

IN AMERICA AS IN OMELAS

“The majesty of the law is that of the angel with the fiery sword at the gate who can cut one off from the world to which he belongs.”

GEORGE HERBERT MEAD, *The Psychology of Punitive Justice* (1918)¹

In the United States, the majestic angel of the law—what George H. Mead described as the “bulwark of our interests”²—functions not only to protect and separate, but also to disguise. It is the element of disguise that I explore in this essay, by way of analogy to Ursula LeGuin’s short story, *The Ones Who Walk Away from Omelas*.³

I. THE AMERICAN DILEMMA

William James once described a type of morality resistant to pleasure gained at another’s expense. Envisioning a utopia that achieved perpetual universal happiness through the everlasting torture of a single person, James declared the cost too high to bear:

[If the] utopias should all be outdone, and millions kept permanently happy on the one simple condition that a certain lost soul on the far-off edge of things should lead a life of lonely torture, what except a special and independent sort of emotion can it be which would make us immediately feel, even though an impulse arose within us to clutch at the happiness so offered, how hideous a thing would be its enjoyment when deliberately accepted as the fruit of such a bargain?⁴

Nearly a century later, Ursula LeGuin brought James’ utopia to literary life. The city of Omelas—paradise of paradises—has a dark secret. Its utter

flawlessness, the perfect happiness of its citizens, depends on the perfect misery of a single child.⁵

In LeGuin's story, Omelas is populated by sophisticated, liberated individuals who are "not naive and happy children." They are not contented simpletons, but instead "mature, intelligent, passionate adults whose lives [are] not wretched."⁶ Concerned by our tendency—encouraged by "pedants and sophisticates"—to equate happiness with stupidity, and our modern incapacity to "describe a happy man," LeGuin emphasizes the complex and progressive nature of the citizens of Omelas, a character enhanced, rather than eclipsed, by their technological accomplishments. Lest Omelas appear sanctimonious or "goody-goody," we are instructed to "please add an orgy."⁷

The inner beauty of the citizens of Omelas is mirrored by the external beauty of the city itself. "[B]right-towered by the sea," it is half encircled by eighteen snow-capped peaks that "[burn] with white-gold fire across the miles of sunlit air."⁸ Bells, music and song fill the air just as joy and celebration fill the hearts of the people who, young and old, dance to the sound of "a shimmering of gong and tambourine."

In the streets between houses with red roofs and painted walls, between old moss-grown gardens and under avenues of trees, past great parks and public buildings...[and] towards the north side of the city, where on the great water-meadow...boys and girls, naked in the bright air, with mud-stained feet and ankles and long, lithe arms, [exercise] their restive horses...⁹

The "victory they celebrate is that of life."¹⁰

The citizens of Omelas lack neither food, nor medicine, nor beer, nor even drugs—that non-habit-forming "*drooz* which first brings a great lightness and brilliance to the mind and limbs, and then...a dreamy languor, and wonderful visions... as well as exciting the pleasure of sex beyond all belief."¹¹ The citizens of Omelas lack for nothing then—except for guilt.¹²

Yet, in the basement of one of its beautiful buildings, inside a tiny room—"about three paces long and two wide: a mere broom closet or dis-used tool room"—with no light, no window, and a damp dirt floor, there lives a child:¹³

It could be a boy or a girl. It looks about six, but actually is nearly ten. It is feeble-minded...It picks its

nose and occasionally fumbles vaguely with its toes or genitals, as it sits hunched in the corner...and the door is locked; and nobody will come. The door is always locked; and nobody ever comes, except that sometimes—the child has no understanding of time or interval—sometimes the door rattles terribly and opens, and a person, or several people, are there. One of them may come in and kick the child to make it stand up. The others never come close, but peer in at it with frightened, disgusted eyes.¹⁴

The child has given up crying for help, fully resigned to a life of perfect misery—the perverse echo of the perfect joy above: “It is so thin there are no calves to its legs; its belly protrudes; it lives on a half-bowl of corn meal and grease a day. It is naked. Its buttocks and thighs are a mass of festered sores, as it sits in its own excrement continually.”¹⁵

The other citizens of Omelas—the singing, dancing, happy people above—know of the child and understand that their perfect lives depend on its perfect misery. They know it “has to be there.”¹⁶ Although the knowledge initially shocks and sickens them and they yearn to help the child—crying or raging tearlessly—they eventually accept the “terrible justice of reality.”¹⁷ They realize that if someone helped the child and its misery were even slightly alleviated then “in that day and hour all the prosperity and beauty and delight of Omelas would wither and be destroyed.”¹⁸ Moreover, as time goes by, they become convinced that there is nothing to be done—that the child, if released, is too dull and corrupted to “get much good of its freedom” or “know any real joy.”¹⁹ Thus the happy people of perfect Omelas recognize and yield to the price of their happiness and perfection, whose “terms are strict and absolute; there may not even be a kind word spoken to the child.”²⁰

The story concludes with one final detail—one the author finds “quite incredible.” There are, among the citizens of Omelas, some that “[do] not go home to weep or rage” after seeing the child but instead do not go home at all.²¹ Others simply “[fall] silent for a day or two, and then [leave] home.”²² These people—the source of the story’s title—walk away from Omelas. “They walk ahead into the darkness, and they do not come back.”²³

A. From Fiction to Reality

America is the mirror to Omelas. Much has been said and written about a system—by no means unique to the United States—that allows a super-minority to control a vastly disproportionate share of its vast

resources. The literature is exhaustive; but perhaps more disquieting—and critical to this essay—is that the resulting differences in education,²⁴ political influence,²⁵ and financial prowess²⁶ have resulted in the institutionalization of the socio-economic disparity—in a relatively fixed distribution of power and wealth.

Despite the efforts and achievements of the Civil Rights movement, America has yet to integrate. Its schools—*Brown*²⁷ notwithstanding—remain racially and economically segregated.²⁸ White children populate suburban and private institutions, while Black and Hispanic children crowd their urban public counterparts.²⁹ The same can be said of America's streets, which remain racially divided.³⁰ As for its jails and prisons, the population here is comprised of almost 70 percent minority inmates.³¹

Additional evidence of the regimentalization of socio-economic inequity lays in the fact that education—though laudably the foundation of prosperity and success—is not a constitutionally protected fundamental right.³² While civil rights advocates continue to toil—albeit unsuccessfully—towards school desegregation, the quality of public education continues to depend on the relative wealth of the students who reside within each district.³³ This is because a lack of federal oversight has resulted in a panoply of local funding mechanisms that revolve around revenues from property taxes.³⁴ Since school districts are usually apportioned along socio-economic lines, these mechanisms aggravate imbalances resulting from the disproportionate distribution of wealth and resources.³⁵ Financially well-off students are further privileged by attending schools with better funding. Wealthy kids go to wealthy schools and have access to the best education that money can buy.³⁶ Conversely, fiscal inadequacy means that schools within poor districts—where poor children are educated—must struggle to keep up with technological advances and, due to market competition, fight to attract and retain experienced teachers and administrators.³⁷ What's more, poorly funded school districts also have trouble luring prosperous residents and businesses, since quality of education is a major concern to both. Hence—despite higher property tax assessments³⁸—these districts have scant possibilities of enlarging their deficient tax bases.³⁹ Given all this and constitutional impotence,⁴⁰ children living in financially disadvantaged districts are likely to grow up to be financially disadvantaged adults. Two equations emerge:

- (1) Poor district = poor school = bad school = unattractive district = poor district⁴¹
- (2) Poor district = poor child = poor school = bad education = poor adult = poor district

The circle is complete—except for one final detail. Because of segregation, poor district typically also means minority district.⁴² In America, as in Omelas, we seek the best for the majority and try to ignore those below.

B. Poverty, Morality and Guilt

[T]he dilemma of the American conscience seems to be twofold: we cannot renounce the exploitation of others that makes possible our high standard of living, nor can we renounce the scapegoat-motif that justifies our comfortable life.⁴³

With a poverty rate of 12.5 percent,⁴⁴ the United States is home to 35.9 million people officially living below the poverty threshold.⁴⁵ Moreover, U.S. Census statistics confirm that the rich are getting richer and the poor are getting poorer.⁴⁶

It is so thin there are no calves to its legs; its belly protrudes; it lives on a half-bowl of corn meal and grease a day.⁴⁷

Theorists and policymakers disagree as to the causes of American poverty. They oscillate between cultural/behavioral and structural/economic perspectives.⁴⁸ Proponents of the “culture of poverty” thesis contend that the poor are held back by their “deficient character...[,] deviant behavior and...resultant self-reinforcing environment.”⁴⁹ They argue that poverty arises from “a destitution of the soul, a failure to develop the habits of education, reasoning, judgment, sacrifice, and hard work required to succeed in the world.”⁵⁰ Others—moving away from pure cultural/behavioral lines—maintain that culture generates “ideas about how to live and make judgments,” ideas that “interact dynamically with structural factors and condition behavioral outcomes.”⁵¹ In addition, structural/economic proponents claim that capitalist America’s competition-driven labor market keeps wages depressed⁵² while the service economy and its multitude of low-income employment opportunities exacerbates the situation.⁵³ They point out that, for people confined to low wage sectors—often due to inequitable access to education and other “tools of success”—the difference between working or collecting welfare may be minute:⁵⁴ for them, “near poverty” may be the best level attainable.⁵⁵ Finally, proponents of a combination behavioral/structural position say that limited employment opportunities constrain the world-view—and future performance—of “near poverty” children, perpetuating destitution from generation to generation.⁵⁶

America's poverty, like its wealth, is inequitably divided. Non-Hispanic Whites—who comprise over 75 percent of the overall population⁵⁷—account for only 44.3 percent of the nation's poor.⁵⁸ At 8.2 percent, their poverty *rate* is the lowest in the United States.⁵⁹ Conversely, Blacks—who comprise only 12.3 percent of the population⁶⁰—account for 25.4 percent, or 9.1 million, of Americans living in poverty. Unsurprisingly, their poverty *rate* is the highest, at 24.3 percent.⁶¹ Hispanics come in at a close second, with a 22.5 percent poverty *rate*. Representing 12.5 percent of America's population, they make up 25.23 percent of its poor.⁶²

The causes of this economic inequity are not clear. Some theorists argue that “institutional racism” is a principal cause.⁶³ For example, interviews of Chicago-area employers demonstrate “that preconceived notions based on race, class and even address are often applied to prospective employees.”⁶⁴ Specifically, employers often apply racially discriminatory biases—when evaluating prospective employees—concerning the productivity of minorities.⁶⁵ Others blame higher incarceration rate among minorities,⁶⁶ claiming that jail robs minority families of wage-earners.⁶⁷ Ultimately, while the causes of poverty may be unclear, the statistics are not: minorities represent a disproportionate part of America's poor, and women—particularly single heads of households—share their misfortune.⁶⁸

Attempts to account for this inequity—and its relation to criminality and minority disenfranchisement—commonly vacillate between cost-benefit and fairness-welfare models: some would consider only costs versus benefits,⁶⁹ while others think the goal should be to promote individual well-being.⁷⁰ Neither model, nevertheless, successfully disguises the discomfort underlying all such debates. However we choose to discuss it, the economic discrepancies of America make us uncomfortable. The situation presents a moral dilemma, a “[challenge to] the American conscience.”⁷¹ For the purposes of this essay, I will refer to this as the “American dilemma.”

II. THE SOLUTION

To exchange all the goodness and grace of every life in Omelas for that single, small improvement: to throw away the happiness of thousands for the chance of the happiness of one: that would be to let guilt within the walls indeed.⁷²

Scapegoating—the “psycho-social propensity to relieve frustration by lashing out at someone defenseless, or to avoid responsibility by blam-

ing someone”⁷³—permeates the most basic of human activities, from family dynamics and religion to law enforcement and war. When the going gets tough, the tough go scapegoating. The criminal law is no exception.

A. The Criminal Scapegoat

It has oft been said that punishment rituals—by drawing the line between insiders and outsiders—help define cultural boundaries.⁷⁴ The work of Emile Durkheim and Mead, for example, suggests that punishing lawbreakers helps build social cohesion as community members come together in hostility against the lawbreaker.⁷⁵ Durkheim speaks of concentrated decency,⁷⁶ while Mead speaks of concentrated anger—calling it the “emotional solidarity of aggression.”⁷⁷ Both consider that the conflict between a conforming majority and a nonconforming minority can vest communal benefits.⁷⁸ Simply put, punishing some unites the rest—I call this the “cultural function of punishment.” Another such proponent, René Girard, maintains that punishment’s unifying function can be traced to *mimesis*: the natural human inclination to imitate each other.⁷⁹ Although a thorough discussion of *mimesis*⁸⁰ is beyond the scope of this essay, the essence of Girard’s argument is that imitation “escalates into competition and rivalry,” which leads to dispute and aggression.⁸¹ To stop this cycle of competition and aggression, the law—and Girard contends that this is one of its primary functions—steps in.⁸²

[W]here only shortly before a thousand individual conflicts had raged unchecked between a thousand enemy brothers, there now reappears a true community, united in its hatred for one alone of its number. All the rancors scattered at random among the divergent individuals, all the differing antagonisms, now converge on an isolated and unique figure, the surrogate victim.⁸³

Gerard’s thesis, though most evident when applied to violent retributions for violent crimes, for example the death penalty,⁸⁴ also applies to ordinary criminal sanctions. As long as a sanction is retributive, it will unite a community against the transgressor; whether through anger, decency, or competition, the cultural function of punishment transforms a transgressor into a scapegoat. The hostility directed at him is larger than what it engendered and the punishment converts the crime into a release valve for community.⁸⁵ This is precisely the definition of a scapegoat.⁸⁶

B. The Omelas Scapegoat

Girard, taking the theory further, suggests that scapegoating may be a *goal* of the criminal law—not just a functional side effect. In support, he discusses the customs of “primitive” cultures where “the victim chosen by the community need not actually be guilty of anything,”⁸⁷ as well as past societies that encouraged, or even required, ritual violations from sacrificial victims.⁸⁸ There—where the law does not exclusively seek to deter or punish but pursues a different end altogether—law’s objective is transformed from ex-post retribution and deterrence into ex-ante “community peace.”⁸⁹ If so, the scapegoating process is complete and only one limiting factor remains: though the scapegoat need not actually *be* guilty for the punishment to unite the community, it must be *perceived* as such.⁹⁰

In keeping with Girard’s thesis—but straying from the subject of mimetic violence—this essay contemplates a different kind of scapegoat, which I will call the Omelas scapegoat. Unlike its criminal counterpart, the Omelas scapegoat does not seek to resolve rivalries or unify communities, but rather to camouflage the American dilemma.⁹¹ The Omelas scapegoat is not inherently guilty of any real transgression,⁹² yet much as we need the Omelas scapegoat, we hate its existence. This is because it is a casualty of the American ideal, a member of the disenfranchised minority. As moral beings, its misery troubles us.⁹³ Since we are also its beneficiaries—unable to help it without hurting ourselves and perennially afraid of *becoming* it—our concern turns to hatred.⁹⁴ As guilt breeds hatred, so hatred breeds guilt, in a vicious circle that continues unless, and until, we convince ourselves that our hatred is justified, and our guilt inappropriate.

Their tears at the bitter injustice dry when they begin to
perceive the terrible justice of reality, and to accept it.⁹⁵

This is where the law comes in. If our respect for law is—as Mead asserted—the obverse side of our hatred for the criminal aggressor,⁹⁶ then the criminal law may hold the perfect solution to our troubled conscience. We need only turn the object of our hatred into criminals. We need only turn them into Omelas scapegoats. Max Weber suggested that the powerful use their “asymmetrical control” to set subjective standards by which to judge the behavior of the powerless and so “[render] it consequential...”⁹⁷ If that is the case, then we may specifically—if subconsciously—*be choosing* to criminalize “victimless” behavior common among the disenfranchised while ignoring arguably worse acts by the wealthy and powerful. Transforming the poor into criminals may help appease our conscience—and justify our hatred.

C. The Crimes

“I will be good,’ it says. ‘Please let me out. I will be good!’”⁹⁸

Though the scapegoat may serve a purpose—to placate our conscience, for instance—its punishment will lack any empirical basis. It is not sanctioned because of its behavior, but rather to serve a function. Unlike the traditional criminal scapegoat whose punishment accomplishes a law enforcement purpose but who usually *did* transgress⁹⁹—the Omelas scapegoat’s offense may be less definite.

1. Solicitation and Prostitution

While the Supreme Court recently decreed that sexual relationships between consenting adults, regardless of sexual orientation, are protected by the constitutional right to privacy,¹⁰⁰ it has been less accommodating on the subject of solicitation. As a result, state legislatures can continue to discourage undesirable, but legal, sexual behavior by sanctioning conduct derivative of that behavior. The question becomes: If the constitution protects the right to engage in an act, homosexual intercourse for instance, how can soliciting that same act be punishable by law?¹⁰¹ One possibility is selective enforcement. The current liberal forbearance regarding homosexuality, for example—symbolized by gay pride parades, gay marriage debates and *Lawrence*¹⁰²—excludes certain acts and actors. While the status quo coexists with more attractive and successful homosexuals in hip neighborhoods like Dupont Circle (DC) and Chelsea (NY), it continues to condemn acts characteristic of their less glamorous counterparts. Perhaps this is because the beauty and success of the former make them the antithesis of the Omelas scapegoat (though they once lived in the closet) while the latter’s solicitation¹⁰³ leads us to associate them with prostitutes¹⁰⁴ and street-dwellers that lie openly in the Omelas camp.

To be sure, enforcement of anti-prostitution legislation usually targets analogous acts of solicitation—by undesirables. In light of the various statutory texts, which can typically be interpreted to cover panoply of condoned sexual acts, one is hard-pressed to deny selective prosecution at work. First, the widespread practice of ignoring participatory acts would seem to eliminate the potential predicament of penalizing a prostitute’s client, or “John,”¹⁰⁵ who tends not to be a likely Scapegoat and whom, consequentially, we may be loath to incarcerate.¹⁰⁶ Additionally, only a small sub—set of acts that potentially fall within the various broad statutory definitions of prosecution—those tending to correlate with disadvantaged sectors—are actually acted against. The California Penal Code, for example, provides that prostitution is “to engage in sexual conduct for

money or other consideration” (excluding “sexual conduct engaged in as a part of any stage performance, play, or other entertainment open to the public”)¹⁰⁷ yet prosecutors regularly ignore conduct clearly within the statutory definition. People who engage in sexual conduct for a drink, a gift, or a casting interview with a powerful Hollywood director are—statutory text notwithstanding—allowed to go about their business. Illinois—whose definition of “prostitution” is still broader¹⁰⁸—similarly disregards opportunities to prosecute its more privileged citizens and industries.¹⁰⁹ When, on the other hand, undesirable elements are involved, prosecutors do not hesitate in enforcing anti-prostitution legislation, as a recent San Francisco Task Force study recently confirmed:

Arrest statistics clearly indicate discrimination in prostitution arrests based on gender, since only a small percentage of those arrested are male despite the fact that males comprise the large majority of participants in prostitution. Police also discriminate against street prostitutes although they represent the smallest sector of prostitutes. Based on Task Force testimony, African American, transgender and immigrant women are specifically targeted in cases of harassment and other abuse.¹¹⁰

Thus, while the criminal justice system ignores or dismisses dominant-culture behavior that—by its own definition—amounts to prostitution, it aggressively prosecutes its marginalized and underprivileged citizens. America has apparently proclaimed that the (disenfranchised) Omelas scapegoat is a whore.

2. Drugs

In 1999, the federal government brought 29,306 drug charges, up from 11,854 in 1984.¹¹¹ The increase is indisputably connected to the passage of the 1986 Anti-Drug Abuse Act (the “Act”) that, among other things, eliminated the possibility of parole for possession offenses and established new mandatory minimum penalties for select drug crimes.¹¹² The Act also differentiated between powder and base cocaine (crack), providing for enormously different penalties. This has come to be known as the 100-to-1 crack-cocaine disparity. It takes one hundred times the amount of powder cocaine to trigger the same mandatory penalty as crack.¹¹³ In other words, a drug conviction involving five grams of crack bears the same five-year minimum sentence as one involving 500 grams of powder.¹¹⁴ The Congressional Sentencing Commission recapitulated as follows:

Five grams of crack represents 10-50 doses of crack, with an average retail price of \$225–\$750...In contrast, a powder cocaine dealer must traffic in 500 grams of powder cocaine in order to receive the same five-year sentence. The 500 grams of powder cocaine represent 2,500-5,000 doses, with an average retail price of \$32,500-\$50,000...Viewed another way, the 500-gram quantity of powder cocaine that can send one powder cocaine distributor to prison for five years can be distributed to up to 89 different street dealers who, if they chose to turn it into crack cocaine, could make enough crack to trigger the five-year penalty for each defendant.¹¹⁵

The disparity was initially based on Congress' conception of crack as especially harmful in relation to powder cocaine: especially popular, addictive, harmful to fetuses, accessible to minors, and linked to systemic crime and violence.¹¹⁶ When the Commission examined these allegations, however, it found them to be groundless and unequivocally concluded that the disparity is unwarrantable:

[T]he Commission firmly and unanimously believes that the current federal cocaine sentencing policy is *unjustified and fails to meet the sentencing objectives set forth by Congress* in both the Sentencing Reform Act and the 1986 Act. The 100-to-1 drug quantity ratio was established based on a number of beliefs about the relative harmfulness of the two drugs and the relative prevalence of certain harmful conduct associated with their use and distribution that *more recent research and data no longer support*.¹¹⁷

Moreover, the Commission found that the crack-cocaine disparity, while having little effect on drug crime prevention,¹¹⁸ has a vastly disproportionate impact on low-level offenders (street dealers)¹¹⁹ and minorities,¹²⁰ groups much more likely to be among America's poor and disenfranchised.¹²¹ Departing from its customary deference to the Commission, Congress rejected its findings and recommendations for "more appropriate and proportionate sentencing"¹²² and left sentencing scheme unchanged.¹²³

Current drug control policies—by emphasizing law enforcement in low-income urban areas with high minority populations—further aggra-

vate the disparity's impact on minority communities.¹²⁴ In 1999, six times more Blacks were arrested for drug offenses, resulting in more Black convictions—25 percent of Black inmates were serving drug-related sentences as opposed to 13 percent of White inmates.¹²⁵ Given the crack-cocaine disparity, Blacks also serve more time: 1997 statistics show a full 86 percent of Black drug offenders in federal prisons are serving time for crimes involving crack (compared with 5 percent of Whites).¹²⁶ It is also worth noting, in light of these statistical discrepancies and the high percentage of imprisoned minorities,¹²⁷ that a full 57 percent of the prisoners in our overcrowded federal prisons are non-violent offenders serving time for a *drug-related offense*.¹²⁸ These facts, particularly considering Congress' unusual disregard of its Commission's conclusions, suggest a second American proclamation: the Omelas scapegoat is a junkie.

D. The Correlation: The Criminals

“[T]he child...has not always lived in the tool room, and can remember sunlight and its mother's voice...”¹²⁹

There are other offenses that may engender Omelas scapegoats—homelessness, for example, is specifically penalized.¹³⁰ And there are a range of behaviors that the criminal justice system chooses not to sanction—such as gambling, which is known to negatively impact individuals and communities¹³¹—and illegal behavior that is frequently overlooked, such as white-collar crime.¹³² Even without these, it is notable that the characteristics of the Omelas scapegoat—poverty, minority status, and lack of education—correspond to a disproportionate share of America's prison population.

1. Race

A Black male born today has an 18.6 percent chance of serving time in prison during his lifetime.¹³³ If the child is Hispanic, his chances drop to 10 percent.¹³⁴ Still, the child's prospects are best—at 3.4 percent chance of incarceration—if he is White.¹³⁵ When factored into America's total demographic, these statistics mean that approximately 32 percent of Black and 17 percent of Hispanic males will spend some of their lives behind bars, compared to 5.9 percent of White males.¹³⁶ It should come as no surprise, then, that nearly 70% of *all* prison inmates are minorities¹³⁷ and that this disproportion is greater in certain low minority areas. In the year 2000, for example, certain parts of New York had up to 91 percent of their Black

population behind bars, and¹³⁸ a 1997 Minnesota sampling produced similar numbers.¹³⁹ According to Graham Boyd, director of the ACLU's drug policy litigation, America has a higher percent of its Black population in prison than South Africa did under apartheid.¹⁴⁰

University of Colorado Professor Richard Delgado argues that the origin of this imbalance can be traced to our "modern conception of black crime"¹⁴¹ and a few well-placed publications that gave rise to the notion of the Black man as criminal.¹⁴² He maintains, moreover, that the criminal image was *intentionally* imposed in response to a white social need to control and repress the Black population.¹⁴³ Delgado, then, identifies a process that closely resembles Omelas scapegoating. The sole difference lies in that his scapegoat is born from the need to repress¹⁴⁴ while the Omelas scapegoat ostensibly arises from oppression itself. In other words, Delgado's man is made criminal in order to repress him while the Omelas scapegoat is made criminal because he is repressed—to camouflage his repression and the guilt it triggers.

2. Wealth and Education

There is also a clear correlation between poverty and crime. It has been widely documented, discussed by law enforcement officials,¹⁴⁵ judicial officers¹⁴⁶ and criminal justice analysts,¹⁴⁷ and unequivocally measured. A 2002 Bureau of Justice publication, for instance, reported that 56 percent of inmates stemmed from single-guardian households,¹⁴⁸ an established cause of poverty in the United States.¹⁴⁹ Almost 20 percent had *no* pre-arrest personal income, while nearly 60 percent earned less than \$1,000 per month.¹⁵⁰ Fourteen percent were homeless the year prior to their arrest.¹⁵¹ The causes of the correlation are less clear. Nonetheless, though poverty may not be a function of criminality, the connection between the two is undeniable. A large percentage of people behind American bars are poor.

A second correlation exists—between crime and education. In 2002, 44 percent of jail inmates—compared to 76 percent of the general population¹⁵²—had neither a high school diploma nor a General Equivalency Degree.¹⁵³ Accordingly, the literacy skills of prisoners are "substantially lower than the household population."¹⁵⁴ Yet, formal education and literacy notwithstanding, inmates are no less *intelligent* than their unconfined counterparts. When compared to equivalently educated members of the general population, they "generally perform as well as or better."¹⁵⁵ As with poverty, the correlation is clear while the cause is uncertain.

E. The Targets

The door is always locked; and nobody ever comes, except that sometimes...the door rattles terribly and opens, and a person, or several people, are there. One of them may come in and kick the child to make it stand up. The others never come close, but peer in at it with frightened, disgusted eyes.¹⁵⁶

That the socio-economically disenfranchised constitute a disproportionate percentage of America's prison and jail populations cannot be solely due to substantive criminal designations. A lawbreaker becomes an inmate only if it is apprehended, tried and convicted. To support of statistical disparities and the scapegoat theory, then, the disenfranchised must be the subject of elevated police and prosecutorial attention.

Evidence shows that minorities are specifically targeted by law enforcement. A 1999 investigation into the "stop and frisk" practices of the New York City Police Department, for example, showed that Hispanics and Blacks are detained at a "disproportionately higher rate" than Whites—a fact unchanged by the supposedly higher crime rates in minority neighborhoods.¹⁵⁷ Similarly, a recent New Jersey study observed that while Blacks and Whites apparently violate traffic regulations at the same rate, the vast majority stopped—73.2 percent—is Black.¹⁵⁸ The "statistically vast" disparity was most astonishing in view of the fact that, at the time of the investigation, only 13.5 percent of the cars on the New Jersey turnpike had a Black driver or passenger.¹⁵⁹ As a result, Dr. John Lamberth of Temple University—the study's author—concluded that "[a]bsent some other explanation...it would appear that the race of the occupants and/or drivers of the cars is a decisive factor or a factor with great explanatory power."¹⁶⁰

Furthermore, the Supreme Court has determined that the "constitutional reasonableness" of traffic stops does not depend on the police officer's *actual motivations*.¹⁶¹ In other words, police can legally employ traffic violations as a pretext to check for drugs. Accordingly, given that 30.6 percent of Black—and 27.5 percent of Hispanic—inmates enter the federal prison system pursuant to drug convictions (compared with 18.5 percent of White offenders),¹⁶² racially disproportionate law enforcement efforts are likely to account—at least partially—for their increased incarceration rate.

Finally, another cause of the foregoing must also lie with State and District Attorneys. After all, they decide which alleged crimes—and criminals—to prosecute, and their discretion in this respect is practically boundless.¹⁶³

F. Concealment

“They know that they, like the child, are not free.”

If Omelas is America, the Omelas scapegoat the American disenfranchised, and law the vehicle that imprisons the Omelas scapegoat, then the question is: which came first, the scapegoat or the disenfranchised? If the scapegoat is the child in a basement, does the law help put it there or merely justify the fact it *was there* in the first place?

The answer, perhaps, lies in America’s ever-expanding prison population. The incongruity between current prison population increases and decreasing crime rates has prompted much debate regarding the tenuous correlation between criminality and imprisonment.¹⁶⁴ To be sure, steadily rising sentences are partly to blame—the number of state prison admissions of inmates with sentences exceeding one year rose from 460,739 in 1990 to 615,377 in 2002¹⁶⁵—as is America’s infamous “war on drugs.”¹⁶⁶ Yet the question remains as to *why*, despite a decline in criminality,¹⁶⁷ more Americans are being incarcerated. One well-established and much-debated theory contends that higher incarceration rates are “part of an effort to institutionalize the surplus or unemployable population in order to control inflation by keeping unemployment relatively low, as well as a method of controlling the underclass...”¹⁶⁸ Though seemingly extreme, this thesis is not unfeasible. A recent study found that including America’s prison population into poverty measurements would increase the number of its poor by *9 to 15 percent*.¹⁶⁹

If correct, this would indicate that disenfranchisement came first and that, while Omelas scapegoating may work to *keep* the disenfranchised down, it did not *put* them there. This conclusion conforms to the scapegoating models of Durkheim, Mead and Girard. It also accords with the requirement—for proper execution of the “scapegoat mechanism”—that the scapegoating process remain hidden.¹⁷⁰ The latter, as per Girard, is crucial because the ability to pierce—and so demystify—veiled persecution hidden behind “transparent accusations...[and] texts that appear innocent” leads to “the deciphering of cultural mechanisms” that in turns leads to their collapse.¹⁷¹ Hence, if even partly accurate, this would seem to expose Omelas scapegoating as the modern solution to an ancient dilemma—the American dilemma. First come the poor and the downtrodden, then our guilt, and then the criminal mask. Out of sight is out of mind. As in Omelas, in America.

III. CONCLUSION

[T]heir happiness, the beauty of their city, the tenderness of their friendships, 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.¹⁷²

It is not malicious, but it does feel uncomfortable. Upon piercing the socio-economic scapegoating¹⁷³ upon which its glory depends—and seeing the child in the basement—America's conscience grows troubled. The beneficiaries see those disadvantaged, and the sight is chilling. We realize their fortune depends on misfortune and so we must bear part of the blame. We also fear them, those unfortunate American casualties—we fear becoming one of them. We hate them. But, unlike the people of Omelas,¹⁷⁴ we have nowhere to go.

NOTES

- 1 GEORGE HERBERT MEAD, "The Psychology of Punitive Justice", 23 *AM. J. SOC.* 577, 586-87 (1918), available at <http://spartan.ac.brocku.ca/~lward/Mead/pubs/Mead1918a.html>.
- 2 *Id.* at 585-86.
- 3 See generally URSULA K. LEGUIN, "The Ones Who Walk Away from Omelas", in *The Wind's Twelve Quarters*, 345 (HarperPrism 1995) (1975).
- 4 WILLIAM JAMES, "The Moral Philosopher and the Moral Life," in *The Will to Believe and Other Essays in Popular Philosophy*, 184, 188 (1897).
- 5 See generally LEGUIN, *supra* note 3.
- 6 *Id.* at 349.
- 7 *Id.* at 350.
- 8 *Id.* at 347-48.
- 9 *Id.*
- 10 *Id.* at 351.
- 11 *Id.*
- 12 *Id.*
- 13 *Id.* at 352-53.
- 14 *Id.*
- 15 *Id.* at 354.
- 16 *Id.*
- 17 *Id.* at 355.
- 18 *Id.*
- 19 *Id.*
- 20 *Id.*
- 21 *Id.* at 356.
- 22 *Id.*
- 23 *Id.*
- 24 See, *e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (evaluating Texas' reliance on local property tax revenues to fund school districts); DEBRA L. IRELAND, "The Price of Education", 6 *Scholar* 159 (2003) (contending that local control and property tax-based funding result in economically segregated schools that deny disadvantaged children an equal opportunity for education and advancement).
- 25 See, *e.g.*, STEPHEN LOFFREDO, "Poverty, Democracy and Constitutional Law", 141 *U. PA. L. Rev.* 1277, 1278 (1993) ("The Court's nearly limitless deference to legislation that disadvantages poor people ignores the central role that wealth plays in American politics."); DAVID ADAMANY, "PAC's and the Democratic Financing of Politics", 22 *Ariz. L. Rev.* 569, 571 (1980) (contending that economic inequality results in different participation by "presumably equal citizens").
- 26 See, *e.g.*, KENNETH THOMPSON, EMILE DURKHEIM 81 (1982) (excerpt from EMILE DURKHEIM, *The Division of Labor in Society* (1893)) ("If one class of society is obliged, in order to live, to take any price for its services, while another can abstain from such action thanks to resources at its disposal which, however, are not necessarily due to any social superiority, the second has an unjust advantage over the first at law.").

- 27 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding that racial segregation in public schools deprives Minority children of equal educational opportunities).
- 28 See JAMES E. RYAN, “Schools, Race, and Money”, 109 *Yale L.J.* 249, 273 (1999) (citing 1995 statistics showing that—though White students represented over 70% of total public school enrollment—urban schools taught two-thirds of all Black students and nearly half of all Hispanic students but less than one-quarter of all White students).
- 29 *Id.*
- 30 See IRELAND, *supra* note 24, at n. 59 (“Approximately 30% of all African-Americans live in hypersegregated...conditions, defined as living such that they will not encounter any Anglos in their schools or neighborhoods. Housing segregation also affects a significant proportion of the Latino population in America.”) (citing JAMES E. RYAN & MICHAEL HEISE, “The Political Economy of School Choice”, 111 *Yale L.J.* 2043, 2093-94 (2002)).
- 31 Press Release, U.S. Bureau of Justice Statistics, Department of Justice, Nation’s Prison Population Increase Largest in Four Years, *2 (2004), at <http://www.ojp.usdoj.gov/bjs/pub/press/pjim03pr.htm>.
- 32 *San Antonio Indep. Sch. Dist.*, 411 U.S. at 35 (holding that education and equal access to such is not a federal responsibility).
- 33 See generally IRELAND, *supra* note 24 (discussing the effects of local control and property-tax funding public schools).
- 34 *Id.* at 169 (citing JONATHAN KOZOL, *Savage Inequalities* 54 (1991); Mildred Wigfall Robinson, Financing Adequate Educational Opportunity, 14 *J. L. & POL’Y* 483, 486-87, 512, 514 (1998)); See also *Abbott v. Burke*, 575 A.2d 359, 373 n.5-7 (N.J. 1990) (identifying States where property taxes have been found to be in compliance with the State’s constitution, and on what grounds); *San Antonio Indep. Sch. Dist.*, 411 U.S. at 1-3 (holding that State reliance on local property tax revenues does not violate the equal protection clause despite disparities in property values among area districts).
- 35 Ireland, *supra* note 24, at 162.
- 36 *Id.* at 169-70.
- 37 *Id.* at 162-63.
- 38 See *San Antonio Indep. Sch. Dist.*, 411 U.S. at 11-13 (comparing Edgewood, a San Antonio, Texas, 96 percent Minority inner city school district with the lowest average assessed property value and median family income in the metropolitan area but the highest equalized tax rate (\$1.05 per \$100 of assessed property) with Alamo Heights, the wealthiest—and predominantly White—school district in San Antonio, with a tax rate of \$.85 per \$100 of assessed property).
- 39 IRELAND, *supra* note 24, at 171-72.
- 40 The federal government, in 2001, enacted the No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425-2094 (2001). It is the latest of a string of attempts to improve public school education. Ireland, *supra* note 24, at 180. The Act will-like its predecessors-likely fail to significantly impact American education due to federal impotence and Majority pressure. *Id.* at 181. For examples of the Act’s (unsuccessful) precursors, see, *e.g.*, National Defense Education Act, 20 U.S.C. §§ 401-591 (2000) (funding for math, science, and foreign language programs); Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701 (2000) (establishing grants for programs targeted to children of low-income families); Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 (2000)

- (establishing grants for school libraries and state departments of education); Department of Education Organization Act, 20 U.S.C. §§ 3401-3510 (2000) (now codified as amended at 20 U.S.C. §§ 1221, 5899) (establishing the Department of Education); Educate America Act, 20 U.S.C. §§ 5801-6084 (1994).
- 41 Although some States have partially revamped their systems, school funding is still largely based on property taxes. Furthermore, the changes are resented by affluent Americans, who begrudge “being told by the state to hand over the fruits of their labor, imperiling the edge they have obtained.” IRELAND, *supra* note 24, at 175-79 (citing DENISE C. MORGAN, “The New School Finance Litigation”, 96 *N.W. U. L. Rev.* 99, 142-43 (2001)).
- 42 *Id.* at 170-71 (citing JUDITH A. WINSTON, “Achieving Excellence and Equal Opportunity in Education”, 53 *Admin L. Rev.* 997, 1000 (2001) (observing a correlation between high percentage Minority enrollment and inadequate instruction and facilities, and below average achievement scores)).
- 43 JERRE COLLINS, “Leaving Omelas”, in 27-4 *Studies in Short Fiction* 525, 525-26 (1990).
- 44 The U.S. Census Bureau measures poverty by computing income and need. *U.S. Census Bureau, Dep’t of Commerce, Poverty – How the Census Bureau Measures Poverty*, *1-2 (Aug. 26, 2004) at <http://www.census.gov/hhes/poverty/povdef.html>.
- 45 CARMEN DENAVAS-WALT, BERNADETTE D. PROCTOR & ROBERT J. MILLS, U.S. CENSUS BUREAU, DEP’T OF COMMERCE, *Income, Poverty, and Health Insurance Coverage in the United States: 2003*, 9 (2004) at <http://www.census.gov/prod/2004pubs/p60-226.pdf>.
- 46 GREGORY JORDAN, “The Causes of Poverty - Cultural vs. Structural”, 1 *Perspectives in Pub. Affairs* 18, 24 (2004), at <http://www.asu.edu/mpa/perspectivesdocs/jordan.pdf> (citing UNITED STATES BUREAU, *Historical Income Tables - Households* (2003), at <http://www.census.gov/hhes/income/histinc/h04.html>)).
- 47 LEGUIN, *supra* note 3, at 354.
- 48 JORDAN, *supra* note 46, at 24.
- 49 *Id.* at 19
- 50 *Id.* at 20 (citing H.R. RODGERS, *American Poverty in a New Era of Reform* (2000) (quoting MYRON MAGNET)).
- 51 *Id.* at 21 (citing ORLANDO PATTERSON, “Taking Culture Seriously”, in *Culture Matters* 202, 208 (L.E. Harrison & S.P. Huntington eds., 2000)).
- 52 *Id.* at 25.
- 53 *Id.* at 24 (“The gains in US GDP are in part due to the success of a consumer economy that rewards Wal-Mart and its cousin conglomerates, but at what cost to the Americans working low wage/benefit jobs?”).
- 54 *Id.* at 24-27.
- 55 *Id.*
- 56 *Id.* at 27.
- 57 ELIZABETH M. GRIECO & RACHEL C. CASSIDY, U.S. CENSUS BUREAU, DEP’T OF COMMERCE, “Overview of Race and Hispanic Origin” - *Census 2000 Brief*, 3 (2001) at <http://www.census.gov/prod/2001pubs/c2kbr01-1.pdf>.
- 58 DENAVAS-WALT ET AL., *supra* note 45, at 9.

- 59 *Id.*
- 60 GRIECO, ET AL., *Overview of Race and Hispanic Origin*, *supra* note 57, at 3.
- 61 DENAVAS-WALT ET AL., *supra* note 45, at 10.
- 62 *Id.*
- 63 JORDAN, *supra* note 46, at 22.
- 64 *Id.* at 23 (citing J. KIRSCHENMAN & K.M. NECKERMAN, “We’d Love to Hire Them, But...”, in *The Urban Underclass* 203, 210 (C. Jenks & P.E. Peterson eds., 1991)).
- 65 *Id.*
- 66 See *supra* note 32.
- 67 JORDAN, *supra* note 46, at 32.
- 68 *Id.* at 22; DENAVAS-WALT ET AL., *supra* note 45, at 10-13.
- 69 See JOSEPH W. SINGER, “Something Important in Humanity”, 37 *Harr. C.R.-C.L. L. Rev.* 103, 105 (2002) (citing LOUIS KAPLOW & STEVEN SHAVELL, “Fairness Versus Welfare”, 114 *Harr. L. Rev.* 961 (2001)).
- 70 *Id.* at 105-106 (emphasis added).
- 71 JERRE COLLINS, *supra* note 43, at 532-34.
- 72 LEQUIN, *supra* note 3, at 355.
- 73 ROBERT G. HAMERTON-KELLY, *The Gospel and the Sacred* 131 (1993).
- 74 See, e.g., AUSTIN SARAT, “The Cultural Life of Capital Punishment,” 11 *Yale J. L. & Human.* 153, 160 (1999) (citing DAVID GARLAND, “Punishment and Culture: The Symbolic Dimensions of Criminal Justice”, 11 *Stud. L. Pol. & Soc’y* 191, 191 (1991)) (“Punishment...‘helps shape the overarching culture and contribute to the generation and regeneration of its terms.’”); MEAD, *supra* note 1, at 591-92 (“The cry of “stop thief” unites us all as property owners against the robber. We all stand shoulder to shoulder as Americans against a possible invader. Just in proportion as we organize by hostility do we suppress individuality.”); EMILE DURKHEIM, *Selected Writings* 127 (Anthony Giddens trans. & ed., Cambridge U. Press 1972) (reproducing a translated excerpt from EMILE DURKHEIM, *The Division of Labor in Society* (1893)) (“Crime brings together honest men and concentrates them.”).
- 75 *Id.*
- 76 DURKHEIM, *Selected Writings supra* note 74, at 127.
- 77 MEAD, *supra* note 1, at 591.
- 78 See *supra* note 76.
- 79 RENE GIRARD, *Things Hidden Since the Foundation of the World*, 7-8 (Stephen Bann & Michael Metteer trans., Stanford U. Press 1987) (1978).
- 80 For critiques of Girard’s theory of mimesis, see, e.g., LEO D. LEFEBURE, “Victims, Violence and the Sacred: The Thought of Rene Girard,” *Christian Century*, Dec. 11, 1996, ¶ 4 at <http://www.findarticles.com/p/articles/mim1058/isn36v113/ai18962919> (“Such novelists as Cervantes, Stendhal, Dostoevsky and Proust taught [Girard] that humans learn what to desire by taking other people as models to imitate. Aware of a lack within ourselves, we look to others to teach us what to value and who to be.”); GIL BAILIE, *Violence Unveiled* 116-17 (1995) (“The second child will be more interested in the first child than in any of the toys, but this interest is translated into a concern for the toy in which the first child has

- shown some interest ...The two children feed each other's desire for the toy by demonstrating to each other how desirable it is...").
- 81 GIRARD, *Things Hidden Since the Foundation of the World*, *supra* note 79, at 7-10.
- 82 *Id.* at 10-19.
- 83 GIRARD, *Violence and the Sacred* 79 (Patrick Gregory trans., Johns Hopkins U. Press 1977).
- 84 See DONALD L. BESCHLE, "Why Do People Support Capital Punishment? The Death Penalty As Community Ritual", 33 *Conn. L. Rev.* 765, 775 (2001) ("Some dramatic step must be taken to stop the spiral of violence and reunite the community; since violence must return violence, this step must itself be violent."); GIRARD, *Violence and the Sacred*, *supra* note 83, at 26 (Patrick Gregory trans., Johns Hopkins U. Press 1977) ("Only violence can put an end to violence, and that is why violence is self-propagating.").
- 85 GIRARD, *Violence and the Sacred*, *supra* note 83 at 79.
- 86 See *supra* note 76.
- 87 BESCHLE, *supra* note 84, at 775-76 (citing GIRARD, *Violence and the Sacred*, *supra* note 83 at 21-22).
- 88 *Id.* at 776, n. 56 (citing GIRARD, *Violence and the Sacred*, *supra* note 83 at 104-10, 274-75) (A prisoner, for example, "might be encouraged to violate the law, or coerced into a ritualistic escape attempt" while a society that executes its kings may, as a part of the execution ritual, "require that the king ritually engage in forbidden acts of violence or incest").
- 89 *Id.* at 778-79.
- 90 This is because a punishment that is considered unfair will not bring the community together but rather may accomplish the exact opposite. *Id.* at 779 (citing GIRARD, *Violence and the Sacred*, *supra* note 83, at 20-22).
- 91 See *supra* Section 1 ("The American Dilemma").
- 92 But See PATRICK DEVLIN, "Morals and the Criminal Law", in *The Enforcement of Morals* 1, 17 (1965) ("Before a society can put a practice beyond the limits of tolerance, there must be a deliberate judgment that the practice is injurious to society.").
- 93 See JERRE COLLINS, *supra* note 43, at 532-34.
- 94 See JOHN E. TROPAN, *Does America Hate the Poor?* 1-5, 125-52 (1998) (The poor create anxiety as our "mirrors of destiny," illustrating the gap between potential and actual fates within the dominant and indigent cultures in America. Our societal response to this anxiety is hatred of the poor and-among the poor themselves-self-hatred.").
- 95 LEGUIN, *supra* note 3, at 355.
- 96 MEAD, *supra* note 1, at 585-86.
- 97 ROBERT A. JONES, EMILE DURKHEIM 57 (1986).
- 98 LEGUIN, *supra* note 3, at 354.
- 99 But see *supra* note 90.
- 100 *Lawrence v. Texas*, 539 U.S. 558, 583-84 (2003) (Overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), and holding that a statute criminalizing same-sex sodomy violated due process.) See also *Romer v. Evans*, 517 U.S. 620, at 634-635 (1996) ("After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.").

- 101 See, e.g., *People v. Uplinger*, 444 N.Y.S.2d 373 (City Ct. Buffalo 1981) (holding that a statute prohibiting “loitering in public place for the purpose of engaging in or soliciting another person to engage in deviate sexual intercourse” and defining “deviate sexual intercourse” as “certain types of sexual conduct between persons of the same sex” was constitutional) (citing N.Y. Penal Law §§ 130.00(2), 240.35(3) (2005)).
- 102 See *Lawrence*, 539 U.S. at 583-84.
- 103 Although wealthy, thriving homosexuals may also solicit, the public tends to associate the act almost exclusively with less affluent homosexual sectors.
- 104 See, e.g., *Uplinger*, 444 N.Y.S.2d at 404, 410 (Although the loitering statute was used against both prostitutes and homosexuals, the court specified that it was the homosexuals’ prostitute-like behavior which offended: “The activity of homosexuals who loiter on the streets to solicit one another is akin to the loitering of prostitutes in its effect on the public.”).
- 105 After all, Johns seldom solicit; that is the prostitutes’ job.
- 106 One Florida study found that the prosecution of Johns is nearly “nonexistent.” They said this was probably “because attorneys, judges, and prosecutors did not regard the men who patronized prostitutes as criminals...[but] viewed [the patrons of prostitutes] as ‘frequently respectable men who had much to lose by public exposure.’” GAIL D. HOLLISTER, “Tort Suits for Injuries Sustained During Illegal Abortions”, 45 *Vill. L. Rev.* 387, 458 (2000) (citing “Report of the Florida Supreme Court Gender Bias Study Commission”, 42 *Fla. L. Rev.* 803, xv (1990)).
- 107 Cal. Penal Code § 653.20 (2005).
- 108 720 Ill. Comp. Stat. Ann. 5/11-14(a) (2004) (“Any person who performs, offers or agrees to perform *any* act of sexual penetration...for any money, property, token, object, or article or anything of value, or *any touching or fondling of the sex organs* of one person by another person, for any money, property, token, object, or article or anything of value, for the purpose of sexual arousal or gratification commits an act of prostitution.”) (emphasis added).
- 109 The State could prosecute, for example, that which California Penal Code expressly exempts, including sexual fondling by remunerated actors while filming of a movie, or penetration while filming a pornographic film.
- 110 CAROL LEIGH, “A First Hand Look at the San Francisco Task Force Report on Prostitution”, 10 *Hastings Women’s L.J.* 59, n. 21 (1999).
- 111 U.S. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, *Special Report: Federal Drug Offenders 1* (2001), at <http://www.ojp.usdoj.gov/bjs/abstract/fdo99.htm>.
- 112 Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986), codified at 21 U.S.C. § 841 (2002).
- 113 *Id.*
- 114 *Id.* Incidentally, a heroin dealer would have to carry 375 grams to incur the same five-year sentence. See also TRACEY L. MEARES, NEAL KATYAL & DAN M. KAHAN, “Updating the Study of Punishment”, 56 *Stan. L. Rev.* 1171, 1175-76 (2004).
- 115 U.S. SENTENCING COMM’N, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 159-60 (1995), at <http://www.ussc.gov/crack/exec.htm>.
- 116 U.S. SENTENCING COMM’N, *Special Report to Congress: Cocaine and Federal Sentencing Policy* 90 (2002), at <http://www.ussc.gov/rcongress/02crack/2002crackrpt.pdf>.

- 117 *Id.* at 91 (emphasis added).
- 118 When faced with the statistics, the Commission went so far as to speculate about the true purpose of the legislation: “The high concentration of federally sentenced street-level crack cocaine dealers also may indicate that scarce federal law enforcement resources are not being focused on serious and major traffickers, as Congress *appears* to have desired.” *Id.* at 100 (emphasis added).
- 119 *Id.* at 99 (“In 2000, the majority of federal crack cocaine offenders—two-thirds—were street level dealers.”).
- 120 *Id.* at 102 (“The overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000.”).
- 121 A street-level “foot soldier” gang dealer is likely to earn an average of \$247.50 per month, or \$2,970 per year. STEVEN D. LEVITT & SUDHIR A. VENKATESH, “An Economic Analysis of a Drug-Selling Gant’s Finances”, *Nat’l Bureau of Economic Research, Working Paper 6592*, at 402 at <http://www.nyu.edu/econ/dept/courses/lagos/GangFinances.PDF>.
- 122 *2002 Special Report to Congress: Cocaine and Federal Sentencing Policy*, *supra* note 116 at 104.
- 123 The sentencing guidelines have since been rendered merely advisory. *United States v. Booker*, 125 S. Ct. 738, 743 (2005). This fact, however, does little to affect the substance of the instant argument.
- 124 HUMAN RIGHTS WATCH, *World Report *15* (1999), at <http://www.hrw.org/worldreport99/usa/>.
- 125 *Id.*
- 126 *Special Report: Federal Drug Offenders*, *supra* note 111 at 11.
- 127 See Press Release, *Nation’s Prison Population Increase Largest in Four Years*, *supra* note 31, at *2 (68 percent of inmates are members of Minority groups.).
- 128 U.S. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, *Criminal Offenders Statistics *4* (2004), at <http://www.ojp.usdoj.gov/bjs/crimoff.htm>.
- 129 LEGUIN, *supra* note 3, at 353-54.
- 130 Approximately 70 percent of the cities surveyed in the 2002 National Homeless Civil Rights Organizing Project had enacted at least one or more new “quality of life” laws specifically targeting homeless people, including “banning bathing and begging in public places, ‘aggressive’ panhandling, sleeping or camping in public, sitting or lying in particular places, loitering or loafing, and obstructing sidewalks and public places, as well as restrictions on spitting, merchandise carts, charging for washing cars and automobile windows, entering vacant buildings, creating odors, living in cars, and public nuisance.” *Ideas and Trends - Homelessness*, 31 NO. CD-18 HDR Current Dev. 10 (2003).
- 131 JOHN W. KIND, “The Failure to Regulate the Gambling Industry Effectively”, 27 *S. Ill. U. L.J.* 221, 223-24 (2003).
- 132 The cost of white-collar crime surpasses the loss from “all the crimes associated with African Americans put together.” RICHARD DELGADO, “Rodrigo’s Eighth Chronicle: Black Crime, White Fears—On the Social Construction of Threat”, 80 *Va. L. Rev.* 503, 518 (1994).
- 133 Projection statistics are based on current incarceration rates. *Criminal Offenders Statistics*, *supra* note 128, at *2.
- 134 *Id.*
- 135 *Id.*

- 136 *Id.*
- 137 The exact number is 68 percent. Nation's Prison Population Increase Largest in Four Years, *supra* note 31, at *2.
- 138 PRISON POLICY INITIATIVE, *Percent of New York's Black Population in Prison* (2003), at <http://www.prisonpolicy.org/atlas/nycountyprisonersblack.shtml> (relying on N.Y. DEP'T OF CORR. SERV. and U.S. CENSUS STATISTICS (2000)).
- 139 MEGAN THOMAS, *Districting, Representation and Prisons* (1997), at <http://blog.lib.umn.edu/archives/thom0286/iziziz/meganthomas.ppt>. (The percentage of Black population in Minnesota county prisons was found to be, respectively: Carlton, 81%; Pine, 71%; Sherburne, 55%; Swift, 95%; Rice, 53%; Waseca, 68%).
- 140 GRAHAM BOYD, *CourtTV Online Transcripts*, Sept. 20, 2005, at *7, at <http://www.courtTV.com/talk/chattranscripts/boyd.html>.
- 141 DELGADO, *supra* note 132, at 510.
- 142 *Id.* (DELGADO points to the following sources, among others: MICKEY KAUS, *The End of Equality* (1992); WILLIAM JULIUS WILSON, *The Truly Disadvantaged* (1987); DANIEL PATRICK MOYNIHAN, *Family and Nation* (1986); CHARLES MURRAY, *Losing Ground* (1984); ALFRED BLUMSTEIN, "On the Racial Disproportionality of United States' Prison Populations", 73 *J. Crim. L. & Criminology* 1259 (1982) (arguing that the high black crime rate is real and not the product of discriminatory enforcement); NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, *To Establish Justice, To Insure Domestic Tranquility* (1969); NAT'L ADVISORY COMM'N ON CIV. DISORDERS, *Report of the National Advisory Commission on Civil Disorders* (1968); PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUSTICE, *The Challenge of Crime in a Free Society* (1967); U.S. DEP'T OF LABOR, OFFICE OF POL'Y PLANNING AND RES., *The Negro Family: The Case for National Action* (1965)).
- 143 *Id.* at 514-16 (citing RICHARD DELGADO & JEAN STEFANCIC, "Images of the Outsider in American Law and Culture", *Cornell L. Rev.* 1258, 1264-65 (1992)).
- 144 *Id.*
- 145 NEIL MACKAY, "Mean Streets Revisited", *Sun. Herald*, Oct. 24, 2004, at 17 ("Like anyone who works in the criminal justice system, [Detective Superintendent] Carnochan sees a 'direct correlation between violence and crime and poverty and deprivation.'").
- 146 MATTHEW D. LAPLANTE, Evidence shows crime and poverty linked, *Newsregister.com*, Sept. 11, 2003, *2, at <http://www.newsregister.com/news/story.cfm?storyno=170630> ([Oregon's Yamhill County's presiding judge, John Collins] observed that "When 90 percent or more of the defendants have to get court-appointed attorneys, that certainly speaks loudly...").
- 147 HALVOR MEHLUM, EDWARD MIGUEL & RAGNAR TORVIK, "Rainfall, Poverty and Crime in 19th Century Germany", *Oslo U. Dept. of Econ. Memorandum Ser.* 04/2004, 13 (2004), at <http://ideas.repec.org/p/hhs/osloec/2004004.html> ("[T]he effect of poverty on property crime is large and significant."); BRUCE WEINBERG, ERIC GOULD & DAVID MUSTARD, "Crime Rates and Local Labor Market Opportunities in the United States": 1979-1995, *Ohio ST. U. Dept. of Econ. Working Papers* 98-11, 29 (1998), at <http://ideas.repec.org/p/osu/osuewp/98-11.html> ("Our results indicate that economic conditions are important determinants of crime").

- 148 Special report, U.S. BUREAU OF JUSTICE STATISTICS, DEPARTMENT OF JUSTICE, 2002 *Profile of Jail Inmates 1* (2004), at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pji02.pdf>.
- 149 DAVID T. ELLWOOD, Ford Foundation Project on Social Welfare and the American Future, *Divide and Conquer: Responsible Security for America's Poor* 9 (1987) (“[O]nly 7 percent of . . . children who [grow] up entirely in single-parent homes [will] escape poverty, and an astonishing 62 percent [will] be poor during their entire first ten years of life! Here poverty is virtually guaranteed, and it is likely to last throughout childhood.”).
- 150 2002 *Profile of Jail Inmates*, *supra* note 148, at 9.
- 151 *Id.*
- 152 KARL O. HAIGLER, CAROLINE HARLOW, PATRICIA O’CONNOR & ANNE CAMPBELL, Executive Summary of Literacy Behind Prison Walls: Profiles of the Prison Population from the *National Adult Literacy Survey*, Nat’l Ctr. for Educ. Stats., *3 (1994), at <http://www.nces.ed.gov/naal/resources/execsummprison.asp#priorexp>.
- 153 2002 *Profile of Jail Inmates*, *supra* note 148, at 2.
- 154 HAIGLER et al., *supra* note 152 at *3 (The average proficiencies of prison inmates are “246 on the prose scale, 240 on the document scale, and 236 on the quantitative scale,” while their household counterparts “average 273 on the prose scale, 267 on the document scale, and 271 on the quantitative scale.”).
- 155 *Id.*
- 156 LEGUIN, *supra* note 3, at 353.
- 157 Press Release, OFFICE OF NEW YORK STATE ATTORNEY GENERAL ELLIOT SPITZER, “Spitzer Releases Results of Investigation into NYPD “Stop and Frisk” Practices”, *1-2 (Dec. 1, 1999), at <http://www.oag.state.ny.us/press/1999/dec/dec01a99.htm> (Blacks are 23 percent, and Hispanics 39 percent, more likely to be stopped than Whites).
- 158 DAVID A. HARRIS, “The Stories, the Statistics, and the Law: Why ‘Driving While Black’ Matters,” 84 *Minn. L. Rev.* 265, 278-79 (1999) (citing Report of Dr. John Lamberth, Plaintiff’s Expert, Revised Statistical Analysis of the Incidence of Police Stops and Arrests of Black Drivers/Travelers on the New Jersey Turnpike Between Exits or Interchanges 1 and 3 from the Years 1988 Through 1991, at 2, State v. Pedro Soto, 734 A.2d 350 (N.J. Super. Ct. Law. Div. 1996) (The rate of White to Black traffic violations were measured according to the turnpike violator census, “in which observers in moving cars recorded the races and speeds of the cars around them.”)).
- 159 *Id.*
- 160 *Id.*
- 161 *Whren v. United States*, 517 U.S. 806, 813 (1996).
- 162 2002 *Profile of Jail Inmates*, *supra* note 148, at 4.
- 163 See, e.g., *Wayte v. United States*, 470 U.S. 598, 607 (1985) (To prevail on a claim of selective prosecution, claimant must demonstrate that the prosecutorial policy had a discriminatory effect and also that it was motivated by a discriminatory purpose).
- 164 JORDAN, *supra* note 46, at 18.
- 165 2002 *Profile of Jail Inmates*, *supra* note 148, at 6.

- 166 See generally *Id.*; HUMAN RIGHTS WATCH, *supra* note 124 (As a result of the “war on drugs,” the prisons and jails of the United States are increasingly peopled by nonviolent offenders.).
- 167 JORDAN, *supra* note 46, at 25 (The crime rate in America has decreased significantly in the past ten years.).
- 168 *Id.* at 25-26 (citing GEORGE RUSCHE & OTTO KIRCHHEIMER, *Punishment and Social Structure* (1939)).
- 169 *Id.* at 25-26 (citing IAN IRVINE & KUAN XU, Crime, “Punishment and the Measurement of Poverty in the United States”, 1979-1997, *Dalhousie U. Econ. Working Paper* 3 (2003), at <http://ssrn.com/abstract=423220>)).
- 170 See ROB MOORE, 1 *The Theory of Rene Girard and its Theological Implications* 4-5 (2002), at <http://www.kyrie.com/outer/girard/GirardandTheologyPartI.pdf> (citing GIL BAILIE, *Violence Unveiled* 33 (1995)).
- 171 GIRARD, *Things Hidden Since the Foundation of the World*, *supra* note 79 at 130.
- 172 LEGUIN, *supra* note 3, at 354.
- 173 Thus threatening, as per Girard, the decomposition of these crucial “cultural mechanisms.” GIRARD, *Things Hidden Since the Foundation of the World*, *supra* note 79 at 130.
- 174 See LEGUIN, *supra* note 3, at 356-57.