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NOTES

PROFILES, SYNDROMES, AND THE RULE 405 PROBLEM: ADDRESSING A FORM OF DISGUISED CHARACTER UNDER THE FEDERAL RULES OF EVIDENCE

*Michael D. Claus**

Introduction

Imagine that after years of meticulous research, a team of doctors, scientists, and criminologists publish a study of convicted murderers. The team has concluded that the vast majority of murderers have certain traits in common. They include personality traits—such as aggression, and environmental traits—such as access to a weapon, and abusive parents. The team of experts further declares that these traits so frequently reoccur among convicted murderers, they can predict with confidence that an aggressive person with access to a weapon and abusive parents is significantly more likely to murder than the rest of the population. The study receives universal acclaim within the scientific community and is immediately included in every respected treatise on the subject. Prosecutors throughout the country are eager to bring a homicide case to trial and try out the new "Convicted Murderer Profile." Trial judges, meanwhile, struggle with the question: to what extent should this evidence be admissible against a defendant who "fits the profile"?

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Profile and syndrome evidence shows a correlation between certain traits or characteristics and particular forms of behavior.[1] After compiling data from numerous cases, experts then attempt to "construct a diagnostic or predictive 'profile' for such behavior."[2] Profile and syndrome evidence invites the inference that individuals who fit a profile or possess a syndrome are likely to have acted in a certain way.

Courts differ greatly in their attempts to define whether profile and syndrome evidence should be admissible, and if so, under what theory of evidence.[3] The Federal Rules of Evidence liberally admit any relevant evidence, unless the Constitution, a statute, or a different rule directs otherwise.[4] "Evidence is relevant if it has *any tendency* to make a fact more or less probable than it would be without the evidence."[5] Intuitively, most people would likely accept a "Convicted Murderer Profile" as at least moderately predictive of behavior, satisfying the "any tendency" standard of Rule 401. Furthermore, the universal recognition in the scientific community of the Profile would satisfy Federal Rules 702[6] and 703,[7] governing expert testimony. Meeting these standards, the majority of jurisdictions today would conclude by examining the evidence under Rule 403,[8] and admit the

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1 *See* EDWARD W. CLEARY ET AL., MCCORMICK ON EVIDENCE, PRACTITIONER'S TREATISE § 206, at 884 (6th ed. 1984).

2 *Id.*

3 *See infra* Part II.

4 FED. R. EVID. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court. Irrelevant evidence is not admissible.").

5 *Id.* 401(a) (emphasis added).

6 *Id.* 702 ("A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.").

7 *Id.* 703 ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.").

8 *Id.* 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

"Convicted Murderer Profile" if the court determined that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.[9]

However, other Federal Rules lurk in the background to complicate the inquiry. First, Rule 404's prohibition against using character evidence to prove conduct seeks to limit the jury from drawing the inference that character traits and past conduct predict present behavior.[10] Even an entirely accurate "Convicted Murderer Profile" raises serious concerns that the defendant will not receive a fair trial. The Convicted Murderer Profile invites the jury to conclude that because this defendant fits the profile, he or she is more likely to have committed the crime. Rule 404 seeks to prevent the jury from drawing precisely this "forbidden inference."

Rule 404(a)(1) declares that "[e]vidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." If one defines fitting a profile or possessing a syndrome[11] as "character" or a "character trait,"[12] the Rule should operate to exclude the evidence, unless an exception to Rule 404 applies.

When dealing with profile and syndrome evidence, the majority of jurisdictions attempt to mitigate Rule 404 concerns by restricting the admissibility of such evidence as proof of substantive guilt, while generally allowing it for other purposes, such as explaining conduct.[13] That is, courts focus exclusively on the *purpose* of the evidence, rather than generally prohibiting it because of the forbidden inference it

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9 As discussed below, most courts would probably exclude the evidence if used to suggest the defendant's guilt or innocence.

10 FED. R. EVID. 404(a)(1) ("Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."); *id.* 404(b)(1) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.").

11 This Note, like most commentaries, uses the terms "profile" and "syndrome" interchangeably, unless discussing a specific profile or syndrome, e.g., "Battered Woman Syndrome."

12 This assumption is admittedly not self-evident. For one thing, there is no comprehensive definition of "character" in the Federal Rules. Further, courts inconsistently define and apply the doctrine. *See* Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1914 (2012) ("Unfortunately, the Federal Rules of Evidence do not define character, and worse still, there is no judicially manageable definition of character for courts to apply when the admissibility of evidence turns on this determination.") (footnote omitted). However, if one focuses on the inference which such evidence invites, profile and syndrome evidence can and should be labeled character evidence.

13 *See infra* Part I and III.

invites. Under the majority view, the "Convicted Murderer Profile" would probably be excluded to prove the defendant's guilt.[14] However, expert testimony regarding other forms of profile and syndrome evidence which invite an inference about an alleged victim's behavior are routinely admitted in trial courts. For instance, Rape Trauma Syndrome[15] evidence—suggesting that, because many rape victims delay reporting an assault, the alleged victim in this case probably delayed—is often found admissible. By ignoring the forbidden inference and focusing solely on the purpose for which the evidence is offered, courts admit disguised character evidence through expert witnesses.

This Note argues that the prohibition against character evidence should be promoted from the background of the trial court's analysis of profiles and syndromes to the forefront. The better approach is to acknowledge that such evidence invites the forbidden inference, and determine its admissibility accordingly. Doing so requires the trial court to consider Rule 404 and its exceptions. Such analysis may well lead to admission of the evidence. I do not seek to argue normatively whether profile and syndrome evidence is valuable or unduly prejudicial.[16] I do maintain, however, that such evidence raises an inference which is generally prohibited under the Federal Rules of Evidence,[17] and should be analyzed accordingly.

That said, the existing framework of the Federal Rules is ill-equipped to handle profile and syndrome evidence. Rule 405 provides the acceptable methods of proving character when an exception to the general prohibition applies. It directs that in the rare instances when character evidence is admissible, "it may be proved by testimony about the person's reputation or by testimony in the form of an opinion."[18] Rule 405 seems to envision character evidence in the form of opinion and reputation testimony provided by a *lay character* witness.

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14 *See* Mark S. Brodin, *Behavioral Science Evidence in the Age of* Daubert*: Reflections of a Skeptic*, 73 U. CIN. L. REV. 867, 882 n.66 (2005) ("It must be noted that profile evidence offered by the prosecution regarding the *defendant* (unlike syndrome evidence regarding the *victim*) is generally not admissible, as it is viewed as unreliable and runs afoul of the character evidence prohibition against painting the defendant as a particular 'criminal-type.' ").

15 *See infra* Part I.

16 Others have effectively taken up this task. *See, e.g.*, Brodin, *supra* note 14, at 870; David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 70 (1997); James Aaron George, Note, *Offender Profiling and Expert Testimony: Scientifically Valid or Glorified Results?*, 61 VAND. L. REV. 221, 224 (2008).

17 As well as under the corresponding state rules.

18 FED. R. EVID. 405(a).

However, profile and syndrome evidence is presented by *expert* witnesses.[19] I have termed this anomaly the "Rule 405 problem."

The Rule 405 problem can be summarized as follows:

(1) Profile and syndrome evidence is presented by expert witnesses.

(2) Profile and syndrome evidence raises a character inference.

(3) Character evidence must be presented by lay witnesses.

Thus, while profile and syndrome evidence may be authorized by the exceptions of Rule 404, such as when a criminal defendant offers evidence of his own character trait, there is no proper method to introduce it under Rule 405.

In Part I of this Note, I discuss some common and controversial profiles and syndromes introduced in trial courts across the country.[20] After briefly outlining the standards governing the prohibition of character evidence in Part II, I then introduce the Rule 405 problem. Part III examines the various approaches among federal and state courts in analyzing profile and syndrome evidence. Finally, in Part IV, I offer some potential solutions to the vexing problem of how to properly introduce profile and syndrome evidence under the existing framework of the Federal Rules.

Disguised character evidence should not be admissible simply because it is presented by an expert. By ignoring the character inference that profile and syndrome evidence invites, courts are able to bypass the general restrictions of Rule 404 and the methodology problems of Rule 405. While perhaps convenient, this Note argues that the prevailing practice diminishes the prohibition against character evidence. Ideally, a new rule would directly address profile and syndrome evidence and provide acceptable methods of presenting it. At the very least, courts should reexamine their approach to profile and syndrome evidence under the current Rules to ensure that character evidence is presented only when truly authorized.

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19 *Id.* 701(c) (declaring that opinion testimony by a lay witness may "*not* [be] based on scientific, technical, or other specialized knowledge" (emphasis added)).

20 The introduction of profile and syndrome evidence is a relatively recent phenomenon, becoming prominent in the late twentieth century. For instance, the first time the Supreme Court addressed the use of drug courier profile evidence was in 1980 in *United States v. Mendenhall*, 446 U.S. 544 (1980), and the first time it addressed Battered Woman Syndrome evidence was in 1984 in *Moran v. Ohio*, 469 U.S. 948 (1984) (mem.) (Brennan, J., dissenting). *See* Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U. L. REV. 747, 754 (1997).

I. Profiles and Syndromes

Psychologists and other experts have developed numerous profiles and syndromes varying considerably in subject matter. Each profile presupposes, first, that a profile of characteristics or traits can be constructed based on a collection of data, and secondly, that the profile can be used to predict behavior.[21] The use of some syndrome evidence, such as the Battered Woman Syndrome, has become commonplace at trial.[22] Such evidence is often used to explain a defendant, victim, or witness's behavior.[23] More problematic, at least in a majority of jurisdictions, are profiles and syndromes that focus on the probable guilt or innocence of a criminal defendant. This evidence "consists of a compilation of otherwise innocent characteristics, coupled with an implicit invitation to infer criminal conduct from those characteristics."[24] For many courts, evidence offered for this purpose is too prejudicial to admit against the defendant.[25]

A full examination of every profile and syndrome that has been introduced in American courts is not feasible. Instead, five of the most common or controversial forms of such evidence are briefly summarized below.

A. *Battered Woman Syndrome*

Battered Woman Syndrome evidence is generally offered by female criminal defendants to explain violent acts, often in conjunction with a self-defense argument.[26] Women who kill their husbands or partners maintain they have been driven to such dire acts by extended periods—even years and decades—of physical and psychological abuse.[27] Furthermore, defendants use Battered Woman Syn-

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21 *See* Cleary et al., *supra* note 1, at 885.

22 *See* 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, 761 (1998) (noting that the vast majority of jurisdictions admit Battered Woman Syndrome or similar evidence to support a self-defense claim).

23 *See, e.g.*, United States v. St. Pierre, 812 F.2d 417, 419 (8th Cir. 1987).

24 Ryan v. State, 988 P.2d 46, 56–57 (Wyo. 1999).

25 *See, e.g.*, State v. McMillan, 590 N.E.2d 23, 32 (Ohio Ct. App. 1990).

26 *See, e.g.*, People v. Wilson, 487 N.W.2d 822, 825 (Mich. Ct. App. 1992) (finding Battered Spouse Syndrome evidence admissible to support a self-defense plea); *see also* United States v. Marenghi, 893 F. Supp. 85, 94-95 (D. Me. 1995) (finding that Battered Woman Syndrome evidence may be admissible to support a defense of duress).

27 *See* Moran v. Ohio, 469 U.S. 948, 950 (1984) (mem.) (Brennan, J., dissenting) ("Descriptions of this syndrome emphasize the husband's repeated and violent beatings and the wife's dependency—economic and emotional—that make it practically

drome evidence to explain their failure to leave an abusive relationship or other behavior which otherwise may seem irrational to a jury.[28] Such evidence is *not* typically used to suggest the guilt or innocence of the woman. Instead, it is used to bolster a self-defense argument or explain otherwise irrational behavior.[29]

According to Battered Woman Syndrome studies, a pattern can be seen throughout abusive relationships.[30] The relationships between female victims and their abusive partners are cyclical.[31] First tension builds between the batterer and the woman, which eventually culminates in violence against the victim. The batterer then makes a seemingly sincere apology, commencing a period of tranquility. Finally, the cycle restarts and the abuse resumes.[32]

Each battered woman experiences similar feelings of helplessness, desperation, depression, passivity, and extreme anxiety.[33] Psychologists have identified four general characteristics of the syndrome:

(1) The woman believes that the violence was or is her fault.

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impossible for her to leave. When faced with an immediate threat, victims may be driven to take the lives of their mates as the only possible method of escaping the threat.").

28 *See, e.g.*, State v. Allery, 682 P.2d 312, 316 (Wash. 1984) ("[E]xpert testimony explaining why a person suffering from the battered woman syndrome would not leave her mate, would not inform police or friends, and would fear increased aggression against herself would be helpful to a jury in understanding a phenomenon not within the competence of an ordinary lay person.").

29 *See* Brodin, *supra* note 14, at 869 ("Battered woman syndrome evidence may also be offered by the defense for the purpose of establishing that the defendant believed she was in imminent danger, even though the objective circumstances posed no apparent immediate threat justifying self-defense (as where the abuser is killed in his sleep).").

30 *See generally* LENORE E. WALKER, THE BATTERED WOMAN (1979) (identifying the cycle of violence and learned helplessness as typical patterns in an abusive relationship).

31 Matthew P. Hawes, *Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on the Battered Woman Syndrome in Ohio*, 53 CLEV. ST. L. REV. 133, 137 (2005) ("The battering relationship itself is often described as cyclical in nature, with three distinct phases: tension building, confrontation, and contrition. During the 'tension building' phase, the woman is generally compliant, often feeling as though she deserves the abuse. Once the tension reaches a boiling point, the batterer will erupt uncontrollably, committing a violent act. Next, in an abrupt about-face, the abuser will exhibit seemingly intense love and affection towards his victim. The victimized women are then led to believe that the violence was an isolated incident and that it will not continue." (footnotes omitted)).

32 *Id.*

33 *See id.*

(2) The woman has an inability to place responsibility for the violence elsewhere.

(3) The woman fears for her life and/or her children's lives.

(4) The woman has an irrational belief that the abuser is omnipresent and omniscient.[34]

Eventually, years of frustration and "learned helplessness"[35] leave the victim no other option but to lash out against the batterer.[36]

B. Rape Trauma Syndrome

Some psychologists argue that victims of rape display certain behaviors and coping mechanisms, many of which are similar to those suffering from post-traumatic stress disorder.[37] The extensive list includes emotional numbing, anxiety, depression, physical and sexual problems, and avoidance of reminders of the assault.[38] Courts sometimes admit evidence that the victim displays such characteristics as proof of the act—that is, that he or she was indeed raped.[39] Similarly, Rape Trauma Syndrome evidence is also used by prosecutors to negate a defense of consent.[40]

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34 *See* BRENT E. TURVEY & WAYNE PETHERICK, FORENSIC VICTIMOLOGY 241 (2009).

35 WALKER, *supra* note 30, at 45–54.

36 Perhaps the most famous attempted use of Battered Woman Syndrome evidence was in the trial of Elisabeth "Betty" Broderick in the early 1990s. Broderick was tried for the murder of her ex-husband and his new wife Linda Kolkena. Broderick claimed she was driven to kill by her husband's psychological abuse and affair with a younger woman. After her first trial resulted in a hung jury, Broderick was convicted on two counts of second-degree murder. Despite considerable evidence against her, Broderick attributes the verdict, in part, to the judge's exclusion of her expert witness who would have testified on Battered Woman Syndrome. *See* MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM 51 (2011); CYNTHIA LEE, MURDER AND THE REASONABLE MAN 48–49 (2003).

37 *See* 12 AM. JUR. 3D *Proof of Facts* 401, 410–11 (1991).

38 *Id.* at 413–30.

39 *See, e.g.*, State v. McQuillen, 689 P.2d 822, 829 (Kan. 1984) (permitting an expert to testify "that the patient/victim does possess and exhibit the emotional and psychological trauma consistent with rape trauma syndrome"). *But see* People v. Bledsoe, 681 P.2d 291, 301 (Cal. 1984) (denying admissibility of expert testimony related to rape trauma syndrome); State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982) (again, denying admissibility of expert testimony related to rape trauma syndrome); *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 HARV. L. REV. 1481, 1500 (1995) (outlining courts' argument that expert testimony concerning rape trauma syndrome is too subjective).

40 *See* CLEARY ET AL., *supra* note 1, at 886.

More commonly, courts admit such evidence to explain a victim's behavior.[41] In this case, the evidence is offered to rehabilitate the witness's testimony, rather than prove the victim was raped. For instance, victims often delay reporting a rape.[42] Rape Trauma Syndrome evidence is offered to show that this behavior is normal.[43] When admitted, the court reasons that the syndrome evidence will assist in dispelling preconceived notions the jury may have about how a rape victim would act.[44]

C. Child Sexual Abuse Accommodation Syndrome

The primary purpose of Child Sexual Abuse Accommodation Syndrome evidence is to explain a child victim's actions that may seem to hurt the child's credibility.[45] Children's testimony presents particularly difficult issues for prosecutors[46] because child witnesses are often confused and nervous, and sometimes present inconsistent versions of the events.[47] Experts are called to testify regarding characteristics commonly observed in sexually abused children including: "(1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and (5) retrac-

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41 *See, e.g.*, People v. Taylor, 552 N.E.2d 131, 136–39 (N.Y. 1990) (admitting expert testimony concerning rape trauma syndrome); Brodin, *supra* note 14, at 914 (discussing the variable nature of victims' behaviors that courts must consider when admitting expert testimony related to rape trauma syndrome).

42 *See* John O. Savino et. al, Rape Investigation Handbook 53 (2d ed. 2011).

43 *See* Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 Nw. U. L. Rev. 1271, 1274 (1994).

44 *See, e.g.*, *Taylor*, 552 N.E.2d at 138 (allowing Rape Trauma Syndrome evidence to demonstrate how a victim would act after an attack); People v. Bennett, 593 N.E.2d 279, 284 (N.Y. 1992) (noting that it would allow Rape Trauma Syndrome evidence to demonstrate how a victim would act during an attack if the evidence has the requisite scientific basis, and its potential value outweighs the possibility of undue prejudice to defendant or does not interfere with the jury's province to determine credibility.).

45 *See* Rosemary L. Flint, Note, *Child Sexual Abuse Accommodation Syndrome: Admissibility Requirements*, 23 Am. J. Crim. L. 171, 194 (1995) ("With appropriate restrictions, CSAAS can be used to explain unusual behaviors of child sexual abuse victims, helping jurors to make informed decisions regarding the credibility of the victims' testimony.").

46 *Id.* at 179 ("Unlike other complainants, the child sexual abuse victim is generally not forceful, convincing, nor consistent in her allegations." (quoting Lisa R. Askowitz & Michael H. Graham, *The Reliability of Expert Psychological Testimony in Child Sexual Abuse Prosecutions*, 15 Cardozo L. Rev. 2027, 2028 (1994))).

47 *Id.*

tion."[48] This syndrome evidence is typically admitted to rebut the inference that a victim is lying because the child delayed reporting the incident, changed his or her story multiple times, or seemingly accommodated the abuser.[49] More controversially, some courts have admitted the evidence to prove the underlying offense.[50]

D. Battering Parent Syndrome / Profile

The Battering Parent Syndrome or Profile is a composite of certain characteristics common among adults who batter their children. Profile characteristics typically include "low self esteem, poor impulse control, low empathy, low frustration tolerance, [and] inadequate knowledge of basic child development and parenting skills," as well as evidence that the alleged abuser was neglected or abused himself as a child, is under financial or other stress, or asks the children for support that the adult should be providing to the child.[51] The profile may be used either by the prosecution, to show that the defendant fits the composite, or by the defense, to prove the incompatibility of a defendant's profile with that of the typical child abuser.[52]

E. Drug Courier Profiles

Drug courier profiles are primarily used by Drug Enforcement Agency agents as investigative tools to identify suspected drug traffickers.[53] The profiles consist of "a list of identifying characteristics or behaviors that law enforcement officials associate with drug couri-

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48 *See* Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L.J. 933, 943–44 (1999).

49 *See* Flint, *supra* note 45, at 180. *See also*, State v. Schnabel, 952 A.2d 452, 462 (N.J. 2008) (recognizing that CSAAS evidence can help explain actions exhibited by victims that might otherwise undermine their credibility); State v. J.Q., 617 A.2d 1196, 1201 (N.J. 1993) (explaining that "this type of testimony has an important nonsubstantive purpose of which the majority of courts approve. It can be used on rebuttal 'to rehabilitate' the victim's testimony when the defense asserts that the child's delay in reporting the abuse and recanting of the story indicate that the child is unworthy of belief.").

50 *See* CLEARY ET AL., *supra* note 1, at 887.

51 *See* David McCord, *Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases*, 66 OR. L. REV. 19, 53 (1987).

52 *Id.* at 53, 55.

53 Kadish, *supra* note 20, at 748 n.1.

ers."[54] Though there is no single, nationally recognized profile,[55] agents look to a number of factors, including; "(1) Reservations and Ticket Purchases; (2) Airports and Flights; (3) Nervousness and Associated Behavior; (4) Significance of Luggage; (5) Companions (Traveled With or Picked Up By); (6) Personal Characteristics; and (7) Miscellany."[56] As almost any traveler behavior could fall under these categories, DEA agents' use of the profiles has been sharply criticized.[57]

Use of drug courier profile in the courtroom is no less controversial.[58] In a majority of jurisdictions, drug courier profile evidence is inadmissible as substantive evidence of guilt.[59] However, such evidence is sometimes admitted: "(1) as background material to explain police conduct in arresting the accused; (2) as foundation for police expert opinions; (3) as background material to explain the modus operandi of the drug trade; and (4) as rebuttal evidence against the accused."[60]

II. Evidentiary Standards and the Rule 405 Problem

A. *The Prohibition Against Character Evidence*

Evidentiary character refers to a person's general disposition or a general trait, such as honesty, chastity, violent temperament, or peacefulness.[61] Character evidence invites the factfinder to draw an inference about someone's actions based on that person's general character. The use of character evidence to prove conduct—or circumstantial use of character[62]—is generally prohibited in the federal courts under Rule 404 and in state courts under the corresponding state rules.[63] Rule 404(a) asserts that "[e]vidence of a person's char-

54 *Id.* *See also* Florida v. Royer, 460 U.S. 491, 525 n.6, (1983) (Rehnquist, J., dissenting) ("A 'profile' is, in effect, the collective or distilled experience of narcotics officers concerning characteristics repeatedly seen in drug smugglers.").

55 Kadish, *supra* note 20, at 748.

56 Charles L. Becton, *The Drug Courier Profile: "All Seems Infected That Th' Infected Spy, As All Looks Yellow to the Jaundic'd Eye"*, 65 N.C. L. Rev. 417, 439 (1987)

57 *See generally id.* (arguing that the use of profile evidence is inconsistent and is inadequately supported by empirical evidence).

58 *See generally* Kadish, *supra* note 20, at 762, 785 (arguing that the use of profile evidence violates evidentiary rules and denies due process rights to the accused).

59 *Id.* at 762.

60 *Id.* at 760–61.

61 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 404.02 (2d ed. 2011).

62 *See* Cleary et al., *supra* note 1, at 748.

63 Fed. R. Evid. 404(a).

acter or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait,"[64] although certain exceptions apply.[65]

Two primary justifications for the prohibition against character evidence in American trials have developed and endured. First, the doctrine attempts to ensure that jurors will not give undue weight to evidence of someone's character.[66] Jurors tend to erroneously consider personality traits as more predictive of individual behavior than they actually are.[67] Further, to the extent that a general character trait does predict behavior, it may distract the jury from other, more probative evidence.[68] "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[69] If evidence of character is kept from the jury, the forbidden inference cannot be drawn.

Just as important, the second rationale for the prohibition against character pervades the American justice system: in short, a defendant stands trial for his actions, not his disposition.[70] Indeed, "[i]t is fundamental to American jurisprudence that 'a defendant must be tried for what he did, not for who he is.'"[71] Without the doctrine, a jury might punish a defendant for his bad character or previous actions, even if the evidence does not support a guilty verdict in the case at hand.[72] Similarly, the jury may feel justified in passing judgment based on the defendant's prior actions, rather than the matter before it.

The exceptions to the general prohibition against character evidence apply only in criminal matters or in rare civil cases when "char-

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64 *Id.* 404(a)(1).

65 *Id.* 404(a)(2)–(3).

66 *See* Barrett J. Anderson, Note, *Recognizing Character: A New Perspective on Character Evidence*, 121 Yale L.J. 1912, 1928–29 (2012).

67 *See* CLEARY ET AL., *supra* note 1, at 743.

68 *See* Anderson, *supra* note 66, at 1928–29 ("[I]f jurors are exposed to character evidence, they are more likely to believe that the individual in question acted in conformity with that character, blinding them to the impact of other evidence.").

69 Michelson v. United States, 335 U.S. 469, 475–76 (1948).

70 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5232 (1978) ("[T]he rule barring propensity evidence supports one of the fundamental policies of our criminal law; that persons are to be punished for what they have done, not for what they are.").

71 United States v. Foskey, 636 F.2d 517, 523 (D.C. Cir. 1980) (quoting United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977)).

72 1 WIGMORE ON EVIDENCE § 194, at 233 (1904).

acter is in issue."[73] First, a criminal defendant may offer evidence of his own pertinent trait, such as truthfulness, peacefulness, or the like. If the evidence is admitted, the prosecutor may rebut it with evidence attacking the defendant's character on the same trait.[74] That is, a defendant's use of character evidence "opens the door" to the prosecution's use of character evidence against the defendant on that same trait.[75] Second, a defendant may also offer evidence of an alleged victim's pertinent trait, again opening the door to the prosecution to offer evidence against the defendant of that same trait.[76] A third, related exception applies only to homicide cases. There, the prosecutor may rebut evidence that the victim was the first aggressor with evidence of the victim's character trait of peacefulness.[77] Finally, Rules 607 through 609 govern the admissibility of the evidence of a *witness's* character.[78] When attacking a witness's character, the evidence is limited to matters pertaining to the witness's character for truthfulness.[79]

The use of evidence of a past crime, wrong, or other act is governed by Rule 404(b). "Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."[80] The Rules are concerned with the inference that because someone committed bad acts in the past, he is likely to have committed the bad act for which he is currently on trial. The rule seeks to protect the accused against unfair prejudice[81] and prevent the jury from drawing a "bad man" inference about a party.

73 *See* Ginter v. Northwestern Mut. Life Ins. Co., 576 F. Supp. 627, 630 (E.D. Ky. 1984) ("It seems beyond peradventure of doubt that the drafters of [Rule 404(a)] explicitly intended that all character evidence, except where 'character is at issue' was to be excluded.").

74 FED. R. EVID. 404(a)(2)(A) ("[A] defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it.").

75 *Id.*

76 *Id.* 404(a)(2)(B) ("[S]ubject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may: (i) offer evidence to rebut it; and (ii) offer evidence of the defendant's same trait.").

77 *Id.* 404(a)(2)(C) ("[I]n a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.").

78 *See id.* 607–609.

79 *Id.*

80 FED. R. EVID. 404(b)(1).

81 *See* MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 190, at 447 (Edward W. Cleary ed., 2d ed. 1972).

Despite the Rule's strong exclusionary language, evidence of prior bad acts is not totally barred. Evidence of prior bad acts "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[82] When admitted, there is something about the prior bad act—typically similarity in mode or circumstances—which is particularly probative of what occurred in the current case.[83] In such cases, the judge will usually give a limiting instruction admonishing the jury to consider the evidence only for its non-character purpose.[84] Of course, a jury may have difficulty drawing the distinction.[85] If the proponent of the evidence can characterize "bad acts" as being offered for a non-character purpose, the effect can be devastating. Trials are won and lost on such characterizations.[86]

The profiles and syndromes discussed in Part I all raise character inferences in varying degrees. For instance, Battering Parent Profile evidence provided by prosecutors overtly suggests that because the accused fits the profile, he is likely to have committed the crime. Profile and syndrome evidence used in this manner is particularly troubling, given the backdrop and justifications for the prohibition against

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82 FED. R. EVID. 404(b)(2). *See also* FED. R. EVID. 404(b) advisory committee's notes (1991 amendments) ("Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence.").

83 *See, e.g.*, United States v. Espinosa, No. 92-50564, 1993 WL 300600, at *1 (9th Cir. July 21, 1993). There the defendant was convicted of conspiracy to possess cocaine with intent to distribute. *Id.* At trial the Court admitted evidence of his prior convictions for smuggling marijuana and possession of marijuana with intent to distribute. *Id.* The Ninth Circuit affirmed the decision. *Id.* at *2. Because "[b]oth offenses involved enormous quantities of drugs which originated in Columbia, the use of tractor-trailers for transportation, and the disguising of loads as legitimate cargo," the prior conviction for smuggling marijuana was similar to the current offense. *Id.* at *1. Thus, the prosecution was permitted to use his prior convictions for the purpose of proving the defendant's knowledge and intent. *Id.* at *2.

84 In *Espinosa*, the Court noted that "the prejudicial effect of the introduction of the prior drug conviction was limited by the district court's instruction to the jury that it was not to consider the evidence for any other purpose but to show motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident." *Id.* at *2.

85 *See* Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 250 (2005) ("The usual limiting instruction certainly makes the cold-type record look better to a reviewing court, but the efficacy of such an instruction has been questioned by professors and judges for decades.").

86 *See id.* at 243 ("The jury will reason from the proved act of uncharged misconduct that it is more likely that the accused committed the crime charged because the accused was predisposed to commit that type of criminal act. The court, to be sure, cautions the jury against doing so, but very few commentators believe that such instructions really curb the jury's common-sense use of uncharged misconduct.").

character evidence. But even when used by the defendant to show that he does *not* fit the profile and is thus *unlikely* to have committed the crime, the effect may be less prejudicial, but the character inference remains.[87] Similarly, drug courier profiles, often used to explain a DEA agent's actions in making an arrest, discreetly invite the jury to conclude that the accused is a drug trafficker because he fits the profile. Even Battered Woman Syndrome evidence explaining victim behavior can also imply to the jury that the batterer is probably typical of other batterers—precisely the sort of conclusion Rule 404 seeks to limit.[88]

As discussed in greater detail in Part III, few courts acknowledge that profile and syndrome evidence raise a character inference under either Rule 404(a) or 404(b). The majority of decisions do not explicitly reject the notion—they unfortunately do not address it or brush it aside.[89] The decision to ignore character inferences is troubling in a system which seeks to punish a defendant based on the evidence presented, not his disposition or prior bad acts. But even when the evidence is presented by a criminal defendant on his own behalf, the inference is raised in contravention of Rule 404(a)(1).

B. *Standards Governing Expert Testimony*

Rule 701 declares that opinion testimony by a lay witness may *not* be based on scientific, technical, or other specialized knowledge.[90] When admissible, profile or syndrome evidence is presented by an

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87 Importantly, Rule 404(a)(1) makes no distinction between evidence used against the defendant and others. The general prohibition on character evidence in Rule 404(a)(1) states that "Evidence of a *person's* character or character trait is not admissible to prove that on a particular occasion the *person* acted in accordance with the character or trait." (emphasis added). By the clear text of the rule, the use of character evidence generally is prohibited against (or by) anyone, not just a criminal defendant.

88 While it is true that character evidence allows witnesses to generalize on the basis of the defendant's past acts to support an inference of the defendant's present conduct, and profile evidence, conversely, often involves generalizations based on the past acts of third parties, see WRIGHT & GRAHAM, *supra* note 70, at § 5233 n.53.2, the distinction is not particularly meaningful. In both cases, the jury is invited to infer that the person acted in conformity with a character trait.

89 *See, e.g.*, State v. Loss, 204 N.W.2d 404, 409 (Minn. 1973) ("The prosecution properly presented to the jury the psychological framework which constitutes a battering parent. It did not attempt to point the finger of accusation at defendant as a battering parent by its medical testimony. Rather, it presented sufficient evidence from which the jury could reasonably conclude that defendant fit one of the psychological patterns of a battering parent.").

90 *See* FED. R. EVID. 701(c).

expert witness.[91] Because it requires scientific, technical, or other specialized knowledge, such evidence falls within the purview of Rule 702.[92]

Three Supreme Court decisions interpreting Rule 702 define the landscape for the admissibility of expert testimony. The "*Daubert* Trilogy" of cases, in particular the decisions in *Daubert v. Merrell Dow Pharmaceuticals*[93] and *Kumho Tire Co. v. Carmichael*,[94] prescribe the trial judge's gate-keeping function of excluding unreliable expert testimony.[95]

In *Daubert*, the Supreme Court held that Rule 702 requires that an expert witness testify to *reliable* scientific knowledge.[96] Furthermore, the information given by an expert witness must assist the trier of fact to understand or determine a fact in issue.[97] In other words, the information must be *helpful* to the jury or judge. Thus, testimony based on unproven science or speculation should be filtered by the trial judge.[98]

The Court then articulated five factors to guide trial judges in making their preliminary "helpfulness" inquiry. They include (1) whether the theory or technique can be, or has been, tested;[99] (2)

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91 *See, e.g.*, Arcoren v. United States, 929 F.2d 1235, 1239–40 (8th Cir. 1991).

92 "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case."

FED. R. EVID. 702.

93 509 U.S. 579 (1993).

94 526 U.S. 137 (1999).

95 The third case, *General Electric v. Joiner*, holds that the standard of review on appeal for the trial court's decision to admit or deny expert testimony is "abuse of discretion." 522 U.S. 136, 141 (1997).

96 *See Daubert*, 509 U.S. at 597 (the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.").

97 *Id.* at 592.

98 *Id.* at 589. The Court reiterated the filtering role of the trial judge who "must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.*

99 *Id.* at 593.

whether it has been subjected to peer review and publication;[100] (3) the known or potential error rate;[101] (4) the existence of standards controlling the technique's operation;[102] and (5) general acceptance of the method or technique within the scientific community.[103] The Court further stressed that the five factors were not an exhaustive list. To the contrary, the Court emphasized that the inquiry is flexible. An expert's testimony need not meet all of the factors—or even any of the factors—to be admitted.[104] If the trial judge finds that the testimony rests on an adequate foundation of scientific reliability—through the listed factors or otherwise—and is relevant, such testimony should be admitted.

The trial judge's gatekeeping role is not limited to scientific evidence. In *Kuhmo*, the Court clarified its position, holding that the text of Rule 702 "makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge."[105] In short, *Daubert* applies to all expert testimony, whether based on scientific principles or non-scientific knowledge, experience, or training. For any proposed expert, the trial judge must serve as a gatekeeper to ensure the evidence he or she will present is reliable and relevant.[106] The *Daubert* factors may be helpful in this task, but may not apply in every instance.

Experts traditionally include engineers, scientists, doctors, and other professionals. Nevertheless, formal training and education is not a prerequisite to testifying as an expert.[107] The witness must simply possess specialized knowledge which is helpful to the trier of fact.[108] This standard is fact-specific and varies depending on the subject matter.[109] Even so, courts liberally allow expert witnesses to testify and often leave any perceived lack of qualifications to weight rather than admissibility.[110]

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100 *Id.*

101 *Id.* at 594.

102 *Id.*

103 *Id.*

104 *Id.* at 593 ("[W]e do not presume to set out a definitive checklist or test.").

105 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).

106 *Id.* at 152.

107 *See* Mulholland v. DEC Int'l Corp., 443 N.W.2d 340, 344 (Mich. 1989) ("It is perhaps tempting to equate the word 'expert' with the notion of a licensed professional. However, there is no basis for doing so in the text of [Rule 702].").

108 Fed R. Evid. 702(a).

109 *Kumho*, 526 U.S. at 137.

110 *See, e.g.*, Vision I Homeowners Ass'n v. Aspen Specialty Ins. Co., 674 F. Supp. 2d 1321, 1325 (S.D. Fla. 2009) ("The qualification standard for expert testimony is 'not stringent,' and 'so long as the expert is minimally qualified, objections to the level of

Generally, profile and syndrome evidence has been found to satisfy *Daubert*. For instance, the defendant in *United States v. Simmons*[111] challenged the government's use of Rape Trauma Syndrome evidence to explain a victim's behavior.[112] The court rejected the argument that the expert's evidence was unreliable because it was "developed for therapeutic, rather than forensic, purposes."[113] The court held that *Daubert* encompasses other indicia of reliability beyond scientific methods, "including professional experience, education, training, and observations."[114] Similarly, Battered Woman Syndrome generally has been accepted by courts as helpful in assisting the factfinder.[115] Indeed, academic commentators are far more critical than the courts regarding the reliability of such evidence.[116]

C. *The Rule 405 Problem*

Rule 404 governs when character evidence is admissible; Rule 405 governs *how* it is proved. Rule 405 identifies three methods of proving character. The first method is through witnesses testifying as to the person's reputation for a certain trait within the community.[117] Second, a witness with personal knowledge of the person can testify as to her opinion on that person's pertinent character trait.[118] Finally, a witness can testify about specific instances of the person's conduct

the expert's expertise [go] to credibility and weight, not admissibility.'" (quoting Kilpatrick v. Breg, Inc., No. 08-10052-CIV, 2009 WL 2058384 (S.D. Fla. June 25, 2009))).

111 470 F.3d 1115 (5th Cir. 2006).

112 *Id.* at 1123–24.

113 *Id.* at 1122.

114 *Id.* at 1123.

115 *See, e.g.*, State v. McMillan, 590 N.E.2d 23, 32 (Ohio Ct. App. 1990) (citing State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990)).

116 *See, e.g.*, David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997). The authors argue that Lenore Walker's second book on Battered Woman Syndrome "contains little more than a patchwork of pseudo-scientific methods employed to confirm a hypothesis that its author and participating researchers never seriously doubted. Indeed, the 1984 book would provide an excellent case study for . . . how *not* to conduct empirical research." *Id.* at 68 (emphasis in original) (footnote omitted); *see also McMillan*, 590 N.E.2d at 32 ("Most writers on the subject of sexual abuse agree that there are no common characteristics sufficient to constitute a profile of sexual abusers.").

117 FED. R. EVID. 405(a) ("When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion.").

118 *Id.*

from which the trier of fact can infer character, but only when character is "in issue."[119]

Profile and syndrome evidence is presented by expert witnesses.[120] Such evidence does not fit within any of three methods of proving character—by reputation, opinion, and specific instances of conduct. Instead, it requires scientific, technical, or other specialized knowledge of the profile or syndrome and thus falls under the purview of Rule 702. Assuming profile and syndrome evidence does raise a character inference, there is no adequate method of offering it under Rule 405.

The differing approaches taken by courts in Indiana and Iowa demonstrate the struggle facing trial courts in dealing with the Rule 405 problem.[121] The Indiana Supreme Court has declared that "expert opinion, whether based on a personality profile or not, is [not] an appropriate way to prove a defendant's character for a particular trait."[122] It further stated the general rule that, in Indiana, the only way to prove character is through reputation testimony.[123] Despite this pronouncement, the court did not—and never has—announced an outright prohibition against the use of profile and syndrome evidence.

In an Iowa sexual assault trial, an expert would have testified that the defendant did not fit the psychological profile of a child molester.[124] The Iowa Supreme Court noted that character evidence would ordinarily be "offered through the testimony of laypersons in the community who are aware of the defendant's 'real' character either by direct knowledge or reputation."[125] After wrestling with various standards courts use to analyze such evidence, the court declared

119 *Id.* 405(b) ("When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.").

120 *See infra* Part III.B.

121 Their approaches differ in spite of the fact that both Iowa and Indiana have adopted evidence codes based on the Federal Rules of Evidence. *See* Cornell U. Law Sch. Legal Info. Inst., *Uniform Rules of Evidence Locator*, UNIFORM COMMERCIAL CODE LOCATOR (Mar. 6, 2003), http://www.law.cornell.edu/uniform/evidence.html.

122 Byrd v. State, 593 N.E.2d 1183, 1187 (Ind. 1992). The "profile" involved in *Byrd* was the Minnesota Multiphasic Personality Inventory test, a personality test frequently administered by psychologists. *Id.* at 1184. In *Byrd*, the defendant attempted to admit his MMPI test results in order to show his character was inconsistent with committing intentional murder. *Id.*

123 *Id.* at 1187 ("Indiana generally permits evidence of a defendant's good character to be proven only by testimony about his reputation in the community.").

124 State v. Hulbert, 481 N.W.2d 329, 331 (Iowa 1992).

125 *Id.* at 332–33.

that "[t]he question boils down to whether the evidence would aid the jury in its decision-making role."[126] There, the court held that it was within the trial court's discretion to exclude the evidence.[127]

In both cases, the holdings may be correct, but the reasoning is unsatisfactory. Each court seemed to acknowledge that profile and syndrome evidence raises a character inference, yet did not suggest how it could be properly introduced. Their struggle is unsurprising. The Federal Rules of Evidence and corresponding state rules simply do not provide an adequate solution to the Rule 405 problem.

III. The Confused Approaches of Federal and State Courts in Analyzing Profile and Syndrome Evidence

The Federal Rules are of course uniform across the federal circuits. Moreover, thirty-eight states have adopted evidence codes corresponding to the Federal Rules.[128] Yet the courts' treatment of profile and syndrome evidence is far from uniform. The variety of approaches demonstrates that the Federal Rules and corresponding state rules do not adequately address such evidence.

A. *The Majority View*

A majority of jurisdictions considering profile and syndrome evidence analyze it exclusively under Rules 401, 403, and 702.[129] That is, they do not even acknowledge that the evidence may raise a character inference.[130]

Like all evidence, profile and syndrome evidence must be relevant under Rule 401 and admissible under the Rule 403 balancing

126 *Id.* at 333. The court also held that the proposed testimony "clearly goes beyond ordinary character evidence. It comes cloaked with an aura of scientific reliability about the predisposition of certain individuals to commit the type of crime at issue." *Id.* It was more objectionable because of the prohibition in Iowa of experts offering an opinion on the ultimate question of guilt. *Id.*

127 *Id.*

128 *See* Cornell U. Law Sch. Legal Info. Inst., *supra* note 121.

129 *See, e.g.*, United States v. King, 703 F. Supp. 2d 1063, 1067–75 (D. Haw. 2010); United States v. Brown, 891 F. Supp. 1501, 1505 (D. Kan. 1995).

130 Perhaps this is by necessity, because of the Rule 405 problem and the prescribed methods of proving character. If one reads the approved methods as being exclusive, profile and syndrome evidence would never be admissible, because it does not fall within any of the categories. Under this view, one must ignore the character inference and Rule 404 in order for the evidence to ever be admitted.

test. Relevance depends on the *purpose* for which the evidence is offered.[131]

Even if profile and syndrome evidence is generally admissible in the jurisdiction, it must be offered for a relevant purpose.[132] For instance, the defendant in *United States v. Taylor*[133] was accused of conspiracy to defraud the Department of Motor Vehicles.[134] Investigators had recorded incriminating conversations of the defendant in her apartment.[135] As part of her defense, she planned to deny any recollection of these conversations.[136] The court held that it would admit Battered Woman Syndrome evidence as relevant and admissible for the limited purpose of explaining her memory loss, and thus rehabilitate her credibility when the government attacked it.[137] It suggested, however, that evidence that showed *generally* that the defendant was abused would be limited by Rule 403, because "the danger of unfair prejudice to the government arising out of the jury's natural tendency to sympathize with Taylor as a battered woman (thereby perhaps prompting the jury to refrain from punishing her further by its verdict) is manifest."[138]

If the evidence meets the standards of Rule 401 and Rule 403, the court must then consider the expert testimony requirements of Article 7. Because evidence of the syndrome is presented through expert testimony, courts simply examine whether the evidence will assist the

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131 *See* FED. R. EVID. 401 advisory committee's note ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.").

132 *See* Menendez v. Terhune, 422 F.3d 1012 (9th Cir. 2005). In 1993, Lyle and Erik Menendez were convicted of murdering their parents. *Id.* at 1025. At trial, the brothers admitted to shotgunning their parents to death, but claimed they had been driven to commit the crime by a lifetime of abuse and fear of their parents. *Id.* at 1024. The trial judge refused to admit expert testimony that the brothers fit the profile of "battered persons." *Id.* at 1030–31. Couching the issue narrowly, the court stated that only evidence which corroborated the defendant's state of mind at the time of the killing was relevant. *Id.* at 1031. The trial judge stated, "[i]t's really irrelevant, and it would be totally irrelevant to any trial, that the defendants had been abused or that they fit a particular diagnosis of being abused. That's totally irrelevant, unless it corroborates their testimony as to their mental state at the time of the crime. If it doesn't do that, then the fact that they happen to be abused or happen to fit a particular diagnosis is irrelevant." *Id.* (emphasis removed).

133 820 F. Supp. 124 (S.D.N.Y. 1993).

134 *Id.* at 125.

135 *Id.* at 126.

136 *Id.* at 128.

137 *Id.* ("[B]attered woman syndrome may, in appropriate circumstances, be offered to counter attacks upon a witness's credibility.").

138 *Id.* at 127.

trier of fact in understanding an issue, and whether the testimony is the product of reliable principles and methods.[139] The Court in *Taylor* began by observing that the Battered Woman Syndrome is sufficiently recognized by the present state of scientific knowledge to permit the admission of expert opinion testimony.[140] Assuming Rule 702's standards for expert opinions are met, courts in a majority of jurisdictions will admit the evidence.[141]

B. The "Group Character Evidence" View

Some jurisdictions have acknowledged that profile and syndrome evidence may raise a character inference.[142] These courts admit the evidence as long as the inference does not relate to the criminal defendant's guilt or innocence. However, these jurisdictions do not address how the evidence can properly be offered under Rule 405 or otherwise.[143]

In *McMillan,* prosecutors in Ohio attempted to use profile evidence of sexual offenders to prove that the defendant was more likely to have committed sexual abuse.[144] After establishing that the defendant had been abused in the past, the prosecution called a detective as an expert witness to testify regarding the profile of sexual offenders.[145] The following exchange occurred at trial:

> Q. Have the seminars [which the detective attended] addressed any common characteristics among offenders or victims?

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139 *See, e.g.*, United States v. Brown, 891 F. Supp. 1501, 1506 (D. Kan. 1995).

140 *Taylor*, 820 F. Supp. at 127.

141 *See, e.g.*, Arcoren v. United States, 929 F.2d 1235, 1241 (8th Cir. 1991) (allowing Battered Woman Syndrome evidence to be presented by either party so long as it meets the standards of Rule 702); United States v. St. Pierre, 812 F.2d 417, 419 (8th Cir. 1987) (allowing an expert to testify as to certain traits and characteristics of sexually abused children as compared with those exhibited by alleged victim because it would assist the jury); *Brown*, 891 F. Supp. at 1508 (allowing Battered Woman Syndrome evidence presented by an expert because it would assist the trier of fact in determining the accused's state of mind and whether she acted as she did because the accused threatened or abused her); Steward v. State, 652 N.E.2d 490, 496 (Ind. 1995) ("The reliability of syndrome evidence, although highly questionable for purposes of affirmatively proving sexual abuse, is generally accepted for purposes of helping the jury to understand that a complainant's reactions are not atypical of a young sexual assault victim.").

142 *See, e.g.*, State v. McMillan, 590 N.E.2d 23, 32 (Ohio Ct. App. 1990) ("Another complicating factor in the use of profile testimony is that, by expert opinion, character evidence is presented to the jury.").

143 *See supra* Part II.

144 *McMillan*, 590 N.E.2d at 23.

145 *Id.* at 31.

> A. There's one thing that they have in common.
>
> MR. LUCAS: Objection, Your Honor.
>
> THE COURT: Well, overruled. Go ahead.
>
> A. Normally, in 85 to 90 percent of the cases, an offender was also a victim earlier in his or her life.
>
> Q. And have you, in the approximately 300 investigations that you have personally been involved with, have you found that characteristic or that to be a commonality among some of the offenders that you have interviewed?
>
> MR. LUCAS: Objection.
>
> THE COURT: Overruled.
>
> A. It's about 85 to 90 percent of the time.[146]

In reversing the conviction, the Ohio Court of Appeals labeled profile evidence of sexual abusers "group character evidence."[147] Group character evidence attempts "to prove that because *other persons* have acted in certain ways in the past, a defendant who shares common characteristics with those persons is likely to have acted the same way with respect to the crime charged."[148] The court further stated that "'group' character evidence is objectionable for the same reason as is traditional character evidence: probative value depends upon the jury drawing the forbidden inference that the defendant has a propensity to commit the crime with which he is charged."[149] There, the court completely barred the use of such evidence because it was too unreliable and prejudicial to a criminal defendant.[150]

However, the same Ohio Court of Appeals *allows* the use of profile evidence if the inference raised does not relate specifically to a defendant's guilt or propensity to commit a crime. In one case, the court allowed an expert to testify about Rape Trauma Syndrome to explain why the victim delayed reporting being raped.[151] In admitting the testimony, the court noted that the expert doctor testified that he had never met the defendant, and did not give an opinion as to whether she was raped or was telling the truth.[152]

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146 *Id.*

147 *Id.* at 32.

148 *Id.*

149 *Id.*

150 *Id.* ("[G]roup character evidence of sexual abusers, at this time, is so unreliable and prejudicial that it should not be used even when the defendant puts his character in issue.").

151 State v. Moore, No. 1736, 1989 WL 21233, at *5–7 (Ohio Ct. App. Mar. 8, 1989), *dismissed*, 541 N.E.2d 623 (1989).

152 *Moore*, 1989 WL 21233, at *7.

Similarly, the court allowed an expert social worker to testify about evidence similar to Child Sexual Abuse Accommodation Syndrome to explain why a sexually abused child might change his or her story.[153] The testimony at trial proceeded as follows:

> Q. The last 10 years you worked with children who have been sexually abused?
>
> A. Yes.
>
> Q. Of the children that you have worked with, how many have been able to tell you the entire story the first time you have seen them?
>
> MR. ALLEN: Objection, Your Honor.
>
> THE COURT: Overruled. He is asking for a percentage.
>
> A. Approximately—well, I'd say maybe 50 percent . . . .
>
> . . . .
>
> Q. So, of the kids that you have dealt with, 50 percent of those kids haven't been able to tell you the entire story?
>
> A. That is correct.
>
> Q. In your first meeting?
>
> A. Yes.
>
> Q. Is there any reason that you know of for that?
>
> MR. ALLEN: Objection.
>
> THE COURT: Overruled. Go ahead.
>
> A. The traumatic experience itself is . . . outside the scope of the child's ability to comprehend exactly what has happened to him or her; and, consequently, because the mind acts as a buffer for trauma, they will bury things; or it's too painful to bring up or to talk about right then. So, it isn't always uppermost in their minds to talk about.[154]

Again, the expert did not testify whether she believed the victim's story.[155] Moreover, the purpose of the testimony, the court noted, was merely to address the credibility of children who had been abused, rather than to show the child in that case was abused or was telling the truth.[156]

The use of Drug Courier Profile evidence has also been admitted for limited purposes, despite the court's acknowledgment that it may

153 State v. McMillan, 577 N.E.2d 91, 94–95 (Ohio Ct. App. 1989). The two *McMillan* cases are unrelated.

154 *Id.* at 94.

155 *Id.*

156 *Id.* at 94–95.

raise a character inference. In *United States v. Doe*,[157] an expert testified that heroin is frequently smuggled into the U.S. through Nigerian traffickers, often through small cities.[158] He further explained that traffickers usually use the mailing addresses of other individuals to receive imported heroin, and often assume false identities.[159] The defendant and the facts and circumstances surrounding his arrest fit the profile.[160] The appellate court agreed with the trial court's decision to admit the expert testimony, because while it could raise a group character inference, it was permissible for the purpose it was offered.[161] Rather than suggesting that the defendant had a propensity to smuggle drugs, the Court reasoned that the evidence merely demonstrated the modus operandi of Nigerian traffickers of heroin.[162] However, the court noted that it was "sympathetic" to the group character argument, and declared that "[i]f the only purpose of profile evidence is to support an inference of guilt by association, then an objection to the evidence would be well-founded."[163]

C. *The Irrelevance View*

Still other courts have dismissed profile evidence as completely irrelevant. The Supreme Judicial Court of Massachusetts prohibited the use of Battering Parent Profile[164] evidence partially on these grounds.[165] It reasoned, "[t]estimony regarding a criminal profile is nothing more than an expert's opinion as to certain characteristics which are common to some or most of the individuals who commit particular crimes. Evidence 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."[166] However, given the remarkably low standard for relevance—whether the evidence has *any tendency* to make a fact

157 149 F.3d 634 (7th Cir. 1998).

158 *Id.* at 636.

159 *Id.*

160 *Id.* at 635–36.

161 *Id.* at 637–38.

162 *Id.* at 638 ("Far from suggesting that Doe had a 'propensity' to import or distribute drugs—as, for instance, a dishonest person might have a propensity to lie, or a hot-tempered person might have a propensity to throw the first punch—Balbo's testimony served only to illuminate the *modus operandi* of Nigerian importers of Southeast Asian heroin.").

163 *Id.* at 638.

164 What the Court refers to as the "child battering profile" is more commonly known as the Battering Parent Profile.

165 Commonwealth v. Day, 569 N.E.2d 397, 399–400 (Mass. 1991).

166 *Id. See also* State v. Maule, 667 P.2d 96, 98–99 (Wash. Ct. App. 1983).

more or less probable than it would be without the evidence—this view is unconvincing.

D. The Wisconsin View

As discussed above, the vast majority of jurisdictions analyze profile and syndrome evidence under the general relevancy rules, Rules 401–403 and the rules governing experts, Rules 701–703.[167] The State of Wisconsin takes a different position. Recognizing that profiles and syndromes often raise a character inference, Wisconsin courts correctly analyze the evidence under Rule 404.

Wisconsin's battle over the admissibility of profile and syndrome evidence began with *State v. Richard A.P.*[168] The defendant Richard was convicted of sexual contact with a minor. At trial, he sought the admission of expert testimony for the purpose of showing that he did not exhibit character traits consistent with a sexual disorder such as pedophilia.[169] A psychologist who had evaluated the defendant would have testified that his sexual history and responses to testing about his sexual behavior did not show any evidence of pedophilia or any other diagnosable sexual disorder. The doctor would have further testified that absent a diagnosable disorder, it is unlikely that such a person would molest a child.[170] In reversing the trial court's decision to exclude the evidence, the Wisconsin Appellate Court held that the evidence was relevant and *admissible character* evidence. The court did not craft a specific rule which would govern sexual deviancy profile evidence. Rather, it simply applied the general rules governing expert testimony and character evidence.[171] Expert opinion relevance depends on whether the evidence will assist the trier of fact in determining a fact in issue. Character evidence allows the defendant to present evidence of his own pertinent character traits in the form of reputation or opinion. Under both rules, the evidence was admissible.[172] The court did not address the Rule 405 problem.

The State of Wisconsin has subsequently fought to overturn *Richard A.P.* decision. The defendant in *State v. Davis*[173] had been

167 *See supra* Parts III.A–C.

168 589 N.W.2d 674 (Wis. Ct. App. 1998).

169 *Id.* at 682.

170 *Id.* at 680.

171 The court concluded that the evidence was admissible under WIS. STAT. § 907.02, the rule governing expert testimony, and WIS. STAT. § 904.04(1)(a), the rule governing character evidence. *Richard A.P.*, 589 N.W.2d at 681.

172 *Id.* at 681–83.

173 645 N.W.2d 913 (Wis. 2002).

charged with repeated sexual assault of a child.[174] At trial, his attempts to introduce *Richard A.P.* evidence were denied.[175] During his appeal, the government lawyers asked the state supreme court to adopt a blanket restriction on *Richard A.P.* evidence.[176] The court declined to do so.[177] Instead, it held that the defendant's expert should have been allowed to testify to the general character traits of sexual offenders, his findings on whether the defendant possessed those character traits, and his ultimate opinion on the likelihood that Davis committed the sexual assault at issue.[178] In doing so, the state supreme court admonished the lower court to "closely scrutinize such evidence, . . . for its relevancy, its probative value, and its potential for danger of unfair prejudice or confusion to the jury."[179] In other words, profile and syndrome evidence must be closely analyzed under Rule 403.

The dissent in *Davis* "reluctantly" agreed with the decision to admit *Richard A.P.* evidence here and in other sexual assault cases, but would have restricted the general use of profile evidence.[180] The dissent emphasized the unique nature of many sexual assault trials, which typically lack neutral witnesses and any physical evidence.[181] As such, profile evidence may be extremely valuable to the defense's case. However, he argued that use of character profile evidence should not be extended to other, non-sexual assault trials, noting that widespread use of this evidence "potentially emasculates the evidence code's rule that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion."[182]

Importantly, *Richard A.P.* and *Davis* do not *mandate* the admission of sexual offense profile evidence. The judge must still conduct a general relevancy balancing test. The Wisconsin rule of evidence is nearly identical to the Federal Rule, asserting that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or

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174 *Id.* at 917.

175 *Id.* at 918.

176 The dissent defined *Richard A.P.* evidence as "expert testimony based on an examination of the defendant, concluding that the defendant lacks the personality characteristics of a sexual offender and is, therefore, unlikely to have committed the alleged sexual assault." *See id.* at 929 (Crooks, J., dissenting).

177 *Id.* at 920 (majority opinion).

178 *Id.* at 920.

179 *Id.* at 917.

180 *Id.* at 928 (Crooks, J., dissenting).

181 *Id.*

182 *Id.*

misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[183] Despite the Rule's pro-admissibility tenor, courts may properly exercise their discretion and exclude *Richard A.P.* evidence.

In *State v. Walters*,[184] a Wisconsin trial court again excluded expert testimony regarding the traits of sexual abusers of children.[185] Government lawyers continued to argue vehemently against such testimony, declaring that "[o]bviously *Richard A.P.* is a wrong decision and contrary to precedent nationwide."[186] This time the Wisconsin Supreme Court upheld the decision to exclude the evidence, but did not overrule or limit *Richard A.P.* The court distinguished the proffered testimony in *Walters* from that of *Richard A.P.* and *Davis.* There, a period of six years had passed since the alleged assaults had taken place and the defendant was evaluated—a much longer gap than in *Richard A.P.* and *Davis.*[187] Furthermore, the defendant had been an alcoholic during most of the period, but no longer was when he was evaluated.[188] The defendant's expert had indicated that the test results can be altered by alcohol consumption, and admitted that her test results did not take into account whether the defendant's behavior was triggered by alcohol consumption.[189] This reduced the probative value of her testimony enough for the Wisconsin Supreme Court to find that a reasonable judge could exclude the evidence.[190] How-

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183 WIS. STAT. ANN. § 904.03 (West 2011).

184 675 N.W.2d 778 (Wis. 2004).

185 *Id.* at 785–86 ("The circuit court conducted such a balancing test and considered the potential for the confusion of the issues, and its propensity to mislead the jury. The court stated that the proffered evidence would be inappropriately 'lengthy' and 'wandering' and would 'obscure' the real issue of witness credibility.").

186 *Id.* at 781.

187 *Id.* at 786.

188 *Id.*

189 *Id.*

190 *Id.* The Wisconsin and Ohio courts appear to have opposite views on profile testimony specific to the defendant. The expert in *Walters* would not have offered any conclusions specific to the defendant's propensity to commit sexual assault. She testified: "What I've done is assess Mr. Walters' personality so that the finder of fact can look at it. And I can talk about what kind of personality child sexual abusers are more likely to have. But clearly you are always going to have some people who aren't child abusers who have the same kind of problems and you are going to find some child abusers who don't have them, but it's a matter of probability. These are characteristics found more often in child sexual abusers, and I can talk about those." *Id.* The Court viewed the generality of the testimony as cutting *against* admissibility—because such evidence was less probative, rather than tilting toward admissibility—because such evidence is more prejudicial. *Id.* The Courts in the *McMillan* cases resolved the issue the opposite way. Evidence specific to the defendant was too prejudicial to

ever, *Richard A.P.* remains the law in Wisconsin. If testimony discussing the personality characteristics of sexual abusers satisfies Rule 403, the evidence is generally admissible.

IV. The Need for Reexamination

A. *Profile and Syndrome Evidence Should be Analyzed under Rule 404*

The variety of different approaches taken by courts in admitting profile and syndrome evidence demonstrates the need for clarity. Most jurisdictions recognize that profile and syndrome evidence is helpful to explain a victim's or witness's actions. They similarly recognize that demonstrating that a criminal defendant fits a profile of "bad men" to prove conduct is highly prejudicial. That said, the broad disregard for the inference raised by profile and syndrome evidence—even if offered for a different purpose—is troubling.

One solution is for courts to reexamine profile and syndrome evidence under the existing Federal Rules. Courts should acknowledge, as the Wisconsin courts do, that profile and syndrome evidence raises a character inference,[191] and craft approaches based on that fact. Rule 404 concerns should be considered any time profile or syndrome evidence is offered. Such an approach would not prohibit the use of profile and syndrome evidence, but would limit its use.

Three important consequences would emerge from such a change:

> (1) The use of profile and syndrome evidence would be greatly reduced in civil cases.
>
> (2) Profile and syndrome evidence would only be admissible against a criminal defendant if it falls under one of the exceptions in Rule 404(a)(2).
>
> (3) Profile and syndrome evidence supporting a *witness's* credibility would be admissible only if the witness's character for truthfulness has been attacked.

First, because character evidence is only admissible in criminal matters, or when character is in issue in a civil case, the use of profile

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admit, while general conclusions were admissible. *See supra* notes 142–156 and accompanying text.

191 *See, e.g.*, Steward v. State, 652 N.E.2d 490, 499 (Ind. 1995) ("Where a jury is confronted with evidence of an alleged child victim's behaviors, paired with expert testimony concerning similar syndrome behaviors, the invited inference—that the child was sexually abused because he or she fits the syndrome profile—will be as potentially misleading and equally as unreliable as expert testimony applying the syndrome to the facts of the case and stating outright the conclusion that a given child was abused.").

and syndrome evidence will be greatly reduced in civil cases.[192] Arguably, such a prohibition deprives the jury of valuable evidence which would assist its decision making. However, the drafters of Rule 404 decided that such evidence, while probative, is unduly prejudicial. As the Supreme Court in *Michelson v. United States* aptly explained, "[t]he overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."[193] Treating profile and syndrome evidence as this Note has suggested merely extends the existing rule prohibiting character evidence in civil cases.

Second, with Rule 404 as the filter, profile and syndrome evidence should only be admissible against a criminal defendant if it falls under one of the exceptions listed in Rule 404. The Federal Rules recognize that criminal defendants should be able to present compelling evidence to support their innocence, and that danger of prejudice forbids certain kinds of evidence from being introduced against them. Under the Rule 404 framework, a defendant must first offer evidence of a pertinent trait.[194] For instance, a criminal defendant could offer evidence that he does not possess qualities consistent with a Battering Parent Profile or Sexual Offender Profile. Then, and only then, could the prosecutor offer evidence—in the form of profile and syndrome or otherwise—to rebut this evidence.[195]

Under Rule 404, which refers to Rule 608 when addressing the character of a witness, profile and syndrome evidence supporting a witness's credibility is admissible only if the witness's character for truthfulness has been attacked.[196] Evidence tending to explain a vic-

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192 1 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404:2, at 354–56 (5th ed. 2001) ("Circumstantial use of character evidence is not permitted in civil cases . . . except to impeach or support the character of a witness for truthfulness as provided for in Rules 607, 608 and 609.").

193 335 U.S. 469, 476 (1948).

194 *See* 2A CHARLES ALAN WRIGHT & PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE § 409, at 97 (4th ed. 2009) ("[T]he rule is entirely settled that unless and until the accused gives evidence of good character, the prosecution may not introduce evidence intended to show that he or she is a person of bad character.").

195 *Id.* at 98–99, 101 ("By offering such evidence, defendant, in the courtroom phrase, 'puts his character in issue.' . . . If the defendant undertakes to show that his or her character is good, the disability previously imposed on the prosecution is removed, and it is now free to attack this evidence and prove that defendant's character is bad.").

196 *See* FED. R. EVID. 608(a) ("A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But

tim's behavior—such as Rape Trauma Syndrome or Battered Woman Syndrome—would fall under this category. In most cases, victims would routinely be permitted to present this evidence, because a defendant would almost certainly argue that the victim was lying. Assuming the witness's character for truthfulness was attacked, profile and syndrome evidence could be used in rebuttal.[197]

B. Solving the Rule 405 Problem

The method of proving character through profile and syndrome evidence remains unclear. Indeed, this demonstrates the weakness of the Federal Rules in dealing with such evidence. The evidence raises a character inference, but Rule 405 does not envision an expert presenting character evidence.

It is possible that Rule 405 can be interpreted as currently written to allow—or at least not preclude—the introduction of profile and syndrome evidence. Two possible readings of the Rule could authorize an expert to present character evidence in some instances. Though both require a somewhat strained interpretation of the Rule, either is preferable to the current prevailing method of ignoring the character inference invited by profile and syndrome evidence entirely.

1. Reading One: Rule 405 only applies to lay witnesses

A plausible reading of Rule 405 is that it is meant to only apply to lay witnesses. Rule 405 states, in relevant part: "When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion." However, Rule 702 declares that an expert's testimony must be based on "the expert's scientific, technical, or other specialized knowledge."[198] The methods of proving character, through opinion based on *personal* observation or *general* knowledge of the person's reputation in the community,[199] seem to clearly contemplate a lay witness.

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evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.").

197 *See also* 28 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE & PROCEDURE EVIDENCE § 6114, at 56 (1st ed. 1993) ("Since Rule 608(a) is not expressly limited to lay opinions, it arguably overrules this common law and provides authority for the admission of expert opinions as to character for truthfulness or untruthfulness.").

198 FED. R. EVID. 702.

199 MCCORMICK, EVIDENCE, Student Edition § 186, at 312 (Broun ed., 6th ed. 2006).

If Rule 405 only applies to lay witnesses, presumably only lay witnesses are constrained by the prescribed methods of proving character. Thus, Rule 405 would not necessarily preclude an expert from presenting character evidence through methods other than opinion, reputation or specific instances of conduct. An expert witness would be free to present character evidence in any manner—including through profiles and syndromes—within the trial court's discretion.

However, focusing on the presenter of the testimony rather than the testimony itself appears at odds with the text of the rule, which makes no mention of the *type* of witness who may present such evidence.[200] The Rule "does not on its face distinguish between expert and lay opinions."[201] Furthermore, there is no companion rule outlining methods of proving character by an expert witness. This suggests either that Rule 405 encompasses all kinds of witnesses including experts, or that expert witnesses may *never* present character evidence.

2. Reading Two: The methods of proving character in Rule 405 are not exhaustive

A related reading proposes that Rule 405 is not meant to encompass every method of proving character. Rule 405(a) states that character "*may* be proved by testimony about the person's reputation or by testimony in the form of an opinion."[202] The use of the word "may" instead of "must" suggests that the Rule does not preclude proving character by methods other than those listed.[203] In other words, a lay witness *may* prove character by opinion, but that does not prohibit an expert from proving character through expert testimony under Rules 702–703. Jurisdictions such as Wisconsin which acknowledge that some profiles and syndromes raise an *admissible* character inference seemingly embrace this interpretation, though none have expressly addressed the Rule 405 problem.

Though far from ideal, a Court could properly read the permissive language of Rule 405 as *examples* of permitted methods, rather than treating it as an exhaustive list. It requires a stretch—but not an

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200 *See* FED. R. EVID. 405.

201 *See* 22 WRIGHT & GRAHAM, *supra* note 70, § 5265, at 591 (concluding also that "it would be beyond the legitimate use of 'interpretation' to read the rule as admitting only lay opinions of character").

202 FED. R. EVID. 405(a) (emphasis added).

203 *See* FED. R. EVID. 101, advisory committee's note to 2011 amendment ("The restyled rules replace 'shall' with 'must,' 'may,' or 'should,' depending on which one the context and established interpretation make correct in each rule."), *available at* http://www.gpo.gov/fdsys/pkg/USCODE-2011-title28/html/USCODE-2011-title28-app-federalru-dup2-rule101.htm.

impermissible one—to conclude that Rule 405 authorizes experts to testify on character issues. At the very least, the Federal Rules do not expressly prohibit the use of profile and syndrome evidence to prove character. Commentators have acknowledged that "there are other ways of evidencing character that are difficult to fit into the scheme" of Rule 405.[204] While not a perfect solution, the text of Rule 405 permits this alternative reading.

A far more preferable approach is for the Supreme Court to promulgate a new rule of evidence directly addressing profile and syndrome evidence. A new rule should specifically identify the form of evidence—a compilation of characteristics, coupled with an implicit invitation to infer conduct from those characteristics—when such evidence is admissible, and the acceptable methods of proving it.

A radical new approach is not necessary, nor desirable. Instead, a new Rule should be modeled after Rules 404 and 608. The default rule should be that profile and syndrome evidence is not admissible to prove that on a particular occasion the person acted in accordance with the profile or syndrome. Just as under Rule 404, it should include a number of significant exceptions. Criminal defendants have the right to offer evidence of their own good character for the purpose of proving it unlikely that they committed the crimes charged, and a rule should reflect that.[205] Once the "door is opened," the prosecution should be allowed to rebut such evidence with its own expert testimony. Similarly, when a victim or witness's character for truthfulness is attacked, they should be permitted to present profile and syndrome evidence to rebut those attacks. Just as importantly, a companion Rule to Rule 405 should prescribe the acceptable methods of proving character by an expert witness.

The rule prohibiting character evidence to show conduct "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence."[206] The majority of courts recognize that profile and syndrome evidence can be exceedingly valuable and helpful to a jury. But contrary to the prevailing norm, such evidence should be admitted only after a proper consideration of Rule 404 and 405.

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204 *See* 22 WRIGHT & GRAHAM, *supra* note 201, § 5262, at 565.

205 *See* State v. Hulbert, 481 N.W.2d 329, 332 (Iowa 1992).

206 FED. R. EVID. 404, advisory committee's note on proposed rules.