

The Commandeering of Free Will: Brainwashing as a Legitimate Defense

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I. Introduction

Imagine that your teenage daughter is dragged from her apartment in the middle of the night while wearing only panties and a bathrobe.¹ Screaming, she is forced into the trunk of a waiting car.² Although her screams attract the attention of her neighbors, they are unable to help as they are driven back into their homes by the kidnappers' gunfire.³ Terrified, she is imprisoned, bound and blindfolded in a closet for fifty-seven days, and subjected to mental and physical cruelty and torture.⁴

This nightmare was the actual fate of Patricia Hearst ("Hearst"), who was kidnapped on February 4, 1974, by a group that identified itself as the Symbionese Liberation Army ("SLA").⁵ Two months after her kidnapping, to the disbelief of her family and friends, Hearst "announced in a taped message that she had repudiated her former lifestyle and was determined to 'stay and fight' beside her captors."⁶ Not long afterwards, Hearst, wielding a sawed-off carbine, participated in the armed robbery of a bank; three bystanders were wounded.⁷ A shoplifting incident followed in which she riddled a sporting goods store with rounds from an automatic weapon.⁸

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1. Patty Hearst Online, *The Kidnapping*, ¶ 4, at <http://www.claykeck.com/patty/kidnap.htm> (last visited Sept. 30, 2003) [hereinafter Patty Hearst Online, *The Kidnapping*] (describing the kidnapping and captivity of Patricia Hearst).

2. *Id.* at ¶ 4.

3. *Id.*

4. *Id.* at ¶ 9.

5. *Id.* at ¶¶ 1, 7.

6. *United States v. Hearst*, 466 F. Supp. 1068, 1071 (N.D. Cal. 1978). Hearst was sentenced to seven years for armed bank robbery. *Id.* at 1072. At trial, she argued she was coerced by members of the SLA into participating in the bank robberies. *Id.* at 1071.

7. *Id.* at 1071.

8. *Id.*

Hearst's subsequent prosecution for bank robbery in *United States v. Hearst*⁹ propelled the defense of brainwashing into the spotlight and courtroom.¹⁰ Hearst's transformation from heiress to gun-toting, radical bank robber seemed inexplicable. At trial, however, Hearst alleged that she did not intend to participate in the bank robbery but did so only under the threat of bodily harm.¹¹ According to Dr. William Sargant, an English psychologist who interviewed Hearst before her trial, "[thirty] days being blindfolded is the maximum a person can take before a 'breakdown' occurs, after which the brain goes into an 'inhibitory' reverse."¹² Essentially, "through an unrelenting campaign of mental cruelty, sensory deprivation, malnutrition, threats of death and injury, and the constant confusion of affection and abuse, [Hearst] was broken. She receded into herself, shut off her feelings and emotions, and did what she was told."¹³ Hearst had been brainwashed. By the end of her trial, however, Hearst went from kidnaping victim to convicted felon.¹⁴ The brainwashing defense failed.

Since *Hearst*, brainwashing as a defense, though not formalized, has been permitted primarily in civil cases dealing with new religions or cults.¹⁵ Proponents of the defense suggest that an individual laboring under the condition should be exculpated completely for any crime he or she commits.¹⁶ Theorists contend that the offending individual is not acting of his or her own free will and should not be held responsible for the beliefs forced upon him or her by an-

9. 466 F. Supp. 1068 (N.D. Cal. 1978).

10. See *Hearst*, 466 F. Supp. at 1071. The issue of whether or not Hearst had the requisite intent to commit the crime was the sole issue of fact at trial. *Id.* The available case history does not elaborate on the defense's use of the brainwashing theory because the issue was not raised on appeal. However, the defense proffered evidence to establish that members of the SLA coerced Hearst to participate in the crimes. *Id.* The suggestion was that her participation, though contrary to her own assertions of joining the SLA, was not willing. *Id.*

11. *Id.*

12. Patty Hearst Online, *The Trial*, ¶ 20, at <http://www.claykeck.com/patty/trial.htm> (last visited Sept. 30, 2003) [hereinafter *Patty Hearst, The Trial*] (outlining critical aspects of the trial and its participants).

13. Patty Hearst Online, *The Kidnapping*, *supra* note 1, at ¶ 16.

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

15. See, e.g., *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 762 P.2d 46, 54 (Cal. 1988) (noting that the plaintiff argued the church engaged in brainwashing to induce members to join the church which constituted, *inter alia*, fraud and emotional distress); *Tuman v. Genesis Assocs.*, 894 F. Supp. 183, 185 (E.D. Pa. 1995) (noting that plaintiff alleged that the defendants were liable for implanting false memories into the plaintiff through the use of brainwashing). See generally Ann Penners Wrosch, *Undue Influence, Involuntary Servitude and Brainwashing: A More Consistent, Interests-Based Approach*, 25 LOY. L.A. L. REV. 499, 501 (1992) (comparing the legal theories of undue influence, involuntary servitude and brainwashing within the context of religious cults).

16. See Richard Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, in JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW, A COLLECTION OF ESSAYS 467, 486 (Michael Louis Corrado ed., 1994) (analyzing the viability of the coerced defendant defense, particularly the criticisms that the defense would have no clearly defined boundaries within the justice system).

other.¹⁷ A criminal defendant who has succumbed to brainwashing could not be held to ultimate accountability without offending the foundations of the legal system.¹⁸

Before brainwashing can become a doctrinally acceptable criminal defense, it must be narrowly defined to complement current legal principles. The defensive postures of duress and battered woman syndrome (“BWS”) offer brainwashing some hope of future acceptance. All three principles endeavor to weigh the actions of a coerced actor against society’s need for retribution. A coerced actor who pleads any of these defenses intended the consequences of his or her actions.¹⁹ If the intent to commit the crime, however, is superimposed by another person, the actor is less culpable than an actor who is able fully to exercise his or her free will.²⁰ Fairness dictates that brainwashing mitigates the culpability and ultimately the punishment of a person who was brainwashed at the time the crime was committed. Complete exculpation, however, goes too far. Brainwashing, as a defense, was unsuccessful in *Hearst* for this apparent reason.²¹ Such a result—complete exculpation for a crime committed knowingly—goes against the grain of our legal system. A compromise is necessary and one is apparently forthcoming.²² The cases of John Walker Lindh (“Lindh”) and Lee Boyd Malvo (“Malvo”) will be telling in this regard.²³

This article proposes that brainwashing should be recognized as a defensive posture, similar to duress or BWS, in the unique case of capital murder. In Part II, this article discusses the origins of brainwashing and its development in the scientific community and legal system. Part III of this article examines the analytical similarities between brainwashing and the doctrinally acceptable defenses of duress and BWS. Part IV outlines the application of the defense in a capital case and the future of brainwashing.

17. *Id.* at 471.

18. *Id.* at 470.

19. *Id.* at 471.

20. *Id.* at 476–77.

21. *See Hearst*, 466 F. Supp. at 1072.

22. *See generally* Dahlia Lithwick, *The Pied Sniper: Was Lee Boyd Malvo Brainwashed into a Killing Machine?*, Slate, at <http://slate.msn.com/id/2088893> (Sept. 25, 2003) (stating that Malvo’s defense team intends to argue brainwashing as a mitigating factor in the penalty phase).

23. *See generally* Jan Cienski, *Walker Faces Court Today in Virginia: Conspiracy Charges: American Taliban Likely to Spend Life in Prison, Say Legal Analysts*, NAT’L POST, Jan. 24, 2002, at A12, available at 2002 WL 4164650 (stating that the defense may argue that Walker was brainwashed into joining al-Qaeda, similar to the Patty Hearst situation); Josh White, *Lanymers Say Malvo Was Under a ‘Spell’: Muhammad Controlled Youth, Defense Team Contends in Sniper Case*, WASH. POST, June 26, 2003, at B1, available at 2003 WL 56501725 (stating that Malvo’s diet and thoughts were controlled by Muhammad, which was relevant to Malvo’s culpability).

II. *The Origin of Brainwashing*

The term “brainwashing” was coined in 1951 by Edward Hunter, an American journalist.²⁴ Hunter was alluding to a form of mind control that was used in the wake of the Communist takeover in China.²⁵ Hunter formalized the concept to explain how American prisoners of war (“POWs”) converted to Communism in the 1950s as a result of coercion by the Communist Chinese and North Korean armies.²⁶

Brainwashing by the Communists was comprised of “an elaborate ritual of systematic indoctrination, conversion, and self-accusation used to change non-Communists into submissive followers of the party.”²⁷ Dr. Joost Meerloo (“Meerloo”) compares the process of brainwashing to Pavlov’s theory of conditioning.²⁸ The prisoners of war were subjected to negative and positive conditioning stimuli such as hunger and food.²⁹ Once a POW conformed to the political teachings his food rations were improved.³⁰ According to Meerloo, “Under the daily signal of dulling routine questions . . . their minds went into a state of inhibition and dismissed alertness.”³¹ This process broke down democratic thoughts and replaced them with conditioned reflexes.³²

24. STANLEY S. CLAWAR & BRYNNE V. RIVLIN, CHILDREN HELD HOSTAGE: DEALING WITH PROGRAMMED AND BRAINWASHED CHILDREN 1 (Fam. Law Sec. ABA, 1991). Brainwashing is defined as “the forcible application of prolonged and intensive indoctrination sometimes including mental torture in an attempt to induce someone to give up basic political, social, or religious beliefs and attitudes and to accept contrasting regimented ideas.” WEBSTER’S THIRD NEW INT’L DICTIONARY (1993). The terms brainwashing, thought reform, and coercive persuasion are synonymous. Delgado, *supra* note 16, at 467.

25. CLAWAR & RIVLIN, *supra* note 24, at 1.

26. EDWARD HUNTER, BRAINWASHING, THE STORY OF MEN WHO DEFIED IT 11–12 (1956).

27. See JOOST A.M. MEERLOO, THE RAPE OF THE MIND, THE PSYCHOLOGY OF THOUGHT CONTROL, MENTICIDE, AND BRAINWASHING 27 (1956) (discussing brainwashing, the implication of the subject of enforced mental intrusion, and the transformation of the free human mind into an automatically responding machine).

28. *Id.* at 48–52. Pavlov’s experiment involved the use of negative and positive stimuli to condition dogs to respond in a particularized manner to bells. *Id.* at 37–38.

29. *Id.* at 49.

30. *Id.*

31. *Id.* at 45. Note that every word can act as a Pavlovian signal.

32. *Id.* In an official statement to the United Nations, Dr. Charles Mayo, a leading American physician, stated:

[T]he tortures used . . . although they include many brutal physical injuries, are not like the medieval torture of the rack and the thumb-screw. They are subtler, more prolonged, and intended to be more terrible in their effect. They are calculated to disintegrate the mind of an intelligent victim, to distort his sense of values, to a point where he will not simply cry out “I did it!” but will become a seemingly willing accomplice to the complete disintegration of his integrity and the production of an elaborate fiction.

One of the most vivid examples of conversion was Colonel Frank H. Schwable, an officer of the United States Marine Corps, who was taken prisoner of war by the Chinese Communists.³³ Colonel Schwable signed a confession that the United States was conducting germ warfare against the enemy.³⁴ After his repatriation Schwable stated, “The words were mine, but the thoughts were theirs. That is the hardest thing I have to explain: how a man can sit down and write something he knows is false, and yet, to sense it, to feel it, to make it seem real.”³⁵ Colonel Schwable’s example shows that brainwashing within the prisoner of war context involves the processes of conditioning or softening-up and indoctrination or persuasion for conversion purposes using hunger, fatigue, tenseness, threats and violence as the tools.³⁶

Traditional interpretations of brainwashing outside of the prisoner of war context “assume a relatively passive subject under the control of all-powerful (and, in the case of new religions, evil) external agents who use coercive and manipulative techniques.”³⁷ The end result is a total negation of the old self and the emplacement of a new one.³⁸ The methods used to achieve this change may be more subtle today, in that torture may not be used, but the basic elements—intimidating suggestion, mass suggestion, dramatic persuasion, humiliation, embarrassment, loneliness and isolation, continued interrogation and over-burdening the unsteady mind—remain.³⁹ The process of brainwashing may be sudden or it may occur over time and it may involve repetition of the program until the subject responds with compliance.⁴⁰ These processes “may be employed singularly or in combination.”⁴¹ In the case of POWs, the “spell” was broken once they returned home with only a few experiencing temporary repercussions such as depression.⁴²

Id. at 20.

33. MEERLOO, *supra* note 27, at 19. *See generally* *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 COLUM. L. REV. 709 (May 1956). Colonel Schwable’s case is the only case of a germ warfare confession which progressed as far as the pre-trial court of inquiry. *Id.* at 742. Schwable was never brought to trial because the investigators found that the tortures he suffered, both physical and psychological, constituted a reasonable excuse. *Id.* at 743.

34. MEERLOO, *supra* note 27, at 19.

35. *Id.* at 20.

36. HUNTER, *supra* note 26, at 199–202.

37. THE BRAINWASHING/DEPROGRAMMING CONTROVERSY: SOCIOLOGICAL, PSYCHOLOGICAL, LEGAL AND HISTORICAL PERSPECTIVES 6 (David G. Bromley and James T. Richardson eds., 1983) (discussing the controversy over the recruitment and socialization practices of new religions).

38. *Id.*

39. *Id.* at 89.

40. CLAWAR & RIVLIN, *supra* note 24, at 8.

41. *Id.*

42. MEERLOO, *supra* note 27, at 91–92.

A. Scientific Acceptance

The scientific community's attitude towards brainwashing lies on a continuum. Some scientists view brainwashing as a legitimate theory.⁴³ Others view it as a pejorative term for the absorption of ideas disdained by the majority.⁴⁴ The scientific community was forced to take a stance in the early 1980s when some mental health professionals testified as experts in court cases against new religious movements.⁴⁵ These experts testified to their own anti-cult theories of brainwashing, mind control, or "coercive persuasion" as generally accepted concepts within the scientific community.⁴⁶ The American Psychological Association ("APA") responded by forming the Deceptive and Indirect Methods of Persuasion and Control ("DIMPAC") task force.⁴⁷ The task force was responsible for, *inter alia*, investigating the techniques of psychological coercion and the use of such techniques by new religions to control and recruit members.⁴⁸

In February 1987, before DIMPAC completed its report, the APA Board of Directors voted for the APA to participate in *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*⁴⁹ by filing an amicus brief.⁵⁰ The APA brief stated that "as applied to new religious movements, the theory of coercive persuasion 'is not accepted in the scientific community' and that the relevant methodology 'has been repudiated by the scientific community.'" ⁵¹ The APA withdrew the brief immediately because the task force had yet to issue its findings.⁵² In 1986,

43. See THE BRAINWASHING/DEPROGRAMMING CONTROVERSY, *supra* note 37, at 320. (stating that some psychiatrists and psychologists affirm that mind control, brainwashing, and psychological kidnapping are meaningful and viable scientific concepts).

44. *Id.* at 319. According to noted psychiatrist Dr. Thomas Szasz, "[b]rainwashing is a metaphor. A person can no more wash another's brain with coercion or conversation than he can make him bleed with a cutting remark However, we do not call all types of personal or psychological influences *brainwashing*. We reserve this term for influences of which we disapprove." *Id.* Dr. Walter Reich takes a similar view, arguing that brainwashing "undermines the foundation of criminal law, which 'is based on the assumption of personal responsibility for one's own behavior.'" *Id.*

45. Alberto Amitrani & Raffaella Di Marzio, *The Neverending Story: A Comment on M. Introvigne's "Liar, Liar"*, ¶7, at http://www.geocities.com/Athens/Olympus/8393/Answer_liar.htm (last visited Oct. 4, 2003) (quoting Massimo Introvigne, "*Liar, Liar*": *Brainwashing, CESNUR and APA*, CESNUR: Center for Studies on New Religions, ¶ 4, at http://www.cesnur.org/testi/gandow_eng.htm) (last visited Oct. 29, 2003)).

46. *Id.*

47. *Id.*

48. *Id.* at ¶¶ 11–13.

49. 762 P.2d 46 (Cal. 1988).

50. Amitrani & Di Marzio, *supra* note 45, at ¶ 15. See *Molko v. Holy Spirit Ass'n for the Unification of World Christianity*, 762 P.2d 46, 61 (Cal. 1988) (involving an attempt to argue coercive persuasion as a defense to fraud).

51. Amitrani & Di Marzio, *supra* note 45, at ¶ 15 (quoting the Memorandum, APA, APA's activities regarding the *Molko* case, (July 11, 1989)).

52. *Id.* at ¶ 20.

DIMPAC submitted its final report to internal reviewers and to two outside academics, Dr. Jeffrey D. Fisher and Dr. Benjamin Beit-Hallahmi.⁵³ The report was rejected as lacking in “scientific rigor.”⁵⁴ According to Dr. Beit-Hallahmi, “The term brainwashing is not a recognized theoretical concept, and is just a sensationalist explanation more suitable to cultists and revival preachers. It should not be used by psychologists because it does not explain anything.”⁵⁵ In the end, the APA took the position that it could not issue a final opinion because it lacked sufficient information on the issue of brainwashing and its use by religious cults.⁵⁶

Brainwashing as a scientific theory is complex because it involves the evaluation of the intangible notion of free will.⁵⁷ As a result, empirical data cannot be collected and analyzed.⁵⁸ Scientists instead must infer that brainwashing occurred based on the overwhelming presence of factors similar to those that existed in the POW situation.⁵⁹ Despite the lack of empirical evidence on brainwashing, science is essential to the development of the brainwashing defense. Members of the lay public, who are potential jurors, “hold beliefs that ‘brainwashing’ is an effective psychological process and that it is practiced by ‘cults’ in recruitment.”⁶⁰ The failure of Patty Hearst’s case indicated that jurors apparently are less accepting of the defense in criminal cases; therefore, scientific testimony is essential to inform jurors of the effects of various brainwashing methods on a defendant and to correct any misinformation a juror may possess.⁶¹ Unfortunately, the scientific community appears to remain fractured

53. *Id.* at ¶ 31.

54. Memorandum from the Board of Social and Ethical Responsibility for Psychology (“BSERP”), to the Members of the Task Force on Deceptive and Indirect Methods of Persuasion and Control (“DIMPAC”) (May 11, 1987), at <http://www.rickross.com/reference/brainwashing/brainwashing5.html> [hereinafter Memorandum from BSERP] (commenting on the final report of the DIMPAC task force).

55. AMERICAN PSYCHOLOGICAL ASSOCIATION ON “BRAINWASHING,”: *What is Brainwashing?*, ¶ 3, at <http://www.alphalink.com.au/~juliekn/brainwashing/p04.html> (last visited Oct. 4, 2003) (explaining the definition of brainwashing within the scientific community).

56. Memorandum from BSERP, *supra* note 54.

57. THE BRAINWASHING/DEPROGRAMMING CONTROVERSY, *supra* note 37, at 323.

58. *Id.*

59. *Id.*

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

61. *Hearst*, 466 F. Supp. at 1072; Dewitt et al., *supra* note 60, at 12, 21. A mock jury was polled to examine the response of jurors to novel scientific evidence. Dewitt et al., *supra* note 60, at 23. The poll reflected that expert testimony about the use of brainwashing by new religions or cults affected verdicts. *Id.* The study showed that less reliable evidence was more effective because the jurors had pre-existing misperceptions that were consistent with the less reliable information. *Id.* The study concluded that in situations in which jurors had weak or non-existent attitudes towards brainwashing and plaintiffs offered no expert testimony to influence them, the mock jurors appeared to scrutinize the facts in favor of the defendant in a civil case. *Id.* This information

on the issue of brainwashing, which currently undermines the validity and admissibility of research on this issue.⁶²

B. *Legal Acceptance*

Brainwashing has been offered successfully as a necessity defense in criminal cases in which deprogrammers have been charged with kidnapping.⁶³ Deprogrammers argue that the crime of kidnapping is excused by necessity.⁶⁴ The crime of kidnapping is posited as the lesser evil; the greater evil is that of leaving the coerced individual with the cult or influencing group.⁶⁵ Unless the coerced individual in question is a minor, legal alternatives to kidnapping are lacking. If the court allows the defendant to assert brainwashing in this form, evidence of life within the group, as well as the group's belief system, is admissible. Deprogrammers use the evidence of interaction within the group to argue that anyone who accepts the belief of the group must have been brainwashed.⁶⁶ The inability of the brainwashed individual to exercise his free will becomes the justification for the kidnapping.

The theory, however, has not been effective for more serious crimes. For example, in *Hearst*, the jury rejected the brainwashing defense.⁶⁷ The question of whether or not Hearst had the requisite intent to commit the crime became the sole issue of fact for trial.⁶⁸ In her defense, Hearst testified about the "grueling, distasteful ordeal that she underwent with the SLA after her kidnapping, including her atrocious and outrageous mistreatment in the closet where she was kept blindfolded for days without relief."⁶⁹ Hearst also offered the testimony of three psychiatrists to confirm that she was coerced by the SLA into robbing the bank.⁷⁰ The jury apparently believed that Hearst was a willing participant and did not believe the coercion theory presented by the defense.⁷¹

should be factored into the jury selection process of a criminal trial in which brainwashing evidence will be proffered.

62. See discussion *infra* Part IV.A.1.

63. See 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, 883 (1996) (summarizing the origins of brainwashing ideas as applied to religious groups). Deprogrammers also assert brainwashing as a defense in civil suits. *Id.* at 885. The defense focuses on the motivation of the deprogrammers in violating the law, which is deemed a lesser evil than not rescuing the "programmed" individual. *Id.* at 886-87.

64. *Id.* at 883.

65. *Id.* at 883-84.

66. *Id.* at 884.

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

68. *Id.* at 1071.

69. *Id.*

70. *Id.*

71. *Id.* at 1072.

Hearst was found guilty and sentenced to seven years in prison.⁷² Though not explicitly stated in the opinion, *Hearst* appears to have established two facts: (1) a defendant arguing brainwashing possesses the requisite intent to commit the crime; and (2) coercion does not completely exculpate a brainwashed victim.⁷³ *Hearst*, however, did not address whether a defendant could use incidents of brainwashing to argue for a reduced sentence rather than complete exculpation.⁷⁴

More recently, the court in *United States v. Fishman*⁷⁵ rejected the defense in a mail fraud case.⁷⁶ In its ruling, the court stated, “Defendant’s proffered testimony negating the element of specific intent relates exclusively to alleged influence techniques brought to bear upon him by the Church of Scientology, which is an aspect of thought reform theory that the Court has deemed inadmissible under the *Frye* standard.”⁷⁷ The *Fishman* ruling reflects the perception held by the legal community that brainwashing is pseudo-science. As a result, courts continue to rule against admitting the theory as evidence.⁷⁸

III. Analogous Defenses: Duress and Battered Woman Syndrome

The criminal justice system currently provides many defenses to crimes in the forms of justification or excuse. The common law and modern penal codes

72. *Id.*

73. *See Hearst*, 466 F. Supp. at 1072 (stating that “the jury apparently believed that Hearst freely participated in the robbery and did not believe the coercion theory” in spite of the overwhelming evidence to the contrary).

74. Hearst’s sentence later was commuted conditionally in 1979 by President Carter, who stated:

it is the consensus of all those most familiar with this case that but for the extraordinary criminal and degrading experiences that the petitioner suffered as a victim of the SLA she would not have become a participant in the criminal acts for which she stands convicted and sentence[d] and would not have suffered the punishment and other consequences she has endured.

Patty Hearst Online, *The Aftermath*, ¶ 11, at <http://www.claykeck.com/patty/aftermath.htm> (last visited Sept. 30, 2003) (describing the pardon campaign of Patricia Hearst).

75. 743 F. Supp. 713 (N.D. Cal. 1990).

76. *See United States v. Fishman*, 743 F. Supp. 713, 723 (N.D. Cal. 1990) (holding that expert testimony regarding coercive persuasion practices of religious cults were not sufficiently established within the scientific community to be admissible as evidence of brainwashing).

77. *Id.* at 722.

78. *See United States v. Kozminski*, 821 F.2d 1186, 1196 (6th Cir. 1987). The trial court ruled the expert testimony inadmissible for failing to conform with Federal Rule of Evidence 702. The court further stated that the proper foundation was not laid because “criticisms voiced . . . suggest that [expert’s] ‘involuntary conversion’ theory is not scientifically recognized.” *Id.* *See also Molko*, 762 P.2d at 61. The trial court in *Molko* refused to allow evidence of coercive persuasion in the plaintiff’s case for fraud, but the appellate court stated “that neither the federal nor state constitutions bars *Molko* and *Leal* from bringing traditional fraud actions against the Church for allegedly inducing them . . . into knowingly entering an atmosphere in which they were then subjected to coercive persuasion” and held that the trial court erred in its decision. *Molko*, 762 P.2d at 61.

recognize two distinct situations in which an offender could be excused on the ground that the crime should be attributed to the pressure exerted by a third party and not to the offender's free will.⁷⁹ The first situation is duress and the second is the marital coercion defense that re-emerged in the mid-1970s as BWS. Brainwashing shares the premise of duress and BWS because it too asserts that pressure from a third party is the impetus for the criminal offense. Therefore, the legal development of duress and BWS suggests how brainwashing should be framed as a defense. By garnering clues from related defenses, brainwashing can avoid several legal pitfalls.

A. Duress

A defendant will be acquitted of an offense other than murder under the common law definition of duress if he proves that: (1) a person unlawfully threatened imminently to kill or grievously injure him or another; and (2) he was not at fault in exposing himself to the threat.⁸⁰ The common law definition hinges on the threat of deadly force to justify the actions of a coerced actor.⁸¹ The Model Penal Code ("MPC") definition is different for several reasons; most notably, it allows a defendant to plead duress as an excuse to any crime, including murder.⁸² The MPC defines duress as:

an affirmative defense that the actor engaged in the conduct charged to constitute an offense 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.⁸³

The level of force referred to in the MPC definition need only be enough "that a person of reasonable firmness in the actor's situation would have been unable to resist."⁸⁴ The MPC definition also involves the jury more deeply in the

79. See Anne M. Coughlin, *Excusing Women*, 82 CAL. L. REV. 1, 29 (1994) (arguing that the BWS defense implies that women do not have the same capacity as men for self-governance and suggesting ways in which it may be reconstructed to be more effective).

80. Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1335 (1989) [hereinafter Dressler, *Exegesis of the Law of Duress*] (outlining the proper limits of the duress defense within which the justification overlap is discussed).

81. *Id.* at 1341.

82. *Id.* at 1344.

83. MODEL PENAL CODE § 2.09 (1985); see also Dressler, *supra* note 80, at 1344 (outlining the common law and MPC treatment of the duress defense). Thirteen states have adopted in whole or in substantial part the MPC definition of duress, including Alaska, Arkansas, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Missouri, New Jersey, New York, Pennsylvania, South Dakota and Utah. *Id.* at 1343 n.89.

84. Dressler, *Exegesis of the Law of Duress*, *supra* note 80, at 1344.

determination of the excuse than is the case at common law because the jury determines whether the hypothetical reasonable person would resist the threat.⁸⁵

Most states treat duress as an excuse.⁸⁶ In general, a defendant asserting the defense of duress must demonstrate that his criminal conduct was the product of an unlawful threat that caused him reasonably to believe that performing the criminal conduct was his only reasonable opportunity to avoid imminent death or serious bodily harm either to himself or to another.⁸⁷ The defense of duress is triggered only if the threatened harm is immediate; the defense is not available to a coerced actor who had an opportunity to avoid the illegal activity.

These requirements are similar in the POW misconduct charges.⁸⁸ In the POW misconduct charges, duress was pleaded in two ways—as individual and general duress.⁸⁹ Only individual duress is relevant to this discussion because the individual defendant's state of mind is at issue; no two defendants will have the same traits for susceptibility, nor will they respond similarly to the same coercive influence.⁹⁰ However, note that general duress—a condition suffered by all prisoners—could only be offered as a mitigating factor under special circumstances.⁹¹ Individual duress—physical and psychological torture aimed at an individual—could completely excuse the offender, go towards mitigation, or do neither, depending on the nature of the coercion.⁹² Individual duress was raised successfully in one case in which the threat was imminent and the actor had no reasonable means to escape or avoid the coercion.⁹³ Mere deprivation of life-sustaining necessities, such as food and water, were held invalid as a defense to guilt but were allowed to be used in mitigation.⁹⁴

The framework of the duress defense is applicable to brainwashing. Similar to a defendant who is asserting duress, a brainwashed defendant acknowledges that he acted “consciously, even enthusiastically, fully aware of the wrongfulness

85. *Id.* at 1345.

86. *Id.* at 1356.

87. *See, e.g.,* *Edwards v. Texas*, 106 S.W.3d 833, 843 (Tex. Ct. App. 2003) (affirming the defendant's conviction for capital murder because the evidence was sufficient for the jury to reject the duress claim. The defendant asserted that he feared a deadly attack from his co-defendants, who testified to the contrary that he was a willing participant); *Sam v. Commonwealth*, 411 S.E.2d 832, 839 (Va. 1991) (affirming the defendant's conviction of first-degree murder because his participation in the crime was not the only reasonable opportunity he had to prevent his family from being harmed).

88. *Misconduct in the Prison Camp*, *supra* note 33, at 768 (exploring the history of prisoner misconduct and the problems raised by the prosecution of resulting cases).

89. *Id.*

90. *Id.*

91. *Id.* at 768–69.

92. *Id.* at 768.

93. *Id.* at 769.

94. *Misconduct in the Prison Camp*, *supra* note 33, at 769–70.

of his actions.”⁹⁵ The brainwashing defense argues that despite the existence of *mens rea* the defendant is morally blameless because the guilty mind with which the defendant acted was not his own.⁹⁶ Unlike duress, however, the threat does not have to be imminent. Rather, the defendant must establish that the crime was committed while under the coercive influence.

The brainwashing defense is most analogous to duress in the POW cases. Note that the decision to excuse a POW was an individualized assessment. The assessment should be the same in brainwashing cases. A ‘reasonable person’ standard would be inappropriate because no two defendants will respond in the same way to psychological manipulation. For example, persons with low self-esteem are more susceptible than others to coercion, therefore the degree of low self-esteem may alter the time and extent to which they are affected by coercion. Acceptance of duress, however, clearly shows that the legal system, and by extension society, is willing to accept that there are circumstances in which a defendant’s free will may be overborne. Most states eventually accepted that those circumstances occur in the case of duress. It therefore becomes important to frame a brainwashing defense in a manner similar to duress.

B. Battered Woman Syndrome

Marital coercion was the second defense that excused defendants based on the pressure exerted by a third party. Although the marital coercion defense no longer exists, it was refined to create what is now BWS. In the case of marital coercion defense, a married woman would be excused for engaging in criminal misconduct if she executed the act because of the coercion of her husband.⁹⁷ A husband’s command that his wife commit a particular act was enough to establish coercion.⁹⁸ The rule provided that a married woman was entitled to a coercion presumption if she committed a crime in the presence of her husband and, therefore, could not be held personally responsible for her conduct.⁹⁹ In the marital coercion defense, the law refused to blame the wife because her misconduct was reflective of the choices of her husband only.¹⁰⁰

Battered Woman Syndrome incorporates most of the elements of the marital coercion defense and is currently described as “a ‘sociological theory of behavioral patterns’ based upon the physical and psychological abuse found in

95. Delgado, *supra* note 16, at 499.

96. *Id.*

97. Coughlin, *supra* note 79, at 30.

98. *Id.* at 31. A married woman is no longer entitled to a coercion presumption. *Id.* at 58. *See generally* Pancoast v. Commonwealth, 340 S.E.2d 833 (Va. 1986). Today, a married woman must clearly show that she exhibits the characteristics of BWS. *See* Steffani J. Saitow, Note, *Battered Woman Syndrome: Does The “Reasonable Battered Woman” Exist?*, 19 NEW. ENG. J. ON CRIM. & CIV. CONFINEMENT 329, 339 (1993) (discussing the characteristics and admissibility of expert testimony on BWS).

99. Coughlin, *supra* note 79, at 31.

100. *Id.* at 44.

women involved in battering relationships.”¹⁰¹ A woman asserting the BWS defense must prove that she exhibited the characteristics of the syndrome at the time of the killing.¹⁰² A battered woman is defined as “[a] woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights.”¹⁰³ A woman must go through two complete cycles of abuse before she can be labeled a “battered woman.”¹⁰⁴ These cycles involve a tension-building phase, followed by the explosion or acute battering incident, and culminate in the loving contrition phase.¹⁰⁵ Additionally, learned helplessness is another component of the syndrome.¹⁰⁶ Learned helplessness explains why a battered woman remains in a relationship that is both psychologically and physically harmful.¹⁰⁷

A woman may assert BWS as a defense in two distinct ways. First, a woman who is accused of killing her abuser may assert it as an imperfect self defense claim.¹⁰⁸ Second, she may use it in support of a duress claim in which she asserts that she committed the crime because she feared violent retaliation by her spouse if she disobeyed his illegal command.¹⁰⁹ This article is concerned only with the assertion of the defense in support of duress.

At trial, expert testimony focuses on the use of violence by the batterer to coerce his female partner into doing what he desired.¹¹⁰ The argument is that the

101. Saitow, *supra* note 98, at 339 (quoting SARA LEE JOHANN & FRANK OSANKA, REPRESENTING BATTERED WOMEN WHO KILL 27 (1989)).

102. *Id.*

103. *Id.*

104. See Lori S. Rubenstein, *What is Battered Woman's Syndrome?*, Family Law Advisor Articles, ¶ 1, at <http://www.divorcenet.com/or/or-art02.html> (last visited Sept. 30, 2003) (describing BWS in the legal system).

105. Saitow, *supra* note 98, at 342.

106. See *State v. Richardson*, 525 N.W.2d 378, 380 (Wis. 1994) (arguing BWS in defense to charge of second-degree reckless homicide in the killing of the defendant's boyfriend); see also Saitow, *supra* note 98, at 344.

107. See, e.g., *State v. Kelly*, 685 P.2d 564, 571 (Wash. 1984) (arguing BWS and effects of learned helplessness in defense to a charge of second-degree murder of the defendant's husband); *United States v. Gordon*, 638 F. Supp. 1120, 1138 (W.D. La. 1986) (noting that an expert described learned helplessness as “a woman's loss of her voluntary will” (quoting the Trial Record at 534)).

108. Coughlin, *supra* note 79, at 55. As an imperfect self-defense claim the defense asks jurors to determine that the accused woman suffered from cognitive disabilities, resulting from the abuse, that deprived her of the capacity to choose lawful conduct. See *Boykins v. State*, 995 P.2d 474, 476 (Nev. 2000) (stating that the defendant argued that she accidentally killed her lover in self-defense as a result of BWS).

109. Coughlin, *supra* note 79, at 56; see also *Neelley v. State*, 642 So.2d 494, 505 (Ala. Crim. App. 1993) (stating that the defendant argued that because of the abuse inflicted by her husband, she lacked the criminal intent for the offense).

110. Coughlin, *supra* note 79, at 57. The common thread from the research on BWS in this article is that BWS was extended to wives only. However, it may be extended to cases where a long

abusive relationship reduces “the woman to a state of ‘psychological paralysis’ and abject faith in her batterer’s omnipotence, which ma[kes] it impossible for her to reject his illegal commands.”¹¹¹ Indeed, a battered woman is fully aware of her actions; she merely is restricted from exercising her free will because it is replaced by the will of her abuser.¹¹² The actions of her abuser do not negate the reality that she knowingly engaged in an illegal act. A woman who is able to manifest a capacity for independence will be punished, while a woman who is able to establish that her abuser controlled her behavior may be excused.¹¹³ However, in keeping with the basic premise of the criminal justice system, the battered woman actually should be punished, but arguably to a lesser degree. It is widely acknowledged that the notion of long-term psychological pressures that render a person submissive to an abuser should be considered as mitigating.¹¹⁴

Expert testimony regarding BWS is admissible only when it is relevant and helpful to the jury to evaluate a defendant’s credibility or to determine that a witness is properly qualified.¹¹⁵ The expert is allowed to explain battering and its general effects, such as endurance of physical and emotional abuse, delays or failure to report abuse, or a recanting of allegations of abuse when help was forthcoming.¹¹⁶ The expert is prohibited, however, from opining that the specific defendant is a battered woman.¹¹⁷ The purpose of the evidence in these cases is limited to helping the jury understand the state of mind of a battered woman at the time the offense was committed.¹¹⁸ According to the courts, expert testi-

standing intimate relationship is established. *See* State v. Riker, 869 P.2d 43, 49–50 (Wash. 1994) (defining a battered woman as a woman “subjected to repeatedly coercive behavior by a man she is intimately involved with . . . but not necessarily married [to], although she often is”).

111. Coughlin, *supra* note 79, at 57. The BWS defense within the duress context closely mirrors the marital coercion doctrine. *Id.*

112. *See id.* at 56–57.

113. *Id.* at 59.

114. *See* Laurie Kratky Dore, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L. J. 665, 757 (1995) (outlining overlap between BWS and the defense of duress).

115. *See, e.g.,* State v. Grecinger, 569 N.W.2d 189, 193 (Minn. 1997) (finding that expert testimony of BWS is admissible to help the jury understand the alleged victim’s behavior); People v. Christel, 537 N.W.2d 194, 196 (Mich. 1995) (noting that an expert in the field of domestic violence and BWS offered evidence on the generalities associated with the syndrome); Rogers v. Florida, 616 So. 2d 1098, 1100 (Fla. 1993) (concluding that BWS has now gained general acceptance in the relevant scientific community as a matter of law).

116. *Christel*, 537 N.W.2d at 205; *see also* *Boykins*, 995 P.2d at 474, 477 (stating that “seventy-six percent of the states have found expert testimony on battering and its effects admissible to prove the defendant is a battered woman”); People v. Hryckewicz, 634 N.Y.S.2d 297, 298 (N.Y. App. Div. 1995) (admitting expert testimony regarding learned helplessness to explain behavior on the part of the defendant that might seem unusual to a lay juror unfamiliar with the patterns of response exhibited by a person who has been physically abused over a period of time).

117. *Christel*, 537 N.W.2d at 201.

118. *See, e.g., id.* at 200; Bechtel v. State, 840 P.2d 1, 8 (Okla. 1992) (asserting that the expert testimony regarding BWS is admissible to help the jury understand the defendant’s state of mind,

mony is essential to correct the mistaken conclusions that jurors may draw from their own experiences.¹¹⁹ The courts point out that jurors often reach a common sense conclusion that if the abuse was as bad as the woman claimed, she would have left her abuser earlier.¹²⁰

A cursory analysis of BWS in relation to brainwashing provides several lessons because both defenses involve a person coerced to act in a manner in which he or she presumably would not act if not under the influence of another. First, expert testimony is necessary to dispel layperson views and to explain novel concepts. Second, lay witness testimony is useful to bolster the expert's assertion that the actor exhibited indicia of coercion. Third, the defense is most effective when used for mitigation purposes,¹²¹ especially when it was first presented in the guilt/innocence phase. Duress in conjunction with the BWS defense establishes the foundation for legitimizing the brainwashing defense. Both defenses are analytically and functionally similar to brainwashing. It is time for the legal community to acknowledge an existing class of defendants and embrace the defense.

IV. Application to Death Penalty Cases

Imagine you are appointed to represent the scared teenage college student turned armed bank robber. A prudent attorney would be skeptical at best when the student explains that her actions were a result of brainwashing. In fact, you probably harbor similar views as members of the scientific community and legal profession. The duty of appointed counsel, however, is to serve the interests of the client and to explore every viable defense.

Brainwashing, like BWS, cannot be pleaded as a complete defense. It is most feasible as an element of an imperfect "mental disease" or "diseased mind" defense. It is an incomplete defense because a brainwashed defendant intends

that is, a reasonable belief of imminent danger, at the time of the offense).

119. See, e.g., *Bechtel*, 840 P.2d at 8 (asserting that admission of expert testimony regarding the BWS is necessary to counter misconceptions held by average jurors); *State v. Koss*, 551 N.E.2d 970, 974 (Ohio 1990) (asserting that admission of expert testimony regarding BWS assists the trier of fact in determining whether the defendant acted out of an honest belief that she was in imminent danger).

120. See, e.g., *Greciner*, 569 N.W.2d at 195 (asserting that expert testimony on BWS could help jurors understand why women return to or stay in battering relationships); *Bonner v. State*, 740 So. 2d 439, 440 (Ala. Crim. App. 1998) (finding expert testimony necessary for purposes of showing coping mechanisms of battered women and why they do not leave abusive homes); *Harrington v. State*, No. CR-00-1861, 2002 WL 31399441, at *19-*20 (Ala. Crim. App. Oct. 25, 2002) (noting the admissibility of BWS evidence in California and Missouri courts to explain why women use deadly force instead of simply leaving the relationship).

121. See *Neelley*, 642 So. 2d at 507. *Neelley* argued that because of the abuse inflicted by her husband, she lacked the criminal intent for the offense. *Id.* at 505. This assertion is incorrect. *Neelley* intended the consequence of her actions, which was the murder of a third party. *Id.* at 507. The abuse she suffered, therefore, did not negate the requisite intent. *Id.* Instead, the abuse by her husband altered her ability to exercise her free will. *Id.*

the consequences of his actions and believes his actions are justified. Therefore, the requisite *mens rea* and *actus reus* are present. A brainwashed defendant, however, is not wholly responsible because the intent involved was superimposed. The main argument then is that, although the defendant committed the crime, he is not wholly responsible because he acted with the intent of another. The superimposed intent was a result of intentional coercive influences that overcame his free will. Introducing evidence of brainwashing during the guilt/innocence phase explains brainwashing within the context of a different, but established, defense. As an element, brainwashing explains why the defendant committed the offense charged.

The brainwashing defense can be laid out more extensively in the sentencing phase. In a capital case, “[c]ounsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.”¹²² According to the American Bar Association (“ABA”) Guidelines for Death Penalty Defense, a capital defense team should consist of at least one mitigation specialist and one fact investigator.¹²³ Appointment of the mitigation specialist is essential in preparing a brainwashing case. The information that a mitigation specialist may uncover can impact the first phase of the defense and decisions about expert evaluations. It may also mean the difference between life and death in a capital case. The battle is uphill in a case that asserts brainwashing as a defense because it currently lacks acceptance within the legal community. The battle, however, is winnable if brainwashing is not asserted as a complete defense but rather as mitigation.

A. Guilt/Innocence Phase

An attorney representing a client who asserts brainwashing as an excuse should begin laying the foundation during the guilt/innocence stage. The inclination of some attorneys may be to reserve introducing the principle of brainwashing until sentencing. Such a strategy may be prejudicial to the client. The onus is on the defense to alter the perception of brainwashing held by criminal jurors. Whether the jury will find the defendant guilty is irrelevant; the risk of waiting until sentencing to introduce such a controversial issue is too great. Ideally, the defense wants jurors to be inclined to recommend life imprisonment instead of death at the conclusion of the guilt/innocence stage.

During the guilt/innocence phase the defense should front-load mitigation evidence through the use of expert and layperson testimony. Three types of information about the defendant should be provided at this stage. First, defense

122. ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.7 (Feb. 2003) [hereinafter ABA Guidelines for Death Penalty Defense], available at <http://www.abanet.org/deathpenalty/guidelines.pdf>.

123. ABA Guidelines for Death Penalty Defense, Guideline 4.1(A)(2) (Feb. 2003), available at <http://www.abanet.org/deathpenalty/guidelines.pdf>. For a complete discussion of mitigation specialists see Daniel L. Payne, *Building A Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43 (2003).

counsel should determine the susceptibility of the defendant to compelled conversion.¹²⁴ Some individuals are more susceptible to influence based on age or mental deficiency. Evidence of the defendant's inclination to succumb to peer pressure or irrational obedience to authority figures would be useful to establish this prong.¹²⁵ Second, counsel must discover the methods used to coerce the defendant. The defendant must give a reason for the jury to believe that his or her free will was negated. For example, when Hearst was first captured, she was subjected to constant assaults of mental cruelty and torture.¹²⁶ Members of the SLA "periodically open[ed] the door to her prison and shout[ed] slogans and propaganda, condemning her as a 'bourgeois bitch.'" ¹²⁷ Hearst was also subjected to repeated rapes by various members of the SLA.¹²⁸ Consistent with the textbook process of brainwashing, as her grip on her free will was weakening, the same members of the SLA began treating her in a more comradely fashion and exposing her to their political beliefs.¹²⁹ Expert testimony would be useful to explain the effects of each method of coercion on the defendant.¹³⁰ Third, the character traits of the defendant before, during, and after the coercive influence was imposed are important to establish that the defendant was influenced by another. If the defendant reverts to his previous characteristics after the coercive element is removed, it reinforces the argument that all actions contrary to the defendant's established character were the product of brainwashing. For example, it was newsworthy when alleged sniper John Lee Malvo's behavior in court changed; it was reported that he was animated and friendly for the first time.¹³¹ These descriptions were consistent with the descriptions of Malvo before he met John Allen Muhammad, his co-defendant. His attorneys attributed the change to Malvo "breaking through a cloud of brainwashing."¹³² All three types of

124. Donald T. Lunde and Thomas E. Wilson, *Brainwashing as a Defense to Criminal Liability: Patty Hearst Revisited*, 13 CRIM. L. BULL. 341, 378 (1977). Lunde and Wilson proposed three factors in mitigation; however, only the susceptibility to compelled conversion factors is necessary for this analysis. *Id.*

125. See *Kozminski*, 821 F.2d at 1194 (noting that the defense tried to introduce expert testimony stating that, given the victims' low mentality, the psychological pressures exerted upon them created an "involuntary conversion" akin to brainwashing.)

126. Patty Hearst Online, *The Kidnapping*, *supra* note 1, at ¶ 11.

127. *Id.*

128. Patty Hearst Online, *The Conversion*, ¶ 2, at <http://www.claykeck.com/patty/conversion.htm> (last visited Sept. 30, 2003) [hereinafter Patty Hearst Online, *The Conversion*] (describing the process of converting Patty Hearst into a member of the SLA).

129. *Id.* at ¶ 3.

130. See *Christel*, 537 N.W.2d at 202–03 (discussing the testimony of experts in the field of domestic violence and BWS and the effects they had in their respective trials).

131. See Josh White, *True, Nicer Malvo Is Emerging, Lawyers Say*, WASH. POST, Sept. 18, 2003, at B1, available at 2003 WL 62216396 (describing the change in Malvo's behavior in that he was described as unusually attentive and alert and he flashed wide smiles and joked with his guards).

132. *Id.* at B5. See also Tom Jackman & John White, *Malvo Ordered to Attend Muhammad's Sniper Trial*, WASH. POST, Oct. 17, 2003, at A1, available at 2003 WL 62223631 (reporting defense attorney's

information must be narrowly tailored to the specific characteristics of the defendant. The jury is more likely to reject generalizations because the standard in this inquiry is cast as that of the reasonable person. Therefore, generalizations would be inappropriate and prejudicial to the defendant. The jury's perception must focus on the defendant as the reasonable person.

During the guilt/innocence phase the main issue will be whether the defendant possessed the requisite intent to commit the charged crime. The brainwashing defense posits that, although the defendant intended the consequences of his action, the intent with which he acted was not his own. Introduction of the three narrowly tailored pieces of information addresses this intent question and lays the foundation for mitigation.

1. *Expert Testimony*

The main hurdle in asserting a brainwashing defense is overcoming the lack of supporting empirical research. In Virginia, courts are required to "appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in preparation and presentation of information. . . [concerning] whether the defendant acted under extreme mental or emotional disturbance at the time of the offense."¹³³ A copy of the report produced by the expert must be given to the Commonwealth "after the attorney for the defendant gives notice of an intent to present psychiatric or psychological evidence in mitigation."¹³⁴

Courts that admit expert testimony in brainwashing cases have relied on the standard set forth in *Frye v. United States*.¹³⁵ The defendant in *Frye* was convicted of second-degree murder.¹³⁶ Frye was denied his request to have an expert testify about the results of his lie-detector test.¹³⁷ The appellate court found that the lie-detector test had not yet "gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony."¹³⁸ This standard of admissibility for expert testimony became known as the *Frye* standard or the general acceptance test.¹³⁹ The *Frye* standard simply did not take into consideration the future acceptance of

observation that "Malvo is gradually emerging from Muhammad's mental manipulation . . . 'We are recapturing the child'").

133. VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 2003).

134. VA. CODE ANN. § 19.2-264.3:1(D).

135. See *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (setting forth the standard for admitting expert testimony).

136. *Id.* at 1013.

137. *Id.* at 1014 (stating that "the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs").

138. *Id.*

139. See *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 585 (1993) (concluding that the Federal Rules of Evidence provide the standard for admitting expert scientific testimony in a federal trial).

novel scientific theories.¹⁴⁰

The court in *United States v. Fishman*¹⁴¹ applied the *Frye* standard.¹⁴² The *Fishman* defendant was charged with mail fraud. Fishman sought to have experts testify that he was incredibly suggestive, compulsive, and obsessive.¹⁴³ Fishman also wanted experts to testify that he was subjected to intense suggestion by the Church of Scientology, which, combined with his previous psychological condition, permitted his mental state to evolve to a point of extremely clouded reasoning and judgment.¹⁴⁴ The *Fishman* court held that mental health professionals' theories regarding coercive persuasion practices by religious cults were not sufficiently established within the scientific community to be admissible as evidence of brainwashing.¹⁴⁵ The determining factor in *Fishman* was the lack of general acceptance of the proffered testimony in the scientific community.¹⁴⁶

Admission of expert testimony is no longer governed, however, by the general acceptance standard. Admission of expert testimony is now controlled by *Daubert v. Merrell Dow Pharmaceuticals*.¹⁴⁷ In *Daubert*, the pharmaceutical company was sued for defects resulting from the drug Bendectin.¹⁴⁸ The plaintiffs proffered the testimony of several experts, which was rejected under *Frye* by the trial court.¹⁴⁹ On appeal, the United States Supreme Court found that the Federal Rules of Evidence, not *Frye*, provide the standard for admitting expert scientific testimony.¹⁵⁰ According to Federal Rule of Evidence 702, expert testimony is admissible if it "assist[s] the trier of fact to understand the evidence or to determine a fact in issue."¹⁵¹ In order to qualify as "scientific knowledge" the knowledge must be "derived by the scientific method."¹⁵² Proposed

140. See generally Lee Richard Goebes, *The Equality Principle Revisited: The Relationship of Daubert v. Merrell Dow Pharmaceuticals to Ake v. Oklahoma*, 15 CAP. DEF. J. 1 (2003).

141. 743 F. Supp. 713 (N.D. Cal. 1990).

142. *Fishman*, 743 F. Supp. at 716 (stating that the principles established in *Frye* were used to determine admissibility of expert testimony from mental health professionals).

143. *Id.* at 715.

144. *Id.*

145. *Id.* at 719–20. Evidence provided to the court showed that there was no consensus or general acceptance within the APA and the American Sociological Association regarding brainwashing or thought reform theories at the time of the trial. *Id.* at 719.

146. *Id.* at 720.

147. See *Daubert*, 509 U.S. at 597. See generally *United States v. Lester*, 234 F. Supp. 2d 595 (E.D. Va. 2002) (using the *Daubert* standard to analyze the admission of expert testimony).

148. *Daubert*, 509 U.S. at 582.

149. *Id.* at 583.

150. *Id.* at 587.

151. *Id.* at 591; see also FED. R. EVID. 702 (prescribing rules for the introduction of expert testimony on scientific, technical or specialized knowledge).

152. *Daubert*, 509 U.S. at 590.

testimony must be validated by sound scientific principles.¹⁵³

In the case of brainwashing, views within the scientific community are fractured. The jury, however, should be allowed to assess the evidence under the *Daubert* standard. The reliability assessment of expert evidence does not require “explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.”¹⁵⁴ *Daubert* abandoned the general acceptance requirement in favor of a more flexible standard that permits admission of evidence that has minimal support.¹⁵⁵ The *Daubert* standard focuses on the principles and methodology employed to generate a scientific conclusion, not the conclusion itself.¹⁵⁶

The adversary system provides the means for attacking admissible, but questionable, evidence.¹⁵⁷ Under *Daubert*, the evidence in *Fishman* would have been admissible for consideration by the jury. In *Fishman*, the mental health professional was permitted to testify and give her opinion as to whether or not the defendant was suffering from a mental defect at the time of the offense.¹⁵⁸ Testimony involving thought reform was prohibited, however, because the court determined that the views of the expert were not generally accepted within the scientific community.¹⁵⁹ The expert concluded that the combination of the Church’s influence techniques and the defendant’s previous psychological condition permitted his mental state to evolve to a point of extremely clouded reasoning and judgment.¹⁶⁰ As a result, the expert concluded that the defendant was led to believe that his participation in the fraud scheme was not a reprehensible act.¹⁶¹ The conclusion by the *Fishman* psychologist that the defendant was unaware that the fraud scheme was reprehensible is irrelevant to our analysis. A defendant who asserts brainwashing as a defense acknowledges that he was aware of the nature of his actions and intentionally committed the illegal action. Of importance, however, is the psychologist’s analysis based on examination of the defendant’s susceptibility to coercion and the methods employed by the Church in concluding that the defendant was coerced. The psychologist’s analysis is not a conclusion, rather it is an explanation of the relevant principles

153. *Id.* See generally Goebes, *supra* note 140, at 30 (outlining the factors judges should consider when determining whether the scientific reasoning or methodology underlying the testimony is scientifically valid.)

154. *Daubert*, 509 U.S. at 594.

155. *Id.* at 594–95.

156. *Id.*

157. See generally *Washington v. Commonwealth*, 323 S.E.2d 577 (Va. 1984), *cert. denied*, 471 U.S. 1111 (1985). In cases in which the defendant’s mental capacity at the time of the offense is placed at issue through expert opinion testimony, the Commonwealth is entitled to explore on cross examination the scope and limits of the expert’s opinion on the subject.

158. *Fishman*, 743 F. Supp. at 723.

159. *Id.*

160. *Id.* at 715.

161. *Id.*

and methodologies to assist the trier of fact to make a conclusion.

In Virginia, expert testimony is a predicate to the introduction of lay witness testimony in cases in which a defendant's mental condition is in question. Under the law of Virginia, a defendant may not offer the testimony of lay witnesses during the guilt phase until expert testimony is proffered.¹⁶² The Supreme Court of Virginia, commenting on the insanity defense, stated that "it is generally recognized that it is advisable to adduce expert testimony to better resolve such a complex problem."¹⁶³ Therefore, a defendant in Virginia asserting an insanity defense, and presumably any defense involving a mental disease or defect, must lay the foundation for lay witness testimony with verified expert testimony. Once expert testimony is presented, lay witnesses may give their observations about the defendant that are supportive of the expert evaluation.

Although courts should not resist admitting evidence on brainwashing, the possibility still exists. Brainwashing, however, has support in the form of the duress and BWS defenses. Expert testimony is permissible in battered woman cases to aid the jury in understanding the state of mind of a battered woman. Similarly, any evidence offered about the effects of brainwashing will aid the jury in understanding the phenomena of "superimposed mens rea."¹⁶⁴ It is essential for the jury to understand that the defendant knowingly committed the crime but not by his or her own free will. The line is a fine one and cannot be left for only laypersons to decipher.

2. Lay Witness Testimony

Lay witness testimony should be given in conjunction with expert opinion testimony to bolster the expert opinion testimony. Testimony of this nature is most useful to establish the demeanor of the defendant before, during, and after the coercive influence was imposed. Arguably, if the defendant was not exercising his free will at the time of the offense, he is not as culpable and should not be subject to a punishment similar to that imposed on a person who was able to exercise free will. Although not enumerated in the ABA Guidelines for Death Penalty Defense, counsel is required to seek out and interview potential witnesses as part of the general investigation requirements.¹⁶⁵ A witness is defined as any person "familiar with aspects of the [defendant's] history that might affect

162. See *McCulloch v. Commonwealth*, 514 S.E.2d 797, 798–99 (Va. 1999) (denying admission of lay witness testimony to support insanity defense because expert testimony was not introduced).

163. *Shifflett v. Commonwealth*, 274 S.E.2d 305, 311 (Va. 1981) (stating that although insanity or sanity may be established by lay witnesses, it is better to have the reasoning of an expert).

164. Joshua Dressler, *Professor Delgado's "Brainwashing Defense: Courting A Determinist Legal System, in JUSTIFICATION AND EXCUSE IN THE CRIMINAL LAW, A COLLECTION OF ESSAYS* 497, 499 (Michael Louis Corrado ed., 1994) [hereinafter Dressler, *Delgado's "Brainwashing" Defense*] (criticizing Professor Delgado's brainwashing thesis; asserting that acceptance of the thesis would create a blameless defense and release dangerous persons back into society).

165. ABA Guidelines for Death Penalty Defense, *supra* note 122, at Commentary 1016.

the likelihood that the [defendant] committed the charged offense(s), and the degree of culpability for the offense.”¹⁶⁶ Witnesses include, but are not limited to, members of the immediate family and extended family, neighbors, friends, acquaintances, and former teachers.¹⁶⁷

Lay witnesses are permitted to testify about the attitude and demeanor of a defendant.¹⁶⁸ Under Virginia law, lay witnesses are prohibited from using terms that may imply a medical conclusion.¹⁶⁹ Therefore, in preparing lay witnesses to testify, it is essential to convey to them the importance of not using terms such as brainwashed, indoctrinated, coerced, or similar catch phrases. Failure to impart to witnesses the necessity of not using such phrases may undermine the effect of their testimony. For instance, the government’s constant objection to the use of such words will disrupt the flow of testimony. The aim of lay witness testimony is to paint a picture of the defendant before, during, or after the coercive influence. Avoiding conflict surrounding the delivery of such information to the jury will increase its effectiveness.

A lay witness’s observations of brainwashing indicia are essential to convince jurors because the jurors are themselves laypersons. The defendant should proffer the observations of disinterested parties in order to reduce the inference of bias from relatives or friends. A disinterested party may be any person who came into contact with the defendant before, during, or after he was brainwashed. The testimony of a disinterested witness will be more persuasive if, upon first meeting the defendant, the witness believed the defendant to be under the influence of another. The observations of lay witnesses may also be developed or supplemented through media reports.

The recent media coverage of the Malvo and Lindh cases is indicative of layperson opinions that may reinforce expert testimony. In the case of Malvo, his attorneys, teachers, and others who came into contact with him prior to the sniper attacks gave descriptions of the teen prior to and during the alleged coercive influence. Typical descriptions of Malvo included:

Lee Boyd Malvo was “under the spell” of John Allen Muhammad, and every aspect of the teenager’s life was controlled by the man he looked to as a father figure. . . . Malvo, a bright, humorous teenager who had emerged from a difficult and fatherless childhood, went through a significant transformation after he . . . met up with Muhammad, the youth quickly changed into a methodical follower who would do anything Muhammad asked. . . . “Every movement was controlled by

166. *Id.* at Commentary 1019. The drafters probably had a history of abuse or symptoms of mild retardation in mind when they wrote this commentary.

167. *Id.*

168. *McCulloch*, 514 S.E.2d at 800; *Herbin v. Commonwealth*, 503 S.E.2d 226, 231 (Va. 1998) (admitting testimony pertaining to the attitude of the defendant on the day of the attack for a case in which the defendant pleaded insanity).

169. *See Mullis v. Commonwealth*, 351 S.E.2d 919, 925 (Va. Ct. App. 1987) (finding lay witness could not testify that the victim was ‘paranoid’ that somebody was out to hurt him).

Muhammad.” . . . “His diet was controlled, his thoughts were controlled, his reading was controlled. That absolutely changed his behavior.”¹⁷⁰

A teacher in Washington state even related an incident of “speaking with a polite, laughing Malvo in a school hallway when Muhammad walked in. ‘Lee immediately became quiet, stopped talking or smiling. The word used was ‘subservient.’ Like a switch had gone off.’”¹⁷¹ According to Malvo’s attorneys in recent media reports, “Malvo’s true personality is breaking through a cloud of brainwashing. . . . ‘He was so programmed. . . . He is nothing like he was before’ . . . Muhammad indoctrinated [Malvo] and essentially took control of him, leading him on a killing rampage.”¹⁷²

Coverage of the Lindh case also spurred statements: “[T]here are reams of documents to indicate that this kid has had problems since way back when. . . . [H]is problems were distinct, in the sense that he did things very, very strange [sic]. He wore long robes to school when he was in high school. He was never a person that fit in. He doesn’t seem to have been a person that really had a tight grasp on reality.”¹⁷³ The mother of Lindh “called upon U.S. authorities to show mercy for her son, who, she said, could have been brainwashed to fight on the side of the Taliban.”¹⁷⁴

The testimony of lay witnesses such as relatives will be more effective during sentencing. The focus during guilt/innocence must be on explaining the defendant’s intent, or more specifically, the personal lack of it. It is important, therefore, to classify and separate properly the different lay witnesses to establish the best defense possible.

B. Sentencing Phase

Under Virginia’s statutory scheme, upon a finding of guilt, “a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment.”¹⁷⁵ In the sentencing phase, the jury has a duty to consider all the evidence relevant to sentencing,

170. Josh White, *Lawyers Say Malvo Was Under a ‘Spell’: Muhammad Controlled Youth, Defense Team Contends in Sniper Case*, WASH. POST, June 26, 2003, at B1–2, available at 2003 WL 56501725.

171. Tom Jackman, *Malvo Was Brainwashed, Ex-Guardian Says*, WASH. POST, May 3, 2003, at B4, available at 2003 WL 20325887.

172. Josh White, *True, Nicer Malvo is Emerging, Lawyers Say*, WASH. POST, Sept. 18, 2003, at B1, available at 2003 WL 62216396.

173. *The O’Reilly Factor: Impact: Interview with Laura Spencer* (FOX News television broadcast, June 16, 2002), available at 2002 WL 5594627.

174. Arthur Bruzzone, *Tale of Two Terrorists*, ¶ 3, at <http://www.rightturns.com/columnists/bruzzone/ab20020101> (Jan. 1, 2002) (comparing the brainwashing claims of John Walker Lindh and Patricia Hearst).

175. VA. CODE ANN. § 19.2-264.4(A) (Michie Supp. 2003).

both favorable and unfavorable, before making its determination.¹⁷⁶ Admissible evidence may include the history and background of the defendant and any other factors in mitigation of the offense.¹⁷⁷ Mitigating evidence is that which shows “‘extenuating circumstances tending to explain but not excuse the commission of a crime.’”¹⁷⁸ Virginia Code section 19.2-264.4(B) enumerates factors that may be considered in mitigation and includes as a factor committing the crime while under the influence of extreme mental or emotional disturbance.¹⁷⁹ Brainwashing, similar to extreme mental or emotional distress, will require psychiatric or psychological testimony.

A jury’s rejection of a defense during the guilt/innocence phase does not bar consideration of the defense in mitigation.¹⁸⁰ For example, the United States Sentencing Guidelines (“Guidelines”) permit consideration of BWS and duress as mitigating factors at sentencing.¹⁸¹ In *United States v. Whitetail*,¹⁸² the defendant introduced evidence of BWS as a component of her claim of self-defense.¹⁸³ At trial, the *Whitetail* defendant was required to prove that she had reasonable grounds for believing she was in imminent danger of death or serious bodily harm.¹⁸⁴ However, under the Guidelines, she was only required to show that the victim’s, that is the batterer’s, “wrongful conduct contributed significantly to provoking the offense behavior.”¹⁸⁵ Similarly, a defendant asserting a duress defense must show “that a person of reasonable firmness in his situation would have been unable to resist” the coercion.¹⁸⁶ Under the Guidelines, the evaluation is based “on the reasonableness of the defendant’s actions and on the extent to which the conduct would have been less harmful under the circumstances as the defendant believed them to be.”¹⁸⁷

The treatment of duress and BWS during sentencing may be imputed to brainwashing. Brainwashing may be offered as an element of an insanity defense

176. *Watkins v. Commonwealth*, 331 S.E.2d 422, 431 (Va. 1985), *cert. denied*, 475 U.S. 1099 (1986).

177. VA. CODE ANN. § 19.2-264.4(B).

178. *See Reid v. Commonwealth*, 506 S.E.2d 787, 792 (Va. 1998) (quoting *Correll v. Commonwealth*, 352 S.E.2d 352, 360 (Va. 1987)).

179. VA. CODE ANN. § 19.2-264.4(B).

180. *See United States v. Whitetail*, 956 F.2d 857, 863 (8th Cir. 1992) (observing that coercion as a complete defense at trial involves proof of substantially different elements than does coercion as a mitigator during sentencing).

181. U.S. SENTENCING GUIDELINES MANUAL §§ 5K2.10, 5K2.12 (2002).

182. 956 F.2d 857 (8th Cir. 1992).

183. *Whitetail*, 956 F.2d at 863.

184. *Id.*

185. *Id.* at 863–64; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.10 (outlining victim’s conduct that may warrant a downward departure); *United States v. Willis*, 38 F.3d 170, 176 (5th Cir. 1994) (concluding subjective evidence of susceptibility of battered woman could not be taken into account in determining liability although it could be considered in sentencing).

186. MODEL PENAL CODE § 2.09 (1985).

187. U.S. SENTENCING GUIDELINES MANUAL § 5K2.12 (2002).

to make the defense more palatable to the judicial machinery. In such instances, evidence that may be prohibited during the guilt/innocence phase should be introduced in mitigation. Justice Stevens noted in *Bell v. Cone*¹⁸⁸ that although the jury was instructed to consider mitigation from the guilt phase, the jury's whole view of that testimony was influenced by its relation to the failed defense.¹⁸⁹ Justice Stevens's dissent strongly reinforces the importance of reintroducing mitigation evidence in sentencing. To do so gives the jury a chance to view the evidence in a new light.¹⁹⁰ Additionally, the rules of evidence do not govern the introduction of novel scientific evidence during sentencing and, thus, such evidence will not be subject to the same scrutiny as in the guilt/innocence phase.

In brainwashing cases, the defense should place equal emphasis on the guilt/innocence and sentencing phases. A brainwashed defendant is, in effect, not acting within his or her true personality.¹⁹¹ As with BWS, the defendant is acting under an altered perception caused by psychological abuse.¹⁹² It is irrelevant whether a "reasonable person" would have resisted these pressures. The evidence should be assessed on a case-by-case basis because an exact scientific methodology is currently lacking. The intent is not to give more weight to the brainwashing claim but rather to reinforce that it should be considered. Because of society's skepticism, it is necessary to ensure that the jury is reminded of its duty to consider all the relevant evidence. Proper consideration of the theory in these cases is the difference between life and death.

V. Conclusion

Brainwashing is poised to take its place within the legal justice system as a doctrinally acceptable defense. Its predecessors—duress and BWS—have paved the way. The first step must be compromise. It is clear from precedent that brainwashing is unsuccessful when asserted as a complete defense. Brainwashing is clearly a mitigating factor. By tracing the life of the defendant, the defense will be better able to explain why and how the free will of the specific defendant was overborne. In the unique case of capital murder, brainwashing is of utmost importance because it truly is the difference between life and death.

188. 535 U.S. 685 (2002).

189. See *Bell v. Cone*, 535 U.S. 685, 707–12 (2002) (Stevens, J., dissenting) (outlining the egregious failure by the attorney to offer possible mitigating evidence during sentencing); Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 127 (2002) (analyzing *Bell v. Cone*, 122 S. Ct. 1843 (2002)).

190. For example, during sentencing it may be more appropriate to introduce evidence of the defendant's good behavior from birth until the time of the offense.

191. See *Neelley*, 642 So. 2d at 505–06 (noting that the defendant, who was convicted of capital murder, argued that she was brainwashed and reduced to an instrument of her husband through his gross mental, emotional, physical, and sexual abuse and as a result did everything he asked).

192. Dore, *supra* note 114, at 757.