1979

Professor Delgado's Brainwashing Defense: Courting a Determinist Legal System

Joshua Dressler

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation

https://scholarship.law.umn.edu/mlr/1711

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.
Professor Delgado's "Brainwashing" Defense: Courting A Determinist Legal System

Joshua Dressler*

I. INTRODUCTION

In 1951, journalist Edward Hunter wrote a book describing "brainwashing," a process of abrupt attitudinal change that was used in the People's Republic of China. At that time, the United States was involved in a "hot" war with the Communist government of North Korea and a "cold" war with the ideology of Marxism. This situation caused both the unfamiliar term and the concept underlying it—that people can have their life-long values involuntarily and suddenly changed—to become the subjects of widespread general interest and copious scientific literature. Except for some interest engendered by military court-martial proceedings against American prisoners of war, however, brainwashing was largely ignored in legal circles until recently, when kidnapping victim Patricia Hearst was prosecuted for joining her captors in a bank robbery.

The absence of debate within the legal community is unfortunate, because the subject of coercive persuasion raises more than eso-

* Associate Professor of Law, Hamline University School of Law. The author wishes to acknowledge Ms. Linda Aaker for her assistance and advice, Mr. Douglas Duncan for his research, and Professor Richard Delgado for his ready cooperation in—even encouragement of—the preparation of this rejoinder to his excellent article.

1. The term "brainwashing" will generally not be used in this Article because it has been criticized by scientists as inaccurate and overly identified with anti-Communist hysteria. See, e.g., R. Lipton, Thought Reform and The Psychology of Totalism 3-4 (1961); E. Schein, Coercive Persuasion 18 (1961). Instead, the term "coercive persuasion," originated by Schein, will be used to describe both the "thought reform" processes used by the Chinese and described in much of the scientific literature, and all other forms of alleged attitudinal and behavioral indoctrination, whether initiated by religious cultists, television, or any other source.
2. E. Hunter, Brainwashing in Red China (1951).
3. Much of the literature written prior to 1961 is summarized and discussed in E. Schein, supra note 1.
teric scientific questions. Its consideration leads to fundamental philosophical quandaries concerning the continued viability of the concept of free will, one of the basic premises of our substantive criminal justice system.

Nor can it any longer be said that the issue of coercive persuasion, and the related debate regarding free will, are of mere academic interest. The likelihood that a defense based on coercive persuasion will be raised in the future is great. Prosecution following "terrorist' kidnapping is but one situation raising the issue. Another is in connection with certain religious cults that allegedly not only coercively indoctrinate new members to their religious views but also indoctrinate them to commit fraudulent acts. In response to the conversion techniques adopted by the cults, parents and professional deprogrammers have imprisoned cultists in order to reverse this influence. The propriety of both the original coercive persuasion and subsequent deprogramming has already been litigated in criminal cases, actions in intentional tort, civil rights actions, and competency and conservatorship hearings. Arguments based loosely on coercive persuasion have also been made in trials that did not involve cultists. 6


7. E.g., United States v. Patrick, 532 F.2d 142 (9th Cir. 1976) (acquittal); People v. Florence, No. 6699 (Mun. Ct., Fullerton, Cal. May 6, 1965) (conviction).


It is critical, then, for both practical and jurisprudential reasons, that legal scholarship in this field flourish. Three recent articles addressing the question of coercive persuasion as a criminal defense have initiated this process, but more is needed. Unfortunately, two of the articles rejected in relatively perfunctory fashion the idea that the law should permit this new defense. An article written by Professor Richard Delgado, however, presents for the first time in legal literature a lucid rationalization for such a new claim.

Because Professor Delgado is the first to call for such a defense, and because he states a convincing case for it, it is to his analysis that this Article directly responds. It is the thesis of this author that Delgado erroneously applies certain criminal law doctrines. More significantly, this Article attempts to show that Delgado's stated defense, or indeed any similar defense, must by necessity either go too far or not far enough. That is, it is logically impossible to frame a coercive persuasion defense that is both consistent with present criminal law and jurisprudential doctrines and is also morally acceptable. Either we reject such a defense, or we revolutionize the criminal law.

II. DELGADO'S THESIS

Professor Delgado sets for himself the goal of justifying a new criminal defense theory for the coercively persuaded defendant which is a "logical extension of existing concepts of act, intent, and blame" and which does not "fatally [erode] the [criminal law's] assumption of freedom of the will." Delgado premises his theory on a new criminal law doctrine he variously describes as "transferred," "superimposed," or "implanted" mens rea. He readily concedes that the typical coer-

15. The present author is a philosophical determinist. He would therefore, probably, although not certainly, choose the path of revolutionizing the law. Nonetheless, no attempt is made in this Article to justify or advocate such a position. The purpose of this reply to Professor Delgado is more modest: to demonstrate that the question Delgado asks—whether society should countenance a coercive persuasion defense—is an incorrect inquiry. Instead, society must ask a more difficult question: whether to reject entirely the premise of free will and the criminal law doctrines based on it, or leave unchanged the current exculpatory concepts of the criminal law.
17. Id. at 33.
18. Id. at 11, 13, 15, 16, 19, 28.
19. Id. at 11, 16.
20. Id. at 11, 20.
cively persuaded defendant is neither insane, coerced, nor the victim of diminished capacity when the criminal acts are performed.\textsuperscript{21} In addition, he grants that such a person acts consciously, even enthusiastically, fully aware of the wrongfulness of his actions.\textsuperscript{22} By all traditional indices, the requisite mens rea is therefore present. Delgado nevertheless suggests that because such intent is coercively indoctrinated into the actor, "the guilty mind with which he acts is not his own,"\textsuperscript{23} and should instead be ascribed solely to the captor. In light of the criminal law's "insistence that any requisite mental state be found to be that of the defendant himself,"\textsuperscript{24} Delgado asserts, the defendant should be exculpated and the captor prosecuted.

Delgado reinforces this doctrinal position with penological arguments, attempting to demonstrate that no modern theory of punishment warrants conviction. He adopts, first, what he admits is an unprovable moral premise: "[P]ersons 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 . . . ."\textsuperscript{25} From this, Delgado concludes that the coercively persuaded defendant is morally blameless for his actions. Consequently, he finds the retributive basis of punishment inapplicable.

In addition, he contends that utilitarian\textsuperscript{26} theories of punishment justify acquittal when a victim of coercive persuasion commits an otherwise criminal act. First, he asserts that most such people upon release return to their earlier law-abiding views;\textsuperscript{27} theories of rehabilitation and special deterrence\textsuperscript{28} are therefore inapplicable. Second, although the theory of general deterrence\textsuperscript{29} could be used to support punishment, the law does not ordinarily permit utilitarian-based punishment unless the individual is also morally condemnable.\textsuperscript{30}

\textsuperscript{21.} \textit{Id.} at 10.
\textsuperscript{22.} \textit{Id.} at 11.
\textsuperscript{23.} \textit{Id.}
\textsuperscript{24.} \textit{Id.} at 7.
\textsuperscript{25.} \textit{Id.} at 7 n.30.
\textsuperscript{26.} Utilitarianism is based on the premise that the law's purpose is to increase the total happiness of the community and to eliminate, insofar as is possible, all that prevents such happiness. \textit{See} Bentham, \textit{Of The Principle of Utility}, in \textit{An Introduction to the Principles of Morals and Legislation} 12-13 (J. Burns & H.L.A. Hart eds. 1970). Accordingly, punishment of a person (an evil, because it prevents happiness) is permissible only if it is outweighed by the societal happiness it causes.
\textsuperscript{27.} Delgado, \textit{supra} note 14, at 9.
\textsuperscript{28.} Special deterrence involves the immediate deterrence of the actor by incapacitation, or the actor's later deterrence by the intimidation that results from incarceration. \textit{See generally} H. Packer, \textit{The Limits of the Criminal Sanction} 39, 45-53 (1968).
\textsuperscript{29.} General deterrence is punishment of an offender in order to discourage commission of proscribed conduct by others. \textit{See generally} \textit{id.} at 39.
\textsuperscript{30.} It has been suggested that the utilitarian approach, followed to its logical
gado insists, therefore, that since coercively persuaded actors are morally blameless, general deterrence does not justify imposing crimi-

nal sanctions on them.

With the doctrinal and penological arguments made, Delgado turns to the definition of his new defense. He admits that it is difficult to state its necessary and sufficient conditions, so he instead lists factors to be considered in deciding whether to allow the defense:

a. The defendant's mental state results from unusual or ab-

normal influences . . . .

b. The induced mental state represents a sharp departure from the individual's ordinary mode of thinking . . . .

c. The state is one that is imposed on the subject . . . .

d. The criminal acts benefit 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. . . .

f. The actor evidences symptoms typical of the coercively per-

suaded personality . . . .

When all or many of these factors are present, Delgado would invoke the defense. When few of them exist, he would not apply it.32

Delgado expressly states that this defense would be available not only when a defendant is coercively persuaded to commit specific criminal acts, but also when indoctrination is solely attitudinal and the defendant is "free to choose"33 how to act upon such beliefs. On the other hand, his defense excludes by definition environmental, media, and similar indoctrination.34

III. CRITICISM OF DELGADO'S THESIS35

Professor Delgado presents a case that, on first view, is appeal-
ing. He provides a defense for people with whom he, and many others, obviously sympathize. At the same time, he assures us that such a result can be reached without radical changes in criminal law doctrine. Thus, reformers can appear humane while causing ripples, not waves, in the criminal law system.

Unfortunately, a careful review of substantive criminal law and current jurisprudential doctrine demonstrates that Delgado's claim is not on solid ground. A fundamental premise of the criminal law, and that which distinguishes the criminal sanction from the civil, is that societal condemnation of the violator of societal norms, or at least of his actions, is a necessary, although not sufficient, condition to punishing the offender. The criminal sanction is applied only when the actor is deserving of punishment. Delgado's defense, however, fails to properly identify those people whom society currently believes are blameworthy (deserving of condemnation) and those who are not. Second, because he fails to frame a defense that has sufficiently clear and just limits to make it susceptible of administration, his defense necessitates embracing a determinist view of society.

A. Blameworthiness

In order to understand why Delgado has failed to satisfy the first of these requirements—identifying people society views as blameworthy—it is necessary to examine the circumstances under which society finds an individual charged with criminal conduct to be either blameworthy or blameless. In broad terms, a person is considered

deterrence are valid theories for incarcerating the coercively persuaded actor. Delgado admits as much when he suggests that, as a "last resort" the "defense can simply be denied in cases in which the victim has not spontaneously 'deconverted' prior to trial." Delgado, supra note 14, at 32.

Second, it is assumed that the coercively persuaded actor does not suffer from a disease of the mind as a result of the indoctrination, which would permit the defendant to raise a traditional insanity defense. Such a person, however, may in fact display psychotic or near-psychotic symptoms. See R. Lipon, supra note 1, at 33; Delgado, supra note 6, at 15. In such circumstances, insanity may be a valid defense. If the person has such a "disease" but the insanity test still fails, this may suggest that the insanity defense should be enlarged. It does not, however, demonstrate the need for a new defense.

36. See Delgado, supra note 14, at 7-8 n.31. It is perhaps worth speculating whether such sympathy by some is due to the treatment such victims have received, or is related more to the fact that victims of coercive persuasion are the "good guys"—coed daughters of multimillionaires, American soldiers, and the children of the middle class—while the fanatic "brainwashers" are the "bad guys"—Communists and religious cultists.


blameworthy when he voluntarily commits an immoral\textsuperscript{39} or illegal\textsuperscript{40} act—actus reus\textsuperscript{41}—while possessing the requisite "guilty" mental state—mens rea.\textsuperscript{42} Under traditional doctrine, if either actus reus or mens rea is absent, the individual is not deserving of punishment.\textsuperscript{43} These concepts thus provide a means of identifying society's definition of blameworthiness. Additional insight into the blameworthiness concept may be obtained by examining the traditional excuses of insanity and duress.

1. Mens Rea

The term "mens rea" can have either a loose or a strict meaning. Used loosely, it is equivalent to "criminal legal responsibility." In that sense, it means nothing more than that punishment is justified for one who possesses mens rea, while for one lacking mens rea, it is not.\textsuperscript{44} So viewed, all defenses involve the issue of mens rea. The term has, however, a more precise meaning as well. Strictly used, mens rea is the specific mental state required in the definition of an offense.\textsuperscript{45} What must be proven in this sense of the term is that the defendant intended\textsuperscript{46} to commit the prohibited acts or was aware of all the facts that made the conduct criminal.\textsuperscript{47} Although the term mens rea as so used has been translated by Blackstone to mean that the defendant must have a "vicious will,"\textsuperscript{48} it is not necessary that defendant be an

41. See notes 81-86 infra and accompanying text.
42. See notes 44-54 infra and accompanying text.
43. See H. Packer, supra note 28, at 105.
44. See id. at 106; Kadish, The Decline of Innocence, 26 Cambridge L.J. 273, 274-75 (1968).
46. "Intent" means only that the actor intended to do the acts that, according to the law, are prohibited. Intent to violate the law is not necessary. See G. Fletcher, Rethinking the Criminal Law § 6.2.1, at 397 (1978). The Model Penal Code defines an "act" as "a bodily movement whether voluntary or involuntary," Model Penal Code § 1.13(2) (Proposed Official Draft 1962), but requires that the act in question be voluntary to incur criminal liability. Id. § 2.01(1). See also W. LaFave & A. Scott, supra note 45, § 25, at 177-80.
47. See, e.g., United States v. Busic, No. 77-1332 (2d Cir. Oct. 30, 1978) (psychological defense of abnormal mental state rejected in airplane hijacking case; general criminal intent sufficient); United States v. Crimmins, 123 F.2d 271, 272 (2d Cir. 1941) (awareness only requirement for mens rea; mens rea is criminal intent).
48. 4 W. Blackstone, Commentaries *21.
evil person. 49

Implicit in the concept of mens rea is the idea of choice, for an actor cannot be said to have "intended" to commit an act if he had no choice but to commit it. The existence of general human free will, however, is conclusively presumed. 50 Although the philosophical and scientific arguments for determinism may seem persuasive to some, 51 the criminal justice system rejects, as a matter of policy, any doctrine that conflicts with a free will theory.

The reason for this inflexible position is that if it were assumed that humans lack free will, they could not "choose" to commit crimes and so would be morally blameless for their conduct. Condemnation, and therefore punishment, would be unjust, given present theoretical premises. 52 But without punishment society would be left in what is believed to be an untenable position. It would need to accept either crime without societal redress, or the "brutal" notion that incarceration is permissible on the purely utilitarian basis that the evil of incarcerating morally blameless people is less than the evil of crime in the streets. 53 Thus, whether free will is a truism or a legal fiction, it is thought to be a necessary one. 54

As noted earlier, 55 Delgado's doctrinal argument is predicated on the unique theory of a superimposed mens rea. Because the mental

51. There is some support for the determinist position in certain psychological theories. Classical Freudian theory, for example, posits that conscious acts are an expression of subconscious drives, resulting from the interplay of the "id," "ego," and "super-ego." The theory asserts that these subconscious structures are formed early in human development. It can be argued, therefore, that later conduct is influenced by events occurring in infancy and childhood, over which the individual has little control, and for which he should bear no responsibility. See J. Meerloo, Rape of the Mind 73 (1956); Hospers, What Means This Freedom? in Determinism and Freedom, supra note 40, at 126. But cf. note 79 infra (alternate formulations of psychological theory).
55. See notes 18-24 supra and accompanying text.
56. Delgado's use of "transferred," a term of art in tort and criminal law, to explain his thesis is unfortunate. In tort law, "transferred intent" means that the
state of the coercively persuaded victim is inculcated by another person, Delgado would create a new legal fiction by treating the actor's mens rea as legally noncognizable. Legal blame would attach solely to the indoctrinator.57

Such a proposal is doctrinally untenable. All ideas and intents originate outside the individual, in the sense that they are shaped by experiences and environment.58 As we have seen, however, the law nevertheless considers intent to be personal—to be a product of each individual's free will.59 This is true whether the intent to commit the crime is initiated by an inanimate object ("I saw the painting and it made me think of killing"), an innocent third party ("X told me the victim had a lot of money so I killed the victim"), or a guilty third party.60 If this were not the case, one could plausibly argue that all mental states—for example, criminal intentions, or political or religious views—are inauthentic, thus unacceptably blurring concepts of moral and legal responsibility.

Coercive persuasion obviously falls within the category of intentions originating with a guilty third person. To say that no legally

actor's intent to commit one tortious act (e.g., assault) is "transferred" to the tort actually committed (e.g., battery), or that intent to commit a tort on one person is "transferred" to the actual, and different, victim. See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 8, at 32-33 (4th ed. 1971). So understood, "transferred intent" is a concept "that has no proper place in criminal law." R. PERKINS, PERKINS ON CRIMINAL LAW 822-23 (2d ed. 1969).

Delgado uses the term "transferred" in a different sense: that the intent of the actor is transferred from the apparent perpetrator to some other person—the one who "gave" him the intent. The doctrine is better viewed, then, as "superimposed" mens rea.

57. See notes 23-24 supra and accompanying text.

In his article, Delgado notes "analogous" contexts in which criminal defendants are exculpated on a "transferred intent or design" basis. Delgado, supra note 14, at 13-19. One such "analogy" is entrapment. Delgado points out that the prevailing test for this defense is that a person is acquitted 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 . . . ." Id. at 15 (quoting Sorrells v. United States, 287 U.S. 435, 442 (1932)).

The true rationale of the entrapment defense is not superimposed mens rea, however, but a public policy that certain government conduct should not be countenanced. Sherman v. United States, 356 U.S. 369, 380 (1958) (Frankfurter, J., concurring). See Sorrells v. United States, 287 U.S. 435, 457 (1932) (Roberts, J., concurring). This is made evident by the fact that the same "entrapment" by a private person of another private person would not serve as a defense. A similar policy serves to explain the confession cases Delgado cites.

Another of Delgado's "analogies," the hypnosis "defense," is discussed at notes 89-96 infra and accompanying text.


59. See notes 50-54 supra and accompanying text.

60. See note 12 supra and accompanying text; note 107 infra.
cognizable mens rea is present in the perpetrator in such cases conflicts with current, and sensible, law. Consider this hypothetical situation: A solicits B to steal X's car. B agrees and steals the car. The idea of theft originated wholly in A's mind. It was "implanted" into B's mind verbally, with the help, possibly, of an offer of money. A, of course, is guilty of theft, as a solicitor, but B is also guilty because, regardless of where the intent originated, it became his when he accepted it as his. His reason for stealing the car, whether for profit, fun, or jealousy, or because he is suggestible, does not, in itself, negate the existence of mens rea.63 The criminal law has no aversion to convicting more than one person for a single crime, although one may be considered the originator of the design and another the follower. Delgado's suggestion that the criminal law insists that "any requisite mental state be found to be that of the defendant himself"64 is based on the irrelevant rule that vicarious liability is generally inapplicable to crimes malum in se.65 The law does not impose punishment unless the guilt—here, mens rea—is personal.66 That view precludes guilt by agency, but not guilt where personal mens rea is present, as it is here.67


62. Suggestibility, if the result of an abnormal mental condition, could, if severe enough, negate the requisite mens rea of a crime under the principle of diminished capacity in some jurisdictions. See People v. McDowell, 69 Cal. 2d 737, 738-39, 447 P.2d 97, 98, 73 Cal. Rptr. 1, 2 (1968). Although logic does not require it, see A. GOLdSTEIN, The Insanity Defense 200 (1967); W. LAFAvE & A. scOTT, supra note 45, § 42, at 331, this "defense" ordinarily applies only to specific intent crimes, see People v. Wells, 33 Cal. 2d 330, 346-47, 202 P.2d 53, 63 (1949), and because the defendant is found partially responsible, conviction of a lesser crime usually occurs. See W. LAFAvE & A. scOTT, supra note 45, § 42, at 326.

63. See Hegeman v. Corrigan, 195 N.Y. 1, 12-13, 87 N.E. 792, 796 (1909); M. BAssIouNI, supra note 45, at 170-71; G. FLETcHER, supra note 46, § 6.5.5, at 452.

64. Delgado, supra note 14, at 17.


66. See notes 50-54 supra and accompanying text. See generally W. LAFAvE & A. scOTT, supra note 45, § 32, at 224 & n.2.

67. B could show that he lacked the specific mens rea in this case if he could prove that he had hoped A would be arrested and the property returned. See Wilson v. People, 103 Colo. 441, 87 P.2d 5 (1939) (defendant who aided another to take property after he had called police not guilty of larceny). Acquittal would not occur because B's mental state was inauthentic, however, but because the specific mental state was not present in any form. B might be guilty, however, of some form of criminal trespass to personal property.

The only other instance in which B might be acquitted on the basis of a lack of mens rea is when A uses B as an innocent instrument or dupe. For example, A could ask B to pick up A's car at X's house. In fact, the car belongs to X, but B does not know this. If B takes the car, he is innocent of theft, not because of an "implanted" mens rea but because of no intent to deprive X of his car (since B does not know it is
It can be argued, however, that this hypothetical situation does a disservice to Delgado, because he is concerned only with cases in which intention is transplanted forcefully. But the particular means through which intent is transferred is irrelevant; so long as the actor remains free to choose his course of action, he is responsible for his blameworthy acts. Of course, if it can be said that B has little choice but to steal the car—where, for example, A holds a gun to B’s head and orders the theft—B would be exculpated on grounds of duress.68 Duress as a defense, however, is not predicated on the theory of the negation or nonrecognition of a personal mens rea,69 but rather on the basis that despite mens rea, the defendant is morally blameless70 because he committed a relatively minor crime71 under circumstances X’s). See generally J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 360-414 (2d ed. 1960); W. LAFAVE & A. SCOTT, supra note 45, § 47, at 356-60 (discussion of ignorance or mistake).


69. See, e.g., Director of Pub. Prosecutions v. Lynch [1975] A.C. 653, 692 (Lord Simon of Glaisdale, dissenting) (“In the circumstance where . . . duress is relevant, there are both actus reus and mens rea . . . . [T]he consequence of the act is intended . . . .”).

70. See id. at 696 (“An infraction . . . under duress does not involve that the conduct is either involuntary or unintentional. . . . But [the actor’s] responsibility is diminished. . . .”).

71. Because homicide is generally not excused, see note 68 supra, duress, like necessity, involves commission of a lesser crime. Some scholars assert that the only distinction between necessity and duress is that in the former the source of compulsion is a natural force whereas in the latter, it is human agency. See M. BASSIOUNI, supra note 45, at 454; W. LAFAVE & A. SCOTT, supra note 45, § 50, at 381. This ignores the fact, however, that necessity is a justification and duress an excuse. The “victim” of acts performed with justification is expected not to resist, and others may properly assist the justified actor in commission of the “crime.” This is clearly not the case with duress. See G. FLETCHER, supra note 46, § 10.4.2., at 830. See generally Gardner, The Defense of Necessity and The Right to Escape from Prison—A Step Towards Incarceration Free from Sexual Assault, 49 S. CAL. L. REV. 110, 123-39 (1975). It is more appropriate to explain duress as a situation in which the actor is morally blameless because the threat was one that a person of ordinary firmness would have not resisted. See MODEL PENAL CODE § 2.09(1),(4) (Proposed Official Draft 1962); M. BASSIOUNI, supra note 45, at 452-53; G. FLETCHER, supra note 46, § 10.4.2, at 831; Fletcher, The
involving severely limited and unacceptable choices.\textsuperscript{72}

The error in Delgado's mens rea analysis becomes clearer if one carefully analyzes a hypothetical situation posited in his article. Delgado notes the existence of "stimoeivers," devices that may be used to apply electrical currents to a person's brain, causing him to feel particular emotions.\textsuperscript{73} Delgado hypothesizes a case in which an evil third person triggers such a device by remote control, causing the actor to feel "inexplicably and overwhelmingly angry."\textsuperscript{74} The actor "might discharge the aggressive impulse by attacking a hapless bystander."\textsuperscript{75} Delgado then states that in a prosecution of the actor for assault, acquittal is proper because "[i]f the defendant possessed mens rea at all, it seems more natural to attribute it, not to the [defendant], but to the [impulse] sender . . . ."\textsuperscript{76}

The difficulty with Delgado's mens rea analysis is that the actor does possess the requisite mental state: intent to batter the hapless victim. Although his anger is inauthentic, like fear in duress, in that it originates from external forces, the decision on how to release the anger is personal, as is the decision on how to alleviate fear. The defendant could have vented his anger in many noncriminal ways: by throwing an object at the wall of his house, screaming, or running around the block. Instead, he exercised an independent and personal choice when he elected to hit the hapless bystander. The mens rea necessary to prove the prima facie case for battery is thus present,\textsuperscript{77} even in Delgado's bizarre example.\textsuperscript{78}


\textsuperscript{72} See, e.g., Director of Pub. Prosecutions v. Lynch [1975] A.C. 653, 692 (Lord Simon of Glaisdale, dissenting) ("[T]here is power of choice between two alternatives; but one of those alternatives is so disagreeable that . . . infraction of the criminal law seems preferable."); Regina v. Hudson [1971] 2 All E.R. 244, 246 (Crim. App.) ("[T]he will of the accused [was] overborne by threats of death . . . so that the commission . . . was no longer the voluntary act of the accused."). See also State v. St. Clair, 262 S.W.2d 25, 28 (Mo. 1953); M. Bassioum, supra note 45, at 452-53; H.L.A. Hart, Punishment and Responsibility 14 (1968).

\textsuperscript{73} Delgado, supra note 14, at 11-12.

\textsuperscript{74} Id. at 12.

\textsuperscript{75} Id.

\textsuperscript{76} Id.

\textsuperscript{77} This is not to suggest, of course, that a defendant, including this one, is guilty of a crime merely because the mens rea is present. An excuse or justification for the actor's behavior may be found to acquit the defendant. But one cannot under current doctrine suggest that there is no cognizable mens rea merely because it is triggered by an inauthentic force.

\textsuperscript{78} Delgado's hypothetical is comparable to the case in which a person is born with, or acquires early in infancy, characteristics of short-temperedness. It may be argued that his innate temper is not his fault, but his choice to kill when angry is ordinarily neither excused nor mitigated. See generally R. Perkins, supra note 56, at 56 (reasonable man standard applies); Michael & Wechsler, A Rationale of the Law
Mens rea is not absent in cases of coercive persuasion. Although theories of the etiology of coercive persuasion abound, all are premised on the view that the captive comes to share the captor’s view, and later commits supportive crimes, because he wants—that is, intends—to commit the acts. The intent itself may derive from any one of various psychological sources but the mens rea is clearly present.

79. Several early writers used Pavlovian classical conditioning principles to explain coercive persuasion used during the Korean War by the Chinese Communists. Pavlovian learning theory, also referred to as classical conditioning, proposes that when a neutral stimulus (e.g., a bell) is paired with an “unconditioned” stimulus (e.g., food) that causes an innate automatic response (e.g., salivation), the neutral stimulus eventually evokes the automatic response even when the unconditioned stimulus is not presented. See D. Schultz, A History of Modern Psychology 160-63 (1973). Pavlov’s theory, however, can account for only very limited aspects of coercive persuasion. See E. Schein, supra note 1, at 16-17. Consequently, although some writers have attempted to expand Pavlovian principles to encompass the entire process of coercive persuasion, see, e.g., J. Meerloo, supra note 51, at 39; W. Sargant, Battle for the Mind 227 (1957), they have often gone so far beyond the experimental findings of Pavlov that their theories are in disrepute. See E. Schein, supra note 1 at 200-04.

Other psychologists have advanced theories that, although based on Pavlovian principles, are not so extreme. One such view combines Pavlovian classical conditioning theory with drive reduction or instrumental conditioning principles. See, e.g., Farber, Harlow & West, Brainwashing, Conditioning, and Debility, Dependency, and Dread, 20 Sociometry 271 (1957); Santucci & Winokur, Brainwashing as a Factor in Psychiatric Illness, 74 A.M.A. Archives Neurology & Psych. 11, 15-16 (1955). The drive reduction theory states that external or internal stimuli trigger innate or learned drives that in turn trigger behavior intended to reduce or eliminate such drives. See J. Dollard & N. Miller, Personality and Psychotherapy 28-47 (1950). For example, an internal stimulus, such as lack of food, will trigger an innate drive to behave in a way that will alleviate the hunger-drive. Adherents of this classical-drive reduction hybrid school assert that when captors employ physical threats to coerce behavior counter to the captive’s beliefs, the captive experiences anxiety and guilt feelings. These feelings create a “drive state” in which the captive seeks to reduce his anxiety and guilt. As time passes, classical conditioning operates to induce anxiety in the prisoner by a variety of simple cues rather than direct threats from his captors. Other than directly confronting his captors, the only means the prisoner has to reduce his anxiety and guilt is to adopt their beliefs and values. See Santucci & Winokur, supra, at 15-16.

logical stresses due to sleep deprivation, harsh prison conditions, and isolation produce disease, malnutrition, mental dullness, depression, and delirium. It is in this state that the prisoner undergoes interrogation. The prisoner, "undergoing an ordeal which is profoundly unpleasant and apparently endless, is highly motivated to seek some end to his misery. . . . [And he is vulnerable to rationalizations and contrived definitions that allow him to make an ostensible confession. . . ."] Hinkle & Wolff I, supra, at 607-08. In short, this theory postulates that because the prisoner is in a state of mental and physical exhaustion, his capacity to evaluate decreases, and his desire "to make whatever adjustments in relation to his environment which are necessary increases." Hinkle & Wolff II, supra at 170. Empirical support for this theory is, however, insubstantial. See E. Schen, supra note 1, at 204-05.

Coercive persuasion has also been explained in traditional psychoanalytic or Freudian terms. See Moloney, Psychic Self-abandon and Extortion of Confession, 36 Internal J. Psycho-Analysis 53 (1955). According to traditional psychoanalytic theory, the personality is a three-part structure: id, ego, and superego. The id, the mental province containing everything inherited, seeks to satisfy instinctual (e.g. hunger, thirst, sex) desires. The ego, an outgrowth of the id, is in direct contact with the external world. Its function is to delay the id's desire for immediate discharge of tension until the appropriate object and environmental conditions are present. Thus, the ego regulates the id with reference to reality. The superego is that component of the personality that internalizes parental or societal standards. Its primary functions are "(1) to inhibit the . . . id . . . , (2) to persuade the ego to substitute moralistic goals for realistic ones, [i.e. be the conscience], and (3) to strive for perfection." C. Hall & G. Lindzey, Theories of Personality 32-35 (2d ed. 1970). Using these psychoanalytic principles Moloney suggests that during great stress a person with a strong superego will convert to the captor's beliefs because the ego is no longer able to direct him toward the reason and sanity of the real world. By obeying the captor's orders, the individual "merely acceded to the only authority which any longer seems real to him, a parasitic superego." Moloney, supra at 58. In short, the authority of his captors serves as the stern father who was so instrumental in developing his strong superego, thereby causing the prisoner to pursue his captor's beliefs as his moralistic goals.

Lifton has presented a second psychoanalytic theory of coercive persuasion. R. Lifton, supra note 1, at 65-65. Because he has integrated sociological principles into his theory, his approach is much broader than the traditional Freudian analysis. Lifton argues that the "thought reform" process begins with emotional assaults on the individual. These assaults create a guilt anxiety that causes the individual to feel in total conflict with the external environment. Contrasting sharply with these periods of assault are periods in which the captors show extreme kindness to the prisoner. This kindness gives the prisoner hope that if he changes his anxiety will end. The captors' constant demand for confession also assumes a powerful role in the thought reform process. "Such demands are made possible not only by the ubiquitous human tendencies toward guilt and shame but also by the need to give expression to these tendencies. . . . Confession becomes a means of exploiting . . . these vulnerabilities." Id. at 425. Thus, confession initially brings satisfaction by providing an opportunity for "emotional catharsis and for relief of suppressed guilt feelings." Id. at 426. When the captors continue to demand confession, however, the captive finds it impossible to strike a balance between worth and humility. In the next stage, the captors broaden the prisoner's guilt so that he views not only his past acts, but also his past identity, as evil. By placing the prisoner in such an anxiety state, the captors begin a process of re-education in which the prisoner adopts the captors' beliefs and loyalties as part of a new identity.

Socio-psychological theories assert that Chinese coercive persuasion operated by intentionally weakening prisoner of war group social structures and casting doubt on each person's professional and personal identity. E. Schen, supra note 1, at 221-33. Thus, the prisoner sought a new identity for which he could obtain social approval.
One cannot do as Delgado suggests: pretend it is not there. If the law creates such a fiction in some cases by ignoring the intent of the actor because of dismay over the way he came to have it, there is no logical reason to limit such inquiry. Delgado's mens rea thesis, therefore, violates his own goal of logically but minimally extending the law. His concept would constitute an abrupt, unprecedented, and potentially unlimitable change in legal doctrine.  

2. Actus Reus

The second component of criminal responsibility—actus reus—may also be looked to for guidance in determining what society considers to be blameworthy conduct. Although mental choice is, as a philosophical matter, conclusively presumed, the law does not presume bodily choice. To be punishable, social harm must be the result of a voluntary act, a voluntary movement of a muscle in the body. 81

Because the captors monopolized the prison conditions, they made it probable that the prisoner would find such an identity in the "new man" modeled by the captors.

Another theory that provides a possible explanation for coercive persuasion is that of operant conditioning. Skinner, its major proponent, believes that all human behavior is controlled by positive and negative reinforcements. B. Skinner, Science and Human Behavior (1953). Reinforcement following a response increases the probability of that response occurring in the future. Behavior changes as the individual attempts to obtain the reward that he receives when he shifts to the new behavior. It would seem that because a captor controls all external rewards, he could use operant conditioning to make his captive behave as he wishes. One author has suggested that whereas bodily functions and emotions may be manipulated by Pavlovian classical conditioning, new ideas and attitudes are more a result of "instrumental" or operant conditioning. See P. London, Behavior Control 85-94 (1969). See also E. Schein, supra note 1, at 209.

The theory of "cognitive dissonance" may also explain coercive persuasion. See generally L. Festinger, A Theory of Cognitive Dissonance (1957). This theory assumes that whenever an individual simultaneously holds two cognitions (ideas, attitudes, beliefs, or opinions) that are psychologically inconsistent, dissonance occurs. When dissonance is present, an individual is motivated to behave in a way calculated to restore consonance. The most common dissonant situation is when an individual performs an act inconsistent with his beliefs or values. One successful means of reducing dissonance is to alter one's personal beliefs to conform with one's public behavior. According to this theory, a prisoner's confession would be a dissonant act and a subsequent attitude change in favor of the ideals of his captors would be the act restoring consonance. See E. Schein, supra note 1, at 241-44.

A final view, proposed by Schein, is that during the process of captivity, prisoners seek methods of understanding their unpleasant conditions. Id. at 233-36. As a consequence they are receptive to information they ordinarily would reject. Gradually, they acquire a "genuine understanding" of why their captors believe they are guilty of moral crimes. Id. at 236. Realizing also that their preconceived expectations of severe torture at captors' hands did not generally occur, they are more willing to evaluate matters in a fashion more favorable to their captors' viewpoints.

80. See notes 125-136 infra and accompanying text.

Although all people can choose, that does not mean that on a particular occasion a person did choose.

It is critical to understand, however, that the term "voluntary," as applied to movements of the body, does not mean that the actor must consciously desire or even be aware that he has willed a movement of a particular muscle. It is enough that it results from an order of the cortex in the brain. What is actually implicated by the concept of involuntariness is the idea that the conduct is inappropriate—that is, conduct not required to do that which the actor believes himself to be doing. Thus, reflexive and unconscious acts are involuntary. Conduct controlled by the subconscious, however, is treated as voluntary. The requirement of a voluntary act, like the requirement of mens rea, serves to prevent punishment where the actor had no control over his actions and, therefore, exercised no choice.

All theories of coercive persuasion support the view that the conduct of a coercively persuaded actor is voluntary as so defined. No theory suggests that the conduct is either reflexive or committed while unconscious. Rather, the behavior results from orders of the brain and is entirely appropriate; the act is required to do that which the actor believes he is doing.

Although Delgado expressly concedes that coercively persuaded individuals act voluntarily, he suggests that coercive persuasion is analogous to hypnotism. He notes that the Model Penal Code and one state, California, recognize hypnotism as a valid defense premised on involuntariness. There is good reason why such a defense is accepted by so few jurisdictions. Although scientific understanding

82. See H.L.A. Hart, supra note 72, at 101-02; M. Hyde, Brainwashing and Other Forms of Mind Control 97-98 (1977).
83. M. Bassioni, supra note 45, at 164; see M. Hyde, supra note 82, at 12.
84. H.L.A. Hart, supra note 72, at 105.
86. The concept of the subconscious is comparatively new. The law of the "act" precedes it by centuries. However, under the current meaning of the term "act," see notes 81-85 supra and accompanying text, such conduct is not "involuntary." It is appropriate conduct. Likewise, it is voluntary in a physiological sense. See M. Bassioni, supra note 45, at 165.
87. See note 79 supra.
88. Delgado, supra note 14, at 11.
89. Id. at 13.
of hypnosis is greater than that of coercive persuasion, it is still seriously incomplete. In 1961, experts were found to be undecided on the extent to which people could be convinced by hypnosis to commit criminal acts. A recent survey of 215 scientific studies indicated that although some "enhancement of hypnotic-like behavior as a consequence of induction" may exist, such enhancement is minimal, and "this is the least resolved of the [various] issues." This survey supports the belief that personal traits are much more important than hypnotic induction in making one suggestible.

As a result, it is difficult to distinguish hypnosis cases from countless other examples of suggestiveness: A yawns, B follows; likewise, some people simply follow other people's leads, almost unthinkingly, because of friendship or other psychological or sociological dynamics. In such cases, either we say that choice is present—one chooses to follow, or chooses not to think for oneself—or we admit that due to personal or sociological factors beyond the person's control, many or all people are so suggestible as to lack real free will. This, however, is a determinist argument, and is therefore antithetical to current legal values. The coercive persuasion-hypnosis analogy, then, does not serve as a logical extension of the law, but as an abrupt, unlimited change.

3. Excuses

The final societal standards of blameworthiness against which Delgado's coercive persuasion defense may be measured are the currently recognized excuses of insanity and duress. As with the mens rea and actus reus requirements, these excuses condition criminal responsibility on the presence or absence of meaningful choice. Insanity involves an internal circumstance—disease of the mind—that substantially or totally impairs the actor's cognitive capability. He must either be unaware of what he has done, or unaware of the wrongfulness of his conduct; alternatively, the disease must substantially

94. Id. at 20.
95. See, e.g., State v. Woods, 48 Ohio St. 2d 127, 357 N.E.2d 1059 (1976) (defendant easily influenced; came under control of another).
96. "There was nothing to prevent [the ghetto child] . . . from thinking, except that he did not feel like it . . . . Man's free will consists of a single action, a single basic choice to think or not to think." Branden, supra note 53, at 280-81.
97. This is the M'Naghten test of insanity. Under this test, the defendant is excused if it is clearly proved that . . . the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong.
impair his volitional capabilities, so that he cannot effectively control his conduct. Under these circumstances, talk of choice is meaningless. A person has no choice when disease causes him to lose all touch with reality or to be unable to conform to reality. Thus, blameworthiness is absent when insanity is proven.

Duress involves an external circumstance—an imminent threat of death or great bodily harm to the individual or a family member—that severely limits the actor's choice. Choice is greater in a case of duress than in a case of insanity, because the actor comprehends the alternatives and has the ability to not respond illegally. Nonetheless, practical choice is eliminated by the deadly threat. Again, the actor is blameless.

The case for exculpating the coercively persuaded defendant in the manner suggested by Delgado is far less compelling. First, he goes so far as to permit the defense not only in cases in which the person

---


This is the so-called "irresistible impulse" or "control" test, which is used only in conjunction with the M'Naghten test. See note 97 supra. First applied in Alabama in Parsons v. State, 2 So. 564 (Ala. 1887), this test judges a person to be insane if he satisfies the M'Naghten test or "if, by reason of the duress of such mental disease, [the actor has] so far lost the power to choose between the right and wrong, . . . as that his free agency was at the time destroyed . . . ." Id. at 566. Five states have adopted this combined test. See State v. Smith, 223 Kan. 203, 217, 574 P.2d 548, 557 (1977) (list of states cited). In addition, 26 states and all but one federal circuit have adopted the American Law Institute (ALI) test, a modernized version of the combined M'Naghten and control test. See id. at 557; A. Goldstein, supra note 62, at 87. Virtually all jurisdictions in the United States, therefore, apply an insanity test based on M'Naghten or the control theories.

See Carter v. United States, 252 F.2d 608, 616 (D.C. Cir. 1957); H. Packer, supra note 28, at 132 ("We must put up with the bother of the insanity defense because to exclude it is to deprive the criminal law of its chief paradigm of free will."). The irresistible impulse test, see note 98 supra, obviously is based on a lack of choice. Thirty-one states apply either the irresistible impulse or ALI test in which negation of volition is included as an element. See id. Even the pure M'Naghten test involves an element of lessened self-control, because the person lacks awareness of the criminality of his conduct. See A. Goldstein, supra note 62, at 45. Moreover, courts have at times permitted explicit evidence of an actor's lack of self-control in a M'Naghten jurisdiction because such evidence may generate reasonable doubt in the minds of jurors regarding the M'Naghten elements. See id. at 54-55.

See note 68 supra.

Where the actor is ordered to murder another, the defense is inapplicable, see note 68 supra, although the degree of choice is equally limited, because society believes that a person "ought rather to die himself, than kill an innocent." Director of Pub. Prosecutions v. Lynch [1975] A.C. 653, 672 (Lord Morris of Borth-y-Gest, quoting 1 M. Hale, Pleas of the Crown 51 (London 1678)). In such circumstances, a person is thought to be morally blameworthy for succumbing to the threat.
is indoctrinated to commit crimes but also in cases in which the defendant is the victim solely of attitudinal indoctrination and is free to choose the means by which to further his new ideology. As a result, Delgado would exculpate obviously morally blameworthy persons.

This is demonstrated by consideration of a few hypothetical situations: $D$, a chronic polluter, involuntarily taught the virtue of ecology by $X$, is transformed into an ecologist. Released from the captive situation, $D$ decides that the best way to promote his new creed is to kill human beings, because they pollute the waters and the lands. Proud of his new faith, aware of the wrongfulness of his conduct, $D$ commits mass murder. Under Delgado's definition of the test, and pursuant to his earlier stated unprovable premise, $D$ would be acquitted because he is blameless. Such a result cannot be defended in light of current jurisprudential thought. The fact that $D$'s views are causally connected to the indoctrination is as legally irrelevant as the fact that parental influence on $D$ may have caused him to initially become a polluter, thus making him a target of $X$'s indoctrination. All that matters under our current criminal justice system is that $D$ voluntarily chose to act in a way he knew was immoral and illegal. The requisite blameworthiness is present.

Consider also a situation in which $D$ is indoctrinated forcefully by $X$ to believe that homosexuality is sinful, that homosexuals are not only immoral but are constant proselytizers of their "sexual sin," and that if allowed to do so, they tend to convert people to their immoral beliefs. $D$ then murders every homosexual he meets. $D$'s counter-indoctrination of homosexuals might have been predicted as a result of his indoctrination by $X$, but murder would not be a reasonably foreseeable outcome. The decision to commit the crime was again solely that of $D$. Would Delgado suggest that $D$ be acquitted? His proposed defense says yes; society would, the author trusts, say no.

The only way, then, in which Delgado's defense could be framed so as to avoid exculpating morally blameworthy actors is if it applies only to cases involving crime indoctrination, for example, where $D$ is

103. See note 33 supra and accompanying text.
104. See note 31 supra and accompanying text.
105. See note 25 supra and accompanying text.
106. See notes 39-40 supra and accompanying text.
107. Furthermore, there is no way to punish $X$ for the mass murders because $X$ did not solicit the crimes. Although he aided in their commission in a causal fashion, guilt by complicity is only possible if he intended the crime to occur. See W. LaFAVE & A. SCOTT, supra note 45, § 64, at 502. Nor can he be treated as the perpetrator, because $D$ is not an innocent dupe. See note 67 supra.
108. Here, too, $X$ would not be guilty of the murders. See note 107 supra.
specifically indoctrinated to kill the polluters or homosexuals. Even so narrowed, the case for those coercively persuaded to commit crimes is less compelling than for those entitled to current excuses. Compared to the insane individual, the coercively persuaded actor's choices are far more substantial, and hence his blameworthiness commensurately greater. Since, as Delgado concedes, the coercively persuaded actor is aware of the wrongfulness of his action, choice is cognitively present. Delgado does not suggest that the actor is volitionally incapable of conforming his conduct to the law.

The case for the coercively persuaded defendant is also weaker than that of one acting under duress. A loaded and cocked gun pressed to one's head presents more substantial loss of choice, and a clearer example of blamelessness, than do the conditions undergone by religious cultists or Patricia Hearst. In the latter type of case, the person may experience a harsh environment, and thus have limited choice, but the residual options cannot be equated to the alternatives available to an actor under threat of immediate death.

B. Adequate Limitations

Even if Delgado could show that some coercively persuaded actors should be considered blameless, his defense would still be open to challenge on the ground that it does not impose clear and just limitations on the excuse's applicability. This failure forces society to choose between two alternatives, both of which are antithetical to current concepts of criminal responsibility. It must either allow some morally blameworthy actors to be excused, while not excusing some morally blameless actors, or accept a theory of criminal responsibility that embraces a determinist view of society.

Existing excuses are framed in a narrow and a relatively clear fashion so as to enable the trier of fact to make an uncomplicated moral judgment. For example, limitations to the duress defense have the effect of making the moral issue comparatively clear: The require-

---

109. Proof of crime indoctrination would be more difficult to obtain than of ideology indoctrination. Was Patricia Heart indoctrinated to commit bank robbery, for example, or was she only ideologically indoctrinated, then told she was free to leave, whereupon she voluntarily chose to stay with her captors-turned-comrades and participate in discussion of the bank robbery? Or, is a “religious convert . . . soliciting donations for nonexistent social programs,” Delgado, supra note 14, at 5, because of crime indoctrination or ideological indoctrination? The line between crime indoctrination and crimes committed because of ideology indoctrination, clear in theoretical terms, is irremediably blurred in evidentiary terms.

110. Delgado, supra note 14, at 11.

111. Delgado does state that thought reform may impair behavior controls. Id. at 6 n.29. To be on equal footing with insanity, however, resulting impairment must be total or substantial.
ment of imminency ensures that the danger is real. The requirement that the threat be to oneself or to relatives and not to strangers, and that it be one of lethal or great bodily harm rather than to reputation, serve to make the threat more easily quantifiable, more tangible, so that jurors can easily evaluate the facts and make the necessary moral judgments. A jury can understand the gun to the head. Each juror can decide whether such a threat would be sufficient to coerce commission of a crime. The insanity defense is admittedly more amorphous, but it does require a disease of the mind: some condition sufficiently clear and defined that an expert can describe it and its effects with relative particularity. The test is narrow in order to ensure that the defense will not succeed unless it is accompanied by visible and gross symptoms. Present excuses, then, have an abruptness to them. Rather than consider degrees of disease or differing degrees of threat, the law has allowed only those defenses that fall within specific, reasonably identifiable categories in which choice is obviously substantially limited.

This necessary clarity is absent in the coercive persuasion defense Delgado proposes. He cannot, himself, state its essential elements. Instead, he lists factors that, when most are present, indicate that the defense is appropriate. In contrast to the exactitude of the duress and insanity tests, his test is imprecise. How a jury should apply the defense is unclear. Is each factor equally important? Can a factor be partially present? For example, how can a jury decide if a defendant's mental state "represents a sharp departure from

---


113. See note 68 supra.

114. The law is unclear regarding what diseases qualify. See G. Fletcher, supra note 46, § 10.4.4, at 839-43. Mental illnesses other than those labeled "psychoses" are rarely interposed as a defense. See A. Goldstein, supra note 62, at 33. Other diseases, however, including neuroses, also qualify. H. Weihofen, Mental Disorder As A Criminal Defense 119 (1954). It appears that if a psychiatrist can pigeonhole the actor's symptoms in a named disease, and discuss the parameters of that disease, the issue of insanity will go to the jury. Id. at 48. See also H. Weihofen, The Urge To Punish 85-99 (1956).

115. United States v. Moore, 486 F.2d 1139, 1180 (D.C. Cir.) (Leventhal, J., concurring) ("The criminal law cannot 'vary legal norms with the individual's capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect that may establish irresponsibility.'") (quoting Model Penal Code § 2.09, Comment at 6 (Tent. Draft No. 10, 1960)), cert. denied, 414 U.S. 980 (1973); A. Goldstein, supra note 62, at 19, 46, 63 (tests expressly apply only to those who obviously have "lost touch with reality"); actors exempted only "if they obviously did not know what they were about," only if there are manifest "visible and gross" symptoms).

116. See Delgado, supra note 14, at 19-22, discussed at note 31 supra and accompanying text.
[that] individual's ordinary mode of thinking"?

Must one begin as an atheist before becoming a religious cultist, or would a prior affiliation with mainstream Christianity be sufficient? Would previous adherence to the tenets of a strict fundamentalist sect serve to disqualify? The defense simply lacks the necessary precision that society rightly requires of all of its exculpatory provisions.

More basically, Delgado's factors, even in combination, lack adequate contours. By permitting the defense when there is no disease of the mind, he takes the defense outside of the convenient medical model. Similarly, because the threat is more psychological than physical, it is not susceptible to needed measurement. In fact, depending upon the scientific theory one accepts, it is not altogether clear that there is any threat with coercive persuasion. It may be that bad conditions alone cause the indoctrination, that intellectualization without threats is sufficient to explain it, or that a quasi-Pavlovian setting results in the actor feeling a threat that is not actually present. Without a medical model or a quantifiable threat, and in the face of conflicting scientific theories as to how the process works, sufficient limits to the defense are absent.

Delgado argues, however, that suitable line drawing is possible with his defense. He notes that there are certain external manifestations of coercive persuasion that will aid in identifying when it is appropriate to apply the defense. First, coercively persuaded individuals exhibit dissociation, memory loss, confusion, and the like; second, there will be external evidence of imprisonment, isolation, sensory deprivation, interrogation, physiological depletion, and terror. The defense can be limited, Delgado claims, to cases involving such evidence.

Not even these external manifestations provide assurance that only blameless actors will be excused, however. One can easily envision a not-so-unlikely hypothetical situation that exemplifies the problem: A prison inmate is put in solitary confinement in a small dank, dark cell and fed little or nothing for an extended period of

117. Id. at 20.


It would be possible, of course, to permit a general defense that one's will was overborne, either by internal psychic pressures or by external force or necessity, and to determine individual cases in light of their special facts. One might reject such a course, however, on the ground that the application of the defense would be highly uncertain and would decrease the law's general deterrence by encouraging people to succumb to strong impulses they would have otherwise resisted.

Id. at 963.

119. See note 79 supra.

120. Delgado, supra note 14, at 26-27.
time. Upon his release from solitary confinement, he immediately comes under the influence of a fellow prisoner who speaks to him about a prison "religion" calling for the murder of guards. Would Delgado, or society, permit a coercive persuasion defense if the prisoner kills a guard? Although the factors for the defense arguably are present, it is unlikely that society would permit the prisoner's acquittal.

If Delgado requires that these external manifestations be present before applying the defense, his proposal may be criticized for an entirely different reason. It seems morally unexceptionable that excuses should be framed so that equal cases are treated equally. Indeed, Delgado asserts that a defense should not sacrifice individuals "for the sake of preserving an artificial conceptual simplicity." His defense, however, is far guiltier of artificial simplicity than is present law, because it fails to treat morally equal cases equally.

As discussed earlier, duress and insanity are limited to cases of substantial choice reduction. Society excuses the actor when substantial choice reduction is caused by a disease or defect, or by a lethal threat. No doubt certain mental conditions less substantial than disease and certain nonlethal threats also cause a diminution, albeit of lesser degree, of the actor's available choices. Society has

121. This is not an unheard of event. See, e.g., Wright v. McMann, 387 F.2d 519 (2d Cir. 1967) (prisoner kept for 33 days in filthy cell, without adequate heat, nude for 11 days, forced upon threat of violence to stand at military attention, deprived of sleep); Krist v. Smith, 309 F. Supp. 497, 498 (S.D. Ga. 1970), aff'd per curiam, 439 F.2d 146 (1971) (prisoner confined in nine foot by five foot cell, without sufficient food, exercise, windows, or company except cockroaches). See generally Comment, Solitary Confinement—Punishment Within The Letter of The Law, or Psychological Torture? 1972 Wla. L. Rev. 223. See also Minneapolis Tribune, Sept. 16, 1978, § A, at 1, col. 2 (reporting CIA spokesman's testimony that CIA kept a Soviet defector in a secret vault camouflaged by a "fake" building for three years, watched him continuously, prevented him from reading or keeping track of time, engaged in "hostile interrogations" designed to elicit a confession that he was a KGB agent, and considered killing him or "render[ing] him incapable of telling a coherent story").


122. Delgado, supra note 14, at 27.

123. See notes 97-102 supra and accompanying text.
chosen, however, to limit the excuses to the more severe situations in the belief that extension to other cases might make the excuses limitless.\textsuperscript{124} A line has therefore been drawn: exculpation is permitted only for "diseases" and "imminent lethal threats" because society has found that choice is substantially limited in such cases, and not so in lesser situations. Such line drawing, while somewhat artificial, is at least fair because it separates the strong cases from the weak.

Delgado replaces this scheme with an artificiality far worse. He separates potentially \textit{equal} cases from one another, so that defendants with arguably similar moral claims are treated unequally. He would excuse a defendant who is the victim of "abnormal influences," such as physical depletion, prolonged isolation, and interrogation, but would deny the defense to a person who presents some of the same symptoms of choice reduction, but whose symptoms are not the result of abnormal influences.\textsuperscript{125} Conditions such as life-long poverty, drug addition, a broken home, peer group pressure, and lowered self-esteem might demonstrate that a ghetto inhabitant's choice in committing a criminal act was also substantially reduced, yet Delgado's defense would not apply.\textsuperscript{126}

Delgado offers no cogent explanation why one should prefer the artificial simplicity of his proposal over the present law of excuses. The morally relevant factor is choice reduction, not exposure to "abnormal influences." If one draws the line as he does, exculpating one form of choice reduction and ignoring others, one is obliged to explain why cases potentially\textsuperscript{127} equal\textsuperscript{128} on their face receive unequal treatment.

\textsuperscript{124} Low I.Q. qualifies as a disease under the insanity test. \textit{See}, \textit{e.g.}, \textit{State v. Johnson}, 233 Wis. 688, 290 N.W. 159 (1940); A. Goldstein, \textit{supra} note 62, at 48; H. Weihofen, \textit{Insanity as a Defense in Criminal Law} 94-96 (1933). Sub-psychoses also qualify. \textit{See} note 114 \textit{supra}. Therefore, only comparatively mild abnormalities would seem to be totally eliminated from consideration. In such cases, the substantial volitional or cognitive disabilities the defense requires are not apt to be present. Furthermore, a "disease" is required because in such cases the actor shifts responsibility to something else—the disease. A. Goldstein, \textit{supra} note 62, at 18-19. The actor did not choose to act as he did; the disease caused his behavior. \textit{See} note 115 \textit{supra}.

\textsuperscript{125} As to duress, see, for example, \textit{State v. Toscano}, 74 N.J. 421, 434, 378 A.2d 755, 761 (1977) (neither threats of slight injury nor threats of destruction to property coercive enough to overcome a person's will).

\textsuperscript{126} \textit{See} notes 31-34 \textit{supra} and accompanying text.

\textsuperscript{127} Delgado's suggested test would require that the defense be inapplicable since only a few, if any, of his suggested factors would be present. \textit{See id.}

\textsuperscript{128} Admittedly, most "environmental" cases will involve facts less severe than would cases of coercive persuasion. What is troubling, is that Delgado's defense excludes such a claim in \textit{all} cases, no matter how compelling.

\textsuperscript{128} The case for exculpation of the ghetto defendant can at times be even stronger than for the coercively persuaded defendant, such as a cultist or Hearst. The conditions under which the ghetto person lives last longer than an episode of tradi-
Delgado's defense, then, not only exculpates those who are blameworthy according to current standards and creates a test that is vague and difficult to apply, it also advocates the drawing of a new, morally doubtful line between criminal responsibility and blamelessness. There are only two ways to avoid such an unfair result: either reaffirm current law, which is strict but clear, or enlarge the coercive persuasion defense to include within its possible reach the full panoply of environmental influences. Such a defense would apply whenever the conditions, not merely threats or abnormal influences, affecting the actor were so great that a person of ordinary firmness in the actor's situation would have committed the crime. With the adoption of this test, however, determinists virtually win their case. Abundant scientific evidence demonstrates that the ordinary person will reject his pre-existing moral values to obey antisocial orders even under comparatively noncoercive circumstances. The person of "ordinary firmness" is not very firm. Likewise, credible evidence shows that factors external to the actor serve as powerful influences, if not determinants, in a person's behavior. For example, parents who batter their children usually were battered in their youth; children
of alcoholics are significantly more likely to have serious social problems than are those of nonalcoholic parents;\textsuperscript{133} juvenile prostitutes often are victims of physical and sexual abuse at home;\textsuperscript{134} some children can be made more susceptible to committing violent acts by the media;\textsuperscript{135} and, of course, the bitterness and conditions of ghetto life are conducive to crime.\textsuperscript{136} In short, if a defense based on reduced choice is to be created that treats equal cases equally, it must permit persons to present their entire life histories as part of a "blamelessness" defense to crime.

Thus, we face a quandary: either we leave the law as it is, or we permit a defense which, if applied to all equal cases, would allow "morally blameless" but possibly dangerous persons back into society. If the latter path is followed, of course, society would have little choice but to throw away current jurisprudential underpinnings and incarcerate people on solely utilitarian grounds. Such a result may appear to some to be logical, even appropriate, but it is certainly revolutionary. Delgado, and other advocates of a coercive persuasion defense, should acknowledge that this is the real choice.


\textsuperscript{134} Sixty-six percent of juvenile prostitutes interviewed in Minneapolis, Minnesota, had been physically abused by parents; 33% sexually abused. Minneapolis Tribune, Aug. 18, 1978, § A, at 1, col. 1 (reporting results of study by Minnesota Task Force on Juvenile Prostitution).
