



## We, the Scapegoats

by Claude Ducloux

**Y**ou know how you hate to watch a car wreck, yet you can't look away, either?

That's how I feel about our last couple of years of American history. Seeing armed guards assigned to



high schools; metal detectors and blocked entrances in public buildings; the need for employees to wear ID

tags; and the expansion of our prison system can't help but make us sad and, at times, angry. There exists an unquenchable longing for answers. Do we dare call this progress? We pray it's a temporary sign of the times.

We remind ourselves that these measures are necessary to manage our current threats. We must seek heightened security from our enemies as well as our domestic misfits, like kids who would bring weapons to school or unhappy litigants like the one who turned over the counsel table in Judge Kocurek's courtroom while his family cheered him on. We assure each other that we won't tolerate those threats, and that our Rule of Law will prevail. But sometimes, just sometimes, it is pretty evident that the cure is worse than the malady.

Recorded human history is full of stories of opportunism. Pope Urban II, in order to plunder the wealth of the considerably more advanced Byzantine and Islamic cultures (and assist in reducing overpopulation at home), convinced all of European Christendom in 1095 to mount the Crusades on the premise that the

Turks (i.e., scapegoats) were defiling the Holy Land, and he promised remission of all sins for any participants. Although nearly 200 years of wars followed, the sharing of cultures inexorably led to the Renaissance (and padded Vatican coffers).

The trick is to meet the differing interests without casting blame. Constantine the Great, in appealing to his pagan constituency when he decided to unite the Roman Empire under fast-growing Christianity, had to throw a few bones of tolerance their way. The pagans, of course worshiped the sun. Religions, he reasoned, would blend a lot better if they all worshiped on the same day of the week. He convinced Christians to worship the same day of the week as the pagans. If you attend church on Sunday (rather than the biblical Sabbath), thank Constantine.

But "scapegoating," that is, using lies and deliberate misdirection to serve your own self-interest is much easier to wield, and has lately reappeared as our most vicious political art form. Most charismatic leaders have always been able to twist facts to support any premise. Hitler blamed the Jews, Joe McCarthy had his communists, and Mao Tse-tung blamed the remnants of the Ch'ing dynasty. The urge to cast blame must be instinctive. Psychologists call it "projection." Yes, it's also shortsighted, but we Americans are, apparently, way beyond seeing the big picture.

But wait a minute, what about our free press? Aren't they supposed to root out the truth, and make sure we hear it (right after the interview with Brittany

Spears' hair stylist)? Apparently, we are way beyond caring about it. Just like Plato says: The downfall of a truly democratic society is the unwillingness of the voters to educate themselves.

And so we have our Proposition 12 (and the Trojan Horse of MedMal Crisis it rode in on). By the time you read this, the people of Texas may have decided that the legislature (God bless 'em) should decide how much a dead loved-one is worth, or a severed limb, regardless of whom it's severed from. Kids, stay-at-home moms, seniors? Hardly worth suing for anymore. Evidence? Immaterial. Why? Supposedly, because lawyers made it impossible for doctors to stay in business (add scary music).

Folks, I love my doctor friends, and I have yet to see one of them lining up at Caritas or moving to Nebraska. Not only that, but between May 2000 and May 2003, the number of doctors increased from 33,999 to 38,035 (Source: Texas Board of Medical Examiners). A 2001 study by the Texas Medical Association said that by 2005, Texas would have a

surplus of 1,614 physicians. But since when did the truth matter?

But I give up. I'm through fighting it. I'm ready to accept blame. We've seen a huge shift in the balance of powers and in our fundamental exercise of government, and perhaps we deserve it.

We lawyers have allowed ourselves to become the scapegoats of society. Everything is our fault. Of course, it's not true, but we've taken the place of the hated railroads of the late 1800's. The railroads got blamed for everything. One story has an old Kansas farmer slipping on his icy porch one morning in January, only to get up and say, "Damn those railroads." Well, it's "damn the lawyers" now. And anything that folks think will hurt the legal profession will be approved. Clearly, even the doctors have been sold a bill of goods, and there is no question but that those lessons will be very painfully demonstrated in the future.

In the interest of the truth, however, let's review: >>

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1) Tort Reform is not now, nor has it ever really been about frivolous suits. People don't win frivolous suits. It's about winning more in a meritorious suit than defendants and insurers had evaluated.

2) Doctors aren't leaving Texas in droves. There are no doctors in some of the 254 Texas counties because they can't make a living there among the lizards and cattle. There are no downhill ski pros there, either, or master electricians in many of those counties. Nor have the dockets of the courts in those counties ever been overflowing with malpractice suits. The TBME statistics prove that, every year the number of doctors in Texas is growing, even in the "litigation zones" of the Rio Grande Valley!

3) There is still nothing in our "reforms" that forces any reductions in health care costs or insurance premiums attendant to damage limitations.

4) There is still nothing that eliminates truly frivolous suits. But see no. 1 above: Professional negligence suits are terrifically expensive and difficult to win.

5) There is nothing that requires elected judges (who rely upon campaign contributions) to dismiss those frivolous suits.

6) There is nothing that requires bad doctors to lose their licenses. (News flash: *Austin American-Statesman*, August 8, 2003: The Texas Board of Medical Examiners, finding that Dr. Eric Scheffey

"presents a continuing threat to the public welfare" only suspends his license despite previous disciplinary action and 78 lawsuits against him. Gee, what the hell does it take?)

So, anyway I've decided to jump ship and join the future. I just had an interview with Representative Armtwister, and his colleague, Representative Toady, who will chair the new "Damage Limits" sub-committee of the House Civil Justice Committee. I hope I can help implement the new revisions to Civil Justice Reform with integrity and fairness. Here is how my first meeting went:

CD: Well, Gentlemen, where should we start?

RA: I say we start with the fingers and toes and work toward the major organs.

RT: Sounds good.

CD: Er... What do you mean?

RE: I mean we set damage limits for each lost part of the body.

Amounts that make sense. You know, so much for a finger, a toe, a leg, so on.

RT: Yeah, but the whole darn thing can't be more than 250, got it?

CD: Oh, you mean we carve up the body into damage pieces until the loss of the entire human body adds up to \$250,000?

RA: Make it real simple for juries. Price 'em out, just like auto parts.

CD: But wouldn't the fingers of a concert pianist be worth more than most folks'?

RA: Absolutely! The pianist would get the full value for severed fingers. The others get less.

CD: But what about evidence of value?

RT: Don't need it. That's the beauty of this system. In fact, defendants could just say, "we're ready to pay the max on them 3 fingers, judge" and you don't even need a trial.

RA: Yep, we're thinking a cool 1,500 per finger.

RT: Right on, bubba. They got ten of 'em, after all.

CD: What if the guy already lost two fingers, say, in another accident.

RA: Well, then the insurance company gets a \$3,000 credit.

RT: Exactly, It'd be stealing otherwise. Insurance fraud.

CD: What about toes?

RA: I've given this a lot of thought. Toes are ugly. Not more than a grand each.

RT: \$5,000 for the set.

CD: What if you lose your whole arm?

RA: Well, you got your 7,500 for the fingers, and 20K for each half of your arm.

RT: And...get this, we're throwing in 2,500 for the hand. We're not heathens after all.

CD: Let's see, that's 50,000 for an arm taken off at the shoulder. Got it. What about legs?

RA: Not nearly as useful. 30K for the whole kit'n'kaboodle.

RT: You can get a good prosthesis, which never gets athlete's

foot, for way less.

CD: Okay. So, that's 180,000 if you lose both arms and both legs. And this applies to anyone, regardless of talent, age, circumstance or history?

RA: Hey, Mr. Hoity-Toity, we're all just people here.

RT: That's right. Isn't that what everyone's screaming for? Equality? Here it is.

CD: Is there any public input on this? Any debate?

RA: Well there could be... But there won't be. We generally try to schedule debate during popular TV shows and NASCAR races. No one comes.

CD: Well. I hope this means we can finally get a limit on rising insurance premiums.

RA: Are you kidding? With all the frivolous lawsuits out there?

CD: Er, uh... Haven't you beaten that horse to death?

RE: Hell no. She's still got at least five good years in her, and we aim to maximize our mileage.

RT: Yep, like taking candy from a baby.

Or, maybe just the voters.

#### Mourning the loss of David

The Austin Legal Community is reeling from the loss of David Walter, a terrific lawyer and Immediate-Past TCBA President. We loved him, and we send our prayers and best wishes to his family, and will remember his contributions to our noble profession. Every day is a gift, folks.

#### Bar & Grill

On a happier note, don't forget The Bar & Grill Show is early this year: Saturday, October 18 at the Paramount. Hope to see you there. Paul Carmona and David Dubose have put together a brilliant script, blending characters from *Chicago*, *Lord of the Rings*, and our own legal community. You'll love it.

Keep the faith. • AL

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