For our 1/19 class meeting, please read:

1. **RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW** 1-16, 21 (Problems 1-7 only) & 23-28 & 279-293 (7th ed. 2007); and


For additional discussion of many of the topics raised in the first two readings (and related additional topics), as well as some intellectual and jurisprudential context in which to situate the first two readings, I recommend that you read, or at least skim:

3. **NICHOLAS L. GEORGAKOPOULOS, PRINCIPLES AND METHODS OF LAW AND ECONOMICS: BASIC TOOLS FOR NORMATIVE REASONING** 11-36 (2005); and


*If you are having difficulty with any of the economic concepts in the assigned readings, or you simply want to refresh or supplement your knowledge of (thus far relatively orthodox) microeconomics, I suggest that you read part(s) or all of one or more of the following:

5. **MERCURO & MEDEMA, supra**, pp. 60-93;

6. **RICHARD A. IPPOLITO, ECONOMICS FOR LAWYERS** 1-183 (2005);

7. **HOWELL E. JACKSON ET AL., ANALYTICAL METHODS FOR LAWYERS** 295-378 & 469-471 (2003); and


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*I assure you I’m not here to indoctrinate you into “Chicago School” or “Posnerian” law and economics. We must begin somewhere; and, despite any preconceptions you might have, or critiques you might have read, about Judge Posner’s views on law and economics, his treatise tends toward mainstream law and microeconomics and the essay is a more expansive, but less current, version of Chapter 2 of the treatise.*
Economics and the Law (LAW 723)  
Professor Keith A. Rowley  
William S. Boyd School of Law  
University of Nevada Las Vegas  
Spring 2010

READING ASSIGNMENT: WEEK TWO

For our 1/26 class meeting, please review the week one reading assignment, then read:

(1) Posner, pp. 17-21 (Problems 8 & 9 only);
(2) Randal C. Picker, An Introduction to Game Theory and the Law, in Chicago Lectures, pp. 29-47;
(3) Georgakopoulos, pp. 50-71 (optional); and

For more on game theory and the law, I recommend that you read part(s) or all of one or more of the following, in increasing order of sophistication:

(5) Sidenfeld, pp. 85-90;
(6) Jackson et al., pp. 34-62; and
(7) Ippolito, pp. 380-415.

For more on behavioral law and economics, I recommend that you read parts or all of one or both of the following:

(8) Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Cal. L. Rev. 1051 (2000)* (elaborating on rational choice theory’s shortcomings and the importance of the bounds within which most decisionmakers act and the biases that affect their actions); and
(9) Grant M. Hayden & Stephen E. Ellis, Law and Economics After Behavioral Economics, 55 U. Kan. L. Rev. 629 (2007)* (reviewing the field up to and since Picker and Korobkin & Ulen in search of a unifying principle that will transform behavioral law and economics from a means of critique to a source of prescription).

* I will post copies of the law review articles to the class web site as soon as possible. In the meantime (or if you have problems accessing them on the class web site), you may find them using Westlaw, LexisNexis, in many cases Hein Online, or (gasp!) the law library.
Economics and the Law (LAW 723)
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Spring 2010

READING ASSIGNMENT: WEEK THREE

Because we have much to discuss from prior readings and the library’s reserve room is closed this weekend, I’ll keep this assignment shortish. For our 2/2 class meeting, please review the second reading assignment, then read:

(1) POSNER, pp. 259-275 (Problems 5-7 only) & 268-270 (§ 8.8 only for now);
(3) MERCURO & MEDEMA, pp. 306-334 & 346-341**; and
(4) Robert C. Ellickson, Law and Economics Discovers Social Norms, 27 J. LEGAL STUD. 537 (1998);

and one or more of the following – each of which deserves at least a skim:

(5a) Andrew J. Cappel, Bringing Cultural Practice Into Law: Ritual and Social Norms Jurisprudence, 43 SANTA CLARA L. REV. 389 (2003); or
(5b) Dorothea Kübler, On the Regulation of Social Norms, 17 J.L. ECON. & ORG. 449 (2001);
(5c) Janet T. Landa, Bounded Rationality of Homo Classificus: The Law and Bioeconomics of Social Norms as Classification, 80 CHI.-KENT L. REV. 1167 (2005); and

Girded by these readings about social norms and the law, as well as our prior readings on neoclassical microeconomics, game theory, and behavioral economics and the law, we should have a fairly broad conceptual base from which to sortie into core doctrinal areas (e.g., property, contract, tort, and criminal law) that will, in turn, open the door to additional theoretical vistas (e.g., public choice theory, critical perspectives on the roles of law and lawmaking in promoting and reinforcing demographic and socioeconomic disparities) that should challenge our perspectives about what we have read and discussed so far and enable us to explore additional doctrinal areas that you will choose for the second half of the course.

** Princeton University Press has generously posted a .pdf copy of this chapter from Mercuro & Medema at http://press.princeton.edu/chapters/s7_8276.pdf. I will post a link from the LexisNexis Web Course.
Because of the UNLV-wide student walk out scheduled to occur during our class time, and because I have already had lengthy topic conferences with some of you and anticipate many more, I’m rescheduling our class meeting to Thursday 2/11 from 10:00 AM to 12:00 PM. Class might actually begin after 10:00 AM because I have a faculty meeting that morning that might run long.

With whatever time we have, I’ll entertain questions and discussions of what we have read so far and will provide a brief preview of economic perspectives on the bodies of substantive law to which we are about to turn.

I generally take roll for rescheduled classes solely for recordkeeping purposes. Absence from a make-up class (particularly one on fairly short notice) does not count against your number of allowed misses. Nonetheless, given the small number of class meetings we have this semester, I encourage you not to miss the make-up.
We turn now to three or four weeks of readings that explore what light heterodox economics can shed on key legal subject-matter areas (and some of the ways the law reflects on economic reality). We’ll start with property because the idea of property rights underlie most of private (and quite a bit of public) law, as well as quite a bit of modern microeconomic theory, and because the watershed article to which many point as the origins of economic analysis of the law addresses issues of property law. For our 2/16 class meeting, please read:

(1)  POSNER, pp. 31-92;

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

(3) Richard A. Epstein, Transaction Costs and Property Rights: Or Do Good Fences Make Good Neighbors, in CHICAGO LECTURES, pp. 175-188;

(4) Thomas W. Merrill & Henry E. Smith, What Happened to Property in Law and Economics?, 111 YALE L.J. 357 (2001); and


For a meatier economic discussion of many of the issues the first five readings raise, as well as some of their corollaries, I recommend, in decreasing order of rigor and sophistication:

(6a) IPPOLITO, pp. 194-214 & 222-246; or
(6b) JACKSON ET AL., pp. 378-396.

For more specifically on the Coase Theorem and some of its implications, I recommend at least skimming one or more of the following, in decreasing order of value added:

(7a) GEORGAKOPOULOS, pp. 95-126;
(7b) MERCURO & MEDEMA, pp. 107-119; and
(7c) SEIDENFELD, pp. 91-94.

* As always, I have posted or will post copies of the law review articles to the LexisNexis Web Course.
Notwithstanding the title of Merrill and Smith’s essay, there is a rich body of literature applying economic analysis to core and emerging property law issues (and critiquing those who do). All of the following are optional readings – at least as far as class preparation goes. Nonetheless, each – or, in some cases, at least the central piece of each set – is worth a skim for anyone interested in exploring economic analysis of property law issues in more depth, with more breadth, or both, or wanting to see how the various “methodological” approaches we read about or discussed the first three weeks of the semester tie explicitly into economic analysis of property law.

(8) **Property Law and Economics: Generally**

Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002);

Donald J. Kochan, *Runoff and Reality: Externalities, Economics, and Traceability Issues in Urban Runoff Regulation*, 9 CHAP. L. REV. 409 (2006); and


(9) **Property Law and Economics: Physical and Virtual Infrastructure and Property**


Brett M. Frischmann, *An Economic Theory of Infrastructure and Commons Management*, 89 MINN. L. REV. 917 (2005);

Lawrence Lessig, *Re-Marking the Progress in Frischmann*, 89 MINN. L. REV. 1031 (2005);

Philip J. Weiser & Dale Hatfield, *Spectrum Policy Reform and the Next Frontier of Property Rights*, 15 GEO. MASON L. REV. 549 (2008); and


(10) **Property Law and Behavioral Economics**


(11) **Property Law and Game Theory**

(12) **Property Law and Social Norms**

MERCURIO & MEDEMA, pp. 334-336; and


(13) **Property Law and Economics: Other Critical Perspectives**


Peter H. Huang, *Reasons within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435 (2000);

Carol M. Rose, *Left Brain, Right Brain and History in the New Law and Economics of Property*, 79 OR. L. REV. 479 (2000); and

For our 2/23 class meeting, please read:

(1)  

(2)  

(3)  

(4)  

(5)  

(6)  

(7)  

(8)  

There is a rich body of literature applying (and critiquing) economic analysis to (and of) core and emerging contract law issues. All of the following readings are optional as far as class preparation goes. Nonetheless, each deserves a skim for anyone interested in exploring economic analysis of contract law issues in more depth, with more breadth, or both.

(9) **Contract Formation and Modification**


    IPPOLITO, pp. 214-222 [contracts/modifications induced by duress].
(10) **Contract Terms**


(11) **Contract Performance, Breach, Excuse, and Remedies**

Donald J. Smythe, *Bounded Rationality, the Doctrine of Impracticability, and the Governance of Relational Contracts*, 13 S. CAL. INTERDISC. L.J. 227 (2004);

Aaron J. Wright, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183 (2005);


(12) **Contract Law and Behavioral Economics (with a dash of Cognitive Theory)**

Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995);


**13** Contract Law and Game Theory


**14** Contract Law and Social Norms (with an intro to New Institutional Economics)


Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 Neb. L. Rev. 506 (2005);


**15** Contract Law and Economics: Other Critical Perspectives

Brian H. Bix, *Epstein, Craswell, Economics, Unconscionability, and Morality*, 19 QLR 715 (2000);

Beverly Horsburgh & Andrew Cappel, *Cognition and Common Sense in Contract Law*, 16 TOURO L. REV. 1091 (2000); and


**16** Application: The Current Economic Crisis


Mark Ireland, *After the Storm: Asymmetrical Information, Game Theory, and an Examination of the “Minnesota Model” for National Regulation of Mortgage Brokers and Tomorrow’s Predatory Lenders*, 36 WM. MITCHELL L. REV. 1 (2009);

Because the U.S. Ninth Circuit Court of Appeals is hearing oral arguments here during our regularly-scheduled 3/2 class meeting, I ask that each of you attend the arguments in lieu of class. Apart from the educational benefit of watching the court and the attorneys before it, each of the three cases raise one or more issues highly susceptible to economic analysis (even though neither counsel seem to have briefed the economics of the underlying act or the best way for an individual or society to protect against such an act).
As your focus shifts more toward your papers, I will shorten the reading assignments and try to intersperse, among the foundational or otherwise-interesting works, readings that pertain to one or more of your paper topics. For our 3/9 class meeting, please read:

(1) Posner, 167-213, 253-256 & 389-408;

(2) Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499 (1961);

(3) Mercuro & Medema, pp. 126-138 & 284-290; and

(4) Georgakopoulos, pp. 141-146.

The following readings are optional. Nonetheless, each deserves a skim for anyone interested in exploring economic analysis of tort law issues in more depth, with more breadth, or both.

(5) **Overviews and Literature Reviews**


Jackson et al., pp. 396-419.

(6) **Meatier Stuff**


Eric Helland & Mark Showalter, *The Impact of Liability on the Physician Labor Market*, 52 J.L. & ECON. 635 (2009); and


(7) **The Intersection of Tort and ...**


Paul H. Rubin, *Treatment Decisions: Tort or Contract*, 22 REGULATION 25 (1999);

Roy Kreitner, *Fault at the Contract-Tort Interface*, 107 MICH. L. REV. 1533 (2009); and

IPPOLITO, pp. 247-281.

(8) **Articles Relevant to Seminar Paper Topics: Price Gouging**


Michael Brewer, Note, *Planning Disaster: Price Gouging Statutes and the Shortages They Create*, 72 BROOK. L. REV. 1101 (2007); and


(9) **Articles Relevant to Seminar Paper Topics: Fiduciary Duty**

Robert Flannigan, *The Economics of Fiduciary Accountability*, 32 DEL. J. CORP. L. 393 (2007);


Maria Gutierrez, *An Economic Analysis of Corporate Directors’ Fiduciary Duties*, 34 RAND J. ECON. 516 (2003);

The students writing three-credit papers will begin making their initial in-class presentations during our 3/16 class meeting. Before they do, we’ll spend some time tying up some loose ends from last week’s discussion of tort law and economic analysis, as well as discussing some issues at the intersections of property, contract, and tort.
While we will devote most of our 3/23 bonus-length class time to students making their initial in-class presentations, a couple of concepts that have come up here and there throughout the semester are particularly relevant to several of this week’s presentations. To give some structure to those concepts, and to better prepare you to ask useful questions about and offer constructive criticism of your classmates’ papers, please read the following for our 3/23 class meeting:

(1) Posner, pp. 249-268, 555-574 n.4, 583-590 & 659-674;

(2) Mercuro & MeDEMA, pp. 156-207; and

(3) J. Mark Ramseyer, Public Choice, in Chicago Lectures, pp. 101-112; and or more of

(4a) Erin Ann O’Hara, Opting Out of Regulation: A Public Choice Analysis of Contractual Choice of Law, 53 Vand. L. Rev. 1551 (2000); or

(4b) Frank B. Cross & Robert A. Prentice, The Economic Value of Securities Regulation, 28 Cardozo L. Rev. 333 (2006); or


(5) (Additional) Articles Relevant to Seminar Paper Topics: The Financial Crisis

Evan N. Turgeon, Boom and Bust for Whom?: The Economic Philosophy Behind the 2008 Financial Crisis, 4 Va. L. & Bus. Rev. 139 (2009);

Eamonn K. Moran, Wall Street Meets Main Street: Understanding the Financial Crisis, 13 N.C. Banking Inst. 5 (2009);

Lauren E. Willis, Will the Mortgage Market Correct?: How Households and Communities would Fare if Risk were Priced Well, 41 Conn. L. Rev. 1177 (2009);

Bryan J. Orticelli, Note, Crisis Compounded by Constraint: How Regulatory Inadequacies Impaired the Fed’s Bailout of Bear Stearns, 42 Conn. L. Rev. 647 (2009);

Raymond H. Brescia, Trust in the Shadows: Law, Behavior, and Financial Re-Regulation, 57 Buff. L. Rev. 1361 (2009); and

While we will devote most of our 4/6 class time to students making their (initial) in-class presentations, one of the presentations requires a working knowledge of statistics and econometrics that I assume not everyone has. So, please read one or more of the following:

(1) Jackson et al., pp. 473-568 (a very useful primer);

(2) Georgeakopolous, pp. 129-196 & 283-321 (delving deeper on some topics, shallower on others, and addressing some that Jackson et al. don't);

(3) Alan O. Sykes, An Introduction to Regression Analysis, in Chicago Lectures, pp. 1-28 (focusing on single-variable and multivariate regression analysis, which are foundational to statistically analyzing most types of quantifiable economic phenomenon).

Some of this is easy reading (admittedly, easier for some than others); some requires more work. Because several of your other classmates, while not having elaborated on this aspect in their initial presentations, are also planning to incorporate statistical analysis into their papers, it is worth your while to spend some time (re-)familiarizing yourself with the topics that Jackson et al., Georgeakopolous, and Sykes address.

For an approachable and holistic treatment of key quantitative methods and the concepts underlying them (written by a practicing attorney who has taught these methods as an adjunct at Columbia Law School for many years), I recommend:


I have placed copies of it and its “big brother,” Michael O. Finkelstein & Bruce Levin, Statistics for Lawyers (2d ed. 2001), in the Wiener-Rogers Law Library’s Reserve Room. Parts of both books are available on the Internet should you wish to browse them to decide which one, if either, better helps you understand the important methodological concepts they address.
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READING ASSIGNMENT: WEEKS TWELVE AND THIRTEEN

We will devote our entire class time on 4/13 and 4/20 to three-credit students making their second in-class presentations. Now that you have heard their topics, I expect you to review relevant readings I assigned earlier this semester to enable you to help your classmates improve their papers.