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THE IMPORTANCE OF THE SCAPEGOAT IN JURY TRIAL CASES: SOME PRELIMINARY REFLECTIONS

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INTRODUCTION

This is a strategy piece about juries. The data which follow are based on the constant and uninterrupted study of a series of twenty-three jury trials in a single federal district court in the Midwest. The writer's usual introductory apologia will here be foregone. It has been repeatedly stated elsewhere.[1] At the same time, it must unequivocally be noted that the data herein and such messages as may be derived therefrom were all made possible by a Ford Foundation grant to the University of Chicago Law School.[2] In other words, what follows is merely a small portion of the author's extremely small contribution to what is now popularly known as the *University of Chicago Jury Project.*

The topic chosen is minor and intentionally so. The *Jury Project* data as a whole are enormous and multi-faceted; it would be extra-ordinarily presumptuous of this writer to begin reporting it by a full-blown and supposedly definitive essay, for example, one dealing with a matter such

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1. See generally Kalven, *Report on the Jury Project of the University of Chicago Law School*, Pam. Conference on Legal Research, University of Michigan Law School (Nov. 5, 1955); Kalven, *A Report on the Jury Project of the University of Chicago Law School*, 24 INS. COUNSEL J. 364 (1957). See, also Meltzer, *A Projected Study of the Jury as a Working Institution*, 287 Annals 97 (1953).

As regards the author's own published *Jury Project* work see Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959); Broeder, *The Jury Project*, 26 S.D.B.J. 133 (1957); Broeder, *The Negro in Court*, 1965 DUKE L.J. 19 (1965); and Broeder, *Previous Jury Trial Service Affecting Juror Behavior*, 506 INS. L.J. 138 (1965).

For other *Project* publications, see, ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURTS (1959); Zeisel, *Split Trials and Timesaving: A Statistical Analysis*, 76 HARV. L. REV. 1606 (1963); Kalven, *General Analysis of and Introduction to the Problem of Court Congestion and Delay*, 1963 ABA SECT. INS. N. & C.L. 322 (1963); Zeisel, *Splitting a Liability and Damage Issue Saves 20% of the Court's Time*, 1963 ABA SECT. INS. N. & C.L. 322 (1963); Kalven, Zeisel & Buchholz, *Delay in the Court*, 15 RECORD 104 (Mar., 1960), as reprinted in 8 U. CHI. L. REV. 23 (1959); Zeisel, Kalven & Buchholz, *Is the Trial Bar a Cause of Delay?*, 43 J. AM. JUD. SOC'Y 17 (1959); Kalven, *The Jury, The Law and the Personal Injury Award*, 19 OHIO ST. L.J. 158 (1958), reprinted in 7 U. CHI. L. REV. 6 (1958).

2. The data in question are based, not only on the twenty-three jury trials mentioned in the text, all of which trials were observed from beginning to end, but likewise on interviews with the judge, the law clerk, and other court personnel. Likewise, in the twenty-three jury cases studied, 225 jurors, all of those consenting to be interviewed, were interrogated at their homes, the average interview running about two and one half hours. Some of the interviews ran in excess of four hours.

as the jury room behavior of various socio-economic groups. Yet that which follows, hopefully at least, may provide some worthwhile insights concerning at least one aspect of the institution of jury trials as a viable, operative force in our society.

A "scapegoat," as the term is employed here, is someone other than plaintiff or defendant upon whom some or all of the responsibility for the happening complained of can or might conceivably be placed. Defendant's fellow tortfeasor, who might or might not also be a defendant, would be a typical negligence-case scapegoat. Defendant's accomplice, who might or might not also be on trial, would be a typical scapegoat in criminal cases. The purpose here is to show the role played by the scapegoat in the cases studied and, as far as possible, to chart his impact upon the juror's thinking and behavior.[3] The question is clearly of importance, for three of the seven criminal and four of the sixteen civil cases involved scapegoat situations, and the scapegoat left his mark in each case.

CRIMINAL CASES

Of all the cases studied, civil as well as criminal, the scapegoat rose to his—actually her—greatest heights in *Cooper*,[4] a Mann Act case. Defendant was charged with transporting his wife, Sue, from State X to State Y for the purpose of placing her in a house of ill-repute. Defendant was thirty-six years of age, fairly handsome, and very articulate; Sue, a tired-looking twenty-nine, often very inarticulate, and apparently

3. Recognition was afforded the effect that "scapegoat" reasoning may have upon the ability of one of several plaintiffs in a consolidated action to prove his injuries in *Moss v. Associated Transport, Inc.*, 344 F.2d 23 (6th Cir. 1965), where Judge O'Sullivan stated at 25-26:

> In support of his claim of prejudice, appellant asserts that because of the separation [of liability and damage issue] prevented him from showing the severity of his own injuries, he was denied a weapon with which to combat the natural sympathy that a jury would feel for the two plaintiff widows who had, in effect, been made Moss' opponents by the consolidation. Without a record containing the proofs on the point, we have no basis for speculating whether the issue of liability was so close that sympathy for the widows might have tipped the scales in their favor. The material before us, however, does disclose that the appellant Moss was present in the courtroom and there is no challenge to the District Judge's statement that 'the mental impairment and total disability of the plaintiff was for all practical purposes stipulated by the parties, as it was stated as a fact both in the opening statement and in the argument and never disputed.' The extent of his injuries could also have been established in explanation of the failure to put him on the stand to testify on the issue of liability. From our review of all the material made available to us, we cannot say the District Judge's discretion was abused by his order of separation.

4. Necessarily, all names and places referred to in this article have been changed. It goes without saying that this is likewise true of other pieces I have written which are based on data garnered while I was a member of the *Jury Project* team.

not very bright. The evidence, as regards Sue, established the following: (1) that she had been a prostitute since the age of sixteen, ten years before defendant came into her life, and that she had plied her trade in many parts of the United States and, particularly, in Alaska; (2) that she had, by a man (or men) other than defendant, two illegitimate children whose care had for many years been entrusted to her mother in State X; (3) that she was the owner and "resident manager" of a house of ill-repute in a remote corner of the United States when she married defendant in 1950; (4) that she began working as a prostitute in State Y almost immediately after the trip from State X in 1953 and continued to do so until shortly before defendant's indictment; and (5) that she had not worked as a prostitute since defendant's indictment, but had instead begun "making a home" for defendant and her two children whom defendant was supporting.

Defendant, the evidence showed, had both "bad" and "good" sides to his personality. The "bad" side consisted of: (1) association with prostitutes for most of his adult life not spent in the military; (2) a previous marriage to one Bess, a prostitute, who, at the time of trial, was working in Los Angeles; (3) the selling of "trick suits," garments employed by prostitutes, to houses of ill-fame in the Southwest and along the Pacific seaboard; and (4) the transporation for hire of prostitutes from the United States to Mexico.

The "good" side was defendant's lack of a serious criminal record, his devotion to the Allied cause in World War II, and his obvious initiative and enterprise, which, when properly channeled, could produce much that was worthwhile. His previous record consisted merely of a conviction for petty theft and assault when he was twenty. He had enlisted in the Royal Canadian Air Force in September, 1939, at the outbreak of World War II, had served several years as a pilot, and was decorated for bravery in action. He was then transferred to the USAF in 1943 where he served with distinction in a similar capacity until his honorable discharge in 1945. In 1948, he had established an apparently successful taxicab business in a far corner of the United States which he continued until 1953, when he and Sue left for the central section of the United States. There he had obtained a job as a salesman for a prominent national advertising concern within five days after the trip from State X, held onto the job and made it pay over $400 per month, placed second among two-hundred and twelve salesmen in a recent selling contest and had so endeared himself to his company that its vice president testified on his behalf at the trial and announced that defendant would, if acquitted, be continued in the company's employ.

The government's case rested chiefly on defendant's prior association with prostitutes, on Sue's admission that she had begun working as a

prostitute shortly after coming to State Y, and upon the testimony of several witnesses that defendant was instrumental in transporting Sue to and from the house of ill-fame where she was employed.

The defense stated that defendant had always opposed Sue's involvement with prostitution, that Sue had promised him that she would give up prostitution and begin life anew when they arrived in State Y, and that his only purpose in coming to State Y was to find work, in which he was successful. Defendant's attorney further stated that defendant left Sue when she returned to and refused to give up prostitution and rejoined her only when assured that she would thenceforth make him a "good wife" and would properly care for her two children whom defendant would support and bring up "in the ways of the Church." Sue, who appeared for the government as well as defendant, supported defendant's story in every particular. The only other circumstance to be noted is that Sue had not and apparently would not be prosecuted for her obvious violation of State Y laws. The decision of the Supreme Court in *Gebardi v. United States*,[5] establishing that the female "immorally transported" cannot, simply because of her consent to a journey interstate suggested by her husband, be found guilty either of a substantive Mann Act offense or of conspiracy, made federal prosecution impossible. The jury, however, was unaware of the decision, and no explanation was offered at the trial for the government's failure to take action against Sue. Defendant was acquitted after a deliberation of approximately six hours.

The "anvil chorus" of the deliberation and the personal interviews was that acquittal became necessary because Sue was "more guilty" than defendant and yet was allowed to go unpunished. The following comment was representative: "The government was trying Sue, not Bob (the defendant). She was the one who was really guilty. Compared with her, he was a paragon of virtue. Yet they let her go free and wanted us to convict him. It would have been a different story if she had been on trial, too; everyone seemed to agree on that. But how could we convict him on such weak evidence when she was getting off scot-free?" The uniformly-held view of the jurors that defendant was "comparatively (*i.e.*, with reference to his wife), free from fault" coupled with their irritation at the government's failure to proceed against Sue were undoubtedly the two factors most responsible for defendant's acquittal.

This is perhaps best and certainly most dramatically shown by the juror's responses to a question phrased substantially as follows: "Supposing everything in the case were the same except that Sue had been indicted for conspiracy to violate the Mann Act and was being tried right along with her husband. Would that have made any difference?" Only two of the twelve jurors responding, both of whom strongly favored

5. 287 U.S. 112 (1932).

defendant in the deliberations, said that it would not have. Their response was: "The fact that she was obviously guilty wouldn't make him guilty; everybody is entitled to be judged separately. But it would have made a big difference to a lot of the jurors; I know that from what was said in the deliberations."

The remaining ten jurors, on the other hand, three of whom had originally voted to convict—the other seven having consistently voted for acquittal—took a markedly different view. The former stated that they would have hung the jury rather than to have acquitted either Sue or defendant, the latter that they would "undoubtedly" (as in the case of five jurors), or would "probably" (as in the case of two jurors), have voted to convict both. The theory, of course, was that the presence of Sue, the "primary wrongdoer," as a defendant would remove the central reason for acquitting her husband; *viz.*, that the husband was comparatively less at fault and that it was unfair to convict him while his "more guilty" wife was allowed to go free. Whether these jurors would also have voted to convict defendant if they had been told the reason for the government's failure to prosecute Sue, if they had thought that she was under indictment for a Mann Act violation but had not yet been tried or that she had been tried but acquitted, or that she had been or would be in the future punished by state authority, is not known. This is especially unfortunate, as data bearing upon such questions would have cast some much needed light upon several important aspects of criminal procedure and particularly the prevailing trend towards trying many defendants jointly rather than separately, as was our practice in earlier times.

While defendant in *Cooper* was only arguably the "less culpable" of the two persons involved in the interstate journey, the defendant in *Johnson* was clearly so. So far, then, the scapegoat theory would dictate an acquittal in *Johnson a fortiori*. However, the two cases differed in their scapegoat aspects by the circumstances that the "more guilty" party in *Johnson*, the jury was informed, had pleaded guilty and was imprisoned at the time of the trial. This feature of *Johnson*, with reference to *Cooper*, would appear to cancel defendant's advantage or even to put him at a disadvantage. That it did not seems certain: scapegoat reasoning again triumphed.

The situation was as follows: Defendant, a twenty-three year old male Negro, was charged under the Dyer Act with "aiding and abetting" the interstate transportation of a stolen Cadillac automobile, known by him to have been stolen. The principal defense was that defendant did not know that the Cadillac was stolen. It was uncontradicted at the trial that one James, defendant's "more guilty" accomplice and the government's chief witness, had stolen the car by himself in Madison, Michigan, for

the purpose of going to Parma, Illinois, in order to avoid capture by the Madison police for a series of robberies, burglaries, and car thefts he had previously committed. James, a mentally retarded and almost wholly inarticulate twenty-year old male Negro, had been in jail almost continuously since the age of fourteen. His criminal record was extensive.

James testified that he drove to defendant's home in Madison after stealing the car and invited defendant to accompany him to Parma to visit some girls and his (James') brother for a few days and then return to Madison. James stated that he merely wanted defendant's company and, since defendant had no money, was willing to finance the entire trip; that defendant accepted the offer and that the pair started immediately for Parma, with James driving. However, James insisted that he had not told defendant that the car was stolen until some point where defendant, who was then driving, stopped to permit a hitchhiker whom he had previously picked up to get out of the car. The police, who had by this time been informed of the theft, arrived upon the scene shortly thereafter. The government impeached James by reading his signed and sworn out-of-court statement—which James denied making—that he had told defendant that the car was stolen at the inception of the journey in Madison. The government's case rested upon James' out-of-court statement, upon testimony that the glass in the car's right front vent window was broken, and that the car had to be started and stopped by crossing and uncrossing the ignition wires. The prosecution mentioned that it was unreasonable to suppose that James could have acquired a Cadillac by lawful means. Defendant did not take the stand and introduced no evidence. The only suggestion that defendant had a previous criminal record was the testimony of James—ordered stricken upon defense counsel's objection—that he and defendant had first met as cellmates. Defendant was acquitted after a heated deliberation of more than six hours.

At the outset, the jury divided seven to five in favor of acquittal, the principal argument of the majority being that the government, instead of trying defendant, had tried James. James, the hardened criminal and perjuror, was the primary culprit. Defendant had played but a minor and incidental role. Defendant was the sheep, the follower; James, the evil shepherd. Defendant had merely been led astray. The government had "got" James and should be satisfied. Social policy did not demand a second and less palatable sacrifice. Reversing the pattern found in *Cooper*, the fact that the "more guilty" was being punished now became a factor favoring defendant. Society was entitled only to so much blood. The central point to be noted, however, is that the jurors vented their spleen on James, as Sue "took the rap" for her husband in *Cooper*. All but two of the ten jurors personally interviewed stated that defendant's role as a follower, *i.e.*, his comparative freedom from fault with reference

to James, was one of the major factors causing them either originally to vote for defendant or to change their votes from guilty to not guilty. The two exceptions were jurors who had strongly favored a conviction and who merely consented to an acquittal in order to end the deliberations and avoid a hung jury.

The scapegoat aspect of *Williams*, the last of the criminal cases to be considered, is extremely marginal, though this feature of the case, oddly enough, becomes for the present purpose its primary virtue. *Williams* involved an accomplice (actually, someone resembling an accomplice), who was "less guilty" than defendant. Without more, of course, scapegoat theory as developed in *Cooper* and *Johnson* would dictate a conviction. *Williams*, however, like *Cooper* and unlike *Johnson*, involved a situation where the "accomplice" was apparently allowed to go free. What happened with this combination?

Defendant, a good-looking and articulate thirty-year-old male Negro, was charged under the Mann Act with transporting one Jane Walter from State X to State Y in order to place her in a house of prostitution. Jane, a Negro of twenty-three, was fairly articulate, beautiful, and extremely well-dressed. The government's evidence that defendant had attempted to place Jane in a house of prostitution shortly after his arrival in State Y was overpowering. Defendant, however, contended that Jane had not accompanied him on the interstate journey, but had followed him to State Y separately and voluntarily and without the slightest encouragement.

The government's evidence to the contrary consisted merely of the testimony of Jane. Jane's story was that she first met defendant in a tavern in a small State X town, that she fell in love almost immediately, and that defendant, without telling her that he was already married, had seduced her under promise of marriage and had taken her to a large State Y city where he said they would be married. Prior to meeting defendant, Jane lived with her grandfather, a convicted murderer, and periodically with the father of her one-year-old illegitimate child. The child was entrusted to the grandfather when Jane left the small town with defendant for a large State Y city.

The promised marriage never took place. However, Jane and defendant took up housekeeping in the large State Y city where they were soon joined by defendant's wife, Connie, a professional prostitute. With the assistance of defendant, Connie taught Jane the "trade" while the three of them were living together in Connie's one-room apartment. "Neither of us would give him up and there was no sense in having two apartments." Jane claimed that defendant forced her into prostitution by threats of physical violence and, later, when she wanted to quit, beat her

and stabbed her in the leg. Defendant, she said, supported himself for nearly two years on the money she and Connie derived from prostitution. Jane's only criminal record was a soliciting conviction, though she admitted having worked as a prostitute in several cities in State X and State Y.

Defendant claimed that Jane, knowing that he was married, had sexual relations with him on the night of their first meeting. He denied that he had ever proposed marriage, saying that he was for many months unaware that Jane and Connie were engaging in prostitution. He further testified that he had taken none of their earnings, but instead had supported them from his earnings as a jewelry salesman. He knew that Jane and Connie both loved him and accordingly saw no reason for giving up either. Defendant, who was extremely cocky while testifying, had previously been convicted of several gambling charges and of selling jewelry without a license. He admitted having stolen a car and having bought another with no intention of paying for it. He had also served two years in the stockade for desertion in wartime—he was a.w.o.l. for approximately a year and a half, having deserted the day after his induction—and been dishonorably discharged from the Army. Neither Jane nor Connie, the jury was informed, were under federal indictment, though no explanation for this was given; neither would apparently be prosecuted under state law. At the time of the trial, Connie, most of whose testimony tended to exonerate the defendant, was working as a prostitute in State X; Jane, on the other hand, claimed to have given up prostitution several months prior to the trial.

Though defendant was convicted in less than thirty minutes, the deliberations evidenced considerable dissatisfaction among the jurors concerning the government's failure to take action against Jane and Connie. Jane's testimony that defendant had coerced her into prostitution was viewed with utter disbelief. Nor did the jurors believe that defendant had seduced Jane under promise of marriage or that she had given up prostitution. "It was an ugly, sordid mess; she (Jane) was almost as much to blame as he was." Indeed, this notion, coupled with the government's failure to charge Jane and, to a lesser degree, Connie, was the principal basis for the original position taken by one juror that defendant should be acquitted.

"It's difficult to put my feelings into words. I guess it comes down to this: They were all in it together; their values, though different from ours, were held by them in common. Who were we, speaking for only one class of society, to punish them for acting in accordance with those values? They probably felt that they had done nothing wrong. It was one class of society sitting in judgment on another and that's not as it should be. And then she (Jane), and his wife also, nothing was going

to happen to them. They would go on just as before. I had no use for him—you couldn't help but dislike him and he was guilty as sin—but I couldn't see what jailing him would accomplish, especially when nothing was being done to the others (Jane and Connie)."

This comment was that of an extremely intelligent and articulate housewife whose performance on other cases where she served—and particularly one criminal case where her understanding of a technical rule of law and her ability to explain it to her fellow jurors prevented a serious miscarriage of justice—does credit to the highest and best of our jury traditions. Though she rapidly abandoned her original position—"he was, after all, clearly guilty"—it was not without serious misgivings. "I have considerable doubt about the justice of the verdict." Similar doubts, based upon identical grounds, were also expressed by an intelligent elderly social worker and librarian whose deceased husband had been a prominent member of the Bar. Scapegoat theory, it would appear, must sometimes tend to operate even in cases where defendant is "more guilty" than his associates, assuming, of course, that the associates are not also being prosecuted.

CIVIL CASES

The civil cases studied—to the extent that they involved scapegoat situations—reflect patterns of behavior very similar and, in important respects, identical with those observed in the criminal cases. Such situations were presented in four cases, *Turner*, *White*, and the two *Phillips* cases.

Turner resembles *Cooper* in that the "more guilty" party was apparently allowed to go free. Plaintiff, a paying-passenger in an automobile owned and operated by defendant, sought recovery for personal injuries sustained in a head-on collision with a car driven by one Fuller. Fuller was intoxicated at the time and was driving on the wrong side of the road. While conceding Fuller's "primary negligence," plaintiff charged that defendant was also negligent in failing to get out of the way. Fuller was not joined as a defendant and did not testify at the trial; nor had his deposition been taken. The jury was not given any explanations for this and was not told whether plaintiff had already or would in future recover from Fuller. The only related remark was the court's instruction that the jury should in no way concern themselves with the question. Fuller, then, was substantially like the jurors' conception of Sue in *Cooper*.

Fuller, like Sue, "took the rap," though the way in which he did so, to be sure, was closely connected with the jurors' consideration of whether plaintiff had already recovered against him, a question upon which there was a sharp division of opinion. The point to be noted, however, is that

all six of the jurors personally interviewed felt that plaintiff should have sued Fuller rather than defendant and, because of this feeling, either had originally voted against liability or had made substantial reductions from their personal estimates of the amount of damages that should be awarded. Defendant's negligence with reference to Fuller's was extremely marginal, and the verdict had to be made to reflect this. And it undoubtedly did: $1500, the amount of the award, was palpably inadequate with regard to the evidence as to damages. The reasoning pattern thus bears a close resemblance to that present in *Cooper*. The analogy to *Johnson* is even more telling. Plaintiff in *Turner*, like society in *Johnson*, was only entitled to so much blood (damages), and should be satisfied with his right to go against (or, as some jurors thought, the damages he secured by going against), Fuller, just as society should be content with having punished the "more guilty" James in *Johnson*.

The data from *White* is extremely inadequate because, among other things, the case was settled just after the judge instructed the jury. This was an action to recover for personal injuries sustained when a car which defendant was towing with ordinary rope broke loose and shot over onto the highway's right shoulder. There the plaintiff, an eighty-five-year-old woman, was walking, and was allegedly so frightened that she fell. Her hip was broken in an effort to escape the car's path. The car which broke loose was driven by defendant's fifteen-year-old son. The defense was that plaintiff was "unreasonably" frightened and that any negligence other than plaintiff's was that of defendant's son for which defendant, under applicable state law, would not be responsible. As plaintiff's counsel sarcastically characterized it, "they're trying their best to blame everything on this helpless old woman and this young schoolboy." In the judgment of the court, the law clerk, and the jury project observer, the son's negligence was about equal to that of defendant, and plaintiff was not contributorily negligent.

The number of jurors taking the above view, however, is unfortunately not known. There were no personal interviews; the mailed questionnaire distributed within a few days of the trial was defective. However, it can at least be stated that six of the ten jurors responding to the questionnaire indicated that they would have reduced damages on account of the negligence of plaintiff and defendant's son. The question, of course, is whether the other four jurors, all of whom favored recovery, felt that plaintiff and/or defendant's son were free from fault and accordingly saw no reason to reduce damages; or whether their failure to reduce damages was motivated by other considerations. Nevertheless, inadequate though they are, the data seem clearly to suggest that scapegoat theory would have operated to a considerable degree had the case been submitted to the jury. At least half of the jurors favored giving defendant

the benefit of his son's negligence. The son, and the plaintiff, as is probably true in many cases involving a question of contributory negligence, were made scapegoats.

The two *Phillips* cases present a scapegoat situation markedly different from any of those involved in the cases heretofore considered. The litigation arose out of a three-vehicle highway accident, occurring about midnight in the winter of 1950. In brief, the driver of a tractor-trailer, one Fox, hit a car parked partly in the lane in front of him. His rig, then out of control, shot across the highway into the path of another tractor-trailer driven by plaintiff. Plaintiff's tractor struck Fox's tractor on its right side, causing personal injuries to plaintiff and damage to his tractor-trailer and cargo. A fourth vehicle, belonging to the scapegoat, while not directly involved in the collision, was a remote contributing factor, in technical tort parlance, a "condition" without which the mishap would never have occurred. The highway in question, which ran in an east-west direction and had three lanes, was to some degree icy. The scapegoat's vehicle had veered off the highway into a ditch to the north and had become mired in soft mud. Its headlights shined up out of the ditch towards the southeast.

Scapegoat, a woman, was unable to extricate the car and flagged down a passing motorist, one Rodgers, who stopped and agreed to render assistance. His parked car was soon struck by Fox's tractor-trailer. While Rodgers was up to his knees in mud, Fox approached the scene from the east, traveling in the outside lane partially obstructed by Rodgers' car. Plaintiff, driving in the opposite outside lane, approached from the west. The center lane remained clear. Both vehicles were traveling at a moderate rate of speed. Fox saw the headlights of plaintiff's tractor and also those of the car in the ditch to the north. "The lights from the woman's car were very bright." While not blinded by the lights, Fox still did not see Rodgers' car behind them until within ten or fifteen feet of where it was parked. It was then too late. His tractor struck the car on its left side, glanced diagonally across the highway towards the south shoulder and into the path of the tractor-trailer driven by plaintiff, who had no opportunity to avoid the collision. The confusion following the accident enabled the woman to escape. Neither Fox nor "Samaritan" Rodgers, who was then rendering assistance to plaintiff, got her name; she was successful in eluding all subsequent efforts to locate her. Plaintiff brought suit against Fox, Fox's employer, the XYZ Motor Co., and Rodgers. Fox, plaintiff charged, was negligent in failing to maintain a proper lookout; Rodgers, in parking on a traveled portion of the roadway and in failing to have his taillights working. Rodgers, however, was clearly free from fault, the evidence establishing that he was reasonable in parking where he did and that his taillights were on. Plaintiff was, likewise, clearly free from fault and, indeed, the court so ruled as a

matter of law in the second trial. The serious and only liability issue in both trials was whether Fox was negligent in view of the semi-icy condition of the highway, the icy rain, and the lights from the woman's car, the headlamps of which, according to some of the evidence, shined towards him out of the ditch. The first jury rendered a verdict in favor of all three defendants. This was later set aside because of inconsistent answers to certain special interrogatories. The second jury, while exonerating Rodgers, found against Fox and his employer for substantial damages.

The defendants' verdict in the first trial undoubtedly resulted in material part from the fact that the jurors blamed the accident upon the woman. This appears, first of all, from an affidavit filed by one of the jurors within a week of the trial which sets out the deliberations at length and indicates that this was one of its central themes. In addition, all six of the nine jurors interviewed at the time of the second trial—two and a half years later—who could recall anything of the case likewise in part attributed the verdict to such a feeling. "The woman was the one primarily to blame. If she hadn't been negligent in keeping her headlights on, the accident wouldn't have happened. She was the one who should have been on trial. It wasn't . . . (defendants') fault that she couldn't be found. Besides, there was something fishy about the fact that she disappeared right after the accident." The "something fishy" apparently was the notion—totally without foundation—that the woman and plaintiff may have conspired to defraud defendants and/or their insurance companies.

Similar—indeed, virtually identical—reasoning was engaged in by all four of the *Phillips #2* jurors originally taking the position that Fox and his employer were not liable: that the woman was "primarily to blame" on account of her "negligence" in sliding off the road (which caused Rodgers to stop) and in failing to turn off her headlights and that there was "something fishy" about the fact that she disappeared so suddenly after the accident. Two of these jurors strongly argued this during the deliberations. Fortunately, however, such arguments, though never objected to as legally improper, were not convincing. Of the eight jurors originally voting that Fox was negligent, only three took the view that the woman was in any way at fault, and even they did not feel her to be very much at fault. The remaining five jurors simply stated that she "just didn't matter" and that "she was out of the picture altogether."

The jurors' own explanations for placing blame upon the woman, *i.e.*, the casual connection between her acts, the accident and the "fishiness" thought to be involved in her sudden disappearance, have a very hollow ring. A more accurate explanation, it is submitted, is this: The jurors in question, having decided not to hold Fox liable for a variety of reasons

(*e.g.*, a desire to protect his reputation as a truck driver, a feeling that his negligence, if any, was "very slight," a feeling that plaintiff was not seriously injured and had already sufficiently been compensated by his insurance companies), nevertheless felt a need to pin the responsibility upon someone, thus avoiding the unsatisfactory feeling which arises if they conclude that no one was responsible. Plaintiff was clearly not at fault; neither was Rodgers. Holding Fox was psychologically difficult. In this posture of affairs, it became very easy to blame everything on the thankless, ungrateful woman who had not even possessed the decency to remain after the accident. This alternative, of course, possessed the added psychological advantage that since the woman was not in court, the jury did not have to face her when they filed in to render a verdict. The suggestion, in sum, is that the chances for a defendant's verdict are enhanced by an absent third-party even though responsibility can only be placed upon such party by strained reasoning.

* * * * * *

A conclusion will be foregone except to state that, if the data contained herein are any criteria, it may be well for any jury trial lawyer to consider carefully potential scapegoats and to count or discount the strength of his case accordingly.