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Scapegoats

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I'd like to talk a little bit this morning about scapegoats. I will start by telling a couple of stories and then maybe comment on both stories.

Many years ago, when my wife and I were on our wedding trip, we were traveling through a beautiful section of France called the Vosges. We came to a town called Saint Marie Au Mines, and that town seemed haunted and ugly. It was a mining town and we thought that maybe that was the reason for it. But later I learned that it was at Saint Marie Au Mines that Private Eddie Slovik was shot, and I had a feeling that the haunting of the town dated back from that time.

Eddie Slovik was the only person executed as a deserter in the American Army from the time of the Civil War through the Second World War. In 1944, at the end of that year, we thought we were winning the war. “Win the War in ’44” was the slogan which we all knew. The Germans were retreating and all was going well. In December, the Germans counter-attacked in the Vosges—it was known as the Battle of the Bulge. They broke through the allied lines which were staffed by green soldiers, people who had just been put in—all the veterans had gone home, the war was over, and these were green troops that were put in—and there was real danger of terrible defeat. Some General, named McAuliffe, was asked to surrender and said “nuts.”

* Guido Calabresi, Dean of Yale Law School, Commencement Address given at Quinnipiac College School of Law, May 16, 1993.
Whatever that meant at the time, it was thought to be a desperate thing to say, and he stopped the Germans just by saying it. At least as a kid that is what I thought. Anyway, things went all right and the war was finally won. 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 the problem was that 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. Double deserters were people 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—this only came out a few years ago when a Rabbi, who had been sent to comfort the person chosen, died and told this part of the story—that of these double deserters, the person who should be picked should be the sole Jewish person among them. He thought that this person should be picked because “after all in this war against the Nazis he should have been especially anxious to fight.” Obviously, I do not understand his logic. In any event, a Jewish deserter was picked to be shot, and the Rabbi was sent to comfort him. But then the matter came up to General Eisenhower, who, maybe thinking of his future, or whatever, 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 something devastating; he said “pick somebody, pick me a loser, 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 decided that he was the one who should be shot. So they took him out and did not just shoot him. They marched him out, 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 try-
ing 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.

All right, that is one story. Another story involves a play. It is called “The Visit.” It is by a man named Duerenmatt, and it is a story about a village in Austria; a very, very poor village. One day a very rich woman comes back from the United States to that village, and the rumor gets around that this woman will give a huge amount of money to the village and save the village from all its troubles. Everybody starts to rejoice, until it comes to be known that what the woman wants in exchange for this huge gift is the life of an elderly man in that village, because when they were young he had seduced and abandoned her. That was why, under the mores of the time, she had had to leave the village, go to America, make a huge amount of money, and now had come back.

This man had lived an ordinary life in the village. He had actually even been elected mayor at one point. People knew about what he had done and nobody liked it. They had known it years before, but over time they had forgotten it. It was a sin like many others, and all of us are sinners. At first in the play when she makes her suggestion, everybody is appalled. The story of the play is how, slowly, slowly, the people in the village come to feel that it is this man’s sin, this man’s evil, that is keeping them from their just rewards. The play ends as he is heading towards the railroad station, trying to get on a train to escape from the village, and the villagers are all closing in on him to kill him.

Scapegoatism can be even worse than that. After all, Eddie Slovik did desert, and the man in “The Visit” did something which was terribly wrong. Scapegoatism can turn on the utterly innocent. It can become the pogrom: racial, religious, ethnic, and put the blame on some group of innocent people. But most of us would not be guilty of that would we? And perhaps that is so. Yet how often do we all fall into the smaller, the Eddie Slovik, or “The Victim,” type of routines. I teach torts—you have heard of it, accident law, ambulance chasing, and we always think that accidents are due to somebody drinking, or to somebody speeding, or to somebody having bad brakes. The fact that they almost always happen at the same curve, at the same exit, or are
made worse because we do not have airbags, is not what we focus on. It is much easier to say, "it is that person's fault; he or she was the one who was responsible for the thing." And, of course, to some degree it is true. We have grade crossings at which trains run into cars with monotonous regularity, and when that happens somebody always did something wrong or they would not have gotten crushed. But if we had not had the grade crossing, it would not have happened, even if the driver were "faulty." Guns do not kill, people do. Therefore, we do not need to worry about adequate gun controls. We bash Japan because it is easier to claim that it is their fault for the things that go wrong than to ask what are the real problems with our industrial system.

So we talk about the welfare cheat, and do not focus on the welfare system. We tend to blame homelessness on the drunken bum. We blame the evil insurance company rather than the underlying reasons for the high cost of insurance and accidents. We concentrate on the evil lawyer who brings these evil suits, rather than on the fact that we are the only industrialized country that does not have a system of health care and medical insurance, so that we have to use the tort system as the only way of getting some of that kind of insurance. We talk about the malefactors of wealth, or used to. (Actually we still do in other, perhaps less elegant, language.) And we execute drug dealers, but do not really do much about drugs. And so it goes.

It is not a matter of the right or of the left, both sides do it, they each have their own scapegoats. And they're both very good at blaming someone, rather than facing up to the underlying problem.

Scapegoating is closely related to the problem of symbols. Some time ago there was a great rush to try to pass an amendment which would allow us to forbid the burning of the flag, because the flag is such an important symbol. But is it the flag that matters, or is it the underlying patriotism, the underlying love of country that really mattered, whether people burned the flag or not. (In all that time very few people mentioned that in the nineteenth century it was not the flag, but the constitution that was the dominant symbol of our land. And when William Lloyd Garrison burnt the constitution, in public, before the Civil War, because of his love of his country, and because he wanted to say
something about slavery and the evils of slavery, no one tried to jail him.)

Why do we do that? Why is it easier to play a symbol, to blame a faulty one, rather than to look at the underlying problem? Well, of course, one reason, and one very important reason, is that if it is not really completely the fault of the faulty one (of the one we make the scapegoat), then we ourselves are at least partly responsible. And we all want to avoid the responsibility. It is so much more comfortable to say that the reason for the fault is someone around us, some individual, rather than to admit that we are responsible for sending in green troops in circumstances where, if the Germans counter-attacked, the young soldiers were likely to run. It is difficult to own up to the fact that we are responsible for the poverty in the little Austrian village in “The Visit.” But the cost of avoiding our own responsibility is to increase the lives lost and the poverty.

Do not misunderstand me; Eddie Slovik was a deserter. The old man in “The Visit” had done something bad; the speeder is at fault. Yes, all of those things, not to mention the drug dealer, not to mention the people who have been nominated for high office and then are turned down (not because we admit that we disagree with their underlying views, but because we find something which allows us to claim that they were at fault); all of that is true. The flag is a great and worthy symbol, but do not confuse this fact with the idea that blaming the would be flag burners, that playing the symbol, will solve any problem. Because if you do any of these things, you will make the guilty ones into scapegoats, and not punish them justly. Whatever punishment was due Eddie Slovik, it was not being shot. Whatever punishment was due, and maybe should have been put on the old man in “The Visit,” it was not getting killed. (If killing him had been just, it would have happened far earlier.) If you do that, if 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.

What has all this to do with law and with commencement? A lot in fact. It is hard to teach law and study law in a time of lawlessness. But lawlessness breeds lawlessness and scapegoats.
To act lawlessly is usually to make scapegoats. Rodney King broke the law, and so some cops decided to act lawlessly. A jury in trying those cops may well have acted lawlessly. I believe they, the first jury, did. And the rioters responded to that lawlessness by acting lawlessly. And, as a result, some Korean shopkeepers and some African-American shopkeepers, were the ones who ended up being the scapegoats of all that lawlessness.

The Supreme Court of the United States last year believed, incorrectly I think, that the Ninth Circuit had acted lawlessly in staying the execution of a man named Harris, and so they acted lawlessly by issuing a middle-of-the-night order which forbade any court, any federal court in the United States, from issuing any further stays in this case. They had no power under any law, under any grant of jurisdiction, to do that. They could point to nothing that granted them such power, but they were mad, and they were the Supreme Court, so they did it, which is the essence of lawlessness, whether it is done at the top or at the bottom, whether it is done in a good cause or in a bad cause.

Yes, the law fails, often, perhaps even usually, the law fails. Therefore the temptation is to abandon it, to act lawlessly, to scapegoat. But if law fails, and often helps the powerful, lawlessness and scapegoatism, always fail and always help the powerful. They always lead us to harm. And this is so whether the powerful are those who call themselves powerful, or those who call themselves powerless. For they are all powerful, at that moment, in comparison to those whom they are making into scapegoats.

The only hope, despite the failure of law, is in law—in systemic careful reform of law, in solutions to underlying problems, not in scapegoatism. You may think that these are the naive statements, the useless prattlings, of an old Polonius. It is sad, and I may be old, but I am not naive. I know all too well how little law and reform can do. I have seen them fail again and again. But I have also seen revolutions fail, riots fail, scapegoatism fail, blame and bombast fail; and I have seen them fail . . . always!

You have been trained in law, in thinking, in getting beyond the incident, in getting beyond the speeder, to the state of the road, and so you must. It is not a comfortable position, for people will always prefer the other. They will always prefer to ask for a scapegoat. But you must use your minds and your hearts
and your learning to go beyond scapegoatism, beyond symbols, beyond the lawless response, to come up with a deeper structural solution, from whatever political point of view you believe in. You must do that, from whatever ideal moves you; you must get beyond the scapegoatism, the lawless response, to the underlying solution that you believe in, and then convince people to accept it.

If you do that, you will not only have eased Eddie Slovik's pain, kept someone from being beaten, or kept somebody from beating, which is a worthy thing to do too, but you will have saved more lives than you can imagine. Or at least you may have saved one life which is the same as saving the world. And you will have made the world and this great nation a better place than you could ever have thought. You will then have taken advantage of the true gift that education in law has given you. You will have taken advantage of the gift of the possibility of helping to solve problems.

Enough, enough, enjoy your day, celebrate your success, it is right to do so. But then go out and use your education to make those changes that matter. Make your teachers proud of you and more important make those who are helpless without you, those who are in need, proud of you. Thank you.