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Navigating Between Extremes: The Florida Supreme Court's Rulings on the Admission of Similar Fact Evidence in Child Sexual Abuse Cases

I. INTRODUCTION

A. *The Dilemma*

In Homer's *Odyssey*, the hero Odysseus learns that in order to return to his homeland he must chart a course for his ship between two mortal dangers.¹ One is a tentacled monster, Scylla, who will lash out and devour the sailors if they come within reach.² The other, Charybdis, is an irresistible maelstrom that will suck down the entire ship.³ There is no good solution to this dilemma, and it has come down to us as the classic example of a situation that, on the one hand, demands that we choose and, on the other, proclaims outright that no matter which way we choose someone will suffer.

Judges in Florida and elsewhere face such a dilemma whenever the prosecution in a child sexual abuse case seeks to introduce into evidence a defendant's prior similar acts. The defense may have taken the position that the incident never took place at all, that the child complainant's testimony is false. Should the prosecution be allowed to introduce evidence of similar crimes committed by the defendant to show a possible predisposition to commit the charged crime? Does evidence of prior acts support an inference that a defendant is more likely to have committed a particular act? If the evidence is to be allowed for that purpose, then how similar to the charged crime—and thus how relevant for proving some element of the case—must a defendant's prior crime be to make its admission into evidence worth the risk of creating an unfair advantage for the prosecution?

The danger of admitting prior act testimony is that it will prejudice the jury. They may ignore the entirety of the evidence and convict based only on the logic that since the defendant committed crimes in the past, he has a propensity to commit such crimes and likely committed this one as well. Perhaps they will even conclude that whether or not he commit-

1. HOMER, *ODYSSEY* 169-72 (T.E. Lawrence trans., Oxford Univ. Press 1991) (1932) (750-700 B.C.) (Before departing the isle of Æaea upon his return from Hades, Circe informs Odysseus of the dilemma he will encounter on his continued journey homeward).

2. *Id.* at 171.

3. *Id.* at 171-72.

ted this particular crime, he has probably committed others for which he deserves punishment but was not caught by the police. In either case, the jury has chosen to convict the defendant based not solely on their judgment beyond a reasonable doubt that on the facts presented as to the particular incident he did indeed commit the alleged crime, but also in part because he is a particular kind of person, a criminal.⁴ When such a judgment occurs, the integrity of the entire judicial process is called into question, since the jury did what the law itself prohibits. As Professor Imwinkelried reminds us, "For over two centuries, American courts have adhered to the tenet that a litigant may not introduce testimony about a specific act by a person in order to establish the person's character and then infer that on a particular occasion, the person acted consistently with his or her character."⁵ In conformity with this principle and with Rule 404 of the Federal Rules of Evidence, section 90.404(1), *Florida Statute*, states, in pertinent part "Evidence of a person's character or a trait of character is inadmissible to prove action in conformity with it on a particular occasion."⁶

Still, there are opposing dangers. If the case simply comes down to a question of a child's testimony against an adult's denial, how can the prosecution fulfill its burden of proof? Or, should evidence that is relevant to establishing an element of the crime or an issue in question be excluded because admitting that evidence would mean telling the jury about a prior act by the defendant that might prejudice them?⁷ The consequence might well be the acquittal of a sexual predator who will continue to victimize those members of our society least able to defend themselves.

B. Propensity Evidence

Propensity evidence has much to recommend it. It is, after all, extremely logical. Many of our daily judgments about people are based upon what we know of their past, so it could hardly be called unreasonable, in an ordinary sense of the word, if a jury came to the conclusion

4. Indeed, one much-cited commentator begs the question entirely by stating, "As a practical matter, innocent people don't have prior victims." David M. De La Paz, *Sacrificing the Whole Truth: Florida's Deteriorating Admissibility of Similar Fact Evidence in Cases of Child Sexual Abuse*, 15 N.Y.L. SCH. J. HUM. RTS. 449, 450 (1999).

5. Edward J. Imwinkelried, *A Small Contribution to the Debate over the Proposed Legislation Abolishing the Character Evidence Prohibition in Sex Offense Prosecutions*, 44 SYRACUSE L. REV. 1125 (1993) (footnotes omitted).

6. FLA. STAT. § 90.404(1) (2000).

7. The federal system contains a balancing test. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 404.

that evidence of an accused person having committed a prior crime makes it more probable that he would commit other crimes as well.⁸ Therefore, propensity evidence is always logically relevant. In fact, it is exactly the “common-sense” relevance of propensity evidence that has traditionally made it inadmissible in American courts.⁹ What is to be proved in a particular trial, of course, is that the particular defendant committed this particular crime on this particular occasion. It is the facts that shed light on this question, and only those facts, that are legally relevant. Propensity evidence is likely to have such a highly prejudicial effect on a jury because it causes them to turn away from the actual question whether the accused committed *this act* and to focus instead on *who the defendant is*. If the defendant has a propensity to commit criminal acts, he is a criminal, and therefore if he is a criminal, he must have committed this particular act. In this case the defendant, is convicted not of the crime charged, but convicted of being a criminal.¹⁰

8. One commentator has explained the distinction quite well:

I would not think of hiring a baby-sitter for my six- and eight-year-old daughters if I knew that the sitter had recently been accused of child abuse. I am risk averse in the extreme when it comes to my daughters' welfare. But not hiring the baby-sitter on account of his history is different from convicting the sitter of child abuse on account of that history. I very much want to believe that I would not be moved to convict the sitter just because he has been accused of child abuse. But I am unsure whether the accusation would not tilt me against the sitter in a way that might prevent me from viewing all of the evidence with the detachment and consideration to which the sitter would be entitled were he on trial for the crime of child abuse.

Miguel A. Mendez, *Character Evidence Reconsidered: "People Do Not Seem To Be Predictable Characters,"* 49 HASTINGS L.J. 871, 873 (1998).

9. Acknowledging the weight of such evidence, Richard J. Sanders points out that:

The problem with propensity evidence is not a lack of logical relevance. . . . Rather, such evidence is excluded because it is not *legally* relevant. There are two problems here: 1) Inferring propensity from acts, or acts from propensity, is a weak logic; and 2) focusing on the prior acts may lead to verdicts based on improper considerations. To be admitted properly, similar fact evidence must be logically relevant to a material issue by proving something other than propensity. It is not enough to ask simply if the proffered evidence is relevant; the answer invariably will be yes. Propensity evidence is *always* logically relevant to prove a material issue. This is because propensity is not, in itself, a material issue; it is an intermediate inference in a chain of inferences between the proffered evidence and the ultimate material issue. We prove propensity in order to circumstantially prove conduct on a particular occasion. In a given case, this can always be phrased in terms of a material issue: Propensity can be logically relevant to prove the defendant committed the charged offense (“identity”); that he acted with criminal intent and not in good faith or mistakenly; or any number of other ultimate material issues.

Richard J. Sanders, “A Dangerous Bend in an Ancient Road”: *The Use of Similar Fact Evidence for Corroboration*, 74 FLA. BAR J. 40, 40 (2000) (footnotes omitted). Sanders goes on to explain that propensity evidence used to establish any link in the logical connection between the similar act and the material fact is traditionally inadmissible. *Id.*

10. For an example of how the prejudice resulting from propensity evidence can run alongside racial prejudice, see *Peek v. State*, 488 So. 2d 52, 56 (Fla. 1986).

These problems are even more pronounced in cases of child sexual battery. We say that prior acts of abuse in such cases are logically relevant, perhaps too relevant, to the question of a defendant's guilt in a charged act. We mean these acts are so aberrant from what people consider to be "normal human behavior" that knowing a defendant committed one or more such acts in the past leads us, at the very least, to shift the burden of proof to the defendant to show that he did not commit the charged act. This is why evidence of prior acts of child sexual battery can so easily be more prejudicial than probative. The information can only be probative if it increases the likelihood that the defendant actually committed this particular act, but its evidentiary value, at best, goes to the likelihood that the defendant will commit some act at sometime. The persuasive effect, however, is stronger than the weight of the logic.¹¹ The severity of the crime convinces us to draw conclusions before we have any actual knowledge that the defendant committed the charged act and, thus, to begin from the position that the defendant is guilty until proven innocent.¹²

Furthermore, this power is out of all proportion to the statistical evidence. Even if we were to concede a jury might reasonably infer some degree of a likelihood of guilt from those statistics, the admission of prior acts in these cases would be unjustified since we cannot say at what point statistical probability might equal evidence of guilt. If, for instance, we knew that forty-nine percent of child molesters were recidivists, it would be more likely than not, by the numbers alone, that our charged child molester was not a recidivist. Yet, if we knew that fifty-one percent of child molesters were recidivists, then it would be more likely than not that our charged child molester repeated his earlier crime. What percentage would it take then to make us feel justified in admitting this evidence? In one article, Thomas J. Reed claims "[r]ecent empirical evidence on sex offenders' recidivism rates that includes estimation of

11. The syllogism would run something like this: major premise—child molesters repeat their crimes; minor premise—the defendant is a child molester; conclusion: the defendant repeats his crime. It does not logically specify that the defendant has committed this particular crime. To begin with the proposition that where a defendant has previously committed child molestation it is more likely he has committed the act charged is to beg the question.

12. Perhaps the factor that most induces jurors to overestimate the probative value of character evidence is what psychologists term the "halo effect." In the present context it might be more aptly called the "devil's horns effect." The term refers to the propensity of people to judge others on the basis of one outstanding "good" or "bad" quality. This propensity may stem from a tendency to overestimate the unity of personality—to see others as consistent, simple beings whose behavior in a given situation is readily predictable.

Miguel Angel Mendez, *California's New Law on Character Evidence: Evidence Code Section 352 and the Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1047 (1984) (footnotes omitted).

undetected recidivism shows that exhibitionists, pedophiles, and adolescent child abusers may have a fifty-percent recidivism rate for sex offenses. . . .”¹³ This sounds convincing, but in practice it would mean that if we were to convict on that statistic alone, we would be wrong half the time. Are we willing to be wrong this often? Reed also tells us, “The national recidivism rate for rearrest within three years for all types of serious crimes hovers around sixty-five percent.”¹⁴ So, even taking into account estimates of unreported recidivism by exhibitionists, pedophiles, and adolescent child abusers, their recidivism rate is actually below that of the average serious criminal.

Still, whatever the statistical entanglements, proponents of allowing propensity evidence argue that child molesters do have a propensity to molest children and that prior acts have a special relevance to this crime. They argue that a “lustful disposition” exception is necessary in cases where a child accuses an adult of sexual battery and the credibility of the child witness is at issue. While such views are well intentioned, they forget that propensity therefore can be strongly argued in the cases of many different crimes (drug offenses, acts of violence, prostitution, etc.). Admission of evidence for the purpose of child sexual batteries could be a very slippery slope indeed.

The best argument, though, for treating child sexual battery differently from other serious crimes with regard to propensity evidence is not the condition of the accused, but of the accuser. Children are both the most vulnerable members of society and the least able to articulate effectively the wrongs that have been done to them. Any proposal for loosening or restricting admissibility of evidence in these cases cannot avoid taking into account the special condition of children as complainants.

C. *Prior Acts and Corroboration*

1. THE WILLIAMS RULE

In 1959, the Supreme Court of Florida clarified and restated its rule on the admissibility of similar fact evidence in *Williams v. State*.¹⁵ The appellant had been convicted of rape and sentenced to death. He had hidden in the back of his victim’s car, stabbed her with an ice pick, and sexually assaulted her twice before letting her go. At trial, Williams

13. Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases*, 21 AM. J. CRIM. L. 127, 154 (1993). Reed states, “Clinical reports on child sexual abuse show that offenders who sexually abused teenagers had a large number of similar incidents that went unreported and unpunished, suggesting that such offenders have a true recidivism rate above fifty percent, similar to the recidivism rate for violent offenders.” *Id.* at 153.

14. *Id.* at 155 (citation omitted).

15. 110 So. 2d 654 (Fla. 1959).

argued that the sex had been consensual and that he and the complainant knew each other, but at the time of arrest, he had told a deputy sheriff that he had mistaken the victim's car for his brother's and had crawled in the back to take a nap. The prosecution introduced testimony from two witnesses that six weeks earlier Williams had been caught in the back of another young woman's unattended car. When caught that time Williams also claimed that he had mistaken the car for his brother's. The cars were of different makes and colors. Williams argued that the testimony related to the prior act should have been excluded because it was irrelevant to whether he had committed the rape in question.¹⁶ The Florida Supreme Court upheld his conviction, stating:

In the immediate case at bar we think the evidence regarding the [prior act] was clearly admissible because it was relevant to several of the issues involved. It definitely had probative value to establish a plan, scheme or design. It was relevant to meet the anticipated defense of consent. At the time when it was offered in the presentation of the State's main case it had a substantial degree of relevance in order to identify the accused. Finally, it was relevant because it demonstrated a plan or pattern followed by the accused in committing the type of crime laid in the indictment. In view of our analysis of the precedents and for the future guidance of the bench and bar, the rule which we have applied in affirming this conviction simply is that evidence of any facts relevant to a material fact in issue except where the sole relevancy is character or propensity of the accused is admissible unless precluded by some specific exception or rule of exclusion. This rule we hold applies to relevant similar fact evidence illustrated by that in the case at bar even though it points to the commission of another crime. The matter of relevancy should be carefully and cautiously considered by the trial judge. However, when found relevant within the limits of the stated rule, such evidence should be permitted to go to the jury.¹⁷

Both Florida's *Williams* rule and its codification, section 90.404(2)(a), *Florida Statutes*, admit similar act evidence when it is relevant to prove a material fact in issue, but not when it is relevant solely to prove bad character or propensity.¹⁸ The Florida legislature in section 90.404(2)(a) gives a non-conclusive list of material facts to which such evidence could be relevant: proof of motive, opportunity, intent, prepa-

16. *Id.* at 654-56.

17. *Id.*, at 663.

18. *Id.* at 663. Professor Ehrhardt finds this use of the term "similar fact evidence" misleading since the evidentiary act does not have to be similar to be admitted; it has to be relevant. Similarity is a function of relevance rather than the other way around. CHARLES W. EHRHARDT, *FLORIDA EVIDENCE* § 404.9 (2000).

ration, plan, knowledge, identity, or absence of mistake or accident.¹⁹ To be admitted under the rule, however, a prior act must meet what has come to be known as a “strikingly similar” standard. As the Florida Supreme Court later explained, “To be admissible under the *Williams* rule, the identifiable points of similarity must pervade the compared factual situations, and, if sufficient factual similarity exists, the facts must have some special character or be so unusual as to point to the defendant.”²⁰

2. BOLSTERING THE TESTIMONY OF A CHILD COMPLAINANT

In cases of child sexual battery within a familial or custodial context where the defendant is known by the child and denies the charges, none of *Williams* rule material facts are usually in dispute at trial.²¹ If a child complainant were to have alleged molestation by a stranger, then identity might be a central issue, and similar acts by the defendant would be admitted because they would be relevant to whether the defendant and the perpetrator were the same person.

Within a familial or custodial context, however, the identification of the defendant as the perpetrator is not the real issue nor is the perpetrator’s intent or knowledge an issue as it would be were charged, for instance, with possession of stolen goods. Similarly, the defendant’s state of mind is not an issue in a sexual battery charge.²² Rather, in this type of child sexual battery the issue upon which the case turns is whether or not the charged act took place. Is the child fabricating his or her testimony? To respond to this situation, the Florida Supreme Court enlarged the list of purposes for which similar fact testimony could be admitted, initially to include admission of similar fact evidence to cor-

19. The list is not limited to the specifically enumerated instances.

20. *Thompson v. State*, 494 So. 2d 203, 204 (Fla. 1986).

21. *But see*, *State v. O’Brien*, 633 So. 2d 96 (Fla. 5th DCA 1994) (court excluded evidence of similar acts because it defined the material issue as opportunity, which the similar act evidence as admitted at trial would not support without unduly prejudicing the jury).

22. In *Coler v. State*, the Florida Supreme Court explained:

To be relevant, evidence must prove or tend to prove a fact in issue. The state argues that the objected-to evidence proves Coler’s state of mind. Coler’s state of mind, however, was not an issue. State of mind is not a material fact in a sexual battery charge, nor is intent an issue. *Cf. Askew v. State*, 118 So. 2d 219 (Fla. 1960) (specific intent is not the essence of the crime of rape).

418 So. 2d 238, 239 (Fla. 1982) (citation omitted). *But see* *Sampson v. State*, 541 So. 2d 733, 735 (Fla. 1st DCA 1989) (holding similar fact evidence admissible where defendant argued he was in stepdaughter’s bedroom for innocent purposes and wife was mistaken in her assumptions). In *State v. Paille*, similar fact evidence was admitted to prove a plan on the part of the defendant. 601 So. 2d 1321, 1323 (Fla. 2d DCA 1992). The problem with admission of prior acts based on a “pattern of criminality” is, that “the distinction between sexual design and sexual disposition is often tenuous.” *Heuring v. State*, 513 So. 2d 122, 124 (Fla. 1987). *See also* discussion of *Kimbrell infra*, p. 2522.

roborate testimony of a child sexual victim in a familial or custodial context, and then later to corroborate a child sexual victim's testimony in nonfamilial sexual battery cases where identity of the perpetrator is not an issue.²³

Evidence of prior or collateral acts can bolster the testimony of a complainant in two basic ways. The first is by creating the presumption that the accused has a propensity or predisposition to commit the crime. This would violate the traditional rationale for the ban on admitting propensity evidence. The second means is by proving an element or material issue in the case. In *Williams*, for example, the issues were plan, identity, and absence of mistake. The existence of the prior act was relevant to establishing that the accused had been correctly identified as the rapist, that his use of a similar plan on both occasions also made it more likely that he was the guilty party, and that the prior act helped to refute his explanation that he had mistaken the car for his brother's and crawled in to take a nap. In other cases, prior acts can establish opportunity, knowledge, intent, motive, or preparation. In child sexual battery cases, however, as discussed earlier, these are not usually material.

There is a material issue, however, to which prior acts can be quite relevant in child sexual abuse cases: the issue of whether the criminal act, the *actus reus*, actually occurred. Prior or collateral acts can corroborate a child complainant's testimony through the similarity of the

23. *Saffor v. State*, 660 So. 2d 668, 671 (Fla. 1995). Also, for its corroboration rationale in *Heuring*, the Florida Supreme Court drew upon what has become a well known law review Comment by Robert N. Block. Block examined a number of cases from California and elsewhere admitting similar fact evidence in sexual battery cases for the purpose of corroborating the testimony of the complainant, the most important of which was *People v. Kazez*:

The admissibility of evidence of other sex offenses for purposes of corroboration was formally recognized in the 1975 California court of appeal case, *People v. Kazez*. In *Kazez*, the defendant was charged with seven counts of incest, allegedly committed against his two daughters. Evidence was introduced showing that the defendant previously had forced his victims' two stepsisters into having sexual relations with him. Because of the established relationship between the parties involved, identity was clearly not at issue in the case. In holding the evidence of previous sex offenses admissible, the court opined that "the admissibility of similar acts of sexual misconduct cannot be justified on any theory except as a permissible attempt to buttress the credibility of the prosecuting witness against the inevitable defense challenge." The court expressly recognized the corroborative purpose of such evidence, acknowledging the truism that because the question of the parties' credibility is inherently at issue in a sex crime prosecution, there will generally be a need for corroboration. The determination of admissibility hinges on the source of the corroborative evidence: The complaining witness is precluded from self-corroboration; but evidence of the defendant's sexual misconduct, as attested by other victims, may properly corroborate the complaining witness's testimony.

Robert N. Block, *Defining Standards for Determining the Admissibility of Evidence of Other Sex Offenses*, 25 UCLA L. REV. 261, 285-86 (1977) (footnotes omitted) (citing *People v. Kazez*, 121 Cal. Rptr. 221 (Cal. Ct. App. 1975)).

charged and collateral acts. The charged act can be similar enough to the collateral act to make it unlikely that the witness is fabricating the testimony.²⁴ The basis for this exception to the traditional inadmissibility of prior acts may be viewed as an expansion of the "absence of mistake or accident" category by what Professor Imwinkelried refers to as the "doctrine of chances." Professor Imwinkelried describes the doctrine of chances as follows:

[A]ssume that the defendant is charged with murdering his child. The child in question died of suffocation . . . [T]he defendant claims that the death was due to natural causes and accidental in character . . . [B]oth English and American cases permit the prosecutor to introduce evidence of similar deaths of other children in the defendant's custody. Considered collectively, the aggregate number of incidents makes it objectively improbable that all the deaths were accidental . . . [T]he prosecutor has invoked the doctrine of chances . . . The question is not whether the defendant is the type of person who . . . murders his relatives. The question is whether it is objectively likely that so many deaths could be attributable to natural causes.²⁵

The greater the aggregate number of incidents, the less likely is the chance of accident or coincidence, which is also the weakness of this argument when it is applied to those child sexual battery cases where one witness's testimony is only collaborated by one other's. Even under these circumstances, however, in order to dispute the logic of the doctrine of chances, we would have to assume either that two different witnesses fabricated stories that were similar in key respects, or that one witness's testimony was contaminated by the other's. While such a situation is not impossible, its degree of improbability does offer some protection to the rights of the defendant. The witness's testimony is corroborated not by the accused's assumed propensity to repeat his crime, but rather by the similarity of the acts themselves.²⁶ The Florida Supreme Court's standard for the admissibility of prior acts in child sex-

24. For consideration of just how similar "similar" has to be, see the discussion of *Saffor* *infra* Section II.B.4.

25. EDWARD J. IMWINKELRIED, UNCHARGED MISCONDUCT EVIDENCE § 4.01, at 4-5 (1984 & 1992 Supp.) (footnotes omitted), quoted in *Lannan v. State*, 600 N.E.2d 1334, 1340 (Ind. 1992).

26. Richard J. Sanders cautions that the logic that follows from the use of the doctrine of chances to corroborate testimony is flawed:

[W]hile the uncharged allegations *do* corroborate the charged allegations, this corroboration is only a side effect of admitting the evidence; it is not the basis for admission. The evidence is admitted because it is objectively reasonable to conclude (on a nonpropensity basis) that the charged allegations are true because it is unlikely that more than one child would fabricate similar false allegations against the same person.

Sanders, *supra* note 9, at 46 (footnotes omitted).

ual battery cases that occur in a familial or custodial context relies on this second means of corroboration.

D. *Florida's Response*

The federal courts are now governed by Rule 414(a) of the Federal Rules of Evidence, which declares, "In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant."²⁷ When it created this rule, Congress made a choice to come down wholly on the side of admissibility, even of admitting prior acts to prove the defendant's propensity to commit the crime, whatever the risk to the judicial process or to the rights of the accused.²⁸ Some commentators see this as a fundamental change occurring to the American legal system. Thomas J. Reed explains:

A new kind of criminal trial process is evolving through manipulation of the principles of evidence. The traditional model for Anglo-American criminal trials was accusatorial. The prosecution was obliged to prove a specific charge under the accusatorial model, and the judge and jury were equally obliged to acquit the defendant if the prosecution failed to prove the defendant committed a forbidden act on the day charged in the indictment. If the prosecution proved the defendant committed a similar act on another day, the defendant was acquitted because of a fatal variance between indictment and proof. Under the new dispensation, the prosecution is still required to indict the defendant and elect a day and time for commission of the prohibited act, but the prosecution may prove that the defendant is predisposed to commit that type of crime by proving the defendant committed a similar bad act on another occasion.²⁹

Reed, a proponent of the admission of character evidence, does not shy away from pointing out its potential for misuse, reminding us that during World War I courts suspended limitations on proof of bad moral character in order to obtain convictions for sedition.³⁰ These shifts in evidentiary law merit our concern.

The Florida Supreme Court in its child molestation cases has tried

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

28. The drafting of Federal Rules of Evidence 413 through 415 does not even make it clear that admissibility depends on Federal Rule of Evidence 403. In other words, it is not clear from the drafting that such evidence *can* be excluded, even if the defendant has been acquitted of the prior acts being considered as evidence. See Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 CLEV. ST. L. REV. 169, 177 (1996).

29. Reed, *supra* note 13 at 160-61.

30. *Id.* at 162 n.190.

to chart a course avoiding both the extreme of admitting evidence of other offenses regardless of their prejudicial effect, and the other extreme of disallowing all evidence of collateral offenses that do not meet the *Williams* “strikingly similar” standard and are not relevant to proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.³¹ Although this course has not been without its own complications and risks, which at their worst could result in a child molester being set free to abuse other children, it is the contention of this Comment that if the court has erred in this dilemma it has erred on the side of protecting the integrity of the judicial process and will ultimately be proven correct in its judgments.

In this effort to strike a balance between the rights of the accused and the practical difficulties in prosecuting a crime where often the only evidence is the testimony of a child, the Florida Supreme Court has created an unusual exception to the ban on evidence of prior criminal acts allowing the admission of this evidence when sexual battery against a child in a familial or custodial setting is alleged and the prior and charged acts share significant similarities so that the prior act corroborates the testimony of the child complainant. Although the court has never articulated a sufficient theoretical rationale for this particular exception—since the logic of corroboration would apply to virtually any crime and any complainant where there was a lack of physical evidence or corroborating eyewitnesses—such a rationale can be expressed. It is based, however, not on any increased reliability of the similar act evidence in this setting but on the consequences to the child complainant should the defendant be wrongly acquitted of sexual battery in a familial or custodial context. The court is, in effect, willing to take a greater risk that this information will prejudice a jury because a mistaken verdict might send a child back into the custody of his or her abuser.

II. DISCUSSION OF CASES

A. *Arizona and California*

Although the lustful disposition exception found is in many states and dates back to the nineteenth century in some cases,³² California and Arizona both recently amended their laws to broaden rules for admissi-

31. These are the categories of both the *Williams* rule and its codification, section 90.404(2)(a). See *infra* at 6.

32. L. Renee Lieux, *The Michigan Pig Farm Perception: The Michigan Supreme Court Continues to Ignore the Opportunity to Create a Lustful Disposition Exception to Michigan Rule of Evidence 404(b)*, 76 U. DET. MERCY L. REV. 127, 151 (1998). Lieux lists twenty-one states as either maintaining some form of a lustful disposition rule or in effect creating one. Florida is included, I believe wrongfully, in this list.

bility of prior acts. Following Congress's 1994 addition of Rules 413-415 to the Federal Rules of Evidence, California in 1995 resolved a vacillation in its judicial history regarding admission of prior acts in sexual battery cases by enacting section 1108 of the California Evidence Code, which stated that in a criminal prosecution for a sexual offense other sexual offenses could be admitted into evidence, and amended section 1101 of the California Evidence Code, its prohibition against character evidence, to allow such evidence in sex crime cases.³³ The only limitation was that the evidence must be more probative than prejudicial. In *People v. Soto*, the Court of Appeal of California affirmed that this broad rule of admission included "consideration of the other sexual offenses as evidence of the defendant's disposition to commit such crimes, and for its bearing on the probability or improbability that the defendant has been falsely or mistakenly accused of such an offense."³⁴ The logic of section 1108 was that since only a small percentage of human beings are willing to commit a sexual offense, evidence of prior offenses is especially probative.³⁵ Although this argument provided a fig leaf for the California legislature, it was an extremely flimsy one. Few of us are bank robbers, diamond smugglers, or even pickpockets, but this does not make evidence of prior acts in those areas particularly probative.

Arizona is even more forthright in embracing character evidence for purposes of proving lustful disposition. Arizona Rule of Evidence 404(c) states:

In a criminal case in which a defendant is charged with having committed a sexual offense, or a civil case in which a claim is predicated on a party's alleged commission of a sexual offense, evidence of other crimes, wrongs, or acts may be admitted by the court if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged. In such a case, evidence to rebut the proof of other crimes, wrongs, or acts, or an inference therefrom, may also be admitted.³⁶

Although, one commentator has claimed that Rule 404(c) is superior in its drafting to its federal counterpart,³⁷ the weakness of its reasoning is even more apparent. It will admit evidence of other crimes, wrongs, or

33. CAL. EVID. CODE § 1108 (2000); CAL. EVID. CODE § 1101 (2000).

34. *People v. Soto*, 75 Cal. Rptr. 2d 605, 616 (Cal. Ct. App. 1998).

35. *Id.*

36. ARIZ. R. EVID. 404(c).

37. Adam Kargman claims:

Through careful drafting, Arizona Rule 404(c) avoids many of the pitfalls of FRE 413 to 415, putting to rest such questions as whether judges need to conduct 403 balancing tests, whether judges must issue limiting instructions, and whether defense counsel can introduce evidence to rebut other acts evidence. As a result, the

acts (not even necessarily similar) specifically if they are relevant not to establishing directly a propensity but to establish an unnamed character trait giving rise to an aberrant sexual propensity. There is evidence the defendant committed a prior bad act that might show he is the kind of person who might commit bad acts that might show that he is likely to have committed this bad act because he might therefore have a sexual propensity to commit this bad act. All this accomplishes is to add another layer of mystification to a mystifying logic. The prior act is admitted not to show that the defendant committed this act, but to show that he had a personality that made him a candidate to commit this act.

B. *The Florida Cases*

1. *HEURING*

In *Heuring v. State*, the defendant, Frederick A. R. Heuring, had been convicted of sexually battering of his stepdaughter when she was between the ages of seven and twelve. The trial court admitted the testimony of his older, natural daughter that he had also sexually battered her, when she was between the ages of seven and fifteen, twenty years before the charged incident.³⁸ In addition, during cross-examination the prosecution asked the defendant “whether he had molested five children not at issue in the case,”³⁹ and during a re-cross also improperly interjected that these five children were going to testify that Heuring had indeed molested them.⁴⁰ Although vacating Heuring’s conviction and remanding for a new trial on the basis of this improper questioning, the court held that the testimony of Heuring’s older daughter was relevant and properly admitted even though it was remote in time from the charged act. The Florida Supreme Court agreed with the lower court, not only that the reliability of the testimony had not been affected by the passage of time, but also that the absence of similar conduct on Heuring’s part during the twenty years between incidents only meant that the opportunity to sexually batter young female children in his family occurred generationally.⁴¹ Then, in response to Heuring’s claim that the evidence of the earlier crime was not proper *Williams* rule evidence, the *Heuring* court first opened the door to the use of a defendant’s prior acts to corroborate the testimony of a child complainant who alleged sexual

Arizona poses much less of a hazard to the truth-seeking function of criminal trials.

Adam Kargman, *Three Maelstroms and One Tweak: Federal Rules of Evidence 413 to 415 and Their Arizona Counterpart*, 41 ARIZ. L. REV. 963, 986 (1999) (citations omitted).

38. *Heuring v. State*, 513 So. 2d 122, 123-24 (Fla. 1987).

39. *Id.* at 125.

40. *Id.*

41. *Id.* at 123-24.

abuse in a familial setting.⁴²

The court began by analyzing the criteria for *Williams* rule evidence: "To minimize the risk of a wrongful conviction, the similar fact evidence must meet a strict standard of relevance. The charged and collateral offenses must be not only strikingly similar, but they must also share some unique characteristic or combination of characteristics which sets them apart from other offenses."⁴³ The similarity between the charged and collateral offenses must reach a kind of critical mass where the likeness of the two cannot but give rise to the inference that the crimes were committed by the same person. The likeness requirement of the *Williams* rule is met by the virtually undeniable similarities between the charged and collateral acts, a so-called fingerprint, although the fingerprint might be achieved by a combination of factors rather than a single unique detail.⁴⁴ Furthermore, the court explained, the requirements of section 90.404(2)(a) must be met, the "the evidence must be relevant to a material fact in issue such as identity, intent, motive, opportunity, plan, knowledge, or absence of mistake or accident."⁴⁵ The court then proceeded to create another category of relevance with a more relaxed standard for admitting similar fact evidence:

Cases involving sexual battery committed within the familial context present special problems. The victim knows the perpetrator, e.g., a parent, and identity is not an issue. The victim is typically the sole eye witness and corroborative evidence is scant. Credibility becomes the focal issue. In such cases, some courts have in effect relaxed the strict standard normally applicable to similar fact evidence. These courts have allowed evidence of a parent's sexual battery on another family member as relevant to *modus operandi*, scheme, plan, or design, even though the distinction between sexual design and sexual disposition is often tenuous. We find that the better approach treats similar fact evidence as simply relevant to corroborate the victim's testimony, and recognizes that in such cases the evidence's probative value outweighs its prejudicial effect.⁴⁶

Unfortunately, the court in *Heuring* did not further explain its decision. Although wishing to avoid the tenuous distinction between sexual design and sexual disposition—that is to say, the pretense that *modus operandi*, scheme, plan, or design are relevant to show whether or not the defendant committed the crime when what is actually being shown is the defendant's propensity or disposition to commit the crime—the

42. *Id.* at 124-25.

43. *Id.* at 124.

44. *Id.*

45. *Id.*

46. *Id.* at 124-25.

court did not make clear what its relaxation of the *Williams* rule entailed. In cases of child sexual battery, was all similar fact evidence per se held to be more probative than prejudicial?⁴⁷ If not, then what standard was to be applied? And, what was the meaning of “familial context”?

2. RAWLS

In *State v. Rawls*, the accused, Augustus J. Rawls, had been a boarder with the complainant's family. The court addressed the issue of what “familial context” means and explained that the determination of a family relationship must be made on a case-by-case basis. While consanguinity and affinity are strong indications of such a relationship they are not necessary to it, and defendant and victim need not reside in the same home.⁴⁸ “The relationship must be one in which there is a recognizable bond of trust with the defendant, similar to the bond that develops between a child and her grandfather, uncle, or guardian.”⁴⁹ The court also acknowledged that the relationship exists “[w]here an individual legitimately exercises parental-type authority over a child or maintains custody of a child on a regular basis.”⁵⁰ The *Rawls* court rejected the prosecution's argument that Rawls's relationship with his victim was familial because he was “essentially a boarder” (paying rent and buying his own food), “did not exercise any custodial or supervisory authority” over the victim, and there was “no evidence that [the victim] looked upon Rawls as a member of the family.”⁵¹ The court, however, agreed that the testimony provided by Rawls's previous victims was rightly admitted, both under the traditional *Williams* rule standard of “strikingly similar” conduct and because it could corroborate the testimony of a child complainant where the issue was the credibility of the victim.⁵²

Rawls's method of securing and molesting his victims was the same in each case: first he would befriend the boys' mothers, persuade them to let him move in to the home as a boarder, give gifts such as clothes, toys or money, then molest the boys when alone with them, and

47. The court does make it clear in *Sexton v. State* that even after determining that similar fact evidence is relevant, this evidence is still subject to the restriction imposed by section 90.403. FLA. STAT. § 90.403 states: “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.” The court goes on, however, to emphasize that the statute's use of the term “substantially outweighed.” *Sexton v. State*, 697 So. 2d 833, 837 (Fla. 1997).

48. *State v. Rawls*, 649 So. 2d 1350, 1353 (Fla. 1994).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 1353.

finally instruct them not to tell anybody.⁵³ The charged act, capital sexual battery, was committed against M.R., a male child during the ten days that Rawls lived with M.R.'s family. Rawls had convinced M.R.'s mother to let him move in, telling her that he wanted "to live with a family with children" and agreeing to provide his own food and to pay rent. When M.R. and Rawls were alone, "Rawls touched M.R.'s penis and placed it in his mouth."⁵⁴ This same pattern was repeated in the evidence of three other boys who corroborated M.R.'s testimony. J.F., at eight or nine-years-old, had been molested by Rawls while Rawls boarded with his family over a period of several years. Rawls gave J.F. gifts and money and took him fishing. When no one else was present, Rawls molested J.F. by putting his mouth on J.F.'s penis and told J.F. not to tell anybody about what Rawls did to him. J.F.'s older brother, J.K.F., testified that he too had been molested by Rawls in the same way beginning when he was also eight or nine-years-old. Finally, T.S., nine-years-old at the time he had been molested in the same manner, testified that Rawls lived with his family as a boarder for somewhere between a year and a year and a half, helping the family with groceries and buying T.S. clothes and drinks. The molestations occurred when the two were alone, and just as he had with the other boys, Rawls instructed T.S. not to tell anyone.⁵⁵ The court held, "Clearly the charged and collateral offenses committed by Rawls share the unique combination of characteristics required to meet the strict standards of the *Williams* rule."⁵⁶

Although *Rawls* is thought to have expanded *Heuring* to include "a child sexual abuse victim's testimony in nonfamilial sexual battery cases where the identity of the perpetrator is not an issue,"⁵⁷ it left unclear whether the standard for admission of such testimony should be the "strikingly similar" standard or the "relaxed" standard. Rawls's particular crimes followed a fingerprint-like, distinct pattern, making the decision somewhat easy, but the court did not comment on cases that were not so straightforward.⁵⁸

53. *Id.* at 1353-54.

54. *Id.* at 1351.

55. *Id.*

56. *Id.* at 1354.

57. EHRHARDT, *supra* note 17, § 404.18, at 214.

58. This issue is still a problem. See *Farrill v. State*, 759 So. 2d 696 (Fla. 2d DCA 2000), where the defendant was known to the complainant, but the incident was not committed in a familial context. The appellate court refused to allow the relaxed standard. If the standard is to be relaxed because the identity of the defendant is not the issue, but rather the credibility of the complainant, a stronger rationale than simply our special abhorrence for familial or custodial child sexual battery needs to be formulated.

3. HALLBERG

On the same day that the court decided *Rawls*, it also decided *Hallberg v. State*.⁵⁹ James Hallberg was a junior high school history teacher who over the course of a summer had sexually abused a child, S.S., Hallberg's pupil during the school year. The incidents took place during Hallberg's visits to S.S.'s home at times when her parents were not present, under the guise of preparing her for the upcoming school year. His visits were not scheduled with her parents' knowledge or consent. The *Hallberg* majority summarized the abuse as follows:

S.S. testified that Hallberg came to her house seven to ten times that summer and that on those occasions he fondled her breasts each time and fondled and penetrated her vaginal area with his fingers on all but the first visit. S.S. testified that on the last visit that summer Hallberg forced her to perform oral sex on him after which he then performed oral sex on her. This particular visit ended with Hallberg having intercourse with S.S.⁶⁰

S.S. was thirteen-years-old.⁶¹

The issue raised on appeal was whether Hallberg was in a position of familial or custodial authority, which would have made him subject to section 794.041, *Florida Statutes*, which covered sexual abuse committed within a familial or custodial context.⁶² The Florida Supreme Court held that because the events occurred during the summer and did not take place on school property, Hallberg was not in a position of custodial authority.⁶³ For Justice Shaw, in his dissent, section 794.041 was "intended to protect Florida's children from those to whom they are most vulnerable."⁶⁴ What counted was the position of trust Hallberg held in the mind of his victim. The majority, however, defined "custodial" more strictly as implying that the person in custody has "some responsibilities in loco parentis."⁶⁵ Just as *Rawls* narrowly defined familial context, *Hallberg* narrowly defined custodial context. Had Rawls been the live-in boyfriend of his victim's mothers, however, or

59. 649 So. 2d 1355 (Fla. 1994).

60. *Id.* at 1356.

61. *Id.* at 1358.

62. In addition to his conviction for five counts of committing lewd acts upon a child, Hallberg had been convicted of three counts of engaging a child in sexual activity by a person in a position of familial or custodial authority. These last three counts carried a sentence of twenty-seven years each, running concurrently.

63. Not to have so held might have left the schools with a potential civil liability for the acts of their employees during times and in places totally removed from the circumstances of the employment.

64. *Hallberg*, 649 So. 2d at 1361.

65. *Id.* at 1357.

had Hallberg been teaching his victim in summer school, the outcome of these cases would likely have been different.

4. SAFFOR

The Florida Supreme Court's most comprehensive attempt so far to address the standard of admissibility of collateral crime evidence came in *Saffor v. State*.⁶⁶ Ramon Saffor had been convicted for sexual battery of the ten-year-old son of his girlfriend. Both the child and his mother were living with Saffor at the time of the attack, and Saffor and the boy slept in the same bed during this period. The child testified that Saffor woke him up, pulled down his pants, and sodomized him. Four years prior to this incident, Saffor had been convicted of attempted lewd assault on his twelve-year-old niece. In that instance, he had entered the bedroom in which she was sleeping at her aunt's house and "put his hands under her pajamas towards her vagina."⁶⁷ She apparently woke up and told him to leave, which he did. The trial court admitted the niece's testimony about the prior act.⁶⁸ Saffor appealed, arguing that the collateral crime of attempted lewd assault on his niece was not sufficiently similar to the charged crime to be admitted under section 90.404(2). The question, then, certified to the court in *Saffor* was, "What Is The Correct Standard To Be Utilized In Determining The Admissibility Of Collateral Crimes Evidence In Cases Involving Sexual Battery Within The Familial Context?"⁶⁹

After determining that the sexual battery did in fact take place in a familial context, the court acknowledged that *Heuring* had not addressed the issue of how similar the charged offense and the collateral sex crime must be to prove admissible. It proceeded to examine and to reject two opposing positions, one that would apply the same stringent similarity requirements to sexual abuse occurring to children within the familial context as are required by the *Williams* rule for other crimes, and one that would require for admissibility merely that both crimes be committed in the familial context, even if all other aspects should be dissimilar. Instead of either of these two positions, the court held:

that when 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 that 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. The additional

66. 660 So. 2d 668 (Fla. 1995).

67. *Id.* at 669.

68. *Id.*

69. *Id.* (emphasis omitted).

showing of similarity will vary depending on the facts of the case and must be determined on a case-by-case basis.⁷⁰

The application of this holding to Saffor's case resulted in his conviction being quashed and the case remanded for a new trial. The two offenses did not resemble each other closely enough to constitute the necessary, additional showing of similarity.⁷¹

5. WHERE WE ARE NOW

In *Saffor*, the court firmly rejected the use of collateral sex crime evidence to corroborate a victim's testimony by using that collateral evidence to demonstrate "a depraved sexual propensity on the part of the accused."⁷² The method of corroboration chosen by the court was a comparison of the acts themselves. The court, however, refused to draw a bright line regarding exactly how similar the alleged act and the prior act must be to prove admissible. Were the prior acts to be considered under the *Williams* rule, without the benefit of *Heuring*, then the "strikingly similar" standard would have to be applied.⁷³ The prior act would have to be so distinctive as to constitute a fingerprint that matches the fingerprint of the charged act. *Heuring*'s innovation was to lower the standard of distinctiveness for the relationship between the prior act and the charged act when they occurred to children in a familial context. In such a setting, as we have already seen, the issue is not the perpetrator's identity, but rather the credibility of the complainant. A familial or custodial context provides a beginning upon which to build an argument for admission of similar fact evidence, but some distinctive link between the charged and collateral acts is still needed. For that link to be made, the details of the prior act only have to be close enough to the details of the act charged to make it unlikely that the child's testimony is fabricated.⁷⁴

70. *Id.* at 672.

71. *Id.*

72. *Id.*

73. One commentator argues that the stringent similarity standards of *Williams* do still apply as a result of *Saffor*:

Though it might not be regarded as absolutely clear, what [the *Saffor* court's holding that the familial context constitutes a significant similarity but that an additional showing is still necessary] 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.

Peter Mirfield, *Similar Fact Evidence of Child Sexual Abuse in English, United States, and Florida Law: A Comparative Study*, 6 J. TRANSNAT'L L. & POL'Y 7, 30 (1996) (footnote omitted).

74. Justice Anstead argued for a stricter analysis in his concurrence to *Saffor* and quoted Judge Allen's dissent below:

This will be different in different circumstances, which is why the *Saffor* court opted for settling the precise standard on a case-by-case basis.⁷⁵

This standard, though avoiding propensity, comes with its own set of problems. First, if the testimony proffered as to both the prior act and the latter act arise from the same family setting, it may be contaminated by contact between the witnesses, so that a higher standard for such testimony might be just as reasonable as a lower standard. Second, the court offered no evidence that child molesters tend to follow a *modus operandi* sufficient to create the similarities necessary for even the lower *Heuring* standard. And, third, since sexual batteries may tend to be similar anyway, which are the decisive factors of the offense for gauging sufficient similarity?

The *Saffor* majority found that differences in the children's ages and genders, in the time frames of the acts, in the locations where they occurred, and in the times of day the acts occurred, were enough to exclude the prior act. However, the dissent by Justice Shaw, author of the majority decision in *Heuring*, found "numerous points of similarity,"

Where collateral crime evidence goes beyond merely showing that a defendant in a familial child sexual assault case has committed a sexual assault upon another child family member and additionally shows that the circumstances of the collateral crime share a unique characteristic or set of characteristics with the charged crime, the evidence serves to prove more than mere propensity. Such evidence bolsters the credibility of the child witness in the charged crime, not because the evidence simply shows the defendant's propensity to commit sexual assaults upon children, *but because it is unlikely that the victim in the charged crime could have fabricated a version of the events which shares unique characteristics with the collateral crime.*

Saffor v. State, 625 So. 2d 31, 42 (Fla. 1st DCA 1993) (emphasis in original); *see also infra* p. 2509 for a discussion of the doctrine of chances.

75. In some ways, this is not an improvement upon *Heuring*, only an elaboration. The *Heuring* court took its similarity rationale from a California Supreme Court case, *People v. Haston*, which it quoted:

[I]t is apparent that the indicated inference does not arise. . . from the mere fact that the charged and uncharged offenses share certain marks of similarity, for it may be that the marks in question are of such common occurrence that they are shared not only by the charged crime and defendant's prior offenses, but also by numerous other crimes committed by persons other than the defendant. On the other hand, the inference need not depend upon one or more unique or nearly unique features common to the charged and uncharged offenses, for features of substantial but lesser distinctiveness, although insufficient to raise the inference if considered separately, may yield a distinctive combination if considered together. Thus it may be said that the inference of identity arises when the marks common to the charged and uncharged offenses, considered singly or in combination, logically operate to set the charged and uncharged offenses apart from other crimes of the same general variety and, in so doing, tend to suggest that the perpetrator of the uncharged offenses was the perpetrator of the charged offenses.

Heuring, 513 So. 2d at 124 (quoting *People v. Haston*, 444 P.2d 91, 99-100 (Cal. 1968)). Unfortunately, this standard smacks of "I know it when I see it" subjectivity.

specifically that the children involved were distant relatives of the accused, not members of his immediate family, the children were close in chronological age, similar in biological development, were each molested in the home, in bed while sleeping, were each asleep for the night, and in both crimes Saffor performed the act upon the child rather than forcing the child to perform a sexual act upon him, the sexual act involving in both cases only the anal-genital region of the child.⁷⁶ It is difficult to avoid the conclusion that if we look hard enough we can always find some elements of similarity in all sexual abuse cases. There is still no clear guidance on which factors should count most.⁷⁷

These problems aside, the *Saffor* standard may yet prove to be a workable solution. In two recent cases, the Fourth District Court of Appeal came to its conclusions by carefully applying that standard. In *Thompson v. State*, the defendant's conviction for sexual battery on a child and sexual battery while standing in the position of a parent or custodian was affirmed by the appellate court.⁷⁸ Thompson had been accused of engaging in oral and vaginal sex with his young daughter, and the trial court had admitted collateral evidence that he previously pled guilty to a lewd and lascivious assault upon his step-daughter while she was between the ages of six and eleven. Thompson had sought to exclude evidence of the collateral crime on the grounds that it, unlike the charged attack, did not include oral or vaginal sex. The court found that the similarity of Thompson's method of approaching his victims, of the location of the incidents, and of the particular threats he made to prevent disclosure, as well as the escalation of his advances, beginning with kissing and fondling and progressing to oral sex, met the requirements of *Saffor*.⁷⁹ In the collateral crime, the defendant's step-daughter had refused to acquiesce to oral sex, despite Thompson's request. The court held:

In the instant case, we do not think the fortitude of the collateral victim in resisting appellant should somehow make the crimes dissimilar so as to prevent the admission of the testimony of these collateral acts in appellant's trial. Therefore, we conclude that the crimes are indeed very similar, and there was no error in the admission of the

76. Since the collateral act in *Saffor* was one for which Saffor was convicted four years previously, presumably without evidence of prior acts, perhaps we should not jump so readily to the conclusion that children are not capable of giving persuasive testimony without the reinforcement of prior-act evidence.

77. The factors chosen by courts to analyze vary considerably. Compare, as Judge Altenbernd suggests in his concurrence to *Farrill*, *Shipman v. State*, 668 So. 2d 313 (Fla. 4th DCA 1996) with *Moore v. State*, 659 So. 2d 414 (Fla. 2d DCA 1995), and *Farrill*, 759 So. 2d 702.

78. 743 So. 2d 607 (Fla. 4th DCA 1999).

79. *Id.* at 608.

collateral crime testimony.⁸⁰

On the other hand, in *Smith v. State* the defendant's conviction was reversed and remanded by the appellate court because the collateral evidence presented at trial was found not to possess sufficient similarity to the charged incident to corroborate the testimony of the victim.⁸¹ Whereas the victim in the charged crime—committing a lewd, lascivious, or indecent act upon a child under the age of sixteen years—was the eight-year-old granddaughter of Richard Smith's girlfriend, the alleged collateral acts were sexual assaults against his two daughters some years earlier.⁸² Although both sets of incidents took place in a familial or custodial context, the charged act was limited to touching the complainant "in a bad way" by putting his hand under her pants and rubbing her vagina when she and the defendant were alone in his bedroom and on a fishing trip. The daughters' testimony involved far more extensive acts, genital to genital contact, strip poker and sexual intercourse, and the locations and modes of approach were quite different. Even though the context of all the incidents was undisputedly familial, the *Saffor* standard was not met.

Although these cases are cause for optimism, there may still be confusion, if not resistance, among the District Courts of Appeal in Florida as to what sorts of limitations exist on the use of similar fact evidence. Recently, in *Kimbrell v. State*, an appellate court admitted a child sexual battery complainant's self-corroborating testimony as to prior similar acts, not for self-corroboration but to show "opportunity, preparation, and plan."⁸³ The question of whether these were material facts in issue in this particular case does not appear to have been part of the court's consideration.⁸⁴ Had the defendant raised these issues as a defense, that he had no opportunity to commit the charged act or that accident or mistake was involved, it would have been reasonable to admit evidence to refute such a claim. The *Kimbrell* court, though, gives no indication in its opinion that this was the case.⁸⁵

80. *Id.*

81. 788 So. 2d 279 (Fla. 2000).

82. *Id.* at 280-81. The incident with which Smith was charged had taken place eight years before trial so that by the time of trial the victim was already sixteen years old. The charged act was alleged to have taken place in 1992-1993, and the collateral acts between 1975 and 1986. The appellate court did not, however, indicate whether the significant lapse of time between incidents and testimony played any part in its decision.

83. 764 So. 2d 893 (Fla. 4th DCA 2000).

84. See *Coler v. State*, 418 So. 2d 238, 239 (Fla. 1982). In that case, the court did perform an analysis of the materiality of the reason given for admitting similar fact evidence.

85. It is striking that the court in this case was apparently unwilling to consider section 90.403, *Florida Statutes*, and weigh the potential for prejudice against the probative value of the testimony. The potential for substantial prejudice resulting from similar fact testimony is made especially evident in child sexual battery cases where self-corroborating testimony is admitted to

III. CONCLUSION

It is possible that in *Heuring* the Florida Supreme Court may have made exactly the right decision, but missed the opportunity to articulate the best reason for making that decision. The question that underlies whether to admit evidence of prior acts on a relaxed standard of similarity when the acts occur in a familial or custodial context is *why* under these circumstances such an admission would be more probative than prejudicial. A lack of physical evidence and of corroborating eyewitnesses does not serve in and of itself to make such a case, as other crimes where we would not wish to admit prior acts frequently share these characteristics. The court's choice to utilize "the better approach" of treating similar fact evidence in such circumstances as "simply relevant to corroborate the victim's testimony"⁸⁶ and not to elaborate as to why this evidence's probative value outweighs its prejudicial effect makes the decision appear vulnerable to a break down in reasoning: the testimony is more probative than prejudicial because we need it to be.

This corroboration rationale has met with criticism, not only because Florida is the only state to use it but also because, strictly speaking, it is, as one handbook termed it, "theoretically unjustifiable."⁸⁷ Evidence of similar acts may frequently corroborate testimony. This does not mean that such evidence should or would be admitted in other circumstances. The Fifth District Court of Appeal in *State v. O'Brien* questioned this logic of admitting similar acts for the purpose of corroboration:

But even in cases not involving the familial context. . . and in non-sexual crimes, corroborative evidence may be scant and credibility may become the focal issue.

For example, in a single witness robbery by an acquaintance (so that identity is not an issue), would it be appropriate to admit evidence that the defendant committed other robberies only to corroborate the testimony of the witness?

Because this is such a heinous crime, harsh penalties are mandated and justified. There is broad agreement that no crime is more

show intent, preparation, plan, relationship between the victim and the offender, and existence of a lustful state of mind toward the victim. Once again, see the court's perceptive remark in *Heuring* that "the distinction between sexual design and sexual disposition is often tenuous." *Heuring v. State*, 513 So. 2d 122, 124 (Fla. 1987); *see also* *Toussaint v. State*, 755 So.2d 170 (Fla. 4th DCA 2000) (testimony as to prior acts against the complainant in a child sexual battery case was also admitted notwithstanding its self-corroborating nature). Although the Florida Supreme Court refused to rehear *Toussaint*, it may eventually have to clarify its stance on the admissibility of prior similar acts against the same victim.

86. *Heuring*, 513 So. 2d at 124-25.

87. MICHAEL H. GRAHAM & ROBERT S. GLAZIER, HANDBOOK OF FLORIDA EVIDENCE § 404.2 (1996).

abhorrent than sexually abusing one's own child. That is precisely the reason that a policy making it more likely that a wrongful conviction may be obtained is surprising.⁸⁸

O'Brien makes an important point, and intellectual honesty compels the acknowledgment that the use of similar acts for the purpose of corroboration—a “more liberal standard of admissibility”—entails “a greater willingness to risk a wrongful conviction.”⁸⁹

What then justifies this greater risk? It cannot merely be that the particular crime is so abhorrent to us, or we will find ourselves unable to answer the criticism voiced by Chief Judge Harris in *O'Brien*. Perhaps, the Florida Supreme Court in *Heuring* did not consider, or at least did not incorporate into its opinion, what constitutes the source of the difference between cases of child sexual battery within the family and other crimes. If the defendant is wrongly acquitted, the victim may well—as a result of action by the state and in conformity to the laws of the state—be returned to the custody or control of his or her abuser. Although a similar situation might exist in cases of domestic violence, there we are more likely to have either physical evidence or to have a victim who is at least *legally* capable of leaving the abusive situation. A child who has been sexually abused by a family member wrongfully acquitted of the act may have no legal option. This is admittedly a consequential argument. It does not make testimony as to prior acts per se any more probative. What it shows is why a particular exception to strict similarity is justified. In other words, regarding cases of child sexual battery within a familial or custodial context, the argument is not that testimony as to prior acts is more probative in that particular context than in others, merely that its potential for prejudicial effect carries less weight given the state's responsibility for the child.

While it may be argued that if a serial killer or terrorist bomber is wrongfully acquitted the consequences are horrific and might also justify loosening of the strict similarity standard, in those cases the veracity of the complainant is not the primary focus of inquiry. In other types of crime where the veracity of the complainant may be the focus, even a sexual battery against an adult, a wrongful acquittal—again, however terrible—would not result in the victim being returned to the legal custody or control of the rapist. Child sexual battery within a familial or custodial context is different.⁹⁰

Although the Florida Supreme Court has articulated a position on

88. *State v. O'Brien*, 633 So. 2d 96, 100 (Fla. 5th DCA 1994).

89. *Id.* at 99.

90. Although in a case where a child alleged physical (non-sexual) abuse against a family member a veracity contest between complainant and defendant could certainly arise, we would at least have the potential for increased physical evidence or for eyewitnesses.

the admissibility of similar fact evidence in child sexual abuse cases that does not depend on propensity and yet still serves to bolster the credibility of child sexual abuse victims, the court has not been able to articulate why the familial or custodial context should be treated differently or to give us a clear hierarchy of factors by which to gauge the similarities of collateral evidence. How similar do prior acts have to be to become relevant? Perhaps it is impossible to answer this question. Like Odysseus's passage between Scylla and Charybdis, perhaps there is no good solution. Odysseus, after all, lost six of his sailors to his dilemma. The court may simply have given us the best solution possible under the circumstances, a careful navigation between extremes.

GEORGE FRANKLIN