Using the Doctrine of Chances to Prove Actus Reus in Child Abuse and Acquaintance Rape: *People v. Ewoldt* Reconsidered

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> "It's not as bad as it sounds" (Mark Twain, commenting on the music of Richard Wagner).
> "The man who wins the lottery once is envied; the one who wins it twice is investigated."[1]

"Judges," wrote Justice Holmes, "know *how* to decide a good deal sooner than they know *why*."[2] He might have added that judges sometimes make the correct decision without *ever* getting the reasons right. That, at any rate, is my view of the California Supreme Court's recent decisions in *People v. Ewoldt*[3] and its companion case, *People v. Balcom*.[4] In each of these cases, one a prosecution for sexually abusing a minor and the other an acquaintance rape, the court approved the admission of evidence that the defendant had done the same thing on another occasion. The court's rationale for admitting this evidence, despite the general ban on character evidence, was that in both cases evidence of the defendant's uncharged acts proved the existence of a plan or design that included the offense for which he was on trial.

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[1] United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991), *cert. denied*, 502 U.S. 916 (1991).

[2] Charles P. Curtis, *The Trial Judge and the Jury*, 5 VAND. L. REV. 150, 162 (1950) (quoting Oliver W. Holmes, Book Review, 5 AM. L. REV. 539, 540 (1871)) (emphasis added).

[3] 867 P.2d 757 (Cal. 1994).

[4] 867 P.2d 777 (Cal. 1994).

In a recent article Professors Mendez and Imwinkelried criticize the *Ewoldt* court's extension of the "plan" rationale for admitting uncharged misconduct evidence.[5] The authors agree with the general proposition that the existence of a plan which includes charged and uncharged acts is a proper basis for admitting uncharged misconduct evidence. However, the authors argue that the *Ewoldt* court's standards for proving the existence of a plan as a foundation for admitting the evidence provide insufficient assurance that a plan exists.

I find Mendez and Imwinkelried's demonstration of the deficiencies in the court's reasoning persuasive, and have nothing to add to their thoughtful critique of the *Ewoldt* court's plan doctrine. But the court's failure to provide a sound justification for its decision does not mean that the court reached the wrong result. I will argue that there is an alternative rationale for admitting similar acts evidence in many child abuse and acquaintance rape[6] prosecutions based on the doctrine of chances. Specifically, I will argue that courts should admit evidence of similar accusations against the accused for having committed the same crime on other occasions whenever the number and circumstances of the similar accusations effectively disproves an accused's claim that the charges against her have been fabricated. Although in many cases the court's plan theory and the doctrine of chances rationale will yield the same result, the doctrine of chances is a better basis for admitting similar acts evidence for two reasons. First, it assists judges in focussing on criteria for admissibility that ensure high probative value. Second, the doctrine of chances makes it easier for jurors to distinguish the proper use of evidence from improper character reasoning.

The argument is divided into four sections. The Part I section briefly describes the character evidence rule and the California Supreme Court's application of the rule in *People v. Ewoldt.* Part II summarizes Mendez and Imwinkelried's critique of the court's

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[5] 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 (1995).

[6] By "acquaintance rape" I mean all those rape cases in which the defendant acknowledges an act of sexual intercourse, but claims that the woman consented.

plan theory. Part III sets forth my argument that there is a valid non-character basis for admitting evidence of the defendant's uncharged similar acts in factual contexts like *Ewoldt* and *Balcom* under the doctrine of chances. Part IV briefly comments on the compatibility of the two approaches.

I. THE COURT'S DECISIONS

A. The Character Evidence Rule

The character evidence rule, a pillar of Anglo-American evidence law,[7] prohibits, with some exceptions,[8] the use of evidence that a person has a particular trait of character or subjective predisposition to prove that the person acted consistently with that trait or predisposition on a specific occasion.[9] As such,

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[7] Wigmore dates the character evidence ban from the latter part of the 17th century and calls its inauguration "a revolution in the theory of criminal trials and . . . one of the peculiar features, of vast moment, that distinguishes the Anglo-American from the Continental system of evidence." 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2, at 1213 (Peter Tillers revisor, 1983). The widespread belief that European systems contrast starkly with Common Law jurisdictions in their liberal use of character evidence is probably overstated. *See* 1A *id.* §58.1, at 1212 (discussing use of character evidence without limitation in early English practice); Office of Legal Policy, Department of Justice, *The Admission of Criminal Histories at Trial*, 22 U. MICH. J.L. REF. 707, 751 (1989) (stating that defendant's criminal record is routinely admitted in European legal systems). The perception that Continental decision makers indulge liberally in character reasoning partly results from the routine receipt of prior convictions evidence in European trials. Evidence of the defendant's prior convictions is invariably admitted because questions of guilt and punishment are decided in the same proceeding, and the defendant's criminal record is relevant to the fixing of sentence. *See* JOHN H. LANGBEIN, COMPARATIVE CRIMINAL PROCEDURE: GERMANY 38, 76-77 (1977). *See generally*, Mirjan Damaska, *Propensity Evidence in Continental Legal Systems*, 70 CHI.-KENT L. REV. 55 (1994) (discussing treatment of character evidence in European legal system).

[8] Courts commonly recognize exceptions to the rule of exclusion for evidence of the accused's character offered by the accused (CAL. EVID. CODE § 1102(a) (West 1995)) or by the prosecution to rebut the defendant's character evidence (CAL. EVID. CODE § 1102(b) (West 1995)), evidence of the character of the victim of a crime, (CAL. EVID. CODE § 1103 (West 1995)), or evidence of the character of a witness (CAL. EVID. CODE § 790 (West 1995)).

[9] CAL. EVID. CODE § 1101(a) (West 1995). Section 1101(a) provides:

> [E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

See also People v. Peete, 169 P.2d 924, 929 (Cal. 1946) (stating that relevant information

the rule does not proscribe the admission of evidence of a person's character per se. Rather, it prohibits one *use* of the evidence.[10] The evidence may not be used to support an inference that because the actor has a particular character trait — dishonesty, for example — she acted consistently with that trait — dishonestly — on some given occasion.[11]

There are two basic reasons for the rule.[12] First, many believe that character is not as powerful a predictor of human behavior as is commonly assumed.[13] That is, while we typically use the notion of character for organizing our perceptions of other people, generalizations about character do not correlate as strongly with actual behavior as is generally believed. From the point of view of evidence doctrine, the problem is not one of logical relevance, since evidence of a person's generalized disposition has some probative value on the issue of whether she behaved consistently with that disposition.[14] The problem, rather, is one of prejudice. Many fear that jurors will over estimate the value of the evidence giving it more weight than it deserves.[15] This, in turn, will induce a greater level of subjective

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about prior offense is admissible except when showing merely criminal disposition), *cert. denied*, 329 U.S. 790 (1946).

[10] *See* William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 PEPP. L. REV. 297, 300 (1982) (explaining that § 1101(b) clarified that § 1101(a) does not prohibit admitting evidence of prior acts if those acts are used to show something other than defendant's disposition to commit such acts).

[11] *See* EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18, at 47-51 (1984) (distinguishing approved and disapproved uses of uncharged misconduct evidence).

[12] For a good, albeit brief, general discussion of the policies behind the character evidence rule, see RICHARD O. LEMPERT & STEPHAN A. A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 216-19 (2d ed. 1982).

[13] *See id.* at 219 (explaining that jurors place too much emphasis on prior criminal record); 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 136, at 128-30 (1985) (expressing concern that jurors will be unfairly prejudiced by evidence of prior crimes); 1A WIGMORE, *supra* note 7, § 58.2, at 1212 (discussing societal belief that criminals can reform);.

[14] CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE §188, at 344 (John W. Strong et al. eds., 4th ed. 1992). *But see* Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME LAW. 758, 783 (1976) (no scientific support for assumptions underlying character evidence rule); Robert Spector, *Commentary: Rule 609: A Last Plea for Withdrawal*, 32 OKLA. L. REV. 334, 351 (1979) (character evidence has "no probative value").

[15] For a discussion of the problem of estimation as an aspect of evidentiary admissibility, see Richard O. Lempert, *Modeling Relevance*, 75 MICH L. REV. 1021, 1027-32 (1977); LEMPERT & SALTZBURG, *supra* note 12, at 160-62.

persuasion than is justified and distort the weight given to other evidence.[16]

The second justification for prohibiting proof of action by showing propensity[17] to act is based on a fear of a different type of unfair prejudice — misuse.[18] Some fear that, consciously or unconsciously, jurors will use evidence of a person's character to decide whether the person deserves to be punished *because of her character*, rather than whether the person deserves to be punished because she performed a particular act. Since the law predicates criminal punishment and civil liability on a person's conduct rather than on her qualities,[19] a decision to impose or withhold punishment based on judgments about the person rather than on her acts is improperly motivated.[20]

Questions about the character evidence rule frequently arise in criminal cases when the prosecution offers evidence of actions by the defendant for which he has not been charged.[21] Indeed, the admissibility of such evidence is one of the most

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[16] In the often-quoted words of Justice Jackson, "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475-76 (1948) (footnote omitted).

[17] The word character as used in the law of evidence is commonly regarded as equivalent to propensity. The two words are routinely used interchangeably. *See, e.g.*, United States v. Beechum, 582 F.2d 898, 909 (5th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 920 (1979). For a critique of that equation, see Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981).

[18] LEMPERT & SALTZBURG, *supra* note 12, at 218; 2 LOUISELL & MUELLER, *supra* note 13, § 136; 1A WIGMORE, *supra* note 7, § 58.2.

[19] *See* Miguel A. Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1007 (1984) (quoting HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 73-74 (1968)).

[20] Other justifications for the general exclusion of character evidence include efficiency concerns — i.e, the evidence, though relevant, is not sufficiently probative to justify the consumption of time routine admission would engender — and guarding against unfair surprise to litigants. MCCORMICK, *supra* note 14, § 188, at 344. Professors Lempert and Saltzburg's insight that the character evidence ban is in part a reflection of a cultural ideal regarding human potential for reform is no doubt also correct. LEMPERT & SALTZBURG, *supra* note 12, at 219. David Leonard has plausibly argued that the character evidence rule serves, apart from its contribution to the search for truth, the function of helping legitimize the outcome of criminal trials. David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1 (1986-87).

[21] *See* IMWINKELRIED, *supra* note 11 (providing comprehensive treatment of subject).

frequently litigated evidentiary issues.[22] Many criminal defendants have engaged in conduct which could be used to portray them as individuals with a criminal disposition, and prosecutors sense the benefits, proper or improper, of informing the jury about the defendant's unsavory side.

The admissibility of other bad acts or uncharged misconduct evidence[23] is not governed by separate or special rules, but is determined by application of the general character evidence ban.[24] There is no prohibition against admitting evidence of other actions of the defendant per se. Rather, the rule prohibits using evidence of uncharged acts to show that the defendant has a propensity to act in a certain way as a basis for inferring that he acted in such a manner at a specific time and place.[25] The character evidence ban does not preclude the use of such evidence as long as the evidence is being offered for a non-propensity use.[26]

Although seemingly simple, the prohibition against using uncharged misconduct evidence to prove character in criminal cases has proven notoriously difficult to apply. One reason for

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[22] *See* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶404[08], at 404-47 (1995) (observing that Federal Rule of Evidence 404(b) dealing with admissibility of "other crimes, wrongs, or acts" has produced more published decisions than any other rule).

[23] There is no completely satisfactory label for evidence offered under California Evidence Code § 1101(b). "Uncharged misconduct" is inaccurate for two reasons. First, the defendant may have been charged with a crime for the conduct, either in a separate or the same action. Second, the evidence does not invariably relate to the defendant's "conduct," as when evidence of the discovery of babies' bodies buried in the defendant's garden is offered to prove that the defendant killed another child whom he is accused of murdering. Because the evidence is sometimes of events or circumstances rather than actions, even the vague labels "other acts" or "extrinsic acts" do not cover all the kinds of evidence included in the § 1101(b) category. "Prior bad acts" is inaccurate because, in addition to the reasons just mentioned, the evidence need not refer to events prior to the crime. Although all the commonly used labels are imprecise, their literal meaning has eroded through long use by the bench and the bar, and it would probably engender more confusion than clarity to depart from common practice.

[24] *See* 2 WEINSTEIN & BERGER, *supra* note 22, ¶404[08] (observing that Federal Rule of Evidence 404(b) allowing evidence of "other crimes, wrongs, or acts" is "arguably redundant" since it does not add anything beyond what is contained in Rule 404(a) general character evidence ban).

[25] IMWINKELRIED, *supra* note 11, §2:18; 2 WEINSTEIN & BERGER, *supra* note 22, ¶404[08].

[26] MCCORMICK, *supra* note 14, § 190; Roth, *supra* note 10, at 300. The evidence may nonetheless be excluded when its probative value is substantially outweighed by the danger of unfair prejudice. *See* CAL. EVID. CODE § 352 (West 1995); FED. R. EVID. 403.

this difficulty lies in the rule itself. Abstractly stated, the rule defines a clean distinction. But in practice, the line between character and non-character uses has proven extraordinarily obscure.[27] Indeed, as will be shown below,[28] character assumptions contaminate the probabilistic reasoning that underlies the doctrine of chances. Furthermore, the usual formulation of the rule for criminal cases as a list of permissible non-character uses probably impedes correct application by focusing attention on whether the evidence falls within one of the "exceptions" contained in the list rather than on whether the evidence violates the character ban.[29] Next, even if an appropriate non-character use is identified, admission of the evidence is not necessarily proper. In addition to deciding whether the jurors *could* use the evidence for a permissible purpose, the judge must decide whether they likely will consider it for only its non-character significance.[30] Finally, the commitment to enforcing the rule has not been unwavering.[31] Judges charged with deciding whether to admit uncharged misconduct evidence may share the general view of the strength of character as a predictor of behavior and may, therefore, be reluctant to keep such evidence from the jury.[32]

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[27] *Cf.* Kuhns, *supra* note 17, at 781-94 (arguing that supposed non-character uses of uncharged misconduct evidence all involve character reasoning).

[28] *See infra* notes 190-215 and accompanying text.

[29] Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 1005 (1938). This "list" approach to the admissibility of uncharged misconduct evidence is probably not as pronounced as it was in 1938 when Professor Stone summarized American law on the subject. *See* Edward J. Imwinkelried, *The Evolution of the Use of the Doctrine of Chances as a Theory of Admissibility for Similar Fact Evidence*, 22 ANGLO-AM. L. REV. 73, 86-88 (1993) [hereinafter *Evolution of the Use of the Doctrine of Chances*] (noting trend toward abandoning list approach). *But see* 2 WEINSTEIN & BERGER, *supra* note 22, ¶404[08] (observing that courts often simply "recite the list of permissible uses specified in the rule and admit without any analysis of the proffered evidence").

[30] *See* Huddleston v. United States, 485 U.S. 681, 688 (1988) (indicating that judges should weigh probative value of uncharged misconduct evidence against risk of unfair prejudice).

[31] The temptation to push the boundaries of what qualifies as a non-propensity use has been especially irresistible in sex offense prosecutions. At least in the past many courts admitted prior acts evidence "[t]o show a passion or propensity for unusual and abnormal sexual relations." MCCORMICK, *supra* note 14, § 190. *See also* IMWINKELRIED, *supra* note 11, § 4:11; 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5239, at 461-62 (1978); David P. Bryden & Roger Park, *"Other Crimes" Evidence in Sex Offense Cases*, 78 MINN. L. REV. 529, 557-60 (1994).

[32] *See* A.A.S. ZUCKERMAN, THE PRINCIPLES OF CRIMINAL EVIDENCE 245 (1989) (noting

In *People v. Ewoldt*,[33] the California Supreme Court attempted to set general standards for the admission of uncharged misconduct evidence under one commonly recognized theory of non-character relevance — as proof of a plan or design.[34] The general argument for admitting of similar acts evidence to prove that the commission of the charged offense was part of a larger plan or design is simple and non-controversial.[35] So long as 1) the uncharged misconduct evidence tends to prove that the defendant has formulated a plan, and 2) the existence of a plan is probative of some issue in the case, then the character evidence rule does not require its exclusion. When the evidence is used in this way, the jurors are not being invited to conclude that the defendant acted in a particular way because of the kind of person he is. Instead, the jurors are being asked to draw conclusions from the existence of a plan that includes both the charged and uncharged acts. The fact that the evidence proving the plan includes reference to the defendant's uncharged misdeeds does not, in itself, require exclusion.

B. People v. Ewoldt *and* People v. Balcom

In *People v. Ewoldt*, the defendant was charged with four counts of committing lewd acts on a minor and one count of a lesser charge for fondling his stepdaughter or forcing her to

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that rule's assumption "that only persons 'who have not been trained judicially' yield to prejudice" is simply not so); Damaska, *supra* note 7, at 65-66 (noting absence of "solid ground in psychology for the belief that only novice factfinders succumb to the temptation of drawing negative conclusions from a person's unsavory life history, while professional adjudicators are immune, even in close cases, to the syren's [sic] call of these inferences").

[33] 867 P.2d 757 (Cal. 1994).

[34] For a brief recital of the commonly recognized non-character uses of uncharged misconduct evidence, see MCCORMICK, *supra* note 14, § 190.

[35] On the use of uncharged acts evidence to prove plan or scheme, see IMWINKELRIED, *supra* note 11, § 3:20 (noting widespread approval for use of uncharged misconduct to show plan or scheme); 2 LOUISELL & MUELLER, *supra* note 13, § 140 (noting that cases disapproving of admissibility of uncharged misconduct to prove plan or scheme are rare); MENDEZ & IMWINKELRIED, *supra* note 5, at 480-85 (discussing scope of plan theory); 22 WRIGHT & GRAHAM, *supra* note 31, § 5244 (reviewing scope of plan or scheme exception to uncharged misconduct rule under Fed. R. Evid. 404(b)); Edward J. Imwinkelried, *The Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine*, 50 MO. L. REV. 1 (1985) [hereinafter *Plan Theory*] (arguing that courts have frequently misapplied plan theory and uncharged misconduct doctrine in general).

touch his genitals on four separate occasions.[36] On two of the four occasions, the defendant woke the victim during the night and either fondled her breasts and genitals or forced her to touch his penis.[37] In addition to her testimony about the charged incidents, the victim testified to one act of fondling for which the defendant was not charged.[38] The victim's older sister testified to three separate occasions when she awoke in the night to find the defendant in her bedroom touching her breasts and genitals.[39] The defendant testified and denied that the incidents occurred.[40]

In *People v. Balcom*, the defendant was charged with forcible rape.[41] The victim testified that the defendant forced his way into her apartment with a rifle where he demanded her money, her ATM card and personal identification number, and the keys to her car.[42] Defendant complained that she had few valuables and said he would rape her. The defendant tied the victim's wrists and ordered her to kneel on the floor. When she did not comply, the defendant held the gun to her face and again ordered her onto the floor. He then gagged and raped her.[43]

Defendant testified at trial and admitted having sexual intercourse with the victim, but claimed that it was consensual.[44] On rebuttal, the prosecution was allowed to call another woman who testified that the defendant raped her in Michigan six weeks after the charged rape occurred in California. The witness testified that, as she was leaving her apartment complex early in the morning, the defendant forcibly entered her car with a handgun. The defendant informed the victim that he only wanted her money, but when she was retrieving her purse the defendant "'jumped on top' of her" and raped her. Defendant then took the victim's ATM card from her purse, demanded her

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[36] *Ewoldt*, 867 P.2d at 760-61.

[37] *Id.*

[38] *Id.* at 760.

[39] *Id.* at 761.

[40] *Id.*

[41] *People v. Balcom*, 867 P.2d 777, 779 (Cal. 1994).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 780.

personal identification number, and drove off in the victim's car.[45]

The defendants in *Ewoldt* and *Balcom* appealed their convictions,[46] claiming that the court committed prejudicial error when it admitted evidence of uncharged crimes. The court in *Ewoldt* set out standards for admitting similar acts evidence in child abuse and acquaintance rape cases[47] and applied these standards in *Balcom*.

In *Ewoldt*, the California Supreme Court framed the issue in terms of the admissibility of evidence of uncharged acts as proof of plan. Specifically, the court reexamined the standards it had established ten years earlier, in *People v. Tassell*,[48] for proving the existence of a plan as the basis for admitting uncharged misconduct evidence. *Tassell*, like *Balcom*, was a rape prosecution of a defendant who admitted having intercourse with the victim, but claimed that she had consented.[49] The victim's testimony, corroborated by physical evidence, was that the defendant forced her to have sex by means of physical violence and verbal threats.[50] The trial court admitted evidence of two previous incidents that bore strong factual similarity to the charged offense on the theory that they evinced a common design or plan to rape women using a particular technique.[51] The California Supreme Court reversed the trial court's decision, holding that to qualify for admission under the plan theory, the evidence

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[45] *Id.* at 780-81.

[46] Notably, in both *Ewoldt* and *Balcom* the defendants were tried twice on the charges because the jurors in both cases were unable to reach a unanimous verdict in the first trial. *Ewoldt*, 867 P.2d at 760; *Balcom*, 867 P.2d at 779. In both cases, the trial courts admitted evidence of uncharged misconduct on the second trial that was not presented to the first juries. *Ewoldt*, 867 P.2d at 760; *Balcom*, 867 P.2d at 779. The fact that both defendants were convicted when tried a second time with the uncharged misconduct evidence is another bit of anecdotal confirmation of the influence similar acts evidence carries with jurors.

[47] The court did not specifically address itself in either *Ewoldt* or *Balcom* to the admissibility of uncharged misconduct evidence in sex crimes cases as a distinct category. Indeed, the court quite clearly couched its holding in terms applicable across the spectrum of criminal cases, and the precedents it cited and illustrations it presented included crimes other than sexual assault. I will argue, however, that the rule the court established will, or at least should be, applicable primarily in prosecutions that are factually similar to the two cases the court decided. *See infra* notes 106-216 and accompanying text.

[48] 679 P.2d 1 (Cal. 1984), *overruled by* People v. Ewoldt, 867 P.2d 757, 769 (Cal. 1994).

[49] *Tassell*, 679 P.2d at 2-3.

[50] *Id.* at 2.

[51] *Id.* at 3.

must support an inference that "there is . . . a 'single conception or plot' of which the charged and uncharged crimes are individual manifestations."[52] But unless the evidence establishes such a "'grand design,' talk of 'common plan or scheme' is really nothing but the bestowing of a respectable label on a disreputable basis for admissibility — the defendant's disposition."[53]

The *Ewoldt* court held that because the *Tassell* requirement of proof of a "continuing conception or plot" set too high a standard for demonstrating the existence of a plan, it effectively prevented the jury from considering legitimate non-character proof that the defendant committed the charged acts.[54] A "plan," according to the court, can be proven circumstantially with evidence that the defendant committed a series of similar, but "unconnected," acts.[55] In describing the type of evidence the prosecution must offer to support an inference of plan or design, the court stated that "[the] evidence of charged and 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.'"[56] The "common features" of the various acts "must indicate the existence of a plan rather than a series of similar spontaneous acts."[57] But, as distinguished from *Tassell*, a plan can be inferred from similarity alone; the various parts of the plan need not be shown to be otherwise connected.[58]

The *Ewoldt* court attempted to clarify the threshold of similarity for proving the existence of a plan by distinguishing the different foundations necessary to introduce evidence to prove intent, plan, or identity. Some similarity between the charged and uncharged acts must be shown to admit the evidence on

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[52] *Id.* at 4-5 (quoting People v. Covert, 57 Cal. Rptr. 220, 223 (Ct. App. 1967)).

[53] *Id.* at 5.

[54] *Ewoldt*, 867 P.2d at 767-68.

[55] *Id.* at 768-69.

[56] *Id.* at 770 (quoting 2 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §304, at 249 (James H. Chadbourn revisor 1979) [hereinafter TRIALS AT COMMON LAW]).

[57] *Id.*

[58] *Id.* at 768-69 (approving admission of evidence of "a similar but unconnected offense" in People v. Ruiz, 749 P.2d 854 (Cal. 1988)).

any of these issues or theories. But the degree of similarity required depends on how the evidence is being used. The least similarity is required when the evidence is being offered to prove the intent with which the act was committed.[59] According to the court, "[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . ."[60]

The greatest degree of similarity is required of evidence offered to prove identity. "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts."[61] The standard for admitting the evidence to prove plan is an intermediate standard between the other two. To prove the existence of a plan, the evidence of charged and uncharged acts must display "common features [that] indicate the existence of a plan rather than a series of similar spontaneous acts."[62]

In endorsing the view that similarity of method is sufficient to raise an inference that a series of acts were part of a single design, the court lowered the threshold for proving the existence of a plan and thereby made it easier for prosecutors to introduce uncharged misconduct evidence on that theory.[63] But at the same time, the court also significantly restricted the circumstances in which plan or design may be used as the basis for offering uncharged misconduct evidence. Throughout its opinion, the court stressed that evidence of other crimes offered as parts of a plan that also includes the charged offense is proper

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[59] *Id.* at 770.

[60] *Id.* (quoting 2 TRIALS AT COMMON LAW, *supra* note 56, at 241).

[61] *Id.*

[62] *Id.* In comparing the requirements for proving intent, identity, and plan, the court confused two different categories. The court failed to distinguish between the non-character theory of logical relevance on which the evidence is being offered and the issue or legal element that the evidence is being used to prove. Intent and identity are both issues that are being proven with the uncharged misconduct evidence, while "plan," "design," "common plan," or "scheme" all are labels for a theory of non-character relevance.

[63] *See* MENDEZ & IMWINKELRIED, *supra* note 5, at 473.

only when used "to show that the act was in fact done or not done"[64] when neither criminal intent nor the identity of the actor is in issue.[65] The court elaborated on this limitation by emphasizing that the admissibility of similar acts evidence to prove intent, identity, or plan depends on whether those issues are actually in dispute.[66] The defendant's intent is in issue and

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[64] *Ewoldt*, 867 P.2d at 764 (quoting 1A WIGMORE, *supra* note 7, §102, at 1666). The *Ewoldt* court also stated that "[e]vidence of a common design or plan . . . is not used to prove the defendant's intent or identity but rather to prove that the defendant engaged in the conduct alleged to constitute the offense. *Id.* at 764, 768.

[65] *Id.* at 764, 768, 772. At first blush, this restriction on the use of plan evidence seems unwarranted. As has been frequently observed and can be easily shown, evidence that the charged and uncharged acts are constituent parts of an objectively defined larger scheme can be used to prove either the identity of the actor or intent with which the act was performed, in addition to the fact that the act was committed. *See* IMWINKELRIED, *supra* note 11, §§ 3:15, 5:33; 22 WRIGHT & GRAHAM, *supra* note 31, § 5244. Consider the case in which the defendant has devised a plan to murder all competing claimants to real property so that he will inherit the property. If the accused claims that the murder was committed by someone else, would not evidence that he had killed other potential claimants pursuant to a plan to make himself the only surviving heir serve to identify him as the perpetrator of the charged offense? Or suppose the defendant admitted that he caused the victim's death, but contends that the killing was accidental. Would not evidence of his plan to eliminate competitors for the property tend strongly to disprove his claim of accident? Plans whose components are linked by a logic of means rather than ends are likewise probative of identity, though they may not be relevant to intent. If it were proven that the defendant planned to steal a gun to commit a murder, evidence that the defendant committed the theft would tend to identify him as the murderer.

Although the existence of a plan is probative of identity as well as actus reus, there is good reason to restrict the use of idiosyncratic plans to issues other than identity. Since the various acts must be in some sense similar, but in no sense distinctive, the evidence of the prior crimes is not, by the court's own admission, sufficient to identify the defendant as the perpetrator of the charged offense. The method used in the commission of crimes satisfying the requirements for an idiosyncratic plan may be sufficiently common to have been utilized by any number of people. But evidence that the defendant had formulated a plan to commit a series of similar crimes is logically probative of the actus reus, regardless of how commonplace the manner of commission. When the defendant concedes that if the woman was raped he was the rapist, evidence that he had devised a plan to commit rape would tend to establish that the sexual intercourse that both parties agree took place was not consensual.

[66] *Ewoldt*, 867 P.2d at 764 n.2. The court's decision to frame the discussion in this way was probably influenced by the opinion in *Tassell*. The *Tassell* court rested its holding (that evidence of other similar rapes was inadmissible to prove the defendant's guilt of the charged offense) on the fact that he had admitted to the act of sexual intercourse and therefore neither intent nor identity was at issue. *Tassell*, 679 P.2d at 7-8. The court took the view that since the only question was whether the victim consented to the intercourse, there were no contested issues on which the evidence of defendant's prior crimes were relevant. The *Ewoldt* court's emphasis on the admissibility of plan evidence to prove the commission of the act when neither intent nor identity is contested was apparently in

uncharged misconduct evidence may be offered to prove intent when "'the act is conceded or assumed [and] what is sought is the state of mind that accompanied it.'"[67] Conversely, "[e]vidence of identity is admissible where it is conceded or assumed that the charged offense was committed by someone" but the defendant claims that it was not him.[68] Finally, "[e]vidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged"[69] when neither intent nor identity is in issue but "'the act is still undetermined.'"[70] As a result, the court stated:

> [I]n a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft [and therefor neither the intent or identity of the shoplifter is in dispute], evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise in the manner alleged by the prosecution.[71]

In applying its revised standards to the facts of *Ewoldt* and *Balcom*, the court had little difficulty finding that the evidence of uncharged acts was properly admitted. First, the disputed issues in *Ewoldt* fit the court's requirement for admission of plan evidence. The defendant disputed neither intent (by admitting to having touched the victim but claiming the touching was innocent), nor identity (which he could conceivably have done by

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response to this aspect of the *Tassell* court's reasoning. As will become clear, on this issue I believe the *Ewoldt* court has the better argument.

[67] *Ewoldt*, 867 P.2d at 764 n.2 (quoting 2 TRIALS AT COMMON LAW, *supra* note 56, at 238). For instance, according to the court's illustration, in a shoplifting prosecution "in which it was conceded or assumed that the defendant left the store without paying for certain merchandise," evidence of other similar acts would be admissible to prove intent to steal. *Id.*

[68] *Id.* Thus, according to the court:

> [I]n a prosecution for shoplifting in which it was conceded or assumed that a theft was committed by an unidentified person, evidence that the defendant had committed uncharged acts of shoplifting in the same unusual and distinctive manner as the charged offense might be admitted to establish that the defendant was the perpetrator of the charged offense.

Id. (citing 2 TRIALS AT COMMON LAW, *supra* note 56, at 477).

[69] *Id.*

[70] *Id.* (quoting 2 TRIALS AT COMMON LAW, *supra* note 56, at 238).

[71] *Id.*

claiming that he was being accused of abuse committed by another). Instead, the defendant denied having committed the act constituting abuse, implicitly conceding that if the victim was abused, he committed the abuse with the requisite criminal intent. Concluding that the foundation for proof of a plan was satisfied, the court pointed to the facts that the victims of the charged and uncharged abuse were defendant's stepdaughters, resided in defendant's home, and were about the same age at the time defendant abused them.[72] The court also emphasized the similarity among the several acts of abuse. The court noted that the defendant committed these acts against the girls while they were asleep in bed and pointed to the fact that defendant offered a similar excuse for his actions in each case. The court found these similarities sufficient to support an inference that the charged and uncharged acts were manifestations of a common design or plan.[73] Accordingly, the court determined that the evidence was properly admitted to prove that the defendant committed the crimes in accordance with his plan.

The court likewise found the evidence of the defendant's uncharged rape admissible in *Balcom*. On appeal, the prosecution defended the admission of evidence of the Michigan rape on the ground that it was permissible proof of the defendant's intent.[74] The court rejected this argument, stating that intent was not genuinely disputed, since "if the jury found that defendant committed the act alleged, there could be no reasonable dispute that he harbored the requisite criminal intent."[75] Because the defendant admitted having had sex with the victim, and because acceptance of the victim's account left no room for a finding of lack of criminal intent, the only issue for the jury was whether defendant forced the victim to engage in sex by holding a gun to her head.[76]

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[72] *Id.* at 770-71.

[73] *Id.*

[74] *Balcom*, 867 P.2d at 781.

[75] *Id.*

[76] *Id.* at 781-82. The court actually held that while the issue of intent was technically in issue by virtue of the defendant's not guilty plea, and therefore the uncharged act was minimally relevant, its probative value on that issue, not the subject of reasonable dispute, would be unfairly prejudicial. *Id.*

Although the court held the evidence of the uncharged rape inadmissible on the issue of intent, it concluded that the evidence was properly admitted to prove that the defendant had a plan to commit the type of offense for which he was charged.[77] The court identified a number of factual similarities between the crimes: their occurrence near an apartment complex early in the morning; the similar clothing worn by the defendant on the two occasions; the use of a gun to gain control of a lone woman; a professed intention to only rob the victim; transporting the victim to a place where the rape could occur before announcing an intention to commit rape; forcibly removing the victim's clothes; and the commission of a single act of intercourse.[78] Moreover, in both cases the defendant stole the victim's ATM card and acquired her personal identification number before leaving in the victim's car.[79] The court deemed these similarities sufficient to establish that both crimes were committed pursuant to a single plan.[80] The evidence was therefore relevant to the material issue of whether the defendant forced the victim to have sex with him at gunpoint. Moreover, the evidence proved this issue without relying on an improper inference about the defendant's propensity to commit rape.

II. THE CRITIQUE OF THE COURT'S RATIONALE

In *People v. Ewoldt* and *People v. Balcom*, the court endorsed the view that similarity alone raises an inference that a series of otherwise unconnected crimes or acts are part of a common plan or design. From this it supposedly follows that evidence of uncharged acts satisfying the similarity requirement may be admitted to prove the charged act without violating the rule against proving conduct through character. This is because the probative value of the evidence derives from the logic of the plan, not from an inference based on subjective propensity. The court also held that evidence that the defendant has formulated a plan to commit a series of similar crimes may not be intro-

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[77] *Id.* at 784.
[78] *Id.* at 782.
[79] *Id.*
[80] *Id.* at 784.

duced to identify the defendant as the perpetrator of the charged offense.

As Professors Mendez and Imwinkelried have shown,[81] the court's conclusion about the inferences one can draw from evidence of a series of similar crimes or acts is highly dubious. Two questions must be considered in determining whether a body of evidence circumstantially demonstrates the existence of a plan or design. First, what is a "plan"? Second, under what circumstances one can infer that a plan exists?

The definition of "plan" for purposes of introducing uncharged misconduct evidence must have its source as much in the concept of character as in the concept of plan. It is not the existence of a plan as such that justifies admission, but the absence of reasoning that relies on character.[82] The admissibility rules prohibit introducing evidence which depends for its persuasive effect on an assumption about the actor's subjective disposition to act in a particular way. 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"[83] or "a conscious commitment"[84] 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.[85] For instance, if an heir to property has devised a plan to become the sole owner of the inheritance by killing off all rival claimants, we could predict that she would kill remaining heirs and identify her as the likely killer of the dead heirs by consulting the plan, without knowing anything about her subjective character.[86] Likewise, a plan to steal a key to break into a safe allows us to forge a logical link between the uncharged key theft and

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[81] MENDEZ & IMWINKELRIED, *supra* note 5, at 473.

[82] CAL. EVID. CODE §1101(b) (West 1995); FED. R. EVID. 404(b).

[83] 2 LOUISELL & MUELLER, *supra* note 13, § 140.

[84] 22 WRIGHT & GRAHAM, *supra* note 65, § 5244.

[85] *Id.*

[86] *See* Bryden & Park, *supra* note 31, at 546. This is an example of what Professors Mendez and Imwinkelried label a chain variety plan. Mendez & Imwinkelried, *supra* note 5, at 482-83.

the charged safe cracking that does not depend on the defendant's disposition.[87]

However, as discussed above, 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.[88] 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. The concept of "plan" that best corresponds with this emphasis on repetition of similar acts as the index of the existence of a plan is the idea of a "blueprint."[89] It is reasonable to infer from evidence showing that the defendant has committed a series of similar crimes that she has settled on a single technique for committing that crime, either because she has had success with the technique or because using the same technique will economize on imaginative effort. While evidence of a series of similar crimes supports an inference that the defendant has a blueprint or plan for committing her crimes, the fact that the defendant has devised such a plan for *how* to commit a particular crime does not prove that the defendant will *use* the plan and commit more crimes. As Professor Kenneth Graham explains, "[p]roof that the witch had constructed one gingerbread house will support an inference that she has the "plans" for this type of architectural endeavor, but it does not prove whether or not she will ever use the blueprint to construct another lure for lost children."[90] Proving the existence of a plan in the sense of a method or blueprint may be probative of the identity of the perpetrator of a crime conceded to have occurred, since the defendant's consistent use of the same technique links her to crimes committed with that technique.[91] But such a plan does not supply the logical link necessary to prove that the defendant

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[87] 1A WIGMORE, *supra* note 7, § 218, at 1883. This is an example of what Professors Mendez and Imwinkelried label a sequential variety plan since its component parts follow "a natural sequence or order." Mendez & Imwinkelried, *supra* note 5, at 481.

[88] *See supra* notes 64-71 and accompanying text (citing People v. Ewoldt, 867 P.2d 757, 767-68 (Cal. 1994)).

[89] 22 WRIGHT & GRAHAM, *supra* note 65, § 5244 (Supp. 1995).

[90] *Id.*

[91] If the technique is common, however, many individuals may be spuriously linked to one crime through their all having committed crimes in the same way.

committed an act which she denies — the issue the other crimes evidence was admitted on in *Ewoldt.* If jurors conclude that a defendant shown to have developed such a blueprint is more likely to have committed the charged crime, that conclusion is based on propensity, not plan.

Since proof that the defendant possesses the means for committing a crime is not proof of commission of the crime, the court presumably meant to require something more than merely showing that the defendant has a developed a blueprint for committing a particular crime as a predicate for admitting evidence of similar uncharged crimes. The court's emphasis on similarity of method as the touchstone for admissibility suggests that evidence of uncharged acts will be admitted upon proof that the defendant has formulated a "plan to commit a series of similar crimes."[92] This type of plan, if established, does prove the commission of the criminal act without reliance on character reasoning. A juror could, at least in principle, properly conclude from the defendant's commission of uncharged rapes that the defendant has a plan to commit that crime. A juror could then infer from the existence of a plan that the defendant committed the charged offense pursuant to this plan. This line of reasoning differs from propensity reasoning, by which the juror concludes on the basis of evidence of uncharged rapes that the defendant is disposed to commit rape, and therefore more likely committed the crime charged.

Although a plan to commit a series of similar crimes does prove commission of the act without reliance on propensity reasoning, the evidentiary showing the court requires to prove the foundational fact that the defendant has formulated such a plan provides only a weak basis for inferring that such a plan exists.[93] The court permits a plan to be inferred from evidence of uncharged acts "similar" to the crime charged. To raise an inference of plan there must be more than "'merely a similarity in the results, but . . . a concurrence of common features.'"[94] It is not enough to prove that the defendant killed A and that

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[92] *See* Bryden & Park, *supra* note 31, at 547 n.66 (quoting IMWINKELRIED, *supra* note 11, at § 3:23).

[93] Mendez & Imwinkelried, *supra* note 5, at 501.

[94] *Ewoldt*, 867 P.2d at 770 (quoting 2 TRIALS AT COMMON LAW, *supra* note 56, at 249).

B was found dead;[95] some similarity in method or circumstances must be shown as well. However, the court's definition of the required degree of similarity is entirely circular. Acts 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 similar spontaneous acts."[96] In further attempting to clarify the standard for proving the existence of a plan, the court distinguishes the lesser degree of similarity required to prove intent and the greater degree of similarity and distinctiveness required to prove identity. The primary significance of this distinction is to make clear that plan evidence need not meet the standards for admission under the familiar modus operandi rule. That rule permits evidence of uncharged acts to identify the perpetrator of the charged crime if both were carried out using a highly unusual or distinctive technique.[97]

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.[98] 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.[99] While it is reasonable to infer a plan from several similar crimes, it is equally,

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[95] Mendez & Imwinkelried, *supra* note 5, at 499.

[96] *Ewoldt*, 867 P.2d at 770.

[97] For a discussion of the modus operandi rule, see *infra* notes 134-41 and accompanying text.

[98] *Plan Theory*, *supra* note 35, at 12.

[99] In contrast to the question of whether the extrinsic act occurred or was committed by the accused, which is purely a matter of relevance and may be left to the jury, Huddleston v. United States, 485 U.S. 681, 689-91 (1988), the existence of a "plan" as a predicate for admission of other acts evidence implicates questions of enforcement of legal policy and must be decided as a preliminary matter by the judge. *See* Norman Garland & Jay A. Schmitz, *Of Judges and Juries: A Proposed Revision of Federal Rule of Evidence 104*, 23 U.C. DAVIS L. REV. 77 (1989) (discussing considerations bearing on allocation of preliminary fact questions between judge and jury); John Kaplan, *Of Mabrus and Zorgs—An Essay in Honor of David Louisell*, 66 CAL. L. REV. 987 (1978) (same).

if not more, reasonable to infer that each individual crime was "'the result of an impulse born of the moment.'"[100] 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.[101] Indeed, some of the similarities the court relied on to find a plan in *Ewoldt* and *Balcom* seem entirely commonplace.[102] Because the threshold degree of similarity required to prove a plan is entirely circular — the common features are sufficient to prove a plan when they prove a plan — a judge disposed to see planned behavior can, and presumably will, find that a plan has been proven.[103] In short, under the standards set forth in *Ewoldt*, "the inference that the accused committed the charged and uncharged offenses as part of one plan is so weak as to be unacceptably speculative."[104]

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[100] *Plan Theory*, *supra* note 35, at 12 (quoting State v. Buxton, S.W.2d 635, 637 (Mo. 1929)).

[101] Mendez & Imwinkelried, *supra* note 5, at 501.

[102] In *Balcom*, for example, the court relied on the facts that in both the charged and uncharged rapes, the defendant was wearing dark clothing and a cap, went to an apartment complex in the early morning, sought out a lone woman he did not know, and gained control over her at gunpoint. *Balcom*, 867 P.2d at 782. While there are other more distinctive similarities, i.e., the defendant's theft of the victims' ATM cards, the court makes clear in its opinion that the defendant's actions need not be distinctive to support an inference of plan. *Ewoldt*, 867 P.2d at 770.

[103] Ironically, the court's decision to admit the evidence on a plan theory may have the effect of excluding evidence which should be admitted. Under the standards laid down in *Ewoldt*, a trial court should admit other crimes evidence whenever the similarities between the charged and uncharged acts prove the existence of a plan. Since the court defines the foundation for proving a plan circularly as evidence that proves a plan, the test is simply whether the trial judge believes the evidence that the defendant had devised a plan. Although a majority of the California Supreme Court finds an inference of plan from a series of similar acts plausible, many people, presumably including many trial judges, will not. Certainly if Professors Mendez or Imwinkelried were ruling on the admissibility of such evidence, they would exclude it unless persuaded of the foundational fact that all the crimes were committed pursuant to a common plan. Should the prosecution lose, moreover, double jeopardy protection prevents the prosecution from appealing the ruling that the existence of a plan to support admission of uncharged misconduct evidence was not proven.

[104] Mendez & Imwinkelried, *supra* note 5, at 501. *See also* 22 WRIGHT & GRAHAM, *supra* note 31, § 5244 (observing that whereas plan theory "is plausible when there is some other evidence of the plan or when the existence of the plan is an obvious inference from the other crime," the theory can, "if not carefully policed, . . . 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

From the perspective of evidence law policy, the mischief in the *Ewoldt* court's allowance of plan evidence based on similarity alone lies in its failure to adequately guard against juror misuse of the evidence.[105] A series of crimes sharing common features suggests planned behavior only weakly, if at all, but "is highly probative of the accused's disposition to engage in the type of criminal conduct with which he is charged."[106] As a result "[t]he value of the evidence as proof of character will be obvious and persuasive; its value as proof of a plan will be tenuous and difficult to discern."[107]

III. THE DOCTRINE OF CHANCES

The *Ewoldt* court's plan rationale for admitting evidence of uncharged acts to prove the actus reus of the charged offense seems strained and tenuous. While the existence of a plan to commit certain acts is undeniably probative of whether those acts were committed, the repeated commission of similar acts provides, at best, a weak basis for concluding that together they comprise parts of a single plan or design.

Although the court's plan rationale is deficient, its focus on similarity as indicative of the existence of a non-character use of other crimes evidence seems apt.[108] The court fails, however, to provide a convincing explanation for how similarity between charged and uncharged acts bespeaks non-character relevance,

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planned course of conduct").

[105] Mendez & Imwinkelried, *supra* note 5, at 501. *But see* Bryden & Park, *supra* note 31, at 547 (advocating broader admissibility of similar act evidence in acquaintance rape cases); Thomas J. Hickey, *Expanding the Use of Prior Act Evidence in Rape and Sexual Assault Cases*, 29 CRIM. L. BULL. 195, 217 (1993) (advocating broader admissibility of prior similar acts in rape and sexual assault cases because "[a]n accused's prior actions are compelling and highly probative evidence of whether he committed a later similar act"); Roger Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress was Right about Consent Defense Cases*, 22 FORDHAM URB. L.J. 271 (1995) (same).

[106] Mendez & Imwinkelried, *supra* note 5, at 501.

[107] *Id.* at 502.

[108] *See* D.W. Elliot, *The Young Person's Guide to Similar Fact Evidence-I*, 1983 CRIM. L. REV. 284 (distinguishing uncharged acts evidence that relies on similarity from that which does not and arguing that where similarity is relied on, prosecution's argument is based on improbability of coincidence); Mark E. Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L.Q. 43, 47 (1979) (explaining probative value of "similar fact" evidence rests on unlikelihood of coincidence).

or to provide adequate standards for when similarity is a sufficient basis for admitting uncharged acts evidence. To clarify those issues, it will be useful to move beyond the factual context of *Ewoldt* and consider the relation between similarity and admissibility of uncharged acts evidence more generally. This inquiry will suggest that there is an alternative non-character theory of relevance that better captures the court's intuition regarding the significance of similarity when uncharged acts are used to prove actus reus. Specifically, I will argue that the existence of similarities between the charged and uncharged acts is significant, not because similarity suggests planned behavior, but because similarity tends to eliminate the possibility of an explanation based on coincidence. I will further argue that understanding the relationship between similarity and non-propensity relevance will assist in formulating criteria for admitting uncharged misconduct evidence that minimize the risk of misuse without excluding probative non-character evidence.

Before considering the contexts in which similarity justifies admitting uncharged acts evidence, it should first be emphasized that similarity per se is not a reliable touchstone for finding non-character relevance.[109] Similarity is neither invariably required for admissibility nor invariably sufficient. First, similarity is not a criterion for admissibility under many theories of non-character relevance. For instance, when uncharged acts evidence is offered to prove a "plan" defined as a commitment to a certain course of conduct, similarity between the charged and uncharged acts is not a factor in the admissibility of such evidence. Once it is shown that the defendant has devised a plan to eliminate rival claimants to his inheritance, uncharged murders pursuant to that plan are admissible to prove the commission of the charged offense whether the method or circumstances of the various killings are similar or not. Likewise, the theft of a weapon can be admitted under either the plan or preparation rubrics to prove a dissimilar crime involving use of that weapon. An illicit sexual relationship can be proven to establish the motive for a homicide; an uncharged robbery can be used to prove that the accused had the "opportunity" to carry out a nearby

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[109] *See* IMWINKELRIED, *supra* note 11, § 2:12 (outlining numerous situations in which dissimilar crimes are logically relevant).

homicide if the defendant claims alibi. While in every case there is some relationship between the charged and uncharged offenses, the kind of relationship depends on the theory of non-character relevance, and in none of the examples is it based on similarities between the charged and uncharged acts.

Just as similarity is not always necessary for admission, the existence of some common features between the charged and uncharged acts is not always sufficient.[110] It is true, however, that similarity between the charged and uncharged offenses is often a factor affecting the admissibility of such evidence.[111] The degree of similarity necessary to raise non-character based inferences depends, as the *Ewoldt* court correctly pointed out, on the issue that the other acts are being offered to prove.[112] What the court failed to recognize, however, is that the reason similarity is significant, increasingly so as it becomes greater, rests on assumptions about probability.[113]

A. Similar Facts Proving Mens Rea

One situation in which similarity does provide the basis for admission of uncharged misconduct evidence is in the use of the accused's similar acts to prove mens rea.[114] Evidence of the

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[110] If the only relevance of the defendant's commission of similar uncharged crimes is as proof of his propensity to commit crime, the evidence is inadmissible notwithstanding the similarities.

[111] Notably, the category label used for this type of evidence in England is "similar fact evidence," although the category includes evidence of the accused's bad acts that is admitted without regard to its similarity to the charged offense. Elliot, *supra* note 108, at 287-89.

[112] *See Ewoldt*, 867 P.2d at 769-70 (discussing different degrees of similarity necessary to establish intent, common design or plan, or identity).

[113] *See* Elliot, *supra* note 108, at 289 (arguing that relevance of similarity rests on improbability of coincidence); Turcott, *supra* note 108, at 47 (discussing relevance of similar fact evidence as based on unlikelihood of coincidence).

[114] *See* IMWINKELRIED, *supra* note 11, § 505 (describing Wigmore's theory of improbability); 22 WRIGHT & GRAHAM, *supra* note 31, § 5242 (discussing examples where similarity of offenses become important in proving intent); Note, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Rule 404(b)*, 61 WASH. L. REV. 1213, 1230-31 (1986) [hereinafter *Admission of Evidence*] (discussing value of similarity between crimes in determining probability). Probability based reasoning is not, however, the only way other crimes evidence is used to prove intent, so similarity between the charged and uncharged acts will not invariably be required when proving intent. *See* IMWINKELRIED, *supra* note 11, § 5:04 (arguing that "litmus test" should be logical relevance rather than similarity); 22 WRIGHT & GRAHAM, *supra* note 31, § 5242 (discussing situations in which other crimes may be relevant on issue of intent

defendant's commission of other similar acts becomes admissible to prove intent or knowledge whenever the defendant concedes having done the act constituting the crime, but claims that it was done accidentally or otherwise innocently. For instance, as in Wigmore's famous example, if a hunter charged with having shot his hunting companion claims that the shooting was accidental, evidence of the defendant's having fired at his companion on other occasions becomes admissible to disprove the claim of accident.[115] Likewise, a defendant who claims that his possession of a controlled substance was innocent and unknowing opens the way for admission of evidence that he possessed the same controlled substance on other occasions.[116]

It is commonly recognized in both case law[117] and commentary[118] that the relevance of the defendant's commission of other similar acts to the question of his state of mind in

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regardless of similarity).

[115] 2 WIGMORE, *supra* note 7, § 302, at 241.

[116] Edward J. Imwinkelried, *The Dispute over the Doctrine of Chances*, CRIM. JUST., Fall 1992, at 19 [hereinafter *Dispute over the Doctrine of Chances*].

[117] *See, e.g.*, United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991) (citing Wigmore on doctrine of chances), *cert. denied*, 502 U.S. 916; McKenzie v. State, 33 So.2d 488, 489-90 (Ala. 1948) (same); People v. Robbins, 755 P.2d 355, 361-62 (Cal. 1988) (citing both Imwinkelried and Wigmore in explanation of doctrine of chances); People v. Spoto, 795 P.2d 1314, 1318-20 (Colo. 1990) (citing Wigmore on doctrine of chances); People v. VanderVliet, 508 N.W.2d 114, 128-31 (Mich. 1993) (same); State v. Stager, 406 S.E.2d 876, 891-93 (N.C. 1991) (same); State v. Johns, 725 P.2d 312, 316-23 (Or. 1986) (same); Commonwealth v. Boykin, 298 A.2d 258, 262-63 (Pa. 1972) (Roberts, J., concurring) (same); Scott v. State, 720 S.W.2d 264, 266-67 (Tex. Ct. App. 1986) (same); State v. Bowen, 738 P.2d 316, 321 (Wash. Ct. App. 1987) (same); State v. Rutchik, 341 N.W.2d 639, 653-54 (Wis. 1984) (Abrahamson, J., dissenting) (same). Recent judicial interest in probability based theories of relevance is largely a result of Professor Imwinkelried's scholarship on the subject. *See generally* IMWINKELRIED, *supra* note 11, chs. 4,5 (analyzing use of uncharged acts to prove actus reus and mens rea).

[118] *See, e.g.*, IMWINKELRIED, *supra* note 11, § 5:05 (describing necessity for similarity under doctrine of chances); 2 WIGMORE, *supra* note 7, § 302 (explaining theory of evidencing intent); 22 WRIGHT & GRAHAM, *supra* note 31, § 5242 (discussing Wigmore's theory of improbability); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 593-601 (1990) [hereinafter *Evidence Prohibition*] (outlining use of doctrine of chances in proving mens rea); *Admission of Evidence*, *supra* note 114, at 1225-26 (discussing doctrine of chances); Vivian M. Rodriguez, Comment, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity (sic) and Unfair Prejudice*, 48 U. MIAMI L. REV. 451, 459 (1993) (discussing admission of similar acts evidence to establish increase in probability of intent).

committing the charged crime rests on assumptions about probability.[119] The probative value of the similar act evidence in disproving the claim of innocence rests on the improbability of non-recurrent similar events recurring by chance. As described by Wigmore, who labeled the theory the doctrine of chances, the relevance of the similar acts evidence on the issue of knowledge or intent rests on "that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all."[120] While one accidental discharge of the defendant's gun in the direction of his companion is plausible, the plausibility of accident as the explanation for the firing of the bullet at his companion diminishes as the number of instances increases. At some point, the improbability of an accidental cause of the events raises an inference that the similarity is the result of design. If two shots from the defendant's gun narrowly miss his companion and then a third shot kills him, "the immediate inference is that [the defendant] shot at [his companion] deliberately."[121] The inference of an intentional shooting is not based on a conclusion about the defendant's subjective propensity to shoot at people, but on the fact that "the [objective] chances of an inadvertent shooting on three successive similar occasions are extremely small."[122]

Some element of similarity is crucial when the doctrine of chances is invoked to prove mens rea because the relevance of the evidence depends on the unlikelihood that similar outcomes will recur randomly.[123] The required degree[124] or ele-

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[119] As Professor Imwinkelried points out, this is but one of several non-character uses of other acts evidence to prove mens rea. IMWINKELRIED, *supra* note 11, ch. 5.

[120] 2 WIGMORE, *supra* note 7, § 302.

[121] *Id.*

[122] *Id. But see* pp. 358-96 *infra* (arguing that propensity assumptions underlie doctrine of chances reasoning)

[123] 2 WIGMORE, *supra* note 7, § 302. *See also* IMWINKELRIED, *supra* note 11, § 5:07 ("[t]he uncharged act should closely parallel the charged act"); *Admission of Evidence, supra* note 114, at 1235 (1986) (arguing that courts should require showing that events are "highly similar" before admitting to prove intent); *Evidence Prohibition, supra* note 118, at 595 (stating that acts must be "roughly similar"). *But see infra* notes 190-91 and accompanying text (arguing that intuitive sense of significance of similarity in dispelling possibility of coincidence has its source in assumptions about character).

[124] *See* IMWINKELRIED, *supra* note 11, § 5:07 (discussing degree of similarity required for

ments[125] of similarity between the charged and uncharged acts cannot be formulated as a general rule. The question in every case is not merely whether the events are similar, but whether it is likely that they could all be the result of chance. It must, of course, be shown that the accused committed all the similar acts, since the probative value of the evidence rests on the improbability of the defendant's repeated innocent or inadvertent involvement in the same rare circumstances. It need not, however, be proven that the defendant harbored a criminal intent on any one occasion.[126] To do so would completely mistake the significance of the evidence under the doctrine of chances. As Judge Cardozo explained in reference to a prosecution for issuing a fraudulent bill of lading:[127]

> The intent was not something to be found separately for each as a preliminary fact, before any one of them could be considered in relation to the bill in controversy, but the mass, when viewed together, had a cumulative value in giving meaning to the parts . . . . A finding that there was fraudulent intent in the earlier transaction does not precede the consideration of its significance in relation to the second. The two are to be viewed conjunctively, with all the sidelights cast by one upon the other. Repetition reduces the likelihood of mistake or mere coincidence. We miss the evidence of system when we ignore the succession, and concentrate our gaze upon the isolated acts.[128]

Other limitations on the admission of similar acts evidence are implicit in the logic of the doctrine of chances. One issue is whether there is a sufficiently large number of similar events to eliminate the possibility of coincidence.[129] The question of how many similar events are enough will depend on circumstances including the complexity[130] of the event.[131] It may also re-

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doctrine of chances relevancy).

[125] *See id.* § 5:08 (discussing aspects of similarity pertinent to assessment of doctrine of chances relevancy).

[126] *Id.* § 5:25.

[127] People v. Gerks, 153 N.E. 36 (N.Y. 1926).

[128] *Id.* at 38.

[129] *See* IMWINKELRIED , *supra* note 11, § 506 (discussing considerations relevant to assessment of numerosity necessary to trigger doctrine of chances).

[130] *See Admission of Evidence, supra* note 114, at 1228-29 (noting that "[t]he repetition of each separate step of the complex act increases the objective improbability of coincidence").

[131] *See* State v. Johns, 725 P.2d 312, 324 (Or. 1986). In *Johns*, the Supreme Court of

quire consideration of the relative frequency of the event, rather than simply the absolute number of occurrences.[132] For instance, if the defendant fired thousands of shots over the course of decades of hunting with the same companion, only three of which passed near the companion, the possibility that all three shots were accidental remains plausible.[133]

Finally, when evidence is offered under the doctrine of chances, the court must be alert to the possibility of alternative explanations for the repeated occurrence of the same event. The relevance of the evidence in proving intent is predicated on the assumption that if the events cannot be explained by chance, then they must be the result of design. The possibility remains, however, that the similar outcomes are produced by neither chance nor deliberate conduct by the accused, but instead by some other force. For instance, if a defendant accused of possessing heroin in his luggage claims that he was unaware of the drug, evidence that on another occasion he also possessed heroin would tend to show his knowledge and thereby rebut his claim of innocence. But if it were shown that the defendant was being unwittingly used as a courier by another person, the inference of criminal knowledge evaporates.

Oregon admitted evidence of the defendant's previous attempt to kill his wife to disprove his claim that he killed her accidentally. The court stated:

> We believe no categorical statement can be made one way or the other [on the question whether one prior similar incident is enough to justify admission]. Depending on the circumstances of the case, sometimes one prior similar act will be sufficiently relevant for admissibility and sometimes not. A simple, unremarkable single instance of prior conduct probably will not qualify, but a complex act requiring several steps, particularly premeditated, may well qualify. These decisions must be made case-by-case . . . .

Id. *See also* IMWINKELRIED, *supra* note 11, § 5:06.

[132] IMWINKELRIED, *supra* note 11, § 506.

[133] Professor Imwinkelried points out that assessing relative frequency to establish mens rea can be problematic in such contexts. *Evidence Prohibition*, *supra* note 118, at 597-98.

B. Probability-Based Reasoning in Proving Identity: The Modus Operandi Rule

Although not as widely recognized,[134] probabilistic reasoning also plays a role in the use of evidence of other similar acts to prove identity when the accused does not actively contest that a crime was committed by someone. This is commonly referred to as evidence of modus operandi, a term more descriptive of the evidence than the theory that makes it relevant. To be admissible under this label, the technique used in the commission of both the charged and uncharged crimes must be both similar and, more significantly, highly distinctive.[135] It is not the similarity between the two crimes that makes the uncharged misconduct evidence relevant, but the unlikelihood that more than one person would employ the same unusual technique to commit the crime.[136] Ideally, the technique used in the commission of the charged and uncharged crimes should be so distinctive as virtually to mark them as the work of a single individual, like a signature.[137] Once the crimes are linked through evidence of their having been committed in the same idiosyncratic manner, identification of the defendant as the perpetrator of one crime serves to link him to the other as well.[138]

As the emphasis on *unusual* technique as the sine qua non of admissibility suggests, the probative value of evidence offered under the modus operandi theory depends on judgments about the frequency with which certain events occur. Specifically, the evidence is relevant whenever it is valid to conclude that the

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[134] *But see Evolution of the Use of the Doctrine of Chances*, *supra* note 29, at 89-92 (summarizing argument for regarding modus operandi rule as application of doctrine of chances).

[135] *See* 3 WEINSTEIN & BERGER, *supra* note 22, ¶404[16]; IMWINKELRIED, *supra* note 11, § 3:12.

[136] *See* People v. Haston, 444 P.2d 91, 100 (Cal. 1968) The court stated:

> [T]he inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses.

Id.

[137] MCCORMICK, *supra* note 14, § 190.

[138] Identity is also sometimes provable under the doctrine of chances without resort to the modus operandi rule. *See, e.g.*, Tucker v. State, 412 P.2d 970 (Nev. 1966).

method of commission of the crime is unlikely to have been independently concocted by different people. As with proof of intent under the doctrine of chances, eliminating independent invention as the explanation for the similarity between the two crimes increases the likelihood that the same person committed both crimes.[139]

Recognition that the relevance of modus operandi evidence lies in the improbability of independent invention helps clarify the proper limits on the use of this type of evidence. Similarities between crimes that are common to many criminals do not support admission under the modus operandi rule because the probability of recurrence is high. In assessing whether independent invention is improbable, consideration must also be given to the temporal proximity of the crimes, since "[g]iven enough time, similar crimes will be committed by other people, and the value of the other acts as an earmark is diminished."[140] Finally, even if independent invention seems unlikely, there may be explanations for the repetition of a distinctive criminal technique other than that the crimes were committed by the same person. One possible explanation is that the technique has been publicized and copied.[141]

C. The Doctrine of Chances to Prove Actus Rea

Ewoldt addresses the admissibility of uncharged misconduct evidence on the basis of similarity in a third category of cases where the defendant contests neither intent nor identity, but disputes the existence of an actus reus. The doctrine of chances, rather than the court's flawed plan theory, provides a better basis for admitting similar acts evidence in this context as well.

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[139] The difference between this theory and the theory used to prove intent is that in the case of the modus operandi rule the improbability of repetition is predicated on assumptions about the limits of human inventiveness, rather than on assumptions about the capacity for chance to reproduce similar outcomes.

[140] United States v. Beasley, 809 F.2d 1273, 1277 (7th Cir. 1987).

[141] The question, of course, is whether the technique is known to criminals, not whether it is known to judges. *See* State v. Rutchik, 341 N.W.2d 639, 652 (Wis. 1984) (Abrahamson, J., dissenting) (dissenting to use of modus operandi theory as basis for admitting prior conviction for residential burglary committed while house occupants were attending funeral, noting that law enforcement publications warned public to take precautions against burglaries during funerals).

There are two variations of the defense predicated on the denial of an actus reus, or "culpable act." The defendant either denies that any social harm occurred, or concedes that there was some social harm but claims that it was not produced by any human agency.[142] In both situations the defendant claims that he did not perform an act that constitutes a crime.

The facts of *Ewoldt* and *Balcom* are both examples of the first category. In *Ewoldt*, the defendant denied that the acts of abuse that the victim testified about ever occurred. By framing his defense in this way, the defendant implicitly conceded that if he committed the alleged acts, he did so with the necessary criminal intent. By not claiming that the victim was blaming him for acts committed by another, the defendant implicitly admitted that if the acts of abuse were committed on the victim, he was the perpetrator. In *Balcom*, the defendant admitted having intercourse with the victim, but claimed that it was consensual. Thus, the defendants in both cases contended that no criminal act occurred.

Sexual abuse of children and acquaintance rape are probably the most common examples of cases in which the claim of absence of social harm arises since these crimes do not often produce lasting physical traces.[143] The paradigmatic case in which the second type of actus reus defense is asserted is physical abuse of children or infanticide, although the defense is occasionally interposed in other types of criminal cases as well.[144] In such cases, the occurrence of social harm is usually established through physical evidence of death or injury. The defendant denies culpability by claiming that the harm was caused by a non-human agency or the victim's own conduct.

Although *Ewoldt* and *Balcom* exemplify the first category of actus reus defense, the court in both cases phrased its holding in terms applicable to both categories of defenses. The court

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[142] This situation is distinct from a defense based on intent, where the defendant concedes that a human agent caused the social harm, but claims that it was caused innocently.

[143] *See* People v. Carradus, 34 Cal. Rptr. 2d 459, 468 (Ct. App. 1994) (explaining that sex crimes are most common category of crimes where criminal act itself is contested).

[144] A defense predicated on denial of an actus reus where the existence of a social loss is undisputed is also frequently interposed in arson prosecutions. For a recent example, see State v. Wieland, 887 P.2d 368 (Or. Ct. App. 1994).

stated that evidence satisfying its similarity requirements is admissible "to prove that the defendant engaged in the conduct alleged to constitute the charged offense,"[145] or "to establish that the defendant committed the *act* alleged,"[146] which is precisely what the prosecution must prove to overcome either type of actus reus defense. In a sexual molestation case, the prosecution must prove that the defendant committed acts of abuse which he denies occurred at all; in a physical abuse case, the prosecution must show that the injuries were caused by the defendant's acts rather than the child or some natural cause. In both situations, the other acts evidence is used to prove that the defendant committed a criminal act.

1. The Doctrine of Chances to Prove Human Agency as the Cause of Social Harm

There is broad consensus that similar acts evidence may be introduced on a doctrine of chances rationale to prove the defendant committed an actus reus when the defendant asserts that he did not cause the social harm, my second category of actus reus defense.[147] This type of evidence is admitted under several of the familiar category labels — absence of mistake or accident, modus operandi, or plan or scheme — but probability based reasoning underlies its relevance. The textbook examples of the application of the doctrine are two infanticide cases and the famous English "brides of the bath" prosecution.

In both *Makin v. Attorney-General for New South Wales*,[148] an 1894 Privy Council decision, and *United States v. Woods*,[149] a 1973 U.S. Fourth Circuit Court of Appeals decision, the defendants were charged with murdering babies under their care.[150]

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[145] *Ewoldt*, 867 P.2d at 764.

[146] *Id.* at 764 n.2.

[147] *See generally* IMWINKELRIED, *supra* note 11, ch. 4 (discussing use of defendant's uncharged acts to prove commission of actus reus).

[148] App. Cas. 57 (1894).

[149] 484 F.2d 127 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974).

[150] In *Makin*, a husband and wife were charged with murdering a baby they had agreed to adopt and for whose support they would receive a small sum of money. The defendants claimed that the baby, whose body was buried in the defendants' garden, died of natural causes. In *Woods*, the defendant was charged with suffocating her foster son. She claimed that the child died naturally from cyanosis.

The prosecution in both cases was permitted to introduce evidence that other babies had died while in the defendants' care to rebut defense claims that the deaths resulted from natural causes. In *Makin*, the prosecution introduced evidence that the bodies of twelve other infants had been discovered buried on premises occupied by the defendants.[151] In *Woods*, the court admitted evidence that eight other children who had been in the defendant's custody had suffered some 20 episodes of cyanosis (oxygen deprivation) that resulted in the deaths of six of those children.[152] In *Rex v. Smith*,[153] the court permitted the prosecution at defendant's trial for murdering his putative wife to present evidence that two other wives had died in bathtub drownings. This evidence was admitted to prove that the third wife, who also drowned in the tub, did not die accidentally during an epileptic seizure as the defendant claimed.

The cogency of the similar acts or, more precisely, similar happenings evidence in *Makin*, *Woods*, and *Smith* has rarely been questioned.[154] The non-character reasoning that underlies the

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[151] App. Cas. 64-65 (1894).

[152] United States v. Woods, 484 F.2d 127, 130-32 (4th Cir. 1973), *cert. denied*, 415 U.S. 979 (1974). Judge Widener's dissent raised a general objection to use of uncharged misconduct evidence to prove the corpus delicti of the crime and did not focus on the strength or weakness of the evidence presented. *Id.* at 139-45. Some older authorities have disapproved the use of uncharged misconduct evidence to prove the corpus delicti. *See* 1 F. WHARTON, WHARTON'S CRIMINAL EVIDENCE §233, at 499-500 (12th ed. 1955); Mark O'Leary, Recent Case, 43 U. CIN. L. REV. 437, 439 (1974) (citing cases disapproving of this use of uncharged misconduct evidence). However, neither the policies of the corpus delicti doctrine nor the policies of the uncharged act rule justify such a limitation. *See* Note, *Evidence—Proof of Prior Events Admissible Generally and Specifically to Demonstrate Corpus Delicti Because the Relevance of and the Need for the Evidence Outweighed its Prejudicial Impact*, 52 TEX. L. REV. 585, 590-92 (1974); Recent Case, 87 HARV. L. REV. 1074, 1076-77 (1974). *But see* Amber Donner-Froelich, Comment, *Other Crimes Evidence to Prove the Corpus Delicti of a Child Sexual Offense*, 40 U. MIAMI L. REV. 217, 237-39 (1985) (arguing uncharged misconduct evidence should not be admitted to prove occurrence of social loss); Comment, *Evidence—Other Crimes—Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator's Identity*, 6 RUTGERS L.J. 173, 180-83 (1974) (same).

[153] 11 Crim. App. 229 (1915).

[154] Many commentators have approved of the results in these cases. *See* IMWINKELRIED, *supra* note 11, § 4:01, at 4-5, §4:03, at 12-13 (1984) (discussing *Makin*, *Woods*, and *Smith*); GRAHAM C. LILLY, INTRODUCTION TO THE LAW OF EVIDENCE 152 n.10, 160 n.28 (1978) (discussing *Woods*); 2 LOUISELL & MUELLER, *supra* note 13, § 140, at 274 n.9 (discussing *Woods*); MCCORMICK, *supra* note 14, § 190, at 346 (discussing *Smith*); CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE 268 n.33 (1994) (discussing *Woods*); WEINSTEIN & BERGER,

use of similar happenings evidence as proof of actus reus in these types of situations is the same as that used in proving knowledge or intent through similar acts. It rests on the objective improbability of the same rare misfortune befalling one individual over and over.[155] Wives sometimes accidently drown in bathtubs. But it does not happen often, and the likelihood of the same man losing three wives in accidental bathtub drownings is extremely remote.[156] The fact that is being proven, the defendant's commission of the criminal act,[157] is established indirectly through a process of elimination. Once the possibility of accident is rendered unlikely, the most plausible

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supra note 22, ¶404[17], at 404-103 to 404-105 (discussing *Woods*); 2 WIGMORE, *supra* note 7, § 363, at 351 n.10 (discussing *Makin*); 22 WRIGHT & GRAHAM, *supra* note 31, § 5239, at 462-65 (1978) (discussing *Woods*); P.B. Carter, *Forbidden Reasoning Permissible: Similar Fact Evidence a Decade After Boardman*, 48 MOD. L. REV. 29, 31-32 (1985) (discussing *Smith*); Myrna S. Raeder, *Navigating between Scylla and Charybdis: Ohio's Efforts to Protect Children without Eviscerating the Rights of Criminal Defendants—Evidentiary Considerations and the Rebirth of Confrontation Clause Analysis in Child Abuse Cases*, 25 U. TOL. L. REV. 43, 146 n.809 (1994) (discussing *Woods*); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 974-75 (1946) (discussing *Makin*); Mark E. Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L.Q. 43, 48-49, 54 (1979) (discussing *Makin* and *Smith*); C.R. Williams, *The Problem of Similar Fact Evidence*, 5 DALHOUSIE L.J. 281, 327-29 (1979) (discussing *Makin* and *Smith*); Comment, *Evidence—Other Crimes—Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator's Identity*, 6 RUTGERS L.J. 173, 187-88 (1974) (discussing *Woods*); Recent Case, 87 HARV. L. REV. 1074, 1076-77 (1974) (discussing *Woods*). *But see* Note, *Evidence—Proof of Prior Events Admissible Generally and Specifically to Demonstrate Corpus Delicti Because the Relevance of and the Need for the Evidence Outweighed its Prejudicial Impact*, 52 TEX. L. REV. 585 (1974) (questioning *Woods* court's reliance on necessity as grounds for admission, disputing reliability, and arguing that admission threatens principle that defendant need counter only allegations in charge).

[155] IMWINKELRIED, *supra* note 11, § 4:01, at 5. *But see infra* notes 178-210 and accompanying text (questioning supposed non-character foundation of doctrine of chances); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1260-63 (1995) (same).

[156] As Mark Turcott dryly put it, paraphrasing Oscar Wilde, "To lose one wife of epilepsy after insuring her life may be regarded as misfortune; to lose three looks like carelessness at least." Turcott, *supra* note 108, at 49. That conclusion obviously rests on empirical assumptions that have not been systematically verified. But all circumstantial evidence requires the use of empirical assumptions, most of which are untested, and it is submitted that the assumptions supporting the doctrine of chances are reliable enough to support even the use of potentially prejudicial character evidence.

[157] *See* Recent Cases, 87 HARV. L. REV. 1074, 1076-77 (1974) (observing that evidence was used in *Woods* prove that victim "had in fact been smothered, and not to show that an act of smothering which had been independently proved was intentional").

explanation for the harm's occurrence is that the defendant caused it.[158]

As with use of similar acts to prove intent, similar happenings offered to prove actus reus need not be unique or distinctive.[159] The probative value of the evidence derives from the coincidence of the same rare, though by no means unique, event occurring repeatedly to the same individual.[160] Nor need it be shown that the defendant caused the social harm on any given occasion.[161] Though each event, if viewed in isolation, might plausibly be explained as accidental, when viewed together they all cast light on the cause of the other.[162] For example, any one of the cyanotic episodes suffered by the children in Mrs. Woods's custody could be explained by natural causes. When considered en masse, however, the innocent explanation for the deaths appears implausible.

To be probative, the number of events must be shown to be significantly more numerous than would be expected in the absence of design.[163] The rarity of the event is certainly an important factor. Accidental deaths on the highway are sufficiently common that a husband could lose two wives in this way without raising an inference of culpable conduct. Bathtub drownings, by contrast, are so rare that losing even two wives through drowning is highly suspicious.[164] The absolute number of incidents is

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[158] *See* 22 WRIGHT & GRAHAM, *supra* note 31, § 5239, at 465 (noting that "under the circumstances of *Woods*—i.e., a large number of specific instances linked by an involvement of a single participant—one can directly infer that the cause of death was the conduct of the actor without any need for an intermediate inference of character.").

The United States Supreme Court implicitly approved the principle of the doctrine of chances to prove the operation of a human agency in causing a social harm. Estelle v. McGuire, 502 U.S. 62 (1991). For a discussion of the use of the doctrine of chances in cases involving physical abuse of children, see John E.B. Myers, *Uncharged Misconduct Evidence in Child Abuse Litigation*, 1988 UTAH L. REV. 479, 516-22.

[159] *Evidence Prohibition, supra* note 118, at 590.

[160] IMWINKELRIED, *supra* note 11, § 4:03, at 12.

[161] *See* People v. Gerks, 153 N.E. 36, 37 (N.Y. 1926).

[162] IMWINKELRIED, *supra* note 11, § 4:03, at 12.

[163] Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1228 (1986).

[164] *Dispute over the Doctrine of Chances, supra* note 116, at 53. Another case in which a defendant claimed that the repetition of a seemingly once-in-a-lifetime occurrence was simply coincidence is Tucker v. State, 412 P.2d 970 (Nev. 1966). The defendant was tried for murdering a man whom, the defendant claimed, he discovered shot to death on his

not a reliable guide to admissibility.[165] In the *Woods* case, for example, 20 cyanotic attacks and seven deaths would not raise an inference of culpable conduct if it were shown that Ms. Woods had cared for thousands of children throughout a long career running a foster home.[166] Because the inference of human causation is adopted as the most plausible alternative to chance, other possible explanations must also be searched out. A genetic predisposition to cyanosis, if demonstrated, might explain the evidence in *Woods* if all the victims were related, or some non-human environmental cause might have been at work.

Several California precedents cited by the *Ewoldt* court as having been correctly decided under its plan theory are better explained under the doctrine of chances.[167] Although each cited case recites the plan or scheme rationale, some of them clearly rely, either implicitly or explicitly, on doctrine of chances reasoning. In *People v. Lisenba*,[168] the American analogue of *Rex v. Smith*, the defendant was charged with murdering his wife by drowning her in the bathtub and then depositing her body in the backyard fishpond to create the appearance of an accident.[169] At trial, the prosecution offered evidence that the defendant's previous wife also drowned in the bathtub under "similar and unusual circumstances."[170] The California Supreme Court approved the admission of the similar act evidence "as tending to establish that the death of the deceased in the pres-

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living room couch when he awoke in the morning. At the trial the prosecution introduced evidence that six years earlier the defendant had likewise called police to report that he had awakened to find a man shot to death in his dining room. The Nevada Supreme Court held the admission of the evidence error on the ground that the defendant had never been convicted or even charged with the earlier murder, and "[a]nonymous crimes can have no relevance in deciding whether the defendant committed the crime with which he is charged." *Id.* at 972. Absent some explanation not disclosed in the court's opinion, it would seem that the improbability of two men dying under similar circumstances in defendant's house within the space of six years is compelling evidence that the defendant killed them.

[165] *Dispute Over Doctrine of Chances*, *supra* note 116, at 53.

[166] *Id.*

[167] Indeed, one of the cases relied on by the court, People v. Lisenba, 94 P.2d 569 (Cal. 1939), is cited by Professor Imwinkelried as a prime example of the use of doctrine of chances to prove actus reus. IMWINKELRIED, *supra* note 11, § 4:01, at 4, § 4:03, at 13.

[168] 94 P.2d 569 (Cal. 1939).

[169] The prosecution presented evidence that the defendant had tried to kill his wife with a rattlesnake bite before drowning her. *Id.* at 572.

[170] *Id.* at 581.

ent action was not accidental, as it might at first appear, and as claimed by the defendant, but was the result of a general plan or scheme."[171] In support of its holding, the court cited *Rex v. Smith*[172] and quoted from cases in which similar acts evidence was admitted to disprove a claim of innocent intent, including language that similar acts evidence is admissible for such purpose when it "has probative effect, logically and under the doctrine of chances."[173] The court assumed that for evidence of the prior incident to be admissible, the prosecution would not only have to prove that the previous wife drowned, but also that the defendant caused her drowning. This aspect of the court's holding supports the *Ewoldt* court's interpretation of the case as premised on a plan theory, since establishing the defendant's involvement in the prior drownings is a prerequisite to admissibility under the plan rationale, but not under a doctrine of chances theory of relevance.[174] Nonetheless, even though the ostensible basis for the court's decision is that the defendant had a plan to murder his wives to collect life insurance benefits, the court used doctrine of chances reasoning in reaching its conclusion that the defendant killed his wives pursuant to a plan. The improbability that the same rare accident would befall the same man twice underlies the court's conclusion that the defendant most likely drowned both women.[175]

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[171] *Id.* at 582.

[172] *Id.*

[173] *Id.* at 582 (quoting Holt v. United States, 42 F.2d 103, 106 (6th Cir. 1930)). The prosecution in *Holt* introduced evidence that the defendant possessed illegal liquor to disprove his claim that shipments of liquor for which he was being tried were not undertaken innocently.

[174] The prosecution must prove the defendant's culpability for the first drowning on a plan theory because if the first drowning were accidental, it would disprove rather than prove the prosecution's contention that the defendant killed two wives pursuant to a common plan.

[175] The prosecution had direct evidence that the defendant drowned the woman he was charged with murdering, but the first drowning, without the additional light cast on the incident by subsequent events, was apparently accepted at the time as accidental. Prior to the first wife's drowning, she had suffered a head injury, which the defendant claimed resulted from an automobile accident. At the trial for the murder of the second wife, the prosecution presented evidence that the defendant staged the accident injuring the first wife and that her injury resulted from a hammer blow to her head. When the first wife was shortly thereafter found drowned in the tub, the defendant stated that she had apparently disregarded doctors' warnings not to wash her hair because of her head injury. *Lisenba*, 94 P.2d at 580-81.

2. The Doctrine of Chances in Child Sexual Abuse and Acquaintance Rape Cases

Probability-based reasoning provides a non-character theory of relevance for admission of similar act evidence to prove intent, identity, and the commission of an actus reus when the existence of a social loss is independently established. The doctrine of chances has not been relied on, at least in this country,[176] as a basis for proving actus reus in cases like *Ewoldt* and *Balcom*, where the existence of a social loss is disputed.[177] There is,

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In People v. Archerd, 477 P.2d 421 (Cal. 1970), another case cited by the *Ewoldt* court as supporting its plan theory, the prosecution was allowed to introduce evidence of three uncharged murders to prove that defendant committed three other murders for which he was on trial. All of the victims were close to the defendant—three wives, the ex-husband of another wife, a nephew, and a friend—and the defendant benefitted financially from all their deaths. The prosecution introduced evidence at trial that all of the victims died of hypoglycemia, but all of the deaths were attributed to other causes when they occurred. The prosecution's theory was that the defendant murdered the six victims by injecting them with insulin. Although there was other evidence, mostly evidence of opportunity, supporting the prosecution's theory, plainly the conclusion that the six people died as a result of criminal conduct and did not develop hypoglycemia naturally, rested at least in part on the improbability that six people close to the defendant would all suffer the same unlikely fate.

[176] Probability-based reasoning is, however, the acknowledged basis for the admission of "similar fact" evidence in Britain in all the factual contexts discussed here, including proof of actus reus through evidence of similar accusations. *See generally* D.W. Elliot, *supra* note 108, at 284 (discussing improbability of coincidence as justification for admitting similar fact evidence in England); *Evolution of the Use of the Doctrine of Chances*, *supra* note 29, at 73 (discussing improbability as basis for application of doctrine of chances by British courts); Turcott, *supra*, note 108, at 43 (arguing that similar fact evidence is generally admissible when coincidence is highly unlikely). In *Boardman v. Director of Public Prosecutions*, App. Cas. 421 (1975), the headmaster of a school, was charged with sodomy and attempted sodomy committed against two different students in his school. The trial judge instructed the jury that they could consider the testimony of each of the victims as corroborating the testimony of the other. The House of Lords unanimously upheld the convictions. In explaining the grounds for admitting such evidence Lord Wilberforce stated:

> [P]robative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witnesses or from pure coincidence.

Id. at 444.

[177] *See Evolution of the Use of the Doctrine of Chances*, *supra* note 29, at 85-90 (summarizing limited use of doctrine of chances in this country). Although courts have not relied on the doctrine of chances to prove actus reus in sex offense cases, the concept has received some scholarly support. *See* Sara S. Beale, *Prior Similar Acts in Prosecutions for Rape and Child Sex*

however, a predicate for employing the doctrine of chances in this last situation as well. This predicate relies on the improbability that one individual would be the object of repeated false accusations.[178]

Abuse, CRIM. L.F. 307, 321-22 (1993) (discussing application of doctrine of chances in child molestation cases); Bryden & Park, *supra* note 31, at 577 (arguing that uncharged misconduct should be admissible in acquaintance rape cases); Edward J. Imwinkelried, *A Small Contribution to the Debate Over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125, 1129-35 (1993) [hereinafter *A Small Contribution*] (discussing improbability of innocent accused being charged with prior acts of rape); Sheri B. Ross, Comment, *Yes or No to Consent? Conforming Rule 404(b) to Society's New Understanding of Acquaintance Rape*, 48 U. MIAMI L. REV. 343, 366-67 (1993) (arguing corroborating evidence increase probability that defendant committed crime). *Cf.* F.R. Lacy, *Admissibility of Evidence of Crimes not Charged in the Indictment*, 31 OR. L. REV. 267, 293 (1952) (discussing admissibility of other acts to corroborate testimony of victim). The doctrine of chances was also mooted in Congress as a rationale for a bill ultimately passed as an amendment to the Federal Rules of Evidence authorizing admission of uncharged misconduct evidence much more broadly than the doctrine supports. *See* Beale, *supra*, at 321 (noting that Congressional Record relies on doctrine of chances); Bryden & Park, *supra* note 31, at 574; *A Small Contribution*, *supra*, at 1130 (describing sponsor statement, which discussed admission of prior acts evidence to show improbability of false accusation).

Professor Imwinkelried credits the Supreme Court of Michigan with having perceived the applicability of doctrine of chances reasoning to prove actus reus in sexual abuse cases. *A Small Contribution*, *supra*, at 1135 (citing People v. VanderVliet, 508 N.W.2d 114, 128 n.35 (Mich. 1993)). Notwithstanding the court's reference to the improbability "that three out of thirty clients would coincidentally *accuse* defendant of sexual misconduct," *VanderVliet*, 508 N.W.2d at 128 n.35 (emphasis added), I read the court's opinion as admitting the evidence to negate the possibility of innocent intent, not to prove that the defendant engaged in the conduct constituting the offense.

[178] For several years, the California courts sporadically employed a doctrine very similar to the doctrine of chances in sex offense cases under the heading of "corroboration." *See* People v. Pendleton, 599 P.2d 649 (Cal. 1979); People v. Thomas, 573 P.2d 433 (Cal. 1978); People v. Stanley, 433 P.2d 913 (Cal. 1967); People v. Creighton, 129 Cal. Rptr. 249 (Ct. App. 1976); People v. Kazee, 121 Cal. Rptr. 221 (Ct. App. 1975); People v. Covert, 57 Cal. Rptr. 220 (Ct. App. 1967). *But see* People v. Key, 203 Cal. Rptr. 144, 147-48 (Ct. App. 1984) (stating evidence not allowed "*solely* to corroborate or bolster the credibility of a witness"). The corroboration doctrine permitted the admission of evidence "of similar, nonremote offenses involving similar victims . . . [to] corroborat[e] the prosecuting witness' version of events." People v. Thomas, 573 P.2d 433, 439 (Cal. 1978). In *Ewoldt*, the court mentioned the doctrine only in the context of rejecting a defense argument that the corroboration rule precluded the admission of the victim's testimony of uncharged crimes committed against her. *Ewoldt*, 867 P.2d at 773-74. In a concurring opinion in *Balcom*, Justice Arabian argued that the corroboration doctrine remains viable and provided an additional justification for admitting similar acts evidence in that case. *Balcom*, 867 P.2d at 785 (Arabian, J., concurring). Noting the similarity of the corroboration rule to the doctrine of chances, Justice Arabian wrote:

> Evidence that defendant committed rape under somewhat similar circumstances in Michigan a short time after the disputed events of this case strongly sup-

At the outset it should be emphasized that the issue being proven through the similar happenings evidence in the *Ewoldt* and *Balcom* situations is identical to the issue being proven in the other category of actus reus cases where the existence of a social loss is undisputed.[179] In both cases, the evidence is offered to prove that the defendant engaged in some conduct or performed some act. This is obvious in prosecutions for sexually abusing children when the defendant denies that any abuse occurred. Since the defendant implicitly concedes both intent and identity, the pivotal issue is whether the defendant engaged in conduct that constitutes abuse.

Similar accusations evidence offered in acquaintance rape cases is likewise offered to prove the defendant's actions, though the relation between the defendant's conduct and the elements of the crime is not always perceived.[180] When the defendant concedes the act of sexual intercourse, there is obviously no question of identity. Nor is evidence of other acts admissible to prove the defendant's state of mind, since "if the act is proved

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> ports the inference that the victim's testimony is the truthful one, not defendant's. It might be coincidence that the complaining witness in this case and the victim in Michigan both claimed defendant raped them, and that both accounts contain common details. But that is unlikely. If a person claims the defendant committed rape, and the defendant denies it, the complaining witness might be lying. If, however, two people claim rape, and if their stories are sufficiently similar, the chance that *both* are lying, or that one is truthful and the other invented a false story that just happens to be similar, is greatly diminished. The jury can reasonably, and quite properly, infer that it is more likely both are truthful.

Id. at 785-86.

For an argument for recognition of the corroboration doctrine as a basis for admitting evidence of other sex offenses, see Robert N. Block, Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. REV. 261, 285-90 (1977); *cf.* Glanville Williams, *Corroboration-Sexual Cases*, 1962 CRIM. L. REV. 662, 665-67 (arguing that evidence of similar independent accusations should be admissible to satisfy requirement that testimony of sex offense victim must corroborated).

[179] It should be emphasized that the two situations cannot be differentiated based on the existence of independent evidence of a social loss, since the victim's testimony provides independent evidence that a sex offense was committed. Inasmuch as California law does not require corroboration of the victim's testimony to support a conviction of rape or child abuse, there is no reason to treat the two types of cases differently for purposes of admission of other acts evidence. CAL. EVID. CODE § 411 (West 1995); Block, *supra* note 178, at 272-73.

[180] *See* Ross, *supra* note 177, at 343 (discussing courts' admission of evidence of prior acts where only issue is victim's consent).

there can be no real question of intent."[181] Because neither intent nor identity is genuinely disputed when the defendant claims consent, some courts have concluded that evidence of the accused's other acts is simply not admissible in acquaintance rape cases, since "[t]he fact that one woman was raped . . . has no tendency to prove that another woman did not consent."[182] Missing from this analysis is a recognition that the defendant's actions of forcing or threatening the victim at the time of the sex act are either themselves elements of the crime or are circumstantially relevant as tending to prove that the victim did not consent.[183] Thus, uncharged acts evidence offered to prove the defendant's actions at the time of the sexual encounter relates to a genuinely disputed material fact.[184]

Evidence that the defendant has repeatedly been accused of committing rape or child abuse tends to prove that he performed actions constituting those crimes through the same

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[181] 2 WIGMORE, *supra* note 7, § 357, at 334. There may be a disputed issue of mens rea if the defendant contends that he neither knew nor had reason to know of the victim's non-consent. *See* Regina v. Morgan, App. Cas. 182 (1976) (discussing whether defendant's belief that there was consent was reasonable). However, such claims are not common. For a discussion of the distinction between general and specific intent crimes as it relates to the admissibility of other acts evidence, see Rodriguez, *supra* note 118, at 460-66.

[182] Lovely v. United States, 169 F.2d 386, 390 (4th Cir. 1948). *See also* People v. Key, 203 Cal. Rptr. 144, 148 (Ct. App. 1984) (stating that evidence of defendant's uncharged rapes only tangentially relevant to whether victim consented).

[183] The California Supreme Court once came close to implying that evidence that the defendant threw the victim into the back of the car before having sex with her was irrelevant in a prosecution for rape. People v. Tassell, 679 P.2d 1 (Cal. 1984). The court's principal reason for holding the prosecution's similar acts evidence inadmissible was that it did not relate to any ultimate fact actually in dispute, since the defendant had admitted to the act of intercourse, and obviously had the intent to engage in intercourse. On that reasoning a defendant should be able to object on relevancy grounds to a rape victim's testimony that he held a gun to her head so long as he concedes that he intended to and did have sex with her.

[184] Ross, *supra* note 177, at 346-47, 363-64 (noting that courts tend to shift emphasis from defendant and concentrate on victim's behavior and mental state). Sensing that uncharged acts evidence must be relevant to something, but stymied by their flawed analysis of rape law, some courts have manipulated or simply ignored the principle that other crimes evidence must be offered to prove a disputed issue and have held the evidence admissible to prove some other issue, usually intent. *See e.g.* People v. Balcom, 1 Cal. Rptr. 2d 879 (Ct. App. 1991) (holding that evidence that defendant committed rape and robbery after commission of alleged offenses was not admissible to prove intent); People v. VanderVliet, 508 N.W.2d 114 (Mich. 1993) (holding witnesses' testimony that defendant had touched their genitals was logically relevant to and probative of defendant's intent towards victim).

chain of reasoning that evidence of prior deaths all connected to the defendant tends to prove that the defendant engaged in conduct that caused those deaths. The only difference is that in the former case the probative value rests on the "coincidence of story" whereas in the latter case it rests on "coincidence in the facts."[185]

The probability that any given individual who might be accused of rape or child abuse will be falsely accused of those crimes is low.[186] That is true regardless of the proportion of all rape and child abuse accusations that are false. For even if a comparatively high percentage of charges are concocted — and there is no reason to believe they are[187] — it is certain that only a small fraction of the eligible population will ever be accused, rightly or wrongly. Because only a small percentage of the population will be accused, the probability that an innocent person will be falsely accused is low. This holds regardless of the proportion of true to false charges. Just as we do not need to determine the proportion of cyanosis deaths that result from

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[185] Boardman v. Director of Public Prosecutions, App. Cas. 421, 452 (1975) (per Lord Hailsham) (noting that evidence of similar circumstances was admitted to exclude coincidence where there was no other evidence either of killing or intent). One English commentator succinctly summed up the rationale for this type of evidence:

> If victim A says that D treated him in an exactly similar way on several occasions, we are not driven to choose between coincidence and guilt as the explanation. A third conjecture obtrudes — that A is mistaken or lying. But if A, B and C say that D treated them in similar ways, even if they are not exactly similar, then, in the absence of conspiracy between the witnesses, the coincidence of testimony becomes compelling.

Elliot, *supra* note 108, at 290 (suggesting that for coincidence to be against all probabilities there must be striking similarity). *See also* Carter, *supra* note 154, at 34-35 (noting that similar facts from which propensity is inferred are themselves being established in part by reliance upon facts inferred from propensity).

[186] The proposition in the text is true only if unfounded accusations of rape and child abuse are randomly distributed among the innocent population — an assumption we will return to below.

[187] *See* Patricia Frazier & Eugene Borgida, *Juror Common Understanding and the Admissibility of Rape Trauma Syndrome Evidence in Court*, 12 L. & HUM. BEHAV. 101, 106-07 (1988) (concluding that false reports of rape are no more and perhaps less common than for other crimes). As Professors Bryden and Park point out, there is considerable disincentive for women to falsely allege rape since they will perceive the ensuing investigation of the allegation to be intrusive and unpleasant. Bryden & Park, *supra* note 31, at 577. The authors note that because the consequences will not be as readily anticipated by children, the danger of fabrication may be greater in cases of child abuse, but nonetheless conclude that similar accusations evidence should be admitted in those cases as well. *Id.* at 582.

intentional suffocation and natural causes to conclude that accidental deaths are rare, we do not need empirical information about the frequency of false as compared to true child abuse charges to conclude that the likelihood of a randomly chosen innocent person being accused of the crime is remote.

Given the infrequent occurrence of false rape and child abuse allegations relative to the entire eligible population, the probability that the same innocent person will be the object of multiple false accusations is extremely low. That conclusion is based on the so-called product rule, which posits that the probability that two independent events will occur together is calculated by multiplying the probability that each will occur alone.[188] Because the probability that an innocent person will be falsely accused of child abuse or rape is low, evidence that a defendant on trial for one of those crimes has previously been accused of the same thing suggests that some force other than chance is at work in producing this improbable outcome.[189]

Of course, proof that some force other than bad luck is at work does not constitute proof that the defendant committed the crime. Evidence that the defendant has repeatedly been accused of an act is probative of his having done the act only if

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[188] For example, if the probability of rolling a six with one die is one in six, the probability of rolling two sixes is one in thirty six.

[189] It is certainly impossible and probably actually unwise to calculate the probability that an individual would be repeatedly accused of the same crime. Nonetheless, in considering the significance of the evidence, it is useful to specify the frequencies that would be used to calculate the probability that a defendant would have been accused of committing the same crime on another occasion. The probability that a defendant presently on trial for child abuse will have been accused of that crime on another occasion is *not* calculated by simply squaring the probability that an innocent person will be falsely charged. That would produce an exaggerated estimate, as shown by the dice analogy. After one six has already been rolled, the chances of getting *two* sixes is not one in thirty six, but one in six. Likewise, the probability that a currently accused defendant will have had another accusation lodged against him is not equal to the probability that an innocent person will be falsely accused multiplied by itself, since the defendant has already been accused once. Neither is the probability that the defendant would be innocently accused on two separate occasions equal to the probability that the prior accusation was false multiplied by the probability that the current charge is false. To extend the dice analogy, the probability of rolling a second six is equal to the prior probability of rolling one six, or one in six, rather than the posterior probability of rolling a six, which is one. Thus, were we to estimate the likelihood of the defendant's having twice been falsely accused, the probability would be calculated by multiplying the probability that a given accusation is false by the probability that a randomly chosen person would be falsely accused.

the improbability of the various accusations arising by chance raises an inference that defendant caused the accusations by engaging in the conduct. This step in reasoning from similar accusations evidence to conclusions about the defendant's actions raises difficulties not present when reasoning from evidence of prior deaths to a conclusion that a human agent caused those deaths. Difficulties result from the fact that in the case of similar accusations evidence, the *effect* for which a cause is being sought is a voluntary human action — an imputation of criminal conduct.[190] Apart from a built-in reluctance to attribute causal relationships to human actions, the possibility that the defendant produced the effect — the accusations — but not through having committed the criminal acts, arises more frequently in the case of similar accusations evidence than in other contexts. As a result, judges must exercise appropriate caution before admitting such evidence. Despite these qualifications, however, there is an unquestionably correlation between committing child abuse and being accused of the crime. In other words, one who commits the crime stands a better chance of being accused than one who does not. Since multiple accusations are unlikely to occur through chance alone, but can plausibly be explained by inferring that they are true, there seems to be a sound basis for admitting similar accusations evidence to prove the commission of an actus reus, at least in some circumstances.

One might object that recognizing the doctrine of chances rationale for admitting similar accusations evidence opens the door to the admission of a very broad compass of evidence not limited by similarity to the charged crime. While it is unlikely that a defendant charged with child abuse would have been accused by a different victim of committing the same crime on another occasion, it is also unlikely that the defendant would have previously been charged with burglary, shoplifting, tax evasion, adultery, or any other dissimilar crime. Furthermore,

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[190] This is problematic in part because of the law's reluctance to accept causal explanations to human actions. We find it more comfortable to infer that if Ms. Woods's victims did not die accidently, then she must have caused their deaths, than to conclude that a pattern of false accusations was caused by the defendant's behavior. Premised as it is on assumptions about human agency, the law hesitates to see lying simply as a statistical probability.

just as the seeming coincidence of the defendant's having the rotten luck to be accused twice of abusing children can be explained by inferring that he provoked the charges by abusing his accusers, it could equally be inferred that the reason he had the misfortune of being accused of both burglary and child abuse is because he committed both crimes.

There is undeniable force to this argument. Indeed, it raises basic questions about what makes two events similar and why similarity matters, as well as questions about the basis for imputing some cause to a seemingly inexplicable coincidence. These questions are ultimately subversive of the supposed non-character basis for doctrine of chances evidence.

The criteria for finding two events "similar" and therefore significant are not derived from probability theory. Probability theory does not define the questions — the events whose joint occurrence is to be calculated — but simply permits us to calculate the likelihood of their concurrence after they have been specified. If we knew the frequency of sunspots, we could calculate the likelihood that a person accused of child abuse was born on a day when there were sunspots.

The specification of which coincidental events will be deemed significant for the question of the defendant's guilt has its source in assumptions about the way events are connected, including the concept of character. We are *not* interested in the probability that the defendant was born on a day with sunspots, but we *are* interested in the probability that the defendant would be accused of having committed the same crime on two separate occasions. The reason is that we believe, in the case of multiple accusations, that the two events might be related through a common cause; in the case of criminality and sunspots we are certain they are unrelated. And the 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 the 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.

The problem of assumptions about character contaminating doctrine of chances reasoning is not confined to the situation where similar accusations evidence is used to prove the commission of an actus reus. In the *Makin*, *Woods*, and *Smith* contexts as well, the selection of the "similar" event whose improbability seems to bespeak the defendant's guilt is guided by cultural constructions of how events are related.[191] Assumptions about character, rather than probability theory, explain the intuitive conclusion that discovering bodies of dead children in the Makins' garden is more telling of their guilt than, for instance, discovering of dead chickens. Although each may be improbable, we see similarity and therefore significance only because we expect consistency of conduct.

The discovery of character assumptions infecting probability reasoning might lead us to exclude all evidence whose non-character relevance is explained under the doctrine of chances—including evidence that has generally been deemed admissible.[192] But such a change is neither feasible nor wise. Crude global character theories which posit general character traits assumed to produce consistent conduct in diverse situations appear to be invalid.[193] But the opposite view, that there is no cross-situational consistency in behavior, is also overstated. Pre-

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[191] *See* Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1263 (1995) (observing that "if it were not for the propensity to repeat, the chances, or probability, that an innocent person and a guilty person would be charged repeatedly would be identical"). *Cf.* Kuhns, *supra* note 17, 781-94 (1981) (arguing that most recognized uses of other acts evidence involve propensity reasoning).

[192] The flaw in the doctrine of chances may not be unique to that theory, but may be shared by the other non-character theories for admitting uncharged misconduct evidence as well. *See* Kuhns, *supra* note 17, at 781-94 (arguing that no useful purpose can be served by attempting to distinguish admissible from inadmissible specific acts evidence on ground that latter involves propensity inference). Character-based assumptions may be operating sub rosa in all the recognized "exceptions" to the general ban on uncharged misconduct evidence. If so, strictly enforcing the rule against propensity evidence would result in a complete prohibition of all other crimes evidence, an outcome that is neither likely nor (in my view) desirable.

[193] Leonard, *supra* note 20, at 26-29 (summarizing research rejecting "trait" theory); Mendez, *supra* note 19 1051-53 (same). *But see* Bryden & Park, *supra* note 31, at 562 n.149 (noting that some personality scholars continue to support trait theory).

vailing psychological opinion holds that behavior is a function of the interaction between subjective disposition and objective circumstance,[194] and therefore supports the view that character evidence has probative value in some circumstances. Specifically, the empirical record indicates that conduct is more likely to be consistent when external stimuli are similar.[195]

Given the fact that similar act evidence does have probative value, the aim in formulating standards for admitting uncharged misconduct evidence should be to confine its use to situations where probative value is high and the risk that jurors will punish the defendant for his uncharged acts is low. One approach that has recently gained support is to abrogate the categorical propensity ban and admit evidence of past similar acts *qua* character evidence.[196] But while admitting other acts evidence to prove propensity recognizes the probative value of such evidence, it also heightens the risk of unfair prejudice. For unlike

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[194] Leonard, *supra* note 20, at 27-29 (summarizing psychological research); Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevance*, 27 CRIM. L. BULL. 504, 517-20 (1991) (same).

[195] Davies, *supra* note 194, at 517-20 (arguing that behavior is simultaneously function of disposition and situation); Bryden & Park, *supra* note 31, at 563 (noting that propensity to commit specific crime may be situational).

[196] *See* FED. R. EVID. 413-415 (admitting evidence of similar crimes or similar acts in sexual assault, child molestation, and civil cases involving sexual assault and child molestation); Act of Sept. 2, 1995, ch. 439, 1995 Cal. Legis. Serv. 2724-25 (West) (permitting in prosecutions for sexual offenses evidence of defendant's commission of another sexual offense subject to balancing of probative value against unfair prejudice); IND. ST. ANN. § 35-37-4-15 (1994) (permitting evidence of similar crimes subject to balancing of probative value against unfair prejudice in child molestation and incest prosecutions); MO. REV. STAT. § 566.025 (1995) (admitting evidence that defendant has committed other crimes against minors to show defendant's propensity to commit such crimes in prosecutions for certain crimes against minors); *see also* David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15 (1994) (defending relaxation of character evidence ban in sex offense cases); Kuhns, *supra* note 17, at 781-94 (advocating straightforward balancing of probative value versus prejudice instead of categorical rule); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1264-65 (1995) (proposing refinement of the concept of propensity). *Cf.* Bryden & Park, *supra* note 31, at 582-85 (arguing for more liberal admissibility of uncharged misconduct evidence in acquaintance rape cases on basis of necessity and probative value). English courts have sanctioned propensity reasoning, but only when it carries high probative value. *See* Boardman v. Director of Public Prosecutions, App. Cas. 421, 452 (1975) (rejecting categorical distinction as ground for admitting similar fact evidence). *See generally* Carter, *supra* note 154, at 29 (discussing English rule); T.R.S. Allan, *Similar Fact Evidence and Disposition: Law, Discretion and Admissibility*, 48 MOD. L. REV. 253 (1985) (same); Turcott, *supra* note 108, at 43 (same).

most non-character theories of logical relevance, proving the defendant committed the charged crime through evidence of his disposition to criminal behavior requires jurors to attend to the defendant's subjective character. This invitation to focus on the defendant's character magnifies the risk that jurors will punish the defendant for being a bad person regardless of his guilt for the charged crime. Thus, even in jurisdictions that permit propensity evidence, the doctrine of chances remains an attractive theory of logical relevance since it favors evidence of acts occurring under similar conditions and directs the fact finder's focus away from the accused's negative moral attributes that are likely to engender prejudice.

Much of the evidence that would be admissible under the *Ewoldt* court's plan theory would also be admissible on a doctrine of chances rationale. However, similar accusations evidence entails some requirements not pertinent to the court's plan theory and explains the source and significance of other requirements the court did impose for establishing plan.[197] First, the court's emphasis on similarity, though appropriate, is too narrow. Similarity is telling only insofar as it eliminates the possibility of invention. The ultimate question is whether, under all the circumstances, it is highly unlikely that the various accusations could have resulted from any cause other than the defendant's conduct. In resolving that question, a number of factors other than similarity must be considered.

Since the probative value of similar accusations evidence rests on the improbability of chance repetition of the same event, the various accusations should be independent of each other.[198] Events are independent for purposes of applying the product rule if the occurrence of one does not influence the likelihood of the occurrence of the other. Although complete independence is necessary for statisticians applying the product rule, an air-tight demonstration of independence should not be required

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[197] Without authority or explanation, the *Ewoldt* court listed "the extent to which its source is independent of the evidence of the charged offense" as a factor in assessing the probative value of the evidence. *Ewoldt*, 867 P.2d at 771. On the significance of independence for the admission of similar accusations evidence, see *supra* notes 188-91 and accompanying text.

[198] Bryden & Park, *supra* note 31, at 577. *Cf.* Beale, *supra* note 177, at 322 n.52 (arguing that independence is generally difficult to show).

for admission of similar accusations evidence in judicial trials,[199] just as the truth of eyewitness testimony need not be demonstrated for admission of that type of evidence. Whether two accusations are independent or result from the same cause is, in most cases, a credibility question for the jury.[200]

There are, however, some situations where the risk of non-independence is so great or the jury's capacity to determine it is so limited that the evidence should be excluded. Where one person makes several accusations, the same animus or delusion that induced the accuser to allege the abuse that is the subject of the charges might have produced the allegation of uncharged acts.[201] Another situation where the risk of non-independence is patent, though not in my view so great as to require blanket exclusion, is where the accusers are known or related to each other directly or through a third person. Multiple accusations from persons related or known to each other could easily result from collusion among the accusers, imitation, or inducement by the third party.[202]

One broad category of cases in which the risk of non-independence justifies a strong presumption of inadmissibility is that in which similar accusations evidence is offered to prove identity.[203] The principle behind similar accusations evidence is

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[199] *But see Boardman*, App. Cas. 451, 459 (1974) (per Lord Cross) (stating that similar accusations evidence should be excluded if "there is any real chance" that accusers "have put their heads together to concoct false evidence").

[200] *Cf.* Beale, *supra* note 177, at 321-22 (arguing that non-independence problem can be solved by informing jury of risk).

[201] *Cf.* People v. Stanley, 433 P.2d 913, 917 (Cal. 1967) (victim's testimony of uncharged acts with defendant "[adds] nothing to the prosecution's case"); People v. Kazee, 121 Cal. Rptr. 221, 223 (Ct. App. 1975) ("Where . . . corroboration comes from the mouth of another witness, we admit it. When it consists of nothing but the complaining witness corroborating himself, we reject it."); Lacy, *supra* note 177, at 291 ("[h]aving testified directly that the charged act occurred, the prosecutrix [sic] should scarcely be allowed to pull herself up by her bootstraps by giving testimony not a bit more credible than her direct evidence and tending only indirectly to prove the same act").

[202] *Cf. Boardman*, App. Cas. 421, 459 (1974) (per Lord Cross) (noting that "the first question which arises is obviously whether [the] accusers may not have put their heads together to concoct false evidence").

[203] Ironically, some courts are *more* inclined to admit other acts evidence in stranger rape cases when the issue is identity. Bryden & Park, *supra* note 31, at 531, 580. *See also* Ross, *supra* note 177, at 358. Professors Bryden and Park, after noting this tendency, argue that this is misguided and that similar acts evidence should be more freely admitted in acquaintance rape cases than current law generally permits, but treated with caution in

equally applicable to prove the identity of the perpetrator of a crime conceded to have occurred as it is to prove that the crime itself was committed. The improbability that the same innocent person will be repeatedly accused of committing crimes raises an inference that he did commit the crimes. The problem with using similar accusations evidence to prove identity is that the "accuser" is, in substance, the police. Although a suspect will not be accused unless identified by a victim or a witness, eyewitness identifications of anonymous assailants are notoriously unreliable.[204] The crucial selection, therefore, is often that made by the police. Police methods for investigating unsolved crimes are such that one accusation of criminal conduct significantly increases the chances that the same person will be accused again of the same crime. The police, who are not banned from employing character assumptions, focus their investigations on people known or accused of having committed crimes in the past. This tendency to "round up the usual suspects"[205] could seriously skew the probability of repeated accusations and counsels against use of similar accusations evidence to prove identity.

Assuming an adequate showing of independence, it must next be demonstrated that the number of accusations is unlikely to have occurred absent some common cause. This may require consideration of the similarity, complexity, and unusual character of the alleged conduct, as well as the relative (as opposed to absolute) frequency of the accusations. Intuitively the more similar, detailed, and distinctive the various accusations, the greater is the likelihood that they are not the result of independent imaginative invention. It is less likely that two accusers would independently manufacture similar stories that are detailed and unusual than that they would coincidentally tell the same commonplace lie.[206]

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stranger rape cases because the risk of non-independence is higher. Bryden & Park, *supra* note 31, at 575-82.

[204] *See generally* ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY 1-7 (1979) (discussing problems with eyewitness testimony).

[205] *See* LEMPERT & SALTZBURG, *supra* note 12, at 217-18 (quoting famous line from movie *Casablanca* to sum up this feature of police work).

[206] *See Boardman*, App. Cas. at 460-61 (per Lord Cross). The question is not whether the event described in the accusation is unlikely to occur but whether it is unlikely that such an accusation would be made if it were not true. As Lord Cross explained in *Boardman*:

As suggested above, however, our intuition about the relation between similarity and probability is influenced to some degree by an assumption that people behave consistently in similar circumstances. For instance, intuition might suggest that it is less likely that the same man would twice be accused of rape than that an accused rapist would also have been accused of murder. In fact, however, the probability of a prior rape accusation is undoubtedly higher than the probability of a prior murder accusation, since acquaintance rapes occur more frequently than murders. The perception that repeated false rape accusations are highly improbable is in part the result of our belief that repeated rapes by the same person are highly probable.

Although doctrine of chances reasoning might support an extension of similar accusations evidence beyond the category of similar crimes, expanding the admissibility of uncharged misconduct evidence in that way would be unwise. First, the intuition that people tend to behave consistently in similar situations, but not according to broad character generalizations across diverse situations seems accurate.[207] Thus, evidence of prior commission of similar acts is more probative of the defendant's having committed the charged crime than is evidence of dissimilar conduct. Second, because jurors will perceive greater improbability in multiple accusations of the same crime, there is a better likelihood that jurors will attend to the probabilistic significance of the evidence, rather than simply punish the defendant for being a bad person.

Fixing a threshold of similarity for admitting similar accusations evidence is inevitably imprecise, since the probative value of the evidence will depend on other factors besides the existence of common features between the various accusations. Generally, evidence should not be admitted unless similarities between the charged and uncharged incidents are sufficient to

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> The point is not whether what the appellant is said to have suggested [to the boys he was accused of molesting] would be, as coming from a middle-aged active homosexual, in itself . . . unusual but whether it would be unlikely that two youths who were saying untruly that the appellant had made homosexual advances to them would have put such a suggestion in his mouth.

Id.

[207] *See supra* notes 191-92.

dispel any realistic possibility of independent invention.[208] The greater the similarity, complexity, and distinctiveness of the accusations, the stronger is the case for admission. Yet, the alleged conduct need not be unusual so long as the probability of invention is very low, since the probative value of the evidence derives from the improbability of fabricated accusations from diverse sources.

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.[209] A defendant who has cared for hundreds of children in day care runs a greater risk of being falsely accused of molesting a child than would a defendant with less frequent association with children. One other dissimilar, non-distinctive accusation against the child care worker might be the result of simple bad luck, but would arouse suspicion if lodged against a defendant whose exposure to being falsely accused is low. Although more might be necessary under some circumstances, as a general proposition the twin goals of ensuring probative value and guarding against prejudice do not require more in the way of frequency and similarity than that the defendant have been previously accused of engaging in the same conduct. The number of accusations and their similarity to the charged offense are factors affecting the relevance and probative value of the evidence. But, like all relevancy questions, the ultimate determination whether prior accusations evidence disproves the defendant's claim that the charges were fabricated must be based on a common sense evaluation of all the circumstances.

Finally, in ruling on the admissibility of similar accusations evidence, judges should consider the possibility of alternative explanations for the pattern of allegations consistent with the defendant's innocence.[210] The accused might possibly have pro-

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[208] *Boardman*, App. Cas. at 453 (per Lord Hailsham) (quoting Regina v. Kilbourne, App. Cas. 729, 759 (1973) (Lord Simon)).

[209] *Cf. Dispute over the Doctrine of Chances*, *supra* note 116, at 16, 52-54 (discussing concept of relative frequency for doctrine of chances generally).

[210] *Cf. Boardman*, App. Cas. at 444 (per Lord Wilberforce) (cautioning that similar accusations from independent sources "may have arisen by a process of infection from media . . . publicity or simply from fashion"); Beale, *supra* note 177, at 321 (arguing that

voked the accusations, but not through having committed the alleged acts. For example, a defendant who has been involved in several acrimonious divorces might conceivably be the target of recriminatory false accusations of child abuse instigated by a former spouse. Or a defendant who induced women to consent to sexual intercourse by signaling false intentions of intimacy might be repeatedly and falsely accused of rape by women angered by his behavior. While neither of these claims should be accepted prima facie, the possibility of alternative explanations should be considered.

When one moves from the question whether prior accusations evidence *could* be used for a non-character purpose to whether it likely *will* be used properly, the case for admission is no more suspect than for other categories of uncharged misconduct evidence admissible on the grounds of similarity to the charged crime. The possibility that, notwithstanding the existence of an approved use for the evidence, jurors will indulge in propensity reasoning can never be completely eliminated.[211] The risk of misuse is arguably higher when evidence is admitted under non-character theories that rely on similarity, since consistency of conduct is highly suggestive of character.[212] But the proper use of similar accusations evidence to disprove repeated fabrications is no more mysterious or obscure, and the temptation to misuse no greater, than for the other doctrine of chances uses, including the venerable modus operandi category.[213] Shorn of scholarly obfuscation, the principle behind similar accusations evidence is the common sense notion of corroboration.[214] Focus-

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showing dependence in arguments or reason for false arguments weakens doctrine of chances).

[211] Allan, *supra* note 196, at 259.

[212] Mendez & Imwinkelried, *supra* note 5, at 502-03.

[213] *See A Small Contribution*, *supra* note 177, at 1136-37 (noting that similar accusations evidence invites jurors to focus on objective improbability of repeated accusations rather than subjective character of accused). *Cf.* Comment, *Evidence - Other Crimes - Balancing Relevance and Need Against Unfair Prejudice to Determine the Admissibility of Other Unexplained Deaths as Proof of the Corpus Delicti and the Perpetrator's Identity*, 6 RUT.-CAM. L.J. 173, 187-88 (1974) (observing that evidence of prior deaths in infanticide prosecution "did not suggest the prejudicial inference that [the defendant] was wicked and therefore likely to have committed a crime"). *But see* IMWINKELRIED, *supra* note 11, § 4:01, at 5 (cautioning that, since ultimate inference when proving actus reus is conduct, line between proper and improper use is blurred); *Dispute over the Doctrine of Chances*, *supra* note 116, at 19 (describing line between character and non-character use as hard to draw when using doctrine of chances).

[214] *Cf.* JON R. WALTZ & ROGER C. PARK, EVIDENCE: CASES AND MATERIALS 456-57 (8th

ing as it does on the accusers' stories rather than on the accused's conduct, similar accusations evidence is 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.[215] As Lord Cross of the English House of Lords put it, "[i]f two [or more accusers] make [similar] accusations . . . at about the same time independently of one another then no doubt the ordinary [person] would tend to think that there was 'probably something to it.'"[216]

CONCLUSION

The admissibility of evidence of uncharged acts of rape and sexual abuse of children in criminal prosecutions for these crimes has recently been the subject of both academic debate and judicial and legislative action.[217] Although commentators hold differing opinions on the issue,[218] the direction of legal change is unmistakable. The most noteworthy development is Congress' recent amendment of the Federal Rules of Evidence to permit introduction of uncharged misconduct evidence in

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ed. 1995) (quoting Biblical story in which testimony of two witnesses who told conflicting stories was rejected).

[215] *Cf.* Lacy, *supra* note 177, at 293 (commenting on a case in which "jury was asked to believe that a middle-aged man obtained a ladder, climbed through a second-story window of his own house, entered a room where he knew his stepdaughter and another daughter were sleeping, and forcibly raped his stepdaughter," author states "[t]estimony by other witnesses that D a week later entered the same room in the same way under similar circumstances makes it easier to believe that he made the first sortie, hence prosecutrix [sic] told the truth about the offense charged"). *See also* Bryden & Park, *supra* note 31, at 577 (noting "synergistic effects" of multiple accusations).

[216] Boardman v. Director of Public Prosecutions, App. Cas. 421, 460 (1974) (per Lord Cross).

[217] Awareness of the issue has no doubt been heightened by several recent celebrity prosecutions in which evidence of uncharged acts of sexual assault was excluded. In the rape trial of William Kennedy Smith, which was televised nationally, the trial judge disallowed testimony from other women that Smith had assaulted or attempted to assault in a manner similar to that charged in the indictment. He was subsequently acquitted. Although evidence of the uncharged acts of boxer Mike Tyson was similarly disallowed when he was tried for rape, he was convicted. *See* Hickey, *supra* note 105, at 195-98 (discussing cases).

[218] *See, e.g., Colloquy, Perspectives on Proposed Federal Rules of Evidence 413-415*, 22 FORDHAM URB. L.J. 265 (1995) (discussing different views on recent amendments to Federal Rules of Evidence liberalizing admission of other acts evidence in sex offense prosecutions).

rape and child sexual abuse cases virtually without limitation.[219] Whether or not the *Ewoldt* court provided a persuasive legal rationale for its decision, the outcomes in *Ewoldt* and *Balcom* admitting such evidence are unquestionably in line with the dominant trend.[220] It is increasingly apparent that the question is not whether similar acts evidence should be admissible in sex offense cases, but how broadly the evidence shall be admitted and on what grounds.

As indicated in the epigraph, my view of the *Ewoldt* decision mirrors Mark Twain's opinion of Wagner's music: "It's not as bad as it sounds." Though I find the court's plan rationale unconvincing, the broader notion that similar acts evidence should be admissible to prove the defendant's commission of the actus reus in child sexual abuse and acquaintance rape cases is sound. The potential cogency of this category of evidence is illustrated by the facts of *Balcom*. Evidence that another woman from a distant state who, so far as appears in the opinion, neither knew nor knew of the complainant, accused the defendant of raping her in a manner similar to the charged offense, thoroughly discredits the defendant's claim that the victim fabricated her allegation of forced sex. Moreover, the non-character use of the evidence under the doctrine of chances should be sufficiently apparent and attractive to lay jurors to allow the judge to conclude that the risk of unfair prejudice from the evidence does not substantially outweigh its probative value.

The argument for admitting the testimony of the victim and her sister about uncharged acts of sexual abuse in *Ewoldt* is less compelling. Certainly, the victim's testimony of uncharged similar acts committed against her adds little, if anything, to the likelihood that the defendant committed the charged acts. If the victim falsely accused the defendant of engaging in the conduct that led to the charges, she probably lied about the uncharged

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[219] FED. R. EVID. 413-415.

[220] For instance, the Supreme Court of Washington relied on *Ewoldt* in holding recently that "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" in an acquaintance rape case. State v. Lough, 889 P.2d 487, 490 (Wash. 1995). The Supreme Court of Minnesota has also recently approved the admission of prior similar acts of the defendant to prove that the defendant engaged in the conduct alleged to constitute sexual abuse. State v. Wermerskirchen, 497 N.W.2d 235, 239-43 (Minn. 1993).

conduct as well. The admissibility of the testimony of the victim's sister presents a closer question. The similarities in the accounts of the two sisters tend strongly to disprove the possibility of independent invention. Both girls testified that they awoke in bed to discover the defendant fondling them, and both stated that the defendant provided them with the excuse that he was tucking them in. Doubts concerning the admissibility of the sister's testimony arise from the fact that she was no stranger to the victim or, presumably, the details of her allegations against their stepfather. The seemingly improbable coincidence of strikingly similar accusations against the defendant could be the result of either collusion between the sisters or simply the older girl's belief in and desire to stand behind her sister against their stepfather. But the court considered the possibility of collaboration between the sisters,[221] and while one might quarrel with the court's determination that the risk of collusion was not so high as to require exclusion, it cannot be said that the court's decision to admit the evidence was unreasonable.

Given my conclusion that the court reached a defensible outcome, it is appropriate to summarize here how, if at all, the court was wrong. The label under which uncharged misconduct evidence offered to prove actus reus is admitted is important only insofar as it serves to focus the judge's attention on the requirements for admissibility and alerts jurors to the proper use of the evidence once admitted.[222] For reasons stated in Part II, the word "plan," at least in the usual understanding of the term, seems to me to be a poor choice. The commission of a series of similar acts does not strongly suggest that they all were carried out pursuant to an antecedent plan, and the question whether the defendant planned a series of similar crimes shades perilously close to the question whether the defendant has the propensity to criminality.

There is another, admittedly strained, sense of the term "plan" that does capture the probative value of similar accusations evidence. Plan, or at least design, is entirely apt if under-

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[221] *Ewoldt*, 867 P.2d at 771 (stating that second accusation was made only after hearing sister's complaint).

[222] As observed above, California courts at one time admitted similar accusations evidence under the label "corroboration." *See supra* note 178.

stood not as a forward looking subjective program for action, but as a retrospective explanation for a set of otherwise inexplicable coincidences.[223] Plan in this sense does not denote a mental resolve to follow a certain course of conduct. Indeed, it is not defendant's *conduct* that is planned at all. The accusations evince plan, design or system only in the sense that they are non-random. The existence of the plan is not inferred from the commission of a series of similar *acts*, but the operation of human agency or design — as opposed to chance — is adduced as the only plausible explanation for the repetition by different accusers of the same *story*. Instead of focussing on what goes on inside the defendant's head, this concept of plan directs jurors' attention to the likelihood of a pattern of similar false accusations occurring randomly.

Although the court's label "plan" can be stretched to fit the doctrine of chances rationale for admission of uncharged misconduct evidence, the foundational requirements the court establishes for introducing the evidence cannot. The court's requirement of common features between the charged and uncharged events as a prerequisite to admissibility is proper. But similarity alone is not sufficient, since "[e]ven strictly identical conduct on other occasions may fail to raise an unlikely coincidence."[224] The test for admissibility should be whether, considering all the circumstances, "there is 'such an underlying unity between the [accusations] as to make coincidence an affront to common sense.'"[225]

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[223] *Cf.* Rex v. Smith, 11 Crim. App. 229, 237 (1915) (stating that evidence of uncharged deaths of other purported wives admitted "to show that the act charged had been committed, that is, had been designed").

[224] Turcott, *supra* note 108, at 66.

[225] Boardman v. Director of Public Prosecutions, App. Cas. 421, 453 (1974) (per Lord Hailsham) (quoting Regina v. Kilbourne, App. Cas. 729, 759 (1973) (Lord Simon)).

As this article was being prepared for publication the California Legislature amended the Evidence Code relaxing the restrictions on the admission of prior crimes evidence in prosecutions for sexual offenses. Act of Sept. 2, 1995, ch. 439, 1995 Cal. Legis. Serv. 2724-25 (West). The substantive portion of newly enacted Section provides: "(a) In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissable be Section 1101, if the evidence is not inadmissable pursuant to Section 352." *Id.*

Whatever else this amendment accomplishes, it does not affect the viability of either the doctrine of chances or the plan theory as a basis for offering uncharged misconduct evidence in sex offense cases. Section 1108 removes the prohibition against using evidence

of character to prove conduct in criminal prosecutions for sex crimes. It therefore authorizes admission of evidence of prior sex crimes on a propensity theory of logical relevance. In other words, evidence of defendant's past sexual offenses may be used to prove the defendant's propensity to commit such crimes as the basis for inferring that he committed the crime charged. Section 1108 stipulates, however, that admissibility is subject to the balancing of probative value against prejudice required by Evidence Code § 352. The evidence is admissible only if its probative value as evidence of propensity to commit sex crimes is not substantially outweighed by the danger of unfair prejudice.

The extent to which prior crimes evidence will be admissible under § 1108 is uncertain. First, the statute does not specify how much probative value past crimes evidence have as proof of criminal dispositon. Indeed, § 1108 clearly contemplates that at least in some cases the probative value of prior crimes evidence on a propensity theory will be substantially outweighed by the danger that the jury will misuse the evidence. Moreover, admission of evidence on a propensity theory of logical relevance magnifies the danger of unfair prejudice. The propensity use of prior crimes evidence requires the jury to focus on the defendant's subjective character, and therefore heightens the risk that jurors will punish him for his past actions or his general character regardless of his guilt of the crime charged.

Because the probative value of propensity evidence is uncertain and prejudicial effect of such evidence is high, non-propensity theories of logical relevance may provide a stronger basis for admission of uncharged misconduct evidence than § 1108's propensity theory, at least in some cases. As I have argued, evidence of prior accusations against the accused can be highly probative in disproving a defense claim that the sex offense victim has falsely accused the defendant of rape or sexual abuse. The doctrine of chances focuses attention on the improbability of repeated false accusations against the same person, rather than the defendant's subjective character, and therefore minimizes the danger of misuse.

Section 1108 will undoubtedly be construed to permit the admission of evidence of past sex crimes to prove a disposition to commit such crimes in some cases. But the recognition of propensity as a permissible use of such evidence does not wholly supplant non-propensity theories of logical relevance.