

Abstract

The Color of our Character: Confronting the Racial Character of Rule 404(b) Evidence.

By Chris Chambers Goodman

“African Americans are violent.” “Latinos are drug dealers.”

We have all heard some version of these stereotypes about the behaviors of people of color in the United States. What we hear less about is the frequency with which such stereotypes creep into the courtroom, and subtly influence the decisions that jurors make in criminal cases. Some say that these generalizations are irrelevant, or impermissible character evidence or can be properly subject to an objection on the grounds of unfair prejudice, but these oversimplified responses to the racial character of evidence is leading to an unfair administration of justice in several ways.

Criminal defendants charged with crimes associated with stereotypes about their race face a “perfect storm” of character assassination, with the triple threat of racial character evidence: (1) introduced ostensibly but not actually for non-character purposes, (2) bad character outweighing good character, and (3) specific instance evidence outweighing reputation and opinion evidence. The prosecution prevails in all three instances by taking the shortcut to proof that racial characterizations can provide.

This Article evaluates the racial implications of certain evidence admitted pursuant to Federal Rules of Evidence Rule 404(b), to provide some considered suggestions for increasing the fairness in criminal cases. Part II describes the background of Rule 404(b). Part III analyzes Professor Jody Armour’s contention that forcing jurors to confront prejudices and stereotypes can prompt less biased behavior in their decision-making process. It then examines how a version of Professor Charles’ Lawrence’s cultural meaning test can be used to identify inappropriate racial triggers, and to determine which racial references should be excluded from criminal trials. Part III further explains how to identify triggers for positive behavior, to activate the non-prejudiced personal views that jurors may hold, so that these views supplant the less conscious decision-making that occurs when jurors rely on stereotypes to draw conclusions.

Part IV examines the ways in which racial references specifically, and character evidence more generally are admitted or excluded, under the existing Federal Rules of Evidence. Part V describes several potential solutions. The first is simply to enforce the ban on propensity evidence under Rule 404(b), by declining to admit such evidence when the most relevant line of reasoning is character-based, even though other non-character based reasoning also exists. The second suggestion is to promulgate a new federal rule, entitled the Racial Reference Exclusion, to give attorneys a more firm basis for objecting to evidence with racial implications. The third potential solution is to expand the admission of good character evidence, in fairness, when racial references are deemed admissible in the court’s discretion, through a new federal rule. The fourth suggestion is that new form limiting instructions be used to activate non-prejudiced personal beliefs in jurors who may or have been exposed to implicit or explicit racial references, generalizations, or stereotypes. Some proposed additions to the Federal Rules of Evidence and draft jury instructions also are included in Part V.