

## Course Outline

<b>COURSE:</b>	<b>LAWS 4801 C - Risk and the Legal Process</b>
<b>TERM:</b>	<b>Winter 2009-10</b>
<b>PREREQUISITES:</b>	<b>Fourth year Honours standing</b>
<b>CLASS:</b>	<b>Day &amp; Time: Thursday 1805 – 2055</b>
	<b>Room: Please check with Carleton Central for current room location</b>
<b>INSTRUCTOR: (CONTRACT)</b>	<b>Dwight Barnaby</b>
<b>CONTACT:</b>	<b>Office: C476 LA ((Loeb) - Contract Instructors' Office</b>
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"Students with disabilities requiring academic accommodations in this course must contact a coordinator at the Paul Menton Centre for Students with Disabilities to complete the necessary Letters of Accommodation. After registering with the PMC, make an appointment to meet and discuss your needs with me in order to make the necessary arrangements as early in the term as possible, but no later than two weeks before the first assignment is due or the first test requiring accommodations. For further information, please see: [http://www.carleton.ca/pmc/students/accom\\_policy.html](http://www.carleton.ca/pmc/students/accom_policy.html) . If you require accommodation for your formally scheduled exam(s) in this course, please submit your request for accommodation to PMC by **March 12, 2010 for April examinations**.

For Religious and Pregnancy accommodations, please contact Equity Services, x. 5622 or their website: [www.carleton.ca/equity](http://www.carleton.ca/equity)

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**COURSE DESCRIPTION**

While mathematics, statistics, physics, and epidemiology seek to describe risk naturally and scientifically, and common sense deals with risk intuitively, law approaches risk through its own deliberately artificial logic. Both ordinary intuition and political ideology also have their own distinctive views of the moral issues involved in risk, but here again law views risk in terms of its independent moral philosophy, resisting the influence of both common sense and politics. Studying the way law deals with risk highlights the unique style of analysis which law brings to social issues.

The moral significance of imposing tangible harm on another person is quite clear, but the ethical meaning of merely increasing the risk of harm for other people is a more subtle issue, especially since almost all human action elevates risks for the rest of society. How law determines which risks amount to prohibited actions and which do not also illustrates law's characteristic style of approaching social problems.

This course will use risk as a lens to study the peculiar style of legal thinking in its understanding of social action and its moral significance.

**REQUIRED TEXTS**

A coursepack with all the required reading is available at the university bookstore.

**SUPPLEMENTARY TEXTS**

No supplementary texts are required.

**EVALUATION - All components must be completed in order to get a passing grade**

- 33% of the grade will be based on one-page (ca. 300-word) comments on the assigned reading for each week, calculated as a maximum of 3% per comment. These comments must be emailed to the instructor by midnight on the Wednesday prior to the class discussion of the materials the next day.
- 17% of the grade will be based on class participation.
- 50% of the grade will be based on twelve-page term paper on any aspect of the course. The paper should be emailed to the instructor by 5 PM on April 24.

**SCHEDULE****7 Jan Introduction**

No assigned reading

**14 Jan Detaining People for Being a Risk Rather than Committing a Crime**

The foundational idea of liberal society is that the state may not deprive its citizens of their liberties without first proving that they have committed a criminal act. But how can the involuntary detention of people for being a risk to themselves or others be justified? How is the state's assessment of that risk to be kept honest?

Immanuel Kant, *The Metaphysics of Morals*, 140-141

G. W. F. Hegel, *Elements of the Philosophy of Right*, 121-127

David MacAlister, "Use of Risk Assessment by Canadian Judges," in Law Commission of Canada, *Law and Risk*, 20-49.

*Charkaoui v. Canada*, [2007] 1 SCR 350

**21 Jan Criminal Responsibility for Encountering Unusual Risks of Harm**

If you commit a criminal assault against someone, how far should you be held responsible for the risk that your assault may have unusual consequences? If your victim or those helping your victim oppose the attack in surprising ways that result in further injury, who is to blame for the additional harm?

Glanville Williams, *Textbook of Criminal Law*, 381-401

*R. v. Mackie* (1973), 57 Cr App R 452

*R. v. Blaue*, [1975] 61 Cr App R 271

*R. v. Pagett*, [1983] Crim L R 393

*R. v. Cribben* (1994), 17 OR (3d) 548

*R. v. Nette*, [2001] 3 SCR 488

**28 Jan Tort Responsibility for Encountering Unusual Risks of Harm**

If your carelessness injures someone with a thin skull so that extraordinary harm results, should you be held responsible for that? What if your victim had not just a thick skull but a crumbling skull, so that unusual injuries were already developing before your negligence caused any harm? How broadly or narrowly is the range of your responsibility for the results of your carelessness to be drawn?

G. W. F. Hegel, *Elements of the Philosophy of Right*, 147-148

Ernest Weinrib, *The Idea of Law*, 157-158

*Palsgraf v. Long Island Railroad Company*, 162 NE 99 (1928)

*Rogers v. Elliott*, 15 NE 768 (1888)

*Athey v. Leonati* (1996), 140 DLR (4<sup>th</sup>) 235

*Fairchild v. Glenhaven*, [2002] 3 WLR 89

**4 Feb Tort Law and Losing a Chance of a Better Outcome**

A chance is the logical complement of a risk, so how does tort law handle negligent injuries that result in someone losing the chance of a better outcome? Since no one really has a better future in the way that people have their present characteristics and possessions, is it really justified to let people claim compensation for loss of something they might have had if they had not been harmed? Also, if there is only a chance someone is responsible for your injury, how should the law treat that situation?

*Hotson v. East Berkshire Area Health Authority*, [1987] 1 AC 750

*Chaplin v. Hicks* (1911), 2 KB 786

*Tarleton v. M'Gawley* (1797), Peake 270

*Tuttle v. Buck*, 119 NW 946 (1909)

*International News Service v. Associated Press*, 248 US 215 (1918)

*Sindell v. Abbott Laboratories*, 26 Cal. 3d 588 (1980)

**11 Feb Voluntary Assumption of Risk**

If you deliberately expose yourself to a risky situation, can you still claim compensation for injuries you may receive as a result of the carelessness of the people creating, managing, or interacting with you in that risky context? If you voluntarily expose yourself to risk by attempting to rescue a person in danger because of his or her own carelessness, can that person be held responsible for your injuries?

*Haynes v. Harwood*, [1935] 1 KB 146

*Horsley v. MacLaren*, [1972] SCR 441

*Dube v. Labar*, [1986] 1 SCR 649

*Crocker v. Sundance* (1988), 51 DLR (4<sup>th</sup>) 321

*R. v. Leclerc* (1991), 67 CCC (3d) 563

**18 Feb Winter Break, No Class****25 Feb The Right to Personal Risk Autonomy**

It is generally accepted that the state has a right to protect the health and safety of its citizens, but what if a person wants to take a risk that the state does not want to allow? If the risk harms only the person taking it, can it still be the business of a liberal state to forbid that risk? What if that risk concerns an intimate personal decision, such as trying a risky medication to cure an otherwise hopeless disease?

Jonathan Simon, "Risking Rescue: High Altitude Rescue: A Moral Risk and Moral Opportunity," in R. Ericson and A. Doyle, eds., *Risk and Morality*, 375-406

L. Newton, "Liberty and Laetrile" (1981) 15 *Journal of Value Inquiry* 55-67

*Abigail Alliance v. von Eschenbach*, U. S. Court of Appeals for the D. C. Circuit, August 7, 2007

A.Spital, "Ethical Issues in Organ Donation" (2001) 38 *American Journal of Kidney Disease* 189-195

**4 Mar Social Regulation of Risky Personal Interactions**

If your own important interests and rights are put at risk by the interests and rights of others, to what extent can you be allowed to assess the competing needs and dangers and to resolve the conflict independently of the state? How serious does your interest have to be for the risk-benefit assessment to be left up to you rather than controlled by legal restrictions?

*United States v. Holmes*, 26 F. Cas. 360 (1842)

*Tarasoff v. Regents of the University of California*, 551 P 2d 334 (1976)

*Dobson v. Dobson* (1999), 174 DLR (4<sup>th</sup>) 1

*Ferguson v. City of Charleston*, 532 US 67 (2001)

**11 Mar The Right Against State Actions Imposing Risk**

On the one hand the Canadian Charter guarantees people protection of certain vital interests against state actions. But on the other, a democratically elected government can claim a certain right to make its own risk-benefit judgments for the society. How is the tension between these opposing value to be resolved?

*Operation Dismantle v. The Queen*, [1985] 1 SCR 441

*R. v. Morgentaler*, [1985] 1 SCR 30

*Jane Doe v. Metropolitan Toronto Police* (1990), 74 OR (2d) 225

*Chaoulli v. Quebec*, [2005] 1 SCR 791

**18 Mar State Restriction of Risky Rights**

Although liberal governments often guarantee their citizens certain liberties against state interference, these freedoms can be restricted to prevent their use from harming other people. But what if certain uses of these freedoms only risk harming other people? The equilibrium between liberty and security is determined by how far courts are willing to limit rights to protect against the risks of the harm that they might do.

*R. v. Butler*, [1992] 1 S.C.R. 452

*Skokie v. National Socialist Party of America*, 366 NE (2d) 436 (1977)

David Dyzenhaus, "Pornography and Public Reason" (1994) 7 Canadian Journal of Law and Jurisprudence 261

Anonymous, "The Limitation of Free Speech for Causing 'Real Harm'"

**25 Mar Public vs. Private Insurance**

Some maintain that public provision of insurance to all people without user fees creates the 'moral hazard' that people may be encouraged to become careless and irresponsible since their risks are taken care of by the state. But others point out that all systems of private insurance discriminate against those most in need of protection. Where to draw the line between these opposing concerns is an essential issue in modern public policy. Private tort actions serve as a kind of social insurance system, but they are open to criticism for their failure to achieve a coherent approach to spreading the cost of accidents.

Guido Calabresi, *The Costs of Accidents*, 293-318

Mark Schaam, "From Universal to Conditional Risk Take-Up," in Law Commission of Canada, ed., *Risk and Trust*, 123-143

Tom Baker, "Containing the Promise of Insurance," in R. Ericson and A. Doyle, eds., *Risk and Morality*, 258-281

*Whiten v. Pilot Insurance Company*, [2002] 1 SCR 595

**1 Apr Capitalism and Risk**

Do capitalists have the right to run huge speculative risks, even though the failure of these gambles may cause a collapse of the economy and injure people who would not have gained from those risks had they been successful? Should people have to gamble their money on expensive legal fees to seek justice before the courts? How should the risks that contracts may fail be distributed between the parties? Risk is an essential feature of a capitalist economy, and these are just a few of the issues it raises.

F. A. von Hayek, *The Road to Serfdom*, 146-156

Karl Marx, "Wage Labour and Capital," in *Marx/Engels Selected Works*, 85-90

D. Abbott, A. Jones, and D. Quilgars, "Social Inequality and Risk," in P. Taylor-Gooby and J. Zinn, eds., *Risk in Social Science*, 228-245

Keith Uff, "Costs and Risk: Recent Developments in the English Law of Costs," in G. Woodman and D. Klippel, eds., *Risks and the Law*, 146-156

*Fibrosa Spolka Alcyna v. Fairbairn*, [1943] AC 32