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Articles

Evidence of Habit and Routine Practice

William A. Schroeder*

I. INTRODUCTION

Evidence of habit and routine practice is often relevant to prove that on a particular occasion a person or organization¹ acted in a manner consistent with that habit or practice.² Illinois courts have taken a variety of approaches to the admissibility of such evidence. Some cases, many of them recent, suggest that evidence of habit and routine practice is admissible on the same terms as other relevant evidence.³ A few cases suggest that the admissibility of habit evidence lies within the trial court's discretion.⁴ Still other cases hold that "evidence of

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1. This article will address only the habits and routine practices of persons and organizations. It does not address questions such as the habits of animals. *See generally*, *Domm v. Hollenbeck*, 102 N.E. 782, 783-84 (Ill. 1913) (discussing a dog's propensity for violence); *People v. Jones*, 89 N.E. 752, 754-55 (Ill. 1909) (discussing a bull's propensity for violence).

2. Evidence of an individual's habits has sometimes been admitted for purposes other than to show conduct consistent with the habit. *See Grand Lodge Ancient Order of United Workmen v. Belcham*, 33 N.E. 886, 887 (Ill. 1893) (holding that to prove the insured lied on an application when he denied he used "alcoholic stimulants," the insurer had to show not just the insured's occasional use of such substances, but rather "a habit or custom" on the part of the insured); *Gallagher v. People*, 11 N.E. 335, 336 (Ill. 1887) (holding that where defendant was charged with "selling intoxicating liquor to persons in the habit of getting intoxicated" no error occurred when the trial court permitted a witness to answer that persons alleged to be "in the habit of getting intoxicated were in such habit"); *People v. Thomas*, 421 N.E.2d 357, 366 (Ill. App. 1st Dist. 1981) (stating that, when sentencing an offender, a court "may inquire into the general moral character of the offender, his mentality, his habits, his social environments, his abnormal or subnormal tendencies, his age, . . . and the stimuli which motivated his conduct").

3. *See infra* notes 88, 97-98 (citing cases addressing habit); *infra* note 102 (citing cases addressing routine practice).

4. *See, e.g.*, *Solomon v. The Fair*, 183 N.E.2d 588, 589, 590-91 (Ill. App. 1st Dist.

habit or general practice is not admissible as proof of behavior and conformity with that habit on a specific occasion.”⁵ Most often, however, Illinois courts limit the admissibility of such evidence through a variety of arcane and archaic rules.

Traditionally, evidence of routine practice has been admissible to show that the practice was followed on a particular occasion only if corroborating evidence demonstrates that the practice was, in fact, followed on that occasion.⁶ Evidence of a person’s careful habits has traditionally been admitted in wrongful death and personal injury actions, where a showing of due care at the time of the occurrence was necessary to recovery, only if no competent eyewitnesses could testify to the victim’s behavior at the time of the occurrence.⁷

1962) (holding that the trial court did not err in permitting a defendant delivery man to testify to his “custom and habit with respect to due care and caution” in making similar deliveries and to testify that “he placed bed frames wherever people directed him to place them” when he had no independent recollection of delivering a bed frame on which plaintiff was injured and could not say whether he or his helper delivered the bed frame in question). The admission of such evidence, said the court, “depends on the facts of each case.” *Id.* at 590.

5. *People v. West*, 429 N.E.2d 599, 603 (Ill. App. 2d Dist. 1981) (holding that it was harmless error for trial court to admit witness’ testimony about her usual practices when witness admitted that she had no detailed knowledge of the occasion in question) (citing *City of Salem v. Webster*, 61 N.E. 323 (Ill. 1901); *Goetz v. Country Mut. Ins. Co.*, 328 N.E.2d 109 (Ill. App. 1st Dist. 1985)); *cf.* *Herget Nat’l Bank v. Johnson*, 316 N.E.2d 191, 193 (Ill. App. 3d Dist. 1974) (stating that evidence of a person’s conduct on one occasion is irrelevant to show “his conduct on the occasion in issue, except to show habit, state of mind, knowledge or intent and the like”).

6. *See Goetz*, 328 N.E.2d at 115 (Ill. App. 2d Dist. 1975) (holding that evidence of routine practices is admissible only if other evidence also tends to show that the practice was followed on the occasion in question); *see also State Bank v. Standaert*, 82 N.E.2d 393, 396-97 (Ill. App. 2d Dist. 1948) (holding that where there was no evidence of either a dictation or writing of the particular notice of dishonor nor records of any kind indicating that the notice was mailed, plaintiff’s evidence was insufficient).

7. *See Plank v. Holman*, 264 N.E.2d 12, 14-15 (Ill. 1970) (holding that secondary evidence of careful habits should not have been permitted where plaintiff could have testified to her deceased husband’s due care at the time of the accident); *Cairns v. Hansen*, 524 N.E.2d 939, 945-46 (Ill. App. 2d Dist. 1988) (holding that plaintiff’s proffered evidence of due care was properly ruled inadmissible where there were eyewitnesses, and stating that “the established rule” in Illinois is that “in wrongful death cases, where there are no competent eyewitnesses, and the plaintiff has the burden of proving the person injured exercised the proper degree of care . . . evidence of prior careful habits . . . may be admitted as tending to prove the deceased’s exercise of due care”); *Gardner v. Geraghty*, 423 N.E.2d 1321, 1324-25 (Ill. App. 1st Dist. 1981) (noting that habit evidence is generally barred, but evidence of careful habits is permitted in wrongful death cases “where there are no eyewitnesses to the accident”).

In *Herget National Bank v. Johnson*, 316 N.E.2d 191, 193 (Ill. App. 3d Dist. 1974), the court stated:

[I]t has long been the recognized rule of personal injury and wrongful death actions arising out of motor vehicle accidents that evidence of habits and

Looking at these approaches, the appellate court recently observed that Illinois law governing the admissibility of evidence of habit and routine practice is "inconsistent" and "uncertain."⁸ This article will examine the history and evolution of the law governing the admissibility of habit and routine practice evidence.⁹ The article concludes that Illinois should, as proposed in some recent appellate court decisions, adopt Rule 406 of the Federal Rules of Evidence.¹⁰

II. EVIDENCE OF HABIT AND ROUTINE PRACTICE: A BRIEF HISTORY

A. *Definitions and General Rule*

Much of the complexity in the law governing evidence of "habit," "custom," and "routine practice" stems from the failure of Illinois courts to adequately define these terms and to distinguish evidence of "habit" from evidence of "character." Some of these terms have never been defined by Illinois courts. Others have been defined or used in more than one way. The lack of agreed upon definitions has made meaningful discussion and analysis of the law in this area almost impossible.¹¹

This article will use the definitions of "habit" and "routine practice" contained in recent Illinois cases, as well as the generally accepted

customary behavior of one killed or injured by the alleged negligence of another is admissible on the issue of the former's conduct at and immediately prior to the time of accident. Illinois still adheres to the principle that the rule is one of necessity, available only where there are no competent eyewitnesses.

Herget, 316 N.E.2d at 194.

8. *People v. Keller*, 641 N.E.2d 891, 895 (Ill. App. 1st Dist. 1994) (surveying cases that suggest Illinois courts are uncertain about the effect of a witness' presence on the admissibility of careful habits evidence, and are inconsistent in admitting habit or custom evidence when offered for a purpose other than showing careful habits). The *Keller* court noted that "the rule has been discussed with seemingly inconsistent results in cases in which the party offering habit or custom evidence sought to establish other than careful habits" and "the rule governing admissibility of habit or custom evidence has an uncertain history." *Id.*

9. See *infra* Part II (discussing the evolution of the use of habit and routine practice evidence in Illinois).

10. See *infra* Parts IV and V (suggesting that the adoption of Federal Rule of Evidence 406 would clarify the use of habit and routine practice evidence).

11. See 23 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5272, at 18 (1980) (suggesting that the lack of definitions was a deliberate strategy used by some courts so that they could admit or reject evidence on the basis of labels without revealing their real reasons for doing so).

definition of "character."¹² Those definitions are reasonably unambiguous and consistent with the definitions used in most jurisdictions and by most authorities. Because Illinois courts have failed to clearly define "custom," this article will not use this term.

"Habit" has been said by the Illinois Appellate Court to be a person's "regular practice of responding to a particular kind of repeated situation with a specific type of conduct."¹³ Unvarying regularity is the key. A mere tendency to act in a particular manner is not a habit,¹⁴ although it may be a manifestation of a character trait.

"Routine practice" refers to behavior of a group or organization that would be termed habit if engaged in by an individual.¹⁵ "Custom" has sometimes been used by Illinois courts as a synonym for habit.¹⁶ It has also been used as a synonym for routine business practices.¹⁷ Because its meaning is unclear, the term "custom" is best not used to describe evidence whose relevance lies in its tendency to prove that

12. See *infra* note 13 and accompanying text (defining "habit"); *infra* text accompanying note 15 (defining "routine practice"); and *infra* notes 19-20 and accompanying text (defining "character").

13. *People v. Miller*, 519 N.E.2d 717, 720 (Ill. App. 3d Dist. 1988) (citing MODEL CODE OF EVIDENCE Rule 307(1) (1942)); see also *Hajian v. Holy Family Hosp.*, 652 N.E.2d 1132, 1140 (Ill. App. 1st Dist. 1995) (defining a habit as conduct that is "semiautomatic, invariably regular, and not merely a tendency to act in a given manner"); *Knecht v. Radiac Abrasives, Inc.*, 579 N.E.2d 1248, 1252-53 (Ill. App. 5th Dist. 1991) (requiring that habit evidence establish conduct that is "semiautomatic, invariably regular, and not merely a tendency to act in a given manner"); cf. FED. R. EVID. 406, advisory committee's note (noting that "[h]abit . . . describes one's regular response to a repeated specific situation").

See generally MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 406.1 (6th ed. 1994) (citing *Chicago, Rock Island & Pac. R.R. v. Bell*, 70 Ill. 102 (1873)), defines habit as "a settled way of doing a particular thing." *Id.*

Chicago, Rock Island & Pacific Railroad v. Bell, cited by Graham, does not, in fact, define "habit." *Bell* was an appeal from a judgment for a plaintiff who had sought damages for the death of plaintiff's intestate and the loss of his horses and wagon when struck by defendant's train. See *Chicago, Rock Island & Pac. R.R. v. Bell*, 70 Ill. 102, 104 (1873). The court held that evidence of the deceased's personal habits when intoxicated was properly rejected in the absence of "some particularizing of the habits offered to be proved, so that it might be seen that the proof of them might have some legitimate bearing upon the issue." *Id.* at 105.

14. See *Hajian*, 652 N.E.2d at 1140; *Knecht*, 579 N.E. at 1253.

15. See FED. R. EVID. 406 advisory committee's note.

16. See *American Express Co. v. Haggard*, 37 Ill. 465, 473 (1865).

17. For a description of routine business practices, see 1 MCCORMICK ON EVIDENCE § 195, at 828 (John William Strong ed., 4th ed. 1992) (practitioner treatise series) (referring to "evidence of the 'custom' of a business organization"). See also *id.* at 826 n.5 (quoting MODEL CODE OF EVIDENCE Rule 307(1) (1942)) (stating that "[c]ustom means a course of behavior of a group of persons regularly repeated in like circumstances").

“behavior on a specified occasion conformed to the custom.”¹⁸

“Character” refers to “the nature of a person, his disposition generally, or his disposition in respect to a general trait such as honesty, peacefulness or truthfulness.”¹⁹ Thus, character is less specific than habit. One authority has observed that “[i]f we think of character for care, we think of the person’s tendency to act prudently in all the varying situations of life.”²⁰

Illinois courts have consistently stated that evidence of character, or traits of character, is inadmissible in civil cases to prove conduct consistent with the character trait shown.²¹ In criminal cases in

18. *Id.* at 828 n.14 (quoting MODEL CODE OF EVIDENCE Rule 307(2) (1942)).

Evidence of custom is sometimes received to show the usual way in which an act is done in order to raise the inference that an act performed in that way was not negligent. *See* *Fowler v. Chicago Railways Co.*, 120 N.E. 635, 637 (Ill. 1918) (citing *Campbell v. Chicago, Rock Island & Pac. Ry. Co.*, 90 N.E. 1106 (Ill. 1910)). Conversely, evidence that an act was not done in the usual way is admissible to show that it was done negligently. *Turner v. Chicago Hous. Auth.*, 136 N.E.2d 543, 545 (Ill. App. 1st Dist. 1956).

The Uniform Commercial Code provides for the use of evidence of custom and usage to explain ambiguous terms in contracts. *See* 810 ILL. COMP. STAT. §§ 5/2-202(a), 5/2-208(2), 5/2-314(3) (West 1994) (recognizing that implied warranties may arise from “course of dealing or usage of trade”). Illinois defines a course of dealing as “a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct” and defines usage of trade as “any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question.” *Id.* at 5/1-205 (West 1994); *cf.* *Colderwood v. McCrea*, 11 Ill. App. 543, 546 (1st Dist. 1882) (noting that in order to ascertain the intent of parties to contract, it was proper “to show how they were in the habit of dealing together in respect to like transactions”).

19. GRAHAM, *supra* note 13, § 404.1, at 195; *see also* 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 825 (describing character as “a generalized description of a person’s disposition, or of the disposition in respect to a general trait, such as honesty, temperance, or peacefulness”).

20. 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 825 (quoted with approval in FED. R. EVID. 406 advisory committee’s note).

21. *See, e.g.*, *Joseph Taylor Coal Co. v. Dawes*, 77 N.E. 131, 132 (Ill. 1906) (stating rule, but finding an exception to the ban on character evidence when such evidence was used to establish the mental state of an allegedly negligent mine shaft operator); *Holzman v. Hoy*, 8 N.E. 832, 832-33 (Ill. 1886) (finding that the trial court did not err in a medical malpractice case when it barred a defense witness from testifying to defendant doctor’s professional reputation in the community and stating that “defendant’s skill or rather the want of it, . . . [could not] be either established or disproved by showing his general reputation.”); *Crose v. Rutledge*, 81 Ill. 266, 267 (1876) (stating that the law prohibited the receiving of character evidence with respect to the parties to an action to raise “a presumption disadvantageous or unfavorable to either of them” and adding that “[i]n a prosecution for an infamous offense evidence of an admission by the accused that he was addicted to the commission of similar offenses is . . . irrelevant.”); *see also* *Hickey v. Chicago Transit Authority*, 201 N.E.2d 742, 746 (Ill. App. 1st Dist. 1964) (stating that in ordinary civil cases, parties may not support

Illinois, character is inadmissible if offered by the state as part of its case-in-chief.²² However, it may be admissible to prove conduct under other limited circumstances.²³

B. The Early Cases: Haggard, Stolp, and Thorp

In 1987, in *Bradfield v. Illinois Central Gulf Railroad Co.*,²⁴ the Illinois Supreme Court stated that "evidence of habit and custom . . . was held properly admitted in *American Express Co. v. Haggard*,²⁵ [decided in 1865] and . . . has been admitted since that time without proof of necessity."²⁶ Six years later, in *People v. Keller*,²⁷ the Illinois Appellate Court echoed these observations and cited *Stolp v.*

their position by evidence of their good character); *McBean v. Fox*, 1 Ill. App. 177, 187 (1st Dist. 1878) (holding that the trial court erred in permitting defendant, charged with fraud in a business transaction, to defend by showing his good character and reputation). The *McBean* court noted, however, that evidence of good character may be shown in some criminal settings and in civil cases where character is in issue as in slander actions and actions for "seduction, criminal conversation, and breach of promises of marriage." *Id.* at 186; *cf.* FED. R. EVID. 404(a) (barring the use of character evidence to prove conduct except for limited uses in criminal cases).

22. *See* *People v. Randle*, 498 N.E.2d 732, 736 (Ill. App. 2d Dist. 1986) (stating that "[t]he state may not initially introduce evidence of bad character against a defendant because it is feared that the jury will be swayed to convict [the defendant] . . . because the defendant is a bad person"); *see also* *People v. Rogers*, 154 N.E. 909, 912 (Ill. 1926) (stating that "[i]t is not, however, competent . . . to prove a habit or predisposition of the accused, or to introduce evidence of another crime on the ground that proof of such crime shows the probability that he committed the crime charged in the indictment"); *cf.* FED. R. EVID. 404(a) (providing that in certain circumstances, evidence of the character of the accused and the character of crime victims may be admissible).

23. *See, e.g.,* *People v. Lynch*, 470 N.E.2d 1018, 1020-21 (Ill. 1984) (holding that in cases where self-defense is claimed, evidence of the aggressive character of the victim is admissible to show that the victim acted in a manner consistent with his character and to show that defendant knew of that character and, therefore, felt threatened even in an otherwise ambiguous setting); *People v. Flax*, 498 N.E.2d 667, 672 (Ill. App. 1st Dist. 1986) (stating that a defendant in a criminal case may introduce evidence of his general reputation to establish that his character traits are inconsistent with the specific crime charged); *Randle*, 498 N.E.2d at 736 (Ill. App. 2d Dist. 1986) (holding that prosecution may not introduce evidence of defendant's bad character to prove his guilt unless the defendant first introduces evidence of his good character); *cf.* FED. R. EVID. 404(a)(1) (allowing the prosecution to rebut character evidence offered by the accused).

24. 505 N.E.2d 331 (Ill. 1987).

25. 37 Ill. 465 (1865).

26. *Bradfield*, 505 N.E.2d at 333. The court stated that "[i]t has long been established that habit testimony is relevant and the only limitations imposed on its admission have been on the basis of necessity." *Id.* at 333-34. The court found that it is thus "questionable whether the cases [relying on the eyewitness rule] . . . are on point." *Id.* at 334.

27. 641 N.E.2d 891 (Ill. App. 1st Dist. 1994).

*Blair*²⁸ and *Thorp v. Goewey*,²⁹ two nineteenth-century cases that permitted the introduction of habit or custom evidence under specific circumstances. In *Keller*, the appellate court concluded that “the better rule, which has been accepted by the supreme court, although a long time ago, is that habit and custom evidence may be admitted provided that a proper foundation has been established.”³⁰

On close examination, *Haggard*, *Stolp*, and *Thorp* present a more complex picture than what appears at first glance. In *Haggard*, the plaintiff sought to recover \$170.30 from the defendant for failing to deliver a package of money sent to the plaintiff by his agent.³¹ On direct examination, a defense witness testified that it was the custom of the defendant’s wagon drivers never to deliver parcels without obtaining a written receipt.³² The supreme court held that given the direct examination, the trial court did not err in allowing the plaintiff to show, on cross-examination, that “it was the custom of the particular driver who had this package to steal money parcels.”³³

Although the *Haggard* court never used the word “habit,” the evidence received on direct examination could fairly be characterized as evidence of a habit, that is, evidence of a semiautomatic, regular practice of requiring a written receipt. The question before the supreme court, however, was the admissibility of the evidence received on cross-examination, regarding the custom of the driver to steal money parcels.³⁴ This evidence can only be characterized as habit evidence if it was this particular driver’s *unvarying*, semiautomatic response to steal parcels containing money, every time he had custody of such parcels. Such behavior is unlikely; it is more likely that he stole only when presented with the opportunity to do so without getting caught. Therefore, the evidence at issue in *Haggard* is more fairly characterized as evidence of the driver’s disposition or character, not his habit.

Eight years later, in *Stolp*, a suit to recover money loaned to the defendant, the supreme court held that the trial court properly allowed plaintiff to introduce evidence that he had frequently lent money to others without taking written notes from the debtors as proof of the

28. 68 Ill. 541 (1873).

29. 85 Ill. 611 (1877).

30. *Keller*, 641 N.E.2d at 896. The *Keller* court made “no pronouncement one way or the other as to the requirement that there be no eyewitness available before habit or custom evidence is admissible.” *Id.*

31. See *American Express Co. v. Haggard*, 37 Ill. 465, 470-71 (1865).

32. See *id.* at 469.

33. *Id.* at 473.

34. See *id.* at 472-73.

debt.³⁵ Like the *Haggard* court, the *Stolp* court did not use the word “habit” to characterize the evidence. It appears, however, that the plaintiff regularly lent money and invariably failed to acquire written evidence of the debt.³⁶ One could fairly characterize this action, or inaction, as a semiautomatic, regular response, and, therefore, a habit.³⁷

In 1877, in *Thorp*, the supreme court held that the trial court properly admitted evidence showing the deceased “was prompt to pay his debts, prudent, careful, credit good . . . and did not like to be in debt,” and suggested that because he had “these habits of life,” it was unreasonable to believe that the deceased would leave a note outstanding for seventeen years.³⁸ *Thorp* is the first Illinois case to use the word “habit.” However, the “habits” attributed to the deceased, even if they could be described as “habits” in a lay sense, do not appear to be the kind of semiautomatic responses to particular stimuli that would constitute habit in a legal sense. Rather, the evidence in question demonstrated a trait of the deceased’s character, his careful behavior with money.

C. Careful Habits Evidence and the Eyewitness Rule

In 1883, the Illinois Supreme Court announced the first in a line of cases that would further cloud an already murky picture by permitting, under some circumstances, evidence purporting to demonstrate the careful habits of a party whose behavior was in dispute.³⁹ That year, in *Chicago, Rock Island & Pacific Railway v. Clark*,⁴⁰ the supreme court held that the trial court did not err when it admitted evidence that

35. See *Stolp v. Blair*, 68 Ill. 541, 542 (1873). In another 1873 case, *Chicago, Rock Island & Pacific Railroad v. Bell*, 70 Ill. 102, 105 (1873), the court held that a general inquiry into the personal habits of the deceased was properly rejected absent “some particularizing of the habits offered to be proved, so that it might be seen that they were such as that the proof of them would have a legitimate bearing upon the issue.” *Id.* at 105.

36. See *Stolp*, 68 Ill. at 542.

37. One could argue that a failure to act does not reflect the pattern of stimulus and automatic response that is the essence of habit. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5273, at 39; cf. *Alvarado v. Goepf*, 663 N.E.2d 63, 64-65 (Ill. App. 1st Dist. 1996) (stating that evidence of defendant dentist’s frequent failure to have a treatment plan for patients could be admissible, in theory, but proffered testimony was too “vague, general, and ambiguous” to constitute a proper foundation, especially given that “plaintiff was attempting to establish a negative, a failure to do something”).

38. *Thorp v. Goewey*, 85 Ill. 611, 614 (1877).

39. See *Chicago, Rock Island & Pac. Ry. v. Clark*, 108 Ill. 113 (1883) (involving the death of a railroad employee where evidence of employee’s habits was important to show he was not negligent at the time of an accident which had no surviving witnesses).

40. 108 Ill. 113 (1883).

plaintiff's decedent was "habitually prudent, cautious and temperate" to show that the decedent was exercising due care when defendant's train struck and killed him.⁴¹ The court rejected defendant's argument that habit evidence was always inadmissible,⁴² holding that the evidence was admissible, but stating that "[h]ad there been witnesses who saw the infliction of the injury . . . this evidence would not be admissible."⁴³ The court cited no authorities in support of its ruling. Instead, it focused on the fact that the plaintiff needed the evidence to prove his decedent's freedom from contributory negligence, which plaintiff was required to do, in order to recover any damages.⁴⁴

Ten years later, in *Toledo, St. Louis & Kansas City Railroad v. Bailey*,⁴⁵ the supreme court held that evidence of the careful habits of plaintiff's decedent, a train engineer, was admissible "as tending to raise the presumption that he . . . exercised due care and caution" when he died.⁴⁶ The court stated that the admissibility of this kind of evidence was settled in *Clark*.⁴⁷ However, the *Bailey* court did not specifically state that the absence of eyewitnesses was a prerequisite to admission of the evidence. Rather, it simply noted that no living witnesses were available to testify to the manner in which the train engineer operated the locomotive.⁴⁸

41. *Id.* at 117.

42. *See id.*

43. *Id.* The court also expressed the view that, absent any eyewitness, "defendant would surely have the right to prove the person was habitually rash, imprudent and intemperate, to repel the presumption that he was in the exercise of proper care at the time he received the injury." *Id.*

44. *See id.* at 117; *see also* *Chicago North Shore Ry. v. Green*, 93 Ill. App. 105, 109 (1st Dist. 1901) (noting that a plaintiff must "establish . . . that the deceased, when injured through [the] negligence of [defendant] . . . was himself in the exercise of due care and diligence").

45. 33 N.E. 1089 (Ill. 1893) (concerning a wrongful death claim against the railroad of the engineer of a train killed in an explosion of the engine).

46. *Id.* at 1089.

47. *See id.* In *Sorenson v. Sorenson*, 59 N.E. 555 (Ill. 1901), the court overturned an election where the voting rolls swelled from 50 to 59 just prior to the election. The *Sorenson* court stated, "[c]ircumstantial evidence, such as party affiliation, relations with candidates, etc., is always admitted to show how a person voted, and is generally sufficient to prove the character of the vote." *Id.* at 556.

48. *See Bailey*, 33 N.E. at 1089; *see also* *Plank v. Holman*, 264 N.E.2d 12, 14-15 (Ill. 1970) (noting in a wrongful death action that it must be alleged and proved that "the decedent was in the exercise of due care and caution . . . at the time of the occurrence . . . [and] the use of secondary evidence of careful habits was allowable only if direct evidence . . . [was] unavailable"). Thus, careful habits testimony was improperly admitted because plaintiff, decedent's wife, was an eyewitness and "should have testified as to her husband's due care at the time of the accident." *Id.*

Later cases, perhaps influenced by decisions in other jurisdictions,⁴⁹ made it clear that necessity was a limitation on the admissibility of careful habits evidence. In *Casey v. Chicago Railways Co.*,⁵⁰ a 1915 wrongful death case, the supreme court stated that proof of plaintiff's due care must be shown by the best proof available.⁵¹ The court indicated that if there are no eyewitnesses, circumstances other than habit must, if possible, be shown, "to raise the presumption of due care."⁵² If no such proof is available, however, the trial court may receive evidence that the deceased was habitually careful, prudent, and cautious.⁵³ By 1921, it was clear that the established rule in Illinois was that in wrongful death cases, if there was an eyewitness to the accident that gave rise to the litigation, it was error to allow evidence that the deceased was a man of careful habits.⁵⁴

For many years, the admission of careful habits evidence, subject to the eyewitness rule, was said to be limited to wrongful death actions.⁵⁵ Eventually, however, Illinois courts extended the rule to personal injury actions. In 1967, the supreme court held that evidence of careful habits was admissible to prove a plaintiff's due care in a personal injury action where the plaintiff was the only eyewitness, and was barred from testifying.⁵⁶ In justifying its ruling, the court stated that "[c]onsiderations of hardship, which underlie our holdings that admit careful habit evidence for a plaintiff in wrongful death cases without eyewitnesses, present themselves just as forcefully under the instant circumstances."⁵⁷ Other decisions expanded the rule to allow evidence of a *defendant's* careful habits in both wrongful death⁵⁸ and

49. See 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 189, at 795; *id.* § 195, at 828.

50. 109 N.E. 984 (Ill. 1915).

51. See *id.* at 985.

52. *Id.*

53. See *id.*

54. See *Petro v. Hines*, 132 N.E. 462, 463-64 (Ill. 1921) (holding that evidence of the decedent's careful habits was inadmissible because an eyewitness to the death was available).

55. See *McElroy v. Force*, 220 N.E.2d 761, 765-66 (Ill. App. 5th Dist. 1966) (noting that several authors have said "that careful driving habit evidence is only admissible on behalf of plaintiffs and then only in wrongful death cases" but disagreeing "that the cases have so limited the rule"), *aff'd*, 232 N.E.2d 708 (Ill. 1967); *cf.* *Chicago, Rock Island & Pac. Ry. v. Clark*, 108 Ill. 113, 117 (1883) (stating in dicta, in a wrongful death case, that absent any eyewitness, "defendant would surely have the right to prove the person was habitually rash, imprudent and intemperate, to repel the presumption that he was in the exercise of proper care at the time he received the injury").

56. See *McElroy v. Force*, 232 N.E.2d 708, 711 (Ill. 1967).

57. *Id.*

58. See, e.g., *Logue v. Williams*, 250 N.E.2d 159, 164 (Ill. App. 5th Dist. 1969) (holding that the trial court did not err in admitting evidence of the careful habits of

personal injury cases.⁵⁹

1. The Nature of Careful Habits Evidence

The phrase “careful habits” can refer to two distinct concepts.⁶⁰ First, careful habits can refer to specific, regular, semiautomatic responses to specific stimuli.⁶¹ For example, an individual who always signals before turning, or always comes to a complete stop at stop signs and never drives through them can be said to do these things habitually.⁶² Such evidence is true evidence of habit. Second, careful habits can refer to general traits or probabilities,⁶³ such as habits for care, promptness, or forgetfulness,⁶⁴ or somewhat less general behaviors such as usually obeying traffic laws.⁶⁵ One evidence scholar notes that “[e]vidence of these [general traits] . . . would be identical to the kind of evidence that is the target of the general rule against character evidence.”⁶⁶ It is this latter kind of evidence, which is essentially evidence of a character trait, that Illinois courts generally receive under the label, “careful habits evidence.”⁶⁷

Illinois courts have not clearly acknowledged the difference between these two kinds of habit evidence. Perhaps this is because the use of the all encompassing word “habit” obscures the need to analyze the underlying evidence. Or, perhaps it is because, as some authors have

defendant driver in a wrongful death action resulting from the death of a pedestrian).

59. See, e.g., *Solomon v. The Fair*, 183 N.E.2d 588, 589 (Ill. App. 1st Dist. 1962) (holding that where defendant delivery man had no independent recollection of delivering bed frame on which plaintiff was injured and could not remember whether he or his helper delivered the bed frame, the trial court did not err in permitting him to testify as to his “custom and habit with respect to due care and caution in making other similar deliveries” or in permitting him to testify that he placed bed frames wherever directed by customers); see also *McElroy*, 220 N.E.2d at 765-66 (rejecting contention that careful habits evidence is only admissible on behalf of plaintiffs but holding that defendant was not prejudiced by the trial court’s refusal to permit such evidence on behalf of defendant).

60. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5273, at 37.

61. *Id.*; see also CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, MODERN EVIDENCE § 4.24 (1995); 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 826.

62. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5273, at 37; MUELLER & KIRKPATRICK, *supra* note 61, § 4.24, at 285.

63. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5273, at 25 (noting the probability theory of habit and contrasting it with the stimuli-response theory).

64. See 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 825.

65. See 23 WRIGHT & GRAHAM, *supra* note 11, § 5273, at 37.

66. See 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 825.

67. See *id.* § 189, at 795 (noting that most courts reject such evidence but stating that some admit it “under the guise of evidence of ‘habit[]’ when there were no eyewitnesses to the event”) (citing *Pritchett v. Steinker Trucking Co.*, 247 N.E.2d 923, 926-27 (Ill. App. 4th Dist. 1969)).

noted, “[c]haracter and habit occupy different areas on the same continuum”⁶⁸ and are, therefore, “easily confused.”⁶⁹ Regardless of the reason, the careful habits cases are best understood as instances in which the courts took advantage of the lack of clear definitions of “habit” and “character” to carve out a narrow exception to the ban on character evidence to assist plaintiffs who could not otherwise meet their burden of proving due care.⁷⁰

For many years, the careful habits/eyewitness cases co-existed with a parallel line of cases that admitted evidence more closely akin to true habit evidence. For example, in 1929, the appellate court, in *Wolf v. Peoples Bank*,⁷¹ held that the trial court erred in excluding testimony about the deceased’s “habit[s] and custom[s] about expenditures of money.”⁷² The court stated that “[a]ppellant should have been given the widest latitude, under the law, to bring out every fact and circumstance which had any material bearing upon the merits of the controversy.”⁷³ Even though the evidence at issue in *Wolf* was not true habit evidence, the court quoted extensively from various sources that mentioned the probative value and general admissibility of habit evidence.⁷⁴

Wolf suggests that, for a long time, Illinois courts implicitly recognized a difference between the progeny of *Clark* (the careful

68. MUELLER & KIRKPATRICK, *supra* note 61, § 4.24, at 285-86 (stating that the more a behavior can be said to be specific, regular, and unreflective, the more likely it is to qualify as habit).

69. 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 825.

70. See *Brown v. Nale*, 245 N.E.2d 9, 11-12 (Ill. App. 4th Dist. 1969) (stating that “one purpose of evidence as to habits of care as an exception to the general rule in civil cases is to make available such evidence of freedom from contributory negligence as would meet the traditional element of the cause of action and avoid a directed verdict”).

71. 255 Ill. App. 127 (3d Dist. 1929).

72. *Id.* at 155.

73. *Id.* at 156.

74. See *id.* at 150-51 (citing *Walker v. Barron*, 6 Minn. 508, 515 (1861); *State v. Manchester & L.R.R.*, 52 N.H. 528 (1873); SIMON GREENLEAF, 1 TREATISE ON THE LAW OF EVIDENCE § 14j, at 53 (16th ed. 1899); JOHN HENRY WIGMORE, 1 A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 92, at 166 (1904)); cf. *Hunter v. Harris*, 23 N.E. 626, 628 (Ill. 1890) (finding that on the question of whether a note was genuine, the court should have received evidence of various transactions between the parties “out of which a liability could have arisen”). A few cases after *Wolf* took a similar approach. See, e.g., *Solomon v. The Fair*, 183 N.E.2d 588, 589 (Ill. App. 1st Dist. 1962) (holding that trial court did not err in permitting defendant deliveryman, who could not recall delivering bedframe on which plaintiff was injured and could not tell the court whether he or his helper delivered it, to testify as to his “custom and habit with respect to due care and caution in making other similar deliveries” and to testify that he placed bedframes wherever directed by those receiving them).

habits cases) and the progeny of *Haggard* (habits of other kinds).⁷⁵ Eventually, however, the careful habits cases began to swallow the rule announced in the early cases. As a result, some courts said that the only kind of habit evidence that could be admitted was evidence of careful habits when offered in personal injury or wrongful death actions where there were no eyewitnesses.⁷⁶

2. The Eyewitness Rule

Clark and its progeny limited the use of careful habits evidence to cases where there were no eyewitnesses—who could testify to whether a plaintiff exercised the required due care necessary for recovery in a negligence action.⁷⁷ Initially, the eyewitness rule applied *only* to careful habits evidence, as demonstrated by the fact that *Haggard*, *Stolp*, and *Thorp* did not apply the rule to other kinds of habit evidence. Consequently, in *Wolf*, the court made no mention of the eyewitness rule. Eventually, however, the eyewitness rule spilled over into cases involving true habit evidence. For example, in 1980, the appellate court held that evidence of an anesthesiologist's habits in monitoring breathing during surgery was not admissible because there

75. See *supra* notes 39-59 and accompanying text (discussing the careful habits cases); *supra* notes 13, 24-38 (discussing habits of other kinds).

76. See, e.g., *Gardner v. Geraghty*, 423 N.E.2d 1321, 1324-25 (Ill. App. 1st Dist. 1981) (holding that even though the general rule is not to admit habit testimony, an exception exists in wrongful death cases and the trial court should have admitted testimony regarding decedent's careful habits).

77. The exact scope of the eyewitness rule is unclear. Some cases hold that habit evidence is rendered inadmissible by the presence of eyewitnesses even if those witnesses are of questionable reliability. See, e.g., *Plank v. Holman*, 264 N.E.2d 12, 14-15 (Ill. 1970) (finding that although the plaintiff did not see everything that occurred at the scene of accident in which her husband was killed, "[i]f the plaintiff could relate circumstances from which the decedent's behavior and operation of his automobile might be reasonably inferred, she may be termed an 'eyewitness' and stating that because plaintiff was an eyewitness to the accident, she was 'compelled to call herself [to prove his due care] in the absence of other direct testimony'"); *Herget Nat'l Bank v. Johnson*, 316 N.E.2d 191, 194 (Ill. App. 3d Dist. 1974) (witness' mental deficiency is relevant "only in so far as it affects the weight to be given his testimony" and "it is not necessary that an eyewitness see everything that occurred at the accident scene").

Other cases suggest that evidence of careful habits may be received if an eyewitness has no recollection whatsoever of the events that he observed or if there are no witnesses who can testify to the precise issue on which the evidence is offered. See, e.g., *Bitner v. Central Illinois Light Co.*, 394 N.E.2d 492 (Ill. App. 3d Dist. 1979) (holding that when witness to an accident lacked recollection of the accident, the witness could not be classified as a competent eyewitness; thus, the evidence of decedent's careful habits should have been permitted); *Hall v. Kirk*, 300 N.E.2d 600, 603 (Ill. App. 5th Dist. 1973) (holding that evidence of plaintiff's careful habits was properly admitted to show he was not the driver where no direct evidence existed to show who was driving vehicle involved in accident and eyewitnesses to the accident did not see who was driving).

were eyewitnesses to the operation that resulted in injury to the plaintiff.⁷⁸ Thus, although Illinois courts originally imposed the eyewitness rule to limit the use of careful habits evidence, a kind of character evidence, by 1980 they had stood the rule on its head by stating that even true habit evidence was inadmissible unless there were no eyewitnesses.

3. *Bradfield* and its Progeny: Emerging Approaches

In 1985, in *Bradfield v. Illinois Central Gulf Railroad Co.*,⁷⁹ the appellate court took a new approach, suggesting a much more permissive attitude towards the use of habit evidence. *Bradfield* involved a wrongful death action that arose when defendant's train struck a car driven by plaintiff's decedent at a grade crossing.⁸⁰ The appellate court held that the trial court did not err in allowing decedent's wife and son to testify that, on prior occasions, other Illinois Central Gulf Railroad Company train crews failed to sound a whistle or horn when approaching the crossing in question.⁸¹

The *Bradfield* court recognized that it was dealing with evidence of routine practices, rather than evidence of habit.⁸² However, the court noted that Illinois' traditional rule of limiting habit evidence to cases without any eyewitnesses had often "been criticized because its premise is the 'superior' reliability of eyewitness testimony."⁸³ The court then purported to adopt "the better rule" set forth in Rule 406 of the Federal Rules of Evidence,⁸⁴ which provides:

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

78. See *Vuleitch v. Bolgla*, 407 N.E.2d 566 (Ill. App. 1st Dist. 1980); see also *City of Salem v. Webster*, 61 N.E. 323, 324 (Ill. 1901) (holding in a personal injury action that defendant's evidence that plaintiff was ordinarily a rapid driver was inadmissible because "direct testimony [existed] as to the rate at which plaintiff was driving," rendering the offered evidence "not competent"); *Pellico v. Jackson*, 217 N.E.2d 281, 288-89 (Ill. App. 1st Dist. 1966) (stating that "[t]he general rule in this state is that general habits are admissible only where there are no eyewitnesses to the occurrence," but noting that the Illinois cases deal only with general habits of due care of a decedent).

79. 484 N.E.2d 365 (Ill. App. 5th Dist. 1985), *aff'd on other grounds*, 505 N.E.2d 231 (Ill. 1987).

80. See *id.* at 366.

81. See *id.* at 367-68.

82. See *id.* The court stated, "[W]e are not dealing with the habits of specific individuals but with the routine practice of an organization. . . ." *Id.* at 367.

83. *Id.* at 367. The court went on to observe that even though it was dealing not with habit evidence but evidence of "the routine practice of an organization," the same shortcomings of the "eyewitness" requirement held true. *Id.*

84. See *id.* at 367-68.

conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.⁸⁵

In affirming the appellate court's decision, the Illinois Supreme Court acknowledged that its decision in *Haggard* made "it questionable whether the [eyewitness cases] are in point."⁸⁶ However, it neither adopted Federal Rule of Evidence 406 nor definitively rejected the eyewitness rule.⁸⁷ With these indecisive actions, the supreme court cut the law governing habit evidence loose from its traditional moorings and cast it adrift without a rudder.

As a result, post-*Bradfield* appellate decisions have taken a variety of approaches. In civil cases, several post-*Bradfield* decisions have rejected the eyewitness rule and stated that Illinois has adopted Federal Rule of Evidence 406.⁸⁸ Other decisions have placed traditional restrictions on the introduction of such evidence.⁸⁹

85. FED. R. EVID. 406.

86. *Bradfield v. Illinois Cent. Gulf R.R. Co.*, 505 N.E.2d 331, 333-34 (Ill. 1987). See *supra* notes 31-34 and accompanying text for a discussion of *Haggard*.

87. See *Bradfield*, 505 N.E.2d at 334 (holding that defendant failed to preserve for review the question of the propriety of the admission of habit testimony by objecting only to the relevance of such evidence).

88. See, e.g., *Alvarado v. Goepf*, 663 N.E.2d 63, 64-65 (Ill. App. 1st Dist. 1996) (rejecting the eyewitness rule and stating that Illinois courts have adopted Federal Rule of Evidence 406, but holding that habit evidence should not have been admitted because plaintiff failed to lay a sufficient foundation for it); *Hajian v. Holy Family Hosp.*, 652 N.E.2d 1132, 1140 (Ill. App. 1st Dist. 1995) (noting that Illinois courts had adopted Federal Rule of Evidence 406 and holding that where patient's mother testified that she had asked a nurse to check on patient but the nurse did not do so, the trial court did not err in allowing nurse to testify that her habit was to respond to patient and family requests for her attention); *Taruc v. State Farm Mut. Auto. Ins. Co.*, 578 N.E.2d 134, 138 (Ill. App. 1st Dist. 1991) (holding that the trial court did not err in admitting evidence of normal office procedures, and stating that "[m]ore recent cases . . . have recognized that Federal Rule 406 states the proper formulation of the relevance (and thus admissibility) of habit evidence"); *Wasleff v. Dever*, 550 N.E.2d 1132, 1137 (Ill. App. 1st Dist. 1990) (stating that "our courts have adopted Rule 406 . . . which establishes that habit evidence is always admissible for the purpose of proving the conduct of a person or business organization" and holding that the trial court did not err in admitting testimony of trustee's daughter that she routinely signed her father's name to checks and withdrawals while handling his financial affairs); see also *Collins v. Roseland Community Hosp.*, 579 N.E.2d 1105, 1109 (Ill. App. 1st Dist. 1991) (holding that "[e]vidence of routine or habit is admissible to prove that the conduct of the person was in conformity with [the] habit or routine practice").

89. See, e.g., *Knecht v. Radiac Abrasives, Inc.*, 579 N.E.2d 1248, 1253 (Ill. App. 5th Dist. 1991) (cautioning against easy admission of habit testimony and observing that many Illinois cases have conditioned the admission of habit evidence on a showing of a "strong necessity for its reception"); *Cairns v. Hansen*, 524 N.E.2d 939, 945-46 (Ill. App. 2d Dist. 1988) (observing that the Illinois Supreme Court has not clearly rejected the eyewitness rule and noting that the "established rule of law in Illinois" provides that in wrongful death cases, where the plaintiff must show that the deceased exercised due care for his own safety at the time of the occurrence, evidence of prior

In criminal cases, *Bradfield* has had a more definitive impact. Prior to *Bradfield*, Illinois courts only rarely approved of habit evidence in criminal cases.⁹⁰ However, in 1988, in the case of *People v.*

careful habits, if pertinent, may be admitted as tending to prove the exercise of due care *if there are no competent eyewitnesses*). The *Cairns* court also held that because a competent eyewitness was available, habit testimony to prove defendant's due care was inadmissible. *See id.* at 945-46. Moreover, the court found that the witness' testimony that she had ridden with decedent every day for some time, that he was careful and did not drink, and that he was driving carefully the night of the accident was too indefinite and ambiguous to establish that the decedent, as a matter of habit, met a specific situation with a specific response. *See id.*

90. In *Gallagher v. People*, 11 N.E. 335, 336 (Ill. 1887), the defendant was charged with selling intoxicating liquor to "persons in the habit of getting intoxicated. The court held that the trial court did not err in permitting a witness to answer that persons alleged to be "in the habit of getting intoxicated" were in such habit. *Id.*

In *People v. Moretti*, 129 N.E.2d 709, 713 (Ill. 1955), the defendant, charged with murder, claimed that the victim's death occurred while the defendant was trying to defend himself against an attack by a third person. The *Moretti* court stated that it could receive evidence of the alleged attacker's violent character and habits to show who was the first aggressor, but held that the trial court did not err in excluding the evidence because the defense witness called to testify to the attacker's reputation was not familiar with that reputation. *See id.* at 725-26. The court did not mention the eyewitness rule; but, because of *Moretti's* focus on proof by evidence of reputation, the question before the court appears to have been the admissibility of character evidence and the word "habit" seems to have been used loosely as a synonym for character. *See id.; see also People v. West*, 429 N.E.2d 599, 603 (Ill. App. 2d Dist. 1981) (holding as harmless error the admission of witness' testimony about her usual practices when she admitted that she had no detailed knowledge of the occasion in question) (citing *Salem v. Webster*, 61 N.E. 323 (Ill. 1901); *Goetz v. Country Mut. Ins. Co.*, 328 N.E.2d 109 (Ill. App. 1st Dist. 1975)).

Courts in other jurisdictions often allow evidence that a homicide victim habitually carried a weapon or engaged in other behaviors that suggest a propensity for violence. *See, e.g., Naugher v. State*, 23 So. 26, 27 (Ala. 1898) (holding that testimony of defendant's knowledge about whether the deceased habitually carried a gun was permissible because it might shed light on the circumstances of the shooting). The limited use of this kind of habit evidence in Illinois in cases of this kind may flow in part from the fact that Illinois, unlike many other jurisdictions, allows proof of specific instances of conduct to prove a homicide victim's character for violence. *See, e.g., People v. Lynch*, 470 N.E.2d 1018, 1021 (Ill. 1984) (stating that when theory of self-defense was raised, victim's aggressive and violent character is relevant to show who was the aggressor); *People v. Peeler*, 299 N.E.2d 382, 386 (Ill. App. 1st Dist. 1973) (ruling that in homicide prosecutions where defendant argues self-defense and where the aggressor is in question, evidence of decedent's prior threats and violent disposition towards the defendant is admissible). Evidence of a victim's violent habits is thus rarely necessary in Illinois criminal cases. *Cf. People v. Charles*, 606 N.E.2d 603, 610 (Ill. App. 1st Dist. 1992) (citing with apparent approval *United States v. Weddell*, 890 F.2d 106, 107-08 (8th Cir. 1989) and stating that the case stood for the proposition that evidence of defendant's general habit of using knives was admissible to rebut his claim that he was defending himself when he stabbed his victim); *People v. Meares El*, 403 N.E.2d 547, 553 (Ill. App. 1st Dist. 1980) (finding the distinction between evidence of habit and evidence of character irrelevant because, in either event, it was harmless error to admit testimony that the witness knew that the defendant carried a knife).

Miller,⁹¹ the appellate court suggested that habit evidence was admissible.⁹² In 1989, in *People v. Galbreath*,⁹³ a drunk-driving prosecution, the state sought to establish the proper administration of a blood test through evidence of a medical technician's habitual practices when performing such tests.⁹⁴ The trial court granted defendant's motion to exclude the evidence,⁹⁵ and the state appealed pursuant to Supreme Court Rule 604(a)(1).⁹⁶ The appellate court, relying on *Miller*, held that the exclusion of this evidence was reversible error; it made no mention of the eyewitness rule.⁹⁷ Since *Galbreath*, other appellate decisions have also approved the use of habit evidence in criminal cases.⁹⁸

91. 519 N.E.2d 717 (Ill. App. 3d Dist. 1988).

92. *See id.* at 720 (setting out requirements for admission of habit evidence but holding that five to seven examples of conduct were insufficient to establish habit).

The *Miller* court cited the Model Code of Evidence Rule 307(1) and a 1977 United States Court of Appeals decision, *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 511 (4th Cir. 1977). *Miller*, 519 N.E.2d at 720. It made no reference to any Illinois cases in support of its position and held that the evidence in question was inadmissible because it "[did] not amount to a habit, but only instances of similar conduct." *Id.*; *cf.* *People v. Brooks*, 474 N.E.2d 1287 (Ill. App. 1st Dist. 1985) (stating the general rule that "a court will not consider evidence that a person has, or has not, done a certain act at a particular time as probative of a contention that he has, or has not, done a similar act at another time").

93. 538 N.E.2d 200 (Ill. App. 4th Dist. 1989).

94. *See id.* at 202.

95. *See id.* at 202-03.

96. ILL. SUP. CT. R. 604(a)(1).

97. *See Galbreath*, 538 N.E.2d at 202. The *Galbreath* court found that the trial court erred in excluding a witness' testimony that she drew approximately 100 blood samples per week, was familiar with the procedures, and had never deviated from them. *See id.* The testimony was admissible as evidence of the routine practice of an organization because it was corroborated by the testimony of the arresting officer. *Id.* The testimony was also admissible as evidence of habit because the procedure was performed often enough to be called a habit and was "similar enough to the alleged conduct." *Id.* (quoting MICHAEL H. GRAHAM, CLEARY & GRAHAM'S HANDBOOK OF ILLINOIS EVIDENCE § 406.4, at 55 (4th ed. 1984 & Supp. 1989)).

98. *See, e.g.,* *People v. Randle*, 661 N.E.2d 370, 379 (Ill. App. 1st Dist. 1995) (holding that in establishing that a murder victim was robbed, the trial court properly received circumstantial evidence to establish that the victim habitually received and kept cash in her home), *reh'g denied*, 661 N.E.2d 370 (Ill. App. 1st Dist. 1996), and *appeal denied*, 667 N.E.2d 1061 (Ill. 1996); *People v. Keller*, 641 N.E.2d 891, 896 (Ill. App. 1st Dist. 1994) (holding that if a proper foundation was laid, the trial court could in its discretion admit evidence that a shopkeeper habitually or customarily kept large amounts of cash on his person and in his cash register).

D. Evidence of Routine Business Practice

Routine business practice refers to the behavior of a group or organization that would be termed habit if engaged in by an individual.⁹⁹ Routine practices generally involve probabilities rather than semiautomatic responses stimulated by specific events. The Illinois Appellate Court has stated that “[t]he types of conduct qualifying for admission as a routine business practice are ministerial acts: mailing, filing, sending notice, and the like, “and not discretionary acts such as treating employees fairly.”¹⁰⁰

Evidence of a routine practice is relevant and highly probative when offered to show that the conduct of an organization on a particular occasion conformed to that practice. Perhaps because it is seen as more reliable than habit evidence, Illinois courts have generally not limited the use of routine practice evidence by the eyewitness rule.¹⁰¹ However, Illinois courts have imposed a different kind of limitation. Traditionally, Illinois courts have limited the use of routine practice evidence to cases where other evidence, including eyewitnesses, could corroborate a claim that a group or organization followed the practice in question in the particular case.¹⁰²

The inconsistencies and definitional problems that have led to so much confusion in the law governing habit evidence have not plagued the law governing evidence of routine practices. Here too, however, the winds of change are blowing. In recent years, Illinois courts have started to follow Federal Rule of Evidence 406, which rejects any corroboration requirements, and have been allowing evidence of routine practice in the absence of corroboration. Thus, in 1987, in

99. FED. R. EVID. 406 advisory committee's note.

100. *Knecht v. Radiac Abrasives, Inc.*, 579 N.E.2d 1248, 1254 (Ill. App. 5th Dist. 1991).

101. *See, e.g.,* *Craftsmen Fin. Co. v. Landfield Fin. Co.*, 129 N.E.2d 773, 773 (Ill. App. 1st Dist. 1955) (stating that in an action to recover money allegedly loaned and profits resulting from that loan, “permitting witness to testify to a series of similar business ventures . . . was not error”) (abstract published only); *see also* 23 WRIGHT & GRAHAM, *supra* note 11, § 5272, at 14 n.10 (stating that “[t]he no-eyewitness rule only applied to habits of individuals”); *Note: Evidence—Relevancy—Admission of Habit Evidence to Show Due Care*, 10 VAND. L. REV. 447, 448-49 (1957).

102. *See, e.g.,* *State Farm Mut. Auto. Ins. Co. v. Oss*, 468 N.E.2d 439, 442 (Ill. App. 1st Dist. 1984); *Commonwealth Edison Co. v. Property Tax Appeal Bd.*, 407 N.E.2d 1088, 1090 (Ill. App. 2d Dist. 1980); *Lynn v. Village of W. City*, 345 N.E.2d 172, 175 (Ill. App. 5th Dist. 1976); *Goetz v. Country Mut. Ins. Co.*, 328 N.E.2d 109, 115 (Ill. App. 2d Dist. 1975); *State Bank v. Standaert*, 82 N.E.2d 393, 396 (Ill. App. 2d Dist. 1948); *cf. Meyer v. Krug*, 19 N.E.2d 111, 111 (Ill. App. 1st Dist. 1939) (holding that “[e]vidence that insurance agent[] . . . placed letters addressed to defendant in a pile of letters to be mailed by [it] was insufficient to raise presumption that letters were mailed and received by defendant”) (abstract published only).

Webb v. Angell,¹⁰³ the appellate court found no error in the admission of evidence of routine practice, stating that “[e]vidence of the routine practice of an organization is relevant to prove that the actions of the organization on a specific occasion conformed to the routine.”¹⁰⁴ The court further stated that if there was evidence that “the routine was not followed on a particular occasion, it is up to the jury to resolve the conflict.”¹⁰⁵ Similarly, in the 1991 case of *Taruc v. State Farm Mutual Automobile Insurance Co.*,¹⁰⁶ the appellate court stated that “[m]ore recent cases . . . have recognized that Federal Rule 406 states the proper formulation of the relevance (and thus admissibility) of habit evidence.”¹⁰⁷ The court implied that showing that the practice was followed on the occasion in question was unnecessary, holding that the evidence “established a relevant and admissible routine business practice.”¹⁰⁸

III. METHODS OF PROOF

Habits and routine practices are usually proved through the testimony of witnesses who have observed the behavior in question.¹⁰⁹ A reasonably large number of instances must be shown,¹¹⁰ and the testimony must be specific.¹¹¹ Generally, testimony that a person

103. 508 N.E.2d 508 (Ill. App. 2d Dist. 1987).

104. *Id.* at 517. *But cf. Knecht*, 579 N.E.2d at 1253 (rejecting evidence, in part, because there was no corroborating proof).

105. *Webb*, 508 N.E.2d at 517; *see also Kolia v. State Farm Mut. Auto. Ins. Co.*, 500 N.E.2d 502, 506 (Ill. App. 1st Dist. 1986) (holding that direct evidence of actual mailing was unnecessary when presence of routine was shown).

106. 578 N.E.2d 134 (Ill. App. 1st Dist. 1991).

107. *Id.* at 138.

108. *Id.*; *see also Small v. Prudential Life Ins. Co.*, 617 N.E.2d 80, 83 (Ill. App. 1st Dist. 1993) (finding evidence of routine practice of company relevant and admissible to prove that the company's actions on a specific occasion conformed to that practice).

109. *See, e.g., Hajian v. Holy Family Hosp.*, 652 N.E.2d 1132, 1140 (Ill. App. 1st Dist. 1995) (holding that the trial court did not err in allowing a nurse to testify about her habit of responding to patient and family requests for her attention because her testimony “contained sufficiently detailed and specific facts so the court could infer [that] her testimony . . . was reliable and not mere speculation or conjecture”); *People v. Galbreath*, 538 N.E.2d 200, 202 (Ill. App. 4th Dist. 1989) (holding that witness' testimony that she drew approximately 100 blood samples per week, was familiar with procedures, and never deviated from them, was sufficient to establish habit and to secure admission of blood-alcohol test results).

110. *See People v. Miller*, 519 N.E.2d 717, 720 (Ill. App. 3d Dist. 1988) (finding five to seven instances insufficient to establish habit); *see also Roherty v. Green*, 206 N.E.2d 756, 761 (Ill. App. 1st Dist. 1965) (stating that a single similar transaction “cannot be raised to the status of a custom or method of doing business”).

111. *See Alvarado v. Goepf*, 663 N.E.2d 63, 64-65 (Ill. App. 1st Dist. 1996) (holding testimony that a dentist “often” failed to have a treatment plan was

often does something,¹¹² or evidence of a few "instances of similar conduct" is inadmissible to prove or disprove present conduct.¹¹³

It has sometimes been suggested that habit and routine practice cannot or should not be proved by opinion evidence.¹¹⁴ This suggestion seems correct if a witness simply speculates and lacks personal knowledge of the behavior in question.¹¹⁵ In such a case, opinion testimony, if allowed, could enable the witness to give testimony without risking prosecution for perjury.¹¹⁶ However, opinion testimony seems unobjectionable if the witness cannot remember or cannot relate every specific instance of the relevant behavior but simply expresses an opinion as a shorthand way of

inadmissible because it was "vague, general, and ambiguous"); *Cairns v. Hansen*, 524 N.E.2d 939, 946 (Ill. App. 2d Dist. 1988) (holding that testimony that witness rode with decedent every day for a period of time before the accident, that decedent was careful and did not drink, that the witness was with him the night of the accident and that he drove carefully and slowly was far too ambiguous and general to establish a habit of the decedent). Specific instances could, in theory, be shown through circumstantial evidence, by the use of documents, or even by opinion testimony. 23 WRIGHT & GRAHAM, *supra* note 11, § 5276, at 67.

The testimony of a single credible witness is clearly sufficient to establish a habit. *See, e.g., Hajian*, 652 N.E.2d at 1140.

112. *See Alvarado*, 663 N.E.2d at 64-65 (finding it was reversible error to admit testimony that a dentist "often" failed to have a treatment plan for patients because "[t]here were no specifics, no numbers, no testimony about the kind of patient or kind of treatment involved . . . [and] no time parameters").

113. *Miller*, 519 N.E.2d at 720; *see also Roherty*, 206 N.E.2d at 761 (holding that "[w]hile it is generally true that evidence can be introduced in a proper case to show a manner or custom of doing business, [defendant's two] payments cannot be raised to the status of a custom or method of doing business"); *cf. Traff v. Fabro*, 84 N.E.2d 874, 877 (Ill. App. 1st Dist. 1949) (finding proof of "isolated instances is not sufficient to establish a usage or custom").

114. *See Knecht v. Radiac Abrasives, Inc.*, 579 N.E.2d 1248, 1252 (Ill. App. 5th Dist. 1991) (finding that lay opinion testimony "was not proper evidence of habit or routine practice"); *see also* 23 WRIGHT & GRAHAM, *supra* note 11, § 5271, at 9 n.5 (listing lawyers groups that opposed the use of opinion evidence to prove habit or routine practice). *See generally* FED. R. EVID. 406 advisory committee's note (neither rejecting nor sanctioning opinion evidence to prove habit).

115. *Cf.* 23 WRIGHT & GRAHAM, *supra* note 11, § 5276, at 72-73 (stating that "[t]he lay witness who wishes to 'generalize' under the Federal Rules must, of course, show that his opinion or generalization is based on his personal knowledge"). *But cf. United States v. Quezada*, 754 F.2d 1190, 1195-96 (5th Cir. 1985) (holding that the existence of a routine practice may be proved through the testimony of someone familiar with the practice and need not be proved by direct personal observation). *See generally* FED. R. EVID. 406 advisory committee's note (neither rejecting nor sanctioning opinion evidence to prove habit).

116. *See* 23 WRIGHT & GRAHAM, *supra* note 11, § 5272, at 3 (Supp. 1994) (citing *Weinisch v. Sawyer*, 567 A.2d 259, 264 (N.J. Super. Ct. App. Div. 1989) (rejecting this argument and finding that defendant's testimony of his own habit or custom in conducting business was properly admitted), *rev'd on other grounds*, 587 A.2d 615 (N.J. 1991)).

summarizing his own observations.¹¹⁷

Some authorities suggest that evidence of reputation may be used to prove habit.¹¹⁸ Evidence of reputation, however, is necessarily hearsay and the law does not recognize a hearsay exception for reputation evidence used to prove habit.¹¹⁹ In Illinois, evidence of reputation is the only way to prove a trait of character where offered to prove conduct consistent therewith.¹²⁰ Ordinarily, Illinois does not allow evidence in the form of opinion or specific instances to prove character.¹²¹

Part of the confusion between character and habit in the early cases may flow from these different methods of proof. In most Illinois cases purporting to deal with "habit" evidence, the "habit" in question appears to have been proved by a witness' opinion or by evidence of specific instances of conduct observed by a witness.¹²² When reputation evidence was used, courts usually treated the evidence as character evidence, and barred its use.¹²³ However, when opinion evidence was used, courts did not recognize the evidence as character evidence, naming it instead as evidence of "habit" or "custom."¹²⁴

117. See *Hajian v. Holy Family Hospital*, 652 N.E.2d 1132, 1140 (Ill. App. 1st Dist. 1995) (finding that the trial court properly admitted nurse's testimony as to her own habits "which contained sufficiently detailed and specific facts so the court could infer her testimony . . . was reliable and not mere speculation or conjecture"); see also *Gallagher v. People*, 11 N.E. 335, 336 (Ill. 1887) (noting that the law "forbids the opinions or conclusions of witnesses from being given in evidence; but whether or not a person possesses a certain habit is rather a question of fact than of opinion or conclusion").

118. See *Travers v. Snyder*, 38 Ill. App. 379, 387 (2d Dist. 1890) (stating that it was proper for appellee to "show by his witness . . . the habits of appellee in regard to giving his notes, but . . . the inquiry should be confined to his general reputation in that regard"); cf. *Brown v. Nale*, 245 N.E.2d 9, 11 (Ill. App. 4th Dist. 1969) (finding that the trial court erred in admitting evidence of reputation to prove habits of due care).

119. Cf. FED. R. EVID. 803(21) (recognizing a hearsay exception for evidence of reputation used to prove character, but saying nothing about habit).

120. See *People v. Willy*, 133 N.E. 859, 864 (Ill. 1921).

121. See *id.*; cf. FED. R. EVID. 405 (permitting opinion evidence to prove character).

122. See *supra* notes 109 and 117 (citing cases dealing with proof of habit by opinion or evidence of specific instances). Even "careful habits" have generally been shown by testimony as to specific instances. See *Brown*, 245 N.E.2d at 11.

123. See, e.g., *Holtzman v. Hoy*, 8 N.E. 832, 832-33 (Ill. 1886); *Brown*, 245 N.E.2d at 11 (noting that only two Illinois cases "referred to reputation of habits of due care" and holding that it was error to allow plaintiff to introduce evidence of reputation to habits of due care); *McBean v. Fox*, 1 Ill. App. 177, 186-87 (1st Dist. 1878). *But cf. Travers*, 38 Ill. App. at 387.

124. See *Thorp v. Goewey*, 85 Ill. 611, 614 (1897) (failing to note method of proof, but apparently evidence of one specific instance was introduced).

IV. STRAIGHTENING OUT THE MESS—THE NEED FOR FEDERAL RULE OF EVIDENCE 406

A. *Habits and Careful Habits*

True habit evidence, evidence of semiautomatic behavior on other similar occasions, can be highly probative of conduct on a particular occasion. The often unconscious nature and unvarying regularity of habits strongly suggest the likelihood of repetition. Furthermore, because evidence of habit is not likely to mislead the trier of fact or precipitate a decision on an emotional or other improper basis, it will rarely be inadmissible if it is relevant.¹²⁵

In contrast, careful habits evidence, like all character evidence, is of limited probative value.¹²⁶ People often behave in ways inconsistent with their character. More often, they behave in ways inconsistent with their reputations, the usual means of proving character. Because character may change over time, evidence of a character trait on one occasion may not be probative of conduct on another occasion.¹²⁷ Moreover, character evidence may “distract the minds of the jury from the principal question,”¹²⁸ may be given excessive weight by the jury, and may lead the jury to make judgments on the basis of past, rather than present character.¹²⁹ For these reasons, and because the character

125. See 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 826. Some evidence scholars have argued that habit evidence might be objectionable for the following reasons. “[F]irst, . . . individuals can consciously take advantage of the fact that they are known to have certain habits, . . . second, . . . even well established habits do not always govern behavior . . . [and] third, habit evidence is . . . particularly easy to fabricate and particularly difficult to refute.” RICHARD O. LEMPERT & STEPHEN A. SALTZBURG, A MODERN APPROACH TO EVIDENCE 249-50 (2d ed. 1982). None of these arguments is persuasive. The first point is true of anything—individuals can always take advantage of facts about themselves to try to avoid responsibility. The second point goes to the weight of the evidence. The third point is true of many kinds of evidence, including eyewitness testimony.

126. See David P. Leonard, *The Use of Character to Prove Conduct: Rationality and Catharsis in the Law of Evidence*, 58 U. COLO. L. REV. 1, 26-31 (1987) (discussing psychological research as it relates to people’s perception of habitual behavior).

127. *But cf.* Miguel A. Mendez, *Essay: The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 234 (1996) (noting new research which suggests that basic personality structures are relatively stable and unvarying).

128. *Kelly v. People*, 82 N.E. 198, 200 (Ill. 1907) (citing *State v. Potter*, 13 Kan. 414 (1874)); see also *Holzman v. Hoy*, 8 N.E. 832, 833 (Ill. 1886) (holding character evidence inadmissible because its bearing upon the issue in question “is too remote, and in many, if not most, cases it would tend to mislead the jury, rather than enlighten them”).

129. See GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 5.2, at 132 (3d ed. 1996); see also *People v. Randle*, 498 N.E.2d 732, 736 (Ill. App. 2d Dist. 1986) (stating that the bar on character evidence exists “because it is feared that the jury will be

traits that parties seek to expose are often highly prejudicial,¹³⁰ character evidence is disfavored.

The use of careful habits evidence grew out of Illinois' requirement that personal injury plaintiffs must prove due care and show the absence of contributory negligence to recover for injuries caused by the negligence of others. By carving out an exception to the usual ban on character evidence and allowing some plaintiffs to introduce evidence of careful habits in their case-in-chief, the Illinois Supreme Court has provided plaintiffs, who could not otherwise prove that they were without fault, an opportunity to get their case before a jury.¹³¹

The development of tort law in Illinois since 1980 has greatly reduced the need for careful habits evidence in personal injury lawsuits. In 1981, in *Alvis v. Ribar*,¹³² the Illinois Supreme Court held that a plaintiff's contributory negligence does not bar him from recovery for an injury,¹³³ and adopted a rule of comparative negligence, which allows partial recovery even if the plaintiff is found at fault.¹³⁴ As a result, evidence of careful habits may help the plaintiff win a larger award, but it will rarely be *necessary* to a recovery. Under these circumstances, it is difficult to see any reason, except blind adherence to precedent, for Illinois courts to continue to allow the use of one kind of character evidence, careful habits evidence, while barring other kinds of character evidence.

The adoption of Federal Rule of Evidence 406 would clarify the relevance of true habit evidence when offered to prove conduct consistent with the habit shown. Rule 406, however, does not define "habit," and other jurisdictions have taken conflicting positions on the question of whether evidence of "careful habits" falls under the rule.¹³⁵ Although, the adoption of Rule 406 would not, therefore, determine the relevance or admissibility of careful habits evidence, such evidence

swayed to convict based not on a defendant's actual guilt . . . but because the defendant is a bad person").

130. See 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 825 n.3.

131. See *supra* notes 39-59 and accompanying text (discussing Illinois cases upholding this exception to the usual ban on character evidence).

132. 421 N.E.2d 886 (Ill. 1981). In 1986 this case was subsequently superseded by statute. See 735 ILL. COMP. STAT. 5/2-1116 (West 1994) (enacting a modified version of comparative negligence).

133. See *id.* at 898.

134. See *id.*

135. See, e.g., 23 WRIGHT & GRAHAM, *supra* note 11, § 5273, at 36-37 (1980) (noting conflicting and inconsistent approaches to the issue). The adoption of Federal Rule of Evidence 404, which bars the use of character evidence to prove conduct except in limited circumstances in criminal cases, would bar careful habits evidence if that kind of evidence were viewed, as it should be, as evidence of character. FED. R. EVID. 404.

is of little probable value and should be barred if offered only to show conduct consistent with the character trait shown.¹³⁶

B. *The Eyewitness Rule*

Courts have generally found that character evidence “should only be admitted when absolutely essential to the discovery of the truth.”¹³⁷ In accord with this approach, the eyewitness rule, as announced in the careful habits cases, limits the use of careful habits evidence, a kind of character evidence, to circumstances where it is absolutely essential.¹³⁸ The eyewitness rule should be confined to the circumstances that gave rise to it. A rule designed to limit the use of unreliable, last resort, character evidence, should never have been expanded to bar true habit evidence—evidence of an entirely different kind—which is often very reliable.

As a matter of policy, the eyewitness rule makes little sense in any context. Eyewitness testimony is hardly the most reliable sort of testimony. Perceptions and memories are often inaccurate.¹³⁹ Even the best observers may be biased or have an interest in the matter being litigated. Moreover, the need for habit evidence is not reduced where eyewitnesses disagree or where, for some other reason, the issue to which the habit evidence relates is in doubt.¹⁴⁰

Federal Rule of Evidence 406 expressly abolishes the eyewitness rule where true habit evidence is concerned. However, Rule 406 only effects the eyewitness rule as it applies to evidence of careful habits, if such evidence is deemed habit evidence within the meaning of that rule.¹⁴¹

136. See *Cairns v. Hansen*, 524 N.E.2d 939, 945 (Ill. App. 2d Dist. 1988) (stating that the resolution of this question is for the supreme court).

137. *Kelly v. People*, 82 N.E. 198, 200 (Ill. 1907) (citing *State v. Potter*, 13 Kan. 414 (1871)); *Holzman v. Hoy*, 8 N.E. 832, 833 (Ill. 1886) (holding character evidence inadmissible because its bearing upon the issue in question “is too remote, and in many, if not most, cases it would tend to mislead the jury, rather than enlighten them”).

138. See *supra* notes 50-54 and accompanying text (discussing the limitation of the use of careful habits evidence to circumstances in which it is essential).

139. LEMPert AND SALTzBURG, *supra* note 125, at 168 (citing Robert Buckhout, *Eyewitness Testimony*, 231 SCI. AM. 23-31 (1974)).

140. See 1 MCCORMICK ON EVIDENCE, *supra* note 17, § 195, at 828 n.16; see, e.g. *Sawyer v. Fleming*, 83 N.E.2d 360, 361 (Ill. App. 2d Dist. 1949) (reasoning that plaintiff was properly barred from introducing evidence of careful habits of deceased because defendant offered two eyewitnesses who “had been thoroughly discredited”).

141. See Howard T. Brinton, *The Proposed Federal Rules of Evidence: Pointing the Way to Needed Changes in Illinois*, 5 J. MARSHALL J. PRAC. & PROC. 242, 261 (1972) (arguing that Federal Rule of Evidence 406 should be adopted in Illinois because it will abolish the eyewitness rule where careful habits testimony is offered).

C. *Routine Practices and the Corroboration Requirement*

The adoption of Federal Rule of Evidence 406 would eliminate the requirement of corroboration of evidence of routine business practices.¹⁴² The corroboration requirement bars routine practice testimony in the cases where it is most needed, where there are no eyewitnesses. Thus, the corroboration requirement is inconsistent with the eyewitness rule. Moreover, a lack of corroboration does not reduce the probative value or relevance of the evidence; it simply affects its weight. If the corroboration requirement is premised, as seems likely, on a mistrust of routine practice evidence, that mistrust should go to weight, not admissibility. The evidence should be received and given whatever weight the trier of fact believes it deserves.

D. *Method of Proof*

The adoption of Federal Rule of Evidence 406 should have no effect on the methods used to prove habit and routine practice. When originally proposed, Rule 406 provided that habit or routine practice could be proved by testimony "in the form of an opinion or by specific instances of conduct."¹⁴³ Subsequently, that provision was removed, based on the rationale "that the method of proof of habit and routine practice should be left to the courts to deal with on a case-by-case basis."¹⁴⁴

V. CONCLUSION

Federal Rule of Evidence 406 embodies the principle that evidence of a person's habit or an organization's routine practice is highly probative when offered to show that the conduct of the person or organization on a particular occasion conformed to the habit or practice. The Illinois Supreme Court should clearly and unequivocally adopt Federal Rule of Evidence 406 and make such evidence admissible on the same terms as other relevant evidence.

Careful habits evidence presents special problems. In reality, it is a kind of character evidence, and generally, evidence of character is not admissible in civil cases to prove conduct consistent with the trait of

142. See *supra* text accompanying note 102 (explaining that Illinois has limited the use of routine business practice evidence to cases where there is corroborating evidence, resulting in confusion in the law).

143. H.R. REP. NO. 93-650, at 5 (1973), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7079.

144. *Id.*

character shown. With the elimination of the contributory negligence bar on recovery in personal injury cases, plaintiffs no longer need to plead and prove freedom from contributory negligence in order to recover.¹⁴⁵ Under these circumstances, it is difficult to see any reason, except adherence to precedent, that courts should continue to allow evidence of careful habits while barring other kinds of character evidence. Courts should recognize careful habits testimony as character evidence and, bar it on that basis.

The eyewitness rule and the corroboration requirement both seem to reflect a distrust of habit evidence. The eyewitness rule arose out of a desire to limit the use of "careful habits" evidence. It was not intended to apply, and should not apply, to ordinary habit evidence.¹⁴⁶ The adoption of Federal Rule of Evidence 406 would abolish the eyewitness rule and limit it, if it survived at all, to cases where evidence of careful habits is received.

The corroboration requirement, also abolished by Federal Rule of Evidence 406, makes little sense because it bars routine practice testimony in the cases where it is most needed, where there are no eyewitnesses. A lack of corroboration does not reduce the probative value or relevance of the evidence; it simply affects its weight. Federal Rule of Evidence 406 insures that the evidence will be received and given the weight it deserves.

True habit evidence is in no way inferior to other evidence, and should be admitted on the same terms as other evidence. However, until the Illinois Supreme Court clarifies the law, evidence of habit and routine practice should be viewed with caution.

145. See *supra* notes 133-35 and accompanying text (explaining the rationale for admitting careful habits evidence in earlier cases as helping to prove the absence of contributory negligence).

146. Cf. *Augenstein v. Pulley*, 547 N.E.2d 1345, 1350-56 (Ill. App. 5th Dist. 1989) (noting that authorities conflict on the admissibility of evidence of accident reconstruction testimony where there were eyewitnesses and holding that admissibility of such testimony "is to be determined upon the rules announced by the supreme court for opinion evidence").