

Course Outline

COURSE: LAWS 4801D– Risk and the Legal Process

TERM: WINTER 2020

PREREQUISITES: Fourth-Year Honours Standing

CLASS: **Day & Time:** Tuesday, 2:35 P.M. to 5:25 P.M.
 Room: Please check with Carleton Central for current room location

INSTRUCTOR: **Dr. Dwight Barnaby**
(CONTRACT)

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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.

16% of the grade will be based on class attendance and comments in class discussions. Credit for class attendance will be assigned beginning with the meeting on January 29.

84% of the grade will be based on three short papers of no more than 4 typed, double-spaced pages each (ca. 1000 words), each worth 28% of the grade, due at the January 28, March 10, and April 7 class meetings, or by email on those dates. Each paper should represent your own original, academic response to the readings, discussions, and lectures in the section of the course completed up to the due date of the assignment and since the previous assignment. It should not be a mere summary of the readings, but instead your own critical insight into and independent analysis of the ideas of the authors studied and the material presented in class. The paper can treat the entire set of readings and discussions as a whole, some continuing theme you have identified in them, or any particular issue in the material covered which interests you. You are not required to develop your thoughts by reference to any reading beyond the coursepack.

SCHEDULE**January 7, 2020: 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.

January 14, 2020: 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)

January 21, 2020: Criminal Responsibility for Interacting with Unusual Risks of Harm

It 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

January 28, 2020: 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

February 4, 2020: 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)

February 11, 2020: 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

February 17 to February 21: Winter Break, No Classes

February 25, 2020: 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

March 3, 2020: 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)

March 10, 2020: 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

March 17, 2020: 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'"

March 24, 2020: 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

March 31, 2020: 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 Alcyzna v. Fairbairn, [1943] A.C. 32

April 7, 2020: Philosophical Retrospective

Students may read this final section of the required text and write their final paper on it if they wish, but there will be no class on this topic.

The foundational presupposition of science is that every effect has a cause, so the notion that humans can act freely of cause so that they are justly responsible for what happens when they act in the real world is scientifically senseless. So how do we explain our moral praising and blaming of people for the results they achieve, or our legally holding them responsible for only some of what follows from their acting? In applying the precautionary principle to social risk management, how can we justify treating some unlucky harms as risks the whole society must insure everyone against, while others are treated as mere misfortunes which the unlucky deserve or at least have to bear alone?

Alan Brudner, *Constitutional Goods*, 175-179
 Tony Honoré, "Responsibility and Luck," in T. Honoré, *Responsibility and Fault*, 14-30
 Gregory Keating, "Pressing Precaution Beyond the Point of Cost Justification," *Vanderbilt Law Review*, 56. 674-689 (2003)

ACADEMIC ACCOMMODATIONS

You may need special arrangements to meet your academic obligations during the term. For an accommodation request the processes are as follows: <https://carleton.ca/equity/wp-content/uploads/Student-Guide-to-Academic-Accommodation.pdf>

Pregnancy obligation

Please contact 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, visit the Equity Services website:

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, visit the Department of Equity and Inclusive Communities (EIC): <https://carleton.ca/equity/>

Academic Accommodations for Students with Disabilities

If you have a documented disability requiring academic accommodations in this course, please contact The Paul Menton Centre (PMC) at 613-520-6608 or 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 as soon as possible to ensure accommodation arrangements are made. Please consult the PMC Website for their deadline to request accommodations for the formally-scheduled exam (if applicable) www.carleton.ca/pmc

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:* <http://carleton.ca/studentaffairs/academic-integrity/>

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 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: carleton.ca/sexual-violence-support

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

For more information on academic accommodation, please contact the departmental administrator or 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.

<http://carleton.ca/law/current-students/>