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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 Contand.[1] For decades, women have been coming forward claiming to have been the victims of Mr. 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, only one criminal count was announced as the statute of limitations had passed on the claims made by other accusers. Immediately after the charges were announced, though, the media's attention turned to the question of whether these other accusers would be permitted to testify to bolster Ms. Constand claims.[3] For the wrong reasons, the law is likely to get the answer to this question right in the Cosby case.

It is difficult to explain to a layman why a defendant's prior bad acts generally can't be used to determine whether he committed the criminal act with which he is charged. The fact that a defendant previously engaged in criminal conduct certainly makes it more likely that he did so in a contested case.[4] This is just common sense. In fact, the legal theories that underlie the Federal Rules of Evidence do not reject this common sense reasoning. Instead, the drafters of evidence codes fear that juries will over-rely on past conduct – either giving it more weight than it deserves, or convicting the defendant because of his past alone.[5] Once we accept this premise, however, the exceptions to this rule are much harder to justify.

The drafters of the various evidence codes surely hedged their bets with a litany of exceptions to the general prohibition on the introduction of other bad acts. On the one hand, the Federal Rules of Evidence, largely adopted by most states 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 that character."[6] But in the next breath, 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 consent."[7]

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[1] Sydney Ember & Graham Bowley, *Bill Cosby Charged in Sexual Assault Case,* N.Y. TIMES, Dec. 30, 2015.

[2] Noreen Malone & Amanda Demme, *I'm No Longer Alone: 35 Women Tell Their Stories About Being Assaulted by Bill Cosby, and the Culture that Wouldn't Listen*, NEW YORK, July 26, 2015.

[3] Tom Winter, *Other Women Accusing Bill Cosby of Sexual Assault Could be Called to Testify: Expert*, NBCNew.com, Dec. 30, 2015, http://www.nbcnews.com/storyline/bill-cosby-scandal/other-women-accusing-bill-cosby-sexual-assault-could-be-called-n488001.

[4] *See* Chris William Sanchiro, *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* Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 781-90 (2013).

[6] Fed. R. Evid. 404(b)(1).

[7] Fed. R. Evid. 404(b)(2).

In a contradiction that is all-too-common in legal doctrines, the rules essentially say that evidence of a defendant's propensity to commit bad acts may be not be used to show he committed a bad act on a particular occasion. *But* a defendant's propensity to have a particular intent, 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.[8] 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 which were found in his wallet at the time of his arrest.[9] 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, a distinction whose difference is difficult to grasp even for people who parse such language for a living.

The difficulty of reconciling the basis for the exception with the rationale behind the general prohibition against other bad acts is certainly not limited to evidence offered on the defendant's intent. Consider 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 if they are committed in such a unique way that they can be said to be bear the defendant's unique signature.[10] Such proof is often referred to as evidence of *modus operandi*.[11] It is difficult, if not impossible, to describe this exception as anything other than a propensity to commit crimes in a very specific way.

Rules of evidence, and their interpretation by courts, have made prior acts of sexual misconduct more readily admissible that other types of specific bad acts to show that the defendant's conduct in the present case fit his *modus operandi*. In federal court, all acts of sexual misconduct are admissible in civil or criminal cases involving allegations of sexual assault.[12] Responding to public concern that the criminal justice system was unable to protect society from sexual predators, in 1994, Congress amended the Federal Rules of Evidence to change the presumption about the admissibility of other bad acts in a criminal cases when those other acts are of a sexual nature.[13] The drafters claimed 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.[14] Limits have been recognized on the

[8] United States v. Beechum, 582 F.2d 898 (5th Cir. 1978).
[9] *Id*. at 904.
[10] 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404:5 (7th ed. 2015).
[11]
[12] Fed. R. Evid. 413-415.
[13] R. Wade King, *Federal Rule 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).
[14]

scope of evidence under these new rules, but the burden, under federal law, is on the defendant to demonstrate that this evidence should not be admitted.[15]

Drafters of state evidence codes have generally not followed the lead of the drafters of the Federal Rules of Evidence, likely because recidivism rates are not significantly higher in sexual assault cases than they are in, for instance, larceny cases.[16] State courts have, however, been quite liberal in allowing prior acts of sexual misconduct to be admitted as evidence of *modus operandi*.[17] When used to establish identity, at least in theory, the prior act and the charged acts must have a unique similarity that no one but the defendant could have committed both crimes. The doctrine has to be shoe-horned to fit sexual assault cases when consent rather than identity is at issue.[18] The question in such cases is not whether the defendant's trademark way of committing the crime establishes that the same person committed both acts. The question is whether the defendant's method of engaging in one sexual act without consent is so similar to a subsequent act that it is quite certain he proceeded without consent on the latter occasion. Theoretically, a high level of similarity between the two acts is required when consent rather than identity is at issue. In practice, however, such a rigorous match between the two acts has not been required.

Some state courts embrace the presumption now embodied in the federal rules that *all* prior acts of sexual misconduct are admissible in sexual assault cases, creating a so-called lustful disposition exception.[19] A portion of the states recognizing this exception only permit evidence of previous sexual improprieties toward the same victim, others allow all such other acts to be admitted.[20] 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 *modus operandi* exception.[21] Often the so-called signature aspects of the prior acts are fairly common to many sex crimes.

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[15] 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 CIRCUIT REV. 1, 13-17 (2013).

[16] *See* Christina E. Wells & Erin Elliot Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 158 (2001) (asserting that recidivism rates are not higher in sexual assault cases).

[17] *See, e.g., Reeves v. State*, 755 S.E.2d 695, 698 (Ga. 2014); Jeannine Mayre Mar, *Washington's Expansion of the "Plan" Expansion After* State v. Lough, 71 WASH. L. REV. 845 (1996); David P. Bryden & Roger C. Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 534 (1994) ("Court often admit [evidence of other acts of sexual misconduct] either on the ground that is it 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.").

[18] For this reason, some states have rejected *modus operandi* evidence in acquaintance rape cases as there is no issue of identity, which *modus operandi* evidence is traditionally designed to support. *See, e.g.*, Thompson v. State, 15 N.E.3d 1097, 1101-03 (Ind. Ct. App. 2014).

[19] Lisa M. Segal, *The Admissibility of Uncharged Misconduct Evidence in Sex Offense Cases: The Federal Rules of Evidence Codify the Lustful Disposition Exception*, 29 SUFFOLK U. L. REV. 515 (1995). *The Michigan Pig Farm Perception: The Michigan Supreme Court Continues to Ignore the Opportunity to Create a Lustful Disposition Exception to Michigan Rule of Evidence 404(b)*, 76 U. DET. MERCY L. REV. 127 (1998).

[20] *See, e.g.*, Jeffrey C. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual Evidence in Washington*, 70 WASH. L. REV. 883, 885 n.14 (1995).

[21] *See* Brian E. Lam, *The Admissibility of Prior Bad Acts in Sexual Assaults Under Alaska Rule 404(b) – An Emerging Double Standard*, 5 ALASKA L. REV. 193, 194 (1998); John David Collins, *Character Evidence and Sex*

Pennsylvania, the jurisdiction in which Bill Cosby has been charged, has not formally adopted a lustful disposition exception, but like many jurisdictions has demonstrated such a willingness to admit such testimony that is could almost be said to have a *de facto* version of the exception. A very recent example illustrates the willingness of Pennsylvania courts to stretch the *modus operandi* doctrine in sex crime prosecutions. The Superior Court, the first level of appeal for criminal cases in the Commonwealth, decided on June 10, 2015, that similarities between a defendant's rape charge and his prior rape conviction were sufficient to be admitted the prior conduct.[22] The defendant in *Commonwealth v. Tyson* allegedly raped a woman in 2010 and had been convicted of raping another woman five years earlier.[23] 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.[24] He stayed with her at her apartment that night. She awoke to him having vaginal intercourse with her and told him to stop, which he did.[25] The victim went back to sleep, awoke at some point at went to the kitchen where she found Tyson naked.[26] She again informed him that she did not wish to have sex with him, but let him continue to stay in her apartment, and went back to bed.[27] Later that night, she again awoke to find him having vaginal intercourse with her.[28] In the previous case, the Tyson had attended a party, been drinking, and had sex with the sister of the host of the party in her bedroom while she was asleep.[29]

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" for the *modus operandi* exception,[30] the majority of the Pennsylvania Superior Court found the prior rape admissible.[31] The similarities the court noted, none of which seemed to uniquely earmark the crimes, were these:

> (1)the victims were the same race and similar in age; (2) both victims were casually acquainted with [Tyson]; (3) [Tyson's] initial interaction with each victim was legitimate, where [Tyson] was invited in the victim's home; (4) [Tyson] had vaginal intercourse with each victim in her bedroom; (5) both incidents involved vaginal intercourse with an alleged unconscious victim who woke up in the middle of the act; and (6) in each case, [Tyson] knew the victim was in a compromised state.[32]

Crimes in Alabama: Moving Toward Adoption of the New Federal Rules 413, 414, and 415, 51 ALA. L. REV. 1651 (2000). *See generally,* R. P. Davis, *Admissibility, in Prosecution for Sexual Offense, of Evidence of Other Similar Offenses*, 77 A.L.R.2d 841 (originally published in 1962).

[22] Commonwealth v. Tyson, 119 A.3d 353 (Pa. Super. 2015).

[23] *Id*. at 356, 357.

[24] *Id*. at 356.

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id*. at 365 (Donohue, J., dissenting).

[30] Commonwealth v. Roney, 79 A.2d 595, 606 (Pa. 2013).

[31] *Tyson*, 119 A.2d at 363.

[32] *Id*. at 357-58.

Even in its most bold 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 this type of propensity evidence differently. Yet some applications of these exceptions have strong intuitive appeal. It seems perfectly reasonable to consider the fact that the postman in *United States v. 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.[33] But the fact that this evidence fits into one of the categorical exceptions to the prohibition on introducing other bad acts hardly seems like the basis for that intuition.

Another explanation is sometimes offered for permitting evidence of other bad acts in criminal cases – the doctrine of chances. 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? In evaluating this question, a strong presumption should be made that guilt of the first act has too little to say about the second for admissibility, but this way of viewing the appropriateness of other bad act evidence seems to offer a better explanation of the world. The court in *Beechum* seems to arrive at the right answer not because the credit cards in the postman's wallet reveals the defendant's *mens rea* rather than *actus reus* in another case. 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.

In many ways, the doctrine of chances resembles *modus operandi* analysis. Each looks to the similarity of the acts and the likelihood that one act permits conclusions to be drawn about another act. Though it is rarely used in modern evidence law, the doctrine of chances as a rationale for introducing other bad acts, includes a critical factor missing from considerations of *modus operandi* – the *number* of prior bad acts.[34] Wigmore first described the doctrine of chances in explaining when other acts could be used to establish an individual's intent in a particular case. He described the doctrine as "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."[35] The doctrine of chances necessarily rests upon propensity reasoning,[36] conclusions are to be drawn about the future based on events in the past. But this is always the effect of offering evidence of other bad acts. When these acts fit into a particular category of probative value, such as intent or knowledge, they offer value only in their ability to suggest that a previously possessed mental state existed on a later occasion. The doctrine of chances, which inquires into both the similarity and number of occurrences of a prior bad act, permits a candid assessment of the quality of the propensity evidence.[37]

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[33] *Beechum*, 582 F.2d at 904.
[34] *See* Mark Cammack, *Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape:* People v. Ewoldt *Reconsidered*, 29 U.C. DAVIS L. REV. 355, 379-80 (1996).
[35] 2 JOHN H. WIGMORE, EVIDENCE IN CRIMINAL TRIALS AT COMMON LAW § 302 (Peter Tillers revisor, 1983).
[36] *Id*. at 358-96 (arguing that propensity-type reasoning explains the doctrine of chances).
[37] *See* Cammack, *supra* note ___ at 380-83.

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. Over fifty women claim that the comedian sexually assaulted them.[38] Given his status in the entertainment world, naturally most, if not all, of these women viewed him as a mentor or authority figure. More significantly, though, while many of the women did not know they were being given drugs of any kind, a number of those woman claim that Cosby offered them pills of some sort. Some state 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 Mr. Cosby taking advantage of their inability to resist.[39] It is hard to imagine anyone, other than a pharmacist, dispensing this many pills. And of course this summer Cosby admitted in a deposition that he gave women Quaaludes to have sex with them.[40]

Many sexual assault cases, such as this one, lack physical evidence. This case, as many, are all about the credibility of 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 the other testimony of the other alleged victims should not merely, or even primarily, turn on the fact that Cosby 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 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 of why an exception exists to the general prohibition on considering a defendant's prior bad acts. Not only, then, does the doctrine of chances provide a more sound basis for admitting the testimony of Mr. Cosby's accusers, using it rather than some version of the lustful disposition exception would enhance the public's perception that Cosby received a fair trial.

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[38] Julie Miller, *New Cosby Accusers Mean Over 50 Women Have Accused Comedian of Sexual Assault*, VANITY FAIR, Aug. 20, 2015.

[39] *See* Malone & Demme, *supra* note ___; Elliot C. McLaughlin & Ben Brumfield, *What Alleged Victims Say Bill Cosby Did to Them*, CNN, Dec. 2, 2014.

[40] Paul Farhi, *In 2005, Bill Cosby Admitted Seeking Drugs to Give Women*, WASHINGTON POST, July 6, 2015.