



1-1-1995

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Recommended Citation

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).

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**PEOPLE v. EWOLDT: THE CALIFORNIA
SUPREME COURT'S ABOUT-FACE ON THE
PLAN THEORY FOR ADMITTING
EVIDENCE OF AN ACCUSED'S
UNCHARGED MISCONDUCT**

*Miguel A. Méndez**
& *Edward J. Imwinkelried***

*Law of Motion #3: To every action there is always opposed
an equal reaction*¹

I. INTRODUCTION

It has been called "the Prosecutor's Delight."² It is evidence of the accused's uncharged misconduct. Although the accused is charged with one crime, time and again prosecutors attempt to introduce evidence of other, uncharged misdeeds allegedly committed by the accused. For example, in the prosecution for the Atlanta child killings, Wayne Williams was formally charged with only two murders.³ However, the prosecutor succeeded in persuading the trial judge to admit testimony about ten other killings allegedly perpetrated by Williams.⁴ Evidence of other sexual misconduct also figured prominently in the trial of boxer Mike Tyson.⁵ While the only accusation lodged against Tyson was raping a particular contestant in a beauty pageant, the court permitted the prosecution to introduce evidence of sexual ad-

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1. SIR ISAAC NEWTON, *MATHEMATICAL PRINCIPLES* 13 (Florian Cajori ed. & Andrew Motte trans., 1934).

2. Rand Karl Shotwell, Comment, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight"*, 21 *UCLA L. REV.* 892, 892 (1974).

3. *Williams v. State*, 312 S.E.2d 40, 48 (Ga. 1983).

4. *Id.*

5. William Nack, *On Trial*, *SPORTS ILLUSTRATED*, Jan. 20, 1992, at 46, 49.

vances Tyson allegedly made toward other contestants.⁶ Likewise, the turning point in the William Kennedy Smith rape case was the trial judge's decision to bar any mention of three other sexual assaults allegedly committed by Smith.⁷

Prosecutors relish proffering uncharged misconduct evidence because they realize that it is so devastating to the defense. A London School of Economics study of jury behavior found that the admission of evidence of an accused's uncharged crimes significantly increases the probability of conviction.⁸ American researchers have come to the same conclusion. In the 1960s the Chicago Jury Project concluded that, as a practical matter, the presumption of innocence operates only for an accused without a prior criminal history.⁹ In the 1980s the National Science Foundation Law and Social Science Project sponsored an empirical investigation of the prejudicial impact of various types of evidence. The type of evidence most consistently rated damning was "evidence suggesting [other] immoral conduct by the defendant."¹⁰

Prosecutors favor uncharged misconduct evidence precisely because they know that it is one of "the most prejudicial [types of] evidence imaginable."¹¹ The numbers tell the story. Dean McCormick once remarked that the decisions on this issue are as numerous "as the sands of the seas."¹² In criminal cases the admissibility of uncharged misconduct is the single most commonly litigated evidentiary issue on appeal.¹³ The federal statute on point, Federal Rule of Evidence

6. Sonja Steptoe, *A Damnable Defense*, SPORTS ILLUSTRATED, Feb. 24, 1992, at 92.

7. Mark Hansen, *Experts Expected Smith Verdict*, A.B.A. J., Feb. 1992, at 18; *Subvert Damaging Testimony*, NAT'L L.J., Feb. 3, 1992, at S3.

8. Nickolas J. Kyser, Comment, *Developments in Evidence of Other Crimes*, 7 U. MICH. J.L. REF. 535, 543-44 (1974).

9. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY 160-61, 178-79* (Univ. of Chicago Press 1971) (1966); see also Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961) ("The jurors almost universally used defendant's record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial." (quoting Letter from Dale W. Broeder, Associate Professor, University of Nebraska College of Law, to *Yale Law Journal* (Mar. 14, 1960))).

10. Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1162.

11. *People v. Smallwood*, 42 Cal. 3d 415, 429, 722 P.2d 197, 205, 228 Cal. Rptr. 913, 922 (1986).

12. 2 DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, *FEDERAL EVIDENCE* § 140, at 113 (1978).

13. Byron N. Miller, Note, *Admissibility of Other Offense Evidence After State v. Houghton*, 25 S.D. L. REV. 166, 167 (1980).

404(b), has generated more published opinions than any other provision of the Federal Rules.¹⁴

Statutes such as Rule 404(b) and California Evidence Code section 1101(b) prescribe the hurdle that prosecutors must surmount in order to introduce uncharged misconduct evidence.¹⁵ Section 1101(b) provides that, although evidence of other crimes, wrongs, or acts is inadmissible to prove the character of a person in order to show that he or she conformed his or her conduct therewith, the ban does not prohibit the admission of such evidence "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act."¹⁶

This statutory scheme is comprised of a negative prohibition as well as an affirmative authorization. California Evidence Code section 1101(a), like Rule 404(b), codifies the traditional, common-law ban on the use of character evidence.¹⁷ These rules forbid the prosecutor from offering evidence of an accused's uncharged misdeeds to prove that the accused is guilty of committing the crime charged because he or she is the kind of person who would commit such an offense.¹⁸ The California Code and the Federal Rules preclude the use of this theory of logical relevance because each link in the chain of reasoning raises significant questions about whether the accused can be tried fairly.

The first link would require the jurors to consciously focus on the kind of person the accused is.¹⁹ If the jurors are forced to evaluate the accused's character, they could be subconsciously tempted to decide the case on an improper basis. After learning of the accused's misdeeds, the jurors might be inclined to convict even if they otherwise have a reasonable doubt about the accused's guilt of the charged offense. In our legal system the accused are accountable "for what

14. 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08], at 404-46 to 404-47 (1994).

15. FED. R. EVID. 404(b); CAL. EVID. CODE § 1101(b) (West Supp. 1994).

16. CAL. EVID. CODE § 1101(b); *see also* FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts . . . may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . .").

17. CAL. EVID. CODE § 1101(a).

18. FED. R. EVID. 404(b); CAL. EVID. CODE § 1101(a).

19. *People v. VanderVliet*, 508 N.W.2d 114, 121 (Mich. 1993) (quoting *People v. Engelman*, 453 N.W.2d 656, 661 n.16 (Mich. 1990) (quoting EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18, at 48-49 (1984))).

they do and not for what they are.' ”²⁰ The United States Supreme Court has held that the Eighth Amendment’s prohibition of cruel and unusual punishment forbids convicting persons on account of their status.²¹ That prohibition precludes convicting on the basis of the accused’s status as a recidivist.²²

After reaching a conclusion about the accused’s character, the second link in the chain of reasoning would compel the jurors to use their conclusion about the accused’s character as a basis for predicting whether, on the occasion in question, the accused engaged in conduct consistent with that character.²³ The prevailing view of social science researchers is not only that character is a poor predictor of conduct, but that laypeople—including jurors—give character undue weight as a predictor.²⁴ Jurors might well overestimate the value of evidence that in fact says little or nothing about the likelihood of the charged behavior. Although the ban on character evidence predated the scientific studies, these dangers nevertheless account for the character evidence prohibition found in the Federal Rules and California Code.

That negative prohibition, though, is only part of the statutory framework. California Evidence Code section 1101(b), as well as Federal Rule of Evidence 404(b), affirmatively allow prosecutors to offer evidence of an accused’s uncharged misconduct to prove any relevant proposition other than the accused’s predisposition to commit the offense charged.²⁵ The rules of evidence recognize that evidence that may be inadmissible for one purpose may nonetheless be received for some other admissible purpose.²⁶ Since, in this instance, the jurors are not being asked to pass on the accused’s character, the dangers attending character evidence are largely absent. The California Code and the Federal Rules legitimate noncharacter theories of logical rele-

20. MIGUEL A. MÉNDEZ, CALIFORNIA EVIDENCE § 3.04, at 34 (1993) (quoting HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 74 (1968)).

21. *Id.* at 34 n.10 (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)).

22. The Eighth Amendment does not forbid punishing recidivism. *Rummel v. Estelle*, 445 U.S. 263, 284-85 (1980). Under recidivist statutes, however, the accused’s past convictions are used solely to enhance punishment and not as evidence of the accused’s guilt of the offense charged. *See id.* at 284 (“The purpose of a recidivist statute . . . is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and . . . to segregate [those] person[s] from the rest of society for an extended period of time.”).

23. *VanderVliet*, 508 N.W.2d at 121 (quoting *People v. Engelman*, 453 N.W.2d 656, 661 n.16 (Mich. 1990) (quoting EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18, at 48-49 (1984))).

24. MÉNDEZ, *supra* note 20, § 3.04, at 34.

25. *See supra* note 16 and accompanying text.

26. FED. R. EVID. 105; CAL. EVID. CODE § 355 (West 1966).

vance because under those theories, there is little or no policy reason for depriving the jurors of relevant evidence.

The courts have developed a myriad of noncharacter theories for admitting evidence of an accused's uncharged crimes. One is the well-settled *modus operandi* theory for proving an accused's identity as the perpetrator of the crime charged.²⁷ Under this theory, prosecutors may offer evidence of uncharged misdeeds if the unique circumstances attending the commission of the uncharged and charged misdeeds are so distinctive as to suggest that only one person—the accused—committed the misdeed charged.²⁸ For example, when the prosecutor can show that the unique circumstances attending the charged killing are nearly identical to those surrounding other killings committed by the accused, the use of the other crimes evidence does not violate the ban on the use of character evidence.²⁹ The jurors are not being asked to convict because the accused is a bad person or even the kind of person who would perpetrate the offense charged. Rather, they are being urged to convict because the charged and uncharged offenses were committed by a one-of-a-kind methodology, suggesting that the accused is the person who committed the offense charged. Once the judge is convinced that the manner in which the charged and uncharged offenses were committed is idiosyncratic, the judge may allow the jurors to consider the evidence of the uncharged offenses as proof that it is unlikely that another person committed the charged crime.³⁰ Of course, it is possible that a copycat criminal perpetrated the charged offense. However, that possibility is but a factor the jurors can take into account in determining how much weight, if any, to give to the evidence of the uncharged offense.³¹

An increasingly popular noncharacter theory of admissibility is the doctrine of chances.³² Assume, for example, that when the police lawfully stop the accused's vehicle, they discover contraband drugs in

27. 2 DAVID W. LOISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 140, at 264-68 (rev. ed. 1985); see also 1 CHARLES TILFORD McCORMICK, McCORMICK ON EVIDENCE § 190 (John William Strong ed., 4th ed. practitioner treatise ser. 1992) (stating evidence of uncharged crimes is admissible "[t]o prove other crimes by the accused so nearly identical in method as to earmark them as the handiwork of the accused").

28. 1 McCORMICK, *supra* note 27, § 190, at 801-03.

29. *Id.* at 801 n.19 (citing *People v. Peete*, 28 Cal. 2d 306, 169 P.2d 924 (1946) and *Commonwealth v. Wable*, 114 A.2d 334 (Pa. 1955)).

30. See 2 LOISELL & MUELLER, *supra* note 27, § 140, at 265.

31. See FED. R. EVID. 104(e); CAL. EVID. CODE § 406 (West 1966).

32. See, e.g., *United States v. York*, 933 F.2d 1343, 1350 (7th Cir.), *cert. denied*, 112 S. Ct. 321 (1991); *VanderVliet*, 508 N.W.2d at 128-29 & n.35; *State v. Allen*, 725 P.2d 331, 334 (Or. 1986).

the trunk. The accused disclaims any knowledge of the presence of the drugs. However, the prosecutor has evidence that on four prior occasions, the accused was found driving a vehicle containing illegal drugs. It is true that innocent persons sometimes become enmeshed in suspicious circumstances, but the more often such events occur, the claim that the accused acted innocently becomes less plausible.³³ The extraordinary coincidence flies in the face of common sense and allows jurors to conclude that it is objectively unlikely that the accused was ignorant of the presence of the drugs. The prosecutor need not rely on an inference about the accused's subjective character. Hence, under the doctrine of chances, the uncharged misconduct can be probative of mens rea without running afoul of the character evidence prohibition. The California Evidence Code and the Federal Rules of Evidence expressly recognize that evidence of other misdeeds may be offered to prove the accused's guilty "knowledge."³⁴

Another popular noncharacter theory is common plan or scheme.³⁵ Assume a sex offense prosecution in which the accused does not dispute the victim's claims of abuse. The accused simply claims to have not committed the abuse. May the prosecution call other witnesses to the stand to testify that the accused also abused them? The prosecutor may do so only if the prosecution's theory is that the accused perpetrated the charged offense as part of a common plan to commit the charged and uncharged offenses.³⁶ Both the California Code and the Federal Rules include "plan" in the list of acceptable noncharacter theories of logical relevance.³⁷ This theory "suppl[ies] a frequent ticket of admissibility" for evidence of uncharged misconduct.³⁸ Reversals for erroneously admitting uncharged misconduct under this theory are "few and far between."³⁹

In recent years, the plan doctrine has proven to be one of the most controversial theories for admitting uncharged misconduct.⁴⁰ Some critics have charged that by irresponsibly invoking the theory without careful analysis,⁴¹ many courts have converted plan into a

33. See *York*, 933 F.2d at 1350.

34. FED. R. EVID. 404(b); CAL. EVID. CODE § 1101(b) (West Supp. 1994).

35. E.g., *People v. Ewoldt*, 7 Cal. 4th 380, 393-99, 867 P.2d 757, 764-68, 27 Cal. Rptr. 2d 646, 653-57 (1994).

36. *Id.* at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

37. FED. R. EVID. 404(b); CAL. EVID. CODE § 1101(b).

38. *People v. Covert*, 249 Cal. App. 2d 81, 86, 57 Cal. Rptr. 220, 223 (1967).

39. 2 LOUISELL & MUELLER, *supra* note 27, § 140, at 261.

40. See MÉNDEZ, *supra* note 20, § 3.14, at 56-64.

41. 2 WEINSTEIN & BERGER, *supra* note 14, ¶ 404[16], at 404-97 (Supp. Mar. 1994).

“euphemism” for bad character,⁴² and have allowed the theory to degenerate into “a dumping ground” for inadmissible bad character evidence.⁴³ Whatever else may be said about the theory, it is evident that its scope is now a major battleground between prosecutors and defense counsel.⁴⁴

In the span of a single decade, the California Supreme Court has twice issued major pronouncements about the scope of the plan theory. Ten years ago, in *People v. Tassell*,⁴⁵ the court advocated a restrictive view of the evidence necessary to invoke the theory.⁴⁶ *Tassell* instantly became the leading defense precedent.⁴⁷ But a mere ten years later, in *People v. Ewoldt*,⁴⁸ the court did a complete about-face, overruling this aspect of *Tassell*.⁴⁹ *Ewoldt* is as forceful a prosecution precedent as *Tassell* was a defense victory.

Our thesis is that the 1984 *Tassell* opinion was a well-reasoned decision and that the 1994 *Ewoldt* decision represents a step backward in the administration of the character evidence rules. Part II of this Article reviews the general split of authority over the scope of the plan theory. That split of authority was the historical backdrop for *Tassell*. Part III describes how *Tassell* and its progeny triggered a national trend toward a more constrained application of the plan theory. Part IV details the court’s reasoning in *Ewoldt*. The remaining sections explain why *Ewoldt* was wrongly decided.⁵⁰ *Ewoldt* is flawed as a matter of evidentiary policy. Our hope is that by exposing the flaws in *Ewoldt*, this Article will help preempt a dangerous countertrend toward the undue expansion of the plan theory. In our opinion, *Tassell* imposed much needed limitations on the plan theory, and it would

42. *People v. Tassell*, 36 Cal. 3d 77, 85, 679 P.2d 1, 5, 201 Cal. Rptr. 567, 571 (1984), overruled by *People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994). *Ewoldt* overruled *Tassell* “to the extent [it] hold[s] that evidence of a defendant’s uncharged similar misconduct is admissible to establish a common design or plan only where the charged and uncharged acts are part of a single, continuing conception or plot.” *Ewoldt*, 7 Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

43. 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5244, at 499 (1978).

44. See MÉNDEZ, *supra* note 20, § 3.14, at 56-64.

45. 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567.

46. *Id.* at 84, 679 P.2d at 4, 201 Cal. Rptr. at 570.

47. 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, 13 (1985).

48. 7 Cal. 4th 380, 867 P.2d 757, 27 Cal. Rptr. 2d 646 (1994).

49. *Id.* at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

50. See *infra* parts V-VI.

be a tragedy if *Ewoldt* subverted the fairness that *Tassell* sought to achieve in the administration of the character evidence rules.

II. THE PRE-*TASSELL* SPLIT OVER THE SCOPE OF THE PLAN THEORY

The California Evidence Code, like the common law and the Federal Rules of Evidence, recognizes that under some circumstances, evidence of the accused's misconduct can be offered under the plan doctrine without offending the ban on character evidence.⁵¹ The rub under all three systems of evidence is that the term "plan" is not defined.⁵² Not surprisingly, different understandings have emerged. It would be a mistake, however, to overstate the differences among the courts. The published opinions can be synthesized into four categories, and the present controversy⁵³ relates principally to only one of them.

In the first three categories, all the crimes—both charged and uncharged—are the product of some prior,⁵⁴ conscious⁵⁵ resolve⁵⁶ in the accused's mind.⁵⁷ The accused formulates a single,⁵⁸ overall⁵⁹ grand design that encompasses both the charged and uncharged offenses.⁶⁰ That design is overarching,⁶¹ all the crimes are integral⁶² components⁶³ or portions⁶⁴ of the same plan. Each crime is a step⁶⁵ or

51. FED. R. EVID. 404(b); CAL. EVID. CODE § 1101(b) (West Supp. 1994); 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 304 (James H. Chadbourne ed., 4th ed. 1979).

52. 2 WEINSTEIN & BERGER, *supra* note 14, ¶ 404[16], at 404-97 (Supp. Mar. 1994).

53. See MÉNDEZ, *supra* note 20, § 3.14, 56-64.

54. 2 LOUISELL & MUELLER, *supra* note 27, § 140, at 257.

55. 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 500.

56. 2 LOUISELL & MUELLER, *supra* note 27, § 140, at 257.

57. 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 515 (Supp. 1994) (citing *Cook v. State*, 650 P.2d 863, 868 (Okla. Crim. App. 1982)).

58. *People v. Tassell*, 36 Cal. 3d 77, 84, 679 P.2d 1, 4, 201 Cal. Rptr. 567, 570 (1984), *overruled by People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994).

59. 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 507 (Supp. 1994).

60. *Tassell*, 36 Cal. 3d at 84 n.4, 679 P.2d at 5 n.4, 201 Cal. Rptr. at 571 n.4.

61. 1 McCORMICK, *supra* note 27, § 190, at 801.

62. *Id.* at 800.

63. 2 LOUISELL & MUELLER, *supra* note 27, § 140, at 262 n.97 (citing *United States v. Dothard*, 666 F.2d 498, 502-04 (11th Cir. 1982)).

64. MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.5, at 207 n.12 (3d ed. 1991) (citing *People v. Barbour*, 436 N.E.2d 667, 672 (Ill. App. Ct. 1982)).

65. 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 515-16 (Supp. 1994) (citing *State v. Harris*, 365 N.W.2d 922, 926 (Wis. Ct. App. 1985) and *State v. Balistreri*, 317 N.W.2d 493, 500 (Wis. 1982)).

stage⁶⁶ in the execution of the plan. Each is a means to achieving the same goal.

A. A True Plan of the Sequential Variety

One variation of the single, overall grand design is sometimes called a sequential plan.⁶⁷ Sequential plans are characterized by a natural sequence or order. One crime is predicated upon the commission of another.⁶⁸ For example, the accused first breaks into a bank president's residence on January 1, steals the key to the side door to the bank, and then uses the key to burglarize the bank on February 1. The accused perpetrated the January crime as a means to facilitate the commission of the February offense.⁶⁹ In a prosecution for committing the second offense, the prosecutor can offer evidence of the first offense as proof that the accused perpetrated the burglary. The prosecutor will urge the jurors to find that the accused committed the second offense because it was an outgrowth of the accused's uncharged misconduct;⁷⁰ one crime was the precursor of the other.⁷¹ Examples of sequential plans abound.⁷² In all these cases, evidence of uncharged offenses can be used to prove some element of the offense charged without violating the prohibition on the use of character evidence. If the January crime were the charged offense, the February burglary would be admissible as proof of the accused's motive to commit the earlier crime;⁷³ evidence of motive to commit that crime would single the accused out as the perpetrator. The February crime could also be offered to identify the accused as the perpetrator of the

66. *Ali v. United States*, 520 A.2d 306, 312 (D.C. 1987).

67. See *Imwinkelried*, *supra* note 47, at 10.

68. RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, *A MODERN APPROACH TO EVIDENCE* 227 (2d ed. 1982).

69. See Jeffrey H. Contreras, Note, *Evidence: Admissibility of Other Crimes to Establish a Common Scheme or Plan*—*Hall v. State*, 37 OKLA. L. REV. 103, 112 (1984).

70. See 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 500.

71. 1 McCORMICK, *supra* note 27, § 190, at 800 n.15 (citing *United States v. Parnell*, 581 F.2d 1374 (10th Cir. 1978), *cert. denied*, 439 U.S. 1076 (1979)).

72. *E.g.*, *Lewis v. United States*, 771 F.2d 454, 458 (10th Cir.) (accused broke into garage to steal cutting torch and then employed torch to burglarize post office), *cert. denied*, 474 U.S. 1024 (1985); *United States v. Carroll*, 510 F.2d 507, 509 (2d Cir. 1975) (early crimes committed in order to determine whether conspirators were capable of committing later, more serious offense), *cert. denied*, 426 U.S. 923 (1976); *State v. Yoshino*, 364 P.2d 638, 642 (Haw. 1961) (during robbery of first victim, accused obtained name and address of next victim); *State v. Long*, 244 P.2d 1033, 1046 (Or. 1952) (after obtaining truck by killing owner, accused used truck in robbery); 1 McCORMICK, *supra* note 27, § 190, at 800 nn.15-16 (citing cases allowing use of other crimes evidence to prove existence of plan).

73. See 1 McCORMICK, *supra* note 27, § 190, at 806.

January crime by establishing possession of a fruit of that crime, namely, the key.⁷⁴ Conversely, if the February crime were the charged offense, the January crime would be admissible as proof that the accused was the perpetrator of the February offense. The prosecutor's theory would be that the accused committed the first offense in order to facilitate the commission of the second.⁷⁵ In neither case would the prosecutor have to invite the jury to infer the accused's guilt from a predisposition to commit the crime charged. In both cases, the prosecutor would be relying on acknowledged noncharacter theories of logical relevance.

B. A True Plan of the Chain Variety

Another variation of the plan doctrine has been dubbed a chain plan.⁷⁶ Assume that the accused decides to gain control of a business by killing the accused's partners⁷⁷ or to acquire title to realty by murdering all the competing heirs with superior claims to the property.⁷⁸ A chain plan is distinguishable from a sequential plan in that there is no necessary order to the crimes. The accused may attain the above goals by killing the other partners or heirs in any sequence. But the accused is not simply a random killer who acts out of a propensity to kill. Rather, the accused has a larger,⁷⁹ more comprehensive⁸⁰ goal in mind, and each crime is but a means to achieving that goal.⁸¹ There are many examples of chain plans. The accused attempts to bribe enough members of a city council to obtain a majority of the votes,⁸² or to injure so many of a company's nonunion truck drivers that the

74. See *id.* at 808.

75. See *id.* at 800 n.15 (citing *Lewis v. United States*, 771 F.2d 454, 458 (10th Cir.), *cert. denied*, 474 U.S. 1024 (1985)).

76. See *Imwinkelried*, *supra* note 47, at 10.

77. 22 *WRIGHT & GRAHAM*, *supra* note 43, § 5244, at 517 n.15 (Supp. 1994) (citing *State v. Cruz*, 672 P.2d 470 (Ariz. 1983)).

78. *Id.* at 501.

79. *GRAHAM*, *supra* note 64, § 404.5, at 208 n.12 (citing *United States v. Krezdorn*, 639 F.2d 1327, 1331 (5th Cir. 1981), *cert. denied*, 465 U.S. 1066 (1984)); 1 *McCORMICK*, *supra* note 27, § 190, at 800-01; 22 *WRIGHT & GRAHAM*, *supra* note 43, § 5244, at 500; *id.* § 5244, at 511 n.8 (Supp. 1994) (citing *United States v. Barron*, 707 F.2d 125 (5th Cir. 1983)).

80. 22 *WRIGHT & GRAHAM*, *supra* note 43, § 5244, at 512 n.8 (Supp. 1994) (citing *United States v. Krezdorn*, 639 F.2d 1327, 1331 (5th Cir. 1981)).

81. 2 *WEINSTEIN & BERGER*, *supra* note 14, ¶ 404[16], at 404-97 n.7 (Supp. Mar. 1994) (citing *United States v. Johnson*, 700 F.2d 163, 177 (5th Cir.), *aff'd in part and rev'd in part*, 718 F.2d 1317 (5th Cir. 1983)).

82. William Roth, *Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach*, 9 *PEPP. L. REV.* 297, 308 n.41 (1982).

company must bargain with the accused's union.⁸³ In each instance, the accused has a specific objective, and achieving that objective requires the commission of multiple crimes.⁸⁴ Once again, irrespective of the crime the accused is charged with, the prosecutor is entitled to offer the other crimes as uncharged misconduct. The prosecutor does not need to draw any forbidden inference from the accused's bad character to demonstrate the logical relevance of the uncharged offenses.

C. *A True Plan of the Bizarre Variety*

A third variation of the plan doctrine allows prosecutors to argue that what may appear at first blush to be inadmissible character evidence is in truth offered for a relevant noncharacter purpose.⁸⁵ The sequential and chain plan theories presuppose the introduction of evidence which jurors can recognize as comprising a plan.⁸⁶ Suppose, however, that the prosecutor is unable to produce such evidence. Criminals, especially murderers, often have bizarre motivations for their conduct⁸⁷—motivations that would not readily occur to most jurors. What may appear to be unconnected crimes to most people may, however, be the product of a common plan hatched by a warped criminal mind.⁸⁸ The accused's written⁸⁹ or oral statements⁹⁰ may be evidence that the accused harbored such a plan. The accused's diary might describe the various crimes as "phases" or "stages."

Although the accused's goals may be unfathomable to the jurors, here too the prosecutor could articulate the logical relevance of the evidence without relying on forbidden character inferences. To be sure, the evidence may be more vulnerable to exclusion under a judge's discretionary powers to exclude relevant evidence. California Evidence Code section 352 and Federal Rule of Evidence 403 empower a trial judge to exclude relevant evidence when its probative value is substantially outweighed by the enumerated concerns, includ-

83. *Peats v. State*, 12 N.E.2d 270 (Ind. 1938).

84. *Imwinkelried*, *supra* note 47, at 10.

85. *Id.* at 11.

86. *See id.* at 10-11.

87. *Id.* at 11.

88. W.A. Harrington, Annotation, *Remoteness in Time of Other Similar Offenses Committed by Accused as Affecting Admissibility of Evidence Thereof in Prosecution for Sex Offense*, 88 A.L.R. 3d 8, 36 (1978) (citing *State v. Thorne*, 260 P.2d 331 (Wash. 1953)).

89. *People v. Corona*, 80 Cal. App. 3d 684, 145 Cal. Rptr. 894 (1978) (holding ledger containing names of victims tends to show how defendant recruited victims).

90. *Hicks v. State*, 389 S.W.2d 950, 951-52 (Tex. Crim. App. 1965).

ing notably, the danger of unduly prejudicing the objecting party.⁹¹ Because of their peculiar nature, evidence of bizarre plans might not be as probative of a common plan or scheme as evidence of sequential or chain plans. From a purely relevance perspective, however, evidence of bizarre plans may be offered as proof of an admissible noncharacter proposition.

D. *Unlinked or Spurious Plans*

There is a widespread consensus that in each of the three common plan variations described above, the uncharged misconduct evidence may be admitted without affront to the character evidence prohibition.⁹² The consensus ends abruptly, however, over the admissibility of a fourth variation. Prosecutors relying on this variation attempt to prove some element of the charged offense by showing that the accused committed, within a fairly tight time frame, crimes similar to the one charged.⁹³ The similarities between the charged and uncharged offenses are, however, insufficient to satisfy the test for the existence of a truly distinctive *modus operandi*.⁹⁴

Moreover, the prosecutor is unable to produce any direct evidence that the accused committed the charged and uncharged offenses as part of a single common plan. The only evidence available to the prosecution is that all the crimes were committed in roughly the same fashion.⁹⁵ One inference that the jurors can draw is that each crime was an end in itself; its commission was "the result of an impulse born of the moment"⁹⁶ when the opportunity randomly presented itself. Since the crimes are not connected, this variation of the plan doctrine is sometimes termed the "unlinked" plan.⁹⁷

The courts are in sharp disagreement over the admissibility of evidence of unlinked plans. Some courts treat evidence that the charged and uncharged offenses were committed in roughly the same fashion as adequate proof of the existence of a plan, thereby permitting the

91. FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966).

92. See *supra* parts II.A-C.

93. See 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 518 n.19 (Supp. 1994) (citing *People v. Wills-Watkins*, 99 Cal. App. 3d 451, 160 Cal. Rptr. 289 (1979)).

94. Imwinkelried, *supra* note 47, at 13.

95. 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 507 (Supp. 1994).

96. *State v. Buxton*, 22 S.W.2d 635, 637 (Mo. 1929).

97. David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 547 (1994).

introduction of the uncharged misconduct.⁹⁸ These courts require the prosecutor to demonstrate only that the charged and uncharged crimes were similar and temporally proximate.⁹⁹ The courts do not conduct a "detailed analysis"¹⁰⁰ to determine whether a common objective in fact inspired the accused to commit all the crimes.¹⁰¹

Other courts disagree. These courts believe that, without additional proof of the accused's intentions, evidence about recent, similar crimes does not amount to proof of a plan.¹⁰² For the most part, academic commentators concur with these courts.¹⁰³ The commentators condemn the unlinked plan theory as tolerating spurious plans¹⁰⁴ and criticize the courts that advocate the unlinked plan theory for transforming plan into an incantation for circumventing the prohibition on the use of character evidence.¹⁰⁵ Proof that the accused has recently committed similar crimes is probably the most cogent method of proving the accused's propensity to perpetrate that type of crime.¹⁰⁶ Thus, these critics find it anomalous to treat the same showing as an adequate predicate for the noncharacter theory that the accused committed the charged crime pursuant to a plan. It strikes them as

98. *E.g.*, *United States v. Wright*, 943 F.2d 748, 751 (7th Cir. 1991); *State v. Hines*, 354 N.W.2d 91, 93 (Minn. Ct. App. 1984).

99. *United States v. Harvey*, 959 F.2d 1371, 1374 (7th Cir. 1992); *People v. Honey*, 596 P.2d 751, 754 (Colo. 1979).

100. 2 WEINSTEIN & BERGER, *supra* note 14, ¶ 404[16], at 404-97.

101. *See* 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 500.

102. *E.g.*, *United States v. Beasley*, 809 F.2d 1273, 1277-78 (7th Cir. 1987); *United States v. Dothard*, 666 F.2d 498, 502 (11th Cir. 1982); *United States v. Goodwin*, 492 F.2d 1141, 1153 (5th Cir. 1974); *State v. Harris*, 677 P.2d 202 (Wash. Ct. App. 1984); 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 507 (Supp. 1994).

103. *But see* *Bryden & Park*, *supra* note 97, at 547-48.

[T]his concept of "plan" is a textually plausible interpretation of the rule against character reasoning. One could construe the concept of "character" as referring only to traits manifesting a general propensity, such as a propensity toward violence or dishonesty. Under this interpretation, a situationally specific propensity, such as a propensity to lurk in the back seats of empty cars in shopping centers as a prelude to sexual assaults on the owners, would be too specific to be called a trait of character.

Id. (footnote omitted).

104. *Contreras*, *supra* note 69, at 112, 115; Thomas Quigley, Note, *Admissibility of Evidence Under Indiana's "Common Scheme or Plan" Exception*, 53 IND. L.J. 805, 811-12 (1978).

105. MÉNDEZ, *supra* note 20, § 3.14, at 59.

106. In a technical sense, testimony about an accused's reputation for a character trait, or an acquaintance's opinion of the accused's trait, may be more direct evidence of character than testimony about specific similar acts. However, as a practical matter, testimony about recent, similar acts is likely to be the most convincing proof for lay jurors. 1 McCORMICK, *supra* note 27, § 186, at 788.

legerdemain to hold that the most persuasive showing of character simultaneously qualifies as a noncharacter foundation.¹⁰⁷

Despite this criticism, at one time the courts approving the unlinked plan theory were in the majority.¹⁰⁸ Throughout the country, many courts routinely admitted evidence of other burglaries¹⁰⁹ or drug offenses¹¹⁰ on this theory. Only a minority refused to stretch the plan doctrine that far.¹¹¹ That was the state of the law in 1984 when the California Supreme Court decided *People v. Tassell*.¹¹²

III. TASSELL'S REPUDIATION OF THE UNLINKED PLAN THEORY

A. *The Tassell Decision*

Tassell was charged with raping a waitress.¹¹³ According to the prosecution's evidence, Tassell asked the victim for a ride home at the end of her shift.¹¹⁴ He got the ride, but once they arrived at his stated destination, he attempted to kiss her.¹¹⁵ According to the victim, when she rejected his advances, Tassell choked her, pulled her hair, and raped her.¹¹⁶ Tassell admitted accompanying the complainant and having sex with her, but he denied raping her.¹¹⁷ He claimed that she had consented to the sex acts.¹¹⁸

Over the accused's objection, the judge allowed the prosecutor to call two witnesses, Mrs. G. and Cherie B., who also claimed to have been raped by Tassell.¹¹⁹ Mrs. G. testified that in 1976 Tassell followed her after her shift as a barmaid.¹²⁰ When she resisted his at-

107. See Contreras, *supra* note 69, at 107 (stating that in sex-related cases Oklahoma courts liberally admit evidence of other crimes "under the guise of the common scheme or plan premise").

108. See 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 500.

109. *People v. Moen*, 526 P.2d 654 (Colo. 1974); *Perry v. People*, 181 P.2d 439 (Colo. 1947); 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 500 n.9; Max D. Melville, *Evidence as to Similar Offenses, Acts or Transactions in Criminal Cases*, 29 *DICTA* 235, 241 (1952).

110. 22 WRIGHT & GRAHAM, *supra* note 43, § 5244, at 500 n.9.

111. See *id.* at 500 & n.11.

112. 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984), *overruled by* *People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994).

113. *Id.* at 80, 679 P.2d at 2, 201 Cal. Rptr. at 568.

114. *Id.*

115. *Id.*

116. *Id.* at 80-81, 679 P.2d at 2, 201 Cal. Rptr. at 568.

117. *Id.* at 81, 679 P.2d at 3, 201 Cal. Rptr. at 569.

118. *Id.*

119. *Id.* at 82, 679 P.2d at 3, 201 Cal. Rptr. at 569.

120. *Id.*

tempt to kiss her, Tassell raped her.¹²¹ Cherie B. testified that in 1977 Tassell gave her a ride and tried to kiss her.¹²² When she rebuffed his advances, he proceeded to rape her.¹²³ The trial judge allowed the testimony of Mrs. G. and Cherie B. on the ground that the two incidents helped prove that the accused assaulted the complainant as part of a plan to rape women.¹²⁴

The California Supreme Court held that it was error for the trial judge to admit the evidence of the uncharged offenses.¹²⁵ Writing for the majority, Justice Kaus took to task the early California cases applying the unlinked or spurious plan theory. He noted that at common law and by statute,¹²⁶ the use of character as evidence that is probative of conduct is "taboo."¹²⁷ Justice Kaus faulted many of the prior California decisions for corrupting the plan theory of Evidence Code section 1101(b) to "bestow[] . . . a respectable label on a disreputable basis" for admitting evidence of the accused's disposition to commit the offense charged.¹²⁸ Because these decisions approved the use of recent, similar uncharged offenses without explanation, they reduced the common plan doctrine to a transparent euphemism for bad character.¹²⁹

To guide judges and parties on the proper use of common plan evidence, Justice Kaus specified the foundation the prosecution must lay. The prosecution must produce evidence from which a reasonable jury could find that the accused had in mind "a 'single conception or

121. *Id.*

122. *Id.*

123. *Id.* at 82-83, 679 P.2d at 3, 201 Cal. Rptr. at 569.

124. *See id.* at 82, 679 P.2d at 3, 201 Cal. Rptr. at 569.

125. *Id.* at 89, 679 P.2d at 8, 201 Cal. Rptr. at 574. There were two other opinions in *Tassell*. Although Chief Justice Bird and Justices Broussard, Grodin, and Mosk concurred with Justice Kaus, Justices Reynoso and Richardson each filed separate opinions, concurring and dissenting. In his opinion, Justice Reynoso indicated that he agreed with Justice Kaus's analysis of the plan theory; Justice Reynoso wrote that "it appears" that the prior California cases had employed the plan theory as "a euphemism for 'disposition.'" *Id.* at 92, 679 P.2d at 10, 201 Cal. Rptr. at 576 (Reynoso, J., concurring). However, he tried to construct an argument that the uncharged misconduct was admissible to show intent. *Id.* at 92-96, 679 P.2d at 10-13, 201 Cal. Rptr. at 576-79 (Reynoso, J., dissenting). For his part, Justice Richardson agreed with the result, affirming the accused's conviction. *Id.* at 96, 679 P.2d at 13, 201 Cal. Rptr. at 579 (Richardson, J., concurring). However, he rejected Justice Kaus's "analysis regarding the admissibility of evidence of prior crimes for the purpose of demonstrating a 'common design or plan' on defendant's part." *Id.* (Richardson, J., dissenting). In so many words, he championed the spurious plan variation of the theory.

126. CAL. EVID. CODE §§ 1100-1101 (West 1966 & Supp. 1994).

127. *Tassell*, 36 Cal. 3d at 86, 679 P.2d at 6, 201 Cal. Rptr. at 572.

128. *Id.* at 84, 679 P.2d at 5, 201 Cal. Rptr. at 571.

129. *Id.* at 85, 679 P.2d at 5, 201 Cal. Rptr. at 571.

plot' of which the charged and uncharged crimes are individual manifestations."¹³⁰ In other words, the accused must conceive of a particular objective,¹³¹ and of all the crimes—both charged and uncharged—as a means to attain that end. Justice Kaus described the prosecution's burden as necessitating evidence of a "grand design"¹³² and in a footnote provided examples of such plans.¹³³ The foremost fall into the chain plan category—a scheme to bribe a majority of the members of a city board of supervisors and a plan to acquire property by murdering the competing heirs.¹³⁴ Justice Kaus not only attempted to restrict the scope of the plan theory, but he also reaffirmed the court's earlier ruling in *Thompson* that to be admissible, proof of the existence of a plan must relate to an important, disputed issue in the case.¹³⁵

B. Tassell's Progeny

Justice Kaus's opinion was so forcefully written and prescribed such specific foundational requirements that it attracted considerable attention. *Tassell* was the subject of articles in legal periodicals¹³⁶ and was discussed widely on the continuing legal education circuit. It had an immediate impact in California. Relying on *Tassell*, the intermediate appellate courts began to find error in the admission of uncharged misconduct under the plan theory. In *People v. Nottingham*¹³⁷ the court noted that the record was devoid of proof that the charged and uncharged offenses "were integral components of a single conspiracy, conception, or plot."¹³⁸ In *People v. Gordon*¹³⁹ the court found that the prosecution's reliance on the plan theory was misplaced because it was not relevant to any important, disputed issue such as intent or identity.¹⁴⁰ In *People v. Ward*¹⁴¹ and *People v. Brunson*,¹⁴² the courts

130. *Id.* at 84, 679 P.2d at 5, 201 Cal. Rptr. at 570-71 (quoting *People v. Covert*, 249 Cal. App. 2d 81, 86-87, 57 Cal. Rptr. 220, 223 (1967)).

131. *Id.*

132. *Id.* at 85, 679 P.2d at 5, 201 Cal. Rptr. at 571.

133. *Id.* at 84 n.4, 679 P.2d at 5 n.4, 201 Cal. Rptr. at 571 n.4.

134. *Id.*

135. *Id.* at 88, 679 P.2d at 7, 201 Cal. Rptr. at 573.

136. Imwinkelried, *supra* note 47, at 13.

137. 172 Cal. App. 3d 484, 221 Cal. Rptr. 1 (1985).

138. *Id.* at 498, 221 Cal. Rptr. at 8.

139. 165 Cal. App. 3d 839, 212 Cal. Rptr. 174 (1985).

140. *Id.* at 860, 212 Cal. Rptr. at 189.

141. 188 Cal. App. 3d 459, 233 Cal. Rptr. 477 (1986).

142. 177 Cal. App. 3d 1062, 223 Cal. Rptr. 439 (1986).

found the same deficiency—lack of any important, disputed issue.¹⁴³ Admittedly, some lower courts continued to reach results seemingly at odds with *Tassell*.¹⁴⁴ But the California Supreme Court continued to adhere to its decision,¹⁴⁵ and *Tassell* contributed to the view that, at least in California, the unlinked plan theory was in disrepute and falling into disuse.

Tassell's influence was not confined to California. The opinion emboldened defense counsel throughout the United States to mount attacks on the unlinked plan theory. After 1984, several federal courts rejected the view that a mere showing of recent, similar crimes was adequate proof of the existence of a plan.¹⁴⁶ State courts also embraced *Tassell*'s narrow definition of a plan.¹⁴⁷ Though *Tassell* accelerated the acceptance of a narrower understanding of a plan, as in

143. *Ward*, 188 Cal. App. 3d at 469, 233 Cal. Rptr. at 483; *Brunson*, 177 Cal. App. 3d at 1067, 223 Cal. Rptr. at 442. These courts indicated that uncharged misconduct may be admissible in sex offense cases as evidence of the defendant's prior attraction toward a particular person to prove that the defendant acted on this desire. *Ward*, 188 Cal. App. 3d at 469, 233 Cal. Rptr. at 483; *Brunson*, 177 Cal. App. 3d at 1068, 223 Cal. Rptr. at 443. Both courts held, however, that the uncharged misconduct was not admissible under this theory because the only evidence of the charged and uncharged acts was the uncorroborated testimony of the victim. *Ward*, 188 Cal. App. 3d at 469-70, 233 Cal. Rptr. at 483; *Brunson*, 177 Cal. App. 3d at 1068, 223 Cal. Rptr. at 443. In *People v. Ewoldt* the California Supreme Court held that it would not strictly apply this rule. *People v. Ewoldt*, 7 Cal. 4th 380, 407-08, 867 P.2d 757, 773, 22 Cal. Rptr. 2d 646, 662 (1994) ("There will be circumstances . . . in which the uncorroborated testimony of the complaining witness concerning the defendant's uncharged misconduct will be admissible.").

144. *E.g.*, *People v. Taylor*, 180 Cal. App. 3d 622, 225 Cal. Rptr. 733 (1986); *People v. Callan*, 174 Cal. App. 3d 1101, 220 Cal. Rptr. 339 (1985).

145. *People v. Ogunmola*, 39 Cal. 3d 120, 701 P.2d 1173, 215 Cal. Rptr. 855 (1985), *overruled by* *People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994) (overruling *Ogunmola* "to the extent [it] hold[s] that evidence of a defendant's uncharged similar misconduct is admissible to establish a common design or plan only where the charged and uncharged acts are part of a single, continuing conception or plot"); *People v. Alcala*, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984).

146. *E.g.*, *United States v. Beasley*, 809 F.2d 1273, 1278 (7th Cir. 1987) ("[S]omething more than a pattern and temporal proximity is required . . ."); *Ali v. United States*, 520 A.2d 306, 311-12 (D.C. 1987) ("[I]f there is no inference of a specific plan in the accused's mind which interconnects the uncharged and charged acts, then the other crimes evidence is offered for nothing other than the accused's propensity to commit a series of similar but discrete bad acts. . . . The distinguishing characteristic of the common scheme or plan exception to inadmissibility is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution: the series of crimes must be mutually dependent."); *United States v. Rappaport*, 22 M.J. 445, 447 (C.M.A. 1986) (requiring proof of overall scheme).

147. *E.g.*, *Getz v. State*, 538 A.2d 726 (Del. 1988) (holding accused's mere repetitive commission of same type of crime is insufficient to prove plan); *People v. VanderVliet*, 508 N.W.2d 114, 119 n.6, 123 n.18 (Mich. 1993) (stating prosecutor must establish existence of "true" plan).

physics, such a dramatic departure from established precedent produced an opposite, equally forceful reaction. That occurred in 1994 when the California Supreme Court decided *People v. Ewoldt*.¹⁴⁸

IV. THE REPUDIATION OF *TASSELL*: *EWOLDT* AND THE UNLINKED PLAN THEORY

Ewoldt was prosecuted for engaging in lewd and lascivious acts with his stepdaughter Jennifer.¹⁴⁹ Unlike Tassell, who admitted intercourse with the alleged victim but claimed consent, Ewoldt denied engaging in the acts that the victim described.¹⁵⁰ To prove that the accused had engaged in those acts, the trial judge allowed the victim's sister to describe acts Ewoldt allegedly committed with her that were similar to the acts described by Jennifer.¹⁵¹

Holding that the trial court had erred in admitting the sister's testimony absent evidence that the accused committed the charged and uncharged offenses as part of a common plan, the California Court of Appeal reversed Ewoldt's conviction.¹⁵² The California Supreme Court in turn reversed.¹⁵³ The California Supreme Court reaffirmed the principle that evidence of uncharged offenses may be used only to prove some relevant proposition other than the accused's predisposition to commit the offense charged.¹⁵⁴ However, the court took issue with the portion of *Tassell* requiring the prosecution to prove that the charged and uncharged offenses were part of a single, continuing conception or plot.¹⁵⁵ The court disapproved of *Tassell* to that extent, holding instead "that evidence of a defendant's uncharged misconduct is relevant [and, therefore, admissible under the plan doctrine] where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan."¹⁵⁶

In describing the quantum of evidence the prosecution must offer to sustain a claim of a common plan, the court found it useful "to distinguish the nature and degree of similarity (between uncharged misconduct and the charged offense) required . . . to establish a com-

148. 7 Cal. 4th 380, 867 P.2d 757, 27 Cal. Rptr. 2d 646 (1994).

149. *Id.* at 387, 867 P.2d at 759, 27 Cal. Rptr. 2d at 649.

150. *Id.* at 389, 867 P.2d at 760, 27 Cal. Rptr. 2d at 650.

151. *Id.*

152. *Id.* at 390, 867 P.2d at 760, 27 Cal. Rptr. 2d at 650.

153. *Id.* at 408, 867 P.2d at 774, 27 Cal. Rptr. 2d at 663.

154. *Id.* at 393, 867 P.2d at 764, 27 Cal. Rptr. 2d at 653.

155. *Id.* at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

156. *Id.*

mon design or plan, from the degree of similarity necessary to prove intent or identity.¹⁵⁷ According to the court, the least degree of similarity is required when the evidence of uncharged offenses is offered to prove intent.¹⁵⁸ The greatest degree is necessary when the evidence of the uncharged offenses is offered to identify the accused as the perpetrator of the charged offense.¹⁵⁹ In order to be admissible to prove identity, "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."¹⁶⁰

However, only an intermediate degree of similarity is required when the uncharged offenses are offered in support of the claim that the charged and uncharged offenses were committed as part of a common design or plan.¹⁶¹ "[I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'"¹⁶² To "establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual."¹⁶³

The reference to "spontaneous acts" is significant. If the charged and uncharged acts are truly spontaneous, they cannot be connected and, therefore, cannot be the product of a plan as defined by *Tassell* or even by *Ewoldt*. "[P]urely opportune" conduct differs from planned behavior.¹⁶⁴ Under the teaching of both cases, a plan does not encompass unrelated crimes committed against random "targets

157. *Id.* at 402, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

158. *Id.*, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659; *see also* *Jankins v. TDC Management Corp.*, 21 F.3d 436 (D.C. Cir. 1994) (holding evidence of uncharged misconduct inadmissible to show intent or common scheme because there was no similarity between charged and uncharged acts).

159. *Ewoldt*, 7 Cal. 4th at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

160. *Id.*

161. *Id.* at 402, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

162. *Id.* (quoting 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 304, at 249 (James H. Chadbourn ed., 4th ed. 1979) (emphasis omitted)).

163. *Id.* at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

164. *United States v. Ivery*, 999 F.2d 1043, 1046 n.4 (6th Cir. 1993) (quoting *United States v. Rust*, 976 F.2d 55, 57 (1st Cir. 1992)). "Conduct is 'purely opportune' only if it is spur of the moment conduct, intended to take advantage of a sudden opportunity." *Id.* (quoting *United States v. Rust*, 976 F.2d 55, 57 (1st Cir. 1992)).

of opportunity.”¹⁶⁵ Unless offered under some other noncharacter theory, unconnected acts give rise only to the inference that the accused perpetrated the offense charged because of a predisposition to commit such offenses. Because the character evidence doctrine prohibits jurors from drawing and using this inference, *Tassell* implicitly rejected the unlinked plan theory as a ploy for circumventing the prohibition.¹⁶⁶

By disapproving the use of spontaneous acts as adequate evidence of a plan, *Ewoldt* too must be read as condemning the unlinked plan theory. However, *Ewoldt*'s condemnation of the unlinked plan theory is suspect because *Ewoldt* eliminated *Tassell*'s requirement that the prosecution proffer evidence that the charged and uncharged misdeeds were the product of a single plan.¹⁶⁷ The key question is whether, by doing so, the *Ewoldt* majority fashioned a test so lax that it effectively permits the misuse of uncharged misconduct as proof of bad character.

Justice Mosk answered that question in the affirmative.¹⁶⁸ In his dissent he underscored the lack of any required foundational evidence from which the sort of “overarching plan” contemplated by *Tassell* could be inferred.¹⁶⁹ Without that evidence the testimony that *Ewoldt* molested the victim's sister could be received only to prove that he was the kind of person who was predisposed to commit the molestation charged. In Justice Mosk's view the foundation prescribed by the majority was logically sufficient only “to draw the inference from the earlier crime that it is defendant's inclination or nature to commit such crimes.”¹⁷⁰ Whether Justice Mosk is right depends on the degree to which *Ewoldt* differs from *Tassell* and inadvertently resurrects the unlinked plan theory.

V. THE POINTS OF AGREEMENT BETWEEN *EWOLDT* AND *TASSELL*

It would be simplistic to assert that the *Tassell* and *Ewoldt* opinions are diametrically opposed. Quite to the contrary, the two opinions agree on numerous points. First, both agree that evidence of an

165. *People v. Williams*, 44 Cal. 3d 883, 909, 751 P.2d 395, 412, 245 Cal. Rptr. 336, 353, cert. denied, 488 U.S. 900 (1988).

166. *People v. Tassell*, 36 Cal. 3d 77, 88, 679 P.2d 1, 7, 201 Cal. Rptr. 567, 573 (1984), overruled by *People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994).

167. *Ewoldt*, 7 Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

168. *Id.* at 411, 867 P.2d at 776, 27 Cal. Rptr. 2d at 665 (Mosk, J., dissenting).

169. *Id.* (Mosk, J., dissenting).

170. *Id.* (Mosk, J., dissenting).

accused's uncharged crimes may not be offered on a character theory of logical relevance.¹⁷¹ *Ewoldt* rejected the California Attorney General's argument that the character evidence prohibition was no longer in effect in criminal cases in California.¹⁷² Second, both opinions recognize that proof of the existence of a plan, including the charged and uncharged offenses, is a legitimate noncharacter theory of admissibility.¹⁷³ Third, both avow that proof of a plan requires a showing of connected acts—rather than spontaneous, random acts.¹⁷⁴ Finally, the two opinions are in accord that a mere showing of similar results is insufficient to establish the requisite connection between the charged and uncharged offenses.¹⁷⁵ Given these points of agreement, in many cases the *Tassell* and *Ewoldt* tests yield identical results. Consider two hypotheticals.

A. *A Case in Which the Prosecution Has Direct Evidence That the Accused Formulated an Antecedent Plan Including the Charged and Uncharged Crimes*

Assume that *C* is prosecuted for killing *B*. To prove that *C* killed *B*, the prosecution calls *W* to testify that *C* told *W* that *C* killed *B* as part of a plan to kill *A* and *B*. *W*, who was not present when *C* allegedly killed *B*, is also prepared to testify to seeing *C* kill *A*. May the evidence be received without violating the ban on the use of character evidence?

Under both *Tassell* and *Ewoldt*, the answer is yes. The jury is not being asked to find that *C* killed *B* on the basis that, because *C* killed *A*, *C* is the kind of person who kills. That, as we have seen, is precisely the taboo inference which the character evidence doctrine prohibits.¹⁷⁶ Rather, the jury is being asked to find that *C* murdered *B* as

171. *Id.* at 393, 399, 867 P.2d at 763, 768, 27 Cal. Rptr. 2d at 652, 657; *People v. Tassell*, 36 Cal. 3d 77, 88, 679 P.2d 1, 7, 201 Cal. Rptr. 567, 573 (1984), *overruled by People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994).

172. The Attorney General argued that Proposition 8, an initiative measure passed in 1982, had overturned the character evidence prohibition set out in California Evidence Code § 1101. *Ewoldt*, 7 Cal. 4th at 390, 867 P.2d at 761, 27 Cal. Rptr. 2d at 650. However, the court did not reach the merits of that argument. *Id.* The court found that a post-1982 legislative amendment to § 1101 had the effect of reinstating that code section. *Id.*

173. *Id.* at 393, 867 P.2d at 763-64, 27 Cal. Rptr. 2d at 652-53; *Tassell*, 36 Cal. 3d at 83-84, 679 P.2d at 3-5, 201 Cal. Rptr. at 569-71.

174. *Ewoldt*, 7 Cal. 4th at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659; *Tassell*, 36 Cal. 3d at 84-85, 679 P.2d at 4-5, 201 Cal. Rptr. at 570-71.

175. *Ewoldt*, 7 Cal. 4th at 402, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659; *Tassell*, 36 Cal. 3d at 85-86, 679 P.2d at 5-6, 201 Cal. Rptr. at 571-72.

176. *See supra* note 18 and accompanying text.

part of a plan to kill *A* and *B*. Indeed, the prosecution has direct evidence that *C* formulated such a plan: *W* will testify that *C* told *W* that *C* conceived of the plan. To protect *C* against the misuse of the testimony as character evidence, *C* is entitled to have the jurors instructed to consider the evidence only for its admissible, noncharacter purpose.¹⁷⁷

Although the testimony is logically relevant on a noncharacter theory, the judge could still exclude *W*'s testimony. Under California Evidence Code section 352 and Federal Rule of Evidence 403, a judge may exclude relevant evidence whenever its probative value is substantially outweighed by its prejudicial effects.¹⁷⁸ Since *W*'s testimony is also probative of the proposition that *C* killed *B* because of *C*'s predisposition to kill, a judge could conclude that, realistically, the risk is too great that the jurors will be unable to abide by the limiting instruction.

A review of the principles relating to relevance confirms the validity of this analysis of the initial hypothetical. An item of evidence is relevant if it is probative of a material proposition.¹⁷⁹ A material proposition in this case is that *C* killed *B*. Evidence that *C* killed *B* as part of a plan to kill *A* and *B* is probative of that proposition; the evidence renders the proposition that *C* killed *B* more likely than it would be without the evidence. *C* had an antecedent plan to kill both *A* and *B*, and subsequently carried out part of the plan by murdering *A*; hence, it is more likely that he executed the last part of the plan by killing *B*.

But the evidence has dual relevance; the same evidence is also probative of *C*'s predisposition to kill. The proposition that *C* is predisposed to kill is rendered more likely by evidence that *C* killed *A*—whether or not pursuant to a plan—than that proposition would be without the evidence. Evidence that *C* is predisposed to kill, in turn, is probative of the material proposition that *C* killed *B* since that proposition is rendered more likely by evidence of *C*'s inclination to kill than the proposition would be without the evidence.

Sometimes evidence can be susceptible to two uses, one that is permissible while the other is not. Evidence law customarily resolves this apparent conflict by providing that evidence which is inadmissible for one purpose may nevertheless be received for an admissible pur-

177. FED. R. EVID. 105; CAL. EVID. CODE § 355 (West 1966).

178. FED. R. EVID. 403; CAL. EVID. CODE § 352 (West 1966).

179. FED. R. EVID. 401; CAL. EVID. CODE § 210 (West 1966).

pose.¹⁸⁰ A judge who allowed *W* to testify would invoke this principle and instruct the jurors to consider the evidence only for the admissible noncharacter purpose.¹⁸¹

W's testimony does not pose unusually severe evidentiary problems. If true, *C*'s admission to *W* of killing *B* as part of a plan to kill *A* and *B* provides persuasive evidence that *C* may have killed *B* as a result of the same, antecedent plan. Though the evidence also lends itself to a character inference, *W*'s testimony provides a firm basis for a noncharacter finding that *C* killed *B* pursuant to a plan. A properly instructed jury could thus use the evidence for the proper purpose contemplated by the rules of evidence.

B. A Case in Which the Only Common Denominator Between the Charged and Uncharged Crimes Is Similarity in Result

Severe evidentiary problems, however, most assuredly arise when the prosecution relies only on circumstantial evidence to prove the plan. Suppose that the only evidence of the alleged plan consists of *W*'s testimony that *W* saw *C* kill *A*. Should a judge exclude the testimony as constituting inadmissible character evidence? The best argument for admission is that the evidence is probative of the proposition that *C* killed *B* as part of a plan to kill *A* and *B*. An item of evidence is logically relevant so long as it ever so slightly affects the balance of probabilities of the existence of any fact in issue. The fact in issue is whether *C* killed *B*. The prosecution can contend that the proposition that *C* killed *B* pursuant to the plan is rendered more likely by evidence that *C* killed *A* than the proposition would be without the evidence.

The counterpoint—the most powerful argument against admission—is that the evidence is at least equally probative of the opposite proposition, namely that the killings of *A* and *B* were unconnected. If they were unconnected, absent some other noncharacter justification, evidence that *C* killed *A* would be probative only of the proposition that *C* is the kind of person who kills; and the character evidence doctrine would prohibit using *W*'s testimony as a basis for inferring that *C* killed *B*.

The validity of this analysis of the second hypothetical is confirmed when *W*'s testimony is viewed from the perspective of the accused, *C*. If *C*'s objective is to show that the two killings are

180. FED. R. EVID. 105; CAL. EVID. CODE § 355.

181. FED. R. EVID. 105; CAL. EVID. CODE § 355.

unconnected or "unlinked," *C* could do so simply by offering evidence that *A* was killed on one day and *B* on another. From a relevance perspective, the proposition that the killings are unconnected is rendered more likely by evidence that the killings occurred on different days than that proposition would be without the evidence. The problem with the circumstantial use of past misdeeds to prove a common plan is that in many cases the evidence is at least as probative of the proposition that the accused committed the charged misdeed because of his or her predisposition—or character—to commit such misdeeds.

How serious is the risk that the jurors will be unable to abide by a limiting instruction? As pointed out, social scientists have found that laypeople routinely use character-type reasoning in making everyday decisions.¹⁸² Several aspects of their research are especially troubling in a courtroom setting.

To begin with, people tend to remember the bad about others rather than the good.¹⁸³ Hence, jurors hearing about the accused's uncharged misdeeds are likely to remember them in reaching their verdict and might well ignore countervailing evidence about the accused's good deeds. Next, social scientists have discovered that past behavior is a poor basis for predicting future behavior.¹⁸⁴ The fact that *C* killed *A* does not dictate the conclusion that *C* killed *B*.¹⁸⁵ Whether or not the first killing tells us anything about the second one depends on the identity of the circumstances attending the two incidents. Even trivial differences between the two killings can reduce the predictive value of the first killing to zero.¹⁸⁶ Lastly, laypeople employing past behavior to predict future behavior tend to overestimate the influence of past conduct on future behavior.¹⁸⁷ In other words, hearing that *C* killed *A*, jurors are likely to jump to an unwarranted conclusion that *C* killed *B*.

In light of these risks, any testimony about *C*'s killing of *A* would be excluded under both *Tassell* and *Ewoldt*. Just as both courts would admit the evidence in the prior hypothetical, both courts would ex-

182. See Miguel A. Méndez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1048 (1984).

183. See *id.* at 1044-58 (noting psychologists have found that people give greater weight to unfavorable information about a person than to favorable information of equal intensity).

184. *Id.* at 1052-53.

185. *Id.*

186. *Id.*

187. *Id.*

clude the evidence on these facts. Absent additional evidence of a connection between the murders of *A* and *B*, the only foundational evidence is a similarity in result between the two crimes, namely, deaths. The *Ewoldt* court specifically stated that a mere showing of similarity of result between the charged and uncharged crimes is insufficient proof of the existence of a plan linking the crimes.¹⁸⁸

In summary, the two opinions agree in the easy cases. On the one hand, when the prosecutor is lucky enough to have direct evidence of the existence of a plan—a declaration by the accused that he or she had formulated the plan—both courts would admit the uncharged misconduct as evidence that the accused committed the charged and uncharged offenses as part of the same plan. On the other hand, when the only evidence of a connection between the charged and uncharged offenses is a gross similarity in result, both courts would exclude the evidence.

The two opinions disagree, however, about the admissibility of the uncharged offenses when the evidence of a plan falls somewhere between these polar extremes. A case in point would be one in which the prosecution's evidence embraces more than just a similarity in basic result between the charged and uncharged crimes. In the words of the *Ewoldt* court, the prosecution's evidence would include also several other "common features,"¹⁸⁹ such as some similarities in the way the two killings were committed. At this juncture *Ewoldt* and *Tassell* part company.

VI. THE POINT OF DISAGREEMENT BETWEEN *EWOLDT* AND *TASSELL*—AND THE SUPERIORITY OF THE *TASSELL* OPINION

Tassell's limitations on the use of character evidence reflect the law's abiding fears about the dangerousness of this kind of evidence. *Tassell* seeks to allay these fears by requiring prosecutors to offer foundational evidence that the charged and uncharged misdeeds were the product of a single plan.¹⁹⁰ Only then does the probative value of the evidence on contested issues justify the risk of misuse by the jurors. The foundational requirements are met when the prosecution

188. *People v. Ewoldt*, 7 Cal. 4th 380, 402, 867 P.2d 757, 770, 27 Cal. Rptr. 2d 646, 659 (1994).

189. *Id.* at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

190. *People v. Tassell*, 36 Cal. 3d 77, 84, 679 P.2d 1, 4, 201 Cal. Rptr. 567, 570 (1984), overruled by *People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994).

offers direct evidence of a single plan, for example, an admission by the accused that he committed the charged and uncharged crimes as part of one plan. Under *Tassell*, the requirements can also be met circumstantially but only if the evidence allows the judge to conclude that the charged and uncharged offenses were committed as part of a "grand design," that is, as part of a single overarching objective as is found in sequential and chain plans. But in reassessing the sufficiency of the evidence needed to establish a plan circumstantially, *Ewoldt* eliminated *Tassell's* "grand design" requirement. By rejecting this requirement, *Ewoldt* creates serious risks that the jurors may disregard the limiting instruction telling them to ignore the uncharged misconduct as proof of the accused's bad character.

A. *The Ewoldt Test for Evaluating the Sufficiency of the Proof of the Existence of a Plan*

As Part V explained, *Ewoldt* does not undo *Tassell* entirely. *Ewoldt* leaves untouched the requirement that prosecutors refrain from offering plan evidence unless it is directed at important, contested issues.¹⁹¹ Also, *Ewoldt* does not quarrel with the assumption that evidence of unconnected misdeeds serves only to prove the accused's predisposition to commit such misdeeds.¹⁹²

Ewoldt does, however, purport to relax the requirement that the prosecution offer evidence that the charged and uncharged misdeeds were the product of a single plan.¹⁹³ *Ewoldt* holds that while the prosecution must demonstrate more than just a similarity in results, it need show only "such a concurrence of common features [between the charged and uncharged misdeeds] that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations."¹⁹⁴

To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. . . . [Evidence] need only exist to support the inference that the de-

191. See *Ewoldt*, 7 Cal. 4th at 400, 867 P.2d at 768, 27 Cal. Rptr. 2d at 657.

192. See *id.* at 396-97, 867 P.2d at 766, 27 Cal. Rptr. 2d at 655 (citing *People v. Sam*, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969)).

193. *Id.* at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

194. *Id.* at 402, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659 (quoting 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 304, at 249 (James H. Chadbourne ed., 4th ed. 1979) (emphasis omitted)).

fendant employed that plan in committing the charged offense.¹⁹⁵

Whatever this language may mean, *Ewoldt*, like *Tassell*, clearly rejects the unlinked plan theory by requiring the prosecution to offer more than just evidence that *C* killed *A* and that *B* was found dead.

How much more must the prosecutor offer under *Ewoldt*? To answer that question requires a careful review of the majority's comments about the noncharacter modus operandi theory for admitting uncharged misconduct. Those comments and the majority's effort to distinguish that theory from its version of the plan theory reveal the drastic extent to which *Ewoldt* lowers the threshold for admitting evidence of an accused's uncharged misconduct.

It is hornbook law that under the modus operandi theory prosecutors may offer evidence of the accused's uncharged misdeeds to prove that the accused perpetrated the charged misdeed if the circumstances attending the commission of the uncharged and charged misdeeds are so distinctive as to establish that only one person—the accused—perpetrated the charged misdeed.¹⁹⁶ The prosecution meets this burden by showing that the charged and uncharged crimes all were committed with a distinctive methodology or modus operandi. This evidence is also susceptible to a character interpretation—the accused committed the charged misdeed because, given the accused's past misdeeds, he or she is the kind of person who would commit the charged misdeed. But the risk that the evidence may be misused for a character purpose is believed to be outweighed by its substantial value as proof of the noncharacter proposition.¹⁹⁷ To assure that the evidence possesses that high degree of probative value, courts prohibit prosecutors from using this route to admit evidence of the accused's uncharged misdeeds unless the similarities between the charged and uncharged misdeeds are so great as to warrant a finding that only the accused could have committed the charged misdeed.¹⁹⁸

The difficulty is that in the typical case, that finding cannot be made; the degree of similarity between the charged and uncharged crimes ordinarily falls short of demonstrating a truly distinctive modus operandi. Prosecutors, therefore, must search for alternative theories of admissibility which do not impose such rigorous requirements.

195. *Id.* at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

196. See *supra* notes 27-29 and accompanying text.

197. See *supra* notes 29-30 and accompanying text.

198. GRAHAM, *supra* note 64, § 404.5, at 208 n.14; 1 McCORMICK, *supra* note 27, § 190, at 801 & n.19.

Tassell sharply restricted the use of the plan theory as an alternative by requiring prosecutors to offer evidence that the charged and uncharged misdeeds were the product of a single plan.¹⁹⁹ But, by reversing this aspect of *Tassell*, *Ewoldt* threatens to undo the essential protection that the character evidence prohibition is designed to afford an accused.²⁰⁰

The magnitude of the threat can be gauged by revisiting *Ewoldt's* description of the quantum of evidence the prosecution must produce to invoke the plan theory. In specifying the foundational requirements, *Ewoldt* distinguished "the nature and degree of similarity (between uncharged misconduct and the charged offense) required . . . to establish a common design or plan, from the degree of similarity necessary to prove intent or identity."²⁰¹ According to the court, the least degree of similarity is required when the evidence of uncharged offenses is offered to prove intent.²⁰² When the prosecution relies on the doctrine of chances to prove intent, a relatively low degree of similarity is acceptable. The highest degree is necessary when the evidence of the uncharged misdeeds is offered to identify the accused as the perpetrator of the misdeed charged.²⁰³ But only an intermediate degree of similarity is mandatory when the uncharged misdeeds are offered on the theory that the accused committed the charged misdeed as part of a plan to commit both the charged and uncharged misdeeds.²⁰⁴ Thus, it is apparent from the court's own words that when the prosecutors lack enough evidence to satisfy the identity test, they can use the same evidence to meet *Ewoldt's* plan test. *Tassell's* single plan test can be viewed as the functional equivalent of the similarity test of the modus operandi doctrine. Both are designed to withhold evidence of uncharged offenses from the jurors unless the commission of the charged and uncharged offenses is highly similar. The *Ewoldt* majority, however, refused to allow the plan test to continue to play the same protective role.

199. *People v. Tassell*, 36 Cal. 3d 77, 84, 679 P.2d 1, 4-5, 201 Cal. Rptr. 567, 570-71 (1984), *overruled by* *People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994).

200. *Ewoldt*, 7 Cal. 4th at 401, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

201. *Id.* at 402, 867 P.2d at 769, 27 Cal. Rptr. 2d at 658.

202. *Id.*, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

203. *Id.* at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

204. *Id.* at 402-03, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

B. *The Intolerable Risks Posed by the Ewoldt Test*

In short, the *Ewoldt* majority takes the position that the existence of a plan can be inferred from "common features" even when: (1) the shared features fall short of proving a distinctive *modus operandi*;²⁰⁵ (2) there is no direct evidence of the existence of a plan in the form of an admission by the accused;²⁰⁶ and (3) the circumstances do not sustain an inference of the type of "grand design"²⁰⁷ which Justice Kaus alluded to in *Tassell*.²⁰⁸ Inferring a plan here—and consequently admitting the uncharged misconduct under the rubric of "plan"—creates an unacceptable risk that the jury will treat the evidence as proof of the accused's bad character.

Under *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. Even when the accused's conduct is random, an imaginative prosecutor will almost always be able to articulate a number of prosaic similarities in the methodology of the charged and uncharged crimes: all were committed in daytime, all were perpetrated at private residences, all the victims were middle-aged, and all the crimes involved weapons. A person's character is not an infallible predictor of the person's conduct, but the psychological research indicates a measure of consistency in any given person's behavior.²⁰⁹ *Ewoldt* mandates that the prosecutor show that charged and uncharged crimes share "common features."²¹⁰ However, even spontaneous, opportunistically perpetrated crimes will often display many common features. Whenever the same person commits several crimes of the same type, all the crimes will display some common methodologies even if all the acts are spontaneous.

In contrast, a showing of common features is highly probative of the accused's disposition to engage in the type of criminal conduct with which he is charged. Again, perhaps the most persuasive evidence of the accused's propensity to engage in a particular type of misconduct consists of the accused's recent commission of similar mis-

205. *Id.* at 403, 867 P.2d at 770, 27 Cal. Rptr. 2d at 659.

206. *Id.* at 393, 867 P.2d at 764, 27 Cal. Rptr. 2d at 653.

207. *People v. Tassell*, 36 Cal. 3d 77, 84, 679 P.2d 1, 5, 201 Cal. Rptr. 567, 571 (1984), *overruled by People v. Ewoldt*, 7 Cal. 4th 380, 401, 867 P.2d 757, 769, 27 Cal. Rptr. 2d 646, 658 (1994).

208. *Ewoldt*, 7 Cal. 4th at 402-03, 867 P.2d at 769-70, 27 Cal. Rptr. 2d at 658-59.

209. See Susan Marlene Davies, *Evidence of Character to Prove Conduct: A Reassessment of Relevancy*, 27 CRIM. L. BULL. 504, 514-20 (1991); see also Bryden & Park, *supra* note 97, at 561-62 (surveying most recent psychological research).

210. *Ewoldt*, 7 Cal. 4th at 402-03, 867 P.2d at 769-70, 27 Cal. Rptr. 2d at 658-59.

deeds.²¹¹ While a mere showing of common features lends scant support to the inference that the accused acted pursuant to an antecedent plan, that showing virtually impels the jury to conclude that, by character, the accused is predisposed to perpetrate the kind of offense charged.

In assessing the risk that uncharged misconduct evidence will be misused, the court must realistically consider the comparative value of the evidence as proof of the proper and the forbidden inferences.²¹² The substantial value of the evidence as proof of character will simply overwhelm its minimal value as proof of a plan. As a result, *Ewoldt* places jurors in an impossible situation. They will be faced with a seemingly strong character theory and a comparatively weak plan theory. The 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."²¹³ Yet, the jurors must abide by the limiting instruction telling them to ignore the evidence as proof of the accused's predisposition to commit the offense charged. In light of the differences in probative value, it is fanciful to think that jurors will disregard the evidence as proof of character and consider it only as proof of plan.

Even *Tassell's* requirement of proof of a grand design or a high degree of similarity in the commission of the charged and uncharged misdeeds does not eliminate entirely the risk that jurors will misuse the evidence as proof of character. Obviously, the greater the similarity in the manner in which the charged and uncharged misdeeds are perpetrated, the greater the likelihood that only the accused committed the charged misdeed—modus operandi theory—or that the accused committed the misdeed charged as part of single scheme to commit the charged and uncharged misdeeds—*Tassell's* plan theory. But so is the likelihood that the accused committed the charged misdeed because the accused is the kind of person who would commit such a misdeed. The uncharged misdeeds, after all, would be convincing evidence that the accused is predisposed to commit such offenses.

Any noncharacter theory of admissibility relying on the similarity between the charged and uncharged misdeeds carries a risk that jurors

211. 1 McCORMICK, *supra* note 27, § 186, at 788.

212. P.B. Carter, *The Admissibility of Evidence of Similar Facts*, 69 LAW Q. REV. 80, 92 (1953); John T. Johnson, *The Admissibility of Evidence of Extraneous Offenses in Texas Criminal Cases*, 14 S. TEX. L.J. 69, 74 (1973).

213. GRAHAM, *supra* note 64, § 404.5, at 208 n.12 (quoting *United States v. Lynn*, 856 F.2d 430, 435 (1st Cir. 1988)).

will misuse the evidence as proof of the accused's character to commit the offense charged. But, as noted, the law of evidence resolves this dilemma not by banning the use of other crimes evidence, but by balancing its value as proof of a noncharacter proposition against the risk that it might be misused as proof of character.

Tassell reduces that risk to tolerable proportions. It permits the introduction of uncharged misconduct under the plan theory only when the foundational showing is highly probative of the proposition that the accused formulated an earlier resolve encompassing the charged and uncharged offenses.²¹⁴ *Tassell* helps ensure that jurors will not be placed in an impossible situation. Its foundational requirements virtually guarantee that the formally noncharacter theory presented to the jury will be well-substantiated and attractive. When the jury is likely to find the evidence so probative on a legitimate theory and the judge gives them a powerfully worded limiting instruction, there is much less risk that they will resort to forbidden character reasoning.

Ewoldt's mischief is not limited to the difficulties it creates for the accused. It also puts jurors in an untenable situation. *Ewoldt* holds that "evidence of a common design or plan is admitted not to prove the defendant's intent or identity, but to prove that the defendant engaged in the conduct alleged to constitute the charged offense."²¹⁵ It may be that the court was attempting to prevent prosecutors who cannot meet the rigorous *modus operandi* test from falling back on the plan doctrine to prove that the accused committed the offense charged. But that goal, commendable as it may be, creates serious problems for the jurors. Applied to *Ewoldt*, evidence that *Ewoldt* molested the victim's sister would be admissible to prove only that he engaged in acts of molestation with Jennifer as part of a plan to molest both sisters but not that he was the one who engaged in such acts with Jennifer. How jurors are expected to abide by such a conflicting instruction is left unexplained by the court.

VII. CONCLUSION

It is possible that the lower courts will limit the *Ewoldt* decision and carefully circumscribe the admission of uncharged misconduct evidence. There is language in *Ewoldt* which an astute defense counsel

214. *Tassell*, 36 Cal. 3d at 88, 679 P.2d at 7, 201 Cal. Rptr. at 573.

215. *Ewoldt*, 7 Cal. 4th at 399, 867 P.2d at 768, 27 Cal. Rptr. 2d at 657.

might seize upon for that purpose. For example, near the end of its opinion, the court cautioned:

[E]vidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's . . . identity as to the charged offense. [I]n most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. . . . [I]n such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible.²¹⁶

The court also qualified its opinion by indicating that lower courts should not construe *Ewoldt* as a blanket authorization to admit uncharged misconduct evidence for the purpose of showing the accused's intent.²¹⁷ The court emphasized that to pass muster under Evidence Code section 352, the evidence must relate to a disputed issue.²¹⁸ After recounting the lewd conduct which Jennifer had testified to, the court stressed that "[i]f defendant engaged in this conduct, his intent in doing so could not reasonably be disputed."²¹⁹

Although the defense bar can take some consolation from those qualifications in the *Ewoldt* opinion, it would be a mistake to allow the court's plan analysis to escape uncriticized. That analysis greatly exacerbates the risk that jurors will treat uncharged misconduct evidence as proof of the accused's bad character. Without repealing the plan doctrine, there is only one way to eliminate altogether the risk that jurors will misuse evidence proffered in support of a plan theory: Judges could require the prosecution to offer direct evidence of the existence of a plan in the accused's mind. However, the accused rarely divulges his plans before trial; therefore such helpful admissions will ordinarily be unavailable to the prosecution.

The risks associated with the doctrine can be ameliorated, though not eliminated, by returning to the *Tassell* test. When the proof of the plan consists only of circumstantial evidence, prosecutors should be

216. *Id.* at 406, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661.

217. *Id.*

218. *Id.* at 405-06, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661.

219. *Id.* at 406, 867 P.2d at 772, 27 Cal. Rptr. 2d at 661.

precluded from offering the uncharged misdeeds unless the evidence warrants a finding by the trial judge that the charged and uncharged misdeeds were indeed the product of a single plan. The finding of a grand design can logically be drawn in the three true plan scenarios described in Part II of this Article. Such a finding, however, should not be based on the type of flimsy showing of common features sanctioned by *Ewoldt*.

The need to assure that the accused are convicted only for what they do and not for who they are, as well as the undesirability of placing jurors in untenable positions, argue for a return to the *Tassell* test. In Newtonian terms, *Tassell* generated a momentum for reform of the plan theory; and it would be a tragedy if *Ewoldt*, the "opposed . . . reaction"²²⁰ to *Tassell*, were permitted to arrest that momentum.

220. See *supra* note 1 and accompanying text.

