

thereby facilitating comparison of the tax bases applied to interstate and local truckers. Assuming an agency function of guarding against this overt discrimination, the difficulty of comparing the relative burdens of local and interstate trucking calls for agency prescription of an interstate "benefits" apportionment factor.

This plan, while not infringing on existing freedom to select the tax base favored for allocation of burden, also makes state attempts at discrimination more easily detectable. Of course, the agency should be given broad powers to investigate state practices in order to discover delicate shades of discrimination. At the same time, adoption of such a system simplifies its task of divining the most accurate apportionment measure. The agency, then, could inaugurate studies which ultimately might also unearth precise yet administrable methods of allocating the highway burden between classes of users.

COERCION: A DEFENSE TO MISCONDUCT WHILE A PRISONER OF WAR

Recent innovations in psychological coercion and use of false confessions in the current war of propaganda have emphasized the latent exiguity of traditional military law regarding coerced prisoners of war.¹ The charge has been voiced that both military and international laws concerning coercive defection of such prisoners are obsolete because of these developments.² This contention is too superficial. The problem of how the Armed Forces should handle these prisoners upon their return from captivity is complex and requires a complete reappraisal of the jurisprudence on the subject.

In the past, military authorities have given too little consideration to the problems of the relative degrees of harm to the national security caused by various disloyal acts, the different kinds and severity of coercion applied, and the over-all effect of the acts on military morale.³ Thus, much more is called for than an attempt to reconcile or modernize the traditional approach.

1. The term coercion, throughout this paper, is used in the sense of pressure of any type applied by one person upon another to force a desired action. This includes a gamut of acts from bad treatment such as meager amounts of food to brutal physical and mental torture.

2. Louisville Courier-Journal, Feb. 21, 1954, p. 2, col. 1.

3. See the discussion at p. 611 *infra*.

The cases of Marine Colonel Frank H. Schwable⁴ and Army Corporal Edward S. Dickenson⁵ have brought the entire problem into precise focus. A Marine Corps Board of Inquiry was appointed to investigate Schwable's false confession of waging bacteriological warfare made while a prisoner of the Chinese communists and to determine what action,⁶ if any, should be taken against him, considering the degree of physical and mental coercion involved.⁷ Corporal Dickenson has been tried by an Army court-martial on charges of giving information to his captors concerning fellow prisoners in order to secure favorable treatment for himself and unlawfully collaborating with the enemy.⁸ Dickenson has maintained in defense that all wrongful acts he may have committed while

4. For a comprehensive coverage of Colonel Schwable's background and his experiences as a captive, see N.Y. Times, Feb. 21, 1954, §4, p. 2, cols. 1-4.

5. For a discussion of the background of the Dickenson case, see Louisville Courier-Journal, Feb. 18, 1954, p. 2, cols. 1-2; Indianapolis Star, April 20, 1954, p. 3, cols. 1-3.

6. In appointing the Board of Inquiry to investigate the case, Gen. Lemuel C. Shepherd, Jr., the Marine Corps Commandant, said on Jan. 23, 1954: "I expect the court to advise me as to whether the degree of physical, mental and psychological suffering experienced by Colonel Schwable was such as would reasonably constitute an excuse for acts of the type he is alleged to have committed." N.Y. Times, Feb. 21, 1954, §4, p. 6, col. 1.

7. The crucial question before the Board of Inquiry seemed to be, ". . . should the Marine Corps excuse an officer for breaking under the kind of mental and physical torture techniques perfected by the Communists? Can it overlook the medical opinion that every man has his eventual breaking point? Does it have the right to expect that Marines will stand firm where other men have failed?" *Id.* at col. 2.

It is possible that on the basis of the "brainwashing" which Schwable underwent that a defense similar to that of temporary insanity might be raised. It is important to note that the case is similar to the situation of insanity; however it is suggested that the many problems involved in such a defense, coupled with its infrequent acceptance in judicial proceedings, makes coercion a much more plausible and acceptable defense. On Apr. 27, 1954, the Department of Defense announced that Schwable had been cleared from any disciplinary action. The Board of Inquiry said he had resisted torture to the limit of his ability and was reasonably justified in making the false confession, Louisville Courier-Journal, April 28, 1954, p. 3, col. 1.

8. The three specific charges lodged against Dickenson at the opening of the court-martial were: (1) Corresponding and holding intercourse with the enemy in violation of the Uniform Code of Military Justice. (2) Informing on Pfc. Edward M. Gaither of Philadelphia, a fellow prisoner, by telling the enemy Gaither intended to escape. As a result of this he suffered beatings and other torture. (3) Informing on Cpl. Martin Christensen of Libertyville, Ill., another prisoner, and telling the Communists he had a gun in his possession. Because of this Christensen was jailed and repeatedly beaten. Indianapolis Star, April 20, 1954, p. 3, col. 3. These are based on Articles 104 and 105 of the Uniform Code of Military Justice, 64 STAT. 108 (1950), 50 U.S.C. c. 22 (1951). Article 104 reads: "Any person who—(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court-martial or military commission may direct." Article 105 provides: "Any person subject to this chapter who, while in the hands of the enemy in time of war—(1) for the purpose of securing favorable treatment by his captor's acts without proper authority in a manner contrary to law, custom, or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or (2) while in a position of authority over such persons maltreats them without justifiable cause; shall be punished as a court-martial may direct."

a prisoner were done because of beatings.⁹ The considerations involved in the *Dickenson* case are more complex than in the Schwable inquiry since both the propaganda germ-warfare confession and the informing charges are included.¹⁰ The Army contended that both were done without coercion and for the purpose of securing favorable treatment.¹¹ Dickenson denied that he made false confessions and asserted that any informing proved was done under coercion.¹²

Since Schwable's false confession and Dickenson's alleged broadcasts differ substantially from acts of disloyalty heretofore known,¹³ the determination of their seriousness requires the application of criteria not employed in the more common situation in which military information is given. This does not mean, however, that the relative harm of these admissions was any less than that of Dickenson's alleged betrayal of prisoners, although the former probably had a less direct effect on troop morale. On the other hand, Dickenson's alleged treacherous revelations concerning his fellow captives closely resembles the classical situation of the prisoner of war who discloses information of strategic importance in order to obtain better treatment.

The problem of the prisoner who in the face of inhuman treatment gives military information, informs on fellow prisoners, or even joins the enemy forces is not new in the history of warfare.¹⁴ In 1333 John de Culewen,¹⁵ an Englishman, in fear for his life while a prisoner in the hands of the Scots swore fealty to this enemy. The defense of fear for life was held to be good, provided the captive returned his allegiance as soon as possible. Hale also records a case decided in 1419 in which ". . . those who supplied with victuals Sir John Oldcastle and his accomplices then in rebellion . . . were acquitted by judgment of the court, because it was found to be done pro timore mortis and quod recesserunt, quam cito potuerunt."¹⁶ The English courts have frequently reiterated

9. See Indianapolis Star, April 20, 1954, p. 3, col. 3. It is not clear how severe the coercion was. Dickenson contended at the trial that he was beaten. However, his preliminary statements do not indicate that he claimed severe beatings or fear of death.

10. Schematically the case breaks down into four basic possible alternative fact situations—the propaganda confession with or without coercion as a defense, or the informer charge with or without coercion as a defense. There could also be a composite of these four basic situations.

11. See Indianapolis Star, April 20, 1954, p. 3, cols. 1-3.

12. *Ibid.*

13. See the discussion of the case of Major Boon at p. 610 *infra*.

14. See the report of the trial of Baldwin Tyrel in the Pleas of Trinity Term, A.D. 1214, in Cornwall, where coercion was attempted as a defense. 1 SELECT PLEAS OF THE CROWN 67 (The Selden Society 1887).

15. Close Roll, 7 Edw. 3, memb. 15 (1333), cited in 1 HALE, HISTORIA PLACITORUM CORONAE 167-8 (1736).

16. ". . . for fear of death and that they returned as quickly as they were able." *Id.* at 50.

this rule during the succeeding five centuries.¹⁷ However, bad conditions and inhumane treatment while a prisoner of war have been held insufficient as a defense to the charge of treason for adhering to the King's enemies,¹⁸ and the English courts have dealt harshly with persons who were traitors under such circumstances.¹⁹

The earliest American case involving a disloyal prisoner of war is *Respublica v. M'Carty*.²⁰ The defendant was charged with high treason; he had been taken prisoner by the British, confined at Wilmington, and subsequently "enlisted" in the British Forces remaining with them for a period of ten or eleven months. The Supreme Court said,²¹ ". . . nothing will excuse the act of joining the enemy, but the fear of immediate death; not the fear of any inferior personal injury, nor the apprehension of any outrage upon property." In addition, he must have ". . . enlisted . . . with a sincere intention to make his escape. . . ."²² The rule as stated in the *M'Carty* case has been repeated in several of the other early American treason decisions.²³ Early British and American cases reveal that the

17. In *Rex v. MacGrowther*, 18 How. St. Tr. 391, 394 (1746), a tenant of the Duke of Perth was tried for treason for joining the Duke in a rebellion after threats of destruction of his home, crops, and some physical coercion. He was convicted. The court said, at 394, ". . . the only excuse [for collaboration with the enemy] is a force upon the person and present fear of death; and this force and fear must continue all the time the party remains with the rebels. It is incumbent on every man, who makes force his defence, to shew an actual force, and that he quitted the service as soon as he could. . . ."

18. Note that in the earlier cases the crime of treason is used to cover a multitude of crimes both major and minor. Such things from the counterfeiting of coin up to the actual plotting of the king's death were included within the definition of treason. The Treason Act, 1351, 25 Edw. III, Stat. 5, c. 2, specifies as acts of treason—compassing or imagining the death of the king, queen or their eldest son, the levying of war against the king, adherence to the king's enemies, and giving his enemies aid and comfort.

19. See *Rex v. Cundell*, 4 Newgate Calendar 62 (1812). There a number of British sailors and marines had been confined, in 1808, as prisoners of war on the Isle of France. The court said: "The prison, being much crowded, was greatly incommoded with dirt and vermin, and, there being no way of escaping from such inconvenience but that of desertion, every art was practised by their keepers to induce the unhappy prisoners to enter the French service. Fifty men, among whom were Cundell and Smith, had not virtue enough to resist the temptations on the one hand, and the hope of escaping from distress and filth on the other. They forgot their country and allegiance, and put on the enemy's uniform, acting as sentinels over those who were so recently their companions in captivity. These traitors continued to do duty with the French until the surrender of the island to the British forces, when Cundell and Smith . . . threw themselves upon the mercy of their country [and] surrendered to the English. . . . These culprits were [then] transmitted to England, and a special commission was [established] for their trial, which took place at the Surrey Court-house February 6, 1812. Cundell, Smith, and five others were found guilty of adhering to His Majesty's enemies. . . . On Monday morning, March 16, 1812, William Cundell and John Smith, pursuant to their sentence were hung. . . ."

20. 2 Dall. 86 (U.S. 1781).

21. *Id.* at 87.

22. *M'Carty* was found not guilty by the jury despite his confession in open court.

23. See *United States v. Vigol*, 2 Dall. 346 (U.S. 1795), where the defendant was charged with intimidation of a revenue officer amounting to insurrection in the so-called Whiskey Rebellion. Vigol was convicted after the court found that he did not come

courts consistently drew a line between fear of immediate death and all other degrees of duress and did not give any consideration to the relative seriousness of the various acts of defection; all received the same relative weight as harms under the umbrella-like category of treason.²⁴

During the Civil War approximately two percent of the Union soldiers who were taken prisoner subsequently joined the Confederate forces, and about one percent of Confederate soldiers allied themselves with the Union Army.²⁵ In recognizing the defense of coercion, the Judge Advocate General of the Army advised that if Union prisoners in the hands of the Confederates were subjected to *extreme suffering and privation* which endangered their lives,²⁶ and were induced to enlist in the Confederate Army solely to escape from the situation, they should not be considered deserters.²⁷ However, if these prisoners did not escape when they might have, but had voluntarily remained, then the fact that they were forced to join should not weigh in their favor.²⁸ The acceptance of this defense is the first indication of a wavering from the strict "fear of immediate death" rule. The harm involved was commensurate with that involved in older cases, though the degree of coercion was not as great.

No record of defections of captives appears again until the Second World War, and there only two cases achieved any notoriety.²⁹ Neither of these involved directly the question of coercion. Factually they seem similar to the Army's allegations of informing in the *Dickenson* case.³⁰

within the rules articulated in *Respublica v. M'Carty*, 2 Dall. 86 (U.S. 1781), and *United States v. Pryor*, 27 Fed. Cas. No. 16,096, at 628 (C.C.D. Pa. 1814), where the defendant while a prisoner of war acted in behalf of the British forces in attempting to procure food and supplies to be used by the prisoners. Pryor was acquitted because his acts were said not to come within the statutory meaning of treason in the statute. See also *United States v. Greiner*, 4 Phila. 396 (1861).

24. See note 18 *supra*.

25. H.R. REP. No. 45, 40th Cong., 3d Sess. 229, 742-755 (1869), cited in FLORY, PRISONERS OF WAR 142-3 (1942). The Union deserters numbered 3,170 out of a total of 188,145 captured; Confederate deserters totaled 5,452 out of 476,149 captured.

26. Italics supplied.

27. A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 1076-7 (U.S. War Dep't 1912).

28. *Id.* at 1077.

29. Following the Second World War there were five cases resulting in convictions for corresponding with the enemy, all involving facts remote to the *Schwable* or *Dickenson* situations. Communication to the Indiana Law Journal from Lt. Col. James K. Gaynor, of the Judge Advocate General Corps. These cases undoubtedly include the cases of Martin James Monte, who was convicted of treason, and Dale H. Maple, who was convicted of violating Article of War 81. For a complete factual coverage and discussion of these two cases, see WEYL, TREASON 390-399 (1950).

30. The first important case, in point of time, was that of chief signalman Harold E. Hirshberg, who was tried in 1947 before a Navy general court-martial for ". . . maltreatment of two naval enlisted men . . ." "who were prisoners of the Japanese. See *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210, 211 (1949). Hirshberg was charged with a violation of Article 8 (2) of the Articles for the Government of the Navy, REV. STAT. §1624 (1875), 34 U.S.C. §1200 (1946), which provides ". . . such

These two decisions are important because they motivated the inclusion of Article 105 in the Uniform Code of Military Justice and reveal the type of conduct it was intended to punish.³¹

Although the United States waited until 1950 to provide specifically for the punishment of misconduct while a prisoner of war, the British have had such a measure in their Army Act since 1881.³² They by-passed

punishment as a court-martial may adjudge may be inflicted on any person in the Navy . . . who is guilty of . . . maltreatment of, any person subject to his orders. . . ." Although convicted he was subsequently released by a federal district court in a habeas corpus proceeding, United States *ex rel.* Hirshberg v. Malanaphy, 73 F. Supp. 990 (E.D. N.Y. 1947), rev'd, 168 F.2d 503 (2d Cir. 1948), which was later affirmed by the United States Supreme Court because of a lack of jurisdiction in the Navy court-martial.

The most publicized trial was that of Sergeant John David Provoo for treason. See N.Y. Times, Feb. 15, 1953, §4, p. 2, col. 6. Provoo, like Hirshberg, was charged with willfully mistreating fellow prisoners while a captive of the Japanese on Corregidor following the surrender of the Philippines. Although coercion was not placed in issue, there was a claim of insanity at the time of trial. See N.Y. Times, Jan. 15, 1953, p. 3, col. 5. The Court found Provoo legally sane, although extremely unstable emotionally. See N.Y. Times, Feb. 18, 1953, p. 1, cols. 1-2. Provoo was found guilty of treason in February 1953, and sentenced to life imprisonment. See N.Y. Times, Feb. 15, 1953, §4, p. 2, col. 6. No report of the case has appeared to date. The trial was held in the Federal District Court for the Southern District of New York, Judge Noonan presiding.

31. See *Hearings before a Subcommittee of the House Committee on Armed Services on H.R. 2498*, 81st Cong., 1st Sess. 1229, 1259 (1949); and *Hearings before a Subcommittee of the Senate Committee on Armed Services on S. 857 and H.R. 4080*, 81st Cong., 1st Sess. 37 (1949). Until 1950 the prosecution of disloyal prisoners of war was based on a charge of treason under 18 U.S.C. §2381 (1948), the general "aiding the enemy" Article of War 81, 41 STAT. 804 (1920), 10 U.S.C. §1553 (1946), or as in the Hirshberg case, some ambiguous article which was interpreted to cover the situation although certainly not originally intended for such purpose. See CONG. GLOBE, 37th Cong., 2d Sess. 2865-6 (1862).

However, in the new Uniform Code of Military Justice, 64 STAT. 138 (1950), 50 U.S.C. c. 22 (1951), a provision, which became Article 105, was specifically inserted to cover the Hirshberg-Provoo situation. The old Article of War 81 was carried over as Article 104 with only inconsequential change.

The cases of Corporal Dickenson and Colonel Schwable are the first to arise under Articles 104 and 105 of the Uniform Code, although Pfc. Rothwell B. Floyd was convicted of violating Article 105 of the Uniform Code on April 1, 1954, for offenses committed while a prisoner in Korea. He was sentenced to 40 years in prison by an Army court-martial for murdering a fellow prisoner. See Louisville Courier-Journal, April 2, 1954, p. 6, col. 1. The Dickenson case is the first court-martial to be tried under the two articles; thus no precedent exists to aid the interpretation of Article 105. However, the most exhaustive treatise interpreting the Uniform Code has set forth in comprehensive form the essential elements of the offenses under that article. See SCHNEDEKER, MILITARY JUSTICE UNDER THE UNIFORM CODE 653-4 (1953). This author recognizes the defense of coercion and states that if a member of the armed forces is captured and compelled by threats of instant death or serious bodily harm to aid the enemy, he is not guilty of such aid unless he had a reasonable opportunity to escape and failed to avail himself of it. *Id.* at 522. Schneдекer cites as authority for this proposition, *Respublica v. M'Carty*, 2 Dall. 86 (U.S. 1781); see p. 606 *supra*.

32. Section 4 of the Army Act, 1881, 44 & 45 VIC., c. 58, provides, ". . . [e]very person subject to military law who . . . (5) [h]aving been made a prisoner of war voluntarily serves with or voluntarily aids the enemy; . . . shall, on conviction by court-martial, be liable to suffer death, or such less punishment as is in this Act mentioned." Under the French Code of Military Justice such activities come within the provision for treason. See Law of March 9, 1928, CODES DE JUSTICE MILITAIRE, ARME

this provision in favor of prosecution for treason in two of the most celebrated cases early in this century;³³ however, they employed it extensively following the Second World War, when 36 servicemen were court-martialed for voluntarily aiding the enemy while held captive.³⁴

Variations of the defense of coercion were raised frequently in these cases and according to published accounts were allowed if the duress could be proved to have been of a sufficient degree.³⁵ What constituted a sufficient degree is not entirely clear. A typical case is that of Henry Rose,³⁶ a stoker first class in the Royal Navy, who was tried for giving information to the enemy while a prisoner of war. Rose had been on a British ship sunk in the North Sea; he was rescued and questioned by the Germans. After rather severe physical torture, he was threatened with death and shown the corpses of two British seamen who reportedly had refused to talk. He thereupon agreed to give the desired information, which concerned the structure of the interior of the engine room on a certain type British destroyer. He was found guilty and sentenced to 16 years at hard labor,³⁷ subsequently reduced to 5 years.³⁸

Probably the most important and widely publicized proceeding of this type was the court martial of Major Cecil Boon on eleven charges covering acts alleged to have been committed while he was a prisoner in Hong Kong.³⁹ This case is particularly pertinent since it involved col-

DE TERRE, Arts. 235, 236 (Jurisprudence Generale Dalloz 1939). The Belgian Penal Code in the section of Military Justice is similar to the French. See Law of July 19, 1934, Art. 15, which for the purposes of military justice incorporates, Articles 113-9, 121-3, and 123 *quater* of the BELGES CODES PENAL (1950).

33. See *Rex v. Lynch*, 1 K.B. 444 (1903). There a soldier of Irish descent, while a prisoner during the Boer War in the South African Republic, took an oath of allegiance to the Boers and helped form an armed body of men called the Second Irish Brigade for the purpose of combating the British. It seems obvious that the strong anti-British prejudices of the Irishman Lynch were capitalized to the fullest extent by the Boers in enticing him to defect from his allegiance. Lynch was convicted of treason.

A similar case arose in the First World War, *Rex v. Casement*, 1 K.B. 98 (1917), in which the defendant was charged with and convicted of violating the Treason Act, 1351, 25 Edw. 3, Stat. 5, c. 2, for soliciting and persuading certain other British subjects who were prisoners of war in Germany to join what was called the Irish Brigade. This force was supposed to fight solely ". . . for the cause of Ireland and under no circumstances . . . [to] be directed to any German end." The plan was to put the Brigade ashore in Ireland to stir up a rebellion there, which would, of course, have the effect of diverting some of the British forces from the Continent. Casement was sentenced to death.

34. Several of these men were involved in pro-Nazi organizations, and a large number had been members of the British Union of Fascists and similar organizations in civilian life. *The Times* (London), April 12, 1946, p. 8, col. 4. See also Note, 56 *YALE L.J.* 1210, 1212 (1947).

35. See the cases of Francis McLardy, *The Times* (London), Jan. 30, 1946, p. 2, col. 4, and Hugh Cowie, *The Times* (London), Jan. 5, 1946, p. 2, col. 7.

36. *The Times* (London), March 21, 1946, p. 2, col. 2.

37. *The Times* (London), March 25, 1946, p. 2, col. 2.

38. *The Times* (London), June 26, 1946, p. 2, col. 6.

39. *The Times* (London), Aug. 28, 1946, p. 2, col. 1; Aug. 29, 1946, p. 2, col. 1; Aug. 30, 1946, p. 2, col. 4.

laboration with the Japanese for propaganda purposes.⁴⁰ The charges included disclosure, to his captors, of information regarding proposed escapes of other prisoners and the personal searching of prisoner of war quarters which on one occasion uncovered a wireless set. Boon was also charged with having written a letter to the commander of the American Far East Air Force in which he complained of indiscriminate bombing of the camp, a letter which was used for propaganda purposes and later published in the *Nippon Times*. It admittedly complained of wholly fictitious raids. Boon either denied the charges or raised the defense of coercion.⁴¹ The letter, he testified, was written after threats of *punishment or death*.⁴² After the prosecution rested, the court dismissed six of the eleven charges on the ground that no *prima facie* case had been established.⁴³ The defense was made on the remaining five charges on which the court rendered a verdict of not guilty thereby accepting the plea of coercion.⁴⁴ A comparison of the *Boon* and *Rose* cases reveals a significant change in the British approach.⁴⁵ It would seem that the coercion in the latter case was more forceful, and this becomes especially clear when it is noted that the duress in the *Boon* case was a threat of *punishment or death* and that there was no evidence as to how forcefully these threats were made, or with what degree of reasonableness Boon believed them.⁴⁶ *Rose*, however, was convicted, while Boon was freed. This suggests that the judges determined that *Rose's* act was more serious than that committed by Boon. It is important to note that there was a weighing of the gravity of the offense against the degree of coercion involved in each case. It is this process which merits further consideration.

Assuming that some degree of duress exists, the crucial problem becomes one of policy. Here, as in that portion of criminal law which pertains to coercion, generally, the commission of the crime is admitted, but exculpation is sought on grounds of compulsion.⁴⁷ Here also, as in criminal law, the possible rationales for determining the quantity and quality of punishment break down into the same general theories—deterrence, reformation, and just punishment.⁴⁸

40. See the discussion of this element in the Schwable case p. 611 *infra*.

41. *The Times* (London), Sept. 2, 1946, p. 2, col. 4.

42. Major Boon's defense was vaguely reported in the printed accounts, and it appears that the threat was his own opinion of what was likely to happen if he did not cooperate.

43. *The Times* (London), Sept. 13, 1946, p. 2, col. 4.

44. *The Times* (London), Sept. 21, 1946, p. 2, col. 2.

45. See the discussion p. 609 *supra*.

46. See note 57 *supra*.

47. For an excellent discussion of coercion in criminal law, see HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 405-426 (1947).

48. *Id.* at 420.

As Professor Hall points out, the utilitarians in interpreting the deterrence theory have insisted that a fear of future legal punishment cannot equal the greater fear of immediate death.⁴⁹ Thus, the proponents of this theory argue for complete exoneration even for murder where coercion amounting to fear of death is involved. Hall has indicated some major inconsistencies in the utilitarian position by showing that they insist on a punishment, in most crimes, which conforms to the strength of the temptation. However, in situations involving extreme duress where punishment should be the most severe to counteract temptation, they advocate exculpation.⁵⁰

More useful to both the criminal law and to the problem at hand is the theory of just punishment. This rationale repudiates the claims of the uncontrollable drive for self-preservation and the resulting complete exculpation.⁵¹ It is based instead on the relative temptation involved. As Professor Hall has put it, ". . . the theory of just punishment attempts an evaluation of the gravity of the harm committed, posited on the principle that human beings have a 'sufficient' degree of autonomy to justify their being held accountable for their actions. Unlike the deterrent theory, it holds that as temptation increases, so do the claims of mitigation. . . ."⁵² As applied specifically to the prisoner of war situation such an approach should consist of a consideration of the seriousness of the offense committed and its effect on military morale and the security of the nation.

The false confession and the giving of information must be distinguished when evaluating the gravity of the offense. Although the former has indirect impact on the national security, its effect when used as propaganda is of much greater intricacy and importance than is commonly supposed. It may be suggested that such confessions are of little consequence since they are reputedly given slight credibility in world public opinion and may be effectively countered by immediate denials pointing out the undoubted use of coercion. This assertion may appeal to the average American imbued with the patriotic fervor of war time; however, it is an unpleasant fact that in a great number of the free nations Russian-communist propaganda and American counter-propaganda are often equated. There are many intelligent people in responsible positions throughout the world who feel that all virtue and honesty in the cold war does not lie with the United States. The reasons behind this situation are varied and complex, one of the most basic being simply the emergence of the United States as one of the two major world powers.

49. *Id.* at 416.

50. *Id.* at 419.

51. *Id.* at 421-6.

52. *Id.* at 421.

Our global strategy of attempting to build a coalition against communism has forced us into a position of unintentionally irritating many of the nationalistic elements in the smaller noncommunist countries, particularly in the Middle and Far East.⁵³ It must be remembered that there was, and may still be, a significant segment of world opinion which believed the charges of bacteriological warfare of which the confessions of Colonel Schwable and his colleagues formed such a basic part.⁵⁴

The harm resulting from yielding information to the enemy must be evaluated according to the type of disclosure. Betrayal of fellow prisoners almost exclusively affects their morale, while revealing knowledge of troop concentrations and construction of weapons and various military installations primarily concerns the security of military forces and, therefore, the nation. Accordingly, the first major consideration in determining the proper punishment of the defected prisoner requires a weighing of the seriousness and effect of the act committed on the national security, and of less importance, on military morale either in the prisoner of war camp or in the armed forces generally.

The second determinant should be an evaluation of the degree of coercion involved. Such may be interpreted to include everything from mere unpleasant conditions (poor food, cold, crowded quarters) which could have been the situation in the *Dickenson* case, to brutal and inhuman physical torture, plus the most cunning psychological techniques such as were reputedly administered Colonel Schwable. Generally, the greater the degree of compulsion, the greater should be the degree of mitigation, extending to complete exculpation in the case of extreme torture. However, it may not be possible to grant acquittal where the act is heinous and of great seriousness despite severe coercion. It should, however, to some extent, reduce the punishment to be inflicted even where the act is of this nature.

The last criterion in the determination of the proper punishment should be an appraisal of the opportunity for escape, for deterring, stalling, or deceiving the coercionist.

Initially, it should be remembered that there is a basic difference between the disclosure of military information under coercion and the false confession to be used for propaganda purposes. This should be reflected in the soldier's indoctrination before combat as well as in the ap-

53 The problems involved in our relations with the Arab nations in the Near East, Iran, India, and Indo-China are all based on this unfortunate situation.

54. There were many well-educated Frenchmen and Englishmen, such as the Dean of Canterbury, who claimed to believe these charges. Admittedly many of these people are inveterate distrusters of America, but in an environment of freedom of speech and press, they chose to believe the communist propaganda.

proach taken by authorities after the act has been committed. In the former situation it is possible that with some precombat indoctrination a technique of clever fabrication could be utilized by the captured soldier to satisfy the captor and still maintain the security of his military forces. In the false confession situation the problem is more difficult. Obviously, the captor cannot be deceived since he knows exactly what he wants his prisoner to say or write or sign. If he persists, the captive is left with only the alternatives of compliance or death; there is no chance to make a "false" false confession. In no manner, however, can the subsequent punishment of the serviceman alter the effect such confession had on world public opinion. This can only be accomplished by counter-propaganda, and the insistence on neutral investigation of charges.⁵⁵ Thus, the determination of the penalty to be imposed should be based on the factors discussed above regarding the theory of just punishment.⁵⁶

Under this proposal a much more detailed statement of the facts is required than under other theories of penal liability, and a difficult evaluation of harms is involved.⁵⁷ Nevertheless, this should not seriously prejudice the adoption of this plan since use of them involves large amounts of uncertainty regarding both their ultimate effect and application.⁵⁸ Acceptance of the theory of just punishment would entail the surrender of any absolute formula of exculpation such as the "fear of immediate death" rule.⁵⁹

55. There is a possibility that a change or more properly an addition to the 1949 Geneva Convention might have a salutary effect on the coerced confession problem. As is frequently the case, the communist use of the coerced confession is an adjunct to the simultaneous trial of the confessor, as in the cases of Robert Voegler, William Oatis, and Joseph Cardinal Mindszenty. If, as was suggested by some international legal scholars at the time of the Nurnberg trials of the war criminals, an international court could be set up to try such charges as constitute war crimes, which would include the germ-warfare accusation, the opportunity for use of the trial and confession as propaganda devices could in this manner be substantially removed. If such a court were established it could be given jurisdiction to try all such war crimes. Thus, the captor, upon the filing of such charges against a prisoner, would be required to place him in the custody of the international court. It is unfortunate in this regard that the Big Four Powers did not see fit to heed this advice before Nurnberg since now the communist powers have a very persuasive and embarrassing precedent in support of trial by the captor.

With this one exception, it seems that a change in international law could have little effect on the problem of these coerced confessions since compulsion on the part of the captor is at present illegal under the Geneva Convention of 1949, 75 U. N. TREATY SERIES 972 (1950). This is probably one of those unfortunate situations where no perfect solution exists. The only feasible alternative seems to be the use of a penetrating expose of the methods used by communist captors and insistence on investigation by a neutral international commission.

56. See the discussion pp. 611-612 *supra*.

57. HALL, *op. cit.* *supra* note 47, at 425.

58. *Id.* at 420.

59. See discussion pp. 605-607 *supra*. Hall suggests that in addition to murder, the crimes of rape, kidnapping, treason, and very serious mayhem—generally all punishable

In applying the just punishment theory to the cases of Schwable and Dickenson it is reasonable to expect in the former (if all the facts of the defense are believed) that the result of a court-martial, if such were held, would be either complete exculpation or, at worst, some very light form of reprimand.⁶⁰ Although Schwable's act is of a serious nature considering the over-all effect on the national security,⁶¹ the degree of coercion should be sufficient to grant exculpation. Moreover, there is no plausible way in which his communist captors could have been deceived by falsification since they knew exactly what they wanted him to do. In Dickenson's situation,⁶² if the broadcast and betrayal are proved and it is determined that no coercion existed,⁶³ the court-martial might result in severe punishment, going to the maximum under the Uniform Code.⁶⁴ However, even if his proposed defense is believed,⁶⁵ the Corporal's punishment should be more severe than Schwable's since the coercion was apparently less rigorous.

To determine the proper punishment coercion should not automatically be the basis for complete exculpation, but rather should constitute a mitigating factor depending on the seriousness of the offense committed, the degree of coercion involved, and the relative opportunities for avoidance by fabrication or escape. Finally, it would be advisable to supplement precombat indoctrination by instruction in the techniques of falsifying information especially for those who in their military positions have access to information vital to military and national security. It should also be remembered that the morale of any army is more properly based on a firm conviction that what they fight for is right and honorable, than on a fear of severe punishment and degradation if they should waver from their allegiance under the most brutal form of coercion.

by death or long terms of imprisonment—should be placed beyond the defense of coercion. Hall, *op. cit. supra* note 47, at 425.

60. See note 7 *supra*.

61. See discussion p. 611 *supra*.

62. See notes 9-12 *supra* and accompanying text.

63. There is a much more difficult problem of proof in Dickenson's case since it involves acts allegedly done inside the prisoner of war camp where the available evidence may amount only to rumor or hearsay among the prisoners. See Indianapolis Star, April 20, 1954, p. 3, cols. 1-3.

64. The maximum sentence under Art. 104 is death, and under Art. 105 life imprisonment can be imposed. However, death has been apparently ruled out in Cpl. Dickenson's case. See Louisville Courier-Journal, Feb. 18, 1954, p. 2, col. 2. The Army court-martial found Dickenson guilty of betraying fellow prisoners, sentenced him to ten years at hard labor, and recommended a dishonorable discharge. See Louisville Courier-Journal, May 5, 1954, p. 1, cols. 7-8.

65. See notes 10 and 11 *supra* and accompanying text.