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# Victims' Rights and Obligations – Why these Concepts Should be Central to the Assessment of Criminal Wrongdoing

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## 1. Why Focus on Victims' Rights?

I will defend the thesis that victims' rights and obligations should play a more prominent role in criminal law theory in general and, more specifically, in the assessment of events as criminal wrongdoing in individual cases. I will come back to the notion of victims' obligations as a component for the assessment of crimes at the end of this chapter, but most of the discussion will be on victims' rights. The decision to focus on victims' rights means venturing away from well-trodden paths in the German and the Anglo-American traditions. The traditional German approach has been and continues to be decidedly non-individualistic: even in the case of serious crimes against persons (classic mala in se crimes), criminal wrong is *not* defined as something done to the victim (Hirsch 2021: 13–18). Instead, criminal law scholars describe the essence of wrongdoing as conduct that 'harms the validity of norms' (*Normgeltungsschaden*) (Jakobs [2000] 2017; Frisch 2015: 77–85; Pawlik 2017: 29). Others rely on the notion of 'social harm' (*Sozialschädlichkeit*, Roxin and Greco 2020: 316). Criminal law theory in English-speaking countries also shows non-individualistic tendencies, in the tradition of legal moralism, with a focus on violations of moral prohibitions (Moore 1997: 72–72) or on the notion of 'public wrongs' (Duff 2018: 75–101).

Within the Anglo-American discussion, however, there is also a strong individualistic strand: references to the harm principle in the tradition of John Stuart Mill are common (Feinberg 1984; Husak 2008: 65–77; Simester and von Hirsch 2011). According to this approach, the assessment of a specific crime should focus on the harm (or risk of harm) for the individual victim or victims. I share the individualistic starting point that does not conceptualise all criminal wrongs as (potential) damage to the validity of norms or some other not clearly specified 'social' harm.

However, I argue that criminal law theory needs to integrate the notion of rights beyond the notion of harm. Looking for damages, injuries, or suffering – or the risk of such outcomes – is not always the best way to evaluate conduct that involves an attack on another human being. In some cases with individual victims, the judgment need to be 'serious wrongdoing' despite the fact that the victim did not suffer and the act did not cause tangible harm.[1] A different, in my view preferable approach explains the common core of such criminal wrongs as a violation of another person's defensive rights (*Abwehrrechte)*.[2] The focus on the notion of rights is an alternative to *both* non-individualistic *and* 'tangible harm/risk of tangible harm' concepts of wrongdoing. This does not mean that judgments about the seriousness of crimes will always be different if the violation of a right is considered to be the essence of wrongdoing. Usually, disregard for another person's defensive rights will *also* result in harm or the concrete risk of being harmed, and the weight of harms or endangerment plays a role at the sentencing stage, when a fine-tuned assessment of a specific event is required. With a rights-based approach, however, harm is not a necessary component of criminal wrongdoing.

The individualistic approach, with its focus on rights, has the advantage of being a 'better fit' with foundational concepts in both political and constitutional theory. Modern constitutions that have been shaped by liberal political philosophy are built around individual rights. This focus on individuals' rights is a characteristic feature of 'normative individualism' (von der Pfordten 2005; von der Pfordten and Kähler, 2014), and it can and should be replicated in criminal law.[3] Choosing this path does not require the existence of written constitutional texts or constitutional courts in systems of positive law. As criminal law theorists, we can assume that the basic idea of normative individualism is well anchored today (not in all, but in many countries). Political theory based on normative individualism provides common ground for transnational criminal law theory.

A move to a stronger focus on victims' rights in criminal law theory requires complex theories of punishment and criminalisation. After all, criminal law in modern societies must also protect indivisible shared goods (such as our physical environment) and genuine collective interests (such as administrations that are free of corruption). Rather than speaking of 'the theory of punishment' and 'the theory of criminalisation' in the singular, the alternative is to develop pluralistic theories: one for crimes that disregard defensive rights of individuals and thus create individual victims, and another set of considerations regarding crimes against collective interests. Criminal law theorists disagree if proposing pluralistic theories is desirable. Alec Walen, in his new book (Walen forthcoming), proposes to distinguish between criminal law and penal law, the latter encompassing

[1] See Gardner and Shute 2000, who make this point for the raping of an unconscious woman and other examples of 'harmless rape'.

[2] Hörnle 2014b; see for the relevance of subjective rights also Hirsch 2021; Coca-Vila, Chapter 3 in this volume.

[3] See for this point also Coca-Vila, Chapter 3 in this volume.

regulatory offences that are unavoidable in modern, highly complex states. Others insist that criminal law theory should be derived from one singular axiom (see Pawlik 2012: 86). Aesthetic reasons might explain a preference for a unified theory and deductive reasoning beginning with only one axiom: describing separate constructions is less satisfying than developing a seamless, holistic theory. This kind of reasoning does, however, not have much convincing force. Mastering complexity is more important than pleasing criminal law theorists' preferences for the beauty of minimalist constructions. Ivó Coca-Vila points out in this volume that there are other reasons to be sceptical of pluralist accounts: opening a second route to justify the criminalisation of conduct might take out some of the critical bite of a rights-based analysis. A plurality of theories for criminalisation gives politicians more opportunities to find a rational explanation for trends that expand the scope of criminal prohibitions. I would respond to this concern that pluralistic does not mean plethoric, or unfettered discretion for law-makers. Rather, the challenge is to pay closer attention to the second strand of criminalisation theory, too, which focuses on collective interests, and to develop criminal policy guidelines for this field as well.

## 2. Which Rights?

Before discussing in more detail my proposal that victims' rights deserve more attention in criminal law theory, a few words about the basic notion of rights are necessary (see also Coca-Vila, Chapter 3 in this volume). Invoking 'rights' means introducing a highly complex, historically shaped concept (Wenar 2021; Wenar 2005) that can be understood in the sense of natural rights, constitutional rights, or claims of rights. It is not possible to cover these discussions extensively in a sub-section of one chapter, thus, I will only briefly sketch some assumptions. With regard to the idea that rights can be deduced from a theory of natural law, scepticism is in place, particularly if this approach is rooted in the assumption that the way humans organise their coexistence must be shaped by their relation to God (or some other version of higher power). Classical treatises on natural law and natural rights have drawn such connections (Finnis 2011), but legal reasoning should not presuppose religious beliefs that are no longer widely shared. Beyond references to God, proponents of natural law also talk about basic goods that are essential for a good human life (Finnis 2011: 59–89). The problem with such lists of essential goods is that they are described as universally valid and that they are based on a particular version of a good life to be defended against other visions and practices. If this makes sense in moral philosophy, it must be left open here, in any case, it should not be transferred into the field of law. In fragmented societies, law must be pragmatic and realistic and must bridge different conceptions of what various subsets of the population regard as a good life.

A more promising alternative to claims about 'natural rights' focuses on rights granted in constitutions. Some question this approach, arguing, first, that the high status of constitutional rights makes it more difficult to criticise demands for criminalisation (Simester and von Hirsch 2011: 136). The fear is that references to constitutional rights within criminal policy debates would more or less automatically lead to the conclusion that the conduct in question should be made a criminal offence. However, this worry can be attenuated: after all, almost all constitutional rights are subject to a process of balancing against countervailing reasons. Second, Simester and von Hirsch point out that throughout history human rights were rights of human beings against the state.[4] But this is neither state of the art – at least not in German constitutional theory – nor can one develop a plausible portrayal of the modern state on this basis (see Volkmann 2021: 1076–80). Constitutional rights include the right to be protected against the actions of others, and thus the state must also protect human rights against interferences by fellow citizens.

In transnational debates, another obvious objection is that references to constitutional rights might work well in a national legal system such as the German, which has both a written constitution that includes a comprehensive catalogue of fundamental rights and a well-established tradition of constitutional theory and jurisprudence that recognises protective rights. But what if this is not the case? And would we not lose important perspectives if discussions in criminal law theory were restricted to legal scholars who focus solely on their own system of law (Simester and von Hirsch 2011: 134)? I agree that it cannot suffice for criminal law theory to point to national constitutional law, but the conclusion should not be to forego categorically a set of arguments that might actually help convince politicians and lawmakers. If, for instance, there is a rich discussion about privacy rights as constitutional rights, this can be the starting point (not a conclusive argument) for developments in criminal law theory. In addition to national constitutional law as a source of inspiration, guidelines for the protection of rights through criminalisation of conduct can also be derived from international human rights law (Malby 2019).

There are, however, limits to making constitutional references, particularly if a given constitutional text does not contain an extensive list of individual rights. Other obvious sources for identifying individuals' rights are civil law and public law. Ivó Coca-Vila describes this approach with the expression 'Criminal Law as an Ancillary Form of Shielding the Law' (Coca-Vila, Chapter 3 in this volume). In many cases, this will be a promising approach: if the law grants rights, and if these rights serve to protect fundamental interests of human beings, also in their role as citizens, this can be a *pro tanto* reason in favour of criminalisation. However, a simple reference to an existing legal right will not always be a sufficient starting point to argue that it should be protected with the means of the criminal law. The

[4] Simester and von Hirsch 2011: 134; see for a distinction between negative and positive constitutional rights and scepticism regarding positive rights also Currie 1986: 890.

scope of legal rights (*all* legal rights granted somewhere in a legal system) is wide, too wide to give even a *pro tanto* reason for applying the criminal law as a protective shield (Coca-Vila, Chapter 3 in this volume). Another problem can be that neither civil law nor public law do yet acknowledge an individual right despite the fact that the conduct in question might be highly detrimental for individual victims. For instance, this can become relevant if conduct using new technologies or other recently emerged phenomena are discussed as a matter of criminalisation before other legislative projects have been begun or concluded (for example, because debates about the adequate regulation in civil or public law take a long time on the European or other supra-national level). Therefore, it can be necessary and plausible to base a *pro tanto* argument in favour of criminalisation on the claim that a right *should* be acknowledged.[5] The term 'rights claims' means 'should be acknowledged as a right' in contrast to the descriptive statement 'has been acknowledged as a right' in, for instance, constitutional or other laws. Even if one is sceptical about a strong, ontological or quasi-ontological claim that persons *have* certain rights 'just in virtue of being a person' (Stewart 2010: 19), the basic reasoning can be rephrased as 'we should acknowledge mutual rights that we all have as citizens or as human beings'.

Arguments in criminal law theory that are based on a rights claim need a more complex structure than rights already granted in constitutions or other legal documents. Reasons must be given as to why a right not to be treated in a certain way should be acknowledged; in further steps, conclusions must be drawn for the field of criminal law. A plausible rights claim is not sufficient to support the demand for criminalisation. Often, the crucial questions are, first, whether a defensive right really needs to be supported with the expensive and harsh instrument of criminal justice rather than with other measures and, second, whether countervailing rights of other parties or compelling collective interests might topple the initial *pro tanto* argument.

With this very short sketch of rights and rights claims I hope to have made it plausible enough that the concept can be employed in a meaningful way for the purpose of criminal law theory. In order to argue that an individual does have the right not to be treated in a certain way, it can suffice to point to an acknowledged constitutional right or to another source in the legal system that grants individuals an important right. If this is not the case, arguments must be more complex, beginning with arguments in favour of a rights claim.

## 3. Mapping the Landscape

In treatises on criminal law and criminal law theory, in Germany and elsewhere, rights and obligations of individuals do not play an important role. My plea is to

[5] Hörnle 2014b: 183–85; see for the notion of rights claim in general Zivi 2011.

re-construct criminal law theory on the basis of the concept of victims' rights and (to a lesser degree) victims' obligations, see Section 4.5 below, in all areas that make up the broader field of criminal law theory. These are

- theories of punishment;
- theories of criminalisation;
- criminal law doctrine;
- criminal procedure; and
- sentencing.

## 3.1. Theories of Punishment

A theory of punishment has to justify the prohibitions (norms of conduct) and the threat of sanctions in criminal laws as well as the practices of criminal proceedings, censure in the form of convictions and criminal punishments. Scholars occasionally discuss victims' rights within the framework of punishment theories (Whiteley 1998; Silva-Sánchez 2008b; Hörnle 2019b). However, most answers to the question 'How can criminal punishment be justified?' focus exclusively on public interests (our shared interest in the prevention of future crimes) (see Roxin and Greco 2020: 151–54), or they dismiss, in the form of pure retributive approaches, the idea that punishment for crime needs any justification at all (Moore 1997: 104–52). Expressive theories of punishment mostly emphasise the belief that the message delivered with a criminal conviction serves to reaffirm 'the validity of norms' (Jakobs [2000] 2017; Frisch 2015: 77–78). My position is that victims of serious crimes have a right to obtain a censuring response from the state[6] and that this must be a central element within a sufficiently complex approach to justify criminal justice systems and the criminal punishment of individual offenders.

Obviously, victims' rights cannot be the only consideration that supports the existence of criminal punishment as an institution. To justify this expensive and intrusive system, public interests should play an important role, too, that is, citizens' shared interests in the prevention of certain conduct. Strengthening the role of victims' rights in punishment theories does not mean excluding the public dimension of criminal law and criminal justice.[7] We share the interest in preventing exploitative behaviour that harms collective achievements and goals, such as tax evasion and corruption, or that endangers natural resources. With regard to conduct which targets individuals, prevention likewise is in our collective interest, as we are all potential victims of future crimes. Environments that are characterised by high levels of violence and other forms of disregard for the rights of others not only have an impact on individual victims but also on everyone who takes

[6] Hörnle 2019b; see for a stronger focus on victims' rights also Hirsch 2021: 228–41.
[7] See, for this conclusion also, Hirsch 2021: 235–236; see Hirsch, Chapter 8 in this volume.

precautions against high risks of victimisation. Also, social cohesion and social solidarity in societies with a high prevalence of serious crimes against persons might well decrease.[8]

The usual framing of discussions about punishment theories as a matter of 'either prevention or retribution' or 'absolute versus relative theories' misses a crucial point – preventive considerations are important, but do not exhaust the reasons that are needed to justify complex practices of prohibiting behaviour, enforcing these prohibitions and acknowledging that individuals' rights have been violated. Criminal law judgments *also* serve important functions for victims of crime. Victims have the right to obtain a judgment, a judgment stating that wrong has been done to them. Public disinterest would imply that the victim was struck by misfortune (rather than another human being's wrongful, rights-violating conduct) or that responsibility lies with the person who wrongly claims to have been a victim.

Emphasising the relevance of criminal law judgments for victims of crimes does not presuppose empirical proof that every crime victim, or at least a majority of them, in fact feels the desire to see offenders punished. In terms of the overall degree of civilisation within societies, it is a good sign if individual victims are willing to accept restorative measures and if they prefer mild rather than hard expressions of disapproval. Emphasising victims' rights does not amount to a demand for severe sentences. The argument, rather, is a normative one that addresses the basic rationale of criminal punishment in contemporary legal systems. Violations of defensive rights should not simply be ignored. Putative victims can demand that state officials, acting on their behalf, examine the possibility of a serious violation of their rights by others and then, once the requisite facts have been established, censure wrongdoing. The German Constitutional Court grants victims the right to have state authorities investigate crimes against life, bodily integrity, liberty, and sexual autonomy as well as crimes that occurred while the victim was in the custody of the state (see Hörnle 2017b: 41–42).

## 3.2. Theories of Criminalisation

Theories of criminalisation aim to provide a framework for decisions concerning the kinds of conduct that should be criminalised and the kinds that should not. The notion that the rights of individuals should play an important role in this context is as underdeveloped as it is in the field of punishment theories. In the German tradition (see Roxin and Greco 2021: 24–62; Dubber 2005a: 682–96), the general guideline as to what to criminalise focuses on the vague notion of a legal good (*Rechtsgut*). Within this framework, it is common to distinguish between collective legal goods (*Universalrechtsgüter*) and individual legal

[8] See, for the concept of social cohesion, Schiefer and van der Noll 2017.

goods (*Individualrechtsgüter*). The basic underlying idea is not to focus on the relations between individuals and defensive or subjective rights but on the argument that certain goods are valuable and thus should be protected by criminal laws.

In Anglo-American criminal law theory, references to the harm principle are frequent, see Section 1 above. The main reason for evoking the harm principle is to rebut legal moralism, that is, the idea that moral disapproval is a sufficient reason to prohibit conduct. At the same time, however, it is obvious that the detrimental consequences of an act for another human being are not always a sufficient reason for a criminal prohibition. Criminal law theorists thus argue that the harm principle needs to be supplemented with the category 'wrongfulness' (Husak 2008: 65–77; Simester and von Hirsch 2011: 19–32; Tadros 2016). With this move, the main question becomes how to determine whether conduct is wrongful or not. The idea to point to moral wrongfulness again requires connecting legal reasoning with moral arguments. Antony Duff tries to draw some boundaries by insisting that criminal prohibitions should target only public and not private wrongs (Duff 2018: 75–101). I propose keeping more distance from common concepts and relying neither on the notion of *Rechtsgüter* nor on the harm principle filtered by the notion of a public wrong. The alternative is to focus on the violation of individual rights as one major area where strong prima facie reasons support the criminalisation of conduct. Again, this cannot not be the only reason, as collective interests can also be deserving of the protection of criminal laws.[9]

Another clarification might be called for: speaking about victims' rights should not be understood as referring to rights that cannot be subjected to balancing with countervailing reasons. Victims' rights are merely *pro tanto* rights, that is, they must be open to balancing against other considerations and factual constraints. Not even well-funded criminal justice agencies in states with ample financial resources would be able to carefully investigate and assess every case of a rights violation.

## 3.3. Criminal Law Doctrine

The term 'criminal law doctrine' (*Strafrechtsdogmatik*) is used to describe the rules that govern the assessment of individual cases. In most legal systems, these rules are written down, in part, in criminal codes and criminal laws, complemented by case law and, in the German tradition, by criminal law scholarship as well. The rules of criminal law doctrine determine, for instance, which outcomes will be attributed to which agents and whether a justification is applicable under the circumstances of the case. The suggestion to emphasise victims' rights and obligations in this context might sound peculiar. Victims' rights usually do not play a

[9] Hirsch 2021: 217 uses an extended view of rights, speaking of collective subjective rights as rights of the 'legal community', see also Hirsch, Chapter 8 in this volume.

notable role in standard accounts of national criminal law doctrine in textbooks or case books. They figure in the chapter of textbooks that deals with the relevance of consent as justification of conduct that fulfils the elements of an offence description. However, within criminal law theory (and based on it, criminal law doctrine), the notion of subjective rights and the relational features of the event that is examined as a crime should play a stronger role. Recognising theses relational features is important for defining the boundaries of permissible conduct, see in more detail Section 4 below.

## 3.4. Criminal Procedure and Sentencing

In the field of criminal procedure theory, it is most obvious that the rights of individuals must play an important role. Defendants' rights – the right to privacy, for instance – can provide protective shields, and intrusive investigative measures must be justified as a proportionate interference with defendants' rights. This point is universally acknowledged, as 'rights' here often refers to well-established legal rights that are part of positive law (constitutions and/or codes of criminal procedure) rather than merely points of discussions within criminal law theory.

More debated are issues of victims' rights. Positive law commonly acknowledges victims' rights in the form of rights that *all* witnesses in criminal trials have – those, for instance, that limit the scope of permissible questions in order to protect core privacy rights.[10] Beyond the functional role as (possible) witness, the role of victims in procedural laws is limited, and it is controversial as to which degree of involvement would be desirable within a theory of criminal procedure. To what extent should individual victims have a say regarding the initiation and termination of criminal proceedings and decisions during proceedings? Should they be able to influence sentencing decisions – either directly or indirectly – with victim impact statements? In recent decades, procedural laws have given victims a somewhat more active role. In Germany, for instance, they may assume the role of accessory prosecutor in the case of certain serious crimes,[11] and in the US and the UK they may submit victim impact statements (Bandes 1996; Roberts and Manikis 2011). The basic structure is not designed, however, to give victims comprehensive decision-making powers. The historical evolution of our criminal justice systems took responses to crimes away from victims and their social groups and established state prosecution and adjudication. This emergence of public criminal law and criminal procedure is considered an important step towards more civilised, less violent ways of communal existence (Baldwin 2021). It is not my intention to radically question this development, to the contrary: attempts to reintroduce the victim as an actor with real power deserve close scrutiny.

[10] Rape shield laws are examples, compare for the current state of law in the US Cassidy 2021: 151–58.
[11] Described as a 'renaissance of the victim', Jung 2020.

My point is that it is possible to strengthen the perspective of 'a victim' in criminal law theory, that is, in the general, not case-related discussions about the basic structures of criminal law and criminal law doctrine, without necessarily making the commitment to give individual victims' personal needs and personal assessments decisive weight on the individual case level. Victims of real crimes and the role of 'a victim' within criminal law theory should be distinguished. The latter is a not-yet-individualised figure in the social role of a citizen with defensive rights against other citizens.[12] When discussing criminalisation theory or punishment theory, it is obvious that we can only refer to 'a victim' in a non-individualised way: we can only refer to the 'typical' interests or status of potential victims. The same is true with regard to criminal law doctrine. However, when dealing with cases in criminal procedure and sentencing, the victim is a unique human being, an individual with personality, attitudes, needs, and emotions.

Giving this individual a stronger position would imply opening the door to personal assessments beyond the narrow legal framework that aims to hedge the impact of personal opinions and emotions and the social and biographical factors that shape them. A crucial question is whether it is desirable to introduce victims' personal perspectives. This question cannot be resolved here. There is a large body of literature discussing the advantages and disadvantages of giving victims a say in criminal proceedings (see Mendlow 2021, Roberts and Erez 2004; Crawford and Goodey 2000; Bandes 1996). It could be argued that listening to the assessments and needs of individual persons might counterbalance the alleged detachment of criminal justice professionals from the real world. Giving extensive decision-making powers to individual victims would, however, unavoidably clash with principles and goals that should structure criminal procedure and sentencing: the equality principle (equal treatment of offenders who have committed similar crimes) and the purpose of criminal convictions, namely, as the uniform, consistent reaffirmation of the norms of conduct. Emphasising victims' rights does not mean *excluding* all other considerations, such as our collective interest in maintaining an equality-based system of criminal justice and norms of conduct. Within the scope of this contribution, it is not possible to discuss these tensions comprehensively. Emphasising victims' rights in criminal law theory *does* require the re-examination of procedural rules.[13] It does not, however, force us to conclude that each individual victim must be entitled to determine whether and how criminal proceedings should be conducted and what sentence is adequate.

[12] As used here, the term 'citizen' refers to all persons who live within a jurisdiction, beyond the formal legal status of nationality; see for the broader notion of 'denizens' in political theory for instance Turner 2016.

[13] See, for this point also, Hirsch 2021: 241–324.

# 4. Rights and Obligations in Criminal Law Doctrine

## 4.1. A Critique of the German Collectivist Approach

One purpose of this chapter is to defend a strong role for victims' rights and victims' obligations within the basic structures of criminal law doctrine. In Germany, criminal law scholars have traditionally devoted considerable effort to passionate debates about how these basic structures should be conceptualised, compare Schünemann 1984. Recently, discussions have become somewhat less intense, but central chapters in textbooks and handbooks on criminal law still describe the 'general doctrine of crime' (*Allgemeine Verbrechenslehre*) or 'the system of criminal law', see, for instance (Roxin and Greco, 2020: 288–333; Hilgendorf 2020).

A general doctrine of crime serves two functions. First, it helps grasp the essence of 'a crime', that is, the general features of criminal wrongdoing that apply to *all* crimes or important subgroups of crimes. Describing what constitutes the core of criminal wrongdoing overlaps with theories of criminalisation, but treatises on German law outline the general doctrine of crime separately from the sections in which criminalisation and the *Rechtsgut* doctrine are discussed (see Roxin and Greco, 2020: 20–100; 288–333). Second, consent about 'the system' helps structure the path by which to proceed when assessing a specific case. A systematic approach does have advantages, particularly for the education of future lawyers and judges: it can contribute to a more consistent and predictable application of law.[14]

I propose reconsidering the basic abstract notion of the essence of crime. Within German criminal law doctrine, this means questioning the assumption that wrongdoing can be described in a uniform way, a way that is suitable for both offences against collective interests as well as for crimes against individuals.[15] From this viewpoint, crime is *exclusively* a matter between the state or the collective of citizens and the offender. Victims have no relevance for these kinds of theories. But, as Eric Hilgendorf (2020: 7) commented: "A rape cannot plausibly be seen as an act of communication between the offender and the state about the content of law." Wolfgang Frisch recently admitted that it is not plausible to reduce the 'essence of crime' to disrespect for the law (Frisch 2019: 195).

The idea of focusing on offenders' disrespect for the law as the essence of criminal wrongdoing is neither helpful on a descriptive level, if one seriously tries to grasp the effect of crimes, nor is it convincing from a normative viewpoint. Authors who use terms such as 'harm to the validity of the law' (*Normgeltungsschaden*) do

[14] On a more critical note, one could add that German legal scholars sometimes spend too much time retelling the story of how the system evolved, see Hilgendorf 2020: 4.

[15] See, for this approach, for instance, Pawlik 2012: 151–56, and other authors who emphasise that criminal acts show disrespect for the norms of conduct, e.g. Frisch 2015: 67–68; Rostalski 2019: 97–98.

not make an effort to operationalise this kind of harm. These words are not meant to refer to a state that can somehow be measured. This is not to say that the broad, general idea is implausible: if the public authorities were to ignore a significant number of crimes, detrimental effects on persons' willingness to respect prohibitions seem likely, and vengeance and blood feuds might occur. But this allows only a crude sketch of cumulative effects after many crimes remain uninvestigated or offenders unpunished. This way of defining criminal wrongdoing can work only if crimes are seen in the plural, as a group of incidents with cumulative effects.

The notion of a *Normgeltungsschaden* is equally problematic from a normative perspective. First, as mentioned above, the basic features of many contemporary legal systems are shaped by normative individualism. Individuals' subjective rights play a fundamental role in national constitutional law and international human rights law. It seems odd to maintain a basic understanding of crime that ignores individuals and their rights and to focus exclusively on the cumulative effects of a multitude of crimes rather than on the relations between individuals. Second, the use of lofty and misty concepts in criminal law theory can have negative effects on criminal justice practice. It opens the door for judgments about crimes that are at best intuitive, at worst moralistic, but which claim to be the best solution for defending 'the validity of the law'. Third, it is also not convincing to insist that criminal law theory has its place as an academic, scientific enterprise if we work with terminology that sounds rational and impressive but on closer examination turns out to be fuzzy.

## 4.2. A Critique of the 'Harm Plus Moral Wrongdoing' Definition

English literature that begins with the harm principle concedes that the finding of criminal wrongdoing cannot be based *solely* on the diagnosis that the offender caused harm but needs to be supplemented with a determination of moral wrongdoing. Emphasising *moral* wrongdoing, however, invites the objection that assessments in criminal law differ from moral assessments. According to Antony Duff, only a subset of moral judgments is relevant for criminal wrongdoing, namely, the category of public wrongs that excludes merely private wrongdoing (Duff 2018: 75–101). With this idea, the relevant questions are moving in the same direction as a rights-based concept. I would assume that deliberating about the question: 'Was this a public wrong?' will mostly lead to results similar to those arrived at when the question is discussed whether a person in this situation should be granted a defensive right. The shared assumption is that judgments in criminal law should track only a small subset of morally problematic conduct. The reasons as to *why* a certain kind of intrusion should concern all other citizens can be expected to be similar to the reasons why the claim 'a citizen should not be required to accept this as something that others might rightfully do' should be accepted and a defensive

right granted. Conceptually, however, the move from 'wrongfully harming others' to 'violating the rights of others' makes it clearer that legal judgments should be rooted in political philosophy rather than being a subset of assessments stemming from moral philosophy. Starting point for understanding the general essence of 'a crime' should not be moral considerations that point to moral wrongs, even if the moral wrongs are narrowed down in a second step as Duff proposes, by excluding the merely private moral wrongs. Rather, starting points for describing what 'crime' means should be citizens' defensive rights against each other and important genuinely collective interests.

## 4.3. The Importance of Perspectives

Not only punishment theory and criminalisation theory, but also the assessment of criminal offences should be rooted in the notions of normative individualism and equal relations between citizens. This requires paying more attention to perspectives when discussing the general concept of crime (*Allgemeine Verbrechenslehre*). If one looks into criminal law textbooks, the question 'Which perspective should be taken when assessing criminal wrongdoing?' does not play a role. The most likely reason for the lack of attention to the relevance of perspectives is that authors implicitly and automatically, *without thinking about it*, step into one particular vantage point: the third-person perspective. If one takes it as a given that assessments must be made from a third-person viewpoint, this point is not even worth mentioning. Only if one pays attention to the existence of a possible alternative, that is, the second-person viewpoint, can awareness grow that the third-person perspective is not natural and unavoidable when assessing human conduct. In contemporary moral philosophy, arguments are made for the 'second-person standpoint' (Darwall 2006) and a relational perspective (Wallace 2019). This important shift deserves more attention in mainstream criminal law theory.[16]

What is there to criticise about a third-person perspective? As far as it means that events should be evaluated in an objective, impersonal way, I certainly do not wish to raise objections. Criminal judgments are and should remain judgments by state officials, expressed on behalf of the individual victim, but not adopting this individual victim's *personal* assessment of the event. To be taken seriously by everyone, not just victim and offender, criminal law must strive for high standards of objectivity. This also means relying on the current state of scientific knowledge. For example, an ill-founded assumption about the cause of a disease (voodoo or poisoning with an otherwise innocuous substance) must be irrelevant for criminal law, even if both offender and victim believe in it.

[16] See, for an adaption of Darwall's arguments about recognition, Hirsch 2021: 147–56 and Chapter 8 in this volume.

The idea of a third-person perspective becomes problematic if it is meant to adopt a detached, other-worldly perspective that assumes an evaluator who is not on eye-level with humans but who assesses our conduct from a superior vantage point. In societies that have been shaped by monotheistic religions, not only moral judgments but also criminal law theory have been influenced by belief in God as the evaluating instance. Our ordinary moral judgments are still deeply anchored in Judeo-Christian thinking and thus take the third-person perspective as the undisputed vantage point for moral judgments.[17] The belief that our sins are recorded and assessed in the Last Judgment has shaped the more general idea of a moral ledger where moral merits and moral shortcomings are recorded. Criminal law theorists have mentioned the picture of a moral ledger as a notion that also matters for legal assessments (see Alexander and Ferzan 2009: 179).

While scholars in our contemporary secularised constitutional states would certainly agree that criminal law theory should not be based on an *explicit* reference to God or other religious concepts, the point I want to make is that we should also be more attentive to *implicit* assumptions. The link from religious convictions to traditional moral judgments, and from there to the assessment of crimes within the institution of state punishment, has left traces in criminal law theory and criminal law doctrine. Traditional moral judgments, which are imbued with the idea of God's moral ledger, are retained in the field of criminal law theory, not in the form of open, explicit references to religious commands or traditional moral demands, but with regard to the poorly reflected foundational choice of 'whose perspective'. The input of traditional moral judgments is most likely particularly strong if influential voices within moral philosophy rely on their intuition, that is, if they spend their energy on the invention of ever more bizarre factual scenarios while trusting the soundness of their intuition for the moral assessment of each scenario.[18]

Meanwhile, our societies – their legal frameworks, that is, and to a great extent their extra-legal norms of conduct – have moved on from the norm 'obey God's commands' to a different kind or relational morality. The second-person viewpoint of equal citizens and the rights and duties inherent to these relations are part of what has been introduced above as normative individualism. This foundational shift requires us to scrutinise both the older foundations of judgments about moral wrongdoing as well as implicit assumptions that underlie retrospective assessments in criminal law. It should no longer be taken for granted that criminal law doctrine should be constructed in correspondence with traditional moral judgments based on a third-person perspective. Rather, the logical conclusion is that judgments in criminal law should consciously adopt a relational perspective that focuses on the second-person perspective, that is, on the perspective of a victim.

[17] See Casey 1990 for the connection between Christian teaching and the formation of our moral practices.

[18] See, for an example of this approach, Kamm 2007.

As mentioned above (see Section 3.4.), this does not mean relying on the personal assessment of the individual victim. Applying a victim's perspective requires judges and jurors to slip into the shoes of actual victims, but to put an emphasis on the social role of the victim rather than on his or her individual personality. This social role will often be 'thin' as most incidents charged as crimes happen between strangers, that is, in contexts without a preceding 'thick' web of mutual duties and rights between offender and victim. The 'thin social role' refers to the offender's status as a fellow citizen and the resulting duty not to interfere with other citizens' right to X, X being property, bodily integrity, etc. In contrast, some crimes are committed within the context of more substantial versions of pre-crime rights and duties, for instance, within families or other relevant social relations.

Criminal justice officials who assess a crime should ask themselves whether a reasonable person or, more precisely, a reasonable person in the social role of the victim in relation to the offender would consider certain circumstances as factors that enhance or diminish wrongdoing. The crucial point is to adopt a second-person viewpoint and to avoid moral reasoning that is based on a third-person (God's) viewpoint and, in particular, to avoid the idea of a ledger and a Last Judgment. Criminal courts should neither attempt to pass judgment about the entire life of a defendant nor should they strive to grasp every detail that might be called morally significant. The decisive question should be whether a citizen in the social role of the victim (typically a stranger, sometimes not) had a defensive right or whether such a citizen had to accept what the defendant did.

## 4.4. Consequences for Criminal Law Doctrine: A More Limited Role for Intentions

The deliberations above concerning the superiority of a second-person versus a third-person perspective might sound highly abstract and theoretical. However, I hope to show that the choice of perspective matters for the details of criminal law doctrine, for instance, when ruminating about the question if and how much a defendant's *mental state* influences the seriousness of a crime. My thesis is that applying a victim's perspective should lead to an overhaul of criminal law doctrine because less weight should be given to the subjective world-view of offenders (what they thought and intended) and more to objective factors (such as the deviation from standards of care that citizens have to abide by).

One issue that needs to be reconsidered is the relevance of intentions for criminal law assessments. We should ask why criminal laws often assign (much) higher sentences to acts if harmful consequences were intended compared to objectively reckless or careless behaviour without this intention. Scholars and criminal justice officials tend not to question the assumption that intentional crimes are much more serious, probably because this assessment dovetails with traditional, deeply rooted

moral intuitions. Some argue that without inner mental states such as intention or knowledge of substantial risk, objective carelessness should not be considered a criminal wrong at all.[19] Why human beings' inner mental states should be considered so important can be explained with the logic inherent to Christian theology: the inner act of disobedience alters the relevant relationship with God, and the crucial wrong lies in humans' evil, insurgent will.[20] The theological tradition of focusing on evil will survived the period of Enlightenment – and was re-affirmed in a modified version as Kant's famous dictum that nothing but good will can be called good in itself without reservations (Kant [1785] 2016: 18). The idea that an agent's will should be the focus of moral assessments still plays a significant role in present-day moral judgments.

A victim's perspective is based on a different concept of 'relational'. From a second-person viewpoint, the focus of attention would shift from the 'evil will' as something occurring in the offender's mind to other ways of describing the wrong done, namely the social meaning of an interaction and the tangible aspects of the incident. This is not to say that offenders' mental states would become entirely irrelevant for criminal law theory and criminal law doctrine. I do not propose to revert to older systems of evaluation that responded only to harm (*Erfolgsstrafrecht*). Indeed, it is unclear if there ever was a criminal law system that paid no attention to the difference between intended and unintended consequences.[21] Rather, the point is to ask the right question, and this question is: 'To what extent do offenders' intentions and attitudes matter to a hypothetical reasonable victim?'

They do matter if they alter the social meaning of an act that disregards the victim's rights. Antony Duff has drawn attention to the difference between an attack and endangerment (Duff 2009: 147–58). This distinction is relevant from a victim's perspective. If two offenders' degree of carelessness and the outcomes of their conduct are identical, the fact that one of the acts was an intentional attack adds an additional element. For instance, purposely hurting another person expresses targeted disrespect for the individual victim and that person's rights. A point that needs more attention, however, is the *relative weight* of the difference between cases of gross carelessness and cases of intentionality. Sentencing ranges deserve scrutiny if they prescribe much higher punishments for intentional acts than for cases of gross carelessness: from the victim's perspective, the additional feature 'intentional attack' will not always make a pronounced difference compared to a 'merely' reckless act, if the latter was committed in a way that showed a particularly high degree of indifference for fellow citizens.

[19] See, for instance, Alexander and Ferzan 2009: 71, who claim that humans are not morally culpable for taking risks of which they are not aware.

[20] See Maihold 2005: 154–55 for the central role of free will in Thomas Aquinas' theological concept of crime and punishment.

[21] See for the argument that seemingly pure harm-based Medieval practices actually presupposed intentions as typical phenomena: Schildt 1997: 388.

The relevance of subjective and objective factors for assessing the weight of wrongdoing plays a role at many places in criminal law doctrine, for instance, in discussions about the appropriate sentencing of attempted versus completed crimes. Philipp-Alexander Hirsch, who also proposes the second-person viewpoint, argues that the difference between attempts and completed crimes does not influence the degree of criminal wrongdoing, as the (completed) attempt as such expresses the full amount of disrespect for the victim (Hirsch 2021: 219–24). This conclusion does not seem evident to me. Disregard for the victim's defensive rights has indeed been fully expressed with the completion of the attempt. However, from a victim's perspective, it also matters for the retrospective assessment of wrongdoing that and how much harm has been done.[22] If one reconstructs defensive rights and mutual duties of citizens, the crucial point is that outcomes can be attributed to offenders' careless behaviour. More ambitious versions of 'control about everything, including all consequences of one's acts', usually discussed under the heading 'moral luck', are too demanding if the task is to regulate relations between citizens.[23]

## 4.5. Victims' Obligations

Evaluating criminal wrongdoing from a second-person viewpoint entails paying attention to the notion of victims' rights. However, a change of perspective should not lead to resorting to a one-sided, partisan evaluation of incidents. *Mutual* rights and obligations that structure the relations between citizens matter, and for this reason, judgments in criminal law can also include obligations of potential victims. This thought is even more alien to standard views in criminal law theory and criminal law doctrine, which concentrate exclusively on the wrong done by the offender. In German sentencing theory, a few authors have argued that punishment should be mitigated if victims could easily have done more to protect themselves against the kind of crime in question (Hillenkamp 1981; Schünemann 1982). Their reasoning was different, however, from mine: for them, the argument that criminal law should be 'ultima ratio' was central, that is, the expensive and intrusive machine of criminal justice should only be used if crimes cannot be prevented by other, cheaper and less intrusive means, including self-protection by potential victims. My aim is not to challenge the *ultima ratio* idea in principle, but I would emphasise a different aspect: when assessing criminal wrongdoing, it should be considered whether the other person in an interaction, the subsequent crime victim, disregarded the obligation to behave in a reasonable way.

This notion of victims' obligations should figure in lawmakers' decisions on how to formulate the legal description of offences and should also play a role at

[22] See, for a more extensive development of this argument, Duff 1996.
[23] See, for a discussion of the moral luck problem, Burghardt 2018: 395–404, 418.

the sentencing stage. Victims' obligations can become a topic in the process of drafting or altering prohibitions in criminal law if the criminal act is typically preceded by interactions between the future offender and the future victim. In the reform of sexual assault law, for example, the appropriate scope of criminalisation depends on what is considered to be necessary communication between persons in a sexualised interaction. This debate is summarised with the keywords 'no means no' or 'only yes means yes'. Conceptual deliberations that are necessary when reforming sexual assault law, moving away from the old-fashioned focus on offenders' violence and towards a consent-based model, should include a clear idea of how citizens need to communicate if a prior interaction could be considered ambivalent (typically in contexts that might be called 'date rape'). Another example are laws that mitigate sentences for cases of provocation. A traditional approach focuses on the mental state of the offender, that is, the intensity of the offender's anger and related emotions. However, if mental states as such are not the key but rather victims' obligations, the laws on provocation must be based on a different logic. Under this premise, it is not sufficient to argue that the offender acted in a very agitated state; rather, the decisive question should be whether the victim violated a legal duty towards the offender. If the victim's conduct did not conflict with legal obligations, the offender's mental state (annoyed, furious, etc.) should not be relevant for assessments in criminal law. For instance, a victim's announcement of the intention to seek a divorce should not lead to the finding that the victim's spouse, who was deeply emotionally affected by the announcement, should receive a milder sentence for a violent attack on the victim (Grünewald 2010: 243–61).

## 5. Conclusion

The purpose of this chapter is to argue for a conceptual reorientation in both criminal law theory and criminal law doctrine. We should question the traditional, religiously grounded, virtually exclusive fixation on the offender, particularly the offender's evil mind. This requires us to recognise the deep impact of traditional moral evaluations that still shape widely held intuitions. In societies based on the idea of normative individualism and with constitutions that emphasise the rights of individuals, criminal law theory needs to be rebuilt. This affects all the questions that criminal law theory should address: Why maintain the institution of criminal punishment (punishment theory)? What should be prohibited (criminalisation theory)? How should individual conduct be assessed (criminal law doctrine and sentencing theory)? Once it is accepted that judgments in criminal law should track citizens' rights and duties from a second-person point of view, victims' rights and obligations must play an important role.