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HOW LESS IS MORE: THE UNRAVELING OF THE INEXTRICABLE INTERTWINEMENT DOCTRINE UNDER *UNITED STATES V. GORMAN*

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INTRODUCTION

In July 2010, the United States Court of Appeals for the Seventh Circuit explicitly abolished the long-standing doctrine of inextricable intertwinement as a basis of admissibility for other bad acts evidence.¹ Other bad acts evidence is usually inadmissible, as it tends to suggest improper character inferences.² However, in some instances, this type of evidence is intertwined with other admissible evidence in such a way that it helps to complete the story of the crime by filling a conceptual or chronological void³ or is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove an element of the charged crime.⁴ In such circumstances, the

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¹ See *United States v. Gorman*, 613 F.3d 711 (7th Cir. 2010).

² See *infra* notes 13–25.

³ See, e.g., *United States v. Luster*, 480 F.3d 551, 556–57 (7th Cir. 2007).

⁴ See, e.g., *United States v. McLee*, 436 F.3d 751, 760 (7th Cir. 2006); *United States v. Gougis*, 432 F.3d 735, 738 (7th Cir. 2005); *United States v. Ojomo*, 332 D.3d 487, 489 (7th Cir. 2003); *United States v. Senffner*, 280 F.3d 755, 764 (7th Cir. 2002).

doctrine of inextricable intertwinement is invoked to admit the evidence.⁵ This doctrine's relationship with Federal Rule of Evidence 404(b)'s prohibition against the use of other bad acts evidence has become increasingly confusing and problematic. The Seventh Circuit's recent decisions indicate an increasing frustration with the doctrine, with the court believing that the doctrine has "become overused, vague, and quite unhelpful" and as such, "has outlived its usefulness."⁶ In *United States v. Gorman*, the Seventh Circuit altogether abolished the doctrine in favor of the exclusive use of Rule 404(b)⁷ as the basis of admissibility for other bad acts evidence.⁸ To date, the Seventh Circuit is alone in this practice. However, it is the position of this Comment that as a result of the way the doctrine has been expanded since its creation, the doctrine should be abolished in the other circuits as well. As currently applied, the doctrine poses significant threats to defendants' rights.⁹

I. CHARACTER EVIDENCE

The term "character evidence" is used to indicate any evidence "probative of a pertinent trait of a person's character, such as honesty, temperance or peacefulness."¹⁰ This evidence may be presented in either civil or criminal trials, and may be introduced in three ways: reputation testimony, personal opinion testimony, or by evidence of specific acts previously committed by the defendant.¹¹ The most persuasive of these proofs is evidence of prior acts, which can be particularly damning in the context of prior crimes, wrongs, or misconducts.¹² As such, the American legal system has created special

⁵ *Id.*

⁶ *Gorman*, 613 F.3d at 719.

⁷ FED. R. EVID. 404(b).

⁸ *Gorman*, 613 F.3d at 719.

⁹ See *infra* notes 17–18, 229–43 and accompanying text.

¹⁰ FED. R. EVID. 404 advisory committee's note.

¹¹ CHARLES MCCORMICK, EVIDENCE 443 (2d ed. 1972); see also FED. R. EVID. 405.

¹² MCCORMICK, *supra* note 11, at 443.

standards with which to determine the admissibility of this type of evidence.

A. Other Bad Acts Evidence

Admissibility of prior acts evidence, especially in the context of prior bad acts, poses substantial risks. Other bad acts evidence is often highly prejudicial, tending to “distract the trier of fact from the main question of what actually happened on the particular occasion . . . [and subtly permitting] . . . the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened.”¹³ The introduction of other bad acts evidence may further prejudice the defendant by creating an unfair risk of surprise, thereby robbing him or her of the opportunity to prepare an adequate defense.¹⁴ It “saddles a person with disabilities because of prior conduct”¹⁵ and “violates a social commitment to the thesis that each person remains mentally free and autonomous at every point in his [or her] life.”¹⁶ The nature of the evidence is problematic as well; the evidence is often of little probative value, yet its introduction is unduly time-consuming. Its admissibility may even be unconstitutional, implicating, in the context of other criminal acts, the prohibition against double jeopardy¹⁷ or the right against self-incrimination.¹⁸ Recognizing the severity of the risks

¹³ FED. R. EVID. 404 advisory committee’s note.

¹⁴ See JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 54.1 (1983 & Supp. 1983).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5239 (1978 & Supp. 1993) (“When the defendant has previously been acquitted of . . . uncharged crimes, their evidentiary use undermines the values that support the prohibition on double jeopardy.”); see also U.S. CONST. amend. V (“No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . .”).

¹⁸ WRIGHT & GRAHAM, *supra* note 17, at § 5239 (“The privilege against self-incrimination can be eroded where the defendant is forced to take the stand to answer the uncharged offenses, thus emphasizing his failure to testify as to the

and high likelihood of their occurrence, American courts exercise great caution in admitting such evidence.

Federal Rule of Evidence 404 embodies the current American rule regarding the admissibility of other bad acts evidence: “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.”¹⁹ However, Rule 404(b) bans this evidence only when it is being used as propensity evidence, i.e., to demonstrate an individual’s propensity to act in a certain way based on his or her prior conduct.²⁰ The prohibition against this use of character evidence “is so deeply embedded in our jurisprudence as to assume almost constitutional proportions.”²¹ However, Rule 404(b) provides an exception for certain uses of a specific kind of character evidence; the evidence “may . . . be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”²² Proponents must offer the evidence for specific identified purposes, with the proponent only able to argue and the trier of fact only able to consider the evidence as possible proof of the elements for which it was offered.²³ Once a permissible, non-propensity theory of relevance has been identified, the court cannot exclude the evidence unless it finds that “its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue

charged offense.”); *see also* U.S. CONST. amend. V (“No person shall . . . be compelled in any criminal case to be a witness against himself . . .”).

¹⁹ FED. R. EVID. 404(b).

²⁰ *Id.*

²¹ Fed. R. EVID. 404(a) advisory committee’s note (1991).

²² FED. R. EVID. 404(b). For a discussion on the effective limitations of this clause, *see infra* notes 221–26 and accompanying text.

²³ *See* Jason M. Brauser, Comment, *Intrinsic or Extrinsic?: The Confusing Distinction Between Inextricably Intertwined Evidence and Other Crimes Evidence Under Rule 404(b)*, 88 NW. U. L. REV. 1582, 1598 (1994) (“Congress intended the court to specify the purposes for which it will use the evidence in order to foster greater admissibility while still guarding against impermissible character uses.”).

delay, waste of time, or needless presentation of cumulative evidence”²⁴ under Rule 403.²⁵

B. Inextricable Intertwinement Doctrine

The inextricable intertwining doctrine is frequently invoked as a basis of admissibility for other bad acts evidence. This judicially-created doctrine allows bad acts evidence to be admitted when it is intertwined with other admissible evidence in such a way that “it helps to complete the story of the crime by filling a conceptual or chronological void”²⁶ or “is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove any element of, the charged crime.”²⁷ The doctrine is premised on the fact that evidence inextricably intertwined with the charged conduct is, by its very nature, not *other* bad acts and therefore, does not implicate Rule 404(b).²⁸ As such, evidence admitted under this doctrine is not subject to the same constraints as evidence under Rule 404(b).²⁹

²⁴ FED. R. EVID. 403.

²⁵ FED. R. EVID. 404(b) Senate Judiciary Committee’s note. (“It is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e., prejudice, confusion or waste of time.”).

²⁶ *See, e.g.*, *United States v. Luster*, 480 F.3d 551, 556–57 (7th Cir. 2007) .

²⁷ *See, e.g.*, *United States v. McLee*, 436 F.3d 751, 760 (7th Cir. 2006); *United States v. Gougis*, 432 F.3d 735, 738 (7th Cir. 2005); *United States v. Ojomo*, 332 D.3d 487, 489 (7th Cir. 2003); *United States v. Senffner*, 280 F.3d 755, 764 (7th Cir. 2002).

²⁸ WRIGHT & GRAHAM, *supra* note 17, § 5239, at 427, 445.

²⁹ *United States v. Conner*, 583 F.3d 1011, 1019 (7th Cir. 2009) (“[E]vidence admitted under this doctrine ‘lie[s] outside the purview of the Rule 404(b) character/propensity prohibition,’ and is not subject to its constraints regarding the manner in which the evidence may be used.”) (citations omitted); *see also infra* notes 229–43 and accompanying text.

1. Development

The inextricable intertwinement exception to the prohibition against other bad acts evidence first emerged as the “inseparable crimes exception.”³⁰ While the court in *People v. Molineux*³¹ readily acknowledged that “the exceptions to the rule [of the inadmissibility of other bad acts evidence’s inadmissibility] cannot be stated with categorical precision,”³² the court clearly recognized an inextricable intertwinement exception.³³ In that case, Ronald Molineux was charged with murder in the first degree for his alleged involvement in the death of Katharine Adams.³⁴ Molineux sent by mail a bottle labeled “Bromo Seltzer” to Adams’s housemate, Harry Cornish; however, instead of containing Bromo Seltzer, the bottle contained cyanide of mercury, a type of poison.³⁵ Cornish innocently administered the contents of the bottle to Adams while attempting to treat a headache of hers, and thus, inadvertently caused her death.³⁶ During the course of the trial, the prosecution presented evidence of Molineux’s alleged involvement with the murder of Henry Barnet, who had died seven weeks earlier.³⁷ Prior to his death, a bottle labeled as “Kutnow powder” had been sent to Barnet through the mail.³⁸ When this bottle was tested after Barnet’s death, it was discovered that rather than containing the indicated Kutnow powder, the bottle actually contained cyanide of mercury.³⁹ This same type of poison had also killed Barnet.⁴⁰ Molineux was not charged with Barnet’s death.⁴¹ The prosecution presented evidence of Barnet’s death in an attempt to

³⁰ Brauser, *supra* note 23, at 1594–95.

³¹ 61 N.E. 286 (N.Y. 1901).

³² *Id.* at 293.

³³ *Id.* at 293, 299–302.

³⁴ *Id.* at 287.

³⁵ *Id.*

³⁶ *Id.* at 287–88.

³⁷ *Id.* at 289–90.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 290.

⁴¹ *Id.* at 286.

prove Molineux's guilt in murdering Adams.⁴² Molineux appealed the resulting conviction to the New York Court of Appeals.⁴³ The court of appeals strongly emphasized the general rule prohibiting the use of any other bad acts evidence.⁴⁴ The court did, however, recognize the existence of a few exceptions to this rule and reasoned that other bad acts evidence may be competent to prove, *inter alia*, "a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others."⁴⁵

Although at first blush, it would appear that the court was recognizing an exception only for other bad acts evidence that demonstrated a common plan or scheme, the court's further development of the exception indicated that it also intended this exception to encompass other bad acts evidence inextricably intertwined with the charged crime. In elaborating upon the exception, the court indicated that the exception is meant to encompass situations in which "two or more crimes are committed by the same person in pursuance of a single design, *or under circumstances which render it impossible to prove one without proving all.*"⁴⁶ Though the court's discussion focused primarily upon the common scheme or plan prong of the exception, it is clear that the notion of inextricably intertwined evidence is separate and distinct. For this exception to apply, "there must be evidence of [a] system between the offense on trial and the one sought to be introduced. They must be connected as parts of a general and composite plan or scheme, *or they must be so related to each other as to show a common motive or intent running through both.*"⁴⁷ The exception is extremely narrow, requiring a connection between the crimes "to have existed both in fact and in the mind of the actor."⁴⁸ If a court is unable to "clearly perceive" the connection, the

⁴² *Id.* at 289.

⁴³ *Id.* at 287.

⁴⁴ *Id.* at 292–93.

⁴⁵ *Id.* at 294.

⁴⁶ *Id.* at 299 (emphasis added).

⁴⁷ *Id.* (emphasis added).

⁴⁸ *Id.*

dangers of admitting such evidence indicate that the “the accused should be given the benefit of the doubt, and the evidence rejected.”⁴⁹

Turning to the facts of the case, the *Molineux* court held that the evidence of Barnett’s death was not inextricably intertwined with Adams’ murder.⁵⁰ Given the entirely unrelated motives for each murder (health club quarrels versus jealousy regarding a female’s affections, respectively) and the length of time between the murders (eight weeks), the court found it “impossible to perceive any legal connection between the two cases.”⁵¹ Although the methods were similar in each murder, “the methods referred to are as identical as any two shootings, stabbings, or assaults, but no more so.”⁵² Without a common plan or any similarities in motive or intent, the admission of the evidence of Barnett’s murder was a “clear error of law” and necessitated reversal of Molineux’s conviction.⁵³

2. Modern Application of the Inextricable Intertwinement Doctrine in the Seventh Circuit

The current state of the inextricable intertwining doctrine is a far cry from the original form pronounced in *Molineux*, which encompassed only “circumstances which render[ed] it impossible to prove one without proving all.”⁵⁴ The Seventh Circuit now considers other crimes evidence to be inextricably intertwined with the charged conduct when: (1) the evidence is so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove any element of the charged crime, (2) the absence of the evidence would create a chronological or conceptual void in the story of the charged crime, or (3) the evidence completes the story of the

⁴⁹ *Id.*

⁵⁰ *Id.* at 301.

⁵¹ *Id.* at 293.

⁵² *Id.* at 301.

⁵³ *Id.* at 311.

⁵⁴ *Id.* at 299.

charged crime.⁵⁵ With the courts' expansion of the doctrine, it has morphed from one of practical necessity—essential to convicting individuals of their charged crimes—to one of convenience.

This transformation has not gone unnoticed. Critics have widely criticized the doctrine as well as the courts' inconsistent and overly broad application of it.⁵⁶ The courts are not entirely to blame, however; the doctrine itself offers little by way of guidance. "Inextricably intertwined," "intricately related," "blended," and "connected," for example, are all nebulous terms, having only relational meaning. "[T]he test creates confusion because, quite simply, no one knows what it means."⁵⁷ It is the "vacuous nature of the test's wording"⁵⁸ that gives rise to the doctrine's criticism, as this is precisely what makes the doctrine dangerous. The doctrine's lack of clarity is "a virtual invitation for abuse."⁵⁹ Even with the best intentions, it may be impossible for a court to accurately and consistently apply the doctrine. However, courts are often condemned as having less than the best intentions, "substitut[ing] a careful analysis with [the doctrine's] boilerplate jargon."⁶⁰ Rather than actually analyzing the necessity of the evidence, courts simply label

⁵⁵ See, e.g., *United States v. Ramirez*, 45 F.3d 1096, 1102 (7th Cir. 1995). "Every circuit now applies some formulation of the inextricably intertwined 'test.'" *United States v. Bowie*, 232 F.3d 923, 927–28 (D.C. Cir. 2000).

⁵⁶ See generally Brauser, *supra* note 23; Milton Hirsch, "This New-Born Babe an Infant Hercules": The Doctrine of "Inextricably Intertwined" Evidence in Florida's Drug Wars, 25 NOVA L. REV. 279 (2000); Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 CATH. U. L. REV. 719 (2010).

⁵⁷ *United States v. Green*, 617 F.3d 233, 246 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 363 (2010).

⁵⁸ Imwinkelried, *supra* note 56, at 729.

⁵⁹ *Id.* at 730; see also Brauser, *supra* note 23, at 1610–11 (describing a case in which the court found that other bad acts evidence set the "tone for the relationship" between the defendant and an undercover agent although the tone of the relationship was clearly not an element of the charged offenses).

⁶⁰ *Green*, 617 F.3d at 246.

the evidence as inextricably intertwined when in fact, the evidence was “anything but inseparable.”⁶¹

a. Evidence “so blended or connected that it incidentally involves, explains the circumstances surrounding, or tends to prove any element of the charged crime”

Uncharged criminal activity arising from the same transaction or transactions as the crime charged is said to incidentally involve the charged crime and as such, is admitted as inextricably intertwined evidence.⁶² In *United States v. Gibson*,⁶³ the defendant was charged with four counts of distributing and possessing crack cocaine with the intent to distribute.⁶⁴ During one of the charged sales, the defendant agreed to sell two handguns to an undercover agent.⁶⁵ Evidence of the potential gun sales was admitted at trial as inextricably intertwined, and the defendant appealed on that basis.⁶⁶ The Seventh Circuit upheld the admission, finding that because the defendant and the undercover agent “were negotiating the sale of crack cocaine and guns *at the same time in the same conversations*,” the evidence was inextricably intertwined.⁶⁷

The Seventh Circuit also considers evidence that explains the circumstances surrounding the charged crime to be inextricably

⁶¹ Imwinkelried, *supra* note 56, at 730.

⁶² *United States v. Gibson*, 170 F.3d 673, 681 (7th Cir. 1999) (“Uncharged criminal activity is admissible under the ‘intricately related’ doctrine if it arises from the same transaction or transactions as the charged crimes.”).

⁶³ *Id.*

⁶⁴ *Id.* at 676.

⁶⁵ *Id.*

⁶⁶ *Id.* at 680.

⁶⁷ *Id.* at 681–82; *see also* *United States v. Parkin*, 917 F.2d 313, 317 (7th Cir. 1990) (holding evidence of conversation about potential cocaine sale that occurred during charged marijuana sale inextricably intertwined); *United States v. Hawkins*, 823 F.2d 1020, 1023 (7th Cir. 1987) (finding evidence that defendant offered to exchange guns for cocaine during charged gun transaction was inextricably intertwined because statements were made during same transaction), *overruled on other grounds by* *United States v. Baldwin*, 60 F.3d 363 (7th Cir.1995).

intertwined. For example, in *United States v. Strong*,⁶⁸ the defendant was charged with being a felon in possession of a firearm and in possession of ammunition.⁶⁹ During his trial, the district court admitted evidence that drugs were sold at the defendant's home partly because it "helped explain why he would possess [the firearm and ammunition]." ⁷⁰ The Seventh Circuit upheld the admission, explaining that evidence of "drug trafficking supplies a motive for having [a] gun . . . [b]ecause weapons are 'tools of the trade' of drug dealers."⁷¹ The court found that evidence of the defendant's involvement in drug trafficking explained the circumstances surrounding his possession of the firearm and ammunition.⁷² In *United States v. Richmond*,⁷³ the defendant was charged with, among other things, conspiracy for making false statements to obtain a firearm.⁷⁴ The Seventh Circuit again held that evidence of the defendant's gang association was inextricably intertwined with the charged conspiracy, as the evidence explained the circumstances surrounding the relationships of the involved individuals.⁷⁵

Furthermore, evidence directly probative of the charged crime is admissible in the Seventh Circuit under the inextricable intertwining doctrine, as it tends to prove an element of the charged crime. For example, in *United States v. Roberts*,⁷⁶ the defendant was charged with conspiracy to commit armed bank robbery, armed bank robbery, use of a firearm in commission of a federal felony, and possession of a firearm after having been convicted of a felony.⁷⁷ Evidence that the defendant was "caught with a dark steel revolver with a brown handle matching the description of the weapon he used only two days earlier to rob [a] Joliet bank [was] directly relevant to

⁶⁸ 485 F.3d 985 (7th Cir. 2007).

⁶⁹ *Id.* at 986.

⁷⁰ *Id.* at 990.

⁷¹ *Id.* (quoting *United States v. Stokes*, 211 F.3d 1039, 1042 (7th Cir. 2000)).

⁷² *Id.*

⁷³ 222 F.3d 414 (7th Cir. 2000).

⁷⁴ *Id.* at 415.

⁷⁵ *Id.* at 416–17.

⁷⁶ 933 F.2d 517 (7th Cir. 1991).

⁷⁷ *Id.* at 517.

the crimes with which he was charged.”⁷⁸ As such, the court considered the evidence to be inextricably intertwined.⁷⁹ Similarly, in *United States v. Muhammad*,⁸⁰ the defendant appealed his conviction for conspiracy to possess with intent to distribute cocaine and possession of ammunition by a felon.⁸¹ Police initially encountered the defendant after being called to the scene of a shooting.⁸² After the defendant fled the scene, the police obtained a search warrant for his home, where they found several boxes of ammunition.⁸³ The defendant challenged admission of testimony regarding the shooting scene as well as the admission of ammunition.⁸⁴ Testimony about the defendant’s presence and flight from the shooting scene was admitted to put his arrest “in context” and formed “at least in part the basis for the indictment on [a charge of which he was acquitted] and for the ammunition possession count.”⁸⁵ As such, “the testimony was ‘directly relevant to the crimes charged.’”⁸⁶ Evidence that the defendant possessed the ammunition for which he was charged with possessing “was direct evidence of the crime for which [he] was indicted.”⁸⁷ The court considered this evidence to be inextricably intertwined and upheld its admission as such.⁸⁸

Although in some situations, the evidence may in fact be inextricably intertwined, the cases discussed above demonstrate the court’s cavalier attitude to actually making that determination. For example, in *United States v. Gibson*,⁸⁹ evidence that the defendant attempted to negotiate the sale of firearms was found to be inextricably intertwined with the four charged counts of distributing

⁷⁸ *Id.* at 520.

⁷⁹ *Id.*

⁸⁰ 928 F.2d 1461 (7th Cir. 1991).

⁸¹ *Id.* at 1463.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1468.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ 170 F.3d 673 (7th Cir. 1999).

and possessing with the intent to distribute cocaine base.⁹⁰ The attempted sale of the firearms was not an element of the charged crime;⁹¹ nor would the jury have been confused by the witness's testimony had evidence of the conversation remained unoffered. Admittedly, evidence of any conversation relating to drugs may have been relevant; however, evidence of an entirely separate topic discussed by happenstance during the charged transactions is as inextricably intertwined with the charged crime as any conversations about the weather that may have taken place during that transaction.⁹² Even a cursory analysis would have revealed that the evidence of the defendant's attempted firearm sale could easily have been extricated without harm to the prosecution's case. Furthermore, it is not necessary to prove the circumstances surrounding a charged crime in order to prove the charged crime itself. By deeming evidence of extraneous circumstances "inextricable," the Seventh Circuit has misinterpreted what "inextricable" actually means.

b. Evidence whose "absence would create a chronological or conceptual void in the story of the crime"

Evidence necessary to avoid a chronological or conceptual void in the story of the crime is also frequently admitted as inextricably intertwined evidence. For example, in *United States v. Adamo*,⁹³ the defendant was convicted of conspiracy to distribute cocaine.⁹⁴ He challenged his conviction based partly on the district court's decision to admit evidence of his personal cocaine use.⁹⁵ During his trial, the prosecution offered testimony that he had purchased and consumed a "sample" of cocaine on the date that the alleged conspiracy began.⁹⁶ The Seventh Circuit affirmed the lower court's ruling, holding that

⁹⁰ *Id.* at 676.

⁹¹ *See* 21 U.S.C. § 841(a)(1) (2006).

⁹² *See Gibson*, 170 F.3d at 676.

⁹³ 882 F.2d 1218 (7th Cir. 1989).

⁹⁴ *Id.* at 1220

⁹⁵ *Id.* at 1234.

⁹⁶ *Id.*

without the evidence, there would have been a “‘chronological and conceptual void’ in the witness[es’] testimony” as they recounted the events of that day.⁹⁷ Similarly, in *United States v. Hattaway*,⁹⁸ evidence of the victim’s boyfriend’s death was admitted in the defendants’ trial for the abduction and holding of the victim.⁹⁹ Evidence of the circumstances of the death implicated the defendant and the victim’s boyfriend in other crimes; this evidence helped the jury understand, for example, why the victim failed to call the authorities, which if absent would have left a chronological and conceptual void in the account of her ordeal.¹⁰⁰ However, as is evident from discussions of these cases, evidence is now deemed to be inextricably intertwined when there is any type of chronological or conceptual void. Admission is no longer reserved for circumstances without which there would be a nonsensical void; rather, admission is now the regular course of action if there is any resulting chronological or conceptual void.

Evidence of a defendant’s role in previous bad acts that constitute necessary preliminary steps in completing the crime charged is also considered inextricably intertwined; without such evidence, there would be a chronological or conceptual void that may confuse the jury. In *United States v. Cox*,¹⁰¹ the court admitted evidence that the defendant had committed credit card fraud as inextricably intertwined with the charged crimes of persuading an individual to cross state lines with the intent to engage in prostitution and with transporting individuals under the age of 18 across state lines to engage in prostitution.¹⁰² The court found that evidence of credit card fraud established that the defendant had sufficient resources to be a “pimp” and proved how he “had the means to pay for the hotel gatherings at which he promoted his prostitution business.”¹⁰³ The court reasoned

⁹⁷ *Id.*

⁹⁸ 740 F.2d 1419 (7th Cir. 1984).

⁹⁹ *Id.* at 1424–25.

¹⁰⁰ *Id.* at 1425.

¹⁰¹ 577 F.3d 833 (7th Cir. 2009).

¹⁰² *Id.* at 834.

¹⁰³ *Id.* at 839.

that without an understanding of the defendant's involvement in that preliminary step, there would have been a chronological and conceptual void in the story of the charged crime.¹⁰⁴

c. Evidence that "completes the story of the crime charged"

Most other bad acts evidence can be said to complete the story of the charged crime; as such, the court often considers this category to overlap with the other categorical bases of admissibility.¹⁰⁵ For example, in *Gibson*,¹⁰⁶ the court explicitly found that "there were at least two bases for admitting the gun evidence."¹⁰⁷ In addition to viewing the evidence as so blended or connected to be inextricably intertwined,¹⁰⁸ the gun evidence "was [also] necessary to provide the jury with the 'complete story'" of the defendant's crimes; negotiations about the gun were so intertwined with the drug sales "that admission of the portions of the taped conversations pertaining to gun sales was necessary to enable the jury to fully understand and make sense of the underlying negotiations for the sale of crack cocaine."¹⁰⁹

Similarly, in *Hattaway*,¹¹⁰ in addition to considering evidence of the victim's boyfriend's death necessary to avoid a chronological or conceptual void,¹¹¹ the evidence also helped complete the story of the victim's ordeal. The evidence of the defendants' role in her boyfriend's death explained why the defendants kidnapped her only to release her

¹⁰⁴ *Id.*

¹⁰⁵ This trend is unsurprising given the court's changing formulations of the inextricable intertwining doctrine; the court now considers the "complete the story" basis of intertwining to be the same as the "chronological or conceptual void" basis, contrary to earlier formulations. *Compare, e.g.,* *United States v. Luster*, 480 F.3d 551, 556–57 (7th Cir. 2007), *with* *United States v. Ramirez*, 45 F.3d 1096, 1102 (7th Cir. 1995).

¹⁰⁶ *United States v. Gibson*, 170 F.3d 673 (7th Cir. 1999).

¹⁰⁷ *Id.* at 681.

¹⁰⁸ *See supra* notes 62–67 and accompanying text.

¹⁰⁹ *Gibson*, 170 F.3d at 682.

¹¹⁰ *United States v. Hattaway*, 740 F.2d 1419, 1424–25 (7th Cir. 1984).

¹¹¹ *See supra* notes 93–100 and accompanying text.

after her boyfriend's body was found.¹¹² However, the court frequently upholds the admission of other bad acts evidence, citing only the "completes the story" basis of intertwinement. For example, in *United States v. Harris*,¹¹³ the Seventh Circuit considered testimony regarding the defendant's "modus operandi for the sale of drugs . . . including the negotiations, the purchase, the transfer of the cocaine, and the use of code language" as necessary to complete the story of the charged crime of distributing cocaine.¹¹⁴ Without this evidence, the jury would have had "a somewhat confusing and incomplete picture."¹¹⁵ However, "all relevant prosecution evidence explains the crime or completes the story."¹¹⁶ Therefore, the court must engage in careful consideration of the evidence's actual inextricableness lest it admit dangerous evidence unnecessarily.

II. THE UNRAVELING OF THE INEXTRICABLE INTERTWINEMENT DOCTRINE

Often, however, the Seventh Circuit is not specific as to why it considers evidence inextricably intertwined. Even in the circumstances in which the court is explicit, there is still significant overlap between the categories, demonstrating, in part, the loose nature of the doctrine. This looseness, as well as courts' seeming difficulty in applying the doctrine, has caused widespread criticism. Like many other jurisdictions attempting to apply the inextricable intertwinement doctrine, the Seventh Circuit seems to have "lost its way."¹¹⁷

¹¹² *Hattaway*, 740 F.2d at 1424–25.

¹¹³ 271 F.3d 690, 705 (7th Cir. 2001).

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *United States v. Bowie*, 232 F.3d 923, 929 (D.C. Cir. 2000).

¹¹⁷ 1 MICHAEL H. GRAHAM, *HANDBOOK OF FEDERAL EVIDENCE* § 404:5, at 709 n.22 (6th ed. 2006).

A. *The Seventh Circuit's Growing Dissatisfaction*

Criticisms of the doctrine have not gone unnoticed, however, at least by the Seventh Circuit. The court has become increasingly vocal in expressing its own concerns regarding the doctrine and serious doubts about the doctrine's continuing viability. The court had occasion to consider two instances of other crimes evidence admitted under the inextricably intertwined doctrine in *United States v. Taylor*.¹¹⁸ Taylor and Hogsett were convicted in separate trials of distributing crack.¹¹⁹ Both appealed their convictions based on the lower courts' admission of other crimes evidence under the inextricable intertwinement doctrine, and the Seventh Circuit consolidated their appeals.¹²⁰ During Taylor's trial, the prosecution presented evidence that Taylor was a known crack dealer, with the arresting officer, among others, testifying.¹²¹ The officer testified that he knew Taylor to be a crack dealer based on knowledge gained "throughout his career as a police officer and as a drug and gang officer."¹²² This testimony implied to the jury that Taylor had a long history of drug and gang activity and thus was the basis of Taylor's appeal.¹²³ The prosecution argued that the testimony was inextricably intertwined with the rest of the officer's testimony; the statement explained why the officer arrested Taylor for the admittedly trivial offense of illegally tinted automobile windows: he knew Taylor's car and knew him to be a crack dealer.¹²⁴ However, the "evidence was at once irrelevant and damaging, as was the officer's testimony about his prior professional knowledge of Taylor. It is not as if the government

¹¹⁸ 522 F.3d 731, 734 (7th Cir. 2008), *cert. denied*, Taylor v. United States, 129 S. Ct. 190 (2008), and *cert. denied*, Hogsett v. United States, 129 S. Ct. 1308 (2009).

¹¹⁹ *Id.* at 732.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 733.

¹²³ *Id.*

¹²⁴ *Id.* at 733–34.

had to try to justify the arrest on the basis not of the traffic offenses but of suspicion that Taylor was a drug dealer.”¹²⁵

Hogsett’s appeal was based on the trial testimony of the passenger in his car at the time of his arrest.¹²⁶ She testified that she and Hogsett were on their way “to hit a lick” when he was arrested and explained that this meant that they were going to sell drugs.¹²⁷ When questioned as to how she knew what “hit a lick” meant, she indicated that she had hit licks with Hogsett in the past.¹²⁸ This last statement indicated that the defendant had a history selling drugs, which was why the defense objected to its admission.¹²⁹ The government argued that this statement was inextricably intertwined with the rest of her testimony, filling a conceptual void and forming “an integral part of the witness’ account of the circumstances surrounding the offenses of which the defendant was indicted.”¹³⁰

In determining the propriety of admitting the statements into evidence, the court expressed two interpretations of the inextricable intertwining doctrine: “evidence ‘intrinsic’ to the charged crime itself, in the sense of being evidence of the crime” or “evidence of another crime [that] may be introduced in order to ‘complete the story’ of the charged crime.”¹³¹ However, “neither formulation is satisfactory: to courts adopting the former, ‘inextricably intertwined evidence is intrinsic, and evidence is intrinsic if it is inextricably intertwined,’ while ‘the ‘complete the story’ definition of ‘inextricably intertwined’ threatens to override Rule 404(b).”¹³² The court found in these two instances that the statements constituted impermissible character evidence, implying to the jury that the defendants were longtime drug offenders and suggesting that they were therefore more likely to have committed the charged drug offenses.¹³³ The police

¹²⁵ *Id.* at 734.

¹²⁶ *Id.* at 735.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 734.

¹³² *Id.* (citing *United States v. Bowie*, 232 F.3d 923, 927–28 (D.C. Cir. 2000)).

¹³³ *Taylor*, 522 F.3d at 735–36.

officer's testimony was "just a way of telling the jury that the officer knew Taylor to have been a drug offender and gang member for a long time and that at the time of the arrest Taylor was a wanted criminal."¹³⁴ The same rationale applied to Hogsett's case.¹³⁵ The court recognized that the inextricable intertwinement doctrine's "vagueness invites prosecutors to expand the exceptions to the rule beyond the proper boundaries of the exceptions."¹³⁶ "A defendant's bad act may be only tangentially related to the charged crime, but it nevertheless could 'complete the story' or 'incidentally involve' the charged offense or 'explain the circumstances.' If the prosecution's evidence did not 'explain' or 'incidentally involve' the charged crime, it is difficult to see how it could pass the minimal requirement for admissibility that evidence be relevant."¹³⁷

This potential for abuse motivated the court to carefully consider whether the evidence could be admissible under any of Rule 404(b)'s exceptions. "Almost all evidence admissible under the 'inextricably interwoven' doctrine is admissible under one of the specific exceptions in Rule 404(b)."¹³⁸ In actively re-directing the evidence to Rule 404(b), the court seemed to be attempting to redirect judges and lawyers to the Rule's exceptions as the primary basis to admit other bad acts evidence. The court essentially re-offered the evidence it deemed inadmissible under the inextricable intertwinement doctrine under Rule 404(b). For example, the court argued that the officer's testimony in Taylor's case could have been offered to demonstrate identity: "the fact that a defendant's buyers had dealt with him previously could explain how they were able to identify him, why they picked him for the controlled buy, and why he was willing to deal with them."¹³⁹ Similarly, the court argued that the passenger's testimony in Hogsett's case could have been offered to show the absence of

¹³⁴ *Id.* at 735.

¹³⁵ *Id.* at 734–35.

¹³⁶ *Id.* at 735.

¹³⁷ *Id.* at 734.

¹³⁸ *Id.* at 735.

¹³⁹ *Id.* at 734.

mistake.¹⁴⁰ The court pointed out that without the explanation of how the passenger knew the meaning of “hit a lick,” the defense could have challenged the accuracy of her understanding for lack of foundation in its closing argument, leaving the prosecution no opportunity to present contrary evidence.¹⁴¹ Therefore, the prosecution could have offered the testimony as a way of demonstrating absence of mistake.¹⁴² Although the court determined that the evidence was improperly admitted under the inextricable intertwinement doctrine, given the overwhelming evidence of guilt at the trials, the errors were deemed harmless.¹⁴³ Given the harmless nature of the errors, the court did not address the impact of the proper alternative bases of admissibility under Rule 404(b); however, its distaste for the inextricable intertwinement doctrine and strong preference for admission under Rule 404(b) was clear.

The court’s strong preference for the use of Rule 404(b) as the basis of admissibility for other bad acts evidence is also evident in *United States v. Conner*.¹⁴⁴ An FBI informant participated in two controlled purchases of crack cocaine.¹⁴⁵ During the first buy on December 20, 2006, the informant called Conner’s co-defendant, Hughes, to request a quarter ounce of crack cocaine.¹⁴⁶ Hughes indicated that although he did not have that amount, he knew someone who did: Conner.¹⁴⁷ Hughes instructed the informant to meet him at Conner’s residence, and there, Conner provided the informant with 5.737 grams of crack cocaine.¹⁴⁸ For the second buy on January 10, 2007, the informant called Conner directly to request the drugs.¹⁴⁹ However, when Conner did not return the informant’s call to provide details of the sale, the informant resorted to contacting Hughes

¹⁴⁰ *Id.* at 735.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 734–35.

¹⁴⁴ 583 F.3d 1011 (7th Cir. 2009).

¹⁴⁵ *Id.* at 1016.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

again.¹⁵⁰ Hughes was able to make contact with Conner, who directed him to another co-defendant, Robison.¹⁵¹ Robison was in possession of some of Conner's crack cocaine supply, from which Conner instructed him to provide the requisite amount to Hughes.¹⁵² Robison met the informant and Hughes at a local drug store and made the exchange.¹⁵³ Conner was not present at this exchange.¹⁵⁴ Conner was charged only for his involvement with the December 20, 2006, buy.¹⁵⁵

During Conner's trial, the government introduced evidence of Conner's involvement with the January 10 buy, as well as evidence of his prior drug-dealing relationships with his co-defendants, Hughes and Robison.¹⁵⁶ Both Hughes and Robison pled guilty and agreed to cooperate with the government, with both testifying against Conner.¹⁵⁷ Hughes testified to his and Conner's long history of selling drugs together and to the specifics of how Conner would prepare the crack cocaine as well as how much money Conner would typically make from these drug sales.¹⁵⁸ Robison testified to his involvement in Conner's operation, serving as a middleman making pickups and deliveries of cocaine.¹⁵⁹ The government argued that this evidence was inextricably intertwined with evidence of the charged crime; it helped provide the jury with a more complete picture, illustrating and providing context for the relationship among the co-defendants as well as indicating that the sale was not an isolated event.¹⁶⁰ The government alternatively argued that the evidence was admissible under Rule 404(b), as it demonstrated knowledge, intent, and a common scheme or plan.¹⁶¹ The district court did not address the

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.* at 1016–17.

¹⁵³ *Id.* at 1017.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1020.

¹⁶¹ *Id.* at 1017.

evidence's admissibility under Rule 404(b) and opted instead to admit the evidence under the inextricable intertwinement doctrine.¹⁶²

On appeal, the Seventh Circuit held that the evidence was inadmissible under the inextricable intertwinement doctrine.¹⁶³ As Conner was charged only with distribution, the jury did not need to understand the relationship among the co-defendants or the circumstances surrounding the January 10 buy.¹⁶⁴ Neither evidence of Conner's relationship with his co-defendants nor his involvement in the January 10 sale was "necessary to complete the story of the single [distribution] on trial. Nor was it needed to avoid a conceptual or chronological void in the story of the [charged distribution]."¹⁶⁵ Therefore, admission under the inextricable intertwinement doctrine was inappropriate.¹⁶⁶ The court again emphasized the potential for abuse of the doctrine and its strong preference for the use of Rule 404(b).¹⁶⁷

However, the court acknowledged that the doctrines, at least in theory, have distinct purposes.¹⁶⁸ Evidence rightfully admitted under the inextricable intertwinement doctrine does not fall within the meaning of 'other acts' contemplated by Rule 404(b).¹⁶⁹ "[E]vidence concerning the chronological unfolding of events that led to an indictment, or other circumstances surrounding the crime, is not evidence of 'other acts' within the meaning of [Rule] 404(b)."¹⁷⁰ As the evidence in Conner's case related to "separate transactions that took place at separate times . . . [this evidence] . . . falls squarely within the types of 'other acts' contemplated by Rule 404(b)."¹⁷¹ After a brief explanation of Rule 404(b)'s exceptions, the court found that

¹⁶² *Id.*

¹⁶³ *Id.* at 1020.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 1020–21 (quoting *United States v. Simpson*, 479 F.3d 492, 501 (7th Cir. 2007)).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1020.

¹⁶⁸ *Id.* at 1021.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (quoting *United States v. Ramirez*, 45 F.3d 1096, 1102 (7th Cir. 1995)).

¹⁷¹ *Id.*

evidence of Conner's prior drug relationship with his co-defendants and his involvement with the January 10 sale were relevant to prove absence of mistake, knowledge, and intent.¹⁷²

In so holding, the *Conner* court seemed to be reconsidering the position developed in *Taylor*. By recognizing the distinct purposes that the doctrines are meant to serve and attempting to classify the evidence accordingly, the court indicated that there are situations in which inextricably intertwined evidence will not be admissible under Rule 404(b). While the *Taylor* court recognized this possibility,¹⁷³ its focus was on the overlap between the two doctrines as bases of admissibility rather than the differences.¹⁷⁴ The *Conner* court seemed to be offering the inextricable intertwinement doctrine another chance at life, provided that attorneys arguing for evidence's admissibility under the doctrine and lower court judges realize the potential dangers of recklessly invoking the doctrine and follow the Seventh Circuit's guidance to begin using the doctrine in a safe and responsible manner.¹⁷⁵

B. The End of the Inextricable Intertwinement Doctrine in the Seventh Circuit

However, in July 2010, the Seventh Circuit put the final nail in the doctrine's proverbial coffin.¹⁷⁶ The court explicitly abolished this theory of admissibility for other bad acts evidence in *United States v. Gorman*,¹⁷⁷ overturning a long history of allowing evidence to be admitted under this doctrine.

The *Gorman* case came before the court on appeal from the Southern District of Indiana.¹⁷⁸ Defendant Jamarkus Gorman had been

¹⁷² *Id.* at 1021–22.

¹⁷³ *See* *United States v. Taylor* 522 F.3d 731, 734–36 (7th Cir. 2008).

¹⁷⁴ *Id.* at 735 (“Almost all evidence admissible under the ‘inextricably interwoven’ doctrine is admissible under one of the specific exceptions in Rule 404(b), or under the judge-made ‘no confusion’ exception . . .”).

¹⁷⁵ *Conner*, 583 F.3d at 1024–25.

¹⁷⁶ *See* *United States v. Gorman*, 613 F.3d 711 (7th Cir. 2010).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 711–12.

convicted of perjury after giving false testimony before a grand jury in violation of 18 U.S.C. § 1623.¹⁷⁹ In the course of investigating Gorman's cousin for drug trafficking, federal agents obtained and executed a search warrant for Gorman's home, intending to seize a Bentley automobile they believed had been obtained by the proceeds of the cousin's illegal drug trafficking activities.¹⁸⁰ The agents informed Gorman of their intentions, whereupon he indicated that he was unaware of any such Bentley.¹⁸¹ Gorman escorted the agents to the building's garage and indicated parking spots 20 and 22 as his assigned parking spots.¹⁸² These parking spots were vacant, and the agents' investigation concluded without recovery of the Bentley.¹⁸³

Despite his assignment to these parking spots, Gorman actually used parking spots 31A and B, in which the Bentley was parked.¹⁸⁴ These parking spaces, and thus the Bentley, were not visible from the parking spots that Gorman showed the agents.¹⁸⁵ Following the agents' departure, Gorman enlisted several unscrupulous individuals to assist him in removing the Bentley from the building's parking garage altogether.¹⁸⁶ Upon Gorman's instruction and direction, these individuals removed the Bentley by greasing the floor with oil to allow the Bentley's tires to slide and loading the automobile into the bed of a flatbed tow truck.¹⁸⁷ At the automobile shop to which the individuals had towed the Bentley, the men broke into the car by cutting the soft top and by prying open the trunk to remove bags of money.¹⁸⁸ The car was subsequently abandoned and found shortly thereafter by the investigating agents.¹⁸⁹

¹⁷⁹ *Id.* at 713; *see* 18 U.S.C. § 1623 (2006).

¹⁸⁰ *Gorman*, 613 F.3d at 713.

¹⁸¹ *Id.*

¹⁸² *Id.* at 713–14.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 714.

¹⁸⁵ *Id.* at 713–14.

¹⁸⁶ *Id.* at 714.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

It was during the investigation of yet another alleged illegal activity perpetrated by his cousin that Gorman was called to testify before the grand jury.¹⁹⁰ He was questioned about the Bentley, and it was his remarks on this subject that gave rise to the perjury case against him.¹⁹¹ The testimony was as follows:

Grand Juror: Mr. Gorman, did you have a Bentley in your garage at Lion's Gate [his residence searched by the federal agents]?

Jamarkus: No.

Grand Juror: Ever?

Jamarkus: No, never.¹⁹²

Prior to the trial, the government notified Gorman of its intention to introduce evidence of his involvement in an uncharged conspiracy to obstruct justice by concealing evidence from federal officers in violation of 18 U.S.C. § 1512(c)¹⁹³—namely, evidence of Gorman's involvement with the storage and subsequent theft of the Bentley.¹⁹⁴ Objecting to the use of such evidence, the defense filed a motion in limine seeking to suppress the evidence as impermissible other bad acts evidence under 404(b).¹⁹⁵ The defense argued that the evidence tended to prove only Gorman's propensity to commit perjury by subjecting him to the risk that the jury would “assume that anyone who would commit such a theft would have a propensity to commit the somewhat less extravagant perjury that was charged.”¹⁹⁶ The

¹⁹⁰ *Id.* at 714–15.

¹⁹¹ *Id.* at 715.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Brief and Required Combined Appendix of Defendant-Appellant Jamarkus Gorman at 8, *United States v. Gorman*, 613 F.3d 711 (7th Cir. 2010) (No. 09-3010).

government argued for the admissibility of the evidence, claiming that the evidence of the storage and theft “provide[d] an explanation of why [Gorman] would make the charged false declaration,” filling “what would otherwise be a gaping conceptual void.”¹⁹⁷ The district court admitted this evidence under the inextricable intertwinement doctrine, finding that the evidence was “inextricably intertwined to [sic] the fact of the perjury . . . and provides an explanation to the jury to understand why the defendant would . . . provide the false statement.”¹⁹⁸ The district court thus included the evidence of Gorman’s involvement with the Bentley as evidence of his motivation to commit perjury.¹⁹⁹ The jury convicted Gorman of perjury and sentenced him to thirty-six months of imprisonment.²⁰⁰

Gorman appealed his conviction to the United States Court of Appeals for the Seventh Circuit based on, *inter alia*, the admission of the evidence relating to his involvement in the storage and theft of the Bentley.²⁰¹ A district court’s evidentiary rulings are reviewed under an abuse of discretion standard.²⁰² The appellate court gives special deference to the trial court’s rulings and should reverse only where the record contains no evidence on which the district court judge could have rationally based his or her evidentiary ruling.²⁰³ In determining whether the district court improperly admitted the evidence, the Seventh Circuit reviewed the three general bases of admissibility of

¹⁹⁷ Brief of the Plaintiff-Appellee United States of America at 33, *United States v. Gorman*, 613 F.3d 711 (7th Cir. 2010) (No. 09-3010).

¹⁹⁸ Brief and Required Combined Appendix of Defendant-Appellant Jamarkus Gorman, *supra* note 196, at 18.

¹⁹⁹ The district court found that “to include the facts as alleged that it had to do with retrieving or claiming the money that was stashed in the automobile, and that it was allegedly drug proceeds, are also relevant facts, and the prejudicial value of which does not outweigh the probative value in this case because they are inextricably intertwined to [sic] the fact of the perjury, and that is alleged in the indictment, and provides an explanation to the jury to understand why the defendant would, if the Government can prove that he did, provide the false statement” Brief of the Plaintiff-Appellee United States of America, *supra* note 197, at 16.

²⁰⁰ *Gorman*, 613 F.3d at 715.

²⁰¹ *Id.*

²⁰² *United States v. Joseph*, 310 F.3d 975, 978 (7th Cir. 2002).

²⁰³ *United States v. Conley*, 291 F.3d 464, 472 (7th Cir. 2002).

other bad acts evidence: (1) direct evidence, (2) Rule 404(b)'s "other bad acts" evidence, and (3) inextricably intertwined or intricately related evidence.²⁰⁴ Evidence of Gorman's involvement in the uncharged conspiracy was admitted as inextricably intertwined evidence;²⁰⁵ accordingly, the court should review the evidence in light of that doctrine. However, the court did not address whether the evidence was properly admitted as inextricably intertwined evidence.²⁰⁶ The standard of review is such that if the record reflects any rational basis for the district court's admission of the evidence, the district court's finding will be affirmed.²⁰⁷ "Under an abuse of discretion standard of review, as long as the admission was proper, the fact that the rationale for admission may have been blurred matters little."²⁰⁸ The court indicated that, "any confusion of the proper channel of admissibility is insignificant to that ultimate outcome."²⁰⁹ Given that Gorman was charged with perjury based on his denial of ever having the Bentley, the court believed that the evidence that he actually did have the Bentley was direct evidence of the charged crime.²¹⁰ Therefore, the evidence would have been properly admitted as direct evidence; the fact that it was admitted as inextricable intertwinement evidence "is insignificant to th[e] ultimate outcome."²¹¹

Although the court did not address whether the evidence of Gorman's involvement in the uncharged conspiracy was inextricably intertwined with the charged perjury, the court did address the inextricable intertwinement doctrine in great detail. Having "recently cast doubt on the continuing viability of the inextricable intertwinement doctrine,"²¹² the court now moved to completely

²⁰⁴ *Gorman*, 613 F.3d at 717–18.

²⁰⁵ *Id.* at 715.

²⁰⁶ *Id.* at 717–20.

²⁰⁷ *Id.* at 717, 719.

²⁰⁸ *Id.* at 719 (citing *Conley*, 291 F.3d at 472).

²⁰⁹ *Gorman*, 613 F.3d at 719.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 718; see also *United States v. Conner*, 583 F.3d 1011 (7th Cir. 2009); *United States v. Taylor* 522 F.3d 731, 734–36 (7th Cir. 2008).

abolish the doctrine, believing it to have “outlived its usefulness.”²¹³ Having earlier surveyed the three bases of admissibility of other bad acts evidence, the court discussed the relationship among the three doctrines and concluded that there is no further need for the inextricably intertwined doctrine.²¹⁴ Either other bad acts evidence is direct evidence, in which case it is always admissible, constrained only by Rule 403, or it is propensity evidence, in which case it is constrained by Rule 404(b) and Rule 403.²¹⁵ The court found that “almost all evidence admitted under this [inextricable intertwining] doctrine is also admissible under Rule 404(b).”²¹⁶ For example, in this case, had the evidence not been direct evidence, it would have been admissible under Rule 404(b) as indicative of motive. As such, “there is often no need to spread the fog of inextricably intertwined over it.”²¹⁷ The court found that the inextricable intertwining doctrine has become “overused, vague, and quite unhelpful.”²¹⁸ Given the doctrine’s confusing nature and the court’s belief in its redundancy in light of other doctrines, the court concluded that “[h]enceforth, resort to inextricable intertwining is unavailable when determining a theory of admissibility.”²¹⁹

C. Analysis

The Seventh Circuit believed that “almost all evidence admitted under [the inextricable intertwining] doctrine is also admissible under Rule 404(b).”²²⁰ This means one of two things: (1) either the court is merging the doctrine with Rule 404(b) and in effect, indicating its position that Rule 404(b) is a rule of inclusion rather than one of exclusion, or (2) the court is eradicating bases of admissibility

²¹³ *Gorman*, 613 F.3d at 719.

²¹⁴ *Id.* at 718–19.

²¹⁵ *Id.* at 718.

²¹⁶ *Id.* (quoting *Conner*, 583 F.3d at 1019).

²¹⁷ *Gorman*, 613 F.3d at 718 (quoting *Conner*, 583 F.3d at 1019) (internal quotation marks omitted).

²¹⁸ *Id.* at 719.

²¹⁹ *Id.*

²²⁰ *Id.* at 718 (citing *Conner*, 583 F.3d at 1019).

previously covered by the inextricable intertwinement doctrine, such as ‘explains the circumstances’ if there is not a corresponding exception under Rule 404(b). Either way, the court has taken important and necessary steps to safeguard defendants’ rights. 1. Rule 404(b) as Inclusive or Exclusive

There has been substantial debate regarding whether Rule 404(b)’s list of exceptions was meant to be exhaustive, and thus whether Rule 404(b) was meant to be an inclusive or exclusive rule. Many courts view the Rule’s language of “such as” as indicative of Congress’s intent that the list be non-exhaustive, i.e., that other bad acts evidence be admissible for purposes other than those specifically articulated by the Rule.²²¹ Based on this language, courts admit other bad acts evidence for purposes not specifically articulated by Rule 404(b).²²²

However, a careful examination of Rule 404(b)’s legislative history indicates that this may not have been Congress’ intent, and by imputing such an intent, the courts have created a plethora of “overused, vague, and quite unhelpful”²²³ overlapping doctrines of admissibility. As originally submitted to Congress, Rule 404(b) read:

²²¹ See *United States v. Taylor*, 522 F.3d 731, 736 (7th Cir. 2008) (citing *Huddleston v. United States*, 485 U.S. 681, 687–89) (“The aim of the rule is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person.”); *Udemba v. Nicoli*, 237 F.3d 8, 15 (1st Cir. 2001) (“[W]e reject the appellant’s concept that Rule 404(b) contains a comprehensive list of all the ways in which evidence of other bad acts may be specially relevant. Although the text of that rule enumerates some of the purposes for which such evidence may be admitted (e.g., to show ‘motive’ or ‘intent’), that list is not exhaustive.”); *United States v. Fields*, 871 F.2d 188, 196 (1st Cir. 1989) (“[Rule 404(b)’s] list is not exhaustive . . . ‘for the range of relevancy outside the ban is almost infinite; and further, . . . the purposes are not mutually exclusive for the particular line of proof may fall within several of them.’”) (citing CHARLES MCCORMICK, EVIDENCE § 190 at 448 (Cleary ed. 1972)).

²²² See, e.g., *United States v. Cruz-Garcia*, 344 F.3d 951, 955 (9th Cir. 2003) (admitting other bad acts evidence to refute defense’s assertions defendant was too unsophisticated to have committed charged crime).

²²³ *Gorman*, 613 F.3d at 719.

Evidence of other bad acts, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *This subdivision does not exclude the evidence* when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.²²⁴

The House of Representatives Committee on the Judiciary amended the second sentence of the Rule to read “*It may, however, be admissible* for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”²²⁵ The House believed that this formulation of the Rule placed greater emphasis on admissibility.²²⁶ However, this does not indicate that the House intended to change the scope of the Rule. Placing greater emphasis on admissibility is not the same thing as changing the scope of admissibility. Congress simply changed the sentence from a negative statement to a positive one, which does not necessarily reflect any substantive changes in the statement’s meaning. Although there may not be any decisive evidence of Congress’ intended scope for Rule 404(b), in effect, the scope of the Rule could be precisely what the Seventh Circuit decided in *Gorman*.²²⁷ By re-directing all evidence previously understood as inextricably intertwined to be admitted under Rule 404(b), the court may have subtly indicated its position that Rule 404(b) is to be applied as a rule of inclusion.²²⁸ Admission under Rule 404(b) requires many safety precautions for defendants not taken when the inextricable intertwining doctrine is invoked. By viewing the Rule as inclusive, the court may be merging the inextricable intertwining doctrine with Rule 404(b); this allows the court to provide necessary protection

²²⁴ Fed. Rules of Evidence Notes of Advisory Committee on Rule, Notes to Rule 404 (Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932; Mar. 2, 1987, eff. Oct. 1, 1987) (Amended Dec. 1, 1991) (emphasis added).

²²⁵ H.R. REP. NO. 93-650 (1974) (emphasis added).

²²⁶ *Id.*

²²⁷ See 613 F.3d 711.

²²⁸ See *id.* at 718–19.

to defendants' rights by subjecting the evidence to the Rule's precautions without the court having to worry that necessary prosecutorial evidence will systemically go unadmitted as a result of the inextricable intertwinement doctrine's abolition.

2. Providing More Protection to Defendants

Prior to the court's ruling in *Gorman*, by simply labeling evidence as "inextricably intertwined," courts could avoid examining the evidence's applicability of evidence under Rule 404(b). For example, to admit other bad acts evidence under Rule 404(b), the Seventh Circuit stated that the court must determine if:

(1) the evidence is directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged, (2) the evidence shows that the other act is similar enough and close enough in time to be relevant to the matter in issue, (3) the evidence is sufficient to support a jury finding that the defendant committed the similar act, and (4) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.²²⁹

In failing to examine the admissibility of evidence under Rule 404(b), courts turn a "blind eye to the danger of admitting prejudicial [other bad acts] evidence."²³⁰ Evidence admitted under Rule 404(b) entails a variety of precautionary steps, such as requiring notice to the defendant, requiring the non-propensity purpose to be specifically articulated, and requiring a corresponding limiting instruction.²³¹ All of these precautions are designed to protect the defendant from what is known to be extremely prejudicial evidence.²³² Although evidence admitted as inextricably intertwined is subject to Rule 403's balancing

²²⁹ United States v. McAnderson, 914 F.2d 934, 945 (7th Cir. 1990).

²³⁰ Imwinkelried, *supra* note 56, at 730; *see also supra* text accompanying notes 13–18.

²³¹ FED. R. EVID. 404 advisory committee's note.

²³² *See supra* notes 12–18 and accompanying text.

test,²³³ the evidence is not subject to any other constraints.²³⁴ This is presumably because evidence historically admitted under this doctrine was not offered to prove anything. Inextricably intertwined evidence was not meant to be substantively considered; rather, the evidence was simply necessary to maintain cohesion in the prosecution's case.²³⁵ Therefore, precautions ensuring that the evidence would be non-prejudicial did not develop. To use inextricably intertwined evidence, the government does not have to prove that the defendant actually committed the other bad acts;²³⁶ in contrast, many jurisdictions require the government to prove to some standard that the defendant actually committed the other bad acts in question.²³⁷ Furthermore, neither the prosecution nor the judge must specify "why he or she believes that the deletion of the references will impair the narrative integrity of the prosecution's account of the charged offense;"²³⁸ for example, although it may be argued that without the evidence, there will be a chronological or conceptual void in the evidence, neither is required to identify what that void may be.²³⁹ Although some jurisdictions do provide a limiting instruction for inextricably intertwined evidence,

²³³ FED. R. EVID. 403; *see also, e.g.*, *United States v. Strong*, 485 F.3d 985, 990–91 (7th Cir. 2007) ("Even inextricably intertwined evidence must withstand scrutiny under Federal Rule of Evidence 403, which allows a district court to exclude relevant evidence if its prejudicial impact substantially outweighs its probative value.").

²³⁴ *See United States v. Senffner*, 280 F.3d 755, 763–64 (7th Cir. 2002). "[S]o long as those [inextricably intertwined] acts meet the requirements of Rule 403, they may be admitted in evidence at trial." *Id.* at 764.

²³⁵ *See People v. Molineux*, 61 N.E. 286 (N.Y. 1901).

²³⁶ *See, e.g.*, Jennifer Y. Schuster, *Uncharged Misconduct Under Rule 404(b): The Admissibility of Inextricably Intertwined Evidence*, 42 U. MIAMI L. REV. 947, 961, 971–72. "As the courts began to articulate preadmission requirements for Rule 404(b) evidence, particularly the clear and convincing standard of proof prior to admission, the courts were reluctant to subject [inextricably intertwined] evidence to these requirements, because to do so would put too great a burden upon the government." *Id.* at 971.

²³⁷ *See generally Huddleston v. United States*, 485 U.S. 681 (1988).

²³⁸ *Imwinkelried, supra* note 56, at 731.

²³⁹ *Id.* at 741.

guiding the jury away from impermissible character inferences,²⁴⁰ there is a “marked judicial trend” towards not providing such an instruction.²⁴¹ Furthermore, whereas evidence admitted under Rule 404(b) may be used only to demonstrate the element for which it was offered,²⁴² “treating evidence as inextricably intertwined . . . also carries the implicit finding that the evidence is admissible for all purposes notwithstanding its bearing on character, thus eliminating the defense’s entitlement, upon request, to a jury instruction.”²⁴³

CONCLUSION

By abolishing the doctrine of inextricable intertwinem as a basis for other bad acts evidence in *Gorman*,²⁴⁴ the Seventh Circuit not only afforded desperately needed protections to defendants but also eased a substantial burden on the judicial system. As previously applied, the doctrine threatened defendants’ rights to a fair trial, too easily allowing impermissible character evidence to be admitted because it was inextricably intertwined with evidence necessary to prove the charged crime.²⁴⁵ Therefore, if the court had continued to use this doctrine, to adequately protect defendants, it would have been necessary to overhaul the doctrine, clearly delineating what evidence is and is not admissible under it, as this is currently unclear.²⁴⁶ This task has plagued courts for more than 100 years;²⁴⁷ however, even if the court found its way through the fog, continuing to use the doctrine would require detailed analyses of the facts of each case and a detailed construction and evaluation of each parties’ arguments to determine exactly what evidence is inextricably intertwined. Not only would this further stress an already extremely over-worked judiciary, but it also

²⁴⁰ *Id.* at 731.

²⁴¹ *Id.* at 742.

²⁴² *See supra* note 23 and accompanying text.

²⁴³ *United States v. Bowie*, 232 F.3d 923, 928 (D.C. Cir. 2000).
²⁴⁴ 613 F.3d 711 (7th Cir. 2010).

²⁴⁵ *See supra* notes 53–58 and accompanying text.

²⁴⁶ *Id.*

²⁴⁷ *See People v. Molineux*, 61 N.E. 286, 294 (N.Y. 1901).

interferes with the parties' rights to construct their case as they so choose and potentially affects the court's impartiality. This area of the law is contentious enough, with Rule 404(b) being the most litigated Rule in the Federal Rules of Evidence.²⁴⁸ Compounding the complexities of this Rule by continuing to have a vague and misused doctrine was wasteful of the judiciary's already scarce time and dangerous for defendants. By abolishing the doctrine of inextricable intertwinement and having one less basis of admissibility for other bad acts evidence, the court has given defendants and the judiciary in general so much more.

²⁴⁸ MCCORMICK, *supra* note 11, at 327 n.2. (noting that Rule 404(b) cases were as abundant "as the sands of the sea").