

**ECON 390-01: Economic Analysis of Law**  
**Professor Steven G. Medema**  
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The economic analysis of law has had a profound influence on modern legal thinking, with its effects being felt in legal theory, court decisions, the law school classroom, and regulatory policy. It is also controversial, as its logic and goals are often said to pose a stark challenge to traditional legal thinking. This course provides an introduction to the economic analysis of legal rules and decision making, including criminal law, torts, property, contracts, and legal procedure. Particular attention is given to how economic thinking confirms and challenges various aspects of traditional legal reasoning. If time allows, we will also devote some attention to the economic analysis of the political process--sometimes known as "public choice analysis," as the political sector is the source of many of the legal rules that govern social-economic interaction. Pre-requisite: ECON201D (Intermediate Microeconomics I).

**Textbooks:**

Required:

Robert Cooter and Thomas Ulen, *Law and Economics*, 6th edn. Reading, MA: Addison-Wesley, 2012. (Available via free online download at: [https://scholarship.law.berkeley.edu/books/2/.](https://scholarship.law.berkeley.edu/books/2/))

A. Mitchell Polinsky, *An Introduction to Law and Economics*, 5th edn. New York: Wolters Kluwer, 2019.

Students may also wish to consult:

David Friedman, *Law's Order*. Princeton: Princeton University Press, 2000. (Available online at [http://www.davidfriedman.com/laws\\_order/index.shtml](http://www.davidfriedman.com/laws_order/index.shtml).)

Richard A. Posner, *Economic Analysis of Law*, 9th edn. New York: Wolters Kluwer, 2014.

Steven Shavell, *Foundations of Economic Analysis of Law*. Cambridge, MA: Belknap Press, 2004.

Nicholas Mercuro and Steven G. Medema, *Economics and the Law: From Posner to Post Modernism and Beyond*, 2nd edn. Princeton: Princeton University Press, 2006.

**Class Norms:**

Students are expected to come to class having read and prepared to discuss the assigned materials for that day.

Email is the most effective way for me to communicate with you outside of the classroom, and it is your Duke University email address through which those communications will take place. Please check your Duke email daily to ensure that you are not missing any important communications. You should also check Sakai regularly for postings of any relevant material.

Our goal is to provide a welcoming, high-quality learning environment for all concerned. With this in mind, cell phones must be silenced and put away during class. If you use a laptop or tablet, your activity on it should be confined note-taking (i.e., no social media, web browsing, emailing, etc.), as this is a distraction both to you and to those around you.

Our time together will be most productive if there is plenty of discussion along the way, and the unique perspective that economic analysis brings to legal issues makes for interesting conversations--and a wealth of viewpoints on the issues under discussion. Speak up, and ask questions, even if doing so is difficult for you. These 'public' speaking skills are an important piece of the toolkit you'll need for success down the road. Don't be afraid that you might give the wrong answer as we work through the analysis. We've all been there, and the point is to develop and utilize your critical thinking skills. It goes almost without saying that this only works well in an environment characterized by civil discourse and mutual respect; you would want that from your fellow students, and you should offer them the same.

### **Course Requirements/Grading:**

Midterm exam	30%
Final exam	30%
Case analysis	30%
Participation	10%

The midterm and final exams will be based on the readings and in-class discussions. Where relevant, I may from time to time assign short problem sets that will help you to prepare for the exams. These will not be graded, but worked-out answers will be provided to you.

If any student requires assistance or appropriate academic accommodations for a disability, please contact me after class, by email, during office hours or by individual appointment. You must have established your eligibility for disability support services through the Division of Student Affairs, Disability Services.

### **Case Analysis Assignment:**

This assignment provides you with the opportunity to apply the economic tools utilized in this course to an actual legal case.

Step 1: Identify a case, decided within the last ten (10) years, that interests you and that you believe offers a fruitful opportunity for the application of economic thinking. The case can come from any area of law and from courts at any level or jurisdiction. Cases can be found in Nexis Uni, which you can access from the Duke Libraries website and which allows you to search by keyword, subject, date, etc.

Step 2: Write a one- to two- page prospectus, due on February 28, which:

- Identifies the case that you wish to analyze, including the legal citation;
- Summarizes the facts of the case;
- Identifies the legal and economic issues that you will analyze in your paper.

I will review your prospectus and offer relevant feedback. If I believe that the case is unlikely to offer a fruitful path to a paper, I will recommend that you select a different case. Duplication of cases across students is not allowed, and case selection is first come, first served. A list of cases selected by your classmates will be posted on Sakai for your consultation.

Step 3: Analyze the case using the tools and methods we discuss in class. For cases that have been decided, identify the various incentives that the ruling will have for other individuals involved in similar situations in the future and what you expect the likely behavior of those individuals to be as well as your assessment of whether the ruling will lead to efficiency in the long run. If the case has not yet been decided, identify the various incentives that the decision will have if the court finds in favor of the plaintiff and the incentives it will have if the court finds in favor of the defendant and provide your assessment of which ruling is more efficient.

Step 4: Develop a short (10 minute) oral presentation of your case. In this presentation, provide a short synopsis of the case, the incentives you identified that the ruling will have, and your final assessment of its efficiency implications. You will deliver this presentation to the class during the last week of classes, and you should feel free to utilize PowerPoint, Prezi, etc. if you believe that this will be helpful to you in the presentation of your analysis. Your intended audience for the presentation is a judge or jury unfamiliar with the economic approach to law and so should avoid complex economic jargon. Focus on explaining to the court the economic impact of the decision in layman's terms.

Step 5: Write a 2000 – 2500 word (8 – 10 double-spaced pages) paper presenting your analysis of the case you have selected. The paper is due the day of the final exam, but feel free to turn it in earlier. The paper should include:

- A complete description of the case, identification of the plaintiff and defendant, the facts of the case, the relevant legal history (e.g., lower-court activity if the case involves appeals);
- The legal and economic issues involved;
- Your analysis of the incentives involved; and
- Your assessment as to whether the ruling will lead to efficiency in the long run.

In discussing the economic issues, make sure to include any specific economic theories or models that are relevant for the case. If you believe that the ruling will lead to efficiency in the long run, you need to explain why. If you believe it will not, you should provide an alternate ruling that would be more efficient.

Students are expected to be familiar with Duke University rules regarding academic dishonesty and, in particular here, plagiarism. Papers that contain plagiarized material will receive a failing grade. Please note, however, that you do not have to provide citations when discussing the facts of the case unless you get them from a source outside of the court opinion.

Sources should be documented using a standard bibliographic format, such as MLA, and a complete reference list should be provided at the end of the paper. Any notes should be in the form of footnotes rather than endnotes.

The case paper is due by April 26 at 11:59 pm.

### Evaluation of the Case Analysis:

Twenty (20) percent of your Case Analysis grade will depend on your in-class presentation. You will be graded based on how well you explain and present the key elements of your analysis in layman's terms. Thus a non-economics major should be able to understand from your presentation the impact you expect the case to have on society and on individual behavior in the future.

Eighty (80) percent of your Case Analysis grade will be determined by your grade on the final paper, which will be evaluated on both content/analysis--consistent with the four bullets, above--and style. The analysis here will, ideally, be a bit more sophisticated than that found in your in-class presentation.

### **Important Dates:**

Midterm Exam:	February 25
Case proposal due:	February 28, 11:59 pm
Case presentations:	April 16, 21 (tentative)
Case paper due:	April 25, 11:59 pm
Final Exam:	April 27, 9:00 am

## OUTLINE OF THE COURSE

Note: Readings not taken from Cooter and Ulen or Polinsky will be posted to Sakai unless otherwise noted. The instructor reserves the right to alter the order in which these materials are covered and/or to alter the reading list and topics covered through either addition or subtraction.

### I. Introduction: Microeconomic Tools and Legal Institutions

Cooter and Ulen, Chaps. 1, 2, 3

Polinsky, Chaps. 1, 2, 12

### II. Property Law

Cooter and Ulen, Chaps. 4, 5

Polinsky, Chaps. 3, 4

Ronald Coase, "The Problem of Social Cost." *Journal of Law and Economics* 3 (October 1960): 1-44.

Cases (Tentative, Sakai):

*Boomer v. Atlantic Cement Company*, 26 N.Y.2d 219, 309 N.Y.S.2d 312, 257 N.E.2d 870, Court of Appeals of New York (1970).

*Spur Industries v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

*Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 505 U.S. 1003 (1992).

### III. Contract Law

Cooter and Ulen, Chaps. 6, 7

Polinsky, Chaps. 5, 8

Cases (Tentative, Sakai):

*Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

### IV. Tort Law

Cooter and Ulen, Chaps. 8, 9

Polinsky, Chaps. 6, 7, 9, 13, 14, 15

Cases (Tentative, Sakai):

*U.S. v. Carroll Towing Co.*, 159 F.2d 169, 2d Cir. (1947).

*MacPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916).

### V. Legal Procedure

Cooter and Ulen, Chapt. 10, 11

Polinsky, Chapt. 16, 18

### VI. The Economics of Crime and Punishment

Cooter and Ulen, Chaps. 12, 13

Polinsky, Chapt. 10, 11

Cases TBA (Sakai)

**VI. The Economics of the Political Process**

Readings TBD