JAMES Q. WILSON

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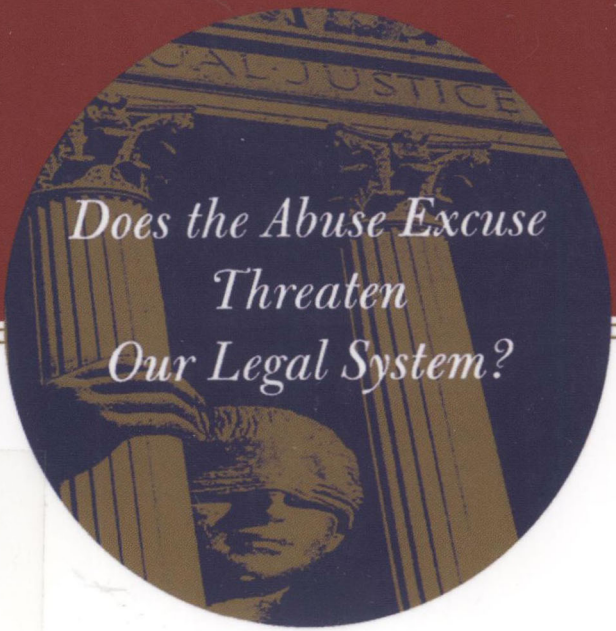

MORAL JUDGMENT

"This book is a masterpiece, and will be a classic."—Irving Kristol

MORAL JUDGMENT

Does the Abuse Excuse Threaten Our Legal System?

JAMES Q. WILSON

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For some years I have on occasion delivered public lectures about crime and criminal justice. I quickly learned that the first three questions that would follow my remarks were, in no particular order, the following: What do you think of gun control? Of drug legalization? Of the death penalty?

In 1995 that all changed. The first—and for many people, the only—question was, How could the Menendez brothers have gotten off? Of course they did not "get off"; the two juries were divided between convicting them for murder and manslaughter, and a retrial was scheduled. But the point remained the same—two rich boys executed their parents for financial gain, and the criminal justice system could not convict them of what they surely deserved, first-degree murder. My audiences were profoundly upset about what they—and I—regarded as an indefensible outcome.

At about the same time journalists and one or two law school professors were making heavy use of such phrases as the "abuse excuse," implying that what happened in one celebrated Los Angeles case was in fact the tip of a very large and mischievous iceberg. As a consequence, when I was invited to deliver the Godkin Lectures at Harvard, I decided to use the occasion to investigate what produced an effect so many people deplored, hoping to discover if it was either

idiosyncratic or reflective of some deeper deformation in our laws.

On delivering the lectures at Harvard, I learned again what I have so often forgotten: no matter how the world changes, the intellectual life of Cambridge follows its own stern destiny. The first question after my first lecture was this: What do you think of gun control?

My choice of topic required that a social scientist learn a lot of criminal law and criminal court procedure, an enterprise that proved so taxing that, had I realized in advance how much effort would be required, I probably would have selected a different subject. Lawyers, and especially law school professors, have thought long and hard about the issues that help explain the Menendez outcome. Happily, I had the benefit of good advice from four law school professors who read some drafts and gave me clear and often blunt assessments of my ideas. I wish to acknowledge their great assistance: Peter Arenella of the University of California at Los Angeles, Susan Estrich of the University of Southern California, George Fletcher of Columbia University, and Stephen Morse of the University of Pennsylvania. The final manuscript was carefully read by Kent Scheidegger, legal director of the Criminal Justice Legal Foundation, and by Gary Katzman. I also benefited from discussions of these matters with Judge Diane Wayne, former Los Angeles district attorney Ira Reiner, and assistant district attorney David Conn.

I am grateful to many people who helped introduce me to English criminal law, but especially to Anne Rafferty, Q.C., chairman of the Criminal Bar Association of England and Wales, Professor Martin Wiener of Rice University, and Loretta Damron at the London office of the Pepperdine University Law School.

Daniel Garstka was an intelligent and industrious research assistant who not only supplied me with facts but challenged, where necessary, my own views.

Certain errors in my treatment no doubt persist. I apologize to my advisers but take a certain pride in having willfully retained them.

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Faulty Experts

Many Americans worry that the moral order that once held the nation together has come unraveled. Despite freedom and prosperity—or worse, perhaps because of freedom and prosperity—a crucial part of the moral order, a sense of personal responsibility, has withered under the attack of personal self-indulgence.

By responsible people I mean accountable: We ought to answer for our own actions and not, save for the extaordinary reasons, claim that we were compelled to act badly by forces over which we had little control. We all know that society helps shape our character, but most of us deny that society excuses it. People ought to own up to what they do and accept the consequences of their actions. High rates of crime, the prevalence of drug abuse, and the large number of fathers who desert children and women who bore them all support the popular belief that responsibility has given way to selfishness.

Nowhere does the problem of personal responsibility seem greater than in the criminal law. The public worries that criminals are too often excused rather than punished or,

if they are punished, that the sentence is too short when imposed and even shorter in practice. The public suspects that criminal trials, especially those involving murderers, have been hamstrung by the introduction of a range of implausible excuses. These range from the so-called Twinkie Defense, a claim of judgment impaired by the toxic effects of junk food, through claims of psychosexual abuse used by Erik and Lyle Menendez to produce a hung jury in their first trial, to arguments that a woman may castrate or shoot a brutal husband even though he is asleep. Americans have never been entirely comfortable with the insanity defense as raised by John Hinckley after he shot President Ronald Reagan; that discomfort has been heightened by what people view as an indefensible effort to extend insanity, narrowly defined, to include psychological states described by such terms as "temporary insanity" or "diminished capacity" or by various "syndromes"—premenstrual, postpartum, posttraumatic, and the like. The emergence of these concepts suggest to many people that essential notions of personal responsibility have been weakened by the frivolous use of dubious theories of social causation. The stern task of judging the behavior of a defendant, based on a dispassionate review of the objective evidence, has given way to explaining that behavior on the basis of conflicting theories presented by rival expert witnesses speaking psychobabble.

Experts on criminal justice see the matter quite differently. Though the law reviews are filled with learned and subtle discussions of every new defense claim that is considered by an appellate court, and though some journals overflow with proposals from law students for even more fanciful defenses, law professors are usually inclined to dismiss

public anxiety over such novel defense stratagems. The insanity defense, they point out, is rarely raised and even more rarely successful. And a person found to be insane may spend more time in an institution than one convicted of murder. The Twinkie Defense, though it made for interesting headlines, probably played no role in the case of Dan White, accused of shooting two San Francisco officials. New defenses are being introduced, but few of them lead to killers being acquitted; at most, theories about the mental state of the defendant may lead to verdicts of manslaughter rather than murder, and even that occurs only infrequently. The first trial of the Menendez brothers was an anomaly, not at all representative of the great majority of homicide prosecutions. To be sure, the battered-woman syndrome has been introduced into many trials of women who killed their husbands, but such killings are unusual; the syndrome rarely leads to any outcome more questionable than a lenient sentence based on a recognition of grave prior brutality; and, in any event, battered women are entitled to have the jury hear what has befallen them at the hands of a sadistic or out-of-control husband. Finally, all these excuses, defenses, and syndromes can have no greater effect than a jury chooses to give them; if jurors find such arguments compelling, there is no more reason to exclude from the trial these claims than there is to exclude physical evidence.

Though the public is not comfortable with the lawyers' response, there is considerable logic and some evidence behind it. Legal experts—law professors and criminologists—argue that the American criminal justice system is the most punitive in the free world: more likely to convict, more likely to imprison, and more likely to execute than that of any other democratic nation. We are frequently told

that the United States incarcerates a higher proportion of its population than any other nation.[1]

In response, many citizens argue that if this is so, it is only because America has vastly more crime than other nations. For each crime committed, they suggest, we still are more likely than other nations to excuse the offender and moderate the penalty.

In fact, both academic experts and ordinary citizens are partially correct. The experts are right to say that we have a higher fraction of our population in prison than do most other nations, but the citizens are right to think that the chances of going to prison for having committed a given violent crime were, at least in the early 1980s, about the same in America, Canada, England, and West Germany.[2] The experts are correct to argue that America imprisons more of its burglars than do many other nations, but the citizens are right to think that this difference may help explain why the American burglary rate is significantly lower than it is in Australia, Canada, England, the Netherlands, or Sweden.[3] The experts are correct to suggest that America hands out stiffer sentences for property crimes than does Canada or England, but the citizens are right to think that American sentences for property crimes have gotten shorter than they were in the 1950s and that sentences for homicide are not only about the same here as in other countries but are also relatively short (in the early 1990s around six years for the nation and around four years in California).[4] The experts are correct to suggest that America has increased the use of prison for drug offenders, but the citizens are right to think that, at least in the states that have been studied, these offenders rarely go to prison just for selling drugs—most have much more serious criminal records.[5] The experts have some

grounds for saying that America is a punitive nation, but the citizens are right to suspect that when incarceration is based on crime rates and time served, America handles murderers much as other democratic nations do, is somewhat more punitive toward burglars, and seems to enjoy (perhaps as a result) a lower rate of burglaries than other countries. In short, the crime policies of this country are more complex than most persons imagine.

These complexities are not widely understood and, in any event, pale into insignificance in the context of a particular trial that has caught the public's attention. When Dan White was convicted of murdering two San Francisco public officials, when Bernhard Goetz was exonerated after shooting some black youths, when the first trial of Erik and Lyle Menendez led to hung juries, or when O. J. Simpson was speedily acquitted of his murder charge, what generally happens to murderers becomes much less important than what happens to a particularly notorious one. If there is an acquittal or a light sentence, we are treated to media complaints about the existence of mental conditions and social causes that excuse defendants and to arguments about the influence of race on jury decisions. We are aware that celebrated cases attract skilled attorneys and we suppose—with some reason—that expensive or highly motivated legal talent will produce results that are quite different from those in ordinary cases.

The best defense attorneys will raise the most detailed and persistent objections to prosecutorial arguments, urging every objection that has any support in the rules governing how evidence should be collected, testimony taken, and data processed. Beyond this they will try to portray the defendants as the victims of forces beyond their control—spousal

abuse, parental mistreatment, psychological depression, questionable diets, and personal confusion.

Since most citizens have a tough view about crime and its control and regularly join with their fellows in denouncing defendant excuses and judicial leniency, one would expect that most jurors would repeat in their private deliberations the views that animate them in the public square. But repeatedly a remarkable transformation occurs: people who denounce crime as citizens understand, if not excuse, particular crimes as jurors. To some extent this reflects those attitudes we want jurors to display. We hope they will put aside passions and preconceptions, judge each case on its merits, and think dispassionately about what happened. But often our hopes lag well behind the reality: a representative group of jurors, most of whom have feelings about crime no different from those of the average citizen, decides a matter in ways that they would have likely denounced had they stayed out of the jury box.

It is one of the purposes of this book to explain that transformation. I want to explain why jurors often behave in ways that lead citizens to criticize American society for its alleged moral decay. Many of us believe that there has been a decline in the willingness of citizens to assume and ascribe personal responsibility for their actions. In this view we are now more likely to deny guilt, to expect rewards without efforts, to blame society for individual failings, and to exploit legal technicalities to avoid moral culpability.

I wish to assess one count in this indictment—namely, the argument that the legal system has become excessively tolerant of excuses. I will begin with an account of how the law shapes self-control and continue in the next chapter with an analysis of how it defines self-defense. I then will

turn to a history of Anglo-Saxon law that briefly explains how we have steadily transformed the rules governing self-control and self-defense. I will end with an explanation of the necessary tension in each of us between the desire to judge and the desire to explain human behavior. Unless the law proceeds carefully, it risks placing its finger too heavily on one side of that tension—typically, the explanatory side—so that juries are more likely to explain and less likely to judge the defendant's actions.

Social science seeks to explain behavior, criminal law to judge it. Science seeks causation and tries to clarify motives; the law demands responsibility and tends to discount motives. The central failing of American criminal law is not the adoption of endless "abuse excuses," but blurring the boundaries between imperfect science and commanding law, with the consequent admission into courts of questionable expert testimony.

The general principle of Anglo-Saxon law is that people are responsible for their actions, but to this rule there have been added, by the combined effects of justice and benevolence, a number of exceptions.[6] For murder these include those based on justifications (such as self-defense), excuses (such as accident or insanity), and mitigations (such as causing a reasonable person to lose his or her self-control).[7] These exceptions, originally designed to moderate severe penalties, such as the execution of all murderers, have created an opportunity for medicine and social science to explain criminal behavior by expanding on what mental states may weaken self-control, enlarging on what constitutes self-defense, and exploring what might amount to a provocation. The result has been a tension between judging and explaining a killing, with the result that in some cases—not as many as some crit-

ics allege, but more than most people would accept—we get a criminal law that punishes conduct only to the extent that it was an act of deliberate hostility or arose without the aid of any one of a growing list of temporizing conditions.

The law, we must not forget, holds us all to a high standard: We must never intentionally and without justification harm others, and to conform to that standard we must learn, as Oliver Wendell Holmes put it, not only the law but the lessons of common experience.[8]

The most visible symbol of the growing struggle between science and law is the rise in expert testimony. When we think of an expert, we imagine a person who has a commanding knowledge of a subject about which knowledge, and not merely opinion, is possible. There is, of course, scarcely any such thing as incontrovertible scientific evidence. For nearly every proposition, some future event may disprove or reshape it. "The sun always rises in the east" seems a secure scientific statement, but in the event of an unpredictable celestial holocaust, it may not rise at all, or if it does, there might be no earth left to provide a basis for distinguishing east from west.

Scientists do not know incontrovertible facts; they know, instead, methods by which supposed facts may be tested. Usually, we say that for a statement to be a fact it ought to be possible to disprove it. "The sun rises in the east" must be taken seriously as a putative fact because—who knows?—it might rise someday in the west, or not at all. It becomes more like a real fact than a supposed one the more consistently we observe that despite the daily opportunity for refuting it, it has never (yet) been refuted. The more times a statement might be disproved and yet is not, the more likely we are to regard it as a fact.

This means that real knowledge, as opposed to mere opinion, consists of statements that have survived the efforts of many people to disprove them. Such knowledge need not be scientific; it could as well be practical, of the sort acquired by a carpenter, a plumber, or a bank loan officer. What all such groups know, and not just think, are statements that could be falsified but, in general, are not.[9]

Science is, in a sense, a formal way of exposing assertions to the possibility of being disproved. It includes a host of methods and habits, ranging from careful experimentation through statistical inference to the testing of ideas by rival scientists. Some aspects of what we know about people meet these scientific tests reasonably well. We know that blood circulates, the brain produces weak electrical currents, intelligence is largely but not entirely inherited, and the lack of certain vitamins contributes to specific disorders. Other aspects of people are more problematic: for example, we can tell roughly the difference between types of personality, though there is a lot of uncertainty as to how precisely we can measure the differences and what they imply for human conduct. And still other features of people are much more speculative, such as the relationship between attitudes and behavior; our inclination to help others or seek help for ourselves; and how we respond to crowds, alcohol, and ideology.

For several decades the courts have increased dramatically the extent to which they admit testimony by people claiming to be experts—claiming, that is, that they can make statements that are not easily disproved about the sources of human behavior. Much of this new testimony has been the inevitable result of matters entering the courtroom—such as the effect of a drug on a patient or the precision of DNA