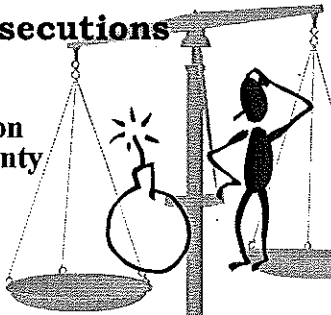


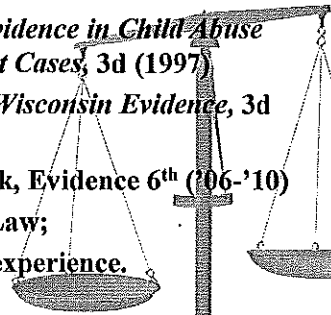
## Other Acts Evidence In Child Abuse Prosecutions

Thomas J. Fallon  
ADA Dane County  
Madison, WI



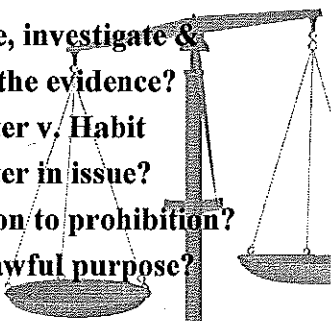
## Sources relied upon

- A. Meyers, *Evidence in Child Abuse and Neglect Cases*, 3d (1997)
- B. 7. Blinka, *Wisconsin Evidence*, 3d (2008).
- C. McCormick, *Evidence* 6<sup>th</sup> (196-'10)
- D. Common Law;
- E. 30+ years experience.



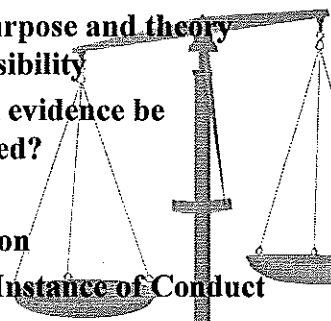
## Preliminary Considerations

- A. Investigate, investigate &
- B. Nature of the evidence?
  - 1. Character v. Habit
  - 2. Character in issue?
  - 3. Exception to prohibition?
  - 4. Other lawful purpose?



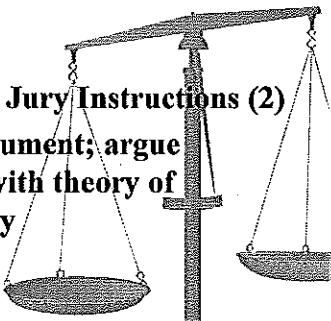
## Preliminary Considerations

- C. Know purpose and theory of admissibility
- D. How will evidence be introduced?
  - Opinion
  - Reputation
  - Specific Instance of Conduct



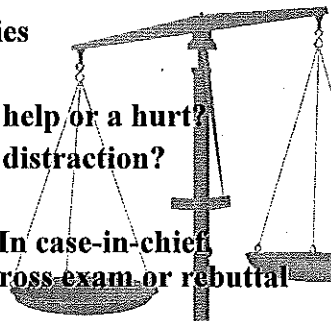
## Preliminary Considerations

- E. By whom?
- F. Cautionary Jury Instructions (2)
- G. Closing argument; argue consistent with theory of admissibility

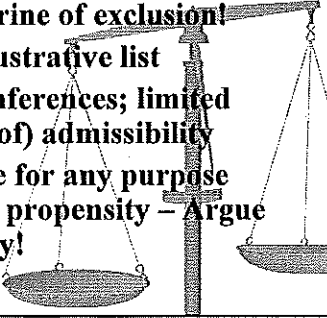


## Preliminary Considerations

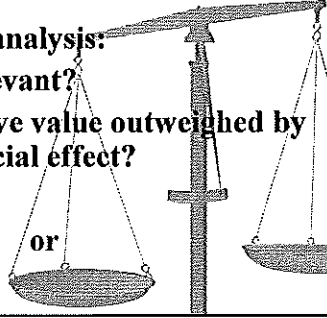
- H. Practicalities
  - 1. Needed?
  - 2. OAE: A help or a hurt?
  - 3. OAE: A distraction?
  - 4. Notice?
  - 5. When? In case-in-chief during cross-exam or rebuttal



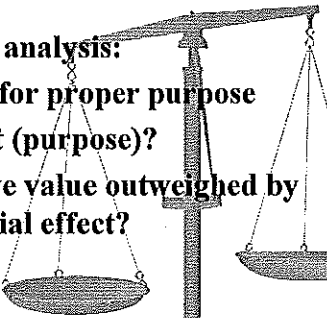
### General Principles

- A. Not a doctrine of exclusion!
  - B. 404(b): Illustrative list
  - C. Multiple inferences; limited (purposes of) admissibility
  - D. Admissible for any purpose other than propensity – Argue accordingly!
- 

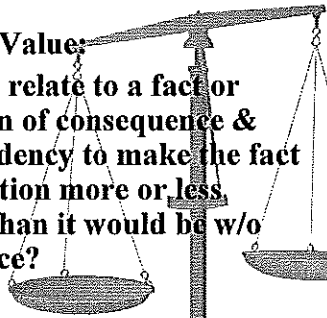
### General Principles

- E. Two step analysis:
    1. Is it relevant?
    2. Probative value outweighed by prejudicial effect?
- or
- 

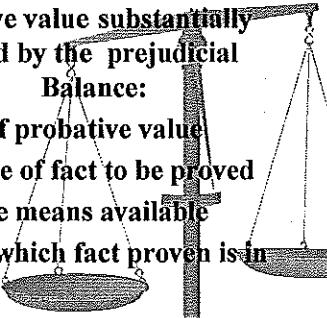
### General Principles

- E. Three step analysis:
    1. Offered for proper purpose
    2. Relevant (purpose)?
    3. Probative value outweighed by prejudicial effect?
- 

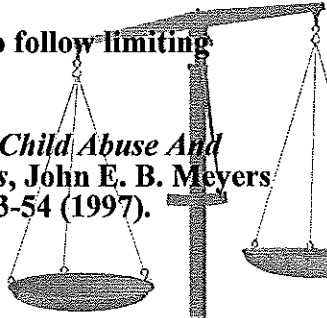
### General Principles

- F. Probative Value:  
Does OAE relate to a fact or proposition of consequence & have a tendency to make the fact or proposition more or less probable than it would be w/o the evidence?
- 

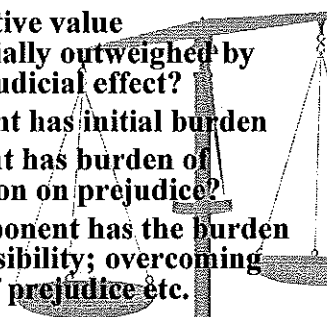
### General Principles

- G. Is probative value substantially outweighed by the prejudicial effect? Balance:
    - Strength of probative value
    - Importance of fact to be proved
    - Alternative means available
    - Degree to which fact proven is in dispute
- 

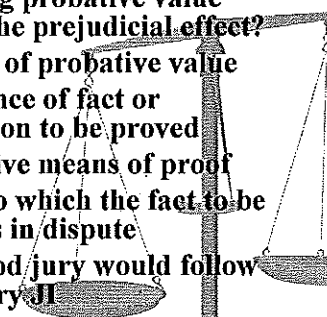
### General Principles

- Jury likely to follow limiting instruction?
  - 2. *Evidence in Child Abuse And Neglect Cases*, John E. B. Meyers 3d § 8.17, 453-54 (1997).
- 

### General Principles

- G. Is probative value substantially outweighed by the prejudicial effect?
1. Proponent has initial burden
  2. Opponent has burden of production on prejudice?
  3. The proponent has the burden of admissibility; overcoming claims of prejudice etc.
- 

### General Principles

- H. Balancing probative value against the prejudicial effect?
1. Strength of probative value
  2. Importance of fact or proposition to be proved
  3. Alternative means of proof
  4. Degree to which the fact to be proven is in dispute
  5. Likelihood jury would follow cautionary JI
- 

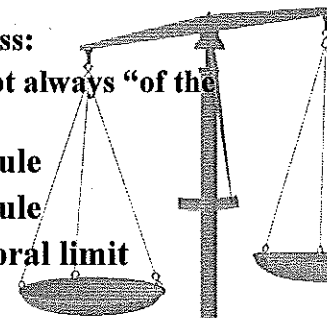
### General Principles

*E.g. Evidence is unfairly prejudicial when it has a tendency to influence the result by improper means, appeal to jury's sympathies, arouse a sense of horror, or provoke the jury to punish or otherwise base its decision on something other than the established propositions in the case.*

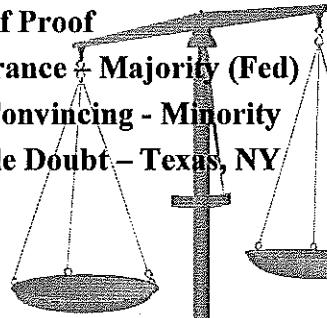
*State v Davidson, 613 N.W.2d 606 (WI 2000)*



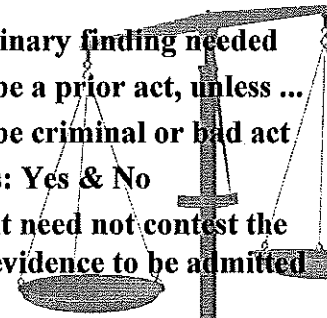
### General Principles

- I. Remoteness:  
Time is not always "of the essence"
- 10 year rule
  - 20 year rule
  - No temporal limit
- 

### General Principles

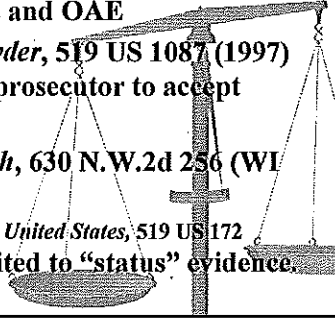
- J. Burdens of Proof
1. Preponderance - Majority (Fed)
  2. Clear & Convincing - Minority
  3. Reasonable Doubt - Texas, NY & .....
- 

### General Principles

- No preliminary finding needed
  - Need not be a prior act, unless ...
  - Need not be criminal or bad act
  - Acquittals: Yes & No
  - Defendant need not contest the issue for evidence to be admitted
- 

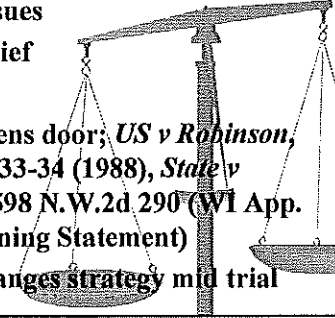
### General Principles

- Stipulations and OAE
- *U.S. v. Crowder*, 519 US 1087 (1997) can't force prosecutor to accept stipulation
- *State v Veach*, 630 N.W.2d 256 (WI 2002).
- Cf. *Old Chief v. United States*, 519 US 172 (1997). Limited to "status" evidence.



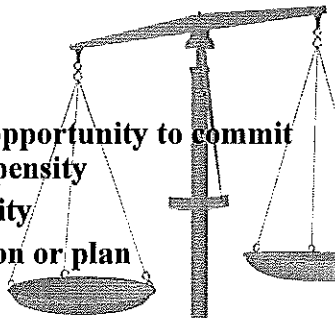
### General Principles

- Strategy issues
- Case-in-Chief
- Rebuttal
- Defense opens door; *US v Robinson*, 485 US 25, 33-34 (1988), *State v Edmunds*, 598 N.W.2d 290 (WI App. 1999) (Opening Statement)
- Defense changes strategy mid trial



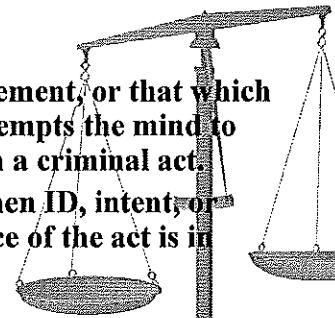
### Traditional Pathways

- A. Motive
- B. Intent  
Greatest opportunity to commit sin of propensity
- C. Opportunity
- D. Preparation or plan



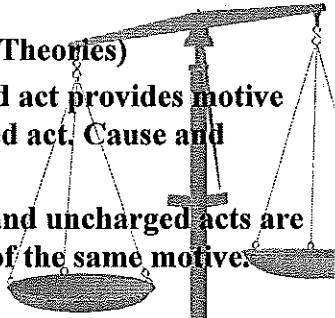
### Traditional Pathways

- A. Motive
  1. An inducement, or that which leads or tempts the mind to indulge in a criminal act.
  2. Useful when ID, intent, or occurrence of the act is in dispute.

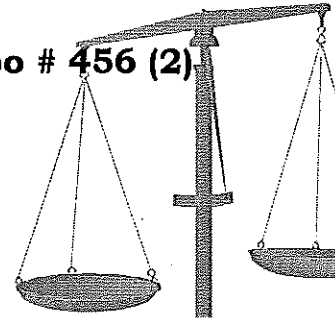


### Traditional Pathways

- A. Motive (2 Theories)
  3. Uncharged act provides motive for charged act. Cause and effect
  4. Charged and uncharged acts are products of the same motive.



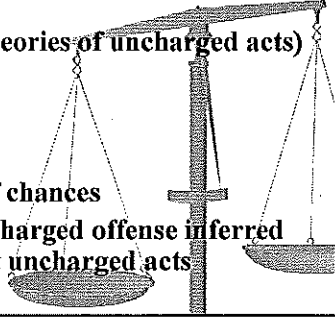
Hypo # 456 (2)



### Traditional Pathways

#### B. Intent (5 theories of uncharged acts)

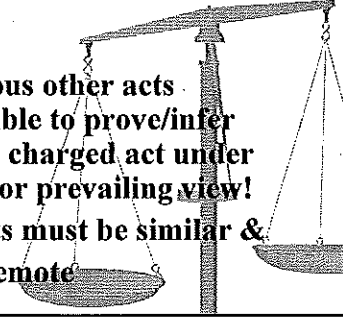
1. Motive
2. Plan
3. Knowledge
4. Doctrine of chances
5. Intent for charged offense inferred from intent uncharged acts



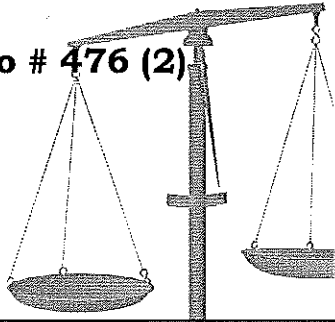
### Traditional Pathways

#### B. Intent

6. Anonymous other acts inadmissible to prove/infer intent for charged act under majority or prevailing view!
7. Other acts must be similar &
8. Not too remote



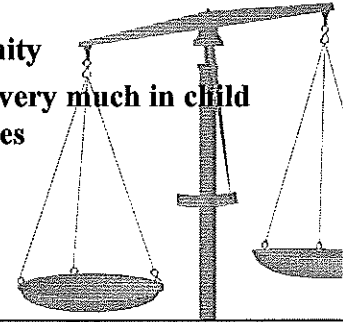
Hypo # 476 (2)



### Traditional Pathways

#### C. Opportunity

Not used very much in child abuse cases

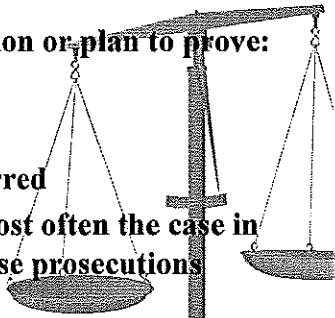


### Traditional Pathways

#### D. Preparation or plan to prove:

1. Identity
2. Intent
3. Act occurred

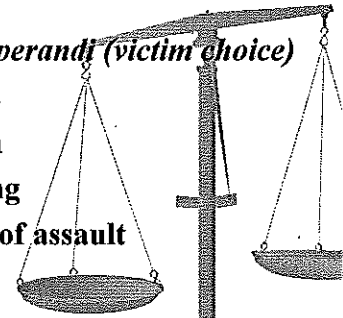
This is most often the case in child abuse prosecutions

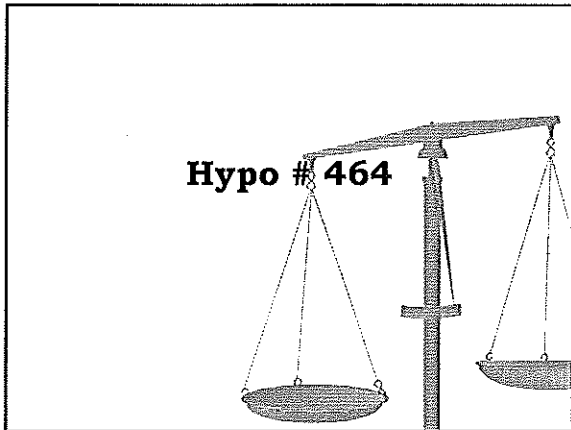


### Traditional Pathways

#### 4. *Modus operandi* (victim choice)

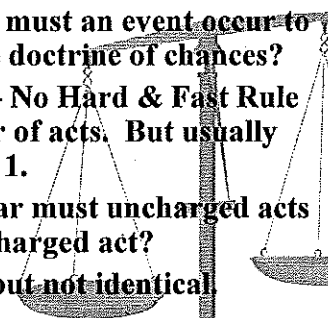
- Searches
- Selection
- Grooming
- Manner of assault





### Traditional Pathways

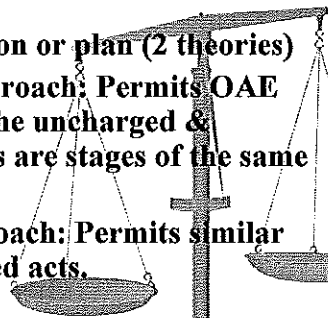
1. How often must an event occur to trigger the doctrine of chances?  
Majority – No Hard & Fast Rule on number of acts. But usually more than 1.
2. How similar must uncharged acts be to the charged act?  
Similar – but not identical.



### Traditional Pathways

D. Preparation or plan (2 theories)

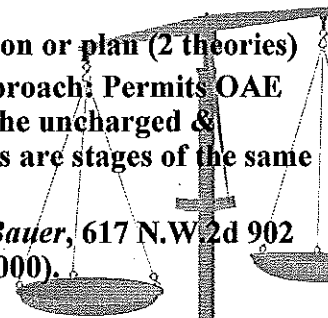
- Narrow approach: Permits OAE only when the uncharged & charged acts are stages of the same plan.
- Broad approach: Permits similar but unrelated acts.



### Traditional Pathways

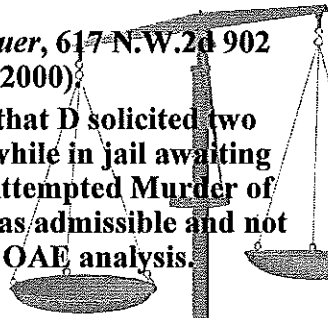
D. Preparation or plan (2 theories)

- Narrow approach: Permits OAE only when the uncharged & charged acts are stages of the same plan. ???
- Cf. *State v Bauer*, 617 N.W.2d 902 (WI App. 2000).



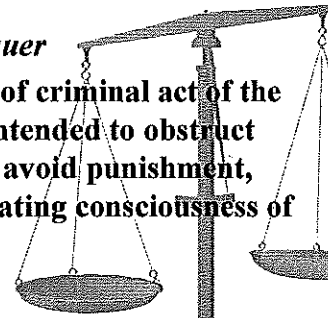
### Traditional Pathways

Cf. *State v Bauer*, 617 N.W.2d 902 (WI App. 2000)  
Evidence that D solicited two murders while in jail awaiting trial for Attempted Murder of his wife was admissible and not subject to OAE analysis.



### Traditional Pathways

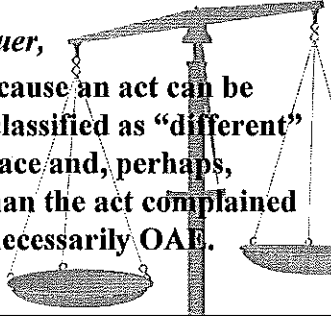
Cf. *State v Bauer*  
Evidence of criminal act of the accused intended to obstruct justice or avoid punishment, demonstrating consciousness of guilt.



### Traditional Pathways

*Cf. State v Bauer,*

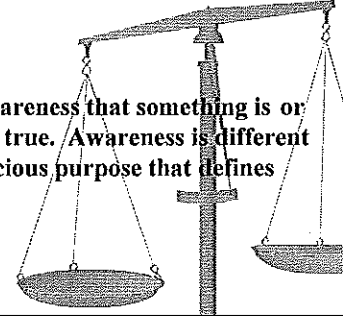
Simply because an act can be factually classified as “different” in time, place and, perhaps, manner than the act complained of, is not necessarily OAB.



### Traditional Pathways

E. Knowledge

Subjective awareness that something is or believed to be true. Awareness is different than the conscious purpose that defines intent.



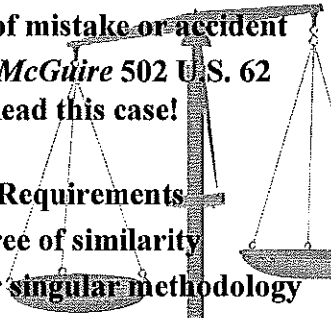
### Traditional Pathways

F. Absence of mistake or accident

*Estelle v. McGuire* 502 U.S. 62 (1991). Read this case!

G. Identity: Requirements

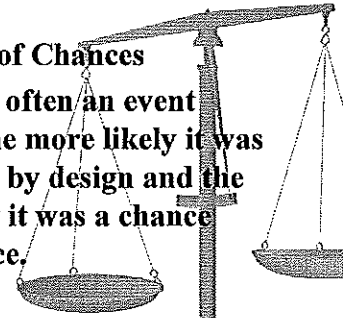
1. High degree of similarity
2. Unique or singular methodology



### More theories & arguments

A. Doctrine of Chances

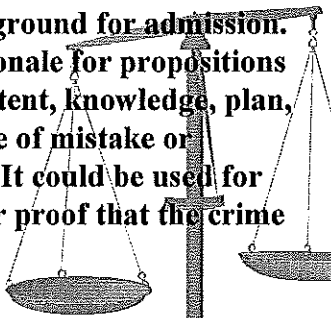
1. The more often an event occurs, the more likely it was produced by design and the less likely it was a chance occurrence.



### More theories & arguments

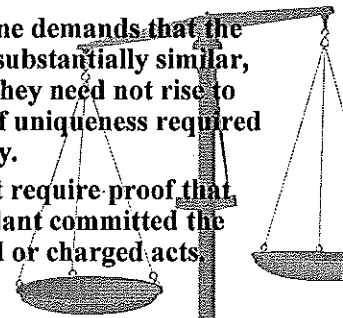
2. It's not a ground for admission.

It's a rationale for propositions such as intent, knowledge, plan, or absence of mistake or accident. It could be used for identity or proof that the crime occurred.



### More theories & arguments

3. The doctrine demands that the events be substantially similar, although they need not rise to the level of uniqueness required for identity.
4. It does not require proof that the defendant committed the uncharged or charged acts.

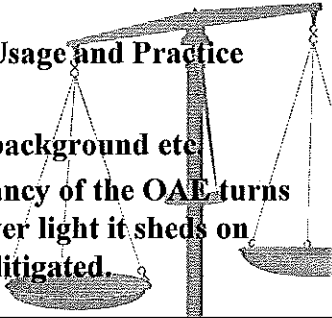


### More theories & arguments

B. Custom, Usage and Practice

C. Context, background etc

1. The relevancy of the OAE turns on whatever light it sheds on the event litigated.

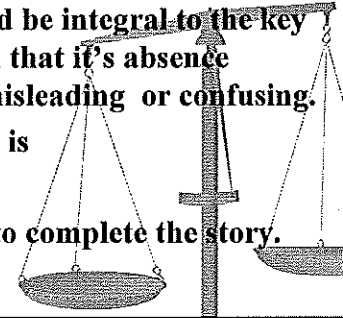


### More theories & arguments

2. OAE should be integral to the key events such that it's absence would be misleading or confusing.

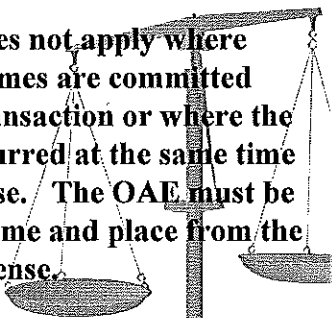
3. Test: OAE is

- Helpful &
- Necessary to complete the story.



### More theories & arguments

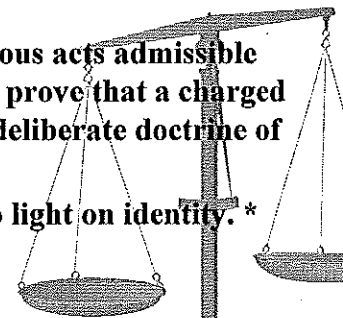
4. The rule does not apply where multiple crimes are committed during a transaction or where the bad act occurred at the same time as the offense. The OAE must be distinct in time and place from the charged offense.



### Traditional Pathways

5. Anonymous acts admissible under to prove that a charged act was deliberate doctrine of chances.

- a. Sheds no light on identity.\*



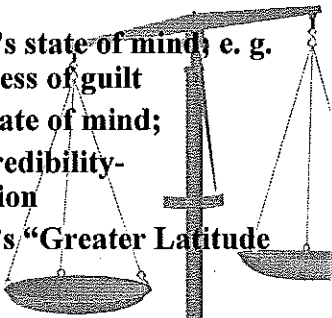
### More theories & arguments

D. Defendant's state of mind; e. g. consciousness of guilt

E. Victim's state of mind;

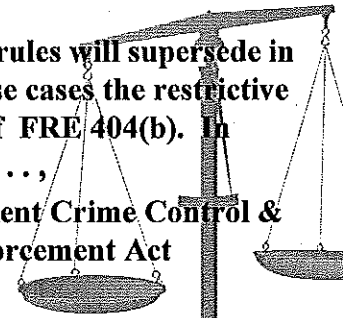
F. Victim's credibility-rehabilitation

G. Wisconsin's "Greater Latitude Rule"



### New Age Rules; 413 & 414

A. The new rules will supersede in sex offense cases the restrictive aspects of FRE 404(b). In contrast . . . , 1994 Violent Crime Control & Law Enforcement Act



## **New Age Rules; 413 & 414**

### **A. 1994 Violent Crime Control & Law Enforcement Act**

The new rules authorize admission and consideration of evidence of an uncharged offense for its bearing on any matter to which it is relevant.

## **Old School: Depraved Sexual Propensity Rule**

Some courts permit evidence of defendant's uncharged sexual misconduct to prove that the defendant has a propensity to commit sexually deviant acts.

Usually OAE must concern same victim.

## **Defense Use of Character Evidence**

### **FRE 404(a)(1)**

#### **Character of the Accused**

"Evidence of a pertinent trait of character offered by the accused, or by the prosecution to rebut same..." is admissible.

## **Character of the Accused**

### **A. 5 Exceptions to 404(a)**

1. D may offer character evidence that decreases likelihood D committed charged offense.
2. D may offer evidence of V's character that increases likelihood V acted in conformity.

## **Character of the Accused**

### **A. 5 Exceptions to 404(a)**

3. Witnesses may be impeached with evidence of untruthful character.
4. In sex offenses, in some courts, OAE may be offered to show propensity for sexual deviancy.
5. New FR'sE 413 - 415

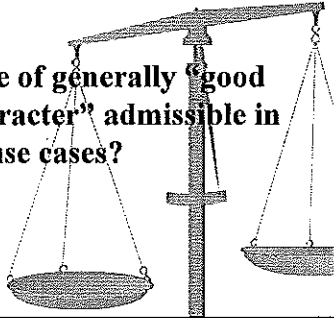
## **Character of the Accused**

### **B. May defendant offer evidence of pertinent character traits in physical abuse cases?**

1. Evidence that D is peaceful, and or affectionate or nurturing may well be admissible.

### Character of the Accused

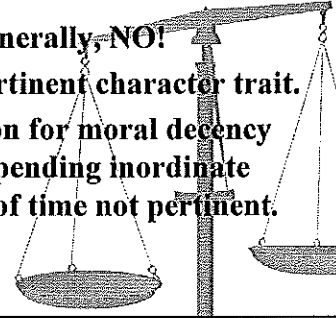
- C. Is evidence of generally "good moral character" admissible in sexual abuse cases?



### Character of the Accused

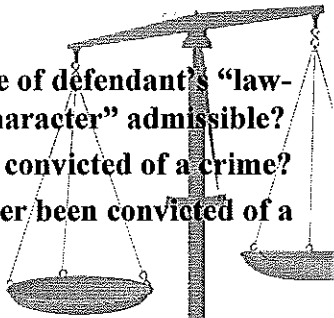
Generally, NO!

1. Not a pertinent character trait.
2. Reputation for moral decency and not spending inordinate amounts of time not pertinent.



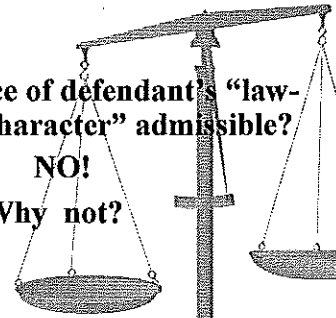
### Character of the Accused

- D. Is evidence of defendant's "law-abiding-character" admissible?  
Q Ever been convicted of a crime?  
A I have never been convicted of a crime!



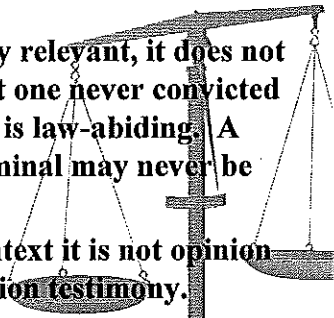
### Character of the Accused

- D. Is evidence of defendant's "law-abiding-character" admissible?  
NO!  
Why not?



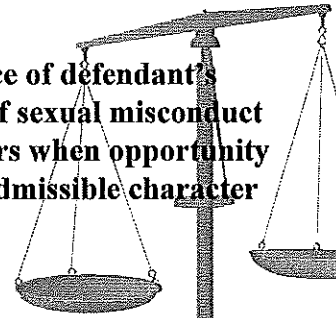
### Character of the Accused

1. Marginally relevant, it does not follow that one never convicted of a crime is law-abiding. A clever criminal may never be caught.
2. In this context it is not opinion or reputation testimony.



### Character of the Accused

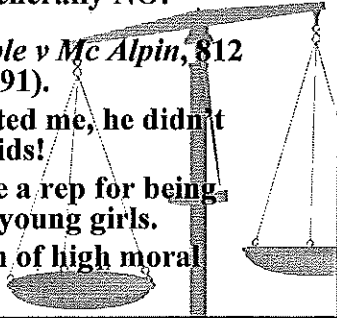
- E. Is evidence of defendant's absence of sexual misconduct with others when opportunity existed, admissible character evidence?



### Character of the Accused

Generally NO!

1. But cf. *People v Mc Alpin*, 812 P.2d 563 (1991).
- When he dated me, he didn't molest my kids!
  - Doesn't have a rep for being attracted to young girls.
  - D is a person of high moral character!

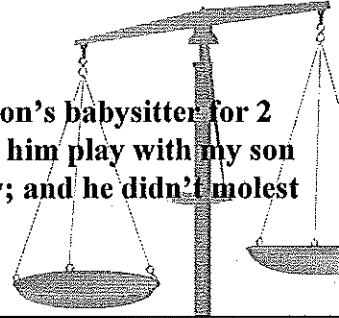


### Character of the Accused

How about:

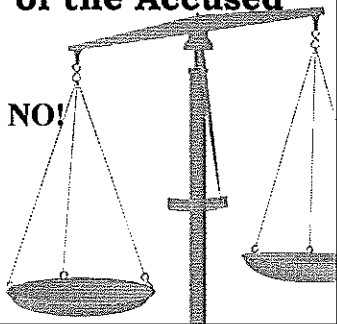
He was my son's babysitter for 2 years. I saw him play with my son every Friday; and he didn't molest him!

Admissible?



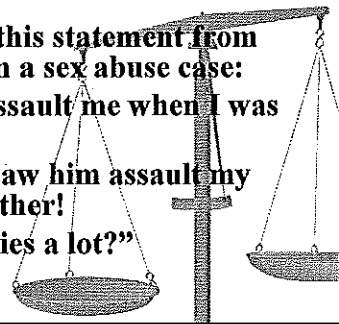
### Character of the Accused

NO!



### Character of the Accused

What about this statement from older sister in a sex abuse case:  
"He didn't assault me when I was 12;  
and I never saw him assault my little sister either!  
My brother lies a lot?"



### Character of the Accused

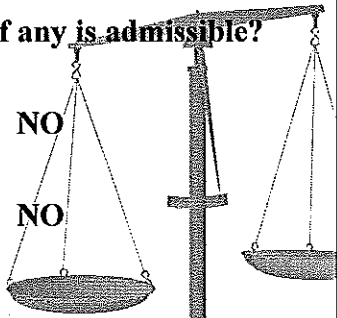
What part if any is admissible?

Part I

NO

Part II

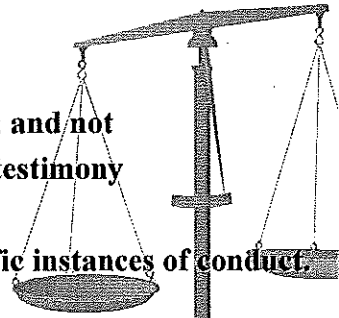
NO



### Character of the Accused

1. Irrelevant
2. Hearsay
3. Not opinion; and not
4. Reputation testimony

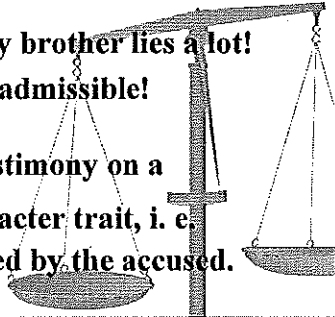
They are specific instances of conduct.



### Character of the Accused

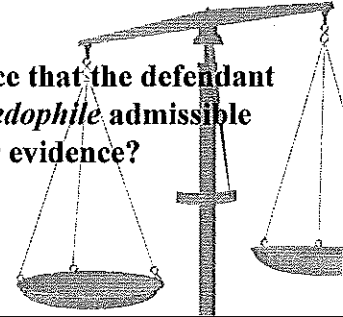
Part III My brother lies a lot!  
Is admissible!

It's opinion testimony on a  
pertinent character trait, i. e.  
honesty, offered by the accused.



### Character of the Accused

F. Is evidence that the defendant  
*is not a pedophile* admissible  
character evidence?

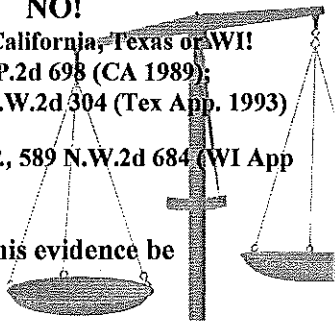


### Character of the Accused

**NO!**

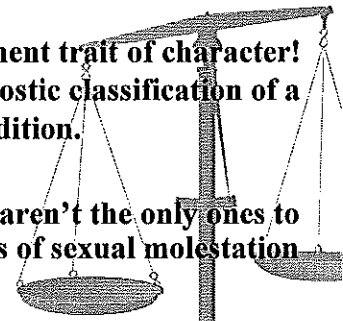
Unless you are in California, Texas or WI!  
*People v Stoll*, 783 P.2d 698 (CA 1989);  
*Nolte v State*, 854 S.W.2d 304 (Tex App. 1993)  
or  
*State v Richard A.P.*, 589 N.W.2d 684 (WI App  
1998)!

Why shouldn't this evidence be  
admissible?



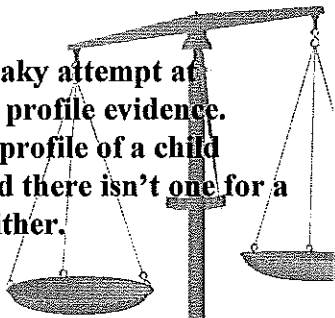
### Character of the Accused

1. Not a pertinent trait of character!  
It's a diagnostic classification of a  
mental condition.
2. Irrelevant.  
Pedophiles aren't the only ones to  
commit acts of sexual molestation  
(sic)?



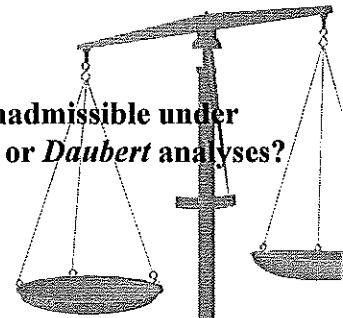
### Character of the Accused

3. This is a sneaky attempt at  
introducing profile evidence.  
There is no profile of a child  
molester and there isn't one for a  
pedophile either.



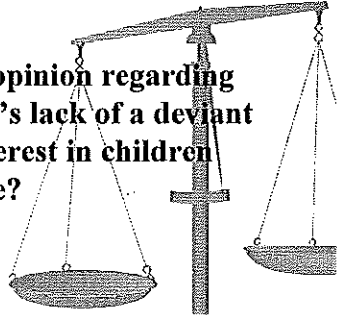
### Character of the Accused

4. Arguably inadmissible under  
either *Frye* or *Daubert* analyses?



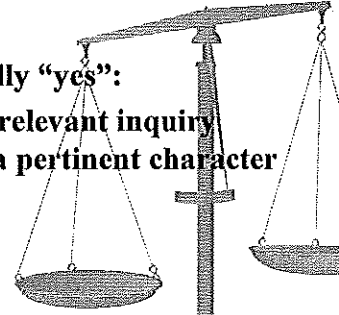
### Character of the Accused

- G. Is expert opinion regarding defendant's lack of a deviant sexual interest in children admissible?



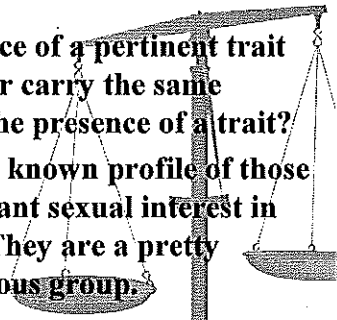
### Character of the Accused

1. Theoretically "yes":  
This is the relevant inquiry regarding a pertinent character trait.  
But . . . .



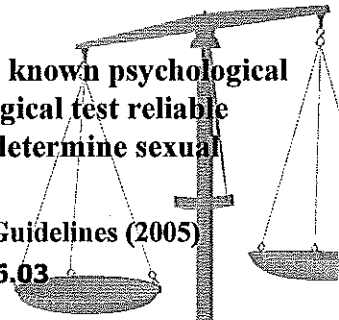
### Character of the Accused

2. Does absence of a pertinent trait of character carry the same weight as the presence of a trait?  
3. There is no known profile of those with a deviant sexual interest in children. They are a pretty heterogeneous group.



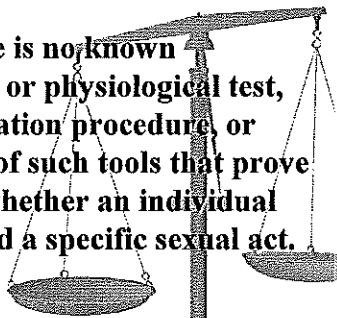
### Character of the Accused

4. There is no known psychological or physiological test reliable enough to determine sexual deviance!  
*See, ATSA Guidelines (2005)*  
§§ 16.02, 16.03



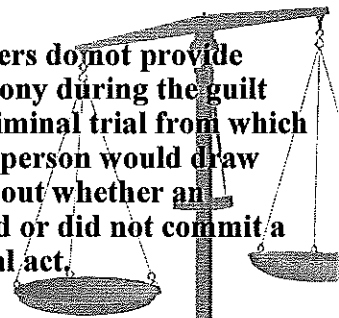
### ATSA Standards 2005

16.02 (T)here is no known psychological or physiological test, profile, evaluation procedure, or combination of such tools that prove or disprove whether an individual has committed a specific sexual act.



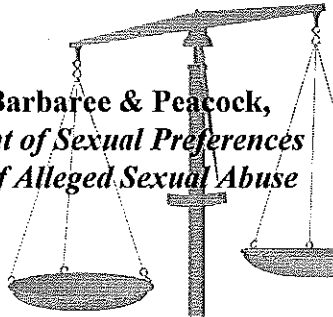
### ATSA Standards 2005

16.03 Members do not provide expert testimony during the guilt phase of a criminal trial from which a reasonable person would draw inferences about whether an individual did or did not commit a specific sexual act.



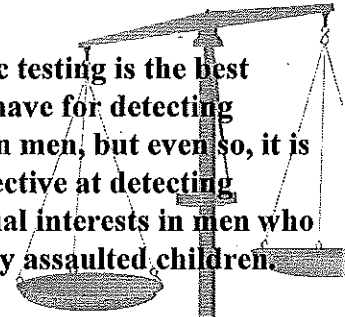
### Character of the Accused

- 5. See, also Barbaree & Peacock, *Assessment of Sexual Preferences in Cases of Alleged Sexual Abuse*



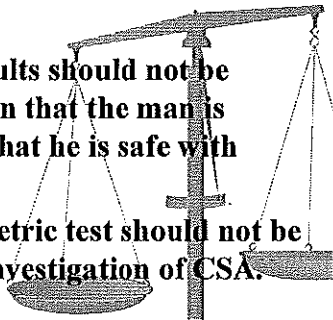
### Character of the Accused

- Phallometric testing is the best method we have for detecting pedophilia in men, but even so, it is not very effective at detecting deviant sexual interests in men who have sexually assaulted children.



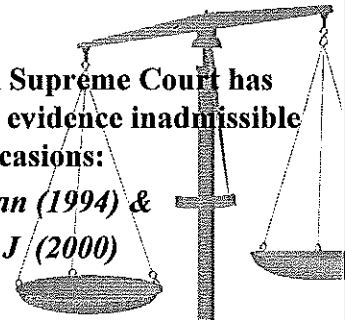
### Character of the Accused

- Negative results should not be taken to mean that the man is innocent or that he is safe with children.
- The phallometric test should not be used in the investigation of CSA.



### Character of the Accused

- 5. Canadian Supreme Court has ruled this evidence inadmissible on two occasions:
  - *R. v. Mohan (1994)* &
  - *R. v. J. -L.J (2000)*



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