From a Tight Place: Crime, Punishment, and American Liberalism

Jonathan Simon
Book Review

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I. CRIME, PUNISHMENT, AND AMERICAN GOVERNMENT

It is surely one of the ironies of President Bill Clinton's remarkable career that he will be remembered both as the leader who helped save the Democratic Party from a near fatal lack of resolve on fighting crime and as a chief victim of a governmental culture obsessed with detecting and punishing crime. Clinton's saga is only one part of the story of how a great fear of crime and a powerful passion to punish have reshaped the dynamics of American elections and, ultimately, the administration of government at the federal and state levels during the last thirty years.

Signs of this transformation were present far earlier than the 1990s. In 1964, presidential candidate Barry Goldwater's acceptance speech at the Republican National Convention addressed crime in the streets and a general threat to law and order in what he labeled the permissive climate of the early 1960s. Goldwater lost by a landslide, but the victorious Democrat, Lyndon Johnson, wasted little time in appointing a national Professor of Law, University of Miami.

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1. See E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 179 (1991) ("Tonight, there is violence in our streets, corruption in our highest offices, aimlessness among our youth, anxiety among our elderly, and there's a virtual despair among the many who look beyond material successes toward the inner meaning of their lives.") (quoting Barry Goldwater, Acceptance Speech at the Republican National Convention (July 15, 1964)).
2. His speech is primarily remembered for his embrace of extremism. "[E]xtremism in the defense of liberty is no vice . . . [M]oderation in the pursuit of justice is no virtue." DIONNE, supra note 1, at 179 (quoting Barry Goldwater, Acceptance Speech at the Republican National Convention (July 15, 1964)).
crime commission to document the crime problem and recommend effective strategies for managing it.\(^3\)

In 1968, Republican Richard Nixon made law and order a central issue in his campaign and defeated Democrat Hubert Humphrey, who expressed a preference for spending government money on school teachers instead of police officers.\(^4\) Despite Nixon’s expressed intentions, the implementation of strategies designed to reduce crime were complicated by a multitude of issues, including urban riots, busing for integration, campus disturbances, and the Vietnam War.

It was not until the 1980s that crime and punishment emerged from the multitude of “social issues” to become dominant elements in political campaigns.\(^5\) Both Presidents Reagan\(^6\) and Bush\(^7\) embraced punishment as one of the few forms of domestic governance defensible within their political ideology.\(^8\) As presidential candidates, both men castigated Democrats and other liberals for having too much sympathy for criminal defendants and offenders, a strategy that helped secure their respective victories. The effectiveness of this type of campaign tactic was not limited to national politics, it also proved to be a winning formula for Republican candidates in state elections.\(^9\)

Despite early efforts like that of President Johnson’s crime commission, Democrats have generally found themselves losers in the reconfiguration of politics around crime and punishment.\(^10\) Though many Democrats in Congress voted for the crime bills introduced by Presidents Reagan and Bush,\(^11\) and Democrats at the state level generally supported increases in prisons and prison sentences, their party was wounded dur-


\(^4\) This is a position practically unimaginable for a credible Democratic contender in the Clinton years. See Harry A. Chernoff, The Politics of Crime, 33 HARV. J. ON LEGIS. 527, 534 (1996).


\(^6\) See KATHERINE BECKETT, MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS 50-51 (1997) (arguing that Reagan’s rhetoric contrasted law enforcement and punishment with welfare as appropriate forums for government intervention); THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 115 (Stephen R. Donziger ed., 1996) (stating that Reagan saw the war on drugs as filling the public’s demand for government to be “tough and go on the offensive”).

\(^7\) See BECKETT, supra note 6, at 48.

\(^8\) See Chernoff, supra note 4, at 533-35.

\(^9\) See THE REAL WAR ON CRIME, supra note 6, at 79-81.

\(^10\) See WATENBERG, supra note 5, at 37-38 (discussing the failure of the Democratic Party to take the crime issue seriously).

\(^11\) See DIONNE, supra note 1, at 297.
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ing the 1980s by the perception that it was too soft on criminals and insufficiently sensitive to the fear of violent crime felt by ordinary citizens.12

This disability came to be symbolized by President Bush's 1988 victory over former Massachusetts governor Michael Dukakis.13 Dukakis, thought to be the Democratic Party's best chance to recapture the presidency in years, led in some polls by as many as seventeen points during the summer preceding the election. Dukakis soon saw his lead and heady expectations crushed, however, by the crime issue personified by convicted murderer Willie Horton.14 Horton was a Massachusetts prisoner on a weekend furlough who terrorized a couple and raped a woman shortly before the 1988 election. The image of a dangerous killer being released from prison to prey on an unsuspecting family was used by Dukakis opponents to cast the Democratic Party as out of touch with the fears of ordinary law-abiding citizens and unable to inflict the punishments supported by such citizens.15

Additionally, the fact that Willie Horton was an African-American sent out signals about crime and race.16 Political commercials using photographs of Horton were perceived by Dukakis supporters and other observers as an effort to invoke the historically significant icon of "black crime" as a threat to American society.17 At a minimum, the Horton case caused some white voters to question whether Democrats were too wedded to liberalism and civil rights to undertake the tough policies necessary to check violent crime.18 In 1992, President Clinton won in large part because he neutralized the crime issue with an early embrace of tough punishment and the undeniable credential of having authorized an execution as governor of Arkansas.

The politics of crime and punishment has not been limited to elections, however. Rather, politicians' increasing focus on these issues has penetrated the broad operation of government in a number of ways.19 First, the remarkable expansion of both state and federal prison popula-

12. See BECKETT, supra note 6, at 48 (discussing Reagan's argument that liberals treat criminals as if they were the victims of social disadvantage).
14. See id.
15. See SUSAN ESTRICH, GETTING AWAY WITH MURDER 65-67 (1998). In fact, such furlough programs were not uncommon in that period and had been adopted in states controlled by Republicans as well as those controlled by Democrats. See WATTENBERG, supra note 5, at 38.
16. See THE REAL WAR ON CRIME, supra note 6, at 100.
17. See DIONNE, supra note 1, at 77 (quoting Susan Estrich's comment on the symbolism of the Willie Horton case).
18. See BECKETT, supra note 6, at 5 (commenting on the Bush campaign's manipulation of the Willie Horton incident).
tions is reshaping the body politic and the social body. Nearly three percent of all adults in the United States were in some form of correctional custody in 1995.\textsuperscript{20}

The impact of this trend on the status of particular demographic groups is even more significant. For example, more than a third of all young African-American males were under correctional custody in the early 1990s.\textsuperscript{21} This trend has had a striking impact on the economic viability of those who are imprisoned as well as on the communities in which they are concentrated after release. One of the most disturbing ramifications of the trend is that the increase in incarceration has caused a significant portion of young African-American males to lose their right to vote—often permanently.\textsuperscript{22}

The issues of crime and punishment have also affected the operation of government by transforming state budgets.\textsuperscript{23} Policy issues are more likely to be funded if they fit the model of crime—that is, if they can be seen as the result of blameworthy behavior by responsible individuals whose identification and punishment can be plausibly thought to deter others.

Finally, fear of crime, much of it created by the political process itself,\textsuperscript{24} is affecting government because it has reconfigured the way that middle- and upper-class Americans have chosen to locate themselves geographically and institutionally. In the 1960s and 1970s, large numbers of middle-class families simply fled over city limits to escape crime, but, in recent years, even these suburbs have been hollowed out by a flight to more remote settings and a distancing from community life in the name of security.\textsuperscript{25} Because municipal boundaries create distinct political communities over broad and essential aspects of life—including schools, residential price and availability, and jobs—efforts by Americans to segregate themselves from the poor and minorities have proven all too

\textsuperscript{20} See Bureau of Justice Statistics, U.S. Dep't of Justice, Correctional Populations in the United States, 1995, tbl.6.2.

\textsuperscript{21} See Jerome Miller, Search and Destroy: African-American Males in the Criminal Justice System 7 (1996). These figures would almost certainly be higher today.


\textsuperscript{24} Beckett, supra note 6, at 15, argues primarily that the public's view that priority should be given to ameliorating problems such as crime and drug use increased after political mobilization around the crime issue.

successful. Without the binding influences that come from common political and social forums, the politics of exclusion and demonization prosper.

Few authors are in as good a position to reflect on this watershed change in American politics as Susan Estrich, the Robert Kingsley Professor of Law and Political Science at the University of Southern California. Estrich has been an advisor to every Democratic presidential candidate since 1984. She also managed Michael Dukakis's 1988 presidential campaign. Today she is a leading commentator on legal and political affairs in the national media spotlight. Moreover, Estrich has been an influential legal scholar whose research has consistently leaped beyond the library abstractions of traditional doctrinal analysis. Her 1986 article on rape and the social assumptions that guide prosecutorial and jury thinking about it opened with an unforgettable recounting of her own experience as a victim of violent crime. Ultimately, the article helped transform the treatment of rape in criminal law courses.

Estrich's latest publication, Getting away with Murder, sounds like another book about the O.J. Simpson case, or a hatchet-in-hand polemic about lying lawyers and inept bureaucracies like the one published by the late New York trial judge Harold Rothwax. It is not, however. Estrich does believe that the Simpson trial reflected a lot more about what is generally wrong with American criminal justice than is commonly acknowledged, but her reflections do not dwell on the media-saturated Simpson case. Rather, readers will find themselves learning far more about contemporary controversies in criminal law doctrine than the standard fare of celebrity cases embodies.

At first glance, it is somewhat difficult to discern the overall structure of Estrich's reflections, which move from defenses based on the subjugated positions occupied by women and ethnic minorities, to racism in the criminal justice system, to the politics of punishment and the honesty of lawyers. At times the book reads like the intellectual diary of a person deeply involved in teaching and commenting on crime and politics. Through the use of this eclectic and informal approach, Estrich gives the reader a sampling of the issues that concern her as a teacher and activist rather than a theoretical explication of these issues. This unique and admirably straightforward approach allows the reader to acquire a broad understanding of Estrich's views. Taken as a whole, the book seems to reflect a larger project—one of recasting and reaffirming a liberal ap-

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27. See HERALD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE (1996) (arguing that criminal justice has been undermined by manipulative defense tactics).
approach to criminal justice. One hopes the book will develop into a concomitantly larger work.

In this review, I will concentrate on Estrich’s defense of contemporary liberal legalism. In the two most substantial sections of her book, Estrich addresses two major threats to her position—one commonly associated with the political left and one associated with the right. On the left, liberal legal theory finds its doctrinal structures, including the Model Penal Code and the United States Sentencing Guidelines, under pressure from proponents of identity politics and those who demand recognition of subjective positionality in the administration of justice. On the right, liberal legal theory finds itself menaced by a diffuse populist punitiveness that tends to identify with crime victims and demand retributive justice.

The “tight place” of my title comes from a famous passage of *Psalms* that is often included in Jewish Sabbath and holiday meditations. The passage is usually translated as follows: “In distress, I called on the Lord; the Lord answered me from a wide space.” The central Hebrew term “Hametzar” invokes two meanings, bodily affliction and spatial constriction. In my title, I mean to emphasize the spatial image, although distress is implied as well. Liberalism is in a “tight place,” caught between crime and race. To survive, it must escape to a wider space where its traditional politics of coalition can thrive. Estrich recognizes this distress and attempts to direct liberals toward a broader vision of politics and law.

In the remaining sections of this review, I will argue that Estrich’s vision is not yet broad enough to allow real revitalization of liberal legalism. The following section examines Estrich’s defense of a common standard of reasonableness, a term at the core of many important defenses, especially defenses to violent crimes. The review will then examine Estrich’s effort to re-imagine a liberal embrace of punitive justice.

**II. THE REASONABLE PERSON IN A POST-MODERN AGE**

The book’s subtitle warns that “politics is destroying the criminal justice system,” but Estrich has neither an exposé to offer nor an axe to grind against an overarching conspiracy. Rather, she seems to express the sentiment that, if politics threaten American criminal justice, it is because our country’s politics are fundamentally fragmented and inconsistent. Despite this, Estrich does not argue for an idealized state of law that exists at a remove from politics. Rather, she suggests that, if it once seemed

like law was law, and politics was politics, it was because both responded
to a relatively narrow band of opinion. “If the 1950s were a time of
greater clarity in the law, it is not because politics was missing but be-
cause the homogeneity of the system made consensus look and feel like
something other than a political decision.” 30

Since publishing her law review article on rape, 31 Estrich has been en-
gaged in criticizing the limits on social knowledge incorporated in crimi-
nal law doctrine that have resulted from the longstanding exclusion of
women and minorities. But in so doing, she has sought to preserve and
build on the advances of modern criminal law theory, especially those as-
associated with the Model Penal Code (“MPC”), rather than destroying the
preexisting structure in its entirety.

One of the distinctive features of the MPC is its heavy reliance on
jury evaluations of the “reasonableness” of the actor’s conduct as an al-
ternative to bright-line rules based on specific objective factors. Estrich
endorses “reasonableness” as a way of producing political compromise in
American criminal law. 32 Interestingly, in Getting away with Murder,
Estrich is troubled most not by the arguments of conservative defenders
of the traditional white male standard of reasonableness but rather by
the suggestions of fellow advocates for the excluded who would prefer to
substitute for the common reasonableness standard specific standards
tied to the subjective position of the accused.

Estrich defends reasonableness in a two-pronged argument. First,
Estrich rejects “the modern political attack on . . . the reasonable man as
being racist and sexist, Western and white.” 33 Rather, she argues, reason-
ableness standards are capable of being as open as the politics that sur-
round them. Second, Estrich fears the political and legal results of a sys-
ystem that addresses the traditional narrowness of the reasonable man
standard by creating wholly distinct standards for specific categories of
disadvantaged groups. 34 Deprived of the opportunity to use the criminal
law to set community-wide standards, she argues, juries and the public-
at-large might respond by becoming even more paranoid and hostile
“beyond the jury room.” 35

While expressing the belief that the right level of individualization in
applying reasonableness standards can be found, Estrich does not suggest
that this is an easy feat. Its difficulty is exemplified for Estrich by the

30. ESTRICH, supra note 15, at 19.
32. See ESTRICH, supra note 15, at 18.
33. Id. at 23.
34. See id. at 37.
35. Id.
problem of battered women as criminal defendants. The issue has received considerable attention from legal scholars since the decision of State v. Wanrow, a prosecution brought in Washington in the late 1970s.

Avena Wanrow, a Native-American woman, was convicted of murder for the shooting death of a man she had accused of attempting to sexually abuse her child. On appeal, Wanrow’s attorneys argued that she should have been allowed to introduce evidence bearing upon how her status as a woman and a minority influenced her perception of the threat she faced when she committed the murder. Additionally, Wanrow’s lawyers argued that the jury instructions on reasonableness failed to correct the statute’s implication that reasonableness was to be measured by a masculine standard.

Ultimately, the Washington Supreme Court overturned Wanrow’s conviction, holding that the jury instructions created the impression that “the objective standard to be applied is that applicable to an altercation between two men.” Instead, according to the court, “self defense instructions [must] afford women the right to have their conduct judged in light of... individual physical handicaps which are the product of sex discrimination.” Estrich agrees with this decision, arguing that it represents an effort to make the reasonableness standard more inclusive, but she rejects efforts that have been mounted since Wanrow to establish a series of specific reasonableness standards for defendants with particular identities.

For Estrich, the use of expert testimony to bolster the credibility of defendants’ stories—especially when those stories are likely to be less visible and familiar to juries because of sexism and racism—is not a problem. Estrich becomes concerned, however, when juries are invited to apply a wholly specific standard applicable to particular categories of people or individuals. Once courts start down that path, Estrich fears, it will become too easy for virtually all criminals to show they were acting reasonably based on their own unique developmental circumstances. Moreover, Estrich is concerned that this approach will endanger women’s efforts to defeat stereotypes that have been produced as a by-product of their oppression.

Estrich draws an interesting analogy between specific reasonableness standards and the development of the insanity defense in the 1950s, when

37. See ESTRICH, supra note 15, at 25 (quoting Wanrow, 559 P.2d at 558).
38. Id.
39. See id. at 26-27.
40. See id. at 33-34.
41. See id. at 27.
the standard for mental illness was redefined to allow it to fit the specific experience of defendants—an approach embodied by the well-known Durham rule. Estrich notes that it has always been difficult to determine whether these reformed standards made any real difference, but the perception that they were depriving juries of the opportunity to apply a community standard of blameworthiness has clearly led to a backlash in which the law has largely returned to its most traditional posture.

While Durham-type reforms were largely the result of white male lawyers advocating for white male defendants, Estrich clearly believes that their long term results should serve as a warning to advocates for women and minorities. Specifically, these advocates should be aware that particularized identity-based standards may be no more likely to produce victories for defendants, because juries must still “apply” them and are quite likely to rebel against efforts to expand reasonableness.

Estrich advocates the implementation of the “reasonable person” standard: “[n]ot the lowest common denominator, which allows everyone to get away with murder, and not the 1950s white-male standard either, but the product of an inclusive process that seeks to define and enforce common ground.” She argues that, when this standard works well, juries will consider the background of defendants like Avena Wanrow in evaluating the circumstances that surrounded the choice to kill, but, having done so, they will revert to the standard of common reasonableness in applying the law. At this stage, Estrich suggests, cases will—and should—often turn on the credibility of actors rather than on the identities of these individuals. In summary, Estrich challenges her readers to “imagine a process, an inclusive and representative process, in which Americans of diverse backgrounds and beliefs could come together and decide that some battered wives are acting reasonably and some aren’t.” Ultimately, she argues, juries could become places where we find our common ground and enforce it rather than heading to our separate camps.

Estrich’s picture is attractive. Juries are one of the rare political institutions that allow for direct participation in government. Like their close cousin the militia, juries loomed far larger in the landscape of the late eighteenth century than the late twentieth. Estrich is not alone her be-

42. See Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954).
45. See ESTRICH, supra note 15, at 36.
46. Id. at 37.
lief that a renewal of the jury could be a good thing. Others seem to share the hope that the jury could become a forum for building trust and confidence among members of increasingly diverse communities in their collective ability to make judgments.

It is easy to share Estrich's desire for an improved system. It is not certain, however, how well reasonableness as a political compromise works in general. The Model Penal Code, like much of modern criminal jurisprudence, relies heavily on jury evaluations of the mental state of the offender to distribute blame and punishment. In so doing, the Code rejects earlier common law traditions that relied on objective features of conduct and circumstance to delimit culpability. In a sense these traditional approaches, which prevailed until the late 1950s, reflected a uniquely twentieth-century optimism about our ability to understand the mental states of others and find a common ground missing in social and cultural life.

Cases with defendants who bring obscure cultural backgrounds to court underscore the law's dependence on shared norms. How is a California jury to evaluate whether abandonment by a husband is sufficient provocation to mitigate a Chinese woman's murder of their infant son? It is also important to realize, however, that such cases are quite rare and that focusing exclusively upon them may actually distract us from addressing the pressing question of how well juries can operationalize legal standards when confronting more pedestrian facts and more familiar neighbors.

The historic trend in Anglo-American jurisprudence toward granting juries a greater role in assessing the evidence places more and more weight on the ability of the jury to sort through contradictory evidence, including contests of testimony between witnesses. But the incredibly dispersed experiences of life in late twentieth-century America under-

48. See Estrich, supra note 15, at 55-56; see also Amar, supra note 47.
49. For example, in the law of attempts, the Model Penal Code rejected a long list of traditional objective tests of when progress toward a crime had gone far enough to be punishable with a strong emphasis on intent. See Kaplan et al., supra note 44, at 796-97.
50. See generally Psychological Man (Robert Boyers ed., 1975) (reviewing the intellectual developments supporting this 20th-century notion); Nikolas Rose, Inventing our Selves: Psychology, Power, and Personhood (1996) (analyzing the centrality of psychology to liberal governance). The priority of the subject has even deeper roots in the western philosophical tradition. See Hubert L. Dreyfus, What Computers Can't Do: The Limits of Artificial Intelligence 235 (2d ed. 1979) (analyzing the western tendency to privilege cognition over the body as the source of validation for knowledge and the relationship of this tradition to contemporary artificial intelligence research).
mine our confidence in the ability of jurors to fulfill this task. The problem is not simply one of unfamiliarity; it arises from the very diffusion of agency and its connection with mental life in a postmodern world that seems to be losing many of the institutions and experiences the grounded earlier optimism of psychological unity. The question for an increasingly postmodern society may be whether such a mentally oriented justice system can work to legitimate an increasingly distended punishment system.53

Against this challenge, the emphasis of modern criminal law on allowing the jury to use mental-state conditions to forge acceptable compromises may only hide the problem. Consider, for example, common law theories of accomplice liability. These limited the set of actors who could receive the heaviest punishments for a crime by employing objective features of conduct such as presence at the scene and the level of objective assistance provided.54 Modern approaches, including the Model Penal Code, have rejected such constructs in favor of an emphasis on the mental state of the defendant—primarily on whether he intended to aid the crime.55

The modern shift in criminal law toward a greater role for mental state undoubtedly reflects the sense that reliance on conduct elements was being undermined by modernization and its attendant break down of traditional practices in our society. Modernists tried to solve this problem by viewing mental life as a place to anchor criminal culpability, but postmodern conditions, including globalization, the passing of the industrial economy and the urban society it has sustained, and the enormous expansion of communication technology, undermine the capacity of the jury—at least as currently composed and organized—to have much reliability and consistency in rendering judgment.56 The problem is not whether juries can sufficiently identify with defendants seen as “other” because of differences in race, nationality, or culture but whether the dominant cultural narratives are coherent enough to permit effective judgment even of more sympathetic defendants.

Two approaches offer themselves for those who are concerned that substantive injustices arising from such incoherency may ultimately un-

54. See KAPLAN ETAL., supra note 44, at 859-63 (discussing modern accomplice liability).
55. See id.
dermine the legitimacy of criminal law. First, in opposition to the trend of modern criminal law that Estrich defends, we may need to inject new objective conduct elements into the definitions of substantive crimes. Victoria Nourse has argued, for example, that the modern trend in the law of homicide toward allowing the jury to consider provocation manslaughter without much judicial limitation allows men who kill women in an effort to enforce male domination to avoid the harshest punishments.57 Nourse argues for limiting manslaughter defenses to "warranted excuses," that is, to those cases where the passion that led to the crime was an emotional response paralleling the law's own response to the victim's conduct.58

Second, if we intend to continue to rely on juries to sort out mental states, we should limit the reach of the law to conduct that by broad consensus is threatening enough to social order to justify the risk of heavy punishment. Punishments for most drug crimes, for example, should be aimed at ameliorating the harm to both addicts and communities.59 The most destructive sanctions, like prison, should be limited to those whose willingness to use violence and degree of profit require the strongest deterrents.60

III. RACE, CRIME, AND AMERICAN LIBERALISM

In her experience as Michael Dukakis's campaign manager, Estrich saw firsthand the devastating effects the crime issue can have on a candidate who cannot provide a sufficiently enthusiastic response to the increasing popular demand for harsh punishment. Dukakis was defeated, in large part, because of the public's perception that he was overly solicitous of dangerous criminals like Willie Horton and unwilling to support severe punishments, especially the death penalty.61

Why are liberals so disabled by the crime issue? The answer is no doubt complicated, but Estrich cuts to its core by focusing on racism. Liberals have resisted calls for toughness in punishment for at least two reasons, both grounded in their experience with the race question. First,

58. See id. at 1392-94. She draws on law itself to provide this objectivity by suggesting that a killing motivated by unlawful aims should be proscribed.
59. See, e.g., THE REAL WAR ON CRIME, supra note 6, at 201-04 (presenting such a proposal).
60. The German constitutional court has taken a similar position on drugs. See German Court Refuses To Allow Prosecution of Marijuana Offenses, 3 DRUG L. REP. 140 (1994).
61. It is now conventional wisdom that, when Governor Dukakis declined a reporter's invitation to admit that he would want capital punishment for someone who had raped and murdered his wife, he crystalized the view that he did not share the values of ordinary Americans. See WATTENBERG, supra note 5, at 42.
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liberals fear that the criminal justice system produces results that continue to reflect the systematic racism that was an undeniable feature of American criminal justice at least through the 1970s. Second, liberals have been concerned that tough penalties do not adequately reflect the social responsibility that the American government has for the powerful criminogenic forces that surround most children born into urban zones of hardened poverty.63

Given the centrality of crime to American voters and their use of tough punishment as a measure of political integrity, liberals have found themselves in an increasingly tight place. Their commitment to undoing the effects of racism has made them reluctant to address crime and embrace punishment for lawbreakers. In contrast, conservatives like Ronald Reagan could express open-throated outrage about crime, unhampered by any fears of a resurgent use of penal justice to achieve racial domination.64

Estrich clearly sees her mission as liberating liberals from this painful and politically self-destructive bind. As early as 1980, in her work as a staff attorney on the Senate Judiciary Committee, Estrich wanted to move crime to the center of the party’s domestic program, a thought that horrified fellow liberal staffers. In Getting away with Murder, Estrich reflects on one such conversation. “You want us to take the lead in locking up black men he asked me.... Yes. White people too. If they’re rapists and killers. Help the victims, not the bad guys.”65

The development of her thinking on this topic seems to have been catalyzed by a discussion with Bill Clinton. Estrich recalls a Clinton visit to the Dukakis debate preparations in 1988:

[A]fter a long and frustrating session of Willie-Horton/pledge of allegiance/ACLU/death-penalty questions, the future President explained crime politics to me. He took out a piece of paper, and on one side listed the Democratic governors who were for the death penalty, and on the other those who were against. It was a breakdown between the past and the future.66

Clinton is an intriguing example. More than any other President since Lyndon Johnson, Clinton has made his relationship to the race issue a constitutive issue of his presidency. At the same time, he has been uncompromising in pushing a punitive “tough on crime” position, including

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62. See ESTRICH, supra note 15, at 68.
63. See id. at 67.
64. This fact reflected what can most charitably be called Reagan’s “active ignorance” of the reality of American racism.
65. ESTRICH, supra note 15, at 68.
66. Id. at 69.
support for the death penalty and the hiring of more police. But like so much else about his presidency, it is difficult to tell with Clinton where postmodern pastiche ends and the real reconciliation of opposing values begins. Ultimately, his policies tend to reconcile these antinomies with a balance of gestures rather than workable solutions.

Estrich suggests that the Clinton position has proved politically effective, but only at the cost of making the whole debate about crime less honest. It is difficult to discern, however, whether she has made more substantive progress in reconciling the anti-racist values of liberals with the need to address the crime fears and angers of ordinary Americans.

Estrich unabashedly embraces the anger of ordinary Americans toward specific types of crime—crimes against persons and personal property—that they fear most. She also embraces the demand for harsh punishments against those who commit such crimes while demanding that such harshness be channeled into rational strategies that maximize the crime control bang for taxpayers' retributive bucks. These strategies include better use of policing, more selectivity in the use of long prison sentences, and even attention to the external sources of crime, especially in the realm of schools, families, and communities.

Estrich's vision for a liberal posture on crime policy is thus two-fold. First, Estrich argues that liberals must embrace severe punishment in the name of victims, without reservations based on the fear of racism haunting the criminal justice system. The second, less developed argument calls for "smart" punishment that will maximize the crime control value of the punishment we do use. Among other things, Estrich argues that liberals should tap into their special sensitivity toward race issues to develop more effective and less damaging crime control strategies.

The first suggestion has immense political appeal given current electoral conditions, but it subordinates the problem of racism in a manner that should trouble liberals. Additionally, it promotes a solidarity based on fear of crime victimization, the political results of which are difficult at best to predict. Although politically attractive, Estrich's proposed strategy represents a dangerous surrender of principle that could, in the long run, return to haunt liberals whose most precious legacy from the twentieth century is their correct insistence that solving America's heritage of racism receive priority treatment from government.

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67. See Chernoff, supra note 4, at 543.
68. Both Chernoff and Wattenberg take Clinton to task for failing to follow through on the crime issue, see WATENBERG, supra note 5; Chernoff, supra note 4, others have been equally disappointed by his civil rights efforts.
69. See ESTRICH, supra note 15, at 65.
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The appeal to smart punishment that is research-based and results-oriented is more promising, but unfortunately Estrich remains wedded to one early example, Rand's selective incapacitation proposal from the early 1980s.\textsuperscript{70} The Rand proposal, if implemented, directly threatens to exacerbate the racial effects of punishment. This difficulty noted, however, I believe Estrich's second strategy, with modification, may prove to be sound.

A. Embracing the War on Crime

While acknowledging the increasing overrepresentation of African-Americans in the correctional population,\textsuperscript{71} Estrich rejects the view that the criminal justice system in general, or the war on drugs specifically, is a reflection of enduring racism. Like most criminologists, Estrich points to the strong correlation between the rate of incarceration and the rate of offending as reported both in police reports and victim survey data.\textsuperscript{72} From this perspective, the incredibly high rates of involvement of African-American males in every stage of the criminal justice system reflect a very real difference in the prevalence of criminal offending.

What the police are doing in stopping black men, what I am doing in hesitating to get on the elevator, what many of us, Jesse Jackson included, do when we cross the street to avoid a black man, is not wrong in a statistical sense. Of course a majority of black men aren't criminals, but that's not the question. Is the risk big enough to make it worthwhile to take precautions?\textsuperscript{73}

Estrich rightly points out that this correlation hardly dismisses the larger social justice question of why so many young African-Americans are seemingly fated for a life of crime and punishment.\textsuperscript{74} Like other liberals, most notably William Julius Wilson,\textsuperscript{75} Estrich espouses the view that high rates of crime among African-Americans reflect the predictable outcome of social and economic policies that have produced an underclass whose dismal decline has balanced the rise of a black middle-class.\textsuperscript{76} Estrich, however, argues that if racism and its residues are a source of these high crime rates, this is very different than racism within the criminal justice system.\textsuperscript{77} Estrich seems to believe that a liberalism that recog-
nizes that distinction can confidently take up the cause of fighting crime along with its traditional goals of fighting racism and inequality.

Estrich's strongest argument is that liberals' concern for racial minorities should lead them to identify primarily with minority victims of crime rather than with minority victims of discrimination in the criminal justice system.\(^7\) It is undeniable that the excess incidence of crime, especially violent crime among black males, primarily affects poor minority communities.\(^7\) Liberals who only see the civil rights issue of discriminatory treatment of minorities in arrests, prosecutions, and punishment fail to consider the plight of the law-abiding majority in such communities.

Estrich's position is not entirely satisfying for two reasons. First, announcing empathy with African-American victims of crime remains an empty gesture unless it is followed by genuine consideration of whether the punitive crime control approaches so widely supported by politicians targeting white suburban voters actually address the concerns and viewpoints of African-Americans living in communities adversely affected by increasing crime rates.

The answer to this unasked question is not clear. For instance, in her recent work on this topic, Professor Tracey Meares has suggested that the structural problems of inner-city communities may indeed have law enforcement solutions but that heavy and indiscriminate use of imprisonment is actually counter-productive.\(^8\) Specifically, she argues that addressing crime by indiscriminately removing law-breakers from the community may do more to undermine informal social controls than to bolster them.\(^8\) Lengthy imprisonment of mature males involved in low-level drug trafficking may denude a community of fathers and older brothers to police younger males and discourage violent conflict among juveniles.\(^8\) Meares argues that many inner-city residents want law enforcement not to withdraw but instead to be reoriented toward actions that will bolster the community's own capacity for social control. Such strategies might include targeting buyers—often suburban whites—rather than low-level dealers—often minorities from the inner-city—for arrest and introducing curfews and anti-loitering laws designed to disrupt behavioral patterns that lead to crime.\(^8\)

\(^7\) See id.
\(^7\) See id. The same route is taken by Professor Randall Kennedy in his insightful book on race and crime. See RANDALL KENNEDY, RACE, CRIME, AND THE LAW 345 (1997).
\(^8\) See Butler, supra note 81, at 1280-81.
\(^8\) See Meares, supra note 80, at 697-99.
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Estrich's suggestion is also problematic because the massive effects of criminalization on the minority community cannot be justified solely by identifying with the situation of minority victims. The crime that is responsible for the largest part of the increase in African-American incarceration, drug trafficking, does not easily fit the victimization model. Insofar as trafficking brings income into impoverished communities, its affects on these communities may well be mixed if not downright beneficial.84

In the absence of a more convincing analysis of black victimization and its relationship to the punishment boom, Estrich's argument serves only to leap over the question of race. From the victim's perspective, the need for punishment cannot be diminished even by the reality of a racist society. Estrich herself displays the tendency toward this view, drawing on her own experience of violent victimization to argue that race simply does not matter when it comes to punishing the guilty. She comments that, "[t]he man who raped me when I was 21 deserved to be punished without regard to race or racism. Whatever else happened to him in his life, he was still responsible for what he did to me. That much, at least, I always knew."85

Victimization produces an imperative for governmental action that has its own moral authority and trumps the issue of racism, in part, because the claims of victims resonate across the divisions of race. Nevertheless, Estrich fails to address adequately the potentially negative ramifications of employing such a strategy in addressing the crime problem. Rather, in Getting away with Murder, the reader gets the sense that recent years have given Estrich a new purchase on the political meaning of victimization and the empowerment that it provides. She never addresses this directly, but it comes through most clearly in her meditations on the darkest corner of the race, crime, and punishment problem—the death penalty.

85. ESTRICH, supra note 15, at 68.
86. It is precisely the apparent denial of this idea by juries in the trial for the attempted murder of Damian Williams and the murder trial of O.J. Simpson, both in L.A., that outraged many white commentators. See ESTRICH, supra note 15, at 42. But it is far from clear that this is the best way to read those verdicts. In both cases, the moral claims of victims were deflected by defense lawyers who deftly invoked the specter of police racism—greatly aided, of course, by the reputation and conduct of the LAPD. Likewise, the largely white jury in Simi Valley, California, which acquitted the four Los Angeles police officers showed not that they approved of vicious gang-style assaults but that, once framed as a battle between law enforcement and a parolee willing to lead the police on a highway chase, the violence was perceived as justified. As Estrich demonstrates in chapter one, however, the capacity to evaluate violent conduct as something other than blameworthy is one of the central features of the body of criminal law inherited from the common law. See id. at 9-14. Violent assaults leading to possible death are the acts most likely to be viewed sympathetically.
In *McCleskey v. Kemp*, the Supreme Court upheld Georgia’s death penalty against a statistical demonstration that, all other things being equal, killers of white victims were significantly more likely to receive the death penalty than black victims. For many liberals, *McCleskey* is emblematic of the current Court’s willingness to abandon the pursuit of equal protection for racial minorities. Yet, in a stunning admission, Estrich joins the *McCleskey* majority in rejecting the statistical argument as a reason for halting executions. She notes, “[t]hat argument failed to persuade a majority of the Supreme Court, not to mention most Americans. *It doesn’t even persuade me anymore.* Why should statistical under-valuation of the lives of black victims provide the grounds for reversal in the case of an unquestionably guilty and brutal killer?”

It is tempting to follow Estrich out of the tight place of crime and race that liberalism finds itself in. Upon closer examination, however, it becomes apparent that Estrich fares no better than Clinton in her ability to offer the liberals an ethical vision of how to make this strategy anything other than a politically expeditious move. Like President Clinton, Estrich finesses the tight place of race and crime through a genuine empathy with crime victims and a readiness to claim the moral authority that victimization provides for governing. Relying on the moral force of victimization, however, leads to two problems. First, it denies the independent force of our constitutional commitment to eradicate vestiges of racism in our culture. Second, by valorizing the victims of crime not just as an objects of sympathy but as a source of political power, it promises electoral success for liberals without commensurate governmental success.

Choosing to prioritize crime victims over victims of racism should be rejected on the grounds that liberals are right to see governmental responsibility for overcoming racism as fundamental. Government, after all, bears the responsibility for having institutionalized and enforced racism for most the United States’ history. By contrast, while our government’s failure to prevent crimes is regrettable, crime is not a product of government action. Rather than allowing empathy with victims to undercut the government’s responsibility for combating racism, the imperative of overcoming racism should set limits on our efforts to punish offenders when the two values conflict.

Consider, for example, the case of the death penalty. It may be true that McCleskey was a deserving candidate for the death penalty in Georgia and many other states because he deliberately killed a police officer
in the perpetration of another serious felony. But McCleskey's lawyers presented unrefuted evidence that the apparatus of capital punishment decisionmaking in Georgia was infected with racial social meanings—racial solidarity for whites and animus toward blacks.90

To permit a state that has in the past quite openly discriminated on the basis of race to utilize a penal sanction peculiarly associated with racism—in a manner that, as objectively measured, still remains racially marked—is to recognize the hollowness of the underlying right to equal protection.91 Since Georgia can effectuate most if not all of its retributive, incapacitative, and deterrent goals by sentencing Warren McCleskey and similar killers to lifelong imprisonment, it is quite unlike situations in which fear of the racist influence on law enforcement practices tempts us to forego any punishment of particular offenders.92 The death penalty is a practice that can be justified, if at all, because of its social meaning.93 In the face of strong evidence that the social meaning of executions in Georgia remains strongly racially demarcated, permitting execution in this state can only reflect a willingness to ignore the implications of historic racism.

Liberals can and should promote responses to victimization that do not exacerbate existing problems of racism. For example, serious efforts to provide resources to compensate and restore victims of crime do not run the risk of reinforcing racially identified punishments.94 Indeed, insofar as a disproportionate number of crime victims are racial minorities, a well-funded victim compensation scheme would promote both the goals of overcoming racism and helping crime victims. Likewise, serious efforts to empower communities to prevent crime by bolstering community institutions can promote crime reduction and help to overcome the historic consequences of racism.95

Finally, even if liberals were to believe that the criminal process was free of racial invidiousness, they should hesitate before embracing victimization as a central source of legitimization for government. Whereas

90. The Baldus study showed that, controlling for numerous relevant variables, both the race of the victim and the race of the offender had a statistically significant effect on death sentences; combining a white victim with black killer was shown to produce the greatest likelihood that the defendant would be given the death penalty. See McCleskey, 481 U.S. at 286-87.

91. See KENNEDY, supra note 79, at 340-41.

92. Such situations might evoke support for the exclusionary rule because of fear that Fourth Amendment violations will disproportionately befall minorities. See, e.g., David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 SUP. CT. REV. 271, 328.


95. See Meares, supra note 80, at 694-705 (suggesting ways of reorienting law enforcement to empower poor communities).
the experience of victimization and the fear of it provide a moral source
of authority for power, it is not clear that victimization provides a suit-
able practical base for authority, at least not the more activist govern-
ment that liberals like Estrich would normally seek. The problem is not
one of dividing people. In fact, outrage over what happens to victims of
violent crime crosses all communities. It might indeed form a basis for
widespread coalitions of the sort that have recently slipped away from
liberals who once wielded them effectively on issues like education. The
problem is the kind of governing for which such a coalition can deliver a
mandate.

Political theorist Wendy Brown has recently offered a critique of the
victim-centered politics pursued by many feminists and anti-racists.96 She
argues that the satisfaction that comes from avenging oppression carries
the price of reinforcing the very categories of the original victimization. It
also tends to reconfigure relationships so that law and the state become
inevitable intermediaries. Additionally, a politics of crime victimization
will tend to make the experience of victimization and its mentalities of
humiliation and revenge into a framework for governing, for, when peo-
ple are brought together out of their shared outrage at victimization, it is
to concerns of security and vengeance that they are most likely to turn.

B. Smarter Crime Control

Estrich is at her most persuasive when she suggests that “it is not the
disproportionate impact of punishment that makes the system racist but
the disproportionate impact of our failures at prevention . . .”97 Crime
prevention advocates like to note that it takes three elements to produce
a crime: a motivated offender, a vulnerable victim, and a time and place
that brings them together and makes the crime possible.98 Crime policy,
both liberal and conservative, overwhelmingly focuses on the offender—
whether to punish or rehabilitate.99 In recent years, criminologists and
policy experts have begun to turn to the other possibilities for interven-
tion suggested by the other elements of crime.100 Unfortunately, despite
acknowledging that the people may support prevention more than politi-
cians do,101 Estrich does not adequately address the question of how the

96. See WENDY BROWN, STATES OF FREEDOM: POWER AND FREEDOM IN LATE
97. ESTRICH, supra note 15, at 92.
98. See Ronald V. Clarke, Situational Crime Prevention, in BUILDING A SAFER SOCIETY:
STRATEGIC APPROACHES TO CRIME PREVENTION 100 (Michael Tonry & David P. Farrington
eds., 1995).
99. See id.
100. See id.
101. See ESTRICH, supra note 15, at 89.
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correlations of both crime victims and the general public might be addressed
by crime prevention measures. Rather, her view of smart crime control is
smarter use of punishment.

Estrich offers a strong critique of our current reliance on the strategy
of imprisoning as many offenders as possible and the use of devices such
mandatory sentences designed to effectuate this goal. Clearly, the cost
of this strategy, in human terms, is staggering. The Department of Justice
calculated that if the 1991 incarceration rates continued unchanged, a
black male in the United States would have greater than a one-in-four
chance of spending some time in prison. If imprisonment were the only
sensible way to combat serious crime, this consequence might be accept-
able to Estrich (in light of the moral priority that she assigns to crime vic-
tims). Imprisonment, however, is not the only sensible way to combat
crime.

Like many criminologists but few politicians, Estrich believes that
general use of long prison terms for incapacitation is a bad deal on crime
control. She acknowledges that keeping a person in prison clearly pre-
vents him or her from committing crimes in the community while con-
fined. Furthermore, assuming that these individuals do not accelerate of-
fending after their release and that imprisonment costs are less than the
costs of the crimes avoided, time in prison is a net gain for crime control.

She emphasizes, however, that this conclusion is unfounded, if im-
prisonment does accelerate the criminality of enough prisoners or the
pattern of future offending is driven by predictable factors independent
of imprisonment—factors that have been proven to operate. In reality,
crime rates tend to peak in the late teenage years and diminish greatly
across the adult life span. Thus, by the time an offender is facing a long
prison term after accumulating a few convictions, he is likely to be near
the end of his criminally productive years. Consequently, we may be
locking people up for long terms precisely at the point where the costs of
imprisonment are likely to quickly outstrip the savings on crimes pre-
vented. Because of this, currently popular laws like “three-strikes” legis-
lation actually exacerbate the problem by throwing very long and inflexi-
ble sentences at offenders who will typically be on the mature side of the
age curve.

102. See id. at 82-86.
103. See THOMAS P. BONCZAR & ALLEN J. BECK, U.S. DEP'T OF JUSTICE, LIFETIME
LIKELIHOOD OF GOING TO STATE OR FEDERAL PRISON 1 (1997).
104. See ESTRICH, supra note 15, at 82.
105. See ROBERT SAMPSON & JOHN LAUB, CRIME IN THE MAKING: PATHWAYS AND
TURNING POINTS THROUGH LIFE 6 (1993).
106. See ESTRICH, supra note 15, at 75-76.
The problems with generalized incapacitation through imprisonment lead Estrich to endorse a strategy that focuses on incapacitating the most dangerous offenders, both those who commit violent crimes and those who commit serious crimes at a very high rate. In the early 1980s, Professor Estrich joined with a group of scholars from Harvard’s Kennedy School to publish a book endorsing a selective incapacitation approach for sentencing robbers and burglars. The approach was showcased in 1982 by the publication of a Rand Corporation study that used inmate self-report data to develop a predictive scale capable of identifying high-rate offenders with efficiency.

The Rand system included seven factors that Professor Estrich reprints in full, describing them as unsurprising:

1. Prior conviction for the same type of offense;
2. Incarceration for more than 50 percent of the preceding two years;
3. Conviction prior to age 16;
4. Serving time in a state juvenile facility;
5. Use of hard drugs in the preceding two years;
6. Use of hard drugs as a juvenile;
7. Being employed less than 50 percent of the preceding two years.

Estrich acknowledges the problems of selective incapacitation, especially its disparate race effects, but she still embraces it. Despite its flaws, the approach seems to embody the kind of improvements that Professor Estrich would like to see liberals bring to crime policy—the use of expertise to maximize the social benefit of punishment, in contrast to the populist pandering that conservative crime warriors provide.

Her response to the fairness and the race issues is similar to her approach to racism and the death penalty. As long as it makes sense as crime policy, the fact that it has unintended racial effects is acceptable. To the black robber who is sentenced to a particularly long prison term because he picked up a juvenile record, served time as a juvenile, and was unemployed a lot—all factors highly correlated with race—the answer is one supported by the moral force of victimization. For Estrich, “[t]he answer to the black false positive is that we have a right to fight crime. Would we do the same thing if the false positives were white? Cut crime, and save prison space? Absolutely.”

But Estrich’s answer is tragically flawed, because it merely dismisses race in the face of crime once again. Estrich rejects placing any of the responsibility on those who make race a factor in responding to crime. It is not police and shopkeepers who make racial judgments as a daily business that we should castigate but those black criminals who have pro-

107. See id. at 83.
108. Id. at 89.
109. See id. at 90.
110. Id. at 91.
vided a core of truth to the statistical case for suspicion of black men. This argument echoes Randall Kennedy's recent call for the rallying of African-American communities to repudiate and distinguish those law breakers in their midst. Estrich relies on our "confidence" in the racial "neutrality" of these proceedings to suggest that we should live with the potential errors of judgment made in identifying those most likely to be involved in crime, yet such reliance is problematic at the very least.

IV. CONCLUSION

No one feels the tightness and distress of the space in which liberal legal and political thought has found itself more than Susan Estrich. An eyewitness to the political slaughter of liberals over the crime issue in the 1980s, Estrich knows that liberals have to find their way to broader ground on these issues. The question is whether allowing the embrace of punishment to take precedence over the mandate to eliminate the residues of a government-supported system of racial injustice provides a resolution.

Whether this is a necessary compromise for electability, as President Clinton apparently believes, depends on the available alternatives. One alternative is to address crime fears directly through an embrace of crime-prevention strategies, both situational strategies aimed at making victims less vulnerable to offenders and social strategies aimed at reducing the pool of available offenders. It is clear that even after an aggressive expansion of preventive measures, the need to incapacitate and punish some offenders will remain, but that does not suggest that incarceration rates would remain as high as they are today.

For most of the twentieth century, the United States experienced a relatively stable prison incarceration rate of about 100 per 100,000 residents. But since the 1970s, we have more than quadrupled that figure to over 400 per 100,000. The embrace of punishment advocated by Clinton and now Estrich could lock us into these high rates for the foreseeable future. The consequences for a governable democracy are simply unknown because of the dearth of relevant precedents among societies with established democratic institutions, but intuition suggests that this situation would be anything but optimal. We should look for a viable alternative to punishment.

111. See id. at 52-53.
112. See generally KENNEDY, supra note 79.
113. See SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1997, at 490-91 fig.6.35 (Kathleen Maguire & Ann L. Pastore eds., 1997).
114. See id. In 1997, the rate stood at 445 prisoners per 100,000 resident adults. See id.
115. See ESTRICH, supra note 15, at 67-68.
While Estrich's primary arguments are lacking in a number of ways, some of her observations do provide a glimmer of hope that liberals may one day be able to extricate themselves from the tight place in which they currently find themselves vis-à-vis issues of crime and race. Estrich's epilogue meditates on the racial mistrust engendered by the racial differences in reaction to the Simpson verdict. She notes that though politics can sometimes be aggravated by trials and lead to distortions in practice, criminal law can be a vehicle for compromise and reconciliation. Perhaps, she suggests, the criminal law, especially the grand spectacle of the murder trial, can help create a common moral standard.

There is a promising possibility here. As Tom Tyler and his colleagues have suggested, the very perception that diversity has grown out of control and produced frightening gaps in the moral standards of different communities leads to demands for greater punitiveness and greater use of criminal law in resolving social conflicts. If the procedures for resolving criminal cases serve to build confidence in the ability of a diverse community to reach a satisfying consensus on the quintessentially moral issues raised by criminal law, over time, these procedures might some day lessen the demand for punitiveness that produced them.

116. See id. at 113-17.