

# **Law and Economics in the Civil Law World: The Case of Brazilian Courts**

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## **Abstract**

Conventional wisdom holds that economic analysis of law is either embryonic or nonexistent outside of the United States generally and in civil law jurisdictions in particular. Existing explanations for the assumed lack of interest in the application of economic reasoning to legal problems range from the different structure of legal education and academia outside of the United States to the peculiar characteristics of civilian legal systems. This paper challenges this view by documenting and explaining the growing use of economic reasoning by Brazilian courts. We suggest that the rise of economic reasoning in Brazilian legal practice is driven not by a supply-push from scholars, but by a demand-pull due to ideological, political, and legal factors leading to greater judicial empowerment in the formulation of public policies. Given the ever-greater role of courts in policymaking, the application of legal principles and rules increasingly calls for a theory of human behavior (such as that provided by economics) to help foresee the likely aggregate consequences of different interpretations of the law. Consistent with the traditional role of civilian legal scholarship in providing guidance for the application of law by courts, the further development of law and economics in Brazil is therefore likely to be mostly driven by judicial demand.

## I. Introduction

It is difficult to overstate the influence of law and economics on U.S. law.<sup>1</sup> Yet, in contrast to numerous instances of U.S. legal imperialism during the twentieth century<sup>2</sup> – culminating in what is sometimes referred to as the “Americanization of law”<sup>3</sup> around the globe –, the diffusion of law and economics elsewhere has apparently proceeded at a far slower pace.<sup>4</sup> Common and civil lawyers alike repeatedly portray civil law jurisdictions as the province of abstract, doctrinal scholarship, with law students being instructed early in their careers to reason about the law exclusively in terms of the broad principles that it presupposes, rather than in terms of the consequences that it entails.<sup>5</sup>

A large body of literature documents the rejection of law and economics in the civil law world, and offers an extensive list of possible reasons for this apparent incompatibility. The catalog of potential culprits includes the alleged singularity of American ideology,<sup>6</sup> divergent attitudes toward legal science and practice in the civilian world,<sup>7</sup> the lack of mathematical and economic skills among civilian legal scholars,<sup>8</sup> language barriers and inertia,<sup>9</sup> the comparatively greater power of U.S.

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<sup>1</sup> The prominence of law and economics in the United States is widely acknowledged by its supporters and detractors alike. *See, e.g.*, ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 2-3 (5th ed. 2007) (“economics has changed the nature of legal scholarship, the common understanding of legal rules and institutions, and even the practice of law”); and Anthony T. Kronman, *Remarks at the Second Drinker Forum for Excellence in the Law*, 42 *WAYNE L. REV.* 115, 160 (1995) (“[law and economics] continues and remains the single most influential jurisprudential school in this country”). The importance of law and economics has also been documented quantitatively. *See, e.g.*, William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 *J. L. & ECON.* 385 (1993); and Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 *CHL.-KENT L. REV.* 751 (1996).

<sup>2</sup> Ugo Mattei, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 *AM. J. COMP. L.* (2004).

<sup>3</sup> The phenomenon is so robust that France’s prestigious Archives de Philosophie du Droit devoted its entire forty-fifth volume to this theme in 2001.

<sup>4</sup> Ejan Mackaay, *LAW AND ECONOMICS FOR CIVIL LAW SYSTEMS* 26 (2013) (“In continental Europe, reception [of law and economics] came later, no doubt because of differences in language and legal system”). For an earlier survey reporting the slow pace of the diffusion of law and economics outside of the United States, *see* *ENCYCLOPEDIA OF LAW AND ECONOMICS* (Boudewijn Bouckaert & Gerrit De Geest eds., 2000) [hereinafter “Encyclopedia of Law and Economics”].

<sup>5</sup> JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 67 (2007).

<sup>6</sup> Catherine Valcke, *The French Response to the World Bank’s Doing Business Reports*, 60 *U. TORONTO L. J.* 197, 200 (2010).

<sup>7</sup> *See* Juan Javier del Granado & M. C. Mirow, *The Future of the Economic Analysis of Law in Latin America: A Proposal for Model Codes*, 83 *CHL.-KENT L. REV.* 293 (2008); and Christian Kirchner, *The Difficult Reception of Law and Economics in Germany*, 11 *INT’L REV. L. & ECON.* 277 (1991).

<sup>8</sup> Dennis W.K. Khong, *On Training Law and Economics Scholarship in the Legal Academia*, 1 *ASIAN J. L. & ECON.* (2010).

courts,<sup>10</sup> the different incentives faced by law professors,<sup>11</sup> the degree of protectionism within the legal profession,<sup>12</sup> misconceptions about the comparative method,<sup>13</sup> the influence of legal realism,<sup>14</sup> other cultural differences,<sup>15</sup> and even Marxist domination of economics faculties.<sup>16</sup> Although existing works focus on the resistance to law and economics by civilian scholars (as opposed to judges), the possible influence of economics on civil-law courts has been neglected as even more far-fetched. Even if the progress of law and economics scholarship in some civil law countries has been acknowledged from time to time,<sup>17</sup> conventional wisdom still holds that the legal profession in civil law jurisdictions is impervious to economic reasoning.

At least in Brazil, however, the assumed insulation of legal practice from economic reasoning is plainly mistaken. To be sure, although law and economics scholarship in Brazil is rapidly gaining ground, it admittedly remains far from dominant. Perhaps surprisingly, most of the action in integrating economic and legal reasoning has not taken place within the Ivory Tower, but outside of it. Unbeknownst even to most educated observers,<sup>18</sup> Brazilian courts are increasingly receptive to

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<sup>9</sup> Robert Cooter & James Gordley, *Economic Analysis in Civil Law Countries: Past, Present, Future*, 11 INT'L REV. L. & ECON. 261, 262 (1991).

<sup>10</sup> Richard Posner, *The Future of the Law and Economics Movement in Europe* 17 INT'L REV. L. & ECON. 3 (1997).

<sup>11</sup> Nuno Garoupa & Thomas S. Ulen, *The Market for Legal Innovation: Law and Economics in Europe and the United States*, 59 ALA. L. REV. 1555 (2008); Oren Gazal-Ayal, *Economic Analysis of Law in North America, Europe and Israel*, 3 REV. L. & ECON. 485, 486-487 (2007); and J. Mark Ramseyer, *Law and Economics in Japan*, 2011 U. ILL. L. REV. 1455.

<sup>12</sup> Nuno Garoupa, *The Law and Economics of Legal Parochialism*, 2011 U. ILL. L. REV. 1517.

<sup>13</sup> Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT'L REV. L. & ECON. 265, 273 (1991). *See also* Roberto Pardolesi & Giuseppe Bellantuono, *Italy*, in ENCYCLOPEDIA OF LAW AND ECONOMICS (“the hindrances encountered by the economic analysis of law stem from a misconception of both the economic and the comparative method”).

<sup>14</sup> *See* Kristoffel Grechenig & Martin Gelter, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism*, 31 HASTINGS INT'L & COMP. L. REV. 295 (2008); Garoupa & Ulen, *supra* note 11, at 2.

<sup>15</sup> Kenneth G. Dau-Schmidt & Carmen L. Brun, *Lost in Translation: The Economic Analysis of Law in the United States and Europe*, 44 COLUM. J. TRANSNAT'L L. 602, 616 (2006).

<sup>16</sup> J. Mark Ramseyer, *Law and Economics in Japan*, 2011 U. ILL. L. REV. 1455.

<sup>17</sup> *See, e.g.*, Ben Depoorter & Jef Demot, *The Cross-Atlantic Law and Economics Divide: A Dissent*, 2011 U. ILL. L. REV. 1593 (“the gap between the United States and Europe regarding the development of law and economics is greatly exaggerated”); Carole M. Billiet, *Formats for Law and Economics in Legal Scholarship: Views and Wishes from Europe*, 2011 U. ILL. L. REV. 1485 (“Europe’s internationally visible law and economics outputs do not give the full measure of its total law and economics production”); Hans-Bernd Schäfer, *Law and Economics in Germany*, Eur. Ass’n L. & Econ. (May 30, 2009), <http://ealeorg.blogspot.com/2009/05/third-in-series-on-development-of-law.html> (“the authors write in their national language and publish in national law journals”); and Erich Schanze, *What is Law and Economics Today? A European View*, in NEW FRONTIERS OF LAW AND ECONOMICS, 99, 107 (Peter Nobel ed., 2006) (in German speaking Europe “there are hundreds of dissertations [...] containing major chapters on law and economics”).

<sup>18</sup> *See, e.g.*, DECIO ZYLBERSZTAJN & RACHEL SZTAJN, DIREITO & ECONOMIA vii (2005) (“The field of Economics of Law, whose scope has expanded to include the field of Organizations, is little developed in Brazil. Except for the area of competition, other topics (...) are mostly ignored”); ARMANDO PINHEIRO & JAIRO SADDI, DIREITO, ECONOMIA E MERCADOS xxv (2006) (“the movement of Law & Economics, established in the United States and Europe, has always suffered great resistance in Brazil, especially due to the lack of understanding of some paradigms and because it is viewed as a ‘gringo thing,’ given that it comes from a common law regime, perpetuating the basic, but common, error that only countries with such type of legal system could do Law & Economics”); and Luciano Benetti

economic arguments. They have taken the lead in employing economic concepts to illuminate the application of the law and have repeatedly shown concern with incentives, cost-benefit analysis, and aggregate consequences of different legal regimes. Those who decry the resistance to economic analysis in Brazil may simply have been looking at the wrong places.

Moreover, we argue that the growing use of economic reasoning by Brazilian courts is not the product of blind imitation of foreign fads. Instead, it is the result of a profound transformation in the character and operation of the Brazilian legal system – to the effect that courts are increasingly in the business of shaping and implementing core public policies. In other words, our hypothesis is that, conditioned on minimum levels of economic literacy, judicial involvement in policymaking is the relevant variable to explain the rise of economic analysis in the practice of law.<sup>19</sup> This suggests that, contrary to prevailing assumptions in the literature, the spread of economic reasoning in Brazilian legal practice is driven not by a supply-sided push by academics, but by a demand-pull due to the changing structure of the law. While others have reflected on the new role for “the common law in the age of statutes,”<sup>20</sup> we here address the implications of what we term the “civil law in the age of judicial empowerment.”<sup>21</sup> We leave for future work to determine the extent to which the Brazilian experience is representative of developments in other civil law jurisdictions as well.

This article proceeds as follows. Part II defines what we mean by the use of economic reasoning in Brazilian courts. Part III outlines the ideological, political, and legal factors that are spurring judicial demand for economic insights in the adjudication of legal disputes. Part IV documents and analyzes the use of economic reasoning in paradigmatic judicial decisions by Brazil’s higher courts. Part V concludes by suggesting possible implications of these developments for legal education and scholarship in civil law jurisdictions.

## II. Economic Reasoning in Court

Before proceeding to substantiate our claim that Brazilian judges have increasingly employed economic reasoning in their opinions, we should clarify what

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Timm, *Lições do Nobel de Economia para o Direito*, VALOR ECONÔMICO, Nov. 27, 2009 (“[i]t is well known that our jurists, well-versed in Latin and French, solemnly refused to adopt the suggestions coming from the Anglo-American legal system (‘common law’), as well as the legal and economic theories originating in English language”). See also José R. Rodríguez, *The Persistence of Formalism: Towards a Situated Critique Beyond the Classic Separation of Powers*, 3 L. & DEV. J. 39, 41 (2010) (“Formalism persists everywhere despite 100 years of critical legal theory [...] While this is a general phenomenon, it seems to be especially acute in Brazil”).

<sup>19</sup> Garoupa and Ulen link the rise of law and economics to the ascent of legal realism, understood in terms of “a skepticism of formalism and a concern for the actual effects of law on targeted behavior.” Garoupa & Ulen, *supra* note 11, at 1562. While we agree that concern for the actual effects of law explain the growing interest in law and economics, we do not view such concern as synonymous with a rejection of formalism, but rather as result of the changing structure of the law. See Part III.C *infra*.

<sup>20</sup> See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* (1985).

<sup>21</sup> The recent trend toward ever-greater judicial empowerment around the globe is well documented. See, e.g., Ran Hirschl, *The Political Origins of the New Constitutionalism*, 11 IND. J. GLOBAL LEGAL STUD. 71, 71 (2004) (arguing that “in numerous countries and in several supranational entities, fundamental constitutional reform has transferred an unprecedented amount of power from representative institutions to judiciaries”).

we mean by the use of economic reasoning by Brazilian courts. For these purposes, it is helpful to begin by clarifying what it is not.

First, the use of economic reasoning in court is not to be confused with the recognition that certain legal developments are at least partially influenced by economic considerations.<sup>22</sup> This should be a fairly uncontroversial proposition even in civil law jurisdictions. Prominent civil law scholars have long explained the evolution of key legal institutions and rules as practical responses to shifting economic needs.<sup>23</sup> Also, it is no secret that a number of legal rules (such as the legal restrictions to self-contracting and self-dealing under Brazil's civil and corporate law, among many others) are implicitly based on the behavioral assumption that individuals act as self-interested maximizers of their own utility (i.e., as a *homo economicus*) – a propensity that can at times clash with societal objectives. Moreover, economic concepts such as monopoly, markets, and competition are known to be an integral part of antitrust law.<sup>24</sup>

Still, the fact that a legal rule is inspired by economic considerations does not necessarily entail the use of economic reasoning by courts. When a judge applies the Brazilian Civil Code to declare void a non-authorized sales contract entered into between an attorney (representing the principal) and the same attorney (acting for herself), economic reasoning will most likely be absent from her decision<sup>25</sup> – and appropriately so. In most cases where economic considerations are embedded in legal rules, the usual tenets of legal reasoning and interpretation will still suffice in their application.

Second, it is also important to distinguish the use of economic reasoning by Brazilian courts from the original aspirations of the law and economics movement of U.S. lineage.<sup>26</sup> As articulated by Richard Posner, “economic analysis can illuminate,

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<sup>22</sup> MAX WEBER, *ECONOMY AND SOCIETY* 655-6, 883 (Guenther Roth & Clauss Wittich eds., Ephraim Fischhoff et al. trans., 1978) (“Economic factors can therefore be said to have had an indirect influence only”; “economic conditions have [...] everywhere played an important role, but they have nowhere been decisive alone and by themselves”).

<sup>23</sup> See, e.g., TULLIO ASCARELLI, *PANORAMA DO DIREITO COMERCIAL* 22 (1947) (explaining the emergence of a separate body of commercial law in terms of the inadequacy of Roman-canonic law to the economic exigencies of a capitalist system).

<sup>24</sup> Posner attributes the development of law and economics in the United States in large part to “the curious American fascination with monopoly.” Richard Posner, *The Future of the Law and Economics Movement in Europe*, 17 *INT’L REV. L. & ECON.* 3, 4 (1997). The very field of antitrust law, however, was comparatively a latecomer in civil law jurisdictions.

<sup>25</sup> Brazilian Civil Code, Art. 117 (“Except as authorized by law or by the principal, the contract that the attorney, in his interest or on behalf of someone else, celebrates with himself is annulable”). The economic rationale for such a provision is straightforward: the underlying assumption is that a self-interested attorney would favor his own interests over those of the principal; as a result, the law offers as a default rule the regime that the parties presumably would have wanted – one that forbids the attorney from acting in a conflicted transaction).

<sup>26</sup> This is emphatically not to suggest that the use of economic reasoning in courts as we describe it here does not exist in the United States. It certainly does, having in fact preceded the law and economics movement (see, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947), where judge Learned Hand laid out the famous formula that uses cost considerations to establish negligence). Since the inception of the law and economics movement, the use of economic arguments in court has flourished, decisively shaping the development of various areas of law. See, e.g., Posner & Landes, *supra* note 1, at 386-7 (“[t]he impress of economics is strong on the calculation of damages in tort, contract, securities, and other types of cases and even on monetary relief in divorce cases. (...) Judges are increasingly receptive to economic arguments”); and Roberta Romano, *After the Revolution*

reveal as coherent, and in places improve [the law].”<sup>27</sup> These are academic ambitions of both descriptive and normative character – the chief idea being that economics can be used both to explain the underlying logic of the law and to evaluate whether the current legal regime is desirable from a cost-benefit standpoint. Accordingly, such a project has been widely criticized as subordinating or subsuming the law to economics.<sup>28</sup>

Conversely, the use of economic reasoning by Brazilian courts is the appropriation of key tenets and lessons from economics (especially microeconomics) as an instrument for the application of legal rules or principles.<sup>29</sup> Economic insights illuminate legal interpretation not only when the law implicates economic concepts (as is often the case in antitrust and monetary law) but also when the legal principles or rules in question call for a *forecast* of the likely consequences of certain events or legal regimes. Economics is thus at the service of the law, not the other way around. In this context, the use of economics to predict factual consequences of legal norms (positive law and economics) matters, but efficiency considerations (normative law and economics) carry comparatively little weight.<sup>30</sup>

For a simple illustration, consider the well-established rule that the victim of an unlawful act is entitled to recover lost profits (*lucrum cessans*). The rule requires monetary damages to be fixed so as to put the aggrieved party in the position it would have been but for the unlawful act.<sup>31</sup> The concrete application of this rule thus calls for a prediction of what the victim’s profits would have been had the unlawful act not been committed. And yet the law provides no theory of human behavior on which to ground such a prediction. Be it viewed as a science, an art or a social practice, legal thinking is essentially normative in character: it speaks about what ought to be, but has comparatively little to say about how the social world works – which is precisely the province of economics as well as of other social sciences.

In the Special Appeal 771,787, the issue before Brazil’s Superior Court of Justice (*Superior Tribunal de Justiça* – STJ)<sup>32</sup> was whether the government’s imposition of price ceilings on sugar cane derivatives below the actual cost of production was unlawful and, if so, what the appropriate measure of damages payable

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in *Corporate Law*, 55 J. LEGAL EDUC. 342 (2005) (describing the impact of finance and economic theory on the development of U.S. corporate and securities law).

<sup>27</sup> RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* XIX (6th ed. 2003).

<sup>28</sup> See, e.g., Kronman, *supra* note 1, at 161 (decrying the “built-in imperial instinct” in law and economics, “where the case is there to serve the theory, and not the other way around”).

<sup>29</sup> One must bear in mind that is a broader definition of the practice of law and economics than that typically employed by the scholars investigating the reception of law and economics outside of the United States. For instance, in a widely cited article, Garoupa and Ulen consider law and economics as the application of economics to non-obvious areas of law. Garoupa & Ulen, *supra* note 11, at 1567-8 (“for our purposes we adopt a definition suggested to us informally by Professor Louis Kaplow: ‘law and economics’ is the application of economic analysis to any area of the law except those areas where its application would be obvious”).

<sup>28</sup> On this topic, see Ugo Mattei & Roberto Pardolesi, *Law and Economics in Civil Law Countries: A Comparative Approach*, 11 INT’L REV. L. & ECON. 265, 274 (1991) (correctly predicting that allocative efficiency would not necessarily be the “polar star” of the practice and study of law and economics within the civil law tradition).

<sup>31</sup> For its current formulation under Brazilian law, see arts. 402, 403 and 927 of the Brazilian Civil Code.

<sup>32</sup> The STJ is Brazil’s court of last resort on the interpretation of federal law other than constitutional law. Federal law, in turn, accounts for the lion’s share of Brazil’s legal system.

to the aggrieved producers should be.<sup>33</sup> In approaching these issues, the dissenting opinion by Justice Herman Benjamin relied squarely on economic lessons. Specifically, the opinion rejected the measure of damages claimed by the plaintiffs, which was calculated solely based on the difference between the price ceiling imposed by the government and what the price would have been had it been duly fixed according to the actual costs of production.

Quoting elementary lessons from a Portuguese law-and-economics textbook on the concept of demand elasticity, the Justice concluded that the proposed formula would likely overestimate the amount of damages, since the artificially low price likely increased the amount of the product sold.<sup>34</sup> As the Justice himself emphasized, such use of economic insights was instrumental in the application of the law. In his words, although his analysis “resorted to economic tools and concepts in its interpretative effort,” it was “purely legal” in nature.<sup>35</sup>

This simple, almost trivial example, is however illustrative of a broader trend.<sup>36</sup> In this case, as in others, the use of economics explicitly replaces more intuitive forms of reasoning or rules of thumb. An important – and, as we shall argue, growing – number of legal norms in Brazil require adjudicators to ponder over the likely factual consequences of different events or legal regimes. Although the trend is partly driven by advancements in economic theory vis-à-vis the distant past (as is the case in the more nuanced application of the ancient legal concept of lost profits), it was significantly bolstered by a transformation in the underlying structure of the legal system, to which we now turn.

### **III. The Rise of Economic Reasoning in Judicial Adjudication: The Driving Factors**

One could be tempted to view the greater use of economic reasoning in a Latin American country as the artificial transplant of foreign academic fads that have corrupted the cohesion and purity of the civil law tradition. We suggest that such an assumption is unwarranted, for it places too much weight on the role of intellectual elites while failing to capture broader societal and legal forces at play. Our basic hypothesis is that contemporary Brazilian law – a typical exemplar of a civil law jurisdiction<sup>37</sup> – is particularly amenable to economic reasoning for related and

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<sup>33</sup> S.T.J., Resp No. 771.787, Órgão Julgador: 2ª. Turma, Relator: Otávio de Noronha, 15.04.2008, S.T.J.J. (Braz.).

<sup>34</sup> The Portuguese book quoted is VASCO RODRIGUES, ANÁLISE ECONÔMICA DO DIREITO 24 (2007).

<sup>35</sup> S.T.J., Resp No. 771.787, Órgão Julgador: 2ª. Turma, Relator: Otávio de Noronha, 15.04.2008, S.T.J.J. (Braz.), at 19.

<sup>36</sup> The trends we identify throughout the text refer to the greater *degree* of judicial involvement in policymaking and, therefore, the greater demand for tools (including those provided by economics) to assist in the forecast of the factual consequences of different legal regimes. There is no question that courts’ involvement in public policy, as well as the resort to teleological modes of interpretation, have a long historical pedigree.

<sup>37</sup> Brazil is consistently classified as a civil law jurisdiction subject to strong French influence. Nevertheless, as one of us has previously argued, Brazilian law has long incorporated influences from both civil and common law origins. See Mariana Pargendler, *Politics in the Origins: The Making of Corporate Law in Nineteenth-Century Brazil*, 60 AM. J. COMP. L. 805 (2012). See also Mariana Pargendler, *The Rise and Decline of Legal Families*, 60 AM. J. COMP. L. 1043 (2012) (describing the historical evolution and contingency of legal family classifications).

mutually reinforcing (i) ideological, (ii) political, and (iii) legal factors, to which we now turn.<sup>38</sup>

### A. *The Ideological Factor: The Rise of Progressivism*

The first driving factor of the growing demand for economic reasoning is the ascent of progressive ideology as the underpinning of the modern Brazilian state. Progressivism – here, loosely understood as the antithesis of conservatism<sup>39</sup> – is the ideology of advancement and development, which is based on a strong belief in human capacity to deliberately alter reality and ameliorate human condition. In Brazil, the rise to power of president Getulio Vargas in the early 1930s marked the triumph of progressivism as the dominant state ideology, which is one that resorts to the “instrumental use of law” as a tool for “social engineering.”<sup>40</sup> While conservatism typically presupposes the wisdom embedded in existing rules and institutions, progressive ideology constantly puts it to test.

The state that embraces the mission of actively ordering and perfecting society – in short, the progressive state – is the institutional incarnation of progressive ideology. Brazil’s Constitution of 1988 is far from timid about its progressive ambitions. Article 3 explicitly articulates that “ensuring national development,” “eliminating poverty and marginalization, and reducing social and regional inequalities,” as well as “promoting the well-being of all” are “fundamental objectives of the Federative Republic of Brazil.”

Brazil’s progressive state is significantly involved in the pursuit of a series of concrete objectives or public policies – be they the elimination of illiteracy or the reduction of pollution, the promotion of industrialization or the fight against domestic violence. The formulation and implementation of public policies, in turn, creates the need of tailoring legal instruments and solutions to the goals of achieving concrete normative ends. In order to accomplish such a task, the traditional techniques of legal reasoning – based on grammar, history, logic, and internal coherence – no longer suffice. Once the legal *ends* are given, the legal debate turns to the question of the proper means to further such ends.

The legal controversy involving Law 11,340 of 2006 (“Lei Maria da Penha”) – a statute that, according to its preamble, was designed to create “mechanisms for deterring domestic and familial violence against women” – is illustrative of the use of social science works to evaluate the effectiveness of certain legal means to achieve the desired ends. The main legal debate surrounding the statute did not lie in the legitimacy of its objectives (which were fairly uncontroversial<sup>41</sup>), but in whether the

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<sup>38</sup> We developed an earlier version of this argument in Mariana Pargendler & Bruno Salama, *Direito e Consequência no Brasil: Em Busca de um Discurso sobre o Método*, 262 REVISTA DE DIREITO ADMINISTRATIVO 95 (2013).

<sup>39</sup> For present purposes, the term conservatism can be understood as a positional ideology against dismantling existing institutions (rather than an ideational one, which provides specific views about how society ought to be organized). See Samuel P. Huntington, *Conservatism as an Ideology*, 51 AM. POL. SCI. REV. 454, 468 (1957).

<sup>40</sup> See José Reinaldo Lima Lopes, *Regla y Compás, Metodología para un Trabajo Jurídico Sensato*, in ENSAYOS SOBRE METODOLOGÍA DE LA INVESTIGACIÓN JURÍDICA 41, 44 (Christian Courtis ed., 2006).

<sup>41</sup> The exceptions prove the rule. A lower court judge who declared the statute unconstitutional for depriving men of their regular means of control of women – arguing that “the world is, and shall continue to be, masculin” – was sanctioned by Brazil’s judicial oversight body National Council of



mechanisms provided by the statute were consistent with such goals. Accordingly, the Brazilian Supreme Court (*Supremo Tribunal Federal* – STF) had to decide on the constitutionality of the statutory provision that conditioned the criminal prosecution of wrongdoers to the “representation” (request) of the victim.

In a split decision, the Court ultimately decided to grant an interpretation “in accordance with the constitution” to the effect of permitting the criminal prosecution of offenders notwithstanding the absence of representation by the victim. The court’s majority considered women’s well-known reluctance to file representations against their spouses, as documented in sociological studies presented to the court, and concluded that the imposition of such requirement would effectively “eliminate the protection” afforded to women under the Constitution,<sup>42</sup> thus making it particularly inept to accomplish the desired objective of curbing domestic violence. Tellingly, the disagreement expressed in Justice Cezar Peluso’s dissenting opinion hinged at least partially on the presumed *concrete factual consequences* of mandating or dispensing the victim’s representation – the type of inference that is typical of social sciences such as economics, but foreign to the deductive mode of legal reasoning that is said to characterize the civilian tradition.<sup>43</sup> A behavioral theory – such as that offered by economics and other social sciences – about how actors respond to different rules and policies is therefore badly needed.

To be sure, portraying progressivism as a propeller of law and economics may sound oxymoronic, especially for American audiences.<sup>44</sup> The law and economics movement that flourished in the United States in the 1960s decade was premised on a *laissez faire* agenda that is still today routinely labeled as “conservative.”<sup>45</sup> In the Brazilian legal context, however, the rise of progressivism has gradually undermined strong versions of legal formalism that conceived legal categories as exclusively derived from history, logic or reason.<sup>46</sup> The advancement of the progressive ideology

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Justice (*Conselho Nacional de Justiça* – CNJ). The conviction was later reversed by STF. S.T.F., MS 30.320, Relator: Ministro Marco Aurélio, 28.02.2011, S.T.F.J. (Braz.).

<sup>42</sup> S.T.F., ADI No. 4.424, Relator: Ministro Marco Aurélio, 09.02.2012, S.T.F.J. (Braz.).

<sup>43</sup> *Id.* Noticeably, Justice Peluso’s dissenting opinion specifically referred to “studies of several entities of civil society and also the Applied Economic Research Institute (IPEA)” and also to “several elements brought by people from the fields of sociology and human relations,” including “public hearings that presented data justifying the [relevant] conception of the criminal lawsuit.”

<sup>44</sup> See Herbert Hovenkamp, *Knowledge About Welfare: Legal Realism and the Separation of Law and Economics*, 84 MINN. L. REV. 805, 810 (2000) (“progressive legal thought from roughly 1925 to 1960 [in the United States] is characterized by an unprecedented separation of law and economics”); and Herbert Hovenkamp, *The Mind and Heart of Progressive Legal Thought*, 81 IOWA L. REV. 149 (1995).

<sup>45</sup> See e.g. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 90-134 (2010). *But see* Pierre Schlag, *An Appreciative Comment on Coase’s The Problem of Social Cost: A View from the Left*, 1986 WIS. L. REV. 919 (1986) (“Coase’s insights can yield some left-leaning implications for the understanding of law and its relation to economics”) and *Four Conceptualizations of the Relations of Law to Economics (Tribulations of a Positivist Social Science)*, 33 CARDOZO L. REV. 2357 (2012) (comparing the approaches of Frank Knight, Ronald Coase, Richard Posner and Cass Sunstein). See also RICHARD POSNER, *LAW, PRAGMATISM AND DEMOCRACY* 274-288 (arguing that Hayek’s position, in requiring judges to enforce custom without regard to consequences, is therefore antithetical to economic analysis).

<sup>46</sup> MERRYMAN, *supra* note 5, at 91 (“While common lawyers tend to think of the division of the law as conventional, i.e., as a the product of some mixture of history, convenience, and habit, the influence of scholars and particularly of legal science has led civil lawyers to treat the matter of division of the law in more normative terms [...] definitions and categories are thought to be scientifically derivable from objective legal reality”).

in Brazil opened space for the sort of policy-based reasoning that so distinctively characterizes U.S. law up to present day, and that is so often deemed to be a catalyst for forward-looking approaches within law.

## **B. *The Political Factor: The Ascent of the Judiciary***

The growing demand by lawyers and judges for theories of human behavior is due not only to the widespread pursuit of public policies by the Brazilian progressive state, but also and especially by the ever greater role of courts in the formulation and implementation of such policies. Since 1988 the judiciary shifted from the periphery to the center of political power in Brazil.<sup>47</sup> Following redemocratization, the Brazilian Supreme Court took on the role of arbiter of the country's great institutional and political conflicts, a function previously exercised by the armed forces. Oscar Vilhena Vieira aptly termed the country's current regime as a "supremocracy."<sup>48</sup>

The worldwide trend toward the expansion of judicial power assumed a particularly extreme configuration in Brazil. The avenues for judicial review of legislation – which is arguably the main mechanism for courts' interference in policymaking – are exceptionally broad. Whereas the vast majority of jurisdictions adopt either concentrated or diffuse modes of judicial review (that is, when they do not fail to recognize *ex post* judicial review altogether),<sup>49</sup> Brazilian law contemplates both forms of constitutional challenges to legislation.<sup>50</sup> This hybrid system, combined with a long, detailed, and ambitious constitution,<sup>51</sup> creates enormous leeway for judicial protagonism.

This new prominence of the judicial branch in public policymaking has not gone unnoticed, and has triggered related innovations in institutional design. Law 9,868 of 1999, which regulates the procedure for concentrated judicial review, innovates by permitting the STF to call "public hearings" (*audiências públicas*) to hear "the testimonies of persons with experience and expertise on the subject." By admitting public hearings before the court – a tool for information-gathering and accountability which is characteristic of typical policymaking arenas, such as the legislature and administrative agencies –, the statute both underscores and reinforces the court's role in shaping public policy.

This function, indeed, is ever more explicit. Breaking with the classical separation of powers<sup>52</sup> and the archetypical conceptions of the role of courts in civil law jurisdictions,<sup>53</sup> the STF is at present constitutionally empowered both to issue

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<sup>47</sup> MATTHEW M. TAYLOR, *JUDGING POLICY: COURTS AND POLICY REFORM IN DEMOCRATIC BRAZIL* (2008); and Marcos Paulo Verissimo, *A Constituição de 1988, Vinte Anos Depois: Suprema Corte e Ativismo Judicial "à Brasileira,"* 4 *REVISTA DIREITO GV* 407 (2008) (the Constitution of 1988 "has transformed [the Brazilian Supreme Court] into one of the country's major political actors").

<sup>48</sup> Oscar Vilhena Vieira, *Supremocracia,* 4 *REVISTA DIREITO GV* 441 (2008).

<sup>49</sup> TOM GINSBURG, *JUDICIAL REVIEW IN NEW DEMOCRACIES* 7-8 (2003).

<sup>50</sup> For an overview in English language, see Maria Angela Jardim de Santa Cruz Oliveira, *Reforming the Brazilian Supreme Court: A Comparative Approach,* 5 *WASH. U. GLOBAL STUD. L. REV.* 99 (2006); and Stephen Zamora, *Judicial Review In Latin America,* 7 *SW. J. L. & TRADE AM.* 227 (2000).

<sup>51</sup> Carlos Portugal Gouvêa, *The Managerial Constitution: The Convergence of Constitutional and Corporate Governance Models* (working paper, 2013), <http://ssrn.com/abstract=2288315>.

<sup>52</sup> Bruce Ackerman, *The New Separation of Powers,* 113 *HARV. L. REV.* 633 (2000).

<sup>53</sup> Rodriguez, *supra* note 18, at 52 ("The [civilian] judge subsumes [facts to legal provisions] because the political discussion is supposed to have been resolved in the Parliament: society has already

“binding statements” (*súmulas vinculantes*) that must be followed by lower courts and other branches of government and to pick its cases based on what it deems to be their “general repercussion.”<sup>54</sup> Law 11,418 of 2006 defines “general repercussion” as the “relevant questions from an *economic*, political, social and legal standpoint that transcend the subjective interests of the case.”<sup>55</sup> It should come as no surprise that, having been asked explicitly by the legislature to factor economic considerations into their decisions, the STF has obliged.

Indeed, the STF has expressly asserted that correcting a “forecast error by the legislator” is a legitimate ground for judicial review.<sup>56</sup> But then again, the business of forecasts falls outside the scope of the law’s essentially normative enterprise. In order to fulfill such a task, judges face a choice between resorting to common sense or personal experience on how the world works<sup>57</sup> or employing more systematic knowledge generated by the social sciences, such as economics.

### C. *The Legal Factor: The Changing Structure of Law*

Finally, the greater judicial role in policymaking does not operate in a legal vacuum. On the contrary, under a system that purports to uphold the rule of law, the growth in the power of the judiciary was accompanied by changes in the structure of legal rules.<sup>58</sup> These changes, in turn, create increasing demand for economic reasoning in two ways: by directly incorporating economic consequences into the content of legal rules and by rendering the application of a given legal regime conditional on the desirability of its consequences.

In its canonical form, a legal rule contains both a description of a (past) fact and its legal consequences. Article 121 of Brazil’s Criminal Code offers a representative example: “To kill someone. Penalty: imprisonment from six to twenty years.”<sup>59</sup> Economic reasoning might be useful in determining whether such a rule is desirable *before* its enactment by the legislature, but it plays essentially no role in its concrete adjudication. The main tasks before the decisionmaker are interpretative and evidentiary in nature: circumscribing the meaning of the rule’s wording (i.e.: What is the meaning of *killing*? What is the meaning of *someone*?) and determining whether the *fact* described in abstract form therein has in fact materialized (by resorting to standard evidentiary procedures). Although legal rules adhering to such a structure continue to exist – and, indeed, should continue to exist –, a growing number of legal

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decided on its differences and adopted a rule of conduct - the general and abstract law - that will serve as a reference for settling potential conflicts on that particular subject.”)

<sup>54</sup> Art. 543-A, §3º and §7º of the Brazilian Civil Procedure Code.

<sup>55</sup> Art. 2, which introduced art. 543-A to the Civil Procedure Code (emphasis added).

<sup>56</sup> S.T.F., ADI No. 1.194-4, Relatora: Ministra Cármen Lúcia, 20.05.2009, S.T.F.J. (Braz.).

<sup>57</sup> *Id.* (as when Justice Mendes concluded at the requirement of attorney review of a legal person’s constitutional documents did not decrease the number of errors, which, in his view, made such a mandate unconstitutional).

<sup>58</sup> For an early recognition of these changes see WEBER, *supra* note 22, at 882-889 (analyzing the anti-formalistic tendencies of modern legal development). See also MERRYMAN, *supra* note 5, at 94-98 (laying out several reasons for the “crisis” in the crucial distinction within the civil law between public and private law).

<sup>59</sup> Although the statutory range from six to twenty years appears to give courts excessive discretion, the Criminal Code specifies several aggravating and attenuating circumstances that serve as sentencing guidelines.

commands follow a different model which is far more conducive to economic thinking.

First, there is a greater incidence of legal rules that prescribe sanctions that, instead of invariably applying to past facts, will apply or not depending on the expected *consequences* of the facts. This latter technique has, in fact, become the hallmark of modern antitrust law, which originated in the United States and then quickly spread to other jurisdictions, including Brazil. In lieu of so-called *per se* rules (which followed the classic legal rule structure of assigning sanctions to certain predetermined factual descriptions), virtually all conducts that receive competition law scrutiny are now subject to what is known in the United States as “the rule of reason” standard and in Europe by the more eloquent label of “effects-based analysis.”<sup>60</sup>

The recent change in the legal treatment of the commercial practice of minimum “resale price maintenance” in distribution agreements in the United States illustrates this point. While the practice agreement used to be illegal in all circumstances, it is now subject to the rule of reason, which means that the restriction will be permitted or not depending on a case-specific analysis of whether its likely effects are pro- or anticompetitive.<sup>61</sup> Economic analysis therefore becomes essential for the application of such rules, since traditional legal methods of interpretation are of little help in ascertaining the actual market effects of any given conduct.

Second, the contours and methods for the application of legal principles also depart from those of a canonical legal rule. It is well known fact that legal principles, as opposed to legal rules, have become increasingly influential in the adjudication of legal disputes, in Brazil as elsewhere.<sup>62</sup> But legal rules and legal principles have a markedly different structure. While legal rules are norms that “immediately describe behavior,” legal principles are norms that “instead of describing behavior, establish an ‘ideal state of affairs’ (that is, an objective) whose realization implies the adoption of certain behaviors.”<sup>63</sup> Under Robert Alexy’s influential definition, legal principles are “optimization mandates,” that is, norms that direct the realization of a value or objective to the greatest extent possible given the existing legal and factual constraints.<sup>64</sup>

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<sup>60</sup> Damien Geradin & Caio Mario da Silva Pereira Neto, *For a Rigorous “Effects-based” Analysis of Vertical Restraints Adopted by Dominant Firms: A Comparison of EU and Brazilian Competition Law*, 9 COMPETITION POL’Y INT’L 1-16 (2013).

<sup>61</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007) (overruling the longstanding precedent *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), according to which minimum vertical price restraints were unlawful *per se*).

<sup>62</sup> Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72, 112 (2008); David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 687 (2005); and HUMBERTO ÁVILA, *TEORIA DOS PRINCÍPIOS* 15-16 (2005). See also Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMP. L. 463 (relating the increased use of proportionality tests worldwide as a shift from a culture of authority to a culture of justification).

<sup>63</sup> PONTES DE MIRANDA, *I TRATADO DE DIREITO PRIVADO* 80 (RT, 2012) (note included by revisors Judith Martins Costa et al.).

<sup>64</sup> ROBERT ALEXY, *A THEORY OF CONSTITUTIONAL RIGHTS* 44-61 (Julian Rivers trans., Oxford University Press 2002) (1986).

Following the German tradition, the most popular test for deciding conflicts between legal principles in Brazil is that of “proportionality.”<sup>65</sup> The application of proportionality test, in turn, incorporates to legal decisionmaking elements traditionally viewed as “nonlegal,” since they pertain to the possible factual consequences of different regimes. In its conventional formulation, proportionality requires the decisionmaker to scrutinize different dimensions of the regime in question: (i) its *suitability* (does the means promote the end?), (ii) *necessity* (among all available means equally apt to promote the end, are there other means that are less restrictive?), and (iii) *proportionality in the narrow sense* (do the advantages in promoting the end outweigh the disadvantages brought about by the adoption of the means in question?).<sup>66</sup> In a significant number of cases, answering the questions posed by the proportionality test requires a style of reasoning that is fundamentally different from the deductive endeavor that historically distinguishes the civilian method of “syllogism” or “subsumption.” It often becomes necessary to employ a theory of human behavior to predict if a certain measure is adequate or necessary to promote the ends.

In sum, the application of a canonical legal rule requires the determination of whether a fact has occurred, leaving generally little room for economic analysis in its enforcement. Effects-based rules, by contrast, condition the application of legal sanctions on a finding about the likely factual consequences of a given fact or conduct – an inference for which economic reasoning is very helpful, if not utterly indispensable. The application of legal principles, in turn, depends on the evaluation of the likely factual consequences, not of a fact, but of the application of the norm itself.

As a result, the distinctive trait of the legal system vis-à-vis other systems – the focus on discerning between what is lawful and what is unlawful<sup>67</sup> – can no longer be readily addressed by appealing to purely abstract and conceptual interpretation of legal norms. Probabilistic judgments about the likely effects of different legal regimes are increasingly indispensable. These, in turn, are empirical questions for which the traditional analytical methods provide no ready answer – but with respect to which the social sciences can be of considerable assistance. In other words, the presumed consequences of one or another legal regime will ultimately determine the weight afforded to different principles in a given case. In this context, it is particularly useful to resort to lessons from the social sciences – including, but not limited to, economics – in order to evaluate the probable effects of different legal regimes with a minimum degree of rationality.

#### **IV. The Use of Economics by Brazilian Courts**

Having laid out factors that have increased demand for economic reasoning in legal adjudication, we now turn to an overview of the most common forms by which

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<sup>65</sup> Bernhard Schlink, *Proportionality in Constitutional Law: Why Everywhere But Here?*, 22 DUKE J. COMP. & INT. L. 291, 296 (2012) (“In comparative constitutional law, the principle of proportionality is often traced back to German roots (...). But there is nothing inherently German about the roots of the principle of constitutionality (...). It is a response to a universal legal problem”).

<sup>66</sup> For a description of the proportionality test, see Mathews & Sweet, *supra* note 62, at 75.

<sup>67</sup> Niklas Luhmann, *Law as a Social System*, 83 NW. U. L. REV. 136, 139 (1989) (“Only the law can say what is lawful and what is unlawful, and in deciding this question it must always refer to the results of its own operations and to the consequences for the system’s future operations”).

economic reasoning has made an appearance in Brazilian judicial decisions. Our aim is not to scrutinize whether any specific argument was sound from an economic or legal standpoint: economics, like law, only seldom provides definitive or uncontroversial answers to any given problem. Neither do we make an attempt to systematically quantify the incidence of economic arguments in Brazilian judicial decisions, though the fact that the opinions described below come from important cases decided by Brazil's most prominent courts suggest that they are not mere rarities or aberrations.<sup>68</sup> Evidently, most court opinions, in Brazil as elsewhere, do not resort to economic arguments, and for good reasons.

Moreover, in referring to specific cases where judges employ economic reason we do not wish to deny that there are judges who are completely oblivious to economic thinking. Yet the decisions documented below, which implicitly or explicitly rely on economic lessons to solve legal problems, are surprising, not only in light of conventional wisdom, but also of the hurdles that had to be overcome for these arguments to surface: namely, the lack of in-depth economic training by the vast majority of Brazilian judges,<sup>69</sup> the dearth of instruction in law and economics in law schools, the relative scarcity of law and economics scholarship in Portuguese language, and the rarity of studies applying economic insights to problems specific to Brazilian law. The cases described below however reveal that economic reasoning is no stranger to at least a part of Brazil's judiciary and that Brazilian judges are not nearly as hostile to economic reasoning as the prototype of a common law judge would suggest.

#### **A. *The Application of Constitutional Principles***

A particularly fertile, if surprising, area for the use of economic reasoning in Brazil has been the application of constitutional principles by the Supreme Court. The STF's 2003 decision in Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade* – ADI) 1,946 is illustrative in this regard. First, the decision concerned the rare delicate case of a constitutional challenge raised against a constitutional amendment. Second, the Court's bold decision to restrict the scope of a literal interpretation of the amendment was critically motivated by the use of economic reasoning.

The case dealt with the funding of the social right to maternity leave provided by the Brazilian constitution. Prior to the amendment, employers were constitutionally and legally required to grant eligible women 120 days of maternity leave, but were at the same time entitled to obtain reimbursement of the salaries paid during the leave period from Brazil's social security system. In 1998, the newly-enacted Constitutional Amendment No. 20 – widely known as the “social security

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<sup>68</sup> On this topic see Horacio Spector, *Fairness and Welfare from a Comparative Law Perspective*, 79 CHI.-KENT L. REV. 521, 537 (2004) (arguing that economic considerations are not completely absent from legal science as practiced in the civilian world but are limited to hard cases).

<sup>69</sup> This is so even though an introductory course in economics is a mandatory part of Brazilian law schools' curriculum, as required by art. 5, I, of Resolution No. 9/04 issued by the National Council of Education. In fact, a course on political economy has been part of law schools' curriculum since the mid-nineteenth century in Brazil (as explained in Opinion CNE/CES No. 211/04). Anecdotal evidence however suggests that there has always been great variance in the quality and coverage of such courses, ranging from fairly structured introductory discussions of political economy to shallow, quasi-philosophical discussions of the relationship between law and ideology.

reform” (*reforma da previdência*) – capped all social security payments to the amount of R\$1,200 (approximately US\$1,000 at the time). If the new limit were to apply to maternity leave, any difference between the new ceiling and a woman’s actual salary would need to be funded by the employer. The Brazilian Socialist Party (*Partido Socialista Brasileiro* – PSB) filed suit, arguing that the application of the cap to maternity leave payments violated the Constitution, in view of its explicit provision requiring the “protection of women’s labor market” (Art. VII, XX).

The Court’s unanimous opinion written by Justice Sydney Sanches posited that shifting the financial burden of maternity leave onto employers would “facilitate and stimulate their option for male, instead of female, workers,” so the ceiling would precisely “foster the discrimination that the Constitution sought to undercut.”<sup>70</sup> The outcome of the case was clearly driven by the Court’s *forecast* of the effects that a literal interpretation of the constitutional amendment would have on the rate and form of women participation in the workforce. Justice Sanches further emphasized the “perceived lack of adequacy between the legal means (a limitation on payments by the social security system and the transfer of the burden to the employer) and the normative end established under the Constitution to combat the discrimination of women in the labor market.”<sup>71</sup> Although the decision makes no formal reference to economics, its reasoning is evidently based on a key tenet of price theory, driven by the law of supply and demand: namely, that an increase in the price of a production input will trigger a reduction in its demand.

Notice that at no point did the Court ponder about the economic *efficiency* of encouraging women’s participation in the workforce – a theme on which economists’ views can and do differ.<sup>72</sup> The promotion of women’s workforce participation is a given, that is, a prior political choice inscribed in the Constitution itself. The role of economics was to aid the attainment of a legal objective by providing a theory about the concrete effects of different legal regimes.

Another paradigmatic case involving social rights dealt with the scope of the Brazilian statute providing a homestead exemption to the so-called “family home” (*bem de família*), according to which the personal residence of a debtor cannot be foreclosed.<sup>73</sup> The same statute specifies a number of exceptions to this exemption, including one that authorizes foreclosure of the home of a lease guarantor.<sup>74</sup> The constitutionality of the guarantor exception was challenged before the STF based on the argument that it violated the constitutional right to housing (*direito à moradia*) inserted by Constitutional Amendment No. 26 of 2000.

In affirming the constitutionality of the exception, the majority opinion written by Justice Cezar Peluso argued that the right to housing was not synonymous with home ownership. Instead, the fact that “there are few property owners in Brazil” justified, in his view, the “stimulus to lease arrangements,” which was presumably

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<sup>70</sup> S.T.F., ADI No. 1.946, Relator: Ministro Sydney Sanches, 03.04.2003, S.T.F.J. (Braz.).

<sup>71</sup> *Id.*

<sup>72</sup> Contrast GARY BECKER, A TREATISE ON THE FAMILY (1991) (positing that married women’s specialization in domestic work can be efficient) with Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L. J. 595 (1993) (advancing an efficiency argument in favor of women’s labor force participation).

<sup>73</sup> Law No. 8,009 of 1990.

<sup>74</sup> *Id.*, Art. 3.

achieved by the challenged exception.<sup>75</sup> Justice Peluso’s opinion concluded that eliminating the exception “would disrupt market equilibrium, systematically requiring costlier kinds of guarantees for residential leases, thereby harming the constitutional right to housing.”<sup>76</sup> The opinion not only alludes to facts that are apparently outside the scope of the legal rule in question (such as the proportion of Brazilians that do not own real property), but also implicitly employs a standard model of supply and demand to infer causality between the interpretation of the law by the Supreme Court and the available supply of residential homes and their respective prices.

The use of economic reasoning in the decisions above – with a particular focus on the incentives structure generated by different rules – was by no means exceptional in STF jurisprudence. In its 2013 decision in *Reclamação* 4,374, the STF reversed its prior ruling to deem unconstitutional the statutory provision that excluded welfare payments to the elderly whose family earned more than one-fourth of a minimum salary per month. The majority opinion by Justice Mendes acknowledged that “it was not up to the Federal Supreme Court to assess the political and economic convenience of the sums that can or should serve as the basis for measuring poverty.”<sup>77</sup> Nevertheless, in deeming the existing threshold unconstitutional, the decision not only referred to the changes in legal and economic conditions since the Court’s original ruling, but also to the fact that the current system “ends up discouraging contributions to the social security system, further increasing informality.”<sup>78</sup>

An even more explicit use of incentives rhetoric took place in the decision of ADI 4,425, in which the STF found unconstitutional a number of provisions of Constitutional Amendment No. 62 of 2009, which addressed the system of enforcement of monetary judgments against the State (*precatório*). Among the amendment’s innovations was the ability of the government to institute a reverse auction, which would permit private parties to escape the lengthy line to receive payment by agreeing to receive a haircut. The majority opinion written by Justice Luiz Fux maintained that “the existence of a reverse auction system would represent an *incentive* for the State not to perform its obligations, aggravating the illiquidity of the judgments and increasing the discount (...). In other words: the *system of incentives* generated by the auction model promoted opposite results to those desired by the Constitution.”<sup>79</sup> Similar decisions employing the language of incentives to reach constitutional law conclusions abound, being far too numerous to be described in full.

In other cases, the STF went so far as to draw specific inferences about the implications of certain legal institutions for Brazil’s economic development more generally. In the AgReg 5,206-7, decided in 2001, the question was whether Brazil’s Arbitration Law of 1996 – which sought to regulate and enforce the contractual parties’ agreement to submit their disputes to arbitration – was valid in view of the constitutional rule that “the law shall not exclude from judicial appraisal any violation or threat to a right” (Art. 5, XXXV). Concluding that the Arbitration Law passed constitutional muster, Justice Ilmar Galvão explicitly reasoned that the observed

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<sup>75</sup> S.T.F., RE No. 407.688-8, Relator: Ministro Cezar Peluso, 08.02.2006, S.T.F.J. (Braz.).

<sup>76</sup> *Id.*

<sup>77</sup> S.T.F., Rcl. No. 4.374, Relator: Ministro Gilmar Mendes, 18.04.2013, S.T.F.J. (Braz.).

<sup>78</sup> *Id.*

<sup>79</sup> S.T.F., ADI No. 4.425, Relator: Ministro Luiz Fux, 16.03.2013, S.T.F.J. (Braz.).



“avalanche of lawsuits” in the judiciary, combined with a “slowness that surpassed maximum tolerable limits,” constituted a “serious disincentive to business, precisely in a moment in which one expects a sharp increment in business activities among us, especially due to the celebrated flows of foreign capital in view of exploring new enterprises of an economic nature.” In this context, he argued, “the Brazilian legislator came up with the alternative of an *Arbitral Tribunal* as a solution for this serious problem, aiming to ensure the country’s economic development.”<sup>80</sup>

In the same vein is the opinion of Justice Joaquim Barbosa in ADI 1,194, which challenged, *inter alia*, the provision of the Statute of the Brazilian Bar Association (*Estatuto da OAB*) attributing to the lawyer of the winning party of a lawsuit the judicial award of attorney’s fees. The Justice concluded that the destination of the award of attorney’s fees shall be a matter of freedom of contract, a solution which “not only unlocks the access channels to the Judiciary, but also permits the essential imperatives of economic rationality, which are fundamental for the country’s growth, to apply, without discrimination, to lawyers, in the same way that they apply to other categories of professionals.”<sup>81</sup> Similarly, in the Extraordinary Appeal 422,941, the reporting Justice Carlos Velloso claimed that the government’s imposition of price ceilings below the cost of production “constituted a serious obstacle to the exercise of economic activity, in violation of the principle of free enterprise.”<sup>82</sup> He added that the “establishment of well-defined rules of state intervention in the economy, and their compliance, are fundamental for the maturation of Brazilian institutions and market, ensuring the necessary economic stability that conduces to national development.”<sup>83</sup>

Moreover, there are decisions in which different Justices employ economic reasoning to reach disparate conclusions. In ADI 4,167, one of the questions before the Court was the scope of the expression salary “floor” for elementary school teachers, as specified by a new federal statute applicable to all Brazilian states. Justice Joaquim Barbosa argued that the term floor “can be interpreted in accordance with the intention of strengthening and improving public education services.”<sup>84</sup> He then argued that “adequate compensation of teachers and other education professionals is one of the useful mechanisms for the attainment of such objective.”<sup>85</sup> In his view, “if the floor comprises the teacher’s global remuneration, the additional payments (*gratificação*) may equal or exceed the minimum, so as to annul or mitigate the incentives for the diligent professional,”<sup>86</sup> hence resulting in the “perceptible deterrence to the incentive and responsibility policies that are necessary for the provision of quality educational services by the State based in a most relevant criterion: merit.”<sup>87</sup>

Conversely, Justice Gilmar Mendes contended that the interpretation of floor as synonymous with basic salary, as advocated by Justice Barbosa, could lead to the

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<sup>80</sup> S.T.F., AgRg No. 5.206-7 Relator: Ministro Sepúlveda Pertence, 12.12.2001, S.T.F.J. (Braz.).

<sup>81</sup> S.T.F., ADI No. 1.194-4, Relatora: Ministra Cármen Lúcia, 20.05.2009, S.T.F.J. (Braz.).

<sup>82</sup> S.T.F., RE No. 422.941, Relator: Carlos Velloso, 06.12.2005, S.T.F.J. (Braz.).

<sup>83</sup> *Id.*

<sup>84</sup> S.T.F., ADI No. 4.167, Relator: Ministro Joaquim Barbosa, 27.04.2011, S.T.F.J. (Braz.).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

“impossibility of expansion of education services,”<sup>88</sup> due to a substantial increase in teacher compensation. Moreover, he reasoned, such an interpretation would create an incentive for the states to restructure existing compensation packages so as to eliminate any bonus payments in addition to the basic salary – a conclusion which, in his words, derived from “pure game theory.”<sup>89</sup>

## **B. *Teleological or Purposive Interpretation of Statutes***

The STF is however not alone in resorting to economic lessons in its opinions. Economic reasoning is also prevalent in the decisions of the STJ. The use of economic insight is particularly noticeable when the Court employs a teleological or purposive method of statutory interpretation, a method with a long history in the Western tradition.<sup>90</sup>

For instance, in the early 2000s, the STJ had to determine the scope of Art. 6 of the statute regulating the concession of public services.<sup>91</sup> The rule in question expressly allowed concessionaires to suspend the provision of public services to clients in default. The question before the court was whether the rule applied to the provision of “essential services,” such as water, gas or energy, given that Art. 22 of the Brazilian Consumer Protection Code<sup>92</sup> requires utilities to provide essential services in a “continuous” fashion. The majority opinion by Justice Gomes de Barros repudiated the interpretation that prevented concessionaires from suspending the provision of services, a regime which, in his view, would generate a “domino effect.”<sup>93</sup> Indeed, he maintained, “in finding out that a neighbor is receiving energy for free, the citizen will tend to bestow on himself such tempting benefit.”<sup>94</sup> The result would be that “soon enough, nobody will honor the electricity bill.”<sup>95</sup>

The STJ has also recently resorted to economic reasoning in interpreting Brazil’s consumer protection law, so as not to hurt the people the law is trying to help.<sup>96</sup> In the Special Appeal 1,232,795, the issue before the Court was whether the company operating a private parking law was liable for the armed robbery of a client inside its facilities. The unanimous opinion written by Justice Nancy Andrichi stated that no such liability existed, among other reasons, because assigning this burden to private parking lots would also be detrimental to consumers, for they would require investments that “would certainly reflect upon the price of the [parking] service, which is already high.”<sup>97</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> José Reinaldo Lima Lopes, *Raciocínio Jurídico e Economia*, 8 REVISTA DE DIREITO PÚBLICO DA ECONOMIA – RDPE 137,146-147 (2011).

<sup>91</sup> Law No. 8,987 of 1995.

<sup>92</sup> Law No. 8,078 of 1990.

<sup>93</sup> S.T.J., Resp No. 363.943, Órgão Julgador: 1ª Seção, Relator: Humberto Gomes de Barros, 10.12.2003, S.T.J.J. (Braz.).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> This is in fact a familiar argument within the law-and-economics literature. *See, e.g.*, Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 STAN. L. REV. 361 (1990-1991) (for a sophisticated discussion of this point).

<sup>97</sup> S.T.J., Resp No. 1.232.795, Órgão Julgador: 3ª Turma, Relatora: Nancy Andrichi, 02.03.2013, S.T.J.J. (Braz.).

### C. *Citations to Academic Works*

While most uses of economic reasoning by Brazilian are implicit in nature, this is not always the case. Indeed, there are numerous court decisions – from all levels of the judiciary – that explicitly cite works by economists or law and economics scholars. For instance, in ruling at ADI 2,340 that a state law could not obligate municipalities to provide water with water trunks whenever the regular provision of water was suspended, STF Justice Gilmar Mendes reasoned that “the service of basic sanitation is a natural monopoly [...] rendering interstate competition not only impracticable, but also suggesting that the consolidation of demand from neighbor cities can reduce costs and render the service more attractive to private concessionaires.”<sup>98</sup> The same opinion expressly relies on the concept of natural monopoly as described in the books *Law & Economics*, by Robert Cooter and Thomas Ulen, and *Economic Analysis of Law*, by Richard Posner. On another occasion, Justice Mendes also cited Cooter and Ulen’s celebrated handbook in discussing the possible effects of disparate tax regimes “on the offer of products on the spare parts market, with a relevant impact on market equilibrium, internal consumption and inflation.”<sup>99</sup>

In citing economics bibliography, Justice Gilmar Mendes – who, before joining the Court, was a distinguished constitutional law scholar who obtained his PhD in Germany – is not an outlier. Economic lessons also made their way into the STF decision in ADI 3,510, the high-profile constitutional challenge against Brazil’s Biosecurity Law, which regulates stem cell research. In his dissenting opinion on the unconstitutionality of stem cell research, Justice Cezar Peluso underscored what he viewed as flaws in the enforcement devices outlined by the statute. He argued that the mechanism for the appointment of members of a certain Committee of Ethics and Research was deficient because its composition was to be determined by the respective research institution. In his view, “this rule entails, at least, a serious risk of what economic theory calls an agency problem, that is, a critical conflict of interest that harms the independency of the entity immediately responsible for ensuring the zealous adherence of the grave constitutional and legal restrictions of the authorized research.” He then goes on to quote a definition of the principle-agent problem from Joseph Stiglitz’s book on the *Economics of the Public Sector*.<sup>100</sup>

State courts have also directly cited law and economics scholarship. In a recent decision by the Court of Appeals of the State of São Paulo, the issue was whether a shop had recourse against a credit card company for a purchase later cancelled due to fraud. Specifically, an appliances store had sold an air conditioner to a client who paid with a cloned credit card. The true holder of the credit card requested the cancellation of the purchase, which the credit card company did and then denied payment to the appliances shop. The shop then sued the credit card

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<sup>98</sup> S.T.F., ADI No. 2.340, Relator: Ministro Ricardo Lewandowski, Voto: Gilmar Mendes, 06.03.2013, S.T.F.J. (Braz.).

<sup>99</sup> S.T.F., RE 405.579, Relator: Ministro Joaquim Barbosa, 01.12.2010, S.T.F.J. (Braz.).

<sup>100</sup> S.T.F., ADI No. 3.510, Relator: Ministro Cezar Peluso, Voto: Cezar Peluso, 29.05.2008, S.T.F.J. (Braz.) (also arguing that the “big risk is that the Committees of Ethics and Research would be subordinated and would become agents of the institutions, instead of keeping the necessary self-reliance and independence. The alignment of interests, in this case, is ostensibly deleterious for the whole system”).

company for the amounts due, arguing that the contract clause excluding liability of the credit card company in such instances was “abusive” and, therefore, void.

In upholding the exclusion of liability, and effectively assigning the loss to the shop, Judge Andrade Marques used law and economics scholarship to shed light on the rationale behind the contract clause. He argued that, at least with respect to face-to-face sales, “in comparison with the credit card company, the merchant has greater capacity to control and prevent the risk of trickery by customers. In other words, the seller is the superior risk bearer in this contractual relationship.”<sup>101</sup> After a short digression about the concept of good faith in the Brazilian Civil Code, the opinion directly quoted a passage from George Triantis’s entry on “Risk Allocation in Contracts” from the *Encyclopedia of Law & Economics*, which describes in detail the concept of a *superior risk bearer*. The opinion then went on to conclude that “the assignment of risks to the superior risk bearer is more efficient from an economic standpoint because this is the party that can avoid and mitigate the risk at a lower cost.”<sup>102</sup>

In another decision concerning a damages claim against a company that had outsourced its transportation services, Judge Marcelo Banacchio of the Court of Appeals of the State of São Paulo cites the famous opus by Cooter and Ulen to ground his observation that in its business activities a company “constantly balances costs against means to seek profits, of which outsourcing some of its crucial activities are an example, and in so doing it considers marginal costs, among which lies the payment of damages, it being understood that the optimal activity level will take place whenever precautionary costs are lower than the [expected] payment of caused damages.”<sup>103</sup> He then concludes that the company “cannot act in the market as if third parties did not exist, so it must consider the possibility of damages and their internalization within the productive process, meaning that if the outsourced activity such as the one at hand generates more losses than profits it will certainly [...] be discarded [by the company]”.<sup>104</sup> Likewise, in a dissenting opinion that deemed valid the administrative proceeding that summoned only the legal representative of a company (and not all of its partners, as defended by the plaintiffs), Judge Beretta da Silveira from the Court of Appeals of the State of São Paulo, stated that “it is worth recalling the doctrine of prominent Law & Economics scholar Richard Posner, according to which one should consider balance of costs/benefits involved in judicial decisions.”<sup>105</sup>

Brazilian judges have also expressly referred to prominent figures of the law and economics literature. In ruling on the value of damages to be paid by a news company, Justice Nancy Andrighi, of the Superior Court of Justice, cited Richard Posner and Robert Bork in support of the proposition that “in deciding on whether to publish a defamation, [a news company] takes into account, on one hand, the damages established in court and, on the other hand, the expected income that such publication

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<sup>101</sup> T.J.S.P., Ap. Civ. No. 0202965-46.2009.8.26.0100, Órgão Julgador: 22ª Câmara de Direito Privado, Relator: Des. Andrade Marques, 31.01.2013 (Braz.).

<sup>102</sup> *Id.*

<sup>103</sup> T.J.S.P., Ap. Civ. No. 954.795-0/3, Órgão Julgador: 28ª Câmara de Direito Privado, Relator: Des. Marcelo Banacchio, 13.02.2007 (Braz.).

<sup>104</sup> *Id.*

<sup>105</sup> T.J.S.P., Ap. Civ. No. 629.521-4/9-00, Órgão Julgador: 3ª Câmara de Direito Privado, Relator: Des. Beretta da Silveira, 28.04.2009 (Braz.).

will bring.”<sup>106</sup> Justice Andriahi then concluded that “in establishing the damages the judge shall take into account the income of the news company with the unlawful act, for otherwise it will stimulate those that seek to maximize their profit to the detriment of society as a whole.”<sup>107</sup> Nothing could be closer to the familiar notion within law and economics literature that a company’s calculation for profit maximization is influenced by the prospects of legal sanctions and rewards,<sup>108</sup> and that a judge should be forward looking while calibrating her decisions.<sup>109</sup>

Richard Posner is cited by several other court decisions. In finding that the exclusivity requirement imposed by a doctors’ cooperative was unlawful under Brazil’s competition law, STJ Justice Humberto Martins examines the concept of entry barriers by quoting a long passage in English from Richard Posner’s classic, *Economic Analysis of Law*.<sup>110</sup> In rejecting the filing of a “rescissory action” (*ação rescisória*),<sup>111</sup> Judge Osvaldo Cruz, of the Court of Appeals of the State of Rio Grande do Norte, refers to the works of Ronald Coase and Richard Posner to argue that “the judge must pay attention to the economic incentives and disincentives produced by court precedents.”<sup>112</sup> All of the preceding cases are merely illustrative, rather than exhaustive. It is possible to find various other court decisions citing law and economics scholars or containing sparse references to “economic analysis of law” or the “law and economics” movement.<sup>113</sup>

## V. Conclusion: The Prospects for Law and Economics in the Civil Law

The preceding analysis of the Brazilian case suggests that the conventional assumption that economic reasoning is absent from legal practice in the civil law world is flawed. Brazilian judges habitually employ concepts borrowed from economics to forecast the likely consequences of events or rules when such a prediction is called for by the relevant legal norms. Since Brazilian judges are not abandoning the time-honored practice of formally grounding their decisions on a preexisting legal provision that controls the relevant set of facts, economics seems to be at the service of law, not the other way around. Consequently, the Brazilian court system cannot be deemed to be undergoing the much-feared process of intellectual “colonization” by economics in any meaningful way.

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<sup>106</sup> S.T.J., Resp No. 355.392, Órgão Julgador: 3ª Turma, Relatora: Nancy Andriahi, 26.03.2002, S.T.J.J. (Braz.).

<sup>107</sup> *Id.* Justice Andriahi also cited a U. S. Supreme Court case in her opinion, namely *New York Times Co., v. Sullivan*, 376 U. S. 254 (1964).

<sup>108</sup> *See, e.g.*, Herbert Hovenkamp, *Rationality in Law & Economics*, 60 GEO. WASH. L. REV. 293 (1992).

<sup>109</sup> *See, e.g.*, RICHARD POSNER, *OVERCOMING LAW* 4 (1995).

<sup>110</sup> S.T.J., Resp No. 1.172.603, Órgão Julgador: 2ª Turma, Relator: Humberto de Martins, 04.03.2010, S.T.J.J. (Braz.).

<sup>111</sup> Under Brazilian law, a “ação rescisória” is a lawsuit that in exceptional circumstances can be filed to challenge an unappealable, final judgment. *See* art. 485 of the Brazilian Civil Procedure Code.

<sup>112</sup> T.J.R.N. Ag.Rg. No. 2010.008686-7/0001.00, Relator: Des. Osvaldo Cruz, 02.03.2011 (Braz.).

<sup>113</sup> T.J.P.R., RI No. 2012.0001633-0/0, Órgão Julgador: Turma Recursal, Relator: Des. Gustavo Tinoco de Almeida, 26.07.2012 (Braz.); T.J.S.P., ED. No. 0112359-50.2008.8.26.0053/50000, Órgão Julgador: 5ª Câmara de Direito Público, Relator: Des. Fermínio Magnani Filho, 17.09.2012 (Braz.); and T.J.S.P., Ap. Civ. No. 450.057-4/1-00, Órgão Julgador: 7ª Câmara de Direito Privado, Relator: Des. Elcio Trujillo, 13.09.2006 (Braz.).

Neither are Brazilian courts undergoing a process of ideological colonization. Whatever the merits of the claim that law and economics has a conservative bias, the Brazilian case highlights the potential of using economics to further progressive legal objectives as well. At least in the Brazilian context, economics works more like a knife (that can cut both ways) than as rhetorical platform that is inexorably linked to a certain political agenda.

Admittedly, we make no attempt to articulate the precise place of economic reasoning in legal discourse – a deep philosophical issue that is outside the scope of this article. Neither do we delve into the intricate relationship between the use of economic reasoning and the resulting quality of legal adjudication. Rather, we conclude by briefly reflecting on the implications of our findings for legal education and scholarship.

If, as suggested above, the use of economic reasoning as part of legal analysis is a function of the broader transformation in the character and operation of the Brazilian legal system, demand for law and economics scholarship in Brazil seems to be there to stay. And, given that the traditional role of legal scholarship in civil law countries is both to explain and to assist in the application of the law,<sup>114</sup> we expect to see a corresponding rise in the pursuit of law and economics studies by the legal academy, both in terms of research and teaching.

Finally, we have no reason to believe that the ideological, political, and legal factors that have increased demand for economic knowledge by courts are unique to Brazil, though we leave this line of inquiry for future work. For now, we can only speculate that it is not only in Brazil that commentators have been looking at the wrong places in their apparently fruitless search for integration of economic analysis into the law. This suggests that the future of law and economics scholarship in civil law jurisdictions more generally rests on the understanding that this type of work is increasingly consistent with the traditional vocation of civilian jurists of producing work that is instrumental in the application of the law.

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<sup>114</sup> James Gordley, *The State's Private Law and Legal Academia*, 56 AM. J. COMP. L. 639 (2008) (describing the “symbiotic relationship between law as promulgated by state authority and law as understood by jurists).