IS THE PROSECUTION OF WAR CRIMES JUST AND EFFECTIVE? RETHINKING THE LESSONS FROM SOCIOCY AND PSYCHOLOGY

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Introduction .......................................................... 750

I. Impact of Sociology and Psychology on Criminal Law:
   Domestic Crimes Versus War Crimes .................. 756
   A. Justifying Penal Law in Light of Sociology and Psychology ........................................ 756
       1. Rational, Dissuadable Behavior as the Premise that Justifies Penal Law .......... 756
       2. Criminal Law’s Reaction to Behavioral-Determinism Claims ........................... 761
   B. Sociopsychological-Coercion Claims in Agreement with Legal Theory .................. 762
       1. Support for New Defenses Based on Sociological and Psychological Research .......... 762
       2. Arguments that the Research Findings Necessitate New Defenses ....................... 763
   C. Differences Between Domestic Crimes and War Crimes Prosecution .................. 770

II. Jurisprudential Reactions to Sociopsychological-Coercion Claims .......................... 772
   A. Should Sociopsychological-Coercion Claims Be Accepted? .................................. 774
       1. Increasing Readiness to Accept Sociopsychological-Coercion Claims in the Context of War Crimes .......... 774
       2. The Overinclusiveness of Sociopsychological-Coercion Claims ................... 778
   B. Jurisprudential Attempts to Limit Sociopsychological-Coercion Claims .................. 780

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1. The Consequentialist Response ................................................. 781
2. The Moral-Blame Response ................................................. 783
3. The “Balancing” Response ....................................................... 786

III. THE INFLUENCE OF PENAL NORMS ON
SOCIOPSYCHOLOGICAL COERCION .......................................................... 788
A. Research Findings .................................................................. 790
   1. Psychological Research ................................................... 790
   2. Sociological Research ................................................... 793
B. War Crimes Prosecution and Requirements for
Penal Norms to Be Influential ....................................................... 794
   1. Fairness ............................................................................ 794
   2. Enforcement ..................................................................... 798
   3. Communication ................................................................ 800
C. Rational, Dissuadable Behavior in War Crimes—
If Research Findings Are Not Misinterpreted ........................................ 805

IV. HOW SHOULD ICL RESPOND TO SOCIOPSYCHOLOGICAL
COERCIVE CONDITIONS? ........................................................................ 807
A. Increasing and Not Decreasing Proactivity .................................. 807
B. Minimizing the Scope of Sociopsychological-
Coercion Defenses ........................................................................ 808
C. Sociopsychological Coercive Conditions
as a Mitigating Consideration ............................................................ 809
D. A Sociopsychological-Coercion Defense Should
(Sometimes) Still Be Afforded .......................................................... 811

V. WHO SHOULD BE AFFORDED A SOCIOPSYCHOLOGICAL-
COERCION DEFENSE IN WAR CRIMES PROSECUTION? .......... 814
A. Limits on the Coercion Defense .............................................. 814
B. The Brainwashing or Coercive-Indoctrination Defense ............. 815

CONCLUSION ................................................................................................. 818

INTRODUCTION

Should perpetrators of genocide, violent acts against civilians during war, or other massive violations of core human rights be punished? International criminal law (ICL) answers this question affirmatively, asserting that the punishment of such atrocities is just and that their effective prosecution can (and should) contribute to the prevention of such future acts.1

1. See, e.g., Rome Statute of the International Criminal Court pmbl., opened for signature July 17, 1998, 2187 U.T.N.S. 90 [hereinafter Rome Statute]. The Rome Statute begins as follows: “Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation . . . .” A common interpretation of the first part of this sentence is that it expresses a core retributive Kantian principle. According to this principle, individuals who commit horrific crimes must be punished even if their punishment will not lead in any way to a future decrease in crimes. See, e.g., George P. Fletcher, Parochial Versus Universal Criminal Law, 3 J. INT’L CRIM. JUST. 20, 26 (2005). The second part of this sentence clearly states a consequentialist rationale, i.e., to
Moreover, an increasing attempt has been made in the international and domestic arenas to act in accordance with these assertions of ICL through the prosecution of war crimes. During the last two decades the role of ICL has become gradually more significant, and the fall of the Soviet bloc has lifted the main political barriers that had prevented the implementation of ICL. Furthermore, the atrocities of the 1990s (mainly in the former Yugoslavia and Rwanda) have reaffirmed the post-World War II realization that means directed against states (such as reprisals and countermeasures) are insufficient to prevent those atrocities that ICL is designed to prevent and punish. These atrocities have also strengthened the moral conviction that perpetrators of such acts must be punished. Thus, ICL has been increasingly applied through the use of international tribunals that directly apply the norms of ICL, as well as through domestic prosecution of acts that constitute war crimes.

These attempts on the international and domestic levels are strongly connected. Accordingly, it can be argued that an international penal legal ensure “effective prosecution.” Moreover, Pre-Trial Chamber I of the International Criminal Court (ICC) reached the conclusion that this part of the sentence instructs the ICC to act in order to maximize the deterrent effect of war crimes prosecution and obligates the ICC to subordinate the retributive aim of war crimes prosecution to its crime-prevention aim. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, ¶¶ 47–48 (Feb. 24, 2006).

2. For the purpose of this Article, hereinafter all three core categories of acts that are defined as crimes by international law—genocide, crimes against humanity, and war crimes (in the narrow sense of the term)—will be referred to jointly as “war crimes” because of the convenience of using the term “war crimes prosecution.” This will be done despite the fact that the discussion made herein applies also to acts of genocide and crimes against humanity performed not during an armed conflict. See Theodor Meron, War Crimes Law Comes of Age, 92 Am. J. Int’l L. 462 (1998) (referring to the law dealing jointly with these crimes as “War Crimes Law”).


5. See HERSCH LAUTERPACHT, INTERNATIONAL LAW AND HUMAN RIGHTS 40 (1950) (stating that in reference to the Nuremberg trials, “there is cogency in the view that unless responsibility is imputed and attached to persons of flesh and blood, it rests with no one”).


7. Neff, supra note 4, at 4, 51. When the norms of international criminal law (ICL) are enforced domestically, it is done in one of two ways: (1) explicitly prosecuting the person for violating a norm of ICL; or (2) prosecuting a person that has committed an act that constitutes a war crime for committing a domestic crime that consists of similar elements. See Knut Dörmann & Robin Geiß, The Implementation of Grave Breaches into Domestic Legal Orders, 7 J. INT’L CRIM. JUST. 703, 705, 709–10 (2009).

8. The connection, some argue, is interest based: that is, states are afraid that if they do not enforce these norms, they will be enforced by international tribunals or by other states employing universal jurisdiction. Neff, supra note 4, at 4, 51. It can also be argued that the
system currently exists (ICL) and that the different international and domestic forums that partake in war crimes prosecution are simply different means that this system has to enforce its norms. Alternatively, it can be argued that each domestic enforcement mechanism should be viewed as a “branch” within the relevant domestic system, and thus the reference to ICL as a legal system should only be made in the context of war crimes prosecution made by international tribunals. This Article will not attempt to resolve this dispute and thus will use the dual terms “ICL” and “war crimes prosecution.”

The Article intends to focus on attempting to justify a phenomenon that cannot be disputed: the considerable strength that direct and indirect enforcement of ICL norms through war crimes prosecution has gained in recent decades.

The prosecution of war crimes is not without its critics. Much of the criticism of ICL and war crimes prosecution’s premises of just punishment and effective crime prevention is based on the findings of sociological and psychological research. As of yet, proponents of ICL and war crimes prosecution have failed to supply a sufficient response to this criticism. This Article attempts to fill this void.

Because of the large-scale atrocities committed in the last century, the fields of sociology and psychology have seen a surge in research aimed at uncovering the reasons leading individuals to commit atrocious acts. Research findings were surprising in that the vast majority of simulated atrocities in the experiments were not committed by “monsters” or individuals with exceptional psychiatric pathologies, but rather by ordinary people functioning under unique sociopsychological “coercive” conditions. These connection is less cynical and that the increased domestic and international punishment of such acts is the expression of a universal, increased cultural aversion to the commission of such horrific acts. See discussion infra Part III.B.2.

9. The argument between the two views discussed in the text is the manifestation in ICL of the unresolved dispute between monism and dualism. See J. G. Starke, *Monism and Dualism in the Theory of International Law*, 17 Brit. Y.B. Int’l L. 66, 71 (1936) (taking the view that criminal prosecution is an act of the international legal system, even when the penal enforcement of the international norms is made by organs of the domestic legal system).

10. Peter Wismer, *Bringing Down the Walls!—On the Ever-Increasing Dynamic Between the National and International Domains*, 5 Chinese J. Int’l L. 511, 549 (2006) (“[S]upra-national norms directly applicable to individuals, but enforced only by domestic institutions, in the final analysis must be considered domestic norms . . . .”)

11. See id. at 513 (stating that the monism-versus-dualism dispute has subsided in recent years without being resolved).


findings showed that under conditions such as strong group cohesion and social isolation, the vast majority of "normal" individuals tend to commit atrocious acts; it has been argued that these findings indicate that many individuals who commit atrocious acts under such sociopsychological coercive conditions cannot avoid behaving in this manner (so-called conditioned behavior).

ICL and war crimes prosecution attempt to regulate actions that are almost always executed during combat or social-breakdown situations by members of close and distinct social groups (such as domestic societies, combat units, nationalist groups, and tribes). In other words, the sociopsychological conditions that research indicates lead the vast majority of individuals to commit such atrocious acts exist in almost all situations that ICL and war crimes prosecution regulate. This fact raises doubts as to the moral justification of the prosecution of war crimes and, with it, of ICL as a legal system. Specifically, the moral justification of ICL and war crimes prosecution is based on the twin premises that it is just to hold individuals accountable for committing atrocious acts, and that the relevant laws and threats of punishment will influence human behavior (reducing the commission of future atrocities). However, if perpetrators cannot avoid their actions,

See infra notes 108–110; see also Robert Cryer et al., An Introduction to International Criminal Law and Procedure 4, 14 (2d ed. 2010) (discussing the core crimes of ICL and the core root shared by ICL and international humanitarian law).
what is the moral basis for holding them accountable?\textsuperscript{20} Furthermore, if the vast majority of atrocities are committed under conditions that prevent individuals from acting in any other way, can ICL and war crimes prosecution actually influence behavior (that is, will they ever be able to effectively prevent atrocious acts)\textsuperscript{21}

Legal discourse has put forth several inadequate responses to this difficulty in justifying war crimes prosecution. Some jurists fully acknowledge the difficulty, claiming that ICL and war crimes prosecution should be applicable only in a very narrow category of situations (if any at all), and thus view most current acts of war crimes prosecution as morally illegitimate.\textsuperscript{22} Other jurists also acknowledge the difficulty but, owing to their desire to maintain ICL and war crimes prosecution intact, leave the issue unresolved.\textsuperscript{23} Yet most jurists attempt to minimize (or even reject) the need to adapt ICL and war crimes prosecution to the findings of sociological and psychological research.\textsuperscript{24} They assert that, despite these findings, most war crimes are committed by individuals who have control over their actions. But since this response fails to reconcile its assertion with the findings of sociological and psychological research, it also fails to supply moral justification for war crimes prosecution and ICL.

Thus, none of the views in the current legal discourse are able to successfully argue that, despite the research findings, most actions regulated by ICL and war crimes prosecution are not conditioned. As such, one might argue—and some in fact do\textsuperscript{25}—that ICL and war crimes prosecution are unjust and ineffective and therefore should be abandoned.

This Article, however, argues that a proper understanding of sociological and psychological research does not lead to the delegitimization of ICL and war crimes prosecution. It does so by pointing to an aspect in these research findings that has received little attention. Specifically, the research indicates that a criminal justice system’s laws and law enforcement (which I call \textit{normative assertions})—by stressing avoidance of certain actions and threatening to punish those who ignore its assertions—can affect an individual’s disposition, thereby increasing the ability of a person to rationally decide whether or not to commit the prohibited act.\textsuperscript{26}

\textsuperscript{20} See infra text accompanying note 113.
\textsuperscript{21} See infra text accompanying notes 114, 164.
\textsuperscript{22} See sources cited infra note 120.
\textsuperscript{24} See Osiel, supra note 23, at 119 (“Despite the serious nature of these criticisms, lawyers and legal scholars tend to dismiss these pervasive discontents rather too perfunctorily.”).
\textsuperscript{26} See infra Part III.
Therefore, in terms of crime prevention, a legal system can often assume that a strategy of enacting criminal law and enforcing it can decrease the occurrence of the relevant unwanted behavior even in situations in which sociopsychological coercive conditions exist. Moreover, such a strategy increases the likelihood that, even in situations in which sociopsychological coercive conditions exist, those who will commit crimes will do so as a result of a conscious decision. Therefore, such a strategy will often also allow the legal system to justify from a moral-blame perspective the punishment of such individuals. Consequently, the existence of strong sociopsychological coercive conditions in the situations ICL and war crimes prosecution attempt to regulate should not lead to the abandonment of the attempts to prosecute war crimes.

This Article proceeds in the following manner: Part I examines the relationship among criminal law jurisprudence, sociology, and psychology in an attempt to explain why sociological and psychological research findings raise greater concerns that war crimes prosecution is unjust and ineffective—as compared to the concerns these findings raise with regard to the prosecution of domestic crimes—and, as such, raise greater concerns that ICL is unjust and ineffective—as compared with the concerns they raise in the context of domestic legal systems. These concerns are due to the existence in almost all situations regulated by ICL and war crimes prosecution of certain sociopsychological coercive conditions (not present in many domestic contexts), which research findings seem to indicate would lead the vast majority of individuals to commit atrocious acts. Part II explains why current jurisprudential views have failed to demonstrate that, despite the existence of sociopsychological coercive conditions in almost all situations that ICL and war crimes prosecution regulate, most war crimes are committed by individuals who have control over their actions. Part III argues that the basis for the assertion that most war crimes are committed by individuals who have control over their actions, as well as for ICL and war crimes prosecution’s legitimacy, is found in the above-mentioned research itself. This Article points to a less recognized factor in the research findings: the effect that normative assertions, especially criminal law and law enforcement, have in increasing the likelihood that individuals will rationally consider whether to commit a wrongful act. Taking this factor into account leads to the conclusion that only on rare occasions should sociopsychologically conditioned behavior be assumed, even in the context of war crimes. Part IV further discusses the different implications that this less recognized factor in the research findings has, and should have, on ICL and war crimes prosecution. Part V uncovers a rare category of situations in which, even after the effect of ICL and war crimes prosecution’s normative assertions is taken into account, sociopsychologically conditioned behavior should be assumed: crimes committed by individuals who are, prior to the commission of the crime, subjected to harsh coercive methods in an attempt to strongly indoctrinate them (what are sometimes inaccurately referred to as brainwashing attempts). This Article argues that, in the context of such crimes, a criminal law defense needs to be—but currently is not—afforded. This
Article concludes that after accounting for the effect of the system’s normative assertions, the relationship between the existence of strong sociopsychological coercive conditions and war crimes should not lead to the conclusion that ICL and war crimes prosecution are unjust and ineffective and should therefore be abandoned. Rather, proactive enforcement against war crimes should be supported, since it is likely to lead to ICL and war crimes prosecution being more just and effective.

I. IMPACT OF SOCIOLOGY AND PSYCHOLOGY ON CRIMINAL LAW: DOMESTIC CRIMES VERSUS WAR CRIMES

A. Justifying Penal Law in Light of Sociology and Psychology

1. Rational, Dissuadable Behavior as the Premise that Justifies Penal Law

Punishment cannot be considered just without sufficient moral rationale. Two main categories of moral justifications are usually advanced in support of the punishment inflicted by criminal justice systems: (1) retributivist—punishment of certain individuals for the commission of certain acts (considered wrongful) as an end in itself; and (2) consequentialist—punishment of certain individuals for the commission of certain acts (considered harmful) as an efficient means to reduce future harm. Despite the diversity in views about morality, the vast majority of positions in current criminal law jurisprudence agree that in order for the punishment of crimes to be morally justified, perpetrators’ behavior must usually be proven rational.

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27. See sources cited supra note 19.
and dissuadable. These terms are explained below. Moreover, the mainstream views in criminal law jurisprudence, whether retributivist or consequentialist, assert that human behavior is in fact usually rational and dissuadable.

Modern criminal law jurisprudence is based on the assumption that most actions, of most individuals, most of the time, are made by rational actors. In other words, rationality is assumed to be the default mode of human behavior. This means that it is assumed that most actions of most individuals, most of the time, are made by actors who have some control over their actions and consider the consequences of these actions. Furthermore,
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the vast majority of jurisprudential views hold that the majority of indi-
viduals in the majority of situations usually consider the fact that a legal
prohibition (accompanied by a threat of sanctions) has been enacted as a
negative incentive when determining whether to commit the prohibited act.
In other words, people are assumed to be usually dissuadable by penal nor-
mative assertions. Some irrational individuals are dissuadable; that is the
case, for example, for individuals who obey the law under all circumstanc-
es—even when it requires the commission of a clearly immoral act and even
when there is no chance that they will be caught and punished—due to an
irrational fear of law-enforcement authorities. Similarly, some individuals
who are undissuadable by the normative assertions of a legal system are ra-
tional. That is the case, for example, in situations in which, no matter what
the legal system is practically able to do in order to convey its normative
assertion, a certain rational individual cannot become aware of the relevant
legal duty demanded by that system; or, even if that person can become
aware of the legal duty demanded by the system, she fails to comprehend
that she is duty bound to obey the demands of that system. The vast major-
ity of jurisprudential views hold, however, that the majority of individuals in
the majority of situations are both rational and dissuadable.

Consequentialist views, their main focus being on assisting future crime
prevention, emphasize the premise of dissuadable behavior. Some even
abandon the premise of rationality and claim that because the majority of
individuals are dissuadable, penal punishment is generally effective and
therefore morally justified. However, this is a minority view, and current

the compatibilist view because actual legal systems seem to function under the premise that
individuals do have control over their actions. See sources cited infra note 57 and accompany-
ing text. But see sources cited infra notes 39, 53, 171 (discussing compatibilist perspectives).

35. See Kenneth G. Dau-Schmidt, An Economic Analysis of the Criminal Law as a
Preference-Shaping Policy, 1990 DUKE L.J. 1, 5–6. Some argue this is because individuals are
deterrable by legal threats of sanction; others argue this is because laws have a social influence
that leads individuals to view the commission of the prohibited act more negatively. There is
no need to rule here between these conflicting views. See id. (discussing both views). See also
infra Part II.B.1 (discussing the different crime prevention advantages of punishment). Fur-
thermore, mainstream retributivist views also demand dissuadable behavior to some extent in
order to justify punishment. See sources cited infra note 42.

36. See Gray Cavender, Special Deterrence: An Operant Learning Evaluation, 3 LAW
& HUM. BEHAV. 203, 205–09 (1979) (generally arguing that deterrence is the result of psycho-
logical conditioning and not of a rational decision-making process).

37. The classic example of a person who is rational (and aware of her general duty to
obey the norms of a penal system) yet not dissuadable with regard to a specific penal prohibi-
tion of that system is a person who is out at sea when a new legal probation is adopted and
violates that probation before she has any opportunity to learn about the legal change. E.g.,
Douglas N. Husak, Mistake of Law and Culpability, in THE PHILOSOPHY OF CRIMINAL LAW:
SELECTED ESSAYS 257, 261 (2010). This scenario has become a prototypical example in light
of an actual English case (commonly considered as unjust) in which a sailor was convicted

38. See HERBERT L. PACKER, THE LIMITS OF CRIMINAL SANCTION 74–75 (1968); Jones,
supra note 29, at 1032, 1036.
mainstream consequentialist views consider rationality to be the default mode of human behavior.39

Current mainstream retributivist views (which I refer to as moral-blame perspectives) place greater emphasis on the rationality premise, arguing that it is only morally justifiable to punish individuals who have made a rational decision to violate the law since only such individuals are morally blame-worthy.40 Furthermore, such perspectives claim that punishment in criminal justice systems is generally morally justified because most actions of most individuals, most of the time, are in fact made by rational actors.41 Yet, many moral-blame perspectives also assume that individuals are usually dissuadable.42


40. See Alan Wertheimer, Coercion 148–50 (1987); sources cited supra note 30. See also infra Part II.B.2.

41. See sources cited supra notes 33–34. See also sources cited infra notes 56–57.

42. Often such acknowledgment is made because it is indisputable that rational individuals consider the consequences of their actions. See Ronald J. Rychlak, Society’s Moral Right to Punish: A Further Explanation of the Denunciation Theory of Punishment, 65 Tulane L. Rev. 299, 309–10, 325–26 (1990); see also Ohlin, supra note 34, at 162–63. See generally John Rawls, A Theory of Justice 26 (1971). Sometimes, a retributivist view will be able to justify the punishment of a rational person who is undissuadable. However, such views usually cannot assume that most of the individuals a legal system addresses are undissuadable. Since such views assume that most individuals most of the time are rational, they must also assume that most lawmakers most of the time are rational. Therefore, most lawmakers most of the time should be assumed to consider the consequences of their actions. Lawmaking and law enforcement have costs. As such, a rational lawmaker will not usually legislate a penal prohibition if most of the individuals she addresses, most of the time, are undissuadable. Sometimes, of course, it will be rational to punish individuals who are undissuadable because their incarceration can protect their potential victims or dissuade others from committing similar crimes. Yet such a policy is not likely to be rational if most of the individuals the lawmaker addresses, most of the time, are undissuadable. In such a context, unless the lawmaker makes sure that (almost) all individuals are incarcerated, such a policy is not likely to be effective; moreover, making sure that (almost) all individuals are incarcerated in itself is likely to make that policy extremely costly and so even less likely to be effective (as well as most likely unjust for additional reasons that there is no need to discuss herein). Retributivist views may also accept that some lawmakers, sometimes, act irrationally and enact ineffective norms. To assume that individuals are generally not undissuadable, however, would be to assume that lawmakers are generally irrational. To assume that would contradict the assumption that most people most of the time are rational. See Kramer, supra note 30, at 399. Supposedly, there is one exception to the conclusion just reached. A core retributive Kantian principle asserts that a lawmaker must make sure that individuals who commit horrific crimes are punished even if their punishment will not lead to any future benefit. Immanuel Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right 196–98 (W. Hastie trans., Edinburgh, T. & T. Clark 1887) (1796). This principle is often argued to be the moral justification for ICL. See, e.g., Fletcher, supra note 1, at 26. The moral justification for punishment in such a case, according to modern retributivist perspectives (including that of Kant, see Kant, supra), is that these wrongdoers voluntarily choose to commit the wrongful acts and should thus be punished for making such a choice. It is further assumed that, when it comes to horrific crimes, it is unlikely that individuals will not be able to recognize the moral duty to avoid the commission of such acts. See John Parry, Culpability, Mistake and Official Interpretation of Law, 25 Am. J. Crim. L. 1, 24-25 (1997). Accordingly,
Modern criminal law jurisprudence does acknowledge that individuals are often not perfectly rational and that a variance exists in the extent to which an individual’s decision-making process is influenced by laws and legal sanctions. Yet, criminal law jurisprudence assumes that individuals usually are sufficiently rational and dissuadable, at least to the extent that holding them legally accountable will be morally justified. In this Article, I shall refer to an action committed by an insufficiently rational and dissuadable person as a conditioned action. Further, because it is recognized that the level of rationality and dissuadability of human behavior varies (between different individuals and according to different situations), most jurisprudential views (to varying extents) allow excuse defenses for at least some categories of irrational or undissuadable behavior (that is, conditioned behavior). For example, most jurisprudential views recognize an insanity defense in situations in which a person cannot be considered rational or when it cannot be assumed that she was able to control her actions. With this retributivist reasoning can offer, sometimes, a moral justification for a lawmaker to punish individuals who violate the law, even if the majority of individuals addressed are undissuadable. It can do so mainly when the reason for the majority’s undissuadability is that the benefits these individuals can expect to gain from committing the horrific crime are always greater than the harm they expect to receive if they are caught and punished. That will be the case, for example, when the legal system suffers from severe enforcement deficiencies that enable the lawmaker’s agents to catch and punish only few perpetrators of crimes. Yet, this retributivist reasoning does not always offer a moral justification for a lawmaker to punish individuals who violate the law when the majority of individuals addressed are undissuadable, because it is based on the premise that the perpetrators make a choice to violate the law. As such, it does not offer such a moral justification when the cause for the majority’s undissuadability is that these individuals cannot recognize their duty not to violate the core moral or legal prohibitions, or when they are aware of the wrongfulness of their actions but remain undissuadable because of conditions that compel them still to violate the law. Since claims of sociopsychological coercion argue that the majority of war criminals are undissuadable for these latter reasons, I will not further discuss this retributivist attempt to salvage the moral justification for punishment.

43. E.g., Greene & Cohen, supra note 30, at 1778.
45. Kent Greenawalt, Punishment, 74 J. CRIM. L. & CRIMINOLOGY 343, 360 (1983). I am aware that the wording I use in the text, “individuals usually act in a sufficiently rational, dissuadable manner to be held legally accountable,” is vague. As will become clearer in Part II.B, different moral views do not set the same level of rational or dissuadable behavior as the benchmark for culpability. However, it is important to presently understand that: (1) according to most jurisprudential views, the default mode of human behavior is assumed to be a sufficient level of rational, dissuadable behavior for the punishment of most offenders to be morally justified; and (2) most jurisprudential views do view lack of rationality or dissuadability as a consideration that should (at least in some situations) negate culpability.
46. See, e.g., Parry, supra note 42, at 19 ("[O]ur criminal justice system operates on a presumption of free will, with limited exceptions."). This issue will be discussed further infra Part II.B.
47. Greenawalt, supra note 45, at 360. See generally United States v. Brawner, 471 F.2d 969 (1972) (discussing the standards and criteria for an insanity defense).
that said, different moral views disagree regarding when that defense should be afforded. 48

2. Criminal Law’s Reaction to Behavioral-Determinism Claims

Unlike criminal law jurisprudence, some sociological and psychological theories assume “behavioral determinism.” 49 According to such an assumption, humans do not have control over their behavior; rather, it is a result of sociological and psychological conditions. 50 Since the core premise of criminal law jurisprudence is that human behavior is usually rational and dissuadable, and since this premise serves as the basis for the moral justifications of penal law, some supporters of behavioral determinism argue that if the actions of individuals are actually determined by sociological and psychological conditions, then it is morally illegitimate to punish the commission of crimes. 51

Thus, many claim that if behavioral determinism were scientifically proven, all current criminal law systems that see both rationality and dissuadable behavior as the basis for moral justification for punishment (including ICL) would be morally questionable. 52 Yet, based on the findings of current research, the more accepted position in the fields of sociology and psychology views behavior as a product of both rationality (and dissuadable behavior) and sociological and psychological conditions. 53 Moreover, it is agreed that variations among different situations and among different

50. Jones, supra note 29, at 1034.
52. Some claim that the consequentialist moral justification for punishment can be salvaged. See, e.g., Greene & Cohen, supra note 30, at 1783–84. Some irrational individuals can be deterred (that is, the fear of punishment will be the factor that will determine their actions), and further even the incarceration of those that cannot be deterred (for example, those that have an abnormal tendency toward violence) can have a consequentialist advantage (the protection of others). Yet, according to current mainstream jurisprudential views, such a legal system is considered unjust. See Sloane, supra note 19, at 62 n.110. Moreover, such a consequentialist rationale for punishment will not salvage the moral justification of a legal system that mainly attempts to regulate actions that are performed in situations in which strong external influences determine the behavior of individuals that are not abnormal. In the context of such a legal system, unless all individuals will be incarcerated, the system will be ineffective. Since the prosecution of war crimes is claimed to be such a system, I will not discuss consequentialist attempts to salvage the moral justification for punishment at length in this Article.
individuals exist regarding the degree to which each person’s behavior in each situation is rational and dissuadable, as opposed to influenced by sociological and psychological conditions. Therefore, as in criminal law jurisprudence, the mainstream positions in the fields of sociology and psychology assume that a spectrum exists between completely rational and dissuadable and fully irrational and undissuadable behavior and that only on some relatively rare occasions is human behavior completely determined by sociological and psychological conditions.54

Since the findings of sociological and psychological research have failed to prove behavioral determinism as a rule, criminal law jurisprudence has been able to maintain its premises regarding rational, dissuadable behavior, at a minimum, as theorems. Holding these premises as theorems means that criminal law jurisprudence acknowledges that if these premises should one day be proven false, it would likely drastically change criminal law jurisprudence (as well as many norms that are part of current penal codes).55 Yet, at the same time, criminal law jurisprudence asserts that since this is not the case, sociological and psychological theories that adopt behavioral determinism do not harm the legitimacy of all current penal systems. Thus, these theories can be rejected. Rational, dissuadable behavior can still be assumed to be the default mode of human behavior.56

B. Sociopsychological-Coercion Claims in Agreement with Legal Theory

1. Support for New Defenses Based on Sociological and Psychological Research

The above discussion shows that the premises of criminal law jurisprudence do not clash with the findings of sociological and psychological research. The research findings have indicated that only in

54. See Stephen J. Morse, New Neuroscience, Old Problems, in Neuroscience and the Law: Brain, Mind, and the Scales of Justice 157, 168–69 (Brent Garland ed., 2004); see also Michael S. Moore, Causation and the Excuses, 73 Calif. L. Rev. 1091, 1114–18 (1985) (discussing the popularity of this point of view in law, philosophy, and social sciences). It should be noted that Moore criticizes this view and claims that the influence on behavior that is attributed to free will is in fact an element that should be attributed to determining factors that have yet to be discovered by science.


56. Greene & Cohen, supra note 30, at 1778 (“Thus, the argument goes . . . new science will not justify any fundamental change in the law’s approach to responsibility unless it shows that people in general fail to meet the law’s very minimal requirements for rationality. Science shows no sign of doing this, and thus the basic precepts of legal responsibility stand firm.”).

57. Lon L. Fuller, The Morality of Law 162–67 (1964); Parry, supra note 42, at 19; Sloane, supra note 19, at 62; see also George P. Fletcher, Rethinking Criminal Law 801–02 (1978).
some relatively rare occasions is human behavior completely irrational or undissuadable.\textsuperscript{58} Criminal law jurisprudence is ready to accept that, at least sometimes, irrational or undissuadable behavior should be excused.\textsuperscript{59} Thus, the potential exists for reconciliation between criminal law jurisprudence, on the one hand, and sociology and psychology, on the other. It allows making, in the context of criminal law, excusatory claims (which I will refer to as \textit{sociopsychological-coercion claims}) based on the findings of sociological and psychological research without delegitimizing the general criminal law premise of rational, dissuadable behavior. Such sociopsychological-coercion claims acknowledge rational, dissuadable behavior as the default mode of human behavior but argue that several \textit{new} excuse defenses should be adopted (sociopsychological-coercion defenses) in order to excuse individuals who have violated the law under the \textit{specific conditions} that the research findings indicate render people irrational or undissuadable.\textsuperscript{60}

However, while it seems as though such sociopsychological-coercion claims do not invalidate the rational, dissuadable behavior premise of criminal justice systems, for reasons explained below, that is only true if such sociopsychological-coercion claims are made in the context of the prosecution of domestic crimes.\textsuperscript{61} In the context of war crimes prosecution, such claims do in fact invalidate the rational, dissuadable behavior premise of this particular prosecutorial project and with it the moral justification of ICL. In order to understand the difference between the prosecution of domestic crimes and war crimes, the sociopsychological-coercion claims must be presented along with the sociological and psychological research these claims are based upon.

2. Arguments that the Research Findings Necessitate New Defenses

According to sociological research and theory, members of a close and distinct subculture often have a different system of norms than that of the general society,\textsuperscript{62} while law often represents the norms of the general society.\textsuperscript{63} Therefore, members of such a close subculture might not recognize the illegality of their actions, or, even if aware of their actions’ illegality, might be conditioned not to view the norms that underlie the legal system as obligatory

\begin{itemize}
  \item \textsuperscript{58} See sources cited \textit{supra} notes 53–54 and accompanying text.
  \item \textsuperscript{59} See sources cited \textit{supra} notes 43–46 and accompanying text.
  \item \textsuperscript{60} See Sloane, \textit{supra} note 19, at 61; Gonzalez, \textit{supra} note 13, at 64–66; \textit{see also} Parry, \textit{supra} note 42, at 19–21 (discussing this issue in the context of other excuse defenses). Such claims are made both with regard to lack of rationality and dissuadable behavior. See, \textit{e.g.}, Kim, \textit{supra} note 53, at 257–58; Tallgren, \textit{supra} note 13, at 572–74.
  \item \textsuperscript{61} See \textit{infra} Part I.C.
  \item \textsuperscript{63} See FULLER, \textit{supra} note 57, at 50–51.
\end{itemize}
if they contradict the norms of their subculture. Therefore, a minority of jurists and some sociologists argue that an extensive sociological-coercion defense should be afforded to members of close and distinct subcultures who violate the law due to the influence of their subculture. As Sykes and Matza, for example, state:

[M]easures for “defenses to crimes” are provided in pleas such as nonage, necessity, insanity, drunkenness, compulsion, self-defense, and so on. The individual can avoid moral culpability for his criminal action—and thus avoid the negative sanctions of society—if he can prove that criminal intent was lacking. It is our argument that much delinquency is based on what is essentially an unrecognized extension of defenses to crimes . . . for deviance that is seen as valid by the delinquent but not by the legal system or society at large.

Such a sociological-coercion defense has been accepted (though formally hidden behind a temporary insanity defense) in a domestic context in the case of People v. Metallides. In that case, the defendant killed his best friend when he found out that the friend had raped his daughter. Metallides’s attorney relied on the “irresistible impulse” test of temporary insanity to argue that the “law of the old country” is that “you do not wait for the police if your daughter has been raped.” Metallides was acquitted. In other words, the argument accepted by the jury was that Metallides should be excused because he was unable to internalize, in the relevant situation, the existence of a duty to obey the norms of his new country when they contradicted the norms of his culture of origin.

An example of an acceptance of such a sociological-coercion defense in the context of war crimes prosecution (though formally hidden behind a

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64. This research has been used extensively to explain the reasons leading to the commission of war crimes and atrocities. See, e.g., Hannah Arendt, Eichmann in Jerusalem: A Report on the Banality of Evil 252–55 (1963); Drumbl, supra note 19, at 567–72, 577; Laurel E. Fletcher & Harvey M. Weinstein, Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation, 24 Hum. RTS. Q. 573, 603–06, 616–17, 619–20 (2002); Alison Dundes Renteln, A Justification of the Cultural Defense as Partial Excuse, 2 S. Cal. REV. L. & WOMEN’S STUD. 437, 439 (1993); Tallgren, supra note 13, at 573–76; Gonzalez, supra note 13, at 94–100, 180.

65. See, e.g., Olusanya, supra note 13, at 69–89; see also Ross & Shestowsky, supra note 53, at 1102–04; Gonzalez, supra note 13, at 156–65 (discussing claims made specifically in the context of war crimes). Such claims may also be made in the context of domestic law. See, e.g., Renteln, supra note 64, at 440, 445, 487–500; Alison Dundes Renteln, Raising Cultural Defenses, in CULTURAL ISSUES IN CRIMINAL DEFENSE 423, 426 (Linda Friedman Ramirez ed., 2d ed. 2007).


67. See Renteln, supra note 64, at 464.

68. Id.

69. Id.
combination of superior-order, compulsion, and mistake-of-law defenses) can be seen in the Canadian case of *R v. Finta*. 70 Finta was a commander of the gendarmerie in a city in Hungary during World War II. After the war he immigrated to Canada. Evidence was discovered that suggested that he may have participated in the deportation of Jews from Hungary during the war, and he was charged with war crimes. 71 The Canadian Supreme Court ruled that a person can be acquitted based on the superior-orders defense even if the order she obeyed was manifestly unlawful if “there was such an air of compulsion and threat to the accused that the accused had no alternative but to obey the orders.” 72 Moreover, the court ruled that the defense would be applicable even if there was no actual threat but the accused had made a reasonable mistake to think that such a threat existed. 73 The court thus acquitted Finta for his participation, under orders, in the deportation of Jews from Hungary due to the air of compulsion and threat he mistakenly felt—a feeling that, among other reasons, was strongly influenced by the fact that Jews were perceived as an eminent threat by Hungarian society during the war. 74 The court ruled:

> [T]he respondent has correctly noted that evidence of the following circumstances was entered at trial which gave the defences of mistake of fact and obedience to superior orders an air of reality: (1) Finta’s position in a para-military police organization; (2) the existence of a war; (3) an imminent invasion by Soviet forces; (4) the Jewish sentiment in favour of the Allied forces; (5) the general, publicly stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary; (6) the universal public expression in the newspapers cited by one of the witnesses of approval of the deportation of Hungarian Jews; (7) the organizational activity involving the whole Hungarian state together with their ally, Germany, in the internment and deportation; (8) the open and public manner of the confiscations under an official, hierarchical sanction; (9) the deposit of seized property with the National Treasury or in the Szeged synagogue. 75

Similar claims for the need for a new coercion defense are also made based on the findings of psychological research. These findings indicate that when in a group, a person’s behavior is psychologically influenced by the group’s behavior. 76 If the group behaves in a certain wrongful way, individual group members often tend to join their group’s action without protest,
even if they disagree with the action. \textsuperscript{77} Interestingly, group members will act in such a manner even if the group is objectively wrong. \textsuperscript{78} In Asch’s lines experiment, subjects were shown a card with one line on it, followed by another card with three lines. The participants were then asked to identify which line matched the line on the first card in length. Other individuals (“group members”) were instructed, without the knowledge of the subject, to claim that an incorrect line was the one matching. Most subjects, when asked to identify the correct line after learning of the group’s position, agreed that the line supported by the group was the one matching. \textsuperscript{79}

Moreover, it seems that group members often do not even recognize that the act committed by the group is wrongful (even though they would have clearly recognized it as such outside of a group context). \textsuperscript{80} Thus, they seem to suspend their own judgment and be swept up by the group’s behavior. \textsuperscript{81} An indication of the validity of this assertion can be found in Zimbardo’s prison experiment, \textsuperscript{82} which sought to examine the psychology of prison life. In the experiment, students were divided into two groups: “guards” and “prisoners.” Zimbardo and his fellow researchers had to end the experiment, which was planned to last two weeks, after six days, because the “guards” had become increasingly sadistic, suspending their ordinary judgment and internalizing their group’s role identity. \textsuperscript{83}

The tendency to commit a wrongful act and not recognize it as wrongful is especially strong when the wrongful act is ordered by someone who is considered an authority figure by group members, as indicated by Milgram’s experiment. \textsuperscript{84} In that experiment, in which subjects believed themselves to


\textsuperscript{78} Id.

\textsuperscript{79} Id.

\textsuperscript{80} See, e.g., Gonzalez, \textit{supra} note 13, at 104 (“[Soldiers] are likely to rely only on other soldiers for guidance and may never have made the same decision in another context or category.”).

\textsuperscript{81} Id. (“It is not uncommon to hear of accounts of soldiers indicating uncontrollable, numbed obedience to group norms.”).


\textsuperscript{83} Id. at 69, 80–81, 89.

\textsuperscript{84} Milgram, \textit{supra} note 12; see also Herbert C. Kelman & V. Lee Hamilton, \textit{Crimes of Obedience} 146–66 (1989); Jerry M. Burger, \textit{Replicating Milgram: Would People Still Obey Today?}, 64 AM. PSYCHOLOGIST 1 (2009). Based on this research, some have argued that an extensive superior-orders defense needs to be adopted in the context of war crimes. See, e.g., Gonzalez, \textit{supra} note 13, at 157–58. I do not discuss these claims for a superior-orders defense separately from the other sociopsychological-coercion claims for three reasons: First, many war crimes are not “crimes of obedience,” and thus these claims are less relevant to the discussion of whether the prosecution of war crimes is generally morally justified. Second, I do discuss \textit{infra} note 195 that the conditioned tendency to obey orders is reduced by normative messages in a way that is very similar to the manner in which the effect of other sociopsychological coercive conditions is reduced. Third, as I have discussed elsewhere, there are many considerations that should be taken into account in the formulation of a proper superior-orders defense. Sociopsychological coercion is only one of them. See Ziv Bohrer, The
be assisting in the performance of a science experiment, all of the participants followed the instructor’s commands to give 300-volt electric shocks to a man attached to electrodes as he kicked the wall and writhed in pain (though participants in the study did not know that the man they were shocking was an actor who did not receive actual electric shocks). Sixty-five percent of the participants shocked the man with the maximum voltage, at which point they were led to believe that the man on the other side of the wall had lost consciousness. The participants showed great discomfort with their task but followed the instructions nonetheless.

Furthermore, group behavior changes a person’s perception regarding what should be viewed as wrong. Research dealing with cognitive dissonance indicates that once the group performs an act that a group member initially thought of as wrong (or that she would have recognized as wrong in a non-group-behavior context), the group member often abandons her previous position and claims that the act is right or justified.

Thus, it can be concluded that psychological research findings show that under conditions such as group dynamics and peer pressure, people either do not recognize the wrongfulness of their actions (even though in “normal” conditions they would have been able to recognize them as such), or do recognize the wrongfulness of their actions but are nevertheless “psychologically compelled” to act in a wrongful manner. Moreover, unlike the sociological findings that require being a part of a certain preexisting social group, the psychological findings indicate that any person can experience strong situational group cohesion. Thus, in a domestic context, not only can some gang members belonging to a close, distinct, disenfranchised subculture be seen as

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85. Milgram, supra note 12, at 375–76.
86. Id.
87. Id. at 377.
89. According to the cognitive dissonance theory, which has been supported by research, if a person is induced to act contrarily to a previously held attitude, and if she is provided minimal external justification for doing so, she will change her attitude to be more consistent with her behavior, especially if the act she committed has caused an aversive consequence. See Eddie Harmon-Jones, Evidence that the Production of Aversive Consequences Is Not Necessary to Create Cognitive Dissonance, 70 J. Personality & Soc. Psych. 5, 5–7 (1996) (discussing the theory and the different positions regarding the extent to which an aversive consequence is necessary). Moreover, it is commonly claimed that this process can occur even if the wrongful act is committed not by the individual but by other members of the group with whom the person identifies. See, e.g., Keijzer, supra note 88, at 54; John M. Darley, The Cognitive and Social Psychology of Contagious Organizational Corruption, 70 Brook. L. Rev. 1177, 1185–86 (2005).
90. See, e.g., Keijzer, supra note 88, at 50–64; Fletcher & Weinstein, supra note 64, at 606–12; Muñoz-Rojas & Fréïard, supra note 13, at 193–200.
91. E.g., Stanley Milgram, Obedience to Authority: An Experimental View 205 (1974).
compelled to act, but so can any individual who commits a crime under the influence of extremely strong peer pressure and group cohesion. Based on these findings, a minority of jurists and some psychologists argue that those who violate the law under such conditions should be afforded a psychological-coercion defense. As Ross and Shestowsky, for example, state:

To the extent that we cannot control the immediate situation or larger environment confronting the potential transgressor, and our goal simply becomes public safety, the relative effectiveness of the threats of punitive incarceration as opposed to other types of interventions in providing such safety becomes an empirical question for which no simple answer is likely to be forthcoming. The threats of harsh prison conditions may well serve as a deterrent to potential transgressors. But the distressingly high recidivism rates we observe for parolees suggests that prison produces no positive change in prisoners’ attitudes, values, capacities or calculations of risks versus benefits of crime, or at least that the pressures and constraints of the environments to which they return are more powerful than any changes that we accomplished. If society’s goal is a criminal justice system that is not only effective but also logically coherent and just, additional implications of a situationist perspective come to the fore. One such implication would surely be a more “forgiving” response to transgressors who have been subjected to unusually strong situational pressures, including pressures whose strength is unlikely to be appreciated by lay observers who have never faced those pressures.

Such a psychological-coercion defense, in the context of war crimes prosecution, seems to have been accepted, for example, by an Italian court

92. Compare the position in Richard Delgado, “Rotten Social Background”: Should Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 LAW & INEQUALITY 9, 54–55 (1985), with that in Ross & Shestowsky, supra note 53, at 1101. Delgado’s support of an excuse defense in the context of gang members (and other members of disenfranchised subcultures) is based on the sociological and psychological history of such individuals and not only on situational cohesive factors. Ross and Shestowsky, on the other hand, rely on situational cohesive factors to claim that any person that has performed a crime under the influence of strong peer pressure should at least enjoy a mitigation of the severity of punishment.

93. See, e.g., JOHN MICHAEL DORIS, LACK OF CHARACTER: PERSONALITY AND MORAL BEHAVIOR 134 (2002). (“We’ve seen how noncoercive situational factors may result in ‘ordinary, decent’ people acting in ways they know to be wrong: Milgram’s subjects tearing their hair as they shocked their victim, a Stanford Prison Experiment ‘guard’ awash in self-loathing as he abused ‘inmates,’ and the anxiety experienced by some passive bystanders in the experiments of Darley and colleagues. Such data suggest ‘weakness of will,’ ‘incontinence,’ or as Aristotle called it, akrasia—cases where a person knowingly acts other than as she thinks is best.” (citations omitted)); see also Ross & Shestowsky, supra note 53, at 1101 (discussing such a claim in the context of domestic crimes).

94. Ross & Shestowsky, supra note 53, at 1100–01 (footnote omitted) (discussing the issue in the context of domestic crimes).
in the case of Kappler and others. Kappler and his subordinates were prosecuted for their participation in the Ardeatine Cave Massacre: a massacre committed under Hitler’s orders as reprisal for the killing of thirty-two S.S. soldiers by Italian partisans. The court ruled:

The mental habit of prompt obedience that the accused developed working in an organization based on very strict discipline, the fact that orders with the same content had been previously executed in the various areas of military operation, the fact that an order from the Head of the State and Supreme Commander of the armed forces, owing to the great moral force inherent in it, cannot but diminish, especially in a serviceman, that freedom of judgment necessary for accurate appraisal, all these are elements which lead this Court to believe that it may not be held with certainty that Kappler was aware and willed to obey that unlawful order. Based on this conclusion of the court, all of Kappler’s subordinates were acquitted, since they committed their actions in obedience to orders. Kappler was convicted only for the acts of murder that he had instigated without orders.

Claims that sociopsychological-coercion defenses should be afforded by criminal law systems are not intended to clash with criminal law jurisprudence’s core assumptions of rational, dissuadable behavior. They only argue that in addition to the exceptional situations in which current criminal law jurisprudence acknowledges that irrational and undissuadable behavior exists and affords excuse defenses, several additional (seemingly exceptional) situations exist in which irrational or undissuadable behavior needs to be recognized by the adoption of new criminal law defenses in the context of these situations. The situations in which they argue irrational and undissuadable behavior needs to be recognized (and, therefore, defenses afforded) are those situations in which sociopsychological coercive conditions exist that, according to research, lead the vast majority of individuals to commit wrongful acts. Thus, even under an assumption that

95. Trib. Militare Territoriale Di Roma, 20 luglio 1948, Foro Pen. 1949, 603 (It.) translated and cited in Antonio Cassese, INTERNATIONAL CRIMINAL LAW 236–37 (2003). See generally Trib. Militare Territoriale Di Roma, 20 luglio 1948, Foro it. 1949, II, 160 (It.) translated in 15 ANN. DIG. & REP. PUB. INT’L. L. CASES 471 (Hersch Lauterpacht ed., 1948) (omitting relevant mens rea analysis). It should be noted that this ruling was given before most of the psychological research on the subject had been conducted and thus did not directly rely on this research.
96. Cassese, supra note 95.
97. Id. at 236.
98. Id.
99. E.g., Sykes & Matza, supra note 66, at 666. See also sources cited supra note 60 and accompanying text.
100. See, e.g., Ferdinand David Schoeman, Statistical Norms and Moral Attribution, in Responsibility, Character, and the Emotions: New Essays in Moral Psychology 287,
these claims are correct in their interpretation of the research regarding when irrational and undissuadable behavior should be assumed, accepting their interpretation as true and adopting the defenses they support does not seem to force the abandonment of current premises of criminal law jurisprudence. However, as will be now discussed, while it might be argued that this is the case with regard to the prosecution of domestic crimes, it is not likely to be the case with regard to war crimes prosecution.

C. Differences Between Domestic Crimes and War Crimes Prosecution

What are the implications for a legal system that interprets the research as showing that irrational and undissuadable behavior exists in all the situations discussed above and therefore affords defenses for all individuals who violate the law in such situations? Notably, these implications are considerably different depending on whether the system prosecutes domestic non-war-related crimes or war crimes; thus they are considerably different depending on whether the system is a domestic legal system or ICL.

Let us assume that the threshold from which a behavior is considered so irrational or undissuadable as to obligate excusing individuals is low: that is, that any instruction is considered an order that suspends self-control, even a low level of peer pressure is sufficient to excuse a person, and any membership in a social group is sufficient in order to view a person as inculpable. Sociopsychological-coercion claims suggest that in the situations in which sociopsychological-coercion defenses are applicable, behavior is conditioned. Under such a low-threshold interpretation of the research findings, these defenses seem to be applicable to almost all the situations regulated by any legal system. Accordingly, accepting such a low threshold as true would force the abandonment of the premise that rational, dissuadable behavior is the default mode of human behavior in general (that is, in the contexts of both domestic and war crimes) and the acceptance of determinism. This would threaten the moral justification of any legal system.

Yet supporters of sociopsychological-coercion defenses seem to assert a higher threshold—for example, by requiring strong peer pressure or truly close and distinct subcultures. Under such a threshold the legitimacy of the

298 (1987). For explicit strong reliance on statistics, see, for example, Ross & Shestowsky, supra note 53, at 1110. It should be noted that Ross and Shestowsky hold an extreme position. They abandon the demand for rationality and only require dissuadable behavior in order to justify punishment. Based on such a view, they argue that excuse defenses should be offered when statistics strongly indicate that people are not likely to be able to avoid committing the act. Id. at 1100–03.

101. Dana K. Nelkin, Freedom, Responsibility and the Challenge of Situationism, 29 MIDWEST STUD. PHIL. 181, 193 (2005) (“[O]ne might think that the experiments are threatening because they suggest that some sort of psychological determinism is true, and psychological determinism is incompatible with freedom and/or responsibility.”).
prosecution of “regular” domestic crimes is much less likely to be threatened than war crimes prosecution.\textsuperscript{102}

For a legal system dealing with domestic crimes, the practical implications of the enactment of sociopsychological-coercion defenses under such a threshold are likely to be limited. Adopting such sociopsychological-coercion defenses, because they will still be extensive, will certainly reduce the workload of criminal prosecutors—as well as the system’s conviction rate—and, some may even argue, reduce the effectiveness of the system.\textsuperscript{103} Furthermore, it might even lead, if the threshold is somewhat lowered, to a situation in which the threat of legal punishment is completely lifted from certain categories of individuals (such as gang members, new immigrants, or individuals jointly committing a crime due to strong peer pressure).\textsuperscript{104} But these effects will be limited. The vast majority of domestic criminals will not be eligible for such defenses, since most domestic criminal offenders, under the threshold now discussed, will not be considered as belonging to a sufficiently close and distinct subculture, and many will not be considered to be committing a crime under sufficiently strong peer pressure.\textsuperscript{105} Moreover, sociopsychological-coercion claims suggest that, in most situations in which sociopsychological-coercion defenses are irrelevant, rational, dissuadable behavior can be assumed. Thus, since in the contexts of most domestic crimes these defenses are irrelevant, if a legal system dealing mostly with domestic (nonwar) crimes accepts this interpretation of sociopsychological-coercion research as true, doing so would not force the abandonment of the premise of rational, dissuadable behavior as the default mode of human behavior. Thus the moral justification of such a legal system will not be threatened.

However, this is not the case within the context of war crimes prosecution. The vast majority of war crimes are committed under extreme

\textsuperscript{102} See, e.g., Renteln, supra note 64, at 497–99 (distinguishing between what she sees as members of distinct cultures and members of subcultures, and arguing that members of subcultures should not be afforded the defense because “their worldview is not radically different from the rest of society”); Ross & Shestowsky, supra note 53, at 1101 (stating that under a retributivist perspective “pressures whose strength is unlikely to be appreciated by lay observers who have never faced those pressures” is what is needed in order to excuse a person).

\textsuperscript{103} If most individuals are deterred by the penal threats of the system, punishing those who do act out of conditioned behavior may sometimes increase the effectiveness of the system, since their punishment can aid in increasing general deterrence. See Fletcher, supra note 57, at 813–17.

\textsuperscript{104} See sources cited supra notes 65–67, 92–93 and accompanying text.

\textsuperscript{105} See Patricia J. Falk, Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage, 74 N.C. L. Rev. 731, 809 (1996); Renteln, supra note 64, at 493–94; cf. sources cited infra note 110 and accompanying text (discussing the greater effect of sociopsychological-coercion claims on ICL and war crimes prosecution).
conditions such as combat or “social breakdown”\textsuperscript{106} and often by members of closed, strongly tied groups (such as a military unit).\textsuperscript{107} Moreover, almost all perpetrators of war crimes are combatants belonging to a closed military subculture that is a tightly knit social unit that strongly indoctrinates its members,\textsuperscript{108} and when the prosecution is made by an international tribunal or a foreign state, it can further be stated that all perpetrators of war crimes belong to distinct cultures (their domestic societies). Furthermore, most of the relevant crimes that are performed by noncombatants or performed outside the context of an armed conflict, such as some acts of genocide and crimes against humanity (as well as many of the crimes that are performed by combatants or otherwise during an armed conflict) are usually performed under conditions of social breakdown or by members of isolated societies (such as by members of authoritarian states).\textsuperscript{109} As such, if war crimes prosecution were to fully accept the sociopsychological-coercion claims as true—even the ones that are not based on a premise of behavioral determinism—it is likely that the defenses would be so plentiful that few criminals, if any at all, could be punished.\textsuperscript{110} Moreover, since sociopsychological-coercion claims suggest that behavior is conditioned in the situations in which sociopsychological-coercion defenses are applicable, and since these defenses seem to be applicable to almost all the situations regulated by ICL and war crimes prosecution, then accepting these claims as true would force the abandonment of the premise that rational, dissuadable behavior is the default mode of human behavior in the context of the actions regulated by ICL and war crimes prosecution.\textsuperscript{111}

\section*{II. Jurisprudential Reactions to Sociopsychological-Coercion Claims}

Assuming this interpretation of sociopsychological-coercion research is true means that while, in the context of the prosecution of regular do-

\begin{itemize}
\item \textsuperscript{106} See Cryer et al., supra note 17, at 4, 14 (discussing the core crimes of ICL and the core root shared by ICL and international humanitarian law); Jenny S. Martinez, Understanding Mens Rea in Command Responsibility: From Yamashita to Blaskic and Beyond, 5 J. Int'l Crim. Just. 638, 639 (2007); Gonzalez, supra note 13, at 83, 92–155, 159 (describing the uniquely strong sociopsychological coercive conditions that exist for combatants).
\item \textsuperscript{107} Martinez, supra note 106 (identifying combatants as the primary perpetrators of war crimes); Gonzalez, supra note 13.
\item \textsuperscript{108} See Gonzalez, supra note 13, at 83, 92–94, for a discussion of the military as a social subculture that strongly indoctrinates its members.
\item \textsuperscript{109} Drumbl, supra note 19, at 567; Fletcher & Weinstein, supra note 64, at 605–20; Olusanya, supra note 13, at 31–33, 54–58, 69–72; W. Michael Reisman, Legal Responses to Genocide and Other Massive Violations of Human Rights, 59 Law & Contemp. Probs. 75, 77 (1996); Sloane, supra note 19, at 41–42, 72–77; Tallgren, supra note 13, at 571–76, 592.
\item \textsuperscript{110} See Ross & Shestowsky, supra note 53, at 1102–04; see also Olusanya, supra note 13, at 69–72; Reisman, supra note 109, at 77; Tallgren, supra note 13, at 571–76, 592.
\item \textsuperscript{111} Dingwall & Hillier, supra note 25, at 6, 18 (interpreting the research in this way and, therefore, criticizing the legitimacy of the prosecution of war crimes).
\end{itemize}
mestic crimes, legal systems can retain the premise that most individuals are rational and dissuadable by such penal normative assertions, in the context of war crimes prosecution, the same assumption cannot be made. Accordingly, it seems that while sociological and psychological research findings do not lead to the conclusion that domestic criminal justice systems generally lack moral justification, they do lead to the conclusion that war crimes prosecution lacks moral justification. As Osiel has stated, in the context of sociological coercion (describing Arendt’s position):

[Modern episodes of large-scale administrative massacre tend to occur in circumstances where many of the legal concepts associated with culpability don’t make sense . . . . When the dominant mode of moral thinking is missing in just a single individual, the system of criminal justice works reasonably well. Its concepts of malice, character, and sanity permit it to deal coherently and defensibly with such an individual. In such cases, the problem can plausibly be classified as the individual defendant, not the system . . . . But the system fails utterly and makes little sense . . . when the social institutions that bolster normal modes of moral thinking have been destroyed, so that such thinking no longer prevails among many members of society. The “crisis of our century” . . . consisted precisely in the destruction of these institutional supports for the individual’s ability to tell right from wrong . . . .]

If this is the correct interpretation of the research findings regarding sociopsychological coercion, from a retributivist moral-blame perspective it becomes difficult to justify ICL and war crimes prosecution, since they allow the extensive punishment of individuals who seem to have acted in a conditioned manner. From a consequentialist perspective, it also becomes difficult to justify ICL and the prosecution of war crimes. Since the vast majority of atrocities are committed under conditions in which people act in a conditioned manner, there may not be individuals who will be influenced by ICL and war crimes prosecution.

In other words, if we view all the different international and domestic war crimes prosecutions as being part of one legal system, then this legal system cannot maintain the premise of rational, dissuadable behavior as the default mode of human behavior with regard to the individuals it addresses. Thus, this penal system is suspect as lacking a moral justification and

112. Mark J. Osiel, Mass Atrocity, Ordinary Evil, and Hannah Arendt 59–60 (2001); see also Arendt, supra note 64, 277–79 (supporting the punishment of Eichmann despite the absence, in her opinion, of any standard of fault).
113. See, e.g., Dingwall & Hillier, supra note 25, at 9–15, 18; Ross & Shestowsky, supra note 53, at 1102–04; see also Muñoz-Rojas & Frésard, supra note 13, at 202 (“[T]he idea that the bearer of weapons is morally autonomous is inappropriate.”).
114. Dingwall & Hillier, supra note 25, at 7–9, 14–18; Tallgren, supra note 13, at 571–76, 583–84, 592.
115. See sources cited supra note 9 and accompanying text.
being ineffective and unjust. Alternatively, if we view each domestic war-crimes-prosecution mechanism as being part of the relevant domestic legal system, and view ICL as a legal system only when referring to war crimes prosecution made by international tribunals,\textsuperscript{116} then this (narrowly defined) international legal system is suspect as unjust and ineffective and thus lacking a moral justification. Moreover, many (if not all) of the domestic war crimes prosecutions are suspect as unjust and ineffective, and to some extent the whole domestic attempt to regulate such actions through the use of criminal law is suspect as lacking moral justification.

However, are criminal justice systems in general, and in the context of war crimes prosecution specifically, morally bound to accept the claim that such an extensive category of individuals must be excused because their behavior has been conditioned? As will be discussed below, current jurisprudence has supplied sufficient reasoning as to why claims for such extensive sociopsychological-coercion defenses should not be fully accepted. However, this jurisprudence has failed to supply sufficient guidance as to when, despite the existence of strong sociopsychological coercive conditions, rational, dissuadable behavior can still be assumed.\textsuperscript{117} Therefore, as will be further explained, since strong sociopsychological coercive conditions exist in almost all of the situations that ICL and war crimes prosecution attempt to regulate, current jurisprudence insufficiently supports the assumption that rational, dissuadable behavior is the default mode of behavior in the context of war crimes.\textsuperscript{118}

A. Should Sociopsychological-Coercion Claims Be Accepted?

1. Increasing Readiness to Accept Sociopsychological-Coercion Claims in the Context of War Crimes

Some scholars argue that sociopsychological-coercion claims’ interpretation of research findings (regarding when conditioned behavior should be assumed) must be fully accepted by legal systems.\textsuperscript{119} Such an argument can be found, in the context of ICL and war crimes prosecution, in several forms. Some accept these interpretations as true and therefore argue that war crimes prosecution, and with it ICL, cannot be justified\textsuperscript{120} or, at a minimum, that it is currently very difficult to justify ICL and war crimes prosecution.\textsuperscript{121} Dingwall and Hillier, for example, state:

\begin{itemize}
\item \textsuperscript{116} See sources cited supra note 10 and accompanying text.
\item \textsuperscript{117} See infra Part II.B.
\item \textsuperscript{118} See id.
\item \textsuperscript{119} See sources cited supra note 100; sources cited infra notes 120–124.
\item \textsuperscript{120} See, e.g., Dingwall & Hillier, supra note 25, at 18; see also Osiel, supra note 23, at 118–19.
\item \textsuperscript{121} Drumbl, supra note 19, at 568–70, 607–10; Tallgren, supra note 13, at 564–65, 594–95.
\end{itemize}
Extraordinary crimes are committed by ordinary people in extraordinary times. Deterrence can only be relevant if the extraordinary times return. The atypical context also challenges retributivists. There is no doubt the harm is severe. Culpability is much more difficult to assess . . . if the validity of punishment cannot be provided by either deterrence or retribution . . . .

Can we justify punishment in these contexts? The crimes dealt with by the Tribunals did not occur in normal circumstances. Psychological research suggests that in the right context there are remarkably few of us who are not capable of considerable cruelty. Punishment will have limited or no effect in such situations. The focus has been on the individual offender which has meant that the context has been overlooked. What society requires most is that the context does not re-emerge—without the context the crime does not occur.122

For reasons explained in this Article, these views are inappropriate. To be clear, even today the majority of jurists reject them. Yet the problem with current jurisprudential rejections of these views, as discussed later herein, is that they in fact fail to show that rational, dissuadable behavior can generally be assumed in the context of war crimes. This leaves the moral justification of ICL and war crimes prosecution on shaky ground. Accordingly, currently a concern exists that as ICL and war crimes prosecution are increasingly applied, support for views such as that of Dingwall and Hillier will gain momentum.

An indication of this increased support can be found in two phenomena. First, prominent jurists have recently begun to claim that individuals commit atrocities as a result of conditioned behavior123 even in the context of soldiers of democratic states that routinely use domestic law and law enforcement to prosecute their own agents who commit war crimes. Minow, for example, in the context of American soldiers, stated:

122. Dingwall & Hillier, supra note 25, at 18 (footnote omitted).
123. See, e.g., Martha Minow, Living Up to Rules: Holding Soldiers Responsible for Abusive Conduct and the Dilemma of the Superior Orders Defence, 52 McGill L.J. 1, 37 (2007). For a more moderate response but one that still abandons the possibility for deterrence, see Mark J. Osiel, Obeying Orders: Atrocity, Military Discipline, and the Law of War, 86 Calif. L. Rev. 939, 1068 n.541 (1998) (“Unfortunately, as a practical matter, it is likely that most illegal orders will be obeyed, given the overwhelming influence of the military’s hierarchical structure, particularly on the lowest echelons. The question is therefore simply which instances of such obedience should be excused.”).
reduces or eliminates liability is not likely to prevent military atrocities. Both research and common sense indicate the near futility of teaching soldiers the rule that superior orders do not shield them from punishment or liability for genocide, mass violence, or crimes against humanity. However formulated, the rule produces cognitive dissonance: sometimes the soldier should obey without question and sometimes the soldier should question and not obey. Some formulations may push toward more questioning than others, but once in the field, this rule is not likely to be foremost in the soldier’s mind.124

If such a position is accepted, it casts serious doubts on the legitimacy of any war crimes prosecution.125 As will be discussed later,126 I posit that, if research findings are correctly interpreted, the right conclusion is that many subordinates even in authoritarian states do not commit atrocities as a result of conditioned behavior. Yet, even if one reaches the conclusion that my position is excessive, at a minimum I hope one will be convinced, in light of the discussion made below, that positions such as Minow’s are wrong. This is sufficient to defend the legitimacy of many war crime prosecutions.

A second indication of increased support can be found in current criticisms, made in light of sociological and psychological research findings, of attempts by international tribunals to prosecute low-ranking subordinates.127 There are moral justifications to focusing on those at the top of the chain of command. Given the limited resources available for international tribunals, it is appropriate to focus on those who are both most responsible and best equipped to prevent future crimes.128 Moreover, harsh punishment of all perpetrators of war crimes by international tribunals may backfire, leading to antagonism within the relevant domestic societies and thus to violations of ICL out of defiance.129

Yet, a position that argues only for the prosecution of high-ranking individuals raises several concerns. First, a consequentialist difficulty exists. Subordinates are often the ones that physically perform the war crimes, whereas commanders are often not present during their commission. Thus, it is often easier to catch and convict a subordinate;130 moreover, in many cases

124. Minow, supra note 123, at 36.
125. Minow supports the prosecution of the conditioned soldiers based on the consequentialist rationale of the expressive function of criminal law, id. at 39; however, the flaws of this consequentialist rationale will be discussed in Part II.B.1.
126. See infra Part V.A.
127. E.g., Tallgren, supra note 13, at 572–73.
128. See Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case Against Mr. Thomas Lubanga Dyilo, ¶¶ 45–46 (Feb. 24, 2006).
129. See infra Part III.B.2.
130. See Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 263, 270–92 (2004) (discussing war crimes); Jeffrey I. Ross,
the only person that can supply evidence of a commander’s participation in a crime is the subordinate. As such, a legal system that addresses only high-ranking commanders is less able to deter even commanders (who are assumed to be rational and dissuadable) in comparison to a legal system addressing both subordinates and commanders.

Secondly, as a descriptive matter, war crimes are not prosecuted only by international tribunals, and not only high-ranking individuals are prosecuted. The international community uses the threat of prosecution and actual prosecution of high-ranking individuals in international tribunals in order to incentivize states to prosecute low-ranking individuals, and even resorts sometimes to the prosecution of low-ranking individuals when attempts to convince the states to do so fail. Accepting the position that, in light of sociological and psychological research findings, only high-ranking individuals can be prosecuted (currently directed against international tribunals) seems to imply that domestic postwar prosecution of low-ranking individuals that a state performs due to international pressure is also illegitimate. Thus, it delegitimizes much of past war crimes prosecutions and prevents much of the future development of ICL and war crimes prosecution.

As will be discussed later, I suggest that if research findings are correctly interpreted, the right conclusion is that many low-ranking subordinates—even low-ranking subordinates of authoritarian states—can be held accountable. Yet, even if one reaches the conclusion that my position is excessive, at a minimum, in light of the discussion made hereinafter, the legitimacy of the war crimes prosecution of low-ranking subordinates of many states could be justified.
2. The Overinclusiveness of Sociopsychological-Coercion Claims

An interpretation of sociological and psychological research findings that supports sociopsychological-coercion claims and an extensive excusing of perpetrators is, in fact, inappropriate. The normative implications of these claims do not logically proceed from the research findings. As many in current criminal law jurisprudence convincingly argue, although most people act in a certain manner, this does not necessarily mean that all of these people, or even most of these people, do so irrationally or without sufficient awareness of the legal system’s demands.136

Conditioned behavior cannot be directly assessed. All that the research can show is a statistical tendency to commit a wrongful act,137 and the correlation between the two is only partial. As such, at least some of the individuals who perform a wrongful act will be rational and dissuadable, and at least some of the people that function under sociopsychological coercive conditions will not behave in a conditioned manner and thus may not commit the wrongful act.138 Therefore, a legal rule that renders an excuse to all individuals that violate the law under the conditions that research findings indicate lead to a tendency to perform wrongful acts is likely to be extremely overinclusive.139 Thus, in the context of ICL and war crimes prosecution, such an interpretation of the sociopsychological research is likely to overestimate the extent of conditioned behavior.

It is true that any legal rule is to some extent overinclusive and underinclusive.140 Therefore, in choosing a rule, a lawmaker should choose the one that is the least flawed compared to the alternatives.141 However, those who support extensive excuse defenses based on sociological and psychological research simply leap from the finding of a strong statistical tendency to extensive defenses and miss two significant steps: (1) they fail to sufficiently


137. It should be noted that, on the philosophical level, even the kind of relation that exists between observable behavior and mental state is disputed. See Anthony Kenny, *Freewill and Responsibility* 6–7 (2011). Yet, even if one adopts a reductionist perspective, one must acknowledge that currently, science cannot assess mental states directly. See Morse, *supra* note 54, at 167; see also Ralph Slovenko, *Psychiatry and Criminal Culpability* 209–10, 219 (1995) (discussing the fact that statistical evidence supplies only indirect support for a claim of conditioned behavior in a specific case).


acknowledge that at least some of the individuals who perform the wrongful acts are rational and dissuadable;\textsuperscript{142} and (2) they fail to justify why an attempt to more accurately distinguish between conditioned behavior and rational, dissuadable behavior is bound to lead to worse results.\textsuperscript{143} Therefore, any interpretation of the sociopsychological research that simply concludes that the behavior of all those who perform wrongful acts under such conditions is conditioned or should be excused must be rejected, both for lacking a sufficient basis and for likely supporting overly extensive excuses.

Yet, the inability to discern conditioned behavior from rational, dissuadable behavior also creates a difficulty for those who do not accept this interpretation of the sociopsychological research (that is, those who wish to limit the extent to which the existence of sociopsychological coercive conditions during the commission of a crime will be accepted as a basis for a criminal law defense). Often, the way in which rational, dissuadable individuals tend to behave can be estimated.\textsuperscript{144} We can expect variation between individuals (due to differences in preferences,\textsuperscript{145} as well as due to the existence of a spectrum between perfect rationality and full irrationality\textsuperscript{146}), but we still often can estimate the way rational, dissuadable individuals will tend to behave. Therefore, research showing that the majority of individuals will commit wrongful acts under conditions in which we would expect most rational, dissuadable individuals not to commit a wrongful act makes it harder to claim that all (or most) who violate the law under these conditions do so rationally and under awareness of the relevant criminal sanctions at the time the act is committed.\textsuperscript{147} Thus, such results make it much more likely that many of

\textsuperscript{142.} See Morse, supra note 54, at 180.

\textsuperscript{143.} See id. at 179 (arguing that their flaw is even more severe, namely a failure to acknowledge that the determination of where along the spectrum between complete irrationality and full rationality the excusatory line should be drawn is a normative one and not a scientific fact).

\textsuperscript{144.} See Colb, supra note 33, at 238 (stating that the assumptions concerning the default mode of human behavior of microeconomic models [models that attempt to predict how people would act] and of modern criminal law are identical).

\textsuperscript{145.} If we have no ability to assess the preferences of rational individuals, we will not be able to predict their behavior. See Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 Calif. L. Rev. 1051, 1060–62 (2000), for the criticism of economic models that rely on the “thin” rationality assumption.

\textsuperscript{146.} See, e.g., sources cited supra note 54; see also Slovenko, supra note 137, at 40–41.

\textsuperscript{147.} For example, if research discovers that all people will cheat on their taxes when they know that they will not get caught, nobody will argue that such cheating is irrational or undissuadable or that people who cheat on their taxes must be excused. Dressler, supra note 136, at 1365. But see V. Lee Hamilton, Intuitive Psychologists or Intuitive Lawyers? Alternative Models of the Attribution Process, 39 J. Personality & Soc. Psychol. 767, 771 (1980) (arguing that rationality should be assumed to be uncommon in the context of obedience to orders since Milgram’s research shows that the way individuals generally tend to act under such conditions considerably differs from the way we expect rational individuals to act). Hamilton’s argument, however, does not sufficiently supply a justification for not attempting to
these individuals were compelled by sociological and psychological conditions.148

For example, Milgram’s experiment uncovered that the general tendency to commit wrongful acts under orders is much higher than what we would expect from rational individuals, and this may indicate that a great portion of those who obey orders act in a conditioned manner.149 Yet, to assume that all who obey orders act in a conditioned manner would be overreaching, since the research findings are insufficient to reach such a conclusion, and it is more likely that not all “crimes of obedience” are conditioned.150 Furthermore, to excuse all individuals that obey orders without attempting to distinguish conditioned obedience from rational, dissuadable obedience, or without convincing evidence that any attempt to more accurately distinguish between the two groups would lead to worse results, is inappropriate.151 Yet, at the same time, any attempt to more accurately distinguish between the two groups must also justify itself by showing that it is sufficiently accurate or that there are reasons to support not trying to more accurately draw the line.152

Thus, current criminal law jurisprudence is faced with a need to differentiate in a justifiable way between conditioned violators and rational, dissuadable violators in those situations in which sociopsychological coercive conditions exist, and, as the next Section will show, it fails to do so. This in turn means, as discussed in the next Section, that a difficulty still exists in generally assuming rational, dissuadable behavior in the context of war crimes because sociopsychological coercive conditions exist in almost all relevant situations.

B. Jurisprudential Attempts to Limit Sociopsychological-Coercion Claims

In current criminal law jurisprudence, both consequentialist and moral-blame responses have been raised in an attempt to address the difficulty in differentiating between conditioned violators and rational, dissuadable violators. The discussion in the current Section will examine these reactions and more accurately distinguish between those who rationally decided to obey wrongful orders and those who are conditioned to do so. In other words, we can still expect some individuals to obey illegal orders for rational reasons, so why should we not attempt to punish them?

148. See Osiel, supra note 123, at 959–60 (“Criminal law often faces the question of how far to go in the direction of reducing liability in light of such inherent cognitive constraints.”). For the unique difficulty of drawing such a line in the context of atrocities, see Osiel, supra note 23, at 125–26.

149. Hamilton, supra note 147, at 771.

150. See Gonzalez, supra note 13, at 90.


152. This is both for the reasons discussed supra in notes 141 and 143, and because punishment must be done only when a moral justification exists for doing so. See sources cited supra note 19.
show that each is flawed and that, as a result of these flaws, neither succeeds in disproving the claim that rational, dissuadable behavior cannot be assumed within the context of most war crimes—leaving the moral standing of ICL and war crimes prosecution in question.

1. The Consequentialist Response

Most consequentialist views of criminal law hold that the main purpose of modern criminal law is to direct behavior, and thus that it is less important whether the crime was committed by conditioned individuals or by rational, dissuadable ones.\textsuperscript{153} Supporters of these views differ in the extent to which they accept excuse defenses, in the importance they place on the need to ascertain whether a person that has committed a crime was rational or dissuadable, and in the consequentialist advantages they argue excuse defenses might possess.\textsuperscript{154} Despite these differences of opinion, it seems that according to most consequentialist points of view, evidence indicating (even if not positively proving) that individuals commit crimes irrationally or that their behavior is undissuadable under certain conditions can serve as the basis for an excuse defense.\textsuperscript{155} This is, however, only when there is little advantage in their punishment.\textsuperscript{156}

\textsuperscript{153.} See, e.g., Ross & Shestowsky, supra note 53, at 1113. Taken to the extreme, such consequentialist views are ready to abandon the rationality premise. See sources cited supra notes 29, 38 and accompanying text. However, many consequentialists do believe that people usually act in a rational manner, and this is the premise held by the consequentialist views within the mainstream of modern criminal law jurisprudence. See Jones, supra note 29, at 1038; Sloane, supra note 19, at 62 n.110; see also Halleck, supra note 30, at 127; Kramer, supra note 30, at 399; supra sources cited note 33 and accompanying text.

\textsuperscript{154.} Many consequentialist views (including utilitarian views) are ready to recognize criminal law excuses. Some such views claim that when a person is under conditions that grant an excuse for her behavior, she will not be able to be deterred, and therefore the utility of punishment is not substantial. See, e.g., Jones, supra note 29, at 1052; Steven Shavell, Criminal Law and the Optimal Use of Nonmonetary Sanctions as a Deterrent, 85 COLUM. L. REV. 1232, 1254–59 (1985). Others state that even if there are certain gains to be made from the punishment of conditioned actions (in the form of general deterrence, for example), an excuse should be permitted (at least sometimes). They argue this is justified because there are different consequentialist advantages in not punishing individuals when there is evidence indicating that under the relevant conditions their crimes were committed as a result of conditioned behavior. See, e.g., William H. Shaw, CONTEMPORARY ETHICS—TAKING ACCOUNT OF UTILITARIANISM 134–40, 173–84 (1999); Richard B. Brandt, A Utilitarian Theory of Excuses, 78 PHIL. REV. 337, 343–61 (1969); Halleck, supra note 30, at 128–29.

\textsuperscript{155.} See, e.g., Alec Buchanan, Psychiatric Aspects of Justification, Excuse and Mitigation: The Jurisprudence of Mental Abnormality in Anglo-American Criminal Law 38 (2000) (“Even if a strict utilitarian . . . approach is adopted, the mental state of the actor is important in determining his ability to be deterred, and the degree to which punishing him is likely to deter others.”); Greene & Cohen, supra note 30, at 1783 (arguing that even a consequentialist position that supports determinism and therefore holds only a “derivative notion of free will” will wish to excuse those who cannot be deterred).

\textsuperscript{156.} This can be inferred from the way in which different scholars justify the excuse defenses they support once we acknowledge that usually there is no way to positively know that a person acted as a result of a conditioned behavior. See sources cited supra note 154; see also
If such a policy is appropriate, the problem of discerning a distinction between conditioned behavior and rational, dissuadable behavior is solved, at least from a consequentialist point of view. As long as the punishment is advantageous and it has not been proven that the act was conditioned, individuals can be justifiably punished. This means that, assuming that such a policy is appropriate, sociopsychological-coercion claims can at least be partially (if not fully) rejected if consequentialist advantages exist in support of punishment.

Different consequentialist advantages are given in support of such punishment in the context of war crimes prosecution. Usually, deterrence is raised as a consequentialist advantage, but other consequentialist advantages—such as reconciliation and “social repair” or the “expressive rationale of punishment”—are also raised. These consequentialist advantages lead scholars to place extensive restrictions on the extent to which they allow the existence of sociopsychological coercive conditions to be taken into account—if not completely rejecting their relevance.

Yet there are two main problems with such responses. First, they treat individuals merely as means and not as ends in and of themselves by punishing individuals (without any attempt to prove their actions were not conditioned) in order to influence the behavior of others. As such, they support a way of using people that is hard to reconcile with the currently accepted understanding of human dignity. Second, these responses are

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Richard B. Brandt, Morality, Utilitarianism, and Rights 220 (1992) (discussing when even a traditional utilitarian theory will be ready to enact an excuse defense); Buchanan, supra note 155, at 34–35.

157. If it has been positively proven that the act has been committed irrationally, most consequentialist views will either claim that it is unlikely that it will ever be beneficial to punish such a person or that there is a side constraint that forbids the punishment. Antony Duff, Legal Punishment, pt. 3, STAN. ENCYCLOPEDIA PHIL. (Edward N. Zalta ed., fall 2008 ed.), http://plato.stanford.edu/entries/legal-punishment/. However, if there is no such positive proof, then the extent to which the suspected irrationality of the behavior is taken into account depends on whether doing so can aid in furthering consequentialist aims. See Buchanan, supra note 155, at 39.

158. See, e.g., Bagaric & Morss, supra note 19, at 242, 248–54.

159. Fletcher & Weinstein, supra note 64, at 627–28. But see Bagaric & Morss, supra note 19, at 242–48 (rejecting such rationales as the basis for justifying punishment in war crimes prosecution).

160. Sloane, supra note 19, at 42, 44, 70–71, 83–85, 88–94; see also Kapur, supra note 13, at 1036–38. But see Dingwall & Hillier, supra note 25, at 15–18 (criticizing this rationale). This rationale has both consequentialist and retributivist aspects.


162. Eyal Zamir & Barak Medina, Law, Morality, and Economics: Integrating Moral Constraints with Economic Analysis of Law, 96 CALIF. L. REV. 323, 332–33 (2008) (stating that even most consequentialists are concerned about the “counterintuitive or even morally repugnant conclusions of unconstrained consequentialism,” one of them being the permission to use people as a means to another end).

163. See, e.g., Sloane, supra note 19, at 42, 82; Tallgren, supra note 13, at 592. Some consequentialist points of view see no problem with punishing individuals for the sole pur-
highly speculative: without further proof of rational, dissuadable behavior, claiming that punishing a person will affect her or others’ future behavior is devoid of merit.\footnote{164}

2. The Moral-Blame Response

“Retributivism comes in very different forms,”\footnote{165} and accordingly the core terms of such perspectives, such as “moral blame” and “culpability,” are vague, and their precise definition is disputed among different retributivist views.\footnote{166} Therefore, it is much more difficult to reach an undisputed conclusion regarding when culpability exists.\footnote{167} Attempts have been made, however, to use the commonly endorsed bases for the attribution of blame in order to claim that sociopsychological-coercion defenses are unnecessary. Yet, the fact of the matter is that none of the commonly endorsed bases for culpability succeed in convincingly showing that the line should be drawn in such a manner, or where exactly the line between excusable and culpable behavior should be drawn.\footnote{168} Thus, other

\footnote{164. See Dingwall & Hillier, supra note 25, at 7–9, 14–18; Druml, supra note 19, at 590–93; Ross & Shostowsky, supra note 53, at 1102–04; Tallgren, supra note 13, at 571–76, 582–83, 584, 592; Gonzalez, supra note 13, at 90–91. This criticism is clearly true regarding deterrence, but it is also true regarding the other consequentialist rationales, such as social repair or the expressive rationale. Roughly speaking, both of these rationales assert that the punishment of past criminals can change peoples’ views, and this will in turn reduce the chances that the individuals influenced by the normative message and the means used to convey it (that is, the punishment of past criminals and the declaration that the act is wrong) will perform atrocious acts in the future. However, without proving that the individuals who violate ICL are rational and dissuadable by ICL and war crimes prosecution, the use of a penal process for the creation of such a normative messaging is suspect as futile for two main reasons. First, if in those specific situations in which ICL is violated such strong sociopsychological coercive conditions exist as to compel almost all individuals to perform atrocities, then any attempt to influence their behavior through the use of \textit{ex ante} normative messaging would not have any effect. Second, many think that the punishment of conditioned individuals is unfair, and research indicates that individuals are only dissuadable by laws and threats of sanctions that are made by legal systems that they view as fair. See, e.g., Gonzalez, supra note 13, at 91. As such, if an attempt is not made to excuse those conditioned actors, this may backfire, leading individuals to commit war crimes out of defiance. See Tallgren, supra note 13, at 561, 583.}

\footnote{165. Duff, supra note 157, pt. 5.}

\footnote{166. See Fletcher, supra note 57, at 491–504; Herbert Fingarette, \textit{Rethinking Criminal Law Excuses,} 89 Yale L.J. 1002, 1008–12 (1980) (book review).}

\footnote{167. Dingwall & Hillier, supra note 25, at 18 ("Culpability is much more difficult to assess.").}

\footnote{168. See Osiel, supra note 112, at 25–61. Assertions of the ability to hold a person responsible according to the commonly endorsed bases for the attribution of blame, despite the
than this general statement, the discussion herein shall focus on the attempts of a relatively accepted retributivist perspective to deal with the difficulty in discerning when behavior is conditioned.

This retributivist moral-blame perspective attempts to provide a response to the difficulty in differentiating between rational and irrational violators. This response argues that only morally blameworthy people should be punished. However, it recognizes that it is currently impossible to accurately distinguish acts committed rationally (which are therefore potentially blameworthy) from those committed by conditioned individuals (which are therefore not blameworthy). With that said, this response does not support abandoning all attempts to differentiate between these two categories of actions. Accordingly, it does not claim that permissive sociopsychological-coercion defenses should be enacted based on the findings of sociological and psychological research.

Research findings, were mainly made by supporters of the compatibilist retributivist perspectives (because these perspectives do not assume that a person has control over her actions). See sources cited supra note 34. Yet these assertions are unconvincing. See Andrew E. Lelling, A Psychological Critique of the Character-Based Theories of Criminal Excuse, 49 SYRACUSE L. REV. 35, 89 (1998) (discussing the inability of character-based theories to distinguish between acts that should be attributed to one’s character and acts that should be viewed as the result of external forces); Luban, supra note 34, at 106–16 (arguing that in light of an action-based theory of responsibility, sociopsychological-coercion defenses should not be adopted—a problematic argument because it is true only if one accepts his explanation for the process that leads individuals to commit the wrongful act, an explanation that cannot be proven or refuted); Nelkin, supra note 101, at 194–206 (showing that if one adopts weakness of will, identificationism, or reasons-responsiveness as the basis for culpability, sociological and psychological research threatens the ability to attribute responsibility and supports the conclusion that, in the end, the determination should be made on a case-by-case basis); see also Jonathan Glover, Responsibility 66–67, 181–90 (1970) (adopting a “reactive” basis for the attribution of blame and thus reaching the conclusion that sociopsychological-coercion defenses should not be adopted). Glover’s perspective, however, ignores the fact that whether members of a society will wish to condone an act depends on the explanation given for the commission of the act. Miller, supra note 16, at 266.


170. As previously discussed, most current retributivist views see rationality as a prerequisite for criminal responsibility. See sources cited supra notes 30, 40.


172. See Richard Delgado, A Response to Professor Dressler, 63 MINN. L. REV. 361, 364 (1979); Joshua Dressler, Professor Delgado’s “Brainwashing” Defense: Courting a Determinist Legal System, 63 MINN. L. REV. 335, 358–60 (1979). Despite the disagreement between Delgado and Dressler regarding the brainwashing defense (as well as other sociopsychological-coercion defenses), each criticizes the accuracy of the other scholar’s legal rule used to distinguish conditioned behavior and rational, dissuadable behavior. Moreover, even Delgado, who supports a more permissive approach, states that belonging to a group that suffers from certain coercive socioeconomic conditions is insufficient to entitle every member of that group to a defense. Delgado, supra.
moral-blame perspective is not only based on the tenet that people who are not morally responsible should not be punished, but also on the belief that not punishing people who are morally responsible violates their basic human dignity since it fails to respect their ability to rationally differentiate between right and wrong.173

Therefore, supporters of this moral-blame response believe that criminal law should draw a normative dividing line in an attempt to differentiate between conditioned violators and rational, dissuadable violators, but acknowledge that such a line will be “crude” (leading to the punishment of some conditioned individuals and to the acquittal of some rational, dissuadable individuals).174 Supporters of this view argue that such a dividing line can be morally justified, despite its inaccuracy, if it fulfills two conditions. First, the legal system must draw the line as accurately as current scientific knowledge enables it.175 Second, since scientific knowledge alone cannot provide the answer as to where precisely this dividing line should be placed, any remaining uncertainty regarding its accurate placement needs to be resolved according to society’s perceptions of what behavior should fairly be considered conditioned.176

Moreover, one should take notice of the fact that in the context of a person who has committed a criminal act in a situation in which strong sociopsychological coercive conditions exist, there are at least two reasons that make determining whether that person is morally blameworthy difficult. First, a spectrum exists between completely conditioned behavior and fully rational, dissuadable behavior; therefore, a decision needs to be made about where on this spectrum a person’s rationality (and dissuadability) is so diminished that it would be unfair to hold her morally blameworthy.177 Second, direct assessment of a person’s level of rationality (and dissuadability) is impossible, as only the external factors that have a potential to influence a person can be assessed (that is, environmental, sociological, and psychological conditions, as well as individuals’ observable behavior, traits, and capabilities).178 In a real-life context, an


174. Fletcher, supra note 57, at 846; Dressler, supra note 136, at 1367. See also sources cited supra note 172 (admitting some over- and underinclusiveness in their suggested norm while criticizing the over- and underinclusiveness of the other scholar’s norm).

175. Cf. Fletcher, supra note 57, at 492–96, 839–46 (discussing this issue in the context of the insanity defense). Further, many argue that science cannot ever solve the need to make a normative determination. They argue that the decision regarding at which point along the spectrum between perfectly rational, dissuadable behavior and completely conditioned behavior a person should be considered not blameworthy is always a normative decision. See Morse, supra note 54, at 179.


177. See, e.g., Morse, supra note 54, at 179.

178. See supra note 137 and accompanying text.
abundance of factors influence a perpetrator’s actions (or at least have the potential to influence behavior), with some such factors tending to increase a person’s level of conditioning and others to decrease it. Therefore, the true decision that needs to be made is when it can be assumed that the effect of the coercive factors has diminished rationality (and dissuadability) to a point at which it would be unfair to hold a person morally blameworthy. Yet in these two difficulties also lies a part of the solution. First, in a real-life context, many factors are likely to influence a person’s actions (and some such factors tend to increase a person’s level of rationality and dissuadability). Second, because a spectrum exists between completely conditioned behavior and fully rational, dissuadable behavior, it can be assumed that some level of rationality (and dissuadability) almost always affects a person’s actions. Therefore, according to many supporters of the moral-blame perspective, fairness demands viewing a person who has committed a crime in a situation in which sociopsychological coercive conditions exist as not blameworthy only when these conditions are so intense that law-abiding behavior cannot be reasonably expected.\textsuperscript{179}

In the legal discourse of ICL and war crimes prosecution, attempts to provide a response to the difficulty in differentiating between conditioned violators and rational, dissuadable violators that are based on a moral-blame perspective do seem to exist. Reliance on this perspective is implied in some of the positions that do not support abandoning war crimes prosecution—despite the existence of sociopsychological coercive conditions—yet support the adoption in the context of war crimes of extensive sociopsychological-coercion defenses.\textsuperscript{180}

However, this response is problematic in its use of society’s perceptions of fairness as a means of distinguishing between culpable and nonculpable behavior. Setting such a vague benchmark is likely to lead to variance in judicial rulings.\textsuperscript{181} Especially within the context of the heterogeneous international community,\textsuperscript{182} perpetrators of similar war crimes may be treated differently depending on the presiding judges’ interests and moral views.\textsuperscript{183}

3. The “Balancing” Response

A third attempt to differentiate between conditioned violators and rational, dissuadable violators in current criminal law jurisprudence is based upon a

\textsuperscript{179} Paul H. Robinson, Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and “Rotten Social Background,” 2 Ala. C.R. & C.L. L. Rev. 53, 57 (2012).

\textsuperscript{180} See, e.g., Gonzalez, supra note 13, at 50, 66, 76, 83, 91, 156–69.

\textsuperscript{181} Even in the domestic context Dressler has admitted that the fairness test “provides no simple or noncontroversial answers” and that it will always be “a matter of line drawing about which reasonable minds can differ.” Dressler, supra note 136, at 1367.

\textsuperscript{182} See, e.g., Sloane, supra note 19, at 53.

\textsuperscript{183} Cf. Olusanya, supra note 13, at 30–31; Renteln, supra note 64, at 439–40.
view that attempts to balance moral-blame and consequentialist considerations.\textsuperscript{184} Such a perspective views moral blame as an important concern and therefore tries to ascertain more clearly—in comparison with the consequentialist points of view—those instances in which a person’s actions are conditioned.\textsuperscript{185}

Yet, most supporters of this perspective oppose permissive recognition of sociopsychological-coercion defenses because they fear that a defense that easily excuses offenders will be taken advantage of by people who rationally violate the law.\textsuperscript{186} Because of this concern, supporters of this perspective argue that excuse defenses that are based on claims of conditioned action, such as sociopsychological-coercion defenses, should be allowed only in the context of categories of situations in which a person can point to a “disability” that clearly distinguishes her behavior from that of the majority.\textsuperscript{187}

Based on this moral perspective, some in domestic legal discourse have rejected any need to incorporate sociopsychological-coercion defenses, while others have concluded that relatively extensive sociopsychological-coercion defenses should be allowed.\textsuperscript{188} This discrepancy alone indicates that this perspective does not provide sufficient guidance with regard to the extent to which such defenses should be incorporated.

Moreover, in the context of war crimes prosecution, acceptance of a view that endorses extensive sociopsychological-coercion defenses on the basis of this moral perspective will be difficult. That is because the categories that could be used to differentiate between individuals and the majority in the context of the prosecution of domestic crimes—such as belonging to a close and distinct subculture or committing the crime under extremely strong peer pressure—are likely to include most perpetrators of war crimes.\textsuperscript{189} At the same time, in the context of war crimes prosecution, an attempt to further restrict the categories in which sociopsychological-coercion defenses should be

\textsuperscript{184} It can be argued that in practical terms this is the actual approach utilized by most legal systems. See Darryl K. Brown, \textit{Cost-Benefit Analysis in Criminal Law}, 92 Calif. L. Rev. 323, 326 (2004); Coughlint, \textit{ supra note 30}, at 9–10; Jerome Hall, \textit{Science and Reform in Criminal Law}, 100 U. Pa. L. Rev. 787, 796 (1952); Halleck, \textit{ supra note 30}, at 128–29; Gonzalez, \textit{ supra note 13}, at 63.

\textsuperscript{185} Coughlint, \textit{ supra note 30}, at 9–10 (“[M]ost of the current scholarship serves up a concoction of the two, in which principles derived from one of the dominant theories attenuate the excesses that the other would achieve in an undiluted form.”). The most significant “excess” of consequentialist theories is claimed to be the lack of sufficient care for the issue of blameworthiness. Duff, \textit{ supra note 157}, pt. 3.

\textsuperscript{186} See, e.g., Shavell, \textit{ supra note 154}, at 1254–55 (discussing such concerns of abuse).


\textsuperscript{189} See sources cited \textit{ supra note 110} and accompanying text.
applied out of a fear that more extensive defenses will be abused is also problematic. It suffers the same ills that the consequentialist views suffer. From a moral-blame perspective, such limitations will lead to the punishment of many nonculpable individuals for the sole purpose of preventing those who are culpable from going unpunished. From a consequentialist perspective, without further proof of the assumption of rationality or dissuadable behavior, to claim that the setting of such limits (that will lead to the punishment of irrational and undissuadable individuals) will affect their or others’ future behavior is to make a speculative claim devoid of concrete proof.

In summary, none of the current jurisprudential responses provide a convincing answer to the following question: How can conditioned violators and rational, dissuadable violators be differentiated when a crime has been committed where sociopsychological coercive conditions exist? Since almost all situations that ICL and war crimes prosecution attempt to regulate are situations in which sociopsychological coercive conditions exist, these responses do not aid in disproving the claim that rational and dissuadable behavior cannot be generally assumed in the context of war crimes. Thus, current jurisprudential responses leave ICL and war crimes prosecution standing on shaky moral ground, unable to convincingly justify the criminal punishment of at least most, if not all, violators of ICL. Is, then, the only conclusion that ICL and war crimes prosecution lack moral justification? The answer is no, since a more accurate interpretation of the findings of sociological and psychological research leads to the conclusion that rational, dissuadable behavior can be generally assumed, even in the context of war crimes.

III. The Influence of Penal Norms on Sociopsychological Coercion

Reality is often much more complex than a laboratory setting. A person’s behavior in real life is often influenced by a much greater array of factors. Some factors increase the tendency for rational, dissuadable behavior and others increase the potential for conditioned behavior. This does not mean that sociopsychological coercive conditions do not compel individuals to commit wrongful acts in real life. It does, however, mean that

190. Cf. Fletcher, supra note 57, at 846 (discussing a similar issue in the context of the insanity defense in domestic law); sources cited supra note 163 and accompanying text.

191. Cf. supra note 164 and accompanying text (pointing out a similar flaw—of making a speculative assertion devoid of sufficient proof that punishing a person will affect her or others’ future behavior—with regard to the consequentialist response).

192. See, e.g., Kelman & Hamilton, supra note 84, at 166 (“Authority situations differ in their likelihood of eliciting obedience, depending on the interplay between binding and opposing forces.”).

193. Some claim that the research findings cannot be generalized beyond the laboratory setting. See, e.g., Martin T. Orne & Charles H. Holland, On the Ecological Validity of Labora-
when judging the extent to which a person’s action should be considered conditioned, we should do so while taking into account all the different factors that likely influenced that action. We should not judge the action based solely on the fact that it was performed in a setting in which strong sociopsychological coercive conditions existed.\textsuperscript{194} It further means that, in the real world, as well as in a laboratory setting, actions may be taken in order to strengthen the effect of the factors that increase the levels of rationality and dissuadability.

Research does not ignore this complexity, as the discussion below shows. The research not only attempts to uncover the factors that increase the probability that a person’s behavior will be conditioned but further attempts to uncover those factors that increase the levels of rationality and dissuadability. Yet the legal discourse dealing with ICL and war crimes prosecution has focused mainly on the fact that strong sociopsychological coercive conditions exist in the context of almost all of the situations that ICL and war crimes prosecution attempt to regulate, while factors that do (or at least can) have a countereffect are generally ignored.\textsuperscript{195} If, however, the complexity of the reality is not ignored and factors that have a countereffect are taken into account, the levels of rationality and dissuadable behavior are revealed to be much higher in war crimes, leading to the conclusion that ICL and war crimes prosecution do not lack moral justification.\textsuperscript{196} The following Section examines a main factor that may enhance rationality and dissuadable behavior, which has received little notice...
in the context of ICL and war crimes prosecution;\(^\text{197}\) the effect of normative assertions in reducing conditioned behavior.\(^\text{198}\)

\section*{A. Research Findings}

\subsection*{1. Psychological Research}

Psychological research shows that the tendency of individuals to perform atrocities out of conformity to a social group’s behavior can be reduced.\(^\text{199}\) As previously discussed, such findings show that under conditions of group cohesion, people either do not recognize the wrongfulness of their acts (despite the fact that in “normal” conditions they would be able to recognize this), or, even if they do recognize the wrongfulness of their acts, they are nevertheless psychologically compelled to act in a wrongful manner.\(^\text{200}\)

Yet research findings indicate that normative assertions can \textit{ex ante} educate individuals about the wrongfulness of certain acts and, if internalized by these individuals, can reduce conformity to the group.\(^\text{201}\) Moreover, if a member of the group clearly expresses her position that the act is wrong, conditioned conformity to the group’s view is not likely to be the controlling

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\(^{197}\) The exception is the study made by the International Committee of the Red Cross in an attempt to understand the sociological and psychological roots of war crimes. Muñoz-Rojas & Frésard, \textit{supra} note 13, at 192. Muñoz-Rojas and Frésard have acknowledged the influence that law has in reducing the likelihood of the commission of war crimes. However, based on the research findings, they have reached the conclusion that individuals’ behavior is conditioned in the context of war crimes. The combined result of these two factors has led them to the conclusion that violations of the law of war should be treated as a criminal matter and that violators should be punished “because the idea that the bearer of weapons is morally autonomous is inappropriate.” \textit{Id.} at 202. I disagree with their claim of a general lack of autonomy. First, if true, it would be unjust, from a moral-blame perspective, to punish these individuals. Second, a spectrum exists between completely conditioned behavior and perfectly rational, dissuadable behavior, and normative assertions increase a person’s moral-autonomy level. Therefore, their claim is simply incorrect.

\(^{198}\) Robinson has strongly taken this issue into account in the context of domestic criminal law. \textit{See} Robinson, \textit{supra} note 179. However, I think that even he would agree that the course of action he generally supports would be problematic in the context of ICL and war crimes prosecution. \textit{See} Robinson, \textit{supra} note 28, at 113, 130, 135, 152–53, 180.

\(^{199}\) \textit{See} sources cited \textit{supra} notes 191–191, 195, 197.

\(^{200}\) \textit{See} sources cited \textit{supra} note 90 and accompanying text.

factor in the decisions of a significant number of members of her group. 202
Let us assume that a group member does not initially view the action performed by other group members as wrong. However, a second group member asserts that the act is wrong. In such a situation, it is less likely that the first group member will be simply swept up by group conformity to commit the act. Rather, it is more likely that she will rationally assess the situation and decide how to act, since dissent within a group breaks the group’s coercive psychological influence and leads even those individuals who disagree with the dissenter’s view to act in a manner that they independently determine is correct. 203 For example, when Asch, in his line experiment, inserted into the group a dissenter that claimed that a third line, which was also not the right one, was the matching line, conformity was substantially reduced and most subjects correctly stated which line was the matching one. 204

As also discussed previously, once the group performs an act that a group member has initially thought of as wrong, that group member often abandons her previous position and claims that the act is right or justified. 205 Yet, research indicates that if a group member is aware of normative messages asserting that the act is wrong, she is less likely to abandon her previous position out of conformity—it is more likely that she will instead rationally consider which position should be adopted (her initial one supported by the norm or the group’s position) before acting. 206

Penal norms may be especially effective in reducing the performance of wrongful acts out of conformity because of their external demand for accountability. 207 That is, however, under the condition that they are also internalized by at least some group members as social norms after being legislated or, alternatively, that they correlate with and reaffirm a social norm

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202. E.g., Asch, supra note 77, at 34 (showing that when a second dissenter is found in the group, even if she holds a different position than that of the subject, that “the effect of the majority on the subject decreases . . . and extremes of yielding disappear”).

203. Rita L. Atkinson et al., Hilgard’s Introduction to Psychology 651 (13th ed. 2000); Asch, supra note 77, at 34; see also Keizer, supra note 88, at 56–58, 64; Kelman & Hamilton, supra note 84, at 160–61.

204. Asch, supra note 77, at 34.

205. See supra notes 88–90 and accompanying text.

206. See Don A. Moore & George Loewenstein, Self-Interest, Automaticity and the Psychology of Conflict of Interest, 17 SOC. JUST. RES. 189, 190–90, 195–96, 198–99 (2004) (arguing that “[s]elf-interest is automatic, viscerally compelling, and often unconscious,” while “[u]nderstanding one’s ethical and professional obligations to others, in contrast, often involves a more thoughtful process,” and suggesting the use of social norms in order to encourage decision making based on the conscious process).

that existed before their legislation; otherwise, they may create antagonism and defiance.208

Moreover, when group members start to commit the wrongful act, penal norms can reduce the likelihood that a group member will abandon her initial position that views the act as wrong. Penal norms thus supply the person with a strong backing for her initial position, reducing the likelihood of self-doubt,209 and the publicized backing of the norm with sanctions increases the probability that the group member will be aware of a norm asserting that the act is wrong.210 Thus, penal norms reduce the likelihood that a normative view that an act is wrong, held by some group members, will gradually be replaced by undesirable norms, even if other group members start to perform the prohibited act.211

Furthermore, penal law holds individuals accountable for their actions, and “[p]sychological studies confirm the view of social theorists that accountability—a requirement to explain one’s decision to others—can weaken the otherwise strong pressure to conform to peer judgments”212 and increase the probability that each group member will “consider the facts more objectively.”213 As such, penal norms not only reduce the commission of wrongful acts, they also increase the likelihood that commission of such an act will be based upon rational deliberation that resulted in a choice to violate the law despite the risk of being punished.214

Further, research examining wrongful acts committed by subordinates under the order of an authority indicates that a normative proclamation that contradicts the wrongful order, if made by another authoritative body (such as a penal system), increases the chances that subordinates will not obey out of conditioned conformity but will rationally consider the conflicting normative assertions.215 As Kelman and Hamilton state:

It is likely that divided authority reduces the strength of binding forces even in situations in which one of the authorities is clearly of


209. Moore & Loewenstein, supra note 206, at 198–99 (“One way in which rule-based deterrence can work is by proscribing certain behaviors and putting them outside the bounds of propriety.”).

210. Darley & Robinson, supra note 208, at 472 (“Every time criminal liability is imposed, it reminds us of the norm prohibiting the offender’s conduct and confirms its condemnable nature.”).

211. See Jones, supra note 207, at 139; see also Muñoz-Rojas & Frésard, supra note 13, at 203 (discussing this issue in the context of war crimes prosecution).

212. Jones, supra note 207, at 141.

213. Id. at 143; see also Muñoz-Rojas & Frésard, supra note 13, at 192 (discussing this issue in the context of war crimes prosecution).

214. See supra note 34 (discussing the definition of rationality).

215. Kelman & Hamilton, supra note 84, at 159; Danielle S. Beu & M. Ronald Buckley, This is War: How the Politically Astute Achieve Crimes of Obedience Through the Use of Moral Disengagement, 15 LEADERSHIP Q. 551, 565 (2004).
higher status. In such a situation, of course, subordinates are not as free to choose the authority whose orders they find more congenial . . . . The mere fact that there is a disagreement among authorities, however, raises the possibility of redefining the situation and gives some authoritative backing to that possibility.216

2. Sociological Research

Sociological research also supports the conclusion that penal law can reduce the likelihood of conditioned action.217 Such research indicates that members of a subculture are usually not completely isolated from the general society, and the extent to which they are isolated depends on society’s efforts to influence their behavior and incorporate them into the general society.218 Law can affect social perceptions, and as such the general society can promote acceptance of its norms over those of the subculture by stressing the duty to abide by its law.219 If the legal system is fair220 and the law is sufficiently enforced, this strategy sends a normative message that “counteracts the inferences that point social influence in the direction of crime.”221 As such, this policy can reduce the isolation of the members of the subculture to a level where it will be insufficient to justify (according to views that do not endorse behavioral determinism) a sociological coercion defense.222 Or,
in other words, this policy not only reduces the commission of crimes, but also increases the ability to assume that a person rationally chooses to commit the crime in situations where crimes are committed.

B. War Crimes Prosecution and Requirements for Penal Norms to Be Influential

The findings of sociological and psychological research thus indicate that a criminal justice system that is sufficiently fair\(^2\) and sufficiently enforced,\(^3\) and one in which normative messages reach many (even if not all) members of the social groups the system addresses,\(^4\) can use penal norms to reduce the effect of sociopsychological coercive conditions. However, are these requirements attainable in general and by ICL and war crimes prosecution specifically? If they are, then this research supports what current jurisprudence has failed to demonstrate, namely that the commission of a war crime should be perceived as a conditioned act only on rare occasions.

1. Fairness

If a person disagrees with the norms of a legal system (for example, the norms of ICL) and prefers the values of her subculture, will she ever perceive her punishment or that of other members of her group for violating the legal system’s norms, which contradict the subculture’s norms, as fair?\(^5\) Research suggests that this is possible because a person’s perception of fairness does not depend only on the outcome of the penal process, but also on the procedure.\(^6\) Moreover, her perception of procedural fairness can sometimes be even more influential than whether she attained a “favorable outcome” in reducing the probability that she will return to crime.\(^7\)

Furthermore, the presentation of the situation as one in which a member of a subculture always prefers the values of her subculture over those of the legal system is misleading; it has been proven that even in the context of the norms of ICL, usually the legal system’s “values coexist[] alongside residual values associated with deviant subcultures.”\(^8\) In such a context, the effect of procedural fairness can be expected to be even stronger, and research indicates that “perception of just treatment (even if adverse) could reduce the

\(^2\) See supra note 220 (discussing why this is needed).
\(^3\) See supra text accompanying note 221 (discussing why this is needed).
\(^4\) See supra text accompanying note 203 (discussing why this is needed).
\(^5\) See Robinson, supra note 179, at 64–65; see also Tallgren, supra note 13, at 571.
\(^6\) See ROBINSON, supra note 28, at 51; Gonzalez, supra note 13, at 91.
\(^8\) Sampson & Bartusch, supra note 53, at 780 (stating this issue in the context of domestic subcultures). See also supra text accompanying note 218; infra text accompanying note 276 (discussing this issue in the context of ICL and war crimes prosecution).
likelihood that individuals will completely sever or further attenuate their ties to conventionality.230

With that understanding in mind, is war crimes prosecution sufficiently fair in its procedural and other process-related aspects to allow the assumption of at least some effect on human disposition? War crimes prosecution is sometimes criticized for lacking such fairness mainly because of the selectivity and scarcity of trials and the inconsistent application of the norms of ICL.231 However, this criticism (and the current imperfection of attempts to prosecute war crimes) should not lead us to ignore the progress made by ICL and war crimes prosecution in the last two decades. War crimes prosecution is becoming increasingly fair with regard to these issues as well as others. For example, ICL is being increasingly enforced with less selectivity.232

Some have claimed that the International Criminal Court (ICC) has not fulfilled its promise to end impunity for perpetrators of war crimes because of the scarceness of its verdicts since formation.233 Moreover, the International Criminal Tribunal for the former Yugoslavia (ICTY), and International Criminal Tribunal for Rwanda (ICTR) have also been criticized for being slow, costly, and able to deal with a limited number of cases.234 Yet the activities of these three international tribunals should not be ignored. The ICTY and ICTR have prosecuted several important cases and have strongly contributed to the advancement of ICL and war crimes prosecution.235 As for the ICC, currently it has 120 member states236 that have

230. Paternoster et al., supra note 228, at 193.
231. See, e.g., Drumbl, supra note 19, at 550, 558–59, 567, 570, 572, 582–83, 589–91, 593. In these pages Drumbl also argues for a lack of fairness from insufficiently taking into account the issue of sociopsychological coercion. This claim, as the current Article shows, is an exaggeration.
232. See, e.g., Rikhof, supra note 3, at 4, 9–10, 49–51.
235. Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? 95 AM. J. INT’L L. 7, 9 (2001) (“The empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peaceful building in postwar societies, as well as to introducing criminal accountability into the culture of international relations.”).
pledged to aid in the prosecution of war crimes—some that have also reformed their laws accordingly. Furthermore, the ICC is currently dealing with seven situations (those in Uganda, the Democratic Republic of the Congo, the Central African Republic, Darfur-Sudan, Libya, Kenya and Côte d’Ivoire), and the prosecutor is conducting preliminary examinations regarding several additional situations (including those in Afghanistan, Georgia, Guinea, Colombia, Honduras, the Republic of Korea, and Nigeria).

Moreover, these three international tribunals are not alone in advancing the aims of ICL. In the last two decades, several important hybrid and internationalized courts have been formed: for example, the Extraordinary Chamber in the Court of Cambodia, the Regulation 64 Court Panels in the Court of Kosovo, the Special Panel for Serious Crimes in East Timor, the Special Court for Sierra Leone, the War Crimes Chamber in Sarajevo, and, to some extent, also the Iraqi Special Tribunal.

Most importantly, the attempts at war crimes prosecution by international and hybrid tribunals have encouraged states to prosecute war criminals domestically. A survey of such proceedings made by Rikhof in 2008 found

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238. See, e.g., Rikhof, supra note 3, at 10.
240. Id.
241. See Rikhof, supra note 3, at 4–10 (discussing the work of these tribunals); see also Lindsey Raub, Positioning Hybrid Tribunals in International Criminal Justice, 41 N.Y.U. J. Int’l L. & Pol. 1013, 1016 (2009).
242. This has been the rationale behind the complementarity principle adopted by the ICC regime. See Markus Benzing, The Complementarity Regime of the International Criminal Court: International Criminal Justice Between State Sovereignty and the Fight Against Immunity, 7 MAX PLANCK Y.B. U.N. L. 591, 596 (2003). Moreover, it is important to note that the existence of the ICC has put pressure not only on member states to increase efforts to enforce international law and to prosecute war criminals, but on other states as well. See Amir Oren, Dokh Goldstone Al Mitzva Oferet Yitzukah: Ha-Pachad Hoo Ha-Yoetz Ha-Mishpat Ha-Tov Be-Yoter [The Goldstone Report on the Cast Lead Operation: Fear Is the Best Legal Adviser], H’aretz (Isr.), Sept. 16, 2009 (discussing the effect of the ICC on the Israeli executive branch, which has led to an increase in war crimes investigations and prosecutions); Nomi Levitsky, Ha-‘Elyonim : Be-Tokhekhe Bet Ha-Mishpat Ha-Elyon [The Supremes: Inside the Supreme Court] 176 (2006) (claiming, based on interviews with Israeli Supreme Court Justices, that the Justices’ increased scrutiny of international law issues has been because of a fear that, if they do not prevent such acts, Israelis will be prosecuted abroad). For such an actual effect with regard to NATO countries (which are not all members of the ICC regime), see Daniel Schwammenthal, Prosecuting American ‘War Crimes’: The International Criminal Court Claims Jurisdiction over U.S. Soldiers in Afghanistan, WALL ST. J. (Nov. 26, 2009, 7:04 PM), http://online.wsj.com/article/SB10001424052748704013004574519253095440312.html. Furthermore, the ICC is not the only international (or even international judicial) body that is putting pressure on states to prosecute war crimes. See, e.g., Alexandra Huneeus, Courts Resisting Courts: Lessons from the Inter-American Court’s Struggle to Enforce Human Rights, 44 CORNELL INT’L L.J. 493, 496 (2011) (“Notably, since it is not a criminal court but routinely hears cases of mass
Summer 2012]  Is the Prosecution of War Crimes Just and Effective?  797

that thirty-seven states participated in war crimes prosecution and that more
than ten thousand perpetrators have been prosecuted by these states. Moreover, his survey was underinclusive since he did not examine domestic cases in which perpetrators of war crimes were prosecuted for their acts based on violation of domestic norms that consist of similar elements, as was done in recent years by several countries, including the United States and Israel (both of which have opposed the establishment of the ICC regime). Additionally, ICL is enforced not only through criminal prosecution, but also through other sanctions against individuals, such as denial of refugee status and civil remedies, which are also increasingly being applied. Furthermore, an effort has been made by many states to prevent war crimes by educating their soldiers on ICL and the law of war. Thus, recent attempts to prevent and prosecute war crimes are becoming more extensive and much less selective than has been claimed.

Moreover, the ICC regime has demonstrated increased substantive, procedural, and prosecutorial fairness in the prosecution of war crimes, for example, by adopting a “General Part” and by setting proper rules of procedure. As Kapur states, in the context of the ICC: “Humanity has also

state-sponsored crimes, the Inter-American Court has ordered states to conduct criminal prosecution in a majority of its rulings.”

243. Rikhof, supra note 3, at 51.
244. Id. at 15 n.61 (providing the names of cases from South Africa, Russia, Cambodia, and Uruguay).
246. See, e.g., STATE OF ISRAEL, GAZA OPERATION INVESTIGATION: SECOND UPDATE 3 (2010) (stating that forty-seven criminal investigations have been opened following the Cast Lead Operation, and several of them have resulted in trials).
247. Despite early strong opposition to the ICC, the United States has increasingly aided and supported the court. See, e.g., William H. Taft et al., U.S. POLICY TOWARD THE INTERNATIONAL CRIMINAL COURT: FURTHERING POSITIVE ENGAGEMENT iii, v–vi (2009). As for the actual effect of the court on Israel, see sources cited supra note 242.
250. Jolyon Ford, Bringing Fairness to International Justice: A HANDBOOK ON THE INTERNATIONAL CRIMINAL COURT FOR DEFENCE LAWYERS IN AFRICA 25 (2009) (“It is therefore true to say that although there is a definite need to ensure greater fairness in international justice at the ICC, suggestions that the Court is structurally unsound from a fairness perspective ignore the facts that procedural and institutional measures are being taken to protect defence rights.”).
252. Salvatore Zappala, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 25, 48 (2003); see also Meron, supra note 2, at 463.
driven the growing commitment to fairness to all defendants, irrespective of scale of atrocities likely committed by them."\textsuperscript{253}

2. Enforcement

What is the level of law enforcement necessary to support the assumption that a legal system’s penal norms reduce conditioned behavior? Is this level met in the context of ICL and war crimes prosecution?

Research indicates that the likelihood of a normative influence on behavior depends more on the perpetrator’s probability of getting caught and less on the severity of punishment.\textsuperscript{254} Yet, from these findings one should not conclude that only extensive prosecution and conviction will lead to penal law having an effect on individual behavior.\textsuperscript{255} Most crimes, even within the context of domestic legal systems, go unpunished.\textsuperscript{256} However, despite the low probability of getting caught, the existence of penal law and law enforcement can have a deterrent effect.\textsuperscript{257} Furthermore, research indicates that \textit{continuous visible enforcement}, rather than the prosecution of all or even most crimes, is the level of enforcement needed for a legal system to send normative messages that will, at least to some extent, counteract “the inferences that point social influence in the direction of crime.”\textsuperscript{258} Moreover, attempts to prosecute all crimes will not only be extremely costly (if not im-

\begin{itemize}
\item \textsuperscript{253} Kapur, \textit{supra} note 13, at 1041–42.
\item \textsuperscript{254} See, e.g., Bagaric & Morss, \textit{supra} note 19, at 249; see also Halleck, \textit{supra} note 30, at 141; Kahan, \textit{supra} note 219, at 377–82.
\item \textsuperscript{255} See, e.g., Robinson, \textit{supra} note 28, at 21–22 (critiquing deterrence as the main rationale of punishment because of, among other reasons, the low probability of a criminal being caught, but acknowledging that at a minimum the existence of a penal system that enforces its norms does create deterrence).
\item \textsuperscript{256} See \textsc{John Braithwaite \\ & Philip Pettit}, \textit{Not Just Deserts: A Republican Theory of Criminal Justice} 197 (1990). In the context of the United States, for example, based on victimization reports, arrest reports, and reports regarding rates of prosecution and conviction from the year 2000, Robinson and Darley have estimated that in general a criminal offender has a 98.7% chance of not receiving punishment at all. Robinson, \textit{supra} note 28, at 34; see also Hans Zeisel, \textit{The Limits of Law Enforcement}, 35 VAND. L. REV. 527, 528–32 (1982). One may argue that comparing domestic crimes and war crimes in that matter is inappropriate since domestic crimes are much less severe than war crimes. Yet this is not true, since for all severe domestic crimes other than murder examined by Robinson and Darley, the probability of being caught and punished was revealed to be less than 7% (rape: 6.8%; robbery: 4.9%; burglary: 1.9%; assault: 1%; larceny: 0.4%). As for murder, Robinson and Darley simply did not provide similar statistics because of an inability to attain reliable victimization information. Paul H. Robinson \\ & John M. Darley, \textit{Does Criminal Law Deter? A Behavioral Science Investigation—Appendix}, 24 OXFORD J. LEGAL STUD. (2004), \textit{available at} http://www.law.upenn.edu/fac/phrobins/OxfordDeterrenceAppendix.pdf.
\item \textsuperscript{257} See, e.g., Robinson, \textit{supra} note 28, at 21.
\item \textsuperscript{258} Kahan, \textit{supra} note 219, at 371–73 (discussing this issue in a domestic context); see also Robinson, \textit{supra} note 28, at 27–28 (discussing the fact that people have a tendency to overestimate rare but visible events, which leads them to overestimate detection rates).
\end{itemize}
possible), but they can also backfire by leading group members to violate the law out of defiance. Additionally, the influence of the law and law enforcement on behavior goes beyond deterrence, because both attempt to support social norms held by at least some group members by signaling to them that the actions of some other group members are actually not supported by all. For that purpose, continuous visible enforcement, not harsh enforcement of all crimes, is the kind of enforcement needed.

ICL has been criticized for insufficient enforcement in that current war-crimes-prosecution attempts are insufficient, with claims that the probability of prosecution is “almost the equivalent of losing the war crimes prosecution lottery.” However, as discussed in the previous Section, this argument ignores the fact that war crimes prosecution has substantially increased over the last two decades and is continuing to increase. It especially ignores the substantial increase—which is not sufficiently acknowledged in legal discourse—in domestic prosecution of war crimes (which may be attributed to an increasing concern that if states do not enforce ICL, their agents will be prosecuted by other states).

Moreover, while the current percentage of war criminals prosecuted is still low, it would be wrong to claim that the level of law enforcement is insufficient for the relevant penal norms to reduce conditioned behavior. ICL is still less enforced than domestic crimes; yet prosecution of war crimes cases, especially by international bodies, is often very visible. Therefore, given that the prosecution of war crimes has substantially increased with mechanisms set to encourage continuous enforcement (for example, the ICC and domestic laws that allow for universal jurisdiction), and since war crimes prosecution is usually highly visible, a sufficient level of enforcement exists to allow us to assume that ICL and war crimes prosecution often convey normative messages that influence the cognition of the individuals.

260. See Kahan, supra note 219, at 375–76.
261. See id. at 371–73, 375–76; supra Part III.A. Kahan discusses the issue in the context of the order-maintenance policy. This policy has sometimes been falsely misinterpreted as a policy of zero tolerance, while in fact the main rationale is to send group members a signal that will aid in exposing the fact that most group members do not support the illegal acts. In order to do so, there is no need for harsh enforcement of all crimes. See George Kelling, “Broken Windows” and Police Discretion 50 (1999); Robinson, supra note 28, at 91 (describing a similar effect of law and law enforcement outside the context of the “order maintenance policy”); Darley & Robinson, supra note 208, at 472 (“Every time criminal liability is imposed, it reminds us of the norm prohibiting the offender’s conduct and confirms its condemnable nature.”).
263. See supra Part III.B.1.
264 See sources cited supra notes 244–247.
they intend to address, even if these messages do not always succeed in dis-
suading them from committing the crime. 266

3. Communication

Can we assume that those who wish to enforce ICL have a sufficient
ability to communicate with members of the different groups that ICL and
war crimes prosecution attempt to regulate? It should be remembered that,
as previously discussed, research indicates that even if a penal norm has
been internalized as a social norm by only some members of the group, the
probability that the decisions of many members of the group will be rational
and dissuadable (and not the result of conditioned conformity to the group’s
view) still increases. 267 Moreover, it should be remembered that the role of a
penal norm is to reinforce a social norm that has been internalized by at
least some members of the group. 268 If the penal norm correlates with a so-
cial norm, then the penal norm supplies a person with a strong backing to
her initial position, reducing the likelihood for self-doubt, 269 and the publi-
cized backing of the norm with sanctions increases the probability that a
group member will be aware that a norm asserting the wrongfulness of the
act exists. 270 Thus, penal norms reduce the likelihood that a normative view
considering an act to be wrong, held by some group members, will gradu-
ally be replaced by undesirable norms, even if other group members start to
perform the prohibited act. 271 Moreover, the demand for accountability as a
result of penal norms increases the likelihood that a decision whether to vi-
olate the law will be made rationally and not out of conditioned behavior. 272
Furthermore, if this process occurs at least for some group members, it will
break group cohesion; thus we can expect the behavior of many other group
members not to be conditioned. 273

In the context of ICL, communication with members of different do-

mestic communities has gradually increased. 274 David Rodin points out that
currently, despite the fact that

military commanders and government officials restrict access to
relevant information and routinely engage in deception of soldiers

266. See id.
267. In order to reduce conditioned behavior, not all group members need to be aware of
the legal system’s normative assertions. Rather, it is enough that some members be aware. See
sources cited supra note 203 and accompanying text.
268. See sources cited supra note 208.
269. See supra note 209 and accompanying text.
270. See supra note 210 and accompanying text.
271. See supra note 211 and accompanying text.
272. See supra notes 212–214 and accompanying text.
273. See supra notes 203–204 and accompanying text.
274. See David Rodin, The Liability of Ordinary Soldiers for Crimes of Aggression, 6
and citizens, there often exist other channels of relevant information . . . . even within non-democratic societies, access to relevant in-
formation is at least increasing with technologies such as the
Internet. This may be sufficient to a morally reflective person to
make a reasonable assessment.\textsuperscript{275}

Therefore, increased awareness of the norms of ICL may trickle down to
enough morally reflective actors to have this effect on the population they
belong to.

Moreover, these communications condemning the acts and stressing
their illegality correlate with social norms commonly held around the world.
Surveys performed recently by the International Committee of the Red
Cross show that the majority of individuals in all diverse communities ad-
dressed by ICL view the commission of the core acts prohibited by ICL as
wrong.\textsuperscript{276} This means that we can expect that, even in a country that does
not enforce ICL, international communications condemning violations of
ICL will correlate with social norms held in the relevant country; thus it is
likely that at least some members of the society will be attentive to these
communications, so group cohesion is likely to be reduced.

Currently, however, a different position is often advanced. Many schol-
ars ignore the effect normative assertions have in reducing conditioned
behavior.\textsuperscript{277} Thus they assume that a group member’s action will not be the
result of rational, dissuadable behavior but rather the result of a conditioned
process that resolves cognitive dissonances.\textsuperscript{278} The commission of atrocities
by group members, they assume, leads to a cognitive dissonance for group
members who are not participating in the commission of these acts and who,

\textsuperscript{275.} \textit{Id.}
\textsuperscript{276.} \textit{See Muñoz-Rojas & Frésard, supra note 13, at 189–93. Some have gone even fur-
ther. For example, while it is commonly claimed that the twentieth century has been the most
violent century in human history, statistical analysis has shown that, relative to the size of the
human population, the probability of an individual suffering from war-related acts of violence
has actually been in decline throughout the centuries. Pinker has argued that the gradual de-
cline in war-related violence that has occurred during the twentieth century should be
attributed to gradual global spread of a cultural perspective that views such violence as morally-
wrongful, and that the increasingly prominent place given to the norms of ICL is one of the
expressions of this cultural trend, as well as one of the means of increasing the influence of this
culture. \textit{See Steven Pinker, The Better Angels of Our Nature: Why Violence Has De-
Glover, Humanity: A Moral History of the Twentieth Century} 3 (2001). It should be
noted that Gray has criticized Pinker’s social-evolution-based description. \textit{See John Gray, Delu-
sions of Peace, Prospect}, Sept. 21, 2011, \textit{available at} http://www.prospectmagazine.co.uk/
2011/09/john–gray–stev–pinker–violence–review/. However, as Clarke points out, Gray does
not dispute the actual decline in violence. \textit{See Steve Clarke, Has Violence Declined? John Gray
on Steven Pinker, Practical Ethics} (Oct. 19, 2011), http://blog.practicalethics.ox.ac.uk/2011/
\textsuperscript{277.} \textit{E.g., Mark A. Drumbl, Atrocity, Punishment, and International Law} 202
(2007); Minow, \textit{supra} note 123, at 36.
up to that point, viewed these acts as wrongful. They further assume that such dissonance will result in an individual group member sticking to her initial view (the belief that the atrocious acts are wrongful) only when she senses that support for those acts is not widespread within the group. Thus, many scholars assume that group members will be able to oppose atrocities only when the atrocities are in their initial stages and only if the group has sufficiently internalized the norm that views that act as wrongful; otherwise, an unstoppable cycle of atrocities is expected to begin. For example, Drumbl states:

Many atrocities begin with the devious kindling of conflict entrepreneurs . . . . Community responses to this are not predestined . . . . If community members ignore these flames, and look past attempts to habituate them to violence and hatred, then the conflict entrepreneur remains marginal. If community members are attracted to the flames, and identify with violence and hatred, then the wheels of atrocity are set in motion. And once set in motion, these wheels quickly become unstoppable by anything other than the use of countervailing force.

Furthermore, since scholars assume that group members will prefer the actions of other group members to the position of the law, which is viewed as external, they believe it is unlikely that atrocities will be prevented.

Moreover, it is assumed that the majority, which does not initially participate in the actions, will be conditioned by a syndrome called the bystander effect. The bystander effect is a psychological phenomenon that refers to cases where individuals do not offer help to a victim because they think that, if the act was inappropriate, other people would have intervened. Once they do not act, so it is further argued, cognitive dissonance will again have its effect, leading these passive group members to abandon their initial position that the atrocious act is wrongful. Thus the cycle of violence is expected to gradually expand.

However, unless we adopt a strongly deterministic position that views almost all inactions of a person within a group as a sign of conditioned behavior and almost all changes in a person’s views as being the result of a

279. See supra notes 88–90 and accompanying text.
280. Drumbl, supra note 278, at 202; see also Clifton D. Bryant, Khaki-Collar Crime: Deviant Behavior in the Military Context 57 (1979).
281. E.g., Drumbl, supra note 278, at 202.
282. Id.
283. See, e.g., Bryant, supra note 280, at 57.
284. Fletcher & Weinstein, supra note 64, at 613–15.
285. Id. at 613.
conditioned process, it is hard to accept this description. What is implied in such descriptions, in fact, is an admission that the majority does not participate in the commission of the atrocities. However, supporters of the position just described further assume that the behavior of this “passive” majority is also conditioned. That would be true if the only three options available for group members are participation in the wrongful act, explicit resistance, and complete inaction. Yet group members actually behave in many other ways; for example, many soldiers, when given an order to commit a wrongful act, do not confront their commanders but instead de facto disobey the order by “reinterpreting” it so as to not demand the commission of the atrocious act ordered. This indicates rational, dissuadable behavior: attempting, on the one hand, not to confront the commander, while at the same time not committing the wrongful act. Thus, if not all members of the supposedly passive majority are afflicted by the bystander effect—and in fact many members of that majority are not at all passive—it seems that we can assume that rational behavior is common. In the current age, in which the core values that ICL represents have been internalized by many group members, and condemnation by the international community of violations of ICL often succeeds in penetrating the veil of sovereignty, there is no reason not to assume that the majority, who do not participate in the commission of the atrocities, do so because they have internalized the norms. In other words, there is no reason not to assume that enough members of the relevant domestic society have internalized the norms represented by ICL and are attentive to international condemnation to such an extent that group cohesion is not at a level that prevents rational, dissuadable behavior.

287. Such a view should not be adopted. Even sociopsychological-coercion claims adopt a higher threshold from which behavior should be considered conditioned (at least those that do not endorse behavioral determinism). See supra note 102 and accompanying text. The flaws of such a position can further be revealed by examining the view of Muñoz-Rojas and Fréard—who make a problematic assumption of a high probability for conditioned behavior without a sufficient basis. On the one hand, they state: “Moral disengagement is a complex process and malicious acts are always the product of interactions between personal, social and environmental influences.” Muñoz-Rojas & Fréard, supra note 13, at 197. Yet, despite that statement, they reach the conclusion that the “idea that the bearer of weapons is morally autonomous is inappropriate.” Id. at 202.

288. See Fletcher & Weinstein, supra note 64, at 613 (“We assume that in most episodes of mass violence only a fraction of the population commits criminal acts.”).

289. See sources cited supra notes 284–286 and accompanying text.

290. See Fletcher & Weinstein, supra note 64, at 613 (making the assumption that these are the only three possible categories of behavior).

291. Osiel, supra note 123, at 1110.

292. See supra note 276 and accompanying text.

293. See supra notes 274–275 and accompanying text.

294. See Zygmunt Bauman, The Ethics of Obedience (Reading Milgram), in MODERNITY AND THE HOLOCAUST 151, 165–66 (1989) (“A most remarkable conclusion flowing from the full set of Milgram experiments is that pluralism is the best preventive medicine against morally normal people engaging in morally abnormal actions. . . . Unless pluralism had been
Thus, actions of both those who participate and those who do not participate in the commission of the atrocities are likely to be the result of a rational choice, made with awareness of the possibility that the international community may decide in the future to prosecute war crimes committed in the relevant country.

To use a current event as an example, why should we assume that a soldier that deserts from the Syrian army is rational and dissuadable by ICL and war crimes prosecution, while his colleague that does not desert and obeys orders to shoot civilians is conditioned to obey atrocious orders? It is more probable that the fact that both kinds of soldiers exist (as well as probably many soldiers who find creative ways to avoid obedience to atrocious orders) is an indication that each of them has made a rational decision. It seems that in the current age, in which the different domestic societies are not disconnected from the world and the norms of ICL correlate with values supported by many individuals within each society, there is no reason to assume an extremely deterministic view of human action.

Therefore, it can be concluded that the requirements needed for a legal system to be able to use its normative penal assertions to reduce the probability of conditioned behavior are attainable. Moreover, in the context of war

eliminated on the global-societal scale, organizations with criminal purposes, which need to secure an unflagging obedience of their members in the perpetration of evidently immoral acts, are burdened with the task of erecting tight artificial barriers isolating the members from the ‘softening’ influence of diversity of standards and opinions.”. Such barriers are much more difficult to erect today than in 1989 when Bauman made his statement.

Jeremy Bowen, Up to 15,000 Syrian Soldiers Defect, Says Opposition, BBC News (Nov. 16, 2011), http://www.bbc.co.uk/news/world-middle-east-15768038. Some of the variation in behavior between different Syrian soldiers might be the result of sectarian divisions within the Syrian society, a country in which an Alawite minority rules over a population mainly consisting of Sunnis. A Sunni soldier, thus, may be more strongly influenced to defect by the norms of his subculture than an Alawite soldier. Yet, an examination of the behavior of soldiers belonging to Sunni majority strongly indicates that any deterministic explanation fails to properly account for the behavior of Syrian soldiers. The majority of soldiers in the Syrian army are Sunni; while many of them have defected, many of them have yet to do so, even after months of civil war. This variance in the behavior of members of the same subculture simply cannot be explained if we assume that the actions of these soldiers are simply the result of sociological conditioning. See Agencies, Top Syrian Army Defector Safe in Turkey, NATIONAL (U.A.E.) (Oct 5, 2011), http://www.thenational.ae/news/world/middle-east/top-syrian-army-defector-safe-in-turkey (stating that the Syrian Army consists mainly of Sunni soldiers); Jim Garamone, DOD Officials Call Syrian General’s Defection ‘Significant,’ AM. FORCES PRESS SERV., July 6, 2012, available at http://www.defense.gov/news/newsarticle.aspx?id=117037 (quoting a Syrian officer that has defected as stating that “the vast majority of the Syrian military is still following” the regime’s orders); see also Joelle El-Khoury, Former Syrian Officer Says Ranks of Defectors Are Swelling, ALMONITOR (N.Y.C.) (July 10, 2012), http://www.al-monitor.com/pulse/security/01/07/a-dissident-alawi-army-officer-a.html (discussing an interview with the highest-ranking Alawite defector from Syria’s military, who estimates that nearly a quarter of the Syrian military has defected and further claims that areas “which have an Alawite majority have recently been witnessing many protests that are demanding the fall of the regime”).

See Fletcher & Weinstein, supra note 64, at 614 n.143 (assuming that only the actions of those who resist are not conditioned).
crimes prosecution, even when the attempts of ICL enforcement are made by the international community and are directed against members of a domestic society in which the government supports the violation of ICL, these requirements are fulfilled. Because of the imperfections of war crimes prosecution, as well as the strength of sociopsychological coercive conditions in the context of war crimes, sociopsychological coercive conditions can still be expected to have an effect on individuals’ cognition. That being said, in real-life situations, both sociopsychological coercive conditions and counterinfluences of ICL and war crimes prosecution do have an effect—a fact that has not sufficiently been taken into account in the current discourse. Hence, the likelihood that a war crime is committed out of completely conditioned behavior is much less than the current interpretation of the sociopsychological research may lead some to assume. Moreover, it should be noted that war crimes prosecution and ICL’s levels of fairness, enforcement, and communication have been continually increasing.

C. Rational, Dissuadable Behavior in War Crimes—If Research Findings Are Not Misinterpreted

In light of these research findings, it can be concluded that those who support the extensive interpretation of sociological and psychological research (and wish therefore to enact extensive sociopsychological-coercion defenses) have overextended the conclusions that should be deduced from sociological and psychological research. The current Section summarizes the flaws in their position, showing that, once these flaws are redressed, rational, dissuadable behavior can generally be assumed in the context of war crimes. As such, ICL and war crimes prosecution can be assumed to be just and effective (or at least more just and effective than some have claimed).

One flaw in the common interpretation of research findings is an exaggeration of the implications that can be extrapolated from statistics. As previously discussed, evidence showing that most people act in a certain manner does not necessarily mean that all of these people, or even most of these people, do so irrationally or without being sufficiently aware of the legal system’s demands.297 Thus, even in an “ideal setting,” when the effect of sociopsychological coercive conditions is only minimally interrupted by counterinfluences, we can assume that at least some individuals who commit the wrongful act are rational and dissuadable.298

297. See supra note 147 and accompanying text.

298. There is some indication that even in a laboratory “ideal setting,” behavior is not completely conditioned. For example, in Milgram’s experiment all participants obeyed the instruction to cause pain to a person, but a third refused the instruction to cause pain that renders a person unconscious; moreover, almost all participants exhibited discomfort when obeying the instructions. These factors indicate that even in such a setting, individuals’ actions are not completely conditioned. See Adi Parush, Tziyut, Achrayut, Ve-HAChok HA-Pleelee—SUGIYOT MISHPATIYOT BE-RE’I PHILOSOPHI [OBEDIENCE, RESPONSIBILITY, AND THE CRIMINAL LAW—LEGAL ISSUES FROM A PHILOSOPHICAL OUTLOOK] 108–11 (1996); Luban, supra note 194, at 295. Zimbardo, a leading researcher in this area of psychology, also interprets his own research
A second flaw in the interpretation of the research findings is an overemphasis on the effect of sociopsychological coercive conditions. The research findings indicate that there are factors that can counter the effect of sociopsychological coercive conditions. These countering factors reduce both the probability that wrongful acts will be committed as well as the probability that a wrongful act, if committed, will be committed as a result of conditioned behavior. In a real-life context, a person is likely to be affected by a diversity of factors, some that have the potential to increase conditioned behavior and some that are countervailing factors. Those who support the adoption of extensive sociopsychological-coercion defenses generally ignore the likely effect of the countervailing factors and instead advocate that a sociopsychological-coercion defense should be afforded whenever a crime has been committed in a situation in which strong sociopsychological coercive conditions exist. However, the existence of sociopsychological coercive conditions alone is insufficient to support the conclusion that a person has acted as a result of conditioning. We also need to examine the extent to which countervailing factors (which increase rational, dissuadable behavior) affected the person’s actions.

Furthermore, as previously discussed, sociological and psychological research indicates that a legal system (1) that is sufficiently fair, (2) that is sufficiently enforced, and (3) in which normative assertions reach many (even if not all) members of the social group it addresses, can use its criminal law and law enforcement to reduce the effect of sociopsychological coercive conditions. Moreover, these three prerequisites are not impossible to attain, even in the context of ICL and war crimes prosecution. Thus, we can expect that normative assertions, even when made in the context of ICL and war crimes prosecution, will often have at least some effect on an individual’s levels of rationality and dissuadability.

Once these flaws are exposed, it becomes clear that a much higher benchmark—at least higher than the one advanced by supporters of sociopsychological-coercion claims—is needed in order to conclude that a

findings in a manner that supports such a position. He opines that the conclusion that should be reached from his research is not that individuals committing wrongful acts under the influence of group cohesion should be viewed as lacking criminal culpability. His claim is more moderate, arguing only that they should be viewed as partially responsible as a result of such influence. 


299. See supra note 192 and accompanying text.

300. That is because even individuals who are rational and dissuadable can be expected to sometimes commit a crime. See sources cited supra notes 138–139.

301. See supra note 192 and accompanying text.

302. See Part II.A.

303. See SLOVENKO, supra note 137, at 211.

304. See supra Part III.A.

305. See supra Part III.B.
wrongful act has been committed as a result of conditioning. In other words, the fact that a wrongful act has been committed in a situation in which strong sociopsychological coercive conditions existed is insufficient, considering that countering factors (including the normative assertions of a penalizing legal system) also play a role. Therefore, only in rare situations in which countering factors could not have an effect is it appropriate to assume that an illegal act is committed by a completely irrational, undissuadable agent.  

This conclusion has substantial implications for the legitimacy of ICL and war crimes prosecution. It is insufficient to recite the mantra that strong sociopsychological coercive conditions exist in almost all situations ICL and war crimes prosecution regulate in order to question the justness or effectiveness of ICL and war crimes prosecution. ICL in its current state, though imperfect, is fair and enforced, and it communicates with members of different domestic societies at a level that enables us to assume that its normative assertions often affect its audience. Therefore, in the real-life situations regulated by ICL and war crimes prosecution, both sociopsychological coercive conditions and the countering influence of these penal norms and their enforcement will usually have an effect. This means that rational, dissuadable behavior can generally be assumed even in the context of war crimes, and the moral justification for ICL and war crimes prosecution is not truly threatened by sociological and psychological research findings.

IV. How Should ICL Respond to Sociopsychological Coercive Conditions?

These research findings not only supply the basis for a premise of rational, dissuadable behavior in the context of ICL and war crimes prosecution, but they also indicate ways in which the influences of sociopsychological coercive conditions must be taken into consideration. As such, they highlight that some changes need to be made in relevant laws and legal policies.

A. Increasing and Not Decreasing Proactivity

In light of sociological and psychological research findings, an attempt should be made to increase—as much as possible within the limitations of ICL and war crimes prosecution—fairness, the level of enforcement, and the lines of communication with the different social groups ICL and war crimes prosecution attempt to regulate. This will further reduce the influence of
sociopsychological coercive conditions and thus the probability of irrational, undissuadable behavior.  

Therefore, even though ICL and war crimes prosecution are still at a stage where sociopsychological coercive conditions may have some effect on individuals’ behavior, those who claim that ICL and war crimes prosecution are illegitimate have misinterpreted the relevant research. It should not be concluded that, because of the existence of strong sociopsychological coercive conditions, the use of war crimes prosecution should be minimized (or even abandoned). Rather, war crimes prosecution, if we wish ICL and war crimes prosecution to be just and effective, must be made increasingly proactive, because doing so will further increase the likelihood that the individuals addressed will be rational and dissuadable.

B. Minimizing the Scope of Sociopsychological-Coercion Defenses

Research concerning the effect of penal law and law enforcement, as will be explained herein, aids in addressing many of the flaws that exist in current jurisprudential attempts to limit the incorporation of sociopsychological-coercion defenses. Moreover, addressing these flaws will elucidate the strategy that needs to be adopted with regard to sociopsychological-coercion defenses in the context of war crimes.

First, research has supplied additional information that aids in defining more accurately the difference between conditioned actors and rational, dissuadable actors. Furthermore, it provides a strong consequentialist justification for minimizing the scope of sociopsychological-coercion defenses. Rejecting as much as possible the need for sociopsychological-coercion defenses can aid a legal system in asserting that its norms must be obeyed. By strongly asserting the duty to obey its norms, a legal system decreases the probability that individuals will be influenced by sociopsychological coercive conditions. Further, such research strengthens the assumption that laws and threats of punishment will affect the behavior of individuals, as well as the assumption that the punishment of an individual will affect her and others’ future behavior. Specifically, through dissemination of law and the threat of punishment, a legal system increases the probability that the individuals it addresses will remain rational, dissuadable agents.

From a moral-blame perspective, these findings also supply a nonconsequentialist justification for restricting, as much as possible, the recognition of sociopsychological-coercion defenses. By not affording

310. See supra Part II.B (discussing these flaws).
311. See text accompanying supra note 303.
312. See Robinson, supra note 179, at 62.
313. See supra Part III.A.
314. The extent to which this is possible in war crimes prosecution will be explained infra in Part V.
such defenses, a penal system sends a clear, normative message that its laws should be obeyed and that an individual should not perform wrongful acts, even when her social and cultural group thinks otherwise.315 Such a normative message will often prevent a person from lapsing into a conditioned mode of behavior.316 Therefore, it can be concluded that the legal system’s rejection of sociopsychological-coercion defenses can increase the probability that, if a law is violated, it will be by a morally blameworthy individual.317

These conclusions are applicable to ICL and war crimes prosecution. Therefore, by addressing these flaws in this context, the course of action that needs to be adopted with regard to sociopsychological-coercion defenses in the context of war crimes will be revealed.

The strategy of using penal law and law enforcement to reduce the effects of sociopsychological coercive conditions both supports (with respect to efficiency) and justifies (from a moral-blame perspective) minimizing, in the context of war crimes, the scope of the sociopsychological-coercion defenses afforded. This strategy supports such a course of action because the rejection of these defenses can aid in asserting that the norms of ICL must be obeyed, which in turn decreases the probability that individuals will be influenced by sociopsychological coercive conditions.318 Accordingly, it will also often be justified not to excuse individuals if they have committed a war crime, even in a situation in which strong sociopsychological coercive conditions exist.319 However, as will be discussed in the next Section, this should not lead us to the conclusion that the effects of sociopsychological coercive conditions should be ignored completely when deciding whether, and how much, an individual should be punished.

C. Sociopsychological Coercive Conditions as a Mitigating Consideration

The effects of sociopsychological coercive conditions cannot simply be ignored. To do so would be to repeat the mistake committed by supporters of sociopsychological-coercion claims—that is, to ignore the complexity of reality.

315. See Robinson, supra note 179, at 63 (making this argument in the context of the consequentialist rationale). At this point this argument is identical for both the consequentialist and the moral-blame rationales. Therefore there is no need to discuss it separately with respect to the moral-blame rationale.
316. This is because of the effect of normative penal assertions as discussed supra Part III.A.
317. Cf. Halleck, supra note 30, at 136–37 (presenting both consequentialist and moral-blame rationales that support strongly asserting the responsibility of a person to obey the law for the influence of such assertions on a person’s cognition).
318. See supra note 312 and accompanying text.
319. See supra notes 315–317 and accompanying text.
Individuals in a real-life setting are influenced by many factors, including sociopsychological coercive conditions. Therefore, when a wrongful act is committed in a situation in which strong sociopsychological coercive conditions exist (such as in the context of many war crimes), we should assume that these conditions will at least have some effect on a person’s cognition. Therefore, in the context of war crimes we can expect that many individuals’ levels of rationality and dissuadability will be partly diminished. Moreover, we can also expect that in some (relatively rare) situations in which it is unlikely that countering factors could have an effect, war crimes will be committed by fully irrational, undissuadable agents.

At first glance, the existence of these two categories of behaviors (fully conditioned and partially conditioned behaviors) seems to create a difficulty in the context of war crimes prosecution in that consequentialist and moral-blame considerations pull in different directions. From a moral-blame perspective, it is unjust not to recognize the hardship that such individuals face—a hardship that, even when it does not render their behavior conditioned, affects the severity of their moral blame. From a consequentialist perspective, on the other hand, it seems at first glance that such recognition of their hardship might reduce deterrence and, as such, weaken the normative assertion of ICL and war crimes prosecution, which attempts to counter the effects of sociopsychological coercive conditions.

However, allowing sociopsychological coercive conditions to be viewed as a mitigating consideration should reduce some of this tension. From a consequentialist perspective, this will not weaken normative messaging because, perhaps counterintuitively, the severity of punishment has a very weak effect on reducing the crime rate. Moreover, such a course of action is likely to increase the probability that individuals will perceive ICL and war crimes prosecution as fair, and thus increase the likelihood that they will be dissuadable by these laws and threats of punishment.

320. See, e.g., Kelman & Hamilton, supra note 84, at 166 (discussing this issue in the context of “crimes of obedience”).
321. One should remember that a spectrum exists between fully irrational, undissuadable behavior and perfectly rational, dissuadable behavior. See supra note 53 and accompanying text; supra note 137.
322. See Zimbardo, supra note 298.
323. See text accompanying supra note 303.
324. According to a moral-blame perspective, the level of moral blame is influenced by a person’s level of rational, dissuadable behavior and thus should affect the severity of punishment. See Fletcher, supra note 57, at 350–54, 461–63; see also Robinson, supra note 28, at 109, 111.
325. Cf. Robinson, supra note 179, at 63 (discussing this consequentialist rationale in a domestic context).
326. Bagaric & Morss, supra note 19, at 194–95; see also Halleck, supra note 30, at 141; Kahan, supra note 219, at 377–82.
327. See source cited supra note 228 and accompanying text.
From a moral-blame perspective, considering these conditions as mitigating factors is the just course of action for individuals that were only partially affected by sociopsychological coercion. Supporters of a moral-blame perspective hold that external influences that do not reach the level that necessitates considering the actions they influenced as conditioned should affect the question of mitigation of punishment (and not the question of criminal conviction). Yet, in the case of individuals who can still be expected to be completely conditioned, a conflict remains between consequentialist and moral-blame considerations.

D. A Sociopsychological-Coercion Defense Should (Sometimes) Still Be Afforded

How should those who commit war crimes as a result of completely conditioned behavior, despite the normative assertions of ICL and war crimes prosecution, be treated? Though only a crude line can be drawn to distinguish those fully conditioned from those only partially affected by sociopsychological coercive conditions, a sociopsychological-coercion defense should still be afforded in some categories of situations. Such a course of action can be supported both from a moral-blame perspective and from a consequentialist perspective.

The moral-blame perspective’s response to the difficulty of distinguishing conditioned behaviors from rational, dissuadable behaviors (as previously discussed) endeavors to excuse those who cannot be considered rational, dissuadable criminals—even if consequentialist considerations support their punishment. But since such a perspective takes into account the difficulty in distinguishing conditioned behavior from rational, dissuadable behavior, it establishes a legal norm that will attempt to distinguish between them as accurately as possible (based on available scientific knowledge) and will attempt to resolve any remaining uncertainty in a fair (though unavoidably inaccurate) manner. However, this Article has exposed currently available scientific findings that have not been taken into account by the supporters of this response: the “louder” a legal system proclaims a duty to obey its legal norms, the greater the likelihood that criminal violators will be rational and dissuadable and therefore can be considered morally blameworthy for their criminal actions.

However, a problem from the moral-blame perspective remains when deciding how to differentiate between conditioned behavior and rational, dissuadable behavior. On the one hand, since the normative messaging of ICL and war crimes prosecution can influence the level of rationality and dissuadability of individuals, the refusal to afford a sociopsychological-coercion defense increases the probability that this refusal will be morally

328. See sources cited infra note 324.
329. See sources cited supra note 176 and accompanying text.
330. See sources cited supra notes 315–317, 319 and accompanying text.
justified (that is, it increases the probability that the individual punished is truly morally blameworthy). Such a refusal increases this probability because it strengthens the normative assertion that the norms of ICL must be obeyed, which in turn decreases the probability that violations of the law, even when sociopsychological coercive conditions exist, will be the result of conditioned behavior. On the other hand, this normative assertion is not the only factor influencing an individual’s level of rationality and dissuadability. Even with a strategy that fully rejects the need to adopt a sociopsychological-coercion defense, some individuals will still violate the law as a result of conditioned behavior.

Research findings addressing the influence of penal norms do not direct the exact placement of the normative dividing line between conditioned behavior and rational, dissuadable behavior. Rather, they indicate that the behavior of a much smaller category of individuals should be considered conditioned (smaller than what has been argued by supporters of sociopsychological-coercion claims). This will only be the case when the sociopsychological coercive conditions are unusually strong to the extent that we cannot expect the normative assertions of ICL and war crimes prosecution to have an influence.

However, the phrase “unusually strong” is extremely vague, and adopting such a vague benchmark is likely to lead to a variance in judicial rulings. This concern is especially severe within the context of the heterogeneous international community. Therefore, it would be more appropriate to define categories of situations in which we can usually expect sociopsychological coercion to be unusually strong (to the extent that it is very unlikely that normative messaging will have much influence on a person’s cognition) and set sociopsychological-coercion defenses in the context of these categories. Such legal rules would reduce (though not eliminate) variance among courts and would therefore reduce the unfairness concern.

Though such rules will be somewhat over- and underinclusive, leading to the punishment of some nonculpable individuals and excusing some that are culpable, this should be acceptable to many supporters of the

331. See Halleck, supra note 30.
332. See text accompanying supra note 323.
333. See supra Part III.C.
334. Vagueness in a penal rule can lead to an inconsistent application of the rule, and this creates a fairness problem in which similar individuals are not treated alike. See, e.g., Paul H. Robinson, Fair Notice and Fair Adjudication: Two Kinds of Legality, 154 U. Pa. L. Rev. 335, 366–67 (2006).
335. See supra notes 182–183 and accompanying text.
338. Because of the tension that exists between considerations such as the one discussed in Greenawalt, supra note 336, and considerations such as the one discussed in Fletcher, supra
moral-blame perspective, as previously discussed. Furthermore, since judges are fallible and vary in their interests and moral views, we can expect that a vague (discretionary) norm will also lead to the punishment of some nonculpable individuals and the excusing of some that are culpable. Moreover, variance in rulings within war crimes prosecution is expected to be especially extensive because of the heterogeneous nature of the international community. This fact supplies, in this context, additional support for reliance on a rule-based norm rather than a discretionary one.

Furthermore, one should keep in mind that according to the course of action suggested herein, the fact that sociopsychological coercive conditions existed during the commission of the crime should be a mitigating consideration when it is not allowed as a defense. Doing so reduces the possible injustice that might result from the inexact manner in which the suggested legal line is drawn to distinguish between those who should be afforded a defense and those who should not.

Allowing a defense in such rare, discernible categories can also be justified from a consequentialist perspective. According to many consequentialist points of view, evidence indicating that individuals, under certain conditions, commit crimes as a result of a conditioned behavior can serve as the basis for an excuse defense; however, consequentialists only agree to afford a defense in such cases when there is little advantage in punishing the relevant individuals. The rareness of those situations in which the suggested sociopsychological-coercion defense is relevant, the fact that punishment is not likely to affect the behavior of the individuals to which this defense will apply, and the fact that affording such a defense increases the likelihood that individuals will perceive this legal system as fair, all increase the probability that supporters of a consequentialist perspective will be ready to accept such a defense.


340. See Greenawalt, supra note 336; see also Burton, supra note 140, at 185 (“[T]he rule of law is important precisely because we cannot count on our judges to be virtuous.”).

341. See supra notes 182–183 and accompanying text.

342. See Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life 152–55 (1991) (stating that the more we are concerned about the harm that will be caused by mistakes made by agents with discretion, the more we should prefer a rule-based norm over a discretionary one).

343. A discussion of the specific category in which the defense should be afforded will be made infra Part V.

344. See supra note 154 and accompanying text.

345. See supra note 154 (providing sources citing the different consequentialist reasons that have been raised in support of enacting excuse defenses).
Defining clear, discernible categories in which the defense will be afforded has an additional advantage. As supporters of the “balancing” approach have pointed out, it reduces the likelihood that the defense will be abused.346

V. WHO SHOULD BE AFFORDED A SOCIOPSYCHOCLOGICAL-COERCION DEFENSE IN WAR CRIMES PROSECUTION?

As noted, a sociopsychological-coercion defense should be afforded in the context of war crimes only with regard to clearly discernible (and rare) categories of situations in which the sociopsychological coercive conditions are unusually strong. This defense should be added to existing defenses already found in ICL (such as physical duress). However, in practical terms, what are those categories of situations in which a sociopsychological-coercion defense needs to be afforded?

A. Limits on the Coercion Defense

Some scholars claim that the influence of authoritarian states on their citizens is so strong that normative assertions of ICL and war crimes prosecution do not reach their citizens or are distorted by the authoritarian regime.347 As a result, citizens under authoritarian regimes are unable to recognize those situations in which ICL demands their disobedience of national legal norms (even when the domestic norm demands the commission of an atrocious act).348

If these claims are correct, it would be difficult to define the war crimes committed by citizens of authoritarian regimes as actions of rational individuals or of individuals that could be potentially dissuaded by ICL and war crimes prosecution (performed in this context by the international community).349 From a consequentialist perspective, attempts to direct their behavior are futile. From a moral-blame perspective, they should be excused since, if their actions are conditioned, they are not blameworthy.

However, as previously discussed,350 there is no reason to assume that the majority of individuals who live under authoritarian rule are irrational, not influenced by war crimes prosecution, or unaware of the true content of obligations.

346. See sources cited supra note 187.
347. See ARENDT, supra note 64, at 252–55; Drumbl, supra note 19, at 567–77, 590–91; Fletcher & Weinstein, supra note 64, at 605–12; Reisman, supra note 109, at 77; Tallgren, supra note 13, at 571–76. The arguments made by these scholars are generally made with respect to authoritarian regimes.
348. See sources cited supra notes 64, 109.
349. See R. v. Finta, [1994] 1 S.C.R. 701, ¶ 86 (Can.), for an example of an implied assumption that subordinates of authoritarian states are less blameworthy than those of non-totalitarian states. See also Drumbl, supra note 19, at 567–77, 590–91; Fletcher & Weinstein, supra note 64, at 605–12; Reisman, supra note 109, at 77; Tallgren, supra note 13, at 571–76.
350. See supra Part III.B.
the normative assertions of ICL.\textsuperscript{351} Furthermore, the international community tends to condemn states that persistently violate international law, and these condemnations often succeed in penetrating the veil of sovereignty of even the most authoritarian states (and many of these condemnations are not successfully distorted by such regimes).\textsuperscript{352} As such, the communication between the international community and citizens of authoritarian regimes increases the probability that a person committing war crimes will do so based on a rational decision to violate the law.\textsuperscript{353} Therefore, the fact that a person committing a war crime does so under an authoritarian regime cannot by itself extinguish her responsibility, and thus there is no need to extend a sociopsychological-coercion defense to all individuals living under such regimes.

There is, however, a narrower category of situations in which a sociopsychological-coercion defense should be afforded to perpetrators who, under current positive law, would be convicted: those arising in the context of what can be referred to as brainwashing attempts, more accurately called coercive-indoctrination attempts.

\textbf{B. The Brainwashing or Coercive-Indoctrination Defense}

In current ICL\textsuperscript{354} and most domestic legal systems,\textsuperscript{355} brainwashing is not recognized as a defense. The reluctance of legal systems to recognize such a defense is due to the fact that it is still debated—particularly in the psychology profession—whether brainwashing is truly effective, and if so what level of coercive means is needed in order to radically transform and completely control someone else’s mind.\textsuperscript{356}

Yet, despite this debate in the legal and psychological fields, it should be acknowledged that a relatively extensive consensus exists (based on a consensual moral intuition) that supports recognizing a coercion defense, which can be referred to as a brainwashing defense, or more accurately as a coercive-indoctrination defense,\textsuperscript{357} when harsh coercive means are used as part of a comprehensive indoctrination attempt, such as forced drug use, torture, or abduction at a young age.\textsuperscript{358} Despite this consensus, current domestic law in most legal systems still does not recognize this defense—perhaps owing to

\begin{footnotes}
\item[351.] Sloane, supra note 19, at 61–65, 71–75.
\item[352.] Rodin, supra note 274, at 595; supra Part III.B.3.
\item[353.] Rodin, supra note 274, at 595.
\item[354.] Olusanya, supra note 13, at 54.
\item[356.] See Emory, supra note 355, at 1340–41; Warburton, supra note 355, at 78–80.
\item[357.] See Robinson, supra note 179, at 54–55 (using this term instead of the inaccurate term “brainwashing”).
\item[358.] Emory, supra note 355, at 1354; Robinson, supra note 179, at 65, 68, 73–74.
\end{footnotes}
the rarity of situations in which people attempt to comprehensively indoctrinate others through the use of extremely harsh coercive means in the context of domestic crimes.\footnote{359}

A coercive-indoctrination defense—even if afforded only to those tortured, forced to use drugs, or abducted and indoctrinated by the military at a young age—excuses individuals that under current ICL are not afforded a criminal law defense. Current duress and coercion defenses demand that the coercion be physical and that the threat of harm be immediate in order for a person to be excused.\footnote{360} Similarly, the intoxication defense only excuses an individual for actions committed while under the influence of the drug.\footnote{361} And the exclusion of crimes on the basis of age, currently set in the Rome Statute of the ICC, only excludes from the jurisdiction of the Court acts committed when the perpetrator was under the age of eighteen.\footnote{362} A coercive-indoctrination defense aims to excuse criminal actions committed even after the physical threat of harm has lifted, the forced use of drugs has stopped, or the abducted, indoctrinated child soldier has turned eighteen.\footnote{363} This excuse is based on the premise that extensive indoctrination attempts have long-term effects that make rational, dissuadable behavior highly unlikely, even after the use of the coercive means has stopped.\footnote{364}

Even without ruling on the general dispute as to whether the effects of coercive indoctrination should be recognized as the basis for a defense, and despite the fact that it is unlikely that complete control over someone else’s mind can be achieved, in the specific context of war crimes, a sociopsychological-coercion defense (which may be referred to as a coercive-indoctrination defense) should be afforded to individuals when harsh coercive means (such as forced drug use, torture, or abduction and indoctrination into military service at a young age) have been used as part of a comprehensive attempt to indoctrinate a person. This conclusion is based upon the cumulative effects of the different coercive influences that come into play in this context.

Once we take into account (1) the fact that research findings indicate that strong sociopsychological coercive conditions are found at the background of most war crimes (though usually at least partially countered by

\begin{footnotes}
\footnotetext[359]{In the United States, for example, the main cases in which the issue was discussed were: (1) the cases of American POWs in China during the Korean War which are discussed in Robinson, supra note 179, at 65–67; (2) United States v. Hearst, 466 F. Supp. 1068, 1072 (N.D. Cal. 1978); and (3) Muhammad v. State, 934 A.2d 1059, 1076–77 (Md. Ct. Spec. App. 2007). One should note the lengthy time span that exists between these cases. Moreover, in \textit{Muhammad}, it is doubtful whether the actions could truly be considered an attempt to brainwash.}

\footnotetext[360]{See Olusanya, supra note 13, at 54–58.}

\footnotetext[361]{Rome Statute art. 31(1)(b).}

\footnotetext[362]{\textit{Id.} art. 26.}

\footnotetext[363]{See Richard Delgado, Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded (Brainwashed) Defendant, 63 MINN. L. REV. 1, 8 (1979) (discussing this defense in a domestic law context).}

\footnotetext[364]{\textit{Id.}}
\end{footnotes}
opposing influences); (2) the existence of an intentional attempt to affect a person’s behavior and cognition (that is, the comprehensive-indoctrination attempt); and (3) the influence of the trauma caused by the past use of strongly coercive means (such as forced drug use, torture, or abduction and indoctrination into military service at a young age\textsuperscript{365}), along with the fear that coercive means might be used again in the future, I suggest that it becomes extremely unlikely that factors encouraging rational, dissuadable behavior (including normative assertions) will be sufficiently effective to fairly allow a person to be held accountable. Of course, as with any legal rule, this defense may be somewhat over- and underinclusive\textsuperscript{366} and may also be subject to some variation in its interpretation.\textsuperscript{367} However, requiring strong coercive means, in my opinion, reduces these concerns at least to a level that is not that different from other excuse defenses.\textsuperscript{368} Thus, such individuals, because of the strong sociopsychological coercion that seems to have influenced their behavior, should be afforded a defense.

\textsuperscript{365.} In the context of abduction and indoctrination into military service at a young age, a further clarification should be made. The current legal norm sets an arbitrary benchmark—the age of eighteen. This arbitrariness leads this norm to be both over- and underinclusive. This legal benchmark is overinclusive because many children who join the fighting are not coerced to do so and have a sufficient level of maturity for their decision to join the fighting (as well as subsequent decisions to commit atrocities) to be considered rational. See Michael Wessells, Child Soldiers: From Violence to Protection 45, 57, 99 (2006); Mark A. Drumbl, Reimagining Child Soldiers in International Law and Policy 11 (Wash. & Lee Legal Studies Paper No. 2011-17, 2012), available at http://ssrn.com/abstract=1921527 (“[N]otwithstanding accuracy in many individual cases, the portrayal of the child soldier as a faultless passive victim is unduly reductive.”). This legal benchmark is underinclusive because it is hard to believe that those who were first strongly coerced (abducted) to join the armed forces at a young age and then extensively indoctrinated suddenly become rational (and dissuadable by ICL and war crimes prosecution) agents at the age of eighteen; it is especially hard to believe that this is the case once we also consider the fact that research findings indicate that strong sociopsychological coercive conditions are found in the background of most war crimes. See Peter Warren Singer, Children at War 44 (2005). There is no need within the limits of the current Article to argue against the overinclusiveness of this legal benchmark. Furthermore, there are certain public interests that are supportive of maintaining this benchmark despite its overinclusiveness, such as maintaining the clarity of the normative message declaring that any recruitment of child soldiers is wrongful. Yet, this norm’s underinclusiveness should be amended so that those who are abducted and indoctrinated into military service at a young age and then subsequently exposed to extensive coercive indoctrination will be excused for illegal acts committed even after the age of eighteen (but only those individuals, and not all former child soldiers who have become adult combatants).

\textsuperscript{366.} See Burton, supra note 140 for discussion of this unavoidable difficulty.

\textsuperscript{367.} See generally Jeremy Waldron, Lucky in Your Judge, 9 THEORETICAL INQUIRIES L. 185, 216 (2008), for this unavoidable difficulty.

\textsuperscript{368.} See Robinson, supra note 334, at 381–84, (expressing a greater, but still limited, readiness to allow vagueness in excuse defenses in order to allow judges sufficient discretion to assess culpability based on the circumstances of the case at hand).
In the last two decades, the role of ICL has gradually become more significant. With increased significance comes increased criticism regarding the legitimacy of ICL and war crimes prosecution. Current trends in legal research seem to indicate that much of this criticism revolves (and will increasingly revolve in the future) around the sociological and psychological conditions under which war crimes are committed.\(^\text{369}\) This criticism asks two seemingly simple questions: (1) If the findings of sociological and psychological research show that under certain coercive conditions the vast majority of normal individuals will commit acts prohibited by ICL, and if such coercive conditions will almost always exist in those situations ICL and war crimes prosecution attempt to regulate, is it just to punish individuals for acting in what seems to be a conditioned manner? (2) If these are the conditions under which almost all war crimes are committed, can ICL and war crimes prosecution ever be effective in preventing criminal behavior?

Currently, supporters of ICL and war crimes prosecution have failed to supply a sufficient response to these questions, thus leaving ICL and war crimes prosecution vulnerable to delegitimization. This Article counters these delegitimizing claims by arguing that they are based on a misinterpretation of the findings of sociological and psychological research. This Article notes that research findings indicate that the normative position of a penal system is not passive, but rather that its normative assertions can affect an individual’s disposition and perception of a situation (increasing rational, dissuadable behavior) by instructing an individual how to act and asserting that she must obey the legal system’s laws (through criminal legislation and law enforcement). Thus, as discussed in this Article, this strategy not only decreases crimes, but also increases our ability to assume that a person’s illegal acts result from a rational decision to violate the law despite the risk of being punished.

Therefore, those who criticize the justness and effectiveness of ICL and war crimes prosecution have severely misinterpreted the normative implications of sociological and psychological research. While it is true that the findings of such research do indicate that current law should be reformed, these findings do not lead to the conclusion that ICL and war crimes prosecution are unjust, ineffective, or lacking in moral justification. Once the effect of ICL’s norms and its enforcement through war crimes prosecution is taken into account, rational, dissuadable behavior can be assumed to be much more common in the context of war crimes. Further, the existence of strong sociopsychological coercive conditions should not result in the minimization of war crimes prosecution (or even its abandonment). Rather, if we wish ICL and war crimes prosecution to remain both just and effective,

\(^{369}\) As explained supra note 2, in this Article all three core categories of acts that are defined as crimes by international law—genocide, crimes against humanity, and war crimes (in the narrow sense of the term)—were referred to jointly as “war crimes” because of the convenience of using the term “war crimes prosecution.”
war crimes prosecution must aspire to be increasingly proactive. War crimes prosecution must develop in such a way as to further increase the likelihood that the individuals whom ICL and war crimes prosecution attempt to regulate will be rational and dissuadable.