Plan Theory for Admitting Evidence of the Defendant's Uncharged Crimes: A Microcosm of the Flaws in the Uncharged Misconduct Doctrine, The

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THE PLAN THEORY FOR ADMITTING EVIDENCE OF THE DEFENDANT'S UNCHARGED CRIMES: A MICROCOSM OF THE FLAWS IN THE UNCHARGED MISCONDUCT DOCTRINE

EDWARD J. IMWINKELRIED*

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I. INTRODUCTION

The scenario is all too familiar to criminal defense counsel. The defendant is charged with and on trial for crime X. During the trial, the prosecutor offers evidence of uncharged misconduct, crime Y, which is mentioned nowhere in the indictment against the defendant. The doctrine governing the admission of

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the evidence in this scenario is of critical importance in criminal practice. Proof of the defendant's other crimes can be so devastating to the defense that this species of evidence has been called the "prosecutor's delight."\(^1\) The available empirical research, including studies by the Chicago Jury Project, the London School of Economics, and the National Science Foundation, confirms that the introduction of evidence of the defendant's other crimes can dramatically affect the outcome of a prosecution.\(^2\) The numbers tell the story. In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence are the most frequent ground for appeal in criminal cases.\(^3\) In some jurisdictions, errors in the admission of uncharged misconduct evidence are the most common ground for reversal.\(^4\)

The federal rule codifying the doctrine, Rule 404(b), has generated more reported decisions than any other subsection of the Federal Rules.\(^5\) This rule simply states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.\(^6\)

The first sentence of the rule continues the hoary, common law principle that the prosecutor may not offer evidence of the defendant's uncharged crimes to prove the defendant's bad "character . . . in order to show that (the defendant) acted in conformity therewith." The prosecutor may not introduce the evidence to establish the defendant's bad character and then argue that the defendant's bad character increases the probability that the defendant committed the charged crime. The common law and Rule 404(b) thus forbid the prosecutor from resorting to the theory of logical relevance depicted in Figure 1.

The rationale for banning this theory of logical relevance is that the theory poses two significant probative dangers. The first step, inferring the defendant's bad character from the uncharged crime, raises the danger of prejudice to the defendant. In deciding whether to draw the inference, the jury must focus on the type of person the defendant is. The jury must ask whether the defendant is an immoral law-breaker. This focus is dangerous because it tempts the jury to decide the case on an improper basis. In effect, the jury may try the defendant for being a criminal rather than for the particular charge.

The second step in the theory presents a further probative danger. There is a grave risk that the jury will overestimate the probative value of the evidence. The defendant's subjective character may have little relevance to the issue of the defendant's conduct on a particular occasion. In fact, the available psychological literature suggests that we can have little confidence in the construct of character as a predictor of behavior. There may be little consistency between a person's general subjective character and conduct at a specific time. The jury may give character far more weight than it deserves.

11. Larson, Credibility and Character: A Different Look at an Interminable
While the first sentence of Rule 404(b) prohibits the prosecutor from using a character theory for introducing the defendant's uncharged crimes, in the next breath the second sentence leaves other avenues of admissibility open to the prosecutor. The second sentence lists other theories for admissibility that have so-called "independent" relevance, since the evidence is logically relevant on a theory other than the hypothesis of using the defendant's bad character as circumstantial proof of bad conduct at the time of the charged crime.13 The plan theory14 is one of the most frequently invoked justifications for introducing uncharged misconduct.15 Moreover, the invocation is usually successful. Although trial judges often rely on the plan theory as the basis for admitting the prosecution's uncharged misconduct evidence, appellate courts rarely rule the admission erroneous.16

The first section of this article advances the thesis that the courts have frequently misapplied the plan theory. Paradoxically, the courts have at once unduly contracted and unwarrantedly expanded the plan theory. At one extreme, some courts have unnecessarily excluded relevant plan evidence. These courts have fashioned rigid requirements that uncharged acts offered to show a plan must be similar to the charged act, occur before the charged act, and be introduced for a very limited number of purposes (such as proving the commission of the act constituting the actus reus of the charged crime).17 At the other extreme, many courts have sustained inadequate showings of the existence of a plan—showings that amounted to nothing more than proof that the defendant committed uncharged crimes similar to the charged crimes.18 In so doing, the courts admitted evidence logically relevant only to the verboten issue of the defendant's bad character.

It is bad enough that the courts have repeatedly misapplied the plan theory for introducing evidence of the defendant's uncharged misconduct. The thesis of the second section of this article is that the courts' misapplication of the plan theory is a microcosm of the courts' mishandling of the uncharged misconduct doctrine itself. On the one hand, many jurisdictions have adopted the fallacious exclusionary conception of the uncharged misconduct doctrine.

Problem, 50 Notre Dame Law. 758, 778-81 (1975).
16. 2 D. Louisell & C. Mueller, Federal Evidence § 140, at 140-41 (1978) ("[C]ases disapproving the receipt of such evidence for this purpose are few and far between.").
17. See infra notes 23-30 and accompanying text.
18. See infra notes 57-66 and accompanying text.
Under this conception, the doctrine is viewed as a general rule forbidding the receipt of evidence of the defendant's other crimes with specified exceptions such as "plan." Even when evidence is independently relevant on a noncharacter theory, this conception mandates the inadmissibility of the evidence unless it falls within a pigeonhole exception previously approved by an appellate court. Like the arbitrary limitations on the scope of the plan theory, the exclusionary conception of the doctrine leads to the rejection of probative, legitimate evidence.

On the other hand, many courts have developed talismanic theories, including "res gestae," for admitting uncharged misconduct. Under this nebulous rubric, the courts admit acts of uncharged misconduct whenever the uncharged act occurred simultaneously with the charged crime. This talisman has the same effect as the courts' acceptance of inadequate showings of plan: the introduction of evidence relevant only to the defendant's bad character.

II. THE COURTS' MISAPPLICATION OF THE PLAN THEORY

The plan theory is only one of numerous noncharacter theories for admitting evidence of a defendant's uncharged misconduct. Other recognized theories include the use of uncharged misconduct to prove the defendant's motive to commit the charged crime\(^\text{19}\) or the defendant's preparation for the commission of the charged crime.\(^\text{20}\) The definition or essence of the plan theory is that the defendant has a goal in mind that encompasses both the charged and uncharged crimes.\(^\text{21}\) The charged and uncharged crimes are different stages in the execution of the plan.\(^\text{22}\) The defendant commits the charged and uncharged crimes as means to an antecedent,\(^\text{23}\) pre-conceived,\(^\text{24}\) or pre-existing\(^\text{25}\) end.

Suppose, for instance, that the defendant is charged with a March 1 burglary of a store, including the theft of money from two strong boxes kept in the inventory room. One strong box was forced open, and there are scratches around the lock indicating that the burglar "jimmied" the lock. The other strong box was opened during the burglary, but there is no evidence of forcible

19. Fed. R. Evid. 404(b) specifically mentions "motive."
entry. The prosecutor has evidence that on January 1, the defendant burglarized a hardware store and stole a tool that could be used as a "jimmy." The prosecutor also has evidence that on February 1, the defendant burglarized the store owner's private residence and stole the key to the second strong box. The defendant is on trial for only the March 1 burglary. However, the first two crimes obviously facilitated the commission of the March 1 burglary. The three crimes are so naturally interconnected that there is a rational inference that the defendant had in mind a plan including all three criminal acts. Hence, the prosecutor's factual showing satisfies the definition of a plan.

At first glance, this definition of plan seems straightforward. It should be a simple matter for the courts to determine whether there is sufficient evidence that the defendant had a plan in mind.\(^2\) Yet the application of the plan theory by the courts has often been erroneous.

A. The Undue Contraction of the Plan Theory

Several jurisdictions have narrowed the scope of the theory by imposing additional limitations. One limitation is that the uncharged act must antedate the charged crime. No less an authority than the chief justice of a state supreme court has written that "one's act committed subsequent to the crime charged cannot possibly be relevant to establish a prior . . . plan and should therefore be excluded."\(^27\) Another limitation is that the uncharged crime must be similar to the charged crime. In the past, the Indiana courts have enforced a requirement that the two crimes be similar.\(^28\) Under this requirement, if the uncharged act is dissimilar to the charged crime, the two crimes cannot constitute parts of the same plan.\(^29\) A final limitation restricts the permissible purposes for introducing plan evidence. In describing the legitimate uses of plan evidence, it is often asserted that such evidence has only one or limited uses.\(^30\) The purposes most commonly mentioned are to prove the doing of the act and...
to prove the defendant's mens rea.\textsuperscript{31}

All these limitations are unnecessary and unsound. First, there is no need to confine the plan theory to uncharged acts antedating the charged crime. The uncharged act does not have to occur prior to\textsuperscript{32} or contemporaneously with the charged crime.\textsuperscript{33} Consider our original burglary hypothetical. Suppose that the defendant were charged with the February 1 burglary of the store owner's residence. During that burglary, the perpetrator stole the key to a strong box at the store. The defendant's commission of the subsequent March 1 burglary, in which that key was evidently used, is logically relevant to prove the defendant's identity as the perpetrator of the February 1 crime. The uncharged act, the March 1 crime, would be probative even though it occurred after the charged crime.

It is equally fallacious to insist that the uncharged act be similar to the charged crime.\textsuperscript{34} The charged and uncharged acts can be part of the same plan even if the acts are dissimilar. Consider a variation of the burglary hypothetical. In this variation, the January 1 crime is the brutal murder of the best security guard at the store. The defendant wanted to ensure that the guard would be unable to foil the March 1 burglary. The two offenses are dissimilar; the March 1 crime is an offense against property while the other is a crime against a person. One crime is nonviolent while the other may be violent to the point of barabarity. Nevertheless, it is patent that both crimes can be part of the same plan.

Finally, it is illogical to confine plan evidence to proof of the doing of the act or even to that purpose plus proof of the defendant's mens rea. The following hypotheticals illustrate that, without violating the character prohibition in the first sentence of Rule 404(b), a prosecutor can fashion theories of logical relevance to use plan evidence either to establish the defendant's identity as the criminal, the occurrence of the actus reus, the defendant's mens rea, or to disprove an affirmative defense such as entrapment.

Plan evidence can be material on a noncharacter theory to prove the defendant's identity as the perpetrator of the charged crime.\textsuperscript{35} Most persons are law-abiding citizens; not all persons plan to commit crimes, much less the specific crime with which a defendant is charged. Proof that the defendant planned to commit the charged crime, therefore, is probative of the defen-

\begin{itemize}
\item \textsuperscript{31} See authorities cited \textit{supra} note 30.
\item \textsuperscript{32} Note, \textit{Admissibility of Prior Crimes in a Prosecution for Forgery}, 10 \textit{St. John's L. Rev.} 263, 264 (1936).
\item \textsuperscript{33} Note, \textit{supra} note 15, at 808.
\item \textsuperscript{35} Herbert, \textit{supra} note 30, at 309.
\end{itemize}
dant's identity as the perpetrator. The evidence tends to set the defendant apart from innocent persons who did not entertain the plan. The intermediate inference is the defendant's act of entertaining the plan, rather than any forbidden character inference.

Similarly, plan evidence may be pertinent to prove the commission of an actus reus. Assume that the defendant is charged with murder. The defendant (A) and the victim (B) were sisters and potential heirs to an estate. There were two other potential heirs, also sisters (C and D). The victim died while hiking with the defendant, and the defendant claims that the cause of death was a natural, fortuitous accident—the victim slipped on a boulder and fell to her death. There is no real question of identity because the defendant admits accompanying her sister. The pivotal question is whether the cause of B's death was an accident (slipping) or homicide (a push). It would be logically relevant for the prosecutor to show that the defendant had made attempts on C's and D's lives. Those attempts tend to show the existence of the defendant's plan to eliminate other competing claimants to the estate. In turn, the fact that someone was planning the murder of all the other heirs (including B) reduces the objective likelihood that B's death was fortuitous. That objective probability, rather than the defendant's subjective disposition, is the intermediate inference.

Plan evidence can also be used to prove the defendant's possession of the requisite mens rea for the crime. Suppose that the defendant, a bookkeeper, is charged with embezzling from his company in December. In that month, the defendant made several demonstrably erroneous entries in the company books. The defendant claims that those mistakes were innocent clerical mistakes. The prosecutor's version of the facts is that the defendant embezzled money from the company to pay his large gambling debts. The prosecutor has evidence that in November, the defendant made other mistaken entries and used the money to pay off part of the same gambling debt. The uncharged November embezzlement would be material to show that the defendant possessed the required mens rea, animus furandi, in December.
Plan evidence may even be pertinent to disprove an affirmative defense. Assume that the defendant contends that the police entrapped him into committing the crime; the police implanted the idea for the crime in his mind and pressured the defendant into committing the crime. It would certainly be logically relevant for the prosecution to show that, even before the initial police contact with the defendant, the defendant had begun planning the charged crime. The plan evidence would be material even if the evidence took the form of an earlier uncharged act tending to show the plan's existence. Whether the prosecutor's theory is the negative purpose of overcoming a defense or the affirmative purpose of establishing identity, actus reus, or mens rea, plan evidence can be relevant to a material fact of consequence in the case. In each hypothetical, the prosecutor can establish the materiality of the evidence without relying on the intermediate inference that the defendant has an immoral or law-breaking character.

B. The Undue Expansion of the Plan Theory

It is inexcusable that many courts arbitrarily restrict plan evidence to prior, similar crimes offered to prove the commission of the actus reus or the defendant's mens rea. Many courts compound the error by accepting inadequate showings of the existence of a true plan when the prosecutor offers evidence of a prior, similar crime for one of these two purposes and invokes the label "plan." To satisfy the definition of a true plan, the prosecution must shoulder the burden of proving that in fact and in mind, the defendant conceived of a goal or objective larger than commission of the individual crimes.

There are three recurring fact patterns in which the court may be justified in inferring the existence of a broader plan. One pattern can be called a sequential plan. In a sequential plan, one crime is predicated on the other. For example, in the original burglary hypothetical, the defendant stole the key to a strongbox from the store owner's private residence before using the key in the subsequent store burglary. One crime naturally precedes the other. There are numerous examples of sequential plans. The defendant steals the key to a

64 N.E. 966 (1902).
40. United States v. Lard, 734 F.2d 1290 (8th Cir. 1984).
41. Federal Rules of Evidence 401 states the modern standard of materiality.
42. 1 H. Underhill, Criminal Evidence § 207 (5th ed. 1956); Mount, supra note 26, at 324; Note, supra note 15, at 810.
44. 2 D. Louisell & C. Mueller, Federal Evidence § 140 (1978).
45. R. Lempert & S. Saltzburg, A Modern Approach to Evidence 227 (2d ed. 1982). The first crime facilitates or prepares the way for the second crime. Note, supra note 34, at 112.
till and later steals money from the till;\textsuperscript{46} the defendant first steals instruments needed to carry out the second crime;\textsuperscript{47} the defendant gives a minor marijuana to lower her resistance to his subsequent sexual advances;\textsuperscript{48} or the defendant stages one holdup to determine whether his co-conspirators are qualified to pull off a later, more difficult mail truck robbery.\textsuperscript{49} When the earlier crime is a necessary preliminary to the later crime, there is clearly a rational inference of the existence of a broader goal inspiring the earlier crime.\textsuperscript{50}

The court is also warranted in inferring the existence of a larger objective in the chain plan fact pattern. Think back to the hiking hypothetical. The defendant is charged with murdering another potential heir to the estate. The prosecutor has evidence that the defendant made attempts on the lives of two other heirs, \textit{C} and \textit{D}.\textsuperscript{51} The broader objective is obtaining the estate. The murders of all the other heirs are links in a chain of crimes leading to the attainment of the broader objective. A chain plan differs from a sequential one because, in a chain plan, the defendant does not have to commit the crimes in any particular sequence. However, to achieve the objective, the defendant must commit several crimes, including the uncharged crimes. There are numerous examples of chain plans. The defendant may need to bribe enough supervisors to have a majority of votes before a city council.\textsuperscript{52} The defendant may need to attack and incapacitate all of a company’s nonunion truck drivers to force the company to bargain with the defendant’s union.\textsuperscript{53} The very nature of the objective creates an absolute or relative necessity that the defendant commit several crimes. There is a much stronger relationship between the crimes than mere similarity.\textsuperscript{54} In the case of both sequential and chain plans, the crimes are so logically interrelated that the obviousness of the connection to any reasonable person is circumstantial evidence of the defendant’s state of mind.

There is a third fact pattern in which the court is arguably justified in finding a true plan. In the case of sequential and chain plans, there is not only an inference that the defendant has a larger objective in mind. The objective is

\begin{itemize}
\item \textsuperscript{46} J. Wigmore, Evidence § 215 (3d ed. 1940).
\item \textsuperscript{47} Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 Harv. L. Rev. 988, 1009 (1938).
\item \textsuperscript{48} United States v. Gano, 560 F.2d 990 (10th Cir. 1977).
\item \textsuperscript{49} United States v. Carroll, 510 F.2d 507, 509 (2d Cir. 1975), cert. denied, 426 U.S. 923 (1976).
\item \textsuperscript{50} United States v. Torres, 685 F.2d 921, 924 (5th Cir. 1982).
\item \textsuperscript{52} Roth, Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach, 9 Pepperdine L. Rev. 297, 308 (1982); Comment, supra note 34, at 472-73 & n.45.
\item \textsuperscript{53} Peats v. State, 213 Ind. 560, 12 N.E.2d 270 (1938); Note, supra note 15, at 812-13.
\item \textsuperscript{54} Note, supra note 15, at 812-13; Note, supra note 51, at 101-05.
\end{itemize}
also identifiable. The court can review the sequence of burglaries and infer that the store burglary was predicated upon the burglary of the private residence. The court can infer from the number of attempted bribes that the defendant wanted to muster a majority on the city council for the ordinance he was proposing. In some cases, however, even when the court cannot identify the objective, the court might be justified in concluding that there was a broader objective in the defendant’s mind. Consider, for example, a number of killings committed by a serial murderer. The Juan Corona case in California is illustrative. Corona maintained a ledger which referred to both the victims named in the pleadings and other, uncharged victims. A defendant’s writings or oral declarations may give rise to an inference that a number of crimes are connected in his or her mind even though the defendant’s overall objective is unclear. If a defendant’s statements show that the crimes are connected or interlocking, the court may plausibly infer the existence of a broader objective even though the objective cannot be identified. Given the bizarre, often warped, motivation of serial murderers, it should not be surprising that their objectives may not be readily apparent to normal minds. As long as the court can infer the existence of a larger plan encompassing the uncharged crime, the court can admit the plan evidence without relying on an intermediate inference of the defendant’s bad character.

Many courts, however, have purported to find plans even when the prosecutor’s foundation did not fit within any of the three fact patterns mentioned above. There is no proof that the crimes follow any particular sequence, there is no evident overall objective, and the defendant has made no statements indicating the crimes are interconnected in his or her mind. All the prosecutor proves is the defendant’s commission of several, similar crimes within a short time period. Some courts tend routinely to admit evidence of similar, proximate crimes, especially when the charged crime is a burglary or drug offense, on the stated justification that the uncharged and charged crimes are part of the same plan.

60. United States v. Baykowski, 615 F.2d 767, 769, 773 (8th Cir. 1980); Williams, The Problem of Similar Fact Evidence, 5 Dalhousie L.J. 281, 323 (1979); Thomas, supra note 59, at 441.
Although the defendant's other similar, proximate offenses are logically relevant to prove the existence of a plan, standing alone they are insufficient to show a plan. A plan requires an overall objective tying the crimes together. There is a permissive inference of the existence of an overall objective in the case of sequential and chain plans and when the defendant's own statements connect the crimes. However, even if the defendant commits several similar crimes, each individual crime could be "the result of an impulse born of the moment." When the prosecutor's only foundational evidence is proof of the commission of several similar crimes, the only plan proven is a spurious "plan to commit a series of acts" of the same type.

It is true that there is an alternative, legitimate theory for admitting evidence of the defendant's uncharged crimes: unique modus operandi. Under this theory, the prosecutor shows that the defendant committed an uncharged crime with the same distinctive modus operandi as the charged crime. The use of the same peculiar modus operandi in both crimes shows that both crimes were perpetrated by "one and the same man." To invoke this foundation, the prosecutor must establish not only that the charged and uncharged crimes have similarities but also that the modus operandi in both crimes was exceptional, idiosyncratic, or singular. The burglar who always left the bathroom scale by the front door and the killer who invariably shot his victims near the fourth cervical vertabra are good illustrations of the requisite degree of uniqueness. Standing alone, even a large number of similarities between the charged and uncharged crimes is insufficient to establish a unique

63. 1 H. UNDERHILL, CRIMINAL EVIDENCE § 207 (5th ed. 1956); Mount, supra note 26, at 324; Note, supra note 15, at 810.
64. State v. Buxton, 324 Mo. 78, 84, 22 S.W.2d 635, 637 (1929).
68. R. v. Morris, 54 Crim. App. 69, 80 (1970); Williams, supra note 60, at 307-08.
70. Williams, supra note 60, at 307.
73. Comment, supra note 22, at 258.
modus operandi. The points of similarity may be common or hackneyed methods of committing that type of crime.

In most spurious plan cases, the prosecutor could not invoke the alternative, modus operandi theory to justify the admission of the evidence of similar crimes. In many such cases, the evidence is logically irrelevant on that theory because the crimes were not committed with a unique modus operandi. The modus simply is not idiosyncratic. In other cases, the evidence is legally irrelevant because the issue of the defendant's identity was not in dispute. The defendant may admit his identity as the perpetrator of the act but defend on the ground of lack of mens rea or an affirmative defense such as self-defense. In either event, the prosecutor cannot rationalize the admission of the evidence on a modus operandi theory.

In the spurious plan cases, the net effect of the court's acceptance of the plan theory is the erroneous admission of evidence of the defendant's bad character, disposition, and propensity. The prosecutor has shown that the defendant has repeatedly committed the same or a similar crime, but that evidence proves only that the defendant is a professional burglar or drug dealer. The California Supreme Court recently surveyed earlier California "plan" cases and concluded that those cases had diluted the plan theory to the point that "plan" had become a euphemism for disposition.


79. Note, supra note 51, at 104-05.

80. Comment, supra note 77, at 279.

81. Recent Case, supra note 77, at 395-96.

82. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5244, at 500 n.9 (1978).


84. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5244, at 500 n.9 (1978).

85. People v. Tassell, 36 Cal. 3d 77, 89, 679 P.2d 1, 8, 201 Cal. Rptr. 567, 574 (1984); see also People v. Alcala, 36 Cal. 3d 604, 685 P.2d 1126, 205 Cal. Rptr. 775 (1984).
In short, many courts have admitted evidence of similar, uncharged crimes on a plan theory when (1) the modus operandi was not unique, and (2) the prosecutor’s foundation included no evidence of a sequential plan, a chain plan, or the defendant’s statements tying the crimes together. Under the rubric of “plan,” these courts are admitting illicit character evidence in blatant violation of the common law character prohibition and the first sentence in Rule 404(b).

III. THE PLAN THEORY AS A MICROCOSM OF THE COURTS’ MISAPPLICATION OF THE UNCHARGED MISCONDUCT DOCTRINE

In the last section, we noted the flaws in the courts’ application of the plan theory for admitting uncharged misconduct evidence. At one extreme, some courts unnecessarily exclude probative evidence that has independent relevance by restricting plan evidence to prior, similar acts offered for certain, approved purposes. At the other extreme, under the “plan” banner, some courts overlook the necessity for proof of a true plan connecting the various crimes and improperly admit prior, similar acts relevant only to the defendant’s bad character. These flaws, unfortunately, are not confined to the plan theory; they are symptomatic of more pervasive errors infecting fundamental aspects of the uncharged misconduct doctrine.

A. The Undue Contraction of the Uncharged Misconduct Doctrine

As we have seen, many courts arbitrarily limit the plan theory to evidence of prior, similar acts offered either to prove the very doing of the act or the defendant’s mens rea. Rather than independently assessing the logical relevance of evidence proffered on a plan theory, these courts pay undue deference to past precedents and tend to admit only evidence that, for example, is offered for purposes previously approved in the reported cases. The same illiberal attitude has distorted the very conception of the uncharged misconduct doctrine.

There are two competing formulations of the doctrine: the inclusionary and exclusionary approaches. Federal Rule of Evidence 404(b) epitomizes the inclusionary approach. The first sentence of the rule forbids the prosecutor from invoking one (and only one) theory of logical relevance: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.” The second sentence legitimates or includes any other theory of logical relevance for such evidence: “It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” The courts of appeal for the First, Second, Fourth,
Fifth, Ninth, Tenth, and Eleventh circuits all have concluded that Rule 404(b) embodies the inclusionary approach permitting the introduction of relevant uncharged misconduct evidence on any theory other than the solitary theory banned in the first sentence of the rule.89 The theories expressly listed in the second sentence of Rule 404(b) are merely examples of theories that might possess legitimate, independent relevance in a particular case.90

The exclusionary approach to the doctrine stands in sharp contrast. Under this conception, the doctrine consists of two elements: (1) a general rule excluding evidence of the defendant's uncharged misconduct, and (2) a list of recognized exceptions to the rule such as motive, plan, and identity.91 This conception was the inspiration for the widely-used MIMIC mnemonic for the uncharged misconduct doctrine: MIMIC - M(otive)-I(ntent)-M(istake or accident)-I(dentity)-C(ommon scheme or plan).92 Under this conception, evidence of the defendant's uncharged misconduct is automatically inadmissible unless it fits squarely within one of the previously approved exceptions.93 Thus, the exclusionary approach mechanically excludes evidence falling outside the recognized exceptions even when the evidence is relevant on a non-character theory. At one time, the exclusionary approach was dominant in three-fifths of the states94 and the majority of the federal circuits.95 Although there was substantial movement toward the inclusionary approach in the past decade, the exclusionary approach may still be the majority view among the state courts.96 The exclusionary approach still has adherents among the federal courts.97

The leading historian of the uncharged misconduct doctrine in the United States, Professor Julius Stone, vehemently attacked the exclusionary approach as spurious.98 His criticism is well-founded. The exclusionary approach is unsound in principle; it routinely excludes evidence that is indistinguishable in terms of probative value and danger from evidence that the approach admits as a matter of course.

One of the most celebrated modern uncharged misconduct cases, United

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91. Stone, supra note 47, at 1001-02.
92. Comment, supra note 22, at 246 n.6.
94. Chesnutt, The Admissibility of Other Crimes in Texas, 50 Tex. L. Rev. 1409 n.4 (1972); Stone, supra note 47, at 1036 n.221.
95. Reed, supra note 89, at 113.
96. Schroeder, supra note 30, at 247 n. 42; Comment, Rule 404(b) Limits the Admission of Other Crimes Evidence, Under an Inclusionary Approach, to Cases Where It Is Relevant to an Issue in Dispute, 55 Notre Dame Law. 574, 580 n.36 (1980).
97. Reed, supra note 89, at 160-61.
98. Stone, supra note 47, at 1027.
States v. Woods,99 illustrates the clash between the inclusionary and exclusionary approaches. In Woods, the defendant was charged with infanticide. The defendant's foster son died as a result of cyanosis, a condition caused by lack of oxygen. The defendant claimed that the death was an accident. The prosecution offered evidence that nine children in the defendant's custody had suffered a minimum of twenty cases of cyanosis. The trial judge admitted the evidence over the defense's objection. A divided Court of Appeals for the Fourth Circuit affirmed. The dissent argued that in the past, the court had admitted uncharged misconduct under only a "limited" number of "circumscribed" theories.100 It added that proof of the corpus delicti—establishing that the death was due to an actus reus rather than natural accident—was not one of the previously approved exceptions to the bar on uncharged misconduct evidence. The dissent was a vintage application of the exclusionary approach. The majority agreed that proof of the corpus delicti was not a recognized theory for admitting uncharged misconduct in the Fourth Circuit.101 However, the majority dismissed the exclusionary approach as rigid "pigeonholing."102 The majority endorsed the inclusionary approach by asserting that "evidence of other offenses may be received, if relevant, for any purpose other than to show a mere propensity or disposition on the part of the defendant to commit the crime."103

Woods is a textbook illustration of the weaknesses of the exclusionary approach. Under the aegis of the exclusionary approach, the dissent would have uncritically excluded the uncharged misconduct. Yet the exclusion is certainly not justifiable on the ground that the evidence is logically irrelevant. The evidence of the twenty cyanotic incidents had independent, logical relevance. As the first sentence in Rule 404(b) acknowledges,104 the character evidence rules forbid the prosecutor from offering uncharged misconduct to establish the defendant's personal, subjective disposition as a wrongdoer and, in turn, inferring the defendant's guilt from the defendant's subjective character.105 However, in Woods, the prosecutor was not relying on the defendant's subjective character as the intermediate inference. Rather, the prosecutor was invoking the doctrine of chances.106 Based on ordinary common sense107 and

99. 484 F.2d 127 (4th Cir. 1973).
100. Id. at 140 (Widener, J., dissenting).
101. Id. at 133-34.
102. Id. at 134 (quoting C. McCormick, McCormick's Handbook on the Law of Evidence 453 (2d ed. 1972)).
103. 484 F.2d at 134.
104. Fed. R. Evid. 404(b).
mundane human experience, it is objectively unlikely that such a large number of unfortunate accidents would have befallen Mrs. Woods' children in a short period of time. Considered in isolation, each cyanotic incident might have been easily explicable as an accident. However, when all the incidents were considered collectively, the doctrine of chances created an inference of human design. The sheer number of the incidents objectively reduced the probability of accident. To decide whether to accept the prosecutor's theory, the jurors were not required to focus on the question of the defendant's subjective character and inquire whether the defendant was an immoral, law-breaking person. Their focus would be the objective likelihood of accident given the large number of similar incidents within a short time span.

Nor was the evidence proffered in Woods distinguishable from evidence routinely admissible under the exclusionary approach in terms of the quantum of probative value. The quantum of probative value of a particular item of evidence in a specific case largely depends upon the extent of dispute over the fact that the item is offered to establish. In Woods, the central issue was whether the child's death was accidental or the result of human intervention. Under the doctrine of chances, the evidence of the twenty cyanotic episodes was persuasive on that issue. If the pivotal issue in Woods had been identity and the prosecutor had offered evidence of uncharged crimes committed by Mrs. Woods with the same, unique modus operandi, the dissent would undoubtedly have approved the admission of the evidence. The incidents offered in Woods to disprove accident have as much probative worth as any uncharged misconduct evidence that could have been offered to prove identity, if identity had been the point of dispute.

Finally, the uncharged misconduct offered in Woods cannot be distinguished from evidence that would be routinely admissible under the exclusionary approach in terms of the probative dangers posed by the evidence. In the main, the degree of probative danger posed by uncharged misconduct depends on the factors of the reprehensibility of the uncharged act and the degree of similarity between the charged and uncharged crimes. The more repugnant

108. Id.
109. Comment, supra note 9, at 174.
110. Id. at 173-74.
113. Comment, supra note 96, at 582.
114. Roth, supra note 52, at 300.
the act, the greater is the danger that the act will poison the jurors' minds\(^1\) and create an overmastering hostility against the defendant.\(^1\) Furthermore, the greater the similarity between the charged and uncharged crimes, the more acute is the risk that the jury will draw a forbidden character inference from the evidence.\(^1\) The jury may reason simplistically that if the defendant performed the act once, he or she is likely to have done it again. With these factors in mind, it is clear that it would be arbitrary to bar the uncharged misconduct offered in *Woods*. Under the modus operandi theory sanctioned by the exclusionary approach, the prosecutor would be permitted to offer evidence of brutal murders and sordid sex crimes so long as they were committed in the same, peculiar fashion as the charged crime. In addition, the admission of strikingly similar crimes under the modus theory might place greater strain on the character rules than the admission of the cyanotic incidents in *Woods*. The doctrine of chances requires proof that the charged and uncharged incidents are generally similar, but the modus theory demands a higher degree of similarity. Under that theory, the crimes must be "nearly identical."\(^1\) In this respect, the uncharged misconduct in *Woods* was less objectionable than evidence that would be admitted as a matter of course under the exclusionary approach.

The parallel to the plan theory is evident. When evidence is proffered under the plan theory, numerous courts refuse to engage in independent logical relevance analysis; they admit uncharged misconduct only if the prosecutor offers the evidence for purposes previously approved by the appellate courts. The courts' refusal leads to the needless exclusion of probative evidence that would not offend the character rules. The exclusionary approach to the uncharged misconduct doctrine has the same effect but on a larger scale. If the evidence does not seem to fall within the scope of a previously sanctioned theory, the courts refuse to undertake an independent logical relevance analysis and reflexively bar the evidence. Neither these restrictions on the plan theory nor the exclusionary conception of the uncharged misconduct doctrine can withstand close scrutiny.

B. The Undue Expansion of the Uncharged Misconduct Doctrine

As we have seen, the plan theory suffers not only from the imposition of arbitrary limitations by some courts; the administration of the theory has a second flaw. In many jurisdictions, when the prosecutor invokes the theory, the courts neglect to insist upon adequate proof of the existence of a true plan in the defendant's mind. The existence of the plan is a preliminary fact condi-

\(\text{116. 1 H. Underhill, Criminal Evidence §§ 205-06 (5th ed. 1956).}\
\(\text{117. 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[18] (1982).}\
\(\text{118. 7 J.L. Ref. 535, 544 (1974).}\
\(\text{119. Mount, supra note 26, at 336; Note, supra note 15, at 818 (quoting Biggerstaff v. State, 266 Ind. 148, 152, 361 N.E.2d 895, 897 (1977)).}\

http://scholarship.law.missouri.edu/mlr/vol50/iss1/6
tioning the admissibility of the evidence on a plan theory.\textsuperscript{120} To establish the existence of the preliminary fact, the prosecutor should present proof of a sequential plan, a chain plan, or the defendant's statements showing the crimes were interconnected. In the spurious plan cases, the courts overlook the necessity for proof of the preliminary fact and are content with a showing that the defendant committed similar crimes within a short time period. The result is the admission of improper character evidence.

This lax attitude toward preliminary facts conditioning the admissibility of uncharged misconduct is not confined to the plan theory. The same attitude has distorted another theory for admitting uncharged misconduct, the res gestae theory.\textsuperscript{121} In this context, the major transaction is the crime, and the incident event, the res gestae, is the uncharged offense. The rationale of the res gestae theory is that the uncharged act forms part of the context of the charged crime\textsuperscript{122} and that the jury needs to know the context to evaluate the evidence of the charged crime.\textsuperscript{123} The uncharged act tends to explain the charged crime.\textsuperscript{124}

Properly understood, the res gestae theory is defensible. The stated justification for admitting the uncharged crime is that it explains the charged crime.\textsuperscript{125} The theory is viable if the charged crime requires some explanation and the uncharged crime is logically relevant to furnish that explanation without relying on a forbidden character inference. Consider a simple example. Suppose the defendant is charged with assaulting a police officer when the officer stopped the defendant to issue a minor traffic citation. The police officer will testify that the defendant attacked him even after the officer made it clear that he was stopping the defendant for a trivial infraction and that the fine would be only five dollars. At first blush, the jury may find such testimony difficult to believe because the assault seems so senseless and inexplicable.\textsuperscript{126} However, the prosecution has evidence that the defendant had a large quantity of marijuana concealed in the car. This uncharged misconduct tends to explain the charged crime. The illegal possession of contraband might furnish the motive for the attack on the officer because the defendant might have suspected that the officer detected the marijuana odor emanating from the trunk. Motive is a well-accepted, noncharacter theory for admitting uncharged misconduct

\begin{thebibliography}{100}
\bibitem{120} See Fed. R. Evid. 104.
\bibitem{121} I. D. LOUISELL & C. MUELLER, FEDERAL EVIDENCE § 140 (1978).
\bibitem{123} Kemper v. State, 643 S.W.2d 759, 760 (Tex. Ct. App. 1982).
\bibitem{125} Id.
\bibitem{126} Moses v. State, 168 Tex. Crim. 409, 412, 328 S.W.2d 885, 887 (1959); Chesnutt, supra note 94, at 1425.
\end{thebibliography}
The prosecutor is not relying on the weak character inference that the drug offense shows that the defendant is willing to commit crimes and that that willingness or disposition increases the likelihood that the defendant committed another crime, the assault. Rather, the prosecutor has a more specific and persuasive theory: The drug offense directly supplied the motive for the assault.

When the prosecution invokes the res gestae theory, the judge should demand that the prosecution establish two foundational elements: (1) from the perspective of the typical lay juror, some aspect or feature of the charged crime requires explanation, and (2) the uncharged misconduct furnishes that explanation without running afoul of the character prohibition. In practice, just as many courts ignore the requirement for proof of a true plan in the defendant's mind, they disregard the necessity for proof of these two elements. In many jurisdictions, under the res gestae rubric, the courts tend to admit evidence of any uncharged crime that the defendant commits simultaneously with the charged crime. This tendency is especially pronounced in cases involving simultaneous drug transactions, killings, and thefts. In a drunk driving prosecution, for example, one court held that the prosecutor may prove that at the time of arrest, the defendant had a pistol on his person. The courts repeatedly protest that the uncharged act is explanatory for the jury. The courts, however, almost never bother to specify the aspect of the charged crime requiring explanation or the explanation itself.

The effect of the courts' neglect of the foundational elements underlying the res gestae theory is the same as the impact of their inattention to the need for proof of the defendant's bad character. The uncharged misconduct is explanatory only in the sense that it evidences the defendant's disposition toward crime. The temporal simultaneity of the charged and uncharged crimes does not guarantee the legitimate logical relevance of the uncharged crime. It is

128. Reese v. Wainwright, 600 F.2d 1085, 1090 (5th Cir.), cert. denied, 444 U.S. 983 (1979); R. LEMPERT & S. SALTZBURG, A MODERN APPROACH TO EVIDENCE 225 (2d ed. 1982); Turcott, supra note 105, at 60; Williams, supra note 60, at 296-97; Comment, supra note 43, at 526-27.
132. Comment, supra note 22, at 260.
133. United States v. Levy, 731 F.2d 997, 1002-04 (2d Cir. 1984); 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[18] (1982); K. REDDEN & S. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL 133 (2d ed. 1982); 1 F. WHARTON, CRIMINAL EVIDENCE § 242 (13th ed. 1972); Note, Evidence of Defendant's Other
neither necessary nor sufficient that the two crimes be contemporaneous. Whether the uncharged crime occurs before, during, or after the commission of the charged crime, the prosecutor must prove up the elements establishing that the uncharged act is logically relevant on a noncharacter theory.

IV. CONCLUSION

In administering both the plan theory and the larger uncharged misconduct doctrine, many courts have fallen into error. The courts have unjustifiably narrowed the theory and doctrine by imposing arbitrary restrictions on uncharged misconduct evidence. At the same time, in other cases the courts have treated “plan” and “res gestae” as talismans allowing the admission of improper character evidence. Initially, these developments seem contradictory. The courts are, at the same time, unduly tightening and relaxing the requirements for admission of uncharged misconduct. However, the paradox is more apparent than real. The developments are not contradictory, for each error has the identical root cause: flawed logical relevance analysis. The only possible antidote for the ills of the uncharged misconduct doctrine is radical in the classical sense: a return to fundamentals of logical relevance and a willingness in the future to subject each item of uncharged misconduct to independent, painstaking logical relevance analysis.

Whenever the prosecutor proffers uncharged misconduct evidence, the trial judge should engage in the following sequence of analysis. At the outset, the trial judge should insist that the prosecutor articulate a complete theory of logical relevance, including all intermediate inferences. Many of the accepted “theories” for the admission of uncharged misconduct evidence, including plan and modus operandi, are not complete theories of logical relevance. Plan and modus operandi usually function as intermediate inferences or facta probantia. The ultimate facts are the facta probanda including the commission of an actus reus, the defendant's identity as the actor, and the defendant's possession of the requisite mens rea. A judge should never accept the prosecutor's statement that he or she is offering uncharged misconduct to show “plan,” “modus operandi,” or “res gestae.” Those terms are shorthand, elliptical expressions, and the judge must demand an explicit statement of the complete theory of relevance. The trial judge cannot begin to assess intelligently the propriety of the prosecutor's proffer until the prosecutor sets out the entire theory.

After learning the theory, the judge must test the theory under the common law character prohibition or the first sentence of Rule 404(b), barring the use of uncharged misconduct as character evidence. Suppose, for example, the prosecutor offers uncharged misconduct under the res gestae doctrine.

Crimes: Admissibility in Minnesota, 37 MINN. L. REV. 608, 613 (1953).
134. Stone, supra note 47, at 1026 n.190.
135. Id.
136. FED R. EVID. 404(b).
When the judge presses for a more explicit statement of the theory of logical relevance, the prosecutor initially says, "The uncharged act tends to explain the charged crime." When the judge presses further, the prosecutor adds, "The defendant's willingness to commit the uncharged crime increases the probability that he would be willing to commit the charged crime." At that point, the judge should rule the evidence inadmissible. The prosecutor has verbalized the precise theory of logical relevance verboten by the character rules and Rule 404(b).

Even if the prosecutor articulates a theory permissible under Rule 404(b), the analysis is not at an end. The judge must now identify all the preliminary or foundational facts conditioning the admissibility of the uncharged misconduct under that theory. If the theory of logical relevance is the use of evidence of defendant's plan to help identify defendant as the perpetrator, the prosecutor must establish the preliminary fact of the existence of a true plan in the defendant's mind. Alternatively, the theory may be that some aspect of the charged crime cries out for explanation and that as part of the res gestae, the uncharged act supplies the explanation. On this theory, the prosecutor must shoulder the burden of specifying the aspect requiring explanation and demonstrating that the uncharged misconduct furnishes a noncharacter explanation.

Finally, the judge must determine whether the prosecutor has presented sufficient evidence of the existence of all the foundational elements and preliminary facts. In most cases, the existence of such facts will condition the logical relevance of the evidence and the conditional relevancy procedure, codified in Federal Rule 104(b), will govern. The prosecutor will have to present sufficient evidence to create a permissive inference that the fact exists. Without this foundational proof, the judge should exclude the uncharged misconduct. This foundational proof is necessary to ensure that the uncharged misconduct possesses the independent relevance required to satisfy the common law character ban and Rule 404(b). Uncharged misconduct is always logically relevant on the forbidden, character theory; it tends to show the defendant's propensity for anti-social conduct. Unless the trial judge makes certain that the uncharged misconduct in fact possesses the independent relevance claimed by the prosecutor, the jurors will probably use the evidence for the forbidden purpose. The trial judge cannot be bemused by talismans such as "plan" and "res gestae." The judge must look beyond the labels invoked by the prosecutor and insist on adequate proof of the preliminary facts guaranteeing the independent relevance of the evidence.

There is an immediate, imperative need for more meticulous logical relevance analysis of uncharged misconduct evidence. It bears repeating that all

137. See Fed. R. Evid. 104.
139. Rule 104(b) requires "evidence sufficient to support a finding of the fulfillment of the condition." Id.
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the empirical studies to date demonstrate that uncharged misconduct is one of the most damning species of evidence. Moreover, uncharged misconduct evidence is being offered more frequently than ever before. The widespread adoption of Rule 404(b) has led to a general liberalization of the standards for admitting the evidence, and the evidence is more readily available to prosecutors because a growing number of jurisdictions maintain computerized data on recidivist criminals. Yet, to a greater degree than in any other area of criminal evidence, the courts have lost sight of the fundamental principles of logical relevance in administering the uncharged misconduct doctrine. The most basic rules of logical relevance have been almost forgotten and relegated far into the background.

The reform must start somewhere. For several reasons, a reappraisal of the plan theory would be an ideal starting place for reforming the application of the uncharged misconduct doctrine. The plan theory is one of the most frequently used rationales for admitting uncharged misconduct. Like the doctrine itself, the plan theory has been misapplied because of the courts' neglect of the most elementary rules of logical relevance. Even more importantly, the courts' misapplication of the plan theory epitomizes the errors that on a larger scale have distorted the courts' application of the doctrine. The flaws of the plan theory are a microcosm of the flaws of the doctrine. It would be only fitting if the theory that once epitomized the doctrine's flaws became the paradigm for the doctrine.

140. Empirical studies have been conducted by the London School of Economics, see 7 J.L. Ref. 535, 544-45 (1974); L.S.E. Jury Project, Juries and the Rules of Evidence, 1973 CRIM. L. REV. 208; Comment, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 YALE L.J. 763 (1961), the Chicago Jury Project, see 1 H. KALVEN & H. ZEISEL, THE AMERICAN JURY 179 (1966), and the National Science Foundation Law and Social Science Program. See Teitelbaum, Sutton-Barbere & Johnson, Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries, 1983 WIS. L. REV. 1147, 1162.


143. Trautman, Logical or Legal Relevance—A Conflict in Theory, 5 VAND. L. REV. 385, 393, 403, 407 (1952).

144. Id.