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Raymond M. Brown

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# THE “AMERICAN TALIBAN” VERSUS THE JUNIOR “BELTWAY SNIPER”: TOWARD UNDERSTANDING DEATH, “BRAINWASHING,” “TERROR,” AND RACE IN THE COURT OF PUBLIC OPINION

Raymond M. Brown\*

## INTRODUCTION

Racial myopia can distort media<sup>1</sup> discourse about juveniles accused of homicides, even in potential capital cases. Such a bias seems to have infected the commentary surrounding an eighteen-year-old Jamaican, Lee Boyd Malvo, the younger “beltway sniper,”<sup>2</sup> and a twenty-year-old Caucasian, John Walker Lindh, otherwise known as “the American Taliban.”<sup>3</sup>

Each youth was accused<sup>4</sup> of involvement in multiple “terrorist”<sup>5</sup> murders. In each case, supporters claimed that the young men acted

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\* The author is a trial lawyer (Fellow of the American College of Trial Lawyers), a teacher (Visiting Professor and Research Scholar at Seton Hall University School of Law, where he is teaching a Death Penalty Seminar in the Winter 2004 term), and a legal journalist (a former anchor at Court TV, current host of New Jersey Network’s *Due Process*, and guest commentator on numerous radio and television programs).

1. As I noted during the Symposium, this brief exploration considers in one category media outlets with different elements and missions. It includes radio, print, and the varieties of television outlets-local and national. It also lumps together C-Span, National Public Radio, and public television and radio with profit ventures. At another time it may prove fruitful to analyze each of these outlets separately.

2. *Competing for the Sniper Trial*, N.Y. TIMES, Oct. 30, 2002 at A26.

3. Juliette Kayyem, *Prosecuting the War and Its Terrorists*, N.Y. TIMES, Jul. 16, 2002, at A17.

4. In his first case, Malvo was charged with two counts of capital murder in violation of VA. CODE ANN. § 18.2-31(8) (2003), capital murder in violation of VA. CODE ANN. § 18.2-31(13) (2003), and use of a firearm in the commission of a felony in violation of VA. CODE ANN. § 18.2-53.1 (2003) in the shooting death of Linda Franklin in Fairfax County, Virginia on October 14, 2002. He was more broadly alleged to be part of a murder spree with John Allen Muhammad covering five jurisdictions (Virginia, Alabama, Maryland, Louisiana, and Washington, D.C.) and including ten murder victims. *Commonwealth v. Lee Boyd Malvo*, Crim. No. 102888, 2003 Va. Cir. LEXIS 188 (Cir. Ct. May 6, 2003) (Roush, J.) (granting in part and denying in part Malvo’s motion to suppress statements). For a detailed assessment of the “forensic trail” that investigators followed and the media trail followed by media observers, see Craig M. Cooley, *Forensic Individualization Sciences and the Capital Jury: Are Witherspoon Jurors More Deferential to Suspect Science than Non-Witherspoon Jurors?*, 27 S. ILL. U. L.J. 477, 477-80 (2003). Lindh was arraigned on a ten-count indictment in the United States District Court for the Eastern District of Virginia, Alexandria Division, charging him *inter alia* with conspiracy to murder nationals of the United States, including American military personnel and other governmental employees serving in Afghanistan following the September 11, 2001 terrorist attacks, in violation of 18

under duress or domination<sup>6</sup> by others. In both cases, the strategic charging decisions were made by Attorney General John Ashcroft.<sup>7</sup> Despite these similarities, their dispositions differed drastically. Malvo faced at least one capital trial, which led to a conviction and life-sentence,<sup>8</sup> while Lindh was indicted on noncapital charges and received a twenty-year sentence pursuant to a plea agreement with the government.<sup>9</sup>

Their cases overlapped chronologically, with Lindh's highly publicized sentencing occurring on October 4, 2002,<sup>10</sup> twenty days before Malvo's arrest.<sup>11</sup> Nonetheless, few media observers compared the two cases,<sup>12</sup> and no one examined the racial element surrounding these

U.S.C. § 2332(b)(2) (2000) and nine additional counts. For a detailed description of the charges, see *United States v. Lindh*, 212 F. Supp. 2d 541 (E.D. Va. 2002). (Ellis, J.) (denying defense pretrial motions).

5. Malvo's second murder count in the Franklin case under VA. CODE ANN. § 18.2-31(13) (2003) is based on a post-September 11, 2001 statute criminalizing killing that occurs during an act of "terrorism." Lindh, of course, was charged with serving as a foot soldier for the Taliban and al-Qaeda. See *supra* note 35 and accompanying text.

6. The Model Penal Code provides a national standard consistent with the nationwide media discourse. The Code recognizes as mitigating factors that "the defendant acted under duress or under the domination of another person" or merely that the defendant was a "youth at the time of the offense." MODEL PENAL CODE § 210.6 subsection 4(f), 4(h) or (2) (2003). *But see infra* note 37 and accompanying text concerning commentators' standards.

7. It was public knowledge from the time of their arrests that the decision to try Malvo and Muhammad in Virginia state courts was made by Ashcroft. As noted in a *New York Times* article:

A vivid episode came after John Muhammad and Lee Malvo were arrested in last October's Washington-area sniper shootings. With different jurisdictions vying to prosecute them, Mr. Ashcroft made the final call based in large part, his aides acknowledged, on where the two suspects would stand the best chance of being executed if convicted. "It is appropriate—it is imperative—that the ultimate sanction be available for those convicted of these crimes," he said in announcing that Fairfax and Prince William counties in Virginia would get the cases.

Eric Lichtblau & Adam Liptak, *Threats and Responses; On Terror, Spying and Guns, Ashcroft Expands Reach*, N.Y. TIMES, Mar. 15, 2003, at A1.

Ashcroft spirited [Muhammad and Malvo] out of Maryland—scene of the most sniper shootings and the police task force that led the investigation—because he was fit to be tied that Maryland will not put juveniles to death (Malvo is seventeen) and has a temporary moratorium on executions while the death penalty is under study. It is, the Attorney General argued, not only "appropriate" but "imperative" that these two get the best possible shot at being put to death.

Marie Cocco, *Ashcroft Uses Virginia for Its Death Penalty*, NEWSDAY, Nov. 21, 2002, at A39. See *infra* note 15.

8. Bill Geroux, *Malvo Juror Was Adamant; Jury's Verdict Came After One Member Said No, to Death Penalty*, RICHMOND TIMES DISPATCH, Dec. 25, 2003 at A1.

9. *Lindh* 227 F. Supp. 2d at 565 (Ellis, J.) (Sentencing Memorandum).

10. *Id.* at 570.

11. *Commonwealth v. Lee Boyd Malvo*, Crim. No. 102888, 2003 Va. Cir. LEXIS 188, at \*2.

12. A Lexis search of news references, last conducted January 14, 2004, revealed only thirty-eight entries that mentioned both "Lindh" and "Malvo." However, eight of these contain refer-

dramatically different dispositions. The failure to consider race as a distinguishing factor in the two cases is hard to explain.

During the DePaul University College of Law's Race To Execution Symposium on race and the death penalty,<sup>13</sup> I noted the muted attention in the mass media to the age and suggestibility of Malvo, then on trial for his life, and argued that the national media dialogue on this question would have been more intense had Malvo been white. During a subsequent Symposium discussion of the "Malvo question," Marc Maurer and Scott Turow,<sup>14</sup> agreed with me that race had influenced the silence surrounding Malvo's plight. Turow further contrasted the spectre of Attorney General Ashcroft's shopping for a jurisdiction that could execute Malvo<sup>15</sup> with President Bush's public comment that John Walker Lindh, the "American Taliban," was "a mixed-up kid."<sup>16</sup> Turow's comment prompted me to take a closer look at the relative media discourse about Malvo and Lindh. I have found little evidence of media examination of the racial<sup>17</sup> component in this disparate treatment.

Any comparison of the media observations about the two cases must focus on the public details describing the defendants' conduct, the circumstances under which the conduct took place, and the extent of domination by others. With respect to conduct, circumstance, and mitigation, a comparison of the two defendants, particularly at the level characterizing ordinary media analysis, suggests strong similarities that do not easily explain the grossly differing dispositions. I do not contend that Lindh should have been punished more severely or that differences did not exist between the two cases. I do maintain

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ence to the stabbing of Swedish Prime Minister Anna Lindh, leaving only thirty mentioning Malvo and John Walker Lindh.

13. I spoke on "The Role of the Media."

14. Remarks at the DePaul University College of Law Race to Execution Symposium, Panel Discussion: *Where Do We Go From Here?*

15. Attorney General Ashcroft could have chosen any of five jurisdictions for a trial (Alabama, Maryland, Virginia, Washington, D.C., or the federal government) but selected Virginia, the only one of these jurisdictions to have executed juveniles since the reinstatement of the death penalty in 1973. See Joseph W. Goodman, *Overturning Stanford v. Kentucky: Lee Boyd Malvo and the Execution of Juvenile Offenders*, 2003 L. REV. MICH. ST. U. DETROIT C.L. 389, 408. See *supra* note 7.

16. See *infra* note 42.

17. There has, however, been "profiling" commentary, reflecting on the fact that the cases of Lindh, who does not look like a "middle easterner," and Muhammad and Malvo, who are not "lone white male[s]" thus, demonstrate the ineffectiveness of racial profiling by law enforcement. Nelson Lund, *The Conservative Case Against Racial Profiling in the War on Terrorism*, 66 ALB. L. REV. 329, 339-41. (2003). See also Rosie DiManno, *It's Open Season on Americans*, TORONTO STAR, Oct. 25, 2002, at A01; Greg Freeman, *Arrests in Washington Sniper Case Point Out Futility of Racial Profiling*, ST. LOUIS POST-DISPATCH, Oct. 27, 2002, at C3.

that, applying the common sense standards of typical media analysis, there was a dramatic unwillingness to examine the possibility that race was a factor in the differing outcomes in these two matters.

## II. FACTS IN THE COURT OF PUBLIC OPINION

It is alleged that Malvo participated with John Muhammad in a string of thirteen shootings resulting in ten deaths in the Washington, D.C. metropolitan area. There are allegations of at least two additional shootings, one in Alabama and one in Louisiana. It is impossible to determine who pulled the trigger on which occasion, but there is enough evidence to suggest that Malvo has culpability in shootings involving fifteen people and levels of fear for many others.

However, Malvo was described as being “unquestionably obedient”<sup>18</sup> to Muhammad while family members noted that he was kept on a starvation diet of “honey, crackers and nutritional supplements to keep him compliant.”<sup>19</sup> Under Muhammad’s direction and control, Malvo changed his religion and his first name to John. His mother became so distressed about the level of control that Muhammad exercised over Malvo that she traveled from Jamaica to the United States in an unsuccessful attempt to free him from Muhammad’s influence.<sup>20</sup>

Almost from the moment the two “beltway” defendants were apprehended, while sleeping in a Chevy Caprice at a Maryland rest stop, lawyers for young Malvo claimed that he was acting “under the spell”<sup>21</sup> of Muhammad. The media seemed to recognize Malvo’s dependent relationship, though often disparagingly, referring to Malvo as “mini-me”<sup>22</sup> and to Muhammad and Malvo as the “man-boy couple.”<sup>23</sup> Scores of news reports referred to the older man as “Svengali”<sup>24</sup> in his relationship to Malvo.

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18. Lynette Clemetson, *For Teenager, Troubling Bond in Chaotic Life*, N.Y. TIMES, Oct. 27, 2002, at A1.

19. “Muhammad introduced the teen as his son [in Tacoma] and allowed him to eat only crackers, honey and nutritional supplements. Family members said the youth seemed brainwashed.” Jim Fielder et al., *A Scared Kid & His Svengali*, DAILY NEWS, Oct. 25, 2002, at 4.

20. For a general discussion of media coverage of Malvo’s youth and ways in which Malvo’s “life experience” fits into a proportionality argument against executing juveniles, see Goodman, *supra* note 15, at 401.

21. Jon Ward, *Malvo Team Seeking ‘Under Spell’ Defense*, WASH. TIMES, Jan. 26, 2003, at B1.

22. *The Week*, NAT’L REV., Nov. 25, 2002, at 8.

23. Marie Cocco, *Ashcroft Uses Virginia for Its Death Penalty*, NEWSDAY, Nov. 21, 2002, at A39.

24. A Lexis search for “Malvo” and “Svengali” produced seventy-five entries when last attempted on January 14, 2004.

On the other hand, John Walker Lindh voluntarily traveled<sup>25</sup> to Pakistan in 2001, where he received basic military training in a camp funded by an organization identified as “terrorist”<sup>26</sup> by the United States government. Thereafter, he “volunteered” to fight with the Taliban in Afghanistan, where he received additional military training in a facility funded by Osama bin Laden;<sup>27</sup> he attended lectures by bin Laden and was received briefly by bin Laden with four other recruits.<sup>28</sup> He subsequently was assigned to the front lines facing Northern Alliance and U.S. troops, from September through November 2001—although he claims to have never fired a shot. The sentencing judge called this contention “an interesting and surprising comment on the level of combat activity at the front line during that period.”<sup>29</sup> Lindh remained with the Taliban after he learned of Al-Qaeda’s sponsorship of the September 11, 2001 attacks on the United States, and was told that successive additional waves of attacks were to be executed. He claimed that he stayed because of fear.<sup>30</sup>

In late November, Lindh was captured and taken to QIJ prison facility near Mazar-e-Sharif.<sup>31</sup> He was interrogated by CIA Agent Johnny Michael Spann but declined to answer questions, apparently telling Spann that he was a Pakistani.<sup>32</sup> Later on the day of Lindh’s interrogation, Taliban detainees overpowered their guards, killed Spann, and barricaded themselves in an abandoned barracks, where Lindh and others remained for a week until they were dislodged by force. Lindh denied any role in planning or carrying out the uprising or in attacking Agent Spann—an assertion vigorously challenged by Spann’s father.<sup>33</sup>

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25. This factual description of Lindh’s travel and conduct can be found in Judge Ellis’s Sentencing Memorandum. See *United States v. Lindh*, 227 F. Supp. 2d 565, 567 (E.D.Va. 2002).

26. Two counts of Lindh’s indictment charge him with engaging in illegal conduct with “Harakat ul-Mujahideen (HUM), a foreign terrorist organization.” *Id.* at 566. Judge Ellis’s memorandum provides details of Lindh’s relationship with HUM. *Id.*

27. The court described the facility as “the al Farooq training camp located several hours west of Kandahar, a facility associated with and funded by Osama bin Laden and al Qaeda.” *Id.* at 567.

28. *Id.* at 568.

29. *Id.*

30. *Id.*

31. *Id.* at 569.

32. See Affidavit of Special Agent Anne E. Asbury Offered in Support of Criminal Complaint and Arrest Warrant, *United States v. Lindh*, No. CR. 02-51-M (E.D. Va. Jan. 15, 2002) [hereinafter Affidavit of Special Agent Anne E. Asbury], available at <http://www.usdoj.gov/ag/criminalcomplaint1.htm> (last visited Apr. 19, 2004).

33. The court in *United States v. Lindh* stated:

To be sure, there will be many who think the sentence is too lenient, pointing out, as did the father of CIA Agent Spann, who spoke eloquently in the course of the sentencing hearing, that defendant must have played a role in the murder of Agent Spann. In

### III. PUBLICLY KNOWN CONDUCT

On the question of personal participation in violence, it is difficult to see great differences between the two young men. Malvo has great legal “exposure” as an accessory, but it may not be clear for a long time how much he physically participated in the violent episodes in which he abetted Muhammad.

Lindh’s case is surrounded with a similar aura of uncertainty. The sentencing judge expressed skepticism about Lindh’s claim that he never fired a shot during three months of voluntary service on the front lines.<sup>34</sup> It is not surprising that there are gaps in the Government’s case concerning the uprising at QIJ, but such gaps are normally grist for the media mill.

The unanswered questions about both of these men create discomfort. Nonetheless, Malvo is left fighting for his life and Lindh has the prospect of emerging in his early forties with a chance to reconstruct his life.

### IV. THE “TERRORIST” CONTEXT

Although there are definitional problems surrounding the term “terrorist,”<sup>35</sup> the label fits Lindh far more snugly than Malvo. A federal judge not involved in either case has noted that the Virginia authorities charged Malvo under a post-September 11, 2001 “terrorism” statute because it provided an opportunity to convict him of a capital offense without proving that he physically pulled the trigger.<sup>36</sup> The

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fact, it is clear that the government’s exhaustive investigation uncovered no evidence that defendant played any role whatsoever either in Agent Spann’s murder or in the planning of the QIJ uprising. Had such evidence existed, the court would not have accepted the proffered Plea Agreement.

*Lindh*, 227 F. Supp. 2d at 573. For the circumstantial evidence suggesting Lindh’s possible culpability in Spann’s death, see Affidavit of Special Agent Anne E. Asbury, *supra* note 32.

34. See *infra* note 46.

35. I reject the generally imprecise use of the term “terrorism.” For purposes of this Article, I use “terrorism” to describe conduct that the charging authority (or legislature) has labeled as “terrorist.” This is not the forum for an extended discussion of “terrorism” or the lack of a universally accepted definition. For a discussion on some constitutional dimensions of this problem domestically, see NANCY CHANG, *SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES* 13 (2002). In the international context, see Johnathan Weinberger, *Defining Terror*, 4 SETON HALL J. DIPL. & INT’L REL. 63 (2003), and for an earlier exploration of this definitional problem from a widely respected scholar of international law currently serving as an advisor to the Iraqi Special Court, see M. Cherif Bassiouni, *Crimes of Terror Violence*, IN *INTERNATIONAL CRIMINAL LAW* 777 (M. Cherif Bassiouni ed., 1999).

36. As noted earlier, the murder charge in the Franklin case under VA. CODE ANN. § 18.2-31(13) (2003) is based on a statute criminalizing killing that occurs during an act of “terrorism.” Terrorism is defined elsewhere in the Code: “[A]n act of violence . . . committed with the intent

concept that the \$10 million demand made by the “Beltway snipers” gave an ideological motivation to the shooting spree is pure pretext.

On the other hand, it does not require much parsing of the semantic vagaries of “terrorism” to label Lindh. He trained with a “terrorist” organization in Pakistan, pled guilty to supplying services to the Taliban, received training from Osama bin Laden, and continued to serve in the front lines against the United States and Northern Alliance troops after learning of Al-Qaeda’s involvement with the September 11th attacks.

#### V. MITIGATION: AN EXCURSION INTO COMPARATIVE BRAINWASHING

This brings us to the most dramatic point of comparison between the two men—the extent to which their conduct can be mitigated by the overbearing behavior of others. It would be folly to expect columnists and commentators<sup>37</sup> in the electronic media to familiarize themselves with the nuances of mitigation that have permeated death penalty jurisprudence since *Furman v. Georgia*<sup>38</sup> and *Gregg v. Georgia*.<sup>39</sup> However, it seems fair to expect them to generally understand mitigation as it has been developed by legislators in death penalty states and in Congress. In fact, the media did employ “brainwashing” as a way of addressing “duress” in the cases of Malvo and Lindh, but it never seemed willing to ask the ultimate question about racial disparity.

Lindh’s parents stated shortly after his arrest in Afghanistan: “If he got involved in the Taliban he must have been brainwashed.”<sup>40</sup> Dur-

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to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation.” VA. CODE ANN. § 18.2-46.4 (2003). As Judge John C. Coughenour noted, the decision to use the “terrorist statute has more to do with prosecutors’ proof problems concerning who pulled the trigger than with the \$10 million note used by the defendants after nine of the thirteen metropolitan area killings had been completed. See Hon. John C. Coughenour, *Reflections On Russia’s Revival of Trial by Jury: History Demands That We Ask Difficult Questions Regarding Terror Trials, Procedures To Combat Terrorism, and Our Federal Sentencing Regime*, 26 SEATTLE UNIV. L. REV. 399, 415 (2003).

37. Candor requires me to admit that I have opposed written standards for lawyers offering commentary in the media. See *A Panel Discussion on a Proposed Code of Ethics for Legal Commentators*, 50 MERCER L. REV. 681 (1999); Raymond M. Brown, *A Ransom Note from the Opposition to the Proposed Rules of Ethics for Legal Commentators*, 50 MERCER L. REV. 767 (1999).

38. 408 U.S. 238 (1972).

39. 428 U.S. 153 (1976).

40. The *New York Times* attributed this comment to Lindh’s mother. See Jack Hitt, *The Year in Ideas; Return of the Brainwashing Defense*, N.Y. TIMES, Dec. 5, 2002, § 6 (Magazine), at 116. The *Washington Post* claimed the comment was by Lindh’s father, Don Oldenburg; see *Stressed To Kill: The Defense of Brainwashing; Sniper Suspect’s Claim Triggers More Debate*, WASH. POST, Nov. 21, 2003, at C1.



ing this same time, and before any thorough investigation could be undertaken, President George W. Bush, promulgator of the eponymous doctrine that anyone supporting terrorists is complicit in murder,<sup>41</sup> voiced compassion for Lindh:

We're just trying to learn the facts about this poor fellow. Obviously, he has been misled, it appears to me he thought he was going to fight for a great cause and in fact he was going to support a government that was one of the most repressive governments in the history of mankind.<sup>42</sup>

The President, possibly influenced by the sentiments he expressed at the outset of the case, subsequently approved the indictment against Lindh and his plea agreement.<sup>43</sup> Ironically, however, it is difficult to find the powerful mitigating force in the Lindh episode. Lindh admitted that every act he committed was voluntary *until* he heard about Al-Qaeda's involvement in the September 11th attacks.<sup>44</sup> Thereafter, he maintains that he was forced to remain with the Taliban out of fear.<sup>45</sup> The sentencing judge who approved the plea agreement had an interesting response to this argument:

Importantly, it is also true that defendant did not seek to walk away from the front line or the Taliban after learning that the United States was fighting in Afghanistan and might be threatened by Osama bin Laden and al Qaeda. According to defendant, he might have been killed had he attempted to leave. This rationalization reflects, as the Court stated in the course of sentencing, that it appears defendant was willing to give his life for the Taliban, but not for his country.<sup>46</sup>

The "brainwashing" and "misled kid" arguments are difficult to accept as pure mitigation from a young man resourceful and courageous enough to travel to a war-torn section of the planet and take up arms with a modestly armed contingent against the most powerful military force in the world. Outside observers may never know why he chose

41. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited at Apr. 10, 2004).

42. President Bush interview with Barbara Walters. The President's statement was initially shown on the morning of December 5, 2002 on *Good Morning America* as a "tease" for the upcoming telecast of an entire interview of the President and First Lady, which had been conducted by Barbara Walters. The interview was then shown on *20/20* that same evening. *Good Morning America* and *20/20* (ABC broadcasts Dec. 5, 2002). This statement or portions of it have been reprinted, retelevized and rebroadcast hundreds of times since those original airings. (need to blue book correctly p. 143)

43. See Terry Moran, *World News Tonight: Plea Agreement Reached in American Taliban Case* (ABC television broadcast, July 15, 2002).

44. *Good Morning America* (ABC television broadcast, Dec. 5, 2002).

45. See also, *20/20* (ABC television broadcast, Dec. 5, 2002).

46. *United States v. Lindh*, 227 F. Supp. 2d 565, 574 (E.D. Va. 2002).

not to abandon those whose conduct suddenly repelled him. Nonetheless, the power of the claim by his parents and the President that he was “mised” and “brainwashed” are diminished by this uncertainty. A further cloudiness surrounds Lindh’s decision not to embrace agent Spann when interrogated at QIJ after his capture.

Ironically, the term “brainwashing,” a revived staple of media talk, seems to have been embraced by both Malvo’s family members<sup>47</sup> as well as his legal counsel. There seems little doubt that a compelling component of Malvo’s story is his complex and submissive relationship to John Muhammad. By the end of the first trials for Muhammad and Malvo, a Chesapeake, Virginia jury had convicted Malvo on two counts of capital murder and recommended a life sentence, while a Virginia Beach jury had convicted and recommended death for forty-three-year-old John Muhammad.<sup>48</sup> Although facing different murder allegations, the two men were charged as actors in the same criminal scheme. Nonetheless, jurors in Virginia—one of the few American states that still countenances the death penalty for juveniles—were receptive to the mitigating argument that the youthful Malvo had been significantly influenced by Muhammad.<sup>49</sup>

## VI. ARE SOME MORE “BRAINWASHED” THAN OTHERS?

Interestingly, relatively few<sup>50</sup> media commentators or reporters compared Lindh and Malvo, despite the obvious similarities between their predicaments. Of those few, an even smaller number compared the extent to which the two<sup>51</sup> were subjected to coercion. The modest

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47. “Brainwashing” has become the media term of preference for the argument that Malvo’s offenses should be mitigated because he was influenced by Muhammad. *See also* Adam Liptak & James Dao, *2nd Sniper Trial Opens, Its Focus on Audiotapes*, N.Y. TIMES, Nov. 14, 2003, at A14 (“But Mr. Cooley [Malvo’s counsel] said Mr. Malvo’s statements were, like the killings themselves, a product of brainwashing by Mr. Muhammad. ‘He was programmed as to what to say to the enemy,’ Mr. Cooley said, suggesting that Mr. Malvo was still following orders when questioned two weeks after his capture.”).

48. *See* Geroux, *supra* note 8.

49. *Id.*

50. *See supra* note 12.

51. Partial acknowledgment should be given to MSNBC’s Dan Abrams for an implicit comparison of duress in the two cases. Either Abrams or his producer invited attorney Tony West, identified as one of “Lindh’s lawyers,” to comment on whether the taped call allegedly made by Malvo to the Montgomery County authorities rebutted the claim that Malvo was acting under “duress” from Muhammad. West argued that, even though Malvo had apparently made the call, he may have been reading material supplied from Malvo. Conservative voices focused on the connection between John Muhammad’s link’s to Islam (and the presumably vicarious Islamic influence on Malvo) and Lindh’s courtship with the Taliban. *Abrams Report*, (MSNBC television, broadcast, Nov. 1, 2002.) The author should disclose that he worked as a colleague with Abrams at Court TV and considers Abrams a friend.

number of comparisons that were made constituted an ideological potpourri. Media outlets on the political right latched onto the relationship of Malvo and Lindh to Islam.<sup>52</sup> A voice on the left argued that Malvo was treated more harshly than Lindh in the context of the war on terror,<sup>53</sup> and a cultural critic noted that both men were wearing t-shirts with commercial slogans when apprehended.<sup>54</sup>

The *Washington Post*'s Don Oldenburg and the *New York Times*' Jack Hitt were apparently inspired to explore the "brainwashing" question by the "brainwashing" claim of Lindh's parents—Oldenburg and Hitt each referred to a similar remark by the mother of Zacarias Massaoui<sup>55</sup> and independently applied the concept to Malvo because of his lawyers' arguments. Neither offered a comparison of Lindh and Malvo's claims, and Hitt ridiculed Malvo's explanation as a "Sunday Morning TV parable of brainwashing."<sup>56</sup> Neither columnist commented on the fact that Malvo faced the death penalty and that Lindh did not.

## VII. CONCLUSION

No one who has experienced America's trial courts and its court of public opinion would wish to be tried before the media instead of a jury. On the other hand, coverage and commentary of crime and trials are both ancient and growing American pastimes. So is a frequent unwillingness to acknowledge the role of race in even the most profound criminal justice sagas. Lee Boyd Malvo and John Walker

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52. *The Week*, NAT'L REV., Nov. 25, 2002, at 8; *A Deadly Silence*, N.Y. POST, Oct. 25, 2002, at 34.

53. In a column focused on the federal courts' treatment of Jose Padilla and Yasir Hamdi, American nationals currently being held by the government without charge or trial, Patricia Williams observed:

After all, John Walker Lindh was also an American citizen captured on a battlefield in Afghanistan, but he was tried in U.S. courts. His case was attended by a near-universal public sense that for purposes of his situation, the war ended when Hamid Karzai took power. What is at least as worrisome as the inconsistency is that the Bush Administration has repeatedly defended its power to detain enemy combatants not simply in the war against Al Qaeda or Afghanistan or Iraq or North Korea but "in this war on terrorism." As I write, prosecutors are discussing whether to charge sniper John Lee Malvo under an antiterrorism statute. Does this mean that Malvo's quite terrifying but wholly domestic crimes have the potential to turn suburban Washington into a theater of war?

Patricia J. Williams, *The Enemy Within*, NATION, Feb. 3, 2003, at 9.

54. "Teen sniper John Lee Malvo was arrested wearing a locally made And-1 t-shirt, and when 'American Taliban' John Walker Lindh was captured, cameras recorded him wearing a SOMEBODY IN PHILLY LOVES ME t-shirt." Duane Swierczynski, *First Annual Cracked Bell Awards*, PHIL. MAG., Feb. 2003, at 62.

55. Massaoui was accused in the Eastern District of Virginia as a participant in the September 11, 2001 attacks.

56. Hitt, *supra* note 40.

Lindh were two young men charged with participating in horrendous homicidal episodes. Advocates for both claimed that “brainwashing” should be a mitigating factor in their dispositions.

Huge gaps remain in the public knowledge of whether or how they discharged the firearms at their disposal. Lindh participated in a military adventure against his country during the early phases of a “terror war.” Malvo was involved in an unfathomable killing spree in the Beltway. It is uncontestable that Malvo had a pathological dependency on his senior partner, while the coercive factors affecting Lindh are murky at best. Yet the media outlets and pundits covering criminal justice, never reluctant to play the “race card,” declined to comment on or speculate about the possibility that race played a role in determining the fates of these two men. Perhaps the brainwashing that should concern us has taken place in the Fourth Estate.

