Book Reviews

The Economics of Justice and the Criterion of Wealth Maximization

The Economics of Justice. By Richard Posner. *Massachusetts: Harvard University Press*, 1981. Pp. xiii, 415.

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Richard Posner's latest book, *The Economics of Justice*,[1] is unusually ambitious. But then ambitious books such as this have a way of turning out to be the most interesting, instructive and enduring.

The book is essentially an elaboration of some important points and ideas that are touched on in Posner's earlier textbook *Economic Analysis of Law*.[2] Each chapter after the first is based upon a previously published article (or, in one case, a chapter from *Economic Analysis of Law*). The earlier works have been extensively revised, however, reflecting a serious effort to keep up to date with the relevant literature, and to relate the various chapters to each other and to the unifying theme of the book.

This theme is the same as that of *Economic Analysis of Law*—namely, that economic principles should be used to analyze and to explain legal rules and institutions and even the outcomes of important court cases. The theme is set out in the first chapter, "An Introduction to the Economics of Nonmarket Behavior." Posner argues that the "economic" approach can and should be used to analyze decisions other than simply narrow economic ones concerning resource allocation.[3] He ascribes the "modern revival of interest in applying economics to nonmarket behavior"[4] to Gary Becker, who has certainly made a point of stepping into many areas

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1. R. POSNER, THE ECONOMICS OF JUSTICE (1981) [hereinafter cited by page number only].
2. R. POSNER, ECONOMIC ANALYSIS OF LAW (2nd ed. 1977).
3. *See* L. ROBBINS, AN ESSAY ON THE NATURE AND SIGNIFICANCE OF ECONOMIC SCIENCE (1932).
4. P. 2.

where more orthodox economists have feared to tread. Becker, however, is by no means alone in assuming that people "maximize" or "optimize" in just about all of their decisions; there is a vast literature on the application of game theory to social decisionmaking that is based on precisely this postulate.[5] In fact, Becker's theory is distinguished mainly by its mercenary insistence on reducing virtually all human motivation to monetary values.[6] It would indeed prove convenient if we could measure the value of virtually anything by a person's willingness to pay for it. This is the approach of Marshallian price theory, which is what really lies behind the principle of what Posner calls "wealth maximization" or "economic efficiency."[7] It is this principle that is followed almost entirely throughout his earlier *Economic Analysis of Law*, and that has already been criticized by a number of writers.[8] The criticisms thus far, however, are less conclusive than they could be. Thus, I shall offer a number of criticisms of my own, and I shall consider briefly a version of utilitarianism other than the crude Benthamite "greatest happiness" principle, which Posner apparently regards as the main alternative to wealth maximization.

I. Utilitarianism and Wealth Maximization As Ethical Principles

Part I of the book, entitled "Justice and Efficiency," starts by advancing wealth maximization or efficiency as an ethical principle and distinguishing it from utilitarianism. Chapter two contrasts Bentham, the founding father of utilitarianism, with Blackstone whose *Commentaries on the Laws of England* apparently did much to incite Bentham to pioneer the analysis of law through an explicit ethical theory that did not unduly rely on the power of a sovereign or the precepts of a religion. As Posner frankly states: "The purpose of this chapter is mainly negative—to arouse the reader's mistrust of utilitarianism by examining the thought of its most thorough practitioner, Jeremy Bentham."[9]

5. "Game theory" was introduced, of course, in J. VON NEUMANN & O. MORGENSTERN, THEORY OF GAMES AND ECONOMIC BEHAVIOR (1944). A by now somewhat dated sample of its applications can be found in GAME THEORY AND RELATED APPROACHES TO SOCIAL BEHAVIOR (M. Shubik ed. 1964).

6. Becker's work also exhibits an unusual fondness (common to several members of the Economics Department of the University of Chicago) for a "partial equilibrium" approach to price theory, which traces its origins to Alfred Marshall in Cambridge during the last century. A. MARSHALL, THE PRINCIPLES OF ECONOMICS (1890).

7. Posner distinguishes "economic efficiency" from Pareto efficiency and uses the term as many economists do when they talk, very loosely, of "efficiency" as opposed to "equity." It should be noted, however, that the concepts are identical with unrestricted lump-sum transfers, because an economic allocation or state of affairs is efficient in either sense if and only if there is no reallocation (including lump-sum transers) that makes everybody better off.

8. *See, e.g.*, Keenan, *Value Maximization and Welfare Theory*, 10 J. LEGAL STUD. 409-19 (1981); Polinsky, *Economic Analysis as a Potentially Defective Product: A Guide to Posner's Economic Analysis of Law*, 87 HARV. L. REV. 1655-81 (1974).

9. P. 13.

Chapter three, "Utilitarianism, Economics and Social Theory," is more positive. It is based on an earlier article with almost the same title except that the word "social" has significantly replaced "legal".[10] Of course, it is true that Posner's very general ethical theory applies to all social choices, not just to legal issues, so the change of title is appropriate. Posner succinctly states his thesis as follows: "The important question is whether utilitarianism and economics are distinguishable. I believe they are and that the economic norm I shall call 'wealth maximization' provides a firmer basis for ethical theory than utilitarianism does."[11]

This is indeed a very serious philosophical claim whose implications are by no means limited to legal philosophy or to economics. It is a claim that this reviewer feels deserves very careful discussion. Although much ground is covered both in chapter three, and in chapter four, "The Ethical and Political Basis of Wealth Maximization," there is much more that remains to be said.

First, it is important to understand what Posner means by the two ethical criteria of utilitarianism and wealth maximization. By utilitarianism, which he also refers to as "Benthamism,"[12] he has in mind the old happiness-maximizing principle, which is the straw man that so many moral philosophers have rightly knocked down. There are many reasons why this kind of utilitarianism is unappealing, some of which I shall discuss in Section IV.

Of course, wealth maximization is much more inflexible than utilitarianism. One of the criticisms of utilitarianism that Posner considers is the indeterminacy of any measure of utility and the consequent vagueness of its ethical recommendations. By contrast, wealth maximization appears strikingly precise. It amounts to adding dollars in a way that Harberger, especially, has rather forcefully advocated.[13] Such precision is bought at an enormous price, however, and I shall argue in Section III that wealth maximization often leads to conclusions that many of us would regard as totally unethical. Moreover, the precision of wealth maximization is more apparent than real because, as I argue next, it can easily lead to a logical inconsistency.

10. Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103 (1979).

11. P. 48.

12. *Id.*

13. More recently, however, Harberger has somewhat retracted this argument. *See* Harberger, *Three Basic Postulates for Applied Welfare Analysis: An Interpretive Essay*, 9 J. ECON. LIT. 785-97 (1971); Harberger, *On the Use of Distributional Weights in Social Cost Benefit Analysis*, 86 J. POL. ECON. S87-S120 (1978).

II. The Inconsistency of Wealth Maximization

Posner explicitly discusses the Kaldor-Hicks compensation test, and seems to believe it equivalent to his wealth maximization criterion.[14] Yet economists have known since 1941 that the Kaldor-Hicks criterion can lead to an inconsistency in the sense that A is better than B and yet B is better than A, except in very special cases first analyzed by Gorman.[15] The problem is that when the test is used to assess policy changes that are large enough to alter relative prices significantly, the wealth effects of the price changes on different individuals need to be taken into account; this the Kaldor-Hicks criterion does not do. Posner has not totally ignored this problem, but he only alludes to it casually,[16] in discussing the wealth maximizing assignment of property rights and Dworkin's criticism.[17] Posner regards the problem as "exaggerated," noting for example that "[e]ven moving from negligence to strict liability for automobile accidents would not have so large an effect on prices as to prevent a comparison of the total wealth of society before and after the change."[18] This is actually an empirical question that ought not to be disposed of so cavalierly in the absence of any quantitative evidence.

Moreover, although Posner himself has not realized the distinction, wealth maximization is actually a somewhat more subtle criterion than the Kaldor-Hicks compensation test. Wealth maximization allows detailed consideration of the distribution of income and of goods between people in evaluating aggregate willingness to pay, whereas the compensation test looks only at aggregates. Even so, except in the very special cases discussed by Gorman and by Roberts,[19] it is still impossible to avoid logical contradictions in using the wealth-maximization criterion except by a particular device that is unlikely to be used in practice. Each individual's willingness to pay must always be measured with reference to a fixed status quo. This amounts to using a measure of "equivalent variation", to use the standard economic terminology attributable to Sir John Hicks.[20]

14. Pp. 91-92.

15. *See* Scitovsky, *A Note on Welfare Propositions in Economics*, 9 REV. ECON. STUD. 77-88 (1941). More recent discussions can be found in Keenan, *Value Maximization and Welfare Theory*, 10 J. LEGAL STUD. 409-419 (1981); Sen, *The Welfare Basis of Real Income Comparisons: A Survey*, 17 J. ECON. LIT. 23-25 (1979). For an elegant mathematical proof of when this kind of approach to welfare theory is logically consistent, see Roberts, *Price Independent Welfare Prescriptions*, 13 J. PUBLIC ECON. 277-97 (1980). The conditions for consistency were first given in Gorman, *Community Preference Fields*, 22 ECONOMETRICA 63-80 (1953); Gorman, *The Instransitivity of Certain Criteria Used in Welfare Economics*, 7 OXFORD ECON. PAPERS 25-35 (1955).

16. *See* pp. 109-11.

17. Dworkin, *Is Wealth a Value?* 9 J. LEGAL STUD. 191 (1980).

18. P. 111.

19. *See* Gorman, *supra* note 10, Roberts, *supra* note 10.

20. *See* Chipman & Moore, *Compensating Variation, Consumer's Surplus, and Welfare*, 70 AM. ECON. REV. 933-49 (1980); Hause, *The Theory of Welfare Cost Measurement*, 83 J. POL. ECON.

But to remember what the status quo was, and what people were willing to pay in the status quo, becomes harder and harder as more and more changes are made. This way of avoiding contradictions, therefore, is totally impractical. Concomitantly, it is entirely evident that utilitarianism always manages to avoid such contradictions because each individual's utility is described by a fixed utility function that is then aggregated into a fixed social welfare function for evaluating all possible outcomes. And even if wealth maximization is made logically consistent by measuring everything with reference to a fixed status quo, I believe it still faces insurmountable problems in becoming an acceptable ethical criterion.

III. The Boundary Problem

Among the problems associated with utilitarianism is the boundary problem. Posner puts the problem with characteristic elegance and starkness:

> Whose happiness is to count in designing policies to maximize the greatest happiness? Does the happiness of animals count?
>
> . . . .
>
> Another boundary problem of utilitarianism concerns foreigners. Should American policy be to maximize the happiness of Americans, with foreigners' happiness given a zero weight? Or is a more ecumenical perspective required? And how about the unborn?[21]

These are difficult problems for utilitarianism in any of its forms, and I shall not even attempt to give an answer now beyond concurring with Posner that: "it seems that if maximizing utility is to be taken seriously, the broadest possible conception of the relevant population must be used."[22]

With regard to wealth maximization, Posner claims that the boundary problem is much less serious,[23] and that it has a clear resolution. As Posner puts it: "Animals count, but only insofar as they enhance wealth. The optimal population of sheep is determined not by speculation on their capacity for contentment relative to people, but by the intersection of the marginal product and marginal cost of keeping sheep."[24]

1145-82 (1975); Hicks, *Consumers' Surplus and Index Numbers*, 9 REV. ECON. STUD. 126-137 (1942).

21. Pp. 52-53.
22. P. 53.
23. P. 76.
24. *Id.*

This is not too objectionable, although it is rather disturbing if we can only justify measures to prevent cruelty to animals by people's willingness to pay to have less cruelty, and can only justify protecting endangered species on similar grounds. The real problem arises because wealth maximization treats sheep and humans on a more or less equal footing, since, as Posner says:

> Another implication of the wealth-maximization approach, however, is that people who lack sufficient earning power to support even a minimum decent standard of living are entitled to no say in the allocation of resources unless they are part of the utility function of someone who has wealth. This conclusion may seem to weight too heavily the individual's particular endowment of capacities. If he happens to be born feeble-minded and his net social product is negative, he would have no right to the means of support even though there was nothing blameworthy in his inability to support himself. This result grates on modern sensibilities, yet I see no escape from it that is consistent with any of the major ethical systems.[25]

Presumably utilitarianism is not to be regarded as a "major ethical system," since it is surely more sensitive than this. So are most theories, such as those of Harsanyi and Rawls,[26] which are based on the notion of an "original position." Indeed, later Posner goes out of his way to discuss such original position theories:

> But any theory of consent based on choice in the original position is unsatisfactory, not only because of the well-known difficulties of describing the preference functions of people in that position but also because the original position approach opens the door to the claims of the nonproductive. In the original position, no one knows whether he has productive capabilities, so choices made in that position will reflect some probability that the individual making the choice will turn out to be an unproductive member of society . . . .[27]

Carried to its logical conclusion, then, wealth maximization requires people who have outlived their usefulness and cannot persuade others to look after them voluntarily to be slaughtered or left to die just like old sheep who are no longer producing an adequate supply of good wool! At least Posner is honest and consistent here.

When it comes to the boundary problem that arises from the conflict

25. *Id.*

26. *See* J. RAWLS, A THEORY OF JUSTICE (1971); Harsanyi, *Cardinal Welfare, Individualistic Ethics and Interpersonal Comparisons of Utility*, 63 J. POL. ECON. 309-321 (1955).

27. P. 100.

between maximizing the wealth of a nation and that of the whole world, he provides only an evasive footnote that claims "most trade restrictions hurt both parties to them."[28] But there are many cases of monopoly power where this is simply untrue. And what about all the conflicts that arise when there is colonialism, or when the ownership of mineral rights on the sea floor is considered? I conclude that, while wealth maximization provides a clear answer to the boundary problem in contrast to utilitarianism, the clear answer provided is ethically unacceptable to most people I know.

IV. Utilitarianism, Hedonism and Moral Monsters

Another problem that Posner claims is better treated by wealth maximization than by utilitarianism is "moral monstrousness." He explains two types of monstrosity—"the utilitarian's refusal to make moral distinctions among types of pleasure"[29] and "the utilitarian's readiness to sacrifice the innocent individual on the altar of social need."[30]

The first type of monstrosity only arises because Posner only considers a Benthamite if not a hedonistic type of utility. This is well illustrated in the following claim:

> The difference between utilitarian and economic morality, and the source, I believe, of the "monstrousness" of the former, is that the utilitarian, despite his professed concern with *social* welfare, must logically ascribe value to all sorts of asocial traits, such as envy and cruelty, because these are common sources of personal satisfaction and hence of utility.[31]

Of course, envy and cruelty are surely better described as "antisocial" rather than merely "asocial" traits. Really, then, this goes to confirm my view that Benthamite or hedonistic utilitarianism is ethically unacceptable. There are, however, other forms of utilitarianism that do not count monstrous preferences, and disregard satisfactions derived from cruelty or the lack of satisfaction that arises from envy.[32] I shall discuss one in Section V below.

The second type of monstrosity can be dealt with to some extent by replacing simple act utilitarianism by a suitable form of rule utilitarianism.[33] However, I must agree that "any utilitarian objections to creating

28. P. 79 n.58.
29. P. 56.
30. P. 57.
31. P. 83.
32. For a recent survey of possible types of utilitarianism, see Brock, *Recent Work in Utilitarianism*, 10 AM. PHIL. Q. 241-76 (1973).
33. For a good recent discussion of rule utilitarianism, see Harsanyi, *Rule Utilitarianism and Decision Theory*, 11 ERKENNTNIS 25-53 (1977); Harsanyi, *Rule Utilitarianism, Rights, Obligations*

an exception to the murder laws for killers of obnoxious grandfathers have no force at the level of personal morality once it is stipulated that the murder will go undetected,"[34] though the case would be even better if the murder were also to go unsuspected.

How does wealth maximization deal with monstrosity?

> In a thoroughgoing utilitarian system no budget constraint exists to cramp the style of the utility monster. But in a system of wealth maximization his activities are circumscribed by the limitations of his wealth, and his victims are protected by the rights system, which forces the monster to pay them whatever compensation they demand.[35]

This appears to deal relatively well with those of a monster's intended human victims who happen to be able to exercise rights. An obnoxious grandfather can be murdered only if he is first compensated enough to make him willing to be a victim later. Mephistopheles' contract with Faust was also wealth-increasing, no doubt. But what about cruelty to animals or to young children? Must young children rely on the protection of parents who may be callous and mercenary? Do animals have to rely on being bought from monstrous owners by humane societies? These questions raise the possibility that wealth maximization may not be the answer to monstrosity either, and may even be less of an answer than a refined form of utilitarianism.

V. Another Kind of Utilitarianism

I have argued that Benthamite or hedonistic utilitarianism is an unnecessarily crude form of utilitarianism. It is incumbent on me to offer an alternative, although space does not permit more than the briefest sketch of the alternative I wish to propose, nor have I yet fully worked out the details.

The first problem that a utilitarian faces is to determine what constitutes "utility" for an individual. The second problem is that of making interpersonal comparisons of individual utilities and aggregating them into what economists call a measure of social welfare.

One of the better discussions of how to determine "utility" for an individual is that of John Broome.[36] As he observes:

> If somebody selects one of the alternatives rather than the other,

and the Theory of Rational Behavior, 12 THEORY AND DECISION 115-33 (1980).

34. P. 57.

35. P. 82.

36. Broome, *Choice and Value in Economics*, 30 OXFORD ECON. PAPERS 313-33 (1978).

> but has no good reason for doing so, then there is no reason to say that it is the best alternative for him or her. To be more exact, the choice needs to be based on good, self-interested reasons. They must be self-interested, because if a person were to make a choice for a reason which was not self-interested, then by considering the choice alone we should not get a proper indication of this person's interest, as opposed to the interests of other people.[37]

The evident difficulty here is how we are to determine what constitute "good" and "self-interested" reasons for making choices. Clearly one wants to use ethical criteria, which suggests using the Kantian principle of universalizability that Hare especially has argued lies at the heart of all ethical arguments.[38] This in turn suggests defining the utility of a particular individual as that which the individual would wish a utilitarian moral agent to maximize on his or her behalf, when the moral agent contemplates making choices for "good" reasons based upon the individual's personal interest. This is universalizable because it is presumably how any moral agent wants his own personal interests to be treated, and we should have a rule that is symmetrical regardless of who is the moral agent. It should be remarked that "good" here should be taken to include moral worthiness—at some risk of being circular—as well as practical considerations such as full use of available information, sound judgment and common sense.

The second problem of interpersonal comparisons is one that even a Benthamite utilitarian has to face, since the happiness of different people (and animals) has to be compared and weighed. The problem seems to have been of great concern to economists but not, oddly enough, to philosophers. This may be because many philosophers have found so much in utilitarianism to criticize even before they reach the problem of comparing individuals' utilities, whereas most economists have been content to follow the doctrine of "consumer sovereignty" whereby the preferences consumers exert in the market are thought to correspond to their "utility"—a doctrine that Broome and others have rightly called into question.

My own view is that we should concentrate more on constructing an acceptable social welfare function than on the interpersonal comparisons that are bound to be incorporated in that function at least implicitly. For example, in constructing a function that represents our judgments concerning the distribution of income, we should follow Atkinson's suggestion[39] and contemplate the trade-off between total income and inequality

37. *Id.* at 333.
38. R. HARE, THE LANGUAGE OF MORALS (1951); R. HARE, FREEDOM AND REASON (1963).
39. Atkinson, *On the Measurement of Inequality*, 2 J. ECON. THEORY 244-63 (1970).

directly, rather than indirectly as we would if we started with interpersonal comparisons.

It is clear that this form of utilitarianism has very many subjective features—probably even more than the crude Benthamite form. This should come as no surprise, however, since ethics is inevitably subjective, despite the attempts of many—including Posner—to rest it upon fairly secure empirical foundations.

I suppose such subjectivity is especially disturbing to lawyers, who would like to have verdicts based on "the facts of the case" as far as possible. Yet, ever since the time of David Hume, if not before, we have known that such attempts to avoid subjectivity are more or less doomed to failure, even if made by experts in legal ethics. Must the lesson be repeated over and over again?

VI. Rights

Another difficulty with utilitarianism that Posner notices is how it can easily disregard individual rights. As he writes, "if happiness can be increased by treating people more like sheep, then rights are out the window."[40] I would prefer substituting the word "utility" or "welfare" for happiness, but basically I agree with this statement. The conflict with rights is one of the most powerful criticisms of utilitarianism, and has been extensively discussed of late by philosophers, economists, political theorists, and lawyers.[41] But is wealth maximization really any better in respecting rights? After all, it is really no more than a special kind of utilitarianism, in which "utility" is replaced by the specific measure "wealth"—or, more specifically, the equivalent variation relative to some fixed status quo, as discussed in Section II.

In a rather shallow sense, wealth maximization does respect rights more than utilitarianism does, simply because everybody retains the right to earn wealth and to spend it as he sees fit. But this leaves the destitute with no effective rights whatsoever, as was noticed in connection with the boundary problem. The old person who has become helpless and destitute is not even entitled to self-respect, no matter how noble his or her past labors may have been.

Posner, however, claims that wealth maximization determines how rights should be allocated. As he puts it: "If transactions costs are positive . . . the wealth maximization principle requires the initial vesting of rights in those who are likely to value them most, so as to minimize trans-

40. P. 56.

41. *See, e.g.*, Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152-157 (1970); R. DWORKIN, TAKING RIGHTS SERIOUSLY (1978); J. RAWLS, *supra* note 26; UTILITARIANISM AND BEYOND (A. Sen & B. Williams eds. forthcoming).

actions costs."[42]

In a footnote here, he notices the "technical difficulty" that arises because of "the possibility that the initial assignment of rights may affect prices and thereby make values derivative from the assignment of rights rather than determinative of it,"[43] but he postpones discussion to the next chapter. There he seeks to rebut some of Dworkin's criticisms of wealth maximization[44]—in particular, precisely this "problem of circularity in my attempt to derive a system of rights from a goal of maximizing wealth."[45] He also attempts to show that Dworkin's example is unreasonable. Dworkin's example is of a slave called Agatha who is owned by a master called Sir George. Posner's discussion of the example concludes as follows:

> The point is that wealth maximization leads to a determinate solution in the Agatha-Sir George case once it is assumed that she could produce more if she were free than if she were a slave. Since she would retain her freedom if given it from the first and would purchase it if she began as Sir George's slave, the initial assignment [of rights] does not determine the final assignment. Transactions costs are therefore minimized by making her free in the first place.[46]

I agree with Dworkin "that a theory that makes the moral value of slavery depend on transactions costs is grotesque."[47] Nevertheless, such emotive feelings apart, what happens if Agatha wants to be free not only to produce more, but simply to be able to enjoy more leisure than if she were a slave? Then she would be unable to earn enough to buy her freedom, and Posner's argument against her remaining a slave collapses. Posner justifies freeing only very industrious slaves, not pleasure-seeking ones.

VII. Consequentialism

Another limitation that both utilitarianism and wealth maximization share is their concentration on consequences. In fact, many of the criticisms that philosophers make of utilitarianism, including those by Williams that Posner cites,[48] are actually criticisms of the rather more general ethical doctrine of consequentialism. Posner realizes this, and realizes that

42. P. 71.
43. *Id.*
44. Dworkin, *supra* note 11.
45. P. 109.
46. P. 110-11.
47. *Id.* at 211.
48. Williams, *A Critique of Utilitarianism*, in UTILITARIANISM FOR AND AGAINST (J. Smart & B. Williams eds. 1967).

wealth maximization is a special form of consequentialism, yet does nothing to rebut the rather damaging criticisms of consequentialism that can be made, especially in non-economic contexts.[49] For example, one criticism of consequentialism is that it devalues heroism. It does not lead us to applaud the person who against all the odds—indeed, regardless of the odds—jumps into freezing water to try to help the drowning child and risks drowning himself as well. In a legal context, this raises the question of how much somebody who was demonstrably negligent in not adequately fencing off a dangerous pond is liable to pay compensation not only for the life of the child but also for that of an unsuccessful intended rescuer. The principle of wealth maximization leads us to measure the value of the intended rescuer's life as no more than what is consistent with his willingness to attempt the rescue at great danger to himself. Of course, the intended rescuer also valued the child's life, and this in principle should be counted, but of what value is the life of a child to a dead man, or to his widow, if the child was a complete stranger?

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At this point, I feel I should summarize what has been said in the last few sections. If one adopts a more flexible and appropriate form of utilitarianism than Benthamism, some of the most important problems disappear. Moreover, wealth maximization, when it is forced—rather artificially—into a form in which it is logically consistent, is really no more than a very specific but also very unappealing form of utilitarianism. As a special form of utilitarianism, wealth maximization shares many of its defects, including a disregard of all rights that are not property rights, and an excessive regard for consequences rather than for the actions that led to those consequences and for the motives that stimulated those actions.

VIII. Posner's Applications of Ethical Criteria

I have paid vastly disproportionate attention to the statement and defense of the principle of wealth maximization in Part I of the book because Posner regards it as his fundamental theme, and because it merits serious discussion as an ethical principle. In the little space that remains I shall argue that, although Posner himself believes that wealth maximization is the criterion that should be used consistently, he relies at least as much on other more widely accepted ethical criteria.

Part II, on "The Origins of Justice," is essentially anthropological where it is based upon fact rather than (as in chapter five, "The Homeric Version of the Minimal State") on ancient Greek mythology. The connec-

49. P. 48 n.3.

tion with economics is extremely tenuous; that with game theory may be somewhat less so, as one might expect. Posner considers "primitive" societies in which the distinction between the less demanding criterion of Pareto efficiency and the more demanding one of wealth maximization[50] is probably just too subtle for us ever to identify which, if either, is really being pursued. This is especially true if one uses an ex-ante version of the Pareto criterion, as in Posner's principle of "consent,"[51] because the members of primitive communities are unlikely to have widely different interests. Nor do the arguments presented have the analytical detail that would exploit the distinction between the two ethical criteria. The institutions discussed—such as mutual insurance within a kinship group, the strict liability concept in primitive legal systems, and retribution—all look as though they could be justified by an appeal to the weaker criterion of Pareto efficiency.

Part III of the book is concerned with privacy. It argues against privacy as secrecy, rightly on the whole. In a society that consistently pursues some ethical goal, making more information public is generally beneficial.[52] An exception that Posner notes concerns inventions, where secrecy is justified as providing an incentive to inventors. Yet such secrecy and the associated patent laws often produce at least temporary monopolies that are Pareto inefficient as well as not wealth maximizing. The optimal degree of protection of inventors' rights is a difficult and delicate question that economists are really just beginning to face properly.

Another kind of privacy that Posner discusses is seclusion—the right not to have one's house searched without a warrant, for example. This is perceived to be a right, however, and no attempt is made to justify seclusion on wealth-maximizing grounds. Probably no such attempt could be successful, either. Especially in a country that has experienced the likes of Joseph McCarthy, privacy is indeed a valuable right, and one that should not be restricted to those who can afford to pay for it. Privacy may, however, be inconsistent with wealth maximization if, for instance, it is wealth-maximizing to use every possible means to track down a dangerous

50. Pareto efficiency is less restrictive than wealth maximization (where the latter is well defined—*see supra* pp. 1496-97) unless unrestricted lump-sum transfers of wealth can take place costlessly—*cf. supra* note 7. Such transfers are generally needed to convert a wealth-increasing change into a Pareto-improving change, with everybody better off.

51. P. 94.

52. A number of economists have recently disputed this, and have argued that, at least in special cases, extra public information could actually make everybody worse off by removing opportunities for insurance that would exist in the absence of the extra information. *See* Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561-74 (1971). For an assessment of Hirshleifer's argument, see Hammond, On Welfare Economics with Incomplete Information and the Social Value of Public Information (Stanford University, Institute of Mathematical Studies in the Social Sciences, Economics Technical Report No. 332, 1981) (unpublished paper on file with *Yale Law Journal*).

criminal.

Nor do we find Posner using his criterion of wealth maximization consistently in Part IV, on discrimination. He recognizes that racial discrimination may well be economically efficient or wealth-maximizing. Nevertheless, he is broadly sympathetic to legislation against discrimination. As he writes:

> Because blacks are an economic minority, the costs to them of the whites' prejudice are proportionately greater than the costs to the whites. This is not to say that discrimination is inefficient but that discrimination has systematic redistributive effects that could be used as the premise of a neutral, though not a wealth-maximizing, antidiscrimination principle.[53]

and:

> The fact that much racial discrimination may be efficient does not mean that it is or should be lawful. It does suggest, however, that the "balancing" approach sometimes used in constitutional cases might, if honestly followed in racial cases, result in upholding many instances of racial discrimination on efficiency grounds, even if distributive effects were also weighed in the balance.[54]

So the argument against discrimination is redistributive. What Posner fails to recognize, however, is that such a redistributive argument can also justify reverse discrimination. Posner summarizes his views on this as follows:

> [I]n the case of discrimination against an economic minority, such as the blacks in this country, a distributive argument is available. The argument is that discrimination imposes proportionally greater costs on the minority than on the discriminating majority. This distributive ground is not available, however, to justify reverse discrimination based simply on the threat of a minority group to impose costs on the majority if they do not distribute wealth to it, over and above the redistribution brought about by outlawing discrimination against minorities. Nor have I been able to discover any other persuasive ground for justifying reverse discrimination.[55]

It is quite true that redistribution cannot really be justified solely on the basis of threats (though Posner comes close to denying this in his discus-

53. P. 355.
54. P. 363.
55. P. 386.

sion of Blackstone and Bentham).[56] But the absence of adequate reverse discrimination equally "imposes proportionally greater costs on the minority" and so seems to be an equally valid distributive argument for reverse discrimination. If distributive arguments can only be used to oppose discrimination against poor minorities, with what can we oppose discrimination against poor majorities, such as occurs under South Africa's system of apartheid?[57] Having raised the possibility of using distributive arguments, it seems that Posner is most reluctant to face up to their full implications.

Conclusion

Posner's *The Economics of Justice* is an interesting and lively book. Its stated purpose is to expound and illustrate the principle of wealth maximization and its applications to law. This purpose could never be fully accomplished because the principle itself is fatally flawed. As I have argued, it is logically inconsistent except in implausible special cases. It is also ethically unacceptable to many of us. Posner's arguments for this principle include an attack on what he sees as the alternative, which is classical or Benthamite utilitarianism based on happiness. Improved versions of utilitarianism, however, are much more acceptable. Finally, I have argued that in the applications he discusses, Posner in fact often uses quite different and more widely accepted ethical criteria, such as Pareto efficiency, rights, and egalitarian arguments for redistribution. In fact, much of his advocacy is entirely sensible precisely because he departs from rigid adherence to wealth maximization. Where he does not, his advocacy is sometimes extremely suspect and heartless, as, for example, when people who lack the means of self-support are considered.

The Economics of Justice is a book from which the thoughtful reader can learn much—not least, about his or her own values. It will be much discussed, as it deserves to be, and not only by lawyers.

56. P. 43.

57. Of course, apartheid is almost certainly not wealth-maximizing, but what if it were shown to be, or modified to become so?

Socratic Jurisprudence: The Province of Legal Morality—Undetermined

Socrates and Legal Obligation by R.E. Allen. *University of Minnesota Press,* 1980. Pp. 148, $17.95.

Thomas R. Kearns†

By focusing on points in legal theory, R.E. Allen's *Socrates and Legal Obligation*[1] provides a distinctive and stimulating interpretation of Plato's *Apology* and *Crito.* Often these two accounts—of Socrates' trial and of his subsequent refusal to escape his execution—are read as posing a kind of Socratic paradox in political obligation. Specifically, how can one proclaim, as Socrates did, a duty to one's god that surpasses allegiance to the State and then, barely four weeks later, willingly submit, as Socrates also did, to what one regards as one's own unjust conviction and wrongful death? Professor Allen's very interesting thesis, part of it expressed only *sotto voce,* is that the answer depends on certain specific aspects of the nature of law, aspects that cannot be derived from any general analysis of political obligation. By emphasizing jurisprudential issues, Professor Allen masterfully identifies yet another domain of insight and invention in Socratic thought. It is one that should interest contemporary students of jurisprudence and that henceforth will require political theorists and others who work with these materials to grapple with some long ignored points about the nature of law and legal systems.

The present review concentrates on what Professor Allen alleges is the central argument of the *Crito,* namely, an account of legal authority that purports to show that Socrates' escape would be tantamount to destroying the law of Athens. The review examines several interpretations of Professor Allen's analysis of this argument and concludes with one that Socrates possibly endorsed—though, probably, he should not have. Whether Professor Allen himself thinks the argument is a good one is not entirely clear. In the final pages, the review focuses on Professor Allen's laments regarding certain alleged failures of legality at Socrates' trial. Here there

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1. R. ALLEN, *Socrates and Moral Obligation* (1980) [hereinafter cited by page number only].

is reason to think that the book's emphasis on jurisprudential issues conceals some important philosophical points, especially the splendid irony that the trial was the occasion of Socrates' final effort to revise Athens' conception of piety.

I. The Argument of the *Crito*

Even supposing, as Socrates did, that in convicting him "the City did [him] an injustice and didn't decide the case correctly,"[2] there are many reasons why he might have chosen to accept his fate and not escape. Some of them are enumerated in the course of the dialogue and touch on such disparate considerations as his age, his "big talk" at the trial to the effect that he would rather die than disappoint his god, the fact that he would be received with suspicion were he to go elsewhere, and so on. These, surely, are reasons Socrates might have had for not escaping. But they do not show that it would have been *wrong* for him to do so; they do not show that he had a duty not to escape. Yet it appears that Socrates accepted an argument that he supposed entailed precisely that duty. Philosophical interest in the *Crito* turns largely on this argument. What is it and is it any good?

As readers may recall, the argument in question is conducted neither by Socrates nor by Crito, but by the Laws, the laws of Athens personified. Professor Allen reports that the appearance of this figure was much admired among contemporaries as an inspired literary device, but it is not only that, as the author carefully notes.[3] Indirectly, it might be interpreted as a statement in legal ontology, suggesting, perhaps, that "[s]tatements about a legal order cannot be analyzed without remainder into sets of statements about individual human beings. . . . "[4] On the other hand, one can easily lose sight of the fact that the Laws are not really persons and that their perspective is not the same as that of a citizen. Here, it seems, is a source of great mischief, greater possibly than either Socrates or Professor Allen noticed.

Much of the Laws' speech recites the numerous things they have done for Socrates: they have overseen his birth, nurture, and education; they have given him an equal share in the goods of the State; they have offered him, in his maturity, a real option to leave Athens if he chose to do so; and they have governed, not by commands, but by rules that could be changed or held in abeyance if shown to be unjust. Socrates chose to stay; he raised a family in Athens; he did nothing to withdraw himself from the

2. P. 123 (quoting PLATO, CRITO, line 50(c)).
3. P. 81.
4. Pp. 81-82.

City's rightful rule. How is this collection of considerations to be understood? Typically, each item has been cited as an independent reason—a reason of debt, or gratitude, or estoppel, or agreement—in support of the conclusion that Socrates had an inescapable obligation to obey the Laws.

Professor Allen's interpretation is strikingly different. He urges that agreement is the *fundamental* or foundational component of the Laws' argument.[5] The agreement in question—implied, of course—is the promise to abide by the law. The other things cited in the course of the Laws' argument are simply evidence of and consideration for the agreement. But this agreement, while fundamental to the Laws' argument, is neither the sole nor the most important component. What the agreement does is bring Socrates within the Laws' jurisdiction; it explains why Socrates, but not everyone (no Thessalian, for example) is subject to Athenian law. The agreement determines what Professor Allen calls the Laws' scope,[6] though presumably there might be other ways of becoming a legal subject, by being sold into Athenian slavery, for example, or by military capture. But merely being a proper subject of Athenian law does not explain why one should not escape what one believes is an unjust conviction. According to Professor Allen's reading of the Laws' argument, what makes escaping wrong, conclusively wrong, is the *injury* it would do the Laws.[7]

Astounding as it might seem at first, the injury contemplated here is the Laws' destruction, or something tantamount to that, as far as it lay in Socrates' power. The possibility of this injury depends on the foundational agreement to abide by law, but the injury itself, the Laws' destruction, is principally *delictual* in character, not contractual.[8] The chief problem in the dialogue is to understand why the Laws might think that Socrates' escape would be tantamount to their destruction. If this point could be made plausible, surely Socrates' fate would be sealed, for however unjust his conviction might have been, it could not conceivably morally warrant his destroying Athens and her laws.

This two-pronged interpretation of the Laws' argument, citing an agreement and the threat of an enormous noncontractual injury, is powerfully supported by the text. The Laws' first remarks refer to the contemplated escape as an attempt to destroy them, thus signalling the crucial claim of the argument.[9] Subsequent passages revert to the tempo-

5. Pp. 75-76.
6. Pp. 86, 91, 94.
7. P. 76.
8. P. 85.
9. The full argument is as follows:

> Tell us, Socrates, what you intend to do. Do you mean by this to undertake to destroy us? To destroy, as far as in you lies, the Laws and the City as a whole? Or do you think a city can any longer exist and not be overturned, in which legal judgments once rendered are without

rally prior matter of the agreement and establish ample consideration for Socrates' implied promise to abide by Athens' laws. That these materials come after the point about destroying the Laws does not show that they are somehow merely additive to the opening claim. Clearly, if the opening claim can be made out, any additions would be entirely superfluous. The fact that further points *are* made indicates, then, that they should be understood as support for the opening assertion and not as further independent arguments as to why Socrates should not escape.

Professor Allen's interpretation has the considerable virtue of *not* ascribing to Socrates a kind of moral rigorism as regards agreements. It is true that Socrates held that agreements, provided they are just, should be kept.[10] But this is compatible with being released from one's promise when what would otherwise count as a breach is the only way to avoid suffering a promisee's wrongdoing. It is also true that part of the Socratic moral revolution was to reject retribution, the view that doing harm is the proper response to harm done.[11] But it should be possible to distinguish retribution from an effort to avoid suffering a wrongful injury, even when the latter inescapably involves the breach of a just agreement. It might occur to someone to stand Professor Allen's argument on its head: perhaps the topic of agreement follows the Laws' opening claim about their own destruction because the agreement, or its breach, is itself supposed to explain the point about destruction. But this would also have to be explained since, without more said, it would follow that every petty theft, involving as it does a breach of the agreement to abide by the law, would be the moral equivalent of destroying the Laws. If this is right, every violation of law should be a capital offense, if any is. But this is patently absurd.

What reason is there to regard Socrates' breach in the seemingly hysterical way that the Laws suggest? Professor Allen's answer comes in a very condensed paragraph that is reproduced, almost verbatim, below. It centers on a certain understanding of judicial authority. In the opening sentences of their speech, the Laws note explicitly that according to Athenian law "judgments judicially rendered [are] authoritative."[12] With this law in mind, Professor Allen proceeds to impute to the Laws the following line of thought. For Socrates to escape he would have to deny the

force, but may be rendered unauthoritative by private citizens and so corrupted.

How are we to answer that, Crito, and questions like it? A good deal might be said, especially by an orator, in behalf of that law, now to be broken, which requires that judgments judicially rendered be authoritative. Or are we to reply that the City did us an injustice and didn't decide the case correctly. P. 123 (quoting PLATO, CRITO, line 50 (b-c)).

10. P. 122 (quoting PLATO, CRITO, line 49 (e)).

11. Pp. 70, 112.

12. P. 123 (quoting PLATO, CRITO, line 50 (b)).

authority of his sentence. But its authority derives precisely from the fact that it was rendered "according to law."[13] So, to deny it would be "to deny authority to any sentence so rendered; but this is to deny authority to law itself, since it is to deny authority to its application."[14] And, the author concludes, since "the application of law is essential to the existence of law, to act in breach of a given application is—by so much—destructive of all law."[15]

The argumentation here is terse and needs to be unpacked, piece by piece. First, the notions of legal authority and legal validity must be distinguished and clarified. Legal validity, Professor Allen notes, is "a specifically legal concept,"[16] but more, it has to do with identifying the specifically legal materials (or their sources) on which the several parts of the legal order are authorized to operate. By contrast, legal authority "is a moral concept which contains validity"[17] as *one* element, and agreement (presumably, the citizen's agreement to abide by the law) as the other. To express the matter somewhat more fully than Professor Allen does, it appears that legal authority is really a three-placed relation that obtains between a law, a person, and a legal system, as follows: a given law, L_1, is legally authoritative for a person, P, if and only if L_1 is legally valid in legal system LS_1, and P stands within the scope of LS_1.

This complexity in the structure of legal authority, apparently unnoticed by Professor Allen, has the embarrassing consequence that it is simply unintelligible to speak of a law being authoritative *simpliciter;* whereas a law is either (legally) valid or not, relative to a given legal system, a law is legally authoritative only with respect to a specific person (relative to a specific legal system). What can it possibly mean, then, for Athens to have a law that declares that judgments judicially rendered are authoritative? If, as Professor Allen maintains, legal authority is a matter of scope (that is, of agreement, and in this regard a moral matter) *and* a matter of (legal) validity, then a law's authority will in every case depend on the specific person to whom it is applied and on whether that person is or is not within the law's scope. But plainly this is not a matter that can be decided in advance, as a matter of law, since in part, anyway, it is a contingent matter of fact.[18] Moreover, what can it mean for the Laws to contend, as they do, that were Socrates to escape, the precise law he would breach would be the one that declares that judgments judicially rendered

13. P. 84.
14. P. 85.
15. *Id.*
16. P. 110.
17. *Id.*
18. It is *also* a moral matter, as Professor Allen insists, *see* p. 110, but the law's declarations regarding the *moral* status of its own pronouncements have no moral force whatever.

are authoritative?[19] Declarations can be questioned, denied, contradicted, misunderstood, ignored, and, no doubt, other things as well. But they cannot be breached.

The situation is partly clarified by supposing that the law in question simply confers legal validity on judicial judgments, that is, that it identifies them as proper legal materials—as "internally" authoritative for various legal purposes—and thus ensures them the same legal status as any other law of the system relative to this or that person. On this understanding of things, it follows that if a single law of a given legal system is authoritative for a person, then *any* valid law of the system is identically authoritative for that person. Moreover, it appears that the authority in question is not merely legal but has *some* moral force as well, grounded as it is in an agreement to abide by law. Of crucial importance, however, is the *magnitude* of that moral force.

Oddly, Professor Allen touches on the matter of magnitude only indirectly. On his understanding of the Laws' argument against Socrates' escape, the entire case turns on the proposition that Socrates could not escape without, by deed, denying the legal authority of the court's sentence.[20] But it is very difficult to see why he thinks this. Why can't Socrates acknowledge that he is a proper legal subject under Athenian law and grant, too, that judicial judgments, including the one that sentenced him to death, are legally valid, and *nonetheless* escape? His escape would deny none of these things—unless, of course, one supposes that the agree-

19. The Laws assert: "A good deal might be said, especially by an orator, in behalf of that law, now to be broken, which requires that judgments judicially rendered be authoritative." P. 123 (quoting PLATO, CRITO, line 50 (b-c)).

20. P. 84. This crucial matter might be clarified by two further points. *First*, Socrates might have argued as follows: "I must never do wrong. It is wrong not to keep just agreements. I have entered into a just agreement to abide by the laws. The court's order sentencing me to death is a lawful order. To escape would violate this law, and would thus be wrong. Hence, I must not escape." Socrates might have argued this way, but he did not. Rather, he assented to the Laws' contention that his escape would implicate him in the destruction of the Laws, so far as that lay in his power. But how this could be is the central question of the *Crito*, or so Professor Allen contends.

Second, Professor Allen's answer refers us to what he claims is Socrates' novel understanding of legal authority. Unfortunately, it seems that Professor Allen's reconstruction of the argument set out in the text (the one whose conclusion is that Socrates' escape would implicate him in a rejection of law) employs the new notion of authority without ever fully explaining or justifying it. Thus, if the idea of legal authority consists of nothing more than (1) an agreement to abide by law, and (2) a valid legal directive applied to someone who falls under the scope or jurisdiction of Athens' law, it is not clear just how the satisfaction of these conditions is supposed to establish that Socrates' escape would involve him in "deny[ing] the [legal] authority of [his] sentence," p. 84. There must be, one supposes, something special about the nature of law or legal authority, something not deducible merely from the possible stringency of *agreements*, that explains what is going on here. Thus, if the (supposed) moral conclusiveness of (just) agreements were doing the work, it would follow immediately that Professor Allen's account (in terms of the destruction of law) would be otiose. But, absent this assumption, it seems, at this point in Professor Allen's discussion, that Socrates could consistently acknowledge the legal authority of the court's sentence and deny *only* its moral conclusiveness.

ment that brought him under Athenian law entails, straightaway, that he is absolutely obliged to obey all (just) laws. But if the agreement is authoritative in *this way*, that is, if it is morally conclusive on the issue of escape, then the Laws' reference to their own threatened destruction is simply superfluous. And, if this is right, Professor Allen's attempt to show that the agreement to abide by law is only a necessary, and not the most important, component of the Laws' argument against Socrates' escape fails.

To avoid this outcome it seems necessary to suppose, then, that the moral force of the agreement to abide by law is not alone conclusive on the issue of escape. But now we are returned to where we began. If the agreement is not conclusive, why would Socrates' escape involve him in denying the legal authority of the sentence against him? Why couldn't he acknowledge the *legal* authority, but deny that that authority is *morally* conclusive on the issue at hand? But if this is right, then Professor Allen's interpretation of the Laws' argument again fails, for unless Socrates' escape would involve him in denying the legal authority of the court's sentence, the claimed link between *this* denial and the denial of *all* such directives would be broken. And without that link the grounds for thinking that his escape would be tantamount to destroying the Laws would be completely undercut.

To understand Professor Allen's interpretation correctly, it appears to be absolutely essential to bear in mind that it is the Laws that are speaking. It is they who claim that Socrates' escape would involve him in denying the court's authority, and from *their* perspective, it is not utterly unintelligible that the matter should so appear. From their point of view, whatever is legally authoritative in a given case is conclusive or absolutely determinative as regards their actions. For the Laws, if Socrates' sentence is legally valid and if it pertains, as it does, to a proper legal subject, it is legally authoritative. And plainly this is conclusive on the Laws' behavior. Barring, possibly, cases involving incompatible valid directives, the Laws cannot have a reason not to act in accordance with a legally authoritative standard. The Laws' reasons for acting as they do are always exclusively legal in nature. It follows that for the Laws to reject *any* valid order would be tantamount to rejecting *all* such orders. Validity, as indicated above, attaches to a *source* of directives.[21] Hence, it is impossible to reject the validity of a single directive from a designated source without rejecting

21. *See* pp. 85, 110. It is this *pedigree* aspect of the notion of validity, *see* R. DWORKIN, TAKING RIGHTS SERIOUSLY 17 (1977), not any principle of universalization, that explains the move from "this" to "all." Professor Allen cites, instead, a universalization argument that he says is to be "found nowhere else in ancient philosophy," p. 85. Alas, it is not to be found in the text either, nor, apparently, is it necessary.

the validity of all directives having that source. Finally, where the directives in question pertain, as in Socrates' case, to the *application* of law, their denial is tantamount to the rejection of law altogether, for law without application is impossible.

This, it appears, is the argument Professor Allen means to attribute to the Laws. Insofar as it is understood as an argument internal to the Laws, it is, perhaps, unexceptionable. But since Socrates is a moral agent, not a legal system, the argument seems to have no force against him. Unlike the Laws, Socrates can have good and compelling reasons not to act in accordance with a pertinent, legally authoritative directive, since unlike the Laws (and without their approval) he has both a right and a duty to look beyond the law to morality. It follows that he, unlike the Laws, can act contrary to the legal sentence against him without denying the authority of the court's sentence, because that directive is not necessarily conclusive on what he (as opposed to the Laws) ought to do.

Professor Allen refers to the Laws' argument as involving a "trick of perspective,"[22] but it is not clear whether he thinks the argument is a good one or not, a piece of chicanery or a real insight. A principle of charity requires that he be given the benefit of any doubt, but there is some doubt. Thus, assuming he thought Socrates accepted a weak argument, there surely is some obligation to explain Socrates' gullibility in this important matter. That Professor Allen is silent on the point is some evidence he is unaware of the difficulty.

What might explain Socrates' susceptibility to the argument Professor Allen has identified? Three considerations come to mind. First, Socrates quite clearly conceived of the relationship between citizens and the Laws as a moral one, not essentially a matter of force. So, at the outset, there exists a certain pressure in favor of according some moral status to the law collectively considered. Second, as the argument laid out by Professor Allen shows, law has its own "internal" logic that is conclusive on its operations. But "conclusiveness on action" (on what ought to be done) is commonly thought to be a central aspect of "the moral," certainly for moral agents. Thus, if morally speaking one ought to do X, then, all things considered, X is what one ought to do.[23] By a parity of reasoning, one might think that what is conclusive on *legal* action is an aspect of the *law's* morality.[24] Finally, bringing these several considerations together is a principle fundamental to Socrates' thought, namely, some version of what

22. Pp. 86, 111.

23. The so-called Socratic paradoxes all apparently presuppose some version of this principle and this view about the connection between morality and action.

24. For the suggestion that law itself might be said to have a morality, see L. FULLER, THE MORALITY OF LAW (rev. ed. 1969).

might be termed the Unity of Practical Reason—a commitment to the idea that the set of conclusive or finally compelling reasons for action is a consistent set. From these points it would appear to follow that what is finally conclusive for the Laws and what is finally conclusive for Socrates cannot finally be incompatible, as they would be if it were both right for the Laws to execute Socrates and for Socrates to escape. Since "law logic" affords the Laws no choice in the matter, it is up to Socrates, who is required only to suffer, not to perform, an injustice,[25] to make the required accommodation and not escape.

Whatever Professor Allen means to say about the force of the Laws' argument, he must be congratulated for bringing to light an interpretation that is sufficiently beguiling to explain how even Socrates might have been taken in by it. There are not many plausible alternatives. The best of them, variations on pure agreement theory, saddle Socrates with an embarrassing moral absolutism regarding the bindingness of (just) agreements; they either ignore, as mere hyperbole, the Laws' opening remarks about their threatened destruction, or they wrongly suppose that somehow this readily follows from the bare fact of the agreement to abide by law. There are, then, strong indirect incentives to accept Professor Allen's ingenious proposal.

II. Legality, Meaning, and Philosophy in the *Apology*

The *Apology* also has lessons to teach from the perspective of legal theory, or so the author implies. The most important is the way that the vagueness of the term "impiety" contaminates the entire case against Socrates, reducing the trial to a mere mockery of legality. Because of this vagueness, the charge fails to provide a "legal standard which ascertainable fact could be adduced to support or refute. . . ."[26] In the absence of such a standard there exists a pressing danger that one will be tried for one's reputation rather than for specific conduct. It is certain that Socrates was aware of this possibility, since in his defense he sharply distinguished between his old accusers and the instigators of the "current" action. The author worries that in a case like this "innocence and guilt lose precise meaning, as does proof,"[27] and he maintains that the reason Socrates did not really deny the charges against him "is because he could not."[28] They

25. Professor Allen maintains that the Laws' speech, and Socrates' position, finally turn on what he calls "the primacy of justice." P. 82. In fact, it is really the principle of not doing injustice oneself, and seems unconcerned with barring or rectifying the injustices that others might cause.

26. P. 30.

27. *Id.*

28. P. 29.

were just too vague.

Much of what Professor Allen objects to here is, of course, objectionable, but several important caveats must be entered. First, most if not all of these objections are from the perspective of Anglo-American, not Attic, jurisprudence and so should not be read as points Socrates might reasonably have raised in opposition to procedural practices governing his trial. Second, some of these alleged failings in legality may have been partially cured by other facets of Athenian trials, the large juries, for example. And third, to emphasize the matter of vagueness as strongly as Professor Allen does undermines Socrates' seeming certitude that his case was not decided correctly. If the charge against him was so vague that he couldn't defend himself, how could he confidently contend that the jury returned the wrong verdict?

Professor Allen is surely right to worry about the meaning of "impiety," but the central problem here (the crux of the trial from Socrates' point of view) is something more akin to ambiguity than to vagueness. Vagueness occurs at a term's boundaries, in the penumbra of its meaning. Doubtless, "impiety" is vague. In many cases it would be impossible, as a matter of meaning, to say whether someone had been impious or not. But not in Socrates' case, surely. For by "impiety" Athens apparently, if only vaguely, meant something like "failing to show due deference to the gods, idols, and sacred occasions acknowledged or celebrated by the City." And, on this understanding of "impiety," who could seriously doubt that Socrates was impious? Who could seriously hold that his conviction was an "injustice," that his case was not decided correctly, relative to this interpretation of the crucial term? Vague as this term is, it is not *that* vague.

A more plausible story is as follows. At his trial (and before, as the *Euthyphro* indicates), Socrates was hard at work introducing Athens to a new notion of piety. He sought to move his countrymen away from a largely conventional and behavioristic understanding and in the direction of a formal and genuinely normative replacement. Piety, he seems to have been suggesting, is properly understood as fidelity to standards of right conduct, whatever one conscientiously supposes those to be. This "suggestion" is not weak and wan, only dimly discernible in the text. Rather, it is everywhere in the *Apology*, once Socrates has answered, as well as he could, the problem posed by his "old accusers." Immediately following Socrates' answer, Meletus is asked to clarify his accusation.[29] Strangely, Meletus changes the charge from "Socrates loves gods other than those acknowledged by the City" to "Socrates loves no gods at all," that is, athe-

29. P. 47 (quoting PLATO, *Apology*, line 26(b-c)).

ism.[30] One might dismiss this remarkable revision as mere stage-setting for the show to come; it could be an indication that Meletus is not master of the accusation he has made, that he is, in fact, neither serious nor sincere. But from this point on, almost the entire argument of the *Apology* is aimed at rehearsing Socrates' steadfastness to doing his duty, to obeying his superiors (be they god, State, or another person), to what he took to be the requirements of right conduct. Evidently, Socrates thought that if he could persuade his jurors that he had been steadfastly dutiful throughout his life, he would have established that he had not acted impiously. Of course, for this showing to have succeeded, the jurors would have had to succumb, no doubt unwittingly, to Socrates' exquisitely subtle, even surreptitious, effort to induce a conceptual revision regarding the idea of piety. There was little hope that he would succeed, but as a pious person, he had no choice but to try.

This interpretation of the *Apology* brings to light what is surely the most poignant of the many ironies to be found there,[31] namely, Socrates' using the occasion of his trial to teach, to improve his countrymen, to instruct them on the true meaning of piety, to propose to them a certain conceptual revision, and thus to stand before his accusers and do what worried them most about him—philosophize. But more importantly, perhaps, this reading explains how Socrates might seriously maintain that his conviction was unjust as distinct from a mere error in evaluating the evidence he had adduced. A fatal mishandling of the facts might result in what, colloquially, could be termed a "miscarriage of justice," but surely this just means a failure in *legal* justice. Socrates, though, had something else in mind—a kind of moral, not merely casuistical or computational, wrong. What could it be?

Socrates himself referred to it as the jurors' "failure to decide the case correctly." But what does *that* mean? One thing it suggests is that Socrates did not object to a law proscribing impiety. But if he did not take exception to the law itself, then it seems that the only alternative would be to object to the jurors' handling of the facts. The jury must have misweighed them or drawn faulty inferences, prejudicial to Socrates.[32] But there is another possibility, almost hidden from our twentieth-century view because of our sharp distinction between questions of law and questions of fact. According to Anglo-American jurisprudence, courts settle the first kind of question; juries decide only questions of fact. But Attic jurors

30. *Id.* (quoting PLATO, *Apology*, line 26(c)).

31. Others are elegantly teased from the text by Professor Allen. *See* pp. 3-16.

32. This reading is greatly encouraged by the Laws' concluding remark that if Socrates "departs" by execution, he will be the "victim of injustice at the hands of men, not at the hands of we who are the Laws." P. 127 (quoting PLATO, *Crito*, line 54 (c)).

did it all. Not only did they hear and evaluate evidence, they also determined how the law should be interpreted. It follows that the supposed injustice against Socrates might well have been, not a mistake in evaluation, but a misinterpretation of the law against impiety, measured, of course, against the new meaning of "piety" that Socrates' efforts (alas, in vain) had been designed to promote. On this view of things, we can assume that the jurors did not follow Meletus in his apparent slide from "impiety" to "atheism" and that they held Socrates accountable to the traditional, and conventional, requirements of piety. But, on Socrates' view, this would be tantamount to holding him accountable to an immoral standard. Understandably, he might have regarded this as a grave moral (not legal) wrong—indeed, as an injustice.

Conclusion

Many other things might be said about Professor Allen's book. It includes his new translations of the *Apology* and the *Crito*, "not because the world is groaning for them," but "as an aid to the reader and a control on interpretation;"[33] the discussion of irony and rhetoric in the *Apology* is a pleasure to read; and woven throughout the book is a haunting descant noting problems with legal realism, problems that Socrates' views about law, inchoate as they were, deftly avoid.

Despite Professor Allen's ingenious efforts, some readers will continue to doubt his claim that the *Crito* is "one of the great masterpieces in legal philosophy."[34] But the success of *Socrates and Legal Obligation* does not turn on this point. The test, as always, is whether the book stimulates thought. This book does, abundantly.

33. P. ix.
34. P. viii.