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BOOK REVIEW

GETTING AWAY WITH MURDER: HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM

BY SUSAN ESTRICH

HARVARD BOOKS, 1998

*Reviewed by Georgia Wilemon**

Getting Away With Murder is an enjoyable book written in layman's terms, although familiarity with legal concepts does make it more accessible. Susan Estrich, a law professor, syndicated columnist, and author, spices her points with anecdotes and statistics that make it difficult to attack her conclusions. She is in a position to write such a captivating book because of her access to people and information. She is clearly a very influential and intelligent person who has taken great pains to maintain sensitivity and respect while realistically assessing difficult questions about crime, race, and politics.

The book has only four chapters. The first starts with an explanation, clearly designed for non-lawyers, about the importance within the criminal justice system of *choice* on the part of the offender. Our system does not punish everyone whose actions produce a bad result, such as a dead body. We make a decision as to the intensity and depravity of the criminal intent before we agree on a punishment. Unfortunately, there is no standard to use to assess criminal intent. We default to the "reasonable person" standard, which is flexible, objective, biased, and even political. Estrich illustrates the pervasive use of the reasonable person standard by offering this example: a woman tells a man she no longer wants to date him. In a rage, he kills her. Should he be treated the same as a parent who kills the abuser of his child? Also, the reasonable person standard is used to evaluate justification defenses. Would a reasonable police officer believe that a traffic violator who reaches into the glove compartment is going for his gun or his driver's license? In fact, she argues, the reasonable person standard is used almost constantly in the criminal justice system. In many ways its use is unconscious on the part of jurors, prosecutors, and judges who must use some standard to judge criminal intent. She does not argue that the standard is bad; she urges honesty in acknowledging that the standard is political.

Estrich deplores two particular political uses of the reasonable person standard that are employed to help offenders get away with murder. First, Estrich points

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out that some district attorneys have different standards for reasonableness depending on the gender of the accused. They will excuse a husband who kills his unfaithful wife, hearkening back to old "my woman is my property" attitudes, but not a woman who kills an abusive husband. Second, some district attorneys excuse the "make my day" defendants like Bernard Goetz. These defendants may begin their actions (in Goetz's case, the action was shooting at someone) in self-defense, but they continue after the threat is gone. These vigilante defendants are often not prosecuted even though their actions are not legally justified.

The second chapter exposes the practice of jury nullification as being counter-productive and divisive. Use of juries as a tool to accomplish political goals manipulates them to help defendants with heavyweight lawyers avoid responsibility for their crimes. The "send them a message with your verdict" closing argument, she argues, results in polarization and suspicion between the diverse groups. Her answer to this very dangerous trend is to end peremptory challenges, stating at page 63, that "no (juror) should be struck for no reason at all." She believes that the first twelve qualified people should serve. One very convincing argument she advances involves these questions from the O.J. jury questionnaire: "Have you ever written a letter to the editor of a newspaper or magazine? Do you believe it is immoral or wrong to do an amniocentesis to determine whether a fetus has a genetic defect?" Her point is that a very expensive jury consultant is either wasting the time of jurors and judges or is manipulating the system in favor of rich defendants, neither of which should be acceptable. I agree that peremptory challenges waste valuable court time, cost millions of taxpayer dollars, and probably make very little difference in the number of convictions or acquittals nationwide. But since both prosecutors and criminal defense lawyers would fight strongly to save them in their respective state legislatures, the proposal to end peremptory challenges is not practical.

The third chapter is devoted to the practice by politicians of using public perception that criminals with expensive lawyers can escape responsibility, and other criminal justice-related fears, to gain votes. She cites many situations where these get-tough policies backfire, but not politically. The three strike law in California, she opines, will result in an aging and largely non-dangerous prison population receiving free medical care. The young predators who are the real danger to society will be released because of the space demands of the third-strikers, who are mostly drug users, according to Estrich. Every state has similar laws that cost taxpayer dollars and will not make life safer. As long as politicians believe that the public supports such laws, they will continue to enact them. Estrich does offer some suggestions that could make us safer. She argues that there are better ways to predict future dangerousness than three prior felony convictions, and that crime prevention programs are much more cost-effective in creating a safe society than building bigger prisons. She believes, however, that politicians will never embrace these alternatives, partly because politicians may not be giving the public sufficient credit.

My strongest criticism of the book is that Estrich has an ability to articulate innumerable problems with the criminal justice system, which is not a remarkable or even helpful feat, but she does not point to answers. I do not necessarily

believe that answers exist that she ignores or fails to imagine; but I do believe that merely emphasizing or exposing problems does little good in society.

In her final chapter Estrich does, however, point to one answer with which I strongly agree. The criminal justice system could improve greatly (though not necessarily be *saved*) if criminal defense attorneys tempered their trial decisions with ethics.

Saving the system is not the only reason that criminal defense lawyers should reject the attitude of winning at any cost. Estrich points out that, among professionals, lawyers are the least satisfied, most disappointed, and most alcoholic of all. The "hired gun" attitude, which emphasizes doing everything for the client that the client would want done, is very hard on one's dignity, and winning is empty when the acquittal comes at the cost of doing the right thing.

Some of the traps that criminal defense lawyers are tempted by include many *not addressed by ethics rules*, such as:

- attacking the credibility of a victim, for example, in a rape case where the criminal defense lawyer knows that consent is not an issue, but also realizes that the jury will be less likely to convict a rapist who accidentally picks a prostitute to rape rather than a nun;
- asking questions of a witness for the defense when the criminal defense lawyer suspects the answer will be a lie, but has taken great pains to avoid knowing the truth;
- lying to the press about the innocence of one's client with the intent of changing the public atmosphere surrounding a case;
- asking questions of a potential witness in a way so as to suggest what the best answer might be. She offers three examples:
 - "Did your father by any chance abuse you?"
 - "Did your husband beat you?"
 - "Was your wife unfaithful?;"
- urging a jury to ignore guilt, focusing instead on police misdeeds to "send a message" through their verdict.

These actions, and a thousand examples like it, cause the system to fail. Victims are twice brutalized and come forward no more. Witnesses who know the truth see the small part of the truth that is presented to the jury and lose respect for the process. Police become cynical and hesitate to play by the rules. The public loses faith. Criminals get away with murder.

So why don't many criminal defense lawyers play by the ethical rules and by the higher standard of assuming responsibility for the correct working of the system? Estrich maintains that, based on today's priorities, to so behave would be absolutely contraindicated, diametrically opposed, to success. Fame, general acclaim as a good criminal defense lawyer, ability to charge high fees — these are all rewards of those who *win*. Estrich advocates seeking the truth in a trial situation, and there are no reporters lining up to interview those lawyers who are good at eliciting the truth, while protecting their clients as best they can. A guilty defendant is not at all interested in the lawyer with the highest ethical standard; rather, he or she wants the one most likely to confuse the jury so that it won't hear and properly evaluate the truth.

An example of a concept that I would like to see Estrich, with her excellent mind and far-reaching contacts, explore more fully is the attraction to potential clients of ethical criminal defense lawyers. She gives one example that bears repeating. A responsible parent whose child is arrested for a drug violation and who wants the child to actually learn and grow from the whole experience would absolutely not want to send the juvenile to a lawyer with less than the very highest ethics. If the juvenile ends up with a criminal record, or doing time, doubtless the child would be a better person for having faced the consequences of his or her behavior, however tempting it may be for a parent to help the child escape those onerous consequences. In addition to allowing the child to expiate his or her guilt through the old-fashioned notion of having paid one's debt to society, the child would see honor at work, nobility in action. Estrich makes an excellent point that here, high ethics is a selling point. I would love to see her offer more.

This leads to my opinion that the book Estrich should have written is an explanation to criminal defense lawyers, especially those fresh out of school, that to accept responsibility for the criminal justice system and to eschew the sleazy tricks is, in the long run, in *their own* best interests. The high road will not result in stellar incomes or in fame. But the rewards in personal dignity and self-esteem much outweigh the material gains. There is no possibility of happiness for a person who does not respect him- or herself, and there is no self-respect for a lawyer who will win at any cost. A standard needs to be set, like Kant's categorical imperative, which holds that the measure of one's actions is whether the world would be better off if everybody acted in the same way. An adaptation of that standard to the criminal justice system would approximate "What effect will my actions have on allowing the fact-finder to know the truth?" A lawyer should ask him or herself, "is asking *this* question of *this* witness going to illuminate or obfuscate the truth?"

This is not to say that the criminal defense lawyer should be no different from the prosecutor. In most matters before the court, there are several truths. The truth from the point of view of an armed robbery defendant, for example, is that he felt he had no other options because he needed to support his pregnant girlfriend and his sick mother. The victim's truth is that he was forced into becoming a convenience store cashier from lack of other opportunity and didn't deserve to have a gun pointed at him. The truth from the robbery detective is that this convenience store robbery looked suspiciously like that other one, so far unsolved, and the defendant is not a poor hungry kid but someone who likes the power in watching cashiers tremble, so adding on those other dubious charges was necessary to stop this spate of robberies and thus protect society.

In sum, a book that proposes a feasible solution to any of the various problems of the criminal justice system would be a welcome addition, even if it just attacks one problem at a time. Estrich's book is entertaining, informative, and easy to read. Unfortunately, it is not helpful or encouraging. I do not believe America needs more books telling us the degree to which our criminal justice system is political and dysfunctional. I believe most Americans already understand and are more open to rational changes than our politicians think we are.

Estrich has a pulpit from which to argue intelligently for ways to decrease the politicization of the system, particularly her argument for higher ethics in the courtroom. My criticism of her book is that she did not make full use of that pulpit.

