A HISTORY OF LAW AND ECONOMICS, 1870 - 1970:

PROPERTY, STATE AND THE MARKET

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Short Abstract

The purpose of this work is to to construct an alternative history of law and economics (L&E). One, that is rid from the mainstream's allegation that L&E was born in the 1960s to Chicago scholars who revived the interaction between law and economics, which they argue, lay dormant since Bentham writing in 1789. It provides a journey through one hundred years of economic and legal thought, between 1870 and 1970. It highlights how law and economics have continued to interact, to be entangled and to produce a common language. Both legal and economic thought have gone through immense transformations that have shaped their discourses over the years. I have chosen to focus on only three of these transformations, that I refer to as paradigm shifts, that I consider significant to the story I narrate.

Constructing this alternative history of L&E is an extensive project that groups some of the work I have already completed,[1] and some of the projects I intend to undertake. I will present the part of the project that focuses on the history of law and economics told through the prism of the *public interest* in utility and market regulations.

Tracing the genealogy of the public interest in utility and market regulations illustrates how law and economics have been in constant interaction. I chose to start the analysis in the 1870s when the Granger Laws were being adopted and when *Munn v. Illinois* set the stage for the centrality of the public interest in both the legal and economic treatment of regulatory policy.

[1] *See e.g.,* Dina I. Waked, *Sens et non-sens de la responsabilité civile et analyse économique du droit,* in SENSE ET NON-SENSE DE LA RESPONSABILITÉ CIVILE, Le Bourg et Quézel-Ambrunaz ed. (2018); Dina I. Waked, *Markets need not be perfect: Competition Policy and Market Structure Analysis in the Global South*, 4(16) L. & PRAXIS (2016); Dina I. Waked, *Adoption of Competition Law in Developing Countries: Reasons and Challenges,* 12 (2) J. L., ECON. & POL'Y 193 (2016); Dina I. Waked, A*ntitrust Goals in Developing Countries: Policy Alternatives and Normative Choices*, 38(3) SEATTLE U. L. REV. (2015); Dina I. Waked, *Development Studies Through the Lens of Critical Law and Economics: Efficiency and Redistribution Revisited in Market Structure Analyses in the Sout*h, 5(4) TRANSNATIONAL LEGAL THEORY (2014).

The unfolding of the public interest in these fields goes through three paradigm shifts, each drastically changing what the public interest meant and how it would be achieved.

During the first paradigm, while progressive economists were still considered *economists,* the public interest corresponded to a collective maximization of societies welfare. It was used to legitimate rate regulations, distributive policies, statism, constraint on private property, but also the existence of monopolies and their use *for* the public interest.

With the rise of the Ordinalists, this paradigm shifts and the economics and law that ensue are responsible for narrowing the public interest to only mean the welfare of the consumer. Progressive economists were no longer considered producing scientific knowledge, and were hence cast outside of the economic discourse. Simultaneously, the failure of the First New Deal's law making – which was highly inspired by progressive economic thinking – guaranteed the end of their influence. In its place, competitive market structures became desired, state intervention for distributive objectives became drastically narrowed, and restraint on private property become obsolete. Monopolies, were no longer to be *used* for the public interest, but were considered efficient, given the unregulated *free* market.

Finally, the last paradigm shift, which was spearheaded by Chicago School's scholarship, was responsible for narrowing the public interest even further. When Chicago scholars took as their mission to bring their version of economics to law, they minimized the public interest to mean economic or allocative efficiency; leading to a discourse that became confined to the price theory and efficiency analyses. Upon this constraint, the neoliberal program took off – manifested in the deregulatory movement, amongst many others.

The analysis ends in the 1970s when Richard Posner set narrow confines to the definition of public interest, with the inauguration of his wealth maximization concept. These confines only allow for a price theory and efficiency discourse to take root and shape the public interest. The repercussions were colossal. They were, however, only possible given the changes that have been occurring over a hundred years in both law and economics. The materialization and transformations of these issues are traced throughout the manuscript.

Tracing these changes to the public interest concept, and the ensuing repercussions witnessed in law *and* economics, helps entangle alternative concepts of property, state and the market. It

aids in imagining how these alternatives could be reconstructed instead of the dominant mainstream reigning today.

Finally, in illustrating this interaction between law and economics a dialectical relationship emerges, where one can see how economics changes given the changes in law's background rules, especially of property and contract, which economics takes for granted; and how law changes when economics mutates and transforms. This perpetual dialectic relationship is at the heart of the argument presented.

The provided narrative is consciously selective, to produce this particular history, while acknowledging that many other histories covering the same time frame have already been told and would have been possible to tell. It, is however, told in this way to shed light on a specific transformation that has *only* been possible due to the interactions of both law and economics demonstrated throughout the studied period.