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Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded (“Brainwashed”) Defendant

Richard Delgado*

I. INTRODUCTION

Coercive persuasion, or thought reform,¹ has been extensively described by psychologists and psychiatrists in field studies of prisoners of war,² victims of Chinese “revolutionary universities,”³ captives of outlaw or extremist groups,⁴ and members of religious cults.⁵ In

* Associate Professor of Law, University of Washington. I am indebted to the following individuals, whose help made this article possible: Robert Lifton, M.D., Foundations Professor of Psychiatry, Yale Medical School, who nourished my understanding of the psychology of totalism; Michael Shapiro, Professor of Law, University of Southern California Law Center, for suggestions and helpful criticism of my ideas; and Richard Cleva, James Brewer, Cokey Woodard, Patrick Marshall, Karen Perret, and Richard Goldsmith, for research and editorial assistance. I also gratefully acknowledge grants from the University of Washington Graduate School and Faculty Development Fund, 1977-78.

1. “Coercive persuasion” and “thought reform” are terms for a 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. This process is popularly referred to as “brainwashing,” although scientists generally avoid use of this latter term because of a widespread public emotional response and misuse of the term, *see, e.g.*, R. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF “BRAINWASHING” IN CHINA* 4-5 (1961), and because by glib repetition in many contexts it has lost all semblance of its original narrow meaning, *see, e.g.*, Gunther, *Brainwashing: Persuasion by Propaganda*, *TODAY’S HEALTH*, Feb. 1976, at 15.

2. *See, e.g.*, J. SEGAL, *THERAPEUTIC CONSIDERATIONS IN PLANNING THE RETURN OF AMERICAN PRISONERS OF WAR TO CONTINENTAL UNITED STATES* (U.S. Navy, Neuro-Psychiatric Research Unit, Rep. No. 72-37, 1973); Lifton, *Home by Ship: Reaction Patterns of American Prisoners of War Repatriated from North Korea*, 110 *AM. J. PSYCH.* 732 (1954); Schein, *The Chinese Indoctrination Program for Prisoners of War*, 19 *PSYCH.* 149 (1956); Strassman, Thaler & Schein, *A Prisoner of War Syndrome: Apathy as a Reaction to Severe Stress*, 112 *AM. J. PSYCH.* 998 (1956). *See generally* J. MEERLO, *RAPE OF THE MIND* (1956).

3. *See, e.g.*, R. LIFTON, *supra* note 1, at 247-48, 253-73; E. SCHEIN, *COERCIVE PERSUASION* (1961).

4. *See, e.g.*, V. BUGLIOSI & C. GENTRY, *HELTER SKELTER* (1974) (trial of Manson cultists); *THE TRIAL OF PATTY HEARST* (1976) [hereinafter cited as *HEARST*] (trial transcript of *United States v. Hearst*, 412 F. Supp. 873 (N.D. Cal. 1976)) (Numerous motions ruled on in this trial are reported at 412 F. Supp. 858-95.).

5. *See* Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 *S. CAL. L. REV.* 1, 10-25 (1977), and sources cited therein (psychologists and psychiatrists describe psychological servitude resulting from indoctrination and membership in extremist religious cults). *See also* W. SARGANT, *BATTLE FOR THE MIND* 91-158 (1957) (describing techniques of religious conversion).

more controlled settings, behavioral scientists have explored the contributions that isolation,⁶ physiological depletion,⁷ assertions of authority,⁸ guilt manipulation,⁹ peer pressure,¹⁰ and cognitive dissonance¹¹ can have in bringing about behavioral compliance and attitudinal change. Despite some disagreement over the theoretical model that best explains such changes,¹² it is generally agreed that certain elements or themes are centrally involved in instances of coercive persuasion. These include:

- (1) isolation of the victim and total control over his environment;
- (2) control of all channels of information and communication;
- (3) physiological debilitation by means of inadequate diet, insufficient sleep, and poor sanitation;
- (4) assignment of meaningless tasks, such as repetitious copying of written material;

6. See, e.g., GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, SYMPOSIUM NO. 3: FACTORS USED TO INCREASE THE SUSCEPTIBILITY OF INDIVIDUALS TO FORCEFUL INDOCTRINATION 90-93 (1956) [hereinafter cited as G.A.P. SYMPOSIUM No. 3]; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, SYMPOSIUM NO. 2: ILLUSTRATIVE STRATEGIES FOR RESEARCH ON PSYCHOPATHOLOGY IN MENTAL HEALTH 14, 18-20, 98-103 (1956) [hereinafter cited as G.A.P. SYMPOSIUM No. 2]; Lilly, *Mental Effects of Reduction of Ordinary Levels of Physical Stimuli on Intact, Healthy Persons*, 5 PSYCH. RESEARCH REP. 1 (1956).

7. See, e.g., G.A.P. SYMPOSIUM No. 2, *supra* note 6, at 103, 122, 123; Rensberger, *A Brainwashing Defense: Delving Into Murky Area*, N.Y. Times, Feb. 17, 1976, at 1, col. 4 (reporting that many such studies were unpublished investigations carried out by the Department of Defense using conscientious objectors as subjects). Physiological depletion—the deliberate inducement of physical debility by means of starvation, terror, and inadequate sleep and sanitation—has been described as a potent weapon of thought reform, see, e.g., Chodoff, *Effects of Extreme, Coercive & Oppressive Forces*, in 3 AMERICAN HANDBOOK OF PSYCHIATRY 384 (S. Arieti ed. 1966); Farber, Harlow & West, *Brainwashing, Conditioning, and DDD (Debility, Dependency, and Dread)*, 20 SOCIOLOGY 271 (1957).

8. See Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUMAN REL. 57 (1965); Milgram, *Group Pressure and Action Against a Person*, 69 J. ABNORMAL PSYCH. 137 (1964); Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL PSYCH. 371 (1963).

9. See E. SCHEIN, *supra* note 3, at 140-56, and sources cited therein.

10. See, e.g., Asch, *Studies of Independence and Submission to Group Pressure: A Minority of One Against a Unanimous Majority*, 70 PSYCHOLOGICAL MONOGRAPHS, No. 416 (1956).

11. See, e.g., E. ARONSON, *THE SOCIAL ANIMAL* 122-25 (1972); L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* 84-97 (1957). Dissonance theory describes the tendency of human beings to alter belief systems to accord with changed behavioral patterns.

12. For an excellent discussion of the various theories or models that have been proposed to explain the phenomenon of coercive persuasion, see E. SCHEIN, *supra* note 3, at 195-268. Dr. Schein analyzes psycho-physiological stress theories, traditional learning theory models, psychoanalytical theories, socio-psychological theories, cognitive theory, and social-influence and attitude change theories. After reviewing each of them, he adopts an eclectic approach, combining a number of models with observed mechanisms that are employed at various stages to facilitate change. *Id.* at 254.

- (5) manipulation of guilt and anxiety;
- (6) threats of annihilation by seemingly all-powerful captors, who insist that the victim's sole chance for survival lies in identifying with them;
- (7) degradation of and assaults on the pre-existing self;
- (8) peer pressure, often applied through ritual "struggle sessions";
- (9) required performance of symbolic acts of self-betrayal, betrayal of group norms, and confession;
- (10) alternation of harshness and leniency.¹³

Acting alone, none of these forces is likely to prove irresistible to a person of ordinary resolve, particularly if he is aware that an attempt is under way to influence him.¹⁴ Rather, it is the concentration of multiple forces, both physical and psychological, intensively applied over a short period of time, that gives coercive persuasion its peculiar power.¹⁵ Many authorities, including the drafters of a Department of Defense report prepared in response to evidence of widespread collaboration by American prisoners of war (POW) during the Korean conflict, have concluded that a determined captor, possessing total control over the life and environment of a captive, can produce behavioral and attitudinal change in even the most strongly resistant individual.¹⁶

13. See generally G.A.P. SYMPOSIUM No. 3, *supra* note 5; HEARST, *supra* note 4, at 317 (testimony of Robert J. Lifton); R. LIFTON, *supra* note 1 (classic study of survivors of Chinese thought reform); J. MEERLO, *supra* note 2; W. SARGANT, *supra* note 5; E. SCHEIN, *supra* note 3 (eclectic view of coercive persuasion). See also Bettelheim, *Individual and Mass Behavior in Extreme Situations*, 38 J. ABNORMAL & SOC. PSYCH. 417 (1943); Farber, Harlow & West, *supra* note 7; Lifton, *supra* note 2; Strassman, Thaler & Schein, *supra* note 2; J. Segal, Long-Term Psychological and Physical Effects of the POW Experience: A Review of the Literature (1973) (unpublished paper) (filed with Center for Prisoner of War Studies, Navy Medical Neuropsychiatric Research Unit, San Diego, California).

14. For this reason, many of the experiments referred to in notes 6 & 8-10 *supra* were designed as "deception experiments"—those in which the subject is deliberately deceived about the objectives of the study.

15. See, e.g., HEARST, *supra* note 4, at 250 (testimony of Louis J. West); *id.* at 327-28 (cross-examination of Robert J. Lifton); R. LIFTON, *supra* note 1, at 8-15, 66-85. See generally G.A.P. SYMPOSIUM No. 3, *supra* note 6.

16. See SECRETARY OF DEFENSE'S ADVISORY COMM. ON POWS, POW, THE FIGHT CONTINUES AFTER THE BATTLE (1955); Farber, Harlow & West, *supra* note 7, at 278 ("possibility of resistance [becomes] vanishingly small"); Meerlo, *The Psychology of Treason and Loyalty*, 8 AM. J. PSYCHOTHERAPY 648, 655 (1954); Schein, *Reaction Patterns to Severe Chronic Stress in American Army Prisoners of War of the Chinese*, 13 J. SOC. ISSUES, No. 3, at 21-40 (1957). See also W. SARGANT, *supra* note 5, at 55, 108-09 (resistance simply hastens victim's ultimate collapse).

These conclusions, largely based on field studies and interviews, are further supported by the results of what appears to be the sole consciously designed experiment testing the ability of multiple coercive forces to elicit desired behavior changes. During the Vietnam War, the United States Air Force and Navy developed a survival training program for senior military officers, particularly pilots, who were exposed to the high-

Apart from Korean POW cases,¹⁷ allegations of the use of thought reform techniques have arisen in two areas of recent controversy. The first concerns a number of new-age religious cults that, according to their critics, utilize high-pressure thought reform methods to induce college-age youths to join them as devotees, fund raisers, and street-corner proselytizers.¹⁸ The second involves individuals such as Patricia Hearst who are tried for criminal acts asserted to have been induced by coercive persuasion.¹⁹

Both of these situations involve the use of similar methods and

est degree of risk of capture and interrogation by the North Vietnamese. The aim was to strengthen their resistance to coercive persuasion techniques in order to safeguard tactical military secrets for the longest possible time. After being dropped off in a desert without food or maps, the officers practiced survival skills and then were "captured" by "pseudo-enemies," dressed in strange uniforms and communicating in an unfamiliar language. After a night of enforced sleeplessness, the officers were individually interrogated, put into isolation in small cells and reinterrogated by their captors in an effort to elicit hypothetical military "secrets" the officers had been given before the commencement of their training. Despite introductory lectures forewarning them of the experiences they would undergo and reassuring them that neither they nor their families would be in any real physical danger, "a very remarkably high percentage, as high as twenty-five percent of these experienced . . . senior officers" confessed and divulged the "secrets" they had been told to conceal. Some even revealed genuine military secrets. HEARST, *supra* note 4, at 292-93 (testimony of Martin T. Orne). Eventually the program was redesigned to make it "less realistic" because participants were experiencing psychiatric symptoms and developing fear of, instead of resistance to, the techniques employed. *See id.* at 252 (testimony of Louis J. West). This study contributed to a decision by the Department of Defense not to court-martial returning POW collaborators after the Vietnamese conflict, except for those who had participated in the most egregious acts of complicity. In fact no such prosecutions were recorded. Philadelphia Evening Bulletin, Mar. 19, 1976, at 40, col. 1 (interview with Martin T. Orne).

17. *See, e.g.*, United States v. Olson, 20 C.M.R. 46 (A.C.M.R. 1955), *aff'd*, 7 C.M.A. 460, 22 C.M.R. 250 (1957); United States v. Batchelor, 19 C.M.R. 452 (1954), *aff'd*, 7 C.M.A. 354, 22 C.M.R. 144 (1956); United States v. Fleming, 19 C.M.R. 438 (1954), *aff'd*, 7 C.M.A. 543, 23 C.M.R. 7 (1957). *See also* G.A.P. SYMPOSIUM No. 3, *supra* note 6; N.Y. Times, Apr. 28, 1954, at 16, col. 3 (case of Colonel Schwable; prosecution not brought because of finding of intense pressures applied during captivity).

18. *See, e.g.*, CALIFORNIA SENATE SELECT COMM. ON CHILDREN AND YOUTH, HEARING ON THE IMPACT OF CULTS ON TODAY'S YOUTH (1974) [hereinafter cited as CALIFORNIA HEARING]; NEW YORK ATTORNEY GENERAL, FINAL REPORT ON THE ACTIVITIES OF THE CHILDREN OF GOD (1974); Vermont Legislative Council, Hearing Before the Vermont Senate Comm. for the Investigation of Alleged Deceptive, Fraudulent and Criminal Practices of Various Organizations in the State (Aug. 18, 1976) [hereinafter cited as Vermont Hearing]. *See generally* Delgado, *supra* note 4, at 5-6, and authorities cited therein.

19. *See* United States v. Hearst, 412 F. Supp. 873 (N.D. Cal. 1976) (trial transcript reprinted in HEARST, *supra* note 4); *cf.* Borowitz, *Psychological Kidnapping in Italy: The Case of Aldo Braibanti*, 57 A.B.A.J. 990 (1971) (conviction for attempted *plagio*—the reduction of another to a state of psychological subjection). *See also* People v. Manson, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), *cert. denied sub nom.*

the goal of controlling the minds of others for given purposes.²⁰ Because the legal contexts in which these cases arise are distinct, however, each area of controversy involves unique issues. For example, the primary question in connection with the use of such methods by religious cults is the extent to which their peculiar conversion practices merit the protection of the first amendment.²¹ In prosecutions of criminal defendants, by contrast, the fundamental issue is the extent to which coercive treatment interferes with the victim's capacity to formulate voluntarily the criminal intent required to uphold a criminal charge.²² These two areas of controversy can overlap: a religious convert might be induced by his leaders to commit acts—such as soliciting donations for nonexistent social programs—that violate the criminal law.²³ At trial he might attempt to interpose his forcible conversion as a defense.

An earlier article by this author considered issues raised by reli-

Manson v. California, 430 U.S. 986 (1977) (penalty trial) (reported in V. BUGLIOSI & C. GENTRY, *supra* note 4).

20. There are other parallels as well. The voluntariness of the cult-joining process, which plays an important part in the first amendment analysis, Delgado, *supra* note 5, at 49-62, corresponds roughly to the analysis of intent in the case of criminal defendants. See generally W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 25, at 180 & n.23 (1972) ("[I]t is clear that criminal liability requires that the activity in question be voluntary."). The latitude afforded religious choice, see, e.g., U.S. CONST. amend. I; Aboud v. Detroit Bd. of Educ., 431 U.S. 209, 231 n.28 (1977); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("[N]o official . . . can prescribe what shall be orthodox in . . . religion . . ."), parallels the presumption of the criminal law that individuals, for the most part, act freely and voluntarily, W. LAFAVE & A. SCOTT, *supra* § 28, at 202-03 ("[P]eople are 'presumed to intend the natural and probable consequences of [their] acts'" and are liable for "whatever a reasonable man would have foreseen as probable.").

21. See, e.g., Delgado, *supra* note 5, at 9-49.

22. There are, of course, other differences as well. The purposes for which claims of coercive persuasion are argued can be diametrically opposed. In the religious cult controversy, allegations of thought reform are urged as a justification for state intervention, see Delgado, *supra* note 5, at 88-91, whereas in the case of criminal defendants, they are used to resist the state's power to punish, see, e.g., Lunde & Wilson, *Brainwashing as a Defense to Criminal Liability: Patty Hearst Revisited*, 13 CRIM. L. BULL. 341, 377-82 (1977); Note, *Brainwashing: Fact, Fiction and Criminal Defense*, 44 U. MO. KAN. CITY L. REV. 438, 478-79 (1976). Both commentaries propose that coercive persuasion, although not constituting a cognizable defense, still presents grounds for mitigation of sentences.

23. Lunde & Wilson, *supra* note 22, at 352, also suggests the hypothetical example of a new convert assisting in the kidnapping of another for the purpose of initiating that person into the recent convert's newfound religious faith. The opposite problem can be presented when criminal defendants (such as Charles Colson, a Watergate defendant) allege that a conversion has taken place, with the result that they are no longer suitable objects of punishment. Cf. Delgado, *Organically Induced Behavioral Change in Correctional Institutions: Release Decisions and the "New Man" Phenomenon*, 50 S. CAL. L. REV. 215 (1977) (impact of organically induced personality change on the notion of criminal culpability).

giously motivated thought reform;²⁴ the present Article addresses the question of how the legal system should treat the coercively persuaded criminal defendant. Although not dictated by the number of victims of wartime or religious coercive persuasion,²⁵ the present inquiry is of interest for several reasons. The frequency with which such cases arise is likely to accelerate as social conditions conducive to terrorism and other forms of psychologically totalistic behavior continue,²⁶ and as the potential utility of thought reform methods becomes more widely known among extremist groups.²⁷ Moreover, commentators who have considered the problem of the coercively persuaded defendant have concluded, largely on an analysis of the Patricia Hearst case, that no legal defense is available to such an individual.²⁸ If they are correct,²⁹ their conclusion is a troubling one, for it

24. Delgado, *supra* note 5.

25. Although the number of young persons involved in the country's 200 to 1,000 religious cults is relatively large—perhaps on the order of one to three million youths, see Delgado, *supra* note 5, at 6-7 nn.24-26—very few persons have attempted to raise a criminal defense of brainwashing. These are restricted to the POW cases, see note 17 *supra*, the case of Patricia Hearst, see note 19 *supra*, the case of Charles Manson, see note 19 *supra*, and the recent “brainwashing by television” case, *Zamora v. State*, 361 So. 2d 776 (Fla. 1978), discussed in Ayres, *Influence of TV Fails as Defense Plea*, N.Y. Times, Oct. 7, 1977, § A, at 18, col. 1; Ayres, *Despite Conviction of Youth, Debate Over TV Violence Continues*, N.Y. Times, Oct. 8, 1977, at 10, col. 1; *Did TV Make Him Do It*, TIME, Oct. 10, 1977, at 87; *TV on Trial*, NEWSWEEK, Sept. 12, 1977, at 104.

26. Interview with Robert J. Lifton, M.D., Foundations Professor of Psychiatry, Yale Medical School, in New York City (May 15, 1978) [hereinafter cited as Lifton Interview]. Professor Lifton is the author of several seminal works on the psychology of totalism, including R. LIFTON, *THOUGHT REFORM AND THE PSYCHOLOGY OF TOTALISM: A STUDY OF “BRAINWASHING” IN CHINA* (1961) (cited in note 1 *supra*); Lifton, *Thought Reform of Chinese Intellectuals: A Psychiatric Evaluation*, 13 J. Soc. ISSUES 5 (1957); Lifton, *Home by Ship: Reaction Patterns of American Prisoners of War Repatriated from North Korea*, 110 AM. J. PSYCH. 732 (1954) (cited in note 2 *supra*).

27. See Miller, *Conference Summary*, in G.A.P. SYMPOSIUM No. 3, *supra* note 6, at 295.

28. Lunde & Wilson, *supra* note 22, at 363-76; Note, *supra* note 22, at 460-79.

29. Lunde and Wilson's conclusion may be incorrect. There may well be enough elasticity in such defenses as insanity and diminished capacity to permit their extension to at least some coercively persuaded defendants. For example, insanity might be found in cases involving a severe traumatic neurosis which affected the victim's ability to appreciate the nature of the allegedly criminal act or to know that it was wrong. Some progressive tests for insanity require only that the “abnormal condition of the mind . . . substantially affect . . . mental or emotional processes and impair . . . behavioral controls.” *McDonald v. United States*, 312 F.2d 847, 851 (D.C. Cir. 1962), cited with approval in *United States v. Brawner*, 471 F.2d 969, 983 (D.C. Cir. 1972). Since thought reform may cause exactly such results, a victim might successfully argue that he was rendered legally insane by the process of thought reform.

Diminished capacity is a second possible defense. Where recognized, the defense will lie if the accused lacked the ability to form the specific type of intent required for conviction, for example, premeditation in the case of first degree murder. See generally

means denying a defense to a class of defendants who are, by ordinary moral intuitions,³⁰ often more victims than perpetrators.³¹

W. LAFAVE & A. SCOTT, *supra* note 20, § 42, at 325-26. In cases of coercive persuasion, the victim may argue that his capacity has been so affected that he was unable to form the specific intent required for the crime, or unable to "maturely and meaningfully" reflect upon the gravity of his contemplated act. *People v. Wolff*, 61 Cal. 2d 795, 821, 394 P.2d 959, 975, 40 Cal. Rptr. 271, 287 (1964) (emphasis omitted).

The defense of duress may also be available. This defense requires that the defendant believe that should he fail to act as demanded he, or another, will be severely injured or killed. See generally W. LAFAVE & A. SCOTT, *supra* note 20, § 49. The threat must be one that a person of reasonable firmness would find impossible to resist. Because the victim of thought reform often continues to feel controlled by the captors even after leaving their presence, he may "reasonably," if incorrectly, believe that he will suffer punishment if he fails to act as expected. Alternatively, forced subjection to the process may of itself supply sufficient coercion to justify application of the defense. Since the defense excuses one who "chooses" to perform a criminal act when forced to do so, it would constitute no great extension of the doctrine to excuse those who have been forced to "choose" to commit a crime consistent with their new, coercively induced beliefs and values.

Even though existing defenses might be capable of extension, at least in some cases, to encompass victims of coercive persuasion, it does not follow that this would be the most desirable solution. Extension 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. Moreover, this solution may be available only to some thought reform victims—those who are able to bring their mistreatment within the parameters of some existing defense theory. Others will be left without any defense. Finally, a totally new defense has the considerable advantages of analytical simplicity and precision, predictability, as well as other benefits discussed at p. 33 *infra*.

30. The decision to recognize a given defense, like the decision to criminalize certain forms of behavior, is ultimately a moral one, reflecting notions of acceptable conduct under current social standards. This Article has previously offered support for the proposition that it is morally desirable to afford some degree of exculpation for coercively persuaded defendants. See notes 20-23 *supra* and accompanying text. Later sections examine whether such a defense is consistent with existing legal doctrine and can withstand objections that have been or could be made against it. Ultimately, however, the moral premise that persons who have without fault undergone brutalizing experiences aimed at effecting drastic changes in their thoughts and behavior should not be held accountable for actions stemming from these experiences—like moral premises generally—cannot be proved, at least not in the same way in which facts in the physical world may be. One who has rejected the underlying moral premise of this Article will, of course, be unpersuaded by later sections of the analysis, for they deal only with analytical continuities and other more formal aspects of the defense.

31. The public's attitude toward Patricia Hearst is illustrative. According to the Field poll, early in 1975 about ninety percent of the general public believed that Patricia Hearst was guilty and should be sentenced to prison. One year later, as more of the circumstances of her treatment by the S.L.A. became known, a "large majority" favored imprisonment. In a recent survey, nearly one-half of the public favored parole or pardon. See Field, *Public Divided on Freeing Patty*, *San Francisco Chronicle*, Sept. 15, 1978, at 1, col. 1; *Pleas for Patty: Support Grows for Her Release*, *TIME*, Oct. 2, 1978, at 34 (40,000 persons signed pleas for clemency).

Subsequent to the appearance of the poll the Harrises pleaded guilty to the kid-

Consider a hypothetical individual captured by an outlaw gang and subjected to lengthy thought reform techniques, beginning with threats and terror, and continuing with isolation, starvation, sleep deprivation, and guilt manipulation carried out by seemingly all-powerful captors. At various intervals in the process, that individual's captors demand that he perform criminal acts for their benefit. Under traditional criminal defense theories, exculpation would be available for those crimes the victim commits during the initial stages of captivity, when classic duress and coercion exist,³² but not during the latter stages, when such overt coercion no longer is necessary for the captors to maintain control.³³ Such a result is surely wrong. The breakdown of the victim's identity and will in the latter stages of the coercive persuasion process destroys the very mechanisms by which he might have offered resistance. Thus, acquiescence is rendered more certain than in the early stages when simple duress is applied.³⁴ A person under direct threats of death will rarely cling to even deeply held beliefs.³⁵ Rarer still is the individual who can resist protracted, unremitting, coercive thought reform techniques.³⁶

Consideration of theories traditionally believed to justify punishment also suggests that coercive persuasion should be taken into account in assessing a defendant's criminal guilt. Prison law decisions hold that punishment, to be constitutional, must advance one or more of the accepted rationales of the criminal justice system—societal safety, rehabilitation, deterrence, or retribution.³⁷ Punitive treatment of coercively persuaded defendants is difficult to reconcile

napping, thereby implying that Miss Hearst was blameless for the manner in which she became involved in the group. Miss Hearst's counsel feels that many persons who expressed the belief that she should receive punishment did so on the grounds that she was somehow involved in her own kidnapping. These individuals may well soften their attitude toward Miss Hearst. Telephone Interview with George C. Martinez, Attorney, in San Francisco (Oct. 5, 1978).

32. See generally W. LAFAVE & A. SCOTT, *supra* note 20, § 49, at 377-81.

33. In these latter stages, a defense of coercion would not lie because there is no immediate threat of death or serious bodily injury, and often the victim does not avail himself of the opportunity to escape when it arises. *Id.* at 378-79 & n.40.

34. See note 16 *supra*.

35. Those who do so are customarily thought of as martyrs. See, e.g., PLATO, *THE APOLOGY* (J. Kaplan ed. 1950) (Socrates accepts death sentence rather than exile for "corrupting the youth" of Athens).

36. See note 16 *supra* and sources cited therein. See also E. SCHEIN, *supra* note 3, at 163-66 (examples of Western victims of Chinese thought reform who subsequently praised their captors, expressing thanks for their own brainwashing); *id.* at 54-56 (ability of such thought reform methods to remake individuals into "new men").

37. See, e.g., *Pell v. Procunier*, 417 U.S. 817, 822-24 (1974) (prisoners' access to press); *Procunier v. Martinez*, 416 U.S. 396, 412-16 (1974) (censorship of prison mail); *Nolan v. Fitzpatrick*, 451 F.2d 545 (1st Cir. 1971); *Carothers v. Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970). See generally Delgado, *supra* note 23, at 239-41 (1977).

with this requirement. Past experience demonstrates that most such victims, once removed from the coercive environment, soon lose their inculcated responses and return to their former modes of thinking and acting.³⁸ This return often is accompanied by expressions of anger, in which the former captive accuses his captors of the "rape" of his mind and personality.³⁹ Punishment of such individuals does little to promote the rationales of the criminal justice system.⁴⁰

38. See R. LIFTON, *supra* note 1, at 86-151; HEARST, *supra* note 4, at 258-62 (testimony of Louis J. West); *id.* at 318-21 (testimony of Robert J. Lifton); Rensberger, *supra* note 7. These persons may not, however, return to the same "place"; the post-thought reform personality may contain elements of both the old and the imposed self. Lifton Interview, *supra* note 26. Nevertheless, these persons generally will be law-abiding. After her capture and opportunity to converse with friends and family, Patricia Hearst slowly began to lose her revolutionary identity. Although not the same young, naive woman who had been engaged to marry Steve Weed, she was recognizably Patty once again. *But cf.* Lunde & Wilson, *supra* note 22, at 352 n.45 ("It is arguable that Patricia Hearst's experience in the San Mateo County Jail during the months following her arrest constituted a period of 'deprogramming' at the hands of the defense team."). Similar observations have been made with regard to returning POWs and victims of Chinese thought reform universities. See, e.g., R. LIFTON, *supra* note 1, at 86-152.

39. See, e.g., R. LIFTON, *supra* note 1, at 133-51; HEARST, *supra* note 4, at 318. See also Delgado, *supra* note 5, at 80 n.405.

40. The rationale of rehabilitation is inapplicable, because these persons do not need to be "reformed" for a second time by the criminal justice system to be law-abiding. See note 38 *supra*. See generally K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); B. WOOTTON, *CRIME AND THE CRIMINAL LAW* 32-57 (1963). For similar reasons, the interest in societal protection is not advanced, since after the programmed-in responses wash away, the victim is no more likely to commit violent crime than the average person. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 48-53 (1968); *cf.* *United States v. Brown*, 381 U.S. 437, 458 (1965) (bill of attainder invalid for preventive purposes). Hence, specific deterrence—the notion that the offender needs to be discouraged from repeating his act—is inapplicable. General deterrence, however, might be considered to support punishment for such individuals, in order to discourage others from engaging in similar conduct. See generally Adenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949 (1966). This rationale depends, however, on moral condemnation of the defendant, since otherwise it could as easily justify punishing, on utilitarian grounds, randomly chosen innocent persons. To avoid such results, proponents of general deterrence add the limitation that the person chosen for punishment be selected from among the guilty. See, e.g., H. PACKER, *supra* at 62-70. If, as seems likely, the informed public views the "brainwashing" victim as morally blameless, there is no purpose in punishing such victims to enforce respect for, or fear of, the law. Punishment in such cases could, in fact, weaken the utilitarian basis of deterrence, since one may "as good be hanged for a sheep as a lamb."

A final rationale for punishment is retribution—the notion that wrongdoers must suffer because justice demands it, see, e.g., I. KANT, *PHILOSOPHY OF LAW* 195 (W. Hastie trans. 1974) ("Punishment . . . must in all cases be imposed only because the individual . . . has committed a Crime.") (emphasis omitted), or because it is a necessary occasion for the criminal to repent and recognize his errors. See generally F. DOSTOEVSKY, *CRIME AND PUNISHMENT* 532 (C. Garnett trans. 1951); Plato, *The Gorgias*, in *THE COLLECTED DIALOGUES OF PLATO* 262-63 (E. Hamilton & H. Cairns eds. 1961). Like

If punishment of the coercively persuaded defendant conflicts with both basic intuitions and the justifications advanced for invocation of criminal punishment, yet cannot be avoided under any existing defense theory, it becomes necessary to fashion a new theory of defense. Occam's razor⁴¹ dictates that any such new defense should constitute, insofar as is possible, a logical extension of existing concepts of act, intent, and blame.⁴² The actus reus of defendants who have undergone coercive persuasion is undisputed,⁴³ they apparently are neither insane, coerced, nor acting under diminished capacity,⁴⁴ and yet they seem less than fully responsible for their acts. This is so because the coercively persuaded defendant's choice to act criminally was not freely made and, indeed, appears to be not his choice at all.⁴⁵ Traditional mens rea analysis has inquired only whether a defendant who committed an allegedly criminal act possessed the requisite state of criminal mind at the time of the act. In the case of the coercively persuaded defendant, it is appropriate to ask also whether the intent the actor possessed can properly be said to be his own.⁴⁶

general deterrence, however, moral condemnation of the offender is a prerequisite for retribution. See e.g., E. DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 108-09 (G. Simpson trans. 1933). An important ingredient in such moral condemnation is a belief that the offender had the possibility of controlling his conduct—the ability to understand the rules, to deliberate without undue impairment of his capacities, and to reach decisions concerning his choice of conduct. See generally H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY* 227-30 (1968). If one accepts the view that the coercively persuaded victim lacks these capacities, the moral basis for retributive punishment vanishes. Unlike alcoholism or drug addiction, there is not even an original moral fault, since the entire process is induced by another with no initiative on the part of the victim. Cf. *People v. Zapata*, 220 Cal. App. 2d 903, 911-13, 34 Cal. Rptr. 171, 177-78 (1963) (denial of addict's request for rehabilitation not reversible error); *People v. Nettles*, 34 Ill. 2d 52, 56, 213 N.E.2d 536, 539 (1966), cert. denied, 386 U.S. 1008 (1967) (addict's prosecution for possession of narcotics not unconstitutional punishment for status).

41. Attributed to William of Occam, the principle—that entities should not be multiplied beyond necessity—urges that the simplest possible rule or theory be adopted that is consistent with the facts or phenomena to be explained. See, e.g., B. RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 472 (Essandess paperback ed. 1945).

42. See note 29 *supra* (placing coercive persuasion defense in extant category avoids stretching lines of existing defenses, such as insanity or duress); note 67 *infra* (defense fills in a pre-existing void, or asymmetry, in the theory of criminal excuses).

43. Unlike cases of hypnotism, see text accompanying notes 59-63 *infra*, the acts of the coercively persuaded defendant lack the reflexive, unpremeditated, automatic quality that is required for an actus reus defense. See J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 222-28 (2d ed. 1960) (actus reus defenses); MODEL PENAL CODE § 2.01 (Proposed Official Draft 1962).

44. See note 28 *supra* and accompanying text.

45. The criminal justice system requires, as a general matter, that before punishment is imposed, it must be shown that the defendant freely chose to act as he did. See, e.g., *Carter v. United States*, 252 F.2d 608, 616 (D.C. Cir. 1957). See also H. PACKER, *supra* note 40, at 103-35.

46. See note 39 *supra* and accompanying text; note 40 *supra*.

The victim of thought reform typically commits criminal acts fully aware of their wrongfulness.⁴⁷ He acts consciously, even enthusiastically,⁴⁸ 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. Explication of the concept of transferred or superimposed mens rea—criminal intent that is not the actor's own—is thus the principal task of this Article. Initially, an example is presented in which characterization of a person's actions as stemming from an intent other than his own seems intuitively plausible. Then, various existing legal doctrines are reviewed in order to ascertain the extent to which analogous concepts of transferred or superimposed mental states have been applied to relieve the actor of liability in other contexts. Concluding that the notion of implanted mens rea offers, both intuitively and doctrinally, a tenable basis for a new criminal defense, a third section offers criteria for determining when such a transfer has occurred. A final section considers possible objections to the new defense, including the criticisms that the defense would have no clearly defined boundaries and that it would destroy the concept of free will that underlies the criminal justice system.

II. A CASE IN WHICH THE DEFENSE SEEMS INTUITIVELY PLAUSIBLE

Lightweight, implantable "stimoceivers" are available for treatment of a variety of neurological and psychiatric disorders, including mood disturbances, movement disorders, disturbances of consciousness, intractable pain, and impulsive violence and irascibility.⁴⁹ When employed for any of these uses, the stimoceiver functions much like a cardiac pacemaker, prompting some neuroscientists to refer to it as a "pacemaker for the brain."⁵⁰ Able to send and receive radio

47. See, e.g., W. SARGANT, *supra* note 5, at 189-92 (prisoners knowingly confess to acts not done); cf. E. HUNTER, BRAINWASHING 238-41 (POWs "learn" to confess, implying that they recognize wrongfulness); R. LIFTON, *supra* note 1, at 67-83 (person undergoes "rebirth," emerges as a new, seemingly autonomous individual); *id.* at 84 (person identifies with captors, is "happy in his faith").

48. See, e.g., R. LIFTON, *supra* note 1, at 84; E. SCHEIN, *supra* note 3, at 157-58 (range of possible responses inevitably includes this occurrence). See generally HEARST, *supra* note 4.

49. See J. DELGADO, PHYSICAL CONTROL OF THE MIND 142-43, 181, 200-01 (1969); Delgado, Mark, Sweet, Ervin, Weiss, Bach-Y-Rita & Hagiwara, *Intracerebral Radio Stimulation and Recording in Completely Free Subjects*, 147 J. NERVOUS & MENTAL DISORDER 329 (1968) [hereinafter cited as *Intracerebral Stimulation*]. See generally Delgado, *supra* note 23, at 223-27.

50. See Heath, *Modulation of Emotion with a Brain Pacemaker*, 165 J. NERVOUS & MENTAL DISORDER 300 (1977).

and electrical signals simultaneously, the device is cemented to the patient's skull and connected to thin electrodes surgically implanted in areas of the brain suspected of giving rise to the aberrant behavior.⁵¹ If the stimoceiver detects abnormal electrical activity, the area is stimulated by weak electrical currents transmitted through the apparatus.⁵² If this stimulation produces the desired behavior, the area may be treated chemically or surgically.⁵³ Since a stimoceiver works by radio transmission, remote monitoring is possible.⁵⁴

Suppose that a stimoceiver-equipped patient, outside the laboratory, and at a time when he believes the device to be inoperative, receives through it a signal—a stray impulse, or one sent by a practical joker, enemy, or madman—that activates portions of his limbic brain,⁵⁵ causing him to feel inexplicably and overwhelmingly angry. Unable to attribute his anger to the electrical stimulus, the patient might discharge the aggressive impulse by attacking a hapless bystander.⁵⁶ In a prosecution for assault, it would be difficult to exculpate such an individual under an existing defense, such as unconsciousness, coercion, insanity, or diminished capacity.⁵⁷ Yet common sense indicates that there is no purpose in punishing the defendant. The attack was instigated by the radio signal, which was transmitted without any fault on the part of the recipient. No one could reasonably be expected to resist the powerful mood change that resulted.⁵⁸ If the defendant possessed *mens rea* at all, it seems more natural to attribute it not to the patient but to the sender, since it is his will and intent that is expressed through the patient's criminal act.

51. See authorities cited in notes 49-50 *supra*.

52. See *Intracerebral Stimulation*, *supra* note 49, at 336-38. See generally Delgado, *supra* note 23, at 227.

53. See Delgado, *supra* note 23, at 227, 232-38.

54. See authorities cited in note 49 *supra*; V. MARK & F. ERVIN, *VIOLENCE & THE BRAIN* 97-108 (1978); Delgado, *supra* note 23, at 224-25.

55. Located deep within the lower, more primitive area of the brain, the limbic system governs functions of the brain stem, including arousal and fight-or-flight behavior. Organic treatments for violent behavior have often focused on the limbic system. See, e.g., Delgado, *supra* note 23, at 223-27, 232-38, and sources cited therein.

56. This hypothetical example may be compared with the description of the behavior of a patient under limbic brain stimulation. See, e.g., V. MARK & F. ERVIN, *supra* note 54, at 97-108.

57. See note 28 *supra* and accompanying text. Since the patient's response is mediated by a mood change involving the higher brain centers, rather than being triggered by reflex action, a defense of automatism would not lie. Such a patient's action is fundamentally different from that of a patient suffering an epileptic seizure or sleepwalking in that it is conscious and involves some elements of choice. See notes 155-58 *infra* and accompanying text (Brainwashed victims often have a mix of implanted "intentions"—impulses to commit specific criminal acts—and "motivations"—more generalized value orientations.).

58. For example, see the description of the patient's reaction in J. DELGADO, *supra* note 49, at 114 ("I guess, Doctor, that your electricity is stronger than my will.").

III. ANALOGOUS CONCEPTS INVOLVING INDUCED MENTAL STATES

In a number of contexts, courts have expressed a willingness to relieve individuals from responsibility for criminal acts based on transferred intent or design.

One illustration of the concept of transferred mens rea is found in cases of posthypnotic suggestion.⁵⁹ California recognizes a defense of hypnosis,⁶⁰ and the Model Penal Code incorporates a hypnosis defense under its treatment of actus reus,⁶¹ justifying it by the marked dependency and helplessness of the subject.⁶² It would seem that the hypnosis defense might more appropriately be analyzed according to the transferred mens rea concept. Regardless of its theoretical moorings, however, the doctrine assigns criminal responsibility to the hypnotist who procures the illegal behavior, not to the subject who physically carries it out.⁶³ This approach recognizes that the hypnotized subject is more a victim of the crime than its perpetrator, and that a search beyond the primary actor will reveal another to whom the criminal action may more appropriately be ascribed.

The Model Penal Code also refuses to inculcate when an otherwise criminal act results from reflex, convulsion, unconsciousness, or an active state of automatism, because of the involuntary nature of the act committed.⁶⁴ The victim of brainwashing, by contrast, acts voluntarily and is usually aware of the wrongfulness of his acts.⁶⁵ Thus, such cases do not fit squarely into the Code's treatment of hypnosis—transferred actus reus. Yet the recognition that there can

59. Some psychologists believe that there is an element of hypnotic suggestion in coercive persuasion. See, e.g., Farber, Harlow & West, *supra* note 7. Those authors observe that the hypnotized subject, like the thought reform victim, responds automatically, especially to verbal stimuli, is greatly influenced by the attitude of the leader or hypnotist, and is highly selective in his responses. See also J. MEERLO, *supra* note 2, at 31-36.

60. *People v. Marsh*, 170 Cal. App. 2d 284, 338 P.2d 495 (1959) (trial judge's instruction on hypnosis defense upheld).

61. See MODEL PENAL CODE § 2.01(2)(C) (Proposed Official Draft 1962).

62. *Id.* § 2.01, Comment at 122 (Tent. Draft No. 4, 1955).

63. The Code makes third parties liable for the acts of others generally through the law of inchoate crime. See *id.* at §§ 2.06, 5.02. Defining hypnosis, as well as reflex, convulsion, and unconsciousness in actus reus terms constitutes one form of recognizing that the defendant who committed the act in question was not morally culpable. Because of the "dependence of the subject on the hypnotist," hypnosis was seen by the drafters as requiring special comment. *Id.* § 2.01, Comment at 121 (Tent. Draft No. 4, 1955).

64. *Id.*

65. See note 47 *supra* and accompanying text.

be transferred actus reus is an important step toward recognizing a new defense for the coercively persuaded defendant. If a showing that the actus reus originates outside the defendant results in exoneration, the same consequence should follow when it is the element of mens rea that is externally induced.⁶⁶

Presumably, this extension has not previously occurred because until recently it was considered impossible to interfere with the mental states of others to the same extent as with their physical acts. The development of potent techniques of organic and psychological behavior control, however, suggests that such an extension is now appropriate.⁶⁷ Like the addition of newly discovered elements to the periodic table, recognition of a defense based on transferred mens rea

66. An even clearer, although rarer, case would be one in which *A* physically guided the hand of *B* in carrying out a criminal act. Assuming that *B* resisted and that *A* used overwhelming force in seizing and guiding *B*'s hand, there is little doubt that *B* would be entitled to an actus reus defense. Why should not the same result follow when *A* uses illegitimate and irresistible force to gain control of *B*'s mind?

67. Advances in medicine and psychiatry have frequently required adjustments in thinking about crime and offenders. See, e.g., *Durham v. United States*, 214 F.2d 862, 871 (D.C. Cir. 1954) ("The science of psychiatry now recognizes that a man is an integrated personality and that reason . . . is not the sole determinant of his conduct."); *Smith v. United States*, 36 F.2d 548, 549 (D.C. Cir. 1929) (speaking of the "great advancement in medical science as an enlightening influence," court held that uncontrollable impulse will exculpate under insanity doctrine). But see *Blocker v. United States*, 288 F.2d 853, 863 (D.C. Cir. 1961) (Burger, J., concurring in result) (rejecting the view that scientific advances must always be accompanied by legal change). See also *Powell v. Texas*, 392 U.S. 514, 559-60 (1968) (Fortas, J., dissenting) (scientific evidence regarding insanity should not be excluded merely because the science is imprecise).

Although the case for exculpation is perhaps clearest when physical means or hypnosis are employed, the same considerations argue for leniency when the techniques used are those of classic thought reform. The mechanisms are equally well known and studied. See notes 123-30 *infra* and accompanying text. While the period of time in which they operate may be longer, they are ultimately as difficult to resist as those that are purely physical. See notes 14-16 *supra* and accompanying text. Indeed, some authorities believe resistance simply hastens the ultimate breakdown. See, e.g., W. SARGANT, *supra* note 5, at 48-55, 108. Recent studies of the physiology of coercive persuasion suggest that the underlying mechanisms may well be identical to those involved when purely organic means are used. Address of John Clark, M.D., Professor of Psychiatry, Harvard Medical School, at Central American Rabbinical Conf., New Haven, Conn. (May 17, 1978) (coercive persuasion disrupts neural functioning necessary to process and assimilate new information); see G.A.P. SYMPOSIUM No. 3, *supra* note 6 (food, sleep deprivation, isolation, exhaustion, pain); E. SCHEIN, *supra* note 3, at 198-202 (physiological stress theories); Delgado, *supra* note 5, at 57 n.306 (neurophysiological explanation for cultist conversion indoctrination). See generally W. SARGANT, *supra* note 5, at 29-46 (Pavlovian conditioning theory of coercive persuasion). Whether the disorganizing effect is achieved by sleep and dietary deprivation, or by a potent drug or electrical current, is immaterial. Both forms of intervention interfere with the physical substrata of autonomous mental functioning, with similar effects.

simply fills in an existing asymmetry in the theory of criminal excuses.

Another existing legal doctrine that employs the concept of transferred mens rea is entrapment.⁶⁸ The prevailing test for entrapment examines the extent to which criminal intent originates not with the defendant but with the police authorities.⁶⁹ In the leading case of *Sorrells v. United States*,⁷⁰ a government agent, whose sole purpose was to entrap the defendant, posed as a tourist and convinced the defendant to sell him liquor for a friend. The Court found that the defendant had no previous disposition to commit the crime and was lured into doing so only by the agent's persistent solicitation and appeals to wartime reminiscences. Observing that the government may provide the opportunity or the facilities for the commission of an act so as "to reveal the [preexisting] criminal design,"⁷¹ the Court held that a different case was presented when "the criminal design originates with . . . the Government [agents], and they implant in the mind of an innocent person the disposition to commit the alleged offense"⁷² In such a case, the criminal act is not properly ascribable to the defendant, but is "the creature of"⁷³ the agent who procured it.

Subsequent cases have also interpreted the test for entrapment in terms of transferred mens rea. One court, for example, stated that "it is . . . when the Government's deception actually implants the criminal design in the mind of the defendant that the defense of entrapment comes into play."⁷⁴

Entrapment, however, is not exclusively a transferred mens rea defense. It also reflects a desire to curb egregious police conduct.⁷⁵ For

68. See generally W. LAFAVE & A. SCOTT, *supra* note 20, § 48, at 372, 374.

69. See, e.g., *United States v. Russell*, 411 U.S. 423 (1973). See generally Williams, *The Defense of Entrapment and Related Problems in Criminal Prosecution*, 28 *FORDHAM L. REV.* 399 (1959).

70. 287 U.S. 435 (1932).

71. *Id.* at 441-42.

72. *Id.* at 442.

73. *Id.* at 441.

74. *United States v. Russell*, 411 U.S. 423, 436 (1973); *accord*, *Ryles v. United States*, 183 F.2d 944, 945 (10th Cir. 1950) (entrapment will lie when "government agents induce and originate the criminal intent of the defendant"); see *State v. Nelson*, 228 N.W.2d 143, 147 (S.D. 1975) (when the evidence shows "the criminal intent is traceable to the defendant [and not] the Government Agent," an entrapment defense will not lie).

75. A minority of the Supreme Court has consistently preferred to rest exculpation directly upon a public policy of deterring distasteful law enforcement practices. See *United States v. Russell*, 411 U.S. 423, 439 (1973) (Stewart, J., dissenting); *Sherman v. United States*, 356 U.S. 369, 378 (1958) (Frankfurter, J., concurring in result); *Sorrells v. United States*, 287 U.S. 435, 459 (Robert, J., concurring) ("The applicable

this reason, courts have permitted the entrapment defense in the face of official behavior falling considerably short of coercive persuasion.⁷⁶

Police confession cases evidence similar judicial concern about superimposed or transferred mental states. In *Reck v. Pate*,⁷⁷ the Supreme Court invalidated a confession given by a nineteen-year-old youth of subnormal intelligence after four days in police custody. On each day of his confinement, the youth had been subjected to "six- or seven-hour stretches of relentless and incessant interrogation"⁷⁸ conducted by groups of officers. Moreover, he had been intermittently placed on public exhibition, interrogated until he vomited blood, given morphine, among other drugs, and denied adequate food and all contact with the outside world.⁷⁹ This combination of circumstances, the Court said, was "so inherently coercive that its very existence is irreconcilable with the possession of mental freedom by a lone suspect against whom its full coercive force is brought to bear."⁸⁰ In a concurring opinion, Justice Douglas recognized that identified interrogation techniques "can give the interrogator effective command over the prisoner."⁸¹

In *Miranda v. Arizona*,⁸² the Court dealt again with the ability of forceful interrogation methods to deprive a suspect of free choice. Citing practices suggested by police manuals—including guilt manipulation, isolation, pretended kindness, and physical and mental stress—as tantamount, according to one authority, to "brainwashing,"⁸³ the Court struck down a custodial confession and prescribed detailed rules in an effort to control police questioning techniques.

In a majority of the confession cases, the issue is whether intensive interrogation has deprived the victim of the ability to resist a

principle is that courts must be closed to the trial of a crime instigated by the government's own agents.").

76. In *Sorrells*, for example, the government agent persistently implored the defendant to commit the criminal act, but resorted to few of the classic techniques of coercive persuasion, such as physiological depletion, guilt manipulation, and threats of annihilation. See generally Park, *The Entrapment Controversy*, 60 MINN. L. REV. 163, 180-83 (1976); see also *United States v. Costello*, 483 F.2d 1366, 1368 (5th Cir. 1973) ("inducement or persuasion"); *Johnson v. United States*, 317 F.2d 127 (D.C. Cir. 1963) (offering to provide the defendant with funds to commit the offense); *United States v. Sherman*, 200 F.2d 880, 883 (2d Cir. 1952) ("soliciting, proposing, initiating, broaching, or suggesting" that the defendant commit a crime).

77. 367 U.S. 433 (1961).

78. *Id.* at 441.

79. *Id.*

80. *Id.* at 442.

81. *Id.* at 445.

82. 384 U.S. 436 (1966).

83. *Id.* at 445-58.

demand for confession.⁸⁴ In the recent case of *Reilly v. State*,⁸⁵ however, the concern was that such interrogation produced not only a confession, but also the suspect's subjective belief that he was, in fact, guilty. *Reilly* involved the conviction of a "somewhat immature" young man with a weak sense of self,⁸⁶ who underwent intensive questioning by the authorities in connection with the death of his mother. After he refused to confess, the police succeeded in convincing the suspect that since he could not remember killing her, he must have done so.⁸⁷ The confession finally obtained was later described by a psychiatrist as the product of the young man's low self-esteem and suggestibility resulting from induced guilt and exhaustion.⁸⁸ The psychiatrist compared the methods used in procuring his confession to prisoner of war thought reform. After a defense committee of prominent local residents urged that the case be reopened, a Connecticut appellate court ordered a new trial,⁸⁹ citing the questionable reliability of the confession, as well as the state's suppression of exculpatory evidence. Charges were eventually dropped.

Cases involving multiple personalities or defendants who testify while under the influence of psychoactive drugs further illustrate the criminal law's insistence that any requisite mental state be found to be that of the defendant himself. In *People v. Bicknell*,⁹⁰ a criminal defendant was acquitted following his testimony, given under hypnosis, establishing that he suffered a multiple personality. A psychiatrist elicited the testimony of two alter egos, who placed the blame on a third, evil personality whose existence had since been dispelled by therapy.⁹¹ The defense theory apparently was that the guilty individual simply no longer existed.

In *State v. Murphy*,⁹² a criminal defendant won a new trial as a result of evidence that during the earlier proceeding he had testified while under the influence of powerful mind-altering medication. The rationale for the court's order appears to have been that the jury had not been exposed to the "real" defendant; as such, the conviction

84. See, e.g., *Escobedo v. Illinois*, 378 U.S. 478 (1964) (lengthy interrogation and denial of opportunity to consult with attorney); *Rogers v. Richmond*, 365 U.S. 534 (1961) (incommunicado detention accompanied by pretense of bringing accused's wife in for questioning); *Ashcroft v. Tennessee*, 322 U.S. 143 (1944) (36 hours of questioning); *Brown v. Mississippi*, 297 U.S. 278 (1936) (brutal beating). See also text accompanying notes 77-83 *supra*.

85. 355 A.2d 324 (Conn. Super. Ct. 1976).

86. N.Y. Times, Feb. 17, 1976, at 41, col. 3.

87. *Id.*

88. *Id.*

89. 355 A.2d 324, 336-37 (Conn. Super. Ct. 1976).

90. No. 102329 (Mun. Ct., San Jose, Cal., June 21, 1976).

91. *Id.*

92. 56 Wash. 2d 761, 355 P.2d 323 (1960).

violated his right to trial by jury.⁹³ On similar grounds, many courts have refused to try criminal defendants who have been committed to mental institutions earlier because of incompetency to stand trial.⁹⁴ Often, a short period of hospitalization coupled with treatment by antipsychotic drugs will have restored the individual to apparent normality. Despite such changes, however, courts have refused to try such defendants on the ground that their competency is only a type of "chemical sanity," even though their condition is identical to that prior to the onset of the illness.⁹⁵

As a final area of comparison it is useful to examine the way in which the law deals with impermissible influences upon an actor's formulation of intent in civil cases. This branch of the law takes an even less restrictive view of the circumstances that will relieve the actor of liability. In contract law, for example, duress is defined as any wrongful threat that induces an individual to enter into an agreement while unable to exercise free will and judgment.⁹⁶ Similarly, a testamentary arrangement will be set aside if the testator was induced to make it under circumstances such that it "appear[s] in outward form to be his . . . although in reality [it] . . . embodies the wishes and dispositive plan of another person and is not the will of the testator at all."⁹⁷ Such a document, "[a]lthough executed by the testator . . . is the product of a captive mind."⁹⁸ In these cases, "[t]he will of another person is substituted for and disguised as the will of the testator";⁹⁹ the testator's act becomes "in effect, that of another."¹⁰⁰

In civil cases, then, courts utilize notions of substituted will or intent to relieve parties of responsibility when it appears that external forces have influenced them to enter into relationships that would otherwise be binding. Of course, this need not mean that similar fact patterns should enable a criminal defendant to escape liability. The criminal and civil law respond to different interests.¹⁰¹ Nevertheless,

93. *Id.* at 767-68, 355 P.2d at 327.

94. See Winick, *Psychotropic Medications and Competence to Stand Trial*, 3 AM. B. FOUNDATION RESEARCH J. 769, 772 (1977), and cases cited therein.

95. *Id.*

96. See, e.g., Kaplan v. Kaplan, 25 Ill. 2d 181, 185, 182 N.E.2d 706, 709 (1962); RESTATEMENT (SECOND) OF CONTRACTS §§ 317, 319 (Tent. Draft No. 12, 1977). See generally J. CALAMARI & J. PERILLO, CONTRACTS 262-63 (2d ed. 1977).

97. 1 W. PAGE, THE LAW OF WILLS § 15.3, at 718 (1960).

98. *Id.* at 719.

99. *Id.* at 718; *In re Estate of Mott*, 200 Iowa Rep. 948, 948, 205 N.W. 770, 770 (1925).

100. 1 W. PAGE, *supra* note 97, § 15.2, at 712.

101. In contract law, for example, the parties may agree to rescind the contract and waive damages, whereas the victim's forgiveness cannot affect the liability of one who commits a criminal act. See W. LAFAVE & A. SCOTT, *supra* note 20, § 57, at 410-11.

these civil analogues, together with the criminal examples discussed earlier, demonstrate that the concept of transferred or imposed intent has proved not only intelligible and useful but also indispensable to society's sense of fairness and justice.

IV. CRITERIA FOR DETERMINING WHEN A TRANSFER OF MENS REA HAS OCCURRED

Since traditional actus reus and mens rea defenses have been declared inapplicable¹⁰² and courts have been reluctant to extend existing defenses to thought reform victims,¹⁰³ development of a new defense along lines suggested here may well constitute the minimal departure from existing theory that Occam's principle demands.¹⁰⁴

Establishing a model for exculpation requires determining when the application of a transferred mens rea defense is appropriate. It is proposed that the following elements must be shown to exist:

- (1) that coercive persuasion actually occurred;
- (2) that the defendant's unlawful action was the proximate result of that coercive persuasion; and
- (3) that exculpation for the act committed is morally justified.

More difficult is the task of showing when these elements exist. Criteria for determining the class of individuals entitled to a transferred mens rea should enable one to "draw the line"—to distinguish cases that warrant exculpation from those that do not because the accused has simply given in to temptation, learned to commit crimes, or voluntarily adopted the behavior patterns of a criminal subculture.¹⁰⁵ Although transferred ownership of mens rea, like other "polysynthetic"¹⁰⁶ legal concepts, is difficult to reduce to a precise set of necessary and sufficient conditions, there are factors which, in combination, warrant its application. These include:

- a. *The defendant's mental state results from unusual or abnormal influences*, including drugs, hypnosis, prolonged confinement, physiological depletion, and deliberate manipulation

102. See, e.g., Lunde & Wilson, *supra* note 22, at 377-82; Note, *supra* note 22, at 478-79.

103. See note 17 *supra*; HEARST, *supra* note 4; cf. V. BUGLIOSI & C. GENTRY, *supra* note 4 (insanity defense rejected in Charles Manson murder trial).

104. See note 41 *supra* and accompanying text.

105. Compare United States v. Alexander, 471 F.2d 923, 964-65 (D.C. Cir. 1973) (Bazelon, J., concurring), with Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 389 (1976).

106. Cf. Shapiro, *Therapeutic Justifications for Intervention into Mentation and Behavior*, 13 DUQ. L. REV. 673, 730-31 (1975) (arguing that autonomy—brainwashing's opposite—is a polysynthetic concept, i.e., one that is incapable of being reduced to a determinate set of conditions or properties).

of guilt, terror, and anxiety.¹⁰⁷ These are not the mechanisms of ordinary attitudinal change, and a finding that they were instrumental in bringing about the criminal act suggests that the mens rea with which the victim acted was not his own.

b. *The induced mental state represents a sharp departure from the individual's ordinary mode of thinking.*¹⁰⁸ The more gradual the change, the more likely it is to be found to be the product of education, maturation, or other ordinary processes which do not call for exculpation. In some instances, the changes induced may be so great as to suggest that the individual has undergone a change of identity.¹⁰⁹ A defense based on ownership and ascription of mens rea does not require that a defendant be so transformed, however. Rather, exculpation from criminal liability is appropriate whenever a defendant's state of mind with reference to a particular criminal act is found to be implanted, inauthentic, and not of his own choosing.

c. *The state is one that is imposed on the subject, rather than self-induced or consciously selected.*¹¹⁰ Most victims of coercive persuasion, like Cardinal Mindszenty or the American

107. See HOUSE COMM. ON UN-AMERICAN ACTIVITIES, 85TH CONG., 2D SESS., COMMUNIST PSYCHOLOGICAL WARFARE (BRAINWASHING) 21 (Comm. Print 1958) (consultation with Edward Hunter); R. LIFTON, *supra* note 1, at 21-85; E. SCHEIN, *supra* note 3, at 195-268; HEARST, *supra* note 4, at 154-56; Bettelheim, *supra* note 13, at 417; notes 6-7 *supra*; note 13 *supra* and accompanying text.

108. See, e.g., Vermont Hearing, *supra* note 18, at 17; Vermont Legislative Council, Hearings Before the Vermont Senate Judiciary Comm. 43 (Mar. 10, 1976) (radical personality alterations resulting from cultist conditioning); Lifton, *Psychiatric Aspects of Chinese Communist Thought Reform*, in GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, SYMPOSIUM No. 4: METHODS OF FORCEFUL INDOCTRINATION 238, 247-48 (1957) (identity change in Chinese thought reform programs). See generally R. LIFTON, *supra* note 1, at 5, 11, 66, 83; HEARST, *supra* note 4, at 97. See also note 109 *infra* and accompanying text (identity change).

109. Examples of this phenomenon are the frozen-faced cardinal who, after weeks of relentless questioning, confessed elaborate crimes against the state to his Communist captors, see J. CARDINAL MINDSZENTY, MEMOIRS 110-14 (1974), psychosurgery patients who return home as strangers to their spouses, see, e.g., Delgado, *supra* note 23, at 236-37, and the monotonous-voiced Tanya whose taped messages rejected society, her parents, and her former values, see *Hearst Defense Fails to Suppress Adverse Evidence*, N.Y. Times, Feb. 12, 1976, at 1, col. 5 (Tanya tapes). These severe changes may also be noted in victims of mass disasters, see, e.g., R. LIFTON, DEATH IN LIFE: SURVIVORS OF HIROSHIMA (1968), and those who have suffered extreme physical and psychological traumas, see, e.g., Comment, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 YALE L.J. 826, 837 n.51 (1976), and sources cited therein.

Psychologists have explained these changes in terms of psycho-physiological stress theory, dissociation, and dissonance, see HEARST, *supra* note 4, at 298-99 (testimony of Martin T. Orne); E. SCHEIN, *supra* note 3, at 198-205, 241-43, while neurophysiologists have focused on the effect of chemical-endocrine changes on the brain. See J. DELGADO, *supra* note 49, at 214.

110. This change can result from coercion, as in the POW cases cited at note 17

prisoners of war, will be found to have resisted the process, at least initially.¹¹¹ In other cases, for example those involving religious cults, the voluntary quality of the joining process may be placed in question by the employment of deception in luring potential converts to initial meetings, after which thought reform techniques are brought to bear.¹¹² Resistance or deception suggest that the resulting condition of psychological servitude was not freely chosen by the victim. The Manson women, by contrast, appeared to have elected to voluntarily become members of the group, and to undergo a lengthy process of initiation and indoctrination without protest.¹¹³ In such a case, a legal defense based on transferred mens rea should not be available. By analogy to voluntary intoxication, the victim can be blamed for his own condition.¹¹⁴ If his mental processes have been altered in such a way as to make it more likely that he will commit crimes, his initial choice to undergo such changes was made with a free will. This choice is itself blameworthy,¹¹⁵ rendering the actor an appropriate object of punishment.

d. *The criminal acts benefit the captors.*¹¹⁶ Since ordinary human motivation is self-seeking, a showing that an individual engaged in behavior that could only benefit another suggests the presence of abnormal influence. This is particularly true when the actions induced are dangerous and are ones the individual showed no interest in performing before falling under the control of the captors.

e. *The actor, when apprised of the manner in which he came to hold his beliefs, rejects them and sees them as inauthentic or foreign.*¹¹⁷ If, after having been acquainted with the

supra, or the Patricia Hearst case, see note 19 *supra* and accompanying text, or from deception, as is often the case in cultist thought reform, see note 18 *supra* and accompanying text.

111. See, e.g., authorities cited in note 126 *infra* (prisoners of war); J. CARDINAL MINDSZENTY, *supra* note 109, at 92-114 (1974) (Catholic cardinal subjected to thought reform by Communists).

112. Delgado, *supra* note 5, at 38-41, 52-53.

113. V. BUGLIOSI & C. GENTRY, *supra* note 4, at 173-75, 234-38, 258, 278, 484.

114. See J. HALL, *supra* note 43, at 537.

115. See W. LAFAYE & A. SCOTT, *supra* note 20, § 45 at 347-48 (voluntary intoxication is no excuse).

116. In POW cases, the captors ordinarily attempted to induce the captives to make false confessions, reveal military secrets, and carry out other acts that would benefit them. In the Hearst case, the Symbionese Liberation Army (SLA) procured the victim's collaboration in a variety of criminal ventures, as well as the preparation of propaganda tapes.

117. See notes 38-39 *supra* and accompanying text. See also Delgado, *supra* note 5, at 59-60, 82 n.427.

details of his own treatment by the captors, including their motivation in subjecting him to it, he rejects his affiliation with them (and does so genuinely, and not simply to escape punishment),¹¹⁸ it seems reasonable to conclude that the mental state was not his own, but was wrongfully implanted or superimposed.¹¹⁹

f. *The actor evidences symptoms typical of the coercively persuaded personality,*¹²⁰ including flattened affect, reduced cognitive flexibility, drastic alteration of values, and extreme dissociation.

Where all or many of these factors are present, a defense should lie; where few are present, it may properly be denied. Even with these criteria, some cases will be difficult. Nevertheless, as in cases involving duress, insanity, or diminished capacity, final judgment should be entrusted to the collective moral sense of the jury. In coercive persuasion, a number of symptoms and causes must be weighed. Just as no clear line separates those who are sane from those who are not, so here the jury must decide where on a continuum of responsibility a particular defendant lies. But this is scarcely a new problem. Innumerable situations require that the jury members evaluate the evidence before them and apply a general standard to the case at hand.

V. OBJECTIONS TO THE PROPOSED DEFENSE

A first set of objections to a transferred mens rea defense, based on psychiatric authority or fear of its abuse, may reflect a number of related concerns. One is that coercive persuasion simply does not occur, or, if it does, that psychiatrists and psychologists know too little about it to warrant their testimony in court as expert witnesses.¹²¹ A variant of this objection is that all forms of influence are essentially the same, "brainwashing" being simply a pejorative label for types of influence of which we disapprove.¹²²

That the process does occur is attested to by voluminous ac-

118. The genuineness of this rejection might, of course, present difficult questions of fact, especially if it appeared to result from intensive "preparations" by teams of defense attorneys and experts. See note 38 *supra*.

119. Cf. Delgado, *supra* note 5, at 59 & n.311 ("individual's perception of himself as unharmed may itself appear 'programmed in'") (citing Dworkin, *Autonomy & Behavior Control*, HASTINGS CENTER REP., Feb. 1976, at 23, 25-27).

120. HEARST, *supra* note 4, at 298; Delgado, *supra* note 5, at 17-18, 70-71; Shapiro, *Destructive Cultism*, 15 AM. FAM. PHYSICIAN 80, 83 (1977).

121. See, e.g., Reich, *Brainwashing, Psychiatry and the Law*, 39 PSYCH. 400 (1976); Szasz, *Patty Hearst's Conversion: Some Call it Brainwashing*, THE NEW REPUBLIC, March 6, 1976, at 10-12.

122. See, e.g., Robbins & Anthony, *The 'Brainwashing' Metaphor as Social Weapon* (Oct. 27, 1977) (paper presented at Society for the Scientific Study of Religion annual meeting, Chicago, Ill.); Szasz, *supra* note 121, at 10. But see Meerlo, *The Psychology of Treason & Loyalty*, 8 AM. J. PSYCHOTHERAPY 648, 650 (1954).

counts of those who have experienced it,¹²³ as well as reports of scientific investigators who have studied it.¹²⁴ The body of professional literature related to thought reform is extensive.¹²⁵ The legal system has gained familiarity with the phenomenon through POW court-martial cases,¹²⁶ the Hearst¹²⁷ and Manson¹²⁸ trials, and conservatorship¹²⁹ and defense-of-necessity¹³⁰ cases involving religious cultists. Against such an array of documentation, it is surely difficult to maintain that thought reform simply does not exist.

Similar objections have also been raised by persons belonging to the "anti-psychiatry" school. Their criticism has an initial appeal because many feel that psychiatry has already gone too far in influencing the criminal process.¹³¹ Moreover, this objection is in accord with an intuitive feeling that individuals ought to be held accountable for their acts. The law, however, has long recognized a great many defenses that free the individual of accountability for his acts.¹³² Psychiatry has proven of incontrovertible value to courts in such cases.¹³³

123. See, e.g., Vermont Hearing, *supra* note 18, at 17-46 (testimony of John Clark, M.D., Professor of Psychiatry, Harvard Medical School, based on study of college youths involved in cults); HEARST, *supra* note 4, at 58-166 (testimony of Patricia Hearst); R. LIFTON, *supra* note 1 (study of coercive persuasion based on interviews with victims of Chinese thought reform); J. CARDINAL MINDSZENTY, *supra* note 109.

124. See, e.g., authorities cited in notes 1-11 & 15-16 *supra*.

125. A partial bibliography compiled by this author contains over one hundred articles and thirty books including symposia prepared by the authoritative Group for the Advancement of Psychiatry (bibliography on file with the author).

126. See cases cited in note 17 *supra*; Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 57 COLUM. L. REV. 709 (1956); Note, *Coercion: A Defense to Misconduct while a POW*, 29 IND. L.J. 603 (1953).

127. *United States v. Hearst*, 412 F. Supp. 873 (N.D. Cal. 1976) (trial transcript reprinted in HEARST, *supra* note 4).

128. *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976), cert. denied *sub nom.* *Manson v. California*, 430 U.S. 986 (1977) (penalty trial) (reported in V. BUGLIOSI & C. GENTRY, *supra* note 4).

129. See, e.g., *In re Surber*, No. G-946 (Super. Ct., Pima Cty., Ariz., Oct. 24, 1975); *In re Petri*, No. NCP 5267B (Super. Ct., Los Angeles Cty., Cal., Mar. 1, 1976); *In re Coleman*, No. 16386 (Super. Ct., Mendocino Cty., Cal., Dec. 3, 1975). See generally *Katz v. Superior Court*, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (conservatorship for purposes of deprogramming under then existing California statute unconstitutional).

130. See, e.g., *United States v. Patrick*, 532 F.2d 142 (9th Cir. 1976); *People v. Patrick*, N-320-778 (N.Y. Crim. Ct., Mar. 30, 1973). In these two cases the defense of necessity was successfully asserted in prosecutions of deprogrammer Ted Patrick.

131. See Ennis & Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CALIF. L. REV. 692 (1974); authorities cited in note 121 *supra*.

132. See generally notes 59-101 *supra* and accompanying text.

133. In the criminal law, psychiatric testimony is best known because of its use in insanity and diminished capacity defenses, although it is also commonly used to tailor sentences to fit an individual defendant. Lewin, *Psychiatric Evidence in Criminal Cases for Purposes Other than the Defense of Insanity*, 26 SYRACUSE L. REV. 1051

Certainly, psychiatric knowledge of coercive persuasion need not be complete for it to be of use to courts. Such a requirement is not realistic; moreover, it was not observed in connection with the development of other mental defenses, which were recognized long before a universally accepted scientific model was available.¹³⁴ The modern "right from wrong" test of insanity, usually attributed to the 1843 trial of Daniel M'Naghten,¹³⁵ was intended by the judges who formulated it to be but a restatement of prior law dating as early as 1724.¹³⁶ Yet, as recently as 1880 a treatise on the medical jurisprudence of insanity offered a classificatory scheme in which insanity was considered caused by "moral influences," "intellectual overwork," and "masturbation."¹³⁷ That the legal system chose to exculpate defendants although the scientific basis for so doing was so rudimentary suggests that scientific certainty has never been essential to the establishment of a legal defense. Instead, 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.

A final variant of this argument against recognition of a coercive persuasion defense can be labeled the "psychoanalytical" objection. According to this view, even intense thought reform cannot convert a law-abiding citizen into an outlaw. Instead, for thought reform to occur, the victim must have possessed the "germ" or "seed" of the criminal personality; the coercive process only elicits and nourishes what already exists in latent form.¹³⁸ The unstated conclusion is that

(1976). It has also been used in civil cases involving contracts and wills to show whether a party is incompetent or has been subjected to undue influence. See, e.g., *In re Kaufman's Will*, 20 A.D.2d 464, 247 N.Y.S.2d 664 (1964), *aff'd mem.*, 15 N.Y.2d 827, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965), noted in Shaffer, *Undue Influence, Confidential Relationship, and the Psychology of Transference*, 45 NOTRE DAME LAW. 197, 218-22 (1970). Against such a background of widespread acceptance, it seems only reasonable to make available to the court the body of psychiatric knowledge concerning coercive processes. Accord, Lifton, *On the Hearst Trial*, N.Y. Times, Apr. 16, 1976, at 27, col. 1; see 30 VAND. L. REV. 214, 218-20 (1977) (citing trend on part of courts to recognize that advances in psychiatric knowledge make it reasonable to allow a wider range of psychiatric testimony in connection with mental defenses). See also cases cited in note 67 *supra*. In any event, the jury will hear testimony offered by both lay witnesses and the defendant concerning his coercive experience. The jury should also have the benefit of the evaluation of trained observers. Authoritative testimony that can be of aid to the courts should not be denied admissibility.

134. See generally J. BIGGS, *THE GUILTY MIND* 79-117 (1955).

135. M'Naghten's Case, 10 Clark & Fin. 200, 8 Eng. Rep. 718 (H.L. 1843). For a discussion of the M'Naghten case and its impact, see J. BIGGS, *supra* note 134, at 95-110.

136. J. HALL, *supra* note 43, at 472.

137. J. BROWNE, *THE MEDICAL JURISPRUDENCE OF INSANITY* 131 (1880).

138. See HEARST, *supra* note 4, at 520-23 (testimony of Harry L. Kozol) ("This

the victim should be punished for containing the "seed" of his future crime even though he once was, and again will be, law-abiding.

There are two responses to this objection. First, those psychologists and psychiatrists who are most intimately familiar with thought reform believe that virtually everyone can be induced to behave criminally if subjected to intensive thought reform in a totally controlled environment.¹³⁹ If this is true, the psychoanalytical objection loses its force, since everyone would be viewed as harboring a latent form of mens rea. This, of course, divests the concept of any meaning.

In addition, the psychoanalytical objection fails to suggest a rationale for punishing the coercively persuaded offender who has returned to normality. A fundamental premise of the criminal law is that the physical act (*actus reus*) and the requisite mental state (*mens rea*) must "concur";¹⁴⁰ the mental state must actuate and be proportional to the criminal act.¹⁴¹ Thus, a finding that Patricia Hearst, for example, prior to her capture by the SLA, was a headstrong young woman who smoked marijuana and disobeyed her teachers¹⁴² would not sustain her conviction for armed robbery, since the requisite degree of mens rea is lacking. Of course, a proponent of the psychoanalytical objection could maintain that the defendant, prior to her kidnapping, harbored the mens rea of armed robbery, but in latent form. This view, however, is simply implausible. If the concept of mens rea were made to reach so far, it would become either a supposed characteristic invoked only against the coercively persuaded or a post hoc fiction inviting abuse in other contexts as well.

Another group of objections is based on the asserted impossibility of limiting the applicability of the defense. Since coercive persuasion does not result in physically discernible changes, such as diseased tissue, and thus falls outside a "medical model," it is arguably impossible to determine with any precision those deserving of the defense this Article posits. With conditions falling within the medical model, by contrast, there is such boundary demarcation: a person is excused when found to be "sick," and not excused when he is not.¹⁴³ It could be argued that no such stopping point exists with coercive persuasion; it shades off by degrees into milder and more conventional forms of influence.

The drawing-the-line argument can, however, be made with

girl [(Hearst)] was a rebel. . . . [S]he had gotten into a state where she was ripe for the plucking. . . . She was ready for something, she was a rebel in search of a cause It was as though [the SLA] were offering her a way to get rid of the terrible turmoil that had developed in her.").

139. See authorities cited in note 16 *supra*.

140. W. LAFAVE & A. SCOTT, *supra* note 20, § 34.

141. *Id.* at 176.

142. HEARST, *supra* note 4, at 520-23 (testimony of Harry L. Kozol).

143. See *United States v. Alexander*, 471 F.2d 923, 965 (D.C. Cir. 1973) (Bazelon, J., concurring).

equal facility from either direction.¹⁴⁴ The different forms of influence may be viewed as lying along a continuum, with mild forms such as television advertising and church sermons at one end, and more severe forms at the other. Those who oppose the defense are prone to emphasize the milder forms of persuasion and ignore the fact that the continuum also contains, at the other extreme, such brutal treatment as that inflicted on Cardinal Mindszenty—treatment most would agree justifies exculpation.¹⁴⁵ This end of the continuum must not be overlooked, and it would seem more productive to acknowledge the existence of a continuum along which lie increasing degrees of coercive persuasion, some of which obviously do not merit a defense and some of which may, and then attempt to identify the factors that make application of the defense appropriate.¹⁴⁶

A related objection is that even if an analytically defensible stopping point could be found, it would be impossible to tell on which side of it a particular defendant falls. Because the syndrome is difficult to diagnose, allowing a defense of coercive persuasion would invite abuse by defendants falsely claiming that their deeds were the result of brainwashing by accomplices, leaders, friends, or others.

This problem might indeed prove difficult if a court is allowed to consider only reports of the mental state of the actor at the time of the crime. Because the coercively persuaded defendant may have "felt" the decision to be his own at the time, he may truthfully have said he was acting of his own free will.¹⁴⁷ Indeed, he may have appeared so to the casual observer. A court is not limited to these sources of information, however. It also may examine the victim's later testimony concerning what happened and how he presently feels about his earlier actions.¹⁴⁸ Moreover, there will be those external manifestations of coercive persuasion which even lay persons will notice and which expert testimony can aid the jury to interpret.¹⁴⁹ These symptoms, including confusion, flattened affect, stereotyped speech, dissociation, and memory loss, are probably as difficult to mimic successfully before a trained observer as are the symptoms of legal insanity. The diagnosis of coercive persuasion can be confirmed

144. See Delgado, *supra* note 5, at 64 n.327.

145. Compare the extremely intense, prolonged and focused thought reform described in J. CARDINAL MINDSZENTY, *supra* note 109, at 92-114, with that described in sources cited in note 2 *supra* (POW Chinese thought reform), and note 4 *supra* (religious cults and the Manson group).

146. See notes 107-20 *supra* and accompanying text.

147. See notes 46-48 *supra* and accompanying text. See generally Delgado, *supra* note 5, at 57 n.306, 58 nn.309-10.

148. See, e.g., HEARST, *supra* note 4, at 58-166 (testimony of Patricia Hearst).

149. See, e.g., CALIFORNIA HEARINGS, *supra* note 18, at 29-31 (unmistakable changes noted by parents); Delgado, *supra* note 5, at 71 & nn.365-66.

by use of standardized psychological tests, including personality inventories, IQ tests, and other psychological assessment techniques.¹⁵⁰ Finally, there is extrinsic evidence of the experience undergone by the defendant: imprisonment, isolation, sensory deprivation, interrogation, physiological depletion, and terror. These mechanisms are so different from those of ordinary attitudinal change that, even without a medical model, a jury should be able to determine whether or not a particular defendant has in fact been coercively persuaded.

Refusal to recognize a defense for fear of difficult line-drawing problems is thus needless and, potentially, inhumane. Certainly, the boundaries of the coercive persuasion continuum represent areas of genuine moral ambiguity. In this respect, however, the coercive persuasion defense is no different from the insanity defense, or, indeed, criminal responsibility itself. Fear of such problems need not prevent us from addressing those compelling polar cases that call for compassionate, informed treatment.¹⁵¹ It is hardly a noble doctrine that sacrifices individuals for the sake of preserving an artificial conceptual simplicity in the law of criminal excuses. Instead, it only duplicates the error of early courts-martial that heard testimony about brutal coercive persuasion but ignored it because it did not fit into existing legal categories of insanity or duress,¹⁵² a mistake repudiated by later Department of Defense decisions.¹⁵³

Even should it be granted, however, that it is possible to develop both criteria and methodology for distinguishing between defendants for whom the coercive persuasion defense would be appropriate and those who might attempt to abuse it, yet other objections exist. Some would maintain the absolutist view that the defense is fundamentally incompatible with freedom of the will and must therefore be rejected.

150. See HEARST, *supra* note 4, at 297 (testimony of Martin T. Orne that use of psychological tests renders simulation virtually impossible since tests require coordinated cheating on many interlocking subsections).

151. Such refusal to act violates the injunction that human beings should be treated as ends in themselves rather than as means. A foundation of Western moral philosophy, this principle was given its best known formulation by Immanuel Kant, whose *Metaphysics of Morals* (1785) regards it as a corollary of his "categorical imperative" (act in such a way that the precepts underlying one's deeds might be made universal law). For a discussion of Kant's moral philosophy, see B. RUSSELL, *HISTORY OF WESTERN PHILOSOPHY* 677-84 (University ed. 1961).

152. See the cases of Martin James Monte and Dale H. Maple, discussed in N. WEYL, *TREASON* 390-99 (1950); cases cited in Note, *Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases*, 56 *COLUM. L. REV.* 709, 770 (1956). See also Lunde & Wilson, *supra* note 22 (rejecting idea that coercive persuasion can be assimilated in any existing criminal defense and suggesting that it be taken into account only as an element in mitigation of sentences).

153. See note 16 *supra*.

If coercive persuasion can, however, be distinguished from more legitimate forms of influence, at least in paradigmatic cases, a defense of coercive persuasion does not really threaten the premise of freedom of the will. Application of the defenses is confined to cases recognized as markedly different from the normal. So limited, it does not purport to exculpate for the type of whole-life conditioning that courts have rejected as incompatible with the free will premise.¹⁵⁴

Another doctrinal objection that could be made to a defense of transferred mens rea is that what is transferred in coercive persuasion is not mens rea at all, but only a predisposition to act in certain general ways¹⁵⁵—what some criminal law commentators call a “motivation.” According to these writers, the criminal law is concerned only with intent; a person’s motivations are irrelevant.¹⁵⁶ Alterations of the kind produced by coercive persuasion, it could be said, therefore cannot affect criminal liability.

There are a number of responses to this argument. First, captors in a case likely to merit a transferred mens rea defense ordinarily will be concerned with more than instilling changes in the victim’s ideology, beliefs, and values—the emotional-cognitive foundation that constitutes an individual’s motivations. They will also usually require that the captive perform specific acts of compliance.¹⁵⁷ The captive’s ability to formulate an intent to perform specific acts, therefore, also will be overridden by the will of the captors. These dual objectives work synergistically. The captors instill new values and

154. See *United States v. Brawner*, 471 F.2d 969, 1002 (D.C. Cir. 1972) (rejecting view that since “the behavior of every individual is dictated by forces—ultimately, his genes and lifelong environment—that are beyond his control,” exculpation must follow for every criminal defendant). See also *State v. Sikora*, 44 N.J. 453, 210 A.2d 193 (1965) (discussing law’s treatment of free will and determinism).

155. For this suggestion, I am indebted to James Hardisty, Professor of Law, University of Washington.

156. J. HALL, *supra* note 43, at 100-02. Hall observes that, “although motivation is carefully considered in modern criminal law systems, the preservation of the objective meaning of the principle of mens rea and of legality requires that motivation be excluded from the definition of criminal conduct.” *Id.* at 102. See also *State v. Sikora*, 44 N.J. 453, 470-71, 210 A.2d 193, 202-03 (1965) (defendant’s unconscious motivations will not be taken into account).

157. The Symbionese Liberation Army, for example, desired that Patty Hearst make accusatory tape recordings and aid them in robbing banks, stealing cars, and kidnapping, see *HEARST*, *supra* note 4, at 58-166 (testimony of Patricia Hearst); the North Korean and Chinese prison camp authorities set out to coerce their American captives to sign confessions and peace petitions, march in parades, and reveal military information, see, e.g., Schein, *Reaction Patterns to Severe, Chronic Stress in American Army Prisoners of War of the Chinese*, 13 J. Soc. ISSUES 21, 26-27 (1957). By contrast, Chinese mainland thought reform was aimed at causing long-lasting attitudinal change, thereby creating “new men.” See, e.g., Lifton, *supra* note 26, at 8.

loyalties in part to assure behavioral compliance. At the same time, they encourage the performance of particular acts as a means of solidifying value changes.¹⁵⁸ Accordingly, intent will be as centrally involved as the more generalized "motivation." Both forms of change facilitate each other and are inextricably linked.

Even in the relatively rare case where it appears that the captors have sought only to change the victim's values and attitudes, leaving him free to choose the means by which such values will be expressed, such changes may call for exculpation. Motivation already is taken into account by the criminal law in various ways to reduce liability. Self-defense, for example, requires an examination into the accused's motives;¹⁵⁹ so do necessity¹⁶⁰ and the defense of others.¹⁶¹ Resisting an illegal arrest requires taking account of the motivation of the resisting party.¹⁶² Even a police officer's arrest of a felon is permissible only with proper motivation.¹⁶³ A finding that an individual's values and motivations were forcibly, brutally, and wrongfully altered, with the result that he became the type of person who, without guidance or force, would commit crimes of certain types, should also justify exoneration even without a showing that specific intents or behaviors were inculcated.

A final objection, applicable only in connection with defendants who do not spontaneously return to normality, stems from the difficulty of finding a rationale for their detention after acquittal. With insanity and other conditions falling within the medical model, defendants are detained under civil commitment provisions because of the need to provide treatment for mental illness. But with coercive persuasion no such rationale appears available. Acquittal and release of such defendants may consequently appear to leave unsatisfied society's need for retribution as well as its need to detain persons who represent dangers to themselves or others.

158. See R. LIFTON, *supra* note 1, at 67-70, 441; E. SCHEIN, *supra* note 3, at 123-24; Schein, *supra* note 157, at 26 (use of minor acts of collaboration to accelerate change).

159. See W. LAFAVE & A. SCOTT, *supra* note 20, at 391; MODEL PENAL CODE § 3.04 (Proposed Official Draft, 1962).

160. See *The William Gray*, 29 F. Cas. 1300 (C.C.N.Y. 1810) (No. 17,694) (sale of cargo due to necessity during an embargo); *United States v. Holmes*, 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383) (sacrifice of passengers not excused by necessity).

161. See *generally* *People v. Williams*, 56 Ill. App. 2d 159, 165-66, 205 N.E.2d 749, 752 (1965); *Morrison v. Commonwealth*, 24 Ky. 2493, 2497-98, 74 S.W. 277, 279 (1903).

162. See, e.g., *Hughes v. Commonwealth*, 19 Ky. 497, 41 S.W. 294 (1897).

163. See, e.g., FED. R. CRIM. P. 4(a) (1974) (requiring probable cause on part of officer to believe that offense had been committed and that defendant had committed it).

Initially, it should be observed that such cases are likely to arise only infrequently. Generally, the victim will have returned to normality prior to trial.¹⁶⁴ Therefore, he will be in need of no further confinement to effect rehabilitation or to protect the public from further crimes. In such a case, society's retributive instinct may be adequately satisfied by punishing the captors held primarily responsible for the victim's acts.¹⁶⁵

In other instances, however, the coerced individual may continue to adhere to the programmed-in values. In these cases, a range of responses should be considered, with a view to striking a balance between respect for the victim's autonomy and protecting the public from harm. One obvious solution would be to exonerate the defendant but initiate civil commitment under statutes that permit detention of persons dangerous to themselves or others. Lack of medical or psychological pathology, however, may render such statutes inapplicable.¹⁶⁶ In particular cases, therefore, a carefully drawn provision for preventive detention might enable the state to prevent release of acquitted defendants¹⁶⁷ it knows are likely to perpetrate violent crimes because of imposed mens rea.¹⁶⁸ As an alternative to either

164. See notes 38-40 *supra* and accompanying text.

165. See, e.g., notes 62-63 *supra* and accompanying text. See generally note 40 *supra*.

166. See Dershowitz, *The Law of Dangerousness: Some Fictions About Predictions*, 23 J. LEGAL EDUC. 24, 32 (1970) ("The one universal criterion for involuntary hospitalization is the presence of mental illness.").

167. Such a dangerous defendant, however, might be entitled to release on bail while awaiting trial. See *In re Underwood*, 39 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973).

168. See Frankel, *Preventive Restraints and Just Compensation: Toward a Sanction Law of the Future*, 78 YALE L.J. 229, 229-31 (1968). Frankel suggests that narrowly drawn statutes allowing preventive detention are constitutional if there is a strong showing of their necessity, certainty, and reasonableness; they are clearly drawn; they are not aimed at political dissidents or other enemies of the state; and they make adequate provision for due process protections, including an adversary hearing at which the potential detainee can challenge the grounds of his commitment.

Given the primacy of personal liberty . . . a respectable argument can be made that preventive detention can never be justified where the person to be detained has not consented to his detention, will not benefit from it, and has not by prior blameworthy conduct merited detention as punishment

. . . .

Nevertheless, I am forced to conclude that a complete constitutional bar to preventive detention should not be erected. Once it becomes possible to predict with substantial accuracy that someone constitutes a danger to the lives of others . . . , I am not prepared to assert that he has . . . an absolute right to freedom until he kills or tries to kill his first victim. The individuals composing our society are entitled to protection from dangers which can be prevented without too great a social cost.

Id. at 231 n.11. Preventive detention or deprogramming might be the only solution for acquitted brainwashing victims where indoctrination makes them likely to behave

form of detention, the individual could be offered psychiatric "deconditioning" similar to that employed in connection with religious cultists¹⁶⁹ or returning prisoners of war.¹⁷⁰

It could be objected that the state might abuse this power by forcibly deprogramming such persons as political dissidents or civil rights protesters, perhaps on the theory that group meetings, discussion, reading, rallies, and consciousness-raising sessions constituted a form of brainwashing.¹⁷¹ It seems unlikely, however, that our traditions would tolerate this. The pressures that result in imposed states of mens rea are immediately perceived as strange and aberrant, while those the government might cite as causes of radical or militant consciousness would strike most as relatively ordinary life experiences. Justifying official intervention because of these latter experiences would certainly be seen as a threat to deeply held values of autonomy and respect for individual differences. As such, it is easily distinguishable from the case of the coercively persuaded defendant.

Further protection against abuse is found in that before deconditioning could proceed, the defendant would need to personally invoke the defense. Many civil disobedients, if they assert a defense at all, will likely claim not that they were brainwashed but rather that their actions were justified by a higher law.¹⁷²

Finally, several additional protections could be provided, including:

- (1) a requirement that deprogramming proceed only to the point at which the subject is able to exercise free choice, and that it have as its objective only the freeing of the subject from a state of psychological domination rather than imposing a new, or even an old, set of values or loyalties;¹⁷³

criminally but in ways that do not jeopardize the health or safety of other persons, but commitment statues would presumably not reach such individuals if their only criminal propensity amounted to perpetuating acts of fraud, misdemeanors, etc. See Delgado, *supra* note 5, at 25-35.

169. See Delgado, *supra* note 5, at 78-92 (discussion of religious deprogramming).

170. For discussions of treatment of returning POWs (often termed "debriefing"), see authorities cited in note 2 *supra*.

171. Cf. *United States v. Alexander*, 471 F.2d 923, 963-64 (D.C. Cir. 1973) (Bazelon, J., concurring) (expressing fear that psychiatric power could be misused to decondition individuals who are not insane).

172. Without such a plea initiated by the defendant, counterconditioning would likely be held to violate constitutional guarantees of due process, mental freedom, and freedom from cruel and unusual punishment. See Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CAL. L. REV. 237 (1974); see, e.g., *Knecht v. Gilman*, 488 F.2d 1136 (8th Cir. 1973); *Kaimowitz v. Department of Mental Health*, No. 73-19434-AW (Cir. Ct., Wayne Cty., Mich., July 10, 1973) (reported in 2 PRISON L. RPT. 433 (1973)).

173. Cf. Delgado, *supra* note 5, at 86-87 (guidelines for religious deprogramming).

- (2) a limitation that deprogramming be undertaken only for those individuals who voluntarily elect to undergo it, understand that alternatives, including simple confinement, are available, but who nevertheless desire assistance in overcoming their imposed criminal propensities;¹⁷⁴
- (3) direct monitoring by the court or appointment of an expert overseer charged with preventing abuse;¹⁷⁵
- (4) appointment of an attorney to protect the subject's rights and help ensure that all other protective measures are observed.

If none of the above dispositional alternatives seem attractive, and if no more satisfactory solution suggests itself, a remedy of last resort is always available: the defense can simply be denied in cases in which the victim has not "deconverted" prior to trial. The trials of such persons could be delayed until it appeared they were once again themselves, analogizing confinement to that imposed in cases of defendants found incompetent to stand trial. Alternatively, such defendants could be found guilty, but with a special instruction given that penal authorities consider releasing them when it appears that their noncriminal personalities and behavioral patterns have reasserted themselves. Either of these latter approaches is, strictly, inconsistent with the theoretical basis of the defense, perhaps so much so as to invite attack on equal protection or due process grounds. But the balance between fairness to defendants and protection of the public must be struck somewhere. In striking this balance, it may be best to leave the dispositional problem presented by "non-deconverted" defendants to case-by-case development in the trial courts rather than striving for an early uniform solution applicable in all situations.

174. It could be argued that such a choice can never be freely made. Cf. *Kaimowitz v. Department of Mental Health*, No. 73-19434-AW (Cir. Ct., Wayne Cty., Mich., July 10, 1973) (reported in 2 PRISON L. RPT. 433 (1973)) (involuntarily committed mental patients cannot consent to experimental psychosurgery). But, insofar as the argument aims at preventing victims of coercive persuasion from making decisions they perceive to be in their own self-interest, this paternalistic rationale for denying them the right to make such decisions is weak. The legal system has never found it necessary to declare plea bargaining void because of the "coerced" nature of such bargains, nor has it found a comparable problem with respect to most ordinary conditions of parole or probation. This is not to deny, of course, that courts should be vigilant for instances of possible overbearing applications in which the state would force deprogramming on unwilling subjects. This would constitute a flagrant abuse of personal liberty; still, there seems to be no need to assume that the danger of abuse is so great as to necessitate a per se rule against treatment that may be the only means by which certain victims of brainwashing may escape confinement and return to normality.

175. Cf. *Delgado*, *supra* note 5, at 88 (guidelines for religious deprogramming).

VI. CONCLUSION

The development and dissemination of potent techniques of coercive thought reform/behavior control raise the spectre of such techniques being used for illegal ends. When a group or individual bent on criminal action succeeds in capturing and subjecting to forceful indoctrination a captive who would otherwise not have joined in criminal ventures, the victim may attempt to interpose his abusive treatment at the hands of his captors as a defense to subsequent criminal prosecution. Since existing defense theories appear unavailable to such a defendant, a new defense should be considered. Such a new defense theory may be based on considerations of the origin and ownership of mens rea, the mental element of crime. This defense accords with existing intuitions about the purposes and limits of criminal punishment, and is consistent with doctrine in other areas of the law. It is possible to provide criteria to assist the trier of fact in determining when such a transfer has occurred. This new defense may be applied without fatally eroding the assumption of freedom of the will or opening the floodgates to every defendant who has been subjected to some degree of persuasion.

Furthermore, permitting a coercive persuasion defense has a number of advantages over existing practice. Its primary import is its ability to articulate a rationale for excusing the conduct of those who are not properly considered to be culpable. A new defense achieves this without placing additional stress on already overextended existing theories such as insanity, duress, and diminished capacity. Perhaps more significant, permitting the defense would facilitate public exposure, through the forum of criminal trials, to the process of coercive persuasion itself, thereby heightening society's awareness of the nature and efficacy of such techniques. By attempting to determine which coercive influences justify exculpation, a new defense would invite close scrutiny of the myriad of psychological forces at work in society and renew consideration of the premises underlying current concepts of criminal responsibility.

Editor's Note:

In the next issue of the *Minnesota Law Review*, Professor Joshua Dressler of the Hamline University School of Law responds to the transferred mens rea criminal defense theory proposed by Professor Delgado.

