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### Are We Responsible for Who We Are? Indoctrination and Social Influence as a Defense to Crime

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ARE WE RESPONSIBLE FOR WHO WE ARE?  
INDOCTRINATION AND SOCIAL INFLUENCE AS A DEFENSE TO CRIME

Paul H. Robinson\* and Lindsay Holcomb\*\*

**Abstract**

*A patriotic POW is brainwashed by his North Korean captors into refusing repatriation and undertaking treasonous anti-American propaganda for the communist regime. Despite the general abhorrence of treason in time of war, the American public opposes criminal liability for such indoctrinated soldiers, yet existing criminal law provides no defense or mitigation because, at the time of the offense, the indoctrinated offender suffers no cognitive or control dysfunction, no mental or emotional impairment, and no external or internal compulsion. Rather, he was acting purely in the exercise of free of will, albeit based upon beliefs and values that he had not previously held.*

*Retributivists committed to blameworthiness proportionality might support the community's view of reduced blameworthiness, perhaps on some version of the argument that the offense was not committed by the offender's authentic self. And a crime-control utilitarian might support revision of the criminal law to recognize a defense because such a serious conflict between community views and criminal law reduces the law's moral credibility with the community and thereby undermines its ability to gain deference, compliance, assistance, and the internalization of the criminal law's norms.*

*On the other hand, to recognize a defense or significant mitigation for indoctrination-induced offenses would produce a tectonic shift in criminal law foundations. The indoctrination dynamic at work in the brainwashed POW case is not limited to such unique circumstances but rather is a common occurrence in the modern world, where governments, religions, political groups, and a host of other organizations, and indeed individuals, consciously manipulate others toward criminal conduct through a variety of indoctrinating mechanisms. Are people no longer to be held responsible for who they are? Is the criminal law now to investigate how an offender came to have any beliefs and values that contributed to the offense conduct?*

*We argue that a close analysis of why some indoctrination cases are seen as blameless while others not suggests an articulable analytic framework based upon five key questions. We use a wide variety of real-world indoctrination cases to illustrate the operation of this framework and propose a specific statutory defense formulation that embodies it.*

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Soon after the start of the Korean War, Richard Tenneson, a patriotic farm boy from Minnesota volunteered for Army service in the hopes that he could do heroic things for his country.<sup>1</sup> Promptly taken hostage by Communist forces, Tenneson was quickly identified by his captors as potentially vulnerable to their well-developed “brainwashing” program.<sup>2</sup> Through several stages of psychological manipulation, using both abuse and reward, they effectively produced in Tenneson a true believer so dedicated to the pro-communist, anti-American cause that, upon cessation of hostilities, Tenneson refused repatriation to the United States.<sup>3</sup> He and other coercively indoctrinated<sup>4</sup> soldiers provided a propaganda bonanza for the Communist project, and much of their conduct constituted treason against the United States.<sup>5</sup>

Despite Americans’ natural tendency to be outraged by treason in a time of war, enormous public support arose for the “brainwashed” POWs, who were widely viewed as victims of a manipulative regime, rather than as traitors to their country. When the Army court-

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<sup>1</sup> MATTHEW DUNNE, A COLD WAR STATE OF MIND: BRAINWASHING AND POSTWAR AMERICAN SOCIETY 116 (U. of Mass. Press, 2013)

<sup>2</sup> *Id.* at 117.

<sup>3</sup> PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES 145, 218 (West Academic Pub., 5th ed., 2015)

<sup>4</sup> For our purposes, coercive indoctrination refers to the process by which a person’s values or beliefs are changed through coercive means. Thus, a defendant who would not have otherwise committed the offense in question might claim that he acted only because of new beliefs forcibly imposed on him.

<sup>5</sup> PAUL H. ROBINSON, WOULD YOU CONVICT? SEVENTEEN CASES THAT CHALLENGED THE LAW 179-216 (1999)

martialed the indoctrinated soldiers, the public protested so vigorously that Army prosecutors sometimes had to wear firearms to court and sneak in the back entrance.<sup>6</sup> When the brainwashing cases later fell within the jurisdiction of the Department of Justice, the Department simply declined to prosecute out of deference to public opinion, which they judged was likely to reflect that of a jury.<sup>7</sup>

The case illustrates a foundational problem for criminal law. While Tenneson might have gotten a duress defense or some excuse or mitigation for offenses committed *during* the abusive indoctrination process, he would not be eligible for such a remedy after the indoctrination had been successfully completed because at this point he had fully internalized the beliefs and values of his indoctrinators. Tenneson's treasonous post-indoctrination conduct was not the result of duress, mental illness, emotional upset, or any other exculpating or mitigating condition. It was the product of a series of free choices by Tenneson that logically flowed from the set of beliefs and values that had been indoctrinated in him.<sup>8</sup> If he were tested by clinicians at the time of his treasons, they would find no cognitive or control dysfunction to elicit the insanity defense, no internal or external compulsion to compel a finding of duress, nor any other psychological abnormality or state that might give rise to a mitigation or excuse under criminal law then or now.

In that sense, the lack of relief offered by the criminal law seemed out of step with the public's understanding of Tenneson's blameworthiness. Anyone who read the news reports of patriotic farm boy turned traitorous propagandist intuited a serious character shift in Tenneson that seemed to belie the idea that the beliefs and values that drove him to treason were not his own.<sup>9</sup> Instead, they appeared so out of touch with what was known of his former understanding of the world that they could only have been coercively implanted in him through a program of psychological manipulation.

But if Tenneson did now hold those pro-communist anti-American beliefs and values, how could the criminal law conclude that he ought not be held liable for what he has freely chosen to do in promotion of them? Should the criminal law no longer assume that we are responsible for who we are? Is it not enough for criminal liability to show that the person freely chose to commit the offense? Must the law also inquire into how it was that the offender came to have the beliefs and values that contributed to commission of the offense? That, of course, would be a tectonic shift in the criminal law's principles of liability and exculpation. For decades, the criminal law has established blameworthiness based on a snapshot view of the offender in the moment of his criminal act, and not on the myriad characteristics that might have inspired him to behave in such a way. An offender's history might have evidentiary relevance – for example, past victimizations might support and explain an offender's claim of extreme fearfulness – but the focus was still upon her state at the time of committing the offense.

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<sup>6</sup> *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 5, 756-770 (1956).

<sup>7</sup> *Id.* at 186-87.

<sup>8</sup> Before returning to the U.S., Tenneson told a reporter from the Washington Post, "The reason I'm leaving China is that certain weaknesses in my character make it very uncomfortable and impossible to stay." *Coming Home, Turncoat GI Tells Mother*, WASH. POST A13 (Sep. 13, 1955).

<sup>9</sup> *Peiping Releases 4<sup>th</sup> Turncoat*, N.Y. TIMES, A4 (Dec. 13, 1955); *Tenneson, GI, Turncoat, Is Back At Home* BALTIMORE SUN A3 (Dec. 17, 1955); *Turncoat Yank Tells How GIs Lived In China*, CHI. DAILY TRIB. A20, (Dec. 14, 1955).

One might be tempted to simply ignore the conflict between the widely shared community judgment that cases like Tenneson deserve exculpation and the criminal law's failure to recognize any sort of coercive indoctrination defense, especially if one is a good crime-control utilitarian. The general deterrence message communicated by a severe sentence might be undermined by a policy that allows for the variable characteristics of the offender to be taken into account at the sentencing stage. For this reason, the criminal law of the past half-century has been happy to regularly promote general deterrence and incapacitation of the dangerous, even though those distributive principles regularly conflict with pure desert-based blameworthiness proportionality.<sup>10</sup> Denying a mitigation or excuse for an offense caused by coercive indoctrination is simply one more example of how justice, at least as perceived by the community, may be sacrificed as necessary to help fight crime.

But more recent social science research has suggested that criminal law rules that conflict with shared community judgments of justice can undermine the law's crime-control effectiveness.<sup>11</sup> The studies suggest that a criminal law whose rules regularly conflict with community views will lose moral credibility with the community and as a result will increasingly provoke resistance and subversion.<sup>12</sup> In contrast, a criminal law whose rules embody community justice judgments will build moral credibility and promote deference, acquiescence, compliance, and the internalization of the criminal law's norms.<sup>13</sup> As more and more diverse cases of indoctrination crop up around the globe, establishing a legal framework to treat these cases in a way that aligns with the community's notions of justice becomes all the more important.<sup>14</sup>

In order to actualize the community's intuitions, one might be tempted to simply create a special rule for Tenneson's unusual circumstances. There aren't many offenders who commit their offense as the result of being a POW subjected to a well-tuned indoctrination program. But the problem with this approach is that there are a host of more common situations – situations involving neither captivity nor a planned indoctrination program – that can be just as compelling in their effect in altering a person's beliefs and values as was the Chinese indoctrination of Tenneson.

What is the criminal law to do with such cases of informal or ad hoc indoctrination? And what if the offender in some way volunteered for, or perhaps just went along with, the chain of events that led to the indoctrination, perhaps with a limited understanding of where the path

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<sup>10</sup> PAUL H. ROBINSON & MICHAEL T. CAHILL, *LAW WITHOUT JUSTICE* 11 (2005).

<sup>11</sup> PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 176, 177 (2008).

<sup>12</sup> See PAUL H. ROBINSON, *INSTITUTIONS OF JUSTICE AND THE UTILITY OF DESERT* chs. 7-10 (2013) (explaining that certain criminal law rules such as three-strikes laws, drug offense penalties, adult prosecution of juveniles, abolition of the insanity defense, and the felony-murder rule, among others, seriously conflict with the community's judgments of justice and thereby undercut the criminal law's crime-control effectiveness).

<sup>13</sup> See *Id.* at 177-184 (explaining that various social science studies have shown that changes in the legal system's moral credibility produce changes in people's willingness to defer to the legal system's judgements).

<sup>14</sup> See e.g., Colin Moynihan, *Nxivm: How a Sex Cult Leader Seduced and Programmed His Followers*, N.Y. TIMES (Jun. 14, 2019) (available at <https://www.nytimes.com/2019/06/14/nyregion/nxivm-trial-sex-cult-women.html>); Ruth Padawer, *At 5 She Protested Homosexuality. Now She Protests the Church that Made Her Do It*, N.Y. TIMES (Oct. 8, 2019) (available at <https://www.nytimes.com/2019/10/08/books/review/megan-phelps-roper-unfollow.html?searchResultPosition=1>); BBC Panorama, *Data Leak Reveals How China Brainwashes Uighurs in Prison Camps*, BBC NEWS (Nov. 24, 2019) (available at <https://www.bbc.com/news/world-asia-china-50511063>); Joe Coscarelli, *2 Women Living With R. Kelly Denounce Their Parents and Deny Being Brainwashed*, N.Y. TIMES (Mar. 7, 2019) (available at <https://www.nytimes.com/2019/03/07/arts/azriel-clary-joycelyn-savage-r-kelly.html?searchResultPosition=2>).

was leading? That is, even if one were to recognize a defense or mitigation for offenses arising from indoctrination, is there any practical way by which the criminal law could draw a line that would put a workable limit on which indoctrinated offenders might qualify for mitigation or excuse?

That is the challenge taken up by this Article. It examines a wide variety of indoctrination mechanisms and indoctrination cases in order to develop an analytic framework by which these cases can be analyzed and distinguished, then proposes a statutory formulation that might be used in practice.

### I. The Disutility of Perceived Injustice

Indoctrination cases serve as a powerful litmus test of the means by which various distributive principles handle the tensions between the public's intuitions of justice and established legal doctrine. While retributivists might be sympathetic to the argument that those who have been indoctrinated deserve a reduction in blameworthiness, utilitarians may not be as persuaded by the desire to take into account the individualized circumstances giving rise to the crimes of indoctrinated persons. Retributivists would likely recognize the argument that because an offense committed by an indoctrinated person was not committed by his authentic self, the person's later, unindoctrinated self is not deserving of punishment.<sup>15</sup> Utilitarians would likely reject the argument, however, because a focus on the offender's personal ideological history undermines the law's ability to effectively communicate deterrent prohibitions to the wider public.<sup>16</sup>

This theoretical disagreement underlines the stakes of the indoctrination question. It has long been assumed that the goals of doing justice and fighting crime necessarily conflict, but perhaps these two aims of the criminal justice system may not be so diametrically opposed.<sup>17</sup> That is, the extent of the criminal law's effectiveness in gaining compliance in borderline cases, such as indoctrination, through deference to its moral authority is to a great extent dependent on the degree to which the justice system has earned credibility with the citizens governed by it.<sup>18</sup> Ultimately, whether the justice system heeds the moral intuitions of the public in regards to those who have been coercively manipulated to commit a particular crime presents a compelling instance in which doing justice might actually be the most effective means of fighting crime.

Various empirical studies have confirmed that the relationship between the criminal justice system's moral credibility and its ability to garner public deference applies not just to extreme cases but to all manners in which a community interacts with the criminal law.<sup>19</sup> There is a general relationship between the system's moral credibility and its ability to gain compliance such that even a marginal decrease in the former will produce a decrease in the

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<sup>15</sup> See Michael S. Moore, *Justifying Retributivism* 27 *ISR. L. REV.* 16, 30 (1993) (explaining that the distinctive assertion of retributivists is that punishment is justified if it is given to those who deserve it, and a person deserves punishment only when he has culpably done wrong).

<sup>16</sup> See Robinson *supra* note 7 at 9 (explaining that general deterrence principles tend to reject excuse defenses because "any failure to punish an actor who has violated a prohibition tends to undermine the effectiveness of the prohibition, for it shows potential offenders the possibility that they can offend yet escape punishment even if caught").

<sup>17</sup> Paul H. Robinson, *Empirical Desert* in *CRIMINAL LAW CONVERSATIONS* 29-31 (Robinson, Garvey, & Ferzan, eds. 2009).

<sup>18</sup> Robinson *supra* note 8 at 162.

<sup>19</sup> *Id.* at 111-120.

latter.<sup>20</sup> This suggests that any system can improve its ability to gain deference and compliance by improving its reputation for doing justice and avoiding injustice. Several mechanisms explain this phenomenon.

First, a criminal law with moral credibility can harness the power of stigmatization.<sup>21</sup> Many people will avoid breaking the law if doing so will stigmatize them and thereby endanger their personal and social relationships. If the power of stigmatization is cheap – does not have the cost of imprisonment, for example – and exists even if the threat of official sanction is not present – it is enough that friends or acquaintances might learn of the misconduct. A criminal law that regularly punishes conduct that is seen as blameless or at least not deserving the condemnation of criminal liability will be unable to harness the power of stigmatization.

Second, a system that has earned moral credibility with the people also can help avoid vigilantism.<sup>22</sup> Vigilante justice refers to occasions in which groups of citizens unite to enforce rules and norms that they feel the legal system is failing to adequately enforce. This phenomenon occurs most commonly where people feel that they have been deprived of justice, that the law is powerless to do what is just, and that the offender is deserving of something other than the punishment he has or has not been given.<sup>23</sup> The disconnect between the public's perception of the offender, and the justice system's treatment of the offender motivates their decision to resist. Ultimately, people will be less likely to take matters into their own hands if they have confidence that the system is trying hard to do justice.<sup>24</sup>

Third, a reputation for moral credibility can avoid provoking the kind of resistance and subversion that we see in criminal justice systems with poor reputations.<sup>25</sup> Such resistance and subversion can appear among any of the participants in the system. Do victims report offenses? Do potential witnesses come forward to help police and investigators? Do prosecutors and judges follow the legal rules, or do they feel free to make up their own? In systems with trial juries, do the jurors follow their legal instructions or do they make up their own rules? Do offenders acquiesce in their liability and punishment, or do they focus instead on thinking an injustice has been done to them?

Finally, the most powerful force that comes from a criminal justice system with moral credibility is its power to shape and reinforce societal norms, and to cause people to internalize those norms.<sup>26</sup> If the criminal law has earned a reputation for doing justice, then when the law criminalizes some new form of conduct or makes some conduct a more serious offense than it had previously been, the community takes this legal action as reliable evidence that the conduct really is more condemnable.

The forces of social influence and internalized norms are potentially enormous. But if the criminal law conflicts with people's judgments of justice, that conflict will undermine the law's moral credibility and thereby undermine the criminal law's ability to harness these forces.

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 154.

<sup>22</sup> *Id.* at 155.

<sup>23</sup> *Id.* at 156.

<sup>24</sup> And, as Robinson has detailed elsewhere, the danger of vigilantism goes beyond those rare souls willing to “go into the streets”; it includes “shadow vigilantes” – normally law-abiding citizens and officials who see the system's failures of justice as justifying their distorting of the criminal justice process to force justice from a system apparently reluctant to do it. PAUL ROBINSON & SARAH ROBINSON, SHADOW VIGILANTES: HOW DISTRUST IN THE JUSTICE SYSTEM BREEDS A NEW KIND OF LAWLESSNESS (Prometheus 2018)

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 161.

To summarize, legal rules that deviate from the community's judgments of justice are not cost-free, as has generally been assumed in the past, but rather carry a hidden cost to effective crime-control.<sup>27</sup> To be most effective, the criminal law should try to build a reputation as a reliable moral authority that above all else does justice and avoids injustice.<sup>28</sup> In that way, it can harness the powerful forces of social and normative influence to gain deference and compliance.

## II. The Special Challenge of Judging Liability in Indoctrination Cases

The *Tenneson* case described above provides a crisp example of the power of a coercive indoctrination program in which captors have complete control over every aspect of their prisoner's existence and put him through a time-proven manipulation regime specifically designed to replace the prisoner's existing beliefs and values with their own ideology. But not all cases of effective indoctrination arise from such controlled, militaristic conditions. A person's worldview can be reshaped by any number of powerful influences, and when such influences are particularly coercive, they can lead to criminal behavior. Consider the case of Alex Cabarga, whose indoctrination was perhaps just as strong as Tenneson's, despite the fact that it occurred in the middle of San Francisco at the hands of a single civilian.

Alex Cabarga was abandoned by his biological parents and raised by a sadistic pedophile named Tree Frog from the age of five. Tree Frog raped and abused the child for more than a decade, beating him and depriving him of food and water whenever he resisted Tree Frog's sexual violations. The pair lived together in a van, avoiding contact with the rest of the world. Cabarga never went to school or had meaningful contact with anyone other than Tree Frog, who Cabarga depended for all of his basic needs.<sup>29</sup> When Tree Frog decided that he needed more children to enslave, Cabarga cooperated in the kidnapping, abuse, and rape of two other children. Cabarga was arrested the week after he turned eighteen and was charged with rape and kidnapping. Finally exposed to the outside world, Cabarga expressed genuine remorse at the errors of his ways, and his judge noted that while Cabarga did commit crimes, he too was a victim of his captor.<sup>30</sup>

As with Tenneson, there was no existing criminal law doctrine that recognized a defense or even a significant mitigation for Cabarga. Unsurprisingly, he was convicted and given a life-sentence. But the appellate court understood that, despite the absence of a defense or a formal mitigation, the issue of Cabarga's blameworthiness was more muddled than criminal law doctrine was willing to recognize. "A sentence of life imprisonment for Cabarga, who the evidence overwhelmingly discloses was Johnson's 'third victim,' is constitutionally excessive," two justices opined in dissent.<sup>31</sup> Another dissenting opinion took an even stronger view, arguing, "If the record makes anything clear, it is that Alex Cabarga is as tragic a victim as [the

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<sup>27</sup> *Id.* at 209.

<sup>28</sup> *Id.* at 197; *But see* Donald Braman, Dan Kahan, and David Hoffman, *Some Realism About Punishment Naturalism*, 77 U. CHI. L. REV. 4, 1537 (arguing that empirical desert fails to provide a credible account of the social and cognitive mechanisms by which individuals evaluate both crime and punishment).

<sup>29</sup> PAUL H. ROBINSON, *CRIMINAL LAW CASE STUDIES* 223-226 (West Acad. Pub., Ed. 5, 2015).

<sup>30</sup> Erin Hallissey, *Tara Burke's Triumph Over Terror*, S.F. GATE (Oct. 27, 1997) (available at <https://www.sfgate.com/crime/article/PAGE-ONE-Tara-Burke-s-Triumph-Over-Terror-15-2799170.php#item-85307-tbla-3>).

<sup>31</sup> Philip Hager, *208-Year Term in 1982 Child Molestation Case Rejected*, L.A. TIMES (Sep. 3, 1988) (available at <https://www.latimes.com/archives/la-xpm-1988-09-03-mn-3141-story.html>).



girl he helped to kidnap]; a victim not just of Tree Frog Johnson but of the misguided parents who delivered him to that monstrous pedophile at the age of about 10.” The dissent suggested that Cabarga never should have been tried as an adult and that he should receive a hearing to re-determine his capacity to stand trial.<sup>32</sup> In both cases, either by virtue of immaturity or insanity, the dissent suggested that Cabarga was somehow incapacitated and rationally impaired at the time of his offense. Cabarga’s term was reduced to twenty-five years and he was subsequently paroled after thirteen years.<sup>33</sup> In other words, while the criminal law’s formal liability and mitigation rules could not help Cabarga, the moral intuitions of the individual judges push them to find some way to ameliorate the law’s failure.

The *Cabarga* case hints at the size of the indoctrination problem for criminal law. The potential for blamelessness or significantly-reduced blameworthiness exists not just in the unusual and extreme case of POW Tenneson but rather can arise in a wide variety of situations that involve neither imprisonment nor even an indoctrination program. It is a common occurrence in the modern world that governments, religions, political groups, and a host of other organizations, and indeed individuals, consciously manipulate others toward criminal conduct through a variety of indoctrination mechanisms. If this sounds too hokey, consider just some of the high-profile instances of indoctrination that have emerged within the context of the criminal law in the past year. Members of a sex cult called Nxivm were charged in Brooklyn for coercively indoctrinating women into sexual servitude and a complex pyramid scheme,<sup>34</sup> the Chinese Communist Party was widely reprimanded for carrying out a coercive indoctrination program designed to irrevocably alter the culture and belief systems of Chinese Uighur Muslims,<sup>35</sup> and an anti-Semitic mass shooter in Jersey City was charged with coercively indoctrinating his co-conspirator girlfriend and forcing her to believe in his hateful ideas.<sup>36</sup> Thus, while *Cabarga* is the tip of the iceberg, the use of mechanisms of indoctrination remains quite prevalent in ways that meaningfully impacts the criminal law.

As noted at the start of this Article, an attempt to take indoctrination into account in assessing criminal liability would represent a significant shift in the criminal law’s focus because it drops the criminal law’s long-standing assumption that (sane) people are responsible for who they are. Is the criminal law now to investigate how an offender came to have any beliefs and values that contributed to his or her offense? Some would fear that such a practice would boil down to viewing each offender as the sum of the various social influences she had been exposed to rather than the choices she made. Such a process of investigation and tabulation in pursuit of a moral ledger of decision-making would be lengthy and expensive for a court to undertake. One might argue that to avoid this problem, the criminal law liability rules ought simply to ignore the problem of absent or reduced blameworthiness in indoctrination cases, and instead leave the issue to judicial sentencing discretion. After all, such discretion

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<sup>32</sup> *Id.*

<sup>33</sup> Robinson *supra* note 27 at 226.

<sup>34</sup> Nicole Hong, Nxivm Sex Cult Was Also a Huge Pyramid Scheme, Lawsuit Says, N.Y. Times (Jan. 29, 2020) (available at <https://www.nytimes.com/2020/01/29/nyregion/nxivm-lawsuit-keith-ranieri.html>).

<sup>35</sup> Juliette Garside and Emma Graham-Harrison, *UK Calls for UN Access to Chinese Detention Camps in Xinjiang*, THE GUARDIAN (Nov. 25, 2019) (available at <https://www.theguardian.com/world/2019/nov/25/uk-calls-for-un-access-chinese-detention-camps-xinjiang>).

<sup>36</sup> Leah Simpson, New Jersey Shooter’s Niece Says He Wasn’t Always A Monster, DAILYMAIL.COM (Dec. 15, 2019) (available at <https://www.dailymail.co.uk/news/article-7795177/New-Jersey-shooters-niece-describes-horror-learning-cool-uncle-mass-murderer.html>).

ameliorated Cabarga's life sentence. But this approach, we would argue, has serious and unacceptable deficiencies.

First, in a world of mandatory minimum sentences and sentencing guideline systems, sentencing discretion sufficient to adequately mitigate may be unavailable. Second, relying upon sentencing discretion invites unjustified disparity among similar cases depending on the judge tasked with adjudicating the case. The offender's ultimate liability may depend upon their good or bad luck in the judicial assignment rather than their relative blameworthiness. Third, an indoctrination defense/mitigation is the classic kind of fact-based judgment decision that requires a jury rather than an individual sentencing judge. A jury is better suited than a judge to perform this normative task because it better represents community judgments of justice.<sup>37</sup> Fourth, jury decision-making on these issues will improve the system's reputation with the community for being just and, as noted previously, such increased moral credibility can have significant crime-control benefits.<sup>38</sup>

It is for these reasons that we argue that only a codified defense/mitigation provision can set each decision-maker with the same task and orientation. Understanding the motivations behind an indoctrinated offender's choice to commit an offense involves issues on which most people have some kind of intuitive justice judgment but, without the framework of some kind of analytic structure, different people's intuitions on a case may play out differently if for no other reason than that different people may focus on different factors.

Finally, part of the value of having a codified indoctrination provision is that it requires a principled analysis of what the contours of the defense/mitigation doctrine should be. A collection of case opinions can provide a partial set of rules but, unlike an appellate judge dealing with the case at hand, a code provision provides a universal rule that will apply to all cases, and that kind of universal-rule drafting simply cannot be done without first elucidating the underlying governing principles. Development of such a principle is a significant and challenging analytic task, well beyond what is realistic to expect of an individual sentencing judge or even a panel of appellate judges deciding an individual case.

### III. Sources of Social Influence

The *Cabarga* case shows that effective indoctrination can take place even in the absence of a formal indoctrination program, such as that used on POW Tenneson. But the fact is that indoctrination mechanisms at work in Cabarga's situation are not unique or even unusual. A person's beliefs and values are regularly, and probably continuously, altered through a wide variety of mechanisms that would not normally be thought of as programs of indoctrination. They are, rather, simply common sources of social influence.

Social influence is not always a sinister weapon of coercion, but instead is often an innocuous practice that presents itself in everyday life. An analysis of social influence begins with accepting the premise that people are easily persuaded by one another. Conformity is widely understood as a socially transmitted evolutionary trait wherein individuals adopt the most common characteristics within their particular community as a means of surviving environmental challenges.<sup>39</sup> Allowing oneself to be influenced by others decreases the time and

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<sup>37</sup> Paul H. Robinson & Barbra A. Spellman, *Sentencing Decisions: Matching the Decisionmaker to the Decision Nature*, 105 COLUM. L. REV., 1124 (2005).

<sup>38</sup> See IJUD, *supra* note 4, chapters 8 & 9.

<sup>39</sup> STEPHEN COLEMAN, *POPULAR DELUSIONS: HOW SOCIAL CONFORMITY MOLDS SOCIETY AND POLITICS* 7 (2007).

energy one must put into individual learning.<sup>40</sup> By learning from the mistakes of our peers, we can adopt successful strategies for navigating the uncertainties of our environment or social group.

In modern societies, social scientists of all stripes have agonized over widespread human susceptibility to social influence. As Alexis de Tocqueville wrote, surveying American political culture in the early nineteenth century, “Whenever social conditions are equal, public opinion presses with enormous strength upon the minds of each individual; it surrounds, directs, and oppresses him; and this arises from the very nature of society much more than from its political laws.”<sup>41</sup> John Stuart Mill was similarly concerned about the power of social influence to undermine individual liberty, writing of the members of nineteenth century English society, “It does not occur to them to have any inclination, except for what is customary. Thus the mind itself is bowed to the yoke: even in what people do for pleasure, conformity is the first thing thought of; they like in crowds; they exercise choices only among things commonly done; peculiarity of taste, eccentricity of conduct, are shunned equally with crimes.”<sup>42</sup>

Today, both academic and popular concern about the powers of social influence have not waned. As more and more individuals associate in various groups, buoyed by the connective power of the internet, conformity can be found in virtually every corner of social life. Two major influences of individual behavior motivate our conforming beliefs and behaviors: the actions and statements of others, and the desire to be well-regarded by our peers.<sup>43</sup> To the former point, individuals are swayed by myriad factors which appear to augment the legitimacy of an argument. These include the number of people that appear to support a particular opinion, the confidence displayed by those articulating a view, the special expertise possessed by the person conveying information, and the degree of similarity between the person professing a certain belief and the person receiving that belief, among other factors. As Cass Sunstein writes, “Conformity is often a rational course of action... One reason we conform is that we often lack information of our own – about health, about investments, about law, and about politics – and the decisions of others provide the best available information about what should be done.”<sup>44</sup> Following one another can secure our membership in a particular group and prevent us from making mistakes that we might make by relying on our individual reasoning. It can also create echo chambers, constrain free speech, and facilitate authoritarianism.

Consider a few common examples of sources of social influence.

## **A. Rhetorical Advantage**

Where an individual or group advocates for a position that appeals to our most innate convictions and cherished sensibilities, they are more likely to persuade us.<sup>45</sup> This phenomenon, known as rhetorical advantage, is not premised on the rhetorical abilities of the speaker, but rather the inherent moral sway of the belief discussed and the degree to which that belief is aligned with social norms. Many prominent examples of rhetorical advantage

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<sup>40</sup> *Id.* at 8.

<sup>41</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* Vol. 2, Sec. 3, Ch. 21 (1840) (2004 Amer. Classics ed. Goldman trans.).

<sup>42</sup> JOHN STUART MILL, *ON LIBERTY* 57 (1859) (2001 Batoche Books ed.).

<sup>43</sup> CASS SUNSTEIN, *CONFORMITY THE POWER OF SOCIAL INFLUENCE* 5,6 (2019).

<sup>44</sup> *Id.* at 4.

<sup>45</sup> *Id.* at 89.

occur in the realm of medicine where doctors must make grave decisions about patients' lives. Though individually doctors might make their decisions according to cost benefit analysis or other means of evaluation, in groups, they are hard pressed to justify their decision to not resuscitate a patient.<sup>46</sup> Articulating such a decision is simply more difficult because there is a rhetorical advantage disfavoring behavior that seems averse to heroic acts. People do not want to exhibit certain non-normative traits in front of their peers, so they behave in particular ways to avoid the shame that might come from defense of socially non-normative positions.

## **B. In-Group and Out-Group**

If an individual is from within a group in which we imagine ourselves, he is more likely to be a credible and persuasive source of information for us.<sup>47</sup> If he is from a group that we distrust or dislike, or any kind of "out group," we are likely to reject whatever new information or opinions he is giving us. The in-group/out-group distinction is most effective where group identity is psychologically salient such as religious beliefs, political parties, race, gender, or nationality. People speak differently about their group versus other groups, attributing broad positive characteristics to themselves, but denigrating the attitudes and beliefs of those they perceive as unlike them.<sup>48</sup> These trait attributions result in the tendency to view out-groups as unrealistically negative. Any negative behavior undertaken by the out-group is seen as reflective of larger characteristics of the group and is rarely attributed to aberrant individuality. The same is true of positive behaviors exhibited by the in-group such that any act reflective of wider social norms is seen as innately characteristic of the in-group as a whole.<sup>49</sup>

In-group favoritism also has the effect of increasing polarization within a group by reducing the possibility of dissent. The celebration of particular social ties among members of the in-group similarly quiets diverse points of view and reinforces decision-making based on social identification rather than rational, individual choice. This tendency was demonstrated quite clearly in a 1971 experiment conducted by Henri Tajfel.<sup>50</sup> Tajfel and his colleagues showed high school students two paintings and divided the students into two groups, allegedly by the students' preferences for each artist.<sup>51</sup> The students were then asked to determine each other's pay for participating in the study, and each of the students uniformly gave more money to people in their group than people in the other group. The study showed that even where there is no real group at all, people will exhibit in-group favoritism. That is, the very fact of group membership marshals individual beliefs and behavior in line with social influence.

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<sup>46</sup> *Id.* at 90.

<sup>47</sup> CHARLES STANGOR, PRINCIPLES OF SOCIAL PSYCHOLOGY Ch. 11, Part 1 (2014) (available at <https://opentextbc.ca/socialpsychology/chapter/ingroup-favoritism-and-prejudice/>).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at Part 2.

<sup>50</sup> Henri Tajfel, M.G. Billig, R.P. Bundy, & Claude Flament, *Social Categorization and Intergroup Behavior*, EURO. J. OF SOC. PSYCH. 149, 149 (Apr. 1971).

<sup>51</sup> *Id.* at 165.

## C. Confidence

It is widely recognized that there is a strong link between confidence and extremism, such that confident people are both more influential and more prone to polarization.<sup>52</sup> Where a question is posed to a group of people, by and large the person who most confidently answers the question will be seen as having the correct answer, and others in the group will follow her lead. Confidence is strongly correlated with authority and is preserved through reputation. A person who is “known to know” will be more readily believed by members of her group and such members might rely on her knowledge as a heuristic when learning new information or making a decision.<sup>53</sup> As Jonathan Thomas and Ruth McFadyen found in 1995, there is evidence which suggests that in group discussions more weight is placed on the confidence with which arguments are presented than the content of those arguments.<sup>54</sup> More often than not, informational influence is mediated through an expression of confidence.

The confidence heuristic is particularly strong where the position confidently advocated for mirrors the decision maker’s pre-discussion inclinations.<sup>55</sup> In any deliberation where new information that aligns with a group member’s preconceived notions is confidently disseminated, the group member is more likely to believe the information and become more strongly convinced of his prior position.<sup>56</sup> Social influence, rather than informational influence, therefore contributes most strongly to group polarization in deliberative situations. In groups where unanimity is required to make decisions, groups are often more likely to move towards extreme positions where those articulating such views make their cases most confidently.<sup>57</sup> This is particularly true where the contested matter is not an obscure fact, but rather a matter of highly visible public questions such as whether capital punishment is justified or whether abortion should be criminalized.<sup>58</sup> In such cases, the most extreme views will carry the most weight, articulated by the most confident authority, such that the rest of the group feels compelled to follow.

## D. Authority Figures

Perhaps the strongest social influence of all is the presence of an authority figure who is seen as having some special knowledge or expertise.<sup>59</sup> Authority figures have been shown to not only encourage changes in individual attitudes and opinions, but also changes in moral judgments.<sup>60</sup> An authority figure can override an individual’s most deeply held beliefs if, under the right circumstances, he is able to subtly pressure the individual into adhering to his views.

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<sup>52</sup> Sunstein *supra* note 45 at 14,15.

<sup>53</sup> *Id.* at 95.

<sup>54</sup> Jonathan Thomas & Ruth McFadyen, *The Confidence Heuristic: A Game-Theoretic Approach*, 16 J. Econ. Psych. 97 (1995).

<sup>55</sup> Cass Sunstein, *The Law of Group Polarization*, John M. Olin Program in L. and Econ. Working Paper No. 91 12 (1999).

<sup>56</sup> *Id.* at 10.

<sup>57</sup> *Id.* at 11.

<sup>58</sup> *Id.* at 16.

<sup>59</sup> Sunstein *supra* note 45 at 35.

<sup>60</sup> Charles Helm & Mario Morelli, *Stanley Milgram and the Obedience Experiment: Authority, Legitimacy, Human Action* 7 Political Theory 321, 328 (1979).

Several studies in social psychology have confirmed the strength of such influence, most prominently Stanley Milgram's experiment in which subjects were asked to administer electric shocks to an actor.<sup>61</sup> The subjects, who were under the impression that the purpose of the experiment was to test the effects of punishment on memory, delivered fake shocks which they believed to range from 15 to 450 volts.<sup>62</sup> As the actors writhed in simulated pain, the subjects were asked by a doctor in a lab coat to administer higher and higher shocks. The doctor had no power to enforce any sanctions on the subjects if they refused to continue, and yet, without fail, all of the subjects acquiesced to the doctor's demands, shocking the actors well near the maximum level permitted on the machine.<sup>63</sup> As Sunstein explains, subjects respond most strongly to an individual "whose credentials and good faith they [think] they can trust."<sup>64</sup>

The results of the study serve as a clear demonstration of the compelling power of uniformed authority buoyed by special expertise. Where an individual is commanded by someone she perceives as a credentialed and knowledgeable authority, she is far more likely to follow instructions and suspend her skepticism.<sup>65</sup> This is particularly true where she perceives her involvement as being in pursuit of an important goal such as a scientific experiment or a religious project.<sup>66</sup> Ultimately, people are alarmingly quick to adopt a trusted authority's moral judgement as their own, quickly displacing their own convictions and deeply held beliefs.

#### IV. Common Sources of Effective Indoctrination

Effective indoctrination can occur anywhere that strong social influence is present. Though public attention on indoctrination is typically limited only to those most extraordinary instances of coercion, such as the case of Tenneson, more often, indoctrination takes place in communities and institutions far removed from a prisoner of war camp. Arguably the most widespread forms of indoctrinating environments are spaces in which many of us feel comfortable, such as religious institutions, the military, and political organizations. Within these unique environs, each subject is molded using variations of the same indoctrinating techniques utilized in POW camps. Through deprivation, surveillance, isolation, confessions, social pressure and other techniques, recruits' perceptions of the world change, and their deference to certain leaders, doctrines, or codes of conduct becomes more unquestioning and committed.

Without the political intrigue associated with threats of Communism, these more mundane forms of social influence are often dismissed as innocuous facets of group associations. Such a characterization diminishes their immense power, however, and ignores the dozens of narratives pointing to the ways in which fairly common persuasive techniques can lead individuals to throw away their former selves, subjugate their capacity to make individual choices, and commit themselves to the ideology of another. Of course, institutionalized encouragement of conformity and deference to authority is not threatening when such institutions remain open to dissenting voices and susceptible to change by evolving social norms. But when they do not – as is the case in authoritarian political parties, extremist

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<sup>61</sup> *Id.* at 321.

<sup>62</sup> *Id.* at 322.

<sup>63</sup> *Id.* at 323, 324.

<sup>64</sup> Sunstein *supra* note 19 at 32.

<sup>65</sup> Helm & Morelli *supra* note 36 at 325.

<sup>66</sup> *Id.* at 332.

religious groups, and to some extent, the military – a subject might become just as indoctrinated as Tenneson.

### **A. Political Indoctrination by Authoritarian States**

Indoctrination towards political extremism is most clearly conceptualized as the process of converting everyday citizens into complete, unquestioning devotees of leader and party in an authoritarian regime. Most authoritarian states have used major institutions such as the educational system, the state media, and cultural establishments in order to control the public narrative about the success of the ruling political party and its leader.

Youth are for the most part indoctrinated through their schools which use political imagery, routines, and lecturing in order to instill the party message on students. In Nazi Germany, for example, students could expect to learn in a classroom covered with photos of Adolf Hitler; practice chants, salutes, and physical exercises in the name of the Fuhrer; and learn ahistorical lessons legitimizing the Nazi mission and vilifying perceived enemies.<sup>67</sup> Under the innocuous, didactic guise of a traditional lesson for school children, Nazi ideology was spread to the youth. Youth groups similarly inculcate skills and ideology that will be valuable to the youths once they pursue positions in the party or in the military. Such groups teach survival techniques, military expertise, and party slogans in order to one day craft the most efficient and resilient band of soldiers possible for the country.<sup>68</sup> For example, the Hitler Youth, a mandatory, dystopian scouts program premised on the construction of intergenerational continuity between Hitler and his successors, transformed thousands of German youth into dedicated machines of the party.<sup>69</sup>

The media has often been used by authoritarian states as a means of communicating false ideas to the population in order to convince them to behave in a particular way or to assuage their anxieties about the shortcomings of the regime.<sup>70</sup> Typically the former is accomplished by the transmission of panicked, exaggerated messages which serve to instill fear in the public and inspire them to act irrationally in the interest of the ruling party.<sup>71</sup> The Rwandan genocide, for example, was instigated in large part by the radio messages disseminated by the ruling Hutus regarding the alleged threats posed by the minority Tutsis.<sup>72</sup> Many of the news coverage conveyed on these programs was entirely false, however it was effective in ginning up panicked commitment to the Hutu ethnicity as both a political and social movement.<sup>73</sup> The paucity of dissenting opinions on the air waves served to reify the assumed credibility of the party message.

Finally, cultural establishments serve to propagate the party message by providing a widely accessible, entertaining means of inspiring patriotism in the public. In Nazi Germany, for example, Joseph Goebbels went to great lengths to convey imaginative and exciting depictions of the Nazi war effort, parodying British and American soldiers as weak and incompetent in

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<sup>67</sup> ALFONS HECK, *A CHILD OF HITLER: GERMANY IN THE DAYS WHEN GOD WORE A SWASTIKA* 17 (1985).

<sup>68</sup> *Id.* at 8.

<sup>69</sup> *Id.* at 9, 10.

<sup>70</sup> Leonard W. Doob, *Goebbels' Principles of Propaganda*, 14 *THE PUBLIC OPINION QUARTERLY* 419, 431 (1950).

<sup>71</sup> *Id.* at 438.

<sup>72</sup> PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 18 (1999).

<sup>73</sup> *Id.* at 77.

comparison with the powerful German Wehrmacht.<sup>74</sup> German citizens left the theater feeling empowered, confident in the party, and united against a clearly defined enemy.<sup>75</sup> In Soviet Russia, similarly, film served as a powerful means of instilling pride in everyday people regarding the power of the Soviet state, while diminishing any shortcomings of the state.<sup>76</sup> At the same time, any dissenting opinion was censored thoroughly by the state, and critical writers and filmmakers were publicly degraded as so-called enemies of the people.<sup>77</sup> This monopoly on cultural expression no doubt inspired many Soviet citizens, effectively persuading them to set aside whatever skepticism or criticism they might have about the party.<sup>78</sup>

## B. Religious Radicalization

The process of religious radicalization occurs through individual, organizational, and environmental means, playing off of a person's unique social network and personal values. Such radicalization typically begins with feelings of oppression or marginalization in particular minority subgroups.<sup>79</sup> For example, conflicts in Bosnia and Palestine are often cited as having stoked the fires of moral outrage among some Muslim individuals who were later radicalized.<sup>80</sup> The experience of understanding the lived conditions of their marginalized fellow believers, coupled with an appreciation of the ways in which such marginalization plays out on a wider geo-political scale, can increase feelings of humiliation and unrest, ultimately culminating in the feeling that the religion itself is at war or is persecuted.

Often at this point, recruits investigate more radical fringes of the religion in question by joining more conservative places of worship, seeking mentorship from more radicalized clerics, and investigating more extremist fringes of their faith online.<sup>81</sup> Having expressed interest, the recruit is gradually lured into the extremist ideology with increasingly totalizing forays into his world.<sup>82</sup> Extremist recruiters are trained to examine and are well trained at identifying those who might seem particularly vulnerable to their influence, either because of loneliness or isolation or feelings of personal marginalization.<sup>83</sup> They communicate with the recruit often in an accessible means and invite him to share personal information with them. Out of this good rapport, they propagandize and inspire others to join them.

After repeated, consistent exposure to the radical religious worldview, the recruits come to not only understand the arguments behind extremist action, but to also begin to internalize these arguments. At this point, the recruit is typically encouraged to engage in a series of escalating commitments, each designed to increase his tolerance for challenging and uncomfortable tasks.<sup>84</sup> First, he might be asked to donate a small sum of money to the organization. Then, he might be asked to help recruit new members, to host formal group

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<sup>74</sup> Doob *supra* note 67 at 441.

<sup>75</sup> *Id.* at 437.

<sup>76</sup> DAVID BRANDENBERGER, PROPAGANDA STATE IN CRISIS: SOVIET IDEOLOGY, INDOCTRINATION, AND TERROR 168, 169 (2011).

<sup>77</sup> *Id.* at 166.

<sup>78</sup> *Id.* at 178.

<sup>79</sup> *Stages of the Radicalization and Deradicalization Process*, PRACTICES PARTNERSHIP AGAINST VIOLENT RADICALIZATION IN CITIES NETWORK 13, 14 (Oct. 31, 2018).

<sup>80</sup> *Id.*

<sup>81</sup> Muhammad Fraser-Rahim, *In and Out of Extremism USA*, QUILLIAM 16, 17 (2019).

<sup>82</sup> *Id.* at 18.

<sup>83</sup> *Id.* at 17, 18.

<sup>84</sup> JAMES WALLER, BECOMING EVIL: HOW ORDINARY PEOPLE COMMIT GENOCIDE AND MASS KILLING 205 (2002).



meetings, to quit his job and devote all of his time to the group, to renounce his family and friends, and so on and so forth until his new identity as a member of the particular religion is completely consolidated.<sup>85</sup>

Throughout this process, the recruit is receiving meaningful benefits that encourage his continued participation in the group.<sup>86</sup> These could include praise, a higher purpose, a sense of community, financial benefits, a sense of connection with one's ancestry or any number of items.<sup>87</sup> These self-interested pursuits spur their continued involvement in the group up until the point where they become so ingrained in the group, so convinced of its mission or ideals, that the group's rationale and ideological posture merge with the individual's own.

It is important to also mention that while the most documented process of religious radicalization is that of radical Islam, radicalization is no doubt at play among the far reaches of the evangelical Christianity, ultraorthodox sects of Judaism, the Hindu nationalist movement, and others. All of these groups share feelings of persecution and marginalization, amplified by a resonance with personal experiences, and mobilized by insular social networks – online and in real life – entirely devoid of non-believers.

### C. Military Indoctrination

The indoctrination process carried out by various military branches can be broadly conceptualized as the process of turning civilians into service members. The process involves far more than the accumulation of technical skills, and instead hinges on the imbuing of a particular disposition, which is intended to supersede the innately individualistic posture of civilian life.<sup>88</sup> Military indoctrination occurs predominantly in the training camps of the various branches of the military, yet the instilling of military doctrine continues throughout the recruit's entire enlistment, on the battlefield and off.<sup>89</sup> Service members are taught to think like soldiers, to make decisions in high stress, life-threatening situations, to identify risks, and to lead their comrades.<sup>90</sup>

Indoctrinating a service member follows many of the traditional tactics of indoctrination used in cults and other extremist groups. First the recruit is "softened up" by separating the recruit from his family and bringing him to a secure, often isolated training base where he is subjected to strenuous physical challenges under stressful and disorienting conditions.<sup>91</sup> At the same time, the recruit is encouraged to forget his individuality, and instead to adopt the identity of the group in a stage known to social psychologists as "depluralization."<sup>92</sup> Recruits are not spoken to by their first names, but rather by their rank, and in the Marine Corps, recruits refer to themselves in the third person, starting sentences not with I, but instead, "the private."<sup>93</sup> Recruits sleep together, eat together, participate in the same training, wear the

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<sup>85</sup> *Id.* at 206, 207.

<sup>86</sup> Robert Baron, *Arousal, Capacity, and Intense Indoctrination*, 4 PERSONALITY AND SOCIAL PSYCHOLOGY REV. 238, 241 (2000).

<sup>87</sup> *Id.* at 245.

<sup>88</sup> Dennis McGurk, David Cotting, Thomas Britt, & Amy Adler, *The Role of Indoctrination in Transforming Civilians to Service Members* (2006) in MILITARY LIFE: THE PSYCHOLOGY OF SERVING IN PEACE AND COMBAT 13, 14 (Vol. 2, 2013).

<sup>89</sup> *Id.* at 13.

<sup>90</sup> *Id.* at 15.

<sup>91</sup> *Id.* at 16.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 17.

same uniforms, learn the same information, and endure the same physical challenges, building a sense of uniformity and *esprit de corps*.

Next, the behaviors learned in training camp are cemented in the recruits' minds such that they become second nature. Recruits are constantly in the presence of their training officers and are under 24/7 surveillance.<sup>94</sup> Random bunk checks in which recruits are berated for not having their bed properly made or their belongings properly organized instill a high degree of self-policing behavior in the recruit, ingraining practices of neatness, cleanliness, and self-discipline.<sup>95</sup> In mock combat situations, recruits are deprived of food and sleep and are asked to perform complex decision-making tasks for which success requires that they rely on their ingrained beliefs and uniquely militaristic logic.<sup>96</sup>

Instead of committing themselves unquestioningly to a particular leader, however, service members are taught to adopt the values sewn onto their patches and printed all over their recruiting materials.<sup>97</sup> Celebration of these socially acceptable values has an enormous role in reigning in the degree to which service members are expected to eschew their personal moral code in order to appease a commander.<sup>98</sup> For example, a private would be lauded for rejecting a command from his captain to harm an unarmed civilian as such an act would be against the fundamental moral tenets of military engagement.<sup>99</sup> Adherence to particular standards of behavior broadly aimed at helping those in need serves to reinforce the line between combatants and non-combatants and encourages soldiers to engage in socially positive acts such as delivering food to children in warzones or providing rescue efforts in the wake of national disasters.

#### D. Conclusion

The unifying theme across all of these types of indoctrination is the leveraging of the legitimacy of long heralded, stable institutions as a means of conveying a highly indoctrinating message. These groups and institutions show that indoctrination can take place anywhere so long as the institutional environment and the socializing techniques employed can produce a committed and deferential subject. Certainly, such radical messages would not be so widely and confidently adopted were they not transmitted through authorities in which the public has historically maintained significant confidence. Schools, the press, and the arts have long been far more trusted and compelling institutions than any sort of political body, making them the perfect vessels through which to convey the party message.

Political, religious, and military indoctrination hinge on the ability to control nearly every aspect of a recruit's life, to de-individuate him from his peers, and to commit him to a cause that appears larger than himself. It is a challenging task to turn an everyday citizen into a violent zealot. Such indoctrination requires more than simple acknowledgement and

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<sup>94</sup> *Officer Training School "Scrutiny"* U.S. MARINES <https://www.marines.com/becoming-a-marine/officer/training.html> (accessed Jan. 8, 2020).

<sup>95</sup> *Recruit Training "Stress"* U.S. Marines <https://www.marines.com/becoming-a-marine/enlisted/training.html> (accessed Jan. 8, 2020).

<sup>96</sup> *Recruit Training "Doubt"* U.S. MARINES <https://www.marines.com/becoming-a-marine/enlisted/training.html> (accessed Jan. 8, 2020).

<sup>97</sup> McGurk et al. *supra* note 90 at 15.

<sup>98</sup> *Id.*

<sup>99</sup> Field Manual No. 27-2, *Your Conduct in Combat Under the Law of War*, U.S. ARMY 5 (Nov. 23, 1984) (available at [https://www.loc.gov/rr/frd/Military\\_Law/pdf/conduct-in-combat-1984.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/conduct-in-combat-1984.pdf)).

understanding of a particular point of view, but rather an unquestioning dedication to the party's professed doctrine. Unlike a green grocer in a totalitarian state, who hangs up the party slogan in his shop every day, performing patriotism all the while knowing that it is all a charade, the indoctrinated subjects of the military, religious, and political institutions described above are truly convinced of every facet of the ideology they have adopted.<sup>100</sup> Their interests are effectively inseparable from those of the organizations and groups to which they claim membership.

## V. The Indoctrination Continuum

The previous sections have illustrated the wide variety of mechanisms by which a person's beliefs and values can be altered. But many, if not most, of these indoctrination or social influence tactics are not likely to reduce an offender's blameworthiness to the extent necessary to deserve a defense or serious mitigation in the eyes of the community. Instead, ordinary people are likely to see a continuum of personal responsibility and blameworthiness depending upon the specific details of each case.<sup>101</sup>

In a study done with law students, subjects were asked to read cases involving an offense committed under conditions suggesting some kind of indoctrination. They were asked to judge for each case whether the defendant deserves:

- (0.0) No mitigation (complete blameworthiness),
- (1.0) Minor mitigation (punishment reduced by 10 percent or less, a primarily symbolic gesture),
- (2.0) Moderate mitigation (punishment reduced by between 10 percent and 50 percent),
- (3.0) Major mitigation, (punishment reduced by 50 percent or more, essentially a one offense grade reduction in liability), or a
- (4.0) Complete defense.

The results of the study, provided in the table below, suggest that the subjects had little difficulty distinguishing among indoctrination cases along a continuum of blameworthiness and deserved punishment. In fact, the rubric of blameworthiness that guided subjects' responses seemed very much in line with the parameters of the subjects' own justice judgments.

It should be noted, however, that the study collecting this data lacked the methodological rigor to assure that the liability means of the subjects accurately represent the means that would be found in the general population. For example, the fourteen subjects were neither randomly selected nor representative of the community but instead were simply those

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<sup>100</sup> VACLAV HAVEL, *POWER OF THE POWERLESS* 28 (Routledge 2015).

<sup>101</sup> Note that such a blameworthiness continuum exists in essentially all disability excuses, such as insanity, involuntary intoxication, and duress, where there may be a continuum of cognitive or control dysfunction yet a decision-maker must decide where on that continuum a defendant is entitled to a complete defense. Under Model Penal Code's insanity defense, for example, in §4.01(1), the decision-maker must determine whether the offender "lacks substantial capacity" to appreciate the criminality of or to control his conduct. Presumably, an offender who falls just short of the "*substantial capacity*" cut off for complete defense in these cases deserves some significant mitigation, such as a one offense grade reduction. Robinson, *Mitigations: The Forgotten Side of the Proportionality Principle*, *Harvard Journal on Legislation* (forthcoming 2019) (discussing the importance of recognizing significant mitigation for cases of "near excuse.").

students and professors who participated in the seminar. The cases were not presented in randomized order, nor were they presented and judged in the same sitting. Instead, the cases were presented two or three each week over the course of the semester. Participants were allowed to alter their judgments on any prior case, so the table represents the subjects' judgments as of the conclusion of the seminar.

On the other hand, the results do represent the carefully considered judgments of the subjects, as well as our own personal intuitions on the cases, which we suspect, are likely to generally match the judgments of the reader. While by no means a scientifically rigorous metric, the study demonstrates the facility with which a group of diverse individuals, approximately the size of a trial jury, can reach some level of agreement on the complex, intuitive judgements of deserved mitigation. Note the clustering of responses around particular levels of mitigation – shown in the distributions chart below. Ultimately, this process of fact-based inquiry and blameworthiness judgment regarding those who have been manipulated is exactly the kind of exercise we can imagine juries performing in a legal system that takes processes of indoctrination more seriously

In the survey, subjects were given a narrative for each case that was usually two to three pages in length, which provided the facts relevant to the indoctrination and the offense, but not the legal disposition of the case. The text below gives summaries of the cases that the subjects found to be the most blameworthy and least blameworthy.<sup>102</sup>

Each subject provided a response using the five-point liability survey described above. The exact presentation is reproduced in the margin.<sup>103</sup> The same scale was used successfully in

<sup>102</sup> The full narratives used in the study are available from the principal author.

<sup>103</sup> Survey Instructions and Liability Scale:

After reading the two assigned case narratives for each week, please use this survey to rate whether the defendants' punishment should be eliminated or mitigated.

The scale is as follows:

- No Mitigation (complete blameworthiness)
- Minor Mitigation - punishment should be reduced by up to 10%
- Moderate Mitigation - punishment should be reduced by between 10 and 50%
- Major Mitigation - punishment should be reduced by 50% or more
- Complete Defense (no blameworthiness)

1. What mitigation of liability, if any, in the following cases?

	0 - No Mitigation	1 - Minor Mitigation - 10% or Less	2 - Moderate Mitigation - Between 10 and 50%	3 - Major Mitigation - 50% or More	4 - Complete Defense
1. Tenneson (POW)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>
2. Cabarga (Treefrog)	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>

other surveys undertaken by participants in the seminar. The results of the study are presented in the table below.

**Survey Results: 24 Cases Ranked in Order of Mitigation Mean**

CASES	MEAN	MO DE	CASE DESCRIPTIONS	EFFECT
1. Tenneson	3.67	4	Korean War POW converted to communism, refuses US repatriation	Defense/ Grade Reduction
2. Heck	3.5	4	Nazi youth leader, fighter pilot fought for German Nazi domination	
3. Cabarga	3.25	4	Given to pedophile at 5, later helps to kidnap and rape other children	
4. Kenton	2.33	3	Raised in drug rehab commune, leaves rattlesnake in mailbox	Moderate Mitigation
5. Vlok	2.25	2	S. African official encouraged acts of violence to uphold Apartheid	
6. Jeffs	2.08	2	Born into religious polygamous church community, upholds practices	
7. Malvo	1.92	2	Abandoned at 11, trained by guardian to commit murders by age 17	Symbolic Minor Mitigation
8. Nawaz	1.67	2	Radical Islamicist who works to recruit others	
9. Meadlo	1.42	0	21 year-old soldier participates in massacre of Vietnamese villagers	
10. Ongwen	1.5	1/2	Abducted, trained to be child soldier, then becomes leader	
11. Hearst	1.33	1	Kidnapped at age 19, joins her kidnapers to commit a bank robbery	
12. Picciolini	1.33	0	Young man engages in violence, hate rhetoric for White Power	
13. Van Houten	1.08	2	Joins hippy commune, helps to commit crimes, eventually murders	
14. Vallat	1.08	0/1	Junior al-Qaeda operative who participates in and assists terrorism	
15. Miller	1.08	0	Amish man who obeys his wayward Bishop and assaults people	
16. Layton	1.0	0/1	Joins socially active church and later attempts to kill several people	
17. McDonough	.83	0	Lover of sexual sadist helps hide the body of murder woman	No Mitigation
18. Seromba	.83	0	Catholic priest in Rwanda who orchestrates a mass killing	
19. Gotti	.58	0	Joins his father as a member of the Mafia	
20. Hardaway	0.5	0	Child gang member follows orders to commit murder	
21. Couch	0.42	0	Unchecked by parents, a teen's drunk driving causes death of four	
22. Hayashi	0.25	0	Surgeon joins religious cult and orchestrates a serine gas attack	
23. Benjamin	0	0	Man shoots and kills Marines because he feels a race war is coming	
24. Vlasak	0	0	Dr. turned animal activist via spouse advocates violence	

Below is a table showing the percentage distribution of responses for the cases judged the least and the most blameworthy. The mode for each case is in bold.

### Mitigation Distributions for the Least Blameworthy and the Most Blameworthy Cases

Case	0- No Mit	1- Minor Mit 10% or less	2- Mod Mit 10-50%	3- Major +50%	4- Complete Defense	Mean
<b>Less Blameworthy Indoctrination Cases – Defense or Mitigation</b>						
1. Tenneson (POW)	-	-	8%	17%	<b>75%</b>	3.7
2. Heck (Hitler Youth)	-	-	8%	33%	<b>58%</b>	3.5
3. Cabarga (Treefrog)	-	8%	8%	33%	<b>50%</b>	3.3
4. Kenton (snake)	8%	8%	33%	<b>42%</b>	8%	2.3
5. Vlok (Apartheid)	8%	-	<b>58%</b>	25%	8%	2.3
6. Jeffs (polygamy)	8%	25%	<b>33%</b>	17%	17%	2.1
<b>More Blameworthy Indoctrination Cases – No Mitigation</b>						
17. McDonough (sex slave)	<b>67%</b>	-	17%	17%	-	0.8
18. Seromba (Rwanda)	<b>50%</b>	25%	17%	8%	-	0.8
19. Gotti (Mafia)	<b>58%</b>	25%	17%	-	-	0.6
20. Hardaway (gang)	<b>50%</b>	<b>50%</b>	-	-	-	0.5
21. Couch (influenza)	<b>67%</b>	25%	8%	-	-	0.4
22. Hayashi (sarin gas)	<b>75%</b>	25%	-	-	-	0.3
23. Benjamin (RSB)	<b>100%</b>	-	-	-	-	0.0
24. Vlasak (animal rights)	<b>100%</b>	-	-	-	-	0.0

In the first three cases – including *Tenneson* and *Cabarga*, discussed previously – the most common response by the subjects was a complete defense, with the mean of the subjects’ responses above 3.0. Three other cases had a mean of between 2.0 and 3.0. In contrast, eight cases assessed in the study had a mean between 0.0 and 1.0, and a mode of 0, indicating that the subjects would not provide even a symbolic mitigation of 10 percent.

This significant variation among the extent of mitigation offered to different offenders suggests that subjects did not feel compelled to categorically deny blameworthiness reductions, as current law does now, nor did they feel compelled to award a significant mitigation or a complete defense to every person who had experienced some sort of manipulation or psychological influence. The wide array of responses across the gamut of available mitigations suggests that an indoctrination defense could be effectively operationalized because people are able to make nuanced complex judgments about blameworthiness in such cases.

Consider below the cases ranked highest and lowest and how their circumstances may affect a judgment of blameworthiness.

#### A. Indoctrination Cases That Seem Less Blameworthy

To begin, we consider the cases most likely to elicit some form of liability reduction of a complete defense or a major mitigation of a reduction of one offense grade. Each of these three cases received a mean score of between 3.25 and 3.67 using the metric noted above, and there was consistency among the fourteen surveyed subjects in their responses. Our own evaluation of these most blameless cases mirrors their judgments.

Overwhelmingly, the strongest case was *Tenneson*. As discussed above, *Tenneson* was a farm boy who had never traveled outside of Minnesota, but decided to join the U.S. military, at the age of 17, in order to help his country in the Korean War effort. Unwaveringly patriotic, he told his mother, “If I should win the Congressional Medal of Honor, I still wouldn’t have done

enough for my country.”<sup>104</sup> Only months later, though, this politically unsophisticated young man was fully convinced of the superiority of the Communist system after having been subjected to a highly intrusive, controlling, and abusive indoctrination program run by Chinese forces. What compelled subjects most about the Tenneson case was the unrelenting, mechanistic nature of his indoctrination. The Chinese were highly trained at identifying particularly vulnerable individuals, and Tenneson, for all of his youth and naivete, was the ideal candidate. After being worn down by a litany of physical abuses such as starvation, long marches in the freezing cold, and manual labor, the Chinese disoriented Tenneson by dramatically altering their treatment of him, showering him with kindness, tending to his physical ailments, and submitting him to a program of intensive reeducation so that in this highly pliable state, he came to trust them and believe in their political vision. At no point did Tenneson even have the chance to resist.

Next highest ranked by the subjects was Alfons Heck, who was raised in rural Rhineland, Germany, and who was five years old when Adolf Hitler was appointed Chancellor of Germany.<sup>105</sup> Every aspect of Heck’s life supported his devotion to the Nazi Party. His schoolteachers encouraged a commitment to Hitler, as did his parents and friends, and every time he turned on the radio, or read a newspaper, or watched a movie, he was assured that following Hitler, and fighting to defend him, was a righteous path. Most formative among the various Third Reich institutions that distorted his perception of the world was the Hitler Youth, discussed above,<sup>106</sup> in which Heck excelled and was ultimately given a leadership role. Heck became so devoted to the German cause that even as the German war effort began to deteriorate, Heck’s commitment to Hitler did not wane. Heck was seen as particularly sympathetic to subjects because of the formulaic, state-sanctioned nature of his indoctrination. Rather than hiding from the rest of society in a deviant community, Heck was propped up by the state for his dedication to the Nazi cause. Throughout the most formative years of his life, Heck was exposed to no outside influence that might encourage him to foment skepticism about the Third Reich. The intensely patriotic culture in which he was raised made his unquestioning adulation of Hitler seem like a foregone conclusion.

Following Heck in mitigation granted by the subjects was Cabarga, discussed above, who was effectively raised as a prisoner of his abusive guardian, Tree Frog. While Tree Frog was not operating a militaristic or state-sanctioned indoctrination program, he perhaps intuitively used similar procedures. Cabarga was kept isolated in Tree Frog’s van, raped frequently by Tree Frog, denied access to outside information or social connections, and repeatedly told that their way of living was morally superior. He was taught to fear the outside world and distrust everyone except Tree Frog so that even if he was presented with the opportunity to escape, Cabarga was too afraid to attempt such a feat.<sup>107</sup> Furthermore, Cabarga never had a sense of self before being indoctrinated and thus had no point of reference in the outside world from which to understand his precarious condition. Ultimately, Cabarga’s youth, segregation from the rest of society, and lack of education, made him a particularly vulnerable target for Tree Frog’s

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<sup>104</sup> PAUL H. ROBINSON, CRIMINAL LAW CASE STUDIES 145, 218 (Ed. 5, 2015).

<sup>105</sup> This narrative is drawn from Heck *supra* note 69.

<sup>106</sup> Discussed *supra* notes 69-71.

<sup>107</sup> Discussed *supra* notes 27-32.

indoctrinating efforts, and thus a highly compelling case to the subjects in terms of blameworthiness reduction.

Thus, among this top tier of cases, it seems clear that factors that support a conclusion of major mitigation or near complete defense include such things as the amount of physical and psychological control over the offender's daily life, whether the indoctrination was state-sanctioned, the extent to which violence, including sexual violence, was used to make the offender more submissive, and the vulnerability of the offender to such manipulation, especially his youthfulness, relative isolation, and the deviance of the ideology in which he was indoctrinated to believe. The overarching theme of these top three cases, however, was the impossibility of resisting the indoctrination or rejecting the ideology. Faced with no alternatives, and no means of escape, these three men succumbed to the pressures of the only world they knew or were able to know. The subjects found it difficult to condemn them for what seemed to be perfectly reasonable responses to highly manipulative, coercive, and disorienting situations.

Within the twenty-four cases the subjects read, a second tier of cases emerged in which the subjects seemed in general agreement that the offender should receive at least a moderate mitigation. These three cases had a mean between 2.08 and 2.33 on the survey mechanism described above.

The highest score in this second group was given to Lance Kenton, who was raised communally by the members of a drug rehabilitation community called Synanon after his biological father left him there as a child. Kenton's primary caregivers were a group of dysfunctional adults who elected to isolate themselves from the outside world, dress the same, cut their hair the same, and engage in public ceremonies of violence designed to correct undesirable behavior. Having been raised in this fear-based, insular environment, Kenton never cultivated any spirit of independence and instead organized his life around his subservience to Synanon's leader. Ultimately, Kenton attempted murder on the group's behalf by putting a rattlesnake in the mailbox of a lawyer suing the organization.<sup>108</sup> Subjects viewed Kenton as having a strong case for reduced blameworthiness because of his youth, his isolation from the rest of society, and his subjection to extraordinary information control. For young Kenton rejecting his leader's commands seemed unimaginable, constituting a disavowal of the only home he knew. Furthermore, Kenton's crime seemed a rational choice because nothing mattered more to Kenton and the other members of Synanon than the survival of the group. Eliminating a threat to the only group of people that had ever cared for him, taught him, and invested in his growth seemed perhaps like more than an ideological project, but rather a means of survival.

Earning just slightly less mitigation than Kenton was Adriaan Vlok, who was a child when South Africa institutionalized apartheid. Vlok was white and lived in a racially homogenous community where he rarely encountered other races outside of domestic servant roles. Growing up, he was exposed to an all-encompassing, state-sponsored educational system that

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<sup>108</sup> This narrative is drawn from the following sources: DAVID GERSTEL, *PARADISE INCORPORATED: SYNANON – A PERSONAL ACCOUNT* 267 (Novato: Presidio Press, 1982); Hillel Aron, *The Story of This Drug Rehab-Turned-Violent Cult is Wild, Wild Country-Caliber Bizarre*, L.A. MAGAZINE, (Apr. 23, 2018) (available at <https://www.lamag.com/citythinkblog/synanon-cult/>); Paul Morantz, *The History of Synanon and Charles Dederich*, PAULMORANTZ.COM (2009), (available at <http://www.paulmorantz.com/cult/the-history-of-synanon-and-charles-dederich/>); Paul Morantz, *The True Story of the Rattlesnake in the Mailbox*, PAULMORANTZ.COM (2009), (available at [http://www.paulmorantz.com/the\\_synanon\\_story/the-true-story-of-the-rattlesnake-in-the-mailbox/](http://www.paulmorantz.com/the_synanon_story/the-true-story-of-the-rattlesnake-in-the-mailbox/)).



was designed to teach white citizens the moral correctness of segregation. The developers of apartheid had studied and copied the methods used by the Nazis to ensure that no ordinary citizen ever thought to criticize the forced segregation of the races, so by the time Vlok graduated high school, he was fully convinced that apartheid was religiously ordained and scientifically proven. Because of the stifling unavailability of outside information or conflicting perspectives, Vlok was constrained to a silo of thought. Later in life, in his capacity as South Africa's Minister of Law and Order, Vlok was responsible for quashing anti-apartheid activity in the country and commissioned several assassinations of anti-apartheid leaders. After the fall of apartheid, however, Vlok felt genuine remorse and admitted to his crimes in front of South Africa's Truth and Reconciliation Commission.<sup>109</sup> Overwhelmingly, subjects were sympathetic to Vlok because like Heck, he did not seem to have much choice in his adoption of the National Party's stance on apartheid. At every juncture in Vlok's life, the National Party's stance on apartheid was impressed upon him, leaving Vlok to believe that there was only one correct path to follow and the preservation of his country and their way of life depended on his conformity.

The final case ranked in this moderate mitigation group was Rachel Jeffs, who was born into the Fundamentalist Church of Jesus Christ of Latter-Day Saints, one of the most radical sects of Mormonism. Jeffs' father, Warren Jeffs, was the leader of the church and sexually abused her, beginning when she was eight years old. Like all of the children raised in the church, Jeffs had no exposure to the outside world and was denied a meaningful education. She was taught that all non-members of the church were sinners and that if she disobeyed any of Warren's commands, she too would be condemned to eternal damnation. Motivated by this weighty existential fear, Jeffs facilitated the solitary confinement of disobedient women, the denial of modern medical treatment for the sick and injured, and the forceful separation of children from their parents. Even after her father was imprisoned, Jeffs still obeyed his every command and perpetuated the fraudulent misuse of government entitlements by the community.<sup>110</sup> Subjects supported reduced blameworthiness for Jeffs because her access to

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<sup>109</sup> This narrative is drawn from the following sources: South African History Online, *Adriaan Vlok*, SAHO (Aug. 23, 2019), (available at <https://www.sahistory.org.za/people/adriaan-vlok>); Mary Kalantzis & Bill Cope, *Apartheid Education*, NEW LEARNING, CH. 5: APARTHEID EDUCATION (last visited Jan. 23, 2020) (available at <http://newlearningonline.com/new-learning/chapter-5/apartheid-education>); Erin Blakemore, *The Harsh Reality of Life Under Apartheid in South Africa*, HISTORY.COM, (last updated May 9, 2019), (available at <https://www.history.com/news/apartheid-policies-photos-nelson-mandela>); Eve Fairbanks, *I Have Sinned Against the Lord and Against You! Will You Forgive Me?* THE NEW REPUBLIC, (Jun. 18, 2014), (available at <https://newrepublic.com/article/118135/adriaan-vlok-ex-apartheid-leader-washes-feet-and-seeks-redemption>); Johnny Masilela, *Why Vlok is still apologizing*, IOL, (Sept. 6, 2015), (available at <https://www.iol.co.za/sundayindependent/why-vlok-is-still-apologising-1911387#.VfF5cNKqgko>); Wally Mbhele, *The Semantic Battles of Adriaan Vlok*, MAIL & GUARDIAN, (Oct. 17, 1997), (available at <https://mg.co.za/article/1997-10-17-the-semantic-battles-of-adriaan-vlok>); N. Westcott, *Indoctrination for Subordination*, S. AFR. HIST. ONLINE, (1972) (available at <https://www.sahistory.org.za/archive/indoctrination-for-subordination>).

<sup>110</sup> This narrative is drawn from the following sources: Daphne Branham, *Rachel Jeffs on Life after Polygamy and Why She Testified Against the Blackmores*, VANCOUVER SUN, (Nov. 22, 2017), (available at <https://vancouversun.com/opinion/columnists/daphne-bramham-rachel-jeffs-on-life-after-polygamy-and-why-she-testified-against-the-blackmores>); RACHEL JEFFS, *BREAKING FREE: HOW I ESCAPED POLYGAMY, THE FLDS CULT, AND MY FATHER, WARREN JEFFS* (2017); Eun Kyung Jim, *Daughter of Warren Jeffs Tells How She Broke Free of his Cult*, TODAY.COM, (Nov. 10, 2017), (available at <https://www.today.com/news/daughter-polygamist-warren-jeffs-tells-how-she-broke-free-his-t118665>); Emma Reynolds, *Daughter Of Notorious Cult Leader Opens Up On Year Of Sickening Sexual Abuse*, NEWS.COM.AU, (Jan. 17, 2018), (available at [24](https://www.news.com.au/lifestyle/real-</a></p></div><div data-bbox=)

information and education was so limited that it seemed perfectly understandable that she had a difficult time poking holes in any of the church's teachings. Furthermore, subjects were swayed by Jeffs' deep rooted existential fear that disobedience would lead to punishment not only in this life, but in the next, and thus, that obedience was morally justified.

## **B. Indoctrination Cases That Seem More Blameworthy**

At the other end of the indoctrination continuum were cases in which subjects gave the offender little or no mitigation. These cases, for a variety of reasons, were seen as significantly more blameworthy than those above, and earned mitigation means of between 0.0 and 0.83. Nearly all had a mode of 0. That is, even the most compelling of these bottom tier cases were seen as undeserving of even a minor mitigation. In some cases, the offender simply did not appear to be sufficiently indoctrinated to blame his criminal conduct on his indoctrination. In other cases, subjects expected the offender to reject the new belief system prior to committing the crime, or found that the offender's crime seemed so attenuated from the indoctrination that the newfound belief system could not be seen as the rightful cause. Regardless of the reasoning behind the limited mitigation afforded to each of these bottom tier cases, the sheer fact of their variation from the top tier cases shows that individuals can fairly easily adjudicate between indoctrinated offenders that have what on first glance appear to be many similar features. The facility with which the subjects drew distinctions between like cases shows the immense promise of an indoctrination defense and speaks to the ease of operability of the defense among the wider public.

One of the least compelling of the no mitigation cases – receiving a mean of 0.0 on the blameworthiness reduction rubric – was that of Murdoch Benjamin. Benjamin came of age at the apex of the civil rights era in the predominantly black and impoverished Watts neighborhood of Los Angeles. While he had vague intuitions of the racial injustices that pervaded 1960s America, he did not have a coherent belief system about race relations. As an adult, Benjamin traveled to Washington D.C. to attend the protests that followed the assassination of Dr. Martin Luther King. After hearing Huey Newton and other Black Panthers speak, Benjamin became convinced that a race war was coming in the United States and that he had to defend himself. One night while at a fast-food restaurant in D.C. with friends, Benjamin shot and killed two white unarmed Marines, unprovoked. Benjamin was convicted of murder and received a sentence of 20 years to life.<sup>111</sup> The subjects were wholly unpersuaded by the

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[life/true-stories/daughter-of-notorious-cult-leader-opens-up-on-years-of-sickening-sexual-abuse/news-story/fb4cda958c9260dc6247592961ea4806](https://www.history.com/topics/civil-rights-movement/black-panthers)).

<sup>111</sup> The information in this narrative comes from the following sources: *Black Panthers*, HISTORY.COM, (last updated on June 6, 2019), (available at <https://www.history.com/topics/civil-rights-movement/black-panthers>); Matthew Dallek, *How the Tet Offensive Shocked Americans into Questioning if the Vietnam War Could Be Won*, HISTORY.COM, (last updated on Feb. 22, 2019), (available at <https://www.history.com/news/tet-offensive-1968-vietnam-war-surprise-attack-changed-american-public-opinion>); David Bazelon, *Retired Appellate Judge*, L.A. TIMES, (Feb. 22, 1993), (available at <https://www.latimes.com/archives/la-xpm-1993-02-22-mn-294-story.html>); Patricia Falk, *Novel Theories of Criminal Defense Based upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication, and Black Rage*, 74 N. Carolina L. Rev. 3 (1996); Robert McCaleb, *Rejustifying Retributive Punishment on Utilitarian Grounds in Light of Neuroscientific Discoveries more than Philosophical Calisthenics!*, 63 Clev. St. L. Rev. 515 (2015); Matthew Twombly, *A Timeline of 1968: The Year That Shattered America*, SMITHSONIAN MAG., (Jan. 2018), (available at <https://www.smithsonianmag.com/history/timeline-seismic-180967503/>); U.S. v. Benjamin Murdock, 471, F.2d 923 (D.C. Cir. 1973).

notion that Benjamin might have been indoctrinated. While he suffered a challenging and deprived upbringing, Benjamin never endured a formal indoctrination program. No one was instilling a particular ideology in him or molding his will to meet their needs. His frustration with racism could have been manifested through commitment to non-violent organizing and civil disobedience just as easily as it could have led to violent conduct. In that sense, when Benjamin became violent, the choice was his own.

Almost as unsympathetic to the subjects is the case of Ikuo Hayashi, who committed such a serious crime, that the subjects found his behavior unredeemable. Hayashi was a highly respected heart surgeon who, at age 43, turned to a religion called Aum Shinrikyo, which promised absolution from one's sins. Shortly thereafter, Hayashi renounced his prestigious job and his family to devote himself to his new faith. He lived in isolation with other members of Aum who blindly followed the teachings of the leader of Aum, who they saw as powerful and divine. When the leader instructed his followers to kill non-believers in order to rid the world of bad karma, Hayashi and other Aum devotees complied. Convinced by the feigned omniscience of their leader, they released lethal sarin gas into a crowded subway, and over a thousand commuters were injured, while twelve people died. Within hours of the attack, Hayashi recognized the errors of his ways and renounced Aum.<sup>112</sup> Despite having been subjected to an intensive and personal program of indoctrination, Hayashi was seen by the subjects as being fully blameworthy because of his age, sophistication, and connections to the outside world at the time of his indoctrination. As a surgeon, Hayashi had dedicated his life to saving lives, and yet he allowed himself to become an instrument of mass-killing. This transition seemed unconscionable to the subjects who felt that decades of deeply held moral convictions could not be so quickly uprooted in pursuit of a heinous act.

Garnering just slightly more sympathy than Hayashi was the case of Ethan Couch, who readers might recognize as the young man who attempted to use the defense of "affluenza" – excessive wealth, undermining one's ability to be influenced by the threat of punishment – to reduce his sentence after he was charged with four counts of intoxication manslaughter. Couch was the only child of wealthy parents who used money to smooth over inappropriate and illegal behavior. Couch was given an enormous amount of independence as a child such that he drove himself to school alone at age 13, dropped out of school at 14, and lived alone at age 16, which allowed him to throw many drug and alcohol fueled parties without adult supervision. After one such party, Couch, whose blood alcohol was at three times the legal limit, drove his truck into oncoming traffic, killing four people and paralyzing another. Subjects were not persuaded by Couch's argument that having been raised by wealthy parents, with no rules and no conception of causal behavior, he was unable to appreciate the inappropriateness of his conduct. Instead, subjects argued that Couch had ample opportunities to be different than his parents. Couch went to school until he was 14, had friends who were brought up differently, and learned from teachers who taught a more normative moral code. He broke the law not

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<sup>112</sup> This narrative is drawn from the following sources: ROBERT JAY LIFTON, *DESTROYING THE WORLD TO SAVE IT: AUM SHINRIKYŌ, APOCALYPTIC VIOLENCE, AND THE NEW GLOBAL TERRORISM* 106-300 (Henry Holt & Co, 2000); IAN READER, *RELIGIOUS VIOLENCE IN CONTEMPORARY JAPAN* 114 (U. of Haw. Press, 2000); HARUKI MURAKAMI, *UNDERGROUND: THE TOKYO GAS ATTACK AND THE JAPANESE PSYCHE* 9 (Vintage, 2013); Hiroshi Matsubara, *Aum Rulings Set Line Between Life And Death*, JAP. TIMES, (Aug. 11, 2000), (available at <https://culteducation.com/group/826-aum-sect-shoko-asahara/667-aum-rulings-set-line-between-life-and-death.html>); *Aum Doctor Gets Life Sentence For Subway Sarin Attack*, JAP. TIMES, (May 26, 1998), (available at <https://www.japantimes.co.jp/news/1998/05/26/national/aum-doctor-gets-life-sentence-for-subway-sarin-attack/#.W066XNizqUI>).

because of some deeply implanted belief that governmental authority should be rejected as a false construct, but rather as a performance of social stature and daredevil behavior for his peers.

Only slightly more persuasive was the case of Cragg Hardaway, who despite being raised in a loving stable home, sought out gang life at age 14 because of its promise of money, status, and privilege. While over time, he became convinced of the power of some of the older members of the gang, this reverence was largely a product of the significant amount of money the gang was pulling in from drug sales. Still, when the gang ordered Hardaway to kill an 11-year-old fellow member, he complied, fearing that disobeying the gang's older leaders would force him out of the group. Hardaway was convicted of murder and received a 60-year sentence.<sup>113</sup> Hardaway was not compelling to the subjects because he had no need to follow through on the gang's orders to kill, and yet he persisted as a result of avarice and a desire for respect. Instead of being roped into the gang by coercion or manipulation, he was enticed by the trappings of gang life. He ignored his parents' pleas to leave the gang even as his gang activities led him to multiple run-ins with the police. He was thus seen as entirely blameworthy for his conduct.

Similar to Hardaway, John Gotti Jr. was not persuasive to the subjects because he voluntarily joined the mafia he was attracted to its culture, not because its older members coerced him in any way. The young Gotti, whose father was the boss of the Gambino crime family, was seduced by the thrill of crime and the honor culture that shaped social life inside the organization. At age 18, he joined the group after spending several months sitting in a mafia safehouse watching their activities. As he grew older, though, Gotti became critical of the mafia life he had once romanticized as he watched dozens of his friends get killed or sent to jail.<sup>114</sup> Subjects did not find Gotti to be a strong case deserving of mitigation because it seemed likely that Gotti was never actually indoctrinated. Gotti's involvement in the Gambino crime family

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<sup>113</sup> This narrative is drawn from the following sources: Sharon Cohen, *Locked Up At 14 For An Infamous Murder, Living With Regrets And Dreaming Of A Future*, STARNEWS ONLINE, (Dec. 18, 2007), (available at <https://www.starnewsonline.com/news/20071218/locked-up-at-14-for-an-infamous-murder-living-with-regrets-and-dreaming-of-a-future>); John Fountain & Joseph Kirby, *2 Boys From Robert's Gang Charged In His Execution*, CHI. TRIB., (Sept. 3, 1994), (available at <https://www.chicagotribune.com/news/ct-xpm-1994-09-03-9409030123-story.html>); Francisco, Tonya, "Men convicted in '94 murder of 11-year-old speak out for first time," *WGN9 Morning News*, December 15, 2014, <https://wgntv.com/2014/12/15/men-convicted-in-94-murder-of-11-year-old-speak-out-for-first-time/>; Nancy Gibbs, "Murder in Miniature," *TIME*, June 24, 2001, <http://content.time.com/time/magazine/article/0,9171,165100,00.html>; George Knox, "Gang Threat Analysis: The Black Disciples," *National Gang Crime Research Center*, 2004, <https://www.ngcrc.com/bdprofile.html>; "The Forgotten Story of Robert 'Yummy' Sandifer," *newafrikan77*, March 9, 2014, <https://newafrikan77.wordpress.com/2014/03/09/the-forgotten-story-of-robert-yummy-sandifer/>; Maurice Possley, "Jury Hears: 'Yummy' Knew Too Much," *Chicago Tribune*, November 1, 1996, <https://www.chicagotribune.com/news/ct-xpm-1996-11-01-9611010146-story.html>.

<sup>114</sup> This narrative is based on the following sources: William DeLong, *How John Gotti Jr. Lived The Mob Life — And Then Walked Away*, All Things interesting.com, July 12, 2018, <https://allthatsinteresting.com/john-gotti-jr>; Taylor Maple, "Where Is John Gotti Jr. In 2018? He Left The Family Business Years Ago," *Bustle*, June 9, 2018, <https://www.bustle.com/p/where-is-john-gotti-jr-in-2018-he-left-the-family-business-years-ago-9328289>; John Gotti, Jr. and Peter Lance, *Shadow of My Father*, (Phoenix Media Productions, 2015); Carl Stoffers, "A Family Affair: Notable Fathers and Sons in the Mob," *New York Daily News*, Nov 12, 2015, <https://www.nydailynews.com/news/national/family-affair-notable-fathers-sons-mob-article-1.2432681>; Steve Kroft, *Gotti Jr. on Living and Leaving a Life of Crime*, CBS 60 Minutes, Apr 8, 2010, <https://www.cbsnews.com/news/gotti-jr-on-living-and-leaving-a-life-of-crime/6/>.

could be ascribed to his desire for connection with a father who had neglected him as a child far more than it could be to any sort of forced alteration of his belief system.

Slightly more compelling than Gotti, but still hardly deserving of any sort of mitigation, was the case of Athanase Seromba, a Catholic priest who lived in Rwanda during the 1990s Rwandan genocide. Seromba was a member of the country's majority ethnic group, the Hutus, who controlled the government, and frequently instigated conflict with the minority ethnic group in Rwanda, the Tutsis. Over the radio, the Hutu ruling party encouraged Hutu Rwandans to kill Tutsis, who they claimed were trying to overthrow the government. Despite being highly educated and devoutly professing a faith that decried violence of all kinds, Seromba was convinced by these repeated government messages Seromba organized the mass murder of 2000 Tutsis by inviting them into his church to seek shelter and bulldozing it with them inside.<sup>115</sup> Subjects were unwilling to grant Seromba any mitigation because they believed that Seromba, as an educated person, should have known to doubt the credibility of the radio messages. Further, as a priest, he was taught that God, not the government, was the highest authority, and this religious understanding should have brought him to understand that the killing of even one other person abhorrent. Finally, like Hayashi, the gravity of Seromba's crime motivated against a finding of blameworthiness. Orchestrating the death of 2,000 people was inexcusable no matter how compelling the panicked voices of Hutu broadcasters made the cause against the Tutsis seem.

Equally unpersuasive was the case of Kat McDonough who, at age 18, moved in with her possessive and brooding 28-year-old boyfriend. Over a short period of time, McDonough became completely submissive to him as the pair pretended to be characters in a sexual fantasy with strong violent undertones. When her boyfriend demanded that McDonough find him a new sex slave, McDonough invited a colleague over to their apartment. After McDonough's colleague resisted McDonough's boyfriend's advances, the man killed the young woman by strangulation, while McDonough stood by and made no attempt to intervene. The boyfriend then raped the colleague's corpse, and McDonough later helped him hide the body. After her arrest, however, McDonough expressed great remorse. Despite the intensive, one on one quasi-indoctrinating relationship between McDonough and her boyfriend, McDonough was seen as completely blameworthy. Though the relationship was undoubtedly emotionally manipulative, and the age difference between her and her boyfriend rendered an unequal power dynamic, McDonough likely was sufficiently sophisticated, educated, and independent to reject her boyfriend's sinister sexual desires. Her boyfriend had explicitly stated on several

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<sup>115</sup> This narrative is drawn from the following sources: *Athanase Seromba*, TRIAL INT'L, (last updated on June 13, 2016), (available at <https://trialinternational.org/latest-post/athanase-seromba/#narrative-1>). *Broadcasting Genocide: Censorship, Propaganda & State-sponsored Violence In Rwanda 1990-1994*, 5-68 ART. 19, (Sept. 16, 1994) (available at <https://www.article19.org/data/files/pdfs/publications/rwanda-broadcasting-genocide.pdf>); *Father Seromba Pleads Not Guilty*, U.N. INT'L RESIDUAL MECHANISM FOR CRIM. TRIBUNALS, (Feb. 8, 2002), (available at <http://unictr.irmct.org/en/news/father-seromba-pleads-not-guilty>); Martin Kimani, *For Rwandans, The Pope's Apology Must Be Unbearable*, THE GUARDIAN, (Mar. 29, 2010), (available at <https://www.theguardian.com/commentisfree/belief/2010/mar/29/pope-catholics-rwanda-genocide-church>); Marc Lacey, *Rwandan Priest Sentenced to 15 Years for Allowing Deaths of Tutsi in Church*, N.Y. TIMES, (Dec. 14, 2006), (available at <https://www.nytimes.com/2006/12/14/world/africa/14rwanda.html>). *Rwanda: A Historical Chronology*, PBS, (available at <https://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html>). *Rwanda: How The Genocide Happened*, BBC, (May 17, 2011), (available at <https://www.bbc.com/news/world-africa-13431486>); Gabriella Venturini, *Rwanda's Unanswered Screams: Still Seeking Justice After The Seromba Trial*, THE HAGUE JUSTICE PORTAL, (Feb. 28, 2007), (available at <http://www.haguejusticeportal.net/index.php?id=7123>).

occasions that he had a strong desire to hurt women, and yet, McDonough brought a colleague into his control. Finally, the circumstances by which McDonough may have been indoctrinated were less than compelling. While she was under immense pressure from her boyfriend to comport herself a certain way in his presence, she was never subjected to a program of formal indoctrination in which her movement was restricted or she was cut off from contact with the outside world. The subjects expected that someone in her situation would have resisted the crime-causing aspects of his indoctrination and broken off the relationship.

All of these most blameworthy offenders demonstrate a general tendency among the subject respondents evaluating indoctrination cases to disfavor cases in which the offender did not adopt a clear ideology or belief system; the offender did not have an active indoctrinator; the offender's crime was particularly heinous; or the offender seemed to be motivated by a desire to maintain a personal relationship rather than a coercively implanted belief system. Overall, it seems clear that support for an indoctrination defense or mitigation is not based upon an offender falling within a general category of cases. A defense or mitigation may be held appropriate in one indoctrination case yet seen as entirely inappropriate in another case that would seem similar in many respects. Particularly offensive to the subjects were those cases in which the offender voluntarily joined an organization he knew to be criminal and then committing a crime on the group's behalf. To offer a person like Benjamin, who decided almost on a whim to shoot an unarmed Marine because he thought a race war was coming, anything near the same sort of mitigation as a person like Cabarga, who was abused and kept in isolation for years, seems deeply unfair.

Thus, people's intuitive judgments about mitigation or defense for indoctrination appear to be somewhat complex. What is the analysis that drives the blameworthiness assessment in indoctrination cases? Is it possible to articulate criteria that is most relevant to such an assessment?

## **VI. An Analytic Framework for Assessing Liability in Indoctrination Cases**

Based on the discussions that emerged among the subjects while determining what mitigation should be afforded to each individual, we generated five questions that we think are essential to ask in determining whether a case deserves a defense or significant mitigation because of indoctrination. To flesh out the requirements of each element, we include the narratives of real cases of indoctrination – typically drawn from the case narratives discussed in the previous section – to illustrate the factors pinpointed by each of the five key analytic issues. Because indoctrination comes in many forms, and impacts its subjects in different ways, these vignettes of the lives of indoctrinated individuals can help to clarify the factors that are most important to take into account at each step of the analysis. We also include accounts of the lives of other individuals whose experiences might appear similar to the sympathetic indoctrination cases, but nonetheless ought to be ineligible for a defense or significant mitigation. Drawing distinctions between eligible and ineligible offenders at each stage in the analytic framework helps establish and illustrate the limits on the depth and reach of a indoctrination mitigation or defense.

## A. Indoctrinated?

There obviously can be no basis for an indoctrination mitigation or defense unless the offender was in fact indoctrinated:

*Q1. Was the offender indoctrinated to adopt beliefs or values that were not his or her own?*

In answering this question, a decision-maker might investigate a number of different factors: Did the offender act in a way or freely express beliefs or values that conflicted with his “previous self”? Did the offender act in ways against his own best self-interests in furtherance of the indoctrinated beliefs and values? Was the offender subject to some of the classic mechanisms of coercive indoctrination: isolation, deprivation, control, repeated reeducation, compelled self-criticism, assigned a new name? Was the offender indoctrinated by another person or group, which truly intended to change his belief system? Did the offender subsequently revert to his “previous self”? If so, did he express genuine remorse about his offense?

Exemplifying this requirement is the case of *Tenneson*, discussed above, wherein a midwestern farm boy was indoctrinated by the Chinese military to become a devoutly committed member of the Communist project. Tenneson demonstrates the essence of the indoctrination process – an enormous shift in belief systems that renders the subject a wholly different person. Tenneson became the face of Chinese communist propaganda, decrying the U.S. and its allies. When offered repatriation to the U.S., Tenneson refused, and when his mother came to visit him, Tenneson declined to see her. His decision to join the Communist front was hardly spontaneous or self-directed, but rather was the result of months of extraordinary indoctrination from the Chinese military to best serve Communist interests. The formative understandings and fundamental convictions that had motivated his desire to go to war in the first place were effectively erased and replaced with a reimagining of the world in direct contrast with his previous belief system.

In contrast to Tenneson, the *Benjamin* case presents us with circumstances in which one could conclude that the offender was not really indoctrinated, at least not in a way and to an extent that deserves a defense or substantial mitigation. Murdock Benjamin was neither part of an indoctrinating organization nor under the influence of a coercive and manipulative individual. A young man, with a hardscrabble upbringing in a predominantly poor, minority neighborhood, Benjamin seemed to have been drawn to the Black Panthers and Huey Newton, but there is little indication that Benjamin’s consumption of these various activists’ works made him someone different than his “authentic self.” If Benjamin was considered to be indoctrinated, then anyone persuaded by any polemic work could call themselves indoctrinated, and anyone with a difficult upbringing could call themselves indoctrinated. We are hesitant to permit such a broad conceptualization of the defense. While Benjamin’s background undoubtedly made him ripe for the seeds of extremist ideologies, there was no formal or informal mechanism of indoctrination for such ideas to be sowed. Instead, as a product of his own frustrations and rightful indignations about the black experience in 1960’s America, Benjamin, of his own accord, became certain that there was going to be a race war in the United States. These ideas about the world hardly resembled an indoctrinated, cogent

belief system, but rather formed a few loose strands of ideas that Benjamin clung to in order to organize his life.

## **B. Should Have Resisted the Indoctrination?**

Even if one concludes that the offender was in fact indoctrinated, no significant mitigation or defense is appropriate if the offender could reasonably have been expected to have resisted the indoctrination.

*Q2. Could we have reasonably expected the offender to have avoided or resisted the indoctrination? Where the offender volunteered for indoctrination, could we have reasonably expected the offender to have anticipated the ideology's propensity for criminality?*

In answering this question, the decision-maker might inquire into such factors as: How old was the offender at the time of the indoctrination? Had the offender developed an authentic self before the indoctrination process? Did other similarly situated persons successfully resist the same indoctrination process? Was the source of the indoctrination a planned and organized indoctrination program, an informal ad hoc program, and inadvertent effect, or simply exposure to the existing environment? If the offender volunteered for the group or program doing the indoctrination, did he or she know that the indoctrination would lead to the offense? Was the offender more vulnerable than others to indoctrination for reasons that were not his fault?

The issue hinges on two distinct features of indoctrination: severity and deceptiveness. To the first point, indoctrination is most powerful and difficult to resist where the indoctrinator employs rigorous and methodical techniques to ensure that the subject is wholly and unquestioningly committed to the indoctrinator's agenda. To the second point, indoctrination is particularly hard to avoid where the subject does not know she is being indoctrinated because her indoctrinator is deceptive in his recruiting and reeducation methods. In regards to severity, one must appreciate that indoctrination is not an on-off switch but rather a continuum of depth and control. Even after one is initially indoctrinated, a well-organized program will continue to work to deepen and "consolidate" the indoctrination. Psychologist Robert Baron has pointed to three stages: the "softening-up stage," the "internalization stage," and the "consolidation stage."<sup>116</sup> Each phase features powerful mechanisms of control that increasingly diminish the subject's autonomy and lucidity, rendering him increasingly unable to resist his indoctrinator's demands or question his indoctrinator's motives.

The *Vlok* case presents us with a strong example of the first aspect of this indoctrination inquiry. Every influence and institution Adriaan Vlok encountered in his life in apartheid South Africa, indoctrinated him to believe in a very particular, racialized vision of the world. Educated in a state run school with a curriculum designed to spread the State's notion of white supremacy, raised by parents who themselves were avowed segregationists, and trained by a military that taught him to quash any insurrection in the black community, Vlok's understanding of the world was highly warped by his bigoted and culturally homogenous upbringing. Like many other young white men during apartheid, Vlok was singled out as the

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<sup>116</sup> Robert S. Baron, *Arousal, Capacity, and Intense Indoctrination*, 4 *Personality and Social Psychology Review* 238, 240-242 (2000).



ideal subject of a state-run indoctrination program geared towards promoting apartheid. To resist would have been extremely difficult as every feature of his life was operating in service of the inculcation of these ideas, and there was no inclination that any of these hateful beliefs were wrong. With his adolescence shrouded by a monolithic way of seeing the world, and deprived of access to information with which he could challenge these deeply ingrained views, it was difficult, if not impossible, for Vlok to resist indoctrination.

Conversely, the *Seromba* case provides an example of a person who should have been able to resist indoctrination given his age, education, and religious convictions as well as the significant degree of separation between him and his indoctrinators. At the start of the Rwandan genocide, Seromba was a priest who served as a parish leader for a mixed congregation of Hutus and Tutsis, so he initially rejected the extreme and violent claims made by Rwandan authorities. One could easily conclude that Seromba should have resisted the indoctrination, given his sophistication and strongly grounded beliefs. Unlike Vlok, who was young and naïve at the time of his indoctrination, Seromba possessed deeply-rooted moral convictions and significant knowledge about the world that should have enabled him to disregard the violent messages of the Hutu officials. Furthermore, while Vlok faced his indoctrinators every day in all facets of his life, Seromba only encountered his indoctrinators as periodic voices over the radio. Though the messages of the Hutu authorities were far more intense and panicked than those of the apartheid officials with whom Vlok dealt, they also called for much more extreme commitments that should have encouraged Seromba to second guess their legitimacy. Vlok, as with most whites, did not know the people who lived on the other side of Apartheid as individuals. But Seromba knew many of his victims on an intimate basis: he heard their confessionals, officiated their weddings and baptized their babies. Ignoring his education, his religious convictions, and his earlier skepticism, Seromba's inability to resist indoctrination seems indefensible.

The second analytic requirement noted above introduces the special problem of the offender who is in fact effectively indoctrinated but who volunteers for the program or group in which the indoctrination occurs. A compelling example of this type of indoctrination is the case of Leslie Van Houten, who as a teenager was indoctrinated by Charles Manson to become a part of the Manson Family. Prior to her indoctrination, Van Houten had lived a relatively peaceful life in a bucolic southern California community with intensely religious parents. She found her way to San Francisco in the summer of 1968, where she met a group of young people known as the Manson Family. These individuals immediately recognized her as a vulnerable young person and coaxed her to join their ranks. Naïve and seeking a sense of belonging, Van Houten was enticed by their message of a community founded on love, music, and the worshipping of Charles Manson, a man widely regarded to have Christ-like powers. At no point during her indoctrination was any mention made of violence, race wars, or any of the criminal behavior that would come to define the group's mission. By the time Manson changed his tune and began to suggest the murder of Hollywood elites, Van Houten had been with the group for over a year and was so smitten by Manson's charisma and convinced of the righteousness of his view of the world, that she could not resist his commands. Her experience is the archetypal example of indoctrination by deception as she had no idea of the sinister intentions of the group until it was too late.<sup>117</sup>

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<sup>117</sup> This narrative is drawn from: Ivor Davis, *Will California Ever Release Manson 'Family' Member Leslie Van Houten?*, L.A. MAG. (Aug. 6, 2019) (available at <https://www.lamag.com/citythinkblog/leslie-van-houten-manson->

On the other side, an incident of non-deceptive voluntary indoctrination would be the case of Cragg Hardaway, who left the safety and comfort of his home in order to join a street gang, knowing of its criminal tendencies. Hardaway did not join the gang seeking community or emotional support; instead he joined the organization precisely because he was enthralled with the prospect of the social status and material gains that would come as a result of his association with this criminal element. His actions seem to indicate that he would have committed crimes on the group's behalf before even becoming a full-fledged member. Unlike Van Houten, Hardaway would likely not pass this second criteria because he had direct knowledge of the group's criminality but volunteered to join it anyway. He could have easily avoided or resisted the indoctrination, but instead sought it out as a means of attaining full-fledged membership in what he perceived as a powerful group.

### **C. Indoctrination Caused Offense?**

Even if an offender is indoctrinated, and even if he or she could not reasonably have been expected to have avoided or resisted the indoctrination, the offender cannot persuasively claim a defense or significant mitigation for criminal conduct unless the indoctrination did in fact cause the offense.

*Q3. Might the offender have committed the offense even if he or she had not been indoctrinated, and did the offense naturally and logically follow from the indoctrinated beliefs and values?*

In making these assessments, a decision-maker might inquire, for example, into whether the offender committed some other offenses that did not naturally and logically follow from the indoctrinated beliefs and values? Or whether the nature of his or her pre-indoctrination beliefs and values played a significant role in causing the offense?

A fairly clear-cut case in which the indoctrination seems to have caused the offense is that of Kenton, where young Lance Kenton was raised to be an unquestioning devotee of Charles Dederich, leader of the rehabilitation cult Synanon. Kenton became convinced that he had to do everything he could to ensure the continued success of Synanon. The crime for which Kenton was ultimately charged – the placement of a rattlesnake in the mailbox of a lawyer who was suing Synanon – was engineered entirely by Dederich and was aimed exclusively at promoting the continued existence of the group. Kenton committed the crime at age 20 after ten years of intensive indoctrination that led him to believe that the word of Dederich was unquestionable and the world outside of Synanon was terrifying and dangerous. Kenton's indoctrination was thus a clear but-for cause of his ultimate crime. Without having been so strongly influenced by Dederich and his peers at Synanon, Kenton likely never would have attempted to murder another person.

On the other hand, a person may well be highly indoctrinated but their crime may be one that does not logically follow from the indoctrinated system's beliefs and values. Imagine if

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[family/](https://www.abcnews.com/US/charles-manson-follower-leslie-van-houtens-role-1969/story?id=38424202)); Emily Shapiro, *Charles Manson Follower Leslie Van Houten's Role in 1969 Killings*, ABC NEWS (Apr. 15, 2016) (available at <https://www.abcnews.com/US/charles-manson-follower-leslie-van-houtens-role-1969/story?id=38424202>); Sophie Gilbert, *The Real Cult of Charles Manson*, THE ATLANTIC (Nov. 20, 2017) (available at <https://www.theatlantic.com/entertainment/archive/2017/11/the-real-cult-of-charles-manson/546206/>); CHARLES WATSON, *CEASE TO EXIST: A FIRSTHAND ACCOUNT OF INDOCTRINATION INTO THE MANSON FAMILY* (2019).

Tennessee, Volk, or Kenton committed rape or stole property of another for their own purposes. We would hardly think their indoctrination would qualify them for a defense or mitigation.

#### **D. Should Have Reverted before Offense?**

Even if the offender has been indoctrinated, could not reasonably have been expected to have resisted or avoided the indoctrination, and the indoctrination caused the offense, the decision-maker nonetheless may conclude that in some situations the offender should have rejected the indoctrinated beliefs and values on their own before ever reaching the point of having to decide whether to commit the offense.

*Q4. After being indoctrinated, could we have reasonably expected the offender, before the time of the offense, to have rejected on his or her own the crime-causing aspects of the indoctrination?*

Here, it is useful to examine such factors as: How much of a delay was there between the indoctrination and the offense? Was the indoctrination being continually reinforced during the delay? Was the offender aware of persons who did not share the indoctrinated views? Could the offender interact with such people? How old was the offender at the time of the offense? Had the offender reached full adult maturity? Did the message/ideology of the indoctrination program shift after the offender voluntarily joined? Or, did the message/ideology of the program turn out to be different from the program that the offender voluntarily joined?

An example of a case in which the offender could not reasonably have been expected to revert on their own as they got older is that of *Heck*. Alfons Heck was indoctrinated as a child in Nazi Germany, and nearly everyone in his life was in support of Hitler's party. Throughout his adolescence, at no point did Heck have the opportunity to reject the received wisdom he had inherited from his family members, classmates, schoolteachers, Hitler Youth leaders, and media personalities. Reverting from this monolithic, all-consuming vision of the world as he got older would have been very difficult if not impossible.

In contrast, it may commonly be the case that an offender is genuinely indoctrinated but with the passage of time – as they grow older and more mature, as they are exposed to contrary beliefs, or as they come to see that the indoctrinated ideology leads to criminality – we would expect them to abandon the indoctrinated beliefs and values on their own. Consider the case of Kat McDonough who, at age 18, entered into an overwhelming, unhealthy relationship with an older man. As the relationship became increasingly abusive, and as it became increasingly clear that it was leading to violence against others, one might have expected that McDonough would have started reevaluating the value system her boyfriend had encouraged her to adopt. But she failed to do so, even as her mother encouraged her to be wary of the man's propensity for violence. When the older man commanded her to find a second woman for him to abuse, McDonough worked diligently over several months to fulfill his wish, even though she knew his intention was to hurt the woman. Her continuing exposure to the outside world in her day to day life, her ample avenues of escape, and her increasing knowledge of her boyfriend's dangerously violent tendencies made her failure to resist his indoctrination all the more implausible.

A twist on the scenario in which the subject might abandon her indoctrinated beliefs is that in which the subject has voluntarily joined a group that appears deceptively pro-social only to find out that the group harbors truly dark, criminal aims. If such a subject were to pass Question 2 on the grounds that she was so thoroughly deceived by the group that she could not have resisted indoctrination, or that the group's antisocial aims were not at all clear at the time of indoctrination, she would be up again for analysis in this section in order to assess whether he should have abandoned the indoctrinating beliefs once she knew they were nefarious.

To follow our analysis from Question 2, in the case of Van Houten, who was deceptively indoctrinated into the Manson Family under the guise of love, peace, and music, Question 4 would ask whether Van Houten should have rejected Charles Manson's beliefs once she discovered that he was plotting murders and trying to instigate a race war. While Van Houten could argue that she was so in love with Manson, and so sedated by near constant consumption of drugs, being asked to brutally kill a celebrity likely would have shocked even the most unhinged member of the Manson Family. This is particularly true for Van Houten who was raised in a devoutly religious family and who was attracted to Manson initially precisely because he advocated for love, peace, and an end to war.

In fact, Van Houten testified after the murder for which she was charged as a conspirator that she felt immense trepidation when she was asked to hold down the female victim while the victim's husband was being stabbed to death. Van Houten then hid in the hallway, unable to bring herself to participate in the murder of the wife. Such a strong, visceral reaction to the violent deaths of these two individuals would indicate that Van Houten was uncomfortable with the idea of murder long before the act took place and perhaps as far back as Manson's first mention of his plan. In light of all of these reasons, we would expect Van Houten to reject Manson's violent vision, motivated by her deeply embedded conviction that killing another person is wrong.

#### **E. Despite Indoctrination, Should Have Resisted the Offense?**

Even if an offender could not reasonably have been expected to have resisted the indoctrination or reverted on their own after indoctrination, and even if the indoctrination caused the offense, the offender ought not be entitled to a defense or significant mitigation if, when immediately faced with commission, we could have reasonably expected the offender to have resisted committing the offense, especially if it is a serious offense.

*Q5. At the time of the offense, could we have reasonably expected the offender to have resisted committing the offense despite the indoctrination?*

The decision-maker ought to examine both the seriousness of the offense and the effectiveness of the indoctrination: What was the seriousness level of the offense? What was the level of success and the depth of the indoctrination? Does the offender genuinely believe that what he is doing is good for the victim? Is good for society? (Such a belief probably ought not provide the basis for a complete defense. The offender cannot substitute his notion of what is good and desirable for society's. But such a belief may make the offender less blameworthy than the similarly-situated offender who commits the same offense without such a belief in the goodness of his offense conduct.)

A strong example of an individual who could not have resisted commission of the offense despite indoctrination is Rachel Jeffs whose kidnapping and child neglect crimes occurred directly as a result of her religious indoctrination. Having never known a world outside of FLDS, Jeffs' commitment to the group and her failure to disobey its doctrine seems in line with what is known about persons raised in groups with totalizing ideologies. Jeffs' failure to resist the crimes she ultimately committed is the product of a deeply ingrained understanding of the existential importance of every task undertaken in service of the community's family values.

In contrast, Hayashi is a case in which one could reasonably have expected the offender to have overcome the indoctrination to have resisted committing a horrendous offense. His desire to join the group seemed perfectly rational, and his overwhelming guilt and grief from injuring people in a car accident might well explain why he was so vulnerable to indoctrination by a religious sect in which one could cleanse one's sins in a glorious afterlife. But when faced with executing a sarin attack on hundreds of innocent people in a subway station,<sup>118</sup> he could reasonably have expected to have reevaluated his new ideology.<sup>119</sup>

## VII. A Proposed Statutory Formulation

If this analytic framework captures the important points in assessing an indoctrinated offender's blameworthiness, can these five inquiries be incorporated into a workable statutory provision? We believe so. Consider the following proposal:

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<sup>118</sup> Hayashi might also lose the defense under Q4: there was a substantial planning period between his initial indoctrination and commission of the offense during which the horrendous nature of the planned attack was obvious, thus one might conclude that he could reasonably have been expected to have rejected his indoctrination on his own. The closer the attack came, the clearer the enormity of the harm and the greater our expectations of him to stop. Hayashi could easily be seen as failing both Q4 and Q5. As this illustrates, an offender may lose a defense by failing to meet several, or all, of the five requirements.

<sup>119</sup> Similar is the case of Dominic Ongwen, who was kidnapped as a child and indoctrinated into becoming a child soldier in Uganda. It is not hard to understand how a boy could have been indoctrinated into becoming a ruthless warrior. But over more than a decade Ongwen rose ever higher in the chain of command. In time he became the man who was kidnapping children and raping girls. As a victim of this type of abuse, Ongwen seems to have been in a position to resist committing the offenses. See *The Prosecutor v. Ongwen*, ICC-02/04-01/15, (last updated October 2018); *Complicating Victims and Perpetrators in Uganda: On Dominic Ongwen*, JUSTICE AND RECONCILIATION PROJECT, (July 31, 2008), (available at <http://www.justiceandreconciliation.org/publications/field-notes/2008/complicating-victims-and-perpetrators-in-uganda-on-dominic-ongwen-fn-vii/>); Helene Cooper, *A Mission to Capture of Kill Joseph Kony Ends, Without Capture or Killing*, N.Y. TIMES, (May 15, 2017) (available at <https://www.nytimes.com/2017/05/15/world/africa/joseph-kony-mission-ends.html>).

## **Indoctrination as a Defense or Mitigation**

(1) Defense. A person is entitled to a defense if he or she:

(a) was indoctrinated by another to adopt beliefs or values that were not his or her own, [Q1]

(b) committed the offense because of such indoctrination, [Q3] and

(c) could not reasonably have been expected to have:

(i) resisted the indoctrination, or anticipated the ideology's propensity for criminality, [Q2]

(ii) before the time of the offense, rejected on his or her own the crime-causing aspects of the indoctrination, [Q4] and

(iii) at the time of the offense, resisted its commission despite the indoctrination. [Q5]

(2) Mitigation. A person who satisfies the requirements of subsections (1)(a) and (1)(b) but who fails to meet one or more of the requirements of (1)(c) may be eligible for a reduction of one offense grade if the jury finds that, while the person should have resisted or rejected as required by subsections (1)(c), it was readily understandable why the person failed to do so. Alternatively, upon such a finding the jury may recommend that the sentencing judge provide some lesser mitigation.

(3) Burden of Proof. The defendant shall have the burden of proving this defense or mitigation by a preponderance of the evidence.

*Indoctrination – (1)(a).* The proposal adopts a broad view of what may constitute indoctrination, which it can afford to do because of the very specific demands of the leader subsections. With this broad definition in (1)(a), we create space for a wide array of indoctrinating scenarios. The offender need not have been indoctrinated by a particular, identifiable individual or institution. In some circumstances, the subject may be drawn into a particular belief system by a charismatic leader,<sup>120</sup> but a personal relationship with the indoctrinator is not necessary. In cases of widespread, societal indoctrination, for example, a subject's unquestioning dedication to the ruling party emerges organically out of the litany of social institutions, such as schools and the state media, that serve as indoctrinating intermediaries between party leadership and everyday citizens.<sup>121</sup>

Account is taken of the actor's unique situation, not only in terms of the features of their indoctrination but also in terms of the unique tangible and intangible factors that differentiate one actor from another. As indicated in the above section, the locus of the indoctrination analysis is the character of the indoctrinated subject. In determining the existence of indoctrination, we must consider the degree to which the offender's indoctrinated self resembles their un-indoctrinated or de-indoctrinated self. To that end, unlike in the

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<sup>120</sup> See e.g., Frank Bell *Larry Layton and Peoples Temple: Twenty-Five Years Later* Considerations of Jonestown & Peoples Temple (Mar. 9, 2016) (available at [https://jonestown.sdsu.edu/?page\\_id=16973](https://jonestown.sdsu.edu/?page_id=16973)) (explaining that Layton's primary motivation throughout his criminal conduct was to prove his loyalty to Peoples Temple leader, Jim Jones).

<sup>121</sup> See e.g., Nico Voigtländer and Hans-Joachim Voth *Nazi Indoctrination and Anti-Semitic Beliefs in Germany*. 112 PNAS 26 (Jun 30, 2015) (explaining that Nazi schooling as well as radio and cinema propaganda were highly effective at modifying public opinions, attitudes, and beliefs); ALFONS HECK, A CHILD OF HITLER: GERMANY IN THE DAYS WHEN GOD WORE A SWASTIKA 2 (1985) (explaining that indoctrination of the youth in Nazi Germany began on the very first day of elementary school; "We swallowed our daily dose of nationalistic instruction as naturally as our morning milk.")

defense of duress, the actors' intangible features, such as his temperament, level of education, age, and upbringing might bear weight on the extent to which the beliefs that motivated his crime were truly his own.

The standard also implies a certain degree of intentionality in the indoctrinating process. Some person, group, institution, or force must be orchestrating the indoctrination with the intent to create an indoctrinated subject. The intent need not be so particularized as to hold a certain subject in mind during the indoctrinating process. Instead, it can be aimed loosely at a particular demographic. For example, while the Nazi Party did not design the Hitler Youth with the intent of indoctrinating a specific ten-year-old from the Rhineland, that specific child can still claim to have been indoctrinated by the Nazi Party through his involvement in the Hitler Youth.<sup>122</sup>

The intentionality requirement also prevents those cases where an individual radicalizes himself from being eligible for the defense. For example, Dylan Roof, the white supremacist who murdered nine black churchgoers in Charleston, South Carolina, could not claim to have been indoctrinated because, as he claimed, he read Wikipedia articles and news reports about instances of "black on white crime" that convinced him that a race war was necessary.<sup>123</sup> While these materials may have led to his becoming militant, they did not indoctrinate him because their authors' aims were not to make the reader a docile subject or to push him towards an avowedly racist ideological position; they were purely to inform. We are wary of incentivizing the adoption of criminally-inclined and morally offensive beliefs as a means of obtaining an affirmative defense, and feel that, as shown in the above example, the intentionality requirement curtails this outcome.

The intentionality requirement also distinguishes indoctrination cases from Stockholm Syndrome cases. Stockholm Syndrome manifests as a traumatic bond between hostage and captor where the hostage's desire to survive supersedes his urge to loathe the person threatening his life.<sup>124</sup> Psychologists Dee Graham and Edna Rawlings have explained that the survival instinct is at the heart of the attachment in Stockholm Syndrome, particularly where the hostage feels sympathetic towards the captor out of relief that the captor is not going to kill him.<sup>125</sup> These seemingly incongruous positive feelings towards one's captor, though, are not necessarily reflective of a wholesale adoption of the captor's beliefs. Instead, the performance of unquestioning obedience is motivated largely by fear for one's life, fear of upsetting the captor, and fear of inciting further mistreatment rather than by deep inculcation of new ideologies and the supplanting of a pre-hostage self.<sup>126</sup> Thus, any offense committed because of Stockholm Syndrome might more appropriately be examined under a duress defense than under indoctrination.

A final issue that may arise in the context of this (1)(a) analysis is the offender's voluntary participation in the indoctrination. Where an offender has freely joined a group with known criminal proclivities, this voluntary association can weigh heavily on the question of his indoctrination. For example, a person who joins a street gang, knowing the extent of its criminal

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<sup>122</sup> *Id.* at 7.

<sup>123</sup> Rebecca Hersher, *What Happened When Dylann Roof Asked Google for Information About Race*. NATIONAL PUBLIC RADIO <https://www.npr.org/sections/thetwo-way/2017/01/10/508363607/what-happened-when-dylann-roof-asked-google-for-information-about-race> (Jan. 10, 2017).

<sup>124</sup> DEE GRAHAM AND EDNA RAWLINGS *LOVING TO SURVIVE: SEXUAL TERROR, MEN'S VIOLENCE, AND WOMEN'S LIVES* 59 (1994).

<sup>125</sup> *Id.* at 60.

<sup>126</sup> *Id.* at 212.

practices, would likely not be eligible for the defense. His choice to join the gang might serve as an indication that even before he was indoctrinated, he was willing to offend on their behalf, and he believed in their criminal aims. Thus, there was no change in his belief system as a result of indoctrination. The same cannot be said, however, where an offender has freely joined an ostensibly non-violent, licit organization, seeking some sort of enlightenment, commitment to social justice, or simply love and community, and over time, the group gradually turns towards criminal behavior. Within this context, the jury should take seriously the persuasive social and psychological effects that membership in a totalizing group can have, understanding that an organization with wholly licit ends can become criminal over time, dragging along even its most law-abiding members with it. Here, the subject of indoctrination undergoes an enormous change in beliefs such that his earlier dedication to the group's prosocial aims are leveraged to generate dedication to the group's later nefarious goals. Thus, with the exception of those who voluntarily join notoriously criminal groups, a person's choice to be indoctrinated does not necessarily prevent him from receiving the defense.

*Causal Connection – (1)(b).* Section (1)(b) of the defense provides that the offender must have committed the offense because of the indoctrination. That is, the offender having been indoctrinated must have been a precursor to the offense but for which the result in question would not have occurred. This is primarily an inquiry that assesses (1) the strength of the ideological connection between the crime and the offender's indoctrination, and (2) whether the offense would have been in the purpose or contemplation of the actor had he not been indoctrinated.

If the offender was found not to be indoctrinated under the first prong of the statute, a jury need not proceed further as the defense is *per se* inapplicable to the offender. There is also a temporal limit on the (1)(b) analysis such that even if the offender can be said to have been indoctrinated at some point, he will not qualify for the defense if he was not fully indoctrinated at the time of committing the offense. Any post hoc psychological effects of indoctrination that emerge once a person has been de-indoctrinated will not be accepted as a causal factor in this analysis.

In examining the ideological relationship between the offender's indoctrination and the offender's crime, a jury may look at the extent to which the crime was in service of some larger goal that the offender adopted through indoctrination and whether the indoctrinator ordered the offender to commit the offense. Such a connection need not only be found in those cases where the crime was in pursuit of loftier, ideological goals; the crime can simply be in service of sustaining the group's adherents. For example, crimes to promote the financial survival of an indoctrinating organization or crimes attendant to the management of daily life within such a group would be sufficiently connected to qualify.<sup>127</sup> If the connection between the indoctrination and the crime appears attenuated, however, the offender likely will not be granted a defense.

In assessing whether the offender might have committed the offense even without the indoctrination, a jury might look towards the criminogenic factors in the offender's life, as well as her psychological health, prior to indoctrination. For example, if an offender claim to have been indoctrinated by their "rotten social background," as in Benjamin, even if some kind of

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<sup>127</sup> See e.g., Hillel Aron, *The Story of This Drug Rehab-Turned-Violent Cult is Wild, Wild, Country-Caliber Bizarre*, L.A. Times Magazine (Apr. 23, 2018) (available at <https://www.lamag.com/citythinkblog/synanon-cult/>) (explaining members of the Synanon cult committed theft, insurance fraud, and tax evasion in order to financially sustain the group).



indoctrination could be shown, a defense or significant mitigation would not be appropriate if it appears that the person would have committed the crime anyway, because of the highly criminogenic factors that shaped their upbringing. The idea is not to disregard the hardships these individuals have faced, but rather to distinguish their situations from those who have been intrusively and systemically indoctrinated to commit the offense, so as to dilute the parameters of the defense.<sup>128</sup>

*Reasonable Expectations – (1)(c).* Section (1)(c) of the defense functions as a limiting principle, constraining the defense by having the jury make a normative assessment of whether, taking all aspects of the offender’s capacity and situation into account, we could have reasonably expected the offender to have avoided the offense through any of three different paths: resisting the original indoctrination, rejecting the indoctrinated beliefs and values on their own before the time of the offense, and resisting commission of the offense despite the indoctrination. Broadly, the three subsections of (1)(c) provide a timeline of the indoctrination process, starting with the offender’s recruitment into the group and ending with her commission of the crime.

*Resisting Indoctrination – (1)(c)(i).* In determining whether the offender should have resisted the indoctrination under subsection (1)(c)(i), the most important factor may be the strength of the techniques employed on the subject. This analysis is best conducted by assessing the extent to which the offender was isolated from friends and family, deluded by strict information control, and subjected to a flurry of emotional stimuli intended to disorient, exhaust, and confuse. Often, the indoctrinator uses physical or sexual violence, or threat of such violence, to heighten the stress levels of the recruit, cultivating pronounced suggestibility. If evidence is presented establishing the forceful use of these coercive techniques, the reasonable expectation that the subject could have resisted indoctrination should be lowered.

Subsection 1(c)(i) is most likely to provide difficulty for an offender who has been manipulated by an active indoctrinator – that is, where the offender was indoctrinated after childhood by a particular group or individual, rather than having been raised in a totalizing, insular community, family, or state. Persons in the latter category may have less of an opportunity to resist indoctrination because there was never anything available to them other than the indoctrinated state.

*Rejecting Crime-Causing Beliefs on Their Own – (1)(c)(ii).* Subsection (1)(c)(ii) asks whether the subject could have rejected on her own the crime-causing aspects of the indoctrination before the time of the offense.<sup>129</sup> The degree to which the subject has internalized the group’s aims or motives is inversely proportional to her ability to independently reject the criminality of the group prior to the offense. Loyalty and adherence to the group’s doctrine can become a means of survival that over time, subtly inculcates the group’s ideas into the subject’s mind so that they appear to be naturally occurring.<sup>130</sup> In this case, the subject may find it difficult to reject her indoctrinator’s crime-causing beliefs because she recognizes such beliefs as originating from herself, and thereby entirely her own. If this process happens quickly, intensely, and without any sort of rupture in the form of access to conflicting views, relief from social pressure, or freedom from isolation, it is highly challenging for the subject to reject her newly learned belief system.

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<sup>128</sup> David L. Bazelon, *The Morality of the Criminal Law*, 49 S. Cal. L. Rev. 385 (1975).

<sup>129</sup> Baron *supra* note 120 at 242.

<sup>130</sup> *Id.* at 244.

Rejecting crime-causing beliefs also requires the ability to anticipate them and to cast a normative judgement on them as being anti-social and condemnable. This jump can be difficult to make for those who have completely lost the capacity to think for themselves or to imagine their group's belief system through the lens of an unaffiliated party. Thus, we would not imagine those indoctrinated to believe that non-believers are all sinners and destined for hell, to reject the criminal aspects of their beliefs as they would feel no compulsion to obey the justice system or to take seriously an outsider's perspective on their behavior. We may, however, expect rejection of such views in cases where the individual has spent significant unsupervised time and has been exposed to the group's mythmaking process, such that he might question the legitimacy of its views. Ultimately, the less he conceptualizes himself as being part of the group, the more capable the subject becomes of independent thought or resistance.

Resisting Commission – (1)(c)(iii). Subsection (1)(c)(iii), which assesses whether the subject, despite her indoctrination, should have resisted commission of the offense, asks both how deep and committed she was to her indoctrinated values at the moment of the crime as well as how serious the crime was. To the former point, a subject who has established herself as a member of the group via earnest and zealous commitment to the group's belief system, is less likely to resist commission of the crime.<sup>131</sup> Such a totalized subject would find it quite difficult to resist any command from her indoctrinator because she believes such orders to have divine origin, and her reasoning has been so warped that she can rationalize even the most heinous crime as being in the service of her group's more important project. Despite having been powerfully manipulated, the subject still believes herself to be wholly in charge of her own reasoning and decision-making capacity such that she comes to see the group's aims not only as righteous and necessary, but as her own. It would therefore be unreasonable for the jury to expect that an individual with such a committed belief system could disobey her indoctrinator's wishes.

The decision-maker should also consider the severity of the crime. Where the crime involves the loss of life or a disregard for the value of human life, we can reasonably expect an indoctrinated offender to be more hesitant and to at least reconsider the appropriateness of the conduct. Only the most intense, effective forms of indoctrination would be able to convince an offender to go through with crimes of a gruesome nature or characterized by extreme moral turpitude.

Perhaps ironically, evidence of an offender's doubt, repulsion, or skepticism about commission of the offense or about the indoctrinated beliefs motivating it may hurt the offender's chances of a defense or mitigation. Evidence that the offender had some awareness of the gross impropriety of her act may lead jurors to conclude that we could more reasonably have expected this indoctrinated offender to resist than one who shows no such awareness.

*Application of the Defense.* The jury should proceed through the defense requirements in order from (1)(a) to (1)(c)(iii). A person who does not meet the criteria established in section (1)(a) is *per se* ineligible for the defense. A person who meets the requirements in section (1)(a) but who does not meet the requirements in section (1)(b) is also not eligible for the defense. That is, a person who was indoctrinated but whose crime is seriously attenuated from his newly adopted values or belief system is ineligible for the defense. Occasionally, the facts suggesting ineligibility under these two subsections may overlap. For example, an allegedly indoctrinated

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<sup>131</sup> *Id.*

member of a radically non-violent cult would have no claim to the defense if he assaulted someone, while continuing his membership in the cult, as his violence would clearly demonstrate that he had failed to fully internalize the group's most cherished beliefs and/or would demonstrate that any indoctrination that had occurred was not the cause of his violent offense.

If the offender is found to have been indoctrinated, and to have committed the crime as a direct result of the indoctrination, the jury should proceed to the section (1)(c) inquiry, asking what could reasonably have been expected of the individual under the circumstances. If the jury determines that the offender should have resisted the indoctrination, or on their own subsequently rejected the indoctrinated ideology, or resisted commission of the crime despite the indoctrination, but did not, then the offender is again ineligible for a defense.

However, if the jury concludes that it was readily understandable why the offender failed in what was reasonably expected of him under subsection (1)(c), a mitigation of some sort remains possible. The jury might conclude, "Though the offender should have behaved otherwise, we can appreciate why he failed to do so." This analysis would look to the key decisional moments of the offender's indoctrination and subsequent criminal behavior with an eye to the totality of circumstances influencing his thoughts and behaviors at those junctures. Where the external, indoctrinating influence on the offender is very intense and intrusive, the jury might consider evaluating his actions as less blameworthy, and where such an influence is less severe, the jury might deem his actions more blameworthy. In the former case, the offender may be eligible for a reduction in liability of one offense grade – typically half the maximum sentence – or, if the jury decides, some lesser mitigation. The reasoning here is that if an offender falls just short of complete blamelessness on the continuum of blameworthiness, their appropriate degree of liability and punishment is something just short of a complete defense.

*Logistics of the Defense.* Section (3) of the defense provides that the burden of proof is on the defendant, and the standard of proof is a preponderance of the evidence. We do not narrow this defense to particular crimes or to particular stages of the criminal proceedings. The defendant may plead the defense affirmatively at any time.

Some people may be concerned that providing an indoctrination defense would invite too many jury acquittals in borderline cases. But this concern may fail to appreciate two points. First, as the Article has shown, one can construct an indoctrination defense formulation that has a series of explicit limitations and exclusions. It is not a completely open-ended defense that leaves the issue to the unguided discretion of the jury. Second, whether one approves of it or not, jurors do in fact have the power to nullify – that is, the power to return a not-guilty verdict even if the technical law on the books provides no defense in the case. This means that providing the proposed indoctrination defense may actually avoid improper acquittals rather than create them. A jury faced with an offender who they see as of significantly reduced blameworthiness because of indoctrination may choose the reduced-offense-grade option provided by the indoctrination formulation rather than enter a nullifying verdict of acquittal.

### **VIII. Indoctrination as a Third Category of Excuse**

We have suggested that the recognition of an indoctrination defense is essential for a just system of criminal liability, but we have also conceded that such a recognition represents a dramatic shift in scope of criminal law's inquiry: in the cases that satisfy the requirements of

the defense, the criminal law is crossing an important red line by taking account of how an offender came to hold the beliefs and values that motivated the offense.

Having said that, however, it is nonetheless true that an indoctrination defense has a logical place in criminal law's existing conceptual framework. Specifically, the indoctrination defense proposed here operates to the same effect as other excuse defenses, which, like excuse defenses, contrasts sharply with purpose and operation of justification defenses.<sup>132</sup> That is, while the indoctrination defense is new and different, it is fully analogous to and fits well within the existing category of excuse defenses, and in contrast to justification defenses.

Justification defenses, like lesser evils, self-defense, and law enforcement authority, tell the community *ex ante* the criminal law's rules of conduct. Justifications authorize actors to do that which would otherwise be an offense. Assaulting another person is normally a crime, except when done as a necessary and proportionate means of defending oneself against an unlawful attack. Justification defenses as a group represent an exception to the offense definitions in defining prohibited conduct (or required conduct).

Excuse defenses, in contrast, operate *ex post* to adjudicate whether a violation of the *ex ante* rules of conduct deserves liability and punishment. Justification defenses essentially decriminalize certain acts, while excuse defenses exculpate certain actors.

Traditionally, there have been two kinds of excuse defenses: mistake excuses and disability excuses. The first group, such as reliance upon an official misstatement of law or mistake as to justification, are cases where an actor is excused because his mistake is a reasonable one under the circumstances. In the second group, disability excuses, such as insanity, involuntary intoxication, or duress, the actor is excused despite acting very unreasonably, because he or she suffers some cognitive or control dysfunction sufficiently severe in its effect to render the offender blameless for the offense conduct.

As noted previously in Part I, the indoctrination defense does not qualify as a disability excuse. At the time of the offense, the offender may be suffering no cognitive or control dysfunction yet nonetheless may be entitled to the indoctrination excuse. In broad perspective, the indoctrination defense operates in the same way that other excuse defenses do: it provides *ex post* exculpation even though the actor's conduct violates the *ex ante* rules of conduct. Thus, the indoctrination defense represents a third kind of excuse: one based upon neither a reasonable mistake nor existing dysfunction at the time of the offense but rather upon the actor's lack of responsibility for the beliefs and values that motivated the offense.

Appreciating the place of the indoctrination excuse in criminal law's conceptual framework has important practical implications.<sup>133</sup> For example, the rules of conduct, as in justification defenses, have the general public as their audience and therefore benefit from clarity and objective criteria. In contrast, the principles of adjudication, including excuse defenses, typically have as their audience decision-makers such as judges and juries who can be specially trained or instructed and can properly apply more complex and subjective standards rather than objective rules. Thus, the open-ended standards used in the proposed statutory formulation above might be unsuitable in a justification defense or offense definition but are entirely appropriate when used in the excuse defense. Indeed, most other excuse defenses,

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<sup>132</sup> Paul H. Robinson, *Structure and Function in Criminal Law* 68-125 (Oxford 1997).

<sup>133</sup> *Id.* at 143-181.

both those of the reasonable mistake sort and those of the disability sort, have similarly open-ended standards.<sup>134</sup>

Seeing that an indoctrination defense fits comfortably within the category of excuse defenses also has important practical implications in the operation of criminal law doctrine. For example, note that an actor can never lawfully resist justified aggression, such as a lawful arrest, but can lawfully resist excused aggression, such as a psychotic aggressor. Thus, because indoctrination is an excuse defense, one can lawfully resist the attack of an indoctrinated aggressor even though that aggressor will have a complete defense to their aggressive conduct. Similarly, once we recognize an indoctrination defense and understand it to operate as an excuse, then we are in a better position to impose criminal liability on the indoctrinator for the indoctrinated person's offense. Model Penal Code section 2.06(2)(a), for example, holds a person legally accountable for the conduct of another when "he causes an *innocent or irresponsible person* to engage in such conduct."<sup>135</sup>

## IX. Summary and Conclusion

By failing to provide a defense or mitigation for an indoctrination-induced offense, current criminal law fails in its obligation to do justice, which frustrates both retributivist and utilitarian crime-control goals. The availability of judicial sentencing discretion is insufficient to avoid the problem because such discretion is not always available, it is too dependent upon personal judgment of the individual judge rather than community views, and it is likely to produce disparate results in similar cases, making criminal liability depend upon the defendant's good or bad luck in the judicial assignment, rather than upon his crime and blameworthiness. Reliance upon judicial discretion also ignores the need to develop an analytic framework to control the availability of a defense, a project well beyond the scope of sentencing or appellate judges adjudicating a single case.

Admittedly, providing a defense or mitigation for an indoctrination-induced offense could undermine criminal law's foundations if it means having to constantly inquire into how an offender came to have the beliefs and values that contributed to the offense. This danger becomes significantly more acute once one appreciates that powerful forces of manipulation and influence exist in a wide variety of common situations, not just in the extreme and unusual case of POW brainwashing. It would be unworkable if the criminal law now had to investigate how offenders came to hold their crime-inducing beliefs and values.

The Article has shown, however, that it is possible to define specific liability criteria for an indoctrination defense/mitigation by which a decision-maker can effectively identify the special indoctrination cases in which the offender is truly blameless or has significantly reduced blameworthiness. We suggest an analytic framework that focuses on five points of inquiry: Was the offender in fact indoctrinated by another to adopt beliefs and values not his or her own? Could the offender have reasonably been expected to have resisted the indoctrination? Did the indoctrination cause the offense, or might the offense have occurred even without the indoctrination? Should the offender at some time prior to the offense have recovered from the indoctrination effects on their own? And, faced with the decision to commit the offense, could we reasonably have expected the offender to have resisted commission despite the

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<sup>134</sup> *Id.* at 196-207.

<sup>135</sup> Model Penal Code §2.06(2)(a) (emphasis added).

indoctrination? An offender who clears all of these hurdles deserves a complete defense. Even an offender who clears most hurdles and barely misses the second, fourth, or fifth hurdle, may deserve a significant mitigation, such as a reduction of one offense grade.

It is true that recognizing a defense or formal mitigation for an indoctrination-induced offense would break new ground in modern foundations of criminal liability. It would be the first time in which a (sane) offender would not be held responsible for the beliefs and values that he holds. However, this historic broadening of the criminal law's liability principles ought to be accepted if one sees value in imposing liability only on those who deserve it and only in proportion to their blameworthiness, as both retributivists and crime-control utilitarians ought to support.