ARTICLES

FORCE OF HABIT? CONSIDERING THE RELEVANCE OF POST-INCIDENT EVIDENCE UNDER FEDERAL RULE OF EVIDENCE 406

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Much of the analytical imprecision surrounding the admission of habit evidence results from a failure to adhere to a consistently applied definition of habit. In everyday parlance, the word "habit" is used in varying ways. What are frequently called "habitual acts" will only infrequently rise to the dignity of a habit as recognized by Rule 406.[1]

I. INTRODUCTION

Federal Rule of Evidence 406 (FRE 406), covering habit, is a "rule of relevance."[2] Not only is habit evidence "freely admissible,"[3] but the necessity of the rule has been questioned:

> Given Rule 402, which specifies that all relevant evidence is admissible unless excluded by another rule, Rule 406 should seem odd, unnecessary. Its main purpose is simply to alert

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[1] GLEN WEISSENBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 406.2, at 182 (7th ed. 2012) (citing MCCORMICK ON EVIDENCE § 195, at 322 (Kenneth S. Broun ed., 6th ed. 2006)).

[2] Marc D. Ginsberg, *Habit Forming: Evidence of Physician Habit in Medical Negligence Litigation*, 19 YALE J. HEALTH POL'Y L. & ETHICS 216, 219 (2019).

[3] ROGER C. PARK, AVIVA A. ORENSTEIN & DALE A. NANCE, EVIDENCE LAW: A STUDENT'S GUIDE TO THE LAW OF EVIDENCE AS APPLIED IN AMERICAN TRIALS § 7.15, at 306 (5th ed. 2022).

the user of the rules to the fact that habit is not caught by the prohibition of character evidence in Rule 404.[4]

FRE 406 provides as follows:

> **RULE 406. Habit; Routine Practice**
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> Evidence of a person's *habit* or an organization's *routine practice* may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.[5]

It is an idiosyncratic rule. The rule does not define habit. It does not articulate the sources of habit evidence. It does not provide any necessary duration of conduct which is habitual. It does not state whether qualifying conduct must be non-volitional/non-judgmental.[6] It does not provide a time frame for conduct contemplated by the rule. It does not state how frequently conduct must occur for it to be habitual. It does not identify the specificity of conduct contemplated by the rule, i.e., does the rule require identical conduct each time it occurs for the conduct to qualify as habitual? The rule does not address whether post-incident conduct is admissible to establish habit.

Rule 406 does not state if conduct occurring after the conduct at issue is admissible to establish habit. Why should Rule 406 address this "issue"? Surely, it is counter-intuitive to suggest that conduct which happened after the event at issue could prove the existence of a pre-incident habit. A review of case law is required to determine if courts simply agree that the use of post-incident conduct to prove habit is illogical.

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[4] *Id.*; *see* Marc D. Ginsberg, *An Evidentiary Oddity: "Careful Habit" — Does the Law of Evidence Embrace this Archaic/Modern Concept?*, 43 OHIO N. UNIV. L. REV. 293, 294 (2017) (reviewing the distinction between character and habit, and how these concepts have been confused by courts).

[5] FED. R. EVID. 406 (emphasis added).

[6] *See* Ginsberg, *supra* note 2, at 219–20 (examining whether conduct of physicians must be non-volitional to be considered habit).

II. HABIT EVIDENCE IN CRIMINAL CASES

The use and admissibility of habit evidence arise less frequently in criminal prosecutions as compared to civil litigation.[7] Further, cases involving post-charge habit evidence are exceedingly rare.[8] Like the civil analog, the admissibility of habit evidence in criminal cases turns on the "semi-automatic" nature of the conduct at issue.[9] As illustrative, in *United States v. Troutman*, the Tenth Circuit considered the trial court's exclusion of the defendant's proposed habit evidence in an extortion prosecution.[10] The government alleged that the defendant engineered a scheme to require applicants for government contracts to contribute to political fundraisers.[11] At trial, the defendant endeavored to present evidence from "several firms, not related to the present controversy" that he never before awarded contracts based on political contributions.[12] Over the defendant's objection, the trial court limited the testimony to a single witness.[13] The Tenth Circuit agreed, explaining that "[committing] [e]xtortion or refraining from extortion is not a semi-automatic act and does not constitute habit."[14]

Particularity and repetition also matter.[15] In *United States v. Angwin*, the Ninth Circuit reviewed the trial court's rejection of habit evidence in a prosecution for trafficking undocumented immigrants.[16] The defendant asserted that he "tried unsuccessfully to stop" several undocumented immigrants from entering his motorhome before relenting under duress.[17] He then claimed that he thought the

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[7] *See* Adam H. Kurland, *Prosecuting Ol' Man River: The Fifth Amendment, the Good Faith Defense, and the Non-Testifying Defendant*, 51 UNIV. PITT. L. REV. 841, 937 (1990).

[8] *See, e.g.*, United States v. Luttrell, 612 F.3d 396, 397 (8th Cir. 1980).

[9] *See* United States v. Troutman, 814 F.2d 1428, 1455 (10th Cir. 1987); Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1293 (7th Cir. 1988) (citing Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 511 (4th Cir. 1977)).

[10] *See Troutman*, 814 F.2d at 1454–55.

[11] *Id.* at 1436.

[12] *Id.* at 1454.

[13] *Id.* (noting that the trial court allowed the defendant to submit an offer-of-proof as to the remaining testimony in support of his claim of habit).

[14] *Id.* at 1455.

[15] *See* United States v. Angwin, 271 F.3d 786, 799 (9th Cir. 2001), *overruled on other grounds by* United States v. Lopez, 484 F.3d 1186 (9th Cir. 2007). As stated above, the rule does not define the precise number of acts or the specificity necessary to constitute habit. *See* FED. R. EVID. 406 advisory committee's note ("The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion").

[16] *See id.* at 794–99.

[17] *Id.* at 793.

"wisest course of action" was to drive to the border with the immigrants in tow.[18] Once there, the defendant testified that he attempted to alert border patrol agents before they inspected his vehicle but "couldn't get any words out."[19] The defendant unsuccessfully attempted to offer as habit evidence "multiple examples" during which his training and experience in the Coast Guard Auxiliary "taught [him] to take the least confrontational course of action in potentially dangerous situations."[20] On appeal of his conviction, the Ninth Circuit adopted a three-factor civil standard to determine whether specific acts amount to habit: "(1) the degree to which the conduct is reflexive or semi-automatic as opposed to volitional; (2) the specificity or particularity of the conduct; and (3) the regularity or numerosity of the examples of the conduct."[21] The court noted that the defendant was "correct" that "the more frequently that someone has engaged in certain conduct, the more likely it is that the conduct will qualify as evidence of habit."[22] However, the defendant's background "in rescuing distressed boats" was "not particularly similar" to the facts of the charged crime.[23] Further, notwithstanding the dissimilarity, the defendant's training "was not sufficiently reflexive" to qualify as habit evidence.[24]

While repetition is probative of habit, the analysis is not purely quantitative. In other words, sample size is a "key factor" in assessing proffered habit evidence.[25] In *United States v. Newman*, the defendant was charged with beating an inmate while the inmate was handcuffed to a cell bar.[26] At trial, the victim testified that the defendant handcuffed him to the first bar of the cell.[27] In response, "the defense attempted to introduce" a police officer's "testimony that he had seen between 75 and 100 prisoners handcuffed to the cell bars,

[18] *Id.*
[19] *Id.*
[20] *Id.* at 798.
[21] *Id.* at 799 (citing Weil v. Seltzer, 873 F.2d 1453, 1460–61 (D.C. Cir. 1989)); *see also* Simplex, Inc. v. Diversified Energy Sys., Inc., 847 F.2d 1290, 1293–94 (7th Cir. 1988).
[22] *Angwin*, 271 F.3d at 799.
[23] *Id.* at 799 (explaining that "the district court was not objecting to the quantity of [the defendant's] evidence but its quality").
[24] *Id.* at 800 (concluding that the defendant's "response to dangerous situations—prudently taking the least confrontational course of action—is hardly reflexive or semi-automatic").
[25] *See* JACK B. WEINSTEIN & MARGARET A. BERGER, STUDENT EDITION OF WEINSTEIN'S EVIDENCE MANUAL § 7.03[1], at 7-49 (9th ed. 2011) (citing FED. R. EVID. 406 advisory committee's note).
[26] *See* United States v. Newman, 982 F.2d 665, 667 (1st Cir. 1992).
[27] *See id.* at 668.

but never to the first bar."[28] The trial court excluded the evidence.[29] The Second Circuit upheld the ruling, observing that the "requisite regularity is tested by the 'ratio of reaction to situations.'"[30] The court reasoned that the trial judge did not err in excluding the evidence despite the large number of purported instances of handcuffing to the "third bar" as the defendant presented "no evidence even approximating the number of times prisoners were handcuffed to the cell bars."[31]

As another obstacle to admissibility, criminal courts routinely guard against efforts to sidestep prohibited character-propensity evidence under the guise of habit.[32] For instance, in *United States v. Serrata*,[33] two prison guards stood trial for assaulting an inmate.[34] The defendants claimed they physically restrained the victim-inmate only after he repeatedly resisted handcuffing amidst a disturbance in the dining hall.[35] In defense of their conduct, the defendants attempted to put forth evidence of the victim-inmate's habitual refusal to submit to handcuffs during past encounters with law

[28] *Id.* at 667–68. The location of the handcuffs became material due to the testimony of a detainee in the same cellblock who claimed to have seen the inmate's "cuffed hands protruding through the bars during the assault" but could only have done so if they were handcuffed to the first bar. *Id.* at 668.

[29] *Id.* at 668.

[30] *Id.* at 668 (quoting Wilson v. Volkswagen of Am., Inc., 561 F.2d 494, 512 (4th Cir. 1977)).

[31] *Newman*, 982 F.2d at 668–69 (quoting G.M. Brod & Co. v. U.S. Home Corp., 759 F.2d 1526, 1533 (11th Cir. 1985)) (finding that "testimony concerning specific instances within experience of witness, when considered in light of thousands of unobserved similar instances, 'falls far short of the adequacy of sampling and uniformity of response which are the controlling considerations governing admissibility'"); *see also* United States v. Heard, 709 F.3d 413, 434 (5th Cir. 2013) (citing Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 442 (5th Cir. 2007)) (finding that no abuse of discretion in preventing defendant, a certified public accountant, from offering testimony by two witnesses that the defendant had always filed timely payroll taxes for them as habit evidence as "[t]here is no indication of how many clients [the accountant] has had in his career, [so] establishing that he had always filed payroll taxes for two of them does not provide an adequate sample for showing habit.").

[32] *See* 1 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 406(B), at 467–68 (6th ed. 1994) (quoting Simplex, Inc. v. Diversified Energy Sys., 847 F.2d 1290, 1293 (7th Cir. 1988)) ("Courts have generally proceeded cautiously in permitting the admission of a pattern of conduct as habit, 'because it necessarily engenders the very real possibility that such evidence will be used to establish a party's propensity to act in conformity with its general character, thereby thwarting Rule 404's prohibition against the use of character evidence except for narrowly prescribed purposes.'"); *see* FED. R. EVID. 406 advisory committee's note (acknowledging that the two rules are "close akin" but that habit is "more specific" and "describes one's regular response to a repeated specific situation" as opposed to a person's "tendency to act" in accordance with a particular character trait "in all the varying situations of life").

[33] United States v. Serrata, 425 F.3d 886 (10th Cir. 2005).

[34] *See id.* at 889.

[35] *Id.* at 891.

enforcement.[36] On appeal of their conviction, the court rebuffed the strategy as "an untenable attempt to circumvent restrictions on character evidence by repackaging it as habit evidence."[37]

The strict gatekeeping standards for habit evidence combined with concerns over the circumvention of the character-propensity ban limit the rule's efficacy in criminal cases.[38] Still, the rule occasionally bears evidentiary fruit.[39] In *United States v. Arredondo*, the Sixth Circuit considered an appeal of the defendant's conviction for criminal contempt after the trial court concluded that he had fabricated a claim of ineffective assistance of counsel.[40] Specifically, the defendant claimed that his attorney failed to advise him of the government's two favorable plea offers prior to his trial conviction.[41] The attorney did not "squarely deny" the allegation.[42] Instead, he testified that he "could not specifically remember the events of that day, but [stated] that 'my practice has always been to communicate any plea offer made by the prosecution to my client regardless of my personal view as to the merits of the offer.'"[43] The attorney estimated that he had represented between "five and fifteen" federal clients at the time of the defendant's trial and he "had undertaken more representations since then."[44] The appellate court affirmed the admission of the evidence under Rule 406 in light of the attorney's criminal defense "experience."[45] Notably, the court did not expressly state whether it considered the attorney's "representations since then," i.e., his post-incident acts, as part of the habit calculus.[46] Its inclusion of that language as part of its favorable analysis, however,

[36] *Id.* at 901.
[37] *Id.* at 906.
[38] *See id.*; United States v. Angwin, 271 F.3d 786, 799 (9th Cir. 2001), *overruled on other grounds by* United States v. Lopez, 484 F.3d 1186 (9th Cir. 2007) (noting courts are "somewhat cautious" in admitting habit evidence because of Rule 406's status as an exception to the bar on character evidence); United States v. Yazzie, 188 F.3d 1178, 1190 (10th Cir. 1999) (noting that, because of its propensity to establish character, the admission of habit evidence is "highly discretionary and potentially troublesome"); United States v. Newman, 982 F.2d 665, 668–69 (1st Cir. 1992); *see generally* FED. R. EVID. 406 advisory committee's note.
[39] *See* United States v. Arredondo, 349 F.3d. 310, 315 (6th Cir. 2003).
[40] *Id.* at 312–13.
[41] *Id.* at 313.
[42] *Id.*
[43] *Id.*
[44] *Id.* at 315.
[45] *Id.*
[46] *See id.* at 315–16.

suggests that it did.[47] Certainly, it did not reject the evidence out of hand.[48]

In *United States v. Luttrell*, the United States Court of Appeals for the Eighth Circuit reviewed a conviction for failure to file income tax returns.[49] In a brief *per curiam* opinion, the court referred to Federal Rules of Evidence 404(b) and 406 and stated:

> Rule 406 of the Federal Rules of Evidence provides evidence of a person's habits may be admitted. Clearly, there was no abuse of discretion in the district court's admission of evidence regarding defendant's income tax filings, either for the years preceding or following the years on which his conviction was based.[50]

It is unclear from this language if the court may have meant to limit habit evidence to income tax filings prior to the years which were the basis of the prosecution.

Like their federal counterparts, state criminal courts generally employ admissibility standards for habit evidence anchored in repetitious, particularized, and non-volitional conduct.[51] For instance, in *State v. Tappe*,[52] a North Carolina appellate court considered the defendant's appeal of a conviction for driving while impaired.[53] In July of 1988, a police officer stopped the defendant's automobile after he "observed [it] . . . cross[] the center line."[54] After the officer noticed evidence of the defendant's intoxication, he arrested the defendant.[55] At the Sheriff's Department, another

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[47] *See id.*

[48] *See id.*

[49] *Id.* at 397.

[50] *Id.*

[51] *See, e.g.*, State v. Fair, 557 S.E.2d 500, 516 (N.C. 2001) ("To rise to the level of habit, the instances of specific conduct must be 'sufficiently numerous to warrant an inference of systematic conduct and to establish one's regular response to a repeated specific situation.'") (quoting Crawford v. Fayez, 435 S.E.2d 545, 549 (N.C. Ct. App. 1993); People v. Memro, 700 P.2d 446, 462 (Cal. 1985) ("'Habit' or 'custom' is often established by evidence of repeated instances of similar conduct."), *overruled on other grounds by* People v. Gaines, 205 P.3d 1074 (Cal. 2009); Wacker v. State, 171 P.3d 1164, 1169 (Alaska Ct. App. 2007) ("A significant factor in the determination of habit 'is the degree of volition required for the activity[.]'"); Hooker v. State, 716 So. 2d 1104, 1111 (Miss. 1998) ("'A habit . . . is the person's regular practice of meeting a particular kind of situation with a specific type of conduct[.]'").

[52] State v. Tappe, 533 S.E.2d 262 (N.C. Ct. App. 2000).

[53] *Id.* at 263.

[54] *Id.* (alterations in original).

[55] *Id.* The defendant admitted to consuming a beer and then "remarked that he was of German origin and that 'in Germany they drank beer for water.'" *Id.*

officer administered a "breathalyzer" test, which yielded a .34 blood alcohol concentration.[56] The defendant failed to appear for his court appearance and did not stand trial until his re-arrest in 1998.[57] At that point, the police had destroyed the notes related to the breathalyzer test results "in accordance with standard Patrol procedures."[58] The defendant filed a motion to suppress those results.[59] During a hearing, the officer that administered the breathalyzer test testified that he was "unable to recall [the] specific details" of the breathalyzer test but related the "customary and required procedures" he used to administer tests.[60] The officer then estimated that he had administered "[p]robably a thousand" breathalyzer tests by the time of the defendant's arrest.[61] The trial court admitted the evidence under Rule 406.[62] The appellate court approved, reasoning that the officer's testimony about his "customary" protocol combined with his experience satisfied the rule's requirements.[63]

Moreover, post-incident acts are not categorically off-limits. As illustrative, in *People v. Memro*, a California appellate court reviewed the lower court's exclusion of complaints detailing police misconduct sought by the defendant in a motion to suppress his confession.[64] The defendant requested the complaints to demonstrate that officers engaged in a "continuing course of conduct" of coercive interrogation methods to extract involuntary confessions.[65] In support of his request, the defendant included statements by four other individuals who alleged "brutality and intimidation" by officers "during recent interrogations."[66] The trial court refused the defendant's request.[67] The appellate court reversed the decision, opining that discovery of complaints against the interrogating officers "might lead to evidence of habit or custom admissible to show that [the officers] acted in conformity with that habit or custom on a given occasion."[68] In so

[56] *Id.*
[57] *See id.*
[58] *See id.*
[59] *See id.* at 264.
[60] *Id.* at 266.
[61] *Id.*
[62] *See id.* at 267.
[63] *Id.* at 266–67.
[64] People v. Memro, 700 P.2d 446, 457 (Cal. 1985), *overruled on other grounds by* People v. Gaines, 205 P.3d 1074 (Cal. 2009).
[65] *Id.* at 461.
[66] *See id.* at 457.
[67] *Id.*
[68] *Id.* at 462–64.

holding, the court did not limit the defendant's discovery request to the "recent" complaints that pre-dated his interrogation.[69] Rather, it stated that, "the Evidence Code clearly supported" the request.[70]

III. HABIT EVIDENCE IN CIVIL CASES

In *Holmes v. Pomeroy*,[71] a 2021 decision of the Supreme Court of Iowa, the court considered a personal injury lawsuit involving a collision between a vehicle and a bicycle.[72] The bicycle rider sued the vehicle driver, "alleging her negligence caused his injuries and damages."[73]

The evidentiary issue relating to habit arose from defendant's "motion in limine asking the district court to prevent [plaintiff] from making any argument that [defendant] has a habit of driving while distracted."[74] The alleged source of distraction was defendant's cell phone use.[75] "The [trial court] ordered [that plaintiff] could not use evidence of [defendant's] cell phone use while driving that occurred subsequent to the accident to prove a habit."[76] At trial, "the jury returned its verdict for [the defendant]."[77] The verdict was affirmed by the intermediate court of appeals.[78]

The opinion of the Iowa Supreme Court quite clearly stated that the only issue to be addressed on appeal was "whether the court of appeals erred in affirming the [trial] court's determination that the proffered evidence of [defendant's] cell phone use while driving did not constitute habit evidence under Iowa Rule of Evidence 5.406."[79] The Iowa Rule of Evidence governing habit is identical to FRE 406.[80]

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[69] *See id.* at 457, 464.
[70] *Id.* at 462.
[71] Holmes v. Pomeroy, 959 N.W.2d 387 (Iowa 2021).
[72] *Id.* at 388.
[73] *Id.* at 388.
[74] *Id.*
[75] *Id.* at 388–89.
[76] *Id.*
[77] *Id.* at 389.
[78] *See* Holmes v. Pomeroy, 952 N.W.2d 894 (Iowa Ct. App. 2020), *aff'd*, Holmes v. Pomeroy, 959 N.W.2d 387 (Iowa 2021).
[79] *Holmes*, 959 N.W.2d at 389.
[80] *Compare* IOWA R. EVID. 5.406 ("Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness."), *with* FED. R. EVID. 406 ("Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.").

The manner in which the Iowa Supreme Court framed the issue on appeal would lead to the conclusion that the supreme court was poised to consider whether post-incident conduct (here, texting while driving) could constitute admissible habit evidence.[81] The trial court concluded that only pre-incident conduct was admissible to establish habit.[82] The supreme court recognized the existence of authority "for both positions,"[83] citing relevant case law.[84]

Despite its recitation of case law on both sides of the issue, the supreme court, upon its review of defendant's cell phone use, stated that, "we need not decide at this time whether habit evidence may be shown through specific instances that occur subsequent to the occasion in question."[85] Why? The supreme court referred to "twenty examples of [defendant] using her cell phone while in a vehicle from May 2015 to June 2018,"[86] the pre- and post-incident time frame.[87] The supreme court then hypothesized that some of these instances related to defendant's cell phone use "in a vehicle she was not driving,"[88] and others may have occurred when "the vehicle was stopped or completely parked."[89] The supreme court concluded that "on the limited evidence offered, [defendant's] cell phone use while driving does not rise to the level of a habit but rather 'casual recurrences.'"[90] It seems, therefore, that the supreme court concluded that the frequency and specificity of defendant's cell phone use were insufficient to implicate habit.[91]

It seems curious that the supreme court started down the path of pre- and post-incident conduct, only to conclude that the analysis was

[81] *See Holmes*, 959 N.W.2d at 389–90.
[82] *Id.* at 390.
[83] *See id.*
[84] *Id.* For cases holding post-incident conduct irrelevant, see DeMatteo v. Simon, 812 P.2d 361, 363 (N.M. Ct. App. 1991); Gucciardi v. New Chopsticks House, Inc., 19 N.Y.S.3d 80, 82 (App. Div. 2015); Jackson v. Chesapeake & Ohio Ry., 20 S.E.2d 489, 492 (Va. 1942). For cases permitting post-incident conduct, see United States v. Luttrell, 612 F.2d 396, 397 (8th Cir. 1980); Gasiorowski v. Hose, 897 P.2d 678, 682 (Ariz. Ct. App. 1994); People v. Memro, 700 P.2d 446, 462, 466 (Cal. 1985), *overruled on other grounds by* People v. Gaines, 205 P.3d 1074 (Cal. 2009); Kita v. Borough of Lindenwold, 701 A.2d 938, 941 (N.J. Super. Ct. App. Div. 1997); *In re* Est. of Ciaffoni, 446 A.2d 225, 226 (Pa. 1982).
[85] *See Holmes*, 959 N.W.2d at 391.
[86] *Id.*
[87] *See id.* at 388, 391.
[88] *See id.* at 391.
[89] *Id.*
[90] *Id.* (quoting Barrick v. Smith, 80 N.W.2d 326, 329 (Iowa 1957)).
[91] *See id.*; *see also* Benjamin Gardner, *Habit as Automaticity, Not Frequency*, 14 EUR. HEALTH PSYCH. 32, 33–34 (2012) (discussing the automatic nature of habit, rather than its frequency).

unnecessary to the resolution of the appeal.[92] The result, of course, is the need to examine the case law of other jurisdictions. That examination commences now.

A. Cases Not Permitting Post-Incident Conduct to Establish Habit

1. New Mexico

On multiple occasions, the Court of Appeals of New Mexico has held that post-incident conduct is inadmissible to establish habit.[93] As will be seen, in each, the court of appeals rejected the post-incident conduct without much fanfare.[94]

In *Morales-Murillo v. City of Las Cruces*, the court of appeals reviewed a personal injury jury trial yielding a plaintiff's verdict for damages.[95] With respect to the claim that the defendant police officer had a habit of speeding while driving, the Court of Appeals succinctly stated that "the one speeding citation could not show that Officer Mendoza had a habit of speeding at the time the accident occurred with Plaintiffs for two reasons: (1) he received the speeding citation after the subject accident . . . ; and (2) because it was only a single instance of speeding . . . ."[96]

In *DeMatteo v. Simon*, the court of appeals reviewed a jury verdict in a personal injury action, in which the trial court "allow[ed] evidence of [defendant's] pre-accident and post-accident driving history[.]"[97] Very simply, the court of appeals stated, "[s]ubsequent conduct, however, is not relevant to show habit."[98] As the court of appeals held that this evidentiary error at trial implicated issues in addition to habit, it reversed the jury verdict and remanded the case for retrial.[99]

In *De La O v. Bimbo's Restaurant, Inc.*, the Court of Appeals considered an appeal from a plaintiff's jury verdict, arising from a bar

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[92] *See Holmes*, 959 N.W.2d at 391.

[93] *See, e.g.*, Morales-Murillo v. City of Las Cruces, No. A-1-CA-35478, 2018 WL 4380840, at *2 (N.M. Ct. App. Aug. 9, 2018); DeMatteo v. Simon, 812 P.2d 361, 363 (N.M. Ct. App. 1991); De La O v. Bimbo's Rest., Inc., 558 P.2d 69, 73 (N.M. Ct. App. 1976).

[94] *See Morales-Murillo*, 2018 WL 4380840, at *2; *DeMatteo*, 812 P.2d at 363; *De La O,* 558 P.2d at 73.

[95] *Morales-Murillo*, 2018 WL 4380840, at *1.

[96] *Id.* at *2 (first citing *DeMatteo*, 812 P.2d at 363; then citing State v. Ross, 536 P.2d 265, 267–68 (N.M. Ct. App. 1975)).

[97] *Id.* at 362.

[98] *Id.* at 363 (citing *De La O*, 558 P.2d at 72–73).

[99] *See DeMatteo*, 812 P.2d at 363.

fight in 1972.[100] At trial, the court excluded "specific incidents of drunken or abusive conduct by plaintiff subsequent to the 1972 incident[.]"[101] In addition to finding the lack of similar acts necessary to establish habit,[102] the court of appeals posed this question: "how does a 1975 habit tend to establish that plaintiff acted in conformity with the habit in 1972 -- three years earlier?"[103] The 1975 habit was not relevant.[104] Therefore, the trial court properly excluded the evidence.[105]

2. Nevada

In *Pederson v. County of Ormsby*, the Supreme Court of Nevada considered a land use case involving a commercial gravel pit.[106] This use continued "[b]etween December of 1961 and April 1968[.]"[107] The potential habit evidence, excluded by the trial court related to the "opera[tion] [of] a gravel pit between 1962 and 1968."[108] The proposed use of the evidence was to establish the intention to operate a gravel pit in 1961.[109] Not surprisingly, the supreme court held that the operation from 1962 to 1968 was "not relevant to the question of an actual operation of a pit" in 1961.[110]

The supreme court neither mentioned habit nor cited an evidentiary rule in its opinion. The *Pederson* opinion is included here as it was cited by the Court of Appeals of New Mexico in *De La O v. Bimbo's Restaurant* during its habit analysis.[111] Frankly, the Supreme Court of Nevada may not have contemplated a habit analysis at all, relying on basic relevance.[112]

[100] *De La O*, 558 P.2d at 71.
[101] *Id.* at 71–72.
[102] *Id.* at 73.
[103] *Id.*
[104] *Id.* (citing Pederson v. County of Ormsby, 478 P.2d 152 (Nev. 1970)).
[105] *De La O*, 558 P.2d at 73.
[106] *Pederson*, 478 P.2d at 153.
[107] *Id.*
[108] *Id.* at 154.
[109] *Id.*
[110] *See id.*
[111] De La O v. Bimbo's Rest., Inc., 558 P.2d 69, 73 (N.M. Ct. App. 1976).
[112] *See Pederson*, 478 P.2d at 154.

3. New York

A New York State appellate court approved the exclusion of post-incident conduct in *Gucciardi v. New Chopsticks House, Inc.*[113] Here, plaintiff claimed injury "after slipping on ice in a parking lot outside of a restaurant owned by the defendant."[114] She alleged that the defendant's employee caused the icy conditions by "dumping . . . water into the parking lot."[115] It was this conduct that plaintiff claimed was habitual.[116] Apparently, plaintiff's attempt to offer habit evidence was limited to instances occurring "more than two months after the date on which [she] was injured."[117]

The appellate division agreed that the evidence of post-incident conduct was inadmissible, also noting that the proffered conduct "was observed on only seven occasions over the next six weeks."[118] This curious comment may suggest that more frequent post-incident conduct may have been admissible.

B. Cases Permitting Post-Incident Conduct to Establish Habit

1. Arizona

The Court of Appeals of Arizona, in *Gasiorowski v. Hose*, considered post-incident conduct in the context of medical negligence litigation.[119] Here, plaintiff claimed that defendant-anesthesiologist improperly placed a catheter "and triggered dystonia, a cramping, spasmodic condition that has left her wheelchair bound."[120]

At trial, plaintiff attempted to use post-incident catheter use by the defendant via "the observations of delivery room nurses that Dr. Hose had a routine practice of threading epidural catheters to excessive depth."[121] The court of appeals referred to statements made by the trial judge in permitting this evidence, as follows:

> Judge Alan S. Kamin, who administered this case in its discovery stage and ordered defendants to produce the

[113] Gucciardi v. New Chopsticks House, Inc., 19 N.Y.S.3d 80, 82 (App. Div. 2015).
[114] *Id.* at 81
[115] *Id.*
[116] *Id.*
[117] *See id.* at 82.
[118] *Id.*
[119] *See* Gasiorowski v. Hose, 897 P.2d 678, 679–80 (Ariz. Ct. App. 1994).
[120] *Id.* at 679.
[121] *See id.* at 682 (citing Purcell v. Zimbelman, 500 P.2d 335, 343–44 (Ariz. Ct. App. 1972)).

> evidence in question, succinctly stated the probative potential of those subsequent incidents as follows: "If you don't know how to do it on January first of 1990, there is a very good chance you didn't know how to do it on January first, 1989." That these were subsequent, not prior, incidents does not defeat their relevance to this case.[122]

It would be fair to suggest the above reasoning is counter-intuitive and illogical. How does conduct not in existence at the time of the key incident assist in establishing habitual conduct in existence prior to the incident? This, of course, is the weakness of the use of post-incident conduct to establish habit.

2. New Jersey

A New Jersey appellate court considered a land use, property damage claim in *Kita v. Borough of Lindenwold*.[123] At trial, the jury returned a plaintiff's verdict due to "the overflow of water resulting from defendant's negligent maintenance of drainage pipes and ditches."[124] The land at issue was purchased by plaintiff from the defendant in 1972.[125] The relevant period of time occurred prior to 1989.[126]

The evidentiary issue was whether defendant's "failure to maintain the pipes and ditches between 1993 and 1996 was so pervasive as to make it likely that such negligence was continuous in nature and occurred prior to 1989."[127] The appellate court held that, indeed, post-incident negligence was admissible to establish habit.[128]

Interestingly, the appellate court relied, in part, on *Gasiorowski*, previously examined in this paper,[129] and on three pre-Federal Rules of Evidence cases,[130] none of which specifically refer to "habit."[131] In

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[122] *Gasiorowski*, 897 P.2d at 682.
[123] Kita v. Borough of Lindenwold, 701 A.2d 938, 939 (N.J. Super. Ct. App. Div. 1997).
[124] *See id.* at 939.
[125] *See id.*
[126] *See id.* at 940.
[127] *See id.* at 941.
[128] *See id.*
[129] *See supra* notes 119–122 and accompanying text.
[130] *See Kita*, 701 A.2d at 941 (first citing Falconi v. FDIC, 257 F.2d 287, 290–91 (3d Cir. 1958); then citing SEC v. Crofters, Inc., 351 F. Supp. 236, 262 (S.D. Ohio 1972), *rev'd on other grounds*, 493 F.2d 1304 (6th Cir. 1974); then citing SEC v. Globus Int'l, Ltd., 320 F. Supp. 158, 160 (S.D.N.Y. 1970)); *see also* Ginsberg, *supra* note 4, at 324 (noting Federal Rules of Evidence were adopted in 1975).
[131] *See generally* Falconi, 257 F.2d 287; *Crofters*, 351 F. Supp. 236; *Globus*, 320 F. Supp. 158.

fact, these cases suggest that prior conduct may be relevant to establish an inference of subsequent conduct.[132] Of course, this is entirely different from the reliance on post-incident conduct to establish habit.

C. Maybe Yes, Maybe No – Cases Possibly Permitting Post-Incident Conduct To Establish Habit

1. New York

Recently, in *Melfe v. Roman Catholic Diocese of Albany*,[133] a New York intermediate appellate court considered an appeal of a trial court order granting a motion to compel discovery against the Diocese.[134] The litigation involved a claim "for injuries sustained as a result of alleged sexual, physical and emotional abuse committed by defendant . . . while he was employed as a priest . . . ."[135] The priest allegedly committed sexual assaults from 1969 to 1979.[136] Plaintiffs requested "discoverable materials" pertaining to non-defendant priests.[137] These "priests were removed from the Diocese in 2002 after having been credibly accused of acts of child sexual abuse, acts that had been committed more than 15 years prior."[138] Of course, these acts may well have occurred after those allegedly committed by the defendant-priest.

As to whether the materials might be admissible, the court characterized this eventuality as the plaintiff's burden.[139] It is possible that the court was contemplating this evidence as establishing the habit of conduct (or lack of conduct) of the Diocese. The court did note that "it is possible that the abuse committed at the hands of the six nonparty priests occurred in the same or similar time frame as the abuse committed by [the defendant-priest]."[140]

Certainly, the appellate opinion did not resolve the admissibility issue. It is possible to read the opinion to suggest that post-incident

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[132] *See Falconi*, 257 F.2d at 291; *Globus*, 320 F. Supp. at 160.
[133] Melfe v. Roman Catholic Diocese of Albany, 151 N.Y.S.3d 233 (App. Div. 2021).
[134] *See id.* at 235.
[135] *Id.*
[136] *Id.*
[137] *See id.* at 236.
[138] *Id.* at 237.
[139] *See id.* at 238 (first citing Gucciardi v. New Chopsticks House, Inc., 19 N.Y.S.3d 80 (App. Div. 2015); then citing Rigie v. Goldman, 543 N.Y.S.2d 983 (App. Div. 1989)).
[140] *Melfe*, 151 N.Y.S.3d at 239.

conduct of the non-party priests might be admissible to establish a habit of inaction by the Diocese.

2. U.S. District Court for the Northern District of Indiana

In *Wanke v. Lynn's Transportation Co.*,[141] the trial court considered motions in limine in a vehicular collision case.[142] The collision occurred on May 26, 1992.[143] At issue was the admissibility of defendant's speeding ticket two days following the collision.[144]

The court specifically referred to FRE 406 and stated: "Arguably, if it could be shown that [the defendant] had a 'habit' of driving too fast whenever he was behind the wheel of a truck, evidence of the May 28 incident would be admissible."[145] The court, however, noted that a single incident of speeding would be insufficient to establish a habit.[146]

Despite the "arguably" reference, the *Wanke* Court really did not provide the argument for possible admissibility.[147] It is simply difficult to predict an admissibility result from this case.

3. Virginia

In *Jackson v. Chesapeake & Ohio Railway Co.*, the Supreme Court of Appeals of Virginia considered a personal injury claim arising from a railroad crossing accident.[148] The evidentiary issue of interest was the failure to provide railroad crossing signals, seven months after the accident.[149]

It is not clear if the court referred to the inadmissibility of character evidence (negligence) as a general rule, or habit evidence, as an exception to the rule.[150] The court stated that:

> [i]n any view of the case, the specific acts of negligence claimed to have been committed seven months after the alleged

[141] Wanke v. Lynn's Transp. Co., 836 F. Supp. 587 (N.D. Ind. 1993).
[142] *Id.* at 591.
[143] *Id.*
[144] *Id.* at 592.
[145] *See id.* at 594.
[146] *See id.* (first citing United States v. Holman, 680 F.2d 1340, 1351 (11th Cir. 1982); then citing Utility Control Corp. v. Prince William Constr. Co., 558 F.2d 716, 721 (4th Cir. 1977)).
[147] *See Wanke*, 836 F. Supp. at 594.
[148] *See* Jackson v. Chesapeake & Ohio Ry., 20 S.E. 2d 489, 490 (Va. 1942).
[149] *See id.* at 492.
[150] *See id.*

> negligent act which caused the injury are too remote in time and too indefinite in substance to be relevant to the question, whether the crossing signals were given on August 23, 1940.[151]

IV. SHOULD POST-INCIDENT CONDUCT BE ADMISSIBLE TO PROVE HABIT?

Despite the myriad restrictions imposed by courts on habit evidence, Federal Rule 406 – unlike most other evidentiary standards – is "a rule of admissibility rather than inadmissibility."[152] While a small number of state evidence rules governing habit add clarifying language beyond the federal rule's generic terms, the overwhelming majority mirror the federal rule.[153] The federal rule does not, by its terms, bar post-incident conduct as habit evidence in civil cases or criminal prosecutions.

Again, the rule does not provide a time frame for habitual conduct. In light of the idiosyncratic nature of FRE 406, it seems appropriate to ask: Can post-incident conduct actually support a finding of pre-incident habit? Is post-incident conduct relevant[154] to pre-incident habit? It has been stated that:

> Relevancy is "an affair of logic and experience." . . .
>
> . . . .
>
> . . . Relevancy can exist only as a relation based upon human experience between an item of evidence offered and a proposition sought to be proved."[155]

Logic suggests that conduct occurring after an incident cannot evidence a habit in existence before or at the time of the incident. Why? Simply because post-incident conduct is non-existent at the time of the incident, and non-existent conduct is not logically relevant to the formation of a pre-incident habit.

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[151] *Id.*

[152] *See* WEISSENBERGER & DUANE, *supra* note 1, § 406.1, at 181.

[153] *See* 3 CLIFFORD S. FISHMAN & ANNE TOOMEY MCKENNA, JONES ON EVIDENCE § 18:4, Westlaw (database updated January 2022) (listing states adopting Rule 406). The most notable example is the analogous New York rule, which requires "a deliberate and repetitive practice by a person or organization in complete control of the circumstances." Guide to NY Evid. Rule 4.13, Habit.

[154] *See* FED. R. EVID. 401 (defining relevance).

[155] Herman L. Trautman, *Logical or Legal Relevancy – A Conflict in Theory*, 5 VAND. L. REV. 385, 388 (1952) (citing JAMES BRADLEY THAYER, PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 269 (1898)).

Moreover, repetitive acts in criminal cases—occurring both pre- and post-charge—are often admissible on other bases under FRE 404(b)(2).[156] For instance, evidence of a defendant's similar acts are generally relevant as a "plan" in that they form "a single, overall grand design that encompasses both the charged and uncharged offenses."[157] Much like the acts that coalesce to form "habit" evidence, "plan" comprises common acts, "[e]ach [that] is a means to achieving the same goal."[158] Likewise, evidence of similar acts may evince "identity" if the acts share a "distinctive modus operandi."[159] To wit, "similar act evidence" is routinely admissible, notwithstanding character prohibitions, to establish acts that are "so nearly identical" in nature to "earmark them as the handiwork of the accused."[160] Beyond those routes, evidence of similar crimes "will usually follow, as an intermediate channel, some one or more of the

[156] *See, e.g.*, United States v. Horner, 853 F.3d 1201, 1215 (11th Cir. 2017) (holding that evidence of similar tax returns from past years were admissible to show defendants had "an ongoing plan" to avoid reporting income and to demonstrate modus operandi and motive); United States v. Christensen, 624 F. App'x 466, 479–80 (9th Cir. 2015) (reasoning that evidence of defendant repeatedly forging signatures was admissible to show that defendant had a plan to obtain control of victim's business); United States v. McNair, 605 F.3d 1152, 1204 (11th Cir. 2010) (reasoning that evidence that defendant regularly gave "gifts" to other contractors was relevant to demonstrate defendant's intent, motive, and plan as "what might arguably be a 'gift' to one person becomes less likely a gift if the 'gifts' are widespread to others involved with the same or similar projects"); United States v. Gipson, 446 F.3d 828, 830–31 (8th Cir. 2006) (determining that evidence of the defendant's two other arrests for drug offenses at the same apartment complex involved in the charged offense "tended to . . . demonstrat[e] a common plan or scheme to sell cocaine base from the same apartment complex"); Gov't of the V.I. v. Harris, 938 F.2d 401, 420 (3rd Cir. 1991) (affirming trial court's admission of repeated similar acts of domestic abuse as probative of intent and preparation in homicide prosecution); United States v. Sampol, 636 F.2d 621, 657–59, 657 n.21 (D.C. Cir. 1980) (rejecting defendant's efforts in a conspiracy prosecution to demonstrate that a cooperating witness had "a 'habit' of assassinating Chilean exiles," while admitting similar evidence about past assassination attempts involving the same witness as "proof of intent, plan, preparation, and motive"); United States v. Danzey, 594 F.2d 905, 908, 910–15 (2d Cir. 1979) (reasoning that evidence of "fifteen similar" prior bank robberies was admissible as probative of defendant's "identity").

[157] Miguel A. Méndez & Edward J. Imwinkelried, People v. Ewoldt*: The California Supreme Court's About-Face on the Plan Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 28 LOY. L.A. L. REV. 473, 480–81 (1995) (citations omitted) ("That design is overarching; all the crimes are integral components or portions of the same plan.").

[158] *See id.* at 481–82 (describing one common form of "plan" evidence as "chain plan" – or a series of identical acts with no required sequence or necessary order).

[159] *See Danzey*, 594 F.2d at 910–11 (first citing United States v. Cavallino, 498 F.2d 1200, 1206–07 (5th Cir. 1974); then citing United States v. Sidman, 470 F.2d 1158, 1166 (9th Cir. 1972); and then citing United States v. McCray, 433 F.2d 1173, 1175 (D.C. Cir. 1970)).

[160] *See id.* at 913 n.6; MCCORMICK ON EVIDENCE § 190.3, at 448 (Robert P. Mosteller ed., 8th ed. 2020); United States v. Pascarella, 84 F.3d 61, 73 (2d Cir. 1996) (noting that "[s]imilarity of the acts [under FRE 404(b)(2)] is required only when the evidence is used to prove knowledge, intent, or a common scheme or plan.").

other [Rule 404(b)(2)] theories[.]"[161] In light of the outsize weight routinely given by juries to a defendant's "character" – as opposed to its actual probative value – and the many avenues to the admissibility of *de facto* character evidence, equity also demands the exclusion of post-incident conduct as habit.[162]

V. CONCLUSION

At the outset of this paper, we highlighted the idiosyncratic nature of FRE 406. That Rule 406 neither expressly permits nor rejects the use of post-incident conduct to establish habit is an important example of the peculiarity of the rule, which leads to inconsistent application of the rule.

Post-incident conduct should not be admitted into evidence under Rule 406. As previously explained, both logic and equity require this result. The authors would even recommend an amendment to Rule 406, specifically prohibiting the use of post-incident conduct to establish habit. Without an amendment, and with the inconsistent application of the rule by courts, the result will be blurring of the line between admissible habit evidence and prohibited character evidence.

[161] *See Danzey*, 594 F.2d at 913–14, 913 n.6 (naming "continuing plan, scheme, or conspiracy, and distinctive device"); *see* MASSACHUSETTS DISTRICT COURT CRIMINAL DEFENSE MANUAL § 14.12 (5th ed. 2019) (noting that "[r]ecently the [404(b)(2)] exception seems to have all but swallowed up the rule [against character-propensity evidence].").

[162] MCCORMICK, *supra* note 160 (warning against the admission of character evidence in criminal trials due to the jury's tendency to afford the evidence undue weight in assessing guilt or to vote for conviction "irrespective of [the defendant's] guilt" for the crime at issue); A. Leo Levin & Harold K. Cohen, *The Exclusionary Rules in Nonjury Criminal Cases,* 119 U. PA. L. REV. 905, 913 (1971) (warning against the admission of character evidence in criminal trials due to the jury's tendency to afford the evidence undue weight in assessing guilt or to vote for conviction "irrespective of [the defendant's] guilt" for the crime at issue).