2019

The Temptations of Scapegoating

Daniel B. Yeager
California Western School of Law, dby@cwsl.edu

THE TEMPTATIONS OF SCAPEGOATING

Daniel B. Yeager*

INTRODUCTION

The origin of this Article is a September 12, 1991 faculty meeting I attended that was briefly preempted by a colleague's revelation that two days earlier, a Marion County, Indiana grand jury had indicted former heavyweight boxing champion Mike Tyson for the rape of Desiree Washington. Washington, who was in Indianapolis representing Rhode Island at the Miss Black America beauty pageant, met Tyson, a celebrity guest of the pageant, at a rehearsal on July 17, 1991.[1] Two days later, Tyson called Washington at 1:30 a.m., agitating to see her.[2] After Tyson picked Washington up from the Omni Severin Hotel in a chauffeured limousine, he told her they would be taking a brief detour to retrieve an item from his room at the Canterbury Hotel.[3] At 2:00 a.m., the two entered room 606 at the Canterbury, which Washington left an hour later for the Omni.[4] An hour after that, Tyson left Indianapolis and headed for Cleveland.[5] The next day, Washington was admitted to the Methodist Hospital emergency room, where she reported the rape.[6] From the moment police became involved, Tyson continuously denied the accusation.[7]

In response to the news that Tyson might be a rapist, my colleague gave the following summary:

> On the one hand, I would hate to see a male celebrity athlete, who gets paid to be violent, violate some comparatively low-status person—an 18-year-old beauty queen—as though her right to choose her sexual partners doesn't even matter. On the other hand, I would hate to see Tyson locked up because of a stock, discriminatory move that caricaturizes him as a randy black man who can't control his physical urges. So, I really am torn on how this should come out.[8]

It occurred to me then that within the logic of my colleague's position, Tyson's guilt or innocence was peripheral to which of two competing political preferences

---

* Earl Warren Professor, California Western School of Law.

1. Tyson v. Trigg, 50 F.3d 436, 442 (7th Cir. 1995) (on federal habeas corpus).
2. *Id.* at 443.
3. *Id.*; William Nack, *A Gruesome Account: Mike Tyson's Accuser Told Jurors at His Indianapolis Rape Trial of an Evening Of Pain And Terror*, VAULT (Feb. 10, 1992), https://www.si.com/vault/1992/02/10/125944/a-gruesome-account-mike-tysons-accuser-told-jurors-at-his-indianapolis-rape-trial-of-an-evening-of-pain-and-terror.
4. *Tyson*, 50 F.3d at 443; Nack, *supra* note 3.
5. *Tyson*, 50 F.3d at 443.
6. *Tyson*, 50 F.3d at 443; Nack, *supra* note 3.
7. *Tyson*, 50 F.3d at 443.
8. Interview with Professor, Cal. W. Sch. of Law, in San Diego, Cal. (Sept. 12, 1991).

should win out. The implication of that position is that facts may be just "pretty playthings," which players in the legal system manipulate to ratify their own ready-made conclusions.[9] From such an angle, Tyson's case, with its unverifiable facts,[10] had an up-in-the-airness that made judging him a free-for-all, thereby reducing Tyson himself to a Rorschach inkblot onto which we project any ideological concerns we like.

A just response to my colleague's position could recite how punishment is a gesture of equality,[11] designed for treating humans as subjects, not objects—as ends in themselves, not means.[12] This preoccupation with an offender's dignity goes further: because punishment affirms the offender's rationality and humanity, punishment is his or her *right*.[13] Another way of saying this is that we punish *not* to deter like behavior by publicizing that crime does not pay, but instead to "negate the negation," i.e., to somehow cancel out the offender's interference with the victim's rights.[14] Under such an offender-centered view, the adjudicative process is said to be structured to avoid false positives—structured to avoid the imposition of punishment on insufficient proof.[15] Expressive of this preference is the saying that "it is better that ten guilty persons escape, than that one innocent suffer."[16]

Despite this rhetoric, evidence of a ten-to-one preference for false acquittals over false convictions is weak.[17] In actuality, the "twofold aim . . . that guilt shall not escape or innocence suffer"[18] weights the avoidance of both false convictions and false acquittals equally in criminal cases.[19] Therefore, the Supreme Court's claim that "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence" turns out to be porous.[20] The "truth" sought at trial need be only *true enough*, in that verdicts are true for legal purposes if fairly

---

9. *See* KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 5 (7th ed. 1981) (describing legal rules).

10. *See Tyson*, 50 F.3d at 442–44 (explaining both parties' versions of the events).

11. IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 138 (John Ladd trans., Hackett Publ'g Co., Inc. 1999) (1797).

12. IMMANUEL KANT, GROUNDWORK FOR THE METAPHYSICS OF MORALS 45 (Allen W. Wood ed., trans., Yale Univ. Press 2002) (1785).

13. Jeanne L. Schroeder & David Gray Carlson, *The Appearance of Right and the Essence of Wrong: Metaphor and Metonymy in Law*, 24 CARDOZO L. REV. 2481, 2497–98 (2003).

14. Ekow N. Yankah, *Virtue's Domain*, 2009 UNIV. ILL. L. REV. 1167, 1202–03 (citing G.W.F. HEGEL, ELEMENTS OF THE PHILOSOPHY OF RIGHT 124–29 (Allen W. Wood ed., 1991) (1821)).

15. *See, e.g.*, Ehud Guttel & Doron Teichman, *Criminal Sanctions in the Defense of the Innocent*, 110 MICH. L. REV. 597, 608–09 (2012); Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307, 346, 348 (1994).

16. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (Univ. of Chicago Press 1979) (1765).

17. Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 198–99 (1997) (quoting Ballew v. Georgia, 435 U.S. 223, 234 (1978) (stating that 10:1 preference for false acquittals is "perhaps not an unreasonable assumption")).

18. Berger v. United States, 295 U.S. 78, 88 (1935).

19. *See* In re Winship, 397 U.S. 358, 364 (1970); Volokh, *supra* note 17, 198–99.

20. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986).

arrived at, irrespective of the actual truth.[21] The risk of false convictions is therefore considered acceptable, though the materialization of that risk is never considered a trivial event.

Scapegoating is such an event, an embarrassment to any regime in which allocating responsibility requires judgments about human action, not policy preferences. Indeed, the doctrines of *respondeat superior*—holding employers accountable for their underlings' wrongdoing—and proximate cause—allowing individuals to escape liability for certain causal contributions to harm—are explicable as anti-scapegoating measures. Specifically, *respondeat superior* reduces scapegoating by preventing employers from avoiding responsibility by blaming the entity's wrongs on employees; proximate cause reduces scapegoating by recognizing that some contributions to harm are too trivial to count as the most legally relevant variable in a harm-causing event.

Scapegoats overpay for their part in harm-causing events, without which there would be false accusations, but no scapegoats. In other words, if Washington was not actually raped—if her story had been invented or exaggerated—then Tyson would have been falsely accused, but not scapegoated.

What Tyson's case shares with scapegoating is the potentiality or openness of contested facts. Because Washington and Tyson are in their bodies and we are in ours, they are enigmatical; their inaccessibility subjects those sitting in judgment of them to the possibility of deception.[22] Because Washington's accusation and Tyson's denial are irreconcilable, anything is possible, especially since their case features few incontrovertible facts. Thus, my colleague was on to something; those sitting in judgment really *can* do whatever they want, for whatever purpose. They can even ignore that humans are ends in themselves, not pawns.

In this Article, I examine four types of scapegoating which I designate (1) frame-ups, (2) axe-grindings, (3) patsies, and (4) reckonings. Each type is distinct from the original Levitical sense of the term whereby Aaron, by placing his hands on the head of a live goat and confessing the sins of the people of Israel, transfers the guilt of the people to the goat, which he promptly banishes to the desert.[23] That Levitical sense of the term still has point within the fields of race, family psychology, and mass sociology,[24] where scapegoating is identified as a process of "externalizing" social harms.[25] For example, Michigan State University osteopath Larry

---

21. *See* Kenneth Klein, *Truth and Legitimacy (In Courts)*, 48 LOY. U. (CHI.) L.J. 1, 11–12 (2016).

22. It is this sense of separateness or privacy that Virginia Woolf identifies as loneliness, when this basic fact about human beings strikes us with particular force, as it can at any time. *See* J.L. Austin, *Other Minds*, *in* PHILOSOPHICAL PAPERS 112 (J.O. Urmson & G.J. Warnock eds., 3d. ed. 1979) (making this point via an allusion to Woolf's *Jacob's Room*).

23. *See* Bradley C. Bobertz, *Legitimizing Pollution through Pollution Control Laws: Reflections on Scapegoating Theory*, 73 TEX. L. REV. 711, 715–17 (1995).

24. *See id.* at 716.

25. *See, e.g.*, Katie Rose Guest Pryal, *Heller's Scapegoats*, 93 N.C. L. REV. 1439, 1447 (2015) (quoting Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity through Modern Punishment*, 51

Nassar took a sentence in January 2018 of 40 to 175 years *so that*, we might say, the structures that enabled his sexual abuse of some 200 girls can go *un*-abated.[26]

Yet is it safe to say that few of the nearly 20,000 Westlaw references to scapegoating rely on this Levitical sense of the term. Instead, most point to more extended senses of the term, some too extended for my taste, as in "diversity jurisdiction"[27] or "double taxation"[28] as scapegoating. Here, I attempt to present the first taxonomy of scapegoating in senses of the term that have been stretched over time, but stretched neither un-naturally nor all out of shape. My intention is to uncover the grammar of scapegoating, the close study of which may help us reach agreement on when and why scapegoating can tempt those sitting in judgment, thereby threatening to undermine principles of equality in punishment: of treating humans as ends in themselves.

I. SCAPEGOATING TYPE 1: FRAME-UPS (THE MAFIA COP)

Scapegoating Type 1 is the process by which an innocent person is punished for what a guilty person has done. By this process, the innocent scapegoat is held responsible so the real culprit can get off scot-free. With such an objective, this first mode of scapegoating is brought about purposely by accusers, though the term can also be operative when accusers proceed with indifference as to whether the wrong person is brought to book.

An example of Scapegoating Type 1 is the case of Barry Gibbs, a drug-addicted postal worker who was framed for murder by Louis Eppolito,[29] a decorated Brooklyn police detective who was moonlighting as a hitman for the Lucchese crime family.[30] The frame-up began when United States Park Services officers discovered the corpse of Virginia Robertson on November 4, 1986 by the Belt Parkway, where she was deposited after being fatally strangled.[31] When eyewitness Peter Mitchell described to Eppolito a man strikingly dissimilar from Gibbs disposing of the corpse,[32] Eppolito leaned hard on Mitchell to identify Gibbs as the

---

Hastings L.J. 829, 833 (2000)) ("The essence of scapegoating is the attempt to identify the sources of social problems as external to the group.").

26. *See* Hannah Brenner, *A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault?*, 104 IOWA L. REV. 93, 94–95 (2018); *cf.* Guido Calabresi, *Scapegoats*, 14 QUINNIPIAC L. REV. 83, 87 (1994) ("[I]f you make scapegoats out of the sinner, you will avoid struggling to solve real problems. And then you and I will in fact be responsible for the unavoided harm because we did not deal with the underlying problem but took the easy way and blamed the scapegoat.").

27. *See* Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 197–99 (1982).

28. *See* Steven A. Bank, *Is Double Taxation a Scapegoat for Declining Dividends? Evidence from History*, 56 TAX L. REV. 463, 463–65 (2003).

29. A.G. Sulzberger, *City to Pay $9.9 Million Over Man's Imprisonment*, N.Y. TIMES (June 3, 2010), http://www.nytimes.com/2010/06/04/nyregion/04gibbs.html.

30. United States v. Eppolito, 543 F.3d 25, 28 (2d Cir. 2008).

31. Complaint & Jury Demand ¶¶ 24–25, Gibbs v. City of New York, No. 065112, (E.D.N.Y. Sept. 22, 2006).

32. *Id.* ¶¶ 46, 48, 55.

man.[33] Eppolito, it turns out, had a grudge against Gibbs, who had asked Eppolito to pay for a soda that Eppolito took from a refrigerator in the deli where Gibbs worked nights.[34] For his part, Mitchell had come to New York in violation of parole restrictions he suffered for a California assault.[35] Eppolito lorded the threat of a parole revocation over Mitchell, who out of fear selected Gibbs in a shoddy lineup staged by Eppolito on November 14, 1986, two days after the deli incident.[36]

Based on that identification plus the self-refuting claims of a chronic jailhouse snitch,[37] a jury convicted Gibbs of second-degree murder on January 31, 1988.[38] Nine years into Gibbs's twenty-years-to-life sentence, his quest for a fresh look landed with Innocence Project founder Barry Scheck, who was unsuccessful in challenging Gibbs's conviction for seven years due to the disappearance of the Robertson/Gibbs file.[39] Yet as fate would have it, a federal investigation of the then-retired Eppolito led to a March 2005 search of his Las Vegas house, where the stolen file was recovered.[40] When interviewed by the DEA, Mitchell recanted his identification of Gibbs on grounds of duress.[41] Two months later, Gibbs's conviction was reversed.[42] From there, Gibbs's federal civil rights suit against the City of New York for the frame-up got him a $9.9 million settlement, to which the State kicked in an additional $1.9 million.[43] The federal criminal case against Eppolito for racketeering and murder resulted in a life sentence in a Tucson federal prison.[44] The motive for the frame-up? To elicit positive feedback for the exceedingly vain Eppolito's detective skills.[45]

This first mode of scapegoating offends the idea that humans are ends in themselves. And even if humans are *not* ends in themselves, but merely pawns in a punishment apparatus set up to scare others away from crime,[46] scapegoating is a poor

---

33. *See* GUY LAWSON & WILLIAM OLDHAM, THE BROTHERHOODS: THE TRUE STORY OF TWO COPS WHO MURDERED FOR THE MAFIA 406 (2006).

34. *Id.* at 405.

35. *See* Complaint & Jury Demand, *supra* note 31, ¶ 28.

36. *See* LAWSON & OLDHAM, *supra* note 33, at 405–06.

37. *See* Complaint & Jury Demand, *supra* note 31, ¶ 61.

38. *Id.* ¶ 4.

39. LAWSON & OLDHAM, *supra* note 33, at 405–07.

40. Alan Feuer, *Wrongly Convicted in '88 and Freed in '05*, N.Y. TIMES (Sept. 20, 2005), http://www.nytimes.com/2005/09/30/nyregion/wrongly-convicted-in-88-and-freed-in-05.html.

41. LAWSON & OLDHAM, *supra* note 33, at 406.

42. *See* Feuer, *supra* note 40.

43. Sulzberger, *supra* note 29.

44. *Two Former NYPD Detectives Who Secretly Worked as Mafia Associates Sentenced to Life Imprisonment for Racketeering and Murder*, FBI ARCHIVES (Mar. 6, 2009), https://archives.fbi.gov/archives/newyork/press-releases/2009/nyfo030609a.htm; *see* United States v. Eppolito, 543 F.3d 25, 27 (2d Cir. 2008) (reinstating jury verdict).

45. *See* LAWSON & OLDHAM, *supra* note 33, at 407 (explaining that Eppolito did not care if Gibbs was guilty as long as Eppolito could "turn[] the awful reality of a murder into a chance to aggrandize himself").

46. On differences between the two punitive sensibilities, see Markus Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1583 (1994) ("According to Hegel, the

tool to that end. It should therefore come as no surprise that I have nowhere seen this mode of scapegoating defended, either generally or even in a particular instance. Frame-ups are the rarest type of scapegoating because they (1) attack known innocents (here, Gibbs), (2) require cooperation (here, from Mitchell), and (3) lack the allure of a good cause (here, only Eppolito benefits, not the public).

Another way of saying this is that the strongest temptations for police to lie are presented *outside* the context of frame-ups. The most tempting context for police to lie is where lying is a low-risk way to facilitate bringing a manifestly guilty person to book. The late, great Bill Stuntz demonstrated this in his *Warrants and Fourth Amendment Remedies*,[47] which posits that warrantless searches that uncover evidence are usually upheld against challenges at pre-trial suppression hearings due to a combination of judicial bias and police perjury. For example, when an unjustified police search of a car trunk uncovers, say, a sack of cocaine, police have two strong incentives to lie at the suppression hearing to get the cocaine admitted at trial. First, police by then know that defendant is a criminal (he has a sack of cocaine in his trunk). Second, because the judge by then knows the same thing, when incompatible back-stories are told about the incident, the judge will believe police—who protect the public at great risk to themselves—over someone with a sack of cocaine in the trunk. If you are doing a good thing by getting an obviously guilty criminal off the street, and are going to be believed no matter what, then why not lie and say the defendant consented to the search?[48]

Eppolito's incentives for lying, however, were much lower. Eppolito did not behold in Gibbs an obviously guilty criminal caught with damning evidence of crime in the manner described above by Stuntz. Without the good cause of getting criminals off the streets, the urge to scapegoat by coercing Mitchell to identify Gibbs is tempting only to a sociopath like Eppolito, whose frame-up of Gibbs is a rare phenomenon when adjudged against the recurring police "testilying"[49] that concerned Stuntz. While humans are certainly capable of lying about anything, be it petty or grand, Scapegoating Type 1 is extant but exotic.

II. SCAPEGOATING TYPE 2: AXE-GRINDINGS (PHI KAPPA PSI)

In this second type of scapegoating, accusers conjure up—though not quite consciously—the scapegoat's role, which is decoupled from factual reality, to halt an untoward recurring activity. I call this mode "axe-grinding" because the accusatory motive is to correct a *trend* of utmost priority rather than resolve a discrete

---

dominant deterrence theories of the day . . . disrespected the offender's dignity as a rational person: 'To justify punishment in this way is like raising one's stick at a dog; it means treating a human being like a dog instead of respecting his honor and freedom.'").

47. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881 (1991).

48. *Id.* at 915 n.75.

49. *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037, 1040, 1040 n.11 (1996) (describing that lying to evade the exclusionary rule "is so common and so accepted in some jurisdictions that the police themselves have come up with a name for it: 'testilying'").

dispute as in the first type, *à la* Eppolito/Gibbs. Recent judgments resulting from *Rolling Stone* magazine's defamatory article chronicling a monstrous crime at the University of Virginia (UVA) illustrate Scapegoating Type 2.

On November 19, 2014, *Rolling Stone* published "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA," a 9,000-word tract on the September 28, 2012 rape of "Jackie" at the Phi Kappa Psi fraternity house in Charlottesville.[50] Jackie recounted the harrowing details of her violation by seven recruits to the chapter in an initiation ritual overseen by an onlooker and Jackie's date, a fraternity member with whom she worked as a lifeguard at the campus pool. The exposé featured two primary scapegoats: UVA under-dean Nicole Eramo (a stand-in for widespread inertia regarding the safety and dignity of women students) and Phi Kappa Psi (a stand-in for drunk young rapists). Together, Eramo and the fraternity operated within what *Rolling Stone* considered a rape culture, which Jackie's case was meant to illuminate.[51]

Four months before publication, the author, Sabrina Rubin Erdely, assigned by the magazine to find a representative case, contacted Emily Renda, a UVA rape counselor whose allusion in Senate testimony to Jackie's plight gave Jackie a ready-made credibility for Erdely.[52] After twenty hours interviewing Jackie, Erdely found her forthright, credible, voluble, and confident.[53] Nearly two years after the attack, Jackie recounted the moment it began (12:52 a.m.), crashing through a glass table, the attackers' sick utterances, and turning outside the house—mute in a bloody dress—to three friends, who, like Eramo, treated her indifferently.[54] Any doubt in Jackie's deportment (e.g., dropping out of sight for two weeks) Erdely consigned to trauma.[55]

Rolling Stone came hard at UVA, Eramo, and the frat. Story editor Sean Woods, managing editor Will Dana, and Erdely together decided to kid-glove Jackie, whom they feared running off and re-traumatizing.[56] Taking Jackie entirely at her word, Erdely obtained no corroboration while identifying neither her date nor her assailants. "We just kind of agreed . . . . We just gotta leave it alone," Erdely

---

50. Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), https://web.archive.org/web/20141119200349/ https://www.rollingstone.com/culture/features/a-rape-on-campus-20141119?page=4.

51. *See id.* (describing UVA's "culture of hidden sexual violence").

52. *See Sexual Assault on Campus: Working to Ensure Student Safety: Hearing Before the S. Comm. On Health, Educ. Labor & Pensions*, 113th Cong. 3–4 (June 26, 2014) (statement of Emily Renda, Special Intern, University of Virginia) (calling Jackie "Jenna" and describing Jackie's story).

53. T. Rees Shapiro, *In Her Own Words: Rolling Stone's Sabrina Rubin Erdely on Experience with 'Jackie'*, WASH. POST (July 3, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/07/03/in-her-own-words-rolling-stones-sabrina-rubin-erdely-on-experience-with-jackie/?utm_term=.c0406b43ef04.

54. Declaration of Sabrina Rubin Erdely in Support of Defendants' Motion for Summary Judgment ¶¶ 33–34, Eramo v. Rolling Stone, 209 F. Supp. 3d 862 (W.D. Va. 2016) (No. 3:15-cv-23-GEC); *see* Erdely, *supra* note 50.

55. Sheila Coronel et al., *Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report: 'A Rape on Campus' What Went Wrong?*, ROLLING STONE (Apr. 5, 2015), https://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405.

56. *Id.*

summarized.[57] For all principal parties there were only pseudonyms, though the tract concealed from readers that the real names, apart from Jackie's, were a mystery to the magazine. *Rolling Stone*'s head fact-checker and an in-house counsel approved the final draft.[58]

Aided by the scrutiny of 2.7 million views of the online iteration of the article, the *Washington Post* exposed "A Rape on Campus" as baseless.[59] That finding was ratified in an audit (commissioned by *Rolling Stone*) by the Columbia University School of Journalism and a four-month investigation by the Charlottesville Police Department.[60] On April 5, 2015, after the *Columbia Journalism Review* described the piece as a "journalistic failure" that "set aside or rationalized as unnecessary essential practices of reporting," *Rolling Stone* retracted "A Rape on Campus."[61]

Jackie had mentioned that one of her attackers was from a small discussion group in her anthropology class, but no attempt to find him ever commenced.[62] Additionally, no social function occurred on September 28, 2012 at Phi Kappa Psi, who learned the details of Jackie's accusation only after publication.[63] The frat had been purposely kept in the dark by UVA and *Rolling Stone* to facilitate the emergence of two other putative victims, whose circumstances and identities were known, it turns out, only to Jackie. The name later attributed to her date, Haven Monahan,[64] was Jackie's digital invention that she based on a boy she knew in high school, cooked up to attract the attention of another UVA student.[65] Jackie claimed to have access to her date's Facebook page, but would not clue Erdely in for fear of retaliation from her date.[66] Neither the tell-tale documents nor the blood-stained dress that Jackie claimed to have access to ever came to light.[67] That Jackie's story kept changing did not concern Erdely:[68] was it five or seven men, oral copulation or vaginal penetration, 1:00 or 3:00 a.m. when she called her

57. *Id.*

58. *Id.*

59. T. Rees Shapiro, *U-Va. Students Challenge Rolling Stone Account of Alleged Sexual Assault*, WASH. POST (Dec. 10, 2014), https://www.washingtonpost.com/local/education/u-va-students-challenge-rolling-stone-account-of-attack/2014/12/10/ef345e42-7fcb-11e4-81fd-8c4814dfa9d7_story.html?utm_term=.ff2e6affa039; *see* T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), https://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html?utm_term=.a1daf76cfee9.

60. Coronel et al., *supra* note 55.

61. *Id.*

62. *Id.*

63. Shapiro, *Key Elements*, *supra* note 59.

64. Coronel et al., *supra* note 55 (though Jackie's date was allegedly named Haven Monahan, Charlottesville police "could not identify a UVA student or any other person" with that name).

65. *See* Shapiro, *U-Va. Students Challenge*, *supra* note 59 (photographs of Jackie's date texted to her friends were "pictures depicting one of Jackie's high school classmates in Northern Virginia," who "barely knew" Jackie and hadn't been to Charlottesville in six years).

66. Coronel et al., *supra* note 55.

67. *Id.*; *see* Declaration of Sabrina Rubin Erdely, *supra* note 54, ¶¶ 40, 176.

68. Declaration of Sabrina Rubin Erdely, *supra* note 54, ¶ 97.

friends, and did those friends meet her outside the frat house or a mile away? But Erdely pressed on.

So where did *Rolling Stone* go wrong? To be sure, Eppolito set up Gibbs. But this is different, isn't it?

The Columbia audit of "A Rape on Campus" cites the operation of "confirmation bias—the tendency of people to be trapped by pre-existing assumptions and to select facts that support their own views while overlooking contradictory ones"—as "a well-established finding of social science."[69] In a similar vein, the federal district court in Eramo's defamation suit cites "evidence that could lead a jury to determine that Erdely had a preconceived story line" from which she refused to waver.[70] Adding that "Erdely had also previously published five similar articles," the court intimated she was caught up in being right about her depiction of UVA's "rape culture."[71] In other words, Erdely and her editors *wanted* to believe Jackie, both about the incident and Eramo's role in privileging the school's reputation over its students' bodies.[72] This phenomenon may express what William Butler Yeats meant a century ago in *The Second Coming* by "[t]he best lack all conviction, while the worst/Are full of passionate intensity."[73] In sum, Erdely was too passionate, too staked in her angle to resist a story that the Second Circuit Court of Appeals, ruling in a defamation suit by three Phi Kappa Psi members, called "fabricated."[74]

Had the holes in Jackie's story never come to light, *Rolling Stone* could have spared UVA, Eramo, and Phi Kappa Psi the abundant "fallout" that resulted in defamation awards of $3 million to Eramo and $1.65 million to Phi Kappa Psi.[75] Had Jackie's story held up, "A Rape on Campus" would at least theoretically have achieved some good, *even if* Jackie was not raped (or if, as her father at one point insisted, the incident occurred at a different fraternity).[76] After all, UVA did have a problem. It is not as though there were no representative cases to be had there.

---

69. Coronel et al., *supra* note 55.

70. Eramo v. Rolling Stone, 209 F. Supp. 3d 862, 872 (W.D. Va. 2016).

71. *Id.*

72. According to *Newsweek*, "A Rape on Campus" is not the first time that Erdely and *Rolling Stone* have joined up to that effect. *See* Ralf Cipriano, *Another Rolling Stone Rape Article has Major Holes*, NEWSWEEK (Dec. 11, 2014), http://www.newsweek.com/another-rolling-stone-rape-article-has-major-holes-291257 (describing another *Rolling Stone* article with factual discrepancies).

73. W. B. Yeats, *The Second Coming*, *in* THE COLLECTED POEMS OF W. B. YEATS 185 (Macmillan Publishing Co. 1956).

74. Elias v. Rolling Stone LLC., 872 F.3d 97, 101, 103 (2d Cir. 2017).

75. *See* Elias v. Rolling Stone LLC, 192 F. Supp. 3d 383, 389 (S.D.N.Y. 2016) (stating that the Washington Post had reported on "discrepancies and 'questionable facts' in the article about 'Jackie's' rape" and that Rolling Stone acknowledged the "ensuing fallout"); Eriq Gardner, *Rolling Stone Settles Last Remaining Lawsuit Over UVA Rape Story*, HOLLYWOOD REPORTER (Dec. 21, 2017), https://www.hollywoodreporter.com/thr-esq/rolling-stone-settles-last-remaining-lawsuit-uva-rape-story-1069880.

76. *See* Nick Fagge, *'My Daughter Told the Truth': Father of UVA Girl, 20, Defends Her Claim that She WAS Raped—and Says She Simply Got Name of Fraternity Where 'Attack' Happened Wrong*, DAILY MAIL (Dec. 9, 2014), http://www.dailymail.co.uk/news/article-2865965/My-daughter-told-truth-Father-girl-center-University-Virginia-gang-rape-storm-defends-20-year-old-saying-raped-simply-mistake-fraternity-attack-happened.html.

Two *adjudicated* rapes of UVA students,[77] not to mention the murders of sophomore Hannah Graham and senior Yardley Love,[78] were documented pre-publication.

But none posed the spectacle of Jackie's account, in which fraternities, determined "to get everyone blackout drunk,"[79] ruthlessly violate women, then turn to a bureaucracy stifled by privacy, due process, and the specter of reputational harm, to look the other way. During the relevant time-frame, the UVA Phi Kappa Psi chapter had fifty-three members.[80] Without implicating any members individually, would not some good derive from calling them out, even if none has committed or even condoned rape?[81] If Phi Kappa Psi is not quite part of the "rape culture," the argument might run, then other frats on the UVA campus must be, and would themselves as a result be favorably awakened and reformed by the demise of *any* neighboring fraternity.

That, I suspect, is an urge behind "A Rape on Campus," which is less a report than a crusade bespeaking the attitude that "when the legend becomes fact, print the legend."[82] In the scapegoating of UVA, Eramo, and Phi Kappa Psi, the accusatory apparatus did not invent the "rape culture" it sought to depict.[83] Nor were the defamed parties sacrificed for the purpose of letting the real culprits off scot-free.[84] Instead, the accusers lost sight of a truism of criminal law: that it takes a real commitment—read, thick skin—not only to *endure* a criminal accusation, but to *make* one, too. With a misdirected zeal to do good, the facts became but pretty playthings. By the time axe-grinding had led to scapegoating, no more good was done there by *Rolling Stone* than by Louis Eppolito in his peculiar attempt to resolve the Virginia Robertson murder. And as is the case with all tragedy, it could

77. *See* Coronel et al., *supra* note 55.

78. *See* Eamon McNiff et al., *How the Retracted Rolling Stone Article 'A Rape on Campus' Came to Print*, ABC NEWS, http://abcnews.go.com/2020/deepdive/how-retracted-rolling-stone-article-rape-on-campus-came-print-42701166 (last visited Feb. 28, 2019).

79. *See* Coronel et al., *supra* note 55.

80. Elias v. Rolling Stone, LLC, 872 F.3d 97, 102, 108 (2d Cir. 2017).

81. In addition to the fraternity's defamation suit, which has settled, another suit was brought by three individual plaintiffs: Elias, Fowler, and Hadford, who also brought a small-group claim as members of Phi Kappa Psi. The federal district court dismissed the action in its entirety. On plaintiffs' appeal, the Second Circuit reinstated the claims of Elias (who occupied the room where the attack was alleged to occur) and Fowler (the fraternity's "rush" chairman), who demonstrated that the article was "of and concerning them." The appeal of Hadford, whose tie to the suit was as a UVA graduate who rode his bike around campus, was denied. The small-group claim of all three was reinstated, clearing the way for a trial, *id.* at 101, later precluded by settlement for an undisclosed amount. *See* Gardner, *supra* note 75.

82. THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962).

83. *See* McNiff et al., *supra* note 78 ("More than one in five female undergraduates said they had been victims of sexual assault or misconduct during their time at school, according to a survey conducted at 27 universities by The American Association of Universities.").

84. Declaration of Sabrina Rubin Erdely, *supra* note 54, ¶ 5 ("I had complete confidence in Jackie's credibility as a source, in the accuracy of her account, and in the accuracy of the Article.").

have been otherwise.[85]

III. SCAPEGOATING TYPE 3: PATSIES (PRIVATE EDDIE SLOVIK)

Both Gibbs and Phi Kappa Psi were innocent. Other scapegoats are not. In Scapegoating Types 1 and 2, the basis of the scapegoat's responsibility is invented; but in Scapegoating Type 3, the basis of responsibility is real, but exaggerated, at least when adjudged against others similarly situated. In other words, in both Gibbs's case (of the first type) and Phi Kappa Psi's case (of the second type), the efforts of players in the accusatory process aligned to get the wrong guy: in Gibbs's case on purpose, while in Phi Kappa Psi's case negligently, if not recklessly. But in this third type of scapegoating, accusers overstate a *guilty* scapegoat's responsibility by understating or ignoring what other guilty parties have done.

For example, on the evening of his arrest on suspicion of assassinating JFK (and soon after murdering Dallas police officer J.D. Tippit), Lee Harvey Oswald described himself to reporters as "just a patsy."[86] In the two days between those shootings and his murder by Jack Ruby, Oswald never copped to killing anyone, despite twelve hours of interrogation in the basement of the Dallas Police and Courts Building by police, the FBI, and the Secret Service, to name a few.[87] Oswald fancied himself a scapegoat of the first type: framed up just like Gibbs.[88]

While few still doubt that Oswald shot JFK, some do believe Oswald's claim to be "just a patsy."[89] But by "patsy" they do not mean anyone framed Oswald, whose notion of patsy-dom may be eccentric or loose.[90] Rather, they mean Oswald was *put up* to the act by string-pullers (Castro, the mob, the CIA), who became the subject of various enduring grassy-knollisms.[91] By this account, if Oswald did not shoot JFK, then he is not a patsy, but a scapegoat of the first type. Oppositely, if he was set up to take sole blame for an act he committed in concert with others, then

---

85. *See* DAVID S. CUNNINGHAM, TRAGEDY WITHOUT EVASION: ATTENDING TO PERFORMANCES, IN CHRISTIAN THEOLOGY AND TRAGEDY: THEOLOGIANS, TRAGIC LITERATION AND TRAGIC THEORY 221 (Kevin Taylor & Giles Waller eds., 2011).

86. *See* DIANE HOLLOWAY, THE MIND OF OSWALD 215 (2000).

87. *See* REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, NATIONAL ARCHIVES 180 (Sept. 24, 1964), https://www.archives.gov/research/jfk/warren-commission-report/chapter-4.html.

88. Charles Sanders & Mark Zaid, *The Declassification of Dealey Plaza: After Thirty Years, a New Disclosure Law at Last May Help to Clarify the Facts of the Kennedy Assassination*, 34 S. TEX. L. REV. 407, 440 n.168 (1993) ("Oswald repeatedly claimed while in police custody that he was being 'railroaded.'").

89. *See* L.D.C. FITZGERALD, I'M JUST A PATSY! LEE HARVEY OSWALD IN HIS OWN WORDS (Ursa Minor Publishing 2012).

90. *Cf.* VINCENT BUGLIOSI, RECLAIMING HISTORY: THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 841–42 (2007) (discussing whether by "patsy," Oswald meant "framed," "fall guy," or "co-conspirator").

91. *See, e.g.*, *id.* at 1281–82; Nicole Rodriguez, *Fidel Castro Killed JFK? Top Government Official had 'Feeling in his Guts' that Cuba Paid Off Oswald*, NEWSWEEK (Nov. 3, 2017), http://www.newsweek.com/hired-gun-cubans-paid-oswald-assassinate-jfk-according-one-top-us-official-701725.

he is indeed a patsy: a scapegoat of the third type.[92] (In this respect, perhaps "fall guy" rather than "patsy" would more clearly exclude frame-ups from its grammar).

Even if Oswald was put up to the shooting, his quick demise prevented him from becoming a fully realized patsy or fall guy.[93] A more representative example is Private Eddie Slovik—the only deserter executed in the American Army from the Civil War through World War II—who was shot on January 31, 1945 by a firing squad at Sainte Marie aux Mines, France.[94] I have nicked the account below from Guido Calabresi's 1994 commencement speech at Quinnipiac Law School:

> The Germans were retreating and all was going well. In December [1944], the Germans counter-attacked in the Vosges—it was known as the Battle of the Bulge.[95] They broke through the allied lines which were staffed by green soldiers, people who had just been put in . . . . But at that moment, an awful lot of people deserted. An awful lot of the green troops got scared and ran. The Army decided that it was necessary to make an example, because if this sort of thing could happen, the war could be lost.
>
> But . . . there were too many deserters and the Army did not want to shoot them all. So they decided that they would look for double deserters . . . who deserted and were caught, and were sent back to the front, got scared again, and ran again. There were about fifteen of these, and that was too many. So they decided that they had to pick somebody to make an example of. At first, the commanding General decided . . . that of these double deserters, the person who should be picked should be the sole Jewish person among them . . . because "after all in this war against the Nazis he should have been especially anxious to fight." . . . In any event, a Jewish deserter was picked to be shot . . . . But then the matter came up to General Eisenhower, who . . . said that the last thing he needed to do was to have somebody picked to be shot on the ground that he was Jewish. The Jewish soldier was spared. Eisenhower then said . . . "go back and pick me a loser." So they sent in psychologists to interview the double deserters and came up with Eddie Slovik, who came from someplace in the middle west, did not seem to have any family, had perhaps been a petty thief before going into the army, and was a loser. . . . They marched him out,

---

92. Newly released de-classified documents frown on grassy knollisms. *See e.g.*, *The Final Documents on JFK's Assassination are being Declassified*, NPR (Aug. 10, 2017), https://www.npr.org/2017/08/10/542531879/the-final-documents-on-jfk-s-assassination-are-being-declassified. Instead, they confirm the Warren Commission's findings repudiating in-concert activity. *See* REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY, *supra* note 87, at 374.

93. *See* Sanders & Zaid, *supra* note 88, at 440 ("Due to the murder of suspect Lee Harvey Oswald on the day after his arraignment for the assassination of the President, there will forever remain doubts concerning whether or not he was individually or conspiratorially guilty of the crime.").

94. *See* Calabresi, *supra* note 26, at 93.

95. *Id.* In fact, the counter-offensive (aka Battle of the Bulge) took place in the Ardennes. *See* HUGH M. COLE, THE ARDENNES: BATTLE OF THE BULGE 1 (1993). It was Private Slovik's execution that took place in the Vosges, some 200 kilometers away. *See* Allen Pusey, *January 31, 1945: Pvt. Eddie Slovik Executed*, ABA JOURNAL (Jan. 2013), http://www.abajournal.com/magazine/article/january_31_1945_pvt._eddie_slovik_executed/.

> they stripped him of his epaulets and his buttons, they went through the whole routine, in the interest of something. Well the story would probably have never been heard if it had not been for the fact that he had in fact been married and his widow later spent years and years trying to get the insurance that she was due. She never got it, of course, because her husband had been shot as a deserter rather than having been killed in the war.[96]

Scapegoating Type 3 thus singles out a manifestly guilty person (here, Slovik) for an otherwise just punishment, which is rendered unjust by inequality of treatment. Of the more than 40,000 deserters in the European Theater of Operations during World War II—2,864 of whom were convicted at general courts martial and forty-nine of whom were sentenced to death—only Slovik's sentence went un-commuted.[97] Aware of his blaringly disparate treatment, Slovik justifiably concluded that he was to be executed not for deserting, but for having gotten caught stealing bread and chewing gum before being drafted—acts that rendered him a "loser."[98]

While Slovik's acts of desertion were in no sense coordinated with other deserters,[99] Scapegoating Type 3 can occur where parties with a common scheme or design rely on division of labor to pursue their shared illegal purposes. Within that division of labor, those who control and profit most from the enterprise leave the dirty work to functionaries. An upshot of such hierarchy is that these functionaries, or bit players, end up taking the fall for behind-the-scenes masterminds.

As an illustration, in May 2017, the United States Department of Justice Special Counsel's Office began an investigation of Russia's efforts to interfere in the 2016 U.S. presidential election. Headed by former FBI Director Robert Mueller, the investigation sought evidence of 1) coordination between Donald Trump's presidential campaign and Russia; and 2) possible obstruction of justice by Trump and others. Dozens of indictments and at least eight convictions have resulted so far. Among them, National Security Advisor Michael Flynn pled guilty in December 2017 to making false statements to the FBI. In September 2018, Trump's campaign manager Paul Manafort pled guilty to conspiracy to defraud the U.S. and to obstruct justice, his plea coming a month after a jury had found him guilty of eight felony counts of financial crimes. In November 2018, Trump's personal lawyer Michael Cohen pled guilty to lying to a Senate committee about efforts to build a Trump Tower in Moscow; that plea came three months after Cohen's guilty plea to eight counts, including two campaign finance violations for the purpose of

---

96. See Calabresi, *supra* note 26, at 83–85.

97. Michael A. Rizzotti, *The Execution of Private Slovik*, 2013 ARMY LAWYER 39 (Sept. 2013).

98. CHARLES GLASS, THE DESERTERS: A HIDDEN HISTORY OF WORLD WAR II xiv (Penguin 2014); *see also* WILLIAM BRADFORD HUIE, THE EXECUTION OF PRIVATE SLOVIK 229 (Westholme Publishing ed., 2004) (1954) ("[T]here has been only one man executed for a military offense since Mr. Lincoln's time.").

99. *See* Rizzotti, *supra* note 97, at 40. Slovik wrote, "I told my commanding officer my story. I said that if I have to go out there again, I'd run away. He said there was nothing he could do for me so I ran away again." *Id.*

influencing the 2016 election.[100] Guilty pleas were also forthcoming from Manafort's business partner Rick Gates, Dutch attorney Alex van der Zwaan, former Trump campaign adviser George Papadopoulos, lobbyist W. Samuel Patten, and computer enthusiast Richard Pinedo.[101]

In the grand scheme of things, the above-described charges and convictions are all against bit players. With that in mind, if special counsel Robert Mueller's investigation ends up pinning election improprieties *only* on Papadopoulos, Gates, Manafort, Flynn, et al.,[102] then suspicions could arise that, though guilty, those bit players were scapegoated *for* President Trump, if not for his son and son-in-law. However, given the intensity of the investigation in terms of scope, duration, and expense, such suspicions would be misplaced. After all, such an elaborate investigative spectacle quite unlikely would have been undertaken for the purpose of bringing to book *just* a cast of functionaries. There is thus no manifest purpose in the Mueller investigation to scapegoat functionaries, regardless of whether anything ends up sticking to higher-ups or string-pullers.

Although scapegoating has a purposeful, even conniving vibe to it, the term may be apt even when inadvertently brought about. So, if Trump did participate in election wrongdoings, but somehow avoids being held responsible while underlings Papadopoulos, Gates, Manafort, Flynn, et al. pay the price, that would not necessarily indicate something fishy about Mueller's investigation. Instead, it could merely reflect that those who control and profit most from an enterprise (there, Trump and sons) are also the most insulated or hidden. If Trump manages to obscure his role without any help from Mueller, then we can still say "Papadopoulos is just a scapegoat," though the process of scapegoating there would bear little resemblance to what Eppolito/Mitchell or Jackie/*Rolling Stone* did.

Accordingly, prosecuting drug couriers whose bosses are too insulated to get caught is a form of scapegoating, whether purposeful or not. And it is on that basis that mandatory minimum sentences which are indifferent to division of labor are

---

100. Devlin Barrett et al., *Michael Cohen, Trump's Former Lawyer, Pleads Guilty to Lying to Congress About Moscow Project*, WASH. POST (Nov. 29, 2018), https://www.washingtonpost.com/politics/michael-cohen-trumps-former-lawyer-pleads-guilty-to-lying-to-congress/2018/11/29/5fac986a-f3e0-11e8-bc79-68604ed88993_story.html?utm_term=.6e06331fa20d; Devlin Barrett et al., *Michael Cohen Says He Worked to Silence Two Women 'In Coordination' With Trump to Influence 2016 Election*, Wash. Post (Aug. 21, 2018), https://www.washingtonpost.com/world/national-security/trumps-longtime-lawyer-michael-cohen-is-in-plea-discussions-with-federal-prosecutors-according-to-a-person-familiar-with-the-matter/2018/08/21/5fbd7f34-8510-11e8-8553-a3ce89036c78_story.html?utm_term=.3271790f3cc8.

101. *See* Noah Weiland et al., *Robert Mueller and His Prosecutors: Who They Are and What They've Done*, N.Y. TIMES (Nov. 30, 2018), https://www.nytimes.com/interactive/2018/11/30/us/mueller-investigation-team-prosecutors.html.

102. *See* Emily Cochrane & Alicia Parlapiano, *Over 100 Charges, 34 People and 3 Companies: The Investigations Surrounding Trump, Explained*, N.Y. TIMES (Feb. 23, 2018), https://www.nytimes.com/2018/02/23/us/politics/mueller-investigation-charges.html.

criticized, though "scapegoating" is not there the term of criticism.[103] Likewise, sentencing regimes that offer probation in exchange for cooperation inadvertently promote scapegoating by rewarding only the most knowledgeable players, who happen to be highest up the ladder.[104] An anti-scapegoating response has been the passage of a smattering of "drug kingpin" statutes, which enhance the punishments of those in control of drug operations.[105] Those statutes mean to prevent so-called mules—who may be important cogs in drug schemes—from taking the rap for kingpins, who reap the greatest benefits while taking on the lowest risks of detection, apprehension, and conviction.[106]

This does not mean, however, that holding bit players responsible is necessarily an act of scapegoating. Consider *People v. Kauffman*, where six men conspired to burgle a cemetery, but abandoned the plan when they saw an armed guard at the scene, after which one of them (Woods) fatally shot a police officer (Robinson) who intercepted them on foot on their way home.[107] Concluding that a plan to break into a safe at the cemetery implicitly included a plan to avoid arrest while coming and going, California's high court held all six conspirators guilty of murder, including Kauffman, who was unarmed with his hands up when Officer Robinson appeared.[108]

While *Kauffman* is no aberration,[109] it is important to clarify that holding Kauffman responsible *in addition to* Woods (the shooter) is *not* an act of scapegoating, though it would be if Kauffman had remained on the hook while Woods got off. The common law of group criminality long guarded against the practice of allowing bit players to take the fall for their superiors by precluding the conviction of accessories to felonies without the prior conviction of their principals.[110] Specifically, if the principal went uncharged, had stood mute, claimed the benefit of clergy, obtained a pardon, or died before judgment, the accessory could not be tried.[111] So viewed, a bank robber's escape and disappearance prior to trial legally precluded prosecution of the escaped robber's getaway driver. The reason? An

---

103. *Cf.* Harris v. United States, 536 U.S. 545, 570–71 (2002) (Breyer, J., concurring in part & concurring in the judgment) ("Mandatory minimum[s] . . . rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently.").

104. *See, e.g.*, State v. Hunter, 586 So.2d 319, 323 (Fla. 1991) (Barkett, J., concurring in part and dissenting in part) (explaining that unlike an experienced drug kingpin, "[t]hose who are the least culpable, because of their limited involvement and knowledge, have little to trade, and accordingly they are left to suffer the greater punishment of the minimum mandatory prison sentences").

105. *See, e.g.*, *Validity, construction, and application of "drug kingpin" statutes*, 30 A.L.R. 5TH 121 (1995) (naming the United States, Alaska, District of Columbia, Georgia, Maryland, Mississippi, Missouri, and New Jersey).

106. *See, e.g.*, Williams v. State, 616 A.2d 1275, 1284–85 (Md. 1992).

107. People v. Kauffman, 92 P. 861, 862–63 (Cal. 1907).

108. *Id.* at 863.

109. *See, e.g.*, People v. Chiu, 325 P.2d 972 (Cal. 2014).

110. *See, e.g.*, 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 623–24 (1736).

111. *See, e.g.*, McCarty v. State, 44 Ind. 214, 215 (1873) (citing 4 BLACKSTONE'S COMMENTARIES ON THE LAWS OF ENGLAND 323 (Thomas M. Cooley ed. 1871)).

accessory's liability was considered entirely derivative of, or dependent on, the principal's liability. Any defense or event that stymied the principal's conviction, including reversal on appeal, would at once stymie the case against the accessory, who could not be brought to book without a sustainable final judgment of robbery entered against the principal.[112]

More specifically, robbery has two elements: larceny and assault.[113] A getaway driver fulfills neither element. Nor does a getaway driver *cause* a robbery to be committed by the principal, even if the principal cannot drive a car. If the getaway driver *did* cause the robbery, then it would be the driver's doing, not the principal's. One certainly can perform an action by getting others to perform it. We say, for example, "Louis XIV built Versailles," even though the actual construction was done by others.[114] Particularly, we can think of cases where the principal is not a principal at all, but is simply a tool, instrument, or means of someone else, such as where the helper recruits an insane person or a child to do the deed.[115] But those cases involve such coercion or manipulation of susceptible parties that the putative principal's act is not really his own, but better attributable to the string-puller.[116]

Absent such coercion or manipulation of susceptible parties, the accessory's contribution to the principal's offense was long considered a secondary matter because an accessory is outside the elements of the principal's offense: without an adjudicated principal offender, there was nothing left to pin on the accessory.[117] While a principal's conviction is no longer required to bring about an accessory's conviction,[118] cases where an accessory ends up convicted while the principal is acquitted are uncommon.[119] And as an anti-scapegoating matter, it makes good sense to make laying the entire blame on an enterprise's small potatoes as uncommon as possible.

IV. SCAPEGOATING TYPE 4: RECKONINGS (O.J. SIMPSON)

In this fourth extended type of scapegoating, accusers seek a reckoning for a wrong they justifiably believe the scapegoat to have unjustifiably gotten away with. Put slightly differently, here scapegoats are being scapegoated for *their own acts*. This payback motive on the part of accusers is concealed so that the former

112. State v. Ward, 396 A.2d 1041, 1049 n.16 (Md. 1978).

113. *See* Williams v. United States, 113 A.3d 554, 560 (D.C. 2015).

114. JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 110 (1983).

115. *See, e.g.*, MODEL PENAL CODE § 5.01(2)(g).

116. *See, e.g.*, *id.* § 2.06(2)(a).

117. *See* McCarty v. State, 44 Ind. 214, 215 (1873).

118. It is not agreed upon when, exactly, this shift occurred. *Compare* Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CAL. L. REV. 323, 340 (1985) (arguing that the rule that an accessory could not be convicted without the prior conviction of the principal had been abandoned by Blackstone's time) *with* Standefer v. United States 447 U.S. 10, 15 (1980) (arguing that the rule was abandoned later, in 1899).

119. *Compare* MODEL PENAL CODE § 5.01(3) *with* People v. McCoy, 24 P.3d 1210 (Cal. 2001) *and* Standefer v. United States 447 U.S. 10 (1980).

event and the current punishment can be presented as unrelated. The payback punishment can be either harsher or milder than the punishment associated with the prior event.

An example of Scapegoating Type 4 is O.J. Simpson, whom the L.A. County prosecutor charged in June 1994 with murdering Simpson's ex-wife Nicole Brown and her acquaintance Ronald Goldman. Prior to the verdict, the victims' families sued Simpson to get compensation for lost happiness and income, plus punitive damages to boot. Simpson was acquitted in the criminal case in October 1995, despite a strong case against him. He was found liable in the civil case in February 1997 and ordered to pay $8.5 million in compensatory damages to Goldman's parents, who were to split an additional $25 million in punitive damages with Brown's children. The awards were upheld on Simpson's appeal.[120]

Simpson's civil judgment has amounted to little. At the time of the tort, his net worth was $10.8 million, an amount long gone, about a third to his lawyers.[121] Simpson's retirement pension from eleven years in the NFL is worth $25,000 per month for life,[122] but is shielded from judgment creditors by law.[123] His Miami home, encumbered by $1 million in debt to a lender, sold at auction in 2014 for $655,000, just $100,000 over the price Simpson had paid in 2000.[124] Goldman's mom, Sharon Rufo, has been trying to sell her renewable $8.5 million judgment (plus millions more in interest) in an online auction with a buy-it-now price of $1 million and no minimum bid.[125] Apart from the forced sale of some Simpson knick-knacks, Goldman's parents profited from the sale of his 1968 Heisman Trophy ($230,000) in 1999,[126] and in 2007 a Florida bankruptcy trustee awarded them 90% of the rights to his book, *If I Did It: Confessions of the Killer*.[127]

---

120. *See* Goldman v. Simpson, 160 Cal. App. 4th 255, 264–65 (2008); Rufo v. Simpson, 103 Cal. Rptr. 2d 492, 497 (Ct. App. 2001).

121. *See* Alan Abrahamson, *Simpson Legal Fees Could Run Into Millions*, L.A. TIMES (July 9, 1994), http://articles.latimes.com/1994-07-09/news/mn-13443_1_legal-fees; Alexander Atkins, *How Much Did O.J. Simpson Pay His Lawyers*, BOOKSHELF (Apr. 11, 2016), https://atkinsbookshelf.wordpress.com/2016/04/11/how-much-did-o-j-simpson-pay-his-lawyers/.

122. Abigail Goldman, *Drawing $25,000 a Month*, L.A. TIMES (June 13, 1997), http://articles.latimes.com/1997-06-13/local/me-3080_1_o-j-simpson. *But see Rufo*, 103 Cal. Rptr. at 524, 529 (alleging "two pension plans with a combined value of $4,121,000" plus "a pension from the NFL, which in 2002 will begin paying him $1,910 per month").

123. *Rufo*, 103 Cal. Rptr. 2d at 524, 529.

124. Ashley Collman, *He Still has the Big House! OJ Simpson's Florida home sold for $655,000 in Foreclosure Auction*, DAILY MAIL (June 5, 2014), http://www.dailymail.co.uk/news/article-2649552/He-big-house-OJ-Simpsons-Florida-home-sold-655-000-foreclosure-auction.html.

125. Aaron Smith, *$9 million claim against O.J. Simpson up for Auction*, CNN MONEY (Aug. 13, 2014), http://money.cnn.com/2014/08/13/news/companies/oj-simpson/index.html.

126. *Simpson Items are Auctioned for $382,075*, N.Y. TIMES (Feb. 17, 1999), http://www.nytimes.com/1999/02/17/us/simpson-items-are-auctioned-for-382075.html. Simpson's Heisman trophy sold at auction for $230,000. *Id.*

127. Patrick Oppmann & Susan Candiotti, *O.J.'s Book Proceeds will go to Goldman Family*, CNN (July 30, 2007), http://www.cnn.com/2007/US/law/07/30/simpson.book/.

Simpson's dramas old and new began when, on March 3, 1991, LAPD officers Koon, Wind, Powell, and Briseno were videotaped beating a black man by the name of Rodney King. Though the brutal video provided clear evidence of their guilt of using excessive force and assault with a deadly weapon, a Ventura County jury acquitted all four defendants on April 29, 1992.[128] The conduct of the LAPD in King's case, combined with the apparent racism displayed by Detective Mark Fuhrman in Simpson's case, led at least one juror to look the other way when sitting in judgment of accused murderer Simpson.[129]

On September 13, 2007, as the battle over his non-exempt assets dragged on, an intoxicated Simpson hatched a raggedy plan with six cronies to recover items of personal property that he suspected his agent, Mike Gilbert, had stolen from him. Simpson and five others lured two memorabilia dealers (Fromong and Beardsley) to the Vegas Palace Station hotel room of yet another (Riccio). After the first to enter (Stewart) shoved Fromong into a chair, another (Alexander) revealed a gun in his waistband, while a third (McClinton) waived a gun around, as two others (Cashmore and Ehrlich) stuffed goods, some of which were Simpson's, into pillowcases.[130] Riccio, an auctioneer with an impressive criminal history, went on to sell his tape-recordings of the event to tabloids and testify with immunity against the other six.[131] The guilty pleas of Alexander, McClinton, Cashmore, and Ehrlich got them probation.[132]

On October 3, 2008, Simpson and Stewart were convicted by a jury, who managed to bloat the caper into one misdemeanor (conspiracy to commit burglary)[133] and eleven manifestly overlapping felonies: one count each of conspiracy to commit kidnapping, conspiracy to commit robbery, and burglary while in possession of a deadly weapon; plus two counts each of first-degree kidnapping with use of a deadly weapon, robbery with use of a deadly weapon, assault with a deadly weapon, and coercion with use of a deadly weapon.[134]

On December 5, 2008, after dismissing the coercion counts as redundant to the kidnapping,[135] Judge Jackie Glass gave both Simpson and Stewart thirty-three year

---

128. *See* Koon v. United States, 518 U.S. 81, 87–88 (1996). The jury hung on one count of assault as to Koon. *See id.*

129. *See* Taylor Lewis, *O.J. Simpson's Not-Guilty Verdict was 'Payback' for Rodney King, says Juror*, ESSENCE (June 17, 2016), https://www.essence.com/2016/06/17/oj-simpson-not-guilty-verdict-payback-rodney-king; *see also* Ta-Nehisi Coates, *What O.J. Simpson Means to Me*, ATLANTIC (Oct. 2016), https://www.theatlantic.com/magazine/archive/2016/10/what-o-j-simpson-means-to-me/497570/.

130. *See* State v. Simpson, No. 07C237890-4, 2013 WL 6237199, at *2–6 (Nev. Dist. Ct. Nov. 26, 2013).

131. *See* Scott Glover, *Auctioneer Has a History of Felonies*, L.A. TIMES (Sept. 19, 2007), http://articles.latimes.com/2007/sep/19/nation/na-riccio19.

132. *See Simpson*, 2013 WL 6237199, at *6–7.

133. *See* Respondent's Answering Brief at 18, Stewart v. State, No. 53100 (Nev. Oct. 16, 2009), 2009 WL 6482744 at *18 ("In this case, the State presented ample evidence proving Stewart participated in a conspiracy to commit burglary, coercion, assault, kidnapping, and robbery.").

134. *See* State v. Simpson, No. C237890, 2008 WL 5129099, at *1 (Nev. Dist. Ct. 2008).

135. *See Simpson*, 2013 WL 6237199, at *7.

sentences.[136] Stewart served twenty-seven months before winning an appeal for having been prejudiced by being jointly tried with a character like Simpson.[137] Rather than face re-trial, Stewart agreed to nine months' house arrest.[138]

Thereafter, Simpson argued that because his lead attorney, Yale Galanter, had advised that forcible retrieval of one's own property cannot be robbery, talk of a guilty plea never came up.[139] In other jurisdictions,[140] including Galanter's home state of Florida,[141] Galanter's notion about the elements of robbery would be correct, but not in Nevada. Simpson also argued that upon learning that even the two gun-wielders in the heist were given probation, he pressed his lawyers for like treatment.[142] According to prosecutor David Roger, no pre-trial offer was forthcoming because Galanter had told him that Simpson insisted on probation, a deal-killer for Roger.[143] During trial, Simpson's local counsel, Gabriel Grasso, fielded an offer of two to five years on a single count of robbery.[144] Galanter was not in chambers to hear the offer, but did recall a break in the hallway when Simpson said he would accept no more than a year.[145] Roger also recalls making Galanter a mid-trial offer of thirty months, but it was tied to an identical offer being accepted by Stewart, who turned it down.[146]

Simpson's seven years of post-conviction challenges to what I previously described as "manifestly overlapping felonies" went nowhere, whether couched in the constitutional ban on double jeopardy or Nevada's (now defunct) ban on redundant punishments.[147] In acts of judicial jiu-jitsu, Nevada courts deemed the luring of Fromong and Beardsley to Riccio's hotel room two counts of kidnapping, aggravated by use of a gun that played no actual role in the luring.[148] To cut off the assaults from the robberies and kidnappings, preventing the charges from being "the same offense" in double-jeopardy terms, the Nevada high court characterized holding the victims at gunpoint *after* the pillowcases were full as a *separate* armed assault.[149] Despite another case in which a Nevada federal court found such a

136. *See id.* at *7–8 (listing sentences).

137. *See* Stewart v. State, No. 53100, 2010 WL 4226456, at *1–3 (Nev. Oct. 22, 2010); *see also* Dan Whitcomb, *O.J. Simpson Co-defendant Freed from Prison in Deal*, REUTERS (Jan. 4, 2011), https://www.reuters.com/article/us-simpson-codefendant/o-j-simpson-co-defendant-freed-from-prison-in-deal-idUSTRE70404P20110105.

138. *See* Whitcomb, *supra* note 137.

139. *Simpson*, 2013 WL 6237199, at *15.

140. *See, e.g.*, People v. Tufunga, 987 P.2d 168, 181 (Cal. 1999).

141. *See* Thomas v. State, 584 So.2d 1022, 1023 (Fla. Dist. Ct. App. 1991).

142. *See Simpson*, 2013 WL 6237199, at *23.

143. *Id.* at *15.

144. *Id.* at *23.

145. *Id.*

146. *Id.* at *22–24.

147. *See, e.g.*, Simpson v. State, No. 64529, 2015 WL 5311109, at *4 (Nev. Sept. 10, 2015); *Simpson*, 2013 WL 6237199 at *7–8, *24–35.

148. *Simpson*, 2013 WL 6237199, at *31.

149. *See* Simpson v. State, No. 53080, 2010 WL 4226452, at *9 n.3, *9–10 (Nev. Oct. 22, 2010); *Simpson*, 2013 WL 6237199, at *7.

move to be an unlawful instance of double-counting,[150] the Nevada Supreme Court found that Galanter's failure to cite the federal case was insufficient to count as constitutionally ineffective assistance of counsel because the favorable case was merely persuasive, not controlling.[151]

To be sure, leaving Simpson's long sentence intact was facilitated by the deferential standards of review that pervade criminal law in and out of Nevada.[152] But it certainly was not dictated by them: Nevada law gave Judge Glass discretion to structure the sentences to all run concurrently.[153] But she did not.[154]

To impose and let stand the thirty-three-year term took a conviction apparatus bent on scapegoating Simpson.[155] Indeed, it was game-on from the opening argument, when D.A. Chris Owens reminded jurors of Simpson's adverse tort judgment, which Owens said made Simpson desperate enough to rob back his property in Nevada to avoid the California post-judgment remedies on which Fred Goldman was relying.[156] This too, from Judge Glass at Simpson's sentencing:

> And when I first started this trial and I talked to the jury when we had the whole panel in, I stated to the group that if this was—if they were here because they wanted to punish Mr. Simpson for what happened previously, then this was not the case for them. And I meant that. As the judge in this case, I'm not here to sentence Mr. Simpson for what has happened in his life previously in the criminal justice system.[157]

---

150. Hymon v. Williams, No. 2:09-cv-1124-RLH-LRL, 2011 WL 941065, at *6 (D. Nev. Mar. 15, 2011) (reversing conviction of assault with use of a deadly weapon as a lesser-included offense of robbery with use of a deadly weapon).

151. *See Simpson*, 2015 WL 5311109, at *4; *Simpson*, 2013 WL 6237199, at *27–28.

152. *See* Robert Anderson IV, *Law, Fact, and Discretion in the Federal Courts: An Empirical Study*, 2012 UTAH L. REV. 1, 24, 43 (2012) (noting that deferential standards of review "are associated with a decrease in the probability of a 'Reverse' outcome at the appellate level").

153. NEV. REV. STAT. ANN. § 176.035(1) (West 2014).

154. *Cf.* Linda Deutsch, *O.J. Simpson Sentenced to 33 Years*, WASH. POST (Dec. 6, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/12/05/AR2008120503321.html ("Glass, known for tough sentences, imposed such a complex series of consecutive and concurrent sentences that even many lawyers watching the case were confused as to how much time Simpson got.").

155. *Cf.* John C. Meringolo, *The Media, the Jury, and the High Profile Defendant: A Defense Perspective on the Media Circus*, 55 N.Y. L. SCH. L. REV. 981, 992 (2011) ("[Simpson's] later conviction on unrelated robbery and kidnapping charges in 2008 may have been tainted by the perception ... that he had escaped a justly deserved punishment for the murders of Nicole Brown Simpson and Ronald Goldman thirteen years earlier.").

156. *Prosecutor Reminds Jurors of O.J.'s Past*, NBC NEWS (Sept. 15, 2008), http://www.nbcnews.com/id/26722627/ns/us_news-crime_and_courts/t/prosecutor-reminds-jurors-ojs-past/#.WmThy62ZMdU.

157. *Judge's Statement at O.J. Simpson Sentencing*, SAN DIEGO UNION-TRIBUNE (Dec. 5, 2008), http://www.sandiegouniontribune.com/sdut-oj-simpson-judge-statement-120508-2008dec05-story.html (transcript of Judge Glass's sentencing statement).

Glass later swore that pronouncing Simpson's judgment on October 3, 2008—the 13th anniversary of his infamous acquittal—was, after a three-week trial, pure coincidence.[158]

Courts have acknowledged the widely held perception that Simpson got away with murder.[159] That Judge Glass threw the book at Simpson as a tit-for-tat scapegoating gesture is not a secret, dug up only by the likes of *NPR* and *Huffington Post* (though dig it up they did).[160] The retaliatory nature of this second Simpson prosecution, conviction, and punishment was a widespread rumor among sources both peculiar and mainstream: rebutted by Judge Glass to Howard Stern, and floated by, among others, respected legal journalist Jeffrey Toobin.[161] Within two years of Simpson's sentencing hearing, Judge Glass, a former TV news reporter, had theatricalized the memorabilia heist to the point that she left the bench to star in a short-lived reality show, *Swift Justice*, where she replaced Nancy Grace.[162]

Most importantly, Glass was sure that Simpson's thirty-three-year sentence was lawful.[163] Let us assume, *arguendo*, that it was. We can say the same of patsies like Oswald, Slovik, and drug mules who are guilty enough, but are asked to bear alone what others should at a minimum share. This is a chance for us to loop back to the introduction to this Article, where the offender-centered view of punishment emphasized equality and denounced using offenders for the pursuit of even the worthiest penal causes. Consider, for a moment, the argument that what matters most in justifying a death sentence is whether the defendant committed a death-eligible offense, not whether *other* death-eligible defendants received death sentences themselves.[164] But how other death-eligible defendants were treated is *precisely* the point: just ask Eddie Slovik, whose special treatment among double-deserters

---

158. *Judge in O.J. Simpson Robbery Trial Tells Stern Show Her Ruling Had Nothing to Do with His Murder Acquittal*, HOWARD STERN (Mar. 14, 2017), https://www.howardstern.com/show/2017/3/14/judge-oj-simpson-robbery-trial-tells-stern-show-her-ruling-had-nothing-do-his-murder-acquittal/.

159. See United States v. Lentz, 58 F. App'x 961, 966 (4th Cir. 2003) ("[A] reference to O.J. Simpson is modern-day shorthand for suggesting that someone has gotten away with murder."). In Stewart's appeal on his motion to sever his trial from Simpson's, the Nevada Supreme Court noted that "[d]espite Simpson's acquittal, opinion polls show that the majority of Americans continue to believe he murdered his ex-wife and her friend." Stewart v. State, No. 53100, 2010 WL 4226456, at *2 n.2 (Nev. Oct. 22, 2010).

160. *See* Alex Cohen & Ted Robbins, *O.J. Sentenced to Minimum 9 Years*, NPR (Dec. 5, 2008), https://www.npr.org/templates/story/story.php?storyId=97855530; Earl Ofari Hutchinson, *More than a Sentence for O.J. Simpson*, HUFFPOST: THE BLOG (Dec. 4, 2008), https://www.huffingtonpost.com/earl-ofari-hutchinson/more-than-a-sentence-for_b_148418.html.

161. *Judge in O.J. Simpson Robbery Trial Tells Stern Show Her Ruling Had Nothing to Do with His Murder Acquittal*, *supra* note 158; Jason Guerrasio, *Legal Expert Jeffrey Toobin: O.J. Simpson Should Note Be In Prison Right Now*, BUSINESS INSIDER (June 10, 2016), https://www.businessinsider.com/jeffrey-toobin-oj-simpson-should-not-be-in-prison-2016-6.

162. *Judge Glass Leaving Las Vegas*, 19 NEV. LAW. 40, 41 (Aug. 2011).

163. *See* Steve Friess, *After Apologies, Simpson is Sentenced to at Least 9 Years for Armed Robbery*, N.Y. TIMES (Dec. 5, 2008), http://www.nytimes.com/2008/12/06/us/06simpson.html; *see also Judge's Statement at O.J. Simpson Sentencing*, *supra* note 157.

164. *See, e.g.*, Dora W. Klein, *Categorical Exclusions from Capital Punishment*, 72 BROOK. L. REV. 1211, 1240 n.127 (2007).

no doubt shocks the conscience. One cannot "negate the negation," i.e., cancel out crime through punishment, here and there, now and then, not without subordinating equality.

Without more, Simpson's eligibility for thirty-three years does not justify the sentence except in the most superficial sense. That he can be said to have earned such a sentence by somehow committing eleven felonies in one transaction can pass for argument only when considered in light of the treatment of other similarly situated offenders. How many offenders who stole personal property by like methods would be punished for *eleven* felonies? Simpson, who had *no* priors, served the statutorily required nine-year minimum of the thirty-three before being paroled from Lovelock Correctional Center on October 1, 2017 at age seventy.[165] For what it is worth, I had a client who pistol-whipped three drug dealers in their apartment, took their cash, and got sentenced to eight years (and will serve no more than six), despite a considerable criminal history.[166] The lesson of O.J. Simpson, Part II? If humans are ends in themselves, the avoidance of even the appearance of scapegoating is a worthy objective, despite the temptation to believe in the comeuppance as an equally worthy objective.

CONCLUSION

I recently represented a juvenile (Hector H.) whose friend stole an old Toyota Camry, then picked up my client before crashing the car in a ditch. After six kids jumped out and ran, a witness identified Hector as a back-seat passenger. Knowing the car was stolen when he hopped in (the ignition was dangling at the driver's knee), but neither encouraging nor assisting the taking or driving, Hector was charged with knowing receipt of stolen property. Specifically, he copped to (constructive) "possession" of the car, an element of the offense. When the prosecutor asked the court to order Hector to pay the owner $8,000 for damage to the Camry, trial counsel insisted Hector had not caused even eight cents in damage. Discussing only bluebook value, the court ordered the juvenile to pay $1,690 in restitution to the owner.

Affirming in an opinion that might mystify any first-year student of torts, the California Court of Appeal said only that Hector, though uninvolved in stealing the car, "enjoyed the benefits of its use, relinquishing it only after it was damaged to the extent of being unusable."[167] Plus, the court went on, his "presence in the vehicle made the crash more likely to occur."[168] As to how Hector exerted such causal influence over the crash, the court did not say.

---

165. *OJ Simpson Released on Parole from Nevada Jail*, BBC NEWS (Oct. 1, 2017), http://www.bbc.com/news/world-us-canada-41458911.

166. People v. Antonio, 10 Cal. App. 5th 1064, 1066–67 (2017).

167. In re Hector H., No. D070373, 2017 WL 2644678, at *9 (Cal. Ct. App. 2017).

168. *Id.*

This is scapegoating—giving in to an urge to blame a plausibly responsible party when the facts and law are open enough to make doing so lawful. But there is only one thing to do with temptation when yielding would, by way of scapegoating or any other means, entail treating humans other than equally, other than as ends in themselves: resist. If I have succeeded in providing a glimpse at the workings of four extended senses of scapegoating, then perhaps a slightly more refined basis for detecting and resisting them has come to light as well. These are serious matters.