

## Course Outline

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<b>COURSE:</b>	<b>LAWS 4801B – Risk and the Legal Process</b>
<b>TERM:</b>	<b>Fall 2021</b>
<b>PREREQUISITES:</b>	LAWS 2908 or PAPM 3000 and Fourth-Year Honours Standing
<b>CLASS:</b>	<b>Day &amp; Time: Tuesday 6:05-8:55 pm</b> <b>Room: Please check Carleton Central for current Class Schedule.</b> Course will be delivered synchronously online weekly through Brightspace supported by BigBlueButton.
<b>INSTRUCTOR:</b>	Dwight Barnaby
<b>CONTACT:</b>	<b>Office:</b> <b>Office Hrs:</b> By appointment <b>Telephone:</b> 613 562 2966 <b>Email:</b> <a href="mailto:dwight.barnaby@carleton.ca">dwight.barnaby@carleton.ca</a>

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### CALENDAR COURSE DESCRIPTION

Application of risk assessment and management in various legal arenas including insurance, liability and tort, litigation management, environmental protection, and sentencing and parole.

### COURSE DESCRIPTION

While mathematics, statistics, physics, and epistemology seek to describe risk naturally and scientifically, and common sense addresses 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 conceives risk in terms of its own 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.

While the moral significance of imposing harm on another person is quite clear, 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 nature 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**

Standing in a course is determined by the course instructor subject to the approval of the Department and of the Faculty Dean. This means that grades submitted by the instructor may be subject to revision. No grades are final until they have been approved by the Department and the Dean.

### **TERM PAPER ASSIGNMENTS (45 marks each x2)**

Students should submit two term papers each about four pages in length or 1000 words long. One paper is due by the end of the day on October 12, 2021, and the other is due by the end of the day on December 7, 2021. Each paper should be submitted via the Assignment section of the module for the corresponding due date. The first paper should be an original academic analysis of some topic in risk and the legal process which relates to the material presented in the course up through October 12, while the second paper should also be an original academic analysis relating to material presented in the course after that date. Term papers should be footnoted if and when necessary, and sources footnoted should be listed in a bibliography. Any coherent form of academic citation and bibliographic format is acceptable. All research can be done in the course readings found in the coursepack, but students may use additional sources if they wish. Since the page numbers have been omitted from the coursepack by the printer, references to the coursepack can be cited by citing the relevant article title.

### **CLASS PARTICIPATION (10 marks)**

The class participation marks are based on the quality of comments in the BigBlueButton discussion sessions. There is one BigBlueButton session scheduled for each lecture, which can be accessed via Brightspace. Students should attend these sessions after having read the relevant course lecture notes on Brightspace as well as in the relevant section of the coursepack. Note: no reading in the coursepack is assigned for the first BigBlueButton session.

**LATE PENALTIES AND REQUESTS FOR EXTENSION**

The granting of extensions is determined by the instructor who will confirm whether an extension is granted and the length of the extension. For requests for extensions, please complete the form at the following link and submit it to the instructor prior to the assignment due date: <https://carleton.ca/registrar/wp-content/uploads/self-declaration.pdf>.

**SCHEDULE**

<b>Fall Term 2021 Sessional Dates and University Closures</b>	
<i>Please find a full list of important academic dates on the calendar website: <a href="https://calendar.carleton.ca/academicyear/">https://calendar.carleton.ca/academicyear/</a></i>	
<b>September 6, 2021</b>	Statutory holiday. University closed.
<b>September 8, 2021</b>	Fall term begins. Fall and fall/winter classes begin.
<b>October 11, 2021</b>	Statutory holiday. University closed.
<b>October 25-29, 2021</b>	Fall break, no classes.
<b>November 26, 2021</b>	Last day for summative tests or examinations, or formative tests or examinations totaling more than 15% of the final grade before the official examination period (see examination regulations in the Academic Regulations of the University section of the Undergraduate Calendar/General Regulations of the Graduate Calendar).
<b>December 10, 2021</b>	Fall term ends. Last day of fall term classes. Classes follow a Monday schedule.
<b>December 11-23, 2021</b>	Formally Scheduled Final Exams may be held.
<b>December 23, 2021</b>	<b>All take home examinations are due</b> on this day, with the exception of those conforming to the examination regulations in the Academic Regulations of the University section of the Undergraduate Calendar/General Regulations of the Graduate Calendar.
<b>December 25, 2021 through January 1, 2022 inclusive</b>	University closed.

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This course uses Brightspace, and all lectures can be read on Brightspace online.

### **September 14, 2021: Introduction**

There is no required reading for the introductory lecture, which will explore the historical, scientific, mathematical, and political nature of risk to provide a context for understanding law's special approach to problems of risk in a social setting.

### **September 21, 2021: Detaining People for Being a Risk Rather than for Being Criminals**

The foundational idea of a liberal society is that the state may not deprive its citizens of their liberties without first proving that they are guilty of a crime. But how can detaining innocent people against their will for being a risk to themselves or others be reconciled with the demands of liberty? How is the state's assessment of these risks to be kept honest?

Kant, *The Metaphysics of Morals*, General Remarks, section E (I)

*R. v. Lyons*, [1987] 2 S.C.R. 309

*Charkaoui v. Canada*, [2007] 1 S.C.R. 350 *Canadian Criminal Code*, s. 515

*United States v. Salerno*, 481 U.S. 739 (1987)

### **September 28, 2021: Criminal Responsibility for Interacting with 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 or unexpected consequences? If your victim or those helping your victim oppose or react to the attack in surprising ways that result in further injury, who is to blame for that additional harm?

Glanville Williams, *Textbook of Criminal Law*

*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 383

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

### **October 5, 2021: Tort Responsibility for Encountering Unusual Risks of Harm**

If your negligence injures someone with a thin skull so that extraordinary harm results, should you be held responsible for that unexpected outcome? What if your victim had not just a thin skull but a crumbling skull, so that unusual injuries were already developing before your negligence caused any further 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 Private Law*, 157-158

Palsgraf v. Long Island Railroad Company, 162 N.E. 99 (1928)  
 Rogers v. Elliott, 15 N.E. 768 (1888)  
 Athey v. Leonati (1996), 140 D.L.R. (4th) 235  
 Fairchild v. Glenhaven, [2002] 3 W.L.R. 89

### **October 12, 2021: 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 negligence that causes someone to lose 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 the loss of something they merely might have had if they had not been harmed? Also, if there is only a chance that some particular person is responsible for your injury, how should the law treat that situation?

Hotson v. East Berkshire Area Health Authority, [1987] 1 A.C. 750  
 Chaplin v. Hicks (1911), 2 K.B. 786  
 Tarleton v. M’Gawley (1797), Peake 270  
 Tuttle v. Buck, 119 N.W. 946 (1909)  
 International News Service v. Associated Press, 248 U.S. 215 (1918)  
 Sindell v. Abbott Laboratories, 26 Cal. 3d. 588 (1980)

### **October 19, 2021: 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 or managing the risky situation, or interacting with you in it? If you voluntarily expose yourself to risk by attempting to rescue a person in danger because of his or her own carelessness, should that person be held responsible for any injuries you receive?

Haynes v. Harwood, [1935] 1 K.B. 146  
 Horsley v. MacLaren, [1972] S.C.R. 441  
 Dube v. Labar, [1986] 1 S.C.R. 649  
 Crocker v. Sundance (1988), 51 D.L.R. (4th) 321  
 R. v. Leclerc (1991), 67 C.C.C. (3d) 563

### **October 26, 2021 No Meeting - Fall Break**

### **November 2, 2021: 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 the liberal state to forbid that risk? What if that risk concerns an intimate personal decision of overriding importance to the person taking it, 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

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

### **November 9, 2021: 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 the community's legal restrictions? What if the risk occurs in an emergency situation where the state could only intervene too late?

*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 D.L.R. (4th) 1

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

### **November 16, 2021: The Right Against State Actions Imposing Risk**

On the one hand the Canadian Charter guarantees people protection of certain vital personal 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 competing values to be resolved?

*Operation Dismantle v. The Queen*, [1985] 1 S.C.R. 441

*R. v. Morgentaler*, [1981] 1 S.C.R. 30

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

*Chaoulli v. Quebec*, [2005] 1 S.C.R. 791

### **November 23, 2021: State Restriction of Risky Rights**

Although liberal governments often guarantee their citizens certain rights against state interference, these freedoms can be restricted to prevent their use from actually harming other people. But what if certain uses of these freedoms only risk harming other people? How far should the state's judgment of how far personal liberties should be limited to prevent a mere risk but not certain harm to the public be controlled by the courts?

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

Skokie v. National Socialist Party of America, 366 N.E. (2d) 436 (1977)  
 David Dyzenhaus, "Pornography and Public Reason," (1994) Canadian Journal of Law and Jurisprudence 261-281  
 Anonymous, "The Limitation of Free Speech for Causing 'Real Harm'"

### **November 30, 2021: 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, since these people are unprofitably risky. Where to draw the line between these two opposing concerns is an essential issue in modern public policy. Private tort actions serve as a kind of social insurance system, but they are often criticized for failing to achieve a socially coherent approach to spreading the costs of accidents.

Guido Calabresi, The Costs of Accidents, 293-318  
 Mark Schaun, "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 S.C.R. 595

### **December 7, 2021: Capitalism and Risk**

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

F. von Hayek, The Road to Serfdom, 146-156  
 Karl Marx, "Wage Labour and Capital," in Marx/Engels Selected Works, 85-90  
 D. Abbott, et al., 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 Alcyona v. Fairbairn, [1943] A.C. 32

## **COVID-19 PREVENTION MEASURES**

All members of the Carleton community are required to follow COVID-19 prevention measures and all mandatory public health requirements (e.g. wearing a mask, physical distancing, hand hygiene, respiratory and cough etiquette) and [mandatory self-screening](#) prior to coming to campus daily.

If you feel ill or exhibit COVID-19 symptoms while on campus or in class, please leave campus immediately, self-isolate, and complete the mandatory [symptom reporting tool](#). For purposes of contact tracing, attendance will be taken in all classes and labs. Participants can check in using posted QR codes through the cuScreen platform where provided. Students who do not have a smartphone will be required to complete a paper process as indicated on the [COVID-19 website](#).

All members of the Carleton community are required to follow guidelines regarding safe movement and seating on campus (e.g. directional arrows, designated entrances and exits, designated seats that maintain physical distancing). In order to avoid congestion, allow all previous occupants to fully vacate a classroom before entering. No food or drinks are permitted in any classrooms or labs.

For the most recent information about Carleton's COVID-19 response and required measures, please see the [University's COVID-19 webpage](#) and review the [Frequently Asked Questions \(FAQs\)](#). Should you have additional questions after reviewing, please contact [covidinfo@carleton.ca](mailto:covidinfo@carleton.ca)

Please note that failure to comply with University policies and mandatory public health requirements, and endangering the safety of others are considered misconduct under the [Student Rights and Responsibilities Policy](#). Failure to comply with Carleton's COVID-19 procedures may lead to supplementary action involving Campus Safety and/or Student Affairs.

## **ACADEMIC ACCOMMODATIONS**

### **Academic Accommodation**

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows:

**Pregnancy obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For accommodation regarding a formally-scheduled final exam, you must complete the [Pregnancy Accommodation Form](#).



**Religious obligation:** write to me with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. For more details [click here](#).

**Academic Accommodations for Students with Disabilities:** [The Paul Menton Centre for Students with Disabilities](#) (PMC) provides services to students with Learning Disabilities (LD), psychiatric/mental health disabilities, Attention Deficit Hyperactivity Disorder (ADHD), Autism Spectrum Disorders (ASD), chronic medical conditions, and impairments in mobility, hearing, and vision. If you have a disability requiring academic accommodations in this course, please contact PMC at 613-520-6608 or [pmc@carleton.ca](mailto:pmc@carleton.ca) for a formal evaluation. If you are already registered with the PMC, contact your PMC coordinator to send me your Letter of Accommodation at the beginning of the term, and no later than two weeks before the first in-class scheduled test or exam requiring accommodation (if applicable). After requesting accommodation from PMC, meet with me to ensure accommodation arrangements are made. Please consult the PMC website for the deadline to request accommodations for the formally-scheduled exam (if applicable).

### **Survivors of Sexual Violence**

As a community, Carleton University is committed to maintaining a positive learning, working and living environment where sexual violence will not be tolerated, and where survivors are supported through academic accommodations as per Carleton's Sexual Violence Policy. For more information about the services available at the university and to obtain information about sexual violence and/or support, visit: <https://carleton.ca/equity/sexual-assault-support-services>

### **Plagiarism**

Plagiarism is presenting, whether intentional or not, the ideas, expression of ideas or work of others as one's own. Plagiarism includes reproducing or paraphrasing portions of someone else's published or unpublished material, regardless of the source, and presenting these as one's own without proper citation or reference to the original source. Examples of sources from which the ideas, expressions of ideas or works of others may be drawn from include but are not limited to: books, articles, papers, literary compositions and phrases, performance compositions, chemical compounds, art works, laboratory reports, research results, calculations and the results of calculations, diagrams, constructions, computer reports, computer code/software, and material on the Internet. Plagiarism is a serious offence. More information on the University's Academic Integrity Policy can be found at: <https://carleton.ca/registrar/academic-integrity/>.

### **Accommodation for Student Activities**

Carleton University recognizes the substantial benefits, both to the individual student and for the university, that result from a student participating in activities beyond the classroom experience. Reasonable accommodation must be provided to students who compete or

perform at the national or international level. Please contact your instructor with any requests for academic accommodation during the first two weeks of class, or as soon as possible after the need for accommodation is known to exist. Read more here:

<https://carleton.ca/senate/wp-content/uploads/Accommodation-for-Student-Activities-1.pdf>.

For more information on academic accommodation, please visit:

<https://students.carleton.ca/services/accommodation/>.

### **Department Policy**

The Department of Law and Legal Studies operates in association with certain policies and procedures. Please review these documents to ensure that your practices meet our Department's expectations: <https://carleton.ca/law/student-experience-resources/>.