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Symposium on Efficiency as a Legal Concern Introduction

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SYMPOSIUM ON EFFICIENCY AS A LEGAL CONCERN

Ever since humanity recognized the need for social order, it has struggled with how to regulate the interaction of individuals. Central to that search has been the question, What is law? For it is law—whether written or unwritten, enforceable in a court or through less formal means—that regulates the interaction of those living in organized society. The laws each society create reflect the values that bind it together and represent that society's own compromise between ideals and the realities of human nature. Thus, the answer a society gives to that question provides a revealing portrait of itself. Our times are no different, and the variety of answers we have as yet proposed present incomplete and contradictory pictures of our self-image. In what is perhaps a first step in defining that image, the economic analysis of law approach has emerged as increasingly dominant among the competing voices.

Basically, economic analysis of law divides into two branches: positive and normative. The first seeks to describe and explain judicial decisions and legal reasoning by employing the conceptual paradigms of decisionmaking and human behavior developed by economic theory. Starting with the assumption that human beings are rational and will therefore seek to maximize their gains and minimize their losses, it declares that for centuries legal decisions have sought, implicitly more often than explicitly, to maximize efficiency by arriving at the arrangement of legal rules that either minimizes the cost of entering into bargains or produces the state of affairs that would have been arrived at had free bargaining been possible. It disclaims any prescriptive theories and professes merely to describe existing patterns of behavior and estimate the costs of a given course of conduct. The normative approach, on the other hand, argues that decisions should be made on the basis of efficiency criteria and seeks to justify an economic approach to

legal and social decisionmaking. For the first two decades of its existence, economic analysis of law focused primarily on exploring and developing the descriptive and explanatory aspects of its theories. While this has continued apace, attention has focused increasingly on the normative justifications for its approach.

The operative definition for economic analysis of law rests on the concept of efficiency. For a long time efficiency was defined simply as the ability to produce more at a lower cost. As economic analysis explored new avenues and sought to bring an increasing number of formerly distinct legal areas within its ambit under a unified analysis, that definition proved too crude. While it provided a convenient standard for approaching such diverse topics as property rules, discrimination, breach of contract, and civil procedure, its simplicity left it open to attack on descriptive grounds. On a normative level, it failed to provide more than the most basic justification for its existence. In addition, whatever moral claims it had rested largely on the strength of utilitarianism, a theory generally viewed as bankrupt. It was in part to flesh out the definition and to firmly anchor the theory on defensible normative grounds that scholars began addressing the justifications for economic analysis of law. This has opened a new debate on the theory's philosophical underpinnings and spurred fresh examinations, albeit often implicitly, of the question what is law.

One of the most salutory features of economic analysis of law has been its joining of formerly discrete disciplines to examine in a more unified way interrelated questions usually viewed as solely within the scope of a single discipline's expertise. In this spirit, the *Hofstra Law Review* has invited some of the nation's leading legal, economic, and philosophic thinkers to explore the positive and normative aspects of efficiency. To further refine the discussion we have asked a number of scholars to critique the symposium in the next issue of the *Review*. The Board of Editors chose to focus on efficiency because it has been at the center of both the new debate and the old working definition. It is our hope that this symposium and the critiques will become a focal point for future discussion. Above all, we hope that the precedent of an interdisciplinary approach to the questions that puzzle society will continue irrespective of the ultimate fate of the economic analysis of law movement.