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Individual Consent and Shared Normative Authority

Conceiving of Crimes as Violations of Individual Rights and Public Wrongs

PHILIPP-ALEXANDER HIRSCH

1. Who is Wronged when Crimes Occur?

Let me sketch out an – admittedly somewhat rough – answer to this question from the perspective of criminal law theory. Many authors[1] seem to readily subscribe to the position that criminal law serves a genuinely public function, equating crimes with public wrongs. Consequently, it is the polity or the legal community that is wronged when a crime is committed. This can be dubbed the *public-wrong conception of criminal law*. According to this conception, the distinctive feature of criminal law that distinguishes it from other areas of the law lies in responding to public wrongs, whereas the function of civil law is to respond to private wrongs (e.g. Pawlik 2004: 75 et seq.; Lamond 2007; Renzikowski 2007: 563 et seq. and Chapter 13 in this volume:; Husak 2008: 135 et seq.; Edwards and Simester 2014; Lee 2015).[2] Where public and private wrongs cannot be distinguished at a primary level (e.g. crimes and torts), criminal law's distinctive function is seen in responding to wrongs *on behalf* of the legal community as a whole, whereas the function of civil law is to respond to wrongs *on behalf* of a specific individual (see Duff 2011: 140, 2014: 164, 170 et seq. and Chapter 15 in this volume or Stevens 2014: 112 et seq. and 121 et seq.). This often corresponds to the underlying normative justification of criminal law. According to communitarian approaches, for example,

[1] In this chapter, I will not consider approaches that see themselves as alternatives to state criminal law, such as abolitionist or restorative justice approaches.

[2] The notion that criminal wrongdoing is of a genuinely public nature is also not a new development but historically well-founded, to be found for instance in Blackstone, *Commentaries on the Laws of England* (1765–9), Bk IV, ch. 1; Hegel, *Grundlinien der Philosophie des Rechts* (1820), §§ 95 et seq., 220 or Kant, *Metaphysik der Sitten* (1797), § 52, Anm. E.

the values or interests pursued by criminal law are of a genuinely public nature, which is why it falls to the community – or rather its agent, i.e. the public prosecutor – to prosecute crimes and to hold offenders accountable (see Duff 2001: 56 et seq.). That said, more individualistic approaches (such as Kantian approaches), according to which criminal law upholds a system of equal freedom, are not substantially different in this respect. This is the case because while these theories refer to the value of individual rights to freedom, they are always concerned with the protection of the *totality* of individual rights. The latter can only be upheld by a public agent that can speak for all: i.e. the state. Consequently, the enforcement of criminal law must remain in public hands (see Thorburn 2011b: 96 et seq. or Ripstein 2009: 308 et seq.).

In the following chapter, I would like to propose an alternative model to this *public-wrong conception of criminal law* that meets two criteria: It is able to explain the public character of crimes whilst simultaneously allowing us to conceptualise crimes directed against individuals as violations of their rights. To this end, I will first argue that, at the level of substantive law, crimes are primarily concerned with the rights of the victim. This is the case since deontic control over the primary duty whose violation constitutes the crime lies with the victim (II.). I will go on to show that criminal law – unlike civil law – is particularly concerned with one aspect of the violation of rights: the offender's disregard for the legal status of the victim as a holder of rights (III.). Finally, drawing on relational theories of morality, I will demonstrate that understanding crimes as status violations not only substantiates attributing rights to individuals, but also identifies crimes as a public matter, in turn justifying public prosecution (IV.).

2. Consent and Rights in Substantive Criminal Law

Anyone attempting to discuss rights in criminal law should first clarify what rights actually are. However, it would exceed the scope of this chapter to adequately address this question, which has been disputed for decades. Instead, I will focus on *legal* rights and conceptualise them in the tradition of the *will theory*.[3] This appears justified, as legal practitioners and scholars – notwithstanding the

[3] Sometimes also called *choice theory of rights*. Its elaboration by Hart 1955, 1982 in particular has remained influential to this day. Other will-theory approaches can be found, for example, in Wellman 1985; Sumner 1987; Steiner 1994 or more recently Weissinger 2019. But see (even older) German literature, e.g. von Savigny 1841: 331 et seq. or Kelsen 1960: 130 et seq. Adopting an understanding of rights based on the *will theory of rights* naturally entails a number of conceptual limitations and problems inherent in the *will theory*. On the 'conceptual baggage' of the *will theory* (also in comparison to other approaches), see specifically Campbell 2006: 43 et seq.; Edmundson 2012: 98 et seq. and Wenar 2021. These conceptual limitations concern in particular the question of who or what can be the holder of rights, which in turn raises the question of who or what constitutes a legal subject. Since a concept of rights informed by the *will theory* only considers those entities to be potential rights-holders that are able to exercise power in the Hohfeldian sense (e.g. by being able to consent or

academic dispute about the correct theory of rights – still largely determine legal rights based on considerations rooted in *will theory*. Judges and other legal officials do not consider a putative right to be a legal right unless the presumptive rights-holder has specific powers with regard to the obligation of a legally obligated party. This makes a legal right a Hohfeldian (see Hohfeld 1913/17) molecule consisting of a claim-right in combination with a power pertaining to the legal duty correlative with the right.[4] Different forms of power can be distinguished following Steiner's classification:

1. to waive compliance with the duty (i.e. extinguish it);
2. to leave the duty in existence (i.e. demand compliance with it);
3. to waive proceeding for the enforcement of the duty (i.e. for the restraint of, or compensation by, the duty-holder in the face of threatened or actual breach) and thereby forgive its breach;
4. to demand proceeding for the enforcement of the duty;
5. to waive enforcement;
6. to demand enforcement.[5]

For an attribution of rights, it seems sufficient for one of these forms of power to be applicable, either on an individual level or in connection with others.[6] Thus, prima facie, it is not impossible that the power to waive rights and the power to (judicially) enforce rights are attributed to different subjects within a legal system.[7]

However, I see the question of whose rights are wronged by criminal offences (the victim or the legal community) as a matter of substantive criminal law, which defines criminal offences and potential defences. This, in turn, limits the scope of

to enforce rights in court), animals, for example, are excluded; in the case of children or legal persons, a more or less comprehensive proxy model is required. See also Hart 1982: 184, fn 86, but critical of the resulting inconsistencies of the will theory, e.g. Wellman 1995: 116 et seq. and MacCormick 1976. Of course, this has implications for the rights-based conception of criminal law developed below, where criminal law is invoked to protect, for example, animals, children or corporate identities.

[4] The ensuing question of whether we should add to the full description of rights a privilege in Hohfeld's sense – being allowed to exercise a power (to which the distinction between validity and legitimacy is coupled) – cannot be addressed here.

[5] Steiner 1994: 69, following the fundamentally similar distinction made by Hart 1982: 184.

[6] However, this is controversial: While the levels of compensation (levels 5 and 6) are ignored by most will theorists, many emphasise the aspect of (judicial) enforceability (levels 3 and 4; see, e.g. Kelsen 1960: 139 et seq. or Wellman 1985: 136). For others, the mere possibility of the right's addressee to be released from the correlative duty (levels 1 and 2) suffices to be attributed rights (e.g. Sumner 1987: 43). I agree with the latter view because subsequent levels, i.e. levels 3–6, are contingent upon and justified by the existence of a power at the first two levels; firstly, there is a logical precedence in that the question of enforcement only arises if the obligation has not been waived (i.e. no waiver of rights at the first level) and the obligation or right continues to exist; secondly, the fact that a person has the power to insist on or waive a right is a *pro tanto* reason to give them the power to enforce the right if it is infringed. This does not preclude assigning the enforcement of the right to someone else for other reasons. However, this goes hand in hand with an increased need to justify assigning downstream levels of power (enforcement) to someone other than the person who has primary power over the duty of conduct.

[7] Similarly, it is conceivable that a right may be assigned to more than one person (either individually or collectively) at the first, second or third level. See also Kelsen 1960: 141.

consideration to the first two levels of power. Indeed, an act does not need to be prosecutable as part of criminal proceedings to qualify as an offence under substantive criminal law.[8] On a descriptive level, we can distinguish substantive criminal law from criminal procedural law because the latter only entails the mechanisms by which the former is enforced. Therefore, the attribution of rights on a substantive level can be considered independently of the procedural reaction to a criminal wrong. It follows that who is wronged by a criminal offence depends solely on who has power over the existence or non-existence of duties, the violation of which is punishable under criminal law (i.e. level 1 and 2 in the above list). Now, most offences affecting individual interests can be justified or excused by an individual's consent. This corresponds to the (potential) victim executing a legal power to waive compliance with a duty (i.e. extinguish it) or to leave the duty in existence. This means that, focusing on substantive criminal law and thus on power on the first two of the aforementioned levels, the *will theory of rights* conceptualises consent as an instance of discharging someone from his or her duty; hence, it designates the (potential) victim as the rights-holder. To put it differently: Individuals hold legal rights against possible offenders not to be criminally battered, robbed, raped, or otherwise encroached upon their interests, precisely because *they* have the power to waive compliance with the duty in question.

Some objections might be raised against this line of argument. For one, criminal law does not recognise an unlimited power of consent. For example, major assaults against individuals, such as killing someone, cannot be legally justified by a victim's consent. Admittedly, this is a bullet I have to bite.[9] However, this does not call into question rights in criminal law in general. Justifiable restrictions on consent (e.g. in cases of incapacity to autonomously determine one's own affairs) at best prove that the scope for the legal system to assign power over obligations relevant to criminal law to individuals is limited.[10] However, this should not come as a surprise and is not specific to criminal law. There are also limits to private

[8] Effective criminalisation, of course, requires procedural enforcement. It would hardly be conceivable for behaviour X to be criminalised by a legislature passing a law that defines X as a crime, only for them to add that X-ing will not attract criminal liability – that those who engage in X-ing must never be prosecuted. However, the procedural question of whether and how an act of X-ing is to be prosecuted does not arise until, on a substantive level, the violation of a duty backed by criminal sanctions comes into play (see n 6). Since the question of who is wronged by a crime depends primarily on the direction of this duty, this is a matter of substantive law. For partly similar considerations, see also Stevens 2014: 119 et seq.

[9] At least against the background of the will theory of rights, which has difficulties in conceptually accounting for inalienable rights that cannot be waived.

[10] Admittedly, incompetent consent is a relatively uncontroversial example; most would agree that, in general, only competent consent may waive a duty. The more difficult examples are those where criminal law does not sanction even competent, informed consent to negate an offence, e.g. in the case of consensual homicide. This raises the question of whether criminal law should refrain from defining as criminal what is done with the consent of the person concerned, restricting itself to *injuria* – and *volenti non fit injuria*. I cannot explore this question in depth here, but I would like to propose two possible solutions: First, one could take a strictly positivist stance and reject the question entirely. Restrictions on consent are nothing more than restrictions on the attribution of rights within a positive

autonomy in civil law along the lines of those in criminal law – for example, void contracts that cannot be enforced by either party, even when both had agreed. However, no one would doubt the existence of rights in civil law because of this.[11]

A second objection could be that the outlined argument is only cogent insofar as it concerns the violation of individual interests. How do victimless crimes, which clearly affect only public interests, fit into the picture? In the context of criminal offences that aim at protecting public interests it makes little sense to speak of individual rights in criminal law. However, this does not stand in the way of applying the concept of crimes as violations of rights to them as well. In victimless crimes, all members of society are the joint holder of a right. To exercise this public right, society has created a public agent, the state. It follows that state authorities only have a derivative legal power, which they exercise vicariously for the members of the legal community. So, even if the power of consent in criminal law is only a strong argument in favour of individual rights, there is nothing to be said against adopting the concept of violations of rights in the context of victimless crimes, the legal community being the entitled person.[12]

Finally, one could object that my approach leads to a problematic privatisation of criminal law. This objection can be understood in two ways: On the one hand, it seems that it would lead to a levelling of the differences between civil and criminal wrongs, and thus between civil law and criminal law. On the other hand, my approach seems to be incompatible with the idea that crimes – even where they impair individual interests – concern us all; that is, that they are always a public matter. I would like to investigate these two objections separately in an attempt to reject them.

3. Crimes as Status Violations

What is the difference between civil and criminal wrongs anyway if crimes affecting individuals are understood as violations of individual rights? There can be no

system of criminal law. Whether these legal restrictions – provided that higher law (e.g. the constitution) allows them – can in turn be morally justified, cannot be meaningfully answered from a legal perspective. Secondly, the principle of *volenti non fit injuria* could be recognised as a moral principle constitutive of criminal law (I personally think that competent and informed consent should always be recognised in criminal law as negating the crime). If this were accepted, then the criminalisation of the killing of another human being upon their request might only be justified if it can be shown that not only the person killed is affected; for example, by citing the protection of the rights of third parties (or of collective legal interests) as the fundamental reason for criminalisation (for this line of reasoning, see, e.g. Stevens 2014: 117 et seq.; McConnell 2000: 29 et seq. and Hruschka 1977: 198, fn 16). Yet if this cannot be convincingly justified (and I think there is much to be said for that position), then criminalisation itself cannot be justified.

[11] For a similar rebuttal, see Stevens 2014: 119 et seq.

[12] In fact, this is what adherents of a *public-rights conception of criminal wrongdoing* advocate when they conceive of criminal wrongdoing as violations of rights of the state. See, e.g. Steiner 1994: 66 et seq. or Renzikowski 2007: 563, 569 et seq. While this is particularly odd when it comes to explaining violations of individual rights (see Moser 2019: 182 et seq.), it works quite well for victimless crimes.

meaningful distinction between civil and criminal wrongs unless there are also differences in the way criminal law and civil law each conceptualise the violation of individual rights. In the following section, I would like to argue that this can be achieved by invoking the concept of a *status violation*. This is the case as a culpable status violation, i.e. the disrespect of claims to legal recognition, is constitutive only of criminal wrongdoing. More specifically: Criminal wrongs are characterised by the fact that one culpably disregards the normative authority that rights endow to a rights-holder. To support this argument, two things need to be shown: first, that rights have this recognitional function; and second, that this recognitional function is only relevant in criminal law.

3.1. The Recognitional Function of Rights

One notion of the recognitional function of rights is rooted in the fact that the attribution of rights often serves as a way of recognising the worth of individuals or groups (e.g. in the gay rights movement).[13] However, this is not the notion I am concerned with. My point is that holding rights comes with a special normative authority to which legal recognition refers. Whoever has a right, exercises a practical de jure authority vis-à-vis the obligated party to make a demand with regard to the object of the right. And vice versa: Whoever considers himself or herself obligated because of another person's right, stands in an accountability relation to the rights-holder; he or she must recognise and respect this authoritative status. Therefore, rights have a recognitional function that goes beyond claiming a certain behaviour from someone else.[14] For this reason, I would like to distinguish between the material and the formal aspect of rights:[15] The *material* aspect of a right is about its content. The *formal* aspect of a right is about the status that someone has as the holder of the right. Let us take the example of my property right to my car. If Peter takes possession of my car, then I can demand a certain behaviour from Peter, namely, to hand over the car. This is what my right consists in *materially*. At the same time, I can demand that he recognises my normative authority as the owner: I alone, and no one else, can assert this authoritative status in relation to Peter. This is what my right consists in *formally*.

[13] On the recognitional function in this sense, see Edmundson 2012: 113 et seq.

[14] This recognitional function of having rights is naturally associated with *demand theories of rights*. Like *will theories*, they focus on the agency of the rights-holder; unlike *will theories*, they place a special emphasis on how the status of a rights-holder plays out in intersubjective relations. The *locus classicus* for this approach is Feinberg 1980: 151, labelling rights as 'especially sturdy objects to "stand upon" […]. Having rights enables us to "stand up like men", to look others in the eye, and to feel in some fundamental way the equal of anyone. […] Indeed, respect for persons (this is an intriguing idea) may simply be respect for their rights […]. To respect a person then, […] simply is to think of him as a potential maker of claims.' Various elements of a *demand theory* can also be seen in the work of Wildt 1992: 148 et seq., Waldron 2000: 128 et seq. or Darwall 2006: 18 et seq.

[15] As far as I know, the distinction I want to make was first systematically developed in Kant's philosophy of law. See Kant, *Metaphysik der Sitten* (1797), § 42 with fn * and, on this, Hirsch 2017: 305 and Hirsch 2021: 162 et seq.

As the example shows, these two aspects of a right correspond to two different claims: the *material* claim to fulfil a certain duty which is the content or object of the right; and the *formal* claim to be recognised as the holder of a right with a special normative authority to make that material demand. It is the latter, the formal claim, that comes with a recognitional function. This is nicely illustrated by Feinberg's distinction between two ways of claiming one's right which he describes in his widely acclaimed essay 'The Nature and Value of Rights':

> One important difference then between *making legal claim to* and *claiming that* is that the former is a legal performance with direct legal consequences whereas the latter is often a mere piece of descriptive commentary with no legal force. Legally speaking, *making claim to* can itself make things happen. This sense of "claiming", then, might well be called "the performative sense". […] Claiming that one has a right […] as opposed to "performative claiming" […] is another sort of thing […]. To claim that one has rights is to make an assertion that one has them, and to make it in such a manner as to demand or insist that they be recognized (Feinberg 1980: 150).

Following Feinberg, I will refer to the performative and assertoric claiming of a right. A right is claimed *performatively* when Φ – i.e. the content or object of the right – is claimed. In contrast, a right is claimed *assertorically* when the recognition of the status as rights-holder (i.e. of being entitled to demand Φ from the obligor) is claimed. Only the latter is a claim to recognition.

However, it is important to emphasise that this recognitional function is not merely an insignificant, commendable by-product of rights ownership. Rather, it is a constitutive element of it. Without it, it would be impossible to understand what it means to be the owner and addressee of a right. Indeed, the recognitional function of rights is crucial to understanding why duties correlative with rights are *directed* duties. It is characteristic of rights that they correlate with duties directed to or owed to the rights-holder. However, I am obligated to the rights-holder precisely because he or she exercises practical authority in relation to me. If I want to fulfil my duty *as* a directed duty, then I must recognise this status. The reverse is true for violations of rights: The violation of a directed duty is more than just *a wrong*: It is *a wronging* of the being to whom the duty is owed (see e.g. Hart 1982: 184; Waldron 1984: 8; Jones 1994: 36 et seq. or Thompson 2006). Hence, flouting of a directed duty always expresses disrespect for the person entitled to it (see also Darwall 2006: 18 et seq., 140 et seq.; Wallace 2019: 82 et seq., 156 et seq. and Vandieken 2019: 293 et seq.).

3.2. Criminal Wrongs as Violations of Rights in the Formal Sense

How does this help us to distinguish between criminal and civil wrongs when both see the individual as the rights-holder? On the surface, there seems to be no difference. The same protected interests and the same primary duties underlie torts and crimes, e.g. in the case of tortious battery and criminal battery. In both cases, the

content of the right, i.e. the claim not to be harmed and the corresponding duty to refrain from harming, is the same. However, if we consider the formal aspect of a right and the recognitional function that comes with it, civil law and criminal law take different paths. This is the case because civil law does not attach any decisive importance to a culpable status violation, i.e. to the offender's disregard for the practical authority of the rights-holder.[16] On the one hand, tort law does allow for strict liability (i.e. liability regardless of whether someone is at fault for disregarding the rights of others[17]). On the other hand, the disregard of the rights of others is not in itself sufficient to trigger civil liability. Thus, tort law neither recognises liability for attempts nor liability for endangerments. Rather, civil liability presupposes that the object or content of the right was actually impaired. Let us again take the example of tortious battery: Civil liability requires that harm to bodily integrity was actually caused. The situation is different in criminal law. In Germany, for example, there is no strict liability at all; in common law jurisdictions, there is a strong presumption against strict liability.[18] It follows that only a person who culpably disregards the rights of others can be held criminally liable. In fact, such a status violation is not only necessary (at least in most crimes),[19] it is also sufficient for criminal liability. This is the case because even if no harm or

[16] For a partly similar verdict – although not related to a culpable *status violation* – see Sullivan 2014 and Antill, Chapter 6 in this volume, who argue that tort law focuses on compensation for harm and therefore does not place the same emphasis on culpable wrongdoing as criminal law: It does not differentiate between levels of wrongdoing as subtly as criminal law does, and also ignores some forms of criminal wrongdoing, such as attempts, altogether.

[17] This is, of course, controversial and there has been an ongoing debate as to whether strict liability can be justified in tort law. However, although there are many torts in both civil and common law jurisdictions that require fault (at least negligence) on the part of the defendant in order to be liable for causing harm, there remains a considerable number of torts in tort law that do not require fault. See, e.g. Flume 2021 for German and Austrian law; and for a survey of European tort law, Dam 2013. For English law, see Oliphant 2017; Sullivan 2014 and in particular Gray 2020. For a comparative law perspective, see Bussani, Sebok and Infantino 2022.

[18] Admittedly, the situation is not clear-cut in common law jurisdictions: On the one hand, there is a certain opposition towards strict liability due to the commitment to the *mens rea* principle rooted in common law. On the other hand, there are many offences, particularly in statutory law, which either (in part) do not require fault or where this has not been stipulated, leaving the matter to interpretation. In English law, for example, there has even been a presumption against strict liability since 1960, unanimously established by the House of Lords, according to which 'the common law presumes that, unless Parliament has indicated otherwise, the corresponding mental element is an unexpressed ingredient of every offence' (*B* v *DPP*, [2000] 2 AC, 428, 460). However, this presumption of *mens rea* can be (and has been) rebutted by the courts when interpreting statutes, and English criminal law now probably contains more offences which impose strict liability than ones which require fault – as well as more offences of this kind than most other European countries. Nevertheless, the moral objections to holding people criminally liable when they have not been proven to be at fault are deeply anchored in the common law criminal law theory and theoretically well-founded. For an overview of the problematic relationship between strict liability and criminal law, see the contributions in Simester 2005 and also the overview in Horder and Ashworth 2022: 100 et seq., 192 et seq. and in particular 199 et seq.

[19] This naturally leads to the question whether criminal liability should depend solely on such status violations. If so, this would argue for treating attempted and completed crimes in the same way. Moreover, criminal liability would be excluded in the case of (inadvertent) negligence. I cannot explore

damage has been caused, one can be liable to prosecution solely for attempting to undermine the legal status of another person or for culpably creating a risk for this to happen.

Now one might ask why it is the culpable *status violation* that is characteristic of criminal wrongdoing: Why is it not sufficient to refer to the culpable violation of a duty as the distinguishing factor between criminal and civil wrongdoing? The answer is that only the concept of a status violation captures the fact that criminal offences are about the violation of rights correlative with directed duties. If we were to only refer to the culpable breach of duty, it would not matter to whom this duty is owed and who is wronged by its breach. The formal aspect of a right and the associated recognitional function alone express that rights correlate with directed duties. It is this directedness that matters in criminal law,[20] as demonstrated by the power of consent. Consent in criminal law demonstrates that criminal wrongdoing depends precisely on the offender disregarding the victim's special normative authority to decide on the permissibility of harmful conduct.[21] Let me present this argument again in a slightly more formalised version:

1. If consent in criminal law requires us to conceptualise criminal offences as culpable violations of rights or of the duties that correlate with them;
2. And if the directedness of duties correlative with rights presupposes that the obligor and the obligee stand in a relationship of authority and accountability, so that the breach of a directed duty owed to the rights-holder shows disrespect for his/her authoritative status;
3. Then a culpable status violation is constitutive of criminal offences.

If this is correct, and if, in turn, such a culpable status violation is neither necessary nor sufficient for civil liability, then a meaningful distinction can still be made between torts and criminal offences, even with both involving the violation of individual rights. Thus, individual rights in criminal law do not lead to a privatisation of criminal law in the sense of cancelling out the difference to civil law.

this question in detail within the scope of this paper and must contend myself here with a Solomonic response: If one wants to advocate a rights-based approach as a monistic theory, then this involves treating attempted and completed crimes equally and decriminalising crimes of negligence (see Hirsch 2021: 219 et seq. for details). However, my approach does not seem prima facie incompatible with a *pluralist theory* of criminal law that recognises other criteria for criminal behaviour (e.g. harm) in addition to status violation, which might allow for different treatment, for example of completed and attempted crimes.

[20] This does not mean that there is no bipolarity and directed duties in private law. I am merely arguing that civil law does not attach any importance to bipolarity in the context of rights (i.e. the recognitional function) in what constitutes a wrong.

[21] Insofar as the offender must cognitively understand that a harmful act is not being performed with consent. If the offender erroneously believes that he or she is performing a harmful act with the consent of the person concerned, there is no criminal liability. See Dsouza, Chapter 7 in this volume.

4. Special and Shared Normative Authority

However, this only helps us to avoid the first prong of the aforementioned 'privatisation objection'. The other prong aims at the alleged fact that conceptualising criminal offences as violations of individual rights would mean that crimes could no longer be understood as a public matter. The need for a public prosecution of criminal offences directed against individuals would thus become obsolete. However, this objection fails to recognise that the violation of the victim's authoritative status, which is constitutive of criminal offences, always has a supra-individual and thus society-wide dimension.

To demonstrate this, I would like to take a closer look at the metaethics of directed duties correlative with rights, drawing on Stephan Darwall's conception of second-personal reasons (Darwall 2006).[22] In his acclaimed book, 'The Second-Person Standpoint', Darwall argues that directed duties have an essentially interpersonal character. According to him, those duties implicate a distinct class of practical reasons, 'second-personal reasons […] whose validity depends on presupposed authority and accountability relations between persons and, therefore, on the possibility of the reason's being addressed person-to-person' (Darwall 2006: 8, italics omitted). Thus, second-personal reasons are agent-relative (as opposed to agent-neutral) reasons for action. This means that these reasons for action only apply because and insofar as someone else has normative authority over me, and I am accountable to him or her. As Darwall shows, however, second-personal reasons are subject to certain felicity conditions. If, for example, A demands something from B, then this constitutes a second-personal reason for action for B if and only if:

1. A has de jure legitimate authority to make this demand on B (*normative authority*).[23]
2. B is accountable to A, insofar as A is entitled to blame B, complain to B or otherwise demand responsibility from B in case of refusal or non-fulfilment (*accountability*).[24]

[22] Darwall's approach is one of several approaches that seek a relational justification of morality and that have gained some traction in the moral philosophical literature. See, e.g., Wallace 2019 and Zylberman 2021. I use Darwall's approach here because – unlike Wallace and Zylberman, for example – he does not attempt to trace all moral duties back to bipolar duties but recognises that bipolar and impersonal duties coexist and are inextricably linked. This is what makes him interesting for the relational interpretation of criminal wrongdoing that I am trying to defend.

[23] This normative authority must not be misunderstood as a legislative authority, according to which the authority would consist in creating obligations that would not otherwise exist. Darwall's theory of morality illustrates this point: According to Darwall 2006: 277 et seq., 300 et seq., the origin of moral duties are the demands of the moral community, which he justifies in terms of hypothetical contractualism (as demands on behaviour that no one could reasonably reject). Therefore, authority – and this idea can also be transferred to other, non-moral normative duties – is rather an authority in terms of validity (according to which it depends on the authority of the entitled person whether an obligation remains in force or is maintained) and an authority in terms of justification (according to which one is able to demand accountability from others for breaches of duty). See also James 2007: 915 et seq. and Yaffe 2007: 949 et seq.

[24] See Darwall 2006: 15 et seq., 65 et seq.

3. B is normatively competent, i.e. B can comprehend the demand asserted by A as a justified reason for action and – on the basis of this – to consider himself or herself responsible to act in accordance with the demand (*normative competence*).[25]
4. Authority, accountability and competence are, in principle, claimed or attributed reciprocally, so that the authority claimed by A is not forcefully imposed on B, but is acceptable by the latter as a free and equal agent of the normative community (*reciprocity*).[26]

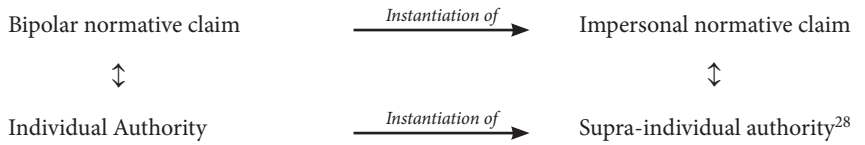
These felicity conditions for successfully addressing second-personal reasons and, likewise, for being bound by directed duties reveal a central feature of those reasons: Individual authority can only be claimed between two persons if, *ceteris paribus*, it can, in principle, be claimed by every member of the normative community (including the accountable person).[27] This has the effect that second-personal reasons must always be considered under two aspects. For one,

[25] Darwall 2006: 22 et seq., 107 et seq. In this respect, he refers to *Pufendorf's Point*: '[I]n holding people responsible, we are committed to the assumption that they can hold themselves responsible by self-addressed demands from a perspective that we and they share, […] the standpoint of free and rational members of the moral community.' Here, Darwall recalls Pufendorf's insight that '[t]o be obligated […], we must be able to take a second-personal standpoint on ourselves and be motivated by internally addressed demands whose (second-personal) authority we ourselves accept' (Darwall 2006: 23).

[26] See Darwall 2006: 20 et seq., 243 et seq.

[27] This claim, of course, requires some explanation, which Darwall has given in great detail – and I think convincingly – in his book and other papers on the subject. For the purpose of this chapter, however, I will attempt to summarise Darwall's argument for the 'entailment claim', i.e. that bipolar obligations always already entail a moral obligation period (i.e. an obligation that is not owed to a specific person and thus not agent-relative) and, hence, that individual authority must inherently entail representative authority. Darwall's argument is based on the premise that the determination of moral obligations is not within the purview of particular individuals, even when those obligations are owed to them (i.e. bipolar obligations). To illustrate this, Darwall examines the process of blame from the perspective of the victim. Consider a scenario in which a blatant breach of duty to you occurs; for example, I step on your foot for no good reason. Your blame, which subsequently manifests as an implicit moral demand for a better course of action, is more than a simple expression of emotion. Rather, it is an attempt to highlight my blameworthy actions and hold me accountable. The essence of your blame is to initiate a dialogical interaction, an 'implicit R.S.V.P.' that requires recognition on your part (see Darwall 2006: 145). However, the process of acknowledging and accepting your blame, culminating in feelings of guilt and remorse, requires that I accept your blame as justified and agree that a different course of action would have been more appropriate (see Darwall 2006: 28, 2013a: 139). It is not simply because of you, the victim, having said so that I would accept your blame as justified. Rather, it is the realisation that the implicit demand in your blame could be made by any member of the moral community, including myself, that triggers my acceptance of your blame and subsequent guilt. In essence, it requires understanding that my actions against you constitute a universal moral transgression, or in Darwall's terms: a violation of an *obligation period*. Darwall refers to this as *Pufendorf's Point* (Darwall 2006: 23, 112), which is expressed by the third of the aforementioned felicity conditions (*normative competence*, fn 25) and posits that in order to legitimately obligate and hold others accountable, there must be an assumption that they can hold themselves responsible and accountable for the same reasons from a shared perspective (see Darwall 2013c: 37 et seq.). Darwall sees this shared perspective as the impartially disciplined perspective of the moral community, rather than a simple normative implication between two individuals. The application of *Pufendorf's Point* illustrates that when one assigns blame, one reinforces a claim that is assumed to be universally applicable within the moral community. Consequently, according to Darwall, the act of blaming, whether directed at oneself or others, implicitly communicates a demand, not out of individual discretion, but as a representation of the moral community.

second-personal claims express a *bipolar* authority/accountability relation; in turn, this constitutes a particular instantiation of a *general* authority/accountability relation within the normative community of equal agents. The following diagram helps to understand the normative relations at issue:



Individual second-personal authority vis-à-vis an accountable person (corresponding to a bipolar normative claim) thus implies that the accountable person as well as uninvolved third persons have what I would like to call a supra-individual second-personal authority as members of the normative community (corresponding to an impersonal normative claim).[29] Nevertheless, despite this derivational connection, individual authority – compared to supra-individual authority – is accompanied by a special, privileged status, since it establishes claims of a different kind, as Darwall vividly shows using the example of rights:

> Right holders […] have a distinctive authority to hold others answerable for violations of *their* rights that third parties do not have. The point is not that third parties

[28] Following Darwall 2013c: 39: 'Bipolar normativity [*sc.* bipolar normative claim] involves a distinctive individual authority that obligees have to make demands of and hold obligors responsible. And moral obligation period [*sc.* impersonal normative claim] entails a representative authority that anyone shares as a representative person or member of the moral community.' The elements in each column entail each other, and each of the elements in the left column entails the element in the right column that is in its row. Since general claims can exist without corresponding bipolar claims, the elements in the right column do not entail the elements in the left column in their rows.

[29] I would like to deviate from Darwall's terminology in order to follow a differentiation rooted in norm theory – particularly common in German legal scholarship – according to which criminal sanctions presuppose the violation of a norm of conduct. A distinction must be made here between a violation of a concrete duty of conduct (i.e. the norm of conduct already concretised for a specific case) and a violation of the general norm of conduct (i.e. as it expressed in criminal law provisions in an abstract-general way): If A commits an assault on B according to Section 223(1) of the German Criminal Code, then the punishable violation of the duty of conduct in the bilateral relationship between A and B constitutes a violation of the right (i.e. the bipolar normative claim) of B because the existence of the duty of A not to assault B depended on B's (non-)consent, and thus it was precisely B who was wronged. At the same time, however, this breach of duty constitutes a violation of the norm of conduct as an abstract-general rule (i.e. the one from which the specific duty of A in relation to B was derived), whereby A acted 'objectively' wrongfully. This 'objective wrongdoing' consists in the fact that all other addressees of the norm enshrined in Section 223(1) of the German Criminal Code (C, D, … *n*) may demand compliance with the rules of conduct subject to criminal sanctions (i.e. the impersonal normative claim) because the special authorisation of B is only the concrete instantiation of a supra-individual authority from which every member of the legal community can hypothetically derive a special authorisation – i.e. if they themselves are affected. Or, to put it differently: Since every member of the legal community may potentially derive individual claims from norms of conduct that are enforced by means of punishment due to their nomological structure, every member may generally demand that everyone should comply with these norms. On this in detail, see Hirsch 2021: 187 et seq.

> have no authority. To the contrary, I […] claim that any special authority right holding obligees have can exist only if there is also an authority, *representative* [in my terms: *supra-individual*] *authority*, which they share with third parties, as well as with any obligor who might violate their rights. The point is that there is a special *individual* authority an obligee has to hold the obligor personally answerable that can, like the power of consent, be exercised only by the right-holding obligee herself at her discretion (Darwall 2013c: 30).

Let us again take the example of Peter who takes possession of my car: In the bipolar relationship with Peter, I have a special, individual authority with regard to the car. This is reflected, for example, in the fact that I can demand its return or consent to it being damaged. However, I only have this individual authority because I am part of the legal community with Peter and other persons, which assigns this authority to each owner. As members of the legal community (and potential owners), they therefore have a supra-individual authority. They, too, may demand that my individual authority (i.e. ownership powers) is respected, although they have no individual authority – and thus no bipolar claims – regarding my car. However, this connection between individual and supra-individual authority also holds true in the case of a status violation, i.e. the disrespect of one's authority. If Peter destroys my car against my will, he not only violates my special status, i.e. my normative authority as the rights-holder with the power to consent, but also the general status of every member of the legal community. This is the case because my special authority to consent to harmful acts concerning my property exists only because and insofar as all members of the legal community (including Peter) may claim it, *ceteris paribus*, with regard to their legal interests.

Since, in my understanding, the violation of individual rights in criminal law amounts to the disregard or non-recognition of the victim's legal status as a rights-holder, this meta-ethical analysis of rights and directed duties following Darwall allows criminal offences to be considered as a private *and* a public matter. The clou of my approach is to conceptualise criminal wrongdoing intersubjectively all the way through. When it comes to their private dimension, crimes are violations of individual rights, or more precisely: of the special legal status constitutive of the ownership of rights. However, since this special legal status is an instantiation of the general status that each member of the legal community holds, crimes retain a public dimension. Public prosecution is justified by the fact that not only the special legal status of the victim is violated, but also – albeit in a different way – the underlying general legal status of every other member of the legal community (including the offender). Thus, the public dimension of crimes, i.e. crimes being a matter of general public concern, is derived from the plurality of the violated subjects.[30] In this dual wrongfulness of crimes, understood as status violations, lies

[30] I must admit that this analysis differs from Darwall's position in two respects: First, Darwall himself draws a parallel between the distinction between bipolar obligations and obligations periods and the distinction between civil law (more precisely: tort law) and criminal law. For Darwall – and he shares this view with many other advocates of bipolar normativity – tort law is the proper realm in

the deeper normative reason why criminal proceedings – unlike civil proceedings – allow for both public prosecution and individual participation by the victim.

5. The Twofold Nature of Crimes

Let me summarise my argument again: The power of consent in criminal law demonstrates that the normative authority to decide on the (non-)existence of a duty – the violation of which is punishable under criminal law – lies with the potential victim. It follows that crimes are primarily a violation of individual rights, the distinctive feature of criminal liability (as distinguished from civil liability) being that the offender culpably disregards this particular *individual authority*. However, this individual authority to consent is vested in the individual by the legal community, as I have attempted to demonstrate drawing on Stephen Darwall's conception of second-personal normativity. It can exist only if there is also a *shared authority*, which the potential victim possesses together with third parties, as well as with any obligor who might violate his or her rights. This explains why crimes necessarily have both a supra-individual and an intersubjective dimension. The former justifies public prosecution, the latter justifies victims' participation rights in criminal proceedings.

Compared to the *public-wrong conception of criminal law* mentioned at the beginning, this perspective on crimes has the advantage of providing a normative explanation of why consent may justify crimes against individuals. It can also provide a normative explanation of why victims should be involved in criminal proceedings, as victims' participation rights are not merely charitable benefits that

which bipolar obligations have their place. See Darwall 2013d: 176 et seq., but also Thompson 2006: 343 et seq. or Wallace 2019: 98 et seq. I fear, however, that in doing so Darwall overestimates the bipolar internal structure of tort law, at least if – as I have attempted to show above – we take the recognitional aspect of bipolar obligation seriously and categorically understand the flouting of bipolar obligations as a failure of recognition. At a minimum, and this is all I need for my argument, bipolar normativity has its place in criminal law if we understand crimes as status violations. Second, Darwall seems to paint a different, less individualistic picture of impersonal obligations and supra-individual authority than I do when he says that 'it is up to the people and their representatives, e.g. prosecutors, to decide whether and how to hold people accountable for violations of criminal law' (Darwall 2013b: 84 and likewise Darwall 2013c: 31). This suggests that criminal wrongdoing concerns the polity ('the people') as such, rather than its constituent citizens individually. According to this view, the public dimension of criminal wrongdoing is due to the genuinely collective character of the people (the normative community). I, on the other hand, would like to conceptualise the public dimension of criminal wrongdoing in a thoroughly intersubjective way. I see no need for prosecution by a public prosecutor on the grounds that the public ('the people') has been wronged as a collective. Rather, the public character of criminal justice is fundamentally a matter of pragmatism. Since each individual member of the community has had his or her supra-individual status violated, it is easier to provide for a kind of class action on behalf of all individuals than for all members of the legal community to have to deal bilaterally with the offender because of the violation of their supra-individual authority. Supra-individual authority is indeed a public status in that it can be claimed by anyone as a member of the normative community. However, this does not change the fact that individual claims correspond to this status.

we hand out to victims so that they may better cope with a crime. Rather, they reflect the fact that victims of crime – from the perspective of substantive criminal law – have their own rights violated. At the same time, this approach enables us to retain the public dimension that justifies public prosecution. Hence, acknowledging this dual nature of crime does not replace the *public-wrong conception of criminal law*, but adds another layer to it, which allows us to paint a more comprehensive normative picture of crime.