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# Losing Your Head in the Washer – Why the Brainwashing Defense Can Be a Complete Defense in Criminal Cases

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# **Losing Your Head in the Washer – Why the Brainwashing Defense Can Be a Complete Defense in Criminal Cases**

**Rebecca Emory\***

## Introduction

“Brainwashing” is not a new concept, not even in the legal world. In the field of psychology, the term has been used over time in the studies of prisoners of war and religious cults.<sup>1</sup> In the field of law, individual criminal defendants have tried, though unsuccessfully, to use brainwashing as a criminal defense.<sup>2</sup> Nevertheless, it is still disputed whether brainwashing should play a role at trial and, if so, how big a role this should be. Some have proposed that brainwashing should only be used as a mitigating factor in criminal cases.<sup>3</sup> However, when examined against other defenses, such as duress and insanity, an argument can be made that brainwashing could be as successful and complete a defense to a crime as these other defenses.

Furthermore, an argument can be made that a potential brainwashing defense should fall, though disputed, under the insanity defense. Both defenses have similarities. Brainwashing can be categorized as a mental defect or disease and it can be argued that the defendant cannot distinguish between right and wrong when he or she is committing the act.<sup>4</sup> Like insanity, brainwashing should also be categorized as an excuse and not a justification for committing a crime. The difference between a justification and an excuse is crucial. Though a defendant is acquitted in both instances, “claims of excuse concede that

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\* J.D., Pace University School of Law, 2010.

1. Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded (“Brainwashed”) Defendant*, 63 MINN. L. REV. 1, 1 (1978-1979).

2. *See, e.g., United States v. Hearst*, 412 F. Supp. 863 (N.D. Cal. 1975).

3. *See Ida-Gaye Warburton, The Commandeering of Free Will: Brainwashing as a Legitimate Defense*, 16 CAP. DEF. J. 73 (2003).

4. James Dao, *Mental Health Experts Call Sniper Defendant Brainwashed*, N.Y. TIMES, Dec. 11, 2003, at A38.

the act is wrongful, but seek to avoid the attribution of the act to the actor.”<sup>5</sup> For example, a crime committed in self-defense is “both legally and morally correct” and is therefore deemed a justification.<sup>6</sup> However, an excuse “is not justified, since it should not be encouraged, but is still exempt from criminal liability due to society’s understanding of the grave situation in which the actor has found himself.”<sup>7</sup> The courts do not concentrate on the specific act done by the perpetrator, but rather focus “on the circumstances of the act and the actor’s personal capacity to avoid either an intentional wrong or the taking of an excessive risk.”<sup>8</sup> Insanity is rarely used as a defense at trial because most juries are reluctant to believe it.<sup>9</sup> Yet, it is still an available defense. The brainwashing defense has not yet been successful; however, this does not mean it should not be included as a valid defense. The success rate of a defense should not guide the implementation of it. In the past, society and society’s morals have called for certain legal defenses based on scientific theories, even in circumstances where the scientific community was reluctant to acknowledge them.<sup>10</sup>

There have been two highly publicized cases presenting the brainwashing defense: the Patty Hearst case involving a kidnapped heiress who robbed banks with her kidnappers,<sup>11</sup> and the D.C. sniper case, involving a teenager claiming to be “indoctrinated” into killing random people from his car.<sup>12</sup> In both cases the defense failed for various reasons.<sup>13</sup> Nevertheless, these cases provide stepping stones for a potential brainwashing defense in the future. Defendants who have allegedly been brainwashed are often categorized as victims rather than perpetrators.<sup>14</sup> “Sentencing can promote beneficial effects for society by deterring future harms and incapacitating only those who would visit such harms upon the polity.”<sup>15</sup> Yet, in cases where the defendant has

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5. Mohammed Saif-Alden Wattad, *The Torturing Debate on Torture*, 29 N. ILL. U. L. REV. 1, 40 (2008).

6. Boaz Sangero, *In Defense of Self-Defence in Criminal Law; and on Killing in Self-Defence—A Reply to Fiona Leverick*, 44 NO. 6 CRIM. LAW BULLETIN 4 (2008).

7. *Id.*

8. Wattad, *supra* note 5, at 40.

9. Fox Butterfield, *Dispute Over Insanity Defense Is Revived in Murder Trial*, N.Y. TIMES, Mar. 4, 1996, at A10.

10. See Delgado, *supra* note 1, at 24.

11. *United States v. Hearst*, 412 F. Supp. 863 (N.D. Cal. 1975).

12. Mike M. Ahlers, *Jury Convicts Malvo of Sniper Murder*, CNN LAW CENTER, Dec. 19, 2003, <http://www.cnn.com/2003/LAW/12/18/sprj.dcspl.malvo.trial/index.html>.

13. See *infra* Part III.C-D.

14. Delgado, *supra* note 1, at 7.

15. O. Carter Snead, *Neuroimaging and the “Complexity” of Capital Punishment*,

raised the insanity defense, deterrence is shown to be ineffective.<sup>16</sup> Besides retribution, there is no basis for imprisonment.<sup>17</sup> This is also true in brainwashing cases. As in insanity cases, instead of putting brainwashed defendants behind bars, they should enter a treatment program for rehabilitation. Many states have implemented statutes that will place defendants, who have been acquitted by reason of insanity, in medical or psychiatric hospitals. For instance, the “detention under D.C. Code § 24-301(d) is not punitive but rather serves a two-fold purpose: (1) to protect the public and the subject, and (2) to afford a place and a procedure to treat and, if possible, to rehabilitate the subject.”<sup>18</sup> As a result, these statutes should also apply to brainwashed defendants.

This note will demonstrate how brainwashing can be a complete defense to a crime and therefore should be adopted into the Model Penal Code under the insanity defense. Part I provides a brief introduction to the background of brainwashing and the closely related Stockholm Syndrome. Part II analyzes two existing defenses, duress and insanity, in which scholars have tried to place the brainwashing defense. Further, Part II also provides an analysis of two famous cases, the Patty Hearst case<sup>19</sup> and the D.C. sniper case,<sup>20</sup> which have both introduced the brainwashing defense at trial. Part III presents the elements of the brainwashing defense and explains why the Model Penal Code should adopt it. In addition, Part III offers the existing criticism to the brainwashing defense. Finally, Part IV concludes that the criticisms are outweighed by the benefits of the brainwashing defense.

## I. Background

### A. *Brainwashing*

To understand the concept of “brainwashing,” it is necessary to understand where it comes from and what it actually means. Edward Hunter, a journalist for the Chicago Tribune, first introduced the idea of “brainwashing” in 1951.<sup>21</sup> In response to the behavior of American Prisoners in China and North Korea, Hunter tried to explain why these

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82 N.Y.U. L. REV. 1265, 1314 (2007).

16. *Id.*

17. *Id.*

18. *Collins v. Cameron*, 377 F.2d 945, 947 (D.C. Cir. 1967).

19. *United States v. Hearst*, 412 F. Supp. 863 (N.D. Cal. 1975).

20. *Mohammed v. State*, 934 A.2d 1059 (Md. Ct. Spec. App. 2009).

21. Warburton, *supra* note 3, at 76.

“American prisoners of war (“POWs”) converted to Communism . . . as a result of coercion.”<sup>22</sup> Though the threat of force was present, it was the isolation and mind techniques that were used to “brainwash” these prisoners.<sup>23</sup> Psychologist Robert Jay Lifton, through his studies of POWs, found that there were several steps in brainwashing.<sup>24</sup> Later psychologists reviewed Lifton’s work and characterized the steps as three distinct stages: “breaking down the self, introducing the possibility of salvation, and rebuilding the self.”<sup>25</sup> The first stage deals with self-doubt. The indoctrinator or agent attacks a person’s identity until the “breaking point” which leads to a complete “identity crises.”<sup>26</sup> During the second stage, the agent attaches the person’s feeling of guilt to his old belief system.<sup>27</sup> This leads to a “psychological rejection of his former identity.”<sup>28</sup> During the third stage, the agent rebuilds the person’s belief system and gives him a new identity.<sup>29</sup>

According to Lifton, “the process which gave rise to the name” brainwashing was “the official Chinese Community program of *szu-hsiang kai-tsao* . . . .”<sup>30</sup> Translated, “*szu-hsiang kai-tsao*” means “‘ideological remodeling,’ ‘ideological reform.’”<sup>31</sup> Today, common synonyms for “brainwashing” are “coercive persuasion” and “thought reform,” which define the “forcible indoctrination process designed to induce the subject to abandon existing political, religious, or social beliefs in favor of a rigid system imposed by the indoctrinator.”<sup>32</sup> Moreover, the indoctrinator achieves his goal by “isolation, physiological depletion, assertions of authority, guilt manipulation, peer pressure, and cognitive dissonance.”<sup>33</sup>

Although the American Psychological Association (“APA”) has declined to rule “brainwashing” as a scientific theory in regards to

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22. *Id.*

23. Julia Layton, *How Brainwashing Works*, HOWSTUFFWORKS.COM, May 10, 2006, <http://people.howstuffworks.com/brainwashing.htm/printable>.

24. See ROBERT JAY LIFTON, THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM – A STUDY OF “BRAINWASHING” IN CHINA 65-85 (1961).

25. Layton, *supra* note 23.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. LIFTON, *supra* note 24, at 4.

31. *Id.*

32. Delgado, *supra* note 1, at n.1.

33. *Id.* at 2.

religious cults,<sup>34</sup> there have been experts who believe that “brainwashing” is a legitimate theory.<sup>35</sup> In the legal field, judges have allowed experts to testify on the brainwashing defense, while still instructing the jury that it is a controversial theory.<sup>36</sup> Nevertheless, the split in the scientific community undermines the brainwashing theory and therefore also “undermines the validity and admissibility of research on this issue.”<sup>37</sup>

### B. *Stockholm Syndrome*

A mental disease that is widely recognized in the scientific community is the Stockholm Syndrome. In *United States v. Chancey*, expert Dr. Ochberg “described the ‘Stockholm Syndrome’ as a psychological phenomenon whereby a hostage develops positive feelings for his or her captor.”<sup>38</sup> Further, he states “that the theory was ten years old and in the developmental stage, but was accepted by a large percentage of psychiatrists who had been introduced to it.”<sup>39</sup> Although this syndrome was known beforehand, the name “Stockholm Syndrome” originated in 1973 after a bank robbery that took place in Stockholm, Sweden: “The two bank robbers held four hostages, three women and one man, for the next 131 hours. The hostages were strapped with dynamite and held in a bank vault until finally rescued.”<sup>40</sup> Once rescued, the hostages defended the robbers and were even afraid of the police.<sup>41</sup> It was evident that “the hostages had ‘bonded’ emotionally with their captors.”<sup>42</sup>

Experts and researchers have identified several symptoms and behaviors attributed to the Stockholm Syndrome: “[p]ositive feelings by

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34. Massimo Introvigne, “*Liar, Liar*”: *Brainwashing, CESNUR and APA*, CENTER FOR STUDIES ON NEW RELIGIONS, 1998, [http://www.cesnur.org/testi/gandow\\_eng.htm](http://www.cesnur.org/testi/gandow_eng.htm).

35. *Molko v. Holy Spirit Ass’n*, 762 P.2d 46, 54 (Cal. 1988) (“Some highly respected authorities conclude brainwashing exists and is remarkably effective.”) (citing ROBERT JAY LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF “BRAINWASHING” IN CHINA* (1961); EDGAR SCHEIN, *COERCIVE PERSUASION* (1961)), *superseded on other grounds by statute*.

36. *Id.* at 54.

37. Warburton, *supra* note 3, at 80.

38. *United States v. Chancey*, 715 F.2d 543, 547 (11th Cir. 1983).

39. *Id.*

40. Joseph M. Carver, *Love and Stockholm Syndrome: The Mystery of Loving an Abuser*, MENTAL HEALTH MATTERS, Feb. 3, 2009, <http://www.mental-health-matters.com/articles/article.php?artID=469>.

41. *Id.*

42. *Id.*

the victim toward the abuser/controller;”<sup>43</sup> “[n]egative feelings by the victim toward family, friends, or authorities trying to rescue/support them or win their release;”<sup>44</sup> “[s]upport of the abuser’s reasons and behaviors;”<sup>45</sup> “[p]ositive feelings by the abuser toward the victim;”<sup>46</sup> “[s]upportive behaviors by the victim, at times helping the abuser;”<sup>47</sup> and the “[i]nability to engage in behaviors that may assist in their release or detachment.”<sup>48</sup> In the Stockholm scenario, the hostages showed signs of most of these symptoms. One of the female hostages even became “engaged to one of the criminals and another developed a legal defense fund to aid in their criminal defense fees.”<sup>49</sup>

The Stockholm Syndrome is closely related to the brainwashing process. Most of the Stockholm Syndrome symptoms can be found in brainwashed persons as well. In the famous Patty Hearst case,<sup>50</sup> for example, the defense tried to show that “Hearst had been ‘brainwashed’ and suffered from what has been variously called the ‘Stockholm Syndrome.’”<sup>51</sup> The idea was that as a result of brainwashing, Hearst developed the Stockholm Syndrome.<sup>52</sup> Furthermore, both the Stockholm Syndrome and brainwashing are found in similar situations, specifically in “hostage, prisoner, or abusive situations . . . .”<sup>53</sup> The groups that are mostly affected include abused children, battered and abused women, prisoners of war, cult members, and criminal hostages.<sup>54</sup>

## II. Duress, Insanity, and the Disputed Brainwashing Defense

When used, defense counsel has placed the brainwashing defense under two different categories: the duress defense and the insanity defense. For instance, in the Patty Hearst case, the defense counsel stressed that brainwashing should fall within the duress defense because

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43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *See* United States v. Hearst, 412 F. Supp. 863 (N.D. Cal. 1975).

51. Douglas O. Linder, *Patty Hearst Trial (1976)*, UNIVERSITY OF MISSOURI-KANSAS CITY SCHOOL OF LAW, 2007, <http://www.law.umkc.edu/faculty/projects/ftrials/hearst/hearstdolaccount.html>.

52. *Id.*

53. Carver, *supra* note 40.

54. *Id.*

of the element of coercion.<sup>55</sup> However, the defense counsel in the D.C. sniper case used the insanity defense, arguing that the teenager was brainwashed and could not distinguish between right and wrong.<sup>56</sup> Although both approaches failed, the brainwashing defense is more similar to the insanity defense because of the voluntary act that is committed.

#### A. *Duress*

Duress is a valid defense when the actor commits a crime because “he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.”<sup>57</sup> Although the actor commits the crime voluntarily and intentionally, he does not do so by free will.<sup>58</sup> Under duress, the actor does not choose to engage in a certain behavior but is influenced by an “outside force.”<sup>59</sup> Furthermore, “where a defendant acts under duress, she lacks any semblance of a meaningful choice. In that sense her choice is not free.”<sup>60</sup> Therefore, duress shows “the resemblance to [the] lack of *mens rea* . . . .”<sup>61</sup>

In addition, most jurisdictions include the element of “immediacy” to the duress defense.<sup>62</sup> Immediacy refers to the “threat of [bodily] injury.”<sup>63</sup> For example, “a veiled threat of future unspecified harm, as the threat ‘to take care of’, and ‘not to forget’ is *not* the equivalent of an immediate threat of death or severe bodily injury.”<sup>64</sup> Immediacy poses a

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55. *Hearst*, 412 F. Supp. at 870.

56. *Dao*, *supra* note 4.

57. MODEL PENAL CODE § 2.09(1) (2001). See MODEL PENAL CODE § 2.09(2)-(4) (2001), for further provisions under § 2.09 which limit the use of this defense. “(2) The defense provided by this Section is unavailable if the actor recklessly places himself in a situation in which it was probable that he would be subject to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged. (3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. . . . (4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.” *Id.*

58. *Dixon v. United States*, 548 U.S. 1, 24 (2006) (Breyer, J., dissenting).

59. *United States v. Grainger*, 239 F. App’x 188, 190 (6th Cir. 2007) (distinguishing between necessity and duress).

60. *Dixon*, 548 U.S. at 23 (Breyer, J., dissenting).

61. *Id.* at 24.

62. See, e.g., *United States v. Contento-Pachon*, 723 F.2d 691, 694 (9th Cir. 1984).

63. *Id.*

64. *R.I. Recreation Ctr. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir. 1949)



major problem for the brainwashing defense because the initial immediate threat that existed may not be present at the time the crime is executed.<sup>65</sup> Coercion exists in almost any brainwashing scenario, usually at its initiation.<sup>66</sup> If a crime is committed during this period, a defendant can use the duress defense in his favor. However, brainwashed defendants tend to commit crimes after this initial stage, which can be problematic for any defense based on duress.<sup>67</sup>

### B. *Insanity*

For the insanity defense to apply, it is necessary to prove that the defendant was “insane” when he committed the crime. For the brainwashing defense, it would therefore be irrelevant when the initial coercion happened, as long as the defendant was still brainwashed when he committed the crime. Yet, even the insanity defense has been criticized in the past.<sup>68</sup> Some states have gone so far as to abolish this defense completely.<sup>69</sup> Moreover, the insanity defense is only “employed in fewer than [one] percent of criminal cases and is successful in only about one quarter of these trials, according to a study by the American Psychiatric Association.”<sup>70</sup> Nevertheless, it is a valid defense in most states. Most of these states still follow the 1843 definition of insanity. In the English *M’Naghten* case, the bench ruled:

[T]he jurors ought to be told . . . that to establish a defen[s]e on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>71</sup>

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(emphasis added).

65. Delgado, *supra* note 1, at 8.

66. *Id.*

67. See *United States v. Hearst*, 412 F. Supp. 863 (N.D. Cal. 1975).

68. Butterfield, *supra* note 9.

69. *Id.* (stating that, by 1996, Montana, Utah and Idaho had abolished the insanity defense); see also THINKING ABOUT THE INSANITY DEFENSE 6 (Ellsworth Lapham Fersch ed., 2005) (stating that Montana, Utah, Idaho, Nevada, and Kansas have abolished the insanity defense).

70. Butterfield, *supra* note 9.

71. *M’Naghten’s Case*, 8 Eng. Rep. 718722 (1843).

This definition goes to the necessity “of understanding the nature and quality” of the act.<sup>72</sup> If a defendant does not understand that what he did was wrong, there is no reason, under the theories of punishment, to incarcerate him.

The Model Penal Code’s definition of insanity is similar to the M’Naghten rule: Insanity is a legitimate defense when “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirement of law.”<sup>73</sup> Furthermore, evidence of a mental disease or defect “is admissible whenever it is relevant to prove that the defendant did or did not have a state of mind that is an element of the offense.”<sup>74</sup> Although there might be an aspect of “free will” in the person’s actions, “it does show the absence of a ‘vicious will.’”<sup>75</sup>

The main distinction between the duress and insanity defense is that duress requires the element of coercion.<sup>76</sup> Moreover, a jury is probably more likely to believe that a defendant committed a crime under duress than due to insanity.<sup>77</sup> Jurors can relate better to a situation of duress than insanity. For example, it is easy for a juror to imagine why someone robbed a bank when another person threatened to kill him or his family. However, it is more difficult to imagine that someone heard a voice in his head that told him to rob a bank. Additionally, several issues arise with the insanity defense. For example, the issue of legal versus moral insanity has bothered courts in the past.<sup>78</sup> It has also been difficult to find an adequate definition for a “mental disease or defect.”<sup>79</sup> “Most courts seem to assume that ‘mental disease’ for purposes of the insanity defense is a legal, not a medical concept,”<sup>80</sup> therefore the legal concept

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72. Butterfield, *supra* note 9.

73. MODEL PENAL CODE § 4.01(1) (2001).

74. *Id.* § 4.02(1).

75. *Dixon v. United States*, 548 U.S. 1, 24 (2006) (Breyer, J., dissenting) (citations omitted).

76. *See* MODEL PENAL CODE §§ 2.09(1), 4.01(1) (2001).

77. *See* Steven K. Erickson, *Mind Over Morality*, 54 BUFF. L. REV. 1555, 1561 (2007) (explaining that “the take-home message of the Hearst case is the calculated tactic by the defense to pursue a duress claim instead of an insanity one presumably in the hopes that the jury would better receive it”).

78. *See, e.g., State v. Guido*, 191 A.2d 45 (N.J. 1963).

79. SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES* 895 (8th ed. 2007).

80. *Id.*

should also guide its definition.

There are three different approaches as to what constitutes a “mental disease.”<sup>81</sup> These approaches include the *McDonald v. United States* approach,<sup>82</sup> the American Psychiatric Association approach,<sup>83</sup> and the American Bar Association (“ABA”) approach.<sup>84</sup> The *McDonald* approach states that a “mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls.”<sup>85</sup> Under this standard, brainwashing could be categorized as a mental disease. Through certain brainwashing techniques, such as “isolation, physiological depletion, assertions of authority, guilt manipulation, peer pressure, and cognitive dissonance,”<sup>86</sup> the indoctrinator shapes the mind of his victim, which substantially affects his mental processes and impairs behavior controls.

The second approach, by the American Psychiatric Association, is more stringent. A “mental disease” is defined as “severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality and that are not attributable primarily to the voluntary ingestion of alcohol or other psychoactive substances.”<sup>87</sup> It is unlikely that brainwashing would be considered a mental disease under this standard because words, such as “severely” and “grossly” are very high standards to meet. Nevertheless, since most courts look at insanity from a legal perspective, this approach will probably not be used that often.

The third approach, by the ABA, is similar to the *McDonald* approach. A “mental disease” is defined as the “(i) impairments of mind, whether enduring or transitory, or, (ii) mental retardation ... which substantially affected the mental or emotional processes of the defendant at the time of the alleged offense.”<sup>88</sup> Again, under this approach,

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81. *Id.*

82. *McDonald v. United States*, 312 F.2d 847 (D.C. Cir. 1962) (en banc) (per curiam).

83. KADISH, *supra* note 79, at 896 (citing Insanity Defense Workgroup, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. OF PSYCHIATRY 681, 681-88 (1980)).

84. *Id.* (citing ABA, CRIMINAL JUSTICE STANDARDS: MENTAL HEALTH § 7-6.1(a) (1983)).

85. *McDonald*, 312 F.2d at 851.

86. Delgado, *supra* note 1, at 2 (citations omitted).

87. KADISH, *supra* note 79, at 896 (citing Insanity Defense Workgroup, *American Psychiatric Association Statement on the Insanity Defense*, 140 AM. J. OF PSYCHIATRY 681, 681-88 (1980)).

88. ABA, CRIMINAL JUSTICE STANDARDS: MENTAL HEALTH § 7-6.1(a) (1983).

brainwashing would, most likely, be considered a mental disease. The indoctrinator has impaired the brainwashed mind to the extent that the person's mental processes have been substantially affected. It follows naturally that being *legally* insane is enough to find that a defendant has a mental disease or defect and, as a result, the *McDonald* or ABA definition of "mental disease or defect" should be followed. Consequently, the legal approach should also be adhered to for the other elements of the defense, such as "wrong" and "insane." For example, courts have been struggling with the meaning of "wrong" in insanity cases.<sup>89</sup> The difference between morally wrong and legally wrong is evident. Though some courts use *morally* wrong as a guideline,<sup>90</sup> the standard should be the same for all elements. Therefore, the "[i]nsanity acquittal requires the defendant to be unaware that his conduct was *legally* wrong."<sup>91</sup>

Courts are reluctant to expand the idea of duress beyond the immediate threat of harm. As previously mentioned, there are two highly publicized cases that have used the brainwashing defense. Though in both cases the defense ultimately failed, the case analyses will demonstrate that linking brainwashing to the insanity defense makes sense and can be successful in the future. In the Patty Hearst case, there were indicia that she acted out of free will while committing the bank robbery.<sup>92</sup> Free will was deadly to the defense because her counsel linked it to the duress defense. If the defense counsel had not invoked brainwashing through duress, whether or not her actions constituted free will would have been irrelevant. In the D.C. sniper case, there was evidence that the teenager rejected his mentor's plan and even tried to commit suicide.<sup>93</sup> Showing signs of unwillingness undermines the idea that the defendant could not distinguish between right and wrong. In both cases, without this evidence, the brainwashing defense might have proved successful.

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89. *Id.* at 891; *see also* State v. Crenshaw, 659 P.2d 488 (Wash. 1983) (en banc).

90. *See* People v. Coddington, 2 P.3d 1081 (Cal. 2000), *superseded by statute*, CAL. PENAL CODE § 1054 (West 2010), as *recognized in* Verdin v. Superior Court, 183 P.3d 1250 (Cal. 2008).

91. KADISH, *supra* note 79, at 891.

92. Linder, *supra* note 51.

93. Dao, *supra* note 4.

C. *The Case of Patty Hearst*

In the 1970s, the counsel for Patty Hearst drew attention to the brainwashing defense in a highly publicized case. On February 4, 1974, nineteen-year-old Patty Hearst, heiress to the Hearst Corporation, “own[ing] a chain of newspapers, magazines and radio and TV stations,”<sup>94</sup> was kidnapped while in her Berkeley apartment in California.<sup>95</sup> The group responsible for her kidnapping was a radical group known as the Symbionese Liberation Army (“SLA”).<sup>96</sup> According to the FBI, “the SLA wanted nothing less than to incite a guerrilla war against the U.S. government and destroy what they called the ‘capitalist state.’”<sup>97</sup> The SLA’s goals were “closing prisons, ending monogamy, and eliminating ‘all other institutions that have made and sustained capitalism.’”<sup>98</sup> Patty Hearst was the perfect victim. She came from a very affluent and influential family, and therefore the kidnapping brought the desired media attention the SLA had hoped for.<sup>99</sup>

The SLA ordered the Hearst family to create a food donation program.<sup>100</sup> Hearst’s father complied with the order and established the “People in Need program and donated about \$ [two] million.”<sup>101</sup> Yet, many problems arose and, in an audio message, Hearst condemned her father’s program.<sup>102</sup> Additionally, her parents repeatedly tried to rescue their daughter but two months after the initial kidnapping, Patty Hearst “announced in a[nother] taped message that she had repudiated her former lifestyle, and was determined to ‘stay and fight’ beside her captors . . . .”<sup>103</sup> Instead of coming home, Hearst helped the SLA commit many crimes, including robbing the Hibernia Bank in San Francisco,

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94. *Patty Hearst Profile*, CNN PEOPLE IN THE NEWS, 2001, <http://www.cnn.com/CNN/Programs/people/shows/hearst/profile.html> (last visited Feb. 26, 2009).

95. FBI Headline Archive, *A Byte Out of History: The Patty Hearst Kidnapping*, Feb. 4, 2009, [http://www.fbi.gov/page2/feb09/hearst\\_020409.html](http://www.fbi.gov/page2/feb09/hearst_020409.html) (last visited Feb. 6, 2009).

96. *Id.*

97. *Id.*

98. Linder, *supra* note 51.

99. FBI Headline Archive, *supra* note 95.

100. Linder, *supra* note 51 (“The food giveaway program was fraught with problems. In some distribution locations, rioting and fraud hampered efforts, [sic] On February 22 at a distribution site in West Oakland, rioting led to dozens of injuries and arrests.”).

101. *Id.*

102. *Id.*

103. *United States v. Hearst*, 466 F. Supp. 1068, 1071 (N.D. Cal. 1978).

which left three people injured.<sup>104</sup> It took the police over one year until they finally captured Hearst at her San Francisco apartment on September 18, 1975.<sup>105</sup>

Though Hearst's mother categorized her daughter as a kidnapping victim,<sup>106</sup> Hearst was charged with "assault with intent to commit murder, assault with a deadly weapon, robbery, and kidnapping."<sup>107</sup> Hearst's main defense was duress.<sup>108</sup> She maintained that she only participated in the bank robbery "under the threat of bodily harm."<sup>109</sup> The court primarily focused on the issue of her "requisite intent" at the time she committed the crimes.<sup>110</sup> Hearst's defense counsel mainly introduced evidence in form of expert testimony. For instance, counsel called three psychiatrists who testified that she was forced to participate in the robberies.<sup>111</sup> Yet, Hearst took the stand as well. She testified to "her atrocious and outrageous mistreatment in the closet where she was kept blindfolded for days without relief."<sup>112</sup>

Furthermore, the defense counsel claimed Hearst was brainwashed.<sup>113</sup> It tried to analogize brainwashing with duress by showing that "Hearst was never a free agent or voluntary member of the SLA, up to and including the time of her arrest."<sup>114</sup> Moreover, Hearst's defense counsel tried to prove that Hearst had suffered from the Stockholm Syndrome.<sup>115</sup> In addition to the defense counsel's evidence, expert "Dr. William Sargant, an English psychologist who interviewed Hearst before her trial," maintained that Hearst had been brainwashed by her captors.<sup>116</sup> He explained that Hearst was "broken" through "mental cruelty, sensory deprivation, malnutrition, threats of death and injury . . . ."<sup>117</sup> He further stated that Hearst also experienced a "constant confusion

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104. *Id.*

105. Linder, *supra* note 51.

106. *Id.*

107. *Hearst*, 466 F. Supp. at 1071. Altogether, "the State of California filed nineteen criminal charges against the defendant . . . ." *Id.*

108. *Id.*

109. *Id.*

110. *Id.* In fact, requisite intent "became the sole issue of fact to be tried." *Id.*

111. *Id.*

112. *Id.*

113. FBI Headline Archive, *supra* note 95.

114. Linder, *supra* note 51.

115. *Id.* See discussion *infra* Part II.B. (exploring the definition of Stockholm Syndrome).

116. Warburton, *supra* note 3, at 74.

117. *Id.*

of affection and abuse . . . .”<sup>118</sup>

To rebut the defense counsel’s evidence, the Government called its own experts.<sup>119</sup> It called two psychiatrists to testify that Hearst “was not coerced but performed her acts voluntarily.”<sup>120</sup> Furthermore, the prosecution called “Tom Matthews, one of the men whom Ms. Hearst . . . had kidnapped in Los Angeles . . . .”<sup>121</sup> Matthews testified about Hearst’s “voluntary role” in the crimes and how she acknowledged to him that she was participating freely.<sup>122</sup> The prosecution also pointed out Hearst’s flawed testimony. For instance, Hearst claimed to be raped by one of the SLA members; however, she also kept a gift from him in her purse.<sup>123</sup> Yet, the most influential testimony was by psychiatrist Joel Fort. He testified to Hearst’s character and her past behavior.<sup>124</sup> Fort asserted that Hearst previously lied in school, “engaged in sexual activity at an early age, and experimented with drugs such as LSD.”<sup>125</sup> Additionally, he stated that the SLA had many members who were affluent and educated.<sup>126</sup> As a result, Fort concluded that “Hearst would find the SLA appealing.”<sup>127</sup>

In the end, the jury had to decide whom to believe. After deliberation, the jury found Hearst guilty.<sup>128</sup> On the issue of “requisite intent,”<sup>129</sup> the jury found that “Hearst had participated freely in the robbery and did not believe the coercion theory presented by her defense.”<sup>130</sup> Hearst received a prison sentence of seven years.<sup>131</sup> After almost two years imprisonment, “President Carter commuted her sentence.”<sup>132</sup> Then, on January 20, 2001, President Clinton pardoned

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118. *Id.*

119. *United States v. Hearst*, 466 F. Supp. 1068, 1072 (N.D. Cal. 1978).

120. *Id.*

121. *Id.*

122. *Id.*

123. Linder, *supra* note 51.

124. *Id.*

125. *Id.* (“Fort offered his ‘velcro theory’ for aimless, lost souls such as [sic] Hearst: such persons, he said, float around in moral space and then find stuck to them the first random ideology they bump into.”)

126. *Id.*

127. *Id.*

128. *United States v. Hearst*, 466 F. Supp. 1068, 1072 (N.D. Cal. 1978).

129. *See supra* note 110 and accompanying text.

130. *Hearst*, 466 F. Supp. at 1072.

131. *Id.* (“On September 24, 1976, this Court sentenced petitioner to seven years on Count I, for armed bank robbery, and to two years on Count II, for use of a weapon to commit a felony, the sentences to be served concurrently.”) *Id.*

132. FBI Headline Archive, *supra* note 95.

Patricia Hearst.<sup>133</sup>

D. *The D.C. Sniper Case*

Another high-profile case that involved the brainwashing defense is commonly referred to as the D.C. sniper case.<sup>134</sup> Although the defense approached the brainwashing defense from a different angle, it also was not successful. The facts are crucial to understand the use of the defense. Lee Boyd Malvo was a fifteen-year-old boy from Jamaica. After being abandoned by his mother, Muhammad, a retired army veteran, brought Malvo from Jamaica to the United States in 2001. This is when the indoctrination process began.<sup>135</sup> In the United States, “Muhammad filled the teen’s head with visions of an impending race war and trained Malvo in marksmanship.”<sup>136</sup> Malvo learned how to use “an AK47, a 270 rifle, and a 306 rifle.”<sup>137</sup> In addition, “[h]e isolated Malvo, steeped him to his own idiosyncratic, vitriolic brand of Islam and imposed a strict diet and exercise regimen on his ‘adopted’ son.”<sup>138</sup> For about a month, Muhammad and Malvo drove around the D.C. area and shot thirteen people, from the trunk of a car, leaving ten dead.<sup>139</sup> Specifically, Malvo was charged with killing FBI analyst Linda Franklin “outside a Home Depot in Falls Church, Virginia, on October 14, 2002.”<sup>140</sup> Though not proven, Muhammad and Malvo were also believed to be involved with shootings in other states, such as Alabama, Louisiana, Georgia, Arizona, and Washington.<sup>141</sup>

Malvo’s defense counsel followed the unusual path of Hearst’s counsel and claimed that Malvo had been brainwashed by Muhammad.<sup>142</sup>

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133. Linder, *supra* note 51.

134. Muhammad v. State, 934 A.2d 1059, 1076 (Md. Ct. Spec. App. 2007).

135. *Id.* See also Carlin Flora, *The Brainwashing Defense*, PSYCHOL. TODAY, Dec. 9, 2003, <http://www.psychologytoday.com/articles/pto-20031209-000001.html>.

136. Flora, *supra* note 135.

137. *Muhammad*, 934 A.2d at 1077.

138. Flora, *supra* note 135.

139. *Sniper Malvo Sentenced to Life Without Parole*, CNN LAW CENTER, May 5, 2004, <http://www.cnn.com/2004/LAW/03/10/sniper.malvo/index.html> (last visited Feb. 26, 2009).

140. *Id.*

141. *Malvo Gets Life Sentence in Sniper Killing*, CNN LAW CENTER, Oct. 27, 2004, <http://111.cnn.com/2004/LAW/10/26/malvo.plea/index.html> (last visited Nov. 12, 2009).

142. *Sniper Malvo Sentenced to Life Without Parole*, *supra* note 139. See also *Oswald v. Bertrand*, where, in a murder trial, a son unsuccessfully pleaded “that he was brainwashed by his father into committing the crimes.” 374 F.3d 475, 482 (7th Cir. 2004). The court, however, ruled that:



Instead of associating brainwashing with the duress defense, Malvo's counsel related it to the insanity defense. Experts at trial compared the teenage boy to a child soldier or a cult member.<sup>143</sup> For instance, the relationship between Malvo and Muhammad was equated to the relationship between a cult member and a cult leader or a child soldier and a warlord.<sup>144</sup> These experts concluded that, as a result, "Malvo lost all sense of morality, all sense of identity, and became little more than an extension of Mr. Muhammad [sic] ego."<sup>145</sup> Furthermore, Dr. Neil Blumberg, a forensic psychiatrist, testified at trial that "Mr. Muhammad trained Mr. Malvo to be a soldier 'in his war against America . . .'"<sup>146</sup>

The defense counsel's experts also testified to the brainwashing process that took place. They explained that Malvo "suffered from dissociative disorder."<sup>147</sup> According to Dr. Blumberg and other experts, Muhammad used indoctrination "techniques . . . including isolating [Malvo], controlling his diet and sleep, forcing him to watch violent videos, training him to use guns and teaching him a violent brand of Islam and black separatism."<sup>148</sup> Muhammad's brainwashing completely "broke down [Malvo's] already shaky sense of self and made him unable to resist Mr. Muhammad's commands."<sup>149</sup> Moreover, Malvo reached the breaking point that led to his "identity crisis" and loss of who he was.<sup>150</sup> He was merely Muhammad's puppet and his sense of right and wrong was blurred.<sup>151</sup> However, the defense counsel's experts admitted that

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[i]f brainwashing is just a form . . . of the defense of coercion, it is barred by the conspirator exception; if brainwashing is a separate defense, it probably is not recognized by the law; and if it is merely an effort to show that Oswald was somehow incapable of forming an intent to kill, it would be highly unlikely to persuade a jury.

*Id.* (citation omitted).

143. Dao, *supra* note 4.

144. *Id.*

145. *Id.*

146. *Id.* (stating that Muhammad took advantage of "Malvo's hunger for a father figure . . .").

147. *Id.* Dissociative disorder means that the indoctrination "turned Malvo into an automaton-victim, who could neither resist nor sanely understand the nature of his acts." EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS 190 (Mark Costanzo et al., eds., 2006).

148. *Id.*

149. *Id.*

150. Layton, *supra* note 23.

151. Dao, *supra* note 4.

Malvo “was clinically depressed, even suicidal.”<sup>152</sup>

The prosecution focused on Malvo’s suicidal notions and argued that suicide was “evidence that he knew that those plans were horribly wrong.”<sup>153</sup> Additionally, the prosecution’s experts concluded that Malvo knew that what he was doing was wrong. The experts rather equated Malvo’s “sniper missions” with depraved indifference murder and thought that his childhood experiences of “neglect and abuse” could not be considered an excuse for his actions.<sup>154</sup> Besides denying that Malvo had an impaired mind, the prosecution also focused on Malvo’s voluntary actions. The prosecution claimed that “Malvo voluntarily chose to be with Mr. Muhammad, that the so-called indoctrination lasted just a few weeks and could not have completely impaired his faculties and that he was predisposed toward antisocial behavior.”<sup>155</sup>

As in many insanity cases, the jury also rejected the defense counsel’s brainwashing theory. The jury did not believe that Muhammad had indoctrinated Malvo to the point that he could not distinguish between right and wrong.<sup>156</sup> As a result, the jury found Malvo guilty of murder and Malvo received a life sentence.<sup>157</sup> Following this trial, Malvo entered a guilty plea for the killings in Virginia and Montgomery County, Maryland.<sup>158</sup> In addition, he agreed to cooperate with the prosecution and testify against Muhammad at trial.<sup>159</sup>

### III. The Brainwashing Defense Should Be Adopted into the Model Penal Code Under the Insanity Defense

The idea that certain acts should be criminalized and punished mirrors our society’s demand for certain acceptable behavioral standards.<sup>160</sup> In our society, this decision has long been one of moral character.<sup>161</sup> The public’s reaction to the outcome in the *Hearst* trial

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152. *Id.*

153. *Id.* (“Mr. Malvo has on several occasions expressed revulsion or reservations about Mr. Muhammad’s violent plans . . .”).

154. *Sniper Malvo Sentenced to Life Without Parole*, *supra* note 139.

155. Dao, *supra* note 4.

156. Ahlers, *supra* note 12.

157. *Id.*

158. *Muhammad v. State*, 934 A.2d 1059, 1076 (Md. Ct. Spec. App. 2007). Malvo pled guilty to first-degree murder and was “sentenced to six consecutive life sentences without the possibility of parole.” *Id.*

159. *Id.*

160. Delgado, *supra* note 1, at n.30.

161. *Id.* “The indoctrination desensitized Mr. Malvo to violence . . .” Dao, *supra*

demonstrates this notion. For example, in 1975, before all of the details of Hearst's kidnapping and "brainwashing" were disclosed, "about ninety percent of the general public believed that Patricia Hearst was guilty and should be sentenced to prison."<sup>162</sup> Yet, after more details were released, "nearly one-half of the public favored parole or pardon."<sup>163</sup> The public's view of Hearst's situation showed that morally, it felt that Hearst's action should be excused. Especially after Hearst's kidnappers pleaded guilty to the kidnapping, the public realized that "Hearst was blameless" for becoming part of the SLA.<sup>164</sup>

Nevertheless, the overwhelming evidence at trial against Hearst's theory of brainwashing was evident. Hearst's lawyers could not prove that she was still under duress while she committed the crime. Though her seven-year sentence was later pardoned, Hearst's strategy of placing brainwashing under the duress defense did not play out in her favor. The lawyers in the D.C. sniper case learned from the *Hearst* outcome and tried a different strategy. "By trying to equate brainwashing with mental illness, Mr. Malvo's lawyers have pushed the boundaries of the insanity defense into a gray area where precedents are few and obstacles to winning an acquittal are high, legal experts said."<sup>165</sup>

Although the psychological community is not in agreement about whether brainwashing is a mental disease or defect, it has recognized the Stockholm Syndrome. Therefore, as previously mentioned, brainwashing should be categorized as a mental disease as well. The idea set forth in the D.C. sniper case shows that brainwashed people cannot distinguish between right and wrong. A brainwashed defendant may testify that, at the time he committed the crime, he "'felt' the decision to be his own" and that "he was acting of his own free will."<sup>166</sup> As a result, the mens rea of the brainwashed person becomes irrelevant. Though the defendant is conscious of what he is doing, he thinks he is doing the right thing. Consequently, brainwashing should be placed under the insanity defense and not under the duress defense.

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note 4.

162. Delgado, *supra* note 1, at n.31.

163. *Id.*

164. *Id.*

165. Dao, *supra* note 4.

166. Delgado, *supra* note 1, at 26.

A. *Proposed Elements for the Brainwashing Defense*

The elements of the insanity defense include “[a] mental disease or defect” and the lack of “substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.”<sup>167</sup> The brainwashing elements are similar. However, contrary to the insanity defense, brainwashing must be done by an external force. The defendant must be associated with an indoctrinator. For example, through emotional or physical control, the indoctrinator must substantially impair the defendant’s mind. This would satisfy the mental disease or defect element of the insanity defense. Then, the defendant must be acting in furtherance of the indoctrinator’s vision; the defendant’s actions must be aligned with the goal of the indoctrinator. As a result, the defendant knowingly commits the offense; however, he cannot comprehend that his act was wrong.

Consequently, the proposed Model Penal Code provision for brainwashing would read as follows: “(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct. . . .”<sup>168</sup> (2) A mental disease or defect must be the result of an indoctrinator substantially impairing a person’s mind; and (3) A person is acting in furtherance of the indoctrinator’s vision and goals.

B. *Criticism of the Brainwashing Defense*

The brainwashing defense has yet to be successful in court. Naturally, judges are hesitant to admit evidence in support of brainwashing because it is not a recognized defense. By introducing brainwashing under the duress and insanity defenses, brainwashing evidence has been presented in courts. Some critics voice their concern of too much psychiatric influence in the American Criminal Justice System.<sup>169</sup> In addition to the “‘anti-psychiatry’ school,”<sup>170</sup> critics are troubled with the notion that brainwashing is not accepted as a scientific theory by, for example, the American Psychological Association.<sup>171</sup>

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167. MODEL PENAL CODE § 4.01(1) (2001).

168. *Id.*

169. Delgado, *supra* note 1, at 23-24.

170. *Id.*

171. See Introvigne, *supra* note 34.

Nevertheless, brainwashing should stand as a valid legal concept without the scientific basis because the insanity defense was also incorporated into law well “before a universally accepted scientific model was available.”<sup>172</sup> Professor Delgado therefore concludes “that the scientific certainty has never been essential to the establishment of a legal defense.”<sup>173</sup> Now, years after the defense has been successfully used in the courtroom, even the American Psychological Association and the American Psychiatric Association support the insanity defense as long as the defendant receives adequate treatment and society is not endangered if the defendant is let free.<sup>174</sup> Furthermore, research has shown that “[m]embers of the lay public, who are potential jurors, hold beliefs that brainwashing is an effective psychological process . . . .”<sup>175</sup> The first step is to have the general public recognize that brainwashing exists. The legal community should be next in recognizing brainwashing, even if the scientific community has not done so. As a result, the lack of scientific recognition of brainwashing should not be an excuse in refusing to incorporate the brainwashing defense. Perhaps the scientific community would even follow the legal example and acknowledge brainwashing as a scientific theory.

Another criticism to the brainwashing defense is the role of the defendant’s predisposition. In the legal context, the role of a person’s predisposition has not been resolved.<sup>176</sup> Experts in both the Hearst and

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172. Delgado, *supra* note 1, at 24 (“Such a requirement is not realistic . . . [and] not observed in connection with the development of other mental defenses . . .”).

173. *Id.*

174. THINKING ABOUT THE INSANITY DEFENSE 10-11 (Ellsworth Lapham Fersch ed., 2005).

175. Warburton, *supra* note 3, at 79 (quoting John S. DeWitt et al., *Novel Scientific Evidence and Controversial Cases: A Social Psychological Examination*, 21 LAW & PSYCHOL. REV. 1, 7 (1997) (internal quotations omitted)).

One survey of 383 randomly-drawn registered voters revealed that over three-quarters of those questioned said they believed brainwashing occurs. In response to the statement “A person can be brainwashed, even if they are not actually held captive against their will,” nearly seventy-eight percent said they agreed, while twenty-one percent disagreed. Also, about thirty percent of those interviewed agreed with the statement “Brainwashing is required to make someone join a religious cult.”

John S. DeWitt et al., *Novel Scientific Evidence and Controversial Cases: A Social Psychological Examination*, 21 LAW & PSYCHOL. REV. 1, 7 (1997).

176. James T. Richardson, “Brainwashing” Claims and Minority Religions Outside the United States: Cultural Diffusion of a Questionable Concept in the Legal Arena, 1996 B.Y.U. L. Rev. 873, 879 (1996).

D.C. sniper cases touched upon the defendant's predisposition. Proponents of brainwashing sometimes ignore that some people have "predisposing characteristics."<sup>177</sup> In *Hearst*, the prosecution brought forth evidence that Hearst was predisposed to joining the SLA and even found the group appealing.<sup>178</sup> In the D.C. sniper case, the prosecution touched upon Malvo's abusive childhood and his mother's abandonment as a reason for following Muhammad as his role model.<sup>179</sup> The extreme view on predisposition is the "'psychoanalytical' objection."<sup>180</sup> The theory entails that "even an intense thought reform cannot convert a law-abiding citizen into an outlaw."<sup>181</sup> Without some sort of predisposition, a person would not be prone to brainwashing.<sup>182</sup> Proponents of the "psychoanalytical objection" do not believe in brainwashing because, in their view, a person can only be brainwashed when he or she has been predisposed to that kind of behavior. However, there are also those experts that believe that anyone can be brainwashed.<sup>183</sup> It should be up to a jury to decide what theory to believe and how much of a defendant's actions are attributable to predisposing characteristics. In the end, the jury must decide whether or not a defendant was truly brainwashed.

The main criticism of the brainwashing defense is that it is ineffective. Since it is so difficult to prove that a person has been brainwashed, the defense is not used often at trial. Ineffectiveness and rare usage are weak arguments because the insanity defense brings about the same qualities. Acknowledging that "[b]rainwashing is poised to take its place within the legal justice system," the brainwashing theory has been proposed as a mitigating factor instead of a complete defense.<sup>184</sup> The idea is that, despite the failure of the defense "during the guilt/innocence phase," a jury can take into account the same factors during the "sentencing phase" for mitigation purposes.<sup>185</sup> The same approach has been used in insanity cases. In several jurisdictions juries are able to consider mitigating factors "such as psychological

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177. *Id.*

178. Linder, *supra* note 51.

179. *Sniper Malvo Sentenced to Life Without Parole*, *supra* note 139.

180. Delgado, *supra* note 1, at 24.

181. *Id.*

182. *Id.* at 24-25.

183. *Id.* at 25 ("[T]hose psychologists and psychiatrists who are most intimately familiar with thought reform believe that virtually everyone can be induced to behave criminally if subjected to intensive thought reform in a totally controlled environment.")

184. See Warburton, *supra* note 3, at 97.

185. *Id.* at 88-96.

impairment;”<sup>186</sup> factors such as this may work to “reduce the offender’s culpability but do[ ] not meet the threshold for acquittal under an insanity defense.”<sup>187</sup> This is especially prevalent in capital offense cases.<sup>188</sup> For example, the jury spared Malvo from the death sentence despite his admission to the heinous crimes. Although this is a step in the right direction, it undermines the full capability of the brainwashing defense. Insanity has been a valid defense for many decades despite its low success rate and rare usage. Thus, brainwashing should be available as a complete exculpating defense and, if the threshold cannot be met, should naturally be considered as a mitigating factor. It is obvious that States that do not acknowledge the insanity defense should not acknowledge the brainwashing defense either. In all other States, however, there is no valid reason not to adopt the brainwashing defense.

#### IV. Conclusion

Despite some of the valid criticisms, the brainwashing defense should be adopted into the Model Penal Code and associated with the insanity defense for two reasons. First, brainwashing can be validly placed within the ABA’s definition of a mental disease or defect. Second, it should not be associated with the duress defense. Whereas brainwashed defendants commit crimes even after the initial stage of coercion, under the duress defense, coercion and the threat of bodily harm must be imminent.

Brainwashing *can* be a complete defense to a crime and should not be regarded merely as a mitigating factor. Rather than viewing the

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186. Robert F. Schopp, *Two-Edged Swords, Dangerousness, and Expert Testimony in Capital Sentencing*, 30 LAW & PSYCHOL. REV. 57, 83 (2006).

187. *Id.*

188. *See, e.g.*, MODEL PENAL CODE § 210.6(4)(b), (f), (g) (2001). The mitigating circumstances are:

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

...

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

*Id.*

brainwashed person as a perpetrator, he should be viewed as the victim because the indoctrinator completely controlled the person's mind and, therefore, his actions. The goal of the brainwashing defense should be the rehabilitation of the defendant. If necessary, rehabilitation should take place in an institution. Most states already have laws in existence that will determine whether or not a defendant must be institutionalized. As in insanity cases, rehabilitation is emphasized because, under the theories of punishment, deterrence would not be beneficial.

As previously mentioned, the proposed elements for the brainwashing defense that must be established are: "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacks substantial capacity . . . to appreciate the criminality [wrongfulness] of his conduct;. . . (2) A mental disease or defect must be the result of an indoctrinator substantially impairing a person's mind; and (3) A person is acting in furtherance of the indoctrinator's vision and goals."<sup>189</sup> Though it is a stringent test to meet, it is possible. In the end, although it is the jury's decision whom to believe, the defendant should have the option to plead "not guilty" by reason of brainwashing.

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189. MODEL PENAL CODE § 4.01(1) (2001).