

## GUILT AND CRIME

Commentary on: *In America as in Omelas*

Ana Zablah's article, *In America as in Omelas*, offers a bleak and radical assessment of American criminal justice: that the system punishes the poor and disenfranchised to forestall the guilt that the more fortunate members of society would otherwise feel. By turning the miserable into criminal scapegoats, the system neutralizes the guilt that might ruin the happiness of the majority. She compares America to Omelas, the city in an Ursula LeGuin short story,<sup>1</sup> where an otherwise utopian existence depends entirely on the horrific misery of one child locked away in a closet.

Zablah's theory proceeds as follows. First, there is a minority who live in misery. Second, that misery threatens to inspire feelings of guilt among the more fortunate majority, thus disturbing their happiness and welfare. The reason for the majority to feel guilt is not merely that others suffer, but that their suffering is strictly necessary to the happiness of the majority. Third, the fortunate majority forestalls guilt by subconsciously branding those in misery as criminals. Though the disenfranchised are "not inherently guilty of any real transgression," "we may specifically—if subconsciously—be *choosing* to criminalize 'victimless' behavior common among them," transforming them into criminals in order to "appease our conscience." (p.134). Zablah claims that laws against prostitution, sexual solicitation, and drugs, as well as the racially disparate enforcement of other criminal laws, work to ensure that the poor and racial minorities are branded as the criminal element, which makes them seem deserving of their fate and conceals the manner in which their suffering is actually nec-

essary for the welfare of the many. As she summarizes the three steps of her theory: “First come the poor and the downtrodden, then our guilt, and then the criminal mask.” (p.141).

In many respects, Zablach’s criticisms are well-founded. Millions of Americans do live and suffer in poverty. The poor and certain racial minorities are more likely to be arrested, prosecuted, and incarcerated. The size of the discrepancies is often stunning. Criminal law scholars have and should continue to document these problems, explain their causes, and offer possible solutions.

Nonetheless, I am unpersuaded of Zablach’s central claim—that guilt-avoidance explains substantial parts of the American system of criminal justice. Effectively, the claim is causal—that subconscious guilt *causes* Americans to employ criminal sanctions against the poor and disenfranchised to rationalize ignoring these people’s misery. I offer three reasons for skepticism. First, Zablach does not explain why the happiness of most Americans depends on the suffering of a few. Second, I see no evidence that Americans experience great feelings of guilt over poverty (or would experience guilt absent a criminal “mask” to rationalize hating the poor). Third, even if Americans feel guilt over poverty, it remains unclear that this guilt explains the elements of the criminal justice system that Zablach discusses.

To begin, I don’t fully understand the basis for Zablach’s claim that it is *necessary* misery that threatens to cause guilt, rather than *unnecessary* misery. Zablach’s point is not that there are many miserably poor in America, which has the wealth to make them better off and should do so. To the contrary, her point is that the wealth and splendor of America depends on maintaining a class of the miserably poor. For some purposes, this distinction will not matter much. Zablach would still make a stinging indictment of the criminal system if she could show that Americans use criminal punishment to forestall guilt over unnecessary suffering in their midst (rather than to forestall guilt over necessary suffering). But the causal claim is probably stronger in the former case; certainly, I find it more likely that people will feel guilt about suffering when their happiness depends on that suffering than when it doesn’t. Even if this weren’t the case, it is appropriate to ask why Zablach centers her critique of American criminal justice on a parallel to the Olmelas’ story, where the narrator makes clear the necessity of suffering.

In LeGuin’s story, the narrator vividly describes the perpetual misery of a closeted child and states that all the residents of Omelas “understand that their happiness, the beauty of their city, the tenderness of their friend-

ships, the health of their children, the wisdom of their scholars, the skill of their makers, even the abundance of their harvest and the kindly weathers of their skies, *depend wholly* on this child's abominable misery." (p.745, emphasis added). Zablach refers to the "Omelas scapegoat" whose misery "troubles us" because "we are also its beneficiaries—unable to help it without hurting ourselves." (p.134). She concludes: "As in Omelas, in America" (p.141).

LeGuin's story very pointedly offers no explanation of the causal connection between the suffering of the child and the success of Omelas. Unfortunately, neither does Zablach, though she needs an explanation if she is to persuade the reader of her particular causal account. I can only speculate as to the basis of her claim. Perhaps she means that for the economy to prosper there must be some extremely low paying jobs or a large number of unemployed. Perhaps she means that a market economy requires material inequality and that the people at the bottom will necessarily be miserable. But these are highly contestable claims. Ironically, I can imagine Zablach finding support from economic conservatives who argue against redistribution of wealth. Often, they claim that inequality is strictly necessary to motivate the effort and innovation that fuels American prosperity. Against that argument, one might take LeGuin's short story to be a kind of hypothetical response, one that says: *assuming for the sake of argument* that we must let the poor live in misery in order to sufficiently motivate everyone else, could you live in a society knowing that misery secured your happiness? On this reading, LeGuin need not agree with the causal connection, but her story explores how, even if it were true, the necessity might not justify an individual choice to remain in the society.

In any event, it seems to many (including me) that the economic conservatives who make this claim are wrong—that while some inequality of wealth may be necessary to economic prosperity, extreme inequality involving desperation and misery is not. If redistribution can avoid misery without destroying economic incentives, as arguably occurs in some nations that redistribute wealth far more than the United States, then there no necessity to misery. Perhaps the answer is that, on close examination, there are no such nations, but in the end the question seems to be an empirical one. Before we can accept Zablach's causal account, we need elaboration of the claim that America, like Omelas, cannot alleviate misery without destroying itself.

Nonetheless, let us suppose for the sake of argument that the health and happiness of most Americans depends on the suffering of poor and dis-

enfranchised Americans. Would this fact threaten to undermine the happiness of fortunate Americans by causing guilt? Possibly. There is a relevant psychology literature that might clarify the issue. According to studies of the “belief in a just world” (BJW),<sup>2</sup> individuals tend to believe in the basic (not perfect) justness of the world in the sense that people usually “get what they deserve” and “deserve what they get.” To preserve their BJW, individuals will *either* work to correct injustices or change other beliefs, most commonly, by blaming and denigrating those who suffer bad outcomes. When one cannot correct a bad outcome that might be unjust, one preserves a BJW by believing that the victim possesses negative characteristics that make the bad outcome more deserved (or at least less undeserved). Effectively, one “blames the victim.”

According to this BJW literature, however, one blames the victim only if one would otherwise perceive the outcome to be unjust. Is this true of Americans? Zablah claims so. She says that Americans “realize their fortune depends on misfortune and so they must bear part of the blame” (p.142). Perhaps Americans *should* recognize the injustice of their economy and *should* feel guilt. But it is an empirical matter whether Americans, *in fact*, feel this way. What does the evidence show? I’m not sure. Compared to Europeans, Americans engage only in relatively modest levels of wealth redistribution.<sup>3</sup> The BJW literature suggests that individuals derogate victims only when they lack a means of correcting injustice, yet American voters possess a means of ameliorating inequality through their government. I take this as some evidence that Americans don’t actually feel guilt about poverty. Now, I readily admit a possible rejoinder: if Americans do not support redistribution, perhaps it is because they blame the poor for their poverty, and perhaps the criminalization of the poor is one of the mechanisms for that blame. That remains possible. But, unfortunately, it also seems to make the theory non-falsifiable: if evidence shows that Americans are troubled by the unfairness of poverty, that would support the theory that they parry this guilt by scapegoating the poor; if the evidence shows the opposite, that would support the theory that scapegoating the poor has already caused Americans not to be troubled by material inequality. We are left with a logical possibility but not a well-evidenced theory.

Now we reach the final question: assuming American affluence depends on poverty and Americans subconsciously feel guilty for this fact, do they use the criminal justice system to scapegoat the poor? I suppose it is possible, but we can’t really say from the evidence Zablah presents. She does not raise and explore rival hypotheses. One is racism—that white Americans use the criminal justice system to attack a racial group they

despise, rather than using the system to attack a group whose misery threatens to create guilt. Another is misguided paternalism—that nonpoor Americans believe that they know best how to make poor Americans better off, by controlling their vices, particularly sex and drugs. The optimist might propose as an explanation paternalism of the well-guided sort, claiming that a heightened concern for drugs among the poor is justified because drugs are more likely to cause damage when the person lacks the cushion of wealth. Zablah presents no evidence to reject these alternative explanations.

The evidence she does present concerns drug crimes, solicitation, and prostitution. Drug crimes seem a fairly plausible example of Zablah's thesis because they are debatable as a policy matter (unlike, say, the prohibition on murder and rape) and, as she documents, drug crimes are responsible for a large part of the disproportionate incarceration of poor, African Americans. The infamous federal sentencing disparity between crimes involving powder cocaine and crack has, by itself and without justification, produced a very substantial racial disparity in criminal punishment. One could add to Zablah's evidence the history of the initial decisions to criminalize various drugs, which were bound up in racist fears of black Americans, Mexicans, and the Chinese.<sup>4</sup> But the example is nonetheless limited. One wonders whether either racism or guilt over poverty explains the contemporary fact of criminal drug prohibition as opposed to particular policies like the crack/powder distinction. To my knowledge, there is little support for legalizing hard drugs among poor or minority communities; the African-American Congressman Charles Rangel is a noted opponent of legalization (and also of the crack/power distinction).<sup>5</sup>

The less persuasive case, in my view, involves sexual solicitation and prostitution. Over time, many cultures have forbidden these sexual activities, including cultures that did not have a market economy. If Americans wanted to scapegoat the poor, why would they stop at enforcing crimes that are centuries old? Why not make it a crime to dig ditches or mop floors for money? It can't be because such crimes would burden the wealthy who wanted to hire such services. Wealthy Americans manage to bear (or avoid) the same burdens today if they wish to hire a prostitute or buy cocaine. Thus, if the point of the ban is to vilify the poor by criminalizing the limited ways they can earn money, wouldn't we see a much broader ban on menial work?

In conclusion, I have criticized Zablah's explanation of the criminal justice systems' failings without questioning those failings. Like her, I see

much that is wrong with the system and wonder how it could come to exist. I believe the key point to explain is the cultural and political shift in the 1970s and 1980s away from rehabilitation and towards a more intense punitiveness. Zablaj would presumably link this shift to abandonment to the war on poverty. I remain skeptical. In the end, I think political pathologies frequently arise not from guilt but from indifference.

NOTES

1. URSULA K. LEQUIN, "The Ones Who Walk Away From Omelas", in *Black Water: The Book of Fantastic Literature* 740 (A. Manguel, ed., 1984).
2. See, e.g., *The Justice Motive in Everyday Life*, (M. Ross & D. Miller, eds., 2002); J. MAES, "Eight Stages in the Development of Research on the Construct of a Belief in a Just World," in *Responses to Victimizations and Belief in a Just World* 163-85 (L. Montada & M. Lerner, eds., 1998); MELVIN LERNER & D. MILLER, "Just World Research and the Attribution Process: Looking Back and Ahead", *85 Psych. Bull.* 1030 (1978).
3. See, e.g., ALBERTO ALESIN, EDWARD GLAESER & BRUCE SACERDOTE, *Why Doesn't the US Have European-Style Welfare State?* (2001), at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=290047](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=290047).
4. See, e.g., DAVID F. MUSTO, *The American Disease: Origins of Narcotic Control* (3d ed. 1999); KATHLEEN AUERHAHN, "The Split Labor Market and the Origins of Antidrug Legislation in the United States", *24 Law & Soc. Inq.* 411 (1999).
5. CHARLES B. RANGEL, "Why Drug Legalization Should Be Opposed", *17 Crim. Justice Ethics* 2 (1998) (In minority communities, legalization of drugs would be a nightmare").