Take Thucydides, for instance. His Athenians are certainly realists, but Pangle and Ahrensdorf are quick to note that dramatic presentation of realism is not itself an endorsement of realism. The realist Machiavelli recommends vicious tactics but only to secure the survival of the state, to which he assigns independent value. In Hobbes, a realistic appreciation of the perils of life leads to "laws of nature," which indicate when and if wars should be fought, and these laws are prescriptive, not descriptive. In Hans Morgenthau, a realistic assessment of the value of national survival leads to a recommendation for the internationalization of atomic weapons—a thesis more frequently associated with woolly-eyed idealists. The classical realists, then, converge with the more idealistic just-war theorists, at least those just-war theorists who have reduced the number of just causes to the justice of self-defense. What they all dislike are crusades, a conclusion consonant with a communitarian emphasis on specific societal values rather than cosmopolitan ideals.

With the pet ideas of modern idealists Pangle and Ahrensdorf have little patience. They dismiss as enlightenment naïveté Kant's suggestion that the spread of republican regimes will reduce the incidence of war, without considering that democratic societies, even adjoining ones, rarely fight each other. Suggestions for world government floated by Rousseau, Kant, and a host of idealists are waved off as invitations to world tyranny (p. 247), though what for Pangle and Ahrensdorf is a decisive counterargument would seem to many to be a mere downside risk. Every new confederation is greeted as tyranny by some, and the anticosmopolitan protest lodged here, without further articulation, would align Pangle and Ahrensdorf with the Whiskey Rebels of 1794 and Montana skinheads on the lookout for black UN helicopters.

It is with the classical idealists, Plato and Aristotle, that Pangle and Ahrensdorf are most in sympathy. In their view, each had a comprehensive but socially specific vision of the good; neither recognized military valor as a primary value, but both recognized that the good, embodied in concrete societies, can and must be defended with force. The contemporary realists and just-war theorists who make the survival of the state the primary value cannot provide a rationale why the state should survive, or why anyone should die in the state's defense. What is needed is a revived concept of natural law, "a law whose evident existence is testified to by the conscience experienced by all peoples in all times and places, even today" (p. 263). Would that it were so.

DOUGLAS P. LACKEY
Baruch College and the *Graduate Center, City University of New York*

Ripstein, Arthur. *Equality, Responsibility, and the Law.*
Cambridge: Cambridge University Press, 1999. Pp. 307. $54.95 (cloth).

This is an exploration of the place of luck in theories of justice and law. The central theme is that equality and responsibility are not antagonistic concerns (contrary to what is often thought), but are in fact complementary components of what Ripstein calls fair terms of interaction. Attending to the task of properly responding to losses occasioned by bad luck—whether as a matter of distributive,

corrective, or criminal justice—unlocks the political meaning of responsibility (political, in distinction to possibly more diffuse, merely moral, notions), as well as the relevant conception of equality. The book is, more precisely, a theory of responsibility and equality set forth by way of an exploration of the role of luck in the doctrines of tort and criminal law and (somewhat more abstractly) in theories of distributive justice. The exploration is enlivened by the use of examples drawn from judicial opinions, popular culture, and literature. Combining "political theory and the constructive interpretation of legal practice," (p. 134) it merits a wide audience and repays careful reading.

Ripstein's enterprise is intended to contribute to classical liberal political theory by carrying through its implicitly promised reconstruction of private law and criminal law. Such a project is integral to the preeminent place liberalism accords to human interaction, in contrast to the Aristotelian and utilitarian traditions, which in their different ways focus instead on well-being. The idea at the root of liberalism is, for Ripstein, reciprocity or, more fully, the idea that "one person may not unilaterally set the terms of his interactions with others" (p. 2). A companion stricture forbids aggregating costs across persons in utilitarian fashion—not because costs cannot be measured interpersonally (they can and must be, in the law of tort) but because aggregation is contrary to a liberal conception of the proper business of the coercive state.

An important part of Ripstein's project is to extend an account of justice in holdings that capitalizes on the Lockean/Nozickian idea of combining a theory of just acquisition with a theory of just transfer. Costs of activities (as well as dominion over resources) have to be allocated, and here tort and aspects of criminal law enter. Accepting the Hobbesian/Holmesian "let losses lie where they fall" baseline, Ripstein criticizes and rejects two ways of determining when it becomes normatively appropriate to shift losses—when, in other words, one person's loss is to be deemed to be another's responsibility. These two conceptions of responsibility are called "causalist" and "voluntarist"; both assume some fair initial distribution of scarce goods. Causalism assigns to an actor responsibility for losses he causes, regardless of intention; voluntarism (a view apparently without serious exponents) would assign to the actor responsibility for all, but only, those losses he intentionally causes.

The causalist conception is associated with the doctrine of "strict" or "absolute" tort liability but has been criticized by a long line of theorists, notably including Oliver Wendell Holmes, Jr. Ripstein reviews Richard Epstein's recent libertarian defense of causalism, along with discussions by Hart and Honoré, Nozick, Charles Fried, Stephen Perry, and Richard Wright. Ripstein isolates several ideas too appealing to be left to libertarians: a historical (rather than patterned) account of justice in holdings, the importance of liberty and the preferability of private ordering, and the idea that those who wrongfully cause losses own those losses. Libertarian causalism founders because of the multiplicity of causes involved in human interaction—tracing the causal sequence back far enough will inevitably cast both injurer and victim as causers. Ripstein's corrective is to start with an elaboration of the idea of fair terms of interaction—which will yield a fair division of risks—and to define wrongful loss as one caused by further risk imposition. The losses occasioned by, and within, the wrongfully enhanced risk are owned by the risk enhancer; the loss becomes that person's problem.

Ripstein tries to show that the ideas of equality and risk ownership are pow-

erful enough to explain why the "reasonable person" fault standard in tort (often called the "negligence" standard) is "objective" in the sense that fault may lie even where it was beyond an individual's intellectual power to have taken greater care. An objective fault standard—one which assigns liability irrespective of the special capacities, susceptibilities, or psychological states of either the injurer or the injured—is derivable from the proper balance of interests in liberty and security held by a representative reasonable person, as demanded to assure fair terms of interaction, that is, ones not set unilaterally by either party.

Having outlined the conception of responsibility animating tort, Ripstein turns to the importantly distinct realm of criminal law. Here, the notion of making wrongdoers "pay" for their deeds takes a retributive rather than compensatory cast—the rationale, application, and measure of punishment is not, unlike tort remedies, a matter of making the victim "whole." What is it, then? The justificatory explanation of punishment has proven to be a formidable challenge, and the plurality of disparate values at work here has led to the prominence of "hybrid" theories such as H. L. A. Hart's. Ripstein resists pluralism and sets out to provide a systematic and unified account of culpability and punishment. The tort/crime disjunction, in his view, rests upon the difference between taking a risk and choosing it, where "the requisite notion of choice is explicated in terms of the distinction between the rational and the reasonable." Punishment is the appropriate response to crime because crime is essentially a matter of an actor's substituting "private rationality for public standards of reasonableness" (p. 134). "Hard treatment," that is, punishment, rather than compensation, is demanded in order not only to denounce this illegitimate substitution but to render it (post hoc) irrational. But the quantum of punishment is fixed by the seriousness of the actor's denial of the victim's rights, not by the actor's hoped-for advantage. Only in this way can the "non-tradeability" of the victim's rights be vindicated and the advantage the criminal enjoys by treating those rights as though subject to forced sale be canceled.

Two areas of criminal law doctrine are explored with special scrutiny: the various defenses that invoke a mistake on the defendant's part and the law of liability for criminal attempts. These two areas implicate Ripstein's general concern with luck and risk. As to mistake, Ripstein focuses on those pertaining to the defenses of self-defense and of consent—these being areas where "fair terms of interaction" are at stake but are obscured by a "subjectivist" school of thought that would wholly individualize these defenses. The British case *Regina v. Morgan* brought the issue into wide public discussion in the 1970s. In a rape prosecution, ought the law acquit a defendant who sincerely but unreasonably mistook his victim to be willing? If the victim manifested nonconsent but the defendant just didn't get it, whose problem is it? The orthodox approach to the "general part" of the criminal law requires the prosecution to show that the defendant was *aware* of a risk of nonconsent. That approach logically demands the acquittal of the defendant who was sincerely, however stupidly, clueless. The orthodox view has been defended by Glanville Williams and H. L. A. Hart, among many others, and has shaped the culpability provisions of the widely influential Model Penal Code.

Ripstein attacks the subjectivism he finds underlying the orthodox school on the ground that it allows the defendant unilaterally to set the terms of interaction between himself and his victims and thus to substitute his own rationality for public standards of reasonableness. His view is in general sympathy with feminist crit-

ics of *Morgan,* but does not seem to rest on viewing intercourse as sui generis. Intercourse is an interaction, and a political-theoretic conception of fair terms of interaction dictates the elements of both tort and of criminal liability, in broad outline at least. An objective standard of reasonableness in the criminal as well as the tort realm seems demanded here by Ripstein's general position, but now the promise to show how punishment is to be reserved for risk choosers rather than mere risk takers (against whom tort damages alone are properly assessed) looks unkept.

The orthodox view draws the distinction between the kind of culpability deserving only the payment of compensation and that kind meriting punishment, along the crease that divides the idea of negligence (the fault standard for tort, for which awareness of risk is unnecessary) from that of recklessness (the default, minimum, level of culpability required for criminal guilt, requiring proof of awareness). Because Ripstein rejects the subjectivism of the orthodox approach (though he does not deny that it possesses some intuitive appeal), it would seem to be incumbent upon him to give an alternative account of the difference between the fault grounds presumptively appropriate, respectively, for tort and for the criminal law—that, or to question the supposed distinctness of those grounds (as has been done from the familiar Benthamite perspective). He accepts and purports to explain the essential difference between tort and crime, but to rest all upon an unexplicated distinction between taking and choosing risk seems unsatisfactory. It is difficult to see how the distinction can mean anything unless "choosing" is subjectivized, but subjectivizing seems to be foreclosed by Ripstein's stricture against "unilaterally setting terms of interaction."

Ripstein prefaces his examination of distributive justice with a chapter examining the Soviet jurist Evgeny Pashukanis's critique of bourgeois legal responsibility. Ripstein's and Pashukanis's theories exhibit certain interesting parallels: the centrality of ownership to responsibility and the emergence of legal form as a mechanism to assure that terms of interaction not be set unilaterally, as they had been under feudal conditions. Pashukanis saw that, in bourgeois conditions, the "impersonal dependence" of the laborer masquerades as personal independence. The bourgeois ideology of free agency and individual responsibility props up a legal system making the lives of each wholly dependent upon the market, that is, upon the choices of others. Pashukanis's solution was to treat all losses as held in common, rather than distributed according to the bourgeois notion of ownership and responsibility. Ripstein argues, against this Marxist vision, that it reproduces repellent features of Hobbes's state of nature without removing impersonal dependence. Treating all interests alike and all misfortunes as common property, Pashukanis's utopia would "forgive all in a way that made all equally vulnerable . . . [and] fully subject to the choices of all others" (p. 260).

Distributive justice cannot be achieved by holding all misfortunes in common, but now an account is needed of which should and which should not be so held. Ripstein's appealing view is that "those misfortunes that preclude a person having meaningful choices about his or her life—such misfortunes as physical disabilities, illness, or extreme poverty—need to be held in common if people are to be properly held responsible for their choices" (p. 266). He criticizes what he calls "practical reason view"— exemplified in different ways by G. A. Cohen, Richard Arneson, and John Roemer—which looks to "formal features of individual choices" rather than "the importance of various interests" to determine

which losses are to be assigned to individuals as their problems (p. 268). Responsibility presupposes capacity, and, therefore, an individual's loss of capacity, even if the product of her free, fully informed choice, must always be treated as a loss held in common. Restoring capacity is to be distinguished from restoring means of exercising capacity, however, and the components of capacity are to be determined not from the viewpoint of the unfortunate's "efforts or tastes" but "in terms of important interests in liberty and security" attributed to the idealized and objectified reasonable person (p. 292).

A summary of the main themes of the book cannot convey its ingenious treatment of many philosophically interesting aspects of tort and criminal law, including the "eggshell skull" rule, the duty of rescue, intervening and supervening causes, and criminal liability for attempts. Here is a feast for the philosophically minded lawyer, the political theorist, as well as the philosopher curious about law.

WILLIAM A. EDMUNDSON
Georgia State University

Shapiro, Ian. *Democratic Justice.*
New Haven, Conn.: Yale University Press, 1999. Pp. 333.

Democracy and justice are generally put in separate boxes by political theorists, even as they run together in popular imaginations and antiauthoritarian political movements. Shapiro sides with the vernacular here, seeking to establish a democratic basis for thinking about justice. Thus the product is a democratic theory of justice, rather than a theory of democracy as such, though Shapiro is first and foremost a democrat, positioning himself against both liberal escapes from politics and communitarian denials of dissensus. He points out, quite rightly, that philosophers are never going to agree on what justice means. Given that what justice requires is always going to be a matter of debate, why not, Shapiro asks, make it a matter of democratic debate (p. 19)? But Shapiro balks at the implication that it is only for citizen-debaters to decide what is just; he has plenty to say about the substantive public policies to which his commitment to democracy points. Thus his democratic commitments only go so far, certainly not as far as the truly democratic position that justice is whatever a well-arranged democracy produces. Still, Shapiro's democratic commitments go a lot further than most liberals and communitarians, for he wants to appeal to the values of democracy to resolve hard questions about what constitutes justice in particular cases.

The democratic principles on which his appeal rests are in many ways quite conventional. These principles include recognition for the necessity of a coercive state, a mistrust of hierarchy and vanguards, a presumption in favor of legislatures rather than courts, a need for institutionalised opposition, decision rules that can vary from majority rule to unanimity, and a "principle of affected interests" to determine the bounds of the demos. Decentralization gets the benefit of the doubt when it is not entirely clear how big the demos should be. Yet all these principles are treated as provisional, and so Shapiro speaks of a "creative pragmatism" when it comes to their application (p. 61). However it turns out to be