Sharing the great experience of the Linkage Program is something that could be done in different ways. We could write about the classes we attended, the organizations we visited, the great professors we had the opportunity to talk with, and the friends we made during the Program. However, the greatest way of sharing the experiences we had seems to be by demonstrating the importance they had in the academic research that we’ve developed in our home country.

One of the issues which we became more familiar with in classes and meetings at Yale was distributive justice. It had quite an impact on us, influencing the future research that we undertook and reading groups in which we took part. In one of these groups, we researched the Progressive Taxes in Brazil, especially the Tax on Urban Lands (in Portuguese, IPTU) in São Paulo and how the trade-off between equity and efficiency works when this kind of tax is adopted.

The importance of this work seems to be clear: according to UNDP (United Nations Development Program) recent research, Brazil is the 10th most unequal country in distribution of income. Brazil is more unequal than all the others Latin American countries and even more unequal that most sub-Saharan countries. Although Brazil is one of the twenty richest countries in the world, the gross domestic product is very unequally distributed amongst Brazilians, which results in some of them being extremely rich and others miserable. In this context, the purpose of our research, conducted with other Law students in a research group called PET (Program of Tutorial Education), a group we all are part of, to a call for papers of IPEA (Institute of Applied Economic Researches, an economic research institution of the Brazilian government) was analyzing how a public policy such as the implementation of a progressive tax in São Paulo could simultaneously create an increase in equity (income distribution) without damaging efficiency (influence on the tax income and other effects on the economy).
The issue to be researched was decided also based on a debate made in the Brazilian Supreme Court about the constitutionality of the progressivity of the IPTU, which is a tax that varies according to the size and location of the urban land. Some Brazilian jurists say that this measure is unconstitutional because it does not obey the constitutional principle of the contributive capacity (the more one receives as income, the more one must pay as tax) – it does not take into account the real income of the taxpayers, but the size and location of their urban lands. Our research would prove that, according to the Brazilian Constitution and to the evolution of the Brazilian Law, and taking Distributive Justice into account, using taxes as a way of distributing income not only could, but must have been made in Brazil.

In order to make an economical approach to this theme, we compared two models: the public policy adopted in many countries after the 1929 crisis, with Keynesian influence, and the Neoclassical policies, whose adoption started in 1980 in the USA and in the nineties in Brazil, by Presidents Fernando Collor de Mello and Fernando Henrique Cardoso. According to the first model, equality is one of the most effective means to improve economic efficiency. On the other hand, the neo-liberal theories usually relate efficiency and equity in a different way: they state that the institutional arrangements that produce more efficiency, understood as increase of production of wealth in a free market, are more equal.

The theories usually mentioned as Keynesian considered efficiency as economic development, which would be achieved only with more equality in the income distribution. It would make the internal consumption increase in a balanced way. In this system, the function of the State should be to act in the income distribution policies, using employment and other public policies, such as progressivity, as means. These ideas influenced many Latin American economists. For instance, the economists who worked in CEPAL (Economic Commission to Latin America) thought that the Latin American countries would develop only if some improvement in demand occurred, and not in the supply, as happened in the developed countries. The progressivity of taxes would be applied in that area, working as a mechanism of income distribution and compensating the difference of gains between consumers.
In the Neoclassical model, on the other hand, equity is seen as a natural consequence of economic efficiency, and as depending on it. For these theories, the free market is thought of as a mechanism of spontaneous distribution of incomes and gains. This conception has been criticized because it does not take into account the distortions caused by free competition in the market, which produce unequal consequences that are seen by the neoliberals as natural, as a result of the differences in skills, competence and talents developed by some individuals and not by others. This is why they do not consider the difference of income necessarily unjust. To the law, they credit the function not of fixing ends or contents, but only the function of offering the economic agents the constraints which must be obeyed in the market. This idea of a juridical order understood as a system to provide the higher efficiency which is possible is not compatible with a function of creating norms to interfere in the free circulation of wealth. The progressivity of taxes in Brazil is seen in Brazil by the neoliberals as a way to prevent the free market from developing, and so, from the neoclassical point of view, its consequences are inefficiency and unjustness.

These theories had great importance in the 20th century in Brazil, but alone they do not offer solutions to the problem of progressiveness of taxes and the trade-off between efficiency and equality. The idea of a trade-off is linked with the conception of choice in the economy. The economic agents, according to the economists, must make decisions. In this point of view, efficiency and equality could not be combined at the same time and in a higher level in a system, and consequently the government must decide which of the poles it would benefit, considering also the consequences on the other pole. This conception of trade-off, however, is not unanimous among the economists. Many of them, who were quoted in this research (for instance, Osberg and Ricardo Abramovay) defend the proposition that efficiency and equity can be combined. Amartya Sen, Douglas North and Joseph Stiglitz are other authors who see poverty as a brake to development. Our research was a quest to this harmonic combination between efficiency and equity in the Progressive Land Tax adopted in São Paulo, using this tax at the same time as a mean to reduce poverty and inequality and as an incentive for economic growth.

The solutions presented by the Keynesian or Neoclassic theories value only one of the poles of the trade-off, making us think that there is no way to increase both
of them. In the case of the Land Urban Tax, the government tried to improve equality with no damage to efficiency, making the idea of the trade-off relative. This measure was taken in Sao Paulo in 2001, as a way to redistribute income. Many of the owners of urban lands in Sao Paulo started paying more according to the size of the apartment/house that they had, while others paid less or were exempted from paying this tax so that their lands became tax-free.

Analyzing the data from the government, we verified that the number of people who must pay the taxes decreased, while the amount of money charged and effectively paid increased. This means that there was simultaneously an increase in equality and in efficiency, without damage to other sectors of the economy in São Paulo, according to the Municipality.

The case of São Paulo shows that there is a possible gradation, that there can be conciliation between the two poles of the trade-off, and that the choice between them should not be absolute. It means that an introduction of an equitable mechanism in the tax policy is acceptable if it takes into account some constraints of efficiency, such as the maintenance of the tax income at a level that permits the government to have its policies continue to function. It could not be achieved if the progressivity increased the number of people who do not pay taxes properly, but this did not happen in the case of Sao Paulo.

The debate about the progressive IPTU gained this amount of importance in Brazil because of many historical and theoretical elements. A formalist reaction to this statement would be to say that it happened because of the Brazilian Constitution of 1988, which included instruments that permitted the institutionalization of the progressive IPTU in the cities (the IPTU is a municipal tax). But our project tried to submit this question to a different approach, which is the approach of the materialization of law, a phenomenon that took place in the 20th century.

Max Weber describes the legal system in between the 19th and 20th centuries as a formal system that had as its main function the rationalization of the economic processes by means of an efficient bureaucracy. This “liberal law” was founded in relations between individuals and protected the freedom of markets, assuming that the
distribution of the economic and juridical power in the society was equal. The legal system, then, should only exist to guarantee the existence of Capitalism (a negative function) since the state should interfere only when liberties such as property rights and contract rights are violated. The social, political and economic conflicts that took place in the 20th century transformed this idea since the legal system had to adopt new values and principles, so that the state started to implement positive measures. Also, new sectors of the society started to be represented in governmental decisions – what is called a “process of democratization.” In order to find legitimacy, the government had to consult syndicates, political parties, etc. Law started to be a means of social administration, as the politics demanded that the new values be included in it. This is called the materialization of law.

An example of this process is the idea of the social function of property, a discussion that grew in Brazil in the same context as described by Max Weber. Since the 1930s, the state started to have the role of organizer of the economy, solving the conflicts between two emerging classes: the urban proletarians and the urban bourgeoisie. In this context, in the Constitution of 1946 the social function of property was born, questioning the traditional and individualistic character of property. This idea was repeated and broadened in the Constitutions of 1967 and 1988.

The Constitution of 1988, together with the EC (“amendment act”) number 29, included the idea of implementing the social function of property through the tax system. Taking all of these elements into account, it is possible to assert that the inclusion of the progressive IPTU in our legal system is something that can only be analyzed by taking into account the materialization of law.

When moral principles are involved in the promulgation of a statute, it is impossible to discuss the aspects of this statute without referring to these moral debates. The law, then, has to be analyzed from a political perspective. The formalist comprehension of the legal system is incapable of understanding the political context and the intentions behind something as the progressive IPTU. A law that has behind it

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1 Articles 145, §1, 156 §1, e 182, § 4, II.
an economic or moral rationale must be interpreted in economic or moral terms in order for it to have any functionality.

However, it is very common for the debate about the constitutionality of the progressive IPTU, as referred to above (relating to the contributive capacity and isonomy principle) to ignore these views and instead only include technical questions such as the internal contradiction between norms.

It is obvious that the progressive IPTU was implemented so that individuals who had more expensive property paid more and those who had less expensive ones paid less, in order to distribute the income. This public policy should therefore be discussed with regards to these matters – which were presented in the beginning of this article – so that the materialization of law is considered and recognized as a relevant sociological fact.

When dealing with the possibility of the progressiveness of our Tax on Urban Land or IPTU, Brazilians lawyers and legal scholars usually engage in a quite complex legal debate. Before Constitutional Amendment 29, most of the arguments against it consisted of the idea that since there was no legal provision in the Constitution about a progressive IPTU that considered the value and the localization of the property, it could not be created. But there was a consensus around the idea that a specific kind of progressiveness of the IPTU was possible. It was agreed that property not well utilized would pay more tax, due to the provisions of art.156 and art.182 of the Constitution. This kind of progressiveness was called “time progressiveness” and was related to the principle of social function of the property guaranteed in our Constitution, and was considered to have what our legal scholar named “an extra-fiscal character” -- meaning this extra taxation was related to a certain objective of the State achieved by a punitive taxation and not simply more taxation for State income.

Constitutional amendment 29 modified Article 159 of our Constitution, clearly authorizing the progressive IPTU according to the value of the real state, and also providing for the possibility that the municipalities could create different aliquots upon localization and the way the real state is utilized. The so-called “time
progressiveness” was also maintained. We believe that due to these changes the IPTU now has a role more related to promotion of equality and of distributive justice than it had before. The Brazilian Constitution states that our country should reduce social inequalities in order to achieve development. Since the empirical evidence shows that this progressive tax on urban land can achieve equality gains without reducing efficiency, we see it as something clearly positive.

But there are people who disagree. Most say that the constitutional amendment that introduced the new form of progressiveness is itself unconstitutional because it violates principles that the Constitution says should not be changed under any circumstances, including constitutional reform. The first of these principles is the principle of contributive capacity that, according to these critics, would be a protected individual right. In their view, the IPTU is a kind of tax they call “real tax” (that is, it is related to a “thing,” an immovable property, rather than a personal tax related to a “person”). A real tax, according to them, could not be used to determine how much a person pays in taxes because it is related to a certain and specific property, considered alone, and not to the whole patrimony of the person and its qualities. This would create unequal treatment. The point is that contributive capacity should not be considered and individual rights protected from changes, that there is not a distinction in the Constitution between “real taxes” and “personal taxes” since these are simply a scholarly creation, and even in this case one can argue that there are examples of the so-called “real taxes” graduated according to contributive capacity in Brazil (IPI and ICMS, for example). The possibility of using constitutional norms to promote social equality should not be limited by dubious scholarly classifications such as “real taxes” and “personal taxes.”

Another principle that some critics say was violated by the constitutional amendment is the principle of isonomy or equal treatment. According to these critics, the system of gradual progressiveness that creates bands of value inside which the taxation is different could lead to a situation where a single owner of several properties of small value would pay less than an owner of a single property of great value, a disproportional situation between two people of equivalent patrimony. This specific argument is easy to contest. Most of the municipalities that have created the progressive IPTU put as condition the owner having just one piece of real estate in the
area. Besides that, one can sustain that even if there were no such condition, an owner of several pieces of real estate would rent most of his property, and usually in Brazilian tenancy contracts the tenant is responsible for paying the tax on urban land. Since in most cases the tenant of a piece of real estate of little value is someone with less acquisitive power, the progressiveness would benefit him also.

What we see them is that the current discussion about the progressiveness of the IPTU among Brazilians legal scholars and lawyers does not consider what we believe is its central point: its economic role regarding distributive justice. As discussed earlier, we believe that with this materialization process law starts to regulate more deeply our social, economical and even political life, using legal criteria that are sometimes contradictory because law has internalized social problems. That is why legal discussions should have an inevitable interdisciplinary approach, not only taking into account political, economic and even moral criteria, but also clarifying their uses.

To conclude, we would say that even there is no trade-off between equality and efficiency in the case of the Tax of Urban Land in São Paulo, since there is no zero sum game. But our empirical analysis proved that even if there is no gain in efficiency there is no loss and there is also a clear gain in equality, which is why we maintain that there are good reasons to have this tax be progressive. Our research was also a critique of formal law, which we believe is impermeable to material rationality. Material rationality does not corrupt legal reasoning, but on the contrary gives it what we call “good reasons” to a political decision or a legal decision. In our case we say that the “good reasons” are not little technical discussions such as “real taxes” as opposed to “personal taxes” but arguments of efficiency and of constitutional principles, especially the principle of equality defined in the Brazilian Constitution. Our work had a clear normative character since we sustained that we saw the progressiveness of IPTU as a tool for to put in practice a clear value that we believe is contained in our Constitution. And we also stated that we believe that the objectives of a legal system are not only defined by its laws, but also by the intentions behind the laws, in its structure of values or in what Maccormick called its “essential moral aspiration.” That is why we defended the progressive Tax on Urban Land or progressive IPTU in São Paulo and in Brazil.