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Person: An Avoidability Approach**

Michelle Ciurria

Upper-level PhD Candidate; Course director

York University

Canada

Athens Institute for Education and Research
8 Valaoritou Street, Kolonaki, 10671 Athens, Greece
Tel: + 30 210 3634210 Fax: + 30 210 3634209
Email: info@atiner.gr URL: www.atiner.gr
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Michelle Ciurria
Upper-level PhD Candidate; Course director
York University
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Abstract

O.W. Holmes' standard of the reasonable person (SRP) has been criticized by feminists, critical race theorists, and critical disability scholars for reflecting an upper-class, White, able-bodied male ideal in practice, and thereby discriminating against minority groups. In this paper, I consider three interpretations of SRP—the customary view, the avoidability view, and the indifference view—and argue that the avoidability view is the most feasible interpretation and also fares better than the alternatives against the charge of discrimination.

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Introduction

O.W. Holmes' standard of the reasonable person (SRP) has been criticized by feminists, critical race theorists, and critical disability scholars for defining 'reasonableness' by reference to the traditional ideal of the White, middleclass, able-bodied male, thereby marginalizing and unfairly penalizing anyone outside of this privileged group. In this paper, I consider three interpretations of SRP—the customary view, the avoidability view, and the indifference view—and argue that the avoidability view is corroborated by insights in moral philosophy and a combination familiar moral principles. I then argue that in light of this interpretation, the avoidability view manages to avoid the charge of discrimination, and actually fares better in this regard than its main rival, the indifference view.

Three Interpretations of SRP

SRP plays a central role in determining culpable negligence in the common law. However, it has historically been interpreted according to prejudiced assumptions about what is normal or ordinary for particular types of people. For example, it has been applied differentially to girls and boys based on false gender assumptions (Moran, p. 13), and has been imposed unfairly on developmentally disabled persons (Moran, p. 32). In her well-regarded book, *Rethinking the Standard of the Reasonable Person* (2003), Mayo Moran proposes to solve this problem by redefining 'the reasonable person' so that it includes certain biographical and descriptive qualities of the defendant (such as age, intelligence, and physical ability), but excludes specifically 'prudential or normative shortcomings' (Moran, p. 243). This definition is a form of Anthony's Duff's 'indifference account' (1990), which holds people culpable for 'only those actions that betray indifference to the interests of others' (Moran, p. 12). One of the distinctive features of this view is that it does not excuse defendants on grounds of moral ignorance or moral insanity.

Moran compares this view against two popular alternatives. The first is the 'customary view,' which defines negligence in light of community standards. Specifically, it holds a person liable for negligence if she fails to conform to our expectations of what other members of the community would do in similar circumstances. Moran rejects this view because, 'though it may coincidentally embody respect for equal moral standing, it will not *necessarily* do so' (p. 247, emphasis in original). That is, in an unequalitarian society it may simply reinforce customary discrimination, which would undermine the main function of the justice system. Moran thinks that we need a theory that isolates and condemns prudential and normative failings *per se*.

The second theory is the 'avoidability view' popularized by H.L.A. Hart (1970), which defines legal liability in terms of whether the defendant had, 'when [she] acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to

exercise those capacities' (Hart, p. 152, quoted in Moran, p. 243). Moran rejects this account on essentially the same grounds as the customary view, i.e. because it does not rule out specifically prudential and normative deficits.

Moran goes on to defend the indifference account because she believes that it is the only theory capable of protecting the interests of political minorities by ruling out discriminatory interpretations of reasonable behaviour. However, I believe that she may have overlooked the advantages of the alternatives by focusing too much on their (contingent) historical misapplications. In the next section, I argue that if we can restrict misconceptions of SRP by imposing procedural constraints on judicial discretion, the avoidability view represents a highly eligible means of determining legal liability and negligence.

The Customary Account and the Avoidability Account

In considering the customary account and the avoidability account, the first thing to notice is that they are not easily partitioned into distinct categories, inasmuch as customary behaviour naturally and inevitably informs our conception of what it would be reasonable to expect of a person under duress. In particular, it informs our conception of how much it would be fair to expect 'a person of reasonable firmness... to resist,' as required in *The Model Penal Code* for a duress excuse (p. 367). As John Doris (2007) points out,

such observations [as that torture is excusing but embarrassment is not] should not be taken to indicate that excuses are determined simply by population 'base rates'; observing 'everyone's doing it' does not have the makings of an excuse. Still, reflection on base rates helps determine what can be expected of a particular individual in particular circumstances; surely it is partly because most people yield under torture that it seems unfair to hold victims liable for failing to resist it (p. 527).

Hence, customary behaviour is notionally linked with avoidability insofar as it naturally informs our understanding of when an action was preempted by duress. Nonetheless, there must be allowances for saying that certain practices or patterns of behaviour are blameworthy *even though* they are widespread; otherwise the law cannot fulfill its purpose of promoting responsible citizenship and enhancing a general sense of security. The obvious way of achieving this aim is by excusing people only if it can be shown that their legal transgression was *unavoidable* in some reasonable sense of the word. Thus, the avoidability view may be seen as a supplement to the customary view which helps to preserve the aims of the law. It is superior to this view in that it satisfies this important pragmatic criterion.

Now if we compare the avoidability view against the indifference view, the main difference between them is that the former excuses people for actions stemming from inexorable moral ignorance and moral insanity, whereas the latter does not. This is because the indifference view holds people accountable for indifference no matter what the cause, whereas the avoidability view excuses indifference if it is attributable to uncontrollable deficits such as moral insanity. What reason do we have to accept this type of excuse? If we look to moral philosophy, it is not difficult to find arguments for avoidability-type theories of responsibility, which may offer *prima facie* evidence for the same excuse in the common law. Susan Wolf, Miranda Fricker, Gideon Rosen, and Michael Slote, for instance, offer four examples of this type of theory, which may be instructive for our purposes.

Wolf (1987) defends a well-known avoidability-based theory called the ‘sane deep-self view,’ which holds that in order to be morally responsible, an agent must satisfy three criteria: (a) her actions must be within the control of her will, (b) her will must be within the control of her deep self, and (c) her deep self must be sane. The third condition entails that the agent must have the capacity ‘cognitively and normatively to understand and appreciate the world for what it is’ (Wolf, p. 387). This differs from the plain ‘deep-self view,’ which requires only conditions (a) and (b). The latter is essentially a form of indifference theory, since it holds people accountable for indifference due to moral incapacities.

Wolf’s theory hinges largely on the intuitive appeal of a well-known thought experiment. Specifically, Wolf asks us to envision Jojo,

the favorite son of Jo the First, an evil and sadistic dictator of a small, undeveloped country. Because of his father’s special feelings for the boy, Jojo is given a special education and is allowed to accompany his father and observe his daily routine. In light of this treatment, it is not surprising that little JoJo takes his father as a role model and develops values very much like Dad’s. As an adult, he does many of the same sorts of things his father did, including sending people to prison or to death or to torture chambers on the basis of whim. (p. 379)

We are to assume that Jojo wholeheartedly endorses his sadistic actions upon critical reflection. ‘In light of Jojo’s inheritance and upbringing—both of which he was powerless to control,’ says Wolf, ‘it is dubious at best that he should be regarded as responsible for what he does’ (p. 380). Insofar as Jojo’s formative circumstances were ‘out of his control,’ and in this sense unavoidable, we cannot regard him as morally responsible.

Along similar lines, the well-known ethicist and feminist epistemologist Miranda Fricker defends an avoidability type of account which excuses people for culturally-induced moral ignorance (2007). In particular, Fricker argues that a person ‘cannot be blamed for making a routine moral judgment. But one can none the less be held responsible for making a merely routine judgment in a

context in which a more exceptional alternative is, as a matter of historical possibility, just around the corner' (p. 105). She gives the example of Herbert Greenleaf from *The Talented Mr. Ripley*, who discounts the testimony of his son's girlfriend on sexist grounds. Fricker says that Greenleaf should be excused for his prejudiced thoughts and actions because he was not 'in a position to know better' (p. 100). That is, as a 1950's-era Midwestern American man, he did not have access to a more enlightened perspective. However, since moral alternatives are clearly available to most present-day Westerners, the same excuse does not apply to us (barring very abnormal conditions). Hence, the excuse of moral ignorance is limited to peculiar cases.

In a similar vein, Michael Slote (1982) contends that ancient slaveholders should be excused for their actions inasmuch as they were 'unable to see what virtue required in regard to slavery..., not due to personal limitations (alone) but [also by virtue of] social and historical forces, by cultural limitations' (p. 72). And Gideon Rosen (2003) argues that the Hittites should be excused for practicing slavery because, 'given the intellectual and cultural resources available to a second millennium Hittite lord, it would have taken a moral genius to see through to the wrongness of chattel slavery' (p. 66). This reflects a predilection in moral philosophy for an avoidability account of responsibility. Arguably, these explanations rely on the same kinds of considerations that we find in Holmes' *The Common Law*, even if they do not explicitly invoke the standard of the reasonable person. Rather, these philosophers tend to rely on the evidence of "our pretheoretical intuitions" (Wolf, p. 382), "widespread intersubjective agreement" (Wolf, p. 386), and persuasive anecdotes.

Many people have found these accounts intuitively compelling, including myself. However, the obvious objection to this type of justification is that it relies too heavily on anecdotal evidence, emotional appeals, and *ad populum* reasoning. It is reasonable for philosophers to demand a justification for the excuse of moral insanity/ignorance that does not ultimately depend upon intuitive agreement. This is where Holmes' theory becomes useful. It can serve as a theoretical basis for these types of moral intuitions. In turn, Holmes' account can be understood in light of well-known moral principles. In his most famous treatise (1909), Holmes says that the law should determine liability based on 'what would be blameworthy in the average [person], the [person] of ordinary intelligence and reasonable prudence' (p. 51). However, it should also make exceptions for people suffering from inordinate or unusually severe deficits, such as immaturity and 'madness':

[Legal standards] do not merely require that every man should get as near as he can to the best conduct possible for him. They require him at his own peril to come up to a certain height. They take no account of incapacities, *unless the weakness is so marked as to fall into well-known exceptions, such as infancy or madness.* (p. 50, emphasis mine)

Now although there are various possible interpretations of this view, one

can reasonably construe it as relying on two sets of familiar principles: consequentialist and deontic ones. On the one hand, requiring people to come up to the standard of the majority is likely to compel them to do their best. This accords with the commonplace pragmatic/prospective condition of responsibility, i.e. that responsibility ascriptions should encourage people to foster normative competence to the greatest extent possible. On the other hand, Holmes' line of reasoning implies that there must be deontic constraints on this condition. Holmes says, for example, that

There are exceptions to the principle that every man is presumed to possess ordinary capacity to avoid harm to his neighbors, which illustrate the rule, and also the moral basis of liability in general. When a man has a distinct defect of such a nature that all can recognize it as making certain precautions impossible, he will not be held answerable for not taking them. A blind man is not required to see at his peril; and although he is, no doubt, bound to consider his infirmity in regulating his actions, yet if he properly finds himself in a certain situation, the neglect of precautions requiring eyesight would not prevent his recovering for an injury to himself, and, it may be presumed, would not make him liable for injuring another. (p. 109)

Although Holmes disputes some aspects of Kantian ethics (p. 43), this passage shows that he nonetheless enforces deontic constraints on utilitarian thinking. From a theoretical perspective, the easiest way of making sense of this type of constraint is by reference to the Kantian ought-implies-can principle, which Kant describes in the *Metaphysics of Morals* as stipulating that 'an action must be possible under natural conditions if the ought is directed to it' (p. 540). This principle in turn can be understood as implying that people should be excused for actions due to moral insanity and involuntary moral ignorance. This in fact accords with most contemporary Kantian scholarship. Dana Kay Nelkin (2011), for instance, observes that Kantian responsibility seems to require action-directedness, inasmuch as 'action-directedness is built into the very idea of obligation' (p. 114). Thus, there is no sense in holding a morally insane person accountable, since that person cannot engage in moral reasoning. Humans who lack the "perceptual, cognitive, and emotional" capacities required to respond to ought-claims, says Nelkin, are not morally responsible agents (p. 76).

This mixed, consequentialist-deontic interpretation of avoidability is appealing not only as a moral framework, but also as a *legal* one because its deontic aspect prevents the law from treating severely disabled people as a mere means to social utility, while its consequentialist aspect encourages people to foster normative competence, and also places reasonable constraints on the number of defendants who can violate the pragmatic principle of *ignorantia juris non excusat* (ignorance of the law does not excuse). This achieves what Ernest Weinrib (1997) identifies as one of Holmes' main

concerns, i.e. to demarcate ‘the boundary between the defendant’s freedom to act and the plaintiff’s interest in security by treating certain risks as unreasonable’ (p 47). In other words, it manages to balance the defendant’s rights and interests against the value of the general welfare. Thus, this interpretation agrees with Holmes’ general purposes in *The Common Law*.

Response to the Charge of Discrimination

To answer Moran’s objection that the avoidability view discriminates against political minorities, I would contend that while SRP has been misapplied in the past, this is not due to the inherent nature of avoidability: rather, it is due to ignorance about what it is reasonable to expect of people in various circumstances. It is worth noting that all theories of liability are vulnerable to misinterpretation and misapplication, and this general problem is not likely to be resolved by limiting the scope of judicial discretion; nor is it necessarily wise to categorically expunge a concept as broad and normatively significant as avoidability from consideration in court. A better solution, I believe, lies in the prospect of introducing and reinforcing *procedural* safeguards such as appointing more political minorities to the bench; exposing law students to feminist jurisprudence, critical race theory, and critical disability theory; allowing a greater role in legal proceedings for expert testimony and interdisciplinary evidence; looking ‘to history and social science for evidence that law, legal concepts, and legal institutions contain biases against certain groups or interests’ (Culver 2008, p. 212), and so on.

More importantly, if my account of SRP is correct, then Moran’s view actually enforces a distinctive form of prejudicial discrimination: namely, discrimination against individuals who are incapable of responding to moral reasons. According to my earlier Kantian interpretation of ought-implies-can, it is both illogical and unfair to hold a morally insane person responsible, just as it would be illogical and unfair to hold a blind person responsible for not being able to see. In practical terms, Moran’s view speaks against a currently-accepted application of the mental disorders defense, and the general admissibility of cultural evidence. In current legal practice, ‘it may be possible in some cases to introduce cultural factors into court under the rubric of the insanity defense’ (HLRA, p. 1294). In particular, the defendant might argue ‘that his cultural values were so different from the majoritarian values reflected in the criminal law that “he lack[ed] substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law”’ (HLRA, pp. 1294). These considerations reflect the influence that ought-implies-can has in current legal practice. I do not believe that Moran has given us sufficient reason to revoke this well-established precedent.

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