

Critical Notice

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ARTHUR RIPSTEIN, *Equality, Responsibility, and the Law*. Cambridge: Cambridge University Press 1999. Pp. xii + 307.

In this excellent book Arthur Ripstein develops a broadly Kantian interpretation of tort law and criminal law that is noteworthy for its spirited defense of core features of Anglo-American law and for its uncompromising dismissal of the so-called law and economics approach to these matters. A final chapter extends the analysis to the topic of distributive justice.

According to Ripstein, the point of the law is to establish fair terms of interaction among persons. It does so by balancing the individual's interest in liberty against her interest in security. Each person has an interest in being left free to act as she chooses, but also an interest in being protected from harm that the actions of others might impose on her. If all citizens are to be treated impartially by a set of laws, then these interests will be in conflict whenever one rather than another set of laws is chosen and enforced. One cannot together with fellow citizens have maximal liberty and maximal security at once. The normative theory that has shaped the broad outlines of law in the Anglo-American tradition resolves this conflict by conceiving how a reasonable person who behaves with due regard for the legitimate interests of others would act. This standard of reasonableness sets the responsibilities of citizens toward one another and the rights that the law protects.

One might suppose that any way of balancing people's generic interests in liberty and security must involve some form of aggregation of people's particular interests in liberty and security. Ripstein denies this is so. His proposal is that we can avoid aggregation by abstracting from the particular interests that actual interests have in particular settings and by considering instead the generic interests that each person has *ex ante* in both liberty and security.

These issues can be cast in terms of luck and responsibility. Suppose that one person suffers damages, and sues another person to recover her loss. A misfortune has occurred, and the question becomes, whose bad luck is it? A reasonable person respects the rights of others and behaves with due regard for the legitimate interests of others. If one does so, and the causal consequence is harm to another, the harm is the responsibility of the other person who suffers the loss. If you engage in fair and legal business practices, and rivals lose out in competition, their losses are not your problem. If you drive safely, obeying traffic laws, and your car slams into another, the other's injuries and financial loss are once again not your problem. On the other hand, if you do not behave as the reasonable person would in your circumstances, and violate a duty of care to another, you 'own' the risk that your faulty conduct will cause injury, and you are responsible for resulting losses that ensue that are within the scope of the risk brought about by your faulty conduct.

If you deliberately choose to impose significant wrongful injury on others, or recklessly to endanger others, your conduct runs afoul of the criminal law, and is properly condemned and punished. From Ripstein's perspective both tort law and criminal law serve to uphold fair terms of interaction. He extends the same perspective to the analysis

of issues of distributive justice. Here the same issues concerning, risk, misfortune, and the proper division of responsibility arise. Within criminal and tort law, any adult person who is not severely incapacitated by feeble-mindedness or insanity is deemed capable of conforming her conduct to the standard of what a reasonable person would do in her circumstances. In this way a complex standard of equality is respected. All persons are equally protected so far as their fundamental interests in liberty and security are concerned. An objective standard of reasonableness is imposed on everybody, so that no one's interests in liberty and security are compromised by deference to anyone's idiosyncratic preferences or attitudes or traits. But if people are to be held responsible for their choices and actions in this way, a fair background must be maintained, so that everyone's capacity for living her own life autonomously and responsibly is sustained so far as this is possible. The standards that specify this fair background are the principles of distributive justice.

In Ripstein's apt summary formulation: 'Provided that starting points are fair and tortious wrongs are righted, a set of holdings is legitimate if it is the result of uncoerced interaction' (270).

II The Reasonable Person

Ripstein presents the idea of fair terms of interaction among reasonable persons as a clear and normatively attractive alternative to the normative law and economics approach, which holds that civil and criminal law should be set so as to achieve economic efficiency in the Kaldor-Hicks sense. (A change is Kaldor-Hicks efficient if the gainers could fully compensate any losers while still remaining gainers.) However, Ripstein does not propose a theory that specifies how reasonable persons would modify their

behavior to accommodate the interests of others; this matter is left to intuitive judgment. But then the substantive dispute between the law and economics advocate and Ripstein is not yet clearly joined. After all, it has been proposed that the reasonable person is one who modifies her behavior in the light of the interests of others when the expected cost of doing so is less than the expected net gains to affected parties that modification would induce. In other words, fairness and efficiency coincide in their requirements. In order to bring it about that he is presenting a full-fledged rival to the law and economics approach, Ripstein would have to propose a specific set of principles that constitute the norms of the reasonable person and show that these norms would lead to different standards of tort and criminal law than would an efficiency analysis and that his proposed principles of fairness are normatively superior. This he does not do. So far as I can see, he does not fully appreciate that he would need to do this in order to establish the normative superiority of his approach to the law and economics approach.

What Ripstein does attempt to show is that the existing general outlines of tort law and criminal law as it exists in Anglo-American jurisdictions make sense on the reasonable person analysis he offers. Since law and economics analysts have offered detailed arguments to the conclusion that the general outlines of tort law at least can be explained by supposing that those who established this body of law were trying to achieve economic efficiency, it seems that even if Ripstein could show that existing law is congruent with what his analysis asserts to be desirable, this would not show the superiority of his approach to the law and economics approach. At best we would have a tie.

In company with other recent philosophical interpreters of tort law, Ripstein holds that broadly economic interpretations explain away its key features rather than providing them a secure rationale that accords with our common-sense understanding.¹ That is to say that even if both law and economics and common-sense morality provide rationales for current practice (so far as it is acceptable), the former provides the wrong sort of reason, at odds with our underlying norms.

I agree that whatever its merits as a contribution to social science explanation of the salient features of law, the law and economics approach is unattractive when proposed as a normative standard for assessing actual and proposed legal practice, because the Kaldor-Hicks norm is not a plausible candidate for the role of ultimate ethical principle. This is not a very controversial stance.²

Suppose an air line is deciding on safety precautions to be followed by the pilots of its planes approaching an urban airport. The Kaldor-Hicks test says that the air line should maintain a higher standard of safety for residents of wealthy neighborhoods than for residents of poor neighborhoods, because hypothetically a wealthy person would be willing to pay more for increased safety than a less wealthy person, just because the wealthy person is wealthier. This could be so even if the poor person desires more intensely to continue living and would gain more well-being from extending her life by any remotely plausible conception of well-being. The Kaldor-Hicks hypothetical compensation test is simply not a good criterion of whether a change would be ethically superior to the status quo. In response, the advocate of Kaldor-Hicks might respond that if the prior distribution of income and wealth is acceptable, then the Kaldor-Hicks test is appropriate. But in order to decide what income and wealth distribution is acceptable one

may need to devise a standard for assessing the desirability of changes from a given status quo, which was the job the Kaldor-Hicks test was supposed to fill.

One might have doubts about Kaldor-Hicks quite aside from how the test is distorted by maldistribution of income and wealth. Assume the current distribution of income and wealth is ideally fair. To my mind one should still find the Kaldor-Hicks a bad test for identifying morally acceptable alterations of the status quo. One aspect of the badness is that someone might hypothetically be willing to pay a lot of money to avoid an outcome that would not really be bad for him or to attain an outcome that would not really be good for her. I might be willing to pay a lot to achieve pseudo-profound drug experiences or satisfying feelings of revenge that do not really make my life go better, and if the distribution of income were corrected to channel more money to me, I would hypothetically be willing to pay more. Kaldor-Hicks posits hypothetical unwillingness to pay as the criterion of an improving change, but this test is subjective in that its results depend on the attitudes and values of the persons in question. People's subjective attitudes and values may be defective for all sorts of reasons.

But to reject Kaldor-Hicks and with it the law and economics approach is just to eliminate one member of a very large family of views. This is roughly the class of views that would hold that the tort and criminal law should be devised so as to bring about best consequences, with different members of the family offering different interpretations of what defines best consequences. Utilitarianism to my mind would serve as a better standard for an instrumental approach than law and economics; prioritarianism (utilitarianism with extra weight assigned to utility gains for those badly off in utility terms) would be better still; and a version of prioritarianism that integrates a concern for

personal responsibility would be a still better candidate. It would be a digression to try to defend these hunches here.

Ripstein evidently opposes consequentialism of any stripe and favors deontology, but he says little about why he regards the former approach to law to be misleading. No doubt standard legal practice embodies common-sense attitudes to morality that have a deontological character. Ripstein aims to show that the plain meanings on the surface of important legal concepts make sense as they are and do not need to be explained away as means to some goal not explicitly announced. He succeeds quite well at showing that a host of legal distinctions that might seem a hodge-podge in fact form a coherent system, but this is not the same as showing that the system so described is ethically attractive. To clarify this issue, one would have to take the most plausible instrumental conception and the most plausible deontological conception and carefully compare and assess what they would imply in cases where they come apart and yield different implications.

I do not mean to criticize Ripstein for not carrying out this enterprise. But as I mentioned already he does seem to overstate the extent to which his interpretation of law qualifies as a rival to (for example) the normative law and economics approach rather than being a neutral common ground that different normative theoretical approaches to law might rationalize in contested ways.

At one point he compares his understanding of the reasonable man standard in tort law with the economic approach in the form of the Learned Hand test for negligence. The Hand test says that a person who might take precautions to prevent a possible accident fails to exercise due care if the cost of the accident if it occurs multiplied by the probability that it will occur if the precaution is not taken is greater than the cost of taking

precautions, yet the agent does not take them. Although Ripstein does not propose a specific set of principles defining reasonableness that could serve as a rival to the Hand test, he nonetheless believes that his gloss on reasonableness differs from this test in two significant respects. One is that the standard of due care according to Hand varies in its requirements depending on the specific features of the situation such as the costs to the particular agent of taking precautions. The second difference is that Hand and the economic approach generally fuse the question what level of care is required with the question what would the agent have to pay if extra care were not taken and the mishap at issue occurred. In contrast, according to Ripstein's construal of the reasonable man standard, the level of due care that is required is set by weighing the conflicting interests in liberty and security against one another in a generic setting. Once the weighing in the generic situation occurs, its outcome determines what level of care the agent is required to put forth, regardless of the particular cost to her of taking care. Moreover, on the Ripstein version of due care requirements, they might require an agent to take precautions even if the cost to him of taking such precaution exceeds the damages that would in this particular case accrue to the potential plaintiffs if harm came about.

Ripstein is insistent that fixing the requirements of the due care duty by the standard of reasonableness must be carried out by weighing the competing interests in liberty and security as they appear in a suitably generic representation. Only so can we measure interests without aggregating them across persons.

No doubt there are sound reasons that an instrumentalist about law would affirm for making legal requirements coarse-grained rather than fine-grained. Doing so typically increases the degree to which people can come to know at reasonable cost what

the law's requirements on their conduct are in the situations in which they find themselves. So we should abstract from this consideration, since Ripstein's affirmation of generic nor particularized weighing of interests evidently goes beyond it. Why should it be wrong to make the line of legal requirements depend on the gains and losses of those affected at least when this can be done without giving rise to the costs mentioned at the beginning of this paragraph?

Suppose that with respect to a type of activity in which I engage, my need to engage in the activity is especially great and my ability to take care to avoid spillover losses on others is reduced for reasons beyond my power to control. For example, I need to drive a car to work, and I am poor at hand-eye coordination and low in intelligence, so my driving performance is marginal at best. If my driving inability is sufficiently great, it is best if I do not drive and liability rules that induce me to take this decision would be desirable. But for a range of values of gains to me from driving, costs to me of conforming to normal safety standards, and degree of risk imposed on those in the vicinity of my car when I drive, the best solution would be for me to drive even though I drive poorly. If my neighbors in the small town where I live can easily recognize my vehicle and know my situation, it is reasonable to expect these neighbors to take extra precautions in my vicinity. I submit that the law should be devised so as to bring about best outcomes, and to the extent that tailoring the law's requirements to particular features of individuals helps improve outcomes, this should be done. Ripstein resists this instrumentalism on the ground that it violates a norm of equal treatment for all, but more needs to be said to persuade us that we should care about Ripstein equality.

III Risk and Luck in Tort Law

Among the more interesting aspects of Ripstein's book is his defense of the standard tort law practice whereby one who fails to exercise due care and imposes risk of harm on another is liable only if harm actually materializes and is liable for the full amount of the harm caused that is within the risk. In the same spirit Ripstein finds morally justified the common criminal law practice of specifying lesser punishment for an attempted crime than for completed crime. In each case Ripstein opposes the position that those who violate tort law duties and those who attempt crimes should be treated the same whether or not their conduct issues in more or less harmful consequences through factors beyond their power to control. I discuss the tort issue in this section and the criminal law analogue in the next section.

Suppose that two hunters carelessly shoot in the direction of another hunter. One shot strikes this third hunter's eye and causes serious injury. Suppose further that nothing distinguishes the behavior of the two careless hunters; they are equally careless. By chance, one causes harm and one does not. Some would hold that it would be ideally fair if liability for the costs of damages caused by careless behavior was allocated solely in proportion to the fault of those who behaved carelessly, so that one's liability would not vary with chance factors beyond one's power to control. One might roughly formulate this idea as the following rule of liability: those who violate a duty of care to others should pay damages based on the expected disvalue of their conduct (the amount of harm the conduct might cause multiplied by the probability that this harm will occur), not the actual disvalue. Ripstein rejects this line of thought. He upholds the morality of tort law practice, which generally specifies that if one's wrongful act or omission causes no harm,

there is no tort and no legal liability, and if one's wrongful act or omission does cause harm, one is liable for the actual harm caused provided it is reasonably foreseeable.

In this connection Ripstein invokes the metaphor of risk ownership. If I violate a duty of care to another, imposing risk on the other, I can be regarded as 'owning' the risk of this harm to the other. For example, I might carelessly leave a bucket of acid on my window ledge above a busy pedestrian walkway. The bucket might or might not fall to the ground and might or might not spill its contents on a pedestrian, causing injury. According to Ripstein, in this sort of circumstance the risk that the bucket may cause injury belongs to me, and if injury comes about through my carelessness, I am morally required to pay for the damages that are incurred, and legally required as well, via tort liability.³

Ripstein staunchly resists the view that the extent of my liability should be fixed by the wrongness of what I do, rather than variable depending on arbitrary luck that determines whether any injury at all occurs in this scenario, and if so, the extent of the resulting harm to persons and property. It is not morally arbitrary that the extent of my liability for wrongful conduct depends on the actual consequences of my wrongful conduct. Morality supports the common sense judgment that if my faulty act or omission causes harm, I should repair the damage, but if I am lucky, and my faulty conduct generates no damage, there is no harm done and nothing to repair.

The alternative view of this matter is that what would be ideally fair is that all those who violate a duty of care to others by act or omission that wrongfully imposes risk of harm should collectively pay for all resulting harm to victims in proportion to their fault. We might imagine risk pools divided by types of risk, with unsafe drivers and

pedestrians paying for the costs of auto accidents, manufacturers of defective consumer products paying for the harms caused by defects, and so on, or we might have one big all-encompassing risk pool. Under the risk pooling scheme, one's liability does not depend on chance, but on the expected harm associated with one's wrongful act.

Ripstein repudiates the idea that there is a moral imperative to eliminate the effects of chance in this way. He urges that the risk pooling suggestion, advanced as a proposed reform of tort law practice, is an unstable half-way house that cannot be given a coherent rationale.

If undoing the impact of luck on human affairs is the imperative, Ripstein asks, why not include those who act negligently by imposing unreasonable risk of harm on themselves in the risk pool of liability? I do not see why this question should be felt to pose a difficulty for the risk pooling suggestion. Self-injurers do not violate a duty of care to others and do not impose risks of harm on anyone other than themselves. One can coherently maintain that (1) only those who violate a duty of care to others are faulty in the way that should trigger liability for the costs of harm that ensues and (2) among these faulty agents, liability for damages should be proportional to the faultiness of one's conduct as measured by the expected harm imposed on others.

Undoing the impact of luck on human affairs is too broad an aim correctly to express the moral judgment that motivates the risk pooling scheme. The advocate of the risk pool might view with equanimity the varying fortune that falls on people who deliberately choose to engage in high-stakes gambling or to join in risky entrepreneurial activities or thrilling dangerous sports.

Ripstein also voices the suspicion that the risk pooling proposal cannot explain why causation matters at all to liability. Why not instead hold that all faulty or unsavory conduct of any sort triggers a requirement to pay into the risk pool? If causation does matter to liability, why does it not matter in the ordinary common-sense way, such that if you act badly and make a mess, you should pay for fixing it? Again, the advocate of risk pooling has an answer. Acts and omissions violate a duty of care to other persons when they impose wrongful harm or risk of harm on others. What makes the agent's behavior wrongful is that it causes or threatens to cause harm to others. One can consistently hold fast to this conception of the relevant sort of wrong that triggers tort liability and also identify the extent of liability with expected harm imposed not actual harm caused.

On the other hand, Ripstein is correct to insist that one cannot defend the risk pooling suggestion just by objecting to the arbitrariness of sheer luck determining the extent of liability. In general, whether or not it is morally troublesome that chance determines an outcome depends on the moral principles we accept as governing that kind of outcome. We can identify luck as arbitrary or nonarbitrary only with the help of the moral principles that should regulate the situation. Perhaps it is sheer luck that determines that channeling goods to Smith rather than Jones maximizes aggregate utility, but if we accept utilitarianism, letting luck determine the outcome in this sort of case is not problematic. Pointing to the arbitrariness of fortune is not in and of itself a trump card in moral argument. There is always a question as to whether we should accept this or that moral principle that singles out a particular kind of luck as morally undesirable and such that we ought to eliminate its impact on people's lives.

In the case at hand, Ripstein can appeal to the principle that one who causes harm to others by wrongful conduct should repair the damage that he has caused. The rival norm that underlies the risk pooling proposal is that those who violate the duty of due care toward others and in this way engage in behavior that in the aggregate causes harm to the legitimate interests of others should be required to pay in proportion to their fault so that full compensation is made to those who are wrongfully harmed. To implement the latter principle would be inconsistent with the current practice of tort law, but this consideration cuts no ice in this context, because the advocates of the risk pooling proposal are critics of current tort law practice. The advocate of the risk pooling proposal can also uphold it as ideally fair but withhold judgment on the further question, what is the best practically feasible system of civil law that best achieves all of the moral desiderata pertinent to it. Ripstein defends current tort law practice on grounds of ideal fairness, not on grounds of practical feasibility.

So far as I can see, either the norm that ties liability to the harm one has wrongfully actually caused or the norm that underlies risk pooling could be integrated into a coherent set of civil law principles. Ripstein's argument that the risk pooling proposal is normatively unstable does not succeed. But appeal to the moral imperative of preventing chance from running amuck does not unambiguously support risk pooling. As Ripstein notes, the one who violates a duty of due care initiates a lottery in which chance will determine his actual liability, but this is a lottery he should have anticipated, might have declined, and indeed morally ought to have declined. It is not obvious that allowing chance to determine liability in these circumstances violates a moral principle we must accept.

Against this consideration one should set the (to me, anyway) strong intuitive unfairness of a system that can impose a huge liability, devastating for the life of the one who must bear it, on an individual who exhibits very slight fault and happens to initiate a causal process that turns out disastrously. The same system allows a person who is egregiously faulty in a way we regard as horribly morally culpable to escape with no legal liability whatsoever provided he is lucky enough to have initiated a monstrously dangerous causal chain that happens to play itself out harmlessly.

Regarding the moral acceptability of various possible civil law regimes, one might hold (1) that both existing tort law practice and the risk pooling alternative are fair and morally acceptable, (2) that only existing tort law practice is fair and morally acceptable, or (3) that only the risk pooling alternative is fair and morally acceptable. Ripstein ambitiously argues for (2), but the plausible case he makes better fits (1).

Ripstein writes as though he thinks that the only basis for favoring risk pooling over existing tort law practice is the very general imperative that we should eliminate any impact of luck, or at least unchosen luck, on human life. If this were correct, he would be right that the risk pooling alternative is normatively unstable, for it too countenances the influence of some luck. Of two people who are equally disposed by character to react by manifesting wrongful conduct that violates a duty of due care to others in certain circumstances, only one may be unlucky enough actually to face the triggering circumstances and actually to engage in the wrongful conduct. (For simplicity, just suppose neither person can be held morally responsible for avoiding or failing to avoid the triggering circumstances, what are sometimes called the near occasions of sin.) According to the risk pooling proposal, only the person who actually acted wrongfully is

required to contribute to the risk pool according to the expected harm she wrongfully imposed. The risk pooling principle does not declare war against all chance but only against some.⁴ But it does not strike me as incoherent to hold (1) that responsible agents who behave badly toward others should contribute to the costs such bad behavior imposes on others in proportion to their fault and also (2) that the fault that triggers liability is incurred by actual choice not merely by having the disposition to choose.

IV Risk and Luck in Criminal Law

Puzzles about the moral appropriateness of treating individuals differently in response to aspects of their agency that are matters of chance not within their control also arise in criminal law. Some commentators repudiate the standard criminal law practice of punishing attempted crimes less severely than otherwise similar completed crimes.⁵ If two individuals acting independently aim and shoot pistols at an innocent third person with intent to kill, and one shooter misses his target while the other lands a lethal shot, the one is guilty of murder and the other of the lesser crime of attempted murder. But in all morally relevant respects what they did was the same, so it is objected that it is wrong for the state to impose greater punishment linked to stronger condemnation on the shooter who happened to be successful. (We might imagine that both took equally careful and accurate aim before firing, but that by coincidence a falling rock happened to prevent the unsuccessful shooter's bullet from reaching its target.) Ripstein argues that the soundest theory of criminal law supports the standard criminal law practice.

Ripstein makes some interesting points. He observes that the puzzle about discriminating between attempts and otherwise similar completed crimes gains a spurious plausibility from the “additive” assumption that a completed crime can be decomposed

into an attempt plus the circumstances that render the attempt successful. As he points out, the assumption is false, because a crime can be perpetrated recklessly as well as intentionally.

According to Ripstein, 'The basic feature of crime is the substitution of private rationality for public reasonableness, and the proper measure of punishment is the seriousness of the wrong' (p. 225), as measured by the importance of the victim's rights that are violated. Hence what happens makes a difference to how the law should treat the attempter of crime and the successful attempter. If there is a failed attempt, there is no violation of rights and no interference with the freedom of others. One can regard the person who attempts a crime (as well as one who is reckless with regard to the elements of a criminal act) as imposing a risk of rights violation on others. If the risk ripens into a rights violation, one has committed the crime in question, but if not, one has not.

Ripstein points to another example of the law's treating differently those who are equally culpable without doing anyone an injustice or bringing about any unfairness. With random police patrols, some who commit crimes will be caught and not others. Those who are caught are from their perspective unlucky, but they cannot complain the state has treated them unfairly. The example is intended to soften our insistence that the equally culpable must be treated the same by the criminal justice system.

The criminal caught by the police when other criminals escape deserves to be punished according to a noncomparative standard: he is guilty, so he deserves punishment. But there is a comparative unfairness: the caught criminal is no more deserving of punishment than those who get away scot-free. We should tolerate this comparative unfairness because increasing police patrols to the point that all who commit

crimes are caught would be far too expensive and too invasive of citizens' privacy. But in comparative terms it remains unfair that those who are equally guilty of crime are not equally caught and punished. So Ripstein's point does not go as far as he supposes.

I am not sure that Ripstein's characterizations of criminal law practice succeed in removing the initial impression that treating otherwise similar attempters of crime and successful attempters differently is unfair. I agree with Ripstein that it is acceptable for criminal law to accord different treatment to those who are equally culpable in the sense of morally blameworthy. Smith and Jones, acting independently of each other with the intent of murdering innocent Garcia, may be equally culpable, but if Smith shoots the intended victim with a gun while Jones sticks pins in a doll with the intent of killing him by voodoo magic, Jones is not guilty of a crime because what he does is harmless. But the puzzle arises in cases where unsuccessful attempter and successful attempter are similar in relevant respects apart from the actual causal upshot of their acts.

It is hard to disentangle the distinction between attempted and completed crimes from the distinction between wholehearted and less than wholehearted attempts. The person who does not successfully complete an attempt may not wholeheartedly intend to succeed, and this would mark a significant moral difference between mere attempter and successful attempter. So consider an artificial example. Some people play Russian roulette for fun on unwilling and unwitting victims. Those who play the game choose whether to impose a risk of serious injury on another that ranges from minuscule to nearly certain. In the event some persons are seriously injured. Consider two pairs of players. Both members of one pair imposed a one in a thousand chance of gunshot wound on the victim; both members of the other pair imposed a 990 in a thousand chance

of gunshot wound on the victim. As it happens, one member of each pair is ‘successful’ in triggering a gunshot and serious injury. The moral judgment of those who call in question the fairness of treating relevantly similar successful and unsuccessful attempters of crime the same is that in the example just given the people who imposed the same risk of harm wrongfully and intentionally should be treated identically by the criminal law process despite the very different outcomes of their actions.

I accept the moral judgment just stated, but I recommend to the reader Ripstein’s ingenious arguments defending standard criminal law practice.

V Ripstein on Distributive Justice

According to Ripstein, the analytical apparatus already in place helps to explain and justify norms of distributive justice that mesh smoothly with the rationales for civil and criminal law. The general inquiry is to determine fair terms of interaction, a background of opportunities and rules such that it becomes reasonable to expect individuals to bear the costs of their choices.

Distributive justice stipulates that some misfortunes that may befall some individuals through no wrongful actions of others should be shared by all members of society so far as this is feasible. These misfortunes trigger compensation that it is the collective responsibility of all of us to provide. Which misfortunes are these? Ripstein's answer is that all should be enabled to exercise responsible agency and sustained in that capacity against misfortunes that might damage or threaten it. He writes, ‘a person's choices are only normatively significant if he or she has the capacity to choose and is in a position to exercise that capacity in a meaningful way’ (p. 271). Misfortunes such as ‘physical disabilities, illness, or extreme poverty’ (p. 266) prevent a person from shaping

her own life by meaningful choice. The misfortune of this severe magnitude dominates the person's life, calls all the shots. Distributive justice as Ripstein conceives it requires that all citizens be enabled to exercise autonomous agency in a meaningful life and that misfortunes that drop an individual below a decent threshold level of autonomous agency capacity should trigger compensation to bring the individual back to this threshold level. I suppose that Ripstein would want to add that society should undertake efficient prevention of such misfortunes so long as this can be done without unduly infringing on individual liberty.

This is a version of sufficientarianism, the norm that distributive justice requires not that everyone have the same resources or welfare but that everyone should have 'enough.' Harry Frankfurt in recent years has been a forceful advocate of this position.⁶ Ripstein's version gets its special flavor by setting the standard of sufficiency in terms of the requirements of autonomous agency.

On this view what we owe to one another in the form of distributive justice is not fixed by any individual's subjective conception of what he requires for a good enough life but by the standard of the reasonable person that also sets the terms of civil and criminal law responsibility. As in these domains, we attribute to the reasonable person interests in liberty and security that legal arrangements should appropriately balance. Ripstein comments, 'Each person has an interest in having the way his or her life goes depend on what he or she thinks important, as well as an interest in having how that life goes not depend on the choices of others. Reasonable terms of cooperation treat persons as equals by giving each the wherewithal to choose his or her ends, while protecting each from the excessive burdens that the choices of others might create' (p. 267).

Ripstein associates his doctrine of sufficient capacity for autonomous agency with a norm that requires that the just society supply general-purpose Rawlsian primary social goods to people at a sufficient level.⁷ Primary social goods are goods that any rational person with an overriding interest in rational agency and in cooperating fairly with others will want. The contrast here as Ripstein sees it is with what he calls 'practical reason' approaches that try to draw the line between the responsibility of society for an individual and the responsibility of the individual herself for her own life course so that it coincides with the line between what we can reasonably expect the individual to control by way of avoiding bad outcomes. For example, an equal opportunity for welfare approach would in principle hold that an individual should be receive compensation if she is worse off than others through no fault or choice of her own where what renders her worse off is an involuntary expensive taste. According to Ripstein it is not reasonable to hold society responsible for compensating individuals for their particular idiosyncratic quirks that render them worse off than others. What sets the extent of distributive justice compensation for disadvantage is not whether the individual is at fault or responsible for the disadvantage but whether the disadvantage amounts to an objective threat to agency that any reasonable person would find to be such. Hence the measure of what one is owed by way of distributive justice preservation of a fair background for interaction is an index of primary social goods.

It is not clear to me why Ripstein's sufficiency for autonomous agency doctrine should be tied to a primary goods standard as he supposes. We might say that the capacity for autonomous agency is a very general capability to function in a certain significant way. Different individuals will require different amounts and types of

primary social goods in order to bring them to the 'good enough' level of agency capacity and sustain them at that level. Perhaps some individuals require nonprimary goods, goods that people generally do not need to sustain agency, but only individuals of a particular type, or perhaps only the particular individual with unique agency needs. I would have supposed that Ripstein's doctrine that what we owe one another is goods sufficient to sustain everybody at a threshold level of agency should say that this norm will generally require individual provision tailored to that particular individual's traits and susceptibilities as they affect her capacity for agency.

With the Ripstein fair background in place, and provided civil law and criminal law is enforced, then whatever quality of life an individual comes to have is properly deemed that individual's responsibility, not a responsibility for society. People may behave prudently or foolishly, and they may experience good or bad luck, but bad luck that leaves the individual above the threshold of good enough autonomous agency capacity is luck that according to Ripstein the individual properly 'owns.' Here we see the general Ripstein position on luck, responsibility, and reciprocity shaping his view of distributive justice.

I shall press two objections against Ripstein's rather attractive conception of distributive justice. One takes exception to the idea that the sufficient level should be set in terms of the capacity for agency. A second objection challenges the general sufficientarian approach from a standpoint that is both more egalitarian and more respectful of individual responsibility as control.

First, autonomous agency. I find the Ripstein proposal rather vague and unclear. How do we measure someone's capacity for agency? But insofar as I understand the

idea, it does not seem to me to be the ultimate determinant of what we owe one another. People in very reduced circumstances, suffering extreme poverty or disability or disease or comparable affliction, may be perfectly capable of agency, and we may rightly hold such persons responsible for their choices and conduct, praiseworthy if they do well, blameworthy if they do badly. An impoverished parent may be perfectly capable of exercising agency effectively to provide for his children and doing so may render his life meaningful in the sense of oriented to the achievement of a worthy goal. If the parent messes up his children, we blame him, and if he gives them a good start in life despite the constraints he faces, we admire him. We would be wrongfully belittling people's competence if we denied that responsible agency and meaningful action are often possible even in very grim, even horrible circumstances. To my mind extreme poverty should trigger distributive justice amelioration not because such poverty always or typically undermines agency but because it unduly reduces the individual's range of available life options and her opportunity for well-being. Of course extreme poverty, severe illness, and similar harms can undermine and damage the capacity for intelligent and purposive action, but these bad conditions should trigger distributive concern even when nothing like that destruction of agency capacity is at risk.

Ripstein is on strong ground in rejecting the idea that people's subjective attitudes and opinions determine what we owe to each other. That I suppose I need a Jaguar or a big sport utility vehicle to have a decent quality of life imposes no obligations on others. But there can be objective standards for measuring people's condition for distributive justice purposes other than agency capacity, the standard Ripstein favors.

I turn next to the implausibility of sufficientarianism. To hold that distributive justice requires that society preserve each individual's capacity for agency come what may does not adequately register the limits on social responsibility that individual responsibility establishes. If society gives me the wherewithal for a good enough life, deemed to be just, and I squander the opportunities provided repeatedly and negligently or deliberately, at some point society's responsibilities just give out. We have done enough for Arneson, and if he chooses to make a waste of his life and bring early death or grave disability on himself, this is unfortunate, but does not bring it about that other people (or society at large) are obligated to devote still more resources to restoring his agency capacity. Enough is enough. Sufficientarianism potentially renders the wastrel individual a basin that attracts unlimited amounts of social resources to try to restore what the individual by reasonable conduct could have preserved for himself.

Sufficientarianism is too demanding in requiring society to do what it can to maintain individuals at the level of sufficiency come what may, regardless of their irresponsibility. The doctrine is also too undemanding in treating as a 'don't care' from the standpoint of justice what happens to people as a result of voluntary interaction above the threshold. When we must choose between conferring a substantial benefit on people just above the threshold and a comparable benefit on those far better off, in my view justice requires us to give priority to the interests of the worse off. Also, the priority that should be accorded the interests of the worse off is less than absolute, so in some circumstances we should prefer to let a few people languish just below the threshold who could be boosted over it in order to secure gains (or prevent losses) of much greater well-being magnitude for sufficiently many people who are securely above the threshold.

These objections could perhaps be answered by explaining what is so morally special about the threshold that marks the 'good enough' point. If the threshold marks a point along the dimension of agency capacity, what is so transcendentally important about getting agency capacity up to precisely that level? I doubt that one can provide a nonarbitrary specification of the point of sufficiency, and I doubt that even a nonarbitrary specification would rationalize the strict priority associated with the threshold in sufficientarian doctrine.

VI Concluding Remarks

Equality, Responsibility, and the Law is an original and valuable contribution to the philosophical analysis of legal concepts. Ripstein develops a simple and elegant framework of analysis and deploys it in sophisticated ways to address hard problems concerning the justification of standard uses of state power to set terms of interaction among individuals. This review has touched upon some of the book's main themes, but it should be mentioned that Ripstein also has valuable discussions of significant topics not mentioned here.

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¹. See, for example, Jules Coleman, *Risks and Wrongs* (Cambridge: Cambridge University Press 1992); Ernest Weinrib, *The Idea of Private Law* (Cambridge: Harvard

University Press 1995); and Stephen Perry, 'The Moral Foundations of Tort Law,' *Iowa Law Review* 77 (1992) 449-513.

². Kaldor-Hicks can give inconsistent guidance in some circumstances (urging that a change from the status quo would be an improvement and also that if it were made, a change to the status quo ante would be an improvement). So it could not be an across-the-board test of ethically desirable change. Ronald Dworkin criticizes Kaldor-Hicks in 'Is Wealth a Value?', in his *A Matter of Principle* (Cambridge: Harvard University Press 1985). Richard A. Posner defends Kaldor-Hicks as a normative standard in *The Problems of Jurisprudence* (1990), chapters 12-13. He somewhat retracts this claim in 'Wealth Maximization and Tort Law: A Philosophical Inquiry,' in *Philosophical Foundations of Tort Law*, David G. Owen, ed. (Oxford: Clarendon Press 1995), 99-111.

³. Ripstein cautions against taking the risk ownership metaphor too literally. Having behaved negligently, I do not really have property rights in the risk I create. But notice that in a sense I may "sell" this risk by purchasing accident liability insurance. The legal judgment that imposes tort liability on a person is not a determination that the person must be made to suffer by paying the full amount of the judgment herself. She may ensure in advance by insurance contract that others will pay the money that discharges the liability obligation. The availability of accident insurance might be thought to mitigate the concern that prompts the risk pooling proposal. Ripstein does not rely on this response, but contends that tort law practice would be fair even if insurance against the risk of being found tortious could not be purchased for some reason.

⁴. However, one can raise Ripsteinesque questions. Suppose two persons are both driving unsafely for the same reason: each wants to place a bet at the track. Both drive

with excessive speed and arrive on time to place their bets. One person's negligent driving causes an accident (just as the speeding car arrives at the race track entrance). One person wins her bet. The risk pooling proposal says each of the agents ideally ought to pay the same towards a compensation fund, because the conduct of each imposed the same wrongful risk. But why not require the person who wins her bet to contribute some of the winnings toward the compensation fund? The risk pooling proposal singles out a slice of the chance events that befall those who are negligent and corrects the slice so that each pays proportionally to fault. But why this particular slice?

⁵. Ripstein singles out for discussion an essay by Christopher Schroeder, 'Corrective Justice and Liability for Increasing Risks,' *UCLA Law Review* 37 (1990) 439-478. See also Jeremy Waldron, 'Moments of Carelessness and Massive Loss,' in *Philosophical Foundations of Tort Law*, 387-408.

⁶. Harry G. Frankfurt, 'Equality as a Moral Ideal,' in Frankfurt, *The Importance of What We Care About: Philosophical Essays* (Cambridge: Cambridge University Press 1988). It should be noted that Frankfurt's understanding of what is 'sufficient' differs from the view I discuss in the text. Martha Nussbaum proposes another version of sufficientarianism in several essays including 'Aristotelian Social Democracy,' in *Liberalism and the Good*, R. B. Douglass et alia, eds. (New York: Routledge 1990); also Martha Nussbaum, 'Human Functioning and Social Justice: In Defense of Aristotelian Essentialism,' *Political Theory* 20 (1992) 202-246. I borrow the term 'sufficientarianism' from John E. Roemer.

⁷. On primary social goods, see John Rawls, *A Theory of Justice* (1971; Cambridge: Harvard University Press, 1999), 78-81; also John Rawls, 'Social Unity and Primary

Goods,' reprinted in John Rawls, *Collected Papers*, Samuel Freeman, ed. (Cambridge: Harvard University Press 1999).