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## Leadership Crimes

Saira Mohamed

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# Leadership Crimes

Saira Mohamed\*

*The law of mass atrocity readily recognizes that responsibility and punishment for the world's worst horrors—campaigns of displacement, rape, torture, and killing—ought to fall primarily on the political, military, or community leaders who bring about these systematic crimes. But the international criminal courts that try and punish these individuals tell a narrow story about the harms perpetrated by leaders of mass crime. It is a story of leaders who abuse the power that derives from the coercive structures of government and governance—from hierarchy, from the capacity to order and punish subordinates, from the ability to force bureaucracies and institutions into service of violence. This account is not inaccurate, but it is grossly incomplete. The law ought to ascribe responsibility to leaders not only for these abuses of coercive power, but also for their acts of moral persuasion—using their positions of influence to guide, persuade, and convince others of the necessity, or even the rightness, of wrongdoing.*

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*Moral persuasion is a familiar and destructive phenomenon; it is Hitler convincing Germans of the “Jewish peril” and Rwandan politicians warning Hutus that Tutsis cannot be trusted. It forms a crucial component of many situations of mass atrocity, for it transforms ordinary citizens into willing executioners, ready to carry out leaders’ devastating plans. And yet, the idea of moral persuasion is largely missing from both legal scholarship and judicial practice. This Article presents a broad new understanding of leadership and crime by undertaking the first deep investigation of the topic. It offers three contributions: (1) a novel descriptive account of how the law of mass atrocity addresses the culpability of leaders; (2) a theoretical understanding of why this body of law overlooks leaders’ crimes of moral persuasion; and (3) a normative claim for why moral persuasion crimes should be recognized as a source of culpability for leaders.*

*Attending to the full harms of mass atrocity crime—including the moral, psychic, and societal wounds it leaves behind—requires a complete understanding of its formula. Accordingly, this Article argues for the recognition of moral persuasion as a critical repair to a system that is preoccupied with formal power, anxious about the perverse ordinariness of extraordinary crime, and in need of deeper connection with the reality of the horrors it addresses.*

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## INTRODUCTION

Daniel Keller was a U.S. soldier at Abu Ghraib in the early days of the Iraq War. Like many of his fellow Army unit members, he abused Iraqi detainees there during his tour of duty. Prior to his experience in Iraq, he never suspected that he would be capable of such cruelty. “None of us were like this before,” he said. “No one thought about dragging people through concertina wire or beating them or sandbagging them or strangling them or anything like that . . . before this.”<sup>1</sup>

What compelled Daniel Keller and so many others to unleash dogs on prisoners, to hang them from their wrists, to brutally beat them, to sexually humiliate them, to force them to hold their bodies in “stress positions” for so long that their bones broke?<sup>2</sup> Some of it was anger against those who, they believed, had attacked innocent Americans on September 11 and caused such destruction and heartache. Some of it was impatience with having to monitor detainees, a mundane task compared to the raids of terrorist hideouts and searches for weapons of mass destruction they had anticipated when they deployed. Some of it was frustration—with being far from home, with not understanding what they were doing there. But for some, it was also a sense that their conduct was justified. They were told the detainees were dangerous. They were told it was their responsibility to protect their country. They were told what they were doing was urgent, lawful, right. And so they did what they believed the circumstances required.<sup>3</sup>

Daniel Keller has not pointed a finger at any particular person for the transformation that he experienced at Abu Ghraib. But others have. In 2014

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1. JOSHUA E.S. PHILLIPS, *NONE OF US WERE LIKE THIS BEFORE: AMERICAN SOLDIERS AND TORTURE* 186 (2010) (internal quotation marks omitted).

2. See S. REP. NO. 113-288 (2014); PHILLIPS, *supra* note 1, at 38–39, 59, 83–84, 159, 179; TAGUBA REPORT ON TREATMENT OF ABU GHRAIB PRISONERS IN IRAQ, ARTICLE 15–6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE (2004), <https://fas.org/irp/agency/dod/taguba.pdf> [<https://perma.cc/BJ84-4RM5>]. Eleven U.S. soldiers have been convicted in military trials for prisoner abuse at Abu Ghraib. Additional service members were reprimanded but not charged, and no higher-level figures have been charged. Noah Bierman, *Few Have Faced Consequences for Abuses at Abu Ghraib Prison in Iraq*, L.A. TIMES (Mar. 17, 2015), <http://www.latimes.com/nation/la-na-abu-ghraib-lawsuit-20150317-story.html> [<https://perma.cc/S5M8-NXH2>].

3. See PHILLIPS, *supra* note 1, at 62–68.

House Minority Leader Nancy Pelosi remarked that former Vice President Dick Cheney had “set the tone” for the U.S. military and intelligence personnel who tortured and otherwise abused detainees at Abu Ghraib, Guantánamo Bay, and other sites across the globe.<sup>4</sup> She did not suggest that Cheney had directly ordered the use of these tactics. Instead, her point was that he encouraged them and facilitated them by creating a climate—by creating a mindset—in which any patriot, it was thought, would protect his country at all costs.

We are accustomed to the idea of moral inversion, the notion that the exigencies of war or crisis or mass violence alter a person’s sense of right and wrong. What was normal becomes abnormal, and what was wrong becomes right. It is an enduring idea, one that dates back to Thucydides’s tale of Corcyra’s transformation during its destructive civil war and is manifest in present-day narratives like *American Sniper*’s account of a Navy SEAL’s reluctant embrace of the cruelty of conflict.<sup>5</sup> “Words had to change their ordinary meaning,” Thucydides described. “Reckless audacity came to be considered the courage of a loyal ally; prudent hesitation, specious cowardice; moderation was held to be a cloak for unmanliness; ability to see all sides of a question inaptness to act on any.”<sup>6</sup>

Pelosi, however, was not attributing the campaign of torture and abuse to the moral mutations inherent in war. Instead, her comments point to a critical but often overlooked truth: in times of war or crisis, the world indeed turns upside-down, but *the world does not turn upside-down on its own*. Such transformation is, rather, the product of deliberate and calculated choices by leaders who seek to facilitate, encourage, and nurture violence toward some end, whether personal gain, territorial control, or political domination. Government leaders warn citizens that an enemy population is coming for their land, their jobs, their lives. Commanders tell subordinates that their comrades’ lives are in danger and they should do anything to protect them. Politicians advise constituents that a foreign threat must be annihilated, no matter what.<sup>7</sup>

This Article examines these significant but undertheorized acts of leadership—the acts of *moral persuasion* through which an individual uses a position of leadership to convince another actor to commit a crime of his own

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4. John Whitesides et al., *Democrat Pelosi Says Cheney Set Tone for CIA Interrogation Practices*, REUTERS (Apr. 6, 2014), <http://www.reuters.com/article/us-usa-cia-pelosi-idUSBREA350FV20140406> [<https://perma.cc/ESM5-D43L>]; see also 155 CONG. REC. S4504 (Apr. 21, 2009) (Treatment of Detainees in U.S. Custody) (“Claims . . . that detainee abuses could be chalked up to the unauthorized acts of a ‘few bad apples’ were simply false. . . . [I]t was senior civilian leaders who set the tone.”).

5. AMERICAN SNIPER (Warner Bros. 2014).

6. THUCYDIDES, HISTORY OF THE PELOPONNESIAN WAR 224 (Richard Crawley trans., J.M. Dent & Sons 1910); see also MARY FRANCES WILLIAMS, ETHICS IN THUCYDIDES: THE ANCIENT SIMPLICITY 23 (1998) (discussing transformation of Corcyra).

7. See *infra* Part I.A (discussing examples of moral persuasion in Nazi Germany, the former Yugoslavia, Rwanda, Sudan, and others).

accord<sup>8</sup>—and it argues that moral persuasion should be acknowledged as culpable criminal conduct on the part of leaders as a matter of both law and morality. In calling attention to moral persuasion, this Article steps into a rich scholarly and public debate about the responsibility and accountability of senior leaders in situations of widespread crime, both in the United States and around the globe.<sup>9</sup> Should criminal charges be filed against Dick Cheney, former Defense Secretary Donald Rumsfeld, or former CIA Director George Tenet for ordering or allowing torture?<sup>10</sup> Should the International Criminal Court prosecute the heads of state overseeing campaigns of violence or instead focus its attention on the low-level operatives who carry out those plans?<sup>11</sup> Even outside the context of violent crime, these questions provoke deliberation and debate. In recent years, for example, great attention has been paid to whether top executives in Wall Street firms are to blame for creating corporate cultures in which crime would be condoned or even commended.<sup>12</sup>

This Article focuses on moral persuasion in mass atrocity crimes,<sup>13</sup> a context in which senior leaders, as opposed to lower-level figures, are typically targeted for prosecution.<sup>14</sup> Examples of moral persuasion abound in mass atrocity crimes: senior government officials encouraging U.S. interrogators to

8. I use the male pronoun throughout this Article because the majority of perpetrators of mass atrocity crimes and the majority of defendants in international criminal courts are male. See JAMES WALLER, *BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING* 265 (2d ed. 2007).

9. See, e.g., ELAINE SCARRY, *RULE OF LAW, MISRULE OF MEN* 156–57 (2010); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 95–96 (2005); David M. Uhlmann, *After the Spill Is Gone: The Gulf of Mexico, Environmental Crime, and the Criminal Law*, 109 MICH. L. REV. 1413, 1460 (2011).

10. See Editorial, *Prosecute Torturers and Their Bosses*, N.Y. TIMES (Dec. 21, 2014), <http://www.nytimes.com/2014/12/22/opinion/prosecute-torturers-and-their-bosses.html> [<https://perma.cc/2G53-NX89>].

11. See Karen J. Alter, *The Trials and Tribulations of Prosecuting Heads of States: Kenyatta and the ICC*, WASH. POST (Dec. 19, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/19/the-trials-and-tribulations-of-prosecuting-heads-of-states-kenyatta-and-the-icc> (discussing difficulties of prosecuting “powerful actors”) [<https://perma.cc/H4HA-BYRA>].

12. See Complaint ¶¶ 36, 38, *United States v. S.A.C. Capital Advisors, L.P.*, 2013 WL 5913921 (S.D.N.Y. 2013) (No. 13-CV-5182) (alleging that hedge fund owner “furthered [an] insider trading scheme” by “foster[ing] a business culture” conducive to insider trading); Joe Nocera, *Biggest Fish Face Little Risk of Being Caught*, N.Y. TIMES (Feb. 25, 2011), <http://www.nytimes.com/2011/02/26/business/economy/26nocera.html> [<https://perma.cc/Y45U-2YN6>]; Jed S. Rakoff, *The Financial Crisis: Why Have No High-Level Executives Been Prosecuted?*, N.Y. REV. BOOKS (Jan. 9, 2014), <http://www.nybooks.com/articles/2014/01/09/financial-crisis-why-no-executive-prosecutions> [<https://perma.cc/HLP7-SJMM>].

13. The term “mass atrocity crimes” is intended to refer to aggression, crimes against humanity, genocide, and war crimes. See David Armstrong & Florencia Montal, *The Politics of International Criminal Justice*, in *THE ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIME AND JUSTICE STUDIES* 125, 130 (Bruce A. Arrigo & Heather Y. Bersot eds., 2014).

14. See *infra* Part III.A. In the United States, in contrast, there is greater disagreement about whether prosecution of high-level defendants is appropriate.

“take the gloves off,”<sup>15</sup> Serb politicians urging their constituents to protect themselves against a rising Muslim threat,<sup>16</sup> Rwandan propagandists warning of the Tutsi “cockroaches” coming for Hutu land,<sup>17</sup> Adolf Hitler’s screeds against the “Jewish menace,”<sup>18</sup> or even ISIS leaders telling their flock that raping children will bring them closer to God.<sup>19</sup> Nonetheless, legal proceedings and legal scholarship largely neglect these leaders’ blameworthiness for persuading underlings to carry out crimes, even though these acts of persuasion could be punished under international criminal law as it currently is defined.<sup>20</sup> Instead, they focus on leaders’ overt acts of ordering the crimes, their responsibility for planning campaigns of violence, or their egregious breach of their affirmative duties to take care of the populations that they attack or exploit.<sup>21</sup>

This Article argues that leaders’ acts of moral persuasion merit as much attention as their other abuses. A leader shapes the entire landscape of mass atrocity crime by creating a psychological climate, a moral culture in which listeners, followers, or admirers tolerate or embrace illegal actions and choose to undertake them of their own accord.<sup>22</sup> The creation of this environment is often crucial in situations of mass violence, for it enables the commission of crime by masses of willing perpetrators who need no further oversight, as they will act of their own accord.<sup>23</sup> Acts of moral persuasion have significance, however, not

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15. JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 94, 97 (2008).

16. See DUSKO DODER & LOUISE BRANSON, *MILOSEVIC: PORTRAIT OF A TYRANT* 83–84 (1999).

17. See Darryl Li, *Echoes of Violence: Considerations on Radio and Genocide in Rwanda*, in *THE MEDIA AND THE RWANDA GENOCIDE* 90, 93–94 (Allan Thompson ed., 2007).

18. See ADOLF HITLER, *MEIN KAMPF* 311 (Ralph Manheim trans., Houghton Mifflin Company 1998) (1925).

19. See Rukmini Callimachi, *ISIS Enshrines a Theology of Rape*, N.Y. TIMES (Aug. 13, 2015), <http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html> [<https://perma.cc/D2TW-QKLN>].

20. See *infra* Part II.C.

21. See *infra* Part II.A.; see also Carla Del Ponte, *Prosecuting the Individuals Bearing the Highest Level of Responsibility*, 2 J. INT’L CRIM. JUST. 516, 517 (2004) (supporting prosecution of persons in “highest political or military positions” because crimes “cannot be committed without the active complicity, if not the enthusiastic participation” of such leaders); Richard J. Goldstone, *The International Tribunal for the Former Yugoslavia: A Case Study in Security Council Action*, 6 DUKE J. COMP. & INT’L L. 5, 7 (1995) (asserting that “the most guilty are those who ordered” the crimes), quoted in MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 25 (2007) (describing the “widely held position” that “leaders and those in superior positions” are “more deserving of prosecution and weightier punishment” because they have breached “their positive governance obligations”).

22. See *infra* Part I.A.

23. See Neha Jain, *Individual Responsibility for Mass Atrocity: In Search of a Concept of Perpetration*, 61 AM. J. COMP. L. 831, 869 (2013) (describing the “perversion of norms that lends the high level perpetrator his destructive potential” because “[i]t makes the commission of . . . crimes by ordinary people far more likely”). Not all mass atrocity situations involve mass participation based on widespread acceptance of the norms put forward by the powerful. In Chile, for example, mass crimes were committed primarily through the state, in secret. Accordingly, those crimes did not require internalization of a norm of violence by the public. Some put Argentina in this category as well, see DRUMBL, *supra* note 21, at 26, but Mark Osiel notes that after some time the public learned of the abuses

only in their causal connection to the crimes of direct perpetrators. They also generate harms of great interest to the project of international criminal law, harms that are distinct from those caused by leaders in their other, more widely recognized crimes.<sup>24</sup>

This Article thus takes the position that a proper accounting of leadership crimes—from planning campaigns to persuading others to carry them out—is long overdue; that the criminal law can benefit from a deeper exploration of what it means to be a criminal thought leader; and that when the law neglects these crimes of persuasion, it tells an incomplete story, both of the leaders who encourage crime and of the followers who heed their calls. In making this argument, the Article offers three contributions: (1) a novel *descriptive* account of how the culpability of leaders currently is represented in the law of mass atrocity; (2) a *theoretical* understanding of the roots of international criminal law’s relative neglect of leaders’ crimes of moral persuasion; and (3) a *normative* claim for why these crimes should be recognized as a source of culpability for leaders. Ultimately, the Article contends that because of the significance and neglected harm wrought by these acts of moral persuasion, addressing improper uses of leadership positions to persuade others of the rightness of wrongdoing ought to be a significant part of thinking about and addressing mass atrocity crimes.

This Article proceeds in four Parts. Drawing upon social psychology and historical research on mass atrocity, Part I defines moral persuasion and explains its importance in the perpetration of mass atrocity crimes, a phenomenon that scholars of mass atrocity in diverse fields have recognized, but that scholars of international criminal law have tended to overlook.<sup>25</sup> I then distinguish moral persuasion from other forms of influence that play significant roles in mass atrocity crimes, including the giving of orders, coercion, and brainwashing. I further distinguish moral persuasion from mere encouragement of a crime that a perpetrator is already set to undertake—the classic “Attaboy!” shouted at the murderer whose gun is already cocked.<sup>26</sup> Instead, I seek to describe those acts of intentionally “setting the tone”—upending existing norms about good and bad,

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and accepted the regime’s justifications that the state required protection against internal enemies, see MARK J. OSIEL, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT: CRIMINAL CONSCIOUSNESS IN ARGENTINA’S DIRTY WAR 82–83 (2001).

24. See *infra* Part IV.

25. For voices in legal scholarship recognizing the culpability of moral persuasion, see DRUMBL, *supra* note 21, at 26 (“[C]ertain leaders who act as conflict entrepreneurs create the social norms that trap others as captive participants.”); MARK J. OSIEL, MAKING SENSE OF MASS ATROCITY 132 (2009) (“Leaders of states that perpetrate mass atrocity often are disconcertingly successful in transforming community values or ‘common morality’ in support of their homicidal policies.”); George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1541–42 (2002) (“[T]hose who generate a climate of moral degeneracy bear some of the guilt for the criminal actions that are thereby endorsed.”).

26. See *infra* Part I.B (distinguishing moral persuasion from other types of influence used in mass atrocity crimes).

right and wrong, necessary and unnecessary—in order to ultimately convince individuals that when they kill or torture or otherwise harm, they are doing a good thing, the right thing, or at least the necessary thing.

In light of the foundation laid in Part I establishing moral persuasion's significance in mass atrocity crime, Part II examines how the law grapples with the responsibility of leaders. Based on an examination of the substantive law represented in judgments and sentencing decisions of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), along with the decisions of the International Criminal Court (ICC), this Part contends that international criminal law characterizes leaders' conduct primarily through what I call a *criminal law of coercive power*. This comprises the abuses and approaches through which a leader compels the structures of government and governance over which he has control—such as hierarchy and bureaucracy—to operate in service of crime. This criminal law of coercive power punishes leaders for compelling subordinates to commit crimes, failing to restrain those under their control, or abusing a position of leadership to hurt individuals or populations whom, as a result of that position, the leader is obligated to help.

Part II then contrasts the criminal law of coercive power with a *criminal law of persuasive power*.<sup>27</sup> It begins by unearthing a few atypical and neglected cases in which international criminal courts aggravate punishments for leaders based on a finding that their encouragement or commission of crimes could have inspired their constituents to follow their example. These cases have been overlooked by scholars or lumped together in a category with aggravations based on abuses of coercive power. But the two are quite distinct, I argue, as the cases on persuasive power represent an important glimmer of recognition of the significance of moral persuasion to mass atrocity crimes.

I then turn to cases on persecution and to the law of incitement and complicity, concluding that throughout international criminal law, under the doctrine as it currently stands, lie opportunities to more effectively prosecute and punish leaders for moral persuasion crimes—but these opportunities are scarcely being used. The resulting problem is not so much one of under-punishment as of a deficient characterization of the basis for punishment. Ultimately, this Part contends, the law currently tells an incomplete and inadequate story of leaders' relationship to mass atrocity crime. It is a story that neglects persuasion and instead highlights leaders' abuses of power in its coldest, hardest forms: coercive power that comes from hierarchy, from the capacity to order and compel and

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27. For a similar idea, see JOHN KENNETH GALBRAITH, *THE ANATOMY OF POWER* 5–6 (1983) (identifying “conditioned power” as power that “is exercised by changing belief” and “causes the individual to submit to the will of another or of others”). This categorization is not meant to suggest that the capacity to persuade, and to influence more generally, is not a part of power. Nonetheless, I seek here to distinguish abuses of different types of power and thus distinguish persuasive power from coercive power.

prevent and punish the actions of subordinates, from the capacity to overpower bureaucracies and institutions and force them into the service of violence.

Part III considers the challenges of reconceiving leadership crimes in a way that moves away from a near-exclusive focus on abuses of coercive power and toward greater recognition of abuses of persuasive power. Some readers might expect that the primary challenge to prosecuting moral persuasion would be the protection of free speech, but in international law, this would not necessarily impede prosecution, even if it might under the domestic law of some countries, such as the United States.<sup>28</sup> More important than freedom of speech in understanding the obstacles to reimagining leadership crimes, then, is the history of international criminal law.

In particular, this Part argues that international criminal law's fixation on punishing abuses of coercive power reflects its origin story of rupture with classic international law. In its traditional form, international law is built upon a foundation of veneration for the state and nonintervention in the state's affairs—a foundation that international criminal law sought to dismantle when the Second World War exposed the extent of the evil and destruction and horror of which states could be capable. International criminal law, however, has not merely distanced itself from traditional international law's idolization of the state; instead, it has defined itself in opposition to the state and, now, to state-like entities like organized rebel groups or secessionist movements as well. The result is a body of law consumed with abuses of coercive power.

This orientation of international criminal law presents formidable hurdles to accepting liability for moral persuasion, but they are not insurmountable hurdles. This Part concludes by proposing a way out of this difficulty. I do not discount the importance—or the challenge—of using criminal law to target the evils of states and organizations. Rather, I posit that punishing crimes of moral persuasion in fact attends to these aims. Distinguishing moral persuasion by

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28. See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1074 (Dec. 3, 2003) (“[F]reedom of expression and freedom from discrimination are not incompatible principles of law. Hate speech is not protected speech under international law.”). The Appeals Chamber confirmed that international criminal law does not protect hate speech that constitutes persecution. See *Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 988 (Nov. 28, 2007). Even under U.S. law, encouraging speech that constitutes complicity in crime is not protected, and the crimes of conspiracy and solicitation can both be perpetrated through speech, along with the requisite mental state. See *Konigsberg v. State Bar of California*, 366 U.S. 36, 49 & n.10 (1961) (rejecting view that “freedom of speech” is “absolute” and citing prohibition of “solicitation of crime, complicity by encouragement, [and] conspiracy” as examples of permissible restrictions on speech). For a discussion of free speech and incitement-type crimes in U.S. and international law, see *Prosecutor v. Bikindi*, Case No. ICTR-01-72-T, Judgment, ¶ 380 (Dec. 2, 2008) (discussing permissibility of criminalizing incitement despite the right to free expression); KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 57–59 (1989). It should be noted, however, that this Article confines itself to international criminal prosecutions, which necessarily involve crimes of significant gravity. Accordingly, this Article's analysis as to the legal status punishing moral persuasion given rights to free expression is not meant to govern the acts of moral persuasion that may accompany less serious crimes or that may accompany acts that are not criminal at all.

leaders from moral persuasion by peers, this Part argues that greater recognition of moral persuasion by leaders would honor international criminal law's fixation on abuses of coercive power, for the power of leaders to effect moral persuasion derives from the special capacity to shape beliefs and attitudes that comes with their position as leaders. Punishing moral persuasion, rather than merely punishing abuses of coercive power, would draw attention to the harms undertaken by leaders when they exploit their positions of authority in this way, and thereby draw attention to this considerable power of the state and of state-like organizations to do wrong. It would, moreover, imbue with substance the prosecutions of leaders that too often appear merely symbolic. Recognition of moral persuasion crimes can thereby align with and further the longstanding interest of international criminal law in targeting the particular evils accomplished through states and other organizations.

Part IV offers a normative defense of the benefits of acknowledging the reality and culpability of moral persuasion in mass atrocity crime. First, focusing on the expressive purposes of international criminal law, it contends that properly acknowledging the forms of influence that religious, political, government, military, and community leaders wield would better realize the law's aims of crafting an accurate narrative of how atrocities take place and how leaders fit into its formula. The law's current preoccupation with abuses of coercive power obscures the ways in which leaders harmfully use their persuasive power, their voice and example, to accomplish the commission of massive crimes. Second, it argues that recognizing the harms of moral persuasion further serves the law's expressive purposes by illuminating why direct perpetrators commit crimes. Acknowledging leaders' crimes of moral persuasion can help to dismantle the myth of the monstrous perpetrator, driven by innate evil, by exposing the ways that leaders condition their followers for hatred and prime them to commit genocide, war crimes, or crimes against humanity. My purpose here is not to suggest that the direct perpetrators are any less guilty because their drive to commit crimes is shaped by leaders' acts of moral persuasion; instead, the purpose is to point out the roots of direct perpetrators' decisions and to demonstrate the culpability of leaders for shaping others in this way.

Part IV further defends a fuller acknowledgement of moral persuasion as a way of contributing to more comprehensive and complex understandings of the harms that arise from direct perpetrators' commission of mass atrocity crimes. Drawing on burgeoning research on moral injury in veterans, this Part argues that moral persuasion inflicts damage not only because it ultimately leads to crimes that harm victims, but also because of the effect on direct perpetrators. When a person listens to his mayor or president or commander and ultimately chooses to unlawfully kill in response to what he hears, it is not only the victim and the community that is harmed; it is also the perpetrator himself, who has committed a terrible crime, whose trust in leadership has been abused, whose

faith in right and wrong has been betrayed, who allowed himself to be led astray, and who—if he comes to accept that his actions were mistaken or inappropriate or immoral—may not be able to trust himself or his leaders again.

Ultimately, this Article advances a new understanding of leadership in crime. In its most common construction, leadership signifies the status of direction or command.<sup>29</sup> The leader is the person who exercises coercive, hierarchical power over others, the person who can tell others what to do and know that his orders will be duly carried out. The leader is the president who builds concentration camps instead of schools, the commander who orders an illegal attack, the priest who hands his congregation over to génocidaires. This is the understanding that dominates thinking about campaigns of extermination, systematic torture, and organized rape. Indeed, readers immersed in international criminal law will associate the term “leadership crime” with the crime of aggressive war, which is defined to apply only to perpetrators who knowingly occupy some position in which they command or direct the commission of the act of aggression.<sup>30</sup> In this regard, this Article’s title intends to provoke readers to consider and reconsider why this field limits its conception of leadership crimes to directing and commanding. For leadership also represents the capacity to lead—not only to command, but also *to guide, to steer, to shape, to persuade*. The leader is the president who warns of an internal threat that must be rooted out, the commander who encourages victory by any means necessary, the priest who condemns the infidels. When these exercises of leadership constitute abuses of persuasive power, they generate unique harms, separate from and in addition to those harms caused by leaders’ abuses of coercive power. This Article calls for recognition of this neglected category of leadership crimes and asks how it might be acknowledged in a system that is preoccupied with formal authority, anxious about the ordinary nature of extraordinary crime, and in need of deeper connection to the realities of the horrors it addresses.

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29. See Cris Shore, *Anthropology*, in THE OXFORD HANDBOOK OF POLITICAL LEADERSHIP 176, 178 (R.A.W. Rhodes & Paul ‘t Hart eds., 2014) (discussing definitions of leadership).

30. See Rome Statute of the International Criminal Court, art. 15 bis, July 1, 2002, 2187 U.N.T.S. 90, [https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf) [<https://perma.cc/75P9-N55M>] [hereinafter Rome Statute]; see also 2 KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW: THE CRIMES AND SENTENCING 204–08 (2014) (discussing aggression’s “leadership character”). It is important to note that this restriction on aggression is a recent innovation; at Nuremberg, responsibility for aggression was more broadly applied to those who were “in a position to shape or influence” the state’s policy. 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 488 (1950); see also Kevin Jon Heller, *Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression*, 18 EUR. J. INT’L L. 477, 486–88 (2007) (discussing the Nuremberg Military Tribunal’s “shape or influence” requirement for aggression).

## I.

## MORAL PERSUASION AND THE LEADERSHIP OF CRIME

When one considers the worst crimes imaginable—mass rapes and mutilation, death by nail-studded club or gas chamber or starvation, extended and repeated torture—one might expect that those responsible are monsters, innately delighted by and dedicated to brutality.<sup>31</sup> Most studies of the persons responsible for mass atrocity crimes, however, agree that the average perpetrator of the worst crimes imaginable is merely an average person, with no preexisting experience with or tendency toward cruelty or violence.<sup>32</sup> To be sure, some perpetrators are motivated by innate cruelty or psychopathy or sadism; some have criminal histories and search eagerly for the next opportunity to wreak havoc upon innocents.<sup>33</sup> But these are exceptions. Most participants in mass crimes are “ordinary people” who have been “transformed into perpetrators” by “extraordinary circumstances.”<sup>34</sup> They never anticipated that they would kill or rape or maim, but ultimately they participate in campaigns of cruelty, and they do so believing it was the right thing to do, at least in that particular time and place.<sup>35</sup> They justify their actions as necessary protection against some perceived

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31. See MARTHA C. NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 450–52 (2001) (“We very often tell ourselves that the doers of heinous wrongs are monsters, in no way like ourselves.”).

32. See, e.g., HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Penguin Books 2006) (1963); TZVETAN TODOROV, *FACING THE EXTREME: MORAL LIFE IN THE CONCENTRATION CAMPS* 229 (Arthur Denner & Abigail Pollak trans., Henry Holt & Co. 1997) (1991) (describing Holocaust perpetrators as “neither monsters nor beasts but ordinary people”); Albert Bandura, *Moral Disengagement in the Perpetration of Inhumanities*, 3 PERSONALITY & SOC. PSYCHOL. REV. 193, 200 (1999); see also DRUMBL, *supra* note 21, at 27–29 (discussing studies observing the normality of perpetrators of atrocity crimes). For a different approach, see DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 49–128 (1996) (contending that a unique form of “virulent anti-Semitism” motivated Germans during the Holocaust).

33. See BENJAMIN A. VALENTINO, *FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE TWENTIETH CENTURY* 40 (2004) (describing perpetrators in mass killings who “actively seek out violence” for pleasure) (citing Roy F. Baumeister & W. Keith Campbell, *The Intrinsic Appeal of Evil: Sadism, Sensational Thrills, and Threatened Egotism*, 3 PERSONALITY & SOC. PSYCHOL. REV. 210, 213 (1999) (estimating that 5 percent of perpetrators of violent crimes enjoy the act)); Alette Smeulers, *Perpetrators of International Crimes: Towards a Typology*, in SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES 233, 247–48 (Alette Smeulers & Roelof Haveman eds., 2008); see also OSIEL, *supra* note 25, at 68 (discussing sadism in perpetrators of mass atrocity crimes in the former Yugoslavia); REBECCA WITTMAN, *BEYOND JUSTICE: THE AUSCHWITZ TRIAL* 100–01 (2005) (discussing sadism as a motivation for perpetrators in Auschwitz trial).

34. Alette Smeulers, *Punishing the Enemies of All Mankind*, 21 LEIDEN J. INT’L L. 971, 973 (2008) (reviewing DRUMBL, *supra* note 21); see also ARENDT, *supra* note 32, at 276 (describing Eichmann as “terribly and terrifyingly normal”).

35. See DANIEL CHIROT & CLARK MCCAULEY, *WHY NOT KILL THEM ALL?: THE LOGIC AND PREVENTION OF MASS POLITICAL MURDER* 5 (2006); Smeulers, *supra* note 33, at 252. Some, of course, participate only at the barrel of a gun. For a discussion of perhaps the best-known case of a perpetrator who killed to save his own life, see *Prosecutor v. Erdemović*, Case No. IT-96-22-*Tbis*, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 85 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997); Saira Mohamed, *Deviance, Aspiration, and the Stories We Tell: Reconciling Mass Atrocity and the Criminal Law*, 124 YALE L.J. 1628, 1650–58 (2015) [hereinafter Mohamed, *Deviance*].

threat; they believe standard operating procedure no longer applies; they tell themselves that desperate times call for desperate measures.

They did not always feel this way. But something in their lives and in their worlds changed to make such unprecedented acts of violence imaginable, possible, tolerable, good.<sup>36</sup> Through acts of moral persuasion, conduct they condemned—or at least considered inappropriate—they now deem necessary, even laudable.<sup>37</sup>

Moral persuasion can be undertaken by anyone: the Pope, the prime minister, a rebel commander; a teacher, a deejay, a pop star; a sister, a neighbor, a friend.<sup>38</sup> Moral persuasion can be undertaken for good: to end pervasive and longstanding human rights abuses that were tolerated for generations,<sup>39</sup> to change minds about appropriate behavior in order to convince a public of the propriety of some new social policy.<sup>40</sup> Even when directed toward violence, moral persuasion is not necessarily unlawful. The drill sergeant who teaches his troops to be warriors may be upending their longstanding belief in the immorality of killing, but he is not violating the laws of war by doing it, for killing in war is, under the right circumstances, lawful.<sup>41</sup> But in the context of mass atrocity, moral persuasion is nearly always used to accomplish unlawful harm: to isolate, to dehumanize, to transform ideas about threats and dangers and exceptions to longstanding rules.

This Part defines the act of moral persuasion. Synthesizing narrative accounts of perpetrators, historical studies of atrocity, and social psychology research on human behavior, it explains how leaders use their powers of persuasion to encourage and convince those who listen to them to embrace violence. It does not contend that moral persuasion accounts for the perpetration of all atrocity crimes, and it does not suggest that all acts of moral persuasion are

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36. See Paul Morrow, *The Thesis of Norm Transformation in the Theory of Mass Atrocity*, 9 GENOCIDE STUD. & PREVENTION 66, 70 (2015) (describing the “thesis of norm transformation” as holding that “individual and institutional participation in [large-scale] crimes is at least partially explained by transformations in basic norms that structure social and political life”).

37. See TODOROV, *supra* note 32, at 129 (noting that individuals “who committed atrocities never stopped distinguishing between good and evil. . . . They simply believed that the ‘atrocity’ was in fact a good thing.”).

38. See *infra* Part III.C.1 (discussing moral persuasion by individuals other than leaders).

39. See, e.g., P. ERIC LOUW, *THE RISE, FALL, AND LEGACY OF APARTHEID* 43, 83, 157 (2004).

40. See, e.g., BARRON H. LERNER, *ONE FOR THE ROAD: DRUNK DRIVING SINCE 1900*, at 70–92 (2011).

41. See BILL D. ROSS, *IWO JIMA: LEGACY OF VALOR* 189 (1985) (describing “purpose of boot camp[] to mold . . . young Americans into skilled tradesmen in a kill-or-be-killed business”); Jenny S. Martinez, *Understanding Mens Rea in Command Responsibility: From Yamashita to Blaškić and Beyond*, 5 J. INT’L CRIM. JUST. 638, 662 (2007) (noting that the commander “is given license to turn ordinary men into lethally destructive, and legally privileged, soldiers”); see also DAVE GROSSMAN, *ON KILLING: THE PSYCHOLOGICAL COST OF LEARNING TO KILL IN WAR AND SOCIETY* (1996). Grossman offers examples of drill sergeants who also engage in moral persuasion toward unlawful ends. See *id.* at 190 (quoting drill sergeant’s statement “that killing a Vietnamese civilian did not really count”).

the same. Instead, it seeks to offer a portrait of the main dynamics of moral persuasion and its importance in mass atrocity crimes.

### A. Defining Moral Persuasion

#### 1. The Environment of Moral Inversion

Scholars and practitioners widely recognize the role of a moral inversion or moral transformation in the perpetration of mass atrocity. Hannah Arendt drew attention to the idea with her description of how previously prevailing norms in Nazi Germany were replaced with their opposite command. In times of mass crime, Arendt explained, the “black flag” of unlawfulness “flies as ‘manifestly’ above what normally is a lawful order—for instance, not to kill innocent people just because they happen to be Jews—as it flies above a criminal order under normal circumstances.”<sup>42</sup> Notably, these new rules were not ordered from on high and thrust onto unwilling subjects; rather, they were widely embraced by publics who listened.<sup>43</sup> Today, those who study the mass crimes that took place in the former Yugoslavia or Rwanda or Sierra Leone recognize the same mutation of the moral order, a shift from one built around toleration to one built around elimination.<sup>44</sup>

The transformation that takes place during mass atrocity situations is not necessarily a pure substitution of one set of values for a new one. Instead, it may be a revision of values, one that maintains the most basic norms—do not kill, do not steal—but places certain groups outside the “universe of obligation,” in Helen Fein’s terms.<sup>45</sup> Thus, the ethic of elimination is not necessarily one based on pure viciousness. Instead, the motivation to kill can be a form of self-

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42. ARENDT, *supra* note 32, at 148; *see also* David Luban, *State Criminality and the Ambition of International Criminal Law*, in ACCOUNTABILITY FOR COLLECTIVE WRONGDOING 61, 62 (Tracy Isaacs & Richard Vernon eds., 2011) (describing Arendt’s understanding of the “conditions that induce the ‘banal’ wrongdoer to discount the monstrosity” of his crimes: “a political regime in which exceptions and rules, deviance and normality, criminality and lawfulness, [are] inverted”).

43. This is not to suggest that willing publics wholly embraced the new rules; some perpetrators and bystanders participated or did nothing because of fear. *See* Francis R. Nicosia, *Introduction: Resistance to National Socialism in the Work of Peter Hoffman*, in GERMANS AGAINST NAZISM: NONCONFORMITY, OPPOSITION AND RESISTANCE IN THE THIRD REICH 1, 2 (Francis R. Nicosia & Lawrence D. Stokes eds., 1990).

44. *See, e.g.*, CHIROT & MCCAULEY, *supra* note 35, at 59 (discussing Rwandan, Ottoman, and Yugoslav leaders mobilizing mass killings “by playing up threats and reminding their people of negative past experiences”); Morrow, *supra* note 36, at 70.

45. HELEN FEIN, ACCOUNTING FOR GENOCIDE: NATIONAL RESPONSES AND JEWISH VICTIMIZATION DURING THE HOLOCAUST 4 (1979); *see* TODOROV, *supra* note 32, at 129 (“Guards who committed atrocities never stopped distinguishing between good and evil. They simply believed that the ‘atrocities’ was a good thing. . . . The guards were not deprived of a moral sensibility but provided with a new one.”); Danielle Celermajer et al., *Introduction: In Conversation with Hannah Arendt, in POWER, JUDGMENT AND POLITICAL EVIL: IN CONVERSATION WITH HANNAH ARENDT* 1, 6 (Andrew Schaap et al. eds., 2010).

defense.<sup>46</sup> As Michael Reisman writes, “In many of the most hideous crimes, many of the individuals who are directly responsible operate within a cultural universe that inverts our morality and elevates their actions to the highest form of group, tribe, or national defense.”<sup>47</sup> The Nazis, for example, claimed that the survival of the Aryan race required elimination of the Jewish people.<sup>48</sup> The Hutu contended that their self-protection demanded destruction of the Tutsis.<sup>49</sup> The Muslims of northern Sudan argued that their prosperity required the subjugation of the non-Muslim southerners and the agrarian tribes of Darfur.<sup>50</sup> Accordingly, many who participate in mass atrocity crimes are motivated by an aim to protect their community against some perceived threat.<sup>51</sup> Under the circumstances as they understand them, they do not believe that what they are doing is wrong.<sup>52</sup> The Nazis understood these dynamics well. According to G.M. Gilbert, the prison psychologist appointed by the U.S. government for the defendants at the Nuremberg Tribunal, Hermann Göring once remarked, “The people can always be brought to the bidding of the leaders. That is easy. All you have to do is tell them they are being attacked and denounce the pacifists for lack of patriotism and exposing the country to danger. It works the same way in any country.”<sup>53</sup>

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46. See ALEX ALVAREZ, *GENOCIDAL CRIMES* 59 (2010) (noting that genocide perpetrators “believe in the rightness and necessity of their actions”); ERIC MARKUSEN & DAVID KOPF, *THE HOLOCAUST AND STRATEGIC BOMBING: GENOCIDE AND TOTAL WAR IN THE TWENTIETH CENTURY* 195 (1995) (defining a “healing-killing paradox” whereby “[m]oral qualms that might be aroused . . . are assuaged or neutralized by a preoccupation with the [cause’s] worthiness”).

47. W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 *LAW & CONTEMP. PROBS.* 75, 77 (1997); see also DRUMBL, *supra* note 21, at 2 (“[T]hese leaders ensconce atrocity as civic duty.”).

48. Paul Formosa, *Thinking, Conscience and Acting in Times of Crises*, in *POWER, JUDGMENT AND POLITICAL EVIL*, *supra* note 45, at 89, 97–98 (noting Nazis’ “‘self-defence’ argument” and observing that because “self-defence has always been justifiable,” what changed was not Germans’ ethical views, but their racial views).

49. See GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 247 (1995) (quoting Rwandan genocide perpetrator’s statement that he “defended the members of [his] tribe against the Tutsi”).

50. See generally FRANCIS M. DENG, *WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN* (1995) (discussing subordination of non-Arab populations and evaluating conflicts of identities in Sudan); John Hagan & Wenona Rymond-Richmond, *The Collective Dynamics of Racial Dehumanization and Genocidal Victimization in Darfur*, 73 *AM. SOC. REV.* 875 (2008) (analyzing Sudanese government’s use of dehumanization in Darfur).

51. See FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 28, 276–79 (1990); JEAN HATZFELD, *MACHETE SEASON: THE KILLERS IN RWANDA* SPEAK 121, 219 (Linda Coverdale trans., Farrar, Straus & Giroux 2005) (2003); Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 *HUM. RTS. Q.* 573, 605 (2002); Reisman, *supra* note 47, at 77; Patricia M. Wald, *General Radislav Krstic: A War Crimes Case Study*, 16 *GEO. J. LEGAL ETHICS* 445, 469 n.75 (2003).

52. See Peter A. French, *Unchosen Evil and Moral Responsibility*, in *WAR CRIMES AND COLLECTIVE WRONGDOING* 29, 32–34 (Aleksandar Jokić ed., 2001).

53. G.M. GILBERT, *NUREMBERG DIARY* 278–79 (Da Capo Press 1995) (1947).

## 2. *The Act of Moral Persuasion*

In situations of mass atrocity, this inversion of right and wrong takes place through many channels, often over a long period of time, but it typically involves concerted acts of *moral persuasion* by individuals in leadership positions. By moral persuasion, I refer to the leader's act of convincing another person by words or deeds to embrace criminal wrongdoing as tolerable, justifiable, or even good. A few points of detail may serve to explain the notion of moral persuasion by leaders in mass atrocity. First, moral persuasion denotes an intentional act, rather than an inadvertent one.<sup>54</sup> That is, moral persuasion describes a leader's deliberate efforts to sway his followers. This is not to suggest, however, that individuals cannot be led to embrace wrongdoing as a result of others who do not aim or even expect that their ideas or actions will yield influence. To be sure, ideas may be interpreted or repackaged in unanticipated or unintended ways. When Justice Holmes upheld a Virginia forced sterilization program in *Buck v. Bell*,<sup>55</sup> for example, he may not have predicted that Nazis would approvingly cite his decision in a party document on government sterilization programs and present it as evidence for the defense at the Nuremberg trial.<sup>56</sup> But, as reflected in international criminal law's typical requirement<sup>57</sup> that a criminal have some guilty mental state, individuals who exercise such inadvertent and unpredictable influence differ in culpability from those who intentionally or knowingly lead others to criminal wrongdoing.<sup>58</sup>

Second, moral persuasion refers not only to the act of convincing another that conduct is moral, as in good. It encompasses more broadly the act of persuading another to change his view of the morality of certain conduct. This could mean a shift from regarding conduct as wrong to regarding it as right, but it also includes less extreme shifts—shifts from wrong to necessary in those

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54. See JAMES B. STIFF & PAUL A. MONGEAU, *PERSUASIVE COMMUNICATION* 4–5 (2d ed. 2003) (noting that persuasion must be “intended to affect the responses of others”) (citing Gerald R. Miller, *On Being Persuaded: Some Basic Distinctions*, in *PERSUASION: NEW DIRECTIONS IN THEORY AND RESEARCH* 11 (Michael E. Roloff & Gerald R. Miller eds., 1980) (defining persuasion as “any message that is intended to shape, reinforce, or change the responses of another, or others”).

55. 274 U.S. 200, 208 (1927) (upholding Virginia law on compulsory sterilization against due process challenge).

56. See Information Service of the Racial-Political Office of the NSDAP Reich Administration, 30 July 1937, Concerning Race Protection Laws of Other Countries, *reprinted in* 4 *TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10*, at 1158, 1159 (1950).

57. See WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 235–36 (4th ed. 2011) (discussing the requirement of a guilty mind in criminal law generally and the “high standard for the mental element” that dominates international criminal law); Rome Statute, *supra* note 30, art. 30 (requiring “intent and knowledge” for all offenses unless otherwise provided).

58. Although some accounts hold that persuasion “denotes a process of appealing . . . to reason,” David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 *COLUM. L. REV.* 334, 335 (1991), I adopt the broader approach that views persuasion as encompassing not only rational appeals, but also emotional appeals, *see, e.g.*, STIFF & MONGEAU, *supra* note 54, at 147 (discussing “emotional persuasive appeals”); *see also id.* at 128 (“Several scholars have noted that separating rational from emotional appeals is a false dichotomy.”).

circumstances, even if regrettable; from wrong to tolerable, even if suboptimal; from wrong to merely not wrong, even if uncomfortable.

Finally, although anyone can undertake moral persuasion, I focus on leaders, meaning not merely those who hold official government positions, such as heads of state, but rather a broad range of individuals, from those in government to politics to military to community, who hold positions of authority and who by virtue of that authority have a relationship with some audience or community that listens to them and trusts them.<sup>59</sup> I include both state actors such as prime ministers and non-state actors such as rebel commanders or pastors, but I exclude horizontal relationships, such as that between friends or spouses, where there may well be influence, but there is no position of authority.<sup>60</sup>

Consider the following examples. Eric Fair, a private contractor working in Iraq, initially used the Army field manual for his work on interrogations, but he learned quickly that “[n]o one likes field manuals,” and “[n]o one likes barracks lawyers,” the name given to the soldiers who rely on field manuals.<sup>61</sup> Indeed, soon after the manuals were distributed, the first sergeant leading a class on “creative solutions” stressed the need to get results and encouraged the interrogators to “think outside the . . . manual.” The euphemism quickly became clear to Fair.<sup>62</sup> Similarly, military superiors repeatedly told Sergeant Roger Brokaw, an Army interrogator at Abu Ghraib for six months in 2003, that they ought to “tak[e] the gloves off” because getting information from detainees was necessary to save soldiers’ lives.<sup>63</sup> In light of the seeming necessity of using so-called enhanced interrogation methods, individuals like Fair and Brokaw were willing to do whatever it took to “soften . . . up” the detainees.<sup>64</sup>

In Rwanda, for years prior to the genocide, radio broadcasts and newspaper articles vilified the Tutsis, incrementally stripping them of their humanity and increasingly identifying them as a threat. Radio Rwanda, a government-run station, and Radio Télévision Libre des Mille Collines (RTL), a private station that was owned and operated by major political figures and received government support, routinely referred to Tutsis as “cockroaches.”<sup>65</sup> The Hutu Ten Commandments, published in 1990 in *Kangura*, a newspaper sponsored by the extremist Hutu political party, implored the Hutu people to “stop having mercy

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59. See Max Weber, *Three Types of Legitimate Rule*, 4 BERKELEY PUBLICATIONS SOC’Y & INSTITUTIONS 1 (1958) (discussing traditional, legal-rational, and charismatic authority).

60. See *infra* Part III.B (distinguishing between moral persuasion by leaders and moral persuasion by nonleaders).

61. ERIC FAIR, *CONSEQUENCE: A MEMOIR* 93–94 (2016).

62. *Id.* at 94.

63. PHILIP ZIMBARDO, *THE LUCIFER EFFECT: UNDERSTANDING HOW GOOD PEOPLE TURN EVIL* 420 (2008).

64. *Id.*

65. See Li, *supra* note 17, at 93.

on the Tutsi” and described them as dishonest and untrustworthy.<sup>66</sup> After *Kangura* published the commandments, RTLM repeatedly broadcast them.<sup>67</sup> Many of the perpetrators of the genocide, in turn, began to see the Tutsis as they were portrayed—as less than human, as a menace.<sup>68</sup> Driven by “fear of Tutsis” and the consequent feeling of “righteous rage,” they ultimately set out in 1994 to exterminate their perceived enemies.<sup>69</sup> In both cases, leaders deliberately used positions of influence to convince their audiences to embrace criminal actions as good, tolerable, or at least necessary.

Often individuals use moral persuasion in order to consolidate their own leadership positions. In the former Yugoslavia, Slobodan Milošević rose to power pushing a narrative of an embattled Serbian nation that faced a rising Muslim threat. He tied the plight of present-day Serbs to that of Prince Lazar, a medieval Serb ruler who had sought to create a unified Serbian state in the face of a rising Ottoman Empire. Prince Lazar failed in his campaign and lost his life fighting the Ottomans, but Milošević embraced his legacy nonetheless, using it to inspire fear and violence in the Serb people and to convince them that they needed Milošević’s leadership to survive.<sup>70</sup> Milošević’s Croatian counterpart, Franjo Tuđman, similarly aroused fears of annihilation by the Serbs, both mobilizing his people and consolidating his own power in the process.

In many cases, moral persuasion by leaders relies on campaigns of dehumanization, through which these actors identify, distinguish, and target a specific group for exclusion.<sup>71</sup> Under the Third Reich, Nazi leadership described the Jewish people as *untermensch*—literally “subhuman,” inferior to man.<sup>72</sup> In early-1990s Rwanda, Hutu politicians referred to Tutsis as *inyenzi*—

66. 2 SAMUEL TOTTEN & PAUL R. BARTROP, *DICTIONARY OF GENOCIDE* 276 (2008); *see also* PRUNIER, *supra* note 49, at 166 n.12 (describing the Hutu Ten Commandments); *infra* notes 161–62 and accompanying text (discussing prosecution of radio and newspaper founders and editors).

67. Simone Monasebian, *The Pre-Genocide Case Against Radio-Télévision Libre des Mille Collines*, in *THE MEDIA AND THE RWANDA GENOCIDE*, *supra* note 17, at 308, 322.

68. HATZFELD, *supra* note 51, at 121; *see also id.* at 154 (“[I]ntellectuals . . . plant[ed] the idea of genocide in [perpetrators’] heads and swe[pt] away their hesitations.”).

69. MICHAEL MANN, *THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING* 472 (2005).

70. *See* EDINA BEĆIREVIĆ, *GENOCIDE ON THE DRINA RIVER* 30, 39–42 (2014); BRANSON & DODER, *supra* note 16, at 3–4.

71. *See* CHALK & JONASSOHN, *supra* note 51, at 28; HERBERT C. KELMAN & V. LEE HAMILTON, *CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY* 19 (1989) (identifying dehumanization as one of three requirements for mass killing); Albert Bandura et al., *Disinhibition of Aggression Through Diffusion of Responsibility and Dehumanization of Victims*, 9 *J. RES. PERSONALITY* 253 (1975).

72. SS RACE & SETTLEMENT MAIN OFF., *DER UNTERMENSCH: “THE SUBHUMAN”* (1942), <http://www.holocaustresearchproject.org/holoprelude/deruntermensch.html> [https://perma.cc/WLZ2-NKSS]; *see* DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENslave, AND EXTERMINATE OTHERS* 158–59 (2011); John P. Sabini & Maury Silver, *Destroying the Innocent with a Clear Conscience: A Sociopsychology of the Holocaust*, in *SURVIVORS, VICTIMS, AND PERPETRATORS: ESSAYS ON THE NAZI HOLOCAUST* 329, 340 (Joel E. Dimsdale ed., 1980).

cockroaches.<sup>73</sup> By 1994, they were imploring constituents to exterminate those cockroaches, and to “cut the tall trees,” or the “tall weeds,” both references to the typical Tutsi’s tall, thin stature.<sup>74</sup> Even in the absence of such literal pseudospeciation, groups may be classified as other.<sup>75</sup> As the country began to collapse, for example, Serbs in the former Yugoslavia began to identify non-Serbs specifically as Bosniaks or Muslims.<sup>76</sup> They might have been human, but they were different—they did not belong to the world of those who ought to be protected against harm. The September 1, 1941 decree requiring that Jews across German-occupied territories wear the Star of David also served a similar goal of exclusion from the universe of those who deserved empathy and respect.<sup>77</sup> As Claudia Koonz writes of Nazi Germany, in these societies leaders put forward a “public culture” that is “constructed on the mantra, ‘Not every being with a human face is human.’”<sup>78</sup>

Demonization typically accompanies dehumanization or othering. German statesmen presented Jews as a danger to the safety of the German people.<sup>79</sup> Serb writers portrayed Muslims in literature as homicidal and genocidal.<sup>80</sup> Hutu politicians identified Tutsis as a threat not only to the prosperity and stability of the Hutu, but also to their physical safety.<sup>81</sup> Often the demonized group is blamed for past harms. During the interwar years, the Nazis placed responsibility for losing the First World War on Jews, socialists, and communists, and they blamed Jews for Germany’s economic collapse after the war as well.<sup>82</sup> In other cases,

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73. See, e.g., Léon Mugesera, Speech at a Meeting of the National Revolutionary Movement for Development, Kabaya, Rwanda (Nov. 22, 1992) (“These people called Inyenzi are now on their way to attack us.”) (transcript available in *Mugesera v. Canada*, [2004] 1 F.C.R. 3 (Can.)); see also PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 96–97 (1998).

74. Christopher C. Taylor, *The Cultural Face of Terror in the Rwandan Genocide of 1994*, in *ANNIHILATING DIFFERENCE: THE ANTHROPOLOGY OF GENOCIDE* 137, 169 (Alexander Laban Hinton ed., 2002).

75. FEIN, *supra* note 45, at 5.

76. See Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES 1993*, at 111, 112 (Stephen Shute & Susan Hurley eds., 1993) (describing Serbs’ understanding of crimes against Bosniaks and Croats as “discriminating between the true humans and the pseudohumans”).

77. See CLAUDIA KOONZ, *THE NAZI CONSCIENCE* 273 (2003) (“Nazism offered all ethnic Germans . . . a comprehensive system of meaning that was transmitted through powerful symbols.”).

78. *Id.*

79. Smeulers, *supra* note 33, at 219.

80. BEĆIREVIĆ, *supra* note 70, at 47–48.

81. ALISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 73 (1999). Such rhetoric involving the threat of economic destabilization is common. For domestic accounts of populations demonized by charges that they took jobs from those who deserved them, see, for example, PAWAN DHINGRA & ROBYN MAGALIT RODRIGUEZ, *ASIAN AMERICA: SOCIOLOGICAL AND INTERDISCIPLINARY PERSPECTIVES* 44–46, 54–55 (2014); IAN HANEY LÓPEZ, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* 70 (2014).

82. See Alex Alvarez, *Destructive Beliefs: Genocide and the Role of Ideology*, in *SUPRANATIONAL CRIMINOLOGY: TOWARDS A CRIMINOLOGY OF INTERNATIONAL CRIMES*, *supra* note 33, at 213, 226.

leaders recall the past transgressions of the demonized group. In the 1990s, Hutu politicians and statesmen recalled the Tutsi incursions from across the border in Burundi in the 1960s as a reason to fear the Tutsi threat again.<sup>83</sup> Serb politicians used the Croat Ustaša crimes of World War II as a reason to encourage destruction of the Croats decades later.<sup>84</sup>

Although moral persuasion often involves affirmative action such as encouragement of violence and hatred, it also can occur through an omission, such as a failure to protect another person or population coupled with an intent for that failure to ultimately contribute to some additional harm. In the years before the Rwandan genocide, for example, crimes committed against Tutsis typically were not punished, conveying a sense that these were not crimes at all. The failure to prosecute thus represented another dimension of othering; Tutsis were excluded from the universe of legitimate victims of crimes, thus contributing to an environment in which aggressions against Tutsis ultimately were applauded.<sup>85</sup> Similarly, in the U.S. military context, Joshua Phillips argues that failure to punish American service members who mistreated prisoners “helped allow abuse to continue, and to worsen, unabated.”<sup>86</sup> In Phillips’s account, authorities “look[ing] the other way . . . can (and did) help facilitate torture as much as issuing orders.”<sup>87</sup>

With certain populations identified as different and dangerous, perpetrators of crime are able to victimize those populations and still maintain the belief that they are doing what is right, or necessary, or at the very least not wrong in that moment or under those circumstances.<sup>88</sup> Because of their leaders’ acts of moral persuasion, these individuals believe they are protecting themselves, their families, or their communities from a legitimate threat. In their minds, they are not violating the legal or moral order; they are respecting it.<sup>89</sup>

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83. See Monasebian, *supra* note 67, at 323.

84. See Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 87, 91 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997).

85. See NICHOLAS A. JONES, THE COURTS OF GENOCIDE: POLITICS AND THE RULE OF LAW IN RWANDA AND ARUSHA 30, 81 (2010) (“That ethnically based killing did not receive judicial condemnation created a culture conducive to such events taking place.”).

86. PHILLIPS, *supra* note 1, at 42.

87. *Id.* at 48.

88. See Bandura et al., *supra* note 71, at 265 (finding that college students administered electric shocks to “dehumanized” subjects at a higher rate than those who were either humanized or characterized with neutral language).

89. See ERVIN STAUB, THE ROOTS OF EVIL: THE ORIGIN OF GENOCIDE AND OTHER GROUP VIOLENCE 25 (1989) (noting of such perpetrators that “their intention is to create a ‘better world’” and explaining that they “see their actions as necessary or serving a higher good”); Bill Berkeley, *Road to a Genocide*, 49 DISSENT 69, 74 (2002) (quoting a perpetrator’s statement that even though he initially “did not believe the Tutsis were coming to kill us and take our land, . . . when this was repeated over and over, [he] began to feel some kind of fear”); Rorty, *supra* note 76, at 112 (asserting that Serbs believed they were “acting in the interests of true humanity by purifying the world of pseudohumanity”).

### 3. *The Effect and Effectiveness of Moral Persuasion*

Moral persuasion does not necessarily take place through a single pathway from leader to follower. In most cases, multiple sources convey a message. The president and the politicians both speak to the same population, voice the same concerns, call for the same responses; and those ideas are then echoed in newspaper editorials and radio talk shows and dinner table conversations. Moreover, individuals are not devoid of pre-existing preferences when they hear leaders' messages of moral persuasion.<sup>90</sup> They possess attitudes and opinions that are shaped and reshaped, both from within and from without.<sup>91</sup> In some cases, individuals are primed to believe the claims of their leaders. They have lost a job or a home, or they feel alienated from the religious rites or cultural practices of their neighbors. Or in other cases, leaders prime their followers to believe the claims of their peers or families. Thus, the moral persuasion at the center of this Article does not necessarily accomplish a complete turnaround, but it does contribute to the perpetrator's ultimate choice to engage in a crime.

Social psychology offers several explanations for why individuals are often so readily convinced to heed the calls of their leaders in this way. At least four are particularly relevant in mass atrocity situations. First, respect for authority is important not merely in inducing individuals to obey direct orders,<sup>92</sup> but also in influencing them to turn to leaders for guidance on how to make sense of economic, political, or social conditions, especially in difficult times.<sup>93</sup> Second, leaders who engage in moral persuasion typically offer alternative moral values to replace those the leaders are questioning or denouncing. This enables followers to engage in the process of moral equilibration, whereby a person who "fac[es] a conflict between a nonmoral motive and a moral value . . . may reduce the conflict by . . . a shift to a different and less stringent moral value or principle."<sup>94</sup> Third, pressures to conform to group attitudes lead to individuals handing over individual decision-making power to the group and to leaders.<sup>95</sup> Fourth, literature on cognitive dissonance indicates that when people engage in

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90. See S. ALEXANDER HASLAM ET AL., *THE NEW PSYCHOLOGY OF LEADERSHIP: IDENTITY, INFLUENCE, AND POWER* 6 (2011) (citing SIMONETTA FALASCA-ZAMONI, *FASCIST SPECTACLE: THE AESTHETICS OF POWER IN MUSSOLINI'S ITALY* 21 (1997)) (discussing leaders' belief in their ability to shape the will of the masses).

91. See Stephen Reicher et al., *Social Identity and the Dynamics of Leadership: Leaders and Followers as Collaborative Agents in the Transformation of Social Reality*, 16 *LEADERSHIP Q.* 547, 561 (2005) ("Followers do not automatically accept what is put to them, rather they . . . evaluate it on the basis of their prior experiences and the other sources of information available to them.").

92. See STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* 143–49 (1974) (describing study assessing individuals' willingness to obey authority).

93. See ERICH FROMM, *ESCAPE FROM FREEDOM* (1941), cited in Ervin Staub, *The Psychology of Bystanders, Perpetrators, and Heroic Helpers*, in *UNDERSTANDING GENOCIDE: THE SOCIAL PSYCHOLOGY OF THE HOLOCAUST* 11, 16 (Leonard S. Newman & Ralph Erber eds., 2002).

94. STAUB, *supra* note 89, at 147.

95. See ZIMBARDO, *supra* note 63, at 264; Solomon E. Asch, *Opinions and Social Pressure*, 193 *SCI. AM.* 31, 31–35 (1955).

behavior that departs from their typical moral or ethical standards, they change their beliefs to reduce the degree of that divergence between their beliefs and their behavior.<sup>96</sup> Accordingly, once an individual who considers himself tolerant finds himself agreeing with an initial message of exclusion—the Tutsis are different from the Hutu—it is easier, and indeed natural, to embrace the message that the Tutsis pose a threat, because that reduces the inconsistency between what he believes about himself and about the world and what he thinks in this particular context.

Moral persuasion not only is common to mass atrocity situations; in many cases, it also is instrumental, as the commission of these crimes often requires masses of “true believers.”<sup>97</sup> Without those who willingly embrace the cause, the crimes would not take place, or at least would require a system of sanction and monitoring to ensure compliance with orders and threats.<sup>98</sup> The Khmer Rouge, for example, relied in part on such a machinery of death, fear, and coercion to induce foot soldiers to carry out the torture and killing of millions of Cambodians during the 1970s.<sup>99</sup> Coercion, however, is more difficult to deploy than other forms of influence because it requires surveillance and sanction if the target of influence does not comply. Persuasion that results in the internalization of particular beliefs or commitments, by contrast, requires no such monitoring, as the targets of influence possess their own drive to carry out the criminal acts.<sup>100</sup>

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96. Leonard S. Newman, *What Is a “Social-Psychological” Account of Perpetrator Behavior? The Person Versus the Situation in Goldhagen’s Hitler’s Willing Executioners*, in UNDERSTANDING GENOCIDE: THE SOCIAL PSYCHOLOGY OF THE HOLOCAUST, *supra* note 93, at 43, 53–55; *see also* Lee Ann Fujii, *Transforming the Moral Landscape: The Diffusion of a Genocidal Norm in Rwanda*, 6 J. GENOCIDE RES. 99, 100 (2004) (discussing the “normalization” of genocide). In criminology, Gresham Sykes and David Matza’s neutralization theory similarly posits that individuals use “techniques of neutralization” so that “[d]isapproval flowing from internalized norms and conforming others in the social environment is neutralized, turned back, or deflected.” Gresham M. Sykes & David Matza, *Techniques of Neutralization: A Theory of Delinquency*, 22 AM. SOC. REV. 664, 666–67 (1957). Sykes and Matza identify five categories of neutralization techniques: the denial of responsibility, the denial of injury, the denial of the victim, the condemnation of the condemners, and the appeal to higher loyalties. *Id.* at 667–69.

97. *See* ERIC HOFFER, *THE TRUE BELIEVER: THOUGHTS ON THE NATURE OF MASS MOVEMENTS* xii–xiii (1951); JACK KATZ, *SEDUCTIONS OF CRIME: MORAL AND SENSUAL ATTRACTIONS IN DOING EVIL* 17–18 (1988) (noting that “[o]ne feature of the typical homicide” is “its character as a self-righteous act undertaken within the form of defending communal values”); Smeulers, *supra* note 33, at 241–42.

98. *See* ARNE JOHAN VETLESEN, *EVIL AND HUMAN AGENCY: UNDERSTANDING COLLECTIVE EVILDOING* 25–26, 50 (2005); John R.P. Jr. French & Bertram Raven, *The Bases of Social Power*, in *STUDIES IN SOCIAL POWER* 150, 157–158 (Dorwin Cartwright ed., 1959); Bertram H. Raven, *Power/Interaction and Interpersonal Influence: Experimental Investigations and Case Studies*, in *THE USE AND ABUSE OF POWER: MULTIPLE PERSPECTIVES ON THE CAUSES OF CORRUPTION* 217, 219–20 (Annette Y. Lee-Chai & John A. Bargh eds., 2001).

99. *See* ALEXANDER LABAN HINTON, *WHY DID THEY KILL? CAMBODIA IN THE SHADOW OF GENOCIDE* 244 (2005) (defining cadres “working in an atmosphere of isolation, fear, and anxiety”).

100. *See infra* notes 108–111 and accompanying text (discussing internalization of leaders’ views).

Convincing willing foot soldiers of the rightness of their actions, then, ensures a more effectual system of violence, death, and destruction.

*B. Moral Persuasion and Other Forms of Influence in Mass Crime*

By defining moral persuasion, this Article calls attention to a particular phenomenon, defined by the act of persuading others of the rightness of criminal wrongdoing and by the intent on the part of the influencer to contribute to the accomplishment of that crime. But *influence* more generally represents a significant feature of mass crime in a variety of ways.<sup>101</sup> Accordingly, it is important to distinguish moral persuasion from other forms of influence that are exerted to accomplish criminal behavior in mass atrocity situations.

First, moral persuasion is distinct from coercion, both of the sort that rises to the level required for a criminal law defense of duress<sup>102</sup> and of the sort that does not. In a situation of coercion, the influencer threatens to harm an actor or a third party if the actor does not engage in particular criminal conduct.<sup>103</sup> The influencer knows that the actor will not engage in the conduct of his own accord, so he relies on his capacity to harm in order to convince the actor to engage in the conduct. While the coerced actor may well possess the requisite mens rea for the crime,<sup>104</sup> it is the coercion that produces the mental state in the actor.<sup>105</sup> Without that threat of harm, the actor would neither undertake the conduct nor possess the mental state for the crime. In the situation of moral persuasion, by contrast, the influencer convinces the actor to engage in that conduct of his own volition, without the exertion of any direct pressure. Indeed, in the situation of duress, criminal law's predominant rationale for affording a defense is that the threat compromises, if not destroys, the coerced actor's free will, so the actor does not have a fair opportunity to act voluntarily.<sup>106</sup> In the situation of moral persuasion, by contrast, free will and the opportunity for choice remains intact.

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101. For a range of perspectives on many of the forms of influence deployed in mass atrocity crimes, see the essays collected in UNDERSTANDING GENOCIDE: THE SOCIAL PSYCHOLOGY OF THE HOLOCAUST, *supra* note 93.

102. For a discussion of the duress defense in international criminal law, see GEERT-JAN ALEXANDER KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW 46–62 (2d ed. 2008); ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 242–59 (2012). For a discussion of the duress defense in domestic criminal law, see Joshua Dressler, *Duress*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW 269, 269–93 (John Deigh & David Dolinko eds., 2011).

103. See VAN SLIEDREGT, *supra* note 102, at 242–60 (discussing duress defense in national and international criminal law); Dressler, *supra* note 102, at 269–98.

104. See Dressler, *supra* note 102, at 274.

105. See *Dixon v. United States*, 548 U.S. 1, 6–7 (2006) (distinguishing between motive and mens rea for coerced crime); Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331, 1359 & n.165 (1989) (discussing the mistaken assessment that a coerced actor necessarily lacks the mens rea to commit a crime).

106. See GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 803 (1978); Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 265–68 (1995); Paul H. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 225 (1982).

It is instead the actor's assessment of the conduct itself that is affected by the influencer; because of the leader's moral persuasion, the actor believes that the conduct is appropriate.

Second, moral persuasion is distinct from the giving of orders.<sup>107</sup> A superior rendering an order does not necessarily seek to convince the actor receiving the order that the ordered conduct is right or necessary or good.<sup>108</sup> Indeed, a superior might rely on an order because of an awareness that the actor receiving the order would not engage in the conduct of his own accord. The actor receiving the order, meanwhile, undertakes the ordered conduct not because he has internalized that conduct as the right course of action, but rather because the conduct has been communicated as an order.<sup>109</sup> The actor might believe that the person ordering knows best, or he might comply because he believes compliance with orders is the right thing to do regardless of the order's content, or he might simply want to avoid the consequences of disobedience.

Perhaps the most famous example of the power of orders comes from Stanley Milgram's shock experiments, conducted at Yale in 1961, in which 65 percent of individuals ordered by authority figures to administer shocks to others complied, even though there were no negative consequences to defying the order, and even though they expressed discomfort with administering the shocks.<sup>110</sup> The subjects of the experiment did not internalize or agree with the rules of the experiment; taking James Waller's definition of "internalized behavior," these rules did not form "part and parcel of [their] personal value system,"<sup>111</sup> but instead were imposed from an outside source. Despite that lack of internalization, the subjects still readily complied with the rules. This finding elucidates the difference between conduct undertaken as a result of orders, which is not internalized, and conduct accomplished through moral persuasion, an act

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107. See VAN SLIEDREGT, *supra* note 102, at 105–06, 108–09. The giving of orders also is distinct from coercion rising to the level of duress, as the person giving orders may threaten some punishment for noncompliance but does not threaten physical harm. KNOOPS, *supra* note 102, at 44.

108. See H.L.A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 253–54 (1982) ("The commander's expression of will . . . is not intended to function within the hearer's deliberations as a reason for doing the act, nor even as the strongest or dominant reason, for that would presuppose that independent deliberation was to go on, whereas the commander intends to cut off or exclude it.").

109. See *id.* at 254 ("Content-independence of commands lies in the fact that a commander may issue many different commands to the same or to different people and the actions commanded may have nothing in common, yet in the case of all of them the commander intends his expressions of intention to be taken as a reason for doing them. It is therefore intended to function as a reason independently of the nature or character of the actions to be done.").

110. Stanley Milgram, *Behavioral Study of Obedience*, 67 *J. ABNORMAL & SOC. PSYCHOL.* 371, 375–76 (1963).

111. See WALLER, *supra* note 8, at 241.

through which perpetrators come to “personally share[]” the leader’s “orientation to social values.”<sup>112</sup>

Third, moral persuasion is distinct from “brainwashing,” also referred to as “thought reform” or “mind control.”<sup>113</sup> Although definitions of these terms vary, and the question of whether it exists at all as an actual psychological phenomenon remains open, the basic idea behind brainwashing is that it is a technique, usually relying on the imposition of physical force, used to compel a person to change his beliefs.<sup>114</sup> The transformation of the brainwashed actor’s views of right and wrong is not a choice made freely; instead, it is a compelled change, often accomplished through physical abuse and forced isolation.<sup>115</sup> Moral persuasion, by contrast, relies on the subject’s capacity to think and feel in its efforts to change opinions, as it demands that the subject ultimately come to embrace the criminal act on his own.

These distinctions ultimately clarify that moral persuasion does not require compromised agency, such as in the cases of brainwashing and duress, or delegated agency, as in the case of an actor ordered to undertake some conduct.<sup>116</sup> A person who is subject to moral persuasion is guided by the leader’s cues but retains his capacity to choose and to act; and he exercises that capacity to choose and to act, ultimately opting for conduct that embraces that act at least in part for the reasons suggested by the architect of the moral persuasion. The leader does not destroy the subject’s agency, but he does affect how the subject chooses to exercise that agency. The actor subject to moral persuasion is thus both actor and acted upon, both object and subject.

## II.

### THE CRIMES OF LEADERS

For scholars of mass atrocity crimes, then, leaders—from heads of state and government to commanders to religious figures—are understood as individuals who affect—and, indeed, effect—atrocity crimes through persuasion. They are shapers of opinion, molders of choice, not mere puppet masters pulling the strings of limp and lifeless marionettes, not solely violent dictators who accomplish their ends through the barrel of a gun, but rather respected and

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112. *Id.* at 241; *see also supra* notes 97–100 and accompanying text (discussing how individuals who are morally persuaded of the rightness of atrocity will participate willingly, without fear of sanction, in contrast to those who are ordered or participated because of duress).

113. Frances E. Chapman, *Implanted Choice: Is There Room for a Modern Criminal Defense of Brainwashing?*, 49 CRIM. L. BULL. 1379, 1388 (2013).

114. *See* DOMINIC STREATFEILD, BRAINWASH: THE SECRET HISTORY OF MIND CONTROL 347 (2007); Chapman, *supra* note 113, at 1380.

115. Chapman, *supra* note 113, at 1381. For a debate on whether psychological coercion alone can accomplish criminal involuntary servitude, *see* *United States v. Kozminski*, 487 U.S. 931, 944 (1988); *id.* at 956–57 (Brennan, J., concurring).

116. *See* MILGRAM, *supra* note 92, at 133, 146 (defining “agentic state” in which one “sees himself as an agent for carrying out another person’s wishes” and does so without feeling “responsibility for the content of the actions that the authority prescribes”).

admired individuals who use their positions of influence to inspire hatred inside those who listen to them.

This Part turns to the story the criminal law tells about these leaders, based on an examination of final judgments, sentencing decisions, and appeals therefrom in the ICTY and ICTR, and drawing additionally from the ICC's developing case law. It is a story, I argue, not of persuasion, but of power in its coldest, hardest forms: coercive power that comes from hierarchy, from the capacity to order and punish subordinates, from the ability to overpower bureaucracies and institutions and force them into service of violence. Accordingly, I describe the ways these courts portray and understand the culpability of leaders as a *criminal law of coercive power*. This Part then contrasts this heavily used criminal law of coercive power with the idea of a *criminal law of persuasive power*, an infrequently invoked set of laws that could provide—and, on rare occasion, does provide—the doctrinal bases for the prosecution and punishment of leaders for moral persuasion under international criminal law. Ultimately, I contend, the law has unduly focused on abuses of coercive power, while failing to properly account for leaders' culpability as rooted in abuses of persuasive power.

#### A. A Criminal Law of Coercive Power

Despite the fact that leaders in mass atrocity situations often employ their persuasive power in service of violence, it is not this behavior that courts primarily recognize as making them criminally culpable. Instead, it is their employment of their coercive power toward those same ends that forms the basis for criminal prosecution, conviction, and punishment.

Consider, for example, the doctrine of superior responsibility, which assigns liability to a military or civilian superior based on a failure to prevent or punish the crimes of subordinates,<sup>117</sup> and which doggedly refuses to acknowledge the power of influence in the absence of hierarchy.<sup>118</sup> Superior responsibility requires, as a threshold matter, a relationship of “effective control” by superiors over subordinates,<sup>119</sup> defined as “material ability to prevent or

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117. See *Nahimana*, Appeals Judgment, ¶ 605 (“[T]here is no requirement that the *de jure* or *de facto* control exercised by a civilian superior must be of the same nature as that exercised by a military commander . . . .”); Prosecutor v. Musema, Case No. ICTR-96-13-A, Judgment and Sentence, ¶ 148 (Jan. 27, 2000).

118. See Rome Statute, *supra* note 30, art. 28(a)(ii), (b)(iii); S.C. Res. 955, art. 6(3) (Nov. 8, 1994) (Statute of the International Tribunal for Rwanda), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/StatuteInternationalCriminalTribunalForRwanda.aspx> [<https://perma.cc/Z4GS-7N29>] [hereinafter ICTR Statute]; S.C. Res. 827, art. 7(3) (May 25, 1993) (Statute of the International Tribunal for the Former Yugoslavia), [http://www.icty.org/x/file/LegalLibrary/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/LegalLibrary/Statute/statute_sept09_en.pdf) [<https://perma.cc/R5M3-4ZA6>] [hereinafter ICTY Statute]. For a discussion of the difficult matter of the mens rea required for superior responsibility, see Martinez, *supra* note 41, at 660–64 (proposing “duty of knowledge” for superior responsibility of military leaders).

119. See Michael A. Newton & Casey Kuhlman, *Why Criminal Culpability Should Follow the Critical Path: Reframing the Theory of “Effective Control,”* 40 NETH. Y.B. INT’L L. 3, 8 (2010).

punish” the commission of the crime.<sup>120</sup> A mere *de jure* relationship of hierarchy will not suffice, as such formal control does not guarantee a superior’s ability to prevent or punish.<sup>121</sup> That is, a *de jure* superior who lacks effective control over subordinates is not liable through superior responsibility, but a *de facto* superior who has effective control but lacks *de jure* status in a hierarchy can be held liable through the doctrine.<sup>122</sup> In this regard, the law helpfully recognizes the importance of functional control, as opposed to relying merely on the existence of formal control without an inquiry into enforcement capacity. Nonetheless, a relationship of *hierarchy* is still required, and influence exercised in the absence of a hierarchical relationship will not suffice.<sup>123</sup> The ICTY and ICTR justify this requirement of hierarchy as rooted in the requirement of effective control; because liability “is predicated on a superior’s power to control the acts of . . . subordinates,”<sup>124</sup> then a hierarchical relationship between superior and subordinate is required.

This requirement, however, ignores the reality that influence can be controlling even in the absence of hierarchy. In an insightful piece on the uses of legal anthropology to understand superior responsibility, Ilias Bantekas draws attention to this idea through an examination of a decision by the Special Court for Sierra Leone (SCSL), the tribunal established to prosecute crimes committed

120. Prosecutor v. Hadžihasanović, Case No. IT-01-47-T, Judgment, ¶¶ 77–78 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 15, 2006); Prosecutor v. Mucić, Case No. IT-96-21-A, Appeals Judgment, ¶ 256 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, ¶¶ 300–302 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000); see also GUÉNAËL METTRAUX, *THE LAW OF COMMAND RESPONSIBILITY* 53 (2009).

121. Prosecutor v. Blaškić, Case No. IT-95-14-A, Appeals Judgment, ¶ 69 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

122. See Prosecutor v. Brđanin, Case No. IT-99-36-T, Judgment, ¶ 276 (Int’l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (“A superior vested with *de jure* authority who does not actually have effective control over his or her subordinates would not incur criminal responsibility . . . , whereas a *de facto* superior who lacks formal letters of appointment or commission but does . . . have effective control over the perpetrators of offences might incur criminal responsibility.”); Prosecutor v. Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 396 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) (noting that because a superior-subordinate relationship “cannot be determined by reference to formal status,” “formal designation as a commander is not necessary for establishing command responsibility, as such responsibility may be recognised by virtue of a person’s *de facto*, as well as *de jure*, position as a commander”).

123. *Hadžihasanović*, Judgment, ¶ 80; Prosecutor v. Halilović, Case No. IT-01-48-T, Judgment, ¶¶ 743–752 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005); Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Appeals Judgment, ¶¶ 144, 382 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005); Prosecutor v. Kvočka, Case No. IT-98-30/1-T, Judgment, ¶¶ 368–372 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001); *Mucić*, Appeals Judgment, ¶¶ 263 (distinguishing “sufficient authority” from “powers of persuasion or influence”); *Kunarac*, Judgment, ¶¶ 628–629, 863; see also METTRAUX, *supra* note 120, at 183–186 (supporting courts’ approach of distinguishing effective control from “ability to convince, to prompt or to influence”); HÉCTOR OLÁSULO, *THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES* 94 (2009) (“[W]henver senior political and military leaders exercise powers of influence, as opposed to effective control, over the physical perpetrators of the crimes, they are not criminally liable.”).

124. *Hadžihasanović*, Judgment, ¶¶ 80, 795.

during Sierra Leone's civil war. The tribunal held that Kondewa, a spiritual leader, enjoyed effective control over the Kamajors, a group of hunters who took up arms in the war. The court based this holding on Kondewa's de jure position as the High Priest of the Civil Defense Forces, the larger paramilitary force of which the Kamajors were a part. Kondewa thus was liable through superior responsibility for failing to prevent the crimes undertaken by members of the Kamajors.<sup>125</sup> Bantekas critiques the decision as "miss[ing] a golden opportunity" to hold that in certain cases, hierarchy is not necessary for effective control. The decision admitted that "[b]ecause of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country," but it nonetheless refused to recognize these "mystical powers" as the source of effective control. Instead, it located hierarchy and a superior-subordinate relationship in Kondewa's official position as High Priest, and it imposed superior responsibility on the basis of that narrow vision of control.<sup>126</sup> In the court's telling, power outside of hierarchy is not the interest of the law of superior responsibility.

The rationale underlying these legal requirements for superior responsibility also reflects a preoccupation with coercive power. Superior responsibility is justified primarily through a deterrence rationale: if leaders potentially face punishment for failing to prevent or discipline the crimes of their subordinates, the theory goes, then the commander will be more likely to control his troops, the President more willing to curb his underlings, the clergy more careful to restrain his parishioners.<sup>127</sup> Superior responsibility, however, could also be understood and justified through the lens of persuasive power, particularly when superior responsibility is based on a failure to punish subordinates. Specifically, liability based on failing to punish subordinates for crimes can be justified as a way of punishing the superior's creation of a "culture of lawlessness" by assuring future wrongdoers of their impunity.<sup>128</sup> Viewing superior responsibility as a way of punishing the creation of such a culture aligns with the form of moral persuasion accomplished through omission. An officer who fails to punish interrogators who tortured in order to encourage others to do

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125. See *Prosecutor v. Fofana*, Case No. SCSL-04-14-J, Judgment, ¶ 806 (Aug. 2, 2007).

126. Ilias Bantekas, *Legal Anthropology and the Construction of Complex Liabilities*, in *THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW* 181, 189–90 (Charles Chernor Jalloh ed., 2014).

127. See M. CHERIF BASSIOUNI, *INTRODUCTION TO INTERNATIONAL CRIMINAL LAW* 117 (2d rev. ed. 2013); see also Mirjan Damaška, *The Shadow Side of Command Responsibility*, 49 *AM. J. COMP. L.* 455, 479–80 (2001) (contending that superior responsibility based on failure to punish represents responsibility based on dereliction of duty).

128. VAN SLIEDREGT, *supra* note 102, at 198; see also *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Judgment, ¶ 83 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004) (addressing the argument that superior responsibility for "failure to punish" is justified only if the lack of punishment "results in a failure to prevent the commission of future crimes"); Darryl Robinson, *How Command Responsibility Got So Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution*, 13 *MELB. J. INT'L L.* 1, 16–17 (2012) (proposing failure to punish subordinates merits liability because it contributes to future crimes).

so is conditioning those who observe this impunity to think differently about these crimes—to think of them as not wrong or as even admirable, to think of their victims as deserving abuse or as not deserving a second thought.<sup>129</sup> Nonetheless, despite a recognition that leaders' refusal or failure to punish transgressions can create cultures of impunity, superior responsibility continues to be grounded predominantly in concerns about the power to control subordinates' will rather than the power to shape subordinates' opinions.

The law's focus on coercive power and hierarchy also manifests itself in the understanding of perpetration that governs the Rome Statute, the law governing the ICC. Under the Statute, perpetration of a crime—as opposed to accessory participation in a crime—requires “control over the crime.”<sup>130</sup> My interest here is less in the general notion that the category of “perpetrator” represents those who decide whether the crime will be carried out and how it will be performed,<sup>131</sup> and more in the specific application of this concept in the area of indirect perpetration. This form of perpetration refers to two scenarios. First, it includes the classic innocent-agent type situation in which a puppet-master-style indirect perpetrator pulls the strings of an innocent agent, who ultimately serves as the direct perpetrator but is not criminally responsible for that act. Second, it includes situations in which the indirect perpetrator acts through a direct perpetrator who is indeed criminally responsible. In both categories—not only in the innocent-agent situation—the perpetrator is required to “control the will” of the direct perpetrator.<sup>132</sup> This vision of control requires, as in the context of superior responsibility, hierarchy between the indirect perpetrator and the direct perpetrator; mere influence will not suffice. This is justified by the reasoning that the indirect perpetrator must “be sure [that] his decision will be carried out by his subordinates.”<sup>133</sup> In the case of the direct perpetrator who is not an innocent agent but rather is criminally responsible, this requirement of control, of certainty that the crime will be carried out, ultimately means that the direct perpetrator completely subordinates his will to that of the indirect

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129. See *supra* note 87 and accompanying text (discussing view that superiors' failure to punish interrogators for torturing detainees facilitated these abuses as much as superiors' giving of orders to torture).

130. See *Prosecutor v. Bashir*, Case No. ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir, ¶ 210 (Mar. 4, 2009); *Prosecutor v. Katanga*, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶¶ 484–486 (Sept. 30, 2008); *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, ¶¶ 330–333 (Jan. 29, 2007) [hereinafter *Lubanga Confirmation of Charges Decision*].

131. See OLÁSULO, *supra* note 123, at 124 (identifying “highest leader” as the person who “essentially decides whether and how the crime would be committed”).

132. *Lubanga Confirmation of Charges Decision*, *supra* note 130, ¶ 332. For a critique of the emphasis on control, see Jens David Ohlin, *Searching for the Hinterman: In Praise of Subjective Theories of Imputation*, 12 J. INT'L CRIM. JUST. 325 (2014).

133. OLÁSULO, *supra* note 123, at 118; see also Jens David Ohlin et al., *Assessing the Control-Theory*, 26 LEIDEN J. INT'L L. 725, 737 (2013) (discussing the debate over indirect perpetration through organizations and Roxin's theory “that bureaucratic control is . . . ‘immediate’ because the organization carries out the orders of the leader as a matter of course”).

perpetrator. This is a vision, again, of coercive power that manifests itself through the complete domination by one person over another.

The law's emphasis on abuses of coercive power is evident not only in the modes of responsibility, but also in the sentencing context. In numerous cases, the ICTY and ICTR have classified a defendant's abuse of his status as a leader as an aggravating factor in sentencing.<sup>134</sup> The courts' definition of this abuse as

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134. In several cases in addition to those described *infra* in the text, the ICTY and ICTR have found superior position to be an aggravating factor based on a decision that the defendant hurt individuals or populations whom, because of that position, he should have helped. For decisions in the ICTR, see *Prosecutor v. Muhimana*, Case No. ICTR-95-1B-T, Judgment and Sentence, ¶ 604 (Apr. 28, 2005) (“Instead of using, or attempting to use, his position within the community to promote peace and reconciliation, he actively participated in the atrocities. This constitutes an aggravating factor.”); *Prosecutor v. Ndindabahizi*, Case No. ICTR-2001-71-I, Judgment and Sentence, ¶ 508(i)–(ii) (July 15, 2004) (“The Chamber considers it particularly aggravating that instead of promoting peace and reconciliation in his capacity as Minister, he supported and advocated a policy of genocide.”); *Prosecutor v. Gacumbtsi*, Case No. ICTR-2001-64-T, Judgment, ¶ 345 (June 17, 2004) (holding defendant's position as bourgmestre an aggravating circumstance because he “betrayed the trust that the people of his *commune* had placed in him” by perpetrating crimes against them); *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14-T, Judgment and Sentence, ¶ 499(ii) (May 16, 2003) (“The Chamber considers it particularly aggravating that instead of promoting peace and reconciliation in his capacity as Minister of Information, he turned to violence and actively participated in the commission of the massacres . . . .”); *Prosecutor v. Ntakirutimana*, Case Nos. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, ¶ 910 (Feb. 21, 2003) (deeming “particularly egregious that, as a medical doctor, [defendant] took lives instead of saving them”); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Sentencing Decision Transcript (Oct. 2, 1998), <http://ictr-archiv09.library.cornell.edu/ENGLISH/cases/Akayesu/judgement/ak81002e.html> [<https://perma.cc/UFN6-4Z73>] (noting and accepting arguments of prosecution that Akayesu, the bourgmestre of Taba commune, abused his position of authority by using it to hurt the population he was supposed to protect, which constituted an aggravating circumstance).

For decisions in the ICTY, see *Prosecutor v. Krajišnik*, Case No. IT-00-39-T, Judgment, ¶ 1157 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006) (“If a person in such a position exploits [a public position] in order to commit or facilitate a crime, the relative seriousness of the crime is increased by the breach of duty and the legitimate expectations attaching to this position.”); *Prosecutor v. Brđanin*, Case No. IT-99-36-T, ¶ 1099 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (finding abuse of authority as an aggravating factor because “Accused held positions of political authority and . . . abused this authority in a way which discriminated against Bosnian Muslims and Bosnian Croats and brought them great harm and misery”); *Prosecutor v. Deronjić*, Case No. IT-02-61-S, Sentencing Judgment, ¶¶ 194–195 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 30, 2004) (holding that the accused, President of the Crisis Staff and of the Municipal Board, “abused his political power to commit the crimes he is charged with”); *Prosecutor v. Banović*, Case No. IT-02-65/1-S, Sentencing Judgment, ¶¶ 54–55 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003) (holding as an aggravating factor that the defendant, a guard at the Keraterm camp, failed his duty to protect detainees and instead committed crimes against them); *Prosecutor v. Sikirica*, Case No. IT-95-8-S, Sentencing Judgment, ¶ 172 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 13, 2001) (“Došen's position as shift leader is an aggravating factor . . . : he permitted the persecution of, and condoned violence towards, the very people he should have been protecting.”); *id.* ¶ 210 (finding an aggravating circumstance for defendant Kolundžija based on an abuse of position similar to that of Došen); *Prosecutor v. Todorovic*, Case No. IT-95-9/1-S, Sentencing Judgment, ¶ 61 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2001) (“[I]n his position as chief of an institution that is responsible for upholding the law, Stevan Todorovic actively and directly took part in offences which he should have been working to prevent or punish.”); *Prosecutor v. Mucić*, Case No. IT-96-21-T, Judgment, ¶ 1268 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (finding an aggravating circumstance for defendant Delić, deputy prison-camp commander, based on his failure to protect prisoners). While abuse of the leadership position is

involving coercive control or abdication of official responsibility, however, represents an unduly narrow vision of the ways in which leaders abuse their positions of power, a vision dominated by the image of a defendant who abuses coercive power by hurting the very populations that in that position he is entrusted to help.

In sentencing former Rwandan Prime Minister Jean Kambanda, for example, the ICTR held that the defendant's high position during the genocide constituted an aggravating factor because he abused the population he was obligated to protect.<sup>135</sup> The ICTY similarly held superior position in the military to be an aggravating factor for Zlatko Aleksovski, the head of the Croat-run Heliodrom camp in Mostar, where Bosniaks and Serbs were detained during the war. The court based its decision on a finding that “[i]nstead of preventing it, [Aleksovski] involved himself in violence against those whom he should have been protecting.”<sup>136</sup> Pastor Elizaphan Ntakirutama likewise did not merely fail to help his parishioners who had pleaded for his help—“his flock,” in the words of the ICTR Trial Chamber—but in fact transported attackers to the Mugonero complex, where these parishioners had been seeking refuge. Here, too, abusing those he was entrusted to protect constituted an aggravating circumstance based on his position of authority among the population.<sup>137</sup>

Some might say these examples illustrate the breadth of the courts' vision of abuses of leadership, because they aggravate punishment for individuals in a range of positions—from political to military to community leaders. But in all of these cases, the courts are concerned with abuses rooted in control of resources, dominance over institutions, or command of bureaucracies. This focus reflects a wider judgment that leaders deserve prosecution and punishment because they have used the coercive power of their position to accomplish harm,<sup>138</sup> while it neglects their use of persuasion to accomplish harm as well.

### B. *A Criminal Law of Persuasive Power*

Despite this focus on coercive power, within international criminal law there are a few glimmers of recognition of the significance of leaders' ability to shape followers through persuasion. In a handful of cases, the ICTY and ICTR have aggravated sentences for an abuse of a leadership position, based on the

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typically an aggravating factor, some decisions have assessed this as part of the evaluation of the gravity of the offense. *See, e.g.*, Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, ¶¶ 85–87, 89 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003).

135. Prosecutor v. Kambanda, Case No. ICTR 97-23-S, Judgment and Sentence, ¶¶ 44, 61(B)(vii)–62 (Sept. 4, 1998), *aff'd*, Kambanda v. Prosecutor, Case No. ICTR 97-23-A, Appeals Judgment, ¶ 119 (Oct. 19, 2000).

136. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, ¶ 183 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

137. *See* Prosecutor v. Ntakirutimana, Case Nos. ICTR-96-10 & ICTR-96-17-T, Judgment and Sentence, ¶ 902 (Feb. 21, 2003).

138. *See* DRUMBL, *supra* note 21, at 26 (attributing this view to Justice Richard Goldstone).

notion that a leader might inspire audiences by encouragement or by example to participate in crimes. In these decisions, the tribunals recognize the empirical fact that individuals' acts can change others' ideas of right and wrong, thus laying the groundwork for crimes to take place.

Notably, the tribunals do not contend in these cases that the defendants intentionally used their influence to persuade others to embrace crime. Nor do the tribunals contend that the defendants actually succeeded in their efforts at moral persuasion; they make no statement on whether the defendants ultimately led their followers to commit crimes. Instead, the key to the aggravating circumstance is the increased risk that a person would commit a crime because of the defendant's acts or words.<sup>139</sup> In the courts' view, a leader who commits or calls for some transgression deserves enhanced punishment because that conduct or speech augments the likelihood that others will view in a positive light and, consequently, commit those same transgressions.<sup>140</sup>

A few examples might illustrate the tribunals' approach. Joseph Kanyabashi, the bourgmestre—roughly the equivalent of a mayor—of Ngoma commune in southern Rwanda, received an increased punishment because, in the view of the ICTR, the public was more likely to deem his acts “morally legitimate” because he held an “influential” and “respected” position in the community.<sup>141</sup> Similarly, in sentencing Miroslav Kvočka, a police officer and guard at the Omarska concentration camp near the Bosnian city of Prijedor, the Trial Chamber of the ICTY asserted that the defendant's “position of respect and trust in the community” constituted an aggravating factor, as his tolerance of the crimes committed by others in his presence “was likely viewed as giving legitimacy to the criminal conduct.”<sup>142</sup> For Idelphonse Hategekimana, a lieutenant in the Rwandan army and commander of Ngoma camp during the genocide, and Callixte Kalimanzira, the Rwandan Interior Minister, the fact that communities listened to and “revere[d]” them was an aggravating factor at sentencing, because it meant others would be more likely to do as they had done.<sup>143</sup>

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139. For discussions of risk aggravation in the law of complicity, see 1 KAI AMBOS, *TREATISE ON INTERNATIONAL CRIMINAL LAW: FOUNDATIONS AND GENERAL PART* 165 (2013).

140. For a discussion of unintentional influence, see Herbert C. Kelman, *Ethical Limits on the Use of Influence in Hierarchical Relationships*, in *SOCIAL INFLUENCES ON ETHICAL BEHAVIOR IN ORGANIZATIONS* 11, 11 (John M. Darley et al. eds., 2001) (explaining that social influence may occur without intention, as where “O may unwittingly set an example or serve as a model for P”).

141. *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Judgment and Sentence, ¶¶ 3694, 6255 (June 24, 2011).

142. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-T, Judgment, ¶ 716 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 2, 2001).

143. *Prosecutor v. Hategekimana*, Case No. ICTR-00-55B-T, Judgment and Sentence, ¶ 742 (Dec. 6, 2010) (attributing likelihood that “others would follow [defendant's] example” to “influence he derived from his position and . . . local status”); *Prosecutor v. Kalimanzira*, Case No. ICTR-05-88-T, ¶ 750 (June 22, 2009) (noting that Kalimanzira “was loved and appreciated,” which “made it likely that others would follow his example”).

These decisions identify a phenomenon akin to what this Article identifies as moral persuasion, but significant differences separate the phenomenon animating these sentencing decisions and the act of moral persuasion. As an initial matter, whereas the notion of moral persuasion requires a leader's intent to persuade followers to commit some crime,<sup>144</sup> these decisions do not require any showing of the defendant's intent to influence others, or even of his awareness of the possibility of inducing others to commit these crimes.<sup>145</sup> That is, while the idea of moral persuasion would capture only a Donald Trump who intends to provoke violence when he calls for the deportation of Mexican immigrants, the tribunals' approach would aggravate a sentence for a Donald Trump who urges the same without even being aware of the risk of provoking violence.<sup>146</sup> In that regard, the tribunals' approach broadens its capacity to punish moral persuasion by transforming it into a reckless or negligent act. At the same time, this approach necessarily confines the reach of moral persuasion, and its significance, because the tribunals acknowledge the persuasion-like activity only at sentencing. For the tribunals, the defendant's primary wrong is the crime for which he was convicted; the possibility of reckless or negligent moral persuasion, in contrast, is merely an additional item of note, an aggravating circumstance no different from the victim's "special vulnerability"<sup>147</sup> or the defendant's "apparent[] depravity and enjoyment of his criminal acts."<sup>148</sup>

Nonetheless, these sentencing decisions merit acknowledgment because they present a different story of the culpability of leaders from the one predominantly told in the courts, and they present a story in which recognition of leaders' power of persuasion flickers, even if it does not shine. If the more common narrative reflects leaders' abuses of coercive power—power to force people to do things they do not want to do, power to manipulate organizations and bureaucracies so they bend to the will of the leader—then the narrative

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144. See *supra* notes 54–58 and accompanying text (discussing intentionality in the concept of moral persuasion).

145. This approach might mirror a move by criminal law scholars to embrace reckless complicity. See, e.g., Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 380 (1997); see also Robert Weisberg, *Reappraising Complicity*, 4 BUFF. CRIM. L. REV. 217, 247–48 (2000) (noting scholars' interest in "reconceiving accessorial liability as a species of recklessness").

146. See Philip Rucker & Robert Costa, *Donald Trump: 'We Have to Take Back the Heart of Our Country'*, WASH. POST (July 11, 2015), [https://www.washingtonpost.com/politics/trump-tells-supporters-we-need-to-take-back-the-heart-of-our-country/2015/07/11/066aecf2-27dd-11e5-b77f-eb13a215f593\\_story.html](https://www.washingtonpost.com/politics/trump-tells-supporters-we-need-to-take-back-the-heart-of-our-country/2015/07/11/066aecf2-27dd-11e5-b77f-eb13a215f593_story.html) [<https://perma.cc/M4JA-MYG7>]; Editorial, *Mr. Trump's Immigrant-Bashing Rhetoric Breeds Violence*, WASH. POST (Aug. 21, 2015), [https://www.washingtonpost.com/opinions/mr-trumps-politics-of-incitement/2015/08/21/c33d0f2e-483d-11e5-8ab4-c73967a143d3\\_story.html](https://www.washingtonpost.com/opinions/mr-trumps-politics-of-incitement/2015/08/21/c33d0f2e-483d-11e5-8ab4-c73967a143d3_story.html) [<https://perma.cc/KVU5-VNZC>].

147. See, e.g., Prosecutor v. Mrđa, Case No. IT-02-59-S, Sentencing Judgment, ¶¶ 46–48 (Int'l Crim. Trib. for the Former Yugoslavia, Mar. 31, 2004); Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment, ¶ 184 (Int'l Crim. Trib. for the Former Yugoslavia, Dec. 18, 2003).

148. Prosecutor v. Lukić, Case No. IT-98-32/1-T, Judgment, ¶ 1087 (Int'l Crim. Trib. for the Former Yugoslavia, July 20, 2009).

presented in these rare cases is rather one of persuasive power, soft power, power to shape the way people choose to think and feel.<sup>149</sup>

These cases also merit attention because they have been passed over in scholarly accounts of punishment in international law, treated as if they are of a piece with the more common aggravating factor of abuse of a leadership position by hurting those who ought to be helped.<sup>150</sup> But they are quite distinct. The more common approach to sentencing aggravation for leaders focuses on abuse of the coercive aspects of power, while these cases, by contrast, draw attention to the persuasive side of power, a side that deeply merits recognition.

Such glimmers of understanding of the importance of abuses of persuasive power appear in only a few other isolated cases in international criminal law, all in the context of persecution, one of the constituent acts that can constitute crimes against humanity. Covering a wide range of conduct, persecution consists of any act or omission that constitutes the “intentional and severe deprivation of fundamental rights” on the basis of the identity of the victim.<sup>151</sup> Like all constituent acts that form the basis of crimes against humanity, for a persecutory act to constitute a crime against humanity it must be part of a “widespread or systematic attack” against a civilian population,<sup>152</sup> and the perpetrator must have knowledge of the attack.<sup>153</sup> Persecution differs from some other constituent acts of crimes against humanity such as murder<sup>154</sup> or enforced disappearance,<sup>155</sup> however, because it encompasses a range of acts. Courts accordingly have held that for conduct to constitute persecution, it must rise to the same level of gravity

149. On nations’ soft power, see generally JOSEPH S. NYE, JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* (2004). On “hard power,” or coercive power, see JOSEPH S. NYE, JR., *THE FUTURE OF POWER* 20–21 (2011).

150. See, e.g., SILVIA D’ASCOLI, *SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN AD HOC TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC* 209 (2011); Barbora Hola, *Sentencing of International Crimes at the ICTY and ICTR: Consistency of Sentencing Case Law*, 4 *AMSTERDAM L.F.* 3, 3, 16 (2012). For a discussion of that category of aggravating circumstance, see *supra* notes 134–138 and accompanying text.

151. Rome Statute, *supra* note 30, art. 7(2)(g). The Rome Statute provides that persecution may be directed toward “any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, . . . or other grounds that are universally recognized as impermissible under international law.” *Id.* art. 7(1)(h). This broad conception of protected groups contrasts with the definition of persecution governing the Nuremberg Tribunal, the subsequent trials conducted by the United States under Control Council Law, the ICTY, and the ICTR, which were limited to political, racial, or religious groups. WILLIAM SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 176 (2010); Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 *AM. J. INT’L L.* 334, 352 (2013).

152. The Rome Statute defines the “[a]ttack directed against any civilian population” as a “course of conduct involving the multiple commission” of those acts against the civilian population, “pursuant to or in furtherance of a [s]tate or organizational policy to commit such attack.” Rome Statute, *supra* note 30, art. 7(2)(a); see also Sadat, *supra* note 151, at 335, 352 (discussing requirements for crimes against humanity under the Rome Statute).

153. Rome Statute, *supra* note 30, art. 7(1).

154. See *id.* art. 7(1)(a) (prohibiting murder as a crime against humanity).

155. See *id.* art. 7(1)(i) (prohibiting enforced disappearance of persons as a crime against humanity).

as the other acts, such as murder or enforced disappearance, that constitute crimes against humanity.<sup>156</sup>

The ideas behind moral persuasion animated the Nuremberg Tribunal's prosecution and conviction of Julius Streicher for crimes against humanity based on his acts as the publisher and editor of the Nazi weekly *Der Stürmer*, a favorite publication of Adolf Hitler that at its height boasted a circulation of five hundred thousand.<sup>157</sup> The prosecution characterized the heart of Streicher's crimes as changing Germans' minds so that they would support the extermination of the Jewish people. In this view, Streicher "incited a fear and hatred of Jews which made persecution in the first instance, and finally, the program of mass murder which he openly advocated, a psychological possibility."<sup>158</sup> The prosecution refrained from alleging that Streicher directly caused any particular crimes. Instead, it sought to establish that Streicher set the tone, created the climate that made them possible.

The Nuremberg Tribunal ultimately agreed with these characterizations, and went somewhat further than the prosecution in the causal analysis. In its decision convicting Streicher, the Tribunal described Streicher's writing as "poison . . . injected into the minds of thousands of Germans which caused them to follow the National Socialist policy of Jewish persecution and extermination."<sup>159</sup> It thus adopted the language of causation, even though the prosecution had not urged this link, and even though it was not clear that the law required this link. Still, the Court did not connect Streicher's hate-filled speeches and articles to any particular crimes, and instead convicted him on the more general grounds that he made the Holocaust possible.<sup>160</sup>

Decades later, the *Streicher* decision's account of moral persuasion as persecution was echoed in the ICTR's *Media* Trial of Ferdinand Nahimana, Jean-Bosco Barayagwiza, and Hassan Ngeze.<sup>161</sup> Nahimana and Barayagwiza had

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156. See Prosecutor v. Blaskić, Case No. IT-95-14-A, Judgment, ¶ 135 (Int'l Crim. Trib. for the Former Yugoslavia July 29, 2004).

157. ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 333–34 (1983).

158. Thomas J. Dodd, Individual Responsibility of the Defendant Julius Streicher, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center, <http://archives.lib.uconn.edu/islandora/object/20002%3A1942#page/1/mode/2up>, quoted in Richard Ashby Wilson, *Inciting Genocide with Words*, 36 MICH. J. INT'L L. 277, 284 (2015). Similarly, a prosecution memorandum of May 1946 stated, "Streicher helped to create, through his propaganda, the psychological basis necessary for carrying through" the Holocaust. Office of U.S. Chief of Counsel Memorandum for Mr. Dodd, University of Connecticut: Archives & Special Collections at the Thomas J. Dodd Research Center (May 29, 1946), <http://archives.lib.uconn.edu/islandora/object/20002%3A20112949>, quoted in Wilson, *supra*, at 285.

159. International Military Tribunal, Judgment, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 171, 302 (1947) [hereinafter IMT Judgment]; see also Andrew K. Woods, *A Behavioral Approach to Human Rights*, 51 HARV. INT'L L.J. 51, 52 (2010) ("The Streicher judgment implies that certain social conditions can drive human action, even unreasonable, unthinkable acts.").

160. IMT Judgment, *supra*, note 159, at 302.

161. Prosecutor v. Nahimana, Case No. ICTR-99-52-T, Judgment and Sentence, ¶ 1078 (Dec. 3, 2003).

founded the independent radio station RTLM, which, among other things, broadcast names of intended victims and repeatedly referred to the Tutsis as cockroaches. Ngeze, the leader of a Hutu political party, was the owner and editor of the newspaper *Kangura*, which advertised itself to its Hutu readership as “the voice that seeks to awaken and guide the majority people.”<sup>162</sup> It published much hateful content, including the *Hutu Ten Commandments*,<sup>163</sup> which the Tribunal characterized as “the poison described in the *Streicher* judgment.”<sup>164</sup> In convicting the three defendants of persecution as a crime against humanity, it held that their writings and broadcasts “condition[ed] the Hutu population and creat[ed] a climate of harm” that enabled the genocide.<sup>165</sup>

The defendants in the *Media* trial also were convicted of direct and public incitement to commit genocide,<sup>166</sup> which consists of directly and publicly calling for another to commit genocide, with “intent to directly prompt or provoke another to commit [the crime].”<sup>167</sup> Although the same conduct can constitute both incitement and persecution,<sup>168</sup> a comparison of the two crimes is useful for understanding the ICTR’s recognition of the subtleties in the kinds of acts that constitute moral persuasion. Incitement must be “direct and public,” which requires both that it be directed at the public, rather than communicated in private, and that it be a sufficiently direct exhortation to commit genocide.<sup>169</sup> The incitement must “specifically provoke another”; “mere vague or indirect suggestion” will not suffice.<sup>170</sup> Persecution, on the other hand, exists even in the absence of such a direct call to action. Moreover, because persecution has been

162. GOUREVITCH, *supra* note 73, at 85.

163. *Id.* at 88; *see supra* note 66 and accompanying text (discussing RTLM and *Kangura*).

164. *Nahimana*, Judgment and Sentence, ¶ 1078. The Trial Chamber also saw Ngeze’s position as an aggravating factor at sentencing, in line with the cases discussed *supra* notes 134–138 and accompanying text. Ngeze, said the Trial Chamber, “was in a position to . . . shape public opinion.” *Id.* ¶ 1101. And instead of using that power for a lawful purpose, he used it to “poison[] the minds of his readers, and by words and deeds caused the death of thousands of innocent civilians.” *Id.*

165. *Id.* ¶ 1073. The Appeals Chamber upheld the Trial Chamber’s determination that the broadcasts and writings constituted persecution, *see Nahimana v. Prosecutor*, Case No. ICTR-99-52-A, Appeals Judgment, ¶ 988 (Nov. 28, 2007), but it held that RTLM broadcasts before April 6, 1994 could not form the basis of a conviction for persecution because there was no “widespread or systematic attack,” as required for crimes against humanity, prior to that date. Under the same reasoning, the Appeals Chamber overturned Ngeze’s conviction, as *Kangura* was published before April 6, 1994. *See id.* ¶¶ 993–94, 1013.

166. *Nahimana*, Judgment and Sentence, ¶¶ 1092–94; *see also* ICTR Statute, *supra* note 118, art. 2(3)(c). On appeal, Barayagwiza’s conviction on this count was reversed. *See Nahimana*, Appeals Judgment, ¶ 883.

167. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, ¶ 560 (Sept. 2, 1998).

168. *See, e.g., Prosecutor v. Ruggiu*, Case No. ICTR-97-32-I, Judgment and Sentence, ¶¶ 16–17 (June 1, 2000), <http://unictr.unmict.org/sites/unictr.org/files/case-documents/ict-97-32/trial-judgements/en/000601.pdf> [<https://perma.cc/C9DR-JCPZ>].

169. WIBKE K. TIMMERMANN, INCITEMENT IN INTERNATIONAL LAW 213–15, 238 (2015).

170. *Akayesu*, Judgment, ¶ 557. The Trial Chamber went on to note that “the direct element of incitement should be viewed in the light of its cultural and linguistic content. Indeed, a particular speech may be perceived as ‘direct’ in one country, and not so in another. . . . [I]ncitement may be direct, and nonetheless implicit.” *Id.*

found where the persecutory act infringes on the victim's "right to respect for dignity" and "right to security," it need not rise to the level of direct incitement to genocide, or even to the level of incitement to any other mass atrocity crime.<sup>171</sup> The act of priming, of conditioning, of acculturating others to hatred, may constitute the crime against humanity.

The *Media* judgment is significant in recognizing the capacity for persecutory acts to create conditions that ultimately give rise to future harm. In confirming that "hate speech targeting a population on the basis of ethnicity, or other discriminatory grounds, reaches [the same] level of gravity" as other acts that form the basis of crimes against humanity,<sup>172</sup> the Tribunal recognized the harm arising from efforts to convince others of the worthlessness of a population or the value of extermination. Although the defendants' conduct was in many ways incomparable in seriousness and horror to the killings that consumed the country, the court recognized the considerable enormity of this type of persecution. It also recognized the impact of this type of persecution. Because persecution constitutes a deprivation of the victim's rights, it is that deprivation that is typically viewed as persecution's core harm. But the ICTR recognized a separate harm of persecution, one that taps into the danger of persuading individuals of the rightness of wrongdoing. According to the Tribunal, these acts of persecution not only "destroy[] the dignity of those in the group under attack," but also "create[] a lesser status" for that group "in the eyes of others who perceive and treat them as less than human," which can cause "irreversible harm."<sup>173</sup> Thus, just as the heart of Streicher's crime was to make the Holocaust possible, a core wrong of these defendants' crime was to set the psychological stage for hundreds of thousands of readers and listeners to choose to slaughter their neighbors and friends.<sup>174</sup>

### C. Finding a Doctrinal Home for Crimes of Persuasion

The preceding paragraphs have shown international criminal law's halting and sporadic recognition of moral persuasion. These doctrinal vehicles are limited in their capacity to capture the act of moral persuasion. The cases classifying the risk of moral persuasion as an aggravating factor at sentencing indicate the courts' concern about the possibility of such acts of influence, but in their posture as sentencing decisions they necessarily confine moral persuasion

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171. *Nahimana*, Appeals Judgment, ¶¶ 986–87.

172. *Nahimana*, Judgment and Sentence, ¶ 1072. Although the decision has been criticized for its failure to adequately account for the right to freedom of expression, see generally Diane F. Orentlicher, *Criminalizing Hate Speech in the Crucible of Trial*: Prosecutor v. *Nahimana*, 12 NEW ENG. J. INT'L. & COMP. L. 17 (2005), I rely here on the decision not for its specific holdings on hate speech, but rather for its wider principle recognizing the harm inherent in individuals' acts of creating a psychological or moral climate in which atrocities take place.

173. *Nahimana*, Judgment and Sentence, ¶ 1072; see also *Ruggiu*, Judgment and Sentence, ¶ 19 ("[T]he accused, like Streicher, infected peoples' minds with ethnic hatred and persecution.").

174. *Nahimana*, Judgment and Sentence, ¶¶ 1078–79.

to a secondary consideration that matters only in the context of another criminal act. Persecution, meanwhile, better approximates moral persuasion, but it is also limited in scope, both because it requires an act as grave as other crimes against humanity, and because of the definitional requirements of crimes against humanity itself, including the condition that the persecution take place in the context of a wider, systematic attack.<sup>175</sup> The Rome Statute, moreover, has further narrowed persecution's scope, by requiring that the persecutory act be committed "in connection with" any of the other constituent acts of crimes against humanity or "any crime within the jurisdiction of the Court."<sup>176</sup>

Other doctrines offer similarly mixed results. Incitement as a stand-alone crime (as opposed to its operation as persecution) applies only to genocide in international criminal law, thus limiting its reach at least at this time.<sup>177</sup> Moreover, incitement, an inchoate crime, differs from moral persuasion because of its predominant interpretation as a crime that preys on the irrationality and frenzy of groupthink.<sup>178</sup> This understanding of incitement, however, misses just how sensible participation in mass atrocity appears to many perpetrators. To take up arms among so many others is not a matter of frenzied groupthink; it is a choice often made with deliberation, based on the information available at the time. Perpetrators believe that they are doing the right thing—for themselves, for their families, for their communities.<sup>179</sup>

Complicity liability, too, offers an avenue for holding individuals responsible for acts of moral persuasion—though it has not been used for this purpose.<sup>180</sup> Assigning liability to an actor for assistance in a crime that is undertaken or attempted, complicity may be based not only on an actor's provision of material assistance like providing a weapon, or of a service like

175. See *supra* text accompanying note 153 (discussing requirements for crimes against humanity).

176. Rome Statute, *supra* note 30, art. 7(1)(h); see also Margaret M. deGuzman, *Crimes Against Humanity*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL CRIMINAL LAW 121, 134 (William A. Schabas & Nadia Bernaz eds., 2011) (describing requirement as "controversial" because "it precludes convictions based on persecution alone").

177. See Rome Statute, *supra* note 30, art. 25(3)(e); Wibke Kristin Timmermann, *Incitement in International Criminal Law*, 88 INT'L REV. RED CROSS 823, 839–44 (2006).

178. See TIMMERMANN, *supra* note 169, at 236–37 & n.278 (noting incitement triggers "[p]rocesses grounded in group psychology and group dynamics, which render the causal sequence of events unpredictable and uncontrollable" (internal quotation marks omitted)); Albin Eser, *The Law of Incitement and the Use of Speech to Incite Others to Commit Criminal Acts: German Law in Comparative Perspective*, in FREEDOM OF SPEECH AND INCITEMENT AGAINST DEMOCRACY 119, 124 (David Kretzmer & Francine Kershman Hazan eds., 2000).

179. See DRUMBL, *supra* note 21, at 171; *supra* Part I.A.

180. The prosecution of Anto Furundžija, commander of a special unit of the Croatian Defence Council called the "Jokers," provides a rare case in which an individual was held liable as an accomplice based on encouragement rather than material assistance. See Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶¶ 232–35 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998). The case, however, involved encouragement of a principal actor already engaged in a crime; in particular, Furundžija was convicted for rape as a war crime for continuing to interrogate a victim while that victim was being subjected to sexual assault. See *id.* ¶ 26.

driving a getaway car, but also on an actor's provision of psychological assistance through encouragement.<sup>181</sup> Under the Rome Statute, such encouragement can constitute soliciting (understood as “urging, advising, commanding, or otherwise inciting another to commit a crime”<sup>182</sup>) or inducing (involving the “enticement or urging of another person to commit a crime”<sup>183</sup>); aiding and abetting, too, can be satisfied through moral support.<sup>184</sup> For any kind of complicity, the accomplice must assist with purpose or knowledge of facilitating the crime,<sup>185</sup> and the assistance must bear some relationship to the ultimate crime, although the degree of substantiality of assistance has been rendered in various terms.<sup>186</sup> It would, admittedly, be difficult to secure a conviction for moral persuasion through complicity, in light of the rigorous intent requirement.<sup>187</sup> To establish that Dick Cheney intended to facilitate torture when he “set the tone” through words or deeds, to use Nancy Pelosi’s phrase, poses a challenge—though not an insurmountable one, in light of his avowed commitment to waterboarding and similar interrogation methods.<sup>188</sup>

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181. See Rome Statute, *supra* note 30, art. 25(3)(b) (declaring criminal responsibility of a person who “solicits or induces the commission of such a crime which in fact occurs or is attempted”); see also ICTR Statute, *supra* note 118, art. 6(1); ICTY Statute, *supra* note 118, art. 7(1).

182. 1 AMBOS, *supra* note 139, at 163.

183. *Id.*

184. See Rome Statute, *supra* note 30, art. 25(3)(c) (stating that a person shall be criminally responsible for a crime if that person aids or abets in the commission or attempted commission of a crime); Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, ¶ 70 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002) (noting applicability of aiding and abetting for provision of practical assistance, encouragement, or moral support to the principal); *Furundžija*, Judgment, ¶¶ 233, 235, 249 (same).

185. See Rome Statute, *supra* note 30, arts. 25(3)(b)–(d), 30; Prosecutor v. Seromba, Case No. ICTR-2001-66-I, Judgment, ¶¶ 309, 336–38 (Dec. 13, 2006); *Furundžija*, Judgment, ¶¶ 249, 274; 1 AMBOS, *supra* note 139, at 165.

186. See *Vasiljević*, Judgment, ¶ 70 (requiring “substantial effect on the commission of the crime”); *Furundžija*, Judgment, ¶ 234 (same); Prosecutor v. Tadić, Case No. IT-94-1-T, Opinion and Judgment, ¶ 691 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997) (holding that accomplice’s acts “must be direct and substantial” in relation to the crime).

187. One solution would be to lower the intent requirement for complicity to recklessness or *dolus eventualis*. Article 30 of the Rome Statute excludes the possibility of a recklessness or *dolus eventualis* standard for complicity, see Rome Statute, *supra* note 30, art. 30; VAN SLIEDREGT, *supra* note 102, at 153–54, but these approaches have not been abandoned for complicity in other systems of law, see James G. Stewart, *Complicity*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 534, 556–58 (Markus D. Dubber & Tatjana Hörnle eds., 2014); *supra* text accompanying note 145 (noting scholarship in reckless complicity). International criminal law’s relatively significant causation requirement also would pose a more significant hurdle to successful prosecution than domestic law’s more minimal causation requirement. This raises larger questions about whether international criminal law should relax its causation requirements in contexts such as complicity and superior responsibility, or whether it needs heightened causation requirements to preserve its confinement to the most serious crimes. See, e.g., Robinson, *supra* note 128, at 25–29 (discussing contribution requirement for command responsibility).

188. See Scott Shane, *Backing C.I.A., Cheney Revisits Torture Debate from Bush Era*, N.Y. TIMES (Dec. 14, 2014), <https://www.nytimes.com/2014/12/15/us/politics/cheney-senate-report-on-torture.html> [<https://perma.cc/V6Z8-QZD3>].

Each of these crimes and modes thus have limited capacity to capture the precise notion of moral persuasion presented here. But each also offers something close: an avenue to punish perpetrators of mass atrocity crimes whose conduct could morally persuade followers to commit crimes themselves; to prohibit attempts at moral persuasion that form part of a system of organized atrocities in persecution, or that are undertaken with an eye toward genocide; and to proscribe completed acts of moral persuasion that are committed with intent to promote mass atrocity crimes that ultimately are carried out. Perhaps the greatest limitation of these crimes and modes is the fact that they are so infrequently used to capture moral persuasion in international criminal law. The following Part turns to why that may be the case, and what can be done.

### III.

#### LEADERSHIP CRIMES AND THE ANXIETIES OF INTERNATIONAL CRIMINAL LAW

Although complicity, persecution, incitement, and sentencing aggravation could recognize the wrongs of something akin to moral persuasion, the terrain of international criminal law is not so hospitable to prosecution of acts of moral persuasion. Turning from international criminal law's doctrine to its history, this Part offers an explanation for why international criminal law embraces prosecution of crimes of coercion and largely avoids it for crimes of persuasion. I contend that the focus of international criminal law on abuses of coercive power reflects its origin story. International criminal law was born of a rupture with traditional international law, which above all venerates and protects the state. This foundation demanded questioning and revision in the wake of the horrifying crimes committed by and in the name of Nazi Germany during the Second World War. International criminal law, however, did not merely distance itself from state idolization through innovations such as eliminating immunities for state actors. Instead, it defined itself in opposition to traditional international law, such that it became, oddly, fixated on abuses of state power and now, after some decades of expansion, on analogous abuses of power in state-like organizations as well. The result is a body of law that is consumed with targeting abuses of coercive power, but that ignores the equally destructive role of persuasion in mass crime.

This orientation of international criminal law, however, does not present an insurmountable challenge to this Article's call for greater recognition of the notion of moral persuasion. This Part thus proposes an explanation for how greater recognition of crimes of moral persuasion could in fact serve the goal of combating abuses of state and organizational power, before moving on in Part IV to discussing why abuses of persuasive power merit acknowledgement and attention.

A. *The Law of Mass Atrocity and Its Roots in Coercive Power*

International criminal law was born of the ashes of the Second World War and since its inception has been motivated by concerns about the state. While mass killing was “known and practiced throughout human history,” as Seyla Benhabib writes, the “full mobilization of state power, with all the means of a scientific-technological civilization at its disposal, in order to extinguish a human group on account of their claimed racial characteristics, was wholly novel.”<sup>189</sup> The destruction wrought by Nazi Germany represented a new species of wrongdoing, and a new understanding of the state and its capabilities. Instead of the state serving as an individual’s source of protection against harm, it was the unyielding and ruthless source of the harm. The end of the war thus brought with it the revolutionary idea of a “criminal state”—*Verbrecherstaat*, in Karl Jaspers’ terms<sup>190</sup>—a state that was “not . . . the defender of law and order,” but instead was “the very agent of criminality.”<sup>191</sup>

The law of mass atrocity responded to this transmogrified, criminal version of the state by breaking away from traditional international law’s treatment of state action and state actors as sacrosanct.<sup>192</sup> This was accomplished in part through decisions about whom to prosecute. In a ground-breaking move, the London Charter of the Nuremberg Tribunal declared in Article 7 that the “official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment,”<sup>193</sup> thus dismantling the shield of state status that had protected official actors for so long. Justice Robert Jackson, the chief U.S. prosecutor at the Tribunal, explained the rationale behind this provision in his opening statement: “The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched.”<sup>194</sup> Drafted the following year, the Charter of the International Military Tribunal for the Far East (IMTFE) also stripped heads of state and other officials of immunity.<sup>195</sup> With that, the future of the field was settled; today,

189. SEYLA BENHABIB, *Democratic Iterations: The Local, the National, and the Global*, in ANOTHER COSMOPOLITANISM 72–73 (Robert Post ed., 2006).

190. Lawrence Douglas, *Truth and Justice in Atrocity Trials*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 34, 36 (William A. Schabas ed., 2016); see also ARENDT, *supra* note 32, at 262 (“[C]rimes of this kind . . . were, and could only be, committed under a criminal law and by a criminal state.”).

191. Douglas, *supra* note 190, at 36.

192. See Luban, *supra* note 42, at 63 (“[I]nternational law fetishizes and idolizes states . . .”).

193. Charter of the International Military Tribunal, *reprinted in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 159, at XII (art. 7).

194. 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 95, 99 (1947) (Second Day, Wed., Nov. 21, 1945, Morning Session).

195. Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, art. 6, T.I.A.S. No. 1589, 4 Bevens 20 (as amended, Apr. 26, 1946, 4 Bevens 27).

contemporary international criminal tribunals continue to deny immunity to heads of state and other officials.<sup>196</sup>

The destruction of the shield of state sovereignty exists not only in the laws of these tribunals, but also in their practice. All of these courts have prosecuted high-ranking officials, beginning with defendants at Nuremberg, who were selected because of their positions of leadership in different aspects of the Nazi machinery. Although the IMTFE did not prosecute Japan's head of state, Emperor Hirohito, it did prosecute, convict, and sentence a number of high cabinet officers and a former head of state.<sup>197</sup> Today, heads of state or former heads of state have been indicted or prosecuted in the ICC, ICTY, and ICTR, as well as in the hybrid tribunals for Sierra Leone and Cambodia.<sup>198</sup> Over time, the focus on state leadership has widened to include prosecutions of leaders of non-state organizations as well.<sup>199</sup>

This focus on leadership-level defendants is not inevitable. International criminal courts do generally limit themselves, as a matter of either jurisdiction or prosecutorial discretion, to targeting those "most responsible" for crimes, or to "those bear[ing] the greatest responsibility" for crimes,<sup>200</sup> but this category

196. See Rome Statute, *supra* note 30, art. 27; ICTY Statute, *supra* note 118, art. 7(2); ICTR Statute, *supra* note 118, art. 6(2); see also Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea, art. 29, Royal Dec. No. NS/RKM/1004/006 (Oct. 27, 2004) (Cambodia); Statute of the Special Court for Sierra Leone, Jan. 16, 2002, art. 6(2), 2178 U.N.T.S. 138.

197. See BASSIOUNI, *supra* note 127, at 1037; GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 122 (2007) (discussing the selection of defendants at Nuremberg and in other international criminal tribunals).

198. See BASSIOUNI, *supra* note 127, at 91, 767 (discussing prosecutions of Milošević, Kambanda, and former Cambodian head of state Khieu Samphan); Micaela Frulli, *Piercing the Veil of Head-of-State Immunity: The Taylor Trial and Beyond*, in THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW, *supra* note 126, at 325, 326 (discussing prosecution of then-Liberian President Charles Taylor); James Meernik, *Justice, Power, and Peace: Conflicting Interests and the Apprehension of ICC Suspects*, in THE REALITIES OF INTERNATIONAL CRIMINAL JUSTICE 169, 190 (Dawn L. Rothe et al. eds., 2013) (discussing indictment of Sudanese President Omar al-Bashir, former Ivorian President Laurent Gbagbo, and late Colonel Muammar Qaddafi of Libya). With a few notable exceptions, see, e.g., Prosecutor v. Erdemović, Case No. IT-96-22-Tbis, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998), defendants in international trials for mass atrocity crimes have been leaders in political, military, or community institutions. This focus on leaders squares not only with the idea of greatest responsibility, but also with the fact that the international law of immunity for heads of state and other leaders and for official acts limits national courts' ability to prosecute these individuals.

199. See HYERAN JO, COMPLIANT REBELS: REBEL GROUPS AND INTERNATIONAL LAW IN WORLD POLITICS 44 (2015) (listing rebel leaders indicted by ICC).

200. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ¶ 60 (Mar. 31, 2010) (interpreting gravity requirement); see Margaret M. deGuzman, *The International Criminal Court's Gravity Jurisprudence at Ten*, 12 WASH. U. GLOBAL STUD. L. REV. 475, 482 (2013) (describing holding of ICC Pre-Trial Chamber that the gravity threshold requires that potential defendants "must include those who bear the greatest responsibility for the crimes alleged"); Int'l Crim. Ct. Off. of the Prosecutor, Draft Paper on Some Policy Issues Before the Office of the Prosecutor 6, [https://www.icc-cpi.int/iccdocs/otp/draft\\_policy\\_paper.pdf](https://www.icc-cpi.int/iccdocs/otp/draft_policy_paper.pdf) [<https://perma.cc/KBW3-3MUU>]

does not necessarily confine itself to those at senior levels of leadership. Indeed, the Appeals Chamber of the ICC rejected an effort by a Pre-Trial Chamber to limit admissible cases to those involving “the most senior leaders.”<sup>201</sup> The decision on appeal noted, rightly, that “individuals who are not at the very top of an organization may still carry considerable influence and commit, or generate the widespread commission of, very serious crimes.”<sup>202</sup> Still, despite this recognition that seniority and responsibility are not identical, prosecutors have primarily focused on those in positions of high leadership.<sup>203</sup> This preference is reflected in cultural and popular understandings, too, which often associate responsibility with leadership.<sup>204</sup>

Even outside the context of the selection of defendants, the history of international criminal law illuminates its focus on abuses of coercive power and its relative neglect of abuses of persuasive power. In light of the efforts made to craft a body of law that could target the criminal state, coercive power deriving from an actor’s position at the helm of a state or other entity takes on a talismanic quality. Abuse of coercive power represents both the *raison d’être* of international criminal law and its continued preoccupation. And while the criminal state doubtless represented a new problem that required the creation of an entirely new body of law, and doubtless represents a problem that continues

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(proposing prosecutions target “those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible”).

201. Situation in the Democratic Republic of the Congo, Case No. ICC-01/04, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58,” ¶¶ 73–82 (July 13, 2006) [hereinafter Appeals Chamber Decision on Gravity] (rejecting Pre-Trial Chamber’s decision that the Court’s admissibility requirements limited prosecutions to the most senior leaders), *rev’g* Prosecutor v. Lubanga, Case No. ICC-01/04-01/07, 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, (Feb. 24, 2006), Annex I, Decision on the Prosecutor’s Application for a Warrant of Arrest, Article 58, ¶¶ 51–52, 55, 64 (Feb. 10, 2006).

202. Appeals Chamber Decision on Gravity, *supra* note 201, ¶ 77; *see also* Prosecutor v. Eav, Case No. 001/18-07-2007-ECCC-OCIJ, Amended Closing Order, ¶¶ 4, 129 (Aug. 8, 2008) (assessing defendant head of S21 prison, where tens of thousands were tortured and killed, as “most responsible” despite defendant’s lack of senior position in Khmer Rouge).

203. *See* S.C. Res. 1534, ¶ 5 (Mar. 26, 2004); NANCY AMOURY COMBS, *GUILTY PLEAS IN INTERNATIONAL CRIMINAL LAW: CONSTRUCTING A RESTORATIVE JUSTICE APPROACH* 29 (2007) (discussing completion strategy of ICTY and ICTR, including decision “to prosecut[e] only high-level offenders”); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT’L CRIM. JUST. 731, 745 (2008).

204. *See* Off. of U.N. High Commissioner for Hum. Rts., *Making Peace Our Own: Victims’ Perceptions of Accountability, Reconciliation, and Transitional Justice in Northern Uganda* 26 (2007) (noting that respondents of the survey used the seniority of the individuals concerned as one of the criteria in determining accountability of the parties); Afghan Indep. Hum. Rts. Comm’n, *A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan* 21 (2005), <http://www.refworld.org/docid/47fdad50.html> [<https://perma.cc/YLN8-YUL7>] (discussing the “view that trials could be restricted either to those who had committed serious violations and their commanders, or commanders only”); Madeline Morris, *Complementarity and Conflict: States, Victims, and the ICC*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 195, 200 (Sarah B. Sewall & Carl Kaysen eds., 2000).

to torment the globe—along with criminal organizations that resemble states in their capacity to do horror<sup>205</sup>—the law of mass atrocity has taken an unduly restricted view of what it means to combat a criminal state or organization. In this regard, international criminal law perversely originated in a concern about unjustifiable deference to the structure of the state, only to grow into an independent body of law with an excessive fixation on that very concern.

The origins of international criminal law in opposition to traditional international law might help to illuminate why in the United States, despite a resistance to holding leaders accountable and a greater tendency to prosecute lower-level defendants,<sup>206</sup> and despite more stringent restrictions on prohibitions of speech,<sup>207</sup> legal actors are still willing to identify moral persuasion as culpable. In corporate crime, for example, executives are cited for their acts of creating cultures of wrongdoing,<sup>208</sup> and in considerations of accountability for torture, Nancy Pelosi is not the only voice that has urged prosecution of leaders such as Cheney and Rumsfeld for creating a climate conducive to lawbreaking.<sup>209</sup> This is not to suggest that moral persuasion is a primary source of punishment for leaders in U.S. law; but it is clear that the same history does not impede recognition of moral persuasion in domestic criminal law in the way it does so in international criminal law.

We have already seen the preference for punishing coercive power in the Yugoslav, and Rwandan tribunals' greater interest in aggravating sentences for abuses of coercive power than for abuses of persuasive power.<sup>210</sup> This continued emphasis on coercive power is made even more clear in cases that increase punishment for leaders not because they *abused* their power, but simply because they held a position of leadership. In sentencing former Liberian President Charles Taylor to fifty years' imprisonment, for example, the SCSL did not merely express concern about Taylor's use of his position to accomplish evil

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205. ISIS offers today's best example of the destructive capacity of a non-state entity. See Graeme Wood, *What ISIS Really Wants*, ATLANTIC (Mar. 2015), <http://www.theatlantic.com/magazine/archive/2015/03/what-isis-really-wants/384980> [<https://perma.cc/H7LD-Z22L>].

206. See *supra* notes 9–12 and accompanying text. See generally WHEN GOVERNMENTS BREAK THE LAW: THE RULE OF LAW AND THE PROSECUTION OF THE BUSH ADMINISTRATION (Austin Sarat & Nasser Hussain eds., 2010).

207. See GREENAWALT, *supra* note 28, at 219–87.

208. See, e.g., Complaint ¶ 36, United States v. S.A.C. Capital Advisors, L.P., 2013 WL 5913921 (S.D.N.Y. 2013) (No. 13-CV-5182) (alleging that hedge fund owner “furthered [an] insider trading scheme by fostering a culture” conducive to insider trading).

209. See Reed Brody et al., *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees*, HUM. RTS. WATCH (July 12, 2011), <https://www.hrw.org/report/2011/07/12/getting-away-torture/bush-administration-and-mistreatment-detainees> [<https://perma.cc/NCP6-ZKYL>] (arguing that Rumsfeld “created the conditions” for torture and “created a climate in which respect for legal norms by US troops may have been loosened”).

210. See *supra* Part II.A.

ends,<sup>211</sup> but also fixated on Taylor's very position as a head of state. The court noted that the defendant was in a "class of his own"<sup>212</sup> and had a "special status" as head of state, which it found to be "an aggravating factor of great weight."<sup>213</sup> In this regard, the SCSL seems interested in the bare fact that *Taylor was a head of state*; it is troubled by the office itself that he held, not by how he misused it.<sup>214</sup> This approach is out of step with the purported doctrine of the ad hoc tribunals for the former Yugoslavia and Rwanda, which have insisted that a leadership position itself cannot constitute an aggravating factor at punishment in the absence of abuse of that position.<sup>215</sup> But in these tribunals, too, the abuse of authority aggravating factor appears to be found in some cases even in the absence of an allegation of abuse, signaling a concern on the part of the courts with individuals who both have some leadership status *and* commit crimes,<sup>216</sup> as opposed to those who use the leadership status *to* commit crimes.<sup>217</sup>

This approach to punishment reflects a one-sided view of the culpability of leaders, one guided by the past's understandings of mass atrocity crimes. Abuses of coercive power may have provided a substantive basis for eliminating immunities and choosing defendants, but today, as we better understand the ways that persons in positions of leadership affect the populations who listen to them, punishment of leaders is more symbolic than substantive.<sup>218</sup> Writing on the

211. See *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Sentencing Judgment, ¶ 97 (May 30, 2012) (noting that Taylor used his "access to state machinery and public resources" to aid and abet crimes, "rather than using his power to promote peace and stability").

212. *Id.* ¶ 101.

213. *Id.* ¶ 97.

214. See Frulli, *supra* note 198, at 325 (citing Mark A. Drumbl, *The Charles Taylor Sentence and Traditional International Law*, OPINIO JURIS (June 11, 2012, 12:00 PM), <http://opiniojuris.org/2012/06/11/charles-taylor-sentencing-the-taylor-sentence-and-traditional-international-law> [<https://perma.cc/X9SU-SDUY>] (characterizing sentencing decision as "[f]etishizing [h]ead of [s]tate [s]tatus").

215. See *Prosecutor v. Stakić*, Case No. IT-97-24-A, Appeals Judgment, ¶ 411 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006); *Prosecutor v. Babić*, Case No. IT-03-72-A, Judgment on Sentencing Appeal, ¶ 80 (Int'l Crim. Trib. for the Former Yugoslavia July 18, 2005); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 709, (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001); *Prosecutor v. Kayishema*, Case No. ICTR-95-1-A, Appeals Judgment (Reasons), ¶ 358 (June 1, 2001).

216. See, e.g., *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment and Sentence, ¶ 469 (Dec. 6, 1999) (finding as an aggravating factor that accused "abused his authority and committed crimes").

217. See, e.g., *Prosecutor v. Kayishema*, Case No. ICTR-95-1-T, Sentence, ¶ 26 (May 21, 1999) (holding, without analysis of whether defendant abused position, that Ruzinanda deserved less punishment than Kayishema because he did not hold a "position of high authority"); *Prosecutor v. Kambanda*, Case No. ICTR 97-23-S, Judgment and Sentence, ¶ 62 (Sept. 4, 1998) (assessing defendant's "high ministerial post" as an aggravating circumstance); see also Drumbl, *supra* note 214 (characterizing *Taylor* judgment as "[f]etishizing [h]ead of [s]tate [s]tatus"). The focus of prosecutions in the ICC on heads of state of late might be another example of this trend. See *supra* notes 198–98 and accompanying text.

218. See Alexander K.A. Greenawalt, *International Criminal Law for Retributivists*, 35 U. PA. J. INT'L L. 969, 1039 (2014) ("[T]he unique symbolic importance of leadership figures dictates that their prosecution will generally be a public priority. . . ."); Dov Jacobs, *A Narrative of Justice and the*

question of dignity as status, Jeremy Waldron observes that “[i]n law and perhaps in morality too, status seems to operate as an abbreviating concept: it sums up information about a person’s legal or moral position.”<sup>219</sup> While “[a]bbreviations can be helpful for certain practical purposes,” notes Waldron, they also can “distort . . . or obscure the importance of the detail that is inevitably shoved aside for the pragmatic convenience of this essentially shorthand idea.”<sup>220</sup> In these decisions, status has become shorthand for conveying the culpability of leaders in mass atrocity. Status dominates the discourse, crowding out opportunities to think through the ways that culpability arises from leaders’ other acts. These courts lay blame at the feet of leaders because they occupy these positions and concurrently commit crimes; but the sins of these leaders extend far beyond this.

### B. Moral Persuasion as Abuse of Leadership

This assessment of the roots of international criminal law’s orientation toward coercive crimes laments the inadequate account of leaders’ culpability, the symbolic focus on leaders’ particular position rather than a substantive focus on the full complement of acts leaders undertake through that position. But this critique is not meant to challenge the goal itself of capturing through the criminal law the evils accomplished through states and other similar organizations that has dominated the field since its beginnings at Nuremberg. Nor is it meant to deny the difficulty of using the criminal law to address those evils. Theorists of international criminal law have struggled with whether organizations themselves have the capacity for moral agency, with whether liberal criminal law, built as it is around individuals as opposed to collectives, can conceive of a criminal state.<sup>221</sup> Perhaps because of the complexity—the seeming intractability—of

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(*Re*)Writing of History: Lessons Learned from World War II French Trials, in THE HIDDEN HISTORIES OF WAR CRIMES TRIALS 122, 128 (Kevin Jon Heller & Gerry Simpson eds., 2013) (“Trials of high-level leaders always carry a symbolic charge.”).

219. Jeremy Waldron, *Does “Equal Moral Status” Add Anything to Right Reason* 3 (N.Y.U. Pub. Law & Legal Theory Working Papers, Paper No. 292, 2011), [http://lsr.nellco.org/cgi/viewcontent.cgi?article=1293&context=nyu\\_plltwp](http://lsr.nellco.org/cgi/viewcontent.cgi?article=1293&context=nyu_plltwp) [<https://perma.cc/ELE9-YS6C>]; see also Jeremy Waldron, *Law, Dignity, and Self-Control*, in DIGNITY, RANK, AND RIGHTS 47, 58 & n.34 (Meir Dan-Cohen ed., 2012) (discussing definition of status).

220. Waldron, *supra* note 219.

221. See KIRSTEN J. FISHER, MORAL ACCOUNTABILITY AND INTERNATIONAL CRIMINAL LAW: HOLDING AGENTS OF ATROCITY ACCOUNTABLE TO THE WORLD 169 (2012) (arguing that groups can be viewed as “responsible agents and cohesive moral units in themselves”); Luban, *supra* note 42, at 78–91 (discussing state criminality); see also NETA C. CRAWFORD, ACCOUNTABILITY FOR KILLING: MORAL RESPONSIBILITY FOR COLLATERAL DAMAGE IN AMERICA’S POST-9/11 WARS 332–40 (2013) (proposing that military organizations have moral agency); CHRISTOPHER KUTZ, COMPLICITY: ETHICS AND LAW FOR A COLLECTIVE AGE 99–112 (2000) (discussing intentions of collectives); cf. MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 55 (2d ed. 2016) (explaining that organizations cannot have autonomy rights, for they “exist only as means” and “[a]s such . . . are not equal members in the Kantian kingdom of ends”); KUTZ, *supra*, at 188 (“[I]f collective harms can be ascribed to social and economic structures, then those harms can also be traced to individual motivations.”). On individualism in international criminal law, see DRUMBL, *supra* note 21, at 5 (noting that international criminal law is “premised on a construction of the individual

these questions, we turn routinely to doctrines rooted in the coercive powers of the state such as superior orders, or courts lapse into the easy ascription of greater culpability to a defendant simply because he occupied a position of leadership.

These approaches to leadership crimes, however, overlook the fact that recognizing crimes of moral persuasion in fact honors the ingrained focus of international criminal law on the power of states and state-like organizations. This is not simply because including abuses of persuasive power in a category of leadership crimes could leave untouched the law's preference for—indeed, fixation upon—leaders. Rather, it is because recognizing the culpability of moral persuasion means recognizing the abuses of power that are taking place through moral persuasion.

If one accepts that moral persuasion exists and merits attention, then a natural question is why this conduct needs to be undertaken by *leaders* in order to be recognized as culpable. This is a particularly salient inquiry in light of research showing that moral persuasion by peers often is a significant driver of mass atrocity crimes. Christopher Browning, for example, observes based on his research in *Ordinary Men*, a study of the members of a German killing unit operating in Poland during the war, that “the peer group exerts tremendous pressure on behavior and sets moral norms.”<sup>222</sup> These observations align with social psychology research demonstrating the power of social influence, including peer pressure and the impulse to conform, in motivating individual action.<sup>223</sup> Empirical research on the identity of perpetrators supports these findings. In a study using Geographic Information Science technology to map the spatial distribution of killers in the Rwandan genocide, Omar McDoom finds that participants often lived in the same neighborhood and household as other participants, suggesting that neighbors and families influenced individuals' participation in the genocide.<sup>224</sup> Anecdotal evidence, meanwhile, further

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as the central unit of action”); SIMPSON, *supra* note 197, at 58 (“[I]ndividualism . . . lies at the heart of much international justice rhetoric.”). On individualism in criminal law, see NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 144–46 (1988); Christopher Kutz, *The Philosophical Foundations of Complicity Law*, in THE OXFORD HANDBOOK OF PHILOSOPHY OF CRIMINAL LAW, *supra* note 102, at 147, 154–57. International criminal law's exclusive focus on individuals represents another point of departure from traditional international law, which treats the state as the constitutive unit of conduct and does not contemplate responsibility for individuals. See VAN SLIEDREGT, *supra* note 102, at 5–6.

222. CHRISTOPHER R. BROWNING, *ORDINARY MEN: RESERVE POLICE BATTALION 101 AND THE FINAL SOLUTION IN POLAND* 189 (1992).

223. See Robert B. Cialdini & Noah J. Goldstein, *Social Influence: Compliance and Conformity*, 55 ANN. REV. PSYCHOL. 591 (2004); Craig Haney et al., *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 69, 80–81, 89 (1973) (finding that individuals adapt to the social roles foisted upon them); ZIMBARDO, *supra* note 63 (reflecting on the Stanford Prison Experiment).

224. Omar Shahabudin McDoom, *Who Killed in Rwanda's Genocide?: Micro-space, Social Influence and Individual Participation in Intergroup Violence*, 50 J. PEACE RES. 453, 461–64 (2013); see also LEE ANN FUJII, *KILLING NEIGHBOURS: WEBS OF VIOLENCE IN RWANDA* 128 (2009); SCOTT STRAUS, *THE ORDER OF GENOCIDE: RACE, POWER, AND WAR IN RWANDA* 136 (2006).

supports the notion that personal relationships absent institutions of power shape the perpetration of atrocity. In a haunting passage of Gitta Serena's *Into That Darkness*, the wife of Treblinka commandant Franz Stangl admits that she believes she could have persuaded her husband to leave his terrible work at the concentration camp if she had tried—only to recant the next morning, apparently haunted by what it meant to acknowledge her own participation in his crimes.<sup>225</sup>

There is harm in these abuses of personal relationships. In the title essay of his book *Heracles' Bow*, James Boyd White describes the efforts of Neoptolemus and Odysseus in Sophocles' *Philoctetes* to persuade Philoctetes to return Heracles' bow to Troy. Neoptolemus befriends Philoctetes, gains his trust, and then turns on him. Odysseus, on the other hand, attempts to threaten Philoctetes. According to White, "[o]ne consequence of the fullness and beauty of Neoptolemus' developing friendship with Philoctetes is that his abuse of it is a wrong even worse than Odysseus' abuse of his relation with Neoptolemus."<sup>226</sup> White writes that Philoctetes' relationship with Neoptolemus "calls forth a person's central capacities for social and personal life, and then deliberately injures them."<sup>227</sup> To White, "[t]his deception threatens a real destruction of the self."<sup>228</sup>

These types of harms among friends, neighbors, and peers are significant, especially in mass atrocity situations, in the aftermath of which neighborhoods need repair as much as governments do. Mass atrocity violates not only our sense of the appropriate role of the state or other political organizations, but also our sense of appropriate social relations, social bonds, and social influence, for it feeds on exploitation of personal relationships.

The nature of this conduct and its harm, however, differs from the same betrayal and its consequences by a person in a position of leadership. When leaders abuse their persuasive power to convince followers of the rightness of wrongdoing, they rely on the authority of the position to convey their message. As communications theorist Teun van Dijk explains, parents manipulating children, professors manipulating students, politicians manipulating voters, and religious leaders manipulating followers all involve abusing a position of power and authority. Children can manipulate parents and students can manipulate professors, but this results not from their position of power, but rather from characteristics of the individual or of the personal relationship.<sup>229</sup> This means, as an initial matter, that the act of moral persuasion by a leader differs from the same act by a spouse or a friend—or even by a deejay who has a loudspeaker but

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225. See GITTA SERENY, *INTO THAT DARKNESS: AN EXAMINATION OF CONSCIENCE* 361–62 (Vintage Books 1983) (1974).

226. JAMES BOYD WHITE, *Heracles' Bow: Persuasion and Community in Sophocles' Philoctetes*, in *HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 3, 16 (1985).

227. *Id.*

228. *Id.*

229. See Teun A. van Dijk, *Discourse and Manipulation*, 17 *DISCOURSE & SOC'Y* 359, 362 (2006).

not any position of authority on which to draw<sup>230</sup>—for the method of persuasion relies on abuse of the position rather than on some other characteristic of the persuader or the relationship. Leaders who undertake moral persuasion thus exploit their positions of knowledge, of power, of authority.

Recognition of moral persuasion also serves the goal of targeting abuses of state power because the act of moral persuasion represents an essential feature of governance. As Foucault illuminates in his idea of governmentality, the work of governing relies not only on coercion, but also on using power to produce a particular mentality in the governed, one that embraces the interests or programs of government as good or natural.<sup>231</sup> Governmentality sees governing as “artificially so arranging things that people, following only their own self-interest,” will carry out the will of the governing body.<sup>232</sup> In this view, the moral persuasion undertaken by leaders in order to influence constituents or followers draws on the core functions of governing. The crimes of the Nazis have been treated as the ultimate example of the destruction that can be wrought by the state, but one of the greatest sources of this destruction was the regime’s ability to nurture popular beliefs and attitudes that made individuals willing to abide or contribute to its crimes. By targeting this kind of capacity, international criminal law thus can serve its original goal.

Because a leader who undertakes moral persuasion abuses his position to do so, the harm that follows differs from that caused by a peer’s moral persuasion. In relying on the power of leadership to manipulate those who listen and follow, a leader taints the source of that power itself—the office, the position, the status that enables him to speak and be heard, to act and be emulated. In this regard, recognizing the unique harm of moral persuasion by leaders leads us back to—and even honors—international criminal law’s historical roots in targeting the state and its coercive structures. Because leadership-level moral persuasion involves a betrayal of authority, recognizing and punishing it offers yet another opportunity to identify and condemn the ways that leaders abuse state or organizational power to commit crimes.

#### IV.

##### THE BENEFITS OF PUNISHING CRIMES OF PERSUASION

The focus of international criminal law on abuses of coercive power may be understandable in light of its history, but it is neither inevitable nor advisable.

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230. The exception, of course, would be the situation in which the topic of the moral persuasion is the music that the deejay knows better than the average person, in which case the deejay does rely on that particular knowledge.

231. See MICHEL FOUCAULT, *THE BIRTH OF BIOPOLITICS: LECTURES AT THE COLLÈGE DE FRANCE, 1978–79*, at 186 (Michel Senellart et al. eds., Graham Burchell trans., 2008) (2004) (discussing notion of governmentality as “the way in which one conducts the conduct of men”).

232. David Scott, *Colonial Governmentality*, 43 *SOC. TEXT* 191, 202 (1995); see also *supra* notes 96–100 and accompanying text (discussing internalization of leaders’ views through moral persuasion, as opposed to carrying out orders).

This Part offers a normative argument for why international criminal law should recognize the reality and culpability of leaders' acts of moral persuasion. If taken seriously, the proposal for greater attention to moral persuasion could result in prosecution of defendants who might not otherwise be haled into court—the thought leaders rather than the militia leaders. At the same time, it could mean prosecuting leaders already facing other charges for crimes of moral persuasion, which may ultimately result in the same sentences being meted out, though perhaps based on different crimes or theories. In that scenario, pursuing moral persuasion as a theory of prosecution for complicity or incitement or at sentencing could make little difference for criminal law's deterrence functions,<sup>233</sup> if those leaders could be punished anyway, and as severely, for other crimes. But this does not mean it would be inconsequential. Moral persuasion takes on greater significance when examined with an eye to the expressive functions of the law—those reflecting its capacity to send a message, to educate, to speak to affected individuals and communities and the world that watches.<sup>234</sup> This Part, accordingly, begins by identifying a number of expressive benefits that flow from greater recognition of moral persuasion crimes, from more accurate narratives of leaders' conduct to greater understanding of why direct perpetrators participate in mass atrocity crimes.

From a retributivist perspective, too, punishing moral persuasion matters, for it recognizes a different dimension—and a crucial dimension—of leaders' wrongdoing. Accounts of moral persuasion typically highlight its causal contribution to mass atrocity crimes.<sup>235</sup> Some might contend, however, that they exaggerate the importance of this purported causal nexus, as most atrocities are overdetermined in their sources of influence.<sup>236</sup> That is, even if Cheney had never

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233. For debates on deterrence as an adequate justification for international criminal law see Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 10–13 (2001); David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 488 (1999) (stating that the general deterrent effect of prosecutions is likely modest and incremental).

234. See DAVID GARLAND, PUNISHMENT AND MODERN SOCIETY: A STUDY IN SOCIAL THEORY 251 (1990) (“Punishment . . . is a communicative and didactic institution.”); Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000) (assessing expressive theories of law); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 118 (2002); Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000) (analyzing theories of expressivism); Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 400 (1965), reprinted in WHY PUNISH? HOW MUCH?: A READER ON PUNISHMENT 111, 113 (Michael Tonry ed., 2011) (“Punishment is a conventional device for the expression of attitudes of resentment and indignation.”); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025–29 (1996) (discussing how expressive functions of law affect social norms). Expressivist theories of punishment are not necessarily independent of other justifications of punishment, and may overlap with them. See Mohamed, *Deviance*, *supra* note 35, at 1669.

235. See *supra* notes 97–99 and accompanying text.

236. See KUTZ, *supra* note 221, at 113–32; James G. Stewart, *Overdetermined Atrocities*, 10 J. INT'L CRIM. JUST. 1189, 1189–95 (2012).

“set the tone” for torture, Rumsfeld encouraged it;<sup>237</sup> and if neither had ever said a word, commanders still suggested that more coercive tactics were needed; and if commanders had never suggested that, movies and television shows like *24* taught that torture was honorable and effective and necessary in the post-September 11 world.<sup>238</sup> But to discount this causal connection is not to deny the importance of moral persuasion. This Part contends that the harm of moral persuasion lies not only in the pathway to the harms ultimately visited upon victims, but also in the damage—known as moral injury—that it may inflict on those direct perpetrators who are persuaded to commit crimes. This Part concludes by addressing a negative consequence of acknowledging moral persuasion: the potential claim that no one is to blame, for everyone is a product of persuasion by another.

### A. Narratives of Wrongdoing

#### 1. Leaders' Wrongdoing

Within expressive theories of punishment, scholars of international criminal law have prioritized the narrative function of trials and the law.<sup>239</sup> Silence and lies often accompany mass violence, as criminal regimes control not only life and death, but also the stories told about these events.<sup>240</sup> The Nazis, for example, made efforts at the end of the war both to destroy documents detailing their crimes and to destroy evidence of the very existence of the camps and machinery of death that they had put into place.<sup>241</sup> In the act of moral persuasion itself, criminal actors put out false narratives of threat and necessity, of protection and justification.<sup>242</sup> Accordingly, affirmative narratives of an individual's wrongdoing can powerfully counter the amnesia and the lies of an era of atrocity. Criminal trials and punishment proclaim that perpetrators were not justified, that victims were victims and not provocateurs, that victims were not to blame.

Accepting the law's narrative function means caring about the story that is put forward, as trials and punishment can shape individual and collective memory and understanding of an atrocity. If the law punishes leaders solely for their abuses of coercive power, it stands behind a story of hard power, of

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237. See Brody et al., *supra* note 209.

238. See PHILLIPS, *supra* note 1, at 101–09.

239. See MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 3 (1997); RICHARD ASHBY WILSON, WRITING HISTORY IN INTERNATIONAL CRIMINAL TRIALS (2011); Akhavan, *supra* note 233, at 30; Deirdre Golash, *The Justification of Punishment in the International Context*, in INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY 201, 218 (Larry May & Zachary Hoskins eds., 2010).

240. See MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 16 (1998).

241. See Juliet Golden, *Remembering Chelmno*, in ARCHAEOLOGICAL ETHICS 188, 188 (Karen D. Vitelli & Chip Colwell-Chanthaphonh eds., 2d ed. 2006).

242. See *supra* Part I.A.2.

hierarchy, of manipulation of money, armies, and bureaucracies. This story is neither inaccurate nor insignificant; the Holocaust surely would not have taken place without the mobilization of the German state's vast and terrifying resources. But it is an incomplete story, as it fails to expose how leaders use their voice and authority as a weapon, and how in doing so leaders mobilize the vast and terrifying resource of so many willing executioners.

## 2. *Followers' Wrongdoing*

A story of leaders' culpability as rooted in abuses of coercive power also fails to illuminate that at least some direct perpetrators were motivated to kill, to rape, to maim because they respected and heeded the voice of those leaders. In this regard, accounting for moral persuasion not only may offer a more complete narrative of the leaders of atrocity; it also may enrich the narrative of direct perpetrators, thus enabling a more nuanced understanding of how and why individuals commit crimes they never imagined they would commit. This enhanced understanding of perpetration is crucial to better comprehending atrocity crimes more broadly. If abuses of coercive power dominate accounts of leaders' culpability, and acts of moral persuasion are neglected, then the portrait of direct perpetrators that emerges is one of individuals who either are forced to commit crimes or who are driven by their own desires to commit these crimes. Again, in many cases this is not a wholly inaccurate picture, but it is an incomplete one, and it is one that feeds into the false notion that perpetrators of mass atrocity crimes are aberrant monsters, not ordinary people.

In previous work, I have established and critiqued how international criminal courts view the perpetration of mass atrocity through the frames of ordinariness and abnormality, emphasizing perpetrators' deviance rather than admitting their typicality.<sup>243</sup> These courts construct categories of individuals, such as those in the military or those who are well educated, whom they expect to behave differently from the ordinary person. In this narrative, despite the reality that these crimes are widespread and common and often driven by something other than sadistic cruelty, the courts are able to exaggerate the individual deviance of perpetrators of international crimes.

These rhetorical and doctrinal moves reflect, in turn, a tendency to perceive perpetrators of international crimes as monsters driven by an evil character to do terrible things, rather than as regular people.<sup>244</sup> But in reality we find perpetrators who participate in crimes of their own accord, but who are not monsters. They are driven by reasoning that relies on what feels—to them, anyway—like rational assessments of the information and encouragement that their leaders give to them.

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243. See Mohamed, *Deviance*, *supra* note 35, at 1651–62.

244. See Saira Mohamed, *Of Monsters and Men: Perpetrator Trauma and Mass Atrocity*, 115 COLUM. L. REV. 1157, 1209–10 (2015) [hereinafter Mohamed, *Monsters*].

Punishing leaders for their acts of moral persuasion offers one way of elucidating this truth about the people they persuade. Accepting the power of persuasion requires accepting that génocidaires are people, too; that neighbors can become killers; that the people we trust and look up to and listen to are the ones who can turn us into people we never anticipated, people we hardly recognize. Thus, the law's neglect of persuasive power ultimately nourishes the myth that persons who commit mass atrocity crimes are deviants, rather than ordinary people who listen and form opinions when leaders encourage them to fear, to hate, to kill.<sup>245</sup>

Bringing attention to moral persuasion, in turn, offers a better understanding of the subjectivity of direct perpetrators.<sup>246</sup> Indeed, perpetuating the myth that perpetrators who are not forced are, in essence, programmed by their character to commit crimes flies in the face of the liberal preconditions for criminal punishment. Liberalism conceives of agency as the opportunity to choose freely, which requires an opportunity to choose differently. When considering the propriety of criminal punishment, “[w]hat is crucial,” writes H.L.A Hart, “is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids.”<sup>247</sup> That is, the touchstone should be whether the criminal actor could have done otherwise.<sup>248</sup> But imagining perpetrators as monsters imagines them as actors who would not have chosen differently and who could not have chosen differently. If they could not have chosen differently, however, they should not be criminally punished. As Martha Nussbaum writes, when we “place[] the murderer in a class of heinous monsters. . . . , the less obvious it is that this is a moral agent at all, and the less obvious it consequently is that this person deserves the penalty we reserve for fully responsible agents.”<sup>249</sup> Accordingly, honoring criminal law's liberal foundations actually should impel us to search for and draw attention to the signs of choice, of subjectivity, in these criminal actors. Recognizing moral persuasion is part of that effort.

This is not to suggest, however, that the motivation for the criminal act is wholly external to the direct perpetrator. Individuals listen to leaders and evaluate; they may be manipulated, but they are not simply duped. And they

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245. *Id.*; Mohamed, *Deviance*, *supra* note 35, at 1652–61.

246. See Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127, 179 (1984) (discussing liberal notion of subjectivity as consciousness of self and recognizing the individual as an actor possessing agency rather than as an object who is acted upon); see also Anne M. Coughlin, *Excusing Women*, 82 CALIF. L. REV. 1, 9–11 (1994).

247. H.L.A HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 152 (2d ed. 2008).

248. ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 71 (2009).

249. NUSSBAUM, *supra* note 31, at 450; see also Mohamed, *Deviance*, *supra* note 35, at 1680–81 (emphasizing importance of recognizing opportunity for choice in perpetrators of mass atrocity crimes).

engage in their own processes of filtering out unwanted information and confirming their existing beliefs.<sup>250</sup> The morally persuaded actor, we know, is both acting and acted upon, both subject and object.<sup>251</sup> Giving voice to that reality through the criminal law would offer a better understanding of how and why these crimes take place.

### B. Recognition of Harm

Punishment of moral persuasion also sounds in retributive theory. As a preliminary matter, if punishment is justified by reference to an individual's wrongdoing,<sup>252</sup> then that wrongdoing ought to be properly and comprehensively conceived, and must not be limited to coercive visions of harm. Why should moral persuasion be included in the accounting of leaders' harms? Some argue that without these actions that isolate and dehumanize victim populations, that make violence appear necessary and admirable, mass violence would likely not take place.<sup>253</sup> In this view, the harm of moral persuasion is rooted in its direct causal role in producing atrocity crimes. Critics, however, may argue that this claim of causal harm is overstated, because a multiplicity of sources of moral persuasion likely exists in any given atrocity. Even if one government leader had not used a radio broadcast to encourage his flock to embrace killings, for example, another politician would have done the same in a community meeting.<sup>254</sup> Nonetheless, we should still recognize harm in moral persuasion. In a similar context in Anglo-American criminal law, we accept that the *possibility* that an accomplice's actions will contribute to the principal's crime is sufficient to establish successful contribution to the crime.<sup>255</sup> The resulting harm is not the focus; rather, the blameworthiness of the assistance is, even without that tight causal connection.

Beyond this, a retributivist approach to moral persuasion may bring attention to a separate type of harm, one visited not upon the ultimate victims of crimes, but instead upon the direct perpetrators. Conventional accounts of mass atrocity focus, understandably, on the harms experienced by victims—those who are killed and raped and battered, those who are displaced, those who lose their families. Similarly, in literature on reconciliation, typically considered a goal of post-conflict efforts at justice, the restoration of social relations—whether that means mere toleration and coexistence or a richer state of understanding and

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250. See Virginia Held, *Group Responsibility for Ethnic Conflict*, 6 J. ETHICS 157, 157–78 (2002); *supra* note 96 and accompanying text.

251. See *supra* Part I.A.2 (describing act of moral persuasion).

252. See R.A. DUFF, PUNISHMENT, COMMUNICATION, AND COMMUNITY 19–29 (2001).

253. See *supra* notes 97–99 and accompanying text.

254. See *supra* notes 236–238 and accompany text (discussing overdetermination in atrocities).

255. See Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 359 (1985) (defining sufficient contribution for complicity as one that “could have contributed to the criminal action of the principal” (emphasis omitted)).

respect<sup>256</sup>—focuses on repair between victims and perpetrators. Although some scholars have broadened this focus by considering, for example, the place of bystanders in atrocity and in post-atrocity reconstruction,<sup>257</sup> the binary of victim and perpetrator continues to dominate discussions of harm and of healing.

These conventional accounts, however, ignore the harms experienced by direct perpetrators of crimes. Mass atrocity situations not only destroy lives and homes; they also destroy social trust, defined by Jonathan Shay as “the expectation that power will be used in accordance with ‘what’s right.’”<sup>258</sup> Shay, a psychiatrist who has studied the experience of American combat veterans, warns that the damage created by a breach of social trust is wide. According to Shay, “When social trust is destroyed, it is not replaced by a vacuum, but rather by a perpetual mobilization to fend off attack, humiliation, or exploitation, and to figure out other people’s trickery.”<sup>259</sup>

Victims of crime certainly endure this destruction of social trust—in their neighbors,<sup>260</sup> in their state,<sup>261</sup> in the world.<sup>262</sup> But perpetrators of crimes, too, may undergo a similar loss of social trust, as a result of a harm known as “moral injury.”<sup>263</sup> The term describes “experiences of serious inner conflict” that “arise from . . . transgressive commissions and omissions perpetrated by oneself or others. . . .”<sup>264</sup> Research on moral injury, a burgeoning field in psychology and,

256. Joanna R. Quinn, *Introduction*, in RECONCILIATION(S): TRANSITIONAL JUSTICE IN POSTCONFLICT SOCIETIES 3, 5 (Joanna R. Quinn ed., 2009) (providing definitions of reconciliation).

257. See Laurel E. Fletcher, *From Indifference to Engagement: Bystanders and International Criminal Justice*, 26 MICH. J. INT’L L. 1013, 1026–27 (2005).

258. JONATHAN SHAY, *ODYSSEUS IN AMERICA: COMBAT TRAUMA AND THE TRIALS OF HOMECOMING* 151 (2002).

259. *Id.*

260. See Dinka Corkalo et al., *Neighbors Again? Intercommunity Relations After Ethnic Cleansing*, in MY NEIGHBOR, MY ENEMY: JUSTICE AND COMMUNITY IN THE AFTERMATH OF MASS ATROCITY 143, 152 (Eric Stover & Harvey M. Weinstein eds., 2004).

261. See Saira Mohamed, *A Neglected Option: The Contributions of State Responsibility for Genocide to Transitional Justice*, 80 U. COLO. L. REV. 327, 392 (2009) (“State involvement in an atrocity contributes to the disruption of a functioning society [by] poisoning state institutions and preventing the state from using those institutions for acceptable purposes without taint.”).

262. Jean Améry made famous the idea of losing “trust in the world.” JEAN AMÉRY, *AT THE MIND’S LIMITS: CONTEMPLATIONS BY A SURVIVOR ON AUSCHWITZ AND ITS REALITIES* 28 (Sidney Rosenfeld & Stella P. Rosenfeld trans., 1980) (describing “the certainty that by reason of written or unwritten social contracts the other person will spare me—more precisely stated, that he will respect my physical, and with it also my metaphysical, being”); see also JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 54–55 (1992) (discussing how “[t]raumatic events” destroy the “belief in a meaningful world”).

263. JONATHAN SHAY, *ACHILLES IN VIETNAM: COMBAT TRAUMA AND THE UNDOING OF CHARACTER* 18–20 (1994).

264. NANCY SHERMAN, *AFTERWAR: HEALING THE MORAL WOUNDS OF OUR SOLDIERS* 8 (2015) (noting that moral injury can degrade a person’s “sense of goodness and humanity”); see also Brett T. Litz et al., *Moral Injury and Moral Repair in War Veterans: A Preliminary Model and Intervention Strategy*, 29 CLINICAL PSYCHOL. REV. 695, 697 (2009); Jonathan Shay, *Moral Injury*, 31 PSYCHOANALYTIC PSYCHOL. 182, 183 (2014) (defining moral injury as requiring “[a] betrayal of what’s right,” “by someone who holds legitimate authority,” “in a high stakes situation”). Although for some “moral injury is manifested as PTSD-like symptoms,” Shira Maguen & Brett Litz, *Moral Injury in*

more recently, in military ethics, has developed in two strands. Some identify the injury as arising from one's own transgression of right and wrong. Others—including Shay, who coined the term—focus on the betrayal of morality by individuals in a position of “legitimate authority.”<sup>265</sup> Accordingly, Shay identifies what he describes as “leadership malpractice” as a particularly important root of moral injury.<sup>266</sup>

Studies of moral injury have focused on American veterans of war, from the crimes committed in Vietnam to torture in Iraq and Afghanistan.<sup>267</sup> These ideas, however, can open up our thinking about perpetrators of crime in mass atrocity situations as well. When a person in a position of leadership abuses his persuasive power by using it to accomplish crimes through direct perpetrators, that might destroy the direct perpetrator's ability to trust both others and himself if what was presented through acts of moral persuasion as necessary, good, or right is exposed as unwarranted, immoral, and unlawful. The crisis arises from the shift that the direct perpetrator experiences, from a position of believing that his actions are consistent with his or society's values to a position of realizing they are out of sync with those values. Researchers studying interrogators similarly have posited that “when torturers act consistently with their moral or religious beliefs, they may escape torture unscathed.”<sup>268</sup> But when torture conflicts with those beliefs, they suffer from post-traumatic stress disorder or depression or insomnia.<sup>269</sup> Perversely, one of the goals of international criminal law is to trigger this shift: to expose what was presented as necessary, good, or right at one time as in fact unwarranted, immoral, and unlawful. And if it succeeds in this goal, then perpetrators who came to embrace mass atrocity crimes may ultimately be harmed by those who persuaded them to do so. The destruction wrought by this manipulation may result not only in a loss of trust in others, but also a loss of trust in oneself.<sup>270</sup>

Moral injury thus offers a novel way to understand not only the harms that take place in a mass atrocity setting, but also the types of social repair that are needed in its wake. While we are accustomed to thinking about the harms that

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*Veterans of War*, 23 PTSD RES. Q. 1, 1 (2012), psychological research indicates that the damage of moral injury is “not well captured by the current conceptualizations of PTSD,” Litz et al., *supra*, at 696; see also Mohamed, *Monsters*, *supra* note 244, at 1204–06 (discussing trauma in perpetrators of atrocity).

265. Jonathan Shay, *Casualties*, in *THE MODERN AMERICAN MILITARY* 295, 302 (David M. Kennedy ed., 2013). The two can exist in tandem, notes Shay, as in the case of an individual who carries out a crime at the behest of a superior.

266. *Id.* at 303.

267. See BILL RUSSELL EDMONDS, *GOD IS NOT HERE: A SOLDIER'S STRUGGLE WITH TORTURE, TRAUMA, AND THE MORAL INJURIES OF WAR* 14–27 (2015); Litz et al., *supra* note 264, at 696; Shay, *supra* note 265, at 303.

268. DARIUS REJALI, *TORTURE AND DEMOCRACY* 524 (2007).

269. *Id.*

270. See MARGARET URBAN WALKER, *MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING* 93 (2006); Maggie Puniewska, *Healing a Wounded Sense of Morality*, *ATLANTIC* (July 3, 2015), <http://www.theatlantic.com/health/archive/2015/07/healing-a-wounded-sense-of-morality/396770> [<https://perma.cc/GB7D-SHJ3>].

flow from perpetrator to victim, we ought to also consider the harms that flow from the perpetrator-leader to the perpetrator-follower. In this regard, the sentencing decisions of the ICTY and ICTR on abuses of persuasive power are illuminating, because they see the abuse as damaging not the ultimate victims of crimes, but rather the leaders' constituents, the people who follow their example and heed their calls for destructive action.

Perhaps one does not care much about the psychological or emotional state of perpetrators of mass crimes; their victims merit our concern, but they do not—or even if they merit it, they will not be granted it.<sup>271</sup> But even accepting that position, the harms wrought by moral injury ought to be of concern because of the need for rebuilding and reconciliation in the aftermath of atrocity and war. Individuals who experience moral injury and a consequent loss of social trust are less able to flourish, or even survive, in society. And given that perpetrators often return to their countries, their towns, or their neighborhoods with little punishment or treatment, reconciliation will be undermined as individual perpetrators suffer.<sup>272</sup> Accordingly, these followers, and the harms of moral persuasion, should be figured into thinking about reconciliation, restoring trust in leaders, and restoring trust in oneself.

### C. Moral Persuasion and Culpability: Is Anyone to Blame?

Some may criticize the proposal to acknowledge and punish moral persuasion on the grounds that if we accept moral persuasion as real and culpable, then no person can ever be blamed for his actions because every person has been subject to moral persuasion. Critics might claim that moral persuasion allows Hitler, Milošević, Kambanda, Cheney, or Trump to escape liability for their own acts by pointing a finger at those who came before them and shaped their own understandings of the world. Indeed, Adolf Eichmann tried to make a similar argument during his address to the Jerusalem District Court that tried him in 1961. Eichmann insisted that he had tried to live according to “ethical values,” but the state had forced him to live by its rules, and he “had to yield to the inversion of values which was prescribed by the State.”<sup>273</sup>

Perhaps Eichmann can blame Streicher, and Streicher can blame Hitler, and Hitler can blame a movement of anti-Semitic German writers and thinkers who warned of the Jewish threat at the turn of the century.<sup>274</sup> Indeed, all actors who

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271. See David R. Mandel, *The Obedience Alibi: Milgram's Account of the Holocaust Reconsidered*, 20 ANALYSE & KRITIK 74, 91 (1998) (warning that explanations that perpetration of mass atrocity stem from common inclinations to obey authority are “offensive to survivors (and to our memories of victims)” and “insidiously serve[] the function of exonerating Nazi war criminals”).

272. See Mohamed, *Monsters*, *supra* note 244, at 1204–05.

273. 5 THE TRIAL OF ADOLF EICHMANN: RECORD OF PROCEEDINGS IN THE DISTRICT COURT OF JERUSALEM 2209, 2217 (1992). Eichmann, however, claimed (falsely, it seems) that he was coerced to follow the Third Reich's teachings, not that he was persuaded of them.

274. See David R. Mandel, *Instigators of Genocide: Examining Hitler from a Social-Psychological Perspective*, in UNDERSTANDING GENOCIDE: THE SOCIAL PSYCHOLOGY OF THE

are responsible for moral persuasion can conceivably identify themselves also as victims of moral persuasion. Nonetheless, it is crucial to recognize that this Article offers moral persuasion as a source of blameworthiness, and not of exculpation. The notion that individuals in leadership positions are responsible not only for planning or ordering crimes, but also for creating environments in which individuals are willing to engage in those crimes of their own accord, need not conflict with the separate and concurrent responsibility of the individuals who follow their advice or example. The coexistence of superior responsibility and the removal of a superior orders defense, or the concurrent responsibility of the instigating accomplice and the influenced principal, or of the indirect perpetrator and the direct one, all point to the acceptance within international criminal law that an individual can be held responsible for his crimes at the same time that the individual who contributed to them is also condemned.<sup>275</sup> Moral persuasion is not meant to excuse; it is meant to explain, to illuminate how crimes are carried out not merely through abuses of hierarchy and bureaucracy, but through manipulations of vulnerability, trust, and fear.

#### CONCLUSION

In *The Symbolic Uses of Politics*, Murray Edelman writes that holders of high office are “praised and blamed and given ‘responsibility’” because nameless, faceless processes cannot. Leaders “therefore become objects of acclaim for the satisfied, scapegoats for the unsatisfied, and symbols of aspirations or of whatever is opposed.”<sup>276</sup> At the other end of the spectrum, some studies of mass crime, frustrated with the blaming of “bad apples” and “small fish,”<sup>277</sup> point to the responsibility of the system, to cultures of wrongdoing or bureaucracies that merit blame, for they rob individuals of their identities and preferences and enable them to engage in wrongdoing without even recognizing what they are doing.<sup>278</sup>

This Article takes the position that too often we blame leaders without recognizing the full scope of their wrongs; and too often we speak of the bad

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HOLOCAUST, *supra* note 93, at 259, 262–63 (“[T]he racial anti-Semitism propagated by the Nazis under Hitler had as one of its own proximal causes the anti-Semitic German writings of the late 1800s. . . . If Hitler had not been exposed to the[se] ideas . . . , it is almost certain he would not have turned out to be the world’s most notorious democidal instigator.”).

275. See Rome Statute, *supra* note 30, arts. 28, 33; TRACY ISAACS, MORAL RESPONSIBILITY IN COLLECTIVE CONTEXTS 110 (2011) (defending coexistence of organizational and individual responsibility).

276. MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* 78 (1964).

277. See David Luban, *Liberalism, Torture, and the Ticking Bomb*, in *THE TORTURE DEBATE IN AMERICA* 35, 51 (Karen J. Greenberg ed., 2006).

278. On the tendency to attribute wrongdoing to the fault of “bad apples” or “the system,” see generally Peter Rowe, *Military Misconduct During International Armed Operations: “Bad Apples” or Systemic Failure?*, 13 J. CONFLICT & SECURITY L. 165 (2008); Toy-Fung Tung, *Just War Claims: Historical Theory, Abu Ghraib, and Transgressive Rhetoric*, in *INTERNATIONAL CRIMINAL JUSTICE: CRITICAL PERSPECTIVES AND NEW CHALLENGES* 33, 53 (George Andreopoulos et al. eds., 2011).

barrel, the bureaucracy, the system, the culture as if no one is responsible for building it. The system does not create itself; instead, there are individuals—not mere scapegoats—who have a direct hand in creating it. As Daniel Ellsberg lamented during the dark days of the late Vietnam War, we should not view these kinds of horrors as “tragedy without villains, war crimes without criminals, lies without liars.”<sup>279</sup>

This Article has argued for recognition of those acts of creating the system, building the barrel, planting the apple tree. Leaders’ culpability in creating cultures of cruelty in which killing is accepted as community protection ought to be recognized in the criminal law, when it is possible to do so. Where it is not possible, we might turn to alternative opportunities to illuminate the reality and culpability of moral persuasion by leaders. This means not only pointing to moral persuasion in truth commissions or lustration proceedings, in which leaders might be condemned, even if not criminally punished, for conditioning others to commit crimes, but also highlighting moral persuasion’s operation and consequent harm in our cultural accounts of leaders, lest we forget that the leadership of crime takes place not merely through the coercive mechanisms of government and governance, but through reason, through voice, through persuasion.

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279. *Pentagon Papers: The Secret War*, TIME, June 28, 1971, at 21 (quoting Daniel Ellsberg).

