

## ECONOMIC ANALYSIS OF PRIVATE LAW

### *Course description*

This course aims at giving students an overview of the most important insights from the economic analysis of private law. It combines economic analysis of contract law, property law, tort law, and other topics. For contract law, the course covers the main principles of economic analysis of contracts, including the economic rationale for entering into contracts, formation defences, and optimal remedies for breach of contract. For property law, the course integrates the legal and the economic approach to ownership and illustrates costs and benefits of different ways to protect entitlements. For tort law, the course offers an analysis of the legal principles from an economic perspective, particularly regarding the structure of liability, the damage compensation, and insurance. Over topics, such as family law and litigation will be covered if time constraints allow.

### *Teaching team*

Prof. Roe Sarel

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### *Teaching venue*

Room 1083a, Von-Melle-Park 5

### *General background literature*

- ROBERT D. COOTER THOMAS ULEN, LAW AND ECONOMICS (6th edition, Addison-Wesley 2016, [online version](#))
- HANS-BERND SCHÄFER & CLAUS OTT, THE ECONOMIC ANALYSIS OF CIVIL LAW (Edward Elgar 2004)
- STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (Harvard University Press 2004)

Working paper versions:

<http://www.nber.org/papers/w9694> (accident law);

<http://www.nber.org/papers/w9695> (property law)

<http://www.nber.org/papers/w9696> (contract law)

## SYLLABUS

### I. INTRODUCTION

#### **Topic 1: Introduction Class to Private Law & Economics**

### II. CONTRACT LAW & ECONOMICS

#### **Topic 2: Why do parties need a contract?**

*Reading:*

- DAVID FRIEDMAN, LAW'S ORDER, chapter 12 (2000). Working version: [http://davidfriedman.com/Laws Order draft/laws\\_order ToC.htm](http://davidfriedman.com/Laws Order draft/laws_order ToC.htm)
- Cooter & Ulen, Law & Economics, chapter 6 – **only pages 276-287.**

#### **Topic 3: Informal strategies & Incomplete / long-term contracts.**

*Reading:*

- DAVID FRIEDMAN, LAW'S ORDER, chapter 13 (2000). Working version: [http://davidfriedman.com/Laws Order draft/laws\\_order ToC.htm](http://davidfriedman.com/Laws Order draft/laws_order ToC.htm)
- COOTER & ULEN, LAW & ECONOMICS, chapter 6 – **only pages 299-306.**

**Topic 4: Optimal remedies for contract breach I: expectation damages, reliance damages, and specific performance.**

Reading:

- COOTER & ULEN, LAW & ECONOMICS, chapter 6 – **only pages 287-291.**

**Topic 5: Optimal remedies for contract breach II: Handling multiple incentive problems**

Reading:

- Gerrit de Geest, *N Problems Require N Instruments*, 35 INT'L REV. L. & ECON. 42 (2013).

**Topic 6: Optimal remedies for contract breach III & Contractual risk allocation.**

Reading:

- Yehonatan Givati & Yotam Kaplan, *Over-Reliance under Contractual Disgorgement*, 20 AM. L. & ECON. REV. 82 (2018).
- DAVID FRIEDMAN, LAW'S ORDER, chapter 6 (2000). Working version: [http://davidfriedman.com/Laws\\_Order\\_draft/laws\\_order\\_ToC.htm](http://davidfriedman.com/Laws_Order_draft/laws_order_ToC.htm).

**Topic 7: Formation Defences: Incompetence, Dire Constraints, Information, and Monopoly.**

Reading:

- Cooter and Ulen, Law & Economics, chapter 7 - only section II (pages 341-371).
- Gerrit de Geest, *Signing Without Reading*, in ENCYCLOPEDIA OF LAW AND ECONOMICS: BASIC AREAS OF LAW (Alain Marciano & Giovanni B. Ramello eds., 2015). Working paper version: <https://ssrn.com/abstract=2834314>

**III. PROPERTY LAW & ECONOMICS**

**Topic 8: Theory of Property**

Reading:

- Eirik G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory: A Survey of Recent Literature*, 10 J. ECON. LIT. 1137 (1972).

**Topic 9: The emergence of property rights**

Reading:

- Harold Demsetz, *Toward a Theory of Property Rights* 57 AM. ECON. REV. 347(1967).
- Garrett Hardin, *The Tragedy of the Commons* 162 SCIENCE 1243 (1968).

Optional:

- Thomas W. Merrill, *Introduction: The Demsetz Thesis and the Evolution of Property Rights*, 31 J. LEGAL STUD. S331 (2002).
- Richard A. Epstein, *The Allocation of the Commons: Parking on Public Roads*, 31 J. LEGAL STUD. S515 (2002).
- Boudewijn Bouckaert, *Original Assignment of Private Property*, in PROPERTY LAW AND ECONOMICS 107 (1999), <https://www.sfu.ca/~allen/property%20origins.pdf> [only pages 1-7 in the pdf].

**Topic 10: Problems with the Transfer of Property**

Reading:

- Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

- Caspar Rose, *The Transfer of Property Rights by Theft: An Economic Analysis*, 30 EUR. J. L. & ECON. 247 (2010) **only the introduction.**

*Optional:*

- Harold Demsetz, *Toward a Theory of Property Rights* 57 AMERICAN ECONOMIC REVIEW 347 (1967).
- Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 ECON. INQUIRY 225 (1967)

**Topic 11: Protection of private ownership rights against interference**

*Reading:*

- Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

**III. TORT LAW & ECONOMICS**

**Topic 12: Introduction to torts; Harm, causation, and foreseeability**

*Reading:*

- Marcel Kahan, *Causation and Incentives to Take Care under the Negligence Rule* 18 J. LEGAL STUD. 427 (1989).
- Omri Ben-Shahar, *Causation and Foreseeability*, in ENCYCLOPEDIA OF LAW AND ECONOMICS (Boudewijn Bouckaert & Gerrit de Geest eds., 2000).

**Topic 13: Standards of liability**

*Reading:*

- COOTER & ULEN, LAW & ECONOMICS, Chapter 6 (pages 187-229)
- Steven Shavell, *Strict liability versus negligence*, 9 J. LEGAL STUD. 1 (1980).

*Optional:*

- STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW, chapters 2-4 (2003).

**Topic 14: Calculation of damages, punitive damages, and pure economic loss**

*Reading:*

- Victor P. Goldberg, *Recovery for Pure Economic Loss in Tort: Another Look at Robins Dry Dock v. Flint*, 20 J. LEGAL STUD. 249 (1991).
- Robert Cooter, *Hand Rule Damages for Incompensable Losses*, 40 SAN DIEGO L. REV. 1097 (2003).

*Optional:*

- Garrett T. Charon, *Beyond a Bar of Double-Digit Ratios-State Farm v. Campbell's Impact on Punitive Damages Awards*, 70 BROOK. L. REV. 605 (2004).
- Giuseppe Dari-Mattiacci & Hans-Bernd Schäfer, *The Core of Pure Economic Loss* 27 INT'L REV. L. & ECON. 8 (2007).

**Topic 15: Liability, risk bearing, and insurance**

*Reading:*

- STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW, chapter 5 (2003).

*Optional*

- Ronen Avraham & Ariel Porat, *The Dark Side of Insurance (U Texas Law and Econ Research Paper, 2022)*, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4203765](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4203765)

**V. MISC: FAMILY LAW & LITIGATION**

*In this part we will discuss additional topics in private law and economics, but only if time allows.*

*Reading:*

- COOTER & ULEN, *LAW & ECONOMICS*, Chapter 10.
- Margaret F Brinig, *Rings and Promises*, 6 J. L., ECON. & ORG. 203 (1990).
- James W. Hughes & Edward A. Snyder, *Litigation and Settlement under the English and American rules: theory and evidence*, 38 J. L. & ECON. 225 (1995)

*Optional:*

- Theodore Eisenberg & Geoffrey P. Miller, *The English versus the American rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327 (2012).

**VI. CONCLUSION**

Part of the last session will be dedicated for exam preparation.