

## Is Systemic Risk Special?

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In one of his more famous aphorisms, Oliver Wendell Holmes remarked that “[o]ur law of torts comes from the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like,” whereas “the torts with which our courts are kept busy to-day are mainly the incidents of certain well known businesses ... railroads, factories, and the like.”<sup>1</sup> In the 120 years since Holmes penned his remark, our social world has become ever more organized. Holmes wrote before the mass production of consumer products and before environmental harms on a global scale existed. Indeed, Holmes seems to have had in mind just one kind of systemic risk, namely, the repeat imposition of the same risk by an institution that repeats the same action over and over again. Railroads, for instance, run trains past the same intersections on a regular basis.

We are familiar with more advanced and diverse forms of systemic risk. Some products are characterized by risks that are present every time the product is used but that are responsible for physical harm only relatively rarely. Many product design defects are like this. The Ford Pinto gas tank is a case in point. The defective design was present in every Ford Pinto but its risks remained dormant until a car was involved in a collision. Other products impose unacceptable risks every time someone is exposed to them. Asbestos is the most notorious example. In still other cases, the independent actions of innumerable people coalesce into a critical mass and that critical mass imposes a major risk. Climate change is a case in point. It is surprising, then, that the distinctive issues raised by systemic risk imposition have received so little attention, and heartening to see that sophisticated political philosophers have now begun to pay them heed. In *The Distinctive Significance of Systemic Risk*, Aaron James, a political philosopher at the University of California at Irvine, zeros in on several of the thorniest moral issues presented by practices of systemic risk imposition. James is preoccupied with two questions.

(1) When persons, firms, or systems (e.g., the banking system) impose risk systemically, is risk imposition itself problematic, independent of any resulting harm?

(2) When institutions—not individual actors—systematically impose objectionable risks, who is responsible for the imposition of these risks, when are they responsible, and what are they responsible for not doing differently?

These important and fundamental questions are raised by systemic risk imposition, by virtue of its systematicity.

“Many of the great moral problems of our time—including the scourge of financial crises and the specter of global climate change—are,” James rightly observes, “problems of systemic risk. That is to say, what is problematic is not the risk-taking of any particular agent, but rather risk of harm created by large numbers of people acting together, in perhaps unwittingly coordinated ways.” When each of us drives or flies or boards a train or a bus, for example, we participate in a system of transportation that is contributing to an ever-increasing risk of devastating climate change. But my driving by itself—and your driving by itself, and everyone else’s driving by itself—is not a problem. There is no negative externality imposed by my particular acts of driving. It is the critical mass of human activity that creates more CO<sub>2</sub> than the atmosphere can absorb, thereby threatening catastrophic climate change. Do we each nonetheless do wrong whenever we drive or fly, or air condition our houses, or turn on our appliances? And is the risk of climate

change itself objectionable? Or is the systemic imposition of such risk objectionable only when it ripens into harm through climate change?

In answering these questions, James attends mostly to practices that impose a different kind of risk from those that preoccupy tort law and tort scholars. Tort law is preoccupied with physical risk leading to physical harm through physical cause. James is concerned primarily with the vast and often ruinous financial risks which increasingly loom over our economic landscape and endanger the livelihoods and financial security of millions. Because systemic risk has fundamental and common characteristics regardless of the type of harm it risks, much of what James says about financial risk has broader relevance to physical risk as well. James' discussion of whether systemic risk imposition may be objectionable in itself is particularly provocative and relevant. Generally speaking, tort law cares about risk only when it results in harm. There is no tort liability for attempts. Wrongful risk imposition results in liability only when it results in injury, understood as physical impairment of normal bodily functioning. The Third Restatement, for example, defines "physical harm" as "the physical impairment of the human body ('bodily harm') or of real property or tangible personal property ... [Such impairment] includes physical injury, illness, disease, impairment of bodily function, and death."<sup>2</sup> In exceptional cases, tort law allows recovery for subjective emotional distress, precipitated by the imposition of risk of physical harm. The ancient tort of assault, for example, allows recovery for the fright induced by almost being battered. But in general, harm, rather than risk, is required for tort liability.

Multiple reasons can no doubt be given for the traditional tort position. It seems likely, however, that one prominent justification for the position is rooted in the fact that traditional tort law is preoccupied with one-shot, episodic risk. If I step off the sidewalk at a crosswalk with the light in my favor and you speed by me—just missing my foot as you run the red light, utterly indifferent to my emotional tranquility—I will be furious and frightened but physically unharmed. My fury and fright will probably be transitory and I will go on my way intact if indignant. Episodic risk of this sort may not be objectionable enough to justify the imposition of civil liability. Continuous exposure to ongoing systemic risk, however, seems quite different. If I live in a "cancer alley" created by the regular discharge of some toxin or pollutant—and so go about my daily life under the cloud of higher than average risk of contracting a debilitating and often deadly disease—matters seem different. First, I am subject to a special psychic burden. A special sword of Damocles dangles over me. I know that I have escaped harm at its hands only when I die of something other than the cancer threatened by my daily exposure to risk. In addition, if I live with this threat because I am too poor to live somewhere safer, or because I am a member of a discriminated-against minority group, my fate seems especially objectionable because of the inequity. My life is being treated as less valuable than the life of someone wealthier, or than the life of a member of a dominant social group.

This intuition that systemic risk imposition can make risk imposition itself objectionable in a way that episodic risk imposition is not has, I suspect, struck many a tort scholar contemplating systemic risk imposition. To my knowledge, however, the intuition itself has not been systematically developed. Focusing on structurally similar cases of systemic financial risk concentrated on vulnerable populations, James argues persuasively that such risk imposition can be objectionable in itself, because it devalues those on whom it is imposed, whether or not it ever injures them. James' argument is worth the attention of anyone interested in systemic risk imposition. Not only is the argument powerful and carefully thought through, it is philosophically sophisticated in a way in which too few analyses of risk imposition are.

In its philosophical posture, *The Distinctive Significance of Systemic Risk* argues persuasively that we can evaluate the moral significance of systemic risk adequately only if we move beyond the confines of consequentialist moral theory and the aggregative procedure of cost-benefit analysis. It is not the case that the only question to be asked about practices of risk imposition is whether their effects are net beneficial or not. When less privileged populations are asymmetrically exposed to practices of systemic risk imposition whose benefits redound disproportionately to those more advantaged, those exposed have good reason to complain that they are being treated unjustly by their fellow citizens. What we owe to each other as fellow citizens (and persons) is as important a question of political morality as whether the consequences of some practice are net beneficial or not. Professor James' persuasive development of this point expands the moral resources available to tort scholars when we contemplate the distinctive risks of our time.

*The Distinctive Significance of Systemic Risk* also illuminates its second question—where and how to lodge responsibility for systemic practices in which many of us have no choice but to participate. Collective practices of risk imposition call for the creation of new forms of governance adequate to the practices of risk imposition at issue. For those of us whose bread and butter is liability, not governance, the thought that we should revive and extend enterprise liability comes to mind. For reasons of space, however, I must encourage readers to explore this part of James' paper on their own. They will not regret doing so.

1. Oliver Wendell Holmes, *The Path of the Law*, in **Collected Legal Papers** 167, 183 (1920). The paper itself was originally delivered in 1897. [?]
2. Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 4 (Am. Law Inst. 2010). The Third Restatement extends the idea of harm as an impaired condition to include the impairment of property. The philosophical conception of harm is concerned only with harm to persons. The question of how to account for the importance of property damage to tort is peripheral to the concerns of this paper. Offhand, the easiest way to make the extension would appear to be to draw upon the fact that we have rights in property. Those rights give rise to claims against others that they not damage our property, and make impairment of our property a harm to us. [?]

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