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Book Review: Law and Risk, by the Law Commission of Canada (ed)

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LAW AND RISK EDITED BY THE LAW COMMISSION OF CANADA (VANCOUVER: UBC PRESS, 2005) 224 pages.[1]

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The world is and always has been filled with risks, and many of our laws and regulations have been enacted to contain them. The common law of tort and the criminal law, with their accompanying regimes of compensation and punishment, are clear examples, as they aspire to protect individuals' most important interests from behaviour that puts them at risk. Substantive administrative law, too, revolves around risk, for it embodies the government's attempt to regulate the risks posed by industrial growth or those which accompany certain social practices. It is hardly a new idea, then, that law responds to risk. What is new is the increasing recognition that questions of risk, and its cousin, uncertainty, bear on an astounding array of legal issues. Paired with this recent development is the increasing recognition that the law can be fruitfully understood in novel ways by appealing to the concepts of risk and uncertainty. The publication of *Law and Risk*, a volume of five essays and an introduction, edited by the Law Commission of Canada, is therefore timely.

Before offering an assessment, I will briefly summarize the content of the five main essays. The following synopsis is intended to provide the reader with only a taste of what the volume includes, but enough of one to give the flavour of the book's content. Some of the essays are quite detailed in their analyses, and most cover a great deal of ground; I do not purport to do justice to their nuances.

David MacAlister starts off the volume with a discussion of what he calls "actuarial justice," namely, the way in which Canadian courts sentence criminal offenders not merely on the basis of their past crimes, but by virtue of their projected future dangerousness through the so-called dangerous offender and long-term supervision offender designations. Focusing on the five years subsequent to the 1997 revisions to the Canadian *Criminal Code*, MacAlister notes the expansion of

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actuarial justice: the number of declared dangerous offenders has risen substantially, and offenders who are deemed insufficiently dangerous to merit the designation are still declared long-term supervision offenders. These designations are based in large part on how an offender fares on a psychopathy checklist known as the Psychopathy Check-list Revisited (PCL-R). While noting that the PCL-R is widely considered a useful heuristic, MacAlister concludes by observing that actuarial criminal justice is poised to undermine a basic commitment of Canadian criminal justice to treating individual cases individually, and not basing decisions on "characteristics that appear to be similar to others for which mathematical data are available."[3]

Shifting gears from criminal to environmental law, Dayna Nadine Scott takes up the so-called precautionary principle in the next essay, arguing that its adoption would enhance the democratic bona fides of government regulation by revealing the trade-offs involved in the analysis and management of risk. The canonical statement of the precautionary principle, from the 1992 Rio Declaration on Environment and Development,[4] holds that "where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."[5] Scott agrees with the widely held view that adoption of the precautionary principle would effectively shift the burden of proof, under circumstances of uncertainty, to those who create, advocate the creation of, or benefit from a potential hazard, and would require them to present evidence of the absence of harm from the potential hazard. But Scott goes further, arguing that the science of risk itself must incorporate the precautionary principle, so that, for example, false positives are not necessarily privileged over false negatives in risk assessment. Where the burden of proof should lie is largely a normative, not scientific, judgment. And while the scientific status quo may hold that, in Scott's words, it is "better that 10 toxic chemicals go unregulated

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[3] David MacAlister, "Use of Risk Assessments by Canadian Judges in the Determination of Dangerous and Long-Term Offender Status, 1997-2002" in *Law and Risk, supra* note 1, 20 at 38.

[4] United Nations Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992* (New York: United Nations, 1993) [*Rio Declaration*].

[5] *Ibid.*, Principle 15.

than 1 harmless chemical be banned,"[6] science alone cannot justify that status quo—a normative argument is needed. In Scott's own normative view, the various values which are at stake in environmental regulation need to be brought to the fore to guide decisions about where to place the burden of proof.

Turning next to Megan's Law, the collective name of American statutes governing community notification of released criminal sex offenders, Mariana Valverde, Ron Levi, and Dawn Moore examine, as a case study, the implications of the three-part division of labour within Megan's Law between expert risk assessors, the legal system, and average citizens. As the authors explain, Megan's Law works by relying, first, on expert assessments of the likelihood of recidivism, second, on prosecutors and judges who themselves assess and interpret the experts' assessments of recidivism, and, finally, on the notified members of the sex offender's community, who must make their own choices about how to handle the risk of living with the identified offender. The expert risk assessor, prosecutor and judge, and layperson each draw on different "risk knowledges." By incorporating these different perspectives, and due to the interplay between them, Megan's Law, the authors argue, fulfills several different functions.

Danielle Pinard then delves into Canadian constitutional law—and specifically the Supreme Court of Canada's use of risk as a conceptual tool in constitutional adjudication—and the manner in which its risk analyses have both factual and normative components that the Court does not always recognize.[7] Pinard notes and explores the tension that arises when the Court requires laws to have an empirical basis in order to be constitutionally valid, but then adjudicates matters on which factual certainty is simply beyond reach. Pinard dissects the reasoning in *Gosselin v. Québec (Attorney General)*,[8] a case discussing the government's social assistance policy for citizens under the age of thirty and its management of moral hazard in that context. Further, Pinard examines the Court's recent cases on child pornography, tobacco advertising, and marijuana use. Throughout her analysis, Pinard is quick

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[6] Dayna Nadine Scott, "Shifting the Burden of Proof: The Precautionary Principle and Its Potential for the "Democratization" of Risk" in *Law and Risk*, *supra* note 1, 50 at 66.

[7] Danielle Pinard, "Evidentiary Principles with Respect to Judicial Review of Constitutionality: A Risk Management Perspective" in *Law and Risk, supra* note 1, 121.

[8] [2002] 4 S.C.R. 429 [*Gosselin*].

to point out when the Supreme Court characterizes normative evaluations as empirical observations—slippage invited by cases in which uncertainty reigns.

In the final essay, Duff R. Waring and Trudo Lemmens discuss the flaws in the current regime regulating biomedical research, arguing that it is insufficiently formalized in law and, as a result, that it exposes research participants to undue risk. Noting that the current research environment recognizes risks to persons and to social values, the authors focus on the following three additional forms of risk to which any legal framework governing such research must attend: "risk of physical or psychological harm to participants; risks to the objectivity and scientific integrity of research that are posed by conflicts of interest; and risk to other social values, for example, public trust in the ethical conduct of research."[9] In exploring these under-appreciated risks which are inherent in research, Waring and Lemmens maintain that risk assessment is an irreducibly evaluative enterprise even if it does have a quantitative element, and that because of this, risk assessment needs to be more closely scrutinized with an eye on what evaluative judgments are being made *sotto voce*. The authors conclude with a twelve-point proposal for legal reform, the two most fundamental recommendations being the adoption of federal oversight legislation, and the creation of an independent national agency dedicated to the review of research.

One of the few recurring issues in *Law and Risk* is the role that evaluation plays in risk assessment and regulation, or in circumstances of uncertainty. Several essays emphasize the irreducibly normative dimension of risk and chide scientists or judges who purport to be making purely factual or empirical determinations but who, in truth, are also or instead presupposing or indeed expressing normative judgments. Empirical and normative claims should, of course, be distinguished and not conflated. But let us not forget that normative claims can be justified, and that simply because a claim is not empirical, it does not follow that it is therefore, in some non-trivial sense, subjective. One gets the sense in reading through the essays that many of the authors, at least, believe themselves to be exposing as unjustified certain value judgments simply because those judgments are presented as non-normative. That inference, however, is too quick. The mere existence of

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[9] Duff R. Waring & Trudo Lemmens, "Integrating Values in Risk Analysis of Biomedical Research: The Case for Regulatory and Law Reform" in *Law and Risk, supra* note 1, 156 at 157.

the fact/value gap, moreover, does not mean that empirical determinations are irrelevant to normative judgments. Surely evaluation is fact dependent, even if fact and value are distinct, and even if value cannot be wholly reduced to empirical fact. For reasons of economy, let me cite just one place where this point seems to be overlooked. In her extended analysis of *Gosselin*, Pinard is skeptical of the majority's reasoning in upholding the constitutionality of lesser social welfare benefits for those under thirty years of age. The Court wrote that "the complainant argues that the lesser amount harmed under-30s and denied their essential human dignity by marginalizing them and preventing them from participating fully in society. But again, there is no evidence to support his claim." [10]

Much is made by Pinard, and indeed by Leiss and Hrudey in their introductory recapitulation of Pinard's discussion, of the Court's apparent elision of the fact/value gap here. Pinard, as well as Leiss and Hrudey, seem to think that only normative argument has any traction in resolving whether the complainant's human dignity was violated. But that is an expectation that normative reasoning cannot meet, for facts about the complainant's social marginalization certainly matter to the normative assessment of whether the complainant's human dignity was compromised. What seems to be dividing Pinard, Leiss, and Hrudey from the majority of the Canadian Supreme Court, then, is that the latter but not the former considers social science findings relevant to determinations of constitutionality. In this way, the *Gosselin* Court is similar to the U.S. Supreme Court, which, ever since its landmark 1954 desegregation case *Brown v. Board of Education*,[11] has considered such findings crucial to its jurisprudence on equality. In fact, one of the leading affirmative action cases in the United States, the 1989 *City of Richmond v. J. A. Croson Co.*,[12] stands for the proposition that well-intentioned racial classifications are constitutional only if there are ample and specific findings detailing a history of racial discrimination in the relevant jurisdiction. That decision was not unanimous, but the disagreement centred on the scope of the required findings, not on the relevance of findings per se. Abstracting from whether the Canadian

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[10] *Supra* note 7 at 64.

[11] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[12] 488 U.S. 469 (1989).

Supreme Court got it right, could not *Gosselin* be interpreted in a similar and more charitable light, instead of rejecting outright the Court's requirement that a normative claim be supported by empirical evidence?

There is a great deal to be said about each of the constituent essays in *Law and Risk*, but it is simply impossible to do that in a brief review. Let me close instead by addressing the composition of the volume as a whole. The essays cover a wide variety of issues; indeed, their variety is a good indication of just how multi-faceted the relationship is between law and risk, and of how important it is for legal academics and practitioners to understand risk. But any collection of essays organized around so broad a theme runs the risk, as it were, of lacking focus. *Law and Risk*, unfortunately, succumbs to this hazard. As I have noted, its essays range over the predictability of recidivism among violent criminals, the precautionary principle's potential for enhancing the democratic pedigree of government regulation, the respective risk management roles accorded to experts and private individuals by child sex offender notification laws, the interplay of normative and factual judgments concerning risk in the Canadian Supreme Court's constitutional jurisprudence, and the array of risks that must be accounted for in carrying out clinical trials. This diversity is impressive, but there is little that unifies the essays, save for the fact that each examines some way that risk or uncertainty has an impact on a given legal issue. Perhaps this is all that one should expect from a collection of essays devoted to law and risk.

So wide-ranging a collection should be tied together at least by a common vocabulary, but even "risk" is used differently throughout. Some authors refer to true risk, which has an evidentiary basis in probability, while others refer to uncertainty, which admits of no such evidentiary basis. Recidivism, for example, can be explored in light of easily available statistics on re-offence—here we speak of risk. The questions to which the precautionary principle provides an answer, such as environmental degradation, on the other hand, are questions about which no similar findings exist—these are matters of uncertainty. Leiss and Hrudey, in their brief introduction, provide a nice account of the language of risk and risk assessment, perhaps to prepare the reader to translate the subsequent essays into a single vocabulary and framework; it is a shame that translation is necessary.

All this is to say that the constituent essays share almost nothing in common—no doctrinal focus to be sure, but also no methodology or

definitions—and this, I believe, is a flaw in the volume as a whole. *Law and Risk* reads more like an edition of a journal than an edited set of thematic articles demonstrating the explanatory force of a risk-based understanding of the law. Again, its publication is timely, but at the end of the day, *Law and Risk* is too diffuse to be satisfying.