

# Remembering the Answers

STEPHEN L. CARTER

CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY  
BASIC BOOKS 1998

SUSAN ESTRICH

GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM  
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A NYONE WHO HAS made a living as a pundit, pronouncing regularly on the state and future of society, must eventually face the humiliating truth that when it comes to social and intellectual changes, nobody can predict anything worth predicting. This is true virtually by definition: Big changes occur precisely when human beings embark on actions to which their past behavior has given nary a clue. The most you can hope for, peering into the social kaleidoscope, is to be able to recognize the real discontinuities for what they are.

In the past 25 years, American law schools' most prominent contribution to our public discourse has been the attempt by some of their faculty to delegitimate the belief that the

country's legal order rests on neutral or shared principles. Now two new books, one by Professor Susan Estrich of UCLA and the other by Professor Stephen L. Carter of Yale, have announced the opposite aim: Both works seek to reconstruct patterns of language and behavior through which citizens can transcend their diverse backgrounds to achieve a governing consensus. These books may be evidence that at least among some academics who think about law and politics, the tectonic plates have started to move.



Susan Estrich's book, *Getting Away With Murder: How Politics Is Destroying the Criminal*

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*Justice System*, is an argument against what she sees as the corruption of the administration of justice by a conventional modern politics based on ideology and group identity. Estrich notes the contention by critical legal theorists that politics does not intrude into law because law is nothing but politics; in response, she asks, “And then what? If it’s all political, then what?” (p.2)

Estrich asks the “then what?” question for four current issues in criminal justice. First she examines the way in which modern ideas of psychology and group identity have undermined the model of the reasonable man as the more or less unitary standard against which judges and juries assess criminal responsibility. The initial attack on the reasonable man came from psychiatry: Beginning in the 1950s, mental health experts advanced the argument that a criminal defendant’s mental competence should be determined by asking not the rationalist question of whether he knew right from wrong but the clinical question of whether he was mentally diseased. Later, the reasonable man came under a perhaps more successful attack by race, gender, and ethnicity advocates, who have expanded the universe of available criminal defenses by arguing that you cannot determine whether a defendant acted reasonably unless you know the group characteristics of the individual who did the reasoning.

Though Estrich makes rhetorical bows to both these criticisms of the old standard, she ultimately rejects them in favor of what one might call a neo-reasonable-man standard – “the product,” she explains, “of an inclusive process that seeks to define and enforce common ground.” (p.36) The author knows that in reasserting the desirability of a single, shared idea of reasonableness, albeit a broadened one, she is endorsing a norm whose application can produce especially harsh results for members of those groups that most often deviate from the standard. She does not deny responsibility for this consequence.

“Sometimes,” she says, “*doing the best you can is not good enough for the rest of us*, and that is a judgment we are entitled to make, provided we make it in good faith.” (p.38) (italics in original)

In Estrich’s second inquiry, a critique of group-based jury nullification, she makes a similar plea for a common standard and mutual trust in the jury room. In the course of this discussion she makes clear that she sees balkanized juries as the microcosm of a balkanized and passive America. Thus one of her arguments against jury nullification is that nullification “boomerangs,” delegitimizing jury verdicts and inviting attacks on the jury system itself. We can ill afford such attacks, she thinks, at a time when “[w]e are becoming a nation of nonbelievers and nonparticipants in our civic religion.” (p.61)

If her first two arguments seem to dispute the left, Estrich’s third complaint is ostensibly against the right – against the recent legislative trend towards long mandatory prison sentences and, more generally, against the whole approach to crime-fighting that she sees these sentences as embodying. Mandatory minimums do not work, she says, often keeping aging criminals under lock and key after their years of likely predation are behind them, while leaving no room behind bars for the younger, more violent ones who should be the system’s targets. Indeed, she contends, the current emergence of younger, more violent predators requires us to fund more of the preventive programs “easily tagged as 60s-style failed rehabilitation efforts, even when that isn’t so.” (p.88)

Even in opposing fixed sentences, however, Estrich is not making an argument for leniency. She calls attention to a RAND study that claims robberies and incarcerations could both be reduced by sentencing robbers according to a seven-point predictive scale. This scale has the drawback of producing false positives, wrongly identifying and sentencing some peo-

ple as probable repeat offenders when they are not. But, says Estrich, "The answer is tough luck." (p.90) What is more, her answer stays the same even if longer sentences correlate with race; (p.91) the community, she says, has a right to protect itself.

Estrich again sounds the theme of community in her final essay, which regrets that today's headlines featuring criminal defense attorneys are dominated by those who pursue victory at all costs when what in fact we need is lawyers "who see the common ground." (p.111) "We are raising a generation of civic illiterates," Estrich summarizes, (p.116) who do not see that their jobs as lawyers, jurors, or legislators include the obligation to search for civic consensus.



But out of what materials can a society rebuild such consensus when it has become as fragmented along group lines and obsessed with individual autonomy and self-realization as ours seems to be? Answering this question is a task that Stephen L. Carter sets himself in *Civility: Manners, Morals, and the Etiquette of Democracy*. Carter confronts readers with what may be a necessary corollary of communitarian arguments: He contends that we are not likely to succeed in reconstructing a common culture unless we recognize the role played by religion in forming civic values.

Carter's argument begins with the premise that today's Americans treat each other with a dangerous lack of civility. He says that wealth, technology, and the pervasiveness of values imported into social life from politics and the market have both allowed us and prompted us to act as if we have no "fellow passengers" in our life journey. (p.4) Even worse, says Carter, prominent thinkers wrongly defend this lack of civility as the price we must pay if the less privileged in society are to be heard. (p.21-23)

Carter writes about a series of what he calls

"incivility's instruments." (p.113) One, he says, is a politics that values winning at all costs and refuses to accord respect to opposing views. Another is public language that sexualizes human beings and glorifies violence for commercial purposes. Carter also singles out, as a tool of incivility, technological innovations such as the Internet. He argues that in cyberspace, individual users' ability to customize information lessens the extent to which their experience mirrors shared truths. Also, individuals' ability to assume false identities on the Internet is an invitation to fraud: We now see the modern equivalent of 19th-century confidence men, who took advantage of that era's social disorganization to pass themselves off as what they were not.

Carter also gives us a list of what he views as civility's instruments – family, religion, and the common school. Citing family as the most important, Carter insists that government not "interfere with the family's effort to create a coherent moral universe for its children." (p.230) He therefore supports parental resistance to school programs such as AIDS education and condom distribution.

Carter depicts religion as not just an instrument of civility but the sine qua non of civility in a democracy. True, he says, secular society also values civility – but only for the pragmatic reason that civility helps a democracy function with less friction. Secular language cannot do the more fundamental job of explaining to people why they must adopt the self-denying, other-regarding behavior on which civility rests, and why they must do so even on occasions when self-denial does not appear necessary or useful at all. Only religion, Carter says, can answer these questions and thus provide the moral education on which civility rests.

Here, however, Carter must answer what he knows is the most serious challenge to his depiction of religion as a basis of civility: the argument that religion, far from instilling civility, has been through the ages one of the

chief enemies of mutual acceptance and civic peace. In this view, religion undermines democratic civility because it is intolerant of other points of view and, indeed, tries to impose its views on others.

Carter allows that the nature and obligation of religious faith is to resist what it sees as wrongdoing. But civility, Carter says, does not frown on the disagreement that such resistance sometimes provokes; true democratic civility values such disagreement. In his view, religiously motivated disagreement and civility can coexist: Carter's chief example of this possibility is the spirit of dignity and even love that he sees as having animated the civil rights movement of the 1960s. In other words, the two values of tolerance and the pursuit of justice can exist together if only participants in public debate will keep their disagreements – well, civil.



The political and intellectual obstacles to the civic revival sought by Estrich and Carter are enormous – so much so that the temptation is powerful to wish the authors well and retire to the nearest bar.

The political problem is that today's focus on rights consciousness, legalism, and identity politics is not just a collection of fashions, as easy to reverse as the length of a hemline. Instead, these ideas have had practical consequences. They have created, for example, a population of public and private organizations that are dedicated to and supported by the aforesaid rights consciousness, legalism, and identity politics. Opinion makers may decide one morning that the pendulum has swung too far and the polity needs a dose of balance; but this change of mind will not dismantle the institutional and interest-group apparatus that has been bequeathed to us by modern rights consciousness like detritus left on the beach when a big wave recedes.

There is an instructive parallel in this country's treatment of political scandal. From the early 1960s onward, elite opinion grew increasingly mistrustful of government and public officials. After Watergate, this mistrust was massively institutionalized – by more stringent laws in areas such as personal and financial disclosures and conflict of interest reporting and monitoring, and by increased government investigative capacity in organizations from Congressional committees to the institution of the independent counsel.

Some two decades later, friends and foes of President Clinton are wondering aloud how we can get free from this apparatus, especially from an independent counsel process whose every incentive and obligation extend investigations in the direction of infinity. But this emergent consensus produces no practical momentum, because the new institution of the independent counsel has already created a constellation of interests around it. The independent counsel is sometimes a headache to an Attorney General, but it protects the Department of Justice from the worse headache of constant preoccupation with political investigations. The publicity and high drama surrounding independent counsel investigations are a boon to the press. Congress's statutory ability to call for an independent counsel gives lawmakers an added lever with which to influence investigations.

All this political weight ensures that change will come slowly if at all. The same is true with the political fragmentation that Estrich and Carter decry. In one example – for better, worse, or both – any attempt to mute the litigiousness of this society with some type of tort reform will have to run the now-impressive gauntlet of trial lawyers attached to the present system. Similarly, any suggestion that we retire the battered wife syndrome will provoke a fight from women's advocacy groups. Any campaign to elevate the tone of advertising will meet skilled resistance from marketers orga-

nized around the idea (probably true) that there is only one reason why teenagers buy jeans.

The intellectual obstacles to civic regeneration are also large. Estrich, for instance, as she describes the reasonable man, is also describing an era before abnormal psychology and identity politics had begun to make their inroads into ideas of rationality. Before this erosion, judges and juries had the advantage of being able to believe, to a real extent, in a single measure of human values, capacities, fears, and calculations. We do not have that advantage. By now, we cannot help seeing people in partial terms, whether of race or gender or physical capacity or emotional health. We may heartily approve of the proposition that a new, more inclusive "reasonable man" should govern our criminal justice deliberations, but it is hard to instruct our eyes not to see anymore what they have become so accustomed to seeing.

For many readers, the same difficulty will attend Carter's discussion of religion. It may well be true that secular argument provides no adequate basis for democratic civility and that only religious faith can set a secure foundation for citizenship. To nod assent to these propositions, though, and to endorse a role for religion in the polity, is not the same as believing. If we do not genuinely have faith, we cannot really draw on religion to form our behavior

and make it civil. And renewing belief is a more difficult enterprise, intellectual and otherwise, than merely deciding to approve of religion and its social utility.

Yet if significant change consists of events we did not think could take place, it must be the case that even seemingly immutable features of the current social landscape can be altered.

There are examples of such reversal. In the late 1960s, for example, if there was one thing that students in elite colleges knew, it was that the sexual revolution was here to stay. History, it seemed clear, had been a steady progression from hideous restriction to liberation. It contradicted everything known about human nature, let alone the technology of birth control, to think that people who had experienced the pleasures of free sexuality would allow themselves to be returned to the Puritan prison. Then came the women's movement, with its argument that sex could be an arena of oppression. Then came AIDS. Within a decade, the idea of sexual revolution was over, though the practical work of cleanup would take a good deal longer.

It happens. It may happen to the civic values with which Estrich and Carter are concerned. And the two of them are to be much admired for thinking so at a time when it is still difficult to see how we will get from here to there. 