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Similar Fact Evidence of Child Sexual Abuse in English, United States, and Florida Law: A Comparative Study

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Cover Page Footnote

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Articles

SIMILAR FACT EVIDENCE OF CHILD SEXUAL ABUSE IN ENGLISH, UNITED STATES, AND FLORIDA LAW: A COMPARATIVE STUDY

PETER MIRFIELD*

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I. INTRODUCTION

A lawyer from one jurisdiction should be suitably cautious when describing and assessing the law of another jurisdiction, even when both jurisdictions have the common law as their shared heritage. So,

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* Professor of Law, Jesus College, University of Oxford, England. The idea for this article came to me during my half-semester visit to the Florida State University College of Law in the Fall of 1995. It seems particularly appropriate for publication to take place in the *Journal of Transnational Law & Policy*, for I had the honor of being, during my stay, the Visiting Edward Ball Eminent Scholar in International Law. Professor Charles W. Ehrhardt read and commented on an earlier draft of this article. He saved me from several errors, and those which remain are mine alone.

it is with some diffidence that an English lawyer presents a claim that changes in a particular field of English law are mirrored, to a considerable degree, by changes in one American state's jurisdiction, that of Florida, and by the new Federal Rules of Evidence ("Federal Rules"). The field in question is the rules concerning the admissibility of evidence of similar offenses allegedly committed by a defendant as part of the prosecution's case against a person accused of a sexual offense against a child. The writer hopes that, even if error has crept into his treatment of "American law," the reader may still find the discussion of recent developments in English law useful.

One may begin by suggesting that it may not be an unreasonable summary of English similar fact (or similar act, if that term is preferred) cases during the last century or so that they reflect, more than anything else, a history of judicial attitudes in sexual matters. Certainly, the vast majority of similar fact cases decided in England's highest court, the House of Lords, during that period have concerned sexual offenses.[1] Also, within that category, most have been concerned with sexual offenses against children.[2] It is worth adding that in each of the sexual offense cases, the House of Lords eventually concluded that the evidence in question had been rightly admitted at trial.

It will be contended here that in both England and Florida during the last few years, judicial decisions have undermined the well-established general principle that the accused should not be condemned on the basis of his bad propensity, disposition, or character, but only on the basis of the crime presently alleged. In those two jurisdictions, though the judicial modus operandi has been different, the effect has been to offer a degree of tolerance towards prejudice and injustice against the accused for the sake of protecting children from child molesters. There may be room for argument that this is a proper trade-off, that to sacrifice one public good to another is, in this case, justified. However, whatever may be the right or wrong of that argument, it seems indefensible to make that trade-off while claiming, as courts have done in both jurisdictions, that no special exception is being made to the general principle. It may be better to admit, as the recently introduced Federal Rules 413 and 414 do, that an exception is indeed being made, though it will be argued that,

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1. *See, e.g.*, Regina v. Christou, [1996] 2 All E.R. 927; Regina v. H., [1995] 2 App. Cas. 596; Director of Pub. Prosecutions v. P., [1991] 2 App. Cas. 447; Director of Pub. Prosecutions v. Boardman, 1975 App. Cas. 421 (1974); Thompson v. Rex, 1918 App. Cas. 221; Rex v. Ball, 1911 App. Cas. 47 (1910); *cf.* Harris v. Director of Pub. Prosecutions, 1952 App. Cas. 694.

2. Only *Ball* was concerned with an incestuous relationship between two adults. *Ball*, 1911 App. Cas. at 49.

with that honesty, comes the prospect of stark unfairness to persons accused of such a grave crime as a sexual offense against a child. Perhaps, after all, the general principle has a great deal to be said for it.

II. THE MODERN ENGLISH SIMILAR FACT RULE

A. *The Decision in* Makin *and Problems with It*

Until very recently, the leading case in English law relating to similar fact cases was *Makin v. Attorney General for New South Wales*.[3] The Privy Council decided that case on appeal from New South Wales, Australia. Although it was in theory no more than persuasive authority as regards English law, in practice it soon came to be treated as correctly stating English law, too.[4] It is noteworthy that in Florida's own leading case, *Williams v. State*,[5] the Supreme Court of Florida described *Makin* as "the English judicial progenitor of the correctly stated rule"[6] and went on to describe that rule as having been transplanted into Florida.[7]

In *Makin*, Lord Chancellor Herschell famously stated the rule as follows:

> It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.[8]

There has been much speculation about the precise nature of the ruling which Lord Herschell intended to lay down. The detail of the dispute need not detain us, but the bare bones are of interest. Did

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3. 1894 App. Cas. 57 (P.C. 1893) (appeal taken from Sup. Ct., N.S.W.).

4. For detailed treatment, see Peter Mirfield, *Similar Facts* – Makin *Out?*, 46 CAMBRIDGE L.J. 83 (1987).

5. 110 So. 2d 654 (Fla. 1959). For further discussion of the case, see *infra* text accompanying notes 117-20.

6. *Williams*, 110 So. 2d at 659.

7. *Id.*

8. *Makin*, 1894 App. Cas. at 65.

his Lordship mean to say that there were two distinct kinds of relevance, so that one relied either on the one or on the other? If so, the claim would be that it is the *purpose* for which the evidence is sought to be introduced that is the key to the question of admissibility. Does the prosecution, or does it not, rely upon what has come to be known in England as the forbidden mode or chain of reasoning?[9] Alternatively, did his Lordship mean to say that the principle of inclusion stated in his second sentence was an exception to the principle of exclusion stated in his first? Then the claim would be that, within the category of evidence tending to show bad disposition or character, evidence which also rebuts a defense otherwise open to the accused may be adduced by the prosecution. Yet a third possibility is that his Lordship was dealing with relevance rather than with some special rule of inadmissibility; evidence simply adduced to show bad character or disposition is never relevant and, therefore, never admissible.

At all events, during the seventy-five years or so following *Makin*, English courts may fairly be described as having employed a "slot machine" or "laundry list" approach to similar fact evidence. As long as courts felt able to identify some defense reasonably open to the accused, to which the evidence in question could be said to be relevant, they seem to have been largely unconcerned that the mode of reasoning used might be precisely that which was apparently outlawed by the first sentence of Lord Herschell's statement. However, it may fairly be said that they also developed a notion that, in order to be admissible, the evidence ought to possess an *enhanced degree* of relevance. In a sense, the coin for the slot machine had to be a large one, or the item on the laundry list had to be written in bold capitals. The principal way of demonstrating enhanced relevance, though not the only way, was by reference to the similarity between the extraneous evidence and the evidence relating to the offense charged. Thus, if the extraneous acts alleged bore a "striking similarity" to those charged, it might amount to a passport to admissibility,[10] as long as the evidence in question really was relevant to some defense reasonably open to the accused.

It became obvious that, in some cases at least, despite Lord Herschell's apparent rejection of the forbidden mode of reasoning, it did indeed provide the basis for admission of similar fact evidence. There is no better example than *Regina v. Straffen*.[11] In 1951, Straffen

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9. Lord Hailsham firmly supported this view of *Makin* in *Director of Pub. Prosecutions v. Boardman*, 1975 App. Cas. 421, 453 (1974).

10. *See* Rex v. Sims, 1946 K.B. 531, 539-40 (Crim. App.).

11. [1952] 2 Q.B. 911 (Crim. App.).

had been found unfit, by reason of insanity, to plead to two charges of murder.[12] There was no doubt that he had indeed committed those murders. For four hours during a day in April 1952, he was at large from Broadmoor, the institution to which he had been committed.[13] At some time in the course of those four hours, a young girl had been murdered.[14] When questioned by the police following his recapture, Straffen admitted to having been in the neighborhood of the place where the body was found and that he had seen the young girl, but he denied the murder.[15] At his trial for that murder, the prosecution was permitted to adduce evidence of the details of the two earlier killings.[16] All three killings shared common features.[17] Firstly, in each case, the victim had been a young girl.[18] Secondly, each victim had been manually strangled.[19] Thirdly, in no case had there been any sexual interference.[20] Fourthly, in no case was there evidence of a struggle.[21] Finally, the bodies had not been concealed, even though this could easily have been done.[22]

The Court of Criminal Appeal upheld the trial judge's decision to admit the similar fact evidence.[23] In doing so, it referred to the evidence as tending "to rebut a defence which was otherwise open to the accused, that is, that he was not the person who committed the murder."[24] Later, it was described as having the purpose of identifying the murderer of the third victim as being the same individual who had murdered the other two girls in precisely the same way.[25] Now, this trivializes the approach apparently favored in *Makin*. One may have some limited sympathy with an approach requiring the evidence in question to go to some more specific issue within the general issue of guilt or innocence, yet the issue which the similar fact evidence went to in *Straffen* was not specific at all. It did indeed tend to show that Straffen had murdered the present victim. However, it must be plain beyond argument that it did so *by showing*

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12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See id.* at 912.
17. *See id.*
18. *See id.*
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 917.
24. *Id.* at 915.
25. *See id.* at 916.

Straffen to have a disposition to kill young girls in these highly unusual circumstances.[26] It became clear that the effect of *Makin* was to take away with one hand what it had given with the other.

Though it is nowhere stated in *Straffen*, there is every reason why the similar fact evidence was rightly admitted, but not because it went to rebut a defense. Rather, it was highly probative disposition or propensity evidence going to prove guilt. It was most unlikely that, given Straffen's admitted presence in the vicinity and his confession to having seen the young girl in question, some person other than he might have committed the murder. Consequently, as a leading commentator, who is now himself a House of Lords' judge, pointed out, the error in *Makin* was to erect "a distinction between different *kinds* of relevance when the true distinction is between different *degrees* of relevance."[27]

B. The Rejection of the Makin *Dichotomy*

Learning from the lesson taught by *Straffen* and other similar cases, English law has now abandoned the approach to similar fact evidence which relies upon the idea of different categories of relevance. Two of the five members of the House of Lords in *Director of Public Prosecutions v. Boardman*[28] seem clearly to have had its rejection in mind,[29] but they did not carry the rest of the court with them. However, a decade and a half later, the same court unanimously adopted a quantitative view of similar fact evidence. At the same time, the House of Lords rejected the argument that the necessary and sufficient criterion of admissibility was that the evidence in question bore a striking similarity to the evidence in the case at hand.[30]

In *Director of Public Prosecutions v. P.*,[31] a father was accused of various sexual offenses against his two daughters—*B* and *S*.[32] His defense was one of complete denial. The trial judge, having allowed the counts in respect of both daughters to be joined in the same indictment,[33] went on to rule that evidence on the counts with

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26. A point made strongly by Hoffmann (now Lord Hoffmann) in L.H. Hoffmann, *Similar Facts After* Boardman, 91 LAW Q. REV. 193, 198 (1975). An interesting and stimulating United States article making a similar point is Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 786-87 (1981).

27. Hoffmann, *supra* note 26, at 200.

28. 1975 App. Cas. 421.

29. *Id.* at 456-61 (per Cross, L.J.); *id.* at 442-45 (per Wilberforce, L.J.).

30. *See infra* text accompanying notes 35-36.

31. [1991] 2 App. Cas. 447.

32 *Id.* at 451-52.

33. *See id.* at 452.

respect to *B* was admissible on the counts with respect to *S*, and vice versa.[34] When the case reached the House of Lords, one of the questions posed for it to answer was as follows: "Where a father or stepfather is charged with sexually abusing a young daughter of the family, is evidence that he also similarly abused other young children of the family admissible (assuming there to be no collusion) in support of such charge in the absence of any other 'striking similarities?'"[35]

As phrased, the question seems to suggest that the mere fact of multiple allegations is itself striking, but the House of Lords did not take it in that way. Rather, it took the opportunity to say that no striking similarity *at all* was necessary between the evidence provided by the two young women.[36] Instead, it put the test in terms which will be familiar to American readers, though not, for them, as a description of the rule itself. In the words of Lord Mackay of Clashfern L.C.:

> [T]he essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime.[37]

As a gloss upon this general test, the House of Lords supported the idea that striking similarity, or something very like it (Lord Mackay referred to "a signature or other special feature"),[38] would be required, exceptionally in cases where the issue to which the similar fact evidence was said to be relevant was that of the perpetrator's identity.[39]

The House of Lords went on to ask itself whether the "probative value/prejudicial effect" test was satisfied on the facts of that case.[40] It offered some analysis of the probative elements.[41] The two young women had both described a prolonged course of conduct by *P* in relation to them.[42] Both said force had been used by *P*.[43] Each spoke

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34. *See id.*
35. *Id.*
36. *See id.* at 460.
37. *Id.*
38. *Id.* at 462.
39. *See id.* Later cases support the notion that identity cases are exceptional in this respect. *See, e.g.*, Regina v. Johnson, [1995] 2 Crim. App. 41 (C.A. 1994); Ryder, 98 Crim. App. 242 (C.A. 1993); McGranaghan, [1995] 1 Crim. App. 559 (C.A. 1991). *Johnson* is the leading case; it refers to the need for a "special similarity." *Johnson*, [1995] 2 Crim. App. at 46-47.
40. *Director of Pub. Prosecutions v. P.*, [1991] 2 App. Cas. at 460-61.
41. *See id.* at 461.
42. *See id.*

of a general domination by *P* of their mother, that had inhibited her from intervening.[44] *P* was obsessive about keeping his daughters to himself and for himself.[45] The evidence was said to suggest that the younger sister took on the role when the elder left home.[46] Finally, it seems that *P* had assisted both daughters with financing to procure abortions.[47] The House of Lords regarded all these factors, in combination, as giving "strong probative force to the evidence of each of the girls in relation to the incidents involving the other."[48] Unfortunately, the House of Lords was less forthcoming about the possible prejudicial effects of adducing the evidence in question. Lord Mackay was content simply to aver that the prejudicial effect was outweighed by this strong probative force.[49]

This failure to describe the elements of prejudice is regrettable, particularly because there are a number of different kinds of prejudice which might be thought to have been present in *Director of Public Prosecutions v. P.*, yet which may not all count so far as the balancing process is concerned. Most obviously, and perhaps most importantly, the jury may attribute more probative value to the evidence of bad character than is appropriate. The prejudice here would consist in the excess value given to it. This may be described as "disposition prejudice." Secondly, that evidence may persuade the jurors to convict the accused because they believe that such an awful person should not be out on the streets. This, which may be called "bad person prejudice," seems to have been the principal concern in *Regina v. Watts.*[50] Watts was charged with indecently assaulting a young adult female.[51] The bad character evidence, which the prosecution sought to adduce in cross-examination, was of Watts' convictions for indecent assaults on his nieces, then aged three and five.[52] Of course, the jury might give excessive weight to these convictions as *proving* guilt on the present charge, but a more serious concern might be that the jury would be so revolted by the assaults on the nieces that it would act upon a wish to see the accused locked up again, whether or not guilty on the present occasion.

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43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.* In fact, since the counts against *P* were specimen counts, it is not at all clear that this point was made on the facts.
47. *See id.*
48. *Id.*
49. *See id.* at 462-63.
50. [1983] 3 All E.R. 101 (C.A.).
51. *See id.* at 102.
52. *See id.* at 103.

A slightly different type of prejudice might be described as "accumulation prejudice." Where the accused faces a large number of discrete charges on the same indictment, perhaps with a number of additional allegations not made the subject of any charge, the jury may reason that there can be no smoke without fire and, therefore, that it may be appropriate to convict on all charges, or on at least some of them, because there must be a fire somewhere. If so, the jury may fail to look closely enough at whether guilt is made out on any particular charge. Finally, there is what may be termed "diversion prejudice." Where the truth or accuracy of the bad character evidence is itself strongly challenged by the accused, the jury may focus attention solely upon whether that evidence is true and accurate. It may, then, convict of the offense charged without having taken the crucial intermediate step of assessing the *value* of the extraneous evidence as to that offense.

It may be that the reason for the lack of discussion of prejudice in *Director of Public Prosecutions v. P.* was that only disposition prejudice had arisen, essentially because all the criminal conduct revealed was itself charged against the accused and because only two complainants gave evidence. Yet, it remains true that one cannot begin to assess the House of Lords' claim as to where the scales of the balance ended up.

C. *The Later Sexual Abuse Cases*

Director of Public Prosecutions v. P. was widely regarded, and indeed welcomed, as ridding English law of a fiction, namely that cases like *Straffen*[53] and *Director of Public Prosecutions v. P.* itself could be reasoned in terms of rebuttal of a defense rather than in terms of deliberate recourse to reasoning via bad disposition.[54] An element of the reasoning that the jury was to be encouraged to employ in cases of alleged multiple sexual abuse in the family was that, assuming no collusion, the very fact that more than one child made similar allegations made the allegations more likely to be true. One could put it in terms of the unlikelihood that two children would independently, but incorrectly or untruthfully, allege sexual abuse by their father. Alternatively, one could say that the story of one child made the story told by the other more believable.[55] Whichever kind of relevance was to be relied upon, the test to be satisfied was that of

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53. *See supra* notes 11-27 and accompanying text.

54. *See Watts*, [1983] 3 All E.R. at 103.

55. The case for using evidence in this way is made by J.R. Spencer, Case Comment, *Similar Facts and Inconsistent Case Law*, 53 CAMBRIDGE L.J. 249 (1994) (commenting on Ananthanarayanan, 98 Crim. App. 1 (C.A. 1994)).

probative value outweighing prejudicial effect. There was, it would seem, at least in principle, to be no reduced standard of probative strength by virtue of any notion that the similar fact evidence of each complainant might be used to corroborate the direct testimony of each other complainant, rather than as itself being circumstantial evidence of guilt.

However, *Director of Public Prosecutions v. P.* left two important questions unanswered. The first was whether matters are altered by the possibility that the children *did* collude or, quite innocently, discussed together their experiences with their father. In principle, it might seem that where there has been contamination in either of these ways, both arguments for cross-admissibility of the allegations collapse, for the whole weight of them seems to rest upon the independence of the two items of testimony. On the other hand, at least in the case of innocent contamination, since it seems close to inevitable or, at least, highly likely that there will have been exchanges of information, a rule requiring cross-admissibility to be ruled out because of the possibility of contamination might be thought to make child sexual abusers, especially in the family context, more difficult to prosecute successfully.[56]

The second unanswered question[57] is whether charges in relation to which there is *no* cross-admissibility, because probative value does not outweigh prejudicial effect, may, nonetheless, be charged together at the same trial. Each of these two questions has now been answered by the House of Lords, the first in *Regina v. H.*,[58] the second in *Regina v. Christou*.[59] It will be submitted here that these two cases represent, so far as child sexual abuse cases are concerned, the second and third strikes against the general principle denying the jury access to evidence of the accused's bad character, disposition, or propensity. What of the first strike? It is now clear that it was delivered by *Director of Public Prosecutions v. P.* itself.

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56. A point forcefully made by J.R. Spencer. *Id.* at 251.

57. The question was actually asked of the House of Lords, *see* Director of Pub. Prosecutions v. P., [1991] 2 App. Cas. 447, 449, but, given its decision on the other question asked, the House of Lords had no reason to answer the present question.

58. [1995] 2 App. Cas. 596. For an analyses of the case, see Peter Mirfield, *Proof and Prejudice in the House of Lords*, 112 LAW Q. REV. 1 (1996); Roderick Munday, Case & Comment, *Similar Fact Evidence and the Risk of Contaminated Testimony*, 54 CAMBRIDGE L.J. 522 (1995); Case Comment, Regina v. H., 1995 CRIM. L. REV. 718.

59. [1996] 2 All E.R. 927. For further discussion of the case, see *infra* Part II.C.2.

1. *The Decision in* Regina v. H.

In *Regina v. H.*, the accused's adopted daughter *C* and stepdaughter *S* complained of various sexual offenses committed by *H*, the accused, upon them.[60] *H*'s defense was, simply, that the alleged offenses had not taken place.[61] Though the last was alleged to have occurred in April 1989, nothing by way of complaint emerged until May 1992.[62] Then, *S* told *C* about what she alleged against *H*.[63] *C* initially denied that anything similar had happened to her but did eventually change her mind.[64] *S* also spoke to her boyfriend about these matters and then, apparently at his urging, spoke to her mother.[65] Matters were reported to the police.[66] This detail is of importance, not because of any suggestion that delay in complaining necessarily casts doubt upon the veracity of the complaint, but because of *H*'s explanation of why *S* and *C* should make baseless allegations against him.[67] *H* said he had disapproved of *S*'s boyfriend and that he had turned down her request that the boyfriend be allowed to move into the family home.[68] *H*'s case was that a combination of a grudge held by *S* about his attitude and an appreciation by her that, with *H* out of the way, the path would be clear for the boyfriend to move in had led *S* to make up her allegations and to persuade *C* to make up similar ones.[69] The record certainly reveals that two months after *H*'s arrest for the alleged offenses, the boyfriend did indeed take up residence.[70]

The trial judge had ruled that the two sets of allegations were prima facie cross-admissible under the relaxed standard dictated by *Director of Public Prosecutions v. P.*, which, as we have seen, rejects the need for any striking similarity between the allegations themselves.[71] So far as the possibility of collusion was concerned, the trial judge had ruled that this was a matter on which it was necessary only for him to direct the jury that it would need to consider whether *S* and *C* had concocted a false story and further to direct it that unless it was sure that there had been no such collusion, the evidence of the one

60. Regina v. H., [1994] 1 W.L.R. 809, 811 (C.A.).
61. *See id.*
62. *See id.*
63. *See id.*
64. *See id.*
65. *See id.* at 812.
66. *See id.* at 811.
67. *See id.* at 812.
68. *See id.*
69. *See id.* at 811-12.
70. *See id.* at 811.
71. *See id.*

could not be used to support that of the other.[72] In effect, the judge chose to leave the admissibility issue to the jury. Counsel for *H* argued that was the wrong approach.[73] Instead, the judge ought to have considered the contamination issue as a preliminary matter, if necessary by holding a trial within a trial (known in England as trial on the *voire dire*).[74]

The House of Lords was faced with a clash of authority in the court immediately below—the Court of Appeal, Criminal Division. In three cases, it had been held that a judge who concluded there was a real risk or real possibility of contamination must *rule* the evidence given on the one complaint inadmissible in relation to the other.[75] Often, it would indeed be necessary for the judge to conduct a trial on the *voire dire*. However, in two other cases, the line taken by the trial judge in *Regina v. H*—that it was a matter for a properly directed jury to decide—had been preferred, one of those cases being *Regina v. H.* itself in the lower court.[76]

The House of Lords upheld the decision of the trial judge.[77] Lord Mackay of Clashfern L.C. provided the authoritative ruling, one with which no other member of the House of Lords disagreed. He said:

> Where there is an application to exclude evidence on the ground that it does not qualify as similar fact evidence and the submission raises a question of collusion (not only deliberate but including unconscious influence of one witness by another) the judge should approach the question of admissibility on the basis that the similar facts alleged are true . . . . It follows that generally collusion is not relevant at this stage.[78]

In other words, it is indeed for the jury to decide whether there has, in fact, been contamination. However, for his part, the judge must direct the jurors that they should not use similar fact evidence to support direct evidence, or otherwise adversely to the accused, in such a case, unless satisfied it is free of contamination. Furthermore, jury autonomy is restricted in that the judge must direct the jury to rule out cross-admissibility where no reasonable jury could find absence of contamination.

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72. *See id.* at 814.

73. *See id.* at 815.

74. This would require that the judge hear evidence on the contamination issue in the absence of the jury and then decide whether to rule in favor of cross-admissibility.

75. *See* Regina v. Ananthanarayanan, 98 Crim. App. 1, 6 (C.A. 1994); Regina v. W., [1994] 1 W.L.R. 800, 806 (C.A.); Ryder, 98 Crim. App. 242, 252 (C.A. 1993).

76. *Regina v. H.*, [1994] 1 W.L.R. at 815; *see also* Regina v. Hunt, 1995 CRIM. L. REV. 42, 42 (C.A., Crim. Div., 1994).

77. *See* Regina v. H., [1995] 2 App. Cas. 596, 597.

78. *Id.* at 612.

This is not the place for an extended discussion of the basis upon which the House of Lords came to this decision. It suffices to mention two important arguments in favor of its position. First, as a matter of principle, questions concerning the credibility of witnesses and their evidence were properly for the jury, not the judge. Lord Mustill pointed out that a conclusion that there was a real risk of contamination would undermine the evidence of the complainant in question not only as *similar fact* evidence supporting the evidence of the other complainant but also as *direct* evidence of what had happened to her.[79] The logic of the appellant's argument ought, therefore, to dictate that the judge should rule it inadmissible in both respects, not just as similar fact evidence.

It is submitted that Lord Mustill's reasoning is fallacious, simply because it fails to take account of what is now, after *Director of Public Prosecutions v. P.*, the test of admissibility. Part and parcel of the probative force or value of evidence of bad character, which force or value must outweigh the prejudicial effect of such evidence, is its cogency. For example, evidence which has led to a conviction surely has more weight than that which supports only an uncharged allegation.[80] Other things being equal, the less credible the evidence, the more likely it is to be less probative than prejudicial. The position, so far as the evidence as *direct* evidence is concerned, is quite different. It need meet no special standard of enhanced probative value. Rather, all that is required is that it is not so lacking in probative value that no reasonable juror could place reliance upon it. It is worth adding that the "no reasonable jury" limitation announced by the House of Lords in respect of similar fact evidence is, if Lord Mustill is correct, no protection at all for the accused. Turning his Lordship's argument on its head, it could be ruled out as similar fact evidence only if it would equally be ruled out as direct evidence, yet, in this kind of family case, there is unlikely to be any other direct evidence against the accused. Thus only if a conviction of the accused on the basis of that direct evidence would be perverse, would it be right for the judge to instruct the jury not to take account of it as similar fact evidence in relation to the other charge. In those circumstances, he would be required to direct the jury to acquit on all charges anyway.

Lord Mustill's second argument was one of policy. Given that, in his view, discussion of these matters between the complainants

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79. *See id.* at 618.

80. *See* RUPERT CROSS & COLIN TAPPER, CROSS ON EVIDENCE, 377-79 (8th ed. 1995) (explaining very clearly why the cogency of the evidence is an element of the test).

would be almost inevitable in the family setting, the prospect of possible contamination would almost always be present.[81] So, were the argument of counsel for *H* to have been upheld, a separate trial on the *voire dire* would have become a routine feature of such cases. Consequently, each complainant would have faced cross-examination as to her truthfulness twice, once on the *voire dire* and once at the trial of the general issue. This was an ordeal for the complainant which ought to be avoided.[82]

One may properly have sympathy for this argument as attending to the current public concern about sexual abuse in families, as well as about the plight of the complainant. However, there is a grave danger of losing sight, or at least failing to take proper account, of the rights and interests of the person accused of child sexual abuse. The practical effect of *Regina v. H.* is that cross-admissibility of the various complainants' evidence will itself become a routine feature of the criminal trial in the present context. It is to be remembered that, for these purposes, the complainant's evidence is to be treated as *true.* In other words, cogency is to be set artificially, at one hundred percent. Since, after *Director of Public Prosecutions v. P.*, striking similarity is no longer required, we need pay attention only to probative value and prejudicial effect. There is surely a great deal of force in the claim that uncontaminated, independent evidence of another child of the family has very high probative value as regards the first child's allegation. Yet here, in essence, everything turns upon the cogency of that evidence. If cogency is set at one hundred percent, it will indeed be highly probative evidence. As far as concerns prejudice, the key danger is that the jury will draw a strong conclusion from two rather weak allegations. How can that danger be present where both allegations have been deemed to be strong? It is submitted that it is wrong of judges to wash their hands of protecting the accused from jury prejudice in precisely those cases where the fans of prejudice would seem to wave the strongest. Nor should it be forgotten that it is *because* sexual offenses against children involve such a dreadful abuse of trust that we regard them as so serious and, *therefore,* should find the prospect of a person's wrongful conviction of such an offense so terrible.

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81. *See Regina v. H.*, [1995] 2 App. Cas. at 616.

82. An even stronger line was taken in *Regina v. Hunt*, [1995] CRIM. L. REV. 42 (C.A., Crim. Div., 1994). There, the court thought that the judge would, because of the presence of opportunity for discussion in the family, rarely be able to rule out the risk of contamination, with the result that cases of cross-admissibility would be most unusual. In effect, the accused would be able to divide the case against him by insisting upon separate trials in relation to the various complainants. This view must now be read in the light of *Regina v. Christou*, [1996] 2 All E.R. 927, considered in *infra* Part II.C.2.

2. *The Decision in* Christou

So to the final House of Lords' decision. Imagine that rare case where a judge rules against cross-admissibility. Then, one might be forgiven for supposing, there should be separate trials of the two or more sets of complaints. Otherwise, the trial judge would face the unenviable task of directing the jury in the following way. He must tell the jurors that, insofar as the particular complainant's evidence relates to what the complainant claims was done to her, they must decide for themselves whether or not they believe it. However, they are not to treat that evidence as admissible in support of the evidence given by any other complainant of what allegedly happened to her. Even if they conclude the charge or charges in respect of one complainant have been proved, they must put the evidence in question to no other use.

Now, it is well established, by virtue of Rule 9 of the Indictment Rules 1971,[83] that offenses of "a similar character" may be joined in the same indictment and that the criteria of similarity are essentially legal, not factual.[84] In other words, Rule 9 does not import the restrictions imposed by the similar fact rules.[85] In the present context, it would allow joinder on the same indictment of different sexual offenses alleged by different members of the family, or, indeed, by different children making allegations against the same stranger. However, section 5(3) of the Indictments Act 1915 allows the judge to sever an indictment that has been properly joined on the basis of prospective prejudice or embarrassment to the defense, or for any other reason.[86] So, the question that arises is whether the indictment should *automatically* be severed in cases where evidence on one count would, because it is more prejudicial than probative for the purposes of the similar fact rules, be inadmissible on another count.

In his influential speech[87] in *Boardman*, Lord Cross answered that question very clearly in the affirmative.[88] His answer, which was expressly endorsed by Lord Wilberforce in the same case,[89] merits extensive quotation. He said:

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83. The Indictment Rules 1971 are delegated or subordinate legislation made under powers granted in the Indictments Act, 1915, 5 & 6 Geo. 5, § 1 (Eng.).

84. *See* Ludlow v. Metropolitan Police Comm'r, 1971 App. Cas. 29, 29 (1970).

85. *See id.*

86. Indictments Act, 1915, 5 & 6 Geo. 5, § 5(3) (Eng.).

87. House of Lords' opinions are conventionally so described.

88. Director of Pub. Prosecutions v. Boardman, 1975 App. Cas. 421, 459 (1974).

89. *Id.* at 442.

> When in a case of this sort the prosecution wishes to adduce "similar fact" evidence which the defence says is inadmissible, the question whether it is admissible ought, if possible, to be decided in the absence of the jury at the outset of the trial and if it is decided that the evidence is inadmissible and the accused is being charged in the same indictment with offences against the other men the charges relating to the different persons ought to be tried separately. If they are tried together the judge will, of course, have to tell the jury that in considering whether the accused is guilty of the offence alleged against him by A they must put out of mind the fact—which they know—that B and C are making similar allegations against him. But . . . it is asking too much of any jury to tell them to perform mental gymnastics of this sort. If the charges are tried together it is inevitable that the jurors will be influenced, consciously or unconsciously, by the fact that the accused is being charged not with a single offence against one person but with three separate offences against three persons. It is said, I know, that to order separate trials in all these cases would be highly inconvenient. If and so far as this is true it is a reason for doubting the wisdom of the general rule excluding similar fact evidence. But so long as there is that general rule the courts ought to strive to give effect to it loyally and not, while paying lip service to it, in effect let in the inadmissible evidence by trying all the charges together.[90]

There followed a series of cases in the Court of Appeal, Criminal Division, in some of which the principled logic of Lord Cross was followed,[91] in others of which pragmatic considerations of inconvenience and expense led to a negative answer being given.[92] In the latter group of cases, it was stressed, in particular, that section 5(3) granted the trial judge a discretion, rather than imposing a duty.[93]

Christou is a decision of the House of Lords settling the issue in favor of the negative answer.[94] The accused was the cousin of the two female complainants and had lodged in their family home from 1972 to 1982.[95] The indictment contained various counts alleging rape, buggery, and indecent assault upon the complainants, who, at the date of the alleged offenses, were aged between five and fifteen.[96]

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90. *Id.* at 459 (citation omitted).

91. *See, e.g.*, Brooks, 92 Crim. App. 36 (C.A. 1990); Beggs, 90 Crim. App. 430 (C.A. 1989); Wilmot, 89 Crim. App. 341 (C.A. 1988).

92. *See, e.g.*, Cannan, 92 Crim. App. 16 (C.A. 1990); Dixon, 92 Crim. App. 43 (C.A. 1989); Wells, 92 Crim. App. 24 (C.A. 1988).

93. *See, e.g., Cannan*, 92 Crim. App. at 22-23.

94. Regina v. Christou, [1996] 2 All E.R. 927.

95. *See id.* at 930.

96. *See id.*

Though no complaint had been made until 1992, there is no explanation given for the delay.[97]

The defense confined its argument on appeal specifically to cases of alleged sexual abuse of children, contending that, in the absence of cross-admissibility, the admitted discretion should *always* be exercised in favor of severance.[98] This may have been unwise, for one point emphasized by the House of Lords was that this would involve a strange and difficult exercise in line-drawing.[99] It might have been better to argue that severance should be automatic in *all* cases where cross-admissibility is denied because of the similar fact rules. In any event, Lord Chief Justice Taylor, delivering the main speech, also gave other reasons for rejecting the appeal.[100] First, to say that a discretion could be exercised only one way in a given kind of situation would be improperly to fetter a discretion granted to trial judges by Parliament.[101] Second, cases did vary greatly, even within the category of sexual abuse of children.[102] In this respect, where the indictment related to discrete incidents of sexual abuse of different children in different places at different times, the allegations might, in effect, exist in "watertight compartments," so making severance straightforward.[103] However, where the various allegations amounted to "a continuous course of conduct within one household involving two or more children over the same period and in similar circumstances," even if cross-admissibility was not made out, joint trial of such interrelated charges would be much more likely to be appropriate.[104] Third, the matter being one of judicial discretion, the appeal court should overturn only a wholly unreasonable or perverse decision by the trial judge.[105]

His Lordship went on to refer to factors which the judge should consider. In his words:

> [T]he essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are: how discrete or interrelated are the facts giving rise to the counts; the impact of ordering two or more trials on the defendant and his

97. *See id.*
98. *See id.* at 927.
99. *See id.* at 936-37.
100. *See id.*
101. *See id.* at 936.
102. *See id.*
103. *Id.*
104. *Id.*
105. *See id.*

> family, on the victims and their families and on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together. In regard to that last factor, jury trials are conducted on the basis that the judge's directions of law are to be applied faithfully.[106]

It is the final factor which is, it is submitted, most troubling. If his Lordship is right, it seems to follow that the similar fact rules are unnecessary in cases where no crimes extraneous to the indictment are relied upon by the prosecution, and that we should dispense with these rules, in their present form, in such cases. A judge always can give an appropriate direction not to take into account the evidence on count one when considering the issue of guilt on count two. If we are to assume that such directions will be applied faithfully, they will always suffice to obviate prejudice. Yet, the very reason we have a general principle of exclusion is that we are worried that despite the clearest and fairest of instructions, the jury will give too much weight to the evidence in question or will be a prey to the bad person, accumulation, or diversion prejudices. It is certainly the case that Lord Taylor's view is utterly at odds with that of Lord Cross, quoted earlier.[107]

It may well be significant that one member of the House of Lords in *Christou*, Lord Griffiths, expressed the view that the trial judge had, in any event, been wrong to rule against cross-admissibility.[108] He thought *Director of Public Prosecutions v. P.* to be clear authority which should have led the judge to rule that the jury was entitled to regard the evidence of the complainants as mutually corroborative.[109] Lord Griffiths' words were: "This was a case of a man successively sexually abusing his two young girl cousins whilst living as a member of their family in the same house."[110] Though there is no reference to *Regina v. H.* in *Christou*, it is surely right to say that cross-admissibility would be even more obviously made out, in such case, after *Regina v. H.*[111]

D. Conclusion

It may seem stark, but it is hard to reach any conclusion other than the one that follows. In the case of alleged child sexual abuse in

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106. *Id.* at 937.

107. *See supra* note 90.

108. *Christou*, [1996] 2 All E.R. at 929.

109. *See id.*

110. *Id.*

111. At the date of the actual trial in *Christou*, *Regina v. H.* had not been decided by the House of Lords.

the family, and probably also in the case of child sexual abuse more generally, the similar fact rule has, in three strikes, been abolished in England. It *always* is highly probative that independent complainants make allegations of sexual abuse against the same person (strike one: *Director of Public Prosecutions v. P.*).[112] Where there are grounds for doubting independence because of conscious or unconscious contamination of stories as between the complainants, quite extraordinary cases apart, we are to leave the determination of contamination issues to the jury, albeit with an appropriate direction (strike two: *Regina v. H.*).[113] If, most unusually, a judge should happen to rule against cross-admissibility, that judge is, subject only to the need not to reach a perverse decision, free to allow the counts to be tried together anyway. Once again, a suitable direction, this time as to the inadmissibility of the evidence on one count in respect to the other, is all that is *required* (strike three: *Christou*).[114] Yet no member of the House of Lords in any of these three cases has told us that the similar fact rule *has* been abolished in this context, which leaves one to reflect upon what Lord Cross said in *Boardman* about paying mere lip service to the general rule.[115]

III. FLORIDA LAW AND SEXUAL ABUSE OF CHILDREN

A. *The General Rule for Similar Fact Evidence*

Section 90.404(2)(a) of the Florida Statutes provides:

> Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.[116]

This subsection gives statutory effect to the decision of the Supreme Court of Florida in *Williams*,[117] of which mention has already been made.[118] It will quickly be apparent that, though put the opposite way, with the principle of admissibility preceding that of inadmissibility, section 90.404(2)(a) bears a remarkable resemblance to Lord

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112. *See supra* text accompanying notes 31-49.
113. *See supra* text accompanying notes 73-79.
114. *See supra* text accompanying notes 106-07.
115. *See supra* note 90.
116. FLA. STAT. § 90.404(2)(a) (1995).
117. Williams v. State, 110 So. 2d 654 (Fla. 1959).
118. *See supra* text accompanying notes 5-7.

Herschell's formulation in *Makin*.[119] In *Williams*, the Supreme Court of Florida explained the position as follows: "Our view of the proper rule simply is that *relevant* evidence will not be excluded *merely* because it relates to similar facts which point to the commission of a separate crime. The test of admissibility is relevancy. The test of inadmissibility is a lack of relevancy."[120] There could be no more striking expression of commitment to the notion that the key to the solution here is the need to distinguish between different *kinds* of relevance.

However, in Florida, no less than in England after *Makin*, the courts have not been content simply to identify some defense or other to which the similar fact evidence may be said to have some relevance. They have been concerned also with the probative strength of that evidence, at least in cases where the argument for admission is put in terms of similarity between the offense presently charged and the other alleged offense or misconduct.[121] Most obviously, commonplace, routine, or trivial similarities will not suffice where the prosecution seeks to establish the identity of the offender by reference to similar fact evidence. For example, in *Drake v. State*,[122] a murder victim, having left a bar in the company of the person who presumably killed her, had her hands tied behind her back.[123] In order to connect Drake with the murder, the prosecution sought to adduce evidence of two sexual assaults by him which had similar features.[124] The Supreme Court of Florida ruled that the evidence in question had insufficient probative force to be admissible.[125] It stated that "in order for the similar facts to be relevant the

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119. Makin v. Attorney General for N.S.W., 1894 App. Cas. 57 (P.C. 1893) (appeal taken from Sup. Ct., N.S.W.). For a discussion of Lord Hershell's formulation in *Makin*, see *supra* text accompanying notes 8-9.

In *Williams*, Justice Thornal described *Makin* as stating "a broad rule of *admissibility* of all relevant evidence except as to character or propensity, and subject only to specific exclusions or exceptions which are few." *Williams*, 110 So. 2d at 659. In fact, it will be recalled that Lord Herschell's formulation is in terms of a broad rule of exclusion of character or propensity evidence, subject to specific exceptions.

120. *Id.* at 659-60.

121. It may well *not* come from such similarity. For example, the prosecution might wish to connect the accused to a vehicle used in a bank robbery by calling evidence that he had stolen the car several hours earlier. The situation where no reliance is placed upon similarity, for this kind of reason, is convincingly discussed by the Supreme Court of Florida in *Bryan v. State*, 533 So. 2d 744 (Fla. 1988).

122. 400 So. 2d 1217 (Fla. 1981).

123. *Id.* at 1218.

124. *See id.* at 1218-19.

125. *See id.* at 1219.

points of similarity must have some special character or be so unusual as to point to the defendant."[126]

In this and other cases, the courts have stressed that the evidence fails to have *legal* relevance for these purposes unless sufficiently similar. This is so, even though the general provision defining "relevant evidence," section 90.401, simply states that it "is evidence tending to prove or disprove a material fact."[127] This might seem to suggest that similar fact evidence would be legally relevant, even though showing no special similarity with the evidence as to the crime charged. Nor, in imposing this enhanced relevance test have the Florida courts placed reliance upon the general evidential provision, contained in section 90.403, which dictates: "*Relevant* evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, misleading the jury, or needless presentation of cumulative evidence."[128]

There is no doubt that the special similarity requirement announced for identity cases is a requirement in some other cases, too. For example, in *Feller v. State*,[129] the accused was charged with three offenses of sexual battery against his stepdaughter.[130] In order to corroborate his stepdaughter's testimony, the prosecution sought to adduce evidence of an indecent assault by the accused on a child, which allegedly had taken place on a fishing trip.[131] The Supreme Court of Florida ruled that the prosecution should not have been permitted to do so, giving as its reason that the charged and collateral offenses did not "'share some unique characteristic or combination of characteristics.'"[132] It is quite clear that no issue of identity arose in relation to either the fishing trip offense or the stepdaughter offenses.[133]

So it will be clear that, so far as a general theory of similar fact evidence is concerned, the approach of the Florida courts is broadly equivalent to that of the English courts before *Director of Public Prosecutions v. P.*[134] Florida has not taken the step taken in *Director of Public Prosecutions v. P.* of reformulating the rule in straightforward terms of a need for the probative value of the evidence in question to

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126. *Id.; see also* Thompson v. State, 494 So. 2d 203, 203-04 (Fla. 1986); Peek v. State, 488 So. 2d 52, 55 (Fla. 1986).

127. FLA. STAT. § 90.401 (1995) (emphasis added).

128. *Id.* § 90.403 (emphasis added).

129. 637 So. 2d 911 (Fla. 1994).

130. *Id.* at 916.

131. *See id.*

132. *Id.* (quoting Heuring v. State, 513 So. 2d 122 (Fla. 1987)).

133. *See* Stevens v. State, 521 So. 2d 362, 362 (Fla. 1st DCA 1988) (Cobb, J., concurring).

134. [1991] 2 App. Cas. 447. For a discussion of this case, see *supra* Part II.B.

outweigh its prejudicial effect. Improper prejudice to the accused comes into the picture only when the balancing exercise under section 90.403 is undertaken. It might seem, then, that both jurisdictions eventually get to balance proof and prejudice, but Florida first does something extra to protect the accused by requiring section 90.404(2)(a) to be satisfied.[135]

It is to be noted that there are three major differences between the tests in the two jurisdictions. Firstly, under the English rule, evidence is to be excluded unless it is more probative than prejudicial; however, under the Florida rule, the burden goes the other way, for it is to be excluded only if the danger of unfair prejudice, etc., outweighs probative value. Secondly, in Florida, prejudicial effect, etc., must *substantially* outweigh probative value; whereas in England, the two are balanced without any special weight being accorded to probative value. Finally, even though the words of section 90.403 seem more naturally to import a judicial *duty* to exclude evidence failing the test,[136] in practice the matter is treated as *discretionary*, such that the trial judge's decision will not be overturned on appeal unless it amounts to an abuse of discretion.[137] There is no doubt that *Director of Public Prosecutions v. P.* makes exclusion a matter of rule, such that an appellate court is to overturn the judge if it takes a different view of the balance between the two elements.

B. Child Sexual Abuse Cases

1. The Special Rule for Familial and Other Child Sexual Abuse Cases

The wording of section 90.404(2)(a) firmly establishes that the list of examples of kinds of relevance given is not intended to be exhaustive. It follows that new items may be added to the list.[138] In *Heuring v. State*,[139] the Supreme Court of Florida recognized a relevant use to which similar fact evidence might be put which was specific to the case where sexual abuse within the family context is

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135. *See* Symposium, *The Federal Rules of Evidence*, 71 NW. U. L. REV. 634, 635 (1976) (discussing the "double-barreled" test).

136. The relevant phrase in section 90.403 is "is inadmissible." FLA. STAT. § 90.403 (1995). By contrast, under the Federal Rules of Evidence, the words used are "*may* be excluded." FED. R. EVID. 403 (emphasis added). These words more obviously import a discretionary balancing process, giving considerable leeway to the trial judge. *See, e.g.*, United States v. Coiro, 922 F.2d 1008, 1015 (2d Cir. 1991); United States v. York, 933 F.2d 1343, 1353 (7th Cir. 1991).

137. *See, e.g.*, Sims v. Brown, 574 So. 2d 131, 133 (Fla. 1991); Lewis v. State, 570 So. 2d 412, 415 (Fla. 1st DCA 1990); State v. Wright, 473 So. 2d 268, 270 (Fla. 1st DCA 1985).

138. Thus there have been examples in the nonsexual context. *See, e.g.*, Hernandez v. State, 569 So. 2d 857 (Fla. 2d DCA 1990).

139. 513 So. 2d 122 (Fla. 1987).

alleged.[140] The court noted certain features of that kind of case. First, the victim knows the perpetrator, so identity will not be in issue.[141] Second, the victim is usually the sole eyewitness, and corroborative evidence is scant, making the credibility of the respective testimonies of the complainant and of the accused the focal issue.[142] In the court's view, it followed that where there was evidence available to the prosecution of other sexual batteries on other family members, it might be adduced as relevant to *corroborate* the complainant's evidence.[143] The court went on to say that the probative value of the evidence outweighs its prejudice where used for this corroborative capability.[144] This might seem to mean that no section 90.403 balancing is required once the evidence has been ruled admissible under section 90.404(2)(a). However, it has been convincingly argued that this cannot really be the case, especially in view of the fact that if there can be no such balancing, the prosecution would be free to call evidence of *many* other extraneous offenses without any significant additional probative value, yet with much additional prejudicial effect.[145]

Much was left unexplained or unanswered in *Heuring*. In the case itself, the particular similar fact evidence to which the court's ruling in this respect related had been given by another family member, but it is unclear if corroborative capability was to be confined to such evidence. What if the accused also had an alleged propensity to sexually abuse children outside the family?[146] A second issue is whether the new theory is available only in the case of alleged offenses against children. What about adults within the family? Thirdly, the law review article cited by the court in favor of its corroboration theory suggests that the key question is whether the complainant is acquainted with the accused.[147] In those

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140. *Id.* at 124-25.

141. *See id.* at 124.

142. *See id.*

143. *See id.* In this, as in many other cases, courts have referred to the "victim's" testimony or evidence. This reference seems strange, for the very issue in this kind of case is whether the complainant really was a victim. Would it not be preferable to use language which does not assume the accused's guilt?

144. *See id.* at 125.

145. *See* CHARLES W. EHRHARDT, FLORIDA EVIDENCE 181-82 (1996 ed.).

146. In *Heuring* itself, the prosecution had also adduced evidence of sexual molestation of five children who were not family members of the accused. *Heuring*, 513 So. 2d at 125. The Supreme Court of Florida ruled this evidence inadmissible because the alleged offenses did not have sufficient similarity to the charged offenses for the purposes of the *Williams* rule, but did not say whether it might have been used to corroborate the complainant if sufficiently similar. *See id.*

147. *See* Robert N. Block, Comment, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offences*, 25 UCLA L. REV. 261 (1977), *cited in Heuring*, 513 So. 2d at 125.

circumstances, all the features referred to by the Supreme Court of Florida will be present, for it is surely a feature of child sexual abuse cases generally, and not just of the incestuous variety, that what is done is done privately. Therefore, there would seem to be no obvious reason why, if the theory works, it should not apply equally where the accused is an acquaintance of the complainant in respect of the offense charged. Finally, the court did not say if some special similarity was required between the offenses in order for the evidence to be admissible for corroborative purposes.

All these doubts have been settled in later cases, but in a way which makes it convenient to take the final issue first. It is now clear that the stringent similarity requirement of the ordinary *Williams* rule is relaxed where both the offense charged and the extraneous offense are alleged to have taken place in the familial context. The Supreme Court of Florida so held in *Saffor v. State*,[148] describing the position as follows:

> [W]hen the collateral sex crime and the charged offense both occur in the familial context, this constitutes a significant similarity for purposes of the *Williams* rule, but . . . these facts, standing alone, are insufficient to authorize admission of the collateral sex crime evidence. There must be some additional showing of similarity in order for the collateral sex crime evidence to be admissible.[149]

Though it might not be regarded as absolutely clear, what this seems to mean is that the stringent similarity requirement associated with *Williams* does, as a matter of strict theory, apply. However, the fact that both offenses are alleged to have occurred in a familial context is deemed to supply, so to speak, a proportion of that similarity. What remains unclear is how great a proportion is supplied thereby and, therefore, what level of similarity the charged and collateral crimes must demonstrate.[150] In *Saffor* itself, the court went on to point out that the only real similarity was that both offenses had been committed while the child was asleep in bed and that there were a number of significant differences in terms of the ages and gender of the children and of time frames, locations, and times of day.[151] In a subsequent case in the Second District Court of Appeal, it was suggested that "the trial court should make a careful and

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148. 660 So. 2d 668 (Fla. 1995).

149. *Id.* at 672. Justice Anstead, concurring specially, disagreed with the majority in that he would have applied the stringent *Williams* test in the ordinary way. *Id.*

150. *See* Letter from Professor Ehrhardt, the Florida State University College of Law, to Peter Mirfield (Aug. 14, 1996) (on file with author).

151. *Saffor*, 660 So. 2d at 672-74 (Shaw, Wells, JJ., concurring with the majority's statement of the law but dissenting on the facts).

reasoned comparison of the similarities and dissimilarities between the charged offense and the prior incidents."[152]

The limits of the corroborative capability argument, so far as non-familial situations are concerned, were considered by the Supreme Court of Florida in *State v. Rawls*.[153] The court first concluded that the accused had not been in a familial relationship with the complainant child at the time of the alleged offense.[154] However, given that the circumstances exhibited precisely those difficulties identified in *Heuring* and that identity was not in issue, with the result that everything seemed to turn on the comparative credibility of the accused and the complainant, the court applied the corroboration reasoning to *Rawls*, in which the collateral evidence came from other witnesses who had been children at the time of the alleged offenses against them.[155] All the other children had been acquainted with Rawls at the time, but it seems probable that the corroboration reasoning applies to all cases of child sexual abuse where the accused's defense is not one of identity but is that the incident never occurred.[156] The court pointed out that the similar fact evidence in the case at hand fully satisfied the strict similarity standard set by the *Williams* rule.[157] Even after *Saffor*, which was decided in the year following *Rawls*, the charged and collateral offenses in child sexual abuse cases outside the familial context will presumably be required to exhibit the special similarities associated with *Williams*. This is because the absence of a familial context means that no proportion of the overall test can be deemed to have been artificially satisfied.

There is certainly no case in which the corroboration reasoning has been applied outside the context of child sexual abuse altogether. Yet, it is entirely possible that the next development will be to extend that reasoning to sexual offenses concerning adults within the family and beyond. In this respect, it is noteworthy that the seminal law review article putting forward the corroboration argument, an article referred to in both *Heuring* and *Rawls*, certainly did not limit itself to

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152. Moore v. State, 659 So. 2d 414, 415 (Fla. 2d DCA 1995); *see also* Sheppard v. State, 659 So. 2d 457, 458-59 (Fla. 5th DCA 1995).

153. 649 So. 2d 1350 (Fla. 1994).

154. *Id.* at 1353. The line between familial and nonfamilial contexts is, in any event, one which is difficult to draw, as a number of cases demonstrate. *See id.*; *see also* Hallberg v. State, 621 So. 2d 693, 693, 701-02 (Fla. 2d DCA 1993); Bierer v. State, 582 So. 2d 1230, 1231-32 (Fla. 3d DCA 1991); Calloway v. State, 520 So. 2d 665 (Fla. 1st DCA 1988).

155. *Rawls*, 649 So. 2d at 1353-54.

156. This seems to be the effect of the Supreme Court of Florida's explanation of *Rawls* in *Saffor*. *Saffor*, 660 So. 2d at 671.

157. *Rawls*, 649 So. 2d at 1354.

child cases.[158] Once again, where identity is not in issue, the comparative credibility and necessity arguments are very likely to apply.

Turning to the first issue left unsettled by the *Heuring* court, *Feller* seems to have raised the factual situation with which that issue is concerned, for, as we have seen, the offenses alleged against the accused were in respect of his stepdaughter, but the similar fact evidence seems to have related to an alleged offense against a child who was not a member of his family.[159] Though the Supreme Court of Florida regarded the collateral and charged offenses as insufficiently similar on the facts,[160] it seems to be implicit in the decision that there was no objection in principle to its use, in effect to corroborate the stepdaughter. Presumably, this must be right, given that *Rawls* now allows child sexual abuse evidence to be used in this way even where neither offense took place in a familial context.

2. *"Patterns of Criminality"*

It is also worth mentioning a general inclusionary principle which has been supported in some of the authorities, for this principle seems to have been invoked principally, though not exclusively, in cases involving alleged sexual abuse of children.[161] In *Williams* itself, evidence establishing a "pattern of criminality" was said to be capable of demonstrating a kind of relevance such as to render it admissible.[162] This suggestion was taken up in a number of district court cases decided before *Heuring*.[163] The effect of *Heuring* upon this line of authority is not entirely clear. According to Professor Ehrhardt, in that case "the Supreme Court of Florida apparently rejected the use of 'pattern of criminality' evidence in prosecutions for sexual batteries upon children but recognized that similar fact evidence could be admitted in these cases for a new purpose, namely, to corroborate the testimony of the victim."[164]

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158. *See* Block, *supra* note 147.

159. Feller v. State, 637 So. 2d 911, 916 (Fla. 1994).

160. *Id.*

161. For an example of a case not involving child sexual abuse, see Davis v. State, 537 So. 2d 1061 (Fla. 1st DCA 1989). However, it has been regarded by some judges as itself a specific exception for child sexual cases. *See* Gould v. State, 558 So. 2d 481, 486 (Fla. 2d DCA 1990). This is not entirely surprising because the pattern of criminality exception is often stated, as though in alternative terms, as a "lustful attitude" exception. *See* Padgett v. State, 551 So. 2d 1259 (Fla. 5th DCA App. 1989).

162. Williams v. State, 110 So. 2d 654, 662 (Fla. 1959).

163. *See, e.g.*, Sias v. State, 416 So. 2d 1213 (Fla. 3d DCA 1982); Jones v. State, 398 So. 2d 987 (Fla. 4th DCA 1981); Cotita v. State, 381 So. 2d 1146 (Fla. 1st DCA 1980).

164. EHRHARDT, *supra* note 145, at 185.

The word "apparently" may be significant here, for the Supreme Court of Florida certainly did not expressly reject the "pattern of criminality" idea; in fact, the court did not expressly refer to this idea at all.[165] Rather, it described some courts as having relaxed, in child sexual battery cases, the usual strict standard applicable to similar fact evidence, by allowing evidence of familial battery "as relevant to modus operandi, scheme, plan, or design, even though the distinction between sexual design and sexual disposition is often tenuous."[166] It immediately went on to endorse the new idea of admitting extraneous evidence to corroborate the complainant's testimony, describing it as involving "the better approach."[167]

It is certainly true that the "pattern of criminality" theory has attracted almost as many judicial critics as adherents.[168] However, there are a number of cases decided at the district court of appeal level since *Heuring* in which the vitality of that theory for sexual abuse or battery cases involving children has been affirmed.[169] A feature present in some cases probably helps to explain that continued vitality. The corroboration theory works straightforwardly where the similar fact evidence is given by another complainant but will not do the trick where the prosecution seeks to adduce evidence from the complainant in the case itself. There would seem to be grave theoretical objection to allowing the complainant to corroborate herself (or himself) by relating incidents involving the accused similar to the one presently charged. That would plainly be to allow self-corroboration, yet if the *sole* permissible purpose of the evidence under *Heuring* is to corroborate, the similar fact evidence ought surely to come from an independent source. This point was taken in *Padgett v. State* by the First District Court of Appeal,[170] but, rather than reaching the conclusion that the evidence in question was inadmissible, the court, by majority,[171] ruled the evidence admissible, reasoning that "[s]uch a showing, whether it ultimately be labeled as reflecting a particular state of mind . . . or establishing a pattern of conduct . . . is relevance beyond simple propensity where the

165. Nor did the Supreme Court of Florida refer to the obvious district court cases.

166. Heuring v. State, 513 So. 2d 122, 124 (Fla. 1987).

167. *Id.* at 124-25.

168. *See, e.g.*, Bolden v. State, 543 So. 2d 423 (Fla. 5th DCA 1989); *Jones*, 398 So. 2d at 989 (Anstead, J., dissenting); *Cotita*, 381 So. 2d at 1151 (Smith Jr., J., dissenting).

169. *See, e.g.*, State v. Paille, 601 So. 2d 1321 (Fla. 2d DCA 1992); Smith v. State, 538 So. 2d 66 (Fla. 1st DCA 1989); Padgett v. State, 551 So. 2d 1259 (Fla. 5th DCA 1989).

170. *Padgett*, 551 So. 2d at 1260; *see also Paille*, 601 So. 2d at 1324; *Smith*, 538 So. 2d at 67-68.

171. *Padgett*, 551 So. 2d at 1262 (Cobb, J., dissenting).

defendant denies committing the charged sexual assault against the victim."[172]

It should be added that where the prosecution does rely upon a "pattern of criminality" argument, it will be required to demonstrate a striking similarity between the extraneous crime and the one charged. The standard is not the more relaxed one endorsed, so far as use for corroboration purposes is concerned (as we have seen), in *Saffor*.[173] For example, in *Smith v. State*, the First District Court of Appeal pointed out that the evidence in question satisfied the same standard as that required in identity cases, in that the offenses were not only strikingly similar but shared a unique characteristic or combination of characteristics setting them apart from other offenses.[174] Also, in the pre-*Heuring* case of *Ables v. State*,[175] the same court, allowing the appeal, applied the idea that "identifiable points of similarity and a sufficient level of uniqueness" are required.[176] Though there is a statement in the more recent case of *State v. Paille*[177] which seems to suggest that the more relaxed standard associated with the corroboration cases applies,[178] it is difficult to follow how this can be the case.

3. Comment

It is very hard to resist the conclusion that in using extraneous bad character evidence for the purpose of establishing a pattern of criminality, of which the charged offense constitutes an example, the Florida courts have simply been waiving the ordinary rule of exclusion. It may at least be said that in those cases where reference is made to rebuttal of a defense offered by the accused, the court is required to refer to *some standard* beyond or outside propensity or bad character. However, the "pattern of criminality" theory seems to set aside even this canon of caution. Rather than strain the reader's patience by taking my own criticism further, let me offer some Florida judicial opinion.

In his dissenting opinion in *Cotita v. State*,[179] Judge Robert P. Smith, Jr., castigated the majority for employing the pattern analysis, saying that its effect was "that other-crimes evidence is now relevant

172. *Id.*
173. Saffor v. State, 660 So. 2d 668 (Fla. 1995).
174. *Smith*, 538 So. 2d at 67; *see also* Davis v. State, 537 So. 2d 1061 (Fla. 1st DCA 1989).
175. 506 So. 2d 1150 (Fla. 1st DCA 1987).
176. *Id.* at 1152.
177. 601 So. 2d 1321 (Fla. 2d DCA 1992).
178. *Id.* at 1323.
179. 381 So. 2d 1146 (Fla. 1st DCA 1980).

for precisely those qualities, its showing of bad character and criminal sexual propensities, which for 150 years have been the cause for restricting its use."[180]

The Fifth District Court of Appeal in *Bolden v. State*[181] unanimously said that the prosecution's argument that the trial judge had been right, on the pattern theory, to admit the similar fact evidence showed instead "exactly why the evidence was *inadmissible*."[182] Most recently, in *Padgett*, Judge Cobb dissented robustly in the following words from the proposition that the pattern theory enabled one to escape from the problem of self-corroboration: "If a victim's testimony in regard to prior sexual assaults is not admissible for purposes of self-corroboration, then the only purpose of that testimony is to show the defendant's propensity to commit the crime. Such euphemistic phrases as 'pattern of criminality' . . . cannot logically conceal that purpose."[183]

But, what then of the corroborative use of similar fact evidence of parties other than the present complainant? Here, at least, a particular evidential purpose is offered, though not one relating to some defense set up by the accused. Instead, it is used to add force to direct testimony from the complainant as to the crime. However, there are good grounds for doubting the validity of the corroboration theory, at least as it is presently interpreted by the Supreme Court of Florida.

Firstly, one always has reason for doubting that arguments which flow from practical considerations are likely to establish a principled case. It will be recalled that the essence of the reasoning of the Supreme Court of Florida in *Heuring* was that, in cases involving alleged child sexual abuse, particularly (perhaps) within the family, there is usually a *need* for supporting evidence, for little or nothing else is likely to be available.[184] While this is perfectly true, it hardly makes the similar fact evidence more probative or less prejudicial.

Secondly, it is certainly the case that the comparative credibility of the complainant and of the accused is very likely to be the focal issue. However, such cases are not unique in this respect. Rape cases in which the accused's defense is that the complainant consented typically, though not necessarily, become "swearing

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180. *Id.* at 1151-52 (Smith, Jr., J., dissenting).

181. 543 So. 2d 423 (Fla. 5th DCA 1989).

182. *Id.*

183. Padgett v. State, 551 So. 2d 1259, 1264 (Fla. 1st DCA 1989).

184. Heuring v. State, 513 So. 2d 122, 124-25 (Fla. 1987); *see also supra* text accompanying notes 139-47.

matches." (This may, of course, lead some to say that a relaxed standard of similarity or probative strength should equally be applied in those cases.)[185] Equally, cases of nonsexual violence within the family may well share the present feature, though it has to be added that the physical marks left by violent attacks may sometimes alleviate the problem.

Thirdly, it is submitted that taking the route of credibility does not allow us to escape from reliance on propensity or disposition reasoning. The question posed is whether we believe complainant *A* when she accuses her father of a sexual battery. What relevance does evidence of a similar battery alleged by complainant *B* have for these purposes? Well, we may start from the position that there is a presumption of innocence and that, absent other information implicating him, we would be reluctant to accept the truth of the complaint. We might well regard it as more credible once we had heard complainant *A* testify, but we would probably wish to know whether such behavior was out of character for him. Complainant *B*'s testimony would fill that void, at the same time giving us more confidence in our assessment of complainant *A*'s evidence as credible. We would find it more credible because it (if itself credible) showed him to have done the same kind of thing on another occasion. Of course, the greater the number of occasions revealed and the closer the similarity between the circumstances of the alleged crimes, the *more* confident would be our conclusion about the credibility of complainant *A*'s evidence. Yet, these are all matters as to the weight of evidence and not, in reality, as to kinds of relevance.

It is submitted that the reality is that the Florida courts do allow pure propensity evidence to be adduced in cases concerning the alleged sexual abuse of children within the family, and perhaps now, after *Rawls*,[186] in cases concerning such sexual abuse in at least some situations outside the familial context. It is worth noting that there is judicial authority in support of the proposition that that is exactly what the law *should* allow. In *State v. Rush*,[187] a case decided several years before *Heuring*, the Second District Court of Appeal endorsed the following words of Judge Robert P. Smith, Jr., in *Cotita*:

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185. For a course now taken, and more widely than simply in the situation referred to in the text, by the new Federal Rule 413, see 1 STEPHEN A. SALTZBURG ET AL., FEDERAL RULES OF EVIDENCE MANUAL 576-79 (6th ed. 1994); 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE 251-317 (Supp. 1996); Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense* Cases, 22 FORDHAM URB. L.J. 271 (1995).

186. State v. Rawls, 649 So. 2d 1350, 1353-54 (Fla. 1994).

187. 399 So. 2d 527 (Fla. 2d DCA 1981).

> "I confess I am not at all sure that *Williams'* unyielding bar of other-crimes evidence, proving propensity alone, should stand in prosecutions like this, not involving identity issues, for sex offenses against children. It may be that the nature of the offense and the usual difficulties of proving it can justify propensity evidence against the long-honored policy excluding it."[188]

More recently, when *Saffor* was before the First District Court of Appeal, Judge Wolf, perhaps in an unguarded moment, admitted what is really going on when similar fact child sexual abuse evidence is adduced: "[I]t appears . . . that the collateral crime evidence was corroborative because it demonstrated what some commentators have described as 'depraved sexual propensity.' The evidence is corroborative because the fact that the perpetrator has acted in a similarly depraved fashion in the past is predictive of his actions at other times."[189]

Such a view does have the virtue of straightforwardness, though a proper concern to avoid conviction of the innocent for such awful offenses ought surely to dictate that to be admissible, the extraneous evidence should be required, as a matter of law rather than discretion, to have sufficient probative value to outweigh its prejudicial effect. It will be recalled that *Heuring* may lay down that once the section 90.404(2)(a) test of admissibility is satisfied, there is no need to undertake even the discretionary balancing under section 90.403.[190]

C. *Unproved Allegations*

There is United States Supreme Court authority concerning the Federal Rules of Evidence which dictates that where similar fact evidence is challenged on the basis that the accused's involvement in the extraneous offense in question has not been established, the judicial task is merely to satisfy itself that there is sufficient evidence for the jury reasonably to conclude that the accused committed that offense. The case in question, *Huddleston v. United States*,[191] adds that in assessing whether probative value is substantially outweighed by prejudicial effect, one factor to be considered is the strength of the evidence establishing the extraneous offense.[192] In *Huddleston* itself, the extraneous evidence was challenged not on the basis of lack of

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188. *Id.* at 529 (citations omitted) (quoting Cotita v. State, 381 So. 2d 1146, 1153-54 (Fla. 1st DCA 1980) (Smith, Jr., J., dissenting)).

189. Staffor v. State, 625 So. 2d 31, 34 (Fla. 1st DCA 1993).

190. FLA. STAT. §§ 90.403, .404(2)(a) (1995).

191. 485 U.S. 681 (1988).

192. *Id.* at 689 n.6.

credibility, but on the basis that though it showed the defendant to have been in possession of television sets which he was prepared to sell at a very low price, it did not show that those sets were stolen (which was the matter in issue).[193] However, Chief Justice Rehnquist, delivering the unanimous opinion of the Court, did state that in making a determination of relevancy of evidence dependent on the fulfillment of a conditional fact under Federal Rule 104(b),[194] "the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence."[195]

Given that the Court thought the proper analysis for the trial court to employ, as regards similar fact evidence, was dictated by Federal Rule 104(b), it seems clear that the position, as a matter of federal jurisprudence, is essentially the same, as regards the exclusionary rule, as under English law after the decision of the House of Lords in *Regina v. H.*[196]

Before *Huddleston*, the Florida courts had adopted a much higher standard in relation to proof of the extraneous criminality. The leading case seems to be *State v. Norris*,[197] in which Justice Thornal, for the Supreme Court of Florida, said that "in order for the evidence to be admissible there must be proof of a connection between the defendant and the collateral occurrences. In this respect, mere suspicion is insufficient. The proof should be clear and convincing."[198]

Since *Huddleston*, the First District Court of Appeal in *Phillips v. State*[199] has followed *Norris* in continuing to apply the "clear and convincing" evidence standard,[200] notwithstanding that *Huddleston* was referred to by that court.[201] Furthermore, the Second District Court of Appeal has twice applied that standard, though in neither case was any reference made to *Huddleston*.[202] It remains to be seen whether, in the long run, Florida courts will continue to apply the higher standard. Presumably, if they do eventually embrace *Huddleston*, they will also accept that the strength or weakness of the

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193. *Id.* at 683-84.

194. FED. R. EVID. 104(b).

195. *Huddleston*, 485 U.S. at 690.

196. [1995] 2 App. Cas. 596, 597; *see* discussion *supra* Part II.C.1.

197. 168 So. 2d 541 (Fla. 1964); *see also* Chapman v. State, 417 So. 2d 1028 (Fla. 3d DCA 1982); Dibble v. State, 347 So. 2d 1096 (Fla. 2d DCA 1977).

198. *Norris*, 168 So. 2d at 543.

199. 591 So. 2d 987 (Fla. 1st DCA 1991).

200. *Id.* at 989-90.

201. *Id.* at 989 n.4.

202. *See* Thomas v. State, 660 So. 2d 762 (Fla. 2d DCA 1995); Audano v. State, 641 So. 2d 1356 (Fla. 2d DCA 1994).

extraneous evidence should be a factor in the discretionary balancing of probative value and prejudicial effect.

It is of interest that the specific problem of alleged collusion about, or contamination of, evidence does not seem to have arisen in Florida, even though there are many cases concerned with child abuse in the family context. One case apart, the issue of cogency of the extraneous evidence seems to have been argued only in respect of a submission that it did not convincingly connect the accused with the offense in question. In that other case, *Audano v. State*, the lack of credibility of the extraneous evidence was the reason why it was regarded as not meeting the "clear and convincing" standard,[203] though there was no suggestion of any contamination between the complainant in the case at hand and the witnesses who had made the extraneous complaints. Therefore, it remains entirely possible that, once an issue of contamination as such is identified, the courts in Florida, like the House of Lords in *Regina v. H.*, will find especially appealing the argument that this is, classically, a jury issue.

In principle, *Huddleston* would seem to be much easier to explain than *Regina v. H.* Where, rightly or wrongly, courts stick to the idea that there are categories of relevance, they do not directly address probative value as a question of admissibility. So the cogency, including cogency as a matter of credibility, of the evidence does not seem implicitly relevant to that question. Cogency takes its place in the discretionary balancing under Federal Rule 403, where probative value *is* directly addressed.[204] In England, on the other hand, what is done as a matter of discretion in the federal system and in Florida is done as a matter of rule. Not the least mystifying aspect of *Regina v. H.* is that, having removed credibility from the rule-balancing except as a threshold requirement, two members of the House of Lords went on to remind us that the judge enjoys a discretionary power both at common law and under statute to exclude evidence on the basis that its admission at trial would operate unfairly against the accused.[205] They must have had in mind that element of the discretion which concerns evidence more prejudicial than probative. It is very difficult to understand why that which could not properly reduce probative value under the exclusionary rule could, apparently, reduce it under the discretionary power.

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203. *Audano*, 641 So. 2d at 1359.

204. FED. R. EVID. 403.

205. Regina v. H., [1995] 2 App. Cas. 596, 602-03 (per Mackay, L.C.J.) (citing Police and Criminal Evidence Act, 1984, §§ 78(1), 82(3) (Eng.)); *id.* at 627 (per Birkenhead, L.J.) (same).

D. *Joinder and Severance*

The Florida rule as to joinder of offenses in the same indictment is significantly narrower than both the English rule and the United States federal rule. Joinder is permitted under Rule 3.150 (a) of the Florida Rules of Criminal Procedure ("Florida Rules"), where the offenses "are based on the same act or transaction or on 2 or more connected acts or transactions."[206] The federal rule, by contrast, though providing for two grounds for joinder which have essentially the same content as Florida Rule 3.150(a), also allows joinder if the offenses "are of the same or similar character."[207] Now, it will be recalled that Rule 9 of the Indictment Rules 1971 allows offenses of "a similar character" to be joined and that it is this wide-ranging provision as to joinder which makes the discretion to sever under section 5(3) of the Indictments Act 1915 so important.[208]

1. *Federal Joinder*

We may begin by observing that the federal courts have taken a rather different position than that taken in *Christou* on the question of what is to be done about severance where, though properly joined offenses are similar, they are not cross-admissible.[209] The law may fairly be described as erecting a presumption of prejudice in such cases, so that severance ought, in general, to be granted. The strongest case is *United States v. Foutz*.[210] There, the two robberies charged in the same indictment were not so similar that evidence of the one was admissible to prove the identity of the accused as perpetrator of the other.[211] The Fourth Circuit Court of Appeals seems to have held that it *therefore followed* that the trial judge ought to have ordered severance under Federal Rule 14, which provides that a severance *may* be granted "[i]f it appears that a defendant or the government is prejudiced by a joinder of offenses."[212]

However, any notion that a per se rule operates here has to be rejected. First, in the leading case, *Drew v. United States*,[213] the District of Columbia Court of Appeals said there would be no

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206. Rule 3.151(a) uses identical words in relation to consolidation for trial offenses originally charged in two or more informations.

207. FED. R. EVID. 8(a).

208. Indictments Act, 1915, 5 & 6 Geo. 5, ch. 90, § 5(3) (Eng.); *see also supra* text accompanying notes 83-86.

209. For a discussion of *Christou*, see *supra* Part II.C.2.

210. 540 F.2d 733 (4th Cir. 1976); *see also* United States v. Mullen, 550 F.2d 373, 378 (6th Cir. 1977).

211. *See Foutz*, 540 F.2d at 738.

212. FED. R. EVID. 14.

213. 331 F.2d 85 (D.C. Cir. 1964).

prejudicial effect (as a result of refusal of severance) where "the evidence of each crime is simple and distinct."[214] This exception was said to rest on the assumption that a properly instructed jury would, in those circumstances, be easily able to keep the items of evidence distinct in their deliberations, with the result that the danger of it cumulating the evidence would be much reduced.[215] If we imagine a case which just fails to meet the cross-admissibility test, we may reasonably suppose it would not be at all easy for the jury to keep the evidence separate. For example, in a child sexual abuse case, where the argument for cross-admissibility is put in terms of mutual corroboration of the complaints and that argument fails because of insufficient similarity, it would seem clear that the idea of the evidence being simple *and distinct* could hardly apply. The notion that this exception is for cases where the similarity of offenses is in terms of their legal categorization, rather than any factual similarity, striking or otherwise, seems to be supported by the recent case of *Closs v. Leapley*.[216] There certainly does not seem to be the same danger here as that which is entailed by the decision of the House of Lords in *Christou*.

Second, a number of courts have stressed that the severance question remains a matter for the discretion of the trial judge, such that his decision is to be overturned only if it amounts to an abuse of discretion.[217] It is not clear to the writer how this point can be squared with the notions that trial judges *really should* sever where dangers of disposition and other prejudice are present and that appeals should be allowed, in such cases, where they have failed to do so. At all events, the appeal cases do give trial judges the clear message that they should be very cautious before denying severance, even if it is only a perverse decision which appellate courts will overturn.

2. *Joinder and Consolidation in Florida, in General*

It will be recalled that Florida allows joinder, and indeed, consolidation, only where the offenses "are based on the same act or transaction or on two or more connected acts or transactions."[218] Where the argument for joinder is that the offenses are based upon the same act or transaction, it is very likely that one of the *Williams'*

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214. *Id.* at 91.

215. *See id.*

216. 18 F.3d 574 (8th Cir. 1994).

217. *See, e.g.*, Corbett v. Bordenkircher, 615 F.2d 722 (6th Cir. 1980); United States v. Lewis, 547 F.2d 1030 (8th Cir. 1976); United States v. Brashier, 548 F.2d 1315 (9th Cir. 1976).

218. FLA. R. CRIM. P. 3.150(a).

reasons for cross-admissibility will be present anyway, namely that which concerns inseparable crimes.[219] For example, in *Roberts v. State*,[220] the allegations were that Roberts first beat a male victim with a baseball bat, then attempted to rape the female victim, then, fearing someone was approaching, bundled the latter into a motor vehicle and eventually raped her.[221] At some point, the male victim was murdered.[222] In effect, these various crimes were indeed inseparable, for the story of what happened would have been incoherent had some elements been excluded from it. It may properly be said that they were all part of the *res gestae* as well as of the same transaction. Even if we hesitate to describe them as part of the *same* transaction, we would have no difficulty in saying that they constituted *connected* acts or transactions.

Of course, connected acts or transactions will not necessarily be caught by the inseparable crimes rationale. However, the test of connection established by the authorities is such a narrow one that it will very often have the effect of ensuring that offenses which are not cross-admissible cannot be joined either. The leading case is *Paul v. State*,[223] a decision of the Supreme Court of Florida which adopts the dissenting opinion of Judge Smith in the First District Court of Appeal of Florida as regards consolidation of offenses.[224] Though *Paul* was not directly concerned with joinder, Judge Smith himself considered the principles he stated applied no less thereto, and his reasoning has been employed in many subsequent cases about joinder. In his view, the phrase "connected acts or transactions" referred to connection "in an episodic sense," with the result that "the rules do not warrant joinder or consolidation of criminal charges based on similar but separate episodes, separated in time, which are 'connected' only by similar circumstances and the accused's alleged guilt in both or all instances."[225]

In *Paul*, the accused faced three charges of sexual battery or attempted sexual battery relating to three different young women.[226] All three offenses had taken place in university dormitories, two within a very short space of time early one morning, and the other

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219. Williams v. State, 110 So. 2d 654, 659-60 (Fla. 1959); *see also supra* text accompanying notes 117-21.

220. 510 So. 2d 885 (Fla. 1987).

221. *Id.* at 887.

222. *See id.*

223. 385 So. 2d 1371 (Fla. 1980).

224. *See* Paul v. State, 365 So. 2d 1063, 1065-67 (Fla. 1st DCA 1979) (Smith, J., dissenting).

225. *Id.* at 1065-66 (Smith, J., dissenting).

226. *Id.* at 1064-65.

over a month before.[227] Though Judge Smith concluded that evidence of the earlier offense would not be admissible in relation to the other two, he clearly thought it was a close call.[228] Yet, his view, affirmed by the Supreme Court of Florida,[229] was that only the two later offenses could properly be consolidated because they were related in an episodic sense.[230] Another good example of failure to demonstrate the necessary connection is *Crossley v. State*.[231] There, two robberies had been committed within a three-hour time span and only a few miles apart.[232] Yet, the Supreme Court of Florida ruled they had taken place as independent episodes, such that they ought not to have been tried together.[233]

Nonetheless, there will undoubtedly be some cases where joinder is permissible even in the absence of cross-admissibility. *Livingston v. State*[234] may be an example, though one cannot be certain. The allegations were that the accused had first burgled a house at about twelve noon, taking from it, *inter alia*, a pistol.[235] Eight hours later he had robbed a convenience store and, in doing so, had shot the attendant using the stolen pistol.[236] The attendant having later died, the accused was charged with burglary, robbery, and murder.[237] Clearly, no argument for cross-admissibility through similarity could have been put forward here, though it might perhaps have been argued—it was not—that the use of the pistol was such as to render the crimes inseparable. The Supreme Court of Florida ruled that consolidation had been permissible because the offenses had occurred only hours apart in the same small town, with the pistol stolen during the burglary having become the instrument for effecting the robbery and murder.[238] Those facts sufficed to establish an episodic connection. However, it seems reasonable, in those circumstances, to be somewhat sanguine about jury prejudice, for no rational juror could employ disposition or propensity reasoning, except in the very general sense that those who commit violent crimes may be more likely to commit other violent crimes.

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227. *See id.*
228. *Id.* at 1066 (Smith, J., dissenting).
229. Paul v. State, 385 So. 2d 1371, 1372 (Fla. 1980).
230. *Paul*, 365 So. 2d at 1066.
231. 596 So. 2d 447 (Fla. 1992).
232. *See id.* at 448.
233. *Id.* at 450.
234. 565 So. 2d 1288 (Fla. 1988).
235. *See id.* at 1289.
236. *See id.*
237. *See id.*
238. *Id.* at 1290.

3. Joinder and Consolidation in Child Sexual Abuse Cases

Given the central concern of this article, we must now relate what has been said generally about joinder and cross-admissibility to the more specific situation of child sexual abuse. It is crucial to be aware that though much of what has been said so far suggests that charges not cross-admissible are unlikely to be joined, the questions of joinder, consolidation, and severance, on the one hand, and cross-admissibility, on the other, are distinct.[239] This means, as will be clear from the preceding discussion, that more than one child sexual abuse charge could be joined, even though not cross-admissible. However, it is also important to appreciate that, sometimes, such charges may be cross-admissible under the relaxed *Saffor* standard,[240] yet *not* be capable of being joined. Thus, in several cases, it is clear that although the *Heuring* test[241] was satisfied, the charges were not connected in the episodic sense such as to be capable of being joined.[242] In *Roark v. State*,[243] Judge Wolf, for the First District Court of Appeal of Florida, said that "in child sexual molestation cases, motions to sever should be granted where offenses occurred at different times and places, involving different victims."[244] The real importance of this point, for present purposes, is that cases where the relaxed standard of similarity dictated by *Heuring* and *Saffor* is not quite met will *also* fail to meet the criterion for joinder. So the additional dangers of prejudice courted by the House of Lords in *Christou* are much less likely to arise in Florida.

However, it should be added that the decisions in *Heuring* and *Saffor* have another potential impact upon joinder. It is established that the harmless error doctrine applies to cases of misjoinder.[245] Florida courts have attached great significance, when deciding whether the particular error was harmless, to the fact that the evidence in relation to the crimes charged together was cross-admissible.[246] However, the First District Court of Appeal of Florida has recently rejected the notion that "in all familial sexual battery cases where

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239. *See* Beal v. State, 620 So. 2d 1015 (Fla. 1st DCA 1993) (rejecting the deliberate conflation of the two issues in *Spivey v. State*, 533 So. 2d 306 (Fla. 1st DCA 1988)).

240. Saffor v. State, 660 So. 2d 668, 672 (Fla. 1995).

241. Heuring v. State, 513 So. 2d 122, 124-25 (Fla. 1987); *see also supra* text accompanying notes 139-44.

242. *See, e.g.*, Bierer v. State, 582 So. 2d 1230 (Fla. 3d DCA 1991). A case in which it seems very likely that the test would have been satisfied is *Wallis v. State*, 548 So. 2d 808 (Fla. 5th DCA 1989).

243. 620 So. 2d 237 (Fla. 1st DCA 1993).

244. *Id.* at 239.

245. *See* Livingston v. State, 565 So. 2d 1288 (Fla. 1988).

246. *See, e.g.*, Crossley v. State, 596 So. 2d 447, 450 (Fla. 1992); *Bierer*, 582 So. 2d at 1230.

separate crimes would be admissible pursuant to *Heuring v. State* . . . an inappropriate joinder of offenses constitutes harmless error."[247] Were it otherwise, the court reasoned, both prosecutors and courts would be tempted to try separate offenses together simply on the basis of their cross-admissibility, in order to save time and promote efficiency.

It seems not unreasonable to conclude that the less liberal joinder rules in Florida, as compared with those of the federal jurisdiction or of England, do have the effect of ensuring that when joinder or consolidation is permitted, there will usually either be cross-admissibility between the offenses in question or, if not, a reduced likelihood that the accused will actually suffer prejudice. In some cases, admissible similar fact evidence of child sexual abuse will fail the joinder and consolidation tests and so be considered only as collateral evidence. The Florida position seems more conducive, in this respect, to the avoidance of trial unfairness to the person accused of such abuse than does English law as laid down in *Christou*.

E. General Conclusion as to Florida Law

It was suggested earlier that in three strikes the House of Lords has abolished the similar fact rules for cases where child sexual abuse in the family is alleged, and probably also in child sexual abuse cases more generally.[248] Florida seems, by contrast, to have made only one strike at this stage. Issues of joinder and severance are dealt with in a way much more conducive to sober jury determination of serious and difficult issues of guilt and innocence. Florida courts have not yet adopted the *Huddleston* doctrine,[249] so it remains possible that contamination questions will be dealt with in a more satisfactory way than they are in England after the decision in *Regina v. H.* Only with regard to the basic rule about admissibility have the Florida courts been persuaded to invent new doctrine to allow more extensive use of other allegations of child molestation in support of the overall case against the accused. One cannot help feeling, however, that the last word has not been spoken on these matters and that the pitcher of public opinion is ready at the mound with a supply of more curve balls. Florida needs to be aware that there is a federal relief pitcher warming up in the bull pen.

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247. *Roark*, 620 So. 2d at 239-40.

248. *See supra* Part II.D.

249. *See supra* text accompanying notes 191-95.

IV. THE FEDERAL RULES OF EVIDENCE AND SEXUAL ABUSE OF CHILDREN

The considerations that impose restraint upon judicial activism in this area do not act similarly upon legislators. While the Florida courts have claimed to place child sexual abuse cases within the overall theory that similar fact evidence is not to be used solely for propensity purposes, the United States Congress has had no such inhibitions about that theory. According to the recently enacted Federal Rule 414(a) which became effective on July 9, 1995, "[i]n 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."[250]

Federal Rule 414(d) defines "child" as a person below the age of fourteen and "offense of child molestation" such as to confine the term to sexual offenses.[251] This is not the place for an extensive consideration of the content and purpose of this provision, which is companion to Federal Rule 413, a more general provision concerning offenses of sexual assault.[252] However, especially in view of the fact that it was clearly the hope of both those who drafted these provisions and of those who supported in Congress their enactment that state jurisdictions would follow the federal lead, it is worth making a few remarks about Federal Rule 414.

Federal Rule 414 represents an open recognition that it is permissible to use similar fact evidence for propensity purposes. It may be clear from what has gone before that this writer would regard openness, at least, as a merit of the new rule. The test to be satisfied is simply that of relevance to some issue in the case. If that is so, there is now no special rule of inadmissibility in the federal jurisdiction so far as evidence of allegations of child sexual abuse is concerned; the similar facts rule has been abolished.

It remains to be seen whether federal judges will have the inclination or the will to reinvent special ideas of relevance in this area. There seems to be precious little support in the legislative history for judicial activism of this kind, though one commentator

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250. FED. R. EVID. 414(a).

251. *Id.* 414(d).

252. For a discussion of Federal Rules 413 and 414, see Anne Elsberry Kyl, *The Propriety of Propensity: The Effects and Operation of New Federal Rules of Evidence 413 and 414*, 37 ARIZ. L. REV. 659 (1995); Park, *supra* note 185; Symposium, *Admission of Prior Offense Evidence in Sexual Assault Cases*, 70 CHI.-KENT.-L. REV. 3 (1994). *See also* WRIGHT & GRAHAM, *supra* note 185, at 251-338 (providing the very extensive and–to this writer at least–highly persuasive treatment of these rules).

sympathetic to the new rules has suggested that they "are not as iconoclastic as they appear on the initial reading."[253] In addition, it might be thought that the general "probative value/prejudicial effect" discretion under Federal Rule 403 might be prayed in aid to prevent some of the grossest examples of trial unfairness against accused persons to which the new rules could give rise. However, it is to be remembered that Federal Rule 403 gives the trial judge power to exclude only where the danger of unfair prejudice, etc., *substantially* outweighs probative value.[254] Furthermore, there is even a possibility that it will be decided that Federal Rule 403 is not available at all in cases where either Federal Rule 413 or 414 is relied upon for admissibility of the evidence in question. The new rules are drafted in a way which leaves it unclear what Congress intended. Wright and Graham come down clearly in favor of the view that Federal Rule 403 remains available;[255] Saltzburg, Martin, and Capra are of the same view, though with rather less confidence.[256] In any event, it may not matter much that Federal Rule 403 does remain available. Saltzburg, Martin, and Capra make the telling point, both as to Federal Rule 413 and as to Federal Rule 414, that they mandate a change in the way courts have traditionally balanced probative value and prejudicial effect in respect of evidence of other sexual offenses. As they say, "Congress has instructed the Courts to find more probative value in such evidence than the Courts were previously permitted to find."[257] It must follow that application of the balancing test is now much less likely to result in exclusion of that evidence.

One final point may be of interest to readers. The principal sponsor in the House of Representatives of what became Federal Rules 413 and 414, Representative Susan Molinari, had this to say about child molestation cases: "[A] history of similar acts tends to be exceptionally probative because it shows an unusual disposition of the defendant—a sexual or sado-sexual interest in children—that simply does not exist in ordinary people."[258]

Others have perspicaciously pointed out that this argument lies uneasily with another argument often relied upon by those concerned with "reform" of child sexual abuse law and practice, namely

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253. Kyl, *supra* note 252, at 669.

254. FED. R. EVID. 403.

255. WRIGHT & GRAHAM, *supra* note 185, at 268, 308.

256. 1 SALTZBURG ET AL., *supra* note 185, at 578, 581.

257. *Id.* at 578.

258. 140 CONG. REC. H8991 (daily ed. August 21, 1994). The Senate principal sponsor, then Senator Robert Dole, apparently used exactly the same words in that chamber. *See* 140 CONG. REC. S12990 (daily ed. September 20, 1994).

that such abuse is much more common than has traditionally been supposed and that large numbers of men who do *not* abuse children sexually manage to avoid doing so only by virtue of having repressed their latent desires.[259]

V. FINAL REMARKS

American readers, especially those who believe that weak arguments can be remarkably persistent and that there is little, if anything, new under the sun, may be interested in some remarks of Lord Sumner in the famous English case of *Thompson v. Rex*[260] in 1918. In a case concerned with gross indecency in relation to two young boys, he spiced his opinion with the following words:

> The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognized as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a housebreaker is only a particular specimen of the genus rogue, and, though no doubt each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognizable mark of the individual. Persons, however, who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity.[261]

It is not clear whether his Lordship had in mind only those who abuse boys, or pedophiles more generally. In any event, it must be admitted that it would be helpful if these perverts actually did carry a mark on their body, for we would then be saved the time, trouble, and expense of trying them for the presently alleged offense and could satisfy ourselves with the reflection that such vile people deserve to be locked up anyway, whether or not they, in fact, exercised their propensity on the present occasion. Alternatively, one might be led to reflect on the point that it is in just those situations

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259. *See* WRIGHT & GRAHAM, *supra* note 185, at 323-24. It does not seem to have occurred to those who make the point about repressed desires that this point might be regarded as grossly insulting to the law-abiding majority of the male population.

260. 1918 App. Cas. 221.

261. *Id.* at 235.

where our feelings run highest against the offense that the mark of a civilized system of criminal justice is that it resists the temptation to act upon those feelings, confining itself instead to the rational faculty in deciding whether this accused really is guilty.