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THE WORST SURPRISE OF ALL: NO RIGHT TO PRETRIAL DISCOVERY OF THE PROSECUTION’S UNCHARGED MISCONDUCT EVIDENCE

EDWARD J. IMWINKELRIED*

INTRODUCTION**

TWO of the most celebrated criminal trials of this decade have been the prosecution of Wayne Williams in Atlanta, Georgia1 and the case of Claus von Bulow in Newport, Rhode Island.2 Williams was charged with the murders of Nathaniel Carter and Jimmy Ray Payne, and the prosecution in the latter case alleged that von Bulow attempted to kill his millionaire wife, Martha. Though the trials were held miles apart and involved defendants with radically different backgrounds, the trials shared a common denominator: in both trials, the key prosecution evidence was uncharged misconduct—evidence of misdeeds by the defendant other than the crime for which the defendant was being tried.3

One of the turning points in the Williams case occurred when the trial judge decided to admit prosecution evidence of ten other homicides supposedly linked to Williams.4 Williams never was formally charged with any of those killings.5 Similarly, in the von Bulow case, the most dramatic prosecution evidence was the testimony of Mrs. Isles, the alleged lover of von Bulow. On the witness stand, she described her romantic involvement with the defendant—the romance that the prosecution contended supplied the motive for murder.6 Adultery was not included in the indict-

** The general subject of uncharged misconduct evidence is examined extensively in, E. Imwinkelried, Uncharged Misconduct Evidence (1984), published by Callaghan & Co., 155 Phingsten Road, Deerfield, IL 60015. The following Introduction summarizes relevant portions of that treatise.

3. “Uncharged” denotes only that the misdeed is not the crime specified in the current indictment or information against the defendant. E. Imwinkelried, Uncharged Misconduct Evidence § 2:10, at 28 (1984) [hereinafter Imwinkelried I]. The defendant may have been convicted of that crime in an earlier proceeding. In the instant trial, the prosecutor may use the earlier conviction as evidence of the defendant’s commission of the earlier act. Id. at § 2:09, at 26.
5. Id. at 755, 312 S.E.2d at 51.
ment of Claus von Bulow.  

It is not unusual that the judges in Williams and von Bulow admitted evidence of the defendants' other alleged misdeeds, despite the fact that the accusatory pleadings filed against Williams and von Bulow made no mention of those misdeeds. The evidence law in every American jurisdiction authorizes the receipt into evidence of a party's uncharged misconduct.  

Federal Rule of Evidence 404(b), which represents the governing doctrine, states that

\[\text{[evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.}^{9}\]

On the one hand, this doctrine forbids the prosecution from using a defendant's other crimes as evidence of bad character. The prosecution may not imply immoral, law-breaking character from the defendant's other crimes and then simplistically argue that the defendant's bad character increases the probability that the defendant committed the act alleged in the indictment or information.  

On the other hand, the prosecution may offer evidence of the defendant's uncharged crimes if the crimes logically are relevant to the case on a noncharacter theory.  

In Williams, the prosecution contended that all twelve killings evidenced a plan showing Williams' identity as the perpetrator of the two charged murders.  

In von Bulow, the prosecution relied on a motive theory of relevance.  

The conviction in the Williams case and the guilty verdict in the first von Bulow trial illustrate the impact that uncharged misconduct evidence can have on a jury. Experienced trial attorneys know that the judge's decision on the admission of uncharged misconduct can be the pivotal ruling in a prosecution.  

Veteran defense attorneys often plan

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7. See id. at 999.


10. See Gold, Limiting Judicial Discretion to Exclude Prejudicial Evidence, 18 U.C. Davis L. Rev. 59, 68-69 (1984) ("[E]vidence that the defendant in a criminal prosecution has a prior conviction may induce the jury to use the commonly held bias that a person previously convicted of a crime is dispositionally inclined toward repeated criminal behavior.").


15. See Carter, The Admissibility of Evidence of Similar Facts II, 70 L.Q. Rev. 214,
their trial strategy to avoid the admission of uncharged misconduct evidence. One commentator has dubbed this species of evidence the “Prosecutor’s Delight.”

It is understandable that prosecutors delight in offering uncharged misconduct against a defendant; both the empirical studies and the cases show that the admission of uncharged misconduct can have a devastating effect on the defense. The available research data indicate that uncharged misconduct evidence can sway the juror. A study at the London School of Economics demonstrated that the admission of a defendant’s uncharged crimes significantly increases the likelihood of a finding of guilt. The Chicago Jury Project reached the same conclusion. The Chicago researchers concluded that, as a practical matter, the presumption of innocence operates only for defendants without prior criminal records. Uncharged misconduct evidence effectively strips the defendant of the presumption of innocence. If the judge admits a defendant’s other crimes and the jury thereby learns of the defendant’s prior record, the jury probably will adopt a “different . . . calculus of probabilities” in deciding whether to convict. The most recent study, conducted under the auspices of the National Science Foundation Law and Social Science Program, found that, although persons frequently disagree in their estimation of the prejudicial effect of evidence, “the greatest agreement . . . is found in connection with evidence suggesting [other] immoral conduct

215 (1954) (admission of uncharged misconduct evidence “often virtually decisive of the whole case”).

16. See Gregg, Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses, 6 Ariz. L. Rev. 212, 218 (1965) (“[T]he fact that lawyers often shape their entire trial strategy to avoid admission of these other offenses is indicative that experience has shown the grave danger to the defendant of such evidence.”).

17. See Comment, Exclusion of Prior Acquittals: An Attack on the “Prosecutor’s Delight,” 21 UCLA L. Rev. 892, 895-96 (1974) (characterized as “Prosecutor’s Delight” because evidence of prior acts almost always will be admissible through one of the numerous exceptions to exclusionary rule).


19. See H. Kalven, Jr. & H. Zeisel, The American Jury 161 (1966) (“[I]f we take the average of the cases where the defendant has no record as against the cases where he has a record, the acquittal record declines from 42 to 25 percent.”) [hereinafter Kalven & Zeisel]; Note, Other Crimes at Trial: Of Balancing and Other Matters, 70 Yale L.J. 763, 777 (1961) (“[J]urors almost universally used defendant’s record to conclude that he was a bad man and hence was more likely than not guilty of the crime for which he was then standing trial.” (quoting letter from Dale W. Broeder, Associate Professor, University of Nebraska College of Law, on file in Yale Law Library)).

20. See Kalven & Zeisel, supra note 19, at 179.


22. See Kalven & Zeisel, supra note 19, at 179.

by the defendant." The subjects in the study consistently rated uncharged misconduct evidence as highly prejudicial.

The judiciary also appreciates the importance of uncharged misconduct evidence. The California Supreme Court has asserted that uncharged misconduct is "the most prejudicial evidence imaginable against an accused." Some appellate courts believe that this type of evidence is so virulent that a finding of erroneous admission at trial constitutes presumptive harmful error. In a 1986 decision, a panel of the Court of Appeals for the Sixth Circuit held that if the trial judge errs in admitting uncharged misconduct evidence, the burden rests on the prosecution to show that the error was harmless beyond a reasonable doubt. There can be little question that uncharged misconduct is extraordinarily potent prosecution evidence.

One of the essential functions of the criminal discovery system is to give the defense a fair opportunity to prepare to meet the prosecution's evidence. Although the scope of criminal discovery in America still seems narrower than the scope of discovery in other countries, our criminal discovery system has made great forward strides in recent years.

The early English common law granted defendants virtually no discovery rights, and the American courts followed that view well into the

24. See id. at 1162.
25. See id.
28. See United States v. Huddleston, 802 F.2d 874, 877 (6th Cir. 1986), vacated, 811 F.2d 974 (6th Cir.) (per curiam), aff'd 56 U.S.L.W. 4363 (U.S. May 3, 1988). The majority so held over a vigorous dissent that the harmless beyond a reasonable doubt standard should be reserved for constitutional errors. See id. at 881.
30. The generalization often is made that the scope of criminal discovery is broader in countries such as Scotland, Canada and England. See id. at 493-94; Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth?, 1963 Wash. U.L.Q. 279, 293. Numerous articles contain statements that the scope of criminal discovery in England is particularly broad. See id. at 293; Everett, supra note 29, at 493; Krantz, Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice, 42 Neb. L. Rev. 127, 139 (1963); Louisell, Criminal Discovery: Dilemma Real or Apparent?, 49 Calif. L. Rev. 56, 64-65 (1961) [hereinafter Louisell I]. These latter statements, however, are misleading. The Crown Court permits broad discovery, but discovery in the magistrates' courts is far more limited. Feeney, Advance Disclosure of the Prosecution Case, in Managing Criminal Justice: A Collection of Papers 94, 95-96 (D. Moxon ed. 1985); Baldwin & Feeney, Defence Disclosure in the Magistrates' Courts, 1986 Mod. L. Rev. 593, 599.
32. See Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev. 293, 294-95 (1960); Krantz, supra note 30, at 128 (discussing Rex v. Holland, 4 Durn. & E.
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Since World War II, however, the proponents of expanded discovery have made remarkable progress, and the undeniable trend has been toward more liberal discovery. For example, in modern federal criminal practice, the defendant has a right to pretrial discovery of his or her confessions and convictions, as well as reports of scientific analyses of physical evidence in the case.

Ironically, despite the great progress in expanding criminal discovery, in most jurisdictions the defendant has no right to discover the prosecution's uncharged misconduct evidence. The defendant's inability to force pretrial revelation of that evidence represents a major gap in the criminal discovery system. As discussed above, testimony about a defendant's other crimes is one of the most damaging types of evidence available to the prosecution. Further, since by definition the uncharged crime is not mentioned in the indictment or information, a grave danger exists that the defense attorney will be surprised when the prosecution offers the evidence at trial. Thus, the defense counsel may be completely unprepared to meet the prosecution's most damning evidence.

It is clear that the defendant has no common law right to pretrial discovery of uncharged misconduct evidence. Similarly, the courts have

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been unwilling to construe any of the discovery provisions of the Federal Rules of Criminal Procedure—Rules 7, 12, 16(a)(1)(B),

845-46 (1976) (after reviewing a survey of United States Attorneys' voluntary decisions, commentator concluded "[s]uch a system of informal pretrial discovery appears arbitrary and capricious"). Further, many prosecutors reveal the evidence only when it is so strong that it is likely to induce a guilty plea. See Traynor, _Ground Lost and Found in Criminal Discovery_, 39 N.Y.U. L. Rev. 228, 237 (1964); Note, _supra_, at 845-46. The defense, however, needs discovery precisely when the evidence is weak or debatable. Disclosure under these circumstances will enable the defense to conduct a pretrial investigation to generate testimony to rebut the prosecution evidence at trial.

The judge, in his or her discretion, might order pretrial disclosure. Judges possess inherent power to order discovery that is not expressly authorized by statute or court rule. See Brennan, _supra_ note 30, at 293 n.45; Hewitt & Bell, _Beyond Rule 16: The Inherent Power of the Federal Court to Order Pretrial Discovery in Criminal Cases_, 7 U.S.F. L. Rev. 233, 240-43 (1973); Traynor, _supra_, at 231, 240, 242. Nearly all jurisdictions recognize this power, see United States v. Gallo, 654 F. Supp. 463, 471 (E.D.N.Y. 1987); Krantz, _supra_ note 30, at 147, and the Advisory Committee Note to the 1974 amendments of Federal Rule of Criminal Procedure 16 acknowledges it as well. Fed. R. Crim. P. 16 advisory committee note. As Judge Kaufman has noted, judges must exercise their power when the discovery authorized by statute and court rule falls below the constitutional minimum. See Fletcher, _supra_ note 32, at 322 n.105. The courts, however, have recognized an extensive power to authorize discovery in the interests of justice, even when discovery is not constitutionally mandated. See United States v. Campagnuolo, 592 F.2d 852, 857 n.2 (5th Cir. 1979); United States v. Germain, 411 F. Supp. 719, 725 (S.D. Ohio 1975).

Although the consensus is that the inherent power exists, the power does not guarantee defendants pretrial discovery of uncharged misconduct evidence. The judge's discretion allows him or her to exercise the power or to decline to do so. See United States v. Germain, 411 F. Supp. 719, 725 (S.D. Ohio 1975). Moreover, judges are reluctant to exercise the power to grant discovery. The reluctance stems from Congress' response to Jencks v. United States, 353 U.S. 657 (1957). See Traynor, _supra_, at 240. In that decision, rendered June 3, 1957, the Supreme Court recognized the inherent power to permit discovery not explicitly authorized by the federal rules. See Jencks v. United States, 353 U.S. 657, 668-69 (1957). Congress reacted swiftly and decisively. The _Jencks_ decision so upset Congress that by September 2 of the same year, it passed legislation that effectively overruled the decision. See 18 U.S.C. § 3500 (1982); Louisell I, _supra_ note 30, at 73; Krantz, _supra_ note 30, at 142-43. In the wake of the congressional reaction to _Jencks_, the lower courts understandably have been reluctant to exercise their inherent power to compel discovery. See Goldstein, _The State and the Accused: Balance of Advantage in Criminal Procedure_, 69 Yale L.J. 1149, 1182 (1960); Traynor, _supra_, at 240-41 (citing illustrative cases).

42. Federal Rule of Criminal Procedure 7(f) sanctions bills of particulars. Fed. R. Crim. P. 7(f). Bills suffer from several limitations. One limitation is that the grant of a bill is highly discretionary. See United States v. Eyerman, 660 F. Supp. 775, 778 (S.D.N.Y. 1987); Goldstein, _supra_ note 41, at 1176. In addition, the courts have developed the rule that a defendant may not employ a bill to obtain "evidentiary" matter. See United States v. Eymaran, 660 F. Supp. 775, 778 (S.D.N.Y. 1987); 2 W. LaFave & J. Israel, Criminal Procedure § 19.2, at 460 (1984); Goldstein, _supra_ note 41, at 1176; Norton, _supra_ note 32, at 27; Traynor, _supra_ note 41, at 233. As a result, bills seldom are granted. See Goldstein, _supra_ note 41, at 1176; Louisell I, _supra_ note 30, at 68. A bill of particulars thus offers little assistance to a defendant attempting to discover prosecution evidence such as testimony about uncharged misconduct. See Louisell I, _supra_ note 30, at 68.

43. Rule 12 governs the procedures for pretrial hearings and motions. Fed. R. Crim. P. 12. The judge can dispose of pretrial discovery motions at the pretrial hearing. Conceivably, the judge could exercise the inherent power discussed _supra_ note 41 to order the revelation of the prosecution's uncharged misconduct evidence at the hearing. See
16(a)(1)(C), 45 and 17 46—as creating the right. It is true that the courts'

United States v. Anderson, 799 F.2d 1438, 1440 (11th Cir. 1986) (trial judge not prevented from ordering disclosure of similar acts evidence), cert. denied, 107 S. Ct. 1567 (1987). Rule 12, however, cannot be interpreted as according the defendant a right to the discovery of such evidence. As this Article establishes later, the courts have refused to construe Rule 16 as creating that right. See infra text accompanying notes 41-50. Rule 12's discovery provisions incorporate Rule 16's limitations by reference. Rule 12(b)(4) refers to "[r]equests for discovery under Rule 16," Fed. R. Crim. P. 12(b)(4), and Rule 12(d)(2) alludes to "evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16." Fed. R. Crim. P. 12(d)(2). The courts reason that if no right to discovery exists under Rule 16, a fortiori, no right exists under Rule 12. See United States v. Payden, 613 F. Supp. 800, 820 (S.D.N.Y. 1985) (Rule 12(d)(2) intended to enable defendant to file motion to suppress, not to provide him with information undiscoverable under Rule 16); United States v. Climatemp, 482 F. Supp. 376, 391 (N.D. IM. 1979) (motion to discover Rule 16 information pursuant to Rule 12(d)(2) denied), aff'd mem., 705 F.2d 461 (7th Cir.), cert. denied, 462 U.S. 1134 (1983).


45. Rule 16(a)(1)(C) reads:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.


By its terms, this rule applies only to documentary and physical evidence. If a witness comes forward and gives the prosecution an oral report about the defendant's uncharged misconduct, the Rule would not compel the prosecution to disclose the oral report. Furthermore, even assuming that the witness gives the prosecution a written statement, the defense is not necessarily guaranteed pretrial discovery of the report. One prerequisite to the prosecution's duty to disclose is its intent to use a report "as evidence in chief at the trial." Id. If the prosecution opts to present the witness' oral testimony without attempting to introduce the statement as corroboration, Rule 16(a)(1)(C) appears inapplicable. For that matter, it is doubtful that the prosecution could offer the statement as evidence. When the witness is a private citizen, the witness' statement would not qualify under either the business entry or official record hearsay exceptions contained in Fed. R. Evid. 803(6)-(8). The landmark case of Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930), holds that a private citizen's report to the police does not constitute a business entry since the citizen has no business duty to furnish the information. The Advisory Committee Note to Rule 803(6) approvingly cites Johnson. Fed. R. Evid. 803(6) advisory committee
narrow interpretation of Rule 16(a)(1)(B), which guarantees the defendant pretrial discovery of his "criminal record," is debatable.

47. The narrow interpretation of Rule 16(a)(1)(B), which guarantees the defendant pretrial discovery of his "criminal record," is debatable. Because the statement could not be used as evidence in the prosecutor's case-in-chief, the defense would not be entitled to pretrial discovery under Rule 16(a)(1)(C).

46. Rule 17 permits a defendant to request subpoenas for the appearance of witnesses and the production of documentary and physical evidence. Fed. R. Crim. P. 17. Rule 17, on its face, does not include the restrictions set out in Rule 16 governing the source or manner of obtaining evidentiary documents. See Everett, supra note 29, at 483. In Bowman Dairy Co. v. United States, 341 U.S. 214 (1951), however, the Supreme Court made it clear that Rule 17 may not be used generally as a discovery tool. See id. at 220; accord United States v. Haug, 21 F.R.D. 22, 26 (N.D. Ohio 1957); United States v. Schneiderman, 104 F. Supp. 405, 408 (S.D. Cal. 1952); Norton, supra note 32, at 27-28. A Rule 17 subpoena must contain a very detailed description of any requested evidence, see In re Rabbinical Seminary Netzach Israel Ramailis, 450 F. Supp. 1078, 1084 (E.D.N.Y. 1978) ("must identify the demanded documents sufficiently clearly to permit compliance, and the request may not be so broad as to be oppressive").

48. The legislative history of Rule 16 supports the argument that, at least sometimes, Rule 16(a)(1)(B) entitles the defense to discover the prosecution's uncharged misconduct evidence.

At one time, Congress considered amending Rule 16 to give the defense the right to learn the identity of the prosecution's prospective witnesses and certain information about the witnesses' background. See H.R. Rep. No. 247, 94th Cong., 1st Sess. 12, reprinted in 1975 U.S. Code Cong. & Admin. News 674, 684. The House Judiciary Committee report on the proposed amendment indicates that Congress did not intend to limit the expression, "criminal record," to prior convictions. See id. In pertinent part, the report states that "[t]he proposed rule enlarges the scope of the defendant's discovery to include a copy of his prior criminal record and a list of the names and addresses, plus record of prior felony convictions, of all witnesses the prosecution intends to call during its case-in-chief." Id. This statement suggests that Congress intended the term "criminal record" to mean something broader than the defendant's criminal convictions.

During consideration of the amendment that added the "criminal record" language to Rule 16(a)(1)(B), both the House Judiciary Committee's report and Senator McClellan's remarks on the Senate floor indicate that Congress intended this language to extend to the contents of the defendant's F.B.I. rap sheet. See United States v. Trejo-Zambrano, 582 F.2d 460, 465 n.3 (9th Cir.), cert. denied, 439 U.S. 1005 (1978); H.R. Rep. No. 247, 94th Cong., 1st Sess. 12, reprinted in 1975 U.S. Code Cong. & Admin. News 674, 687; 121 Cong. Rec. 23323 (1975); 8 Moore, supra note 44, ¶ 16.04(2) at 16-71 n.61 (1987). F.B.I. rap sheets contain not only convictions but also arrests and indictments that have not resulted in a conviction. See Reporters Comm. for Freedom of the Press v. United States Dep't of Justice, 816 F.2d 730, 732 n.2 (D.C. Cir. 1987); Everett, supra note 29, at 508-09.

Once it is conceded that "criminal record" includes FBI rap sheet entries for acts that have not resulted in a conviction, it becomes difficult to deny the defendant access to other written reports of uncharged misconduct in the prosecution's possession. Senator McClellan, however, asserted in debate that "the Government's obligation under this Rule should be deemed met by obtaining a copy of the F.B.I. 'rap sheet.'" 121 Cong. Rec. 23323 (1975). The full committee report, however, would seem entitled to more weight in interpreting the rule. The text of the rule does not limit the scope of "criminal record" to acts listed on the F.B.I. sheet, and the House report states only that "[t]he prosecutor can ordinarily discharge his obligation . . . by obtaining a copy of the F.B.I. 'rap sheet.'" H.R. Rep. No. 247, 94th Cong., 1st Sess. 15, reprinted in 1975 U.S. Code Cong. & Admin. News 674, 687 (emphasis added). If the prosecutor already possesses a
row construction of the rule, however, is so well-settled that it would be difficult to overturn this interpretation.\textsuperscript{49} Furthermore, reversing the narrow interpretation of the federal rule would not guarantee the defendant a right to discover uncharged misconduct evidence in all jurisdictions, because many states either have no statute on point or a statute worded differently than Rule 16(a)(1)(B).\textsuperscript{50} Consequently, it seems preferable to analyze the merits of the question of the discoverability of Rule 404(b) evidence, and, if the analysis demonstrates that the evidence should be discoverable as a matter of policy, to enact statutes or court rules that expressly mandate discoverability.

The next two sections of this Article undertake that analysis. Part I evaluates the case for pretrial discovery of the prosecution's uncharged misconduct evidence. Part II addresses the principal objections to compulsory pretrial disclosure of this type of evidence. This Article concludes that, although the prosecution should be able to obtain a protective order barring discovery in certain exceptional cases, a criminal defendant ought to be accorded a general right to pretrial discovery of uncharged misconduct evidence.

I. THE CASE FOR PRETRIAL DISCOVERY OF THE PROSECUTION'S UNCHARGED MISCONDUCT EVIDENCE

Two interests cut strongly in favor of recognizing a defense right to pretrial discovery of uncharged misconduct evidence: the systemic interest in insuring that the trial judge rules correctly on the admissibility of the evidence, and the defendant's interest in obtaining a fair trial.

A. Enhancing the Judge's Ability to Rule Correctly on the Admissibility of Proffered Uncharged Misconduct Evidence

At criminal trials, the uncharged misconduct rule may be the most frequently misapplied evidentiary doctrine. In many jurisdictions, alleged errors in the admission of uncharged misconduct evidence constitute the most common ground for appeal.\textsuperscript{51} In a large number of states,
errors in the introduction of such evidence account for more reversals of
criminal convictions than any other type of error, and the number of
appeals involving allegations of error in admitting uncharged misconduct
evidence is rising.

This state of affairs is understandable. As previously stated, the un-
charged misconduct doctrine has two prongs. One prong prohibits the
prosecutor from using the defendant's other crimes to support a general
inference of the defendant's bad character. The other prong permits
the prosecutor to offer testimony about the other crimes on noncharacter
theories of logical relevance to the trial such as identity, plan, and mo-
tive. To apply the rule, the trial judge must differentiate between char-
acter and noncharacter theories of relevance. Both commentators and
courts have complained that the line between inadmissible character
evidence and legitimate uncharged misconduct evidence can be fine.

Denial of pretrial discovery of the prosecutor's uncharged misconduct
evidence increases the likelihood that the trial judge will err in drawing
the line between character and noncharacter evidence. If the prosecution
springs the evidence on the defense for the first time at trial, the defense's
only recourse may be to object in general terms that the evidence
amounts to proof of bad character or that the evidence is unduly prejudi-
cial. Faced with general objections, the prosecutor may only need to in-
voke a vague theory of relevance to insure admission. For example,
when the defendant may have committed recent crimes similar to the
charged offense, prosecutors often cite the plan theory for admitting un-
charged misconduct. Other prosecutors incant res gestae as their the-
ory of admissibility if the charged and uncharged crimes occurred at
roughly the same time. Under such circumstances, not only must the
trial judge rule on the spur of the moment, but he must do so based on
only general objections and vague theories of relevance. The prosecutor's

54. See Fed. R. Evid. 404(b); see also supra notes 9-11 and accompanying text.
55. See Fed. R. Evid. 404(b); see also supra note 10 and accompanying text.
56. See Fed. R. Evid. 404(b); see also supra note 11 and accompanying text.
60. See 22 C. Wright & K. Graham, Federal Practice and Procedure: Evidence § 5239, at 447 (1978) ("[C]ourts began to use the infamous Latin tag 'res gestae' to describe the rule.").
incantation of a magic formula such as res gestae frequently has an "open sesame" effect at trial.\textsuperscript{61} Unfortunately, neither the uncharged crime's similarity to the charged crime nor the temporal coincidence of the crimes guarantees that the uncharged crime has genuine logical relevance on a noncharacter theory.\textsuperscript{62}

There are signs that the appellate courts will no longer permit imprecise analysis of uncharged misconduct issues at the trial level. Some courts have tightened the foundational requirements of the plan theory by holding that mere similarity between the charged and uncharged offenses does not establish the existence of a plan tying all the crimes together.\textsuperscript{63} These courts will not permit the prosecutor to hide behind the ambiguity of the term "plan." Rather, they insist that the prosecutor precisely articulate a noncharacter theory of logical relevance.\textsuperscript{64} Other courts have repudiated the res gestae theory.\textsuperscript{65}

If the appellate courts demand more meticulous analysis of uncharged misconduct issues at trial, the trial judges will have to subject the prosecution's evidence to more rigorous logical relevance analysis than they have in the past.\textsuperscript{66} In one decision, the Court of Appeals for the District of Columbia strongly encouraged prosecutors to disclose their uncharged misconduct to the defense before trial.\textsuperscript{67} In so doing, the court emphasized that pretrial disclosure would benefit the trial judge as well as the defendant.\textsuperscript{68} Due to "the complexity of [the] questions" confronting the trial judge and "the ease of confusion of permissible with impermissible inferences,"\textsuperscript{69} allowing the trial judge to hear more specific arguments would result in a more informed decision. Hence, the trial bench would be one of the beneficiaries of a general rule requiring pretrial disclosure of the prosecution's uncharged misconduct evidence.


\textsuperscript{62} See Imwinkelried, Uncharged Misconduct, 1 Crim. Just. 6, 45-46 (Sum. 1986).


\textsuperscript{64} See cases cited supra note 63.

\textsuperscript{65} United States v. Levy, 731 F.2d 997, 1004 (2d Cir. 1984); United States v. Swiatek, 819 F.2d 721, 727-28 (7th Cir. 1987).

\textsuperscript{66} See Imwinkelried, supra note 59, at 22.

\textsuperscript{67} See United States v. Foskey, 636 F.2d 517, 526 n.8 (D.C. Cir. 1980) (disclosure of uncharged misconduct evidence gives defense opportunity to request analysis justifying admission).

\textsuperscript{68} Id.

\textsuperscript{69} Id.
B. The Defense's Ability to Object Successfully to or Rebut the Uncharged Misconduct Evidence at Trial

Although the trial bench has something to gain from a rule requiring pretrial disclosure of uncharged misconduct evidence, the defendant obviously would be the major beneficiary of such a rule. The question thus becomes whether the defendant has a bona fide need for pretrial discovery of this type of evidence.

1. General Prerequisites for Pretrial Discovery

The defendant has an acute need for discovery, generally, when the following conditions concur. The initial condition requires that a denial of discovery probably would result in surprise at trial. If the prosecution surprises the defense with inadmissible or unreliable evidence at trial, the defense may be unprepared to meet the evidence. Precisely because the defense is not forewarned, it may not be forearmed to object to or rebut the evidence. If the defense, however, already possesses the information and notice that the information will be used at trial, it is unnecessary to require the prosecution to convey the information to the defense. This condition helps explain the defense's right to pretrial disclosure of the defendant's convictions under Federal Rule of Criminal Procedure 16(a)(1)(B). The convictions relate to criminal transactions other than the one alleged in the indictment or information. Trial testimony about other occurrences unfairly surprises the defense. Therefore, the requirement that a denial of discovery will result in trial surprise, therefore, provides the defense with time to meet the prosecution's evidence without wasting time when discovery is unnecessary.

The second condition requires that a pretrial opportunity to investigate the accuracy of the prosecution evidence would be useful to the defense. This condition helps to rationalize the defendant's right to pretrial discovery of scientific analyses under Rule 16(a)(1)(D). A high incidence of error exists in scientific analyses, and many attorneys lack the scienti-...
scientific background necessary to evaluate the evidence at first glance. If the prosecution’s scientific analyses remain undisclosed until trial, most defense attorneys would be unable to detect any errors in the report. The opposing attorney needs a pretrial opportunity to study the report and to learn enough about the relevant scientific discipline to critique the report.  

The final prerequisite for pretrial discovery is that the type of evidence in question is likely to affect the outcome of the case. If the evidence will prove inconsequential at trial, no compelling need exists to force pretrial revelation of the evidence. Confessions epitomize the types of evidence that satisfy this condition. Chief Justice Weintraub of the New Jersey Supreme Court put it best when he wrote:

We must be mindful of the role of a confession. It frequently becomes the core of the State’s case. It is not uncommon for the judicial proceeding to become more of a review of what transpired at headquarters than a trial of the basic criminal event itself. No one would deny a defendant’s right thoroughly to investigate the facts of the crime to prepare for trial of that event. When a confession is given and issues surrounding it tend to displace the criminal event as the focus of the trial, there should be like opportunity to get at the facts of the substituted issue. Simple justice requires that a defendant be permitted to prepare to meet what thus looms as the critical element of the case against him.

Thus, when evidence is likely to carry great weight at trial, pretrial discovery is necessary to give the defendant an opportunity to meet the prosecution’s case.

2. Application of the Prerequisites to Uncharged Misconduct Evidence

The argument for pretrial discovery of uncharged misconduct evidence is strong because each prerequisite to discovery is satisfied. First, the risk of surprise unquestionably exists. The same rationale that mandates disclosure of convictions under Rule 16(a)(1)(B) requires disclosure of uncharged misconduct. To withhold convictions from the defense because the convictions relate to transactions other than the event alleged in the indictment or information unfairly disadvantages the defense: without pretrial discovery, the defense might not be alert to the possibility that those other transactions will come into issue at trial. By parity of rea-


79. See supra note 73 and accompanying text.
soning, to withhold uncharged misconduct evidence from the defense also unfairly handicaps the defense. Such evidence is entitled “uncharged” misconduct because the accusatory pleading makes no mention of these other crimes allegedly committed by the defendant. Thus, as with prior conviction evidence, it is unfair to withhold evidence of uncharged misdeeds from the defense.

Second, the utility of an opportunity for pretrial investigation is likewise present. In fact, evidence that amounts to proof of uncharged misconduct satisfies this condition to a much greater degree than evidence that consists of clearly discoverable information, such as a prior conviction. Where the prosecution, pursuant to Rule 16(a)(1)(B), makes pretrial disclosure of the defendant's convictions, the defense possesses only limited opportunities for pretrial investigation. In recent years, courts have tended to liberalize the admissibility of a defendant's prior convictions offered for impeachment. In many jurisdictions, some types of convictions now are admissible automatically. For example, the prevailing view is that if the crime for which the defendant was previously convicted "involved dishonesty or false statement" within the meaning of Federal Rule of Evidence 609(a)(2), the trial judge must admit that conviction. Under such circumstances, the judge no longer retains the discretion to exclude the conviction on the theory that its prejudicial character outweighs its probative value for impeachment.

Similarly, the defense can do little by way of pretrial investigation to block or rebut at trial evidence of the conviction. Because the defendant already has been convicted, a challenge to the validity of the conviction in the current trial constitutes a collateral attack on the conviction. The defendant cannot relitigate whether he committed the crime for which he was convicted. The only collateral attack most courts entertain on the earlier conviction is an argument that the defendant was denied the sixth amendment right to counsel in the earlier trial. The only factual issue worth investigating before trial, therefore, is whether the defendant was afforded counsel at the trial that culminated in a conviction.

Pretrial discovery of uncharged misconduct proves much more useful than pretrial discovery of convictions. In the case of uncharged misconduct, the defense can pursue numerous lines of pretrial factual and legal investigation. For example, detailed foundation requirements exist for uncharged misconduct evidence offered on noncharacter theories such as

81. Id. at 198-200 (citing cases).
82. Id. at 199-200.
83. See id. § 708, at 196.
84. See id.
modus operandi and motive. Assume that the defense obtains pre-trial disclosure of uncharged misconduct that the prosecution might offer on the modus operandi theory—that the charged and uncharged crimes were committed in the same unique manner. Once the defense attorney learns of the possibility, the attorney can research the massive body of case law on the question of whether the alleged modus operandi is sufficiently distinct to be probative of the defendant's identity as the perpetrator of the charged crime.

Just as the opportunity for pretrial legal research can prove useful to the defense, so too the opportunity for pretrial factual investigation can prove valuable to the defense. An essential part of the foundation for an offer of uncharged misconduct evidence consists of proof that the defendant committed the uncharged act. In the last decade, a number of jurisdictions have relaxed the standard for proving the defendant's commission of the uncharged act. For example, many federal circuits have ruled that the prosecution's evidence suffices if it would support a rational jury finding—a permissive inference—of the defendant's identity as the person who committed the uncharged act. This rule makes it easier for prosecutors to introduce uncharged misconduct evidence, but it also means that the prosecution's foundational proof of the defendant's identity may be weak and easily rebuttable. As discussed above, if the prosecution offers a conviction against the defendant, the defendant's only permissible factual attack may be proof that the defendant was denied counsel at the earlier trial. When the prosecution offers an act of uncharged misconduct, however, the defense is entitled to introduce any evidence to show that the act did not occur or that the defendant did not commit the act.

The final condition—the importance of the type of evidence the defense seeks to discover—also exists when the defense probes for un-

86. See Imwinkelried I, supra note 3, at §§ 3:10-:14. For example, the prosecution may have to establish not only that the crimes were committed in a similar fashion but also that the manner is so unique that only one criminal is likely to employ that modus. See id.

87. Id. at §§ 3:15-:17. Suppose, for instance, that the prosecutor's theory is that the defendant killed the victim because the victim knew of another crime committed by the defendant and could have reported that crime to the police. Some cases require the prosecutor to show both that the victim knew of the other crime and that the defendant knew of the victim's knowledge. See id.

88. Id. at §§ 3:12-:14.

89. See, e.g., Fed. R. Evid. 104(b) (relevancy conditioned on fact); Cal. Evid. Code § 403(a)(4) (1987) ("The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact . . . [when] [the] proffered evidence is of . . . conduct of a particular person and the preliminary fact is whether that person . . . so conducted himself . . . ")

charged misconduct evidence in the prosecution’s possession. In a case such as Williams or von Bulow, the uncharged misconduct evidence can have an impact comparable to that of a confession, which is discoverable as of right under Rule 16(a)(1)(A). Indeed, in Williams, the evidence of the other ten killings patently formed the cornerstone of the prosecution’s case.91

Uncharged misconduct satisfies the condition of the importance of the evidence to a greater degree than does conviction evidence. Uncharged misconduct evidence is more prejudicial to the defense in both the practical and the technical sense of that term. In the practical sense, uncharged misconduct is more harmful to the defense because a judge may admit a conviction only to impeach the defendant’s credibility.92 On defense request, the judge must give the jury a limiting instruction that they may consider the conviction only in evaluating the defendant’s believability.93 Moreover, the defendant’s credibility as a witness does not come into issue until the defendant takes the witness stand.94 Consequently, the prosecution typically cannot broach the subject of the conviction until the cross-examination of the defendant; and if the defendant elects not to testify, the conviction cannot be mentioned at all.

Because similar restrictions do not limit its impact, uncharged misconduct evidence can be more damaging. The prosecutor may use uncharged misconduct as proof of the historical merits of the case such as the defendant’s identity as the perpetrator of the charged crime95 or the defendant’s possession of the mens rea needed for the charged crime.96 During closing argument, the prosecutor may treat the uncharged misconduct as substantive proof of guilt.97 In addition, the prosecutor usually is entitled to offer the uncharged misconduct during the government’s case-in-chief98—before the defendant testifies and even if the defendant does not testify.99

Increased potential for prejudice also exists in the technical sense of the term. The Advisory Committee Note to Federal Rule of Evidence 403 explains that in the formal evidentiary sense, prejudice means the tendency of the evidence to tempt the jury to decide the case on an im-

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92. See Fed. R. Evid. 609.
93. See Fed. R. Evid. 105.
95. See generally Imwinkelried I, supra note 3, at ch. 3.
96. See generally id. at ch. 5.
97. The prosecutor may utilize the uncharged misconduct evidence in summation so long as he operates within standards of ethical conduct, does not use inflammatory descriptions, and does not misuse the evidence as evidence of bad character. See id. at § 9:68.
98. Id. at § 9:23.
99. Id.
proper basis. Conviction evidence poses a danger of prejudice in this sense. The jury might disregard the judge’s limiting instructions and misuse the credibility evidence as evidence on the merits; the jurors may be tempted to reason that if the defendant committed one crime in the past, he or she is more likely to have committed the offense now being tried. Uncharged misconduct presents the very same danger. Once again, the jury may be inclined to treat the evidence as proof of the defendant’s general bad character.

The risk of prejudice is compounded, however, in the case of uncharged misconduct evidence because another danger arises. If the defendant has not been convicted of the uncharged act, the jury may leap to the conclusion that the defendant unjustly has escaped punishment for that act. The jurors subconsciously may be tempted to correct that perceived injustice by punishing the defendant for that earlier crime, even though they have a reasonable doubt about the defendant’s guilt of the charged crime. Therefore, uncharged misconduct evidence creates a graver risk of a guilty verdict on an improper basis than conviction evidence poses.

In summary, the three conditions that determine whether a defendant has a bona fide need for pretrial discovery all are present when the defense requests disclosure of the prosecution’s uncharged misconduct evidence. Denying the defense discovery easily can result in surprise at trial. If surprised, the defense may be woefully unprepared to meet otherwise inadmissible or rebuttable evidence. Such evidence may not only prove likely to sway the jury; it also may influence the jury to convict the defendant on an improper basis. In short, the defendant’s inability to discover uncharged misconduct can pose a tremendous obstacle to

100. Fed. R. Evid. 403 advisory committee note.

101. See People v. Montgomery, 47 Ill. 2d 510, 514, 268 N.E.2d 695, 697 (1971) ("The defendant is a dead duck once he is on trial before a jury and you present a record that he was convicted . . . . If it’s any way close, the jury is going to hang him on that record, not on the evidence."); Griswold, The Long View, 51 A.B.A. J. 1017, 1021 (1965); Spector, Impeachment Through Past Convictions: A Time for Reform, 18 DePaul L. Rev. 1, 4-5 (1968); Wissler & Saks, On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide On Guilt, 9 Law & Human Beh. 37, 45 (1985).

102. See United States v. Shackleford, 738 F.2d 776, 783-84 (7th Cir. 1984) ("Except in unusual circumstances, emanations from evidence of a defendant’s bad acts are almost always suggestive of a defendant’s propensity to commit other bad or criminal acts . . . . and errors in admitting such evidence consequently often go to the fundamental fairness of the trial.").

103. See United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979); see also Sharpe, Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof, 59 Notre Dame L. Rev. 556, 561 (1984) (jurors may subconsciously desire to “sanction the defendant for another crime he seems to have ‘got[ten] away with’”); Williams, The Problem of Similar Fact Evidence, 5 Dalhousie L.J. 281, 289 (1979) ("tendency to condemn . . . because [the defendant] has escaped unpunished from other offences."); quoting 1 Wigmore on Evidence 650 (3d ed. 1940)).

104. See Sharpe, supra note 103, at 561-62.
a fair trial. This part has shown that pretrial discovery of uncharged misconduct would improve markedly the trial judge's ability to rule correctly on the complex issues raised by uncharged misconduct evidence. Coupled with this improved ability, the defense's acute need for pretrial discovery of uncharged misconduct completes a powerful case for amending Rule 16 to guarantee a right to such discovery.

II. THE OBJECTIONS TO PRETRIAL DISCOVERY OF THE PROSECUTION'S UNCHARGED MISCONDUCT EVIDENCE

Thus far, this Article has discussed only the factors favoring pretrial discovery of uncharged misconduct evidence. It now turns to countervailing considerations—potential objections to a proposal to entitle the defendant to discover uncharged misconduct evidence before trial. A number of frequently voiced objections exist.

A. Pretrial Discovery Would Facilitate Perjury by Defense Witnesses

One criticism asserts that pretrial revelation of uncharged misconduct evidence will facilitate the defense's ability to fabricate perjured testimony to rebut the prosecution's evidence. If the defense learns the tenor of the proposed prosecution testimony before trial, he or she will possess greater opportunity to prepare effective perjury by defense witnesses.

In his classic article on criminal discovery, Justice Brennan dubbed the perjury argument "the old hobgoblin." To be sure, pretrial disclosure of the prosecution's uncharged misconduct evidence will pave the way for defense perjury in some cases. It does not follow, however, that, on balance, this danger warrants denying the defense the right to discover

105. See Everett, supra note 29, at 479-80; Fletcher, supra note 32, at 303.
106. See Brennan, supra note 30, at 289.
107. See Fletcher, supra note 32, at 309-11. This objection overlooks the coexistent need to deter perjury by prosecution witnesses. The prosecution’s witnesses to uncharged crimes are sometimes the defendant’s alleged accomplices. See, e.g., United States v. Shepherd, 739 F.2d 510, 513 (10th Cir. 1984) (prosecution's case consisted entirely of uncorroborated accomplice testimony). The accomplice may be an inveterate liar. See Levine, Hearsay and Conspiracy: A Reexamination of the Co-Conspirators’ Exception to the Hearsay Rule, 52 Mich. L. Rev. 1159, 1165-66 (1954). When the accomplice appears to testify to the defendant's uncharged misconduct, the accomplice may have a plea bargain pending with the prosecution, giving the accomplice a strong motivation to curry favor with the prosecution. Defense discovery would deter perjury by this type of prosecution witness. See Fletcher, supra note 32, at 308-09.

To improve his standing with the prosecutor, the accomplice might also give perjurious trial testimony even more favorable to the prosecution than that contained in the pretrial statement. If the accomplice knew, however, that the defense had obtained a copy of the statement, the accomplice would think twice; the accomplice would realize that the defense is in a better position to expose any perjurious trial testimony.

108. See Brennan, supra note 30, at 291; accord Fletcher, supra note 32, at 309 (referring to perjury argument as "bugaboo"); Rice, Criminal Defense Discovery: A Prelude to Justice or an Interlude for Abuse?, 45 Miss. L.J. 887, 896 (1974) (characterizing perjury argument as "a modern day Trojan horse within the gates of justice").
the evidence. The magnitude of the problem of defense perjury is largely unknown. Little tangible proof of the extent of the problem exists. Essentially the same argument was made when the drafters of the Federal Rules of Civil Procedure proposed liberalizing discovery in civil cases. Opponents issued a dire forecast that freer discovery inevitably would result in widespread perjury. The drafters rejected the argument, and the forecast certainly has not come to pass: no discernible increase in the incidence of perjury in civil cases has occurred. In the few states that have implemented liberal criminal discovery, the experience has been similar. One former state's attorney remarked that the experience in his state shows that the fear of a dramatic increase in defense perjury is "imaginary."

Further, the denial of pretrial discovery constitutes a particularly ineffective means of preventing defense witness perjury. A criminal trial usually proceeds in the following order: the prosecution case-in-chief, the defense case-in-chief, the prosecution rebuttal, and, last, the defense surrebuttal or rejoinder. The denial of pretrial discovery prevents perjury effectively in only two situations. If the defense witnesses testified in the defense case-in-chief and the prosecution presented its witnesses' testimony in rebuttal, the defense witnesses would have to commit to a version of the facts before hearing the prosecution testimony. The opportunity to prepare perjured testimony, therefore, would be limited greatly. The denial of discovery also would practically foreclose defense perjury when the defense witnesses testify immediately after the prosecution's uncharged misconduct witnesses. The defense witnesses would not have the time to tailor their perjury.

In practice, however, the prosecutor usually calls the uncharged misconduct witnesses during the prosecution case-in-chief. Often, considerable delay occurs between the prosecution testimony and the contradictory testimony of the defense witnesses called during the defense case-in-chief, allowing defense witnesses a substantial period of time to manufacture perjury. Similarly, the dangers of perjury and wit-

109. See Brennan, supra note 30, at 290 n.39 ("What meager statistical evidence there is suggests that perjury is a very slight danger indeed."); Fletcher, supra note 32, at 310 (risk of defense perjury an "unverified assertion").
110. See Fletcher, supra note 32, at 308.
111. See Rice, supra note 108, at 896 (summarizing opponents' arguments).
112. See id. (opponents' claims of increased perjury, among others, "have never been substantiated as a genuine cause for alarm"); Note, supra note 41, at 806-07 ("[E]xperience in the civil arena has proven that broad discovery does not encourage . . . perjury but rather results in better preparation and more . . . effective cross-examination.") (citation omitted).
113. See Rice, supra note 108, at 897.
114. See Hewitt & Bell, supra note 41, at 244 ("no dire effects").
116. See Imwinkelried II, supra note 80, at § 102.
ness intimidation are greatest in organized crime prosecutions because the trials in these prosecutions tend to be complex and lengthy. Frequently a delay of days, weeks, or months occurs between the prosecution uncharged misconduct testimony and the defense's contradictory testimony. In addition, if the uncharged misconduct evidence surprises the defense, the defense may seek a mid-trial continuance. The Advisory Committee Note to Federal Rule of Evidence 403 emphasizes that when surprise occurs at trial, "the granting of a continuance is a[n] ... appropriate remedy." In sum, a denial of pretrial discovery will not foreclose defense perjury; in the cases in which the threat of defense perjury is heightened, a defendant so inclined frequently will have more than enough time during the trial to recruit and coach potential perjurers.

B. It Is Unfair to Require Prosecutors to Commit Themselves to a Theory of Logical Relevance Before Trial

Although in most jurisdictions defendants have no right to pretrial discovery of uncharged misconduct evidence, a number of states have gone to the opposite extreme. In these states, even absent a defense discovery motion, the prosecution must disclose sua sponte any uncharged misconduct evidence that it intends to offer at trial. Most of these states also require that the prosecution simultaneously indicate the theory or theories of noncharacter relevance that it contemplates using at trial. In von Bulow, for instance, the prosecution would have had to divulge both the content of Mrs. Isles' testimony and its intent to rely on the motive theory of admissibility.

Prosecutors complain that it is unfair to require them to commit to a theory of logical relevance before trial. Although there is no conclusive evidence that this complaint is well-founded, common sense suggests that it has merit. Uncharged misconduct evidence is so prejudicial that most courts permit the prosecution to resort to the evidence only upon a showing of a bona fide need. Suppose that the defendant in a murder

118. See infra text accompanying note 139.
120. Fed. R. Evid. 403 advisory committee note.
121. See Imwinkelried I, supra note 3, § 9:06.
124. See id. at 551 & n.115 (questionnaires sent to prosecutors in Louisiana and Minnesota). The author calls for further empirical studies. Id. at 551-52.
case admits at trial that she killed the decedent but claims to have done so in self-defense. Given the posture of the case, there is no justification for a prosecution offer of uncharged misconduct evidence to prove her identity as the killer. Before trial, however, it may be difficult for the prosecutor to foresee whether a genuine need for uncharged misconduct evidence will arise. The prosecutor may have difficulty predicting which issues the defense intends to controvert and, hence, which facts the prosecutor may need the uncharged misconduct to prove. The need may even arise between the prosecution's revelation of the existence of the uncharged misconduct evidence and the beginning of the prosecution case-in-chief. A defense attorney's statement during an intervening pretrial conference, jury selection, or opening statement may be the first indication that the defense intends to dispute an issue such as identity at trial. Forcing the prosecution to elect a theory of relevance before trial, therefore, seems premature. Unlike the perjury hobgoblin, this prosecution objection has substance.

The unfairness to the prosecution, however, does not arise from the requirement for pretrial revelation itself. Rather, the distinct requirement that the prosecutor simultaneously specify a theory of logical relevance for offering the uncharged misconduct generates the unfairness. This Article urges the adoption of the former requirement without the latter. The prosecution's revelation of the existence and tenor of its uncharged misconduct evidence ordinarily will satisfy the defendant's discovery needs. Although Rule 16 allows the defense to discover several types of prosecution evidence as of right, nowhere does it impose an obligation that the prosecution elect a theory of admissibility before trial. The prosecution may have to disclose an item of physical evidence under Rule 16(a)(1)(C) or a scientific report under Rule 16(a)(1)(D), but the prosecution has no duty to indicate specifically how it intends to use the item or report at trial. No cogent reason exists to single out uncharged misconduct evidence by mandating both pretrial disclosure and pretrial election. Once a competent defense attorney learns the tenor of the prosecution evidence, the attorney usually can identify the most probable trial uses of the evidence. Having identified those uses, the defense attorney can conduct any factual investigation or legal research necessary in anticipation of trial.

The majority of jurisdictions deny the defense the right to pretrial discovery of the prosecution's uncharged misconduct evidence. This Ar-
article does not call for the adoption of the drastic, minority view that the prosecutor must disclose sua sponte uncharged misconduct and commit to a theory of admissibility before trial. Rather, recognizing the validity of this prosecution objection, this Article recommends only the modest reform that the defense be granted a general right to discover uncharged misconduct evidence.

C. Pretrial Disclosure of the Identity of the Prosecution's Uncharged Misconduct Witnesses Will Lead to Witness Intimidation

One objection remains, even to the modest reform proposed in this Article. The objection embodies the fear that if the defense learns the identity of the prosecution's witnesses before trial, the defense will harass, intimidate, and threaten those witnesses. Witness intimidation imperils the public interest as well as the individual witness. If it becomes common knowledge that many criminal defendants harass the prospective prosecution witnesses, potential witnesses will be reluctant to come forward.131 Eyewitnesses to crimes will remain silent out of fear of reprisal.132

Both courts133 and prosecutors134 have expressed their concern that pretrial disclosure of the identity of prosecution witnesses would lead to assaults against, and bribery of, potential witnesses. During its 1974-75 session, Congress held hearings on a Supreme Court proposal to amend Rule 16 to require the prosecution to disclose the identity of its witnesses.135 The Justice Department denounced the proposal. The Department representative testified that the proposal was "dangerous and frightening in that government witnesses and their families will even be more exposed than they now are to threats, pressures, and physical harm."136 The conference committee subsequently deleted the proposal from the 1975 Criminal Procedure Amendment Act.137 In explaining its

131. See Brennan, supra note 30, at 289; Everett, supra note 29, at 478.
132. See Rice, supra note 108, at 901.
133. The classic court statement of that fear was voiced in State v. Tune, 13 N.J. 203, 210, 98 A.2d 881, 884 (1953) ("Another result of full discovery would be that the criminal defendant who is informed of the names of all of the State's witnesses may take steps to bribe or frighten them... so that they are unavailable to testify."). See also Roviaro v. United States, 353 U.S. 53, 66-67 (1957) (Clark, J., dissenting) (discussing importance of government's policy of not disclosing identities of informants); United States v. Estep, 151 F. Supp. 668, 672-73 (N.D. Tex. 1957) (informers' identities must be protected to ensure testimony and conviction), aff'd, 251 F.2d 579 (5th Cir. 1958).
134. See Louisell II, supra note 31, at 928.
action, the committee stated that "[d]iscouragement of witnesses and improper contacts directed at influencing their testimony, were deemed paramount concerns . . ."\(^{138}\)

These concerns are substantial. It is a commonplace observation that the concern over witness intimidation is justified when the defendant is a member of an organized crime syndicate.\(^{139}\) Even if the defendant is in jail, other members of the syndicate may be at large, and their syndicate membership evidences their willingness to violate the law. Moreover, assuming that the extent of discovery currently authorized by Rule 16 is unobjectionable, one still consistently can oppose pretrial discovery of the identities of prosecution witnesses. Rules 16(a)(1)(A)-(D) permit discovery of the defendant's confessions, the defendant's prior record, physical objects, and scientific reports.\(^{140}\) None of these types of evidence creates a significant danger of witness intimidation.\(^{141}\) Only the remotest possibility exists that the defendant will attempt to alter a physical object or an FBI rap sheet, and the only prosecution witnesses of a confession or about a scientific analysis may be police personnel. The danger of witness intimidation is much greater when the defense seeks the identity of private citizen witnesses,\(^{142}\) such as eyewitnesses to the defendant's uncharged misconduct.

In the past, despite these plausible prosecution arguments, most commentators have concluded that the spectre of witness intimidation forms an insufficient basis for limiting criminal discovery.\(^{143}\) They have dismissed the spectre as "imaginary"\(^{144}\) and "factually unsubstantiated."\(^{145}\) Although prosecutors had made many polemic statements about the problem of witness intimidation,\(^{146}\) there was little empirical evidence that the problem was a sizeable one. There were only scattered reports of cases of defense harassment of prosecution witnesses.\(^{147}\) Many states

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\(^{138}\) Id.

\(^{139}\) See Brennan, supra note 30, at 294-95 & n.49; Krantz, supra note 30, at 134; Louisell I, supra note 30, at 99; Louisell II, supra note 31, at 932-33; Norton, supra note 32, at 14; Traynor, supra note 41, at 244 & n.87; Note, Discovery of Witness Identity Under Preliminary Proposed Federal Criminal Rule 16, 12 Wm. & Mary L. Rev. 603, 621 (1971).


\(^{141}\) See Everett, supra note 29, at 506-08; Rice, supra note 108, at 898-901.

\(^{142}\) See Fletcher, supra note 32, at 314.

\(^{143}\) See Langrock, Vermont's Experiment in Criminal Discovery, 53 A.B.A. J. 732, 734 (1967); Rice, supra note 108, at 901-02; Traynor, supra note 41, at 228-29.

\(^{144}\) See Langrock, supra note 143, at 734.

\(^{145}\) See Rice, supra note 108, at 902.

\(^{146}\) See Note, supra note 41, at 803-10.

\(^{147}\) 2 C. Wright, Federal Practice and Procedure: Federal Rules of Criminal Procedure § 252, at 36 n.3 (a survey of 14 prosecutors conducted by the Junior Bar Section of the Bar Association of the District of Columbia in 1963 revealed 10 prosecutors claimed personal experience with problems of witness intimidation); Note, supra note 139, at 622 n.90 (citing Bergan Drug Co. v. Parke Davis & Co., 307 F.2d 725 (3d Cir. 1962) and House of Materials Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962), as "two extreme cases involving witness intimidation").
now require the prosecution to disclose the identity of its trial witnesses, and yet no concrete evidence showing a rise in the frequency of witness intimidation in those jurisdictions exists.

The problem of witness intimidation, however, no longer can be dismissed so casually. In 1985, Professor Michael Graham released his book, *Witness Intimidation: The Law's Response*. There, Professor Graham points out that the available data indicates that the problem of witness intimidation arises in only a minority of cases. The data convinces him, however, that "thousands of examples" of witness harassment exist. He cites a Department of Justice study "listing ... more than 700 instances of witness intimidation ranging from assault to assassination," the problem being worst in organized crime cases. Another Justice Department study found that "10 percent of all murders related to organized crime in a four-year period were of prosecution witnesses." Evidently, neither Department study contained a detailed discussion of the manner in which it collected data, but as official documents, the studies possess a measure of credibility. Even if the 700 and 10 percent figures are somewhat overstated, the figures are startling enough to support Professor Graham's conclusion that the problem is a serious one.

In light of Professor Graham's research, it no longer remains possible for the proponents of expanded criminal discovery to brush aside prosecutors' concerns over witness intimidation. Even accepting the Justice Department figures at face value, however, it is inappropriate to rush to the conclusion that the risk of witness intimidation makes it unwise to liberalize the discovery available to criminal defendants. Section II.A of this Article discussed the prosecutors' contention that liberalized discovery will facilitate perjury by defense witnesses rebutting the prosecution's uncharged misconduct evidence. It noted the fallacy of this contention. Denying the defendant pretrial discovery of uncharged misconduct serves as an ineffective means of preventing defense perjury because the defense often has a substantial time period during trial to ready its perjury, even absent the advantage of discovery. A similar fallacy is to be found in assuming that the denial of pretrial discovery of uncharged mis-

151. See id. at 50 (citing ABA, Discovery and Procedure Before Trial, Standards for Criminal Justice (2d ed. 1980)).
152. Id. at 4.
153. Id.
154. Id. at 5.
155. Id.
156. Id. at 4.
conduct eliminates the possibility of defense intimidation of the prosecution witnesses to the uncharged misconduct. Indeed, the danger of witness intimidation "exists with or without discovery. If the case is important enough for perjury, intimidation or bribery, it is important enough for the defendant to employ the means necessary to ascertain the identity of Government witnesses. Discovery is not needed." If the defendant is willing to threaten or bribe prosecution witnesses, the defendant may be equally willing to resort to the bribery, extortion, or threats to learn the prosecution witnesses' identities. Denying the defendant pretrial discovery is not a panacea for the problem of witness intimidation.

Further, the judge has procedures available to him or her to reduce the risk of intimidation that are less drastic than a complete bar to defense discovery. Rather than denying defense discovery altogether, the judge can use the "scalpel" of a protective order. Initially, the prosecution would seek an order denying the defense the identity of the witness it intends to call to establish the defendant's uncharged misconduct. Under the protective order procedure, the prosecutor then would make a showing to the judge at an in camera hearing; and the transcript of the hearing could be sealed for appeal. The prosecution would have the burden of proving that objective indications exist of a threat to the safety of the prosecution's uncharged misconduct witnesses. The burden imposed on the prosecution, however, should not be unduly heavy. Given the gravity of the problem of witness intimidation, it would be unsound to grant protective orders only when the prosecution can demonstrate that the defendant already has threatened witnesses in the case. Arguably, the prosecution should also be entitled to an order if it can demonstrate that the defendant or an at-large accomplice has a past record for violence.

The protective order procedure safeguards the prosecution's interests while providing more discovery than the defense currently receives in most jurisdictions. The procedure should certainly afford the prosecution's interests ample protection. The protective order procedure requires the judge to differentiate between the run-of-the-mill case and the exceptional prosecution in which a realistic danger of witness harassment exists. Judges routinely make similar determinations in bail hear-
ings. Moreover, the experience with protective orders in jurisdictions otherwise permitting liberal discovery indicates that most judges are solicitous of the prosecution's interest in protecting its witnesses. One prosecutor commented that "[w]hen violence is feared, the courts usually acquiesce in nondisclosure." Another prosecutor remarked that, in his judgment, the protective order procedure had not led to "any untowards results." When objective "circumstances warrant[ing]" a fear that prosecution witnesses would be subjected to harassment were established, the judges "excused [the prosecution] from discovery." The bench's receptivity to prosecution motions for protective orders helps to ensure the safety of the prosecution's uncharged misconduct witnesses under the proposed expanded discovery rule. It is true that the protective order procedure does not eliminate the possibility of witness intimidation. Balanced against the defense's pressing need for discovery, however, this speculative possibility supplies an insufficient basis for denying the defense discovery.

Even when the judge issues an order denying pretrial discovery of the identity of the prosecution's uncharged misconduct witnesses, the defense can obtain more discovery than it now receives in the majority of jurisdictions. A protective order can specify the fact or facts to be withheld from the defense before trial. Thus, while denying the defense the identity of the witness, the judge still could order the prosecution to divulge to the defense all the other circumstances surrounding the alleged uncharged misconduct: the date, time, place, and manner of commission of the act. As in the case of the evidentiary privilege for an informer's identity, the only fact that must be suppressed is the identity of the

165. See id. at 101; Louisell II, supra note 31, at 935.
168. Id.
169. Note, supra note 41, at 830.
170. Some might argue that the availability of the protective order procedure should justify granting the defense general access to the prosecution's investigative file. This Article, however, stops short of calling for such a result.

In determining whether to grant the defense discovery of a particular type of evidence, the competing interests must be balanced. The defense has an especially strong interest in discovering uncharged misconduct evidence: there is a significant risk of unfair surprise at trial, that the evidence is potent enough to change the outcome of the case, and that the changed outcome may be a wrongful conviction. See supra text accompanying notes 15-28. Weighed against a conjectural possibility of witness harassment, this defense interest seems overriding. The balance of interests might have to be struck differently, however, if the defense seeks a different type of evidence. There might be less risk of surprise, the evidence might be less likely to affect the trial outcome, and there might be much less chance of convicting the innocent.

172. See C. McCormick, McCormick on Evidence § 111 (E. Cleary 3d ed. 1984); Imwinkelried II, supra note 80, at § 1710.
potential witness. With knowledge of the other details, the defense can take appropriate steps to prepare for trial. The defense can attempt to locate witnesses to establish the defendant's alibi for the time of the uncharged act and can conduct any legal research needed to determine whether the charged and uncharged acts are sufficiently similar to satisfy the foundational requirements for the modus operandi theory of admissibility. In some cases, the protective order might even compel the prosecution to divulge the identity of the alleged victim of the uncharged crime when the witness fearful of harassment is a person other than the victim. Notwithstanding the protective order for the witness' identity, a well-drafted protective order would leave the defense in a much better position to meet the prosecution's uncharged misconduct evidence at trial.

**CONCLUSION**

This Article recommends a modest change in the law of criminal discovery. The heart of the recommendation lies in the notion that criminal defendants generally should have a right to obtain pretrial discovery of the prosecution's uncharged misconduct evidence. The recommended duty to produce uncharged misconduct evidence would attach to any incident of uncharged misconduct that the prosecution intends to prove at trial, whether the prosecution information about the incident takes the form of a witness' oral report, a rap sheet entry, or a judgment of conviction.

The defendant's right to pretrial discovery should be limited to

173. Some defense attorneys undoubtedly would argue that the duty to produce evidence of uncharged misconduct should attach to any incident of uncharged misconduct known to the prosecution and that the automatic sanction for violating the duty should be the exclusion of the evidence at trial. This argument, however, seems too sweeping.

The prosecution's failure to divulge the incident before trial might be excusable. To begin with, the prosecution might not discover the incident until after trial begins. Alternatively, although the prosecution knew of the incident before trial, at that time, the prosecution might not have foreseen any need to resort to the evidence at trial. See supra text accompanying notes 125-27. The prosecution might be able to show that a turn of events at trial (1) was unforeseeable and (2) now requires the prosecution to employ the uncharged misconduct at trial. In civil actions, when one party moves for sanctions for violation of a discovery order, the judge often must determine whether the other party's technical violation of a discovery order was excusable. E. Imwinkelried & T. Blumoff, Pretrial Discovery: Strategy & Tactics § 13:18 (1986).

Even if the judge concludes that the prosecution's failure to disclose the incident was excusable, the judge can grant the defense some relief. The unanticipated turn of events will usually occur during the defense case-in-chief. The prosecution's next opportunity to present witnesses, therefore, arises during the prosecution rebuttal. The judge can grant the defense a recess or continuance to investigate the alleged incident. It also may be proper to say that, in light of the unforeseen development, the prosecution should be permitted to introduce evidence about the uncharged incident. It would be unfair, however, to say that the defense must question the prosecution's uncharged misconduct witnesses without an opportunity to prepare for cross-examination.

174. The diverse forms of information falling with the new rule should not pose any serious administrative problems in implementing it. Under the current Fed. R. Crim. P. 16, prosecutors are accustomed to processing discovery requests for these various types of
that type of evidence, and should be qualified further by the prosecutor's right to protective orders forbidding discovery of the identity of their uncharged misconduct witnesses whenever realistic indicia of a threat of witness intimidation exist. This recommendation represents a compromise, attempting to accommodate the legitimate interests of both the prosecution and the defense.

Like many attempted compromises in the field of criminal law, this recommendation probably will draw fire from both the prosecution and defense camps. Some defense counsel undoubtedly will claim that the proposal does not go far enough. They will criticize the proposal's qualification that protective orders be liberally available to prosecutors. That criticism is unsound. Beginning in the 1970's, our society has become more cognizant of the need to protect citizens who step forward to perform public service as witnesses in criminal cases. The empirical evidence of the extent of the problem of witness intimidation in America is too impressive to be ignored. Establishing onerous requirements for protective orders would slight the public interest in shielding witnesses from harassment.

For their part, some prosecutors will take issue with the basic thrust of the recommendation. They will claim that the recommendation goes too far in recognizing a general right to pretrial discovery of the prosecution's uncharged misconduct evidence. They will adopt the position that, with the exception of the few types of evidence—such as confessions—which the defense has a right to discover, discovery should be entrusted to the judge's discretion. This position overlooks the unique character of uncharged misconduct evidence. Since this evidence relates to transactions other than the offense mentioned in the prosecution pleading, the evidence poses a special risk of surprise at trial. Moreover, the evidence can have a marked impact on the trial, as demonstrated by the Williams and von Bulow cases. Uncharged misconduct evidence is so potent that its presentation against an unprepared defense can change the outcome of the case.

Worst of all, the changed outcome may be an unjust conviction. Justice Cardozo cautioned that, more so than any other type of prosecution evidence, uncharged misconduct testimony represents a "peril to the innocent." In our system, it is axiomatic that the defendant need answer only for the crime for which he is currently charged. The Supreme Court has held that the eighth amendment's ban on cruel and unusual

information. Rule 16(a)(1)(A), for example, requires the prosecution to divulge the substance of even oral statements made by the defendant. Under Rule 16(a)(1)(B), the criminal record provision, prosecutors must reveal both convictions and rap sheet entries. See supra note 44.

175. See M. Graham, supra note 150, at 9-10; see also supra notes 150-56 and accompanying text.

176. See M. Graham, supra note 150, at 4-8.


178. See Reed, Trial by Propensity: Admission of Other Criminal Acts Evidenced in
punishment forbids a legislature from making a personal status such as drug addiction a criminal offense. Whenever the trial judge admits evidence of a criminal defendant's uncharged conduct, however, a grave risk arises that, in effect, the jury will convict the defendant of a status offense—the status of being a recidivist criminal. Uncharged misconduct evidence can pollute the defendant's character in the jurors' eyes. The evidence can exert a pernicious, subconscious influence on the jury. Once the jury learns of the defendant's criminal past, they may be sorely tempted to convict even though a substantial doubt exists as to the defendant's guilt of the charged offense.

An essential part of the ethos of the adversary system stems from the belief that both sides should have an equal chance to prepare to meet the evidence proffered at trial. In most jurisdictions, the criminal defendant possesses no guaranteed opportunity to prepare to meet uncharged misconduct evidence—evidence that is likely to surprise the defense and that may very well prompt an unjust conviction. Denying the defendant that opportunity is nothing short of a scandal.


180. See State v. Goldsmith, 122 Wis. 2d 754, 758, 364 N.W.2d 178, 180 (Ct. App. 1985); _see also supra_ notes 18-25 and accompanying text.

