

# LAWS 2246

## Economic Analysis of Law

### **Instructor Contacts:**

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Instructor: Professor Stéphane Mechoulan  
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### **Class Details:**

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Class: Mondays - Wednesdays 11:35am-12:55pm,<sup>1</sup> room 309  
Course website: Brightspace Learning System (BLS)

### **Course Description and Objectives:**

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The purpose of this course is to introduce to students the analysis of law from the perspective of economics. Economics offers an important theoretical perspective in the understanding of law and legal institutions. The economic analysis of law involves both positive and normative aspects. The positive analysis of law looks at the impact of law on society whereas the normative analysis asks what laws are most desirable for society. To that end, an efficiency criterion is used. The fundamental objective is to understand and evaluate legal rules by asking how rational individuals can be expected to respond to them.

### **Course Pre-requisites:**

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Successful completion of an introduction to microeconomics undergraduate course (A- or higher).

### **Environment in and out of the classroom**

[1] The class will meet twice a week for a one and a half hour seminar session. Coming to class prepared is therefore paramount. A (small) participation component to your final mark will measure your active engagement with the material, not just class attendance. Economics is all about incentives!

[2] Office hours are indicated above but feel free to catch me at other times if my door is open. Please feel free to drop in. However, it may be useful to tell me in advance by email if you plan to come, if so when, and what you will be discussing.

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<sup>1</sup> I will be away on Monday September 10<sup>th</sup> and Wednesday September 19<sup>th</sup> and, if possible, we will strive to make up for that time over the course of the semester, details TBA.

[3] To avoid duplication, it is best to use the discussion board on Brightspace to ask questions that are relevant to the course and might benefit other students. If your question is personal and urgent, you are welcome to send an e-mail and I will try to reply within 48 hours. In general, I would encourage you to ask longer questions during office hours since it is generally more efficient to do it this way. Email and discussion board exchanges cannot be a substitute for substantive questions and answers during office hours. Please use office hours during the semester as opposed to at the very end when they tend to be crammed. Before coming to office hours, make sure you have thoroughly read the material.

[4] Under no circumstances should you be copying or transposing the assignment of a classmate. If you have questions about what is and is not allowed, please read below or come and speak to me.

[5] I expect students to attend all lecture sessions, and participate actively in class discussions. Please turn all electronic devices off before stepping into class.

### **Assessment and Grading**

Two short assignments + longer end of term essay + participation. The essay will be a topic of your choice that relates to at least two of the themes covered during the semester. It must be original. It can be e.g., a theoretical piece or a case comment. Empirical work welcome but fraught with challenges. One thing it should not be is a literature review. Any standard formatting style and citation method is acceptable as long as it is followed consistently.

Posting of the assignments will be done over the semester. You will get approximately two weeks to complete each assignment. Late submission of assignments will be subject to law school late penalties, unless prior written permission for an extension is granted in advance by the Studies Committee. All assignments and essays will be sent electronically through Brightspace.

#### **DUE DATES**

Assignment #1	October 15 <sup>th</sup>
Assignment #2	November 9 <sup>th</sup>
Essay	Last day for submitting term papers

Assignments (2) (5-6 pp)	40%
Essay (12-15 pp)	50%
Participation	10%
<b>TOTAL</b>	<b>100%</b>

## **Textbook/Required Course Materials:**

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Cooter, Robert and Thomas Ulen, *Law and Economics*, 6<sup>th</sup> edn., 2012, Pearson Addison Wesley, 500+ pages. Dal Bookstore. **THE TEXTBOOK IS AVAILABLE ONLINE FOR FREE HERE:**

<http://scholarship.law.berkeley.edu/books/2/>

+ Other materials, if any, will be made available online

NOTE: many cases that we will discuss in class are referenced in the textbook web notes. You do not need to read the entire case to understand the issues. You are welcome (but not required) to read the cases if you think it can bring more to class discussion.

### **Other Law and Economics books of interest (optional):**

David D. Friedman, *Law's Order: What Economics Has To Do with Law and Why It Matters* (Princeton, NJ: Princeton University Press, 2000). Note that this book is available for free (with hyperlinked notes) at

[http://www.daviddfriedman.com/laws\\_order/index.shtml](http://www.daviddfriedman.com/laws_order/index.shtml)

Polinsky, A.M, *An Introduction to Law and Economics*, 3<sup>rd</sup> edn., 2003, Aspen Publishers. 126 pages. Basic application of economic principles to property, contracts, torts, criminal law.

Posner, Richard A., *Economic Analysis of Law*, 6<sup>th</sup> edn., 2003, Aspen Publishers. 747 pgs. Extensive application of economics to all areas of law by the pioneering scholar in the field and Circuit Court judge.

Shavell, S., *Foundations of Economic Analysis of Law*, 2004, Belknap Press of Harvard University Press. 768 pages. Broad coverage, short chapters, many legal doctrines.

Wittman, Donald A., ed., *Economic Analysis of the Law*, 2003, Blackwell. 352 pgs, paper. A collection of classic articles on property, crime, contracts, family law, the firm. No torts.

Polinsky, A. Mitchell and Steven Shavell, 2006, "Economic Analysis of Law," Stanford L&E Olin WP 316, <http://ssrn.com/abstract=859406> . 42 pages. Survey of: property; torts; contracts; litigation; and criminal law. Includes some criticisms of the economic analysis of law.

*The New Palgrave Dictionary of Economics and the Law*, 1998, 2004, ed. Peter Newman, Palgrave MacMillan.

### **Finding Journals:**

The reading list includes some journal articles. Most of the journals are available to Dal students through the Dal library on JSTOR, <http://www.jstor.org> . I have included hyperlinks.

## Lecture Schedule:

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### Week 1:

Wednesday September 5<sup>th</sup>    lecture 1        Introduction to law and economics

Chapter 1: Introduction to Law and Economics

Cooter Ulen Chapter 1

Note: we will not review in detail Chapter 2 (microeconomic tools). You are encouraged to go through it at your own pace over the semester, and refer to specific concepts whenever they are used in the analysis of legal topics. The background material in Chapter 3 is intended for non law students but is useful to browse insofar as it introduces you to the U.S. legal system, from which the field of law and economics emanates for the most part.

### Week 2:

Monday September 10<sup>th</sup>        no class, make-up class details TBA

Wednesday September 12<sup>th</sup>    lecture 2        Introduction to law and economics  
(continued)

Cooter Ulen Chapter 1

Robert C. Ellickson, *Order without Law*, Harvard University Press, 1994 (pp. 191-205: Whaling Norms) (Google book excerpts); alternatively: Robert Ellickson (1989), "A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry," *Journal of Law, Economics and Organization* 83 ([link](#))

Richard Posner (1980), "The Ethical and Political Basis of Efficiency Norm in Common Law Adjudication," *Hofstra Law Review* 8 ([link](#))

Peter Hammond (1982), "Review: The Economics of Justice and the Criterion of Wealth Maximization," *Yale Law Journal* 7 ([link](#))

Nice blog post by Steven Landsburg giving a more moderate view of efficiency as a normative policy goal: <http://www.thebigquestions.com/2010/08/30/efficiency-experts/>

**Week 3:**

Monday September 17<sup>th</sup>      lecture 3      Property rights

Cooter Ulen Chapter 4

Ronald H. Coase (1960), “The Problem of Social Cost,” *Journal of Law and Economics* 3 ([link](#))

Wednesday September 19<sup>th</sup>    no class, make-up class details TBA

**Week 4:**

Monday September 24<sup>th</sup>      lecture 4      Property rights (continued)

Cooter Ulen Chapter 4

Harold Demsetz, “Toward a Theory of Property Rights,” *57 American Economic Review (Papers & Proceedings)* 347-359 (1967) ([link](#))

Wednesday September 26<sup>th</sup>    lecture 5      Property rights (continued)

Cooter Ulen Chapter 4:

Guido Calabresi and A. Douglas Melamed, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral,” *Harvard Law Review*, Vol. 85, No. 6 (Apr., 1972) ([link](#))

**Week 5:**

Monday October 1<sup>st</sup>            lecture 6      Property rights (continued)

Cooter Ulen Chapter 4:

Ward Farnsworth, “Do Parties to Nuisance Cases Bargain After the Judgment? A Glimpse Inside the Cathedral,” *66 U. Chi. L. Rev.* 373 (1999) ([link](#))

Louis Kaplow & Steven Shavell, “Property Rules Versus Liability Rules: An Economic Analysis” *109 Harv. L. Rev.* 715 (1996) ([link](#))

Wednesday October 3<sup>rd</sup>      lecture 7      Topics in Property (continued)

Cooter Ulen Chapter 5:

[\*Poletown Neighborhood Council v. City of Detroit\*, 410 Mich. 616 \(1981\)](#)

[\*Wayne v. Hathcock\*, 684 N.W.2d 765 \(Mich 2004\)](#)

[\*Kelo v. City of New London\*, 545 U.S. 469 \(2005\)](#)

For those of you interested in intellectual property law, I recommend the very short yet instructive paper Frank H. Easterbrook, [\*Cyberspace and the Law of the Horse\*](#), 1996 *U. Chi. Legal F.* 207

(Note: Easterbrook is currently Chief Judge of the U.S. Court of Appeals for the Seventh Circuit, hence a colleague of Posner's, and another champion of 'law and economics'.)

Some fun property law articles: the [amputated leg](#), [goats on the roof](#), [squatter's rights](#)

#### **Week 6:**

Monday October 8<sup>th</sup>      Thanksgiving      No class

Wednesday October 10<sup>th</sup>      lecture 8      Topics in Property (continued)

Cooter Ulen Chapter 5

[\*Pennsylvania Coal Co. v. Mahon\*, 260 U.S. 393 \(1922\)](#)

Lawrence Blume and Daniel Rubinfeld, "Compensation for Takings: An Economic Analysis," *California Law Review* 72 (1984) ([link](#))

#### **Week 7:**

Monday October 15<sup>th</sup>      lecture 9      An Economic Theory of Tort Law

Cooter Ulen Chapter 6

Steven Shavell (1980), Strict Liability Versus Negligence, *The Journal of Legal Studies* Vol. 9 (1): 1-25 ([link](#))

Wednesday October 17<sup>th</sup>      lecture 10      An Economic Theory of Tort Law (continued)

Cooter Ulen Chapter 6

**Week 8:**

Monday October 22<sup>nd</sup>            lecture 11      An Economic Theory of Tort Law  
(continued)

Cooter Ulen Chapter 6

*State Farm Mutual Automobile Insurance Co v. Campbell*, 538 U.S. 408 (2003) ([link](#))

Wednesday October 24<sup>th</sup>      lecture 10      Topics in Tort (continued)

Cooter Ulen Chapter 7

Gary Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?* 42 *UCLA L. Rev.* 377, 381–87 (1994) ([link](#))

Donald Dewees, David Duff, and Michael Trebilcock, *Exploring the Domain of Accident Law* (1996) (excerpts from a Google Book) ([link](#))

**Week 9:**

Monday October 29<sup>th</sup>            lecture 12      Topics in Tort (continued)

Cooter Ulen Chapter 7

Kip Viscusi (1993) “[The Value of Risks to Life and Health](#),” *Journal of Economic Literature* Vol. 31, No. 4: 1912-1946

Cooter Ulen Chapter 8

Wednesday October 31<sup>th</sup>      lecture 13      Economic Analysis of Contract

Cooter Ulen Chapter 8

**Week 10:**

Monday November 5<sup>th</sup>            lecture 14      Economic Analysis of Contract (continued)

Cooter Ulen Chapter 8

[Hamer v. Sidway](#) (NY Appeals Ct., 1891)

[Hadley v Baxendale](#) [1854] EWHC J70 and if you have not seen it in an earlier course, an application in Canadian labour law:

[Honda Canada Inc. v. Keays](#) 2008 SCC 39

Ian Ayres and Robert Gertner (1989). “Filling Gaps in Incomplete Contracts: An Economic Analysis of Default Rules,” Yale Law Journal 99 ([link](#))

Wednesday November 7<sup>th</sup>    lecture 15    Economic Analysis of Contract (continued)

Cooter Ulen Chapter 8

[Lucy v. Zehmer](#), 196 Va. 493 (1954)

[Alaska Packers' Association v. Domenico](#) 117 F. 99 (9th Cir. 1902)

**Week 11:**

Monday November 12<sup>th</sup>    reading week – no class

Wednesday November 14<sup>th</sup>    reading week – no class

**Week 12:**

Monday November 19<sup>th</sup>    lecture 16    Topics in Contract

Cooter Ulen Chapter 9

[Peevyhouse v. Garland Coal & Mining Co.](#), 382 P.2d 109 (Okla. 1962)

Wednesday November 21<sup>st</sup>    lecture 17    Topics in Contract

Cooter Ulen Chapter 9

**Week 13:**

Monday November 26<sup>th</sup>    lecture 16    An Economic Theory of the Legal Process

Cooter Ulen Chapter 10

Richard A. Posner (1973) [An Economic Approach to Legal Procedure and Judicial Administration](#), 2 *J. Legal Stud.* 399-458

Wednesday November 29<sup>th</sup>    lecture 17    Topics in Procedure



Cooter Ulen Chapter 11

*Daishowa Inc. v. Friends of the Lubicon*, [39 O.R. \(3d\) 620 \(1998\)](#)

Jeff Rachlinski, “Gains, Losses, and the Psychology of Litigation,” [70 So. Cal. L. Rev. 113 \(1996\)](#).

Marc Galanter, “The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts,” [1 J. Empirical Legal Studies 459 \(2004\)](#).

Lexington, “Law v Common Sense” [The Economist, 17 January, 2009, p. 38](#)

#### **Week 14**

Monday December 3<sup>rd</sup>            lecture 18            Economics of Criminal Law

Cooter Ulen Chapter 12

*McCleskey v. Kemp* [753 F.2d 877](#)

David Friedman (2000), “Law’s Order,” Princeton University Press – chap 15

Gary Becker (1968) “Crime and Punishment: An Economic Approach,” Journal of Political Economy 76 ([link](#))

Isaac Ehrlich (1996), “Crime, Punishment, and the Market for Offenses,” Journal of Economic Perspectives ([link](#))

Richard Craswell and John Calfee (1986), “Deterrence and Uncertain Legal Standards,” Journal of Law, Economics, and Organization 2 ([link](#))

Tuesday December 4<sup>th</sup>            lecture 19            Topics in Criminal Law

Cooter Ulen Chapter 13

Knowles, John, Nicola Persico and Petra Todd (2001) "Racial Bias In Motor Vehicle Searches: Theory And Evidence," [Journal of Political Economy vol 109: 203-229](#).  
(this is technical, we will mention some salient results only)

#### **Week x: Make up classes**

Behavioural Economics and the Law  
Unenforced Laws  
Efficiency Revisited

Christine Jolls, Cass Sunstein, and Richard Thaler (1998), “A Behavioral Approach to Law and Economics,” *Stanford Law Review* 50 ([link](#))  
{*Behavioral Law and Economics*, edited by Cass Sunstein, Cambridge University Press (2000)}

Gillian Hadfield (1992), “Bias in the Evolution of Legal Rules,” *Georgetown Law Journal* 80 ([link](#))

Tim Wu, “American Lawbreaking” (Slate)

<http://www.slate.com/id/2175730/entry/2175733/>

## 1. Student Requests for Accommodation

Requests for special accommodation for reasons such as illness, injury or family emergency will require an application to the Law School Studies Committee. Such requests (for example, for assignment extensions) must be made to Associate Dean, Academic Michael Deturbide or the Director of Student Services and Engagement Dana-Lyn Mackenzie as soon as possible, before a scheduled exam or a deadline for an assignment, and will generally require documentation. Retroactive accommodation will not be provided. Please note that individual professors cannot entertain accommodation requests.

Students may request accommodation for either classroom participation or the writing of tests and exams due to barriers related to disability, religious obligation, or any characteristic under the Nova Scotia *Human Rights Act*. Students who require such accommodation must make their request to the Advising and Access Services Center (AASC) at the outset of the regular academic year. Please visit [www.dal.ca/access](http://www.dal.ca/access) for more information and to obtain the Request for Accommodation – Form A. Students may also contact the Advising and Access Services Centre directly at (902) 494-2836.

## 2. Submission of Major Papers and Assignments

Major papers and assignments must be submitted in hard copy. Students should hand papers in to the place stipulated by the instructor and ensure they are date and time stamped. Please read the law school policy on late penalties: <https://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html>

Please note students may also be required to provide an identical electronic copy of their paper to the instructor by the due date. Papers may be submitted by the instructor to a text-matching software service to check for originality. Students wishing to choose an alternative method of checking the authenticity of their work must indicate to the instructor, by no later than the add/drop date of the course, which one of the following alternative methods they choose:

- a) submit copies of multiple drafts demonstrating development of their work
- b) submit copies of sources
- c) submit an annotated bibliography

## 3. Plagiarism

All students must read the University policies on plagiarism and academic honesty <http://academicintegrity.dal.ca/> and the Law School policy on plagiarism

<http://www.dal.ca/faculty/law/current-students/jd-students/academic-regulations.html>.

Any paper or assignment submitted by a student at the Schulich School of Law may be checked for originality to confirm that the student has not plagiarized from other sources. Plagiarism is considered a serious academic offence which may lead to loss of credit, suspension or expulsion from the law school, or even revocation of a degree. It is essential that there be correct attribution of authorities from which facts and opinions have been derived. Prior to submitting any paper or other assignment, students should read and familiarize themselves with the policies referred to above and should consult with the instructor if they have any questions. Ignorance of the policies on plagiarism will not excuse any violation of those policies.

*Clarification on Plagiarism versus Collaboration:*

“There are many other opportunities for plagiarism, for instance, copying on exams and assignments. There is a clear line between group work on assignments and copying solutions from others. It is alright to work on assignments with your friends. In fact, working in groups may be beneficial. For best results, you should always attempt to solve the problem alone, prior to meeting with the group. Whenever you collaborate with your colleagues on assignments, **you must always prepare your own submission. Copying is plagiarism!** This includes copying the work of others, making changes, and submitting it as your own work.

Specific examples of plagiarism include, but are not limited to, the following:

- Copying a computer file from another student, and using it as a template for your own solution
- Copying text written by another student
- Submitting the work of a tutor as your own
- Including your name on a group submission when you have not contributed to that submission

Specific examples of acceptable collaboration include, but are not limited to, the following:

- Discussing the issues and underlying factors of a case with fellow students, and then each of the students writing up their submissions individually, in their own words.
- Working on a computer-based exercise collaboratively, and then each of the students creating their own submissions individually, from start to finish.