> 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.

J.E. Penner
National University of Singapore

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).

One of the most useful distinctions (borrowed from Lacey) is that between "formal" and "substantive" criminalisation. For instance, some offences in the Sexual Offences Act 2003 were avowedly passed in an over-broad form ("formally" criminalising two 15-year-olds consensually kissing), with assurances that prosecutions would be brought only where "appropriate" (thus attempting to ensure the absence of "substantive" criminalisation in the absence of signs of abuse, etc.). Duff recognises the power over substantive criminalisation that police and prosecutors have in the UK and US (and the legislative sloppiness that such devolution may encourage). He is nevertheless realistic about the chances of *effective* criminal laws ever being defined so that all (or even most) substantive work is done by legislatures (or courts) in defining crimes. The formal/substantive distinction ensures that Duff is refreshingly concerned throughout this book with procedural points, and the realities of police and prosecutorial practice.

Having established what criminalisation is, the book's core question comes into view: when does a polity have reason to criminalise Φ-ing? Duff is a legal moralist (accordingly, references to a "wrong" below should be read to mean "moral wrong"). In ch. 2, he compares his account with those of other legal moralists – most prominently, Moore. Moore argues that we have a (not necessarily determinative) reason to criminalise Φ-ing if Φ-ing is wrongful. This is because acting thus will open wrongdoers up to the (for Moore) intrinsic good of deserved punishment. Of course, such reasons to criminalise Φ-ing may be defeated by countervailing considerations (e.g. privacy, or the resource costs of enforcement). By contrast, Duff, being a "modest" legal moralist, does not see the whole universe of wrongdoing as potentially criminalisable. Instead, polities only have a (not necessarily determinative) reason to criminalise public wrongdoing. If wrongdoing is private, nothing counts in favour of its criminalisation.

For Duff, "public" wrongs are those that are the polity's business, and to which the polity can (sometimes *must*) legitimately respond. Such responses can be of various non-criminal forms, including doing nothing, non-criminal regulation, and civil liability (alternatives considered further later in the book). On this account, tort and crime both deal with public wrongs (which may strike private lawyers as counter-intuitive). Indeed, the public/private wrongs divide is less about criminalisation per se, and more about where the polity can legitimately seek to tread in the realm of wrongdoing (a point returned to below).

In ch. 3, Duff builds on his account of public wrongs by considering the relationship between citizenship and the criminal law. For him, the criminal law speaks not with the detached voice of a sovereign, but instead in the voice *of* citizens *to* other citizens. The criminal law is, on this view, *the citizen's* law. This, rather than practical efficiency, is how Duff explains why many systems of criminal law operate with a territorial principle of jurisdiction (a theft committed in Aberdeen cannot be tried in Cambridge). Although careful to note the limited extent to which he can engage with international criminal law, Duff's thoughts on the International Criminal Court, which can (in certain circumstances) pursue crimes against humanity beyond national jurisdictional borders, are helpful clarifications of his earlier work. Duff also discusses helpfully the position of visitors to the polity (e.g. tourists) and recusants (a topic returned to in ch. 5).

In chs. 4 and 5, Duff develops further an account of public wrongs based on the relationship between wrongdoing and the polity's "civic order" (variously described in the book as its framework, structure, organisation). In ch. 4, Duff deals with various criticisms of his conception of civic order, particularly its feasibility in diverse societies. Duff's response to critics of his view is, mainly, that they exaggerate the

extent to which societal agreement is required in order for a civil order to exist (e.g. p. 180). This is another aspect of Duff's theory that could be termed modest.

Chapter 5 continues to flesh out Duff's "liberal communitarian republican" account of the civil order (p. 186), explaining the values (including active citizenship, inclusivity, freedom from arbitrary domination, and equal concern and respect) that are central to it. Duff argues that the criminal law exists to declare wrongs thought to threaten or violate the civil order, and hold those suspected of perpetrating such wrongs to account. Duff believes these things have intrinsic value, thus reducing the importance of punishment in his account of criminalisation (pp. 200–22).

One objection to Duff's view of public wrongs, as summarised above, has focused on distortion: might decisions about criminalisation become about the polity self-indulgently making sure it is living up to and reinforcing *its* values and commitments (in order to achieve some conception of the polity's good), rather than reacting appropriately to wrongs against individuals? The idea that public wrongs belong to, or are owned by, the community, and expressly *not* the victim may invite this "distorted" reading of Duff's account (e.g. pp. 293–94). This may be seen as a disadvantage in comparison with theories of criminalisation that are more *directly* focused on wrongs (e.g. Moore's). Duff responds that "the justifying reason for criminalizing murders and rapes that are committed in the polity is that these are wrongs that are our business as members of the polity" (p. 226), and "[t]he object of our practical attention is the wrong; a condition of directing our attention thus is that the wrong is our business" (p. 226, fn. 138). That such wrongs are contrary to the polity's defining values can also add an *extra incentive* to declare public wrongs and pursue wrongdoers where their inherent wrongfulness does not sufficiently spur the polity into action (pp. 226–27). It will be interesting to see whether this careful reply convinces Duff's critics.

This sketch (and Duff admits it can only be a sketch) of the civil order leads in ch. 6 to a discussion of "master principles" of criminalisation: exclusive statements of the considerations relevant to deciding whether there is reason to criminalise Φ-ing. Duff presents a number of helpful clarifications regarding such principles. Perhaps the most important is the distinction (one of degree, not kind) between "thick" and "thin" "master principles". A thick master principle has rich descriptive content, which can be applied to work out whether to criminalise Φ-ing without further normative judgments having to be made. Thin master principles will lack that level of descriptive content, and thus will require further normative debate to work out whether Φ-ing may legitimately be criminalised.

Duff's master principle is doubly (and very – p. 274) thin:

> A. We have reason to criminalise [Φ-ing] if (and only if) it constitutes a public wrong.
> B. [Φ-ing] constitutes a public wrong if (and only if) it violates the polity's social order. (p. 232)

This principle is thin because there is room for debate about what is public and what is wrong (p. 253). As Duff notes, though, the quest for the holy grail of thick master principles of criminalisation, which would leave little contested normative ground to be fought over, is probably doomed to fail (p. 258). Thin master principles can, at least, structure thinking about decisions to criminalise, identifying relevant considerations at the top level, even if more precise decisions will depend on various normative arguments that are not themselves stated in, or resolved by, the master principle(s) of criminalisation. Duff is clear that anybody looking for concrete examples of whether specific conduct should be criminalised under his master principle

will thus be disappointed, but – justifiably – puts this down to the limitations of moral and political theory of the type utilised in this book (p. 276, fn. 175). He nevertheless, in ch. 7, works through some examples and discusses various non-criminal responses to public wrongs. This is tremendously helpful in showing how the "public wrongs" account might work in practice, even if Duff is careful to present his thoughts as sketches.

The summary of Duff's account given above (which does no justice to the breath-taking number of issues that he elucidates with characteristic care and clarity) is hopefully now sufficient to raise two brief concerns about it. The first concerns the statement of Duff's master principle: for Φ-ing a candidate for criminalisation, Φ-ing must *violate* the civic order. At points, however, Duff uses more permissive language. For instance, Φ-ing can be a public wrong if it threatens (p. 258), disturbs (p. 230), impinges upon (p. 257) or has an adverse relationship with (p. 258) the civil order. It seems plausible that (credible) *threats* to the stability of that order can constitute public wrongs. Remember, being a public wrong does not mean being a criminal offence: *any* intervention by the polity requires publicity. Perhaps this point is merely semantic, but it does matter for the scope of Duff's master principle, and its acceptability.

Second, some examples in the book emphasise the over-breadth of Duff's master principle as a principle of *criminalisation*. As Duff notes, it may be objected that his account gives us *a* reason to criminalise trivial forms of wrongdoing (which is part of Duff's objection to Moore's account). For instance, he helpfully considers whether a polity has reason to criminalise queue-jumping (pp. 280–82). Whether such a reason exists will depend, ultimately, on whether queue-jumping threatens or violates the values constitutive of the polity's civil order. Whether *criminalisation* is appropriate will depend on whether other responses (including doing nothing) are more apt, and – indeed – how burdensome the criminal process would be. That the discussion of criminalising queue-jumping can get that far may strike some readers as problematic, even if Duff is rightfully sceptical about the chances of queueing *actually* becoming a crime (or even meriting a formal societal response).

In a similar vein, it is one thing to for a polity to take formal notice of adultery through its divorce laws (pp. 301–02), and another to take notice of it through the criminal law. Yet, on Duff's account, a polity either has reason to consider *neither* of these options (adultery is private), or *a* reason to consider *both* responses (adultery is public). There is no distinction within types of public wrongs that make one response available and the other absent – the precise response depends on the polity's assessment of its defining values, the nature of the relevant wrong, and what societal response (if any) seems most appropriate. This again bears on the acceptability of Duff's principle as one of *criminalisation*, specifically, as opposed to an account of when the polity has a reason to intervene *generally*.

Even though such worries will drive some readers to not accept Duff's account (at least without amendment), *The Realm of Criminal Law* is an invaluable addition to the literature on criminalisation. One cannot come away from it without having one's thoughts on criminalisation theory stimulated, clarified and challenged, and it will be a vital point of reference for a long time to come.

FINDLAY STARK
JESUS COLLEGE

https://doi.org/10.1017/S0008197319000333 Published online by Cambridge University Press