Rethinking Legal Reasoning. By GEOFFREY SAMUEL. [Cheltenham: Edward Elgar, 2018. 466 pp. Hardback £95. ISBN 978-17-84712-60-0.]

In the "General Introduction" to *Rethinking Legal Reasoning*, Professor Samuel states his aims: first, he is not aiming to produce a new "theory of legal reasoning as such"; rather he intends to

> examine legal reasoning as it is (that is to say in the courts) in relation to its knowledge base and to identify a range of what might be called reference frameworks and legal "artefacts" which can serve as the means for rethinking legal reasoning. The purpose is ontological and epistemological. This said, two general theses (for want of a better term) will be advanced. These are, first, that the legal notion of an "interest" might perhaps be a suitable artefact for rethinking legal reasoning (Chapters 11–12); and, secondly, that fiction theory might be the most viable "epistemological attitude" for understanding.

In the conclusion of the book, Samuel tells us that his aim "has been to look at legal reasoning through a social and human science enquiry paradigm perspective in the hope of rethinking legal reasoning in the context of epistemology more generally". And "If nothing else, what this present work has set out to do is to provide an epistemology of law, or at least a legal epistemology context in which legal reasoning might be appreciated if not rethought".

I shall say a few things about Samuel's general theoretical orientation, and then concentrate my remarks on his "fiction" theory as the most promising epistemological attitude to law.

To say this book is wide-ranging in its thoughts about legal reasoning is an understatement. In contrast to what might be regarded as the Anglophone analytic philosophy tradition, this can be seen as a work of bricolage, drawing upon the views of theorists whose work appeals to Samuel, but without positively endorsing or indeed critically evaluating the cited theories as such. Rather, Samuel engages them as spurs to thought which he then exploits to reflect upon various aspects of legal reasoning. The main critical question the book poses is whether it pulls those thoughts together in a way that illuminates. As I shall set out below, it is not clear to me that it does in so far as we are considering his "epistemology of law".

The book starts well with three chapters on the history of legal thought, from the Roman lawyers to modern juridical thinking. Chapter 4 organises this thinking in terms of different "models" of legal reasoning, for example a "rule model", a "rights model", an "interest model" and a "policy" model. I am unsure what the word "model" is meant to signify here; what animates the discussion seems to be that the courts have embraced a variety of considerations which they bring to bear in rendering judicial decisions. Chapters 5 to 8 explore the different ways in which legal knowledge and reasoning might be represented, in comparison, for example with medical reasoning (ch. 7), or reasoning in film studies (ch. 8). It seems to me, however, that the chapter which most illuminates Samuel's theoretical claims about the epistemology of law are found in ch. 9, "Is Legal Reasoning Based on Fictions?".

At the beginning of the chapter, Samuel states:

> Much of course depends upon how one defines fictions in law, but if one adopts fiction as an "epistemological attitude" such an attitude might be a useful means not only of examining aspects of legal reasoning but of providing a knowledge framework for rethinking the topic. Accordingly the question to be considered is this. To what extent does legal reasoning make use of, or indeed is wholly based upon, fiction and fictitious intellectual constructions?

One way of thinking of "fictions" is that they are in some way false or opposed to "real", but Samuel draws on Vaihinger for the thought that

> If fiction is regarded as any actual construction that functions "as if" it represents a reality it becomes feasible to assert that there "can be no thought without abstract concepts and these concepts are nothing more than fictions". . . . [Vaihinger's] thesis was that reality can be apprehended through intellectual constructions and that our ideas, judgments, forms of knowledge are ultimately justified by their capacity to serve more or less efficiently the aims and objectives of human action.

Samuel recognises that this can be read as a form of pragmatic philosophy, but does not endorse this viewpoint, though neither does he argue against it. Rather, for Samuel, fictionalism "should instead be regarded as an epistemological orientation through which legal reasoning – and indeed legal theories – can be approached in all its (or their) complexity".

But it is very unclear what adopting this epistemological orientation amounts to, or what enlightenment it is supposed to generate. For it to have some theoretical bite, it has to mean more than something like: in order to entertain a proposition we must have the concepts (however so acquired) in which the proposition is framed. At points Samuel discusses what are generally regarded as legal fictions in some sense of "fiction", such as that corporations as "fictional" persons, but at other times fiction encompasses all legal concepts, as "as if" constructions. Consider this: "Legal fictions are employed not to represent reality but act *as if* they represented reality, their epistemological value being assessed in terms of their usefulness" (p. 234, emphasis added).

I suppose one could say something like this about the corporate form in terms of its usefulness, but the unpacking of "fiction" here is necessary if we are not to lose the plot. The legal personality of corporations is only "fictional" in the sense that a corporation, though a legal person, does not have the attributes of a natural person, a mind, body and so on. Its right to sue and to be sued, to have the actions of individuals such as agents attributed to it, and so on, are all artefacts of law in the way that the attributes of a natural person are not. But it makes no sense to say that the law treats a corporation "as if" it were a natural person – if it did there would be no need to create all the rules of attribution I just mentioned. Moreover, corporations are *real*. Corporations exist. They do not exist in the same way that rocks do, so we could say the existences of corporations and rocks supervene on different "ontological" bases, on certain powers of humans in the first case ("psychological" powers, if you want, though this is very loose), and on physical/geological facts in the second.

Samuel follows the passage just discussed with this:

> Are, then, all legal concepts fictional in this "as if" sense? One objection to such an assertion is that legal concepts vary in their nature and level of operation. Some concepts may well leave themselves open to being regarded as fictions in as much as they function at an abstract level and do not directly represent a social fact or factual situation; they are concepts that might be described as fully normative. For example, the notion of a "right" or a "duty" might be seen as such a fictional concept, although there is a perfectly respectable thesis that a right reflects a social interest that the legal system has chosen to protect over and above other interests. In terms of reasoning a notion such as a right permits lawyers to argue at a level that avoids any descent into an empirical social analysis or into political ideology.

There is a lot going on in this passage, but nothing to do with fictions as far as I can see. A concept can be more or less abstract, but it makes no obvious sense to say that a fiction can be more or less abstract, unless all one means is that the fiction in question is framed in more or less abstract concepts. In that sense one could say that the "fiction" – the false theory – that phlogiston is the substance that allows things to burn is more abstract that the "fiction" – the untrue statement – that my laptop caught fire yesterday. Another way of putting this is to say that something's fictitiousness is not a function of its abstractness – the former does not *vary* with the latter. Nor do concepts which "directly represent" a fact or situation gain any "real", as opposed to "fictional", credentials for doing so. "It rains a lot in Singapore" is, I suppose, a more theoretical statement (arising from a process of induction) than is "It rained a lot yesterday"; are we supposed to take it, then, that thoughts which arise via a process of reasoning rather than from more or less direct acquaintance with the facts are *ipso facto* more fictional on this account? It is hard to see how that thought follows, or what the pay-off would be in so thinking. "Fully normative" is equally problematic. All concepts are normative in that there are criteria for their correct application. The normativity of a concept does not vary with its abstractness. What seems to animate this passage is the idea that some concepts are concepts *of norms*, hence Samuel's example of a right (see also p. 235). We can classify concepts according to what they are concepts of. A natural kind concept is a concept of a natural kind, a mathematical concept is a concept which figures in mathematics, and so on. But there is no more or less here. We can, on this taxonomy of concepts, say that the concept of a right is a normative (not a more "fully normative") concept, as opposed, say, to a natural kind concept, or an event concept, like "explode". But again, seeing this does nothing to imply that such a concept is more fictional, nor more abstract. In the case of norms, they may be more or less abstract, though the better word here is "general". The norm "give others their due" is more general, and in that sense more abstract, than "take out the recycling on Tuesdays", but neither is more or less a norm, or normative, than the other.

Later in the chapter (Part 9.8) Samuel discusses "Fact and Fiction". The idea here seems to be different from the one above, concerning the way the law makes certain facts relevant for its purposes, and others not, namely that there is no "direct" way in which facts come before the law: "Facts presented to the court are in a categorised and purified form" (p. 243).

But the import of this truism is not that fiction has somehow crept into the picture. The colour of ink a child uses to do long division is irrelevant to whether she has done the long division properly, as is whether she crosses her sevens. We attend to the facts relevant to making a judgment, and the law could not do otherwise. This is not to deny (another truism) that judges and lawyers present facts in contending ways, but that is not a mystery; they present facts in contending ways because they are advancing contending propositions of what the law is or should be, and these different views of the law will make different facts relevant.

In the conclusion to this chapter, Samuel writes:

> The concepts, the notions, the inference techniques, the imagery employed in argumentation and so on have no reality other than themselves.
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> This is not to say that all of these concepts and techniques are not stimulated by social reality. However, they are like paintings. Imagine one wished to gain knowledge of a country that one has never visited but which has produced endless artists who have created images of the landscapes, towns, people, vegetation, everyday objects and so on, images which he or she can rightfully think represent the unknown country in all its many aspects. But the paintings

> themselves remain fictitious creations. All reasoning about the unknown country will be founded upon the representations of the country and not on the physical reality of the country itself. The map and the territory will have become one. And the reasoning will thus be based upon images to be treated "as if" they are real.

With respect, this is misconceived. First of all, representational paintings are not fictions. They carry information about what they depict, and so long as the depiction is accurate (within the conventions of pictorial representation) they are perfectly sound sources of knowledge of what they depict. But the larger point being made here is even more worrisome. The idea seems to be that having to understand the world with the concepts we have distances us from the world. But the absolute opposite is the case. Acquiring concepts is the means by which creatures like us access the world in so far as we want to think about it. Concepts are not a barrier, but the essential representational bridge. Treating our concepts as "fictional" in this way is not a foundation of an epistemology of any kind, but its negation by fiat.

Let me conclude on a positive note. In the last two chapters, 11 and 12, Samuel says a number of interesting things about what legal reasoning based upon judgments about the interests of the parties, rather than judgments about what rights they have, might portend both for the law and legal theory. Happily, the insights Samuel shares with us in these chapters do not depend on embracing any kind of fictionalism.

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The Realm of Criminal Law. By R.A. Duff. [Oxford University Press, 2018. viii + 373 pp. Hardback £75. ISBN 978-01-99570-19-5.]

This monograph fleshes out the "public" wrongs account of criminalisation that Antony Duff has been developing (sometimes in collaboration with Sandra Marshall) since the late 1990s. It is, in large part, a restatement of Duff's views. Those conversant with his published work will find much that is familiar. But this book is not simply a "greatest hits" compilation: Duff adds depth to previously sketched thoughts, and engages extensively with critiques of his account, leading him to clarify and revisit some positions. Old hands will thus still find much of worth here. This book is also accessible to newcomers (including students), with lucid explanations and helpful cross-referencing throughout. *The Realm of Criminal Law* deserves to be read widely, including by those responsible for creating and applying criminal offences in practice.

After a short introduction, ch. 1 outlines Duff's methodology: what MacCormick termed "rational reconstruction". Duff is not seeking to theorise in the abstract, but rather within a particular empirical context, to see which normative principles could explain and justify that context's existing legal material (and/or allow for critical reflection on that material). Duff's account is not, however, parochial: as well as Anglo-American literature on criminalisation, Duff also refers to German theory, which helps to elucidate core distinctions within the book. Indeed, one of the book's great strengths is its careful drawing of clear and useful distinctions (too many to deal with here).