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Are Risks Wrong?

Author : Anthony Sebok

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John Oberdiek, [The Moral Significance of Risking](#), 18 **Legal Theory** 339 (2012).

In *The Moral Significance of Risking*, John Oberdiek offers a theory of why risk imposition is *prima facie* wrong. Oberdiek admits that his argument will only be persuasive if he applies it to risk imposition in its purest form (what he calls “risking”). Risking’s moral significance – if it has any – must be based on the imposition of the risk of harm, and not the harm itself. In other words, if risking is wrong, it shouldn’t matter in our evaluation of it that the risk of injury never ripened into an injury. Thus, second-order effects of risking on the victim, such as emotional distress, cannot justify the conclusion that risk-imposition is wrong. Similarly (although Oberdiek does not discuss this) instrumentalist accounts for imposing liability on the basis of risk obviously cannot explain why risking is wrong, given that risking is significant to an instrumentalist only to the extent that deterring it would result in the optimal level of harm.

Although Oberdiek claims that his article is about risk imposition from the perspective of moral philosophy, he is quite conscious of the fact that his argument, if accepted, would reshape debates in law, especially tort law. Further, he recognizes that establishing the fact that risking is wrong does not answer the question whether any particular act of risking should be condemned or should be the basis of a liability judgment. His only point in this article is to say that risking is a *prima facie* wrong, and it may be the case that it is justified in many situations in the balance of reasons, or excused, or, in the case of private law, left unrecognized like other moral wrongs that do not generate liability.

Oberdiek observes that there is a tension in everyday moral discourse when it comes to risking. On the one hand, many (not just utilitarians) feel that moral judgments about risk are in the end proxies for moral judgments about harmful acts (however broadly defined), and thus Oberdiek’s search is pointless. On the other hand, he asserts, with some justification, that it makes sense to say of a drunk driver who drives home safely that she did something wrong. “Wrong” not just from a criminal law perspective, but from a second-person perspective as well. Oberdiek thinks that a person who was almost hit by the drunk driver would be saying something true if she were to say to the driver, “even though I suffered no physical injury or emotional distress, your act *wronged me*.”

Oberdiek’s solution is to create what he calls a “détente” between the two prongs of this tension. He notes that the person who is almost struck by a drunk driver has suffered an injury to her “wider conception of life” – wider than her physical body, property, and mental tranquility. (P. 350.) Borrowing from Joseph Raz, Oberdiek argues that the by redefining autonomy as an interest, we can understand how risking can cause “a setback to a nonmaterial autonomy interest of a certain kind” (p. 342) without causing *harm* (or at least harm conventionally cognizable in law). But that is only half of Oberdiek’s burden. He has to further explain how risking actually reduces autonomy, and this is where I find his argument wanting.

Assuming for a moment that a person’s autonomy is a primary good, Oberdiek’s characterization of how risking reduces autonomy seems inadequate for his task. He argues that riskings that do not ripen into harm – and of which the victim is unaware – may not affect the victim’s “experiential or biological life” but may affect her “normative life.” (P. 351.) The victim has fewer options in life, and just as one can limit autonomy by laying traps where someone might walk, imposing risk limits autonomy.

But saying that risk “limits” options is to speak metaphorically twice over. First, in some pure risk cases, the wrongdoer does not reduce the number of choices available to the victim – the wrongdoer may simply make an unwanted result more likely (or reduce the chances of a wanted result). Second, even if we reinterpret Oberdiek to

mean that risk limits autonomy by increasing the likelihood that a person's plans will fail, there is still the question whether it makes sense to say that the victim's autonomy is affected if, after the risk has passed, her plans were in fact not thwarted. If I point a revolver with one bullet in six chambers at you while you sit at your dinner table without knowledge of me, and I pull the trigger and no bullet is fired, it may be true that I imposed a risk on you and that when I did so I increased the chances that your plans would be thwarted (eating dinner, living, etc.), but after the risk passed, in what sense was your autonomy altered? Your options return to where they were, and unless you suffered some other harm – e.g. emotional distress at learning of my act – it is difficult to see how the risking reduced autonomy.

It is possible that Oberdiek's forthcoming book, *Imposing Risk*, answers the questions above. In any event, I think that Oberdiek's instincts are correct and his project quite worthwhile. The slow but steady increase in jurisdictions adopting some form of "loss of a chance" in medical malpractice suggests that the intuition Oberdiek is trying to explain has deep roots. Other practices, such as the award of extra-compensatory damages in cases where only nominal damages are found also needs justification. While such practices can be explained from an instrumentalist perspective, for those of us uncomfortable with such explanations, Oberdiek poses a question for which there is, as yet, no easy or complete answer.

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