every psychological characteristic found linked to child abuse in past research. Id. at 946. Different results might have been obtained with a smaller number of generally accepted characteristics of abusing parents.

This Note assumes that the available psychological research, while not conclusive, provides sufficient information to permit a mental health professional reliably to identify a parent likely to neglect or abuse. This identification would be made on the basis of some combination of clinical observation, testing, and extrinsic evidence about life history, life circumstances (e.g., marital and socioeconomic status) and behavior. Whether this type of identification is sufficiently accurate to be admitted by courts is considered infra notes 55-67 and accompanying text.

43. Duley v. State, 56 Md. App. 275, 467 A.2d 776, 780 (1983) (arguing that similarity to a psychological profile simply has no tendency to show the defendant's guilt for a particular crime).


45. Sanders v. State, 251 Ga. 70, 303 S.E.2d 13, 15 (1983); State v. Loebach, 310 N.W.2d
hibits the state from raising the issue of the defendant's character to prove that she "acted in conformity therewith on a particular occasion." Courts employing this analysis conclude that the battering parent syndrome could have no purpose or effect except to imply to the jury that the defendant possessed a propensity for child abuse, and therefore is more likely to have committed the particular abuse charged.

Despite this apparent conflict with the explicit language of the character evidence rule, the courts have refused to foreclose future admissibility of the battering parent syndrome. Indeed, the courts appear to be most troubled not by the character evidence rule's concern with unfair prejudice to the defendant, but by their uncertainty about the scientific accuracy of the syndrome. A greater showing of scientific accuracy and reliability of the syndrome, courts imply, will result in its acceptance in future cases. The opinions relying on the character evidence rule seem almost to invite more extensive efforts by prosecutors to establish the scientific accuracy of the syndrome.

Current judicial analysis of the evidentiary inadequacies of the battering parent syndrome thus provides at best uneasy protection for parents charged with child abuse. This refusal to shut the door to the battering parent syndrome appears especially troubling in light of courts' traditional liberality in ruling on admissibility of evidence in child abuse proceedings. Likewise, in child protection proceedings, similar evidence on enumerated characteristics of a parent's mental state currently is...

58, 64 (Minn. 1981). Loebach distinguished two earlier Minnesota cases, State v. Loss, 295 Minn. 271, 204 N.W.2d 404 (1973) (permitting evidence that defendant fit the battering parent syndrome when such evidence was offered without objection), and State v. Goblirsch, 309 Minn. 401, 246 N.W.2d 12 (1976) (holding that admission of such evidence, not indispensable to the state's case, did not constitute reversible error). Despite their statements that the battering parent syndrome constitutes inadmissible character evidence, none of the courts considering such evidence (Duley, Sanders, Loebach, and Goblirsch) have found reversible error.


47. Sanders v. State, 251 Ga. 70, 303 S.E. 2d 13, 18 (1983) (finding that the profile "could lead a reasonable juror to no other inference than that the State was implying that this parent had a history of violent behavior, and, more important, that this parent fit within the syndrome, and had in fact murdered her baby"); State v. Loebach, 310 N.W.2d 58, 63 (Minn. 1982) ("The obvious purpose for the introduction of the . . . character evidence was to demonstrate that appellant fit within the 'battering parent' profile"); cf. State v. Maule, 35 Wash. App. 287, 667 P.2d 96, 99 (1983). While basing its holding on the likelihood that testimony on the characteristics of statutory rape offenders would be more prejudicial than probative, the court explained its reasoning in terms of propensity evidence concerns. "Such evidence invites a jury to conclude that because the defendant has been identified . . . as a member of a group having a higher incidence of child sexual abuse, it is more likely that the defendant committed the crime."

48. See infra notes 74-77 and accompanying text.

49. See supra note 22.

50. E.g., Sanders v. State, 251 Ga. 70, 303 S.E.2d 13, 16 n.3, 18 n.7 (noting specifically that the issue of scientific accuracy was not decided because no attempt had been made to establish accuracy).

51. See infra notes 93-96 and accompanying text.
admissible in the adjudication phase. Exclusion of the battering parent syndrome flows against this tide. Such exclusion will continue only if courts express more clearly and with greater certainty the reasons for the exclusion. This Note suggests a framework for continued exclusion, arguing that both existing rules of evidence and overriding policy considerations preclude admissibility.

III. INADMISSIBILITY OF THE BATTERING PARENT SYNDROME UNDER EXISTING RULES OF EVIDENCE

Admission of testimony concerning the battering parent syndrome presents at least two evidentiary problems; the quality of the scientific support for the syndrome and the conflict with the character evidence rule. Part A of this Section measures the syndrome's scientific accuracy against the general requirements for relevancy of expert testimony, and concludes that the unique nature of the psychological profile prevents the syndrome from qualifying as relevant evidence. Part B argues that even if the syndrome is thought to be relevant, the character evidence rule still prohibits its admissibility.

A. Relevancy

The modern trend in determining whether evidence is relevant, and therefore admissible, is to set a very low threshold. The Federal Rules define as relevant evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."  

52. E.g., MINN. STAT. ANN. §§ 260.015(6) (10) (West 1982) (defining "Dependent Child" with regard to the "emotional, mental, or physical disability, or state of immaturity of his parent ..." (6); and "Neglected Child" as a child "without proper parental care because of the faults or habits of his parent ..." (10)). While a broad reading of these mental characteristics could permit evidence of the battering parent syndrome as an "emotional" or "mental disability," it should be clear that the syndrome is not itself a disability, but rather a description of several mental traits, only some of which are themselves disabilities. See supra notes 26-39 and accompanying text. While most states permit court-ordered psychological examination of a parent in evidence at the dispositional phase of a child protection proceeding, some states permit such evidence at the adjudicatory phase. See Fraser, supra note 1, at 669-70 (1978). A forced examination is tantamount to forcing a parent to testify against himself. Id. at 670. While this may present no constitutional problems, since the proceedings are not criminal, loss of custody of a child surely has a punitive dimension. Id. at 670 n.183. See also infra notes 114-117 and accompanying text. To the extent that any such psychological testimony suggests a propensity for abuse or neglect it necessarily relies on existing battering parent profiles.

53. E.g., FED. R. EVID. 402 ("Evidence which is not relevant is not admissible"); MINN. STAT. ANN. RULE 402 (West 1980); GA. CODE ANN. § 38-201 (5744) (1981) ("[E]vidence must relate to the questions being tried by the jury and bear upon them either directly or indirectly. Irrelevant matter should be excluded.").

54. FED. R. EVID. 401.
If possession of a number of characteristics shared by most abusing parents makes it more probable that the possessor is herself an abusing parent, the battering parent syndrome would satisfy this threshold requirement.

The answer to this inquiry depends upon the scientific community’s acceptance of the battering parent syndrome. The decision to admit any expert testimony is made by the trial judge, based on evidence that the testimony reflects a position which is “generally accepted” in the relevant scientific community. Appellate courts have limited their review of decisions to admit or exclude expert testimony to this requirement of general acceptance. As illustrated in Section I of this Note, researchers have accumulated sufficient evidence to show broad agreement on a number of characteristics composing the battering parent syndrome.

Even if it meets the “general acceptance” criteria of the expert testimony requirement, however, the battering parent syndrome will still be inadmissible unless those agreed-upon characteristics tend meaningfully to show that this particular defendant committed the acts charged. In fact, the syndrome does no more than establish that when known child abusers are compared with non-abusing parents, members of the former group more frequently exhibit certain psychological traits and demographic characteristics than members of the latter. Compared with the general population of parents, then, parents exhibiting the battering parent syndrome are statistically more likely to be child abusers. The question is whether such a statistical correlation renders the parent’s guilt “more probable . . . than it would be without the evidence.”

55. E.g., Fed. R. Evid. 702 (“If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . may testify thereto . . .’’); U.S. v. Gavic, 520 F.2d 1346, 1353 (8th Cir. 1975) (“[A]dmissibility of expert testimony lies within the sound discretion of the trial judge.’’); Duley v. State, 56 Md. App. 275, 467 A.2d 776, 780 (1983).

56. In Sanders, the court explicitly noted that the clinical psychologist’s testimony about the features of the battering parent syndrome lacked a showing of “scientific validity.” Sanders v. State, 251 Ga. 70, 303 S.E.2d 13, 16 n.3 (1983). The court seems to be referring to the common law requirement that expert testimony may be admitted only if the scientific principle has “gained general acceptance in the particular field in which it belongs.” Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). Frye continues to be cited as good law, e.g., State v. Collins, 296 Md. 670, 464 A.2d 1028, 1033-34 (1983) (holding that the use of hypnosis to refresh witnesses' memories lacks reliability judged by the standards of the relevant scientific community, and noting that Frye still constitutes the majority rule); United States v. Lewellyn, 723 F.2d 615, 619 (8th Cir. 1983) (holding that defendant failed to make a prima facie showing of insanity because he failed “to demonstrate that there is general acceptance in the fields of psychiatry and psychology of the principle that some pathological gamblers lack substantial capacity to conform their conduct to the requirements of laws . . .’’). The language of the new federal rule appears broader, permitting experts to base opinion upon facts or data “reasonably relied upon by experts in the particular field.” Fed. R. Evid. 703.

57. See supra notes 53-54 and accompanying text.

58. See supra note 42.
In a very crude sense, the answer to this inquiry might appear to be yes. The law frequently permits proof of causation by a showing of statistical likelihood, as when an expert testifies that a construction worker has contracted cancer from working with asbestos. The defendant is free to propose other explanations, or to attack the statistical foundation of the conclusion, but the evidence is admissible because it makes the theory of causation more probable than it would be without the doctor’s testimony. 59

In contrast, it is not clear that the correlation between psychological characteristics and abuse represented by the battering parent syndrome actually tends to show a propensity for abuse in this parent. The law traditionally has taken a skeptical view of the value of psychological profile evidence, admitting it for only limited purposes. 60 Some commentators suggest that the psychologist’s ability to predict behavior accurately on the basis of even accepted diagnoses is so primitive that all psychological testimony should be excluded from courts. Accordingly, absent a statutory mandate, 62 courts have limited the admission of testimony on the mental state of a party largely to child custody

59. Such evidence, however, may not be sufficient to support a finding of liability. See generally R. LEMPERT & S. SALTBURG, A MODERN APPROACH TO EVIDENCE, 152-54 (2d ed. 1982) [hereinafter cited as LEMPERT & SALTBURG]. Evidence is not excludable on relevancy grounds merely because standing alone it would be insufficient to support a verdict. If the state’s case is thought of as a “wall,” each piece of evidence is a “brick” necessary to the construction of the wall. Id. at 151-52.


62. For example, some state statutes require an estimation of the “dangerousness” of a party in a proceeding for civil commitment or criminal sentencing. See generally Mullen & Reinehr, Predicting Dangerousness of Maximum Security Forensic Mental Patients, 10 J. PSYCHIATRY L. 223, 228 (1982) (reporting poor correlations of both psychological tests and demographic data
disputes and criminal defenses. This restricted admission of testimony on mental state reflects the law’s compromise with the necessity of obtaining some knowledge, however imperfect, in order to determine the best placement for the child or the mens rea of an accused. The necessity that moves courts to depart from the general practice of precluding psychological testimony is absent in situations in which the court might be asked to admit testimony about the battering parent syndrome. Psychological testimony is at its strongest when used to prove or disprove insanity, since it is limited to showing merely that the defendant possesses certain thinking processes. A court cannot determine the culpability of a criminal defendant claiming insanity without hearing opinions on whether the defendant’s psychological profile fits that generally associated with a mental disorder. In contrast, a court need not examine the psychological characteristics of a parent to make the

with expert estimates of “dangerousness”); Steadman, Some Evidence on the Inadequacy of the Concept and Determination of Dangerousness in Law and Psychiatry, 1 J. Psychiatry L. 409, 421 (1973) (concluding that the N.Y. statute had led to psychiatric conclusions and recommendations based on the charges levied rather than on any additional evidence of dangerous behavior). While the criticisms levelled by both articles may be justified, they are inapplicable to the use of the battering parent syndrome. First, sentencing of criminals occurs only after conviction, and thus bears analogy to the dispositional phase of a child protection proceeding. At that point, whatever predictions of future behavior are available, even if only minimally reliable, will support the important policy of protecting the child (or the public). Second, the use of psychiatric testimony in both sentencing of a criminal and placement of an abused child does not conflict with the prohibitions of the character evidence rule, because the rule does not apply when character is an “essential element” of the issue before the court. FED. R. EVID. 404(a), advisory committee note.

63. Once a child has been adjudicated “abused” or “neglected,” the court has no alternative but to consider which parent, if either, should have custody. Even if most child custody statutes did not mandate consideration of parental fitness, see supra note 10, it is difficult to imagine how a judge would determine which placement would be in the “best interests” of the child without it. See, e.g., MINN. STAT. ANN §§ 257.025, 260.011 (West, 1978) (requiring the family court to order placement of children in accord with “best interests” or “spiritual [and] emotional . . . welfare,” in any custody proceeding or abuse and neglect disposition). Nonetheless, with a few exceptions, states have carefully limited the use of a psychological study of the parent’s propensity for future abuse to the disposition of a custody dispute, when the issue of parental fitness is unavoidably before the court. See Fraser, supra note 1, at 669-70.

factual determination of whether she did, or did not, abuse her child.\textsuperscript{65} Possession of the psychological characteristics of the battering parent syndrome is relevant only insofar as it suggests the parent's propensity to behave in an abusive way, a conclusion that must rest on psychology's predictive rather than descriptive value.\textsuperscript{66}

Courts take the position that the uncertainty that characterizes psychology's ability to predict behavior warrants concluding that psychological profiles do not make the existence of the "fact" of behavior "more probable ... than it would be without the evidence."\textsuperscript{67} Absent an overriding necessity such as the determination of insanity, courts should follow this general pattern by excluding the battering parent syndrome on this ground of irrelevancy.

\textit{B. Character Evidence}

Even if courts conclude that the general scientific acceptance of its components renders the statistical likelihood suggested by the battering parent syndrome sufficiently relevant to warrant admissibility, the syndrome must nevertheless be excluded because of its conflict with the character evidence rule.\textsuperscript{68}

The traditional and modern rules of evidence squarely support the conclusion that the battering parent syndrome, as established by expert and corroborative testimony, constitutes character evidence.\textsuperscript{69} Wigmore described character as "a person's disposition — i.e. a trait, 65. With limited statutory exceptions, such an inquiry is precluded until the dispositional phase of a child protection proceeding. See infra notes 120-122 and accompanying text. 66. Cf. supra notes 42, 61. Child custody determinations rely on exactly this predictive function, but are justified in such reliance by a statutory scheme that requires an initial determination that abuse has occurred, before attempting to predict the best placement for the child. E.g. Minn. Stat. Ann. § 260.191 (West 1980). Once the fact of abuse has been determined, the law has a strong interest in securing a safe placement for the child. To this end, courts are empowered to consider otherwise inadmissible information at the dispositional hearing, since the need for some means of predicting outweighs the questionable quality of such predictions. E.g., Minn. Stat. Ann. § 260.181(2) (West 1980) (permitting court to consider "any other information deemed material"). 67. Fed. R. Evid. 401. 68. See supra note 21. 69. Id. None of the reported cases have considered whether an expert would be permitted to examine the defendant and make a "diagnosis" that she was afflicted with the battering parent syndrome, or otherwise offer an opinion that this parent has a propensity to abuse. If the American Psychiatric Association were to determine that the battering parent syndrome were a medically diagnosable condition, and to add the syndrome to DSM-III, supra note 26, courts would be presented with a very different question. At that point, the expert's opinion would resemble a typical psychiatric opinion on mental capacity. Nevertheless, if offered for the purpose of showing that because her mental condition included a propensity to abuse, the defendant had in fact committed the abuse charged, the character evidence objection would still exist. While recognizing that a "diagnosis" of battering parent syndrome would present a much clearer conflict between the character evidence rule and the judge's normal discretion to admit expert testimony,
or group of traits, or the sum of his traits." Such evidence may not be used to prove liability for a particular act by suggesting the defendant's general propensity to commit such an act. The battering parent syndrome fits this definition of character evidence. When the state attempts to show that the parent resembles the expert witness's portrait of character traits by calling lay witnesses, the testimony of such witnesses always describes particular traits. For example, in one case, the state called witnesses who testified that as an adolescent, the defendant had exhibited poor control of his temper, social isolation and low tolerance for frustration, three of the characteristics of the battering parent profile. Without testimony that the defendant possesses those traits that comprise the syndrome, testimony on the traits themselves would be irrelevant. Since it is only by suggesting the impermissible inference of guilt by propensity that the syndrome has any relevance, it plainly conflicts with the character evidence rule.

Evidence of propensity is relevant to the likelihood of the defendant's guilt or liability for particular acts, as subsequent courts, Wigmore, and other commentators universally acknowledge. They also agree, however, that the possibility of a jury finding guilt or liability based on the belief that the defendant is a "bad" or "undesirable" person, rather than on proof that she committed the particular acts charged, requires a per se exclusion of all such evidence. This con-

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see supra note 53, this Note assumes that such a "diagnosis" standing alone should likewise be excluded as "Evidence of a person's character or a trait of his character." FED. R. EVID. 404(a).

70. 1A J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 52 (Tillers rev. 1983) [hereinafter cited as WIGMORE].

71. E.g., FED. R. EVID. 404(a).


73. See supra notes 30, 32, 36.

74. Evidence of propensity would not necessarily be sufficient to support a finding of guilt or liability. See supra note 59.

75. See, e.g., WIGMORE, supra note 70, §§ 55, 57; MCCORMICK supra note 60, at §§ 188, 190.

The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson v. United States 335 U.S. 469, 475-76 (1948). But see Lempert and Saltzburg, who argue that guilty defendants with past records are likely to plea bargain to avoid trial, due to the variety of exceptions to the character evidence rule permitted for past bad acts; that defendants with past records who do go to trial are more likely to be innocent; and that police work is organized so that persons mistakenly charged are likely to have criminal records. LEMPERT & SALTZBURG, supra note 59, at 217 n.45, 237. This argument has some force in the child abuse area, since abusive parents, while unlikely to have prior convictions for child abuse crimes (if they still have custody of children), may have past records with child welfare departments which may be admissible to show motive, intent, modus operandi, or for other non-propensity purposes. See, e.g., MINN. STAT. ANN. § 404(b) (West 1978). See infra note 94. For example, if a jury were to find a defendant guilty of child abuse because of his reputation as an alcoholic,
cern for the danger of unfair prejudice provides the theoretical foundation for the character evidence rule. Prejudice has been defined as "harm which results when evidence is inappropriately influential because it appeals to the biases or emotions of the fact finder." Thus, evidence of past episodes of child abuse is logically relevant to the issue of whether the defendant has been abusive on this occasion. Yet such evidence is excluded because the fact finder is likely to conclude that one abuser is like another, and to find liability regardless of whether the evidence warrants such a determination this time.

The possibility of such prejudice is extremely high when a parent is accused of causing harm to her own child, due to universal revulsion at the heinous nature of the offense. Instead of finding guilt based on their feeling that a person with the defendant's other bad habits is also a likely child abuser, the jury might reach a conclusion of guilt from the defendant's apparent similarity to other abusing parents. In both cases, the character evidence rule operates to prevent such a conclusion of guilt based on the defendant's alleged propensity for bad behavior.

The character evidence rule seems unequivocally to exclude the battering parent syndrome from evidence. Nonetheless, the courts appear to rest exclusion only weakly on that foundation, by intimating that a showing of its scientific accuracy might render the syndrome admissible. Since they cannot mean that scientifically accurate expert testimony is exempted from the character evidence rule, the courts must be saying that if convinced of the ability of the battering parent syndrome to identify accurately abusing parents, they would consider fashioning an exception to the rule.

The immediate problem presented by this approach is that it con-

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76. LEMPERT & SALTZBURG, supra note 59, at 156.
77. Another statement of the issue is that a jury is less likely to feel regret at mistakenly convicting an apparently unsavory defendant, so that they will scrutinize evidence far less carefully for an "evil" than a "good" person. Lempert and Saltzburg describe this tendency in terms of the mathematical model of a "regret matrix." LEMPERT & SALTZBURG, supra note 59, at 162-65.
78. The same danger may attach to the parent of a child whose status is being adjudicated by a judge in a child protection proceeding. See infra notes 114-117 and accompanying text.
79. See supra note 22.
80. Despite the logical relevance of propensity evidence, the law classifies it as legally irrelevant. In the federal rules, this is accomplished by the inclusion of the character evidence rule in the relevancy chapter. FED. R. EVID. 404. The common law was more likely to state irrelevance directly. See, e.g., GA. CODE ANN. § 38-202 (1981 Rev.) ("The general character of the parties, and especially their conduct in other transactions, are irrelevant matter . . ."). See generally LEMPERT & SALTZBURG, supra note 59, at 152-55. Thus, Rule 404 and the other relevancy rules control admissibility of all evidence, including testimony by experts. E.g., FED. R. EVID. 702.
81. Otherwise, the language, "We feel this finding is required until further evidence of the
flicts with the fundamental purpose of the character evidence rule, which is concerned not with accuracy, but with prejudice. Increased scientific accuracy does not lessen the likelihood that a jury will convict based on an impermissible inference that because of her propensity, the defendant must have committed the act charged. In effect, an exception to the character evidence rule for the battering parent syndrome would determine that parents of allegedly abused children are not entitled to the same protection from jury prejudice as the law affords other defendants. Assuming such a determination to be permissible, it would give undue weight to the public policy of preventing child abuse at the expense of the rights of defendants.

IV. COMPETING POLICIES: ANOTHER DETERRENT TO CHILD ABUSE OR THE PROTECTION OF FAIR ADJUDICATIONS?

Policy considerations supporting the interest of parents in an opportunity to defend adequately against a charge of child abuse argue against an exception to the character evidence rule for the battering parent syndrome. Part A of this final section examines the strong public policy in favor of eradicating child abuse in the context of the several exceptions to the traditional rules of evidence that the law has developed in support of that policy. Part B argues that notwithstanding this admittedly powerful interest, permitting the battering parent syndrome to override the character evidence rule in criminal cases would conflict with the defendant parent’s right to an adjudication of individual guilt. This part further suggests that the quasi-criminal character of civil child abuse adjudications likewise calls for exclusion of the battering parent syndrome, and concludes that even in the absence of any due process “right,” the danger of a prejudicial decision should be sufficient to bar the syndrome from evidence.

scientific accuracy and reliability of syndrome or profile diagnoses can be established,” would be meaningless. State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981). See also Sanders v. State, 251 Ga. 70, 302 S.E.2d 13, 16 n.3, 17 n.4, 18 n.7 (1983); Duley v. State, 56 Md. App. 275, 279, 467 A.2d 776, 780 (1983).

82. It may be argued, especially in jurisdictions with codified rules of evidence, that any judge-made exception to the character evidence rule would be usurpation of a legislative function. This argument fails to account for other judge-made evidence exceptions, such as the adoption from tort law of a rebuttable presumption of abuse in the presence of certain injuries. See supra note 9; see also Principles, supra note 4. In addition, the activity of legislatures in the area might imply either a desire to provide comprehensive statutory control over evidence in child abuse cases, or legislative intent to facilitate prosecution of such cases. See infra. notes 120-122 and accompanying text.

83. See infra notes 85-96 and accompanying text.

84. See supra note 24 and accompanying text. See infra notes 101-113 and accompanying text.
A. The Compelling Nature of the Public Policy of Eradicating Child Abuse

It seems almost unnecessary to argue that American society supports a strong public policy aimed at the prevention of child abuse, even at the cost of parental "rights" and family "privacy." The law traditionally has declined to intervene in the private realm of family affairs, and even protects many personal decisions about family life from the paternalistic hand of the state's police power. The cases of the United States Supreme Court abound with statements supporting the rights of parents to raise their children free from state regulation, and our

85. For example, other than prescribing the rules of who may marry and under what circumstances parties may end their marriage, e.g., Uniform Marriage And Divorce Act, §§ 201, 203, 204, 205, 207, 208 and commissioner's prefatory note (1970), the law has abstained from tinkering with the terms of the marriage contract; accordingly courts generally have declined to enforce ante-nuptial agreements between the parties. E.g., Kilgrow v. Kilgrow, 107 So. 2d 885 (Ala. 1959) (refusing to enforce such an agreement in parental dispute about where a child should be educated). But see Del Vecchio v. Del Vecchio, 143 So. 2d 17 (Fla. 1962) (enforcing a reasonable ante-nuptial agreement, made after full disclosure and limited to financial matters). In addition, the common law declined to punish the husband for the "moderate correction" of his wife, though concededly such conduct would have constituted a battery between non-family members. E.g., State v. Rhodes, 61 N.C. 349, 251 Terr. 454, 456 (1868) (concluding that "family government is recognized by law as being as complete itself as the State government is in itself . . . and that we will not interfere or attempt to control it"). The law may seem inconsistent in prohibiting the parties from exercising family autonomy in designing the terms of their marriage agreement, yet recognizing "family autonomy" as a general principle excluding the law from family matters. This seeming inconsistency may be explained by the legal fiction that family harmony will best be preserved by removing the possibility of any litigation over most family disagreements.

86. Many of these principles may be summarized under the right of privacy, which prohibits the state from most regulation of "personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' . . . .", Roe v. Wade, 410 U.S. 113, 152 (1973). While the parameters of the right of privacy are unclear, the Supreme Court has prohibited the states from: (1) making illegal the sale and use of contraceptives, Griswold v. Connecticut, 381 U.S. 479, 484-85 (1964); Eisenstadt v. Baird, 405 U.S. 438, 453-54 (1971); (2) requiring that all children attend public schools, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1924) (permitting parents to send their children to Catholic schools); Wisconsin v. Yoder, 406 U.S. 205, 234-35 (1971) (upholding the right of Amish parents, on religious and cultural grounds, to withdraw their children from public schools prior to the minimum dropout age); and (3) zoning a neighborhood to prohibit an extended family from living together, Moore v. East Cleveland, 431 U.S. 494, 499-500 (1976). See generally, Note, Fornication, Cohabitation and the Constitution, or Lochner Redivivus, 77 Mich. L. Rev. 252 (1978) (searching for the boundaries of the right of privacy).

87. E.g., Wisconsin v. Yoder, 406 U.S. 205, 232-233 (1971) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. . . . [Pierce] stands as a charter of the rights of parents to direct the religious upbringing of their children."); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1924) (upholding "the liberty of parents and guardians to direct the upbringing and education of children under their control . . . . The child is not the mere creature of the State."); Meyer v. Nebraska, 262 U.S. 390, 400 ("corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life"); Prince v. Massachusetts, 321 U.S. 158, 166 (1943) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder . . . . [respecting] the private realm of family life which
society generally accepts the physical disciplining of children as a corollary freedom. 88

Against this background, the scope of intervention into the family authorized, 89 indeed required, 90 by state child protection statutes stands in bright contrast. The vague standards for such intervention seem even more remarkable. 91 The unique defenselessness of abused or neglected children, whose presumed protectors are also perpetrators of harm, has led even the federal government to appropriate funds for research and the improvement of child protective services. 92 State legislatures and courts have also attacked the problem by relaxing the rules of evidence, lightening the state’s burden of proof, especially in civil, but also in criminal, proceedings. 93

More important as expressions of judicial policy, however, have been the courts’ extremely liberal interpretations of the existing exceptions to the character evidence rule in child abuse prosecutions. Citing the rule that evidence implicating character may be admitted to prove issues other than propensity, courts have consistently refused to reverse convictions where the small probative value of character evidence to show, for example, intent, seemed substantially outweighed by the possibil-

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88. See, e.g., D. Gil, supra note 1, at 8-17, 134-37.
89. See supra note 10.
90. See supra note 1.
91. See, e.g., MINN. STAT. ANN. § 260.01 I (West 1978); see also supra note 10.
93. In the adjudication (fact-finding) phase of civil abuse and neglect proceedings, the New York legislature has taken the lead in lightening the state’s burden via the evidence provisions of the New York Family Court Act of 1962 and its amendments. N.Y. FAM. CT. ACT, § 1046 (McKinney 1983). The act makes admissible past acts of parental abuse involving different children, id., § 1046(a)(i), and any mandatorily-reported past incident of abuse by the parent on file with the state’s central registry, id. § 1046(a)(v), although both of these provisions would otherwise conflict with the character evidence rule. Indeed, the practice commentary to the Act states that character and background evidence is an “inextricable element in the proof” of a child abuse adjudication. Id. § 1044 Practice Commentary. Hearsay statements of the child are also permitted, id. § 1046(a)(vi). The Act also codifies a rebuttable presumption of abuse on the basis of physical injuries such as “would not ordinarily be sustained or exist except by reason of the acts or omissions of the parent,” id. § 1046(a)(ii), and makes evidence of drug or alcohol abuse by the parent prima facie evidence of neglect, id. § 1046(a)(iii).

In the absence of codification, courts in other states have adopted one or more of the above approaches, especially permitting the physical injuries described by the battered child syndrome to create a prima facie case of abuse which the parent must then rebut. E.g., In Re Doege, 308 Minn. 104, 240 N.W.2d 562 (1976); Higgins v. Dallas County Child Welfare Unit, 544 S.W.2d 745 (Tex. Civ. App. 1976). In addition, courts have liberally construed the parental unfitness aspects of some child neglect definitions, e.g., In re Wachlin’s 245 N.W.2d 183 (Minn. 1976) (finding statutory “neglect” based on the parent’s failure to cooperate to provide her child with speech therapy); MINN. STAT. ANN. § 260.015(10) (West 1982).

In homicide prosecutions arising out of parental abuse, courts have liberally construed rules
ity that the jury would use the evidence as proof of propensity. 94 In one case, for instance, the court permitted the prosecution to show that the defendant had previously burned and beaten his child, resting admissibility of the past acts of abuse on the grounds that they showed the defendants "intent" and "design" to commit manslaughter of his infant son. 95 The defense claimed that the danger of a jury reacting prejudicially to such evidence and convicting on the basis of their emotional disgust with the defendant substantially outweighed any probative value of the evidence on the permissible issue of intent. The court dismissed this objection, citing seriatum the 404(b) exceptions to the character evidence rule as authority for the proposition that the previous acts were admissible to show the defendant's "predisposition" to commit the crime charged. 96

Strong judicial language explicitly disallowing the battering parent syndrome must thus be read in the light of this more general judicial policy. Despite their current exclusion of the battering parent syndrome, courts seem generally to view the concern for arresting child abuse as more compelling than the prohibitions of the character evidence rule. 97 True, so far this policy has been implemented largely by discretionary requiring that convictions based upon entirely circumstantial evidence must exclude "every other reasonable hypothesis." See supra note 8.

94. While character evidence is inadmissible to prove propensity, the law traditionally has permitted evidence of a party's past bad acts to prove matters other than propensity. E.g. FED. R. EVID. 404(b):

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, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The comment to that rule notes that such an admission may be made only after meeting the overriding test of rule 403, that its "probative value is [not] substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403, 404(b), advisory committee's note.


96. State v. Vega, 40 N.C. App. 326, 253 S.E.2d 94, 97, appeal dismissed, 297 N.C. 457, 256 S.E.2d 809, cert. denied, 444 U.S. 968 (1979). Cf. Schleret v. State, 311 N.W.2d 843, 845 (Minn. 1981) (permitting testimony of prior beatings as "background," over a dissent arguing that this is essentially battering parent syndrome evidence and ought to be excluded under Loebach, 310 N.W.2d 58 (Minn. 1981)); People v. Aeschlimann, 28 Cal. App. 3d 460, 473, 104 Cal. Rptr. 689, 697 (1972) (admitting testimony of prior abuse supporting a second degree murder conviction by asserting that the testimony was evidence of the same crime because the crime charged included "a course of conduct of inflicting grievous pain and suffering").

97. Two reasons suggest themselves as explanations for courts' seeming inconsistency regarding admission of these two types of propensity evidence (the battering parent syndrome and past acts of child abuse). First, courts may be wary of directly usurping the legislative function of prescribing the rules of evidence. Admitting evidence of previous conduct may fit, however uncomfortably, into one of the explicit exceptions to the character evidence rule, such as proof of "motive," "intent," or "design." See supra note 94. Admitting evidence of the battering parent syndrome, on the other hand, would require an explicit exception to the rule. Further, child abuse and neglect is not an area of legislative inaction, so any judicial act to create an
interpretation of the codified exceptions to the rule,\textsuperscript{98} and courts have not attacked the rule directly.\textsuperscript{99} Yet they also have intimated that the rule may have limits: that science may some day replace character as the active ingredient in the battering parent syndrome, thus rendering it palatable to the judicial appetite.\textsuperscript{100}

Plainly, the law supports an unusually strong policy in favor of eliminating child abuse and neglect. By necessity, the law of evidence has responded to this policy by creating several exceptions aimed at easing the state’s evidentiary burden. To the extent that these exceptions aid in the protection of children without undermining the integrity of the adjudicatory process itself, they are to be welcomed. The evidentiary problems of child abuse, however, do not justify eliminating those procedural rules that protect defendants from a prejudicial determination of guilt. The creation of an additional exception, abrogating the character evidence rule with respect to the battering parent syndrome, would unjustifiably eliminate this important protection.

\textbf{B. Undesirability of an Exception to the Character Evidence Rule for the Battering Parent Syndrome}

Notwithstanding the compelling public policy against child abuse, any need for an exception to the character evidence rule for the battering parent syndrome is outweighed by the law’s interest in protecting the right of parents to a fair adjudication.

\textit{Criminal Proceedings Against Abusing Parents: Individual Guilt in the Due Process Model—} Not surprisingly, the argument for an exception to the character evidence rule has arisen in the context of prosecutions for criminal child abuse.\textsuperscript{101} Serious crimes engender serious

\textsuperscript{98} Serious crimes engender serious exceptions is more difficult to justify. \textit{Cf. supra} note 82. Yet, because court themselves have suggested the possibility of future admissibility of the syndrome, judicial restraint does not explain their willingness to allow evidence of past abuse while excluding evidence of the battering parent syndrome.

The second possible explanation has more force; intuitively if not legally. Courts are more suspicious of predictions of future behavior than of evidence of previous conduct. The empirical truth of this proposition may be deduced from the fact that courts permit the latter, but prohibit the former. \textit{See supra} note 94. In State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981) the court expressly noted its skepticism of the predictive power of psychology. Yet recognition that courts view past episodes of abuse as more probative of propensity than a psychological profile ought not to obscure the fact that the rule prohibits \textit{either} form of character evidence from being admitted to proof the act in question. \textit{E.g., Fed. R. Evid. 404(a), (b).}

\textsuperscript{99} \textit{E.g.,} Sanders v. State, 251 Ga. 70, 303 S.E.2d 13, 16 n.3, 18 (1983).

\textsuperscript{100} \textit{E.g.,} Sanders v. State, 251 Ga. 70, 303 S.E.2d 13, 16 n.3, 17 n.4, 18 n.7 (1983); State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981).

\textsuperscript{101} \textit{E.g.,} State v. Loebach, 310 N.W.2d 58, 64 (Minn. 1981) ("The state’s position is that the difficulties involved in prosecuting those who abuse children warrant an exception to the general rule.").
revulsion, and reasonable people feel little sympathy for child abusers. Yet it is exactly for the protection of persons charged with especially revolting crimes that our legal system embraces a due process model of criminal procedure. \(^{102}\) Especially when the initial evidence seems overwhelmingly to implicate a parent in the death of her infant child, the law surrounds her with a presumption of innocence, \(^{103}\) and burdens the state with proving beyond a reasonable doubt that this particular defendant committed the particular crime charged. \(^{104}\) The character evidence rule's concern with protecting the defendant from prejudice addresses precisely this fundamental goal of the due process model. \(^{105}\) Character evidence is excluded for fear "that the jury will convict a defendant in order to penalize him for his past misdeeds, or simply because he is an undesirable person." \(^{106}\)

However strong the state's need for evidence in an abuse prosecution, the alleged abusing parent ought to be entitled to the same adjudication of individual guilt as is any other criminal defendant. In this context, what is most offensive about using the battering parent syndrome to prove guilt is the suggestion of "corporate" guilt, arising out of similarity to other abusing parents.

In the same way, the battering parent syndrome attacks the requirement that guilt attaches only to actual past acts or omissions, and not to state of mind, however wicked. \(^{107}\) To the extent it suggests that guilt

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\(^{102}\) This label for the common law system of criminal justice, with its presumptions in favor and protections of the defendant, is based on H. Packer, The Limits of the Criminal Sanction (1968).

\(^{103}\) Without exception, criminal courts recognize the common law presumption of innocence, while acknowledging that the legislature may by statute substitute a limited presumption of guilt in cases where a rational connection exists between defendants' behavior and the guilt presumed. For example, in Yee Hem v. United States, 268 U.S. 178, 182-84 (1925) the Court held that a statute forbidding concealment of opium with knowledge of its importation satisfied due process when possession was presumptive evidence of guilt. "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but . . . by the additional weight of a countervailing legislative presumption." \(\text{Id.}\) at 184-85. For such a legislative presumption to satisfy due process, "it is only essential that there shall be some rational connection between the fact proved and the ultimate fact presumed." \(\text{Id.}\) at 183; (quoting Mobile R.R. v. Turnipseed, 219 U.S. 35, 42-43 (1910)); accord United States v. Fleischman, 339 U.S. 349, 363 (1950); Michaelson v. United States, 266 U.S. 42, 66 (1924); City of St. Paul v. Whidby, 295 Minn. 129, 138-43, 203 N.W.2d 823, 829-32 (1972); State v. Wolske, 280 Minn. 465, 472, 160 N.W.2d 146, 151 (1968); State v. Deike, 143 Minn. 23, 172 N.W. 777 (1919). Professor Packer ties the presumption of innocence to the colloquial meaning of fairness, whose "simplest (if most neglected) meaning is that no one should be subjected to punishment without having an opportunity to litigate the issue of his culpability." H. Packer, supra note 102, at 69.

\(^{104}\) The notion that criminal guilt is personal with the individual(s) charged is expressed in the law's requirement of mens rea. \(\text{E.g.},\) MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962) (providing that no act is criminal unless committed purposely, knowingly, negligently or recklessly).

\(^{105}\) See supra notes 75-77 and accompanying text.

\(^{106}\) State v. Loebach, 310 N.W. 2d 58, 63 (Minn. 1981).

\(^{107}\) This requirement is reflected in part in our constitutional protection against ex post
inheres in membership in a class of parents statistically likely to abuse their children, proof of guilt by profile de-emphasizes the requirement of conduct. Professor Packer summarizes the law’s requirement of individual guilt for particular crimes thus:

[Although its] though it seeks to control the future by shaping the ways in which people behave and by intervening in the lives of people who display anti-social propensities, the criminal law limits its effect and its intervention to the locus poenitentiae [point of no return] of what has in fact observably taken place in the past.108

Because even a highly accurate battering parent syndrome would suggest the parent’s guilt only insofar as it showed propensity to abuse,109 in a close case a jury’s conviction might be based not on a satisfactory showing of the proscribed conduct, but on the jury’s knowledge of propensity.110 Any inroads into the character evidence rule thus attack directly the requirement of individual guilt.

It may be argued that, as a pragmatic matter, courts already admit “character” evidence in child abuse proceedings, by admitting past acts of abuse to prove matters other than propensity.111 Juries seem quite unlikely to heed an instruction that they consider the past acts only on the issue of the defendant’s intent to cause harm on this occasion, and not on the issue of general propensity to abuse.112 The result may be that the character evidence rule has already been abrogated sub silentio by the courts, leaving no reason to continue excluding the battering parent syndrome.

There are three problems with this argument. First even if a jury disregards an instruction not to consider character evidence as proof of propensity, they have at least heard the instruction. It is impossible to estimate how salutory an effect such an instruction will have, but surely it will influence some jurors. Second, to the extent that courts are undermining the character evidence rule by admitting evidence of past acts of abuse, they are operating outside the legitimate scope of their authority.113 The proper response to a small breach in the dike is to plug it, not to tear down whatever protection remains.

108. H. PACKER, supra note 102, at 96 (emphasis added).
109. See supra note 20.
110. In theory, the parent of an allegedly abused child is protected by the requirement of sufficiency of the evidence. See supra note 59. In practice, however, courts have been quite liberal in finding evidence sufficient in child abuse proceedings. See supra notes 6-7, 94.
111. See supra notes 94-96 and accompanying text.
112. See, e.g., LEMPERT & SALTZBURG, supra note 59, at 214.
113. See supra notes 94-97 and accompanying text.
Finally, even if courts continue to interpret liberally the existing exceptions to the character evidence rule, such a limited actual displacement of the rule at least preserves an important theoretical principle: legal criminal guilt may not arise merely from the lifestyles or ways of thinking that characterize abusing parents. An explicit overriding of the character evidence rule by the battering parent syndrome, tending as it does to show guilt by analogy, would undermine this notion too substantially to be a tolerable rule.

B. "Civil" Proceedings to Protect Endangered Children: Prejudice in the Adjudication of Abuse

1. The Quasi-Criminal Character of Child Protection Proceedings—Courts and commentators agree that the fundamental purpose of the rule excluding character evidence is to prevent a jury from penalizing a defendant because they perceive her to be a bad person. The family court’s adjudication that a child is abused, of course, formally addresses no defendant and does not result in penal consequence to the parent. Yet the significant punitive dimension to an adjudication of abuse justifies treating the parent as a defendant, especially with regard to the exclusion of propensity evidence under the character evidence rule.

While the proceeding may be directed only to determining whether a child meets the statutory definition of abused, the parent of a child so adjudged will be subjected to significant state intervention, including potential termination of her parental rights and potential criminal prosecution. The law traditionally has accorded much deference to a parent’s right to guide the upbringing of her child; to secure that right against unwarranted interference, child abuse proceedings generally prohibit inquiry into parental "fitness" until after an independent finding that the child is abused. Given the often difficult task of discriminating between acceptable differences in parenting style and unlawful neglect or abuse, the law ought to secure the parent’s interest that no mistake occurs in the adjudication. The law should therefore treat the parent’s rights with the same care as if she were a defendant, inasmuch as this can be accomplished consistent with the protective purpose of the statutes. This is not to say that abuse adjudications ought to be subject to all the rules of criminal procedure. Clearly, the statutes embody an effort to protect endangered children, not to punish their parents. Where the child’s interest in protection from abuse meets the parent’s interest in retaining control, the statutes command that the latter must yield.

114. See supra notes 75-77 and accompanying text.
115. See generally D. Gil, supra note 1, at 8-17, 134-37.
In some areas, however, such legislative intent may conflict with over­riding due process considerations. Thus, the Supreme Court has held that states may not terminate parental rights except on a finding by a jury of clear and convincing evidence of future danger to the child.\footnote{116 Santosky v. Kramer, 455 U.S. 745, 769 (1982).} This Note makes no attempt to prove that the character evidence rule is an element of constitutional due process in child abuse proceedings.\footnote{117 Yet if the character evidence rule exists to ensure that defendants receive a fair adjudication of their individual guilt, see supra notes 102-113 and accompanying text, the rule may be thought to have its foundations in constitutional due process. To that extent, the substantial punitive dimension of child protection proceedings may likewise require a constitutional analysis. The Supreme Court has indicated that the mere fact that a judicial proceeding carries with it no formal criminal punishment does not mean that the constitution may not require more substantial due process protections in some civil proceedings where substantial parental interests are involved. See, e.g., Lassiter v. Dep’t of Social Services, 452 U.S. 18, 25-34 (1981); Santosky v. Kramer, 455 U.S. 745, 752-57 (1982).} It does argue, however, that the place of the character evidence rule in the due process model of criminal procedure so nearly touches the abuse and neglect adjudication model that the law should rely on the same considerations within both models to exclude the battering parent syndrome from evidence.

2. Legislative Pre-Emption and the Danger of Prejudice—Although the parent in an abuse adjudication occupies a position somewhat different from that of a criminal defendant, a significant parental interest is at stake.\footnote{118 E.g., Lassiter v. Dep’t of Social Services, 452 U.S. 18, 27 (1981) (finding that parent’s right to “‘companionship, care, custody, and management’ of [a child] is an important interest that ‘undeniably warrants deference’ ”) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).} In addition, the exclusion mandated by the character evidence rule applies no less to civil than to criminal proceedings.\footnote{119 E.g., MINN. STAT. ANN. § 1101 (West 1980) (stating that the rules of evidence apply to “all actions and proceedings in the courts of this state”).} For several reasons, character evidence in the form of the battering parent syndrome should be inadmissible in abuse adjudications. First, the child protection statutes permit an adjudication of abuse only on the basis of particular kinds of parental fault.\footnote{120 See supra notes 10, 52.} While state legislatures have authorized courts to examine the “‘immaturity’ or “‘emotional disability’” of a parent, they have not authorized an inquiry into propensity to abuse.\footnote{121 E.g., MINN. STAT. ANN. § 260.015 (10) (West 1978). See also supra notes 10, 52.} Since the legislatures have spoken with particularity regarding which parent characteristics compose abuse, courts ought not to expand the statutory definitions to include propensity to abuse. Courts should consider themselves pre-empted from considering such evidence at the adjudication phase of a proceeding.\footnote{122 This rule should not apply at the dispositional phase of the proceeding, where otherwise...}
to assessment of custody alternatives. Although abuse and placement decisions are made separately, and most jurisdictions provide for the adjudication of abuse by a judge rather than a jury, concerns about prejudice remain. Lay testimony offered to support a battering parent profile might reveal particularly unappealing aspects of the parent’s personality, subjecting even an experienced family court judge to the danger of prejudice. The danger is not the expert presentation of characteristics of typical abusing parents, since such information would likely be superfluous to a judge with experience in child protection proceedings. The danger rather is that in shifting the focus of the inquiry from whether the child has been abused to the characteristics of the parent, the judge may be making the decision about best custody placement that the legislature deliberately deferred to the dispositional phase of the proceeding. The more evidence on the “unfitness” of the parent that arises through lay witness’s discussion of her poor impulse control or low empathy, the more likely the judge is to base the conclusion that abuse has occurred on these “unfitness” criteria, rather than on the criteria specified in the statutes. Since an expert’s recitation of the characteristics of typical abusive parents may be assumed to be superfluous to an experienced judge, the danger of corroborative lay testimony prejudicing the judge against the parent surely “substantially outweighs” the probative value of such testimony.

Thus, despite the latitude permitted family courts to conduct child protection proceedings “in an informal manner,” family court judges ought not to permit the state to prove that a parent fits the battering parent syndrome at the adjudication phase of the proceeding. The parental interests at stake are too great, and the helpfulness of such testimony too small thus to contravene the two-step proceeding contemplated in the statutory child protection scheme.

CONCLUSION

The substantial difficulty of proof in legal proceedings involving child abuse undoubtedly requires the legal system to take extraordinary measures to enable the state effectively to protect children from parental

inadmissible evidence is allowed by statute. See supra note 67.

123. As of 1975, only twelve jurisdictions provided parents with a right to jury trial in child protection proceedings. Katz, Child Neglect Law in America, 9 Fam. L.Q. 1, 32-33 (1975).

124. While an inexperienced judge might find information on typical battering parents useful as background, such a judge would be more subject to the danger of prejudice.


abuse. Despite the responsiveness of courts and legislatures, the problem persists. Although permitting the state to show the parent’s similarity to the battering parent profile may ease the state’s burden in proving abuse, courts have correctly identified the procedure as proof by propensity, and have excluded it under the character evidence rule.

Whatever the scientific accuracy of the battering parent syndrome, courts should continue to exclude it under the character evidence rule. The case for exclusion is most compelling in criminal proceedings, where permitting profile evidence to suggest an inference of guilt would undermine the defendant’s due process right to a determination of individual guilt. Yet the significant punitive dimension that accompanies the deprivation of custody of a child argues almost as forcefully that similar protection ought to be afforded the parent whose child is alleged, under the child protection laws, to have been abused or neglected. Resting proof of child abuse on the psychological profile of typical abusing parents injures too severely the notion of individual guilt to be a prudent solution.

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127. In addition to the criminal and civil abuse proceedings discussed in this Note, the legal system could aid the cause of eradicating child abuse by fostering such currently extra-legal organizations as Parents Anonymous. See generally Lieber, Parent’s Anonymous: A New Direction Against Child Abuse, in NAT. COMM. FOR PREVENTION OF CHILD ABUSE, CHILD ABUSE: PRESENT AND FUTURE 53 (1975); Pike, Professionals Are Not the Only Answer, in id. at 215. There would appear to be no impediment to a family court judge ordering participation in such a self-help group as an alternative to traditional counseling or foster care.