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Understanding Admissibility of Prior Bad Acts: A Diagrammatic Approach

WILLIAM ROTH*

One of the most misunderstood areas of evidence in criminal cases is the admissibility of a defendant's prior bad acts. This article discusses both the practical and theoretical perspectives of prior bad acts and presents a diagram of the different admissibility theories. This visual aid is a great step forward in simplifying this problematic area.

I. INTRODUCTION

The most litigated area of evidence concerns the admissibility of prior bad acts committed by a criminal defendant. In California, the operative provision is section 1101(b) of the Evidence Code. While much has been written on the subject, courts and

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1. 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 404[08], at 404-47 (1981) ("more decisions than occasioned by any other single rule").

2. The word "prior" in this context refers to acts committed before the in court testimony describing them, whether the acts occurred before or after the date of the charged offense and whether these previous acts resulted in arrest or conviction. Acts occurring after a particular date are just as relevant as similar acts occurring before that date, see Waller v. United States, 177 F.2d 171, 175-76 (9th Cir. 1949); B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 21.4 (1972), unless the issue is that of knowledge at the time of the charged act. Waller v. United States, 177 F.2d at 176.

3. This article will focus primarily on the law in California, although the concepts and problems are similar throughout the United States, both state and federal. See Fed. R. Evid. 404 advisory committee note.

CAL. EVID. CODE § 1101 (West 1986) provides:

(a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his character (whether in the form of an opinion, evidence of reputation, or evidence of specific
instances of his conduct) is inadmissible when offered to prove his conduct on a specified occasion.

(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts.

(c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

The Federal Rule of Evidence analogous to section 1101 is Rule 404 which provides:

(a) Character evidence generally. Evidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. 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.

FED. R. EVID. 404. The federal cases are collected and discussed in S. SALTBURG & K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 129-45 (2d ed. 1977) and 2 J. WEINSTEIN & M. BERGER, supra note 1, ¶ 404.

Strictly speaking, CAL. EVID. CODE § 1101(b) and FED. R. EVID. 404(b) are not admissibility sections at all, but merely provisions clarifying their respective first subdivisions. See 2 J. WEINSTEIN & M. BERGER, supra note 1, ¶ 404[08], at 404-45:

Rule 404(b) which admits evidence of other crimes, wrongs or acts for purposes other than to show that a person acted in conformity with his character is not an exception to Rule 404(a) since Rule 404(a) does not apply when criminal propensity is not used circumstantially as the basis for inferring an act. [citation omitted.] Rule 404(b) is redundant; it appears as a rule, although the result would have been the same in its absence, to alert the reader to this avenue of admitting evidence of other criminal acts, and to detail the most usual instances in which admissibility may be achieved.

While CAL. EVID. CODE § 1101 does not distinguish between civil and criminal cases, the issue of the admissibility of prior bad acts will usually arise only in the context of a criminal proceeding. The reason is that criminal defendants often have in fact committed prior bad acts and prosecutors are desirous of bringing them to the attention of the jury—albeit more for their prejudicial effect than their evidentiary relevance. Cf. B. JEFFERSON, infra note 2, ¶ 21.3, at 283 ("the prosecution will always claim that the evidence is relevant to prove, and is being offered to prove, some fact other than that of defendant's disposition to commit [similar] criminal acts" (emphasis in original)). For a discussion of the admissibility of similar facts evidence in civil cases, see Comment, Similar Facts Evidence: Balancing Probative Value Against the Probable Dangers of Admission, 9 U.C.D. L. REV. 395 (1976).

4. See, e.g., Slough & Knightly, Other Vices, Other Crimes, 41 IOWA L. REV. 325 (1956); Stone, The Rule of Exclusion of Similar Fact Evidence: America, 51 HARV. L. REV. 988 (1938); Comment, Rule 404(b) Other Crimes Evidence: The Need for a
their counsel continue to languish in hopeless confusion. In large measure, this confusion is due to the extreme difficulty of keeping clearly in mind what happens evidentially when the issue arises.

The purpose of this article is not to review the vast amount of literature on the subject, nor to restate the fundamentals of character evidence. Rather, the objective is to examine the main causes of the continuing confusion and to suggest a visual model as an aid in resolving the difficult, recurring problems.

II. THE THEORY OF PRIOR ACT ADMISSIBILITY

Section 1101(a) of the California Evidence Code codifies the traditional common law position forbidding the admission of "evidence of a person's character" to prove "conduct on a specified occasion other than the occasion of the offense charged against him." Two-Step Analysis, 71 NW. U.L. REV. 635 (1976); Comment, A Proposed Analytical Method for the Determination of the Admissibility of Other Offenses in California, 7 U.C.L.A. L. REV. 463 (1960); Comment, Defining Standards for Determining the Admissibility of Evidence Of Other Sex Offenses, 25 U.C.L.A. L. REV. 261 (1977). For numerous additional articles and annotations, see 2 J. WEINSTEIN & M. BERGER, supra note 1, at 404-08 to 404-11 (Rule 404 synopsis).

5. See People v. Thompson, 98 Cal. App. 3d 467, 473-74, 159 Cal. Rptr. 615, 619 (1979) (Jefferson, P. J.): "[T]he question of the admissibility of evidence that defendant committed acts of misconduct on occasions other than the occasion of the offense charged against him still presents one of the most troublesome and unsettled features that we face today in the field of criminal evidence." Cf. 2 J. WEINSTEIN & M. BERGER, supra note 1, at 404-45 ("the question of when evidence of a particular criminal act may be admitted is so perplexing that the cases sometimes seem as numerous as the sands of the sea, and often cannot be reconciled.").

6. For textual treatments, see generally C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE §§ 186-195 (2d ed. 1972); 1 J. WIGMORE, EVIDENCE §§ 52-69 (3rd ed. 1940). The citations to this article are illustrative rather than exhaustive. Unfortunately, the sheer number of often irreconcilable cases presents more of a barrier to understanding than an aid. The text seeks to present this intractable subject of prior bad acts in as simplistic a fashion as possible and to that end relies heavily upon the works of recognized authorities in evidence.

7. 1 J. WIGMORE, supra note 6, § 194.

8. The "evidence" spoken of can take three different forms: testimony concerning the defendant's reputation, a personal opinion about the defendant, and testimony that the defendant previously performed certain specific conduct. See CAL. EVID. CODE § 1100 (West 1986); C. MCCORMICK, supra note 6, § 186. Character, as used here, means a defendant's "propensity or disposition to engage in a certain type of conduct." CAL. EVID. CODE § 1101 comment of Law Revision Commission. But cf. Letwin, "Unchaste Character," Ideology, and the California Rape Evidence Laws, 54 S. CAL. L. REV. 35, 48-49 (1980) ("people have all sorts of 'propensities' and 'dispositions'—mental or physical qualities, ideological commitments, life-styles, compulsions, obsessions, habits, preferences, and drives—each of which 'disposes' them to behave in certain ways, without necessarily rising to the category of character traits.").
Section 1101(b), on the other hand, makes clear that subdivision (a) does not prohibit the admission of relevant prior acts if the acts are relevant in some way other than to show the defendant’s “disposition to commit such acts.”

A recent California Supreme Court case, People v. Thompson, was instructive as to the interpretation of section 1101. In that case, the defendant was charged with felony-murder, robbery, and burglary, but denied possessing the specific intent to steal. To
prove intent, the prosecutor introduced evidence that the defendant had also robbed the Breakers Restaurant thirteen days after the charged crimes. In holding the admission of the robbery evidence erroneous, the court stated:

[The inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with the material fact [in this case, the intent to steal]. If no theory of relevancy can be established without this pitfall, the evidence of the uncharged offense is simply inadmissible.]

While the court cited no precedent for this proposition, it was nonetheless a correct exposition of evidence theory.

A.

In deciding Thompson, the supreme court had in mind a relevancy concept independent of reliance on character or disposition. While not articulated clearly, the court implicitly relied on the so called "doctrine of chances." The premise of this doctrine

13. Depending on the case, prior bad acts can logically be relevant on two distinct ultimate issues: the required mental state (intent) and the identity of the perpetrator. See B. Jefferson, supra note 2. It is essential to keep this distinction clearly in mind as the standards governing prior act admissibility differ somewhat depending upon the purpose for which the evidence is offered. See notes 40-43 infra and accompanying text.

14. 27 Cal. 3d at 314, 611 P.2d at 888, 165 Cal. Rptr. at 294. See note 2 supra, acts which occur after the charged offense can be relevant to show previous conduct.

15. Id. at 317, 611 P.2d at 889, 165 Cal. Rptr. at 295 (emphasis added) (footnote omitted).

16. The court's footnote to the statement quoted in the text did not address the question of relevance in relation to disposition. Instead, the footnote made clear that section 1101 does not exclude reliance on all "intermediate facts," such as motive or modus operandi. See notes 30-35 infra and accompanying text. It further pointed out that prior act evidence falling within the terms of section 1101(b) is not automatically admissible; it still must satisfy the rules of admissibility relating to general relevancy and discretionary exclusion. 27 Cal. 3d at 317 n.17, 611 P.2d at 889 n.17, 165 Cal. Rptr. at 295 n.17 (citing CAL. EVID. CODE §§ 210, 350, 352).

17. Cf. C. McCormick, supra note 6, § 190, at 447. "The rule is that the prosecution may not introduce evidence of other criminal acts of the accused unless the evidence is substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character." Id.

18. This doctrine relies on the aspect of "similarity" between the charged offense and the uncharged offenses. It was upon just such an analysis that Thompson was decided.

The theories of relevance advanced in this case are premised on the contention that if a person acts similarly in similar situations, he probably harbors the same intent in each instance. Therefore, if the circumstances of the Breakers Restaurant robbery showed that appellant had an intent to steal, then the presence of similar circumstances in La Habra [the place of the charged offense] would suggest that he had the same intent at
is that while an abnormal fact (or unintentional act) might take
place once, or perhaps even twice, the more times such a fact oc-
curs, the less likely it is that the fact is abnormal (or an act truly
unintentional). For example, if a relatively minor, though
favorable, error in addition were found in a taxpayer's income tax
return, it would be considered by most to be a casual mistake. If,
however, a similar error was found in each of the preceding five
years, the possibility of casual mistake would be greatly dimin-
ished, and, conversely, the possibility of deliberate fraud greatly
increased.

For validity, the doctrine of chances requires *similarity* of oc-
currences. To the extent that prior and charged acts are dissim-
ilar, there is little, if any, probative value derived from the prior
act independent of disposition. Thus, if an accused were
charged with the sale of heroin, it would be erroneous to receive

the time of the shootings. . . . This claimed similarity is not borne out by the
facts.

27 Cal. 3d at 319-20, 611 P.2d at 891, 165 Cal. Rptr. at 297.

The theory of the doctrine of chances is applicable when the issue is intent. 2 J.
Wigmore, *supra* note 6, § 302. When the issue is knowledge, the proper theory of
prior act relevance is premised upon the probabilities relating to prior notice. Id.
§ 301. Other theories, such as modus operandi, apply when the issue is identity. See id. § 306; note 41 infra.

19. 2 J. Wigmore, *supra* note 6, § 302. Put another way, "similar results do not
usually occur through abnormal causes." Id.

20. Weiss v. United States, 122 F.2d 675, 683 (5th Cir. 1941). An excellent illus-
tration of the doctrine of chances can be found in the panel opinion of United
denied*, 440 U.S. 920 (1979). Judge Goldberg, writing for the majority, hypotheti-
cally considered a man on trial for shoving a customs officer and charged with will-
fully interfering with the performance of the officer's duties. 555 F.2d at 495 (citing
United States v. Sanchez, 482 F.2d 5 (5th Cir. 1973), from which the hypothetical
was taken). In this example, the defendant claimed he did not mean to shove the
officer. In order to prove the required intent, the government introduced evidence
of the defendant's prior act of assaulting a bartender. While the assault on the
bartender was relevant to show that the defendant did not likely stumble acciden-
tally against the customs officer, its relevance was premised primarily on the fact
that the defendant was a bellicose person because he assaulted a bartender and
was thus likely to harbor the same aggressive attitude or disposition in pushing
other people. Id. at 495.

Judge Goldberg went on to contrast the above situation with one in which the
defendant, on two previous occasions, shoved customs officers at other border
checkpoints.

Although the conclusion that he intended to assault the customs officer on
the occasion charged is by no means certain, we might view the prior and
charged offenses as sufficiently similar to allow the jury to make the infe-
rence if it chooses to do so. Our reasoning is simple. The defendant might
unintentionally have shoved one customs officer, but the likelihood that
he would shove two or three accidentally is sharply reduced. We might, to
be sure, have an unusually clumsy fellow, but the odds are we do not.
Id. at 495-96; *cited favorably in*, 2 J. Wigmore, *supra* note 6, § 302.

21. 555 F.2d at 496; 2 J. Wigmore, *supra* note 6, § 302.

22. *Cf.* People v. Thompson, 27 Cal. 3d at 321 n.24, 611 P.2d at 892 n.24, 165 Cal.
Rptr. at 298 n.24: "When similarity of behavior is critical to the chain of relevance,
evidence of his prior use of marijuana in order to show the required intent.\textsuperscript{23} Such a dissimilar act, while somewhat relevant on the question of intent,\textsuperscript{24} is inadmissible as evidence primarily because of the inference of bad character (disposition) which could be drawn from the previous marijuana usage by the defendant.\textsuperscript{25}

The \textit{Thompson} decision, however, did more than just adopt the doctrine of chances for use in intent cases;\textsuperscript{26} it also clearly forbade (presumably in all cases) any reliance whatsoever upon evidence of bad disposition.\textsuperscript{27} This strong affirmation of the rule excluding character evidence now casts serious doubt upon the many previous appellate decisions which loosely approved the admission of prior bad acts.\textsuperscript{28}

\begin{itemize}
  \item[23.] Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963), cited in J. WIGMORE, \textit{supra} note 6, § 302 (Supp. 1977).
  \item[24.] The reasoning would be that people who use marijuana are more likely to use, as well as sell, other drugs as compared to people who do not use drugs at all.
  \item[25.] When there is some similarity between the offenses, there will also exist some probative value based upon the doctrine of chances. However, the determinative issue is whether this probative value, properly premised upon similarity, will be substantial enough to outweigh the prejudicial effect premised upon disposition. See notes 39-51 infra and accompanying text. It is the latter, which is always present in prior act cases, that must be overcome before admissibility is proper. See People v. Thompson, 27 Cal. 3d at 317-18, 611 P.2d at 890, 165 Cal. Rptr. at 296.
  \item[26.] See note 18 \textit{supra}.
  \item[27.] Evidence that an individual intended to steal car keys on one occasion does not, by itself, substantially tend to prove that he intended to steal them on a second occasion. The only tendency it establishes is the impermissible inference that he has a "disposition to commit" such crimes. Since the Evidence Code specifically forbids the admission of uncharged offenses to prove such a disposition, \textit{even as a waystation to proving intent}, the trial court erred in admitting this evidence. 27 Cal. 3d at 321, 611 P.2d at 892, 165 Cal. Rptr. at 298 (emphasis added).
  \item[28.] Much of the history of the Section 1101(b) noncharacter categories is a history of evasion and game playing in which evidence that is essentially of character is disingenuously offered and received as though it were something else—enabling the prosecution to benefit from the juror's illicit response to the defendant's 'bad character.'
\end{itemize}

Letwin, \textit{supra} note 8, at 51-52 (footnote omitted). This "evasion and game playing" has several variations. For example, the legitimate theory of admissibility can be misconstrued, as in People v. Massey, 196 Cal. App. 2d 230, 235, 16 Cal. Rptr. 402, 405-06 (1961), where the court labeled a tenuous modus operandi situation as one involving \textit{intent}. A prior act can be offered as being "similar" to the charged crime, but where the similarity is more superficial than distinctive. See, \textit{e.g.}, People v. Perez, 65 Cal. 2d 615, 422 P.2d 597, 55 Cal. Rptr. 909 (1967). In \textit{Perez} the defendant was charged with several nighttime robberies of Sacramento businesses. All of these crimes involved two or three men, some of whom covered their faces

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It would normally seem appropriate to compare the overall circumstances of each incident, not merely a truncated portion thereof."
There remains, however, considerable practical difficulty in dealing with a glove or cloth. The supreme court upheld admission of evidence against the defendant of a prior Sacramento robbery of a business at night in which the defendant was involved and in which two men wore stockings over their heads and one carried a rifle.

In addition, a prior act which, upon analysis, is not properly relevant to any disputed issue in the case could be offered. See, e.g., People v. Greene, 34 Cal. App. 3d 622, 639, 110 Cal. Rptr. 160, 170 (1973), where the defendant claimed an alibi defense, but the court approved the admission of similar prior acts because “[t]here was clearly an issue as to the motive and intent manifested by the defendant if the jurors believed the account of either of the victims . . . .” The problem with this analysis is that, given the alibi defense, the defendant simply was not contesting the fact that the (arguably unknown) perpetrator of the crime had the requisite intent. The defendant’s claim was that he was elsewhere, thereby implicitly conceding that the perpetrator (whoever he or she was) must have had whatever intent was reasonably inferable from the physical conduct described by the victims. To assume, as the court did, that intent somehow become an issue if the jurors believe the victim’s testimony, is to inject into the case a defense which the defendant has not asserted. “The People are, of course, entitled to offer evidence on every issue in the case, but the notion that a plea of not guilty automatically entitles the prosecution to use evidence of other crimes to prove an element of the crime charged is incorrect . . . .” People v. Gregg, 266 Cal. App. 2d 389, 391, 71 Cal. Rptr. 920, 922 (1968). But see People v. Archerd, 3 Cal. 3d 615, 639, 477 P.2d 421, 436, 91 Cal. Rptr. 397, 412 (1970). Rather, the propriety of prior bad act evidence often is best assessed at the time of rebuttal. See also People v. Todd, 1 Cal. App. 3d 547, 555-56, 81 Cal. Rptr. 866, 869-70 (1969). Only then can the trial court accurately determine if the evidence “is offered upon an issue which will ultimately prove to be material to the People’s case . . . .” People v. Schader, 71 Cal. 2d 761, 775, 457 P.2d 841, 849, 80 Cal. Rptr. 1, 9 (1969) (emphasis added). See 2 J. Weinstein, supra note 1, § 404[09].

The situation involving the need to postpone introducing the prior act evidence until rebuttal arises primarily when the evidence is relevant solely on the issue of the defendant’s mental state. The reason is that the evidence concerns something inherently under the defendant’s tactical control—his decision whether or not to deny that he possessed the mental state required for the crime. On the other hand, prior act evidence which is relevant on the issue of identity can safely be introduced during the prosecutor’s case-in-chief. In this latter situation, the prosecutor can reasonably assume, absent a contrary stipulation by the defense, that the defendant’s plea of not guilty means that he will deny doing the charged act (i.e., contest identity).

Of course, when the evidence concerns only a mental state, thus suggesting that the prosecutor should postpone introducing the prior act evidence until rebuttal, there is the risk that the defendant might preclude rebuttal by resting without offering any evidence. In order to obviate this problem, a prudent prosecutor might wish to obtain a prior defense stipulation on the questionable issue. Cf. People v. Hall, 28 Cal. 3d 143, 152, 616 P.2d 826, 831, 167 Cal. Rptr. 844, 849 (1980). “[I]f a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence of other crimes to prove that element to the jury.” Id. Alternatively, a prosecutor should request assurance from the trial court that it will allow a reopening of the prosecutor’s case. Only if both of these approaches fail should there be an attempt to introduce in the case-in-chief prior bad act evidence that is relevant to mental state. Admissibility will, however, still depend on other factors. See note 50 infra (quotation from People v. Schader). For a good attempt to reconcile the cases involving prior bad acts and the problem of “anticipated defenses,” see People v. Perez, 42 Cal. App. 3d 760, 117 Cal. Rptr. 195 (1974).
terminating exactly when prior acts do and do not depend upon the disposition of the defendant for their relevance. The supreme court in Thompson alluded several times to "intermediate facts," and, upon analysis, it is a difference in the nature of these facts which frequently determines the issue of admissibility. As an aid in visualizing these intermediate steps and in thinking through the inferential process involved in prior act cases, the following diagram is suggested:

29. The effort to apply the distinction in practice has proved one of the most troubling problems currently confronting criminal courts. One reason is practical, the other theoretical. The practical reason is that a given item of evidence may have both a permissible and an impermissible use; it is then necessary to decide at what point the one predominates over the other, often a difficult matter. The theoretical reason is that some noncharacter uses—particularly some types of evidence offered under the heading of modus operandi—are in their nature exceedingly difficult to distinguish from the forbidden kinds of dispositional (character) evidence . . . .

Letwin, supra note 8, at 51 n.56.
30. 27 Cal. 3d at 315-17, 611 P.2d at 888-89, 165 Cal. Rptr. at 294-95.
31. The diagram illustrates an important observation made by Wigmore and explicitly relied upon in Thompson, id. at 316 n.16, 611 P.2d at 889 n.16, 165 Cal. Rptr. at 295 n.16:

The impulse to argue from A's former conduct directly to his doing or not doing of the deed charged is perhaps a natural one. But it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like.

This intermediate step is always implicit, and must be brought out.
1 J. Wigmore, supra note 6, § 192, at 942.
ADMISSIBILITY THEORIES FOR PRIOR BAD ACTS

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I. PRIOR ACT(S)

A. Probabilistic Inferences
   1) Doctrine of Chances
   2) Acquisition of Prior Knowledge

B. Non-Character Inferences
   1) Motive
   2) Modus Operandi
   3) Plan, Scheme, or Design
   4) Opportunity or Preparation
   C. Character/Disposition to do Prior Act(s)

II. INTERMEDIATE STEP

III. THE CHARGED CRIME

A. Required State of Mind
   1) Intent; Absence of Mistake/Accident
   2) Knowledge

B. Identity of Perpetrator

C. Occurrence of Required Conduct (actus reus)
The "hidden intermediate step[s]"\textsuperscript{32} are indicated in the center of the diagram and help make clear that the list of admissible purposes found within section 1101 (b) "are not really all on the same plane."\textsuperscript{33} Rather, some are intermediate inferences,\textsuperscript{34} while others are ultimate elements of the charged crime.\textsuperscript{35}

Notice that if a prior act is relevant in a case, it must logically pass through an intermediate stage, as indicated in the diagram (II).\textsuperscript{36} However, the key to determining admissibility of prior acts as evidence is whether, and to what extent, there is a route of relevancy through an intermediate step other than II. C. (Character/Disposition to do Prior Act(s)). If there is, the inference from the prior act (I) to the charged crime (III) is permitted.\textsuperscript{37} However, if an inference cannot be routed through II. A. (Probabilistic Inferences) or II. B. (Non-Character Inferences), the evidence is barred under section 1101.\textsuperscript{38}

C.

While the diagram can be of visual assistance in tracing through the necessary inferential steps, it cannot aid in resolving what is ultimately the most difficult question: exactly when are prior acts "sufficiently similar" to qualify for admission?\textsuperscript{39} Part of the difficulty in making this determination inheres in the fact that

\textsuperscript{32} 1 J. Wigmore, supra note 6, § 192, at 642.
\textsuperscript{33} Stone, supra note 4, at 1026 n.190. Moreover, the listed categories are not the only theories of admissibility, they are merely illustrative of the possibilities. See C. McCormick, supra note 6, § 190, at 448-51.
\textsuperscript{34} "Motive, opportunity, plan, scheme, design, and modus operandi are examples of intermediate facts." People v. Thompson, 27 Cal. 3d at 315 n.14, 611 P.2d at 888 n.14, 165 Cal. Rptr. at 294 n.14.
\textsuperscript{35} "Intent, absence of mistake, and identity are facts in issue—facta probanda." Stone, supra note 4, at 1026 n.190 (emphasis in original).
\textsuperscript{36} "[W]henever resort is had to a person's past conduct or acts as the basis of inference to a subsequent act, it must always be done intermediately through another inference." 1 J. Wigmore, supra note 6, § 192, at 642 (emphasis in original). Cf. People v. Thompson, 27 Cal. 3d at 315 n.14, 611 P.2d at 888 n.14, 165 Cal. Rptr. at 294 n.14. "Evidence of an uncharged offense offered to prove an intermediate fact is not necessarily material. The materiality requirement is satisfied only if the intermediate fact tends logically and reasonably to prove an ultimate fact which is in dispute." Id. (emphasis in original).
\textsuperscript{38} See notes 11-15 supra and accompanying text.
\textsuperscript{39} "It is just this requirement of similarity which leaves so much room for difference of opinion and accounts for the bewildering variances of rulings in the different jurisdictions and even in the same jurisdiction and in cases of the same offense." 2 J. Wigmore, supra note 6, § 302, at 246.
the requisite degree of similarity differs depending on whether the ultimate objective is to prove intent or identity. Situations involving identity (i.e., when the issue is who physically did the charged act) often require that prior acts of the defendant bear **highly distinctive common marks** to those of the perpetrator.

40. See Jones v. Commonwealth, 303 Ky. 666, 668, 198 S.W.2d 969, 970-71 (1947). Note that prior acts of the defendant can never be used to establish the occurrence of the actus reus itself. State v. Donaluzzi, 94 Vt. 142, 146, 109 A. 57, 59 (1920). The reason for this is that inferences from prior conduct to the existence of presently charged conduct rests solely upon dispositional reasoning. See note 31 **supra** and accompanying diagram.

41. Highly distinctive common marks are required when the theory of admissibility is that of so-called modus operandi. B. JEFFERSON, *supra* note 2, § 21.5, at 270-71. The theory is that if the defendant on trial has *in fact* previously committed a crime in a highly distinctive way and this same distinctiveness was manifested by the perpetrator of the charged crime, logic dictates that the defendant must also have been the one who committed the charged crime. See People v. Sam, 71 Cal. 2d 194, 204, 454 P.2d 700, 705, 77 Cal. Rptr. 804, 809 (1969); C. McCORMICK, *supra* note 6, § 190 at 449. For an excellent discussion of what constitutes highly distinctive common marks, see People v. Thornton, 11 Cal. 3d 738, 523 P.2d 267, 114 Cal. Rptr. 467 (1974), cert. denied, 420 U.S. 924 (1975), *overruled on other grounds*, People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979).

The common marks requirement is motive, as when a husband takes out a large life insurance policy on his wife and is later charged with her murder, relevance exists irrespective of any similarity. In the illustration, the prior act is the taking out of life insurance and the charged act is the act of killing.

Analogously, if a defendant is charged with robbery, it might be proper to introduce evidence that the defendant committed a dissimilar prior burglary. Relevance may exist if the burglary were to show something other than disposition, such as *opportunity* (as when the crimes were committed close together in time and location) or *preparation* (as when the defendant stole materials later used in the robbery). G. LILY, *An Introduction to the Law of Evidence* 132-33 (1978).

Another theory of admissibility, that of common plan, scheme, or design, is often confused with modus operandi. *Cf.* People v. Thornton, 11 Cal. 3d 738, 747, 523 P.2d 267, 272, 114 Cal. Rptr. 467, 472 (1974), cert. denied, 420 U.S. 924 (1975), *overruled on other grounds*, People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979) (other highly distinctive rapes "admitted for the purpose of showing his identity through a common plan"). Analytically, common plan is a distinct category. It envisions an overall objective whose accomplishment requires the doing of several distinct acts, such as in a conspiracy. See C. McCORMICK, *supra* note 6, § 190, at 448-49; 2 J. WIGMORE, *supra* note 6, § 304, at 202 (the object is "to prove a pre-existing design, system, plan, or scheme, directed forwards to the doing of [the charged] act"). For example, showing that a defendant previously bribed county supervisors A, B, and C to vote for project X is very probative on the issue of who bribed supervisor D (the charged crime) if four favorable votes were needed for the passage of X. See People v. Glass, 158 Cal. 650, 661-65, 112 P. 281, 288-90 (1910). The California Supreme Court has recognized that common plan "perhaps more accurately implies 'a larger continuing plan, scheme, or conspiracy, of which the present crime on trial is a part.' " People v. Sam, 71 Cal. 2d 194, 205, 454 P.2d 700, 706, 77 Cal. Rptr. 804, 810 (1969). Nevertheless, the court continues to use the phrase "common design or plan" to encompass both modus operandi and situations involving a larger continuing plan. People v. Thomas, 20 Cal. 3d 457, 464-65, 573 P.2d 433, 436, 143 Cal. Rptr. 215, 218 (1978).

While the theory of modus operandi requires acts bearing highly distinctive common marks, admissibility by common plan, when properly labeled, requires
On the other hand, in situations involving intent (i.e., where it is taken as given that the charged defendant physically did the act), the mind asks only for something that will negative innocent intent; and the mere prior occurrence of an act similar in its gross features—i.e., the same doer, and the same sort of act, but not necessarily the same mode of acting nor the same sufferer—may suffice for that purpose.

Similarity of perhaps an even stricter sort: “such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.” 2 J. WIGMORE, supra note 6, § 304, at 202 (emphasis omitted). Of course, acts indicating a common plan also may be relevant to prove intent. People v. Thomas, 20 Cal. 3d at 465, 573 P.2d at 436, 143 Cal. Rptr. at 218 (1978); G. LILLY, supra, at 133-34. But where intent is the desired inference, as opposed to identity, it can be shown short of proving the strict concurrence of features otherwise required for common plan. This is aptly illustrated by Wigmore:

[O]n a charge of assault with intent to rape, where the intent alone is disputed, a prior assault on the previous day upon the same woman, or even upon another member of her family, might have probative value, but if the assault itself is disputed, and the defendant attempts, for example, to show an alibi, the same facts might be of little or no value, and it might be necessary to go further and to show (for example) that the defendant on the same day, with a confederate guarding the house, assaulted other women in the same family who escaped, leaving the complainant as the only woman accessible to him for his purpose. . . . [W]here the very act is the object of proof, and is desired to be inferred from a plan or system, the combination of common features that will suggest a common plan as their explanation involves so much higher a grade of similarity [than needed to show intent] as to constitute a substantially new and distinct test.

2 J. WIGMORE, supra note 6, § 304, at 249-51.

42. The standard framework for admission of evidence of other crimes to show intent is if there is no doubt that defendant had committed an act, but some question as to his intent in doing so [in] all the cases in which other crimes evidence has been introduced to show the intent behind an act, there has been some independent evidence that the act was committed.


43. 2 J. WIGMORE, supra note 6, § 304, at 204.

"Intent," as used here, is a catch-all word designating the required mental state (mens rea) of the charged crime. As a practical matter, prior act admissibility problems normally will not arise unless the charged crime requires purpose, knowledge, or something similar, such as lack of mistake or knowledge. Crimes requiring lesser mental states (e.g., recklessness or negligence) basically involve risk creation and will rarely present a route of relevance independent of disposition. For discussions of the distinctions between the various "intent" words, see generally W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 28, at 195-98 (1972); 2 J. WIGMORE, supra note 6, § 300, at 192-93; Roth, General vs. Specific Intent: A Time for Terminological Understanding in California, 7 Pepperdine L. Rev. 67, 74-74, 76-77 nn.50-51 (1979).

Note also that motive is an intermediate fact which can be relevant to prove either identity or intent. For example, in reference to intent, if a man had a reason to kill his wife, as when he takes out a large life insurance policy on her life, it
Still, in the intent situation, the nagging question of exactly how similar the acts must be remains.\textsuperscript{44} A precise answer probably is not possible,\textsuperscript{45} but the physical components of the prior and charged offenses should at least be substantially alike in order to create significant probative value under the doctrine of chances.\textsuperscript{46} Anything short of substantial similarity will attenuate the allowable probative thrust and, accordingly, magnify the prejudicial effect of the inference based upon disposition, thereby making it inadmissible as evidence of intent.\textsuperscript{47}

Indeed, in all prior act cases, the question of admissibility ultimately comes down to a weighing process.\textsuperscript{48} The admissible intends to show that when he killed her he acted with malice aforethought rather than in self-defense.\textsuperscript{44} See note 39 supra.

\textsuperscript{45} 2 J. Weinstein & M. Berger, supra note 1, § 404[08], at 404-45 ("[T]hough it is easy to criticize any given case, it is impossible to verbalize a formula which can be applied with any precision."). Cf. 2 J. Wigmore, supra note 6, § 302, at 201 ("It is hopeless to attempt to reconcile the precedents . . . for too much depends on the tendency of the court in dealing with a flexible principle.").

\textsuperscript{46} See United States v. Beechum, 555 F.2d at 496-97. "It must be seen that the entire strength of the inference rests on the similarity between the prior and the charged offense. . . . We thus abstract from prior and charged offenses a level of generality at which similarity will retain substantial probative value." Id. (footnote omitted). As indicated in note 20 supra, Judge Goldberg's analysis of the doctrine of chances was favorably cited in 2 J. Wigmore, supra note 6, § 302, at 247. Cf. People v. Schader, 71 Cal. 2d at 775, 457 P.2d at 849-50, 80 Cal. Rptr. at 9-10. "In determining relevance, the trial court . . . must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." Id. (footnote omitted).

\textsuperscript{47} "Since 'substantial prejudicial effect [is] inherent in [prior act] evidence,' uncharged offenses are admissible only if they have substantial probative value. If there is any doubt, the evidence should be excluded." People v. Thompson, 27 Cal. 3d at 318, 611 P.2d at 890, 165 Cal. Rptr. at 296 (footnote omitted) (emphasis in original).

\textsuperscript{48} People v. Schader, 71 Cal. 2d at 774, 457 P.2d at 848, 80 Cal. Rptr. at 8.

A related issue in all prior act admissibility situations is the standard of proof required as to the very existence of the other acts. The rule in California is that the acts may be shown merely by a preponderance of substantial evidence. People v. Durham, 70 Cal. 2d 171, 187 n.15, 449 P.2d 198, 208 n.15, 74 Cal. Rptr. 262, 272 n.15, cert. denied, 395 U.S. 968 (1969); B. Winkin, California Evidence § 344 (2d ed. 1968). Some federal courts of appeal have held the standard should be "clear and convincing evidence," but there is no clear consensus. 2 J. Weinstein & M. Berger, supra note 1, § 404[10]. While there may be logic in the statement that "facts regarding another offense are simply evidentiary facts to be considered along with other evidence in the case on the question of knowledge, plan, or intent," People v. Mendoza, 37 Cal. App. 3d 717, 724, 112 Cal. Rptr. 565, 569 (1974), a low standard of proof severely undermines the premise upon which prior act evidence is admitted: that the charged defendant has in fact committed the prior act.

The problem is particularly acute when the theory of admissibility is modus operandi, i.e., when the prior acts must be so unusual and distinctive as to be "like a signature." C. McCormick, supra note 6, § 190, at 449. Indeed, if one were to compare arguably unknown handwriting with a sample of known handwriting for purposes of determining if a certain person wrote both, one would reasonably expect that the "known" sample would be in the nature of an exemplar, i.e., a writing
ference (based upon the doctrine of chances or other permissible intermediate step) must *outweigh* the always present inadmissible inference (based on bad disposition or character). For this weighing to be performed accurately, a constant analytical separation of the various routes of relevancy is essential. If clarity of thought is not maintained, it is extremely easy for courts to admit prior bad acts under the pervasive sway of their strong probative

congedly belonging to an identified individual. *Cf.* CAL. EVID. CODE § 1418 (West 1966) (requires comparison by expert witness with a writing "proved to be genuine to the satisfaction of the court"). Yet to the extent that prior acts are not proved by evidence beyond a reasonable doubt, they are like samples of handwriting whose authenticity has not yet been proved genuine. "To the extent that there is a serious question about whether the accused committed another crime, the probative force of the entire line of proof is seriously attenuated." 2 J. WEINSTEIN & M. BERGER, supra note 1, at 404-55.

49. People v. Thompson, 27 Cal. 3d at 318, 611 P.2d at 890, 165 Cal. Rptr. at 296. This weighing process is sound. It furthers the legislative purpose in § 1101(a) of the California Evidence Code of protecting the accused from the tendency of a jury to convict a defendant "not because he is believed guilty of the present charge, but because he has escaped unpunished from the other offenses." *Id.* The court cited § 352 of the California Evidence Code as authority for its proposition, *id.*, but this reliance was misplaced. Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." CAL. EVID. CODE § 352 (West 1966). Applying § 352 to the prior bad act situation produces a completely different and unintended balance. The trial court could exclude evidence having some non-character basis only if its probative value was substantially outweighed by a substantial danger of undue prejudice from the inference based upon character. Thus, if there were an even balance between the inferences, § 352 would not bar its admission—a result contrary to the express language in *Thompson*. 27 Cal. 3d at 318, 611 P.2d at 890, 165 Cal. Rptr. at 296. Some federal courts, however, have looked to § 403 of the Federal Rules of Evidence (analogous to CAL. EVID. CODE § 352) and held that its terms should be literally applied during the weighing process in prior bad act cases. *See*, e.g., United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979).

50. The suggested diagram, supra note 31 and accompanying text, will assist in "seeing" the various ways in which the proffered evidence is relevant. *Cf.* People v. Schader, 71 Cal. 2d at 775, 457 P.2d at 849-50, 80 Cal. Rptr. at 9-10 (footnotes omitted):

Before permitting the jury to hear evidence of other offenses the court must ascertain that the evidence (a) 'tends logically, naturally and by reasonable inference' to prove the issue upon which it is offered; (b) is offered upon an issue which will ultimately prove to be material to the People's case; and (c) is not merely cumulative with respect to other evidence which the People may use to prove the same issue. In determining relevance, the trial court . . . must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong.

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value.\textsuperscript{51} The correct solution, however, depends not merely on relevancy, but upon the probative strength of an inference independent of any connection to character or disposition.

III. **Determining Admissibility: A Suggested Analysis**

In order to correctly decide prior act evidence problems, it is necessary to follow some sort of analytical checklist.\textsuperscript{52} Failure to do this can only further blur the often obscure distinction between proper admissibility and inadmissibility. Using the above diagram as an aid,\textsuperscript{53} the following four step analysis is suggested:

1. **Determine accurately the disputed ultimate issues in the case.** For example, if the defendant claims an alibi, intent of the perpetrator simply is not an issue.\textsuperscript{54}

2. **Determine if the prior act has any non-character relevancy.** Prior act evidence will, of course, always be relevant to show something about the character (disposition) of the defendant.\textsuperscript{55} However, to be admissible, the prior act must also be relevant to something "other than [the defendant's] disposition to commit such acts."\textsuperscript{56} These possible "other things" are the various non-character intermediate steps enumerated in the center of the diagram.\textsuperscript{57}

3. **Determine if any non-character inferences further lead to a disputed issue.** (This third step is but a synthesis of the first two.) Note that none of the non-character inferences are relevant to prove the actus reus of a crime, although inferences from character frequently are.\textsuperscript{58}

4. **Determine if the probative value of such non-character inferences out-weigh the prejudicial effect of the character inference.** Even if a prior act is relevant to show a non-character intermediate inference from which a further inference can be drawn to a disputed issue, the strength of this double inference must be balanced against the always present, and also double, inference

\textsuperscript{51} See note 28 supra.

\textsuperscript{52} A similar four-step approach also was suggested in Comment, *A Proposed Analytical Method for the Determination of Admissibility of Evidence of Other offenses in California*, 7 U.C.L.A. L. REV. 463, 482 (1960). That comment, while now somewhat dated, remains an excellent analysis of the problems connected with prior act admissibility.

\textsuperscript{53} See note 31 supra and accompanying text.

\textsuperscript{54} Cf. People v. Greene, 34 Cal. App. 3d 622, 638, 110 Cal. Rptr. 160, 170 (1973) (defendant claimed alibi, but court admitted evidence to prove motive and intent); see note 28 supra for discussion of this case.

\textsuperscript{55} See note 25 supra.

\textsuperscript{56} CAL. EVID. CODE § 1101(b) (West 1966).

\textsuperscript{57} See note 31 supra and accompanying text.

\textsuperscript{58} See note 40 supra.
based upon character.\textsuperscript{59} Only if the non-character inference substantially outweighs the prejudice inherent in the character inference will the prior act be admissible.\textsuperscript{60} Moreover, the strength of many non-character inferences is greatly affected by the degree of similarity between the prior act and the charged offense.\textsuperscript{61}

IV. CONCLUSION

From the above discussion and the reported cases, it is obvious that determining the admissibility of prior bad acts is an extraordinarily difficult and complex task. The reason for this is that there are several diverse factors to be taken into account and their relationship to one another varies depending on the precise facts of each case. Consequently, generalizations of law are of little help in deciding the admissibility of evidence in specific situations.

In order to put the various factors involved in prior act analysis into proper perspective, it is essential to keep the factors clearly and constantly in mind. To this end, it is suggested that the reader utilize the diagram set forth in Part II above. It will visually reinforce the constant dichotomy between relevancy based upon disposition (character) and relevancy based upon one or more non-dispositional theories. Moreover, because the subject is so elusive, no decision as to prior act admissibility should be made without following some systematic approach. A recommended four-part step-by-step approach has been outlined in Part III above and its use will assure a rational and conscientious effectuation of the legal requirements contained within section 1101 of the California Evidence Code.

\textsuperscript{59} See notes 48-51 \textit{supra} and accompanying text.

\textsuperscript{60} See note 49 \textit{supra}.

\textsuperscript{61} See notes 39-51 \textit{supra} and accompanying text.