

ECONOMIC ANALYSIS OF CRIMINAL LAW: BETWEEN THE ECONOMICS OF CRIME AND CRIMINAL DOGMATICS

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Abstract: *The paper discusses the teleological-functionalism of Criminal Law and its paradox between freedom and control, promoting an interpretative economic analysis of Criminal Law. To this end, the following question was formulated: what is meant by an Interpretative Economic Analysis of Criminal Law, considering the methodological framework of the objects investigated within Criminal Law and the Economics of Crime? It presents paradigms of efficiency, optimal criminal intervention, and systemic dysfunctions depending on the criminological school chosen by the interpreter. The general objective is to propose an interdisciplinary methodological framework between teleological-functionalism and microeconomics, highlighting the objects of an interpretative economic analysis of Criminal Law. This is a qualitative, documentary research with a hypothetical-deductive approach, utilising Aristotelian syllogism for hypothesis construction and, from a utilitarian perspective, presenting deductions that are falsifiable, particularly in empirical research on the economic efficiency of criminal policy.*

Key words: *Criminal Law; Economics of Crime; Optimum of Criminal Intervention*

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1. INTRODUCTION

The proper functioning of the law requires citizens' adherence to its prescriptions. This acceptance implies, on the one hand, that legal norms stem from society in its cultural formation and, on the other, that any deviant behaviour finds correspondence in legal and moral prohibitions, thereby restoring order and predictability to social relations.

The legal system, and Criminal Law in particular, operates as a cultural technology whose broader function is the pacification of human interactions through the protection of individual rights and liberties, in the face of abuses by private individuals or by the State itself.

This is the conception rooted in the teleological-functionalism of Criminal Law – or the Criminal Law of legally protected interests – which will be the object of investigation throughout this work, especially in its interaction with another science also of utilitarian origin: the Economics of Crime.

This journey between *homo criminalis* and *homo economicus* gives rise to the following question: what is meant by an interpretative Economic Analysis of Criminal Law, considering the methodological approach to the objects under investigation in both Criminal Law and the Economics of Crime?

Once the research question has been defined, the general objective is to propose an interdisciplinary methodological approach between teleological-functionalism and microeconomics, highlighting the objects of an economic analysis of Criminal Law. The specific objectives are to: (i) review the classical Brazilian and foreign literature on the liberal-functional paradox of Criminal Law in protecting fragmented legal interests versus limiting the *jus puniendi*; (ii) systematise the integration process of the joint science of criminal law, encompassing Criminology, Criminal Law, and the Economics of Crime, discussing the investigative objects of this latter field of knowledge; (iii) provide a brief economic analysis of legal-criminal sciences and criminological schools of thought that influence the criminal legal system, clarifying what is meant by an interpretative Economic Analysis of Criminal Law.

In terms of methodology, this is a qualitative, documentary research with a hypothetical-deductive approach, making use of Aristotelian syllogism to construct hypotheses and, from a utilitarian perspective, present deductions that are susceptible to falsification, especially in empirical research on the economic efficiency of criminal policy.

The work is structured into three main sections. The first (Section 2) discusses the liberal-functional Criminal Law, reviewing extensive literature on the freedom-control paradox. Section 3, in turn, establishes fundamental concepts for understanding what is meant by the joint science of criminal law, the economics of crime, and economic analysis. Section 4, the final section, applies the methodological tools of microeconomics to the liberal-functional paradox of Criminal Law in order to define the scope of economic analysis of Criminal Law as a point of interdisciplinarity between Law and Economics.

The conclusion draws a distinction – even if there is some relationship of inclusion – between the Economic Analysis of Criminal Law and the Economics of Crime, noting that the former is a truly interdisciplinary *jus-economic* theory, with no subordination or ancillary relationship between legal and economic knowledge.

2. LIBERAL-FUNCTIONAL CRIMINAL LAW: THE BALANCE BETWEEN CONTROL AND FREEDOM

Criminal Law, an autonomous branch of Public Law, is defined as a set of rules that regulate the prerequisites or consequences of a given conduct followed by a penalty or a security measure.¹

The definition above is fundamental and useful for a preliminary understanding, but it does not encompass the entire body of criminal law norms, nor the theories dedicated to the analytical concept of crime and its constituent elements.²

There is also a historical trajectory that has illuminated various aspects of the legal-criminal sciences, notably the classical causal school,³ the social and

¹ “The role of criminal law as a distinct branch of the legal system stems primarily from the very nature of the penalties it provides for, but also from the characteristics of the types of conduct it addresses.” Günther Stratenwerth, *Derecho penal parte general I* [Criminal Law: General Part] (Civitas 2000) 2.

² “Although there is some uncertainty regarding the exact period when the analytical concept of a crime first emerged, it is certain, however, that its development was only completed with Beling’s decisive contribution (1906), through the introduction of the element of legality. Although the definition of these structural elements was initially confusing and obscure—and has been refined over time—the prevailing analytical concept came to define a crime as a typical, unlawful, and culpable act.” Cezar Roberto Bitencourt, *Tratado de direito penal: parte geral* [Treatise on Criminal Law: General Part] (24th edn, Saraiva 2018) 407.

³ “The Classical School also adopts the causal-naturalistic theory of action, according to which a voluntary bodily act (Beling) or the voluntary bringing about of a change in the external world (Von Liszt) is sufficient.” Celso Delmanto and others, *Código penal comentado* [Annotated Penal Code] (9th edn, Saraiva 2016) 32.

biopsychological determinisms of the positivist school,⁴ finalism, and the functionalist schools – both teleological and dogmatic (or systemic).⁵

Each historical period and each jurisprudential nuance of Criminal Law have produced moments of convergence and divergence with related sciences, whose methodological frameworks have influenced the understanding of criminal norms.⁶

Nevertheless, a liberal representation of Criminal Law has long prevailed within legal circles, guided by the utilitarian principles systematised by Cesare Beccaria in *On Crimes and Punishments*.⁷

Accordingly, some define Criminal Law from the standpoint of a liberal functionalism that defends the individual against the State and other violations of their private domain. In this regard, Claus Roxin⁸ maintains that the incriminating criminal norm finds its justification in the protection of constitutionally recognised legal interests. This is because the only dogmatic constraint imposed on the legislator is the text of the Constitution and its declaration of fundamental rights.

A concept of a legal right that is binding under criminal law can only be derived from the principles enshrined in the Constitution of our rule of law—which is founded on individual liberty—and through which the limits of the State's punitive power are defined.⁹

This assumption derives from the understanding of law as a normative system, structured in hierarchical levels of validity, according to which criminal norms are constitutional insofar as they serve the purpose of realising fundamental rights.

Thus, it can be said that the function of Criminal Law is to guarantee free and peaceful coexistence, that is, “through the idea of the protection of legal interests, these interests will correspond to all the conditions and purposes necessary for the free development of the individual, the fulfilment of their fundamental rights, and the foundation of a state system”, established to fulfil this constitutional purpose.¹⁰

⁴ “The unifying role of the unified science of criminal law was now replaced by the social system itself, as the highest common denominator of criminal policy, criminology, and (also, at least to some extent) criminal legal theory. It is not surprising that, from this perspective, criminal policy and criminology have not only become completely autonomous from criminal law and its doctrine, but have truly turned their backs on it.” Augusto Silva Dias, *Delicta in se e delicta mere prohibita* [Offenses that are prohibited in and of themselves] (Coimbra Editora 2008) 24.

⁵ “Dualist (teleological-functional) normativism, as advocated by Roxin, acknowledges that its objective logic is supplemented by a practical rationale, whereby the values protected by the criminal justice system are constrained by a factual material basis external to the system itself (that is, criminal law, in developing legal-criminal concepts, is subject to certain material constraints outside the criminal justice system); however, monistic normativism (functionalist-systemic), as advocated by Jakobs, is characterized by the radicalization of the functional criterion, such that the parameters necessary for the structural development of the criminal justice system—and, consequently, of legal doctrine—are found within the system itself and are not subject to external limits.” Bitencourt (n 2) 186-187.

⁶ “To speak of criminal law is, in one way or another, to speak of violence. (...) Violence is, of course, a social problem, but it is also a semantic problem, because it can only be assessed, explained, condemned, or defined within a specific social, political, and economic context. There is, therefore, no static or ahistorical concept of violence that can exist outside the social context in which it arises.” Francisco Muñoz Conde and Mercedes García Arán, *Derecho penal: parte general* [Criminal Law: General Part] (6th edn, Tirant lo Blanch 2004), 29-30.

⁷ Cesare Beccaria, *Dei delitti e delle pene* [On Crimes and Punishments] (Renato Fabietti 1973).

⁸ Claus Roxin, *Derecho penal parte general* [Criminal Law: General Part] (Civitas 1997).

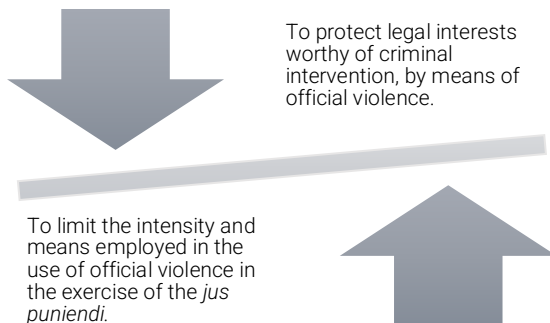
⁹ Roxin (n 8) 55–56.

¹⁰ Claus Roxin, ‘O conceito de bem jurídico como padrão crítico da norma penal posto à prova’ [The concept of the protected legal interest as a critical standard for the penal norm put to the test] (2013) 23 *Revista Portuguesa de Ciência Criminal* 100.

The definition of legal interest aligns with the essential purpose of liberal Criminal Law, as it aims to preserve the autonomy of individuals and their personality rights, particularly their freedoms.¹¹

The Constitution defines the limits and content of penal intervention, thereby producing the following paradox:

Scheme 1 – Functional Paradox of Constitutional Criminal Law¹²



On the one hand, the protection of freedoms is entrusted to the State and its agents, while, on the other hand, such a monopoly of violence is limited by the very system of rights and fundamental guarantees of the individual that previously justified penal intervention. In short, Criminal Law not only limits, but also creates freedom, by simultaneously setting limits on the *jus puniendi* and ensuring peaceful coexistence, a condition for the exercise of personality rights.¹³

Undoubtedly, the metaphor of the scales, often used to represent the legal sciences, reflects this penal dichotomy. However, in reality, balance has not been the norm, as clarified by Jesús-María Silva Sánchez in his work *The Expansion of Criminal Law: Aspects of Criminal Policy in Post-Industrial Societies*.¹⁴

There is, therefore, an apparent tendency towards the expansion of official violence at the expense of its limiting function, the origin of which lies in a "kind of state perversity – demagogic perversity – that increasingly uses merely symbolic constructs in Criminal Law"; in other words, the expansion of penal intervention "functions as a general tendency of criminal policy in various states, inspired by the globalised culture of risk, according to the approaches of Beck and Luhmann."¹⁵

According to Sánchez, the social¹⁶ representation of the fight against crime through the state's *jus puniendi* is consolidated in a consensus around the "virtues" of

¹¹ Fillipe Azevedo Rodrigues and Liliana Bastos Pereira Santo de Azevedo Rodrigues, *Lavagem de dinheiro e crime organizado* [Money laundering and organized crime] (Del Rey 2016) 9.

¹² Source: authors' own elaboration.

¹³ Hans-Heinrich Jescheck and Thomas Weigend, *Tratado de derecho penal: Parte general* [Treatise on Criminal Law: General Part] (5th edn, Comares 2002).

¹⁴ Jesús-María Silva Sánchez, *La expansión del derecho penal* [The Expansion of Criminal Law] (2nd edn, Revista dos Tribunais 2011).

¹⁵ Fillipe Azevedo Rodrigues and Luciana Yeung, 'Análise econômica do direito ou do judiciário brasileiro?' [An economic analysis of Brazilian law or the Brazilian judiciary?] in Ana Marília Dutra Ferreira da Silva (ed), *II Seminário de Direito e Economia do Nordeste* [Northeastern Law and Economics Seminar] (OAB-RN 2021) 159.

¹⁶ Fillipe Azevedo Rodrigues, *O juiz professor* [The judge, who is a professor] (Dialética 2022).

Criminal Law as an instrument for the protection of citizens",¹⁷ indiscriminately among various social, political, and ideological groups. The limiting function of penal bureaucracy loses ground in the vicious cycle between the perpetual rise in criminality and the renewed trust in such conventional instances of social control.

The more inefficient official violence becomes, the more criminality increases, justifying a further expansion of the State over individual freedoms, which originally justified the state monopoly on violence, but are now giving way to a penal bureaucracy that ends up finding an end in itself.

In a study dedicated to the anti-money laundering legislation in Brazil and Portugal, the theory of Criminal Law of legal interests was used to identify the dogmatic foundation of criminalising norms related to the concealment of assets derived from other crimes. The literature reviewed pointed to various theoretical schools regarding the legal interest protected by the criminalisation of money laundering, with a conciliatory discourse prevailing between the protection of the economic order and the administration of justice.¹⁸

Regarding the protection of the economic order through the criminalisation of money laundering, the study concluded negatively, arguing that there is no intention to preserve economic stability or free competition, but rather the manifest purpose of combating macro-criminality or organised crime. In other words, there is a creation of criminal offences as an accessory way to remedy the inefficiency of previous criminalising norms, aiming to deter criminal behaviour.

This is a good example of the self-assertion of penal bureaucracy, finding an end in itself. However, the rhetoric persists that the legal interest being protected is the *administration of justice*, which is nothing more than the complete subversion¹⁹ of Roxin's theory of legal interests, as the State abandons its commitment to safeguarding individual rights and begins to consider its own bureaucracy as an autonomous value, increasingly disconnected from the realisation of freedoms.

A good example is the expansionist dynamics regarding anti-democratic acts, misinformation, fake news, and other allegorical categories of what causes discomfort to the centres of power. The right to expression is a prerequisite of individual freedom precisely because it stands against the State as a right of defence, thus highlighting the abuse of penal bureaucracy by responding to speech with silencing and imprisonment. It is important to note that such "intervention in free expression has the opposite effect: it will invariably be arbitrary, politicised, will apply double standards, and will thus undermine the legitimacy of Democracy".²⁰

In this sense, Günther Jakobs was accurate in identifying the phenomenon of the overextension of punitive intervention to serve solely the health of the State itself:

New legal interests present quantitative characteristics that blur the concept of a legal interest: their boundary with what is socially acceptable is, when clear, objectively arbitrary (prohibited drugs versus permitted drugs), and in other cases, such a vague product of governmental and administrative discretion that the protection of the legal interest risks being overshadowed by the protection of the enforceability of decisions (environment).²¹

¹⁷ Silva Sánchez (n 14) 32.

¹⁸ Azevedo Rodrigues and Azevedo Rodrigues (n 11).

¹⁹ Winfried Hassemer, 'Características e Crises do Moderno Direito Penal' [Characteristics and Crises of Modern Criminal Law] (2003) 18 *Revista Síntese de Direito Penal e Processual Penal* 144, 150.

²⁰ Gustavo Maultasch, *Contra toda censura* [Against All Censorship] (Avis Rara 2022) 133.

²¹ Günther Jakobs, *Derecho penal parte general: fundamentos y teoría de la imputación* [Criminal Law – General Part: Foundations and Theory of Criminal Liability] (Marcial Pons 1995) 49.

Winfried Hassemer,²² in turn, contrasts classical Criminal Law with what he refers to as modern Criminal Law. The latter “is far less oriented towards reacting to the most serious infringements of citizens’ interest in liberty, and increasingly tends to become an instrument of internal political control.”

Nevertheless, contrary to Jakobs scepticism regarding the preservation of a Criminal Law based on legal interests, Hassemer,²³ while acknowledging such Criminal Law as “classical,” affirms that “classical’ is also an ideal, a representation of purpose by which it is possible to determine where a journey ought to lead, which steps move in the right direction, which in the wrong, and how many steps still need to be taken.”

In other words, there is no reason to abandon efforts to rebalance the preservation of liberties with an efficient penal state aimed at safeguarding constitutional legal interests, even in the face of inefficient punitive setbacks.

Based on the systematisation of Delmanto et al., the understanding of the punitive system continues to mature in light of the advances and setbacks since Cesare Beccaria’s seminal work. One example is the divergence between the contemporary Positive School and the German Sociological School in the late 19th century. While the determinists upheld the notion of the born criminal,²⁴ Franz von Liszt rejected this idea and, according to Delmanto,²⁵ defended the autonomy of the Law grounded in liberal values: “general security must not encroach upon the constitutional essence of individual security: liberty.”

The law defines the limits of each person’s sphere of influence; it determines the extent to which the will may be freely expressed and, above all, the extent to which, by demanding action or inaction from others, it may encroach upon the sphere of activity of other people; it guarantees freedom—the authorised power to will—and prohibits arbitrariness; It transforms the relationships of life into legal relationships, and interests into legal rights; by linking rights and duties to certain conditions, it makes the conduct of life a conduct governed by law.²⁶

This effort to balance the need for protection with the control of state protective mechanisms must be guided by the maximisation of individual freedoms. That is, abolishing the penal system would leave citizens defenceless against the attacks of wrongdoers driven by their own will over the liberty, life, and property of others; whereas entrusting²⁷ state agents with unreasonable power would subject citizens to the abuses of a penal bureaucracy serving its own interests.

Defining individual liberty as a scarce and valuable resource in this transaction between intensity and restraint of the *jus puniendi* is entirely logical when one recognises that the human condition precedes the State. For Liszt,²⁸

²² Hassemer (n19) 148.

²³ Hassemer (n19).

²⁴ Fillipe Azevedo Rodrigues, *Análise econômica da expansão do direito penal* [An Economic Analysis of the Expansion of Criminal Law] (2nd edn, Del Rey 2021) 235.

²⁵ Delmanto and others (n 3) 25.

²⁶ Franz von Liszt, *Tratado de direito penal alemão* [A Treatise on German Criminal Law] (F Brigue & C 1899) 96.

²⁷ “The well-being of society” must be understood in terms of the well-being of its members. Society’s collective choices must be analysed as the result of the aggregation of individual choices. (...) The ‘state,’ the ‘government,’ the ‘people,’ or the ‘union’ do not think or decide for themselves, but individuals act on their behalf, respecting—one might imagine—the decision-making criteria applicable to other constraints”. Ejan Mackaay and Stéphane Rousseau, *Análise econômica do direito* [Economic Analysis of Law] (2nd edn, Atlas 2015) 41.

²⁸ von Liszt (n 26).

individual liberty, the inviolability of the home, and the confidentiality of correspondence are interests that existed long before constitutional charters guaranteed them against arbitrary intervention by public authority.

The logic of utilitarian individualism,²⁹ aimed at the maximisation of well-being, is carried over into a continuous assessment of the efficiency of criminal policy in terms of the maximisation of liberties, in accordance with a fragmentary and subsidiary penal intervention. Recognising the inefficiency of a given criminal norm does not discredit the institution; quite the contrary—it may result either in its punitive intensification or in its desirable reduction to the minimum necessary official violence, encouraging the adoption of alternative non-criminal measures of primary intervention, or even shifting the legal debate to an administrative one focused on improving the management of public security. These retreats, albeit only apparent, remain consistent with the purpose of classical Criminal Law: efficient and core.³⁰

3. ECONOMIC ANALYSIS AND THE ECONOMICS OF CRIME

The conceptions of crime vary depending on the discourse, the environment in which they circulate, and the respective field of scholarship, not necessarily sharing the same set of constitutive elements.

Jorge de Figueiredo Dias acknowledges that criminal behaviour has long been recognised as a “diverse phenomenon of social pathology, which reveals not only exogenous (external, social) constraints but also endogenous (internal, individual) substrata—components of (...) human reality.”³¹

It is evident, however, that there are starting points in common sense that are shared within the scientific field, notably the idea that crime is a human act, socially reproved, and one that provokes a punitive response, either from society at large or from the direct victim.

Law, in particular, defines crime based on dogmatic premises of legitimacy,³² respect for the law, and alignment with constitutional objectives.³³ Legal science, despite certain divergences among theoretical schools of Criminal Law, understands crime as a

²⁹ “The utilitarianism inherent in the premise of *homo economicus* formed the basis of the revolution initiated by the Classical School of Criminal Law, with the aim of preserving human freedom and dignity. Subsequently, the aforementioned theories of *homo sociologicus* emerged; however, their propositions—regarded in the theoretical realm as “efficient”—have never been universally accepted in empirical tests. These are generally rhetorical postulates with a claim to scientific validity, which has not materialised due to imprecise concrete data. On the other hand, the utilitarian paradigms of the Classical School, tested by the Economics of Crime, have proven to be much more accurate in empirical surveys. This demonstrates the absurdity of the new wave of sociological intrusion into criminal legal doctrine”. Azevedo Rodrigues (n 24) 235-236.

³⁰ “Civil law and public law also provide for the use of coercion, but in criminal law, the threat and application of coercion are at its very core. Furthermore, criminal law employs the most rigorous instrument of power available to state coercion: public punishment. When other measures and options fail, criminal law ultimately ensures the enforcement of what is permitted or prohibited by the legal system (...). To a certain extent, criminal law represents the *ultima ratio* in the legislator’s arsenal.” Jescheck and Weigend (n 13) 2-3.

³¹ Jorge de Figueiredo Dias and Manuel da Costa Andrade, *Criminologia: o homem delinquente e a sociedade criminógena* [Criminology: The Delinquent and the Crime-Inducing Society] (Coimbra Editora 2013) 18.

³² Delmanto and others (n 3) 96.

³³ Maria João Antunes, in the context of comparative law, points out that the Portuguese Constitution expressly enshrines, in Article 18(2), the “constitutional-legal principle of ‘criminal law based on the protection of legal interests’, as a standard for assessing the constitutionality of incriminating norms based on the criteria of the penal dignity of the legal interest and the necessity of criminal intervention.” Maria João Antunes, ‘A problemática penal e o tribunal constitucional’ [Criminal Law Issues and the Constitutional Court] in *Estudos em Homenagem ao Prof Doutor José Joaquim Gomes Canotilho*, vol I [Studies in Honor of Professor Dr. José Joaquim Gomes Canotilho] (Coimbra Editora 2012) 101.

human act that corresponds to a description previously established in criminal law (*typicity*), to which a punitive legal consequence is attributed (*punishability*). It is also necessary that the act has been committed by a conscious and criminally responsible individual (*culpability*), and that it is, in essence, incompatible with the legal order (*illegality*).

In other words, for the jurist, a crime is a typical, unlawful, culpable, and punishable act. This construction, however, must not result in the arbitrary decision of the legislator to prohibit, impose, or punish, for it would lack legitimacy and proper justification in light of the challenges of social life.

According to Augusto Silva Dias, “the attribution of criminal quality to conduct must be understood as more than a discretionary act of definition carried out by a competent authority.”³⁴ The decision to criminalise “is only legitimate and will only be effective if it serves to protect human needs that are socially experienced as fundamental.” Identifying such human needs qualified as fundamental, and investigating the effectiveness of penal measures intended to protect them is, without doubt, an interdisciplinary task. Here lies the intersection between Criminal Law, Criminology, and the Economics of Crime.³⁵

Criminology is responsible for investigating the social experiment and the moral selection of fundamental needs; Law translates these needs into normative language, considering them constitutional objectives that legitimise the power to punish; and the Economics of Crime, in turn, reveals the dynamics of the incentives that motivate the offender,³⁶ as well as the effectiveness of the punitive system (both legal and moral) in preventing and repressing such deviant behaviour.³⁷

According to Jorge de Figueiredo Dias, this reflects the virtuous cooperation among the disciplines that once formed the ancient “joint science” of criminal law, articulating knowledge between criminal policy and legal dogmatics.³⁸

In short, the process unfolds as follows:

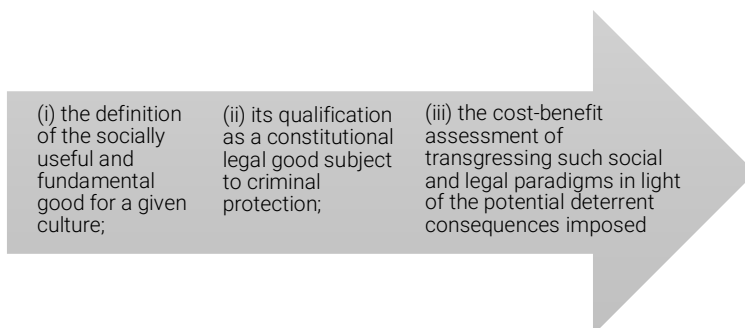
³⁴ Silva Dias (n 4) 31.

³⁵ “In the reform of the penal system and the transformation of criminal policy—making it more preventive and viewing it more as a broad social function rather than merely a matter of state administration—as well as the transformation of criminal justice itself, this work should not be undertaken solely by legal scholars and criminal law experts, as the valuable contribution of criminology and other social sciences is indispensable”. Roque de Brito Alves, *Ciência criminal* [Forensic Science] (Forense 1998) 119.

³⁶ “A person commits a crime because the expected benefits exceed the expected costs”. Richard Posner, *Economic Analysis of Law* (Aspen Publishers 2010) 278.

³⁷ Criminology and the Economics of Crime are understood as methodological repertoires for designing, evaluating, and improving criminal policy, whose function, according to Jorge de Figueiredo Dias, is: “baseada nos conhecimentos da análise da realidade criminal, naturalística e empírica, (...) dirigir ao legislador recomendações e propor-lhe directivas em tema de reforma penal [based on insights derived from the analysis of criminal reality—naturalistic and empirical—(...)] to make recommendations to the legislature and propose guidelines regarding penal reform]”. de Figueiredo Dias and da Costa Andrade (n 31) 23.

³⁸ de Figueiredo Dias and da Costa Andrade (n 31) 25.

Diagram 2 – The Process of the Joint Science of Criminal Law³⁹

This paper aims to delve into the interdisciplinary implications of the transition from the second to the third stage—that is, between Law and Economics. Gary Becker⁴⁰ argues that crime occurs as a rational response by the offender to incentives, weighed through an analysis of criminal risks and potential utility gains from committing or not committing the offence—the identification of the *homo criminalis* as *homo economicus*.

In this context, there is a growing body of literature in the country on the Economic Analysis of Law, which, when dedicated to criminal norms, closely resembles what economists have long⁴¹ defined as the Economics of Crime, despite the existence of different schools of thought.

Pery Shikida and Gilberto Schaefer⁴² identify the three main approaches to crime in Economic Sciences, which differ primarily in the hypotheses they raise regarding the factors that may contribute to the increase in criminality within a given social context.

The first school of thought, known as the Marxist origin, emphasises that the increase in criminality, particularly that related to profitable crimes, is linked to the characteristics of the capitalist process, being a result of changes in business behaviour in an increasingly competitive context; **the second school** argues that the rise in criminality is associated with structural and situational issues (high unemployment rates, income concentration, low levels of education and income, neglect in policing and justice activities, etc.); **and the third school** recognises that the practice of profitable crimes is an activity or sector of the economy, just like any other traditional economic activity.⁴³

Among the three, the last school of thought is the one rooted in utilitarian thinking, according to which criminal behaviour is based on the rational choice to commit a crime.

The economic theory of crime begins to develop in this direction with the proposals of Cesare Beccaria and Jeremy Bentham in the 18th century. In 1788, for

³⁹ Source: authors' own elaboration.

⁴⁰ Gary Stanley Becker, 'Crime and punishment: an economic approach' (1968) 76 *Journal of Political Economy* 169.

⁴¹ In 1968, the concern to investigate crime from an economic perspective was already present in the work of economist: "crime is an economically important activity or 'industry', notwithstanding the almost total neglect by economists. This neglect probably resulted from an attitude that illegal activity is too immoral to merit any systematic scientific attention". Becker (n 40) 169.

⁴² Gilberto José Schaefer and Pery Francisco de Assis Shikida, 'Economia do crime' [The Economics of Crime] (2000) 18(33) *Revista Análise Econômica* 195.

⁴³ Schaefer and Shikida (n 42) 199.

example, Bentham⁴⁴ already stated in *Principles of Penal Law* that the benefit derived from the crime is the force that motivates a person to delinquency; the pain of punishment is the force employed to dissuade them from committing the crime. If the first of these forces is greater, the crime will be committed; if the second is greater, the crime will not be committed.⁴⁵

Gary Becker⁴⁶ refines Bentham's seminal idea in *Crime and Punishment: An Economic Approach*, considered one of the most important works for the microeconomic investigation of crimes and punishments. In this work, the crime is seen as the result of the rational maximisation of the agents involved: the State, the offender, and the victim.

The interesting point is to understand that the conception of crime as a rational decision-making process does not create a divorce⁴⁷ with the analytical concept of Criminal Law. After all, the principles of the legal theory of the offence find their place precisely in the utilitarian thought of Beccaria,⁴⁸ who considered responsibility as stemming from a free and conscious intention to violate legal interests worthy of criminal protection. Therefore, the efficient criminal intervention is one that prevents the offence by the credible threat of a proportional and sufficient penalty to deter it.

For a punishment to be effective, it is sufficient that the harm caused by the punishment exceed the benefit derived from the crime; and this excess of harm must account for the inevitability of the punishment and the loss of the benefit that the crime would have produced. Anything beyond that is therefore superfluous and, consequently, tyrannical.⁴⁹

Gary Becker's economic theory of crime would involve the study of criminal norms, particularly their secondary provisions (sanctions), as a mechanism to discourage crime, without overlooking the investigation of the efficiency of criminal prosecution. On one side, there are criminal norms and penal execution norms; on the other, there are criminal procedural norms and the management of public security.

This is not yet the complete scope, as, according to the other schools of thought mentioned, social implications are also considered, such as the moral inhibitors identified in the article by Pery Francisco Assis Shikida and Salete Polonia Borilli:

not only traditional conditioning factors (restrictions imposed by the state) affect the actions of criminals, but there are also indications that moral barriers (such as religion, family structure, etc.) also influence the degree of violence.⁵⁰

The Economics of Crime would, therefore, not have state penal intervention (penal enforcement) as its sole object of investigation. With regard to the moral restraints cited by Shikida and Borilli,⁵¹ there are strong links to non-legal social norms in contrast with cultural relativism. According to Sánchez, "it is undeniable that (...) the norms of social morality – as norms – perform a guiding function, by allowing one to predict to

⁴⁴ Jeremy Bentham, *Principles of Penal Law* (University of Adelaide Library 2012).

⁴⁵ Azevedo Rodrigues (n 24) 93.

⁴⁶ Becker (n 40).

⁴⁷ Warned about the negative effects of the former divorce between legal and criminological knowledge, particularly in the context of the emergence of the social state, where the individualistic foundations of the liberal legal order were relativised for collective and social welfare purposes. In this context, he attests that "the separation of social science from legal science, to the detriment of the latter." de Figueiredo Dias and da Costa Andrade (n 31) 26.

⁴⁸ Beccaria (n 7).

⁴⁹ Beccaria (n 7) 66-67.

⁵⁰ Salete Polónia Borilli and Pery Francisco de Assis Shikida, 'Economia do crime' [The economics of crime] (2006) 24(46) *Revista Análise Econômica* 4, 17.

⁵¹ Borilli and Shikida (n 50) 17.

some extent the behaviour of others.”⁵² The relativism that affects these norms places pressure on legal norms as the remaining inhibitory resource, which, in turn, intensifies both social and official violence.

It is therefore possible to state that the Economics of Crime addresses both legal and criminological subjects;⁵³ that is, the literature consulted and its theoretical foundations examine legal and moral/social⁵⁴ norms in the complex decision-making process of engaging in criminal behaviour.

These considerations allow the Economics of Crime to be divided into three fields of research:

Table 1 – Research Fields in the Economics of Crime⁵⁵

Objects of Investigation in the Economics of Crime
(i) economic analysis of criminal, criminal procedural, and penal enforcement norms.
(ii) economic analysis of public security management.
(iii) economic analysis of moral and social crime inhibitors. ⁵⁶

Becker’s model, $O = O(P, f, u)$ – the quantity of crimes (O) as a function of the probability of conviction (P), the deterrent effect of punishment (f), and exogenous variables (u) – is notably situated within fields (i) and (ii), formulating an economic theory of punishment and public enforcement. This is because the so-called exogenous variables, although they may include moral inhibitors, lie outside the methodological scope undertaken by the author; after all, as he himself defined them, they are exogenous.⁵⁷

⁵² Silva Sánchez (14) 75.

⁵³ “Substantial elements of sociological theories of crime can be combined fruitfully with the traditional economic models. This is especially true for the effects of day-to-day interactions on the decision to commit a crime. While a start has been made in the analysis of such effects, there seems to be ample room for additional formal research in this field, taking into account information effects other than on the probability of apprehension and other interaction effects. The enforcement of informal social norms in social networks is one case in point”. Stephan M Panther, ‘The economics of crime and criminal law’ (1995) 2(4) *European Journal of Law and Economics* 365.

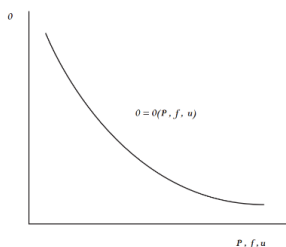
⁵⁴ “Norms, on the other hand, are not necessarily enacted. If they are, it is not by the state, for in that case they would be laws. Often, a norm arises from the gradual emergence of a consensus (and crystallises from there). Norms are enforced through the internalization of values, the refusal to interact with the aggressor, disapproval of the aggressor’s actions, and, at times, private violence”. Richard Posner, *Fronteiras da teoria do direito [Frontiers of Legal Theory]* (Martins Fontes 2011) 374.

⁵⁵ Source: authors’ own elaboration.

⁵⁶ “The economic analysis of law has as many positive (i.e., descriptive) aspects as it does normative ones. Its aim is to explain and predict the behaviour of the groups involved in the legal system, as well as to explain the system’s doctrinal, procedural, and institutional structure. But it also seeks to improve the law by identifying the unintended or undesirable consequences of existing laws or proposed legislation and proposing practical reforms”. Posner (n 54) 8.

⁵⁷ Azevedo Rodrigues (n 24) 99-100.

Graph 1 – Crime Quantity Curve (O) vs. Probability of Conviction (P) and Deterrent Effect of Punishment (f)⁵⁸



The aforementioned work by Shikida and Borilli⁵⁹ is based on Becker's model, but through empirical research, it concludes that moral inhibitors have a significant impact on crime, placing their study within field (iii). The same applies to the research by Stephan M. Panther,⁶⁰ which explores moral and social factors such as anomie, income distribution, and unemployment.

Regarding field (ii) in isolation – the economic analysis of public security management – there is no shortage of studies on increasing investment in law enforcement agencies, judicial efficiency, police intelligence, visible policing, surveillance, and even urban maintenance and public lighting. In this segment, the work of Rodrigues and Yeung,⁶¹ should be mentioned, as it draws a similar distinction between the economic analysis of justice administration and the economic analysis of law: "different objects may be considered part of Law and Economics, some more closely linked to the interdisciplinary zone between Law and Economics, and others aimed at diagnosing and evaluating the management of the Judiciary".

The Judiciary, the Public Prosecutor's Office, and the police forces are, above all, public sector organisations that require sound organisational management to ensure the success of criminal prosecution. They must aim at the allocative efficiency of public resources to deliver public security. However, according to Rodrigues and Yeung,⁶² foreign literature from the Law and Economics movement originally defined "economic analysis in two consequentialist dimensions: decision theory and regulation theory. Law, in this context, has a meaning much closer to its dogmatic conception—that is, legal norms." The only objects of study are the "incentive structures present in contracts, normative acts, and, above all, in judicial or administrative decisions".

A clearer definition of the object to be analysed from an economic perspective is, therefore, essential for the methodological understanding of the *Economic Analysis of Criminal Law*, which may, in a broad sense, be considered synonymous with the Economics of Crime. However, when viewed from a narrower perspective,⁶³ it is limited

⁵⁸ Source: Azevedo Rodrigues (n 24) 100.

⁵⁹ Borilli and Shikida (n 50).

⁶⁰ Panther (n 53).

⁶¹ Azevedo Rodrigues and Yeung (n 15) 161-166.

⁶² Azevedo Rodrigues and Yeung (n 15).

⁶³ This traditional focus of economic analysis on the legal system and judicial and administrative decisions can be identified as another subfield of AED, an AED in the strict sense. It is important to note that there are

to the law-and-economics interpretation of criminal offenses, the dimensions and types of penalties, their enforcement regimes, and procedural criminal norms—nothing much beyond that.

4. INTERPRETATIVE ECONOMIC ANALYSIS OF CRIMINAL LAW

Paying close attention to the words that comprise the title of this section is a useful starting point for the intended aim of discussing the semantic and methodological scope of the Economic Analysis of Criminal Law.

Accordingly, the title may be divided into two parts: (i) economic analysis and (ii) criminal law, without disregarding the importance of the preposition “of” that links the two elements.

Beginning with the first part of the title, Richard Posner⁶⁴ summarises that “most economic analyses [of whatever it may be] consist in outlining the consequences of the assumption that individuals behave rationally in their social interactions”; and, in matters related to the law, “those individuals may be criminals, public prosecutors, one of the parties in a tort case, taxpayers, tax inspectors or striking workers”.

Traditionally, economic analysis is divided into two approaches: positive (descriptive) and normative (prescriptive). The main distinction between them lies in the researcher’s objective. The former aims to describe how legal norms influence the decision-making of their subjects, while the latter seeks to design more efficient normative and institutional arrangements.

A third approach is also possible, as argued by Omar Augusto Leite Melo. Drawing an analogy with Miguel Reale’s three-dimensional theory of law, the author contends that positive law and economics address the fact, normative law and economics concern value, and, as a new dimension, interpretative law and economics shed light on the norm itself.⁶⁵

An unusual example of economic theory applied to law is found in the book *Economic Analysis of the Expansion of Criminal Law*,⁶⁶ specifically the application of microeconomic premises of rational choice to the Brazilian illicit drug market, considering the existing legislation.⁶⁷

In the study, it was concluded that the policy of repressing drug traffickers, when associated with tolerance towards drug users, produces significant negative externalities, particularly: (i) “the restriction of supply [of drugs] and the price increase [reduction of suppliers] do not result in a decrease in consumption, which in economics is called inelastic demand, unaffected by fluctuations in supply”;⁶⁸ and (ii) “users will need

areas of overlap between the sub-branches; after all, analysing the macro-regulatory impact produced by the Judiciary through the imprecise construction of its precedents involves delving deeper into research in both jurisprudence and decision theory. Here is an example that justifies maintaining a consistent designation for both sub-branches as AED. (...). It is up to the law and economics scholar to precisely define the object of their research and the respective methodological framework, avoiding misunderstandings of the interdisciplinary phenomenon under the stigma of efficiency-driven approaches and unfounded links between the method and ideological biases. Azevedo Rodrigues and Yeung (n 15) 167-168.

⁶⁴ Posner (n 54) 9.

⁶⁵ Omar Augusto Leite Melo, *Análise econômica dos direitos fundamentais* [An Economic Analysis of Fundamental Rights] (Dialética 2023) 30.

⁶⁶ Azevedo Rodrigues (n 24) 119-127.

⁶⁷ Law No 11.343/2006 (Brazil).

⁶⁸ Azevedo Rodrigues (n 24) 125.

more resources to satisfy their addiction, which are generally obtained through theft or robbery".⁶⁹

It is evident that the controversial issue of drugs in the political sphere, when examined through the lens of interpretative economic theory, reveals the inefficiency of legal norms aimed at repressing them. The legal object of prohibition is the safeguarding of public health and peace; however, the result is the exact opposite.⁷⁰

Thus, Posner highlights two advantages of the economic approach to controversial issues in the political and ideological fields. According to him, economic analysis "offers an impartial viewpoint on politically controversial legal topics" and "frequently dispels antinomies that may give rise to disputes".⁷¹

Human decisions, in their universality, are made based on calculations of utility and risk, thus opening space for understanding that economic analysis, since Jeremy Bentham, is not limited only to explicit markets, but also to non-market behaviour or – in other words – implicit markets such as Law, and more specifically, Criminal Law.⁷²

Regarding the second part of the title of this section, *Criminal Law*, this work has already developed the concept, stating, from a functionalist perspective, that it is a cultural technology composed of a set of legal norms, tasked with performing two functions in constant balance: protecting legally protected goods worthy of penal intervention and limiting the State's power to punish.

It is worth highlighting that the intention is to provide an economic analysis exclusively of criminal law norms, that is, an approach to the *mentioned normative language, oriented according to the constitutional objectives that legitimise the power to punish*. This would be the restricted interpretative⁷³ economic theory of Criminal Law, not necessarily involving public security budgets, number of patrol cars, installation of surveillance cameras, or the impact of unemployment on crime, etc.

It is an evaluation of the cost-benefit of transgressing such legal-penal paradigms in light of the dissuasive consequences potentially imposed – stage (iii) of the process of cooperation within the "joint science of criminal law"⁷⁴ – thus promoting, for this purpose, an economic analysis of penal norms, procedural criminal law, and penal execution – the object of investigation (i) of the Economics of Crime – under the constitutional postulates to which Criminal Law serves.

Therefore, the impartial viewpoint of interpretative economic analysis⁷⁵ reveals, in the graphic language of a decreasing linear function, the penal paradox presented elsewhere, between the protection of legal goods (PBJ) and the limitation of the *jus puniendi* (LJP), identifying an optimal point of intervention under the liberal-functional paradigm:

⁶⁹ Azevedo Rodrigues (n 24) 122.

⁷⁰ "Profits generated in markets with few suppliers or a single supplier (oligopolies and monopolies, respectively) will be far greater than under the status quo. Thus, drug traffickers become a very dangerous threat to the social system, increasing their influence through the corruption of government officials, as well as their capacity to respond by recruiting new members into their organizations". Azevedo Rodrigues (n 24) 122.

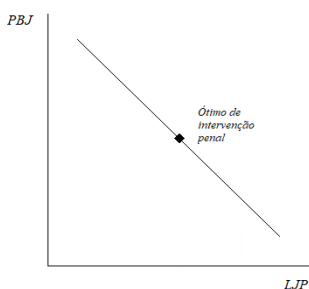
⁷¹ Posner (n 54) 10-11.

⁷² Posner (n 54) 37-38.

⁷³ The concept of *Interpretative Economic Analysis of Law* reached Brazil through the work of Omar Augusto Leite Melo, who defines it as: "Legal interpretation is a process used to identify the meaning and scope of a legal provision. In Interpretive AED, this process involves applying economic tools and theories to identify the intended incentives and likely consequences of the provision, thereby determining its meaning and scope." Melo (n 65) 106-107.

⁷⁴ de Figueiredo Dias and da Costa Andrade (n 31) 25.

⁷⁵ Posner (n 54) 11.

Graph 2 – Optimal Criminal Intervention⁷⁶

The *optimal criminal intervention* derives from the idea of *balance*, that is, the initial standard that remains until the interference of external factors in the relationship,⁷⁷ such as underreporting of offenses, criminal selectivity,⁷⁸ misconduct by prosecution agents, the perception of impunity,⁷⁹ institutionalisation of insecurity,⁸⁰ punitive demagoguery,⁸¹ moral relativism,⁸² etc.⁸³ Undoubtedly, the constitutional norms that declare fundamental rights and freedoms set the tone for this interaction, with such balance being achievable through constitutional hermeneutics preserved from some of the external factors listed above – the stability of the interpretation of constitutional provisions and the entire legal system is essential for maintaining the intervention in balance.⁸⁴

The equilibrium point is considered optimal because it represents a Pareto-efficient situation – or allocative efficiency.⁸⁵ It cannot be altered without sacrificing, even partially, the protection of legal goods on the one hand or, on the other hand, the limitation of the power to punish. As Ivo Gico Jr. states, it is possible to identify a trade-off between more security and more control over state abuse, since the "idea of allocative efficiency directly leads us to the fact that social resources are scarce, and that, often, to obtain something, we must give up something else."⁸⁶

However, a more sophisticated economic analysis of this trade-off could take into account item (iii) of the fields of research in the Economics of Crime (see Table 1),

⁷⁶ Source: authors' own elaboration.

⁷⁷ Azevedo Rodrigues (n 24) 237.

⁷⁸ Felipe Mattos Monteiro and Gabriela Ribeiro Cardoso, 'A seletividade do sistema prisional brasileiro' [The Selectivity of the Brazilian Prison System] (2013) 13(1) *Civitas – Revista de Ciências Sociais* 93, 102.

⁷⁹ Felipe Souza Nery and Paulo Nadanovsky, 'Homicide impunity in Brazil between 2006 and 2016' (2020) 54 *Revista de Saúde Pública* 144.

⁸⁰ Azevedo Rodrigues (n 24) 169.

⁸¹ Azevedo Rodrigues (n 24) 168.

⁸² José Antonio Marina, *Crónicas de la ultramodernidad* [Chronicles of Ultramodernity] (Anagrama 2000) 48.

⁸³ "The premise on which economists base their work is that interactions, free from external interference, tend toward equilibrium, regardless of whether they occur in legal or illegal markets, in elections, games, or even in marriages. By analogy, consider the Standard Conditions of Temperature and Pressure (SCTP) in physics, under which theories are developed and calculations are performed. In economics, SCTP can be understood as the market, in the broadest sense." Azevedo Rodrigues (n 24) 78.

⁸⁴ Douglas C. North, 'Institutions' (1991) 5(1) *Journal of Economic Perspectives* 97.

⁸⁵ Robert Cooter and Thomas Ulen, *Direito e economia* [Law and Economics] (5th edn, Bookman 2010).

⁸⁶ Ivo Teixeira Gico Jr, 'Bem-estar social e o conceito de eficiência' [Social Welfare and the Concept of Efficiency] (2020) 16(2) *Revista Brasileira de Direito* 1, 12.

that is, exogenous moral and social variables, which also requires a more complex concept of equilibrium. From the perspective of the optimum of Nicholas Kaldor and John Hicks, a certain sacrifice in the protection of legal goods could be compensated with effective social policies that create higher opportunity costs in the decision to commit crimes, demanding an evaluation of dynamic efficiency.⁸⁷

For comparative purposes, refer to the table below regarding the optimal point of criminal intervention under the Pareto-efficient and Kaldor-Hicks-efficient perspectives:

Table 2 – Pareto-Efficient and Kaldor-Hicks Efficient Optimal Level of Criminal Intervention⁸⁸

Allocative Criminal Justice Efficiency (Pareto-Efficient)	Dynamic Criminal Justice Efficiency (Kaldor-Hicks Efficient)
Optimal distribution of public security (PBJ) and control of state abuse (LJP), "taking into account society's preferences" and the relevant constitutional objectives. ⁸⁹	Optimal distribution of extra-criminal deterrents to compensate for the reduction in public security enforcement (PBJ), in favour of greater control over the state's punitive power (LJP), such as the potential regulation of a legal drug market supported by educational and public health initiatives. ⁹⁰
The assessment of allocative efficiency is <i>retrospective</i> (descriptive), that is, the efficiency of the present moment takes into account the preceding experimentation.	The assessment of dynamic efficiency is <i>prospective</i> (normative), as it projects compensatory measures whose outcomes can only be verified in the future. ⁹¹

Efficiency criteria – notably the Kaldor-Hicks optimum – if taken into account, enhance the understanding of subsidiarity (*ultima ratio*) and proportionality, elevating them from merely rhetorical concepts to scientifically verifiable *standards*.⁹²

Still regarding the *PBJ* vs. *LJP* trade-off, it must be acknowledged that this only occurs within a legal system whose Constitution adopts the premise of minimal, albeit necessary, intervention – that is, a liberal-functional Criminal Law aligned with the previously discussed teleological functionalism. Other models of criminal intervention, including *abolitionism*, fall outside this framework, placing themselves beyond the constitutional structure designed to safeguard the individual's fundamental freedoms.⁹³

In this regard, criminological schools of thought or even an example of a delinquent State may be represented and contrasted in the graphical outline below.

⁸⁷ Cooter and Ulen (n 85) 64-65.

⁸⁸ Source: authors' own elaboration.

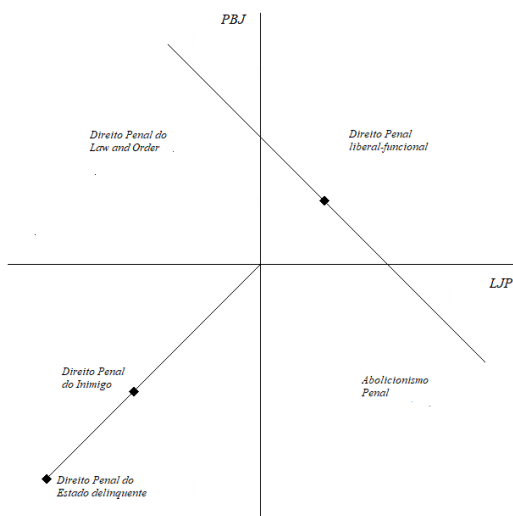
⁸⁹ "The maximisation of social welfare mandated by the Federal Constitution simultaneously requires (i) productive efficiency and (ii) the provision of goods and services that are most highly valued by society". Gico Jr (n 86) 14.

⁹⁰ "Some countries, such as England, have adopted a policy under which users identified as dependent are permitted to purchase a controlled amount of the narcotic, under a medical prescription and at reasonable prices, in order to prevent criminal activity. In this way, the measure weakens the illicit drug market, which was once sustained by these same addicts, who remained loyal to the trade due to their addiction. Policies of this nature, combined with police efforts to combat traffickers, will yield better results". Azevedo Rodrigues (n 24) 125-126.

⁹¹ Gico Jr (n 86) 16.

⁹² de Figueiredo Dias and da Costa Andrade (n 31) 408

⁹³ "Today, it must be said that this principle [the principle of the rule of law] does not merely require the guarantee of the protection of rights and freedoms against the State: it also requires their protection against any de facto social powers. Thus, it can be said that the rule of law fails in its function when it refrains from resorting to the preventive and repressive measures that prove indispensable for safeguarding the security, rights, and freedoms of citizens". de Figueiredo Dias and da Costa Andrade (n 31) 439-440.

Graph 3 – Criminological Theories in Relation to PBJ and LJP⁹⁴

While liberal-functional criminal law is located in the positive quadrant of both axes (1° Quadrant), the Law and Order Penal Law – associated with the *zero-tolerance* criminal policy⁹⁵ – is situated in the positive quadrant for the protection of legal goods (PBJ) and the negative quadrant for the limitation of state punitive power (LJP) (2° Quadrant). Its punitive tendency is evident, even though it is oriented towards the protection of legal goods, as seen in the criminal discourse of Federal Law No. 11.340, dated August 7, 2006 (Maria da Penha Law).⁹⁶

The negative quadrant for both axes (3° Quadrant) is characteristic of the phenomenon of *Enemy Criminal Law*, where the function of protecting legal goods is a priori discarded as a legitimising factor for official violence. Furthermore, the limits on the power to punish are “emergency suspended,” as exemplified by the recurring violation of privacy through the use of covert evidence-gathering methods⁹⁷ – telephone and data interception, and the breaking of fiscal and banking secrecy.

⁹⁴ Source: authors’ own elaboration.

⁹⁵ “The “zero tolerance” policy has its roots in Wilson and Kelling’s “broken windows theory,” which argues that tolerance and disorder are the seeds of more serious crimes, just as a broken window gives the impression of neglect and indifference and leads to others being broken. The ‘broken windows theory’ also states that policing minor infractions and acts of disorder would reduce the occurrence of more serious crimes”. Travis Wendel and Ric Curtis, ‘Tolerância zero: a má interpretação dos resultados’ [Zero Tolerance: The Misinterpretation of the Results] (2002) 8(18) *Horizontes Antropológicos* 276.

⁹⁶ “With regard to this particular law, the success of emergency protective measures of an administrative nature is undeniable, as they prevent the escalation of violence by putting an end to the normalization of violence in the domestic environment. However, it must also be acknowledged that this solution is rooted in a “law and order” ideology”. Azevedo Rodrigues (n 24) 176.

⁹⁷ “So-called covert investigative methods – a category that includes methods of obtaining evidence such as: interception of telecommunications in various forms and manifestations, undercover agents and

Here, penal bureaucracy becomes an end in itself, which can lead to a criminal⁹⁸ State Law, where the word "law" is used inappropriately. The relationship between agent and principal is clearly demonstrated in agency theory.⁹⁹ Penal bureaucracy is the agent who deviates from the principal's interest, society. Public violence then serves occasioned authorities—judges, public prosecutors, politicians, and police officers—as a mechanism to repress social demands and guarantee violations of both material public goods (Treasury) and immaterial public goods (republican institutions), all under the sophistic rhetoric of an emergency law, in the false defence of institutions, democratic order, and social peace. The protection of legal goods thus tends to be negatively accentuated as the State becomes the principal violator of individual freedoms.

The final quadrant, negative in the protection of legal goods and positive in limiting the power to punish (4° Quadrant), is a kind of utopia, typically conceived from a post-capitalist perspective, where the overcoming of the market economy by a society devoid of the "contradictions" inherent to the capitalist model would allow for an austere and peaceful coexistence, rendering official violence outdated and unnecessary. Advocates of this critical, Marxist view of the penal system often identify as *penal abolitionists*.¹⁰⁰ For them, there is no need to protect legal goods because the extinction of capitalist society will give rise to a new state of nature, harmonious and collectivist.

Freed from capitalist slavery, from the horrors, the barbarities, the absurdities, and the unspeakable indignities of capitalist exploitation, men will gradually become accustomed to respecting the elementary rules of social life known for centuries, reincorporated over millennia into all moral precepts, to respecting them without violence, without coercion, without submission, without this special apparatus of coercion called the State.¹⁰¹

The detail of this theory is precisely the transition from today to its idealised universe, which is: it will be up to the social state to lead the transition, using official violence to eradicate the portion of the population (bourgeoisie) that does not adhere to the collectivisation of capital.¹⁰² In summary, the antithesis to the capitalist thesis is an

"informants," covert surveillance, video surveillance, "online searches," recording of images or audio with hidden cameras or microphones ("environmental recordings"), IMSI-Catchers (IMEI), GPS, etc." MC Andrade, 'Métodos ocultos de investigação' [Covert investigative methods] in Mário Ferreira Monte and others, *Que futuro para o direito processual penal: simpósio em homenagem a Jorge de Figueiredo Dias* [What Does the Future Hold for Criminal Procedural Law: A Symposium in Honor of Jorge de Figueiredo Dias] (Coimbra Editora 2009) 104-105.

⁹⁸ See more in Leonardo Coutinho's book Leonardo Coutinho (2018), *Hugo Chávez, o espectro: How the Venezuelan President Fueled Drug Trafficking, Financed Terrorism, and Promoted Global Disorder* (Autêntica Editora 2018).

⁹⁹ Natália Batista da Costa Santos and Fillipe Azevedo Rodrigues 'Os jogos da leniência' [The Games of Leniency] (2017) 14(78) *Revista Direito Público* 63-65.

¹⁰⁰ Luigi Ferrajoli considers "Abolitionists include only those axiological doctrines that condemn criminal law as illegitimate—either because they morally reject any objective as capable of justifying the hardships it imposes, or because they consider it advantageous to abolish the legal-criminal form of punitive sanctions and replace them with educational means or informal, directly social instruments of control". Luigi Ferrajoli *Direito e razão: teoria do garantismo penal* [Law and Reason: The Theory of Criminal Guarantees] (Revista dos Tribunais 2002)

¹⁰¹ Vladimir Lenin, *O Estado e a revolução* [The State and the Revolution] (Editorial Avante 1977) 101.

¹⁰² "The dictatorship of the proletariat entails a series of restrictions on the freedom of the oppressors, the exploiters, and the capitalists. It is necessary to subdue them in order to free humanity from wage slavery; it is necessary to overcome their resistance by force; and it is evident that where there is repression, there is violence; there is no freedom, there is no democracy. (...) Democracy for the vast majority of the people and repression by force—that is, exclusion from democracy for the exploiters, the oppressors of the people—such is the transformation that democracy undergoes during the transition from capitalism to communism". Lenin (n 101) 101.

oppressive state typical of the 3rd Quadrant, whose purpose is to forcibly lead society into the 4th Quadrant. Those readers who are more inclined to dystopias than to utopias must have realised that this transitional social state is far more likely to remain in the 3rd Quadrant as a delinquent state than anything else.

Consequently, this leads to a paradoxical exaltation of criminal law, carried out under the banner of an explicit reduction of law to [Marxist] morality, with fundamentalist overtones rarely found in other doctrines, even within the richest tradition of legal moralism and maximalist criminal law.¹⁰³

The Economic Analysis of Criminal Law is guided, according to Richard Posner,¹⁰⁴ by the utilitarian logic of repressing the lesser offense or its effective attempt in order to avoid the need to react only to serious crimes or those that have already been completed. This repression, with a preventive character, should begin with milder penalties compared to more serious and completed offenses, thus ensuring proportionality. The proposal is to seek the permanent eradication of impunity for crimes of lesser offensiveness or merely attempted, which would produce an efficient criminal¹⁰⁵ policy, guaranteeing the protection of legal goods without compromising the limitation of the state's right to punish.

Returning to the 1st Quadrant, this discussion brought by Posner is eminently functional-teleological, since, according to Sánchez, "the very dogmatics of the theory of crime, in part, tends to be created from teleological perspectives, very conducive to embracing efficiency considerations."¹⁰⁶

The study of deviant behaviour, socioeconomic indicators, and the administrative management of public security remains relevant to the Economics of Crime. However, attention is drawn to what is actually meant by Criminal Law when an economic approach is promoted, that is, the analysis of a set of legal norms produced and applied in light of constitutional objectives, often influenced by ideological biases and irrational appeals for vengeance and social retribution.

Crime Economics studies are unable to promote an economic analysis of Criminal Law if they disregard legal-criminal institutions, from constitutional provisions to the legal formalities of criminal prosecution acts. This means that interdisciplinary research between Law and Economics should not establish a relationship of subordination of one science by the other, whether through explicit rejection of foreign knowledge or implicit neglect of the methodological limits established by each field.¹⁰⁷

Considered as interdisciplinary, functional, and teleological theory, economic analysis requires clarity in the investigated object and the researcher's appropriation of

¹⁰³ Ferrajoli (n 100) 202.

¹⁰⁴ Richard Posner, *Economic Analysis of Law* (Aspen Publishers 2010).

¹⁰⁵ "Scientifically, prevention is the advance knowledge of the likelihood of criminal conduct, coupled with the implementation of appropriate measures to prevent it. Prevention, therefore, in this context, means not only the advance knowledge of probable illegal or criminal harm or damage, but also the preparation, organization, and implementation of the necessary measures to achieve a specific goal, which, in this case, would be to prevent crime." de Brito Alves (n 35) 305.

¹⁰⁶ Silva Sánchez (N 14) 5.

¹⁰⁷ The aim is to avoid the same mistake made by law courses that close themselves off to related sciences, but in the opposite direction, as pointed out by Salo de Carvalho: "The official model of criminal sciences views other fields of knowledge as subservient, allowing them only to provide input for the dominant discipline of criminal law. The arrogance of criminal law, combined with the subservience of the fields of knowledge that are subjected to—and submit themselves to—this model, results in the reinforcement of dogmatism, scientific isolation, and a natural detachment from the real problems of life" Salo Carvalho, *Antimanual de criminologia [The Anti-Manual of Criminology]* (6th edn, Saraiva 2015) 56-57.

scientific knowledge both from the Economics of Crime and from legal dogmatics¹⁰⁸ if they intend to promote an *interpretative economic analysis of Criminal Law*.

5. CONCLUSION

This paper conducted an extensive literature review of Brazilian and foreign criminal law doctrine to identify, as a common element in several of the works consulted, the effort to reconcile the protection of legally protected interests deserving of criminal intervention (fragmentariness) and the limit to the state's power to punish (minimal intervention).

In the West, these functions of criminal law constitute the utilitarian-liberal paradox of the contemporary punitive system, which must operate in favour of maximising individual freedoms, as declared in the respective constitutional charter.

Thus, freedom was defined as a scarce and valuable resource in this transaction between its protection by the state through criminal law and the potential abuse of power by the very public entity holding the monopoly on official violence.

The economic analysis of criminal offenses and sanctions begins to take into account the efficiency of criminal policy in protecting freedoms without excessively sacrificing them. Hence, the concept of penal efficiency or optimal penal intervention emerges.

With these assumptions established, removing any dysfunctional norm—one without a protective function for a fragmentary legal good or with inefficient sanctions—does not discredit the punitive system as a whole. On the contrary, it guarantees the recurring observance of the rational principles of subsidiarity and proportionality—criminal law as the effective and legitimate *ultima ratio*.

As demonstrated, this evaluation requires true interdisciplinary knowledge, a kind of non-servile interaction between legal-criminal sciences and the Economics of Crime, producing what is understood as Interpretative Economic Analysis of Criminal Law.

It is not new that this cooperation is recognised as beneficial, with several instances of misunderstandings and distancing for reasons other than the safeguarding of a free and peaceful society. Therefore, it is a matter of reclaiming the desired joint science of criminal law.

The Economic Analysis of Criminal Law is a clear example of this intersection of non-hierarchical knowledge, guided by the same liberal-functional purpose, and its process of integration was presented in three stages: (i) the definition of the socially useful and fundamental good for a given culture (Criminology); (ii) its qualification as a constitutional legal good subject to criminal protection (Law); and (iii) the evaluation of the cost-benefit of transgressing such social and legal paradigms in light of the potentially imposed deterrent consequences (Economics).

The research focused especially on the last two stages, Law and Economics, recognising three possible fields of microeconomic research whose objects relate to the criminal phenomenon: (i) economic analysis of criminal norms, criminal procedural norms, and criminal execution laws; (ii) economic analysis of public security management; and (iii) economic analysis of moral and social inhibitors of crime.

Thus, it was possible to clearly define the methodological scope of an economic analysis of the legal-normative language, aimed at investigating, with an impartial

¹⁰⁸ "The minimum requirement for conducting interdisciplinary research is to ensure that the participants have similar opportunities to speak, that is, to abandon the notion that one body of knowledge is subordinate to another" Carvalho (n 107) 55.

perspective on controversial criminal issues, types, sanctions, execution institutes, and criminal procedural norms, with the remaining objects being the concern of other research in Criminology and the Economics of Crime.

The decision to commit a crime, when considered based on the current criminal and criminal procedural norms, is also an object of this economic theory of criminal law. After all, since the works of Cesare Beccaria and Jeremy Bentham, the utilitarian logic of rational choice in so-called implicit markets, such as the trade-off between risks and benefits assumed by the criminal, has been recognised.

This impartial point of view can reveal facets and resolve antinomies between various criminological theories that tend to influence legal practitioners in applying criminal norms. In this work, for example, it was possible to contrast these theories using the optimal criminal intervention graph—under the liberal-functional paradigm—and propose a methodology for assessing dynamic penal efficiency, according to the Kaldor-Hicks optimal.

There is an evident convergence between functionalism-teleology and the premise of *homo economicus*, as they share the same philosophical roots in liberal utilitarianism. The intended contribution, therefore, was to promote the methodological distinction between the Economics of Crime and Criminal Law, which implies an Interpretative Economic Analysis of Criminal Law.

