

The Death of a Youth and of a Drunkard:
A Remarkable Story of Habit and Character in New Jersey

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The fact that at some point in 1943 [Petro Radziwil] may have extended a hand to some family [in Poland] for which he received [from the Nazis], he says, a requirement that he work in a prison factory [in Auschwitz] in Germany [sic], the fact that that occurred in 1943, does not in this Court's opinion, constitute a mitigating factor. -- Statement of Judge John Ricciardi, Sentencing Hearing, State of New Jersey v. Petro Radziwil (September 29, 1989).

1. Remarkable Facts and Questions in an Unremarkable Case

In many ways the case was unremarkable. It involved a traffic fatality that may have involved drunken driving, a tragic but common occurrence. This unremarkable case – the criminal action of State of New Jersey v. Petro Radziwil, Indictment No. 1257-8-86 – was, to be sure, important to the family of the 17 year old male whose death gave rise to the case. On November 25, 2004, a memorial notice appeared in the New York Times:

MacCORMACK -- Keith G. Feb 25, 1967--Nov 25, 1984. Killed By Drunk Driver 20 years without you in our lives, but never absent from our hearts.

Loss so overwhelming, our hearts are broken. Your loving brothers & sisters, Bryan, Amy, Ali, John, Megan.

The ingredient of personal tragedy, however, does not make *State of New Jersey v. Radziwil* particularly noteworthy in the eyes of legal professionals: Thousands of criminal prosecutions each year are occasioned by personal tragedies – murders, rapes, child sexual abuse, and so on.

Radziwil is nevertheless noteworthy. It is noteworthy, first, because of its surprisingly pristine facts. Evidence in real-world cases is ordinarily messy and usually harbors many uncertainties. The result of such messiness and uncertainty is that in most appeals there is substantial uncertainty that the issues submitted on appeal are actually raised by the evidence in the case. *Radziwil* was seemingly different in this respect: the evidence and the facts in Radziwil were remarkably unambiguous.

¹ Professor of Law, Cardozo School of Law, Yeshiva University.

The evidence recounted and discussed here was gathered largely through the truly remarkable efforts of the truly remarkable students in my course in fact investigation at Cardozo School of Law in the fall semester of 2004: Jay Bragga, Starr Brown, Thomas Donohoe, Christopher Fugarino, Thomas Gabriel, Oren Gelber, Meredith Heller, Jason Kadish, Elvira Marzano, Leonid Mikityanskiy, Alexander Paykin, Vincent Rao, and Louis Shapiro. Danielle Muscatello, my former research assistant, also made an important contribution.

Radziwil is also noteworthy because it raises important questions about an important part of the law of evidence: the relationship between habit evidence and character evidence. But the questions that *Radziwil* presents reach beyond the law of evidence. The criminal justice system is disproportionately populated with unsavory people, unpleasant people, stubborn people, and strong-willed people. Criminal defendants are frequently both unsavory and unpleasant, and many witnesses – including prosecution witnesses – share these traits. Prosecutors and criminal defense counsel, although not as a rule unsavory, can be unusually strong-willed and stubborn, and judges who preside in criminal cases may become hardened not just to the suffering of victims but also to the plights of those who cause harm. This combination of character traits has the making of a toxic brew. There is reason to worry about the capacity of strong-willed actors such as police officers and trial judges – to make sound judgments about the unpleasant and unsavory people – criminal defendants and witnesses – that they routinely encounter while performing their assigned chores in the criminal justice system. The story of *Radziwil* illustrates how personal likes and dislikes, and the prejudices of actors in the criminal process, can affect the outcomes of criminal proceedings. The story of *Radziwil* also raises the question of whether much can be done to scrub the criminal process clean of the influence of the biases and emotions of the people who shape that process.

2. Conduct and Character

Criminal guilt or innocence is supposed to depend on what a person does, and not on what a person is. This precept runs throughout the criminal law which defines misdeeds in terms of intent and action. It also plays a role in the law of evidence, especially in a doctrine known, variously, as the character evidence rule, the character rule, the propensity rule, and – more elaborately – the prohibition against the circumstantial use of character evidence.

The character rule proclaims – broadly speaking – that evidence of a person's character (or propensity) may not be used to prove that person's conduct on a particular occasion. A prosecutor cannot, for example, introduce evidence of a murder defendant's misanthropy to show that the defendant killed her grandfather. The trial would have to focus on matters such as the accused's actions and her feelings toward her grandfather rather than on her hate-filled disposition toward all humankind. This example, however, does not show that the distinction between character in general and conduct on a particular occasion is clear: legal rules are never so simple, and the character rule certainly isn't.

One way to try to understand the character rule is to try to understand the legal rules and principles that circumscribe it. One such boundary is the habit rule. This rule permits the use of habit to show conduct on a specific occasion. The habit rule rests on the premise that habit and character are different. But the difference between character and habit is not obvious.

Charles McCormick, who wrote a classic and influential hornbook on the law of evidence, saw a clear distinction between character and habit. Habit, he argued is a recurring response to a specific situation that has become semi-automatic. Courts have quoted and embraced Dean McCormick's explanation on numerous occasions. But the drafter of the 1983 revision of the first volume of Wigmore's monumental treatise on the law of evidence did not find the distinction so easy to make. He nonetheless argued for the admission of habit evidence even if habit is a species of character because habit, he thought, is ordinarily more probative than the kinds of propensity evidence that elicit the characterization "character." He also argued that if the probative value of habit is the key to its admissibility, then fully volitional repetitive behavior should be admissible if it is probative of the issues in a case.

If habit evidence, is (as the reviser of Wigmore's treatise seemed to think) a species of character evidence, it is not the only kind of evidence the law admits to show action in accord with character. Criminal defendants can offer evidence of pertinent traits of their character to show they did not commit a crime, the bad character of witnesses for truth and veracity can be admitted to suggest they have lied on the stand, and certain kinds of bad acts may be admitted to show a propensity to commit certain sexual crimes. This paper will not, however, examine these permitted uses. Its focus is on the distinction between habit and character, and it asks whether courts, though professing to honor the distinction, disguise character as habit by allowing behavior that is not semi-automatic to show conduct on a specific occasion and by allowing such circumstantial use of predominantly volitional behavior even when that behavior reveals unattractive character traits. This paper also asks whether in a specific case where character evidence has probative value, the benefits of character evidence outweigh its dangers. These questions and others are raised by *State of New Jersey v. Petro Radziwil*.

3. Death at Night

Keith G. MacCormack died at about 2:00 a.m. – two hours after midnight – on Sunday, November 25, 1984, in an automobile collision at the intersection of Route 537 and Paint Island Spring Road in Freehold Township, Monmouth County, New Jersey. Keith was a passenger in a car driven by his 18 year-old friend Daleston Cote, Jr. Daleston Cote was driving northeast on Route 537, a two-lane road with narrow shoulders. Daleston had stopped at the intersection of Route 537 and Paint Island Spring Road to make a left hand turn. As Daleston was waiting for two oncoming cars traveling westbound to pass, his car was struck in the rear by another car.

Paint Island Spring Road, Northeast



Route 537

FIGURE 1

The collision propelled Daleston's car across Route 537 into the westbound lane where it was struck by a car traveling westbound. Keith MacCormack was thrown from the car after the second collision and was killed. His body came to rest on the shoulder next to the eastbound lane of Route 537. Keith was 17 years old at the time of his death.

The car that struck Daleston's car from the rear did not stop. The hit-and-run car and its driver disappeared. No eyewitnesses were able to describe any of the characteristics of the hit-and-run car. However, debris gathered by the police at the scene of the automobile collision, including fragments of a grill, a maroon header panel, and other maroon fragments, revealed that the car driven by the hit-and-run driver was a maroon 1979 Oldsmobile Delta 88. This evidence narrowed the possibilities but left many open. 1,387 maroon 1979 Oldsmobile Delta 88s were registered in New Jersey in 1984 and more such cars would have been registered in heavily-populated neighboring states.

4. Seeming Serendipity and Skill in a Criminal Investigation

On May 7, 1986, an attentive Freehold Township police officer with an excellent memory – Officer Donald Burlew – made an interesting discovery. He saw a 1979 Oldsmobile Delta 88 in the nearby town of Jackson, New Jersey, and noticed that the car

had a new front end rather than the front end assembly that such cars normally come with. He took the license plate number of this Olds 88 and established that the registered owner was Carl Hobson. Officer Burlew returned to Jackson on May 9, 1986, and spotted the vehicle again. He stopped the vehicle and questioned the driver, who turned out to be Ginger Hobson, Carl Hobson's wife. Although Ginger Hobson told Officer Burlew that Carl was out of town at the moment, she did say Carl had acquired their Olds 88 from an auto body shop. Investigation later established that Carl Hobson had purchased the Olds 88 from Diorio Auto Body Shop in January 1985. The Diorio Auto Body Shop had acquired the Olds 88 from Laffin Chevrolet on November 29, 1984, and Laffin Chevrolet had acquired the Olds 88 from Petro Radziwil on November 28, 1984. In 1984 Radziwil lived in South River. Route 537 lies approximately halfway between South River and Rova Farms, a place that plays an important part in our story.

Burlew's work had established that Radziwil's car was the kind of car that might have rear-ended Daleston Cote's car on November 25, but this fact did not rule out the possibility that one of the other 1,387 maroon 1979 Olds Delta 88s, or a similar car from out of state was the hit-and-run car. But a phone conversation with Carl Hobson on May 13, 1986, added crucial information. Hobson told Burlew that after acquiring the Olds 88 from Diorio Auto Body Shop in January 1985 he had repaired the damaged front end of the car and that he had thrown the parts that he had removed on a junk pile in his back yard. He also said that he had found and retrieved those discarded parts and that he would be happy to deliver them to the Freehold Township Police Department the next day. He testified that he did exactly that at 8:00 a.m. the next morning.

One of the items that the police said Carl Hobson turned over to them was a support for a small section of a plastic grill that had been made for use on a front end of a 1979 Olds Delta 88. That broken-off support matched a part of a plastic grill that the Freehold Township police had found among the debris at Route 537 and Paint Island Spring Road on November 25, 1984. Now it no longer mattered that 1,387 maroon 1979 Olds Delta 88s were registered in New Jersey in 1984 or that more such cars were registered in nearby states. The match between the broken-off support that Hobson delivered to the Freehold Township Police Department and the plastic grill fragment that the Freehold Township police had found at the scene of the automobile collision – together with evidence that Radziwil was the owner of Carl Hobson's Olds 88 on November 25, 1984 – apparently established, practically conclusively, that the Olds 88 Radziwil had once owned was the car that rear-ended Daleston Cote's car. The thesis that Radziwil (rather than someone else) was driving his Olds 88 when his Olds 88 rear-ended Daleston Cote's car was effectively clinched by Radziwil's subsequent statement to the police that he never let anyone else drive his car.

But the case against Radziwil was not yet complete. The prosecutor wanted to charge Radziwil with aggravated manslaughter.² To make that charge stick the police and the prosecutor had to produce evidence that Radziwil had a reckless state of mind on the night of November 25, 1984. To prove that Radziwil had this state of mind at 2:00 a.m. on November 25, 1984, sought and was allowed to introduce evidence of Radziwil's customary drinking practices.

5. A Well-Established Drinking Habit

An essential element of the crime of aggravated manslaughter under New Jersey law was that the perpetrator have the mens rea – the state of mind – of “extreme indifference to human life” at the time the perpetrator committed the act or acts causing the death of another person. It was also the law in New Jersey – as the appellate courts reaffirmed in this very case – that a trier of fact is free to infer such indifference on the part of a driver of a car that causes the death of another person if the trier concludes (beyond a reasonable doubt) that the driver of the car was intoxicated at the time that the car that he or she was driving precipitated that death.

Radziwil's trial for criminal homicide began on January 13, 1987. To prove that Radziwil was intoxicated and, thus indifferent to human life at the time of the accident, the prosecutor offered and the trial court admitted evidence that Radziwil routinely got drunk on Saturday nights at a place called Rova Farms. In particular, at Radziwil's 1987 trial the prosecutor offered and the trial judge admitted the testimony of Bernie D'Zurella, a Rova Farms bartender. The Appellate Division of the Superior Court of New Jersey later described the bartender's testimony this way:

[T]o prove that defendant was intoxicated at the time of the accident, the prosecutor offered testimony by Bernie D'Zurella, the bartender at Rova Farms from 1981 to the end of 1985, that defendant came to Rova Farms just about every weekend until the end of November 1984 and that he always got drunk shortly after arriving. D'Zurella also said that defendant would regularly become loud and obnoxious and that he would be forced to escort him outside the bar.

D'Zurella did not testify that he recalled seeing the defendant intoxicated on Saturday November 24 or Sunday November 25, 1984. Indeed, although D'Zurella initially resisted being pinned down, he eventually affirmatively testified that he did not remember seeing Radziwil at Rova Farms during the evening of November 24, 1984, and that he did not remember seeing Radziwil in an intoxicated state on that particular night. It is possible that the bartender was worried about being personally liable under New Jersey's dram shop doctrine. In any event, the bartender's testimony about Radziwil's customary drinking practices was the only evidence submitted at the trial that tended to

²Radziwil was also charged with “death by auto.” But his conviction for that crime was merged into his conviction for aggravated manslaughter and for present purposes we can disregard the indictment for this lesser crime.

show that Radziwil was intoxicated at the time of the automobile collision on November 25, 1984.

The jury convicted Radziwil of aggravated manslaughter. Radziwil appealed. On appeal New Jersey's Appellate Division said that questions relating to the evidence used to show Radziwil's intoxicated state at 2:00 a.m. on November 25, 1984, were the "only real issue" on appeal because "[t]he evidence that defendant was the driver of the hit-and-run vehicle which caused the accident resulting in Keith MacCormack's death was overwhelming." The Appellate Division added: "Indeed, this point was virtually conceded in defense counsel's summation." The Appellate Division described the central question on appeal this way:

The significant issue presented by [Radziwil's] appeal is whether evidence that a defendant regularly became intoxicated every weekend at a particular bar is admissible as evidence of a habit to prove that defendant was intoxicated at the time of the automobile collision which resulted in his conviction for aggravated manslaughter and death by auto.

The Appellate Division rejected Radziwil's challenge to his conviction. In an opinion that was later "substantially" adopted by New Jersey's Supreme Court, the Appellate Division held that the bartender's testimony about Radziwil's practice of drinking of excessive amounts of alcohol on Saturdays at Rova Farms over a period of years amounted to evidence of habit and was therefore admissible. Like the trial judge, the Appellate Division rejected the defense's claim that Radziwil's pattern of drinking amounted to a propensity or a character trait. The Appellate Division further held that the bartender's testimony about Radziwil's drinking practices on Saturdays and weekends at Rova Farms was sufficient – by itself – to support the jury's implied finding that there was no reasonable doubt that Radziwil was intoxicated at the time of the automobile collision that killed Keith MacCormack – at 2:00 a.m. on November 25, 1984.

The courts of New Jersey also rebuffed the defense's contention that the evidence of Radziwil's pattern of drinking was unduly prejudicial. In its explanation for this conclusion, the Appellate Division emphasized that the bartender's testimony had, it thought, substantial probative value. The Appellate Division also quoted a passage from McCormick's hornbook that ends with the following words:

By and large, the detailed patterns of situation-specific behavior that constitute habits are unlikely to provoke such sympathy or antipathy as would distort the process of evaluating the evidence.³

The story of the Radziwil case tests this proposition.

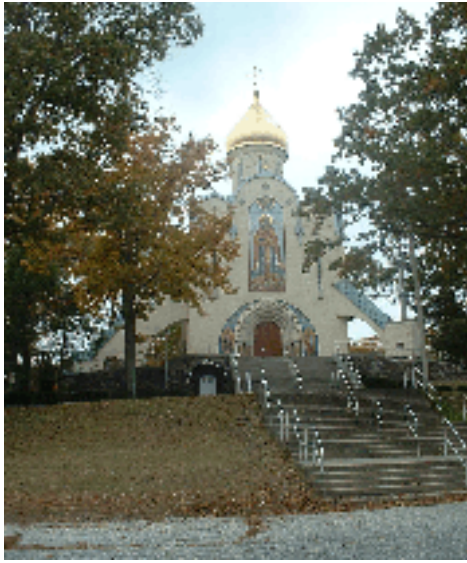
³C. McCormick, EVIDENCE §195 at 575 (3d ed. 1984)

6. The Lives of Immigrants

Petro Radziwil was born at an unfortunate time, September 15, 1922, not long before the onset of the Great Depression in Europe. Radziwil was born in a part of Poland that he called “White Russian country.” (Today we would say that Radziwil was born in a part of Poland that was ethnically Belarus.) Radziwil was 17 years old when Stalin and Hitler carved up Poland in 1940 pursuant to the Molotov-Ribbentrop Pact. Petro’s mother died the same year. He was 18 years old when Germany invaded the Soviet Union in June of 1941. He was 22 years old on VE Day, the day that World War II ended in Europe in May of 1945. His father died in 1946.

Petro Radziwil emigrated to the United States in 1952. He was then 30 years old. Radziwil’s native language was Russian. When Radziwil arrived in the United States, he almost surely spoke very little English. (He had little formal education, attending school only until he was eight years old.) After arriving in the United States, Radziwil settled in northern New Jersey, a portion of the Eastern Seaboard that had large populations of Russian, Polish, and other Eastern European immigrants.

Rova Farms, where Radziwil is alleged to have regularly have gotten drunk, was the result of one wave of Eastern European immigration. In 1926 Russian immigrant communities in the United States gathered for a meeting in Philadelphia and established the Russian Consolidated Mutual Aid Society of America – or ROOVA. In the early 1930s branches and members of ROOVA established Rova Farms Resort, Inc., a joint-stock company which promptly acquired 1400 acres in Jackson, New Jersey. Rova Farms was to be a cultural and social center for Russian immigrants in the United States. From the 1940s through the early 1960s Rova Farms flourished; it ran a large variety of cultural activities (such as a Tolstoy library and a children’s school), it was a popular vacation resort for Russian immigrants and their children, and it hosted popular bands and acts that performed before audiences numbering in the thousands.



St. Vladimir Church – Russian Orthodox Church Adjoining Rova Farms

FIGURE 2

It is not surprising that Rova Farms became a focal point of Petro Radziwil's social life. Radziwil's facility with English was poor. His native language was Russian. At Rova Farms he could find the company of other Russian-speaking immigrants. It is not clear when Radziwil started spending time at Rova Farms, but he probably did so almost immediately after immigrating to the United States. Sometime in the early 1970s Petro Radziwil even lived and worked at Rova Farms.

As Russian immigrants and their children assimilated and moved to other parts of the United States, Rova Farms began a slow but inexorable decline. Today Rova Farms retains only 40 of the 1400 acres it once had. Although Rova Farms is still used by some Russian immigrants and their descendants for festive occasions such as weddings, its main activity now consists of a restaurant and a bar. Outdoor areas are used for activities such as flea markets.



Outdoor Area at Rova Farms in 2004

FIGURE 3

Despite Rova's decline, Radziwil continued to spend most of his leisure time there. That he did so is understandable. Radziwil led a life that can fairly be characterized as solitary and hardscrabble. His parents were both dead. He was unmarried. He had no children. He had a sister somewhere in the United States but he had little or no contact with her. Radziwil lived by himself, mainly in rented apartments or rooms. His work could not have given him much satisfaction. Because he had practically no formal education and spoke poor English, he could only get jobs as a laborer. For the last 21 years of his working life he worked as a cable extruder operator in a wire plant. Here he operated a mechanical device – an extruder – that turned metal such as copper into cable. Radziwil took pride in his work, but the pay was low and the work was hard and dangerous.

Although Radziwil must have regarded Rova Farms as a place of refuge, he did not go to Rova Farms only to see friends and associates. Rova Farms had a bar as well as a restaurant (and other facilities) on its premises. Petro Radziwil did a lot of drinking at Rova Farms from 1981 through 1984 with a small circle of Russian-speaking friends or associates. He very probably did a lot of drinking at Rova Farms for many years before that.

7. An Obnoxious and Dangerous Drunkard?

Although Radziwil's life in the United States from 1952 until the mid-1980s can fairly be described as hard and bleak, probably very few of the participants in and observers of Radziwil's 1987 trial saw him as a sad or pathetic figure. By the end of the trial most of those people probably instead thought of Radziwil mainly as both a repulsive and dangerous old man.

The tone was set by Bernie D'Zurella, the Rova Farms bartender who testified against Radziwil. For example, D'Zurella gave the following testimony:

Q. [by the prosecutor] Let me ask this, how was he in the bar?

A. He drank a lot. I seen him numerous occasions mostly all the time drunk.

Q. Did he drink at the bar?

A. No, sir, because I flagged him from the bar. He get drunk, got loud, obnoxious with me and the customers and we'd have to escort him outside.

...

Q. So do I understand your answer that ever [every] time you remember him being there he was drunk or got drunk?

A. Yeah because most of the time he'd start fighting with me every time he was there, you know.⁴

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In the sentencing hearing following the verdict, only Radziwil's trial lawyer expressed pity for him, and it is impossible to know whether he meant what he told the presiding judge:

You know, Judge, when I walked out of here on the 15th or 16th of January [1987], I was tired, but it was not just physical or mental fatigue ... [T]here was a very draining experience for me because this is unlike any other criminal case and Mr. Radziwil is unlike any other criminal defendant, because while his activities are criminal, they are defined as such by the legislature. This type of offense is qualitatively different than any other type of crime. We have a person who obviously has ... a disease. Society has chosen to deal with it ... by harshly punishing those convicted for the serious offense for which this defendant is convicted of, there is no doubt, but Mr. Radziwil has a disease. ... Mr. Radziwil is a sick person who needs help. ... I quite honestly believe Mr. Radziwil when he tells me to this day he has no recollection of this accident. ... [H]e was and is a very frightened, very confused, very lonely, old man. ...

Regardless of whether the defense counsel actually believed what he said, the prosecutor was having none of it:

[The record of Radziwil's prior convictions and violations] indicates that the guy has a problem, and he is, he is sick. There is no question of that. I am not sitting here and saying he isn't sick. ... [But] he is dangerous, and that is why I stand up before this Court and ask for the maximum. Not because he is sick. I might feel sorry for him. I don't, but I might. But he is dangerously sick....

The record the prosecutor referred to included two convictions for disorderly conduct, and a conviction in 1953 for being a Peeping Tom.

The bartender's testimony about Radziwil's behavior, of which this is only a small sample, was apparently persuasive enough to convince the trial judge that Radziwil was *unforgettably* obnoxious and quarrelsome. When the question arose at trial whether Radziwil's drinking practices were regular enough to qualify as habit, the trial judge reasoned that the bartender's testimony that Radziwil's invariable proclivity to become loud and quarrelsome lent credence to the bartender's claim that he remembered that Radziwil got drunk almost every weekend over a period of four years. The judge said:

And it was interesting to note when [the bartender] said I can't forget him. That clearly means and adds credibility to the fact that he does remember this particular defendant. And when I asked him why you can't forget him, he said because he's drunk and he always becomes obnoxious, etcetera, and so I remember him. He said you can't forget people like that.

Indeed, Radziwil's own lawyers seemed to see him as an obnoxious drunkard. In an interview on November 25, 2004, one of Radziwil's appellate lawyers said, "You have to remember that this was a long time ago and there's not much that I remember. What I do remember is that he was a terrible drunk."

The people participating in Radziwil's trial did not see him only as an obnoxious person or chronic drunkard; they also saw Radziwil as a dangerous menace. The trial judge made both formal findings and side comments to this effect.

The view that Radziwil was a menace is not unsupported by evidence. In addition to the accident for which he was tried, Radziwil was by his own admission an alcoholic, and by 1984 Radziwil's driver's license had been suspended for 22 years for driving while intoxicated, he had been convicted six times for driving while intoxicated, and neither the suspension nor the convictions prevented him from driving.

Yet until the Cote's accident Radziwil had either been a very lucky or a safe driver. At a sentencing hearing he told the trial judge:

I never make accident for all my life. I drive since 1947. I never make one accident with another car, me.

This seems to have been the truth. Although the government's pretrial investigation established that Petro Radziwil had been convicted six times for driving while intoxicated and had had his license suspended, the state uncovered no evidence that contradicted Radziwil's claim that before November 25, 1984, he had never been involved in an automobile accident. Petro Radziwil, despite his abuse of alcohol, had apparently driven a motor vehicle for 37 years – 32 years in the U.S. and five years in post-war Germany – without being involved in even a fender-bender. Until the automobile collision on November 25, 1984, Radziwil was seemingly a safer-than-average driver.

But at the trial no one even mentioned Radziwil's accident-free driving record and only Radziwil noted it at a sentencing hearing. The hypothesis that Radziwil had been a dangerous driver and would remain one if not locked up seems to have been accepted as following inexorably from his drinking history. Despite Radziwil's protestations, no one seems to have wondered whether he really was more dangerous than an ordinary driver. Our association between drunken driving and unsafe driving is so strong that most people, including, it would seem, the judge, lawyers and jurors in this case, take it as a received truth.

8. Is There a Devil in This Detail?

Radziwil's aggravated manslaughter conviction turned on the testimony of Bernie D'Zurella, so it turned on D'Zurella's credibility. Radziwil's counsel and D'Zurella had the following exchange:

Q. Do you know who Mr. Radziwil was with on November 24, 1984?

A. No, when he comes into Rova he's usually by himself. ...

Q. So he doesn't bring a friend?

A. He hangs around, there is a bunch of – I don't know how to put it, but a bunch of bums, alcoholic that hang out there too. So he hangs out with all the bums outside that I usually see him with.

Q. Radziwil is a bum, you mean he's a bum?

Mr. Fagen [prosecutor]: Judge.

THE COURT: Sustained.

A bit later the following exchange took place:

Q. He's a pain, you said?

A. Yes, very much.

Q. You didn't like him?

A. I liked him.

Q. You liked –

A. I had nothing against him. It's just that when you're working and something is aggravating, you know –

Q. You used to talk to him and that was aggravating too?

A. No, sir, it wasn't aggravating.

What should the jury make of this? D'Zurella's distaste for Radziwil is plain; indeed from his description of Radziwil's behavior he seems to have detested him. How could he say he liked him? One might think that contradictions like this would shatter D'Zurella's credibility.

There were other inconsistencies and ambiguities in D'Zurella's testimony that should have raised alarm bells about D'Zurella's credibility. A cloud of inconsistencies and ambiguities enveloped D'Zurella's testimony about the time he closed the bar on November 24 and about the time he left Rova Farms that night. For example, at the 1987 trial D'Zurella testified that he did not remember seeing Radziwil at Rova Farms during the evening⁵ of November 24, 1984, and he denied having any recollection of seeing Radziwil in an intoxicated state on November 24, 1984. D'Zurella further testified that on November 24 – a Saturday – he closed the Rova Farms bar between 5:30 and 6:00 p.m. (on a Saturday night!) and that he left Rova Farms that night between 6:30 and 7:30 p.m. On cross-examination D'Zurella backtracked somewhat on this last point and testified that he left “[a]t nine, ten o'clock.” Yet later in the trial he further amended his testimony further by saying that he left “give or take a little time, 8:30 to eight thirty ish, eight, something around there.”

There was good reason for the jury to question D'Zurella's credibility.⁶ But the jury rejected whatever doubts it had. Given what D'Zurella had told the jurors about Radziwil's “habits” and the view that drinking behavior gave them of Radziwil, inconsistencies and ambiguities in D'Zurella's testimony seemed of little moment even though D'Zurella's word was all they had to establish Radziwil's behavior on the night in question.

9. Obnoxious Drunks and Good Kids

Daleston Cote and Keith MacCormack were 18 and 17 years old, respectively, at the time of Keith's death; physically speaking they were in the prime of their lives. Radziwil was not in the prime of his life in the 1980s. He was 62 years old when the fatal collision occurred, 64 years old when his case for criminal homicide came to trial, and 66 years old when he was re-sentenced in 1989. Radziwil spoke broken English, and suffered from black lung disease. He would die on July 10, 1994.

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However, apparently to the prosecutor's surprise, D'Zurella testified that he *did* remember seeing Radziwil at the Rova Farms during the *day*; he testified that the prosecutor's reference to the Saturday following Thanksgiving “kind of recalls it [that Saturday] into my memory.” The prosecutor responded, “I mean you wouldn't be able to say that definitely Mr. Radziwil was there on that particular day, would you?,” but D'Zurella replied, “I think he was in there [in the bar at Rova Farms].” (Nonetheless, D'Zurella testified that he did not remember seeing Radziwil at Rova Farms in the evening of November 24th.)

⁶ Given D'Zurella's testimony about the time he closed the bar, the jury, if it had been thinking carefully, might well have wondered how it was possible that Radziwil was intoxicated at 2:00 a.m. on the following morning, a full eight hours after the closing of the Rova Farms bar. But this reasonable question and doubt may have been defused by D'Zurella's testimony that liquor could be purchased elsewhere on the Rova Farms premises even after the closing of the Rova Farms bar. This last piece of testimony, however, left the question of what D'Zurella could have meant when he testified (several times) that he was the *only* bartender at Rova Farms. But this last puzzle was never explored by defense counsel.

The physical contrast at trial between the 64 year old Radziwil and the 20 year old Daleston Cote must have been stark. The difference between Radziwil's appearance and the image the jury had of the deceased Keith MacCormack must have seemed equally great. At the trial the jury was told that Keith was 17 years old at the time of his death. The trial judge, the prosecutor, and some witnesses repeatedly referred to Keith either as a "young man" or "young boy." Evidence presented at the trial revealed that Keith was six feet tall and weighed 180 pounds at the time of his death. Although Radziwil did not testify at his trial, Radziwil must have made a much less favorable impression on the jury. By the time of his trial Radziwil was almost certainly the chronic drunkard he had been portrayed as being and had been for some years. Surely his heavy drinking had taken a heavy physical toll. An appellate lawyer for Radziwil recalled in November of 2004, "You have to know that everyone believed that Radziwil was guilty and a drunk. He was poor and downright near being homeless from what I remember. Everyone wanted and would have liked to see him found guilty."

Although the prosecution succeeded in portraying Radziwil as a quarrelsome and dangerous drunkard, Radziwil was not without redeeming features. But most of Radziwil's favorable qualities came out only after the trial, in the two sentencing hearings that followed the trial. For example, in one of the sentencing hearings there was evidence that Radziwil, whether an alcoholic or not, had worked hard and had supported himself without interruption for decades. Even the trial judge had to concede that Radziwil was a conscientious worker. Furthermore, Radziwil apparently revered his parents. In the second sentencing hearing Radziwil seemed as concerned with defending his parents from what he thought were accusations in the press as he was with defending his own behavior:

Something never talking over here in the court, because I have about after two months in the jail, paper [newspaper?] make alcoholic my father, mother, all relationship [relatives?]. My alcoholic. And I am, too.

My father never smoke, never drink a glass of beer all his life and he died 1946. Mother die in 1940. They now make you mother and father alcoholic.

.....

Put in [news]paper. My father – I say in his life I never seen him where I live with him when he drink glass of beer. He never smoke. Never drink. That's it. Yeah.

Radziwil clearly believed that the press had insinuated that his parents had been drunkards and he tried to defend the honor of his long-dead parents. (It is also clear that Radziwil had a limited command of English, could not communicate clearly, and had little capacity to defend himself in a forum as foreign as a court of law, even in an informal sentencing hearing.)

Even some of the evidence presented at the trial suggests that Radziwil was not as obnoxious as the Rova Farms bartender would have had people believe. Although the

bartender called Radziwil's drinking companions "bums" and "alcoholics," Radziwil was at least sociable enough to have drinking companions. Furthermore, Radziwil seems to have had a "girl friend": D'Zurella – the Rova Farms bartender – testified that Radziwil's girl friend sometimes stayed overnight at Rova Farms with Radziwil.

Evidence from an unlikely source also suggests that the unfavorable picture painted in 1987 of Radziwil's character was an exaggeration. Michael Schottland, a New Jersey trial lawyer represented Keith MacCormack's mother Elizabeth MacCormack in a wrongful death action she brought against Rova Farms. Schottland was present during the taking of Radziwil's deposition in East Jersey State Prison in 1991, along with Rova Farm's counsel and an interpreter. In an interview on July 6, 2005, Schottland said that although Radziwil was bitter about having been imprisoned, his manner was pleasantly "Eastern European," even "courtly." Schottland added that he thought that the trial judge, Judge Ricciardi, had given Radziwil an excessively harsh sentence.

If the arrows thrown at Radziwil in his 1987 trial were too sharp, perhaps more arrows should have been directed at Daleston Cote and Keith MacCormack. Stripped of the patina of youth, the behavior of Daleston Cote and Keith MacCormack on the night of November 24 and 25, 1984, was in one respect very similar to the behavior that Radziwil was said to have routinely engaged in at Rova Farms: On the night of the fatal collision – the night of November 24 and 25, 1984 – Daleston Cote and Keith MacCormack had gone drinking with their buddies.

Just before the collision that killed Keith MacCormack, Daleston's car was stopped on Route 537, apparently in preparation for a left hand turn, a sharp left turn of approximately 140°. (See FIGURE 1.) The time was approximately 2:00 a.m. What was Daleston's car doing on Route 537 that night? Why was it there? Where were Daleston and Keith going? Where were they coming from? Some of the answers to these questions are known. Daleston testified that when his car was hit from behind he and Keith were on their way to Keith's house. They had left the house of a friend, Eric Wallace, another teenager, at 12:30 a.m. After leaving Wallace's house, they had gone to look for a fast food restaurant, Daleston testified. Not finding one open, they had gone to the house of another friend, Darren. Not finding Darren home – or not being able to roust Darren from his slumbers – Daleston and Keith decided that Daleston should drive Keith home. They were on their way to Keith's house when the accident happened.

Daleston also told the jury that he and Keith had been at a small party at the home of a teenage friend Eric Wallace, from 8:00 p.m. on, and he admitted that alcohol had been consumed there. In his original statement to the police, however, Daleston had denied that he had been at the Wallace party. Later – at the trial in 1987 – he explained his lie to the police by saying that he had not wanted to get his friend Eric into trouble, particularly since Eric's father was a clergyman. Daleston further testified that he did not know if Keith had drunk any alcohol at Eric Wallace's party and that he himself had not been drinking.

Daleston's denial that he had been drinking does not ring true. The police officer who arrived at the scene of the automobile collision at approximately 2:15 in the morning of November 25 testified that when he interviewed Daleston at the scene of the collision he smelled alcohol on Daleston's breath. After Daleston was taken to the hospital the same officer testified that he took a sample of Daleston's blood. This was done at approximately 3:30 a.m. A test on the sample showed that Daleston's blood alcohol content (BAC) was .035%. Daleston wanted the jury to believe that the source of his BAC was three seven ounce "nips" of Budweiser that he had drunk the night before at 7:00 p.m., but consumption of 21 ounces of beer could not possibly account for a BAC of .035% eight-and-one-half hours later. The conclusion that Daleston had been drinking at Eric Wallace's party and then lied about his drinking is almost inescapable. Keith MacCormack had also almost certainly been drinking at Eric Wallace's house. A test on a blood sample extracted from Keith's corpse during an autopsy showed a BAC of .07% according to the testimony of the examining pathologist. Neither Daleston nor Keith were old enough to drink legally in New Jersey at the time, nor was Eric Wallace who hosted the party, for the drinking age in new Jersey at the time was 21.

If Daleston perjured himself when he lied about his drinking behavior at his friend's party, might he also have lied about the circumstances of the accident? Would any such perjury, for example, raise doubts about Daleston's contested assertion at the trial that his left-hand turn signal was on while he was waiting to turn left? Of course it would. But although Radziwil's trial counsel did touch on one or two of the inconsistencies in Daleston Cote's statements about his drinking and Keith's drinking on November 24 and 25, Radziwil's counsel mentioned those inconsistencies only in passing and he did not mount a serious challenge to Daleston Cote's credibility by emphasizing and exploring the varied ways in which Daleston might have lied about his and Keith's drinking behavior that night. We may never know what motivated Radziwil's counsel to try the case as he did. But it is possible that character images – images of the character of Daleston Cote, Keith MacCormack, and Petro Radziwil – led (or misled) Radziwil's counsel to pull his punches during his cross-examination of Daleston Cote.

During the criminal proceedings against Radziwil there emerged starkly-asymmetrical images of Radziwil, on the one hand, and Cote and MacCormack, on the other hand. Yet Radziwil may not have been a worthless alcoholic bum and Daleston Cote and Keith MacCormack may not have been exemplary young men. The generally-favorable images of Daleston Cote and Keith MacCormack probably made the unfavorable image of Petro Radziwil more intense. The starkly-unfavorable image of Radziwil darkened the heart of at least one key participant in the criminal proceedings against Radziwil and it probably clouded the judgment of at least one other important actor.

10. The Trial Judge and Mr. Radziwil

In pretrial argument about Radziwil's counsel's unsuccessful demand for a nonjury trial the prosecutor said:

But the big argument, as I hear it now, it's not going to be on your [the judge's] mind, the big argument then [for a bench trial] is a jury would be inflamed. And I submit to the Court that a jury in not going to be inflamed by the proofs of this case any more than it would be in any other criminal case and certainly not anymore than a court would. Thank you.

The prosecutor's words were unwittingly prophetic.

The trial judge proclaims the irrelevance of Auschwitz

During the sentencing process, probably in speaking to the probation officer who prepared the presentence report, Radziwil claimed that he had been sent to Auschwitz because of an unsuccessful effort to save a family – possibly a Jewish family – from persecution by the Nazis.

Judge Ricciardi's response to Radziwil's claim of having done a heroic act in the face of Nazi oppression was curt. He said:

The fact that at some point in 1943 [Radziwil] may have extended a hand to some family for which he received [from the Nazis], he says, a requirement that he work in a prison factory [Auschwitz] in Germany [sic], the fact that that occurred in 1943, does not in this Court's opinion, constitute a mitigating factor. That is a long time ago and there is no indication as to the extent that he gave whatever help he says he gave, what that help was at all.

At his trial for criminal homicide Radziwil had been portrayed as a quarrelsome and worthless drunkard. At his second sentencing hearing he tried to challenge this devastating picture of his character by showing that he had at least done one extraordinarily good thing in an otherwise possibly worthless life. His attempt was dismissed out of hand. Discredited characters are not easily rehabilitated.

The trial judge and Radziwil experience a failure of communication

As is evident from Radziwil's attempt to defend his parents' character discussed above, Radziwil may have had trouble understanding English and he clearly had trouble speaking understandable English. Consider a further example, this one taken from a pretrial hearing to determine the admissibility of statements made by Radziwil to the police. Radziwil testified as follows:

Q. [by prosecutor] Do you remember the police ever telling you had certain rights in connection with not taking the breathalyzer [after stops or arrests prior to 1984], do you remember that?

A. [by Radziwil] Yes, I take it.

Q. Did you ever refuse to make it, did you ever refuse to take the breathalyzer?

A. In Jackson [New Jersey] when I was asleep there about three hundred feet when this man and wife, I come to him and the police right from me, I go left, police – They come, stop, you drink. I say no. I say like this –

THE REPORTER: Your Honor, I don't understand the witness.

THE COURT: Neither can I.

A. Makes a ticket, I refuse.

Q. Refused to take the breathalyzer. Didn't they tell – did they read you rights before you refused to take the breathalyzer?

A. I never saying I never drunk; I say I stayed on one feet. The police make refuse.

Despite Radziwil's obvious difficulty in communicating neither Judge Ricciardi nor Radziwil's counsel ever moved to provide an interpreter. The trial judge saw no need: at one point he said that Radziwil was only pretending to have difficulty understanding and speaking English and that Radziwil was a "faker." Whether counsel failed to move for an interpreter because he shared this view, we do not know. Certainly much of Radziwil's testimony at pretrial and sentencing hearings suggests language difficulties rather than trickery, for it is hard to see what Radziwil could gain by failing to get his points across. And when a civil action was later brought against Rova Farms, the lawyer for Rova Farms saw the need for an interpreter. It may be that the judge's image of Radziwil as an obnoxious drunkard shaped his view of why Radziwil spoke English poorly, or it may be that Radziwil's poor English reinforced the image of an obnoxious drunkard; or both or neither of these conjectures may be true. Whatever the situation, Radziwil got no sympathy from the trial judge, and Radziwil may have failed to fully understand the testimony against him and to communicate everything he knew that might have supported his defense.+

The trial judge punishes Radziwil

After the jury found Radziwil guilty of aggravated manslaughter, Judge Ricciardi sentenced Radziwil to imprisonment for twenty years, the maximum allowable sentence for the crime that Radziwil was found to have committed. The trial judge also ordered that Radziwil be ineligible for parole for ten years, the maximum permissible period of parole ineligibility under the applicable New Jersey law. This sentence was imposed in 1987 when Radziwil was 64 years old. Although the Appellate Division of the Superior Court of New Jersey (and, later, the Supreme Court of New Jersey) affirmed Radziwil's conviction for aggravated manslaughter, the Appellate Division vacated the sentence, finding that Judge Ricciardi had erred in his findings of aggravating factors. However, Judge Ricciardi, on remand, did not accept the Appellate Division's strong hint that a twenty year sentence for Radziwil was excessive: He again imposed a sentence of 20 years imprisonment, and he again ordered that Radziwil be ineligible for parole for ten years.⁷

11. A Civil Action

⁷Radziwil did have the services of an interpreter at the second sentencing hearing.

On November 14, 1986, Elizabeth MacCormack commenced a civil action for the wrongful death of her son Keith MacCormack. The named defendants were Petra [sic] Radziwil; Rova Farms; Deleston [sic] Cote, Jr.; Jan Cote, the owner of the car that Daleston Cote was driving on November 25, 1984; and Barbara Castor, the hapless driver who slammed into the car that had been pushed by a hit-and-run driver into her lane. The MacCormack complaint averred that (i) Radziwil's negligent and drunken driving contributed to Keith MacCormack's death; (ii) Rova Farms and its employees contributed to Keith's wrongful death by serving alcoholic beverages to Radziwil after he was visibly intoxicated; and (iii) Daleston Cote, Jr., and Jane Cote contributed to Keith's wrongful death as a result of their negligent operation and maintenance of the motor vehicle that Daleston was driving. Radziwil's answer to the complaint denied that Radziwil was intoxicated and it denied that Radziwil was involved in the collision. In a deposition taken in East Jersey State Prison in 1991 Radziwil testified that he had not been involved in the collision on the night of November 25, 1984. In their answers to the complaint Radziwil and the other defendants responded in part by averring that Keith MacCormack's own negligence had caused his death. Radziwil's answer contained a cross-claim that averred that Daleston and Jan Cote's negligence had been a contributing cause of Keith MacCormack's death. Radziwil's insurer settled with Keith's mother, Elizabeth MacCormack, prior to trial for \$15,000. Rova Farms settled with Elizabeth MacCormack for \$110,000 after plaintiff's counsel wrung a concession out of D'Zurella, the Rova Farms bartender in 1984, that he had closed the bar at Rova Farms not at 5:30 or 6:00 p.m. – as he had testified at the criminal trial – but sometime thereafter; he did remember seeing Radziwil at Rova Farms that night; and he did remember seeing Radziwil at Rova Farms in an intoxicated state that night. The Rova farms bartender, however, persisted in asserting that he had not served Radziwil any alcohol that night.

What's important about the civil action is not the claims made or the result, but the differences between the evidence that was developed in the civil action and the evidence that was submitted in the criminal case. One wonders whether Radziwil was perjuring himself when he swore he was not involved in the collision, whether he was telling the truth or whether his memory of the accident was a blank. One also wonders how the jury in the criminal case would have reacted had Radziwil's counsel had made a more forceful argument that Daleston's drinking or negligence contributed to the accident, and one wonders whether D'Zurella's changed recollections would have affected anything. One also wonders how difficult it was for defense counsel in the criminal trial to wring concessions from D'Zurella during the criminal proceedings against D'Zurella, criminal proceedings that took place when D'Zurella might have been sued under New Jersey's dram shop law but wasn't and when D'Zurella was already cooperating with Mrs. MacCormack's counsel.

12. Loose Ends

Once the Rova Farms bartender had given his testimony in Radziwil's 1987 trial for aggravated manslaughter, it seemed apparent to practically everyone that Petro Radziwil was a dangerous drunk whose drunken driving had killed a young man. Janet Flanagan, a deputy attorney general for New Jersey, later told the New Jersey Supreme Court that the Rova

Farms bartender saw Radziwil drunk more than 200 times. In the criminal proceedings against Radziwil for criminal homicide the minds and energies of the professional actors – the prosecutor, the trial judge, and the defense counsel – were concentrated on Radziwil’s recurring drinking behavior. It is possible that this preoccupation with Radziwil’s chronic drinking and drunk driving not only hardened the trial judge’s heart but also diverted judge, defense counsel and jury from other matters bearing on Radziwil’s culpability.

There was evidence and discussion at trial about the possibility that Daleston Cote’s left-turn signal was not blinking as he waited to turn at the intersection of Route 537 and Paint Island Spring Road, and there was evidence and discussion about the possibility that the headlights and taillights of the Daleston Cote car had not been on. But beyond this, no one really explored the possibility that the accident might have been caused by a sober driver. Route 537 and Paint Island Spring Road meet at a dangerous intersection. An investigation conducted in 2004 by Cardozo students, one of whom had professional experience as a traffic and road engineer, indicated that because of the changing slope of Route 537 as it approaches Paint Island Spring Road, a driver in a car approaching Route 537 and Paint Island Spring Road from the west would first be able to see a car at the intersection of Route 537 and Paint Island Spring from a distance of slightly more than 200 feet.



Looking southwest on Route 537 from the intersection of Route 537 and Paint Island Spring Road

FIGURE 4

The speed limit on Route 537 was 50 miles per hour in 1984. If the line-of-sight measurements that the Cardozo student investigators made are approximately correct, a sober driver traveling east on Route 537 at 50 m.p.h. might not have been able to react quickly enough and brake forcefully enough to bring his car to a stop without hitting a car parked in the eastbound lane of Route 537 at Paint Island Spring Road. This would be almost certainly

true if it were dark and the car at the intersection did not have its lights on. Moreover, the photograph in FIGURE 4 suggests – and evidence introduced at the trial and measurements by student investigators in 2004 confirm – that the shoulder at the intersection on Route 537 was not wide enough to allow a car to avoid a collision by passing on the right.

Thus the driver of the hit-and-run car may have been sober. It is, furthermore, arguable – though not beyond doubt – that even if the driver of the hit-and-run car was intoxicated, the intoxicated state of the hit-and-run driver was not a contributing cause of the death of Keith MacCormack in the sense that the accident and Keith MacCormack’s death would have resulted regardless of the driver’s insobriety.

Was Radziwil really the driver of the hit-and-run car?

The case against Radziwil proceeded on the assumption that Radziwil was driving the vehicle that caused the accident. The Appellate Division said that there was “overwhelming” evidence that Radziwil was the driver of the hit-and-run vehicle and noted that Radziwil’s trial lawyer “virtually conceded” during closing argument that Radziwil was the driver. Indeed, Radziwil’s trial lawyer gave up on this question long before that. Before the trial began, he told the trial judge, “I think quite frankly the State will be able to prove there was an accident with [Radziwil’s] vehicle.”

But Radziwil steadfastly denied being the driver of the hit-and-run car. Radziwil’s protestations that he was “not there” apparently puzzled his own lawyers and was not believed by his trial counsel. In Radziwil’s second sentencing hearing the following exchange took place:

THE COURT: ... Ask [Mr. Radziwil] if there’s anything he would like to say to me before I sentence him. ...

INTERPRETER: He says – he said he doesn’t know what you want him to say and that he’s just stating that he doesn’t know of the accident. And what he said before then, it wasn’t him.

He just said that his lawyer told him that he would answer all the questions and the only thing that he would get is probation. That’s what he was told by his attorney at that time.

And then he said that his lawyer said that he was driving and he wasn’t allowed to speak.

Is it possible that Radziwil was telling the truth and that he was not the driver of the hit-and-run vehicle?

At first sight this hardly seems possible, for Carl Hobson seemed to have nailed this issue for the government when a part he had saved from his front end work and given to the police – a “small support piece” – yard precisely matched a section of a broken plastic grill

that the Freehold Township police had retrieved at the accident scene. However, Hobson's story, though not implausible, raises questions that perhaps should have precipitated some investigative activity. One might, for example, wonder why Carl Hobson was moved to save the damaged body parts that he said he removed from his Olds 88.⁸ In 2004 a student investigator from Cardozo Law School was interested in this very question and called Carl Hobson's listed phone number in Jackson New Jersey. The man who answered identified himself as Carl Hobson. When asked about the parts he said, according to the student, that he had not given the Freehold Township Police any parts from an Olds 88. When the student called the same number the next day, the phone was not answered but there was a message from the phone company saying the number was out of service.

On another occasion a Cardozo Law School student who was investigating a different issue related to the case received a telephone call from a person claiming to be a police officer with the Freehold Township Police Department. This caller told the student investigator, "You better stop looking for [the police report] or you'll find yourself in a whole pile of shit." A few hours later the same person called again and apologized for his earlier call, explaining that he had thought that the student was investigating something else. (This intrepid student investigator was not intrepid enough to ask the police officer what that "something else" was.)

What was going on? If Hobson did not give any parts from the Olds to the police, only one explanation seems possible: The police found both the support piece and the piece it matched at the accident scene, the police persuaded Hobson to testify that he had turned the support piece over to the police, and at trial the matching pieces were offered as conclusive evidence of Radziwil's involvement. Accusations of such serious prosecutorial and police misconduct – perjury and subornation of perjury – are often made but rarely true. However, when police or prosecutors are convinced they have the right person but a weak case such actions are not unheard of. We will never know if such misconduct occurred here. But whether or not such misconduct did occur, the possibility that the trial judge and counsel were too quick to dismiss Radziwil's claim that he was not the driver involved in the collision is a real one. Of course, even if there was a frame-up here, a guilty man may have been framed. Furthermore, even if Radziwil genuinely believed that he was not involved in an automobile collision on November 25, 1984, Radziwil may have been guilty: A severely-intoxicated person can easily forget what happened when he was drunk.

8

An investigation in 2004 suggested that at one point Carl Hobson's property had a garage with room for 21 cars. Perhaps Hobson dealt with junk cars or was in the business of repairing cars and for this reason saved old auto parts. But this possible explanation for Hobson's suspicious discovery of old car body parts in his back yard was moot at the trial – because at trial Radziwil's counsel did not suggest there was anything suspicious about Hobson's supposed discovery.

13. Habit and Character⁹

“Character,” McCormick wrote “is a generalized description of a person’s disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. Habit.... denotes one’s regular response to a [specific] situation. If we speak of a character for care, we speak of the person’s tendency to act prudently in all the varying situations of life.... A habit, on the other hand, is the person’s regular practice of responding to a particular kind of situation with a specific type of conduct.... The doing of habitual acts may become semi-automatic, as with the driver who invariably signals before changing lanes.”¹⁰

Was Radziwil’s purported practice of going to Rova Farms on weekends and drinking until drunk a description of his character or a habit? In fact, it seems neither. It does not describe a generalized attitude or an aspect of personality nor does it seem to be a feature of Radziwil’s persona that applies generally across situations. But it is equally hard to characterize Radziwil’s drinking practices as a habit, at least as McCormick uses the term. There is no reason to think that Radziwil’s drinking was semi-automatic behavior that hardly crossed the threshold of consciousness in the way flicking a turn signal may be, nor does it seem that when Radziwil visited Rova farms something about the scenery or company there impelled him to respond by drinking when he would not have drunk if he were sitting with his bottle at some other location. Yet the New Jersey courts felt compelled to choose, and they chose to call Radziwil’s drinking behavior a habit. They probably felt compelled to choose because the dominant view treats traits like alcoholism and drug addiction as if they were traits of character, and does not allow a factfinder to infer drinking behavior or drug use on a specific occasion simply from the fact of addiction. The alcoholic is, after all, often sober; and the drug user often only intermittently gets high. Only by treating Radziwil’s Saturday night drinking behavior as habit, seeing in its week after week repetition the same guarantee of behavior on the night in question that one gets from knowing that the driver who changed lanes has in the past always used his turn signal, could the court reconcile admitting this seemingly probative evidence with its past precedents.

But we need not be imprisoned by old dichotomies and need not characterize Radziwil’s drinking as either character or habit. Rather we can see it for what it was; namely, – if the bartender is to be believed – regular behavior reflecting a serious addiction, behavior so regular that if Radziwil was at Rova Farms the night of the accident he is unlikely not to have been drinking. This is true even if we suspect that no matter where Radziwil was on a Saturday night it is likely he was drinking. The evidence is thus relevant, and not just relevant but in all likelihood highly probative of Radziwil’s behavior, and so presumptively admissible. In this sense, it is like habit after all.

⁹I am indebted to Rick Lempert for many helpful suggestions but I am particularly indebted to him for his extensive suggestions for this section of my paper.

¹⁰McCormick (5th Ed. 1999 J.W. Strong, ed.) Sec. 195

But the evidence about Radziwil's drinking practices is like character in an important respect. The law is wary of character evidence not just because it is often of low probative value, but also because it may produce verdicts motivated by a bad reason: The miser may be found guilty of embezzlement not because he embezzled but because he is a miser or the ruffian may be found guilty of assault not because he attacked the victim in the case but because a person like him has surely at some time attacked someone. Radziwil may have been found guilty of aggravated manslaughter not because he was clearly drunk - beyond a reasonable doubt - when he hit Daleston Cote's car or even because it is certain that he did hit Cote's car, but rather because it is easy to imagine someone like him hitting some car while drunk and killing someone. Classic habit evidence, on the other hand, rarely excites passions or clouds judgments. Always using a turn signal, or taking two stairs at a time, or turning to the obituaries first, or having a cigarette after sex may elicit approval or disapproval, but it will rarely lead to a positive or negative judgment of a whole person. Rather it keeps attention focused on the likelihood of an action in question, which, in a trial, is where it is supposed to be. In calling Radziwil's Saturday night drinking at Rova Farms a habit, the courts that passed on its admissibility assimilated it to a category where prejudice is ordinarily not an issue.

Ironically, the very relevance of Radziwil's drinking behavior may have made it more prejudicial than ordinary prejudicial but marginally relevant character evidence. The probative value of Radziwil's Saturday night drinking routine demanded attention; it was at the center of the prosecutor's case, and its centrality in the case may have made it seem central to Radziwil's personality. Certainly no one saw Radziwil as a courtly European gentleman, as hard worker, a possible holocaust hero, or someone who loved his parents and was concerned with their reputations even after they were in their graves. The trial judge's words to Radziwil and his sentencing decisions suggest he saw only evil in Radziwil, and Radziwil's attorney may have been blinded to possible weaknesses in the state's case by his view that his client was the kind of person who committed the crime with which he had been charged. Trials are trials of human beings. Judges, jurors and attorneys are going to judge the merits of the people they confront regardless of what the law provides. Evidence law can and does try to refocus actors attention to what happened in the case. But when highly probative evidence is also highly prejudicial, separating judgments of what happened from judgments of those involved is often an impossible task. Was justice done in Radziwil's case? With respect to the sentence he received, probably not. With respect to his involvement in the collision and his insobriety at the time, perhaps yes, but we will never know. Given who Radziwil was, it may be that the trial judge, the prosecutor, the jurors, and the police would not even care.

Epilogue

Petro Radziwil died before completing his prison sentence. He died on July 10, 1994. He was 72 years old.

Judge John Ricciardi died on March 23, 2000. His obituary stated:

In surveys conducted by the Law Journal in 1993 and 1999, lawyers who practiced before Ricciardi graded him high in case- management and courtroom efficiency but low in demeanor, that is, in how he treated lawyers and litigants. His demeanor rating in last year's survey – 2.83 on a 1-to-5 scale – was the lowest in Monmouth County and the sixth lowest of all judges in the state.¹¹

A second judge, who ruled against Radziwil in the New Jersey Supreme Court, had his own story:

Call it a quirk in scheduling or a twist of fate, but on Oct. 23 – a year to the day after he began a one-year recusal from sitting on drunken driving cases – State Supreme Court Justice Robert Clifford was back in the driver's seat.

Clifford sat on a case involving the admissibility of evidence that the defendant is a habitual drinker, [the Radziwil case]. ...

Last October, Clifford was stopped by Princeton Borough police for driving 46 miles an hour in a 35-mile-an-hour zone. At a hearing on Oct. 23, 1989, Clifford apologized for driving while intoxicated and refusing to take a Breathalyzer test, and volunteered to recuse himself from cases involving driving-while-intoxicated or related charges for at least the year that his driver's license was suspended. He also said that he would avoid drinking.¹²

Fortunately Justice Clifford never killed anyone, and the admissibility of evidence about his drinking was never an issue.

¹¹Maria Armental, "Ricciardi, Stern but Efficient Judge in Monmouth County, Dies at 61," New Jersey Law Journal (April 3, 2000).

¹²

Suzanne Riss, "Boy That Year Went Fast," New Jersey Law Journal p. 6 (November 1, 1990)