

THE PURSUIT OF A BIGGER PIE: CAN EVERYONE EXPECT A BIGGER SLICE?

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I. INTRODUCTION

This essay examines and rejects the consent argument, suggested by Professor Richard Posner in this issue,¹ for the assignment of common-law entitlements according to the wealth maximization criterion (WMC).² The greater part of the essay, however, explores a refined argument which seems to be the best argument that can be made for the use of the WMC.

Posner supports any single application of the WMC to a given common-law entitlement. His argument is based on the proposition that any given wealth-maximizing (WM) rule is viewed *ex ante* by all (or almost all) individuals as not worse than any alternative rule. Posner's argument will be refuted simply by demonstrating that, for most common-law rules, his proposition is incorrect: losers, even judged *ex ante*, do exist, and possibly in large numbers.

The refined argument I shall consider supports a policy of consistent application of the WMC to common-law entitlements, but not the adoption of any particular WM rule in isolation. Although individuals may expect such a policy to result in some WM rules which they deem undesirable, it is nevertheless asserted that every individual can expect such a policy to be beneficial (or at least not

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1. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) [hereinafter cited as *Ethical Basis*]. Posner's previous attempt to provide a normative basis for wealth maximization is Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) [hereinafter cited as *Utilitarianism, Economics, and Legal Theory*].

2. See generally sources cited *supra* note 1. The wealth of society is the output of all commodities (tangible and intangible) multiplied by their prices (explicit or shadow). According to the WMC a given change is desirable if it increases social wealth; among the possible assignments of a given entitlement, the one that maximizes wealth should be chosen. The WMC is used as a surrogate for the Kaldor-Hicks criterion. The Kaldor-Hicks criterion judges a given change as desirable if the gainers could hypothetically compensate the losers out of the gains. When a given change increases wealth, then, if prices are not altered by the change, it follows that the gainers can compensate the losers.

damaging) on the whole. Whether indeed everyone can expect a bigger slice from the pursuit of a bigger pie is the subject of my inquiry. My findings are that some groups of individuals may expect to be worse off if a WM policy *as suggested by Posner* is followed. In particular, the bias of the WMC against the poor, which will be demonstrated, suggests that the slice of the poor may well be expected to shrink under that policy.

The ultimate purpose of my inquiry, however, is not to oppose WM rules altogether. I conceive the pursuit of wealth, *appropriately qualified and constrained*, to be normatively appropriate. I further believe that the refined argument to be discussed may ultimately provide the normative basis for such a policy. The objective of my inquiry is therefore to expose the problems that need to be overcome if such an argument is to be accepted. These problems, which require the rejection of the policy advocated by Posner, should guide us in qualifying and limiting the application of the WMC, so as to make use of that criterion just and desirable.

My examination of the refined argument focuses on two issues. The first issue is the non-neutrality of the WMC. When entitlements are allocated according to the WMC, poor individuals are in general less likely than wealthy individuals to be on the winning side. The bias arising from the use of willingness to pay (rather than asking price) in Posner's version of the WMC is already well-known.³ The major original contribution of this essay is, I think, the demonstration that, even ignoring the use of offer prices, and however small the value of the entitlement to be assigned, the WMC is inherently biased in favor of wealthier individuals. The bias of the WMC against the relatively poor, I suggest, is deeper and more pervasive than has been previously recognized.

The second problem to which I wish to draw attention is that an argument asserting that nobody is expected to be worse off under a WM policy must refer to a baseline—that is, to some standard of comparison. Therefore, such argument must relate to an underlying political theory which provides the necessary baseline. I examine the effect of a WM policy in comparison to two baselines—one which I suggest is congenial to Posner's approach, and, the other, the present assignment of common-law entitlements. I conceive neither of these baselines as normatively appro-

3. See, e.g., Baker, *The Ideology of the Economic Analysis of Law*, 5 PHILOSOPHY & PUB. AFF. 3 (1975).

priate, and that is why I consider my present inquiry to be an incomplete one.

The paper develops as follows. Section II refutes the proposition on which Posner's consent argument is based. Sections III-V prepare the ground for the examination of the refined argument. Section III describes the two causes of the non-neutrality of the WMC. Section IV analyzes the two corresponding kinds of indeterminacy. It explains why the WM assignment of any entitlement, however small its value, may well depend on the initial assignment of entitlements, and clarifies the case of fundamental rights. Section V describes Posner's consent argument, appraises the different objections to it, and presents the refined argument. The refined argument is then examined in Section VI.

II. SINGLE APPLICATION OF THE WMC

Posner's consent argument is based on his assertion that ex ante all (or almost all) individuals judge the WM assignment of any given common-law entitlement as not worse than any alternative assignment.⁴ Posner makes his claim with reference to the example of automobile accident liability. I will examine the validity of his proposition first with regard to that specific example and then with regard to common-law entitlements in general.

A. *Strict Liability v. Negligence*

The negligence rule differs from the strict liability (SL) one in that the costs of a non-negligent accident are borne by the pedestrian rather than by the driver. Therefore under the negligence rule the costs of walking will be higher and those of driving lower than under SL. I assume, following Posner, that negligence is the WM rule—that is, that the sum of accident costs and accident avoidance costs is lower under that rule.⁵

Consider a move from SL to negligence. Such a move increases total walking costs, though by less (according to our assumption) than it reduces total driving costs. The increase in walking costs that a pedestrian faces ex ante, before he walks, is composed of the expected costs of non-negligent accidents, and his risk bearing costs, if such exist.⁶ Posner claims that judged ex ante

4. The nature of Posner's consent argument and the general objections to it are dealt with in section V *infra*.

5. Accident costs are composed of the expected accident costs, and the risk bearing costs, if such exist.

6. If the pedestrian does not insure himself, he will ex post suffer either a

pedestrians are fully compensated for the increase they face in walking costs by the reduction in driving costs.

What information do individuals have in the position which Posner refers to as *ex ante*? Obviously individuals cannot know whether they will be victims of a non-negligent accident. Posner allows them, however, to know the extent of their driving and walking activities.⁷ Take individuals who do not drive or who drive very little. How are they to be compensated *ex ante* for the increase in walking costs they face as a result of a move to a negligence rule? Posner suggests that "they use other modes of transportation—taxis or buses or subways . . . whose costs would be by assumption higher under a system of strict liability, and those costs, or a large fraction of them at least, would be borne by the users."⁸ This answer is not satisfactory.

Individuals indeed may consume driving activity, as well as walking activity, indirectly. Therefore, evaluating the effect of a given rule on an individual, his *total* consumption of the two activities, including the indirect components,⁹ should be considered. I grant Posner that all individuals consume both driving and walking and thus bear costs of both activities. The thrust of the matter is, however, that individuals vary in the proportion they consume driving and walking. Assume, for example, that the same number of driving and walking hours are consumed in the economy, and that a move from SL to negligence reduces the cost of a driving hour by \$5 and increases that of a walking hour by \$4. Any individual who consumes, both directly and indirectly, driving hours in a number less than four-fifths of his consumed walking hours is worse off, judged *ex ante*, under a negligence regime than under an SL one. The negligence rule thus does not enjoy the *ex ante* consent of such individuals. It is quite possible that the number of these individuals is large, and indeed they may even be a majority in the population.

greater loss or no loss at all, depending on whether or not he is a victim of a non-negligent accident. If he is insured, his *ex post* and *ex ante* costs are identical. Of course, *ex post*, those pedestrians who are not insured, and who are victims of a non-negligent accident, will be worse off under negligence than under SL. Our focus, however, is on the *ex ante* situation.

7. See section V-A *infra*. Posner's *ex ante* situation is an actual situation that existed at some point in time before the occurrence of the accidents to which the negligence rule is to apply.

8. Posner, *Ethical Basis*, *supra* note 1, at 495.

9. The indirect consumption is to be computed along the methods developed by Leontief. See V. LEONTIEF, *THE STRUCTURE OF THE AMERICAN ECONOMY 1919-1939* (2d ed. 1951).

One notable factor which affects the number of nonconsenting individuals is the ratio of the efficiency gains to the distributional transfer between the two activities. The efficiency gains are the excess of the reduction in driving costs over the increase in walking costs. The distributional transfer is the increase in walking costs—it is the component of the reduction in driving costs which does not reflect any social gain but a mere transfer between the two activities. The greater the ratio of the efficiency gains to the distributional transfer, the greater the asymmetry in consumption in favor of the walking activity which is necessary to make an individual worse off, judged *ex ante*, under negligence, and the smaller the number of nonconsenting individuals. Some lack of consent is likely to exist even if the efficiency gains are very large in relation to the distributional transfer. However, if the sole assumption is that negligence is the WM rule¹⁰—that is, that efficiency gains exist—the scope of *ex ante* objection to negligence may be very large indeed.

B. Common Law Rules in General

The question in the automobile accidents example was to which activity—driving or walking—should an entitlement be assigned. The choice between SL and negligence is representative of all situations in which a given entitlement has to be allocated between two parties (not in contractual relations) engaged in two activities. Activity here should be broadly interpreted to include also passive existence at a given location and time. One major group of such situations is those cases (the accidents example one of them) where externality exists between two activities. The entitlement with regard to that externality is then to be allocated between the two activities.¹¹

In allocating an entitlement between two parties engaged in two activities, the WMC dictates assignment to the party who ascribes the higher monetary valuation to the entitlement.¹² Such assignment maximizes the total value of the two activities. The lesson of my analysis of the automobile accidents example is, however,

10. At the present state of economic analysis of law, granting that the WM rule is identified, we are far from being able to estimate empirically the ratio between the efficiency gains and the distributional transfer. Researchers mainly seek, and often unsuccessfully, to identify the WM rule.

11. Since Coase's seminal article, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), the paradigm of externality between two activities has been very widely used in the economic analysis of the common law.

12. See, e.g., R. POSNER, *ECONOMIC ANALYSIS OF LAW* 34-39 (2d ed. 1977).

that whenever individuals vary in the proportion in which they consume the two activities, the WM assignment, even judged *ex ante*, creates losers as well as gainers.

The automobile accidents example seems to be one of the best Posner could find to test his proposition. Both driving and walking are widely used activities; thus presumably all individuals benefit, at least indirectly, from a reduction in driving costs. Nevertheless, I have demonstrated the likely lack of consent to the WM rule even in that example. The existence of *ex ante* losers, possibly in large numbers, is more apparent when one or both activities are consumed only, or mainly, by a limited part of the population. This is the case with regard to many common-law entitlements.¹³ The greater the diversity in the proportions of consumption of the two activities among individuals, and the smaller the efficiency gains relative to the distributional transfer between the two activities, then the greater the scope of *ex ante* objection to the WM rule.¹⁴

The only significant group of situations in which WM rules may be based on the *ex ante* consent of all parties involved is those situations where the parties are in contractual relations. The use of the WM rule increases the total pie available to the parties, a pie which they share in the contract between them.¹⁵ At the stage of entering the contract, both parties usually benefit from an increase in the total pie available for negotiations, and therefore at this stage they will usually both consent to WM rules to govern their future relations. The mechanism which enables both parties to enjoy a greater pie is the negotiation of the contract.

Posner's claim, in the second example he brings, that both (rich) landlords and (poor) tenants may be said to have consented to a rule enforcing leases¹⁶ is thus, for most circumstances, correct. He cannot, however, generalize from this example, as he does,¹⁷ to

13. See, e.g., *Rodgers v. Elliott*, 146 Mass. 349, 15 N.E. 768 (1888) (person is hurt, because of his uncommon sensitivity, from the ringing of a bell); *Fletcher v. City of Aberdeen*, 54 Wash. 2d 174, 338 P.2d 743 (1959) (blind man falls, because of his blindness, into an excavation).

14. In the paradigm of externality between two activities, the distinction between *ex ante* and *ex post* position exists only when the externality is stochastic. (E.g.,—a given pedestrian may or may not be a victim of an accident.) Where the externality is deterministic, the mere existence of litigation—that is, the lack of *ex post* consent—is *prima facie* proof of the lack of *ex ante* consent.

15. See, e.g., Kronman, *Specific Performance*, 45 U. CHI. L. REV. 341 (1978); Posner and Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83 (1977).

16. Posner, *Ethical Basis*, *supra* note 1, at 500.

17. *Id.*

situations where the parties are not in contractual relations. In these situations there is no mechanism which enables all parties to benefit, even judged *ex ante*, from the bigger pie of the WM rule.

* * *

I exclude from now on the assignment of entitlements between parties in contractual relations from the scope of my discussion of the consent argument. For these entitlements, the application of the WMC may well be appropriate. Limiting my analysis to entitlements between parties who are not in contractual relations, I can proceed on the basis of the proposition that the application of the WMC to a given entitlement is likely to create *ex ante* losers as well as gainers.

At this stage we can already reject Posner's positive theory—that is, his explanation for judges adopting, as he suggests they do, WM rules. I do not accept Posner's claim that judicial decisions can best be understood as a single-minded (possibly unconscious) pursuit of wealth maximization. Nevertheless, granting the validity of Posner's descriptive claim, the interest group theory set by him¹⁸ cannot explain such pattern. His explanation is based on the proposition that “[the] distributive neutrality [of a WM rule] operates to reduce potential opposition,”¹⁹ and we have found this distributional neutrality to be missing.

The concern of this paper is, however, with the normative claim of wealth maximization. As far as such claim is based on *ex ante* consent to the application of the WMC to any given common-law entitlement, which is the argument proposed by Posner, it has been refuted. Most of the rest of this paper will be devoted to the exploration and consequent refutation of a refined argument: that though the application of the WMC to a single given entitlement cannot be based on *ex ante* consent, there is such consent to a *policy* of consistent application of the WMC to common-law entitlements.

III. THE NON-NEUTRALITY OF THE WMC

A. *The Paradigmatic Situation*

It has been demonstrated in the previous section that the application of the WMC to a given entitlement creates losers as well as gainers. In this section I will show that the WMC is not neutral:

18. *Id.* at 502-06.

19. *Id.* at 505.

some individuals are more likely than others to be on the losing rather than on the winning side. In particular, I will propose that the WMC is biased against the poor and in favor of the wealthy.

I will examine the following paradigmatic situation. The WMC is employed to decide whether an entitlement *X* is to be assigned to party *A* (rule *A*) or to Party *B* (rule *B*). *A* and *B* may, of course, represent classes of parties similarly situated.

It will be helpful in the following discussion to distinguish between consumers and producers—that is, between a party which uses the entitlement in a consumptive activity and a party which uses it in a productive activity. It is, of course, possible for an individual to make both consumptive and productive use of a given entitlement (*e.g.*, the entitlement to his own labor). I will assume, however, for simplicity and without loss of generality, that neither party *A* nor party *B* is acting in the dual capacity of consumer and producer.

A consumer is necessarily an individual; consumptive activity is that which directly enhances his utility. A party who is a consumer represents all the individuals who engage in the corresponding consumptive activity using the considered entitlement. A producer may be a sole proprietorship (when the productive activity is performed by an individual working on his own), a partnership, or a corporation. The producer can be viewed as a firm, and the sole proprietor, the partners, or the shareholders will be referred to as the owners of the producing firm. The activity of the firm is aimed at producing dollars. The gain of a producer from being granted an entitlement will be transferred to (and will eventually enhance the utility of) two groups of individuals: the owners of the producing firm and its customers. The allocation of such a gain between these two groups depends on the characteristics of the market for the producer's output. Therefore, considering the assignment of an entitlement to a party which is a producing firm, the party should be viewed as representing in some proportion the owners of the producing firm and its customers.

I assume, for simplicity and without loss of generality for the arguments to follow, that individuals may be represented by party *A* or *B*, but are not and do not expect to be represented by both parties. Consequently, the choice of rule *A* over rule *B* makes all individuals represented by party *A* better off and all individuals represented by party *B* worse off. The case with regard to the choice of rule *B* over rule *A* is parallel.

The three different forms, resulting from the consumer/producer distinction, which the paradigmatic situation may take, and the nature of the inquiry into the neutrality of the WMC, can be clarified by the following example. In the state of *Economia*, four activities take place in the lands of the Wealth Valley: soybean growing, mink breeding, picnicking, and horseback riding. There are two classes of individuals in *Economia*—a rich class *A* and a poor class *B*. Mink breeding and horseback riding are consumed solely by individuals of type *A*, while soybeans and picnicking are consumed only by individuals of type *B*. Unfortunately, not all goes well in the Wealth Valley. Minks often escape, eat the soybeans, and bite the picnicking crowd. The horses trample the soybeans and frighten the picnickers.

Four entitlements, one with regard to each of the described externalities, need to be allocated between: (1) horseback riding and picnicking (consumer v. consumer), (2) horseback riding and soybean growing (consumer v. producer), (3) picnicking and mink breeding (consumer v. producer), and (4) mink breeding and soybean growing (producer v. producer). Imagine now that the judges of *Economia* decide cases according to the WMC. At the end of this section we will be able to make, on the basis of the information described, an educated guess regarding the likely assignment of the four entitlements by the WMC.

B. *The Use of Offer Prices*

Posner's formulation of the WMC employs offer rather than asking prices—that is, the amount a party will be willing to pay for a given entitlement rather than the amount the party will be asking for the entitlement if it is initially assigned to him. This fact has attracted the attention and criticism of many commentators.²⁰

As regards a consumer, his offer price for a given entitlement may well be smaller than his asking price due to a "wealth effect." The consumer's wealth is greater with the entitlement than without it—therefore his marginal utility of income may be smaller and, consequently, the monetary valuation he ascribes to the entitlement may be greater. The size of the "wealth effect" associated with the entitlement increases with its value. The "wealth ef-

20. See, e.g., Baker, *supra* note 3; Dworkin, *Is Wealth a Value?*, 9 J. LEG. STUD. 191 (1980). Baker discusses in detail the bias against the poor created by the use of offer prices. Much of this subsection is a summary of his argument.

fect" can be ignored when the value of the entitlement to the consumer is very small. As regards a producer, his monetary valuation of a given entitlement depends only on the prices of the producer's output and inputs. Therefore, as is the case in most situations, when the allocation of the entitlement does not significantly affect the price system, the producer's asking and offer prices may be treated for practical purposes as identical.²¹

Recently Kelman proposed another reason, in addition to "wealth effects," for divergence between offer and asking prices of consumers, a cause which may have an impact even with regard to entitlements of insignificant value.²² Kelman suggests that consumers, but not producers, treat differently "opportunity cost income" and "realized income": a consumer who retains an entitlement for which he could receive money (opportunity cost income) *does not feel* as if he has spent actual money (realized income) for that entitlement.²³

Whenever one of the parties *A* and *B*, between which the entitlement is to be allocated, is a consumer, the use of offer prices may thus affect the assignment dictated by the WMC. This effect is not neutral; it is biased against the poor.

Assume first that both *A* and *B* are consumers. The use of offer rather than asking prices may well reduce the monetary valuations of both parties. Baker suggests, however, that under very plausible assumptions the wealth effect, when such effect exists, is likely to be smaller for the wealthier consumer.²⁴ That is because for any given monetary valuation of the entitlement, the proportional change in wealth which the entitlement comprises decreases as the consumer's wealth increases. Consequently, if one of the consumers, say *A*, is wealthier, he is advantaged by the use of offer prices—his chance to have the entitlement assigned to him is improved.

Assume now that only one of the parties, say *B*, is a consumer, while the other, *A*, is a producer. The use of offer prices

21. See Baker, *supra* note 3, at 15.

22. Kelman, *Consumption Theory, Production Theory, and Theology in the Coase Theorem*, 52 S. CALIF. L. REV. 669 (1979).

23. Kelman brings the following example of the phenomenon he suggests. A consumer, for whom \$50 composes only a marginal increment to wealth, buys a new color television and decides to keep his old set for which he could realize, net of transaction costs, \$50. If his old television were destroyed, he would not incur (including transaction costs) \$50 for a new television. *Id.* at 681.

24. Baker, *supra* note 3, at 17-18.

may well reduce the consumer's monetary valuation but not that of the producer, thus giving the latter an advantage. The bias in favor of producers is in turn translated into a bias against the poor. First, as has been explained above, the monetary valuations of wealthy consumers are likely to be reduced by the use of offer prices to a lesser extent than those of poor consumers. Second, part of the producer's gain is materialized by the owners of the producing firm, and wealthy individuals have a disproportionate share of the ownership of productive assets. To sum up, the use of offer prices benefits producers at the expense of consumers; wealthy individuals are likely to contribute a smaller than proportionate share of the consumers' losses, and to receive a larger than proportionate share of the producers' gains.

One could try to avoid or limit the bias resulting from the use of offer prices. First, the WMC can be reformulated so as to employ asking prices. The choice between offer prices and asking prices is indeed arbitrary: the rich prefer the use of the first, the poor the use of the latter. Thus, it can be argued that the use of asking prices creates a bias against the wealthy (although such a bias may be tolerated or even desired by some political theories). Alternatively, the problem can be avoided by limiting the scope of the WMC—restricting it, as Dworkin suggests,²⁵ to those entitlements where both tests—the one employing offer prices as well as that utilizing asking prices—yield the same result. The rationale behind such a restriction is that only if both tests yield the same assignment is it free from the danger of being the result of an arbitrary and biased choice. Posner's choice of offer prices for his formulation of the WMC is rooted in his wish to deny any weight to the preferences of individuals who have no money,²⁶ a purpose which we will find to have no justification.²⁷

However, even when the problem of divergence between offer and asking prices can be legitimately ignored, either in the context of entitlements with small value, or because asking prices are taken into account in one of the two ways described above, the WMC does not prove to be a neutral criterion. As the following subsection shows, there is in the WMC, even ignoring the biases arising from the use of offer prices, a deeper, inherent, and unavoidable bias against the poor.

25. Dworkin, *supra* note 20, at 192.

26. See, e.g., Posner, *Ethical Basis*, *supra* note 1, at 499.

27. See section VI-C *infra*.

C. *The Use of Monetary Valuations*

Applying the WMC, we compute the outcome of a hypothetical auction, in which the parties compete for the considered entitlement. The WMC assigns the entitlement to the party with the higher bid. The parties' monetary valuations are used only to compare the values attached by the parties to the entitlement. These monetary valuations do not reflect any actual payment—the WMC does not require the winning party to actually pay his bid. I propose that the use of monetary valuations, in itself, creates a bias against the poor.

I will assume in the arguments to follow that the parties' asking and offer prices can be considered for practical purposes as identical—that is, that the value of the entitlement is sufficiently small. These circumstances are assumed in order to examine the bias created by the use of monetary valuations in the absence of, and thus in isolation from, the biasing impact of the use of offer prices. When this assumption does not hold, *both* biases exist and work against the poor.

Consider first the situation in which both *A* and *B* are consumers and that one of them, say *A*, is wealthier. I will show that it can be inferred from the mere wealth inequality that the entitlement is more likely to be assigned by the WMC to *A* than to *B*.

I first examine the way in which the monetary valuation ascribed by a model individual *E* to the entitlement *X* (that is, the number of dollars he deems as equivalent to *X*) is affected by an increase in *E*'s wealth. *E*'s monetary valuation of *X* is his rate of substitution between *X* and dollars—that is, between *X* and the composite commodity which is represented by money. Normally we can expect the assumption of diminishing marginal rate of substitution—a basic and empirically supported assumption in economic theory²⁸—to hold for the entitlement *X* and the composite commodity "money." Therefore, an increase in *E*'s wealth increases the number of dollars he is willing to substitute for the entitlement *X*.

Alternatively, rather than using the language of rate of substitution, the argument may be presented using that of marginal utility of income.²⁹ The marginal utility of income of an individual is

28. See, e.g., J. HICKS, *VALUE AND CAPITAL* ch. I (1939).

29. The concept of utility plays, in this argument, merely an heuristic role in comparing the benefits of *one* individual from *X* and from money. There is therefore no need to assume that utility, or marginal changes in it, is measurable (even in principle), or comparable among individuals.

the utility he derives from \$1, and it is conceived to be, in general, declining when the individual's wealth increases.³⁰ E 's monetary valuation of X is the utility he derives from X , divided by his marginal utility of income. An increase in E 's wealth decreases his marginal utility of income and therefore, assuming that the utility he derives from X is not (or not significantly) diminished, increases his monetary valuation of X .

Thus the monetary valuation which a given consumer (with some given preferences) ascribes to the entitlement X can normally be expected to increase when his wealth increases. Moreover, the greater the increase in his wealth, the greater the expected increase in that monetary valuation. We can now return to the allocation of X between the consumers A and B , A being the wealthier one. If A and B have the same preferences then (since A can be viewed as B with an increased wealth) A 's monetary valuation of X , P_A , will exceed that of B , P_B . The greater the wealth inequality, the greater the excess of P_A over P_B .

As A and B are different individuals and may differ in their preferences, P_B may still exceed P_A if B 's preferences for X are sufficiently stronger than those of A . Individuals do vary in their preferences. I assume, however, that individuals' preferences for X are distributed independently of, or at least not negatively correlated with, their wealth. Consequently, though it is possible for P_B to exceed P_A , it is nevertheless more likely that P_A will exceed P_B , and therefore that the entitlement X will be assigned by the WMC to A . Moreover, the greater the wealth inequality between A and B , the greater the likelihood of P_A exceeding P_B , and the greater the expected excess of P_A over P_B .

The described bias becomes apparent where there is great inequality in wealth. Assume that B has no or extremely little wealth, while A is of average wealth. Assume also that the WMC uses asking prices so that B 's lack of funds does not preclude him from ascribing a monetary valuation to the entitlement. The preceding analysis makes it clear that most entitlements are extremely unlikely to be assigned by the WMC to B . B 's marginal utility of income is very large. A small sum will enhance B 's utility greatly—it may, for example, prevent starvation—and hence it will be preferred by B to most entitlements. Since B is ready to sell most

30. "Most economists accept the principle of diminishing marginal utility of income as a theoretically plausible and empirically supported description of the individual's preference function." Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 1, at 131.

entitlements for a very small amount, none of these entitlements will be assigned to him by the WMC (nor, of course, will he receive his asking price).

Consider now the situation in which either party or both parties are producers. The monetary valuation a producer ascribes to the entitlement depends on the customers' monetary valuations of the producer's output. The customers' monetary valuations depend in turn on their wealth in the way that has been described. Part of the producer's gain from being granted the entitlement may, as has been explained, reach his customers. To that extent, assigning the entitlement to the producer is indeed granting it to the customers' consumptive activity. Thus a conflict between a producer and a consumer, or between two producers, can be translated, at least in part, into a conflict between two classes of consumers. I have already shown that the WMC is biased against the poor when allocating an entitlement between two consumptive activities.

This concludes the demonstration of the bias against the poor inherent in the WMC. We may now come back to our Wealth Valley example.³¹ It is clear from the analysis of this subsection that the WMC will be biased in favor of the rich class *A*—that is, each of the considered entitlements is likely to be assigned by the WMC to the mink breeding or horseback riding activities rather than to those of soybean growing and picnicking. Can the application of the WMC to those entitlements be then based on the consent of the individuals of class *B*? I shall return to this question in section VI.

IV. THE INDETERMINACY OF THE WMC

A. *Self-Indeterminacy and General Indeterminacy*

The WMC may well be indeterminate with regard to any given entitlement, unless it is accompanied by some presumption about the initial assignment of entitlements on the background of which it is applied. By indeterminacy I mean that the WMC will yield different results when applied to some pair of different initial assignments.³² By initial assignment of entitlements I refer to

31. See p. 679 *supra*.

32. The proposition about the indeterminacy of the WMC is equivalent to the proposition that the allocation evolving in a no transaction costs situation (allocation which is Pareto efficient by definition) may vary for different initial distributions of entitlements. These propositions are equivalent since the WMC dictates assigning a given entitlement to the party who would hold it in the absence of transaction costs.

all entitlements—both common-law and non-common-law entitlements.³³ The presumption that has to be made in order to eliminate the indeterminacy of the WMC with regard to a given entitlement need not accurately specify the initial assignment. It may merely limit the form the initial assignment may take—that is, restrict the set of possible initial assignments so that the result of the WMC will be the same for every initial assignment in that set.³⁴

1. *Self-Indeterminacy*—The broad scope of the indeterminacy of the WMC may best be understood by distinguishing between two ways in which the WMC may be indeterminate with regard to a given entitlement *X*. The distinction is based on the kind of presumption that is necessary to eliminate the indeterminacy.

The first kind of indeterminacy, call it self-indeterminacy, is where the initial assignment of *X* *itself* needs to be presumed. That is, two initial assignments that differ only in the assignment of *X* lead to different results of the WMC with regard to *X*. This is the well-known “Scitovsky Paradox.”³⁵ It is likely to appear only when the value of the entitlement *X* is significant. It is this kind of indeterminacy on which the debate focused.³⁶ The dispute was not so much about the possible existence of self-indeterminacy as about the scope of this problem. Posner conceded that “it is theoretically possible that the initial assignment of a good might determine its ultimate assignment . . . especially where the good was a very large part of the individual’s wealth,” but contended, however, that this is a rare or even unrealistic phenomenon.³⁷

2. *General Indeterminacy*—Leaving open the question of the pervasiveness of self-indeterminacy, I wish to point out that there is an additional kind of indeterminacy that was overlooked in our

33. The distinction between common-law and non-common-law entitlements is discussed in section VI-A *infra*.

34. Thus entitlements may vary in the degree of indeterminacy of the WMC with regard to them—that is, in the extent to which the set of possible initial assignments has to be restricted in order to make the WMC determinate with regard to the given entitlement.

35. Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77 (1941).

36. See, e.g., Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 519 (1980); Dworkin, *supra* note 20, at 192; Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 240-41 (1980); Posner, *Ethical Basis*, *supra* note 1, at 500-02; Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 1, at 108; Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 648-49 (1980).

37. Posner, *The Value of Wealth: A Comment on Dworkin and Kronman*, 9 J. LEGAL STUD. 243, 246 (1980).

debate. Take a given entitlement X which is of small or even marginal value so that self-indeterminacy is highly unlikely to take place. The WM allocation of X is still likely to depend on the presumed initial assignment, though that of *other* entitlements and not that of X itself.

Whatever the value of X , large or marginal, the parties' monetary valuations of X depend, as has been demonstrated in the previous section, on the parties' wealth and on the price system and therefore on the initial assignment as a whole. The impact of the initial assignment on the monetary valuation of a consumer is apparent. Recall that most entitlements will not be assigned to a given consumer who is very poor, and note that there is an initial assignment in which he is in that condition (say, one in which no entitlement is assigned to him). The initial assignment also shapes the monetary valuation of a producer, though in a more subtle way. The producer's monetary valuation depends on the price system, which depends on the initial assignment.

Thus, while the scope of self-indeterminacy is limited, the described second kind of indeterminacy, call it general indeterminacy, gives the presumption employed about the initial assignment a role in the context of almost every entitlement. Indeed, once attention is paid to the problem of general indeterminacy, it is hard to think of any entitlement with regard to which the WMC is determinate.

3. *Non-Neutrality and Indeterminacy*—The reader has presumably already noticed the correspondence between the two sources of bias and the two kinds of indeterminacy that have been delineated in this paper. Generally speaking, bias and indeterminacy are two ways to approach the same phenomenon—the phenomenon that the WM allocation of entitlements is likely to be a function of the presumed initial assignment. Before the presumption about the initial assignment is chosen we view the problem as one of indeterminacy: the result of the WMC depends on that choice. Once the initial assignment is chosen, the WMC obviously becomes determinate. However, the very same problem—that the WMC is a function of the chosen initial assignment—may lead us to regard the WMC as biased (against the group that is disfavored by the choice of initial assignment).

The bias arising from the use of willingness to pay (rather than asking price) corresponds to the problem of self-indeterminacy. They both relate to the possible divergence between offer and asking prices for a given entitlement, and are limited to those

entitlements where the associated wealth effect is sufficiently large to affect their own WM allocation.³⁸

The bias arising from the mere use of monetary valuations and the problem of general indeterminacy, which were introduced in this paper, again correspond to each other. They both reflect the fact that the WM assignment of entitlements depends on the total distribution of wealth—that is, on the initial assignment of entitlements as a whole.

B. *Fundamental Entitlements: Why Dworkin Was Right*

One of Posner's arguments in favor of the WMC was that it assigns fundamental rights (*e.g.*, to life, liberty, labor) in a way which is in accord with widely shared ethical intuitions.³⁹ This proposition led to a debate between Dworkin,⁴⁰ Kronman,⁴¹ and Posner,⁴² regarding the application of the WMC to fundamental entitlements. Dworkin's two related claims were: 1) The WMC is indeterminate with regard to such entitlements, and 2) The application of the WMC to such entitlements may well produce results which contradict our moral beliefs.

The previous subsection has demonstrated that for any given entitlement, even one of marginal value, the result of the WMC is likely to depend on the presumed initial assignment. The indeterminacy of the WMC is particularly obvious with regard to entitlements that are of consumptive use. All this also applies, of course, to those entitlements we view as fundamental. Moreover, since such entitlements are characterized by their significant value, we are likely to have not only general indeterminacy but self-indeterminacy as well—a "Scitovsky Paradox" may well appear.

I nevertheless pay here particular attention to the case of fundamental rights because the Posner-Dworkin debate seems unresolved. I believe this is due to the specific example of slavery on which the debate focused. Dworkin argued that if the entitlement of A's labor is initially assigned to B, the WMC is

38. Recall Dworkin's suggestion, page 681 *supra*, to restrict ourselves to those entitlements where both tests—the one applying offer prices as well as that utilizing asking prices—yield the same result. This means that we limit ourselves to those entitlements where self-indeterminacy, and consequently also the corresponding kind of bias, does not exist.

39. Posner, *Utilitarianism, Economics and Legal Theory*, *supra* note 1, at 125-28.

40. Dworkin, *supra* note 20, at 207-11.

41. Kronman, *supra* note 36, at 240-41.

42. Posner, *Ethical Basis*, *supra* note 1, at 500-02.

likely to maintain this state of slavery. Posner responded that A's willingness to pay for his labor (based on his ability to borrow against his future labor income) will be still greater than B's. The entitlement to A's labor is of both consumptive and productive use to A, and only of productive use to B. Posner indeed asserted that the maximal productive value of A's labor is greater when he is free than under slavery. Thus the debate remained undecided, depending on disputed factual assertions. Posner, conceding that "the theoretical possibility exists that efficiency might dictate slavery or some other monstrous right assignment," insisted that "it is difficult to give examples where this would actually happen," and concluded that "it is possible to deduce a structure of rights congruent with our ethical intuitions from the wealth maximization premise."⁴³

The invalidity of Posner's position becomes immediately apparent if we examine a fundamental entitlement which is solely of consumptive use. Take, for instance, an example of fundamental entitlement suggested by Posner himself⁴⁴—the right to determine one's sexual partners. Consider an initial assignment in which Agatha is poor, while Sir George, who is very attracted to her, is rich. Assume that Sir George is initially assigned an entitlement to Agatha's sexual companionship. Obviously, the WMC is very likely to retain this state, generally viewed as unacceptable. For one thing, Agatha's willingness to pay is necessarily very limited since borrowing is not possible—the entitlement is of consumptive use and will not produce dollars to repay the loan.

It is clear that for every fundamental entitlement which is solely or mainly of consumptive use, the possibility of the WMC assigning it in conflict with our moral intuition is very real indeed. The entitlement will not be assigned to the party who should hold it according to our moral intuition if he is very poor in the presumed initial wealth distribution.

V. THE CONSENT ARGUMENT

A. *Posner's Consent Argument*

The position that Posner held at first⁴⁵ was that a wealth increasing change is just and desirable in itself—a bigger pie is

43. *Id.* at 502.

44. Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 1, at 125.

45. *See generally id.*

WM assignment, even judged *ex ante*, does create losers, so that proposition I is not valid.

Indeed Posner acknowledges that a WM rule does not compensate *ex ante* *all* individuals.⁵⁴ His formulation of proposition I would assert only that *most*, not necessarily all, individuals judge *ex ante* a WM rule as no worse than any alternative rule. However, if proposition I is thus formulated, it seems to me that proposition II cannot be established. I see no plausible way to defend by a consent argument a WM rule on the ground that *ex ante* the losers are fewer in number than the gainers. At any rate, it has been pointed out in section II that the number of *ex ante* losers from a WM rule may well be large. Therefore, I can abstract from the question whether, for the sake of justifying the adoption of a WM rule, the existence of few losers is as good as that of none.

3. *Proposition II*—Having rejected proposition I, Posner's consent argument can be dismissed. I shall, however, consider proposition II in order to defend it, in part, against Dworkin's criticism.⁵⁵ My purpose in doing so is to prepare the ground for the refined consent argument. To examine proposition II, I assume that proposition I is correct.

Assume that the negligence rule is *now* found to be the WM rule for automobile accidents. It then seems indisputably right to adopt the following rule: the negligence rule will be applied to *future* accidents. Given proposition I, no one is made worse off by establishing such a rule. The adoption of such a rule therefore can be based on both consent and utilitarian grounds. What is more problematic is the choice of rule for past accidents. At present there are pending before our courts claims regarding accidents from, say, the last ten years, and more such claims may still be submitted. Ten years ago it would have been right to adopt the negligence rule for those (then considered future) accidents. This, however, was not done. Would we, nevertheless, be right in now adopting the negligence rule for past accidents, although there is no *present* consent for that? Dworkin answers this question in the negative.

A judge can establish the negligence rule only by stating, in the course of a decision he makes in a case, that rule to be the prevailing law. If the negligence rule is to be adopted now by judicial decision it will therefore apply not only to future accidents but to

54. See Posner, *Ethical Basis*, *supra* note 1, at 495.

55. Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563 (1980).

1. *Difficulties in Identifying a Kaldor-Hicks Improvement*—A recurring objection to the assignment of entitlements according to the WMC is that assertions that a given change is a Kaldor-Hicks (KH) improvement⁴⁸ are often questionable.⁴⁹ As the consent argument presumes that a given change composes a KH improvement, this objection is indeed a preliminary one: it proposes that the existence of the circumstances to which the consent argument applies cannot be adequately verified.

Simplifying assumptions are usually necessary for the economic analysis of the impact of a given change. These assumptions may put in doubt the conclusions of such analysis. Among the factors which are often ignored are: (1) external preferences⁵⁰—that is, preferences not for one's own goods and opportunities,⁵¹ 2) second-best problems,⁵² and 3) modification of prices by the considered change.⁵³

Those problems indeed require great caution when concluding a given change to be a KH improvement. Such problems, however, vary in their magnitude with regard to different common-law rules. A finding that a given change is a KH improvement should thus be regarded as very doubtful in the context of certain rules, but not in that of others. The application of the WMC to those entitlements, with regard to which a KH improvement cannot be verified satisfactorily, may well be inappropriate. However, the dismissal of the WMC altogether is, I think, unwarranted. At any rate, since this paper focuses on the consent argument, I will abstract from the described problem. I will assume that the WM rules considered for adoption do compose a KH improvement over alternative rules.

2. *Proposition I*—My rejection of proposition I and, consequently, of the consent argument, is based on the findings of section II. It has been demonstrated that, for most entitlements, a

48. The WMC is used as a substitute for the Kaldor-Hicks criterion. See note 2 *supra*.

49. This view is represented in this issue by Rizzo, *supra* note 36.

50. The term external preferences is borrowed from Dworkin. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 234 (1978).

51. See, e.g., Rizzo, *supra* note 36.

52. A change which seems to be a KH improvement when considered in a partial equilibrium context may prove not to be so in the general equilibrium framework. See, e.g., E. MISHAN, *COST BENEFIT ANALYSIS* 98-108 (2d ed. 1976).

53. When prices are altered by the examined change, the WMC cannot be used to identify a KH improvement. See Samuelson, *Evaluation of Real National Income*, *OXFORD ECONOMIC PAPERS* 1 (1950).

fied WM rules are adopted. Under a weaker version of the WM policy, and for the sake of my discussion there is no need to distinguish between the two versions, the WM rules are adopted only prospectively.⁵⁹

The argument for the WM policy is based on the following proposition, which can be viewed as a refinement of proposition I in Posner's argument: a WM policy is *ex ante* a Pareto improvement—that is, the adoption of the policy makes nobody (would Posner say only few people?) worse off. The validity of that proposition will be examined in the following section.

To determine whether the adoption of the WM policy makes anybody worse off, a baseline—that is, a standard of comparison—is obviously necessary. If the adoption of the policy is to be based on consent grounds the appropriate baseline is, I suggest, the assignment of common-law entitlements to which individuals are *entitled* according to an underlying political theory. In the following section I will explain the appropriateness of such a baseline, and discuss some of the forms it may arguably take. One form which will be examined is the present assignment of common-law entitlements.

It should be noted that we may also seek to base the adoption of the WM policy on utilitarian grounds. The appropriate baseline for that purpose is presumably the present assignment of common-law entitlements. If the adoption of the policy benefits some individuals and makes none worse off in comparison to the present assignment, then that adoption increases utility and is therefore arguably desirable. The inquiry to follow concerns itself with the consent basis of the WM policy. Nevertheless, the possibility of an utilitarian basis will be tested indirectly, since one of the baselines to be examined is the present assignment of common-law entitlements.

The kind of argument presented above for a WM policy has a long history. The idea of consistently applying some criterion for social changes because the adoption of such policy is to everybody's benefit, notwithstanding the fact that any accepted change may well produce losers, goes back to Edgworth.⁶⁰ Edgworth sought to base the principle of utility on consent grounds, suggesting that a

59. Under a third version of the WM policy, the consistent application of the WMC is limited to future hard cases. That is, prevailing non-WM rules are not to be changed.

60. See F. EDGORTH, *MATHEMATICAL PSYCHICS* 52-56 (1888).

past ones as well (including, of course, the case in which the decision for negligence is made). Dworkin's objection to the use of the WMC by judges can be represented by the two following consecutive propositions: (i) it is not right to adopt *now* the WM rule for *past* accidents, and (ii) the objective of having the WM rule apply to future accidents does not justify its adoption now if the rule will necessarily apply to past accidents as well (even though past accidents will be dealt with only for a limited period).

Even granting Dworkin both his propositions, they do not preclude the use of the WMC, but rather limit the scope of its use and the institutions that may employ it. Dworkin considered the WMC solely as a possible criterion for judges in deciding hard cases.⁵⁶ The concern of this paper is, however, with the assignment of common-law entitlements according to the WMC in general, and not solely with assignment by the courts.⁵⁷ Judges cannot establish a rule which applies only to future accidents, but the legislature can. Dworkin's criticism thus requires, at the most, that the use of the WMC should be restricted to the legislature in adopting forward-looking WM rules. Therefore, his position presumably suggests a greater role for the legislature in shaping the common law, so that the benefits of such rules may be realized.⁵⁸

C. *Refinement: The Argument for a Wealth Maximizing Policy*

The conclusion of the previous subsection is that the most serious obstacle to the use of a WM rule (assuming it has been verified as such), at least prospectively, is the fact that the rule is likely, even judged *ex ante*, to produce losers. The refinement discussed below is an effort to remedy that problem. The idea is simple: the attractive *ex ante* Pareto superiority, which a single WM rule lacks, may exist with regard to a policy of consistent application of the WMC.

The refined consent argument defends the adoption of a policy, to which I will refer as WM policy, but not single applications of that policy. Under one version of the WM policy all common-law entitlements are examined (say, in random order) and identi-

56. "It is, after all, just in such hard cases that we need a theory of adjudication like the theory Posner proposes." *Id.* at 581.

57. Posner has a similar approach. See Posner, *Ethical Basis*, *supra* note 1, at 505-06.

58. Of course, the search for and the consequent identification of a WM rule can be initiated by a hard case. Whatever decision the court reaches in that case, the legislature may adopt the WM rule prospectively.

law, of course, does not administer all entitlements in society. In particular, I wish to point out that the WM policy to be considered does not apply to taxation of labor and capital income, estates, and bequests.⁶⁷

I assume that we are determined, regardless of what the WMC may suggest, not to assign the entitlement to one's labor to any other private party (slavery), but to vest it in the individual himself (subject to possible taxation). Therefore, since such an allocation of the entitlement to one's labor may not be altered by the WMC, that entitlement should not be considered as belonging to the domain of the WM policy. At any rate, granting Posner that the WMC assigns that entitlement in the way we are determined to assign it anyway,⁶⁸ we still have no reason to apply the WMC to other entitlements: such a policy should be defended on its own merit. The described reasoning applies not only to the entitlement to one's labor but also to some other fundamental entitlements. I particularly refer to the entitlement to one's labor because of the major impact it has on the distribution of wealth.

Henceforth I will use the term common-law entitlements, with regard to which the WM policy is considered, as not including the entitlements to individuals' labor and presumably some other fundamental entitlements.⁶⁹ By non-common-law entitlements I will refer to all entitlements which are not common-law entitlements as defined above. The distribution of wealth is determined in large measure by the way in which non-common-law entitlements are administered. For one thing, they include the entitlements to individuals' labor and the tax system, which are the major factors shaping that distribution. As the non-common-law entitlements are not to be allocated by the WM policy, I assume that we have some

67. Indeed, to the extent that taxation has a redistributive goal, the use of the WMC, which does not take into account such an objective, is obviously inappropriate. Consider, for example, a tax aimed solely at redistribution: the WMC will suggest that such tax be eliminated altogether in order to save the redistribution costs.

68. See section IV-B *supra*.

69. Recall that in section II-B *supra*, I already excluded from the scope of common-law entitlements, for the sake of the present discussion, those entitlements with regard to which the WM rule does not create *ex ante* losers. Such WM rules may exist, I suggested, in the context of parties who are in contractual relations. The adoption of any such rule, at least prospectively, may be appropriate on its own merit. However, such a rule may be adopted independently of a WM policy for other entitlements. Therefore, the benefits of such a rule cannot be used to justify that policy. What needs to be examined is thus whether a WM policy for entitlements whose WM assignments do create *ex ante* losers (entitlements which compose the great majority of the common law) is appropriate.

policy of maximizing total utility on each occasion is expected to produce the greatest utility for each individual.⁶¹ The appearance of the KH criterion in this context is associated with Hicks⁶² and Hotelling,⁶³ who advocated the consistent application of that criterion with regard to economic activities. As regards legal rules, the refined consent argument for a WM policy was suggested by Michelman,⁶⁴ and is pointed out by several participants in this issue.⁶⁵ Although Posner does not make this argument, once the likely existence of ex ante losers from any given WM rule is acknowledged, it is a logical extension of his own argument. Indeed the refined consent argument to be discussed is the most plausible one which can be made for a WM common law.

Finally, the considered argument has also had its critics. In particular, I wish to note Little's arguments against the policy advocated by Hicks of consistent application of the KH criterion.⁶⁶ However, the possibility that such a policy is non-neutral and, consequently, that its *expected* impact with regard to some group of individuals is negative, a possibility that will be at the focus of my inquiry, has not, as far as I know, been explored before.

VI. CONSISTENT APPLICATION OF THE WMC

A. *The Policy to be Considered*

Before considering whether consent to the adoption of the WM policy exists, we should specify the following: (1) the set of entitlements to which the policy will apply, and (2) the initial assignment of entitlements to which the WMC is to be applied.

1. *The Entitlements Domain of the Policy*—Posner suggests the application of the WMC to common-law rules. The common

61. Note that the two suggested reasons for the bias of the WMC do not exist with regard to the criterion of maximizing total utility. This criterion, however, as is well known, is inapplicable due to the impossibility of measuring utility.

62. See Hicks, *The Rehabilitation of Consumers' Surplus*, 8 REV. ECON. STUD. 108, 108-16 (1941).

63. See Hotelling, *The General Welfare in Relation to Problems of Taxation and of Railway and Utility Rates*, 6 ECONOMETRICA 242, 242-69 (1938).

64. Michelman, *Microeconomic Appraisal of Constitutional Law: A Methodological Preface*, in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS* (D. Rubinfeld ed. 1979).

65. See Tullock, *Two Kinds of Legal Efficiency*, 8 HOFSTRA L. REV. 659, 664 (1980); Dworkin, *supra* note 55, at 584-90.

66. I. M. D. LITTLE, *CRITIQUE OF WELFARE ECONOMICS*, ch. VI (2d ed. 1957). Little's arguments were applied by John Rawls against Edgworth's position. See J. RAWLS, *A THEORY OF JUSTICE* 170-71 (1971).

entitlements, the WM policy must follow (at least in part) a piecemeal approach. Therefore, the outcome of the policy is affected also by the order in which common-law entitlements are examined and, if dictated by the WMC, reallocated.⁷² To abstract from this problem, I assume that under the WM policy entitlements are examined in a random order.⁷³

B. *The Necessity of a Theory of Underlying Entitlements*

The consent argument for the WM policy is, as has already been suggested, incomplete unless a baseline—that is, the alternative allocation of common-law entitlements individuals face if they do not consent to the adoption of the policy—is specified. First, the baseline is used to deduce the individuals' consent. If the adoption of the policy makes nobody worse off in comparison to the baseline, then, it is argued, everyone would consent to that adoption were he asked, and consent may therefore be inferred. Second, the value we attach to the individuals' consent depends on the alternative with which they are faced if they do not consent. An individual will presumably consent when faced with a baseline in which no entitlement is assigned to him. Such consent, however, may not have much of a normative significance.

It is implicit, I suggest, in the consent argument that individuals have a *right* to reject the WM policy and have instead the baseline. Otherwise, if they did not have such a right, their consent would not have been sought. That is, the baseline used by the consent argument is necessarily one to which individuals are presumed to be entitled.

Therefore, one who advances the consent argument necessarily holds some underlying political theory that provides the baseline to which individuals are entitled if they do not consent to the WM policy. To provide such a baseline, the political theory must be one which acknowledges inviolability of individuals (in contrast, for example, to utilitarian theories). The baseline provided by the political theory will be referred to as the fundamental

72. Every individual will prefer that the WM policy first examine those entitlements which are not presently assigned to him and which may be expected to be reallocated to him by the WMC. That will increase his wealth and therefore enhance his chances of being assigned entitlements that will be examined later on.

73. If the order of examination is not random, then there may be another bias involved in the WM policy, in addition to the two biases that this section will discuss. The treatment of such a bias, however, is beyond the scope of this paper; its possible existence and implications will be dealt with in another paper.

other political theory for their assignment. I also assume that the non-common-law entitlements are allocated at present in accord with that political theory, or, alternatively, that the considered WM policy is to be followed subsequent to their allocation in such a way. Indeed all that the preceding analysis presumes is that our normative inquiry is limited to common-law entitlements—that is, when considering the adoption of the WM policy, the assignment of non-common-law entitlements is not disputed.

2. *The Initial Assignment of Entitlements*—The WM assignment of any given common-law entitlement may well depend, as has been explained above, on the distribution of wealth, which in turn depends on the initial assignment of both common-law and non-common-law entitlements. For practical reasons,⁷⁰ we have no choice but to use the present assignment of entitlements as the initial assignment to which the considered WM policy is to be applied.

The allocation of common-law entitlements that will evolve from the WM policy considered for adoption is thus shaped by the present distribution of wealth. The present distribution of wealth is mainly determined by the allocation of non-common-law entitlements. I assume that these entitlements are administered according to some liberal political theory. All liberal political theories administer the entitlements to individuals' labor and the tax system in a way that results in wealth inequality (although such theories may differ in the extent of this inequality). As regards the present assignment of common-law entitlements, it can mitigate (but presumably not eliminate) or increase the inequality in wealth arising from the allocation of non-common-law entitlements. The allocation of common-law entitlements that the WM policy will produce depends, at any rate, on the overall distribution of wealth and not on its components.⁷¹ Whatever the effect of the present assignment of common-law entitlements on the overall wealth distribution, the overall distribution is presumably an unequal one.

Finally, since the WM assignment of a given common-law entitlement may depend on the allocation of other common-law

70. For most entitlements, it will not be possible to assess the parties' valuations of the entitlement (and therefore the WM assignment of the entitlement) under some hypothetical initial assignment.

71. The present assignment of common law entitlements is of significance, aside from its impact on the overall distribution of wealth, only when it serves as the baseline to which the outcome of the WM policy is to be compared. See section VI-D *infra*.

WMC in an effort to imitate, at least to some satisfactory degree, the allocation that will emerge in the absence of transaction costs if the baseline is adopted. The WM policy assigns every entitlement to the party to whom it is more valuable—that is, the party who would hold it in the absence of transaction costs.⁷⁵ However, unlike exchange, the WM policy does not *directly* compensate a party to whom a given entitlement is assigned in the baseline but not in the allocation produced by the policy. Such a party is to be compensated by the receipt of some entitlements which are assigned in the baseline to some other parties. Whether such a compensation can be expected to be sufficient will be dealt with in the following subsections.

Finally, having found that the consent argument for a WM policy necessarily relates to a baseline provided by an underlying political theory, two consequences immediately follow. First, a WM policy is not necessarily incompatible, as it may seem, with theories which recognize individuals' rights as trumps overriding any considerations of general welfare. On the contrary, if a WM policy, however refined and constrained, is to be adopted on consent grounds (as noted above, a utilitarian basis may also be sought), a rights theory must be presumed.

Second, different political theories may vary in the baselines they provide. Therefore, different versions of the consent argument may exist, differing in the baseline they utilize. The adoption of the WM policy may make nobody worse off in comparison to one baseline, but not to another. Whether one accepts any version of the consent argument depends not only on whether he finds the deduction of consent, given the used baseline, persuasive, but also on whether one shares the conception of individuals' rights repre-

75. The WM policy will assign a model entitlement to the party that will hold it in the absence of transaction costs given the present distribution of wealth. The present distribution of wealth may differ (if the baseline differs from the present allocation of common law entitlements) from the distribution of wealth that would obtain were the baseline adopted. The WM policy may thus assign the entitlement to the party other than the one which would have it if the baseline were adopted and transactions were costless. Recall, however, that the distribution of wealth is mainly determined by non-common-law entitlements, which are assumed to be allocated at present in accord with the political theory we hold regarding them. Therefore, we can assume that the above two wealth distributions are sufficiently similar so that the WMC will give the same result when applied to either of them. Under that assumption the WM policy is bound to produce an overall benefit in comparison to the baseline, and the only question is whether everyone can be expected to benefit from that surplus or at least to be compensated for the entitlements he will lose. If that assumption is not correct, the mere existence of such a surplus is questionable.

or underlying rights individuals have regarding the allocation of common-law entitlements. The underlying rights individuals have may not be to some completely specified allocation of common-law entitlements but rather to some principles to which that allocation should adhere.

The baseline dictated by the underlying political theory may or may not overlap with the present assignment of common-law entitlements. Thus the consent on which the adoption of the WM policy is argued to be based may be actual (albeit unexpressed) or counterfactual—depending on whether the baseline used is the actual present allocation of common-law entitlements or a hypothetical allocation.⁷⁴ In both cases, granting that the baseline utilized is accepted as appropriate (that is, as indeed representing the fundamental rights individuals possess), the consent has a normative significance.

I wish now to describe the way in which the WM policy is expected, according to the consent argument, to produce an allocation of common-law entitlements which is Pareto-superior to the baseline provided by a given underlying political theory.

Assume that common-law entitlements were actually allocated according to the baseline. A given entitlement might well then be assigned (according to the underlying political theory) to the party other than the one to whom the entitlement is more valuable. That is, potential gains from exchange would exist. If such an exchange took place, it would (i) transfer the entitlement to the party to whom it is more valuable, and (ii) fully compensate the initial assignee of the entitlement. If transactions were costless, we would without doubt adopt the baseline. All potential gains from exchange would then be realized by a process of smooth exchanges. Transaction costs, however, do exist, and they either are incurred or inhibit potentially beneficial exchanges from taking place. Thus, exchanges cannot be relied on to fully realize the potential gains from trade in entitlements.

Therefore, it is argued, individuals consent to give up their rights to the baseline and to assign entitlements according to the

74. If the baseline is different from the present assignment of common law entitlements, the consent on which the adoption of the policy is argued to be based is one which would be given in a hypothetical situation. In that hypothetical situation common-law entitlements are allocated in accord with the baseline; non-common-law entitlements are allocated in the same way as at present, since their present allocation is assumed to be in accord with the political theory we hold regarding them.

choose one of the parties *A* and *B* and assign the entitlement to him. For the purpose of the discussion to follow, there is no need to distinguish between the different possible versions of the symmetric baseline. I will therefore assume for simplicity that all common-law entitlements are divisible and that in the symmetric baseline each entitlement is equally divided between the relevant parties.

2. *WM Common Law v. the Symmetric Baseline*—The expected outcome of the WM policy can now be compared to the symmetric baseline. The model entitlement *X*, which in the symmetric baseline is equally divided between the parties *A* and *B*, will be wholly assigned by the WM policy to the party with the higher monetary valuation of the entitlement, say *A*. That is, in comparison to the symmetric baseline, the policy will reallocate *B*'s part of entitlement *X* to *A*. Individuals represented by party *A* are made better off and those represented by party *B* worse off by such a reallocation, and the gains of the first group exceed the losses of the latter. The WM policy will produce such reassignments in comparison to the symmetric baseline with regard to every common-law entitlement.

To examine whether everyone's consent to such a series of reallocations can be deduced, consider first the following analogy. Agatha and Sir George are asked to participate in a multi-round game. In every round one of them will be chosen the winner and will receive \$6, while the other will pay \$4, the deficit being financed by the organization sponsoring the game. Every round will thus increase the combined wealth of Agatha and Sir George by \$2. That, however, does not assure that they both will consent to take part in the game, even ignoring their possible risk aversion. Each person's consent obviously depends on his chance of being the winner in a given round of the game. Suppose, for instance, that the odds of Agatha winning a given round are less than forty percent. Agatha will not agree to participate in the game (even if she is risk-neutral): her *expected* payoff is negative.

Do all individuals who will be affected by a given "round" of the WM policy face a priori the same odds of being on the losing side? The WM policy will be applied with the background of the present distribution of wealth, which is, whenever non-common-law entitlements are administered according to some liberal political theory, unequal. It has been demonstrated that the WMC, when applied in the presence of wealth inequality, is biased against the poor. That is, when affected by the WM policy, poor individu-

sented by that baseline. At any rate, the adoption of the WM policy suggested by Posner does not, as will be shown, compose a Pareto improvement over any plausible baseline.

C. *The Symmetric Baseline*

1. *The Baseline Introduced*—The symmetric baseline described below is, I suggest, the baseline most congruent to Posner's approach. This baseline may also have an appeal to some readers because of its seemingly egalitarian nature. However, I will later point out that the egalitarianism of this baseline is very limited.

How would Posner allocate common-law entitlements if WM rules could not be based on consent? Take the automobile accidents example. Posner supported the negligence rule solely because it was assumed to be the WM rule. Were the WMC dictating assignment of the considered entitlement to pedestrians, Posner would undoubtedly advocate such an allocation. That is, Posner's approach does not have any a priori preference between drivers and pedestrians. Neither drivers nor pedestrians are conceived to have, on the *fundamental* level, a stronger claim for the considered entitlement. In Posner's words: "I assumed that the victim of an accident had some kind of moral claim to compensation even though the injury was not at fault. But one could equally well assume that people have a right not to be hampered in their activities by being made liable for accidents that they could not have prevented at reasonable cost."⁷⁶

The underlying political theory which arises from a generalization of Posner's described approach holds that, for any given common-law entitlement *X*, the parties between which the entitlement is to be allocated, *A* and *B*, have on the fundamental level an equally strong right to that entitlement. The baseline provided by such a political theory will be referred to as the symmetric baseline.

There may be more than one way to assign the given entitlement *X* in accord with the considered political theory. First, assuming *X* is divisible, we may divide it equally between *A* and *B*. Second, assuming that there is more than one entitlement to be allocated between *A* and *B*, we may assign to each party half of those entitlements. The specific entitlements to be allocated to each party will be randomly determined. Third, we may randomly

76. Posner, *Ethical Basis*, *supra* note 1, at 496.

The present allocation of some entitlements, namely those regarding which hard cases may arise, is unknown. Therefore, the SQB may be used as a baseline only for that part of the WM policy which examines entitlements whose present allocation is known, and reallocates them if that is suggested by the WMC. The discussion below is thus limited to a WM policy regarding such entitlements. To examine the application of the WMC to hard cases, obviously a different baseline must be used.

Common-law entitlements may at present be allocated in different ways, and I do not want to restrict the forms that the SQB may take. Nevertheless, as the expected impact of the WM policy relative to the symmetric baseline has been already considered, we can assume that the SQB is asymmetric. The SQB being asymmetric, there is some group of individuals, *A*, who are favored, possibly to different degrees, in the present assignment of common-law entitlements. The present allocation may, for example, systematically favor individuals who maintain some given style of life, or have some given preferences or values.⁷⁹ I hasten to add that if a given individual is more favorably treated in the SQB than another one, it does not follow that he is also wealthier, since the distribution of wealth is mainly determined by non-common-law entitlements.⁸⁰ That is, the extent to which an individual is favored or disfavored in the SQB need not correlate with his ranking in the distribution of wealth. That part of the total wealth which is attributable to common-law entitlements may well be distributed differently from the total wealth.

Assume for the moment that the WMC is not biased against the poor or against any other group. Taking a model entitlement *X* and two individuals affected by it, one belonging to class *A* and one not, we are assuming that both individuals have an equal chance

79. The present allocation may, of course, be biased with regard to more than one characteristic of individuals. Consequently, there may be *some* classes of individuals who receive a more favorable or unfavorable treatment, and a given individual may belong to more than one class. The bias represented by the group *A* should be viewed as an aggregation of all those biases.

80. Suppose, for instance, that the present allocation favors a quiet way of life, or, more specifically, quiet at night. Under such allocation the brain surgeon who is a night-parties fan is poorer than under the symmetric baseline: he will have to spend more of his income if he wants to keep his night habits. In contrast, the unskilled worker who sleeps at night is wealthier under such allocation than under the symmetric baseline. Nevertheless, as long as non-common-law entitlements are allocated in accord with some liberal political theory, the brain surgeon is presumably still at the upper part and the unskilled worker at the lower part of the wealth distribution.

als have, in general, greater chances of being on the losing side than wealthy individuals. In particular, some poor individuals' chances of losing in a given "round" of the WM policy affecting them may well be sufficiently large so that, in comparison to the symmetric baseline, the *expected* impact of that policy on these individuals is negative. To phrase the argument differently, the bias of the WMC against the poor suggests that in the expected allocation under the WM policy poor individuals are assigned, on the average, less than half of the entitlements to which they relate. In particular, some poor individuals may well be better off under the symmetric baseline than under such expected allocation.⁷⁷

The number of poor individuals on whom the *expected* impact of the WM policy is negative depends on the following factors: the ratio between the efficiency gains and the distributional transfer involved in every round of the WM policy, the extent to which the distribution of wealth is unequal, and the frequency with which there is wealth asymmetry between the groups of individuals engaged in two consumptive activities between which an entitlement is to be allocated.

In sum, the position of some groups of poor individuals is worse off under the WM policy than under the symmetric baseline due to the fact that the WMC gives to their preferences less weight than to those of wealthier individuals. Posner makes it plain that he indeed does not wish to give much weight to preferences of poor individuals, at least those who have no wealth at all.⁷⁸ Such an approach, however, cannot be based on the consent of those poor individuals.

D. *The Status Quo Baseline*

I will below examine the expected outcome of the WM policy in comparison to the assignment of common-law entitlements present at the time when the adoption of that policy is considered. I will refer to that standard of comparison as the status quo baseline (SQB). Although the SQB seems to have some initial appeal, I will later argue that the SQB is not an appropriate baseline for the consent argument.

The SQB cannot be specified for all common-law entitlements.

77. Some other poor individuals may still be better off in the expected allocation under the WM policy if the entitlements assigned to them, although fewer in number, are more valuable to them than those they are assigned in the symmetric baseline.

78. See Posner, *Ethical Basis*, *supra* note 1, at 499; see also text accompanying notes 25-27 *supra*.

His chances of being assigned by the WMC entitlements affecting him are smaller than those of others while he is more likely to be a present assignee of those entitlements. Both facts make him a more likely loser from reallocations produced by the WM policy. He gives up a bigger slice of the pie than others do, while his expected slice is smaller than theirs. In contrast, both biases work in favor of an individual who is both wealthy and disfavored by the present allocation. Finally, the two biases mitigate each other to some extent with regard to an individual who is poor, and disfavored in the SQB, or who is wealthy and favored in the SQB. In sum, the expected impact of the WM policy in comparison to the SQB may well be negative with regard to individuals who are poor, or favored by the present allocation, or both.

Is it possible that the two described biases will cancel each other with regard to every individual so that all individuals will have the same chance to lose from WM reallocations of the present assignment? For that to happen the wealth of every individual must correlate with the extent to which he is favored by the present assignment in such a way that his relative advantage (disadvantage) regarding the assignment of entitlements by the WMC will be equal to his relative advantage (disadvantage) with regard to the present assignment. Thus, to argue that the adoption of the WM policy makes nobody worse off in comparison to the SQB, one must presume the present allocation of common-law entitlements to be severely asymmetric in favor of the wealthy and symmetric with regard to any other characteristic of individuals.

E. *Uncertainty and Redistribution*

I wish to briefly describe the way in which the analysis hitherto presented is affected by two additional factors—the existence of uncertainty regarding the allocation that will evolve from the WM policy, and the possibility of redistributing the benefits of that policy.

1. *Uncertainty*—In considering whether consent exists for the adoption of the WM policy I have thus far considered the *expected* impact of that policy. The actual allocation that the policy will produce, and therefore the actual impact of its adoption, are uncertain. First, the examination of every common-law entitlement according to the WMC is a process with great informational and computational demands whose accurate results cannot therefore be predicted beforehand. Second, if the WM policy is to be maintained for some period, the WM assignments of some entitlements

that the WMC will assign X to their benefit. However, it is more likely that X is at present allocated to the benefit of the individual belonging to A , than to that of the other individual. Therefore, if the WM policy will reallocate X in comparison to its present assignment, the individual belonging to A is more likely to lose from that reallocation than the other individual. That is, individuals who are favored in the SQB have, in general, greater odds of losing from reallocations that the WM policy will produce, and the more favored an individual in the present allocation, the greater his odds of losing.⁸¹ In particular, the chances of some given individuals who belong to A to be on the losing side from reallocations to which the WM policy will lead may well be sufficiently large so that the expected impact of that policy on those individuals is negative.

To phrase the argument differently, if the WMC is neutral everyone has the same expectations regarding the size of the slice he will have from the bigger pie that the WM policy will produce. However, if the present pie is unequally divided, some individuals may have at present a bigger slice than the one they are expected to have in the increased pie. In sum, comparing the WM policy to the SQB, we find, not surprisingly, that the policy is biased against those individuals favored in the present allocation simply because they lose more from the mere decision to reexamine common-law entitlements disregarding their present assignment. Consequently, the adoption of that policy may make some of those individuals worse off than their present position, to which they are presumed, if the SQB is used as a baseline, to have a fundamental right.

We can now incorporate in the analysis the non-neutrality of the WMC—that is, the fact that the prospects of poor individuals regarding the expected allocation under the WM policy are worse than those of others. Thus *two* biases are involved in the reallocations that the WM will produce in the present allocation—against poor individuals, and against individuals favored in the SQB (say, those engaged in some activities which are favored by the present allocation).

Both biases work against an individual who is both poor (as mainly determined by the value of non-common-law entitlements assigned to him) and a beneficiary of the asymmetry of the SQB.

81. Consider, for example, an individual who is at present assigned every entitlement to which he is a party. Obviously, he cannot but lose from any reallocation to which the WM policy will lead.

gains in excess of losses, its adoption should not be withheld because it makes some group of individuals worse off. Rather, one would argue, that problem can be addressed by a redistribution of some of the benefits of the policy to those individuals.

I will not attempt in this paper to fully discuss the extent to which redistribution can remedy the described defects of the WM policy and the ways in which the policy has to be qualified and limited for that purpose. I wish only to point out two apparent consequences of the need for redistribution to compensate individuals.

First, if redistribution is necessary in order for the adoption of the WM policy not to make anyone worse off, then the consent that may be argued to exist is not to the WM policy alone, but only to such policy accompanied by an adequate redistribution. To be based on consent, the WM policy must carry a commitment to redistribution. The mere pursuit of a WM policy regarding common-law entitlements thus grants to some individuals rights to redistribution, in addition to and independent of any rights for redistribution they may have according to the political theory we hold regarding non-common-law entitlements. One who advocates a WM policy for common-law entitlements must therefore acknowledge a commitment to redistribution, even if his view with regard to individuals' labor income, and to the administration of non-common-law entitlements in general, does not require, or indeed opposes any redistribution.

Second, redistribution is costly. Some WM reallocations may require redistribution whose costs are in excess of the efficiency gains produced by the reallocation. The distributional consequences of a WM rule—whether it will necessitate the incurring of redistribution costs and the extent of such costs—must be taken into account. That is, some form of tradeoff between efficiency and redistribution cannot be avoided when allocating common-law entitlements, and the decision may at times be against the WM rule.

F. Some Comments on the Appropriate Baseline

The comments below relate to the question whether either of the two baselines that have been discussed above is appropriate for the consent argument. Taking first the symmetric baseline, I wish to point out, without making a judgment regarding the appropriateness of that baseline, that its egalitarianism is specious, or, at most, seriously limited. The symmetric baseline dictates an equal division of common-law entitlements, regardless of the way in

may well change with changes in factors such as individuals' preferences and production technologies.

Recall the game in which Agatha and Sir George were asked to participate.⁸² Even if the expected payoffs of both Agatha and Sir George are positive, one of them or both may not consent to take part in the game because of risk aversion. The value risk-averse individuals attach to an uncertain payoff is equal to the expected payoff reduced by some risk premium. Thus, to examine how the adoption of the WM policy is judged by a given individual, the expected impact of the policy on him should be adjusted by an appropriate risk premium. The risk faced by the individual (and the corresponding risk premium) would not be large if he were to be affected by numerous WM reallocations each of very small value to him. However, some WM rules may impose significant losses (even judged *ex ante*) on some of the individuals involved. Thus, even if the expected impact of the WM policy on every individual were positive, some individuals would possibly judge the adoption of the WM policy as making them worse off.⁸³

The considered uncertainty is not, however, the only factor which may cause individuals to judge the adoption of the WM policy as making them worse off. Rather, the uncertainty factor works in addition to and combination with the bias[es] involved in the operation of the policy. Due to the non-neutrality of the policy, even its *expected* impact may be negative with regard to some individuals. In addition to those individuals, there may be some other individuals who face a positive expected impact, but who, after taking into account the uncertainty involved, view the policy as undesirable. The uncertainty regarding the accurate allocation to which the WM policy will lead may thus increase the number of non-consenting individuals.

2. *Redistribution*—If Agatha and Sir George do not play the game out of fear of losing, they miss a sure opportunity to increase their combined wealth. They may therefore agree with each other to play the game with a commitment to share the profits in a way that will assure that neither of them loses from participating. Similarly, one might think that if the WM policy is bound to produce

82. See p. 701 *supra*.

83. Compare J. RAWLS, *supra* note 66, at 170-71. Rawls' rejection of Edgworth's argument for a consistent application of the principle of utility is based on the risks with which individuals are faced by such a policy. Of course, the risks involved in the construction of the basic structure of society are significantly greater than those involved in the allocation of common-law entitlements.

N. The actual support for the WM policy does not make it just, since the supporting individuals are denied the alternative *N* to which we presume they have a fundamental right. The WM policy will be unjust; justice requires us to establish *N*. Thus, in deciding whether the SQB should serve as a baseline for the consent argument, the relevant question is not whether in reality individuals are likely to agree to an alternative more favorable than the status quo, but only whether the present allocation is in accord with the individuals' fundamental rights.

The above explains why I consider my inquiry of the impact of a WM policy to be an incomplete one—the WM policy should be examined also, I think, in light of additional baselines that may be provided by various political theories. Such examination will, however, be pursued in another paper, together with the identification for the different possible baselines of the ways in which a WM policy must be limited and qualified if its adoption is to make nobody worse off in comparison to the baseline.

At any rate, we can already make a judgment with regard to the WM policy suggested by Posner. In comparison to every baseline but one, such a policy makes some group of individuals worse off. The only exception, I have shown, is a baseline which is asymmetric in favor of wealthy individuals to an extent correlating with each individual's wealth, and symmetric with regard to any other characteristic of individuals. And it is hard to imagine a plausible underlying political theory that will provide such a baseline.

G. Conclusion

The WM policy suggested by Posner—a consistent, unqualified, and unlimited application of the WMC to all common-law entitlements—can be rejected. It has been demonstrated that the expected impact of such a policy in comparison to every plausible baseline may well be negative with regard to some group of individuals.

I have already expressed, however, my belief that the application of the WMC to legal rules, appropriately qualified and constrained, is just and desirable. This essay has prepared the ground for a future work that will identify those appropriate qualifications and constraints. I have set forth the problems that work must address, and the lines along which it may proceed. An adequate theory of the normative foundations and the limits of the economic analysis of law is already long due.

which non-common-law entitlements are allocated. The baseline is thus compatible with any overall wealth inequality that may arise from non-common-law entitlements. In particular, the baseline is compatible with a libertarian approach to non-common-law entitlements and with the resulting severe inequality in wealth. The symmetric baseline does not therefore reflect any commitment to or concern about overall wealth inequality, a concern which characterizes a true egalitarian theory such as Rawls' Theory of Justice.⁸⁴

Turning to the SQB, I wish to explain why I judge it to be an inappropriate baseline for the consent argument. I do not see any good reason why the status quo allocation, merely by virtue of being the present one, is the allocation to which individuals have a fundamental right. We can, of course, hold the view that individuals are entitled to the *particular* allocation we now have because of its features. But then its use as a baseline is due to those features and not to the fact that it obtains at present, and the baseline should therefore be defined in terms of those features. Finally, granting Posner's positive claim that the present allocation of common-law entitlements is, at least in large measure, wealth maximizing, this does not justify the use of the present allocation as a baseline but merely introduces a problem of circularity: to defend the preceding application of the WMC which produced the present allocation, a baseline is again necessary.

Assume that the normatively appropriate baseline is *N*, which differs from the SQB. The SQB may still be relevant for a *positive* theory attempting to explain why a WM policy may be actually followed. Assume that the adoption of the WM policy composes a Pareto improvement over SQB, but not over *N*. Although the SQB, differing from *N*, is unjust, it may be hard as a matter of political reality to change the status quo in a way that worsens the situation of some group of individuals. Consequently, individuals who are in a worse position under the present allocation than under *N* may nevertheless compromise with reality, accept the status quo, and judge alternatives by comparing them to the SQB. Therefore, one could argue that the adoption of the WM policy, making nobody worse off than under the SQB, would actually enjoy the support of all individuals. The concern of this paper is, however, with the normative claim for a WM policy. The WM policy is indeed normatively preferable to the SQB, but it is not so with regard to

84. See J. RAWLS, *supra* note 66.

