"TO EXCLUDE OR NOT TO EXCLUDE"

EXAMINING THE PSYCHOLOGICAL ASSUMPTIONS MADE

IN SIMILAR FACT EVIDENCE LAW

by

Elizabeth Jane Ridley

A thesis submitted in conformity with the requirements
for the degree of Doctor of Philosophy,
Graduate Department of Psychology,
University of Toronto

"To Exclude or Not To Exclude"

Examining the Psychological Assumptions Made in Similar Fact Evidence Law

By Elizabeth Jane Ridley

Degree of Doctor of Philosophy, 2002

Graduate Department of Psychology

University of Toronto

The psychological validity of assumptions made in similar fact evidence law was examined in a series of 3 studies. The primary assumption under investigation was that jurors are able to moderate their use of similar fact evidence. Assumptions regarding the prejudicial value of this type of evidence were also investigated. All studies employed a mock jury paradigm using a written trial adapted from a real court case. The trial was modified for the experiments to include similar fact evidence in varying degrees of similarity to the crime for which the defendant was charged. In all of the studies, the negative impact of the similar fact evidence against the defendant was assessed by various measures of guilt. Prejudicial inferences made about the defendant were examined to determine whether or not the jurors were misusing the evidence.

Results from Study 1 indicated that as the similarity of the evidence increased juror ratings of the defendant's guilt also increased. Unexpectedly, once the evidence surpassed a certain degree of similarity, its negative impact against the defendant reached

a plateau, indicating that increasing similarity beyond this point did not change the effects of the evidence. Study 2 investigated perceived collusion between witnesses as a possible explanation for this plateau of effects. The results indicated that possible witness collusion did not differentially affect mock jurors. However, the negative effects of the evidence again reached a plateau at a certain degree of similarity. Study 3 examined possible effects of the cogency of the evidence. As expected, similar fact evidence of a proven conviction had more negative effects against the defendant than did similar fact evidence of a mere allegation. Furthermore, results from studies 2 and 3 indicated that mock jurors were making prejudicial inferences about the defendant based on the similar fact evidence even though they had been prohibited from doing so by judicial instruction.

The results are discussed in terms of social cognitive theory regarding human judgment making, balancing the probative value of the evidence against its prejudicial impact, and the implications of excluding or admitting similar fact evidence into a trial.

Acknowledgements

It seems as though it has been a long road that has led me to this place. As this chapter in my life draws to a close, I find myself contemplating and wishing to acknowledge all of those people who made it possible for me to get from there to here.

First, I would like to thank my supervisor Jonathan Freedman for his constant encouragement, support and understanding. Jonathan's calm and patient manner was a source of great comfort to me. He is generous and kind and I feel so lucky to have had him to talk to, and to learn from. I would also like to thank the other members of my committee, Patty and Michele, for their insightful comments and suggestions, which always led to a new and helpful perspective from which to work.

I would especially like to thank my Mom and Dad who, as they have for my entire life, encouraged me to do anything and everything I imagined doing. They have helped me in immeasurable ways to achieve my goals through their love and their support. I also owe so much to my sister Amy, my great friend and mentor, who has regularly provided me with pep talks, intellectual and emotional guidance, friendship, and love. My husband-to be, Matthew, has never failed to be there for me with his love and his rock solid support. I love him and thank him for accepting everything that came our way and never being surprised by any of it. To my friends, I thank them for taking my mind off school when I needed to and for their support and understanding at all times.

Table of Contents

List of Tables

Pilot Study

Study 1

Study 2

Study 3

List of Figures

Pilot Study

Study 1

Study 2

Study 3

CHAPTER 1: GENERAL INTRODUCTION

Psychologists have had a long-standing interest in the law and in using experimental methodology to test some of the underlying psychological assumptions made in the legal system. Within the last two decades, the psychology-law link has become stronger and the interaction between fields has been recognized as useful and necessary. There are many and varied interests and concerns in the field of psychology and law. The psychology within the law that is most apparent to the layperson are those psychologists who are actually *acting* in the adversarial arena as expert witnesses, consultants or forensic psychologists assessing mental status of defendants. There are however, psychologists who are studying basic psychology and then applying these findings to legal issues. A psychologist who studies human decision-making and then applies the findings to an analysis of jury decision-making is an example of this type of psychology-law interaction. There are also psychologists who are studying legal issues directly such as pre-trial publicity effects, eyewitness testimony, and evidence. These psychologists are active in formulating and changing policy and applying what they learn to the law so as to bring the assumptions made in the law more in line with the findings from psychological studies.

When psychologists are attempting to examine the assumptions in the law and analyse these assumptions in a scientific manner, one field of psychology from which they can draw theoretical groundwork and experimental techniques is Social Psychology. Social psychologists are interested in how people are influenced by the presence of

others. Over the last decade a trend in the field of social psychology has led to a growing concern and examination of the *cognitive* aspects of social psychology as well as with the *application* of these findings to situations in the world outside of the laboratory. The cognitive approach in social psychology has been termed Social Cognition. Social cognition has been defined as the study of "how people select, interpret, remember, and use social information to make judgments and decisions" (Aronson et al., 2001). How people select, interpret, remember, and use social information to make judgments and decisions can be applied to the entire legal process—from the initial investigation to the courtroom proceedings. Actually, the law provides a very good context in which to find a great deal of social psychological principles acted out. Examining the psychology in the law is an excellent example of the way in which the current trends are manifesting themselves by *applying* social psychological principles and using a *cognitive* approach to analyse the law and legal process. The goal of applying psychological theories and methodology to an examination of legal issues is to understand the process and ensure that it is operating fairly.

There is a very large body of literature devoted to psychological examinations of legal issues. As previously mentioned, there are various different areas of the law being studied by psychologists. The area of concern for the present discussion falls under the approach that directly examines the law itself using psychological methodology and theory. One of the essential elements of any trial is the evidence in the trial and more specifically, the process by which it is presented and evaluated. There are a plethora of rules and regulations that govern what evidence is or is not acceptable to present in a trial and *how* the evidence is presented. These rules rely heavily on psychological

assumptions made about the decision-making processes and reasoning capabilities of the jury. Within the rules of evidence, psychological issues can be raised, questioned, and scientifically evaluated. The present discussion will be an evaluation of the psychological assumptions in one of these rules of evidence. This evaluation will address both the effects of this rule of evidence on jury decision-making as well as the social cognitive factors that underlie the decision-making process.

A question that arises in many criminal trials is whether the jury should be permitted to hear evidence of a defendant's prior criminal or otherwise dubious past. This kind of evidence is generally excluded from the courtroom on the principle that a defendant should be tried only for the crime with which he or she is charged, not for some other crime or past behaviour. However, there are exceptions to this general rule of exclusion. For instance, when the evidence of a prior act is somehow *similar* to the crime for which the defendant is being charged—a kind of evidence called "similar fact evidence"—the question of exclusion becomes more complex. There are specific rules in place to govern the admissibility and use of similar fact evidence. Embedded in these specific rules are many psychological assumptions regarding how people (namely the jury) think about, and make, decisions. Unfortunately, psychology (especially social cognitive psychology) and the small body of scientific research that currently exists inform us that many of these intuitive beliefs underlying similar fact evidence law are misinformed or, at least, as yet untested. Judgments regarding the inclusion or exclusion of similar fact evidence, which are based on unsubstantiated claims about the human decision maker, could result in fatally flawed jury decisions. It is therefore necessary for psychologists to identify the assumptions in evidence law that need empirical

investigation and carry out such investigations so that the information is available for the legal professionals.

In order to fully understand the complexity of this type of evidence and the psychological assumptions that are made in the law, we must begin our discussion with a fairly lengthy description of evidence law and the laws specifically pertaining to similar fact evidence. By doing this the psychological issues to be examined will be apparent in the complexity of this particular law of evidence.

Evidence Law

The most basic rule of evidence requires that information is relevant to the case in order to be admissible. According to Delisle (1996) "relevance is normally determined by asking whether the evidence tendered renders the desired inference more probable than the inference would be without the evidence"(p. 287). However, things are rarely that simple since not all evidence that is relevant is admissible. In essence, relevance exists as a necessary but not a sufficient condition for admissibility. For instance, the judge may exclude relevant evidence if its potential prejudicial effects outweigh its probative value. Character evidence often falls under this exclusionary rule.

Character evidence "is any proof that is presented in order to establish the personality, psychological state, attitude, or general capacity of an individual to engage in a particular behaviour" (Paciocco and Stuesser, 1996, p.32). There are a number of ways to establish character in the court but the one that will concern us here is similar fact evidence.

Similar Fact Evidence

Williams (1979) defines "similar fact evidence" as "all evidence which shows that on some other occasion the accused acted in a way more or less similar to the way in which the prosecution alleges he acted on the occasion which is the subject of the present charge" (p.281). Similar fact evidence is a kind of non-direct, or, circumstantial evidence. Evidence is circumstantial in nature when inferences are necessary in order to link the evidence with the facts. The danger of similar fact evidence lies in the unfairness of the possible inferences that might be adduced from it.

According to Zuckerman (1987) (in Mee, 1994) "similar fact evidence threatens the two central principles of the criminal justice system. The first is that in any criminal trial the accused stands to be tried, acquitted or convicted, only in respect of the offense with which he is charged. The second is that conviction must take place only if the jury are persuaded of the guilt of the accused beyond all reasonable doubt" (p.195). Mee (1994) suggests a number of reasons why these fundamental principles of the presumption of innocence and the burden of proof might be threatened by similar fact evidence. Similar fact evidence may induce an inference that because the defendant has a tarnished past he or she is the *type* of person that would commit another crime. This reasoning will be explored in much more detail in the following discussion since this kind of disposition reasoning may threaten the presumption of innocence that should be afforded to the defendant and in addition may lower the burden of proof required to convict the defendant.

There are other possible inferences that may threaten fundamental principles of the criminal justice system. For example, jurors might feel retribution is in order for a

past crime and as a result may be willing to impose it, post hoc, during the trial for the present crime. Evidence that the defendant has engaged in prior, and similar, misconduct might change the default position of giving the defendant the "benefit of the doubt." Similar fact evidence may also cause jurors to hold a different stance with regard to what a "regret factor" (Eggleston in Mee, 1994). The notion here is that it may not be as serious, in the minds of the jurors, to convict a defendant whose past is already tarnished with dubious or criminal activity for a crime he or she did not commit than to convict a person with an untarnished past. In other words, if a juror voted guilty and the defendant is really innocent of that particular crime, the juror may feel that this is not as regrettable a mistake since the defendant needs to be punished for the other act anyway. For these reasons, similar fact evidence poses a risk to some of the most fundamental postulates of the criminal justice system.

Evidence of a person's past actions may be in the form of a prior conviction or just mere allegations of wrongdoing. This is a distinction that is recognized in the courts. When the past criminal activity of the defendant is considered, the courts may often refer to something called "prior record evidence." Past criminal activities of the defendant will normally be subsumed under rules related to prior record evidence. It is only when past criminal activities of the defendant are considered to be too *similar* to the crime for which the defendant is being charged that this evidence will be construed as similar fact evidence. The distinction between prior record evidence and similar fact evidence is important both theoretically and practically especially since prior conviction evidence and similar fact evidence are governed by different sets of procedural rules[1]. In addition,

[1] For example, in Canada, the Crown will present *similar fact evidence* in its examination-in-chief, but can only present *prior record evidence* in the cross-examination of the defense's case.

whereas prior record evidence includes only *convicted* criminal acts, similar fact evidence encompasses both criminal acts *and* previous dubious or disreputable misconduct on the part of the defendant. This results in a difference in "cogency" or strength of the evidence due to the fact that while criminal acts have been proven in a court of law, dubious or disreputable acts may only be *allegations*. Therefore, although prior record evidence is always "cogent," similar fact evidence may differ in its degree of "cogency."

The issue of similar fact evidence is extremely salient in both historic and modern courts. Sections, such as 404(b), of the American Federal Rules of Evidence and section 12(1) of the Canadian Evidence Act (C.E.A.) outline the laws of evidence regarding other crimes, wrongs, or acts (see appendix for all specific statutes). Imwinkelried (1993) points out that section 404(b)[2] "has produced more published appellate opinions than any other subsection of the Federal Rules [of Evidence]." He also suggests that the similar fact evidence issue "has been dubbed the single most important question in contemporary criminal evidence law" (Imwinkelried in Imwinkelried, p. 74).

Similar fact evidence presents a striking problem for the courts. Williams (1979) addressed the problem succinctly when he stated, "such evidence is, clearly, frequently of great probative value. Equally, such evidence constitutes the example *par excellence* of evidence possessing a potential for prejudice" (p.281). Similar fact evidence, therefore, involves two essential principles of evidence law—to admit evidence with probative value, and to exclude evidence with potential prejudicial impact. The foremost fear with regard to the admission of similar fact evidence is that the jury will use the evidence to make a certain inference about the defendant that is unfair and prejudicial. This inference is known in the courts and the legal literature as "propensity."

The "Propensity" Inference:

Defining propensity.

The courts generally do not allow evidence of a person's character or evidence of a past crime to be used for "the purpose of proving action in conformity therewith on a particular occasion" [Rule 404 (a)(b) of the Federal Rules of Evidence][3]. In other words, the court does not allow evidence of a person's character to be used to argue that because he or she acted in a certain way on a past occasion it is more likely that he or she acted in the same way on another occasion. The courts refer to this kind of reasoning as the propensity inference. The propensity inference refers to the reasoning that because someone has committed a similar crime or engaged in similar dubious behaviour in the past he or she is more likely to be a criminal or the type of person who would commit the present crime. Therefore propensity is an inference of a criminal personality disposition.

"Forbidding" propensity inferences.

Carter (1985) suggests that propensity reasoning is dangerous, not in terms of what the trier of fact "might rationally" do, but rather what they are "actually likely to do" (p. 29). Carter's distinction between rationality and actuality is an important one because social cognition tells us that humans are far from simply rational creatures and that even if we are committed rationally to following the rules, we may not actually be able to follow them. We will examine this possibility later when we discuss social cognitive theories in detail.

---

[2] See appendix A
[3] See appendix A

The "Propensity" Inference:

Defining propensity.

The courts generally do not allow evidence of a person's character or evidence of a past crime to be used for "the purpose of proving action in conformity therewith on a particular occasion" [Rule 404 (a)(b) of the Federal Rules of Evidence][3]. In other words, the court does not allow evidence of a person's character to be used to argue that because he or she acted in a certain way on a past occasion it is more likely that he or she acted in the same way on another occasion. The courts refer to this kind of reasoning as the propensity inference. The propensity inference refers to the reasoning that because someone has committed a similar crime or engaged in similar dubious behaviour in the past he or she is more likely to be a criminal or the type of person who would commit the present crime. Therefore propensity is an inference of a criminal personality disposition.

"Forbidding" propensity inferences.

Carter (1985) suggests that propensity reasoning is dangerous, not in terms of what the trier of fact "might rationally" do, but rather what they are "actually likely to do" (p. 29). Carter's distinction between rationality and actuality is an important one because social cognition tells us that humans are far from simply rational creatures and that even if we are committed rationally to following the rules, we may not actually be able to follow them. We will examine this possibility later when we discuss social cognitive theories in detail.

---

[2] See appendix A
[3] See appendix A

Some legal scholars attempt to focus on the nature of the forbidden inference itself and why it has been forbidden. Carter (1985) suggests that "the focal point of prejudice is the inherent reluctance or inability of the trier of fact to have due regard to the possibility that the accused has mended his ways, or to the fact that in any event most criminal propensities manifest themselves only intermittently"(p.29). The idea is that there would be a prejudice in believing in the notion that "once a criminal, always a criminal." As previously mentioned, this kind of inference would threaten some fundamental postulates of the criminal justice system. For this reason, the courts are very guarded against this particular inference.

Similar Fact Evidence Rules: Admissibility and Use

The courts treat both the admissibility and the use that can be made of similar fact evidence with much caution.

Admissibility of similar fact evidence.

In general, evidence must be relevant in order to be admitted into the trial. However, as previously mentioned, even if it is relevant it may still be excluded, as there are exceptions to this basic rule. Evidence that fits into this exception includes past actions that are extremely "similar" to the crime for which the defendant is being tried. This kind of evidence is relevant but some inferences that connect it to the present crime are not allowed. In fact, as mentioned above, they are for the most part forbidden and so there is a general rule of inadmissibility where similar fact evidence is concerned. Even evidence that is relevant above and beyond reliance on the forbidden inference (we will examine instances of this in the case law) may be excluded. The assumption behind this

exception is that, even if the evidence is relevant, jurors will be influenced by the similarity of the crime so as not to be able to refrain from resorting to a chain of reasoning that is unfairly prejudicial to the defendant. The problem is that even if the evidence does not *rely* on the forbidden inference, it still remains as a possible inference.

To complicate matters further, there are exceptions to the general rule of exclusion or inadmissibility. These exceptions are based on the perceived similarity of the similar fact evidence. If the evidence is extremely similar, there are instances and precedents that will allow the evidence to be admissible in court. Also, if the evidence is not similar and involves a prior conviction, then there are instances where the evidence will be allowed as prior record evidence. Propensity inferences are still, generally,[4] not allowed although it becomes extremely complicated to separate the inferences that are allowed from those that are forbidden. In fact, it is within these exceptions to inadmissibility that some of the decisions that have perplexed legal scholars for more than a century are found. Examples of the instances where similar fact evidence are and are not admissible will be discussed in detail in the next section by examining the case law over the last century.

Let us briefly recap the admissibility of similar fact evidence before we go on to examine its use. Similar fact evidence is, for the most part, inadmissible. The exceptions to this rule occur when the evidence is either not similar (admitted as prior record evidence) or *extremely* similar. A difficulty that arises is that determining what qualifies as *slightly* or *extremely* is subjective. It is the judge who will ultimately decide whether the evidence will be deemed admissible or inadmissible. Often, the judge may decide on

---

[4] There is a debate in the legal scholarship whether propensity inferences are sometimes admissible (Piragoff, 1981).

the admissibility of evidence in what is known as a *voir dire*[5]. The judge must first decide which rules apply and how to adhere to the common law. If the judge decides that the evidence is admissible, she must then decide how it can be *used.*

Use of similar fact evidence.

The judge must decide what use can be made of the evidence according to the legal statutes and precedent. The judge, then, is required to instruct the jury on the proper use of that evidence. The instructions of any particular judge are based on instructions from past judges with modifications to fit the context of a particular case. Retrospectively, these instructions are often at issue in appellate court with challenges related to their composition and the judge's adherence to precedent. One of the problems with many appellate court decisions about the use of similar fact evidence is that the fine details of any situation are very subjective. It is difficult for the law to attempt to set strict criteria when the issues are so specific and unique to each situation.

The instructions that the judge is required to give can become extremely complex, especially in a case where the judge must instruct the jury on the limited use that can be made of similar fact evidence. The most common kind of limiting instructions instructs the jurors not to use similar fact evidence for making propensity inferences. The enormous complexity of these similar fact evidence instructions will become obvious through a closer examination of the most pivotal precedent setting cases on similar fact evidence over the last one hundred and fifty years.

---

[5] A *voir dire* is a hearing where the judge can hear and decide whether evidence is admissible without the jury present.

The Case/Common Law on Similar Fact Evidence

In the case law, the intricacies of the rules of evidence are exposed and debated. The case law has gone through an evolution in the way it delineates when and how similar fact evidence can be used. As we will see, rules of evidence regarding admissibility, use, probative value vs. prejudicial impact, and relevance, as they relate to similar fact evidence in the case law, elucidate the complexity that context can bring to these rules of evidence.

Makin v. Attorney-General for New South Wales (1894).

A discussion of the common law related to similar fact evidence usually begins with *Makin v. Attorney-General for New South Wales* (1894). The Makins, a husband and wife, were charged with the murder of a baby. It was alleged that the Makins had been paid to adopt this baby. The evidence in question came from a number of other mothers who had paid the Makins to adopt their children as well as evidence that 12 other bodies of babies had been found on the Makins' property. This evidence had been introduced into the original trial but, on the grounds that it should not have been admitted, the verdict was appealed. Finally, however, there was a ruling that the evidence was properly admitted to establish that the death of the baby was the result of the actions of the Makins. It is at this point that Lord Herschell L.C. delivered his precedent setting judgment:

> 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 [sic] 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 defense which would otherwise be open to the accused (p. 65)

A great deal of the common law rules of evidence have been generated from Lord Herschell's statement. Multiple interpretations have been attempted in order to use these statements in a meaningful way.

The general statement that evidence of past criminal activity is inadmissible unless it is relevant for certain reasons was interpreted as a rule of exclusion that incorporated some exceptions. The rule that similar fact evidence is excluded *except* when it fits into a number of categories is an approach that dominated the case law for many years. The categories laid out by Lord Herschell include evidence that "bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defense which would otherwise be open to the accused." Over the years, these categories of exceptions to the exclusionary rule over the years grew more numerous. Other exceptions include proving knowledge or intent, to rebut a defense of mistake or involuntary conduct, to establish "system," or to establish "identity." Limiting categories leaves almost no room for specific contextual information that is constantly changing in the case law. The categorical approach which dominated the legal precedent for so long sanctions the practice of allowing evidence to be admitted because it "fits" into a category without a thorough examination of its relevance to a particular case.

The interpretation of Lord Herschell's statement has changed over the years. The new interpretation recognizes the first part of Lord Herschell's statement as describing an

inference from prior criminal activity to a criminal disposition. As previously discussed, evidence which can lead to this inference has come to be known in such terms as "propensity," "disposition," or "tendency" evidence. The point, however, is that the second part of Lord Herschell's dictum that evidence has to be "relevant to an issue before the jury" has been re-interpreted to mean relevant *other than* to imply that the accused has a criminal disposition or criminal propensity. In this way, the categorical approach to finding exceptions to the exclusionary rule was replaced by an approach which groups the exceptions to the exclusionary rule as all evidence *not relevant via propensity*. At least in theory, this is what the court believed had been done in the years following *Makin*.

In the years following this re-interpretation, it became clear that it does not make theoretical or practical sense to make subtle interpretations concerning which line of reasoning embodies the forbidden types of propensity and which do not.[6] Even if you could separate "relevant via propensity" and "not relevant via propensity" that does not guarantee that the dangers associated with propensity evidence would be alleviated. Indeed, as Mee (1994) suggests, "evidence relevant otherwise than via propensity can have as many dangers as (and very similar ones to) so called propensity evidence"

---

[6] Unfortunately, there is confusion with regard to the term "propensity." Paciocco and Stuesser (1996) reinforce the confusion surrounding the term propensity when they suggest that it is misleading to use the term propensity to refer to the prohibited inference since it is not "propensity reasoning *per se*" that is prohibited; only propensity reasoning based "solely on general bad character is prohibited" (p. 42). When the courts refer to propensity, they are referring to this very specific inference but the distinctions between this inference and other inferences are not always clear. Carter (1985) also identifies important complications in referring to propensity evidence as simply "inadmissible." For instance, evidence tendered to show something referred to in the courts as "system," *is* admissible (in certain cases); however, it is very difficult to differentiate or define "system" in a way that is not related to propensity since "evidence of system has usually been simply evidence of a *propensity* to behave regularly and consistently (i.e. systematically) in a particular way" (p. 35). Propensity evidence therefore is not a simple way to describe a category of inadmissible evidence.

(p.103). Therefore, the similar fact rules needed reinterpretation. This is what began to transpire in the courts with *Straffen*.

***R. v. Straffen* (1952).**

Upon examination of *R. v. Straffen* it becomes more obvious that the lines between "relevance via propensity" and "relevance other than propensity" are not clear. John Thomas Straffen was convicted of the murder of a young girl. Part of the evidence adduced against him was his confession to the murder of two other young girls a year prior. There were certain particular aspects of all three murders that were similar to one another. For instance, in all three cases, the victim was a young girl, all three were killed by manual strangulation, there was no sexual interference in any of the three cases, and there was no evidence of a struggle in any of the cases. In addition, the assailant had not attempted to conceal the body in any of the three cases. The evidence of the other two murders was admitted into the trial on the grounds that it may establish the identity of the murderer of the young girl. Straffen's conviction was appealed on the grounds that the evidence of the other two murders was wrongly admitted. The judge noted that in certain cases, trying to fit evidence into a specified list of categories so that it can be admitted is difficult. The problem here is that the evidence does tend to use propensity reasoning of a certain type. That is, as the judge noted, " ...I think one cannot distinguish abnormal propensities from identification. Abnormal propensity is a means of identification" (p. 662). This evidence was tendered at this trial not to prove that Straffen was simply the type to strangle but rather was the person who strangled this particular little girl. As Williams (1979) suggests, the evidence in this case was relevant because of the "unusual nature of the propensity" (p.287).

Two problems exist. Evidence that may be relevant because it fits into a specific category or because it fits into a more general grouping of being relevant for some reason other than propensity *still* remains relevant via "propensity" even though it is not admissible as such. No matter what the rules are, the fact remains that even if alternate and useful inferences can be made from evidence of prior criminal activity, the evidence necessarily carries with it the possible inference of a criminal disposition.

The second problem is that some evidence, as in *Straffen,* may be relevant solely via a type of propensity and has been admitted as such. The courts needed a way to reconcile the fact that evidence "relevant via propensity" could not be used as an *exhaustive* exclusionary rule. That is, the rules needed to be understood in a way that would override the confusion of how to eliminate "propensity." This necessity was recognized in *Boardman.*

Director of Public Prosecutions v. Boardman (1975).

Some legal scholars have claimed that the third approach to similar fact evidence was an "intellectual breakthrough" (Hoffmann, 1975, p.193). This approach acknowledges that evidence of past criminal or dubious activity always carries the risk of potential propensity inferences but that sometimes the evidence will have enough probative value to justify inclusion in the trial.

The court in *Boardman* stopped trying to delineate evidence into set categories of relevance other than propensity but instead seized on the idea that there are "degrees of relevance." The *Boardman* decision sets a precedent that the judge should consider that it "is not the nature of the issue to which the evidence is relevant but, rather, the degree of the relevance of the evidence weighed against its prejudicial effect (Acorn, 1991, p.64).

Carter (1985) suggests that with *Boardman* "it is no longer necessary for a judge to seek out a specific escape route from a supposedly inflexible rule of exclusion." In some instances, "the evidence is received not because it has substantial relevance without involving resort to the forbidden reasoning, but rather because such resort is in the circumstances exceptionally warranted" (p.36). When interpreted in this fashion, the similar fact evidence is a more complete and clear rule. For instance, even evidence that does not rely on propensity reasoning but simply "fits" into one of the old categories might now be excluded if it was of low probative value. This new approach helped to simplify the similar fact rules. The new interpretation in *Boardman* has served to simplify the past distinctions between rules of admissibility.

All of this talk of clarity and flexibility of the new interpretation of the similar fact evidence law is not the totality of the picture. As pointed out above, this new interpretation simplifies the law in the sense that it is a more exhaustive and clear dictum of how to decide which evidence should be admitted without resorting to all kinds of categories and analysis of what inferences should or should not be drawn from the evidence. However, the new formulation of the similar fact evidence rule calls for a balancing test of the probative value of the evidence with its potential for prejudicial impact. This may, at the outset, seem simple; however under closer examination it appears that this new precedent generates a new confusion.

The Balancing of Probative Value against Prejudicial Impact

Because of the enormous complications in understanding criminal disposition and the difficulties in applying the appropriate legal rules to similar fact evidence, the *Boardman* decision was a breakthrough of sorts. It actually acknowledged that

propensity inferences cannot always be separated from the other inferences, but instead that the potential for prejudice should be assessed and balanced against probative value. However, "while the test is simple to articulate, the balancing of these competing considerations is one of the most difficult tasks facing a trial judge today" (Delisle 1996, p.288). Carter (1985) elucidates the complexities of this problem even further by stating "it would be a bold judge who would claim that in assessing true probative worth he is himself totally free from the influence of the sort of prejudice to which it is feared the jury might fall victim"(p.37).

Carter (1985) also suggests that there are potential problems related to this balancing task. That is, in order to balance these competing concerns the judge must first weigh the probative value of the evidence. The judge must then somehow decide what effect the evidence might have upon his own, or the jury's mind. Carter (1985) calls this a "prognostic evaluation of likely jury reactions"(p.36). One legal scholar confirms that, "the problem of estimating the probative value of evidence is one which has received surprisingly little attention. Relevance and weight are generally treated as matters of common sense or experience both by judges and by academic commentators. In this way, the difficulties associated with what is in fact the key concept in the law of evidence are largely glossed over" (Williams, 1979, p. 289-290).

How has probative value been assessed in the past? Theoretically, according to Paciocco and Stuesser (1996) probative value is estimated according to "the cogency of the evidence, the extent to which the evidence supports the inference sought to be drawn and the extent to which the fact sought to be inferred is in issue in the proceedings" (p.43). As can be seen in the case law, the way that probative value is established has to

do with the cogency of the evidence as well as the similarity of the evidence. We will examine each in turn.

Paciocco and Stuesser (1996) describe how the *cogency* of the evidence is evaluated. That is, "the more compelling the proof of the similar act is, the more cogency the evidence will have and the greater its probative value will be" (p.43). For instance, it is assumed that prior convictions would be more compelling than would an unproven accusation. Likewise, direct testimony would be more compelling than would circumstantial testimony. Again however, the problem is in assigning "weight" to these judgments. A relative weighting would be necessary to determine how *much* more probative is the evidence if it is more cogent. For now, determining how much weight to give to an "unproven" allegation is left primarily up to the discretion of the judge when deciding whether to admit it into the trial. Once in the trial, the jury will have to do the same type of evaluation of cogency. It is unclear how they actually do this and the potential impact that this type of information has on their decision-making process. It seems that the only answer to this question as of yet, is intuition and experience.

The admissibility criterion in the *Boardman* decision hinges on the rationale that *not* to admit the evidence would be (according to Lord Cross) an "affront to common sense" because of its "striking similarity" to the present accusation (p. 456). In the *Boardman* case, the headmaster at a boys school was convicted of "attempted buggery" with one student and of "incitement to commit buggery" with two other students. The defendant was tried for all three offenses in the same trial and the judge had instructed the jury that they were permitted to consider the evidence of *all* the boys for each charge. Two convictions were appealed on the grounds that the evidence of one boy should not

have been used against the defendant concerning the charge regarding a different boy. Lord Morris in *D.P.P. v. Boardman* dismissed the appeal by stating that:

> ...there may be cases where a judge having both limbs of Lord Herschell L.C.'s famous proposition (*Makin* v. *Attorney-General for New South Wales* [1894] A.C. 57, 65) in mind, considers that the interests of justice (of which the interests of fairness form so fundamental a component) make it proper that he should permit a jury when considering the evidence on a charge concerning one fact or set of facts also to consider the evidence concerning another fact or set of facts if between the two there is such a **close or striking similarity or such an underlying unity that probative force could fairly be yielded** [emphasis added](p.441).

Lord Wilberforce also dismissed the appeal. He noted that:

> The probative force is derived, if at all, from the circumstance that the facts testified to by the several witnesses bear to each other such a striking similarity that they must, when judged by experience and common sense, either all be true, or have arisen from a cause common to the witness or from pure coincidence (p. 444).

However he did also suggest that the facts of this particular case may be "setting the standard of 'striking similarity' too low" (p.444). What is especially interesting to note here is that there is a suggestion that the probative value be judged "by experience and common sense" according to striking similarity. The general notion here is that the more similar the past actions, the more probative they are with regard to the present accusation. Furthermore, the more probative value given to this evidence, the more chances it will outweigh any prejudicial value in the criterion of admissibility.

There is also some suggestion that the "peculiarity" of the details of the crime should be considered beyond just the similarity. There is a line of reasoning espoused in this case that the similar fact evidence is more probative if aside from being highly

similar to the present charge, it is also of a particular and peculiar nature. On the other hand, if similar acts are too common then they do not carry as much probative value. The problem with this reasoning however is that the idea of "peculiarity" is so highly subjective. The subjectivity of a judgment of "peculiarity" is borne out in the *Boardman* case since the testimony of the boys was considered more similar because they all described acts of "buggery" which, in the words of the court, had the defendant playing the "passive" role. In this instance, homosexual acts in which the aggressor played the "passive" sexual role was considered to make the allegations of the boys less likely to have arisen out of coincidence. This is obviously a highly subjective judgment that was not based on any known facts, only suppositions regarding homosexual activity. Lord Cross also dismissed the appeal and suggested that

> If two boys make accusations of that sort at about the same time independently of one another then no doubt the ordinary man would tend to think that there was 'probably something in it.' But it is just this instinctive reaction of the ordinary man which the general rule is intended to counter and I think that one needs to find very **striking peculiarities** common to the two stories to justify the admission of one to support the other. [emphasis added](p.460)

Lord Salmon states that:

> It has, however, never been doubted that if the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused the manner in which the other crimes were committed may be evidence on which a jury could reasonably conclude that the accused was guilty of the crime charged. The **similarity would have to be so unique or striking** that **common sense makes it inexplicable on the basis of coincidence**. [emphasis added] (p.462)

The point of citing the words of these learned judges is to reinforce that these notions of "striking" similarity, "coincidence," and "common sense" are being used in the courtroom as if they were objective principles, without resorting to any scientific

benchmarks. Carter (1985) suggests that in order to determine the probative value of similar facts there are certain factors which the judge should consider such as: "How strikingly similar are they? How clearly do they establish a propensity? Are they acts which are intrinsically likely to be repeated? Is the propensity continuing or intermittent? Etc." (p.43). The question then remains of how similar is "similar" which elucidates the fact that terminology such as "striking similarity" is questionable.

Assessing prejudicial value is no less problematic. It is important to note here, as Delisle (1996) suggests, that "prejudice in this context, of course, does not mean that the evidence might increase the chances of conviction but rather that the evidence might be improperly used by the trier of fact" (p.288). Delisle suggests that "it is one thing for evidence to operate unfortunately for an accused but it is quite another matter for the evidence to operate unfairly. It is the possibility of unfairness that is the concern" (p.288). The idea of prejudice referring to the *use* that will be made of the evidence is important to examine further. For it is this kind of prejudice that is a potential problem when considering similar fact evidence. It seems that even the great "simplicity" of the *Boardman* logic is questionable.

Recent case law.

Similar Fact Evidence Law was not necessarily simplified or clarified by the *Boardman* decision. Some legal scholars argue that it is not entirely certain that all judges in *Boardman* advocated simply a balancing test. Mee (1994) suggests that there was also the distinction made based on *kinds* of relevance in the decision. Since that time, the decisions in the courts have been mixed. Although the court in *R v. B. (C.R.)* (1990) adopted the approach to balance probative value against potential prejudicial

influence, the Supreme Court has since followed approaches more in line with *Makin* and the categorical type similar fact distinctions in *R. v. C. (M.H.)* (1991) and *R. v. B. (F.F.)* (1993). The confusion regarding similar fact evidence still resides in the courts all the way to the Supreme Court judges who often do not agree amongst themselves with regard to these issues.

Having laid out some of the arguments of over 150 years of case law, we must try to make some general conceptual sense of the relationship between the similarity of the evidence to the current crime in terms of its admissibility and use.

A Theoretical Continuum of Similarity

We can interpret the case law by imagining past dubious or disreputable activity evidence as existing on a theoretical continuum of similarity where one end of the continuum represents evidence that is not similar and the other end representing extremely similar evidence. There is admissibility of this evidence at both extreme ends of the continuum. Evidence of dubious past actions is generally not admitted unless it is not very similar to the present crime or, on the other hand, extremely similar to the present crime. If it is not very similar and is of a fairly recent prior conviction then it might be admissible as prior record evidence for a specific purpose (credibility) or the evidence will be admitted but for some other purpose in the trial than to establish character. However, at the point where the evidence becomes *too similar* to the present charge, the law considers that there is too great a risk that the jurors will *not* be able to use this evidence for any legal purpose without also making illegal inferences regarding disposition of the defendant. At that point the evidence is deemed no longer admissible. There is a further point on the continuum of similarity where the evidence is once again

admissible and the assumption here is extremely complex. It is assumed that if the evidence is extremely similar, then the appropriate inferences are so probative (modus operandi, identity, etc.) that they outweigh the possible prejudicial impact of the jurors using the forbidden inference. In the extreme cases, the courts have even acknowledged that the probative value of the evidence outweighs any potential for prejudice *even if* jurors resort to a propensity style inference. In essence, it is assumed that at this end of the continuum jurors need to use the information for one purpose and not another, but the risk of them not being able to do this is outweighed by the probative value of the evidence.

The theoretical continuum laid out above reveals some of the assumptions that are being made in the law. The assumptions are that people will be able to limit how they use similar fact evidence and that similar fact evidence should be differentiated according to *degrees* of similarity. These assumptions are both cause for concern and investigation. There is already some psychological literature to date, which can be used as a preliminary examination of the assumptions underlying similar fact evidence law.

Psychology and Similar Fact Evidence

Judge's Instructions and Similar Fact Evidence

The notion that the jury can, and will, be able to use similar fact evidence in a limited way for one purpose and not another is an assumption that is being made by the courts. In theory, it seems to make sense to tell the jury how to use the evidence, but whether people are really capable of, or willing to, make this kind of cognitive distinction

remains unclear. The subtleties debated in the appellate courts with regard to the effect of legally erroneous instructions on the jury are voluminous and time-consuming. It may be that these are irrelevant arguments if the jurors are not be able to understand or follow even the simplest instructions. Logically, if the cognitive processes of human beings do not permit them to correctly process even basic instructions, it seems even less likely that they would be able to follow extremely subtle and complex limited use instructions. Before we address the question of whether people could use information for one purpose but not use the same information for another purpose, it will be necessary to examine whether people are capable of ignoring information that is presented to them. This is because it follows logically that if people were to use information for one purpose and not another they are, in essence, required to *ignore* it for that other purpose.

Inadmissible Evidence

There *is* a body of literature examining whether people are able to ignore evidence once presented to them. Not surprisingly, when considering the somewhat limited social cognitive capacities and certain fallibilities of the human judgment maker, the research shows that people generally are not very adept at ignoring information. There is some indication in the literature that jurors do, indeed, use information even when told not to. Carretta and Moreland (1983) found reason to suggest that even when evidence is ruled inadmissible by the judge it still affects the verdicts as well as the participants' estimations of the probability of the defendant's guilt, although not as much as if the evidence had been ruled admissible. There is also evidence indicating that it is not only negative inadmissible information that is being inappropriately used by the jurors. An investigation by Thompson et. al (1981) revealed that the effects of the

inadmissible evidence actually mirrors the direction to which the evidence was aimed. They found that jurors were less likely to convict when they received information that favoured acquittal than are jurors who received no inadmissible evidence. Likewise, Carretta and Moreland (1983) found that jurors who were exposed to inadmissible evidence supporting the prosecution had a more negative reaction toward the defendant than did control participants, while alternatively jurors who were exposed to inadmissible evidence supporting the defense had a more positive reactions toward the defendant than did control participants. There is also some evidence to suggest that whether inadmissible evidence actually enters into jurors' decisions depends on the seriousness of the crime. In a study conducted by Rind et al. (1995), mock jurors were biased by inadmissible evidence only when the crime was low in seriousness (i.e. vandalism versus arson or murder).

Further adding to the complexity of this issue, Wolf and Montgomery (1977) found that evidence ruled inadmissible by the judge had little effect on judgments of guilt *unless* the jurors were specifically instructed that the inadmissible testimony should be disregarded. Only then were the verdicts altered, but surprisingly, they changed in the direction of the inadmissible testimony. This result suggests that instructing people not to use certain information in a decision-making context can actually increase rather than decrease the effect. Past research has suggested that the act of telling people to forget certain information might even serve to *increase* the salience and impact of the information (Golding & Hauselt, 1994; Edwards & Bryan, 1997). Similar research has shown that when people attempt to suppress a certain thought, they end up thinking more

about that thought than people who were not told to suppress the thought in the first place (Wegner et al., 1987).

We will not go into a great deal more detail on the success, or lack thereof, of instructions to ignore inadmissible testimony. Neither are we concerned at present with exactly *why* jurors have trouble ignoring information (see Edwards & Bryan, 1997 for a good review of this phenomenon). It is important, however, to note that the results are mixed and suggest that, at the very least, the assumption that ignoring information is simple is not supported by the relevant psychological literature. Notwithstanding the evidence that people have difficulty ignoring information, the courts make even more complex rules instructing people to *limit* the use of evidence for one purpose but not for another.

Limited Use Instructions

There has been some research on people's capacity to *limit* the use of evidence. This research has focused, for the most part, on prior record evidence since the rules for using this evidence, unlike similar fact evidence, are quite straightforward. That is, prior record evidence, if admitted must be used for the limited purpose of assessing someone's credibility (see section 12 of the C.E.A. and Rule 609(a) of the Federal Rules of Evidence). In such circumstances, the evidence of prior criminal activity is deemed relevant to the issue of credibility, but all alternative inferences are not permitted.

What the court assumes will happen in the mind of jurors with regard to limiting the use of prior record evidence may not necessarily be an accurate assessment of jurors' psychological capabilities. Prior record evidence has been found to increase individuals' ratings of a defendant's guilt both when the proper limiting instructions were given by the

judge and when they were not (Doob & Kirshenbaum,1972, Greene & Dodge, 1995). Furthermore, evidence has been found suggesting that groups exposed to prior record evidence (with judge's instructions) are more likely to convict the defendant than those not exposed to prior record evidence—even after deliberations (Hans & Doob, 1975). Greene and Dodge (1995) actually found that it was specifically a prior conviction that resulted in higher conviction rates versus a prior acquittal or no record evidence. This last finding suggests that it may be something about the *conviction* per se that is influencing the jurors rather than just a prior *record.*

Hans and Doob (1975) did not find that groups who were informed of a defendant's prior record spent significantly more time discussing issues of credibility than did those groups who knew nothing of a prior record. This suggests that the limiting instructions are ineffectual at focusing the relevance of the prior record evidence solely on issues of credibility. There was also some evidence to suggest that groups were even using the prior conviction evidence to estimate the probability that the defendant was guilty. This suggests that not only do jurors not follow the instructions they are given, they might even be going directly against these instructions.

There is one important thing to clarify when talking about prior record evidence that supports the prosecution. Higher guilt ratings and higher conviction rates do not necessarily mean that jurors are misusing the evidence. It might well be that if jurors were to use the prior conviction evidence correctly, it could result in their discrediting the defendant's testimony and, as a result, produce higher conviction rates for those defendants who have prior records. This allows for the possibility that the results indicating that prior record evidence increased ratings of defendant's guilt and conviction

rates might be obtained for the legally correct reasons. Wissler and Saks (1985) set out to examine this possibility by varying the prior conviction evidence in terms of its impact on the issue of credibility. Their prediction was that a prior conviction for perjury should have more influence on the defendant's credibility than would another type of prior conviction since perjury is directly related to the issue of credibility. Results from this study indicated that ratings of the defendant's credibility were not significantly lower when the prior record had been for perjury than when it had been for another type of crime. That is, the type of prior conviction evidence did not differentially affect ratings of the credibility of the defendants. This research finding suggests that the defendant with a prior conviction for perjury is not found to be less credible. Rather, the prior convictions seem to render the defendant more likely to be guilty in the minds of the jury regardless of the issue of credibility. Therefore, information that is not affecting credibility ratings is not lying dormant in the minds of the jurors as per the judicial instructions. Rather, results suggest that all of the prior conviction conditions had a significantly higher conviction rate than the no prior record condition. Clearly something about the prior conviction evidence is influencing subjects' decisions and instructions are not effectual in limiting this influence to issues of credibility only.

As previously mentioned, a great deal of the psychological research that has addressed the issue of limited use instructions has examined those instructions related to section 12 of the C.E.A. as well as 609(a) of the Federal Rules of Evidence. Yet, it must be noted that this is only one *type* of limited use instruction. Indeed, in some cases, the limited use instructions get far more intricate and complex than the common instruction to use the evidence tendered for credibility but not propensity.

Schaefer and Hansen (1990) have conducted the only research to date that investigates instructions that limit the use of evidence to something other than credibility. They examined the influence of both admissible as well as inadmissible similar fact evidence. The study used a manslaughter trial where the similar fact evidence was testimony regarding the prior violence against the deceased perpetrated by the accused. Instructions in this case serve to limit the use of this evidence to show "design or malice" against that particular deceased individual, but not to use it to infer that the accused has a general criminal disposition and for that reason would have been more likely to commit the crime. Admitting similar fact evidence for the purposes of showing "design or malice" is a contested issue in the case law, which lowers the ecological validity of this research paradigm; nevertheless, this research paradigm is the most closely analogous to the actual common law regarding similar fact evidence. Schaefer and Hansen found that the subjects who received the admissible similar fact evidence in addition to the appropriate limited use instructions gave significantly lower "guilty" verdicts than did subjects in any of the other conditions (other conditions included varied judges instructions as well as inadmissible similar fact evidence, or the no similar fact condition). This result presents the only evidence to date that juries treat evidence that is accompanied by limiting instructions differently from evidence that is not accompanied by limiting instructions. The results of this study need to be interpreted with caution as the findings of guilt in the other conditions of the experiment did not concur with the researchers' predictions. That is, the similar fact evidence condition combined with instructions highlighting the use of the inadmissible aspect of the evidence did not yield higher guilty verdicts than did the control condition.

The courts have incorporated the assumption that jurors will be able to use evidence regarding prior similar activity for a limited purpose as a legitimate and valid legal principle. But according to the available research, this level of sophistication seems to be too great for the average human judgment maker. When evidence of prior similar activity is introduced into the minds of the jurors, the use that will be made of this evidence does not seem amenable to any type of instruction. In the case where instructions are having some effect, it is unclear exactly why this occurs or what the mediating variables are. It remains extremely unclear what, how, and when different kinds of evidence will be used and what kinds of instructions will have which kind of effect.

The Degree of "Similarity" of Similar Fact Evidence

Few studies have dealt with the issue of the *similarity* of the prior dubious (or criminal) behaviour. When the issue is addressed, it is usually treated such that prior behaviour is simply considered similar or not (Wissler & Saks, 1985). Schaeffer and Hansen (1990) considered inadmissible and admissible similar evidence, which is a closer approximation of the levels of similarity that are sometimes considered in the courts (in their admissible condition, the prior violence was toward the deceased and in their inadmissible condition the violence was toward siblings of the deceased). This consideration of similarity goes beyond that of most researchers in the area. But, very few researchers have considered the notion that similarity might exist on a continuum

such that it is not simply similar or not, but there is a degree of similarity involved.[7] This would be much more analogous to the way the issue is conceptualized in the legal system.

Throughout this discussion, we have examined the assumptions that are being made by the law with regard to the human decision-maker. We have made reference to the possibility that many of these assumptions may not hold up under closer scrutiny by social cognition. Even by taking only a rudimentary look at the social cognitive literature, it is obvious that our cognitive processes with regard decision-making are very different than they are assumed to be in similar fact evidence law.

Relevant Propositions of Social Cognitive Psychology

The human judgment maker is not a rational computer-like machine. Instead, we are creatures with a penchant for heuristic thinking and because of this our decisions and judgments often have inferential errors, biases, and flawed logic. Having said this, however, it is important to note that we are extremely skilled in navigating around our worlds and we make a remarkable amount of decisions in our everyday life with minimal amount of effort. However, in order to investigate the validity of the psychological assumptions in the law with regard to similar fact evidence, we must examine the potential pitfalls of human inference making that come into play when humans are faced with these types of decisions and judgments.

---

[7] What has been examined is the relevance of the similarity. That is, the similarity of the prior dubious behaviour in terms of a relevant dimension such as honesty has been examined. That is, where it is not the fact that the two behaviours are similar but rather, that one has a dimension relevant to the other (please refer back to the discussion re: Wissler & Saks, 1985).

When we try to make sense of our world, we have a desire for predictability more than rationality.

> We are predisposed to see order, pattern, and meaning in the world, and we find randomness, chaos, and meaninglessness unsatisfying. Human nature abhors a lack of predictability and the absence of meaning. As a consequence, we tend to "see" order where there is none, and we spot meaningful patterns where only the vagaries of chance are operating. (Gilovich, 1991)

People, without guidance, will rely on heuristics to make their way around their physical and mental worlds. The problem with this is that their inferences have a high probability of being faulty. Human judgments are replete with errors that result from information being used incorrectly. Psychologists have spent a great deal of time examining how it is that people tend to "'see' order where there is none" (Gilovich, 1991). Many of these heuristics and biases may be operating in the courtroom with regard to similar fact evidence.

Representativeness Bias

For instance, in determining whether the character of the accused is "consistent" with a guilty person, people may draw on information that is affected by a heuristic known as a representativeness bias (Tversky and Kahneman, 1974). The representativeness bias involves making an inference that there is a greater likelihood that something represents the category the closer it matches a prototype in that category (Myers, 1999). For instance, people are more likely to judge that a shy, introverted, and withdrawn person would be a librarian rather than an actor because shyness and introversion are more representative of the category of librarians than of actors. Even though they are told not to, people might be unable to avoid the urge to think that a

person who has committed a crime or been engaged in dubious prior activities related to the present crime is more likely to have committed the present crime because he or she fits into the category and mental representation of a bad person, or a criminal. The representativeness heuristic may be helpful to human decision-makers in the complexities of everyday decision-making but it could be problematic in the courtroom.

The Availability Heuristic

Another heuristic that might pose a problem in similar fact evidence is that of *availability*, one of the most basic cognitive heuristics. The availability heuristic is a inferential shortcut used by people to determine the frequency or *likelihood* of an event. The likelihood of an event is determined on the basis of how quickly instances or associations of that event can be brought to mind (Tversky and Kahneman, 1974). Simply put, the ease with which one can imagine an event occurring in a particular way makes people think it *is more likely* that it did happen that way. When we do not know a person, and are asked to make a judgment about that person, we will search for information to complete the holes in the picture. For example, when deciding whether a person is kind or selfish, if instances of the person donating to charity are easily accessible and salient, we will probably think that the person is kind.

Giving people an instance of previous (and similar) dubious behaviour of the accused may promote this heuristic and facilitate exactly what the law is trying to avoid—disposition reasoning. Like the representativeness heuristic, the availability heuristic can be important for our everyday functioning. As it turns out, there are probably many instances when the fact that something is more accessible to us probably means it is more likely. However, there is always a chance that a shortcut will lead to the

wrong conclusion. It is possible that the information most available to us is *not* typical of the overall picture and the ultimate conclusion, if based on this information, will be erroneous. Unlike everyday life, the law requires that we *not* use these normal intuitive devices. In everyday life mistakes might not be serious concerns, but in the case of the law they can be very serious.

The "Halo" Effect

Other social psychological research that is relevant to a discussion of similar fact evidence suggests a "halo" effect when people make judgments of others (Nisbett & Wilson, 1977). Researchers have demonstrated that when positive information has been given about a person, others are more likely to infer other positive characteristics about that person. On the other hand, if negative information is given about a person, others will infer other negative characteristics about that person, a kind of "reverse halo" effect (Rosenberg & Sedlak, 1972). No doubt similar fact evidence is negative information and if it evokes or perpetuates a kind of "reverse halo" effect then this could be cause for concern in the courtroom.

The Fundamental Attribution Error

People have a tendency to buy into the idea that behaviour is consistent. Again, this tendency is driven by a need to make the world predictable and if it turns out that people can predict future behaviour from past behaviour, then the world is a much easier place to navigate. The problem is that there is actually startlingly little consistency in people's behaviour from one situation to another (Kunda, 1999). According to Kunda (1999) "we jump to conclusions about their underlying personality far too readily and

have much more confidence than we should in our ability to predict their behaviour in other settings" (p.395). Research has suggested that although temporal stability of trait related behaviour is high, "cross-situational consistency" is low (Mischel, 1968; Mischel and Peake, 1982). For example, if Sally is mean and selfish in meetings at work, there is a good chance she will be mean and selfish at all work meetings, but she will not necessarily be mean and selfish at a dinner party. People tend to infer cross-situational consistency; we tend to believe that people's behaviour is driven by the kind of people that they are. We tend to overestimate the extent to which behaviour is determined by internal dispositions and underestimate the extent to which behaviour is influenced by the specific situation. This is known in social psychological terms as the *fundamental attribution error* (Ross, 1977).

In the case of similar fact evidence, if the prior activities are extremely similar, it is possible that there might be some predictability derived from the evidence in terms of consistency of character, but when the situation begins to deviate in similarity, this predictive power is considerably less. People might not adjust their predictions of trait related behaviours to account for the fact that cross-situational consistency of these behaviours is low. That is, the less similar the situations are, the less predictive power can be derived from the behaviour. Even so, people may not adjust their belief that "once a criminal, always a criminal." In this way, similar fact evidence may perpetuate the fundamental attribution error in the courtroom.

Illusory Correlations

We must also examine people's tendency to look for covariation. In order to make the inference that a person who has previously committed a crime or engaged in

dubious and related prior activities would be more likely to have committed the present crime, first a judgment of the covariation between previous activity and present activity is necessary. In other words, the strength of the relationship between previous misconduct and present misconduct must be assessed. Research has provided evidence that people's ability to make accurate judgments of covariation is poor (Nisbett and Ross, 1980). It may be that there is a higher probability that people who have engaged in a particular behaviour in the past are more likely to engage in a similar behaviour in the present but scientific evidence supports the contention that human social judgment makers forgo this scientifically measurable probability for what is known as an illusory correlation. When people expect that there is a relationship between two things, they will either overestimate the degree of relationship that exists or impose a relationship where one does not exist (Chapman, 1967; Fiske and Taylor, 1990; Gilovich 1991). According to Nisbett and Ross (1980), the most important factor which influences the accuracy of covariation estimates, is whether or not individuals have prior expectations or theories about the relationship between the two variables.

Simply put, there is ample evidence to show that people do not judge relationships using rational measures. Rather, research indicates that people use more intuitive means to develop theories. Social cognition indicates that casually determining a strong relationship between the past and the present is based more on intuition than on scientific probabilities. In order to develop an accurate and scientific assessment of the relationship between past and present misconduct, one would not only have to determine the frequency of guilty people who have dubious and similar behaviours in their past, but also the frequency of innocent people who have dubious and similar behaviours in their

past. This is not a process that is occurring in everyday practice and moreover is definitely not necessarily occurring in the courtroom.

We have pointed out some important and relevant inferential shortcomings of the human judgment maker. What is more, even though human beings are not rational decision makers, they very often think they are. As it turns out, people do not always have access to their higher order cognitive processes (Nisbett and Wilson, 1977). It seems that we do not necessarily know what or why we think what we think. Therefore, these known and researched tendencies must be acknowledged when deciding process issues in the law because they cannot be left to operate on their own, and they certainly cannot be sanctioned or embedded within the law itself. Since the law is guarded heavily against propensity inferences, there is some indication that the lawmakers are aware (at least intuitively) of the potential inferential flaws of the human judgment maker. However, the gray boundaries around admissibility and use of similar fact evidence indicate that there is an inadequate understanding of the capabilities of the human judgment makers.

Empirical Questions investigated:

1. Do people recognize and deal with information differently depending on the *degree of similarity* of the similar fact evidence? For example, does "extremely" similar evidence influence people differently than "moderately" similar evidence?
2. Can we separate or identify important variables in the decision-making process of the jurors with regard to similar fact evidence?
3. Are judges' instructions effective?
    a) Can people limit the use of similar fact evidence?

b) Do jurors use propensity inferences even when instructed not to?

Given that there is such a paucity of psychological research that examines any notion of people's reactions to similar fact evidence, we set out to answer the most preliminary questions first. In the first study we examined the notion of *degrees* of similarity. We also examined the effectiveness of judicial instructions against making propensity inferences.

In a second study, we investigated another possible variable in the decision making process of the jurors—possible collusion between witnesses. We also examined similarity and propensity reasoning more closely. Specifically, we will explore whether people are able to follow a judge's instructions not to *use* propensity inferences. We will also explore the people's perceptions of the importance of judge's instructions to their decision.

In a third study we examined yet another possible variable in the decision making process of the jurors—the cogency (the effects of proven versus unproven allegations) of the evidence. We continued to examine similarity and propensity inferences and the influence of judge's instructions.

In sum, we hoped to provide a foundation of empirical data on similar fact evidence, which actually maps onto the current legal debates. In this way, not only are the findings interesting to psychologists interested in decision-making and social cognition, but also the findings might be of use to the legal community.

CHAPTER 2: PILOT STUDY

At the beginning of this series of studies, we performed a pilot study as a manipulation check on our treatment condition of "degree of similarity." We examined participants' perceptions of the different *degrees* of similarity between the accusation of a sexual offense against the defendant and the similar fact evidence (another accusation against the defendant). Our goal was to confirm that participants' perception of *degree* of similarity corresponded to the assigned level of similarity for each treatment condition.

Methods

Participants

Participants were 50 undergraduate psychology students (39 females and 11 males) enrolled in the Introductory Psychology course at the University of Toronto, Canada. They were recruited by means of a sign up sheet on the University of Toronto Psychology 100 website. Participants were given course credit in exchange for their participation and were fully debriefed to ensure that they had learned some basic methodological principles from their experience. For ethical reasons, there was an indication on the sign up sheet that participants were to read a trial with sexual content. This ensured that participants were informed about the content of the trial in a very general manner and would not sign up if this made them uncomfortable.

Design

The study included four conditions with similar fact evidence and a control condition. The four similar fact conditions contained testimony of an accusation against the defendant which was designed to be either "not similar," "somewhat similar," "very similar," or "extremely similar" condition to the current charge. There was also a no similar fact evidence (control) condition. The complainant in the trial that was used in all conditions was the defendant's biological daughter who was between the ages of 11 and 13 at the time of the alleged offense. In the testimony of the complainant there was no consent to the sexual activities and the situation in which the offense took place was described in detail. The variations in *degree* of similarity of the similar fact testimony were: in the sexual content of the story, the relationship of the witness to the defendant, the age of the similar fact witness, and whether or not there was consent (see table A.1).

Table A.1 Specific Variations in Degrees of similarity of the Similar Fact Evidence

	Degree of Similarity of Similar Fact Evidence			
Variables Manipulated	Not similar	Somewhat similar	Very similar *R v. B (C.R.)*	Extremely similar
Relationship to the Defendant	Secretary/cashier (Works with the defendant)	Friend of the family	Step-daughter	Biological daughter
Age of the Witness	22→24	18→21	15→17	11→13
Status of Consent	Consent	Consent	No consent	No consent
Sexual Content of the Story	Watching a movie in a not very similar situation	Watching a movie in a not very similar situation	Watching a movie in a similar situation	Watching a movie in an identical situation

All participants received identical trials except for the inclusion or exclusion of the similar fact witness.

Procedure

The study was conducted in one session, which lasted approximately one hour (maximum). Participants were run in groups in a large room with ample space for each participant. Participants were randomly assigned to one of the five conditions (control, "not similar," "somewhat similar," "very similar," and "extremely similar"). Participants were informed that they were participating in a study that examines decision-making in a legal context. They were instructed that they would be given a criminal trial transcript and would be asked to assume the role of a juror on the case. Participants were then asked for their informed consent in writing.

At this point, participants were given the appropriate trial transcript and instructed that they were allowed as much time as they needed in order to finish reading this transcript. Following that, participants were asked to fill in the questionnaire and informed that they could refer back to the trial transcript at any time. Finally, participants were fully debriefed, thanked, and were given time to ask questions.

Materials

The trial.

The trial transcript was based on R. v. B. (C.R.), a sexual offense trial in which similar fact evidence was at issue. The original decision of the court had been appealed to the Supreme Court of Canada based on the issue of the admissibility and use of the similar fact evidence in the trial. In all conditions the trial included judge's instructions

regarding reasonable doubt, presumption of innocence, etc. In the treatment conditions, the trial transcript also included judges' instructions to limit the use of similar fact evidence to purposes other than propensity. These instructions were developed in collaboration with a criminal lawyer and law professor and were based on pattern instructions that have been examined empirically (Severance et al., 1984). The judge's instruction in the control condition did not include the limiting instruction since it does not apply to the information in that condition (i.e. there was no similar fact evidence in that trial).

It is important to note that the reason for selecting the subject matter of sexual offense in the trial used in this study is that sexual offense cases are the most common instances where similar fact evidence is debated in the courts. Therefore, in order for the study to be relevant to the legal community, we felt that we needed to use a trial involving a sexual offense. However, the trial transcript presented the facts of the case but did not contain any lurid or overly explicit details.

Dependent Measures

Since the testimonies were constructed to vary along a continuum of similarity, we felt that it was necessary to assess participants' perceptions of how similar the testimonies were in general and also how similar they were specifically with regard to the sexual nature of the reported interaction with the defendant.

Similarity measure #1: general content of the testimonies.

The first measure of similarity was an assessment of the similarity of the general content of the similar fact testimony compared to the main prosecution witness's testimony.

Participants were asked to rate the similarity of the general content of the testimonies on a 7-point Likert scale from "not at all similar" (1) to extremely similar (7).

Similarity measure #2: sexual content of the testimonies.

The second measure of similarity was a more specific assessment of the similarity of the two testimonies in terms of their sexual content.

Participants were asked to rate the similarity of the sexual content of the testimonies on a 7-point Likert scale from "not at all similar" (1) to extremely similar (7).

Results

Overview

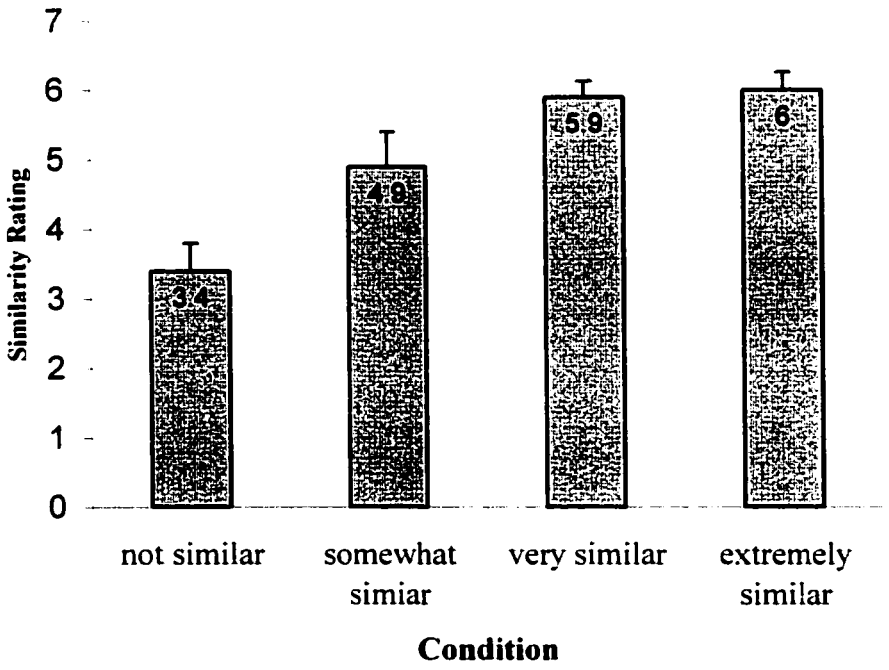
An analysis of variance (ANOVA) was performed on the two measures of similarity to verify that the levels of similarity perceived by jurors corresponded with the level of similarity condition to which participants had been assigned. For example, we wanted to test that the assignment of "very similar" to a condition corresponded to a high similarity rating by participants. In this way we attempted to confirm that participants would perceive the similarities between the testimonies of the similar fact witness and the main prosecution witness to be as similar or not as similar as we had intended them to be.

Similarity measure #1: The Similarity of the General Content of the Two Testimonies

Participants perceived the similarity of the general content of the two testimonies to be significantly different depending on the level of similarity condition, $F(3,36) = 10.88$, $p<.001$ (see appendix A, Table A1)

Mean ratings increased in a linear pattern from the not similar condition to the extremely similar condition, although not all comparisons were significantly different (see figure A.1). Post hoc tests (Scheffe, $p < .05$) indicated that the testimonies in the "not similar" condition were rated as significantly less similar than were the testimonies in the "very similar" condition as well as significantly less similar than were the testimonies in the "extremely similar" conditions. Testimonies in the "not similar" condition were rated as marginally less similar than were the testimonies in the "somewhat similar" condition (Scheffe, $p < .06$).

Figure A.1 Mean General Content Similarity Ratings by Condition

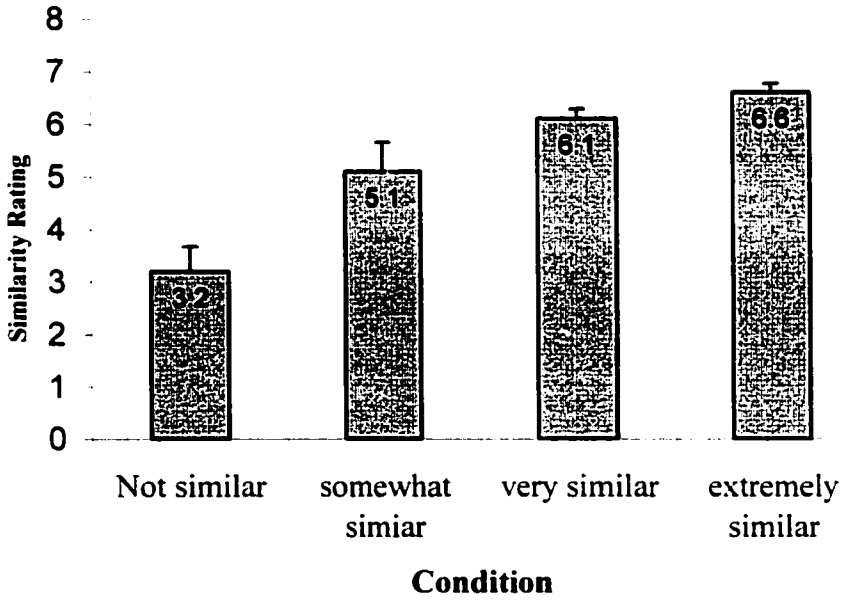


Similarity measure #2: The Similarity of the Sexual Content of the Two Testimonies

Participants did perceive the sexual nature of the two testimonies to be significantly different in similarity depending on levels of similarity condition, $F(3,36) = 15.68$, $p<.001$. The mean ratings of similarity of the sexual content of the testimonies increased as the level of similarity increased (see appendix A, Table A2).

Mean ratings increased in a linear pattern from the not similar condition to the extremely similar condition, although not all comparisons were significantly different (see figure A.2). Post hoc tests (Scheffe, $p < .05$) indicated that the testimonies in the "not similar" condition were rated as significantly less similar than were the testimonies in the "somewhat similar condition", the "very similar" condition, as well in the "extremely similar" conditions.

Figure A.2 Mean Sexual Content Similarity Ratings by Condition



Discussion

Pilot data confirmed that participants perceived differences in similarity between the critical testimonies. These differences corresponded in magnitude to the treatment condition to which they had been assigned. In the "not similar" condition, the mean ratings of similarity for both the content and sexual nature of the stories were rated closest to "not at all similar" on the similarity scale which places the treatment condition at the expected place on the similarity continuum. We had not expected participants to rate the "not similar" evidence at the extreme end of the continuum since the evidence could be perceived by some participants to have slight similarities. Likewise the ratings of similarity in other conditions corresponded with the magnitude on the similarity scale rating.

It is interesting to note that the content and the sexual similarity ratings between the "very" and "extremely" similar conditions did not differ significantly from one another in the post hoc analysis. However, we continued to include both conditions in the series of studies since the "very similar" condition is representative of the similarity of the evidence in the actual case of *R v. B (C.R.)*. In this case, the Supreme Court justices disagreed on whether this evidence was similar enough to be admitted. For this reason we felt that it was necessary to continue testing this level of similarity against evidence that is extremely similar since extremely similar evidence would definitely be allowed in to court under the similar fact evidence rule.

In summary, pilot data confirmed that participants did indeed differentially perceive the degree of similarity of the treatment levels and we proceeded with the series of studies using all four of these degrees of similarity.

CHAPTER 3: STUDY 1

In this study we examined decision-making and judgmental processes of mock jurors. We attempted to investigate the most basic of our research questions first. Because we were interested in the possible prejudicial effects of different *degrees of similarity* of similar fact evidence, we began with an examination of mock juror judgments under different conditions of similarity.

We hypothesized that as the similar fact evidence bore more and more of a resemblance to the evidence of the main prosecution witness, jurors would be more likely to judge the defendant negatively on a number of different indices. This prediction is not unlike the assumptions made in the law. The law of similar fact evidence recognizes that the more similar the similar fact evidence is, the greater the prejudicial potential of this evidence. Therefore this hypothesis would validate the assumption that the more similar the evidence, the more risk it has of prejudicing the jury.

It is not entirely clear in evidence law whether the lawmakers are concerned that even evidence that is "not similar" will still have a generalized prejudicial effect. As mentioned previously, this kind of evidence would be considered under the prior record evidence rule and might be admitted into a trial (if deemed to be not too similar) under the assumption that jurors would use this evidence *only* to assess credibility. Therefore, our present prediction that this evidence will have a generalized negative effect on judgments made in the trial would run contrary to this assumption made in evidence law. We hoped to find evidence that would provide some clarification of what jurors are actually capable of doing in their decision-making process when evidence is not similar.

In addition, as evidenced by the dissenting judge's in the Supreme Court cases in *R v. B. (C. R.)* it appears that the courts assume that there is a linear relationship between potential for prejudice and similarity which extends to the upper end of the continuum of similarity. There is an assumption that the probative versus prejudicial weight of *very* similar evidence should be evaluated differently than should evidence that is *extremely* similar. This assumption that the linear relationship between degree of similarity and prejudicial potential extends to the upper most extreme on the continuum of similarity was empirically examined in this next study.

Finally, we attempted to investigate jurors' endorsement of propensity inferences. Contrary to assumptions made in similar fact evidence law, we hypothesize that jurors will *not* be able to refrain from making propensity type inferences—even when faced with evidence that has only a low degree of similarity to the main prosecution evidence and given instructions not to use the evidence improperly. We examined juror endorsement of propensity type thoughts as an important first step in trying to identify the thought process of the jurors with regard to propensity reasoning.

Methods

Participants

Participants were 99 undergraduate psychology students (70 females and 29 males) enrolled in the Introductory Psychology course at the University of Toronto, Canada. They were recruited using the same method as used in the pilot study.

Design

This study consisted of four treatment conditions, which varied along a continuum of similarity from "not similar" to "extremely similar." The four similar fact conditions consisted of a "not similar," "somewhat similar," "very similar," and an "extremely similar" condition. There was also a no similar fact evidence (control) condition. These conditions were the same as used in the pilot study.

All participants received identical trials except for the inclusion (in varying degrees of similarity) or exclusion of the similar fact witness. All trials included judges' instructions at the conclusion of the trial. These instructions were identical in all conditions with the exception that in the four similar fact conditions there were instructions as to the proper legal use that can be made of the similar fact evidence. This instruction was not included in the control condition as there was no similar fact evidence in the trial.

Procedure

The study was conducted in one session, which lasted approximately one hour (maximum). Participants were run in groups in a large lab with ample space for each participant. Participants were randomly assigned to one of the five conditions (control, "not similar," "somewhat similar," "very similar," and "extremely similar). Participants were informed that they were participating in a study that examines decision-making in a legal context. They were informed that they would be given a criminal trial transcript and would be asked to assume the role of a juror on the case. Participants were then asked for their informed consent in writing.

Participants were then given the appropriate trial transcript and instructed that they were allowed as much time as they needed in order to finish reading this transcript. Following that, participants were asked to fill in the questionnaire and informed that they could refer back to the trial transcript at any time. Finally, participants were fully debriefed, thanked, and were given time to ask questions.

Materials

The trial.

The trial used was the same as the trial used in the pilot study.

Dependent Measures

Verdict and guilt ratings.

Participants were asked to indicate a verdict choice ("guilty" or "not guilty"). Participants were also asked to rate the likelihood that the defendant is guilty on a 7-point Likert scale (1 = definitely not guilty, 7 = definitely guilty).

Influence of witnesses.

Participants were asked to rate to what extent key witnesses influenced their verdict choice on a 7-point Likert scale (1 = not at all, 7 = a great deal).

Propensity.

Participants were asked to rate the extent to which they endorsed a propensity statement on a 7-point Likert scale (1 = completely disagree, 2 = completely agree). The propensity statement is as follows: " If Steven Croft had sexual relations with Melissa,

then I think he is the kind of person who would probably have had sexual relations with Amanda." This kind of reasoning that if a person committed some kind of crime or dubious act in the past then they must be the *kind* of person that would commit the present crime is what the courts refer to as "propensity" reasoning. These are assumptions being made about a person's disposition based on past actions.

Judgment.

Those participants who voted "not guilty" were asked to indicate the reason for this decision (1 = "you think he is innocent," 2 = "you think he is guilty but you do not think there is enough evidence to prove it," and 3 = "you are unsure whether he is innocent or guilty").

In order to further examine the decision-making processes of the jurors, we developed a measure of judgment of guilt using these ratings of judgment combined with guilty verdicts to create a "judgment" variable.

This is an important measure since it enables us to further differentiate between "not guilty" and "guilty." People who vote "not guilty" may do so for various different reasons. That is, a "not guilty" verdict does not necessarily mean that the juror felt the defendant was innocent. We feel that the reasoning behind a not guilty verdict is important to take into consideration when determining how the similarity of evidence influences the perceptions of the guiltiness of the defendant.

People who voted "not guilty" were asked whether it was because they felt the defendant was innocent, were unsure of his guilt or innocence, or felt he was guilty, but that there was not enough evidence to convict him. Thus the measure of judgment ranges from

thinking the defendant is innocent (1), to being unsure of guilt or innocence (2), thinking he is guilty but not enough evidence (3), and to thinking he is guilty (4).

Results

Overview

The statistical analyses performed on the data consisted of a chi-squared analysis on verdict and a one-way analysis of variance (ANOVA) with 5 levels of similarity on each dependent measures of interest. Preliminary analyses indicated that there were no significant sex effects on any of the dependent measures therefore we did not included sex in any of the analyses.

Verdicts

Table 1.1 shows the breakdown of verdicts for the five conditions.

Table 1.1 Verdict Counts by Condition

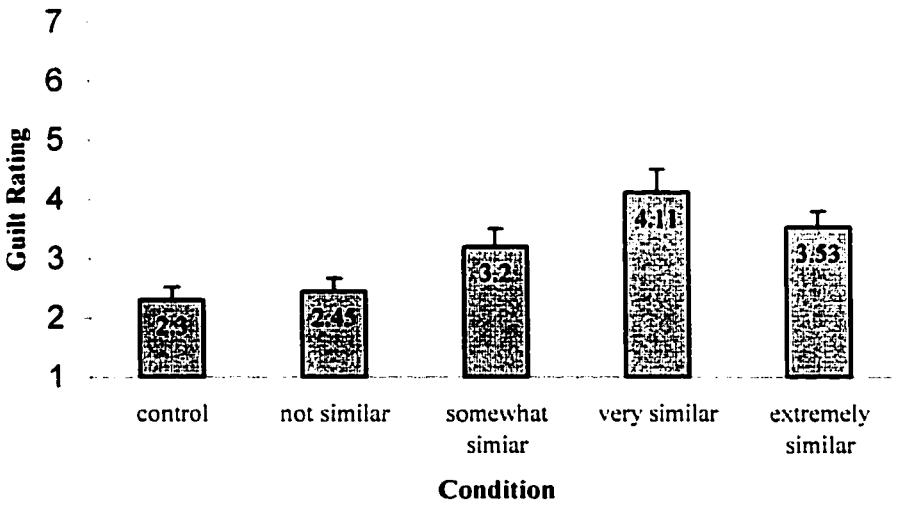
	Verdict		
Condition	Not Guilty	Guilty	Total
Control	20	0	20
Not similar	20	0	20
Somewhat similar	19	1	20
Very similar	12	7	19
Extremely similar	18	2	20
Total	89	10	99

Unfortunately the chi-squared analysis could not be reported because the expected counts in certain cells were too low.

Ratings of guilt

Analysis of variance revealed that the ratings of guilt varied as a function of similarity, F (4, 93) = 7.1, p<.001 (see appendix A, Table A3). Post hoc tests (Scheffe, p<.05) indicated that participants in the "very" similar condition felt that the defendant was more likely to be guilty than those in the control condition. Also, participants in the "very" similar condition felt that the defendant was more likely to be guilty than those in the "not similar" condition. There was no difference between the "very" and "extremely" similar conditions. Figure 1.1 depicts the mean ratings of guilt for all of the levels of similarity showing a linear relationship between levels of similarity and ratings of guilt.

Figure 1.1 Mean Likelihood of Guilt Ratings by Condition

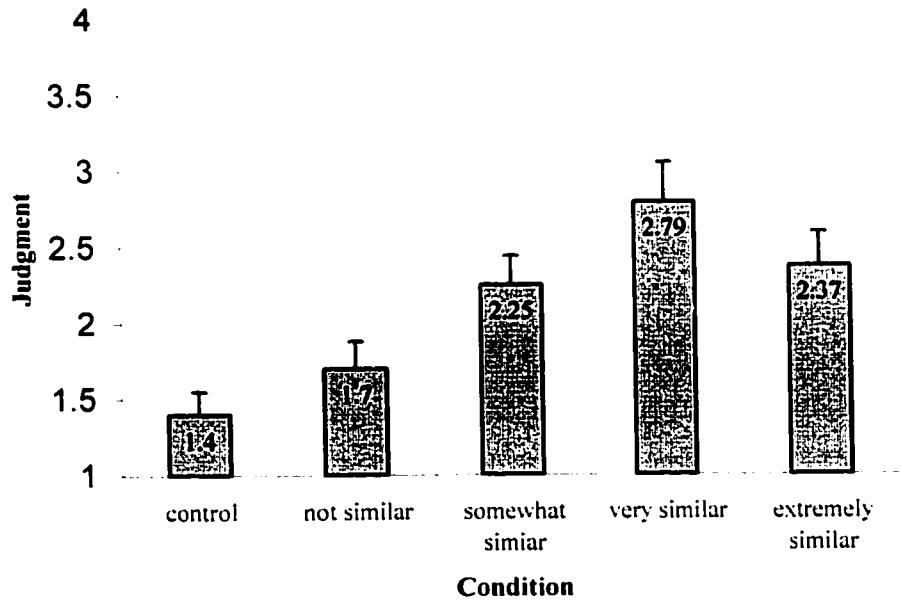


Judgment

Analysis of variance conducted on judgment indicated that the level of similarity of the evidence had a significant effect on judgment ratings F (4,94) =7.48 , p<.001 (see appendix A, Table A4). Higher ratings indicate participants feel that the defendant is guilty.

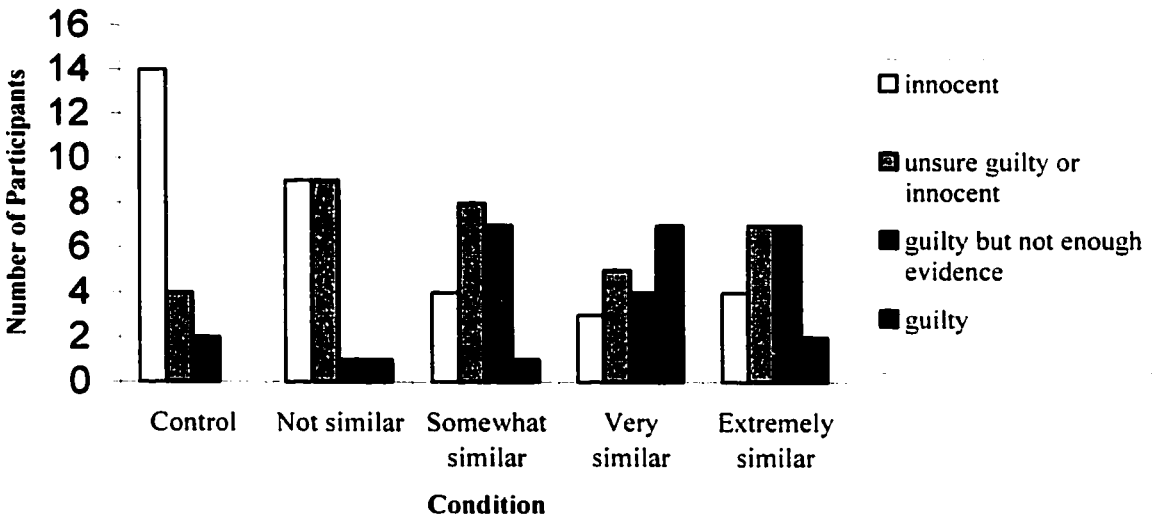
Post hoc tests (Scheffe, $p < .05$) indicated that participants who were exposed to "somewhat," "very," and "extremely" similar evidence gave higher judgments of guilt than participants not exposed to the evidence. Also, participants who were exposed to the "not similar" similar evidence gave significantly lower judgment ratings than did participants exposed to the "very" similar evidence (see figure 1.2). All other comparisons were not significant.

Figure 1.2 Mean Judgment ratings by Condition



Because examining the shift in the reasons for voting "not guilty" was of interest we further examined it by looking at the counts of judgment by condition (see figure 1.3). As can be seen from Figure 1.3, participants who vote "not guilty" do so for different reasons when faced with evidence of differing degrees of similarity.

Figure 1.3 Judgment Counts by Condition



Propensity

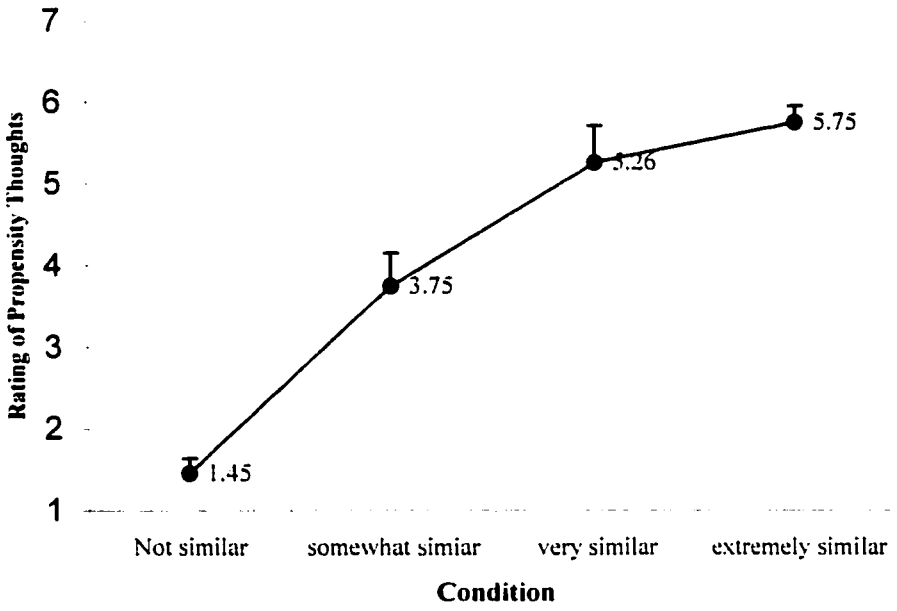
In order to evaluate the effects of the judge's explicit instructions *not* to make propensity inferences about the *kind* of person the defendant is, we examined whether jurors were processing information in such a way as to be making these forbidden propensity inferences about the defendant. Because the control condition did not involve similar fact evidence, it was not included in the analysis.

Propensity thought.

Participants were more likely to endorse a disposition and propensity statement that the defendant was the *kind* of person who would commit the crime as they read testimony with evidence increasing in levels of similarity, $F(3, 75) = 35.2$, $p<.001$ (see appendix A, Table A5).

Post hoc comparisons (Scheffe, $p < .05$) indicated that all groups were significantly different from one another except for participants in the "very" and "extremely" similar condition who did not differ from one another on this measure. It appears that the more similar the evidence is the more participants endorsed propensity type reasoning (see figure 1.4).

Figure 1.4 Mean Ratings of Propensity Thinking by Condition



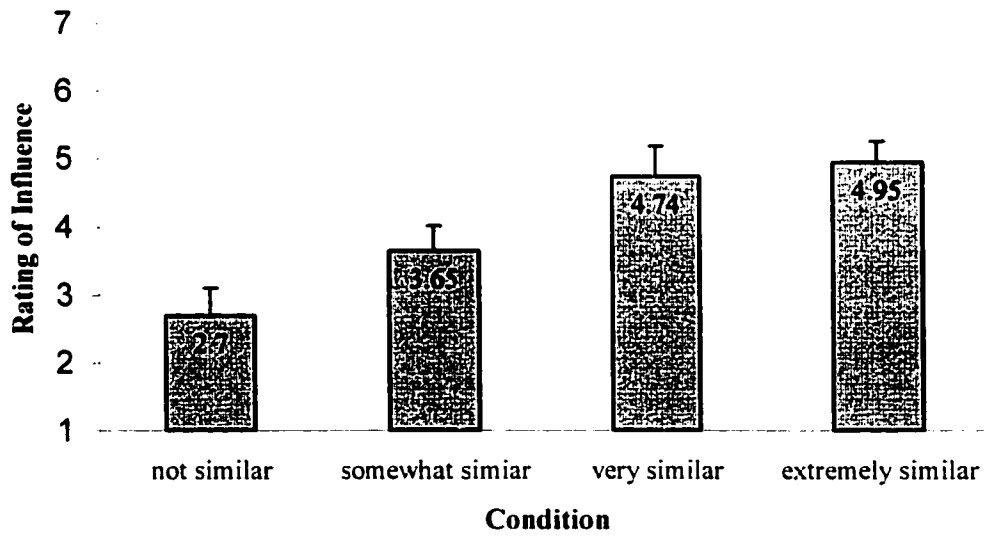
Influence of Similar Fact Witness's testimony

It was of interest to determine the level of awareness participants had regarding the influence of the similar fact witness had on their decisions and whether this influence differed according to the similarity of the evidence. Therefore an analysis of variance was performed on ratings of the influence of the similar fact witness's testimony. We found that the level of similarity significantly affected participants' ratings of the influence that the similar fact witness had on their decision $F(3,75) = 7.57$, $p < .001$(see appendix A, Table

A6). Participants who were in the "not similar" condition felt that the testimony of Melissa had influenced their decision less than participants who were in the "very" and "extremely" similar condition (see figure 1.5). This indicates that participants were aware that the testimony of the similar fact witness was influencing their decision. Moreover, participants seemed to be aware of how much of an influence the similar fact witness's testimony was having on them since ratings did increase as the level of similarity of the evidence.

Post hoc tests (Scheffe, $p < .05$) indicated that the "not similar" similar condition rated the influence lower than the "very" and "extremely" similar condition but that the ratings by jurors in the very and extremely similar condition did not differ significantly from one another.

Figure 1.5 Mean Ratings of Influence of Similar Fact Testimony by Condition



Discussion

Consistent with our expectations, as the degree of similarity of the evidence increased mock jurors became more prejudiced against the defendant. Interestingly, but not surprisingly, judge's instructions were not effective at eliminating propensity reasoning.

The finding that "not similar" evidence does not influence mock-jurors any differently than no evidence was unexpected but explainable. Either mock jurors exposed to information that is not similar but still possibly detrimental are able to follow instructions and put possible prejudicial information aside or they are simply not prejudiced by information that is so dissimilar. Either explanation suggests that less caution be called for when deciding to admit this kind of evidence for a limited purpose. However, more research on this lowest end of the degree of similarity continuum is necessary since evidence of this kind that is admitted into a real trial is admitted as *prior record evidence*. That is, in an actual trial, there is always an element of cogency that is attached to evidence at this low level of similarity, which was not the case in our study. The resulting prejudicial effects of a proven conviction, even one that is not similar, may differ from those that the present study could examine. However, it must be noted that the lower end of the continuum was not the focus of the current series of studies. Rather, we were more interested in the upper end of the continuum of similarity.

Contrary to our predictions, prejudicial effects of evidence that is very similar did not differ from those of evidence that was extremely similar. This indicates that *more* caution is warranted when testing the critical balance between prejudicial and probative

value of the evidence, especially at the "very similar" level. It appears that the prejudicial value of the evidence may not vary once reaching a certain threshold of similarity making very similar evidence as prejudicially dangerous as extremely similar evidence. If the evidence is not similar enough to be probative then the magnitude of its prejudicial weight will be problematic since we know from the present experiment that it will have the same potential for prejudice as virtually identical evidence. Therefore, extreme caution is called for when weighing probative value versus prejudicial value of evidence that is very similar but not identical.

In order to more fully understand the nature of the prejudice involved in similar fact evidence, other variables in the decision-making process should be considered. This was the focus of the next study in this series.

CHAPTER 4: STUDY 2

To further investigate the decision-making processes of the jurors, we sought to identify specific variables that may be under consideration by a juror when making decisions using similar fact evidence. One such variable may be the possibility of collaboration between witnesses, otherwise known as collusion.

Study 2 examined perceived collusion as a variable. We suspected that perceived collusion might help explain the lack of difference found between prejudicial effects of very similar and extremely similar evidence. It is possible that jurors might scrutinize extremely similar evidence more rigorously due to the implausibility of two stories being virtually identical. It may be the case that the extremely similar evidence would be treated with more caution than the very similar evidence due to the reasoning that possibility of collusion between witnesses may render the extremely similar evidence less believable. This caution may explain why extremely similar evidence tends not to be more prejudicial than very similar evidence.

Collusion is a variable considered by the court when admitting evidence. However, collusion is considered mainly when assessing the *probative* value of the evidence. For instance, according to Pacciocco and Stuesser (1996),

> "(W)here evidence depends for its probative value on the suggestion that it is unlikely that two or more persons would be making similar false allegations, the prospect of collaboration is an important consideration in determining the cogency of the evidence. Where the risk of collaboration is significant, the probative value of the evidence may be reduced. Sopinka J. has even suggested that the Crown must negate the prospect of collaboration beyond all reasonable doubt"[8](p.44).

We suspected that collusion might be an important factor to consider when weighing both probative *and* prejudicial value. We were curious about the extent to which people would consider collusion in their decision-making process and whether or not it would influence their final judgments. As the stories (testimonies) of the similar fact witness and the main prosecution witness become more and more similar, the possibility that jurors may believe the witnesses were colluding is expected to be more of a concern. Just as two identical stories are seen to be more probative and possibly more prejudicial, it may be that the more similar the stories, the more doubt cast upon the witnesses by the jurors. That doubt would be in the form of thoughts that the witnesses must have colluded to arrive at such similar stories. For example, if testimonies were identically worded or the stories so identical as to render them implausible, a juror may be more hesitant to believe the witnesses. If there is no possibility that the witnesses colluded, identical testimonies should be more damaging to the defendant.

In addition, in this study we examined more closely the role of propensity reasoning in the judgmental processes of the jurors. Study 1 exposed the fact that jurors were endorsing propensity type thoughts according to the degree of similarity of the evidence. In study 2 we wanted to examine whether participants were actually *using* this

---

[8] Interestingly, Sopinka J., suggested this in the case of *R v.B. (C.R.)* in his dissenting decision.

type of inference in their judgments even when explicitly told not to use it. In addition, we examined whether jurors were using this type of reasoning differentially depending on the degree of similarity of the evidence.

Finally, we were also interested in expanding on the dependent variables in this study to include a variable that would give us a direct report of participants' perceptions of the influence of the judge's instructions. We wanted to examine both whether judge's instructions were being used effectively as well as juror perceptions of how well they were using judge's instructions. In study 1, people were more likely to endorse propensity type thoughts as evidence increased in similarity. Therefore, theoretically, the judge's instructions should be more influential when there is evidence of increasing similarity because it is in these cases where there is increased temptation to use the propensity type reasoning. That would mean that the instruction forbidding using propensity type reasoning would need to be invoked and used more persistently as the evidence increased in similarity. We investigated this possibility.

Methods

Participants

The 164 participants (121 females and 43 males) were recruited and debriefed in the same way as was outlined for the Pilot study and study 1.

Design

The study was a 2X3 factorial design. There were three similar fact conditions. These included the "not similar" condition, which will serve as a control in this study,

and the "very similar" and "extremely similar" conditions. The collusion variable involved a "collusion" condition and a "no collusion" condition.

Procedure

Study 2 employed the identical procedure as in study 1. This was done in an attempt to keep a high consistency between studies so as to remove as much error due to extraneous variables as possible.

Materials

The trial.

The trial used was the same trial used in study 1 with slight modifications for the collusion and no collusion conditions. In Study 1, the notion of collusion was left ambiguous. It was left unsaid whether the similar fact witness and the main prosecution witness had any contact. In Study 2, there was a clear statement in the testimony of the similar fact witness that there was or was not a possibility of collusion. In addition, the defendant's occupation was identified as a mechanic (in study 1, he was identified as a doctor). We were interested in replicating the results of Study 1 with a defendant of a different Socio-economic status in order to expand the generalizability of the results.

In the no collusion condition the testimony read as follows:

Q. Now, did you ever talk to Amanda Croft about what happened?
A. No, never.

Q. So, you never discussed anything regarding Mr. Croft?
A. No, I didn't ever speak with Amanda. I don't even know her.

Q. So you have never met Amanda Croft?
A. No, I never did.

In the collusion condition, the testimony read as follows:

Q. Now, did you ever talk to Amanda Croft about what happened?
A. Yes.

Q. So, you had a chance to discuss all of these alleged events with each other?
A. Yes, we talked about what happened.

Q. So, you talked to her about your story and she talked to you about her story?
A. Yes, we talked about everything

Q. How many times have you talked to her about it?
A. I guess three or four times.

Dependent Measures

The dependent measures were identical to those in Study 1 with the following additional measures:

Influence of judge's instructions.

The participants were asked to rate (on a 7-point Likert scale) to what extent he or she felt that the instructions of the judge influenced their decisions.

Propensity.

In addition to asking participants to rate their endorsement of propensity style reasoning, participants were asked to rate how much they *used* propensity style reasoning. There was a series of questions asking participants to what extent they used certain factors in their decision-making. These factors included the propensity inference that "because of his past actions, Steven Croft is the kind of person who would commit this type of crime." All of these ratings were made on a 7-point Likert scale where the extent of the use of the items was rated from 1= "not at all" to 7= "a great deal."

Results

Overview

Analyses performed on the data included chi-square analyses of verdict; an analysis of variance performed on ratings of guilt, judgment, and other dependent measures of interest. In addition, a path analysis was performed on propensity use and three other measures of guilt in order to further understand the role of propensity reasoning in juror decision-making. Preliminary analyses revealed that there was a sex effect on some dependent measures of interest. When a sex effect was found in the preliminary analyses, sex was included in the model for analyses.

Verdicts

A 2 X 3 (verdict X similarity) Pearson chi-square analysis revealed that the level of similarity of the evidence had a significant effect on verdict choice, $\chi^2(2, N = 163) = 18.31, p < .001$ (see Table 2.1). A 2 X 2 (verdict X collusion) Pearson chi-square analysis on collusion and verdict indicated that collusion did not differentially influence verdict choice $\chi^2(1, N = 163) = .6$, ns. (see table 2.2). A 2 X 3 X 2 (verdict X similarity X collusion) Pearson chi-square analysis indicated that similarity had a significant effect on verdict within both levels of collusion. However, a 2 X 2 X 3 (verdict X collusion X similarity) Pearson chi-square analysis indicated that collusion did not have an effect on verdict within any level of similarity.

Table 2.1 Verdict Counts by Similarity Condition

	Verdict		
Condition	Not Guilty	Guilty	Total
Not similar	51	2	53
Very similar	37	19	56
Extremely similar	35	19	54
Total	123	40	163

Table 2.2 Verdict Counts by Collusion Condition

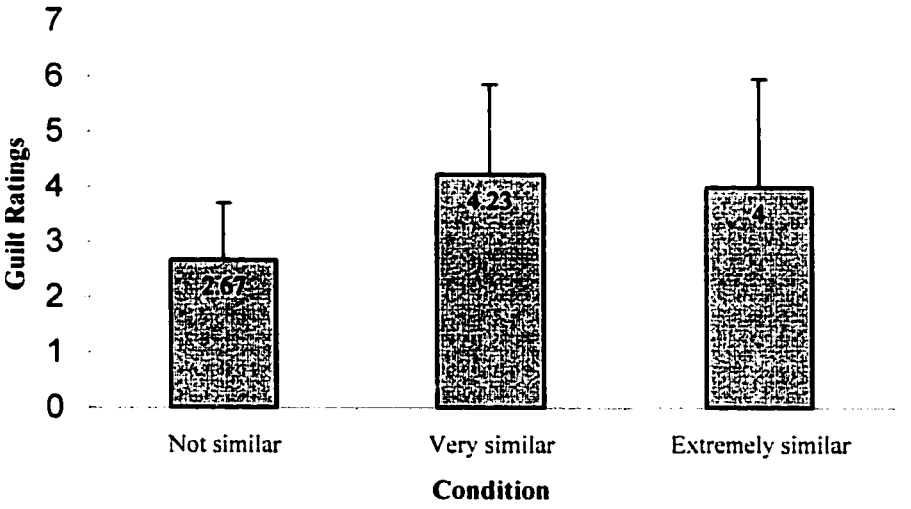
	Verdict		
Condition	Not Guilty	Guilty	Total
Collusion	59	22	81
No collusion	64	18	82
Total	123	40	163

We performed two further 2 X 2 chi-square analyses in order to fully understand the effects of similarity on verdict. First, a 2 X 2 (similarity X verdict) was performed comparing the "very" similar condition with "extremely" similar condition. There were no significant differences in verdict between these two conditions. Therefore, we collapsed them and performed a 2 X 2 (similarity X verdict) chi square analysis comparing "not similar" similar to the collapsed ("very" and "extremely") condition. This chi square analysed yielded a significant difference in verdicts such that those in the "not similar" condition assigned significantly fewer guilty verdicts than those in the collapsed similarity condition $\chi^2(1, N = 163) = 18.29\, p < .001$.

Ratings of Guilt

A 2 X 3 X 2 analysis of variance (Collusion X similarity X sex) yielded a significant effect of levels of similarity on likelihood ratings F (2, 152) = 9.24, p <.001 (see appendix A, Table A7). Scheffe post hoc tests indicated that those participants who read either "very" similar evidence or "extremely" similar evidence gave higher ratings of guilt than participants who read evidence that was "not similar" similar (See Figure 2.1). No effect of collusion was obtained. A significant main effect of sex indicated that female ratings of guilt (M = 3.92, SD = 1.7) were generally higher than male ratings (M = 2.86, SD = 1.5) F (1, 152) = 9 p < .01 but there were no interactions between variables.

Figure 2.1 Mean Likelihood of Guilt Ratings by Condition



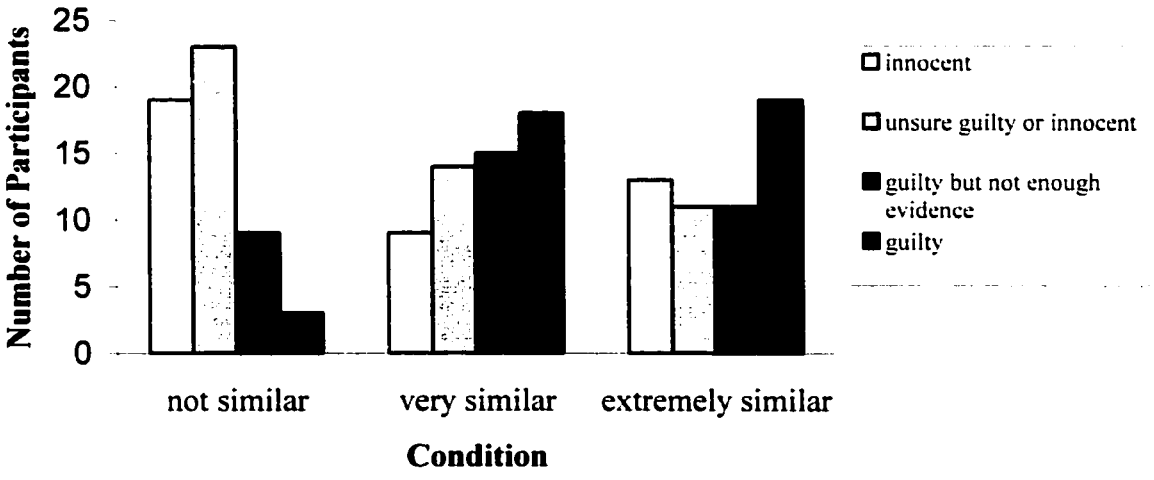
Judgment

A 2 X 3 X 2 analysis of variance (collusion X similarity X sex) yielded a significant similarity effect F (2, 152) = 7.73, p < .01(see appendix A, Table A8). Participants who read evidence "very" or "extremely" similar were more negative toward guilt in their judgments

of the defendant ($M = 2.75$, $SD = 1.1$, $M = 2.67$, $SD = 1.2$) than were those participants who read evidence that was "not similar" similar ($M = 1.92$, $SD = .86$). There was no significant main effect or interaction involving collusion. The analysis yielded a significant main effect of sex on judgment ($F(1, 152) = 5.56$, $p < .05$). Female ratings were generally higher ($M = 2.6$, $SD = 1.1$) than male ratings ($M = 2.02$, $SD = 1.1$) however, there were no interactions.

See figure 2.2 for actual counts of judgment showing the shift of reasons for not voting guilty as the level of similarity increases. Even though some jurors are voting "not guilty" in the "very" and "extremely" similar condition, they are voting that way for different reasons (such as: "not enough evidence") than jurors who vote "not guilty" in the not similar condition (where there is a higher count of jurors who believe the defendant is innocent). This confirms that the verdict of "not guilty" represents different conclusions in the mind of the jurors. In other words, "not guilty" does not mean that the juror necessarily believes that the defendant is innocent.

Figure 2.2 Judgment Counts by condition



Propensity

Propensity thought.

Propensity thought was measured by participants' endorsement of agreement on a seven-point scale to the statement that: "If Steven Croft has sexual relations with Melissa, then I think he is the kind of person who would probably have had sexual relations with Amanda" (see Appendix 2.1).

A 2 X 3 X 2 analysis of variance (collusion X similarity X sex) indicated that participants were more likely to endorse a disposition or propensity statement that the defendant was the *kind* of person who would commit the crime as they read testimony with evidence increasing in levels of similarity, F (2, 152) = 56.24, p<.001 (see appendix A, Table A9). Scheffe post hoc comparisons revealed that participants in the "very" and "extremely" similar conditions endorsed higher ratings of propensity thought (M = 5.02 , SD = 1.7 , t M = 5.09 , SD = 1.8) than did participants in the "not similar" condition (M = 1.85, SD = 1).

Propensity use.

Propensity use was measured by participants' ratings (on a seven-point scale) of the extent they used the idea "that because of his past actions, Steven Croft is the kind of person who would commit this type of crime" in their final decision (see Appendix 2.1).

A 2 X 3 X 2 analysis of variance (collusion X similarity X sex) indicated that the use of propensity reasoning differed depending on the level of similarity of the evidence to which the participant was exposed F (2, 151) = 11.78 p < .001 (see appendix A, Table A10). Participants who were in the "very" and "extremely" similar condition used propensity reasoning more in their decision-making process (M =4.21 , SD = 1.6, M = 4.2 , SD = 1.9)

than did participants in the "not similar" similar condition ($M = 2.64$, $SD = 1.4$) (Scheffe, $p < .05$).

Path Analyses on Measures of Guilt and Propensity

Path analyses using AMOS were conducted in order to more accurately assess the role of the *use* of propensity reasoning in the decision-making process. Moreover, we wanted to investigate whether propensity use mediates between the level of similarity and various measures of guilt. Because the ANOVA on propensity use did not reveal any differences between the "very" and "extremely" similar conditions, we collapsed these conditions in the path analysis. Therefore, we had a "similar" and a "not similar" condition.

Verdict.

The zero-order correlations are presented in Table 2.3 among the treatment variable (exogenous variable) of similarity and the dependent measures (endogenous variables) of propensity and verdict.

Table 2.3 Correlations Among Similarity, Propensity, and Verdict

	Correlations				
Variable	1	2	3	*M*	*SD*
1. Similarity	-			1.01	.81
2. Propensity	.35**	-		3.72	1.78
3. Verdict	.29**	.52**	-	.25	.43

Note: **$p<.01$

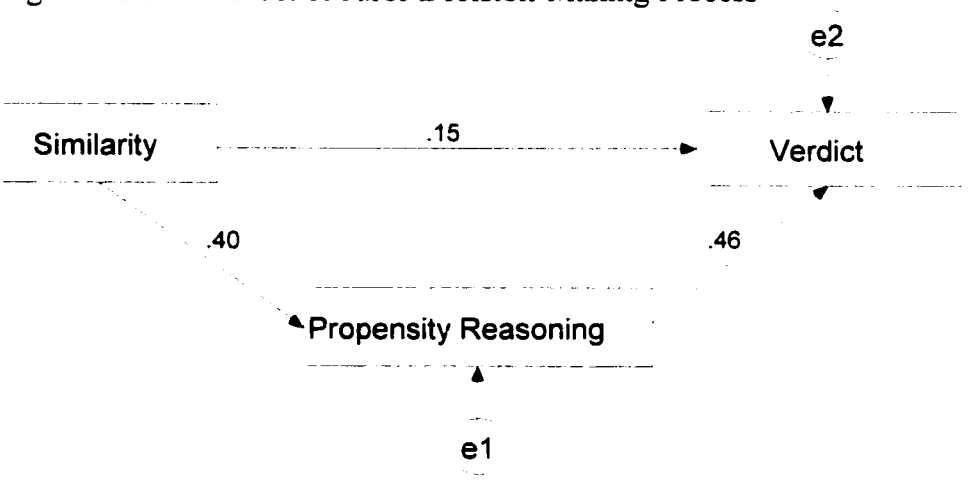
On the basis of our predictions that jurors will use propensity reasoning to make their verdict based on levels of similarity, we devised the path model to examine this relationship whereby propensity may mediate between similarity and verdict.

Because the path model included all possible paths the model was a perfect "fit" (χ^2 (0, 162) = 0). Therefore, it was not necessary to report fit measures for this analysis. This was true for all path models reported in this series of studies.

Similarity explains 16% of the variance in propensity. Whether or not the evidence is similar has an effect on propensity reasoning such that when the evidence is more similar participants rate a higher usage of propensity reasoning ((β = .40, p < .001). Whether or not the evidence is similar has an independent effect on verdict such that the more similar the evidence is, the more likely they are to give a guilty verdict (β = .15, p < .05).

The purpose of the analysis was, however, to unpack the role of propensity in the decision-making process. Whether or not people use propensity reasoning has a large effect on verdict even taking similarity into account (β = .46, p < .001). The more propensity reasoning jurors use, the more likely they are to give a guilty verdict. As predicted, the analysis revealed that propensity is a mediating variable. Similarity has a larger effect on verdict through propensity than it does directly. The indirect effect of similarity on verdict through propensity is β = .19 indicating that there is an increase in predictive power of similarity mediated through propensity. Similarity and propensity together explain 29% of the variance in verdict choice (See Figure 2.3 for path diagram).

Figure 2.3 Path Model of Juror Decision-Making Process



Likelihood of guilt ratings.

When a path was constructed in order to examine relations between similarity, *use* of propensity reasoning and likelihood of guilt ratings, we found that propensity was again a mediating variable between similarity and likelihood of guilt.

The zero-order correlations are presented in Table 2.4 among the treatment variable (exogenous variable) of similarity and the dependent measures (endogenous variables) of propensity and likelihood of guilt.

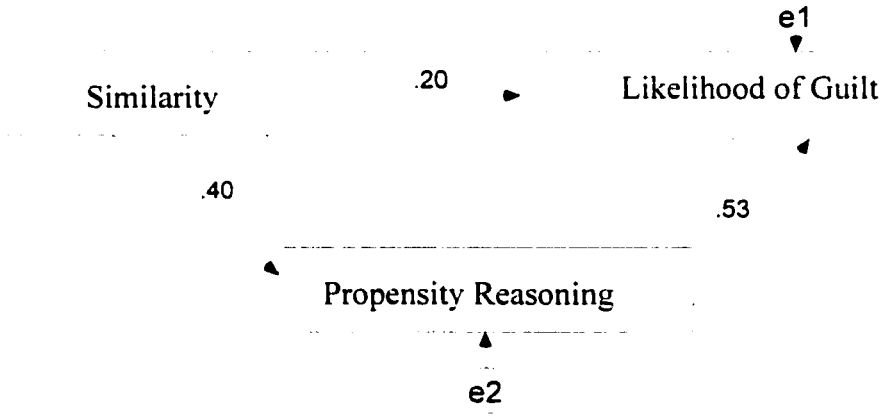
Table 2.4 Correlations Among Similarity, Propensity, and Likelihood of Guilt

	Correlations				
Variable	1	2	3	*M*	*SD*
1. Similarity	-			1.01	.81
2. Propensity	.37**	-		3.72	1.79
3. Likelihood	.33**	.61**	-	3.63	1.73

Note: **$p<.01$

Whether or not people use propensity reasoning has a large effect on likelihood of guilt ratings even taking similarity into account (ß = .53, $p < .001$). The more propensity reasoning jurors use, the more likely they are to give a higher rating of guilt. This analysis again revealed that propensity is a mediating variable. Similarity appears to have a larger effect on likelihood through propensity than it does directly. The indirect effect of similarity on likelihood through propensity is ß = .22 indicating that there is an increase in predictive power of similarity mediated through propensity. Similarity and propensity explain 41% of the variance in likelihood of guilt ratings (See Figure 2.4 for path diagram).

Figure 2.4 Path Model of Juror Decision-Making Process



Correlations among measures of guilt.

Similar results from the path analyses on the other dependent measures of guilt (likelihood and judgment) and verdict are not surprising given the high correlations between these measures and verdict (see table 2.6)

Table 2.5 Correlations Among Measures of Guilt

	Correlations				
Variable	1	2	3	*M*	*SD*
1. Verdict	-			.25	.43
2. Likelihood	.75**	-		3.63	1.73

Note: **$p<.01$

Influence of Similar Fact Witness's testimony

A 2 X 2 ANOVA (collusion X similarity) was performed in order to assess the extent to which similarity and/or collusion influenced participants' perceptions of the influence that the testimony of the similar fact witness had on their decision. Results from the analysis suggested that the similarity of the evidence did affect ratings of influence F (2, 156) = 21.82, p <.001 (see Appendix A, Table A11). Participants who read evidence that was "very" and "extremely" similar rated that that evidence had influenced their decision more (M = 5.05, SD =1.6 , M = 5.04, SD = 1.67) than participants who read evidence that was "not similar" (M = 3.2, SD =1.7) F (2, 161) = 21.82, p < .001. There was no effect of collusion on influence measures.

Influence of Judge

A 2 X 2 ANOVA (collusion X similarity) yielded no effect of similarity or collusion on participants' ratings of the influence of judge's instruction on decision-making. The overall mean rating was 4.4 indicating that participants in all conditions felt that the judge's instructions played a moderate role in their decision-making process.

Discussion

Results in this study were consistent with some of our hypotheses. As predicted, similar fact evidence prejudiced jurors against the defendant. However, contrary to our expectations, possibility of collusion between witnesses had no appreciable effects on the measures of guilt. When jurors are faced with the possibility that the similar fact witness and the main prosecution witness may have colluded on their stories, it does not seem to influence their decisions. Obviously, this does not reveal any new insights into whether the courts should be concerned with collusion as far as its probative value (something far outside the scope of this study), but it does indicate that it is not a cause for concern where prejudicial potential is at issue.

The results of this second study further suggest that the court's efforts to forbid propensity reasoning by way of instructions to the jury is not effective. Our findings indicate that the use of propensity reasoning not only influences jurors in their decisions, but of the variables we examined, it has the *greatest* influence on their decisions regarding the guilt of the defendant. Results from this study indicated that jurors did not feel that the instructions of the judge were more than moderately influential overall. More importantly, however, there were no differences in the perceptions of the influence of judge's instructions among jurors who were exposed to evidence of different degrees of similarity. There are at least two possible explanations for this. One possibility is that the jurors are not using the instructions properly where propensity reasoning is concerned and are just using the instructions in a general way with regard to reasonable doubt and presumption of innocence. The other possible explanation would be that jurors feel that the temptation to use propensity inferences does not differ as evidence becomes more

similar. This second possibility is unlikely given the findings with regard to jurors' reports of their usage of propensity inferences, which *do* differ depending on the degree of similarity of the evidence.

Participants were aware that they were being influenced by the testimony of the similar fact evidence witness since all participants reported being somewhat influenced by the testimony. Participants' ratings of the influence of the similar fact evidence did correspond in magnitude to the similarity of the evidence to which they were exposed. This level of awareness is important because it shows that to some extent jurors are accurate in reporting certain facets of their decision-making process.

Some level of awareness on the part of the jurors as to certain influences on their decision-making has been demonstrated with this study. What is notable, however, is the lack of efficacy of outside influences in altering how these variables influence the juror. It may be that the jurors are aware that certain factors are influencing their decisions more than others, but they are not aware of specifically how they are being influenced. Alternatively, it is possible that jurors are aware of exactly how they are using the information they are given. Support for this explanation can be found in the accuracy of juror's reports of their usage of propensity inference. The question of whether jurors are not *able* to follow instructions or whether they are not *willing* to follow instructions deserves further investigation. Very different courses of action in the legal system would be called for depending on which of these possibilities held true.

Not all of the variation is accounted for by similarity or propensity when examining measures of guilt. Therefore there are other factors that must be influencing the decision-making processes. It is important for the courts to know which specific

factors they should be concerned with when weighing probative value against prejudicial value. Therefore, in our next study we attempted to investigate another possible source of bias where similar fact evidence is concerned.

CHAPTER 5: STUDY 3

In Study 3 we added cogency as a variable in order to investigate whether evidence that is proven and evidence of a mere allegation would differentially influence juror decisions. As previously discussed, cogency is already recognized as an important variable for consideration in the law. However, the recognition that cogency has garnered has to do with its probative value, not its potential for prejudice. As previously discussed, when a judge makes the decision to admit similar fact evidence, he or she must weigh the probative value of the evidence against its potential for prejudice. Paciocco & Stuesser (1996) state that in order to weigh probative value the judge must consider and evaluate three different factors. According to Paciocco and Stuesser (p. 43), these three factors are:

a) the cogency of the evidence,

b) the extent to which the evidence supports the inference sought to be drawn

c) the extent to which the fact sought to be inferred is in issue in the proceedings

According to Paciocco and Stuesser, "the more compelling the proof of the similar act is, the more cogency the evidence will have and the greater its probative value will be." Contrary to the above stated use of cogency to assess probative value—something that we will not address here[9]—we expect that cogency will actually have an effect on the *prejudicial* value of the evidence. Thus, while the judge may consider cogency in her evaluation of probative value, we expected to produce evidence to support the claim that judges should evaluate cogency in terms of potential prejudicial effects as

[9] We were concerned with assessing potential for prejudice in the present study, not probative value although it can be argued that the two concepts are intertwined.

well. If cogency is being evaluated in terms of its probative value, it should also be evaluated in terms of its potential for prejudice. That way, a more accurate assessment can be made when weighing probative and prejudicial value against each other.

One problem we wished to address with this study is that the prejudicial value of cogency is not known outside of mere intuitive speculation. Intuitively, we might assume that people would be more influenced by evidence that has been proven in a court of law rather than being a mere accusation, but it remains to be seen whether this can be empirically validated. Therefore, we sought to empirically validate this assumption.

We were primarily concerned with how cogency might influence juror decisions in this study. For this reason, we included only the "very" and "extremely" similar conditions as these are the conditions where the similar fact witness's evidence would be about a crime punishable in a court of law. Even though we have not found any evidence in the previous studies to suggest that the very similar and extremely similar conditions differ, we included both conditions since the "very similar" condition represents the degree of similarity of the evidence in *R v. B. (C.R.)*. Since there was debate in the Supreme Court whether this evidence was similar enough to be admitted, we wanted to continue to compare this "very" similar condition of the actual case with the fictitious "extremely" similar condition.

We hypothesized that cogency would be an important consideration in terms of potential for prejudice. We expected that jurors would be more negative in their judgments when they were exposed to similar fact evidence that has been proven than to similar fact evidence that has not been proven. We also expected that propensity usage would be influenced by the cogency of the evidence. In this study, we continued our

examination of the jurors' own perceptions of how influential the similar fact witness was as well as how influential they felt the judicial instructions were.

Methods

Participants

The 115 participants (99 females and 16 males) were recruited and debriefed exactly as in study 1 and study 2.

Design

The design was a 2X2 (+ control) factorial design with the two independent variables of interest being *similarity* and *cogency*. The similarity conditions consisted of a "very similar" condition, and an "extremely similar" condition. These were crossed with the cogency variable that also consisted of two levels: a proven conviction condition and an unproven allegation condition. To serve as a baseline, there was a control condition in which there was no similar fact evidence.

Procedure

The procedure was identical to that of study 1 and 2.

Materials

The trial.

The trial was the same trial used in study 1 and 2 except for some minor changes. Since we were including a cogency variable, there were some minor changes to the testimony of various witnesses so that they made logical sense. In addition, the evidence provided by the similar fact witness was altered in order to manipulate the cogency variable. In the "proven" conviction condition the similar fact witness will recount that there was a trial and that a jury found the defendant guilty of a sexual offense against her. In the "not proven" condition, the similar fact witness recounted that, although she told a few friends about the sexual offense, she did not ever tell anyone official.

Dependent Measures

The questionnaire used was identical to the one used in study 2.

Results

Overview

Analyses performed included chi-square analyses of verdict; an analysis of variance performed on ratings of guilt, judgment, and other dependent measures of interest. A path analysis was performed on propensity use and three different measures of guilt in order to further understand the role of propensity reasoning in juror decision-making. Preliminary analyses revealed that there was a sex effect on some dependent measures of interest. When a sex effect was found in the preliminary analyses, sex was

included in the model for analyses and reported in footnotes; sex was not found to make much appreciable difference in the results nor was it of particular interest in the study given so few male participants.

Preliminary Analyses on Similarity

A one-way ANOVA yielded no significant differences between the two levels of similarity (very and extremely) on any of the dependent measures. For this reason, we collapsed very and extremely similar into one level. We then performed some analyses with three levels of the independent variable of cogency--a control condition with no mention of a prior accusation, a no proof condition with an unproven accusation against the defendant and a proof condition with mention of the defendant having a proven criminal record. All analyses were performed with similarity collapsed into one level.

Verdicts

A Pearson chi-square analysis revealed that condition had a significant effect on verdict choice, $\chi^2 (2, N = 115) = 9.84, p < .01$. In order to unpack this effect further, chi-square analyses were performed on separate 2 X 2 combinations. There were significantly more guilty verdicts in the proof condition than in the control group $\chi^2 (1, N = 70) = 9.5, p < .01$. Furthermore, somewhat more participants in the no proof condition gave guilty verdicts than did those participants in the control condition, although this difference was not statistically significant [χ^2 $(1, N = 69) = 3.5$ $p < .10$]. Contrary to expectations, there were no significant differences between verdicts rendered in the proof and no proof condition χ^2 $(1, N = 91) = 2.6$ $p = .11$, although there was a trend in that direction (see table 3.1).

Table 3.1 Verdict Counts by Condition

	Verdict		
Condition	Not Guilty	Guilty	Total
Control	21	3	24
No proof	30	15	45
proof	23	23	46
Total	74	41	115

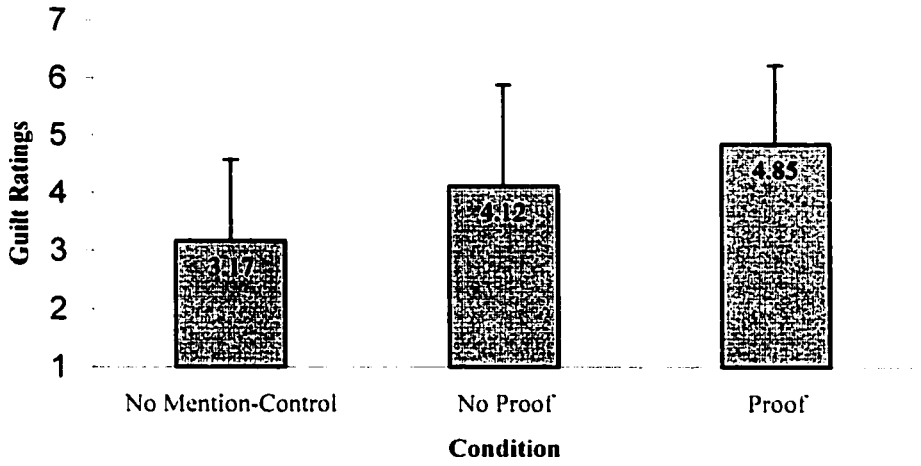
Ratings of Guilt

Analysis of variance yielded a significant effect of cogency on likelihood of guilt ratings F (2, 112) = 9.48, p <.001 (see appendix A, Table A12). Post hoc tests (Fisher's LSD[10], p<.05) indicated that those participants in the control condition gave lower ratings than those in the proof and those in the no proof condition. As well, participants in the no proof condition gave lower ratings than those in the proof condition (see figure 3.1)[11].

[10] The Fisher's least significant difference (LSD) procedure was used in Study 3 for making a posteriori comparisons. This procedure is appropriate when the experiment involves three means and the overall F is significant (Howell, 1992).

[11] When sex was included in the analyses, a 2 X 3 (sex X cogency) ANOVA again yielded a significant effect of cogency on likelihood of guilt ratings F (2, 109) = 3.51, p <.05. Post hoc tests (LSD, p < .05) indicated that those participants in the control condition gave lower ratings than those in the proof and in the no proof condition. As well, participants in the no proof condition gave lower ratings than those in the proof condition. A main effect of sex was found such that ratings of guilt assigned by females (M = 4.35, SD = 1.6) were generally higher than those assigned by males (M = 3.37, SD = 1.8) F (1, 109) = 4.16 p < .05, however, there were no interactions between variables.

Figure 3.1 Mean Ratings of Guilt by Condition



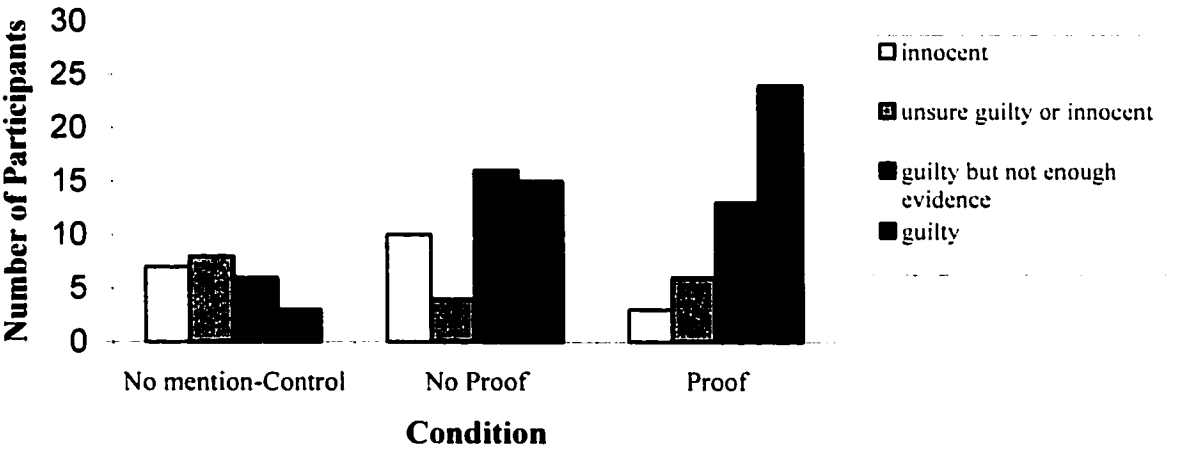
Judgment

An analysis of variance yielded a significant cogency effect on judgments F (2, 112) = 8.28, p < .001(see appendix A, Table A13) such that participants who read testimony with mere accusations or actual proof of past similar behaviour were more negative in their judgments of the defendant (M =2.8, SD = 1.14, M =3.26, SD =.9) than were those participants who read evidence with no mention of any past actions (M = 2.21, SD =1) (LSD, p <.05). In addition, participants who read evidence where the past similar behaviour was proven were more negative in their ratings than those participants who read of similar past behaviour that was a mere allegation (LSD, p <.05)[12].

[12] When sex was included in the analyses, a 2 X 3 (sex X cogency) ANOVA yielded a marginally significant effect of cogency on likelihood of guilt ratings F (2, 109) = 2.26, p =.11 A main effect of sex was found such that ratings of guilt assigned by females were more negative than those assigned by males F (1, 109) = 4.36 p < .05, however, there was no interaction among conditions. Furthermore, when females were analysed separately from males, female ratings differed depending on which condition they were in F (2, 96) = 9.72, p <.001. No differences were found within males however there was a relatively small number of males to make such a comparison (n = 15).

Because examining the shift in the reasons for voting "not guilty" was of interest we further examined it by looking at the counts of judgment by condition (see figure 3.2). We found that jurors reasons for voting not guilty seemed to shift depending on the level of similarity of evidence to which they were exposed.

Figure 3.2 Judgment Counts by Condition



Propensity

Because there is no possibility of using propensity reasoning in the control condition (since there is no similar fact evidence), the analyses on propensity are performed only on the proof and no proof conditions. Cogency in these analyses then refers to an independent variable with two levels of no proof and proof.

Propensity thought.

An ANOVA examining cogency on propensity thinking revealed no significant differences between no proof and proof. This indicates that participants did not endorse propensity thinking any differently when they were in the "no proof" or the "proof"

condition. However, overall ratings of propensity thinking were quite high ($M = 5.3$, $SD = 1.4$), indicating that many participants were highly endorsing propensity type thoughts.

Propensity use.

An ANOVA examining the effect of cogency on propensity use revealed no significant differences between "no proof" and "proof." This indicates that participants did not believe they were using propensity reasoning any differently when they were in the no proof or the proof condition. Again, the overall ratings of propensity use were quite high ($M = 4.88$, $SD = 1.5$), indicating that participants were aware that they were using propensity type reasoning.

Path Analyses on Verdict and Propensity

We did not expect there to be any appreciable differences between conditions of cogency where propensity use was concerned. The reason being that if the jurors were abiding by judge's instructions not to use propensity, they would not be expected to differentiate between proof and no proof since that is not something on which the judge instructs the jury.

Verdict.

The zero-order correlations are presented in Table 2.3 among the treatment variable (exogenous variable) of similarity and the dependent measures (endogenous variables) of propensity and verdict.

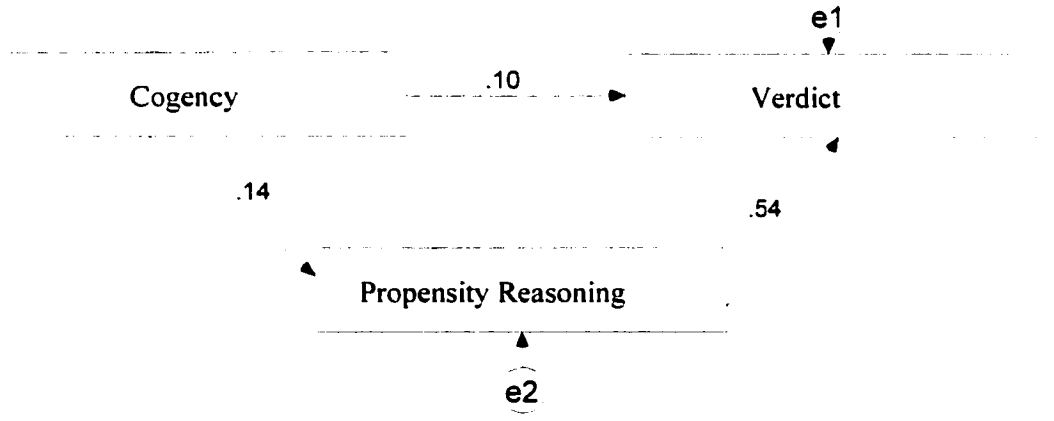
Table 3.2 Correlations Among Cogency, Propensity, and Verdict

	Correlations				
Variable	1	2	3	*M*	*SD*
1. Cogency	-			.51	.5
2. Propensity	.14	-		4.88	1.53
3. Verdict	.17	.55**	-	.42	.5

Note: **$p<.01$

A path analysis was conducted to determine whether propensity mediated between cogency and verdict. Cogency did not have a significant effect on verdict nor did it have a significant effect on propensity. The indirect of cogency on verdict through propensity is $\beta = .07$ which is lower than the direct effect. For these reasons, we cannot conclude that propensity mediated between cogency and verdict.

Figure 3.3 Path Model of Juror Decision-Making Process



Influence of Similar Fact Witness's testimony

An ANOVA was performed in order to assess the extent to which cogency influenced participants' perceptions of the influence that the testimony of the similar fact witness had on their decision. Results from the analysis suggested that the cogency of the evidence did affect ratings of influence $F(1,89) = 10.35, p < .01$ (see Appendix A, A14). Participants who read accusations that were proven rated that that evidence had influenced their decision more ($M = 5.72, SD = 1.3$) than participants who read evidence that was a mere accusation ($M = 4.69, SD = 1.8$).

Influence of Judge

An ANOVA yielded no effect cogency on participants' ratings of the influence of judge's instruction on decision-making. The overall mean rating was 4.44 indicating that participants in all conditions felt that the judge's instructions played a moderate role in their decision-making process.

Discussion

Results suggest that more concern with the potential prejudicial value of the cogency of the evidence *is* warranted. Unexpectedly, there were no differences in verdicts between jurors exposed to proven versus unproven evidence. As expected, however, when jurors were exposed to evidence that the defendant had committed a

similar crime in the past and this crime was proven in a court of law, they were more likely to find the defendant guilty than if no mention had been made of any past crime.

These results are interesting as they raise questions regarding possible judgmental biases at play during decision-making. The most obvious question is in regard to what is going on in the minds of the jurors that creates the lack of differential effects on verdicts when exposed to evidence of a proven criminal record or evidence of alleged criminal activity. This lack of difference runs counter-intuitive to our expectations that jurors would be sensitive to the difference between a mere allegation and a proven criminal record. The fact that they are not raises many issues having to do with the mechanism of bias that is being utilized by the jurors.

When looking at less definitive measures of guilt than simply "guilty/not guilty," results indicated that jurors were slightly more sensitive to the issue of cogency than they were with verdicts. However, even with ratings of guilt, jurors who were exposed to the mere mention of an allegation felt that the defendant was more likely to be guilty than did jurors who read no mention of a past allegation against the defendant. For reasons we are not entirely sure, but speculate that may be related to the fact that "likelihood of guilt" ratings allow for more variation in the judgments (i.e. a Likert scale) than verdict (a dichotomous variable), jurors *did* differentiate between a proven criminal record and a mere allegation.

Thus, jurors appear to be more sensitive to the difference between a proven criminal record and an unproven allegation only to the extent that the decision can be assessed with a sensitive measure. That is, when the decision is a dichotomous simple one, jurors seem to err on the side of negativity and find the defendant guilty or feel that

he is guilty, even after the mere mention of a criminal past which involves similar behaviour. On the other hand when allowed to rate the defendant's guilt on a more sensitive scale, they are able to differentiate between proof and no proof. However, as mentioned previously, it is very interesting to note that no matter what the measure, jurors are more negative in their judgments when exposed to the mere mention of a past allegation than they are when there is no mention of any past allegation. This is something that invites further investigation.

Participants' reporting of the influence of the similar fact witness on their decision reflected the condition that they were in. That is, participants who were in the proof condition reported being more influenced by the similar fact evidence than those in the no-proof condition. Again, it seems that participants have an awareness of the magnitude of influence the evidence had on their decisions. This again suggests an unexpectedly high level of awareness on the part of the jurors.

Examining jurors' use of propensity reasoning was another goal of this study. As expected, we again found that the use of propensity reasoning had a negative effect on verdict. The use of propensity reasoning seems to drive verdict decisions and other guilt decisions despite judge's instructions that it should not. We did not expect that judge's instructions would have a differential effect due to the cogency as there were no instructions to deal with this information any differently whether it was proven or unproven. Again, it is interesting to note that participants felt that they were moderately influenced by the judge's instructions even though they were clearly not fully abiding by these instructions and using propensity in their decision-making.

Although cogency was an influential variable, it was mediated through propensity. Once again, this indicate that propensity reasoning appears to be the most influential variable in juror decision-making.

CHAPTER 6: GENERAL DISCUSSION

Mock jurors were prejudiced by similar fact evidence. They were either unable or unwilling to follow judicial instructions with regard to not using propensity reasoning. Jurors, instead, used propensity reasoning to the detriment of the defendant. These results may not come as a surprise to social cognitive psychologists who are already aware of heuristic thinking and the inferential tendencies of the human judgment maker. But the courts should take notice of these findings and be realistic with regard to human decision-making in formulating the rules of evidence, specifically the similar fact evidence rules.

As there is limited research on similar fact evidence, the present research can be seen as establishing a basic understanding of the effects of similar fact evidence on jurors. These findings are similar to those of previous research on prior record evidence, which has found that there are deleterious effects of exposing jurors to prior record evidence. The similarities between the findings of this research and past research lie in the inability or unwillingness of jurors to ignore or limit the use of certain information in their decision-making processes.

Limitations

These results must be interpreted with some caution, as there are limitations to the mock jury research paradigm used in this series of studies. Four main concerns are often raised with regard to psychological research in the law using a mock jury paradigm. The first of these issues relates to the use or omission of deliberations. The use of

deliberation more closely mirrors the actual legal process and therefore has more ecological validity.

The second concern about of the mock jury paradigm involves the format in which the trial is presented to the participants. In some past research, the trial has often been presented to the mock jurors as a small vignette summing up a case (either fictional or non-fictional) in a paragraph or a page. At the other extreme, a trial may be presented in a courtroom with actors playing the parts of the judge, jury, and lawyers. The present research was limited in the sense that it did not achieve the extent of realism that a mock trial with actors would have. On the other hand, there was a heightened element of realism in that the participants were aware that the trial was adapted from a real trial. In addition, the trial was fairly lengthy with testimony from witnesses, lawyers' examination and cross-examination of witnesses, and judicial remarks to the jury. In addition using university students as mock jurors may be a concern in that they are not representative of the sample from which a real jury is selected.

The third methodological concern about research using a mock jury paradigm involves the inclusion/non inclusion of judicial instructions and the opening and closing statements of the lawyers. The quality, content and existence of instructions is important in making the mock jury paradigm as realistic as possible. In the present study, instructions were included; these were adapted from past research in the field and modified with the help of a criminal lawyer. However, the present paradigm was limited in its realism by the omission of lawyers' opening and closing remarks to the jury, which limits the ecological validity of the paradigm. Opening and closing statements were not included in the trial transcript upon which the trial was based and we felt it was important

to keep the trial as similar to the real trial as possible. In addition, there was a limitation in terms of length of the trial in that we needed all participants to be able to complete the reading portion of the experiment in a specific amount of time. However, the lack of realism of the trial is certainly a concern and it presents a further limitation in that the mock jurors are aware that their decisions are of no real consequence to the defendant. This lack of consequence is a limitation in any mock jury paradigm.

The final area of concern and potential limitation in mock jury research is the choice of dependent variables. In order to increase realism and applicability to the legal system, a measure of verdict should be assessed. However, because the statistical procedures available to analyse verdicts are somewhat limited, other measures of guilt were used in the present study in an attempt to further understand what was occurring in the decision-making process of the jurors. Although other measures did appear to uncover more details regarding the feelings of the jurors, it is not clear what *exactly* is being measured. More psychometric research on the dependent measures used in this kind of paradigm would be useful. For example, it would be interesting and potentially useful to uncover other variables being used in the decision making process of the jurors such as weighing the evidence, memory of the case, etc.

Certain ethical considerations may help to explain why the results were slightly more moderate than were expected. In order to adhere to ethical guidelines for research with human participants, we did not include any lurid sexual details in the trial. In the real trial, these details were included and may well have served to heighten negative reactions to the defendant. For example, if lurid and explicit details had been included in the collusion study, this may have intensified people's reactions to two identical stories

and made the collusion condition more obvious and effective. This could have potentially increased people's suspicion of collusion and strengthened the distinction between the collusion and no-collusion conditions.

Mechanisms

One thing that is important to note is that when discussing the results of these series of studies in terms of the inferential "shortcomings" of the human judgment maker, we are not being pejorative. That is, the ease with which human beings make their way around in a confusing and complex world is remarkable, and not necessarily problematic. Heuristic thinking becomes problematic only when used in the wrong context, such as the courtroom.

The tasks expected of a juror in the courtroom are unique and, contrary to their everyday experience, jurors are expected to make totally rational decisions based only on specific pieces of information. They are discouraged from filling in any gaps in the information, and they are not supposed to bring human experience in to their judgment process. Here is where the problem lies. In our everyday life, it is necessary to use inferential thinking and take mental shortcuts. For instance: what if a person were faced with a decision to ride in a car at night with a person who had committed a sexual offense in the past or a person who had not? It certainly makes sense for the person to choose to ride in the car with the person who has no criminal record. We would assume that there is some probative value to the fact that if the person had committed a crime in the past, they are more likely to commit a crime in the present. Even if we do not believe that they are necessarily going to attack us, we would probably still play it safe when faced with

this decision since there would be no reason not to do so. This assumption not only protects us, but there may be some truth in it. The problem is that to carry this very sensible reasoning into the courtroom is inappropriate because of the way the legal process is organized. Unfortunately, we are unable or unwilling to leave our common sense and heuristic thinking behind.

The representativeness heuristic, the availability heuristic, and the halo effect are all examples (as discussed previously) of some of the psychological mechanisms that people use to make sense of a complex world, sometimes with expediency coming at the cost of accuracy. In any judgmental task, we will use our past experiences to inform our present decisions and we will sometimes succumb to error in the process. For instance, perhaps taking the ride with a person who has a criminal past would have led to a safe, pleasant journey and a new friend. We may have been wrong in our assumption that it was safer to ride with the person who has no criminal past—maybe it will be a dull, boring and tedious ride. This mistake however, is not a dire one; no harm has come of it and we feel as though we made the right choice. The point that needs to be emphasized here is that while these mistakes are not particularly problematic in our everyday life, they can be extremely serious in the legal system.

Implications

Wrongful Convictions

The effect of jurors being prejudiced against the defendant by using propensity reasoning when they have been exposed to similar fact evidence is to bias the jury against

the defendant. If the jury is biased against the defendant based on prohibited reasoning, then the defendant will have been treated unfairly. The ultimate effect of using faulty inferences to arrive at a verdict would be to arrive at the verdict of guilty when in fact the defendant is not guilty and wrongfully convict an innocent defendant.

With the advent of DNA testing, wrongful convictions are being exposed at an alarming rate in the United States and Canada. Often in these cases, the defendant has spent a substantial amount of time incarcerated for a crime he or she did not commit. If wrongful convictions exist in the system, we must try to understand what went wrong in the justice system to produce such a mistake.

Exposing the misuse of similar fact may help to explain where things may go wrong in the criminal process. If jurors are prejudiced by similar fact evidence and this prejudice outweighs any probative value that the evidence actually has, then the defendant is not being judged fairly. Any time the judgment is unfair, the judgments could be faulty and could end in a wrongful conviction.

R v. B. (C.R.)

The results have implications for an analysis of the real case of *R. v. B. (C. R.)*. In the Supreme Court decision on this case, the supreme court justices were split, with some of the judges dissenting from the ruling that the evidence was appropriate to present to the jury. The results of these studies indicate that the dissenters had substance to their claim that the evidence should not have been admitted. The present experiments make it clear that the evidence that they were contesting (the "very" similar) evidence was just as prejudicial as it would have if it had have been virtually identical. Therefore, to let it into

the trial as evidence expecting the jury to limit its use to something other than propensity was misinformed. The probative value of a "very" similar story is unknown but the prejudicial value has been shown to equal that of an identical story—therefore the balancing of probative and prejudicial value of this evidence should have been undertaken with more caution.

The question remains, if similar fact evidence unfairly prejudices the jury, when and how should it be eliminated or its use questioned? If there is this scientific evidence that similar fact evidence can cause unfair prejudice, when should this scientific information be used and how?

Where does science fit into the law?

There is only one built-in mechanism at present whereby the law could resort to empirical research to answer some fundamental questions.

Section 686(1)(b)(iii) of the Canadian Criminal Code

There is a particular article in the Canadian Criminal Code very often referred to by the appellate court in cases involving similar fact evidence. Section 686(1)(b)(iii) regarding the powers of the court of appeal dictates that the court of appeal:

> b) may dismiss the appeal where
>
> iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favor of the appellant, **it is of the opinion that no substantial wrong or miscarriage of justice has occurred.** [Emphasis added]

Herein lies an important part of the appeal process whereby the judges must decide, given that there was an error of law, whether there might have been a different verdict. If the

judges decide that, had it not been for the error of law, there might conceivably have been a different verdict, then the appeal can be accepted and a new trial will be ordered. If, however, the judges find that there is an error of law but they are under the impression that, notwithstanding this error, the verdict rendered would have been the same, then section 686(1)(b)(iii) may be applied and the appeal dismissed. This critical part of the appeal process can ultimately determine whether the appellant will receive a new trial or not.

The important thing to note here for the purposes of the present discussion is the question of how the judges arrive at this decision of whether the trial would have been different had it not been for the error of law. The important decision of what might change the course of the trial should not be left up to *opinion.* It is here that empirical evidence from psychology must come into the process to scientifically address this question of whether decisions would have been different had there not been an error of law.

In the case of *R v. B. (C. R.),* it is definitely possible, given the results of the present research, that were it not for the inclusion of the similar fact evidence, there may have been a different verdict rendered. Therefore an appeal based on section 686 (1) (b) (iii) in this case would be warranted. On the other hand, in some trials discussions of the effect of the inclusion or exclusion of similar fact evidence on the final decision may be moot if there is already enough evidence to find the defendant guilty without any similar fact evidence. When the case may hinge on the similar fact evidence, however, an inquiry into the proper admission of this evidence is warranted.

Future directions

Research in psychology and law is increasingly being accepted and sought out by those in the legal profession. Expert witnesses are being called on more frequently to explain complex psychological phenomena to the judge and jury (such as police lineup fairness and the complexities of eyewitness testimony). However, there is a greater challenge in getting process-oriented research assimilated into the system, since this kind of research raises issues that are woven into the very fabric of the justice system. Efforts to make the courts and legal professionals aware of the research findings on process issues, such as evidence law, are needed.

As discussed previously, this research was aimed at providing a foundation for research on similar fact evidence by addressing some very basic questions about similar fact evidence and propensity reasoning. There is definitely more need, and urgency, for research on similar fact evidence. It would be informative to examine the effects of similar fact evidence in cases where the defendant is charged with a crime other than a sexual offence, such as a murder charge. It would also be interesting and important to examine other variables that may be important in the application of the similar fact evidence rule. Other variables that could be investigated include the amounts and details of the information given to jurors, different characteristics of a defendant such as sex, socioeconomic status, occupation and physical attractiveness. In addition, more research is needed on the issues of trying a defendant for multiple and similar crimes at the same time, since many of the same judgmental processes may be occurring in these cases as are with similar fact evidence.

Overall Message and Recommendations

Human beings are not machines. We are evolutionarily programmed to respond to our environment in certain ways. These include constantly making inferences about our environment and the people we come into contact with. The jury situation is a unique one in the sense that people are expected to make a decision based only on what they hear in court and on nothing else. However, human experience and human logic cannot be avoided in people's decision-making processes. For this reason it is inappropriate to admit evidence that would call for a complete ignorance of everything we have previously learned in order to survive and thrive in the world. That is, the law should be formulated around the notion that people will make propensity inferences.

Similar fact evidence is dangerous if misused. The present series of studies indicates that there is a very good possibility that similar fact evidence is being misused. The most disastrous end result of misuse could be a wrongful conviction and the incarceration of an innocent person. These are very high costs of a mistake. The stakes are especially high in the United States where capital punishment is a possible result of a conviction. With so much on the line, empirical research must be assimilated into the justice system. We must work toward integrating social cognitive psychology into the legal system so as to bring the law more in line with the capabilities of the human judgment maker.

REFERENCES

Acorn, A. E. (1991). Similar fact evidence and the principle of inductive reasoning: Makin sense. *Oxford Journal of Legal Studies, 11(1),* 63-91.

Carretta, T. R., & Moreland, R. L. (1983). The direct and indirect effects of inadmissible evidence. *Journal of Applied Social Psychology, 13,* 291-309.

Carter, P.B. (1985). Forbidden reasoning permissible: similar fact evidence a decade after *Boardman. The Modern Law Review, 48,* 29-43.

Delisle, R.J. (1996). The direct approach to similar fact evidence. 50 C.R. (4^{th}).

Director of Public Prosecutions v. Boardman [1975] A.C. 421, [1974] 3 All E.R. 887.

Doob, A. N., & Kirshenbaum, H. (1972). Some empirical evidence on the effect of s. 12 of the Canadian Evidence Act upon the accused. *Criminal Law Quarterly, 15,* 88-96.

Edwards, K., & Bryan, T. (1997). Judgmental Biases Produced by Instructions to Disregard: The (paradoxical) case of emotional information. *Personality and Social Psychology Bulletin, 23(8),* 849-864.

Fiske, S., & Taylor, S. (1991). *Social Cognition.* New York: McGraw-Hill.

Gilovich, T. (1991). *How We Know What Isn't So. The Fallibility of Human Reason in Everyday Life.* (p. 9). Toronto: Macmillan Canada.

Golding, J., & Hauselt, J. (1994). When instructions to forget become instructions to remember. *Personality and Social Psychology Bulletin, 20(2),* 178-183.

Greene, E., & Dodge, M. (1995). The influence of prior record evidence on juror decision making. *Law and Human Behavior, 19(1),* 67-78.

Hans, V., & Doob, A. (1975). Section 12 of the Canadian Evidence Act and the deliberations of simulated juries. *Criminal Law Quarterly, 18,* 235-253.

Hoffmann, L. H. (1975). Similar facts after Boardman. *The Law Quarterly Review, 91,* 193-206.

Howe, E. S. (1991). Judged likelihood of different second crimes: A function of judged similarity. *Journal of Applied Social Psychology, 21(9),* 697-712.

Imwinkelried, E. (1985). Uncharged Misconduct. *Anglo-American Law Review, 22(1),* 73-96.

Kunda, Z. (1999). *Social Cognition: Making Sense of People.* Cambridge, Mass: MIT Press.

Lerner, M. (1980). *The Belief in a Just World: A Fundamental Delusion.* New York: Plenum Press.

Makin v. Attorney-General for New South Wales [1894] A.C. 57

Mee, M. D. (1994). Similar fact evidence: Still hazy after all these years. *Dublin University Law Journal, 16,* 83-104.

Mischel, W. (1968). *Personality and Assessment.* New York: Wiley

Mischel, W., & Peake, P. (1982). Beyond déjà vu in the search for cross-situational consistency. *Psychological Review, 89,* 730-755.

Nisbett, R., & Ross, L. (1980). *Human Inference: Strategies and Shortcomings of Social Judgment.* New Jersey: Prentice-Hall.

Nisbett, R. E., & Wilson, T. D. (1977). The halo effect: Evidence for unconscious alteration of judgments. *Journal of Personality and Social Psychology, 35,* 250-256.

Paciocco, D.M., and Stuesser, L. (1996). *The Law of Evidence.* Toronto: Irwin Law.

R v. B. (C.R.) [1990] 1 S.C.R. 717.

R. v. B. (F.F.) [1991] 1 S.C.R. 763.

R. v. C. (M.H.) [1993] 1 S.C.R. 697.

R. v. Straffen [1952] 2 Q.B. 911, [1952] 2 All E.R. 657.

Rind, B., Jaeger, M., & Strohmetz, D. B. (1995). Effect of crime seriousness on simulated jurors' use of inadmissible evidence. *The Journal of Social Psychology, 135*, 417-424.

Rosenberg, S., & Sedlak, A. (1972). Structural representations of implicit personality theory. In L. Berkowitz (Ed.), *Advances in Experimental Social Psychology*, Vol. 6, New York: Academic Press.

Severance, L., Greene, E., & Loftus, E. (1984). Toward criminal jury instructions that jurors can understand. *Journal of Criminal Law and Criminology, 75(1)*, 198-233.

Schaefer, E. G. & Hansen, K. L. (1990). Similar fact evidence and limited use instructions: An empirical investigation. Criminal Law Journal, 14, 156-179.

Thompson, W. C., Fong, G. T., & Rosenhan, D. L. (1981). Inadmissible evidence and juror verdicts. *Journal of Personality and Social Psychology, 40*, 453-463.

Taylor, S., Peplau, L., & Sears, D. (1994). *Social Psychology.* New Jersey: Prentice Hall.

Tversky, A., & Kahneman, D. (1974). Judgment under uncertainty: Heuristics and biases. *Science, 185*, 1124-1131.

Wegner, D. M., Schneider, D. J., Carter, S. R., & White, T.L. (1987). Paradoxical effects of thought suppression. *Journal of Personality and Social Psychology, 53*, 5-13.

Williams, C.R. (1979). The Problem of Similar Fact Evidence. *The Dalhousie Law Journal, 5*, 281-348.

Wissler, R., & Saks, M. (1985). On the inefficacy of limiting instructions. When jurors use prior conviction evidence to decide on guilt. *Law and Human Behavior, 9(1)*, 37-48.

Wolf, S., & Montgomery, D. A. (1977). Effects of inadmissible evidence and level of judicial admonishment to disregard on the judgments of mock jurors. *Journal of Applied Social Psychology, 7*, 205-219.

APPENDIX A

Statistical Tables

Table A1. Anova on Similarity(General Content) Ratings by Similarity Condition

Tests of Between-Subjects Effects

Dependent Variable: SIMILAR1

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	43.700[a]	3	14.567	10.880	.000
Intercept	1020.100	1	1020.100	761.900	000
CONDREV	43.700	3	14.567	10.880	000
Error	48.200	36	1.339		
Total	1112.000	40			
Corrected Total	91.900	39			

a. R Squared = 476 (Adjusted R Squared = 432)

Table A2. Anova on Similarity (Sexual Content) Ratings by Similarity Condition

Tests of Between-Subjects Effects

Dependent Variable: SIMILAR2

Source	Type III Sum of Squares	df	Mean Square	F	Sig
Corrected Model	67.700[a]	3	22.567	15.683	.000
Intercept	1102.500	1	1102.500	766.216	000
CONDREV	67.700	3	22.567	15.683	000
Error	51.800	36	1.439		
Total	1222.000	40			
Corrected Total	119.500	39			

a. R Squared = 567 (Adjusted R Squared = 530)

Table A3. Anova on Guilt Ratings by Similarity Condition

Tests of Between-Subjects Effects

Dependent Variable: how likely do you think it is that he is guilty?

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	44.103[a]	4	11.026	7.078	.000
Intercept	951.119	1	951.119	610.549	.000
CONDIT	44.103	4	11.026	7.078	.000
Error	144.876	93	1.558		
Total	1132.000	98			
Corrected Total	188.980	97			

a. R Squared = .233 (Adjusted R Squared = .200)

Table A4. Anova on Judgment Ratings by Similarity Condition

Tests of Between-Subjects Effects

Dependent Variable: JUDGMENT

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	23.724[a]	4	5.931	7.488	.000
Intercept	435.532	1	435.532	549.841	.000
CONDIT	23.724	4	5.931	7.488	.000
Error	74.458	94	.792		
Total	531.000	99			
Corrected Total	98.182	98			

a. R Squared = .242 (Adjusted R Squared = .209)

Table A5. Anova on Propensity Thought Ratings by Similarity Condition

Tests of Between-Subjects Effects

Dependent Variable: propensity reasoning

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	222.752[a]	3	74.251	35.216	.000
Intercept	1297.263	1	1297.263	615.267	.000
CONDIT	222.752	3	74.251	35.216	.000
Error	158.134	75	2.108		
Total	1669.000	79			
Corrected Total	380.886	78			

a. R Squared = .585 (Adjusted R Squared = .568)

Table A6. Anova on Influence of Similar Fact Witness by Similarity Condition

Tests of Between-Subjects Effects

Dependent Variable: influence of melissa

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	64.616[a]	3	21.539	7.570	.000
Intercept	1269.202	1	1269.202	446.097	.000
CONDIT	64.616	3	21.539	7.570	.000
Error	213.384	75	2.845		
Total	1542.000	79			
Corrected Total	278.000	78			

a. R Squared = .232 (Adjusted R Squared = .202)

Table A7. Anova on Likelihood of Guilt by Similarity by Collusion by Sex

Tests of Between-Subjects Effects

Dependent Variable: how likely do you think it is that he is guilty?

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	107.167[a]	11	9.742	3.932	.000
Intercept	1387.828	1	1387.828	560.133	.000
COLLUSIN	.202	1	.202	.082	.775
SIMRITY	45.813	2	22.907	9.245	.000
SEX	22.285	1	22.285	8.994	.003
COLLUSIN * SIMRITY	1.471	2	.736	.297	744
COLLUSIN * SEX	.964	1	.964	.389	534
SIMRITY * SEX	4.824	2	2.412	974	380
COLLUSIN * SIMRITY * SEX	.342	2	.171	.069	933
Error	376.607	152	2.478		
Total	2657.000	164			
Corrected Total	483.774	163			

a. R Squared = .222 (Adjusted R Squared = .165)

Table A8. Anova on Judgment of Guilt by Similarity by Collusion by Sex

Tests of Between-Subjects Effects

Dependent Variable: JUDGMENT

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	36.878[a]	11	3.353	3.075	.001
Intercept	654.712	1	654.712	600.464	.000
COLLUSIN	.314	1	.314	.288	.592
SIMRITY	16.853	2	8.427	7.728	.001
SEX	6.058	1	6.058	5.556	.020
COLLUSIN * SIMRITY	.678	2	.339	.311	.733
COLLUSIN * SEX	.800	1	.800	.734	.393
SIMRITY * SEX	4.273	2	2.137	1.960	.144
COLLUSIN * SIMRITY * SEX	2.074	2	1.037	.951	.389
Error	165.732	152	1.090		
Total	1188.000	164			
Corrected Total	202.610	163			

a. R Squared = .182 (Adjusted R Squared = .123)

Table A9. Anova on Propensity Thought by Similarity by Collusion by Sex

Tests of Between-Subjects Effects

Dependent Variable: propensity reasoning

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	387.873[a]	11	35.261	14.403	.000
Intercept	1764.216	1	1764.216	720.616	.000
COLLUSIN	4.573E-02	1	4.573E-02	.019	.891
SIMRITY	275.395	2	137.697	56.244	.000
SEX	8.209	1	8.209	3.353	.069
COLLUSIN * SIMRITY	2.416	2	1.208	.493	.612
COLLUSIN * SEX	6.850E-02	1	6.850E-02	.028	.867
SIMRITY * SEX	2.324	2	1.162	.475	.623
COLLUSIN * SIMRITY * SEX	5.595	2	2.797	1.143	.322
Error	372.127	152	2.448		
Total	3384.000	164			
Corrected Total	760.000	163			

a. R Squared = .510 (Adjusted R Squared = .475)

Table A10. Anova on Propensity Use by Similarity by Collusion by Sex

Tests of Between-Subjects Effects

Dependent Variable: propensity reasoning

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	117.236[a]	11	10.658	4.013	.000
Intercept	1513.719	1	1513.719	569.956	.000
COLLUSIN	3.390	1	3.390	1.276	.260
SIMRITY	62.590	2	31.295	11.783	000
SEX	6.557	1	6.557	2.469	.118
COLLUSIN * SIMRITY	.389	2	.195	.073	.929
COLLUSIN * SEX	3.190	1	3.190	1.201	275
SIMRITY * SEX	6.127	2	3.063	1.153	.318
COLLUSIN * SIMRITY * SEX	2.293	2	1.147	.432	.650
Error	401.034	151	2.656		
Total	2749.000	163			
Corrected Total	518.270	162			

a. R Squared = 226 (Adjusted R Squared = .170)

Table A11. Anova on Influence of Similar Fact Witness by Similarity by Collusion

Tests of Between-Subjects Effects

Dependent Variable: influence of melissa

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	126.577[a]	5	25.315	9.154	.000
Intercept	3180.206	1	3180.206	1149.944	.000
COLLUSIN	2.014	1	2.014	.728	.395
SIMRITY	120.693	2	60.346	21.821	.000
COLLUSIN * SIMRITY	4.090	2	2.045	.739	.479
Error	431.423	156	2.766		
Total	3758.000	162			
Corrected Total	558.000	161			

a. R Squared = .227 (Adjusted R Squared = .202)

Table A12. Anova on Likelihood of Guilt by Cogency

Tests of Between-Subjects Effects

Dependent Variable: how likely do you think it is that he is guilty?

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	45.185[a]	2	22.592	9.482	.000
Intercept	1720.230	1	1720.230	722.011	.000
COGENCY3	45.185	2	22.592	9.482	.000
Error	266.846	112	2.383		
Total	2353.250	115			
Corrected Total	312.030	114			

a. R Squared = .145 (Adjusted R Squared = .130)

Table A14. Anova on Influence of Similar Fact Witness by Cogency

Tests of Between-Subjects Effects

Dependent Variable: influence of melissa

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	24.062[a]	1	24.062	10.347	.002
Intercept	2463.315	1	2463.315	1059.257	.000
COGENCY3	24.062	1	24.062	10.347	.002
Error	206.971	89	2.326		
Total	2700.000	91			
Corrected Total	231.033	90			

a. R Squared = 104 (Adjusted R Squared = 094)

Table A13. Anova on Judgment of Guilt by Cogency

Tests of Between-Subjects Effects

Dependent Variable: JUDGEMET

Source	Type III Sum of Squares	df	Mean Square	F	Sig.
Corrected Model	17.746[a]	2	8.873	8.280	.000
Intercept	798.567	1	798.567	745.156	.000
COGENCY3	17.746	2	8.873	8.280	.000
Error	120.028	112	1.072		
Total	1079.000	115			
Corrected Total	137.774	114			

a. R Squared = .129 (Adjusted R Squared = .113)

APPENDIX B

Materials for Studies

*please note that material found in appendix may not be *exact* replications of materials used in studies due to some formatting changes in the document.

Materials for Pilot Study

P1. Consent Form

CONSENT FORM

"It's Your Turn for Jury Duty"
University of Toronto

I _____agree to participate in this study on decision making and the criminal justice system. I understand that my participation involves the following.

I understand that my participation in this study involves one session that will last approximately one hour. During the session, I will read a trial transcript. Following that, I will fill out a questionnaire with questions regarding that trial as well as some more general information questions.

I understand that all information given by me will remain in the strictest confidence, and that, at no time will information of a personal nature (such as my name and address) be released to anyone, nor will this information appear in print.

I understand that the material I will read may be somewhat sensitive and that I am free to discontinue my participation at any time. I have been assured that my participation in this research is totally voluntary.

If I have any questions or complaints about the research, I may direct my inquires to Elizabeth Ridley through the University of Toronto Psychology Department.

Having been fully informed as to the nature of this study, and having been assured that all information will be confidential, I agree to participate in the study.

Signature: _____

Date: _____

P.2 Questionnaire #1 –Treatment Conditions

For Experimenter use: [redacted]

Your #_____

Questionnaire #1

What is your age? _____ Years old

What is your sex? a) Male b) Female

---

1. How similar do you think the content of Melissa White's testimony was to the content of Amanda Croft's testimony? *(You may refer back to the trial)*

1	2	3	4	5	6	7
Not at all similar			somewhat similar			Extremely similar

2. Both Melissa and Amanda described events of a sexual nature. Specifically, with regard to those events, how similar do you think Melissa's story was to Amanda's story?

1	2	3	4	5	6	7
Not at all similar			somewhat similar			Extremely similar

3. What is your verdict in this case?

_____ Guilty

_____ Not Guilty

2. How likely do you think it is that Mr. Croft is guilty?

1	2	3	4	5	6	7
Definitely Not Guilty						Definitely Guilty

3. If you voted "not guilty" on question #1, was it because:

a) You think he is innocent
b) You think he is guilty but you do not think there is enough evidence to prove it
c) You are unsure whether he is innocent or guilty

P.3 Questionnaire #1—Control Condition

For Experimenter use _____ **Your #**_____

Questionnaire #1

What is your age? _____ Years old

What is your sex? a) Male b) Female

---

1. What is your verdict in this case?

_____ Guilty

_____ Not Guilty

2. How likely do you think it is that Mr. Croft is guilty?

1	2	3	4	5	6	7
Definitely Not Guilty						Definitely Guilty

3. If you voted "not guilty" on question #1, was it because:

a) You think he is innocent
b) You think he is guilty but you do not think there is enough evidence to prove it
c) You are unsure whether he is innocent or guilty

P.4 Debriefing Form

Debriefing Form

One of the most complex and important questions in many criminal trials is whether the jury may hear evidence of a defendant's prior criminal or otherwise disreputable activity. In April 1999 with the extensive news reporting of the Alison Parrott murder trial, Canadians became aware of, and in some cases outraged by, the controversial legal question regarding "similar fact evidence." Many people were angry and confused by the fact that the jury was not allowed to hear evidence that Francis Roy (the defendant) had past convictions for rape and assault.

There are specific rules of evidence in the criminal law governing the admissibility and use of such evidence. Underlying the rationale for these conditions of admissibility are many **social psychological** assumptions. These assumptions are based, for the most part, only upon the "common sense" and intuition of those in the legal profession. The present research is an attempt to examine the psychology behind these intuitive assumptions using the scientific method.

The study that you were involved in was a **pilot study**. A pilot study is a "mini-experiment" conducted before a large-scale experiment. The purpose of a pilot study is to pre-test one or more of the independent variables or other stimuli in order to determine if the desired manipulation has been obtained. In other words, it is a way for the experimenter to be sure that levels of the independent variable or other stimuli have been set up as intended. A pilot study gives some assurance to the researcher that when they go ahead with the larger scale experiment that they are indeed manipulating what they were intending to manipulate.

In the present pilot study, the stimulus that was being tested was the relationship between the levels of the independent variable and the trial. The **independent variable** is *similarity* of evidence. The researchers are interested in determining participant's ratings of the *similarity* of the similar fact evidence to the testimony of the main prosecution witness. The rating of similarity is **the dependant variable**. We **hypothesize** that there will be four clusters of similarity ranging from not at all similar to extremely similar. You were randomly assigned to one of four treatment groups. Each group read a different version of the similar fact evidence. There is no **control group** in this pilot study.

By examining the properties of the similar fact evidence, we will be better prepared to more accurately design the large-scale study that will follow. As previously mentioned, the planned large scale study is an attempt to empirically examine some of the intuitive psychological assumptions being made in evidence law regarding human decision making.

References

Wissler, R. & Saks, M. (1985). On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt. Law and Human Behavior, 9(1), 37-48.

Gleitman, H. (1994). Psychology. (5th ed.) New York: W.W. Norton & Co. pp. 467-487.

P.5 Debriefing Questions

Debriefing Questions

1. In which general area of psychology does this type of research belong?

Answer: Social Psychology

2. What kind of study is this?

Answer: A pilot study

3. What is a pilot study?

Answer: A pilot study is a "mini-experiment" conducted before a large-scale experiment. The purpose of a pilot study is to pre-test one or more of the independent variables or other stimuli in order to determine if the desired manipulation has been obtained. A pilot study gives some assurance to the researcher that when they go ahead with the larger scale experiment that they are indeed manipulating what they were intending to manipulate.

4. What stimuli are being pre-tested?

Answer: The similar fact evidence

5. What are the desired manipulations?

Answer: That there will be four different clusters of similarity ranging from not at all similar to very similar corresponding to the four different versions of the similar fact evidence that participants read.

P.6 The Trial Title Page – Treatment Conditions

HER MAJESTY THE QUEEN

(Respondent)

-against-

STEVEN JEREMY CROFT
(Accused)

J. F. Myers – for the Crown

L. B. Foster – for the Defense

For the Crown:

1) Amanda May Croft –the complainant

2) Melissa White –witness

For the Defense:

2) Steven Jeremy Croft – the defendant

3) Deborah McLoyd – social worker

P.7 The Trial Title Page –Control Condition

HER MAJESTY THE QUEEN

(Respondent)

-against-

STEVEN JEREMY CROFT
(Accused)

J. F. Myers – for the Crown

L. B. Foster – for the Defense

For the Crown:

4) Amanda May Croft –the complainant

For the Defense:

5) Steven Jeremy Croft – the defendant

6) Deborah McLoyd – social worker

P.8 The Trial –All Conditions

The case for the Crown

Amanda Croft, sworn

1) Examination-in-chief by Mr. Myers

Q. Amanda, how old are you?
A. 15.

Q. When were you were born?
A. January 13th, 1970.

Q. Who are your natural parents? First, your mother's name?
A. Louise Margaret Fisher.

Q. The name Fisher, was that her married name or her maiden name?
A. Her maiden name.

Q. And your natural father?
A. Steven Jeremy Croft.

Q. Did your natural parents break-up at some time?
A. Yes, when I was 2.

Q. All right. Did your mother remarry or become involved with another man?
A. Well, she did not remarry, but she was involved with another man.

Q. All right. Who was this other man?
A. Mark Hall.

Q. Did you and your mother live with Mark Hall?
A. Yes.

Q. Where did you live at this time?
A. Toronto.

Q. Okay. I understand that in 1981 your mother died, --
A. Yes, she did.

Q. All right, do you know the circumstances that led to her death?
A. Overdose.

Q. Would that be an overdose of pills?
A. Yes.

Q. **I understand that you came thereafter to live with your natural father Steven Jeremy Croft; is that correct?**
A. **Yes.**

Q. **All right. So you moved from Toronto to Calgary.**
A. **Yes.**

Q. **Had you ever met your natural father's new wife, Anna, before that?**
A. **No.**

Q. **What grade were you about to enter into?**
A. **6.**

Q. **Where are you living now?**
A. **In Edmonton in a group home.**

Q. **And that is a group home where you were placed by Alberta Social Services?**
A. **Yes.**

Q. **Have you been made aware of their plans in relation to you moving elsewhere?**
A. **When I turn 16 in January, I'll be moving in with my grandfather—my mother's father.**

Q. **Was there anyone else living with Anna and your father and yourself?**
A. **Yes. Anna's son Victor.**

Q. **How old did you understand him to be when you moved in?**
A. **19.**

Q. **All right. Now, at some point I understand in the fall of 1981 some unusual things started happening between you and your father; is that correct?**
A. **Yes.**

Q. **All right. I want you now to recall the first incident in that nature. Firstly tell me approximately when it first started happening.**
A. **Beginning of November.**

Q. **Of 1981?**
A. **Yes. About 2 months after I arrived.**

Q. **All right. And who all was home when the incident happened"**
A. **Just Mr. Croft and me.**

Q. Okay. Tell us now what happened.
A. Well, first, he asked me to watch a movie with him. Then he told me that he wanted me to wear my nightgown and sit with him on the couch. He said he had back problems and he wanted to lie down. Then...

At this point, Amanda relates in detail an incident involving extensive improper sexual touching.

Q. All right. Did you tell anyone about this incident after it happened, before the next incident happened?

A. No.

Q. Do you recall in relation to when the first incident happened how long it was before the next incident occurred?
A. Couple of days.

Q. And are you able to recall now what happened in that second incident?
A. Basically the same thing.

Q. On that second incident, was there anyone else home besides you and your father?
A. No.

Q. Where was Anna?
A. At work.

Q. And when you say "basically the same," do you mean the same events of a sexual nature?
A. Yes.

Q. How many more events of that nature do you recall occurring before you talked to someone about it?
A. Two, maybe three.

Q. That is, are you saying that this happened about four or five times before you told anybody about it?
A. Yes.

Q. And were all of those events more or less the same as you've described the first incident?
A. Yes.

Q. Would all of them be instances where they occurred in the home?
A. Yes.

Q. Would they all be incidents where Anna was at work?
A. Yes.

Q. Who did you first tell about these incidents?
A. I told two school friends?

Q. And you knew that one of these friends told her mother?
A. Yes.

Q. Shortly after that, you received a visit from a social worker named Deborah McLoyd. Is that correct?
A. Yes.

Q. What did she say? Or what do you recall the subject she discussed was?
A. That someone had called her and said that my father was sexually abusing me.

Q. Did you say anything in response to that?
A. No.

Q. All right.
A. Well, she asked me if it was true and I said that it wasn't.

Q. Did you provide to her an explanation for the complaint that she had received?
A. Yes, I said that my friend had just misinterpreted me.

Q. Was that the truth?
A. No.

Q. Why did you lie?
A. Because I changed my mind.

Q. All right, so I take it you continued to live in the house.
A. Yes.

Q. Did any of these kinds of events that you have described of a sexual nature between you and your father continue to happen?
A. Yes, they did.

Q. On – how often would they happen?
A. Two, three nights a week.

Q. At some point in time did they change? Did he do anything else to you?

A. Yes.

At this point Amanda testifies that the sexual events progressed beyond touching to sexual intercourse.

Q. All right. Now, I understand that in September of '83, you told someone else about these events.
A. Yes.

Q. Who did you tell?
A. My school guidance counselor—Mr. Evans.

Q. How soon after the last incident of sex between you and Mr. Croft did you tell Mr. Evans.
A. A few weeks.

Q. What led you to change your mind and to tell someone in September of 1983?
A. I wanted to go and live with my grandfather.

Amanda then testifies that she told her school counselor about the incidents. After this, Amanda was removed from the home and placed in a group home in Edmonton.

Q. In relation to all of these activities of sexual contact between you and your father, did you want him to do any of those things?

A. No.

Q. All right. Mr. Foster is going to ask you some questions now. I'd please ask you to answer his questions as honestly as you can.
A. Yeah.

2) Cross-examination by Mr. Foster

Q. Okay. What, if anything, triggered you to go and see your guidance counselor and make this complaint?
A. Mr. Croft and I had an argument.

Q. What was the argument about?
A. He had come home from work and Anna was leaving for work. I told him that I wanted to go to Edmonton to stay with my grandfather for a while and he got mad at me, saying that I didn't love or care for him and stuff like that.

Q. Had you ever gone to stay with your grandfather before?
A. Yes. Maybe five or six times.

Q. All right. Now I believe that Anna worked evenings at the bakery, isn't that right?
A. Yes.

Q. But she only worked Monday to Thursday, didn't she?
A. I don't remember.

Q. She didn't work weekends though, did she?
A. She didn't work Friday, Saturday or Sunday, --

Q. When did she come home from work?
A. Usually about 7 o'clock at night.

Q. And when did Mr. Croft get home from work?
A. Usually about 6 o'clock at night.

Q. So you're saying that these events took place between 6 and 7 o'clock on days between Monday and Thursday?
A. I guess so. Yeah.

Mr. Foster's next questions reveal that Victor (Anna's son) was often in and out of the house irregularly and that Anna often came home early from work because she had problems at her job. In other words, it was a very busy household, with constant traffic going in and out of the house.

Q. Now, I take it that this was a very major decision for you to go and see the guidance counselor at your school, wasn't it?
A. Yes, it was.

Q. Is this something you had thought about for a long time before doing it?
A. Yes, I thought about it over the weekend.

Q. **All right. Have you ever thought during the two years from the time that this started in 1981 in November, as you have said, until September when you finally told the guidance counselor,--**

A. **Yes, there were a number of times.**

Q. **All right. And Mr. Evans had helped you in grade 7 with some homework study plan and that sort of thing to help you in your school work, isn't that right?**

A. **Yes.**

Q. **And you would have seen him on a number of occasions throughout grade 7? And you would have appointments in his office to see him on these occasions?**

A. **Yes.**

Q. **Would it just be the two of you in his office on those occasions?**

A. **Yes.**

Q. **So you would have had the opportunity to talk to him at that time, would you not, about this problem with Mr. Croft?**

A. **Yes.**

Q. **But you chose not to.**

A. **Yes.**

Q. **Don't you have a wish to go and live with your grandfather?**

A. **Yes. I have had for a very long time.**

Q. **So you had a wish to live with your grandfather even before you came to live with your father?**

A. **Yes. I wanted to live with my grandfather before I even met my biological father.**

Q. **All right. Did you think that after you had spoken to the guidance counselor about this particular complaint that you would then be able to go up and live in Edmonton with your grandfather?**

A. **Yes, I was hoping I'd be able to.**

Q. **Would I be correct in saying that Mr. Croft didn't wish for you to go up to Edmonton to live with your grandfather?**

A. **Yes.**

Q. **All right. You had asked him about going up to live with your grandfather, hadn't you?**

A. **Yes.**

Q. **And he said he didn't' think that's where you should go?**
A. **Yes.**

Q. **Were you angry with him because he wouldn't let you go to Edmonton and live with your brother and sister?**
A. **Yes, I was.**

Q. **You were very angry with him, were you not?**
A. **Yes.**

Q. **Did you think Mr. Croft was too strict around the house with you?**
A. **Yes.**

Q. **How about Anna, was she too strict?**
A. **Yes. Way too strict.**

Q. **Did you ever complain about having to come home and do your homework right away as opposed to leaving it to do later on?**
A. **I might have a couple of times.**

Q. **Did Mr. Croft tutor you in your homework, that is, help you with your homework?**
A. **Usually when I did my homework, he wasn't home from work, but there were a couple times when I didn't quite understand what to do, then I would ask him.**

Q. **And he'd help you in the evenings?**
A. **Yes.**

Q. **He was concerned that you do well in school?**
A. **Yes.**

Q. **Did he put any pressure on you to make sure that you do well in school by telling you that he expected you to do well?**
A. **He didn't really need to tell me that he expected me to do well. I kind of knew.**

Q. **In fact, he would go to the parent/teacher meetings at school, would he not?**
A. **Yes, he would.**

Q. **And he would check on your progress at school, see how you were doing, how you were doing in your studies?**
A. **Yes.**

Q. **He showed an interest in what was going on in school, didn't he?**
A. **Yes, he did.**

Q. And Anna did not, isn't that correct?
A. No.

Mr. Foster follows this line of questioning for a little while longer. He questions Amanda regarding her school activities. The questions reveal that she is very active in drama class. Mr. Foster then proceeds to peruse a line of questioning that reveals that Amanda had been in counseling before the trial. The counseling has specifically concentrated on what would go on during the trial.

Q. In preparation for the preliminary hearing, you would be sort of having a trial run-through with her
A. Yeah, kind of.

Q. I take it you would be giving your evidence there as if it was the trial about yourself. You wouldn't be making up something about somebody else?
A. Yes.

Q. She would be just there to listen or act as the judge, or what?
A. She'd ask me questions, and I'd answer, and she told me what kinds of questions to expect.

Mr. Foster's next questions are related to the contents of a particular conversation that took place between Amanda and Mr. Croft.

Q. Do you remember having a conversation with Mr. Croft about love and about how if he loved you now, would he still love you even if you do something unkind and unfair to him? Do you remember having this conversation the night before you went to see the school guidance counselor?
A. No.

Q. You don't remember ever having a conversation like that with Mr. Croft?
A. No. Sometimes we would argue and he'd say you don't love me.

Q. I'm not talking about an argument. I'm talking about a time when you would have made some inquiries and ending up questioning Mr. Croft about whether he would still care for you or still love you, even if you did something to him that wasn't very nice.
A. Yes, I remember now.

Q. Nothing further.

(WITNESS STANDS DOWN)

The case for the defense

Steven Jeremy Croft, sworn

1) Examination-in-chief by Mr. Foster

Q. How old are you , please, Mr. Croft?
A. 53

Q. What is your occupation, please?
A. I'm a doctor.

Q. What kind of doctor?
A. Cardiologist

Q. And I understand that Amanda is your daughter. Is that correct?
A. Yes, she is.

Q. And what is her mother's name?
A. Louise Fisher.

Q. Do you recall how long you lived together with Louise Fisher, after the birth of your daughter?
A. Just about two more years.

Q. All right. And I take it at some point after Amanda was two years old or so, the relationship between you and Louise was broken up.
A. It was just before Amanda's second birthday.

Q. And what happened in that regard with whom went where and with whom?
A. Louise moved to Toronto with Amanda.

Q. How did this happen?
A. Relations between Louise and I were very bad. I did not want her to take Amanda so far away, but she did it anyway.

Q. And how did it become to be that Amanda came to be living at your house in 1981?
A. I got word that her mother had died. So I went to Toronto to go and get her.

At this point Mr. Foster's questions focus on Mr. Croft's trip to Toronto to get Amanda. It is revealed that Amanda's living conditions were substandard and that her mother's boyfriend was not an appropriate person to raise Amanda. Mr. Croft and Amanda drove back to Calgary. Mr. Croft immediately enrolled Amanda in school.

Mr. Foster then moves on to discuss the family relationships.

Q. How was the relationship between Anna and Amanda? At the beginning and since?
A. It has always been very bad.

Q. In what way?
A. In the way that Anna couldn't tolerate the things that Amanda did, and the small lies that Amanda would tell.

Q. Such as what?
A. She would tell lies regarding things that had gone missing in the house. She would deny talking them and then later Anna would find them in her room or something. Just little things—like bathroom combs, spare change, etc. Sometimes she would lie about who had called—this would annoy Anna a lot because she would often miss important phone messages because of it.

Q. In terms of your involvement with Amanda, how did you get along with her?
A. I thought well.

Q. Were you involved in her school and friends?
A. Yes, I was involved in everything that Amanda did. One thing that had bothered me and seemed to be wrong is that Amanda didn't have any interests. I got her enrolled in the girl guides. Over the next two years, she attended guides regularly.

Q. All right. Do you recall Amanda expressing a desire to go and live with her grandfather in Edmonton?
A. Yes, she often talked about that possibility.

Q. How did these discussions usually go?
A. There were times when she wanted explanations of why she could not go. I would tell her that her grandfather could not afford it—I did not want to pay for her to live with him when she could live with me and have all the necessities of life. I did not want her to live substandard lifestyles. We lived in a quiet residential neighbourhood. She got the best of everything. The kids at school, they didn't congregate and get into trouble. It was a good school. Her grandfather lived in the center of the city and I didn't know what kind of life she would have there.

Mr. Foster examines the witness as to the weekly routine of the household. Mr. Croft testifies that he would usually go to work at eight o'clock before Amanda would get up. He would be gone all day until five or six as would Anna's son Victor who was attending university. Anna worked at a bakery from Monday until Thursday. She would leave at about 10 in the morning and would come home around seven at night. Mr. Croft testifies that often Anna might get home even earlier—it was very unpredictable because of the

management of the bakery. Victor's schedule was highly unpredictable as well since he was in university and 19 years old. The house had constant traffic going through.

Q. Now, in relation to what took place in the first week in September in 1983, when Amanda went to her guidance counselor with her accusations, do you recall what took place on the Tuesday, Wednesday, and Thursday of that week, in terms of discussions between yourself and Amanda and Anna.

A. Yes, I remember.

Q. All right, take it from the Monday night please.

A. Amanda and Anna had been really fighting that week and I had gotten to the point where I just couldn't take any more of it. I told Amanda that she wasn't co-operating and that she needed to try and get along with Anna and to help try and make things run smoothly. She was not co-operating with Anna, she was constantly sluffing off some of her work, which was very minor at the house that Anna would give her to do—and this was causing considerable turmoil.

I also told her that the only alternative was that she go and live with her grandfather but that he probably wouldn't take her. I told her she could write him a letter explaining that things were so bad with Anna and that maybe then he would agree to take her.

On the Monday night, Anna had gone to work. Amanda and I were not really talking since we had the big fight on the Thursday previous. The crux of it was, that – that Amanda, for some reason came to me and asked me specifically what my expectations were and how much I loved her, and I explained to Amanda that over the two years that she'd been with me, I'd come to love her greatly. I had a great guilt complex for nine years while she had been with her mother because I knew she wasn't getting the proper care, the proper attention and the proper education she needed. I had a guilt complex because I had allowed my marriage with Anna and my job to be the main focus in my life and had not tried to help Amanda during those nine years. So I told Amanda these things. I told her that I loved her and that I had high hopes for her future.

She then asked me, and she was very specific in this, would I still love her if she did something bad against me. She said, like cutting your throat? And I—I assumed she meant verbally, not – not physically, and—and I told her that if you truly love someone, you do not stop loving them or stop caring what happens to them if they don't stand up to your expectations. There wasn't much more to it than that. The next morning I left on a business trip and didn't get back till Wednesday night.

Q. What happened when you got back?

A. When I got back Amanda showed me the letter that she had written to her grandfather. Anna walked in the room and I kind of broke down. I think I cried a little, saying that my daughter really wants to leave us. There were things in the letter that weren't true. I think Amanda put the lies in there to ensure that her grandfather would take her—things about Anna and things about me—like that I drank and that Anna was unbearable to live with.

It hurt that she really wanted to go to Edmonton that badly, that she—she was willing to tell these lies to her grandfather, even though I would back them up and make them not lies to help her get to Edmonton. We all talked together—it got very heated...

Q. How did things end after that meeting, in terms of what was to be done, or what was going to be done.

A. I don't think it ended with anybody being mad at each other. It was agreed upon by me, that I would try and be more lenient towards Amanda and that I would try and be more understanding towards her and her needs.

Q. That pretty well concluded the discussion, if I can call it that, on the Wednesday night?

A. Yes.

Q. All right, I take it you were ultimately arrested in relation to this matter.

A. Yes, I was.

Q. When was that?

A. On the Saturday.

Q. Now, Mr. Croft, you've been present during the course of the trial, and you've heard the testimony of Amanda. Have you not?

A. Yes.

Q. Did you ever at any time have any kind of sexual relationship with Amanda Croft?

A. I did not.

Q. Did you at any time make any kind of sexual advances towards her?

A. No I never did.

2) Cross-examination by Mr. Myers

Q. All right, you perceived—you loved your daughter a great deal at that time I presume?
A. I still do.

Q. What did you perceive in relation to her feelings towards you?
A. I never really knew what Amanda's feelings were.

Q. Well, you've told us that from time to time in emotional situations you would hug and kiss.
A. Yes. In fact, my suspicion is that because her living situation was substandard in Toronto, perhaps she was not used to any kind of physical affection and that maybe she misinterpreted my affection towards her as sexual.

Q. And it never was sexual?
A. Absolutely not.

Q. And you had a very heart felt talk on September 12, 1983 in relation to her asking you, as you say, questions about if "I do something to you, if I hang you out" or words to that effect, would you still love me?
A. Yes, sir.

Q. And that was an emotional moment for you, was it not?
A. Yes, sir, we had many emotional moments together.

Q. All right, did you not feel that as an expression of love?
A. I felt that Amanda and I were becoming closer and closer together as the time went by. I felt this very strongly.

Q. And is Amanda, as far as you have ever seen, perfectly normal in terms of her emotional, psychological and intellectual development?
A. As far as I can determine.

Q. On Wednesday, September 15, 1983, you arrived home and found out that your wife had been speaking to someone at the crisis center. Did you know what the crisis center meant at that time?
A. Well, yes, sir, I had been in touch with the crisis center before.

Q. And so you accused your daughter of talking?
A. It was not that immediately at all.

Q. I put it to you that that is exactly what happened—your fears all came to roost. You had averted the situation several years before and all of a sudden

– the crisis center comes up again and you knew who to blame immediately, Amanda?

A. I don't know what you mean by "several years ago?"

Q. When Deborah McLoyd—the social worker—had come to you as a result of a complaint to the crisis center.

A. That was not the first time I had contact with the crisis center.

Q. All right.

A. I had contact with them when Amanda first came to live with us because the crisis center was following Amanda's case.

Q. Okay, fine. So what did you do when you found out that your wife had been speaking to someone at the crisis?

A. I asked my wife whether she knew if Amanda had been telling stories at school again referring to the fact of her and Anna not getting along, the fact that she was not getting everything she wanted in the house.

Q. And what did she say?

A. Anna told me that Amanda had been telling things at school, but that they were far more harmful than those types of stories.

Q. And that is when you lost your temper?

A. Yes, I wouldn't believe everything I had worked for keeping the family together was going to be ruined.

(WITNESS STANDS DOWN)

Deborah McLoyd, sworn

1) Examination-in-chief by Mr. Foster

Q. Mrs. McLoyd, I understand that you used to be employed with the Government of Alberta in the Department of Social Services; is that correct?
A. Yes.

Q. What was your position with the Department of Social Services in 1981 and thereafter?
A. A child welfare worker.

Q. All right, and in that capacity as a child welfare worker, did you have occasion to have dealings with Amanda Croft, Steven Croft, and Anna Croft?
A. Yes, I did.

Q. Do you recall when it was that you first had dealings with them and how it came about?
A. The first contact with our department came to our office in the form of a direction form Ontario on September 2, 1981.

Q. And as a result of that direction, what did you do ma'am?
A. The direction was that the child Amanda had gone to Calgary with her father and that we would follow the case.

Q. And did you have occasion to attend the Croft home?
B. Yes, I did.

Q. And for what purpose?
A. Purely to follow up the case. It was a situation whereby this little girl Amanda, had come from Toronto with her father, her mother having passed away, and the social worker from the east felt that there should be some follow up due to the fact that the child had just lost her mother under questionable circumstances.

Q. How many times would you have attended the Croft home during the early time that Amanda Croft came to live there to see how they were getting along and checking on the circumstances, that sort of thing?
A. I would say during the time that I was involved, I very likely was in the home six or seven times and that's approximate.

Q. Generally speaking on those occasions when you attended in relation to Amanda getting settled in, how did you find the family unit in terms of Amanda settling in with them and how Amanda herself was?

A. I found it a very positive situation. When I want to the home on September 4th, my first visit, the arrangements had all been made for Amanda in school. She was also attending the Roman Catholic Church. I felt that there was very little for me to do other than to recommend counseling for Amanda to deal with the move and loss of her mother.

Q. I take it that you would have interviewed Mr. and Mrs. Croft and Amanda when you would have first gone out to deal with them?

A. That's right.

Q. How did you find Amanda to be personality wise?

A. A little withdrawn but certainly very much a little girl 11 years of age.

Q. Now, did you have occasion to interview Amanda again in relation to a specific problem in the fall of 1981?

A. Yes, I did.

Q. Do you recall what the date would be, please?

A. October 19th, 1981.

Q. All right, what happened there please?

A. A call came to our office that afternoon indicating that Amanda had given a girlfriend information that her father had sexual contact with her.

Q. All right, and what did you do, please?

A. I meet Amanda after school and took her to the social services center.

Q. What happened then?

A. I spoke with Amanda regarding the complaints.

Q. So you asked her if it was true that her father had sexual contact with her?

A. Yes I asked her and she said it wasn't true.

Q. Did you ask her anything further?

A. I asked her why did she say this, and she told me that she made it up because she was angry at her living situation and that she wanted to leave.

Q. What happened after that?

A. I explained the seriousness of the situation and that I felt that counseling would be in order.

Q. **Okay. During the time that you would have been dealing with the Croft family, did you notice any changes in the family environment, as you perceived it, or any changes in Amanda?**

A. **Amanda had expressed a wish to go to Edmonton and I certainly, this child was not a ward, had no status whatsoever with us and I had certainly no authority to say yes, she could go to Edmonton or no, she couldn't. However, I did advise against it until such time as she was more settled into the family.**

Q. **When had Amanda first expressed a desire to you to go to Edmonton?**

A. **Approximately after she had been in the home a week, 10 days. As a matter of fact, it was on September 4th.**

Q. **During the time that Amanda was at the home as she was living there over the couple of months that you were dealing with the family, did you notice if her attitude towards the home or how she was fitting in changed at all in those months?**

A. **Yes. Amanda—well I'm not sure it was Amanda that changed a great deal but you must appreciate that this little girl came from a situation in Ontario where I believe there were very little controls, structure set for her, and in the Croft home her step mother Anna was extremely good with her, and she did a tremendous amount to make the child comfortable in the home. However, in my interpretation, Amanda rejected this, and she rejected Anna.**

Q. **Did you have occasion when you were there to observe if there were household rules -- that sort of thing and the strictness of them if I can say that?**

A. **Yes, there were household rules. Amanda had a time for bed and apparently, Amanda very much liked and enjoyed watching TV and she would have watched TV all day if given the opportunity.**

Q. **Were there rules restricting her television watching, sort of thing?**

A. **Yes. And there were times that she had to go to bed and there was a time for her to get up in the morning, there was a time for studying.**

Q. **Did you ever talk to Amanda yourself about how she was getting on in the house, that is just you and her talking together without other members around?**

A. **Yes.**

Q. **And how did it appear to you from those conversations that she was getting along?**

A. **As a matter of fact, I was surprised how well she had fitted in. Sometimes she used to say, oh, Anna is difficult about this or that, but actually, no, there was no complaining. She enjoyed the school--she enjoyed the area.**

2) Cross-examination by Mr. Myers

Q. **You recommend counseling and I take it you recommended it on more than one occasion?**

A. **That is true, sir.**

Q. **And that was clearly conveyed to Mr. Croft as counseling for Amanda?**

A. **Yes. We had a situation here where Amanda had moved into a foreign climate. She also had lost her mother.**

Q. **All right. That was not done though as far as you know?**

A. **Apparently from my information they went on two occasions.**

Q. **Okay. And the latest opportunity you had to recommend counseling was because of this rather frightening, serous allegation that you had heard from a third party about Amanda's perhaps telling someone that she had had sexual contact with her father.**

A. **Yes.**

Q. **All right. But you did not recommend any further interventions in the family regarding the complaint?**

A. **I think, sir, that I accepted the answer that Amanda gave me that she made up the story. If I had believed it was true, I certainly would have acted in a far different manner.**

Q. **All right, if I may say this though, that on the basis of the original information you received, would it not be the ordinary procedure by other child welfare workers that the child be apprehended?**

A. **Not when you have the child denying the allegations. Especially when the child explicitly gives a reason why she made up the story. I had told Amanda that if the story was true, I could make it so that she never had to go back to the household—that she would be protected, but she claimed that she made up the story because she was angry and felt a bit displaced.**

Q. **Okay, nothing further.**

(WITNESS STANDS DOWN)

P.9 Similar Fact Evidence—Not Similar

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. How did you come to know a Mr. Steven Croft?
A. We worked together. I was his secretary.

Q. You are 32 years of age, is that correct?
A. Yes.

Q. Okay. When you worked with Mr. Croft, how old were you?
A. I was 22 and I worked there until I was 24.

Q. How long ago was that?
A. Ten years ago.

Q. All right, what was your relationship to Mr. Croft at that time?
A. We worked together.

Q. Was your relationship to Mr. Croft strictly professional?
A. Well, at first it was.

Q. Could you please tell the court about your relationship to Mr. Croft?
A. Okay, sometimes we would work late together and then hang out after.

Q. Was that all?
A. No. It progressed from hanging out to being more than just friends.

Q. Do you mean sexually?
A. Yes.

Q. How long did you know him before it progressed to a sexual relationship.
A. A few months.

Q. When was the first incident of a sexual nature?
A. Well, one time we went back to his house to hang out and watch movies. His family was away and things just lead to things...

Melissa testifies that there was an incident of secual touching at this point.

Q. Was that all that ever happened?
A. No, things progressed beyond touching to sex.

Q. Do you mean sexual intercourse?
A. Yes.

Q. How long did that go on?
A. About two years, off and on.

Q. Now on all of those occasions you were 20 to 24 years old. What was your attitude towards it? In other words, did you want to do those things?
A. Well, he was really attractive and I kind of thought it would be fun.

Q. How long did the sexual relationship last?
A. I got a really good job offer and took it. So I did not see Mr. Croft again.

2) Cross-examination by Mr. Foster

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard, people talk and I heard.

Q. Up to that point in time, had you ever told anyone that you had sexual relations with Steven Croft?
A. No, I never did. He was a lot older than me and I just didn't want to tell anyone.

Q. But you did tell, for the fist time, when you spoke to Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but that it would probably not be good if people at the hospital found out.

Q. Now, did you ever talk to Amanda Croft about what happened?
A. Only after she was taken away by child services.

Q. How many times have you talked to her about it?
A. Only once. One night I went to the police station and she was there and we talked about it.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

P.10 Similar Fact Evidence—Somewhat Similar

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. What is your relationship to Steven Croft.
A. My parents are friends of Mr. Croft and Anna Croft..

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. How did you come to know Mr. Croft?
A. Well, my parents became friends with him and Anna when I was about 18 years old.

Q. How long ago was that?
A. Ten years ago.

Q. Could you please tell the court what your relationship to Mr. Croft was?
A. Well, my parents were friends but they would go away a lot and I would often stay with Mr. Croft and his wife when they were away.

Q. Was there more to your relationship with Mr. Croft?
A. Well, not at first.

Q. Could you please tell the court about your relationship to Mr. Croft?
A. I would stay with Mr. Croft and his wife when my parents went on vacation.

Q. Was that all?
A. No.

Q. Could you please continue?
A. Okay, the thing was that I was 17 and didn't think that I needed to be looked after like a child. Sometimes when Anna was out we would watch movies together and hang out—you know.

Q. Was that all?
A. No. He made some advances towards me after a while.

Q. Okay. When did these advances start?
A. About the second time I stayed there.

Q. Did the advances progress from that time?
A. Yes.

Q. How?
A. It progressed from hanging out to being sexual.

Q. Could you explain?

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was your Anna?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse occurred when Melissa was 18-20 years old.

Q. How long did the sexual relationship go on?
A. Well, everytime I stayed there after that—but then my parents eventually started letting me stay home by myself so I only saw him with my parents after that.

Q. Now on all of those occasions you were 18 to 20 years old. What was your attitude towards it? In other words, did you want to do those things?
A. Well, at the time I thought it was okay since my parents were friends with him.

2) Cross-examination by Mr. Foster

Q. During the time of the sexual relationship, did you ever tell anyone that this was going on?
A. No.

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard.

Q. Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?
A. No, I never did.

Q. But you did tell, for the fist time, in the presence of your mother, and Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.

Q. Now, did you ever talk to Amanda Croft about what happened?
A. Only after she was taken away by child services.

Q. How many times have you talked to her about it?
A. Only once. One night I went to visit her and see how she was doing and we talked about it.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

P.11 Similar Fact Evidence—Very Similar

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Anna Croft.
A. Yes.

Q. Which also makes you the step-sister of Amanda Croft?
A. Yes.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you lived in Calgary with your mother, Anna. Was there a time at which you also lived with a person by the name of Steven Jeremy Croft.
A. Yes, I did.

Q. How old were you at that time?
A. He came to live with us when I was 15.

Q. How long ago was that?
A. Ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, Anna, and Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as a father?
A. After about six months, like, he seemed nice, and, you know, comfortable to be with as a father.

Q. Now, you mentioned that he came to live with you when you were 15, and how long did you continue to live in that residence?

A. About two years.

Q. During that two years, were you happy in the home?
A. I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. How long after Mr. Croft joined the family did these advances start?
A. Probably a few months.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then I think he realized that I wasn't going to run to anybody so they just progressed from there. Usually, he would ask me to watch a movie with him. Then he would tell me that he wanted me to sit with him on the couch...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was Anna?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began within a year of Mr. Croft moving in and started when Melissa was 15 years old.

Q. Now on all of those occasions you were 15 to 17 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 17.

2) Cross-examination by Mr. Foster

Q. **During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?**
A. **No.**

Q. **After you moved out, did you maintain contact with your mother?**
A. **As much as I could.**

Q. **Did you hear in September of 1983 that Amanda was apprehended by child services?**
A. **Yes, I heard.**

Q. **Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?**
A. **No, I never did.**

Q. **But you did tell, for the fist time, in the presence of Anna, and Detective Manny.**
A. **I told my mother that morning, and that afternoon, I went and wrote a statement.**

Q. **Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?**
A. **No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.**

Q. **Now, did you ever talk to Amanda Croft about what happened?**
A. **Only after she was taken away by child services.**

Q. **How many times have you talked to her about it?**
A. **Only once. One night I went to visit her and see how she was doing and we talked about it.**

Q. **Okay, nothing further**

(WITNESS STANDS DOWN)

P.12 Similar Fact Evidence—Extremely Similar

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Steven Croft.
A. Yes, we have different mothers but the same father.

Q. Which also makes you the half-sister of Amanda Croft?
A. Yes.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you mother and Mr. Croft were married, you lived in Calgary with both of them, is that correct?
A. Well, my parents broke up when I was a baby, but then they got back together when I was abut 11 years old.

Q. So, how long did you live in a house with your mother and Mr. Croft?
A. Until I was 13.

Q. How long ago was that?
A. Ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, and your father Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as your father?
A. After a time, I guess I started to think of him that way.

Q. Now, you mentioned that you only lived with your father until you were 13. Why was that?
A. My mother and father got separated again, so my mother and I moved away.

Q. Had you been happy in the home before that?
A. No, I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. When did these advances start?
A. When I was about 11 years old.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then it just progressed from there. Usually, he would ask me to watch a movie with him. He would tell me that he wanted me to wear my nightgown and sit with him on the couch. He would say that his back was hurting and he needed to lie down and then...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was your mother?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began when Melissa was 11 years old.

Q. Now on all of those occasions you were 11 to 13 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 13.

2) Cross-examination by Mr. Foster

Q. During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?
A. No.

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard.

Q. Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?
A. No, I never did.

Q. But you did tell, for the fist time, in the presence of your mother, and Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.

Q. Now, did you ever talk to Amanda Croft about what happened?
A. Only after she was taken away by child services.

Q. How many times have you talked to her about it?
A. Only once. One night I went to visit her and see how she was doing and we talked about it.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

P.13 Judge's Instructions to the Jury –Control Condition

The Judge:

As jurors in this case, you have several duties:

First, it is your duty to determine the facts in this case from the evidence produced in court;

Second, it is your duty to accept the law as I will instruct you, regardless of what you personally believe the law is or ought to be;

Third, to reach a verdict, you are to apply the law to the facts and in this way decide the case.

Mr. Steven Croft is charged with sexual interference.

A person commits the offense of sexual interference when a person touches any part of the body of a person under the age of fourteen years for a sexual purpose.

To sustain the charge of sexual interference, the Crown must prove that Mr. Croft touched either directly or indirectly, with a part of the body, any part of the body of Amanda Croft for a sexual purpose.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In evaluating the testimony of any witness, you may take into account the following factors: the opportunity and ability of the witness to observe the facts; the accuracy of the witness' memory; the reasonableness of the witness' testimony considered in light of all the evidence; and any other factors that bear on believability and weight.

You have nothing whatever to do with the punishment in case of a violation of law. You cannot consider the fact that punishment may follow conviction except that it may tend to make you careful.

Throughout your deliberations you will permit neither sympathy nor prejudice to influence you. You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The defendant is presumed to be innocent and is not required to prove his or her innocence or any fact. This presumption of innocence is present at the beginning of the trial and continues unless you decide after hearing all the evidence that there is proof beyond a reasonable doubt that the defendant is guilty. The state has the burden of proving each element of the crime beyond a reasonable doubt.

A reasonable doubt about guilt is not a vague or speculative doubt but is a doubt for which a reason exists. If you are satisfied beyond a reasonable doubt that all elements of the charge have been proved, then you must find the defendant guilty. However, if you are left with a reasonable doubt about the proof of any element, then you must find the defendant not guilty.

P.14. Instructions to the Jury – Treatment Conditions

The Judge:

As jurors in this case, you have several duties:

First, it is your duty to determine the facts in this case from the evidence produced in court;

Second, it is your duty to accept the law as I will instruct you, regardless of what you personally believe the law is or ought to be;

Third, to reach a verdict, you are to apply the law to the facts and in this way decide the case.

Mr. Steven Croft is charged with sexual interference.

A person commits the offense of sexual interference when a person touches any part of the body of a person under the age of fourteen years for a sexual purpose.

To sustain the charge of sexual interference, the Crown must prove that Mr. Croft touched either directly or indirectly, with a part of the body, any part of the body of Amanda Croft for a sexual purpose.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In evaluating the testimony of any witness, you may take into account the following factors: the opportunity and ability of the witness to observe the facts; the accuracy of the witness' memory; the reasonableness of the witness' testimony considered in light of all the evidence; and any other factors that bear on believability and weight.

You have nothing whatever to do with the punishment in case of a violation of law. You cannot consider the fact that punishment may follow conviction except that it may tend to make you careful.

Throughout your deliberations you will permit neither sympathy nor prejudice to influence you. You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict.

If you accept the evidence that the defendant has previously been involved in similar acts to the one presently accused, this is not to be used in deciding whether he is guilty or innocent. It is relevant only for the limited purpose for which it is admitted. That is, the similar fact evidence may be used to show that the crime charged constitutes merely one incident forming part of a systematic course of conduct engaged in by the accused. In other words, you may use the similar act evidence to infer that the defendant is more likely to have perpetrated the crime since the similar and unusual nature of the stories would make it unlikely to just be coincidental. You are not to use the evidence that the defendant may have perpetrated other disreputable acts to infer that the accused is a person whose character or disposition is such that he is likely to have committed the offence for which he is presently charged.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The defendant is presumed to be innocent and is not required to prove his or her innocence or any fact. This presumption of innocence is present at the beginning of the trial and continues unless you decide after hearing all the evidence that there is proof beyond a reasonable doubt that the defendant is guilty. The state has the burden of proving each element of the crime beyond a reasonable doubt.

A reasonable doubt about guilt is not a vague or speculative doubt but is a doubt for which a reason exists. If you are satisfied beyond a reasonable doubt that all elements of the charge have been proved, then you must find the defendant guilty. However, if you are left with a reasonable doubt about the proof of any element, then you must find the defendant not guilty.

Materials for Study 1

Note: The consent form, the trial, the similar fact evidence, and the judge's instructions are identical to those used in the pilot study. Please refer back.

1.1 Questionnaire –Treatment Condition

For Experimenter use: Your #_____

Questionnaire #1

What is your age? _____ Years old

What is your sex? a) Male b) Female

---

1. What is your verdict in this case?

_____ Guilty

_____ Not Guilty

2. How likely do you think it is that Mr. Croft is guilty?

1	2	3	4	5	6	7
Definitely Not Guilty						Definitely Guilty

2. If you voted "not guilty" on question #1, was it because:

a) You think he is innocent
b) You think he is guilty but you do not think there is enough evidence to prove it
c) You are unsure whether he is innocent or guilty

3. To what extent do you think that the testimony of Amanda Croft influenced your verdict choice?

1	2	3	4	5	6	7
Not at all						A great deal

4. To what extent do you think that the testimony of Steven Croft influenced your verdict choice?

1	2	3	4	5	6	7
Not at all						A great deal

5. To what extent do you think that the testimony of Melissa White influenced your verdict choice?

1	2	3	4	5	6	7
Not at all						A great deal

Please indicate the extent to which you agree or disagree with the following statements.

Melissa's testimony made Amanda's testimony more believable to me.

1	2	3	4	5	6	7
Completely disagree						Completely agree

Melissa's testimony made Steven Croft's testimony less believable to me.

1	2	3	4	5	6	7
Completely disagree						Completely agree

If Steven Croft had sexual relations with Melissa, then I think he is the kind of person who would probably have had sexual relations with Amanda.

1	2	3	4	5	6	7
Completely disagree						Completely agree

Please rate Steven Croft on the following scales:

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all honest						Extremely honest

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all likeable						Extremely likable

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all dangerous						Extremely dangerous

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all a good person						An extremely good person

6. What kinds of factors did you consider while you were making your assessment of your verdict in this case?

_____

_____

_____

1.2 Questionnaire –Control Condition

For Experimenter use:

Your #_____

Questionnaire #1

What is your age? _____ Years old

What is your sex? a) Male b) Female

---

1. What is your verdict in this case?

_____ Guilty

_____ Not Guilty

2. How likely do you think it is that Mr. Croft is guilty?

1	2	3	4	5	6	7
Definitely Not Guilty						Definitely Guilty

2. If you voted "not guilty" on question #1, was it because:

a) You think he is innocent
b) You think he is guilty but you do not think there is enough evidence to prove it
c) You are unsure whether he is innocent or guilty

3. To what extent do you think that the testimony of Amanda Croft influenced your verdict choice?

1	2	3	4	5	6	7
Not at all						A great deal

4. To what extent do you think that the testimony of Steven Croft influenced your verdict choice?

1	2	3	4	5	6	7
Not at all						A great deal

Please rate Steven Croft on the following scales:

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all honest						Extremely honest

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all likeable						Extremely likable

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all dangerous						Extremely dangerous

I think Steven Croft is:

1	2	3	4	5	6	7
Not at all a good person						An extremely good person

5. What kinds of factors did you consider while you were making your assessment of your verdict in this case?

_____

_____

_____

1.3 Debriefing Form

Debriefing Form

One of the most complex and important questions in many criminal trials is whether the jury may hear evidence of a defendant's prior criminal activity. In April 1999 with the extensive news reporting of the Alison Parrott murder trial, Canadians became aware of, and in some cases outraged by, the controversial legal question regarding "similar fact evidence." Many people were angry and confused by the fact that the jury was not allowed to hear evidence that Francis Roy (the defendant) had past convictions for rape and assault.

Courts in Australia, Great Britain, Canada and the United States have generally held that prior criminal activity evidence *is* relevant, but there is great concern that it may also be prejudicial so it is generally regarded as inadmissible. The general concern of the courts is that the jury may use the evidence of the defendant's past criminal activity to infer that the defendant has some kind of criminal disposition and is therefore more likely to have committed the present crime. This kind of "propensity" reasoning is heavily guarded against in the courts as it is seen to be highly prejudicial and unfair. In certain circumstances however, this type of evidence *is* admissible for purposes that don't involve propensity reasoning. One such circumstance would be when evidence of a person's criminal or disreputable past is admitted for use in assessing credibility of a witness.

In determining which evidence is admissible and which is not, the courts consider the similarity of the evidence to the present crime. Very generally speaking, if it is not similar it can be admissible for certain purposes dictated by the judges instructions, if it is very similar it is not admissible, and if it is extremely similar, it may be admissible in certain circumstances. Underlying the rationale for these conditions of admissibility are many **social psychological** assumptions. These assumptions are based, for the most part, only upon the "common sense" and intuition of those in the legal profession. The present research is an attempt to empirically examine the psychology behind these intuitive assumptions using the scientific method.

We **hypothesize** that jurors will not distinguish between the similarity of the prior criminal activity evidence (**independent variable**). In other words, we predict that *any* prior criminal activity will negatively affect juror's ratings of the defendant's guilt, his credibility, etc. (**dependant variables**). We also **hypothesize** that judges' instructions will not be effective in limiting the use of prior criminal activity evidence to something other than "propensity" reasoning no matter how similar or dissimilar it is to the present crime.

All participants read the same trial. The only difference between groups was the degree of similarity of the prior criminal activity evidence. In the **control group**, participants read the trial but read no similar fact evidence.

References

Wissler, R. & Saks, M. (1985). On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt. Law and Human Behavior, 9(1), 37-48.

Gleitman, H. (1994). Psychology. (5th ed.) New York: W.W. Norton & Co. pp. 467-487.

1.4 Debriefing Questions

1. In which general area of psychology does this type of research belong?

Answer: Social Psychology

2. State one of the hypotheses of this study?

Answer: People do not distinguish between *degree* of similarity of the similar fact evidence. In other words, *any* evidence of a person's disreputable past will influence jurors in their verdicts.

3. State another one of the hypotheses of this study?

Answer: People will not limit the use of similar fact evidence to assess only credibility; instead, it will affect their ratings of the defendants' general disposition (likeability, honesty, etc.)

4. What is the independent variable?

Answer: The similar fact evidence

5. What are the levels of the independent variable?

Answer: 5 conditions ranging from very similar to very dissimilar and a no evidence condition

6. What is the dependent variable?

Answer: Verdicts, guilt ratings, ratings of the general disposition of the defendant and other scores on the questionnaire.

7. What was the control group?

Answer: The group that was not exposed to any similar fact evidence.

Materials for Study 2

Note: The consent form and the judge's instructions are identical to those used in the pilot study. Only those parts of the trial that differ from the trial used in Study 1 are reproduced here. Please refer back.

2.1 Questionnaire –Treatment Conditions

For Experimenter use only

Your #_____

Questionnaire #1

What is your age? _____ Years old

What is your sex? a) Male b) Female

---

1. What is your verdict in this case?

_____ Guilty

_____ Not Guilty

2. How likely do you think it is that Mr. Croft is guilty?

1	2	3	4	5	6	7
Definitely Not Guilty						Definitely Guilty

2. If you voted "not guilty" on question #1, was it because:

a) You think he is innocent
b) You think he is guilty but you do not think there is enough evidence to prove it
c) You are unsure whether he is innocent or guilty

3. To what extent do you feel that the instructions of the judge influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

4. To what extent do you think that the testimony of Amanda Croft influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

5. To what extent do you think that the testimony of Steven Croft influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

6. To what extent do you think that the testimony of Melissa White influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

Please indicate the extent to which you agree or disagree with the following statements.

Melissa's testimony made Amanda's testimony more believable to me.

1	2	3	4	5	6	7
Completely disagree						Completely agree

Melissa's testimony made Steven Croft's testimony less believable to me.

1	2	3	4	5	6	7
Completely disagree						Completely agree

If Steven Croft had sexual relations with Melissa, then I think he is the kind of person who would probably have had sexual relations with Amanda.

1	2	3	4	5	6	7
Completely disagree						Completely agree

Please rate Steven Croft on the following scales:

1	2	3	4	5	6	7
Not at all honest						Extremely honest

1	2	3	4	5	6	7
Not at all likeable						Extremely likable

1	2	3	4	5	6	7
Not at all dangerous						Extremely dangerous

1	2	3	4	5	6	7
Not at all a good person						An extremely good person

7. When making your final decision, to what extent did you use the following factors?

The possibility that Amanda is not telling the truth

1	2	3	4	5	6	7
Not at all						A great deal

The idea that because of his past actions, Steven Croft is the kind of person who would commit this type of crime

1	2	3	4	5	6	7
Not at all						A great deal

The testimony that there were often people in the house

1	2	3	4	5	6	7
Not at all						A great deal

The fact that Steven Croft was a mechanic

1	2	3	4	5	6	7
Not at all						A great deal

8. Where there any other kinds of factors did you consider while you were making your assessment of your verdict in this case?

_____

_____

_____

2.2 Trial –Section which differs from Trial used in Study 1

Steven Jeremy Croft, sworn

1) Examination-in-chief by Mr. Foster

Q. **How old are you , please, Mr. Croft?**
A. **53**

R. **What is your occupation, please?**
A. **I'm a auto mechanic.**

Q. **Where do you work?**
A. **At the gas station in my neighbourhood.**

Q. **And I understand that Amanda is your daughter. Is that correct?**
A. **Yes, she is.**

Q. **And what is her mother's name?**
A. **Louise Fisher.**

Q. **Do you recall how long you lived together with Louise Fisher, after the birth of your daughter?**
A. **Just about two more years.**

Q. **All right. And I take it at some point after Amanda was two years old or so, the relationship between you and Louise was broken up.**
A. **It was just before Amanda's second birthday.**

Q. **And what happened ir that regard with whom went where and with whom?**
A. **Louise moved to Toronto with Amanda.**

Q. **How did this happen?**
A. **Relations between Louise and I were very bad. I did not want her to take Amanda so far away, but she did it anyway.**

Q. **And how did it become to be that Amanda came to be living at your house in 1981?**
A. **I got word that her mother had died. So I went to Toronto to go and get her.**

At this point Mr. Foster's questions focus on Mr. Croft's trip to Toronto to get Amanda. It is revealed that Amanda's living conditions were substandard and that her mother's boyfriend was not an appropriate person to raise Amanda. Mr. Croft and Amanda drove back to Calgary. Mr. Croft immediately enrolled Amanda in school.

Mr. Foster then moves on to discuss the family relationships.

2.3 Trial Pages –Not Similar—No Collusion

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. **All right. What is your date of birth?**
A. **February 8, 1959.**

Q. **How did you come to know a Mr. Steven Croft?**
A. **We worked together. I was a cashier at the gas station.**

Q. **You are 32 years of age, is that correct?**
A. **Yes.**

Q. **Okay. When you worked with Mr. Croft, how old were you?**
A. **I was 22 and I worked there until I was 24.**

Q. **How long ago was that?**
A. **Oh, around ten years ago.**

Q. **All right, what was your relationship to Mr. Croft at that time?**
A. **We worked together.**

Q. **Was your relationship to Mr. Croft strictly professional?**
A. **Well, at first it was.**

Q. **Could you please tell the court about your relationship to Mr. Croft?**
A. **Okay, sometimes we would work late together and then hang out after.**

Q. **Was that all?**
A. **No. It progressed from hanging out to being more than just friends.**

Q. **Do you mean sexually?**
A. **Yes.**

Q. **How long did you know him before it progressed to a sexual relationship.**
A. **A few months.**

Q. **When was the first incident of a sexual nature?**
A. **Well, one time we went back to his house to hang out and watch movies. His family was away and things just lead to things...**

Melissa testifies that there was an incident of secual touching at this point.

Q. Was that all that ever happened?
A. No, things progressed beyond touching to sex.

Q. Do you mean sexual intercourse?
A. Yes.

Q. How long did that go on?
A. About two years, off and on.

Q. Now on all of those occasions you were 20 to 24 years old. What was your attitude towards it? In other words, did you want to do those things?
A. Well, he was really attractive and I kind of thought it would be fun.

Q. How long did the sexual relationship last?
A. I got a really good job offer and took it. So I did not see Mr. Croft again.

2) Cross-examination by Mr. Foster

Q. **Did you hear in September of 1983 that Amanda was apprehended by child services?**
A. **Yes, I heard, people talk and I heard.**

Q. **Up to that point in time, had you ever told anyone that you had sexual relations with Steven Croft?**
A. **No, I never did. He was a lot older than me and I just didn't want to tell anyone.**

Q. **But you did tell, for the fist time, when you spoke to Detective Manny.**
A. **I told my mother that morning, and that afternoon, I went and wrote a statement.**

Q. **Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?**
A. **No, he never said not to tell anybody, but that it would probably not be good if people the gas station found out.**

Q. **Now, did you ever talk to Amanda Croft about what happened?**
A. **No, never.**

Q. **So, you never discussed anything regarding Mr. Croft?**
A. **No, I didn't ever speak with Amanda. I don't even know her.**

Q. **So you have never met Amanda Croft?**
A. **No, I never did.**

Q. **Okay, nothing further**

(WITNESS STANDS DOWN)

2.4 Trial Pages –Not Similar—Collusion

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. **All right. What is your date of birth?**
A. **February 8, 1959.**

Q. **How did you come to know a Mr. Steven Croft?**
A. **We worked together. I was a cashier at the gas station.**

Q. **You are 32 years of age, is that correct?**
A. **Yes.**

Q. **Okay. When you worked with Mr. Croft, how old were you?**
A. **I was 22 and I worked there until I was 24.**

Q. **How long ago was that?**
A. **Oh, around ten years ago.**

Q. **All right, what was your relationship to Mr. Croft at that time?**
A. **We worked together.**

Q. **Was your relationship to Mr. Croft strictly professional?**
A. **Well, at first it was.**

Q. **Could you please tell the court about your relationship to Mr. Croft?**
A. **Okay, sometimes we would work late together and then hang out after.**

Q. **Was that all?**
A. **No. It progressed from hanging out to being more than just friends.**

Q. **Do you mean sexually?**
A. **Yes.**

Q. **How long did you know him before it progressed to a sexual relationship.**
A. **A few months.**

Q. **When was the first incident of a sexual nature?**
A. **Well, one time we went back to his house to hang out and watch movies. His family was away and things just lead to things...**

Melissa testifies that there was an incident of secual touching at this point.

Q. Was that all that ever happened?
A. No, things progressed beyond touching to sex.

Q. Do you mean sexual intercourse?
A. Yes.

Q. How long did that go on?
A. About two years, off and on.

Q. Now on all of those occasions you were 20 to 24 years old. What was your attitude towards it? In other words, did you want to do those things?
A. Well, he was really attractive and I kind of thought it would be fun.

Q. How long did the sexual relationship last?
A. I got a really good job offer and took it. So I did not see Mr. Croft again.

2) Cross-examination by Mr. Foster

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard, people talk and I heard.

Q. Up to that point in time, had you ever told anyone that you had sexual relations with Steven Croft?
A. No, I never did. He was a lot older than me and I just didn't want to tell anyone.

Q. But you did tell, for the fist time, when you spoke to Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but that it would probably not be good if people at the gas station found out.

Q. Now, did you ever talk to Amanda Croft about what happened?
A. Yes.

Q. So, you had a chance to discuss all of these alleged events with each other?
A. Yes, we talked about what happened.

Q. So, you talked to her about your story and she talked to you about her story?
A. Yes, we talked about everything.

Q. How many times have you talked to her about it?
A. I guess three or four times.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

2.5 Trial Pages –Very Similar—No Collusion

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Anna Croft.
A. Yes.

Q. Which also makes you the step-sister of Amanda Croft?
A. Yes.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you lived in Calgary with your mother, Anna. Was there a time at which you also lived with a person by the name of Steven Jeremy Croft.
A. Yes, I did.

Q. How old were you at that time?
A. He came to live with us when I was 15.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, Anna, and Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as a father?
A. After about six months, like, he seemed nice, and, you know, comfortable to be with as a father.

Q. Now, you mentioned that he came to live with you when you were 15, and how long did you continue to live in that residence?
A. About two years.

Q. During that two years, were you happy in the home?

A. I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. How long after Mr. Croft joined the family did these advances start?
A. Probably a few months.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then I think he realized that I wasn't going to run to anybody so they just progressed from there. Usually, he would ask me to watch a movie with him. Then he would tell me that he wanted me to sit with him on the couch...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was Anna?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began within a year of Mr. Croft moving in and started when Melissa was 15 years old.

Q. Now on all of those occasions you were 15 to 17 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 17.

2) Cross-examination by Mr. Foster

Q. **During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?**
A. **No.**

Q. **After you moved out, did you maintain contact with your mother?**
A. **As much as I could.**

Q. **Did you hear in September of 1983 that Amanda was apprehended by child services?**
A. **Yes, I heard.**

Q. **Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?**
A. **No, I never did.**

Q. **But you did tell, for the fist time, in the presence of Anna, and Detective Manny.**
A. **I told my mother that morning, and that afternoon, I went and wrote a statement.**

Q. **Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?**
A. **No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.**

Q. **Now, did you ever talk to Amanda Croft about what happened?**
A. **No, never.**

Q. **So, you never discussed anything regarding Mr. Croft?**
A. **No, I didn't ever speak with Amanda. I don't even know her.**

Q. **So you have never met Amanda Croft?**
A. **No, I never did.**

Q. **Okay, nothing further**

(WITNESS STANDS DOWN)

2.6 Trial Pages –Very Similar—Collusion

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Anna Croft.
A. Yes.

Q. Which also makes you the step-sister of Amanda Croft?
A. Yes.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you lived in Calgary with your mother, Anna. Was there a time at which you also lived with a person by the name of Steven Jeremy Croft.
A. Yes, I did.

Q. How old were you at that time?
A. He came to live with us when I was 15.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, Anna, and Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as a father?
A. After about six months, like, he seemed nice, and, you know, comfortable to be with as a father.

Q. Now, you mentioned that he came to live with you when you were 15, and how long did you continue to live in that residence?
A. About two years.

Q. During that two years, were you happy in the home?

A. I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. How long after Mr. Croft joined the family did these advances start?
A. Probably a few months.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then I think he realized that I wasn't going to run to anybody so they just progressed from there. Usually, he would ask me to watch a movie with him. Then he would tell me that he wanted me to sit with him on the couch...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was Anna?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began within a year of Mr. Croft moving in and started when Melissa was 15 years old.

Q. Now on all of those occasions you were 15 to 17 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 17.

2) Cross-examination by Mr. Foster

Q. During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?
A. No.

Q. After you moved out, did you maintain contact with your mother?
A. As much as I could.

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard.

Q. Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?
A. No, I never did.

Q. But you did tell, for the fist time, in the presence of Anna, and Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.

Q. Now, did you ever talk to Amanda Croft about what happened?
A. Yes.

Q. So, you had a chance to discuss all of these alleged events with each other?
A. Yes, we talked about what happened.

Q. So, you talked to her about your story and she talked to you about her story?
A. Yes, we talked about everything.

Q. How many times have you talked to her about it?
A. I guess three or four times.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

2.7 Trial Pages –Extremely Similar—No Collusion

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Steven Croft.
A. Yes.

Q. Which also makes you the half-sister of Amanda Croft?
A. Yes, we have different mothers but the same father

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When your mother and Mr. Croft were married, you lived in Calgary with both of them, is that correct?
A. Well, my parents broke up when I was a baby, but then they got back together when I was about 11 years old.

Q. So, how long did you live in a house with your mother and Mr. Croft?
A. Until I was 13.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, and your father Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Now, you mentioned that you only lived with your father until you were 13. Why was that?
A. My mother and father got separated again, so my mother and I moved away.

Q. Had you been happy in the home before that?
A. No, I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?

A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. When did these advances start?
A. When I was about 11 years old.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then it just progressed from there. Usually, he would ask me to watch a movie with him. He would tell me that he wanted me to wear my nightgown and sit with him on the couch. He would say that his back was hurting and he needed to lie down and then...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was your mother?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began when Melissa was 11 years old.

Q. Now on all of those occasions you were 11 to 13 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 13.

2) Cross-examination by Mr. Foster

Q. **During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?**
A. **No.**

Q. **Did you hear in September of 1983 that Amanda was apprehended by child services?**
A. **Yes, I heard.**

Q. **Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?**
A. **No, I never did.**

Q. **But you did tell, for the fist time, in the presence of your mother, and Detective Manny.**
A. **I told my mother that morning, and that afternoon, I went and wrote a statement.**

Q. **Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?**
A. **No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.**

Q. **Now, did you ever talk to Amanda Croft about what happened?**
A. **No, never.**

Q. **So, you never discussed anything regarding Mr. Croft?**
A. **No, I didn't ever speak with Amanda. I don't even know her.**

Q. **So you have never met Amanda Croft?**
A. **No, I never did.**

Q. **Okay, nothing further**

(WITNESS STANDS DOWN)

2.8 Trial Pages –Extremely Similar—Collusion

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Steven Croft.
A. Yes.

Q. Which also makes you the half-sister of Amanda Croft?
A. Yes, we have different mothers but the same father.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When your mother and Mr. Croft were married, you lived in Calgary with both of them, is that correct?
A. Well, my parents broke up when I was a baby, but then they got back together when I was about 11 years old.

Q. So, how long did you live in a house with your mother and Mr. Croft?
A. Until I was 13.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, and your father Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Now, you mentioned that you only lived with your father until you were 13. Why was that?
A. My mother and father got separated again, so my mother and I moved away.

Q. Had you been happy in the home before that?
A. No, I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?

A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. When did these advances start?
A. When I was about 11 years old.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then it just progressed from there. Usually, he would ask me to watch a movie with him. He would tell me that he wanted me to wear my nightgown and sit with him on the couch. He would say that his back was hurting and he needed to lie down and then...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was your mother?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began when Melissa was 11 years old.

Q. Now on all of those occasions you were 11 to 13 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 13.

2) Cross-examination by Mr. Foster

Q. During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?
A. No.

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard.

Q. Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?
A. No, I never did.

Q. But you did tell, for the fist time, in the presence of your mother, and Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.

Q. Now, did you ever talk to Amanda Croft about what happened?
A. Yes.

Q. So, you had a chance to discuss all of these alleged events with each other?
A. Yes, we talked about what happened.

Q. So, you talked to her about your story and she talked to you about her story?
A. Yes, we talked about everything.

Q. How many times have you talked to her about it?
A. I guess three or four times.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

2.9 Debriefing

Debriefing Form

One of the most complex and important questions in many criminal trials is whether the jury may hear evidence of a defendant's prior criminal or disreputable activity, especially if that evidence is similar to the crime for which the defendant is being charged. Courts in Australia, Great Britain, Canada and the United States have generally held that this kind of "similar fact evidence" *is* relevant, but there is great concern that it may also be prejudicial so it is generally regarded as inadmissible. The general concern of the courts is that the jury may use the evidence of a defendant's past to infer that the defendant has some kind of criminal disposition and is therefore more likely to have committed the present crime. This kind of "propensity" reasoning is heavily guarded against in the courts as it is seen to be highly prejudicial and unfair. In certain circumstances however, this type of evidence *is* admissible for purposes that don't involve propensity reasoning.

In determining which evidence is admissible and which is not, the courts consider the similarity of the evidence to the present crime. Very generally speaking, if it is not similar it can be admissible for certain purposes dictated by the judges instructions, if it is very similar it is not admissible, and if it is extremely similar, it may be admissible in certain circumstances. Underlying the rationale for these conditions of admissibility are many **social psychological** assumptions. These assumptions are based, for the most part, only upon the "common sense" and intuition of those in the legal profession. The present research is an attempt to empirically examine the psychology behind these intuitive assumptions using the scientific method.

We **hypothesize** that jurors will be negatively influenced by very *similar* similar fact evidence **(independent variable)** and will be influenced by whether the witness who testifies as to the prior dubious activity may or may not have colluded with the main prosecution witness (another independent variable). In other words, we predict that extremely similar prior disreputable activity will negatively affect juror's ratings of the defendant's guilt, his credibility, etc. (**dependant variables**) but that the possibility of collusion might lesson the negative effects of the similar fact evidence. We also **hypothesize** that judges' instructions will not be effective in limiting the use of prior criminal activity evidence to something other than "propensity" reasoning. In the **control group**, participants read the same trial but read evidence of an act that is not similar to the crime for which the defendant is being charged.

References

Wissler, R. & Saks, M. (1985). On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt. Law and Human Behavior, 9(1), 37-48.

Gleitman, H. (1994). Psychology. (5th ed.) New York: W.W. Norton & Co. pp. 467-487.

2.10 Debriefing Questions

1. In which general area of psychology does this type of research belong?

Answer: Social Psychology

2. State one of the hypotheses of this study?

Answer: Very similar "similar fact evidence" will have the most negative influence on jurors verdicts.

3. State another one of the hypotheses of this study?

Answer: People will not limit the use of similar fact evidence to assess only credibility; instead, it will affect their ratings of the defendants' general disposition (likeability, honesty, etc.)

4. What is one of the independent variables?

Answer: Whether the witnesses might have colluded with one another

5. What is the dependent variable?

Answer: Verdicts, guilt ratings, ratings of the general disposition of the defendant and other scores on the questionnaire.

6. What was the control group?

Answer: The group that was not exposed to evidence of an act that is not similar to the crime for which the defendant is charged.

Materials for Study 3

3.1 Questionnaire –Treatment Conditions

For Experimenter use

Your #_____

Questionnaire #1

What is your age? _____ Years old

What is your sex? a) Male b) Female

---

1. What is your verdict in this case?

_____ Guilty

_____ Not Guilty

2. How likely do you think it is that Mr. Croft is guilty?

1	2	3	4	5	6	7
Definitely Not Guilty						Definitely Guilty

2. If you voted "not guilty" on question #1, was it because:

a) You think he is innocent
b) You think he is guilty but you do not think there is enough evidence to prove it
c) You are unsure whether he is innocent or guilty

3. To what extent do you feel that the instructions of the judge influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

4. To what extent do you think that the testimony of Amanda Croft influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

5. To what extent do you think that the testimony of Steven Croft influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

6. To what extent do you think that the testimony of Melissa White influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

Please indicate the extent to which you agree or disagree with the following statements.

Melissa's testimony made Amanda's testimony more believable to me.

1	2	3	4	5	6	7
Completely disagree						Completely agree

Melissa's testimony made Steven Croft's testimony less believable to me.

1	2	3	4	5	6	7
Completely disagree						Completely agree

If Steven Croft had sexual relations with Melissa, then I think he is the kind of person who would probably have had sexual relations with Amanda.

1	2	3	4	5	6	7
Completely disagree						Completely agree

Please rate Steven Croft on the following scales:

1	2	3	4	5	6	7
Not at all honest						Extremely honest

1	2	3	4	5	6	7
Not at all likeable						Extremely likable

1	2	3	4	5	6	7
Not at all dangerous						Extremely dangerous

1	2	3	4	5	6	7
Not at all a good person						An extremely good person

7. When making your final decision, to what extent did you use the following factors?

The possibility that Amanda is not telling the truth

1	2	3	4	5	6	7
Not at all						A great deal

The idea that because of his past actions, Steven Croft is the kind of person who would commit this type of crime

1	2	3	4	5	6	7
Not at all						A great deal

The testimony that there were often people in the house

1	2	3	4	5	6	7
Not at all						A great deal

The fact that Steven Croft was a mechanic

1	2	3	4	5	6	7
Not at all						A great deal

8. Where there any other kinds of factors did you consider while you were making your assessment of your verdict in this case?

_____

_____

_____

3.2 Questionnaire –Control Condition

3.1 Questionnaire –Control Condition

For Experimenter use: [redacted] **Your #**_____

Questionnaire #1

What is your age? _____ Years old

What is your sex? a) Male b) Female

---

1. What is your verdict in this case?

_____ Guilty

_____ Not Guilty

2. How likely do you think it is that Mr. Croft is guilty?

1	2	3	4	5	6	7
Definitely Not Guilty						Definitely Guilty

2. If you voted "not guilty" on question #1, was it because:

a) You think he is innocent
b) You think he is guilty but you do not think there is enough evidence to prove it
c) You are unsure whether he is innocent or guilty

3. To what extent do you feel that the instructions of the judge influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

4. To what extent do you think that the testimony of Amanda Croft influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

5. To what extent do you think that the testimony of Steven Croft influenced your decisions?

1	2	3	4	5	6	7
Not at all						A great deal

Please rate Steven Croft on the following scales:

1	2	3	4	5	6	7
Not at all honest						Extremely honest

1	2	3	4	5	6	7
Not at all likeable						Extremely likable

1	2	3	4	5	6	7
Not at all dangerous						Extremely dangerous

1	2	3	4	5	6	7
Not at all a good person						An extremely good person

6. When making your final decision, to what extent did you use the following factors?

The possibility that Amanda is not telling the truth

1	2	3	4	5	6	7
Not at all						A great deal

The testimony that there were often people in the house

1	2	3	4	5	6	7
Not at all						A great deal

The fact that Steven Croft was a mechanic

1	2	3	4	5	6	7
Not at all						A great deal

7. Where there any other kinds of factors did you consider while you were making your assessment of your verdict in this case?

_____

_____

_____

3.3 Trial pages –Control Condition

– the crisis center comes up again and you knew who to blame immediately, Amanda?

A. I don't know what you mean by "several years ago?"

Q. When Deborah McLoyd—the social worker—had come to you as a result of a complaint to the crisis center.

A. That was not the first time I had contact with the crisis center.

Q. All right.

A. I had contact with them when Amanda first came to live with us because the crisis center was following Amanda's case.

Q. Okay, fine. So what did you do when you found out that your wife had been speaking to someone at the crisis?

A. I asked my wife whether she knew if Amanda had been telling stories at school again referring to the fact of her and Anna not getting along, the fact that she was not getting everything she wanted in the house.

Q. And what did she say?

A. Anna told me that Amanda had been telling things at school, but that they were far more harmful than those types of stories.

Q. And that is when you lost your temper?

A. Yes, I wouldn't believe everything I had worked for keeping the family together was going to be ruined.

(WITNESS STANDS DOWN)

3.5 Trial Pages –Very Similar – Proof

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Anna Croft.
A. Yes.

Q. Which also makes you the step-sister of Amanda Croft?
A. Yes.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you lived in Calgary with your mother, Anna. Was there a time at which you also lived with a person by the name of Steven Jeremy Croft.
A. Yes, I did.

Q. How old were you at that time?
A. He came to live with us when I was 15.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, Anna, and Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as a father?
A. After about six months, like, he seemed nice, and, you know, comfortable to be with as a father.

Q. Now, you mentioned that he came to live with you when you were 15, and how long did you continue to live in that residence?
A. About two years.

Q. During that two years, were you happy in the home?
A. I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. How long after Mr. Croft joined the family did these advances start?
A. Probably a few months.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then I think he realized that I wasn't going to run to anybody so they just progressed from there. Usually, he would ask me to watch a movie with him. Then he would tell me that he wanted me to sit with him on the couch...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was Anna?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began within a year of Mr. Croft moving in and started when Melissa was 15 years old.

Q. Now on all of those occasions you were 15 to 17 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 17.

2) Cross-examination by Mr. Foster

Q. **During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?**
A. **Yes.**

Q. **And what happened?**
A. **Mr. Croft was arrested and charged with a sexual offense.**

Q. **Was there a trial?**
A. **Yes.**

Q. **What was the verdict?**
A. **Guilty.**

Q. **So, he was convicted of a sexual offense against you?**
A. **Yes, that's right, he was.**

Q. **Did you hear in September of 1983 that Amanda was apprehended by child services?**
A. **Yes, I heard.**

Q. **During the time that these events were taking place, did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?**
A. **No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.**

Q. **But you told anyway.**
A. **Yes.**

Q. **Okay, nothing further**

(WITNESS STANDS DOWN)

– the crisis center comes up again and you knew who to blame immediately, Amanda?

A. *I don't know what you mean by "several years ago?"*

Q. *When Deborah McLoyd—the social worker—had come to you as a result of a complaint to the crisis center.*

A. *That was not the first time I had contact with the crisis center.*

Q. *All right.*

A. *I had contact with them when Amanda first came to live with us because the crisis center was following Amanda's case.*

Q. *Okay, fine. So what did you do when you found out that your wife had been speaking to someone at the crisis?*

A. *I asked my wife whether she knew if Amanda had been telling stories at school again referring to the fact of her and Anna not getting along, the fact that she was not getting everything she wanted in the house.*

Q. *And what did she say?*

A. *Anna told me that Amanda had been telling things at school, but that they were far more harmful than those types of stories.*

Q. *And that is when you lost your temper?*

A. *Yes, I wouldn't believe everything I had worked for keeping the family together was going to be ruined.*

Q. *Okay, I would like to talk to you about Melissa White, your step-daughter. Were you involved in a sexual relationship with her?*

A. *No.*

Q. *But you were arrested and charged with a sexual offense against Melissa White.*

A. *Yes I was, but it was a false allegation.*

Q. *But the jury found you guilty beyond a reasonable doubt in a trial?*

A. *Well, they were wrong.*

Q. *Nothing further.*

(WITNESS STANDS DOWN)

3.5 Trial Pages –Very Similar – No Proof

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Anna Croft.
A. Yes.

Q. Which also makes you the step-sister of Amanda Croft?
A. Yes.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you lived in Calgary with your mother, Anna. Was there a time at which you also lived with a person by the name of Steven Jeremy Croft.
A. Yes, I did.

Q. How old were you at that time?
A. He came to live with us when I was 15.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, Anna, and Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as a father?
A. After about six months, like, he seemed nice, and, you know, comfortable to be with as a father.

Q. Now, you mentioned that he came to live with you when you were 15, and how long did you continue to live in that residence?
A. About two years.

Q. During that two years, were you happy in the home?
A. I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. How long after Mr. Croft joined the family did these advances start?
A. Probably a few months.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then I think he realized that I wasn't going to run to anybody so they just progressed from there. Usually, he would ask me to watch a movie with him. Then he would tell me that he wanted me to sit with him on the couch...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was Anna?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began within a year of Mr. Croft moving in and started when Melissa was 15 years old.

Q. Now on all of those occasions you were 15 to 17 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 17.

2) Cross-examination by Mr. Foster

Q. During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?
A. Yes, I had told a couple of my best friends, but I never told anyone official.

Q. After you moved out, did you maintain contact with your mother?
A. As much as I could.

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard.

Q. Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?
A. Yes, well, as I said, I told a couple of friends but not my mother.

Q. But you did tell, for the first time, in the presence of Anna, and Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

– the crisis center comes up again and you knew who to blame immediately, Amanda?

A. I don't know what you mean by "several years ago?"

Q. When Deborah McLoyd—the social worker—had come to you as a result of a complaint to the crisis center.

A. That was not the first time I had contact with the crisis center.

Q. All right.

A. I had contact with them when Amanda first came to live with us because the crisis center was following Amanda's case.

Q. Okay, fine. So what did you do when you found out that your wife had been speaking to someone at the crisis?

A. I asked my wife whether she knew if Amanda had been telling stories at school again referring to the fact of her and Anna not getting along, the fact that she was not getting everything she wanted in the house.

Q. And what did she say?

A. Anna told me that Amanda had been telling things at school, but that they were far more harmful than those types of stories.

Q. And that is when you lost your temper?

A. Yes, I wouldn't believe everything I had worked for keeping the family together was going to be ruined.

Q. Okay, I would like to talk to you about Melissa White, your step-daughter. Were you involved in a sexual relationship with her?

A. No.

Q. But she testified that you were involved in a sexual relationship?

A. I know she does, but it is not true.

Q. Did her accusations ever go to court?

A. No, they did not.

Q. Nothing further.

(WITNESS STANDS DOWN)

3.7 Trial Pages –Extremely Similar – No Proof

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Steven Croft.
A. Yes.

Q. Which also makes you the half-sister of Amanda Croft?
A. Yes, we have different mothers but the same father

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you mother and Mr. Croft were married, you lived in Calgary with both of them, is that correct?
A. Well, my parents broke up when I was a baby, but then they got back together when I was about 11 years old.

Q. So, how long did you live in a house with your mother and Mr. Croft?
A. Until I was 13.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, and your father Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as your father?
A. Yes.

Q. Now, you mentioned that you only lived with your father until you were 13. Why was that?
A. My mother and father got separated again, so my mother and I moved away.

Q. Had you been happy in the home before that?
A. No, I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. When did these advances start?
A. When I was about 11 years old.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then it just progressed from there. Usually, he would ask me to watch a movie with him. He would tell me that he wanted me to wear my nightgown and sit with him on the couch. He would say that his back was hurting and he needed to lie down and then...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was your mother?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began when Melissa was 11 years old.

Q. Now on all of those occasions you were 11 to 13 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 13.

2) Cross-examination by Mr. Foster

Q. During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?
A. Yes, I had told a couple of my best friends, but I never told anyone official.

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard.

Q. Up to that point in time, had you ever told anyone; in particular, had you ever-told your mother or anyone in the Croft household that you had sexual relations with Steven Croft?
A. Yes, well, as I said, I told a couple of friends but not my mother.

Q. But you did tell, for the first time, in the presence of your mother, and Detective Manny.
A. I told my mother that morning, and that afternoon, I went and wrote a statement.

Q. Did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

– the crisis center comes up again and you knew who to blame immediately, Amanda?

A. *I don't know what you mean by "several years ago?"*

Q. *When Deborah McLoyd—the social worker—had come to you as a result of a complaint to the crisis center.*

A. *That was not the first time I had contact with the crisis center.*

Q. *All right.*

A. *I had contact with them when Amanda first came to live with us because the crisis center was following Amanda's case.*

Q. *Okay, fine. So what did you do when you found out that your wife had been speaking to someone at the crisis?*

A. *I asked my wife whether she knew if Amanda had been telling stories at school again referring to the fact of her and Anna not getting along, the fact that she was not getting everything she wanted in the house.*

Q. *And what did she say?*

A. *Anna told me that Amanda had been telling things at school, but that they were far more harmful than those types of stories.*

Q. *And that is when you lost your temper?*

A. *Yes, I wouldn't believe everything I had worked for keeping the family together was going to be ruined.*

Q. *Okay, I would like to talk to you about Melissa White, your daughter. Were you involved in a sexual relationship with her?*

A. *No.*

Q. *But she testified that you were involved in a sexual relationship?*

A. *I know she does, but it is not true.*

Q. *Did her accusations ever go to court?*

A. *No, they did not.*

Q. *Nothing further.*

(WITNESS STANDS DOWN)

3.8 Trial Pages –Extremely Similar – Proof

Melissa White –sworn

1) Examination-in-chief by Mr. Myers.

Q. All right. What is your date of birth?
A. February 8, 1959.

Q. Okay. You are the natural daughter of Steven Croft.
A. Yes.

Q. Which also makes you the half-sister of Amanda Croft?
A. Yes, we have different mothers but the same father.

Q. You are 26 years of age, is that correct?
A. Yes.

Q. Okay. When you mother and Mr. Croft were married, you lived in Calgary with both of them, is that correct?
A. Well, my parents broke up when I was a baby, but then they got back together when I was about 11 years old.

Q. So, how long did you live in a house with your mother and Mr. Croft?
A. Until I was 13.

Q. How long ago was that?
A. Oh, around ten years ago.

Q. All right, and you lived, then, in that household with your natural mother, and your father Mr. Steven Croft, and your brother Victor, is that correct?
A. Yes, I did.

Q. Did you regard Mr. Croft as your father?
A. Yes.

Q. Now, you mentioned that you only lived with your father until you were 13. Why was that?
A. My mother and father got separated again, so my mother and I moved away.

Q. Had you been happy in the home before that?
A. No, I wasn't comfortable where I was.

Q. Does that relate to something that had happened to you in the home?
A. Yes.

Q. Were any of these problems related to Mr. Croft.
A. Yes.

Q. Tell us about those problems, how they started.
A. Well, they started slowly, like, with him making sexual advances towards me.

Q. Okay. When did these advances start?
A. When I was about 11 years old.

Q. Did the sexual advances progress from that time?
A. Yes.

Q. How?
A. It started slowly, like, just touching, you know, and then it just progressed from there. Usually, he would ask me to watch a movie with him. He would tell me that he wanted me to wear my nightgown and sit with him on the couch. He would say that his back was hurting and he needed to lie down and then...

Melissa then testifies that this situation would progress to sexual touching.

Q. During these occasion on which these events occurred, where was your mother?
A. She was at work or out.

Mr. Myers begins to question the witness as to the details of the sexual nature of the relationship between herself and Mr. Croft. It is revealed under questioning that the relationship progressed from touching to sexual intercourse and other sexual contact. The sexual intercourse began when Melissa was 11 years old.

Q. Now on all of those occasions you were 11 to 13 years old. What was your attitude towards it? In other words, did you want to do those things?
A. No, I didn't.

Q. How long did the sexual relationship last?
A. Well, he continued making advances towards me all the way when I moved out when I was 13.

2) Cross-examination by Mr. Foster

Q. During the time you lived with your mother, Victor and Mr. Croft, did you ever tell anyone that this was going on?
A. Yes.

Q. And what happened?
A. Mr. Croft was arrested and charged with a sexual offense.

Q. Was there a trial?
A. Yes.

Q. What was the verdict?
A. Guilty.

Q. So, he was convicted of a sexual offense against you?
A. Yes, that's right, he was.

Q. Did you hear in September of 1983 that Amanda was apprehended by child services?
A. Yes, I heard.

Q. During the time that these events were taking place, did Mr. Croft ever talk to you about the possibility of your telling somebody about what was happening between you?
A. No, he never said not to tell anybody, but he used to say that my mother wouldn't believe me, anyway.

Q. But you told anyway?
A. Yes, I did.

Q. Okay, nothing further

(WITNESS STANDS DOWN)

– the crisis center comes up again and you knew who to blame immediately, Amanda?

A. *I don't know what you mean by "several years ago?"*

Q. *When Deborah McLoyd—the social worker—had come to you as a result of a complaint to the crisis center.*

A. *That was not the first time I had contact with the crisis center.*

Q. *All right.*

A. *I had contact with them when Amanda first came to live with us because the crisis center was following Amanda's case.*

Q. *Okay, fine. So what did you do when you found out that your wife had been speaking to someone at the crisis?*

A. *I asked my wife whether she knew if Amanda had been telling stories at school again referring to the fact of her and Anna not getting along, the fact that she was not getting everything she wanted in the house.*

Q. *And what did she say?*

A. *Anna told me that Amanda had been telling things at school, but that they were far more harmful than those types of stories.*

Q. *And that is when you lost your temper?*

A. *Yes, I wouldn't believe everything I had worked for keeping the family together was going to be ruined.*

Q. *Okay, I would like to talk to you about Melissa White, your daughter. Were you involved in a sexual relationship with her?*

A. *No.*

Q. *But you were arrested and charged with a sexual offense against Melissa White.*

A. *Yes I was, but it was a false allegation.*

Q. *But the jury found you guilty beyond a reasonable doubt in a trial?*

A. *Well, they were wrong.*

Q. *Nothing further.*

(WITNESS STANDS DOWN)

3.9 Debriefing

Debriefing Form

One of the most complex and important questions in many criminal trials is whether the jury may hear evidence of a defendant's prior criminal or disreputable activity, especially if that evidence is similar to the crime for which the defendant is being charged. Courts in Australia, Great Britain, Canada and the United States have generally held that this kind of "similar fact evidence" *is* relevant, but there is great concern that it may also be prejudicial so it is generally regarded as inadmissible. The general concern of the courts is that the jury may use the evidence of a defendant's past to infer that the defendant has some kind of criminal disposition and is therefore more likely to have committed the present crime. This kind of "propensity" reasoning is heavily guarded against in the courts as it is seen to be highly prejudicial and unfair. In certain circumstances however, this type of evidence *is* admissible for purposes that don't involve propensity reasoning.

In determining which evidence is admissible and which is not, the courts consider the similarity of the evidence to the present crime. Very generally speaking, if it is not similar it can be admissible for certain purposes dictated by the judges instructions, if it is very similar it is not admissible, and if it is extremely similar, it may be admissible in certain circumstances. Underlying the rationale for these conditions of admissibility are many **social psychological** assumptions. These assumptions are based, for the most part, only upon the "common sense" and intuition of those in the legal profession. The present research is an attempt to empirically examine the psychology behind these intuitive assumptions using the scientific method.

We **hypothesize** that jurors will be negatively influenced by *similar* similar fact evidence (**independent variable)** and will be influenced by whether the prior dubious activity involves proven facts or only allegations (another independent variable). In other words, we predict that extremely similar prior disreputable activity, especially if it is a proven fact, will negatively affect juror's ratings of the defendant's guilt, his credibility, etc. (**dependant variables**). We also **hypothesize** that judges' instructions will not be effective in limiting the use of prior criminal activity evidence to something other than "propensity" reasoning. In the **control group**, participants read the same trial but read no similar fact evidence.

References

Wissler, R. & Saks, M. (1985). On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt. Law and Human Behavior, 9(1), 37-48.

Gleitman, H. (1994). Psychology. (5th ed.) New York: W.W. Norton & Co. pp. 467-487.

3.10 Debriefing Questions

Debriefing Questions

1. In which general area of psychology does this type of research belong?

Answer: Social Psychology

2. State one of the hypotheses of this study?

Answer: Very similar "similar fact evidence" will have the most negative influence on jurors verdicts.

3. State another one of the hypotheses of this study?

Answer: People will not limit the use of similar fact evidence to assess only credibility; instead, it will affect their ratings of the defendants' general disposition (likeability, honesty, etc.)

4. What is one of the independent variables?

Answer: The cogency of the evidence—is it a proven fact or an unproven allegation

5. What is the dependent variable?

Answer: Verdicts, guilt ratings, ratings of the general disposition of the defendant and other scores on the questionnaire.

6. What was the control group?

Answer: The group that was not exposed to any similar fact evidence.

APPENDIX C

Legal References

The Federal Rules of Evidence and The Canadian Evidence Act

Section 12. (1) of the Canadian Evidence Act[13] that relates to the examination of a witness as to a previous conviction is relevant to this discussion. According to s.12:

> A witness may be questioned as to whether he has been convicted of any offence, and, on being so questioned, if he either denies the fact or refuses to answer, the opposite party may prove the conviction.

As for the United States Federal Rules of Evidence[14], there is quite a bit more detail espoused relating to character evidence of this kind. The rules that pertain to character can be found in article IV on relevancy and its limits.

Rule 401. Definition of "Relevant Evidence"
"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible: Irrelevant Evidence Inadmissible
All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
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

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
Character evidence generally.
Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused , or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the

---

[13] R.S.C. 1985, c. C-5.
[14] 28 United States Code

victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

Other crimes, wrongs, or acts.
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 406. Habit; Routine Practice
Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Also relevant for the present discussion are:
Rule 413. Evidence of Similar Crimes in Sexual Assault Cases
In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

Rule 414. Evidence of Similar Crimes in Child Molestation Cases
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.

As well as:
Rule 607. Who May Impeach
The Credibility of a witness may be attacked by any party, including the party calling the witness

Rule 608. Evidence of Character and Conduct of Witness
Opinion and reputation evidence of character
The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise

Specific instances of conduct
Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility , other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

Rule 609. Impeachment by Evidence of Conviction of Crime
General Rule
For the Purpose of attacking the credibility of a witness,

evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject or Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determined that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

And finally:

Rule 105. Limited Admissibility
When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.