THE MISUSE OF ABUSE: RESTRICTING EVIDENCE OF BATTERED CHILD SYNDROME

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"We must not allow our abhorrence of an act to become the abhorrence of conscious and deliberate thought and observation in connection with child abuse."[1]

I
INTRODUCTION

The line between medicine and law has never been exactly bright. Yet when physical violence occurs, it naturally implicates both disciplines. This interdisciplinary blend is particularly evident in the case of child abuse. Thus, as child abuse became a recognized phenomenon in medical science, it also became a subject of criminal prosecution. As the scientific definition of child abuse has expanded, so has its importance in the legal arena. Battered child syndrome (BCS), which was originally intended to be a helpful tool for physicians, has evolved into a cunning instrument for prosecutors and a clever trump card for parricide defendants.

Since 1962, doctors have been researching child abuse in the form of BCS. More recently, over the past few decades, both child abuse prosecutors and homicide defendants have sought to introduce evidence of the syndrome into the courts. Because of these two distinct and conflicting forms, one might ask, "[W]hich use of battered child syndrome do you believe? Many courts have still not figured this out."[2]

Medical and mental health professionals generally use BCS as a shorthand description of serious abuse. Children who are intentionally harmed by their caretakers are labeled battered children.[3] Injuries that may fall within BCS range from minor bruises to fatal skull fractures.[4] Furthermore, the broad

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1. David Bakan, *Slaughter of the Innocents: A Study of the Battered Child Phenomenon*, 10 J. SOC. DISTRESS & HOMELESS 147, 154 (2001).

2. Jessica L. Hart & Jeffrey L. Helms, *Factors of Parricide: Allowance of the Use of Battered Child Syndrome as a Defense*, 8 AGGRESSION & VIOLENT BEHAV. 671, 680 (2003).

3. *See infra* Part II.A.

4. *See infra* Part II.A.

syndrome may also be defined to include the profound psychological effects of abuse.[5] In order to determine the intentionality of the injuries, the repetitive nature of child abuse is often a particularly important aspect of BCS.[6]

However, the original definition of the syndrome has not been closely adhered to in all cases. Thus, for all the good it can do, the introduction of BCS evidence in some cases is also rife with peril. As one student commentator described it, BCS evidence "is a weapon capable of mischief."[7] In particular, when BCS is used by prosecutors to mask otherwise impermissible and prejudicial character evidence and by defense attorneys as a justification for homicide, one should worry about its admissibility into the judicial system. In these cases, lawyers have improperly shifted the focus of BCS from the abused child to the person who is alleged to have caused the abuse. Because prosecutors and defense attorneys are distorting BCS and obfuscating its role in medicine, judges should take care to limit testimony regarding BCS to facts about the abuse itself rather than the abuser.

II
THE HISTORICAL EVOLUTION OF THE BATTERED CHILD SYNDROME

Child abuse has occurred everywhere for centuries, albeit under different levels of approval.[8] In the West, philosophers such as Aristotle suggested that killing defective children was wise, and Roman law gave fathers ultimate command over their children, including control over life and death.[9] Parents in the eighteenth century went so far as to maim their children so that they could become lucrative beggars or circus exhibits.[10] Even into the twentieth century, child abuse was generally an unrecognized trauma.[11]

In 1962, Dr. C. Henry Kempe and his colleagues published a seminal article on child abuse and introduced the term "battered child syndrome."[12] Kempe used the term to describe "a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent."[13] Kempe recognized physicians' reluctance to consider abuse as the cause of a child's injuries.[14] But he admonished them that "[t]o the informed physician, the bones tell a story the child is too young or too frightened to tell."[15] Based on this

5. *See infra* Part II.A.

6. *See infra* Part II.A.

7. Kristi Baldwin, Note, *Battered Child Syndrome as a Sword and a Shield*, 29 AM. J. CRIM. L. 59, 81 (2001).

8. *See generally* Samuel X. Radbill, *A History of Child Abuse and Infanticide*, *in* THE BATTERED CHILD 3 (Ray E. Helfer & C. Henry Kempe eds., 2d ed. 1974).

9. Bakan, *supra* note 1, at 166.

10. *Id.* at 174.

11. C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17, 17 (1962).

12. *Id.*

13. *Id.*

14. *Id.* at 18.

15. *Id.*

recognition, Kempe argued that "the physician's duty and responsibility to the child requires a full evaluation of the problem and a guarantee that the expected repetition of trauma will not be permitted to occur."[16] Such a recognition created implications for both medicine and law.

A. BCS in Medicine

As originally intended, BCS was a way for medical professionals to identify abuse in children. Kempe recognized that the nature and degree of injuries resulting from abuse vary widely,[17] and that the typical abusive caretakers initially exhibit "complete denial of any knowledge of injury to the child."[18] Still, he identified some tell-tale signs of repeated abuse that could reveal the lies in the caretakers' denials, including severe bruises, multiple fractures, and lesions in different stages of healing.[19] Consistent with these signs, Kempe proffered radiologic examination as the primary vehicle to identify child abuse.[20] Kempe concluded that "a marked discrepancy between clinical findings and historical data as supplied by the parents" is a major diagnostic feature of the BCS.[21]

Kempe's classic description of BCS, however, proved to be too narrow. The year following the publication of Kempe's article, Dr. Vincent Fontana criticized that narrowness and proposed the concept of "maltreatment syndrome" instead.[22] In addition to physical abuse, Fontana argued that the syndrome should include such injuries as "deprivation of food, clothing, shelter and parental love."[23] He persuaded even Kempe himself, who ultimately argued that the label BCS be dropped in favor of the more general term "child abuse and neglect."[24]

Kempe's work and views gained wide acceptance, particularly in the medical and mental health professions. Since the publication of his original article, understanding of child abuse has expanded greatly.[25] Kempe and his colleagues identified two principal components of the syndrome: physical manifestations and psychiatric aspects.[26] Thus, although many think of child abuse as a physical condition, the breadth of BCS has "slowly evolved from a purely medical term to include the . . . psychological effects of abuse."[27]

Current research focuses on identifying both physical abuse and its long-

16. *Id.* at 24.
17. *Id.* at 17.
18. *Id.* at 19.
19. *Id.* at 17–18.
20. *Id.* at 20–23.
21. *Id.* at 18.
22. Vincent J. Fontana et al., *The "Maltreatment Syndrome" in Children*, 269 NEW ENG. J. MED. 1389, 1389 (1963).
23. *Id.*
24. State v. Smullen, 844 A.2d 429, 446 n.10 (Md. 2004).
25. *See* Carole Jenny, *Medicine Discovers Child Abuse*, 300 J. AM. MED. ASS'N 2796, 2796 (2008).
26. Baldwin, *supra* note 7, at 61.
27. Hart & Helms, *supra* note 2, at 676.

term effects. Medical professionals use modern technologies, including biomechanics, proteomics, biochemistry, and genetics, to detect the physical aspects of child abuse.[28] In this context, BCS is still often diagnosed as a result of signs of repeated abuse, particularly in bone injuries.[29] Doctors can analyze both radiological and histological findings to date fractures found in children.[30] Dating fractures can show both repetition of injuries and indicate if the injuries developed in accordance with the parent's version of how the trauma occurred.

The physical effects of child abuse are relatively straightforward, even when they lurk beneath the skin. The psychological and developmental effects, however, are not as clear or easy to discern.[31] For example, the mental consequences of child abuse are said to include depressive and anxiety disorders.[32] Research has also associated child abuse with some psychosomatic behaviors, including nicotine and marijuana use,[33] obsessive–compulsive acts,[34] and HIV risk behaviors.[35] Yet, the psychological contours of the syndrome remain unclear—research has not definitively fit BCS within any specific psychological disorder.

Kempe used the name of the syndrome as a shorthand device to describe a previously unrecognized set of injuries; contemporary medical and mental health professionals use BCS as a convenient description of intentional abuse. But diagnosing BCS is not always clear cut. One researcher has indicated that "oversensitivity or hyposensitivity of the children to the pain, insufficient history to the explanation of the trauma's features, the time between the approval of the patient for physical examination and trauma's exact time *may* lead us to the diagnosis of battered child syndrome."[36] BCS was never intended to be an illness in the sense of a disease that doctors could label, research, and cure. As a result, researchers have not concerned themselves with efforts to carefully limit the syndrome. They even recognize that not all abused children

28. Jenny, *supra* note 25, at 2797.

29. *See* Inger J. Sagatun, *Expert Witnesses in Child Abuse Cases*, 9 BEHAV. SCI. & L. 201, 206 (1991) (noting that children with BCS usually show signs of repeated abuse).

30. H. Klotzbach et al., *Post-Mortem Diagnosis and Age Estimation of Infants' Fractures*, 117 INT'L J. LEGAL MED. 82, 83 (2003).

31. *See generally* Doriane Lambelet Coleman et al., *Where and How to Draw the Line Between Reasonable Corporal Punishment and Abuse*, 73 LAW & CONTEMP. PROBS. 107 (Spring 2010) (providing a detailed exposition of the psychological ramifications of corporal punishment in general).

32. Robert F. Anda et al., *The Enduring Effects of Abuse and Related Adverse Experiences in Childhood*, 256 EUR. ARCHIVES PSYCHIATRY & CLINICAL NEUROSCIENCE 174, 175 (2006).

33. Cathy L. Pederson et al., *Childhood Abuse Related to Nicotine, Illicit and Prescription Drug Use by Women: Pilot Study*, 103 PSYCHOL. REP. 459, 459–60 (2008).

34. Audrey R. Tyrka et al., *Childhood Maltreatment and Adult Personality Disorder Symptoms: Influence of Maltreatment Type*, 165 PSYCHIATRY RES. 281, 283–85 (2009).

35. Christina S. Meade et al., *Long-Term Correlates of Childhood Abuse Among Adults with Severe Mental Illness: Adult Victimization, Substance Abuse, and HIV Sexual Risk Behavior*, 13 AIDS & BEHAV. 207, 208 (2009).

36. Mehmet Sunay Yavuz et al., *A Battered Child Case with Duodenal Perforation*, 15 J. FORENSIC & LEGAL MED. 259, 259–60 (2008) (emphasis added).

have BCS.[37] Indeed, the syndrome is what a medical dictionary says a syndrome is: "[A] set of symptoms that occur together."[38]

As child abuse remains a major social problem,[39] however, the increasing research maintains continued importance. The National Child Abuse and Neglect Data System reported that in 2006, social service agencies found 905,000 children in the United States to be survivors of child abuse or neglect.[40] To give some perspective to the statistic, the international incidence of child abuse is ten times more common than cancer.[41]

B. BCS in the Law

Of course, child abuse occurred and was recognized as such before Kempe's article. Even historical texts such as the Bible include prohibitions against infanticide.[42] Still, modern prosecutions for child abuse were virtually nonexistent well into the nineteenth century.

Then, in 1874 the plight of one eight-year-old girl gained national attention. For several years, Mary Ellen Wilson was neglected, abused, and starved by her guardian.[43] When the caretaker was convicted of what the judge referred to as "gross and wanton cruelty,"[44] the case became one of the first successfully prosecuted child abuse cases in the United States.[45] Although the Society for the Prevention of Cruelty to Animals officially initiated Mary Ellen's case, the Society for the Prevention of Cruelty to Children formed quickly thereafter.[46] Since then, criminal prosecutors have been increasingly aware of the child abuse problem.[47]

With the advent of Kempe's work on BCS, child abuse became a widely recognized phenomenon in the law. Within four years of the publication of Kempe's article, the vast majority of states passed statutes to address child abuse.[48] Largely because of Kempe's suggestion that a physician "should report possible willful trauma to the police department or any special children's protective service that operates in his community,"[49] all states currently have

37. Sagatun, *supra* note 29, at 206.

38. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1808 (30th ed. 2003).

39. Bakan, *supra* note 1, at 152.

40. Jenny, *supra* note 25, at 2797.

41. Yavuz et al., *supra* note 36, at 260–61.

42. *See, e.g.*, *Deuteronomy* 12:31, 18:10.

43. Mary Renck Jalongo, *The Story of Mary Ellen Wilson: Tracing the Origins of Child Protection in America*, 34 EARLY CHILDHOOD EDUC. J. 1, 1–2 (2006).

44. Mary Ellen Wilson, *Mrs. Connolly, the Guardian, Found Guilty, and Sentenced to One Year's Imprisonment at Hard Labor*, N.Y. TIMES, Apr. 28, 1874, at 8.

45. Jalongo, *supra* note 43, at 1.

46. Greeneville Cnty. Dep't of Soc. Servs. v. Bowes, 437 S.E.2d 107, 112 (S.C. 1993) (Toal, J., dissenting).

47. *Id.* at 112–13.

48. Monrad Paulsen et al., *Child Abuse Reporting Laws: Some Legislative History*, 34 GEO. WASH. L. REV. 482, 482 (1966).

49. Kempe et al., *supra* note 11, at 23.

laws that require certain individuals to report suspected abuse to law enforcement.[50] These reporting requirements are at the core of a comprehensive legal scheme that is, among other things, designed to identify abused children and prosecute their abusers.

However, child abuse cases, and especially homicides, can be very difficult to prosecute because of a lack of evidence. For example, even if the victim is alive, he or she may be too young to testify or too immature to be credible.[51] Without direct evidence, prosecutors turn to BCS because "the bones tell a story the child is too young or too frightened to tell."[52] Therefore, "[d]espite defendants' objections, courts have repeatedly admitted [BCS] evidence claiming that battered child syndrome provides proof of intent and negates accident in relevant cases."[53] When direct evidence in abuse cases is lacking, prosecutors use BCS to show a history of abuse and indicate that someone intended to cause harm.

In its correct form, evidence of BCS is properly admissible as medical testimony. For example, the case of *State v. Wilkerson*[54] involved a two-year-old child, Kessler Wilkerson, who was first abused and then killed by his father. Kessler suffered multiple injuries over the course of his short life, ranging from standing "spread eagle" for long periods of time to violent kicks in the abdomen.[55] Kessler's father explained to a neighbor that he wanted to "bring [Kessler] up to be a man."[56] Eventually, Kessler died of an abdominal hemorrhage from a ruptured liver.[57] His father claimed that Kessler choked on his cereal and swallowed some water, but the doctors found no fluid in the child's lungs or any signs of drowning.[58] The father was convicted of second-degree murder,[59] based partly on the testimony of a pediatrician on BCS.

At trial, the pediatrician defined a battered child as one "who died as a result of multiple injuries of a non-accidental nature."[60] Although he explained the medical evidence that resulted in his conclusion that Kessler Wilkerson was a battered child, the doctor did not attempt to identify or describe the particular individual who would have caused such injuries. Instead, the pediatrician's testimony focused on injuries he had witnessed in similar children and

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50. SAMUEL M. DAVIS ET AL., CHILDREN IN THE LEGAL SYSTEM: CASES AND MATERIALS 559 (4th ed. 2009).

51. Sagatun, *supra* note 29, at 201. For additional evidence on the difficulty of proving child abuse in court, see Jack G. Collins, *The Role of the Law Enforcement Agency*, *in* THE BATTERED CHILD, *supra* note 8, at 179, 183.

52. Kempe et al., *supra* note 11, at 18.

53. Baldwin, *supra* note 7, at 66.

54. 247 S.E.2d 905 (N.C. 1978).

55. *Id.* at 908.

56. *Id.*

57. *Id.* at 907.

58. *Id.*

59. *Id.* at 919.

60. *Id.* at 908.

explained how they related to the situation in *Wilkerson*.[61] The Supreme Court of North Carolina ruled that the pediatrician's testimony was properly admitted because it did not invade the province of the jury since it was helpful to explain something that the jury would not otherwise understand.[62] Furthermore, the testimony was based solely on the doctor's experience with abused children.[63] Conversely, the court noted that such evidence would likely be inadmissible if the expert testified "that a certain event had in fact caused the injuries complained of."[64] The latter would not only have been beyond his medical expertise, it would have also served to bring Kessler's injuries home to the defendant. Based on the proper evidence of previous injuries, Wilkerson was convicted.

On the other hand, evidence of past abuse has not received universal acceptance. In *United States v. Diaz*,[65] for example, an expert witness presented a pattern of abuse against the defendant's two infant daughters.[66] The Court of Appeals for the Armed Forces referred to such evidence as "uncharged misconduct" and held that it was inadmissible to demonstrate a pattern of abuse.[67] The doctor's testimony regarding previous injuries was not relevant because the prosecution did not present sufficient evidence to establish the defendant's culpability for those injuries.[68] The court expressed "grave doubt that the panel could separate and fairly consider the uncharged and charged misconduct. Under the prosecution's theory, these events of uncharged and charged misconduct were inextricably intertwined."[69]

Therefore, BCS is apparently relevant, reliable, and admissible evidence *if* it focuses on Kempe's original definition: "[A] clinical condition in young children who have received serious physical abuse."[70] Consistent with evidence law, as medical and mental health professionals study child abuse, they should be able to testify in court so long as their information is relevant and not more prejudicial than probative.[71] Therefore, as in *Wilkerson*, courts have generally held that BCS evidence is admissible for the purpose of describing prior

61. *Id.* at 908–09.

62. *Id.* at 910–12.

63. *Id.* at 911.

64. *Id.* at 912.

65. 59 M.J. 79 (C.A.A.F. 2003).

66. *Id.* at 91.

67. *Id.* at 93–96. The problem was exacerbated when the expert witness testified that the child's death was a homicide and the defendant caused it. *Id.* at 85–93.

68. *Id.* at 94.

69. *Id.* at 95. *See also* State v. Guyette, 658 A.2d 1204, 1207 (N.H. 1995) (holding evidence of BCS inadmissible where there is no connection to the defendant of prior intentional injuries); McCartney v. State, 414 S.E.2d 227, 229 (Ga. 1992) (holding evidence of "childhood maltreatment syndrome" inadmissible where jurors had the ability to reach the conclusion proffered by the expert).

70. Kempe et al., *supra* note 11, at 17.

71. FED. R. EVID. 401 (stating the standard for relevant evidence); *Id.* 402 (stating that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice). States have similar rules. *See, e.g.*, N.C. GEN. STAT. § 8C-1 (2008) (stating analogous rules with identical language).

injuries.[72] Using the syndrome in that sense falls precisely within Kempe's original definition, and will subsequently be referred to as "Kempe's BCS."

III
THE MISUSE OF ABUSE

Legal use of BCS evidence has evolved to be something more than Kempe's BCS, however. Indeed, according to one scholar, "[t]he recent tendency has been to broaden the definition of child abuse as a medical phenomenon, which in turn has resulted in a broadening of its definition . . . under the law."[73] One doctor, for example, testified that BCS is "a general term used to describe any kind of abuse or neglect to a child in the first three years of his life; the syndrome may arise from sexual, emotional, physical or nutritional abuse."[74] Even if that definition is an accurate statement of its evolution and helpful in the medical context, the doctor's definition creates grave problems when used by attorneys.

Lawyers on both sides of the case have morphed Kempe's BCS into what is essentially a "child batterer syndrome." Prosecutors use related evidence to show that a defendant is the type of person who would abuse a child. Some have extended it so far as to provide for a child battering profile. Conversely, parricide defendants use it to show that their victims, who are alleged to have abused their children, "deserved" their punishment. In either case, Kempe's BCS is stretched far beyond its original usefulness as such judicial uses of BCS taint the original purpose of the syndrome and obfuscate its importance.

A. Child Batterer Syndrome

Prosecutors use the syndrome as a convenient description of child abuse as well as the child abuser. For example, Tori McGuire was a six-month-old girl who died forty-five minutes after being brought to the hospital by her parents.[75] Her father, Mark McGuire, was subsequently convicted of second-degree murder for her death, based partly on the testimonies of two physicians who stated that the victim was a battered child.[76] Although both doctors concluded that the child exhibited signs of the syndrome, their definition of the syndrome was very general: "[A] group of findings which when combined indicate that [the] child had died as a result of mistreatment from another person, usually an adult."[77]

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72. *See, e.g.*, Price v. Commonwealth, 446 S.E.2d 642, 644, 645–46 (Va. Ct. App. 1994) (explaining that BCS evidence is permitted when limited to description of previous injuries and the testifying doctor "expressed no opinion as to the identity of the abuser"); *see also* People v. Cauley, 32 P.3d 602, 604–06 (Colo. App. 2001) (employing similar logic to approve evidence of shaken baby syndrome).

73. DAVIS ET AL., *supra* note 50, at 535.

74. United States v. Bowers, 660 F.2d 527, 529 (5th Cir. 1981).

75. Estelle v. McGuire, 502 U.S. 62, 64–65 (1991).

76. *Id.*

77. Brief for Petitioner at 11, Estelle v. McGuire, 502 U.S. 62 (1991) (No. 90-1074), 1991 WL 521611.

The evidence of prior abuse was relatively similar to that presented in *Wilkerson*. The *use* of the evidence presented against McGuire, however, was not the same use of similar evidence against Wilkerson. Evidence in the McGuire case was properly presented, per the *Wilkerson* line of reasoning, that the victim had multiple bruises, rectal tearing that was at least six weeks old, partially healed rib fractures, and other injuries at different stages of healing.[78] Evidence was also presented that Tori's mother was the person who inflicted the fatal injury.[79] The only evidence connecting McGuire to the injury that caused Tori's death was the fact that he was at home during the relevant time period.[80] Evidence was presented, however, that McGuire had treated Tori roughly in the past.[81] Thus, the prosecutor focused on the previous abuse and went beyond Kempe's BCS when he "argued that the modality of violence identified McGuire as the killer."[82] In essence, "McGuire was on trial for his propensity for violence, rather than for whether he committed the murder of his baby."[83]

The trial judge exacerbated the problem by explicitly linking McGuire to the previous injuries. "Evidence has been introduced," the judge told the jury, "for the purpose of showing that the Defendant committed acts similar to those constituting a crime other than that for which he is on trial."[84] If anything could have sealed McGuire's fate, the judge certainly provided it. McGuire appealed his conviction, arguing that the jury had "the mistaken impression that it could base its finding of guilt on the simple fact that he had previously harmed [the victim]."[85] The state courts upheld the conviction, but the Ninth Circuit reversed the conviction on federal habeas review.[86]

The Supreme Court finally reached the BCS issue in *Estelle v. McGuire*.[87] In a six–two decision,[88] the majority upheld the conviction upon McGuire's habeas petition, holding that "McGuire's due process rights were not violated by the admission of the evidence."[89] The BCS evidence was permissible because it was "probative on the question of the intent with which the person who caused the injuries acted."[90]

By so holding, the Court failed to recognize that the use of BCS in *Estelle*

78. *Estelle*, 502 U.S. at 64–65.
79. *Id.* at 79 (O'Connor, J., concurring in part and dissenting in part).
80. *Id.* at 65–66 (majority opinion).
81. *Id.* at 65.
82. Brief for Respondent at 4, Estelle v. McGuire, 502 U.S. 62 (1991) (No. 90-1074), 1991 WL 521613.
83. *Id.*
84. *Estelle*, 502 U.S. at 67 n.1.
85. *Id.* at 71.
86. *Id.* at 64.
87. *Id.* at 62.
88. Justice Thomas did not take part in the decision. *Id.* at 64.
89. *Id.* at 70.
90. *Id.* at 69.

was far from what Kempe had intended. Despite the evidence that McGuire's wife had actually caused the fatal injury, McGuire was convicted because of BCS evidence. Instead of explaining who committed the charged crime, the prosecutor told the jury that McGuire had abused the child in the past.[91] Thus, even without using the language of a profile, McGuire was labeled as one who abused children and thus was likely the cause of his daughter's death.[92] The prosecutor turned Kempe's battered child syndrome into child batterer syndrome. Such evidence is much closer to the impermissible profile evidence described below than the admissible BCS evidence described in *Wilkerson*.

Indeed, some of the judges involved in *Estelle* seemed more upset by the prior history of abuse than the injury that actually caused the child's death. Judge Kozinski, dissenting from the Ninth Circuit's denial of the state's petition for en banc rehearing, gave a detailed and explicit description of the prior injuries—but not the fatal one.[93] Rather than providing a thorough explanation of his legal analysis, he summarily concluded that "McGuire got no worse than he deserved."[94]

Conversely, it was the original panel of Ninth Circuit judges who perceived the situation correctly. "The prosecution introduced evidence of prior injuries to the baby to establish that [McGuire] was a child abuser, and for no other purpose, in a murder trial for the death of his child."[95] The panel further explained, "we cannot ignore that a trial of the grisly murder of an innocent baby implicates highly charged emotions. The unproven characterization of appellant as a child abuser maximized the prejudice flowing from the irrelevant evidence."[96]

Whatever its value in constitutional jurisprudence,[97] the Supreme Court in *Estelle* incorrectly decided the BCS question. Still, after the Court's decision in *Estelle*, prosecutors across the country have used BCS in the same way. Some courts simply cite to *Estelle* to explain that BCS evidence was properly admitted.[98] The most recent cases do not even discuss its admissibility: they just take it for granted.[99] Because of *Estelle*, courts seem to have a green light to allow the use of BCS evidence that goes far beyond a description of previous injuries to prove that the injuries at issue in the case were not accidental.[100] Such

91. McGuire v. Estelle, 902 F.2d 749, 752 (9th Cir. 1990).

92. *Id.* at 754.

93. McGuire v. Estelle, 919 F.2d 578, 578–79 (9th Cir. 1990).

94. *Id.* at 584.

95. *McGuire*, 902 F.2d at 754.

96. *Id.*

97. *See, e.g.*, Rivera v. Illinois, 129 S. Ct. 1446, 1454 (2009) (citing *Estelle* for due process doctrine); Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (citing *Estelle* for habeas corpus doctrine).

98. *See, e.g.*, Heath v. Roberts, No. 02-3349-JTM, 2004 U.S. Dist. LEXIS 22659, at *22–24 (D. Kan. Nov. 5, 2004).

99. *See, e.g.*, Thompson v. Henry, No. 1:05-cv-0014-1 ALA HC, 2008 U.S. Dist. LEXIS 76532, at *49–52 (E.D. Cal. Aug. 28, 2008).

100. *See, e.g.*, State v. Heath, 957 P.2d 449, 463 (Kan. 1998) (citing *Estelle* and approving of doctor who testified about BCS and also testified about the typical caretaker); State v. Koon, 730 So. 2d 503,

a judicial extension of Kempe's BCS creates several problems.

Those familiar with BCS would likely admit that this evidence does more than "simply indicate[ ] that a child found with serious, repeated injuries has not suffered those injuries by accidental means."[101] The prosecutor who uses BCS really argues that because the defendant committed these acts in the past, he is a child abuser who needs to be punished, almost regardless of whether he actually committed the crime charged. Instead of focusing on the crime, the evidence evolves from what the person did (or did not do) into who the person is. Such evidence is dangerously close to a propensity argument, which evidentiary rules generally prohibit.[102] As reprehensible as the prior injuries are, a fact finder is only permitted to punish a defendant for the crimes actually charged.

Evidence of past similar acts is only relevant if the defendant in fact performed the similar acts.[103] Even if they donot hear this requirement explicitly, jurors may be unable to parse the past behavior from the charged crime. When jurors learn about the past injuries, they may be simultaneously learning or feeling, even implicitly, that they need to punish someone for those injuries. As in *Estelle*, the prosecution then focuses on previous injuries in part to indicate to the jury who committed the crime in question. Thus, prosecutors cleverly mask otherwise-impermissible propensity arguments with the guise of a medical syndrome.

That masking problem is compounded when defendants must respond to the evidence. "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[104] These means, however, are certainly less effective if not impossible in child abuse cases. Once a defendant is labeled as a child abuser, either explicitly or implicitly, any other evidence will likely fall on deaf ears. Thus, when prosecutors use BCS evidence to indicate who committed the previous injuries, those on trial are left to defend themselves against an impenetrable attack.

On the other hand, the prosecutor paints a vivid and disturbing picture to the jury. The nature of this type of BCS allows prosecutors to focus more on a graphic description of previous abuse and less on the expert's diagnostic or classification criteria regarding the charged crime. For those listening to the story unfold, "the vision of a child being tortured arouses the sense of weakness

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510–11 (La. Ct. App. 1999) (same); State v. Taylor, 701 A.2d 389, 391, 395–96 (Md. 1997) (citing *Estelle* and permitting BCS evidence that was presented to show *the defendant's* intent and the absence of mistake, although ostensibly not to show that he "was generally a bad person").

101. Estelle v. McGuire, 502 U.S. 62, 68 (majority opinion) (quotations omitted).

102. 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 action in conformity therewith.").

103. Otherwise, the evidence would not be "of consequence to the determination of the action." *Id.* 401.

104. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 596 (1993).

and vulnerability that each of us had as a child."[105] As opposed to Kempe's BCS, the prosecutor here uses evidence of the syndrome as a summation of why the jury should punish the defendant.

In addition, experts testifying about the syndrome have exactly what the Supreme Court feared with regard to polygraph evidence: the aura of infallibility.[106] "[T]he horrifying injuries of child abuse cases are inflammatory, and one runs the risk that the jury will attach too great a weight to the prior injury evidence."[107] Indeed, "[t]he potential to allow jury prejudice to lessen the burden of proof is the very rationale for prohibiting character evidence under the guise of 'battering parent syndrome.'"[108] Far beyond explaining Kempe's syndrome, prosecutors who use BCS in this way convince the jurors that the doctors are sufficiently well informed to identify the perpetrator, even when that is not what the doctors intend to say.

Finally, focusing on the previous injuries instead of the charged crime also presents another problem. As one expert witness testified, "in eighty percent of fatal child abuse cases, [the] fatal event is the first time that that child has ever been abused."[109] Kempe's BCS was intended to include not just a pattern of abuse but also single occurrences. But prosecutors who are focusing on this type of BCS may be missing, and therefore misrepresenting, the bigger picture.

The current use of BCS evidence by prosecutors is, therefore, unfairly prejudicial. Regardless of the heinousness of the previous abuse, those injuries are not what put McGuire or similar defendants on trial. The use of BCS evidenced in *Estelle* is not the same as Kempe's BCS. And prosecutors should not be permitted to use a medical syndrome such as BCS to relieve their burden of proving beyond a reasonable doubt who committed the crime in question.

B. Child Battering Profile

In a similar vein, prosecutors have also attempted to use BCS to create a battering person profile. When a child abuse prosecution is weak enough, such use of expert testimony is employed to describe the type of person who would abuse a child. Some traditional characteristics of such a profile include stress in the family, violence against other family members, and isolation.[110]

Fortunately, courts have generally held such testimony to be inadmissible. In *Commonwealth v. Day*, for example, the defendant had apparently abused his victim several times while living with the victim's mother.[111] The victim, an eighteen-month-old girl, had "several contusions on her head, neck, abdomen,

105. Bakan, *supra* note 1, at 157.

106. United States v. Scheffer, 523 U.S. 303, 314 (1998).

107. Baldwin, *supra* note 7, at 69.

108. State v. Aguayo, 835 P.2d 840, 847 (N.M. Ct. App. 1992) (granting a new trial because of prior abuse evidence, although not specifically labeled as BCS).

109. United States v. Traum, 60 M.J. 226, 231–32 (C.A.A.F. 2004).

110. Commonwealth v. Day, 569 N.E.2d 397, 398 (Mass. 1991).

111. *Id.*

kidney, legs, and feet."[112] Eventually the beatings became more severe, and the child tragically died from "blunt trauma to the head and neck."[113]

Still, the major distinction from *Wilkerson* lies not in the facts but in the *use* of expert witnesses. Rather than focusing on the child's previous injuries, the prosecutor forced the expert witness in *Day* to spend the majority of his testimony on certain characteristics of the typical family in which abuse occurs.[114] The court, however, held that "[e]vidence of a 'child battering profile' does not meet the relevancy test, because the mere fact that a defendant fits the profile does not tend to prove that a particular defendant physically abused the victim."[115] Because the prosecutor focused on the person doing the battering rather than the child being battered, the evidence was inadmissible.[116]

Indeed, despite the fact that the situations occurred on opposite coasts, the similarities between *Day* and *Estelle* are striking. In both cases a little girl under the age of two tragically lost her life. In both cases it was a man accused of killing a child. In both cases the defendants presented evidence that the child's mother not only had access to the child but also was likely culpable herself. Doctors found extensive sets of bruises and injuries on both children. Yet, although both cases reached a supreme court, the outcomes were very different.

As in *Day*, the Ninth Circuit has hinted that battering profile evidence is improper. In *Martineau v. Angelone*, a doctor diagnosed the victim as having BCS despite the absence of any "signs of previous abuse or neglect."[117] The court suggested that the prosecutor should not have had the doctor testify regarding the diagnosis in the first place.[118] Indeed, the prosecutor's use of the doctor's "opinion was based on an abstract theory of how child abusers behave."[119] Fortunately, courts have generally recognized that the use of such a child battering profile is improper.

Furthermore, current evidentiary rules show a general policy judgment that profile evidence is improper in the courtroom. "In general, courts have found any kind of 'profile testimony' to be unreliable."[120] "The use of criminal profiles as substantive evidence of guilt is inherently prejudicial to the defendant."[121] Even more importantly, BCS presents differing profiles. The typical families in which abuse occurs are "anomic and alienated, virtually isolated, without friends or interested relatives, without religious affiliation, and without any club or group membership or association."[122] Other research explains that one who

112. *Id.* at 397–98.
113. *Id.* at 398.
114. *Id.* at 398–99.
115. *Id.* at 399.
116. *Id.* at 400.
117. 25 F.3d 734, 736–37 (9th Cir. 1994).
118. *See id.* at 737 n.5.
119. *Id.* at 741.
120. Sagatun, *supra* note 29, at 205.
121. *Day*, 569 N.E.2d at 399.
122. Bakan, *supra* note 1, at 192.

abuses a child "often suffered abuse as a child, ha[s] a low intelligence level, and lack[s] maturity."[123] Whereas researchers attempt to create a comprehensive picture of a battered child, prosecutors use BCS to create a problematic set of differing profiles.

C. Defensive Use of BCS Evidence

On the other side of the courtroom, defendants also raise the issue of child abuse, but as a justification for homicide, particularly of abusive parents. For example, after years of physical and psychological abuse, Deborah Jahnke assisted her brother in fatally shooting their father.[124] Jahnke was subsequently convicted of aiding and abetting voluntary manslaughter.[125] The ensuing *Jahnke v. State* was the first case in which a defendant argued that killing an abusive parent is justified as a form of self defense. Naturally, similarly situated defendants quickly gravitated to the BCS defense.[126]

Perhaps the most widely publicized case of BCS evidence as a defense was the trial of the Menendez brothers. In 1989, Erik and Lyle Menendez shot and killed their allegedly abusive parents.[127] After the brothers' first trial resulted in deadlocked juries, the brothers were retried and the defense called Dr. John Wilson as an expert witness.[128] Dr. Wilson expressed his opinion that Erik Menendez suffered from what the doctor called "battered-person's syndrome."[129] Although Dr. Wilson proceeded through a lengthy description of a diagnosis for post-traumatic stress disorder, he merely acknowledged the existence of battered person's syndrome without further explanation. The closest thing to a definition of the syndrome, notably supplied by the defense attorney rather than the witness, was "persons who have certain symptoms and report a relationship with another person which has traumatizing features."[130] In addition, Dr. Wilson clarified that many people with battered person's syndrome do not have post-traumatic stress disorder. Dr. Wilson described the current research situation as an "ongoing revolutionary process."[131]

Although the use of this testimony was ultimately unfruitful (as Erik Menendez was still convicted), it presents a disturbing trend in judicial use of BCS evidence. The defense lawyer's use of Dr. Wilson's testimony is a far cry from Kempe's original definition of the syndrome. Nowhere in the Menendez

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123. Baldwin, *supra* note 7, at 62.

124. Jahnke v. State, 692 P.2d 911, 914–16 (Wyo. 1984).

125. *Id.* at 916.

126. *See, e.g.*, *In re* Appeal in Maricopa County, 893 P.2d 60 (Ariz. Ct. App. 1994) (raising a self-defense BCS claim); Johnson v. State, 718 So. 2d 848 (Fla. Dist. Ct. App. 1998) (same); People v. Shanahan, 753 N.E.2d 1028 (Ill. App. Ct. 2001) (same); State v. Crabtree, 805 P.2d 1 (Kan. 1991).

127. Ann W. O'Neill, *Defense Rests in Menendez Brothers' Retrial*, L.A. TIMES, Feb. 1, 1996, at A1.

128. *Id.*

129. Transcript of Record at 45959, State v. Menendez, No. BA068880 (Cal. Super. Ct. Jan. 11, 1996).

130. *Id.* at 45956.

131. *Id.* at 45955.

trial did the attorney have the doctor describe the injuries themselves or explain how he reached his conclusion that the brothers had battered person's syndrome. As with most cases of this type, the defense attorney simply used BCS as a convenient route to present his testimony. Such a defensive use of BCS creates problems of its own.

In contrast to the prosecutorial use of BCS, the evidence is *intended* to be character evidence when criminal defendants use it in homicide prosecutions as a form of self defense. Use of expert testimony in that situation "demands that the jury consider the defendant's reactions not as a 'normal' person, but as [a] battered child."[132] In other words, the childhood "he made me do it" justification reverberates again in the courtroom. As with prosecutorial evidence, though, this type of evidence is improper.

Using battered child syndrome as a justification contradicts the basic theory of self defense. Normally, self defense requires a reasonable fear of imminent harm.[133] The classic case of self defense is when a homicide victim starts the fight that ends in his or her death. However, empirical research has shown that the defendants who use BCS as a defense usually use unreasonable force, kill while the victim is in a relaxed position, and act out of personal vengeance rather than self protection.[134] To further cast doubt on the validity of the BCS defense, "the abuse often remains concealed until trial; this leaves many to conclude that the defendant has concocted an 'abuse excuse.'"[135]

As with prosecutorial experts, defense experts may have an aura of infallibility. Such experts could disguise the actual issue in a homicide case and prevent the jury from truly analyzing the defendant's culpability. As Dr. Bakan noted, "Explanation can function as excuse; and when the evil is so monstrous we do not tolerate the possibility that it is excusable."[136] When defense attorneys use expert witnesses to explain that defendants cannot be guilty if they exhibit signs of BCS, the judicial system struggles to maintain its focus on holding people responsible for their actions.

Not all courts approve of this defensive use of BCS.[137] And this discrepancy creates a larger problem, as well. "[W]hen [the evidence] is allowed, the children often are acquitted, and where it is refused, they are usually convicted, despite the fact that the children are similarly situated."[138] Defendants who find a friendly judicial ear and are able to use such a broad definition of BCS thus have a significant advantage

Still, the problem looms larger than one might think. A federal circuit court

132. Baldwin, *supra* note 7, at 76.
133. *See, e.g.*, United States v. Ebert, 294 F.3d 896, 898 (7th Cir. 2002).
134. Hart & Helms, *supra* note 2, at 677–78.
135. Baldwin, *supra* note 7, at 78.
136. Bakan, *supra* note 1, at 151.
137. *See, e.g.*, State v. Crabtree, 805 P.2d 1 (Kan. 1991); Jahnke v. State, 692 P.2d 911 (Wyo. 1984).
138. Baldwin, *supra* note 7, at 81.

of appeals has implicitly approved of a BCS defense.[139] State courts seem to be moving in the same direction.[140] The law is slowly replacing Kempe's BCS with a new version of the syndrome that takes the focus away from the battered child and onto the battering parent.

Because of these various extensions, states have disagreed on the admissibility of BCS evidence. Some legislatures have passed statutes to address the admissibility of such evidence. In 1991, for example, Texas enacted the first law that allows a person who has been accused of killing his parent to admit evidence of past abuse.[141] At least four states specifically allow experts to testify about BCS in various situations.[142] Conversely, some states specifically preclude the defensive use of BCS evidence altogether.[143] Other state statutes are simply silent on the issue.

Likewise, courts struggle with the current uses of BCS evidence. The Supreme Court of Ohio, for example, ruled that the evidence is generally admissible when it is relevant and reliable.[144] Some courts say that BCS evidence is admissible because the syndrome is an accepted medical diagnosis;[145] others say that the evidence is permissible as simply a sociological term.[146] Conversely, the Kansas Supreme Court determined that the evidence is inadmissible, at least when the killing does not involve a specific precipitous confrontation.[147]

Still, some general trends have emerged. Although courts have frequently permitted evidence of battered child syndrome to prove the intent to commit child abuse, courts rarely allow use of the syndrome as a defense to prove justification.[148] Judges have generally come to a consensus that expert witnesses may give testimony on descriptions of commonly observed behaviors.[149] Courts also agree "that the expert *cannot* testify in the form of legal conclusions as to whether abuse occurred and, if so, who committed the abuse."[150]

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139. United States v. Hollow Horn Bear, No. 94-2484SD, 1994 WL 578218, at *1 (8th Cir. Oct. 20, 1994).

140. *See, e.g.*, *In re* Appeal in Maricopa County, 893 P.2d 60 (Ariz. Ct. App. 1994) (approving of the evidence but also affirming the conviction); People v. Shanahan, 753 N.E.2d 1028 (Ill. App. Ct. 2001) (reversing a conviction for failing to hold a *Frye* hearing on the BCS defense).

141. Hart & Helms, *supra* note 2, at 681.

142. Baldwin, *supra* note 7, at 77–78.

143. Hope Toffel, Note, *Crazy Women, Unharmed Men, and Evil Children: Confronting the Myths About Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defenses to All Victims of Domestic Violence*, 70 S. CAL. L. REV. 337, 344 (1996).

144. State v. Nemeth, 694 N.E.2d 1332, 1334 (Ohio 1998).

145. People v. Jackson, 95 Cal. Rptr. 919, 921 (Cal. Ct. App. 1971).

146. State v. Mapp, 264 S.E.2d 348, 353 (N.C. Ct. App. 1980).

147. State v. Crabtree, 805 P.2d 1, 6 (Kan. 1991); *see also* State v. Guyette, 658 A.2d 1204 (N.H. 1995) (holding for a similar rule).

148. *See* Baldwin, *supra* note 7, at 72 (analyzing the defensive use of such evidence).

149. Sagatun, *supra* note 29, at 204.

150. *Id.* at 205.

IV
THE PROBLEM AND ITS SOLUTION

The current use of BCS creates a unique problem in the courtroom because of its amorphous nature in the hands of clever attorneys. The flexibility of Kempe's BCS is one of its principal benefits, but that same flexibility is actually a hindrance to the fact-finding process when lawyers use expert witnesses to explain such a novel concept to lay jurors without concrete terms. Furthermore, the common thread among the three mutations of BCS evidence is that they take the focus away from the child's injuries and onto the person causing those injuries. Thus, the use of evidence beyond Kempe's original definition morphs BCS into a behavioral, rather than a physical, syndrome. Identification of typical behavior is not the same as identification of physical injuries.[151] True BCS evidence, or in other words Kempe's BCS, "seeks to explain physical injuries, rather than behavior."[152] Yet, all of the versions of BCS described above focus on the perpetrator's behavior.

The problem with such an extension of BCS evidence is twofold. First, the use of such evidence is on shaky ground under general rules of expert testimony. Second, and perhaps more importantly, such use of BCS tends to diminish the syndrome's importance in the medical field. As a solution, judicial use of such evidence should be strictly limited to Kempe's BCS.

A. Analyzing the Current Uses of BCS Evidence

The Supreme Court dramatically changed the analysis of expert testimony in 1993. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[153] disbanded the prevailing general acceptance standard as the test for such evidence. The Court noted that expert testimony requires "a valid scientific connection to the pertinent inquiry as a precondition to admissibility."[154] In determining the admissibility of expert testimony, the Court instructed future judges to consider such factors as whether a scientific theory can be (and has been) tested, whether it has been subjected to peer review and publication, the known or potential rate of error, the existence and maintenance of standards controlling its operation, and its general acceptance within the relevant scientific community.[155] The purpose of this new analysis was to ensure that "any and all scientific testimony or evidence admitted is not only relevant, but reliable."[156]

The advisory committee subsequently changed the Federal Rules of Evidence to reflect the *Daubert* holding. Now, the Rules explain that an expert witness may opine only under limited conditions: "if (1) the testimony is based

151. *See* State v. Lopez, 412 S.E.2d 390, 393 (S.C. 1991) (distinguishing evidence of a behavioral syndrome from evidence "based on a number of physical findings").

152. Brodit v. Cambra, 350 F.3d 985, 991 (9th Cir. 2003).

153. 509 U.S. 579 (1993).

154. *Id.* at 592.

155. *Id.* at 593–94.

156. *Id.* at 589.

upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[157]

Several states have not yet adopted the Supreme Court's *Daubert* analysis.[158] Of those that have, only two states have specifically applied a *Daubert* analysis to BCS.[159] Both courts held that the BCS evidence was admissible, but neither of the courts addressed the *Daubert* factors in particular. A lawyer's extension of BCS, as opposed to Kempe's version, does not lend itself to sufficient testability, rate of error, standards of maintenance, peer review, or general acceptance. A proper analysis of these *Daubert* factors shows that the current use of BCS does not pass the Supreme Court's standard.

Like any scientific evidence, the use of BCS should be tested for relevance and reliability before it is deemed admissible. As a syndrome, judges have naturally compared BCS with other syndromes. The Supreme Court of Washington, for example, ruled that BCS evidence is admissible because it is the "functional and legal equivalent of the battered woman syndrome."[160] Similarly, the Minnesota Supreme Court explained that "[l]ike expert testimony on battered woman syndrome . . . expert testimony on battered child syndrome may help to explain a phenomenon not within the understanding of an ordinary lay person."[161] Of course, the admissibility of other syndromes is an ongoing debate.[162] However, BCS is not necessarily like other syndromes. Indeed, one doctor explained that "a set of symptoms has not been shown in battered children at a sufficient rate of occurrence to support the same general acceptance in the community that battered woman syndrome enjoys."[163] Judges need to do an independent analysis of BCS, and its specific use in the case at hand, before it is admitted into evidence.

Because the current use of BCS is a description of several ambiguous symptoms, which change depending on who is using the evidence, it cannot be "tested" in the traditional sense. Researchers recognize that not all physically abused children suffer from BCS.[164] However, they have not delineated a clear description of when BCS exists and when it does not. Neither *The Diagnostic and Statistical Manual* nor *The International Classification of Diseases* contains diagnostic criteria for BCS. Since no diagnostic criteria are in place, nobody can argue with the lawyer's application of the syndrome in a specific situation. Most

157. FED. R. EVID. 702.

158. *See, e.g.*, People v. Leahy, 882 P.2d 321 (Cal. 1994); Howerton v. Arai Helmet, Ltd., 597 S.E.2d 674 (N.C. 2004).

159. State v. Koon, 730 So. 2d 503 (La. Ct. App. 1999); State v. Nemeth, 694 N.E.2d 1332 (Ohio 1998).

160. State v. Janes, 850 P.2d 495, 503 (Wash. 1993).

161. State v. MacLennan, 702 N.W.2d 219, 234 (Minn. 2005).

162. *See, e.g.*, Erin M. Masson, Annotation, *Admissibility of Expert or Opinion Evidence of Battered-Woman Syndrome on Issue of Self-Defense*, 58 A.L.R. 5TH 749 (1998).

163. *MacLennan*, 702 N.W.2d at 227.

164. Sagatun, *supra* note 29, at 206.

starkly, neither the law nor medicine can effectively test Dr. Wilson's definition of battered person's syndrome since so many people have relationships "with traumatizing features."

Differential diagnosis is particularly difficult in suspected abuse cases, especially because alternative explanations exist for most common injuries in child abuse.[165] Even bruises, perhaps the most easily recognized sign of physical abuse, can be attributed to other causes, such as leukemia, coagulation disorders, or connective tissue disorders,[166] not to mention accidental injuries. When prosecutors use BCS to identify the perpetrator of previous injuries, like the evidence presented in *Estelle*, they often forget these simple facts. Contrary to courts' assertions that BCS is an accepted diagnosis,[167] forensic experts have yet to create a specific set of symptoms with which they can test the syndrome. As one judge explained, "[T]here is no acceptable scientific method yet applicable to the syndrome."[168]

Consequently, the current uses of BCS have no known or potential rate of error. However, judges should remember that "[m]any of the so-called common effects of abuse may be attributed to other trauma or exist in normal children."[169] The Supreme Court of Minnesota has explained that "in the area of 'syndromes' experts do not administer a specific set of tests."[170] Child abuse is certainly a serious problem that society needs to address and curtail, but by extending it beyond Kempe's definition, the judicial use of BCS has failed to present any known or potential rate of error.

Researchers have also recognized that no definitive standards for identifying these modifications of BCS exist. Some will concede that the line between punishment and abuse "may be quite thin psychologically."[171] The research has not, and probably cannot, draw a bright line between child rearing and child abuse. Indeed, physicians faced with an abuse situation would likely not even *want* to draw such a line. Yet, proposed standards for admissibility in court are likewise unworkable. For example, one researcher has suggested that "[t]he defense of battered child syndrome would still be reserved for only those cases where there is clear evidence that the defendant acted out of desperation and had no other choice."[172] However, deciding ex ante which cases have clear evidence of desperation is an all-but-impossible task for a court unless it has a comprehensible definition of BCS to follow. Limiting the syndrome to Kempe's syndrome gives just such a definition.

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165. *See* Howard Dubowitz & Susan Bennett, *Physical Abuse and Neglect of Children*, 369 LANCET 1891, 1892–95 (2007).

166. *Id.* at 1892.

167. *See, e.g.*, United States v. Boise, 916 F.2d 497, 503–04 (9th Cir. 1990) (citing several cases concluding that BCS is an accepted diagnosis).

168. People v. Shanahan, 753 N.E.2d 1028, 1030 (Ill. App. Ct. 2001).

169. Sagatun, *supra* note 29, at 210.

170. State v. MacLennan, 702 N.W.2d 219, 233 (Minn. 2005).

171. Bakan, *supra* note 1, at 159.

172. Hart & Helms, *supra* note 2, at 679.

Furthermore, researchers have not sufficiently published or peer reviewed a clear description of BCS in the way it is currently used by prosecutors and defendants. Those in the medical field still recognize a significant lack of research.[173] Researchers have studied and identified child abuse, but they have not introduced a body of research defining or limiting BCS. Particularly when considering defendants seeking to use BCS evidence as part of a self-defense argument, violence against parents is arguably the most under-researched form of family violence.[174] To add to the problem, the American Board of Pediatrics did not administer the first examination for board certification in child abuse pediatrics until 2009.[175] Under *Daubert*, judges should not permit lawyers to use testimony that is in advance of current research.

Although BCS has certainly and rightly gained a level of general acceptance, its specific boundaries have not. Reactions of victims to abusive behavior vary widely, and that variance prevents the formation of any established or agreed upon observable indicators of an abused child profile.[176] A psychologist noted that the research is "inconclusive at best, dubious at worst, and undeniably contradictory."[177] Unfortunately, doctors who provide expert testimony on child abuse do not always receive a favorable response from the media or from the public.[178] Although the type of BCS used in courts may have gained a general acceptance among attorneys, it has not necessarily gained the same acceptance among those who are experts in the field. Kempe's BCS is generally accepted among medical and legal practitioners, but the extensions described above are less established. Particularly with respect to its psychological components, BCS "is not, at this point, well tested and confirmed enough to gain credibility that there is such an accepted syndrome."[179]

Finally, the Federal Rules of Evidence explain that expert opinion is only admissible if the witness "has applied the principles and methods reliably to the facts of the case."[180] Courts, however, seem to take a different view. The Minnesota Supreme Court, for example, explained that BCS experts cannot testify about whether a particular person has the syndrome.[181] Yet, the court also recognized that the evidence is only relevant if the attorneys establish a factual basis to suggest that the person actually has the syndrome.[182] Although the expert witness ostensibly cannot say that a specific person has BCS, the

173. Bakan, *supra* note 1, at 154.

174. Jeffrey A. Walsh & Jessie L. Krienert, *Child–Parent Violence: An Empirical Analysis of Offender, Victim, and Event Characteristics in a National Sample of Reported Incidents*, 22 J. FAM. VIOLENCE 563, 563 (2007).

175. Jenny, *supra* note 25, at 2797.

176. Sagatun, *supra* note 29, at 204.

177. Walsh & Krienert, *supra* note 174, at 566.

178. *See* Mike Fitzpatrick, *Child Abuse*, 363 LANCET 830, 830 (2004).

179. State v. MacLennan, 702 N.W.2d 219, 227 (Minn. 2005).

180. FED. R. EVID. 702.

181. *MacLennan*, 702 N.W.2d at 233.

182. *Id.* at 230–31.

evidence is only admissible if the person does. Indeed, some states only allow evidence of previous abuse if that connection is actually proven.[183] By taking the focus away from medical testimony and onto personal attacks on character, the current use of BCS violates these admissibility tests for scientific evidence.

Conversely, Kempe's BCS does not suffer from these same weaknesses. Perhaps Kempe's BCS cannot be "tested" in the traditional sense, but the involvement of so many medical professionals alleviates concerns about differential diagnosis or impermissible rates of error. Similarly, the type of syndrome presented in *Wilkerson* and similar cases enjoys professional standards among the medical community, significant research and publication, and general acceptance among those in both the medical and legal fields. A *Daubert* analysis shows the need to differentiate Kempe's BCS from its judicial manipulations.

B. Losing the Significance of BCS

Wholly aside from the effect on courtroom behavior, the current trend in expanding BCS has disturbing consequences for the nation more generally. Extending BCS beyond its original intention diminishes the role of Kempe's work because it taints the syndrome's flexibility and extracts it from its basis in medicine.

The prevalence of child abuse is certainly a disturbing epidemic; however, admitting abuse evidence into a courtroom does not serve any general deterrent purposes. Indeed, "criminal sanctions are a poor means of preventing child abuse."[184] To the knowledge of the author, no research has indicated that the judicial use of BCS evidence deters future child abuse. In fact, the introduction of such evidence only occurs after the abuse has already happened. In the case of criminal defendants using a self-defense claim, expert witnesses often present the evidence many years after the maltreatment.[185]

Of course, Kempe's BCS does function as a specific deterrent; that is, convictions are more easily attained. However, if this deterrence is the goal of the criminal justice system, then a stricter definition of BCS would be even *more* helpful. With a concrete set of diagnostic criteria, doctors could easily label and explain cases of abuse as instances of the syndrome.

From the beginning, BCS was intended to help professionals identify abuse. "[T]he physician's training and personality usually makes it quite difficult for him to assume the role of policeman or district attorney and start questioning patients as if he were investigating a crime."[186] Yet, as BCS evidence is expanded in the courtroom, physicians and therapists are asked to do just that.

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183. *See, e.g.*, State v. Norlin, 951 P.2d 1131, 1135–36 (Wash. 1998) (citing several cases).

184. Monrad G. Paulsen, *The Law and Abused Children*, *in* THE BATTERED CHILD, *supra* note 8, at 153, 154.

185. *See, e.g.*, State v. Crabtree, 805 P.2d 1, 2 (Kan. 1991) ("The shooting took place some seven years after the last physical violence to [the defendant].").

186. Kempe, *supra* note 11, at 19.

The more that BCS is judicially stretched, the more the syndrome loses its foundation in medical science. For example, some courts allow battered children to bring medical malpractice claims against hospitals and physicians for not diagnosing the syndrome.[187] Similarly, criminal defendants may be able to bring a legal malpractice claim against their lawyers for failing to present BCS evidence.[188] Instead of focusing on the battered child or even the battering adult, the focus is placed on the lawyer or physician diagnosing BCS. Lawyers have indeed turned the tables on Kempe.

Furthermore, the problem with always using BCS in criminal cases is that it loses its essential function as a help to medical and mental health professionals who are trying to identify abuse. Kempe himself recognized that an emphasis on the criminal aspect of BCS "impedes the therapy that both pediatricians and psychiatrists are attempting to give to the parents."[189] Kempe did not find "any evidence to indicate that failure to criminally punish parents who injure their children will increase the problem."[190] According to this doctor, the father of BCS, "[t]he child can usually be protected without the necessity of arresting the parents."[191] Physicians, not the courts, "are the first line of defense in the fight to decrease the incidence of the maltreatment syndrome in children."[192]

C. The Proper Solution

For those reasons, courts must be careful to distinguish battered child syndrome from child batterer syndrome. Medical evidence regarding previous injuries in a child abuse case may be relevant, helpful to the jury, and proper testimony for an expert witness. However, any evidence regarding *who* committed the abuse should be excluded. Such evidence is closer to profile evidence that masks the real issue in both infanticide and parricide cases.

For example, judges should limit testimony from those who conduct examinations to the area in which they are admitted as experts. Determining the cause of death is "the principal purpose for conducting exhaustive investigation and postmortem examination in harmony with the law enforcement agency."[193] Although identifying BCS is helpful in determining the willfulness of a child's death and eliminating alternate explanations, it is not by itself a cause of death. Thus, a lawyer's use of testimony from a pathologist should be limited to the actual cause of death—the fatal injury—and not the profile of one who would cause such an injury.

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187. *See, e.g.*, Landeros v. Flood, 551 P.2d 389 (Cal. 1976); Becker v. Mayo Found., 737 N.W.2d 200 (Minn. 2007); Heidt v. Rome Mem'l Hosp., 278 A.D.2d 786 (N.Y. App. Div. 2000).

188. *See, e.g.*, Wade v. Calderon, 29 F.3d 1312, 1316–18 (9th Cir. 1994) (discussing an ineffective assistance claim).

189. THE BATTERED CHILD, supra note 8, at 187.

190. *Id.*

191. *Id.*

192. Fontana, *supra* note 22, at 1393.

193. James Tuthill Weston, *The Pathology of Child Abuse*, *in* THE BATTERED CHILD, *supra* note 8, at 61, 66.

When BCS evidence is admissible, judges should use a special jury instruction. As Justice O'Connor explained in *Estelle*, "The fact that a . . . child was repeatedly beaten in the course of her short life is so horrifying that a trial court should take special care to inform the jury as to the significance of that evidence."[194] Judges need to be careful not to "encourage[] the jury to assume that [the defendant] had inflicted the prior injuries and then direct[] the jury to conclude that the prior abuser was the murderer."[195]

Perhaps the best example of proper jury instructions to date concerning BCS was presented in the case of *State v. Moorman*.[196] The lawyer limited the expert's testimony to facts regarding the child's injuries and did not allow him to discuss the identity or possible identity of the person who inflicted those injuries.[197] With that background, the judge instructed the jury that it could only use the expert testimony of prior injuries as evidence that the child's death was not caused by a fall down stairs, and not as evidence of any predisposition by the defendant to commit the crime. The judge advised the jury that it was not bound to accept the doctor's testimony as credible evidence as to whether or not the child's death was accidental. The judge cautioned the jury that even if it concluded that the child was a victim of BCS, and had died because of repeated physical abuse, it could not return a guilty verdict unless it was convinced beyond a reasonable doubt that the defendant had inflicted the injuries.[198]

By limiting BCS evidence to Kempe's original definition and placing the focus correctly on the battered child, judges will preserve the proper role of the syndrome—in both medicine and law.

V
CONCLUSION

In the medical field, battered child syndrome has left several questions unanswered. Does the syndrome include mere neglect? Is emotional abuse sufficient to diagnose BCS? How many injuries are required for a child to be "battered"? How does BCS relate to other mental diseases and defects? For physicians, the distinction between one injury and two might not make much of a difference. For a criminal defendant, that distinction may mean the difference between prison and freedom.

Thus, evidence of BCS needs to be judicially restricted in a different way from how it is restricted in the medical context. To the extent that BCS evidence is about the perpetrator rather than the victim, it is improper. Regardless of the truthfulness of the evidence, the American criminal justice system is one of limited information. As the Supreme Court explained:

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194. Estelle v. McGuire, 502 U.S. 62, 76 (1991) (O'Connor, J., concurring in part and dissenting in part).

195. *Id.*

196. Reported on appeal at 670 A.2d 81 (N.J. Super. Ct. App. Div. 1996).

197. *Id.* at 85.

198. *Id.*

> We recognize that, in practice, a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations. That, nevertheless, is the balance that is struck by Rules of Evidence designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes.[199]

Still, "the refusal to face evil serves to perpetuate it."[200] Society should certainly not ignore the prevalence of child abuse. Hopefully, continued scientific research into BCS will create a more expansive and more comprehensive explanation of the syndrome. But, whatever happens in the medical field, "[i]n order to be fair and consistent, the courts need to come to a conclusion on how they are going to treat and punish battered children."[201]

199. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 597 (1993).
200. Bakan, *supra* note 1, at 149.
201. Hart & Helms, *supra* note 2, at 681.