CLIMATE OF FEAR: ADMISSION OF PRIOR BAD ACTS TO ESTABLISH COERCION IN HUMAN TRAFFICKING CASES

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I. INTRODUCTION

At the mere age of fourteen, B.H. became involved with Michael Gardner, before Gardner began to physically beat, threaten, rape, and coerce her into having sex with strangers for money.[1]While B.H. was still a minor, Gardner filmed the two having sex on his iPhone, and then pressured her to have sex with other men in exchange for money.[2] Knowing that B.H. was seventeen, he posted over thirty advertisements for sex with her on Backpage.com.[3] When customers called inquiring about the advertisements, Gardner instructed B.H. to put the phone on speaker so he could hear discussions regarding price.[4] Gardner arranged

† J.D. Candidate, Harvard Law School, 2020. The author thanks Professor Alex Whiting, Assistant District Attorney Maryrose Anthes, and Kyleigh Feehs, as well as all the members of the *Cardozo Journal of Equal Rights and Social Justice* editing team.

1 John Cotton Richmond, Kyleigh Feehs, & CJ Murphy, *Fight, Flight, and the Federal Court: Examining the Role Traffickers Play in Creating a Victim's Climate of Fear*, TRAFFICKING MATTERS, https://www.traffickingmatters.com/fight-flight-and-the-federal-court-examining-the-role-traffickers-play-in-creating-a-victims-climate-of-fear/ (last visited Nov. 15, 2019); *United States v. Gardner*, 887 F.3d 780 (6th Cir. 2018); *United States v. Gardner*, No. 16-20135, 2016 WL 5110191 (E.D. Mich. Sept. 21, 2016).

2 *Gardner*, 887 F.3d at 782.

3 *Id.*

4 *Id.*

transportation, gave B.H. drugs for her customers, and then demanded the money that the customers gave her.[5] When B.H. told Gardner that she did not want to do this, Gardner would get angry, and he put his hands around her throat multiple times while saying that "'he could hurt [her] really bad' and get away with it."[6] In October 2016, through an undercover operation, officers were able to apprehend Gardner, but he and B.H. were later released.[7]

B.H., who was pregnant, agreed to move to Kentucky to live with Gardner and his mother.[8] B.H. was hoping that the sex trafficking would cease, but Gardner pressured her to continue and became violent when she refused.[9] B.H. fled, and was able to return to Detroit.[10] A grand jury later indicted Gardner for sex trafficking of a minor and producing child pornography.[11] Before trial, Gardner moved to have the government precluded from introducing any evidence that he was a member of the Vice Lords gang.[12] The government responded by alleging that B.H. knew that Gardner was in the gang and would testify at trial that she was fearful of him because of this.[13] Specifically, B.H. would testify that she was familiar with Gardner's social media posts, which included pictures of him posing with firearms and making gang signs, as well as pictures with other gang members.[14]

The district court held that evidence of Gardner's membership in the gang was relevant to whether Gardner used force and coercion to cause B.H. to engage in sex acts: that she "believed that failure to perform any act would result in serious harm."[15] The court also found that the prejudicial effect of the evidence did not outweigh its probative value, because Gardner's "affiliation with the Vice Lords is connected to the charged offense of child sex trafficking by coercion."[16] The court further stated that this evidence was "related to the climate of fear" that Gardner created.[17] The court did, however, condition the admissibility of the photographs on B.H.'s testimony on whether B.H. actually saw them.[18] The Sixth Circuit subsequently agreed with the district court's

5 *Id*.
6 *Id*.
7 *Id*. at 782–83.
8 *Id*. at 783.
9 *Id*.
10 *Id*.
11 *Id*.
12 *Gardner*, 2016 WL 5110191, at *1.
13 *Id*.
14 *Id*. at *3.
15 *Id*. (citing 18 U.S.C. §†1591(e)(2) (2018)).
16 *Id*.
17 *Id*. This phrase was also used in *United States v. Wysinger,* No. 5:17-CR-00022, 2018 WL 4956515, at *4 (W.D. Va. Oct. 12, 2018), discussed *infra* Part IV.
18 *Gardner*, 2016 WL 5110191, at *3. One photograph is included in the Trafficking Matters

relevance and prejudice analyses, also noting that jurors saw evidence with "far greater inflammatory potential," and that the district court "carefully circumscribed the evidence, admitting only photographs B.H. had seen during and around" the sex trafficking scheme.[19]

In *Gardner*, prior bad acts evidence was admissible as intrinsic evidence of the sex trafficking crime itself. This Note argues that not only should such evidence be admissible in this manner, but that Federal Rule of Evidence 404(b) should also not bar the admission of evidence of a defendant's gang membership or violent acts to show coercion in human trafficking cases where such evidence is relevant and probative to show how a given trafficker creates a coercive environment, or "climate of fear." If Rule 404(b) is implicated, it will very frequently fall into one of the Rule's permissible purposes for admission. Part II of this Note discusses coercion in human trafficking offenses, the specific findings of Congress as to traffickers' coercive tactics and the level of criminal enterprise involvement in human trafficking, and empirical data regarding means traffickers utilize to create climates of fear. Part III provides an overview of Rule 404(b) and discusses the criticisms of some scholars and courts regarding this controversial rule. Part IV reviews the limited caselaw on this subject and concludes that despite the criticisms of the Rule, evidence of a defendant's means of creating a coercive environment should be admissible.

II. COERCION IN HUMAN TRAFFICKING

Coercion is an element in several federal human trafficking definitions and is also central to understanding how human trafficking as a scheme works. The federal statute addressing human trafficking offenses is the Trafficking Victims Protection Act ("TVPA"), passed in 2000.[20] Its stated purposes are 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."[21] In enacting the TVPA, Congress found that human trafficking was the "largest manifestation of slavery today," and often occurred through "force, fraud, or coercion."[22] Congress found that force and coercion often occurred through traffickers' use of physical violence to force victims to engage in sex

post regarding this case. *See* Richmond, Feehs, & Murphy, *supra* note 1.

19 *Gardner*, 887 F.3d at 784–85 (internal quotation marks and citation omitted).

20 Victims of Trafficking and Violence Protection Act, 22 U.S.C. §§†7101–7114 (2000).

21 *Id*. §†7101(a).

22 22 U.S.C. §†7101(b)(1)–(2).

acts or labor, including "rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion."[23] Traffickers also "make representations to their victims" and use threats of physical harm in the event they try to escape, and Congress found that these "representations" can be equivalently coercive in comparison to direct threats.[24] Finally, Congress found that organized criminal enterprises are increasingly responsible for human trafficking, and it "is the fastest growing source of profits for organized criminal enterprises worldwide."[25]

The TVPA accordingly prohibits labor and sex trafficking. Sex trafficking is defined as knowingly "recruiting, enticing, harboring, transporting, providing, obtaining, advertising, maintaining, patronizing, or soliciting a person to engage in a commercial sex act, or benefiting financially or otherwise from such a venture."[26] Knowingly using minors for commercial sex acts automatically violates the statute.[27] When the victims are adults, however, the trafficking must occur through means of force, threats of force, fraud, or coercion.[28] Coercion is then defined as (1) "threats of serious harm to or physical restraint against any person"; (2) "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person"; or (3) "the abuse or threatened abuse of law or the legal process."[29]

Labor trafficking is similarly defined as "knowingly provid[ing] or obtain[ing] the labor or services of a person by any one of, or by any combination of" by certain means: (1) "force, threats of force, physical restraint, or threats of physical restraint"; (2) "serious harm or threats of serious harm"; (3) "abuse or threatened abuse of law or legal process"; or (4) "by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint."[30] Notably, the United Nations Office on Drugs and Crime also broadly defines trafficking in persons as "the acquisition of

23 *Id*. §†7101(b)(6); *see also id*. §†7101(b)(9) ("Trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.").

24 *Id*. §†7101(b)(7).

25 *Id*. §†7101(b)(8).

26 Ann Wagner & Rachel Wagley McCann, *Prostitutes or Prey? The Evolution of Congressional Intent in Combating Sex Trafficking*, 54 HARV. J. ON LEGIS. 17, 20 (2017); *see* 18 U.S.C. §†1591(a) (2018).

27 18 U.S.C. §†1591(a)(2).

28 *Id*.; *cf*. Julianna Siegfriedt, *When Sex Trafficking Victims Turn Eighteen: The Problematic Focus on Force, Fraud, and Coercion in U.S. Human Trafficking Laws*, 23 WM. & MARY J. WOMEN & L. 27, 32, 34–35 (2016) (criticizing the distinction of victims based on age).

29 18 U.S.C. §†1591(e)(2).

30 18 U.S.C. §†1589(a).

people by improper means such as force, fraud or deception, with the aim of exploiting them."[31] In sum, coercion is an essential element of both sex trafficking of adults and labor trafficking—the prohibited means of obtaining labor are almost identical to the means that meet the definition of coercion in the sex trafficking statute.[32] It is an element Congress explicitly found to be present in human trafficking cases, and was critical to Congress's understanding of how such operations start and continue.[33]

Empirical data also supports the conclusion that coercion is central to how traffickers control victims (and it remains necessary to meet the elements of federal sex trafficking of an adult under the TVPA). The Human Trafficking Institute's 2018 Federal Human Trafficking Report, published in April 2019, found that in over half (56.2%) of criminal sex trafficking cases, a defendant used physical violence to force a victim to engage in commercial sex.[34] Even more of these cases (58.1%) involved withholding pay.[35] Defendants also utilized threats of physical abuse, verbal or emotional abuse, and sexual violence in many cases.[36] Furthermore, traffickers frequently use drugs to initiate victims and exploit addiction.[37] In criminal labor trafficking cases, withholding pay and threats of physical abuse were also frequent, and in 51.4% of cases, defendants used threats of deportation.[38]

Moreover, scholars have noted that physical violence may not be necessary when psychologically coercive environments achieve a

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31 *UNODC on Trafficking in Persons and Smuggling of Migrants*, UNITED NATIONS OFFICE ON DRUGS AND CRIME, https://www.unodc.org/unodc/en/human-trafficking/index.html (last visited May 10, 2019). This Note will only address federal cases, but it is also important to note that some states define human trafficking more broadly than the TVPA does; *see, e.g.*, MASS. GEN. LAWS ch. 265, §†50 (2019) (defining sex trafficking as occurring when an individual "knowingly: (i) subjects, or attempts to subject, or recruits, entices, harbors, transports, provides or obtains by any means, or attempts to recruit, entice, harbor, transport, provide or obtain by any means, another person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography†.†.†.†or causes a person to engage in commercial sexual activity, a sexually-explicit performance or the production of unlawful pornography†.†.†.†; or (ii) benefits, financially or by receiving anything of value, as a result of a violation of clause (i)").

32 *See* Beth A. Williams, *Efforts to Stop Human Trafficking*, 41 HARV. J. L. & PUB. POL'Y 623, 623 (2018) (summarizing federal law to prohibit "compel[ling] another person to provide labor, services, or commercial sex through prohibited means of coercion, and to exploit a minor for commercial sex").

33 22 U.S.C. §†7101(b)(6), (9); *see also* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 409, 415 (2011) (examining "the empirical and normative scope of coercion in the laws addressing contemporary involuntary labor").

34 ALYSSA CURRIER ET AL., HUMAN TRAFFICKING INSTITUTE, 2018 FEDERAL HUMAN TRAFFICKING REPORT, iii, 11 (2019), https://www.traffickingmatters.com/wp-content/uploads/2019/04/2018-Federal-Human-Trafficking-Report-Low-Res.pdf.

35 *Id*. at 11.

36 *Id*.

37 *See* Wagner, *supra* note 26, at 708.

38 CURRIER, *supra* note 34, at 12.

trafficker's goal of maintaining control over a victim.[39] Drs. Hopper and Hidalgo draw parallels between the psychological treatment of human trafficking victims and victims of cults, prisoners of war, domestic violence victims, prisoners of concentration camps, and other victims of captivity.[40] They break down the process of psychological manipulation and control into three phases: recruitment, initiation, and indoctrination.[41] Throughout this process, traffickers create an environment of "intense stress, strict controls, and threats of harm," to which victims respond physiologically.[42] Victims suffer physical and psychological consequences of the constant exposure to the "environment of fear," which impair their ability to resist their abusers.[43] The psychologically coercive strategies thus have a significant capacity to create a "cyclical psychological trap for victims."[44]

The role that criminal enterprises play in human trafficking is also important to consider in evaluating how traffickers create coercive environments. The Human Trafficking Institute Report names "leveraging fear of gang violence" as a method of coercion that was present in 2018 cases.[45] As Congress noted in its TVPA findings, criminal enterprises remain responsible for human trafficking.[46] The Report further found that "[o]f the 680 active criminal cases, 408 were part of a pimp-directed enterprise, 26 were part of a gang-directed enterprise, and 26 were part of an organized crime-directed enterprise."[47] Another study surveying a total of 862 cases between 2000 and 2015 with a total of 2,096 defendants found that 58% of all defendants in human trafficking cases operated as part of an organized criminal group.[48] From the international perspective, the UN confirms the intuitive view that the higher the presence of organized crime in the country of origin, the more victims from that country are detected, and the greater risk individuals are at for becoming victims of human

39 Elizabeth Hopper & Jose Hidalgo, *Invisible Chains: Psychological Coercion of Human Trafficking Victims*, 1 INTERCULTURAL HUM. RTS. L. REV. 185, 185–86 (2006).

40 *Id*. at 191–92.

41 *Id*. at 193–99.

42 Hopper, *supra* note 39, at 206.

43 *Id*. at 207, 209.

44 *Id*. at 207 (internal quotation marks omitted); *see also* Wagner & McCann, *supra* note 26, at 708 ("Psychological coercion and substance abuse are particularly destructive as they may inhibit victims from self-identifying as sex trafficking victims.").

45 CURRIER, *supra* note 34, at 96.

46 *See* 22 U.S.C. §†7102(b)(8).

47 CURRIER, *supra* note 34, at 10.

48 VANESSA BOUCHÉ, NAT'L CRIM. JUST. REFERENCE SERV., AN EMPIRICAL ANALYSIS OF THE INTERSECTION OF ORGANIZED CRIME AND HUMAN TRAFFICKING IN THE UNITED STATES, ii (2017), https://www.ncjrs.gov/pdffiles1/nij/grants/250955.pdf.

trafficking.[49] Finally, a 2011 FBI Law Enforcement Bulletin stated that sex trafficking "is the fastest-growing business of organized crime and the third-largest criminal enterprise in the world."[50] It is thus important to continuously consider the large role criminal enterprises play in analyzing how human trafficking cases are handled.

III. FEDERAL RULE OF EVIDENCE 404(B)

Once a case has commenced against a trafficker, evidence rules will shape much of the discussion between the parties and litigation. One particular rule governing admissibility of prior bad acts evidence will often be determinative of the outcome of a trial.[51] Federal Rule of Evidence 404(b) provides that evidence of a defendant's prior bad act is inadmissible to "prove a person's character in order to show that on a particular occasion the person acted in accordance with the character"—in other words, to show propensity.[52] This rule exists not because such evidence is irrelevant, but because it is thought to weigh too heavily with a jury and is overly prejudicial to defendants, denying them the opportunity to properly defend against the current charge.[53] Prior bad acts evidence is admissible for other purposes, however, "such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[54] If prior bad acts are introduced for one of these permissible purposes, the court must determine they are relevant and that there is sufficient proof such that a jury could reasonably find that the acts occurred by a preponderance of the evidence.[55] In *Huddleston v. United States*, the Supreme Court

[49] UNITED NATIONS OFFICE ON DRUGS AND CRIME, 2016 GLOBAL REPORT ON TRAFFICKING IN PERSONS 59 (2016), https://www.unodc.org/documents/data-and-analysis/glotip/2016_Global_Report_on_Trafficking_in_Persons.pdf. For criticisms of the TVPA and trafficking regimes, see, e.g., Moshoula Capous Desyllas, *A Critique of the Global Trafficking Discourse and U.S. Policy*, 34 J. SOC. & SOC. WELFARE 57 (2007).

[50] Amanda Walker-Rodriguez & Rodney Hill, *Human Sex Trafficking*, 80 FBI L. ENFORCEMENT BULL. 1, 2 (2011); *see also* Loring Jones et al., *Globalization and Human Trafficking*, 34 J. SOC. & SOC. WELFARE 107, 108 (2007) (noting that in 2004, the U.S. Department of Health and Human Services characterized trafficking as the "fastest growing criminal industry in the world"); *Human Trafficking Prevention*, FBI NEWS STORIES (Jan. 20, 2012), https://www.fbi.gov/news/stories/human-trafficking-prevention (stating that human trafficking "generates billions of dollars of profit each year").

[51] *See, e.g.*, Jeffrey Cole, *Bad Acts Evidence under Rule 404(b)*, 14 LITIG. 8, 9 (1988) ("Defending against such evidence can be devastating.").

[52] FED. R. EVID. 404(b)(1).

[53] *Michelson v. United States*, 335 U.S. 469, 475–76 (1948); *cf.* Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: England*, 46 HARV. L. REV. 954, 954 (1933) (noting the paradox of excluding evidence that creates "extreme" undue prejudice but is simultaneously likely to be highly probative).

[54] FED. R. EVID. 404(b)(2).

[55] *Huddleston v. United States*, 485 U.S. 681, 689–91 (1988); *see also* FED. R. EVID. 104(b).

emphasized that protection from unfair prejudice is a result of the requirements that courts must: (1) find that the prior bad acts evidence is offered for a permissible purpose; (2) find that the evidence is relevant; (3) find that the probative value of the evidence is not outweighed by its potential for unfair prejudice under Rule 403; and (4) offer a limiting instruction, upon request and pursuant to Rule 105, that the evidence should only be considered for the proper purpose for which it was admitted.[56]

Rule 404(b) is controversial in various respects and the Judicial Conference Advisory Committee on Evidence Rules is therefore currently considering amending it.[57] One objection to the current treatment of Rule 404(b) is that some federal courts treat it as a rule of inclusion rather than exclusion.[58] A recent circuit split in perspectives on Rule 404(b) has occurred, with the Third, Fourth, and Seventh Circuits attempting to make their standards for admission more stringent and treating the rule as one of exclusion.[59] In its en banc decision in *United States v. Gomez*, for example, the Seventh Circuit refocused its analysis from a four-factor test to how prior bad acts evidence is relevant for a non-propensity purpose—admission of such evidence must be "supported by some propensity-free chain of reasoning."[60] The Seventh and Third Circuits have also deployed Rule 403 to limit admission of evidence where the underlying factual proposition is not contested.[61] Finally, the Third Circuit has rejected the "inextricably intertwined" test, which states that Rule 404(b) does not apply to acts "intrinsic" to the charged offense, and acts are intrinsic if they are "inextricably intertwined" with that offense.[62] The court held that the inextricably intertwined test is "vague, overbroad, and prone to

56 *Huddleston*, 485 U.S. at 691–92.

57 *See* Dora W. Klein, *The (Mis)Application of Rule 404(b) Heuristics*, 72 U. MIAMI L. REV. 706, 709 (2018) ("Rule 404(b) is perhaps the most controversial of the Federal Rules of Evidence"); Daniel J. Capra, *Conference on Possible Amendments to Federal Rules of Evidence 404(b), 807, and 801(D)(1)(a)*, 85 FORDHAM L. REV. 1517, 1522 (2017) (Judge Hamilton stating that "Rule 404(b) is obviously a constant source of disputes"); Daniel J. Capra & Leisa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 802 (2018) (discussing amendments to Rule 404(b)).

58 *See* Capra & Richter, *supra* note 57, at 772; Cole, *supra* note 51, at 9; *cf*. Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 243–44 (2005) (describing courts' treatment of Rule 404(b) as a "categorical exclusionary rule followed by a limited number of judicially-recognized exceptions" but stating that evidence is freely admitted in this manner).

59 *See* Capra & Richter, *supra* note 57, at 773.

60 *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014).

61 *Id*. at 857 (citing *Old Chief v. United States*, 519 U.S. 172, 191–92 (1997)); *United States v. Caldwell*, 760 F.3d 267, 283–84 (2014).

62 *United States v. Green*, 617 F.3d 233, 245 (2010).

abuse."[63] However, the court did not reject the concept of intrinsic evidence completely, and held that it includes (1) evidence that "directly proves" the charged offense; and (2) "uncharged acts performed contemporaneously with the charged crime†.†.†.†if they facilitate the commission of the charged crime."[64]

In accordance with these cases, the Advisory Committee has proposed three amendments to Rule 404(b): (1) a propensity inference ban; (2) a requirement of "active contest"; and (3) curbing a perceived overuse of the "inextricably intertwined" doctrine.[65] Professors Capra and Richter, while disapproving of the way courts predominantly apply Rule 404(b), also criticize each of these proposed amendments.[66] They instead propose an amendment to Rule 404(b) that would merely require the probative value of prior bad act evidence to outweigh any unfair prejudice to the defendant, flipping the standard Rule 403 balance.[67]

Another criticism of Rule 404(b) arises with respect to its allowance of prior bad act evidence related to intent.[68] Some scholars argue that prior bad acts offered to show intent are too often really being offered for the impermissible propensity purpose.[69] Some courts acknowledge this danger. For example, in *United States v. Davis*, the Third Circuit joined other circuits in holding that a drug possession conviction is inadmissible to prove intent to distribute, noting that "there is an ever-present danger that jurors will infer that the defendant's character made him more likely to sell the drugs in his possession."[70] Because intent is also an element in many crimes, some courts have held that prior bad acts are only admissible if intent is in dispute.[71] In *United States v. Beechum*, for example, the court found that

63 *Id*. at 248; *see also* Edward J. Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 CATH. U.L. REV. 719, 728 (2010).

64 *Green*, 617 F.3d at 248–49 (internal quotation marks and citations omitted).

65 *See* Capra & Richter, *supra* note 57, at 802–18.

66 *Id*.

67 *Id*. at 819–20.

68 *See* FED. R. EVID. 404(b)(2).

69 *See* David A. Sonenshein, *The Misuse of Rule 404(B) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 275 (2011).

70 *United States v. Davis*, 726 F.3d 434, 444–45 (2013); *see also* Deena Greenberg, Note, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. CR-CL L. REV. 519, 525 (2015) (arguing for limiting the use of Rule 404(b) in admitting evidence of prior convictions in drug cases, and that courts should follow the approach where "404(b) evidence of prior convictions can be introduced only when it is a disputed element of the crime and only when it has probative, non-propensity purposes specific to the facts of that case.").

71 *See* Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451, 456 (1993).

necessity of the 404(b) evidence to resolve the question of intent was an important factor in determining admissibility.[72] Some courts have also distinguished between admitting evidence to prove "general intent" and "specific intent" crimes—where the government must prove specific intent, the evidence is admissible because intent becomes "more than a formal issue."[73]

IV. RULE 404(B) AND ADMITTING EVIDENCE OF COERCION IN HUMAN TRAFFICKING CASES

Despite the forgoing criticisms of Rule 404(b), its application to admission of prior bad acts in human trafficking cases is appropriate. Particularly where coercion is a necessary element of proving an offense, such as in the sex trafficking statute for adult victims, prior bad acts evidence should be admissible to prove that a defendant used such coercion. Such evidence could include a defendant's gang membership that the victim knew about or other violent acts that create an overall coercive environment. It is relevant and probative not only to establish the trafficking crime itself, but to show the scheme and modus operandi of the human trafficking operation. It can even be used to show knowledge and intent elements that are often at issue in these cases.

Where coercion is an element, a threshold question arises as to whether the evidence is "intrinsic" to the crime so that Rule 404(b) does not apply. Even under the Third Circuit's stricter test discussed in the preceding section, a defendant's gang membership or violent tendencies could "directly prove[]" the charged offense in that it proves coercion, or is contemporaneous to the trafficking offense and facilitated its commission.[74] Indeed, in *United States v. Betts*, the district court admitted evidence of the defendant supplying alcohol to minor girls, including two of the victims; sexually assaulting two victims; and behaving violently in front of two victims.[75] The Eighth Circuit held that the district court properly deemed this intrinsic evidence that did not require a Rule 404(b) jury instruction, because the evidence "supplied necessary context by fill[ing] the gaps in the jury's understanding of the crime charged."[76] Moreover, the evidence was

[72] *United States v. Beechum*, 582 F.2d 898, 914 (5th Cir. 1978) (en banc) ("Probity in this context is not an absolute; its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference.").

[73] Rodriguez, *supra* note 71, at 456.

[74] *See Green*, 617 F.3d at 248–49.

[75] *United States v. Betts*, 911 F.3d 523, 529 (8th Cir. 2018).

[76] *Id*. (internal quotation marks and citation omitted, alteration in original). For a case where

more probative than prejudicial, because it showed that the defendant "actively controlled the girls' behavior rather than passively remained present as bad acts occurred around him."[77]

Similarly, in the *Gardner* case described in the Introduction of this Note, neither the district court nor the Court of Appeals mentioned Rule 404(b) in holding evidence of the defendant's gang membership admissible.[78] The district court held that the evidence tended to show a necessary element of the crime, and was relevant to the climate of fear that the defendant created.[79] The Western Virginia District Court also used the phrase "climate of fear" in admitting evidence of alleged threats to a sex trafficking victim and a photo from the defendant's phone: the court stated that the "evidence is relevant to show the climate of fear he created, which goes directly to the element that he used threats and coercion to get women working for him in prostitution and to intimidate them from reporting him to the police, as referenced in the indictment."[80] The court concluded that the evidence was admissible as intrinsic evidence, "or, at the very least, under Rule 404(b)."[81] Moreover, after the more restrictive analysis of Rule 404(b) in *Gomez* discussed in Part III, in *United States v. Carson*, the Seventh Circuit nevertheless held that "climate of fear" evidence was admissible in a sex trafficking case, as it did not fall under Rule 404(b) at all.[82] The evidence that did fall under Rule 404(b) was admissible to show modus operandi.[83]

If prior bad acts evidence is held to not be intrinsic to the charged offense(s), it could still be admissible for a proper Rule 404(b)(2) purpose, such as modus operandi in *Carson*.[84] In a labor trafficking case, the Third Circuit held that evidence prior to the indictment period that the defendant beat the victims and demonstrated voodoo practices in order to intimidate and threaten them was admissible in showing the defendant's "plan, scheme, and/or absence of mistake in pressing the victims into her service."[85] The evidence was also relevant to the

evidence of shared gang membership was intrinsic to the crime of conspiracy to sex traffic persons, see *United States v. Lockhart*, 844 F.3d 501, 512 (5th Cir. 2016).

77 *Betts*, 911 F.3d at 530.

78 *See United States v. Gardner*, 887 F.3d 780 (6th Cir. 2018); *United States v. Gardner*, No. 16-20135, 2016 WL 5110191 (E.D. Mich. Sept. 21, 2016).

79 *Gardner*, 2016 WL 5110191, at *3.

80 *United States v. Wysinger,* No. 5:17-CR-00022, 2018 WL 4956515, at *4 (W.D. Va. Oct. 12, 2018).
(citing *United States v. Fuertes*, 805 F.3d 485, 493–94 (4th Cir. 2015)).

81 *Id*.

82 *United States v. Carson*, 870 F.3d 584, 559–601 (7th Cir. 2017).

83 *Id*. at 598–99.

84 *Id*.; FED. R. EVID. 404(b)(2).

85 *United States v. Akouavi Kpade Afolabi*, 508 F.App'x 111, 118 (3d Cir. 2013).

charges and underlying pattern of coercion.[86]

Courts have also correctly held that prior bad acts evidence is admissible to prove intent and knowledge, despite the criticisms of offering this evidence for intent described in Part III. To the extent that prior bad acts evidence is problematic when used to prove intent, it is less so when used to prove specific intent.[87] Accordingly, some courts have drawn this distinction in the human trafficking context.[88] Additionally, in *United States v. Willoughby*, the court affirmed the admission of testimony from two other victims—one woman testified that the defendant had been her pimp, and the other testified that the defendant had repeatedly asked her to engage in commercial sex for him.[89] The court found that the testimony was admissible to prove knowledge in the case at bar, since the government was "required to prove that he recruited, enticed, harbored, or transported [the victim in the current case] knowing that she would be caused to engage in a commercial sex act."[90] The other victims' testimony was relevant to show that the defendant knew that a certain location in Toledo was a notorious place for prostitution.[91] Moreover, the defendant's knowledge was an element of the charged crime and he did not concede it, and therefore it was of no moment that the he did not put his knowledge "in issue."[92]

In *United States v. Geddes*, the Eighth Circuit conducted a similar analysis in holding that the district court did not abuse its discretion in admitting evidence of an incident where the defendant physically assaulted and threatened to kill his ex-girlfriend in a trial for sex trafficking with a different victim.[93] In the present case, the government alleged that the defendant forced the victim into committing commercial sex acts by refusing to allow the victim to return home, and when a customer underpaid, the defendant slapped the victim four times in the face.[94] The court cited its circuit's precedent that Rule 404(b) is a rule of "inclusion, rather than exclusion, and admits evidence of other crimes

86 *Id*.

87 *See* Rodriguez, *supra* note 71, at 456.

88 *See, e.g*., *United States v. Ruiz*, 701 F.App'x 871, 874 (11th Cir. 2017) ("By pleading not guilty and then specifically contesting whether he had the intent necessary to commit the offense, Ruiz made his intent a material issue in the case."); *United States v. Edwards*, No. CR 16–103–BLG–SPW–1, 2017 WL 4159365, at *3 (D. Mont. Sept. 19, 2017) (holding that the defendant's prior convictions went to a material element of the charged crimes—that the defendant intended the victims to engage in commercial sex acts and used force, fraud, or coercion to cause them to do so—and therefore the evidence was probative of knowledge, intent, and absence of mistake).

89 *United States v. Willoughby*, 742 F.3d 229, 236 (6th Cir. 2014).

90 *Id*. at 237 (citing 18 U.S.C. §†1591(a)).

91 *Id*.

92 *Id*.

93 *United States v. Geddes*, 844 F.3d 983, 991 (8th Circ. 2017).

94 *Id*. at 987.

or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition."[95] The court reasoned that the defendant's knowledge and intent were both at issue due to the elements of the charges.[96] Accordingly, testimony regarding the use of force against his ex-girlfriend was relevant to the issue of the defendant's intent, which was "a material issue at trial."[97] The prior bad acts evidence was also "similar in kind and not overly remote in time to the crime charged."[98] In both the present case and the prior bad acts, the defendant threatened the victim and was physically abusive.[99] Finally, the Rule 403 analysis weighed in favor of admission, where the testimony was limited to "twenty lines of the trial transcript" and the district court gave "extensive" limiting instructions.[100]

A recent law review article levies an extensive critique on the court's reasoning in *Geddes*.[101] First, the authors argue that the relevance reasoning only works if one proceeds through a propensity chain of inferences.[102] As the court stated, however, the material issues at trial were whether or not the defendant knowingly transported the victim in interstate commerce with intent that she engage in commercial sexual activity and whether the defendant used coercion. Further, the court reasoned that showing that the defendant had previously utilized threats and physical abuse to get his way was relevant to showing that he intended to sex traffic the victim.[103]

Second, the authors argue that since the defendant never actively contested his intent and simply pleaded not guilty, "virtually any act somewhat similar to the charged act will be admissible in every criminal case that proceeds to trial."[104] By pleading not guilty to an offense that has a specific intent element, however, the defendant does make intent a material issue "which imposes a substantial burden on the government to prove intent," and the government may do this through appropriate Rule 404(b) evidence "absent affirmative steps by the defendant to remove intent as an issue."[105] The slippery-slope argument that this will begin happening in every criminal case that goes to trial also proves too much, because the four safeguards identified by the Supreme Court in

95 *Id*. at 989 (citing *United States v. Oaks*, 606 F.3d 530, 538 (8th Cir. 2010)).
96 *Id*. at 990.
97 *Id*.
98 *Id*.
99 *Id*.
100 *Id*.
101 Capra & Richter, *supra* note 57, at 779–80.
102 *Id*.
103 *Geddes*, 844 F.3d at 990.
104 Capra & Richter, *supra* note 57, at 780.
105 *United States v. Zapata*, 139 F.3d 1355, 1358 (11th Cir. 1998).

Huddleston still apply to prior bad acts evidence with full force.[106]

Third, the article contends that the court ignored the role Rule 403 must play in excluding evidence where its probative value for a non-propensity purpose is weak.[107] Here, the probative value was not weak. The evidence forcefully showed that the defendant intended to use coercive means to cause the victim to engage in commercial sexual activity. Moreover, as the court noted, the prejudicial impact was not overly great where the testimony did not take up much trial time and the district court gave limiting instructions.[108]

Finally, the article criticizes the court's characterization of Rule 404(b) as a rule of inclusion rather than exclusion.[109] Until the "recent" circuit split, however, courts routinely cast Rule 404(b) in this light, and until the circuit split is resolved, the continuing treatment of the Rule in this manner is not incorrect or impermissible.[110] Indeed, as a policy matter, treating the Rule as one of inclusion in the human trafficking context specifically is appropriate in light of the discussion in Part II. As discussed, prior bad acts evidence is particularly relevant and probative to demonstrating coercion, a required element for some of the human trafficking crimes. Moreover, given that this evidence is often arguably intrinsic to the crime itself, if there is a difficult call to make on whether it actually is part of the crime, courts should nonetheless admit it under Rule 404(b), as the *Wysinger* court indicated.[111]

V. CONCLUSION

Federal human trafficking is a category of crimes where perpetrators inherently utilize means of coercion. Traffickers create a "climate of fear" through physical and psychological tactics designed to control their victims. Congress recognized this paradigm in enacting the TVPA and found that criminal enterprises play a significant role in these schemes. Recent empirical studies show that these patterns continue in trafficking cases. In cases like *Gardner*, evidence of a defendant's gang membership or prior violent acts is therefore particularly appropriate to prove the climate of fear. Although scholars criticize Rule 404(b), its application in human trafficking cases does not

106 *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988).

107 Capra & Richter, *supra* note 57, at 780.

108 *See also United States v. Gardner*, No. 16-20135, 2016 WL 5110191, at *3 (E.D. Mich. Sept. 21, 2016) (noting with approval that the district court "carefully circumscribed" the admitted evidence).

109 *Id*.

110 *Cf.* Capra & Richter, *supra* note 57, at 787.

111 *See United States v. Wysinger,* No. 5:17-CR-00022, 2018 WL 4956515, at *4–5 (W.D. Va. Oct. 12, 2018).

raise the same concerns as in other types of cases given the nature of the crimes. Accordingly, prior bad acts evidence should be admitted if it is relevant and probative to show the climate of fear and if the other *Huddleston* safeguards are met, either as intrinsic evidence to the crime or for a permissible purpose under Rule 404(b).