

Abstract

A source for a longstanding scholarly dissent, negligence is differently approached by various jurisdictions. While some penalize negligent actors, others refrain from doing so. The trend in recent decades, however, consistently gravitates towards criminalization of negligence. My doctoral dissertation challenges this trend's philosophical backbone, using empirical findings stemming from cognitive psychology. Here I wish to extend the lessons we should take from the case of negligence in the criminal law, and suggest a holistic approach to synthesis law with other fields of science.

First, I canvas the polemic over negligence and analyze the philosophical justification to support it. I show that in recent years, "capacity" became imperative to justify negligence in criminal law. To justify their position, both the retributivist and preventative discourses rely on the assumption that the actor had the capacity to avoid the risk.

Practically, for many years, the reasonable person test was considered as Achilles heel even to those who accept criminal negligence. Some argue that it discriminates against minorities, while others argue the test applies norms in retrospect. Recently, technological improvements have become a highly influential factor in negligence justification. As technology allows documenting increasing portions of our daily acts, the popularity of cameras and other recording devices ease the mentioned objections. Presumably, the bench's ability to reconstruct the actor's ken in real time, and hence to judge the failure to perceive the risk, is significantly improved.

Counterintuitively, I propose that an increasingly detailed documentation of action does not support negligence. I present a phenomenon known as 'inattentional blindness'. Put bluntly, cognitive researchers demonstrated repeatedly, that we perceive much less than what we commonly believe we do. Due to cognitive limitations, we often fail to perceive significant stimuli in front of our eyes. In one of the experiments, participants were asked to watch a short video on a television screen. A woman wearing a gorilla suit walked across the screen from one side to another. 50% of the viewers failed to perceive the "gorilla".

Synthesizing the philosophical arguments with the empirical findings leads to conclude that penalization of negligence suffers from 'Type 2 Error'. I.e.: in many cases the negligent actor "failed" simply because of cognitive limitation. In the absence of a test to sort the fault of the actors, I predict that excluding negligence from criminal law is necessary. I also show that both education, and technology improvement might better tackle the issues, which negligence aimed to address.

This essay provides not only a postmortem analysis of the theoretical developments but also explores the futuristic progress of the criminal law boundaries of responsibility. I conclude that the future legal scholar will have to be well versed in interdisciplinary research, taking a holistic approach. To further the evolution and practice of law we are required to take advantage of developments in other scientific fields, which ultimately translate into advancements in conventional wisdom. This will allow for a vibrant as well as a more just legal process.