AUTHOR'S INTRODUCTION TO THE 2025–2026 EDITION

In the past year cases involving the uncharged misconduct doctrine made headlines. Perhaps the most notable illustrations were the Weinstein,Trump, and R. Kelly cases cases. As last year's supplement noted, in early 2024 the New York Court of Appeals reversed Harvey Weinstein's conviction for sexual assault. People v. Weinstein, 42 N.Y.3d 439, 248 N.E.3d 691, 223 N.Y.S.3d 531 (Ct.App. 2024). At trial, the judge had permitted the prosecution to introduce the testimony of three women about similar assaults by Weinstein. By a 4-3 vote, the court concluded that the testimony did not possess non-character relevance on either consent or lack of mistake as to consent. New York has not enacted rape sword legislation such as Federal Rules 413-15. After the reversal the Manhattan District Attorney's Office announced its intent to retry Weinstein. Moreover, the office indicated that they hoped to consolidate two sex crime cases against Weinstein into a single trial. Marcelo, NY Prosecutors Want to Combine Harvey Weinstein's Criminal Cases into a Single Trial, U.S. News (Oct. 11, 2024). Weinstein's defense attorneys are opposing the motion and arguing that charges should be severed. The defense contends that the evidence in the two cases is not cross-admissible and that the testimony in each case lacks non-character relevance in the other cases.

At the very end of 2024, a panel of the Court of Appeals for the Second Circuit handed down its decision in Carroll v. Trump, 124 F.4th 140 (2d Cir. 2024). The court upheld the trial judge's decision to admit evidence under Rule 415 that President trumped had groped one woman, kissed another woman without her consent, and made the infamous remarks recorded on the "Access Hollywood" tape. Significantly, the court ruled that the evidence was admissible on both Ms. Carroll's defamation claim and her sexual assault claim. The court reasoned that Rule 415 authorized the receipt of the evidence because Ms. Carroll had to prove the assault in order to establish defamation; in the words of Rule 415(a), the defamation claim "involve[ed] a claim for relief based on a

party's alleged sexual assault . . . ." In 2025, the Second Circuit denied a request for an en banc rehearing. 2025 WL 1668820, 2025 U.S.App.LEXIS 14606 (2d Cir. June 13, 2025). Two judges dissented from the denial and filed an opinion challenging the panel's interpretation of Rule 415.

In early 2025 in United States v. Kelly, 128 F.4th 387 (2d Cir. 2025), the same Court of Appeals affirmed the conviction of R. Kelly, the recording artist and singer. In its opinion, the court affirmed several trial judge rulings admitting uncharged misconduct evidence. The court upheld the introduction of some extremely disturbing evidence, including videos and recordings, in order to: prove the existence of the defendant's alleged racketeering enterprise, demonstrate his control over his victims, and establish his motive to bribe public officials.

Quite apart from the cases in the headlines, the past year witnessed the rendition of several other cases making significant announcements about the doctrine There were also a number of recent articles containing useful insights into the doctrine.

- Section 1.6 of this treatise deals with the admissibility of uncharged misconduct during pretrial and posttrial proceedings such as sentencing. In Commonwealth v. Berry, 323 A.3d 641 (Pa. 2024), the Pennsylvania Supreme Court addressed the question of the introduction of testimony about a defendant's prior arrests during sentencing. The court held that the prosecution may not introduce evidence of a defendant's arrest history during sentencing unless there is additional evidence to substantiate the offense that the defendant was arrested for. The court stated that without more, a defendant's prior arrest has insufficient probative value to establish a defendant's likelihood of recidivism.
- Section 2:5 discusses the question of the interpretation of "person" in Rule 404(b). The term is certainly expansive enough to apply to third persons other than the defendant. If so, the restrictions applicable when the prosecution offers the defendant's uncharged misdeeds also apply when the defense attempts to introduce the uncharged misdeeds of a third party whom the defense claims is the real perpetrator. Despite the breadth of the Rule's wording, Pittman v. State, 318 Ga. 819, 826 n. 5, 901 S.E.2d 90 n. 5 (2024) points out that the federal decisions are in conflict over

this question. In a dissent in Burrell v. State, 332 A.3d 412 (Del. 2024), Justice Valihura argues that it makes sense to admit defense testimony about alternative suspects more liberally. Citing this treatise, he contends that evidence of a third party perpetrator presents much less risk of a decision on an improper basis.

- Section 2:5 addresses the question of whether the person must be the accused or at least a party to the litigation. In Stereotypes as Character Evidence, 77 Stan.L.Rev. 89 (2025), Professor Hilel Bavli explains why base rate information can present character evidence problems. He distinguishes among three types of base rate information: (1) information about non-behavioral propensities such as DNA population statistics, frequencies of fingermark patterns, and disease incidences to prove causation in toxic tort cases; (2) information about non-character behavioral propensities such as base rates for skills; and (3) predictive character evidence. He argues that the latter can pose character issues. The presentation of such evidence is based on a comparison between a subpopulation of persons who have a certain feature or features and a person such as a defendant who possesses the same feature or features. For example, a prosecutor might offer evidence that drug mules smuggling drugs across the board ordinarily possess certain characteristics and that the defendant has the same characteristics. In the past, most courts have overlooked the character issue posed by such base rate evidence and instead analyzed the proffers under provisions such as Rules 401-03 and 702. Professor Bavli points out that in many cases predictive character evidence is both relevant and reliable. He contends that in these situations, the courts should recognize and sustain a character evidence objection.
- Section 2:9 relates to the measure of proof for establishing that the act occurred and the person committed the act. In Carroll v. Trump, supra, the Court of Appeals for the Second Circuit holds that whether the act is offered under Rule 404(b) or a rape sword provision, Rule 104(b) and Huddleston control.
- Section 2:11 turns to the question of whether the testimony relates to an act "other" than the charged act. The courts continue to struggle with the definition of conduct that is "intrinsic" to the charged offense. State v. Taylor, 372 Or. 536, 551 P.3d 924 (2024) illustrates one approach. Taylor was charged with sexual

abuse by making unpermitted conduct with a woman who was studying alone in a library. The trial judge permitted the prosecution to introduce security video footage showing that only minutes before the charged incident, the defendant had attempted to sit next to another woman in the library and encroach on her space in a similar manner until she got up and left. The concurring opinion criticizes the alternative res gestae and "completing the story" theories.

- In Taylor, the prosecution could have introduced testimony about the charged offense without mentioning the prior incident. On the facts of the case, U.S. v. Myricks, 2024 WL 3326019 (6th Cir. July 8, 2024) takes a somewhat more restrictive approach to defining "intrinsic" evidence. In Myricks, the defendant was charged with wire fraud, inflating the amounts she was entitled to receive from Great Trades, an organization that offered educational resources to students seeking to learn investing and finance skills. The trial judge permitted the prosecution to introduce evidence of false statements the defendant had made to public assistance agencies. The court rejected the prosecution argument that the uncharged misconduct was intrinsic to the charge. The court observed that the evidence of the charged crime could "stand alone, independent of her submissions to the public assistance agencies." U.S. v. Gallegos, 114 F.4th 1068 (10th Cir. Aug. 5, 2024) declares that evidence of uncharged misconduct may be deemed intrinsic "'when a witness's testimony [about the charged offense] would have been confusing and incomplete without mention of the prior act." Those problems are absent when the evidence of the charged crime can "stand alone."
- Section 2:36 deals with the rape sword provisions, Rules 413-15. In Carroll v. Trump, supra, a panel of the Court of Appeals for the Second Circuit stated that the question is not whether the defendant has committed a federal crime. Rather, the issue is whether they have committed an act which would be a crime under federal law; it is immaterial whether the act was subject to state jurisdiction rather than federal jurisdiction. As previously stated, after the panel's 2024 opinion, in 2025 the Second Circuit declined to rehear the case. However, two judges dissented from the denial. They pointed out that Rule 415 draws on Rule 413(d)'s listing of covered acts, and they argued that the panel had misconstrued Rule 413(d). In particular,

they contended that the panel erred by not limiting the misconduct to violations of statutes that criminalize conduct constitutive of sexual assault and by employing a "freestanding" notion of criminal attempt, which went beyond either federal or Florida law.

- Sections 3:4–3:5 take up the topic of consciousness of guilt evidence. Gallegos, supra, states that "'flight evidence carries with it a strong presumption of admissibility." The court adds that conduct may be characterized as "consciousness of guilt" evidence so long as consciousness of guilt is "a 'pemissible' inference . . . ." from the conduct. The court rejects the position that consciousness of guilt evidence is admissible only when consciousness is the " 'only possible explanation . . . .' "
- Streets, Must We All be Bold as Lions? Unfair Prejudice from Evidence of Flight and Alternative Standards, 84 Mont.L.Rev. 343 (2023) surveys the federal and state case law on the admissibility of flight evidence. The article points out that many minority citizens have such a negative perception of the police that they might flee even when they are completely innocent. Therefore, contrary to Gallegos, the article contends that "flight evidence [should] only be admissible when there is only one reasonable explanation for the conduct—criminal consciousness of guilt."
- People v. Bolourchi, 103 Cal.App.5th 243, 325 Cal.Rptr.3d 3 (2024) and People v. Montoya, 546 P.3d 605 (Colo. 2024) both deal with the issue in the context of drunk driving prosecutions. In both cases, the court rules that when a defendant refuses to consent to testing in violation of the implied consent laws, the refusal is admissible evidence of consciousness of guilt. However, Bolourchi adds the qualification that the refusal is inadmissible if the defendant had a statutory right to refuse the particular test. For its part, the Colorado court adds that if the prosecution introduces evidence of a refusal, the defense may introduce evidence that the defendant later recanted and consented to testing.
- Several sections of Chapter 4 address the doctrine of objective chances. Those sections of this edition now cite a September 2022 publication of the Royal Statistical Society, Healthcare Serial Killer or Coincidence: Statistical Issues in Investigation of Suspected Medical Misconduct. The report discusses the statistical

analysis of a cluster of deaths involving a particular physician or nurse. Appendix 2 of the report clarifies the type of statistic that an expert witness might testify to. The appendix distinguishes between (a) the probability that an investigator would find certain evidence if an hypothesis is true and (b) the probability that given the evidence, the hypothesis is true. Although those two probabilities may sound alike, they are fundamentally different. A simple example will suffice. If the hypothesis is that an animal is a horse, the probability of finding evidence of four legs is almost 1.0 (100%). Contrast the probability of the hypothesis that the animal is a horse given evidence that the animal has four legs. That probability is a fraction of 1%, since so many types of animals have four legs. The moral is that even if the judge admits testimony about the uncharged incidents under the doctrine of chances, the prosecution witness should not be permitted to misstate the statistical inference from the testimony.

- In United States v. Kelly, supra, the court upheld the admission of uncharged misconduct evidence in order to establish the existence of the defendant's alleged racketeering enterprise and "the means and methods" he used to operate the enterprise.
- While the focus of Chapter 4 is proof of the actual reus, Chapter 5 turns to proof of mens rea. The topic of § 5:22 is proof of intent to distribute. Some courts have balked at allowing the prosecution to draw that inference for one type of drug from dealings involving another type of drug. Other courts hesitate when the uncharged incident involves a very small amount of drugs suitable only for personal use. However, U.S. v. Robinson, 2024 WL 4691101 (11th Cir. Nov. 6, 2024) emphatically adopts a different view. The court declares that "[r]egardless of drug type or quantity, Robinson's pattern of drug distribution speaks directly to his intent and knowledge in the charged offense."
- The primary focus of Chapter 1-6 is criminal litigation. However, the courts are increasingly invoking Rule 404(b) in civil actions. Although the courts applying 404(b) are generally not as restrictive as the courts were at common law, some limits remain.
- Section 7:12 deals with proof of tortious intent. In Jackson v. Esser, 105 F.4th 948 (7th Cir. 2024), a prisoner sued a prison guard lieutenant under 42 U.S.C. § 1983. The prisoner alleged that the guard in

question had intentionally denied him access to water by placing him a cell without running water for five days and denied him medical care for dehydration. The plaintiff attempted to introduce testimony about another incident in which the same guard had water shut off to a prisoner's cell to remove excess property and then failed to have the water turned back on. The court held that the testimony was inadmissible because "there was no evidence that Lt. Esser's failure to turn the water on was not a mistake."

- While § 7:12 deals with intentional torts, § 7:15 relates to negligence actions. In Tuite v. Carnival Corp., 713 F.Supp.3d 1338 (S.D.Fla. 2024), the plaintiff was a passenger on a cruise. The plaintiff alleged that the cruise line negligently maintained a raised metal threshold in the dining area and that that negligence caused the plaintiff to sustain personal injuries when the plaintiff tripped and fell. The plaintiff attempted to introduce testimony about (a) another passenger's prior trip-and-fall and (b) a stumble by the passenger's traveling companion in the area of the threshold. The court rigorously enforced the "substantially similar" doctrine. Initially, the court excluded the testimony about the other passenger because the witness to that incident could see what caused the passenger to trip. The court also barred the testimony about the companion's stumble because the companion never fell and did not report the incident to the cruise line.
- Section 7:29 deals with the all important topic of damages. A.H. v. Tamalpais Union High School Dist., 105 Cal.App.5th 340, 325 Cal.Rptr.3d 800 (2024) endorsed a novel theory for admitting evidence of a party's uncharged misconduct to prove damages. In the case, a former high school student alleged that as a result of the school district's negligence supervision, a tennis coach was able to abuse a student. The court upheld the admission of evidence of the coach's conviction of molesting children years after the termination of his employment with the district. The court reasoned that the publicity for the subsequent conviction caused the plaintiff to think about the earlier abuse again.
- Chapter 8 deals with the legal irrelevance limitations largely imposed by Federal Rule of Evidence 403. Under Rule 403, on an ad hoc basis the judge balances the probative value of the item of evidence against the attendant probative dangers.
- Under Rule 403, one of the factors the judge considers in assessing the extent of the probative value is

remoteness in time. That is the subject of § 8:8. As that section points out, as a general proposition once the time lapse exceeds multiple decades, the courts are usually inclined to exclude. However, State v. Smith, 698 S.W.3d 798 (Mo.Ct.App. 2024) holds that a 30 year gap did not dictate the conclusion that the uncharged incident was inadmissible. Smith was charged with statutory rape. The court ruled the evidence admissible because the charged and uncharged incidents involved similar acts, the victims' ages at the time of the incidents were similar, and both victims stood in a similar relationship to the defendant.

- As previously stated, under Rule 403 the judge balances probative value against probative dangers such as prejudice that can tempt the jury to decide the case on an improper basis. Sections 8:24–8:25 review the case law on prejudice. Many courts have acknowledged that gang evidence can generate such prejudice. Hooker, Beyond an Unreasonable Inference: Introduction of Gang Evidence and Implicit Bias in Oregon Criminal Courts, 102 Or.L.Rev. 211 (2023) asserts that gang evidence can be especially prejudicial because it can trigger racial bias. The article goes to the length of contending that when the uncharged misconduct takes the form of gang evidence, as a matter of policy the normal Rule 403 balancing test ought to be reversed and the prosecution should be obliged to convince the judge that the probative value of the testimony outstrips the risk of prejudice.
- Chapter 9 surveys the procedural issues related to the admission of uncharged misconduct evidence. Section 9:4 relates to motion to sever charges. The California legislature recently enacted legislation granting defendants a right to bifurcate when the charging document includes a gang enhancement. In People v. Burgos, 16 Cal.5th 1, 548 P.3d 1024, 321 Cal.Rptr.3d 377 (2024), the court's opinion clearly indicates that the court understands and appreciates the policy considerations that motivated the legislature to adopt the Penal Code amendment. However, the court rules that the legislation is not retroactive.
- The topic of § 9:6 is motions to sever defendants' trials. U.S. v. Green, 114 F.4th 163 (3d Cir. 2024) rules on such a motion. The court frankly observes that "motions to sever predicated on prejudicial joint trials are frequently made and infrequently granted." The court quotes a Seventh Circuit opinion, U.S. v. Shively, 715

F.2d 260, 267 (7th Cir. 1983) to the effect that "'[s]everance is argued in almost every case where there are multiple defendants, and appellate courts give the argument short shrift, regarding it as a matter within the discretion of the trial judge.' " However, the Green court cautions that "the mere rarity of the argument's success does not eviscerate the Fifth Amendment's guarantee of a fair trial." The court identifies several situations in which severance is warranted. Yet, in Green, although some evidence admitted against Green's codefendant "would be entirely inadmissible in a solo trial of Green," the court found that the trial judge had not abused discretion in denying the severance motion.

- In contrast, in U.S. v. Spivak, 735 F.Supp.3d 902 (N.D.Ohio 2024), the court was so concerned that the complexity of the case, especially the obstruction counts, might "color" all the co-defendants that the court ordered a three-phase trial to help the jury keep the defendants and charges separate in their minds.
- On the same topic, U.S. v. Armenta, 2024 WL 4784958 (10th Cir. Nov. 14, 2024) comments that that court has tended to rule that spillover evidence does not necessitate severance when the evidence "does not directly relate to the elements of the . . . crime" the moving defendant is charged with.
- Chapter 10 lists many of the constitutional constraints on uncharged misconduct evidence. Section 10:18 discusses due process constraints on the introduction of uncharged misconduct that is marginally relevant and highly prejudicial evidence. Miller, A Constitutional Right to Exclude Evidence, 12 Tex. A. & M. L.Rev. 317 (2024) is an excellent discussion of the due process doctrine.
- Section 10:51 considers the situation in which the defense offers evidence of a third party's misdeeds on the theory that the testimony shows that the third party is the perpetrator of the crime that the defendant is charged with. In Bradford v. Paramo, 100 F.4th 1088 (9th Cir. 2024), the court granted a petitioner habeas corpus relief. The court concluded that a state court ruling excluding such testimony had violated the defendant's constitutional right to present a complete defense.
- State ex rel. Bailey v. Horsman, 2024 WL 4536351 (Mo.Ct.App. Oct. 22, 2024) increases the defendant's

ability to mount a claim that a third party was the perpetrator. The court ruled that evidence showing an alternative suspect is subject to the prosecution's Brady disclosure obligations.

As in the past, we invite any reader to submit questions or comments. If you encounter a new uncharged misconduct issue, please feel free to contact either of us directly. If we only read the advance sheets, we are years behind the cutting-edge issues in the courtroom. We are delighted when someone alerts us to a novel issue on the horizon that has not yet surfaced in any published opinion. Professor Imwinkelried's cellphone number is (530) 400-9648, and his email address is ejimwinkelried@ucdavis.edu. Professor Lave's phone number is (858) 699-5344, and her email address is tlave@law.miami.edu. We greatly appreciate your help.

Edward J. Imwinkelried

Davis, California

Tamara Lave

Miami, Florida

December 2025