UNIVERSITY OF
COLORADO LAW REVIEW
*Volume 71, Number 5* *2000*

# THE "SAINTLY" CARDOZO: CHARACTER AND THE CRIMINAL LAW

RICHARD POLENBERG*

Considerations of character influenced Benjamin Cardozo's decisions in virtually all areas of the law, but were particularly important in his approach to the criminal law. I will focus on *People v. Zackowitz*,[1] a case involving first-degree murder that came before the New York State Court of Appeals in 1930, during Cardozo's tenure as Chief Judge. Cardozo wrote the majority opinion for a sharply divided Court that overturned Zackowitz's conviction. The case is especially revealing because Cardozo's decision—which, as we will see, contrasted sharply with his usual approach in criminal cases—was based largely on his assessment of the defendant's character. This assessment, in turn, reflected distinctive aspects of Cardozo's own personality.

One of the words most frequently used to describe Benjamin Cardozo's character during his lifetime was "saintly." Where Louis D. Brandeis was considered a "prophet"—crying out against injustice, calling on government to mend its ways, and holding out the hope of a better world to come—Cardozo was widely regarded as a man who embodied virtue, benevolence, and a remarkable kind of purity. When Dean Acheson spoke of Cardozo's "saintly character" at the memorial service held at the Supreme Court, he merely echoed the sentiments of many of the Justice's family members, friends, and acquaintances.[2]

The adjective "saintly" has profoundly religious connotations, and contemporaries often spoke about Cardozo in reverential, even worshipful, terms. People compared him to St. Paul, St. Francis of Assisi, and Thomas More.

---

* Goldwin Smith Professor of American History, Cornell University.

1. 172 N.E. 466 (N.Y. 1930).

2. *See* RICHARD POLENBERG, THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS 240 (1997).

Notwithstanding the fact that he was Jewish, they remarked on his "priest-like" attributes.[3] He was "more angel than mortal," a person who knew him well marveled, "more like a Heavenly Being than a human."[4] For Cardozo, observers added, "the law has been a holy grail."[5] As a judge, it was said, he exhibited a "serene and chosen spirit of true humility."[6] Shortly after his death in July 1938, the Brooklyn *Jewish Examiner* published a eulogy which read in part: "With him justice was not a legal device. It was a divine quality."[7]

The characterization of Cardozo as "saintly," therefore, suggested more than that he was a modest and gentle soul, courteous, circumspect, and considerate of others; it suggests more even than that he was a person of consummate dignity, integrity, and generosity, as Judge Richard A. Posner has concluded.[8] Although Cardozo did indeed exhibit these attractive character traits, surely all of us know individuals who also possess them, and yet to whom we would hesitate to apply the adjective "saintly." What was distinctive about Cardozo, I believe, was the aura he conveyed of innocence or unworldliness. Unlike most people, he was perceived as being uncontaminated by self-interest, untainted by petty concerns. He seemed to dwell on a loftier, more spiritual plane, which explained why, as another writer put it, "he radiates an atmosphere of benevolence and wisdom."[9]

The circumstances of his personal life do much to explain why Cardozo projected such an image. A confirmed bachelor, he never (so far as is known) had a love affair, a romantic involvement, or a sexual relationship with anyone in his life. He often referred to his "celibate existence," and indeed used the terms "bachelor" and "celibate" interchangeably.[10] If his lifestyle sometimes led him to experience feelings of loneliness, it also made for a certain equanimity. Cardozo's emotional life

---

3. *See* ANDREW L. KAUFMAN, CARDOZO 183 (1998).

4. POLENBERG, *supra* note 2, at 132; KAUFMAN, *supra* note 3, at 183.

5. BERYL H. LEVY, CARDOZO AND FRONTIERS OF LEGAL THINKING 22 (The Press of Case Western Reserve University 1969) (1938).

6. Dr. Bernard Revel, Address Conferring on Cardozo an Honorary Degree from Yeshiva College (1935).

7. POLENBERG, *supra* note 2, at 239.

8. *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 7–9 (1990).

9. JOSEPH POLLARD, MR. JUSTICE CARDOZO: A LIBERAL MIND IN ACTION 7 (1935).

10. *See* POLENBERG, *supra* note 2, at 132.

remained relatively serene, certainly when compared to some of his friends: he never felt the kind of jealousy experienced by Learned Hand when he discovered his wife was in love with another man,[11] or the kind of elation that overcame Oliver Wendell Holmes when he fell in love with Lady Claire Castleton,[12] or the kind of anguish that affected Felix Frankfurter when his wife needed to be hospitalized for clinical depression.[13]

When friends sought to solve "the riddle of Cardozo's bachelorhood,"[14] they usually pointed to his devotion to his older sister, Ellen Ida, always known as "Nell" (perhaps, as was common at the time, after the long-suffering child in Charles Dickens's *The Old Curiosity Shop*). Benjamin's mother, Rebecca, died when he was only nine and one-half years old, and Nell, who was nineteen at the time, assumed the maternal mantle for Benjamin, his twin sister Emily, and the other children in the family.[15] All of them called her their "mother-sister," but it was with Benjamin that she developed the closest relationship. Some viewed the intense, lifelong bond between the two as mutually protective, while others saw it as a mutual entrapment, but everyone commented on Nell's fiercely possessive nature. It was only half-humorously that Benjamin referred to himself as "Nellie's doggie." During her protracted illness, which lasted for more than a decade before her death in 1929, Cardozo devoted himself to caring for her.[16] His attentiveness to her needs enhanced his reputation as a saintly figure who sacrificed his own chance for domestic happiness out of a sense of filial obligation.

Cardozo's celibate life undoubtedly influenced his views on relationships between the sexes. During the eighteen years he served on the New York State Court of Appeals, from 1914 to 1932, Cardozo handed down rulings on many cases involving

---

11. *See* GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 184–87 (1994).

12. *See* G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES 230–45 (1993).

13. *See* Richard Polenberg, *Introduction* to NICOLA SACCO, THE LETTERS OF SACCO AND VANZETTI xixxxiii (Marion Denman Frankfurter ed., Penguin Books 1997) (1960).

14. GEORGE S. HELLMAN, BENJAMIN N. CARDOZO: AMERICAN JUDGE 49 (1940).

15. *See* POLENBERG, *supra* note 2, at 8.

16 *See id.* at 9.

marital responsibilities and sexual behavior.[17] Like many people raised in genteel circumstances during the Victorian era, he harbored courtly, old-fashioned expectations regarding gender-roles and the corresponding behavior appropriate for each sex. He tended to depict women as either entirely innocent, virtuous, and pure, in which case they deserved the benefit of every legal doubt; or else as depraved, corrupt, and sluttish, and therefore not worthy of special consideration.[18] On the other hand, Cardozo tended to regard males as wild and unruly, potential sexual aggressors whom the law needed to restrain. In the rare instance when he thought he was dealing with a man who had behaved honorably or chivalrously, Cardozo wished to see that he received the most ample protection possible.

In 1930, such a man came before Cardozo, or so he believed, in the person of Joseph Zackowitz, who had been convicted of murder in the first degree. Cardozo wrote the majority opinion for the New York State Court of Appeals that overturned Zackowitz's conviction and the death sentence that the judge had imposed. For Cardozo to side with a defendant in a criminal case was highly unusual; but in this instance, as Cardozo saw it, the accused was an upright young man of good repute who, although he had committed a terrible crime, had done so in order to defend his wife's honor. The trial had been tainted, Cardozo believed, because the prosecution had improperly introduced evidence designed "to load the defendant down with the burden of an evil character."[19] Cardozo reached the right conclusion, I believe, but what is most revealing is why he reached it, that is, how he interpreted the record before him so as to support his ruling.

Reconstructing the grim sequence of events that transpired on a street in Brooklyn, New York, late on the night of November 10, 1929, is no easy task. Witnesses for the defense and prosecution naturally contradicted each other, and there were crucial discrepancies between the statement made by the defendant when he was taken into custody and his testimony at the trial. Since Zackowitz did not deny shooting and killing

17. *See id.* at 120–56.

18. *See id.* at 124–31. *See also* People v. Burnhardt, 168 N.E. 412 (N.Y. 1929); People v. Carey, 119 N.E. 83 (N.Y. 1918).

19. People v. Zackowitz, 172 N.E. 466, 467 (N.Y. 1930).

one Frank Coppola, the trial centered on whether the act had been premeditated or if Zackowitz had acted in self-defense. Certain facts, however, either were not disputed or else can be stated with reasonable certainty.

Twenty-four year old Joseph Zackowitz had married seventeen-year old Irene Duffy in April, 1929. They took an apartment at 105 Devoe Street in Brooklyn. Joseph, having only a grammar school education, was then employed in manufacturing eyeglass frames for an optical firm. He left that job in August, starting an automobile wrecking business with a friend, buying used cars and selling the parts. In October, however, Zackowitz quit to try to open his own wrecking establishment. In November, when Copolla was murdered, Zackowitz was still unemployed, living on savings. He continued, however, to pursue one of his hobbies: collecting guns, some of which he bought and some of which he found and rebuilt. He did not have a permit to carry a pistol.

Shortly after midnight on November 10, 1929, Joseph and Irene—who was known by the nickname, "Fluffy"—were walking home from a dance. When they approached Devoe Street, Irene walked ahead while Joseph stopped to buy a newspaper. Frank Coppola and three of his friends, all of them in their early twenties, were on the opposite side of the street, where one had crawled under his car to try to fix the muffler. According to Irene, Coppola approached her and offered derisively, "two dollars for a lay."[20] Joseph soon caught up with his wife, who said Coppola had insulted her but did not repeat his actual language. Zackowitz went over to the four friends and told them they had five minutes to leave or he would return and "bump them off."[21] When the Zackowitzes reached their nearby apartment, Irene reported Coppola's actual words. Zackowitz, who had been drinking heavily at the dance, picked up a .25 caliber pistol, and returned to where the four friends were fixing their car, ostensibly to demand an apology. He may have tried to kick Coppola, as the victim's friends claimed; Coppola may have brandished a monkey wrench, or so Zackowitz contended. In any event, Zackowitz pulled out his gun and fired one shot, which hit Coppola in the chest and

20. Trial Transcript at 172, People v. Zackowitz, 172 N.E. 466 (N.Y. 1930), (*reprinted in* People v. Joseph Zackowitz, CASE & POINTS).

21. *See id.* at 175.

killed him. Hailing a taxicab, the Zackowitzes then went to visit friends in uptown Manhattan. As they crossed the Willamsburg Bridge, Joseph tossed the gun out the window into the East River.

When he was arrested two months later, on January 7, 1930, Zackowitz denied any wrongdoing. But his wife, Irene, led the police to their apartment and pointed out a metal box concealed inside a radio set in which Zackowitz kept a small arsenal: two .32 caliber pistols, a .38 caliber revolver, a tear-gas gun, and cartridges, steel jackets, and lead fronts for all of them. Zackowitz claimed the sergeant "shoved [the box] right in his face," although the policeman insisted that he had struck Zackowitz accidentally. [22] However, Zackowitz admitted owning the weapons and confessed that he had shot Coppola. Maintaining that he had not returned to Devoe Street with any intention of killing Coppola, Zackowitz said he drew the gun to protect himself from an attack and that the weapon then discharged accidentally.

Three days later, on January 10, 1930, the district attorney presented the case to the grand jury with Irene as one of the chief witnesses. She spent the next seven weeks in jail, held as a material witness in lieu of $25,000 bail. The trial began on February 24 in Kings County Court but a mistrial was declared when a juror became ill and a second trial was held the following month. The prosecution entered Irene's grand jury testimony over the defense's objection that it should be excluded, since she had not been informed of her right not to testify against her husband.

As it turned out, however, the central issue on appeal was the judge's willingness to allow the prosecution to introduce Zackowitz's three pistols, tear-gas gun, and cartridges. The district attorney exploited the weapons to the hilt, extracting a detailed description from the policeman who found them, despite the defense's objections that the obvious purpose was to make "a theatrical display."[23] The trial judge, Algeron I. Nova, overruled a defense motion to exclude the exhibits on the grounds that they would inflame the jury. Even worse, when Zackowitz testified, the judge questioned him aggressively: "What is an automatic, Zackowitz?" "I can't describe it, your

22. *Id.* at 237.
23. *See id.* at 78.

Honor." "Is it one of those guns that when you put your finger on the trigger it shoots and keeps on shooting?" "Don't it do that?" the judge persisted, even as the defense attorney futilely objected.[24] Later, Judge Nova intervened once again: "An automatic is a gun that has a magazine that you stick in the handle of it where the bullets are loaded, isn't that so?" "Yes, sir," Zackowitz answered. "And then when you press your finger on the trigger and the shot goes off and the fire comes out, the shell releases itself; right?" "Yes." The judge naturally overruled objections to his own line of questioning.[25]

According to Zackowitz's attorneys on appeal, Judge Nova's physical actions while firing these questions at the defendant were similarly prejudicial:

> From the record it appears that his Honor picked up the guns, manipulated them, handed them to the witness, and generally discussed them with him.... We can, therefore, readily imagine what the reaction of the jurors was as his Honor flashed the guns aloft, tried the trigger, whirled the barrels, and generally discussed their operation. This certainly was not necessary to a proper proof of the defendant's guilt. There was no doubt that he had shot Coppola with a gun; he already had so testified.... Such a display of firearms surely served to inflame the minds of the jurors and to lead them to the ultimate inference that the defendant was a generally vicious man, and, hence, must have deliberated and premeditated the particular crime.[26]

The prosecution justified introducing the weapons in several ways. They argued that "the people were entitled to show that he was in possession at that time of other deadly weapons than the one with which the killing was effected"[27] since Zackowitz admitted that he killed Coppola and disposed of the murder weapon, and that he owned the weapons.[28] Since the weapons would surely be admissible if he had them on his person when he shot Coppola, "it is only a step to show that

---

24. *Id.* at 244–45.

25. *Id.* at 279.

26. Appellant's Brief at 38–39, *Zackowitz*, 172 N.E. at 467 (N.Y. 1930) (*reprinted in* People v. Joseph Zackowitz, CASE & POINTS).

27. Respondent's Brief at 25, *Zackowitz*, 172 N.E. at 467 (*reprinted in* People v. Joseph Zackowitz, CASE & POINTS).

28. Zackowitz only admitted to owning the weapons at trial, but retracted this admission at trial conceding only that the tear-gas gun was his.

they were in the appellant's possession at this time, in his home."[29] Possession indicated that Zackowitz "was a person criminally inclined," that he was, in fact, "a desperate type of criminal."[30] While possession did not establish probable guilt, the prosecutors asserted, it went to the question of whether he acted deliberately and intentionally.[31]

The defense attorneys offered a very different view of the matter. They claimed that the weapons should have been excluded since they had not been used in the crime, and because Zackowitz had retracted his earlier statement admitting ownership—and now claimed either that he was a victim of a police plant or that the guns belonged to a friend. The prosecution's goal, the argument continued, was to convey the impression "that the defendant was guilty of a crime arising out of the possession of guns, which crime was distinct from the one charged in the indictment."[32] Moreover, the prosecution sought to portray Zackowitz as a person of low character, which was impermissible since the defense "had not placed his general character in issue."[33]

In submitting their appeal, however, Zackowitz's lawyers made his general character a central issue. Young and hot-blooded, a newlywed enamored of his bride, Zackowitz, his lawyers claimed had acted out of anger and without deliberation or premeditation. "One may infer that for him the romance of newly wedded life persisted still unsoiled by the harsh actualities of fact. For him his 'Fluffy' was still the fair Elaine and he her Launcelot, her knightly protector from insult and affront."[34] But even if Zackowitz was not a figure drawn directly from Arthurian legend, his lawyers continued, even if he was merely "a rough-neck whom we would not choose to have as a neighbor,"[35] it was incumbent on the jurors to "delve into his very soul"[36] and strive "to look out into the world

29. Respondent's Brief at 25, *Zackowitz*, 172 N.E. at 467 (*reprinted in* People v. Joseph Zackowitz, CASE & POINTS).

30. *Id.* at 22.

31. *See id.* at 29.

32. Appellant's Brief at 38–39, *Zackowitz*, 172 N.E. at 467 (*reprinted in* People v. Joseph Zackowitz, CASE & POINTS).

33. *Id.* at 33–34.

34. *Id.* at 25.

35. *Id.*

36. *Id.*

through *his* eyes, and not through our own."[37] From that perspective, "[w]e may picture this fancied Launcelot sallying forth to demand the apology," his bride "trailing behind him, weeping and begging him not to go."[38] Zackowitz may have been rash and impulsive, but he was not a cold-blooded killer.

The case went to the New York State Court of Appeals on June 9, 1930 and was decided on July 8. The judges divided four to three. Benjamin Cardozo wrote the majority opinion that overturned the conviction, and Cuthbert Pound spoke for the minority. Although this was not the only time that Cardozo voted to set aside a guilty verdict in a murder case because of prejudicial error, it was one of the few times that he did. In many other cases, where procedural flaws were arguably more severe, Cardozo adopted the position that Judge Pound here asserted for the minority. The reasons why Cardozo reached his conclusion reveal much about his own outlook and about the role that an evaluation of character played in his jurisprudence.

In discussing the events leading up to Coppola's murder, Cardozo employed language that made Zackowitz out to be, if not exactly a Sir Launcelot, at least a man bearing a passing resemblance to a Knight of the Round Table.[39] Cardozo noted that Coppola spoke to Irene "insultingly, or so at least she understood him," that Joseph, finding his wife "in tears," was "enraged;" and so he "upbraided the offenders with words of coarse profanity."[40] When Irene reported the actual insult—"a youth had asked her to lie with him, and had offered her two dollars"—Zackowitz, "with rage aroused again," returned to Devoe Street, and there was evidence that Coppola "went for him with a wrench."[41]

And who was Zackowitz, anyway? Aside from his possession of weapons, Cardozo declared:

> [T]here is nothing to mark the defendant as a man of evil life. He was not in crime as a business. He did not shoot as a bandit shoots in the hope of wrongful gain. He was

37. *Id.*
38. *Id.* at 28.
39. *See* People v. Zackowitz, 172 N.E. 466 (N.Y. 1930).
40. *Id.* at 467.
41. *Id.*

> engaged in a decent calling, an optician regularly employed, without criminal record, or criminal associates.[42]

Whether or not Cardozo would have considered a jobless auto wrecker to be engaged in a "decent calling" will forever remain a mystery, since he overlooked or chose to ignore the evidence pertaining to Zackowitz's recent employment history.

In effect, Cardozo made a judgment about Zackowitz's moral character, and a rather positive one at that. Consequently, the prosecution's effort to run him down by exhibiting the guns to the jury was especially offensive. The jurors had the difficult task of trying to assess the matter of premeditation, of discovering what Cardozo called "the line between impulse and deliberation."[43] Their ability to discern that line could only be impaired by the attempt to portray the defendant "as a man of murderous disposition."[44] As Cardozo saw it: "The end was to bring persuasion that here was a man of vicious and dangerous propensities, who because of those propensities was more likely to kill with deliberate and premeditated design than a man of irreproachable life and amiable manners."[45]

For the prosecution to paint the defendant as "a man murderously inclined," Cardozo believed, violated the fundamental rule "that character is never an issue in a criminal prosecution unless the defendant chooses to make it one. In a very real sense, a defendant starts his life afresh when he stands before a jury, a prisoner at the bar."[46] Where someone has confessed to having killed another person, but claims to have acted in self-defense or on a sudden impulse, the law forbids an endeavor "to fasten guilt upon him by proof of character or experience predisposing to an act of crime."[47] Conceding the common-sense notion that certain kinds of people are more likely to commit crimes than are others, Cardozo insisted that the law "is not blind to the peril to the innocent if character is accepted as probative of crime."[48] The

---

42. *Id.* at 468.
43. *Id.* at 467.
44. *Id.*
45. *Id.*
46. *Id.* at 468.
47. *Id.*
48. *Id.*

peril was obvious: it was one thing for Zackowitz to defend himself against a specific charge, but quite another "to answer to the charge, pervasive and poisonous even if insidious and covert, that he was man of murderous heart, of criminal disposition."[49]

The dissenting opinion by Cuthbert Pound argued that the prosecution's exhibits were properly admitted—but, even if they were not, they were unlikely to have decisively influenced the jury, and so a new trial was not warranted. True, the weapons were in Zackowitz's apartment, not on his person, but they were "a part of the history of the case," and were submitted "as bearing on the entire deed of which the act charged forms a part."[50] The district attorney merely portrayed Zackowitz,

> as a man having dangerous weapons in his possession, making a selection therefrom and going forth to put into execution his threats to kill; not as a man of a dangerous disposition in general, but as one who, having an opportunity to select a weapon to carry out his threats, proceeded to do so.[51]

In addition, Pound asked: "How can we say with confidence in the circumstances of this case that the evidence, even if technically objectionable, so tended to influence the jury against him that 'justice requires a new trial?'"[52] It was not the guns that caused the jury to find Zackowitz guilty, Pound concluded: "The proof merely darkened that which was black enough when painted by his own brush."[53]

What is striking about this dissent is that it was written by Cuthbert Pound—not by Benjamin Cardozo—for it closely tracked the kind of reasoning that Cardozo, a strong law-and-order judge, usually employed. Nothing more clearly revealed this lack of sympathy for criminal defendants than two decisions Cardozo wrote for the Court of Appeals when it rejected pleas for new trials based on reversible error at least

---

49. *Id.* at 469.
50. *Id.* at 471.
51. *Id.*
52. *Id.*
53. *Id.*

as blatant as that committed in Zackowitz: *People v. Defore,*[54] which was handed down in January 1926, and *People v. Miller,*[55] decided in July 1931.

The Defore case posed the question of whether evidence turned up during the course of an admittedly illegal search could be admitted.[56] The Supreme Court had declared that such evidence was inadmissible in federal trials. In fact, in 1925 the Justices reversed the conviction of an alleged cocaine dealer because it rested, in part, on evidence found in a warrantless search: "The protection of the Fourth Amendment extends to all equally—to those justly suspected or accused, as well as to the innocent."[57] Pierce Butler wrote for a unanimous Supreme Court, but Cardozo rejected this standard. He believed that a person who was the victim of an illegal search could sue the arresting officer for damages, he conceded, but could not insist that "evidence of criminality, procured by an act of trespass . . . be rejected as incompetent for the misconduct of the trespasser."[58] Cardozo also believed the Supreme Court had erred in placing individual rights above the protection of society. He laid out the consequences of the federal rule, as he saw them, in a memorable sentence: "The criminal is to go free because the constable has blundered."[59]

In a second case involving the rights of the accused, Cardozo came close to saying that the criminal should not go free because the judge or magistrate had blundered. In 1931, the Court of Appeals reviewed the conviction of Le Roy J. Miller for murdering his lover.[60] The trial judge made several seemingly egregious blunders: he permitted the district attorney to refer to the grand jury testimony of three defense witnesses during cross examination; yet when the defense asked to see that testimony, the prosecution objected and the judge sustained the objection, holding that grand jury proceedings could be kept confidential. In addition, the police had recovered letters from the murdered woman's room, and although they were not offered in evidence, a prosecution

54. 150 N.E. 585 (N.Y. 1926).
55. 177 N.E. 306 (N.Y. 1931).
56. *See* POLENBERG, *supra* note 2, at 203–07.
57. Agnello v. United States, 269 U.S. 20, 32 (1925).
58. *Defore*, 242 N.E. 585, 587.
59. *Id.*
60. *See Miller*, 177 N.E. at 306; POLENBERG, *supra* note 2, at 207–10.

witness was permitted to testify they had been written by the same man, obviously Miller. Again, the defense was denied access to the letters. Cardozo held for a unanimous court that the errors were "not so substantial in [their] bearing on the fate of the defendant as to call for a reversal of the judgment of conviction."[61]

The Zackowitz case was unique, then, because the controversial evidence went directly to the question of character. Of course, if Cardozo had formed a lower opinion of Zackowitz's character, it is entirely possible he would have voted the other way, to uphold the conviction. That much is clear if we examine his response to a somewhat analogous case that arose a few years earlier when a young man named Adam Kasprzyk was convicted of second-degree murder and sentenced to "twenty years-to-life" at hard labor.[62] Kasprzyk also appealed on the grounds that testimony offered by the prosecution was improperly admitted and had prejudiced the outcome. Yet the Court of Appeals did not grant him a new trial, partly because Cardozo viewed Kasprzyk's character in quite a different light than that of Joseph Zackowitz.

On June 12, 1922, twenty-one-year old Adam Kasprzyk shot and killed Valentine "Dixie" Czehowski in Buffalo, New York with a single-barreled 12-gauge shotgun. The defendant claimed that, following an altercation between the two in which Dixie tried to hit him with an iron poker, the defendant and his brother, Casimir, had run to their home. "I didn't want to have trouble," Kasprzyk explained.[63] But Dixie and another man followed them, struck their mother in the face, and threatened them. Fearing for their safety, Casimir handed the gun to his brother, Adam, who claimed: "He was coming towards me, and I had the shot gun in my hand, and I says to him, get out, or I'll shoot; so he wouldn't stop, and he just came right at me, and I shot."[64]

Like Zackowitz, Kasprzyk claimed that he acted in self-defense. But the two defendants differed in many respects. Unlike Zackowitz, the "optician regularly employed," the Buffalo youth was a machinist's helper. Unlike Zackowitz,

---

61. *Miller*, 177 N.E. at 307.

62. *See* People v. Kasprzyk, 144 N.Y. 922 (N.Y. 1924) (mem.).

63. Trial Transcript at 397, People v. Kasprzyk, 144 N.Y. 922 (N.Y. 1924) (mem.), (*reprinted in* People v. Adam Kasprzyk, CASE & POINTS).

64. *Id.* at 406.

Kasprzyk had a shady past. In 1920 he had been convicted of carrying a revolver without a permit. In 1921 he was found in possession of stolen property and spent nearly a year in the Elmira Reformatory. He was released in April, 1922, only two months before killing Czehowski. Unlike Zackowitz, Kasprzyk, who was unmarried, had not defended a woman's honor, but to the contrary, had evidently provoked the original skirmish by cursing out two teenage girls who were walking home from a communion party. One of them was his former girlfriend: he called her a "god damn son of a bitch," and said she "ought to get a good crack in the jaw" for having gone to the party.[65] If anything, it was the victim, Dixie, who appeared on the scene to rebuke Kasprzyk, although he surely carried things too far by following him to his home.

As at Zackowitz's trial, the prosecution sought to depict Kasprzyk as a habitual user of guns. During the trial, Kasprzyk admitted to the prior conviction for carrying a concealed weapon, but denied he had ever fired it. In rebuttal, the prosecution called his probation officer to the stand, and, over defense objections, had him testify that Kasprzyk had admitted firing it. The purpose, the defense protested, was "to create the impression in the minds of the jury that defendant at another time fired a gun under almost similar circumstances."[66] In his summation, the district attorney cited this testimony to show that Kasprzyk was predisposed to use a weapon, although there was no connection between the first alleged incident and the crime for which he was standing trial.

The judge's willingness to admit this testimony proved crucial when the case went to the Appellate Division of the New York State Supreme Court. The justices divided three-to-two in favor of upholding the conviction. The minority thought the probation officer's testimony was "clearly incompetent," and the summation only perpetuated the "glaring" error, for "in spite of the objection of defendant's counsel, the court refused to confine the use of this evidence to the question of credibility of the defendant as a witness."[67] Even the justices in the majority conceded that the statements should have been kept

65. *Id.* at 50–51.

66. Appellant's Brief at 28, *Kasprzyk*, 144 N.Y. 922 (N.Y. 1924) (*reprinted in* People v. Adam Kasprzyk, CASE & POINTS).

67. People v. Kasprzyk, 204 N.Y.S. 786, 790 (N.Y. App. Div. 1924).

out because they were used to do more than impeach the defendant's credibility. "The admission of this evidence was therefore technically at least, error," they agreed; but they then went on to say that the error did not harm the defendant so seriously as to require a new trial.[68]

In June 1924, the Kasprzyk case finally reached the Court of Appeals, which sustained the conviction without even writing an opinion. But Benjamin Cardozo wrote a confidential memorandum for the judges' conference, as was the Court's custom, laying out the reasons, as he saw them, for sustaining the lower court's ruling. Those reasons had much to do with how he construed Kasprzyk's character:

> He was evidently a member of a rough gang, and he met force with force, according to the standards which his own habits of thought and those of the men about him had led him to accept. The law, however, has standards of its own, which it enforces with rigor in aid of the sanctity of human life.[69]

No Launcelot here, bravely venturing forth to protect a maiden's honor; just a rowdy, a ruffian, or, as Cardozo might have preferred, a villain, not deserving of any special consideration.

So *Kasprzyk*, like *Zackowitz*, demonstrates how Cardozo's evaluation of a defendant's character influenced his jurisprudence, and how that evaluation reflected aspects of his own character. Had he been so inclined, Cardozo could have construed Kasprzyk's behavior in a more positive light, inasmuch as the youth had been followed home and threatened, and had witnessed an attack on his mother. Instead, Cardozo interpreted the evidence in the case so as to comport with his reading of the defendant's character. His finding that the prosecution's introduction of the disputed testimony did not involve prejudicial error was surely defensible, but had he formed a higher opinion of Adam Kasprysk, he might well have reached the opposite conclusion. In that sense, Cardozo's jurisprudence was filtered through the lens of character.

---

68. *Id.* at 789.

69. KAUFMAN, *supra* note 3, at 393 (quoting consultation report for People v. Kasprzyk, CM, Box 2 Folder, 1935).

It is significant that when Cardozo spoke directly about the issue of character, as he did several times in law school commencement addresses, he construed it as the opposite of both "prejudice" and "passion."[70] Character is certainly incompatible with prejudice in the sense that those who are sworn to uphold the law must seek to avoid any trace of bias or bigotry. Yet we need not accept Cardozo's view that character is also the opposite of "passion." By "passion" he undoubtedly meant zealousness and intolerance—deplorable traits, especially in a judge, and ones Cardozo rarely, if ever, exhibited. But passion may also denote ardor and enthusiasm, which may serve judges very well indeed. Although these are not qualities we usually associate with Cardozo, they certainly made their appearance in some of his criminal law opinions. How could it have been otherwise? For all his virtues, Cardozo was, after all, not a saint, but rather an all-too-human judge whose character necessarily left its imprint on his jurisprudence.

70. Benjamin Cardozo, *Our Lady of the Common Law*, 13 ST JOHN'S L. REV. 231 (1939), *reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 90–91 (Margaret E. Hall ed., 1947).