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Prosecutorial Storytelling Through Intrinsic Evidence

Brian Chen*

Abstract

Crimes make for compelling stories. So juries make for an eager audience. Jurors want to—indeed, expect to—learn what the defendant did, how they did it, and why they deserve punishment. Capable prosecutors know how to deliver. Trial narratives empower jurors to link discrete pieces of evidence and infer facts from circumstantial proof. Only then can they render a verdict consistent with their sense of justice. Federal courts thus afford wide leeway for prosecutors to present their case as they please, with the evidence at their disposal.

The Federal Rules of Evidence delineates the scope of that discretion. Under Rule 404(b), prosecutors may not introduce proof of the defendant's "other crimes" solely to prove that old habits are hard to break. But courts have struggled to distinguish between "other crimes" and crimes that are part and parcel of the charged offense. Most circuits draw the line by relying on the "inextricably intertwined" doctrine: Rule 404(b) does not cover evidence of uncharged misconduct "inextricably intertwined" with—or "completes the story" of—the charged offense. This Article argues that this judicially invented doctrine manifestly conflicts with Rule 404(b)'s text, structure, and history. It invites jurors to rely on seductive but unfair assumptions about the defendant's personal character when deciding the paramount question of guilt or innocence.

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INTRODUCTION

To say that "the basic purpose of a trial is the determination of truth"[1] would be an oversimplification. The objective of criminal adjudication is not truth for truth's sake. Our protection of other substantive values makes room for—and often demands—objectively incorrect verdicts. To promote privacy and fairness, we often hide from jurors incriminating evidence obtained in violation of the Fourth Amendment,[2] and coerced but truthful confessions extracted in violation of the Fifth.[3] We exclude privileged communications between attorneys and clients to encourage effective advocacy.[4] Our aversion to false positives leads us to require conviction only if the prosecution has proved its case beyond a reasonable doubt, even when the evidence suggests that the defendant likely committed the crime.[5]

Notwithstanding the litany of constitutional, statutory, and common-law exclusionary rules, federal courts vest prosecutors with immense discretion to set the tone, pace, and disputed issues of trial—"to prove its case by evidence of its own choice."[6] They enjoy broad latitude to prod witnesses and deliver opening and closing statements to unfurl "the natural sequence of narrative evidence."[7] Incriminating facts alone do not guarantee conviction. Prosecutors must weave together discrete pieces of evidence—from witness testimony to tangible objects—to tell a compelling narrative about the defendant's alleged crimes. Their job is to reveal the "human significance" of cold facts—to "give life to the moral underpinnings of law's claims."[8] Trial outcomes often depend on whether the jury will find that the evidentiary record corroborates the stories and themes underlying the prosecution's theory of the case.[9] So "the government, which has the burden of proving every element of the

1. Tehan v. United States, 382 U.S. 406, 416 (1966); *accord* United States v. Haven, 446 U.S. 620, 626 (1980) ("There is no gainsaying that arriving at the truth is a fundamental goal of our legal system."); Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring) ("The State's obligation is not to convict, but to see that, so far as possible, truth emerges.").

2. Weeks v. United States, 232 U.S. 383 (1914); *see* United States v. Payner, 447 U.S. 727, 734 (1980) (acknowledging that the exclusionary rule impedes "the truth-finding functions of judge and jury").

3. Bram v. United States, 168 U.S. 532 (1897).

4. Fisher v. United States, 425 U.S. 391 (1976); *see* FED. R. EVID. 502.

5. In re Winship, 397 U.S. 358 (1970).

6. Old Chief v. United States, 519 U.S. 172, 186 (1997); *see also* United States v. Becht, 267 F.3d 767, 774 (8th Cir. 2001) ("[T]he Government is free to offer its evidence as it sees fit."); 1 WEINSTEIN'S EVIDENCE MANUAL § 2.01 ("Under the adversary judicial system, primary decisions on tactics and style within very wide limits are assigned to the lawyers.").

7. *Old Chief*, 519 U.S. at 189.

8. *Id.* at 187–88.

9. *See* STEVEN LUBET, MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE 1 (2d ed. 1997) ("[T]he party who succeeds in telling the most persuasive story should win.").

crime charged, must have the freedom to decide how to discharge that burden."[10] Courts tend not to constrain the scope of this freedom, out of fear that exclusionary rules would make certain offenses more difficult to prove and thus step on law enforcement toes.[11]

Of course, prosecutors' storytelling discretion is bounded. The Federal Rules of Evidence does not give free rein for prosecutors to introduce whatever evidence as may be relevant. The analysis begins at Rule 402 but does not end there.[12] Notably, Rule 404 excludes evidence of the defendant's past misconduct or moral turpitude when introduced as circumstantial proof of recidivism. This prohibition on character evidence seeks to protect "the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is."[13] The danger lies in unfair prejudice, rather than lack of probative value. Character evidence tends to "weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge."[14]

The problem is twofold. First, jurors may infer that the defendant's prior bad act "rais[es] the odds that he did the later bad act now charged."[15] Second, those "uncertain of [the defendant's] guilt" on the charged offense may rationalize that "a bad person deserves punishment."[16] While intuitive, this "bad person" reasoning threatens to transform criminal trials into personality assessments, denying defendants a fair opportunity to contest charges of specific misconduct. The inquiry centers on whether the defendant is a "good" or "bad" person, irrespective of whether there is sufficient evidence that he committed the alleged crimes. The exclusion of character evidence seeks to afford a clean slate to defendants whose culpability ought to depend solely on the conduct for which they are on trial.

Under Rule 404(a), "evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."[17] This prohibition extends to evidence

10. United States v. Queen, 132 F.3d 991, 997 (4th Cir. 1997).

11. *See* United States v. Johnson, 803 F.3d 279, 283 (6th Cir. 2015) (noting that restricting "the government's presentation of evidence about an essential element of the crime . . . would mean that [it] would have a harder time prosecuting felon-in-possession cases when the prior conviction involved a gun, a strange regime that would hinder prosecutions of the crime when society needs them most").

12. *See* FED. R. EVID. 402 ("Relevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court.").

13. United States v. Caldwell, 760 F.3d 267, 276 (3d Cir. 2014).

14. Michelson v. United States, 335 U.S. 469, 476 (1948); *see* United States v. Burkhart, 458 F.2d 201, 204–05 (10th Cir. 1972) ("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality. This is true regardless of the care and caution employed by the court in instructing the jury.").

15. Old Chief v. United States, 519 U.S. 172, 180 (1997).

16. United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) (Breyer, J.).

17. FED. R. EVID. 404(a)(1). Other rules have carved out exceptions to Rule 404's prohibition against propensity evidence. *See, e.g.*, FED. R. EVID. 413 (allowing admission of prior sexual assault

of "any *other* crime, wrong, or act" when introduced as a proxy for that person's character.[18] The text of Rule 404(b) implicitly distinguishes between conduct that is part of the charged offense, and conduct that constitutes some "*other* crime, wrong, or act."[19] In most circuits, courts ask whether the misconduct is "inextricably intertwined" with the charged offense. If so, it falls outside Rule 404(b)'s coverage and may be proved as part of the prosecution's case-in-chief. This Article argues that the judicially invented "inextricably intertwined" doctrine remains sharply at odds with Rule 404's plain text, clean formalism, and deep-rooted common-law antecedents.

The Article proceeds in five steps. Part I elaborates the purpose and mechanics of Rule 404's prohibition on character evidence. It also introduces the conceptual distinction between "intrinsic" and "extrinsic" evidence—the dividing line governing the application of the inextricably intertwined doctrine. Part II surveys federal courts' varying approaches with respect to the doctrine's breadth, sorting each circuit into one of three general buckets—from expansive to shrunken to near wholesale rejection. Part III explains how criminal defendants stand to benefit from the broader—more natural—reading of Rule 404(b)'s "other crime, wrong, or act" language. Part IV prescribes a straightforward two-step inquiry to determine whether evidence of uncharged misconduct falls under its scope. This Article enters the important but dormant debate over the proper interpretation of that Rule, and advances one most faithful to its text, structure, and "the development of evidence law."[20]

I. PROPENSITY AS UNFAIR PREJUDICE

Even before the enactment of the Federal Rules of Evidence, federal courts have excluded evidence of defendants' character traits and uncharged misconduct if offered to prove "propensity"—that the defendant is more likely to have committed the charged offense because they are naturally inclined to partake in criminality.[21] The principle that the prosecution may not introduce

evidence as circumstantial proof of guilt in criminal sexual assault case). Rule 404's prohibition does not apply when evidence of someone's character directly proves an element of the crime, claim, or defense. FED. R. EVID. 404 advisory committee's notes on proposed rules.

18. FED. R. EVID. 404(b)(1) (emphasis added). Generally, the defendant may not introduce evidence of his prior "good acts" as circumstantial evidence of innocence. *See* United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990) ("A defendant may not seek to establish his innocence, however, through proof of the absence of criminal acts on specific occasions."). Though defendants may introduce evidence of their own "pertinent trait," which then opens the door for the prosecution to "offer evidence to rebut it." FED. R. EVID. 404(a)(2)(A).

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

20. FED. R. EVID. 102.

21. *See, e.g.*, Thompson v. Bowie, 71 U.S. 463, 471 (1866) ("When trying a prisoner on an

the defendant's "prior trouble with the law, specific criminal acts, or ill name among his neighbors" for propensity purposes finds deep roots in common law.[22] Traditionally, "evidence of bad character relevant only as tending to make guilt more likely, is inadmissible as part of the prosecution's case-in-chief."[23] But courts exempted from exclusion evidence introduced to prove "motive, prior intention, opportunity, and the like."[24] Evidence relevant for some legitimate, nonpropensity purpose was fair game.

Enacted in 1975 under this common-law backdrop, Federal Rule of Evidence 404 categorically prohibits "evidence of a person's character or character trait . . . to prove that on a particular occasion the person acted in accordance with the character."[25] But this exclusion does not reach evidence introduced for "*another* purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[26] As in common law, whether the jury may hear evidence of some "other crime, wrong, or act" depends on whether the prosecution can proffer a relevant nonpropensity purpose.[27] Since character evidence necessarily arouses impermissible reasoning, Rule 403 confers wide discretion for the court to exclude evidence whose probative value is "substantially outweighed" by the danger of unfair prejudice.[28] And upon the defendant's request, the judge must instruct jurors to steer clear of propensity reasoning.[29]

Federal courts uniformly follow an "inclusionary" approach to the admissibility of other act evidence.[30] Such evidence is admissible unless offered

indictment, for a particular crime, proof that he has a general disposition to commit the crime is never permitted."); Gianotos v. United States, 104 F.2d 929, 932 (9th Cir. 1939) ("The general rule is that . . . evidence which in any manner shows or tends to show that accused has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible.").

22. Michelson v. United States, 335 U.S. 469, 475 (1948) ("Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of guilt."); United States v. Piette, 45 F.4th 1142, 1157 (10th Cir. 2022) ("Evidence law generally abhors the propensity inference . . . ."); United States v. Caldwell, 760 F.3d 267, 275 (3d Cir. 2014) ("Derived from English common law, Rule 404(b)'s instruction that prior criminal acts are not admissible to show a defendant's propensity to commit the charged offense is now well-entrenched in our American jurisprudence.").

23. Judson F. Falknor, *Extrinsic Policies Affecting Admissibility*, 10 RUTGERS L. REV. 574, 584–85 (1956).

24. *Id.* at 585.

25. FED. R. EVID. 404(a); *see* 1 WEINSTEIN'S EVIDENCE MANUAL § 7.01 ("Rule 404 continues the proscription against the circumstantial use of character evidence in ways that other jurisdictions and the common law had observed for a long time.").

26. FED. R. EVID. 404(b)(2) (emphasis added); *see* United States v. Cruz-Garcia, 344 F.3d 951, 955 (9th Cir. 2003) ("[T]his list is illustrative, not exhaustive.").

27. *Caldwell*, 760 F.3d at 276 ("[T]he burden of identifying a proper purposes rests with the proponent of the evidence, usually the government.").

28. FED. R. EVID. 403; *see, e.g.*, United States v. Hall, 858 F.3d 254, 269 (4th Cir. 2017) (holding that evidence of the defendant's prior conviction for possession of marijuana was highly prejudicial and minimally probative to establish knowledge in marijuana possession case).

29. FED. R. EVID. 105.

30. *See, e.g.*, United States v. Bowie, 232 F.3d 923, 929 (D.C. Cir. 2000) ("Rule 404(b) is a rule

solely to advance a propensity inference.[31] Rule 404(b)(2) opens the door to all "other acts" so long as they are relevant, offered for some nonpropensity purpose, supported by "sufficient" evidence, and able to survive Rule 403.[32] The prosecution must articulate, on the record, how that other misconduct "fits into a chain of inferences" connecting the disputed evidence to a legitimate, nonpropensity purpose.[33] To ensure that prosecutors do not sneak in "propensity evidence in sheep's clothing,"[34] trial judges must carefully justify their rulings on the record,[35] subject to appellate review.[36]

But these safeguards are more demanding in theory than in practice. Commentators have criticized federal courts' "cavalier approach" to Rule 404(b) and their less-than-rigorous application of Rule 403.[37] Though trial judges must "remain on guard to preserve the *per se* force of Rule 404(b),"[38] its sweeping exceptions send mixed messages about the admissibility of "other acts" evidence. Murky lines encourage prosecutorial overreach.[39]

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of inclusion rather than exclusion."); United States v. Cole, 537 F.3d 923, 928 (8th Cir. 2008) ("We have long viewed Rule 404(b) as a rule of inclusion."); United States v. Curley, 639 F.3d 50, 56 (2d Cir. 2011) ("This Circuit follows the 'inclusionary' approach, which admits all 'other act' evidence that does not serve the sole purpose of showing the defendant's bad character and that s neither overly prejudicial under Rule 403 nor irrelevant under Rule 402.").

31. *See* United States v. Williams, 796 F.3d 951, 958 (8th Cir. 2015) (explaining that uncharged misconduct evidence is admissible "unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts").

32. Huddleston v. United States, 485 U.S. 681, 688–90 (1988). To determine whether "sufficient evidence" exists, the judge must ask (as a matter of conditional relevance) whether a reasonable jury could find by a preponderance of the evidence that the defendant committed the prior bad act. *Id.* at 689. Consistent with the Double Jeopardy and Due Process Clauses, the prosecution may introduce evidence of misconduct for which the defendant was previously acquitted so long as "sufficient evidence" exists. *Id.* at 685; Dowling v. United States, 493 U.S. 342, 350 (1990).

33. United States v. Caldwell, 760 F.3d 267, 277 (3d Cir. 2014).

34. United States v. McCallum, 584 F.3d 471, 477 (2d Cir. 2009).

35. *Caldwell*, 760 F.3d at 277 ("To ensure that protections afforded by Rule 404(b) are not ignored, we also require care and precision by the district court in ruling on the admission of prior act evidence for a non-propensity purpose.").

36. Generally, the appellate court must affirm the trial court's evidentiary ruling if an alternative, sufficient justification exists. *See* United States v. Miller, 673 F.3d 688, 695 (7th Cir. 2012) ("Because the district court reached the correct result, the court's use of the now disfavored rationale does not matter."). Even upon abuse of discretion, the appellate court may affirm as harmless error. *See* United States v. Brown, 888 F.3d 829, 838 (6th Cir. 2018) (concluding that "this wrongly admitted evidence constitutes harmless error").

37. Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(B) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 (2018) ("[F]ederal courts routinely find that the probative value of other-acts evidence is not 'substantially outweighed' by the risk of prejudice to a criminal defendant.").

38. United States v. Senffner, 280 F.3d 755, 765 (7th Cir. 2002).

39. *See* United States v. Varoudakis, 233 F.3d 113, 125 (1st Cir. 2000) ("[T]he prosecution too often pushes the limits of admissibility of this evidence, knowing its propensity power and gambling that the time constraints on the trial court, the court's broad discretion, the elasticity of Rule 404(b), and the harmless error rule of the appellate court, will save it from the consequences of overreaching.

But this Article is not about courts' excessively broad interpretation of Rule 404(b). My concern is that Rule 404(b) does not go far enough. The Rule only governs evidence probative of some "*other* crime, wrong, or act."[40] Direct proof of the charged offense falls squarely outside its scope. In a homicide trial, evidence that the defendant fired his gun at the victim directly proves that he is guilty as charged. However, federal courts have extended broad leeway for prosecutors to introduce evidence of *uncharged* misconduct as circumstantial proof of guilt, applying a cramped reading of Rule 404(b)'s "other crime, wrong, or act" language.

Suppose instead that the defendant stands trial for one count unlawful possession of a firearm as a felon.[41] Prosecutors seek to introduce evidence that the defendant fired his weapon at an undercover police officer immediately prior to his arrest. In an analogous case, the First Circuit held that "the evidence comprises part and parcel of the core events undergirding the crime for which he was charged," so the shooting does not constitute an "other crime, wrong, or act" under Rule 404(b).[42] Such evidence is "intrinsic" rather than "extrinsic," thus regulated only by Rules 402 and 403. This bifurcation makes sense on paper. Intrinsic evidence does not advance any propensity purposes because the misconduct being proven *is* the charged offense.[43] When the evidence directly proves the defendant's culpability, Rule 404(b) does not apply. But federal courts have expanded the umbrella of intrinsic proof to exempt whole swaths of uncharged misconduct evidence from Rule 404(b) scrutiny.

II. SURVEY OF THE CIRCUIT SPLIT

The distinction between "intrinsic" evidence of charged misconduct and "extrinsic" evidence of uncharged "other" acts begets no bright-line rules. Whenever the prosecution introduces evidence of discrete misconduct, the trial judge must decide whether that evidence is "intrinsic," such that it does not implicate Rule 404(b). In most circuits, the "inextricably intertwined" doctrine frames the inquiry: "[T]hose other acts that are inextricably intertwined with the charged offense,"[44] or "necessary to complete the story of the crime on trial,"[45] or "provide a total picture of the charged crime"[46] constitute

That is not always a good gamble.").

40. FED. R. EVID. 404(b) (emphasis added).

41. 18 U.S.C. § 922(g).

42. United States v. Roszkowski, 700 F.3d 50, 56 (1st Cir. 2012).

43. *See* United States v. Bowie, 232 F.3d 923, 927 (D.C. Cir. 2000) (noting that Rule 404(b) does not apply to "[e]vidence that constitutes the very crime being prosecuted").

44. United States v. Till, 434 F.3d 880, 884 (6th Cir. 2006).

45. United States v. Quinones, 511 F.3d 289, 309 (2d Cir. 2007) (internal quotation marks omitted).

46. United States v. Johnson, 463 F.3d 803, 808 (8th Cir. 2006) (citations and internal quotation marks omitted).

intrinsic evidence.[47] But beyond these "vague and conclusory labels,"[48] lower federal courts have failed to prescribe a coherent framework for how to navigate this fact-sensitive inquiry. The likelihood that the trial judge will invoke the doctrine to exempt uncharged misconduct evidence from Rule 404(b)'s substantive and procedural guarantees depends on the circuit where they sit, or perhaps their idiosyncratic approach to criminal trial practice. This is no way to run a railroad.

While every circuit's approach is unique—at least on the margins—each may be lumped into one of three methodological buckets. I have labeled them the "borderline relevance," "hard look," and "direct evidence" approaches. "Borderline relevance" circuits play fast and loose with the inextricably intertwined doctrine. Judges invoke the doctrine on a hair trigger. Evidence of uncharged misconduct may be deemed intrinsic if merely offered to "help" the jury's general understanding of the case, to provide "context" for the charged offense,[49] or "to complete the story of the crime on trial."[50] Whereas "hard look" circuits have exhibited willingness to narrow the doctrine's scope. They tend to expect trial judges to closely scrutinize whether such evidence is actually "necessary" to complete the story of the charged offense, rather than merely defer to prosecutors. Lastly, "direct evidence" circuits have rejected the inextricably intertwined doctrine entirely, devising alternative ways to distinguish intrinsic and extrinsic evidence.

A. The "Borderline Relevance" Circuits

Most circuits—the First, Second, Fifth, Sixth, Ninth, Tenth, and Eleventh—do not hesitate to label evidence of uncharged misconduct as "intrinsic"

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47. Courts have developed a myriad of other formulations. *See* United States v. Anderson, 558 F. App'x 454, 463 (5th Cir. 2014) ("both acts are part of a single criminal episode"); United States v. Wright, 392 F.3d 1269, 1276 (11th Cir. 2004) ("forms an integral and natural part of an account of the crime" or is "linked in time and circumstances with the charged crime" or "not part of the crime charged but pertain[s] to the chain of events explaining the context").

48. Capra & Richter, *supra* note 37, at 827.

49. United States v. Coleman, 78 F.3d 154, 157 (5th Cir. 1996) (holding that evidence of prior uncharged carjacking is intrinsic to the armed carjacking charge because it was "particularly helpful . . . in generally placing [the defendant's] conduct regarding the charged offense in proper context"); *see, e.g.*, United States v. Carpenter, 923 F.3d 1172, 1181 (9th Cir. 2019) (holding that the defendant's previous marijuana trafficking was intrinsic because it was "necessary to provide a 'coherent and comprehensible story' regarding the background" for a kidnapping charge); United States v. Hall, 604 F.3d 539, 543 (8th Cir. 2010) (holding that evidence of uncharged fraudulent activities was intrinsic because "failure to introduce [it] . . . might have created a gap in the jury's understanding"); United States v. Parker, 553 F.3d 1309, 1314 (10th Cir. 2009) ("Generally speaking, intrinsic evidence is directly connected to the factual circumstances of the crime and provides contextual or background information to the jury." (citations and internal quotation marks omitted)).

50. United States v. Zhong, 26 F.4th 536, 552 (2d Cir. 2022) (citations omitted).

under the inextricably intertwined doctrine. Consider, for example, the Sixth Circuit's decision in *Sumlin.*[51] The defendant was charged with distribution and possession of heroin and fentanyl—conduct which led to the victim's overdose. Hours before her death, the victim texted and solicited drugs from someone saved on her phone as "TJ."[52] At issue on appeal was Amanda Kelly's testimony that she also purchased drugs from the defendant, and that she also contacted him through his "TJ" alias.[53] The Court held that the defendant's uncharged drug dealings with Kelly constituted intrinsic evidence, as Kelly's testimony "provid[ed] background information and contextualiz[ed] the government's case . . . ."[54] These earlier transactions shed important light on the defendant's drug operation, and thus "form[ed] an integral part of [the] witness's testimony . . . ."[55] Further, the evidence "clarif[ied] Kelly's motives for testifying, as well as revealing any potential bias she harbored against [the defendant]."[56] Under this logic, uncharged misconduct evidence is intrinsic if offered to reveal witness bias, even when the defense never sought to impeach that witness.[57] The Sixth Circuit effectively opened the door for prosecutors to introduce evidence of their witnesses' crimes *with the defendant* under guise of impeachment,[58] all while sidestepping the strictures of Rule 404(b).

At the same time, the court regarded evidence of Kelly's drug purchases as intrinsic because it provided context for her testimony.[59] This approach leaves little daylight between evidence that is *relevant* under Rule 401 and evidence that is *intrinsic* for purposes of the inextricably intertwined doctrine.[60] Consider the Sixth Circuit's similarly strained interpretation of Rule

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51. United States v. Sumlin, 956 F.3d 879 (6th Cir. 2020).

52. *Id.* at 886.

53. *Id.* at 890.

54. *Id.* at 882.

55. *Id.* at 890 (quotation omitted) (noting that "the court would not undertake a Rule 404(b) analysis" for intrinsic evidence (citations omitted)).

56. *Id.*

57. *See* United States v. McLean, 138 F.3d 1398, 1404 (11th Cir. 1998) (holding that evidence of the defendant's uncharged cocaine and marijuana sales was intrinsic because it was "vital to establishing [the confidential informant's] credibility" in trial for conspiracy to possess with intent to distribute crack cocaine).

58. While prosecutors are free to impeach their own witnesses, FED. R. EVID. 607, the inextricably intertwined doctrine empowers them to pursue such impeachment by airing out the defendant's uncharged misconduct in front of the jury.

59. *Sumlin*, 956 F.3d at 889 ("[T]his evidence was necessary both to contextualize the relationship between Kelly and Sumlin, and to explain how Kelly could identify 'TJ' the drug dealer, as Sumlin. The government also explained that the evidence was relevant to Kelly's motives for testifying.").

60. *See* United States v. DeClue, 899 F.2d 1465, 1472 (6th Cir. 1990) ("Evidence which is probative of the crime charged and does not solely concern uncharged crimes is not 'other crimes' evidence."); United States v. Rodriguez-Estrada, 877 F.2d 153, 156 (1st Cir. 1989) (noting that "the linked incident occurs close in time, and is highly relevant, to the charged conduct, the argument for admissibility is powerful"); United States v. Ross, 969 F.3d 829, 842 (8th Cir. 2020), *vacated on other grounds*, 2022 WL 4103064 (8th Cir. 2022) ("Evidence that is inextricably intertwined with a charged offense . . . is admissible as relevant under Rule 401. It is not governed by Rule 404(b)."); United States v. Zelaya, 908 F.3d 920, 928 (4th Cir. 2018) ("Rule 404(b) does not apply to evidence

404(b) in *Price*.[61] During his felon-in-possession trial, the defendant argued that the firearms seized from his home belonged to his wife—and that he "never touched those guns."[62] The challenged evidence was an April 17, 2001 certificate he received after completing a Glock firearm safety course with Tennessee's Department of Safety, despite his felony status. The prosecution introduced the certificate as proof that the defendant knowingly possessed Lorcin .380mm and Ruger 9mm firearms on May 5, 2001.[63] Though the defendant was only charged for unlawful possession of these two weapons, the Court nevertheless found that the Glock certificate was "*relevant* to the crime charged and not subject to exclusion under Rule 404(b)."[64] The certificate—even if "bogus"—supplied circumstantial evidence that the defendant "was taking steps to possess" the charged Glock.[65] The Sixth Circuit conflated the notoriously low threshold for relevance with the outwardly stringent "inextricably intertwined" standard.[66] The upshot is the erasure of Rule 404(b)(1)'s special carveout from Rule 402's general rule allowing admission of relevant evidence.

Likewise, the Second Circuit in *Towne* stretched the doctrine in a manner wholly inconsistent with Rule 404(b)'s text and structure.[67] The defendant was charged with unlawful possession of a Smith & Wesson firearm as a convicted felon. Prosecutors introduced evidence that the defendant possessed the same firearm outside the single date specifically charged in the indictment.[68] The Second Circuit held that the uncharged conduct did not constitute some "other crime" under Rule 404(b) because "the evidence was admitted to show that it was Towne and not someone else who exercised continuous dominion and control over the pistol."[69] But the uncharged conduct proved continuous possession through an impermissible inference: The defendant

introduced to prove a substantive element of the offense charged.").

61. United States v. Price, 329 F.3d 903 (6th Cir. 2003).

62. *Id.* at 904.

63. *Id.* at 904–05.

64. *Id.* at 906 (emphasis added) ("[T]he proximity of the certificate, which bore Price's name, to the firearms and ammunition found on May 5, 2001, is relevant to the crime charged. . . .").

65. *Id.* at 906.

66. The Sixth Circuit has, in dicta, recognized the doctrine's outer limits. *See* United States v. Brown, 888 F.3d 829, 838 (6th Cir. 2018) (applying the doctrine but noting that it "cannot be broadly applied to completing a story but must specifically involve past acts that establish a close connection"); United States v. Clay, 667 F.3d 689, 698 (6th Cir. 2012) (holding that evidence of the defendant's uncharged theft of separate firearm was not intrinsic to armed carjacking offense).

67. United States v. Towne, 870 F.2d 880 (2d Cir. 1989).

68. *Id.* at 886.

69. *Id.* The court's argument that "[t]he continuous possession of the same gun does not amount to a series of crimes, but rather constitutes a single offense" is unpersuasive where the defendant is alleged to have possessed the firearm on a specific date. *Id.* Otherwise, the indictment's specific allegations have no bearing on what constitutes an "other act" under Rule 404(b).

unlawfully possessed the firearm on a specific date because he unlawfully possessed that firearm in the past. Despite Rule 404(b)'s apparent purpose to foreclose propensity reasoning, courts have applied the inextricably intertwined doctrine to end-run its protections. These distortions have special bite in felon-in-possession cases, since law enforcement generally uncover unlawful firearm possession after the occurrence of some other (often more serious) misconduct. Courts tend to regard that uncharged misconduct as intrinsic to the isolated act of unlawful possession.[70]

Next consider the Second Circuit's decision in *Fama*.[71] Prosecutors alleged that the defendant committed armed robbery of Capital One Bank with an accomplice. The evidence at issue was the accomplice's testimony that the defendant said (on the day of the robbery) that "he robbed that bank previously some years back and it was successful."[72] The Court reasoned that the opposing party statement constituted intrinsic evidence because it was made "immediately before the commission of the crime while the two were planning the robbery."[73] The fact that the disputed statement disclosed prior criminal conduct made no difference in the analysis. So long as it was uttered immediately before the charged misconduct, it constituted intrinsic evidence regardless of what specifically was said. The Second Circuit's narrow reading of Rule 404(b) overlooks the possibility that while the conversation itself may be intrinsic, its underlying content constitutes evidence of some "other crime, wrong, or act."[74]

In many circuits, evidence of uncharged misconduct "linked in time and circumstances with the charged crime" satisfies a sufficient (rather than necessary) condition for the inextricably intertwined doctrine to apply.[75] But this approach ignores the commonsense fact that people may commit multiple discrete "crimes, wrongs, or acts" at the same time. Consider *Douglas*,[76] where the defendant faced charges of conspiracy to possess cocaine and methamphetamine with intent to distribute. The Eleventh Circuit regarded testimony from a cooperating witness that he previously purchased cocaine from the defendant as intrinsic evidence because "*some* of the overt acts . . . *overlapped*

70. *See* Brown v. United States, 2020 WL 10054086, at *4 (6th Cir. Nov. 25, 2020) (finding that the defendant's earlier act of stealing handgun from his girlfriend was intrinsic to unlawful possession charge because "there was a 'direct connection' between the earlier and later crimes," and that his firing of the gun into his girlfriend's home was similarly intrinsic).

71. United States v. Fama, 636 F. App'x. 45 (2d Cir. 2016).

72. *Id.* at 46.

73. *Id.* at 48.

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

75. United States v. Portillo, 287 F. App'x 818, 819 (11th Cir. 2008) (quoting *McLean*, 138 F.3d at 1403). The Ninth Circuit has erected some boundaries here. *See* United States v. Carpenter, 923 F.3d 1172, 1182 (9th Cir. 2019) (finding that evidence of contemporaneous methamphetamine use was not intrinsic to kidnapping charge); United States v. Vizcarra-Martinez, 66 F.3d 1006, 1013 (9th Cir. 1995) ("Coincidence in time is insufficient . . . . There must be a sufficient contextual or substantive connection between the proffered evidence and the alleged crime to justify exempting the evidence from the strictures of Rule 404(b).").

76. United States v. Douglas, 385 F. App'x 951 (11th Cir. 2010).

with the period of [the defendant]'s involvement in the charged conspiracy."[77] In any case, temporal overlap was not necessary: "To the extent some of the acts occurred outside [that time] period," they were "*closely linked* in time and circumstances to the charged conspiracy."[78] So long as prosecutors can demonstrate "close" temporal or circumstantial linkage—whatever that means—evidence of uncharged misconduct may be introduced without implicating Rule 404(b).[79]

Similarly, evidence of uncharged misconduct which occurred *after* the charged offense may be intrinsic, even though the prosecution could have amended the indictment with additional charges but did not. The Eleventh Circuit confronted the issue in *McDonald*.[80] The defendant was charged with theft of government funds and conspiracy: He allegedly cashed nine fraudulently obtained Treasury checks between November and December 2011.[81] The court regarded evidence that the defendant cashed eight similarly fraudulent Treasury checks later in January and February 2012 as intrinsic. While the indictment did not charge him with those subsequent deposits, both sets of checks were of "the same type," and were deposited "within weeks of each other."[82] Therefore, "the temporal and circumstantial link" between the uncharged and charged misconduct was "strong."[83] Under the Eleventh Circuit's approach, prosecutors may sneak in evidence of uncharged misconduct for propensity purposes in cases where impermissible propensity inferences would be particularly seductive. The more closely the uncharged misconduct resembles the charged offense—thus the greater the risk that jurors will partake in propensity reasoning—the more likely that the court will consider them inextricably intertwined.[84]

Lastly, consider the Eleventh Circuit's decision in *Rodriguez*.[85] In early 2018, the Federal Bureau of Investigation traced the source of illicit child

77. *Id.* at 952 (emphasis added).

78. *Id.* (emphasis added); *see* United States v. Robles, 434 F. App'x 736, 739 (10th Cir. 2011) ("We have previously found acts occurring before a charged conspiracy to be intrinsic evidence because they were 'inextricably intertwined' with that conspiracy.").

79. *See* United States v. Jo, 99 F.3d 1147, 1147 (9th Cir. 1996) (holding that evidence of the defendant's "efforts to purchase methamphetamine during the period of time in which he was charged with distributing the drug" was intrinsic).

80. United States v. McDonald, 756 F. App'x 964 (11th Cir. 2018).

81. *Id.* at 966.

82. *Id.* at 968.

83. *Id.*

84. *Cf.* United States v. Varoudakis, 233 F.3d 113, 123 (1st Cir. 2000) ("[T]he more the prior bad act resembles the crime, the more likely it is that the jury will infer that a defendant who committed the prior bad act would be likely to commit the crime charged.").

85. United States v. Rodriguez, No. 21-10355, 2022 WL 1788818 (11th Cir. June 2, 2022) (per curiam).

pornography to the defendant's IP address.[86] When FBI agents searched his residence, they found the defendant's computer drive and cell phone. Digital forensic testing found copies of the 2018 video files on both devices. Agents also uncovered his incriminating search history, "multiple sticky notes on which someone had written various terms associated with searching for child pornography," and "over 900 images of child pornography."[87] The defendant was then charged with possession and distribution of the 2018 video files. At trial, the district judge found that the search history, sticky notes, and illicit images constitute intrinsic evidence, even though none directly related to the 2018 video files. No surprise that the jury decided to convict.

The Eleventh Circuit found that, with respect to the distribution charge, the contested evidence "was an integral and natural part of the story of either the search of Rodriguez's home or the forensic search of his devices."[88] Evidence that he previously searched for child pornography is intrinsic because it provided "important context" into the FBI investigation and the digital forensic techniques that uncovered the 2018 video files saved on his computer drive and cellphone.[89] The court did not (and could not) say that the contested evidence directly proved the distribution charge. That evidence merely explained how the police went about their work. The court's decision appears to extend the inextricably intertwined doctrine to reach uncharged misconduct evidence that completes the story that individual witnesses tell on the stand or sheds light on police investigative techniques. Without guidance of limiting instructions, the jury may hear evidence that provides color, context, and credibility to a "witness's accounts of the circumstances surrounding the offenses for which the defendant was indicted."[90]

Yet the Eleventh Circuit held that the contested evidence was not inextricably intertwined with the possession charge. Because the defendant possessed child pornography through "a backup file for his cell phone," that unlawful conduct did not depend on his "use of the internet or peer-to-peer programs to search for and download child pornography."[91] In other words, evidence found on his computer drive was not intrinsic to crimes related to his cellphone. As the court explained, the prosecution introduced the computer drive evidence to disprove "lack of mistake" or "inadvertent possession of child pornography," rather than to directly prove the discrete act of possession.[92] But those reasons are indistinguishable from the legitimate, nonpropensity purposes laid out in Rule 404(b)(2).[93] Despite the Eleventh Circuit's

86. *Id.* at *1.
87. *Id.* at *1–2.
88. *Id.* at *3.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at *4.
93. *Id.* (reversing the district court for "treating the evidence as outside the scope of Rule 404(b) and refusing to give a limiting instruction on that basis").

broad leeway for uncharged misconduct evidence relevant for "important context,"[94] *Rodriguez's* charge-by-charge approach steers the doctrine in a more sensible direction.

B. The "Hard Look" Circuits

Some courts have sought to address the distortions that flow from the inextricably intertwined doctrine's broad and frequent application. While the doctrine remains good law, the Fourth and Eighth Circuits have cast doubt on trial judges' discretion to label uncharged misconduct as inextricably intertwined to charged offenses without thorough scrutiny. Thus, prosecutors who seek to evade Rule 404(b) operate on a tighter leash.

Consider the Fourth Circuit's decision in *Brizuela*.[95] The defendant, a physician, was charged with unlawful distribution of controlled substances outside the bounds of professional medical practice. These charges related to his dealings with five specific patients.[96] He allegedly refilled these five patients' opioid prescriptions despite warning signs for addiction. The prosecution called two of these five patients to testify, as well as four other patients whose interactions with the defendant were omitted from the indictment. The defendant's prescription practices for each of these six witnesses were mostly identical.[97] Accordingly, the trial judge admitted the testimony from the latter four witnesses as intrinsic evidence because it "show[ed] the extent and severity of [his] violation of a professional norm."[98] The Fourth Circuit reversed this "unduly expansive interpretation" of the inextricably intertwined doctrine as abuse of discretion and remanded for retrial.[99]

The court prescribed a "hard look" to ensure that a "clear link or nexus" between charged and uncharged misconduct exists.[100] Mere temporal

94. *Id.* at *3 (explaining that "evidence which is intrinsic to one count may be extrinsic to another count"); *see* United States v. Joseph, 978 F.3d 1251, 1263 (11th Cir. 2020) (finding that evidence of defendant's prior identity theft to obtain rental property for narcotics storage was intrinsic to narcotics conspiracy charge).

95. United States v. Brizuela, 962 F.3d 784 (4th Cir. 2020).

96. *Id.* at 789.

97. Amy McCabe testified to uncharged interactions—that the defendant prescribed her opioids despite her past history of opioid abuse, and continued even after she failed her drug screens and faced "risk [of] sudden death." *Id.* at 791–92 (citations omitted). Similarly, Jennifer Lively testified that the defendant continued to fill her requests even after she was put on life support for withdrawal symptoms. *Id.* at 792.

98. *Id.* at 791 (internal citation and quotation marks omitted).

99. *Id.* at 793 (quoting from the defendant's brief). *Brizuela* departs from the Fourth Circuit's previously broad definition of "intrinsic" evidence. *See* United States v. Bush, 944 F.3d 189, 195 (4th Cir. 2019) (stating that Rule 404(b) is "only applicable when the challenged evidence is extrinsic, that is, separate from or unrelated to the charged offense" (internal citation and quotation marks omitted)).

100. *Brizuela*, 962 F.3d at 795.

proximity or circumstantial relatedness does not suffice. Uncharged misconduct evidence is properly deemed intrinsic only if it arose "out of the same series of transactions as" the charged offenses.[101] Furthermore, that evidence "must be probative of an integral component of the crime on trial or provide information without which the factfinder would have an incomplete or inaccurate view of other evidence or of the story of the crime itself."[102] Evidence of uncharged misconduct must be necessary—in the strict sense—to jurors' understanding of the case. Here, the testimony of the latter four witnesses bore no direct relationship with the unlawful prescriptions alleged in the indictment. Though prosecutors preferred to tell a story of a doctor who "was not acting as a healer but as a seller of wares," they could not rely on "uncharged acts that are not necessary to the stories of [those] prescriptions."[103] To hold otherwise, the court argued, "would not only misapply [the doctrine], but would also render Rule 404(b) virtually toothless."[104]

The Eighth Circuit has long regarded uncharged misconduct evidence probative of the defendant's consciousness of guilt as direct—and thus intrinsic—proof of mens rea.[105] But the court recently cabined the scope of this exception to Rule 404(b) in *Vaca*.[106] There, the defendant performed a drive-by shooting after losing a barfight.[107] During interrogation, police asked him whether he had ever possessed a firearm. He responded "never," notwithstanding the fact that he pled guilty back in 1995 to aggravated battery for shooting a pregnant woman.[108] In the instant proceeding, the defendant was charged with—and convicted of—violating the felon-in-possession statute. On appeal, he argued that the 1995 guilty plea is extrinsic evidence governed by Rule 404(b). The Eighth Circuit first rejected the prosecution's argument that the twenty-year old conviction "completed the story" of the crime. That evidence "completes the wrong story": "Rather than telling us something about what happened after [the defendant] and [the victim] left the bar that night, it completes the story of what happened roughly 18 months later, when [the defendant] met with the detectives."[109]

The court then circumscribed the consciousness-of-guilt exception to Rule 404(b) to apply only when the uncharged misconduct sheds light on the

101. *Id.* (citations omitted and cleaned up)*; see id.* at 795–96 (explaining that the "transaction" in question was the defendant's writing of the specific prescriptions listed in the indictment).

102. *Id.* at 795.

103. *Id.* at 796 (internal citation omitted).

104. *Id.* at 797; *see also* United States v. Fuertes, 805 F.3d 485, 494 n.4 (4th Cir. 2015) ("[B]y characterizing evidence as 'intrinsic,' federal courts, including this one, have allowed prosecutors to introduce evidence of uncharged bad acts free from Rule 404(b)'s protections . . . .").

105. *See* United States v. Skarda, 845 F.3d 370, 378 (8th Cir. 2016) (witness intimidation); United States v. Bradley, 924 F.3d 476, 483 (8th Cir. 2019) (jailhouse statements).

106. United States v. Vaca, 38 F.4th 718 (8th Cir. 2022).

107. The defendant fired his gun "several times" at the victim and then drove away in his "expensive white sedan" in front of multiple witnesses. *Id.* at 720.

108. *Id.*

109. *Id.* at 721.

facts underlying the commission of the charged crime.[110] Since the defendant was charged with unlawful firearm possession, rather than lying to the police or obstruction of justice, "[t]he prior conviction . . . had nothing to do with the charged crime itself."[111] The prosecution must proceed under Rule 404(b) instead. Evidence probative of the defendant's guilty state of mind remains admissible "to the extent it showed he was willing to lie to negate one of the elements of the offense that the detectives had just told him he committed."[112] While unhelpful for this particular defendant, the Eighth Circuit's reasoning in *Vaca* deviates from prior cases broadly applying the inextricably intertwined doctrine, and nudges more uncharged misconduct evidence into the bucket of Rule 404(b).[113] Whether this approach will take hold in other circuits (and panels) remains to be seen.

C. The "Direct Evidence" Circuits

Three circuits—the Third, Seventh, and the District of Columbia—have jettisoned the inextricably intertwined doctrine. The D.C. Circuit was first. In *Bowie*,[114] the defendant was charged with possession of counterfeit currency after police caught him with fake bills during an arrest on May 16, 1997. The trial judge admitted as intrinsic evidence his prior April 17, 1997 arrest—during which police again seized identical counterfeit bills—on grounds that it is "in some sense really evidence of the same crime."[115] The D.C. Circuit disagreed, first noting that "[b]ifurcating the universe into intrinsic and extrinsic evidence has proven difficult in practice."[116] While the inextricably intertwined doctrine offered some guidance for these line drawing problems, it has

110. Evidence probative of consciousness of guilt is already admissible under Rule 404(b)(2). *See* United States v. Heath, 456 F. App'x 102, 104 (3d Cir. 2011) ("[E]vidence admitted for this purpose is proper under Rule 404(b).").

111. *Vaca*, 38 F.4th at 722 (cleaned up).

112. *Id.*

113. The Eighth Circuit still has a long way to go. *See* United States v. Smith, 4 F.4th 679, 685 (8th Cir. 2021) (finding that evidence of defendant's contemporaneous synthetic marijuana trafficking was "blended or connected" with, and thus intrinsic to, charged methamphetamine distribution conspiracy (internal citation omitted)); United States v. Reed, 978 F.3d 538, 543 (8th Cir. 2020) (holding that evidence of defendant's previous Illinois and Mississippi robberies are intrinsic to charged Minnesota robbery because it "revealed the pattern and routine that helped explain how [the defendant] committed the robberies charged in the indictment" and was "helpful in proving" his identity).

114. United States v. Bowie, 232 F.3d 923 (D.C. Cir. 2000).

115. *Id.* at 927 (internal citation omitted). Law enforcement seized the first set of counterfeit bills during the April 17 arrest, and seized the second set of bills during the May 16 arrest. *Id.* at 925–26, 929. Therefore, this case may be distinguished from *United States v. Towne*, 870 F.2d 880 (2d Cir. 1989), where the evidence in dispute related to the defendant's possession of *the same item* at an earlier time.

116. *Bowie*, 232 F.3d at 927.

operated as a one-way ratchet in favor of intrinsicality. The court disagreed with other circuits' application of the doctrine under a borderline relevance standard: "[A]ll relevant prosecution evidence explains the crime or completes the story. The fact that omitting some evidence would render a story slightly less complete cannot justify circumventing Rule 404(b) altogether."[117] The court then settled on a narrower definition of "intrinsic" evidence, limited to evidence of "an act that is part of the charged offense" or "uncharged acts performed contemporaneously with [and that facilitated] the charged crime."[118] Recital of "circular" and "over-broad" characterizations no longer suffices.[119] Unless prosecutors can muster direct evidence of the charged misconduct, they must proceed under the settled framework of Rule 404(b).[120]

The Seventh Circuit followed suit in *Gorman*.[121] The defendant was charged with perjury for false grand jury testimony. He testified that had "never" stored a Bentley in his garage, when evidence later revealed that he did—and that he stole it.[122] The trial judge admitted evidence of the uncharged theft under the inextricably intertwined doctrine. But as the Seventh Circuit noted, the doctrine was superfluous because this evidence directly proved an element of the perjury charge: the falsity of his grand jury testimony.[123] Prosecutors' habitual reliance on the doctrine as an easy avenue for admissibility reveals its "overused, vague, and quite unhelpful" nature.[124] If prosecutors could circumvent their burden to assert some legitimate, nonpropensity justification for uncharged misconduct evidence, Rule 404(b) would have no bite whatsoever.[125] Though the inextricably intertwined doctrine seeks to clarify "subtle distinctions" between direct and indirect evidence, courts "have often lumped together these types of evidence."[126] The Seventh Circuit thus instructed trial judges to examine the latter under Rule 404(b).[127]

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117. *Id.* at 929 ("But it cannot be that all evidence tending to prove the crime is part of the crime. If that were so, Rule 404(b) would be a nullity.").

118. *Id.* The court nevertheless admitted the evidence under Rule 404(b)(2) as probative of the defendant's intent (to possess the counterfeit bills) and knowledge (of their counterfeit nature). *See id.* at 930.

119. *Id.* at 928.

120. The court left behind an exception for uncharged misconduct that is contemporaneous to and facilitative of the charged offense. *Id.* at 929.

121. United States v. Gorman, 613 F.3d 711 (7th Cir. 2010).

122. The defendant's cousin parked a Bentley in the defendant's garage. Federal law enforcement officials sought to seize the vehicle as drug proceeds. During the search of the garage, the defendant misdirected their attention to a vacant area of the garage. After they left empty handed, the defendant stole his cousin's vehicle by removing it from the garage—never to be returned. *Id.* at 713–14.

123. *Id.* at 719.

124. *Id.*

125. *Id.* at 718 (noting that evidence of uncharged misconduct "is usually propensity evidence simply disguised as inextricable intertwinement evidence, and is therefore improper, at least if not admitted under the constraints of Rule 404(b)."); *see also* United States v. Taylor, 522 F.3d 731, 734 (7th Cir. 2008) (arguing that the inextricably intertwined doctrine "threatens to override Rule 404(b)").

126. *Gorman*, 613 F.3d at 719.

127. *See* United States v. Miller, 673 F.3d 688, 695 (7th Cir. 2012) ("Evidence of prior, uncharged gun possessions by felons has the potential to be used for impermissible propensity purposes. We

The Third Circuit rejected the inextricably intertwined doctrine in *Green*.[128] The defendant was charged with attempted possession of cocaine with intent to distribute. The prosecution sought to introduce evidence of his prior attempts to obtain dynamite to "blow up" an undercover police officer whose work led to his previous arrest on unrelated state charges.[129] The trial judge found that this evidence was inextricably intertwined with the charged offense because the person from whom he sought to purchase dynamite was the same person from whom he sought to purchase cocaine.[130] The Third Circuit rejected this analysis. The doctrine, it explained, finds roots in the common-law concept of *res gestae* ("thing done"). At common law, evidence of prior misconduct that "helps the factfinder to evaluate all of the circumstances under which the defendant acted" is generally admissible.[131] But commentators have long noted that the term *res gestae* was "too vague to be useful and encouraged rote incantation of Latinisms in lieu of thoughtful analysis."[132] These problems live on through the inextricably intertwined doctrine.

The court identified three such problems. First, "no one knows what it means" for uncharged misconduct to be "inextricably intertwined" with the charged offense.[133] Circuits have adopted varying standards, such that the same piece of evidence may be deemed extrinsic in one but intrinsic in others.[134] Second, the doctrine was unnecessary because "[t]here is little practical difference between admitting inextricably intertwined evidence as 'background' pursuant to Rules 401 and 402, and admitting it under Rule 404(b)."[135] Evidence offered to "complete the story" of the charged offense or to aid jurors' understanding of witness testimony already falls within the

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have analyzed such evidence under Rule 404(b) and have allowed it, at least where the prior possession was recent and involved the same gun.").

128. United States v. Green, 617 F.3d 233 (3d Cir. 2010).

129. *Id.* at 236.

130. *Id.* at 237 (observing that the trial judge reasoned that "the dynamite explains how we got into a drug deal in the first place" and "the Government certainly is entitled to give the background [and an] explanation [of] how this all came about" (internal citation omitted)).

131. *Id.* at 245 (internal citation and quotation marks omitted). Some courts continue to use *res gestae* and "inextricably intertwined" interchangeably. *See, e.g.*, United States v. Brown, 888 F.3d 829, 836 (6th Cir. 2018) (recognizing "an exception to Rule 404(b) for res gestae evidence").

132. *Id.* at 243; *see also* United States v. Matot, 146 F.2d 197, 198 (2d Cir. 1944) (Hand, J.) (stating that *res gestae* "has been accountable for so much confusion that it had best be denied any place whatever in legal terminology; if it means anything but an unwillingness to think at all, what it covers cannot be put in less intelligible terms."); 1 WIGMORE ON EVIDENCE § 218 (3d ed. 1940) (the concept of *res gestae* "make[s] rulings on evidence arbitrary and chaotic, when we ignore the correct purposes of admission and substitute an indefinite and uncertain phrase of this sort.").

133. *Green*, 617 F.3d at 246 (collecting cases and describing the standard as "elusive and unhelpful").

134. *Id.* ("All of the formulations used by the courts of appeals purport to embody the same test, but clearly they are not interchangeable.").

135. *Id.* at 247.

gambit of Rule 404(b)(2). Third and relatedly, the doctrine's "broader formulations . . . classify evidence of virtually any bad act as intrinsic," operating to "eviscerate" Rule 404(b).[136] However, the Third Circuit did not jettison the distinction between intrinsic and extrinsic evidence. If uncharged misconduct directly proves or was "performed contemporaneously" with and "facilitate[d]" the charged offense, it may be deemed intrinsic.[137] Outside these two narrow categories, prosecutors must proceed under Rule 404(b).

III. STAKES OF THE DEBATE

Rejection of the inextricably intertwined doctrine, without more, offers cold comfort for criminal defendants who seek retrial. In all but two of the cases discussed above,[138] the circuit panel affirmed the ruling below. Evidence of uncharged misconduct inadmissible under the inextricably intertwined doctrine nevertheless is relevant for nonpropensity purposes, and thus is admissible under Rule 404(b)(2).[139] Evidence that "forms an integral and natural part of an account of the crime" provides necessary context in aid of jurors' comprehension of the trial.[140] Accordingly, Rule 404(b) offers significant leeway for prosecutors to present their "story of the crime" as they wish.[141]

Even though such evidence is generally admissible as extrinsic proof under Rule 404(b)(2), much remains at stake for criminal defendants in the debate over the scope of the inextricably intertwined doctrine. The doctrine discards the primary safeguards that the Federal Rules of Evidence have established to mitigate the dangers of unfair propensity inferences—namely notice, limiting instructions, and exclusion under Rule 403. The problem is not admissibility but labels, and the procedural protections attached to some labels but not others.

136. *Id.* at 248.

137. *Id.* at 249 (quoting United States v. Bowie, 232 F.3d 923, 929 (D.C. Cir. 2000)); *see* United States v. Williams, 974 F.3d 320, 357 (3d Cir. 2020) ("[W]here a criminal conspiracy is charged, courts have afforded the prosecution considerable leeway to present evidence [under the inextricably intertwined doctrine], even of unalleged acts within the indictment period, that reflects a conspiratorial agreement or furtherance of the conspiracy's illegal objectives.").

138. *See* United States v. Brizuela, 962 F.3d 784 (4th Cir. 2020); United States v. Rodriguez, No. 21-10355, 2022 WL 1788818 (11th Cir. June 2, 2022).

139. *See* United States v. Taylor, 522 F.3d 731, 735 (7th Cir. 2008) ("Almost all evidence admissible under the 'inextricably interwoven' doctrine is admissible under one of the specific exceptions in Rule 404(b).").

140. United States v. Wright, 392 F.3d 1269, 1276 (11th Cir. 2004); *see Green*, 617 F.3d at 249 ("As a practical matter, it is unlikely that our holding will exclude much, if any, evidence that is currently admissible as background [under Rule 404(b)] or [as] 'completes the story' evidence.").

141. *See* United States v. Vizcarra-Martinez, 66 F.3d 1006, 1012–13 (9th Cir. 1995) (noting that "other act" evidence is admissible when "necessary to . . . permit the prosecutor to offer a coherent and comprehensible story regarding the commission of the crime").

A. Pretrial Notice

Rule 404(b) guarantees the defendant "reasonable" pretrial notice whenever prosecutors intend to introduce "other act" evidence.[142] Whereas intrinsic evidence does not trigger any notice requirements.[143] While the Due Process Clause obliges prosecutors to disclose all materially exculpatory evidence before trial,[144] neither the Constitution nor the Federal Rules of Evidence compels notice of whether and, more importantly, how they intend to use intrinsic evidence at trial.

Lack of notice thwarts pretrial motions in limine. Defendants prefer that evidentiary issues be resolved before trial. Even when they lose, rulings in limine inform defense counsel on what to expect at trial. They will have ample time to adjust defense strategy, whether by presenting different arguments or calling different witnesses. Without notice, defense counsel often finds themselves unprepared—and unable to prepare—to challenge the prosecution's case. Then, their job is to confront wholly unforeseeable arguments based on uncharged misconduct peripherally related to the charged offense.

Uncertainty over the admissibility of uncharged misconduct evidence chills defense counsel objections during trial. With no sense as to whether the law will be on their side, defense counsel may forfeit their Rule 404 objection for fear that the interruption and ensuing sidebar arguments would annoy the judge and jury. Furthermore, most courts' broad definition of "intrinsic" evidence forces defense counsel to speculate on the specific theories of culpability that the prosecution will put forward. Already stretched thin from the rigors of trial, defense counsel must remain hypersensitive to evidence of their client's uncharged misconduct, or else risk "plain error" appellate review for unpreserved objections.[145] Never mind Rule 404(b)'s purpose "to reduce surprise and promote early resolution of admissibility."[146]

I have no doubt that most federal prosecutors invoke the inextricably intertwined doctrine in good faith—to provide necessary context rather than to inflict unfair surprise.[147] In defense of the doctrine, a senior Department of

142. FED. R. EVID. 404(b)(3) (also requiring the prosecutor to "articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.").

143. FED. R. EVID. 404(b) advisory committee's notes to 1991 amendment (explaining that the notice requirement "does not extend to evidence of acts which are 'intrinsic' to the charged offense" (citations omitted)).

144. Brady v. Maryland, 373 U.S. 83, 87 (1963) ("[T]he suppression by the prosecution of evidence . . . violates due process where the evidence is material either to guilt or to punishment . . . .").

145. *See* FED. R. EVID. 103.

146. FED. R. EVID. 404(b) advisory committee's notes to 1991 amendment.

147. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2150 (1998) ("[W]e should not be entirely cynical about the possibility that government officials

Justice attorney observed that "[n]o prosecutor wants to risk evidence not being admitted for failure to provide notice if the court finds the proffered evidence not to be inextricably intertwined with the charged crime."[148] Therefore, "prosecutors typically err on the side of providing 404(b) notice for evidence that falls under this doctrine."[149] The strategic advantage of arguing against unprepared, off-the-cuff defense counsel objections is not worth the risk of being unable to introduce inculpatory evidence for lack of timely notice.[150]

While these observations are well taken, they do not seriously undercut calls for reform. Even assuming that prosecutors are risk adverse in this regard, what difference would it make if widespread practice is also compelled by law? The fairness and efficiency of criminal trials should be governed by evidence law, rather than prosecutors' enlightened self-interest. The Advisory Committee, the Supreme Court, and Congress—through Rule 404(b)—have struck a balance between the defendant's right to fair trial and prosecutors' discretion to present their case. Lower courts should enforce that Rule as written. Prosecutors should not get to unliterally decide whether defendants will know in advance of trial which aspects of their personal history will be thrown into controversy.

B. Limiting Instructions

More importantly, whether prosecutors introduce evidence of uncharged misconduct under Rule 404(b) or the inextricably intertwined doctrine determines whether the trial judge *must* issue an appropriate limiting instruction to caution jurors against propensity inferences. If admitted under Rule 404(b), the trial judge must issue one under Rule 105.[151] If admitted under the inextricably intertwined doctrine, the trial judge has discretion to deny the

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can conduct themselves with fairness and in the broadest public interest. First, it is a simple fact that most do.").

148. Memorandum from Elizabeth J. Shapiro, Deputy Branch Dir. of the Civ. Div. of the U.S. Dep't of Just., to Daniel J. Capra, Rep. to the Jud. Conf. Advisory Comm. on the Fed. R. of Evid. (April 4, 2017), available at https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf [https://perma.cc/3H3W-X8ZQ] (arguing that the "proposed amendment [to limit the inextricably intertwined doctrine] is unnecessary").

149. *Id.*

150. Trial judges have discretion to "excuse lack of pretrial notice" for "good cause." FED. R. EVID. 404(b).

151. FED. R. EVID. 105 ("If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly."); *see, e.g.*, United States v. Simpson, 479 F.3d 492, 500 (7th Cir. 2007) (vacating judgment because "the jurors did not receive a relevant limiting instruction, which can minimize prejudice from the introduction of Rule 404(b) evidence"); United States v. French, 974 F.2d 687, 694 (6th Cir. 1992) ("In order for Rule 404(b) evidence to be admissible . . . the court must issue a limiting instruction cautioning the jury not to consider such evidence for improper purposes.").

defendant's request, in which case jurors are free to indulge propensity inferences.[152] Conceptually, intrinsic evidence does not warrant limiting instructions because it directly proves the charged offense. In practice, however, most circuits define "intrinsic" evidence to encompass evidence of uncharged misconduct. The inextricably intertwined doctrine precludes applicability of Rule 105 in cases where limiting instructions are most vital: When the uncharged misconduct presented is closely related to the circumstances of the charged offense.

The perennial debate over whether limiting instructions are conducive to their intended purpose—to prevent jurors from engaging in unfair propensity inferences—remains lively.[153] But whether a defendant who requests a limiting instruction should get one as a matter of right is an entirely different question. As it stands, the answer depends on which circuit their district court happens to sit, and (in most circuits) whether the presiding trial judge is inclined to regard uncharged misconduct evidence as "intrinsic" under capacious legal standards. If so inclined, the jury is then free to partake in the "bad person" reasoning repudiated by Rule 404(b) and its common-law antecedents.[154] Regardless of whether limiting instructions are psychologically effective, defendants who request one wisely prefer some guardrails over none.[155]

152. *See* United States v. Rodriguez, 2002 WL 17888818, at *3 (11th Cir. June 2, 2022) ("Because the evidence was intrinsic, Rule 404(b) did not apply, and it was no abuse of discretion to refuse to give Rodriguez's requested limiting instruction as to the receipt and distribution counts."); United States v. Hattabaugh, 295 F. App'x 249, 250 (9th Cir. 2008) ("Because we conclude that the evidence regarding the real estate transaction was admissible as direct evidence, 'inextricably intertwined' with [the defendant's] fraud charges, no limiting instruction was required under Rule 105.").

153. *Compare* United States v. Gorman, 712 F.3d 1146, 1155 (7th Cir. 2013) ("We assume juries ordinary follow limiting instructions."), Richardson v. Marsh, 481 U.S. 200, 211 (1987) ("Th[is] rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process."), *and* Gray v. Maryland, 523 U.S. 185, 200 (1998) (Scalia, J., dissenting) ("The almost invariable assumption of the law is that jurors follow their instructions."), *with* Bruton v. United States, 391 U.S. 123, 132 (1968) ("Limiting instructions to the jury may not in fact erase the prejudice[.]"), Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1923) (Hand, J.) (describing limiting instructions as "recommendation[s] to the jury of a mental gymnastic which is beyond, not only their powers but anybody's else"), *and* 1 WEINSTEIN'S EVIDENCE MANUAL § 2.04 (2023) ("The efficacy of limiting instructions in restricting the jury's consideration of evidence of other crimes for proper purposes is questionable in many cases.").

154. The presiding judge may deem uncharged misconduct evidence as "intrinsic" yet still issue limiting instructions as a matter of discretion. *See, e.g.*, United States v. Bonugli, 162 F. App'x 326, 328 (5th Cir. 2006) ("[A]ny undue prejudice from the admission of the challenged evidence [under the inextricably intertwined doctrine] was mitigated by the district court's limiting instruction."). My point is that this freewheeling discretion is inconsistent with the uniform application of evidence law.

155. The defendant may strategically choose against requesting one "to avoid highlighting the evidence." United States v. Gomez, 763 F.3d 845, 860 (7th Cir. 2014) (noting that "sua sponte limiting instructions in the middle of trial, when the evidence is admitted, may preempt a defense preference to let the evidence come in without the added emphasis of a limiting instruction").

The inextricably intertwined doctrine denies them this entitlement.

C. *Rule 403*

Rejecting the inextricably intertwined doctrine, the D.C. Circuit reasoned that "the *only* consequences of labeling evidence 'intrinsic' are to relieve the prosecution of Rule 404(b)'s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel's request."[156] Not so simple. Once we look beyond Rule 404(b), we find that the doctrine distorts the proper application of Rule 403. In theory, Rule 403 "applies with full force" to uncharged misconduct evidence,[157] since "unfair prejudice . . . speaks to the capacity of some concededly relevant evidence to lure the fact-finder into declaring guilt on a ground different from proof specific to the offense charged."[158] Rule 404(b) and Rule 403 work in tandem: Once uncharged misconduct evidence is admitted under Rule 404(b), the trial judge must then consider whether the danger of prejudicial propensity inferences substantially outweighs its probative worth. Given that all federal courts adopt an "inclusionary" approach to uncharged misconduct evidence under Rule 404(b), one might expect trial judges to routinely invoke Rule 403 in defendants' favor. But that has not been the case. Judges have limited discretion to exclude such evidence under Rule 403, since they must "look at the evidence in a light most favorable to its admission, maximizing its probative value and minimizing its undue prejudicial impact."[159] As a result, "exclusion of extrinsic evidence based on its prejudicial effect should occur only sparingly."[160]

To the extent that Rule 403 protects defendants against unfairness, all is lost once uncharged misconduct evidence is deemed "intrinsic." Across many jurisdictions, trial judges lose nearly all discretion to conclude that the evidence engenders unfair prejudice which substantially outweighs its probative worth. Some circuits have opined that Rule 403 "should *generally* not be used to exclude intrinsic evidence, because intrinsic inculpatory evidence is by its

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156. United States v. Bowie, 232 F.3d 923, 927 (D.C. Cir. 2000) (emphasis added).

157. *Gomez*, 763 F.3d at 856 (internal quotation marks and citations omitted).

158. Old Chief v. United States, 519 U.S. 172, 180 (1997).

159. United States v. Edouard, 485 F.3d 1324, 1344 n.8 (11th Cir. 2007) (citations omitted); *see* United States v. Alfaro-Moncada, 607 F.3d 720, 734 (11th Cir. 2010) (describing exclusion under Rule 403 as "an extraordinary remedy"); United States v. Straker, 800 F.3d 570, 589 (D.C. Cir. 2015) ("Rule [403]'s requirement that the danger of unfair prejudice substantially outweigh probative value calls on us, in close cases, to lean towards admitting evidence."). Under an abuse-of-discretion standard, the reviewing court's ability to vacate the lower court ruling is even more limited. *See* United States v. Paulino, 445 F.3d 211, 217 (2d Cir. 2006) ("To find such abuse, we must conclude that the trial judge's evidentiary rulings were 'arbitrary and irrational.'"). Two circuits review de novo whether uncharged misconduct evidence is intrinsic. *See* United States v. Loftis, 843 F.3d 1173, 1176 n.1 (9th Cir. 2016); United States v. Green, 617 F.3d 233, 239 (3d Cir. 2010).

160. United States v. Leahy, 82 F.3d 624, 637 (5th Cir. 1996); *see* United States v. Troya, 733 F.3d 1125, 1131 (11th Cir. 2013) ("When Rule 404(b) evidence is 'central to the prosecution's case' it should not lightly be excluded.").

very nature prejudicial."[161] Others have gone further: "Even if the evidence is extremely prejudicial to the defendant, the court would have no discretion to exclude it because it is proof of the ultimate issue in the case."[162] Therefore, if the prosecution prevails under the inextricably intertwined doctrine, it automatically prevails under Rule 403.[163] Though courts have uniformly refused to interpret Rule 403 as a *per se* rule of exclusion in favor of the defendant,[164] they have applied the Rule in the intrinsic evidence context as a near *per se* rule of inclusion in favor of the prosecution. Whether uncharged misconduct evidence is "intrinsic" matters more than whether unfair prejudice substantially outweighs probative value. As a result, any clever prosecutor may sidestep Rule 403 by first resorting to the inextricably intertwined doctrine.[165]

IV. TAKING RULE 404(B) SERIOUSLY

With respect to the admissibility of uncharged misconduct evidence, federal courts have reached a fork in the road. The "borderline relevance" approach calls for courts to continually exempt evidence introduced "to provide relevant context" for the charged offense from Rule 404(b) scrutiny.[166] The "hard look" approach would cabin the scope of the inextricably intertwined doctrine, at least at the margins. The "direct evidence" approach would reject the doctrine and focus the threshold inquiry on whether the disputed evidence "directly proves" the defendant's culpability for the charged offense. This Article urges federal courts to move in the direction of this latter approach—to take Rule 404(b) seriously.

Basic linguistics and statutory structure rebuff the inextricably

161. United States v. Sudeen, 434 F.3d 384, 389 (5th Cir. 2005).

162. United States v. Schneider, 801 F.3d 186, 201 (3d Cir. 2015) (citations omitted); *see* United States v. US Infrastructure, Inc., 576 F.3d 1195, 1210 (11th Cir. 2009) ("[I]n cases where this Court has found other acts evidence inextricably intertwined with the crimes charged, the Court has refused to find that the evidence should nonetheless be excluded as unduly prejudicial[.]").

163. *See* Memorandum from Daniel J. Capra, Rep. to the Jud. Conf. Advisory Comm. on the Fed. R. of Evid., to the Advisory Comm. on Evid. R. (April 1, 2017), https://www.uscourts.gov/sites/default/files/advisory_committee_on_rules_of_evidence_-_spring_2017_meeting_materials.pdf [https://perma.cc/6EZ8-2H9Q] ("[I]t would be the rare case in which proof of an inextricably intertwined act could be considered so prejudicial as to justify exclusion under Rule 403."). *But see* United States v. Zhong, 26 F.4th 536, 553 (2d Cir. 2022) ("Even if the evidence from 2001 and 2002 completed the story of the crimes charged against [the defendant], we would nevertheless conclude that the district court abused its discretion" for failing to exclude it under Rule 403.).

164. *See, e.g.*, United States v. Crowder, 141 F.3d 1202, 1210 (D.C. Cir. 1998) ("[T]he Rule 403 inquiry in each case involving Rule 404(b) evidence will be case-specific. There can be no 'mechanical solution,' no per se rule of the sort [defendants] advocate.").

165. *See* United States v. Taylor, 522 F.3d 731, 735 (7th Cir. 2008) ("The objection to 'inextricably interwoven' is that its vagueness invites prosecutors to expand the exceptions to the rule beyond the proper boundaries of the exceptions.").

166. United States v. Gordon, 851 F. App'x. 89, 90 (9th Cir. 2021).

intertwined doctrine.[167] Rule 404(b)(1)'s "any other crime, wrong, or act" language denotes broad coverage in ordinary parlance. "Any" stands for "unmeasured or unlimited in amount, number, or extent."[168] "Other" means "not the same" or "being the one (as of two or more) remaining or not included."[169] Putting these two pieces together, "any other crime, wrong, or act" necessarily refers to the entire universe of "crimes, wrongs, or acts" not included in the charged offense. We reach the same conclusion by reading the phrase in context with the rest of the sentence.[170] "[A] particular occasion" refers to a specific instance of misconduct—that which is alleged in the indictment. So "any other crime, wrong, or act" must refer to all "crime[s], wrong[s], or act[s]" omitted from the indictment. Where, as here, the operative text is unambiguous, courts need not fabricate doctrines to elucidate its meaning. Those "bad old days" are over.[171] Clean textualism supplies clear answers. And "[w]hen the current statute's language is clear, it must be enforced just as Congress wrote it."[172] No more, no less.

Rule 404(b) does not speak of "intrinsic" or "extrinsic" evidence. By fixating on that distinction as the crux of the analysis, the inextricably intertwined doctrine has led courts down the wrong path.[173] With each application, we stray further and further away from Rule 404(b)'s best reading. By my lights, Rule 404(b)'s "any other crime, wrong, or act" language prescribes a straightforward two-step inquiry. To paraphrase the Supreme Court in *Wooden v. United States*: Given that this language "has just its ordinary

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167. Some courts have applied the inextricably intertwined doctrine even after conceding that the uncharged misconduct constitutes "other acts," justifying this conclusion by referencing the supposed "policies underling Rule 404(b)." *See* United States v. Williams, 989 F.2d 1061, 1070 (9th Cir. 1993) (noting that those policies "are inapplicable when offenses committed as part of a 'single criminal episode become other acts simply because the defendant is indicted for less than all of his actions'"). This reeks of bad textualism.

168. *Any*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/any [https://perma.cc/L74C-A5XW] (last visited Mar. 26, 2024).

169. *Other*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/other [https://perma.cc/TNN2-AGVB] (last visited Mar. 26, 2024).

170. *See* Biden v. Nebraska, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("To strip a word from its context is to strip that word of its meaning.").

171. Paul Clement, Opinion, *Arguing Before Justice Scalia*, N.Y. TIMES (Feb. 17, 2016), https://www.nytimes.com/2016/02/17/opinion/arguing-before-justice-scalia.html ("A few years back, during oral argument, Justice Antonin Scalia asked me when I thought 'the bad old days'—when the Supreme Court routinely looked beyond the text of statutes—had ended? I said, 'The bad old days ended when you got on the court, Mr. Justice Scalia.'")

172. United States v. Games-Perez, 695 F.3d 1104, 1118 (10th Cir. 2012) (Gorsuch, J., dissenting). Whether textualism should apply the same way to Federal Rules (drafted by the Judicial Conference) as to statutes (written by Congress) remains an open question. The Supreme Court has suggested that the answer is yes, at least with respect to the Federal Rules of Civil Procedure. *See* Bus. Guides, Inc. v. Chromatic Commc'ns. Enters., Inc., 498 U.S. 533, 540–41 (1991) ("As with a statute, our inquiry is complete if we find the text of the Rule to be clear and unambiguous.").

173. I have no gripe with the "extrinsic" and "intrinsic" labels themselves. They indeed prove useful heuristics. Rather, I take issue with how federal courts, relying on the inextricably intertwined doctrine, apply those labels to evade serious analysis of whether the disputed evidence constitutes "any other crime, wrong, or act." FED. R. EVID. 404(b)(1).

meaning, most cases should involve no extra-ordinary work."[174]

As the starting point, courts should ask whether the disputed evidence is probative of some "crime, wrong, or act"—whether it tends to prove that the defendant engaged in some misconduct, either charged or uncharged. Facts that do not amount to misconduct need not be scrutinized under Rule 404(b). Suppose video surveillance revealed that the perpetrator wore red sneakers. Then, during trial, a neighbor testified that the defendant frequently walks his dog wearing shoes of the same color and model. That testimony is beyond the purview of Rule 404(b) because the conduct at issue—wearing red sneakers—does not rise to a "crime, wrong, or act." While the word "act" appears broad in isolation, *ejusdem generis* demands a narrower interpretation: This catch-all term must be construed to share a common theme with "crime" and "wrong"—both denoting misconduct that reflects poorly on that person's character.[175] Read together, "crime[s], wrong[s], or act[s]" refer to all misconduct which may give rise to improper propensity reasoning.

If the conduct at issue amounts to a "crime, wrong, or act," we then ask whether it is "other" than the charged offense. The dividing line between *the same* and *other* misconduct ought to mirror the tried-and-true distinction between *direct* and *indirect* proof.[176] Direct evidence "proves the existence of a fact without requiring any inferences," whereas indirect (or circumstantial) evidence merely supports an inference that some fact exists.[177] Whether evidence is direct or indirect depends on what the proponent intends to prove, and how they intend to go about proving it.[178] The elements of the charged offense—generally mens rea, actus reus, and causation—determine what the prosecution must prove, and thus the scope of the charging document. If the

174. 595 U.S. 360, 370 (2022) (holding that the defendant's multiple burglaries were not committed on "different occasions" for purposes of the Armed Career Criminal Act).

175. This narrower reading of "act" arguably renders that word redundant, as duplicative of the word "wrong." But not so. Ordinary parlance distinguishes between what is a "wrong" and what amounts to misconduct. The difference is slight—one of degree. A "wrong" is more serious, connotating greater moral blameworthiness. Driving five miles above the speed limit on the highway constitutes an "act" of misconduct, but doing so in a school zone constitutes a "wrong."

176. Rule 404 already incorporates the distinction between "direct" and "indirect" proof. *See* FED. R. EVID. 404 advisory committee's notes on proposed rules (distinguishing between "character in issue" and "circumstantial" character evidence). Other rules also apply this distinction. For instance, "hearsay" is "evidence [offered] to prove the truth of the matter asserted in the statement." FED. R. EVID. 801. If the out-of-court statement constitutes direct proof of the truth of the matter asserted, then that statement constitutes hearsay, which is inadmissible unless exempt under Rule 801(d) or excluded under Rules 803, or 804, or 807.

177. Willard v. Huntington Ford, Inc., 952 F.3d 795, 806 (6th Cir. 2020) (discussing distinction in employment discrimination context).

178. Take a familiar example: The fact that I can observe rain through the courtroom window is direct evidence of the weather. But if the courtroom blinds are shut, the fact that other people are wearing rainboots and carrying umbrellas offers circumstantial evidence.

indictment can be fairly construed to encompass the misconduct at issue, then evidence probative of that misconduct should be deemed intrinsic, thus beyond the scope of Rule 404(b). On the flip side, discrete misconduct beyond the scope of the indictment only circumstantially proves the defendant's culpability for the charged offense. At bottom, "whether evidence is admissible as either intrinsic or extrinsic turns on the elements the Government will have to prove at trial," which in turn delineate the conduct encompassed by the charged offense.[179]

Courts should go one step further to discard the residual exemption for "uncharged acts performed contemporaneously with the charged crime" which "facilitate[d] the commission of the charged crime."[180] Like the inextricably intertwined doctrine, this exemption requires judges to apply capacious legal standards to sprawling facts. Further, it ignores the intuitive distinction between direct and indirect evidence sourced from Rule 404(b)'s plain text. To be sure, discrete crimes often overlap in time, space, and purpose.[181] People rarely embark on a criminal venture only after all prior ones reach an end. Indeed, they often commit crimes to facilitate the completion of another (usually more serious) offense. But Rule 404(b) does not prescribe a different approach for defendants who commit multiple crimes at once. So courts ought not invent one. The factfinder's job is to decide whether the prosecution has met its burden of proof with respect to the specific offenses alleged in the indictment, not to root out criminals from upstanding citizens. Unless the misconduct at issue directly proves an element of the charged offense, the prosecution should be forced to proceed under Rule 404(b)(2).

Whether through the inextricably intertwined doctrine or Rule 404(b), evidence of uncharged misconduct shedding light on the charged offense will almost certainly go to the jury. But Rule 404(b) offers important safeguards to ensure that the defendant is prepared to attack the weight of that evidence, and the jury will not misuse it for improper propensity purposes. The inextricably intertwined doctrine offers nothing to match.

V. CONCLUSION

Jury deliberation cannot be reduced to probabilistic analysis.[182] The

179. United States v. Suggs, 625 F. Supp. 3d. 428, 435 (E.D. Pa. 2022); *see* United States v. Williams, 974 F.3d 320, 357 (3d Cir. 2020) ("[T]he nature and scope of the evidence able to be deemed intrinsic will vary with the charged offense.").

180. United States v. Bowie, 232 F.3d 923, 929 (D.C. Cir. 2000).

181. *See* United States v. Taylor, 522 F.3d 731, 734 (7th Cir. 2008) ("[I]f a defendant commits two criminal acts at the same time and is charged with only one, the evidence of the charged crime may unavoidably reveal the charged one[.]").

182. *See* Kenworthey Bilz, *We Don't Want To Hear It: Psychology, Literature and the Narrative Model of Judging*, 2010 U. ILL. L. REV. 429, 435 (2010) (casting doubt on the "rationalist" model, under which decisionmakers "come to their conclusions by estimating the likelihood of their objective truth"); Lisa Kern Griffin, *Criminal Adjudication, Error Correction, and Hindsight Blind Spots*, 73 WASH. & LEE L. REV. 165, 169 (2016) (noting that factfinders "react to the evidence as a whole, in an

whole of the evidentiary record is greater than the sum of its parts. Throughout trial, seemingly disjointed pieces of evidence "come together" to develop a unified story, "with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences . . . necessary to reach an honest verdict."[183] If one piece of this puzzle is lost, jurors may suspect that something is hidden from them—and then wonder why.[184] So "the offering party's need for evidentiary richness and narrative integrity" merits deference.[185] Courts thus afford immense discretion to the prosecution to "place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault."[186] The import of narrative storytelling underlying this deference assumes that jurors digest evidence by asking how discrete pieces of proof map onto preexisting assumptions about the way criminals are, and how trial will play out.[187]

While trial narratives empower jurors to digest vast sums of evidence and overcome analysis paralysis,[188] these benefits occasionally come at the cost of unjust verdicts.[189] Persuasive narratives "can override doubts, even though those doubts, considered dispassionately, have a stronger basis in the evidence, and that decision makers in the criminal justice system may be ill-

integrated and non-linear process").

183. Old Chief v. United States, 519 U.S. 172, 187 (1997); *see* Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 285 (2013) ("Many social scientists who study juries have concluded that they interpret information not by considering and weighing each relevant piece of evidence in turn, but by constructing competing narratives and then deciding which story is more persuasive.").

184. *Old Chief*, 519 U.S. at 189; *accord* United States v. Jackson, 405 F. Supp. 938, 945–46 (E.D.N.Y. 1975) (Weinstein, J.) ("The jurors, who tend to be extremely sensitive to courtroom nuances, may get the impression—wholly accurate in most cases—that they are not getting the entire story and they may let their imaginations fill in the gaps to the prejudice of one side or another.").

185. *Old Chief*, 519 U.S. at 183; 1 WEINSTEIN'S EVIDENCE MANUAL § 2.02 (2023) ("The court should defer to the parties' preferences respecting the mode of questioning and order of proof, so long as they promote the efficient ascertainment of the truth.").

186. *Old Chief*, 519 U.S. at 188.

187. *See* Griffin, *supra* note 183, at 295; CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 4:33 (4th ed. 2022) ("[L]earning about other acts may be crucial in understanding and appraising evidence of the crimes in issue because talking about one with the other leaves confusing void areas.").

188. *See* ROBERT P. BURNS, A THEORY OF THE TRIAL 150 (1999) ("Stories solve the problem of information overload by allowing a continuing reintegration of new information and reorganization of that information according to the changes in meaning that the new information allows or requires."); Verizon Directories Corp. v. Yellow Book USA, Inc., 331 F. Supp. 2d 136, 142 (E.D.N.Y. 2004) (Weinstein, J.) ("[U]ltimately, it is the trier's ability to think clearly in integrating evidence and arguments and in drawing rational conclusions that is the essence of our system of trials.").

189. *See* Lynch, *supra* note 147, at 2142 ("[T]he jury trial, with its largely binary outcomes, may sometimes oversimplify the messy realities of uncertain proof and graduated culpability.").

equipped to follow particular rules and instructions as a result."[190] The Federal Rules of Evidence seeks to foreclose some particularly seductive narratives. Propensity is one. Once jurors perceive the defendant as a habitual offender with a lengthy rap sheet, holes in the prosecution's case do not appear quite as large.[191] Even assuming that the propensity narrative is descriptively accurate across many cases, the prohibition against character evidence "is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence."[192] So Rule 404 tries to "keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn't worry overmuch about the strength of the government's evidence."[193]

The inextricably intertwined doctrine upsets Rule 404's carefully considered balance between prosecutorial and defendant interests. Under that Rule, the prosecution may introduce evidence of the defendant's "other crimes, wrongs, or acts" if relevant for some nonpropensity purpose.[194] In exchange, the defendant must receive "reasonable notice"[195] plus limiting instructions "restrict[ing] the evidence to its proper scope."[196] And the defendant may seek exclusion under Rule 403 on grounds that the probative value of the evidence is "substantially outweighed" by the danger of unfair prejudice.[197] All goes out the window once the court finds that the uncharged misconduct is inextricably intertwined with the charged offense. That label limits the defendant's capacity to mount a defense, without any reciprocal and legitimate upsides for the prosecution. Inextricably intertwined or not, uncharged misconduct evidence which "provides contextual or background information to the jury" is presumptively admissible under Rule 404(b).[198] My proposal is modest. It does not purport to regulate what jurors can (and cannot) hear. My concern is not substance but procedure—not whether evidence should be admitted, but what safeguards should attach once it is.

All told, Rule 404(b) does not meaningfully disturb prosecutors' prerogative to tell a compelling story about crime and culpability. Instead, it targets

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190. Griffin, *supra* note 183, at 285.

191. *Id.* at 302 ("Trials purposefully leave gaps, and story telling inspires jurors to fill those spaces. . . . The implicit invitation for jurors to participate in constructing facts, combined with the missing narrative components, can introduce bias and lead to error.").

192. FED. R. EVID. 404 advisory committee's notes on proposed rules; *cf.* Robinson v. California, 370 U.S. 660, 665–66 (1962) (holding that the Eighth Amendment prohibits punishment for an individual's "status" and "chronic condition" of drug addiction).

193. United States v. Taylor, 522 F.3d 731, 735 (7th Cir. 2008) (citations omitted).

194. Huddleston v. United States, 485 U.S. 681, 685 (1988).

195. FED. R. EVID. 404(b)(3).

196. FED. R. EVID. 105.

197. FED. R. EVID. 403.

198. United States v. Parker, 553 F.3d 1309, 1314 (10th Cir. 2009); *see, e.g.*, United States v. Butch, 256 F.3d 171, 176 (3d Cir. 2001) (admitting under Rule 404(b)(2) uncharged misconduct evidence that "explain[s] [the defendant's] role in the criminal enterprise and . . . would give the jury a complete story of the crime by explaining the circumstances of the alleged relationship between the alleged conspirators").

one particular story—that which airs out the defendant's "prior trouble with the law" to prove that old habits are hard to break.[199] The inextricably intertwined doctrine needlessly muddles this settlement and frustrates the uniform application of evidence law. So the path forward is clear: Federal courts should give full force to Rule 404(b)'s plain text and scrap judicially made-up doctrines which operate to deny criminal defendants their fair shake at trial.

199. Michelson v. United States, 335 U.S. 469, 475 (1948).