USING THE POWER OF "ME TOO" EVIDENCE IN CRIMINAL SEXUAL ASSAULT TRIALS

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INTRODUCTION

In October 2017, "#MeToo" became "an internet phenomenon," a "viral awareness campaign" that inspired millions of social media posts after dozens of women publicly accused Harvey Weinstein of sexual misconduct.[1] In reality, the "me too" movement was founded back in 2006 by Tarana Burke in an attempt to help women and girls who had survived sexual violence.[2] Twelve years later, the movement encouraged women to come forward and announce that they are the victims of Harvey Weinstein, Charlie Rose, Matt Lauer, and others.[3] While the movement has taken popular culture by storm, its impact on the American legal system, especially on evidentiary rules, is yet to be seen.[4]

Generally, "me too" evidence refers to evidence of the accused's alleged misconduct in a similar form against those other than the victim of the present offense.[5] Such evidence may pose an issue because the jury might use it to make the impermissible inference that the defendant bears a certain evil character and therefore committed the present charge.[6] Evidence of additional victims may confuse the jury and prolong the trial, and courts for this reason may also exclude "me too" evidence.[7]

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[1] *See* Hardwick v. Indiana Bell Tel. Co., Inc., 2018 WL 4620252, at *15 (S.D. Ind. Sept. 26, 2018) (internal citation omitted).

[2] *Id.*

[3] Jeannie Suk Gersen, *Bill Cosby's Crime and the Impact of #MeToo on the American Legal System*, THE NEW YORKER (April 27, 2018), https://www.newyorker.com/news/news-desk/bill-cosbys-crimes-and-the-impact-of-metoo-on-the-american-legal-system [hereinafter *Gersen*].

[4] Cara Kelly and Aaron Hegarty, *#MeToo was a culture shock. But changing laws will take more than a year*, USA Today (Oct. 5, 2018, 12:28 P.M.), https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/ (stating that something needs to be done in response to the "me too" movement, but massive change in laws has not happened).

[5] *See, e.g.*, Pantoja v. Anton, 198 Cal. App. 4th 87, 92 (2011) (In this particular case, "me too" evidence refers to "evidence of the employer's alleged gender bias in the form of harassing activity against women employees other than the plaintiff.").

[6] *See* Fed. R. Evid. 404.

[7] *See* Fed. R. Evid. 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.").

Although courts have already considered "me too" evidence in employment cases, the recent success of the movement means that the judicial system must also examine the admissibility of such evidence by prosecutors in criminal sexual assault cases.[8] This contribution explores some permissible routes under the existing evidentiary rules for such evidence to be heard by the jury. Part I provides a background of the admissibility of "me too" evidence in employment cases. Part II shifts the focus to criminal sexual assault cases, addressing some specific arguments that prosecutors might use to introduce "me too" witnesses. Part III discusses how prosecutors and courts could combat and manage the evidence's risks of unfair prejudice, jury confusion, and undue delay of the trial.

PART I

The power of "me too" evidence lies in "the power of numbers across time."[9] While a victim's lone account accusing the wrongdoer might not be believed, "the choruses of 'me too'" serve to make each account much more believable.[10] "Me too" thus constitutes an evidentiary claim that "what you say happened to you happened to me, too, and so it is more likely that we are both telling the truth."[11] While that logic may satisfy common sense, parties trying to use "me too" evidence must ground their arguments in the rules of evidence.

In civil employment cases, plaintiffs claiming to be victims of discrimination have attempted to introduce similar evidence of other employees' unfair treatment.[12] In *Sprint/United Management Co. v. Mendelsohn*,[13] the Supreme Court concluded that "me too" evidence is not *per se* admissible or inadmissible; rather, its relevance is fact-specific and depends on factors such as how closely related the evidence is to the plaintiff's circumstances and theory of the case."[14] Applying *Mendelsohn*, the United States District Court for the District of Columbia delineated four factors in determining the admissibility of "me too" evidence:

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[8] *See Gersen, supra* note 3.
[9] *Id.*
[10] *Id.*
[11] *Id.* This theory has been recognized by an Alabama district court. *See* Andazola v. Logan's Roadhouse, Inc., 2013 WL 1834308, at *6 (N.D. Ala. Apr. 29, 2013) (Theory behind admitting "me too" evidence is "[i]f it happened to them, it must have happened to me, too.").
[12] *See, e.g.*, Goldsmith v. Bagby Elevator Co., 513 F.3d 1261 (11th Cir. 2008) ("me too" evidence admissible to support plaintiff's racial discrimination claim).
[13] 552 U.S. 379 (2008).
[14] *See id.* at 380, 388.

1) whether the employer's past discriminatory or retaliatory behavior is close in time to plaintiff's alleged event,
2) whether the same decisionmaker was involved,
3) whether the witness and plaintiff were treated in the same manner, and
4) whether they were otherwise similarly situated.[15]

This test has not been universally adopted, but it has been mirrored by some other courts.[16]

Upon satisfying the relevancy threshold, "me too" evidence may be admissible to prove an employer's "motive, intent, or plan" to discriminate under FRE 404(b).[17] For example, the United States Court of Appeals for the Eleventh Circuit admitted "me too" evidence in a racial discrimination action to prove the employer's intent to discriminate and retaliate because both the plaintiff and his coworkers were allegedly discriminated against by the same supervisor, and the same person was involved in each termination.[18]

PART II

As noted, the "me too" movement has grown beyond the context of employment cases. This section explores some possible routes for prosecutors to introduce testimonies of "me too" witnesses against the same defendant in criminal sexual assault trials.

First, evidence must be relevant in order to be admissible.[19] Evidence is relevant if it has any tendency to make a fact more or less probable and if the fact is of consequence in determining the action.[20] Relevancy would not be a hurdle for "me too" evidence in criminal sexual assault trials because the additional victims would be against the same defendant. A

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[15] *See* Hayes v. Sebelius, 806 F. Supp. 2d 141, 144–45 (D.D.C. 2011) (internal citation omitted); *see also* Kathryn T. McGuigan and Justin Hanassab, *Admissibility of "Me Too" Evidence*, LEXIS PRACTICE ADVISOR JOURNAL (Apr. 18, 2018), https://www.lexisnexis.com/lexis-practice-advisor/the-journal/b/lpa/archive/2018/04/18/admissibility-of-me-too-evidence.aspx.

[16] Several courts in Florida, Hawaii, Iowa, and Mississippi have cited this four-factor test. *See, e.g.*, Morris v. Young, 2016 WL 3249109 (N.D. Miss. June 13, 2016); Harkness v. Bauhaus U.S.A., Inc., 2015 WL 631512 (N.D. Miss. Feb. 13, 2015); Davis v. City of Lake City, 2013 WL 12091324 (M.D. Fla. Mar. 15, 2013), *aff'd sub nom.* Davis v. City of Lake City, Fla., 553 F. App'x 881 (11th Cir. 2014); Thu Mong Tanaka v. Dep't of Accounting & Gen. Servs. Hawaii, 2011 WL 13233180 (D. Haw. Aug. 31, 2011); Salami v. Von Maur, Inc., 838 N.W.2d 680 (Iowa Ct. App. 2013).

[17] *See* Gordanier v. Montezuma Water Co., 2010 WL 1413109, at *2 (D. Colo. Apr. 2, 2010) (internal citation omitted).

[18] *See Goldsmith*, 513 F.3d at 1286.

[19] *See* Fed. R. Evid. 402.

[20] *See* Fed. R. Evid. 401.

defendant who committed sexual assaults before is more likely than someone who has never committed sexual assault to be the wrongdoer of the present charge. Therefore, "me too" witnesses against the same sexual assault defendant would pass the relevancy threshold.

Second, evidence of past crimes is not admissible to prove a person's character in order to support a propensity inference that the person committed the particular misconduct in question.[21] But Congress has carved out two exceptions to the general ban on propensity inferences: FRE 413 and 414, which concern similar crimes in sexual assault cases and child molestation cases.[22] The exceptions lend "credence to a victim's accusations," as a sexual assault or child molestation victim might be unwilling to testify in full details.[23] Moreover, "acts showing a perverted sexual instinct" in the defendant may connect a crime of that character with the defendant.[24] Under FRE 413 and 414, courts can allow "me too" victims to testify against the defendant, supporting an inference that the defendant has a disposition of committing such offenses and therefore also committed the present offense. Some states have adopted rules or statutes similar to FRE 413 or 414 or both, making "me too" evidence directly admissible.[25]

However, in states where no such rule has been adopted, prosecutors must find other routes around the impermissible propensity inference box – *i.e.* prosecutors must offer "me too" evidence for purposes other than showing the defendant's character of tending to commit sexual offenses. FRE 404 provides some permissible around-the-box routes: evidence can be introduced to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[26] Using these routes, prosecutors could at least frame arguments to prove opportunity, intent, plan, or absence of mistake. First, hypothetically, if a defendant employer claims to have had no opportunity to rape a janitor because of the professional setting, testimonies of other victims who were similarly situated janitors could rebut the argument and show that the defendant did have the *opportunity* to commit the present offense. Second, the Eleventh Circuit allowed "me too" evidence to prove the employer's

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[21] *See* Fed. R. Evid. 404.
[22] *See* Fed. R. Evid. 413, 414.
[23] *See* Lannan v. State, 600 N.E.2d 1334, 1335 (Ind. 1992) (internal citation omitted).
[24] *See id.*
[25] These states include Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Michigan, Missouri, Nebraska, Oklahoma, Tennessee, Texas, Utah, and Washington. *See* George Fisher, EVIDENCE 218 (3d ed. 2013) [hereinafter *Fisher*]; Michael L. Smith, *Prior Sexual Misconduct Evidence in State Courts: Constitutional and Common Law Challenges*, 52 Am. Crim. L. Rev. 321, 324 (2015) [hereinafter *Smith*]. However, courts in Iowa, Missouri, and Washington have struck down their statutes. *See Smith*, at 324 n.12, 16, 21 (internal citations omitted).
[26] *See* Fed. R. Evid. 404(b).

intent to discriminate and retaliate.[27] Similarly, additional victims can show that the defendant has an intent to commit sexual assault. In Bill Cosby's retrial, the judge allowed "me too" evidence based on the theory that multiple women testifying that "Cosby gave them pills that rendered them unconscious or semi-conscious and then penetrated them" demonstrated his *intent* to penetrate the plaintiff without consent.[28] Third, "me too" evidence could also prove a common plan or scheme, "in which there is a logical connection between the alleged prior assaults and the charged crime–they are considered parts of a whole overarching goal."[29] The fourth route is absence of mistake.[30] If, for example, the defendant claims to have mistakenly given the victim excessive alcohol and thought that the victim consciously consented to sex, additional victims' testimony that the defendant rendered them unconscious with alcohol before raping them could rebut the defendant's claim because it is highly unlikely that one always mistakenly intoxicates another to the degree of unconsciousness and has sex with that person.

Other than these permissible routes explicitly provided by FRE 404(b), there are other arguments available to prosecutors: compulsion, modus operandi, and doctrine of chances. First, the recidivist rationale underlying FRE 413 could lend strength to the theory of compulsion. Additional victims' testimony could prove the defendant's state of mind or a perverted sexual impulse that the defendant could not resist when certain sexual stimulus was presented. Second, prosecutors could establish a modus operandi: if evidence shows that the defendant previously committed a particular crime, and the present offense matches that crime in idiosyncratic ways, then the inference is that the defendant committed the present offense as well.[31] In Cosby's case, more than fifty women described a very similar modus operandi in a period spanning five decades.[32] Third, prosecutors could argue doctrine of chances: because of the minimal chances that all "me too" witnesses and the plaintiff are lying, it is more likely than not that they are telling the truth and that the defendant did commit the present crime.[33]

PART III

No matter which ground prosecutors try to introduce "me too" evidence on, the probative value of the evidence must not be substantially outweighed by the risks of unfair prejudice, jury confusion, or undue delay

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[27] *See Goldsmith*, 513 F.3d at 1286.
[28] *See Gersen*, *supra* note 3 (emphasis in original).
[29] *Id.*
[30] *See* Fed. R. Evid. 404(b).
[31] *See Fisher*, *supra* note 25, at 171.
[32] *See Gersen*, *supra* note 3.
[33] *Id.*

of the trial.[34] Prosecutors should offer multiple routes for a piece of evidence, so that the cumulative probative value could combat the risks concerned by FRE 403. Briefing the testimony in detail would assist the court in determining the evidence's high probative value.[35] For example, to establish modus operandi, prosecutors must meet the very high bar of showing that the similarities between the previous crimes and the present one are "so distinctive that the inference that *nobody else* could have committed this crime overcomes the jury's temptation to engage in propensity reasoning."[36]

Courts should carefully balance preserving the probative value of the evidence and reducing the risks of jury confusion and undue delay of the trial. The more "me too" witnesses the court allows to testify, the more persuasive each account is by virtue of the corroborating effect. But the jury is also more likely to be confused by hearing extensive offenses beyond the one(s) charged against the defendant.[37] Courts are in a position to manage the number of additional victims allowed to testify. The prosecutor against Cosby initially wanted to introduce testimony from nineteen women, but the judge lowered that number to five.[38] Moreover, as a Florida district court stated, courts should effectively and efficiently manage the testimony to prevent needlessly lengthy questioning or a "mini-trial" effect.[39]

CONCLUSION

The "me too" movement has encouraged many sexual assault victims to come forward and to corroborate each other's stories, and their testimony could be a powerful piece of evidence against defendants. To ground the "me too" testimony in evidentiary rules, prosecutors in state courts should check whether the state has enacted a counterpart of FRE 413, and if not, explore other permissible routes. Despite the various risks posed by such evidence, the movement may influence a judge's willingness to allow more "me too" witnesses.[40] States might adopt FRE

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[34] *See* Fed. R. Evid. 403.

[35] An Alabama district court afforded the plaintiff an opportunity to further detail the alleged harassment of others before making a final decision about the evidence. *See Andazola*, 2013 WL 1834308, at *7.

[36] *See Fisher*, *supra* note 25, at 171.

[37] *See* United States v. Guardia, 135 F.3d 1326, 1332 (10th Cir. 1998) (Doctor was accused of sexual abuse during gynecological procedures, and court found evidence that defendant treated "four additional witnesses under similar but distinct circumstances creates a substantial risk of jury confusion.").

[38] *See Gersen*, *supra* note 3.

[39] *See* E.E.O.C. v. Suntrust Bank, 2014 WL 1796681, at *5 (M.D. Fla. May 6, 2014).

[40] Joseph Ax, *Cosby Sentencing is New Milestone for #MeToo Movement*, REUTERS (Sep. 23, 2018, 12:03 P.M.), https://www.reuters.com/article/us-people-cosby/cosby-sentencing-is-new-milestone-for-metoo-movement-idUSKCN1M30CT.; *see also*,

413 to completely open the gate, or we might see a judicial incorporation of FRE 413 in disguise if courts admit "me too" evidence on other grounds. The movement has shaped our society's understanding of sex crimes, perpetrators, and victims, and we may expect to more clearly see its impact on our judicial system in the near future.[41]

Gersen, *supra* note 3 (Judge permitted five additional women to testify in Cosby's second trial amidst the "me too" movement, but only one was allowed in the first trial.).

[41] Tricia L. Nadolny, Jeremy Roebuck, and Laura McCrystal, *How Cosby Verdict Could Signal #MeToo Impact on Criminal Justice System*, PHILLY.COM THE INQUIRER (April 28, 2018), http://www2.philly.com/philly/news/bill-cosby-guilty-sexual-assault-legal-implications-20180428.html.