

EXPLAINING EVERYTHING

Review of Moral Judgment: *Does the Abuse Excuse Threaten Our Legal System?* by James Q. Wilson

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James Q. Wilson has written an important book which is almost certain to be misunderstood in ways that conceal both its strengths and weaknesses. Though it brilliantly analyzes the effect of the "abuse excuse" upon our legal system, it ultimately undermines the basis of moral judgment. In so doing, it keeps the promise of its subtitle yet defeats the promise of its title.

According to the author, the basic principle of our law is that people are accountable for their actions. To be sure, there are a few exceptions: in the case of murder, for example, we recognize justifications such as self-defense, excuses such as insanity, and mitigations such as provocation. Traditionally, however, these exceptions have been narrowly defined and strictly limited. That is just how it should be, for the task of law is "to raise, not lower the ante" in the circumstances that tempt us: law must be unkind, and the greater the temptation, the sterner and more unkind it should be.

Of course, as the stern mills of the law are grinding out their unkind judgments they sometimes have need of expert testimony, and herein lies the danger. So long as experts deal in "hard" knowledge like whether the fibers found on the heels of the defendant's shoes came from the clothing of the victim, their testimony is helpful. But when they are allowed to give their opinions as to "soft" matters like whether being beaten as a child predisposed the defendant to beating people as an adult, the focus of proceedings shifts from judgment to explanation. In the sciences, of course, explanation is the goal. But in an institution whose purpose is to determine legal culpability, *explaining* can mean only *explaining away*. Those rare and narrowly crafted justifications, excuses, and mitigations are steadily multiplied and enlarged, until the principle of accountability itself seems in danger of being swept away.

This shift from judgment to explanation is the source of the "abuse excuse" that has become so disturbingly familiar from press coverage of high-profile trials. Don't blame me! I was drunk, high, full of steroids. It wasn't my fault! I'm a battered woman, an urban survivor, a victim of sexual abuse. I couldn't help it! I was full of black rage, suffering from post-traumatic stress, caught up in the mentality of the mob. I wasn't responsible! I've got learned helplessness, XYY chromosomes, a rotten social background. I wasn't myself! It was the pornography, the junk food, the pre-menstrual stress. *Let me off! Let me go! Give me a break!*

Here is the first point at which Mr. Wilson's book will be -- already has been -- misunderstood. Even one of the worthies quoted on the back cover has got it wrong. The author does *not* argue that "the criminal justice system has become a kind of theater of the absurd" with murder "explained away by arguments like having a bad day." In fact he maintains just the opposite. "Contrary to what many suppose," he says, "there is no avalanche of 'abuse excuses' afflicting American criminal law." Such ingenious defenses are seldom mounted and even more seldom succeed. Only in the splashiest cases -- in trials where someone has the money to pay for the skilled lawyers and expert witnesses that are necessary to make them credible -- do they make any headway at all.

If the abuse excuse is so rarely successful, why dwell on it at all? For two good reasons. First, the very fact that it succeeds only in the presence of the catalyst of money shows how easily the law can be distorted by wealth. Second, and more important, what these trials exhibit in exaggerated form is also happening on a smaller scale throughout the criminal justice system: "though no avalanche has occurred," says the author, "the courts are having difficulty keeping their footing on a slope that has become increasingly slippery." What greases the slope is the notion that "since crime is socially caused, personal responsibility is diminished."

All of this is persuasive, but here is the second point at which Wilson's book will be misunderstood -- and this is where I think he undermines his own project of talking about moral judgment. The author does *not* argue that crime is *not caused*. He is a thoroughgoing determinist; for what some people call free will, there is no room in his view of things at all. "There is no reason to think," he says, that actions like "intentional thought, speech, and social behavior" are "any less caused than the patellar reflex" -- the inherited disposition which causes your leg to jump upward when your knee is struck in a certain place with a small hammer. Indeed, "if we knew enough about my genetic endowment and childhood socialization, the opportunities and incentives available to me and the beliefs and principles by which I evaluate them, we could fully explain why I am sitting here writing this chapter." True, we can't *now* predict human behavior with much precision, and courtroom experts who say they can are pretenders. But "some day, in fact, we may have such a theory," and if we don't, it won't be because of free will.

Now things become complicated, for Wilson has presented us with a paradox. All behavior is caused, yet somehow we are accountable for it; everything we do could in principle be explained by antecedent conditions, yet in all but the rarest cases (in fact, just those cases to which the traditional exceptions to the principle of legal accountability apply) a person "could have acted other than as he did." How can these contraries be reconciled? By way of answer the author says things like "A cause is not an excuse except insofar as the cause deprives the person of reason or forces a person to act." There is something puzzling here. If the way I think when I am not deprived of reason is determined by antecedent causes just as tightly as the way I think when I am deprived of it, then what difference does it make whether I am deprived of it or not? And doesn't *every* true cause "force" me to act? What else *is* a cause but something which "forces" something else to happen?

Wilson is too smart a thinker simply to contradict himself. I suggest that what he is getting at may be something like the following. In deciding whether to hold a man accountable for something he did, Wilson seems to think we shouldn't ask *whether his choice was free*, but *whether his act was avoidable*. Suppose one day you get out a gun and shoot me just for fun. Clearly your act was avoidable -- you *could* have acted other than as you did, not in the sense that the choice was free, but in the sense that the choice made a difference. That is, had you chosen differently, the shooting would not have taken place. Now change the illustration -- you still shoot me, but for a different reason. Someone has forced a gun into your hand, twisted your wrist until the muzzle pointed at me, and muscled your finger against the trigger. This time your act was *not* avoidable -- you could *not* have acted other than as you did, not in the sense that the choice was unfree, but in the sense that the choice didn't make a difference. Had you chosen differently, the shooting would have taken place anyway.

Just such a way of thinking was proposed by philosopher C.L. Stevenson in the 1940s. Could it be that Wilson is a Stevensonian? It would certainly explain how he can believe that all of our choices are completely determined by their causes, yet consider those causes irrelevant to the determination of legal culpability. Not only that, the traditional exceptions to legal culpability, which Wilson wants to preserve, correspond precisely to the circumstances in which our acts are not avoidable. Consider for example the traditional insanity defense: if I shoot my brother, while out of my mind, under the delusion that he is really a ravening lion, my act is unavoidable because a choice *not* to shoot my brother can make no difference to what I actually do; that's not what I think I am doing anyway. But in all cases where actions *are* avoidable -- where my choices *do* make a difference to what I do -- it makes sense for the law to *become* one of causal influences upon my choices by sternly threatening me with punishment for choosing wrongly.

Stevensonian or not, this much, at any rate, is clear. For Wilson, the fact that my behavior is caused does not make me unaccountable. Rather it is a *condition* of my being accountable, because accountability means susceptibility to causal influence *by the law itself*. Penalties are sensible not because of freedom, but because of determination. The crux of the matter is that law is a control system. It is an unusual one -- one which works by the internalization of external norms, by "focussing," as Wilson puts it, what we quaintly call our "self" control -- but it is a control system nonetheless.

This view presents a deep difficulty. If law is reconceived as a sheer control system, then of course it can survive the denial of free will. And yet one cannot help thinking that Wilson does not want the control system to be sheer. He wants it to be *moral* -- to fulfill the promise of his title -- to reflect the notions of sympathy, duty, self-control, and fairness that he has discussed so interestingly in other works. Now it is one thing for a control system to survive the denial of free will. But it is quite another for moral obligation to survive it. If the world is to be matter in motion, then one must explain how *ought* is a property of matter.