Intangible Captivity: The Potential for a New Canadian Criminal Defense of Brainwashing and Its Implications for the Battered Woman

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Intangible Captivity:
The Potential for a New Canadian Criminal Defense of Brainwashing and Its Implications for the Battered Woman

Frances E. Chapman†

ABSTRACT
This Paper explores the potential for a Canadian defense of brainwashing in the context of battered spouses who commit crimes against third parties. Part I briefly discusses a working definition of “brainwashing” and the historical basis for this potential defense. Part II discusses the juridical basis for a new defense of brainwashing by examining the theory behind the proposed defense. This leads to an examination of the established defenses of necessity, duress, automatism, and diminished capacity, which in turn moves the discussion toward the feasibility of an affirmative defense of brainwashing through the concept of superimposed intent. Part III will explore the evolution of Battered Woman Syndrome (BWS) as a model for a new defense and will examine brainwashing and the battered spouse. The paper is limited to a subset of abused women termed victims of the “sexual sadist.” Part IV concludes by analyzing the case of Karla Homolka and the future of a brainwashing defense.

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INTRODUCTION

The goal of criminal law is to satisfy a collective sense of justice and to seek punishment for those who commit crimes. ¹ The Canadian criminal justice system has attempted to separate those who are criminal from those who are excused. However, there are examples that fall on the continuum between free choice and no choice, where the accused may or may not be culpable. One of these situations is the proposed defense of “brainwashing.” ² Although brainwashing ³ has not been fully recognized as a viable defense in North America, the use of the techniques and psychological bases for the phenomenon have been explored for decades. ⁴ A largely unexamined subset of a potential brainwashing defense involves those who commit crimes against third parties under the overwhelming influence of an abusive partner.

There has been relatively little research on the role of brainwashing in the context of criminal law; indeed, little has been written on brainwashing since the cases of Patty Hearst and cult indoctrination in the 1970s. ⁵ Some have

². While the term brainwashing has many negative connotations and stereotypes, there is good reason for choosing it over other related terms. For the purposes of this Paper, the historic term is preserved in order to reclaim this word that entered the discourse and seeped into North American homes in the 1950s. It is the recognized medical term in the Diagnostic and Statistical Manual of Mental Disorders; therefore, it is the most appropriate.
³. Also called coercive persuasion, mind control, thought control, thought reform, menticide, and brain warfare. See ALAN W. SCHEFLIN & EDWARD M. OPTON, THE MIND MANIPULATORS: A NON-FICTION ACCOUNT 87 (1978) (noting the term that is the “most pungent of all, ‘mental douche.’”); see also EDMUND BERGLER & JOOST A.M. MEERLOO, JUSTICE AND INJUSTICE 108 (1963). For the purpose of this Paper I will use the terms interchangeably.
⁴. SCHEFLIN & OPTON, supra note 3, at 9. This experimentation has been conducted by hundreds of scientists in dozens of countries on thousands of people hundreds of thousands of times. Behavior modification, a major school of psychological thought, dominates many university psychology departments; psychosurgery has been endorsed by a national commission established to investigate its dangers; micro-miniature electronic circuits are making control of the mind through direct brain stimulation a real possibility; drugs to control moods and emotions have become the largest and most profitable part of the pharmaceutical industry; the techniques of brainwashing appear to have been revived with great success by numerous religious sects; [and] computer technology now makes possible monitoring (and therefore control) of intimate aspects of behavior.
⁵. See United States v. Hearst, 466 F. Supp. 1068 (1978); PATRICIA HEARST, EVERY SECRET
questioned the basis of such a defense. These critics claim that the entire notion of brainwashing is fallacious as one can no more “wash” another’s brain “than he can make him bleed with a cutting remark” and that the term brainwashing is wrongly reserved for influences of which we disapprove. Given the current cases of extreme domestic violence, this approach is short-sighted. In fact, there are numerous examples of battered spouses who commit horrific acts that can be explained using the conceptualization of mind control.

Brainwashing is particularly hard to classify and study because it calls on both the emotional and the intellectual. It “evokes fears of losing self-control, of being used and dominated by another, and of losing one’s very identity.” The idea that someone could be in the command of another is a premise that the legal system is loath to accept. However, at its most fundamental, to “blame a person is to express a moral criticism, and if the person’s action does not deserve criticism, blaming him is a kind of falsehood and is, to the extent the person is injured by being blamed, unjust to him.” Blameworthiness is fundamental to our legal system and to the basis of fault itself. For the purposes of the brainwashing defense, the coercively persuaded actor is one who has been selected, targeted, and brainwashed by the brainwasher to commit whatever criminal acts he chooses for his victim.

Extreme forms of brainwashing are quite real, especially in the form of coercion in intimate partnerships. Even though the dynamic of a dysfunctional intimate partnership lays a foundation for a brainwashing defense, it is not easy to say which women deserve this defense because it is difficult to say who is only a victim, or only a perpetrator.

This Paper will suggest that it is always imperative to seek justice for those who might not fit squarely within a paradigm and not simply look at an offender as victim or monster. By acknowledging the defenses of necessity, duress, Not Criminally Responsible by means of Mental Disorder (NCRMD), and automatism, the Canadian criminal justice system has embraced the idea that identical firmness of character from each individual is simply unrealistic. Although some view the science of brainwashing as an unsubstantiated relic of the past, such a conclusion fails to recognize certain realities of brainwashing which merit investigation. It is important to recognize that “[m]ind-manipulation techniques are not merely the pet projects of white-coated, laboratory-housed, contract-funded intellectual recluses who fiddle with dials, pull levers, push

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8. Id.
buttons and throw switches."11 These techniques have been successfully used on people. Our legal system should recognize the reality of brainwashing as it will ensure justice for the subset of offenders who are forced to commit crimes under the overwhelming influence of their partner and who currently face condemnation by the criminal justice system.12

Part I will briefly discuss a working definition of brainwashing and the historical basis of this potential defense. Part II proceeds by discussing the foundations for a new defense of brainwashing in the Canadian criminal justice system. This section examines the theory behind the proposed defense based on an examination of the already established defenses of necessity, duress, automatism, and diminished capacity. Ultimately, the feasibility of the brainwashing defense is discussed, focusing specifically on the concept of superimposed intent. Part III will explore the evolution of Battered Woman Syndrome (BWS)13 as a model for a new defense and will examine brainwashing and the battered spouse. To limit the field of this research, I propose to study a subset of abused women14 that I characterize as victims of the “sexual sadist.” Part IV concludes by analyzing the case of Karla Homolka and the future of a brainwashing defense.

11. SCHEFLIN & OPTON, supra note 3, at 11. Also, the terms reflect the process and its effect on individuals:
   “Brainwashing” conveys the sense of something done to a person that actually eliminates his original value system and world-view. ‘Menticide’ emphasizes that this transformation is no voluntary conversion. ‘Thought reform’ distinguishes this kind of change from that produced by the gradual accretion of socializing influence (as occurs, for example, in professional training). Coercive persuasion, observes psychiatrist Willard Gaylin, is intended not simply to force ‘a person to do that which you will, but rather to force him through the manipulation of his emotions to will that which you will.


13. Intimate violence is also perpetrated against men, but
   [w]omen are victims of intimate partner homicide about eight times more often than men, and women are assaulted by their partners seven times more often than men are. However, the number of male victims may be underreported, influenced by male stereotyping: men may be less willing to reveal themselves as victims, and authorities may be less sympathetic to their complaints.

Lesly Tamarin Mega, Jessica Lee Mega, Benjamin Tamarin Mega and Beverly Moore Harris, Brainwashing and Battering Fatigue: Psychological Abuse in Domestic Violence, 61 N.C. MED. J. 260, 261 (2000). For the purposes of this paper, violence by men perpetrated on women will be the focus.

14. One hundred percent of sexual sadists studied by Dietz et al. were men. Park Elliott Dietz, Robert R. Hazelwood, & Janet Warren, The Sexually Sadistic Criminal and His Offenses, 18 BULL. AM. ACAD. PSYCHIATRY LAW 163, 163 (1990) [hereinafter Dietz et al., The Sexually Sadistic Criminal]. The victims discussed in this paper are limited to women because they were the primary targets of these sexual sadists. If there are in fact no, or very few, female sexual sadists, this gives credence to the argument that these women may not have committed these sadistic acts without their male partner.
PART I: SETTING THE FOUNDATION

A. Definition of the Term Brainwashing

The term “brainwashing” is problematic because “there is no specific magic process called ‘brainwashing.’” Rather, the term is a collective one, shorthand for a set of specific social psychological processes, some or all of which may be operative when “mindcraft” is employed to influence a person or persons.” There are semantic and practical problems associated with studying this phenomenon since brainwashing has never had a precise technical definition, even though it is a recognized medical term:

In common parlance, the term has a broader connotation encompassing any attempt at persuasion or influence which is disapproved of by someone. The more technical definition, however, properly focuses upon the process of ideological conversion. Brainwashing exists only when a person has been compelled to believe subjectively a set of principles originally alien to him. Furthermore, the means used to accomplish this change must have been aggressive or violent.

This very broad definition is preferable to the more simplistic concept “characterized in wholly negative terms as a kind of mental rape: it is forced upon the victim by an attacker whose intention is to destroy the victim’s faith in former beliefs, to wipe the slate clean so that new beliefs may be adopted.” This annihilation of beliefs is far too broad. Instead, the term needs to be understood to include force with prolonged indoctrination in which the subject gives up previously held beliefs and attitudes.

In psychological literature, brainwashing currently appears in the Diagnostic and Statistical Manual IV-TR (DSM-IV-TR) under section 300.15, Dissociative Disorder not Otherwise Specified. This is a category of disorders

15. TAYLOR, supra note 7, at 95. Kinkead further notes,

In our society, when we face a phenomenon that we do not completely understand, we are apt to give it a name that indicates there is something magical, something beyond the reach of man’s powers of comprehension . . . [some say] “[y]ou can remove a man’s brain and wash out what’s in it, and wash into it whatever you want, the way you manage tape on a tape recorder!” The terrible implications of the term itself undermine the will of some people to resist. This is foolish. If only we can get to the point where we really understand indoctrination, we will have taken a long step forward in defeating it.

EUGENE KINKEAD, IN EVERY WAR BUT ONE 32 (1959).

16. SCHEFLIN & OPTON, supra note 3, at 85–86.

17. TAYLOR, supra note 7, at 4.


19. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF
characterized by “disruption in the usually integrated functions of consciousness, memory, identity, or perception of the environment” including category three which contains “[s]tates of dissociation that occur in individuals who have been subjected to periods of prolonged and intense coercive persuasion (e.g., brainwashing, thought reform, or indoctrination while captive).”20 However, it is also important to remember that brainwashing is mentioned as an exemplar of coercive persuasion, relegated to the parentheses of one of the elements for the diagnosis of a “Dissociative Disorder not Otherwise Specified.”21 The other elements that must be satisfied for the diagnosis to be substantiated are not defined further, which suggests a potential lack of empirical foundation that would be difficult to obtain.

The term brainwashing speaks to a fundamental change in character complete with implanted beliefs and choices. This character change is unlike traditional legal concepts such as duress, where the individual is freed from that coercion as soon as they are out of the control of the person exerting duress. Brainwashing in this particular context takes substantial intervention to allow the victim to recall their former beliefs. I adopt the definition of brainwashing as 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.”22 For this Paper, this type of violent conversion to a thought process foreign to the brainwashed’s values and principles is used since it is most similar to that experienced by the battered woman.

PART II: THE JURIDICAL BASIS FOR A NEW DEFENSE OF BRAINWASHING

In 1978, an American philosopher named George Fletcher entered the discourse on criminal law excuses with the publication of his seminal work Rethinking Criminal Law. 23 Fletcher had a profound effect on the general discussion by (1) classifying defenses as justification or excuse24 and (2) highlighting moral/normative involuntariness and the impact on both duress and necessity. Fletcher’s discussions of these two topics formed the basis for the defenses of necessity and duress in Canada. They were eventually adopted by the Supreme Court in R. v. Perka and R. v. Ruzic.25


20. Id.
21. Id.
22. Delgado, supra note 12, at 1 n.1.
One of the basic philosophical arguments within a discussion of duress is labeling the defense as an excuse or a justification. Forcing defenses into one category is difficult and often results in an inconsistent philosophy.\textsuperscript{26} Fletcher begins his analysis with the basic assumption derived from J. L. Austin that “justifications concede that the definition of the offense is satisfied, but challenge whether the act is wrongful; claims of excuse concede that the act is wrongful, but seek to avoid the attribution of the act to the actor.”\textsuperscript{27} Thus, an excuse concedes that there is a wrong, but if the excuse is valid, the actor is not accountable for the wrongful act. Additionally:

\begin{quote}

[a]s the inquiry moves from justification to excuse, the emphasis shifts from assessing the act in abstraction to assessing the actor’s response to unusual circumstances. The relevant question is no longer whether other people should act the same way in the same situation, but whether this defendant can be justly blamed for having succumbed to overwhelming pressure.\textsuperscript{28}
\end{quote}

Most theorists agree that a potential brainwashing defense would likely fall in the realm of excuses rather than justifications and that the application must be subjective.

Examining the idea of excuse in more detail, it is necessary to understand what is meant by the terms normative involuntariness and moral involuntariness. Fletcher uses the term “involuntariness” throughout his work, but he appears to struggle with this term. Ultimately, Fletcher chooses to use the word \textit{involuntary} even though he does not mean that the person is fully involuntary. He resists the adoption of a term that suggests that any decision at all is actual choice. Rather, physical involuntariness must be distinct from normative involuntariness, which is not an easy task given that “our language systematically blends the two in one set of terms.”\textsuperscript{29}

Out of Fletcher’s work, brainwashing could be conceptualized as an excuse where the individual characteristics of the actor, along with the involuntariness of the action, must be examined on a case-by-case basis. It would be impossible to universalize a justification around brainwashing; the individual actor is key. Thus, the difficulty with a defense such as brainwashing is that it cannot adequately be put in a perfect box: this defense needs a more individualized approach.

\textbf{A. Free Will and Choice Theory}

Any discussion of brainwashing will by necessity involve a discussion of the concept of free will. The question of free will has been a constant topic

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\textsuperscript{26} FLETCHER, \textit{supra} note 23, at 451.
\textsuperscript{27} Id. at 759.
\textsuperscript{28} George P. Fletcher, \textit{The Individualization of Excusing Conditions}, 47 S. CAL. L. REV. 1269, 1276 (1974).
\textsuperscript{29} FLETCHER, \textit{supra} note 23, at 803.
debated by philosophers and lawyers.\textsuperscript{30} Canadian criminal law is governed by the maxim \textit{actus non facit reum nisi mens sit rea}, or “an act does not become guilty unless the mind is guilty,”\textsuperscript{31} or what H.L.A. Hart terms a “morally evil mind.”\textsuperscript{32} Although there is much disagreement among scholars on many issues surrounding this topic and what the law calls mens rea, or the guilty mind, it has been argued that moral blame should only attach to a voluntary choice.\textsuperscript{33} Similarly, it is widely agreed that a fully rational choice is what we can expect of a normal human actor.\textsuperscript{34}

Yet rational choice cannot be expected of many coercively persuaded defendants and the debate surrounding how best to treat these defendants continues. Hart contends that it would be immoral to punish an individual who had no choice and could not have avoided what was done.\textsuperscript{35} In fact, most lawyers, laymen and moralists, considering the legal doctrine of mens rea and the excuses that the law admits, would conclude that what the law has done here is to reflect, albeit imperfectly, a fundamental principle of morality that a person is not to be blamed for what he has done if he could not help doing it.\textsuperscript{36}

On the other hand, some scholars argue that the only way to punish fairly is to target the voluntary offender who has been given an opportunity to avoid the harm.\textsuperscript{37}

When explaining how a potential brainwashing defense would likely be an excuse, Michael Moore simplifies the standard. Moore says the discourse on excuse “asserts that the criminal law is morally right in excusing all those, and only those, whose actions are caused by factors outside their control.”\textsuperscript{38} In Canada, the courts are permitted to evolve the types of defenses (whether an excuse or a justification) that are not codified. Under section 8(3) of the \textit{Criminal Code}, an uncodified defense to a charge may continue to exist even if it is not formally recognized in legislation.\textsuperscript{39} If a brainwashing defense was satisfactorily born out by scientific evidence, it could be added as a new defense, just like the

\begin{itemize}
\item \textsuperscript{30} Stephen J. Morse, \textit{The Twilight of Welfare Criminology: A Reply to Judge Bazelon}, 49 S. CALIF. L. REV. 1247, 1251 (1975).
\item \textsuperscript{31} James Stribopoulos, \textit{The Constitutionalization of 'Fault' in Canada: A Normative Critique}, 42 CRIM. L. Q. 227, 230 n.4 (1999).
\item \textsuperscript{34} Stephen G. Coughlan, \textit{Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change?}, 7 CAN. CRIM. L. REV. 147, 192 (2002).
\item \textsuperscript{35} HART, supra note 22, at 152.
\item Id. at 174.
\item \textsuperscript{36} See Richard Burgh, \textit{Guilt, Punishment, and Desert}, in \textit{Responsibility, Character, and the Emotions} 316, 318 (Ferdinand Schoeman, ed.,1988).
\item \textsuperscript{37} Michael S. Moore, \textit{Causation and the Excuses}, 73 CALIF. L. REV. 1091, 1091 (1985).
\item \textsuperscript{38} Criminal Code, R.S.C. 1985, c. C-46 § 8(3) (Can.).
\end{itemize}
The evolution of the self-defense doctrine as it related to an increased understanding of Battered Woman Syndrome (BWS) which will be discussed below. In this analysis, the type of excuse that would encompass a brainwashing defense would be a “volitional deficiency.” Thus, the central theme is choice: whether someone in the same circumstance would have done the same thing, and whether she would have been able to control her conduct. It is a “decision to recognize the brainwashing excuse [that] would require the criminal law to ignore the accused’s choice to commit a crime and embrace a determinist view of human conduct, thereby affording universal excuse on the ground that misconduct is the product of influences originating outside the actor’s own will.” Or, alternatively, “we excuse because culpable choice is lacking, not because the action fails to manifest bad character.”

It is established that an actor should not be punished if she was severely coerced. The trier of fact must question responsibility by looking at whether the accused could have avoided doing what she did on the basis that no one should be punished for acts—even immoral acts—that could not be avoided. It has become well accepted in modern jurisprudence that unless an individual has an opportunity to avoid the behavior, she should not suffer the penalties.

The irony is that the actor, in some ways, is autonomous because of a desire to complete the actions required in order to avoid a less desirable outcome, but the brainwashed actor is functioning with impaired decision-making capabilities. Even an individual who is acting rationally and clearly may find it impossible to comply with certain behaviors where there is no “normatively acceptable option for him to choose.” Although the actor has a choice, it is a constrained choice because it is made between “two bad outcomes, neither of which the actor would consider worthy of choice in itself or in better circumstances.” For example, a woman could “choose” to sexually assault someone because her sexual sadist husband tells her to do so to avoid being punished physically, mentally, emotionally, sexually, and/or financially. If the choice is between sexually assaulting someone or being savagely sexually tortured repeatedly for the foreseeable future, we must ask whether any real choice exists.

Choice makes a defense like duress an “atypical excuse” because the actor

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40. Kadish, supra note 9, at 272.
42. Michael S. Moore, Choice Character and Excuse, in CRIME, CULPABILITY, AND REMEDY 29, 58 (Ellen Frankel Paul et al. eds., Basil Blackwell 1990) [hereinafter Moore, Choice].
43. Hart, supra note 32, at 28.
44. Id. at 39.
45. Id. at 181.
48. Id. at 605.
chooses to commit the criminal offense rather than to accept the threatened consequences. He would not have chosen to commit the crime but for the threat, but it is still his choice, albeit a hard and excruciatingly difficult choice. His act may be unwilling, but it is not unwilled.\textsuperscript{49} When trying to determine if an individual acted in a comprehensible way in a particular situation, the trier of fact is faced with the issue that even though there were potentially debilitating factors that affected the actor’s choice, it was still a choice of some kind.\textsuperscript{50} Thus, it is not “impaired capacity,” as many argue, that one fails to conduct oneself in the proper manner, but it is lack of opportunity to act otherwise.\textsuperscript{51} The individual, from all appearances, seems to be acting in a voluntary way. The key difference is that when responding to what the duressor demands, “she is not deliberating as to whether or not she should perform this action, but whether or not she should resist being forced to do it.”\textsuperscript{52} This results in the paradox of being simultaneously autonomous and nonautonomous.

Using this as a basis, a conviction is impermissible unless, “(1) a condemnable act was committed by the actor-defendant; (2) the actor can be condemned – that is, he could reasonably have been expected to have conformed his behavior to the demands of the law; and (3) society [may] sit in condemnation of him with respect to the condemnable act.”\textsuperscript{53} When discussing brainwashing, it is difficult in most cases to condemn the actor under the second or the third preconditions. It is not possible for the coercively persuaded actor to conform to the law under the state in which she functions, and society has no basis to punish or condemn those acts. The discussion of the persuasively coerced defendant is an intimidating prospect, but this shift in our views of criminal responsibility is necessary and not as momentous as some believe.\textsuperscript{54}

B. The Established Defenses

A full discussion of the topic is beyond the scope of this Paper, but a brief discussion of the possibility of integrating brainwashing concepts into the existing structure of defenses in Canadian law is necessary, since it is asserted that adding brainwashing as a defense to the already established defenses of necessity, duress, NCRMD, automatism and diminished responsibility is

\textsuperscript{49} Joshua Dressler, \textit{Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits}, 62 S. Cal. L. Rev. 1331, 1360 (1989) (noting, “[i]f law is paramount, so the argument might proceed, a person who knowingly places his own interests above that of the community, as represented by the law, should not be excused.”).


\textsuperscript{51} Baker, supra note 47, at 609.

\textsuperscript{52} Taylor, supra note 46, at 154.


\textsuperscript{54} Thomas D. Nolan III, \textit{The Indoctrination Defense: From the Korean War to Lee Boyd Malvo}, 11 Va. J. Soc. Pol’y & L. 435, 457–58 (2004) (“Given that there is not even a substantial minority acceptance of indoctrination within the psychiatric community, now is certainly not the time for such a drastic reform.”).
impossible.

Necessity is a defense that draws considerable scrutiny and furthers the arguments on blameworthiness and involuntariness. Unlike duress, the Canadian Criminal Code does not explicitly codify the defense of necessity. Necessity and duress have developed simultaneously, and “some have argued that the very existence of the defense of duress argues for a recognition of necessity” because it would be illogical to recognize a defense to threats and not to circumstances. Many see duress as a species of necessity with the difference being that duress “is created by the illegal conduct of another person, whereas in cases of necessity compulsion is generated by natural forces.” The key to remember in relation to brainwashing is that it could not possibly fit within necessity, because necessity captures only those choices that are compelled by natural circumstances and not human agency. Brainwashing does not fit within necessity; it is a better fit in duress, which involves the coercion of individuals.

The defense of duress is “a paradigmatic example of an excuse.” The actor “would not choose any such act in itself.” Duress defines voluntary wrongdoing as a situation where “the actor’s freedom of choice is constricted.” Thus, the actor is not in a situation in which his acts are physically involuntary, as would be the case if he were having a seizure, and no one forces his hand to a “victim’s throat;” instead, the type of involuntariness shown in duress is an extension of the term used in R. v. Perka to “moral or normative involuntariness.” The Canadian Supreme Court elevated the principle of moral involuntariness to the status of a principle of fundamental justice. The only way to anchor a defense of brainwashing is with normative involuntariness, as it will not fit within the conventional categories.

56. Id. at 850.
58. FLETCHER, supra note 23, at 830. (Yet, note that Fletcher does recognize at 799 that duress is an excuse in some legal systems, but not in others. There are disparate concepts of duress, including one assessment that duress is a justification and a sub-categorization of necessity according to Wayne R. LaFave & Austin W. Scott, Jr., CRIMINAL LAW §§ 5.3, 5.4(b) (2d ed. West 1986) cited in Joshua Dressler, Justifications and Excuses: A Brief Review of the Concepts and the Literature, 33 WAYNE L. REV. 1155, 1170 note 57 (1987). Michael Gorr’s article, Duress and Culpability, argues that duress and necessity are often confused in both legal and philosophical realms and disagrees with the assertion that duress is simply a subspecies of necessity. Michael Gorr, Duress and Culpability, 19 CRIM. JUST. ETHICS 3, 4 (2000). Gorr suggests that duress is properly categorized as an excuse and necessity is properly a justification. Id.)
59. FLETCHER, supra note 23, at 830 (quoting Aristotle, THE WORKS OF ARISTOTLE: ETHICA NICOMACHEA 1110a (W.D. Ross trans. 1925)).
60. Id. at 802.
61. Id.
63. FLETCHER, supra note 23, at 803. (The courts have struggled for centuries to determine if duress should be limited so that, as noted in R. v. Farduto (1912), 21 C.C.C. 144, 185 (Que. Ct. K.B.), the compulsion must be “such as to make the accused person a mere inert physical instrument.”)
With respect to the defense of duress, however, there are serious issues with fitting brainwashing within those parameters. “Since coercive persuasion, when successful, often eliminates the need for continuing coercion, as well as the will to resist and desire to escape, a victim is unlikely to meet the fairly rigid standards of a duress defense.”64 It is a fundamental problem in that the “victim of thought reform often continues to feel controlled by the captors since even after leaving their presence, he may ‘reasonably,’ if incorrectly, believe that he will suffer punishment if he fails to act as expected.”65 In addition, there are many limitations to duress, including the problems with immediacy, safe avenue of escape, prior fault, and excluded offenses. It is not advisable to fit brainwashing into this existing defense.

Instead, the “[e]xtension of existing doctrine to include the ‘hard case’ of a coercively persuaded defendant may blur the lines separating legal concepts to the point where no one can predict their boundaries,”66 while a new defense has the “considerable advantages of analytical simplicity and precision, [and] predictability.”67 In summary, brainwashing does not fit within the established defense of duress in Canada because:

1. The continuing threat that is required for duress does not exist in brainwashing. The individual often appears to be completely removed from the threat of their brainwasher;

2. The immediacy element of duress often will not be present in brainwashing as no one is standing over the brainwashed actor;

3. The presence requirement in duress (which may not exist after R. v. Ruzic) certainly is not present in brainwashing cases;

4. The brainwashed defendant frequently has an obvious safe avenue of escape;

5. The brainwashed defendant might have some element of prior fault;68

6. There are numerous excluded offences in the duress defense making it unavailable to the bulk of actors requiring this defense.

It is also important to inquire into whether a brainwashing defense could fit within the defense of NCRMD. The Canadian defense of mental disorder is found in Section 16 of the Criminal Code of Canada.

65. Delgado, supra note 12, at 7 n.29.
66. Id.
67. Id.
68. See Roy Hazelwood et al., Compliant Victims of the Sexual Sadist, 22 AUSTRALIAN FAMILY PHYSICIAN 474 (1993) [hereinafter Hazelwood et al., Compliant Victims].
reasons why the defense of brainwashing would not fit within the established defense of NCMRD:

1. Section 16 of the *Criminal Code* states that a person must be suffering from a mental disorder which makes them “incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.” From the first fundamental precept, this is not the case of the brainwashed defendant. They may know the quality of the act, and they may know that it was wrong. Thus, it fails on both heads.

2. For many brainwashing victims, they are not suffering from any recognized mental disorder.69

3. The brainwashed defendant may be operating in this state for very long periods of time. It is difficult to say that the actor was temporarily insane for several months or years.

4. The influence is largely (or completely) external to the accused in brainwashing rather than an internal cause as in a mental disorder.

5. Although there may be some sense of self remaining in the insane actor, the brainwashed defendant may have their entire self suppressed. Thus, this does not fall into the category of NCMRD.

Automatism is another traditional defense that is linked to the defense of mental disorder, because in both outcomes the accused may not be criminally responsible for an act committed while suffering from either state.70 The links between a brainwashing defense and automatism are clear. However, unlike some forms of automatism, brainwashing comes from an external cause, and in brainwashing the individual almost always reverts back to their “normal” self at some point in time. In looking at automatism, cases have focused on the continuing danger theory which states that the court must decide if the individual is a recurrent threat to society and must be considered insane.71 This is a difficult inquiry in brainwashing.

Many have argued that the defense of automatism was rendered virtually

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69. As discussed above in Part I, Brainwashing currently appears in the DSM-IV-TR diagnostic manual under section 300.15, *Dissociative Disorder not Otherwise Specified.* DSM-IV-TR, supra note 19, at section 300.15 (3).

70. Many of the cases discussed in this paper occurred under the old insanity provisions of the *Criminal Code* and are, therefore, referred to as sane and insane automatism. Today the *Criminal Code* specifies that the accused would be found not criminally responsible by reason of mental disorder (NCRMD). Therefore, although some of the material in this paper may refer to sane and insane automatism, NCRMD is the correct term today to be consistent with the terminology of Part XX.1 of the *Criminal Code*. However, for the purpose of ease, the terms can be used interchangeably.

inaccessible by the Canadian case, R. v. Stone,72 which stated that there is a presumption of a “diseased mind whenever sufficient evidence to ground a plea of automatism is introduced. The other is that, in assessing the likelihood of recurrence, the judge is to consider not only the psychiatric history and emotional make-up of the accused but also the likelihood that the triggering event will itself recur.”73 The result is a test that looks for an external cause because unconscious acts are a disease of the mind unless “an external cause can be identified; and, according to the second, even if an external cause can be identified, there may nonetheless be disease of the mind if it is likely that the external cause will recur and irrespective of whether there is evidence of peculiar susceptibility in the accused.” 74 Hence, this two-step approach in assessing automatism may destroy the defense in Canada, and it seems illogical to attempt to add a subset of brainwashing to this inaccessible defense.

Some have attempted to fit brainwashing within the paradigm of diminished capacity or a stand-alone defense of “unconsciousness” in that the accused did not have awareness of their actions. 75 This model has the benefit of not requiring proof of a non-existent disease of the mind. 76 However, when it comes to brainwashing, it is not possible for the accused to say that they were unaware of their actions. 77 One argument for the diminished capacity defense is to create a middle ground between insanity and the full exculpation of the accused. 78 This is based on the uniquely British conception of clouded consciousness, which simply reduces murder to manslaughter in very limited circumstances. This defense, however, does not exist in Canadian law. In conclusion, to plead unconsciousness or diminished capacity would also not be an option for the brainwashed offender. If there is no defense of brainwashing, the result is troubling, because it would mean “denying a defense to a class of defendants who are, by ordinary moral intuitions, often more victims than perpetrators.”79

C. Superimposed Intent

In light of the significant difficulty in fitting brainwashing within traditional defense definitions, and the difficulty in conceptualizing it as an entirely new affirmative defense, there may be good reason to focus on brainwashing as a unique mens rea claim in which superimposed intent negates mens rea. For this approach, there are six criteria to determine if there has been a

73. Id. at 68.
74. Id.
76. Id. at 370.
77. Id. at 372.
transfer of mens rea to distinguish those cases that require a criminal defense from those who have “given in to temptation, learned to commit crimes, or voluntarily adopted the behavior patterns of a criminal subculture.”

1. The mental state of the accused is the product of “unusual or abnormal influences including drugs, hypnosis, prolonged confinement, physiological depletion, and deliberate manipulation of guilt, terror, and anxiety.” The presence of these factors implies that the mens rea was not that of the victim.

2. The state of mind is markedly different than their “ordinary mode of thinking.” Was the process very slow (which would suggest a normal process of change) or very rapid to the point of being a “change of identity?” Where it is found that the state of mind for the criminal offence is “implanted, inauthentic, and not of his own choosing” the defendant warrants acquittal.

3. The mens rea is not self-imposed as could be said in some situations where individuals freely choose to become part of a cultic organization. If this choice was freely made, the choice is blameworthy and this individual is an “appropriate object of punishment.”

4. The criminal offense perpetrated is for the benefit of the oppressor with an apparent lack of benefit for the victim. This is particularly the case where the “actions induced are dangerous and are ones the individual showed no interest in performing before falling under the control of the captors.”

5. The victim genuinely rejects these beliefs when outside of the oppressor’s influence and recognizes that these beliefs were “not his own, but were wrongfully implanted or superimposed.”

6. There are also “symptoms typical of the coercively persuaded personality,” including “flattened affect, reduced cognitive flexibility, drastic alteration of values, and extreme dissociation.”

80. Id. at 19.
81. Id. at 19–20.
82. Id. at 20.
83. Id.
84. Id.
85. Id.
86. Id. at 21.
87. Id.
88. Id.
89. Id. at 21–22.
90. Id. at 22 (emphasis omitted).
To explore the victim of compelled coercion from this very different perspective requires one to look at the criminal law in a very different manner:

The victim of thought reform typically commits criminal acts fully aware of their wrongfulness. He acts consciously, even enthusiastically, and without overt coercion. Yet, in an important sense, the guilty mind with which he acts is not his own. Rather, his mental state is more appropriately ascribed to the captors who instilled it in him for their own purposes.\(^91\)

Thus, there is a transferred or superimposed mens rea that is not comprised of the actor’s own thoughts.\(^92\) It is arguable that the brainwashed actor has neither the requisite mens rea nor actus reus. Although the actor appears to be aware of his or her actions, those actions are involuntary and unintended. A concrete example of this theory is the defense of “hypnosis,” which allows for the concept of “transferred or superimposed mens rea.”\(^93\) The defense recognizes the “marked dependency and helplessness of the subject.”\(^94\) Some cases have found that responsibility can be assigned to the hypnotist for the illegal acts, instead of to the individual who performed the crime.\(^95\)

There are many who object to brainwashing as a transferred mens rea defense. It is noteworthy that some of this criticism comes from those who believe that psychiatry has influenced the criminal justice system excessively.\(^96\) Additionally, the intuitive notion of personal responsibility complicates the defense.\(^97\) However, there are many situations where the justice system rightly allows individuals to defend their actions with the assistance of psychiatry. Furthermore, the “law has accommodated excusing conditions when paradigmatic cases were recognizable and moral intuitions demanded exculpation, despite the absence of a fully developed theory or model capable of explaining the difficult, confused, or borderline case.”\(^98\) Often the development is caused by a need to exculpate a specific actor who may not fulfill the perfect case. Although it is unlikely that superimposed intent will be wholly recognized, the system has accepted analogous ideas in the areas of entrapment and false confessions.\(^99\)

Thus, it will be necessary to integrate existing defenses by way of analogy because for the brainwashed accused it will be virtually impossible to escape conviction by claiming a lack of mens rea. The conventional perspective on criminal liability suggests that one can infer that an accused has chosen to do harm from the fact the accused acted with an awareness of the risk of harm.

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91. Delgado, supra note 12, at 11 (internal citations omitted).
92. Id.
93. Id. at 11.
94. Id. at 13.
95. Id.
96. Id. at 23.
97. Id.
98. Id. at 24.
99. A full discussion of these topics is beyond the scope of this Paper.
Accordingly, mens rea is too narrow a concept for dealing with the brainwashed accused as a clear choice with awareness has still been made by the individual. However, if one’s choices are actually a product of manipulated beliefs and desires, one may still escape conviction on the basis of the affirmative excuse. Using this starting point, one is able to investigate further the defense of brainwashing.

PART III: BRAINWASHING AND THE BATTERED SPOUSE

A. Battered Woman Syndrome (BWS)

“This delay in revealing brainwashing left the public with a twisted conception of it. People still think it has something to do only with prisoners of war, and possibly foreigners put under arrest... Brainwashing only incidentally concerns military prisoners or foreigners.”

The reason that the BWS model is an important element of this analysis is because it provides a scenario which is most analogous to a situation of an individual in a coercive environment who commits a serious criminal act. Traditionally, in BWS, the violence is directed toward the aggressor, while in brainwashing (for the purpose of this Paper) it targets third parties. However, before entering into any discussion of BWS in Canadian law, it is important to note that BWS is not a full defense in Canada. BWS has been used in conjunction with already established defenses like self-defense and duress, but it is not itself an affirmative defense. Rather, in the context of self-defense, the understanding of BWS has led to a re-conceptualization of how courts assess the reasonable fear and reasonable response of a spouse claiming self-defense.

The thread that runs through the research on battered women is that “[a]ssaults of wives by their husbands have long been considered a family, rather than a legal, matter.” It has been noted that wife abuse in North America has existed “since the founding of the Colonies. English Common Law and Christianity, foundations of this nation’s culture, accepted wife abuse as the husband’s prerogative: “‘Marital violence was his privilege’” Blackstone


101. ANGELA BROWNE, WHEN BATTERED WOMEN KILL 164 (1987); see also Martha Shaffer, Coerced into Crime: Battered Women and the Defence of Duress, 4 CAN. CRIM. L. REV. 271, 275 n.7 (1999) (“By saying that wife abuse is largely a gendered phenomenon, I do not mean to suggest that partner abuse does not occur within gay and lesbian relationships, nor that female violence against male partners does not exist.”).

102. STEVEN M. MORGAN, CONJUGAL TERRORISM: A PSYCHOLOGICAL AND COMMUNITY TREATMENT MODEL OF WIFE ABUSE 4 (1982) (citing T. Davidson, Wifebeating: A Recurring Phenomenon Throughout History, in BATTERED WOMEN: A PSYCHOLOGICAL STUDY IN DOMESTIC VIOLENCE 233 (M. Roy ed., 1977). In England “beatings were so common in some districts, they were known by the manner of beating administered there. Liverpool was known as the ‘kicking district’ because the husbands kicked their wives with hobnailed boots.” Id. at 6.
wrote in his commentaries that “[f]or as [the husband] is to answer for her misbehavior, the law thought it reasonable to intrust [sic] him with this power of chastisement, in the same moderation that a man is allowed to correct his apprentices or children.” 103 Research on battered women, however, shifted significantly in the 1980s with the work of Lenore Walker.

In her seminal book, *The Battered Woman Syndrome*, 104 American psychologist Lenore Walker looked at the historical basis of this phenomenon. She noted that spousal abuse can be traced throughout history. 105 Walker was the first to develop the fundamental pattern of spousal abuse that has been adopted by many working in the field. She describes a cycle with three phases:

(1) tension building, (2) the acute battering incident, and (3) loving-contrition. During the first phase, there is a gradual escalation of tension displayed by discrete acts causing increased friction such as name-calling, other mean intentional behaviors, and/or physical abuse... The woman attempts to placate the batterer, doing what she thinks might please him, calm him down, or at least, what will not further aggravate him... Often she succeeds for a little while which reinforces her unrealistic belief that she can control this man. It also becomes part of the unpredictable noncontingency response/outcome pattern which creates the *learned helplessness*. The tension continues to escalate and eventually she is unable to continue controlling his angry response pattern... The second phase, the acute battering incident, becomes inevitable without intervention. Sometimes, she precipitates the inevitable explosion so as to control where and when it occurs, allowing her to take better precautions to minimize her injuries and pain... The acute battering phase is concluded when the batterer stops, usually bringing with its cessation a sharp physiological reduction in tension... In phase three which follows, the batterer may apologize profusely, try to assist his victim, show kindness and remorse, and shower her with gifts and/or promises. The batterer himself may believe at this point that he will never allow himself to be violent again... This third phase provides the positive reinforcement for remaining in the relationship, for the woman... [there may be] no observable loving-contrition behavior, and still be reinforcing for the woman... This is a sign that the risk of a lethal incident is very high. 106

Some identify BWS as “a descriptive term which attempts to explain the unique combination of psychological stresses that result[s] from the deliberate and repeated infliction of mental and physical abuse” 107 and define “syndrome” as “a descriptive expression for an identifiable group of symptoms that occur together,

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105. Id. at 142.
106. Id. at 126–27 (citations omitted) (emphasis in the original).
the sum of which characterize the behavior and state of mind of the battered woman.” 108 Today, this syndrome is also termed “intimate partner violence” that includes psychological, physical and sexual abuse and is often targeted at women.109

Most recently, a particular type of battering (the focus of this Paper) has been defined as “intimate terrorism”110 which theorist Lewis Okun adopted from brainwashing literature.111 “Okun compared woman battering to torture and used the term conjugal terrorism to depict the threats and the larger pattern of control by which batterers construct the victims’ decision-making powers.”112 This lack of control and blind acceptance are characteristics of this debilitating condition which can be described as terror. Johnson uses the term intimate terrorism113 to denote a situation where the batterer is “violent and controlling” while the partner is not.114 Stark has noted that “woman battering is qualitatively different than other forms of abuse or assault in that it extends over time and through social space and exacts a significant toll that cannot be explained by injury or violence.”115 Many battered women today prefer the term “battered woman survivor” and there is a growing literature on the will to survive.116 However, the fact remains that, “while the term . . . may be repugnant to some, [BWS] is now specifically cited in much statutory and case law.”117 It has been noted that

108. Id.
111. LEWIS OKUN, WOMAN ABUSE: FACTS REPLACING MYTHS (1986).
112. Stark, supra note 110, at 1021. Stark explains that coercive control (CC) is involved in “exploitation and deprivation as well as its links to ‘psychological abuse.’ If most battered women experience CC rather than domestic violence, this would explain why ‘abuse’ continues even when couples separate, why ‘minor’ violence can have significant consequences, why battered women are entrapped and develop a unique problem profile.” Id.
113. See Michael P. Johnson, Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women, 57 J. MARRIAGE & FAM. 283, 287 (1995) [hereinafter Johnson, Patriarchal Terrorism]. Johnson also uses the term “patriarchal terrorism” as a term in which “men systematically terrorize their wives.” Id. Johnson defines patriarchal terrorism as a situation in which the beatings occur on average more than once a week, and escalate in seriousness over time. The violence is almost exclusively initiated by the husband, most wives never attempt to fight back, and, among those who do, about one-third quickly desist, leaving only a small minority of cases in which the women respond even with self-defensive violence.

Id.
114. Johnson, Conflict, supra note 110, at 1003.
115. Stark, supra note 110, at 1020.
116. Elizabeth M. Schneider, Feminism and the False Dichotomy of Victimization and Agency, 38 N.Y. L. SCH. L. REV. 387, 390 (1993). Schneider has noted that “[r]esource and advocacy materials on battered women now emphasize the human strengths and capacities of battered women who struggle to survive, protect themselves and their children, and keep their families functioning.” Id.
counsel may have little choice but to use the term if they wish to have the jury hear experts on the intricacies of domestic violence.118 For that reason, the term BWS will be used throughout this paper, but the paper will draw on the terminology of coercive control and conjugal terror.

It has been noted that BWS is “not itself analogous to an indoctrination defense. Indoctrination may, but need not, involve fear of death itself or serious bodily harm. Indoctrination is not a self-defense claim. Rather, the essence of the defense is that the defendant’s will is no longer hers.”119 The question remains, how will the brainwashing defense be conceptualized? Like duress, brainwashing exists despite the mens rea, but the accused is blameless because the mental element was not his own. The defendant needs to prove that the crime was perpetrated while under the influence of another, rather than focus on the imminent manner of the act, as in the codified version of duress.120 Thus, some of the limitations inherent in the defense of duress, like proximity, would be eliminated with the defense of brainwashing. Ida-Gaye Warburton notes that the standard should be very individualized, because a reasonable person standard would be inaccurate given that no two actors respond identically to coercive persuasion.121 For this reason, individual torture and manipulation could excuse the brainwashed actor or at least be a factor in mitigation.122

It is very important to recognize that BWS is not wholly accepted by all scholars and professionals and has not been consistently used within Canadian criminal law. Research subsequent to Walker’s work has been critical of the cycle of violence theory because the cycle of violence was “not present in some abusive relationships and also because it implied that abuse was predictable and intermittent, thereby obscuring the ever-present controlling behavior of the batterer.”123 While many theorists have explored the obvious links between BWS and post-traumatic stress disorder (PTSD), Walker has been criticized for “pathologizing women and implying that battered women suffer from mental illness.”124 Schneider notes, the danger in BWS is that

it focuses on the woman’s defects, the woman as subject to the “syndrome.” It implies that she is limited because of her weakness and her problems, and does not appear to affirm the circumstances of her act... the battered woman “suffers” from the syndrome and therefore should not be expected to leave her home, not because it is relevant to the reasonableness of her act; the court is

118. Id.
120. Warburton, supra note 18, at 84.
121. Id.
122. Id. at 83. Mitigation is beyond the scope of this Paper.
123. Mega et al., supra note 13, at 261; see also Regina Schuller & Sara Rzepa, The Scientific Status of Research on Domestic Violence Against Women, in 2 MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY 37, 62 (David L. Faigman et al. eds., 2002) (finding that physical abuse is not predictive of emotional distress).
willing to extend its “protection” and admit the testimony because the battered woman is perceived as weak... [T]he psychological aspect of the description sounds like incapacity and excuse.125

There are researchers who rightly challenge the use of “syndrome evidence” in court. The U.S. Department of Justice commissioned a report to examine this issue, titled “The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials”.126 With the input of experts such as Regina Schuller, the report committee found that the term BWS “does not adequately reflect the breadth or nature of knowledge concerning battering and its effects,” and that the term, “in the context of the knowledge developed within the past 20 years, is imprecise and, therefore, misleading.”127 The report concluded that the term BWS is “not adequate to refer to the scientific and clinical knowledge concerning battering and its effects germane to criminal cases involving battered women.”128 The committee identified that a common problem with the term is that it implies battered women have something wrong with them.129

Researchers have noted that rather than pathologizing women, the intent of expert testimony is to provide jurors with an “alternative perspective, or ‘social framework’, for interpreting the woman’s beliefs and actions—an interpretive social schema from which to view her actions as reasonable rather than aberrant.”130 Critics of the term BWS point to the need for different explanations of coercion to account for the actions and mindset of the battered woman. Yet the impact of BWS, whether or not the term is methodologically or definitionally precise, is hard to ignore. Courts have admitted BWS with some frequency, not only in the U.S., but also in courtrooms across Canada, Great Britain, Australia, and New Zealand.131 It is clear that despite any inconsistency and definitional imprecision, BWS has been accepted by Canadian courts and is currently being used as a legal concept within the Canadian justice system.

B. The Battered Spouse and Prisoners of War

During the 1970s, a few researchers explored the link between those who have been brainwashed and battered women. Suzanne Steinmetz described

127. Id. at 17.
128. Id.
129. Id. at 19.
131. Regina A. Schuller & Gwen Jenkins, Expert Evidence Pertaining to Battered Women: Limitations and Reconceptualizations, in EXPERT PSYCHOLOGICAL TESTIMONY FOR THE COURTS 203, 203 (Mark Costanzo et al. eds., 2007). Schuller and Jenkins also note that BWS is “not specifically listed in the Diagnostic and Statistical Manual of Mental Disorders.” Id. at 208.
brainwashed battered spouses as “fearful, isolated, dependent, helpless, and trapped, overcome by anxiety, depressed, and full of guilt and shame.”132 The similarity between the process experienced by Prisoners of War and by battered woman is shockingly similar.133 The batterer attempts to maintain power over his victim by using “‘brainwashing tactics’ similar to those used on prisoners of war, hostages, or members of a cult.”134 In short, the common features of brainwashing include isolation, humiliation, accusation, and unpredictable attacks. The abusive environment produces real and anticipated fear, which contributes to the battered woman’s belief that her situation is hopeless and that she must depend on her abuser. She develops coping strategies to deal with her oppressive environment, but eventually exhibits symptoms of “battering fatigue,” similar to the battle fatigue of soldiers in combat who, like battered women, live in fear of being killed or severely injured.135

This abuse creates an environment of fear that is ever-present in the life of the battered woman and contributes to her belief that she is caught in an endless dependence on her batterer.136 Battered women are like other victims of trauma in that their long-term reaction to trauma may be to become “dependent and suggestible,” unable to make their own decisions and independently exist in society.137 This model is seen time and again in case studies of battered women.

133. Many American cases have acknowledged this link. See, e.g., State v. Edwards, 60 S.W.3d 602, 613 (Mo. Ct. App. 2001). The court comments: [T]here is no easy answer to why battered women stay with their abusive husbands. Quite likely emotional and financial dependency and fear are the primary reasons for remaining in the household. They feel incapable of reaching out for help and justifiably fear reprisals from their angry husbands if they leave or call the police. The abuse is so severe, for so long a time, and the threat of great bodily harm so constant, it creates a standard mental attitude in its victims. Battered women are terror-stricken people whose mental state is distorted and bears a marked resemblance to that of a hostage or a prisoner of war. The horrible beatings they are subjected to brainwash them into believing there is nothing they can do. They live in constant fear of another eruption of violence.
Id.; see also State v. Hundley, 693 P.2d 475, 478 (Kan. 1985) (noting the case was a “textbook case of the battered wife, which is psychologically similar to hostage and prisoner of war cases”).
134. Mega et al., supra note 13, at 260.
135. Id.
136. Id. at 261–62.
137. BROWNE, supra note 101, at 123. Browne notes: [p]arallels also exist between the principles of brainwashing used on prisoners of war and the experiences of some women in battering relationships. Key ingredients of brainwashing include isolation of the victim from outside contacts and sources of help, and humiliation and degradation by the captor; followed by acts of kindness coupled with the threat of a return to the degraded state if some type of compliance is not obtained. Over time, the victims of such treatment become apathetic, sometimes react with despair, and may finally totally submit.
Id. at 125.
There are additional links between populations of battered women and POWs. Okun has noted that the “battered woman’s situation obviously resembles that of a prisoner subject to thought reform. Like brainwashed captives, battered women are subjected to verbal abuse, beatings, other forms of physical abuse, and to confinement or imprisonment.” Declarations of guilt are commonly used against POWs as well as battered women. In order to justify his violence, the batterer makes the victim “confess” her guilt to things, including fictitious extramarital affairs. The batterer often forces the victim to agree that she is responsible for her abuse. Further, “[a]ny time that a battered woman attempts to mollify her abuser by apologizing and claiming her own fault for his abuse of her, this can be viewed as identical in kind to confessions elicited in brainwashing . . . induced by the batterer through physical, emotional, or economic coercion.”

Okun also notes that POWs and battered women face similar deprivations:

[i]nadequate food, clothing, shelter, heating, and medical care are considered neglect when they occur in families. Many battered women and their families are subjected by the batterer to inadequate provision of the basic necessities of life. More often than not, this is not a matter of poverty. . . . Perhaps the most common pattern is for the batterer’s alcoholism to exhaust the couple’s or family’s finances, at times to the point of literally starving the battered woman and her children.

Sleep deprivation is a basic tool used against prisoners of war. Most battered women are sleep-deprived because of anxiety or the coercive practices of the

138. OKUN, supra note 111.
139. Id. at 115–16.
140. Id. at 116–17. Okun cites an actual example stating:

Kellie recounted how she had been beaten and interrogated by her husband for at least four hours. He demanded she confess to having had sex with a mutual friend of theirs. She truthfully insisted that she had not had any extramarital sexual contacts, even though she was beaten almost continually for her refusal to confess. When her husband took out a sawed-off shotgun, loaded it, and demanded again that she own up to this imaginary sexual affair, she finally gave in and confessed in fear for her life. He continued to interrogate her at gunpoint, forcing her to fabricate details of her nonexistent tryst, especially specific sexual acts. Sixteen months after this interrogation ordeal, Kellie’s husband would still cite her false confession to justify beating her.

Id. at 117.
141. Id. Okun notes:

Battered women can be coerced into taking blame in order to dissuade police officers from arresting the abuser. Especially if witnessed by a third person, false confessions can later be used against battered women in civil suits concerning divorce, custody and property settlements, child visitation rights, and damages. False confessions later recanted by the victim can be used to establish her unreliability as a witness in civil or criminal justice proceedings. Perhaps most important, confessions of this sort can be used to subvert the battered woman’s reputation among her closest friends and family.

Id.
142. Id. at 121.
batterer. Often, the batterer prevents the battered woman from sleeping by making “lengthy harangues and interrogations into the night; making loud noise with stereos, television or machinery; threats of battering or murder if the woman falls asleep; and enforcement of the expectation that the battered woman be awake when her mate returns home.”143 Many battered women are also subjected to unrealistic work requirements, including child care and house work that drives them to the point of exhaustion.144

Despite these similarities, Okun also notes some important differences between brainwashing and battering, concluding that battered woman may be in a more disadvantaged position than POWs. A battered woman will generally cooperate with her partner, while “[t]hought reform prisoners, subjected to imprisonment and abuse by adversaries in a foreign land, would generally feel more motivated than battered mates to resist their coercive controllers.”145 Another key difference between the two situations is that various types of abuse from a spouse may “take on an enormous impact that similar behavior by a foreign adversary would achieve with greater difficulty, if at all. The fact that the batterer often is simultaneously the most rewarding and most dangerous person in the battered woman’s life poses tremendous psychological difficulties for the victim.”146 Thus, the battered woman is placed in a situation potentially more dangerous and mentally debilitating than that of a POW.147

Moreover, the relationship of the battered woman and her abuser is much more difficult to navigate than that of the hostage and hostage-taker. In the hostage situation, the hostage is captured unexpectedly by a stranger; in a domestic violence situation, the “victim is taken prisoner gradually, by courtship.”148 The abuser’s initial attempt at power reflects western notions of romantic love, and as a result the woman may feel flattered.149 As the abuser becomes more “domineering, she may minimize or excuse his behavior, not only because she fears him but also because she cares for him.”150 Since many “women derive pride and self-esteem from their capacity to sustain relationships, the batterer is often able to entrap his victim by appealing to her most cherished values. It is not surprising, therefore, that battered women are often persuaded to return after trying to flee from their abusers.”151

In the ultimate testament to coercive persuasion, those who are battered often come to see their abuser as their protector. For example, “[s]urvivors of domestic or political captivity often describe occasions in which they were convinced that they would be killed, only to be spared at the last moment. After

143. Id. at 122.
144. Id.
145. Id. at 119.
146. Id.
148. Id. at 82.
149. Id.
150. Id.
151. Id. at 83.
several cycles of reprieve from certain death, the victim may come to view the perpetrator, paradoxically, as her savior.”\textsuperscript{152} Again, what many do not understand is that the hope of a “meal, a bath, a kind word, or some other ordinary creature comfort can become compelling to a person long enough deprived.”\textsuperscript{153} This kind of cooperative dependence on a captor and resulting terror is called “frozen fright.”\textsuperscript{154} Those exposed to terror exhibit a type of anxiety that “causes adults to set aside recently learned experience and to respond instead with the early adaptive behavior of childhood for survival,” which has been termed “traumatic psychological infantilism.”\textsuperscript{155} Isolation is also a key component of this cycle of violence. The abuser carries out “jealous surveillance, such as stalking, eavesdropping, and intercepting letters or telephone calls, which results in solitary confinement of the battered woman within her home.”\textsuperscript{156} Again, these moves are not made in leaps but rather in small steps.\textsuperscript{157}

C. Sexual Sadism

The most resourceful, destructive, and elusive of all deviant offenders is the ritualistic sexual sadist. Just as the great white shark is the renowned predator of the oceans, the sexual sadist is the most dangerous and cunning of all aberrant criminals.\textsuperscript{158}

The study of the sexual sadist is by no means a new pursuit; Richard von Krafft-Ebing coined the term “sexual sadism” in the eighteenth century for behaviors that combined “sexual acts with domination, degradation, and violence.”\textsuperscript{159} Krafft-Ebing noted that “[s]adism is the experience of sexual pleasurable sensations . . . produced by acts of cruelty, bodily punishment afflicted on one’s own person or when witnessed in others . . . . It may also consist of an innate desire to humiliate, hurt, wound or even destroy others in order thereby to create sexual pleasure.”\textsuperscript{160} The birth of this term gave rise to a new way of conceptualizing the criminally deviant. Since the inception of this term, attempts have been made to access the elusive world of the sexual sadist

\textsuperscript{152.} Id. at 77. Herman goes on to note that “sexual and domestic prisoners frequently describe long periods of sleep deprivation during sessions of jealous interrogation as well as meticulous supervision of their clothing, appearance, weight, and diet.” Id. at 78.

\textsuperscript{153.} Id.

\textsuperscript{154.} Martin Symonds, VICTIM RESPONSES TO TERROR 95, 97-98 (Frank M. Ochberg & David A. Soskis eds., 1982).

\textsuperscript{155.} Id. at 99 (borrowing the concept from psychoanalyst Karen Horney).

\textsuperscript{156.} Herman, supra note 147, at 80.

\textsuperscript{157.} Id.

\textsuperscript{158.} ROY HAZELWOOD & STEPHEN G. MICHAUD, DARK DREAMS 86 (2001) [hereinafter HAZELWOOD & MICHAUD, DARK DREAMS].

\textsuperscript{159.} See Dietz et al., The Sexually Sadistic Criminal, supra note 14, at 163. Krafft-Ebing based the term on the writings of Donatien-Alphonse-François, Marquis de Sade (1740-1814).

\textsuperscript{160.} RICHARD VON KRAFFT-EBING, PSYCHOPATHIA SEXUALIS: WITH ESPECIAL REFERENCE TO THE ANTIPATHIC SEXUAL INSTINCT: A MEDICO-FORENSIC STUDY 80 (1933).
who believes, to some extent, that “lust and cruelty are very similar stimuli.”161

This paper examines a subset of abused women that are victims of the “sexual sadist.” Janet Warren and Robert Hazelwood recently used the term “compliant victims” to describe women’s role in crime, reflecting “the acquiescent nature of these women’s cooperation in their own and others’ victimization.”162 This is not to minimize a woman’s criminal behavior as an accomplice to sexually violent crimes, but instead to understand her culpability.163 The term “compliant victim” is most descriptive of the battered spouse’s reaction to that abuse. This type of relationship is characterized by some of the “most brutal forms of sexual violence and entails the transformation of a woman’s sense of self and of her behavior in response to intimate contact with the fantasies and the overtly expressed desires of a sadistic male.”164 Some scholars posit that the battered spouse of the sexual sadist experiences a process of coercion akin to brainwashing.165 They have noted that these women go through a “systematic manipulation of rewards and punishments in the context of social isolation” which “can alter self concept, expectations, and behaviors among at least some victims.”166

What is often most striking about individuals under this type of influence is that the battered spouse outwardly appears to take the abuse despite avenues of escape.167 This seeming willingness and even enjoyment in the participation of criminal acts is one of the ongoing problems of those acting under coercion, because in order to use the defense of duress, the accused must show that they were not complicit in bringing the coercion upon themselves.168 It could be argued that the battered spouse stayed in the relationship and, thus, accepted responsibility for all actions that followed. In addition, some claim that the compliant individual experiences satisfaction in participating.169 Yet, in this type of domestic abuse the “‘captor’ not only seeks compliance, but also seeks opportunities for continuing abuse of the victim.”170 The abuser gains full control over the partner so that these women will endure long-term and horrific violence and will participate in deviant sexual, and sometimes murderous, crimes.

Most recently, researchers have noted that the motivation for the woman to submit herself to these acts is complex and not simply to please her abuser, as

163. Id.
164. Id.
165. Id.; Hazelwood et al., Compliant Victims, supra note 68, at 474.
166. Hazelwood et al., Compliant Victims, supra note 68, at 474.
167. Id.
168. Warren & Hazelwood, Relational Patterns, supra note 162, at 88.
169. Id. at 77.
170. Hazelwood et al., Compliant Victims, supra note 68, at 474.
was once assumed. Interestingly, in some cases “the women become assimilated into the sexual aggression of their partner.” Another motivation could be the “sense of exhilaration in sharing behavior that is extreme and outside all definitions of normalcy.” These researchers theorize that these victims are enmeshed in this behavior even before intimacy and the “response to this paraphilic interest in the man lies at the core of gradual assimilation of behavior that integrates the sadist’s sexual desires into their own behavior. It is the erosion of self-preserving and law-abiding boundaries that lies at the heart of this descriptive effort.” This helps to explain why these margins of law-abiding behavior expand in these compliant victims who actively participate even when it appears that they could leave or refuse to perpetrate the crimes. Since relatively little is known about these women, they are a subset of offenders who are largely convicted without question by the Canadian criminal justice system. To analyze these offenders and the women who become complicit in their criminal actions, it is informative to look further at the work of Park Dietz, Robert Hazelwood, and Janet Warren, who attempt to investigate these rare offenders and their partners.

**D. The Sexually Sadistic Criminal**

Dietz, Hazelwood, and Warren have attempted to trace the modern manifestation of the sexual sadist in three corresponding articles: “The Sexually Sadistic Criminal and his Offences” in 1990, “Compliant Victims of the Sexual Sadist” in 1993, and “Relational Patterns Associated with Sexual Sadism: A Study of 20 Wives and Girlfriends” in 2002. In particular, they have focused on those sexual sadists who translate their proclivities into criminal acts “unencumbered by ethical, societal, and legal inhibitions.” The authors identify that these offenders are elusive and rare, but that they are an unimaginable threat to the unsuspecting public. The study gathered a group of thirty offenders who fit the desired parameters.

Most noteworthy in reference to the crimes committed was the fact that 93 percent of the offenders meticulously choreographed their offenses, and 90

171. Warren & Hazelwood, *Relational Patterns*, supra note 162, at 76.
172. Id.
173. Id. at 76–77.
174. Id. at 77.
177. Dietz et al., *The Sexually Sadistic Criminal*, supra note 14, at 163. The authors note that many of these individuals are not available for study because it is “possible that a majority of sexual sadists never engage in a sexually sadistic act, much less a crime. Among those who act on their fantasies, there are those who limit their actions to lawful behaviors with consenting partners or to behaviors with paid partners.” Id. at 164.
178. Id. at 164.
179. Id. at 163.
percent used a “con approach” where they engaged the victim “under a pretext such as requesting or offering assistance, asking directions, or making an arrest.” 180 Sixty percent kidnapped their victims from twenty-four hours to six weeks before releasing or murdering them, and three sadists “persuaded or coerced former captives to return for additional abuse.” 181 A variety of sexual acts were performed on the captives including anal rape and foreign object penetration. 182 Eighty-seven percent of the offenders were described by their victims as having an “unemotional, detached affect” and 100 percent of the sadists “intentionally tortured their victims.” 183 The authors further explored the detachment of these offenders calling their actions “methodical,” “deliberate,” and “calm” even during their victims’ “obvious and intense distress.” 184 They also noted that the men often lacked compassion, would respond with rage, and demanded reverence from their captives, and many regarded themselves as “super criminals.” 185 This very elusive criminal who cunningly seeks to evade detection is understandably difficult to identify and study.

Astonishingly, the thirty men interviewed had murdered a total of 187 known victims, and were suspected of killing a total of more than three hundred. 186 Seventy-three percent of the offenders targeted females, 17 percent males, 10 percent males and females, and 43 victimized children. 187

Although sexual sadists may be “forthcoming about their criminal acts, they are rarely forthcoming about the pattern of sexual arousal that motivates or accompanies the crimes.” 188 Even though they had all perpetrated elaborate and “grotesque” crimes, none were described as deviant by those around them. 189 In fact, some had attempted to get professional assistance with their proclivities, but none were successful. 180

What should be flagged is that the “hallmark of their offenses is intentional torture of the victim to sexually arouse the offender.” 181 Although these

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180. Id. at 170.
181. Id.
182. Id. at 171.
183. Id.
184. Id. at 175.
185. Id.
186. Id. at 172. An unusually high proportion—61 percent—of the murders were from “asphyxial causes of death.” Id. However, the authors also state that there are many other sexual sadists who committed far fewer crimes but would not be studied by the National Center for the Analysis of Violent Crime and were therefore not included in this study. Id. at 173.
187. Id. at 173.
188. Id. at 174.
189. Id. at 175.
190. Id.
191. Id. at 177. The authors explain that these men had been examined for “military discharge, incarcerations for earlier offenses, or for other purposes.” Id. at 175. One man went to see a psychiatrist to explain that he was concerned that he wanted to add murder to his sexual experiences, but “his elderly psychiatrist fell asleep” and he left therapy. Id. Another left commitment in a state hospital to commit more murders, and one psychotherapist did not recognize that the writings of one of the men contained recollections, not fantasies. See also id. at 173–76 (when the researchers asked one sadist how a woman could prevent a rape by
offenders “wish to inflict pain on others[, that] is not the essence of sadism”; the essence of sadism lies in the ability to have complete mastery over another person, to make him-her [sic] a helpless object of our will, to become her God, to do with her as one pleases. To humiliate her, to enslave her are means to this end, and the most important radical aid is to make her suffer since there is no greater power over another person than that of inflicting pain on her to force her to undergo suffering without her being able to defend herself. The pleasure in the complete domination over another person is the very essence of the sadistic drive.

This was one of the first large scale studies to look at the characteristics of the sexual sadist, but in the context of studying this subset of offenders, the authors became very interested in certain victims in particular: the wives and girlfriends that were subjected to this brutal and degrading abuse.

E. Compliant Victims of the Sexual Sadist

The second article in the series by Hazelwood et al. (1993) was pivotal in explaining why a woman under the influence of brainwashing or marital coercion may seem to actively participate in the crimes dictated by her abuser. This study was based on interviews with seven women who had been the partners of sexual sadists identified in FBI investigations. There was a pattern to the sexual, emotional, and physical abuse, and the “process of transformation,” which each woman experienced. Three of the women were married for two to thirteen years and the other four were in relationships ranging in length from three to eighteen months. All were products of middle- to upper-middle class socioeconomic status and were “non-aggressive, remorserful,

an offender such as himself, the man responded that “there’s a lot of steps you can take to help eliminate the average criminal [who is] just spontaneous and reckless and careless . . . [but] [i]f somebody wants somebody bad enough . . . it’s nearly impossible [to prevent] . . . . They could have the best security in the world. They could have guards and dogs and everything else. But if you have the time and the patience, the opportunity is going to arise when you can hit somebody.” Id. at 176.)

192. Hazelwood et al., Compliant Victims, supra note 68, at 478.
193. Id.
194. See id. at 474.
195. Id. The authors’ definition of a “sexual sadist” comes from an original study that they had completed where they had interviewed thirty men who were sexually aroused by the intentional torture of victims. Their crimes were also characterized by careful planning, selection of strangers as victims, recording of the offences by various means, keeping personal items taken from their victims, restraints of the victim, and a pattern of holding the victims captive for periods ranging from 24 hours to 7 years before killing or releasing them.

196. Id.
197. Id. at 474–75. Four of the women had been abused sexually as a child, two physically, and six psychologically. Six women were “sexually naïve” when meeting their abuser, all had low self-esteem, and none had experienced sadomasochism in the past. Id. at 475.
and guilt-ridden. They berated themselves for ‘being so stupid’ and could not accept the fact that they had been manipulated to such a degree by the men.198 All but one were professionally successful when they met their abusers.199 It is important to the sexual sadist to select professional women because he wants to prove that he can transform a subject from a good family whom he can reduce to a “sexual slave willing to join him in any act, no matter how degrading or depraved, to prove her love or to keep him from leaving.”200 The challenge of coercing an accomplished woman, who could rationally leave the relationship, seems to be part of the game.

The physical abuse catalogued by the researchers in these cases was astounding. All of the victims were frequently beaten at the hands of their abuser, sometimes with objects.201 One woman was bound with adhesive tape over her entire body for three days and was continually beaten.202 Four of the women had broken bones, five were whipped, one was hung by the wrists and whipped, four were burned, and all were bitten.203 Six were strangled in some manner during sex, most to the point of losing or nearly losing consciousness, and bondage was used on all of the women to increase discomfort.204 Even though many had serious injuries, only one sought any medical attention.205 All were sexually abused, three with foreign objects.206 A wide range of humiliating acts were reported including forced fellatio, ejaculating on the victim’s face or mouth, being urinated on, forced enemas, sex with third parties, and sex with other kidnapped parties.207 All stated that their partners were “sexually insatiable” and one reported that she was not allowed to “cry, scream or plead” during an episode in which she was whipped unconscious for her abuser’s sexual gratification.208

These women also suffered emotional and psychological abuse. Three of them were kept captive for twenty-four hours or longer, three were forced to “write and sign documents of slavery or servitude,” six were “scripted” by the men, four had their sexual acts recorded in some manner (photographs, drawings, audiotapes, and writings), and some were later blackmailed with these

198. Id. at 475.
199. Id. The women in this study were employed; their occupations ranged from a bank employee, a fire system engineer, business owner, insurance broker, and student nurse to a retail clerk. Id. at 476.
200. HAZELWOOD & MICHAUD, DARK DREAMS, supra note 158, at 111.
201. Hazelwood et al., Compliant Victims, supra note 68, at 475.
202. Id.
203. Id. Five women had “clamping devices” used on their labia and nipples with one woman noting that her “boyfriend wanted to place an earring through her labia but he could not find ‘one he liked.’” Id.
204. Id.
205. Id.
206. Id.
207. Id.
208. Id.
All were verbally abused, which “lowered their self-esteem, but also kept them in a constant state of fear and depression.”\(^{209}\) The transformations of these women’s normal lives into “bizarre, destructive, and dangerous forms of exploitation and perversion” were very similar.\(^{211}\)

The study revealed patterns of coercive persuasion among the victims with five common factors: First, the abusers selected “naive, passive, and vulnerable” women, who they would exploit to satisfy their “need for dominance, control, and sadistic sexual behaviours,” and they would select “‘nice’” women who had not been subjected to these practices before.\(^{212}\) Second, they seduced the targeted women, who stated that their abusers were “charming, considerate, daring, unselfish, and attentive” when they began dating. All of the women entered into the relationships quickly “even though they recognised a sinister side” in their partners.\(^{213}\) The abuser was careful to be sure of “genuine affection” from the woman until he was “confident in his ability to manipulate and use the woman in ways that were sexually gratifying to him.”\(^{214}\) Third, the abuser shaped the woman’s sexual behavior. This factor depended upon the malleability of the woman to engage in alternative sexual acts and the abuser reinforced his gratitude toward her for participating in these activities.\(^{215}\) He expressed disappointment if she did not agree to participate until these acts became regular.\(^{216}\) Eventually, resistance was met with threats of violence. Fourth, the sadists used social isolation when they became jealous of activities that did not involve them and rejected her friends so that “the world of these women became increasingly circumscribed and their circle of confidants eventually dissipated.”\(^{217}\)

Psychological and physical punishment was the fifth and final step, as the women became completely dependent on the sadist who reinforced

\(^{209}\) Hazelwood et al., Compliant Victims, supra note 68, at 476.

\(^{210}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.

\(^{211}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.

\(^{212}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.

\(^{213}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.

\(^{214}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.

\(^{215}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.

\(^{216}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.

\(^{217}\) Hazelwood et al., Compliant Victims, supra note 68, at 477.
that they had participated in acts that no “nice” woman would perform.\footnote{Hazelwood et al., \textit{Compliant Victims}, supra note 68, at 477.}

It is difficult for many to recognize that the “women were compliant for so long with the men who degraded, exploited and abused them.”\footnote{Id. at 478. The authors refer to the work of Lenore Walker, noting that although they do not believe that anyone is “victim-prone,” the fact that there had been such a history of abuse in each victim’s childhood and past relationships suggests that their backgrounds may have made them targets for the sexual sadist. \textit{Id.} (citing Suzanne Prescott & Carolyn Letko, \textit{Battered Women: A Social Psychological Perspective, in BATTERED WOMEN: A PSYCHOSOCIOLOGICAL STUDY OF DOMESTIC VIOLENCE}, 72 (Maria Roy ed. 1977)). See generally \textit{LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME} (3d ed. 2009).}
The common link that joined these women was a vulnerable “sense of self” that made each “a prime target for molding by her eventual captor.”\footnote{Id.} This very similar pattern was observed for all of the women studied and their backgrounds and characteristics were almost identical. The authors made the connection from this distinct group of battered women to brainwashing: many of the dynamics of mind control or brainwashing are used in this situation because “[n]ot only does the sadist isolate the women from other intimate relationships, but he also physically abuses her, deprives her of sleep, repeatedly degrades and humiliates her, and gradually introduces new behaviours into her repertoire.”\footnote{Id.}

The stories of these women confirm this domination as they describe the need of their spouse to control them in all aspects of their lives. This is the element that many do not understand when looking at these women in a legal perspective, because the question asked in court is why the woman did not leave. It is difficult for a judge or jury to contemplate why anyone would stay in these conditions. However, this is a reality and the authors note that “[p]erhaps the most extreme case was a woman who voluntarily returned to abysmal conditions of captivity despite frequent opportunities to escape. The psychological control of the sadist was graphically expressed as a physical reality.”\footnote{Id.}
The need for overt control by the abuser slowly builds until she feels as if she could never escape, whether or not this is the truth. The psychological control is just as effective as the physical control of the compliant victim and the definition of “free choice” seems to no longer apply.

\begin{itemize}
  \item\footnote{Id. There are several examples of women returning to the sexual sadist when outwardly they appear free not to do so. Hazelwood and Michaud describe one sexual sadist who would capture women and keep them captive in his house for approximately six weeks until he no longer wanted to hold them hostage. Hazelwood \& Michaud, \textit{Dark Dreams}, supra note 158, at 94–95. He conditioned their behavior with poisonous snakes. \textit{Id.} He eventually told all of the women that they were allowed to leave, but the women were instructed that they must return to him if he so demanded. If they didn’t, or if they reported him to the police, he warned them they very likely would find a snake in their shower, under their bedcovers, in their car, or in their mailbox. It was a very effective form of psychological coercion. The women did as they were told, without exception. \textit{Id.}}
\end{itemize}
PART IV: THE USE OF THE BRAINWASHING DEFENSE IN INTERPERSONAL RELATIONSHIPS—CASE STUDY

This Section will examine the case of Karla Homolka who, some argue, was an example of an individual living under the control of her sexual sadist partner, Paul Bernardo. This case is part of our collective awareness and has captured the attention of the public through books and movies, but it has not resolved the liability issue regarding the manipulated party. Much of the case material involves hypothesizing because Homolka did not go to trial for her crimes. Very few people saw Homolka as a victim, although she agreed to be the key witness against her sadistic partner. That negative picture painted of Homolka had a great deal to do with the image prosecutors sought to portray and the evidence they provided bolstered their position.

An analysis of the Homolka case may link brainwashing and the battered spouse, thereby laying the foundation for the development of a stand-alone brainwashing defense. Homolka and Bernardo were incarcerated for the sexual assault and murder of three young women and the sensationalistic facts of the case drew much media attention. Homolka successfully negotiated a plea agreement of twelve-year imprisonment in return for her testimony against her husband. However, after the plea deal videotapes were found showing Homolka actively participating in the sexual crimes against the young girls. The public sentiment immediately turned against Homolka. The media portrayal of Homolka and her culpability in the deaths of her sister Tammy, Leslie Mahaffy, and Kristen French was overwhelmingly negative, painting Homolka as a willing and blameworthy participant in the crimes.

Journalist D’Arcy Jenish found that on some tapes Homolka seemed to be a “willing—even enthusiastic—participant in her future husband’s fantasies.” The question of whether Homolka was “cunning or coerced” went unanswered by the media, who wholly discounted the abuse and, in many cases, did not report it at all. Questions about whether there was a breaking point at

223. Please note that due to strict publication bans, much of the record is not available to the public. This case study is based on the information available to the public.
224. STEPHEN WILLIAMS, INVISIBLE DARKNESS 113 (1996) [hereinafter WILLIAMS, INVISIBLE]. Newsweek named them the “Ken and Barbie of Murder and Mayhem.” Id. Bernardo and Homolka had applied to have their names changed to “Teale” after watching the movie Criminal Law. Id. at 121. “Criminal Law was about a young, good-looking, wealthy serial rapist and killer named Martin Thiel (pronounced Teale), played by Kevin Bacon. Like Paul, he sexually assaulted young women. Unlike Paul [at that point in time], he then killed them.” Id. at 121.
225. PATRICK T. GALLIGAN, ADR CHAMBERS, REPORT TO THE ATTORNEY GENERAL OF ONTARIO ON CERTAIN MATTERS RELATING TO KARLA HOMOLKA 47 (1996) [hereinafter GALLIGAN REPORT].
226. Id. at 127–35.
228. See id.
229. Id. at 50.
230. Id. at 51.
which Homolka moved from being the battered spouse of a sexual sadist to a participant in the sexual assault, torture, and murder of young girls seemed to be entirely absent from the commentary.

In 1996, the Honorable Patrick T. Galligan completed an overarching review into the circumstances surrounding the plea deal with Homolka (the Galligan Report).\(^{231}\) In the course of his research, he found that there was considerable evidence that Homolka may have been acting involuntarily during the deaths of Mahaffy, French, and her sister, Tammy.\(^{232}\) Although Justice Galligan concluded that a finding of whether Homolka acted voluntarily was not necessary given the scope of the inquiry, he noted that there was a question as to whether “Homolka acted with volition when she participated with Paul Bernardo in unspeakable atrocities or whether as the victim/accomplice of a psychopathic sexual sadist she acted involuntarily because she was unable to extricate herself from his complete domination and control.”\(^{233}\) The Galligan Report also found that that Homolka’s husband, Paul Bernardo, was a sexual sadist.\(^{234}\)

The Galligan Report outlined the relationship between Homolka and Bernardo in detail. The couple met in a hotel in October 1987, when Homolka was seventeen and Bernardo was twenty-two years old.\(^{235}\) Homolka testified about the almost immediate power that Bernardo had over her, saying “[h]e just has this magnetism. It sounds stupid, but from that night I met him, I knew I would marry him. It’s like, he has this power over women. He just draws them to him. It’s his personality. People want to be around him.”\(^{236}\) Adhering to the sexual sadist’s patterns of control, Bernardo lavished gifts and attention on the seventeen-year-old Homolka when they began dating, but eventually began exercising control over her.\(^{237}\)

He began telling her what to wear and how to style her hair. He told her where

\(^{231}\) Galligan Report, supra note 225. The Galligan Report has also been cited by numerous subsequent sources. See, e.g., Archie G. Campbell, Bernardo Investigation Review: Report of Mr. Justice Archie Campbell (1996); Martin Dionne, Voices of Women Not Heard: The Bernardo Investigation Review: Report of Mr. Justice Archie Campbell, 9 CAN. J. WOMEN & L. 394 (1997). But see Stephen Williams, Karla: A Pact with the Devil 321 (2004) [hereinafter Williams, Pact]. Williams believes that the report was a “total whitewash,” in that Homolka was not truthful in her version of the facts. Id. He explains that this report is a whitewash because “it accepts Karla’s version of events and ignores crucial evidence that puts her behavior and motivations in a vastly different, brighter light.” Id. There are still questions about Galligan’s access to psychological materials, the accuracy of his conclusions, and his perception of Homolka. Id. at 321–22.

\(^{232}\) Galligan Report, supra note 225, at 17.

\(^{233}\) Id.

\(^{234}\) Id. at 18.

\(^{235}\) Id. at 21; see Anne McGillivray, "A Moral Vacuity in her Which is Difficult if Not Impossible to Explain": Law, Psychiatry and the Remaking of Karla Homolka (1998) 5 INT’L J. LEGAL PROF. 255, 261 (1998). McGillivray notes that the couple had sex within an hour of meeting. Id.


\(^{237}\) See Galligan Report, supra note 225, at 23.
she could go and where she could not go. He began to encourage her to disassociate herself from her friends because they were immature and stupid. He began encouraging her to drink more and more alcohol. He began changing the nature of the sexual activity in which he wanted her to engage.238

Soon Bernardo was scripting what he wanted Karla to say and made her repeat phrases such as, “My name is Karla, I am 17 years old. I am your little cocksucker. I am your little cunt. I am your little slut.”239 The sexual components of their relationship became more violent; for example, Bernardo insisted on having anal intercourse with Homolka while she wore a dog choke collar.240 Approximately eight months into their relationship, Bernardo began beating Homolka.241 Although he apologized after the first incident, Homolka felt guilty and believed that she had brought the abuse upon herself by arguing with him.242

Bernardo began alternately calling Homolka degrading names, such as “slut,” “bitch” and “cunt,” and affectionate names like “princess.”243 In addition, he began calling her his “sex slave,” a name Homolka also adopted when referring to herself.244 Homolka later described their relationship as one of “master and servant.”245 At Bernardo’s trial, an expert concluded that he met the diagnosis criteria for numerous disorders, including paraphilias,246 sexual sadism, urophilia,247 toucheurism,248 coprophilia,249 and narcissistic personality

238. Id. See also Makin, Beatings, supra note 236, at A1. Homolka described Bernardo’s controlling behavior, saying

[h]e would tell me I couldn’t wear miniskirts to school. I couldn’t dye or perm my hair. I couldn’t go out with friends to dances. I used to wear things like ballet shoes and boxer shorts. He wanted me to dress more preppy. I used to colour my hair red and other colours. He didn’t want me to colour it any more.”

Makin, Beatings, supra note 236, at A1.

239. Id. at 25. Makin, Beatings, supra note 236, at A1. Homolka testified about pictures of her having sex with Bernardo with a knife to her head and a cord around her neck, saying

[...] it was his idea. [...] He used to call me his little slave and his little sex slave. I used to refer to myself as that. Because that’s how he treated me [...] When he wanted something, I would do it. When he told me to get something, I would get it. If I didn’t do it, he would verbally abuse me or threaten me or hit me.

Makin, Beatings, supra note 236, at A1.

240. Id. at 26. (stating that Homolka said Bernardo began beating her during the summer of 1988).

241. Id. at 26.

242. Id. at 29.

243. Id.

244. Id. at A1.


246. A DICTIONARY OF PSYCHOLOGY 550 (Andrew M. Colman ed., 3d ed. 2009). Paraphilias is defined as “[a] group of mental disorders characterized by recurrent sexually arousing fantasies, sexual urges, or behaviour involving non-human objects, children or other non-consenting sexual partners, or suffering or humiliation of oneself or a sexual partner, causing clinically significant distress or impairment in social, occupational, or other important areas of functioning.” Id.

247. Id. at 796. Urophilia is “[a] paraphilia characterized by recurrent sexually arousing fantasies, sexual urges, or behaviour involving urinating or being urinated on. Also called undinism, urolagnia.” Id.
Although Justice Galligan noted that it was unnecessary to recite the details of the abuse in his report, he noted that in both her statements to the police and her testimony at Bernardo’s trial, Homolka described the escalating cycle of abuse that put her under Bernardo’s control. Despite any skepticism Judge Galligan may have felt toward her decision to stay in an extremely abusive relationship, his citation to the article Compliant Victims of the Sexual Sadist in his report suggests that he kept an open mind to the possibility that Homolka was suffering from BWS.

The Crown also submitted expert reports by several doctors who evaluated Homolka. Dr. Hatcher reported that the Millon Clinical Multiaxial Inventory (MCMI-III) psychological test, which was performed on Homolka, revealed the following results:

Feelings of depression, loneliness, and isolation may have typified extended periods of her life, although she is not inclined to play up these troublesome moods. Her underlying tension and emotional upset are present in disturbing mixtures of anxiety, sadness, and guilt. Her insecurity and her fear of abandonment account for what may appear to be a quiet, accepting and benign attitude towards life’s difficulties. . . . By submerging her individuality, sabotaging opportunities, subordinating personal desires, and submitting at times to abuse and intimidation, she hopes to avoid what she fears most—total

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248. See id. at 299. Toucheurism, also known as frotteurism, is defined as “[a] paraphilia characterized by recurrent, intense sexual fantasies, urges, or behaviour involving touching or rubbing up against non-consenting people, often in crowded public places.” Id.

249. Id. at 173. Coprophilia is defined as “[a] paraphilia characterized by recurrent sexually arousing fantasies, sexual urges, or behaviour involving excrement or faeces; more generally, an exaggerated interest in or preoccupation with faeces and their excretion.” Id. See Jennifer M. Kilty, The Case of Karla Homolka: From the (Re)construction of Womanhood In Danger to Dangerous Womanhood 87 (September 2003) (unpublished M.A. thesis, University of Ottawa) (on file with author) (saying that Homolka was made to eat Bernardo’s feces during an argument). Id. at 262.

250. A DICTIONARY OF PSYCHOLOGY, supra note 246, at 492. Narcissistic personality disorder is defined as

[a] personality disorder characterized by grandiose ideas or actions, beginning by early adulthood, indicated by such signs and symptoms as self-importance and boastfulness; preoccupation with fantasies of unlimited success, power, beauty, or other desirable attributes; self-image as someone who should associate only with high-status people or institutions; excessive need for admiration; unreasonable expectations of favourable treatment; interpersonal exploitativeness; lack of empathy; envy; and patronizing arrogance.”


251. GALLIGAN REPORT, supra note 225, at 29-30.

252. Hazelwood et al., Compliant Victims, supra note 68.

253. See GALLIGAN REPORT, supra note 225, at 168. Justice Galligan writes that according to the authors of this paper, “in the majority of cases, the sadists took a competent woman ’and transformed her into a sexually and psychologically compliant slave.” Id. at 169.

abandonment. Dr. Hatcher went on to note that Bernardo’s “sexual fantasies focused upon his dominance over females, especially young virgin pre-adolescent and adolescent-appearing girls who would be willing and submissive to his sexual demands. His fantasies required that the young girls state their acceptance of him as the most powerful male, and as their master.” Justice LeSage, who presided over Bernardo’s trial, found that the Crown experts were “certain that while Homolka was with the accused she suffered from Battered Spouse Syndrome.”

Bernardo asked Homolka to pretend to be her fifteen-year-old sister, Tammy, during sex. Eventually, he grew tired of Homolka’s roleplaying and demanded that she assist him in sexually assaulting Tammy and claimed that the assault would be over quickly if they could drug her. Justice Galligan noted that Homolka understood if she “agreed to help him with his plan, the violence to her and the threats to her and her family would cease.” At Bernardo’s request, Homolka acquired the sedative Halcion and the anesthetic Halothane from the animal clinic where she was employed. After administering the drugs to Tammy, both Bernardo and Homolka performed sex acts on the fifteen-year-old, and much of the episode was videotaped. Tammy eventually vomited, stopped breathing, and subsequently died. Bernardo and Homolka hid the evidence of their involvement and the death was ruled accidental.

The Galligan Report states that Homolka continued to obey Bernardo’s demands for more drugs because “she felt totally trapped after Tammy’s death and became more and more subject to Paul Bernardo’s domination.” Bernardo’s abuse continued to escalate after Homolka moved in with him; he constantly threatened to expose her involvement in her sister’s death. Bernardo then demanded that Homolka bring young girls to their house for

255. Id.
256. Id.
257. Id. at ¶ 11.
258. GALLIGAN REPORT, supra note 225, at 33.
259. Id. at 34.
260. Id.
261. Id. at 34. The Galligan Report states that Bernardo told Homolka that “he wanted Tammy that night as his Christmas present” and that Homolka “begged him not to do so but he insisted.” Id. Moreover, in the transcripts of the sentencing hearing Mr. Segal, Counsel for the Crown, submits that that Homolka’s husband her that “he wanted Tammy as a Christmas present.” Id. at 255. However, in other reports it is at least implied that Homolka gave her sister to Bernardo as a Christmas present. See, e.g., McGillivray, supra note 235, at 262 (“On 23 December 1990, as a Christmas present to Bernardo, Homolka drugged Tammy with Halcion and Halothane, tranquilizers obtained through her connection with the veterinary clinic where she worked as an ‘Animal Health Technician’”).
262. GALLIGAN REPORT, supra note 225, at 34–35.
263. Id. at 35.
264. Id.
265. Id. at 36.
266. Id.
sexual purposes. These girls included Jane Doe, Mahaffy, and French. Homolka was involved in various aspects of all of these kidnappings and assaults, including destroying evidence and disposing of bodies. During the course of these crimes, Bernardo continued to abuse Homolka.

In the case of Kristen French, it was reported that Homolka was left alone with the victim in the house on two occasions when Bernardo left to buy food, but she did not attempt to free their captive. In newspaper accounts of the trial, Homolka said that she considered letting French go free, but her fear of Bernardo prevented her from taking action: “All I could picture was the two of us going downstairs and Paul coming home right then and finding us, and killing us.” Homolka testified that she had started to go numb after Tammy’s death and grew more numb after Mahaffy and French had been in the house. She explained that “I didn’t want to be there and I felt extremely bad about what we were doing . . . . It’s my body’s way of protecting myself. I just go numb.”

The Crown experts explained Homolka’s emotional response as a process called “normalization,” which is related to BWS. Justice LeSage explained that it “is an attempt to mix and integrate a criminal act into normal aspects of one’s life. An example of this [was] Homolka’s ability to prepare and serve Father’s Day dinner while Leslie Mahaffy’s dead body lay in her root cellar.”

Through his repeated abuse and torture, Bernardo indoctrinated Homolka’s

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267. *Id.* at 37.
268. *Id.* Jane Doe was fifteen when Homolka first invited her over; she became a frequent companion of Homolka and Bernardo and a frequent visitor in their home. *Id.* Doe is the subject of much of the debate over whether Homolka tried to hide her involvement in the repeated sexual assaults. *Id.* at 138–40.
269. *Id.* at 37–40.
270. *Id.* at 38.
271. According to the transcripts of the sentencing hearing, the submissions of Mr. Segal stated that “Karla Bernardo thought about freeing Kristen French but did not out of fear of being beaten by her husband and being found out by the police.” *Id.* at 261.
273. *Id.*
274. *Id.* Homolka also explained that she had to perform the acts demanded by Bernardo or she would have been beaten. *Id.* She noted that she told French to “make Bernardo happy” because she did not want French to be beaten. *Id.* There were also questions why Homolka smiled for the camera and seemed to be enjoying the sexual acts she was performing on the women. *Id.* A letter from James A. Treleaven of the Ministry of the Attorney General to Inspector Vince Bevan and Acting Inspector Tony Warr of the Green Ribbon Task Force said,

We found particularly troublesome the segment of a tape in which Homolka smiles at the camera while apparently administering halothane to the unconscious victim, while the victim is being sexually violated by Bernardo. Although there were misgivings, Homolka’s explanation that she was forced to perform in this fashion by threats of violence from Bernardo is borne out by the evidence, including medical opinion, recently obtained by you. We note that Kristen French was at one point forced by Bernardo to smile for the camera.

GALLIGAN REPORT, *supra* note 225, at 331.
276. *Id.*
social value system to make her believe that if she wanted the perfect life, she would have to make sacrifices, including the sexual assault and murder of young girls. Homolka’s case, therefore, fits the definition of brainwashing, as an “indoctrination process designed to induce the subject to abandon existing political, religious, or social beliefs in favour of a rigid system imposed by the indoctrinator.”277 In this case, there was a forced (and violent) adoption of Bernardo’s rigid system of sexual and murderous proclivities which necessitated the rape and murder of young girls by Homolka as indoctrinated by Bernardo. In this way, Homolka “knew what was happening but she felt totally helpless and unable to act in her own defence or in anyone else’s defence. She was... paralysed with fear and in that state she became obedient and self-serving.”278

A. Homolka and Brainwashing

Before the plea bargain, two psychiatrists and two psychologists chosen by the Crown conducted psychiatric evaluations on Homolka for a period of six weeks.279 Justice Galligan reviewed the psychiatric reports completed on Homolka. They revealed Homolka suffered from “dysthymia, also known as reactive depression, and a serious posttraumatic stress disorder.”280 One of her doctors compared her experience with Bernardo to that of a “concentration camp survivor” who was subject to a horrible situation in which she had to act in unfathomable ways to preserve herself.281

The Galligan Report cites extensively from the psychiatric reports on Homolka, which concluded that: (1) she shows no signs of a psychotic disorder;282 (2) there was some minimal “residual organic brain disorder” (from the physical injuries), which indicates, but would not impair, rehabilitation;283 (3) she did not suffer from a personality disorder or the “instability, impulsiveness, and inappropriateness of the person with Borderline Personality Disorder”;284 and (4) she had a “crisis in self-image.”285 She was anxious and

277. Delgado, supra note 12, at 1 n.1.
278. WILLIAMS, INVISIBLE, supra note 224, at 622. The report argued that Homolka was not a battered woman, although there was “no doubt Karla Homolka had been physically and emotionally abused by Paul Bernardo at some point. Karla might even have gone through one cycle of the abuse pattern.” Id. However, Williams argues that Walker’s model dictates that a battered woman must experience this cycle at least twice. Id. He concludes that what “evidence there was, along with Karla’s own statements and the substantial medical records available to the court, said that Karla had undergone through the cycle only once and had then left, never to return.” Id. Williams notes that Homolka had a “darker side” since she was a child. Id. at 44. He explains that she would often give her friends an inscribed book which was “always of a certain type. In [one] instance it was BRAINCHILD, a B.F. Skinner-inspired horror story about behavioral psychologists who program human beings for their own nefarious purposes.” Id. at 44–45.
280. GALLIGAN REPORT, supra note 225, at 76–77.
281. Id. at 77.
282. Id.
283. Id.
284. Id.
depressed, leading to “dysthymia” from “disagreeable life situations,” which result[ed] in “sleep disturbances, a low energy level, low self-esteem, a diminished ability to make difficult decisions, and a marked feeling of hopelessness.” Justice Galligan noted that two other psychiatrists and two other psychologists diagnosed Homolka with post-traumatic stress disorder (PTSD), and three of the four believed this was the result of the abuse she suffered. Another expert, Dr. Long, made similar comments in his report after noting Homolka’s depression and withdrawal: she was a “person suffering severe remorse for her participation in the illegal acts referred to.” Again, as with the POW, being removed from the brainwasher allows a person to snap back into reality at some point after the abuse stops, allowing him or her to experience remorse. Dr. Long noted that Homolka “suffers from and requires treatment for the effects of extremely severe prolonged exposure to her husband’s sadistic acts and the ominous atmosphere he created.”

Dr. Long described that Homolka had a history of adopting passive behavior as a coping mechanism since early in life, and that there was no evidence she would act aggressively on impulse. She also did not seem to have “masochistic tendencies in terms of finding pleasure by being hurt herself nor her observing the suffering of others.” He concluded that she was sufficiently hoodwinked and intimidated by Paul Bernardo that she found herself in a compromising position as a result of a sequence of experiences with him that escalated in the intensity of their deviousness and severity. This reached a climax with the death of her sister and, from that point on, she believed that she was trapped in the same manner that an abused wife considers herself to be trapped and then having to fend for her life.

Yet Dr. Long was unable to reconcile her psychological issues with the law. He noted that her psychological state did not “excuse her morally” for her role in the crimes committed as she was “technically of sound mind and free of disease of the mind of sufficient severity to cloud her awareness or cause her to be unable to appreciate the nature and quality of her acts. Indeed, she was a victim herself and is in serious need of continued psychiatric care.” Thus, an already established defense of NCRMD would have been unavailable.

The Galligan Report cited the case of R. v. Lavallee as recognizing

285. Id. at 77–78.
286. Id. at 78.
287. Id. at 81.
288. Id. at 80.
289. Id.
290. Id.
291. Id.
292. Id. at 80–81. It is important to note that these reports pre-date the discovery of the video tapes which and depend on Homolka’s self-reports.
293. Id. at 81.
BWS in the self-defense claim of a woman who killed her abuser. However, the report noted that the precedent of *Lavallee* still did not excuse Homolka’s conduct. Homolka’s counsel speculated that he would argue the defense of duress but that

section 17 of the *Criminal Code* is inapplicable because charges of sexual assault and aggravated sexual assault are specifically exempted from the benefit of that section. However, because there is substantial evidence that Karla Homolka was a battered spouse to such an extent that she was completely under the control and domination of Paul Bernardo, it would be contended that her acts were not voluntary ones controlled by her own mind. Thus, a duress defense would also likely be unavailable.

Justice Galligan speculated that Homolka might prove the defense of necessity, but the requirement of proportionality might be difficult to establish. He noted there was evidence that Homolka’s actions may have been morally involuntary as she was under Bernardo’s control. He expressed no opinion about the validity of any such a defense, but opined that any trial would have been “extremely complicated, both legally and factually, and most certainly would have been long, difficult and with an uncertain outcome.” Critics still maintain there is a disconnect between the abuse committed on Homolka and the abuse she committed on others. The assumption is that a victim may kill her abuser (such as in self-defense), but she must not kill innocent third parties.

This judgment that Homolka did not behave as a battered woman “ought” proliferates the academic and media accounts of the case. Homolka was criticized for what the media called her “grim poise” even in the face of humiliating and debilitating testimony. Bernardo’s counsel, John Rosen, also questioned her high level of intelligence. It has been noted that this line of

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297. *Galligan Report*, supra note 225, at 166. As it worked out, at her sentencing hearing, counsel for Homolka and the Crown both stated that “compulsion by threats is not relevant for purposes of her criminal liability.” *Id.* at 263.
298. *Id.* at 166.
299. *Id.* at 167. Justice Galligan interviewed Jane Doe about the incidents in question. *Id.* at 211. He noted that, at the time of the interview, she was 20 years old and informed Justice Galligan that she did not believe that charges should have been laid against Homolka for the crimes that involved her sexual assault. *Id.* She said that, “in her heart, she knew that Paul Bernardo was the bad person. She told us that Karla Homolka was her friend and then said: ‘she had to do what she did, not because she wanted to, but because he made her do it.’” *Id.*
300. *Id.* at 169.
301. *See generally* Johnson, Mizga & D’Orio, supra note 124..
302. Makin, *Beatings*, supra note 236, at A1; *see* Patricia Pearson, *When She Was Bad: Violent Women and the Myth of Innocence* 193 (1997) (quoting Homolka: “I have this ability;’ she said in court, after viewing herself rape Tammy on the small courtroom monitor, her face fascinatingly impassive, ‘to watch but not to see.’”); *see also* O’Sullivan, *supra* note 10, at 234 (noting that the media called her “saucy and impudent” and “lusty in her pugnacity”).
questioning was intended to show that being intelligent is inconsistent with being battered, or conversely, to show how intelligent Homolka had to be to carry out these crimes, perhaps as the real mastermind.304

Some commentators completely reject the view that Homolka was a compliant victim, but most offer little explanation other than the videotaped evidence that they claim proves her complicity. The suggestion that Homolka could have been a compliant victim is dismissed by saying that instead Homolka was trying to “save her own skin” and that eventually “Homolka assumed a much more significant role; indeed, on some occasions, she may well have been the instigator and the main perpetrator.”305 Catherine Mary O’Sullivan, reflecting the views of the public, states that it is because “the media/public could not justify stretching a defence formulated to excuse women who have killed their abuser to tacitly exculpate someone for the deaths of three innocent third parties merely because of an implied threat to their life.”306 Certainly it became clear that Homolka did not meet “public expectations as to how a battered woman should behave.”307

Releasing the video of Homolka abusing her sister added to the growing public anger over Homolka’s participation in the crimes. In a phenomenon known as “mediatization” of society, people began to believe that “experiences that have been processed through the video camera [were] somehow more reliable or authentic than those that haven’t.”308 While it may have been a Crown tactic to paint Homolka as a battered woman to shore up sympathy for her and add credibility to her testimony against Bernardo,309 it was the videotapes that shifted the “image of Homolka-as-prey” to “Homolka-as-predator in the public mind.”310

One of Homolka’s harshest critics, Anne McGillivray, argued that Homolka remade herself from the “accused sex killer to a battered woman seduced into perversion, beaten into murder” to elicit sympathy from the public.311 She criticizes both the foundations of BWS and the characterization of Homolka as a victim:

[U]nderlying the disquiet was a fear that gender somehow won, that Homolka,

304. Id.; see also WILLIAMS, INVISIBLE, supra note 224, at 23 (Williams notes that “[i]n spite of his good looks, yuppie aspirations and university education, there was something callow about Paul Bernardo that suggested the crimes with which he was charged were beyond his scope.”).
307. Id. at 295.
309. McGillivray, supra note 235, at 266–67. McGillivray also notes the Crown did not contemplate at the time that the videotapes would reveal something different. Id.
310. Id. at 267.
311. Id. at 256.
being female, was held less culpable on that basis alone. This denied women’s equality and moral autonomy. Conversely, it was a sort of witchery through pretended weakness, lies and manipulation, the successful use by an evil woman of obnoxious female traits. Feminists and anti-feminists could unite in their disapprobation of Homolka and her self-created images, first of normality—pretty teen, party girl, beautiful bride, dutiful daughter, supportive wife—and then of the controlled and battered woman with symptoms culled from the Lenore Walker classic on her gaol cell bookshelf.  

McGillivray notes that many are loath to recognize an “evil” woman. She argues that this is why “[t]ransforming Homolka from murderess to battered woman centres domesticity and enhances womanliness,” making her someone who deserves to be punished less severely. She states that there is a “therapeutic transformation from defendant to victim, from action to passion, from agency to compliance” where the “domestic identity” is revised, which emphasizes her “girlish love, marital aspirations, housekeeping, battering—in deliberate contrast to Bernardo’s extramural stalking and rapes.”

McGillivray speaks at length about the “psychiatrising of women” and addresses the common criticisms of BWS. She notes that BWS syndromizes women, reducing the social roots of battering and women’s inequality to an individualized medical condition and thus relieving society of the burden of addressing those roots. Battered Women’s Syndrome is a wedding of feminism, psychiatry and law, a new addition to the taxonomy of culpability in the old alliance of law and the psy disciplines. It is rarely a complete defence. Usually, as in Homolka’s case, it figures in charge and sentence reduction. Had Homolka killed Bernardo, it is likely that she would have been exonerated. She killed others and this falls outside the parameters of the legal defences. Bernardo and Homolka were assigned medical identities—battered woman and sadistic psychopath—leading to different legal results. Battered women’s syndrome diminishes legal fault. Psychopathy, the inability

312. Id. at 257. Many commentators are extremely critical of the books Homolka and Bernardo had in their house. Williams, Invisible, supra note 224, at 430. The police found they had a “cache of what they had been told by the FBI was predictable reading material for a sexual deviant” such as Suffer The Children, Punish The Sinner, Flowers in the Attic, Dark Angel, The Funhouse, The Fury, Fallen Hearts, Perfect Victim, In Broad Daylight, A Deadly Silence, Lisa, Hedda and Joel, In His Garden, the Violent Year of Maggie MacDonal, Ritual Abuse, Bitter Blood, A Killing in the Family, Across the Border, the I-5 Killer, Who Killed Cindy James?, Masquerade, The Ultimate Evil, Childgrave, Small Sacrifices, Teacher’s Pet, the Anarchist’s Cookbook, Petals in the Wind, When the Wind Blows, Life with Billy, Poisoned Blood and The Confessions of Henry Lee Lucas. Id.

313. McGillivray, supra note 235, at 258.

314. Id.

315. Id.

316. Id. at 275–76.
Thus, one could argue that the medicalization of the two defendants in this case cast them in very different roles: Homolka was psychologically damaged and a deal was made to make sure that her psychopathic husband was imprisoned indefinitely.

For these critics, who cannot fathom Homolka’s inaction to save these young girls, Homolka’s culpability is clear. Perhaps this is why the concept of brainwashed offenders is so misunderstood, because it defies most common explanations. It is far too easy to say that brainwashees could have done something when one has never been captive in the same prison. It is more difficult to understand that they are not poor, they are not powerless, they are not unsuccessful in the work world, and they did have somewhere else to go. Thus, they are not typical battered spouses; they speak to a new nontraditional paradigm.

So, the question remains: would Homolka have a defense of brainwashing? It is possible, by examining the definition of brainwashing previously established, that Homolka could utilize the defense:

1. A forcible or violent element: The psychiatric reports clearly indicate that there was a very violent element in this case in the form of repeated abuse;

2. An abandonment of previous beliefs and an adoption and/or an implantation of new beliefs: Homolka abandoned her previous law abiding beliefs to adopt Bernardo’s sexual fantasies in return for her “perfect” life;

3. New beliefs that are foreign to the brainwashee: there is no evidence that Homolka had engaged in any of these behaviors before she met Bernardo, and there is no evidence that she had ever engaged in any independent sadomasochistic behavior;

4. The brainwashee keeps these beliefs until removed from the presence of the indoctrinator for a significant period of time: there is no evidence that Homolka has engaged in any of these behaviors after being released from prison in 2005. She is now a mother of three who is reported to live in the Caribbean with her second husband.318

**CONCLUSION**

Some believe brainwashing is a convenient excuse that allows one to shift blameworthiness and avoid personal accountability. Brainwashing certainly

317. Id. at 276.


319. TAYLOR, supra note 7, at 6.
was not taken casually in the 1950s; rather, it was a phenomenon that promised the loss of free will and outraged normal citizens.\textsuperscript{320} However, there has also been a stigma against brainwashing since the 1950s that questions the authenticity of the phenomenon.\textsuperscript{321} Today, brainwashing is still seen as a disguise for the elements we cannot explain in others, and perhaps in ourselves.\textsuperscript{322} In addition, some have said that brainwashing simply covers our lack of understanding about the human condition, and is an easy answer when we do not want to examine things more deeply.\textsuperscript{323}

The law allows for the shifting of responsibility in situations where it is warranted, and brainwashing could be one of those applications. Unfortunately, brainwashing has yet to be recognized as valid legal defense, because the sensationalistic, instead of the rational, has been at the forefront of the discussion.\textsuperscript{324} Even though many are loath to accept that an actor can be controlled by another and perform what she does not will, it is imperative that we accept brainwashing as a valuable defense.\textsuperscript{325}

From a policy standpoint, many would rather not have a defense that is, in theory, easy to assert and difficult to disprove. But, the same criticism can be leveled against already established defenses like necessity, duress, mental disorder, automatism, intoxication, and diminished responsibility. However, these defenses are rarely used and even more rarely successful. Presumably, the same would be true of a defense of brainwashing.\textsuperscript{326}

In a brainwashing defense, like BWS, the actor is operating under an

\begin{itemize}
\item \textsuperscript{320} Id. Taylor notes that brainwashing “was a terror – a fear of losing control, free will, even identity. Reviled as another lethal aspect of the Red Menace, it was quickly taken up to fuel the fires of popular outrage.” Id.
\item \textsuperscript{321} Id. at 25, stating:
\begin{quote}
Since 1950, when it was first enunciated, the concept of brainwashing has spent much of its life in the seedy undergrowth of popular culture. Lurking in movies and thrillers, increasingly despised by academia, it has surfaced into public awareness typically as a response to certain extreme traumas, a last resort for commentators trying to explain the apparently inexplicable.
\end{quote}
\item \textsuperscript{322} Id. at 7.
\item \textsuperscript{323} See id. at 8. Taylor notes that “brainwashing has a guise as a concept of last resort, a screen pulled across to hide the abyss of our ignorance. We invoke it when we have no other explanation, or are not motivated to look for one.” Id. at 8. See also SCHEFLIN & OPTON, supra note 3, at 23. Alan Scheflin and Edward Opton assert that brainwashing is more than a scare word. It is also a strangely attractive idea. At the same time that it frightens, it paradoxically reassures . . . . The reason the term reassures is that it sounds like an explanation, so it excuses both speaker and audience from the need to contemplate alternative explanations that might be even more disquieting . . . . We do not want to confront Pogo’s famous insight, “We have met the enemy, and he is us.” How much more comforting to think, “We have met the enemy, and he . . . has been brainwashed by Communists.” Id. (emphasis in original).
\item \textsuperscript{324} Id. at 24.
\item \textsuperscript{325} See DENISE WINN, THE MANIPULATED MIND: BRAINWASHING, CONDITIONING AND INDOCTRINATION 177 (2000).
\item \textsuperscript{326} Thomas Nolan notes that “[i]n light of its past, the future of the indoctrination defense is anything but certain. However, the stage does appear to be set for another revival.” Nolan, supra note 54, at 464.
\end{itemize}
implanted perception caused by psychological control or other coercive behavior.\textsuperscript{327} Thus, the reasonable person test may be irrelevant: because we lack precise knowledge about how the human mind works, each case must be examined separately. Although brainwashing does not fit within the established criminal defenses, theorists recognize that brainwashing is positioned to enter “the legal justice system as a doctrinally acceptable defense. Its predecessors – duress and BWS – have paved the way . . . . 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.”\textsuperscript{328}

Fear of medicalization has stifled serious research into the brainwashing phenomenon, since some are concerned that brainwashed individuals will be seen as sick, and in need of protection from themselves.\textsuperscript{329} As with BWS, there is fear that the brainwashed actor will be seen as someone who is broken, rather than someone who is acting in a rational way in an irrational circumstance. This fear of allowing a concept that acknowledges the actor is out of control, and a fear of pathologizing those who are susceptible in some way, has lead the legal process to deny the existence of the brainwashing phenomenon. It has been observed that, while there might be some benefit in recognizing brainwashing, there are objections on many grounds (including that it is simply a Communist scare technique as, perhaps, it was originally depicted to be).\textsuperscript{330}

For those offenders who cannot be diametrically reduced to a victim or monster, it is imperative to seek justice within a new paradigm.\textsuperscript{331} A brainwashing defense can provide that route. However, critics note that “[i]t requires a long, airy leap of logic to believe that a subject released from physical restraint will continue to obey the commands of her captors for protracted

\textsuperscript{327} Warburton, supra note 18, at 97.
\textsuperscript{328} Id.
\textsuperscript{329} Thomas Robbins, Dick Anthony & James McCarthy, Legitimating Repression, in The Brainwashing/Deprogramming Controversy: Sociological, Psychological, Legal and Historical Perspectives 319, 325 (David G. Bromley, James T. Richardson eds., 1983) (“The dubious notions of brainwashing and mind control express moral disapproval of the way in which someone has been influenced by someone else. The terms lend a spurious scientific rationale to such disapprobation. The brainwashing metaphor evokes the medical model of deviant behavior as symptomatic of pathology. The brainwashed’s thought processes are viewed as involuntary symptoms; i.e., he can no more control his thoughts than someone with measles can control his skin rash. He must therefore be restrained and controlled for his own good so that he may be cured.”).
\textsuperscript{330} DOMINIC STREATFEILD, BRAINWASH: THE SECRET HISTORY OF MIND CONTROL 341 (2006). The author notes that brainwashing distracts us from the true causes of destructive or uncharacteristic behaviour, leaving us unable to eliminate them, and susceptible to further similar behaviour. The second is that brainwashing itself, while reassuring us that we are normal and others abnormal, can become a scare story in its own right. At various points in the phenomenon’s history, brainwash-phobia has reached near-epidemic proportions: it makes our enemies seem even more cunning and sinister than they really are. If they’re clever and evil enough to do this, well, what aren’t they clever and evil enough to do? . . . Brainwash paranoia is horribly contagious.
\textsuperscript{331} O’Sullivan, supra note 10, at 318.
periods of time.” But, extreme forms of brainwashing are quite real, especially as evidenced by coercion in intimate partnerships. In addition, even though the dynamic of an abusive intimate partnership lays a foundation for a brainwashing defense, it is not easy to say which women “deserve” this defense. It is difficult to say who is only a victim, or only a perpetrator. It has been noted that women, in particular, are only seen as a pure victim or a pure agent, “when in fact [these roles] are profoundly interrelated. Neither victimization nor agency should be glorified, understood as static, viewed in isolation, or perceived as an individual or personal issue, for gender subordination must be understood as a systemic and collective problem – one in which women experience both oppression and resistance.”

We make certain societal judgments about those who “allow” themselves to be brainwashed. We also make judgments about individuals who are able to withstand brainwashing, and those who cannot. When we are not able to expect better from others, we are led to wonder what our own actions would be when confronted with an impossible choice. Expecting the ideal firmness of character from each individual is simply unrealistic. Although full understanding of mind control is elusive, the devastating impacts are not a relic of the past. Brainwashing is a real phenomenon in need of real answers. The mind of one who has been ritualistically tortured into submission may not be a mind that we wholly understand, but it is one that we need to strive to investigate and, when warranted, excuse.

333. Schneider, supra note 116, at 396.
335. McGillivray, supra note 235, at 274.