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The Reach of the Realm
Kimberly Kessler Ferzan

In The Realm of Criminal Law, Antony Duff argues that the criminal law's realm is bounded by territory. This is because a polity decides what it cares about in crafting its civic home, and it extends its rules and hospitality to guests (non-citizens). I question whether the most normatively attractive conception of a Duffian polity would be bounded by territory, or whether it would exercise far more extensive jurisdiction over its citizens wherever in the world they may be (active personality) and over harm to its citizens/interests wherever in the world the attacks occur (passive personality).

How do we go about deciding upon the objects of criminalization? In the careful, nuanced, and magisterial *The Realm of Criminal Law*, Antony Duff argues, “[W]e are, paradigmatically, criminally responsible as citizens to our fellow citizens. The citizens of a polity are the primary addressees of its criminal law: our criminal law speaks, paradigmatically, to us as citizens of a polity whose law it is (and speaks in our collective voice); it is, paradigmatically, as citizens that we are bound by the criminal law; a defendant in a criminal court appears, paradigmatically, as a citizen who must answer to his fellow citizens.” (103)¹ This polity determines its *res publica*, and through that determination, it determines which wrongs are properly its concern.

Throughout the monograph, Duff’s foil is Michael Moore. To Moore, our starting point for criminalization is moral wrongfulness.² We may be limited by liberty and privacy, and we may not enforce murder in other countries because of sovereignty, (75) but to Moore, moral wrongfulness *writ large* is our business. (74-75)

Duff is troubled by this idea, as he finds a view that, even *prima facie*, maintains that the United States could hold a Canadian citizen liable for defacing another Canadian citizen’s property in Canada to be wildly counterintuitive:

Moore’s legal moralism ... is expansive as to its location and perpetrators, of the wrongs we have reason to criminalize. If moral wrongdoing deserves punishment, it presumably deserves

¹ All numbers in parenthesis refer to R.A. Duff, *The Realm of Criminal Law* (Oxford: Oxford University Press, 2018).

² See generally Michael S. Moore, “A Tale of Two Theories,” *Criminal Justice Ethics* 28 (2009): 27-48.

punishment wherever, by whomever, against whomever it is committed. So we all have reason to promise the imposition of such suffering on wrongdoers anywhere in the world, and thus reason as legislators to bring all wrongdoers within the reach of the criminal law. Those reasons are not restricted by geography or territory. The English legislature has reason to bring within the scope of English criminal law not just wrongs committed within England, but those committed anywhere in the world—to count as a crime under English law, triable in the English courts and punishable in its penal system, murder, rape, theft committed anywhere in the world, and indeed such wrongs as vandalizing property or drunken driving; to criminalize, and to seek to punish criminal damage committed by a Turk on the streets of Istanbul. (74-75)

Instead, Duff endorses the “Territoriality Principle” (104): “what makes it the business of this polity’s criminal law is that it committed within the polity’s territory—within its civic home.” (123) Notably, a focus on territory still endorses the United States punishing a Canadian citizen who defaces another Canadian citizen’s property if such defacing occurs in Kentucky.

But who should be calling the Canadian to account? Duff is quite ecumenical (or noncommittal) about what a polity takes to be its business, but I want to explore whether a (potentially more) normatively attractive account would rest on the jurisdictional bases known within international criminal law as active or passive personality (crimes by or against citizens).³ That is, although Duff gets much mileage out of his “civic home” analogy, I wonder whether the territorial boundaries we currently observe are better explained and justified on sovereignty grounds than on the kind of civic relations that Duff takes to be central. Shouldn’t Canada punish the Canadian who harms another Canadian wherever in the world they may be? It is thus questionable whether the reach of the realm should be even somewhat co-extensive with its territory. Thus, even using Duffian principles about how a polity should think about its criminal law and the reach of its realm, one might wind up with a very different conception. I will thus offer the contrast of a Ferzanian polity, one that abides by Duff’s first principles and yet extends its reach far beyond the boundaries of its territory.

To be clear, what follows is not a devastating objection to Duff’s claims. Duff is going to allow his polities to decide who they are and what matters to them in ways in which he may be able to simply take on board that a Ferzanian polity might proceed in my direction. (Ferzanian polities are nosy. My

³ Cedric Ryngaert, *Jurisdiction in International Law* 2d ed. (Oxford: Oxford University Press 2015): ch. 4.

husband is constantly telling me to mind my own business, but I think a lot of things are my business.) Still, to the extent that Duff maintains the territorial boundaries of the criminal law provide intuitive support for Duff's vision over Moore's, we must question whether Duff's own view should truly abide by the boundaries of nation-states. And, as the civic home loses its territorial boundedness, we might ask how well Duff can accommodate non-citizens after all.

I. Justifying the Reach and Limits of the Duffian Realm

To set the stage for our inquiry, it is important to see how Duff arrives at a polity whose laws are bounded by territory. Duff's interlocutors have attacked from two flanks. One set is the Moorean universalists. Against them, Duff has argued that crimes within other countries aren't our business. The other set is the group that complains that an implication of Duff's view is that non-citizens become some strange lesser/other.⁴ To these objections, Duff has argued that we ought to treat non-citizens as guests in our home, protected by, and held to, our rules. (122).

Let's begin with the universalists. Duff agrees with Moore that there are moral wrongs. But he disagrees with an approach that starts with moral wrongs and then looks for a limiting principle, such as sovereignty or privacy concerns. Although Duff's view of public wrongs seems to invite selecting the wrongs that are public versus private, Duff says this is the wrong way round. Instead, one is supposed to start with the polity, as it looks for those wrongs that are properly the object of its concern. (78)

To bolster his case that not all wrongs might be a polity's business, he gives us the analogy of doctors. When they come to think of their medical profession, they come up with a code that governs their behavior, but that does not include all wrongs that doctors might commit. (80-83) Arson just isn't the medical profession's business. A polity, then, asks which of the immoral behaviors are appropriately the polity's business such that it may call its citizens to account.

Duff thinks that his account is in line with the Territoriality Principle, that is, that "a state's courts have jurisdiction over all crimes committed within its territory." (103) As Duff states in "Responsibility, Citizenship, and Criminal Law," Saddam Hussein should be tried in Iraq and Augusto

⁴ E.g., Lucia Zedner, "Is the Criminal Law only for Citizens? A Problem with the Borders of Punishment," in Katja Franko Aas and Mary Bosworth (eds.), *The Borders of Punishment: Migration, Citizenship, and Social Exclusion* (Oxford: Oxford University Press, 2013): 40.

Pinochet should be tried in Chile.⁵ As Duff explains, “The thought is that in each case that ‘we’ should try ‘our’ wrongs, and their perpetrators.”⁶ Duff thinks that his account has explanatory superiority over pragmatic accounts because his can explain nationality (or active personality) and passive personality jurisdiction: “neither of these can be readily rationalized in terms of the efficient satisfaction of the demands of impersonal and universal justice.”⁷ Duff claims that he can better account for these principles, but he does not “recommend” such principles: “we could instead argue either that, although we have some reason to extend the ambit and jurisdiction of our criminal law in one or both of these ways, we should defer to the polity in which the crimes are committed, and leave the matter to their criminal law; or that wrongs committed by, or to, our fellow citizens are properly our business only when they are committed within our civic home.” (118) To Duff, this “we,” then, is bounded geographically, because we are living together.⁸

But once we look to the home, and how we live together, an altogether different concern arises. A code for citizens by citizens seems to neglect non-citizens.⁹ How is it that they are required to abide by our rules? And how is it that we don’t demean them by not including them within our political community? Here, Duff gives us the “guest in our home” analogy. Our guests are bound, and

⁵ R.A. Duff, “Responsibility, Citizenship and Criminal Law,” in R.A. Duff and Stuart P. Green (eds.), *Philosophical Foundations of Criminal Law* (Oxford: Oxford University Press 2011): 125, 136.

⁶ *Id.*.

⁷ *Id.* at 136-137.

⁸ *Id.* at 137.

⁹ As Duff acknowledges:

Within the territory of any modern polity there will be a large number of non-citizens: people who are in the territory as, for instance, tourists, or short-term business visitors; or who entered for a longer period as workers, or to join family members; or who made their lives and homes in the polity, although they have not been granted, or perhaps have not sought, citizenship; or who have entered as refugees, as asylum seekers, or as would-be immigrants (legally or non-legally). (120)

protected, by our rules.¹⁰ The law will cover them because they commit offenses within its territory. (121) The more difficult question for Duff is how an account grounded in citizenship can protect such individuals. (121) Duff believes “we can talk seriously of *duties* of hospitality that we owe to guests.” (122).

With these two analogies, doctors and guests, we have a neat and happy civic home. We care mainly about how we treat each other in our home, extending our rules to guests. But maybe Duffians should not care so much about homes. To be sure, we need territory to define our community and our structure, but why should it define the reach of the criminal law? Perhaps territory limits the most normatively attractive Duffian account just as it does the most normatively attractive Moorean account. In both cases, territory is a concession to sovereignty.

II. An Alternative Conception: Ferzania

Let us consider the hypothetical polity of Ferzania. In true Duffian fashion, the polity of Ferzania has been doing quite a bit of deliberating about the moral wrongs that are its business. It begins with typical crimes such as rape, murder, and arson. But it conceptualizes its jurisdictional reach quite differently than Duff would have it. First, it thinks that its citizens ought to be called to account for moral wrongs *wherever in the world they may be committed*. Second, it thinks that it ought to be

¹⁰ As Duff explains:

The wrong committed by one who criminally attacks a visitor or a guest is just the same wrong—of murder, or rape, or assault—as it is if the victim is a citizen; what makes it the business of this polity’s criminal law is that it committed with the polity’s territory—within its civic home. If we invite or allow someone into our home, any wrongs committed against them while they are there become our business: not because only then should we recognize them as wrongs (we do not deny they are wrongs when they are committed elsewhere), but because only then are they our business as hosts. The location of the wrong, as being committed within the polity, bears not on its character as a wrong, but on whether the polity has the standing to define it as a wrong that is ‘our’ business, and to call its perpetrator to public account. Its location is a condition, rather than part of the object, of criminal liability. (123)

concerned with wrongs done to its citizens, *wherever in the world the perpetrator, crime, or victim may be*. That is, before we get to pragmatic considerations or worries about how this might impact or conflict with another jurisdiction's sovereignty, Ferzania is in favor of extensive application of both active and passive personality jurisdiction.

Active personality jurisdiction is an uncontroversial form of extraterritorial jurisdiction in international law, wherein a state can exercise criminal jurisdiction over its citizens wherever they commit an offense.¹¹ Ferzania's reasoning is as follows. It is wrong to rape and murder. Our citizens should not rape and murder; therefore, our citizens should be called to account, *as Ferzadians, wherever they may have committed the offense*.

Passive personality is a far more controversial form of extraterritorial jurisdiction.¹² Still, the Ferzadian polity wishes to exercise it as well. Here, the idea is that if a Ferzadian or a Ferzadian interest is threatened anywhere in the world, and threatened by, recall, a moral wrong, then Ferzania will call the perpetrator to account. And, Ferzania will add a dash of the protective principle, where it will exercise jurisdiction over those acts that jeopardize its sovereignty or political independence – “For the operation of the protective principle, actual harm need not have resulted from the acts. This distinguishes it from the objective territorial principle (or effects doctrine).”¹³

Notice that Ferzania is a Duffian polity. Its citizens ask which moral wrongs are of concern to them, and it answers that it is concerned with those wrongs that are committed by them and those wrongs that are directed at them. But the sketch of the polity Duff imagines looks nothing like this—gone is our civic home. To be sure, territory contingently matters—after all, most citizens will be within their territorial home, committing offenses there, being wronged there, and so forth. But it is contingent. Ferzania will call a Ferzadian to account if she murders anywhere. Ferzania will call a

¹¹ Ryngaert, *Jurisdiction in International Law*, pp. 101, 104.

¹² *Id.* at 110. “It is unclear whether the nationality of the victim, which certainly constitutes a legitimate interest of the State, also constitutes a sufficient jurisdictional link under international law. It is quite likely, the most aggressive basis for extraterritorial jurisdiction....”

¹³ *Id.* at 114.

foreign rapist to account if the victim is a Ferzanian. Ferzania takes the reach of its realm to be able to grasp any Ferzanian victims or perpetrators.

III. Evaluating Our Options

A. Active Personality

Ferzanian jurisdiction looks quite broad. At one point, Duff seems to reject this sort of exercise of jurisdiction:

If I commit a theft in Chile while visiting there from Scotland, and return home, the Chilean authorities might seek my extradition; if the conditions that our extradition statute specifies are met, I am liable to be arrested by the Scottish police and extradited by order of a Scottish court. I am not, however, liable to be tried for the theft in a Scottish court, or to be convicted and sentenced under Scots criminal law: for what I did in Chile is not a crime under Scots law, even if (leaving location aside) it fits Scots law's definition of an offence. This is true even if it would be feasible for a Scottish court to decide the case—for instance, if the victim and necessary witnesses happened now to be in Scotland: the Scottish court has the authority over my extradition, but not to try me. Now, on a Moorean account, or any account that takes the aim of the criminal law to consist in serving impersonal values that generate agent-neutral reasons for action, such jurisdictional arrangements as these simply reflect decisions about efficiency and respect for state sovereignty....On the opposing view for which I will argue, the end cannot be specified in such agent-neutral terms; it is that the wrongdoer be called to account by those whose distinctive business his wrong is—by, that is, the Chilean polity. *That* is not an end that Scottish criminal courts can hope to achieve; the best they can do is assist the Chilean courts to achieve it by extraditing me. (97)

But this is rather perplexing. If the code tells us as citizens how we ought to behave, why would it be inappropriate for Scotland to try Duff? It cannot be that the victim must also be Scottish. After all, if Duff killed a Chilean in Scotland, then Duff would say that it is Scotland's business. But it isn't clear why a public account of the sort that Duff imagines would yield that Duff's killing of a Chilean in Chile is not Scotland's business. Duff is Scottish, and he violated Scotland's criminal laws. (And, if they don't reach killing in Chile, the question is why not?)

Now, Duff recognizes the possibility of active personality jurisdiction (indeed, he believes his theory explains it better than Moore's account), but he does not advocate for it because he thinks they "could amount to a kind of imperialism" (219, n.115) This is the "Ferzania is extremely nosy" objection.

No, Ferzania isn't nosy. It is extremely normatively attractive. First, Duff's civic home—"not under my roof"—theory of jurisdiction is troubling. Remember we are talking about moral wrongs, and then picking what is the polity's business. So, the Duffian polity says:

Don't rape and murder...here... Well, really don't rape and murder anywhere because it is morally wrong. But if you are a rapist or murderer then so long as it isn't under our roof, we don't care. It is none of our business.

This is what the Duffian polity says to its own citizens. This is not about ignoring crimes committed by other countries' citizens in other countries. Rather, this is Duff's view about the limits of a Duffian polity's concern.

To employ a distinction that Duff himself is fond of, we should distinguish between the condition of liability and the object. The objects here are moral wrongs, so the condition that makes it our business could be citizenship and not the commission of the offense within the territorial space of the polity.

What, then, makes Ferzania imperialistic? It shouldn't be the regulation of the citizen's life because, again, this is a moral wrong. Moreover, the Ferzania approach is better supported by the analogy that Duff deploys. He mentions doctors with ethical codes. Now, to be sure, every hospital may have its own rules of conduct, but it is the *medical profession* the regulates doctors. When the profession decides the sorts of malpractice or conflicts of interests that justify losing one's license, this is about how the profession conceives of itself—it is not about how the profession limits its scope to only those acts that occur within a particular hospital. Although there may ultimately be some territorial limits, the conception of the profession is defined by its membership and not by where they might be located.

Additionally, the victim of the medical malpractice need not be a doctor. The code speaks to its members and tells its members how to behave first and foremost to non-members. Scotland can rightly demand that Scots not steal from anyone, not just from other members of its citizenry or guests in its home. It is just as wrong to take someone's lunch money on the playground as it is to steal it from your sister.

Indeed, with a view that governs citizens the way the medical profession governs doctors, Duff has less need for his guest analogy. Once we decide the kinds of wrongs that our citizens ought not to

do to each other, do we really need to treat the others in our house as our guests? Or, instead, as we decide what we ought not to do to each other, should we simply extend those decisions to what we ought not to do to others outside our home, or to those who cannot be part of this bilateral discussion (kids, cats, and trees aren't citizens but are worthy of our moral regard)?

Indeed, the guest analogy's focus on actual space only carries so far. There are certainly things we ought not to do to guests, but guests are not fully bound by the rules of the house. To be sure, I get to tell my son's friend to get his dirty hands off my walls (even if he is allowed to destroy the walls with smudged fingerprints at home), but in general, guests go home for the disciplining. If my son punches the neighbor, I discipline my son whether the punch was in my home, on the street, or in my neighbor's home.

To illustrate, let's assume I have a dinner party. In the middle of the party, I get annoyed with my husband and throw a glass of red wine at him. This would be wrong. So, too, if one of my guests were to throw such wine on me. But now imagine instead that my guest throws red wine on her spouse, and that no wine gets anywhere other than on him. If it isn't me and it isn't my stuff, then my guest might be rude, but it hardly seems like it is "my business" in quite the same way. (Notice the best way to make this "my business" is to make the wine quite expensive such that wasting it does wrong me.)

When the medical profession calls doctors to account, it does not matter what hospital they are in. When my guest goes home and expresses his distress with his wife's behavior this has nothing to do with the fact that the insult occurred in my home, as opposed to theirs or a restaurant. The territorial space is not the marker of the wrong, nor does it seem to be the right condition for the liability.

The territoriality principle seems supported only by a view that when deciding what is a public wrong, committed by two members of the polity, that wrong is only of our concern if it occurs within our house. This is a "not under my roof" theory of criminalization. While Duff believes that it is odd to think that a United States court should care about a Canadian killing a Canadian in Canada, it seems odd to think that the American polity would not care about an American killing an American two inches over the US/Canadian border.¹⁴ It seems that the better explanatory account for the de facto limit of

¹⁴ For a call to expand the American use of active personality for this reason, see Geoffrey R. Watson, "Offenders Abroad: The Case for Nationality-Based Criminal Jurisdiction," *Yale Journal of International Law* (1992): 41-84.

jurisdiction is sovereignty and not the publicness of the wrong, and I wonder whether Duffian polity should find this normatively attractive.

To be sure, jurisdictional reach has been largely limited by the territorial principle. The emphasis on territoriality has been linked to differences in evidentiary rules, geographic obstacles, and a view that crimes were against the sovereign.¹⁵ But we are then dealing with a sovereignty limitation, or contingencies of history, as opposed to a view that the exercise of active personality more broadly is unjustified by a normatively attractive theory of criminalization and jurisdiction.

I suspect that any intuitive objections to active personality stem from the fact that we do not have moral agreement about the underlying wrongfulness of the conduct. That is, the most salient counterexamples are the American who travels to Canada to smoke marijuana, or perhaps a woman who goes to another country for an abortion. But why should an American citizen be able to travel to another country where it is legal for him to have sex with a ten-year-old? Or why should an American citizen be allowed to travel somewhere so that he may have his daughter's genitals mutilated?

There are numerous, practical reasons why the world would not be structured to allow for extensive assertions of active personality jurisdiction. We are limited by moral disagreement and sovereignty concerns. But before we make our pragmatic concessions, the Ferzian conception would be a view that we are all accountable for all of our people who abide by our moral codes.

B. Passive Personality

Let's turn to passive personality. I suspect that many people have the intuition that if a Canadian bombs a school in the United States, then the United States should call the Canadian to account. This only gets us the effects test for the territorial principle. But extended more broadly, we could get to the idea of passive personality—that we have jurisdiction over harms to American interests wherever in the world they may be, such that even if a Canadian kills an American in Canada, we can call the Canadian to account.

This approach also has intuitive plausibility. If the neighbor hits my sister, I may wish to call him to account even if he hits my sister in *his* house. *His* wrong is *my* business because *my* sister is *my*

¹⁵ Ryngaert, *Jurisdiction in International Law*, p. 102.

business. A polity should care about harms that happen to other members of the polity. Again, territory seems to strike the wrong boundary.

But through this prism, we can question whether Duff has successfully defended his other flank, against those who claim that he cannot account for non-citizens. From the perspective of passive personality, we can see that Duff's guest analogy has a weakness. To begin with, we can imagine that our Canadian bomber is a trespasser, and not a guest. He comes in to blow up the school and then plans to return to Canada. Is this really different from the Canadian who plans a bombing from Canada, or who launches his rocket there? Does not Duff's conception turn all unwanted guests, all interlopers, burglars, and trespassers, into enemies and terrorists?

A theory of criminalization that takes the polity first seems to make the Canadian's crimes parasitic on the polity's structure in a way that seems to miss the import that the Canadian is committing what is first and foremost a significant moral wrong. To be sure, Duff takes the object of criminalization to be moral wrongfulness; the violation of the polity's rules is a condition. But it still casts those who are not citizens or guests as doing something altogether different than violating a shared moral code.

Duff needs an account of how those who do not share our code (or are not citizens or even guests in our home) can be called to account. And it seems strange to think that if a Canadian shoots an American then the location along the border the Canadian is standing does important legitimizing work in determining why we would want to call him to account, as though his status as our guest is somehow binding him to us in a morally significant way.

It seems that a Duffian polity might make any moral wrong that impacts its citizens and its broader interests its business. Our concerns, and our interests, extend beyond our borders. Our territorial home does not seem to ideally limit the scope of our concern. And those who threaten our fellow citizens can be called to account by us because they have harmed those we care about.

Again, there may be pragmatic reasons why states don't exercise their jurisdiction extraterritorially. First, there is a significant issue with notice. With expansive passive personality jurisdiction, the laws to which one is subject would depend on who one's victim was despite having no notice of this fact. Now, in a world with more moral agreement both about what ought to be criminalized and how those acts ought to be proportionately punished, this would be less problematic. But clearly given the dramatic differences in the criminalization or punishment of different wrongs, this creates the possibility of unfairness.

Moreover, the exercise of passive personality jurisdiction seems to indicate that the other polity is not, cannot, or will not exercise jurisdiction. Thus, just as a Moorean polity may stay its hand for fear of trampling on another state's sovereignty, so, too, a Duffian polity might do the same.

But again, before we make pragmatic concessions, Ferzanians care about each other. And, thus, they seek to exercise jurisdiction on all those who would harm their fellow citizens. These moral wrongs are *their* business. But such a view, that creates cohesiveness by focusing on the shared fellowship of victims does cast non-citizens who harm Ferzanians as the very interlopers Duff aims to avoid.

C. Active, Passive, or Both?

It is difficult in practice to sort out whether a polity ought to exercise active jurisdiction, passive jurisdiction, or both. A Duffian ought to choose what matters, and ideally, we would have one universal theory about each state's jurisdiction. But we might ask one final question about overlapping sovereignty. Double jeopardy-like concerns loom large as we worry whether *both* polities might attempt to exercise jurisdiction.

In his discussion of doctors, Duff tells us that there are sometimes two wrongs that allow two sovereigns to both punish. The doctor who uses his position to steal from his patient violates his code of medical ethics and violates the criminal law. (88) Duff does complicate the picture a bit, considering doctors who violate the criminal law by approving sex-selective abortions. (90) Duff approvingly mentions a prosecutor's decision not to go forward but rather to allow the Medical Practitioners' Tribunal to proceed in the case. He further notes that this may be a matter of delegation: "sex-selective abortion is still a matter of proper public concern, as a public wrong; but it is sometimes more efficiently dealt with by the relevant professional body, which can now be seen to be acting on behalf of the polity, and in effect at the request of the criminal law." (90) Duff ultimately notes that there are interesting questions of how to deal with overlap, that seem to be determined by what is "most salient" about the wrongdoing. (90)

My goal here is not to explore the overlap between the medical profession and the criminal law, but to note that this is a bit unsatisfying. Arguably, the reason to defer to the lesser remedy is because the lesser punishment will be sufficient, but this is already to question whether we should conceptualize this as two distinct wrongs. There seems to be a potential equivocation between the idea that the public nature of public wrongs is a mere condition of liability, such that it is not what the wrongdoing consists in, and the idea that there are two wrongs here owed to two different people. If eight-year-old Katie bites the neighbor's child, does she violate distinct wrongs—one to the neighbor and one to her

parents? Are they both entitled to punish her? Or are the wrongs largely the same one? Just because an act can be of two polities' concern, and one can be answerable to two polities, we should not assume that both should punish. This then means that the "wrong," in "public wrong," may itself be a significant limiting principle, as two polities should not exercise jurisdiction over the same wrong.

Ultimately, a Ferzarian polity would we need a deeper principle of how it constructs its criminal law, or how likeminded polities might divvy up the wrongs for which we call people to account.¹⁶ I will confess to finding both active and passive personality attractive, and I could see how a polity would care both about the conduct of its members, wherever in the world they may be, and about its interests, wherever in the world they may be found and whomever they may be threatened by.

IV. Conclusion

Where does this leave us? Duff's theory of criminalization does not definitively support the same sort of territorial bounding that he believes it does. And non-citizens who commit offenses may not be as easily assimilated into guests as Duff would have us think. Just as Moore's account lets our territory and sovereignty serve as a pragmatic, not intrinsic, limit; it seems, so too, must Duff.¹⁷ If our

¹⁶ These sorts of difficulties appear in tax law. See Ruth Mason, "Citizenship Taxation," *Southern California Law Review* 89 (2016): 169-239.

¹⁷ To be sure, Moore's prima facie jurisdictional reach extends beyond Duff's, even as I have expanded its grasp:

Moore's legal moralism ... is expansive as to its location and perpetrators, of the wrongs we have reason to criminalize. If moral wrongdoing deserves punishment, it presumably deserves punishment wherever, by whomever, against whomever it is committed. So we all have reason to promise the imposition of such suffering on wrongdoers anywhere in the world, and thus reason as legislators to bring all wrongdoers within the reach of the criminal law. Those reasons are not restricted by geography or territory. The English legislature has reason to bring within the scope of English criminal law not just wrongs committed within England, but those committed anywhere in the world—to count as a crime under English law, triable in the English courts and punishable in its penal system, murder, rape, theft committed anywhere in the world, and indeed such wrongs as vandalizing property or drunken driving; to criminalize, and to

criminal law is a code for our citizens, it should follow them wherever in the world they may be. And, alternatively, if our criminal code is about protecting our interests, it, too, should follow those interests wherever in the world they may be. We then ought to prosecute the German citizen who kills the American tourist in Germany.

The challenge that Duff set for Moore was to explain the territoriality principle. He asks, “What normative sense can we make of the Territoriality Principle as the most common basic principle of ambit and jurisdiction—and of these various qualifications and exceptions to it?” (106) He notes that “[a]n obvious answer to this question appeals to pragmatic considerations and to a principle of state sovereignty. On this view, normative theorizing about the criminal law must begin, not with the kinds of local, geographically limited concern that the Territoriality Principle makes salient, but (like all foundational theorizing) with certain universal and agent-neutral demands.” (106) He thinks this account does not do justice to “the criminal law as a distinctive type of legal institution.” (108)

I have contended, however, that a Duffian polity in its most normatively attractive light would shed the boundaries of territoriality and allow its realm to reach wrongdoing that occurs far beyond its modest civic home. Territory, then, strikes me as a vestige of sovereignty and not constitutive of a Duffian polity’s conception of what would be a public wrong. Although the civic home offers Duff a way to cover non-citizens within a jurisdiction’s ambit, it is unlikely to be the most ideal way that a polity could conceive of itself. Whether the polity is best served by thinking that its code should regulate what its citizens do, or what happens to its citizens and interests, whether a code should or could include both, or how we might begin to reconcile competing claims to jurisdiction I will leave for another day.

seek to punish criminal damage committed by a Turk on the streets of Istanbul. (74-75, footnotes omitted).

