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PREJUDICE TO THE NTH DEGREE:  
THE INTRODUCTION OF UNCHARGED  
MISCONDUCT ADMISSIBLE ONLY AGAINST  
A CO-DEFENDANT AT A MEGATRIAL

EDWARD J. IMWINKELRIED\*

*Confusion worse confounded.*

— John Milton, *Paradise Lost*<sup>1</sup>

The past decade witnessed the addition of a new term to the legal lexicon — "megatrial."<sup>2</sup> The term does not signify a lengthy trial of a single accused such as O.J. Simpson. Rather, the term has come to mean a massive, joint trial involving multiple defendants.<sup>3</sup> Recent examples abound. *United States v. Baker*<sup>4</sup> involved fifteen defendants, forty-four counts, 30,000 pages of transcript, and sixteen months of trial. In *United States v. Andrews*,<sup>5</sup> there were 175 counts in the indictment, naming thirty-eight defendants. There were eighty named defendants in *United States v. Kipp*,<sup>6</sup> twenty-four defendants in *United States v. Balogun*,<sup>7</sup> and twenty-three defendants in *United States v. Shea*.<sup>8</sup>

To be sure, massive joint trials are not an exclusively modern phenomenon. Courts have tried similar prosecutions in the past.<sup>9</sup> However, the size of the cases filed in federal court grew during the 1990s. Based on data furnished by the Administrative Office of the United States Courts, the average number of charges was consistently higher in the 1990s.<sup>10</sup>

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1. JOHN MILTON, *PARADISE LOST* Book II, Line 996.

2. *United States v. Ellender*, 947 F.2d 748, 754 (5th Cir. 1991); Cheryl M. Bradley, *Section News*, CRIM. JUST., Summer 1991, at 61; Paul Marcotte, *Gang Megatrial Rejected*, A.B.A. J., Feb. 1991, at 18; Barry Tarlow, *Centrust Mega-Trial*, CHAMPION, Mar. 1994, at 33, 37; Barry Tarlow, *Everybody's a Critic in Failed New England Mob RICO Prosecution*, 23 CHAMPION, Nov. 1999, at 79, 80; Brendan Judge, Note, *No Easy Solutions to the Problems of Criminal Mega-Trials*, 66 NOTRE DAME L. REV. 211, 211 (1990).

3. See authorities cited *supra* note 2.

4. 10 F.3d 1374 (9th Cir. 1993).

5. 814 F. Supp. 673 (N.D. Ill. 1992).

6. 990 F. Supp. 102 (N.D.N.Y. 1998).

7. 971 F. Supp. 1215 (N.D. Ill. 1997).

8. 750 F. Supp. 46 (D. Mass. 1990).

9. See, e.g., *Chadwick v. United States*, 117 F.2d 902 (5th Cir. 1941) (42 counts against 29 persons); *United States v. Bruno*, 105 F.2d 921 (2d Cir. 1939) (88 co-conspirators); *Stern v. United States*, 85 F.2d 394 (7th Cir. 1936) (15 defendants and 44 counts); 1 LESTER B. ORFIELD, *ORFIELD'S CRIMINAL PROCEDURE UNDER THE FEDERAL RULES* § 8:34, at 680-81 (2d ed. 1985).

10. See ADMINISTRATIVE OFFICE, U.S. COURTS, *JUDICIAL BUSINESS OF THE UNITED STATES*

There are several possible explanations for this phenomenon. The federal government has waged a highly publicized legal war against drug traffickers, and drug prosecutions certainly lend themselves to multi-defendant conspiracy trials. Another possible contributing factor, though, is that the United States Supreme Court recently toughened the standards for determining when one defendant is entitled to have his charges severed from those of co-defendants for trial. Early in the 1990s the Supreme Court handed down its decision in *Zafiro v. United States*.<sup>11</sup> *Zafiro* and several co-defendants were charged with conspiring to distribute illegal drugs. A number of the co-defendants moved to sever the cases for purposes of trial; they asserted that their defenses were "mutually antagonistic."<sup>12</sup> The District Court judge denied the motions, and the jury convicted all co-defendants. On appeal, the defendants claimed that the trial judge erred in denying their individual severance motions.<sup>13</sup>

In an opinion written by Justice O'Connor, the Court affirmed the convictions. The Court asserted that "joint trials play a vital role in the criminal justice system" by both promoting efficiency and "avoiding the scandal and inequity of inconsistent verdicts."<sup>14</sup> The Court declined the defendants' invitation "to adopt a bright-line rule, mandating severance whenever co-defendants have conflicting defenses."<sup>15</sup> Instead, if joinder is proper under Federal Rule of Criminal Procedure (FRCP) 8(b), the defendant can gain severance under FRCP 14 only if he can establish "a serious risk that a joint trial would compromise a specific trial right . . . , or prevent the jury from making a reliable judgment about guilt or innocence."<sup>16</sup> The Court suggested that severance is warranted only when the risk of prejudice is both demonstrable and high.<sup>17</sup> The Court opined that in the typical case, "less drastic measures, such as limiting instructions, . . . will suffice."<sup>18</sup> Although he concurred in the judgment, Justice Stevens criticized the majority for expressing what he considered an "enthusiastic and unqualified 'preference' for the joint trial of defendants indicted together."<sup>19</sup> As a practical matter, *Zafiro* has made it exceedingly difficult for a defendant to persuade a trial judge to grant a severance motion, especially in conspiracy prosecutions.<sup>20</sup>

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COURTS, 1998 REPORT OF THE DIRECTOR 210-13 (1998); ADMINISTRATIVE OFFICE, U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS, 1993 REPORT OF THE DIRECTOR A1-123, A1-126 (1993); ADMINISTRATIVE OFFICE, U.S. COURTS, 1988 ANNUAL REPORT OF THE DIRECTOR 257-61 (1988). The following were the average number of defendants per case filed during the listed years in the 1980s: 1984-1.39; 1985-1.38; 1986-1.38; 1986-1.37; 1988-1.38; and 1989-1.38. See sources cited *supra*. In contrast, the following were the averages for the listed years during the past decade: 1991-1.42; 1992-1.41; 1993-1.41; 1995-1.42; 1996-1.42; and 1997-1.40. See sources cited *supra*.

11. 506 U.S. 534 (1993).

12. *Id.* at 536.

13. See *United States v. Zafiro*, 945 F.2d 881, 884 (7th Cir. 1991).

14. *Zafiro*, 506 U.S. at 537.

15. *Id.* at 538.

16. *Id.* at 539.

17. See *id.*

18. *Id.*

19. *Id.* at 544 (Stevens, J., concurring).

20. See *United States v. Tocco*, 200 F.3d 401, 410 (6th Cir. 2000); *United States v. Al-Muqsit*, 191

If you asked the typical criminal defense attorney which type of case he least liked defending, the attorney would probably say a joint trial. There are technical reasons for the defense bar's dislike for joint trials. At a joint trial, the prosecution can put the co-conspirator hearsay exemption to especially effective use. Federal Rule of Evidence (FRE) 801 codifies the exemption, allowing the prosecution to introduce one co-conspirator's statements against another co-conspirator.<sup>21</sup> The statute reads, "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy."<sup>22</sup> It is true that the prosecution may resort to the statutory exemption even when the charges do not include an allegation of conspiracy.<sup>23</sup> However, it strikes the typical trial judge as especially fitting to invoke the exemption when the pleadings include an express conspiracy count.

Aside from the technical reasons, however, defense counsel also dislike joint trials so intensely due to the practical risks they pose. As Justice Jackson observed in *Krulewitch v. United States*:<sup>24</sup>

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together. If he is silent, he is taken to admit it and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other. There are many practical difficulties in defending against a charge of conspiracy . . . .<sup>25</sup>

The essence of the fear is that the jury will become confused and find a particular defendant guilty by association.<sup>26</sup> The empirical data suggests that the fear is far

F.3d 928, 941 (8th Cir. 1999) (citing *Zafiro*, cert. denied, 120 S. Ct. 548 (1999); *United States v. Brandon*, 17 F.3d 409, 440 (1st Cir. 1994) (quoting *United States v. Searing*, 984 F.2d 960, 965 (8th Cir. 1993)) ("In the context of conspiracy, severance will rarely, if ever, be required."); *United States v. Brooks*, 957 F.2d 1138, 1145 (4th Cir. 1992) (noting that "motions to sever . . . are rarely granted in conspiracy cases"); *United States v. Pou*, 953 F.2d 363, 368 (8th Cir. 1992) (quoting *United States v. Drew*, 894 F.2d 965, 968 (8th Cir. 1990)) ("Rarely, if ever, will it be improper for co-conspirators to be tried together . . . ."); *United States v. Andrews*, 953 F.2d 1312, 1323 (11th Cir. 1992) (citing *United States v. Leavitt*, 878 F.2d 1329, 1340 (11th Cir. 1989)) (noting that "co-conspirators should generally be tried together"); *United States v. D-Armond*, 80 F. Supp. 2d 1157, 1172-74 (D. Kan. 1999); *United States v. Wilson*, 79 F. Supp. 2d 1029, 1032-34 (E.D. Ark. 1999); *United States v. Pirro*, 76 F. Supp. 2d 478 (S.D.N.Y. 1999); *United States v. Aiken*, 76 F. Supp. 2d 1346 (S.D. Fla. 1999).

21. See FED. R. EVID. 801(d)(2)(E).

22. *Id.*

23. See *United States v. Lara*, 181 F.3d 183, 196 (1st Cir.), cert. denied, 120 S. Ct. 432 (1999).

24. 336 U.S. 440 (1949) (Jackson, J., concurring); see also *Zafiro*, 506 U.S. at 545 (Stevens, J., concurring) (approvingly citing "Justice Jackson's eloquent description of" the practical concerns about the fairness of joint trials).

25. *Krulewitch*, 336 U.S. at 454.

26. See, e.g., *United States v. Gallo*, 668 F. Supp. 736 (E.D.N.Y. 1987); *People v. Chambers*, 41 Cal. Rptr. 551 (Cal App. 1964) ("We have concluded . . . that defendant was probably convicted by association with [the co-defendant] . . . rather than by evidence of his personal guilt."); WAYNE R.

from groundless. Admittedly, the available studies relate to joinder of charges rather than joinder of defendants;<sup>27</sup> however, the studies indicate that there are realistic limits to a lay juror's ability to draw multiple distinctions in a single trial.<sup>28</sup> There is good reason to believe that in massive joint trials, there is "less individualized decision making" on the issue of each defendant's personal guilt.<sup>29</sup>

The defendant's situation becomes even more precarious when the prosecution succeeds in introducing evidence of a co-defendant's uncharged misconduct under FRE 404(b).<sup>30</sup> That statute provides:

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 admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . .<sup>31</sup>

For instance, in drug prosecutions, the courts routinely admit evidence of other incidents of drug trafficking for the purpose of demonstrating the *mens rea* element of the charged offense.<sup>32</sup> While joint trials may be criminal defense attorneys' least favorite type of prosecution, testimony about uncharged misconduct may be their least favorite type of evidence. One author refers to this species of evidence as "the Prosecutor's Delight."<sup>33</sup> The admission of evidence of uncharged crimes can effectively strip the defendant of the presumption of innocence<sup>34</sup> and cause another type of confusion in the jurors' minds — a confusion over the proper use of the evidence. Under FRE 404(b), the judge admits the evidence for a limited, non-character purpose such as proving *mens rea*. However, the empirical studies indicate that the evidence sorely tempts the jury to engage in forbidden, character

LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 771 (2d ed. 1992); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* § 21.04, at 531-32 (3d ed. 1993).

27. See James Farrin, Note, *Rethinking Criminal Joinder: An Analysis of the Empirical Research and Its Implications for Justice*, 52 *LAW & CONTEMP. PROBS.* 325, 326, 338 (1989) ("[N]o empirical research has been done directly on joinder of defendants."); see also WHITEBREAD & SLOBOGIN, *supra* note 26, § 21.04, at 528; Edward J. Bronson, *Severance of Co-Defendants in Capital Cases: Some Empirical Evidence*, 21 *C.A.C.J. F.* 52, 54, 62 (1994) (on file with *Oklahoma Law Review*).

28. See Bronson, *supra* note 27, at 52, 54, 62; see also generally 1 EDWARD J. IMWINKELRIED, *UNCHARGED MISCONDUCT EVIDENCE* § 1:03 (rev. ed. 1999) [hereinafter IMWINKELRIED, *UNCHARGED*]; Robert D. Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 *Drake L. Rev.* 1 (1999).

29. Bronson, *supra* note 27, at 52, 54, 62.

30. *FED. R. EVID.* 404(b).

31. *Id.*

32. See 1 IMWINKELRIED, *UNCHARGED*, *supra* note 28, § 5.22.

33. Rand K. Shotwell, Comment, *Exclusion of Prior Acquittals: An Attack on the "Prosecutor's Delight,"* 21 *U.C.L.A. L. REV.* 892, 896 (1974). The data indicates that uncharged misconduct is one of the most frequently proffered types of prosecution evidence. There are more published opinions dealing with FRE 404(b) than with any other specific provision in the Federal Rules of Evidence. See 1 IMWINKELRIED, *UNCHARGED*, *supra* note 28, § 1:04.

34. See Walter A. Reiser, Jr., *Evidence of Other Criminal Acts in South Carolina*, 28 *S.C. L. REV.* 125, 126 (1976).

reasoning.<sup>35</sup> Notwithstanding the judge's limiting instruction on the proper use of uncharged misconduct evidence,<sup>36</sup> the typical lay juror's common sense may prompt the juror to fall back on simplistic reasoning that if the defendant did it once, he probably did it again.<sup>37</sup>

While the Supreme Court has made it more difficult for defendants to obtain severance of their trials from co-defendants, in several respects, the courts have made it easier for prosecutors to introduce uncharged misconduct evidence. This type of testimony is so virulent that at one time, "[t]he clear majority rule" in the United States was that a prosecutor could not introduce such evidence unless the prosecutor presented clear and convincing evidence that the defendant committed the uncharged act.<sup>38</sup> However, in its *Huddleston* decision, the Supreme Court overturned the majority rule, holding that the prosecutor need present only enough foundational testimony to support a permissive inference that the defendant was the actor.<sup>39</sup> Similarly, at one time in the United States the prevailing conception of the uncharged misconduct doctrine was the so-called exclusionary view.<sup>40</sup> Under this conception, a general rule excludes uncharged misconduct; to justify the admission of the evidence, the prosecutor must demonstrate that the testimony falls within the scope of one of a finite number of previously recognized "exceptions," such as motive.<sup>41</sup> However, the trend is moving toward the inclusionary conception of the doctrine.<sup>42</sup> According to this view, there is only one forbidden use of uncharged misconduct evidence, namely, the theory of logical relevance mentioned in the first sentence of FRE 404(b).<sup>43</sup> The prosecutor may introduce the evidence on any alternative theory of logical relevance tenable on the facts of the case.<sup>44</sup> Hence, while it is more likely that the defendant will have to stand trial with a co-defendant, it is also more probable that the prosecutor will be able to adduce evidence of the co-defendant's uncharged misconduct at the joint trial.

If the judge decides to permit the prosecutor to introduce evidence of a co-defendant's uncharged misconduct at a joint trial, the defense faces a virtual

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35. See 1 IMWINKELRIED, UNCHARGED, *supra* note 28, § 1.03.

36. See FED. R. EVID. 105.

37. See Victor Gold, *Limiting Judicial Discretion to Exclude Prejudicial Evidence*, 18 U.C.D. L. REV. 59, 68, 80 (1984); see also *State v. Newton*, 743 P.2d 254, 256 (1987) ("[I]t is difficult for the jury to erase the notion that a person who has once committed a crime is more likely to do so again.").

38. *United States v. Kenney*, 598 F. Supp. 883, 889 (D. Me. 1984).

39. *Huddleston v. United States*, 485 U.S. 681, 689-90 (1988).

40. See generally Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988 (1938).

41. See Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 877 (1982); Michael Patrick Day, Comment, *Evidence of Other Crimes as Substantive Proof of Guilt in Maryland*, 9 U. BAL. L. REV. 245, 266 (1980).

42. See *United States v. Woods*, 484 F.2d 127, 134 (4th Cir. 1973); Douglas J. Brocker, Note, *Indelible Ink in the Milk: Adoption of the Inclusionary Approach to Uncharged Misconduct Evidence in State v. Coffey*, 69 N.C. L. REV. 1604, 1604-05 (1991).

43. See *United States v. Daniels*, 948 F.2d 1033, 1035 (6th Cir. 1991) (noting "only one use is forbidden").

44. See *Cotita v. State*, 381 So. 2d 1146, 1148 (Fla. Dist. Ct. App. 1980).

nightmare. At the defendant's trial, the jury may learn of a co-defendant's uncharged crimes solely because the defendant is standing trial with the co-defendant.<sup>45</sup> At a paradigmatic trial, a single defendant may need to be prepared to meet only testimony about the charged crime. In contrast, when the trial judge allows the prosecution to introduce evidence of a co-defendant's uncharged misconduct at a joint trial, the trial becomes several steps removed from the paradigm.

To begin with, the defendant faces the prospect of needing to meet inculpatory testimony about the act of a third party, the co-defendant. When the issue is whether the defendant personally committed an act, it can be a simple matter for the defendant to take the stand to deny the act. However, FRE 602 generally requires that a person have firsthand knowledge and perception before testifying about an event.<sup>46</sup> Lacking personal knowledge of the alleged act, the defendant may be hard pressed to rebut the testimony about the co-defendant's act. Things get worse; at least if the cases were tried separately, in certain circumstances the defendant generally could force his alleged accomplice to take the stand. The defendant might succeed in compelling the accomplice to exculpate the defendant or at least invoke the privilege against self-incrimination in the jury's presence.<sup>47</sup> At a joint trial, the co-defendant is a formal accused and may refuse to testify entirely.

Finally, to make matters worse still, before trial the defendant may not receive notice of the prosecution's intent to proffer evidence of the co-defendant's uncharged misconduct. Only a minority of states require the prosecution to give pretrial notice of its intent to introduce uncharged misconduct evidence;<sup>48</sup> and even in those jurisdictions, by its terms the statute or court rule clearly implies that the only person entitled to notice is the defendant who allegedly perpetrated the act. Under the language of the typical statute or court rule, the prosecutor may plausibly argue that it need not give any advance notice to the defendant when the alleged actor is the co-defendant. Overall, there may be little the defendant can do to combat effectively the danger of confusion over both personal guilt and the proper use of uncharged misconduct evidence.

Given the defendant's plight, one would think that the courts would take special care to ensure that the jury does not become confused and wrongfully convict the defendant. However, in reality in most jurisdictions, courts treat uncharged misconduct issues at joint trials in roughly the same procedural fashion as they approach them at the trial of a single defendant. The thesis of this article is that this approach is woefully inadequate in this situation. Those procedures may be marginally sufficient at the trial of a solitary defendant, but the risks of confusion are so acute when the prosecution introduces evidence of a co-defendant's uncharged misconduct at a joint trial that special steps must be taken to ensure a just verdict.

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45. See *United States v. Salameh*, 152 F.3d 88, 115 (2d Cir. 1998).

46. See FED. R. EVID. 602.

47. See Aaron Van Oort, Comment, *Invocations as Evidence: Admitting Nonparty Witness Invocations of the Privilege Against Self-Incrimination*, 65 U. CHI. L. REV. 1435, 1458 (1998).

48. See 2 IMWINKELRIED, UNCHARGED, *supra* note 28, §§ 9:07, 9:10.

Part I of this article describes the legal status quo that makes megatrials possible. This part surveys four relevant bodies of law: substantive criminal law, pleadings, discovery, and evidence. Part II of the article analyzes the practical impact of the interplay among these four bodies of law. Part II demonstrates that at a megatrial, the interplay has the twofold effect of introducing complexity likely to confuse the trial jurors, making it extremely difficult for the individual defendant to combat the complexity. Part III, the final section of the article, proposes that in the future, the courts should take special steps to combat the intolerable risks of confusion that can arise when the prosecution introduces evidence of a co-defendant's uncharged crimes at a joint trial.

### *I. A Description of the Relevant Bodies of Law That Make Megatrials Possible*

The typical trial portrayed on television and in motion pictures pits a single defendant against the prosecuting sovereign. Moreover, for the most part, the testimony at the trial focuses squarely on the charged crime. As the Introduction indicates, though, megatrials are far different than that popular paradigm. At a megatrial, the jury may find itself bombarded with a confusing array of testimony involving multiple defendants and acts other than those alleged in the pleadings. In large part, the megatrial phenomenon is the product of the interplay of four bodies of law.

#### *A. Substantive Criminal Law*

For substantive crimes, the state may hold a defendant responsible not only for acts that he personally commits; but also, in some circumstances, the defendant is held vicariously responsible for acts committed by third parties. For example, under common law<sup>49</sup> as well as federal<sup>50</sup> and many state<sup>51</sup> statutes, a defendant is sometimes criminally responsible for acts perpetrated by his or her co-conspirators.

This vicarious responsibility is expansive. It is well settled that the defendant is vicariously liable for acts committed by co-conspirators during the defendant's membership in the conspiracy.<sup>52</sup> The defendant is sometimes liable for the act even if he has expressly forbidden the co-conspirators from perpetrating the particular act.<sup>53</sup> Moreover, the defendant's vicarious responsibility may extend farther. In some jurisdictions invoking a ratification theory, the defendant is also liable for acts that co-conspirators committed before the defendant joined the illegal venture.<sup>54</sup> Finally, once the defendant has joined the conspiracy, he may find it quite difficult

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49. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 680-715 (3d ed. 1982).

50. See 18 U.S.C. § 371 (1994).

51. See e.g., ARIZ. REV. STAT. § 13-303 (1989); CAL. PENAL CODE § 182 (West 1999); FLA. STAT. ANN. § 777.04 (West 1992); GA. CODE ANN. § 26-801 (1988); MASS. GEN. LAWS ANN. ch. 27A, § 7 (West 1990); N.J. STAT. ANN. § 2C:5-2 (West 1995).

52. See PERKINS & BOYCE, *supra* note 49, at 707-09.

53. See *id.* at 708.

54. See *id.* at 704-08.



to withdraw and terminate the vicarious responsibility.<sup>55</sup> Without more, the defendant's incarceration does not effect a withdrawal from the conspiracy.<sup>56</sup> Nor does the defendant's mere cessation of conspiratorial activity work a withdrawal.<sup>57</sup> To effectively withdraw, the defendant must commit an affirmative act,<sup>58</sup> such as communicating an intent to withdraw to the other conspirators.<sup>59</sup> Needless to say, the remaining co-conspirators might not react favorably to that communication. They might decide to terminate the defendant by murdering him rather than allowing the defendant to withdraw from the conspiracy.

### *B. The Procedural Law of Joinder*

The substantive law of crimes permits a trial one step removed from the paradigm — a trial at which the defendant is charged with an act committed by a third party. However, at least when the facts support the application of the conspiracy doctrine, the act is one which is imputable to the defendant. As we shall now see, though, the procedural law of joinder allows a further step from the paradigm; at the defendant's joint trial, the jury may learn of crimes that were perpetrated by a co-conspirator but are not imputable to the defendant.

FRCP 8 governs joinder.<sup>60</sup> The rule reads:

(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) Joinder of defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transactions or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.<sup>61</sup>

FRCP 8(a) governs the joinder of crimes against a single defendant while FRCP 8(b) controls the joinder of multiple defendants.

55. *See id.* at 710.

56. *See United States v. Puig-Infante*, 19 F.3d 929, 945 (5th Cir. 1994).

57. *See United States v. David*, 940 F.2d 722, 735 (1st Cir. 1991); *United States v. Jasin*, 25 F. Supp. 2d 551, 557 (E.D. Pa. 1998), *aff'd*, 191 F.2d 446 (3d Cir. 1999); *United States v. Torres-Lopez*, 656 F. Supp. 257, 262 (D.P.R. 1987).

58. *See Hyde v. United States*, 225 U.S. 347, 369 (1912); *Morton's Market, Inc. v. Gustafson's Dairy, Inc.*, 198 F.3d 823, 838 (11th Cir. 1999); *United States v. Miasel*, 24 C.M.R. 184, 189 (C.A.A.F. 1957).

59. *See United States v. Jannotti*, 729 F.2d 213, 221 (3d Cir. 1984); *United States v. Boyd*, 610 F.2d 521, 528 (8th Cir. 1979).

60. *See FED. R. CRIM. P. 8.*

61. *Id.*

In one respect, FRCP 8(b) is restrictive. Unlike FRCP 8(a), FRCP 8(b) does not permit the joinder of defendants simply because they have committed offenses "of the same or similar character."<sup>62</sup> Thus, the prosecution may not join several defendants who have perpetrated unconnected drug offenses simply because the offenses happen to be similar.<sup>63</sup>

With that exception, however, FRCP 8(b) is rather permissive. The courts understandably look favorably on FRCP 8(b), since joinder promotes judicial economy. The courts have stated that the rule is "flexible"<sup>64</sup> and is to be liberally construed.<sup>65</sup> The wording of FRCP 8(b) certainly allows joinder of defendants in conspiracy situations in which each defendant is vicariously responsible for every charged offense.<sup>66</sup> However, FRCP 8(b) is not confined to that situation. Under the rule, joinder of defendants is allowed even when the pleading includes charges for which one defendant is not vicariously responsible on a conspiracy theory.<sup>67</sup> By the terms of FRCP 8(b), joinder is allowable so long as all of the charged offenses occur as part of "the same series of acts or transactions."<sup>68</sup> Even when some of the acts by some of the defendants fall outside the ambit of conspiratorial vicarious responsibility, they may be included in the same pleading if they are closely related in time and place.<sup>69</sup> Suppose, for example, that as a result of a completed conspiracy, each co-defendant gained a sum of money. Shortly after the termination of the conspiracy, an individual defendant attempted to launder his or her money<sup>70</sup> or endeavored to evade taxes on the money.<sup>71</sup> Although the other co-defendants

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62. FED. R. CRIM. P. 8(a).

63. See Teresia B. Jovanovic, Annotation, *What Constitutes "Series of Acts or Transactions" for Purposes of Rule 8(b) of Federal Rules of Criminal Procedure, Providing for Joinder of Defendants Who Are Alleged to Have Participated in Same Series of Acts or Transactions*, 62 A.L.R. Fed. 106, 130-32 (1983).

64. *United States v. Ford*, 632 F.2d 1354, 1371 (9th Cir. 1980).

65. See *United States v. Sarkisian*, 197 F.3d 966, 975 (9th Cir. 1999); *United States v. Bledsoe*, 674 F.2d 647, 655 (8th Cir. 1982); *United States v. Garcia-Fernandez*, 658 F. Supp. 41, 42 (E.D. Pa. 1987); Jovanovic, *supra* note 63, at 144 (noting case where court indicated that the rule is interpreted broadly).

66. See *Garcia-Fernandez*, 658 F. Supp. at 41-42; 1 ORFIELD, *supra* note 9, § 8:32.

67. See Jovanovic, *supra* note 63, at 130-31.

68. FED. R. CRIM. P. 8(b); see *United States v. Joyner*, 201 F.3d 61, 75-76 (2d Cir. 2000); *United States v. Sarkisian*, 197 F.3d 966, 975-76 (9th Cir. 1999).

69. See Jovanovic, *supra* note 63, at 117, 128-30; see also, e.g., *United States v. Barbosa*, 666 F.2d 704, 707 (1st Cir. 1981) (noting the two crimes occurred at the same place in a five minute period); *United States v. Jackson*, 562 F.2d 789, 795 (D.C. Cir. 1977) (in dicta, discussing ABA recognition of same time and same place); *United States v. Green*, 561 F.2d 423, 426 (2d Cir. 1977) (restricting to a short period of time in the midtown district of Manhattan); *United States v. Rogers*, 475 F.2d 821, 828 (7th Cir. 1973) (noting closely related in time and manner); *United States v. Scott*, 413 F.2d 932, 935 (7th Cir. 1969) (placing defendants in the same place within short period of time and by use of the same modus operandi); *Rhone v. United States*, 365 F.2d 980, 981 (D.C. Cir. 1966) (including acts only minutes apart); *Scheve v. United States*, 184 F.2d 695, 696 (D.C. Cir. 1950) (evaluating time, place, and occasion); *United States v. Thomas Apothecary, Inc.*, 266 F. Supp. 890, 892 (S.D.N.Y. 1967) (including those closely related in time, place, and manner).

70. See *United States v. Marzano*, 160 F.3d 399, 401 (7th Cir. 1998).

71. See *United States v. Sutherland*, 929 F.2d 765, 778 (1st Cir. 1991); *United States v. Santoni*, 585 F.2d 667, 673-74 (4th Cir. 1978).

might not be vicariously responsible for the money laundering or tax evasion, those offenses could be joined in the same pleading with the conspiracy counts.<sup>72</sup>

*C. The Evidence Law Governing the Admissibility of Uncharged Misconduct*

The preceding subsection explained that at a joint trial, one downside for a defendant is that the defendant's jury may hear evidence supporting charges against a co-defendant for which the defendant is not even vicariously responsible. However, the upside is that the co-defendant's act is mentioned in the pleading. Setting out the joined charge against the co-defendant in the accusatory pleading filed against all of the defendants puts the defendant on notice of the charge. In the interest of presenting a united front against the prosecution, the defendant might even decide to testify in support of the co-defendant's denial of the charge. Thus, the defendant might give the co-defendant an alibi at the time of the alleged charge. At the very least, throughout the trial the defendant can distance himself or herself from the charge and repeatedly emphasize to the jury that he has nothing to do with that charge.

The defendant can employ the latter strategy precisely because the pleading gives the defendant advance notice that at trial the prosecution will proffer testimony about the charge against the co-defendant. However, evidence law permits still another step beyond the paradigm of the single defendant facing evidence of the charge filed against the defendant. Evidence law, in particular FRE 404(b),<sup>73</sup> enables the prosecution to introduce evidence of misdeeds which are mentioned nowhere in the pleadings.

The Introduction quotes FRE 404(b). The first sentence of the rule codifies the character evidence prohibition.<sup>74</sup> That sentence forbids the prosecution from using evidence of a person's "other crimes" as circumstantial proof of conduct.<sup>75</sup> In the words of the statute, the prosecution may not introduce evidence of a person's "other crimes" to prove the person's bad "character" and, in turn, infer from character "action in conformity therewith."<sup>76</sup> Assume, for example, that the prosecution possessed evidence that a defendant had engaged in drug sales other than the pleaded drug transaction. The first sentence of FRE 404(b) would preclude the prosecution from offering the evidence on the simplistic theory that the testimony demonstrated that the defendant is a drug dealer and that if the defendant sold drugs once, it is more likely that the defendant acted "in character" and sold drugs again.<sup>77</sup>

However, the second sentence of FRE 404(b) adds that the prosecution may offer uncharged misconduct evidence when the evidence possesses legitimate,<sup>78</sup> special<sup>79</sup>

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72. See authorities collected *supra* notes 70-71.

73. FED. R. EVID. 404(b).

74. See *id.*

75. 1 MCCORMICK ON EVIDENCE §§ 188, 190 (John W. Strong ed., 5th Practitioner's ed. 1999).

76. FED. R. EVID. 404(b).

77. See *State v. Deyling*, No. 2672-M, 1998 Ohio App. LEXIS 255, at \*5-\*6 (Ohio App. Ct. Jan. 28, 1998) ("[H]e did it before, therefore, he did it this time.").

78. See *State v. Shaw*, 636 S.W.2d 667, 672 (Mo. 1982); *State v. Moore*, 581 S.W.2d 873, 874 (Mo.

relevance on a noncharacter theory. The statute expressly lists illustrative noncharacter theories "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>80</sup> As previously stated, at a joint trial involving a drug trafficking conspiracy count, FRCP 8(b) would probably permit the prosecution to join a tax evasion count against an individual co-defendant. It is true that the conspiracy might have terminated before the co-defendant committed the tax offense and that consequently, the other defendants would not be vicariously responsible for the tax offense. However, if the drug sales were the source of the income and the co-defendant perpetrated the offense immediately after the termination of the conspiracy, the court might well uphold the joinder.<sup>81</sup>

If the court sustained the joinder, at the joint trial the defendant's jury could hear evidence of the co-defendant's uncharged misconduct. Suppose, for instance, that the co-defendant claimed that he or she has inadvertently failed to mention the income on his or her tax return. A legion of cases hold that a taxpayer's uncharged misconduct is admissible for the purpose of establishing that a failure to report income was willful.<sup>82</sup> Thus, the prosecution would be permitted to introduce testimony that in similar circumstances — other occasions when he or she had acquired income from illegal sources — the co-defendant had failed to report the income. The inference would not turn on any inference about the co-defendant's personal, subjective bad character. Rather, the basis of the inference would be the doctrine of objective chances.<sup>83</sup> It is possible that an innocent person might mistakenly neglect to report taxable income. However, the more often the failures occur, the more objectively implausible the claim of innocent mistake becomes. A defendant can easily explain a single instance of failure to report income as an innocent mistake,<sup>84</sup> but recurrent failures would require the jury to assume an unusual,<sup>85</sup> improbable<sup>86</sup> coincidence. The extraordinary nature of the coincidence strengthens the inference that the defendant's failure was intentional.<sup>87</sup> The result

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Ct. App. 1979).

79. See *United States v. Frankhauser*, 80 F.3d 641, 648 (1st Cir. 1996); *United States v. David*, 940 F.2d 722, 737 (1st Cir. 1991); *United States v. Rodriguez-Estrada*, 877 F.2d 153, 155 (1st Cir. 1989); *United States v. Fields*, 871 F.2d 188, 196 (1st Cir. 1989).

80. FED. R. EVID. 404(b).

81. See *United States v. Sutherland*, 929 F.2d 765, 778 (1st Cir. 1991); *United States v. Santoni*, 585 F.2d 667, 673-74 (4th Cir. 1978).

82. See, e.g., *United States v. Kalita*, 712 F.2d 1122, 1131 (7th Cir. 1983); *United States v. Serlin*, 707 F.2d 953, 959 (7th Cir. 1983); *United States v. Shelton*, 669 F.2d 446, 458-59 (7th Cir. 1982); *United States v. Luttrell*, 612 F.2d 396, 397 (8th Cir. 1980); *United States v. Karsky*, 610 F.2d 548, 551 (8th Cir. 1979); *United States v. Bowman*, 602 F.2d 160, 163 (8th Cir. 1979); *United States v. Thompson*, 513 F.2d 577, 578-79 (8th Cir. 1975); *United States v. Ming*, 466 F.2d 1000, 1004-05 (7th Cir. 1972); 1 *INWINKELRIED, UNCHARGED*, *supra* note 28, § 5:42.

83. See *id.* § 5:06.

84. See Note, *Admissibility of Evidence of Prior Crimes in Murder Trials*, 25 *IND. L.J.* 64, 68 (1949).

85. See William P. Roscoe III, Note, *Evidence of Other Crimes in Montana*, 30 *MONT. L. REV.* 235, 242 (1969).

86. See ZELMAN COWEN & P.B. CARTER, *ESSAYS ON THE LAW OF EVIDENCE* 140, 152 (1956).

87. Mark E. Turcott, *Similar Fact Evidence: The Boardman Legacy*, 21 *CRIM. L.Q.* 43, 47 (1979);

is that at the joint trial, the defendant's jury might learn that on other occasions after participating in drug conspiracies, a co-defendant had engaged in tax evasion. Technically, the evidence would be admissible against only the co-defendant. However, the evidence might affect the jurors at a subconscious level and generally strengthen the prosecution's case against all of the joined defendants.

In these situations, all of the joined defendants would be entitled to limiting instructions under FRE 105.<sup>88</sup> In truth, several types of limiting instructions might be necessary. The co-defendant charged in the separate tax evasion count would have a right to an instruction, forbidding the jury from relying on character reasoning but permitting the jury to treat the testimony as some evidence of the co-defendant's *mens rea*, namely, willfulness. The judge might also have to give the jury limiting instructions on the use of the evidence as against the other joined defendants. If the judge concluded that tax evasion occurred after the termination of the drug conspiracy and the other defendants were not even vicariously responsible for the tax offense, the judge could direct the jury to disregard the evidence in deliberating over the guilt or innocence of the other defendants. However, in some circumstances the judge might find that the substantive offense was sufficiently related to the conspiracy to trigger vicarious responsibility of the other defendants. For example, the prosecution might have testimony indicating that during the pendency of the conspiracy, all of the defendants agreed that one co-defendant would initially launder his or her drug money to establish a business which the other defendants could later use as a front to launder their fruits of the crime. In that event, the judge would have to specify to the jurors how they could use the evidence of the co-defendant's uncharged misconduct in assessing the guilt of the other defendants. Some courts have rationalized the admissibility of the uncharged misconduct against the other defendants on the ground that the evidence demonstrates the "background"<sup>89</sup> of the conspiracy or the "roles"<sup>90</sup> of the accomplices. Depending on the jurisdiction, even when the defense specifically requests a limiting instruction, the judge might be obliged to deliver the instruction only once, at the time of the admission of the evidence.<sup>91</sup> The judge would not be required to repeat the instruction during the final charge to the jury prior to deliberation.<sup>92</sup>

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see also Stephen E. Fienberg & D.H. Kaye, *Legal and Statistical Aspects of Some Mysterious Clusters*, 154 J. ROYAL STAT. SOC'Y 61, 61 (1991) (on file with *Oklahoma Law Review*) (quoting Ian Fleming's villain, Goldfinger, as saying, "Once is happenstance. Twice is coincidence. The third time it's enemy action.").

88. FED. R. EVID. 105.

89. See *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992); *Government of Virgin Islands v. Harris*, 938 F.2d 401, 420 (3d Cir. 1991); *People v. Lowry*, 596 N.E.2d 1218, 1222 (Ill. App. Ct. 1992).

90. See *United States v. Vong*, 171 F.3d 648, 651 (8th Cir. 1999).

91. See *United States v. Mark*, 943 F.2d 444, 449 (4th Cir. 1991); *United States v. Longbehn*, 898 F.2d 635, 639-46 (8th Cir. 1990).

92. 2 IMWINKELRIED, UNCHARGED, *supra* note 28, § 9:74.

#### D. The Procedural Law of Discovery

As we have seen, when the uncharged misconduct doctrine applies, the prosecution may introduce evidence of criminal misconduct other than the charged offense. Hence, the pleading itself does not put the defense on notice that the prosecution will proffer the uncharged misconduct evidence. However, the defense could still learn of the prosecution's intent and therefore be adequately prepared to meet the evidence at trial if the evidence is discoverable or if the prosecution is required to give pretrial notice of its intent. In some jurisdictions, the evidence is discoverable<sup>93</sup> or the government must give pretrial notice.<sup>94</sup> For example, effective December 1, 1991, FRE 404(b) was amended by adding the following concluding language: "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."<sup>95</sup>

Although the adoption of this amendment to FRE 404(b) helps ensure that the defense receives pretrial notice of the prosecution's intent to offer uncharged misconduct evidence, the amendment does not entirely eliminate the possibility of surprise at trial. To begin with, although FRE 404(b) requires pretrial notice in federal practice, it appears that only a minority of states similarly mandate notice or hold that the evidence is discoverable pretrial.<sup>96</sup> Further, in some jurisdictions generally requiring pretrial notice, the courts, by judicial gloss, have carved out an exception to the requirement and held the requirement inapplicable when the uncharged misconduct is very closely related to the charged offense.<sup>97</sup> These precedents allow the prosecution to argue that it is exempt from the notice requirement when the uncharged crime is "part and parcel" of the course of conduct alleged in the pleading.<sup>98</sup> Finally, by its terms, the typical statute or court rule mandating notice imposes the duty only on the government. For example, while FRE 404(b) purports to create the duty, the only duty-bound litigant is "the prosecution in a criminal case."<sup>99</sup> The duty, thus, arguably does not extend to co-defendants. By way of example, suppose that a co-defendant decided to rebut the prosecution's testimony of his or her uncharged misconduct by denying that he or she committed the act and claiming that the defendant was the real culprit. Given the current wording of FRE 404(b), the co-defendant would presumably have no duty to alert the defendant that the co-defendant contemplated attributing the uncharged misconduct to the defendant.

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93. *See id.* § 9:07.

94. *See id.* § 9:10.

95. FED. R. EVID. 404(b).

96. *See* 2 IMWINKELRIED, UNCHARGED, *supra* note 28, §§ 9:07, 9:10.

97. *See* *Bowman v. State*, 361 S.E.2d 58, 59 (1987); *State v. Roy*, 408 N.W.2d 168, 172 (Minn. Ct. App. 1987); *State v. Gillham*, 670 P.2d 544, 549-50 (Mont. 1983); Comment, *Developments in Evidence of Other Crimes*, 7 J. L. REF. 535, 546, 549-50 (1974).

98. *Gillham*, 670 P.2d at 549.

99. FED. R. EVID. 404(b).

## II. *The Practical Effects of the Interplay Among These Bodies of Law on an Accused's Ability to Defend Himself or Herself at a Joint Trial*

Part I described the current state of the bodies of relevant law that make megatrials possible. What is the practical impact of those bodies of law on the defendant? More specifically, what are the effects of the interplay among those bodies of law on the accused's ability to fairly defend against the charges? As we shall now see, the interplay creates a tremendous risk of confusion at trial while largely depriving the defendant of the tools necessary to combat the confusion.

### A. *The Risk of Confusion at Megatrials*

At a megatrial, to properly evaluate the guilt of each individual defendant, the jurors may have to keep track of four different sets of distinctions. First, at the most fundamental level, the jurors must be mindful of the distinction between the defendant's own acts and the acts of third parties. On occasion, co-defendants at a joint trial present a completely united front against the prosecution. However, in many instances, the trial degenerates into fingerpointing among co-defendants. As Justice Jackson commented in *Krulewitch*,<sup>100</sup> at joint trials co-defendants frequently "accus[e] or contradict[] each other."<sup>101</sup> Each co-defendant tries to exculpate himself or herself by inculcating the other co-defendants. For example, one co-defendant might claim that the prosecution's eyewitness is mistaken and has erroneously identified the co-defendant as the perpetrator of an act actually committed by another co-defendant. When one or more co-defendants employ this tactic at trial, it is vital that the jurors differentiate between acts committed by the various co-defendants.

Second, the jurors must distinguish between pleaded third party acts for which the defendant is vicariously responsible and pleaded third party acts for which the defendant has no such responsibility. Under the substantive law of crimes, in certain circumstances a co-defendant's act may be imputed to the defendant. On that assumption, the defendant is vicariously responsible for the co-defendant's acts. However, under the procedural law of joinder, the defendant's jury might hear testimony at trial about pleaded third party acts for which the defendant is in no way responsible. As we have seen, FRCP 8(b)<sup>102</sup> permits the joinder of a conspiracy count involving all of the co-defendants and substantive counts for which one or some co-defendants have no personal or vicarious responsibility.<sup>103</sup> The joinder might be allowable when all of the acts occurred closely in place and time as part of the same series of events. When the pleading includes some counts for which one or more defendants have no responsibility, it is imperative that the jury keep sight of the second distinction. Criminal responsibility must be either personal

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100. *Krulewitch v. United States*, 336 U.S. 440 (1949) (Jackson, J., concurring).

101. *Id.* at 454.

102. FED. R. CRIM. P. 8(b).

103. *See supra* notes 70-71 and accompanying text.

or vicarious.<sup>104</sup> When the defendant is neither personally nor vicariously responsible for an act, it would be wrong to convict the defendant on the basis of the act. However, such a conviction could occur if the jury became confused and overlooked the second distinction.

A third distinction that could be crucial at a megatrial is the difference between pleaded acts and uncharged misconduct admitted under FRE 404(b).<sup>105</sup> Even if the uncharged act is indisputably criminal and the defendant has not yet been punished for the crime, the jury may not convict the defendant of that act.<sup>106</sup> A conviction for the uncharged act would amount to constitutional error.<sup>107</sup>

Finally, the jury must be cognizant of the distinction between forbidden character uses of uncharged misconduct evidence and permissible, non-character theories of logical relevance. The first sentence of FRE 404(b) codifies an absolute<sup>108</sup> prohibition against treating a defendant's uncharged misconduct as circumstantial proof of the charged conduct.<sup>109</sup> However, the second sentence states that uncharged misconduct is admissible when it is independently<sup>110</sup> relevant on a non-character theory. If the jury overlooks this distinction, the jury may convict on the unacceptable basis that "a leopard doesn't change its spots."<sup>111</sup>

Consider the complexity of the jury's task in a megatrial. The starting point is the given that there are multiple defendants and multiple charges. To properly sort out those defendants and charges, the jury may have to observe all four of the distinctions mentioned above. Common sense suggests that the task might strain the ability of lay jurors. Moreover, although the studies are few in number, there is empirical research calling into question the jury's ability to differentiate among defendants<sup>112</sup> and comply with instructions restricting the consideration of uncharged misconduct evidence to non-character uses.<sup>113</sup> These studies do not demean the lay jurors' intelligence. Rather, the point is, as some jurists have

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104. See PERKINS & BOYCE, *supra* note 49, at 911-14.

105. FED. R. EVID. 404(b).

106. See *People v. Guzman*, 86 Cal. Rptr. 2d 164, 174 (Cal. Ct. App. 1999); *State v. Sohn*, 810 P.2d 1337, 1339 (Or. Ct. App. 1991); see also *United States v. Pena*, 930 F.2d 1486, 1491 (10th Cir. 1991) (holding the judge's instruction made it sufficiently clear to the jury that the defendant was not on trial for the uncharged conduct).

107. See *United States v. Flynt*, 15 F.3d 1002, 1005 (11th Cir. 1994); *Cokeley v. Lockhart*, 951 F.2d 916, 921 (8th Cir. 1991).

108. See *United States v. Arias-Montoya*, 967 F.2d 708, 709 (1st Cir. 1992). However, Federal Rules of Evidence 413-15 selectively repeal the character prohibition in specified types of prosecutions and civil actions. See FED. R. EVID. 413-15.

109. FED. R. EVID. 404(b).

110. See *United States v. Yu*, 697 F. Supp. 635, 637 (E.D.N.Y. 1988); see also *United States v. Forgione*, 487 F.2d 364, 363 (1st Cir. 1973) (a decision antedating the effective date of the Federal Rules of Evidence).

111. *State v. Woods*, 880 P.2d 771, 775 (Idaho Ct. App. 1994); see also *United States v. Perholtz*, 842 F.2d 343, 358 (D.C. Cir. 1988); James McElhaney, *Character and Conduct*, 17 LITIG., Winter 1991, at 45, 46 ("[T]he assumption that cats and firebugs do not change their stripes.").

112. See *Bronson*, *supra* note 27, at 52, 54, 62.

113. See 1 IMWINKELRIED, UNCHARGED, *supra* note 28, § 1:03 (collecting the studies); *Dodson*, *supra* note 28, at 3.



complained, that the distinction between character and non-character uses of evidence can be a thin one.<sup>114</sup> The leading evidence casebooks devote tens of pages to explaining and contrasting character and non-character theories of logical relevance,<sup>115</sup> and in their evidence courses many law teachers spend several hours drilling their students concerning the distinction. Yet at trial, the extent of the jurors' "education" on the distinction might be a brief limiting instruction that the judge reads to the jury in a minute. There is real substance to the fear that the jury will become confused during a megatrial.

*B. The Individual Defendant's Limited Ability to Combat the Risk of Confusion at a Megatrial*

Faced with the confusing array of distinctions that could cause a wrongful conviction, the defendant has two basic strategies. One strategy is to tell the jury that there is no need to distinguish between two alleged acts because at least one of the alleged acts did not occur. The defense can attempt to rebut the prosecution testimony that the alleged act was committed. Assuming that the alleged act occurred, there is a second possible defense strategy: to seize on a distinction that would insulate the defendant from responsibility for the act and underscore the distinction throughout the trial — during opening statement, the examination of witnesses, and closing argument. The difficulty is that the bodies of law described in Part I severely handicap the defense in pursuing either strategy.

If the only acts charged against the defendant were his or her own conduct, the defendant would be in a position to personally rebut the prosecution testimony that the defendant perpetrated the act. However, the substantive law of crimes permits the prosecution to endeavor to hold the defendant vicariously responsible for an act committed by a third party such as a co-conspirator. The defendant might not be in a position to rebut testimony about the third party's act. Under FRE 602,<sup>116</sup> before eliciting the defendant's rebuttal testimony, the defense attorney would have to lay a foundation establishing that the defendant was present when the alleged act occurred. As the Advisory Committee Note to FRE 602 emphasizes, the necessity for a showing of personal or firsthand knowledge is one of the most fundamental

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114. See *United States v. Bass*, 794 F.2d 1305, 1313 (8th Cir. 1986). Some respected commentators contend that the distinction is then to the point of being non-existent. See generally Richard Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981). For an extended discussion of the distinctions related to the evidentiary uses of the testimony, see EDWARD J. IMWINKELRIED, *EVIDENTIARY DISTINCTIONS: UNDERSTANDING THE FEDERAL RULES OF EVIDENCE* 41-53 (1993).

115. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE UNDER THE RULES* 463-99 (3d ed. 1996); JON R. WALTZ & ROGER C. PARK, *EVIDENCE* 375-441 (9th ed. 1999); JACK B. WEINSTEIN ET AL., *EVIDENCE* 808-21 (9th ed. 1997).

116. See FED. R. EVID. 602.

foundational requirements.<sup>117</sup> Absent that foundational showing, the defendant cannot supply rebuttal testimony.

Of course, the most natural source of rebuttal testimony would be the third party who allegedly committed the act. If the third party was not formally joined as a co-defendant at defendant's trial, the defendant could resort to compulsory process to compel the third party to testify at trial. While the third party would still be entitled to invoke the narrow Fifth Amendment privilege to refuse to answer specific, potentially incriminating questions,<sup>118</sup> as a non-party witness the third party would not qualify as an accused at the instant trial. Consequently, he or she could not claim the broader Fifth Amendment privilege to altogether refuse to testify.<sup>119</sup> The defendant would be entitled to call the non-party witness to the stand. The defendant might be able to elicit exculpatory testimony rebutting the prosecution's contentions; or in some circumstances, the defendant could force the non-party witness to invoke the narrower privilege in the jury's presence.<sup>120</sup> In a given context, in the jurors' minds, the invocation might tend to rebut the prosecution testimony against the defendant. However, by joining the third party as a co-defendant, the prosecution deprives the defendant of the ability to call the third person as a non-party witness. The joinder makes the person a formal accused at the joint trial; as such, the person can refuse to be called as a witness by the defendant.

At least when the defendant seeks rebuttal testimony as to a third party act expressly alleged in the pleading, the defendant has advance notice that he or she might need rebuttal testimony about the act. However, the defendant may not even realize that he or she needs rebuttal testimony as to an act that the prosecution proffers as uncharged misconduct evidence under FRE 404(b)<sup>121</sup> or its state counterpart. As previously stated, although the prosecution must give pretrial notice in federal practice,<sup>122</sup> only a minority of states require the prosecution to give such notice.<sup>123</sup> Even some of the jurisdictions generally requiring notice dispense with notice when the uncharged act is closely related to the charged offense.<sup>124</sup> In a given case, the prosecutor might persuade the trial judge that the uncharged act in question was so closely connected to the charged crime that the exception applies. Finally, by their terms, the statutes and court rules prescribing notice ordinarily

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117. See *id.* advisory committee's note. "[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact' is a 'most pervasive manifestation' of the common law insistence upon 'the most reliable sources of information.'" *Id.*; see also *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993) (quoting the advisory committee note to Federal Rules of Evidence 602).

118. See *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973); *Hoffman v. United States*, 341 U.S. 479, 488 (1951).

119. See *Couch v. United States*, 409 U.S. 322, 328-29 (1973).

120. See Comment, *Invocations as Evidence: Admitting Nonparty Witness Invocations of the Privilege Against Self-Incrimination*, 65 U. CHI. L. REV. 1435, 1447-51 (1998).

121. See FED. R. EVID. 404(b).

122. See *id.*

123. 2 IMWINKELRIED, UNCHARGED, *supra* note 28, §§ 9:07, 9:10.

124. See *State v. Gillham*, 670 P.2d 544, 549-50 (Mont. 1983).

apply only to "the prosecution;"<sup>125</sup> and they arguably could be construed as requiring only that notice be given to the alleged perpetrator of the uncharged act. Thus, the prosecution might have no obligation to notify the defendant that it intended to introduce evidence of a co-defendant's uncharged act. Further, even if the co-defendant intended to rebut the uncharged misconduct evidence by testifying that the defendant — not the co-defendant — was the actor, the co-defendant would have no duty to notify the defendant. In short, the defendant might come to trial completely unaware that the prosecution planned to proffer the uncharged misconduct testimony and utterly unprepared to rebut the testimony.

Lastly, assume that the testimony about the co-defendant's uncharged misconduct is admitted and that for one reason or another, the defendant cannot rebut the testimony. In that situation, the only viable strategy is to highlight a distinction that could conceivably shield the defendant from responsibility for an act that is not imputable to the defendant or from misuse of the act as bad character evidence. In this situation, the limiting instruction becomes the defendant's last and only line of defense.<sup>126</sup> However, for several reasons the instruction might give the defendant as much protection as the infamous Maginot Line.

In the clear majority of jurisdictions, even when the defendant makes a timely request for the instruction, the judge's obligation is limited to delivering the instruction to the jury only once.<sup>127</sup> Furthermore, the wording of some limiting instructions is wanting. Although the trend is to require the instruction to specify the specific non-character theory tenable on the facts of the case, some judges give so-called "shotgun" instructions which list all the commonly accepted non-character theories such as motive, identity, intent, common plan, and the like.<sup>128</sup> Shotgun instructions are likely to confuse the jury because "the uncharged misconduct is often irrelevant to and inadmissible for some of the listed purposes."<sup>129</sup> Even when the instruction focuses on a specific, supposed non-character theory, the jury may find the instruction unilluminating. As we have seen, the appellate courts have sometimes approved, as non-character uses, theories of logical relevance, which identified the "roles"<sup>130</sup> of the co-conspirators or the "background"<sup>131</sup> of the conspiracy. Those phrases could conceivably hurt rather than help. When the jurors hear the term "background," they could easily slip into thinking about the personal background or character of the actor. Likewise, the term "role" might trigger one or more jurors to engage in improper character reasoning. When a juror turns to analyzing a person's role in a drug conspiracy, the juror may think in terms of the

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125. See, e.g., FED. R. EVID. 404(b).

126. See generally Edward J. Imwinkelried, *Limiting Instructions on Uncharged Misconduct Evidence: The Last Line of Defense Against Jury Misuse of the Evidence*, 8 TRIAL DIPL. J., Fall 1985, at 23 [hereinafter Imwinkelried, *Limiting*].

127. See 2 IMWINKELRIED, UNCHARGED, *supra* note 28, § 9:74.

128. See *id.* § 9:73.

129. *Id.* § 9:73, at 213.

130. See *United States v. Vong*, 171 F.3d 648, 651 (8th Cir. 1999).

131. See *United States v. Pitre*, 960 F.2d 1112, 1119 (2d Cir. 1992); *People v. Lowry*, 596 N.E.2d 1218, 1221-22 (Ill. App. Ct. 1992).

person's character: by disposition the person is a violent character, and it is therefore more likely that he played the role of enforcer for the conspiracy. It would be sensible for the juror to reason that the person's character determined the role that he or she was selected to play in the conspiracy. Only a focused, clearly worded limiting instruction can adequately protect the defendant against misuse of the uncharged misconduct; and in practice, many of the instructions judges read to jurors fall far short of that ideal.

### *III. Procedural Antidotes for the Risk of Confusion at a Joint Trial*

Part II demonstrated that while there is an acute risk of confusion at a megatrial, the current state of the law sharply hampers the defendant's ability to combat such confusion. Short of changing their attitude toward severance motions, what procedural steps could the jurisdictions take to reduce the risk of confusion at a megatrial? At the bare minimum, the majority of jurisdictions should reform the current practices governing pretrial discovery of and trial instructions on co-defendants' uncharged misconduct.

In order to ensure adequate pretrial discovery, the prosecution ought to be obliged to notify all joined defendants of the nature of the uncharged misconduct evidence, which the prosecution contemplates offering against any co-defendant. Even in jurisdictions mandating pretrial notice, the mandate is limited to the prosecution. Moreover, the prosecution seemingly is obliged to notify only the co-defendant who allegedly perpetrated the uncharged act. Even when the prosecution notifies one co-defendant, it is unrealistic to assume that co-defendants will always share their information among themselves. Again, one co-defendant might decide to rebut the uncharged misconduct testimony offered against him or her by claiming that the eyewitnesses mistook the defendant for himself or herself. Without advance notice, the defendant could be unprepared to rebut the testimony. At the very least, if the defendant knew that the testimony was forthcoming, the defendant could use the voir dire examination and opening statement to highlight the distinction between the defendant's own conduct and that of the co-defendant. Those opportunities will be lost if the defendant learns about the uncharged misconduct evidence for the first time during the prosecution's case-in-chief. Even assuming that the defendant subsequently mounts otherwise valid attacks on the uncharged misconduct, the jury might discount the attacks as late, lame excuses.

Just as the prosecution's discovery obligations needed to be broadened in megatrials, the judge's instructional duties should be toughened. As previously stated, if the trial judge admits testimony about a co-defendant's uncharged misconduct and the defendant cannot rebut the testimony, the limiting instruction is the defendant's only protection against jury misuse of the testimony.<sup>132</sup> The risk of confusion at a megatrial is so acute that upon any defendant's request, the judge should be required to read the instruction to the jury both when the evidence is admitted and during the final jury charge. Further, "shotgun" instructions ought to

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132. See Imwinkelried, *Limiting*, *supra* note 126, at 23.

be forbidden. In the instruction, the judge should be required to single out the precise non-character theory of logical relevance that is tenable on the facts. When the judge delivers a shotgun instruction mentioning all the non-character theories listed in a statute or court rule such as Rule 404(b),<sup>133</sup> the instruction can be counterproductive and make matters worse. Mentioning non-character theories that are not apposite could heighten rather than lessen the confusion. Finally, the description of the non-character theory in the limiting instruction should be as precise as possible. References to "background" and "roles" in the limiting instruction virtually invite the jurors to engage in character reasoning. "Background" in particular is problematic, since upon hearing that term a lay juror might easily think of the "personal" background of the actor — that is, his character, disposition, or propensity.

Although some jurisdictions already follow these practices, most of these practices are presently mandated by only a minority of jurisdictions.<sup>134</sup> Rather than mandating these practices, the majority of jurisdictions accord the trial judge discretion whether to employ these additional procedural safeguards. The majority view is arguably sound in a paradigmatic trial at which there is only one defendant. The view might even be defensible at a trial at which, under the pleadings, every defendant is either personally or vicariously responsible for every pleaded act. At those trials, there could be minimal risk of jury confusion. However, at a megatrial at which one or more defendants are not responsible for one or more of the pleaded acts, the jury must keep so many sets of distinctions in mind that the risk of confusion is much more extreme. The cost/benefit calculus is quite different at that type of megatrial.

#### IV. Conclusion

To realistically cope with the significant risk of confusion at a megatrial, the courts can adopt one of two approaches.

One approach would be to grant severance more liberally. The American Bar Association's Criminal Justice Section has gone on record, both expressing its concern about megatrials and urging the courts to rethink their attitude toward severance in such proceedings.<sup>135</sup> However, in the foreseeable future it seems highly unlikely that the courts will take that tack. Given the Supreme Court's decision in *Zafiro*,<sup>136</sup> pressure for a more receptive judicial attitude toward severance will probably not be coming from the top down.<sup>137</sup> Moreover, trial court

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133. See FED. R. EVID. 404(b).

134. See 2 IMWINKELRIED, UNCHARGED, *supra* note 28, §§ 9:07, 9:10, 9:71-74.

135. See Bradley, *supra* note 2, at 61 (noting that the Criminal Justice Section "Council approved a resolution expressing concern about megatrials and urging the U.S. Judicial Conference Advisory Committee on Criminal Rules to encourage U.S. District Courts to fashion remedies in appropriate cases").

136. *Zafiro v. United States*, 506 U.S. 534 (1993).

137. However, the Court did seem more sensitive to the risks of confusion in *Gray v. Maryland*, 523 U.S. 185 (1998), dealing with the admission of accomplice's statements that do not fall within the vicarious admission exemption to the hearsay rule.

backlogs are still a substantial problem.<sup>138</sup> At least for the short term, the megatrial phenomenon apparently is here to stay.

The only other possible approach is to implement additional procedural safeguards at megatrials, at least in proceedings at which one or more co-defendants are not either personally or vicariously responsible for all the pleaded acts. Those are the trials that place the greatest strain on the jury's ability to correctly apply all the pertinent sets of distinctions. At the megatrial, the danger of confusion is so pronounced that the lax procedures, acceptable at the run-of-the-mill trial, are unsatisfactory. If the American criminal justice system is seriously committed to the principle that each co-defendant is entitled to an individualized determination of guilt or innocence, the legislatures and courts must do more to secure that entitlement. Without additional procedural safeguards, the verdict at a megatrial may, in Milton's words, be a product of "[c]onfusion worse confounded."<sup>139</sup> It would, of course, be foolish to think that the procedural measures suggested in this article represent a panacea to the problem of confusion at megatrials. However, the implementation of these measures would be a step in the right direction.

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138. See Edward J. Imwinkelried, *The Right to "Plead Out" Issues and Block the Admission of Prejudicial Evidence: The Differential Treatment of Civil Litigants and the Criminal Accused as a Denial of Equal Protection*, 40 EMORY L.J. 341, 380-83 (1991).

139. MILTON, *supra* note 1, at Book II, Line 996.

