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From territories to the global village : How to protect people in a globalize environment ?

The Law, Economics and Behavior of Class Actions

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VILLE DE SCEAUX
À LA CROISÉE DES TALENTS

université PARIS-SACLAY | FACULTÉ JEAN MONNET
DROIT-ÉCONOMIE-MANAGEMENT

EUGLOH

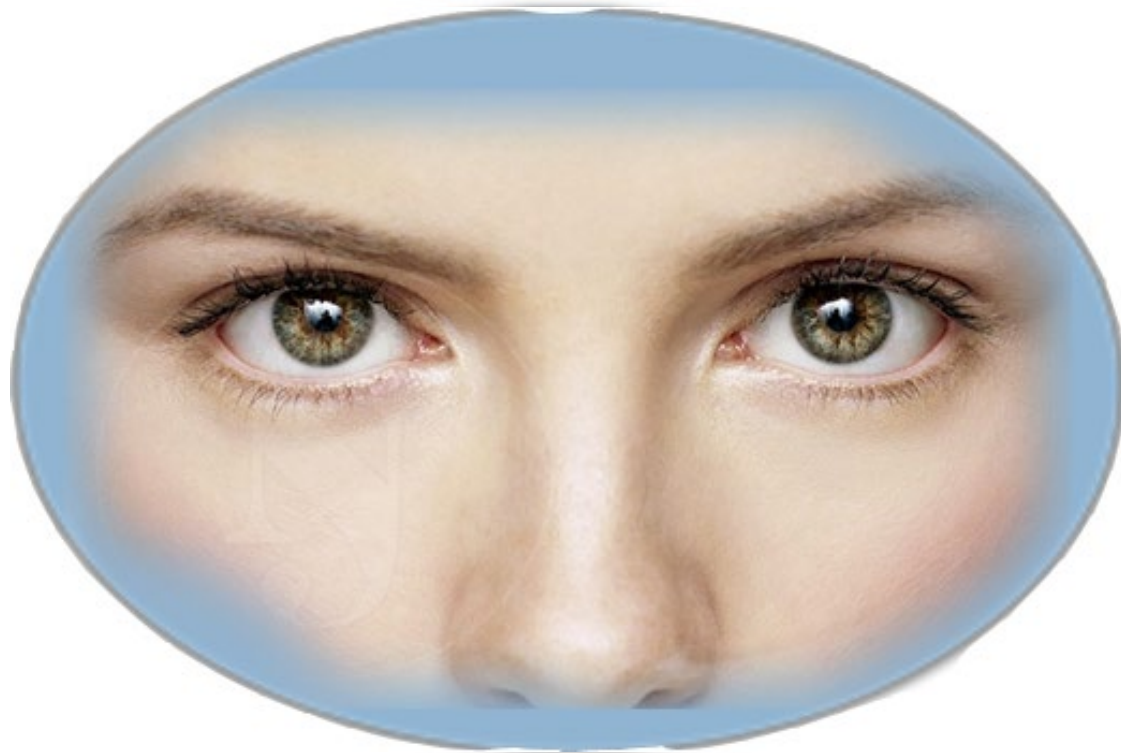# Relationship between the Law & the Real World: three waves

- **Traditional Law:** intuitive **("Old Law & Economics")**

- **"Classical" (or "Neoclassical") "New" Law & Economics:** systematic (rationality)

- **Law, Economics & Behavior:** systematic (open?)

"New" Law & Economics (since 1960)

Approach-based extent:
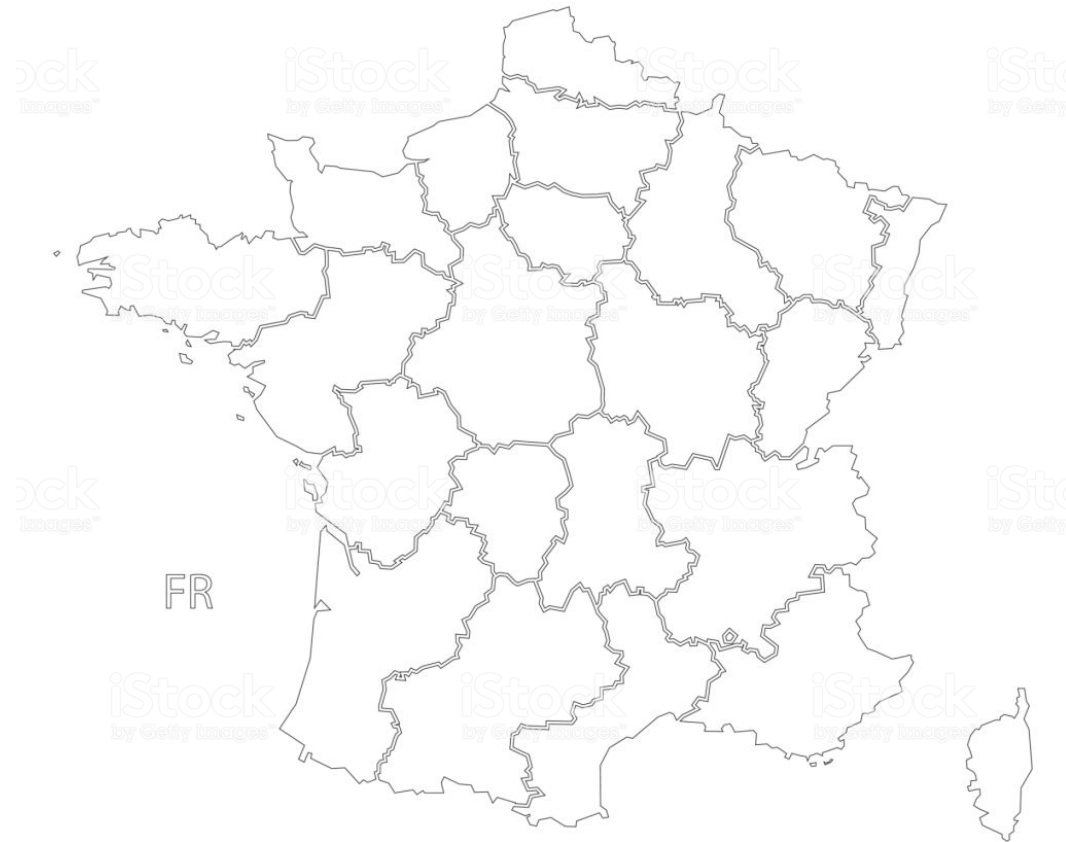
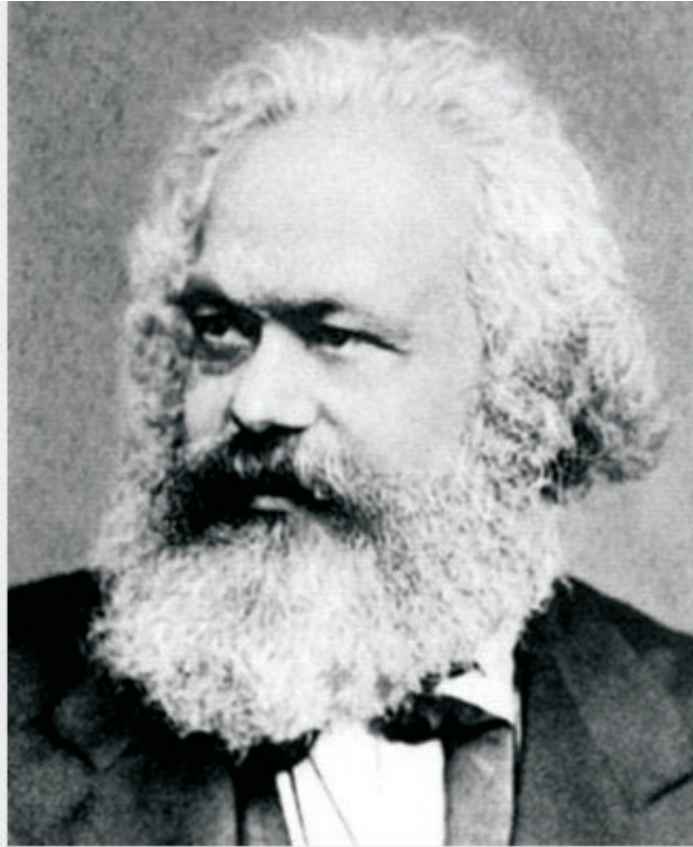L&E **viewpoint** on Economic Law + Non-economic Law

The Law

Law & Economics deals with much more than money issues…

Law & Economics: models as "maps"

Law & Economics is not an ideology

Marx

Efficiency as a Law´s goal (but not the only one)

Efficiency as the ***only*** or the ***main*** aim of Law or public policy

Vs.

Analysis of predictable factual consequences of norms and their consistency with ***any*** aim whatsoever.

Law & Economics? *Law & Consequences*

"*…it is hard to hold that consequences do not matter to the Law. Hence, perhaps a denomination like "Law & Consequences" would have had a more amiable reception in Latin America (and Europe) than "Law & Economics"…*"

(*Introduction to Economic Analysis of Law*, Cooter, R & Acciarri, H., 2012)
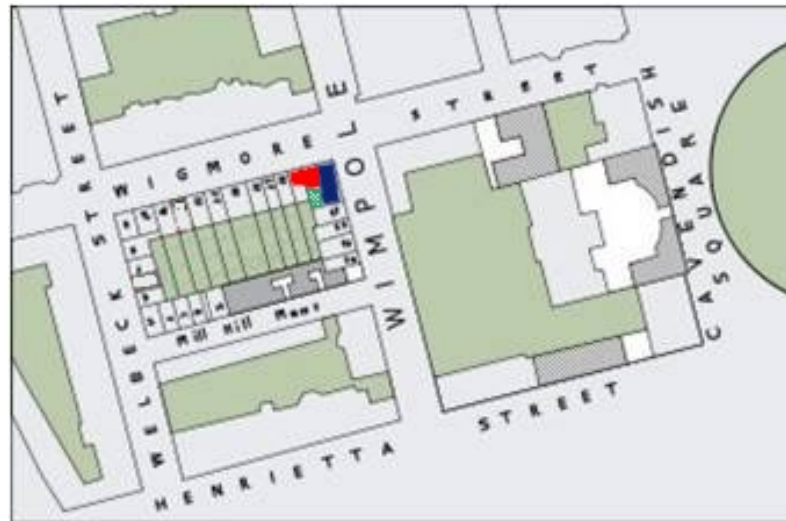
Efficiency criteria

- **Pareto**

    o *Pareto improvement* ➡ *Pareto superiority*

    o *Pareto optimality*

- **Pareto potential criteria** (Kaldor-Hicks)

(**Pre-condition**: individuals are the *best judges of their own welfare; "right of veto" if they feel worse off*)

Coase´s ideas

An exercise on *"Sturges v Bridgman"* (1879, LR 11 Ch D 852)

Defendant: a confectioner in **Wigmore Street**. The Plaintiff: a doctor, is the occupier of a house in **Wimpole Street**, which until recently had a garden at the rear, the wall of which garden was a party-wall between the Plaintiff's and the Defendant's premises and formed the back wall of the Defendant's kitchen.

Outcomes

Without transaction costs	
Liability	**Doctor**
No liability (no Law)	**Doctor**

With (positive and relevant) transaction costs	
Liability	**Doctor**
No Liability (no Law)	**Confectioner**

THE *NEW YORK TIMES* BESTSELLER

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Nudge

Improving Decisions about
Health, Wealth, and Happiness

Richard H. Thaler and Cass R. Sunstein
...with a new afterword

"One of the few books I've read recently that fundamentally changes the way I think about the world." —Steven Levitt, coauthor of *Freakonomics*

A theory of human behavior

- *Sistem 1, Sistem 2*

- *Bias & heuristics*

- *Choice architecture*

- *Libertarian Paternalism*

- *Nudge*

¿What is a *nudge*?

"...*A nudge, as we will use the term, is **any aspect** of the **choice architecture** that **alters people's behavior in a predictable way** without **forbidding any options** or significantly **changing their economic incentives**. To count as a mere nudge, the intervention must be **easy and cheap to avoid**. Nudges are **not mandates**. Putting fruit at eye level counts as a nudge. Banning junk food does not...*" (Thaler & Sunstein, 2008)

Class actions
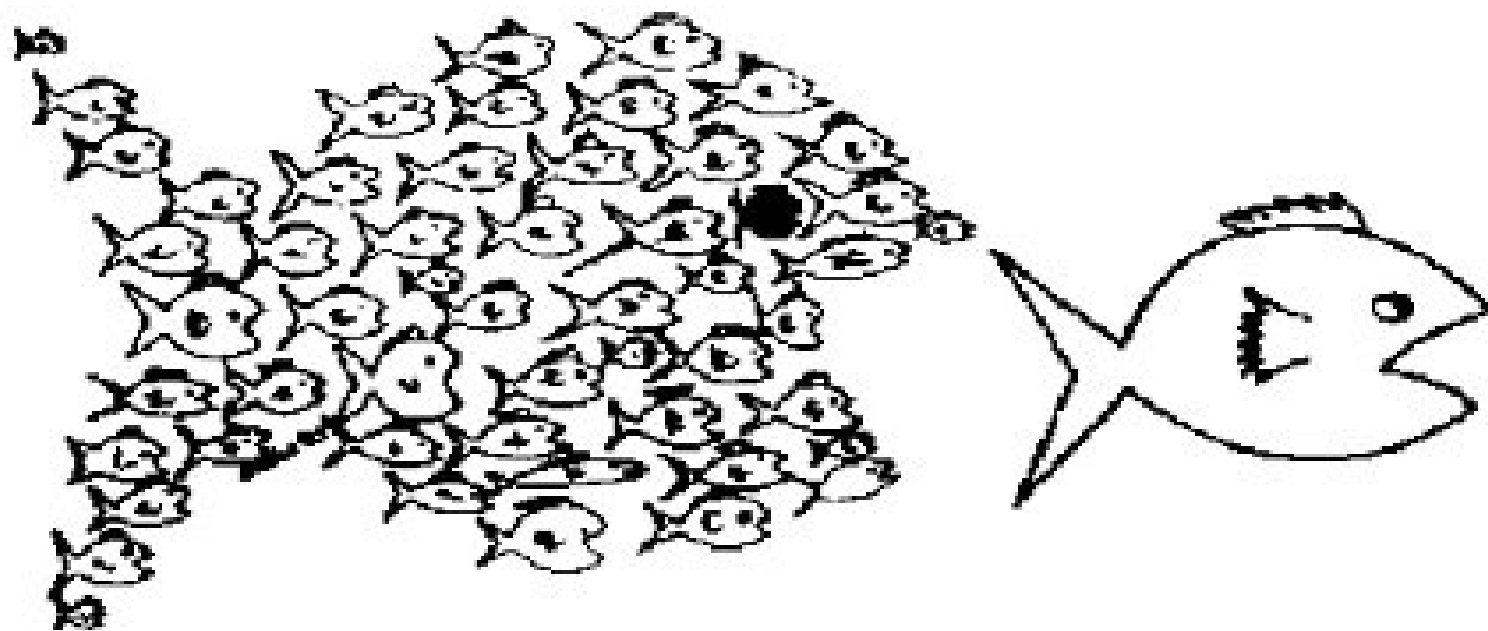
Class actions:
law, economics and behavior issues

"Alternative models of res judicata in class actions. A comparative law & economics approach" Hugo Acciarri and María José Azar-Baud, European Journal of Consumer Law, 2016-1, ps. 5 a 33, ISSN 0775-3209.

SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2962684

Rational litigation in single party tort suits

π = probability of success of the plaintiff´s in claim f

h = value of damages if the plaintiff succeeds in her claim

$c_p(f)$ and $c_d(f)$ administrative cost of the suit for the plaintiff for the defendant.

Plaintiff´s expected value of the suit $EVf_p = \pi h - c_p(f)$

Defendant´s expected value of the suit $EVf_d = -\left[\pi h + C_d(f)\right]$

Rational litigation: Class actions (plaintiff)

Class actions turn individual claims into *a set* of claims to be entertained accumulated, being

- F: a class lawsuit encompassing claims for the set
- H of individual instances of harm h, such as $h \in H$.
- Every h can be also claimed by means of an individual lawsuit f which correlates with an administrative cost $c(f)$.
- $F = \{f : f \text{ corresponds to a } h \epsilon H\}$.

Rational litigation:
Class actions (plaintiff)

Economies of scale turn administrative cost of plaintiffs´ claims

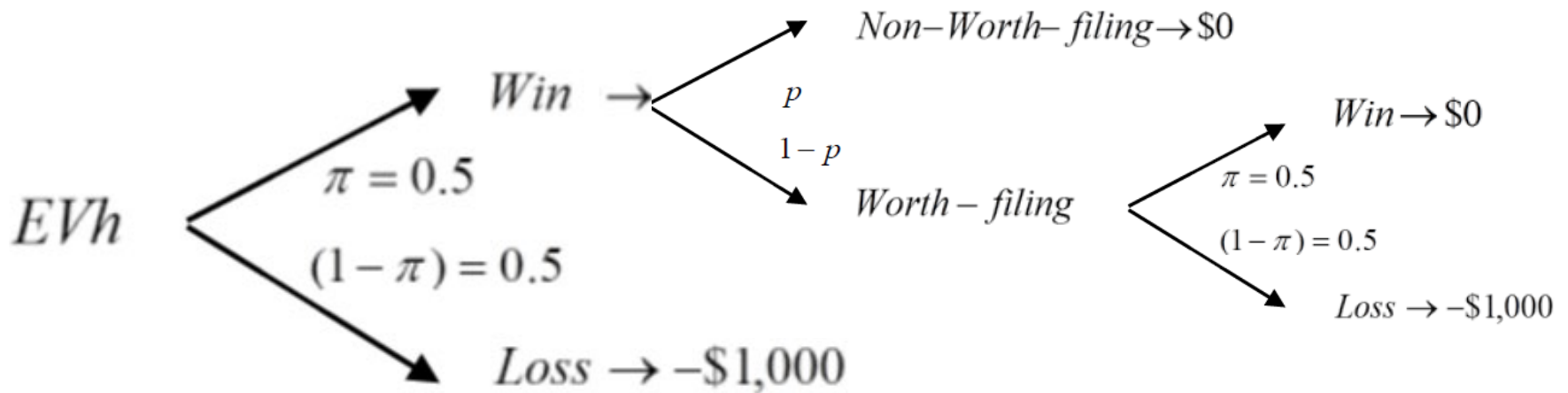$$C_P(F) < \sum_{\substack{f \in F \\ p \in P}} c_p(f) \quad \text{(i.e, a strictly subadditive function)}$$

Differential cost is enough to make the litigation rational, and to "force" the tortfeasor to internalize the full cost of his or her activity.

No "second chance right" and defendant´s costs in the USA

$$EVh \quad \begin{matrix} \nearrow & Win \to \$0 \\ \pi = 0.5 & \\ (1-\pi) = 0.5 & \\ \searrow & Loss \to -\$1,000 \end{matrix}$$
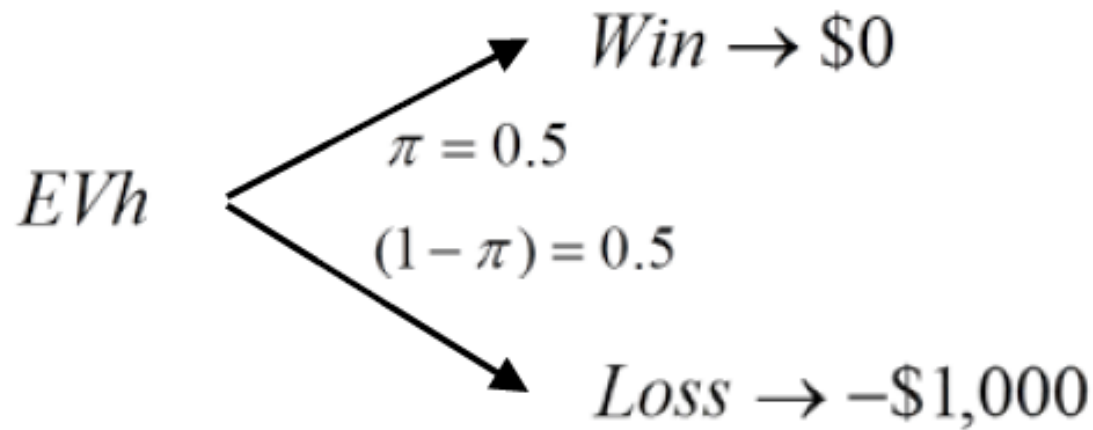
$$EVh = 0 - \frac{1}{2}\$1,000 = -\$500$$

"Second Chance Right" and Defendant's costs

$$EVh = \frac{1}{2}(-1000) + \frac{1}{2}\frac{1}{2}(1-p)(-1000) = -500 - \frac{1}{4}(1-p)1000 = -500 - 250(1-p)$$

Outcome with second chance   **Outcome without second chance**

$-500 - 250(1-p)$ **More costly for the defendant than** -500