

ECONOMICS AND LAW
ECON 4008
Fall 2017

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REQUIRED TEXT: The Economic Analysis of Law, Richard Posner [9th edition; 8th and 7th editions can also be used]

REQUIRED READINGS: See attached reading list giving article titles and dates. All article readings are available on D2L in 'pdf' format for downloading and printing as needed.

PURPOSE OF THE COURSE:

Economics is typically concerned with the behavior of consumers and producers in a commercial context. Partial equilibrium analysis is used to derive qualitative predictions and explanations. However, activities of '*homo economicus*' take place within particular legal, cultural, and institutional frameworks. Historically, the existence of these frameworks was taken for granted by the economist.

Around sixty years ago, economists and legal scholars began to appreciate the limitations of economic analysis that abstracted totally from the institutional environment. They began to examine questions surrounding the legal rules governing property, contract, and tort. Why those rules? Could it be that some of those legal rules evolved because of economic considerations? Could legal doctrines be shaped by economic forces? Should the law be based on principles of economic efficiency? Is there a tradeoff between equity and efficiency and should judges consider such tradeoffs?

The purpose of this course is to interpret and analyze legal rules using economic concepts and methods. We examine the traditional legal realms of property, contract, tort, and others. Our analysis will be both positive and normative, that is, we will interpret how the law is and we will speculate on how the law should be.

While the economic analysis of law is well established as a sub-discipline of both economics and law, there remain critics who question the legitimacy of the combination. There is an active scholarly debate over the appropriate role, if any, for economics in the design of optimal legal rules. Students are invited to develop their own critical interpretations of the economic perspective.

ACADEMIC INTEGRITY:

The educational mission of Marquette University encompasses many dimensions, with the moral dimension unquestionably one of the most important. Academic honesty is therefore expected of all students at all times. We believe that a policy of strictly enforcing sensible rules of academic honesty is in the long run interest of every student.

Simply put, the personal integrity of a Marquette student is much more important than a point or two on an economics exam or paper. Instances of plagiarism will receive a grade of 0 for that assignment, which in almost all cases will result in a course grade of F.

An instructive tutorial on Marquette's complete policy can be found at: <http://www.marquette.edu/provost/integrity-tutorial.php> and you are encouraged to review it.

TEXT AND READINGS:

The required text will be Richard Posner's Economic Analysis of Law, 9th. The Posner text is the leading text in its field. The 7th and 8th editions can be used and page references are mostly provided, however you may have to use the index to find appropriate page references to the material.

Additionally, certain top academic journals, the Journal of Law and Economics, The Journal of Legal Studies, The International Review of Law and Economics, Research in Law and Economics, Economic Inquiry, and the Journal of Law, Economics and Organization, and the best law reviews, U of Chicago, Harvard, Yale, Stanford, Michigan, contain many excellent economic articles which may be valuable in your essays. Additionally, Google Scholar can be a valuable research resource.

CLASS STRUCTURE and PARTICIPATION:

The course will consist of two separate but coordinated phases. Phase I will be taught by Professor Breeden and Phase II by Professor Smith. Both phases will utilize a lecture and class discussion format. Students are expected to come to class having read the assigned materials and prepared to participate in discussion of the topics. Students will also be expected to ask and answer questions from the materials. Student presentations will consist of the presentation of one of research essays or participation in the mock trial. Below is an overview of the semester's plan.

ECON and LAW – Semester in Brief

| | | |
|-----------------|--|-------------------|
| Phase I | Intro and Economics of Property Law | 7 meetings |
| | Economics of Tort Law | 7 |
| Phase II | Economics of Contract Law | 7 |
| | Efficiency vs. Equity as a Legal Norm | 6 |
| | Guest Speaker | 1 |

GRADES:

Grades will be based on a series of two equally weighted essay exams covering the assigned material, four equally weighted short research essays covering the four principal components of the course, and a grade for class participation. The class participation grade is based on attendance (College of Business rules regarding attendance will be honored), demonstrated motivation, and initiative displayed throughout the semester. Participation in the mock trial will be a part of the 'participation' grade.

The weights will be:

| | |
|----------------------------------|-----|
| Exams [2] | 40% |
| Research Essays [4] | 40% |
| Class Participation & Attendance | 20% |

The grading scale is as follows:

| Grade | GP | % |
|-------|------|----|
| A | 4.0 | 92 |
| A- | 3.67 | 90 |
| B+ | 3.33 | 88 |
| B | 3.0 | 86 |
| B- | 2.67 | 84 |
| C+ | 2.33 | 82 |
| C | 2.0 | 80 |
| C- | 1.67 | 76 |
| D+ | 1.33 | 73 |
| D | 1.0 | 70 |

EXAM FORMAT:

Exams will be in-class, closed book essay and will cover material since the last exam. Each exam will consist of 4 questions drawn from the list of study questions made available at the beginning of each segment of the course. You will select and answer your favorite two of the four. Students are encouraged to develop answers to the study questions in preparation for the exam and are also encouraged to discuss their preliminary answers during class discussions, with each other and with the instructor. Makeup exams are discouraged, but when given, will consist of only two required questions (no choices).

RESEARCH ESSAYS:

Research essays of **2 maximum** pages in length will be due on the next class meeting after an exam. They will focus on some aspect of the materials just covered. Precise topic is up to the student but if you have any doubt, run your idea by me in an email to get some direction. The **‘better’ essays** will exhibit the ‘economic way of thinking’ and will incorporate a small graph or equation to direct the reader’s attention to the key tradeoff of the issue at hand. The **‘better’ essays** will cite as authority and utilize reasoning from at least one scholarly source. Utilize ‘google scholar’ or ‘ECON LIT’ to locate references. The essays should be composed as if they were legal briefs in at least one respect: they should be *letter perfect*. Essays will be evaluated on the basis of how well they address the key issue, how they engage and tie in central themes from the section of the course, how effectively they use the graph or equation and reference sources, and the general level of professionalism of the writing and general composition.

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FYI: when completed at a high level, these short writing pieces can make excellent writing samples for law school admission application packets. They have been so used by students from this class in the past.

Remember, “*good writing is not written, it is re-written*”.

-----ASSIGNMENTS--(All non-Posner text readings on D2L)-----

Date **Topic**

Aug 29 Intro, Orientation and “On Writing...”
George Orwell, “Politics and the English Language”, in *Collected Essays*
D. McCloskey, “Economical Writing”, *Economic Inquiry*, Apr. 1985
“Customer finds Rat Parts in food” CNN.com 10/15/04

Property-----

Aug 31, Sep 5,7 - Economics of Property Law
Posner: Ch.3 in its entirety, (except sections 8th: 11,13,15; 9th: 10,12,14:divided ownership, possession, public lands)
"Property Gains: *Lucas v. South Carolina Coastal Council*, *Wall Street Journal* editorial, 1 July 1992, p.A14

Sep 12 - Intellectual Property and Property rights
“History and Sources of IP Law”, *National Paralegal College*. 5 p.
“Intellectual Property Rights Matter”, Doug Shoen, *Forbes* 3 p.
<https://www.forbes.com/sites/dougschoen/2013/09/24/intellectual-property-rights/#6c2395871a5d>
“Do we have too many intellectual property rights?”, Richard A. Posner, *Marquette Univ. IP Law Review*, Vol. 9, No. 2, pp. 173-85 Sep 14

Sep 14 – Property rights in Broadband
“The First Amendment Red Herring in the Net Neutrality Debate”, Daniel Lyons, <https://www.forbes.com/sites/washingtonbytes/2017/03/10/the-first-amendment-red-herring-in-the-net-neutrality-debate/#56ecf5e4326a>
“13 Things about the FCC’s Net Neutrality Regulation”, Marguerite Reardon, *CNET*, Mar, 2015

Sep 19 **One hour essay exam #1: Property Law**

Tort-----

Sep 21, 26, 28, Oct 3 – Economics of Tort Law
Posner:Ch.6 [except sections 15,16,17]
Oct 5 “The FDA is not the Problem”, *Center for American Progress*, Maura Calsyn and Thomas Huelskoetter, March 9, 2016 10 p.;

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“More Choices, Better Health – Free to Choose Experimental Drugs”, *Heartland Institute*, Bartley J. Madden, 15 p.

Oct 10 Mock Trial: High School Sports Injuries

Tort Law; the Regulatory Control Function

“Athletic Head Injuries: An Increasing Liability”, *Rick and Insurance*, Jared Shelly, April 8, 2015, 5 p.

“Is Football Just Too Dangerous?”, Larry Strauss, *HUFFPOST: THE BLOG*, 1 Nov 2013, updated Jan 23, 2014

Oct 12 Exam #2 – Economics of Tort Law

***Contract*-----**

Economics of Contract Law

Oct 17 Posner §§ 4.1, 4.2, and 4.3

Contract Formation Issues

Chapter Problems 9 and 15

Additional Readings Provided in D2L

Oct 24, 26 Posner § 4.4, 4.5, 4.7 and 4.9

Contract Enforceability Defenses

Additional Readings Provided in D2L

Oct 31, Nov 2 Posner § 4.10, 4.11, 4.12, 4.13, 4.14, 4.15

Contract Default Remedies

Chapter Problems 4, 6, 12, and 13

Additional Readings Provided in D2L

Nov 2 Posner § 4.16

Efficient Breach Theory

Additional Readings Provided in D2L

Nov 9--Exam #3 – Contract Law

***Efficiency vs. Equity as Legal Norm*-----**

Nov 14 Richard A. Posner, “The Ethical and Political Basis of Efficiency Norm in

Common Law Adjudication”, *Hofstra Law Review*, Vol. 8, No. 3, pp. 487-507

Nov 16 Efficiency and Law

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Ronald Dworkin, "Why Efficiency?", *Hofstra Law Review*, Vol.8, No.3 [Spr. 1980, pp.573-590] [**D2L Note: not beginning of article**]

Nov 21 Guest Speaker

Nov 23 Thanksgiving Break

Nov 28 Efficiency and Law

Jules Coleman, "Economics and the Law: Critical Review of the Foundations of the Economic Approach to Law", *Ethics*, Vol.94, [7/84, pp.661-679] D2L

Additional Readings Provided in D2L

Nov 30 Resource Allocation: Judicial, Legislative, Market

Posner §§ 20.2, 20.3, 20.5, and 20.6

Additional Readings Provided in D2L

Dec 5, 7 The Choice Between Regulation and Common Law

Posner Ch. 14

Chapter Problems 1, 2, 4, and 5

Additional Readings Provided in D2L

Finals week:

Exam #4 - Efficiency v. Equity as a Legal Norm (take home due TBD)