

Should Law Track Morality?

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Abstract

Does the moral status of an action provide *in itself* a non-instrumental, pro-tanto reason for a corresponding legal status – a reason that applies regardless of whether the law promotes a value that is *independent of the law*, such as preventing wrongdoing or promoting distributive or retributive justice? While the relation between morality and law is a familiar topic, this specific question is typically not considered explicitly. Yet it seems to be controversial and each of the contrasting answers to this question has some appeal. The article highlights and considers this question. It concludes that the answer is negative: there is no necessary relation between morality and law in this respect. Rather, there is a reason in favor of incorporating morality into the law only when this incorporation promotes a moral value that is independent of the law.

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1. Introduction

Does the moral status of an action provide *in itself* a non-instrumental, pro-tanto reason for a corresponding legal status – a reason that applies regardless of whether the law promotes a value that is *independent of the law*, such as preventing wrongdoing¹ or promoting distributive or retributive justice? For example, is the fact that an action constitutes a serious moral wrong² – namely that the action is morally forbidden – *in itself* a reason in favor of a criminal offense that legally prohibits this action? Or is there a reason in favor of criminalization of serious moral wrongdoing only when this promotes a moral value that is independent of the law, for example that it is efficient in preventing (some) wrongful actions or that it in fact brings about (some) distributive or retributive justice. In other words, is there a non-instrumental, pro-tanto reason for the law to *track* or “copy” morality – so that immorality is also illegality – regardless of the consequences of criminalization?

According to one view – the Tracking View – the answer is positive: the law should track morality in this sense, for example the serious moral wrongfulness of an action constitutes in itself a reason in favor of criminalization whose existence does not depend on other

¹ At least consequential wrongdoing. I discuss a special doubt as to whether there is a reason in favor of preventing *deontological* wrongdoing in Section 4.

² We may assume that the wrong is “harmful” and “public”. I consider these conditions in Section 3.

considerations, specifically relating to the consequences of criminalization.³ In contrast, according to another view – the Instrumental View – the answer is negative: there is a reason in favor of criminalization only if and when it promotes a moral value that is independent of the law.

Which moral values are independent of the law and which are not? A value is independent of the law if it is defined without reference to the law and therefore can be promoted by other means as well, in addition to the law. There are clear examples of values that are independent of the law in this sense. For instance, the value of preventing (moral) wrongdoing is defined independently of the law and can be promoted by non-legal means as well – a person who is not a legal official can prevent wrongdoing, for instance. Similarly, distributive justice is often defined in a way that is independent of the law, for example in terms of priority for the worse-off or equality (for example in terms of wellbeing), and thus can be promoted also by non-legal means, for instance a donation from a better-off person, who is not a legal official, to a worse-off person.

The case of retribution (desert) is more complex. Retributive accounts differ in their answer to the question whether *what* culpable wrongdoers deserve is defined in a way that is independent of the law. According to one view, what culpable wrongdoers deserve is defined in terms of wellbeing, for example they deserve to *suffer* (in proportion to their culpability). This

³ For the claim that this is a common view, see Priel 2017: 3.

view is defined independently of the law and thus could be promoted also by non-legal means. Therefore, this version is compatible with the Instrumental View. In contrast, according to another view, culpable wrongdoers deserve punishment and, according to one version of this view, *legal (criminal) punishment*.⁴ It is sometimes claimed, for example, that retribution is a political value in the sense that only the state can promote retribution by imposing legal punishment.⁵ According to this view, the value of retribution is *not* independent of the law and thus it is possible to promote this value *only* through the law. Thus, according to this view, the law is not merely an instrument but rather a constitutive part of the value of retribution. This view is thus compatible *only* with the Tracking view. These different retributive versions might have different practical implications, for example concerning the question whether we should take account of suffering that is not the result of legal punishment⁶ or when legal punishment does not involve suffering to the degree required by a non-legal standard.

The relation between morality and law is of course a familiar topic. However, this specific question – the tracking question, as I will refer to it – regarding the normative relation between

⁴ For the distinction between these versions, see Berman 2011; Berman 2013.

⁵ Compare Hampton 1992: 1694; Binder 2002; Duff 2014: 230-231; Harel 2014: 96-98; Ewing 2015: 371-372.

⁶ See Husak 2010.

morality and law, is typically not considered explicitly.⁷ Yet this question seems to be controversial and each of the contrasting answers to this question has some appeal. On the one hand, the Tracking View, which offers a positive answer to the tracking question, is intuitively appealing: other things being equal, a law that tracks morality – prohibits morally wrongful actions and permits morally permissible actions, for example – appears to be better than a law that does not. For instance, many seem to think that there is (at least) a reason for the law to include a criminal prohibition on intentional killing even if this does not bring about better consequences on balance (in general or specifically in terms of preventing deaths or even more specifically those caused by intentional actions).

⁷ The controversy between the Tracking View and the Instrumental View is relevant also in other legal fields, beyond the criminal law. Here are a few examples. Assuming that a better-off person has a moral obligation to give part of her wealth to a worse-off person, does this count in favor of a legal obligation to pay this amount as a tax that would be transferred to the worse-off, even if a lower tax would produce more revenue (for instance, by reducing tax avoidance) that could be used for the benefit of the worse-off? Should constitutional or international law incorporate a human right even if this would not prevent violations of this right? Does the fact that a promise is morally binding constitute a reason in favor of enforcing it by legal means regardless of the overall effect on promise keeping? And does the fact that it is morally permissible to *break* a promise, when the cost of keeping it is beyond a certain threshold, constitute a reason for making it legally permissible, assuming that, due to a tendency of agents to exaggerate this cost, a more restrictive legal rule would be optimal in terms of encouraging morally right behavior?

There are also other pertinent examples regarding the criminal law. For example, does the fact that an action is morally *permissible* count *against* imposing criminal liability due to this action, even if this would not bring about better consequences on balance? And should the law reflect the moral *reason* for or against criminalization, for example by distinguishing between justifications, which exempt *permissible actions*, and excuses, that exempt *non-culpable agents*, even if this would not bring out better results?

On the other hand, considered from a more theoretical perspective, the Tracking View seems puzzling, and the Instrumental View, which answers the tracking question in the negative, seems to be more plausible. Since the value of the law appears to be instrumental rather than intrinsic, it seems that the law should be treated like any other means whose value depends exclusively on its consequences – its contribution and cost in terms of moral values that are independent of the law (compared to available alternatives). Consequently, when tracking morality through the law is not conducive to an independent moral goal, on balance, it seems worthless, and when it hinders such goals, when it leads to more wrongful actions or exacerbates (distributive or retributive) injustice, for example, it seems perverse.

This paper has the following goals: to depict and explicate the controversy concerning the tracking question; to argue that the right answer to this question is that of the Instrumental View; and to explain why the Tracking View is nevertheless appealing – in light of the plausible assumption that a law that tracks morality often advances independent moral goals.

The paper proceeds as follows: I begin with a few clarifications concerning the tracking question (Section 2) and several examples of the contrasting views, focusing on the less familiar Tracking View (Section 3). Subsequently, I explain why I believe the Instrumental View should be accepted (Section 4) and the Tracking View should be rejected (Section 5), before concluding (Section 6).

2. Clarifications

Before considering additional examples and the merits of the contrasting views, a few clarifications and refinements of the tracking question should be noted.

1. The tracking question assumes, and makes sense only if, morality and law are independent in two senses: first, there are moral values that are independent of the law in that their definition does not refer to the law; and, second, the law does not track morality by definition. The first assumption is not disputed, it seems to me; clearly, there are moral values that are not defined by reference to the law, such as preventing wrongdoing or promoting distributive justice.⁸ The second assumption – that the law does not track morality by definition – is clearly compatible with legal positivism – the view that legal validity depends necessarily only on non-moral facts, particularly the actions and beliefs of those who make the relevant law. But this assumption is also compatible with the most plausible and common version of legal realism⁹ and with the most plausible and common version of a natural law theory, which accepts legal positivism regarding legal validity in the strict sense but highlights a different relationship between law and morality, for example that the ideal law is one that is compatible with morality.¹⁰ Overall, I thus believe that this assumption is both very plausible and very common.

2. The Instrumental View holds that the law is merely a means to an end that is independent of the law. This might create the impression that the Instrumental View is compatible only with a consequentialist moral theory. However, this is not the case and the tracking question and the

⁸ See Section 1.

⁹ See Leiter 2005.

¹⁰ See Finnis 1980: 9-19, 23-36; Murphy 2005: 15-28, 21-22.

Instrumental View are pertinent also to non-consequentialists for two reasons. First, non-consequentialists typically believe that consequences are morally significant, in addition to non-consequential considerations. Therefore, they might even accept the Instrumental View since they believe that the only considerations *that are relevant to the law* are related to consequences. Second, the law might promote (also) non-consequential values, which are independent of the law, for example a non-consequential consideration of desert which is defined, for instance, as a consideration in favor of punishing the guilty but not necessarily through the law.¹¹

3. The question is about the law tracking *individual morality* – the part of morality that is concerned with the actions of individuals who are *not legal officials*. This excludes the *morality of law* – the part of morality that is concerned with the question of what the law should be (and accordingly with the actions of officials who make the law). This limitation is required since it is trivially true (true by definition) that the law should (morally) track the morality of law. For example, if the all-things-considered moral conclusion is that the law should impose a certain sanction in response to a certain action, this settles the question of what the law should be in this respect. In contrast, the all-things-considered moral conclusion that it is (morally) wrong for individuals (who are not legal officials) to harm an innocent person does not settle the question

¹¹ See also Section 4.

of whether the law should prohibit this action – it does not necessarily follow that the law should include a parallel prohibition. Therefore, my reference to morality is meant as a reference to individual morality.

4. Tracking could take various forms. The most direct way is a law that *declares* the content of morality, for instance that a certain action is wrong. This could be done explicitly or implicitly. For example, criminal offenses typically refer explicitly only to a legal power (permission or duty) to punish whoever performs a certain action, but it is often (although not always) plausible to understand these offenses (*inter alia*) as implicitly expressing the judgment that this action is morally wrong. Alternatively, a law could *require* action in accordance with morality, for example proscribe a wrongful action. Again, this might be a plausible interpretation of at least some criminal offenses. Or a law could *respond* to actions that conform to or violate morality in some way, for example by punishing those who perform wrongful actions, as standard criminal offenses do. The Tracking View needs to be completed by explicating the exact nature of tracking. I return to this question when evaluating the Tracking View.

5. The tracking question considers whether there is a *non-instrumental* reason for tracking morality through the law. This excludes instrumental reasons since no one disputes that there are such reasons. Instrumental reasons are based on the contribution of the law to a moral goal that is independent of the law, such as preventing wrongdoing or promoting distributive justice. The law is (merely) a means even if it is the best or the only means, provided that it is the best or the only means merely due to contingent (non-moral) facts. In contrast, the law is not merely of instrumental value if it is necessary in a sense that is not contingent in this way, namely if it is

part of the final goal, as in the case of a retributive account according to which what culpable wrongdoers deserve is legal punishment.¹²

This limitation of the inquiry to non-instrumental reasons complicates it since intuitions concerning specific cases might be affected by instrumental considerations. One way to isolate intuitions regarding non-instrumental reasons is to consider cases in which no instrumental consideration in favor of tracking applies. This might be the case when the law has no effects, or when the only applicable instrumental reasons are *against* tracking, or when the overall balance of consequences is against tracking. This is not a perfect solution, however, since it is hard to put aside the possibility that tracking might have some positive instrumental value, including indirectly and in the long run. For example, it is very plausible to assume that there is *some* chance that a law that prohibits a wrongful action would have *some* influence in terms of preventing wrongdoing. I return to this point too when evaluating the Tracking View.

6. The question is whether there is a *pro-tanto* consideration in favor of tracking – as opposed to a consideration that is necessarily *decisive*. A consideration for tracking might not be decisive due to clashing considerations, such as the negative consequences of legal regulation. Still, if there is a consideration in favor of tracking, a law that deviates from morality involves a moral cost, even if such a law is justified all-things-considered. I focus on this weaker, pro-tanto version

¹² See Section 1.

of the Tracking View since even this version is controversial (this is the version that the Instrumental View denies). It is thus important to recall that a conclusion that there is no *decisive* reason in favor of tracking does not establish that there is no pro-tanto reason for tracking.

7. Finally, the answer to the tracking question has implications not only for the question of whether to enact a certain law, but also for the question of what the content of a given law should be – regardless of whether it is right to enact this law (namely, even if it should not have been enacted to begin with). For example, the tracking question could be posed with regard to the content of a criminal offense that its existence is unjustified since a less costly legal measure would be as effective.

3. The Tracking View

After refining the question, I consider several examples that demonstrate endorsements (and rejections) of the Tracking View (in addition to the claim, noted in the Introduction, that the wrongfulness of an action constitutes in itself a reason in favor of a criminal offense that applies to this action). Before considering more theoretical accounts, it is worth noting that a seemingly common intuition appears to adhere to the Tracking View. According to this intuition, we should criminalize serious forms of (culpable) wrongdoing regardless of whether this is the most efficient way of promoting goals that are independent of the law, such as preventing wrongdoing or promoting retributive justice (that is defined independently of the law). In other words, it seems that a suggestion to abolish the part of the criminal law that is concerned with serious moral wrongs, if it is not the most efficient way of promoting such independent moral goals, would not be universally accepted, to say the least. Indeed, this common intuition seems to be stronger

than the Tracking View in that it holds not only that there is a non-instrumental reason to criminalize serious forms of wrongdoing, but also that this reason is *decisive*, namely outweighs clashing reasons against criminalization (for example due to its cost).

This intuition might underlie Alec Walen's remark that "much of criminal law rightly aims to track the limits of moral permissibility"¹³ and Douglas Husak's suggestion that there is "a presumption that the criminal law should derive from, be based on, conform to, or mirror, critical morality".¹⁴ These might be formulations of the Tracking View, since their general and unqualified nature is less compatible with instrumental reasons that are more likely to be contingent.

The Tracking View appears to be endorsed more explicitly by several specific accounts of the criminal law. Antony Duff explicitly rejects a "simple instrumental view", according to which the only relevant considerations regarding criminalization are the benefits and cost of the criminal law, as well as the view that the criminal law is just one possible means of responding to wrongdoing. Instead, he advocates a version of "Positive Legal Moralism" that considers not only such instrumental considerations but also whether the criminal law is "intrinsically apt as a part of our response" to the relevant action. He argues that this is the case when the action constitutes a "public wrong", namely when it is morally wrong and it is the "business" of the

¹³ See Walen 2014: 1.

¹⁴ Husak 2016: 34.

relevant political community.¹⁵ In other words, this view holds that, other thing being equal, the criminal law should track the part of morality that deals with a salient class of moral wrongs. The consideration suggested by this view in favor of criminalization is non-instrumental – namely, the determination of whether an action is the “business” of the community does not exclusively depend on the effectiveness and the cost of the legal regulation. While this consideration might be *defeated* by clashing considerations, including instrumental considerations relating to the benefits and costs of criminalization, its *existence* does not depend on such instrumental considerations. Rather, it is based on the claim that the function of the criminal law is to condemn public wrong as such – rather than as a means of promoting goals that are independent of the law, such as preventing wrongdoing or exacting retribution (that is defined independently of the law). According to this view, the criminal law is not just one possible means of condemning public wrongs, which should be employed only if it is the most efficient means of doing so, in light of standards that are independent of the law. Rather, the criminal law is the appropriate way to express the condemnation of the political community in light of its inherent nature.¹⁶

¹⁵ Note that “public” in Duff’s sense should not to be contrasted with my description of the part of morality that is not concerned with the law as “individual”. According to Duff, “public” wrongs are wrongs committed by individuals that the political community should be concerned with.

¹⁶ See Duff 2014: 226-230.

Another expression of the Tracking View is David Owens' claim that while the value of "mala prohibita" offenses is exhausted by the value of their consequences, "mala in se" offenses are valuable also in a way that is independent of their consequences, since "the ban recognizes the blameworthiness of a certain act".¹⁷ This value does not seem to be compatible with the Instrumental View.

Alon Harel also argues explicitly that there are various senses in which the law is not merely instrumental – it is not merely a means to securing ends that are independent of the law but is rather a constative part of a just society.¹⁸ Specifically, he argues that there is an intrinsic reason to enact criminal offenses that prohibit violations of basic rights even if this does not prevent violations of such rights. Rather, he argues, criminalization is valuable since it constitutes "public recognition" of the wrongfulness of such violations. The existence of such criminal offenses, the argument continues, makes it the case that agents act "from duty", as opposed to "inclination", and in this sense respect the rights of potential victims (so that the latter do not live "at the mercy" of the agents). Harel offers the following example:

¹⁷ Owens forthcoming: 4-5.

¹⁸ Harel 2014; Harel 2017. Harel's other examples focus on constitutional law. Specifically, he argues that the same non-instrumental reasoning that requires criminalization of violations of basic rights requires also *constitutional* duty to criminalize violations of these rights (and in this sense an entrenchment of these rights). This is again based on the idea that it is valuable that (not only individuals but also) the legislature "acts from a publicly recognized duty" and does not have discretion (as opposed to the instrumental reason to prevent violations of rights). See Harel 2014; Harel 2015.

Assume that evidence is provided to the Bundestag convincing it that decriminalizing abortion would, in fact, reduce the rate of abortions in society and, consequently, more lives would be saved if abortions were decriminalized. In addition, assume that the Parliament concludes therefore that while fetuses have a right to life, criminalizing abortions is detrimental to the protection of life and, consequently, it declares that decriminalizing abortion is constitutionally permissible. Under my analysis, such a decision on the part of the Bundestag is unjustifiable as it subjects fetuses' lives 'to the mercy' of their mothers. When a pregnant woman decides not to abort, her decision is based on her inclinations (or even her judgment that it is permissible), not on a publically recognized right of the fetus.¹⁹

This seems to be a version of the Tracking View, since these goals are defined so that they are achieved *only* by the law – as opposed to morality – and by the law *itself* – regardless of its consequences. In other words, according to this argument, “public recognition”, “action from duty” and lack of “discretion” are all necessary aspects of the law as opposed to morality and to the effects of the law.

¹⁹ Harel 2014: 184; Harel 2015: 5; Harel 2017.

Other examples are less explicit but seem to reflect the Tracking View. One example is the claim that the criminalization of some types of actions is a necessary condition for the legitimacy of a polity (based on a social contract theory).²⁰ This seems to be a version of the Tracking View, since the claim appears to be that criminalization of such actions is required regardless of the attainment of any goal that is independent of the legitimacy of the law (such as preventing these actions).

Another example is the claim made by Cass Sunstein that

A society might... insist on an antidiscrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups.²¹

This is a version of the Tracking View if the suggestion is that a law is sometimes justified regardless of whether it helps members of minority groups (namely, even if it does not).

The last views appear to adhere to the Tracking View based on what might be roughly described as an expressive account of the criminal law. These views appear to reflect the Tracking View since they do not seem to consider the law merely as one means of expressing the relevant sentiment (for example, condemnation), which should be employed only if it is the most efficient

²⁰ See Dimock 2016: 18.

²¹ Sunstein 1994: 823; Sunstein 1996: 2027-2028.

means of expression, in light of its contribution and cost, compared to other possible means.²² Rather, these views seem to suggest that expressing the relevant sentiment *through the (criminal) law* is important in a way that is not, other things being equal, equivalent to expressing it by other means.

A related example is the principle of “fair labeling”, which seems to require that the criminal law reflect the nature of pertinent moral categories and, specifically, of different kinds of wrongdoing and culpability.²³ According to one claim, for example, fair labeling requires that the definition of some offenses should include the mental state of the agent, for instance that there should be an offense of *intentional* killing rather than of killing simpliciter. A different claim is that the negative condition of lack of coercion should typically *not* be a part of the definition of relevant offenses but rather a defense.²⁴ A fair labeling principle of this type reflects the Tracking View if it is based, at least in part, on non-instrumental considerations, as opposed to, for example, the instrumental consideration that fair labeling prevents wrongdoing by guiding the

²² The law is just a means of expressing condemnation even if it is the best or the only means (see Glasgow 2015: 602, 616-617) assuming that this is so only contingently (see Section 2).

²³ See Ashworth 2013: 77-79; Green 2015: ch. 4.

²⁴ Tadros 2007: 101-115.

behavior of people more effectively.²⁵ It seems that fair labeling is sometimes endorsed based on such non-instrumental grounds.²⁶

Similarly, John Gardner claims that

Prima facie – that is, subject to institutional considerations to be factored in afterwards – a punishment should be officially determined to be cruel if and only if it is cruel, a dismissal should be officially determined to be unfair if and only if it is unfair. And so on.²⁷

This is a version of the Tracking View if the suggestion is that a legal punishment should be considered as cruel, for legal purposes, if it is morally cruel, for example.

Another possible version of the Tracking View is the view that criminal liability is justified only regarding “harmful” actions (or only actions that are harmful to people other than the agent).²⁸ This view is a version of the Tracking View if it excludes certain (non-harmful) actions from the scope of the criminal law regardless of whether the criminalization of such actions promotes moral goals such as preventing wrongful actions²⁹ and if it asserts that there is no reason to

²⁵ For this consideration, see Gardner 2007: 33-56, 44-45; Chalmers & Leverick 2008.

²⁶ See, for example, the claim that the principle of fair labeling is not based on the guidance consideration: Tadros 2007: 80-82.

²⁷ Gardner 2010: 72-73.

²⁸ See Mill 1859/1998: chapter 2.

²⁹ This assumes that there are actions that are wrong but not harmful. If there are not, the limitation to harmful actions is equivalent to the limitation to wrongful actions.

promote the goal of providing benefits to deserving people through the (criminal) law (when the benefits are not the prevention of harms).

Finally, theoretical accounts of the criminal law often distinguish between justifications and excuses – as two types of defenses (or elements of criminal liability more generally): one relating to whether the action is wrong and the other to whether the agent is culpable. Often, the implicit assumption seems to be that the legal categories of justification and excuse should reflect parallel moral categories, so that legal justifications apply to actions that are not morally wrong and legal excuses apply to agents who are not morally culpable. When this assumption is based on non-instrumental considerations, it is a version of the Tracking View. This seems to be sometimes the case. For example, George Fletcher denounces the “instrumentalist style of thought” that evaluates the (criminal) law in light of the question of whether it serves some end. Instead, he suggests, there is “a reason for punishing or not punishing that is not a function of the ends of the criminal law”.³⁰ More specifically, various claims concerning the type of actions that justificatory defenses should encompass do not seem to be based (merely) on instrumental considerations. Examples are the suggestions that legal justification should apply to certain types

³⁰ Fletcher 1975: 293-294.

of actions – for instance actions that are morally permissible³¹ or actions that are not “harmful”³² – without additional conditions regarding the consequences of such legal rules.

Against the tendency to equate the moral and legal categories of justification and excuse, Mitchell Berman makes the following claims:

First, it is empirically false that the categories of morally and criminally justified conduct are extensionally identical. Second, there appears no basis for concluding that the extensional divergence is produced by any sort of conceptual error. Naturally, it remains open for one to argue that, for reasons of policy broadly construed, the substantive criminal law *should* be structured in such a way as to extend justification defenses to all, and to only, such conduct as is morally justified. Likewise, one could reasonably argue that the law should extend excuse defenses to all, and to only, such conduct as is morally excused. But any such arguments would be wholly normative; they provide no guidance for understanding the conceptual framework of defenses in those jurisdictions (probably all of them) that resist this advice.³³

³¹ Fletcher 1985: 972; Gardner 2007: ch. 5; Tadros 2007: 280.

³² Robinson 1984: vol. 1, pp. 83, 86-89, 91, 100-101, vol. 2, pp. 2-7, 222-228.

³³ Berman 2003: 11. This criticism is endorsed by Alexander 2004: 858; Thorburn 2008: 1078; Ferzan 2008: 476; Colvin 2009: 356.

This passage seems to reflect the Instrumental View, and to reject the Tracking View, in that it suggests that the answer to the question of what the law should be is contingent. (The passage is irrelevant to these views to the extent that its focus is the descriptive question of what the law is or the conceptual question of what the law could be as opposed to the question of what the law should be.)³⁴

A related controversy concerns the *implications* of the distinction between justifications and excuses. For example, according to a common claim, a third party should be legally justified in helping a person whose action is justified but not a person whose action is excused. This seems to be a version of the Tracking View since it does not consider the effects of such a legal rule. Against this view, it has been argued, in a way that seems to reflect the Instrumental View, that even if a third party is morally justified in helping someone whose action is justified, the law should not necessarily adopt a corresponding rule.³⁵

³⁴ Berman suggests that the moral and legal categories of justification and excuse are related in their structure: moral and legal justifications, he argues, are exceptions to moral and legal norms, respectively (conduct rules), while moral and legal excuses are exemptions from moral and legal liability, respectively (decision rules). Yet, according to the Instrumental View, the structure of the law as well as its content depends on normative considerations.

For a rejection of Berman's criticism in favor of the view that the moral categories of justification and excuse should be reflected in the law presumably regardless of instrumental considerations (namely the Tracking View), see Dressler 2009: 247-248.

³⁵ See Greenawalt 1984: 1918-1927; Gur-Arye 1986; Gur-Arye 1992; Smith 1989: 19-28.

4. The Instrumental View

Unlike the Tracking View, the Instrumental View holds that the law is always just a means and should accordingly be formulated and evaluated based only on considerations that relate to its benefits and costs in terms of moral values that are independent of the law. Such instrumental considerations are presumably uncontroversial in themselves. The Instrumental View differs from the Tracking View not in holding that we should take account of these considerations but rather in maintaining that these are the *only* considerations that are pertinent to the question of what the law should be. This excludes, inter alia, non-instrumental considerations, endorsed by the Tracking View, in favor of the law tracking morality. According to the Instrumental View, the law should track morality only if, and to the extent that, this is the best means of promoting moral values that are independent of the law, namely only due to instrumental considerations.

According to the Instrumental View, there is a reason in favor of criminalization³⁶ – including regarding actions that are morally wrong or agents that are morally culpable – only if, and when, this promotes an independent value, such as preventing (some) wrongful actions or exacting retribution (again if what culpable wrongdoers deserve is defined independently of the law).

³⁶ The term “criminalization” is ambiguous, inter alia, between enacting criminal offenses (that typically refer to *types* of actions) and punishing people (for specific actions). I assume here that what ultimately matters is the former (compare Husak 2016: xiii) but my main points in this paper hold regardless of how we resolve this ambiguity.

Similarly, according to the Instrumental View, there is a reason *against* criminalization if this hinders a moral value that is independent of the law such as retribution, for example if the relevant person is *not* culpable enough to deserve to suffer to the relevant degree. These reasons concerning the law (and specifically criminalization) are *instrumental*. They are instrumental despite the fact that the law might serve non-instrumental reasons, for example the reasons in favor of preventing wrongdoing or exacting retribution. For even if the latter reasons are not instrumental, the reasons regarding the *law* – as a means of promoting these reasons – are always instrumental, according to the Instrumental View.

Thus, according to the Instrumental View, wrongfulness or culpability (or their combination) do not provide in themselves a reason for (or against) criminalization. The proposition that there is a reason in favor of criminalization only when it serves some independent moral value includes a normative condition and a factual condition. The normative condition is a moral value that is independent of the law, such as preventing wrongdoing or exacting retribution whose currency is independent of the law (such as wellbeing). The non-normative condition is that the law is an *effective* means of promoting this value, for example that it would indeed prevent wrongdoing (to some degree) or give offenders what they deserve (in terms of a standard that is independent of the law).

When, and to the extent that, such considerations do apply, and only then, the parts of morality that are concerned with moral wrongness and moral culpability are relevant to the proper scope of the criminal law even according to the Instrumental View. For instance, if there is an instrumental consideration for or against criminalization that refers to the moral status of actions – as right or wrong – and if the concepts of moral rightness and wrongness are subjective

– namely if what is morally right or wrong depends not on the actual facts but rather on the (justified, relevant) beliefs of the agent – the subjective nature of moral wrongness is relevant to the law.³⁷

In this respect, the criminal law is no different from other types of legal regulation. For example, if there is an instrumental consideration against criminalization when the relevant agent is morally innocent, for example due to a concern for desert, it might apply also against *other* – non-criminal – types of legal sanctions, such as an administrative fine or private law compensation. To be sure, such a generalization is not obvious. Perhaps the criminal law is different from other forms of legal regulation in terms of the applicable moral considerations, for example since the criminal law involves condemnation that is unique in a way that is fundamentally morally significant. However, even if the criminal law is unique in this way, it seems clear that it is also similar to other forms of legal regulation in some respects, for example that all impose burdens on people, and this similarity might trigger related, even if not identical, considerations.³⁸

Several points regarding the Instrumental View should be emphasized. First, this view is compatible not only with consequentialism but also with non-consequential views. For while the

³⁷ I discuss this topic in more detail in Segev 2012.

³⁸ I discuss this further in Segev 2010B: 9-13.

Instrumental View considers the law as a mere means, it is compatible with promoting every moral goal, consequential or non-consequential, through the law. Specifically, the Instrumental View is compatible with non-consequential constraints that apply (also) to the law, for example a deontological constraint on doing harm or intending harm.³⁹

Second, the law might be effective in promoting a moral value at least to *some* degree quite often. For example, it seems reasonable to assume that imposing criminal liability – in response to culpable wrongdoing – often diminishes (for example by deterring) wrongdoing and promotes retribution. Similarly, a tax often increases revenue that is used to promote distributive justice. Therefore, the relation between morality and law in this respect is not random. In this way, moral concepts, such as wrongness and culpability, might be relevant to the criminal law (and to other legal fields) quite often.

Third, however, there might be cases in which the law that tracks morality is not effective in promoting a pertinent moral value – and then there is no reason in favor of this law. This might be the case, most obviously, due to non-normative facts. For example, a law that requires paying a tax in the amount that is morally required from the relevant people might lead to less revenue compared to a law that sets a lower tax rate due to tax evasion. In this case, there is no reason in favor of the law that tracks morality (more accurately), according to the Instrumental View.

³⁹ See also Section 2.

The law might be ineffective also in more complex ways, due to both non-moral facts and to the nature of some moral considerations. Indeed, there might be moral considerations that it is impossible or at least very difficult to promote through the law. For example, if it is valuable that agents act for the right (moral) reason, the law might be typically ineffective in promoting this goal. At least, the law is often ineffective in making agents act for the right reasons *directly*, although it might sometimes do that indirectly, for example by affecting the preferences of individuals in various ways (such as by way of education). Sometimes, the law might even undermine moral values. For example, if acting for the right reason is valuable, a law that makes people act from reasons other than the right moral reasons (such as prudential reasons), might undermine this value. Of course, there are important moral considerations that are not of this type. For instance, preventing harmful wrongdoing is valuable regardless of the agents' motivating reasons.

A more complex example concerns the question of whether there is a reason in favor of preventing *deontological* wrongdoing, *inter alia* (but not only) through the law. Intuitively, it seems that there is a reason in favor of preventing wrongdoing. This reason need not be decisive, and even when it is decisive it might not trigger a duty, but there does seem to be a *pro-tanto* reason in favor of preventing wrongdoing. This is clearly true regarding *consequential* wrongdoing – an action that is wrong due to the violation of a decisive consequential reason – since a consequential reason that makes an action wrong is necessarily also a reason in favor of another action that prevents the former, harmful action. The fact that a certain state of affairs is better than another, for example the fact that it is better that a person lives rather than dies, is both a reason against killing and in favor of preventing killing. However, it is less clear if there is

even a pro-tanto reason in favor of preventing *deontological* wrongdoing – an action that is wrong due to the violation of a decisive deontological constraint. While the intuitive answer appears to be positive in this case too, both when considering this question in the abstract and when considering it with respect to paradigmatic specific cases of deontological wrongdoing,⁴⁰ common theoretical accounts of deontological wrongdoing do not entail a reason in favor of preventing such wrongdoing. For these accounts forbid positive agency, for example doing harm or intending harm, whereas *not preventing* harm does not necessarily amount to doing or intending harm.⁴¹ Thus, intuition and theory seem to diverge regarding the question of whether deontological wrongdoing should be prevented.

Fourth, when a law, including one that tracks morality, *is* effective in promoting a moral value, for instance when it prevents some wrongful actions, there is a reason in favor of such a law. However, such a reason is not necessarily decisive, since it might clash with other reasons. In other words, we should consider whether the moral contribution of the law exceeds its moral cost. Since laws often involve a moral cost, such as invasion of privacy, false convictions or the

⁴⁰ See Alexander 2015: 24; Thomson 2009: 516; Dougherty 2013: 530-531.

⁴¹ I discuss this question in Segev 2016.

economic cost of making and enforcing the law, there are typically reasons against legal regulation. Therefore, a reason in favor of legal regulation might not be decisive.⁴²

Finally, the Instrumental View applies in the same way – comparing the contribution and the cost of every form of legal regulation to the attainment of moral values – to every aspect of the law, including its existence and its content. Specifically, it applies in the same way not only to the question of whether to impose a certain legal sanction (such as criminal punishment), but also to the question of which terms and classifications to use when formulating the law. An example is the way in which a law that exempts a certain (type of) action from criminal liability should formulate the exemption. Should it classify it as a negative element of the relevant offense or as a defense? If the exemption is classified as a defense, should it be classified in light of the reason for the exemption, for instance as a justification (when the action is justified) or an excuse (when the agent is not culpable)? Should we assign a different legal rule to each rationale (such as again a justification as opposed to an excuse) or combine several rationales within one legal rule?

The answers to these questions depend, according to the Instrumental View, on the contribution and cost of the relevant legal terminology or classification. The fact that a certain type of a moral reason underlie a certain law is not in itself a reason for employing a similar legal

⁴² Indeed, according to some views, reasons against imposing legal liability might be very powerful. For example, some seem to consider the reason against imposing criminal liability on the innocent as always or almost always decisive.

term or classification, namely for a law that tracks morality in this sense. Rather, legal categories, such as justifications and excuses, should reflect parallel moral categories only if this is, on balance, the best way of promoting the relevant moral values, for example if this is the most efficient way to prevent wrongdoing or exact retribution.⁴³

Indeed, the optimal way of promoting a certain moral value might not include a legal regulation that explicitly or accurately reflects the rationale of the law. For example, a law that exempts morally permissible actions from criminal liability, *because* they are morally permissible, but does not use the term “justification” (or a similar term) might be better, overall, than a law that does (namely, than a law that tracks morality in this sense), for instance since the law that does not track morality has a positive effect in terms of mitigating the tendency of agents to exaggerate certain dangers. In other words, we should adopt only an instrumental principle of fair labeling.

5. Against the Tracking View

While the Tracking View may be appealing at first sight, and while its implications are often reasonable, I think that it is ultimately mistaken. In what follows, I argue that it is more plausible

⁴³ Thus, the legal categories of justification and excuse should include actions that are not wrongful *enough* to warrant criminal liability or agents that are not culpable *enough* to warrant criminal liability. See Segev 2010A.

to consider the law merely a means in a way that supports the Instrumental View; that the intuitive appeal of the Tracking View is misleading; and that it might be impossible to delineate the scope of the Tracking View in a way that is plausible and not arbitrary.

First, the fundamental difference between the Instrumental View and the Tracking View is that the former considers the law merely as a means whereas the latter seems to be incompatible with this assumption. For if the law is merely a means, its content and form, and specifically its relation to morality, should depend only on instrumental considerations concerning its contribution and cost in terms of moral value that are independent of the law, and should not be considered as significant in themselves. In this respect, the Instrumental View seems to me more plausible.⁴⁴ Indeed, the law is very different from things that are (arguably) valuable in themselves, such as well-being and (distributive or retributive) justice, for example. If, for instance, a criminal prohibition on wrongful actions increases, rather than decreases, the number of wrongful actions, there seems to be nothing to say in favor of such a prohibition. Similarly, a non-instrumental account of criminal liability that focuses on an expressive or a retributive value and holds that the relevant fundamental value is *legal* condemnation or *legal* punishment (the ultimate currency of desert is the law itself) seems to me implausible exactly because it assigns to the law significance that is more than instrumental.

⁴⁴ Compare, for example, Gardner 2011: 20-21; Lippert-Rasmussen 2014: 270; Husak 2016.

More generally, there does not seem to be a reason in favor of imposing criminal liability when it is *not* related to an independent moral concern. The fact that a law has some relation to morality – namely that it tracks morality in some sense – is not in itself a reason in favor of this law – just as the fact that a proposition is true is not in itself a reason in favor of declaring it.⁴⁵ Rather, we should make a statement only when there is a (decisive) reason in favor of doing so – that it is interesting, or that it would serve some goal, such as promoting well-being or justice. This seems true regarding statements in general and specifically with respect to making statements through the law.

Second, the intuitive appeal of the Tracking View might be unreliable due to the existence of *instrumental* considerations in favor of tracking, namely the fact that in many cases the implications of the Tracking View coincide with those of the Instrumental View. Indeed, it seems that once we consider all the possible positive instrumental effects of the law (including indirect and long term effects), there is almost always *some* chance that a law that tracks morality would advance a moral value – for example, improve compliance with the demands of morality – to *some* degree. After all, people often obey the law for various reasons. This includes prudential reasons, such as fear or punishment, and the fact that some people consider the law as authoritative, either because they see it as a reliable guide to what morality requires or since

⁴⁵ Compare Cohen 2008: 303.

they consider it as morally binding for some other reason. Moreover, the prevalence of such instrumental considerations in favor of tracking might lead people to assume that they apply even when this is not the case. Finally, even when we consider the question of whether there is a *non-instrumental* reason in favor of tracking, and thus try to ignore instrumental considerations, they might affect our intuitions, especially instrumental considerations relating to the indirect and long-term influence of the law.

Finally, it is difficult to see how we might fill in the details of the Tracking View, and accordingly determine its scope, in a plausible way. A preliminary question is what it means for the law to *track* morality. The dilemma in this respect is that the more straightforward ways of explicating the tracking idea – mainly declaring the content of morality explicitly or requiring action in accordance with morality – seem to be at odds with what the adherents of the Tracking View appear to have in mind. For common legal rules that are supported by the adherents of the Tracking View do not make explicit declarations regarding morality or even regarding legal requirements. Rather, common legal rules often give officials the power or permission to act in various ways, for instance in response to wrongdoing. Therefore, it is not obvious what exactly does tracking requires. One option, for example, might be that tracking does require a legal declaration but that this declaration could be implicit and that criminal offenses should be understood as implicit declarations that the actions to which they apply are immoral.

The more general challenge for the supporters of the Tracking View is to delineate its scope in a way that is not too wide, on the one hand, but also not arbitrary, on the other. One question is whether this view requires that the law track *every* aspect of morality or just a certain part of it, for example whether the criminal law should apply to every wrongful action or merely to a

subset of such actions, for instance only those whose degree of wrongness is above a certain threshold. The former option might seem too wide, even to the adherents of the Tracking View, but it is unclear what the rationale for limiting the Tracking View (for instance) to serious moral wrongs (given that the rationale could not be instrumental) might be. In contrast, the Instrumental View provides a clear standard in this respect.

An additional dilemma is whether the law should reflect morality *accurately* or only roughly. It is hard to consider this question without an answer to the preliminary question of what tracking amounts to, but there seems to be a problem here. On the one hand, requiring complete accuracy seems excessive. On the other hand, it is unclear whether there is a principled way to specify a less radical option. One possibility is that the Tracking View denounces only *significant* deviations of the law from morality. For example, if morality demands that a certain (relatively) well-off person give half of her income to a person who is worse-off, the Tracking View might require that the law demands that this person pays an amount that is equal to, say, half as a tax (even if a less or a more demanding legal requirement is better in terms of the balance of the relevant instrumental considerations). However, this seems arbitrary, since accuracy is a matter of degree and there does not seem to be a reason to single out any specific point along the continuum.

6. Conclusion

The first aim of this paper was to highlight the controversy concerning the tracking question: is there a non-instrumental reason in favor of a law that tracks morality. My suggestion has been that the Instrumental View is more plausible than the Tracking View as an answer to this question: the law should track morality only when this is the optimal way of advancing the

conclusion of the applicable moral values, which are independent of the law. Nevertheless, the Tracking View reflects, albeit in a misguided way, an important insight: morality is pertinent to the question of what the law should be when a law that tracks morality promotes morality. Therefore, the common discussion of moral concepts, such as moral wrongness and moral culpability in legal contexts, is not a colossal mistake. Indeed, it is not a mistake at all when a law that reflects these categories promotes an applicable moral value. Yet the relevance of every proposition about morality to the law should be established, by identifying a pertinent moral consideration and the facts relating to the effectiveness of the law in promoting this consideration.

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