IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN DALE FARMER, Appellant, vs. THE STATE OF NEVADA, Respondent.	)	NO. 65935

PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVEN DALE FARMER,	)	NO. 65935
	)	
Appellant,	)	
	)	
vs.	)	
	)	
THE STATE OF NEVADA,	)	
	)	
Respondent.	)	
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PETITION FOR REHEARING

COMES NOW, Deputy Public Defender DEBORAH L. WESTBROOK, on behalf of the Appellant, STEVEN FARMER, and petitions this Court for rehearing, pursuant to NRAP 40, in the above-referenced case.

This petition is based on the following memorandum of points and authorities and all papers and pleadings on file herein.

Dated this 30 day of November, 2017.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *__/s/ Deborah L. Westbrook__*
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POINTS AND AUTHORITIES

NRAP 40(c)(2)(B) permits this Court to consider rehearing, "[w]hen the court has overlooked, misapplied or failed to consider a statute, procedural rule, regulation or decision directly controlling a dispositive issue in the case." This Court has noted that "rehearings are not granted to review matters that are of no practical consequence" and will consider rehearing only when "necessary to promote substantial justice." Gordon v. Eighth Judicial Dist. Ct., 114 Nev. 744, 745 (1998).

Rehearing is required in this case because the majority misapplied the law, broadening Nevada's joinder statute beyond what the legislature intended when it enacted NRS 173.115. The majority ignored the doctrine of *stare decisis*, key Supreme Court canons of statutory interpretation, and the relevant legislative history. The majority then relied on a single, non-binding case from Virginia and two legal treatises to justify altering more than a decade of Nevada joinder jurisprudence. Yet, these authorities do not actually support the propositions for which they were cited. The majority *misquoted* the definition of "common scheme" utilized in the Virginia case, omitting a key portion of the definition from its analysis. Contrary to the majority's claim, both the Virginia case and the two legal treatises support

the more limited interpretation of "common scheme or plan" that was adopted by this Court in Weber v. State, 121 Nev. 554 (2005).

Rehearing is also required because the majority misapplied the law when it found that joinder was not "unduly prejudicial" in this case. The majority adopted a new standard for the cross-admissibility of other crimes evidence that had never before been recognized in the State of Nevada: the "doctrine of chances." Then, after doing so, it applied the doctrine of chances on appeal without giving the district court an opportunity to evaluate cross-admissibility under that doctrine.

Mr. Farmer's convictions must be reversed, and the case remanded to the district court to undertake a cross-admissibility analysis and determine the extent to which *any* of the cases may be joined together under the "connected together" prong of the joinder statute.

I. The majority misapplied the law of joinder.

From its enactment in 1967 until its amendment in 2017,[1] NRS 173.115 provided as follows:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:

[1] See A.B. 412, 79th Leg. (Nev. 2017). As noted by the majority, "[t]he 2017 amendments to NRS 173.115 are not relevant to our discussion." Farmer v. State, 133 Nev. Adv. Op. 86 at *6, n.4 (November 16, 2017).

1. Based on the same act or transaction; or

2. Based on two or more acts or transactions connected together or *constituting parts of a common scheme or plan*.

See **Exhibit A** (emphasis added).

At the time of Mr. Farmer's trial in 2014, Weber provided the rule for joinder under the "common scheme or plan" subsection of NRS 173.115. See Weber, 121 Nev. at 571-73. Because NRS 173.115 did not define the phrase "common scheme or plan", Weber properly relied on *Black's Law Dictionary* to define the individual terms "scheme" and "plan". Id.; Perrin v. United States, 444 U.S. 37, 42 (1979) ("A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning"); United States v. Mills, 850 F.3d 693, 697 (4th Cir. 2017) (recognizing Black's Law Dictionary as an appropriate source to derive the common meaning of undefined statutory terms).

Using the common meaning of the terms "scheme" and "plan", the Weber court held that they encompassed a singular fundamental concept -- the requirement of a "purposeful design." Weber, 121 Nev. at 572. In doing so, the Weber court implicitly rejected the notion that mere "similarity" of offenses would permit joinder based on a "common scheme or plan".

Farmer v. State, 133 Nev. Adv. Op. 86 (J. Stiglich, dissenting) at *3 (November 16, 2017).

As the Farmer dissent recognized, Weber compels a finding that district court erred in joining the cases of D.H., H.S., M.P., L.S., and R.C. under the "common scheme or plan" prong of the statute. See Farmer (dissent) at *1-5. Without some "purposeful design", Mr. Farmer could not have been involved in either a "scheme" or a "plan", as those terms were defined in Weber. Under Weber, Mr. Farmer was entitled to new, severed trials.

To avoid this result, the Farmer majority overruled Weber by redefining a "common scheme" apart from its context within the larger phrase, "common scheme or plan". See Farmer (majority) at *8. This was error.

The doctrine of *stare decisis* required this Court to follow existing case law unless "compelling" reasons existed for overruling it. Miller v. Burk, 124 Nev. 579, 597 (2008). "Mere disagreement will not suffice." Id. This Court's "prior holding must have proven 'badly reasoned' or 'unworkable' before we will destabilize our case law by overruling it." Thomas v. Eighth Judicial Dist. Ct., 402 P.3d 619, 634 (Nev. 2017) (J. Pickering, dissenting) (citing State v. Lloyd, 129 Nev. 739, 750 (2013)).

Yet, the majority has not provided a legitimate reason -- let alone a "compelling" one -- to alter Nevada's "common scheme or plan" jurisprudence.

a. Canons of statutory construction support the holding in Weber.

The majority claims that Weber improperly "construed the words 'scheme' and 'plan' as synonyms." Farmer (majority) at *8. However, Weber was *correct* to interpret these words as synonyms because *Black's Law Dictionary* defined both terms as synonyms that required "design". See Weber, 121 Nev. at 572 ("According to *Black's Law Dictionary*, a scheme is a 'design or plan formed to accomplish some purpose; a system.' A plan is 'a method of design or action, procedure, or arrangement for accomplishment of a particular act or object. Method of putting into effect an intention or proposal.'").

The doctrine of *noscitur a soccis* further supports Weber's interpretation of "scheme" and "plan".[2] Under this doctrine, words that are "capable of many meanings" are instead "construed in light of their accompanying words in order to avoid giving [a] statutory exception 'unintended breadth.'" Maracich v. Spears, 570 U.S. 48, 133 S. Ct. 2191,

[2] See Ford v. State, 127 Nev. 608, 622 n.8 (2011) (recognizing this Court's "long adherence to the doctrine of *noscitur a sociis* (words are known by—acquire meaning from—the company they keep)").

2201 (2013) (quoting Jarecki v. G.D. Searle & Co., 367 U.S. 303, 307 (1961). Applying this rule, it was proper for Weber to limit the "common scheme or plan" doctrine to cases involving "purposeful design", rather than reading those terms broadly to include joinder based on mere "similarity." See also, Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

The majority further claims that Weber erred by reading "NRS 173.115(2)'s 'parts of a common scheme or plan' language as one phrase with one meaning. . ." Farmer (majority) at *9. Yet, this argument fails because the phrase "common scheme or plan" is a legal term of art that references a single common law concept:

> The phrase "common scheme or plan" is a term of art derived from the common law of evidence, where it is used to determine the admissibility of evidence of uncharged crimes to prove the defendant's commission of the crime charged. It is often improperly equated with the concept of an unusual modus operandi as evidence of identity (*see, Matter of Brandon*, 55 N.Y.2d 206, 212–213, 448 N.Y.S.2d 436, 433 N.E.2d 501 [1982]). In fact, to establish a "common scheme or plan," "[m]ere similarity ... between the crime charged and the uncharged crime is not sufficient; much more is required. There must be 'such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations' (2 Wigmore, Evidence [3d ed] § 304, p 202)" (*People v. Fiore*, 34 N.Y.2d 81, 84–85, 356 N.Y.S.2d 38, 312 N.E.2d 174 [1974]).

People v. Ruiz, 130 Misc. 2d 191, 195 (N.Y. 1985). Because the words "scheme" and "plan" are part of the same common law concept, Weber was correct to interpret those terms harmoniously with one another to require "purposeful design" and to preclude joinder based on mere "similarity."

b. Legislative history supports the holding in Weber.

The legislative history of NRS 173.115 also supports Weber's holding that a "common scheme or plan" requires a showing of "purposeful design." Nevada's joinder statute was part of the Nevada Criminal Procedure Law, introduced as Assembly Bill 81 and enacted in 1967. See Stats. of Nev., 1967, ch. 523, p. 1398, *et seq.*[3] The legislative history reflects that "[m]ost of AB 81 is taken from or conforms to the Federal rules." See Joint Hearing on A.B. 81 Before the Assembly and Senate Committees on Judiciary, 54th Leg. (Nev., February 8, 1967); see also, Report of the Subcommittee for Revision of the Criminal Law to the Legislative Commission (Nov. 18, 1966) at p. 3 ("The basic policy established by the subcommittee at its first meeting was to adopt in statutory form, but not as rules of court, the Federal Rules of Criminal Procedure, discarding those not applicable in state courts

[3] See Assembly History, Fifty-fourth Session (1967), located online at https://www.leg.state.nv.us/Division/Research/Library/LegHistory/LHs/1967/AB081,1967.pdf, (visited 11/18/2017).

and retaining existing Nevada statutes concerning matters not covered by the federal rules.").

When A.B. 81 was drafted, Rule 8(a) of the Federal Rules of Criminal Procedure provided:

> Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the *same or similar character* or are *based on the same act or transaction* or on *two or more acts or transactions connected together* or *constituting parts of a common scheme or plan*.

See **Exhibit B** (emphasis added).

Although the Nevada Legislature adopted Rule 8(a)'s language permitting the joinder of offenses that involved the "same act or transaction", offenses that were "connected together", and offenses that shared a "common scheme or plan", the legislature chose *not* to permit the joinder of offenses that shared the "same or similar character". Compare **Exhibits A** and **B**. Where the drafters of Assembly Bill 81 actually considered Rule 8(a) as a template and still chose not to adopt the complete rule, that legislative decision is entitled to deference by this Court. See Farmer (dissent) at *4 ("If our Legislature had intended to allow for joinder based on the similarity of offenses, the Legislature could have expressly done so as provided for in the federal rules. It did not.").

Additionally, since Nevada's "common scheme or plan" language came directly from Rule 8(a) of the Federal Rules of Criminal Procedure, federal law should guide our interpretation of that phrase. The phrase "common scheme or plan" is not defined in Rule 8(a). Yet, at common law, the phrase "common scheme or plan" was a term of art that required a "general plan". See Ruiz, 130 Misc. 2d at 195. When Congress uses a common law term and does not otherwise define it, it is presumed that Congress intended to adopt the common law definition. Morissette v. United States, 342 U.S. 246, 263 (1952). Therefore, a "general plan" was required for joinder under this portion of Rule 8(a). See also, United States v. Martin, 749 F.3d 87, 93 (1st Cir. 2014) (internal citation omitted) (in the sentencing context, the phrase "common scheme or plan" must be given its "ordinary meaning" and a "scheme or plan implies the existence of 'some kind of connective tissue,' i.e., an initial plan involving multiple acts or steps taken to a single end.").

Where the Nevada Legislature adopted the "common scheme or plan" theory of joinder directly from federal law, it follows that a plan, or purposeful design, is required for admissibility under that theory. Weber was, therefore, correct in its analysis.

c. *The majority's broad interpretation of "common scheme" is unsupported.*

Despite the overwhelming legal authority supporting this Court's analysis in Weber, the majority relies on a single Virginia case and two legal treatises to overrule more than a decade of joinder jurisprudence. Yet, these authorities *do not* stand for the propositions asserted by the majority.

Relying on a Virginia case called Scott v. Commonwealth, 651 S.E.2d 630, 635 (Va. 2007), the majority held that similar offenses may now be joined "when they are committed as parts of a common scheme." Farmer (majority) at *9. The majority relied on Scott because it interpreted "common scheme" and "common plan" as separate legal concepts – something no other court appears to have done in the joinder context. Farmer (majority) at *9.

Yet, Scott is of limited use because it defined "common scheme" and "common plan" with reference to *Virginia's* "other crimes evidence" case law. See Scott, 651 S.E.2d at 635 ("we first observe that we have not defined the term 'common scheme or plan' in the context [of our joinder rule]. However, in our decisions addressing the admissibility of evidence of other crimes in criminal trials, we often have applied the term in discussing pattern offenses or modus operandi."). As such, the definitions used in Scott have little bearing on the definitions of similar terms under Nevada law.

Even if it were appropriate for this Court to define "common scheme" using another jurisdiction's case law, the majority actually *misrepresented* that definition by quoting only *part* of the sentence that defined the term. Ostensibly quoting Scott, the majority claims that "[t]he term 'common scheme' describes crimes that share features idiosyncratic in character." Farmer (majority) at *9 (alteration in original). The majority ended its citation with a period, but Scott actually used a *comma*, followed by additional language that undermines the majority's conclusion. The complete sentence reads as follows, with the omitted language underlined:

> The term "common scheme" describes crimes that share features idiosyncratic in character, which permit an inference that each individual offense was committed by the same person or persons as part of a pattern of criminal activity involving certain identified crimes.

Scott, 651 S.E.2d at 635 (emphasis added).

Looking at this full definition, it becomes clear that Scott rejected a broad interpretation of the phrase "common scheme" that would allow for joinder based on mere similarity. Rather, Scott interpreted this phrase to require a showing of *modus operandi*, which severely limited the types of cases that could be joined under that theory. As a result, Scott reversed the defendant's convictions due to misjoinder because the "evidence demonstrated only a general similarity of manner in which the crimes were

committed" and no idiosyncratic features. Scott, 651 S.E.2d at 636. Plainly, Scott does not support the broad reading of "common scheme" that was adopted by the majority.

The majority also relies on *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* to support interpreting the word "scheme" more broadly than the word "plan". Farmer (majority) at *9 ("interpreting 'scheme' and plan' as having nearly identical meanings ignored the common usage of the words in the evidentiary context."). Although this 2009 treatise discusses current legal trends related to the admissibility of "other misconduct" evidence,[4] it does not tell us anything about what the Nevada Legislature intended when it adopted NRS 173.115 back in 1967.

Indeed, it is unclear why the majority relied on *The New Wigmore* at all when the treatise repeatedly cautioned against broad interpretations of the "common scheme or plan" theory of admissibility:

- "[T]he 'common scheme or plan' theory has been employed in situations involving considerably less obvious 'schemes' or 'plans,' and it is those cases that prove more controversial." See Leonard, *The New Wigmore*, supra, at § 9.1

[4] See generally, David P. Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* §§9.1, 9.2 and 9.4 (2009), attached as **Exhibit C**.

- "The least controversial application of the plan rubric involves the theory that the charged and uncharged acts are connected by a 'single overall grand design.'" *The New Wigmore,* supra, at § 9.2.1.

- "Far more problematic than the linked plans previously discussed are so-called 'unlinked' plans." Id. at § 9.2.2

- "Commentators have long criticized this application of the plan theory on the basis that its true effect is to invite a finding of guilt by character-based propensity rather than through the kinds of inferences that avoid the character ban." Id. at § 9.2.2.

After describing the controversy surrounding the admissibility of uncharged conduct in "unlinked" plan cases, *The New Wigmore* identified the controversial trend, common in sexual offense cases, wherein "most courts apply the common scheme or plan theory to cases in which there is no clear link between the charged and uncharged conduct." Id. at § 9.2.2.

Yet, instead of embracing this trend, the treatise advocated against it:

> When the case does not involve a preconceived plan that encompasses all of the acts, courts have used two kinds of reasoning to justify admissibility. Often the court will apply the concept of a "common scheme or plan". The basic justification for admission of the evidence is that there is a meaningful distinction between that kind of reasoning and the forbidden character reasoning, and that the evidence should be admitted unless its prejudicial potential overwhelms its probative value. As will be shown, this concept is difficult to support.

Id. at § 9.4.2 (emphasis added).

Ultimately, the treatise concluded that a broad interpretation of the phrase "common scheme or plan" to involve merely "similar" conduct was "deeply flawed" and unjustified:

> To pretend that the general similarity of the charged and uncharged crimes justifies the use of a plan theory as a legitimate, non-character route to admissibility is to ignore the closeness of the theory to that forbidden by the rules . . . .
>
> Thus, the plan theory as applied to unlinked acts of the same general nature is deeply flawed because of the difficulty of distinguishing its reasoning from the forbidden character logic.

The New Wigmore, supra, at § 9.4.2(a). Plainly, *The New Wigmore* does not support the majority's position.

Finally, the majority cites Clifford S. Fishman & Ann T. McKenna, *Jones on Evidence: Civil and Criminal* § 17:17 (7th ed. Supp. 2016), to argue that the "traditional" understanding of joinder permits joinder based on "sufficient similar characteristics". Farmer (majority) at * 10. Yet, contrary to the majority's claim, the treatise actually stated that a plan is the "traditional" requirement for this type of joinder:

> *The third category – "acts or transactions connected together or constituting parts of a common scheme or plan" – mirrors a rule admitting extrinsic evidence that shows that the charged and uncharged acts were part of such a plan. Generally, courts have understood the terms "connected together" and "part of a common scheme or plan" to require a showing that the joined counts "grow out of related transactions."* Separate crimes

> committed with a similar unusual modus operandi, or with sufficient similar characteristics, also may be joined for trial.

Fishman & McKenna, *Jones on Evidence*, § 17:17 (emphasis added). By citing only the final sentence, the majority allowed an exception to swallow the general rule requiring a "plan" for joinder.

Because the legal authorities cited in the majority opinion do not support overruling Weber, this Court should grant rehearing.

d. *Rehearing is necessary to promote substantial justice.*

The majority also suggests that a broad reading of "common scheme" is necessary based on the facts of this case:

> To hold under these circumstances that Farmer did not have a scheme to use his position as a CNA to access unusually vulnerable victims and exploit them under the guise of providing medical care would unjustifiably narrow the term, leaving it with little practical effect.

Farmer (majority) at *12. This analysis is a stunning example of how "bad facts make bad law". The Court did not need to artificially broaden the law of joinder to allow "similar" sexual offenses to be prosecuted together. The Legislature already addressed the majority's concerns by amending NRS 48.045 in 2015.[5] With the Legislature's adoption of NRS 48.045(3), the

[5] See 2015 Laws, Chapter 399, A.B. 49, Crimes and Offenses-Photography and Pictures-Distributions, Secs. 21 & 27, 78th Leg. (Nev. 2015) (effective October 1, 2015, NRS 48.045 no longer "prohibit(s) the admission in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense.").

State can more easily join crimes involving "sexual offenses" in a single case as "connected together" under NRS 173.115(2). See NRS 48.045(3); Weber, 121 Nev. at 573 (permitting joinder when offenses are "connected together" or cross-admissible under NRS 48.045). Apart from ensuring that Mr. Farmer never gets out of prison,[6] there is absolutely no reason to broaden Nevada's joinder statute in the sweeping manner accomplished by the majority.

While the majority's decision will have little impact on the joinder of sex offense cases going forward, the decision could have a drastic effect on non-sex cases. Robberies, burglaries, assaults and batteries – as long as there are "similarities" between the charged crimes, they can now be joined together to the detriment of the defense. Yet, as pointed out in *The New Wigmore*, "[b]ehavioral patterns are not common plans or schemes". Leonard, *The New Wigmore*, supra, § 9.4.2 (quoting Johnson v. State, 544 N.E.2d 164, 171 (Ind. Ct. App. 1989)). Indeed, "if we were to recognize exceptions for patterns of behavior – professional burglars, thieves, prostitutes, bad check artists, etc. – we would soon have no general rule prohibiting evidence of prior acts of misconduct." Id. (citing Johnson, 544 N.E.2d at 168 n.2). We should not permit such a result to infect our joinder

[6] Mr. Farmer's case commenced in 2008, long before the effective date of the amendment.

jurisprudence when the joinder of "similar offenses" has been shown to result in unfair bias to the defense. See Farmer (dissent) at *4. Rehearing is absolutely necessary in this case to "promote substantial justice." See Gordon, 114 Nev. at 745.

II. The Supreme Court misapplied the law to find that joinder was not "unduly prejudicial" in this case.

A majority of this Court found that joinder was not unduly prejudicial because, according to the "doctrine of chances", the State could properly argue that "the number of victims, and the similarity of their stories, was evidence that the offenses actually occurred as the victims claimed, which was the primary issue in the case." Farmer (majority) at *13 (citing Leonard, *The New Wigmore*, supra, § 9.4.2).

To be sure, *The New Wigmore* did identify the doctrine of chances as an alternative basis to admit evidence of other crimes that were not part of an overarching plan. See Leonard, *The New Wigmore*, supra, at § 9.4.2(b). Yet, the doctrine had not been recognized in the State of Nevada as a basis for cross-admissibility when the State made its closing arguments in 2014. And the district court never conducted any cross-admissibility analysis that would have permitted such an argument to be made.

The "doctrine of chances" has clearly defined limits. See Leonard, *The New Wigmore*, supra, at § 9.4.2(b) ("This theory does not apply in all

'unlinked plan' cases; were it to apply so broadly, the character ban effectively would be supplanted in cases where a person makes a career out of committing a certain type of crime.")

There are key factual determinations that a trial court must make before admitting evidence under the doctrine of chances. See State v. Verde, 296 P.3d 673, 686-87 (Utah 2012) (identifying four factors the court must consider before admitting evidence under the doctrine of chances: (1) materiality; (2) similarity; (3) independence; (4) and frequency), abrogated on other grounds by State v. Thornton, 391 P.3d 1016, 1026 n.7 (2017).

In particular, the court must find that the defendant was "accused of the crime or suffered an unusual loss '*more frequently than the typical person endures such losses accidentally.*" Id. (emphasis in original). Here, this would have required a finding that Mr. Farmer was accused of improprieties more frequently than were other Centennial Hills Hospital employees. 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, 406 (1996) ("The degree of similarity and detail necessary to raise an inference that the defendant caused the accusations through his actions is a function of both the absolute number of accusations and the defendant's level of exposure to false allegations. A

defendant who has cared for hundreds of children in a day care runs a greater risk of being falsely accused of molesting a child than would a defendant with less frequent association with children.")

Where the district court never conducted any cross-admissibility analysis in this case, it was improper for the State to make arguments premised on a "doctrine of chances" theory of cross-admissibility. And this court cannot retroactively justify the State's improper closing argument based on a legal theory that was neither adopted nor applied in the district court. See Thomas, 402 P.3d at 630 (J. Pickering, dissenting) ("I also do not subscribe to replacing existing law with new law, then applying the new law at the appellate level where, as here, the new law involves fact-finding not undertaken in the district court.").

III. Reversal is required.

To the extent the majority would affirm Mr. Farmer's convictions on the alternate basis that the offenses were "connected together", the majority has provided no analysis supporting that conclusion. See Farmer (majority) at *10 fn.7. As the dissent points out, "[t]his conclusion appears inappropriate where the district court did not reach this issue and the State inadequately addressed it on appeal." Farmer (dissent) at *2, fn.3. In any

case, such a conclusion is belied by material facts in the record. See NRAP 40(c)(2)(A); see also Appellant's Reply Brief at 5-12.

This case should be reversed and remanded to the district court with instructions to conduct the cross-admissibility analysis that was never performed. Such an analysis would set the parameters for an appropriate closing argument, defining the express purposes for which the charges in one case are (or are not) relevant to the charges in another.

Further, to the extent this Court wishes to adopt the "doctrine of chances" as an additional basis for cross-admissibility, the Court should clearly define the parameters of that doctrine and allow the district court to determine, in the first instance, whether that doctrine applies here. See Verde, 296 P.3d at 686-87 (adopting the "doctrine of chances", then reversing and remanding for a new trial to allow the district court to apply that doctrine); see also Thomas, 402 P.3d at 630 (J. Pickering, dissenting).

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CONCLUSION

The majority expanded the law of joinder and adopted a new standard of cross-admissibility without either party raising these issues, and without soliciting input from either party at the time of briefing or oral argument. Because the majority misapplied the law of joinder when it affirmed Mr. Farmer's convictions, substantial justice requires rehearing, reversal and remand for new trials in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

It has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 40 or 40A because it is:

Proportionately spaced, has a typeface of 14 points or more and contains 4,631 words, which does not exceed the 4,667 word limit.

DATED this 30 day of November, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 30 day of November, 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

ADAM LAXALT
STEVEN S. OWENS

DEBORAH L. WESTBROOK
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

STEVEN DALE FARMER
NDOC No. 1121584
c/o High Desert State Prison
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Indian Springs, NV 89070

BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office

EXHIBIT A

West's Nevada Revised Statutes Annotated
Title 14. Procedure in Criminal Cases (Chapters 169-189)
Chapter 173. Indictment and Information
Joinder of Offenses and of Defendants

This section has been updated. Click here for the updated version.

N.R.S. 173.115

173.115. Joinder of offenses

Effective: [See Text Amendments] to September 30, 2017

Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are:

1. Based on the same act or transaction; or

2. Based on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

Credits

Added by Laws 1967, p. 1413.

Notes of Decisions (77)

N. R. S. 173.115, NV ST 173.115
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End of Document

EXHIBIT B

18 USC App Fed R Crim P Rule 8: Joinder of Offenses and of Defendants

From Title 18-Appendix
FEDERAL RULES OF CRIMINAL PROCEDURE
III. INDICTMENT AND INFORMATION
Jump To:
Miscellaneous
Cross Reference

Rule 8. Joinder of Offenses and of Defendants

(a) **Joinder** of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) **Joinder** of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

NOTES OF ADVISORY COMMITTEE ON RULES-1944

Note to Subdivision (a). This rule is substantially a restatement of existing law, 18 U.S.C. [former] 557 (Indictments and presentments; **joinder** of charges).

Note to Subdivision (b). The first sentence of the rule is substantially a restatement of existing law, 9 Edmunds, *Cyclopedia of Federal Procedure* (2d Ed.) 4116. The second sentence formulates a practice now approved in some circuits. *Caringella v. United States*, 78 F.2d 563, 567 (C.C.A. 7th).

CROSS REFERENCES

Consolidation of indictments or informations, see rule 13.
Election of counts, see rule 14.

EXHIBIT C

ASPEN PUBLISHERS

THE NEW WIGMORE
A Treatise on Evidence

Evidence of Other Misconduct and Similar Events

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CHAPTER 9

Plan; Common Scheme or Plan

§9.1 INTRODUCTION

A person who has devised a plan is more likely to act consistently with that plan than is a person who does not have such a plan. This statement provides the intuitive underlying rationale for the use of uncharged misconduct evidence to prove the existence of a "common scheme or plan." The cases in which the evidence strongly suggests the existence of what we normally think of as a scheme or plan are uncontroversial. As will be shown, however, the "common scheme or plan" theory has been employed in situations involving considerably less obvious "schemes" or "plans," and it is those cases that prove more controversial.

Like many of the purposes for which uncharged misconduct evidence may be offered, the "plan" supporting admissibility of the evidence

is usually only an intermediate step in a chain of inferences.[1] With the exception of uncharged misconduct evidence offered to prove the existence of a conspiracy,[2] which involves a plan as an essential element, "plan" evidence is offered as part of a chain leading to one or more of three facts: (1) the occurrence of the act in issue; (2) the identity of the person who committed the act; or (3) the existence of the required mental state in the actor.[3] Uncharged misconduct evidence has been admitted widely for each of these purposes.

The general theory of plan justifying the admission of uncharged misconduct evidence has long been recognized. In his revision of Greenleaf's evidence treatise, Wigmore wrote:

> Where the very doing of the act charged is in issue and is to be evidenced, one of the evidential facts admissible . . . is the person's plan or *design* to do the act. Now this plan or design itself may be evidenced by his conduct, and such conduct may consist of other similar acts so connected as to indicate a common purpose, including in its scope the act charged.[4]

Many early cases also applied the general concept.[5]

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§9.1 [1] *Cf.* People v. Engelman, 453 N.W.2d 656, 660–661 (Mich. 1990) (stating that the purposes for which uncharged misconduct evidence may be offered are "not all 'on the same plane,'" and that purposes such as motive, opportunity, preparation, scheme, plan, or system are intermediate inferences "which may in turn tend to prove some ultimate fact or issue" (quoting People v. Golochowicz, 319 N.W.2d 518 (Mich. 1982))).

[2] The elements of criminal conspiracy are "(1) an agreement between two or more persons, . . . and (2) an intent thereby to achieve a certain [unlawful] objective." Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law §6.4 (1986). *See also* California Jury Instructions — Criminal. 6.10 (2007) (defining a criminal conspiracy as "an agreement entered into between two or more persons with the specific intent to agree to commit the crime of . . . and with the further specific intent to commit that crime, . . . followed by an overt act . . . for the purpose of accomplishing the object of the agreement"). Both quoted definitions contemplate a plan, as that term is understood in normal usage.

[3] *See* McCormick on Evidence §190, at 315 (Kenneth S. Broun ed., 6th ed. 2006) (evidence of plan, scheme, or conspiracy may be relevant to show "motive, and hence the doing of the criminal act, the identity of the actor, or his intention"); 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence §5244, at 501–503 (1978) (stating the same three potential uses of plan evidence); Major Stephen T. Strong, What Is a Plan? Judicial Expansion of the Plan Theory of Military Rule of Evidence 404(b) in Sexual Misconduct Cases, Army Law., June 1992, at 13, 16 (listing the three uses of plan evidence).

[4] 1 Simon Greenleaf, A Treatise on the Law of Evidence 71–72 (16th ed. John H. Wigmore and Edward A. Harriman rev. 1899) (footnotes omitted; emphasis in original).

[5] *See, e.g.*, Commonwealth v. Robinson, 16 N.E. 452 (Mass. 1888) (in murder prosecution, evidence that defendant murdered the beneficiary of a life insurance policy

The use of uncharged misconduct evidence to prove plan overlaps significantly with other admissibility theories discussed in this volume, particularly that of "motive."[6] In some situations, a person's plan to act in a certain way arises from a motive to act that way. In both cases, the inference flows from the initial reason. Thus, a person charged with arson in burning a building to collect insurance proceeds could be said to have had a motive to burn the building for that reason, and also to have had a plan to do so. Evidence of other insured properties burned by defendant potentially would be admissible on either theory if, for example, defendant denies committing the charged offense, or claims the fire began accidentally.[7]

The plan theory also overlaps with other admissibility theories such as "preparation."[8] When, for example, it is necessary to commit a number of offenses in a particular sequence in order to achieve an ultimate goal, evidence of the prior offenses could be said to be part of a "plan" leading to the goal; just as logically, the offenses could be seen as preparatory to commission of the charged act, which might be the ultimate goal or a further step in the chain leading to the desired outcome.[9]

In addition, depending on how one characterizes the offense at issue, uncharged misconduct evidence offered on the plan theory can also be viewed as "inextricably intertwined" evidence—evidence so closely connected to the charged offense that it can be seen as a part of it.[10] If, for example, defendant is charged with conspiracy to commit bank robbery, evidence that defendant stole the getaway vehicle hours before the robbery could be characterized as preparation for the robbery, part of a plan to commit the crime, or, less persuasively, as an inextricably intertwined

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was admissible to prove defendant was the person who committed the murder of the insured, the charged crime); Commonwealth v. Jackson, 18 Mass. 16 (1882) (to prove defendant intentionally defrauded victim by selling a horse on false pretenses, evidence of a similar method used on three other occasions was admissible to prove fraudulent intent); State v. Jones, 71 S.W. 680, 681 (Mo. 1903) (defendant's confession to setting a fire in another house on the same night as fire at issue, as well as his theft of a horse, should have been admitted "as a part of the same scheme"); People v. Wood, N.Y. 1858 (similar; other murder offered to show plan to obtain property of the victim of the charged crime) (the present author is unable to locate the actual case report).

[6] *See supra* Chapter 8.

[7] *See, e.g.*, State v. Shindell, 486 A.2d 637 (Conn. 1985) (in prosecution for arson, evidence that defendant and his agents had attempted to burn other insured buildings was admissible to prove continuing plan of which the charged crime was a part).

[8] *See infra* Chapter 10.

[9] This type of case has been designated a "sequential" plan, and is discussed *infra* §9.2.1.

[10] *See supra* Chapter 5. The "inextricably intertwined" rationale for admission of uncharged misconduct evidence, like the largely abandoned "*res gestae*" concept for admission of hearsay evidence, sometimes reaches too far. *See* id.

part of the act of carrying out the conspiracy itself. In a prosecution for sale of illegal drugs, evidence of a prior transaction involving a small amount of the same drug sold as a sample might be admissible in a prosecution for the larger, subsequent sale.[11] Though the uncharged misconduct in cases such as these is not in fact the crime for which the defendant is charged, courts sometimes hold that the uncharged event is sufficiently connected with the charged offense that it should be viewed as a part of the event at issue.[12]

Some courts have also used plan and "*modus operandi*" interchangeably, particularly when the uncharged misconduct evidence is offered to prove the identity of the charged crime's perpetrator. The two theories are in fact distinguishable, however.[13]

One encounters several difficulties in attempting to set forth and evaluate the cases admitting evidence of plan. One difficulty is courts often provide a laundry list of purposes for which particular uncharged misconduct evidence is admissible, but then fail to explain the reasoning behind each of the listed purposes. To some extent, this is caused by the overlap between plan and other theories. In other situations, however, it is unclear why the evidence should be admitted under any theory. A second reason the cases are difficult to describe and evaluate is that frequently, the courts neither set forth specifically the disputed issues nor state the *ultimate* purpose for which the uncharged misconduct evidence suggesting the existence of a plan was admitted. If we do not know, for example, whether the identity of the perpetrator was in issue, and the court does not specify whether the evidence ultimately was offered to

[11] *See, e.g.*, United States v. Torres, 685 F.2d 921, 925 (5th Cir. 1982) (evidence of sale of the sample was not evidence of other crimes, but was a necessary preliminary to, or means of accomplishing, charged offense). *See* Jennifer Y. Schuster, Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence, 42 U. Miami L. Rev. 947, 962–963 (1988) (discussing *Torres* and other cases employing this theory). The validity of the "inextricably intertwined" theory as applied to this type of situation is questionable. *See supra* Chapter 5.

[12] *See* Russell J. Davis, Annotation, Admissibility, Under Rule 404(b) of the Federal Rules of Evidence, of Other Crimes, Wrongs, or Acts Similar to Offense Charged to Show Preparation or Plan, 47 A.L.R. Fed. 781, 797 (1980 & Supp.) (stating that some bank robbery cases have held that one purpose for which uncharged misconduct evidence may be admitted "is to demonstrate a single scheme involving two or more crimes so interrelated that proof of one tends to establish the other" (citing United States v. Weaver, 565 F.2d 129 (8th Cir. 1977))); 23 Paul Coltoff et al., Florida Jurisprudence, Evidence and Witnesses §232 (2d ed. 1995 & Supp.) (stating that uncharged misconduct evidence "may be admitted in a proper case if it . . . tends to establish a common scheme or plan embracing a series of crimes so related to each other that proof of one tends to prove the other").

[13] *See* 22 Wright & Graham, *supra* note 3, §5244, at 501–502. The distinction between plan and *modus operandi* is also discussed *infra* Chapter 13.

§9.2.1 "LINKED" PLANS

The least controversial[9] application of the plan rubric involves the theory that the charged and uncharged acts are connected by a "single, overall grand design."[10] More specifically,

> all the crimes—both charged and uncharged—are the product of some prior, conscious resolve in the accused's mind. The accused formulates a single, overall grand design that encompasses both the charged and uncharged offenses. That design is overarching; all the crimes are integral components or portions of the same plan. Each crime is a step or stage in the execution of the plan. Each is a means to achieving the same goal.[11]

In *State v. Wallace*,[12] for example, Wallace was charged with burglary of a home and theft of several guns that once had been owned by Haschaik's father. To prove Wallace was involved in the crime, the prosecution presented evidence of Wallace's involvement in two other burglaries in which other guns once owned by Haschaik's father were stolen.[13] The Maine Supreme Court held that the evidence was properly admitted to prove a "common plan or scheme,"[14] and that result fits well with the concept of the linked plan. All of the burglaries were committed in pursuit of a plan developed before any of them took place.

The linked plan concept actually encompasses at least two factual scenarios: the "sequential" pattern and the "chain" pattern.[15]

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[9] *See* Bryden & Park, *supra* note 7, at 546–547 (stating that the "use of uncharged misconduct evidence to show multi-crime plans whose parts are linked in the planner's mind is not controversial").

[10] Mendez & Imwinkelried, *supra* note 7, at 480.

[11] Id. at 480–481 (footnotes omitted). *See also* McCormick on Evidence §190, at 315 (Kenneth S. Broun ed., 6th ed. 2006) ("Each crime should be an integral part of an over-arching plan explicitly conceived and executed by the defendant or his confederates."); 23 Paul Coltoff et al., 23 Fla. Jur. Evidence and Witnesses §232 (2d ed. 1995 & Supp.) ("Evidence is admissible under the [common scheme or plan] theory where, for example, the offense involves a complicated scheme and a series of independent acts show intent or purpose to commit the larger offense.").

[12] 431 A.2d 613 (Me. 1981).

[13] Other evidence showed Wallace's awareness that Haschaik wanted to reconstitute his father's former gun collection. Id. at 615.

[14] Id. at 616. The court also held the evidence admissible to prove (1) that defendant knew about the victim's gun collection; and (2) that defendant acted on a motive. Id.

[15] One authority recognizes a third category of linked plans, the "true plan of the bizarre variety." Mendez & Imwinkelried, *supra* note 7, at 483. The authors define this type of plan as one in which "[w]hat may appear to be unconnected crimes to most people may, however, be the product of a common plan hatched by a warped criminal mind." Id. Because most cases of this type can be classified as either sequential or chain

a. The Sequential Pattern

In the sequential plan case, one crime builds on the other, all designed to achieve a specific goal:

> For example, the accused first breaks into a bank president's residence on January 1, steals the key to the side door to the bank, and then uses the key to burglarize the bank on February 1. The accused perpetrated the January crime as a means to facilitate the commission of the February offense. In a prosecution for committing the second offense, the prosecutor can offer evidence of the first offense as proof that the accused perpetrated the burglary. The prosecutor will urge the jurors to find that the accused committed the second offense because it was an outgrowth of the accused's uncharged misconduct; one crime was the precursor of the other.[16]

The sequential plan reasoning does not violate the character prohibition. Character is thought to be a generalized tendency to act in a particular way, caused by something internal to the actor that arises from that person's moral bearing.[17] The forbidden reasoning relies on an inference of bad character from the uncharged misconduct, and from that, a propensity inference — that the defendant committed the charged act.

Consider *Lewis v. United States*,[18] where Lewis was charged, inter alia, with burglary of a United States post office. Lewis denied involve-

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plans, they will not be discussed separately. However, in these cases the court must recognize the need to permit the introduction of evidence that illuminates the actor's state of mind and reveals the existence of a plan.

[16] Id. at 481 (footnotes omitted). *See also* United States v. O'Connor, 580 F.2d 38, 42 (2d Cir. 1978) (describing similar acts "offered to show the existence of a definite project intended to facilitate completion of the crime in question"); Jeffrey H. Contreras, Note, Evidence: Admissibility of Other Crimes to Establish a Common Scheme or Plan — Hall v. State, 37 Okla. L. Rev. 102, 112 (1984).

[17] In the first edition of his treatise, Wigmore defined character as "the actual moral or psychical disposition, or sum of traits." 1 John H. Wigmore, Evidence in Trials at Common Law §52, at 121 (1904). In an often quoted passage, McCormick defined character as "a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness." Charles T. McCormick, Handbook of the Law of Evidence §162, at 340 (1954). Habit, in contrast, is more specific. Id. Thus, "if we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life." Id. In reference to the character rule, the Advisory Committee suggested that "character is defined as the kind of person one is." Fed. R. Evid. 405 advisory committee's note. One commentator equates character with disposition, and wrote that "the term 'disposition' is employed to denote a tendency to act, think or feel in a particular way." Rupert Cross, Evidence 291 (3d ed. 1967). This last definition is too broad because it encompasses tendencies to act in certain ways that are not based on character.

[18] 771 F.2d 454 (10th Cir. 1985).

ment. To prove he committed the crime, the prosecution permitted the government to present evidence that earlier on the evening of the burglary, Lewis burglarized a garage store and stole a cutting torch. Evidence indicated that the torch was used to gain entry to the post office. On appeal, the court upheld admission of the evidence on a "plan" theory.[19] Had the evidence been offered on a character-based theory, the reasoning supporting its relevance would have applied:

→ EVIDENCE: Lewis burglarized a garage store and stole a cutting torch.

→ INFERENCE: Lewis is the kind of person who would commit crimes such as burglary.

→ CONCLUSION: Lewis burglarized the post office using the cutting torch.

The reasoning is logical[20] but forbidden because it involves two character propositions. First, we are asked to infer from the uncharged act (burglarizing the garage store) that defendant possesses a criminal character. Second, we are invited to apply a character-based propensity inference: that a person with such a character would commit further crimes. This is precisely the reasoning forbidden by the character rule.[21]

Applied to the same evidence, the "plan" reasoning arguably does not violate the character ban:

→ EVIDENCE: Lewis burglarized a garage store and stole a cutting torch.

→ INFERENCE: Lewis had a plan to burglarize the post office using the cutting torch.

GENERALIZATION SUPPORTING INFERENCE: A person who acts in a manner that is consistent with having a plan is more likely to

[19] Id. at 456. The same evidence could well have been admitted under a "preparation" theory. *See infra* Chapter 10. *See also* United States v. Kelley, 635 F.2d 778 (10th Cir. 1980) (evidence of uncharged burglary in which defendant stole weapons was admissible to prove a plan to commit the charged bank robbery); Marks v. State, 654 P.2d 652 (Okla. 1982) (in prosecution for theft of an aircraft, evidence that defendant burglarized an office to obtain keys to the airplane was admissible under the plan theory; the uncharged act was a necessary prerequisite to commission of the charged airplane theft).

[20] It is consistent with everyday experience that a person who would burglarize a store and steal property would also commit other burglaries.

[21] *See* Fed. R. Evid. 404(a) ("Evidence of a person's character or a trait of his character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."); Fed. R. Evid. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.").

have a plan than is one who does not act in such a manner.
——→ CONCLUSION: Lewis burglarized the post office using the cutting torch.

Once again, there are two steps to the reasoning, but because neither involves the use of character, the character rule is not violated.[22] The steps are *first*, from the uncharged misconduct to the existence of a plan to burglarize the post office;[23] and *second*, from the existence of a plan to its execution.

The rules only forbid propensity inferences based on character,[24] which tend to be generalized inferences about the person (the person is a "violent" type, for example). Any other type of reasoning, even when it involves another type of propensity, is permissible. In *Lewis*, the first step in the logical chain, from the uncharged misconduct to the existence of a plan, does not involve a character-propensity inference, though it does require a different type of propensity inference: the tendency to construct plans for the future. But as the generalization noted above shows, this is a universal tendency; applying it does not set defendant apart from anyone else — it does not require any special belief about defendant that does not hold for all people. The existence of a plan in a given situation does not depend on any trait of the person's moral character. In fact, under the right set of circumstances all people can be enticed to develop plans, even to commit crimes, and honest people can have a reason to lie. The use of uncharged misconduct evidence to take the first step in the reasoning — to prove the existence of a plan — therefore does not violate the character evidence rule.

This is not to say that the mere existence of a plan never gives rise to the risks against which the character rule was designed to protect parties, particularly criminal defendants. Some plans are considerably more specific and directed than others. One might, for example, have a plan to burglarize a particular post office, and uncharged acts evidencing such a

[22] *See* Mendez & Imwinkelried, *supra* note 7, at 481 (sequential plan reasoning does not involve a forbidden character inference).

[23] This is not, of course, the only inference possible from the uncharged misconduct evidence. For example, Lewis might have taken the torch in good faith in order to prevent another person from obtaining it and using it to rob the post office; or Lewis honestly (though mistakenly) might have believed the torch belonged to him.

[24] *See* Paul F. Rothstein, Intellectual Coherence in an Evidence Code, 28 Loy. L.A. L. Rev. 1259, 1260–1265 (1995) (distinguishing different types of propensities and describing habit as a very specific type). *See also* Richard B. Kuhns, The Propensity to Misunderstand the Character of Specific Acts Evidence, 66 Iowa L. Rev. 777, 794 (1981) ("All character evidence offered to show action in conformity with character is propensity evidence, but not all propensity evidence is character evidence.").

plan can be highly probative of its existence and carry limited risk of jury misuse. These cases cause little controversy. On the other hand, one might also infer the existence of a far more generalized plan, such as to commit burglaries or sexual assaults. As will be discussed shortly,[25] these are the cases in which the evidence is virtually indistinguishable, if distinguishable at all, from character reasoning. Thus, the more generalized the plan inference, the more like character it becomes, and the greater the danger of unfair prejudice from its use at trial.

The second step in the permitted reasoning — from the existence of a plan to its execution in the charged offense — requires a much less trivial propensity (action-in-conformity) inference, but still not of the forbidden character variety. At least three non-character chains of reasoning (plan, opportunity, and preparation) can be constructed. Taking the plan theory first, the applicable generalization is that *any* person who has a plan, regardless of the person's character, is somewhat more likely to act consistently with the plan than is a person who does not have such a plan.[26] This generalization is easily conveyed to the jury; indeed, its intuitive appeal is sufficiently great that jurors are likely to draw the inference without substantial argument from counsel. Because of this, the likelihood that the jury will employ the forbidden character inference, while hardly negligible, is potentially manageable in many cases.

Returning again to *Lewis*, if Lewis denies committing the post office burglary, evidence of his theft of the cutting torch used in the burglary later that same day first gave rise to a rational inference that defendant had a plan to use the torch in the charged burglary. The second step, from the plan to defendant's identity as the perpetrator, would be as follows:

→ INFERENCE: Lewis had a plan to burglarize the post office using the cutting torch.[27]

→ CONCLUSION: Lewis burglarized the post office using the cutting torch

GENERALIZATION SUPPORTING CONCLUSION: People who have plans to achieve specific goals are more likely to act consistently with those plans than are people without such specific plans.

This second step in the reasoning — from the existence of a plan to its execution by defendant — overlaps with the "opportunity" theories for

[25] *See infra* §9.2.2.

[26] One author has noted that traditionally prohibited propensity inferences ask the fact-finder "to make an 'individualized' propensity inference in the sense that the defendant's propensity . . . is not a propensity shared by the populace at large." Kuhns, *supra* note 24, at 783.

[27] The plan will have been supplied by the uncharged misconduct evidence.

admissibility of uncharged misconduct evidence. When the ability to commit the charged crime in the manner in which it occurred depends on the actor's access to a particular tool, it can be said that defendant is in a group of people who had the opportunity to commit the crime. Though the theory operates even in situations in which a large number of people possess the means for committing the crime, it is especially persuasive where only a limited group of people have such capacity. In *Lewis*, therefore, if relatively few people possess cutting torches, defendant's theft of that kind of instrument places him in the smaller class of people who might have committed the crime:

→ INFERENCE: Lewis had a plan to burglarize the post office using the cutting torch.

→ CONCLUSION: Lewis burglarized the post office using the cutting torch.

GENERALIZATION SUPPORTING CONCLUSION: A person who has the opportunity to act in a certain way is more likely to do so than is a person who does not have that opportunity.

In addition, the plan theory in this case overlaps with the "preparation" theory:

→ INFERENCE: Lewis had a plan to burglarize the post office using the cutting torch.

→ CONCLUSION: Lewis burglarized the post office using the cutting torch.

GENERALIZATION SUPPORTING CONCLUSION: A person who acts in a manner that suggests preparation for a further act is more likely to be preparing to commit that act than is one who does not act in that manner.

All three chains of reasoning differ from the forbidden character-based propensity reasoning. In each, the jury is simply being asked to compare the defendant (who has a plan to carry out the crime, or who has the means to do so, or who appears to be preparing for the crime) to a person who does not. The jury is not required to resort to the character-propensity inference because the alternatives arise from universal human characteristics rather than anything particular and morally based about the defendant. The evidence is not necessarily admissible, of course; intellectually understanding the distinction does not mean the jury will follow it. The temptation to use the evidence in the forbidden way can be very strong in some cases and will carry significant risk of unfair prejudice. To determine whether to admit the evidence, the court must take into account the probative value of the evidence for its permissible

purposes and the possibility that the jury, despite receiving a limiting instruction, will employ the forbidden reasoning.[28] This standard must be employed case-by-case.

Lewis is a case in which the court allowed the use of plan reasoning to prove the identity of the perpetrator. As discussed in detail later in this chapter,[29] the plan theory can also be used to prove the intent of the actor or that the charged conduct occurred. In each of these situations as well, when the plan is truly one of a sequential variety, uncharged misconduct evidence tending to show the existence of a plan is relevant without violating the character rule. If defendant admits or does not contest commission of the *actus reus*, but claims she lacked the requisite criminal intent, plan evidence would tend to show that she harbored such intent. In such a case, we would infer intent by applying a generalization that a person who plans to do something, and then does that thing, is more likely to have committed the act intentionally than is one who did not have such a plan. Similarly, if defendant denies that the act took place, uncharged misconduct evidence tending to show the existence of a plan would assist the jury in reaching the conclusion that the planned act occurred.

Despite the theoretical difference between the plan and character forms of reasoning, the danger always exists that the jury will misuse the evidence. This is particularly true when a character inference from the uncharged misconduct is highly plausible. Nevertheless, the danger generally will not be as great in sequential plan cases as in other situations, because the plan inference is intuitively strong.

b. The Chain Pattern

Another subset of the "single, overall grand design" cases involves acts of misconduct that need not be committed in a specific order but that are part of a scheme requiring commission of multiple acts. As Imwinkelried and Mendez explain:

> Assume that the accused decides to gain control of a business by killing the accused's partners or to acquire title to realty by murdering all the competing heirs with superior claims to the property. A chain plan is distinguishable from a sequential plan in that there is no necessary order to the crimes. The accused may attain the above goals by killing the other partners or heirs in any sequence. But the accused is not simply a random

[28] For discussion of the procedure for determining admissibility of uncharged misconduct evidence, see *supra* Chapter 4, §4.5.

[29] *See infra* §§9.4–9.5.

> killer who acts out of a propensity to kill. Rather, the accused has a larger, more comprehensive goal in mind, and each crime is but a means to achieving that goal.[30]

The reasoning behind the chain plan theory is similar to that of the sequential plan. To illustrate, in *United States v. Rodriguez-Estrada*,[31] defendant, a former bankruptcy trustee, was charged with, inter alia, 20 counts of embezzling funds from a bankrupt estate by submitting false expense charges. At trial, the prosecution first offered into evidence the 20 checks over which the charges were brought. The court then permitted the prosecution to offer 31 similar checks, obtained under "virtually identical circumstances."[32] On appeal, the court held the evidence admissible to prove defendant's fraudulent intent by means of a plan to embezzle. The court held: "Inasmuch as the checks were virtual replicas of those that formed the basis of the indictment, they afforded compelling proof of intent to embezzle, existence of a calculated plan to siphon off funds, and absence of mistake."[33] In *Rodriguez-Estrada*, each alleged act, both charged and uncharged, was part of a single, overall scheme the ultimate goal of which was to milk the bankrupt estate. The case involved a "chain" plan because the commission of each act did not depend on the previous one; no particular order was required. Nevertheless, the evidence carries strong probative value on the existence of a fraudulent scheme, undercutting any claim on defendant's part that the charged acts were the result of mistake or inadvertence.[34]

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[30] Mendez & Imwinkelried, *supra* note 7, at 482 (footnotes omitted). *Cf.* State v. Cruz, 672 P.2d 470 (Ariz. 1983), in which defendant was charged, inter alia, with murder and conspiracy. Defendant denied involvement. Though the Arizona Supreme Court overturned Cruz's conviction on these and other counts, the court approved the trial court's admission of testimony linking defendant to the attempted murder of one person at one time and the murders of two others together. The evidence was admissible, the court held, to demonstrate a plan to take over certain businesses. Id. at 475–476. Because successful completion of this plan required the murders of two people, including one of the victims whose death Cruz was charged with soliciting, id. at 472, the case involved the chain plan. It did not matter which of the two intended victims was attacked first.

[31] 877 F.2d 153 (1st Cir. 1989).

[32] Id. at 155.

[33] Id. at 156.

[34] *See also* United States v. Khan, 969 F.2d 218, 222–223 (6th Cir. 1992) (in prosecution for eight counts of mail fraud in an alleged scheme to defraud insurance companies, evidence concerning defendant's fraudulent Social Security application submitted at about the same time as the charged acts was admissible to show "scheme or artifice to defraud" as required by the relevant statute; the evidence tended to prove intent to defraud where defendant was likely to assert a defense of ignorance about or lack of familiarity with the English language or American customs); United States v. Ausmus, 774 F.2d 722, 727 (6th Cir. 1985) (in prosecution for willful failure to pay

The precise reasoning involved in chain plan cases can be illustrated with the facts of *Rodriguez-Estrada*:

→ EVIDENCE: Rodriguez-Estrada submitted false expense claims on occasions other than those charged.
→ INFERENCE: Rodriguez-Estrada had a plan to deplete the estate by collecting money for nonexistent expenses.
→ CONCLUSION: Rodriguez-Estrada submitted the charged bogus expense claims with fraudulent intent.

As is true for the sequential plan, the reasoning of the chain plan avoids the forbidden character reasoning:

→ EVIDENCE: Rodriguez-Estrada submitted false expenses on occasions other than those charged.
→ INFERENCE: Rodriguez-Estrada is the type of person who would engage in fraudulent conduct.
→ CONCLUSION: Rodriguez-Estrada submitted the charged bogus expense claims with fraudulent intent.

Uncharged misconduct evidence in cases involving the true linked chain plan are likely also to qualify under other admissibility theories, especially motive and *modus operandi*. In *Rodriguez-Estrada*, for example, the court could have admitted the uncharged misconduct evidence on the theory that defendant had a motive to deplete the estate, that his past acts demonstrated a willingness to act on that motive, and that his submission of false expenses on the charged occasions was therefore not inadvertent or accidental. In *Lamar v. Steele*,[35] the court explicitly applied both the plan and motive theories. Lamar, a prison inmate, brought a civil rights

federal income taxes for three years, evidence that defendant also failed to pay income taxes for years prior and subsequent to those charged was admissible to prove willfulness; uncharged acts "demonstrate[ed] a pattern, plan, and scheme indicating that [defendant's] failure to pay his taxes in [the charged years] was not the result of an accident, negligence, or inadvertence"); United States v. Matlock, 558 F.2d 1328, 1332 (8th Cir. 1977) (in prosecution for making false statements in credit card applications and failing to pay for purchases made with credit cards, evidence that when arrested, defendant possessed 61 credit cards in three different names and drivers' licenses in two different names was admissible to show intent; even though most of the credit cards and drivers' licenses were not part of the charged offenses, evidence suggested a scheme to defraud with the use of credit cards that may have been in existence when charged events took place).

[35] 693 F.2d 559 (5th Cir. 1982).

action against Steele, a building major, alleging that he had been denied access to the courts. To prove that Steele's actions were part of a scheme to deny inmates access to the courts, Lamar offered evidence that Steele had threatened to harm Lamar if he filed any more lawsuits and that Steele had given another inmate a knife and asked him to use it to kill another inmate whom Steele referred to as a "writ writer." On appeal of the judgment in favor of Lamar, the court held that the evidence was admissible to prove plan or motive because "Steele's desire to purge the prison of writ writing furnished a reason for the acts of which Lamar complained."[36] Ultimately, the evidence would be relevant both to establish that the alleged acts occurred and to show the intent of defendant in committing those acts.

Similarly, in *State v. Sparks*,[37] the court applied both the plan and motive theories. Sparks was convicted of the first-degree murder of his father and the negligent homicide of his sister. Sparks worked for his father's insurance agency. At one point, the two argued. The prosecution claimed the argument was over the father's claim that Sparks was embezzling money from the agency to support his extravagant lifestyle. The next day, Sparks fatally shot his father and accidentally shot his sister. The prosecution's theory was that the shooting of the father was in retaliation for the argument and part of a plan to take over the agency. To prove this theory, the prosecution offered testimony that Sparks had embezzled funds from the insurance agency. On appeal, the court held the evidence admissible on three grounds:

> That defendant and the victim had an ongoing feud was clearly relevant under the facts of this case. . . . Testimony that the feud may have involved defendant's embezzlement was, in turn, admissible as evidence completing the story of the crime. Where, as here, defendants planned to take over businesses from their victims, testimony of such plans was admissible as evidence of the defendants' motive . . . We see little to distinguish these cases from the case now before us.[38]

Thus, the evidence was admissible to complete the story of the crime, to show a plan to commit the crime, and to show a motive. Presumably, each of these theories would lead to the ultimate conclusion that defendant was the person who committed the crimes or that the shootings were not accidental.[39]

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[36] Id. at 561.
[37] 708 P.2d 732 (Ariz. 1985).
[38] Id. at 737 (citations omitted).
[39] The court did not specify which defense, if any, Sparks mounted.

As indicated previously, evidence tending to show a plan also can be justified on the *modus operandi* theory. In *Rodriguez-Estrada*,[40] for example, had defendant denied being the person who submitted the false expense claims, the virtually identical nature of the charged and uncharged acts would tend to identify him as the perpetrator. Proper application of the *modus operandi* theory, however, requires far greater similarity between the uncharged and charged acts than is required for the plan theory.[41] Courts sometimes fail to recognize this distinction.[42]

As with cases involving the sequential plan, "chain plan" cases are relatively uncontroversial. Whether offered ultimately to prove that an act occurred, the identity of the actor, or the actor's state of mind, the evidence does not violate the character rule. This does not mean no propensity inference is involved; as in the sequential plan cases, one must still infer that a person with a plan has some propensity to carry it out. However, that inference can be made without regard to the individual character of the person involved; it is a generalized inference about human behavior that the jury may rationally apply regardless of the individual.

As always, there is the possibility that the jury will bypass the plan inference and employ the forbidden character reasoning. Because the plan inference is highly intuitive, however, the risk usually will not be significant. Nevertheless, in some cases the risk of unfair prejudice will be sufficiently great, the probative value sufficiently slight, and the likelihood of the jury's ignoring or not comprehending sufficiently great, to justify a trial court's exclusion of the evidence.

§9.2.2 "Unlinked" Plans; Acts Committed Pursuant to a "Common Scheme"

Far more problematic than the linked plans previously discussed are so-called "unlinked" plans. As Mendez and Imwinkelried explain:

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[40] 877 F.2d 153 (1st Cir. 1989). *See supra* notes 31–34 and accompanying text.

[41] *See* 22 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure: Evidence §5244, at 501 (1978) (noting that *modus operandi* theory requires that the method be "quite distinctive and the similarities striking," whereas acts supporting plan theory "may be dissimilar and the technique quite banal").

[42] *See, e.g.*, id. (citing cases including United States v. Oliphant, 525 F.2d 505 (9th Cir. 1975) (approving admission of a "not uncommon" type of postal theft that was only relevant to identify defendant as a perpetrator); People v. Green, 194 Cal. Rptr. 128 (Ct. App. 1983) (believing plan theory requires great similarity between the charged and uncharged acts, the court strained to find nonexistent similarities; however, merely showing that the same victim was object of both the charged and uncharged conduct would have been sufficient under the plan theory)).

> Prosecutors relying on this variation attempt to prove some element of the charged offense by showing that the accused committed, within a fairly tight time frame, crimes similar to the one charged. The similarities between the charged and uncharged offenses are, however, insufficient to satisfy the test for the existence of a truly distinctive *modus operandi*.
>
> Moreover, the prosecutor is unable to produce any direct evidence that the accused committed the charged and uncharged offenses as part of a single, common plan. The only evidence available to the prosecution is that all the crimes were committed in roughly the same fashion.[43]

There might be some advantage to conceptualizing cases of this type as involving a "common scheme" rather than a "plan" because the latter connotes a series of acts done with a relatively specific goal or outcome in mind, while the former connotes a particular act done multiple times in a similar way. Whatever term is used, however, the idea is the same: evidence offered pursuant to this theory involves a far more general concept of "plan" than does evidence offered to show a "linked" plan.

Commentators have long criticized this application of the plan theory on the basis that its true effect is to invite a finding of guilt by character-based propensity rather than through the kinds of inferences that avoid the character ban. As one authority states, the plan theory

> is plausible when there is some other evidence of the plan or when the existence of the plan is the obvious inference from the other crime. However, if not carefully policed, this exception can serve to admit a series of crimes whose most obvious relationship is that they were all committed by the defendant and whose strongest tendency is to prove the defendant's character for crime rather than his planned course of conduct.[44]

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[43] Mendez & Imwinkelried, *supra* note 7, at 484 (footnotes omitted). *See also* Sweet v. Roy, 801 A.2d 694, 708 (Vt. 2002) (describing an unlinked plan as "a series of proximate, similar crimes which establish a plan to commit the series of crimes").

[44] 22 Wright & Graham, *supra* note 41, §5244, at 500. *See also* Jeffrey H. Contreras, Note, Evidence: Admissibility of Other Crimes to Establish a Common Scheme or Plan—*Hall v. State*, 37 Okla. L. Rev. 103 (1984) (discussing Oklahoma cases both admitting and rejecting uncharged misconduct evidence to prove "plan," and criticizing Oklahoma courts for failing to distinguish between the "plan" and "identity" (*modus operandi*) uses of uncharged misconduct evidence; the author also supports a narrow reading of "plan" that requires a "visible connection" between the charged and uncharged acts); Thomas Quigley, Note, Admissibility of Evidence Under Indiana's "Common Scheme or Plan" Exception, 53 Ind. L.J. 805, 811–815 (1978) (criticizing Indiana cases applying common scheme or plan theory to situations in which defendant has committed a series of crimes against a "class" of people, the author states that "[t]here is ultimately no difference between admitting evidence to show that a defendant had previously perpetrated crimes upon humanity, on the one hand, and admitting it to show that defendant was simply a person of bad character, on the other"; id. at 815); Stephen T. Strong, What Is a Plan? Judicial Expansion of the Plan Theory of Military

In the courts, the theory might once have been accepted by a majority of jurisdictions,[45] but overall, courts' reactions have been mixed for some time.[46] Today, while many courts continue to approve admission of

Rule of Evidence 404(b) in Sexual Misconduct Cases, Army Law., June 1992, at 13, 16 (under the unlinked plan theory, "the only logical link between the uncharged misconduct and the ultimate object of proof is the accused's apparent propensity to commit similar criminal acts"); Comment, Admissibility of Prior Criminal Acts as Substantive Evidence in Criminal Prosecution, 36 Tenn. L. Rev. 515, 521–522 (1969) (also endorsing a more narrow definition of common scheme or plan, and stating that "the inquiry should be to determine whether the present crime logically and naturally follows from the first rather than one following the other in a random fashion. In other words, the crime for which the defendant is on trial should have been intended or planned before the commission of the first crime."; id. at 522); Note, Evidence of Defendant's Other Crimes: Admissibility in Minnesota, 37 Minn. L. Rev. 608, 612 (1953); Brook. L. Rev. Note, *supra* note 7, at 101–105 (endorsing a narrow definition of common scheme or plan and stating that "in the true common scheme there is a final goal in the mind of the actor . . . and that all the crimes are committed toward the furtherance of that goal. Each crime brings the actor somewhat closer to the achievement of his desired end."; id. at 101–102); Ivon B. Blum, Comment, A Proposed Analytical Method for the Determination of the Admissibility of Evidence of Other Offenses in California, 7 UCLA L. Rev. 463, 472–473 (1960) (endorsing a narrow definition of scheme or design in which defendant has a final object in mind, and stating that if the scheme or design "does not include the specific act charged within its scope, then the inference that the defendant did the act charged as part of the consummation of the scheme or design is fallacious"; id. at 473).

[45] *See* Mendez & Imwinkelried, *supra* note 7, at 486 (stating that at one time, a majority of courts accepted the unlinked plan theory).

[46] *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901), one of the best known early twentieth century American cases to examine the admissibility of uncharged misconduct evidence, took a strong position in favor of limiting admissibility to linked plans:

> It sometimes happens that two or more crimes are committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all. To bring a case within this exception to the general rule which excludes proof of extraneous crimes, there must be evidence of system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, or they must be so related to each other as to show a common motive or intent running through both. . . . "Some connection between the crimes must be shown to have existed in fact and in the mind of the actor, uniting them for the accomplishment of a common purpose, before such evidence can be received."

Id. at 305–306, 61 N.E. at 299 (quoting H.C. Underhill, A Treatise on the Law of Criminal Evidence §88, at 110 (1898)). *See also* Shaffner v. Commonwealth, 72 Pa. 63 (1872) ("To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish; or it must be necessary to identify the person of the actor, by a connection which shows that he who committed the one must have done the other.").

evidence on this theory,[47] especially in cases involving sexual misconduct,[48] some have rejected it.[49]

It is easy to see that there is no clear line between evidence admissible under the linked plan and evidence offered under the "unlinked" rubric. A "plan" is an idea harbored in a person's mind, and evidence of its existence, absent the person's admission of a plan,[50] will always have to be circumstantial. Once that reality is understood, it is obvious that what constitutes a "plan" is subject to interpretation. Suppose, for example, that Defendant is charged with bank robbery, and the prosecution wishes to offer evidence that Defendant has committed several bank robberies in the same city in the recent past using a similar, but not distinctive, method.[51] Defendant denies involvement in the charged crime. The prosecution might wish to produce evidence of the other bank robberies committed by Defendant on the theory that all of the robberies are tied together by Defendant's plan to enrich herself by robbing banks. Indeed,

[47] *See, e.g.*, United States v. McGuire, 27 F.3d 457 (10th Cir. 1994), where defendant was found guilty of aiding and abetting bank robbery. Over defendant's objection, the trial court admitted evidence of seven other bank robberies to prove identity by means of *modus operandi* and "common scheme or plan." On appeal, the court addressed the latter theory:

> [I]n every instance McGuire looked to medium-sized Midwestern cities in order to find a small branch bank with few employees. Also, McGuire was looking for a bank that had easy access to an interstate in order to facilitate a get-away. McGuire further desired that the small bank with easy access to an interstate be located near the parking area of a shopping center in order to carry out the "vehicle switching" once the robbery was over.

Id. at 461. The court held that "all eight robberies had many common characteristics which would tend to show that the defendant was involved in the [charged] robbery and that the [charged] robbery was a part of a larger common scheme or plan." Id. There were many differences among the robberies, however, including the fact that they took place in different cities and involved various combinations of perpetrators.

[48] *See, e.g.*, State v. Conningford, 901 A.2d 623 (R.I. 2006) (in prosecution for molestation of a seven-year-old boy, the trial court did not abuse its discretion in admitting evidence that defendant previously molested two other young boys (one 8 and the other about 14 years old) to "show a common scheme, plan, or modus operandi to molest young boys"; there were many differences among the charged and uncharged acts, including the ages of the victims and the fact that the uncharged acts took place 7 and 11 years before the charged molestation). For discussion of the broad use of the "common scheme or plan" theory in child molestation cases, see *infra* §9.4.2.

[49] *See infra* §9.4.2.

[50] Even an admission is in fact circumstantial evidence of the person's state of mind. When a person says, "I am planning to rob a bunch of banks over the next year or so," the declaration is not the plan; it is merely a statement about it. To put it differently, one must still infer the existence of the plan from the statement about it.

[51] If the method were truly distinctive, evidence of the other robberies might be admissible on the *modus operandi* theory to identify defendant as the perpetrator.

it is likely that this is exactly what was going through Defendant's mind as she planned and executed each robbery; one would expect as much from bank robbers. Would this justification avoid the forbidden character inference? Compare the lines of reasoning, beginning with the plan justification:

——→ EVIDENCE: In the recent past, Defendant robbed several banks in the same city using a method similar to that used in the charged bank robbery.

——→ INFERENCE: Defendant has a plan to rob banks to enrich herself.

——→ CONCLUSION: Defendant robbed the bank on the charged occasion.

Now, the forbidden character justification:

——→ EVIDENCE: In the recent past, Defendant robbed several banks in the same city using a method similar to that used in the charged bank robbery.

——→ INFERENCE: Defendant is the kind of person who would seek to enrich herself by robbing banks.

——→ CONCLUSION: Defendant robbed the bank on the charged occasion.

If these chains of reasoning are different, the difference is extremely subtle and quite likely to be lost on a jury. Though it is true that the first chain does not specifically require an inference of Defendant's character, the idea that Defendant would have a plan to commit a particular type of crime to enrich herself, practically speaking, is no different from the idea that Defendant is the kind of person who would commit a particular kind of crime to enrich herself. Moreover, if the "plan" reasoning outlined above were to be permitted, it would apply to *any* type of civil or criminal case in which a person charged with committing a particular bad act has committed that type of act before, almost regardless of the similarities among the acts. Accepting the unlinked plan or common scheme theory as a route to admissibility of uncharged misconduct evidence therefore would effectively eviscerate the character ban whenever the individual has engaged in similar misconduct.[52]

[52] One does not need statistics to feel comfortable in the assumption that many criminals make careers out of committing particular types of crimes, and even of using similar methods in committing them. If it's not broken, why fix it?

The thing that saves the "linked" plan cases from those subject to this criticism is that the actor's goal is more specific and more directed than in the "unlinked" plan cases. In the former, one's goal is not simply to achieve wealth by robbing banks. The goal is more specific. One might, for example, rob a bank to obtain the money required to purchase equipment needed to commit the charged bank robbery. Or a person might rob a series of banks owned by a particular company against whom she harbors ill feelings. Or she might rob a series of banks that have identical security arrangements and safes (assuming these things differ among banks). When the goal is specific enough, the distinction between a true plan and a "plan" that in actuality amounts to no more than a general desire to engage in criminal behavior for personal gain or satisfaction becomes more apparent. Some cases will clearly fall on one side of the line or the other, while other cases are a matter of judgment. The principle, however, is the same: if the true effect of the evidence in the circumstances of the case is to invite an inference about the character of the actor, the court should exclude it if the court desires to uphold the character evidence prohibition.[53]

A brief look at prosecutions involving illegal drugs shows that courts often cross the line between permissible and impermissible uses of uncharged misconduct evidence. In *United States v. Guerrero*,[54] for example, a physician was charged with illegally dispensing controlled substances to an undercover agent who was a patient. To prove defendant's unlawful intent to dispense drugs not needed for the patient's medical care, the government offered the testimony of a former secretary-receptionist in defendant's office that he had instructed her to prepare false medical charts for nonexistent patients on which were recorded prescriptions actually issued to a single person; that defendant admitted to her on a few occasions that he was prescribing drugs to patients for illegitimate purposes such as to help a prostitute free herself from her pimp or because it was better for a drug addict to obtain drugs from him than to get them on the street; and that defendant had prescribed drugs in exchange for merchandise.[55] The trial court admitted this evidence, and although the appellate court reversed defendant's conviction on other grounds,[56] it

[53] *See* State v. Murrell, 507 A.2d 1033, 1038 (Conn. App. Ct. 1986) (warning that even when a court attempts to take certain factors into account, there is still a "danger . . . that evidence of prior misconduct, offered to prove a common scheme, will, in fact, serve 'merely to show an evil disposition on the part of the accused'" (quoting State v. Williams, 459 A.2d 510, 512 (1983))).

[54] 650 F.2d 728 (5th Cir. 1980).

[55] Id. at 737.

[56] These grounds included the improper admission of other uncharged misconduct evidence. Id. at 733–736.

held that the secretary-receptionist's testimony was properly admitted as relevant to

> unlawful intent in that it shows extrinsic acts, substantially similar to the charged offenses, which require the same state of mind as the offenses charged in the indictment. Further, it tends to show an ongoing practice of unlawful dispensation and is thus relevant to show a common scheme or plan. [The witness's] testimony contains evidence from which it could be inferred that these extrinsic acts were outside the usual course of professional practice for legitimate medical reasons.[57]

Though the *Guerrero* court did not explain further its "common scheme or plan" reasoning, that reasoning appears to have been as follows:

→ EVIDENCE: Guerrero engaged in several acts of prescribing controlled substances outside the usual course of medical treatment.

→ INFERENCE: Guerrero had a plan to provide drugs to patients and non-patients who did not need them for legitimate medical purposes.

→ INFERENCE: Guerrero's prescription on the charged occasion was in furtherance of this plan.

→ CONCLUSION: Guerrero intended to prescribe drugs unlawfully on the charged occasion.

Given that none of the uncharged acts revealed by the witness were sufficiently similar to the charged act to qualify under *modus operandi* reasoning,[58] it is extremely difficult to distinguish the above reasoning from the forbidden character reasoning:

→ EVIDENCE: Guerrero engaged in several acts of prescribing controlled substances outside the usual course of medical treatment.

→ INFERENCE: Guerrero is the type of person who would unlawfully provide drugs to persons who do not have a legitimate medical reason for obtaining them.

[57] Id. at 737.

[58] For discussion of *modus operandi* as a route to admissibility of uncharged misconduct evidence, see *infra* Chapter 13.

→ CONCLUSION: Guerrero intended unlawfully to prescribe the drugs on the charged occasion.

The idea in defendant's mind in *Guerrero* was not a scheme with an overall goal. The court did not suggest that defendant had a specific financial motive, or a specific ultimate outcome in mind that required commission of each of the charged and uncharged acts. Indeed, each instance related by the government witness could be understood as motivated by a different type of consideration. In one case, it appeared to be to help a prostitute free herself of dependence on a particular pimp; in another, it was to help ensure that an addict would obtain safer drugs than available on the street; in another, it may have been the desire to obtain certain merchandise for himself. To say that defendant's "common scheme or plan" was to use his medical license to dispense drugs other than for legitimate medical purposes and outside the usual course of medical treatment is to stretch the concept of plan well beyond the dividing line between character and non-character reasoning.[59] If the *Guerrero* facts create a plan inference sufficient to overcome the character ban, virtually any evidence of unlawful drug distribution would be admissible in a drug prosecution.[60]

Some courts have not adopted the broad reading of "common scheme or plan" illustrated by *Guerrero*. In *United States v. Lynn*,[61] for example, defendant was charged in connection with an alleged marijuana and hashish importation conspiracy. Defendant denied any involvement in the conspiracy, and most of the government's witnesses were cooperating co-conspirators who were already serving time for the crimes. The government offered evidence of defendant's earlier arrest and conviction for possession of marijuana with intent to distribute. The trial court admitted the evidence to prove either the existence of a common scheme, and thus defendant's participation in the conspiracy, or the defendant's intent.[62] On appeal, the court reversed defendant's conviction, applying a more stringent standard for the admission of uncharged misconduct evidence to prove common scheme or plan:

[59] *See also* 22 Wright & Graham, *supra* note 41, §5244 (characterizing *Guerrero* as involving improper admission of character evidence).

[60] *See also* United States v. Ricardo, 619 F.2d 1124, 1131 (5th Cir. 1980) (in prosecution for marijuana importation conspiracy in which defendants were apprehended in the Gulf of Mexico on a ship containing a large quantity of marijuana, evidence of convictions of certain defendants for previous drug smuggling through the Gulf of Mexico was admissible to prove a plan to smuggle the contraband at issue into the Gulf of Mexico for later importation into the United States).

[61] 856 F.2d 430 (1st Cir. 1988).

[62] Id. at 435.

> There is nothing to suggest that Lynn's previous offense "leads in a progression," as the district court contended, to his participation in the 1980–81 conspiracy. No evidence indicates a continuing or connected scheme of marijuana importation on the part of the defendant. The participants in both events were entirely different; indeed, it is entirely unclear if anyone besides the defendant was involved in the first transaction. . . . Moreover, it is hard to discern a common non—propensity thread connecting Lynn's sale of 100 pounds of marijuana to undercover agent Pucher and an international conspiracy to ship millions of dollars worth of marijuana from the Far East to the United States. Finally, the fact that the prior conviction concerned events that took place six years before the instant offense suggests even more strongly that the two acts were unrelated but for involvement with the same illicit substance. Given the dissimilarities between the two episodes, we cannot uphold the district court's finding that the prior crimes evidence was probative of a common plan or scheme.[63]

The *Guerrero* and *Lynn* courts fundamentally disagree about the unlinked plan or common scheme theory. One sanctions the use of a broad concept of "common scheme or plan" that arguably encompasses virtually any similar behavior. The other requires a distinct link between the charged and uncharged acts, and holds that in the absence of such linkage, admission of the uncharged offense invites the forbidden character reasoning.

Even though the more narrow interpretation of plan is more consistent with the prohibition against character evidence, most courts apply the common scheme or plan theory to cases in which there is no clear link between the charged and uncharged conduct. This is particularly true in sexual offense cases where defendant denies that the act at issue took place, as will be discussed in a later section.[64]

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[63] Id. *See also* United States v. Powell, 587 F.2d 443 (9th Cir. 1978) (in prosecution for conspiracy to possess marijuana with intent to distribute where defendant denied being the supplier of the marijuana, the trial court erred in admitting evidence of a prior conviction for possession of marijuana with intent to distribute; the government did not show that prior crime was connected with the charged crime, and the offenses were not sufficiently similar and distinctive to merit admission to prove defendant's participation).

[64] *See infra* §9.4.

§9.4 USE OF THE "PLAN" THEORY TO PROVE THAT THE ACT AT ISSUE OCCURRED

Evidence of uncharged misconduct may also be offered to prove the existence of a plan, which, in turn, tends to prove that a disputed act occurred. In some cases, the application of this theory is not controversial, while in others situations, its use is more problematic. In many of the reported cases, it is difficult to determine whether the uncharged misconduct evidence was offered to prove that the charged act occurred (*actus reus*) or that the defendant acted with the requisite mental state (*mens rea*). This is especially true in child sexual molestation and acquaintance rape cases. For that reason, those cases will be discussed together.

§9.4.1 Linked Plan Cases

Suppose Defendant is charged with kidnapping Victim, a member of a wealthy family, who disappeared on a specified date and only reappeared when family members paid a large ransom as instructed in a note allegedly from the kidnappers. Defendant claims that no kidnapping took place, and that Victim faked the kidnapping as a way to obtain money from her family.[1] If the case goes to trial, the only genuine issue will be the *actus reus* — whether a kidnapping took place. Suppose further that the prosecutor learns that on another occasion, Defendant kidnapped another member of Victim's family and released the person after the family paid a substantial ransom. From that evidence, it might be inferred that Defendant has a continuing plan to kidnap members of Victim's family for financial gain, and that Defendant carried out the plan on the charged occasion. The reasoning would be as follows:

——→ EVIDENCE: On another occasion, Defendant kidnapped a member of Victim's family and released the victim after the family paid a substantial ransom.

——→ INFERENCE: Defendant has a plan to obtain money from Victim's family by kidnapping family members and returning them after payment of ransom.

§9.4 [1] *Cf.* United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976).

——→ INFERENCE: Defendant used that plan on the charged occasion.

——→ CONCLUSION: The kidnapping (the *actus reus*) occurred.[2]

Although the same facts could give rise to alternative legitimate theories for admission of the uncharged misconduct evidence in the above hypothetical,[3] the plan theory is well suited to cases such as this. The reporters contain many examples of cases applying reasoning of the type outlined above.[4] The "plan" concept applied in these cases is narrow; rather than alleging a broad plan to engage in a particular type of criminal behavior, the theory suggests a specific kind of behavior committed in a relatively specific way against a defined class of victims (in the hypo-

[2] Note that similar reasoning could also be used to justify admission of evidence that Victim had, on another occasion, faked her own kidnapping as a means of obtaining money from her family. By the same logic outlined in the text, the evidence would tend to show a plan, which, in turn, would be relevant to whether a kidnapping took place on the charged occasion.

[3] For example, a court could justify admission of the evidence on the "motive" theory, reasoning that Defendant had a specific financial reason for carrying out a kidnapping, thus making it somewhat more likely that the charged act occurred. In addition, if the method Defendant used to commit the uncharged kidnapping was very distinctive, and the charged kidnapping, if it occurred at all, was carried out in the same manner, the evidence might be admissible on the *modus operandi* theory, even though that theory is normally employed to prove the identity of an actor rather than that the charged event occurred.

[4] *See, e.g.*, United States v. Hill, 898 F.2d 72, 75 (7th Cir. 1990) (in prosecution for conspiring to manufacture marijuana where defendant denied he was involved in the activity, evidence that defendant had previously possessed marijuana seeds was admissible to prove a plan to cultivate marijuana); Lamar v. Steele, 693 F.2d 559 (5th Cir. 1982) (in civil rights action by a "writ writer" (an inmate who frequently petitions the courts for relief from claimed unlawful conditions and other violations) against a building major at the prison, alleging that the major denied him access to the courts, evidence that the building major had given another inmate a knife and asked him to kill the another "writ writer" was admissible to prove plan or motive; the evidence tended to show a plan on defendant's behalf to deny inmates access to the courts, and thus was relevant to prove that defendant denied plaintiff access); United States v. Weidman, 572 F.2d 1199, 1202–1203 (7th Cir. 1978) (defendants were charged with mail fraud, perjury, and conspiracy arising from an alleged scheme to defraud a construction company and a steel company by obtaining money using false work orders, invoices, and purchase orders and by inflating labor and equipment costs; evidence of earlier schemes going back many years and closely resembling the charged scheme was admissible to prove a preexisting design or scheme and thus that the charged acts occurred); State v. Scott, 175 P.2d 1016, 1023 (Utah 1947) (in prosecution for obtaining money by running a confidence game, evidence of defendants' prior participation in similar acts involving the same complex method was admissible to prove defendants were acquainted with each other and that their actions constituted a scheme to obtain money).

thetical just discussed,Victim's family). Though the reasoning in these cases requires a propensity inference (that a person who has a plan to act in a certain way is more likely to act consistently with that plan than is one without a plan), that inference is not based on character. As a result, admission of the evidence does not violate the character rule.

§9.4.2 Unlinked Plan Cases: Two Kinds of Reasoning

When the case does not involve a preconceived plan that encompasses all of the acts, courts have used two kinds of reasoning to justify admissibility. Often, the court will apply the concept of a "common scheme or plan." The basic justification for admission of the evidence is that there is a meaningful distinction between that kind of reasoning and the forbidden character reasoning, and that the evidence should be admitted unless its prejudicial potential overwhelms its probative value. As will be shown, this concept is difficult to support. The second type of reasoning is based on the doctrine of chances, which applies to a more narrow group of cases, but, if the intuitive connection among the acts is strong, it is easier to justify than the "common scheme or plan" theory. The sections to follow consider both types of logic, often in the context of child molestation and acquaintance rape cases, where *actus reus* or *mens rea* is often the major contested issue. Such cases rarely involve linked plans.

a. "Common Scheme or Plan" Reasoning

The concept of a "common scheme or plan" already has been discussed in connection with cases in which identity is the primary contested issue.[5] In child sexual molestation cases, defendant commonly contests neither identity nor *mens rea*; defendant effectively concedes that if the charged acts occurred, they were committed with criminal intent. This makes *actus reus* the sole significant issue in the case. Similarly, in most prosecutions for acquaintance rape, there is no issue of identity. Generally, the defense is based on a claim of consent. That claim, in turn, can be characterized as an attack on either the *mens rea* or *actus reus* element, depending on the fact pattern. If the basic factual stories of prosecution and defense are the same, the primary issue is best framed in terms of *mens rea*. If the parties agree that the interaction began consensually but disagree about what happened later (for example, whether defendant

[5] *See supra* §9.3.

made a threat or used a weapon or physical force), the contested issue probably is best stated as one of *actus reus* (whether the criminal act occurred). In practice, however, it makes little difference; if consent is raised, the admissibility of uncharged misconduct evidence to prove lack of consent is likely to be analyzed the same whichever ultimate fact is deemed at issue. For that reason, it is sensible to treat all cases involving "common scheme or plan" at the same time, even though the ultimate issue the evidence is offered to prove can be either *actus reus* or *mens rea*.

There are fundamentally different views about the applicability of the "common scheme or plan" concept to child molestation and acquaintance rape cases. This controversy is illustrated by the decisions of the California Supreme Court in *People v. Tassell*[6] and *People v. Ewoldt*,[7] the first a rape prosecution and the second a child molestation case. In *Tassell*, the prosecution produced testimony that Tassell asked the victim, a waitress, for a ride home, but when they arrived at his destination, he attempted to kiss her. When she refused his advances, Tassell assaulted and raped her. Defendant admitted having sex with the victim but claimed she consented. To prove lack of consent, the prosecution offered the testimony of two witnesses, both of whom testified that Tassell raped them. One was a barmaid who claimed Tassell followed her at the end of her shift and raped her after she resisted his attempt to kiss her. The other witness testified that Tassell gave her a ride, attempted to kiss her, and when she resisted, raped her.[8] The trial court admitted the testimony of both witnesses on the theory that they tended to prove defendant had a plan to rape women that was manifested on the charged occasion. Defendant was convicted, and the California Supreme Court reversed, holding that admission of the evidence violated the character rule. The court held that proper use of the plan theory requires proof that the defendant had "a 'single conception or plot' of which the charged and uncharged crimes are individual manifestations."[9] The prosecution must demonstrate that defendant had a "grand design," a concept the court illustrated mostly by examples of linked plan cases that fall into the chain pattern.[10]

If *Tassell* presents a restrictive linked plan view of the common scheme or plan theory, *Ewoldt*, the case that overruled it, embraced a more expansive view of "plan" theory. Ewoldt was charged with sexually molesting his stepdaughter Jennifer; Ewoldt claimed the acts did not take place, a common defense in child molestation cases. To prove that they

[6] 679 P.2d 1 (Cal. 1984).
[7] 867 P.2d 757 (Cal. 1994).
[8] 679 P.2d at 3.
[9] Id. at 5 (quoting People v. Covert, 57 Cal. Rptr. 220, 223 (Ct. App. 1967)).
[10] Id. at 5 n.4. For discussion of the "chain pattern," see *supra* §9.2.1.

did, the prosecution was permitted to call the victim's sister to testify that Ewoldt committed similar acts with her.[11] The California Supreme Court held that the trial court did not err. Disapproving its own ruling in *Tassell* barely ten years earlier that the charged and uncharged offenses must be part of a single, continuing plot, the court held that "evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan."[12] As to what constitutes sufficient similarity, the court attempted to identify a middle ground between evidence offered to prove intent (which requires little similarity) and evidence offered to prove identity, by which the court meant the *modus operandi*.[13] The court explained that

> in establishing a common design or plan, evidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." . . . [T]he common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual.[14]

Thus, under the rule in *Ewoldt*, truly spontaneous acts, though similar, are insufficient to establish a legitimate plan, but the acts need not meet *Tassell*'s strict test of "grand design" — the existence of an ultimate goal.

Courts have been particularly receptive to the permissive approach to plan evidence in sexual offense prosecutions; despite broad-based academic criticism of unlinked plan theories,[15] the case reporters contain

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[11] *Ewoldt*, 867 P.2d at 760.

[12] Id. at 769.

[13] Id. at 770.

[14] Id. (quoting 2 John H. Wigmore, Evidence in Trials at Common Law §304, at 249 (James H. Chadbourn ed. 1979)).

[15] *See, e.g.*, 1 Edward J. Imwinkelried, Uncharged Misconduct Evidence §3:24 (1998) (calling the unlinked plan theory "spurious"); Jeannie Mayre Mar, Note & Comment, Washington's Expansion of the "Plan" Exception After State v. Lough, 71 Wash. L. Rev. 845 (1996) (criticizing the broad plan theory); Heather E. Marsden, Note, State v. Hopkins: The Stripping of Rhode Island Rule of Evidence 404(b) Protections from Accused Sexual Offenders, 3 Roger Williams U. L. Rev. 333 (1998) (arguing that adoption of broad "plan" and "lewd disposition" uses of uncharged misconduct evidence eviscerates protections afforded criminal defendants); Major Stephen T. Strong, What Is a Plan? Judicial Expansion of the Plan Theory of Military Rule of Evidence 404(b) in Sexual Misconduct Cases, Army Law., June 1992, at 13, 14 (characterizing the expanded plan theory in sexual offense cases as "nothing more than a pretense for admitting evidence to show criminal propensity"). *But see* David P. Bryden & Roger C. Park, Other Crimes Evidence in Sex Offense Cases, 78 Minn. L. Rev. 529,

countless child sexual molestation prosecutions adopting the "common scheme or plan" theory,[16] and also contain many acquaintance rape

547–548 (1994) (approving broader plan theory in limited category of sexual offense cases).

[16] *See, e.g.*, United States v. Munoz, 32 M.J. 359 (C.M.A. 1991) (in prosecution for committing indecent acts on his daughter, evidence that defendant had committed similar acts on the alleged victim's sister was admissible to prove plan and thus that the charged acts occurred); United States v. Mann, 26 M.J. 1, 5 (C.M.A. 1988) (accepting theory but holding that evidence should have been excluded for reasons of unfair prejudice, though the error was harmless); People v. Dancer, 53 Cal. Rptr. 2d 282, 289–291 (Ct. App. 1996), disapproved on other grounds in People v. Hammon, 938 P.2d 986, 989–990 (Cal. 1997) (in prosecution for lewd and lascivious conduct upon a child, evidence of a prior similar act on another minor was admissible to prove design or plan, and thus to show that the charged acts occurred, even though the prior incident occurred 11 years earlier; the court stressed the similarities between the charged and uncharged acts); People v. Montoya, 703 P.2d 606, 608 (Colo. Ct. App. 1985) (in prosecution for sexual assault on his stepdaughter, evidence that defendant had committed a similar act with another victim was admissible where one distinctive feature was common to both the charged and uncharged behavior); State v. Moore, 819 P.2d 1143 (Idaho 1991) (in prosecution for lewd conduct with his granddaughter, evidence that defendant had committed similar misconduct with his daughter and stepdaughter was admissible to prove common scheme or plan, thus tending to prove that the acts occurred and that defendant possessed the required specific intent; the court treated all acts as part of a "continuing series of alleged similar sexual encounters directed at the young female children living within his household" even though the uncharged acts took place 11 and 3 years before the charged acts); State v. Smith, 694 S.W.2d 901 (Mo. Ct. App. 1985) (in trial for sexual assault of a male foster child entrusted to his care, evidence that defendant had committed sexual misconduct with other boys entrusted to his care was admissible to establish *modus operandi* and a common scheme or plan to sexually molest young boys entrusted to his care; the similarity of the charged and uncharged acts was crucial, however, as Missouri courts tend to exclude such evidence in absence of such a showing; *see* cases discussed in State v. Brooks, 810 S.W.2d 627, 634 (Mo. Ct. App. 1991)); State v. Spencer, 366 N.W.2d 656, 659–660 (Minn. 1985) (in prosecution for sexual abuse of his daughter, evidence that defendant had committed similar acts with another daughter and a neighbor girl was admissible to prove that charged acts occurred); State v. Keithley, 358 N.W.2d 761 (Neb. 1984) (in prosecution for sexual assault of his minor daughter, evidence that defendant had sexually abused the alleged victim's sister was admissible to prove "intent, motive, plan, and method of operation"; the evidence corroborated victim's testimony and thus presumably proved that acts occurred); Daly v. State, 665 P.2d 798, 801 (Nev. 1983) (in prosecution for sexual assault of defendant's 14-year-old stepdaughter, the trial court did not err in admitting evidence of defendant's uncharged sexual abuse of the same victim where defendant claimed the acts did not occur but that the stepdaughter made false charges in order to free herself of defendant's disciplinarian child-rearing methods and the requirement that the stepdaughter do household chores; the evidence was admissible to prove "common scheme or plan" and thus that the charged conduct occurred); State v. Sills, 317 S.E.2d 379, 384 (N.C. 1984) (in prosecution for rape of defendant's seven-year-old stepdaughter, evidence that defendant had raped the same child on a prior occasion was admissible to establish a "common plan or scheme"; the court noted that it had been "'very liberal in admitting evidence of similar sex crimes.' . . . We have held

cases admitting uncharged misconduct evidence on the same basis.[17] It has been asserted that cases such as *Ewoldt* represent the "dominant trend" among the states in dealing with sex offense cases.[18] Perhaps

admissible in particular evidence showing prior similar sex crimes committed by the defendant against the same victim."; id. (quoting State v. Effler, 309 S.E.2d 203 (N.C. 1983))); Hancock v. State, 664 P.2d 1039, 1041 (Okla. Ct. App. 1985) (in prosecution for rape of defendant's 13-year-old stepdaughter, evidence of defendant's prior sexual activity with the same child was admissible to prove "identity or common scheme or plan" and thus, most likely, to show both identity and that the charged conduct occurred); State v. Hopkins, 698 A.2d 183 (R.I. 1997) (in prosecution of defendant for five counts of sexual molestation of his minor stepson, evidence that defendant sexually abused two other children of about the same age was properly admitted to prove, inter alia, that the charged acts were "part of a common scheme or plan by Hopkins to molest young boys subject to his control and influence" and thus to show that the charged acts occurred); State v. Ondricek, 535 N.W.2d 872, 874–878 (S.D. 1995) (in prosecution for rape and sexual contact with defendant's niece, evidence of prior sexual contact with and rape of other nieces was admissible to prove, inter alia, common scheme or plan and thus that the charged acts occurred; the fact that uncharged acts took place approximately 20 years before the charged crime did not make them too remote).

[17] *See, e.g.*, State v. Ashelman, 671 P.2d 901, 905 (Ariz. 1983) (in prosecution for rape of real estate saleswomen where defendant claimed consent, evidence of two subsequent rapes of real estate saleswomen was admissible to prove common plan or scheme); State v. Willis, 370 N.W.2d 193, 198 (S.D. 1985) (in prosecution for rape of a mentally retarded inmate of the institution in which defendant worked, evidence that defendant raped another inmate was admissible to show common plan); State v. Lough, 889 P.2d 487 (Wash. 1995) (in prosecution of a paramedic for raping the victim after surreptitiously giving her drugs to make her unconscious, evidence that defendant had done this to four other women was admissible to prove design to use his special expertise with drugs to render women unable to refuse consent to sexual intercourse); State v. Reuer, 396 N.W.2d 668, 671 (Minn. Ct. App. 1986) (in prosecution for, inter alia, indecent conduct with a woman on a date, the trial court did not err in admitting evidence of a similar attack on another victim to show a plan worked out in advance and thus lack of consent; the trial court found the similarities between charged and uncharged acts to be "striking").

[18] 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, 409 (1996) (asserting that *Ewoldt* is "unquestionably in line with the dominant trend," and citing, inter alia, State v. Lough, 889 P.2d 487, 490 (Wash. 1995), an acquaintance rape case in which the court held broadly that in such cases, "a common plan or scheme may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances"). Referring generally to the admissibility of similar uncharged misconduct in sexual offense cases to prove plan or scheme, one commentator wrote: "It is generally agreed that in the proper factual situation evidence that the accused has previously committed a similar but separate and independent crime is admissible for the purpose of establishing a common plan or scheme of the accused." George L. Blum, Annotation, Admissibility, in Rape Case, of Evidence That Accused Raped or Attempted to Rape Person Other Than Prosecutrix — Prior Offenses, 86 A.L.R.5th 59 (2001). The author makes the same representation about admissibility when the uncharged misconduct takes place after the charged crime (George L. Blum, Admissibility, in Rape Case, of Evidence That

this is understandable. In such cases, physical evidence is often lacking, there are often no witnesses other than the defendant and the alleged victim,[19] and in many situations (particularly in child molestation prosecutions), defendant attacks the alleged victim's credibility.[20] Given the difficulties in achieving successful prosecution of sex offenders, it is not surprising that courts have shown leniency toward admission of uncharged misconduct evidence,[21] and the

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Accused Raped or Attempted to Rape Person Other Than Prosecutrix—Subsequent Offenses, 87 A.L.R.5th 181 (2001)) and in cases in which it is not specified whether the uncharged misconduct took place before or after the charged conduct (George L. Blum, Admissibility, in Rape Case, of Evidence That Accused Raped or Attempted to Rape Person Other Than Prosecutrix—Offenses Unspecified as to Time, 88 A.L.R.5th 429 (2001)).

[19] *See* People v. Covert, 57 Cal. Rptr. 220, 224 (Ct. App. 1967) ("The offense almost always occurs in private. The only direct witnesses are the prosecuting witness and the defendant.").

[20] *See* State v. Moore, 819 P.2d 1143, 1145 (Idaho 1991) ("Corroborative evidence in sex crime cases involving youthful victims is often times necessary to establishing the credibility of a young child. Too often the determination of the case rests strictly upon establishing that the victim's testimony is more credible than that of the alleged perpetrator."); Elizabeth Kessler, Pattern of Sexual Conduct Evidence and Present Consent: Limiting the Admissibility of Sexual History Evidence in Rape Prosecutions, 14 Women's Rts. L. Rev. 79, 79 (1992) ("In the majority of cases, no third party witnesses or other direct evidence will be available to corroborate the woman's story. Most cases turn on the all too common and frustrating theme of his word against hers."); Strong, *supra* note 15, at 17 ("Compelling facts, problems of proof, and confidence in the reliability of prior sexual offense evidence have led to widespread judicial misuse of uncharged misconduct evidence in sexual misconduct cases.").

[21] This leniency is also evident in the existence of rules designed specifically to permit the introduction of evidence of a defendant's other similar misconduct in sex crime cases. For example, a number of jurisdictions have traditionally carved out a separate admissibility category carrying various labels such as "depraved sexual instinct" and "lustful disposition." According to this theory, the uncharged misconduct shows that the person has a tendency to commit this type of crime, and that the evidence does not violate the character rule. *See, e.g.*, David J. Kalovanides, Note, The Depraved Sexual Instinct Theory: An Example of the Propensity for Aberrant Application of Federal Rule of Evidence 404(b), 25 Loy. L.A. L. Rev. 1297 (1992) (discussing numerous cases and sharply criticizing the view that evidence of uncharged misconduct revealing a "depraved sexual instinct" does not violate the character rule). The current edition of McCormick's handbook states that some courts admit evidence of other crimes "[t]o show a passion or propensity for unusual and abnormal sexual relations." McCormick on Evidence §190 (Kenneth S. Broun ed., 6th ed. 2006). Imwinkelried notes that many courts did not strictly apply the requirements of the uncharged misconduct rule in sex offense cases, adding:

> [T]here was a discernible distinction between the standards for admitting uncharged misconduct in sex and nonsex offense cases. The courts were routinely straining and distorting the plan doctrine to rationalize the admission of evidence of the defendant's uncharged sexual misconduct. In some jurisdictions, intellec-

cases admitting uncharged misconduct evidence on the same basis.[17] It has been asserted that cases such as *Ewoldt* represent the "dominant trend" among the states in dealing with sex offense cases.[18] Perhaps

admissible in particular evidence showing prior similar sex crimes committed by the defendant against the same victim."; id. (quoting State v. Effler, 309 S.E.2d 203 (N.C. 1983))); Hancock v. State, 664 P.2d 1039, 1041 (Okla. Ct. App. 1985) (in prosecution for rape of defendant's 13-year-old stepdaughter, evidence of defendant's prior sexual activity with the same child was admissible to prove "identity or common scheme or plan" and thus, most likely, to show both identity and that the charged conduct occurred); State v. Hopkins, 698 A.2d 183 (R.I. 1997) (in prosecution of defendant for five counts of sexual molestation of his minor stepson, evidence that defendant sexually abused two other children of about the same age was properly admitted to prove, inter alia, that the charged acts were "part of a common scheme or plan by Hopkins to molest young boys subject to his control and influence" and thus to show that the charged acts occurred); State v. Ondricek, 535 N.W.2d 872, 874–878 (S.D. 1995) (in prosecution for rape and sexual contact with defendant's niece, evidence of prior sexual contact with and rape of other nieces was admissible to prove, inter alia, common scheme or plan and thus that the charged acts occurred; the fact that uncharged acts took place approximately 20 years before the charged crime did not make them too remote).

[17] *See, e.g.*, State v. Ashelman, 671 P.2d 901, 905 (Ariz. 1983) (in prosecution for rape of real estate saleswomen where defendant claimed consent, evidence of two subsequent rapes of real estate saleswomen was admissible to prove common plan or scheme); State v. Willis, 370 N.W.2d 193, 198 (S.D. 1985) (in prosecution for rape of a mentally retarded inmate of the institution in which defendant worked, evidence that defendant raped another inmate was admissible to show common plan); State v. Lough, 889 P.2d 487 (Wash. 1995) (in prosecution of a paramedic for raping the victim after surreptitiously giving her drugs to make her unconscious, evidence that defendant had done this to four other women was admissible to prove design to use his special expertise with drugs to render women unable to refuse consent to sexual intercourse); State v. Reuer, 396 N.W.2d 668, 671 (Minn. Ct. App. 1986) (in prosecution for, inter alia, indecent conduct with a woman on a date, the trial court did not err in admitting evidence of a similar attack on another victim to show a plan worked out in advance and thus lack of consent; the trial court found the similarities between charged and uncharged acts to be "striking").

[18] 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, 409 (1996) (asserting that *Ewoldt* is "unquestionably in line with the dominant trend," and citing, inter alia, State v. Lough, 889 P.2d 487, 490 (Wash. 1995), an acquaintance rape case in which the court held broadly that in such cases, "a common plan or scheme may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances"). Referring generally to the admissibility of similar uncharged misconduct in sexual offense cases to prove plan or scheme, one commentator wrote: "It is generally agreed that in the proper factual situation evidence that the accused has previously committed a similar but separate and independent crime is admissible for the purpose of establishing a common plan or scheme of the accused." George L. Blum, Annotation, Admissibility, in Rape Case, of Evidence That Accused Raped or Attempted to Rape Person Other Than Prosecutrix—Prior Offenses, 86 A.L.R.5th 59 (2001). The author makes the same representation about admissibility when the uncharged misconduct takes place after the charged crime (George L. Blum, Admissibility, in Rape Case, of Evidence That

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"common scheme or plan" theory appears to be the prosecutor's weapon of choice.[22]

Even given the particular need for uncharged misconduct evidence in sex crime cases, it is important to examine the nature of the theory of "common scheme or plan" adopted in these cases as well as other types of

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tual honesty triumphed, and the courts eventually acknowledged that they were fashioning a special exception to the norm prohibiting the use of the defendant's disposition as circumstantial proof of conduct. However, while willing to announce the existence of a special exception, the courts attempted to limit the scope of the exception. Thus, the courts usually declared that the exception was restricted to the defendant's disposition to aberrant, abnormal, degenerate, depraved, deviant, perverted, psychopathic, rare, unusual, or unnatural sexual conduct. Under this exception, the courts admitted evidence of homosexual acts, incest, child molestation, anal intercourse, and sodomy but excluded evidence of "normal" sexual misconduct such as heterosexual rape.

1 Imwinkelried, *supra* note 15, §4:14 (1999) (footnotes omitted). *See also* Kassandra M. Bentley, Case Note, Lost or Just Bewildered?: The Exceptions to Rule 404(b), the Pedophile Exception in *Hamm v. State*, and the Perverson of the Independent Relevance Standard in *Davis v. State*, 59 Ark. L. Rev. 917 (2007) (discussing Arkansas cases applying the "depraved sexual instinct" theory in pedophile prosecutions). Some states that had adopted this concept later abandoned it. *See, e.g.*, Lannan v. State, 600 N.E.2d 1334 (Ind. 1992) (invalidating Indiana's version of the theory after stating that it represented "what might be labeled the 'rationale behind the rationale,' the desire to make easier the prosecution of child molesters, who prey on tragically vulnerable victims in secluded settings"; id. at 1337).

In 1994, the Federal Rules of Evidence were amended by the addition of Rules 413–415, which simply make other acts of sexual assault and child molestation admissible in prosecutions and civil cases for conduct of those types. Some jurisdictions have adopted rules that achieve most or all of the objectives of the new federal rules. *See, e.g.*, Cal. Evid. Code §1108 (West 1999).

[22] *See* Strong, *supra* note 15, at 17 (noting that in cases of familial child molestation where defendant denies that the acts occurred, uncharged misconduct will not be admissible to prove identity, intent, motive, or opportunity because these matters are not disputed, and that "[j]udges often find that skirting the propensity evidence prohibition by labelling a pattern or course of conduct a 'plan' is much easier than overcoming the more obvious relevance problems that using other theories would entail"); Mar Note, *supra* note 15, at 853–854 (noting that in rape prosecution, evidence of other similar rapes would not have been admissible under other theories). Another author points to a different rationale for a more lenient rule in sex crime cases. Jeffrey H. Contreras, Note, Evidence: Admissibility of Other Crimes to Establish a Common Scheme or Plan — Hall v. State, 37 Okla. L. Rev. 102, 107 (1984) (noting the tendency of Oklahoma courts to admit uncharged misconduct evidence in sex crime cases, often "under the guise of the common scheme or plan premise," and suggesting that the reason for such treatment "is the theory that sex offenders are more likely to repeat their crimes, and therefore evidence of similar sex-related offenses is more probative"). The author discusses, often critically, a number of Oklahoma cases employing this rationale. Id. at 107–111.

cases approving admissibility on the same basis. To return to the facts of *Ewoldt*, evidence that Ewoldt had sexually molested the alleged victim's sister was admissible on the following logic:

——→ EVIDENCE: Ewoldt sexually assaulted the alleged victim's sister.
——→ INFERENCE: Ewoldt had a plan to commit sexual assaults on his stepdaughters.
——→ CONCLUSION: The charged sexual assaults took place.

As noted previously in the description of unlinked plans,[23] this reasoning, while logically valid, is not meaningfully different from character-based reasoning. In *Ewoldt*, character-based reasoning would proceed as follows:

——→ EVIDENCE: Ewoldt sexually assaulted the alleged victim's sister.
——→ INFERENCE: Ewoldt is the type of person who would commit sexual assaults on minors.
——→ CONCLUSION: The charged sexual assaults took place.

Although the "plan" chain described above does not refer directly to the defendant's character, the generalizations supporting the leap from the uncharged molestation to the intermediate inference ("plan" in one case, character in the other) are extremely difficult to distinguish. One might state the generalization in the "plan" chain as follows: "A person who has committed a sexual assault on one stepdaughter is more likely to have a plan to assault another stepdaughter than is a person who does not have such a plan." In the character-propensity chain, the generalization might be: "A person who has committed a sexual assault on a stepdaughter has a bad character that makes him more likely to assault another stepdaughter than a person who does not have a bad character." These generalizations *sound* different, but in reality can be reduced to the same underlying proposition: there is something about a person who has done this sort of thing before that would make him do it again. True, the "something" in the "plan" case is not necessarily a matter of internal character, but the difference is very subtle.[24]

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[23] *See supra* §9.2.2.

[24] One commentator asserts, probably correctly, that the logic involved in *Ewoldt*'s plan theory is a form of character reasoning:

> To qualify as plan evidence, the proof must derive its probative value from some source other than character.
>
> One common understanding of the concept of "plan" seems to satisfy this requirement. The existence of "a prior mental resolve" or "a conscious commit-

Even if it is possible to distinguish between the two lines of reasoning in theory, there is little reason to support a belief that the members of the jury will understand or follow an instruction limiting the evidence to its "proper" purpose.[25] More likely, the prejudice caused by the evidence will overwhelm its probative value. Compare this situation to one in which the charged and uncharged acts are truly linked by a specific, common plan or goal, contrived in advance of any of the acts, of which all are a part. Suppose, for example, that in *Ewoldt*, the prosecution's factual theory was that defendant harbored enmity toward the stepdaughters' biological father, or that he desired to exact revenge against the children for a specifically perceived wrong they committed against him, or that he wished to frighten and intimidate the stepdaughters to prevent them from taking specific actions against him or revealing something he wanted to keep secret. In each of these situations, a juror could comprehend a link between the charged and uncharged acts that makes the inference of a "plan" quite obvious and distinct from character-based reasoning. There is always some danger that the jurors will employ the forbidden reasoning, but the trial judge can assess that risk on a case-by-case basis. This type of case is not common, however, meaning that most involve serial molestation or acquaintance rape. To pretend that the general similarity of the charged and uncharged crimes justifies use of a plan theory as a legitimate, non-character route to admissibility is to ignore the closeness of the theory to that forbidden by the rules and invite the trial court to admit the evidence without conducting the probing examination of its probative value and prejudicial impact that fairness and justice demand.[26]

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ment" to a course of conduct enables us to make predictions about the actor's future conduct or to determine what occurred in the past without knowing anything about the actor's internal disposition. . . .

However, . . . the *Ewoldt* court expressly rejected any requirement that various crimes be shown to comprise parts of a single conception or plot to be admitted as plan evidence. Instead, the court authorized a finding of the existence of a plan based solely on evidence of the defendant's commission of a series of similar, but otherwise unconnected crimes.

Cammack, *supra* note 18, at 371–372.

[25] *Cf.* Miguel A. Mendez & Edward J. Imwinkelried, *People v. Ewoldt*: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct, 28 Loy. L.A. L. Rev. 473, 501 (1995) ("The inference that the accused committed the charged and uncharged offenses as part of one plan is so weak as to be unacceptably speculative.").

[26] Though the courts appear to place a great deal of emphasis on demonstrating similarity of the charged and uncharged events, they do not necessarily require much proximity in time. *See, e.g.*, State v. Ondricek, 535 N.W.2d 872, 877 (S.D. 1995) (in prosecution for rape and unlawful sexual contact with a minor, evidence of other sexual assaults on others was admissible to prove, inter alia, common scheme and thus that the

Thus, the plan theory as applied to unlinked acts of the same general nature is deeply flawed because of the difficulty of distinguishing its reasoning from the forbidden character logic. Indeed, as Cammack points out, *Ewoldt*'s reasoning is "entirely circular" because "[a]cts are sufficiently similar to support an inference that they comprise a common plan if their 'common features . . . indicate the existence of a plan rather than a series of spontaneous acts.'"[27] In other words, common features prove a plan when they prove a plan.[28] Similarity alone is not the key to a legitimate admissibility theory based on the existence of a plan. Cammack explains:

> The defect in the court's "plan-to-commit-a-series-of-similar-crimes rule" is not in its endorsement of plan as a non-character theory of relevance, but in the premise that commission of a series of similar but non-distinctive crimes proves that they were carried out pursuant to an antecedent plan. Admittedly, evidence that two or more crimes have been committed in a similar manner is relevant evidence that the perpetrator had a plan to commit those crimes. But evidence of uncharged misconduct is admissible under the plan theory only if the existence of a plan that includes the charged and uncharged acts has been proven by a preponderance of the evidence. While it is reasonable to infer a plan from several similar crimes, it is equally, if not more, reasonable to infer that each individual crime was "the result of an impulse born of the moment." Moreover, as Professors Mendez and Imwinkelried point out, an enterprising prosecutor will almost always be able to come up with similarities in the method or circumstances of the charged and uncharged crimes.[29]

Ewoldt and other courts therefore endorse admissibility of uncharged misconduct evidence upon an exceedingly weak inference of a true plan. As will be discussed shortly,[30] a different type of reasoning, based on the doctrine of chances, provides stronger support for admission of the un-

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charged acts occurred, even though the uncharged acts took place approximately 20 years before the charged crime; court explained that given the nature of offense and understandable delays in reporting, the passage of 20 years would not bar admission).

[27] Cammack, *supra* note 18, at 374 (quoting *Ewoldt*, 867 P.2d at 770).

[28] Id. at 375.

[29] Id. at 374–375 (quoting Edward J. Imwinkelried, The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Evidence Doctrine, 50 Mo. L. Rev. 1, 12 (1985) (quoting State v. Buxton, 22 S.W.2d 635, 637 (Mo. 1929); and citing Mendez & Imwinkelried, *supra* note 25, at 501)). *See also* Strong, *supra* note 15, at 16 (stating that courts have improperly relied on similarity alone to justify admission of uncharged misconduct evidence on a plan theory, "ignoring the theory's primary requirement that the accused must have committed the charged and the uncharged misconduct to further a common plan").

[30] *See infra* notes 44–64 and accompanying text.

charged misconduct evidence, but that theory does not rescue the results in many of the unlinked plan cases.

Some courts have resisted adoption of too broad a definition of "plan" in sexual crimes prosecutions, sometimes holding that the evidence must be excluded if there was a significant lapse of time between the uncharged and charged events.[31] Some have taken a more narrow view of the plan theory in other types of cases as well.[32] In addition, even in courts that allow the use of unlinked plans to prove that the charged act

[31] For example, Vermont courts have stated repeatedly that Vermont has not adopted special rules for admission of uncharged misconduct evidence in sexual misconduct cases, and they have applied the common scheme or plan concept conservatively. *See, e.g.*, State v. Winter, 648 A.2d 624 (Vt. 1994) (in prosecution for sexual assault, evidence that defendant sexually assaulted his children's 17-year-old babysitter on numerous occasions four years earlier was not admissible to prove either motive or common scheme or plan; the evidence is only admissible on a plan theory if the prior acts show a clear inference of the existence of a plan, which in turn requires showing both similarity among acts and proximity in time; in this case, the passage of four years between the charged and uncharged acts required exclusion); State v. Hurley, 552 A.2d 382, 384–385 (Vt. 1988) (similar; uncharged misconduct occurred 10 and 12 years before charged acts).

In North Carolina, even though the courts have adopted a "very liberal" approach to the admissibility of uncharged misconduct evidence in sex offense cases (*see supra* note 16), they have also been willing to exclude such evidence when too much time passed between the uncharged and charged acts. In *State v. Jones*, 369 S.E.2d 822 (N.C. 1988), for example, defendant was charged with first-degree rape and taking indecent liberties with a child. On appeal of his conviction, the court held that the trial court erred in admitting evidence of sexual misconduct with another child seven years earlier even though the offenses were similar. In the court's view, the seven-year lapse between uncharged and charged acts "'substantially negate[s] the plausibility of the existence of an ongoing and continuous plan to engage persistently in such deviant activities'." Id. at 824 (quoting State v. Shane, 285 S.E.2d 813, 821 (N.C 1982)).

See also State v. Burchfield, 664 S.W.2d 284 (Tenn. 1984) (holding that Tennessee has not adopted a general sex crimes exception, and that evidence of unlawful carnal knowledge of a stepdaughter that took place 11 years earlier should have been excluded from defendant's trial for the rape of his daughter).

[32] *See, e.g.*, J&R Ice Cream Corp. v. California Smoothie Licensing Corp., 31 F.3d 1259, 1267–1269 (3d Cir. 1994) (in franchisee's action against franchisor for consumer fraud and negligence arising from alleged misrepresentations about potential restaurant sales and profits, the trial court erred in admitting evidence that defendants made similar misrepresentations to other franchisees to prove intent and common scheme or plan because intent was not relevant to counts remaining at trial and identity was not in dispute; even though the uncharged behavior was similar to the charged behavior, its admission served only to establish defendants' propensity to commit the charged acts and therefore should have been excluded); People v. Fiore, 312 N.E.2d 174, 176–178 (N.Y. 1974) (in prosecution for, inter alia, receiving a bribe and official misconduct in connection with the alleged receipt of corrupt payments from a contractor, evidence that defendant received such payments from the architect on the same project should not have been admitted; in the absence of proof that charged and uncharged acts were all part of a single scheme to collect corrupt payments from the

occurred, the trial court must balance the probative value of the evidence for its legitimate purpose against the dangers it presents, particularly unfair prejudice.[33]

An Indiana court was particularly careful to distinguish inadmissible patterns of conduct from linked plans or schemes, even where the uncharged and charged conduct involves the same alleged victim. In *Johnson v. State*,[34] defendant was convicted of battery, criminal confinement, and intimidation, all directed against the same victim. At trial, the court permitted the prosecution to present evidence of defendant's prior assaults on the same person. On appeal, the court held that the evidence should not have been admitted. Even where the defendant's similar misconduct occurred with the same victim, it did not satisfy the standard for a common scheme or plan. Responding to a dissenting judge's view that crimes within an ongoing relationship should be admissible, the court wrote: "[I]f we were to recognize exceptions for patterns of behavior—professional burglars, thieves, prostitutes, bad check artists, etc.—we would soon have no general rule prohibiting evidence of prior acts of misconduct."[35] The majority instead held that "[b]ehavioral patterns are not common plans or schemes"[36] and applied that proposition to the facts at issue:

> Nothing indicates Johnson's crimes arose out of a common plan or scheme. Instead, it would appear that they all arose out of separate, distinct crisis situations in the on-going saga of Johnson's and Stokes's "off and on" romantic relationship.[37]

State v. Dewey,[38] though flawed, also illustrates the more restrictive view in sex crimes cases. Defendant was charged with raping K.B., a woman who had accompanied defendant to a restaurant. On leaving the restaurant, the pair noticed that a headlight on K.B.'s car was not

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contractor and architect, the evidence was only relevant on a forbidden propensity theory).

[33] *See* Brown v. Smith, 64 Cal. Rptr. 2d 301, 314–319 (Ct. App. 1997) (in civil action by former tenant and her husband against a landlord and his wife, alleging that the landlord sexually harassed the tenant in violation of a state statute, the trial court erred in admitting evidence that landlord had sexually harassed other tenants and prospective tenants without balancing probative value against prejudice and other dangers; the evidence might have been admissible on the basis of common scheme or plan to prove that charged acts occurred, but the trial court must conduct proper balancing).

[34] 544 N.E.2d 164 (Ind. Ct. App. 1989).

[35] Id. at 168 n.2.

[36] Id. at 171.

[37] Id.

[38] 966 P.2d 414 (Wash. Ct. App. 1998).

working, and she agreed to accompany defendant to his house to retrieve a headlight from defendant's car. K.B. also accepted an invitation to enter defendant's house for a cup of coffee. At this point, K.B.'s story and that of defendant diverged. K.B. claimed defendant carried her to his bed and raped her despite her protests, then drove her home and waited for her to enter her house safely before leaving. Defendant claimed that their sexual conduct was consensual, and that in fact they made plans for another date before parting.[39]

To prove lack of consent, the prosecution introduced evidence of a prior rape.[40] The facts were similar in some ways to the charged rape—it began with a date, the victim agreed to go to defendant's house, defendant acted as a sociable host before forcibly raping the woman, and defendant ensured that the victim was safe before leaving her. The similarities, however, were insufficient for the appellate court, which held that admission of the evidence was reversible error. The court held that there was nothing unique or uncommon about defendant's method, making the evidence insufficient to establish the existence of an "'overarching plan'" that included the charged rape.[41] Absent "features other than those common to most rapes,"[42] the evidence should be excluded if offered on a "plan" theory.

The *Dewey* court's emphasis on the absence of a single, overarching plan demonstrates the court's desire to confine the plan theory to avoid its use as a proxy for character. At the same time, the court's apparent equating of signature-like similarity to the existence of an overarching plan suggests the same flaw in reasoning that has been explored above. As explained previously in connection with the plan theory as a route to establishing that a charged act occurred,[43] an analysis of the similarity between the charged and uncharged acts is a useful tool in assessing the admissibility of uncharged misconduct evidence, but signature-like uniqueness or even close similarity need not be an indispensable requirement for admission.

b. Doctrine of Chances Reasoning

If evidence is to be admitted to prove a "common scheme" where the uncharged and charged acts are unlinked, the trial court should re-

[39] Id. at 415–416.

[40] Id. at 416. Defendant had been convicted in that case, but the trial court did not permit the jury to learn of the conviction.

[41] Id. at 417 (quoting State v. Lough, 889 P.2d 487, 495 (Wash. 1995)).

[42] *Dewey*, 966 P.2d at 418.

[43] *See supra* §9.4.

quire more than a general similarity in the offenses.[44] Perhaps that additional factor can be supplied in some cases by reasoning based on the doctrine of chances. Suppose the following facts could be shown:[45] Defendant has been employed to take care of children in ten different homes in different locations over the course of 20 years. None of the families who employed Defendant knew each other. Five of the families accused Defendant of sexually molesting a child in Defendant's care. Charged in connection with one of these cases, Defendant denies that any sexual molestation occurred, claiming that all contacts with the child were appropriate. If the prosecution argues that the evidence concerning the other charges should be admitted to show the existence of a "plan," and thus that the charged molestation occurred, admissibility can only be justified under the broad concept represented by cases such as *Ewoldt*, discussed earlier,[46] because the crimes do not appear to be linked by any ultimate plan other than the commission of acts of sexual molestation. Nevertheless, it is difficult to argue that the evidence should be excluded because of the sheer improbability of so many unfounded accusations of sexual molestation being made independently. As Cammack explains, admissibility of the evidence in such a case

> rests on the objective improbability of the same rare misfortune befalling one individual over and over. . . . The fact that is being proven, the defendant's commission of the criminal act, is established indirectly through a process of elimination. Once the possibility of accident is rendered unlikely, the most plausible explanation for the harm's occurrence is that the defendant caused it.[47]

This theory does not apply in all "unlinked plan" cases; were it to apply so broadly, the character ban effectively would be supplanted in cases where a person makes a career out of committing a certain type of crime. Only when all accusations are independent of each other,[48] when the number of

[44] Ironically, if the acts fall into the category of the linked plan, there is no need for much, or even any, similarity. *See* Thomas Quigley, Note, Admissibility of Evidence Under Indiana's "Common Scheme or Plan" Exception, 53 Ind. L.J. 805, 808 (1978) (criticizing Indiana courts for requiring similarity between charged and uncharged crimes, and noting that crimes that are part of a common scheme or plan might actually be dissimilar).

[45] The facts are suggested, in part, by *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973), which will be discussed in more detail below. *See infra* notes 54–59 and accompanying text.

[46] People v. Ewoldt, 867 P.2d 757 (Cal. 1994). *See supra* notes 11–14 and accompanying text.

[47] Cammack, *supra* note 18, at 388–389.

[48] According to the "product rule," the probability of the occurrence of a series of independent events (such as flipping heads on an unaltered coin) is the product of the

accusations is unlikely to have been made absent a common cause, when the crimes are relatively similar, and when alternative explanations of innocence appear weak intuitively,[49] does the evidence carry significant probative value on the issue of *actus reus* or *mens rea*. At the same time, the validity of this theory does not depend on extremely great similarity in the details of each act nor on an antecedent finding that defendant did in fact commit the uncharged acts; the commission of each act, charged and uncharged, is made more probable by the presence of each other act.[50]

Though similarity of the accusations is not a hallmark of the doctrine of chances theory, it is also true that the more similar the details of the charged and uncharged crimes, the less likely the defendant has been accused falsely. Though courts frequently hold that striking similarity makes the evidence admissible on the basis of "common plan or scheme,"[51] admissibility under those circumstances (and assuming other factors, such as independence of the accusations, are also present) is more appropriately justified on the basis of the doctrine of chances. In some of those cases, the evidence would also satisfy the requirements of the *modus operandi* route to admissibility.

The doctrine of chances concept rests on commonsense logic and corroboration.[52] The stronger the logic, the less likely the jurors will make adverse inferences about defendant's character and decide the case on that

probability of each event occurring. Thus, the probability of flipping heads on an unaltered coin is one in two. The probability of flipping heads two times in a row is one in four; three times is one in eight; and so forth. *See* Valerie J. Easton & John H. McColl, Statistics Glossary ver. 1.1, at http://www.stats.gla.ac.uk/steps/glossary/probability.html#multrule (visited Mar. 5, 2008) (stating that for independent events, "the probability of the joint events A and B is equal to the product of the individual probabilities for the two events").

[49] Cammack, *supra* note 18, at 404–407 (suggesting that the court consider these factors when determining admissibility to prove *actus reus* under doctrine of chances reasoning).

[50] Id. at 389. Note that some have claimed that the probability of false rape or child abuse accusations is relatively low. *See* Patricia Frazier & Eugene Borgida, Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court, 12 Law & Hum. Behav. 101, 106–107 (1988) (stating that false reports of rape are no more common, and perhaps less common, than for other crimes); Bryden & Park, *supra* note 15, at 577 (similar).

[51] *See, e.g.*, State v. Carleton, 919 P.2d 128, 131 (Wash. Ct. App. 1996) (in prosecution for rape of a teenage boy, evidence that defendant employed a markedly similar method in committing similar acts with two other boys was admissible to prove "common scheme or plan," presumably as proof that charged acts occurred); State v. Bennett, 672 P.2d 772 (Wash. Ct. App. 1983) (in prosecution for statutory rape, strikingly similar behavior toward other under-age victims was admissible to prove common scheme or plan, and thus that the charged sexual intercourse took place).

[52] Cammack, *supra* note 18, at 407–408 (stating that behind all the academic jargon "is the common sense notion of corroboration. Focusing as it does on the accusers' stories rather than on the accused's conduct, similar accusations evidence is

improper basis. Though doctrine of chances reasoning does not avoid propensity (if only the general propensity of people to tell the truth, which even "liars" do most of the time),[53] the decision to admit evidence of uncharged misconduct in cases such as these is difficult to assail.

Still, the court must not analyze the case before it superficially. If, for example, all of the accusations were made by the same person or by a small circle of people (children in the same location, members of the same family, people who might have harbored a motive falsely to accuse defendant), the probability of an innocent explanation rises dramatically. On the other hand, properly understood and applied, doctrine of chances reasoning is a useful tool to uncover truth in a type of case where the truth is almost always elusive.

Doctrine of chances reasoning to prove *actus reus* is not limited to cases involving sexual offenses. Indeed, some of the best known cases in which the courts applied the doctrine of chances (explicitly or implicitly) to admit uncharged misconduct evidence have involved other types of crimes. In *United States v. Woods*,[54] for example, defendant was charged with murdering an eight-month-old child she was in the process of adopting. The child apparently died of cyanosis (oxygen deprivation). The government's theory was that Woods smothered the child. To prove an act of Woods, rather than an accident or natural causes, caused the child's death, the government offered evidence that beginning approximately 25 years earlier, defendant had custody of or access to nine children who suffered at least 20 episodes of cyanosis, and that seven of

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easily distinguished from character. And the logical force of the evidence to verify the truth of the victim's testimony should be both obvious and familiar to lay jurors.").

[53] The argument made in this volume is that some propensity evidence does not involve character but rather stems from aspects common to virtually all people. For discussion of this aspect of doctrine of chances reasoning in the context of motive evidence, see *supra* Chapter 8. Somewhat differently, Cammack argues that the doctrine of chances reasoning involved in the present problem does require consideration of character, though it is not troubling in context because the character inference is fairly trivial:

> [T]he reason we believe that multiple accusations are likely to result from a common cause is in part that we see behavior through the lens of character. To be sure, a belief that people act in accordance with their character is not crucial to the relevance of similar accusations evidence. The only necessary assumption is that people (in this case accusers) tend to tell the truth. Even without assuming that people tend to behave consistently, we could infer from the fact that two people have both accused the defendant of the same thing that the defendant caused the accusations by his conduct. We more readily perceive that multiple accusations against the same person were caused by the defendant's actions because of the strength of our belief in the concept of character.

Cammack, *supra* note 18, at 399–400.

[54] 484 F.2d 127 (4th Cir. 1973).

these children had died.[55] Woods was convicted and on appeal argued that the trial court erred in admitting the evidence. The court affirmed:

> [W]ith regard to no single child was there any legally sufficient proof that defendant had done any act which the law forbids. Only when all of the evidence concerning the nine other children and Paul is considered collectively is the conclusion impelled that the probability that some or all of the other deaths, cyanotic seizures, and respiratory deficiencies were accidental or attributable to natural causes was so remote, the truth must be that Paul and some or all of the other children died at the hands of the defendant.[56]

The court also stressed the need for the evidence in infanticide or child abuse cases:

> [E]vidence of repeated incidents is especially relevant because it may be the only evidence to prove the crime. A child of the age of Paul and of the others about whom evidence was received is a helpless, defenseless unit of human life. Such a child is too young, if he survives, to relate the facts concerning the attempt on his life, and too young, if he does not survive, to have exerted enough resistance that the marks of his cause of death will survive him. Absent the fortuitous presence of an eyewitness, infanticide or child abuse by suffocation would largely go unpunished.[57]

The *Woods* court explicitly declined to rest its decision on any other admissibility theory, including the "signature" (*modus operandi*) theory or that of lack of accident.[58] Instead, the court employed doctrine of chances reasoning, even though it never used that term. Some courts might have analyzed the case as one involving "plan," but the absence of evidence linking all the events to a single goal makes that theory weak, while the sheer number of independent, though similar, events makes the doctrine of chances reasoning particularly compelling.[59]

Other well-known cases have also admitted uncharged misconduct evidence on similar theories to prove *actus reus*. *R v. Smith*,[60] the well-known "brides of the bath" case, is an example of a case that satisfies both

[55] Id. at 130–131.

[56] Id. at 133.

[57] Id.

[58] Id. at 133–134.

[59] *See also* Makin v. Attorney-General for New South Wales, App. Cas. 57 (1894) (in prosecution of professional foster parent for infanticide, evidence that 12 other infants entrusted to defendant died was admissible); R v. Roden, 12 Cox Cr. 630 (1874) (similar; evidence that three of defendant's other children had died in her lap was admissible to prove defendant murdered the victim by suffocation).

[60] 11 Crim. App. 229 (1915).

doctrine of chances reasoning and the requirements of the traditional linked plan concept, chain variety. Smith was charged with the murder of Bessie Mundy, a woman with whom he had gone through a marriage ceremony although he was married to another woman at the time. Mundy drowned in her bathtub. Smith claimed that no crime occurred — that Mundy drowned accidentally while bathing. To prove that a crime occurred and that Smith was responsible, the prosecution presented evidence that after Mundy's death, Smith went through wedding ceremonies with two other women; that both women subsequently drowned in the bathtub; that at defendant's suggestion, all three women had obtained life insurance policies; and that shortly before each woman died, defendant took her to the doctor stating that the woman was ill. In *Smith*, it seems likely that defendant developed a plan to "marry" and then kill women, and recover the benefits of a life insurance policy. The "link" is a plan conceived before any of the killings. The doctrine of chances also supports admission of the evidence because of the strong intuitive appeal of the proposition that there was nothing coincidental about this string of very similar events, and that it is very unlikely that defendant was not the cause of each.

An American case bears eerie similarities to *Smith*. In *People v. Lisenba*,[61] the defendant was charged with the murder of his wife, who drowned in the bathtub.[62] As in *Smith*, defendant claimed the death was accidental, and to prove otherwise, the prosecution was permitted to offer evidence that defendant had murdered a previous wife by drowning her in the bathtub. Linkage of the two deaths was provided by the fact that in each case, defendant had arranged for the women to obtain a life insurance policy naming him as beneficiary, and the prosecution's theory was that defendant committed both the charged and the uncharged murders in accordance with a plan to collect the proceeds of the policies. On appeal, the court described many similarities between the two deaths,[63] and held that the evidence was admissible to prove that the

[61] 94 P.2d 569 (Cal. 1939).

[62] An alleged accomplice who pled guilty was the prosecution's principal witness at defendant's trial. The two men allegedly drowned the victim after attempting unsuccessfully to kill her with a rattlesnake bite. Id. at 571. According to the accomplice, the snakes were purchased after a search of various sources in the Los Angeles area for ones that would be particularly effective; the chosen two were found acceptable when they dispatched several chickens. Id. at 572. The snakes were displayed at trial, and though "confined in boxes," apparently threw the courtroom "into a state of excitement and consternation." Id. at 573.

[63] The court stated:

> In each instance the defendant had placed his asserted victim in touch with insurance agents with a view to and ultimate procurement of life insurance on her. In each instance defendant inquired whether he might be named beneficiary when

death "was the result of a general plan or scheme on the defendant's part to insure, marry and murder his victims in order that he might thereby profit financially."[64] The court's reasoning is strong; the insurance evidence, particularly in context, suggested the existence of an overall plan linking the two deaths. Even though the evidence in *Lisenba* involved only a single uncharged death, the plan theory as invoked in that case is valid in the same way as in *Smith*.

§9.5 USE OF THE "PLAN" THEORY TO PROVE THAT THE PERSON ACTED WITH A REQUIRED MENTAL STATE

Evidence that a person has a plan to achieve a specific goal makes it somewhat more likely that when the person performs an act that advances or achieves that objective, the act was done with the intent to achieve it. If the goal consists of a crime or other wrong, evidence of other acts might be admissible to prove that the actor had a plan that included both the charged and uncharged acts, and thus that she acted with the required mental state.

§9.5.1 Linked Plans

Suppose Defendant is charged with the murder of Victim. Defendant admits shooting Victim but claims the shooting was an accident. To prove that Defendant possessed criminal intent, the prosecution wishes to present evidence that on two prior occasions, Defendant had attempted to

the parties were not married. In each instance he received a negative reply and thereafter married the asserted victim. In each instance a policy or policies were issued naming him as beneficiary. In each instance the insured was shortly thereafter found drowned in or near the home she occupied with the defendant under circumstances having an appearance of accident but upon full and close inspection tending strongly to indicate foul play. In each instance the defendant claimed under the accidental double indemnity provisions of the policy or policies and, in each instance, ultimately profited financially by the collection of his wife's insurance.

Id. at 582.

[64] Id. There was also a great deal of other evidence linking defendant to the charged murder, including defendant's confession to the same, although defendant claimed at trial that the confession was inadmissible because involuntary. Id. at 576–579.