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The Cry of a Child Left Unanswered: Pennsylvania's Treatment of Battered Children Who Kill Their Parents

A gentle lamb has rhetoric to plead,
And when she sees the butcher's knife decreed,
Her voice entreats him not to make her bleed.

Dr. William King—Mully of Mountown, Line 52¹

I. Introduction

Reports of child abuse date from the 1600s,² but infanticide was used by many earlier civilizations as a means of population control.³ Modern child abuse statistics are staggering: in Pennsylvania alone, over 20,000 children were reported abused in 1985,⁴ and nearly three million cases of child abuse are reported in the United States each year.⁵ In spite of these figures, Pennsylvania remains reluctant to admit evidence of the battered child syndrome as a defense to parricide.⁶ The state fails to see that permitting this defense would allow justice and equal

1. JOHN C. GROCOTT, *FAMILIAR QUOTATIONS* 215 (London, George Routledge & Sons, Lmtd. 6th ed. n.d.).

2. Karla O. Borei, Comment, *Syndrome Testimony in Child Abuse Prosecutions: The Wave of the Future?*, 8 ST. LOUIS U. PUB. L. REV. 207, 207 n.1 (1989).

3. SANDERS J. BREINER, M.D., *SLAUGHTER OF THE INNOCENTS: CHILD ABUSE THROUGH THE AGES AND TODAY* 7 (1990) (citing L. WILLIAMSON, *INFANTICIDE* (1971)).

4. ATTORNEY GENERAL'S FAMILY VIOLENCE TASK FORCE, *VIOLENCE AGAINST CHILDREN* 5 (1987) [hereinafter TASK FORCE].

5. *Scared Silent* (ABC television broadcast Sept. 6, 1992, hosted by Oprah Winfrey). Reports of child deaths from abuse and neglect jumped 23% nationwide between 1985 and 1986. PAUL A. MONES, *WHEN A CHILD KILLS—ABUSED CHILDREN WHO KILL THEIR PARENTS* 322 (1991).

6. See *infra* notes 60-86 and surrounding text. Parricide is the act of killing a parent or someone who stands in a similar relationship to the murderer. WEBSTER'S NEW UNABRIDGED DICTIONARY 1305 (Jean L. McKechnie ed., 1983).

protection for children. The defense permits evidence to be presented regarding psychological effects of child abuse.⁷ When the horrors of abuse finally become too much for a child to face, the child may kill his abuser.⁸

This Comment will focus on child abuse, the battered child syndrome and the likelihood that Pennsylvania will accept the battered child syndrome as a defense to parricide. Part II of this Comment defines the battered child syndrome and compares the medical and legal perspectives on child abuse. Part III discusses the legal requirements for asserting a self-defense claim in Pennsylvania, the challenges of defending a parricide case, and the resulting need for expert testimony on battered child syndrome in such cases. Part IV examines the admissibility of battered child syndrome and battered woman syndrome evidence in Pennsylvania and the state's potential acceptance of a battered child syndrome defense. Part V evaluates the emerging attitude toward battered children who kill their abusers, and Part VI refutes common objections to the admissibility of syndrome testimony. Finally, this Comment concludes that there is a need for expert testimony when attempting to prove that a battered child killed his abuser in self-defense.

II. Defining Child Abuse and the Battered Child Syndrome

A. *The Battered Child Syndrome: A Medical Perspective on Child Abuse*

The battered child syndrome was first described in a medical journal by C. Henry Kempe over thirty years ago.⁹ Kempe studied 302 cases from 71 hospitals nationwide and discovered several characteristics shared by victims of what he called the "battered child syndrome."¹⁰ These characteristics include "multiple injuries in various stages of healing, . . . frequently coupled with poor hygiene and malnutrition, but peculiarly identified by the marked discrepancies between the clinical or physical findings and the historical data provided by the parents."¹¹ In creating the term "battered child syndrome,"¹² Kempe wanted to increase

7. See *infra* notes 55-59 and surrounding text.

8. MONES, *supra* note 5, at 62.

9. Kempe, *et al.*, *The Battered Child Syndrome*, 181 JAMA 17 (1962).

10. *Id.* at 17.

11. Allan H. McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 MINN. L. REV. 1, 18 (1965) (showing how to identify a battered child and suggesting ways to remedy the abuse).

12. A "syndrome" refers to "[t]he aggregate of signs and symptoms associated with any morbid process and constituting the picture of the disease." STEDMAN'S MEDICAL DICTIONARY 1522

physician awareness of the link between child abuse and a specific set of injuries, but maintain that such injuries were not accidental.¹³

Since Kempe's research, battered children have been studied by pediatricians, psychiatrists, psychologists, sociologists and social workers.¹⁴ While Kempe's definition of the battered child syndrome focused on the physical manifestations of child abuse as described in medical reports, subsequent research has centered on the psychological aspects of child abuse.¹⁵ As a result, there is a greater awareness of the ways in which abuse affects children. Typical psychological symptoms of child abuse include disruptiveness,¹⁶ isolation, depression, low self-esteem and learned helplessness.¹⁷ In addition, abused children have also developed a keen awareness for when they are about to be abused.¹⁸ Recognizing the psychological aspects of child abuse, some experts propose that the battered child syndrome encompass a psychological as well as physical diagnosis.¹⁹

B. A Legal Perspective on Child Abuse

The legal treatment of child abuse victims reflects a narrow definition of abuse. Society's concern for abused children is limited to the type of abuse that puts a child in immediate, life threatening physical danger.²⁰ This definition of abuse fails to recognize the other forms of abuse which are not as physically obvious. For example, in addition to physical abuse,²¹ children may be neglected or receive emotional, verbal or

(William R. Hensyl ed., 25th ed. 1990).

13. Steven R. Hicks, *Admissibility of Expert Testimony on the Psychology of the Battered Child*, 11 *LAW & PSYCHOLOGY REV.* 103, 109 (1987).

14. NEIL FRUDE, *PSYCHOLOGICAL APPROACHES TO CHILD ABUSE* 5 (1981). *See generally* Hicks, *supra* note 13.

15. FRUDE, *supra* note 14, at 5.

16. MICHAEL S. MACPHERSON, *THE PSYCHOLOGY OF ABUSE* 270 (1984).

17. *See generally*, MONES, *supra* note 5. Other signs of child abuse include bruises and welts, frequent absences at school, undernourishment, withdrawal, an unkempt appearance and the need for medical attention. MACPHERSON, *supra* note 6, at 269-70.

18. MONES, *supra* note 5, at 63. This awareness is known as "hypervigilance." *See also infra* note 57 and accompanying text.

19. Hicks, *supra* note 13, at 111.

20. MACPHERSON, *supra* note 16, at vii.

21. The methods of physical abuse vary; but by far the most common are beatings with various instruments such as fists, chair legs, hair brushes and fan belts. McCoid, *supra* note 11, at 15 (quoting VINCENT DEFRANCIS, *CHILD ABUSE—PREVIEW OF A NATIONWIDE SURVEY* 5-7 (1963)). Children have also been burned in open flames, with lighted cigarettes, electric irons or scalding liquids. *Id.* Additionally, the brutality includes stabbings, shootings, electric shocks and drownings. *Id.*

sexual abuse.²² Most abused children experience multiple forms of abuse.²³

The classification of a child's sexual assault by a relative as "sexual abuse" rather than "rape" is additional evidence of society's ignorance of the plight of children. This designation appears to be due to society's misperception that sexual abuse by a relative is not forcefully imposed.²⁴ However, most sexually abused children are forced to have sex with their abuser,²⁵ although the force used may be more psychological than physical.²⁶ Because the perceived brutality of "sexual abuse" is less than that of "rape," this classification of assault results in less stringent penalties.²⁷

Pennsylvania's protection of abused children is similarly insufficient. For example, Pennsylvania defines child abuse merely as "serious physical or mental injury."²⁸ In addition, abused children are usually not removed from the home unless severe harm is demonstrated, and even then it is a long and difficult process.²⁹ Pennsylvania's criteria for child abuse also fails to address actions or omissions that threaten the child's health or safety.³⁰ It should therefore be no surprise that some abused children who lack adequate legal or other protection react violently by killing their abusers. To these children, murder is their only means of self-defense.

22. MACPHERSON, *supra* note 16, at 2. The sexual exploitation of children is one of the most under-reported crimes in the country. U.S. DEP'T. OF JUSTICE, NATIONAL SYMPOSIUM ON CHILD MOLESTATION 201 (1984). Even when child molestation is reported, the abusers may receive inadequate punishment. *See id.* For example, the same court that sentenced a man to four years in prison for stealing a television set, 400 pennies, 2 bars of soap, a bottle of aftershave lotion, and a handbag full of hair curlers sentenced another man on the same day to only one year in jail for molesting three girls in a licensed day care home operated by his wife. *Id.*

23. MACPHERSON, *supra* note 16, at 3.

24. MONES, *supra* note 5, at 142.

25. *Id.* at 142-43.

26. *See id.*

27. *See id.*

28. 23 PA. CONS. STAT. ANN. § 6303 (1991). Child abuse is defined in the Child Protective Services Law as:

Serious physical or mental injury which is not explained by the available medical history as being accidental, sexual abuse, sexual exploitation or serious physical neglect of a child under 18 years of age if the injury, abuse or neglect has been caused by the acts or omissions of the child's parents or by a person responsible for the child's welfare, or any individual residing in the same home as the child, or a paramour of the child's parents.

Id.

29. MACPHERSON, *supra* note 16, at 5.

30. Although Pennsylvania punishes abusive parents whose acts or omissions result in actual injury to their children, 23 PA. CONS. STAT. ANN. § 6303 (1991), the state does not punish any parental acts or omissions that threaten a child's welfare.

III. The Self-Defense Theory and the Admissibility of Expert Testimony Concerning Battered Child Syndrome

A. *Self-Defense Claims in Pennsylvania*

Under Pennsylvania law, a defendant establishes a self-defense claim if he proves that he reasonably believed he was in imminent danger of death or serious bodily injury and that it was necessary to use deadly force against the victim to prevent such harm.³¹ In determining subjective or actual fear, the court will consider evidence of the victim's past behavior if such behavior was known to the defendant and could have added to his fear.³² In addition, psychiatric testimony regarding the accused's state of mind is permitted to establish a subjective belief of imminent danger.³³ A self-defense claim will be rejected, however, if the defendant provoked the altercation or violated any duty to retreat.³⁴

Since self-defense includes an objective component, the court will typically instruct the jury to analyze whether a reasonable person would have felt the need to use self-defense under the same circumstances.³⁵ Because reasonableness and culpability can best be determined by analyzing the defendant's attributes and the particular situation he faced, the jury should be instructed to consider the defendant's individual circumstances.³⁶ Thus, the trier of fact should consider evidence of the comparative size, weight, and strength of the defendant and the victim and whether the defendant suffered from some physical handicap or injury.³⁷ Courts have generally found that if the attacker was unarmed, the use of deadly force is more difficult to justify.³⁸

31. *Commonwealth v. Samuel*, 590 A.2d 1245 (Pa. 1991). *See also* 18 PA. CONS. STAT. ANN. § 505(a) (1983). "The use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose or protecting himself against the use of unlawful force by such other person on the present occasion." *Id.*

32. *E.g.*, *Commonwealth v. Stewart*, 394 A.2d 968, 970 (Pa. 1978); *Commonwealth v. Russell*, 473 A.2d 1383 (Pa. Super. Ct. 1984).

33. *Commonwealth v. Light*, 326 A.2d 288, 292 (Pa. 1974).

34. *Samuel*, 590 A.2d at 1247-48. *See also* 18 PA. CONS. STAT. ANN. § 505(b) (1983). In addition, the use of force is not justifiable when used to resist an arrest or resist the force of one defending his property under a known claim of right. *Id.*

35. *Commonwealth v. Helm*, 402 A.2d 500, 504 (Pa. 1979).

36. *Id.* at 504-505.

37. *Smith v. United States*, 161 U.S. 85, 88 (1896); *See also*, Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393 (1988) (contending that battered women who kill their husbands can legitimately invoke the standard self-defense claim).

38. *Commonwealth v. Jones*, 332 A.2d 464, 466 (Pa. Super. Ct. 1974). However, the Pennsylvania Supreme Court has held that a wife's subjective belief of imminent danger was reasonable where her husband was unarmed. *Commonwealth v. Watson*, 431 A.2d 949 (Pa. 1981).

To further assess the reasonableness of the defendant's actions, the jury may examine evidence of the victim's prior acts or threats of violence.³⁹ Pennsylvania admits such character evidence because it may corroborate the defendant's self-defense claim.⁴⁰ "It is only when the jury understands *how* the defendant perceives the alleged danger are they [sic] able to make a rational judgment about the defendant's actions."⁴¹

B. Parricide: Challenges to the Defense and the Need for Expert Testimony on Battered Child Syndrome

In 1989, 21,500 homicides were committed in the United States, 344 of which were parricides.⁴² A parricide typically presents the prosecution with a case of first degree murder.⁴³ These cases involve significant challenges for the defense. First, the defense must overcome the unspoken expectation that a child should always treat his parents with love, regardless of his suffering.⁴⁴ Second, because there is usually overkill, such as multiple bullet or stab wounds, it is difficult to prove that there was no premeditation or that such extreme behavior was due to fear of retaliation.⁴⁵

Third, because the act of killing one's parent is seen as too brutal to justify the leniency of the juvenile system,⁴⁶ parricides are rarely tried in juvenile court.⁴⁷ In Pennsylvania, the legislature has expressly

39. See *supra* note 32 and accompanying text.

40. Commonwealth v. Stewart, 394 A.2d 968, 970 (Pa. 1978). Evidence of the victim's violent nature can also be presented to prove that the victim was in fact the aggressor. Commonwealth v. Clemmons, 479 A.2d 955 (Pa. 1984). Courts refuse to admit character evidence when the defense is provocation. Commonwealth v. Rivers, 557 A.2d 5 (Pa. Super. Ct. 1989), *appeal denied*, 567 A.2d 652 (Pa. 1989).

41. Commonwealth v. Dillon, 598 A.2d 963, 971 (Pa. 1991) (Cappy, J., concurring).

42. MONES, *supra* note 5, at 25. The typical parent who died at the hands of his child was an abuser who was addicted to controlling the child and the pleasure that accompanied the exercise of such control. *Id.* at 13-14.

43. *Id.*

44. A belief that children must respect and obey their parents dates at least to biblical times. The fourth commandment tells a child to "honor thy father and thy mother." Exodus 20:12 (King James). The Bible even recommends death for a child who disobeys his parents: "And he that smiteth his father, or his mother, shall be surely put to death." *Id.* at 21:15.

45. MONES, *supra* note 5, at 106.

46. See *id.* at 89. Additionally, most parricides seem to be committed by older teenaged children, thus justifying trial as an adult. See generally, MONES, *supra* note 5; GREGGORY W. MORRIS, THE KIDS NEXT DOOR: SONS AND DAUGHTERS WHO KILL THEIR PARENTS (1985). However, despite their chronological age, abused children have an emotional age of only one to three years. MACPHERSON, *supra* note 16, at 22. "The abused child, overwhelmed and unable to cope with trauma of abuse, regresses backwards." *Id.*

47. MONES, *supra* note 5, at 89. On November 18, 1992, another battered child, Billie Joe Powell, fell victim to a judge's ruling that she be tried as an adult. *Town Supports Teen Who Killed Abusive Dad*, EVENING SENTINEL (Carlisle, Pa.), Nov. 21, 1992, at A1. Billie Joe had been sexually,

excluded murder allegations from the original jurisdiction of the juvenile court.⁴⁸ Although a parricide case may be transferred to juvenile court at the discretion of the common pleas court,⁴⁹ the defendant child bears the burden of proving that his case does not belong in adult court.⁵⁰ This is accomplished by demonstrating an amenability to programs of rehabilitation, supervision and care that are provided by the juvenile court system.⁵¹ Unfortunately, the brutality of parricides and the social stigma attached to them make transfer to a juvenile court very unlikely.⁵² The defendant's lack of repentance is an additional stumbling block to transfer: in most parricides by abused children, the child believed that murder was necessary to ensure his survival.⁵³

Finally, judicial rejection of the psychological realities of child abuse has become a major obstacle to the defense of battered children who murder their parents.⁵⁴ Although battered child syndrome research has identified the psychological effects of child abuse, Pennsylvania continues

physically, and emotionally abused by her father. *Id.* Following a night of this abuse, Billie Joe fired a single-shot .22 caliber rifle into her father's back. *Id.* Although she showed little remorse, her hometown of Cement, Oklahoma rallied around her based on an awareness of the rumors of her abuse and on a belief that "frontier justice" was achieved. Jana Mazanec, *Murderer or Victim?*, USA TODAY, Nov. 12, 1992, at 2A. Although the prosecutor recommended that the case be handled in the juvenile system, the judge ruled that she be tried as an adult. Perhaps this case indicates a heightened awareness of the stigma of child abuse and the court system's ignorance of the plight of battered children.

48. 42 PA. CONS. STAT. ANN. § 6302 (Supp. 1993). See also *Commonwealth v. Romeri*, 470 A.2d 498, 505 (Pa. 1983), cert. denied, 466 U.S. 942 (1984); *Commonwealth v. Pyle*, 342 A.2d 101, 106 (Pa. 1975).

49. 42 PA. CONS. STAT. ANN. § 6322(a) (Supp. 1993). See also, e.g., *Commonwealth v. Zoller*, 498 A.2d 436, 439 (Pa. Super. Ct. 1985) (denying transfer due to juvenile's violent episodes and absence of guarantee that he would respond sufficiently to treatment during juvenile court's authority).

50. PA. CONS. STAT. ANN. § 6322(a) (Supp. 1993). Delinquency cases that do not involve murder may be transferred to adult court, but the Commonwealth has the burden of proving that the youthful offender does not belong in the juvenile justice system. *Pyle*, 342 A.2d at 106 n.11; see also *Commonwealth v. Kocher*, 602 A.2d 1308, 1311 (Pa. 1992); *Commonwealth v. Brown*, 480 A.2d 1171, 1174 (Pa. Super. Ct. 1984).

51. 42 PA. CONS. STAT. ANN. § 6322(a) (Supp. 1993). The relevant factors to be considered in determining whether a child is amenable to the juvenile system's rehabilitation, supervision and care include: age; mental capacity; maturity; degree of criminal sophistication exhibited by the child; previous record; nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child; whether the child can be rehabilitated prior to the expiration of the juvenile court's jurisdiction; probation or institutional reports; and the nature and circumstances of the acts for which the transfer is sought. 42 PA. CONS. STAT. ANN. § 6355(a)(4)(iii)(A) (1982). See also *Commonwealth v. Kocher*, 602 A.2d at 1312 (holding that behavior disorder may be considered in determining amenability to juvenile justice system).

52. See generally MONES, *supra* note 5.

53. MONES, *supra* note 5, at 312.

54. See generally, MONES, *supra* note 5.

to equate battered child syndrome solely with a medical diagnosis of physical abuse.⁵⁵ However, information regarding the psychological effects of abuse is necessary to defend a battered child who murdered his parent. Expert testimony on the battered child syndrome can demonstrate that the abused child's actions were immediately necessary, and therefore reasonable, by explaining how abuse sharpens the child's perception of imminent danger.⁵⁶ Abused children develop a "finely tuned antenna for impending violence" based on the experience of previous incidents and the dangers associated with them.⁵⁷ Expert testimony that abused children develop an instinctual awareness of the threat of death or serious bodily harm can help establish a successful theory of self-defense.

Additionally, expert testimony can educate the judge and jury about the horrors of child abuse, including the disbelief of adults to whom children have complained of abuse.⁵⁸ The expert can expose the effect that violence has on a child and explain why the child did not run away or try to get help.⁵⁹

IV. The Battered Child Syndrome as a Defense in Pennsylvania

A. Admissibility of Battered Child Syndrome Testimony in Pennsylvania Child Abuse Prosecutions

In those jurisdictions that have considered the issue, battered child syndrome testimony is admissible in child abuse prosecutions to show that the victim's injuries were not accidental.⁶⁰ In *Commonwealth v.*

55. *Commonwealth v. Dunkle*, 602 A.2d 830, 835-36 (Pa. 1992). The Supreme Court of Washington expressly recognized in *Janes*, however, that the battered child syndrome describes both the psychological and physical effects of child abuse. *State v. Janes*, 850 P.2d 495, 501 (Wash. 1993).

56. MONES, *supra* note 5, at 62. The plight of battered children, who "[i]n the dark moments of their aloneness . . . perceive the imminence of danger . . . [and] undertake to assert their right of self-defense" must not be ignored by the court system and its duty to do justice. *Jahnke v. State*, 682 P.2d 991, 1012 (Wyo. 1984) (Rose, J., dissenting).

57. MONES, *supra* note 5, at 62. See also *supra* note 18 and accompanying text.

58. HICKS, *supra* note 13, at 104. See also *State v. Janes*, 850 P.2d 495, 503 (Wash. 1993).

59. Abused children are often threatened with more abuse if they choose to run away or to report the violence. MONES, *supra* note 5, at 37. Sometimes the child will not leave due to threats that a sibling or the other parent will be abused or killed. *Id.* Abuse children become extremely psychologically attached to their abusive parents. *Id.* at 34. Their dependency on the abuser, complicated by confusion and guilt after an attack, results in a reluctance to report any abuse. *Id.*

60. *State v. Wilkerson*, 247 S.E.2d 905, 912 (N.C. 1978). See also, *People v. Jackson*, 95 Cal. Rptr. 919, 922 (Cal. Ct. App. 1971) (holding physician testimony on presence of battered child syndrome did not invade province of jury); *State v. Loss*, 204 N.W.2d 404, 408-409 (Minn. 1973) (allowing physician testimony that cause of child's death was "brain injury secondary to battered

Rodgers,⁶¹ the Pennsylvania Superior Court addressed the admissibility of expert testimony on battered child syndrome in the prosecution of two parents for the death of their toddler.⁶² At trial, a qualified expert witness testified that the child suffered from the syndrome.⁶³ In addition, based upon his physical examination of the child, the expert offered his opinion regarding the means by which the defendant parents had inflicted various injuries on their daughter.⁶⁴ The expert neither offered an opinion as to the culpability of the defendants nor testified to any behavioral patterns which could have categorized the child as abused.⁶⁵ Rather, the expert's testimony simply revealed that the child was not accidentally injured.⁶⁶ The court held that such testimony is admissible in the prosecution of a child abuser when given by properly qualified experts and relevant to the particular factual circumstances of the case.⁶⁷

B. Admissibility of Child Sexual Abuse Syndrome Testimony in Pennsylvania

When syndrome testimony is offered to show the psychological characteristics and behavior patterns of abused children, Pennsylvania is not as responsive. For example, Pennsylvania has refused to admit expert testimony concerning the "child sexual abuse syndrome," which describes the typical behavior patterns exhibited by sexually abused children.⁶⁸ The Pennsylvania supreme court in *Commonwealth v. Dunkle*⁶⁹ held such testimony to be prejudicial because the syndrome was not

child syndrome"); *People v. Henson*, 304 N.E.2d 358, 363-64 (N.Y. 1973) (holding expert testimony on battered child syndrome relevant in determining whether the child's injuries were accidental); *State v. Best*, 232 N.W.2d 447, 458 (S.D. 1975) (stating "we have found no case in which expert medical testimony on the 'battered child syndrome' was rejected.").

61. 528 A.2d 610 (Pa. Super. Ct. 1987), *appeal denied*, 542 A.2d 1368 (Pa. 1988).

62. *Id.* at 613. Although in 1973 the Pennsylvania supreme court permitted a jury to evaluate an expert witness' opinion that the injuries in a child abuse case were not accidental, the court did not explicitly discuss the battered child syndrome. *Commonwealth v. Paquette*, 301 A.2d 837 (Pa. 1973).

63. *Rodgers*, 528 A.2d at 613.

64. *See id.* at 614.

65. *See id.* at 615.

66. *Id.*

67. *Id.* at 614. In Pennsylvania, relevancy is found when the evidence has probative value and makes the existence of a fact material to a case. *Commonwealth v. Shain*, 471 A.2d 1246, 1249 (Pa. Super. Ct. 1984). A piece of evidence is of essential evidentiary value if the need for it outweighs the likelihood that it will inflame the passions of the jury. *Commonwealth v. Petrakovich*, 329 A.2d 844, 849 (Pa. 1974). *See also*, *Commonwealth v. McCutchen*, 454 A.2d 547, 549 (Pa. 1982); *Commonwealth v. Martinez*, 380 A.2d 747, 750 (Pa. 1977).

68. *Commonwealth v. Dunkle*, 602 A.2d 830 (Pa. 1992).

69. *Id.*

"sufficiently established to have gained general acceptance in the particular field in which it belong[ed]."⁷⁰ The court also held that the evidence was irrelevant.⁷¹ Citing to numerous scholarly works on the subject, the court found no typical behavior pattern or personality profile for sexually abused children.⁷² The court found that although sexually abused children may exhibit the behavior patterns identified by the expert witness,⁷³ those patterns were just as common to children of divorced parents⁷⁴ and to psychologically abused children.⁷⁵

The *Dunkle* court compared expert testimony on child sexual abuse syndrome with such testimony on the battered child syndrome and concluded that the latter evidence was unique to physically abused children and lacked the generality of testimony characteristic of child sexual abuse syndrome.⁷⁶ The court held that expert testimony regarding behavior patterns exhibited by sexually abused children "merely attempts . . . to suggest that the victim was, in fact, exhibiting symptoms of sexual abuse"⁷⁷ and that this "attempt" does not raise the evidence to the level of probative value necessary for admissibility.⁷⁸ The court contended that an introduction of such testimony was erroneous in light of the fact that the proposed behaviors of sexually abused children lacked uniformity and support in the scientific community.⁷⁹ The *Dunkle* court

70. *Id.* at 832, (citing *Commonwealth v. Nazarovitch*, 436 A.2d 170, 172 (Pa. 1981) (quoting *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923))).

71. *Id.* at 834. The evidence was not relevant because it failed to "render[] the desired inferences more probable than it [sic] would be without evidence." *Id.* (quoting *Commonwealth v. Stewart*, 336 A.2d 282, 284 (Pa. 1975)). Relevant evidence must somehow advance the factfinder's inquiry. *Commonwealth v. Walzack*, 360 A.2d 914, 918 (Pa. 1976). See also MCCORMICK ON EVIDENCE § 185 at 544-45 (Edward W. Cleary ed., 3d ed. 1983).

72. *Commonwealth v. Dunkle*, 602 A.2d 830, 832 (Pa. 1992). *But see*, *Commonwealth v. Kacsmar*, 617 A.2d 725 (Pa. Super. Ct. 1992) (permitting psychiatric evidence regarding lack of self-esteem and change in abuse patterns).

73. The expert had testified that sexually abused children exhibit characteristics of low self-esteem, withdrawal, disassociation, falling grades, and lack of concentration on school work. 603 A.2d at 833.

74. *Id.* (citing JUDITH S. WALTERSTEIN & JOAN B. KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980)).

75. *Id.* (citing JAMES GABARINO ET AL., *THE PSYCHOLOGICALLY BATTERED CHILD* 69 (1986)). The court noted that the following characteristics have been identified as exemplary of psychologically maltreated children: inferiority, low self-esteem, anxiety, aggressiveness, and inadequate social behavior. *Id.* at 833 n.7 (citing JAMES GABARINO ET AL., *THE PSYCHOLOGICALLY ABUSED CHILD* 69 (1986)).

76. *Commonwealth v. Dunkle*, 602 A.2d 830, 836 (Pa. 1992). The court noted that it had not yet expressed an opinion on the subject of the battered child syndrome because it had not yet come before the Supreme Court of Pennsylvania. *Id.* at 836 n.17.

77. *Id.* at 834.

78. *Id.*

79. *Id.*

further held that expert testimony is unnecessary in the prosecution of a child abuser to explain why sexually abused children may forget details of the abuse, delay reporting assaults and fail to provide authorities with complete details of the abuse.⁸⁰ The court believed that this information is "well within the range of common experience."⁸¹

Ironically, the court supported its position by relying upon the research of experts, yet it inexplicably instructed that such information is within a juror's common knowledge. However, unless a juror has experienced some form of child abuse or personally knows someone who has been abused, information concerning the behavior patterns of abused children is unlikely to be within that juror's common knowledge.⁸² If behavioral patterns resulting from sexual abuse are common knowledge, it is difficult to understand why sexual abuse by one parent often goes unnoticed by the other parent.⁸³

Expert testimony is admitted in Pennsylvania to aid a jury when the subject matter is related to a science, skill or occupation beyond the knowledge and experience of an average person.⁸⁴ The psychology of intra-familial abuse is a science beyond ordinary lay experience. As recognized by the *Dunkle* dissent, to assert that such matters are universally understood is to declare the field of psychology insignificant.⁸⁵ Additionally, although sexually abused children may share traits common to other abused children, no one has disputed that any of these patterns have been found in sexually abused children.⁸⁶

C. Admissibility of Battered Woman Syndrome Testimony in Pennsylvania

Closely analogous to the battered child syndrome is the battered woman syndrome, which is often presented as a defense by women who kill their abusers.⁸⁷ This syndrome describes an identifiable group of

80. *Id.* at 836-37.

81. *Commonwealth v. Dunkle*, 602 A.2d 830, 837 (Pa. 1992).

82. *See id.* at 843 n.3 (Larsen, J., dissenting); *State v. Janes*, 822 P.2d 1238, 1243 (Wash. App. 1992).

83. *See generally* MONES, *supra* note 5; MACPHERSON, *supra* note 16; McCoid, *supra* note 11.

84. *Commonwealth v. Duffey*, 548 A.2d 1178 (Pa. 1988).

85. *Dunkle*, 602 A.2d at 840 (McDermott, J., dissenting). Justice McDermott wrote: I believe the majority is ascribing to the average juror incredible sophistication regarding the effect of sexual abuse on the workings of a young mind [This] basically trivializes an entire field of child psychology by implying that everybody already knows these facts as surely as they know that apples fall down.

Id. at 839-40.

86. *Id.* at 843 n.4 (Larsen, J., dissenting).

87. *See generally* CHARLES P. EWING, BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-

symptoms that characterize the behavior and state of mind of women who have experienced long-term spousal abuse.⁸⁸

In *Commonwealth v. Stonehouse*,⁸⁹ the Supreme Court of Pennsylvania overturned a battered woman's murder conviction because her defense counsel failed to request an instruction requiring the jury to consider the cumulative effects of long-term physical and psychological abuse when assessing the reasonableness of the defendant's self-defense claim.⁹⁰ In a portion of the majority opinion embraced by only two other justices, Justice Larsen found that the battered woman syndrome was not within the ordinary training, knowledge, intelligence and experience of jurors.⁹¹ He concluded that expert testimony was therefore necessary to provide a proper basis for the jury to evaluate the reasonableness of the defendant's use of deadly force.⁹² The plurality

DEFENSE AS LEGAL JUSTIFICATION (1987); LENORE E. WALKER, *THE BATTERED WOMAN* (1979); Lenore E. Walker, et al., *Beyond the Juror's Ken: Battered Women*, 7 VT. L. REV. 1 (1982); David L. Faigman, Note, *The Battered Woman Syndrome & Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986). The admissibility of expert testimony on rape trauma syndrome and premenstrual stress syndrome has also been questioned. See, e.g., Patricia A. Frazier & Eugene Borgida, *Rape Trauma Syndrome: A Review of Case Law and Psychological Research*, 16 L. & HUM. BEHAV. 293 (1992); Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985); Mark P. Press, Note, *Premenstrual Stress Syndrome as a Defense in Criminal Cases*, 1983 DUKE L.J. 176 (1983); Note, *Checking the Allure of Increased Conviction Rates: The Admissibility of Expert Testimony on Rape Trauma Syndrome in Criminal Proceedings*, 70 VA. L. REV. 1657 (1984).

88. ANGELA BROWNE, *WHEN BATTERED WOMEN KILL* 13 (1987). When a woman does kill her abuser, it is typically unplanned and occurs in the midst of an attack against her, during a warning phase when it became apparent that the attack was inevitable or during an escape attempt. *Id.* at 22.

89. 555 A.2d 772 (Pa. 1989) (plurality opinion).

90. *Id.* at 781. For three years, the defendant, Carol Stonehouse, experienced physical and psychological abuse at the hands of William Welsh, a man she dated for approximately one year. *Id.* at 774. "The events culminating in Welsh's death are so bizarre that one would be tempted to dismiss them as the stuff of pulp fiction were it not for the collaboration of disinterested witnesses . . ." *Id.* Welsh left flowers at the defendant's door for her funeral, stole her car multiple times, deflated her tires several times a week, and followed her everywhere. *Id.* at 774-76. Welsh vandalized the defendant's apartment on multiple occasions by slashing and urinating on her bed; cutting up her clothes; smearing food, cleaning products and lotions on her floors and walls; filling her dresser drawers with water; and soaking her clothes in beet juice. *Id.* at 775, 776. Welsh frequently broke into the defendant's apartment while she was asleep and threatened to kill her. *Id.* at 776. On the night of his death, Welsh broke into the defendant's apartment, held her at gunpoint and threatened to kill her. *Id.* at 779. Stonehouse shot Welsh when she next saw him pointing his gun at her. *Id.* Stonehouse was convicted of third degree murder and sentenced to seven to fourteen years imprisonment. 555 A.2d at 780. She appealed her conviction, claiming ineffective assistance of trial counsel. *Id.*

91. *Id.* at 782-83.

92. *Id.* See also *Fennell v. Goolsby*, 630 F. Supp. 451, 456 (E.D. Pa. 1985) (holding expert testimony on battered woman syndrome to be distinctly related to psychological evaluations beyond

believed that such testimony was necessary to counter the myths surrounding abused women⁹³ and allow the defendant's actions to be considered in light of how a reasonably prudent battered woman would have reacted.⁹⁴

Although four of the seven justices expressly declined to embrace the battered woman syndrome as a separate theory of self-defense,⁹⁵ this was largely because the appellant stated that the battered woman syndrome was not involved in her case.⁹⁶ The concurring and dissenting justices appear willing to address the issue in the future, but only after the issue is properly raised on appeal.⁹⁷

D. An Evaluation of Pennsylvania's Probable Response to the Battered Child Syndrome Defense

Given Pennsylvania's failure in child abuse prosecutions to recognize behavior patterns exhibited by sexually abused children, it is doubtful that similar evidence regarding physically abused children will be permitted when an abused child is a criminal defendant. Although *Stonehouse* may offer hope for the acceptance of a battered child syndrome defense, the *Dunkle* decision strongly indicates otherwise. Pennsylvania's misperception that the average juror is aware of the attributes a battered child displays⁹⁸ and its position that the proffered psychological testimony on abused children is not scientifically accepted⁹⁹ prevents admission of relevant expert testimony at trial. This presents an obstacle difficult for an abused child's defense attorney to surmount.

The repercussions of long-term abuse on a child's identity are beyond the average juror's understanding.¹⁰⁰ If the prosecution questions validity and accuracy of such expert psychological testimony, it should be permitted an opportunity to refute such evidence and thereby

comprehension of average layman).

93. Commonwealth v. Stonehouse, 555 A.2d 772, 783-84 (Pa. 1989).

94. *Id.* at 784. This is the first time that the battered woman syndrome appears to have been recognized as a valid defense in Pennsylvania.

95. Justice Zappala wrote a concurring opinion, in which Justice Flaherty joined, stating that they declined to reach the battered woman syndrome self-defense issue. *Id.* at 785. In his dissenting opinion, Chief Justice Nix, joined by Justice McDermott, also expressly declined to reach the battered woman syndrome self-defense issue. *Id.* at 785-86.

96. Stonehouse, 555 A.2d at 785. The plurality stated that although the appellant's counsel did not address the issue in terms of the battered woman syndrome, such an issue was addressed by amici and would therefore be considered. *Id.* at 774.

97. *Id.* at 785, 786.

98. See *supra* notes 80-81 and accompanying text.

99. See *supra* notes 70-75 and accompanying text.

100. See State v. Janes, 822 P.2d 1238, 1243 (Wash. App. 1992), review granted, 832 P.2d 488 (Wash. 1992).

give the jury a chance to weigh the evidence. Without the presentation of expert testimony, however, the battered child appears destined for conviction.¹⁰¹ Thus, Pennsylvania should re-evaluate its conservative view and follow the emerging acceptance of such testimony.

V. A Changing Attitude Toward Children Who Kill Their Parents

Public anger at abusive parents¹⁰² may be responsible for legislative and judicial sympathy toward children who commit parricide. For example, seventeen-year-old Donna Marie Wisener was acquitted under a new Texas law that permits a person accused of killing a family member to introduce evidence of prior abuse, as well as expert testimony on the psychologies of victims of battering.¹⁰³ Since she was two or three years old, she had been physically and sexually abused by her father.¹⁰⁴ Her father had once handcuffed her to a chair for his amusement, and beat her unconscious when she had brought home an unsatisfactory report card.¹⁰⁵ Additionally, she was emotionally abused, especially because she was aware that her mother was also being abused.¹⁰⁶ Donna shot her father in the head, hip, hand, back, and side.¹⁰⁷

Texas is one of six states that permits a battering defense by law, although it is the only state that does not limit its application to women.¹⁰⁸ The state permits psychological testimony and evidence of prior abuse to prove that the defendant's fear was reasonable. This law reflects the evolving attitude of compassion and understanding toward children who murder their parents.¹⁰⁹

The Washington Court of Appeals took a significant step in recognizing the rights of abused children when it overturned the second degree murder conviction of a boy who killed his abusive stepfather.¹¹⁰

101. See generally *supra* notes 42-59 and surrounding text.

102. See, e.g., *supra* note 47.

103. David Margolick, *When Child Kills Parent, It's Sometimes to Survive*, N.Y. TIMES, Feb. 14, 1992, at A1.

104. Mark Hansen, *Battered Child's Defense: Youths Who Killed Relatives Offer Evidence of Abuse With Mixed Results*, May 1992 A.B.A. J. at 28.

105. Margolick, *supra* note 103.

106. Hansen, *supra* note 104. Abusers traditionally mistreat others to gain a sense of power and control over them. MONES, *supra* note 5, at 13-14. If the child is sexually abused by a family member, it is usually not because the abuser has a true sexual preference for children, but because the abuser is overcome by low self-esteem and poor coping skills and sees the child as a sexual substitute for the preferred peer partner. TASK FORCE, *supra* note 4, at 5.

107. Margolick, *supra* note 103, at A1.

108. Hansen, *supra* note 104.

109. *Id.*

110. *State v. Janes*, 822 P.2d 1238 (Wash. Ct. App. 1992), *aff'd and remanded*, 850 P.2d 495

For ten years, Andrew Janes's stepfather frequently hit him over the head with firewood, beat him unconscious, and threatened to kill him.¹¹¹ Although his stepfather's actions were reported to Child Protective Services on three occasions, the Service did not follow up on those reports.¹¹² After being threatened by his stepfather the night before, Andy left for school the following morning only to return home after two classes to wait, with shotgun in hand, for his stepfather to arrive home.¹¹³ Andy shot his stepfather as the man entered his home, and as a result of two gunshot wounds to the head, his stepfather died.¹¹⁴

Andy's justification for the killing was that he acted in self-defense because "he perceived himself to be in imminent danger of serious bodily harm as a consequence of a condition analogous to 'battered woman syndrome,' stemming from the ten years of abuse he had suffered"¹¹⁵ The trial court refused to permit testimony regarding self-defense; however, it did allow experts to testify on the defense of diminished capacity.¹¹⁶

The Washington Court of Appeals was the first appellate court in the United States to hold specifically that the battered child syndrome applies to cases where an abused child kills a parent.¹¹⁷ The court held that the trial judge erroneously refused to admit testimony regarding battered child syndrome after failing to acknowledge its well-developed scientific basis.¹¹⁸ The court noted that since Washington courts have admitted

(Wash. 1993).

111. D. M. Osborne, *In the News: Solo Wins Right to Battered Child Defense*, AM. LAWYER, April 1992, at 119.

112. *State v. Janes*, 822 P.2d at 1240. On at least two of the three occasions, Mrs. Janes or Andy requested that Protective Services not follow up on their initial call because they feared that they would be abused even further. *Id.* Many times the abused person is threatened if they tell someone of the abuse. See generally BROWNE, *supra* note 88; MACPHERSON, *supra* note 16. Because the abuser can only continue battering if his victim is silenced, the abused are frequently threatened with additional violence should they report the abuse. See generally BROWNE, *supra* note 88; MACPHERSON, *supra* note 16.

113. 822 P.2d at 1240.

114. *Id.*

115. *Id.* at 1241.

116. *Id.* Two expert witnesses testified that Andy suffered from post-traumatic stress disorder. *Id.* As a result, the jury was instructed that it could consider a mental illness or disorder to negate an element of a crime that required a particular mental state. *Id.*

117. Hansen, *supra* note 104, at 28. This statement was made by Paul Mones, the only lawyer in the country who specializes in defending children who kill their parents. *Id.* Mones was co-counsel for Donna Marie Wisener and a defense consultant in the *Janes* case. *Id.* For more information about his work and how to develop a proper defense in parricide cases, see generally MONES, *supra* note 5.

118. *Janes*, 822 P.2d at 1242. In analyzing whether expert testimony concerning the battered child syndrome is admissible to establish a claim of self-defense, the court considered whether scientific understanding of the battered child syndrome was sufficiently developed to be generally

expert testimony on battered woman syndrome to explain a woman's perception, the same allowance should be made for battered child syndrome testimony, especially since "children are both objectively and subjectively more vulnerable to the effects of violence than are adults."¹¹⁹ The rationale for admitting battered child syndrome testimony was found to be "as compelling, if not more so, when applied to children."¹²⁰

The court also felt that without expert testimony on battered child syndrome, the jury would not be able to adequately evaluate the reasonableness of Andy's perception that he was in imminent danger of death or serious bodily harm at the time of the homicide.¹²¹ The impact of long-term abuse was determined to be beyond the average juror's comprehension.¹²² Without expert testimony to put the child's perceptions into context, the jury would not be capable of making a fair evaluation of the child's feeling of imminency.¹²³

On appeal, the Washington Supreme Court held that expert testimony regarding battered child syndrome is generally admissible in appropriate cases to aid in the proof of self-defense.¹²⁴ The court agreed with the Court of Appeals that the underlying principles of the syndrome are helpful to the trier of fact in understanding a "little-known psychological problem."¹²⁵ The court maintained that battered child syndrome was of considerable assistance in evaluating the reasonableness of Andy's belief that his life was in imminent danger and was necessary to properly understand Andy's subjective perceptions.¹²⁶

admissible and whether expert testimony would have been helpful to the jury. *Id.* See also *State v. Allery*, 682 P.2d 312 (Wash. 1984).

119. *Janes*, 822 P.2d at 1243, (citing *State v. Fisher*, 739 P.2d 683 (Wash. 1987) (describing children as being among the most vulnerable members of society); *State v. Grewe*, 813 P.2d 1238 (Wash. 1991) (stating that one aspect of children's extreme vulnerability is their tendency to trust)). See generally MACPHERSON, *supra* note 16 (presenting a theoretical framework to help explain child abuse).

120. *Janes*, 822 P.2d at 1243. The court indicated that children lack the ability to support themselves and the life experience necessary to put battering into perspective. *Id.*

121. *Id.* Washington's test for self-defense "requires a showing of (1) reasonable apprehension of a design to commit a felony or to do some great personal injury, and (2) imminent danger of that design being accomplished." *Id.* at 1241 (citing WASH. REV. CODE ANN. § 9A.16.050(11) (West 1988); *State v. Negrin*, 681 P.2d 1287 (Wash. Ct. App. 1984)). To prove imminent danger, the victim must honestly and reasonably believe that the aggressor intended to inflict future serious bodily injury. *Janes*, 822 P.2d at 1241 (citing *State v. Negrin*, 681 P.2d 1287 (Wash. Ct. App. 1984)).

122. *Janes*, 822 P.2d at 1243.

123. *Id.*

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

125. *Id.*

126. *Id.* at 505. The court remanded the case so that the trial court could reconsider its ruling

Both the *Wisener* and *Janes* decisions represent a recognition of the rights of battered children and the need for expert testimony in cases where an abused child kills a parent. Pennsylvania should adopt this emerging position on the admissibility of expert testimony and show compassion for and comprehension of the plight of abused children.

VI. Responses to Common Objections on Admissibility of Expert Testimony

Objections to the use of expert testimony to describe the characteristics of different syndromes include: (1) that the evidence is unfairly prejudicial; (2) that it represents an improper comment on the credibility of a claimant and thus, invades the jury's province; (3) that such evidence is not beyond the knowledge of an ordinary juror; and (4) that it fails to pass the *Frye* test.¹²⁷ By examining these criticisms in light of expert testimony concerning the battered child syndrome, it appears that such objections are refutable and therefore, should not stand in the way of admissibility in Pennsylvania.

First, expert testimony concerning the behavior patterns displayed by abused children is not prejudicial. Prejudice does not mean "detrimental to a party's case",¹²⁸ but rather, "an undue tendency to suggest a decision on an improper basis."¹²⁹ In cases where an abused child murders in self-defense, expert testimony relating to the characteristics of abused children would not be suggestive of forming a decision on an "improper basis". Rather, it would describe for the jury the sufferings of an abused child and how this may affect the child's impression of imminency. Because such testimony helps explain why a child might murder a parent, its probative value outweighs any danger of unfair prejudice.¹³⁰ Such testimony is necessary for the jury to receive an

denying the self-defense instruction because the record failed to indicate whether the trial court considered the defense evidence in light of Andy's subjective knowledge and perceptions. *Id.* at 506. The court also thought that the trial court may not have properly interpreted the term "imminence." *Id.*

127. David McCord, *Syndromes, Profiles & Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 69 (1987).

128. *Daset Mining Corp. v. Industrial Fuels Corp.*, 473 A.2d 584, 588 (Pa. Super. Ct. 1984) (citing *Whistler Sportswear, Inc. v. Rullo*, 433 A.2d 40 (Pa. Super. Ct. 1981)).

129. *Id.* In Pennsylvania, the trial judge has broad discretion in admitting potentially misleading and confusing evidence. See also *Bowers v. Garfield*, 382 F. Supp. 503 (E.D. Pa. 1974), *aff'd*, 503 F.2d 1398 (3d Cir. 1974).

130. See *Commonwealth v. Ulatoski*, 371 A.2d 186, 191 n.11 (Pa. 1977); *Daset Mining Corp.*, 473 A.2d at 588 (Pa. Super. Ct. 1984). It seems that Pennsylvania courts adopt Federal Rule of Evidence 403 in their analysis of admissibility of evidence. *Daset Mining Co.*, 473 A.2d at 588. Rule 403 requires the probative value of the evidence to outweigh any prejudicial effects. FED. R.

accurate picture of the defendant's state of mind at the time of the homicide.

Second, expert testimony on the battered child syndrome would not invade the province of the jury. Because such testimony is about abused children in general and does not refer specifically to the defendant's behavior, it does not impose on the jury's duty to assess credibility. The function of the expert testimony is merely to assist the trier of fact in evaluating the reasonableness of both the use of force and degree of force used.¹³¹ Ultimately, the decision of whether the child was actually battered and whether he or she reasonably believed that it was necessary to kill for protective purposes remains with the jury. Furthermore, the prosecution would be entitled to introduce any proper expert testimony in rebuttal.

Third, this evidence remains beyond the understanding of the average juror.¹³² An average juror cannot imagine what an abused child goes through on a daily basis, unless that juror was abused or personally knows a child who has been abused. Lacking familiarity with such a situation, a juror is not able to adequately analyze the child's self-defense claims. Thus, expert testimony is a necessary aid, and not an encumbrance, to the jury's duties. Expert testimony will not affect a juror's interpretation of credibility as long as the expert refrains from drawing distinctive conclusions about the culpability of the defendant.

Fourth, the *Frye* test is not the proper standard by which to judge the admissibility of expert testimony. Under the *Frye* test, a determination of admissibility is based on whether the scientific methods used in developing the evidence have gained general acceptance in the scientific community.¹³³ According to this test, expert testimony is inadmissible

EVID. 403.

131. See *State v. Janes*, 822 P.2d 1238, 1242 (Wash. App. 1992). See also *State v. Walker*, 700 P.2d 1168 (Wash. App. 1985), review denied, 104 Wash. 2d 1012 (Wash. 1985).

132. See *supra* text surrounding notes 82-83; *Commonwealth v. Seese*, 517 A.2d 920 (Pa. 1986). "It has long been established that expert testimony is proper only where formation of an opinion on a subject requires knowledge, information, or skill beyond what is possessed by the ordinary juror." *Id.* at 921.

133. *Frye v. U.S.*, 293 F. 1013, 1014 (D.C. Cir. 1923). In *Frye*, the court held that the results of a polygraph test were inadmissible as expert evidence because the polygraph was not generally accepted by the scientific community. *Id.* at 1014. The court stated:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id.

if based on principles considered experimental.¹³⁴ The *Frye* test, however, has been criticized because it can exclude necessary evidence based solely on its "scientific novelty."¹³⁵ The *Frye* test has also been criticized on the grounds that many tenets of science, in particular psychology and psychiatry, are subject to dispute among the various members of the scientific community, thus making general acceptance virtually impossible.¹³⁶ In addition, the *Frye* test distracts courts from their primary duty to decide whether the contested evidence will aid the trier of fact.

More than fifty years after *Frye* the District of Columbia Court of Appeals advocated a new admissibility test derived in part from Federal Rule of Evidence 702.¹³⁷ Under the standard developed in *Dyas v. United States*,¹³⁸ evidence is admissible if "the state of the pertinent art or scientific knowledge [permits] a reasonable opinion to be asserted . . . by an expert."¹³⁹ The court required the testimony to be distinctively related to some science, profession, business, or occupation as to be beyond the jury's understanding and the witness to be properly qualified so as to aid the trier "in his search for truth."¹⁴⁰ Because the behavioral profile of abused children is beyond a jury's understanding, expert testimony on the psychology of abused children would be admissible under the *Dyas* test. Such evidence can be asserted by an expert to aid the jury in its duty to deliver a just verdict.

134. *Id.* Under Pennsylvania law, expert testimony is admissible if it is relevant, satisfies the *Frye* test, and if its contents are beyond the knowledge or experience of the average layperson. *Commonwealth v. O'Searo*, 352 A.2d 30 (Pa. 1976).

135. M. Katherine Jenson, Comment, *State v. Thomas: The Final Blow to Battered Women?*, 43 OHIO ST. L.J. 491, 503 (1982). Psychological evidence is less likely to mislead the jury compared to the aura of credibility attached to items such as machinery and graphs. *Id.* at 506. A jury is more prepared to evaluate psychological evidence because it involves human behavior that an average juror can compare to his or her own life experience. *Id.*

136. McCord, *supra* note 127, at 83.

137. *Dyas v. United States*, 376 A.2d 827 (D.C. 1977), *cert. denied*, 434 U.S. 973 (1977). "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 in the form of an opinion or otherwise." FED. R. EVID. 702. This rule confronts the other objections to admissibility of expert testimony concerning the battered child syndrome. If the danger of prejudice outweighs the probative value, the evidence will not assist the trier of fact. If the evidence is not within the jury's common understanding, it will also not aid in the deliberation process.

138. 376 A.2d 827 (D.C. 1977), *cert. denied*, 434 U.S. 973 (1977).

139. *Id.* at 832 (citing MCCORMICK ON EVIDENCE § 13 at 29-31 (Edward W. Cleary ed., 2d ed. 1972)). See also McCord, *supra* note 30, at 86-90.

140. *Dyas*, 376 A.2d at 832 (citing MCCORMICK ON EVIDENCE § 13, 29-31 (Edward W. Cleary ed., 2d ed. 1972)). This test has been used by courts to determine the admissibility of expert testimony on the battered woman syndrome. See *Ibn-Tamas v. U.S.*, 407 A.2d 626, 632-33 (D.C. 1979); *People v. Torres*, 488 N.Y.S.2d 358, 363 (N.Y. Sup. Ct. 1985).

The Court of Appeals for the Third Circuit expressly criticized the *Frye* test in *U.S. v. Downing*¹⁴¹ as seriously flawed, particularly as in relation to the admissibility of novel scientific evidence.¹⁴² The *Downing* standard analyzes the scientific methodology used to generate the evidence to determine if it can be accepted as reliable even if it has not been widely accepted by the scientific community.¹⁴³ Information on the behavioral characteristics displayed by abused children has been obtained through interviewing and counseling victims of child abuse.¹⁴⁴ This method should not be considered unreliable, especially since the data used to formulate the expert's opinion of the behavioral characteristics displayed by abused children is usually obtained by the expert's personal observations of the effects of child abuse.¹⁴⁵

Recently, the United States Supreme Court finally enunciated the admissibility standard for expert scientific evidence in federal trials.¹⁴⁶ The Court held that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence,¹⁴⁷ which provides specific criteria for the admission of expert testimony.¹⁴⁸ The Court maintained, however, that the Rules do place limits on the admissibility of scientific evidence.¹⁴⁹ The Court favored the use of cross-examination, the presentation of contrary evidence, and careful instruction on the burden of proof over the

141. 753 F.2d 1224 (3d Cir. 1985).

142. *Id.* at 1237.

143. *Id.*

144. Extensive research has been conducted on physically abused children, revealing that they share common behavioral characteristics. See *supra* notes 13-18 and accompanying text.

145. See *supra* notes 13-18 and accompanying text; see also *Dunkle*, 602 A.2d at 841.

146. *Daubert v. Merrell Dow Pharmaceuticals*, 61 U.S.L.W. 4805 (1993). The case concerned the admissibility of expert testimony regarding the potential for a certain prescription drug, Bendectin, to cause birth defects. *Id.* The plaintiffs sought to introduce the conclusions of eight experts which were based upon (1) test tube and animal studies that found a link between Bendectin and malformations; (2) pharmacological studies of the chemical structure of Bendectin which tended to show a similar structure to other substances known to cause birth defects; and (3) the "reanalysis" of previously published human statistical studies. *Id.* at 4806. The District Court had granted summary judgment for the defendant, holding that such testimony did not meet the "general acceptance" standard of *Frye*, and the United States Court of Appeals for the Ninth Circuit affirmed. *Id.*

147. *Id.* at 4807. "Nothing in the text of this Rule establishes 'general acceptance' as an absolute prerequisite to admissibility." *Id.* See also, Paul C. Gianelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, A Half Century Later*, 80 COLUM. L. REV. 1197 (1980).

148. "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 by knowledge, skill, experience, training, or education, may testify thereto in the form of opinion or otherwise." FED. R. EVID. 702.

149. *Daubert*, 61 U.S.L.W. at 4808. The trial judge must determine whether the expert will testify about scientific knowledge that will aid the trier of fact. *Id.* See also FED. R. EVID. 104(a). However, "the inquiry envisioned by Rule 702 is . . . a flexible one." *Daubert*, 61 U.S.L.W. at 4809.

"wholesale exclusion under an uncompromising 'general acceptance' test."¹⁵⁰ Thus, the Court held that in federal trials, the "general acceptance" standard of the *Frye* test can bear on the inquiry of admissibility, but it is not the sole determinative factor.¹⁵¹

In light of the *Daubert* decision, expert testimony concerning the battered child syndrome should be deemed admissible in Pennsylvania. Pennsylvania admits expert testimony if it aids the jury in understanding a science, skill or occupation beyond the knowledge or experience of the average layman.¹⁵² This standard is satisfied by adherence to the *Dyas*, *Downing* or *Daubert* tests. There should be no need to prove that the expert testimony is generally accepted by the scientific community, especially when, in the area of psychology, this is nearly impossible.¹⁵³ As long as the jury's function is not usurped, the testimony should be admitted.

VII. Conclusion

The right of a battered child to present expert testimony on battered child syndrome, including behavioral aspects attributed to victims of child abuse, is increasingly becoming an issue in trials of children accused of murdering their abusive parents. A heightened recognition of the plight of abused children and the unequal treatment received by children in the court system is convincing courts to reevaluate their handling of parricide cases. These children should not be convicted of murder if they are killing their abusers in self-defense.

Pennsylvania must reconsider its view on the admissibility of expert testimony concerning the behavioral patterns exhibited by abused children because this information is not part of a juror's common knowledge. For the Pennsylvania courts to effectively administer justice, testimony on the battered child syndrome should be admitted and the battered child syndrome should be permitted as a theory of self-defense.

Catherine Erin Naughton

150. *Daubert*, 61 U.S.L.W. at 4810.

151. *Id.* at 4809. The court stated that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible." *Id.*

152. LEONARD PACKEL AND ANNE B. POULIN, PENNSYLVANIA EVIDENCE § 702.1 (1987).

153. *See supra* note 136.

