

## EMLE Economic Analysis of Private Law

Haifa 2021

### ECONOMIC ANALYSIS OF PRIVATE LAW SYLLABUS – EMLE 2021/2022 (Haifa, 1st term)

This course provides a comprehensive overview of the most important insights from the economic analysis of private law. It comprises of the analysis of contract law, tort law and property law, all from an economic perspective. With regards contracts, the course concentrates on the enhancement of knowledge and practical skills on how contracts may be rendered a more efficient vehicle of exchange. As far as tort law is concerned, the course offers a comparative analysis of the legal principles from an economic perspective, in particular the structure of liability and damage compensation. In the property law section, the course addresses the inherent tension of private versus public property, and presents contemporary dilemmas pertaining to the efficient management of resources.

Various concepts of Law and Economics, introduced in the course Concepts and Methods of Law and Economics, are studied here in more depth, e.g., the distinction between property and liability rules as means to protect and/or transfer entitlements, as distinguished by *Calabresi* and *Melamed* in their seminal paper. Additional insights provided in this course, including behavioral approaches, contribute to a more profound understanding of the private law concepts.

The final grade for the course Economic Analysis of Private Law will be determined as follows:

- 80% of the final grade is determined by the grade of a written closed book exam.
- 20% of the final grade is determined by various assignments.

#### Literature Contracts (Beldowski)

R. Cooter, T. Ulen, Law and Economics, 2016 (Chapter 9).

C. Ott, H. Schäfer, Economic Analysis of Civil Law, 2004 (Chapter 11).

L. Kaplow, S. Shavell, Contracting, 2004 [Chapters 2-6].

D. Barnes, L. Stout, The Economics of Contract Law, 1992 [Chapters 1 and Chapter 2 (C and D)].

S. Bag, Economic Analysis of Contract Law, 2018 [Chapter 1].

Charles J. Goetz & Robert E. Scott, Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach, 77 Colum. L. Rev.554 (1977).

S. Masten, Contractual Choice, Encyclopedia of Law and Economics, 1999.

<https://reference.findlaw.com/lawandeconomics/4100-contractual-choice.pdf>

M. Hviid, Long term contracts and relational contracts, Encyclopedia of Law and Economics, 1999.

<https://reference.findlaw.com/lawandeconomics/4200-long-term-contracts-and-relational-contracts.pdf>

D. Kahnemann, A. Tversky, Law and Economics, *Econometrica* 1979, Vol. 47, No. 2, pp. 263-292.

### **Literature Torts (Beldowski)**

R. Cooter, T. Ulen, Law and Economics, 2016 (Chapter 6).

C. Ott, H.-B. Schäfer, Strict Liability versus negligence, (in:) M. Faure (ed.), *Tort Law and Economics. Encyclopedia of Law and Economics. Vol. 1*, Cheltenham: Edward Elgar, p. 3-45.

S. Shavell (2003), Economic Analysis of Accident Law, [www.nber.org/papers/w9694](http://www.nber.org/papers/w9694)

M. Artigot i Golobardes, F. Pomar, Contributory and comparative negligence in the law and economics literature (in:) M. Faure (ed.), *Tort Law and Economics. Encyclopedia of Law and Economics. Vol. 1*, Cheltenham: Edward Elgar, p. 46-79.

O. Ben-Shahar, Causation and foreseeability (in:) M. Faure (ed.), *Tort Law and Economics. Encyclopedia of Law and Economics. Vol. 1*, Cheltenham: Edward Elgar, p. 83-108.

L. Konrnhauser, R. Revesz, Joint and several liability (in:) M. Faure (ed.), *Tort Law and Economics. Encyclopedia of Law and Economics. Vol. 1*, Cheltenham: Edward Elgar, p. 109-133.

M.F. Grady (1989), 'Untaken Precautions', (18) *Journal of Legal Studies*, p. 139-156.  
<https://www.jstor.org/stable/3085645>

M. Kahan (1989), 'Causation and the Incentives to Take Care Under the Negligence Rule', (18) *Journal of Legal Studies*, p. 427-447. <https://www.jstor.org/stable/3085628>

G. Calabresi and A.D. Melamed (1972), 'Property Rules, Liability Rules and Inalienability: One View of the Cathedral', (85) *Harvard Law Review*, p. 1089-1128.  
[https://digitalcommons.law.yale.edu/fss\\_papers/1983/](https://digitalcommons.law.yale.edu/fss_papers/1983/)

### **Property (Nevo)**

Gerrit Harding, *The Tragedy of the Commons*, 1968

Elinor Ostrom (et al); *Revisiting the Commons*, 1999

Elinor Ostrom, Collective Action and the Evolution of Social Norms, 14 (3) *Journal of Economic Perspectives* 137, 2000

Dan Hunter, Cyberspace as a Place, 2002 Ten Real-Life Examples of the Tragedy of the Common:  
<https://www.dummies.com/education/science/environmental-science/ten-real-life-examples-of-the-tragedy-of-the-commons/>

Heller, The Wealth of the Commons: <http://wealthofthecommons.org/essay/tragedy-anticommons>

The permission problem: <https://www.newyorker.com/magazine/2008/08/11/the-permission-problem>

Common ownership 2019: [https://www.brookings.edu/wp-content/uploads/2019/02/ES\\_20190205\\_Common-Ownership.pdf](https://www.brookings.edu/wp-content/uploads/2019/02/ES_20190205_Common-Ownership.pdf)

CNN News April 8, 2019/: <https://edition.cnn.com/2019/04/08/uk/internet-regulation-uk-australia-intl-gbr/index.html>

Mark Zuckerberg, Four Ideas to Regulate the Internet:<https://about.fb.com/news/2019/03/four-ideas-regulate-internet/>

Marcela Parada and Felipe Vasquez Lavin, An analysis of economic incentives to encourage organ donation: evidence from Chile:<https://link.springer.com/article/10.1186/s40503-019-0068-2>

## Lecture Schedule<sup>1</sup>

### Lecture 1 (Beldowski)

- Why contracts are made?
- What are the contracts from the legal perspective?
- What are contracts from economic perspective?
- Complete and incomplete contracts

*Literature:*

*S. Masten; L. Kaplow & S. Shavell (Chapter 1); C. Ott, H. Schäfer (Chapter 11); D. Barnes & L. Stout (Chapter 1); S. Bag (Chapter 1).*

### Lecture 2 (Beldowski)

- Principles and checkpoints for contracting.
- Types of contracts by *Kaplow* and *Shavell*.

*Literature:*

*L. Kaplow & S. Shavell (Chapter 2-6).*

### Lecture 3 (Beldowski)

- Unified approach to contract law.
- Limitations on damages.
- Problem of subjective value.
- Specific performance.
- Liquidated damages.
- Efficient breach of contract.

*Literature:*

*Cooter & Ulen (Chapter 9); Barnes & Stout [Chapter 2 (C and D)]; Goetz & Scott; S. Bag.*

### Lecture 4 (Beldowski)

- Principles and checkpoints for contracting.
- Long-term, short-term and relational contracts.

*Literature:*

*Hviid; Kahnemann & Tversky.*

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<sup>1</sup> Please note that the classes are merged into 4-hour lecture in the academic year of 2021/2022.

### **Lecture 5 (Beldowski)**

- Coase and Calabresi
- Tort law and economics
- Contributory negligence
- Comparative negligence
- Concepts of strict liability
- Judge Learned Hand formula

*Literature: Shavell (Chapter 1 + 2); Cooter & Ulen (Chapter 6); Artigot i Golobardes & Pomar; Kornhauser & Revesz.*

### **Lecture 6 (Beldowski)**

- Unilateral accidents
- Unilateral accidents under strict liability and negligence liability
- Bilateral accidents
- Bilateral accidents under negligence rule
- Bilateral accidents under strict liability

*Literature: Shavell (Chapter 2); Cooter & Ulen (Chapter 6); Ott & Schäfer.*

### **Lecture 7 (Beldowski)**

- What is untaken precaution? Breach of duty standpoint
- What is untaken precaution? Cause of fact standpoint
- What is precaution? Proximate cause standpoint

*Literature: Grady.*

### **Lecture 8 (Beldowski)**

- Division of causation and incentives
- Uncertainty over causation
- Causation under strict liability rule and negligence rule
- Inalienability, property and tort rules

*Literature: O. Ben-Shahar; Kahan; Shavell (Chapter 4); Calabresi & Melamed.*

### **Lectures 9-12 (Nevo)**

- Linking ownership to resources
- Advantages of private property
- Private versus public goods
- A prisoner's dilemma in the context of resource management
- Tragedy of the commons
- Modern commons and the public domain
- Solutions to property conflicts
- The importance of social norms
- Tragedy of the anti-commons

- Digital anti-commons
- Private ownership and common ownership
- Behavioral concepts of property