

Washington University Law Review

Volume 93 | Issue 4

2016

Bill Cosby, the Lustful Disposition Exception, and the Doctrine of Chances

Wesley M. Oliver
Duquesne University

Follow this and additional works at: https://openscholarship.wustl.edu/law_lawreview



Part of the [Criminal Law Commons](#), and the [Evidence Commons](#)

Recommended Citation

Wesley M. Oliver, *Bill Cosby, the Lustful Disposition Exception, and the Doctrine of Chances*, 93 WASH. U. L. REV. 1131 (2016).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol93/iss4/10

This Commentary is brought to you for free and open access by Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

BILL COSBY, THE LUSTFUL DISPOSITION EXCEPTION, AND THE DOCTRINE OF CHANCES

WESLEY M. OLIVER*

On December 30, 2015, an affidavit of probable cause alleged that William H. Cosby, Jr., Ed.D., a comedian whose storied career spanned decades, committed aggravated indecent sexual assault upon Andrea Constand.¹ For decades, women have been coming forward claiming to have been the victims of Cosby's unwanted sexual advances, most of them claiming that Cosby drugged them and took advantage of them when they were in an unconscious state.² Despite the number of accusers over decades, thus far only one criminal count has been announced. At this point, it appears that the statute of limitation would preclude an indictment charging any criminal acts against the other alleged victims.

That does not mean that we have heard the last of the other accusers. Even though evidence of a defendant's bad character is "not admissible for the purpose of proving the person acted in conformity therewith,"³ common sense would dictate that a trier of fact should hear from the other victims who claim Cosby similarly assaulted them.

What are the odds that one man could be falsely accused by fifty women? A few courts have asked exactly this question using something called the doctrine of chances, a rule that expressly considers the likelihood that the defendant is innocent of the present offense in light of what we know about his past. Rather than conducting such an analysis, however, a number of courts tend to merely admit all prior sexual misconduct under what is known as the lustful disposition exception. A number of other courts, such as those in Pennsylvania where Cosby will be tried, liberally admit prior sexual misconduct evidence to show that the defendant's actions in question were consistent with a plan.

Prior sexual misconduct, however, is no more likely than other types of bad acts to predict future misconduct. Because courts more readily admit

* Associate Dean for Faculty Research and Scholarship and Professor of Law, Duquesne University. B.A., J.D., University of Virginia; LL.M., J.S.D., Yale.

1. Sydney Ember & Graham Bowley, *Bill Cosby Charged in Sexual Assault Case*, N.Y. TIMES (Dec. 30, 2015), <http://www.nytimes.com/2015/12/31/business/media/bill-cosby-charged-in-sexual-assault-case.html>.

2. See, e.g., Noreen Malone & Amanda Demme, *'I'm No Longer Afraid': 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture that Wouldn't Listen*, N.Y. MAG. (July 26, 2015, 9:00 PM), <http://nymag.com/thecut/2015/07/bill-cosbys-accusers-speak-out.html>.

3. 29 AM. JUR. 2D *Evidence* § 368 (2016); see also generally FED. R. EVID. 404(a)(1).

prior acts to predict future conduct when the acts are of a sexual nature, it seems likely that Cosby's other accusers will be allowed to testify. The result in this case seems correct, but the logic is certainly questionable.

If fifty store clerks had come forward and accused Bill Cosby of petty larceny, their testimony would powerfully undermine his claims of innocence in a shoplifting trial. The power of the testimony of Cosby's other accusers lies in the number of similar accusations, not the fact that all the accusations involve sexual misconduct. Courts, however, tend to ask whether the uncharged acts fit into a defined category in deciding whether to admit this sort of otherwise inadmissible character evidence. Courts do not usually critically ask about the value of the other alleged misdeeds in determining the disputed facts. The testimony of fifty other larceny victims is therefore generally not admissible, but the testimony of one other rape victim often is.

For the wrong reasons, the law is likely to arrive at the right answer in the Cosby case.

I. THE EXCEPTION LADEN PROHIBITION ON A DEFENDANT'S UNCHARGED CONDUCT

It is difficult to explain to a non-lawyer why a defendant's prior bad acts generally cannot be used to determine whether he committed the criminal act with which he is charged. It is generally accepted that previous criminal conduct increases the odds that the defendant engaged in subsequent criminal conduct.⁴ This is just common sense. The prohibition on character evidence is therefore often justified by a concern that the jury will over-rely on the probative weight of his prior bad acts, giving them more weight than they deserve,⁵ not that a defendant's character has no relevance in assessing his guilt.⁵ An extreme version of this concern is that a defendant may be convicted because of his past alone.⁶ If the admission of a defendant's prior bad acts has the potential to work this sort of mischief, then it is difficult to explain anything other than the rare and

4. See Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227, 1246 (2001) (noting that "most" seem to agree that character evidence has probative value).

5. See, e.g., *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (footnote omitted) ("[I]nquiry [into a defendant's prior bad acts] 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.").

6. See Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 781-90 (2013).

exceptional admission of such evidence. Yet, the rules of evidence allow bad acts to be admitted somewhat commonly.

While evidence codes prohibit the use of a defendant's character to show that he committed the act in question, the drafters of the rules hedged their bets with a litany of exceptions. The Federal Rules of Evidence, largely adopted by most states,⁷ provide that "[e]vidence 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."⁸ But in the next provision, these same rules provide that "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."⁹

Character evidence is thus governed by a contradiction. The rules of evidence essentially say evidence of a defendant's propensity to commit bad acts cannot be used to show that he committed a bad act on a particular occasion. *But* a defendant's propensity to have a particular intent,¹⁰ for instance, can be used to demonstrate that he possessed that intent on a particular occasion.

In a classic case, a postal carrier was accused of stealing a silver dollar from his mail route.¹¹ To rebut a claim that he had no intention of keeping the coin, the prosecution introduced credit cards belonging to others on his mail route that were found in his wallet at the time of his arrest.¹² Doctrinally, courts reason that such testimony is admissible because it is offered not to prove the defendant's propensity to commit theft, but as evidence demonstrating the defendant's intent to permanently deprive the rightful owner of the coin mailed to him. In other words, the prosecution is permitted to introduce evidence of the defendant's propensity to possess the intent to permanently deprive, but not evidence of the defendant's propensity to steal. The distinction is difficult to grasp even for people who parse such language for a living.

The exceptions certainly do not limit character evidence to prior acts that show an individual's intent. The rules of evidence permit prosecutors,

7. See, e.g., David N. Dreyer et al., *Dancing with the Big Boys: Georgia Adopts (Most of) the Federal Rules of Evidence*, 63 MERCER L. REV. 1, 2 (2011) (observing that Georgia had become the forty-fourth state to adopt evidence rules based on the federal rules).

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

9. FED. R. EVID. 404(b)(2).

10. *Id.*

11. See *United States v. Beechum*, 582 F.2d 898, 903 (5th Cir. 1978).

12. *Id.* at 904.

in a variety of circumstances, to use the past to predict the future, so long as the particular type of prediction is identified in the rule. If the past is used to suggest that in the future the defendant had knowledge or motive, the evidence is admissible to show the defendant's mental state (i.e., his *mens rea*).¹³ Prior bad acts are also admissible to show *actus reus*—to show that the defendant actually committed the act in question. Otherwise inadmissible character evidence may be offered to show identity or common plan.¹⁴ Contrary to the prohibition in the evidentiary rules on admitting evidence to show a defendant's propensity, the rules governing character evidence very much permit proof of a defendant's propensity. The rules simply require the prosecutor to identify a particular type of propensity from the list provided in Federal Rule of Evidence 404(b), or in the corresponding state evidence code.

Consider, as an example, the use of other acts offered to show identity. A defendant's other crimes can be offered to establish his identity if they are sufficiently similar to the crime in question. The previous crime the defendant is known to have committed may be admitted if it is so similar to the charged crime that it can be said to bear the defendant's unique signature.¹⁵ Such proof is often referred to as common plan or modus operandi evidence.¹⁶ Despite the efforts of the drafters of the rules of evidence to obfuscate this point, modus operandi is propensity.

The rules allow prosecutors to show that a defendant has a propensity for committing a crime in a very specific way, just as prosecutors can introduce evidence to show that a defendant has a propensity to have a particular type of intent. Yet the rules refuse to expressly acknowledge that the evidence can be admitted to show a type of propensity. Instead the rules seem to state that other acts used to show identity or intent, for instance, do not involve propensity at all. There is a real downside to this lack of candor. Rather than requiring prosecutors to demonstrate the likelihood that the defendant committed the prior uncharged misconduct and the current act in dispute, the rules allow in evidence of widely varying probative value that fit into identified exceptions.

13. See FED. R. EVID. 404(b).

14. *Id.*

15. See 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404:5 (7th ed. 2015) (“[W]here evidence of a prior offense is offered to establish that the commission of both crimes were committed by the same individual, referred to as evidence of modus operandi, the two offenses must be so nearly identical and unusual and distinctive in method as to ear-mark them both as the handiwork of the same person—be like a signature.”).

16. *Id.*

II. THE PROBLEMATIC BASIS FOR ADMITTING UNCHARGED CONDUCT IN SEX CRIMES PROSECUTIONS

In sexual misconduct prosecutions, courts and rule makers are particularly prone to admit propensity evidence. Rules of evidence, and their interpretation by courts, have made prior acts of sexual misconduct more readily admissible than other types of specific bad acts to show that the defendant's conduct in the present case is consistent with a previously executed plan or scheme.

In federal court, all acts of sexual misconduct are admissible in civil or criminal cases involving allegations of sexual assault.¹⁷ Responding to public concern that the criminal justice system was unable to protect society from sexual predators, Congress in 1994 amended the Federal Rules of Evidence to expressly allow the admission of prior sexual misconduct in a prosecution, or civil case, involving any sort of sexual assault.¹⁸ Proponents of this rule claim that the rate of recidivism for sexual offenders is sufficiently high that an accused's prior sexual misconduct should be considered in determining whether he committed the charged conduct.¹⁹ Another provision of the Federal Rules of Evidence requires that the probative value of any piece of evidence be weighed against its prejudicial impact.²⁰ In light of the new rules that expressly permit all sexual misconduct for any purpose, including propensity, federal courts tend to find that the balance between probative and prejudicial value of this sort of evidence should be struck more strongly than it ordinarily is in favor of the party offering the evidence.²¹

Drafters of state evidence codes have generally not followed the lead of the drafters of the Federal Rules of Evidence,²² likely because recidivism

17. See FED. R. EVID. 413–15.

18. See, e.g., R. Wade King, *Federal Rules of Evidence 413 and 414: By Answering the Public's Call for Increased Protection from Sexual Predators, Did Congress Move Too Far Toward Encouraging Conviction Based on Character Rather than Guilt?*, 33 TEX. TECH. L. REV. 1167, 1169 (2002).

19. See, e.g., Sherry L. Scott, Comment, *Fairness to the Victim: Federal Rules of Evidence 413 and 414 Admit Propensity Evidence in Sexual Offender Trials*, 35 HOUS. L. REV. 1729, 1747 (1999).

20. See FED. R. EVID. 403.

21. See, e.g., Jeffrey A. Palumbo, *Ensuring Fairness and Justice Through Consistency: Application of the Rule 403 Balancing Test to Determine Admissibility of Evidence of a Criminal Defendant's Prior Sexual Misconduct Under the Federal Rules*, 9 SETON HALL CIR. REV. 1, 13–17 (2012).

22. See Adam Kargman, Note, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 965 (1999) (“Due to the criticism against FRE 413 to 415 . . . states have been reluctant to promulgate FRE 413 to 415.”); Jessica D. Khan, Note, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence*

rates are not significantly higher in sexual assault cases than they are in, for instance, larceny cases.²³ State courts, however, have been quite liberal in allowing prior acts of sexual misconduct to be admitted as evidence of a common plan.²⁴

Even in states that have not adopted the federal rules that admit all sexual misconduct, some courts embrace a common law lustful disposition exception.²⁵ This exception essentially mirrors the recently-promulgated federal rules admitting all character evidence involving sexual misconduct.²⁶ Even states that have not formally adopted a version of the lustful disposition exception have been quite liberal in admitting prior acts of sexual misconduct under the common plan exception.²⁷ Prior acts may

413 and 414, 52 VILL. L. REV. 641, 645 (2007) (observing that as of 2007, only ten states had adopted these provisions).

23. See, e.g., Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 158 (2001) (noting that recidivism rates are not higher for sexual assault cases). Courts have generally interpreted Rules 413, 414, and 415 to create a presumption of admissibility. See, e.g., Aviva Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1519–24 (2005).

24. See, e.g., *Reeves v. State*, 755 S.E.2d 695, 698 (Ga. 2014); Jeannie Mayre Mar, *Washington's Expansion of the "Plan" Exception After State v. Lough*, 71 WASH. L. REV. 845, 862 (1996) (observing that the Washington Supreme Court "seems to have fallen into the trap of treating cases involving sex crimes differently from cases involving other offenses"); Troy W. Purinton, *Call It a "Plan" and a Defendant's Prior (Similar) Sexual Misconduct Is In: The Disappearance of K.S.A. 60-455*, 70 J. KAN. B. ASS'N 30, 32 (2001) ("The Kansas Supreme Court has limited to sexual misconduct cases the more liberal standard allowing admission of plan evidence . . ."); see also David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 534 (1994) ("Courts often admit such evidence [of other acts of sexual misconduct] . . . either on the ground that it is relevant for some purpose other than to show the accused's character, or on the ground that it falls within a recognized exception to the rule against character evidence.").

25. See, e.g., Karen M. Fingar, *And Justice for All: The Admissibility of Uncharged Sexual Misconduct Evidence Under the Recent Amendment to the Federal Rules of Evidence*, 5 S. CAL. REV. L. & WOMEN'S STUD. 501, 524–25 (1996) (observing that "several jurisdictions" admit evidence of sexual misconduct "under a 'lustful disposition' or 'depraved sexual instinct' exception"); Lisa M. Segal, Note, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: New Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515, 526–27 (1995) ("During the twentieth century, common-law courts created the lustful disposition exception . . .").

26. See Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 341 (2012) (noting that new federal rules are "the codification of the lustful disposition exception").

27. See, e.g., John David Collins, *Character Evidence and Sex Crimes in Alabama: Moving Toward the Adoption of New Federal Rules 413, 414 & 415*, 51 ALA. L. REV. 1651, 1665 (2000) ("Although Alabama courts have never explicitly recognized a 'lustful disposition' exception to the general exclusionary rule of character, they have traditionally liberalized the application of the 'intent' and 'identity' doctrines in order to accommodate the admission of collateral sexual misconduct evidence."); Brian E. Lam, Note, *The Admissibility of Prior Bad Acts in Sexual Assault Cases Under Alaska Rule of Evidence 404(b)—An Emerging Double Standard*, 5 ALASKA L. REV. 193, 194 (1988);

be admitted under this common law exception to show identity and to show that the defendant did not mistakenly believe his victim consented.²⁸ Often, the so-called signature aspects of the prior acts, that are technically necessary to show a common plan or absence of mistake,²⁹ are fairly common to many sex crimes.

Pennsylvania, the jurisdiction in which Bill Cosby has been charged, only permits evidence of a lustful disposition toward the same victim.³⁰ But, like other jurisdictions,³¹ for other victims Pennsylvania requires very little commonality between the prior and the charged sexual misconduct. A very recent example illustrates the willingness of Pennsylvania courts to stretch the common plan exception in sex crime prosecutions.³² On June 10, 2015, the Pennsylvania Superior Court, the first level of appeal for criminal cases in the Commonwealth, decided that similarities between a defendant's rape charge and his prior rape conviction were sufficient to be admitted as evidence of a common plan.³³

The defendant in *Commonwealth v. Tyson* was charged with raping a woman in 2010, and he had been convicted of raping another woman over five years earlier.³⁴ In the 2010 case, Tyson had gone to the victim's home, whom he casually knew, to bring her some food as she was feeling ill after donating plasma.³⁵ He stayed at her apartment that night. She awoke to him having vaginal intercourse with her and told him to stop, which he did.³⁶ The victim went back to sleep, awoke at some point, and went to the kitchen where she found Tyson naked.³⁷ She again informed him that she did not wish to have sex with him, but let him continue to

see also R. P. Davis, Annotation, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses*, 77 A.L.R.2d 841 (1961); sources cited *supra* note 24.

28. See Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 613 (1997).

29. See, e.g., *Commonwealth v. Kinard*, 95 A.3d 279, 294–95 (Pa. Super. Ct. 2014) (citation omitted) (stating that other acts admitted to show absence of mistake must be “remarkably similar” to charged offense); *Commonwealth v. Frank*, 577 A.2d 609, 614 (Pa. 1990) (stating that to introduce evidence under the common plan exception, the other acts must be “distinctive and so nearly identical as to become the signature of the same perpetrator”).

30. See Khan, *supra* note 22, at 645–46.

31. See, e.g., Mar, *supra* note 24, at 862–65 (describing unique treatment of character evidence in sexual offense prosecutions in Washington).

32. See *Commonwealth v. Tyson*, 119 A.3d 353 (Pa. Super. Ct. 2015).

33. *Id.* at 363.

34. *Id.* at 356–57.

35. *Id.* at 356.

36. *Id.*

37. *Id.*

stay in her apartment, and went back to bed.³⁸ Later that night, she again awoke to find him having vaginal intercourse with her.³⁹

In 2001, Tyson similarly was accused of having sex with a woman while she slept. In the 2001 case, however, Tyson was not accused of abusing the trust the victim wrongly placed in her attacker. Instead, Tyson had attended a party, drank, and stayed until fairly late. After at least some of the residents of the home had gone to bed, he went into the bedroom belonging to the sister of the party host, and started having sex with the sister while she slept.⁴⁰ Other than the fact that both incidents involved sex with women in their sleep, these incidents seem fairly dissimilar.⁴¹

Despite the fact that Pennsylvania requires two crimes to be “so nearly identical in method as to earmark them as the handiwork of the accused” to qualify for either the common scheme or absence of mistake exception,⁴² the majority found the prior rape to be admissible.⁴³ The similarities the court noted, none of which seemed to uniquely earmark the crimes, were:

In each case, Appellee was acquainted with the victim—a black female in her twenties—and he was an invited guest in the victim's home. Appellee was aware that each victim was in a weakened or compromised state. Each victim ultimately lost consciousness. In each case, the victim awoke in her bedroom in the early morning hours to find Appellee having vaginal intercourse with her.⁴⁴

III. THE DOCTRINE OF CHANCES AS A BASIS FOR ADMITTING THE TESTIMONY OF MULTIPLE ACCUSERS

Even in its boldest form, it is no more difficult to explain a lustful disposition exception than the intent exception, or any of the exceptions for that matter. Each is nothing more than a willingness to tolerate evidence of a particular type of propensity, with no particular justification for treating any particular type of propensity evidence differently. Yet

38. *Id.*

39. *Id.*

40. *Id.* at 365 (Donohue, J., dissenting).

41. The dissent observed that the majority was essentially concluding that any two acts of sexual misconduct toward one physically incapable of consenting were sufficiently similar to be admitted under PA. R. EVID. 404(b). *Id.* at 366.

42. *Commonwealth v. Roney*, 79 A.3d 595, 606 (Pa. 2013) (quoting *Commonwealth v. Bryant*, 530 A.2d 83, 85 (Pa. 1987) (citations omitted)).

43. *Tyson*, 119 A.3d at 363.

44. *Id.* at 360.

some applications of these exceptions have strong intuitive appeal. It seems reasonable to consider the fact that the postman in *Beechum* had credit cards in his wallet that had been mailed months earlier to residents on his mail route in evaluating what his intentions were toward the silver dollar he also possessed.⁴⁵ But the fact that this evidence fits into one of the categorical exceptions to the prohibition on introducing other bad acts does not seem like the basis for that intuition.

A different explanation is sometimes offered for permitting evidence of other bad acts in criminal cases—the doctrine of chances.⁴⁶ Essentially, this explanation replaces the hodgepodge of exceptions with a single question: how likely is it that the defendant is guilty of the first crime and innocent of the second?⁴⁷ The doctrine of chances expressly asks how likely is the evidence to show a very particular type of propensity.⁴⁸ The more similar the uncharged acts are to the charged acts, and the more numerous the uncharged acts, the greater the likelihood the defendant is guilty of the charged offense.⁴⁹ The doctrine of chances candidly recognizes that the evidence is admissible to show propensity, but insists that the uncharged acts be highly predictive of the charged acts.⁵⁰

Reconsider the *Beechum* case in light of the question that the doctrine of chances asks a court to evaluate: what are the odds that the defendant is innocent of the charged and uncharged conduct? The court reasoned that because the uncharged conduct was probative of the defendant's state of

45. See *United States v. Beechum*, 582 F.2d 898, 904 (5th Cir. 1978).

46. See, e.g., Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1133 (1993).

47. See, e.g., Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1263 (1995) (“The doctrine says that the evidence is admissible if it is unlikely that an innocent person would be falsely charged so many times . . .”).

48. See *id.* at 1261.

49. Rothstein calls this “specific propensity” and argues that it is very different in degree from bad character. A propensity to commit a very specific type of crime is very different from having bad character, he concludes. *Id.* at 1264.

50. There is some debate about whether the doctrine of chances actually involves propensity. Edward Imwinkelried, perhaps the strongest proponent of the doctrine, argues that it is not evidence of propensity. Imwinkelried argues that the doctrine “has nothing whatever to do with the accused’s character; rather, the inference relates to the objective improbability of a large number of similar, false complaints against the same accused.” Imwinkelreid, *supra* note 46, at 1137. Paul Rothstein has cogently argued that the doctrine must be about propensity. Rothstein contends that “[t]he essence of this probable guilt argument is that there is a disparity between the chances, or probability that an innocent person would be charged so many times and the chances, or probability, that a guilty person would be charged so many times. If there is such a disparity, however, it is only because a guilty person would have the propensity to repeat the crime.” Rothstein, *supra* note 47, at 1262–63 (emphasis added).

mind, the evidence was admissible.⁵¹ Intuitively, the court's decision to admit the evidence feels right, but not because the credit cards in the postman's wallet provided evidence of the defendant's *mens rea* on another occasion. Intuitively, the court's answer feels right because the odds that the postman stole two credit cards from residents on his route and planned to permanently deprive the owner of the silver coin on his route seem astronomically high.

Using the doctrine of chances in a case like the prosecution of Bill Cosby would represent an important but not radical departure from the current method of evaluating the admissibility of other uncharged acts of sexual misconduct. The doctrine of chances resembles common plan, or *modus operandi*, analysis that courts presently use in sexual assault cases. Each looks to the similarity of the acts and the likelihood that one act permits conclusions to be drawn about another act. The doctrine of chances, however, expressly considers the number of uncharged acts as well as the similarities between the two acts. As Professor Wigmore described the doctrine, it is "that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all."⁵²

As a Pennsylvania court, and indeed the world, will consider the appropriateness of considering the testimony of the many accusers against Bill Cosby, the basis for permitting exceptions to propensity evidence ought to be reconsidered. Intuitively, it seems implausible that one person would be falsely accused of rape on a number of occasions. Over fifty women claim that the comedian sexually assaulted them.⁵³ While many of the women claim they did not know they were being given drugs of any kind, a number of those women claim that Cosby offered them pills of some sort. Some say that they asked him for an aspirin; others, such as the alleged victim in the criminal case against him, say that he offered them pills. These women then recount the pills making them unconscious, or semi-conscious, and Cosby taking advantage of their inability to resist.⁵⁴

51. United States v. Beechum, 582 F.2d 898, 904 (5th Cir. 1978).

52. 2 JOHN H. WIGMORE, EVIDENCE IN CRIMINAL TRIALS AT COMMON LAW § 302 (Peter Tillers revisor, 1983).

53. Julie Miller, *New Bill Cosby Accusers Mean over 50 Women Have Now Accused Comedian of Sexual Assault*, VANITY FAIR (Aug. 20, 2015, 7:39 PM), <http://www.vanityfair.com/hollywood/2015/08/bill-cosby-rape-sexual-assault-50-accusers>.

54. See Malone & Demme, *supra* note 2; Elliot C. McLaughlin et al., *Bill Cosby Facing Litany of Allegations*, CNN (Dec. 30, 2015, 2:53 PM), <http://www.cnn.com/2014/11/20/showbiz/bill-cosby-allegations-repercussions/>.

And, of course, Cosby admitted in a 2005 deposition that he gave women Quaaludes to have sex with them.⁵⁵

Many sexual assault cases, such as this one, lack physical evidence. This case, like many, is all about the credibility of the witnesses. The odds that Andrea Constand is telling the truth about Cosby giving her a pill that rendered her incapable of consent, or even escape, are dramatically higher if a number of other women have almost exactly the same story. The odds of *unfair* prejudice from these prior bad acts decrease both with the similarity and number of misdeeds. The admissibility of testimony from the other alleged victims should not merely, or even primarily, turn on the fact that Cosby's alleged past misdeeds are sexual. The categorical exception the Federal Rules of Evidence and many states have provided for prior sexual misdeeds—and the de facto exception many other states have fashioned for such other bad acts—do not explain what makes the testimony of Cosby's many accusers not only highly relevant, but compelling.

A test that considers both the nature *and number* of prior bad acts, charged or uncharged, in considering whether to admit this sort of character evidence would cabin the use of such evidence to the most appropriate circumstances. It would further offer the public, in a trial that promises to be one of the most watched in American history, a better explanation for the exception to the general prohibition on introducing character evidence against a criminal defendant. Adopting the doctrine of chances in Cosby's case would require courts to be candid about the fact that the law is sometimes willing to consider the predictive value of past acts. To put it another way, courts would have to acknowledge that they sometimes consider a defendant's character, despite a rule of evidence that expressly forbids the use of character evidence. Embracing the doctrine of chances to admit evidence of multiple accusers would, however, demonstrate that the rules of procedure do not have to defy common sense.

55. See Paul Farhi, *In 2005, Bill Cosby Admitted Seeking Drugs to Give to Women*, WASH. POST (July 6, 2015), https://www.washingtonpost.com/lifestyle/style/in-court-document-bill-cosby-says-he-gave-drugs-to-women-before-sex/2015/07/06/a7b1b762-242c-11e5-aae2-6c4f59b050aa_story.html.