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# Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence

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# Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence


I. INTRODUCTION ........ 947
II. THE HISTORICAL DEVELOPMENT OF THE RULE PROHIBITING THE USE OF UNCHARGED MISCONDUCT EVIDENCE ........ 951
III. BEYOND THE COMMON LAW: THE FEDERAL RULES OF EVIDENCE ........ 959
A. *Federal Rule of Evidence 404(b)* ........ 959
B. *Inextricably Intertwined Evidence* ........ 961
1. EVIDENCE OF UNCHARGED MISCONDUCT THAT WAS A PRELUDE TO THE CRIME CHARGED ........ 962
2. UNCHARGED MISCONDUCT EVIDENCE THAT IS DIRECTLY PROBATIVE OF THE CRIME CHARGED ........ 963
3. EVIDENCE OF UNCHARGED MISCONDUCT ARISING FROM THE SAME TRANSACTION AS THE CRIME CHARGED ........ 964
4. UNCHARGED MISCONDUCT EVIDENCE THAT FORMS AN INTEGRAL PART OF A WITNESS' TESTIMONY ABOUT THE CRIME CHARGED ........ 965
5. UNCHARGED MISCONDUCT EVIDENCE THAT COMPLETES THE STORY OF THE CRIME CHARGED ........ 967
IV. CONCLUSION ........ 970


## I. INTRODUCTION

Character evidence exists in three forms: First, testimony of a witness' personal opinion of the defendant; second, testimony regarding the defendant's reputation; and third, testimony regarding the defendant's past conduct.[1] Of the three, evidence pertaining to the defendant's past conduct is the most probative of the defendant's character, but is also the most likely to create prejudice against him.[2] At common law, evidence of a defendant's character was not admissible when introduced to imply that, on a given occasion, the defendant acted in conformity with his character, because this would constitute circumstantial proof of an ultimate consequential fact, the actions of the accused.[3]

Federal Rule of Evidence 404(b) incorporated the common law rule against the circumstantial use of character evidence, and made it applicable to evidence of other crimes, wrongs, or acts.[4] The rule

1. C. MCCORMICK, EVIDENCE 443 (2d ed. 1972).
2. *Id.*
3. E. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 2:18 (1984); Graham, *Evidence as to Character: Circumstantial Use*, 19 CRIM. L. BULL. 234, 234 (1983).
4. Rule 404(b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character

excluding uncharged misconduct evidence is not based on lack of relevance, because a defendant's past criminal activity is likely to be probative of his guilt in a particular case.[5] Rather, the uncharged misconduct evidence is excluded because it may encourage the factfinder, usually a jury, to convict the defendant because he is a bad person who is likely to have committed the crime charged, or because the defendant may have escaped punishment for earlier wrongdoings, and not because the government has made a sufficient showing of evidence that the defendant committed the crime charged.[6]

Rule 404(b) does not automatically require the exclusion of evidence of the defendant's past misconduct. Although the evidence may not be admitted to prove the defendant's propensity to commit the crime charged, the Rule expressly permits use of uncharged misconduct evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[7] This list is not exhaustive, but it indicates that use of uncharged misconduct evidence should be predicated upon some theory of relevance leading to resolution of an ultimate issue that may arise in a given case.[8]

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> of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404; *see also* FED. R. EVID. 404 advisory committee's note, 56 F.R.D. 221 (Rule 404(b) "deals with a specialized but important application of the general rule excluding circumstantial use of character evidence.").

5. 1 J. WIGMORE, EVIDENCE 233 (1st ed. 1904); *see also* United States v. Shackleford, 738 F.2d 776, 783 (7th Cir. 1984) (Evidence of the defendant's prior bad acts almost always suggests that the defendant had the propensity to commit other crimes, and errors in admitting such evidence affect the fundamental fairness of the trial.).

6. As Dean Wigmore noted:

> The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or take the proof of it as justifying a condemnation irrespective of guilt of the present charge.

J. WIGMORE, *supra* note 5, at 233; *see* C. MCCORMICK, *supra* note 1, at 443; *see also* Bray, *Evidence of Prior Uncharged Offenses and the Growth of Constitutional Restrictions*, 28 U. MIAMI L. REV. 489 (1974) (analyzing the constitutional protections that might be infringed by the admission of uncharged misconduct evidence).

7. For the full text of Rule 404(b), see *supra* note 4; *see also* United States v. Salisbury, 662 F.2d 738, 741 (11th Cir. 1981), *cert. denied*, 457 U.S. 1107 (1982) (uncharged misconduct evidence is reliable proof of criminal predisposition for the purpose of rebutting the defense of entrapment).

8. 22 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 5239 (1978). In criminal cases, three ultimate issues may arise: First, corpus delecti, or the substantial fact that a crime has been committed; second, the identity of the accused as the person who committed the crime; and third, mens rea, or the mental state of the accused. *Id.* § 5239 at 460. For example, the government may introduce evidence of other crimes to establish the defendant's motive to commit the crime charged. FED. R. EVID. 404(b).

Any uncharged misconduct evidence that is admissible pursuant to Rule 404(b) is subject to a Rule 403 analysis: If the probative value of the evidence is substantially outweighed by the danger of unfair prejudice created by admission of the evidence, it is inadmissible.[9] In the majority of federal jurisdictions, evidence offered pursuant to Rule 404(b) is subject to additional restrictions. The proponent of the evidence must articulate an independent theory of relevance, and until recently, the proponent was required to prove the uncharged misconduct outside of the jury's presence, under a clear and convincing or preponderance standard of proof, prior to admission into evidence.[10]

Although motive is not an essential element of most crimes, proof of the defendant's motive may serve as proof of either the perpetrator's identity or the defendant's state of mind, both of which may be ultimate issues in the case. Professors Wright and Graham have noted that "[o]nly by tracing the line of relevance through to one of the ultimate issues in the case can the court insure that the fact which the evidence is supposed to prove is in issue and thus prevent sham use of the rule." C. WRIGHT & K. GRAHAM, *supra*, § 5239, at 467.

9. Rule 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

10. As this issue went to press, the Supreme Court of the United States held that district courts need not make a preliminary finding that the government has proved the "other act" by a preponderance of the evidence before it is submitted to the jury. Huddleston v. United States, 108 S. Ct. 1496, 1501 (1988). Rather, uncharged misconduct evidence should be admitted if there is sufficient evidence to allow a jury to find, by a preponderance, that the defendant committed the uncharged act. *Id.* The trial court may assess whether sufficient evidence has been offered to permit the jury to make the requisite finding at a later point in the trial. *Id. See* E. IMWINKELRIED, *supra* note 3, § 8:03; *see* United States v. Leight, 818 F.2d 1297, 1303 (7th Cir. 1987) (trial court did not abuse its discretion in finding that two days of testimony from more than a dozen government witnesses, on direct and cross-examination, established by clear and convincing evidence that the defendant had physically abused several of her children, despite the court's failure to permit the defendant to present contrary evidence); United States v. Payne, 805 F.2d 1062, 1065 (D.C. Cir. 1986) (introduction of guns into evidence, together with testimony showing that the guns had been seized from the defendant's apartment, was clear and convincing evidence of an extrinsic crime); United States v. Biswell, 700 F.2d 1310, 1318 (10th Cir. 1983) (testimony by several law enforcement officers referring to "ongoing investigations" into the alleged prior criminal activity of the defendant, including "gambling, stolen property, [and] things like that," lacked the specificity necessary to satisfy the government's clear and convincing burden of proof that the defendant had participated in these other crimes); United States v. Dolliole, 597 F.2d 102, 107 (7th Cir. 1979) (the function of the clear and convincing evidence standard is to prevent the jury from considering evidence that would establish the defendant's commission of a prior crime "only by highly circumstantial inferences"); McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293 (1982) (discussing standards of proof, their inherent ambiguity, and their potential threat to the constitutional rights they were intended to protect). *But see* United States v. Ebens, 800 F.2d 1422, 1432 (6th Cir. 1986) (courts may admit extrinsic crimes evidence if the government establishes by a preponderance of the evidence that the defendant committed the extrinsic crimes); United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978) (the trial judge determines whether sufficient evidence exists for the jury to find that the defendant actually committed the extrinsic offense). For a general discussion of the standard of proof for the admissibility of

In addition, if the trial judge rules that the evidence is admissible, the jury should be instructed to refrain from using the evidence to infer the defendant's propensity to commit the crime charged, and further, to consider the guilt or innocence of the defendant solely with respect to the crime for which the defendant is being tried.[11]

The inherent difficulty in the application of Rule 404(b) is that some conduct of the defendant that is not explicitly referred to in the charging document may nonetheless stand in such a relation to the crime charged that it cannot be considered wholly independent.[12] Courts have referred to this uncharged criminal activity as "inextricably intertwined" with the crime charged because it is not totally separate from the crime charged.[13] The range of evidence that is

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other crimes evidence, see Sharpe, *Two-Step Balancing and the Admissibility of Other Crimes Evidence: A Sliding Scale of Proof*, 50 NOTRE DAME L. REV. 566 (1984).

11. *See* Carter v. United States, 549 F.2d 77, 78 (8th Cir. 1977) (the trial court's instructions, admonishing the jury to ignore the defendant's possible involvement with narcotics and focus instead on the defendant's guilt or innocence on the charge of possession of a firearm, were adequate limiting instructions accompanying other crimes evidence); *see also* United States v. Martin, 794 F.2d 1531, 1533 (11th Cir. 1986) (the trial court need not give the jury a limiting instruction on the use of uncharged misconduct evidence that is not extrinsic to the crime charged, because the evidence does not fall within the scope of rule 404(b)).

12. For example, a drunken driver who causes someone's death in an automobile accident may be charged with voluntary manslaughter, without specifically being charged with driving under the influence of an intoxicating substance. If the court considers "driving under the influence" to be an extrinsic crime, evidence of intoxication would be subject to the more stringent admission requirements attached to Rule 404(b). The evidence would not be admissible to prove that the defendant had a general propensity to commit voluntary manslaughter. Moreover, the prosecution would be required to present to the judge clear and convincing evidence that the defendant was intoxicated before submitting that evidence to the jury under some other theory of relevance. *See supra* note 10. The jury's use of the evidence would also be subject to a limiting instruction. *See supra* note 11. Even if the judge considered driving under the influence to be a lesser included offense, and therefore not extrinsic, evidence of intoxication would be admissible only if its probative value was not substantially outweighed by its potential for prejudice. *See* United States v. Weeks, 716 F.2d 830, 832 (11th Cir. 1983) (evidence showing that a federal agent was investigating the defendant for theft of motor vehicles was inextricably intertwined with the charge that the defendant assaulted the agent during the time that he was under investigation); United States v. Black, 692 F.2d 314, 316 (4th Cir. 1982) (the defendant's act of throwing human feces at a correctional officer immediately following an armed confrontation with him was evidence of a continuing course of interference with the correctional officer's execution of his duties, and not evidence of a separate crime within the contemplation of Rule 404(b)). *But see* United States v. Levy, 731 F.2d 997, 1003 (2d Cir. 1984) (drug transaction involving a small amount of drugs for sampling was separate from the charged drug transaction occurring six hours later); *cf.* United States v. Stovall, 825 F.2d 817, 823 (5th Cir. 1987) (for sentencing purposes, if one offense requires proof of a fact that is not necessarily required to prove another offense, then the two offenses do not constitute the same offense).

13. *See, e.g.*, United States v. Bass, 794 F.2d 1305, 1313 (8th Cir. 1986) (evidence of the defendants' escape from prison, theft of a prison truck, and other robberies, was an integral part of an extended criminal transaction, and therefore fell outside the scope of Rule 404(b)); United States v. Weeks, 716 F.2d 830, 832 (11th Cir. 1983) (evidence that a federal agent was

inextricably intertwined with the crime charged is as varied as the fact patterns of specific cases. Courts have consistently recognized certain relationships in which uncharged misconduct is inextricably intertwined with the crime charged.[14] Courts have not defined the scope of inextricably intertwined evidence, however, and no guidelines for determining the limits of this class of evidence exist.

This Comment analyzes the inextricably intertwined relationships between certain uncharged misconduct evidence and the crime charged with a view toward determining whether these relationships remove the evidence from the purview of Rule 404(b). After a consideration of the historical development and underlying policies of the general rule excluding evidence of other crimes for the purpose of establishing a defendant's propensity to commit the crime charged, this Comment suggests that evidence of criminal activity committed by the defendant contemporaneously with the crime charged, as a predicate to the crime charged, or as otherwise explaining the context of the crime charged, is not the type of evidence contemplated by Rule 404(b), and should therefore be admissible without regard to the limitations of the more stringent admission standards attached to Rule 404(b) evidence.

## II. The Historical Development of the Rule Prohibiting the Use of Uncharged Misconduct Evidence

The rule prohibiting the use of evidence of other crimes to prove the defendant's propensity to commit the crime charged has its roots in Great Britain's Treason Act of 1695.[15] Parliament passed the Treason Act in reaction to the repressive practices of the Court of the Star Chamber, which admitted evidence of the defendant's prior misconduct as proof of guilt of the crime charged.[16] The Treason Act reformed evidentiary rules, and expressly provided that only conduct

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investigating the defendant for theft of motor vehicles, at the time the agent was assaulted, was inextricably intertwined with the charged offense, and therefore was not governed by Rule 404(b)); United States v. Killian, 639 F.2d 206, 211 (5th Cir. Unit A Mar. 1981) (pistols, cocaine, and methamphetamines, obtained from the defendant's and co-conspirators' homes, were not extrinsic evidence, and therefore Rule 404(b) did not apply); United States v. Two Eagle, 633 F.2d 93, 95 (8th Cir. 1980) (evidence that, shortly after the victim was assaulted, the juvenile defendant was seen driving the victim's car was an integral part of the offense charged, and was therefore not governed by Rule 404(b)).

14. *See infra* notes 94-147 and accompanying text.

15. E. IMWINKELRIED, *supra* note 3, § 2:24; J. WIGMORE, *supra* note 5, at 233; Reed, *Trial by Propensity: Admission of Other Criminal Acts Evidence in Federal Criminal Trials*, 50 U. CIN. L. REV. 713, 716 (1981). For a detailed discussion of the development of the character rule in England, see Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954 (1933).

16. Reed, *supra* note 15, at 716.

that had been specifically mentioned in the indictment could be proven against a defendant at trial for treason.[17]

The Treason Act inevitably prompted the development of the character rule in all criminal trials.[18] During the eighteenth century, jurists recognized that it was inconsistent to prohibit the introduction of a defendant's uncharged misconduct in trials for treason, but to allow that evidence in other criminal trials.[19] In addition, the emerging principle of fundamental fairness, articulated in the Magna Carta and developed through the common law, gradually evolved into a rule prohibiting the use of character evidence to circumstantially prove the crime charged.[20]

Prior to 1840, the rule prohibiting the use of other crimes evidence was defined in inclusionary terms: Evidence of other crimes was admissible unless the sole purpose of its introduction was to suggest the defendant's character as a basis for inferring that the defendant committed the crime charged.[21] Thus, English courts permitted the use of uncharged misconduct evidence if it was probative of a relevant issue other than the defendant's character.[22] For example, courts admitted other crimes evidence when a party could establish its relevance in terms of criminal intent, absence of mistake, knowledge, identity, or the existence of a continuing criminal operation.[23] Ultimately, courts began to treat these independent theories of relevance as exceptions to the general rule prohibiting the use of other crimes evidence.

These exceptions transformed the rule regulating the use of other crimes evidence into one of exclusion: Other crimes evidence was admissible only if it fell within one of the recognized exceptions to the general rule excluding uncharged misconduct.[24] This exclusionary version of the rule caused the courts to evaluate uncharged misconduct evidence mechanically.[25] Thus, courts excluded any uncharged

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17. E. IMWINKELRIED, *supra* note 3, § 2:24; J. WIGMORE, *supra* note 5, at 233; Reed, *supra* note 15, at 717.

18. E. IMWINKELRIED, *supra* note 3, § 2:24.

19. Reed, *supra* note 15, at 717.

20. *See* E. IMWINKELRIED, *supra* note 3, § 2:24; J. MCKELVEY, HANDBOOK OF THE LAW OF EVIDENCE at 144 (1st ed. 1898); J. WIGMORE, *supra* note 5, § 194; Reed, *supra* note 15, at 717.

21. E. IMWINKELRIED, *supra* note 3, § 2:26; Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

22. J. WIGMORE, *supra* note 5, at 233; Reed, *supra* note 15, at 718-19.

23. E. IMWINKELRIED, *supra* note 3, § 2:26; Reed, *supra* note 15, at 718.

24. E. IMWINKELRIED, *supra* note 3, § 2:26. For a discussion of the evolution of the character rule in the United States until the early 1900's, see Stone, *supra* note 21.

25. Comment, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 767-68 (1961).

misconduct evidence that did not fit within one of the exceptions without offering any critical analysis as to whether the evidence was relevant in the context of the facts of the particular case.[26]

The English rule pertaining to the admissibility of other crimes evidence influenced the development of the doctrine in American courts.[27] In keeping with the post-revolution political climate in which the population was keenly aware of governmental repression, courts resolved any ambiguity in the law in the defendant's favor.[28] It is not surprising, therefore, that in early decisions, courts greatly restricted the use of other crimes evidence.[29] By the mid-1800's, however, state courts had expanded the permissible uses of other crimes evidence to include motive, intent, knowledge, and design or plan.[30] By this time, federal courts permitted the use of evidence of uncharged crimes to prove intent, guilty knowledge, and motive.[31]

By 1896, state and federal courts had expanded the permissible uses of other crimes evidence to include evidence showing activity leading to the crime charged.[32] Evidence that did not form a link in the chain of circumstances leading to the commission of the charged offense was inadmissible.[33] Thus, uncharged misconduct evidence was inadmissible unless the prosecutor could establish a causal connection between the uncharged misconduct and the crime charged, which implied that the uncharged misconduct was a distinct and separate crime, or unless the evidence was offered to prove intent, guilty knowledge, motive, or design or plan.

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26. *Id.*

27. The colonial charters of independence incorporated some of the fundamental concepts set forth in the Treason Act of 1695. *See* Reed, *supra* note 15, at 720-21 (The Virginia Declaration of Rights required that the government notify the defendant before trial of all the offenses for which he was to be tried.).

28. E. IMWINKELRIED, *supra* note 3, § 2:27.

29. Walker v. Commonwealth, 28 Va. (1 Leigh) 574 (1829) (restricting other crimes evidence to cases in which the crime charged could not be explained without reference to the other crimes, and cases in which the other crimes evidence was proof of the defendant's knowledge); United States v. Mitchell, 26 F. Cas. 1282 (C.C.D. Pa. 1795) (evidence showing that the defendant had robbed the United States mail while committing alleged acts of treason was inadmissible other crimes evidence).

30. Reed, *The Development of the Propensity Rule in Federal Criminal Causes 1840-1975*, 51 U. CIN. L. REV. 299, 301-02 (1982) [hereinafter Reed, *The Development of the Propensity Rule*]; Reed, *supra* note 15, at 723.

31. Reed, *The Development of the Propensity Rule*, *supra* note 30, at 303.

32. People v. McLaughlin, 150 N.Y. 365, 44 N.E. 1017 (1896). In *McLaughlin*, the defendant was charged with extortion, and the trial court admitted evidence pertaining to the defendant's prior acts of extortion. *Id.* at 1028. The Court of Appeals of New York held that the evidence was inadmissible, because the prior acts of extortion did not constitute a link in the chain of facts surrounding the crime for which the defendant was charged. *Id.* at 1025.

33. *Id.* at 391, N.E. at 1025.

In the landmark case of *People v. Molineux*,[34] the Court of Appeals of New York discussed in detail the permissible uses of uncharged misconduct evidence.[35] In keeping with established common law principles, the court held that the state could not offer evidence of other crimes to prove that the defendant was guilty of the crime charged.[36] In dicta, the court listed theories of relevance under which other crimes evidence could be used, including motive, intent, absence of mistake or accident, identity, and common scheme or plan.[37]

In discussing the permissible uses of uncharged misconduct evidence, the *Molineux* court referred to the common scheme or plan theory of relevance.[38] Under this theory, uncharged misconduct evidence was admissible when "two or more crimes [were] committed by the same person in pursuance of a single design, or under circumstances which render it impossible to prove one without proving all."[39] The court noted that some connection between the uncharged act and the charged crime must exist "in fact and in the mind of the actor" before the evidence would be admissible.[40] The common plan or scheme theory covered situations in which the uncharged act was committed in contemplation of, and in preparation for, the crime charged.[41] It also included uncharged misconduct that occurred contemporaneously with the crime charged, such that one was indistin-

34. 168 N.Y. 264, 61 N.E. 286 (1901).

35. *Id.* at 293, 61 N.E. at 294.

36. "The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged." *Id.* at 291, 61 N.E. at 293.

37. *Id.* at 293, 61 N.E. at 294. The court recognized that it could not state the exceptions with categorical precision, yet it appeared to treat the list of exceptions as exclusive. *See* Stone, *supra* note 21, at 1027. Prior to the enactment of the Federal Rules of Evidence, most federal courts followed the exclusionary approach to the rule governing admissibility of uncharged misconduct evidence: Evidence of other crimes is inadmissible unless it falls within one of the recognized exceptions. *See, e.g.*, United States v. Broadway, 477 F.2d 991 (5th Cir. 1973); Davis v. United States, 370 F.2d 310 (9th Cir. 1966); Swann v. United States, 195 F.2d 689 (4th Cir. 1952); Green v. United States, 176 F.2d 541 (1st Cir. 1949); Kempe v. United States, 151 F.2d 680 (8th Cir. 1945); United States v. Fawcett, 115 F.2d 764 (3d Cir. 1940). The majority of courts readily adopted the exclusionary approach to the rule, perhaps because it was easily and rather mechanically applied. *See* E. IMWINKELRIED, *supra* note 28, § 2:27; Reed, *The Development of the Propensity Rule*, *supra* note 30, at 303. For a discussion of the degree to which the courts have riddled the exclusionary version of the character rule with exceptions, see Slough, *Other Vices, Other Crimes: An Evidentiary Dilemma*, 20 KAN. L. REV. 411, 417 (1972).

38. *Molineux*, 168 N.Y. at 305, 61 N.E. at 299.

39. *Id.*

40. *Id.*

41. *Id.*

guishable from the other.[42]

The *Molineux* court's discussion of the admissibility of uncharged misconduct evidence to show a common plan or scheme referred, in part, to a fact pattern similar to that in *Capone v. United States*.[43] In *Capone*, the defendant was indicted for failing to pay income tax.[44] The United States Court of Appeals for the Seventh Circuit ruled that evidence indicating that Capone had earned money from the illegal sale of bootleg beer during the years of 1922 to 1925 was admissible to prove that, during those years, Capone had received income which he concealed, and for which he failed to file income tax.[45] It would have been impossible to prove tax evasion without proof of bootlegging, and therefore, practically speaking, the crimes were inseparable.[46]

Following cases such as *Capone*, courts developed a doctrine that evidence of uncharged misconduct was admissible when it was "so closely blended or connected with the one on trial . . . that proof of one incidentally involves the other; or explains the circumstances thereof."[47] This exception broadened the class of admissible other crimes evidence by permitting not only the introduction of uncharged misconduct evidence when it was impossible to prove the crime charged without revealing the uncharged misconduct, but also when the uncharged misconduct evidence explained the circumstances surrounding the charged crime.[48] Courts began to refer to these two distinct types of evidence as "res gestae": evidence that explained the circumstances of a crime, and evidence of uncharged misconduct that

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42. *Id.* at 300, 61 N.E. at 297.

43. 51 F.2d 609 (7th Cir.), *cert. denied*, 284 U.S. 669 (1931).

44. *Id.* at 611.

45. *Id.* at 611-12.

46. *Id.* at 619.

47. *See* Bracey v. United States, 142 F.2d 85, 88 (D.C. Cir.), *cert. denied*, 322 U.S. 762 (1944); Behrle v. United States, 100 F.2d 714, 715 (D.C. Cir. 1938); Copeland v. United States, 2 F.2d 637, 639 (D.C. Cir. 1924).

48. 22 C. WRIGHT & K. GRAHAM, *supra* note 8, § 5239. By connecting the phrases "proof of one incidentally involves the other" and "explains the circumstances thereof" with the disjunctive "or," courts have implied that the terms are alternative descriptions of the same thing. *See, e.g.*, United States v. Masters, 622 F.2d 83 (4th Cir. 1980); United States v. Deering, 592 F.2d 1003 (8th Cir. 1979); Ignacio v. Guam, 413 F.2d 513 (9th Cir.1969), *cert. denied*, 397 U.S. 943 (1970); Bracey v. United States, 142 F.2d 85 (D.C. Cir.), *cert. denied*, 322 U.S. 762 (1944). Not all evidence pertaining to the circumstances of a crime, however, stands in such a relation to the crime charged that proof of the crime charged necessarily reveals those circumstances. For example, the fact that a defendant sold drugs to an unnamed, unindicted third party is not necessarily revealed in proving the defendant guilty of selling drugs to a government agent at about the same time, even though it may explain the circumstances of the charged crime. The omission of evidence of the drug sale to the unnamed, unindicted third party would not prevent the government from proving its case.

was necessarily revealed in the proof of the crime charged. Res gestae evidence included facts and declarations that were incidental to the main facts or transaction, but necessary to illustrate their character;[49] acts that illustrated, explained, or interpreted other parts of the transaction of which they were a part;[50] the component parts of the principal fact or transaction;[51] evidence that completed the story of the crime charged;[52] and acts that were an immediate accompaniment of the act charged, so closely causally connected as to constitute a part of the act charged, and without which the factfinder might not have properly understood the main fact or transaction.[53]

The implementation of the res gestae concept in American criminal trials marked a shift which better served the needs of the parties. When courts admitted only uncharged misconduct evidence that was necessarily revealed in the proof of the crime charged, they were primarily attentive, perhaps inadvertently, to the government's need to prove the crime charged. Conversely, when courts began to group uncharged misconduct evidence necessarily revealed in the proof of the crime charged, with evidence of the circumstances within which a crime had occurred, and referred to both of them as res gestae evidence, the focus had shifted to the factfinder's need to understand the context within which the crime had occurred.

Courts admitted res gestae evidence as an exception to the exclusionary rule, and implicitly treated it as evidence of other crimes.[54] Thus, in *United States v. Miller*,[55] the Seventh Circuit admitted evidence that the defendant had disarmed a police officer and departed in a stolen police car, because it constituted "links in the chain of events" explaining the circumstances surrounding the defendant's theft of another car, for which he was charged.[56] In *United States v. Turner*,[57] the same court admitted evidence pertaining to a drug sale two days before the charged drug transaction, because the uncharged drug sale "triggered" the charged offense.[58] In support of its position, the *Turner* court stated that, although the events leading to the commission of the charged crime were other crimes, they were admissible

49. Pugh v. State, 30 Ala. 572, 575, 10 So. 2d 833, 836 (1942).
50. Chicago Union Traction Co. v. Daly, 129 Ill. App. 519, 525 (1906).
51. Lipscomb v. Estelle, 507 F.2d 708, 709 (5th Cir. 1975); United States v. Crowe, 188 F.2d 209, 212 (7th Cir. 1951).
52. United States v. Smith, 446 F.2d 200, 204 (4th Cir. 1971).
53. Wilson v. State, 181 Md. 1, 4, 26 A.2d 770, 772 (1942).
54. Reed, *The Development of the Propensity Rule*, *supra* note 30, at 319.
55. 508 F.2d 444 (7th Cir. 1974).
56. *Id.* at 449.
57. 423 F.2d 481 (7th Cir.), *cert. denied*, 398 U.S. 967 (1970).
58. *Id.* at 484.

pursuant to the exception that such evidence was "so blended or connected" with the crime charged that it explained the circumstances of the crime charged.[59]

Other federal courts characterized res gestae evidence as part of the crime charged,[60] thus circumventing the rule against other crimes evidence altogether. In *Ignacio v. Guam*,[61] the defendants were charged with murder, and the government's theory was that the defendants had pushed and shot the victim from a particular car.[62] As part of its case, the government was allowed to introduce evidence establishing that the defendants had stolen the car in question the night before the murder, because the theft of the car was an inextricable part of the murder itself.[63]

Regardless of the particular theory under which the government introduced other crimes evidence, it still had to meet a given standard of proof before the evidence would be admitted. Prior to the enactment of the Federal Rules of Evidence, other crimes evidence was admissible only if the government met a "clear and convincing" standard of proof,[64] or a similar standard, such as "plain, clear and conclusive,"[65] or simply "plain."[66] The Second Circuit, required the government to prove the extrinsic crime by a preponderance of the evidence before admitting it into evidence.[67]

Once a proponent met the requisite standard of proof, the court assessed whether the probative value of the evidence was substantially

59. *Id.*

60. United States v. Persico, 425 F.2d 1375, 1384 (2d Cir.), *cert. denied*, 400 U.S. 869 (1970); Ignacio v. Guam, 413 F.2d 513, 519 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970); Rodriguez v. United States, 284 F.2d 863, 867 (5th Cir. 1960), *cert. denied*, 368 U.S. 1001 (1962).

61. 413 F.2d 513 (9th Cir. 1969), *cert. denied*, 397 U.S. 943 (1970).

62. *Id.* at 520.

63. *Id.*; *see also* United States v. Weems, 398 F.2d 274, 275 (4th Cir. 1968) (acts occurring during the charged kidnapping were integral parts of the offense charged).

64. United States v. Ostrowsky, 501 F.2d 318, 321 (7th Cir. 1974); Gart v. United States, 294 F. 66, 67 (8th Cir. 1923).

65. United States v. Lawrence, 480 F.2d 688, 691 (5th Cir. 1973); United States v. Cohen, 73 F. Supp. 96, 100 (Pa. 1947). The Fifth Circuit no longer requires the government to establish other crimes evidence by clear and convincing evidence. *See* United States v. Beechum, 582 F.2d 898, 913 (5th Cir.), *cert. denied*, 440 U.S. 920 (1978).

66. Fish v. United States, 215 F. 544, 549 (1st Cir. 1914). In People v. Molineux, the Court of Appeals of New York stated that unless the government clearly shows that the defendant committed the uncharged misconduct, evidence of that misconduct is inadmissible. 168 N.Y. 264, 61 N.E. 286 (1901).

67. United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975). Ordinarily, the trial judge makes a preliminary determination of the sufficiency of the evidence establishing the extrinsic crime, and then admits or excludes the evidence accordingly.

outweighed by the potential for prejudice.[68] The results were not uniform. In *United States v. Smith*,[69] the Court of Appeals for the Fourth Circuit, observing the difficulty in deciding the admissibility of other crimes evidence, considered the degree of certainty to which the government had proven the occurrence of the other crime, as well as the certainty that the defendant was the actor, in balancing the probative value of the uncharged misconduct evidence with the prejudice likely to result from admission of the evidence.[70] The *Smith* court upheld the trial court's decision to admit evidence showing that the defendant had attempted to cash a money order that had been stolen from an envelope that had also contained the money order that the defendant was accused of stealing.[71] The court stated that the uncharged act provided part of the context of the crime charged, and therefore its probative value was greater than "[a]ny resultant impugning" of the defendant's character.[72] In *Ignacio*, however, in which the court had explicitly considered theft as part of the crime charged, the court did not discuss the degree of certainty to which the uncharged theft was proven, or the prejudicial effect versus probative value test of the uncharged misconduct evidence.[73] It is unclear whether the court in *Ignacio* thought that it did not need to apply these considerations when it viewed the uncharged misconduct evidence as part of the crime charged, or whether the court considered that evidence that is part of the crime charged has such a high probative value that it automatically outweighs any potential for unfair prejudice.

The lack of uniformity of decisions defining other crimes evidence, and determining when such evidence was admissible, created a need for Federal Rule of Evidence 404(b). Even since the advent of the rule, decisions concerning the admissibility of other crimes evidence have been neither uniform nor clear. Instead, federal courts have differed in their respective interpretations and applications of Rule 404(b), as well as in identifying the appropriate guidelines for determining when uncharged misconduct is not other crimes evidence within the meaning of the Rule.

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68. United States v. Leonard, 524 F.2d 1076, 1091 (2d Cir. 1975); United States v. Smith, 446 F.2d 200, 203 (4th Cir. 1971).

69. 446 F.2d 200 (4th Cir. 1971).

70. *Id.* at 203.

71. *Id.* at 204.

72. *Id.*

73. Ignacio v. Guam, 413 F.2d 513, 520 (9th Cir.1969), *cert. denied*, 397 U.S. 943 (1970).

## III. Beyond the Common Law: The Federal Rules of Evidence

### A. *Federal Rule of Evidence 404(b)*

After the enactment of the Federal Rules of Evidence in 1975, federal courts generally viewed Rule 404(b) as a codification of the common law principles existing in that jurisdiction prior to the Rule.[74] Thus, the difficulties of defining other crimes evidence and determining when such evidence is admissible, which existed before the Federal Rules, continued after their formulation.

The language of Rule 404(b) lends itself to both the inclusionary and exclusionary approaches to other crimes evidence. Rule 404(b) codified the inclusionary approach to the admissibility of other crimes evidence in that it permits the introduction of other crimes evidence unless its sole purpose is to show the defendant's propensity to commit the act charged.[75] The Rule suggests several proper uses of other crimes evidence, however, including proof of motive, opportunity, intent, preparation, plan, knowledge, identity, and absence of mistake or accident.[76] Indeed, the Rule gives courts flexibility in admitting other crimes evidence, and courts applying the Rule need not pigeonhole the evidence into a particular exception. Rather, the focus is on the facts of the case, the theory of relevance leading to ultimate issues presented by the case, and the degree to which the other crimes evidence has been established.[77]

In order to effectuate the purposes of Rule 404(b)—to protect the defendant from being tried for an uncharged crime for which he has not had an opportunity to prepare a defense and to avoid frustrating the prosecution's purpose of proving the crime charged—the use of other crimes evidence is subject to several limitations. Generally, Rule 404(b) evidence is not admissible in the government's case in chief unless the evidence is a necessary element of the prosecution's prima facie case.[78] Thus, the other crimes evidence must be probative

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74. *See, e.g.*, United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977); United States v. Dudek, 560 F.2d 1288, 1295 (6th Cir. 1977).

75. E. Imwinkelried, *supra* note 3, § 2:30.

76. Fed. R. Evid. 404(b). For a discussion of the problem of determining the relevancy of other crimes evidence, see Krivosha, Lansworth & Pirsch, *Relevancy: The Necessary Element in Using Evidence of Other Crimes, Wrongs, or Bad Acts to Convict*, 60 Neb. L. Rev. 657 (1981).

77. Fed. R. Evid. 404 advisory committee's note, 56 F.R.D. 221; *see also* Cleary, *Preliminary Notes on Reading the Rules of Evidence*, 57 Neb. L. Rev. 908 (1978) (analyzing the legal background against which the Rules were enacted, and discussing the developing pattern of interpretation).

78. Graham, *Evidence as to Character—Other Crimes, Wrongs, or Acts*, 19 Crim. L. Bull. 349, 354 (1983).

of a material fact at issue in the case.[79] Although the material fact for which the other crimes evidence is introduced must be more than formally in dispute,[80] some courts have admitted evidence despite a stipulation offered by the defendant taking the issue out of dispute.[81] These courts have reasoned that the prosecution is entitled to prove its case with whatever evidence is otherwise admissible.[82] Finally, in some jurisdictions, the prosecution must articulate the evidentiary hypotheses by which the ultimate fact might be inferred from the other crimes evidence.[83]

The admissibility of other crimes evidence pursuant to Rule 404(b) is further limited by the requirement that the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice.[84] Probative value is determined by a consideration of several factors: first, the degree of certainty to which the proponent of the other crimes evidence has proven that the other crime occurred and that the defendant was the perpetrator; second, the degree to which the material fact is in dispute; and third, the availability of other, less prejudicial, evidence to establish the same material fact.[85] The prejudicial potential of the evidence is determined according to its propensity to tempt the jury to decide the case on an improper basis, such as a prior unrelated conviction.[86] Evidence is prejudicial if it might give rise to an inference that the defendant is a bad person and therefore is more likely to have committed the crime in question. Evidence might also be prejudicial if it is likely to confuse or distract the jury from the central issues in the case, or if it might be unduly time consuming.[87] Evidence that is otherwise admissible under Rule 404(b) is excluded only if the probative value of the evidence is substantially outweighed by its potential prejudice.[88]

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79. *See* E. IMWINKELRIED, *supra* note 3, § 2:18.

80. For a discussion of the degree of dispute over the material fact that must exist before admitting the offered proof of uncharged conduct, see E. IMWINKELRIED, *supra* note 3, § 8:10.

81. United States v. Vretta, 790 F.2d 651, 655 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986); United States v. Lowe, 569 F.2d 1113, 1114 (10th Cir. 1978).

82. E. IMWINKELRIED, *supra* note 3, § 8:11; *see* United States v. Vretta, 790 F.2d 651, 655 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986) (trial court did not err in admitting the government's evidence of a contemporaneous murder at the kidnap victim's home, and the government was not bound to accept the defendant's offer to stipulate that the kidnap victim did not consent to be taken from his home).

83. *See* United States v. Biswell, 700 F.2d 1310, 1317 (10th Cir. 1983).

84. Graham, *supra* note 78, at 354-56.

85. E. IMWINKELRIED, *supra* note 3, § 8:03.

86. *Id.*

87. *Id.*; *see, e.g.*, United States v. Johnson, 820 F.2d 1065 (9th Cir. 1987) (Unfair prejudice is measured by a jury's negative response to the evidence, and is unrelated to its tendency to make a fact in issue more or less probable.).

88. For the full text of Rule 403, see *supra* note 9.

Of primary importance in determining the admissibility of other crimes evidence is the degree to which the government can prove the occurrence of the other crime and the defendant's participation in the other crime. The standard of proof regulates the admission of other crimes evidence, and is therefore a crucial adjunct to the principle of Rule 404(b). The more stringent the standard, the less likely it is that the government will be able to introduce the other crimes evidence, which is often an important part of the prosecution's proof of the crime charged. Until recently, most federal courts required that the other crime be proven by clear and convincing evidence, out of earshot of the jury, before the judge admits the evidence.[89] The trial judge determined whether the standard had been met, and then either permitted or denied admission of the evidence.[90] The Fifth Circuit, however, set forth a less stringent standard of proof of other crimes evidence in *United States v. Beechum*.[91] In *Beechum*, the court held that the proponent of the evidence need not meet an initial clear and convincing standard.[92] Rather, the trial judge must determine whether sufficient evidence exists for a jury finding, and if so, the court must then allow the jury to decide whether the other crime occurred, and whether the defendant was the perpetrator.[93]

### B. *Inextricably Intertwined Evidence*

The limitations and preadmission requirements applicable to evidence offered under Rule 404(b) govern the admissibility of evidence pertaining to uncharged misconduct that is extrinsic to the crime charged. Some uncharged misconduct, however, is an inseparable part of the crime charged, or is otherwise not wholly independent from the crime charged, even though the conduct is not referred to explicitly in the charging document. Such evidence is often described as being "inextricably intertwined" with the crime charged.[94] Whether uncharged misconduct is inextricably intertwined with the crime charged depends on the facts of the specific case. A review of federal cases reveals several relationships in which uncharged miscon-

89. *See supra* note 10; E. IMWINKELRIED, *supra* note 3, § 2:08; Graham, *supra* note 78, at 357.

90. E. IMWINKELRIED, *supra* note 3, § 2:08.

91. 582 F.2d 898 (5th Cir.), *cert. denied*, 440 U.S. 920 (1978).

92. *Id.* at 913.

93. *Id.* at 913-14.

94. *See* United States v. Vretta, 790 F.2d 651, 655 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986); United States v. Sepulveda, 710 F.2d 188, 189 (5th Cir. 1983); *see also* United States v. Mitchell, 613 F.2d 779, 782 (10th Cir.), *cert. denied*, 445 U.S. 919 (1980) (Evidence of the defendant's conduct the evening before the charged shooting was "inextricably mixed and connected" with the crime charged because it linked the defendant with the shotgun.).

duct is inextricably intertwined with the crime charged: First, uncharged misconduct may have been a necessary preliminary step toward completing the crime charged; second, uncharged misconduct may be directly probative of the crime charged; third, uncharged misconduct may arise from the same transaction or transactions as the crime charged; fourth, uncharged misconduct may form an integral part of a particular witness' testimony concerning the crime charged; and fifth, uncharged misconduct evidence may complete the story of the crime charged. Although these different scenarios of inextricably intertwined evidence may parallel or overlap with each other in certain instances, each describes a unique causal, temporal, or spatial connection to the crime charged.

### 1. EVIDENCE OF UNCHARGED MISCONDUCT THAT WAS A PRELUDE TO THE CRIME CHARGED

When courts treat evidence as inextricably intertwined with the crime charged, and therefore outside the scope of Rule 404(b), they may be referring to evidence of an event that was intended only as a prelude to the crime charged, or as a necessary preliminary step toward the completion of the crime charged. In *United States v. Torres*,[95] for example, during a drug transaction involving a small amount of cocaine sold for sampling purposes, the defendants made plans for the sale of a large quantity of cocaine.[96] The defendants were ultimately charged with the second sale of cocaine.[97] The United States Court of Appeals for the Fifth Circuit held that testimony pertaining to the sample drug transaction was not evidence of other crimes as contemplated by Rule 404(b), but was a necessary preliminary to, or a means of accomplishing, the commission of the crime charged, and therefore was admissible.[98]

Although in *Torres*, the sample drug transaction led directly to the crime charged, a direct causal connection is not always necessary to support admissibility. In *United States v. DeLuna*,[99] the defendants were convicted of charges arising out of a casino skimming conspiracy.[100] The Eighth Circuit upheld the district court's admission of evidence indicating that the defendants illegally obtained inside information regarding a prospective merger of the casino, thereby establishing the defendants' subsequent hidden interest in, and control of,

95. 685 F.2d 921 (5th Cir. 1982).
96. *Id.* at 923.
97. *Id.*
98. *Id.* at 925.
99. 763 F.2d 897 (8th Cir.), *cert. denied*, 106 S. Ct. 382 (1985).
100. *Id.* at 897.

the casino.[101] The court reasoned that the uncharged misconduct formed the basis of the crime charged. Although the uncharged criminal activity did not lead directly to the crime charged, it was a necessary preliminary event that facilitated the conspiracy, and therefore was inextricably intertwined with the crime charged.[102] Under *DeLuna*, uncharged misconduct that formed a predicate of the crime charged is inextricably intertwined with the crime charged.

### 2. UNCHARGED MISCONDUCT EVIDENCE THAT IS DIRECTLY PROBATIVE OF THE CRIME CHARGED

When evidence of uncharged crimes is directly probative of the crime charged, or so interwoven with the evidence needed to prove the crime charged that it would be practically impossible to separate one from the other, the two are inextricably intertwined. This type of inextricably intertwined evidence differs from necessary preliminary evidence in that the uncharged criminal activity is not a means of accomplishing the crime in question. Rather, proof of the crime charged necessarily reveals the proof of the other crime, because the uncharged misconduct evidence is directly probative of the crime charged.

In *United States v. Mitchell*,[103] the defendant was charged with possession of an unregistered firearm.[104] The United States Court of Appeals for the Tenth Circuit held that evidence showing that the defendant had threatened and robbed someone at gunpoint the evening before his arrest was admissible to link the defendant with the firearm, and was therefore directly probative of the crime charged.[105]

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101. *Id.* at 913.

102. In both *Torres* and *DeLuna*, the uncharged misconduct evidence was relevant to establishing the defendant's intent, knowledge, or plan, and therefore was admissible under Rule 404(b). *See* United States v. Means, 695 F.2d 811 (5th Cir. 1983) (Evidence of an illegal payoff scheme as a means of obtaining a branch bank permit was admissible because the charged crime would not have occurred without the payoff scheme.); United States v. D'Ahora, 585 F.2d 16 (1st Cir. 1978) (Evidence of the defendant's prior drug transaction was one link in a chain of events leading to the drug transaction for which the defendant was charged.).

103. 613 F.2d 779 (10th Cir.), *cert. denied*, 445 U.S. 919 (1980).

104. *Id.* at 780.

105. *Id.* at 782. Although the uncharged misconduct evidence in *Mitchell* does not fit comfortably into any of the previously articulated theories of relevance, it may have been relevant to the defendant's identity. *See* United States v. Costa, 691 F.2d 1358, 1361 (11th Cir. 1982) (Testimony showing that the defendant previously had dealt in cocaine was not extrinsic to the government's charge of other cocaine dealings, because it established the relationship between the witness and the defendant, which formed the basis of the witness' expectation that the defendant would provide him with cocaine.); United States v. Martin, 794 F.2d 1531, 1533 (11th Cir. 1986) (Guns seized on board the vessel constituted direct evidence of the charges of possession with intent to distribute, conspiracy, and importation of marijuana.).

Similarly, in *United States v. Vretta*,[106] the Seventh Circuit ruled that evidence proving that the defendant, charged with kidnapping, had murdered the kidnap victim's son immediately before the kidnapping, was admissible because it was directly relevant to the defendant's presence at the kidnap victim's home, and the timing of the kidnapping.[107] In both *Mitchell* and *Vretta*, the uncharged misconduct evidence was directly probative of the charged offense, because it linked the defendant to the crime charged.

### 3. EVIDENCE OF UNCHARGED MISCONDUCT ARISING FROM THE SAME TRANSACTION AS THE CRIME CHARGED

When courts admit evidence of uncharged criminal activity that arises from the same transaction or transactions as the crime charged, they do so with the explicit or implicit assumption that it is inextricably intertwined with the crime charged.[108] This principle encompasses uncharged misconduct that took place contemporaneously with the crime charged. In *United States v. Kloock*,[109] the defendant was charged with importing cocaine after customs agents detected a cocaine-saturated bathmat in the defendant's luggage.[110] The prosecution introduced evidence that the defendant had a false driver's license at the time of the arrest, which he had attempted to use as a prop to facilitate the commission of the charged offense.[111] The Eleventh Circuit held that possession of the false driver's license was part of the same transaction, and was therefore admissible unless its probative value was substantially outweighed by the potential for unfair prejudice upon admission into evidence.[112]

Uncharged misconduct may have arisen from the same criminal episode or transaction even if it did not occur contemporaneously with the crime charged. In *United States v. Derring*,[113] the defendant was convicted of interstate transportation of a stolen vehicle.[114] At

106. 790 F.2d 651 (7th Cir.), *cert. denied*, 107 S. Ct. 179 (1986).

107. *Id.* at 656. Had the court treated the evidence in *Vretta* as other crimes evidence, the government could have argued that it was relevant proof of identity, motive, and intent.

108. *See* United States v. Bass, 794 F.2d 1305 (8th Cir.), *cert. denied*, 107 S. Ct. 233 (1986); United States v. Poston, 727 F.2d 734 (8th Cir.), *cert. denied*, 466 U.S. 962 (1984); United States v. Weeks, 716 F.2d 830 (11th Cir. 1983); United States v. Miller, 688 F.2d 652 (9th Cir. 1982); United States v. Gibson, 625 F.2d 887 (9th Cir. 1980).

109. 652 F.2d 492 (11th Cir. 1981).

110. *Id.* at 493.

111. *Id.* at 494.

112. *Id.* at 495. If the court had treated the evidence pertaining to the false driver's license as other crimes evidence, it would have had difficulty determining the precise theory of relevance under which it could be introduced under Rule 404(b).

113. 592 F.2d 1003 (8th Cir. 1979).

114. *Id.* at 1003.

trial, the defendant challenged the introduction of testimony that he had murdered the owner of the stolen car in another state.[115] The Eighth Circuit held that the evidence was admissible because the murder and the car theft were part of a single criminal transaction over a four-day period.[116] Similarly, in *United States v. Bass*,[117] evidence that the defendants had escaped from jail, stolen several cars, and robbed several people, before stealing the car for which they were charged, was admissible because each of the events constituted an integral part of an extended criminal transaction occurring over several days.[118]

If the defendant has participated in a scheme of criminal activity culminating in uncharged misconduct, evidence of that uncharged misconduct is admissible even though it occurred subsequent to the crime charged, because it arose from the same criminal activity. In *United States v. Poston*,[119] the defendant was charged with misappropriating federally insured funds.[120] The trial court admitted evidence showing that the defendant had attempted to negotiate a money order that the government alleged was criminally obtained. The Eighth Circuit held this evidence to be admissible because the attempted negotiation of the money order was the defendant's attempt to "reap the benefits" of the crime charged.[121] The attempted negotiation was therefore a part of the same criminal episode.[122] In *Kloock*, *Bass*, and *Poston*, the charged offenses were construed broadly to include acts of the defendant that either accompanied, preceded, or followed the crime charged, when the charged and the uncharged acts were connected in the mind of the defendant.

#### 4. UNCHARGED MISCONDUCT EVIDENCE THAT FORMS AN INTEGRAL PART OF A WITNESS' TESTIMONY ABOUT THE CRIME CHARGED

When uncharged misconduct and the charged offense arose from

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115. *Id.* at 1006.

116. *Id.* at 1007. Although evidence of the murder was treated as part of the same single criminal transaction, had the murder been treated as a separate crime and introduced pursuant to Rule 404(b), it would have been relevant to the defendant's motive for stealing the car, and to explaining the defendant's flight from the murder scene.

117. 794 F.2d 1305 (8th Cir.), *cert. denied*, 107 S. Ct. 233 (1986).

118. *Id.* at 1312. The fact that the defendants had escaped from jail and stolen a number of cars to make their getaway was relevant to the defendant's motive, knowledge, and intent. Therefore, the evidence might have been admissible pursuant to Rule 404(b), had the government satisfied the other requirements of the Rule.

119. 727 F.2d 734 (8th Cir.), *cert. denied*, 466 U.S. 962 (1984).

120. *Id.* at 734.

121. *Id.* at 740.

122. *Id.*

the same criminal transaction, the uncharged and charged criminal activity were linked in the mind of the defendant. Uncharged and charged criminal acts also may be linked in the mind of the witness when the uncharged misconduct evidence is linguistically inseparable from the crime charged.[123] Uncharged misconduct that forms a natural and integral part of a witness' account of the crime charged is inextricably intertwined with the crime charged and is outside the scope of Rule 404(b).[124] In *United States v. Wilson*,[125] the defendant was charged with selling a controlled substance.[126] A government informant who had purchased the drugs from the defendant testified that, at the time of the purchase, the defendant had also sold drugs to a third party.[127] The court admitted this evidence because it completed the informant's account of his dealings with the defendant.[128] Had the witness avoided mentioning the uncharged act, his testimony would have been awkward, and the narrative would have sounded less credible.[129]

If the omission of uncharged misconduct evidence causes the witness' testimony to become confusing, the uncharged misconduct evidence is linguistically inseparable from the crime charged. In *United States v. Aleman*,[130] the defendant was charged with possession with intent to distribute heroin.[131] The Fifth Circuit upheld the trial court's admission of evidence indicating that the defendant had given a sample of cocaine to a government agent during a meeting between the two.[132] The court permitted the witness to give a complete rendition of the crime as he knew it. The court noted that the agent's

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123. E. IMWINKELRIED, *supra* note 3, § 6:24.

124. *See* United States v. Chilcote, 724 F.2d 1498, 1501 (11th Cir.), *cert. denied*, 467 U.S. 1218 (1984) (Because the witness' testimony would have been comprehensible without reference to evidence that the defendant piloted a plane to Colombia, that evidence related to an extrinsic act.); United States v. Gonzalez, 661 F.2d 488, 493 (5th Cir. Unit B Nov. 1981) (Testimonial evidence of the sale of the drug diazapam was not other crimes evidence under Rule 404(b), because it completed the government witnesses' account of the entire incident.).

125. 598 F.2d 67 (5th Cir. 1978).

126. *Id.* at 67.

127. *Id.* at 72.

128. *Id.*

129. *Id.*

130. 592 F.2d 881 (5th Cir. 1979).

131. *Id.* at 883.

132. *Id.* at 885. Unlike the uncharged misconduct evidence in *Aleman*, which seemingly would have been relevant to the defendant's knowledge or intent had the evidence been brought in under Rule 404(b), in *Wilson* the uncharged misconduct evidence was apparently not relevant to an ultimate issue in the case. If the prosecution in *Wilson* had been required to articulate a specific theory of relevance before the evidence was admitted, however, the practical result may have been to exclude the evidence. In turn, the witness might have appeared less credible, because of the need to avoid mentioning the circumstances of the crime.

testimony would have been incomplete and confusing without reference to the sample sale of cocaine, thus reducing its credibility.[133] The uncharged crime evidence was, therefore, neither extrinsic to the crime charged, nor within the scope of Rule 404(b).[134]

### 5. UNCHARGED MISCONDUCT EVIDENCE THAT COMPLETES THE STORY OF THE CRIME CHARGED

In both *Wilson* and *Aleman*, the uncharged misconduct evidence was not other crimes evidence governed by Rule 404(b) because it was an integral part of a particular witness' version of the crime. Some courts treat uncharged misconduct evidence that is not part of a particular witness' version of the crime, but nonetheless completes the story of the charged offense, as inextricably intertwined with the charged offense, and not within the scope of Rule 404(b). This type of evidence gives jurors a clearer understanding of the whole criminal episode, even though the defendant has not been charged with every criminal act within it.

In *United States v. Turpin*,[135] the defendant was convicted of charges stemming from his attempt to derail a train.[136] The defendant challenged the introduction of evidence suggesting that he had committed a murder shortly before the train had derailed, and that he had hidden the victim's body in a car which he placed on the railroad tracks, knowing that the car would be demolished by an oncoming train.[137] The Eighth Circuit upheld the admission of evidence pertaining to the murder because it was an integral part of the immediate context of the crimes charged, and consequently was not within the scope of Rule 404(b).[138]

In *Turpin*, evidence of the murder at the site of the train derailment showed events surrounding the crime that were attributable to the defendant. Evidence setting the stage for the crime charged, yet

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133. *Id.*

134. *Id.* at 886.

135. 707 F.2d 332 (8th Cir. 1983).

136. *Id.* at 332.

137. *Id.* at 335.

138. *Id.* at 336. It is unclear from the court's opinion whether the fact that the uncharged misconduct was part of a single criminal episode took the evidence outside the scope of Rule 404(b), or whether that made it an acceptable purpose of other crimes evidence subject to a Rule 404(b) analysis. The practical difference between these alternatives is slight, however, because the court subjected the uncharged misconduct evidence to a Rule 403 analysis, and gave a limiting instruction to the jury on the use of the evidence. *Id.*; *see also* United States v. Caspers, 736 F.2d 1246, 1249 (8th Cir. 1984) (evidence of a prior drug transaction established the events leading to the witness' cooperation with the government, thereby explaining the context of the charged drug offense).

not involving specific events in which the defendant participated, may be offered to establish circumstances surrounding a charged offense. In *United States v. Weeks*,[139] the Eleventh Circuit upheld the admission of evidence showing that the defendant, accused of assault, was under investigation for stealing cars when he assaulted the federal investigator.[140] The evidence did not involve specific acts of the defendant, but rather, acts of the victim. The court noted that evidence of this type, which completes the story of the crime charged, is not evidence of extrinsic crimes, is not governed by Rule 404(b), and therefore is admissible.[141] The fact that the defendant was under investigation when he assaulted the federal agent gave the jurors a comprehensive view of the criminal episode and facilitated a greater understanding of the crime itself.

The absence of some information may cause the jury to become confused or curious about the overall picture of the crime. In *United States v. Moore*,[142] the defendant, a convicted felon, was prosecuted for interstate transportation of a firearm.[143] The defendant appealed the introduction of evidence showing that the firearm had been found in the course of a drug raid of the defendant's residence.[144] The Eighth Circuit upheld the district court's admission of the evidence to explain the officers' presence in the defendant's house and avoid jury confusion.[145] Had the jury not been told why the officers were in the defendant's home, and how the gun had been found, they might have become confused and curious, potentially creating their own explanations for the aspects of the crime that were not explained. The *Moore* court observed that a jury "cannot be expected to make its decision in a void—without knowledge of the time, place and circumstances of the acts which form the basis of the charge."[146] Because the uncharged misconduct evidence was necessary to avoid jury confusion, the *Moore* court treated the evidence as outside the scope of Rule 404(b).[147]

Not all federal appellate courts treat uncharged misconduct evidence that completes the story of the charged crime as inextricably intertwined evidence and outside the scope of Rule 404(b). In *United*

139. 716 F.2d 830 (11th Cir. 1983).
140. *Id.* at 830.
141. *Id.* at 832.
142. 735 F.2d 289 (8th Cir. 1984).
143. *Id.* at 290.
144. *Id.* at 292.
145. *Id.*
146. *Id.*
147. *Id.*

*States v. Levy*,[148] the Second Circuit held that the trial court's admission of evidence pertaining to a drug transaction involving a small amount of drugs for sampling was in error.[149] The sample drug transaction had occurred at a different time and place, and between different people than those involved in the crime charged.[150] At the sample drug transaction, however, plans were laid for the larger drug sale for which the defendants ultimately were charged.[151] The court noted that, although the evidence completed the story of the crime charged, the contemporaneous occurrence of the acts did not necessarily place the evidence outside the scope of Rule 404(b).[152] Instead, the court held that evidence of the sample drug transaction was admissible only if: it qualified under an exception to Rule 404(b) clearly articulated by the prosecution; the probative value was not substantially outweighed by the unfair prejudice; a limiting instruction was given to the jury regarding its use of the evidence; and it otherwise complied with Rule 404(b) admission standards.[153]

Some courts that treat evidence that completes the story of the crime charged as other crimes evidence governed by Rule 404(b) admit such evidence without applying the stringent admission standards usually attached to Rule 404(b) evidence. The Fourth Circuit noted, in *United States v. Masters*,[154] that Rule 404(b) is inclusionary; it prohibits the use of other crimes evidence to establish the defendant's propensity to commit the crime charged, but permits the use of other crimes evidence to provide the context within which the crime occurred.[155] Citing the need to complete the story of the crime for which the defendant is being tried by proving its immediate context or res gestae, the Fourth Circuit upheld the trial court's admission of prosecution tapes in which the defendant boasted about gun transactions other than the one for which he was charged.[156] The court noted that suppression of parts of the res gestae would fragment the

148. 731 F.2d 997 (2d Cir. 1984).

149. *Id.* at 1002.

150. *Id.* at 1001.

151. *Id.*

152. *Id.* at 1003.

153. *Id.* at 1004; *see also* United States v. Back, 588 F.2d 1283, 1287 (9th Cir. 1979) (Evidence showing that the defendant raped another woman around the same time that he allegedly raped the victim was not admissible to explain the context within which the charged rape occurred, unless some nexus of logical relevance existed between the first rape and the charged rape, such that the evidence went, at least indirectly, to an element of the crime charged.).

154. 622 F.2d 83 (4th Cir. 1980).

155. *Id.* at 86.

156. *Id.*

event, and that the jury was entitled to know the setting of the case.[157] After accepting this use of other crimes evidence, the court required that the evidence be subjected to a Rule 403 analysis and to limiting instructions to reduce the potential prejudice resulting from the admission of the evidence, but did not require that the government prove the evidence under a clear and convincing standard before admission.[158]

*Turpin*, *Weeks*, *Moore*, *Levy*, and *Masters* illustrate that courts have treated evidence that completes the story of the crime charged inconsistently. Not all federal courts consider that Rule 404(b) governs the admissibility of this type of inextricably intertwined evidence. When courts treat evidence that completes the story of the crime charged within the scope of Rule 404(b), they consider the fact that the evidence explains the context of the crime to be a proper purpose for introducing other crimes evidence.[159] The evidence is still subject to a Rule 403 analysis and to instructions limiting the jurors' use of the evidence.[160] It is unclear, however, whether the government must prove the evidence under a clear and convincing standard prior to admission. The enactment of Rule 404(b) has done little to clarify the appropriate treatment of evidence that completes the story of the crime charged.

## IV. CONCLUSION

Congress enacted Rule 404 of the Federal Rules of Evidence to limit the circumstantial use of character evidence. Several different types of proof can be used to establish a defendant's character: reputation testimony, personal opinion testimony, and evidence of specific acts of the defendant as reflective of his character.[161] Evidence pertaining to specific acts, especially criminal acts, is the most persuasive proof of a person's character, but it is also the most likely to distract,

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157. *Id.*

158. *Id.* at 87. Another way of expressing the "completes the story" use of uncharged misconduct evidence is to ask if excluding the evidence would create a chronological or conceptual void in the prosecution's presentation of the case. *See* United States v. Swiatek, 819 F.2d 721, 727 (7th Cir. 1987) (The trial court erred in admitting evidence showing that the defendant, who was charged with dealing in explosives, also was willing to fence stolen jewelry and cars, because the exclusion of this evidence would not have left a conceptual void in the story of the charged crime.); United States v. Hattaway, 740 F.2d 1419, 1425 (7th Cir.), *cert. denied*, 479 U.S. 1028 (1984) (Evidence showing that while the victim was being kidnapped, her boyfriend was murdered, was admissible other crimes evidence subject to a Rule 403 analysis, because excluding the evidence would have created a conceptual void.).

159. *See* United States v. Masters, 622 F.2d at 86 (4th Cir. 1980).

160. *Id.* at 88.

161. C. MCCORMICK, *supra* note 1, at 443.

prejudice, or confuse the jury.[162] The introduction of specific past conduct of the defendant may also be unduly time consuming, and create a risk of unfair surprise to the defendant.[163] In recognition of these special dangers, evidence introduced pursuant to Rule 404(b) must have an independent, articulated theory of relevance; and, pursuant to Rule 403, a probative value that is not substantially outweighed by the risk of unfair prejudice created by the admission of the evidence. To guard further against prejudice, the judge typically instructs the jurors of the limited use that they may make of the evidence.

Historically, the character rule was framed in an exclusionary fashion; evidence of other crimes was not admissible unless it fit within one of the recognized exceptions. Often the events surrounding the crime charged, in a spatial, temporal, or causal sense, did not fit readily into one of the accepted uses of the other crimes evidence because of their proximity to the crime charged. The courts developed the res gestae or "completes the story" doctrine in order to ensure that otherwise relevant evidence would not be excluded when it incidentally involved uncharged criminal activity, because the defendant had not been charged with all of his misconduct. The use of the res gestae exception implied that the uncharged misconduct was other crimes evidence as contemplated by the general rule.

The Federal Rules of Evidence apparently follow the inclusionary approach to the rule regulating the admissibility of uncharged misconduct evidence: Other crimes evidence is admissible if introduced for a purpose other than to show the defendant's propensity to commit the crime charged. As such, the category of evidence completing the story of the crime charged was implicitly included among the acceptable uses of other crimes evidence. As the courts began to articulate preadmission requirements for Rule 404(b) evidence, particularly the clear and convincing standard of proof prior to admission, the courts were reluctant to subject res gestae evidence to these requirements, because to do so would put too great a burden upon the government. In order to evade the limitations of the rule, courts avoided characterizing uncharged misconduct as other crimes evidence. The necessarily vague term, "inextricably intertwined," was coined to include those situations in which the evidence involved uncharged criminal activity that was not wholly independent from the crime charged.

Inextricably intertwined evidence stands in a different relation-

162. *Id.*
163. *Id.*

ship to the crime charged than does evidence of wholly independent crimes. The inextricably intertwined evidence is causally, temporally, or spatially connected to the crime charged, and the crime charged and the uncharged acts both involved the defendant. The uncharged misconduct evidence is not offered to prove the defendant's character in order to imply that it was more likely that the defendant committed the crime charged, although in some cases an exact independent theory of relevance may be difficult, if not impossible, to articulate. Rather, the evidence is introduced to facilitate the jury's understanding of the context within which the charged crime occurred, because without this contextual setting the jury would be forced to reach a verdict in a vacuum.

The concerns that prompted the development of the character rule in general, and the other crimes rule in particular, are inapplicable when the uncharged misconduct evidence is inextricably intertwined with the crime charged. The defendant will not be unduly surprised or unprepared to meet evidence of events that were themselves related to, or occurred contemporaneously with, the crime for which the defendant is being tried. The defendant should expect that evidence of events incidentally involving uncharged misconduct that was a necessary preliminary step toward completing the crime charged, that was directly probative of the crime charged, or that arose from the same criminal episode as the crime charged, will be introduced by the prosecution in order to give a conceptually and chronologically complete presentation of the situation to the jury. Evidence providing the contextual setting of a case is not evidence of a collateral matter that is unduly time consuming.

Inextricably intertwined evidence is not likely to be as prejudicial as evidence of a wholly independent crime, because there is only one event in issue, and the risk that the jury would infer a propensity from one event is negligible. For example, a jury may well infer a propensity to commit robbery if evidence was introduced showing that the defendant had committed several unrelated robberies in the past year. In contrast, evidence showing that, immediately prior to the bank robbery in question, the defendant assaulted a guard at the bank does not lead to the conclusion that a defendant has the propensity to rob banks, although the evidence does tend to paint a negative picture of the defendant's character. The jury will either believe that the defendant committed both the charged and uncharged acts, or the jury will believe that the defendant did not commit any of the acts. Nor is inextricably intertwined evidence likely to unduly prejudice the jurors, even if the evidence casts a negative light on the defendant's

character. That the defendant assaulted a bank guard prior to a bank robbery is not so prejudicial as to assure the defendant's conviction. Rather, in most cases, the defendant will be charged with the most serious of his offenses, and the accompanying misconduct will appear small in comparison.

Inextricably intertwined evidence includes: first, a necessary preliminary occurrence intended to produce the criminal activity for which the defendant is charged; second, uncharged misconduct that arises from the same criminal episode as the crime charged; third, uncharged misconduct that is directly probative of the crime charged; fourth, evidence of uncharged misconduct necessarily included in a particular witness' testimony regarding the crime charged; and fifth, evidence that prevents jury confusion by completing the story of the crime charged. Evidence of circumstances surrounding the crime that does not involve criminal activity is admissible if it is logically relevant to prove an ultimate issue in the case, and if its probative value is not substantially outweighed by its potential for prejudice. Inextricably intertwined evidence is evidence of the surrounding circumstances of the crime in a causal, temporal, or spatial sense, incidentally revealing additional, but uncharged, criminal activity. As such, Rule 404(b) is inapplicable to inextricably intertwined evidence, and such evidence should be subject to the same general admissibility requirements as other evidence that is used to provide the trier of fact with a complete picture of the crime in question.

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