a shady business with no legal basis. The purpose of the Interception of Communications Act was to give it one—and this, one might have thought, destroyed the basis for the earlier rule.

It is also said that section 9 was intended to protect the police from defence questioning which might reveal information about their methods that they need to keep secret in order to win their fight against crime. But this too is unconvincing. First, the risk already arises in the situations where section 9 does not apply. Secondly, and more fundamentally, there is no need to protect them against this risk where (as often) it is the police who wish to use the evidence, and the desire to exclude the evidence comes from the defence.

The real explanation for section 9, I believe, lies in the circumstances in which the Interception of Communications Act was enacted. The government of the day was pushed into legislating on telephone-tapping by the *Malone* case (1984) 7 E.H.R.R. 14, hated doing it, and was determined both to keep the power to issue warrants to tap telephones in the hands of the Home Secretary, and to ensure as far as possible that his decisions could not be examined—directly or indirectly—in the ordinary courts. The primary aim of section 9 was to protect the Home Office—and only secondarily the police. The protection of defendants, needless to say, was not part of the scheme at all—although, as with some other ill-conceived evidential rules, it is guilty defendants who mainly profit by it.

In the rest of continental Europe, I believe, the rule is simple: the fruits of telephone-tapping are admissible if it was done legally, but inadmissible if it was not. And one does not have to be a europhile, surely, to believe that this should be the rule in England too.

J.R. Spencer

Similar fact evidence: identity cases and striking similarity

English law sets out from the proposition that, lest it prejudice the tribunal, the prosecution in a criminal case may not adduce evidence that an accused has committed any wrongdoing other than the offence(s) actually charged. Although other misconduct evidence is still supposed only to be admitted if strongly relevant to the issues being tried, over the years the courts have steadily relaxed this self-denying ordinance. Most recently, in *D.P.P.* v. *P* [1992] 2 A.C. 447 Lord Mackay L.C. abandoned the view espoused by members of the House of Lords in *D.P.P.* v. *Boardman* [1975] A.C. 421 that other misconduct evidence may only be adduced if it displays a "striking similarity" to the misconduct charged. He declared that in

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determining its admissibility a judge had only to consider whether the probative force of the other misconduct was "sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime" (p. 460).

This loose test, whereby the probative force of the misconduct evidence is balanced against its likely prejudicial effect, was said to be subject to one important qualification. Whilst acknowledging that in all other contexts such a requirement would "impose an unnecessary and improper restriction upon the application of the (similar fact) principle", in *D.P.P.* v. *P* Lord Mackay stated that "where the identity of the perpetrator is in issue, *and evidence of this kind is important in that connection,* obviously something in the nature of what has been called in the course of argument a signature or other special feature will be necessary" (p. 462: emphasis added). Earlier in his speech, he had already remarked: "obviously, in cases where the identity of the offender is in issue, evidence of a character sufficiently special reasonably to identify the perpetrator is required" (p. 460). Courts have sometimes assumed from these dicta that *D.P.P.* v. *P* does not entirely supersede *Boardman* and that "something over and above the normal criteria for admissibility" is required when identity is in issue in a case (*Johnson* [1995] 2 Cr. App. R. 41, 45 *per* Ognall J.). The curious suggestion that "a signature or other special feature", meaning some sort of distinctive hallmark akin to "the ceremonial head-dress of a Red Indian chief" worn by the homosexual offender in Lord Hailsham's oft-quoted example in *Boardman,* must be present whenever identity is in issue has been persistently criticised and has now finally been laid to rest by the Court of Appeal in *John W* [1998] 2 Cr. App. R. 289.

W was convicted on two counts of falsely imprisoning and indecently assaulting C in Aldershot and on a third count of falsely imprisoning S in Farnham two weeks later. It was not disputed that someone had committed these offences. The identity of the culprit, however, was contested. On appeal, W complained that the trial judge had failed to order separate trials for each of the two incidents and, more particularly, that he had misdirected the jury by omitting to forbid them to take the Aldershot evidence into account when considering the Farnham incident, and *vice versa.* The principal question confronting the Court of Appeal, therefore, was whether the evidence from the Aldershot and Farnham incidents had been, in the jargon of the subject, "mutually admissible". The evidence implicating W in the Farnham offence was agreed to be overwhelming. There were also certain factual links between the Aldershot and Farnham incidents, such as: broadly coinciding descriptions of the attacker and

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his clothing; W resided close to the sites of both attacks at the relevant times; both attacks took place within a short time of one another; the attacker on each occasion was predominantly left-handed. Nevertheless, the two incidents exhibited no "striking similarity". Therefore, W argued, the evidence was not "mutually admissible".

Hooper J., giving the judgment of the Court of Appeal, admitted that "to extract a simple test from Lord Mackay's speech has not always proved easy" (p. 303), but suggested that in the italicised passage in *D.P.P.* v. *P* quoted above, "and evidence of this kind is important in that connection", what Lord Mackay had had in mind was those extremely rare cases where the *only* evidence of any substance against a defendant on one count was "a signature or other very striking similarity". Thus, where there is sufficient evidence against D on count 1 to justify his conviction, if the only evidence linking D with count 2 is a striking similarity between the way in which the two offences have been committed, a jury is entitled to convict D on both counts 1 and 2. Had it not been that D had been aware of the murder of a third young girl before it became general knowledge, *Straffen* [1952] 2 Q.B. 911 would have exemplified this unusual situation. In the normal run of cases, however, some other evidence of substance will inevitably link D to the relevant count. This being so, the question is whether, when added to the evidence relating to that count, the other misconduct passes Lord Mackay's test in *D.P.P.* v. *P*: is it just to admit it despite its prejudicial character? This may explain why in *Thompson* [1918] A.C. 221 the possession of the infamous powder puffs and indecent photographs, although extraneous to the gross indecency charged, was admitted to rebut the defendant's claim of mistaken identity. The evidence was not strikingly similar, but, given the telling coincidence that the man whom the boys singled out as their assailant possessed these items, it was strongly probative of guilt. In short, whilst a striking similarity may be used to establish the identity of a culprit (*e.g., West* [1996] 2 Cr. App. R. 174, *Ruiz* [1995] Crim.L.R. 151), it is by no means a necessary condition for the admissibility of similar fact evidence in all identification cases. In *John W,* therefore, where there was substantial evidence linking W to the Aldershot offences but no striking similarity between the Aldershot and Farnham attacks, Hooper J. held that the test was satisfied and that the evidence from the two incidents was mutually admissible.

John W resolves a significant dispute within similar fact evidence, dispatching the notion that identity cases form a category apart. Just as it did in *Rance* (1975) 62 Cr. App. R. 118 and *Scarrott* [1978] Q.B. 1016, cases that followed close upon the heels of the Lords' ruling in

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Boardman, when it warned that too much importance should not be attributed to the Lords' label "striking similarity", once again the Court of Appeal has given a critical touch on the tiller and, indeed, conferred upon this most problematical of rules a measure of intellectual coherence. Lord Mackay's test may defy precise formulation, will often be difficult to apply, may be virtually appeal-proof owing to its pronounced discretionary flavour and can require the most delicate jury directions. However, we should be appreciative of the small mercy that the law may now have freed itself almost completely from the restrictive clutches of a "striking similarity" test, thereby allowing the judge in cases where other misconduct evidence is sought to be adduced to test the true probative potential of the entire evidence against the factual matrix of the particular case.

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