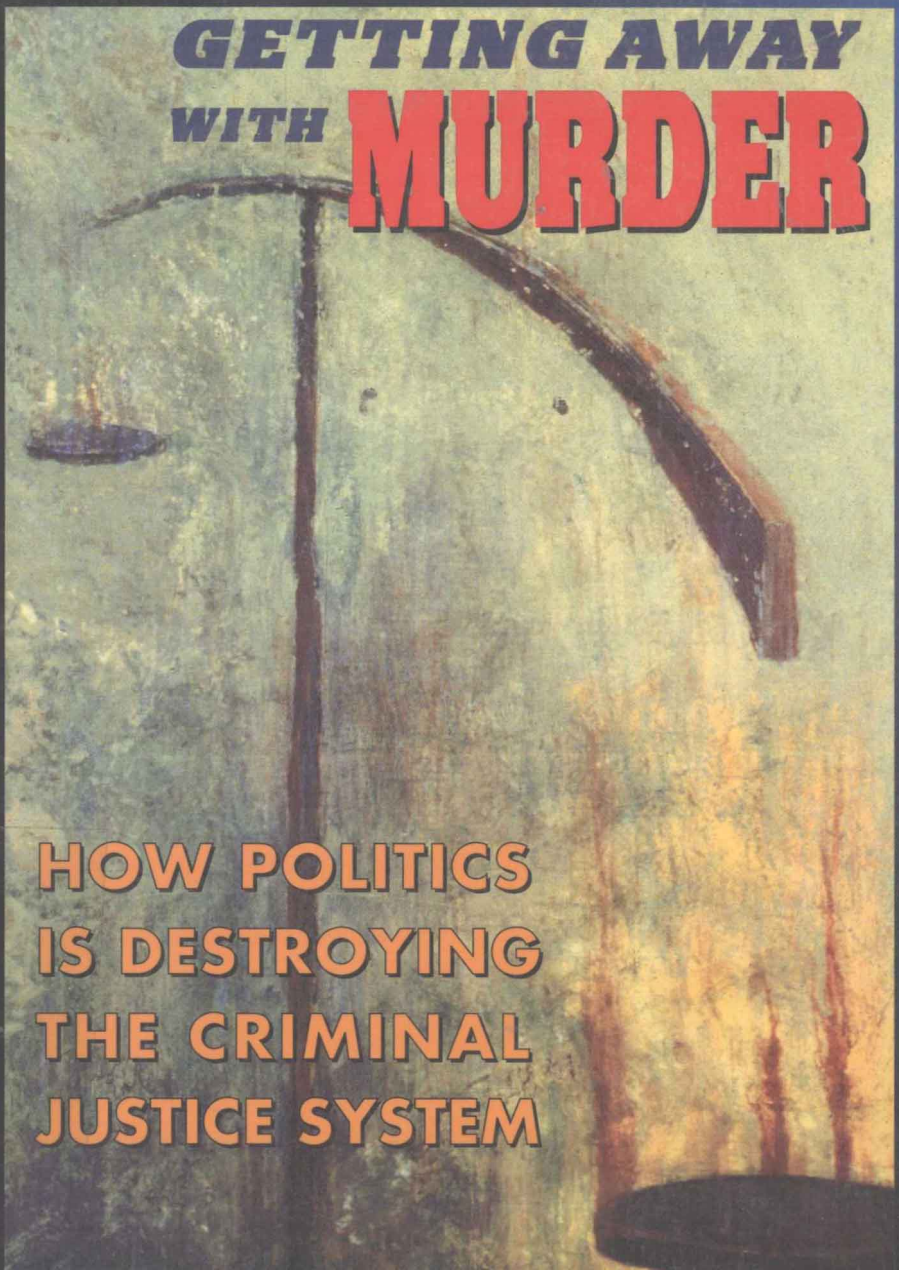
SUSAN ESTRICH



GETTING AWAY WITH MURDER

HOW POLITICS IS DESTROYING THE CRIMINAL JUSTICE SYSTEM

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Designed by Gwen Frankfeldt

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Prologue

Beware what you wish for. After a string of high-profile acquittals in which juries have been accused of nullifying the law and letting guilty defendants get away with murder, along comes a jury that enforces the law and holds a sympathetic defendant guilty of murder. And what happens? The public is aghast, and the respected presiding judge concludes that even though the evidence is sufficient to support the verdict, it should nonetheless be reduced. "Justice" demands that Louise Woodward get away with murder.

In our society, the majority decides what the law should be, something we all recognize as a political decision. But in its application, the law is supposed to be nonpolitical: everyone is to be treated "the same," according to "the rules." The problem is that deciding who is and isn't "the same" is itself a political judgment. So is interpreting the rules. So is deciding when to ignore them.

The line between murder and manslaughter is generally the intent of the defendant: hit men are worse than drag racers. But the law also allows people to be convicted of murder if they act very recklessly, while it allows intentional and even premeditated killers to be found guilty only of manslaughter if

they were provoked. It all depends on how reasonable or unreasonable they are. But what's reasonable? The jury is bound to follow the law, except that it's free in practice to ignore it; and the judge is not to second-guess the jury, except that he has the power to nullify its decision, even if it did just what he instructed, if he decides its decision isn't just.

When I was a first-year law student at Harvard, I took the course called Legal Process with Dean Albert Sacks. The course was based on materials he'd put together nearly twenty years earlier with Henry Hart, one of the giants of legal scholarship. Legal process was, in its time, considered a brilliant response to the postwar realists' unmasking of law. The realist critique left no doubt that judges make as well as interpret law, guided by their values. In the rules of legal decision making—respect for precedent, reasoned elaboration, neutral principles—the legal process found the constraints that gave its product legitimacy as the rule of law and not simply the choices of men.

The crits—the critical legal studies advocates—thought of the legal process as a marvelous dinosaur, and the fact that the materials, twenty years later, were still bound together by staples instead of hardcovers added to their mirth. "I should be teaching the legal process," the crits' colorful and brilliant leader, Duncan Kennedy, used to say, but they wouldn't let him, and he didn't have tenure yet. In his hands, the legal process would have been a case study of deconstruction—a long semester whose point was that there wasn't a point, that everything could be manipulated, that if you pushed the so-called rules far enough, the underlying political choices would be naked. He didn't need to teach the legal process to do that, of course. You can teach any course that way.

And then what? If it's all political, then what?

Then janitors should make as much as professors. Admission to the law school should be by lottery. Law review as an elite

institution should be abolished. The distinctions we drew were ultimately meaningless, or at least no more meaningful than any other. Our enterprise, our process, was delusion and denial. So said Duncan.

It infuriated me. Duncan and I had a running disagreement about it for years, one that flared with issues like affirmative action on the law review, which he favored as a way of attacking the fiction of meritocracy, and which I opposed, at least for women, as unnecessary and stigmatizing, potentially closing off one of the few avenues for women to prove, as they had to, that they were better than the men. He used to describe it as the problem of my "working-class" roots, which amused me, since my parents, first-generation Americans, prided themselves on being solidly middle class. That Duncan could say it, and I could feel it, was a measure of the distance between us.

I used to be envious of people like Duncan—well-born, educated in fancy prep schools, privy to a hundred secrets and a world of contacts way beyond mine. I went to college and law school on scholarship. My father died while I was in law school. When I graduated, I didn't have a dime, and I certainly didn't have any family connections. But I went to work for one of the top law firms in the country, for a great judge and then a great Justice, and then a great professor who has become a Justice, not to mention every Democratic presidential candidate of the 1980s, which was an eye-opening experience even when they all lost. I also became a tenured professor at Harvard Law School, and then left to take a chaired professorship at the University of Southern California Law School.

I was able to do all those things because I was smart, as measured by all the meaningless criteria—grades, law review membership, *Law Review*'s first woman president—that Duncan disparaged. However arbitrary, however contextual, the rules had opened doors for me; if they were arbitrary, at least by the time

I got there it was a form of open-door arbitrariness. If you could win at their game, they weren't allowed to deny you. In those days, the aim of antidiscrimination efforts was just to get a chance to play by the boys' rules. I didn't think of it as a working-class argument. For me, it was a feminist argument.

The feminism that descended from critical legal studies was of a more radical, separatist variety. It rightly exposed the bias inherent in neutral rules, making clear that boys' rules too often were just that—applicable only to the boys—and this exposé was itself an enormous intellectual and political achievement. But many radical feminists also rejected the possibility that *any* common rules could be fair rules, and they used the power imbalance between men and women to justify an approach that essentially says women should always win because they have always lost in the past. Similarly, critical race studies, another descendent, views law as enforcing the power of whites over blacks; academic advocacy of race-based jury nullification is squarely within this worldview. Every question is seen in gender or race terms. Race or gender always matters; it is the only thing that matters; distrust is the underlying attitude, and cynicism its expression. Better anarchy than oppression.

Or, as has been argued a million times since the O. J. Simpson verdict, whites have gotten away with murdering blacks for centuries; why is everyone so angry about a black man getting away with it every now and then?

I once had a student who learned the lessons of his first year in law school too well. By spring, when it was my turn to teach him, he thought the question of how the Supreme Court might decide a particular case to be a naive and foolish one, certainly unworthy of his attention. It's all politics, he said to me, as if that ended the discussion.

In my book, it's the beginning. There are many different ways of doing politics. My parents, faced with unfamiliar names on

a ballot, would always vote for the Jew. I vote for women. This is a perfectly acceptable way to do politics in an election, particularly when you don't know who any of the commissioner candidates are. But it is not an acceptable way to do politics inside the criminal justice system.

Respect for the rule of law demands that people trust the system both to protect the innocent and to punish the guilty. A state that is too weak is as dangerous as one that is too strong. The latter invites repression; the former, anarchy, lawlessness, private justice. It is the balance that provides the grounding for a stable democracy. And vice versa.

Three-quarters of all blacks in America believe that the criminal justice system is racist and unfair. Nearly half of all whites think it's ineffective, and getting worse, particularly in dealing with issues of race.[1] The belief that the system is broken and cannot be trusted is true enough to threaten our faith not only in the rule of law but in one another.

O. J. Simpson was hardly a typical defendant, and his case was unique in many respects. But it was not as unusual as it should have been. The sense that the worst of our balkanized politics had overtaken the criminal justice system was a familiar one; the chorus that no one is responsible for anything anymore has been much repeated, before and since. If the criminal justice system was on trial, it proved guilty as charged of too-familiar crimes: abandoning the requirements of responsibility, converting juries into instruments of race politics, dividing us into our separate camps with charges of bias on all our lips, led by lawyers. The Simpson case, for all its uniqueness, captured too well the ills of the system; it is in all the ways that it is *not* unusual that the case teaches us the most.

Drawing political lines is the business of law. Was Judge Zobel "right" to let Louise Woodward get away with murder? Appeals courts can answer that because they are empowered to do

so, not because those judges necessarily know better than Judge Zobel. We all can offer opinions, some of them more informed by the rules of precedent, or by how similar cases are treated, or by history or example. But in the end, we are still drawing lines on slippery slopes. Faith in the rule of law depends on our faith in one another. This book is an argument for politics as a source of faith.

Chapter 1 argues that criminal law, even in its purest and most academic incarnation, depends for its authority on the possibility of political compromise and consensus. Having a plethora of standards—what the public thinks of as "abuse excuses"—is the wrong answer to just demands for equality, but it is the answer that a mistrustful and divided society will inevitably produce. While the rule of law does not require homogeneity, it does require trust and faith in our ability to judge one another as we would ourselves. I use the familiar chestnuts of academic criminal law to illustrate how traditional tensions take on political content, leaving the common law idea of responsibility vulnerable to a lowest-common-denominator search for false equality.

Chapter 2 addresses the question not of *whether* juries should do politics but *how*, arguing that group-based jury nullification, like group-based abuse excuses, is precisely the wrong answer to the biases of the criminal justice system. There is no denying that the system is racist, albeit not in the simplistic sense that its critics often emphasize. The inevitability of racism in a system in which race and crime correlate so highly mandates attention to issues of representation and demands strict scrutiny of race-based stereotypes, precisely because they are based in fact. But to go beyond process and standards and use the power of juries to nullify the law to send a message about racism is a political disaster on all counts, sure to widen political divisions, increase crime, distort political debate, and undermine the rule of law.

Chapter 3 examines what is most easily recognized as the politics of crime: politicians who outdo one another to prove who is toughest, legislatures that pass tough-sounding but unenforceable laws, and judges who are blamed when things inevitably go wrong. The current political debate about crime distorts the allocation of power within the criminal justice system, contributes to perceptions of racism, ignores the hard questions, and deals dishonestly with the questions that are addressed. Political reactions that should be part of the solution to the loss of faith in the system instead have become part of the problem.

Chapter 4 focuses on lawyers and the intersection between professionalism and politics. The question of how far a criminal defense lawyer should go in defending a client raises in classic form some of the problems of professionalism that confront all lawyers today. Are we simply hired guns, in the business of helping our clients get away with murder, or are other values at stake that should limit and guide our actions? Should a lawyer argue that her client was framed, when she has no reason to believe that he was? Should she impeach the testimony of a witness, even though she knows the witness is telling the truth? Does she help a witness whom she doesn't believe is telling the truth prepare his testimony for trial so as to be more credible? Does she ask the jury to draw inferences, when she knows there is no basis for them? Does she try to undermine the credibility of a rape victim by invoking her sexual past and humiliating her on the stand, even if consent is not an issue? Should a lawyer play the race card, even if there is no evidence of racism? Should he attack a witness for his sexual orientation, playing to the prejudices and homophobia of a jury—or threaten to do so, in the hopes of intimidating the witness into changing his testimony or refusing to cooperate with the prosecution? Does he delay, deceive, and intimidate, in order to help his client get away with murder? Most lawyers don't, but

that is not how the public sees us, or even how we view ourselves.

This book is an argument for political honesty, not political correctness. The processes of the common law need not produce results that clothe racism and sexism with the cloak of legitimacy, as its critics have rightly charged; they can also produce results that clothe commonality with the cloak of legitimacy, which a diverse society desperately needs. Cynicism is built on distrust, and uncommon law is its expression. Common law must be built on good faith.

ONE

Politics and the Reasonable Man

A white man shoots his black assailants on the subway, because he is afraid they will kill or maim him. Is it murder, manslaughter, or no crime at all? A black man shoots the racist who taunts him. Is it murder, manslaughter, or no crime at all? A mother kills a child abuser. A husband kills his unfaithful wife. A battered woman kills her husband. Two abused sons shoot an abusive father in the back.

Throw the book at them all? It won't do. Let me tell you about this father shot by his sons. He played shooting games with his kids, with real bullets. He sexually abused both sons, and then turned his attentions to their younger sister. When *his* sister reported him to social service officials, he threatened to kill her. After the shooting, his own father, the boys' grandfather, said they did the right thing. We don't really want to punish those two boys as murderers, lock them up for life without possibility of parole, do we? These are not the Menendez brothers. Lines must be drawn, not based on the race of the victim or the wealth of the defendant, but based on the law.

I teach criminal law to first-year law students. It is not criminal law as practiced in the system every day, where everyone knows that deals are being made. What I teach is the stuff of

the "high church," the effort to state clearly, if only for academic and appellate purposes, the rules of criminal responsibility. If there were a place in the system that could be free from politics, this would be it. It isn't. It is political to its core.

The standard of criminal responsibility is a political compromise enforced as law. It always has been. That's its genius. The common law is a system for achieving compromise and setting common standards, for deciding who gets what, when, where, and how (the literal definition of politics) and giving legitimacy (the force of law) to those decisions.

From a distance, it doesn't look like politics at all. Under the Constitution, the criminal law must be stated clearly in advance. All states have criminal codes, most of them based on the Model Penal Code drafted in 1954 by the most respected lawyers, judges, and academics in the country as a guide for the states.[1] We have hundreds of years of case law about what the terms in these codes mean and about what satisfies their requirements and what doesn't. Judges are bound to follow the decisions of higher courts in interpreting statutes; juries are told to follow the directions of judges.

Choice is at the core of criminal liability. The person who *chooses* to kill is more blameworthy than the one who acts out of foolishness or inattention, as Justice Holmes recognized. Even a dog knows the difference between being tripped over and being stepped on. Capacity to choose sets the threshold for criminal liability. Small children are treated differently from adults. The insanity defense recognizes that a defendant must have the mental capacity to appreciate and control his conduct before he can be held criminally responsible for it.

The deliberateness of the choice is in turn measured by *mens rea,* or criminal intent. Criminal intent is divided into four basic categories: purpose (acting with a conscious object—the worst); knowledge (doing something with virtual certainty of

the bad result, which is essentially the same as doing it on purpose); recklessness (knowing a risk is an unreasonable risk, and taking it anyway); and negligence (taking an unreasonable risk, whether you know it or not). Murders are graded according to the intent of the killer: The hit man, who acts on purpose, is worse than the drunk driver, who acts recklessly; the reckless driver who deliberately runs a stop sign is worse than the careless one who doesn't even see the stop sign.

Some crimes are defined in terms that require a conscious purpose: attempted murder, for instance, requires that you act with the purpose of actually killing. And being negligent is generally not a crime at all, unless it results in death; even then, mere negligence—the civil standard that would give rise to a duty to compensate the victim's family—is generally not enough to warrant criminal punishment.

Indeed, in 1962, in *Robinson v. California*, the Supreme Court came close to holding that punishing an individual in the absence of some sort of a choice violated the United States Constitution. In throwing out as cruel and unusual punishment a California statute that made it an offense to "be addicted to the use of narcotics," the Court emphasized that narcotic addiction is an illness, "which may be contracted innocently or involuntarily." The implication was that it might be unconstitutional to punish someone for something he couldn't help, couldn't control.

The four established purposes of punishment—deterrence, incapacitation, rehabilitation, and retribution—are all served by the focus on the will of the defendant. Those who do bad things on purpose are, depending on one's perspective, dangerous and deserving of being locked up (incapacitation) and/or unsocialized and in need of rehabilitation. The prospect of punishment is supposed to deter this person (specific deterrence) and others in the community (general deterrence) from

making this wrong choice in the future. To punish in the absence of choice, it is argued by many, cannot deter: how can you deter someone from doing something he didn't choose to do? And as for retribution, aren't we all angrier at the person who intentionally runs down a child than at the person who does it by accident?

To punish in the absence of choice, scholars and judges have argued, is morally unjust: punishment requires fault, and fault requires the ability to do otherwise. If a person was doing the best he could, even if he failed to meet society's standards, the prospect of punishment would not deter him, and its imposition would be unfair. The House of Lords, England's highest court, adopted a variant of this position in the controversial 1976 case of *Regina v. Morgan,* where the Justices concluded that three drunken sailors could not be convicted of rape if they believed, honestly but unreasonably, that the woman they were raping was screaming and fighting because it made sex more exciting for her, as their buddy—the husband of the victim—had allegedly told them.

Requiring choice works just fine, except when it doesn't—when, as in *Morgan,* the result of requiring choice seems to violate common sense. Even the most enthusiastic proponents of choice, even those who would excuse an individual who makes an unreasonable mistake, have their limits. It may be impossible to deter someone who is out of control, but no one wants to license a hothead to kill—even if he is congenitally short-tempered. Do we really care that he wasn't "choosing" fully? In their retrial, the *Morgan* defendants were again convicted; the jury either didn't believe them, or didn't care.

The law in many jurisdictions distinguishes between first- and second-degree murder based on premeditation and deliberation—a measure of the intensity of the choice. But taken literally in every case, such a distinction produces unjustifiable