Economic analysis as a framework for lawyers’ normative reasoning
LL&V §§A-E & F-J // Prof. Garet // Fall, 2015

Roadmaps / review resources as we begin our discussion of economic analysis. These resources also situate economic analysis alongside other frameworks for normative reasoning:

- Collated Handouts #4, “Frameworks for lawyers’ normative reasoning,” pp. 7-9. (Was assigned for class on Tuesday, Sept. 29.)
- Collated Handouts #18, “Review of frameworks for lawyers’ normative reasoning,” pp. 34-39. (Will be assigned for class on Tuesday, Nov. 17.)

1. Positive vs. normative uses of economic analysis. As your reading for today points out, p. 195, economic analysis has two uses: positive (descriptive, explanatory) and normative.
   - We’re mainly interested in the normative use: how economic reasoning helps lawyers and judges frame, analyze, and decide the “should” questions.

2. Normative uses of economic analysis. Economists describe an end-state or desired goal, and seek to maximize attainment of that goal. In popular culture, the goal is often described as “growing the pie.” Economists describe that goal variously as:
   - The greatest benefits net of costs (greatest amount of benefits minus costs);
   - Maximizing the social surplus (the sum of consumer surplus plus producer surplus), or “mutual gain through trade” (sometimes also called “wealth maximization”);
   - Efficiency.

This terminology can be confusing, especially because words such as “wealth” and “efficiency” have other meanings in ordinary language.

3. Conceptions of efficiency (i.e., of the normative goal described in #2 supra). (These concepts are briefly referenced in footnote 1 at the bottom of p. 191.)
   - Pareto-superiority. A Pareto-superior move, aka a Pareto-improving move, makes at least one person better off without making anyone worse off. (This definition begs questions about what is or should be meant by “better off” and “worse off.”) Lawyer-economists try to design legal rules in such a way as to support well-functioning markets, so that participants in those markets can make Pareto-improving transactions with one another. (But many transactions, perhaps most, affect third parties who are not participants in the transaction. Hence economists analyze “externalities,” which we’ll discuss next week.)
   - Kaldor-Hicks efficiency. Adoption of a rule or legal policy is Kaldor-Hicks efficient, even if it generates some winners and some losers, if the gains to the winners are sufficient to enable them (in principle) to compensate the losers. (Kaldor-Hicks does not require compensation to the losers. Other normative principles, however, may require it.) Gains to the winners and losses to the losers are measured, whenever possible, by willingness to pay or willingness to accept, pp. 196-197. The underlying intuition is that social relations are not just a zero-sum game, in which valuable things are transferred from one holder to another. Instead, adoption of intelligent rules or legal policy actually increases the wealth of a society (“grows the pie”).