Seminar Syllabus

UNAS 3333 CROSS CURRENTS: THINKING ABOUT LAW AND ECONOMICS (AND PSYCHOLOGY)

Leader: Ken Felter
Of Counsel, Ropes & Gray LLP

Contact: ken.felter@ropesgray.com (preferred) (or felterj@bc.edu)

Location/Day/Time: UNAS 333301: Stokes Hall 103 South/Wednesdays 6:00 PM - 7:15 PM
UNAS 333302: Stokes Hall 213 South/Wednesdays 4:30 PM - 5:45 PM

Office Hours: Wednesdays 1:00 PM - 4:00 PM

I will also be available at other times. Please email me to schedule a mutually convenient time to meet.

Synopsis: In this seminar, we will explore how economic theory applies to the positive and normative analyses of laws, legal issues and legal systems. We will investigate how traditional (neoclassical) economists analyze the law and how behavioral economists have challenged and complemented traditional (neoclassical) economic theories in several real world legal contexts. We will also explore how biases and heuristics (“rules of thumb”) and other cognitive limitations influence the decisions and choices that we make. To enjoy and learn from this seminar, no prior knowledge of law, economics or psychology is required. The assigned readings, response papers and meeting discussions will enable you to understand and to discuss and debate all the topics that we will explore and to contribute to and actively participate in meeting discussions. To enjoy and learn from this seminar, you need intellectual curiosity.

I believe that this seminar will be provocative and stimulating not only for students who are interested in pursuing professional careers in law, economics, psychology or public policy, but also to a wider audience of students who are intellectually curious about how law, economics and the psychology of decision-making and choice can be applied in our daily lives.

Seminar Requirements: The essence of a successful seminar is the meeting discussions. By actively participating in meeting discussions, you will develop skills in listening, asking questions, forming arguments, and communicating ideas. Coming prepared to meetings and engaging in active learning are essential to developing those skills. Therefore, completion of all reading assignments before meetings and attendance at, and participation during, all meetings are required. My principal roles as seminar leader will be to moderate the meeting discussions and to promote exchanges. To those ends, I will often use the Socratic method: “a form of cooperative argumentative dialogue among individuals, based on asking and answering questions
Reading and Writing Assignments: On each Thursday during the semester, the reading and writing assignments for the next meeting will be published on the seminar website on Canvas at Discussions. There will be assigned readings for each meeting. Most reading assignments will be published research papers or selections from articles, working papers, textbooks, or trade books. The reading assignments will be the main avenues for you to learn about the substantive topics covered during the seminar, and they will also be vehicles to stimulate meeting discussions.

The Schedule and Reading Assignments below identify the readings that will be assigned for each meeting. Note that the assigned readings may be revised during the course of the seminar. You will be timely notified of any revisions to the readings assigned for each meeting. All assigned readings and any assigned videos are on the seminar website on Canvas at Modules.

You will be required to submit a short response paper before each meeting. Response papers are intended to focus you on the assigned readings and to prepare you to contribute to meeting discussions. Each response paper should be 500 to 1,000 words in length and should be submitted on the seminar website on Canvas as a Reply to Discussions no later than 6:00 PM on the Monday before each meeting. This will enable me to read your response papers before we meet on the next Wednesday. We will often use your response papers to initiate or advance our meeting discussions.

Copyright: The Schedule and Reading Assignments and seminar website contain copyrighted materials. Those materials may include text, images, graphics, and other content (collectively, “Content”). In some cases, the copyright is owned by third parties, and Boston College is making the third-party Content available to you by permission or under the fair use doctrine.

The Content is made available to you only for your personal, non-commercial, educational, and scholarly use. You may not use the Content for any other purpose, or distribute or make the Content available to others, unless you obtain any required permission from the copyright owner. You may not alter or remove any copyright or other proprietary notices included in the Content.
Meetings 1 and 2 (August 31 and September 7, 2022): An Economic Approach to Law

In 1897, Oliver Wendell Holmes presciently prophesized that, “[f]or the rational study of the law, the blackletter man may be the man of the present, but the man of the future is the man of statistics and master of economics.” Oliver W. Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897). Today, the application of economic theory in the practice of law is ubiquitous.


The first article is the most cited law review article in history. In that article, 1991 Nobel Prize in Economics laureate Ronald H. Coase argues that, if we lived in a world without transaction costs, people would bargain to produce the most efficient distribution of resources, regardless of the initial allocation of those resources (“Coase Theorem”). He argues further that, with high transaction costs, the law should produce a similar outcome and that courts therefore should seek the most efficient solutions.

The second seminal law and economics article was authored by a former Dean of Yale Law School and Judge of the U.S. Court of Appeals for the Second Circuit. In it, Guido Calabresi explains that “risk distribution” is an ambiguous concept that can refer to the manner in which tort liability for accidental harms affects the allocation of scarce resources, distributes losses across society, or attains normatively desirable distributive outcomes. He uses economic analysis to demonstrate how these three different approaches affect the law of torts.

Since the publications of these two provocative articles, economic theory has been applied in ever-expanding areas of substantive and procedural law. Over time, economics has not only dramatically changed legal scholarship, but it has also changed the practice of law.

We begin the seminar by considering how the novel insights of Coase and Calabresi have been widely applied to traditional (neoclassical) approaches to law and economics to create a more comprehensive theory of law with both positive and normative aspects.

Readings:


Thomas J. Miceli, The Economic Approach to Law (2d ed. 2009), Chap. 1, §§1-5 (pp. 1-14) (14 pages)

Richard A. Posner, Economic Analysis of Law (9th ed. 2014), Chap. 1, §§1.1 - 1.5; Chap. 2, §§2.1 - 2.2 (pp. 3-33) (31 pages)
Meetings 3 and 4 (September 14 and 21, 2022): What is Behavioral Economics?

In 2002, Daniel Kahneman, a psychologist, won the Nobel Prize in Economics. He and Amos Tversky challenged the neoclassical economic theory that choices are made by rational decision-makers. In his 2011 best-selling book, *Thinking, Fast and Slow*, Kahneman summarizes his research on cognitive biases, prospect theory, and happiness.


Selections from these three trade books and a TED Talk by behavioral economist Dan Ariely will provide contexts for our meeting discussions regarding behavioral economics and the law.

**Readings:**

Daniel Kahneman, *Thinking, Fast and Slow* (2011), Introduction and Chap. 1-3 (pp. 3-49) (46 pages)


*****


*****

**Video:** Dan Ariely TED Talk (December 15, 2008)

(https://www.ted.com/talks/dan_ariely_asks_are_we_incontrol_of_our_own_decisions)

Meetings 5 and 6 (September 28 and October 5, 2022): Behavioral Economics and the Law

Traditionally, economic analysis of the law has proceeded under the assumptions of neoclassical economics. This approach to the law posits that the law is best analyzed and understood in light of standard economic principles, including the basic assumption that human behavior is rational. The primary task of behavioral economics and the law is to analyze how the decisions and choices made by real people differ from the hypothetical homo economicus.
Readings:


PART II: REAL-WORLD APPLICATIONS

Meeting 7 (October 12, 2022): Public Law Enforcement

After devoting several meetings introducing the traditional (neoclassical) approach to law and economics, behavioral economics, and behavioral economics and the law, we will turn to real-world applications. We will begin with public law enforcement (criminal law). We will discuss how each approach can or should inform public policy regarding public law enforcement and perform positive and normative analyses of each approach.

Readings:


Meeting 8 (October 19, 2022): Settlement of Civil Litigation

We will next perform positive and normative analyses of the settlement of civil disputes by applying both traditional (neoclassical) economics and behavioral economics theories to understand why most, but not all, civil disputes settle.

Readings:


Meeting 9 (October 26, 2022): Tort Liability Law

We will apply the law and economics (and psychology) concepts that we have discussed in another real-world context: tort (accident) law. We will focus on the influence that hindsight bias might have on jury determinations of liability.
Meetings 10 and 11 (November 2, 9 and 16, 2022): Government Regulation

Should the government care about our happiness? If so, how should happiness be measured? Lawyers, economists and hedonic psychologists debate these issues. We will discuss how the costs and benefits of government regulations are or should be analyzed. Among other law and economics (and psychology) topics, we will discuss “asymmetric paternalism”: government regulation that aims to assist boundedly rational people to avoid making costly mistakes (“nudges”), while at the same time preserving “freedom of choice.”

Readings:


Nudges:


Michael S. Barr, et al, The Case for Behaviorally Informed Regulation, New Perspectives on Regulation (2009), Chap. 2 (pp. 25-55) (30 pages)


* * * * *

Meeting 12 (November 30, 2022): Property Rules

We will consider how traditional (neoclassical) economic and behavioral economic analyses apply to property rights and the effects that the exercise of property rights (“externalities”) has on interested parties.

Readings:


Meeting 13 (December 7, 2022): Closing Discussions

Course Summary:

<table>
<thead>
<tr>
<th>Date</th>
<th>Details</th>
<th>Due</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mon Sep 12, 2022</td>
<td>Meetings 1 and 2 Discussion</td>
<td>due by 6pm</td>
</tr>
<tr>
<td>Mon Sep 19, 2022</td>
<td>Meeting 3 Discussion</td>
<td>due by 6 pm</td>
</tr>
<tr>
<td>Mon Sep 26, 2022</td>
<td>Meeting 4 Discussion</td>
<td>due by 6pm</td>
</tr>
<tr>
<td>Mon Oct 3, 2022</td>
<td>Meeting 5 Discussion</td>
<td>due by 6pm</td>
</tr>
</tbody>
</table>

-7-