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Pimps, Priors, and Propensity

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Sex trafficking is the “fastest-growing business of organized crime” and “the third-largest criminal enterprise in the world,” with the number of cases in the United States steadily increasing over the last two decades. In fact, sex trafficking recently took center stage when rap singer and music producer Sean “Diddy” Combs was arrested and charged, in part, with sex trafficking. Relevant to this Article, the lawyers for both sides brought forth motions challenging the admissibility of character evidence under both Federal Rule of Evidence 404(b) and 413.

In the context of sex trafficking, this Article builds on the existing scholarship analyzing character evidence, particularly Rule 404(b). Notably, sex trafficking often follows a typical framework, which this Article lays out in three parts: Victim Selection, the Grooming Process, and the Method of Operation. These parts also contribute to complex dynamics between the offender and the victim, which greatly impact the investigation and prosecution of these cases. Importantly, as this Article sets forth, courts do not appear to be uniformly aware of this framework, particularly when evaluating character evidence. Thus, this Article sets forth a sex trafficking framework to be used by courts, lawyers, and lawmakers, which will result in improved consistency and predictability when evaluating the admissibility of character evidence.

Additionally, this Article also aims to start the controversial conversation of whether propensity evidence should be admissible in sex trafficking cases, such as by expanding Rules 413, 414, and 415 (“the propensity rules”). While additional contributions are necessary to answer this question, this Article lays the initial foundation by setting forth the scholarly debate surrounding propensity evidence, focusing on the important concerns that propensity evidence inherently possesses, balanced against recent studies relying on forensic psychology theory suggesting its evidentiary value in sex trafficking cases.

ARTICLE CONTENTS

INTRODUCTION	518
I. SEX TRAFFICKING	521
A. THE TRAFFICKING VICTIMS’ PROTECTION ACT	522
B. HOW SEX TRAFFICKING UNFOLDS: VICTIM VULNERABILITIES, THE “GROOMING PROCESS,” AND THE METHOD OF OPERATION.....	524
C. THE REALITIES OF SEX TRAFFICKING EVIDENCE, INVESTIGATIONS, AND PROSECUTIONS	528
II. CHARACTER EVIDENCE—RULE 404(B) & THE PROPENSITY RULES.....	530
A. RULE 404(B).....	532
B. THE PROPENSITY RULES: 413, 414, AND 415	533
C. THE BALANCING TEST UNDER RULE 403	538
III. A PROPOSED SEX TRAFFICKING FRAMEWORK FOR APPLICATION UNDER RULES 404(B) AND 403.....	540
A. SIMILARITIES AND DIFFERENCES BETWEEN THE CHARGED ACT AND PRIOR ACTS.....	541
B. THE NEED FOR THE OTHER ACT EVIDENCE	545
IV. A CONVERSATION STARTER—PROPENSITY EVIDENCE & SEX TRAFFICKING.....	547
A. DOES SEX TRAFFICKING FIT TEXTUALLY INTO THE PROPENSITY RULE?	547
B. THE OPPOSITION AND RELEVANT CONCERNS.....	549
C. THE SUPPORTING PSYCHOLOGY OF PROPENSITY	552
D. SUGGESTED NEXT STEPS.....	557
CONCLUSION.....	557



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INTRODUCTION

Sex trafficking is the “third-largest criminal enterprise in the world” and “the fastest-growing business of organized crime.”¹ Often referred to as “modern slavery,”² the number of cases of sex trafficking in the United States has been steadily increasing over the last two decades.³ While the statistics vary, estimates suggest that there are over six million victims of sex trafficking worldwide.⁴

In fact, sex trafficking recently took center stage when rap singer and music producer Sean “Diddy” Combs was arrested and charged, in part, with sex trafficking.⁵ Leading up to trial, the lawyers for both sides brought forth

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¹ Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, 80 FBI L. ENF'T BULL. 1, 2 (2011).

² See 22 U.S.C. § 7101(b)(1) (“Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today.”). *But see* Denise Brennan, *Fighting Human Trafficking Today: Moral Panics, Zombie Data, and the Seduction of Rescue*, 52 WAKE FOREST L. REV. 477, 485–86 (2017) (“When trafficked persons are equated with modern-day slaves, when only their victimhood is highlighted through a kind of voyeuristic catalogue of abuse, then any and all actions to help them seem justified . . . [which] has had disastrous and violent results for sex workers.”).

³ *Cases with Adult and Minor Victims by District*, HUM. TRAFFICKING INST., <https://data.traffickinginstitute.org/cases-with-adult-and-minor-victims-by-district> (last visited Sept. 18, 2025) (providing data showing an increase in federal sex trafficking cases from 2000 to 2023); *see also* Blanche Bong Cook, *A Primer to Combat Sex Trafficking*, 47 AM. J. TRIAL ADVOC. 299, 301 (2024) (referring to the problem as “The Pandemic That Is Sex Trafficking”); Cheryl Nelson Butler, *Bridge Over Troubled Water: Safe Harbor Laws for Sexually Exploited Minors*, 93 N.C. L. REV. 1281, 1282 (2015) (describing sex trafficking of children in the United States as a “national crisis and growing epidemic”); John Elrod, Note, *Filling the Gap: Refining Sex Trafficking Legislation to Address the Problem of Pimping*, 68 VAND. L. REV. 961, 963 (2015) (“While the precise number of human trafficking victims in the United States is difficult to quantify, it is nonetheless clear that trafficking is a significant domestic issue because of both its prevalence in the United States and its heinous nature.”).

⁴ INT’L LABOUR ORG., WALK FREE & INT’L ORG. FOR MIGRATION, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 45 (2022) (estimating that “a total of 6.3 million people are in situations of forced commercial sexual exploitation on any given day”); *see also* S. Res. 340, 113th Cong. (2014) (noting an FBI report estimates that between 200,000 and 300,000 children in the United States are at risk of becoming victims of sex trafficking).

⁵ *See generally* Sealed Indictment, *United States v. Combs*, No. 24-CR-542, 2024 WL 4719584 (S.D.N.Y. Nov. 8, 2024) (charging Sean Combs with sex trafficking by force, fraud, or coercion). While

motions and oppositions challenging the admissibility of character evidence under both Federal Rule of Evidence (“FRE”) 404(b), which governs the admission of prior “bad acts” for a non-propensity purpose, and FRE 413, which governs admission of other acts of sexual assault to show a propensity to commit the charged sexual assault.⁶

This Article contributes to the existing scholarship on each of these Rules in the context of sex trafficking cases. Sex trafficking cases involve many “psychological complexities,” which this Article uses to refer to the psychological tactics used by sex traffickers and the resulting psychological impact on their victims. However, this Article argues that many courts are not adequately informed about these complexities in sex trafficking, which impacts their ability to make consistent and predictable evidentiary rulings on character evidence.

Character evidence has always been a popular topic amongst scholars, particularly Rule 404(b).⁷ A primary criticism, which this Article seeks to address in sex trafficking cases, focuses on courts’ inconsistent and unpredictable application of the Rule.⁸ Judges appear to transform, stretch, and bend the Rule as necessary.⁹ Sometimes, these concerns arise in the

Combs was convicted of two prostitution-related charges, the jury found him not guilty on the sex trafficking and racketeering charges. *Jury In Sean ‘Diddy’ Combs Trial Reaches Verdict on All Counts*, CNN, <https://www.cnn.com/2025/07/02/entertainment/video/diddy-trial-jury-verdict-digvid> (last visited Sept. 18, 2025).

⁶ See, e.g., *Defendant Sean Combs’s Motion to Exclude Rule 413 and 404(b) Evidence*, United States v. Combs, No. 24-CR-542, 2025 WL 1127915 (S.D.N.Y. Apr. 7, 2025) (arguing that evidence of past allegations of domestic abuse against the defendant is not admissible under Rule 413 or 404(b)); *Defendant Sean Combs’s Motion in Limine to Exclude 404(b) Evidence*, United States v. Combs, No. 24-CR-542, 2025 WL 1309533 (S.D.N.Y. Apr. 2, 2025).

⁷ See Kevin L. Winiarski, *Yet Another Problem with Rule 404(b)? Why the Advisory Committee Should Codify a Higher Initial Burden for Prior Acts Evidence*, 63 B.C. L. REV. 2781, 2783 (2022) (commenting that Rule 404(b) is “one of the most cited Rules in federal court decisions,” and that “[s]cholars have also heavily criticized the idiosyncrasies of these rules”).

⁸ Gillian R. Chadwick, *Reorienting the Rules of Evidence*, 39 CARDOZO L. REV. 2115, 2159 (2018) (describing Rule 404 as “illogically founded and inconsistently applied”); see generally Deborah L. Rhode, *Moral Character: The Personal and the Political*, 20 LOY. U. CHI. L.J. 1, 9 (1988) (“Existing definitions of character are circular, conclusory, or both.”); Lisa Marshall, Note, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1065 (2005) (discussing the judiciary’s failure to abide by Rule 404’s character evidence ban in the context of employment discrimination cases); Jessica Murphy, *Swiss Cheese That’s All Hole: How Using Reading Material to Prove Criminal Intent Threatens the Propensity Rule*, 83 WASH. L. REV. 317, 320–21, 327–29 (2008) (discussing a circuit split in the admissibility of reading material).

⁹ See Anna Offit, *The Character of Jury Exclusion*, 106 MINN. L. REV. 2173, 2179–80 (2022) (detailing that the rule is “not uniformly applied across cases” and “is malleable and complex”); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57, 62 (1995) (“[M]anipulation and expansion of the Rule 404(b) theories of logical relevance amply demonstrate this judicial ambivalence toward prohibition of character evidence.”). Recently, evidence scholars proposed that judges are oftentimes not misapplying Rule 404, and other rules of evidence, but instead, “bending the rules of evidence to ensure the admission of essential evidence.” Edward K. Cheng, G. Alexander Nunn & Julia Simon-Kerr, *Bending the Rules of Evidence*, 118 Nw. U. L. REV. 295, 299 (2023) (emphasis in original). Notably, these scholars suggest that creating exceptions could help address the amount of rule bending that occurs by judges. *Id.* at 309. While maintaining their opposition to these rules, they do acknowledge that Rules 413 and 414 help limit the rule bending that occurs in these types of cases. *Id.*

context of how courts apply the non-propensity “permitted uses” of 404(b).¹⁰ Moreover, these criticisms are further amplified under Rule 403, which determines whether otherwise relevant evidence should be excluded by weighing its probative value against the risk of unfair prejudice.¹¹

As such, this Article’s first contribution seeks to address the noted concerns of unpredictability and inconsistency in the context of sex trafficking evidentiary rulings under Rule 404(b). Notably, the crime of sex trafficking often follows a typical framework, which this Article lays out in three parts: Victim Selection, the Grooming Process, and the Method of Operation. This Article purports that these parts create “psychological complexities” between the offender and the victim, which greatly impact the investigation, prosecution, and defense of these cases. Thus, this Article sets forth a *sex trafficking framework* to be used by courts when evaluating questions under Rule 404(b), which will result in improved consistency and predictability when evaluating the admissibility of character evidence.

Additionally, since the enactment of Rules 413, 414,¹² and 415¹³ (“the propensity rules”), there has been a robust scholarly discussion criticizing the enactment of these rules, setting forth constitutional concerns and the negative impact on the Federal Rules of Evidence.¹⁴ However, recent development in the scholarship suggests that propensity evidence, with the appropriate safeguards, should be admissible in *all* cases.¹⁵ Thus, on one end of the spectrum, scholars condemn the propensity rules and their

¹⁰ FED. R. EVID. 404(b)(2); Sheft, *supra* note 9, at 62. For example, in sexual assault cases, courts have been criticized for broadening the scope of “common scheme or plan” compared to non-sexual assault cases. *Id.* at 62–63. Similarly, “intent” and “absence of mistake” have at times been expanded when the question of consent becomes the central issue in a case, whereas other times questions of consent have not triggered admissibility under 404(b). *Id.* at 62–64.

¹¹ FED. R. EVID. 403; *see also* Aviva A. Orenstein, *Deviance, Due Process, and the False Promise of Federal Rule of Evidence 403*, 90 CORNELL L. REV. 1487, 1519–20 (2005) (describing how courts tend to apply Rule 403 loosely to Rules 413 and 414).

¹² Similar to Rule 413, Rule 414 governs the admission of other acts of child molestation to show a propensity to commit the charged child molestation. FED. R. EVID. 414.

¹³ Applying in the civil law context, Rule 415 considers other evidence of sexual assault or child molestation where a claim for relief was based on sexual assault or child molestation by one of the parties. FED. R. EVID. 415.

¹⁴ *See, e.g.,* Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 566–67 (1997) (noting that if prior act evidence is not used correctly, it could promote pre-existing stereotypes about rape and further the inequitable enforcement of rape law); Sheft, *supra* note 9, at 76; Louis M. Natali, Jr. & R. Stephen Stigall, “Are you Going to Arraign His Whole Life?”: *How Sexual Propensity Evidence Violates the Due Process Clause*, 28 LOY. U. CHI. L.J. 1, 39–40 (1996) (summarizing the constitutional implications of the propensity rules); Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 796 (2013) (arguing that empirical evidence has shown that evidence of prior sexual misconduct holds little probative value).

¹⁵ *See* Steven Goode, *It’s Time to Put Character Back into the Character-Evidence Rule*, 104 MARQ. L. REV. 709, 712, 718, 810–11 (2021) (arguing it should be easier for courts to admit evidence of other acts that hold a high probative value). However, this is not a new scholarly endeavor. *See* H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 890 (1982) (arguing against the exclusion of character evidence).

applicability in sexual assault and child molestation cases, while at the other end of the spectrum, scholars suggest a broad application of propensity evidence to all cases.

Falling somewhere in the middle of this scholarly debate, this Article's second contribution aims to start the controversial conversation of whether propensity evidence should be admissible in sex trafficking cases, such as by expanding the existing propensity rules. While additional contributions are necessary to answer this question, this Article is the first to pose the question and lay the initial foundation. In doing so, this Article sets forth the existing debate surrounding propensity evidence, focusing on the important concerns that propensity evidence possesses, and balances these concerns against recent psychology-based studies suggesting its evidentiary value in sex trafficking cases.

This Article proceeds as follows. Part I provides an overview of sex trafficking, including the psychological complexities that frequently characterize this crime.¹⁶ Part II briefly introduces character evidence, focusing on Rule 404(b) and the propensity rules.¹⁷ Part III sets forth this Article's first contribution, a sex trafficking framework aimed to improve the shortcomings of the current Rule 404(b) analysis.¹⁸ Finally, Part IV introduces this Article's second contribution, initiating the conversation of whether propensity evidence should be admissible in sex trafficking cases.¹⁹

I. SEX TRAFFICKING

Sex trafficking generally refers to compelling another person,²⁰ through force or fear, to engage in sexual conduct in exchange for money.²¹ It is worth repeating that sex trafficking is the “fastest-growing business of organized crime and the third-largest criminal enterprise in the world.”²²

¹⁶ See *infra* Part I.

¹⁷ See *infra* Part II.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Part IV.

²⁰ It is important to note that sex trafficking scholars have long debated the issue of whether individuals can voluntarily engage in the commercial sex act industry. See Brennan, *supra* note 2, at 486 (noting the lack of consensus over whether sex work is a form of labor that can be freely chosen). Similarly, some scholars advocate for a major shift in the way the United States treats prostitution and the accompanying sex workers. See, e.g., Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 *FORDHAM L. REV.* 2977, 2978–81 (2006) (arguing that labor and immigration laws create incentives for trafficking); Sabrina Balamwala, *Trafficking Rescue Initiatives as State Violence*, 122 *PENN. ST. L. REV.* 171, 173–74 (2017). While outside the scope of this Article, these are extremely important questions that will impact future sex trafficking legislation.

²¹ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended at 22 U.S.C. § 7102(12)) [hereinafter TVPA]; see also Heather C. Gregorio, Note, *More Than “Johns,” Less Than Traffickers: In Search of Just and Proportional Sanctions for Buyers of Sex with Trafficking Victims*, 90 *N.Y.U. L. REV.* 626, 628 (2015) (“Three central actors are involved in sex-trafficking transactions—traffickers, victims, and purchasers.”).

²² Walker-Rodriguez & Hill, *supra* note 1, at 2. When Congress enacted the TVPA in 2000, it

While the statistics pose inherent limitations, “[e]stimates place the number of its domestic and international victims in the millions.”²³ In the United States, sex trafficking continues to be a pressing and serious issue.²⁴

This Section aims to provide a broad overview of sex trafficking. For context, the first Section briefly discusses the federal legislation that governs sex trafficking cases. Then, the subsequent Sections illustrate how the crime of sex trafficking occurs and the psychological complexities that occur between the individuals involved, focusing on how offenders target victims and proceed to “groom” them, along with the general business logistics used to facilitate this criminal enterprise. Ultimately, this discussion sets the foundation for the sex trafficking framework advocated for in Part III.

A. *The Trafficking Victims’ Protection Act*

In 2000, Congress passed the Trafficking Victims’ Protection Act (“TVPA”), which was the first comprehensive federal law to address trafficking.²⁵ Specifically, the TVPA intended to combat human trafficking by: (1) prosecuting traffickers; (2) protecting human trafficking victims; and (3) preventing human trafficking worldwide.²⁶ In support of this legislation, Congress also highlighted that sex trafficking “has rapidly expanded over the past several decades.”²⁷ By 2013, every state eventually enacted similar legislation to address human trafficking.²⁸

expressed concern over how quickly the sex trafficking industry was expanding. *See* 22 U.S.C. § 7101(b)(8) (finding that “[t]rafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises . . . [and] is the fastest growing source of profits for organized criminal enterprises worldwide”).

²³ Walker-Rodriguez & Hill, *supra* note 1, at 1.

²⁴ *See generally* RICHARD J. ESTES & NEIL ALAN WEINER, *THE COMMERCIAL SEXUAL EXPLOITATION OF CHILDREN IN THE U.S., CANADA AND MEXICO* (2001) (addressing the worldwide increase in the commercial sexual exploitation of children); Elrod, *supra* note 3, at 963 (“While the precise number of human trafficking victims in the United States is difficult to quantify, it is nonetheless clear that trafficking is a significant domestic issue because of both its prevalence in the United States and its heinous nature.”). Additionally, sex trafficking is the most common form of trafficking in the United States. *See also National Statistics*, NAT’L HUM. TRAFFICKING HOTLINE, <https://humantraffickinghotline.org/en/statistics> (last visited Sept. 18, 2025) (summarizing national statistics of human trafficking). In 2023, the National Human Trafficking Hotline was contacted regarding 8,142 trafficking situations. *Id.* Of these, 5,566 involved sex trafficking, 1,558 involved labor trafficking, and 1,018 involved both sex and labor trafficking. *Id.*

²⁵ TVPA, *supra* note 21.

²⁶ 22 U.S.C. § 7101(a) (detailing that its purpose is “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”).

²⁷ *Id.* at § 7101(b)(2).

²⁸ *See* Press Release, Polaris, Wyoming Becomes 50th State to Outlaw Human Trafficking (Feb. 27, 2013), <https://polarisproject.org/press-releases/wyoming-becomes-50th-state-to-outlaw-human-trafficking>. The TVPA coincided with the United Nation’s efforts to address human trafficking worldwide. *See generally* G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against

The TVPA provides various definitions pertaining to sex trafficking.²⁹ Sex trafficking refers to “the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act.”³⁰ Notably, the TVPA adds to the definition by outlining “[s]evere forms of trafficking in persons,” which covers: (1) victims under 18 years of age; and (2) adult victims that have been induced by “force, fraud, or coercion”³¹ Further, the TVPA utilizes 18 U.S.C. § 1591 to charge individuals with committing sex trafficking.³² Generally, federal sex trafficking charges fall into one of two categories: (a) victim under the age of 18,³³ or (b) victim 18 or older and induced by force, coercion, etc. to commit commercial sex acts.³⁴

Transnational Organized Crime (Nov. 15, 2000) (noting that the protocol was ratified by 175 countries and created standardized terminology along with the trafficking laws in those countries).

²⁹ 22 U.S.C. § 7102.

³⁰ 22 U.S.C. § 7102(12). It defines “commercial sex act” as “any sex act on account of which anything of value is given to or received by any person.” *Id.* at § 7102(4).

³¹ *Id.* at § 7102(11).

³² Of note, the punishment changes based on whether force was used and the age of the victim. 18 U.S.C. § 1591(a)–(c). If force is used and the victim is an adult, the punishment is a minimum of fifteen years and a maximum of life in prison. *Id.* at § 1591(b)(1). This is also the punishment if force was used on a child under eighteen, or force was not used and the child was under the age of fourteen. *Id.* There is a lesser punishment if force was not used and the child is under eighteen years old, but at least fourteen years old. *Id.* at § 1591(b)(2). In this circumstance, the minimum prison term will be ten years and the maximum is life in prison. *Id.*; *see also id.* at § 1591(d) (punishing a person for up to twenty-five years if they obstruct or interfere with the enforcement of this statute).

³³ *Id.* at § 1591(b)(1)–(2). Also, the government does not need to prove that the defendant knew the victim was under 18 so long as the defendant had a “reasonable opportunity to observe” the victim. *Id.* at § 1591(c).

³⁴ *Id.* at § 1591(b)(1). While sex trafficking commonly refers to these two categories, there is also a third category of charges when the victim is eighteen or older, and the defendant does not use force. Essentially, under 18 U.S.C. § 2421, a defendant violates this section by transporting an individual with the intent that they “engage in prostitution.” *Id.* at § 2421(a) (“Whoever knowingly transports any individual in interstate or foreign commerce . . . with intent that such individual engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 10 years, or both.”). While rarely charged in the federal system, many states recognize this charge and title it as “pandering” or “living off the earnings of a prostitute.” *See, e.g.,* NEV. REV. STAT. § 201.300 (2023) (defining pandering as when “[a] person who *without physical force or the immediate threat of physical force*, induces an adult to unlawfully become a prostitute or to continue to engage in prostitution” (emphasis added)); NEV. REV. STAT. § 201.320 (2023) (“A person who knowingly accepts, receives . . . money or other valuable thing, without consideration, from the proceeds of any prostitute”); CAL. PENAL CODE § 266h (West 2024) (defining “pimping”). At this point in the conversation, this form of sex trafficking is outside the scope of this Article and requires additional conversations. Initially, it appears that these types of charges would be consistent with the existing propensity rules. This is supported by the existing definition of sexual assault in the propensity rules. Any “sexual abuse” charged under 18 U.S.C. chapter 109A is included as a “sexual assault.” FED. R. EVID. 413(d). Specifically, under this chapter, 18 U.S.C. § 2243 criminalizes sexual abuse of a minor, a ward, or an individual in Federal custody. Focusing on the latter two—a ward and an individual in Federal custody—these crimes exist *even if the adult victim consents* to the sexual contact, so long as the victim is a “ward” or “in Federal custody.” *Id.* at § 2243(b)–(c). Instead, these charges criminalize the sexual contact because the defendant was in charge of the victim. Similarly here, the defendant, under § 2421, is considered “in charge of” the victim, whom the defendant transported with the intent for the victim to engage in prostitution. *Id.* at § 2421(a). Lastly, similar to sexual abuse, consent by the victim would also not be a defense to a charge under § 2421. 73 C.J.S. § 59 (2025).

Unfortunately, sex trafficking has dramatically increased since 2000. While the statistics have limitations, a recent estimate totaled 6.3 million victims of sex trafficking worldwide—including “1.7 million” children.³⁵ It is again worth repeating: sex trafficking has become the “fastest growing business of organized crime” in the world, and the “third-largest criminal enterprise.”³⁶ In fact, further illustrating this growing problem, the TVPA was recently amended in 2019 to address another component of sex trafficking: state-sponsored sex trafficking.³⁷

B. *How Sex Trafficking Unfolds: Victim Vulnerabilities, the “Grooming Process,” and the Method of Operation*

Sex trafficking is about “power and control.”³⁸ The sex trafficker,³⁹ commonly referred to as the “pimp,” begins by identifying the person they want to target.⁴⁰ What type of people do sex traffickers target? One scholar aptly sums it up: “Vulnerability is the lynchpin of exploitation.”⁴¹ While it is true that anyone can become a victim, traffickers target vulnerable people.⁴² According to Pimpin’ Ken’s book, *Pimpology: The 48 Rules of the Game*, “[w]eakness is the best trait a person can find in someone they want to

³⁵ GLOBAL ESTIMATES OF MODERN SLAVERY, *supra* note 4, at 45 (finding that 1.7 million were children); *About Human Trafficking*, U.S. DEP’T OF STATE (last visited Sept. 16, 2025) <https://www.state.gov/humantrafficking-about-human-trafficking> (estimating 27.6 million victims of human trafficking worldwide).

³⁶ Walker-Rodriguez & Hill, *supra* note 1, at 2.

³⁷ 22 U.S.C. § 7107(a). The TVPA provides that, aside from humanitarian and trade-related assistance, the U.S. refuses to provide support and assistance to any government that “(1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards.” *Id.*

³⁸ Bong Cook, *supra* note 3, at 320 (“Sex trafficking is a matter of power and control . . . [and] is coterminous with the satisfaction and titillation derived from domination.”).

³⁹ According to the Human Smuggling and Trafficking Center, individuals who commit sex trafficking are often referred to as both “traffickers” and “pimps.” HUM. SMUGGLING & TRAFFICKING CTR., DOMESTIC HUMAN TRAFFICKING 2 (2008) (also noting that sometimes, based on jurisdiction, these terms are not always synonymous). This is consistent with the scholarly research used throughout this Article. See Holly Hargreaves-Cormany, James Beasley, Terri Patterson, Kara Meadows, Princess-Kasharác Middleton, Ellen Wood, Jonathan Alicchio & Nathanael Gaspar, *Psychopathy in Human Trafficking Offenders: Current Trends and Challenges*, in PSYCHOPATHY AND CRIMINAL BEHAVIOR 369, 374 (Paulo Barbosa Marques, Mauro Paulino & Laura Alho eds., 2022) (noting that these terms are used interchangeably in the research on sex trafficking); Katherine Gotch, *Preliminary Data on a Sample of Perpetrators of Domestic Trafficking for Sexual Exploitation: Suggestions for Research and Practice*, 2 J. HUM. TRAFFICKING 99, 100 (2016). As such, this Article uses the terms interchangeably.

⁴⁰ Gregorio, *supra* note 21, at 634 (describing the “the different strategies [used] to engage their victims,” known as the “grooming” process). Further, the pimp usually forces the victims to call him “daddy.” *United States v. Baston*, 818 F.3d 651, 657 (11th Cir. 2016).

⁴¹ Blanche Bong Cook, *Stop Traffic: Using Expert Witnesses to Disrupt Intersectional Vulnerability in Sex Trafficking Prosecutions*, 24 BERKELEY J. CRIM. L. 147, 152 (2019); see also *Baston*, 818 F.3d at 657 (discussing the fifth law of being a pimp, “prey[ing] on the weak”).

⁴² Mirelle Raza & Kyleigh Feehs, *Dispelling Sex Trafficking Conspiracy Theories: The Truth Behind Who Is Recruited by Traffickers and How*, 29 WM. & MARY J. RACE GENDER & SOC. JUST. 653, 655 (2023).

control.”⁴³ Thus, it is easier to control the vulnerable and use them for sex trafficking.⁴⁴ For the purposes of this Article, identifying victims’ vulnerabilities is the first psychological complexity defining both sex traffickers and their victims.

To identify and “recruit” vulnerable individuals, pimps often use online platforms, such as social media, to falsely advertise their extravagant lifestyle in order to connect and begin developing a relationship.⁴⁵ In addition to online platforms, sex trafficking can also begin based on a pre-existing relationship, where a person has built trust with the victim.⁴⁶ Commonly, “[t]raffickers can be parents, relatives, schoolteachers, coaches, religious leaders, classmates, boyfriends, girlfriends, or another person who has gained the trust of the victim.”⁴⁷ This lays the foundation to allow the sex trafficker to later coerce the victim into commercial sex.⁴⁸

In the United States, sex traffickers typically target victims both locally and internationally.⁴⁹ Based on the available data, women and children comprise the majority of sex trafficking victims.⁵⁰ When considering vulnerabilities in child victims, traffickers typically target the “forgotten youth,” runaways, children in foster care, or those without a stable home environment.⁵¹ Additionally, traffickers often focus on children and adults with drug addictions.⁵²

⁴³ PIMPIN’ KEN, PIMPOLOGY: THE 48 LAWS OF THE GAME 22 (2007). Notably, the Eleventh Circuit cites this source in a 2016 opinion. *Baston*, 881 F.3d at 657.

⁴⁴ Raza & Feehs, *supra* note 42, at 655.

⁴⁵ Raza & Feehs, *supra* note 42, at 674–80; Walker-Rodriguez & Hill, *supra* note 1, at 3. The data indicates that the most common sites utilized by pimps for recruiting are Facebook, Instagram, Snapchat, Kik, Craigslist, and various dating websites. BRITTANY ANTHONY ET AL., POLARIS, ON-RAMPS, INTERSECTIONS, AND EXIT ROUTES: A ROADMAP FOR SYSTEMS AND INDUSTRIES TO PREVENT AND DISRUPT HUMAN TRAFFICKING 23 (2018). One study found that certain online behaviors increased the risk of being targeted for sex trafficking, such as “communicating with a stranger about sex, meeting people offline, participating in chat rooms, posting personal information, receiving or sending pictures, and visiting pornographic websites” Aimee D. Miller, Human Sex Trafficking: Individual Risk Factors for Recruitment, Trafficking, and Victimization on the Internet 62 (M.A. thesis, Cal. St. Univ. 2014) (ProQuest).

⁴⁶ Raza & Feehs, *supra* note 42, at 680–83.

⁴⁷ *Id.* at 680.

⁴⁸ *Id.* at 680–82.

⁴⁹ See Gregorio, *supra* note 21, at 634–35 (discussing how traffickers exploit vulnerable populations within the U.S. and lure foreign victims to the U.S. with deceptive employment opportunities).

⁵⁰ See U.N. OFF. ON DRUGS & CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS 2020, at 36 (2021) (finding that out of every ten victims of sex trafficking, seven of them were women or children).

⁵¹ Raza & Feehs, *supra* note 42, at 655; see also Emily Selig, *Statistically Speaking: The Overrepresentation of Foster Youth in Sex Trafficking*, 38 CHILD.’S LEGAL RTS. J. 84, 84 (2018) (noting that foster care is often called a “pipeline to prostitution.”).

⁵² Raza & Feehs, *supra* note 42, at 664–65 (“Traffickers aim to find victims who are especially vulnerable to manipulation and who will be dependent on [drugs]. Dependency is one of the keys to keeping a victim in the cycle of exploitation.”). The majority of adult victims fall into this category, with the number rising each year. Sixty-four percent of federal sex trafficking victims from 2016 to 2020 reported substance abuse disorders when they were recruited into sex trafficking. *Id.* at 666 (relying on data compiled by the Human Trafficking Institute). In 2019, seventy-four percent reported substance abuse issues, compared to only forty-five in 2014. *Id.* Even if they do not have a drug addiction initially,

For adult targets, in addition to substance abuse disorders, traffickers often target individuals with experiences concerning uncertain legal status, poverty, homelessness, and prior abuse.⁵³ They utilize these existing vulnerabilities to manipulate, coerce, and incentivize the victims.⁵⁴ Notably, considering these vulnerabilities, traffickers will “commonly target females from low-income communities of color.”⁵⁵ Ultimately, as discussed below in Section D, the sex traffickers’ choice to target those with vulnerabilities has an impact on credibility with juries, law enforcement, and the general public.⁵⁶

This process of identifying, recruiting, and coercing a victim is known as the “grooming process,” and constitutes the next set of psychological complexities in this Article.⁵⁷ Once a victim is identified, pimps will “use a variety of psychological methods of manipulation to persuade recruits to conduct sex work”⁵⁸ False job offers, promises of money, or hopes of a future romantic relationship are just a few examples of how a pimp may try to coerce and manipulate their victims.⁵⁹

Once a sex trafficker has recruited a victim and coerces them to engage in commercial sex, the “grooming process” continues to ensure that they stay “in line.”⁶⁰ This includes physical, emotional, and psychological abuse.⁶¹

pimps will often force them to use drugs to create that dependency and allow for easier manipulation. See Pimpin’ Ken, *supra* note 43, at 22 (“If you can’t find a weakness, you have to create one.”).

⁵³ Raza & Feehs, *supra* note 42, at 666–74.

⁵⁴ *Id.* at 666; see also Azurdee Garland & Maira Gomez, *A Legal Examination of the Experiences of Two Domestic Sex Trafficking Survivors in America*, 109 KY. L.J. 689, 697 (2021) (discussing how traffickers use “romantic relationships” and other “subtle forms of coercion” to manipulate their victims).

⁵⁵ Raza & Feehs, *supra* note 42, at 673. For a discussion on the importance of understanding how intersectionality impacts sex trafficking cases, see Bong Cook, *supra* note 3.

⁵⁶ See Bong Cook, *supra* note 3, at 334 (highlighting the impact of implicit bias on the perception of a woman-victim’s credibility in sex trafficking cases). See generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing intersectionality in the broader context of violence against women of color).

⁵⁷ See Georgia L. Winters & Elizabeth L. Jeglic, *Stages of Sexual Grooming: Recognizing Potentially Predatory Behaviors of Child Molesters*, 38 DEVIANT BEHAV. 724, 724 (2017) (describing and defining the grooming process).

⁵⁸ Raza & Feehs, *supra* note 42, at 676 (quoting Matthew Johnson & Meredith Dank, *The Hustle: Economics of the Underground Commercial Sex Industry*, URB. INST., <https://apps.urban.org/features/theHustle/index.html> (last visited Feb. 6, 2025)).

⁵⁹ Raza & Feehs, *supra* note 42, at 683–87.

⁶⁰ Bong Cook, *supra* note 3, at 327–28.

⁶¹ *Id.* at 328 (noting that, in order to manipulate vulnerability, sex traffickers will use the following tactics: “rape and assault; threats of public shaming and exposure; threats to family members; threats to abduct or torture children; threats of deportation; social isolation; withholding food, money, or identification; promises to fix their credit; customized seduction processes; emotional and ‘romantic’ manipulation; substance abuse exploitation; customized opioid cocktails to forget the abuse and to get ready to work; [or] lowering the victim’s inhibitions about sex”); see also Balamwalla, *supra* note 20, at 197–98 (applying the concept of “terrorizing” to describe the emotional abuse that many sex traffickers use against their victims as part of “a dynamic of coercive control”). For a horrifying illustration of the power and control used during a sex trafficking nightmare, see *United States v. Baston*, 818 F.3d 651 (11th Cir. 2016).

They also seek to isolate victims from their home, family, and any other type of support system,⁶² often moving the victim from jurisdiction to jurisdiction.⁶³ That not only magnifies the victim's isolation, but also has the effect of making it more challenging for law enforcement to investigate.⁶⁴

Not only do these tactics discourage a victim from fleeing, but they also discourage them from reporting it to the police or, even further down the road, testifying against the offender.⁶⁵ Drugs also play a consistent role by helping “control” the victims.⁶⁶ Lastly, the grooming process is the reason many victims return to the sex trafficker—even after escaping or being “saved” by the police.⁶⁷ The sex trafficker has embedded a sense of loyalty in the victim.

Finally, given that sex trafficking is often a “criminal enterprise,” there is usually a common method of operation for how sex traffickers run the “business,” which is the final phase of psychological complexities. The trafficker will typically have a set of rules in place for the day-to-day logistics, such as how the “dates” are coordinated and the exchange of money. It is also common for an offender to have multiple victims simultaneously working for him. This develops into a “hierarchy system.”⁶⁸ Next in line after the offender is the “bottom,” which refers to the victim who oversees the other victims.⁶⁹ She often handles the day-to-day business aspect of this criminal enterprise by collecting money, disciplining the other victims, and identifying or recruiting new victims.⁷⁰ The sex trafficker may even abuse the bottom in front of the other victims as a form of intimidation.

⁶² Gregorio, *supra* note 21, at 634–35. It is common for pimps to take away the victims' forms of identification as another means of control and to deter them from escaping. *Id.*

⁶³ See Walker-Rodriguez & Hill, *supra* note 1, at 8 (advising law enforcement officials of common human trafficking indicators such as meeting “[s]omeone with little knowledge about how to get around in a community”); Balgamwalla, *supra* note 20, at 199–200 (discussing how frequent relocation is used to disorient and isolate victims).

⁶⁴ Balgamwalla, *supra* note 20, at 199–200.

⁶⁵ HANNAH GARRY & MAURA REINBRECHT, INT’L HUM. RTS. CLINIC, OVER-POLICING SEX TRAFFICKING: HOW U.S. LAW ENFORCEMENT SHOULD REFORM OPERATIONS 19 (2021) (arguing that “traffickers rely on demonization of law enforcement to exert control over the victim and to ensure that the victim does not report the trafficker to law enforcement”); 22 U.S.C. § 7101(b)(7) (finding that “[t]raffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape”); see also Balgamwalla, *supra* note 20, at 200 (explaining that victims fear the consequences of reporting their abuser, which could include lack of financial support and isolation). These tactics of abuse have long lasting impacts, causing many victims to even return to their pimp after successfully leaving or after police intervention.

⁶⁶ See Blanche Bong Cook, *Flesh Markets: Sex Trafficking, Opioids, and the Legal Process to Eradicate the Demand*, 109 KY. L.J. 635, 636 (2021) (focusing on how “the epidemic rise in sex trafficking” is “[i]nextricably intertwined with opioid dependency”).

⁶⁷ See, e.g. *United States v. Lewis*, 762 F. App’x 786, 793 (11th Cir. 2019), *rev’d on other grounds*, 140 S. Ct 613 (2019).

⁶⁸ Walker-Rodriguez & Hill, *supra* note 1, at 3.

⁶⁹ *Id.*

⁷⁰ *Id.*

C. *The Realities of Sex Trafficking Evidence, Investigations, and Prosecutions*

Given the varying psychological complexities mentioned above, sex trafficking poses many challenges from an evidentiary perspective. This Article's purpose is, in part, to improve the criminal justice system's ability to understand these sex trafficking complexities in the context of Rule 404(b) (discussed in Part III) and the propensity rules (discussed in Part IV). Before transitioning to these specific evidentiary rules, it is important to consider the evidentiary challenges that are common in sex trafficking cases.

First, these cases often rely solely on the victim's testimony.⁷¹ There is rarely corroborating evidence to support that testimony.⁷² Even though corroboration is not required by the law, the jury often requires it.⁷³ Lawyers can attempt to limit this concern during jury voir dire, but the jury's need for corroboration—via photos depicting injuries, testimony from the commercial sex buyer, or video surveillance from the hotel where the commercial sex act occurred, for example⁷⁴—remains and is supported by empirical data.⁷⁵

To be fair, sometimes corroborating evidence *does* exist. Traffickers often use websites and chat apps to communicate with commercial sex buyers. If the police can recover a trafficker's phone, this evidence would undoubtedly be extremely beneficial to the case. Thus, what evidence exists to prove a case is an important consideration in the Rule 404(b) analysis.⁷⁶ This is helpful to understand because every sex trafficking case will not simply be treated the same based on the nature of the charge. This Article

⁷¹ Amy Farrell, Monica J DeLateur, Colleen Owens & Stephanie Fahy, *The Prosecution of State-Level Human Trafficking Cases in the United States*, 6 ANTI-TRAFFICKING REV. 48, 62 (2016).

⁷² *Id.* at 62 (noting one prosecutor reported they were "always looking for corroborative evidence").

⁷³ See Kristen L. Stallion, Note, *Missouri Abolishes the Corroboration Rule and the Destructive Contradictions Doctrine: A Victory for Victims of Sexual Assault?*, 80 MO. L. REV. 607, 608 (2015) (explaining how Missouri juries' "long-held beliefs on gender and sex norms" serve as a de facto corroboration rule despite Missouri's official abolition of the rule in 2014).

⁷⁴ Farrell, DeLateur, Owens & Fahy, *supra* note 72, at 61–62 (noting that, even with a cooperative victim, prosecutors and police reported a "need for substantial evidence of trafficking such as hotel receipts, photographs of injuries, Backpage/Craigslist advertisements, phone and text message records and financial records").

⁷⁵ See Martha A. Myers & Gary D. LaFree, *Sexual Assault and Its Prosecution: A Comparison with Other Crimes*, 73 J. CRIM. L. & CRIMINOLOGY 1282, 1300 (1982) (discussing the persistence of an informal corroboration rule despite the absence of a formal one in sexual assault cases); see also Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 597–98 (2009) (highlighting how the "vindictive shrew myth" leads jurors to require corroborating evidence in rape trials despite having no formal requirement for such evidence); Elizabeth Langston Isaacs, *The Mythology of the Three Liars and the Criminalization of Survival*, 42 YALE L. & POL'Y REV. 427, 457–61 (2024) (describing the origin of the corroboration doctrine and finding that some rules in New York criminal law still "evinced[e] outright skepticism of female veracity").

⁷⁶ Similarly, it is an existing factor that many courts have discussed in the context of the propensity rules. See, e.g., *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (noting a factor of "whether the government can avail itself of any less prejudicial evidence").

sets forth, as discussed below, a framework that gives the court flexibility to limit the use of Rule 404(b) evidence when it is not necessary.

However, while corroborating evidence may exist, sex traffickers intentionally limit the likelihood of it coming to light. They manipulate, scare, and abuse their victims to discourage reporting; thus, most reports from victims are either delayed or based on police intervention.⁷⁷ Delayed disclosure often eliminates the opportunity to locate corroborating evidence.⁷⁸ For example, surveillance video from a hotel may have existed when the trafficker and the victim arrived to meet the sex buyer, but may be deleted before it is needed as evidence. Additionally, as I have written elsewhere, forensic evidence, if not recovered almost immediately, will be contaminated or destroyed through everyday actions like showering.⁷⁹ Identifying potential witnesses, such as the sex buyer, becomes much more challenging and unlikely as time passes.

Even once law enforcement is involved, the trafficker's manipulation, fear, and abuse are likely to cause the victim to recant or claim that nothing happened.⁸⁰ This adds another unique layer to proving a sex trafficking case: The existing complicated relationship with the trafficker creates a likelihood that the victim will change their testimony in front of a jury.⁸¹

While the nature of the crime and the sex trafficker's actions impact the available evidence and corroboration, so does the trafficker's choice in selecting a victim based on their vulnerabilities. Victims with issues surrounding legal status, poverty, homelessness, and prior abuse are often targeted, particularly in adult victims.⁸² Recent scholarship has suggested

⁷⁷ Garland & Gomez, *supra* note 54, at 701; Jennifer Lavoie, Kelli L. Dickerson, Allison D. Redlich & Jodi A. Quas, *Overcoming Disclosure Reluctance in Youth Victims of Sex Trafficking: New Directions for Research, Policy, and Practice*, 25 PSYCH., PUB. POL'Y, & L. 225, 226 (2019) (noting that "[d]isclosure reluctance is a significant problem across multiple populations of victims of sexual violence, and trafficking victims are likely no exception").

⁷⁸ Farrell, DeLateur, Owens & Fahy, *supra* note 72, at 62 (explaining that evidence like "physical records and corroborating witnesses were often difficult to locate after some time had passed").

⁷⁹ See Bryan Schwartz, *Promoting Justice for Survivors Through Improved Notification and Re-engagement*, 53 SETON HALL L. REV. 1119, 1130 n.52 (2023) (noting that showering before a DNA swab test is among a variety of factors that could produce a false negative).

⁸⁰ See GARRY & REINBRECHT, *supra* note 65, at 19 (noting how traffickers' manipulative strategies foster a "sense of misguided loyalty" often leading victims to be protective of their abusers).

⁸¹ This is not unique to sex trafficking cases. It is also common in domestic violence cases. And to be clear, the rules of evidence provide for admission of prior inconsistent statements, which would allow the jury to hear that the victim did previously report that sex trafficking occurred. However, based on this evidence, it will likely be challenging for a jury to find that the government met its burden of proof.

⁸² See Bong Cook, *supra* note 3, at 335–36 n.188 (summarizing multiple studies that found high rates of physical or sexual victimization in adult homeless populations). While this list is merely illustrative, there are other vulnerabilities that could increase the likelihood of being targeted. For example, individuals with disabilities are frequently targeted for various crimes, including sex trafficking. See *Individuals with Disabilities May Face Increased Risk of Human Trafficking*, POLARIS (Aug. 15, 2018), <https://polarisproject.org/blog/2018/08/individuals-with-disabilities-may-face-increased-risk-of-human-trafficking> (discussing the characteristics of individuals with disabilities that make them especially vulnerable to human trafficking).

that jurors are less likely to find these victims credible.⁸³ Therefore, the decision by the sex trafficker on who to target further impacts the likelihood a jury will find their testimony credible. One tactic that sex trafficking offenders use to discourage reporting is to convince their victims that law enforcement will not help them—that no one will believe them.⁸⁴ This, combined with their existing vulnerabilities, has the effect of discouraging reporting.

Certainly, based on our criminal justice system, a lack of evidence in any case might simply suggest that the case should not be pursued. However, the inherent nature of sex trafficking cases, along with the combination of manipulation, grooming, and victim targeting that occurs, creates these challenges. As such, the next Section introduces the two evidentiary rules at issue in the Article: 404(b) and the propensity rules.

II. CHARACTER EVIDENCE—RULE 404(B) & THE PROPENSITY RULES

Character evidence refers to evidence of a person’s “character, reputation,” or “specific acts.”⁸⁵ In society, we commonly use character evidence to make decisions about others, especially via propensity reasoning—“because a person had a tendency to act in a particular way, the person was more likely to have committed a particular act on a specific occasion.”⁸⁶ For example, if a person “fooled”⁸⁷ you in the past, you likely will not trust them moving forward because you now consider them untrustworthy.⁸⁸

Prior to the codified Federal Rules of Evidence (“FRE”), the common law governed character evidence and prohibited propensity reasoning.⁸⁹

⁸³ See Bong Cook, *supra* note 3, at 326 (detailing in part how intersectional oppression arising from structural racism, sexism, and classism makes victims “terribly attractive to predators and increasingly more vulnerable to manipulation.”); see also Isaacs, *supra* note 75, at 453 (“There is nothing new about the legal system discounting the credibility of women, people of color, and people behind bars.”).

⁸⁴ U.S. DEP’T OF JUST., OFF. JUV. JUST. & DELINQ. PREVENTION, UNDERSTANDING THE PERSPECTIVE OF THE VICTIM (2021).

⁸⁵ DEBORAH JONES MERRITT & RIC SIMMONS, LEARNING EVIDENCE: FROM THE FEDERAL RULES TO THE COURTROOM 292 (2d ed. 2012).

⁸⁶ *Id.* at 314.

⁸⁷ ANTHONY WELDON, THE COURT AND CHARACTER OF KING JAMES 169 (1651) (“The Italians having a proverb, ‘He that deceives me once, it’s his fault; but if twice, it’s my fault . . .’” (emphasis omitted)) This phrase evolved into the common expression, “Fool me once, shame on you; fool me twice, shame on me.”

⁸⁸ See, e.g., Cheng, Nunn & Simon-Kerr, *supra* note 9, at 302 (“Although evidence law generally bars propensity evidence, people make propensity inferences all the time in everyday life. We frequently characterize others as prompt or tardy, trustworthy or dishonest, dependable or fickle.”).

⁸⁹ See, e.g., JEFFREY BELLIN, THE LAW OF EVIDENCE 65–66 (1st ed. 2020) (quoting *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 his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution’s case-in-chief.”).

While courts acknowledged the probative value of character evidence, they also recognized the obvious “unfair prejudice” that can result when character evidence is admitted.⁹⁰ This common law notion is now preserved in FRE 404, which consists of two main subsections: 404(a) and 404(b).⁹¹ The first Section below will give a brief overview of Rule 404(b), which is the relevant subsection for this Article’s purpose.

While the common law prohibition against propensity reasoning was preserved in the FRE, and specifically in Rule 404, Congress enacted an amendment to the rules in 1995 that constituted a major shift in character evidence doctrine. Over significant objection, Congress added Rules 413, 414, and 415 to allow the admission of prior act evidence for propensity reasoning in child molestation and sexual assault cases.⁹² Thus, the second Section below will briefly discuss these rules, which this Article refers to as “the propensity rules.”

Finally, legal scholars and courts continue to reiterate the common law belief that character evidence can have significant probative value in a given case.⁹³ However, it is also equally clear that character evidence poses a risk of being unfairly prejudicial.⁹⁴ Thus, in an effort to address these two opposing characteristics of character evidence, the court must conduct a balancing test under Rule 403 to determine if the evidence should be

⁹⁰ See 1 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 415 (1923) (“The natural and inevitable tendency of the tribunal — whether judge or jury — is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.”); GEORGE FISHER, EVIDENCE 173 (4th ed. 2023) (discussing the unfair prejudice from juries placing too much weight on character evidence).

⁹¹ FED. R. EVID. 404(a)–(b).

⁹² FED. R. EVID. 413–415; see also Jason L. McCandless, *Prior Bad Acts and Two Bad Rules: The Fundamental Unfairness of Federal Rules of Evidence 413 and 414*, 5 WM. & MARY BILL RTS. J. 689, 689, 691, 694 (1997) (claiming that Rules 413 and 414, along with Rule 415 which extends the prior Rules’ scope, violate the Due Process Clause).

⁹³ See Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 721 (1998) (“Common sense . . . is the principal basis . . . for believing character evidence to be probative . . .”); *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (quoting Justice Breyer’s statement that while “‘propensity evidence’ is relevant,” it poses significant risks (citation omitted)); *Michelson*, 335 U.S. at 475–76 (explaining the rationale for this rule, noting that “[t]he inquiry is not rejected because character is irrelevant; on the contrary, it is said 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”); Cheng, Nunn & Simon-Kerr, *supra* note 9, at 304 (arguing that courts do not often misapply Rule 404(b), but instead, bend it because they “perceive [the other act evidence] to be both highly probative and necessary to an accurate determination of the facts”).

⁹⁴ See Lave & Orenstein, *supra* note 14, at 798 (“Traditionally, character evidence has been deemed objectionable because it is tangential, unfairly prejudicial, and unreliable.”). This is also a concern with other rules of evidence, particularly Rule 609 which allows a defendant to be impeached with prior crimes. See Jeffrey Bellin, *Eliminating Rule 609 to Provide a Fair Opportunity to Defend Against Criminal Charges: A Proposal to the Advisory Committee on the Federal Rules of Evidence*, 92 FORDHAM L. REV. 2471, 2480 (2024) (acknowledging that the “most obvious” concern with Rule 609 is that “the jury will use the prior convictions for purposes that are not permitted by the evidence rules: namely, to convict the defendant based on past conduct, rather than present guilt”).

admitted.⁹⁵ The third Section will briefly detail this balancing test, which applies to these questions under both Rule 404(b) and the propensity rules.

A. *Rule 404(b)*

Rule 404(a) governs evidence of a person’s character or relevant traits, while Rule 404(b) covers evidence of “other crimes, wrongs, or acts.”⁹⁶ Both sections expressly prohibit presenting these two types of character evidence to show that the person “acted in accordance with” this character evidence⁹⁷—as mentioned above, this is known as “propensity reasoning.”⁹⁸ However, both sections do provide avenues to admit character evidence if it does not call for propensity reasoning.

Since 404(b) is one of the central topics of this Article, we will focus our attention there. Rule 404(b) lays out the “permitted uses” of other crimes, wrongs, or acts by the defendant: to show “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”⁹⁹ This recognizes that other crimes, wrongs, or acts can be probative of guilt for the current crime so long as the jury is not asked to employ propensity reasoning.¹⁰⁰

Character evidence has always been a popular topic amongst scholars, particularly with respect to Rule 404(b).¹⁰¹ A primary criticism of Rule

⁹⁵ The evidence must also meet the relevance threshold. FED. R. EVID. 401(a)–(b) (defining relevant evidence as evidence that “has any tendency to make a fact more or less probable than it would be without the evidence” when “the fact is of consequence in determining the action.”).

⁹⁶ FED. R. EVID. 404(a)–(b). Courts and scholarship commonly refer to both subsections as “character evidence.” Evidence within subsection (b) is colloquially referred to as “bad act” evidence.

⁹⁷ *Id.*

⁹⁸ See *supra* notes 32–36 and accompanying text.

⁹⁹ FED. R. EVID. 404(b)(2). This list is not exhaustive. So long as the evidence is not presented to support propensity reasoning, any relevant reason could be permitted. See, e.g., *United States v. Armajo*, 38 F.4th 80, 84 (10th Cir. 2022). Additionally, scholars have noted how courts often misinterpret this subsection as an exception, instead of a clarification permitting non-propensity, other-act evidence. BELLIN, *supra* note 89, at 72 (explaining that “Rule 404(b)(2) does not create an exception to the bar on propensity reasoning. Rather, 404(b)(2) illustrates the limited restriction of Rule 404(a)(1) and (b)(1),” which do not permit propensity reasoning.); Hillel J. Bavli, *An Objective-Chance Exception to the Rule Against Character Evidence*, 74 ALA. L. REV. 121, 124 (2022) (noting that Rule 404(b)(2) “is often misinterpreted as an *exception* to Rule 404(b)(1)’s rule against other-acts character evidence rather than a mere clarification that emphasizes the permissibility of other-acts evidence that does not rely on propensity reasoning”).

¹⁰⁰ For context, Rule 404(a) provides exceptions to the general bar of character evidence in a criminal case, for a defendant or victim: (A) “a defendant may offer evidence of the defendant’s pertinent trait,” (B) “a defendant may offer evidence of an alleged victim’s pertinent trait,” and (C) “in a homicide case, the prosecutor may offer evidence of the alleged victim’s trait of peacefulness to rebut evidence that the victim was the first aggressor.” FED. R. EVID. 404(a)(2)(A)–(C).

¹⁰¹ See Kevin L. Winiarski, *Yet Another Problem with Rule 404(b)? Why the Advisory Committee Should Codify a Higher Initial Burden for Prior Acts Evidence*, 63 B.C. L. REV. 2781, 2783 (2022) (“Rule 404(b) being one of the most cited Rules in federal court decisions,” and that “[s]cholars have also heavily criticized the idiosyncrasies of these rules.”); Bavli, *supra* note 99, at 123 (noting that Rule 404(b) “is

404(b) is that the Rule creates unpredictable results based on its inconsistent application by courts.¹⁰² Judges appear to transform, stretch, and bend the Rule as necessary depending on the outcome they believe is just.¹⁰³ Sometimes, these concerns arise in the context of how courts apply the non-propensity “permitted uses” of 404(b).¹⁰⁴ Moreover, these criticisms are further amplified when courts weigh the probative value against the risk of unfair prejudice.

As discussed in Part III, this Article attempts to address this primary criticism—unpredictability based on inconsistent application—within the context of sex trafficking cases.

B. *The Propensity Rules: 413, 414, and 415*

When enacting the propensity rules, Congress drastically altered the landscape of evidence law.¹⁰⁵ The traditional rule against propensity evidence no longer applies to sexual assault and child molestation cases.¹⁰⁶ Instead, the propensity rules now allow the admission of prior acts for the purpose of proving that if a defendant committed a sexually-based offense before, they likely did so again.¹⁰⁷

among the most cited, and arguably the most controversial, of the FRE”); *see also* Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 577 (1990) (“Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules.”); FED. R. EVID. 404 advisory committee’s note to 1991 amendment (“Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence.”).

¹⁰² Chadwick, *supra* note 8, at 2159 (describing Rule 404 as “illogically founded and inconsistently applied”); *see also* Rhode, *supra* note 8, at 9 (“Existing definitions of character are circular, conclusory, or both.”); Marshall, *supra* note 8, at 1065 (discussing the judiciary’s failure to abide by Rule 404’s character evidence ban in employment discrimination cases); Murphy, *supra* note 8, at 320–21, 327–29.

¹⁰³ *See* Offit, *supra* note 9, at 2179–80 (detailing that the rule is “not uniformly applied across cases” and “is malleable and complex”); Sheft, *supra* note 9, at 62 (“[M]anipulation and expansion of the Rule 404(b) theories of logical relevance amply demonstrate this judicial ambivalence toward prohibition of character evidence.”). Recently, evidence scholars proposed that judges are often times not misapplying Rule 404, and other rules of evidence, but are instead “bending” the rules of evidence to ensure the admission of essential evidence.” Cheng, Nunn & Simon-Kerr, *supra* note 9, at 299. Notably, these scholars suggest that creating exceptions could help address the amount of rule bending that occurs by judges. *Id.* at 309–10. While maintaining their opposition to these rules, they do acknowledge that Rules 413 and 414 help limit the rule bending that occurs in these types of cases. *Id.*

¹⁰⁴ Sheft, *supra* note 9, at 61–65. For example, in sexual assault cases, courts have been criticized for broadening the scope of “common scheme or plan” compared to non-sexual assault cases. *Id.* at 62–63. Similarly, “intent” and “absence of mistake” have at times been expanded when the question of consent becomes the central issue in a case, whereas other times questions of consent have not triggered admissibility under 404(b). *Id.* at 63.

¹⁰⁵ *See generally* Sheft, *supra* note 9, at 58 (noting that the propensity rules “[a]lter[ed] three hundred years of Anglo-American jurisprudence, this revision is one of the most significant evidentiary developments since the promulgation of the Federal Rules of Evidence”).

¹⁰⁶ *See* FED. R. EVID. 413.

¹⁰⁷ *See id.*; FED. R. EVID. 414–15.

While the propensity rules apply to sexual assault and child molestation cases in both the criminal and civil context, they have not yet been applied to federal sex trafficking cases. However, some states have not only adopted the propensity rules but also expanded them to include sex trafficking cases.¹⁰⁸ This Article builds on this idea and begins the conversation regarding whether propensity evidence should be utilized in sex trafficking cases. To provide the necessary context, this Section will discuss the enactment and legislative history of the propensity rules.

In 1994, Congress proposed amending the FRE to add the propensity rules: Rules 413, 414, and 415.¹⁰⁹ As mentioned, these rules addressed the use of propensity evidence in sexual assault and child molestation cases, in both the criminal and civil context.¹¹⁰ Specifically, Rule 413 covers other acts of sexual assault, 414 covers charges of child molestation, and 415 addresses the admissibility of these two crimes in civil cases.¹¹¹

In sum, Rule 413 allowed any other acts of sexual assault to be admissible against a defendant charged with sexual assault, even for the purpose of propensity reasoning.¹¹² The format and phrasing of Rule 414 was identical to 413, yet it applied to child molestation cases.¹¹³ Both rules provided definitions of what constituted “sexual assault” and “child molestation” for the purposes of these Rules.¹¹⁴

¹⁰⁸ See *infra* note 141 and accompanying text.

¹⁰⁹ Violence Against Women Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1902, 2135–36 (codified as FED. R. EVID. 413, 28 U.S.C.) [hereinafter “VAWA”]. Notably, through VAWA, Congress also proposed and subsequently enacted FRE 412, which restricted the admissibility of a victim’s past sexual behavior or sexual predisposition in both criminal and civil cases involving a sex offense. See Pub. L. No. 103-322, § 40141, 108 Stat. 1796, 1918–19 (1994) (enacting rule 413).

¹¹⁰ § 320935, 108 Stat. at 2135–36. This amendment was part of VAWA, which fell within the Violent Crime Control and Law Enforcement Act of 1994. See Pub. L. No. 103-322, § 40141, 108 Stat. 1796. VAWA was the first comprehensive federal legislation aimed at ending violence against women. See Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 *FORDHAM L. REV.* 57, 64 (2002) (noting that VAWA was “the nation’s first attempt at a wide-ranging federal response to the devastation caused by rape, domestic violence, and other forms of violence against women”); Leila Abolfazli, *Violence Against Women Act (VAWA)*, 7 *GEO. J. GENDER & L.* 863, 866 (2006) (discussing the “comprehensive legal approach” of VAWA and its “protective and preventive responses to domestic violence”).

¹¹¹ Given the scope of this Article, it will not provide further discussion of Rule 415, which considers other evidence of sexual assault or child molestation in a civil matter where a claim for relief was based on sexual assault or child molestation by one of the parties. § 320935, 108 Stat. at 2136–37 (codified as FED. R. EVID. 415, 28 U.S.C.).

¹¹² § 320935, 108 Stat. at 2135–36. Notably, the legislative history from the congressional hearings makes it clear that a successful prosecution was not a prerequisite for the admissibility of these other sexual assault acts. 140 *Cong. Rec.* H5438.

¹¹³ § 320935, 108 Stat. at 2136–37. Proposed Rule 414 read as follows: “In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.” *Id.*

¹¹⁴ *Id.* For example, proposed Rule 413, which remains unchanged today, defines sexual assault as:
(1) any conduct prohibited by 18 U.S.C. chapter 109A;

However, neither definition includes the crime of sex trafficking.¹¹⁵ As of the publication of this Article, the federal courts have never applied the propensity rules to a sex trafficking case. Further, the rules make no reference to any of the sex trafficking statutes, and no subsequent amendment has added those statutes within the scope of the definitions.¹¹⁶ Instead, the text of the propensity rules clearly covers what would generally be thought of as sexual assault—nonconsensual sexual contact between a defendant and another person,¹¹⁷ violent sexual contact resulting in “death, bodily injury, or physical pain,”¹¹⁸ and sexual contact with a child.¹¹⁹ This holds true for proposed Rule 414’s definition of child molestation.¹²⁰ Conversely, the TVPA, discussed in Part I, defines sex trafficking through “commercial sex acts,” which are not found within the enumerated definitions laid out in the propensity rules.¹²¹

In addition to the text of these amendments, the legislative history and congressional intent pertaining to the propensity rules are instructive for the purposes of this Article. During the congressional hearings on the propensity rules, the House sponsor, Representative Susan Molinari, along with the Senate sponsor, Senator Bob Dole, provided the majority of the testimony to support the amendments.¹²² Specifically, they set forth three notable policy arguments. First, they argued there was a broad public need to address the growing national problem of sexual assault and child molestation.¹²³ Second, they asserted that individuals who commit these types of crimes are

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- (2) contact, without consent, between any part of the defendant's body—or an object—and another person's genitals or anus;
 - (3) contact, without consent, between the defendant's genitals or anus and any part of another person's body;
 - (4) deriving sexual pleasure or gratification from inflicting death, bodily injury, or physical pain on another person; or
 - (5) an attempt or conspiracy to engage in conduct described in subparagraphs (1)–(4).

¹¹⁵ As discussed *infra*, while sex trafficking was a crime at this time, it was not until 2000 that Congress passed the first comprehensive legislation to address sex trafficking.

¹¹⁶ See generally FED. R. EVID. 413–14.

¹¹⁷ See FED. R. EVID. 413(d)(2)–(3) (referring to nonconsensual sexual contact with the defendant, not a commercial sex act). Certainly, if a sex trafficking case also involved sexual assault charges, then other sexual assault crimes might be admissible under the propensity rules. However, other sex trafficking crimes would be subject to Rule 404(b) analysis, and would not be covered by the propensity rules.

¹¹⁸ FED. R. EVID. 413(d)(4).

¹¹⁹ FED. R. EVID. 413(d)(1).

¹²⁰ FED. R. EVID. 414(d). The only additional conduct covered includes charges related to creating and distributing child pornography. FED. R. EVID. 414(d)(2)(B).

¹²¹ Federal law defines sex trafficking as “the recruitment, harboring, transportation, . . . or soliciting of a person for the purpose of a commercial sex act.” 22 U.S.C. § 7102(12). Further, commercial sex act constitutes “any sex act on account of which anything of value is given to or received by any person.” *Id.* at § 7102(4).

¹²² 140 CONG. REC. H8991–92 (Aug. 21, 1994) (statements of Rep. Molinari); 140 CONG. REC. S12990 (Sept. 20, 1994) (statements of Sen. Dole).

¹²³ See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI.-KENT L. REV. 15, 16, 19–21 (1994) (summarizing the argument).

more likely to continue committing these crimes, making the admission of prior acts particularly probative.¹²⁴ Third, they set forth that sexual assault and child molestation cases present a unique challenge in the criminal justice system.¹²⁵ Put simply, they are often hard to prove. This occurs for a variety of reasons.

To start, these cases do not typically occur in the presence of other witnesses, causing these crimes to become a question of the defendant's word against the victim's word.¹²⁶ The importance of the victim's credibility becomes even more crucial when the defense turns on consent, which many do.¹²⁷ Given these crime-specific realities, Congress intended for the propensity rules to allow the jury to hear important additional evidence in these types of cases.¹²⁸

To be expected when trying to alter the foundation of character evidence, the congressional hearings also yielded opposition. Mainly, these oppositions mirrored the historical opposition to propensity reasoning: it is unfair, it violates due process, and, plainly, it goes against our system of justice.¹²⁹ However, despite the initial objections, the proposed propensity rules, along with the remaining bill, passed in Congress.¹³⁰

Subsequently, Congress sent the propensity rule amendments to the U.S. Judicial Conference for comment.¹³¹ In February 1995, the Judicial

¹²⁴ *Id.* at 24 (“[E]vidence showing that the defendant has committed sexual assaults on other occasions places him in a small class of depraved criminals, and is likely to be highly probative in relation to the pending charge.”).

¹²⁵ 140 CONG. REC. H8991–92 (Aug. 21, 1994) (statements of Rep. Molinari).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* (noting the importance of additional evidence given the difficulty with credibility determinations in rape cases).

¹²⁹ 140 CONG. REC. H8990 (Aug. 21, 1994) (statement by Rep. Hughes) (arguing that the rules would “raise very serious constitutional questions”); 140 CONG. REC. H5439 (June 29, 1994) (statement of Rep. Schumer) (stating that these rules would violate due process); 140 CONG. REC. S10277 (Aug. 2, 1994) (statement of Sen. Biden) (objecting on the basis that these rules would offend “every basic tenet of our system”).

¹³⁰ Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 40141, 108 Stat. 1796.

¹³¹ *Id.* at 38 U.S.C. Rule 413 Note (c). It is worth noting, as many scholars have emphasized, that the enactment of the propensity rules did not follow the typical procedure for amending the Federal Rules of Evidence. See, e.g., Edward J. Imwinkelried, *Using the Concept of Specific Propensity to Reform the Administration of the Rape Sword Rules, Federal Rules of Evidence 413-415: An Exclusionary Rule Criticized as Too Broad with Exceptions Also Faulted as Too Broad*, 58 CRIM. L. BULL. 433, 443–44 (2022). The Rules Enabling Act of 1934 granted the Judicial Conference the “authority to make and publish rules in actions at law.” Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. §§ 2071–77). This opportunity allows the judiciary to provide feedback about the consequences and effect of the legislation, along with provide assistance in drafting the rules that they will ultimately be applying.

However, when the propensity rules were proposed as part of VAWA, Congress provided that “[t]he Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.” § 320935, 20 U.S.C. Rule 413 Note(c). Instead, Congress stated it would reconsider the proposed legislation if the Judicial Conference had concerns. Despite the concerns laid

Conference Committee provided a report to Congress strongly advising against adopting the new amendments.¹³² Of the Committee members, only one member from the Justice Department voted in favor of the amendments.¹³³ Specifically, the report advised that the concerns Congress intended to address through the propensity rules were already addressed by the existing rules—particularly Rule 404(b).¹³⁴ Further, the Committee emphasized that propensity reasoning is unfairly prejudicial because of “the danger of convicting a criminal defendant for past, as opposed to charged, behavior” or conduct.¹³⁵ Despite this opposition from the Committee, Congress proceeded forward with the propensity rule amendments.¹³⁶ The propensity rules became law in August of 1995.¹³⁷

After the enactment, as Congress intended, states began following suit and developed similar evidentiary laws.¹³⁸ As of the publication of this Article, twenty-one states have enacted similar laws.¹³⁹ Notably, about half

out in the Judicial Conference Report, Congress did not alter the proposed legislation and instead enacted the rules as originally drafted. *Id.* at Rule 413 Note(d).

¹³² JUD. CONF. OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN CERTAIN SEXUAL MISCONDUCT CASES (1995), reprinted in 159 F.R.D. 51, 51–54 (1995) [hereinafter REPORT OF THE JUDICIAL CONFERENCE].

¹³³ *Id.* at 53 (noting the “highly unusual unanimity of the members . . . , composed of over 40 judges, practicing lawyers, and academicians”).

¹³⁴ *Id.*

¹³⁵ *Id.* (concluding that “the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice”).

¹³⁶ Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135–36 (1994).

¹³⁷ See *United States v. Roberts*, 88 F.3d 872, 877 (10th Cir. 1996) (“the alternatives suggested by the Judicial Conference were not accepted by Congress, and thus Rule 413 became effective . . . on July 9, 1995.”). Within a year of enactment, Congress was forced to clarify its intent regarding retroactivity. Pub. L. No. 104-208, 110 Stat. 3009, 3009-25 (1996). In the original version, the enabling language instructed that these amended evidentiary rules would “apply to proceedings commenced on or after the effective date of such amendments.” Pub. L. No. 103-322, § 320935, 22 U.S.C. Rule 413 Note(e). Subsequently in *Roberts*, the Tenth Circuit concluded that the amendments did not apply to the defendant’s case because his indictment was filed about a month before the amendments became effective. 88 F.3d at 877–79. Thus, the court concluded that Congress did not intend for the amendments to apply to proceedings that had already commenced. *Id.* at 879.

However, Congress called this decision an “erroneously restrictive interpretation of the effective date language for the new rules.” 142 CONG. REC. H12051-04 (1996). In response to *Roberts*, Congress amended the enabling language, stating that the new rules “shall apply to proceedings commenced on or after the effective date or such amendments, including all trials commenced on or after the effective date of such amendments.” Pub. L. No. 104-208, Div. A, Tit. I, § 120, 110 Stat. 3009, 3009-25 (1996). Thus, Congress clarified that the new rules should apply to all *trials* commenced after July 10, 1995. *Id.*; see also *United States v. Enjady*, 134 F.3d 1427, 1429–30 (10th Cir. 1998) (finding that, even though defendant was indicted in May 1995, Rule 413 applied to defendant’s trial, which occurred in June 1996).

¹³⁸ FISHER, *supra* note 90, at 242.

¹³⁹ See ALASKA R. EVID. 404(b)(2)–(3); ARIZ. R. EVID. 404(c); ARIZ. REV. STAT. ANN. § 13–1420 (2021); ARK. CODE ANN. § 16–42–103 (2021); CAL. EVID. CODE § 1108 (West 2021); CONN. CODE EVID. § 4–5(b) (2021); FLA. STAT. § 90.404(2)(b)–(c) (2021); GA. CODE ANN. §§ 24–4–413 to –415 (2020); 725 ILL. COMP. STAT. 5/115–7.3 (2021); KAN. STAT. ANN. § 60–455(d) (2021); LA. CODE EVID.

of these states expanded the scope of the propensity rules, providing a broader interpretation than their federal counterpart.¹⁴⁰ Particularly relevant to this Article, these states specifically included sex trafficking cases within their version of the propensity rules.¹⁴¹

C. *The Balancing Test Under Rule 403*

As noted above, since the codification of the FRE, legal scholars and courts reiterated the common law belief that character evidence can have significant probative value in a given case. However, it is also clear that character evidence poses a risk of being unfairly prejudicial. Thus, in an effort to address these two opposing characteristics of character evidence, the court must conduct a balancing test to determine if the evidence should be admitted.¹⁴² This balancing test, contained in Rule 403, allows courts to “exclude relevant evidence if its probative value is substantially outweighed

ANN. art. 412.2, 412.5 (2020); MD. R. EVID. 5–413; MD. CODE ANN., CTS. & JUD. PROC. § 10–923 (West 2021); MICH. COMP. LAWS §§ 768.27a to –b (2021); MO. CONST. art. 1, § 18(c); NEB. REV. STAT. §§ 27–413 to –415 (2021); NEV. REV. STAT. § 48.045(3) (2021); OKLA. STAT. tit. 12 §§ 2413–14 (2021); TENN. CODE ANN. § 40–17–124 (2021); TEX. CODE CRIM. PROC. ANN. art. 38.37 (West 2021); UTAH R. EVID. 404(c); VA. CODE ANN. § 18.2–67.7:1 (2021); WIS. STAT. ANN. § 904.04(2)(b) (West 2021); OR. REV. STAT. § 40.170 (2020) (enacting Oregon’s Rule 404, which appears to be so broad as to include any type of crime, not limited to sex-related crimes); FISHER, *supra* note 37, at 242.

¹⁴⁰ See CAL. EVID. CODE § 1108 (West 2021); CONN. CODE EVID. § 4–5(b) (2021) (encompassing any crime that “includes aberrant and compulsive sexual misconduct”); FLA. STAT. § 90.404(2)(b)–(c) (2021); KAN. STAT. ANN. § 60–455(d) (2021); LA. CODE EVID. ANN. art. 412.2, 412.5 (2020); MO. CONST. art. 1, § 18(c); NEV. REV. STAT. § 48.045(3) (2021); OR. REV. STAT. § 40.170 (2020) (enacting Oregon’s Rule 404, which is by far the broadest state version of 413 and 414, applying to any criminal charge); 12 TEX. CODE CRIM. PROC. ANN. art. 38.37 (West 2021) (limited to sex offenses committed against someone under 18 years of age, including sex trafficking); WIS. STAT. ANN. § 904.04(2)(b) (West 2021).

Even fewer states have included domestic violence charges under its state statute. ALASKA R. EVID. 404(b)(2)–(3); CAL. EVID. CODE § 1109(a) (West 2022). While not the focus of this Article, domestic violence charges deserve thoughtful consideration as they relate to the propensity rules. Only Alaska currently includes domestic violence charges under its state statute. See also Hillel J. Bavli, *Character Evidence as a Conduit for Implicit Bias*, 56 U.C. DAVIS L. REV. 1019, 1034 (2023) (noting the important policy objectives surrounding evidentiary exceptions for domestic violence and sexual assault cases).

¹⁴¹ See, e.g., NEV. REV. STAT. § 48.045 (2023); NEV. REV. STAT. § 179D.097(1)(r) (defining “sexual offense” to include sex trafficking).

¹⁴² The evidence must also meet the relevance threshold. FED. R. EVID. 401(a)–(b) (defining relevant evidence as evidence that “has any tendency to make a fact more or less probable than it would be without the evidence” when “the fact is of consequence in determining the action”).

by a danger of . . . unfair prejudice,” among other things.¹⁴³ Thus, the evidence must be relevant *and* pass the balancing test.

This is required for evidence offered pursuant to either 404(b) or the propensity rules. However, one initial criticism of the propensity rules surrounded this very issue: whether the propensity rules called for mandatory admission, as the text implied, or whether the 403 balancing test applied, as supported by the legislative history.¹⁴⁴ Courts quickly chimed in on this issue and confirmed the legislative history, finding that the 403 balancing test did apply to the propensity rules.¹⁴⁵ Eventually, the Evidence Rules Restyling Project¹⁴⁶ amended the text of the propensity rules to clarify that it intended the courts to have discretion to admit this evidence through the 403 balancing test.¹⁴⁷ However, scholars have pointed out the weakened application of 403 in the context of the propensity rules, along with the inconsistent application among the circuits.¹⁴⁸

When conducting the 403 balancing test, courts consider a number of factors to determine if the probative value is substantially outweighed by the risk of unfair prejudice. When considering probative value, factors include:

¹⁴³ FED. R. EVID. 403; *see also* FED. R. EVID. 402 (instructing that “[r]elevant evidence is admissible unless” admission is rejected by the U.S. Constitution, a federal statute, these rules, or the Supreme Court); FED. R. EVID. 404, advisory committee’s note to subdivision (b) of 1974 enactment (stating that a trial judge “may exclude” a permissible prior bad act “only on the basis of those considerations set forth in Rule 403”); FED. R. EVID. 404(b)(2) (stating that evidence of a prior bad act “may be admissible” for a purpose other than propensity). To be clear, this is true of any type of evidence, not exclusively character evidence.

In addition to “unfair prejudice,” this rule would also apply if the probative value were substantially outweighed by a danger of “confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403.

¹⁴⁴ *See* Sheft, *supra* note 9, at 67–68 (discussing how the legislative history contradicts the textual analysis); Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 976–77 (1998). This concern was also raised in the Judicial Committee Report. *See* REPORT OF THE JUDICIAL CONFERENCE, *supra* note 132, at 53.

¹⁴⁵ *See, e.g.,* *United States v. Guardia*, 135 F.3d 1326, 1330–31 (10th Cir. 1998) (noting that courts must pay “careful attention to both the significant probative value and the strong prejudicial qualities inherent in all evidence submitted under 413”).

¹⁴⁶ In 2011, the Federal Rules of Evidence were “restyled” to make them easier to understand, which included maintaining consistent style and terminology throughout. FED. R. EVID. advisory committee’s notes to 2011 amendments.

¹⁴⁷ FED. R. EVID. 413; *see also* FED. R. EVID. 414 (reflecting the same amendment as rule 413). Thus, the current Rule 413 reads: “In a criminal case in which a defendant is accused of a sexual assault, the court *may* admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.” FED. R. EVID. 413(a) (emphasis added).

¹⁴⁸ *See* Orenstein, *supra* note 11, at 1519–20 (2005) (arguing that courts employ a “403-lite” by “tending to admit evidence of prior sexual offenses automatically under a pro forma approach . . .”); Fang Bu, Note, *Searching for a Better Constitutional Guarantor for FRE 413-415: The Conflict Among Circuits Applying the FRE 403 Balancing Test and a New Solution*, 4 U. ILL. L. REV. 1905, 1922–34 (2016) (outlining the various approaches taken by the circuits and suggesting an alternative solution based on the “special balancing test utilized under FRE 609(a)(1)(B)”).

(1) the similarity of the prior acts to the acts charged, (2) temporal proximity, (3) the presence or lack of intervening circumstances, (4) the frequency of the prior acts, (5) the strength of proof of the prior act, (6) the relationship between the parties, (7) the need for the evidence, and . . . (8) the potential for less prejudicial evidence.¹⁴⁹

To balance the prejudice, courts consider:

(1) the likelihood such evidence will contribute to an improperly-based jury verdict, (2) the extent to which such evidence will distract the jury from the central issues of the trial, (3) how time consuming it will be to prove the prior conduct, (4) its likely prejudicial impact on the jurors, and (5) the burden on the defendant in defending against the uncharged offense.¹⁵⁰

Along with other scholars, this Article claims that the 403 balancing test does not produce consistent and accurate outcomes. The following Section will set forth this Article's proposed sex trafficking framework to improve the application of Rule 403 in sex trafficking cases when analyzing a 404(b) question.

III. A PROPOSED SEX TRAFFICKING FRAMEWORK FOR APPLICATION UNDER RULES 404(B) AND 403

This brings us to the primary purpose of this Article: to provide a framework based on the psychological complexities of sex trafficking for issues relating to Rules 404(b) and 403, which will provide a deeper and nuanced understanding of the defendants, the victims, and the crime itself. Ideally, this will improve consistency across court rulings on Rule 404(b) evidence, which has been a frequent critique among lawyers and scholars. As illustrated below, my proposed framework will help us better evaluate the 403 factors, particularly the similarity between the charged act and prior acts, the need for the other act evidence, and the frequency of other acts. Finally, it begins to fill a gap noted by sex trafficking scholars about the lack of understanding that courts, lawyers, and lawmakers have about the crime and the individuals involved.

The framework is comprised of three components, which generally follow the chronology of sex trafficking discussed in Part I: Victim Selection, Grooming, and Method of Operation. Notably, while there are unique characteristics to each, overlap will also inevitably occur.

¹⁴⁹ Orenstein, *supra* note 11, at 1523 (internal quotation marks omitted).

¹⁵⁰ *Id.* at 1523–24 (internal quotation marks omitted).

Additionally, there are examples set forth below where courts do rely on parts of this Article's framework. Typically, this occurs when the court has been presented with an expert witness to detail these sex trafficking complexities.¹⁵¹ However, this Section will also discuss examples to the contrary, where courts demonstrate a limited and inadequate understanding of sex trafficking.

Sex trafficking scholars typically agree that the legal profession has a limited, if not mistaken, understanding of sex trafficking.¹⁵² This Article does not fault the courts for this shortcoming—the inner workings of a sex trafficker and their victims, including the larger operation, are “not the subject of common knowledge.”¹⁵³ Thus, in these situations where an expert is not used or available, this framework will be beneficial.

Below, I will discuss the framework components within the 403 factors that are most likely to be impacted: (1) similarities and differences between the charged act and prior acts; and (2) the need for the other act evidence.

A. *Similarities and Differences Between the Charged Act and Prior Acts*

When analyzing the similarity between the charged conduct and the prior conduct under Rule 403, the primary concern arises when courts fail to even address the similarities or differences between the victims when weighing probative value against the risk of unfair prejudice.¹⁵⁴ Additionally, when courts do consider the victim similarities, another shortcoming in this analysis is that courts at times will only focus on the *physical* characteristics of the victims, such as their age, sex, or race.¹⁵⁵ However, the analysis should be more nuanced.

¹⁵¹ See, e.g., *United States v. Carson*, 870 F.3d 584, 590–91 (7th Cir. 2017) (recounting the testimony of a sex trafficking expert); *United States v. Betts*, 911 F.3d 523, 527 (8th Cir. 2018) (same). It is not uncommon for the government to seek to qualify a detective as an expert in this field based on their training and experience. See, e.g., *United States v. Walker*, 73 F.4th 915, 917–18 (11th Cir. 2023) (recounting the testimony of an FBI Special Agent).

¹⁵² See generally Lenora C. Babb, *Utah's Misguided Approach to the Problem of Sex Trafficking: A Call for Reform*, 14 J. L. & FAM. STUD. 277, 287, 293 (2012) (calling a Utah amended statute constitutionally overbroad and vague, as well as bad public policy); Nicole Tutrani, Note, *Open for the Wrong Kind of Business: An Analysis of Virginia's Legislative Approach to Combating Commercial Sexual Exploitation*, 26 REGENT U. L. REV. 487, 509 (2014).

¹⁵³ *United States v. Taylor*, 239 F.3d 994, 998 (9th Cir. 2001) (“[T]he relationship between prostitutes and pimps is not the subject of common knowledge. . . . A trier of fact who is in the dark about that relationship may be unprepared to assess the veracity of an alleged pimp, prostitute, or other witness testifying about prostitution.”).

¹⁵⁴ *United States v. Sims*, 550 F. Supp. 3d 907, 911 (D. Nev. 2021) (admitting prior evidence involving adult victims despite the charged conduct involving minor victims).

¹⁵⁵ See, e.g., *United States v. Midder*, 139 F.4th 649, 653 (8th Cir. 2025) (noting the age difference between victim of the prior act and the victim of the charged act). Notably, this is an important distinction for defense attorneys to be aware of. Given that sex traffickers typically have a more nuanced selection process, simply providing physical characteristic similarities between a prior victim and the present victim is not significantly probative.

First, the framework proposes that courts should consider the tactics used for selecting a victim. When selecting and targeting a victim, sex traffickers typically target particularly vulnerable victims to ensure they will be able to manipulate and control them into participating and falling in line.¹⁵⁶ Thus, the psychological complexity for this part of the framework refers to this tactic, combined with underlying characteristics of the victim that makes them vulnerable and susceptible to control and manipulation.

One misconception is that sex trafficking defendants select a victim based on a physical or sexual attraction.¹⁵⁷ Instead, this crime is typically less about fetish or fantasy and often about manipulation and control.¹⁵⁸ As such, courts should focus on the characteristics of the victims that allow for manipulation and control—because a sex trafficker will frequently target victims with similar vulnerabilities. These characteristics include the victim’s family dynamic, lack of support system, poverty level, substance abuse, or some other special need.¹⁵⁹ The sex trafficker uses these vulnerabilities to build a relationship or connection with the victim, which is later used to exert control and manipulation.¹⁶⁰

While “age” was mentioned above as a physical characteristic, this could also be a factor related to manipulation and control. Certainly, younger victims are typically easier to manipulate and control.¹⁶¹ However, consistent with other arguments made in this Section, there is usually a more nuanced analysis that courts need to engage in. A young victim with a very strong family support system will not be as easy to manipulate and control as a young victim without family support, possibly already involved in the criminal justice system or foster care system.¹⁶² Thus, while age is an important factor in the analysis, this framework suggests that there is usually more to the selection of that victim.

In addition to considering the similarities and differences in victim selection, the next component of the framework suggests that courts analyze the grooming process. The grooming process is an important aspect of sex trafficking cases that presents many psychological complexities. The grooming process refers to the various psychological tactics that a sex trafficker uses to create and maintain control over a victim once selected.

¹⁵⁶ See UNDERSTANDING THE PERSPECTIVE OF THE VICTIM, *supra* note 84 (noting different types of vulnerability factors that sex traffickers tend to target).

¹⁵⁷ Holly A. Hargreaves-Cormany, Terri D. Patterson, Yvonne E. Muirhead & The Federal Bureau of Investigation, *A Typology of Offenders Engaging in the Sex Trafficking of Juveniles (STJ): Implications for Risk Assessment*, 30 *AGGRESSION & VIOLENT BEHAV.* 40, 41 (2016).

¹⁵⁸ *Id.*

¹⁵⁹ Raza & Feehs, *supra* note 42, at 655–74; see also *U.S. v. Carson*, 870 F.3d 584, 590-91 (7th Cir. 2017) (discussing the tendencies of sex traffickers to target these vulnerable populations).

¹⁶⁰ Raza & Feehs, *supra* note 42, at 666–74.

¹⁶¹ See *id.* at 655 (claiming that traffickers build relationships with vulnerable individuals).

¹⁶² See *United States v. Brooks*, No. 22-cr-40086-TC, 2024 WL 3899032, at *8 (D. Kan. Aug. 22, 2024) (involving a defendant who targeted “young girls who were runaways, or from broken homes, and those recently released from a specific juvenile correctional facility.” (internal quotations omitted)).

While the concept of grooming is often present from the beginning, during the selection of the victim, this Article uses the grooming process to refer to the process of keeping and controlling the victim once selected, which includes the exploitation of the vulnerabilities discussed above.¹⁶³

Generally, the grooming process involves a combination of psychological methods of manipulation—violence and fear, false promises, and isolation—used to coerce and control victims.¹⁶⁴ As mentioned above, the government will sometimes utilize an expert witness to help explain the complexities that develop through the grooming process. However, in cases where courts are not familiar with these psychological complexities, the analysis can be lacking. For example, simply stating that a sex trafficker was violent against other victims does not demonstrate a nuanced understanding of the grooming process.¹⁶⁵ To further illustrate, one court simply stated, “[t]he prior conduct was like [the defendant’s] conduct in trafficking [the present victim], thereby maximizing its probative value.”¹⁶⁶

Instead, this framework suggests focusing on the psychological tactics used in the grooming process. To start, sex traffickers often employ what the Fifth Circuit refers to as the “carrot and stick.”¹⁶⁷ This method starts with promises and compliments, among other forms of enticement, to begin building some form of relationship.¹⁶⁸ This is the “carrot.” Then, the sex trafficker transitions to the “stick,” using violence to control the victim and force them into commercial sex acts, among other things.¹⁶⁹ Courts should strive to look at the specificity of this “carrot and stick” conduct to identify meaningful similarities or differences for their 403 analyses.

Courts should also be aware that the sex traffickers may not directly use violence against the victim. For example, one “stick” tactic used by sex traffickers is to abuse a more senior victim in front of a newer victim for the purpose of intimidating the newer victim.¹⁷⁰ Similarly, a sex trafficker may also use a more senior victim to abuse the newer victims in order to help

¹⁶³ Given the important nuances of victim targeting discussed above, it is necessary to isolate grooming as a separate factor for the courts.

¹⁶⁴ Raza & Feehs, *supra* note 42, at 676.

¹⁶⁵ For example, the Eighth Circuit in *Betts* simply states, in part, that the defendant used “violence . . . to control his relationship with the girls over time.” *US. v. Betts*, 911 F.3d 523, 530 (8th Cir. 2018).

¹⁶⁶ *United States v. Watson*, No. 22-13652, 2024 WL 3860113, at *5 (11th Cir. Aug. 19, 2024); *United States v. Gaskins*, 685 F. App’x 698, 701 (11th Cir. 2017) (“The evidence was highly probative because the charged offense and [the defendant’s] interactions with [both victims] were close both in nature and in time.”); *United States v. Sims*, 550 F. Supp. 3d 907, 915 (D. Nev. 2021) (“The conduct described by the adult victims is both similar to the charged conduct and not too remote in time, because Defendant was allegedly trafficking both the adult victims and the minor victims concurrently.”).

¹⁶⁷ *United States v. Campbell*, 49 F.3d 1079, 1084 (5th Cir. 1995).

¹⁶⁸ This may naturally overlap with the victim selection component discussed above. Once the pimp identifies the vulnerabilities that they want to target, the “carrot” is then employed to make contact and begin enticement.

¹⁶⁹ *Campbell*, 49 F.3d at 1084.

¹⁷⁰ *United States v. Carson*, 870 F.3d 584, 591 (7th Cir. 2017); *United States v. Harris*, 701 F.2d 1095, 1100 (4th Cir. 1983).

control and manipulate them.¹⁷¹ As discussed further in the method of operation Section below, it is common for a hierarchy to form, wherein this senior victim is referred to as a “bottom.”¹⁷²

Lastly, courts should focus on whether a sex trafficker has taken steps to tear down and isolate victims. For example, a sex trafficker will commonly relocate a victim so they are not physically near any support system.¹⁷³ Similarly, they will take their driver’s license and other forms of identification to make it more challenging to leave.¹⁷⁴ These tactics aid in convincing many victims that staying with the sex trafficker is the best and only option for them—and even if they wanted to leave, no one would believe them.

The third and final Part of this Article’s sex trafficking framework, method of operation, focuses on how a sex trafficker operates the “business” side of sex trafficking. Admittedly, this part of the framework is less dependent on the psychological complexities that develop in sex trafficking, but nonetheless relevant to the court’s inquiry under 404(b) and 403.

The business of sex trafficking rarely involves one victim. Instead, the nature of the crime includes a series of victims controlled by the trafficker.¹⁷⁵ This operation usually follows a similar flow across the victims. Often, a hierarchy develops wherein one of the victims becomes a “bottom,” and is designated by the trafficker to ensure compliance over the other victims.¹⁷⁶ Thus, a court’s analysis should focus on how the “business” operates—for example, how the trafficker communicates with the victims, how the sex buyers are solicited, where the commercial sex occurs, and the payment procedures. This also includes the use of social media; sex traffickers frequently utilize the same or similar platforms to target and communicate with victims, as illustrated below.¹⁷⁷

An Eleventh Circuit case, *United States v. Watson*, provides an instructive example where the court aptly details the similarity between the

¹⁷¹ *United States v. Ray*, 2022 WL 558146, at *19 (S.D.N.Y. Feb. 24, 2022) (noting how the senior victim became the defendant’s “loyal deputy”).

¹⁷² Leslie D. Unger & Chitra Raghavan, *Isolation and Support Dynamics Among Concurrent Victims of Sex Trafficking 5–7* (Master’s Thesis, CUNY John Jay College, 2019) (on file with CUNY Academic Works).

¹⁷³ *U.S. v. Walker*, 73 F.4th 915, 931 (11th Cir. 2023) (concluding that a jury could find that the victim felt coerced into commercial sex acts because she “was in an unfamiliar city hundreds of miles from home and entirely dependent on [the defendant] for lodging, food, and transportation”).

¹⁷⁴ Rebecca Pfeffer, Kelle Barrick & Terri Galvan, *Barriers and Facilitators to Leaving a Trafficker: A Qualitative Analysis of the Accounts of People Who Have Experienced Sex Trafficking*, 19 VICTIMS & OFFENDERS 1451, 1460 (2024).

¹⁷⁵ *Unger & Raghavan*, *supra* note 172, at 12.

¹⁷⁶ *Id.* at 5–7.

¹⁷⁷ Raza Feehs, *supra* note 42, at 674–80; Walker-Rodriguez & Hill, *supra* note 1, at 3. *See On-Ramps, Intersections, and Exit Routes: A Roadmap for Systems and Industries to Prevent and Disrupt Human Trafficking*, POLARIS (July 1, 2018) BRITTANY ANTHONY ET AL., *supra* note 45 (discussing how traffickers build relationships with victims over social media); Miller, *supra* note 45, at 62.

method of operation used in the prior and present acts of sex trafficking.¹⁷⁸ Here, the defendant was charged with sex trafficking of a minor, along with another related charge.¹⁷⁹ The court explained that the defendant used various websites to post sexually explicit advertisements for “J.D.,” a minor.¹⁸⁰ The defendant also communicated with individuals over a cell phone texting app and coordinated for them to meet J.D. at a particular hotel, where he would be present outside.¹⁸¹ On appeal, the court reviewed the district court’s decision to admit 404(b) evidence involving another minor victim, “L.T.,” which was pending in state court, wherein the defendant similarly posted sexually explicit advertisements for L.T. on the same websites previously used for J.D.¹⁸² He likewise arranged for individuals to meet L.T. at another nearby hotel, where he would be present outside.¹⁸³

Ultimately, the Eleventh Circuit held that the district court did not abuse its discretion in admitting the evidence.¹⁸⁴ The court also found that the prior acts were similar to the current offense.¹⁸⁵ Particularly, the court noted that Watson used a similar website to advertise the victims, used hotels in a similar area, and always waited outside those hotels.¹⁸⁶

B. *The Need for the Other Act Evidence*

In addition to the similarities and differences, this framework sheds light on another 403 factor: why the government may or may not “need” the 404(b) evidence. Instead of focusing on the tactics, as discussed above, the framework’s psychological complexities for this factor focus on the “impact” that these tactics have on the victims.

Returning to the victim selection, while the targeted victim’s vulnerabilities contribute to a sex trafficker’s ability to manipulate and control a victim, traffickers also focus on these vulnerabilities for another reason—credibility, or lack thereof. The sex trafficker knows that if the victim goes to the police, these vulnerabilities make it more likely that a police officer, prosecutor, or subsequent jury will not believe the victim.¹⁸⁷

This issue of “need” is a complicated and contested one. On the one hand, the additional victims who testify, despite their vulnerabilities and

¹⁷⁸ United States v. Watson, No. 22-13652, 2024 WL 3860113 (2024).

¹⁷⁹ *Id.* at *1. The other charge is titled “knowingly benefitting from a venture to engage in sex trafficking of a minor.” *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at *1, *4.

¹⁸² *Id.* at *1.

¹⁸³ *Id.* at *4.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ See generally Bong Cook, *supra* note 3, at 303, 340 (discussing when juries are less likely to believe victims); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (discussing in the broader context of violence against women of color).

potential credibility issues, can be extremely probative if similarities exist. However, if the present crime could not be proved without the testimony regarding a prior act, then this testimony increases the risk of unfair prejudice—convicting the defendant for prior acts alone based on propensity reasoning.¹⁸⁸ Ultimately, the goal of this framework is to educate the courts on these complexities to assist with their rulings. Thus, courts need to be particularly sensitive to this balance between the “need” for prior evidence and the risk of unfair prejudice and propensity reasoning.

The grooming process can also provide valuable insight into the “need” factor. The grooming process not only seeks to control victims so they will engage in commercial sex, but it also seeks to control the victims by discouraging them from going to the police. Even more, it discourages them from eventually going to court and testifying, or alters their testimony in favor of the sex trafficker.¹⁸⁹ The psychological grooming tactics create a loyalty to the sex trafficker. In fact, the grooming process is responsible for why many victims return to the sex trafficker, even after escaping or being “saved” by the police.¹⁹⁰ For example, in *United States v. Lewis*, the Eleventh Circuit considered expert testimony which explained that “an abuse victim may return to an abuser due to an emotional bond formed through trauma.”¹⁹¹ Thus, courts must be aware of these complexities that develop between the sex trafficker and the victim in order to appropriately evaluate whether the government “needs” the prior act evidence.

While this framework focuses on 404(b) evidence, it could be equally utilized if the propensity rules were extended to sex trafficking since both rules of evidence fall back on the 403 balancing test. Thus, the following Section starts the conversation of using propensity evidence in sex trafficking cases.

¹⁸⁸ See *United States v. Johnson*, 27 F.3d 1186, 1193 (6th Cir. 1994) (noting the “powerful and prejudicial impact” that this type of evidence can have, suggesting that “the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered; to suggest that the defendant is a bad person . . . and that if he ‘did it before he probably did it again.’”).

¹⁸⁹ See, e.g., *United States v. Taylor*, 239 F.3d 994, 994–98 (9th Cir. 2001) (affirming the use of an expert witness to help the jury understand why a victim “might not have testified truthfully in previous proceedings about her relationship with her pimp”).

¹⁹⁰ See, e.g., *United States v. Lewis*, 762 F. App’x 786, 793 (11th Cir. 2019) (memorandum opinion) *rev’d on other grounds*, *Lewis v. United States*, 140 S. Ct. 613 (2019) (discussing expert testimony which demonstrated that as a result of grooming, abuse victims sometimes return to their abusers).

¹⁹¹ *Lewis*, 762 F. App’x at 793. However, victims could be more likely to come forward and report sex trafficking if they have reason to believe that something will come of it. See *Garland & Gomez*, *supra* note 54, at 701 (arguing that “[h]igher conviction rates will likely encourage more victims to report their traffickers, believing the law will protect them”). Importantly, allowing additional evidence could help victims feel like there was more to the evidentiary proof than simply their testimony. In addition to reporting, this could help victims remain cooperative with the prosecution as the case proceeds through the system, and reduce the likelihood of recanting.

IV. A CONVERSATION STARTER— PROPENSITY EVIDENCE & SEX TRAFFICKING

In this Section, this Article makes its final contribution: starting the conversation regarding whether propensity evidence should be used in sex trafficking cases. As discussed below, propensity evidence—if you did it once, then you likely did it again—is a controversial topic. The prohibition against this type of character evidence has been a tenet of evidence law since the common law, yet Congress enacted the propensity rules over firm objections from the Judicial Committee and the legal community, resulting in a momentous shift for character evidence. Despite this, the propensity rules have endured criticism and calls for reform for nearly thirty years.¹⁹² Congress has not budged; at this point, it appears the propensity rules are “here to stay.”¹⁹³ Thus, a conversation about the appropriate continued use of the propensity rules is warranted.¹⁹⁴

This Section begins with a brief look at the text of the propensity rules and whether sex trafficking could already fall within the existing doctrine. Next, it further opens the door to the conversation by: (1) briefly discussing the many concerns with the propensity rules that will be rehashed if these rules were extended to sex trafficking cases; and (2) considering recent scholarship from legal scholars (suggesting the value of propensity evidence) and forensic psychologists (suggesting the high likelihood of psychopathy in sex traffickers leading to a likelihood of reoffending).

A. *Does Sex Trafficking Fit Textually into the Propensity Rule?*

As previously stated in Part II, the propensity rules explicitly reference “sexual assault” and “child molestation” cases. Within each rule, neither

¹⁹² See generally McCandless *supra* note 92 (arguing that Rules 413 and 414 are unfair).

¹⁹³ Lave & Orenstein, *supra* note 14, at 796 (“Although we disapprove of Rules 413–414 on many grounds, we are realistic that these rules and their state law analogs are here to stay.”); Katharine Traylor Schaffzin, *Is Evidence Obsolete?*, 36 REV. LITIG. 530, 558 (2016) (“[d]espite the complexity and redundancy of these rules—as well as the fact that they expand the world of admissible propensity evidence, which may cause undue delay and expense—it seems likely that Congress would veto any attempt to amend these particular rules.”).

¹⁹⁴ Soon after the propensity rules were enacted there was significant scholarly conversation about the different issues surrounding these rules. Importantly, in 2015, two scholars revisited some of the policy arguments used by Congress to support these rules. See generally Lave & Orenstein, *supra* note 94 (questioning the basic premise of the propensity rules). Since then, the general demeanor of the scholarly community seems one of displeased acceptance. However, a lot has changed. Notably, in the evidence community, there is a push to reconsider the FRE as a whole. See Edward K. Cheng & G. Alexander Nunn, *Beyond the Witness: Bringing a Process Perspective to Modern Evidence Law*, 97 TEX. L. REV. 1077 (2019) (arguing that it is time for the evidentiary rules to change in order to meet current societal needs); Jeffrey Bellin, *The Silence Penalty*, 103 IOWA L. REV. 395, 434 (2018) (concluding that there is a need to reconsider the “prior offender” penalty that the evidence rule imposes on testifying defendants). Thus, a future discussion is encouraged to reconsider the propensity rules, both in the context of updated data and the immersing philosophy surrounding a revamp of the FRE.

definition mentions the crime of sex trafficking.¹⁹⁵ Further, there is no reference to any of the sex trafficking statutes, and no subsequent amendment has added those statutes within the scope of the definitions.¹⁹⁶ Instead, the text of the propensity rules cover what would generally be thought of as sexual assault: nonconsensual sexual contact between a defendant and another person,¹⁹⁷ violent sexual contact resulting in “death, bodily injury, or physical pain,”¹⁹⁸ and sexual contact with a child.¹⁹⁹ This holds true for proposed Rule 414’s definition of child molestation.²⁰⁰ Conversely, as discussed above, sex trafficking involves “commercial sex act[s],” which are not found within the propensity rules’ definitions.²⁰¹

But, when looking at the scholarship on sex trafficking, many scholars note the blurred line between sex trafficking and sexual assault.²⁰² The sex trafficker is forcing or coercing the victim to have sex with someone against their will. While scholars certainly do not view all sex trafficking under this definition, particularly surrounding the conversation of voluntary sex work, this Article only addresses sex trafficking with force. Thus, even though Congress did not intend to include sex trafficking when enacting the propensity rules, as detailed below, sex trafficking is presently viewed as a form of sexual assault.

Regarding the legislative intent, while Congress did not intend to include sex trafficking within the propensity rules, the reasoning for the propensity rules does appear to apply to sex trafficking cases. To start, there is a problem to address: like Congress’s desire to curb the increase in sexual assault and child molestation, sex trafficking has dramatically increased over

¹⁹⁵ As discussed *supra* Part I.A, while sex trafficking was a crime at this time, it was not until 2000 that Congress passed the first comprehensive legislation to address sex trafficking.

¹⁹⁶ See generally FED. R. EVID. 413–14 (establishing federal propensity rules).

¹⁹⁷ See FED. R. EVID. 413(d)(2)–(3) (referring to sexual contact with the defendant, not a commercial sex act). Certainly, if a sex trafficking case also involved sexual assault charges, then other sexual assault crimes might be admissible under the propensity rules. However, other sex trafficking crimes would be subject to Rule 404(b) analysis, and would not be covered by the propensity rules.

¹⁹⁸ FED. R. EVID. 413(d)(4).

¹⁹⁹ FED. R. EVID. 413(d)(1) (defining sexual assault as, among other things, “any conduct prohibited by 18 U.S.C. chapter 109A,” which includes 18 U.S.C. § 2243 addressing sexual abuse of a minor).

²⁰⁰ FED. R. EVID. 414(d). The only additional conduct covered includes charges related to creating and distributing child pornography. FED. R. EVID. 414(d)(2)(B).

²⁰¹ Federal law defines sex trafficking as “the recruitment, harboring, transportation, . . . or soliciting of a person for the purpose of a commercial sex act.” 22 U.S.C. § 7102(12). Further, a commercial sex act constitutes “any sex act on account of which anything of value is given to or received by any person.” § 7102(4). See also 18 U.S.C. § 1591 (discussing sex trafficking and commercial sex acts).

²⁰² See, e.g., Bong Cook, *supra* note 3, at 299 (explaining that sexual assault is one end of the spectrum of violence that sex trafficking includes); Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 27 (2017) (discussing the high likelihood for women in the commercial sex industry to have been trafficked and experience sexual assault); Marisa Silenzi Cianciarulo, *What Is Choice? Examining Sex Trafficking Legislation Through the Lenses of Rape Law and Prostitution*, 6 UNIV. ST. THOMAS L.J. 54, 59 (2008) (discussing the complex relationship between sex trafficking and sexual assault).

the last twenty-five years. It is worth repeating for a final time: sex trafficking has become the “fastest-growing business of organized crime” in the world, and the “third-largest criminal enterprise.”²⁰³

In addition, sex trafficking also poses evidentiary challenges, which was a significant motivation for Congress and the propensity rules. As detailed in Part I, sex trafficking cases often rely on the victim’s testimony, often without the benefit of corroborating evidence. Further, additional investigative and proof challenges arise based on the targeted victim’s vulnerabilities and the psychological grooming process that this Article has already emphasized.

Lastly, a major criticism of the propensity rules revolves around the final reason Congress set forth: a bare, unsupported allegation that individuals who commit acts of sexual assault and child molestation will keep committing them. As discussed below, forensic psychology studies present an added layer to this argument in the context of sex trafficking cases.

B. *The Opposition and Relevant Concerns*

The enactments of the propensity rules, and their subsequent application by courts, roused significant criticism, particularly from legal scholars. Given this Article’s secondary purpose of simply starting the propensity conversation in sex trafficking cases, this Section does not attempt to fully discuss or respond to the many valid arguments in opposition of these rules. Instead, this Section seeks to preview the primary objections, along with some modest answers to those objections, as a foundation for the continued future conversation.²⁰⁴

²⁰³ Walker-Rodriguez & Hill, *supra* note 1, at 2. In fact, further illustrating this growing problem, the TVPA was recently amended in 2019 to address another component of sex trafficking: state-sponsored sex trafficking. 22 U.S.C. § 7107(a). The TVPA provides that, aside from humanitarian and trade-related assistance, the U.S. refuses to provide support and assistance to any government that “(1) does not comply with minimum standards for the elimination of trafficking,” and “(2) is not making significant efforts to bring itself into compliance with such standards.” *Id.*

²⁰⁴ One notable future conversation is what the impact of this Article’s suggestion would be on sex trafficking victims. Sex trafficking scholarship has frequently criticized legislation, which claims to help victims, as being counterproductive. *See, e.g.,* Chacón, *supra* note 20, at 2979–80 (noting the shortcomings of the TVPA); Brennan, *supra* note 2, at 483–86 (discussing criticisms of legislation related to sex trafficking). At least in part, this discussion is intertwined with the debate surrounding whether anyone can truly voluntarily work as a sex worker. *See generally* DENISE BRENNAN, WHAT’S LOVE GOT TO DO WITH IT? TRANSNATIONAL DESIRES AND SEX TOURISM IN THE DOMINICAN REPUBLIC (2004) (discussing the complicated role of women’s agency in the sex trade). The argument follows: as legislation focuses on victimization and assumes all sex work is violent, sex workers are forced “further underground,” which increases their risk of harm. Brennan, *supra* note 2, at 486 (“[Sex worker rights groups] argue that as sex workers try to work further underground, their risks—of rape, HIV, and yes, even trafficking—increase.”).

Similarly, discussion is needed with regard to how the feminist theory opposition to the propensity rules could apply to sex trafficking cases. Katharine Baker sets forth the concern that these rules will “focus resources on a relatively small class of rapists and thereby ignore the majority of the men who actually rape.” Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*,

To start broadly, the propensity rules seem unfair for defendants and their constitutional right to fair trial. Many scholars, particularly early on, challenged these rules as a violation of the Due Process Clause.²⁰⁵ The propensity rules obviously violate the original premise of character evidence and the potential dangers that accompany it. It is certainly concerning, particularly to the presumption of innocence, to have a rule that could allow a jury to convict someone based on prior sexual misconduct alone. Similarly, scholars raise questions about how a jury can fairly evaluate the present case once they hear about prior sexual misconduct, and further, once they are explicitly told that they can consider it through a propensity lens.²⁰⁶

In response to these challenges, courts have fallen back on the 403 balancing test, which is applied in the propensity rule analysis.²⁰⁷ Courts claim the Due Process Clause is not violated so long as these fairness concerns are balanced against the probative value of the propensity evidence. However, scholars have pointed out the many deficiencies with Rule 403 in the context of the propensity rules, including the inconsistent presumption of admissibility across the circuits, ultimately concluding that Rule 403 is inadequately safeguarding defendants' due process rights.²⁰⁸

Another critique focuses on Congress's underlying motives for enacting these amendments. Broadly speaking, political pressure to address an issue, while it may serve the purpose of satisfying the general public, could result in creating bad law.²⁰⁹ For example, Louis Natali and Stephen Stigall argue that Congress ignored the important constitutional rights at stake and instead simply wanted to satisfy the fears of their constituents—while also analogizing the propensity rules to other politically motivated laws such as Megan's Law, "Three Strikes You're Out" laws, and the imposition of the death penalty for drug dealers.²¹⁰ However, this is not necessarily usual in

110 HARV. L. REV. 563, 565 (1997). Courtney Fraser concludes similarly that the idea that rape is only committed by a small group of depraved individuals takes away from the reality that rape is more commonplace. Courtney Fraser, Comment, *From "Ladies First" to "Asking for It": Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141, 181 (2015).

²⁰⁵ Sheft, *supra* note 9, at 76–77 (explaining that Rule 413 violates the Due Process Clause). *See generally* Natali, Jr. & Stigall, *supra* note 14, at 3 (arguing that the propensity rules violate the Due Process Clause).

²⁰⁶ Lave & Orenstein, *supra* note 14, at 807 (discussing the use of propensity rules at trial).

²⁰⁷ *United States v. Porter*, 121 F.4th 747, 752 (9th Cir. 2024); *United States v. Harvel*, 115 F.4th 714, 736 (6th Cir. 2024); *United States v. Schaffer*, 851 F.3d 166, 177 (2d Cir. 2017); *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005); *United States v. Enjady*, 134 F.3d 1427, 1431 (10th Cir. 1998); *United States v. Mound*, 149 F.3d 799, 801 (8th Cir. 1998).

State legislatures have also addressed the due process concern when enacting its state version of the propensity rules. For example, Florida's legislature echoed the rulings from the courts and concluded that the 403 balancing test ensures that there are not any due process violations. *See Council for Healthy Cmty's. Analysis*, H.R. 759, 2001 Leg., Reg. Sess., at 2–7 (Fla. 2001) (discussing the Florida legislature's analysis using the 403 balancing test).

²⁰⁸ *See* Orenstein, *supra* note 11, at 1519–20 (discussing the issues with applying Rule 403).

²⁰⁹ Ellis, *supra* note 144, at 976–77.

²¹⁰ Natali, Jr. & Stigall, *supra* note 14, at 39–40.

evidence law. As Edward Imwinkelried points out, social policy rationales have supported other exclusionary rules, such as privileges designed to restrict admission of protected conversations.²¹¹

Further, the underlying rationale for the propensity rules that garnered significant opposition was the argument that individuals who commit these types of offenses are likely to continue committing these offenses because they are “depraved.” From the start, scholars have repeatedly argued that the recidivism statistics do not support this rationale in sexual assault and child molestation cases.²¹² More recently, scholars have debated what the recidivism statistics actually show. On the one hand, scholars such as Tamara Rice Lave and Aviva Orenstein provide empirically supported arguments showing that sexual assault offenders are less likely to be re-arrested for a sex-related offense.²¹³ However, other scholars such as Roger Park provide a compelling argument under a theory of “comparative propensity statistics,” showing that prisoners incarcerated for rape were in fact more likely to be re-arrested for another rape than burglary prisoners were to be re-arrested for another burglary.²¹⁴

Unfortunately, while many have found ways to argue recidivism statistics in both directions, there are many limitations on recidivism data. Based on these limitations, these statistics are not a reliable way to determine if someone is likely to re-offend, particularly for sexual offenses, including sex trafficking.²¹⁵ First, sexual offenses often go unreported.²¹⁶ In fact, they

²¹¹ Edward J. Imwinkelried, *Should Rape Shield Laws Bar Proof that the Alleged Victim Has Made Similar, False Rape Accusations in the Past?: Fair Symmetry With the Rape Sword Laws*, 47 U. PAC. L. REV. 709, 710–11 (2016) (“[O]ther exclusionary rules such as communications privileges . . . are designed to promote extrinsic social policies such as encouraging clients to consult attorneys and patients to confide in therapists.”).

²¹² See Patrick Lussier, Stéphanie Chouinard Thivierge, Julien Fréchette & Jean Proulx, *Sex Offender Recidivism: Some Lessons Learned from Over 70 Years of Research*, 49 CRIM. JUST. REV. 413, 426 (2024) (stating that “[d]escriptive studies of samples composed of perpetrators of sexual offenses have shown that their criminal history is characterized mainly by nonsexual crimes Not only the prior record of recidivists is composed mainly of nonsexual offenses, their criminal recidivism is more likely to be for a nonsexual offense than for a sexual offense and this is especially true for adolescents.”).

²¹³ Lave & Orenstein, *supra* note 14, at 817–18; see also Alexander Nunn, *Incoherence of Evidence Law*, 99 NOTRE DAME L. REV. 1255, 1278–79 (2024).

²¹⁴ Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 762–63 (1998); see also Offit, *supra* note 9, at 2185 (explaining that defendants in sex offense prosecutions have a higher rate of repeat offenses than in other types of criminal cases).

²¹⁵ See CHRIS RUSH BURKEY, TUSTY TEN BENSEL & JEFFERY T. WALKER, FORENSIC INVESTIGATION OF SEX CRIMES AND SEXUAL OFFENDERS 11 (Larry S. Miller ed., 2014) (noting unreliable statistics and the limitations of the data collection process); RACHEL SWANER, MELISSA LABRIOLA, MICHAEL REMPEL, ALLYSON WALKER & JOSEPH SPADAFORÉ, CTR. FOR CT. INNOVATION, YOUTH INVOLVEMENT IN THE SEX TRADE: A NATIONAL STUDY 59 (2016) (explaining the inaccuracies in data collection and reporting related to underage prostitution); Lussier, Chouinard Thivierge, Fréchette & Proulx, *supra* note 212, at 423–26 (acknowledging the significant research shortcomings that have developed in the area of sexual offense recidivism).

²¹⁶ RUSH BURKEY, TEN BENSEL & WALKER, *supra* note 215, at 11.

are the most underreported crime nationwide.²¹⁷ Whether a sex offender re-offends requires that they be caught and prosecuted.²¹⁸ Not only is it hard to apprehend someone when the crime is not reported, but even when the case is reported, there is a strong likelihood that the case will not move forward with prosecution.²¹⁹ This makes it hard to compare recidivism statistics with other crimes.²²⁰

As mentioned, there is significant opposition to the propensity rules. Thus, this Article acknowledges that any proposed expansion of these rules to additional crimes will be very controversial. However, as psychology theory continues to evolve, it is worth re-evaluating the propensity rules and their application to other crimes, like sex trafficking. Thus, the remaining Sections apply recent psychology-based findings to our conversation.

C. *The Supporting Psychology of Propensity*

The following Section sets forth three arguments that point toward the use of propensity evidence, with one of these arguments focusing specifically on sex traffickers. Again, as clearly stated previously, this simply serves to frame the future conversation surrounding propensity evidence and sex trafficking cases.

²¹⁷ *Id.* (explaining that while about half of all crimes go unreported, “sex offenses are the most underreported crimes to law enforcement, [and] the UCR statistics for rape are certainly lower than what actually exists”). Another limitation with the UCR, which contributes to underreporting, is that it only accounts for the most serious crime. Thus, in a case that involved rape and murder, the UCR would report that as a murder. *Id.*

²¹⁸ It also requires accurate and complete reporting from law enforcement agencies, which research suggests is not occurring. *Id.*; see also Lussier, Chouinard Thivierge, Fréchette & Proulx, *supra* note 215 at 431–32 (noting the factors that can influence criminal justice data).

²¹⁹ A 2015 FBI report indicates that only 13 of 1,000 reported sexual assault cases were referred for prosecution, and only 7 of those resulted in a felony conviction. *What to Expect from the Criminal Justice System*, RAINN, <https://web.archive.org/web/20250109202441/https://rainn.org/articles/what-expect-criminal-justice-system> (last visited Feb. 6, 2025).

²²⁰ See Park, *supra* note 214, at 762 (showing how “comparative propensity statistics” indicated that “prisoners released from a sentence of rape were 10.1 times more likely than the other prisoners to be re-arrested for rape, while prisoners released from burglary sentences were 2.3 times more likely than the other prisoners to be re-arrested for burglary”); see generally John Gramlich, *What the Data Says About Crime in the U.S.*, PEW RSCH. CTR. (Apr. 24, 2024), <https://www.pewresearch.org/short-reads/2024/04/24/what-the-data-says-about-crime-in-the-us> (finding that over 80% of vehicle thefts were reported in 2022, compared to approximately 21% of rapes, the lowest of all violent crimes).

Relevant to this Article’s focus, there is currently only one available study conducted on the recidivism rates focusing narrowly on individuals convicted of sex trafficking. See NAT’L RAPPOREUR ON TRAFFICKING IN HUM. BEINGS & SEXUAL VIOLENCE AGAINST CHILD., SUMMARY: HUMAN TRAFFICKING OFFENDERS MONITORING REPORT 2017–2021 (2023). This study focused on individuals in the Netherlands from 2017 to 2021. *Id.* at 2. It ultimately concluded that individuals who committed sex trafficking within the Netherlands had a 36% chance of reoffending with any crime within two years, compared to individuals who committed a non-sex trafficking offense, who had around a 26% chance of reoffending with any crime within two years. *Id.* at 5. Lastly, when looking at the likelihood that an individual convicted of sex trafficking would reoffend with another sex trafficking offense, it concluded that “almost one in ten offenders” reoffended with a subsequent sex trafficking offense. *Id.*

1. “Specific Propensity”

Starting broadly, some scholars advocate that propensity evidence should be admissible in all cases, with the appropriate safeguards. Steven Goode’s scholarship on “specific propensity” evidence sets forth factors to ensure courts admit true propensity evidence.²²¹ Goode’s argument relies on a theory from social psychology, known as “interactionism.”²²²

Interactionism refers to the notion that “a person’s conduct on a specific occasion is a product of the interaction between the situation and the person’s propensities.”²²³ Thus, Goode argues that evidence which shows a “specific propensity” is highly probative and should be admitted as non-character evidence.²²⁴ Specific propensity evidence would fall between the general ban on propensity evidence in Rule 404 and habit evidence contemplated in Rule 406.²²⁵

Goode set forth specific factors, mirroring aspects of the probative inquiry under Rule 403, to assist courts in identifying when propensity evidence becomes “specific” and thus “highly probative”: “narrowly defined” propensity (something more specific than showing someone is violent or dishonest), a “match” to the charged acts, frequency, and temporal proximity.²²⁶

Thus, these “specific propensity” factors provide the appropriate starting point when considering propensity evidence. However, “specific propensity” does not consider whether there are any psychological indicators that would make it more likely that a person would continue repeating an offense. Again, this is one of the main oppositions to the propensity rules—the lack of proof to suggest that a defendant is more likely to continue committing sexual assault or child molestation.

2. *Jury Studies*

Additionally, recent scholarship has also attempted to empirically examine propensity evidence and its impact on a jury, in the context of a

²²¹ Goode, *supra* note 15, at 791–92 (2021) (stating that the factors which should be considered by courts are: specificity, match, frequency, triggering circumstances, and temporal proximity).

²²² When the propensity rules were enacted, “situationism,” not “interactionism,” was the leading psychological view. Imwinkelried, *supra* note 125, at 440–41. Situationism focused on the “dynamics of the specific situation” and did not place much weight on predictions based on someone’s character. *Id.* As such, “many legal commentators [concluded] that it was essentially useless or worthless to attempt to infer a person’s conduct in a specific situation from general constructs about their character.” *Id.* at 440.

²²³ *Id.* at 441.

²²⁴ See Goode, *supra* note 15, at 790–93 (arguing that courts should consider noncharacter evidence); Park, *supra* note 214, at 718–20 (discussing the character evidence ban); RICHARD O. LEMPERT, SAMUEL R. GROSS, JAMES S. LEIBMAN, JOHN H. BLUME, STEPHAN LANDSMAN & FREDRIC I. LEDERER, A MODERN APPROACH TO EVIDENCE: TEXT, PROBLEMS, TRANSCRIPTS AND CASES 367 (5th ed. 2014) (discussing the probative value of “other-acts evidence”).

²²⁵ Goode, *supra* note 15, at 778–80.

²²⁶ Goode, *supra* note 15, at 789–93. Edward Imwinkelried subsequently concurred with Goode’s findings, with slight modification. Imwinkelried, *supra* note 131, at 453.

related theory of psychology—impression formation and person perception.²²⁷ Put simply, this area of psychology encompasses the process of how a person creates an impression of another person based on multiple different pieces of information.

Within this context, Justin Sevier developed three original experiments to analyze two reasons often proffered for banning propensity evidence: “(1) jurors will overvalue propensity evidence at the expense of reaching an accurate verdict, and (2) regardless of the effect of such evidence on the accuracy of verdicts, the public is unwilling to legitimize trials in which character evidence is presented because it is procedurally unjust to introduce such evidence.”²²⁸

Regarding the argument that jurors will overvalue the evidence, two of Sevier’s studies measured the weight jurors gave to propensity evidence, and whether they could distinguish between propensity evidence that enhanced (versus diminished) accuracy.²²⁹ Further, addressing the concern that propensity evidence threatens the legitimacy of verdicts, his third study considered when, if ever, the public would be willing to legitimize a verdict based on character witness testimony.²³⁰

Ultimately, the empirical data revealed that there was reason to doubt some of the criticisms of propensity evidence.²³¹ The results first showed that while jurors certainly consider propensity evidence when rendering a verdict, they did so with thoughtful deliberation and did not indicate overvaluing the propensity evidence simply because of its nature as propensity evidence.²³² Further, the results suggest that jurors were careful to consider “the frequency, timing, and similarity of the acts that underlie propensity evidence,” consistent with the interactionist framework discussed in Goode’s scholarship above.²³³ Finally, in the context of public perception of fairness and legitimacy, the study showed that the use of propensity evidence “increas[ed] the trial court’s ability to reach an accurate verdict,

²²⁷ See Justin Sevier, *Legitimizing Character Evidence*, 68 EMORY L.J. 441, 456–64 (2019) (discussing research on impression formation and person perception).

²²⁸ *Id.* at 464–65. Goode would later critique Sevier’s mock juror study for failing to be “demographically representative of the jury population.” Goode, *supra* note 15, at 768 n.390 (arguing that the mock jurors were “vastly more educated and liberal than the average adult” (citing Sevier, *supra* note 227, at 466–67)). More recently, Hayley Stillwell has argued the need to implement “placebo trials” to better test the impact of desired evidentiary variables. Hayley Stillwell, *Placebo Trials: A New Tool to Discourage Wrongful Convictions Caused by Jury Error*, 56 ARIZ. ST. L.J. 1361, 1365 (2024).

²²⁹ Sevier, *supra* note 227, at 465.

²³⁰ *Id.*

²³¹ See *id.* at 464–503 (discussing three studies on propensity evidence). *But see* Goode, *supra* note 15, at 768–69 (noting that mock juror studies are “not terribly helpful in guiding how the law of evidence should address other-acts evidence”).

²³² Sevier, *supra* note 227, at 481–82 (finding that character evidence “[did] not play a disproportionate role in (1) our participants’ verdicts, (2) their judgments of their willingness to find the defendant liable, or (3) their perceptions of the likelihood that the defendant committed the acts for which he was accused”).

²³³ *Id.* at 489.

increas[ed] the perceived fairness of the fact-gathering process that the court used, and increas[ed] the court's ultimate legitimacy."²³⁴

3. *Forensic Psychology Studies on Psychopathy in Sex Traffickers*

Lastly, forensic psychology studies provide an interesting insight into sex traffickers, along with their likelihood to reoffend. Starting with sex trafficking offenses against children, recent research concludes that individuals who commit sex trafficking against children are more likely to be psychopathic.²³⁵ "Psychopathy," in clinical psychology, refers to a "life-long persistent condition characterized, in males at least, by aggression beginning in early childhood, impulsivity, resistance to punishment, general lack of emotional attachment or concern for others, dishonesty and selfishness in social interaction[s], and high levels of promiscuous and uncommitted sexual behavior."²³⁶

Psychopathy tends to be "associated with a lack of ability to have 'sincere social emotions' such as empathy."²³⁷ Importantly, crime rates are higher among psychopathic individuals, along with "increased levels of violence severity and criminal versatility."²³⁸ Notably, psychopathy "is a static risk factor for violence and is considered to be a stable measurement

²³⁴ *Id.* at 501.

²³⁵ Hargreaves-Cormany, Patterson, Muirhead & The Federal Bureau of Investigation, *supra* note 39, at 41 (noting the importance to remember that the evidence does not support the contention that "there is great commonality between various types of sex offenders, . . . [t]hus, it is important to recognize that sexual offenders as a whole are a heterogeneous population of offenders"); SARAH HUPP WILLIAMSON, *CRIMINOLOGY EXPLAINS HUMAN TRAFFICKING* 60 (Robert A. Brooks & Jeffrey W. Cohen eds., 2024).

²³⁶ Hargreaves-Cormany, Patterson, Muirhead & The Federal Bureau of Investigation, *supra* note 39, at 40.

²³⁷ *Id.* The Hare Psychopathy Checklist Revised (PCL-R) is the generally accepted method to evaluate where someone falls on the psychopathy spectrum. See Jodie G. Beeson, *Psychology of Human Trafficking*, in *COMBATING HUMAN TRAFFICKING: A MULTIDISCIPLINARY APPROACH* 47, 47–60, (Michael J. Palmiotto ed., 2015); Mark E. Olver, *Psychopathy and Sex Offender Recidivism*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF PSYCHOPATHY AND CRIME*, at 598, 598–99 (Matt DeLisi ed., 2018); Hargreaves-Cormany, Patterson, Muirhead & The Federal Bureau of Investigation, *supra* note 39, at 40. The checklist consists of 20 symptoms designed to assess psychopathy. The various traits include "glibness" and "superficial charm," grandiose (exaggeratedly high) estimation of self, "[n]eed for stimulation," "[p]athological lying," conning and manipulateness, "[l]ack of remorse or guilt," "[s]hallow affect," callousness and "lack of empathy," "[p]arasitic lifestyle," "[p]oor behavioral controls," sexual promiscuity, "[e]arly behavior problems," "[l]ack of realistic, long-term goals," "impulsivity," "irresponsibility," "[f]ailure to accept responsibility for own actions," "[m]any short-term marital relationships," "[j]uvenile delinquency," "[r]evocation of conditional release," and "[c]riminal versatility." Robert D. Hare & Craig S. Neumann, *Structural Models of Psychopathy*, 7 *CURRENT PSYCHIATRY REPS.* 57, 58 (2005).

²³⁸ Hargreaves-Cormany, Patterson, Muirhead & The Federal Bureau of Investigation, *supra* note 39, at 41; see also Julio Arboleda-Flórez, *The Psychopath in Prison*, in *THE INTERNATIONAL HANDBOOK OF PSYCHOPATHIC DISORDERS AND THE LAW* 375 (Alan Felthous & Henning Saß eds., 2007) (noting that "[p]sychopathic tendencies are noticeable even in young children who later become known for their continuous lawbreaking and inability to live within the rules of society."); Matt DeLisi, *Psychopathy and Crime Are Inextricably Linked*, in *ROUTLEDGE INTERNATIONAL HANDBOOK OF PSYCHOPATHY AND CRIME* 3, 3–10 (discussing the connection between psychopathy and crime).

that is typically persistent throughout the lifespan and is rarely if ever treatable in clinical settings thereby remaining a valid indicator of persistent danger to society.”²³⁹

One instructive study, conducted by the FBI in 2013, examined 117 offenders for child sex trafficking between the years of 1990 and 2011.²⁴⁰ Among the many data-driven results, the main finding showed a “high prevalence of psychopathy.”²⁴¹ Specifically, 75% met the criteria for psychopathy and the remaining 25% scored higher than the average score among adult male inmates in North America.²⁴² Researchers have found similar results in studies involving adult sex trafficking offenders. In a study examining twenty-eight sex trafficking offenders, 79% scored high or very high for psychopathy.²⁴³ Another study of twenty-two “pimps” (sex traffickers) found that they had overall higher scores for psychopathy compared to other inmates.²⁴⁴

Circling back to recidivism, as discussed above, psychology researchers further depict a relationship between psychopathy, sexual deviancy, and recidivism.²⁴⁵ Sexual deviance, in this context, refers to “a pattern of atypical sexual interests (e.g., coercion, sex with children, paraphilias) and compulsive sexual thoughts and behaviors.”²⁴⁶ When an individual exhibits sexual deviancy and psychopathy, it is deemed a “deadly combination” because the research demonstrates that “they are likely to pose a high risk for future sexual violence”²⁴⁷

²³⁹ Hargreaves-Cormany, Patterson, Muirhead & The Federal Bureau of Investigation, *supra* note 39, at 41.

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ Katherine Gotch, *Preliminary Data on a Sample of Perpetrators of Domestic Trafficking for Sexual Exploitation: Suggestions for Research and Practice*, 2 J. HUM. TRAFFICKING 99, 101, 106 (2016).

²⁴⁴ Alicia Spidel, Caroline Greaves, Hugues Hervé, Barry S. Cooper, Robert D. Hare & John C. Yuille, *The Psychopath as Pimp*, 4 CANADIAN J. POLICE & SEC. SERVS. 193, 196 (2006); *see also* Hargreaves-Cormany, Patterson, Muirhead & The Federal Bureau of Investigation, *supra* note 39, at 41 (discussing the relationship between psychopathy and recidivism).

²⁴⁵ Mark E. Olver, *supra* note 237, 598, 603 (providing an overview of the existing studies in this area).

²⁴⁶ *Id.*

²⁴⁷ Mark E. Olver, James C. Mundt, David Thornton, Sarah M. Beggs Christofferson, Drew A. Kingston, Justina N. Snowden, Terry P. Nicholaichuk, Audrey Gordon & Stephen C.P. Wong, *Using the Violence Risk Scale-Sexual Offense Version in Sexual Violence Risk Assessments: Updated Risk Categories and Recidivism Estimates from a Multisite Sample of Treated Sexual Offenders*, 30 PSYCH. ASSESSMENT 941 (2018).

D. *Suggested Next Steps*

Overall, this Section aimed to begin the discussion regarding the intersection of sex trafficking and propensity evidence—a gap in the existing scholarship. While the opposition to the propensity rules is significant, a shift could occur if there was some form of scientific or empirical data to suggest that propensity evidence would not result in *unfair* prejudice.

Certainly, Professor Goode's and Imwinkelried's contribution of "specific propensity" takes a step in promoting the probative value of the character evidence. Further, the valid concern that jurors will overvalue character evidence is at least partially addressed by Professor Sevier's empirical findings from his mock jury studies. One suggested next step is to continue empirically testing the impact of propensity evidence on jurors. While Professor Sevier's study utilized testimony that a defendant had either a good or bad community reputation, it would be particularly insightful to see how jurors responded and valued the admission of prior act evidence, offered for propensity reasons—and even more so whether that change was based on the type of charge and the amount of evidence, particularly in cases based solely on the victim's testimony.

Ultimately, it seems unlikely for the opposition to yield much ground, unless data exists to show that a person is more likely to commit that crime moving forward. While the scholarship to this point has focused on recidivism statistics, this Article concludes that this is not a useful metric given the reporting limitations. Instead, this Article suggests borrowing a tool from forensic psychology, the Hare Psychopathy Checklist Revised ("PCL-R"), which is the generally accepted method to evaluate whether someone falls on the psychopathy spectrum. To be clear, a high or low score would simply be an additional factor to weigh as part of the 403 balancing test under the propensity rules. A high score would shift the probative value up, while moving the risk of unfair prejudice down. A low score would accomplish the opposite. Consistent with the recommendations in Part III, this would simply provide the court with additional information to better understand the defendant in deciding whether to admit propensity evidence.

CONCLUSION

Sex trafficking continues to be one of the most pressing and complex challenges confronting the criminal justice system. While it is expanding in scope across the world, it is also comprised of psychological complexities that create challenges when evaluating the evidentiary issues. As this Article argues, courts have too often addressed evidentiary questions in sex trafficking cases without a nuanced understanding of these complexities, resulting in inconsistent, unpredictable, and incomplete applications of Rule 404(b). The framework discussed here—centered on victim selection, grooming, and method of operation—offers courts a structured and realistic

lens to view these evidentiary matters. By situating the 404(b) analysis within this framework, this Article aims to enhance the Rule 403 balancing analysis, which will provide courts with a more reliable manner to admit or exclude character evidence in sex trafficking cases.

Further, this Article “opened the door” to including sex trafficking within the broader scholarly discussion surrounding propensity evidence. Since their enactment, Rules 413 through 415 have likely been the most controversial amendments to the Federal Rules of Evidence. The criticisms have been thoroughly discussed by scholars and certainly raise fair concerns, ranging from due process violations to inaccurate assumptions about recidivism. However, as our understanding of psychology continues to expand, these criticisms must be re-evaluated. Studies on the psychopathy of sex traffickers, coupled with the “specific propensity” theory, suggest that prior act evidence with the appropriate safeguards should be admissible. While this Article does not suggest the time is ripe for such an expansion of the propensity rules, it does suggest that sex trafficking cases would be a strong candidate for future discussions.

If we are serious about addressing sex trafficking, it will require innovation, not only in investigative and prosecutorial strategies and policy, but also in evidentiary doctrine. This Article’s contributions, while modest, provide an innovative proposal under both 404(b) and the propensity rules. Courts, lawyers, and policymakers that embrace a deeper understanding of the psychological complexities present in sex trafficking cases will be better positioned to contribute to finding ways to appropriately combat sex trafficking.