ADMITTING EVIDENCE OF AN ACCUSED'S UNCHARGED MISCONDUCT UNDER THE DOCTRINE OF OBJECTIVE CHANCES: BEFORE A JUDGE MAY CONSIDER EVIDENCE OF AN UNCHARGED INCIDENT TO DECIDE WHETHER THERE HAS BEEN A SUSPICIOUS COINCIDENCE, MUST THE ACCUSED CLAIM THAT THE INCIDENT WAS AN ACCIDENT?

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ABSTRACT

"The man who wins the lottery once is envied; the one who wins it twice is investigated."

–United States v. York[1]

Evidence of an accused's uncharged misconduct—testimony about a crime other than the one the accused is presently charged with—can be so prejudicial that Federal Rule of Evidence 404(b), which governs the admissibility of such evidence, generates more published opinions than any other Federal Rules of Evidence provision. The Rule provides that the prosecutor may not offer evidence of an accused's uncharged misconduct to show that the accused has a personal, subjective bad character and then argue that their bad character increases the probability that the accused committed the charged crime. That theory poses an intolerable risk that the jury may punish the accused for the type of person he or she is, not for what he or she has done. To satisfy Rule 404(b), the prosecution must show that the uncharged misconduct is admissible on another, non-propensity theory of logical relevance.

In the past few decades when analyzing the admissibility of evidence under Rule 404(b), American courts have essentially imported an evidentiary theory, the doctrine of objective chances, from England. The thrust of the doctrine is that if the accused has been involved in a certain type of event (such as a spouse's drowning death) more often than the average, innocent person would encounter such events, the extraordinary coincidence is relevant to show that one or more of the incidents were caused by an *actus reus* or accompanied by a *mens rea.* The argument

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1. 933 F.2d 1343, 1350 (7th Cir. 1991). Ian Fleming expressed the same sentiment in one of his most famous James Bond novels, Goldfinger: "Once is happenstance. Twice is coincidence. The third time it's enemy action." Stephen E. Fienberg & D. H. Kaye, *Legal and Statistical Aspects of Some Mysterious Clusters*, 154 J. ROYAL STAT. SOC'Y 61, 61 (1991).

runs that this is a legitimate noncharacter theory. The ultimate inference arises from the objective improbability of so many similar events, not a conclusion that the accused has a subjective propensity for criminality.

The doctrine has a relatively short history in American evidence law and is still a work in progress. In the 2021 case, *People v. Skillicorn*, the Oregon Supreme Court addressed a question of first impression about the doctrine: Can the judge apply the doctrine even when the accused does not claim that all the incidents, both charged and uncharged, were accidents? The opinion is a bit unclear on the question; but citing dictum in a prior Oregon case, the court comes very close to holding that evidence is admissible under the doctrine only if the accused makes such a claim.

On the one hand, this Article contends that the Oregon court reached the right result in *Skillicorn*; during closing argument the prosecutor clearly misused the testimony as evidence of the accused's subjective bad character. On the other hand, analogizing to hypothesis testing in statistics, this Article concludes that the doctrine of objective chances can apply absent such a claim by the accused; the doctrine comes into play so long as the charged and uncharged incidents involve similar type of acts, whether or not the accused asserts that all the incidents were accidents. However, positing that conclusion, this Article next argues that when the prosecution's only theory is the doctrine of objective chances, Rule 404(b) precludes the prosecution from introducing evidence that the uncharged incident was an intentional misdeed; under Federal Rule of Evidence 403, the judge should exclude the evidence of intentionality as an irrelevant, prejudicial detail.

TABLE OF CONTENTS

INTRODUCTION

In pertinent part, Federal Rule of Evidence 404(b) provides:

> (1) Prohibited Uses. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.[2]

Forty-four states have evidence codes largely modeled on the Federal Rules of Evidence.[3] All of these jurisdictions have a version of Rule

2. FED. R. EVID. 404(b).
3. RONALD L. CARLSON, EDWARD J. IMWINKELRIED, JULIE SEAMAN, & ERICA BEECHER-MONAS, EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 16 (8th ed. 2018).

404(b) identical or substantially similar to Federal Rule 404(b).[4] Oregon Rule of Evidence 404(3) fits that mold.[5]

Subsection 404(b)(1) of the Federal Rule codifies an application of the general character evidence prohibition.[6] The subsection precludes prosecutors from resorting to the following theory of logical relevance:

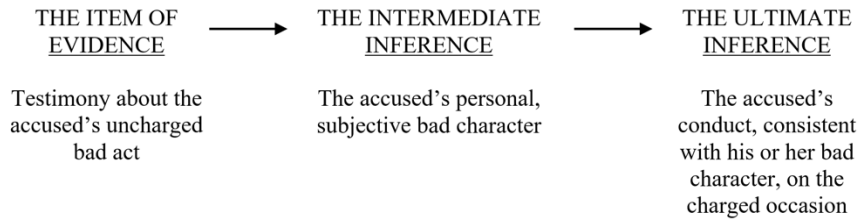

FIGURE 1.[7]

As the above diagram indicates, the theory of logical relevance entails two inferences. The rationale for the prohibition is that both inferences pose significant probative dangers.[8] The first inference poses the risk that the English utilitarian philosopher Jeremy Bentham termed "misdecision."[9] In the words of the Advisory Committee Note to Federal Rule of Evidence 403, the introduction of the evidence may induce the jury to decide the case on "an improper basis."[10] In order to decide whether to draw the initial inference,[11] the jury must consciously focus on this question: What type of person is the accused?[12] In doing so, at least on a subconscious level,[13] the jurors may be tempted to convict the accused for his or her criminal past, even if the jurors would otherwise

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4. 1 EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19, at 237 (2021).

5. The rule reads:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person 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.

State v. Skillicorn, 479 P.3d 254, 262 (Or. 2021) (quoting OR. R. EVID. 404(3)).

6. FED. R. EVID. 404(b) (advisory committee's note to 1972 proposed rules).

7. 1 IMWINKELRIED, *supra* note 4, § 2:19, at 237 (cited with approval in *Skillicorn*, 479 P.3d at 265).

8. *Id.* § 2:19, at 238–39.

9. Jeremy Bentham, *An Introductory View of the Rationale of Evidence; For the Use of Non-Lawyers as Well as Lawyers*, *in* 6 THE WORKS OF JEREMY BENTHAM 1, 105 (John Bowring ed., 1843).

10. FED. R. EVID. 403 (advisory committee's note to 1972 proposed rules).

11. *See* Thigpen v. Thigpen, 926 F.3d 1003, 1014 (11th Cir. 1991); Daniel D. Blinka, *Evidence of Character, Habit, and "Similar Acts" in Wisconsin Civil Litigation*, 73 MARQ. L. REV. 283, 295 (1989). *See generally* Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741, 741–43 (2008); James W. McElhaney, *Character and Conduct*, 17 LITIG. 45, 46 (1991).

12. Mark E. Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 CRIM. L. Q. 43, 46, 48, 54, 56 (1978).

13. 1 IMWINKELRIED, *supra* note 4, § 2:19, at 238–39 (noting that a subconscious risk arises) ("[T]he jury must consciously focus on the type of person the defendant is.").

conclude that the prosecution failed to prove the accused's guilt of the charged offense beyond a reasonable doubt. In the words of the District of Columbia Court of Appeals, the accused must be convicted for "what he did," but not for "who he is."[14] The Supreme Court has squarely held that the Eighth Amendment ban on cruel and unusual punishment forbids criminalizing a person's status.[15]

To make matters worse, the second inference gives rise to another substantial probative danger; that is, overvaluation.[16] After deciding that the accused has a personal character trait or propensity for illegal or immoral conduct, the jury must use that trait as a predictor of conduct on a specific occasion—namely, the time and place of the charged offense.[17] For the most part, available psychological studies find that the general construct of a person's character is a poor predictor of conduct on a particular occasion and that situational factors tend to be far more influential.[18]

The concurrence of these two probative dangers explains the prohibition codified in Rule 404(b)(1). Given these two dangers, uncharged misconduct evidence can pose a "peril to the innocent."[19] Uncharged misconduct evidence can have "a dramatic effect on a jury."[20] In one Seventh Circuit case, the defendant argued that the trial judge's admission of evidence of the accused's other misdeeds was "game over" for the defense.[21] Uncharged misconduct evidence can sink the defense "without [a] trace."[22] Hence, it is hardly surprising that despite the prohibition in Rule 404(b)(1), prosecutors frequently offer uncharged misconduct evidence.[23]

As we have already seen, the text of Rule 404(b)(2) permits the prosecution to introduce uncharged misconduct evidence for other noncharacter purposes—that is, on theories other than the theory barred by Rule 404(b)(1).[24] Distinguishing between the forbidden and permissible uses of uncharged misconduct evidence is one of the most important

14. United States v. Linares, 367 F.3d 941, 945 (D.C. Cir. 2004).
15. Robinson v. California, 370 U.S. 660, 666 (1962).
16. *Id.* at 665–66.
17. *Id.*
18. 1 IMWINKELRIED, *supra* note 4, § 1:3, at 17–18 (collecting the studies).
19. *Id.* § 1:3, at 12 (quoting Justice Cardozo).
20. Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 (2018).
21. United States v. Hawpetoss, 478 F.3d 820, 826 (7th Cir. 2007); *see also* Basyle J. Tchividjian, *Predators and Propensity: The Proper Approach for Determining the Admissibility of Prior Bad Acts Evidence in Child Sexual Abuse Prosecutions*, 39 AM. J. CRIM. L. 327, 379 (2012) ("[G]ame-changing . . . evidence.").
22. D.W. Elliott, *The Young Person's Guide to Similar Fact Evidence—I*, 1983 CRIM. L. REV. 284, 284 (1983).
23. *See* 1 IMWINKELRIED, *supra* note 4, § 1:3, at 14.
24. Indeed, the title of Rule 404(b)(2) is "Permitted Uses." FED. R. EVID. 404(b)(2).

issues in contemporary federal practice.[25] Rule 404(b) has been called "the most controversial of the Federal Rules of Evidence."[26] As the reporter for and the academic consultant to the Federal Rules of Evidence Advisory Committee recently pointed out,[27] in federal practice Rule 404(b) has generated more published opinions than any other provision in the Federal Rules.[28] In many states, errors in the admission of uncharged misconduct evidence are the most common grounds for reversal in criminal cases.[29] In these cases, the battleground issue is usually whether the testimony was barred by Rule 404(b)(1) or permitted under Rule 404(b)(2).[30]

As previously stated, the text of Rule 404(b)(2) allows the prosecution to introduce evidence of an accused's uncharged misconduct to prove "intent" and "lack of accident."[31] At English common law, admitting other misdeeds to prove intent was "[t]he earliest widely recognized use of uncharged misconduct evidence . . . ."[32] Modernly in the United States, the introduction of uncharged misconduct to establish intent is the most common purpose for introducing such evidence.[33]

The giant of American evidence law, Dean John Henry Wigmore, argued that there was a particular theory—the doctrine of objective

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25. The distinction is at the heart of Rule 404(b). While 404(b)(1) refers to "[p]rohibited [u]ses," 404(b)(2) refers to "[p]ermitted [u]ses." FED. R. EVID. 404(b)(1)–(2). The litigation over this issue generates more published opinions than any other provision in the Federal Rules of Evidence. *See* Capra & Richter, *supra* note 20, at 831.

26. Dora W. Klein, *The (Mis)application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. 706, 709 (2018).

27. Capra & Richter, *supra* note 20, at 771.

28. *See, e.g.*, United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) ("Rule 404(b) has become the most cited evidentiary rule on appeal."); Dora W. Klein, *Exemplary and Exceptional Confusion Under the Federal Rules of Evidence*, 46 HOFSTRA L. REV. 641, 666 (2017) ("According to some commentators, the rule appears in appellate court decisions more than any other rule of evidence."); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 211 (2005) ("Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence."); Antonia M. Kopeć, Comment, *They Did It Before, They Must Have Done It Again, the Seventh Circuit's Propensity to Use a New Analysis of Rule 404(b) Evidence*, 65 DEPAUL L. REV. 1055, 1058, 1074 (2016) ("Federal Rule of Evidence 404(b) is the most cited Rule of Evidence . . . ."); Byron N. Miller, Note, *Admissibility of Other Offense Evidence After* State v. Hougton, 25 S.D. L. REV. 166, 167 (1980) ("Admissibility of evidence of other acts, wrongs, or crimes is the most frequently litigated question of evidence at the appellate level . . . .").

29. Patrick Wallendorf, Note, *Evidence—The Emotional Propensity Exception*, 1978 ARIZ. ST. L.J. 153, 156 n.29 (1978); CARLSON ET AL., *supra* note 3, at 16 (explaining that forty-four states have adopted evidence codes modeled on the Federal Rules of Evidence). Almost all the states have versions of Rule 404(b) that are identical to or strikingly similar to Federal Rule 404(b). *See generally* 2 IMWINKELRIED, *supra* note 4, §§ 9:86–88, at 502–17.

30. *See generally* FED. R. EVID. 404(b)(1)–(2) (describing prohibited and permitted uses).

31. FED. R. EVID. 404(b)(2).

32. David P. Leonard, *The Use of Uncharged Misconduct to Prove Knowledge*, 81 NEB. LAW REV. 115, 118 (2002).

33. 22B CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FED. PRAC. & PROC.: EVIDENCE § 5242 (Supp. 2021); Thomas J. Reed, *The Development of the Propensity Rule in Federal Criminal Cases 1840-1975*, 51 U. CIN. L. REV. 299, 306–07 (1982).

chances—that legitimately allowed the prosecution to introduce uncharged misconduct to prove intent.[34] He wrote:

> The argument here is . . . from the point of view of the doctrine of chances,—the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. . . . [T]he mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them. Thus, if A while hunting with B hears the bullet from B's gun whistling past his head, he is willing to accept B's bad aim or B's accidental tripping as a conceivable explanation; but if shortly afterwards the same thing happens again, and if on the third occasion A receives B's bullet in his body, the immediate inference (*i.e.* as a probability, perhaps not a certainty) is that B shot at A deliberately; because the chances of an inadvertent shooting on three successive similar occasions are extremely small.[35]

In essence, the doctrine of objective chances rests on the following theory of logical relevance:

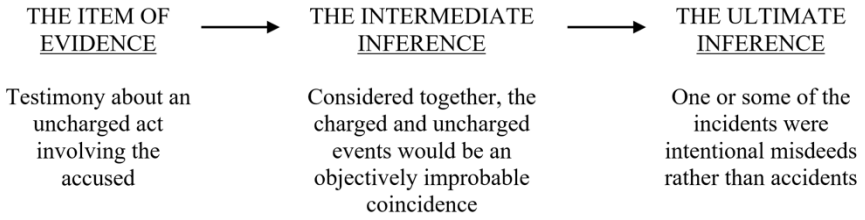

FIGURE 2.[36]

This theory of logical relevance is not only superficially different than the theory barred by Rule 404(b)(1); more importantly, the theory is distinguishable in terms of both of the probative dangers that inspire Rule 404(b)(1)'s prohibition.[37] To begin with, the first inferential step does not require the jurors to consciously address the question of the type of person the accused is. The theory does not force the jurors to advert to the question of whether the accused has a personal, subjective bad char-

34. *See* 1 JOHN HENRY WIGMORE, TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 302 (2d ed. 1923).

35. *Id.*

36. 1 IMWINKELRIED, *supra* note 4, § 4:1, at 590, fig.4-2; State v. Skillicorn, 479 P.3d 254, 269 (Or. 2021) (showing the articulated diagram).

37. Edward J. Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as Justification for Introducing Uncharged Misconduct Evidence to Prove Intent*, 45 HOFSTRA L. REV. 851, 865 (2017).

acter.[38] Of course, there is a risk that some jurors will do so on their motion.[39] However, the theory does not necessitate that the jurors do so. Consequently, there is considerably less risk of misdecision.[40] Moreover, the second step of the theory does not invite the jurors to treat the accused's character as a predictor of conduct on the specific charged occasion. Rather, the second step asks the jurors to do what the pattern instructions in almost all jurisdictions encourage the jurors to do—that is, to draw on their common sense and experience to assess the relative plausibility of the parties' competing versions of the events.[41] Thus, the risk of overvaluation is also absent.

The doctrine of objective chances has a long lineage in English case law; the doctrine traces back well more than a century.[42] In the United States, Dean Wigmore described his version of the theory as early as 1923.[43] Despite Dean Wigmore's advocacy of the theory, American courts ignored the doctrine of objective chances for decades.[44] In a 1973 brief in one of the leading American cases, *United States v. Woods*,[45] the defense represented to the court that no published American decision had explicitly endorsed the doctrine.[46] However, the doctrine began gaining traction in the 1970s,[47] and today most American jurisdictions adhere to some version of the doctrine.[48]

Initially, the courts accepted the doctrine as a basis for admitting uncharged misconduct evidence to prove the occurrence of an *actus reus* (a loss, such as death, caused by human agency), especially in child

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38. *See* United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991) ("This inference is purely objective, and has nothing to do with a subjective assessment of [the accused's] character."); United States v. Aguilar-Aranceta, 58 F.3d 796, 799 (1st Cir. 1995); Nancy Bauer, Note, People v. Spoto*: Teasing the Defense on Prior Bad Acts Evidence*, 63 U. COLO. L. REV. 783, 803 (1992) ("In theory, the doctrine has no bearing at all on the defendant's character . . . .").

39. *See* United States v. Norweathers, 895 F.3d 485, 489–92 (7th Cir. 2018) (explaining that even when the item of evidence is relevant on a noncharacter theory, it remains logically relevant on a character theory under Rule 401). Thus, if a juror gives even slight thought to the question of what the evidence proves, he or she is likely to realize that the uncharged act is also relevant to prove bad character. *Id.*

40. *See id.* at 490.

41. Imwinkelried, *supra* note 37, at 865 n.93 (collecting cases stating that the jurors are allowed and encouraged to engage in that mode of reasoning).

42. *See, e.g.*, R. v. Smith, [1914-15] All ER 262 (Eng.); Makin v Attorney-General for New South Wales, [1894] LRPC 58, 60, 65 (Austl.).

43. 1 WIGMORE, *supra* note 34, § 302, at 611.

44. *See* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 423 (2006) (noting that the doctrine of objective chances made its way into American case law in the 1970s).

45. 484 F.2d 127 (4th Cir. 1973).

46. Edward J. Imwinkelried, United States v. Woods*: A Story of the Triumph of Tradition*, *in* EVIDENCE STORIES 65–66 (Richard Lempert ed. 2006) (citing the Reply Brief of the Appellant in *United States v. Woods*).

47. Imwinkelried, *supra* note 44, at 423.

48. *See* Miller v. Baldwin, 723 Fed. App'x. 408, 411 n.5 (9th Cir. 2018); State v. Atkins, 819 S.E.2d 28, 30–32 (Ga. 2018); Commonwealth v. Hicks, 156 A.3d 1114, 1125 (Pa. 2017).

abuse cases.[49] In the *Woods* case, the accused, Martha Woods, was charged with infanticide—killing a foster child in her care.[50] The child died of cyanosis.[51] She claimed that the death was accidental, but the prosecution alleged that the real cause of death was suffocation.[52] To prove the death was caused by an *actus reus*, the prosecution was permitted to show that during a twenty-five-year period, nine children in the accused's custody had experienced at least twenty cyanotic episodes.[53] The prosecution also offered the opinion of Dr. Vincent DiMaio that, in the charged incident, there was a 75% chance that someone had smothered the child to death.[54] Citing English precedents, the *Woods* majority concluded that the uncharged misconduct testimony about the other nine children was relevant to establish an *actus reus*.[55] That many cyanotic episodes involving children in the accused's custody amounted to an extraordinary coincidence.[56] The seeming coincidence suggested that one or more of the episodes were not accidents, but rather the products of an *actus reus*—that is, human intervention.[57]

The courts have also employed the doctrine of objective chances as a justification for admitting uncharged misconduct to prove *mens rea*, especially in drug prosecutions.[58] Suppose that when the police lawfully stop the accused driver, they find contraband drugs secreted in the car. The accused denies knowing that there were drugs in the car. To rebut the accused's denial, the prosecution offers testimony that on two other occasions when the accused was stopped while driving, officers found illegal drugs in the vehicle. As one commentator stated, "it would be an odd coincidence if the defendant were an innocent victim of drugs planted in his car while being in possession of drugs" on multiple occasions.[59] Again, under the doctrine of objective chances the courts allow the prosecutor to introduce uncharged misconduct to establish a suspicious coin-

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49. 2 IMWINKELRIED, *supra* note 4, § 4:5, at 629 (collecting cases); Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 586 (1990).

50. *Woods*, 484 F.2d at 129–30.

51. *See id.* at 130.

52. *Id.*

53. *Id.* The court referred to a "bizarre" set of events, *id.* at 129, and "the remoteness of the possibility of so many infants in the care and custody of defendant would suffer cyanotic episodes and respiratory difficulties." *Id.* at 134. The numbers in *Woods* do appear suspiciously high although congenital heart disease is the leading cause of death in children with congenital malformations. MARIA M. OSSA GALVIS, RUPAL T. BHATKA, ABDULLAH TARMAHOMED, & MAGDA D. MENDEZ, CYANOTIC HEART DISEASE (2021). Like so many early American cases applying the doctrine of objective chances, the court did not demand that the prosecution present empirical data about the baseline frequency about the type of event involved in the case. *See generally* Imwinkelried, *supra* note 37.

54. *Woods*, 484 F.2d at 133 n.8; Imwinkelried, *supra* note 46, at 67, 71.

55. *Woods*, 484 F.2d at 133 n.8. For a detailed analysis of *Woods*, see Imwinkelried, *supra* note 46, at 69–73.

56. 1 IMWINKELRIED, *supra* note 4, § 4:3, at 621–23.

57. *Id.* § 4:3, at 623.

58. *Id.* § 5:28, at 818–26 nn.1–2 (outlining numerous drug cases).

59. I. H. DENNIS, THE LAW OF EVIDENCE 596 (1999).

cidence and treat the coincidence as some evidence of an element of the offense—here, *mens rea*.[60]

Today, it is not only relatively well settled that the prosecution may sometimes invoke the doctrine of objective chances to justify introducing uncharged misconduct;[61] there is also general judicial consensus on the basic elements of the doctrine.[62] To begin with, as Dean Wigmore noted, the charged and uncharged incidents must be similar at least "in [their] gross features."[63] In addition, considered together, the charged and uncharged incidents must amount to an extraordinary coincidence.[64] That is, the accused must have been involved in such incidents more frequently than we would expect the average, innocent person to become enmeshed in such circumstances.[65] The frequency of the accused's involvement must exceed the baseline frequency for the typical, innocent individual.[66]

Although there is general agreement that the prosecution must establish both elements to properly invoke the doctrine of objective chances,[67] some commentators have criticized the courts for applying these requirements laxly.[68] These commentators have been particularly critical of the failure of many courts to demand that the prosecution establish the extraordinary coincidence by presenting reliable evidence of the baseline frequency.[69] To be sure, it is critical to cabin the doctrine because in a lay juror's mind, the line between inadmissible bad character evidence and evidence possessing genuine noncharacter relevance can be exceedingly

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60. Imwinkelried, *supra* note 37, at 862–63.

61. Edward J. Imwinkelried, *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of an Accused's Uncharged Misconduct*, 50 N. MEX. L. REV. 1, 2–3 (2020) [hereinafter *A Brief Essay*]; *see also* Edward J. Imwinkelried, *The Evidentiary Issue Crystalized by the Cosby and Weinstein Scandals: The Propriety of Admitting Testimony About an Accused's Uncharged Misconduct Under the Doctrine of Chances to Prove Identity*, 48 SW. U. L. REV. 1, 5–6 (2019) [hereinafter *Cosby and Weinstein*] (a growing body of case law approves of the admission of uncharged misconduct under the doctrine to prove *actus reus* or *mens rea*; at this point, the hot button issue is whether prior accusations of such misconduct are admissible for the purpose of proving identity).

62. *A Brief Essay*, *supra* note 61, at 8–9. This Article explains that if courts rigorously apply the requirements, it becomes clear that the theory possesses genuine noncharacter relevance. If one or more of the elements are lacking, the prosecution cannot invoke the doctrine even when the accused is as evil as Richard Dahmer; the accused's evil character is an insufficient basis for applying the doctrine. Conversely, if the elements are present, the prosecution may resort to the doctrine even when the accused is as saintly as Mother Teresa. The logic of the doctrine does not require any assumption about the moral or immoral character of the accused. *See generally id.* The evidence would be admissible even if Mother Teresa has elected to place her character in issue and presented impressive—and uncontradicted—reputation and opinion testimony as to her moral, law-abiding character.

63. 1 WIGMORE, *supra* note 34, § 304, at 619.

64. Imwinkelried, *supra* note 44, at 436 fig.2.

65. *A Brief Essay*, *supra* note 61, at 8.

66. Imwinkelried*, supra* note 37, at 871.

67. *Id.*

68. *Id.*

69. *Id.*

thin.[70] To maintain that line, it is imperative that courts recognizing the doctrine of objective chances identify its limitations as well as its requirements. In early 2021, the Oregon Supreme Court handed down a thoughtful decision in *State v. Skillicorn*,[71] in which the court attempted to do precisely that. The court not only identified the two basic requirements for invoking the doctrine; unlike many courts,[72] to its credit, the Oregon court also rigorously enforced the requirements.[73] The court concluded that the trial judge erred in admitting uncharged misconduct evidence under the doctrine.[74]

In the course of reaching that conclusion, the court addressed an important question about the scope of the doctrine of objective chances.[75] Interestingly enough, until the *Skillicorn* court passed on the question, the question had almost entirely escaped adequate attention. In *Skillicorn*, the accused was charged with intentionally driving into his girlfriend's car and recklessly driving into a second car on the same evening.[76] The testimony indicated that both collisions occurred after the accused had an argument with his girlfriend.[77] The accused denied intent and claimed that his car had malfunctioned.[78] To prove intent, the prosecution offered uncharged misconduct evidence that on an earlier occasion, the accused had sped in the same neighborhood.[79] The supreme court quite properly stated that to invoke the doctrine, the prosecution must establish that the accused has been involved in "similar" incidents more frequently than the average innocent person would have been.[80] The court then reviewed the record to decide whether the number of incidents involving the accused exceeded the baseline frequency for innocent persons.[81] The accused had not expressly claimed that in the earlier uncharged incident his car had malfunctioned.[82] Absent such a claim, the court concluded that the uncharged incident should be treated as inten-

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70. United States v. Bass, 794 F.2d 1305, 1313 (8th Cir. 1986); Imwinkelried, *supra* note 49, at 602. Precisely because the line can be so fine, courts should not admit uncharged misconduct evidence under the doctrine to prove intent unless intent is in genuine dispute. Imwinkelried, *supra* at 598–601. Suppose that an accused intends to defend solely on the ground that he or she did not commit the *actus reus*. Given that theory of the case, the accused tenders a full, unconditional stipulation that whoever committed the charged act did so with the requisite *mens rea*. That stipulation arguably satisfies the prosecution's legitimate evidentiary needs; and under Federal Rule of Evidence 403, the judge should block the admission of the uncharged misconduct evidence. *See* FED. R. EVID. 403; Old Chief v. United States, 519 U.S. 172, 184 (1997).

71. 479 P.3d 254 (2021).

72. Imwinkelried, *supra* note 37, at 862–64.

73. *Skillicorn*, 479 P.3d at 272–73.

74. *Id.* at 273.

75. *See generally id.* at 257, 266–72.

76. *Id.* at 258.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 268–69.

81. *See id.* at 272.

82. *See id.* at 257.

tional conduct.[83] Ultimately, the court ruled that because the accused's uncharged act was intentional, the trial judge could not consider it for the purpose of deciding whether there was an extraordinary coincidence justifying admitting testimony about the act under the doctrine of objective chances.[84] The court seemed to say that, in deciding the extraordinary coincidence issue, the judge may ordinarily consider an uncharged incident only when the accused has claimed that, like the charged incident, the uncharged incident was an innocent accident.

For a number of reasons that will become clear in Part I, the *Skillicorn* court reached the right result in the case. In particular, during closing argument, the prosecutor did not make the type of argument allowable under the doctrine of objective chances;[85] the prosecutor did not discuss the objective improbability or implausibility of so many similar accidental events.[86] Rather, the prosecutor plainly misused the evidence as proof of the accused's personal, subjective bad character.[87] Although the court came to the right result, the thesis of this Article is that the *Skillicorn* court's indication that a trial judge may consider an uncharged incident only when the accused claims that the incident was an accident is unsound. Concededly in previous writings, some commentators, including this author, have used broad, loose language suggesting that the doctrine applies only when the accused has made an implausible claim of "'successive similar' innocent acts"[88]—language that the *Skillicorn* court quoted.[89] However, on reflection, that suggestion is unsound.

This Article proceeds in four parts. Part I reviews the *Skillicorn* case and an earlier Oregon decision, *State v. Tena*. Part II puts *Skillicorn* into perspective by elaborating on the doctrine of objective chances that the *Skillicorn* court applies.

While Parts I and II of this Article are largely descriptive, Part III critically evaluates the proposed limitation imposed in *Skillicorn* that, under the doctrine, a judge may not consider an uncharged act unless the accused claims that the act was accidental. Part III argues that the judge should be able to consider an uncharged act so long as the incident involves the same general type of event and social harm as the charged offense; a claim of accident or, conversely, proof of its intentional character should not affect the admissibility of the uncharged incident under the doctrine. This Part, therefore, concludes that the proposed limitation ought to be rejected.

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83. *Id.* at 270.
84. *Id.* at 271.
85. State v. Skillicorn, 443 P.3d 683, 693–94 (Or. Ct. App. 2019), *rev'd*, 479 P.3d 254 (Or. 2021).
86. *Id.*
87. *Skillicorn*, 479 P.3d at 259–61.
88. *Id.* at 268 (citing 1 IMWINKELRIED, *supra* note 4, § 5:36).
89. *Id.*

However, Part IV of this Article demonstrates that the conclusion in Part III is a double-edged sword. On the one hand, the intentional nature of the act does not preclude its inclusion in the set of incidents to be compared to the baseline frequency for innocent persons. On the other hand, because evidence of intentionality is both unnecessary under the doctrine and prejudicial under Federal Rule of Evidence 403,[90] in many cases the judge ought to prevent the prosecutor from relying on the doctrine as a justification for introducing evidence of the intentionality of the act. Rather, under the doctrine, the prosecution should be confined to describing the general type of event (e.g., the accused's presence in a car containing drugs or the accused's collision with another car). To go further and introduce testimony that the uncharged act was intentional, the prosecutor must identify another noncharacter theory of logical relevance—that is, a theory other than the doctrine of objective chances.

I. A DESCRIPTION OF THE *PEOPLE V. SKILLICORN* CASE AND ITS ANTECEDENT, *STATE V. TENA*

This Part reviews the *Skillicorn* case in detail. However, to understand *Skillicorn,* it is important to review the precursor to *Skillicorn, State v. Tena*.[91]

A. State v. Tena*: The Footnote Dictum About Intentional, Uncharged Acts*

In 2015, an intermediate appellate court in Oregon handed down its decision in *Tena*.[92] The accused was charged with domestic violence against his then-girlfriend, K, in 2011.[93] The accused denied intentionally attacking K; he claimed that he tripped and accidentally struck her.[94] In order to prove his *mens rea*, the prosecution offered testimony about two uncharged incidents: a 1997 assault on his former wife and a 2004 attack on another girlfriend.[95] The trial judge admitted the evidence over objection, and the accused was convicted.[96]

On appeal, the prosecution offered two theories to justify the introduction of the uncharged misconduct.[97] The first was that the accused had a hostile motive or attitude; the prosecution argued that the three incidents showed his hostility toward his domestic partners.[98] The second was the doctrine of objective chances.[99] The prosecution argued that the

90. FED. R. EVID. 403.
91. 384 P.3d 521 (Or. Ct. App. 2016), *rev'd*, 412 P.3d 175 (Or. 2018).
92. *Id.*
93. *Id.* at 523–24.
94. *Id.* at 524.
95. *Id.*
96. *Id.* at 523.
97. *Id.* at 523–24.
98. *Id.* at 524.
99. *Id.* at 526.

large number of incidents in which the accused had injured domestic partners made it objectively improbable that he had accidentally tripped and bumped into K.[100]

The appellate court accepted the prosecution's motive theory.[101] The court reasoned that a person can have a hostile attitude toward not only a single individual, but also a defined class of persons, such as domestic partners.[102] The court then stated that because the evidence was admissible on the prosecution's motive theory, it was unnecessary to rule on the prosecution's doctrine of objective chances theory.[103] Nevertheless, the court added in a footnote: "[T]he doctrine [of objective chances] supports the admission of other acts evidence only when the other acts were, or are claimed to have been, the product of a mistake or accident."[104] Of course, since the court had decided the admissibility on the basis of the motive theory and expressly stated that there was no need to reach the doctrine of objective chances theory, the court's statement in the footnote was dictum.[105]

B. State v. Skillicorn*: The Debate Over Intentional, Uncharged Acts*

i. The Oregon Trial Court

Skillicorn was charged with committing criminal mischief on November 7.[106] The evidence indicated that on that day, he had visited his girlfriend's house and asked Ms. Walker to leave with him.[107] After she refused, he got into a truck belonging to his employer.[108] He then crashed into Ms. Walker's car parked on the house's driveway.[109] After colliding with that car, he collided with another car, belonging to a neighbor Howard, which was parked on the street. Skillicorn denied intentionally running into the two cars; he claimed that the truck was malfunctioning,

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100. *Id.*
101. *Id.* at 529–30.
102. *See id.* at 527.
103. *Id.* at 530.
104. *Id.* at 526 n.4.
105. State v. Skillicorn, 443 P.3d 683, 692 (Or. Ct. App. 2019) ("[O]ur *dicta* in *Tena* . . . ."). The Oregon Supreme Court later reversed the intermediate appellate court. State v. Tena, 412 P.3d 175, 183 (Or. 2018). To begin, the court rejected the motive theory for admitting the uncharged misconduct evidence. *Id.* In the court's mind, it was not enough that all the alleged victims happened to be members of the same class, namely, domestic partners. *Id.* The record below did not indicate that they all had been attacked because of their membership in their class. *Id.* The record contained evidence indicating that other reasons, including child-care issues, a victim's desire to work, and jealousy, had motivated the uncharged incidents. *Id.* at 181–82. The court then addressed the doctrine of objective chances theory. The court refused to invoke that theory. The court declared that that theory does not apply when the central dispute is whether the accused performed the act at all. *Id.* at 182.
106. *Skillicorn*, 443 P.3d 683, 685, *rev'd*, 479 P.3d 254.
107. *Id.* at 684.
108. *Id.*
109. *Id.* at 684–85.

causing two accidental collisions.[110] The two charges of first-degree criminal mischief related to the two collisions.[111]

To rebut the accused's claim of accident, the prosecution offered two types of uncharged misconduct evidence.[112] First, the prosecution introduced evidence that earlier on September 14, after an argument with Ms. Walker, the accused had driven at excessive speed in her neighborhood and that he had evidently lost control of his car, which drove over a curb and rested on a grassy knoll in the neighborhood.[113] Second, the trial judge allowed the prosecution to introduce evidence of the accused's general driving habits, including speeding, described as "blaz[ing]" through the neighborhood.[114]

During closing argument, the prosecutor "told the jury that 'intent' seemed 'to be what the defense [was] contesting the most.'"[115] The prosecutor urged the jury to treat the uncharged misconduct as proof of intent.[116] The prosecutor argued that the evidence showed that when the accused "gets angry, he acts out."[117] The prosecutor added that "just like he did prior, proving the intent after he got into an argument. He took off because he was angry."[118] After hearing the evidence and closing arguments, the jury convicted Skillicorn.[119]

ii. The Oregon Intermediate Appellate Court

Skillicorn appealed.[120] On appeal, he challenged the admission of both the testimony about the September 14 incident and the evidence of his general reckless driving habits.[121]

The court found it unnecessary to resolve the merits of the accused's challenge to the testimony about his general driving habits.[122] The court acknowledged that the trial court record did "not provide sufficient detail" to determine whether the testimony qualified as admissible uncharged misconduct evidence under Oregon Rule of Evidence 404(3).[123] However, the court opined that, even if it was an error to admit

110. *Id.* at 685.
111. *Id.*
112. *Id.*
113. In its opinion, the intermediate appellate court repeatedly stated that on September 14, the accused's car had "crashed." *Id.* at 684, 685, 688, and 693–95. However, the accused's car did not "crash" into anything. The court stated that the car had "went up" and "driven" onto the grassy knoll. *Id.* at 686–87.
114. *Id.* at 687–88, 695.
115. State v. Skillicorn, 479 P.3d 254, 260 (Or. 2021).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Skillicorn*, 443 P.3d at 684.
120. *Id.*
121. *Id.* at 688.
122. *Id.* at 695.
123. *Id.* at 685.

the testimony, "there is little likelihood that the jury's verdict was affected at all by the references to his general driving habits."[124] In short, even if the admission of the testimony was an error, the testimony was not sufficiently prejudicial to be reversible.[125]

Consequently, the court devoted most of its opinion to the question of the admissibility of the testimony about the uncharged September 14 incident.[126] To justify the admission of that testimony, the prosecution cited the doctrine of objective chances.[127] The accused contended that the trial judge erred in considering the September 14 incident in deciding whether there had been an extraordinary coincidence.[128] More specifically, the accused argued that the judge had erred in doing so because the accused had not claimed that the September incident was an accident.[129] The court noted that *Tena* lent support to the accused's contention.[130]

Nevertheless, the court rejected the defense's contention. The court concluded that the language in the *Tena* footnote was mere dictum.[131] Moreover, after surveying other Oregon case law on the doctrine of objective chances, the court concluded that, in applying the doctrine of objective chances, the trial judge is not restricted to uncharged incidents that the accused claims are accidents.[132] The court ruled that even if the accused did not claim that the September 14 and November 7 incidents were accidents, the September 14 incident was "sufficiently similar to the charged acts."[133] The court, therefore, held that the testimony about the September 14 incident was admissible to rebut the accused's claim that the malfunctioning of the truck the accused was driving on November 7 caused the accidental collisions.[134] The result was that the court affirmed the accused's conviction.[135]

iii. The Oregon Supreme Court

Having lost at the intermediate appellate level, the accused prosecuted a further appeal to the Oregon Supreme Court.[136] That appeal was successful, and the supreme court reversed and remanded the case to the

124. *Id.* at 695.
125. *Id.* ("[W]e fail to see how the admission of that testimony would have prejudiced defendant . . . .").
126. *See generally id.*
127. *See id.* at 688–95.
128. *Id.* at 688.
129. *Id.*
130. *Id.* at 690.
131. *Id.* at 692.
132. *Id.* at 693.
133. *Id.*
134. *Id.*
135. *Id.* at 695.
136. *See* State v. Skillicorn, 479 P.3d 254 (Or. 2021).

trial court.[137] There are several noteworthy aspects of the Oregon Supreme Court decision.

The first is that there is a very strong case that the court reached the right result in reversing. As previously stated, the doctrine of objective chances applies only when the charged and uncharged incidents are similar.[138] A 2020 California case, *People v. Winkler*,[139] is illustrative. Winkler was charged with murdering his wife.[140] He claimed that he stabbed her in self-defense.[141] To rebut his self-defense claim, the prosecution attempted to introduce testimony about the death of the accused's prior wife, who had died in a traffic accident under suspicious circumstances.[142] To justify the admission of that testimony, the prosecution invoked the doctrine of objective chances.[143] However, the court balked at applying the doctrine; the court emphasized the significant difference in "the way in which the victims were killed"[144]—a stabbing as opposed to a traffic fatality.[145] A similar argument could be made in *Skillicorn.* It is true that the intermediate appellate court repeatedly characterized the September 14 incident as a "crash[]."[146] However, while in the charged November 7 incidents Skillicorn crashed his truck into Ms. Walker's and Howard's cars, on September 14, Skillicorn's vehicle did not collide with any object or person.[147] On that date, he was evidently speeding, lost control, and drove onto a grassy area in the neighborhood.[148] While losing control of a vehicle due to speeding and colliding with another vehicle both violate traffic rules, they are very different types of events. For example, the two types of events have very different legal consequences.[149] Those differences would certainly be evident to the insurer carrying Skillicorn's auto liability policy. While the policy would probably have covered the property damage he caused to Ms. Walker's and Howard's vehicles on November 7, under a typical policy, the insurer would not be responsible for any criminal fine imposed on Skillicorn for his speeding or reckless driving on September 14.[150] Thus, as in *Winkler*, the Oregon court could plausibly have refused to apply the doctrine due to the marked dissimilarity between the charged November 7 crimes and the uncharged September 14 incident.

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137. *Id.* at 273.
138. 1 IMWINKELRIED, *supra* note 4, § 4:1, at 583.
139. 56 Cal. App. 5th 1102 (2020).
140. *Id.* at 1107.
141. *Id.*
142. *See id.* at 1116–23.
143. *Id.* at 1147–51, 1159–61.
144. *Id.* at 1158.
145. *Id.* at 1160–61.
146. State v. Skillicorn, 443 P.3d 683, 684–85, 688, 693, 695 (Or. Ct. App. 2019).
147. *See id.*
148. *Id.* at 686–87.
149. *Compare* OR. REV. STAT. § 811.109(1), (4) (2020) (describing speed limit violations), *with* OR. REV. STAT. § 811.135(1)–(3) (2020) (describing careless driving).
150. *See* sources cited *supra* note 149.

It is even clearer that the Oregon Supreme Court correctly held that even if the September 14 incident was admissible evidence under the doctrine, the prosecutor blatantly misused the evidence during closing argument.[151] When the doctrine serves as a basis for admitting uncharged misconduct evidence, during summation the prosecutor must confine his or her argument to urging the jury to find that the coincidence is "objectively" improbable or implausible.[152] The court stressed that "the doctrine of chances can be used only to support a particular type of argument: an argument about the objective improbability of certain events."[153] What the prosecutor cannot do is precisely what the prosecutor in *Skillicorn* did: tell the judge that he or she is relying on the doctrine of objective chances while inviting the jury to focus on the accused's personal, subjective character traits.[154] As previously stated, during closing argument in the trial court, the prosecutor told the jury that when the accused "gets angry, he acts out" "just like he did prior."[155] The prosecutor's argument, expressly referring to the accused's subjective character traits, represented classic, forbidden character reasoning and ran afoul of the character evidence prohibition.[156]

In its opinion, the court also commented on one other aspect of the case: the intentionality limitation mentioned in the *Tena* dictum and rejected by the intermediate appellate court in *Skillicorn*.[157] At several points in its opinion, the supreme court emphasized that the doctrine may be applied when the accused claims that all incidents, both charged and uncharged, were accidental or the result of innocent mistake: "[A] party asserts that all the events in a series of similar events were accidents,"[158] the accused claims "successive similar accidents,"[159] "a person claims that [all the] events were caused by accident,"[160] and the accused asserts that "all of the events in a series were accidental."[161] Indeed, the strongest case for applying the doctrine is a situation in which the accused

151. State v. Skillicorn, 479 P.3d 254, 260 (Or. 2021).

152. 2 IMWINKELRIED, *supra* note 4, § 9:80, at 478–81 nn.8, 10 (collecting cases).

153. *Skillicorn*, 479 P.3d at 270.

154. 2 IMWINKELRIED, *supra* note 4, § 9:80, at 478–81 nn. 8, 10.

155. *Skillicorn*, 479 P.3d at 260; *see also* United States v. Richards, 719 F.3d 746, 764–65 (7th Cir. 2013) (discussing the court's idea of the substance of the prosecution's closing argument) ("Richard dealt drugs in California, so he must have done so here, too."); United States v. Pirovolos, 844 F.2d 415, 424 (7th Cir. 1988) ("You can look at Mr. Privolos . . . and time and time again he gets in trouble with the law, like he did in this case."); Stephen Saltzburg, *Proper and Improper Use of Other Act Evidence*, 28 CRIM. JUST. 45, 46 (2014) (discussing *Richards*).

156. 2 IMWINKELRIED, *supra* note 4, § 9:80, at 478–81 nn. 8, 10 (noting that the prosecutor must not only identify a permissible theory when he or she offers the uncharged misconduct evidence; having done so, the prosecutor may not misuse the testimony as evidence of bad character or propensity during summation).

157. State v. Skillicorn, 443 P.3d 683, 692 (Or. Ct. App. 2019).

158. *Skillicorn*, 479 P.3d at 267.

159. *Id.* at 268.

160. *Id.* at 268–69.

161. *Id.* at 270; *see also id.* at 270–71 ("[T]he doctrine of chances is based on the objective improbability of the recurrence of uncommon events, like accidents.").

makes such a sweeping claim about all the charged and uncharged incidents; in that situation, the evidence would flatly contradict the accused's claim. However, that does not necessarily mean that the doctrine applies only when the accused makes that claim. Nevertheless, the supreme court took the leap and announced, in effect, that in deciding whether there has been an apparently suspicious coincidence, the trial judge may not consider an uncharged incident unless the accused claims that the incident was an accident.[162] The court stated:

> [I]n cases like this, where the doctrine is used to prove "lack of accident," the application of the doctrine requires an assessment of the odds that all of the events in a series were accidental . . . . For example, if the defendant in a criminal case was charged with theft and claimed that he took the property at issue by accident, evidence that he had committed theft on two prior occasions would not be relevant on a doctrine-of-chances theory. Because the prior thefts were intentional, there would be no reason to ask, "What are the odds that all three thefts were accidental?" The answer to that question would be "zero," because the first two are known to have been intentional . . . . To be sure, the prior thefts might be relevant on a propensity theory, but such a theory is prohibited by OEC 404(3). They might also be relevant on a nonpropensity theory, such as to prove the existence of a plan, if, for example, the items that the defendant stole during the prior thefts were used to commit the charged theft. But they are not relevant on a doctrine-of-chances theory.[163]

The court went to the brink of explicitly adopting the limitation stated in the *Tena* dictum that, under the doctrine of objective chances, the trial judge may consider an uncharged incident only if the accused claims that the incident was an accident.[164] That limitation is the focus of the remainder of this Article.

II. A DESCRIPTION OF THE BACKDROP OF THE *SKILLICORN* CASE: A GENERAL OVERVIEW OF THE DOCTRINE OF OBJECTIVE CHANCES

Both the Introduction and Part I touched on the requirements for invoking the doctrine of objective chances. However, to put into sharper perspective *Skillicorn*'s proposed limitation of the doctrine to uncharged acts the accused claims to have been accidental, it is necessary to elaborate on the requirements. That is the purpose of Part II.

A. Requirement #1: The Uncharged Act Is Similar to the Charged Act

Rule 404(b) does not announce a categorical requirement that to be admissible, the uncharged act must be similar to the act the accused is

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162. *See id.* at 270.

163. *Id.* The court reaffirmed this view in its recent decision, *State v. Jackson*, SC S067622, 2021 Ore. LEXIS 868, at *3 (Or. Nov. 17, 2021).

164. *See* discussion *supra* Section I.B.

charged with.[165] Although an occasional court opinion uses sweeping language prescribing that requirement,[166] there is no such requirement.[167] For example, under Rule 404(b), the prosecution may introduce "consciousness of guilt" evidence against an accused.[168] Thus, if an accused charged with murder attempted to suborn perjury by a witness and bribe the witness into giving false, favorable testimony, the prosecution could present evidence of the uncharged bribery in the murder prosecution.[169] The dissimilarity between the charged murder and the uncharged bribery would not be a bar to presenting such evidence.[170]

However, sometimes proof of similarity is a logical corollary of the particular noncharacter theory that the prosecution is using to satisfy Rule 404(b).[171] In the section of his treatise devoted to the doctrine of objective chances, Dean Wigmore states that "to satisfy" the demands of this theory, "it is at least necessary prior acts should be *similar*."[172] As we have seen, one of the key concepts underlying the doctrine is that, considered together, the charged and uncharged incidents amount to an extraordinary coincidence.[173] The concept is that there has been an unusually large number of events, and that number can give rise to a coincidence only if the incidents fall into the same general category of event.[174] Having identified the similarity requirement, Dean Wigmore acknowledged that it will sometimes be debatable whether the charged and uncharged acts are sufficiently similar. According to his summary of the case law, although some judges "liberally interpret[]" the requirement, others adopt a stricter position and demand that the uncharged act be "on all fours with the [charged] offense . . . ."[175]

B. Requirement #2: Considered Together, the Uncharged and Charged Incidents Show that the Accused Has Been Involved in Similar Events More Often than the Typical, Innocent Person Would Be

Published opinions give some sense of the general categories of events that charged and uncharged events may fall into. The Introduction mentioned *Woods*, the 1974 decision by the Fourth Circuit that effective-

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165. The word "similar" does not appear in the language of the Rule. *See* FED. R. EVID. 404(b).
166. 1 IMWINKELRIED, *supra* note 4, § 2:13, at 190 n.2 (collecting cases).
167. *Id.* § 2:13, at 191.
168. *Id.* § 3:4, at 390.
169. *Id.* § 3:4, at 375–88 (discussing varied forms of uncharged misconduct amounting to tampering or interfering with witnesses).
170. *Id.* § 3:4, at 364–65.
171. People v. Spoto, 795 P.2d 1314, 1320 (Colo. 1990) ("[S]imilarity is crucial when the theory of logical relevance is the doctrine of chances."); *see* Eric D. Lansverk, Comment, *Admission of Evidence of Other Misconduct in Washington to Prove Intent or Absence of Mistake or Accident: The Logical Inconsistencies of Evidence Rule 404(b)*, 61 WASH. L. REV. 1213, 1230 (1986).
172. 2 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, at 245 (Chadbourne rev. 1979).
173. *See* discussion *supra* Introduction.
174. 1 IMWINKELRIED, *supra* note 4, § 4:1, at 587–89.
175. 2 WIGMORE, *supra* note 172, § 302, at 246.

ly imported the doctrine from earlier English precedents.[176] In that infanticide prosecution, the child died of cyanosis.[177] To prove that the child's death resulted from an *actus reus*, rather than an accident, the prosecution proffered evidence that during a twenty-five-year period, nine children suffered at least twenty cyanotic episodes while they were in the accused's custody.[178] Post *Woods*, doctrine of objective chances evidence became the backbone of many battered child cases.[179] Those cases, though, do not exhaust the possibilities. For instance, courts have admitted similar uncharged acts to establish the *actus reus* in situations in which multiple wives of the accused were found drowned in their own bathtubs,[180] multiple wives of the accused were poisoned by paraquat,[181] and several properties owned by the accused caught fire in a short period of time.[182] The drownings, poisonings, and fires could have all been accidental. Relying on the allocation of the burden of proof to the prosecution, the defense counsel could have challenged the prosecution to establish that there was human involvement in causing the loss.[183] In all these situations, courts have concluded that, under the doctrine, the large number of similar uncharged incidents furnishes circumstantial evidence that the charged loss was a result of human agency.

The second well-settled use of the doctrine is to justify introducing similar uncharged incidents to prove *mens rea*. The Introduction mentioned this use of similar uncharged misconduct evidence. When the police lawfully stop the accused's car, they find illegal drugs in the vehicle. In all likelihood, the presence of the drugs in the car is the result of an *actus reus*, but the accused denies knowing that the car contained the drugs. To prove *mens rea* under the doctrine, the prosecution may introduce evidence that in other occasions when the police detained the accused, they found drugs in the vehicle he was driving.[184] Just as the use of the doctrine to prove *actus reus* is not confined to child abuse cases,

176. For a detailed description of the facts in *Woods*, see Imwinkelried, *supra* note 46, at 59.

177. *Woods*, 484 F.2d at 129–30.

178. *Id.* at 130–31.

179. *See generally* Milton Roberts, *Admissibility of Expert Medical Testimony on Battered Child Syndrome*, 98 A.L.R. 3d § 1 (1980) (analyzing cases in which courts considered the admissibility of a doctor's opinion as to whether a child suffered from battered child syndrome); State v. Crocker, 435 A.2d 58, 73–75 (Me. 1981); State v. Hunter, 960 N.E.2d 955, 973 (Ohio 2011); Michael S. Orfinger, *Battered Child Syndrome: Evidence of Prior Acts in Disguise*, 41 FLA. L. REV. 345, 354–57 (1989) (discussing admissibility of evidence of battered child syndrome in nonfatal child abuse and homicidal child abuse cases).

180. R. v. Smith, 11 Cr. App. R. 229, 236–37 (1915); People v. Lisenba, 94 P.2d 569, 581–82 (Cal. 1939); Recent Cases, *Evidence—Proof of Particular Facts—Evidence that Defendant May Have Committed Similar Crimes is Admissible to Prove Corpus Delicti of Murder*, 87 HARV. L. REV. 1074, 1075 (1974).

181. People v. Catlin, 26 P.3d 357, 382 (Cal. 2001).

182. United States v. DeCicco, 370 F.3d 206, 209–13 (1st Cir. 2004); People v. Erving, 73 Cal. Rptr. 2d 815, 821–22 (Cal. Ct. App. 1998).

183. *See* WAYNE R. LAFAVE, PRINCIPLES OF CRIMINAL LAW 46 (2d ed. 2017).

184. DENNIS, *supra* note 69, at 596.

its use to establish *mens rea* is not limited to drug prosecutions.[185] Thus, when the accused in *United States v. Rojas* was found in possession of counterfeit currency, the prosecution was allowed to introduce evidence that at other times, the accused had counterfeit currency in his possession.[186] Similarly, if an accused had possession of stolen property, there is a large body of case law permitting the prosecution to prove that the possession was knowing by presenting evidence that on other uncharged occasions, the accused stole merchandise.[187] In these cases, the defense cannot tenably defend on the ground that there was no *actus reus* because the testimony of the owner can readily establish that there has been an *actus reus* that is, a theft by human agency. However, a defense of lack of *mens rea* is still available to the defendant who can deny knowing that the property was stolen. By virtue of the doctrine, the prosecution may introduce testimony about similar incidents of possession to prove *mens rea*.[188]

The thrust of the doctrine is that, in these situations, there appears to be an extraordinary coincidence that defies common sense.[189] If none of the incidents was caused by an *actus reus* or accompanied by a *mens rea*, the accused must be the unluckiest person on the face of the earth.[190] In the words of a leading English decision, denying the jury the evidence would be "an affront to common sense."[191]

Of course, there is such an exceptional coincidence and affront only if, considered together, the evidence of the similar charged and uncharged incidents establishes an extraordinary coincidence exceeding the normal incidence of such events.[192] To make that determination, the trial judge must: (a) estimate the expected value, that is the ordinary incidence

185. 1 IMWINKELRIED, *supra* note 4, § 5:29, at 837.

186. United States v. Rojas, 81 F. App'x 965, 967 (9th Cir. 2003); *see also* 1 IMWINKELRIED, *supra* note 4, § 5:29, at 837 (citing cases where the court permitted the prosecution to introduce evidence of uncharged misconduct to show *mens rea*); Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 990–91 (1938).

187. State v. Robertson, 459 N.W.2d 611, 613 (Wis. Ct. App. 1990); 1 IMWINKELRIED, *supra* note 4, § 5:28, at 818–27 (collecting cases); Stone, *supra* note 186, 990–91.

188. There is a third conceivable use of uncharged misconduct evidence under the doctrine, namely, to prove the accused's identity as the perpetrator. The theory runs that it would be objectively unlikely that a large number of people would independently level a similar accusation against the accused. People v. Vandervliet, 508 N.W.2d 114, 128 n.35 (Mich. 1993) ("[W]e can intuitively conclude that it is objectively improbable that three out of thirty clients would coincidentally [falsely] accuse defendant of [similar] sexual misconduct."); State v. Lopez, 417 P.3d 116, 125 (Utah 2018). In a concurring opinion in *People v. Balcom*, Justice Arabian wrote, "If . . . two people claim rape, and if their stories are sufficiently similar, the chance that *both* are lying, or that one is truthful and the other invented a false story that just happens to be similar, is greatly diminished." 867 P.2d 777, 785 (Cal. 1994) (Arabian, J., concurring). The English cases have long accepted this theory. *See generally* R. v. Scarrott [1978] QB 1016 CA 1016 (Eng.); R. v. Boardman [1975] AC 421 (HL). However, there is little American case law approving this application of the doctrine. *Cosby and Weinstein*, *supra* note 61, at 2, 4–6.

189. 1 IMWINKELRIED, *supra* note 4, § 4:1, at 584.

190. Elliott, *supra* note 22, at 289.

191. *Boardman [1975]*, AC at 456.

192. 1 IMWINKELRIED, *supra* note 4, § 4:1, at 584.

of such events—how often would the average innocent person suffer this type of loss or find himself or herself enmeshed in such circumstances; (b) determine the actual value—the number of times the accused has been involved in such events or discovered in such circumstances; and (c) compare the two values to determine whether (b) exceeds (a).[193] As Part III explains, the methods for determining (a) and (b) differ fundamentally. That difference is directly relevant to the question highlighted by *Tena* and *Skillicorn*: In determining (b), may the judge consider an uncharged act only if, in so many words, the accused has claimed that the uncharged incident was an accident?

III. AN EVALUATION OF THE PROPOSED LIMITATION THAT IN DECIDING WHETHER THERE HAS BEEN AN EXTRAORDINARY COINCIDENCE, THE JUDGE MAY NOT CONSIDER AN UNCHARGED INCIDENT UNLESS THE ACCUSED CLAIMS THAT LIKE THE CHARGED INCIDENT, THE UNCHARGED INCIDENT WAS AN ACCIDENT

To appreciate the question posed in *Tena* and *Skillicorn*, we must distinguish the typical doctrine of objective chances fact situation from two other fact patterns.

To begin, this is not a situation in which the accused is charged with all the criminal acts that the prosecution believes that the accused committed. If the acts are similar, the prosecution may not only file all the charges; presumptively, under Federal Rule of Criminal Procedure 8, the prosecution may join the charges in a single case and try the charges in a single trial.[194] Of course, there is always a possibility that the judge will find that the joinder is prejudicial and would deny the accused a fair trial. For example, if the testimony about one charge is much stronger and more inflammatory than the testimony about a second charge, there might be a "spillover" effect prejudicing the jury's consideration of the second charge.[195] If so, under Federal Rule of Criminal Procedure 14, the judge could order the charges be severed.[196] In that event, at the trial of the first offense (the original count one), evidence of the incident mentioned in the original count two would constitute uncharged misconduct since it would not be a charge at the trial of the first offense.[197] However, absent a severance, the prosecution would have the right to[198] introduce testimony about all the incidents at the unitary trial.[199]

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193. *See* Imwinkelried, *supra* note 49, at 597.

194. FED. R. CRIM. P. 8(a); 2 IMWINKELRIED, *supra* note 4, § 9:4, at 205, 208 (discussing joinder and severance).

195. 2 IMWINKELRIED, *supra* note 4, § 9:4, at 205, 208.

196. FED. R. CRIM. P. 14(a); 2 IMWINKELRIED, *supra* note 4, § 9:5, at 209.

197. *See* 2 IMWINKELRIED, *supra* note 4, § 9:5, at 204, 213–17.

198. 1 MCCORMICK ON EVIDENCE § 45, at 128–29 (8th ed. 2020) (discussing specific contradiction impeachment).

199. If testimony as to the first charge qualified under Rule 404(b) as uncharged misconduct evidence on the second charge, the judge would give the jury an appropriate limiting instruction,

Moreover, this is not a situation in which the prosecution is offering the evidence solely on a credibility theory. Instead, the prosecution is offering the testimony as substantive evidence on the historical merits to show either the occurrence of an *actus reus* or that the perpetrator possessed the necessary *mens rea*. If, during the defense's case-in-chief, the accused makes a sweeping claim that none of the harms were the product of an *actus reus* accompanied by the requisite *mens rea*, on cross-examination and during its rebuttal stage the prosecution might argue that it was entitled to impeach the accused's claim by specific contradiction.[200] However, the use of uncharged misconduct under the doctrine of objective chances differs from a credibility theory in two respects. First, substantively, the prosecution is not offering the evidence for a limited impeachment purpose to attack the accused's credibility. Uncharged misconduct testimony is proffered as substantive evidence on the historical merits that is, as proof that the historical events alleged in the pleadings occurred.[201] Thus, if the judge accepts the prosecution's appeal to the doctrine of objective chances, the defense will not be entitled to a limiting instruction under Rule 105.[202] Second, the timing typically differs. The prosecution will ordinarily attempt to introduce uncharged misconduct evidence during its case-in-chief.[203] To sustain its burden of reaching the jury, the prosecution must present sufficient evidence of both an *actus reus* and a *mens rea*.[204] The prosecution will usually want to present the uncharged misconduct evidence relevant to *actus reus* or *mens rea* before the defense has an opportunity to move for a directed verdict or acquittal as a matter of law at the end of the prosecution's case-in-chief.[205] If evidence of uncharged incidents is offered solely to impeach the accused, there is no need for the defense to make any claim about the uncharged incidents before or during the prosecution case-in-chief; the defense can invoke the Fifth Amendment privilege

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specifying the noncharacter theory, under Federal Rule of Evidence 105. If the testimony did not qualify, the judge would inform the jury that they are to consider the charges separately and may not consider the testimony on the first charge during their deliberations over the second charge.

200. Specific contradiction is a recognized method of impeachment at common law. *Id.* It is true that Article VI of the Federal Rules, devoted to witnesses and credibility, does not expressly mention specific contradiction. However, courts continue to allow litigants to resort to this impeachment technique. *Id.* Moreover, Federal Rule of Evidence 408(a) specifically mentions contradiction. However, even under the Federal Rules courts continue to apply a version of the collateral fact rule or Rule 403 to limit extrinsic evidence specifically contradicting some claims by the witness.

201. *See generally* 1 IMWINKELRIED, *supra* note 4, §§ 1:11–14, 6:23–27 (distinguishing credibility theories from uncharged misconduct proffered on the historical merits).

202. FED. R. EVID. 105.

203. 2 IMWINKELRIED, *supra* note 4, § 9:27, at 345 (surveying the case law rejecting defense arguments that prosecution uncharged misconduct evidence should be confined to the rebuttal stage of the case after the defense case-in-chief).

204. *See generally* Imwinkelried, *supra* note 49.

205. 2 IMWINKELRIED, *supra* note 4, § 9:27, at 345.

against self-incrimination, remain silent, and rely on the allocation of the burden to the prosecution.[206]

Prescind from fact situations raising severance problems or involving credibility theories of logical relevant. By process of elimination, we are typically talking about situations in which the incident in question is not a charge that the accused is standing trial for, and in which the prosecution intends to offer testimony about the uncharged act as substantive evidence of *actus reus* or *mens rea* during its case-in-chief.[207] In this situation, to determine the existence of an extraordinary coincidence, should the judge be permitted to consider an uncharged incident only if at some point, for example, in a pretrial interrogation or during opening statement, the accused claims that the incident was an accident? The resolution of that question requires an understanding of the various steps in making that determination.

The end of Part II made the point that the doctrine requires the judge to conduct the following multi-step analysis: (a) estimate the expected value—how often would we expect the typical, innocent person to suffer this type of loss or be found in such suspicious circumstances; (b) determine the actual value—how frequently has the accused sustained that type of loss or been enmeshed in such circumstances; and (c) then compare the two values to determine whether (b) exceeds (a). As outlined in the following subsections, the two values fundamentally differ.

A. The Estimation of the Expected Value: How Often Do Innocent People Encounter Similar Events or Find Themselves in Similar Circumstances?

The first step in evaluating evidence under the doctrine of objective chances is estimating how frequently the typical, innocent person would become involved in a similar event or find himself or herself in similar circumstances.[208] In some instances, this step is simple. The estimation is straightforward when common sense and everyday experience indicate that the event is a "once in a lifetime event."[209] The cases involving discovery of wives found drowned in their bathtub are a perfect illustra-

206. 2 MCCORMICK ON EVIDENCE, *supra* note 198, §§ 126–28, 337, 341 (discussing the accused's Fifth Amendment privilege to refuse to testify at all and the accused's right to insist that the prosecution satisfy its burden of proof of establishing guilt beyond a reasonable doubt).

207. If the prosecution thought that it had enough independent evidence of the *actus reus* and *mens rea*, it might defer presenting the uncharged misconduct until its rebuttal after the defense case-in-chief. However, some judges limit the scope of the prosecution's rebuttal to meeting contentions raised for the first time during the defense case-in-chief. 1 EDWARD J. IMWINKELRIED, PAUL GIANNELLI, FRANCIS GILLIGAN, FREDERIC LEDERER, & LIESA RICHTER, COURTROOM CRIMINAL EVIDENCE § 102 (6th ed. 2016). Thus, by deferring the presentation of the evidence, the prosecution would run the risk that the judge might bar the evidence on the ground that it exceeds the proper scope of rebuttal.

208. People v. Dryden, 60 Cal. App. 5th 1007, 1022 (Cal. Ct. App. 2021) (citing People v. Rocha, 221 Cal. App. 4th 1385, 1395 (Cal. Ct. App. 2013)).

209. State v. Skillicorn, 479 P.3d 254, 268–69 (Or. 2021).

tion.[210] It is extremely unlikely that a type of loss like that would randomly befall an innocent husband more than once in his lifetime.

In cases that are less straightforward, the prosecution must provide the judge with empirical data to furnish a reliable basis for the baseline frequency for innocent individuals.[211] For example, the prosecution might proffer data, compiled by a government public health agency, to establish the frequency of deaths by stabbing or children's cyanotic episodes. The agency may have relevant epidemiological data.[212] Alternatively, a published text or article, which falls within the learned treatise hearsay exception,[213] might provide such data.

Note several things about this step in the analysis: First, at this point, the judge must consider the state of mind, or intent, of the hypothetical person whose experience is being estimated. The judge is attempting to determine the frequency with which *innocent* people suffer this sort of loss or find themselves in similar circumstances.[214] Second, published data about such events will probably overstate the frequency with which innocent persons encounter such events or are involved in such circumstances. For example, the broad category of data on stabbings will include not only stabbings that occurred accidentally, but some that amounted to crimes. Despite this flaw, that information is typically the best data available; in many cases, the parties and court may have nowhere else to turn for such data. Although it may be the best proxy for the expected value the judge is endeavoring to estimate, that data will almost always overstate the frequency for innocent persons.

Although, at first blush, the imprecision of the estimate seems troublesome to both the judge and the defense, the overstatement of the data works to the advantage of the accused. The prosecution may introduce uncharged misconduct evidence under the doctrine of objective chances only if the accused's frequency of involvement exceeds that of the average, innocent person.[215] The larger the estimated value for the typical, innocent person, the more difficult it will be for the prosecution to demonstrate that the accused's personal involvements in similar events exceed that estimated value.[216] The nature of the imprecision is that it benefits the accused.

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210. *See* discussion *supra* notes 180–83 (collecting cases).
211. *See generally* Imwinkelried, *supra* note 49, at 591.
212. *Id.*
213. FED. R. EVID. 803(18).
214. People v. Dryden, 275 Cal. App. 5th 1007, 1017 (2021).
215. 1 IMWINKELRIED, *supra* note 4, § 4:1, at 580–83.
216. *Id.*

B. The Determination of the Actual Value: How Often Did the Accused Encounter Similar Events or Find Himself or Herself in Similar Circumstances?

This step is where *Tena* and *Skillicorn* come into play. The dictum in *Tena* was that, at this step in the analysis under the doctrine of objective chances, the trial judge may consider an uncharged act only if the accused claimed that the act was an accident.[217] *Skillicorn* comes close to endorsing that dictum. As the court noted, in prior writings this author used language suggesting that it is requisite that the accused claim "successive similar innocent acts."[218] However, on reflection, that suggestion is unsound. Although the prosecution has the strongest argument for invoking the doctrine when the accused makes that claim, in principle, the legitimate scope of the doctrine is not limited to such situations. Neither lay nor statistical logic impose that requirement, and it would be unsound as a matter of policy to recognize such limitation.

i. Lay Logic

The quotation at the outset of this Article captures the essence of the pertinent lay logic: "The man who wins the lottery once is envied; the one who wins it twice is investigated."[219] The average layperson would informally estimate that an innocent, law-abiding person is likely to win the lottery only once in his or her lifetime.[220] Under this reasoning, the layperson assumes that the hypothetical person is acting innocently.[221] However, if the accused won the lottery twice, a rational layperson would conclude that the accused should be "investigated."[222] In reaching that conclusion, the layperson does not rely on any prior assumption about the accused's state of mind at the time of either lottery; rather, the layperson focuses on the disparity between the frequency with which an innocent person would win the lottery and the frequency with which the accused has won the lottery.[223] In Dean Wigmore's words, at this stage in the analysis, the layperson simply considers the "similar results":[224] winning two lotteries. Again, before reaching the conclusion that there is a disparity, the layperson need not make any assumption about the accused's state of mind in either lottery.[225] However, in the layperson's mind, the conclusion of a disparity yields a state-of-mind inference that the accused may have cheated in one or both lotteries.[226] An assumption

217. State v. Tena, 384 P.3d 521, 526 (2016).
218. State v. Skillicorn, 479 P.3d 254, 268 (2021) (quoting 1 IMWINKELRIED, *supra* note 4, § 5:8).
219. United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991).
220. *See id.*
221. *See id.*
222. *See id.*
223. *See id.*
224. 2 WIGMORE, *supra* note 172, § 302, at 241.
225. *See id.*
226. *See id.*

about the accused's state of mind is not a prerequisite to finding a disparity, but that finding would naturally lead the average layperson to suspect criminality.

ii. Statistical Logic

It might be objected that although lay logic might support considering uncharged acts even absent an accused's claim of accident, lay reasoning is often flawed. That is certainly true. However, in this instance, statistical logic confirms lay logic. As the late Professor David Leonard insightfully observed, the doctrine of objective chances employs "informal probability reasoning."[227] More specifically, the doctrine rests on a type of hypothesis testing.[228] The U.S. Supreme Court turned to such testing in *Castaneda v. Partida*,[229] one of the Court's leading precedents on discrimination in jury selection. Professor David Barnes, one of the foremost American authorities on statistical evidence,[230] reconstructed the *Castaneda* Court's reasoning in the following fashion: (1) determine the number of people from the allegedly discriminated-against group you would *expect* to find on the jury panel if there were no discrimination, (2) determine the number of people from the allegedly discriminated-against group who were *actually* included on the jury panel, (3) compute the disparity between the two numbers, and (4) determine the probability that random chance could account for the disparity.[231]

Focus initially on the first step in the reasoning process that Professor Barnes set out. As in the first step in reasoning under the doctrine of objective chances, at this point the expert and judge factor into the estimation an assumption about the state of mind of the attorney conducting the voir dire.[232] In the initial step in doctrine of objective chances reasoning, the judge strives to estimate the frequency with which the typical, innocent person will become involved in similar events or find himself or herself in similar circumstances.[233] In the initial step in the hypothesis test Professor Barnes describes, the judge strives to estimate the number of African-American or Hispanic panelists—members of the group allegedly discriminated against—who would be seated on the jury if a hypothetical attorney acted in good faith without any racial bias.[234]

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227. Leonard, *supra* note 32, at 161–62.

228. Imwinkelried, *supra* note 44, at 449. For a general discussion of hypothesis testing, see 1 PAUL C. GIANNELLI, EDWARD J. IMWINKELRIED, ANDREA L. ROTH, JANE CAMPBELL MORIARTY, & VALENA E. BEETY, SCIENTIFIC EVIDENCE § 2.05[3] (6th ed. 2020).

229. 430 U.S. 482, 496 n.17 (1977).

230. DAVID W. BARNES, STATISTICS AS PROOF: FUNDAMENTALS OF QUANTITATIVE EVIDENCE (1983) is a classic in the field. It is cited as authority in 1 GIANNELLI ET AL., *supra* note 228, § 2.05[2].

231. BARNES, *supra* note 230, at 91–92.

232. *See id.* at 91.

233. *See id.* at 91–92.

234. *See id.*

Now, turn to the second step in the reasoning process that Professor Barnes describes. Here again, there is a parallel to reasoning under the doctrine of objective chances. Harking back to Dean Wigmore's words, in this step in the hypothesis testing, the judge adverts to the actual "results."[235] At this point, the judge or expert does not posit any earlier assumptions about the good or bad faith of the attorney actually making the challenges during jury selection.[236] Rather, the judge or expert focuses solely on the outcome; the number of African-American or Hispanic panelists actually seated as jurors.[237]

Finally, consider the third and fourth steps in Professor Barnes' reasoning process. Again, the judge and expert do not make any assumption about the attorney's state of mind during the preceding second step. However, if during these later steps the actual value significantly differs from the expected value, the disparity gives rise to an inference as to the state of mind of the attorney making the voir dire challenges.[238] An assumption as to state of mind is unnecessary during step two, but assuming there is the requisite disparity between the values determined during steps one and two, the disparity yields a logical inference as to state of mind.[239]

iii. Policy

Federal Rule of Evidence 102 states that one of the essential purposes of the Rules is to promote "the end of . . . securing a just determination."[240] In the context of a criminal prosecution, "a just determination" is acquitting the innocent or convicting the guilty. Evidentiary rules should be designed to increase the probability of acquitting the innocent and convicting the guilty. The proposed limitation—restricting the judge determining whether there is an apparent extraordinary coincidence to considering only uncharged incidents that the accused claims to be an accident—would have the opposite, untoward effect.[241]

Consider the consequences for the truthful innocent person. If he or she has merely been accidentally involved in a number of similar mishaps, he or she will truthfully claim that they all are accidents. If so, according to the *Tena* dictum, the judge may consider all the uncharged incidents in making the determination of an extraordinary coincidence. The evidence is more likely to be admissible against the innocent accused and at least slightly increase the probability of a wrongful conviction.

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235. 2 WIGMORE, *supra* note 172, § 302, at 241.
236. *See id.*
237. *See id.*
238. *See* BARNES, *supra* note 230, at 92.
239. *See id.*
240. FED. R. EVID. 102.
241. *See* 1 IMWINKELRIED, *supra* note 4, § 4:1, at 580–83.

Now, contrast the consequences for a guilty person. Assume further that all the incidents were criminal in nature. If this accused merely refrains from claiming "accident,"[242] positing the *Tena* limitation on the doctrine of objective chances, the judge might bar all the uncharged misconduct evidence against the guilty accused. If so, there is at least a slightly higher probability of a wrongful acquittal. The upshot is that the imposition of this limitation would benefit the guilty and disadvantage the innocent. Hence, like the preceding analysis of lay and statistical logic, criminal justice policy cuts against adopting the limitation.

IV. AN EVALUATION OF THE ADMISSIBILITY OF EVIDENCE OF THE INTENTIONALITY OF THE UNCHARGED ACT CONSIDERED IN DECIDING WHETHER THERE WAS AN EXTRAORDINARY COINCIDENCE ADMITTED UNDER THE DOCTRINE OF OBJECTIVE CHANCES

The conclusion in Part III certainly benefits the prosecution: in deciding whether the accused has been involved in similar events or found in similar circumstances more frequently than the typical innocent person, the judge may consider uncharged incidents of the accused's conduct, even absent a claim by the accused that the incident was an accident.[243] However, that conclusion is a double-edged sword; another consequence flows from this analysis. As this Part explains, if the prosecution has powerful evidence that the prior incident was indeed intentional, it will be difficult for the prosecution to present that evidence to the jury. In many, if not most, cases, the prosecution will be able to do so only if the prosecution can establish the applicability of a noncharacter theory of logical relevance other than the doctrine of objective chances.[244]

As Part III demonstrated, when the judge is deciding whether there is an extraordinary coincidence, the judge may consider an uncharged incident absent a claim by the accused that the incident was an accident. By the same token, the judge may consider the uncharged event absent

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242. If the defense counsel believed that the judge was struggling over the question, the counsel might file a pretrial in limine motion and urge the accused to admit at that hearing that the uncharged acts were intentional. In *State v. Skillicorn*, the court stated that if the prosecution offered evidence of prior thefts under the doctrine, they would be inadmissible because "the prior thefts were intentional." 479 P.3d 254, 270–72 (2021). Surprisingly, in some cases, the accused could safely give such testimony. Consider these scenarios:

1. Although the act was a crime in the jurisdiction where the accused committed the crime, the act is not a crime in the forum where the prosecution is pending;
2. The forum would have no subject-matter jurisdiction to prosecute the accused for the crime; or
3. The criminal statute of limitations on the crime has already lapsed.

Under Federal Rule of Evidence 104(d), the defense would have a measure of assurance that the prosecution could not use the testimony against the accused in a subsequent trial. FED. R. EVID. 104(d). Rule 104(d) reads: "By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case." *Id.*

243. *See supra* notes 240–42 and accompanying text.

244. Evidence that there was intentional misconduct will usually qualify as a "crime" or "wrong" within the meaning of Rule 404(b). *See* FED. R. EVID. 404(b). At the very least, even if the act does not amount to a true crime or civil wrong, an intentional misdeed would be an "act" that could prompt a lay juror to engage in bad character reasoning. *Id.*

prosecution evidence that the event was an intentional, criminal act by the accused. The issue is whether the uncharged act falls within the same category of event as the charged act: the drowning of the accused's wife in her own bathtub, the cyanotic episode of a child in the accused's custody, or the discovery of drugs in a vehicle driven by the accused.[245] The only question is the general categorization of the uncharged event; defense claims of accident and prosecution claims of criminality are irrelevant.[246]

Again, assume that the prosecution has convincing evidence that the uncharged act was an intentional misdeed by the accused. The rub is that the evidence of the act's intentionality can also be unfairly prejudicial.[247] The more similar the uncharged event is to the alleged charged crime, the greater is the danger that the admission of testimony about the uncharged incident will tempt the jury to engage in improper character reasoning.[248] The similarity heightens the risk that the jury will succumb to simplistic, "[h]e or she did it once, therefore he or she did it again" reasoning.[249] Of course, that was exactly the improper argument that the prosecutor made during summation in *Skillicorn*.[250]

The authorities are legion that when a specific detail about an otherwise admissible event is both unnecessary and prejudicial, the judge has authority under Rule 403 to bar testimony about that detail.[251] Rule 403 accords the judge discretion to exclude an otherwise admissible item of evidence when the accompanying probative dangers substantially

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245. *See* FED. R. EVID. 401.

246. If the only question is the general categorization, strictly speaking claims of accident or criminality are irrelevant even under the liberal standard set out in Federal Rule of Evidence 401. *See id.*

247. The Advisory Committee Note to Federal Rule 403 explains that, in this context, "unfair prejudice" denotes the risk that the jurors will be tempted to decide the case on an improper basis. FED. R. EVID. 403 Advisory Committee's note to 1972 proposed rules. If the jurors hear evidence that the defendant engages in intentional misconduct, there is an obvious risk that they will resort to simplistic, "He did it once, he probably did it again" reasoning. *See Skillicorn*, 479 P.3d at 265. Many of the types of misconduct that courts have deemed most prejudicial in the past are intentional in character. 2 IMWINKELRIED, *supra* note 4, § 8:25, at 126–35.

248. United States v. Asher, 910 F.3d 854, 863 (6th Cir. 2018) ("When jurors hear that a defendant has on earlier occasions committed essentially the same crime as that for which he is on trial, the information unquestionably has a powerful and prejudicial impact. In the instant case, Asher's alleged crime and the prior-act evidence offered by the government were virtually identical, which the government emphasized in closing arguments. 'I'm sure you'll agree that the similarities between the Gary Hill and the Dustin Turner incidents are uncanny . . . .'") (internal citations omitted); United States v. Myles, 96 F.3d 491, 495 (D.C. Cir. 1996) ("The risk of prejudice is exacerbated when the predicate felony is similar to the charges for which the defendant is currently being tried."); United States v. Bermea, 30 F.3d 1539, 1562 (5th Cir. 1994) (resemblance increases the risk of unfair prejudice to the accused); United States v. Sanders, 964 F.2d 295, 297 (4th Cir. 1992) ("[T]hey were extremely prejudicial since they involved the exact type of conduct for which Sanders was on trial."); 2 IMWINKELRIED, *supra* note 4, § 8:25, at 143; Nickolas J. Kyser, *Developments in Evidence of Other Crimes*, 7 U. MICH J.L. REFORM 535, 544 (1974).

249. *See Skillicorn*, 479 P.3d at 263, 264–65.

250. *Id.* at 260 ("[W]hen defendant 'gets angry, he acts out . . . just like he did prior . . . .'").

251. 2 IMWINKELRIED, *supra* note 4, § 8:33, at 183–85 (collecting cases).

outweigh the probative value of the evidence.[252] To be sure, Rule 403 does not authorize the judge to promulgate new categorical exclusionary rules.[253] Rather, the Rule empowers the judge to make limited, fact-specific, ad hoc rulings balancing the probative value of the item of evidence against the attendant probative dangers.[254] Moreover, Rule 403 is biased in favor the admission of logically relevant evidence; the party resisting the admission of the evidence has the burden of convincing the judge that the attendant probative dangers, such as unfair prejudice, outstrip the probative worth of the evidence by a wide margin.[255] However, when a prejudicial detail about an otherwise admissible event is truly unnecessary, the judge can easily find that Rule 403 warrants barring testimony about that detail.[256]

If the judge exercises his or her Rule 403 authority to bar evidence of the intentionality of the uncharged act when testimony about the general type of act is admitted under the doctrine of objective chances, the prosecution will have to develop an alternative, noncharacter theory to justify admitting evidence of the act's intentionality;[257] under the doctrine, the prosecution will have to be content with testimony generally describing the nature or category of the uncharged event.[258] In *Skillicorn*, the prosecution could not identify an alternative theory. Other prosecutors may come face-to-face with the same problem. If they cannot articulate another, noncharacter theory, the jury will hear that another wife of the accused died from poisoning or that on another occasion, the accused was found in possession of counterfeit currency.[259] However, under Rule 403, the jurors may be precluded from hearing prosecution evidence of the intentionality of the uncharged act.

CONCLUSION

It is understandable that there is still some confusion surrounding the doctrine of objective chances. As the Introduction pointed out, in American jurisprudence the doctrine is relatively novel. The 1974 *Woods*

252. FED. R. EVID. 403.

253. Edward J. Imwinkelried, *The Meaning of Probative Value and Prejudice in Federal Rule of Evidence 403: Can Rule 403 Be Used to Resurrect the Common Law of Evidence?*, 41 VAND. L. REV. 879, 881–82 (1988).

254. *See generally id.* (arguing that Federal Rule 402 should be construed as abolishing uncodified exclusionary rules and denying the courts the power to announce categorical rules in the rule; this Article then contends that in order to reconcile Rule 402 with Rule 403, the latter Rule must be construed as authorizing only ad hoc, case- and fact-specific exclusionary rulings).

255. 2 IMWINKELRIED, *supra* note 4, § 8:29, at 164–67 (collecting cases).

256. *See id.* § 8:33, at 183–90 (collecting cases in which the court exercised their Rule 403 power to bar prejudicial details that had little or no relevance).

257. If the prosecution cannot justify introducing the evidence of intentionality under the doctrine of objective chances, Rule 404(b) will come into play a second time in the case; and the prosecution will have to identify a legitimate noncharacter theory. FED. R. EVID. 404(b)(1)–(2).

258. *See* State v. Skillicorn, 479 P.3d 254, 270 (Or. 2021).

259. *See id.* at 270, 272.

decision[260] marked the real entry of the doctrine into American evidence law.[261] Some commentators still question whether the doctrine qualifies as a genuine, noncharacter theory for admitting uncharged misconduct evidence.[262] For that matter, as the Introduction observed, the line between improper character reasoning and legitimate reasoning under the doctrine can be a very thin one.[263] In a 1991 child abuse case, *Estelle v. Maguire*,[264] the prosecution resorted to doctrine of objective chances reasoning.[265] However, the trial judge's instruction blurred the line between that species of reasoning and verboten character reasoning so badly that Justices O'Connor and Stevens expressed the view that there was a due process violation, warranting federal habeas corpus relief.[266]

Although the persistence of some confusion is expected, it is imperative that courts move to eradicate that confusion and clarify the scope of the doctrine. As the Introduction stated, Rule 404(b) is the most cited

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260. United States v. Woods, 484 F.2d 127 (4th Cir. 1973).

261. For a detailed description of the role that *Woods* played in importing the English case law on the doctrine of objective chances into American jurisprudence, see Imwinkelried, *supra* note 46, at 71–72.

262. *See* Steven Goode, *It's Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 756 (2021); Frederic Bloom, *Character Flaws*, 89 U. COLO. L. REV. 1101, 1144, 1149 (2018); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 199–201 (1998); Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1262–64 (1995); Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 781, 784, 799 (1981); Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1081, 1097–98 (2005).

263. The line can be so thin that the judge should admit uncharged misconduct evidence to prove intent only if the intent issue is in genuine dispute at trial. Imwinkelried, *supra* note 49, at 598–601. Suppose that the accused decides to defend solely on the ground that the accused did not commit the charged act. Given that theory of defense, the accused could tender a full, unconditional stipulation that whoever committed the charged act did so with the requisite *mens rea*. That stipulation arguably completely satisfies the prosecution's legitimate evidentiary need. If so, under Federal Rule of Evidence 403, the judge may bar the uncharged misconduct evidence. *See* Old Chief v. United States, 519 U.S. 172, 175, 186, 191–92 (1997).

264. 502 U.S. 62 (1991).

265. *Id.* at 65–71.

266. *Id.* at 78–80 (O'Connor, J., dissenting). The limiting instruction in question had two prongs. The negative prong of the instruction correctly directed the jury that they could not consider the uncharged misconduct evidence "to prove that [the accused] is a person of bad character or that he has a disposition to commit crimes." *Id.* at 75 (majority opinion). However, the affirmative prong was worded vaguely; that wording informed the jury that they could consider the evidence:

> [O]nly for the limited purpose of determining if it tends to show . . . a clear connection between the other two [uncharged] offense[s] and the one of which the Defendant is accused, so that it may be logically concluded that if the Defendant committed the other offenses, he also committed the crime charged in this case.

Id. at 71. As previously stated, the instruction should have directed the jury to focus on the question of the "objective" improbability or implausibility of the accused's innocent involvement in so many similar incidents. Imwinkelried, *supra* note 37, at 878, 879 n.150 (setting out a sample limiting instruction) ("[I]n deciding this case, you may rely on your knowledge of the way things happen in the real world. You may ask yourself: How likely is it that an innocent person would twice be found driving a car containing cocaine in the trunk? Innocent people sometimes find themselves in suspicious circumstances. However, use your common sense and decide whether it is likely that that would happen to an innocent person twice.").

provision in the Federal Rules of Evidence.[267] Today, the most common use of Rule 404(b) evidence is to prove intent;[268] and most jurisdictions now recognize the doctrine of objective chances as a legitimate noncharacter theory under Rule 404(b).[269] Given those realities, the uncertainty is no longer tolerable.

Of course, courts should not unduly expand the doctrine or apply its requirements loosely. In the past, even when the doctrine was the only conceivable theory capable of justifying the admission of uncharged misconduct evidence to prove intent, the courts often made no mention or short shrift of the requirement that the prosecution establish a baseline frequency for innocent involvement in the type of event or circumstances present in the case.[270] However, neither should the courts illiberally narrow the scope of the doctrine. This Article has argued that, in particular, courts should not declare that in deciding whether there is the required apparent extraordinary coincidence, the judge may consider an uncharged incident only when the accused has claimed that the incident was accidental in character.

As previously stated, in *Skillicorn*, the Oregon Supreme Court quite correctly concluded that the accused's conviction should be reversed. The prosecution argued the doctrine of objective chances as a basis for upholding the conviction, but there were serious weaknesses in that argument. To begin, the defense had a tenable argument that the charged and uncharged incidents were too dissimilar.[271] In the charged incidents, the accused had caused property damage by colliding the vehicle with two parked cars.[272] In the uncharged incident, he appeared to have merely sped and lost control of the vehicle.[273] Those are two very different types of events with different legal consequences. Moreover, in closing argument, the prosecution clearly stepped over the line. Rather than inviting the jury to consider the "objective" improbability or implausibility of so many supposedly similar incidents, the prosecutor resorted to forbidden character reasoning; in so many words, the prosecutor told the jury that they should conclude that on the charged occasion on November 7 he lost control of his emotions when he became angry because he had done the very same thing before on September 14.[274]

The court could have terminated its decision there. However, the court went further. It is true that the court did not explicitly approve of the *Tena* dictum or announce an invariable requirement that the accused

267. *See supra* notes 26–28 and accompanying text.
268. *See supra* note 33 and accompanying text.
269. *See supra* note 48 and accompanying text.
270. *See generally* Imwinkelried, *supra* note 37, at 854, 856–57, 863–64, 870–71.
271. *See supra* notes 139, 148–51 and accompanying text.
272. State v. Skillicorn, 479 P.3d 254, 258 (Or. 2021).
273. *Id.* at 258–60.
274. *Id.* at 260.

must claim that the uncharged incident was accidental. Nevertheless, the court used broad language that comes close to endorsing the *Tena* dictum that the judge may not even consider an uncharged incident unless the accused has expressly claimed that the incident was accidental.[275] That precise issue has attracted little attention in the past, and worse, literature that touches on the doctrine of objective chances contains loose, vague language on the issue.[276]

Fortunately, the *Skillicorn* court has now elevated the visibility of that issue, and hopefully the end result will be a sensible clarification of the issue. This Article argues that the clarification should take the form of an announcement that the judge may consider the uncharged incident even absent a claim of accident. Neither lay logic, statistical logic, nor criminal justice policy favors the limitation embodied in the *Tena* dictum. Thus, without making a prior assumption about the winner's intent at the time of either win, a layperson may rationally conclude that after a second lottery victory the winner should be investigated. Similarly, without positing a prior assumption about the accused's intent, a judge may properly consider a second, uncharged lottery win in deciding whether to invoke the doctrine of objective chances against an accused charged with winning the first lottery by cheating.

275. *Id.* at 268–71. The court makes several references to an accused's "claim" of successive accidents, "where a person claims that [all] events were caused by accident," in the discussion of a theft hypothetical the court states that it would be improper to consider prior thefts because they "were intentional," the court refers to "purportedly accidental [events]" and the significance of "[a] claim that the defendant's prior assault was accidental." *Id.*

276. *Id.* at 268 (quoting 1 IMWINKELRIED, *supra* note 4, § 5:8, at 5-36 ("[T]he defendant's claim of 'successive similar' innocent acts.").