2010

The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct

Edward J. Imwinkelreid

Follow this and additional works at: http://scholarship.law.edu/lawreview

Recommended Citation
Available at: http://scholarship.law.edu/lawreview/vol59/iss3/3

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized administrator of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.
THE SECOND COMING OF RES GESTAE: A PROCEDURAL APPROACH TO UNTANGLING THE “INEXTRICABLY INTERTWINED” THEORY FOR ADMITTING EVIDENCE OF AN ACCUSED’S UNCHARGED MISCONDUCT

Edward J. Imwinkelried†

I. A DESCRIPTION OF THE INEXTRICABLY INTERTWINED DOCTRINE.........724
   A. Distinguishing the Doctrine from Other Rules Related to Uncharged-Misconduct Evidence..............................................................724
   B. The Case for Recognizing the Inextricably Intertwined Doctrine .................................................................726
II. THE CRITICISMS OF THE INEXTRICABLY INTERTWINED DOCTRINE........728
III. A NEW SET OF PROCEDURES FOR ADMINISTERING THE INEXTRICABLY INTERTWINED DOCTRINE........................................731
IV. THE CASE FOR ADOPTING THE NEW PROCEDURES FOR ADMINISTERING THE INEXTRICABLY INTERTWINED DOCTRINE............733
   A. The Prosecution’s Duty to Give the Defense Pretrial Notice..........733
   B. The Requirement that the Prosecution and Defense Exchange Synopses of the Witness’s Account of the Relevant Events ..........734
   C. The Trial Judge’s Ruling: Deciding whether the References to the Uncharged Misconduct Are Inextricably Intertwined with the Witness’s Account of the Charged Offense ................................737
      1. Incomprehensibility ....................................................................737
      2. A Significant Reduction in the Narrative’s Legitimate Credibility ................................................................................738
   D. The Administration of a Limiting Instruction Explaining the Reason Why the Jury Is Being Permitted to Hear the References to the Uncharged Misconduct ........................................741
V. CONCLUSION............................................................................................743

† Edward L. Barrett, Jr., Professor of Law, University of California; former chair, Evidence Section, American Association of Law Schools; author, Uncharged Misconduct Evidence (rev. 2009). The author would like to thank Ms. Kelly Martin, Class of 2011, University of California, Davis Law School, who served as his research assistant on this project.
“An editor . . . separates the wheat from the chaff . . . .”¹
—Adlai Stevenson

“Editing [is] a bloody trade.”²
—Blake Morrison

Until recently,³ the character-evidence prohibition has been a fixture of the American common law.⁴ The prohibition forbids a litigant from employing character evidence as circumstantial proof of conduct⁵—that is, in the past the accused performed an illegal act that shows that he or she has a propensity for illegal conduct, and accordingly, that propensity increases the probability that he or she has performed the charged act.

The common law banned the admission of evidence of previous misconduct because it posed two probative dangers. In order to decide whether to draw the initial inference, the trier of fact would have to focus on the accused’s personal—or subjective—character. However, that focus creates the probative danger that the trier of fact will be tempted to decide the case on an improper basis, namely, the accused’s status as a recidivist.⁶ In deciding whether to draw the inference from character to conduct on the charged occasion, there is also a danger that the trier of fact will attach undue weight to the evidence of the accused’s prior illegal acts.⁷ Moreover, a large body of psychological research corroborates the common-law assumption that character is a poor predictor of conduct on a particular occasion.⁸

Federal Rule of Evidence 404(b) codifies the common-law principle. Rule 404(b) reads:

OTHER CRIMES, WRONGS, OR ACTS. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be

⁵ 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:19. The Eighth Amendment’s prohibition of cruel and unusual punishment precludes punishing an accused for his or her status. Robinson v. California, 370 U.S. 660, 666 (1962).
⁶ ld. § 2:19. The Eighth Amendment’s prohibition of cruel and unusual punishment precludes punishing an accused for his or her status. Robinson v. California, 370 U.S. 660, 666 (1962).
⁷ ld. § 2:19. The Eighth Amendment’s prohibition of cruel and unusual punishment precludes punishing an accused for his or her status. Robinson v. California, 370 U.S. 660, 666 (1962).
⁸ ld. § 2:19.
admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.\textsuperscript{9}

The first sentence of the statute embodies the ban on character reasoning; the second sentence, however, permits the prosecution to introduce testimony about an accused’s uncharged misconduct when the evidence possesses genuine noncharacter logical relevance. When the evidence has legitimate noncharacter relevance, the theory of relevance ordinarily moots the probative dangers that inspire the character-evidence prohibition.\textsuperscript{10} Such theories do not require the jury to posit any assumption about the accused’s bad character.\textsuperscript{11}

The introduction of evidence of an accused’s other misdeeds is obviously prejudicial to the accused. Prosecutors appreciate the potential impact of such evidence at trial; consequently, they proffer the evidence with great frequency. Dean Charles T. McCormick famously remarked that the published opinions on this subject are as numerous “as the sands of the sea[s].”\textsuperscript{12} Rule 404(b) has generated more reported decisions than any other provision of the Federal Rules.\textsuperscript{13} In many jurisdictions, the admissibility of uncharged-misconduct evidence is not only the most frequently litigated issue on appeal,\textsuperscript{14} but also the most common ground for reversal.

In most Rule 404(b) battles, the decisive question is whether the prosecution can articulate a noncharacter theory of logical relevance that is tenable on the facts. Consider the following hypothetical case. The charge is attempted armed robbery, committed on March 1. During the attempt, the robber dropped a pistol that had a serial number—a one-of-a-kind characteristic. In order to show the accused’s identity as the robber, the prosecution offers testimony about a larceny from a gun store on February 1. The store’s records indicate that the stolen pistol had a unique serial number—the same number as

\begin{footnotes}
\item[9] FED. R. EVID. 404(b).
\item[10] 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, § 2:22, at 2-127 to 2-128.
\item[11] Id. § 2:22.
\item[13] 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE ¶ 404[08], at 404-47.
\item[14] 22 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5239, at 427 (1978) (footnote omitted); see also Stephen A. Saltzburg, Trial Tactics: Inextricably Intertwined? Maybe Not, 16 CRIM. JUST. 60, 60 (2001); Jason M. Brauser, Comment, Intrinsic or Extrinsic?: The Confusing Distinction between Inextricably Intertwined Evidence and Other Crimes Evidence under Rule 404(b), 88 NW. U. L. REV. 1582, 1583–84 (1994).
\end{footnotes}
that on the pistol found at the scene of the attempted robbery. The store owner is prepared to identify the accused as the person who stole the pistol on February 1. If the defense objects that the testimony is inadmissible character evidence, the trial judge could overrule the objection under Rule 404(b). The prosecution, however, will not argue that the prior theft demonstrates that the accused is a law-breaker and that it is thus more likely that he committed the charged attempted robbery. On these facts, the evidence actually has much greater probative value on a noncharacter theory. Without assuming that the defendant has an antisocial character trait, the prosecution will contend that the earlier theft put the accused in possession of the unique weapon used in the subsequent attempted robbery. The judge will admit the evidence and give the jury a limiting instruction under Federal Rule of Evidence 105 as to the proper and improper uses of the testimony.15

In recent years, one of the most controversial theories for admitting uncharged-misconduct evidence is the argument that, in some sense, the testimony about the uncharged misconduct is “inextricably intertwined” with the evidence of the charged crime.16 The argument contends that the evidence of the two crimes is inseparable because the two crimes form parts of an “indivisible criminal transaction.”17 Particularly in drug cases decided since the late 1970s, courts have invoked the doctrine on numerous occasions to justify the admission of testimony about an accused’s uncharged offenses.18

15. FED. R. EVID. 105.
17. Id. at 293–94; see also WRIGHT & GRAHAM, supra note 14, § 5239, at 446 (footnotes omitted).
18. One commentator has discussed the surprising vitality of the doctrine as follows: The past two decades have seen a jurisprudential revolution. During that time, state and federal appellate courts having jurisdiction over criminal litigation in Florida have authored some two hundred opinions considering the doctrine . . . . Most of those federal opinions are in drug cases, and in those cases, the demised evidence is almost always found to be admissible . . . . Hirsch, supra note 16, at 280. The doctrine has also been applied in non-drug cases. Id. at 280 n.1.

The number of cases invoking the doctrine continues to mount. See, e.g., United States v. Watkins, 591 F.3d 780, 784–85 (5th Cir. 2009); United States v. Conner, 583 F.3d 1011, 1018–19 (7th Cir. 2009); United States v. Gutierrez-Castro, 341 F. App’x 299, 300 (9th Cir. 2009); United States v. Bell, 337 F. App’x 663, 665 (9th Cir. 2009); United States v. Stephens, 571 F.3d 401, 410 (5th Cir. 2009); United States v. Johnson, 327 F. App’x 748, 750 (9th Cir. 2009), cert. denied, 130 S. Ct. 333 (2009); United States v. Aldridge, 561 F.3d 759, 766 (8th Cir. 2009), cert. denied, 78 U.S.L.W. 3393 (2010); United States v. Concepcion, 316 F. App’x 929 (11th Cir. 2009) (per curiam); United States v. Rodriguez, 316 F. App’x 612, 614 (9th Cir. 2009); United States v. Duffy, 315 F. App’x 216, 217 (11th Cir. 2009) (per curiam); United States v. Hagerman, 555 F.3d 553, 555 (7th Cir. 2008) (per curiam); United States v. Romandine, 289 F. App’x 120, 126–27 (7th Cir. 2008); United States v. Harris, 536 F.3d 798, 807–08 (7th Cir. 2008); United States v. Juneau, 288 F. App’x 335, 337 (9th Cir. 2008), cert. denied, 129 S. Ct. 649 (2008);
The doctrine has gained widespread acceptance, and every federal circuit now recognizes some formulation of it. The inextricably intertwined doctrine has even been codified in a few states. One commentator has described the inextricably intertwined doctrine as a "powerful prosecutorial weapon," as well as a "doctrinal juggernaut."

At the same time, the doctrine has become the target of intense scholarly criticism. Authors of treatises, law review articles, student comments, and articles in practitioner journals all have leveled the accusation that the doctrine is too loose and that it facilitates the admission of otherwise inadmissible evidence of bad character. Several courts have joined in the criticism. One United States court of appeals asserted that the doctrine has emerged as a convenient vehicle for circumventing Rule 404(b). Another court of appeals urged the narrow application of the doctrine, stating that the doctrine's "very looseness and obscurity" create "too many opportunities
for its abuse.' Additionallly, at least one United States district court has 
condemned the indiscriminate invocation of the doctrine. 

Despite this constant drumbeat of substantive criticism, the number of cases 
invoking the doctrine grows largely unabated. Some courts have adamantly 
refused to tighten the doctrine. The thesis of this Article is that the 
substantive criticisms miss the mark. A judge applying the doctrine faces the 
essential task of editing or redacting to determine whether the references to the 
uncharged misconduct can be excised from the witness’s account of the 
charged crime without destroying the account’s comprehensibility and 
credibility. The nature of that task defies the formulation of bright-line tests. 
A much more promising approach would be to reform the procedures for 
administering the doctrine. Part I of this Article describes the doctrine and 
distinguishes it from other doctrines related to the character-evidence 
prohibition. Part II outlines the criticisms of the doctrine. In light of those 
criticisms, Part III of this Article proposes a new set of procedures for applying 
the inextricably intertwined doctrine. Finally, Part IV presents the case for 
adopting these procedures.

I. A DESCRIPTION OF THE INEXTRICABLY INTERTWINED DOCTRINE

A. Distinguishing the Doctrine from Other Rules Related to Uncharged-

Misconduct Evidence

By its terms, Rule 404(b) applies only to “[e]vidence of other crimes, 
wrongs, or acts . . . .” In other words, only evidence of a misdeed other than 
the one or ones alleged in the pleadings is covered by this rule. If the 
 testimony in question describes part of the charged offense, it is “intrinsic”
rather than “extrinsic,” and Rule 404(b)’s strictures are inapplicable. The key consideration is the interpretation of the charge set out in the pleadings.

Conspiracy cases illustrate this point. A conspiracy allegation does not aver a discrete event; rather, the allegation describes a course of conduct. It is true that the pleadings ordinarily mention one or more specific overt acts committed in the course of the conspiracy; however, the scope of the allegation is broader than that. An uncharged overt act can be part of the course of conduct even if the pleading does not expressly mention it. In fact, the act is direct evidence of the charged conspiracy.

The courts sometimes mention the “intrinsic” and “inextricably intertwined” theories in the same breath, but in principle, the two theories are distinguishable. The former theory is that the testimony is part and parcel of the charged offense; thus, the wording of the allegation in the pleadings is expansive enough to encompass the conduct. In contrast, when the thrust of the prosecution’s argument is that the testimony about the uncharged misconduct is “inextricably intertwined” with the charged offense, it is implicit that there are two separate offenses. Nevertheless, the prosecution argues that testimony about the two offenses is so closely related that the court should admit the evidence of the technically uncharged crime. At the most fundamental level, the inextricably intertwined doctrine must be differentiated from the contention that the proffered testimony is intrinsic to—and thus describes part of—the charged crime.

At a second level, the doctrine should be distinguished from the prosecution’s contention that the proffered testimony is logically relevant on a conventional noncharacter theory. The second sentence of Rule 404(b) provides an illustrative list of noncharacter theories, “such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .” Consider the first theory mentioned—motive. In United States v. Hattaway, the accused was charged with kidnapping a woman. At trial, the prosecution attempted to introduce evidence that before the kidnapping, the accused had murdered the woman’s boyfriend. The uncharged murder was probative of a possible motive for the kidnapping—the

35. LEONARD, supra note 22, § 5.2, at 320, 327–29.
36. Id. § 5.2, at 320, 327–29.
37. Id. § 2:11, at 2-66 to 2-70.
39. Id. at 60–61; see also 22 WRIGHT & GRAHAM, supra note 14, § 5239, at 450.
40. Id. § 6:27, at 6-89 to 6-90.
41. Id. § 6:30, at 6-98 to 6-107.
42. FED. R. EVID. 404(b).
43. United States v. Hattaway, 740 F.2d 1419, 1422 (7th Cir. 1984).
44. Id. at 1422, 1424.
accused kidnapped the woman to ensure that she did not reveal details about the murder of her boyfriend. In the same analysis applied in United States v. Fortenberry, the accused was charged with unlawful possession of a shotgun. The prosecution offered evidence of an uncharged double murder as an explanation of "why [the accused] acquired possession of the shotgun." In these two situations, the facts fall squarely within one of the recognized noncharacter theories of relevance; consequently, there is no need to resort to the inextricably intertwined doctrine.

In many of the cases in which courts have invoked the doctrine, they could just as easily have relied on a recognized noncharacter theory, such as motive. However, by treating the inextricably intertwined theory as a separate basis for admitting uncharged-misconduct evidence, courts have announced that this type of evidence can be admitted even when the prosecution cannot lay a proper foundation for a traditional noncharacter theory. The reasoning behind this treatment is that there is a special relationship between the testimony about charged and uncharged crimes that warrants the admission of evidence of the uncharged offense.

B. The Case for Recognizing the Inextricably Intertwined Doctrine

Suppose that the prosecution is prepared to offer a body of testimony that includes references to both the charged crime and an uncharged offense. For present purposes, assume that the proffered testimony about the uncharged misdeed is not intrinsic to the charged crime. Assume further that the prosecution cannot establish a foundation for a conventional noncharacter theory to justify the admission of the testimony about the uncharged misdeed. Under these circumstances, why should the evidence of the uncharged offense be admitted at all?

The references to the charged offense are presumptively admissible: because the charge itself is a fact of consequence under Federal Rule 401, the references to the charge qualify for admission under Rule 402. Moreover,

46. Id. at 1424–25 (noting that the admission of the evidence “showed the defendants’ possible motivation”).
47. 971 F.2d 717 (11th Cir. 1992).
48. Id. at 719.
49. Id. at 721.
50. See LEONARD, supra note 22, § 5.3.2, at 345, 350; 22 WRIGHT & GRAHAM, supra note 14, § 5239, at 449.
51. See 22 WRIGHT & GRAHAM, supra note 14, § 5239, at 447–49.
52. FED. R. EVID. 401.
53. In pertinent part, Rule 402 provides that “[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.” FED. R. EVID. 402.

Even if an item of evidence qualifies as relevant under Rules 401 and 402, in most cases, the trial judge, pursuant to Rule 403, has discretionary power to exclude the evidence if he or she
those references are not subject to Rule 404(b) because they concern the charged offense itself. As previously stated, Rule 404(b) governs only when the testimony relates to “other crimes, wrongs, or acts.”

What is the argument for also admitting the references to the uncharged misconduct? There are several parallels in the law of evidence—situations in which the admissibility of one part of a body of evidence justifies bringing in another part. For instance, Federal Rule of Evidence 411 generally bans evidence of a civil defendant’s liability insurance. The rationale is that the routine introduction of such evidence might tempt the jury to decide the case on an improper basis. Suppose that a sympathetic plaintiff had suffered severe injuries. Even if the showing of the defendant’s fault were weak, the jury might be inclined to impose liability, since the admission of evidence about the defendant’s liability insurance indicates to the jury that the defendant could pass the liability on to his or her insurer. However, it is well-settled that “[e]vidence of insurance may be admitted when it is an inseparable part of an admission of a party bearing on negligence or damages.” If the judge cannot sever the reference to the insurance from the evidence “without substantially lessening the probative value of the admission,” the entire body of evidence, including the reference to insurance, will come in. The reference to insurance is deemed admissible because it is “inextricably bound up in the admission . . . .”

The Supreme Court endorsed this underlying principle in its 1997 decision in Old Chief v. United States. In Old Chief, the accused was charged with several offenses, including assault with a dangerous weapon and felony possession of a firearm. At trial, the prosecution offered evidence of the defendant’s prior conviction to show his status as a felon. The accused objected on Rule 403 grounds, claiming that the prejudicial character of the conviction “outweigh[ed] its probative value.” To avoid the prejudice that would result from a full explanation of the prior conviction, the accused

concludes that the attendant probative dangers, such as prejudice, substantially outweigh the probative value of the evidence. See id. at R. 403. But see id. at R. 609(a)(2) (indicating that a conviction “involv[ing] dishonesty or false statement” cannot be excluded under Rule 403 if used to “attack['] the credibility of a witness”).

54. FED. R. EVID. 404(b) (emphasis added).
55. Id. at R. 411.
56. DIX ET AL., supra note 4, § 201, at 810.
57. Id. § 201, at 809–10.
58. Id. § 201, at 812–13.
59. Id. § 201, at 813 n.19; see also LEONARD, supra note 22, § 6.7.6, at 831–34.
60. Id. § 6.7.6, at 831.
62. Id. at 174–75.
63. Id. at 174–77.
64. Id. at 175.
offered to stipulate to his prior felony conviction. The trial judge overruled the defendant's objection and permitted the prosecution to reject the stipulation and introduce the conviction. On these facts, the Court held that the trial judge had erred.

Writing for the majority, Justice David Souter made it clear that in many cases, the prosecution may reject such stipulations, emphasizing that the prosecution must present the trier of fact with a narrative that is not only legally sufficient, but also tells "a colorful story with descriptive richness." Thus, the prosecution may introduce "robust evidence" in order to tell "[a] convincing tale," and the defense cannot limit the prosecution to an "abstract statement[]" that lacks compelling force. As a practical matter, to obtain a conviction, the prosecution's evidence must establish "a convincing" story. The judge should not deny the prosecution a fair opportunity to make a trial presentation with "evidentiary richness and narrative integrity." In effect, the prosecution's right to prove the charged crime creates a corollary right to introduce evidence of details that are necessary to present a coherent, convincing narrative about the commission of the charged crime. In Rule 404(b) cases, that corollary right arguably justifies the introduction of references to an uncharged offense that are inextricably intertwined with the narrative of the charged crime.

II. THE CRITICISMS OF THE INEXTRICABLY INTERTWINED DOCTRINE

Although the inextricably intertwined doctrine enjoys wide judicial support, it has been sharply criticized for two reasons: (1) the doctrine is vague, and (2) the doctrine's very vagueness makes it prone to abuse. The inextricably intertwined doctrine is arguably the second coming of the common-law res gestae principle. As Judge Learned Hand once remarked, this "phrase...has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms." Dean John Henry Wigmore was equally critical of the principle, asserting that the "phrase...is indefinite in its scope" and, moreover,"has long been not only

65. id.
66. Id. at 177.
67. Id. at 174.
68. Id. at 186–89; see also Richard O. Lempert, Narrative Relevance, Imagined Juries, and a Supreme Court Inspired Agenda for Jury Research, 21 ST. LOUIS U. PUB. L. REV. 15, 17 (2002) (describing Justice Souter's approach as protecting the "narrative relevance" of evidence).
69. Old Chief, 519 U.S. at 187, 189.
70. Lempert, supra note 68, at 17.
71. Old Chief, 519 U.S. at 183; see also LEONARD, supra note 22, § 5.3.2, at 341 (footnote omitted).
72. United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944).
entirely useless, but even positively harmful." Other commentators have described the principle as "mind-numbing," and one court of appeals has disparaged the principle as "overly-broad." Despite these condemnations, the principle found its way into the realm of both hearsay and uncharged misconduct.

In the uncharged-misconduct context, courts have often invoked the principle to rationalize the introduction of uncharged offenses committed simultaneously with the charged crime or perpetrated in the same series of events as the charged crime. Of course, the mere fortuity of timing does not itself guarantee that the testimony regarding the uncharged offense will be found relevant on legitimate noncharacter grounds. Nor does simultaneity automatically ensure that there is a sound policy justification for admitting testimony about the uncharged offense.

"Inextricably intertwined" is the "modern de-Latinized" equivalent of res gestae, and it has been savaged by a similar critique. The standard has been described as "lack[ing] clarity" and "obscure," because it does not embody a clear substantive principle. Thus, the doctrine functions largely as a "shibboleth" or "talisman" to be incanted. The looseness of the doctrine allows the courts to engage in "result-oriented" decision-making. A court can purport to justify the admission of testimony about uncharged misconduct "by the simple expedient of describing [the conduct] as 'inextricably intertwined'" with the charged offense. The vacuous nature of the test's wording gives courts license to employ sloppy analysis and allows them

---

73. JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1767, at 253, 255 (1976).
74. MUELLER & KIRKPATRICK, supra note 22, § 4:33, at 809.
77. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, §§ 6:26-29, at 6-87 to 6-94.
78. Id. § 6:28, at 6-91.
79. Id. § 6:29, at 6-94 to 6-96.
80. Id. § 6:31, at 6-116.
81. 22 WRIGHT & GRAHAM, supra note 14, § 5239, at 446-47.
82. MUELLER & KIRKPATRICK, supra note 22, § 4:33, at 809.
84. Brauser, supra note 14, at 1611.
86. Id. at 280, 313.
87. Id. at 280.
88. LEONARD, supra note 22, § 5.2, at 327; Brauser, supra note 14, at 1604.
quickly to slip from a conclusory analysis to a desired conclusion. Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse.

The doctrine’s second criticism is that, worse still, abuse has in fact occurred. Commentators have noted that courts have frequently applied the doctrine in an overbroad manner. In the view of one treatise author, some courts have “lost [their] way.” In applying the doctrine, a number of courts have turned a blind eye to the danger of admitting prejudicial uncharged-misconduct evidence. Rather than “meticulous[,]” attempting to determine whether the testimony about the charged and uncharged crimes could realistically be severed, the judicial tendency has been to apply the doctrine in a lax fashion. In case after case, the courts have invoked the doctrine even though, on careful scrutiny, the testimony about the charged and uncharged offenses could readily have been separated. In these cases, testimony concerning the different crimes was “anything but inseparable.”

Although the commentators are virtually unanimous in faulting the courts for applying the doctrine indiscriminately, this substantive criticism has had little impact. To the contrary, many courts continue to apply the doctrine as a matter of course. Unsurprisingly, several courts have expressly brushed aside the criticism and refused to tighten the inextricably intertwined doctrine. In the final analysis, the judge’s central challenge is editing: can the judge redact the references to the uncharged misconduct from the body of testimony without rendering the witness’s narrative incomprehensible or significantly less credible?

It is fanciful to think that the courts can develop hard-and-fast rules to govern as delicate and fact-sensitive a task as editing. If there is any hope for
reining in the doctrine's excesses, that hope lies in revising the procedures by which the doctrine is administered. Part III below outlines such a set of revised procedures; Part IV then constructs the case for adopting those proposed procedures.

III. A NEW SET OF PROCEDURES FOR ADMINISTERING THE INEXTRICABLY INTERTWINED DOCTRINE

Currently, the doctrine is administered at trial, under time constraints, and often in the presence of the jury. In most states, the prosecution has no obligation to give the defense any pretrial notice that it intends to offer uncharged-misconduct evidence at trial. Nor must it inform the defense that it intends to offer the evidence under the inextricably intertwined doctrine. The issue usually arises mid-trial. When the issue does arise, the judge's options are limited by the jury's presence and time constraints. The following, then, become the only possibilities: (1) discussing the issue in the jury's hearing, thereby exposing the jury to the challenged evidence; (2) conducting a whispered sidebar debate; or (3) excusing the jurors and sending them to the deliberation room. Even when the judge admits references to the uncharged misconduct, he or she has no obligation to state on the record why he or she believes that the deletion of the references will impair the narrative integrity of the prosecution's account of the charged offense—the judge need say only, "objection overruled." Furthermore, even if the judge admits the references, in some jurisdictions the judge need not give the jury a limiting instruction as to the proper and improper uses of the references. These procedures are not calculated to ensure that the judge engages in the deliberate, careful reflection necessary for sensitive editing.

In contrast, the following procedures would be more conducive to judicial reflection and editing:

- First, when the prosecution intends to rely on the inextricably intertwined theory as a basis for introducing references to an accused's uncharged misconduct, the prosecution should generally be required to give the defense pretrial notice. The notice ought to (1) synopsize the

101. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, § 9:10, at 9-76 to 9-77.
103. Id. at 291.
104. See James W. McElhaney, Trial Notebook: Effective Objections, LITIG., Summer 2002, at 53, 54 (“Federal Judge Robert E. Jones of Portland, Oregon, did some studies on what juries ... don't like [a]nd ... found that juries uniformly hate bench conferences more than any other part of the trial.”).
105. FED. R. EVID. 103(c).
106. See 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, § 9:70, at 9-230.
government witness’s testimony, including the references to the
uncharged misconduct and (2) indicate that the prosecution
contemplates invoking the inextricably intertwined doctrine to justify
the introduction of the references.

• Upon receipt of the prosecution’s notice that it intends to offer
uncharged-misconduct evidence, the defense can file a motion in
limine,\(^{107}\) objecting to the invocation of the doctrine. If the defense
does so, it would be obliged to submit a revised synopsis of the
government witness’s testimony, deleting any references to the
uncharged misconduct. The defense may not merely assert that the
references are readily severable; the defense must actually show the
judge, through the revised synopsis, how the severance can be effected.

• After the defense submits its revised synopsis, the prosecution could
file a memorandum opposing the deletion of the references to the
uncharged misconduct and arguing that the deletion impairs the
narrative integrity of the witness’s account of the relevant events.

• Based on these filings, the judge would then make a pretrial ruling. If
the judge decided to grant the defense’s motion, the prosecution must
refrain from mentioning the references during jury selection and its
opening statement. The prosecution must also instruct the witness to
avoid those references.\(^{108}\) However, if the judge denied the motion, the
judge would be obliged to state on the record why he or she believed
that the deletion of the references to the uncharged misconduct would
render the government witness’s narrative incomprehensible or
significantly less credible.

• Even if the judge denied the motion, the defense would be entitled to
request a limiting instruction.\(^{109}\) Similar to a typical limiting instruction
under Rule 105, the instruction would do two things. First, it would
forbid the jury from using the references to the uncharged misconduct
as a basis for determining the defendant’s character.\(^{110}\) Second, it
would explain why the jury is allowed to hear the references to the

\(^{107}\) FED. R. EVID. 103 advisory committee’s note.

\(^{108}\) If, after such an admonition, the witness nevertheless referred to the uncharged
misconduct within the jury’s earshot, the defense might move for a mistrial. See RONALD L.
CARLSON & EDWARD J. IMWINKELRIED, DYNAMICS OF TRIAL PRACTICE: PROBLEMS &
MATERIALS § 15.3, at 439–41 (4th ed. 2010). Even if the witness violated the court’s order by
referring to the uncharged offense, the judge would not necessarily have to grant the motion. In
large part, the judge’s ruling would turn on his or her assessment of whether a curative instruction
to the jury to disregard the reference would be effective. 1 IMWINKELRIED, UNCHARGED
MISCONDUCT EVIDENCE, supra note 5, § 9:62.

\(^{109}\) 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, § 9:71, at 9-231
to 9-232.

\(^{110}\) Id. §§ 9:72–73, at 9-235 to 9-236.
uncharged misconduct.\footnote{111} By way of example, suppose that the prosecution’s evidence was an audiotape recording on which the accused both described the charged offense and boasted about the uncharged misconduct.\footnote{112} The references to the uncharged misconduct might be so closely commingled\footnote{113} with the statements about the charged crime that the redaction of the references would garble the tape to the point of incomprehensibility. If that was the only reason for the judge’s ruling permitting the jury to hear the references, the jury would be told precisely that.

IV. THE CASE FOR ADOPTING THE NEW PROCEDURES FOR ADMINISTERING THE INEXTRICABLY INTERTWINED DOCTRINE

In four significant respects, the adoption of the procedures outlined above would put the judge in a much better position to make the editing decisions necessary to rule on the application of the inextricably intertwined doctrine.

A. The Prosecution’s Duty to Give the Defense Pretrial Notice

Under the status quo, the defense often receives no advance notice that the prosecution intends either to offer uncharged-misconduct evidence or to rely on the inextricably intertwined doctrine to justify its admission. It is true that several states require the prosecution to give the defense pretrial notice that the government intends to offer uncharged-misconduct evidence at trial.\footnote{114} These provisions typically require the government to describe the evidence at least in general terms.\footnote{115} However, just over one-fifth of the states require the government to give such notice.\footnote{116} Prior to 1991, Federal Rule of Evidence 404(b) did not impose any requirement for pretrial notice. However, in 1991, the rule was amended to provide that “upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, or the general nature of any such evidence it intends to introduce at trial.”\footnote{117} Significantly, the Advisory Committee Note accompanying the 1991 amendment stated that the requirement “does not extend to evidence of acts

\footnotesize{111. Id. § 9.73, at 9-236.}
\footnotesize{112. 1 MUELLER & KIRKPATRICK, supra note 22, § 4:33, at 814 (explaining that if the accused commingles references to the charged and uncharged crimes, the statements about the uncharged acts may be admissible).}
\footnotesize{113. Id.}
\footnotesize{114. 1 IMWINKLERIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, § 9:10, at 9:10 to 9-77 (noting that Alabama, Colorado, Connecticut, Florida, Georgia, Kentucky, Louisiana, Minnesota, Montana, New Mexico, Pennsylvania, Texas, and Wyoming require that the defense be given pretrial notice of the prosecution’s anticipated use of uncharged misconduct).}
\footnotesize{115. Id.}
\footnotesize{116. Id.}
\footnotesize{117. FED. R. EVID. 404(b).}
which are ‘intrinsic’ to the charged offense . . . ." As explained in Part I, on close examination an elementary distinction exists between admitting evidence because it is truly intrinsic to the charged offense and admitting evidence that is intertwined with the charged offense. However, the courts have tended to lump the two situations together and dispense with pretrial notice in cases in which the government relied on the inextricably intertwined theory. Even when Rule 404(b)’s notice provision applies, the provision does not require the prosecution to specify the theory on which it intends to rely to justify the admission of the uncharged-misconduct evidence.

Deferring the ruling on the application of the inextricably intertwined doctrine is far from ideal. At trial, the judge may have to resolve a difficult editorial question: if the government witness proposes to give his or her account of the relevant events, would the deletion of references to the defendant’s uncharged misconduct impair the narrative integrity of the account as a whole? Anyone who has edited the manuscript of a book, appellate brief, pleading, or law review article can appreciate how difficult and time-consuming editing can be. Editing can be “a bloody trade,” requiring long, hard thought. In some cases, an editor can deftly remove a huge part of a draft without distorting the moral of the story. By contrast, in other instances, changing a single word can profoundly alter the meaning of a sentence, a paragraph, or even the entire narrative. Given the stakes, the judge’s editorial decision under the inextricably intertwined doctrine should be considered thoughtfully. Time constraints and the presence of a jury understandably generate pressure for relatively quick decisions at trial. In the “hurly burly” of that setting, the judge may find it extremely difficult to engage in deliberate, careful editing. In particular, if he or she attempted the necessary editing at sidebar with a jury impatiently waiting, the doctrine is far more likely to be misapplied.

B. The Requirement that the Prosecution and Defense Exchange Synopses of the Witness’s Account of the Relevant Events

Requiring the two sides to exchange their competing drafts would enhance the fairness of the judge’s ultimate decision. If the editing issue arises midtrial, the defense, at sidebar, may have to explain orally why it believes that all references to the uncharged misconduct may be excised from the witness’s account. It is expecting a good deal to require the defense to propose editorial deletions without any advance notice. Under these circumstances, the judge is

---

118. FED. R. EVID. 404(b) advisory committee’s note.
119. See supra Part I.A.
120. I GRAHAM, supra note 22, § 404:5, at 711–12 n.22; LEONARD, supra note 22, § 5.2, at 327; I MUELLER & KIRKPATRICK, supra note 22, § 4:33, at 818.
121. Morrison, supra note 2.
123. Id.
asked to make a final editorial decision on the spot. After all, the judge probably knows less about the facts of the case than either the prosecutor or defense counsel. The judge can make a higher quality decision if he or she is presented with two written synopses of the witness’s account and afforded ample time to painstakingly compare the two.

The proposed procedure follows the approach taken by the appellate court in United States v. Moussaoui.124 Zacarias Moussaoui was charged with six counts of conspiracy in connection with the September 11, 2001, attacks.125 In preparation for trial, Moussaoui requested access to an enemy-combatant witness, Ramzi Binalshibh, who would testify that Moussaoui was not involved in the attacks.126 The government was concerned that the witness would disclose potentially sensitive information and refused to allow Moussaoui access to him.127 In the lower court, the United States District Court for the Eastern District of Virginia, the trial judge proposed that Moussaoui interview the witness via satellite with a time-delay, allowing intelligence officials to protect privileged information from disclosure.128 The judge held that Moussaoui’s right to a fair trial required the government to produce witnesses, “presumably in Government custody, who may be able to provide favorable testimony on [Moussaoui’s] behalf.”129 When the government refused to comply, rather than dismissing the charges, the judge merely removed the possibility of the death penalty.130

The United States Court of Appeals for the Fourth Circuit reversed and, in doing so, looked to the Classified Information Procedures Act (CIPA), which provides for sanctions “only if the government has failed to produce an

125. Id. ("[Moussaoui] is charged with conspiracy to commit acts of terrorism transcending national boundaries, . . . conspiracy to commit aircraft piracy, . . . conspiracy to destroy aircraft, . . . conspiracy to use weapons of mass destruction, . . . conspiracy to murder United States employees, . . . and conspiracy to destroy property . . . .")
126. Phil Hirschkom & Kelli Arena, Moussaoui Request Risks National Security, U.S. Argues, CNN.COM, June 3, 2003, http://www.cnn.com/2003/LAW/06/03/moussaoui.trial/ (last visited Apr. 13, 2010); see also Moussaoui I, 333 F.3d at 513; Siobhan Roth, 4th Circuit to Take Up Rules for Terror Trials, LEGAL TIMES, Dec. 1, 2003, at 1. Moussaoui additionally requested to speak with two other enemy-combatant witnesses. Moussaoui I, 333 F.3d at 513 n.5. The district court denied the request because “Moussaoui and standby counsel had failed to establish that the individuals would provide material, admissible testimony.” Id.
127. Moussaoui I, 333 F.3d at 512.
130. Id. at 487. Moussaoui argued that dismissal of the charge was appropriate in accordance with the Classified Information Procedures Act; the prosecution did not argue to the contrary. Id. at 482; see Classified Information Procedures Act, 18 U.S.C. app. § 6(e)(2) (2006) (providing the court with the ability either to dismiss indictments or information where "the interests of justice would not be served by dismissal" or to provide other appropriate sanctions).
adequate substitute for the classified information." The court rejected the trial judge’s conclusion that substitute statements would be inadequate. However, to prevent the government from drafting the substitute statements alone, the court created "an interactive process among the parties and the district court." In effect, the process contemplated an exchange of synopses between the prosecution and defense.

The government would begin the process of generating the substitute statement by preparing an original draft using the precise language of the witness’s existing records as much as possible. Next, the defense would identify the portions that it would attempt to admit into evidence at trial. Then, the government could seek to include additional portions of the evidence in the substitute statement "in the interest of completeness." After this exchange, the trial judge would decide whether the resulting substitutions are admissible and, if so, how to inform the jury of the substitutions. The Fourth Circuit later clarified and refined these procedures. Ultimately, the issue became moot when Moussaoui decided to plead guilty.

131. United States v. Moussaoui (Moussaoui III), 365 F.3d 292, 313 (4th Cir. 2004). The Classified Information Procedures Act provides that upon any determination by the court authorizing the disclosure of specific classified information under the procedures established by this section, the United States may move that . . . the court order—

(A) the substitution for such classified information of a statement admitting relevant facts that the specific classified information would tend to prove; or
(B) the substitution for such classified information of a summary of the specific classified information.

18 U.S.C. app. § 6(c)(1).

132. Moussaoui III, 365 F.3d at 315.

133. Id. at 315–16.

134. Id. at 316.

135. Id.

136. Id.; see FED. R. EVID. 106 (codifying the rule of completeness). However, in this process, the government cannot "bolster its own case by offering what it considers to be inculpatory statements." Moussaoui III, 365 F.3d at 316. The Fourth Circuit noted that the jury must at least be informed "that the substitutions are what the witnesses would say if called to testify; that the substitutions are derived from statements obtained under conditions that provide circumstantial guarantees of reliability[;] . . . and that neither the parties nor the district court has ever had access to the witnesses." Id.

137. United States v. Moussaoui (Moussaoui IV), 382 F.3d 453, 480–82 (4th Cir. 2004) (clarifying standards for admissibility of summaries). For a concise summary, see Fourth Circuit Modifies Ruling on Accused Terrorist’s Access to Witnesses, 75 CRIM. L. REP. (BNA) 615, 616 (2004) ("The process the court set forth for creating substitute witness statements is an interactive one, involving the district court and both parties. . . . The process will begin when defense counsel identifies particular portions of the summaries it seeks to admit into evidence. The government may then argue that additional portions must be included in the interest of completeness. . . . As much as possible, . . . the statements should use the exact language of the documents from which they are derived.").

In the context of prosecutions such as Moussaoui’s, the trial judge faces a more difficult editorial task than the judge would confront under the procedure posed here for Rule 404(b) cases. In 404(b) cases, the body of evidence includes references to two distinct offenses. In terrorism prosecutions, such as Moussaoui’s, the entire body of evidence may relate to a single crime. Moreover, the stakes will often be higher in terrorism prosecutions. To be sure, in both the terrorism setting and in a 404(b) case, the judge is concerned about according the accused a fair opportunity to present a defense. However, terrorism prosecutions may also involve full-fledged state secrets and implicate vital national-security interests. If the collaborative process outlined by the Fourth Circuit is acceptable and feasible in terrorism prosecutions, it should certainly be a viable procedure in cases in which the judge must make editorial decisions under the inextricably intertwined doctrine.

C. The Trial Judge’s Ruling: Deciding whether the References to the Uncharged Misconduct Are Inextricably Intertwined with the Witness’s Account of the Charged Offense

In the past, there were few constraints on a trial judge’s ruling under the inextricably intertwined doctrine. Substantively, the judge applied the vague standard of whether the references to the uncharged misdeed were “inseparable” from the witness’s testimony about the charged crime. The judge might supplement the inseparability standard by quoting the reference to “narrative integrity” in Old Chief, but even that supplemented standard provides little guidance. Procedurally, even if the trial judge admitted the references only because he or she concluded that redacting those references would leave a gap in the witness’s testimony that would pose troubling questions for the jury, the judge was not required to state that conclusion on the record or to identify the gap. The judge simply had to overrule the defense’s objection. Both the substantive and the procedural constraints on the judge’s ruling should be toughened.

Substantively, the judge ought to admit the references to the uncharged misconduct under a two-pronged test: the references should be admitted only if redacting them would render the witness’s account of the charged crime either (1) incomprehensible or (2) significantly less credible.

1. Incomprehensibility

In some cases, the judge should admit references to uncharged misconduct because their exclusion would render the witness’s narrative incomprehensible or hard to understand. For example, the judge might find that the references

140. Brauser, supra note 14, at 1607 n.157.
141. United States v. Lehder-Rivas, 955 F.2d 1510, 1516 (11th Cir. 1992); see also 1 MUELLER & KIRKPATRICK, supra note 22, § 4.33, at 811–12.
are "linguistically inseparable" from the testimony about the charged crime.\textsuperscript{142} Such a finding is especially likely when the evidence takes the form of a writing, audiotape, or videotape.\textsuperscript{143} Suppose the prosecution intends to offer into evidence a recording of the suspect offering to sell marijuana. On the same tape, the accused might make damning admissions about the charged crime while boasting about other misdeeds.\textsuperscript{144} When a potential drug buyer asks about the price for marijuana, the accused might respond by quoting a price and by emphasizing how low it is by contrasting it with the price he normally charges for methamphetamine.\textsuperscript{145} In these situations, if the judge attempted to redact the words, phrases, or clauses mentioning the uncharged misconduct, the admissible remainder of the evidence might be unintelligible to the jury.\textsuperscript{146} Instances of linguistic inseparability present the strongest case for applying the inextricably intertwined doctrine. When a writing or tape exists, the prosecution should be permitted to present it to the jury; otherwise, the trial could degenerate into a "he said, she said" swearing contest between the accused and an informant. The prosecution would need the writing or tape to break the credibility tie. When references to the uncharged misconduct are closely commingled with the testimony about the charged offense, the prosecution should not be forced to present the evidence in garbled and confusing form.\textsuperscript{147}

2. \textit{A Significant Reduction in the Narrative's Legitimate Credibility}

However, those instances of extreme linguistic inseparability are not the only times the inextricably intertwined doctrine may be invoked. It is also defensible to invoke the doctrine when the redaction of the references to the uncharged misdeed would significantly reduce the legitimate credibility of the witness's account of the charged crime.

The term "legitimate" is used advisedly here. References to the accused's uncharged misconduct always enhance the credibility of the remainder of the witness's testimony--albeit in an illegitimate manner--by inviting the jury to engage in forbidden character reasoning.\textsuperscript{148} The uncharged misconduct

\textsuperscript{142} Schuster, supra note 98, at 966.
\textsuperscript{143} United States v. Price, 877 F.2d 334, 337 (5th Cir. 1980) (explaining that "statements [on an audiotape] are understandable only in context and cannot be severed from the remaining taped conversation").
\textsuperscript{144} See, e.g., United States v. Concepcion, 316 F. App'x 929, 932 (11th Cir. 2009) (per curiam) (explaining that the accused discussed prior dealings with a drug cartel with a confidential informant); United States v. Masters, 622 F.2d 83, 85–88 (4th Cir. 1980) (remarking that in some of the taped conversations, the defendant was boasting about his ability to supply weapons to customers); see also 1 MUELLER & KIRKPATRICK, supra note 22, § 4:33, at 814.
\textsuperscript{146} Id. at 299.
\textsuperscript{147} 1 MUELLER & KIRKPATRICK, supra note 22, § 4:33, at 814; Hirsch, supra note 16, at 298–99; Schuster, supra note 98, at 967–68.
\textsuperscript{148} 22 WRIGHT & GRAHAM, supra note 14, § 5248, at 520–21.
"corroborates" the witness and increases the overall credibility of the witness’s testimony about the charged crime because if the accused did it once (the uncharged act), it is more likely that he did it again (the charged act). To properly invoke the inextricably intertwined doctrine under this alternative test, the prosecution must point to another way in which excising the references to the uncharged misconduct significantly impairs the credibility of the witness’s testimony. The alternative method must still preclude the jury from resorting to impermissible character reasoning.

There are occasions, however, when the prosecution can satisfy this substantive standard. In some cases, the exclusion of the uncharged misconduct will create a geographic gap in the case that many jurors would find puzzling. An Arkansas case, Rhodes v. State, is illustrative. In Rhodes, most of the witnesses at trial were either prison inmates or prison guards. It would have been extremely “awkward” to have “sanitized” the testimony by ordering all of the witnesses to refrain from mentioning that the site of the events was a prison in which the accused was incarcerated. Without the benefit of the witnesses’ complete testimony, some of the jurors might become skeptical of the prosecution’s narrative because they may sense that the prosecution and its witnesses are obviously withholding certain facts. Accordingly, the jurors would have an uneasy feeling that the prosecution and its witnesses were hiding the whole truth. In Old Chief, Justice Souter addressed this very problem:

[T]he effect may be like saying, “never mind what’s behind the door,” and jurors may well wonder what they are being kept from knowing.

. . . People who hear a story interrupted by gaps . . . may be puzzled at the missing chapters, and jurors asked to rest a momentous decision on the story’s truth can feel put upon at being asked to take responsibility knowing that more could be said than they have heard.

The most sensible solution is to allow the witnesses to mention facts regarding the uncharged misconduct and to instruct the jurors that they cannot reason that the accused’s past criminal activity made it more probable that he committed the charged offense.

149. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, § 6:5.
150. United States v. Paladino, 401 F.3d 471, 475 (7th Cir. 2005) (“Such evidence can be proper to enable the jurors to make sense of the evidence pertaining to the criminal activity of which the defendant is currently accused, . . . and to avoid puzzling them by making them think that facts important to their understanding of the case are being concealed.” (citation omitted)).
151. 716 S.W.2d 758 (Ark. 1958).
152. Id. at 762.
By the same token, the exclusion of uncharged misconduct will sometimes create a temporal or chronological hole\textsuperscript{156} or lacuna\textsuperscript{157} in the prosecution’s narrative. \textit{United States v. Yusufu} is a case in point.\textsuperscript{158} In \textit{Yusufu}, there was “a three-year gap” in the chronology between the time the accused formed the plan to commit the charged crime and when the accused was convicted and imprisoned for another crime.\textsuperscript{159} Suppose that the prosecution called witness \(A\) to testify to the accused’s development of the plan to commit the charged offense. According to witness \(A\), the accused stated that he was ready to immediately execute the plan. The prosecution then calls witness \(B\) to testify about the execution of the plan. The difficulty is that when the prosecution’s narrative picks up with witness \(B\), three years have already passed. The seemingly inexplicable time lapse might prompt the jury to discount improperly the credibility of witness \(A\)’s testimony; according to witness \(A\), the accused had said that he was ready to execute the plan immediately, but he evidently did nothing for three years. To prevent that improper discounting, the prosecution ought to be permitted to reveal that the accused had spent those three years in prison for another crime. However, out of fairness to the accused, the jury should be instructed that although the accused was convicted of another crime, the jurors cannot rely on that misconduct as a basis for inferring that the accused has a propensity for committing the charged crime.

When the prosecution invokes this second substantive test for inextricability, the judge must inquire whether there is a real possibility that barring any mention of the uncharged misconduct will cause a rational juror to perceive a troubling void in the prosecution witnesses’ narrative.\textsuperscript{160} Will the exclusion of all references to the uncharged misconduct create a gaping hole,\textsuperscript{161} thereby rendering the narrative substantially less credible by making it appear suspiciously incomplete?\textsuperscript{162} If the judge concludes that the exclusion would
have that effect, under the proposed substantive test, the judge may legitimately rely on the inextricably intertwined theory.

However, as previously stated, to effectively regulate the judge's discretion under the theory, procedural safeguards must also be put in place. When a prosecutor proffers uncharged misconduct under Rule 404(b) or its state counterpart, many jurisdictions now mandate both that the prosecutor specifically identify the noncharacter theory upon which he or she is relying and that the trial judge make explicit findings as to that theory.\textsuperscript{163} These requirements not only promote better decision-making by the trial judge, but also facilitate more probing appellate review of the trial judge's decision. In the past, even when the trial judge purported to rely on the argument that banning any mention of the uncharged misconduct would create a troublesome chronological void in the prosecution's case, neither the prosecutor nor the judge was obliged to identify that void.\textsuperscript{164} Appellate courts should no longer accept such conclusory analysis.\textsuperscript{165} Trial judges ought to demand that the prosecutor identify the specific gap that allegedly destroys the integrity of the witness's narrative, and in turn, appellate courts should insist that the trial judge make an explicit finding as to whether the specified gap would likely have that destructive effect. These procedural mandates could significantly improve the administration of the inextricably intertwined doctrine.

\textbf{D. The Administration of a Limiting Instruction Explaining the Reason Why the Jury Is Being Permitted to Hear the References to the Uncharged Misconduct}

As Part IV.A noted, most jurisdictions do not require the prosecution to notify the defense before trial that the government intends to offer uncharged-misconduct evidence at trial.\textsuperscript{166} Moreover, even those jurisdictions that mandate pretrial notice do not demand that the prosecution identify the theory on which it intends to rely as the justification for admitting the evidence. In contrast, the almost universal view is that when the judge admits evidence of uncharged misconduct on a noncharacter theory at the defense's request, he or she must give the jury a limiting instruction under Rule 105.\textsuperscript{167} The instruction forbids the jurors from using the evidence as a basis for character reasoning,

\begin{itemize}
\item 163. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, §§ 9:32, 9:56.
\item 164. Brauser, supra note 14, at 1607 & n.157.
\item 165. Id. at 1608–09, 1617.
\item 166. See supra Part IV.A.
\item 167. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, § 9:70; see also FED. R. EVID. 105.
\end{itemize}
but explains that they may use the evidence on a specified noncharacter theory. 168

Further, the Advisory Committee Note to the Rule 404(b) amendment requiring pretrial notice states that the notice requirement does not apply to acts "intrinsic" to the charged misconduct—behavior that is truly part of the charged crime. 169 Several jurisdictions have blurred the distinction between the intrinsic and inextricably intertwined theories and, for that reason, held that inextricably intertwined conduct does not trigger the notice requirement. 170 A similar blurring has occurred with respect to the limiting instruction that normally accompanies uncharged-misconduct evidence. 171 Additionally, there has been a marked judicial trend of holding that the judge need not give any instruction on inextricably intertwined misconduct. 172 However, this trend away from instructing the jury is misguided. The judge should give the jury a limiting instruction that identifies both the permissible and impermissible uses of the evidence.

The jury certainly needs the guidance of an instruction forbidding it from engaging in character reasoning. It would be a different matter if the conduct in question were truly intrinsic to the charged crime. If the evidence describes such intrinsic conduct, the jury need not rely on any forbidden, intermediate character inference; the evidence is directly probative of the charged offense. In contrast, when the judge admits evidence under the inextricably intertwined theory, he or she admits evidence of another offense—a distinct common-law offense or the violation of a different penal statute. In the latter situation, the jury may well engage in character reasoning—a natural inclination of lay jurors. 173 After all, in the jurors' minds, the other misdeed may tend to show that the accused has a disposition or propensity for criminal conduct. 174 The jurors' common-sense notions of personality may well prompt them to reason that if the defendant committed the act once, he probably committed it again. 175 With no contrary guidance, there is a grave risk that the jurors will do so. In cases such as Rhodes, 176 once a lay juror learns that the accused has already been convicted of a crime, the juror may leap to the conclusion that the

168. 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, §§ 9:73-:74; see also Fed. R. Evid. 105.
169. See supra Part IV.A.
170. See supra note 120 and accompanying text.
172. See, e.g., 1 GRAHAM, supra note 22, ¶ 404:5, at 713-14 n.22; 1 MUELLER & KIRKPATRICK, supra note 22, ¶ 4:33, at 818; Hirsch, supra note 16, at 291; Saltzburg, supra note 14, at 64; Schuster, supra note 98, at 950 n.11 (citing United States v. Martin, 794 F.2d 1531, 1533 (11th Cir. 1986)).
173. 1 IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, supra note 5, ¶ 1:03, at 1-11.
174. Id. ¶ 1:03, at 1-8 to 1-9, 1-11 ("Uncharged misconduct evidence poses a serious risk... because the evidence routinely supports two inferences—one legitimate and one illicit.").
175. Id. ¶ 9:73, at 9-237; see also id. ¶ 1:03, at 1-10 to 1-11.
176. See Rhodes v. State, 716 S.W.2d 758, 762 (Ark. 1986).
accused is precisely the sort of person likely to commit the charged offense. To prevent jurors from relying on character reasoning, the judge must provide guidance and inform them that such reasoning is not permitted.

The limiting instruction should not only explicitly forbid character reasoning, but it should also affirmatively tell the jurors why they are being permitted to hear the references to the uncharged misconduct. Suppose that the judge decided to admit audiotape references to uncharged misconduct, such as other drug sales, on the ground that the references are linguistically inseparable from the evidence about the charged crime. The redaction of the references would reduce the audiotape to a garbled recording. In that situation, as Dean Wigmore emphasized, the references serve no legitimate "evidential purpose." \(^{177}\)

The jury may not employ character reasoning, the misconduct is not intrinsic to the charged offense, and the prosecution has failed to articulate a noncharacter theory of logical relevance. The jury is hearing the references only because the judge could not excise those references without destroying the comprehensibility of the audiotape. If that is the rationale for the judge's ruling, the jury should be told frankly that that is the only reason they are being allowed to hear the references to the earlier misconduct. \(^{178}\)

Assume alternatively that the judge decided to admit the references because their omission would create a puzzling void in the prosecution witness's narrative of the charged crime. \(^{179}\) Three years have elapsed because, in the interim, the accused had been convicted of crime two, preventing him from immediately carrying out the plan for crime one. Crime two is not intrinsic to crime one by any stretch of the imagination, and the prosecution cannot identify any traditional noncharacter theory, such as motive, for admitting the evidence of crime two. If the evidence of the accused's commission and conviction of crime two is to be admitted, it is because omitting any reference to crime two might lead the jurors to discount improperly the credibility of the testimony proffered by the government witnesses about crime one. If the judge then relies on this "completing-the-story" justification for admitting the evidence, he or she should explicitly inform the jury of that reason. Many jurors are unaccustomed to refined circumstantial reasoning, and if they are to use the references properly, they need guidance from the trial judge.

V. CONCLUSION

It is undeniable that the courts have made little progress in refining the substantive test under the inextricably intertwined doctrine. It is equally clear that in a number of cases, the courts have invoked the doctrine even though it seemingly would have been possible to sever the references to uncharged misconduct.

\(^{177}\) 6 WIGMORE, supra note 73, § 365, at 346.
\(^{179}\) United States v. Yusuf, 63 F.3d 505, 512 (7th Cir. 1995).
misconduct from the body of evidence describing the accused's commission of the charged crime.

Admittedly, there has been some movement in the right direction. Several courts have criticized the judicial tendency to apply the doctrine with laxity, and in the past few years, the number of courts subjecting prosecution arguments premised on the doctrine to close scrutiny has gradually increased.

However, in the long term, the real hope for reining in the doctrine is procedural reform. In the final analysis, when the judge determines the applicability of the doctrine in a given case, he or she must make an editorial decision: can the prosecution witness's account be edited by deleting the references to the uncharged misconduct without changing the essential meaning and integrity of the witness's narrative of the charged crime? Anyone who has had significant editing experience realizes how difficult and time-consuming editing can be. It is wishful thinking to believe that appellate courts will ever formulate a clear-cut substantive test that trial judges can easily apply to determine whether to admit references to the uncharged misconduct from the body of evidence describing the accused's commission of the charged crime.


181. United States v. Stephens, 571 F.3d 401, 409–11 (5th Cir. 2009) (explaining that evidence that the accused created a bogus website purporting to be that of a disaster-relief organization was not inextricably intertwined with testimony that the accused had previously created an unrelated bogus website to fraudulently obtain donations for hurricane relief); United States v. Romandine, 289 F. App'x 120, 125, 127 (7th Cir. 2008) (noting that evidence that the accused had in the past used drugs with restaurant employees was not inextricably intertwined with the allegation that the accused had set fire to the restaurant); United States v. Stain, 272 F. App'x 618, 621 (9th Cir. 2008) (remarking that evidence of the accused's involvement with marijuana was not inextricably intertwined with the charged offenses); United States v. Midyett, 603 F. Supp. 2d 450, 460 (E.D.N.Y. 2009) (“[T]he charged ... crime is straightforward and may be fully understood without reference to [evidence of the uncharged and alleged crime].” (quoting United States v. Newton, No. S1 01-cr-635, 2002 U.S. Dist. LEXIS 2414, at *6 (S.D.N.Y. Feb. 14, 2002)); see also United States v. Utter, 97 F.3d 509, 513–15 (11th Cir. 1996) (concluding that the uncharged misconduct was “tangential” to the charged offense); United States v. Lehder-Rivas, 955 F.2d 1510, 1516 (11th Cir. 1992) (stating that the evidence admitted under this doctrine should be “[c]arefully circumscribed”); United States v. Monzon, 869 F.2d 338, 343–44 (7th Cir. 1989) (finding that evidence was not “inextricably related”); United States v. Swiatek, 819 F.2d 721, 727 (7th Cir. 1987) (holding that the case would not suffer from holes in the story should evidence be excluded); United States v. Mahaffy, 477 F. Supp. 2d 560, 566 (E.D.N.Y. 2007) (noting that the uncharged scheme "was a separate, discrete offense that may be conceptually segregated from the charged offenses without impairing the jury's ability to understand the facts underlying the schemes alleged in the indictment" (footnote omitted)); United States v. Alex, 790 F. Supp. 801, 803–04 (N.D. Ill. 1992) (explaining that evidence that the accused had a criminal relationship with a prosecution witness for thirty-five years was not "inextricably intertwined" with the charged crime); People v. Agado, 964 P.2d 565, 570 (Colo. App. 1998) (stating that the courts should be "cautious" in applying the res gestae doctrine); Hirsch, supra note 16, at 305 (discussing how the Florida state courts have not been as receptive to invocations of the doctrine as the federal courts have been).
The nature of the editorial task requires trial judges to make “case-by-case determinations” tied to “the individual facts in each case.”\textsuperscript{183} Even if all the procedural changes proposed in this Article are implemented, they will not guarantee that trial judges will make the right editorial decision in every case.

However, the current procedures for administering the inextricably intertwined doctrine virtually guarantee that trial judges will be wrong in many cases. Realistically, the requisite editing cannot routinely be done at a hurried mid-trial bench conference. A judge would never dream of editing the draft of even a short opinion in that fashion; moreover, no competent practitioner would think of editing the draft of an important pleading or memorandum in that manner. The stakes are too high to continue to rely on the current procedures. As Justice Benjamin Cardozo warned, the introduction of uncharged-misconduct evidence can be a “peril to the innocent.”\textsuperscript{184} The judge’s ruling on the admissibility of uncharged-misconduct evidence is often the “turning point” in the trial.\textsuperscript{185} Therefore, the procedures in place should ensure that when the judge is asked to make this crucial editing decision, he or she has ample opportunity to balance carefully the interests of the state with the rights of the accused. The procedures should give the judge the time and procedural tools to separate the charged wheat from the uncharged chaff.

\begin{footnotesize}

\begin{enumerate}
\item[182.] Brauser, \textit{supra} note 14, at 1585 (noting that “no court has been able to articulate a bright line test” to be used when applying the doctrine).
\item[183.] \textit{Id.} at 1607.
\item[184.] People v. Zackowitz, 172 N.E. 466, 468 (N.Y. 1930).
\item[185.] See I IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE, \textit{supra} note 5, § 1:02, at 1-6.
\end{enumerate}
\end{footnotesize}