January 1978

Have the Prison Doors Been Opened - Duress and Necessity as Defenses to Prison Escape

Wayne H. Michaels

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol54/iss3/12

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
HAVE THE PRISON DOORS BEEN OPENED?—DURESS AND NECESSITY AS DEFENSES TO PRISON ESCAPE

Traditionally, the courts have been exceedingly reluctant to interfere with the internal operations of prisons. Instead, the courts have observed a “hands off” policy, primarily because of their fear of subverting prison discipline, their observance of the separation of powers doctrine, and their lack of expertise in penal matters.

In recent years, however, the violent atmosphere of the modern prison has attracted growing public attention, which has been reflected in a corresponding judicial involvement in penal affairs. Yet, while the courts increasingly have held that intolerable and inhumane conditions may be unconstitutionally cruel and unusual punishment, there has been, until very recently, no comparable acknowledgment of a prisoner’s right to escape from such conditions.

Thus, escapees from prison rarely have been able to invoke successfully common law defenses, including duress and necessity. The courts have feared that endorsement of any defenses to escape would lead to a “rash of escapes” rationalized by allegations of threats, assaults, and other prison horrors.

Within the last few years a number of courts have abandoned the orthodox majority position, and have held that some defense may be available to those defendants charged with escape from prison. The first few courts to do so acknowledged the availability of the defense of duress; the more recent cases have focused on necessity.

While the new trend towards recognition of these defenses now appears to be firmly entrenched in judicial doctrine, only a very few

3. Goldfarb & Singer, supra note 1, at 181-82.
4. Over twice as many violent crimes are committed in prison per capita as in society at large. Note, Duress and the Prison Escape: A New Use for an Old Defense, 45 S. CAL. L. REV. 1062, 1069-70 (1972) [hereinafter cited as A New Use].
5. See text accompanying notes 11-29 infra.
6. See text accompanying notes 80-146 infra.
8. See text accompanying notes 80-101 infra.
9. See text accompanying notes 102-146 infra.
defendants actually have succeeded in getting their defenses to the jury. Most defendants have been unable to satisfy the strict criteria which the courts have established to limit the availability of the duress and necessity defenses. The creation of these qualifications indicates that even those courts which are willing to acknowledge such defenses for prison escapees are reluctant to make those defenses more than minimally available.

The recent Illinois case of People v. Unger may have polarized the judiciary's approach to this issue. All previous cases had emphasized the severe limitations to any available defenses. Unger's approach, in contrast, was much more expansive; the necessity defense it made accessible was unrestricted by specific preconditions. It remains to be seen how extensively the Unger rationale will be followed.

This note will survey briefly the development of the recognition of a prisoner's constitutional right to be free from cruel and unusual punishment. It then will examine the common law defenses of necessity and duress and their applicability to prison escape cases. It confronted the issue of whether to establish the availability of the defenses of duress and necessity for prison escapees. Finally this note will examine the changing policy considerations underlying these decisions and consider the validity of the limited versus the expansive approaches to the availability of these offenses.

DEVELOPMENT OF PRISONERS' RIGHTS

The traditional attitude of the judiciary towards penal matters is expressed by a policy of judicial abstention referred to as the "hands off" doctrine. Correctional administrators have been given de facto autonomy to manage penal institutions as they have seen fit, and the courts have declined to review those policies. Some courts have gone so far as to deny that they have the power or the jurisdiction to examine the administration of penal institutions. Thus, prisoners have been denied a forum in which to assert their rights and voice complaints regarding prison conditions and prisoner treatment.

In recent years, however, the courts have come to recognize that the traditional "hands off" doctrine should not preclude examination of possible serious infringements of inmate rights. Much of the current

---

11. Goldfarb & Singer, supra note 1, at 181. Various formulations of the "hands off" doctrine are catalogued in Beyond the Ken, supra note 1, at 508 n.12.
12. See 60 AM. JUR. 2d Penal and Correctional Institutions § 45 (1972). Several commentators argue that the "hands off" doctrine is no longer viable. See, e.g., Goldfarb & Singer, supra
litigation has centered around the deplorable physical and emotional circumstances concomitant with prison life. These intolerable conditions have been assailed as violative of prisoners' constitutional rights. Recent challenges by inmates to prison conditions have focused on the eighth amendment, which prohibits "cruel and unusual punishment," and the vast majority of modern decisions have allowed review of prisoner complaints which establish the possible existence of cruel and unusual punishment. The courts increasingly have held that certain extreme conditions and practices in correctional institutions are indeed unconstitutional. Thus, the courts have found violations of the eighth amendment in the use of physical force, segregated confinement, inadequate medical treatment, and the denial of food.

The epidemic of homosexual assaults and rapes in prisons, and the inability of prison officials to contain this problem, have forced the courts to devote increasing attention to this aspect of prison life. While no case yet has held that a prisoner has a constitutional right to be free from homosexual assault, the courts have begun to recognize an

note 2; Note, Decency and Fairness: An Emerging Judicial Role in Prison Reform, 57 VA. L. REV. 841 (1971).

13. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.


15. In the leading case of Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (Holt II), inmates brought eight class action suits against the entire Arkansas penal system. In awarding the plaintiffs declaratory and injunctive relief the court stated that while confinement itself is not cruel and unusual punishment, it may be so under certain conditions: "Generally speaking, a punishment that amounts to torture, or that is grossly excessive in proportion to the offense for which it is imposed, or that is inherently unfair, or that is unnecessarily degrading, or that is shocking or disgusting to people of reasonable sensitivity is a 'cruel and unusual' punishment." Id. at 380.

16. Inmates of Attica Correctional Facility v. Rockefeller, 453 F.2d 12 (2d Cir. 1971) (pounding and beating with sticks and belts, dragging along the ground, marking "X"s on prisoners' backs, burning with matches, spitting, racial slurs); Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971) (chained and handcuffed within cells without release to eat or urinate).

17. Wright v. McMann, 321 F. Supp. 127 (N.D.N.Y. 1970) (prisoner put in solitary confinement because he failed to sign a "safety sheet" before commencing work in prison shop—to show he had read the safety rules); Fulwood v. Clemmer, 206 F. Supp. 370 (D.D.C. 1962) (Black Muslim segregated over two years because he violated "disorderly conduct" regulation by exercising his right to preach religious tenets which many inmates found offensive).

18. Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) (guards forced prisoner to walk two weeks after surgery for infantile paralysis, which required long convalescence with as little movement as possible, in complete disregard of hospital personnel warnings); Hirons v. Director, Patuxent Inst., 351 F.2d 613 (4th Cir. 1965) (prisoner was refused surgery on jaw long after the doctor had recommended that an operation take place within the "very near future").


21. See 36 ALB. L. REV. 428, 436 (1972); Goldfarb & Singer, supra note 1, at 191.
inmate's right to personal security. For example, in *Coffin v. Reichard*, a case involving assaults on a prisoner by inmates and guards, the Court of Appeals for the Sixth Circuit enunciated the currently acknowledged test against which prisoners' rights are measured:

A prisoner retains all rights of an ordinary citizen except those expressly or by necessary implication taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion.

While the court did not specifically delineate the boundaries of its notion of personal security, the implication is clear that such a right may include freedom from sexual attack.

Moreover, affirmation of this right additionally may impose a corresponding state obligation. In the recent case of *Gates v. Collier*, the Court of Appeals for the Fifth Circuit affirmed an injunction against an array of unconstitutional conditions and practices in the maintenance and operation of the Mississippi State Penitentiary, including the failure of prison officials to protect the inmates against physical abuses by other inmates. The court noted that since the prisoners had a civil right to personal security, a correlative duty was imposed upon the prison administration to protect the inmates' rights.

Whether the state's failure to provide that protection offers the prisoner a constitutional justification for escape has not yet been deter-

22. 143 F.2d 443 (6th Cir. 1944).
23. Id. at 445.
24. Consider the following argument for constitutional protection against homosexual assault:

Realizing that the concept of cruel and unusual punishment has been greatly expanded and is supposed to evolve with the standards of decency of a maturing society, it seems inconsistent that forced homosexual relations are permitted to exist. Basic to the dignity of man is the personal integrity of his body. Conditions which force a man to submit to undesired sexual conduct are both mentally and physically degrading. Applying the logic used in *Holt* [*Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970) (Holt II)*] and in *Hamilton* [*Hamilton v. Schiro, Civil No. 69-2443 (E.D. La., June 26, 1970)*], the confinement itself under these shocking conditions may violate a prisoner's eighth amendment rights.


26. Among the other unconstitutional conditions the court found were the use of milk of magnesia as corporal punishment; handcuffing to the cells for long periods; confinement in dark holes without clothing, bedding, or toilet articles; inadequate food and heat; and toilets that backed up and deposited human wastes in the cells. 501 F.2d at 1306.

27. Regarding prison officials' liability for monetary damages to inmates assaulted by other prisoners, *see* *Note, Inmate Assaults and Section 1983 Damage Claims*, 54 CHI.-KENT L. REV. 595 (1978).
Defendants who attempt to justify their escapes on such constitutional grounds face two imposing obstacles: the courts' lingering reluctance to scrutinize prison operations, and their aversion to deciding constitutional issues.

The United States Supreme Court so far has declined to address this problem. Presently, prisoners are more likely to defend their escapes successfully with common law defenses such as duress and necessity, rather than constitutional arguments, particularly where homosexual assaults which prompt the escape occur merely as isolated incidents and thus are less likely to be considered to reach the level of cruel and unusual punishment.

**DURESS AND NECESSITY**

Confusion and misunderstanding have surrounded the common law defenses of necessity and duress. The courts and state legislatures have been inconsistent in their enunciation and application of these defenses. Numerous states have duress statutes, while only a few states provide a distinct codification of the necessity defense.

28. One argument supporting such a justification is that since escape is generally defined as voluntary departure from lawful custody, see Note, A Reexamination of Justifiable Escape, 2 NEW ENG. J. PRISON LAW 205, 252-54 (1976) [hereinafter cited as Reexamination].


30. E.g., HAW. REV. STAT. § 703-5 (1968) provides:

No person shall be held criminally responsible for any act, to the doing of which he is compelled by force which he cannot resist, or from which he cannot escape; and no one shall be able to justify himself against a charge of his doing an injury to another, by showing the threat or imminent danger of an equal or less injury to himself.

For a thorough analysis of applicable state statutes, see Note, A Reexamination of Justifiable Escape, 2 NEW ENG. J. PRISON LAW 205, 252-54 (1976) [hereinafter cited as Reexamination].

31. E.g., ILL. REV. STAT. ch. 38, § 7-11 (1973) provides:

A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the
The defense of duress generally excuses one from criminal punishment for performing unlawful conduct if he was coerced to do so by the use of, or threat to use, unlawful force against himself or another, which a person of reasonable firmness would have been unable to resist. Necessity, in contrast, provides a defense for otherwise unlawful conduct if the actor reasonably believed the conduct necessary to avoid a greater harm to himself or another.

The two defenses have three significant features in common. First, neither defense is applicable to murder; thus, both are distinguishable from self-defense. Second, the actor must not have been at fault in creating the situation from which the threat arises. Finally, the threat must be present, imminent, and impending; a threat of future harm is insufficient.

Two important factors distinguish the two defenses. The first is that duress traditionally involves another human being who coerces the actor to perform certain conduct, whereas necessity has been limited historically to such non-human forces as acts of God and unavoidable accidents. Because of this requirement, most prison escapees, until very recently, have grounded their defenses upon duress and have disregarded necessity.

imminent infliction of death or great bodily harm, if he reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct.

ILL. REV. STAT. ch. 38, § 7-13 (1973) provides:

Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.


See generally HALL, supra note 32; PERKINS, supra note 32, at 956-61; WILLIAMS, supra note 32, at ch. 17.

34. The defense is sometimes defined as excluding capital offenses, which may include other crimes such as rape. This definition could cause confusion in some states because of the abolishment and reinstatement of the death penalty.

35. Self-defense excuses the killing of the threatener. In contrast, duress and necessity would involve the killing of an innocent third person. Public policy forbids such killing, even to save one's own life. See, e.g., Regina v. Dudley, [1884] 14 Q.B.D. 273, in which the victims of a shipwreck were found guilty of killing a passenger in their lifeboat for food though all passengers would otherwise have died before rescue.

36. See PERKINS, supra note 32, at 951-61.

37. Id.


NOTES AND COMMENTS

The second, and more significant, distinction between duress and necessity emerges from the basic nature of each defense. Duress is founded upon the theory that some compulsion excuses the actor from blame in a particular case, although the actor admits the wrongfulness of his act. In effect, the actor is excused, but the act itself is not condoned. Indeed, the coercer is criminally responsible for that act.

Necessity, however, involves no actual coercion; there is merely a choice between two evils, one of which is the commission of the unlawful act. Because society prefers to avoid the greater evil, public policy sanctions the choice of the lesser of the two evils. In such a case, the actor is still responsible for the deed, but because of special circumstances society holds that the act is not wrongful, morally or legally. The act is not merely excused, it is justified.

Thus, a successful duress defense proves a lack of criminal intent, but a necessity defense establishes that there was no criminal act. While a judicial decision regarding duress focuses on the state of mind of a particular defendant and thus establishes no general rule, a recognition of the necessity defense creates a new rule of law, because the issue is the act itself. Necessity, in contrast to duress, acknowledges a right to escape.

EARLY CASES: DEFENSE REJECTION

The courts' traditional view that conditions of imprisonment do not provide justifiable grounds for escape is illustrated by People v. Whipple, a 1929 case in which the defendant argued that his flight from prison camp was necessitated by the unsanitary conditions of the camp and the brutal, inhumane treatment by prison officers. The California appellate court, citing previous authorities, refused to alter the settled policy of prohibiting escape defenses:

It is manifest that to allow a prisoner to decide whether the conditions justify him in attempting to escape would be destructive of the necessary discipline which must be maintained in any well ordered prison. . . . It is, unfortunately, possible for the conditions of imprisonment to be so unwelshome as to seriously imperil the health and


40. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 382 (1972) [hereinafter cited as LAFAVE & SCOTT].


42. 100 Cal. App. 261, 279 P. 1008 (1929).

life of the prisoner by exposure to infection and disease, and unhappily it is possible for prison guards to subject prisoners to abuses and serious physical injury unjustified by any disciplinary need. However, a prisoner who escapes for any such reason does so at his peril.\textsuperscript{44}

This attitude has prevailed in the judiciary until the last few years and probably remains the majority view. While the courts have found extremely unsanitary and inhumane prison conditions to be cruel and unusual punishment warranting injunctive relief,\textsuperscript{45} they have not recognized identical conditions as an excuse for self-help.\textsuperscript{46} Nor have they usually found sufficient justification for escape in the brutality or threats by guards\textsuperscript{47} or by other prisoners.\textsuperscript{48}

While \textit{Whipple} has come to stand for the rule that intolerable prison conditions do not justify escape, the case actually was decided on the narrow grounds that no statutory defense of necessity existed in California.\textsuperscript{49} The court interpreted the California Penal Code, which limits criminal offenses to those prescribed by statute,\textsuperscript{50} as precluding the availability of uncodified common law defenses. Thus, the court could not recognize a common law necessity defense.\textsuperscript{51}

Nevertheless, the dicta in \textit{Whipple} may be regarded as a cautious intimation that necessity might justify prison escape if conditions were so egregious as to outweigh the need for prison discipline. The court stated that “ordinary adverse circumstances will not present such a condition as will support a legal excuse for affecting an escape.”\textsuperscript{52} This and other qualifying statements in the opinion imply the possibility of exceptions to the rule. From the dicta emerges an expression of the court’s dissatisfaction with the rule and its uneasiness concerning the conflict between the prisoner’s plight and the need to maintain prison discipline.

44. 100 Cal. App. at 265, 279 P. at 1010.
45. See text accompanying notes 11-29 supra.
46. \textit{E.g.}, State v. Palmer, 45 Del. 308, 72 A.2d 442 (1950) (extremely bad food, inadequate medical treatment, inadequate recreation); State v. Cahill, 196 Iowa 486, 194 N.W. 191 (1923) (bugs, vermin, no furniture, toilet flushed over, inadequate bread and water); State v. Davis, 14 Nev. 439, 33 Am. Rep. 563 (1880) (vermin, filth).
49. California did have, and presently has, a broad duress statute which was not considered by the \textit{Whipple} court. See note 59 infra.
50. \textsc{Cal. Penal Code} § 6 (West 1972).
52. 100 Cal. App. at 263, 279 P. at 1009 (emphasis added).
and order. Nevertheless, the court felt compelled to sustain the traditional attitude of “hands off” prison matters. Thus, it submissively disclaimed its own authority and left the matter to the legislature.53

Forty years after Whipple another California appellate court rejected the applicability of both necessity and duress to prison escape. People v. Richards54 demonstrates that as recently as 1969 the traditional attitude towards prisoners continued to dominate judicial thought. Courts remained reluctant to scrutinize prisoner complaints and when forced to confront such problems consistently applied to prisoners a unique standard which denied them fundamental legal rights given to other criminal defendants.

Richards concerned a prisoner upon whom acts of sodomy had been committed. In spite of the potential dangers of “snitching”55 the defendant informed the guards of the assault. No action was taken by prison officials. Following the other prisoners’ subsequent discovery of the defendant’s actions, the defendant was informed that he was “marked to be killed.”56 Having exhausted all possibilities of receiving help from prison authorities, Richards felt his only remaining alternative was to escape, and he did so. In affirming the defendant’s conviction for escape, the court suggested that the defendant had indeed had another alternative—submission to sodomy.57

Citing Whipple extensively, the court summarily rejected the necessity argument because no such statutory defense existed in California. Nevertheless, in dicta, the court applied a rudimentary balancing test comparable to that of the necessity defense: whether the evil sought to be avoided is greater than the evil of the offense committed. The distressing conclusion was that sodomy was a less serious offense than escape from prison to avoid such humiliation.58

While the availability of the duress defense under California law

53. The court stated:
   [I]t is with very great reluctance that we admit that, under practically all of the authorities, the foregoing opinion states the established law . . . . The function of the court is to declare the law as it is, and we are not authorized to usurp the place of the legislature, which has the power to make laws, and the duty to make just laws.

100 Cal. App. at 265-66, 279 P. at 1010.


55. An informer, or “snitch,” has broken the most inviolate of “prison code” commandments, and is almost assured of reprisals by other inmates, regardless of the circumstances or reasons for his actions.

56. 269 Cal. App. 2d at 771, 75 Cal. Rptr. at 599.

57. Id. at 775, 75 Cal. Rptr. at 602.

58. The court stated, “The evil sought to be prevented is not only the escape of the prisoner in question, but also . . . the destruction of the general discipline of the prison.” 269 Cal. App. 2d at 778, 75 Cal. Rptr. at 604.
was acknowledged, the court effectively precluded any practical applicability of the defense to escape by maintaining the common law rule that the menacing force must compel the actor to commit the alleged criminal act, that is, the escape. This, of course, is never the situation where the escapee actually is being forced to submit to homosexual acts. Such an interpretation by the Richards court was not required by the California statute, which merely excuses the offense if the defendant has reasonable cause to, and does, believe his life will be in danger if he refuses to commit the offense. Evidently, the court was attempting to restrict the use of the duress defense in order to discourage future prison escapes.

The duress defense was also rejected upon grounds of the defendant's failure to establish a key element of the defense: that the threat to the defendant was present and imminent. This requirement has been used repeatedly to defuse contentions of duress. Rarely are the assailants actually in pursuit of the defendant when he escapes. The unique circumstances of prisons, however, suggest that such pursuit is unnecessary to create in the defendant a reasonable fear of imminent harm. The inability of the defendant to avoid his pursuers, the suddenness of attacks in prison, and the impossibility of acquiring protection from the guards may create a lasting and realistic fear which will persist far be-

59. CAL. PENAL CODE § 26(8) (West 1972) provided:
All persons are capable of committing crimes except those belonging to the following classes:

Eight—Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.

60. Id.

61. This requirement has been criticized as being inconsistent with other basic policies of the duress defense. A New Use, supra note 4, at 1079-80. The author argues that the Richards court's reasoning breaks down where the defendant is faced with a threat of death and thus given no alternative to escape. The author contends that in such a case the better view is that the defendant, although not "absolutely driven" to escape, is in effect compelled by circumstances to do so, and, thus, should be excused from punishment for exercising the valid option of escape to avoid death.

The Richards court is correct, however, in suggesting that the defendant in such a situation is in fact confronted with numerous alternatives, however abhorrent some of them may be. He may submit to his assailants; he may resist; he may continue to pursue legal remedies; he may escape. The defendant is not in fact compelled to escape. For this reason the defense of necessity, which weighs the relative harm of those alternatives and judges whether the defendant made the least harmful choice, is more appropriate to these circumstances. The Richards court's analysis of the duress defense is technically correct. It is the court's judgment that escape is a greater evil than submission or resistance to sodomous attacks which bears criticism.

beyond the moment of actual threat. Such conditions suggest a standard of reasonableness concerning the defendant's fear of injury: if the defendant had reasonable cause to believe that he was in imminent danger, the requirement should be satisfied. The Richards court, however, maintained the traditional notion of "gun to the head immediacy." 6

Surely the question of whether the compelling threat was present and imminent is one of fact, and should be resolved by the jury. The Richards court, however, forbade the defendant from offering his defense to the jury. Consequently, there being no evidence upon which to raise a question of fact, the defendant's reasons for escape were deemed immaterial. 6

Two years after Richards, the Missouri Supreme Court advanced conventional notions regarding judicial interference in prison affairs in the case of State v. Green. 6 While Green maintained the prevailing judicial doctrine of prohibiting prison escape defenses, a strong dissent by Judge Seiler indicated an emerging judicial awareness that a person does not forfeit his humanity when he enters prison.

In Green, the defendant, a white, nineteen-year-old, one-hundred-fifty-pound first offender, was incarcerated with older, second offenders and "lifers" in a residential building where inmates were free to wander during the day and enter any cell at night by easily picking the cell door locks or using a secretly obtained key. Because there were few guards, areas of the building were periodically unsupervised for substantial periods of time. Shortly after the defendant was incarcerated, he was attacked during the night in his cell by two inmates who forced him at knifepoint to submit to acts of sodomy. Immediately thereafter, he feigned suicide in order to contact the prison administration. He requested the protection of prison officials, but was told to

63. See A New Use, supra note 4, at 1075.
64. People v. Unger, 33 Ill. App. 3d 770, 775, 338 N.E. 2d 442, 446 (1975).
65. The court approved the trial court's instruction to the jury that "[t]he reasons, if any, given for the alleged escape are immaterial and not to be considered by you as in any way justifying or excusing, if there was such." 269 Cal. App. 2d at 772, 75 Cal. Rptr. at 600-01.
66. 470 S.W.2d 565 (Mo. 1971), cert. denied, 405 U.S. 1073 (1972).
67. Id. at 568-71 (Seiler, J., dissenting).
68. An inmate could transmit a written complaint to prison officials through the use of a "snitch-kite," an intra-prison mail system. However such a procedure required several days for transmission and response. An inmate could complain directly to a guard, but not without the likelihood that the other inmates would soon know that the victim had "snitched," in which case, according to the defendant, the snitch "was as good as dead right then." In any case, the prison administration would not investigate a complaint unless the assailant was identified. Furthermore, unless a guard actually witnessed the assault, the alleged assailant would be allowed to remain among the general prison population during the investigation. The victim's only possible protection was confinement in the "hole," the prison's disciplinary facility. 470 S.W.2d at 569.
"go back and fight it out." 69 Two weeks later, Green was again homosexually raped in his cell by three inmates. He again feigned suicide, reported the incident to prison authorities, and asked for protection. The disciplinary board told the defendant to "fight it out, submit to the assaults, or go over the fence." 70

Three months later, four or five inmates entered the defendant's cell and informed him that they would return that night and make him a "punk," 71 or they would kill him. Convinced that informing prison authorities would be useless, Green escaped that evening to avoid the assault. He was apprehended the next morning a few miles away.

The defendant argued that his escape was justified because it was the only possible means of protecting himself. He claimed that the existing intolerable conditions, combined with the state's denial to the defendant of access to the courts for redress of those unconstitutional conditions, made his escape necessary. 72

The majority rejected the defendant's argument because: (1) there was no evidence of denial of access to the courts; and (2) the threat to the defendant was not present and impending. The first finding was based on the conclusion that the defendant had not specifically requested access to the courts. 73 The second conclusion was the inevitable result of the court's adherence to customary notions of immediacy and disregard for the unique circumstances of correctional institutions. 74 Both conclusions were patently unreasonable. The evidence plainly raised issues of fact as to the exhaustion of legal remedies and the imminence of the threat to the defendant. The court was unjustified in resolving these questions as matters of law.

Judge Seiler, in his well-reasoned dissent, was concerned with the "horrific dilemma" 75 in which the defendant, through no fault of his

69. Id. at 566.
70. Id.
71. A punk plays the female role in homosexual acts. Id. at 570.
72. The defendant's claim that he had been denied access to the courts was based on the unavailability to the inmates of lawyers to prepare pleadings and render legal advice. 470 S.W.2d at 567.
73. Whether the defendant could have reached the courts had he attempted to do so was considered irrelevant:

There can be no denial unless there exists in the defendant a desire and a seeking of access to the courts. The mere fact that legal assistance was not directly or immediately available to inmates in general and, therefore, would not have been available to him if he had sought access to the courts does not afford him substantial ground upon which to base a claim of denial of access where there is no showing that he, in fact, desired access to the courts.

470 S.W.2d at 567.
74. See text accompanying notes 62-64 supra.
75. 470 S.W.2d at 571 (Seiler, J., dissenting).
own, found himself. The effect of the court’s decision, Judge Seiler reasoned, was to relegate the defendant to the alternatives of either debasing himself as a “punk,” or risking his life as a “snitch.” The imposition of such a distasteful choice upon a defendant who was compelled to escape was unjust. Judge Seiler argued that the defenses of coercion and necessity were based upon the “fundamental principle that criminal punishment should not be visited upon the blameless.”

Therefore, if the defendant could establish that indeed he had been compelled to escape, he would be without blame and entitled to acquittal. The facts in Green surely were sufficient to raise a question as to whether the defendant was without fault, and “when the facts presented, if believed, would establish the defense of coercion, then this defense should be available to a charge of escape.”

Judge Seiler’s argument that “the act of escape was just as much coerced as the prior act of sodomy” perhaps makes sense on an emotional level, but stretches conventional notions of duress. However true it was that a reasonable man would have been unable to resist the assailants’ threats, the inevitable result was not escape but submission. Judge Seiler himself pointed out that the defendant’s unwillingness to submit was not unreasonable, and “all that was left was escape.” He seems to suggest that the defendant made the most reasonable choice under the circumstances—to escape. Therefore, his argument suggests application of the defense of necessity, which justifies a free choice of the least evil alternative.

Contrary to the majority’s reliance on precedent, Judge Seiler’s persuasive dissent recognized that the exclusion of the coercion and necessity defenses to prisoners was an unjust, anachronistic practice which contradicted established common law principles. His emphasis on the facts demonstrated that there are extreme situations where a legitimate question of fact is raised and should not be prevented by an inequitable ruling of law from reaching the jury. Judge Seiler astutely recognized the injustice of denying prison escapees the opportunity to defend themselves. His dissent in Green foreshadowed an approaching reversal of the judiciary’s position regarding the availability of defenses to charges of prison escape.

76. Id. at 570.
77. Id. at 571.
78. Id.
79. Id.
RECENT CASES: DEFENSE RECOGNITION—DURESS

As public and judicial awareness of prisoners' rights expanded in the late 1960's and early 1970's, the arguments propounded by Judge Seiler in *Green* found increasing recognition and support. But the notion that a convict might be justified in escaping from "intolerable" prison conditions, while becoming more palatable, continued to be rejected by the courts. The pendulum finally swung to the other side in 1974 when two Michigan courts of appeals concurrently held that the duress defense was available to prison escapees.

In *People v. Luther*, the defendant testified that he was accosted in a prison lavatory by six assailants who made homosexual demands of him. When he refused to acquiesce he was beaten with a toilet bowl brush, threatened with a knife, and "literally chased off the grounds." During his flight he attempted unsuccessfully to locate the guard on duty. Luther was found the next morning a few miles from the camp.

The court of appeals' reversal of the defendant's conviction for escape was founded on very narrow grounds which appear to minimize the case's significance. The court held that the trial judge had committed reversible error by offering an obviously confusing and prejudicial jury instruction: "I instruct you that it is not a defense to escaping prison that the defendant fled to avoid homosexual attacks by other prisoners. However, you may consider as a valid defense whether the defendant escaped while being under duress." It is significant, however, that the court indicated that the first sentence, and not the second, was the incorrect instruction. Whereas flight from homosexual attacks had never been recognized as a defense to escape, nor had any argument of duress, suddenly an appellate court, almost matter-of-factly, indicated that the reverse was true, that fear of homosexual assault could indeed justify prison escape.

The Michigan Supreme Court eliminated any possible narrow construction of this holding when it affirmed the appellate decision. In broad language the court established a unique test whereby, in order to raise the duress defense, a defendant would have to present evidence from which a jury might conclude that:

A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;

82. 53 Mich. App. at 651, 219 N.W.2d at 814.
B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
D) The defendant committed the act to avoid the threatened harm. 84

At the same time that the Luther court embraced the duress defense it significantly altered the historical duress concept. The Luther test made no mention of the requirement that the threatening force actually compel the actor to commit the alleged offense—the escape. Furthermore, the test eliminated the criterion of a present and impending danger. 85 The court distinctly indicated that extreme circumstances might induce sufficient fear to overcome an inmate's "free will," thereby removing the requisite criminal intent necessary to commit the crime of escape. 86

Two problems for defendants arise from the Luther test. The first problem is that the test severely limits the potential success of the duress defense by requiring not merely that the threat be sufficient to create the fear of death or serious bodily harm in a reasonable person, but that the threat did in fact create such apprehension in the defendant, sufficient to remove his free will and compel him to escape. State of mind is very difficult to prove, and in a prison escape trial, proof undoubtedly would rest entirely upon the uncorroborated testimony of the defendant himself. 87 Considering that the judiciary desires to limit the escape defense as much as possible, and that Luther was the first case to allow any such defense, the imposition of such a limitation is understandable.

The second problem for escapees is that the Luther holding merely excused the defendant in that particular case because the evidence, if proven, would have established that the defendant had acted without free will. The court did not condone prison escape; it did not recognize, as would a necessity defense, that the defendant acted freely, consciously, and justifiably. Therefore, the Luther decision did not hold that any defendant under similar circumstances would be justified in making the same choice of escape. 88 This ruling imposes a severe limi-

84. Id. at 623, 232 N.W.2d at 187.
85. In the Luther case, a requirement of a present and impending threat certainly would have been met if the veracity of the defendant's testimony were established. That testimony indicated that the defendant was actually being pursued by his assailants at the time he left the prison camp. 394 Mich. at 620-21, 232 N.W.2d at 186.
86. Id. at 622, 232 N.W.2d at 187.
87. Other prisoners who might be able to support the defendant's story would naturally be reluctant to testify out of their own fear of reprisal by other inmates.
88. See text accompanying note 41 supra, on the distinction between duress and necessity.
tation upon the potential success of escape defenses. At the same time, *Luther* must be considered a breakthrough in the development of prisoners’ rights.

In *People v. Harmon*, another Michigan court of appeals almost simultaneously with the *Luther* court allowed the duress defense in a case of prison escape. However, the *Harmon* court probed deeper into the political justifications for and ramifications of acceptance of the duress defense.

The defendant in *Harmon* was an eighteen-year-old male who recently had been transferred from regular prison facilities to a communal dormitory system. His previously expressed apprehensions about the "‘things’ he heard went on out there" were soon realized. Within a few days of his transfer, he was severely beaten for refusing to cooperate with a group of seven or eight inmates who had demanded sex from him. The defendant did not report the incident out of fear of reprisal from his attacker and other inmates. A few days later the defendant was again approached and beaten, and warned that he would be attacked until he submitted. The next night he escaped.

The court held that the facts, which were corroborated by two witnesses, were "more than sufficient to require the submission of the defense of duress to the jury in the appropriate manner." To establish the defense, the defendant had to show that his conduct was "necessitated by threatening conduct of another which resulted in defendant harboring a reasonable fear of imminent or immediate death or serious bodily harm."

Noticeably absent again from this definition of duress is the requirement that the assailants demand that the defendant escape. Undoubtedly, the court was aware that retaining that criterion would inevitably prohibit application of the defense. The requirement that the threat be present and imminent was retained. However, the court’s statement that the issue of immediacy must be determined by the jury taking into consideration all the surrounding circumstances, including the defendant’s opportunity and ability to avoid the injury, suggests an expansive interpretation of that rule.

90. 53 Mich. App. at 484-85, 220 N.W.2d at 214.
91. See note 55 supra.
92. 53 Mich. App. at 486, 220 N.W.2d at 214.
93. *Id*.
94. The Michigan Supreme Court remarked in its affirmance that the fact that the defendant did not escape until twenty-four hours after the confrontation "[did] not suffice to remove the defense of duress from the consideration of the jury." 394 Mich. at 626, 232 N.W.2d at 188.
The court’s examination of policy issues evidenced an awareness of the increasing legitimization of prisoners’ rights and the parallel emergence of corresponding obligations of the state. Acknowledging the growing problem of homosexual rapes in our prisons, the court affirmed that legislative penal reform was the best solution to this problem, but that fact should not prohibit defendants from presenting “established defenses” in the courts.

The Harmon court declined to follow an earlier Michigan case, People v. Noble, which had feared that allowing the defense would generate a “rash of escapes, all rationalized by unverifiable tales of sexual assault.” The Harmon court’s response pointed out that a mere allegation of duress would not suffice to prevent a conviction: the defendant still must prove his case according to established trial procedures. Furthermore, allowing the duress defense might in fact reduce the number of escapes, because recognition of legitimate complaints might spur penal reform, thereby removing the impetus for flight.

Other courts appear to consider Harmon more persuasive than Luther. One reason, perhaps, is that Harmon initially was decided on less technical grounds than Luther. Assuredly, the acceptance of Harmon also is due to that court’s enlightened commentary on the interrelation of our penal and judicial systems, an example of which may be seen where the court stated:

The time has come when we can no longer close our eyes to the growing problem of institutional gang rapes in our prison system. . . Indeed, the State has a duty to assure inmate safety. . . The persons in charge of our prisons and jails are obliged to take reasonable precautions in order to provide a place of confinement where a prisoner is safe from gang rapes and beatings by fellow inmates, safe from guard ignorance of pleas for help and safe from intentional placement into situations where an assault of one type or another is

97. Id. at 303, 170 N.W.2d at 918.
98. The court stated, “[t]he defense . . . must be established by competent evidence in a trial where the testimony of witnesses is subjected to the scrutiny of the fact-finder who, in the course of determining the true facts of the case, would properly consider the credibility of the various witnesses.” 53 Mich. App. at 487, 220 N.W.2d at 215.
99. The court stated:

If the conditions of our penal institutions have reached the point where the only recourse to free one’s self from unwanted personnel attacks is to flee, then any improvements made in our prisons with respect to assuring the personal safety of the inmates could only serve to eliminate from the ranks of escapees those who do so solely in an effort to protect themselves. The result, therefore, might well be fewer prison escapes rather than more.

Id. at 487-88, 220 N.W.2d at 215.
likely to result. If our prison system fails to live up to its responsibilities in this regard we should not, indirectly, countenance such a failure by precluding the presentation of a defense based on those facts. 101

The significance of the Luther and Harmon cases is twofold. In essence, they represent judicial action and reaction. Because they were the first cases to allow a defense to an inmate’s flight from homosexual assault, they must be acknowledged as the spearhead of a new judicial movement to recognize the potential legitimacy of defenses to prison escape. But these opinions were not issued in a vacuum, nor was the timing purely coincidental. Rather, these cases reflect the emerging awareness, both judicial and societal, that prisoners retain certain rights in spite of their incarceration, and that they are just as entitled as society at large to have those rights protected by judicial scrutiny.

RECENT CASES: DEFENSE RECOGNITION—NECESSITY

Since the Luther and Harmon cases, there has been a marked shift in emphasis away from the duress defense and towards the necessity defense. Recent decisions indicate that the judiciary regards necessity as a more appropriate defense to charges of prison escape. 102 Necessity justifies conduct predicated upon a reasonable belief that such action was required to avoid a greater evil. It is premised upon a conscious choice of action, as opposed to compulsion by an irresistible force. While it remains debatable whether a decision to escape in order to avoid homosexual attack is indeed an act of free will, many courts today apparently regard the prison escapee’s act as one of choice, not compulsion.

In People v. Lovercamp, 103 the California Court of Appeal for the Fourth District became the first court to allow the application of necessity to prison escape from homosexual molestation. This opinion, handed down only a few months after the appellate court decisions in Luther and Harmon, quickly was recognized as a landmark. 104 Nonetheless, Lovercamp is revolutionary not merely due to its holding but

102. Some defendants, of course, continue to submit pleas of duress. E.g., Stewart v. United States, 370 A.2d 1374 (D.C. Cir. 1977); Hill v. State, 135 Ga. App. 766, 219 S.E.2d 18 (1975). In both of these cases, the defense failed because of an insufficient factual basis.
104. Almost all subsequent decisions in prison escape cases have cited Lovercamp. Most of these courts have found the Lovercamp opinion highly persuasive. See, e.g., State v. Boleyn, 328 So. 2d 95 (La. 1976); People v. Hocquard, 64 Mich. App. 331, 236 N.W.2d 72 (1975); State v. Worley, 265 S.C. 551, 220 S.E.2d 242 (1975).
because the court utilized a balancing test under which the interests of the escapee could, and did, outweigh those of society.

The defendants in Lovercamp were two women, one of whom was mentally retarded, who had been continuously threatened by a group of lesbian inmates with the frightening ultimatum to “fuck or fight.” The defendants complained to the authorities several times, with no results. On the day of the escape, the defendants were approached and attacked by ten or fifteen assailants who warned they would soon return. The defendants, in fear for their lives, escaped, and were promptly captured.

In contrast to the Whipple and Richards courts, the Lovercamp court acknowledged the necessity defense, despite the lack of statutory authority. In permitting the defense of necessity to be submitted to the jury, the Lovercamp court manifested a modern, enlightened approach towards the problems associated with our penal institutions. Emphasis was shifted away from the sanctity of prison discipline towards a concern for the physical safety and legal protection of the prisoner. The few courts which previously had considered a balancing of interests all had held summarily that societal interests predominate. The Lovercamp court rejected that strict rule.

105. 43 Cal. App. 3d at 825, 118 Cal. Rptr. at 111.
106. For a consideration of whether Lovercamp is repugnant to or inconsistent with California statutory law, see 9 Loy. L.A.L. REV. 466 (1976).
107. The court’s remarkably incisive observations deserve extensive reproduction:

When our culture abandoned such unpleasantries as torture, dismemberment, maiming and flogging as punishment for anti-social behavior and substituted in their place loss of liberty, certain problems immediately presented themselves. As a “civilized” people, we demanded that incarceration be under reasonably safe and humane conditions. On the other hand, we recognized that the institutional authorities must be afforded a certain firmness of program by which the malefactors be kept where sentenced for the allotted period of time . . . . [A]s an aid to discourage self-help release from incarceration, the offense of escape was born.

However, rather early in the legal history of the offense of escape, it became clear that all departures from lawful custody were not necessarily escapes or, to put it more accurately, there was a possible defense to an escape charge, to wit, necessity . . . . [W]e may assume that a prisoner with his back to the wall, facing a gang of fellow-inmates approaching him with drawn knives, who are making it very clear that they intend to kill him, might be expected to go over the wall rather than remain and be a martyr to the principle of prison discipline.

However, the doctrine of necessity to “excuseth the felony” carried with it the seeds of mischief . . . . Inevitably, severe limitations were affixed to this defense and the general rule evolved that intolerable living conditions in prison afforded no justification for escape. A reading of the cases invoking this rule presents a harsh commentary on prison life in these United States of America, revealing . . . prison life which is harsh, brutal, filthy, unwholesome and inhumane . . . .

In a humane society some attention must be given to the individual dilemma . . . . [B]oth the public’s interest and the individual’s interest may be adequately protected.

43 Cal. App. 3d at 826-27, 118 Cal. Rptr. at 111-12.

108. The Lovercamp court remarked that past decisions “reflect an attitude of the courts which might charitably be characterized as viewing [the problem of escape] with alarm but with results varying from benign neglect to dynamic inertia.” Id. at 828, 118 Cal. Rptr. at 113.
The court observed that traditional concern for societal interests “tended to focus attention away from the immediate choices available to the defendant and the propriety of his cause of action.”109 But “in a humane society some attention must be given to the individual dilemma.”110 The public interest still must be protected, of course, and the courts must exercise “extreme caution”111 to ensure the maintenance of prison order. However, by “determining whether the act of escape was the only viable and reasonable choice available . . . both the public’s interest and the individual’s interest may adequately be protected.”112

The court’s discussion of “choice” points to a key element of the Lovercamp decision: the essence of the necessity doctrine is the justification of one’s choice of conduct. The defendants were not found to have committed an unlawful act, merely excusable under the particular coercive circumstances of the case. Rather, they made a free, conscious decision to escape, and that decision was upheld as the most reasonable, least harmful choice. The act of escape, therefore, was not unlawful. Thus, any defendant under similar circumstances would be justified in escaping, irrespective of that person’s state of mind. The objective act of escape itself, not the defendants’ subjective mental state, is what was condoned in Lovercamp.

The consequences of that decision are apparent. While the court hastened to add that the new defense was “extremely limited in its application,”113 the holding was visibly the broadest recognition of a defense to escape up to that time. In an effort to limit the ramifications of its decision, the court restricted applicability of the defense to situations which met five conditions:

1) The prisoner is faced with a specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future;
2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
3) There is no time or opportunity to resort to the courts;
4) There is no evidence of force or violence used towards prison personnel or other “innocent” persons in the escape; and
5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.114

109. Id. at 827, 118 Cal. Rptr. at 112.
110. Id. Undoubtedly, the fact that the defendants were two women, one of whom was retarded, played a significant role in arousing the court’s sympathy for prison inmates.
111. Id.
112. Id. (emphasis added).
113. Id. at 831, 118 Cal. Rptr. at 115.
114. Id. at 831-32, 118 Cal. Rptr. at 115.
Analysis of Lovercamp Criteria

The Lovercamp standards preserve some traditional elements of the necessity defense and create some unique elements as well. The new elements of the defense are natural outgrowths of the application of common law necessity to the particular realities of prison institutions. Nevertheless, application of some of these criteria is intrinsically or potentially unreasonable.

The first Lovercamp condition is that the prisoner must be faced with an immediate threat of serious harm. Significantly, the California court specifically added forcible sexual attack to the traditional requirement of a threat of death or substantial bodily injury. This inclusion is a demonstrative acknowledgment of the severity of such an attack by one inmate upon another. However, the requirement of immediacy, which preserves the common law notion of "present and impending," is unrealistic within the context of prison institutions. The escapee rarely is chased from the confines of the prison; nonetheless, the threatened harm in the near future is real and inevitable. Instead of immediacy, a reasonable temporal relationship between the threatened injury and the escape should be required. Such a precondition would guard against fraudulent assertions of the defense as much as possible without altogether precluding the defense's availability.

The question of the reasonability of the time factor must be viewed in conjunction with the second and third conditions established by the Lovercamp court, that there be no time to resort to administrative or judicial authorities for assistance. Where the threat to the prisoner is immediate, these two criteria are, of course, satisfied. If, however, there is substantial time between the threat and the escape, then the court must consider whether there was sufficient opportunity to resort to the authorities or the courts. If so, the escape was unnecessary and the defense should be prohibited. On the other hand, if there was insufficient opportunity to obtain help from the authorities, or if such an effort would have been futile, then the court should allow the defense.

These requirements that there be no opportunity to resort to the authorities maintain the priority of administrative remedies, preserve
prison authorities’ jurisdiction over correctional problems, and minimize judicial involvement. Moreover, if the foundation of the inmate’s necessity defense is that he has chosen the least of three evils—submission to homosexual assaults, physical resistance, and escape—he should be obligated to choose the least harmful alternative of applying to the authorities for protection where such an alternative is realistic. At the same time, these conditions recognize that there are circumstances where recourse to “legal” remedies is impossible. However, these criteria, like the requirement of an “immediate” threat, will operate fairly only if they are interpreted broadly, so as not to prevent reasonable utilization of the defense.

The fourth condition, that no force be used by the escapee, is a misdirected attempt to limit the damage done to public interests. Such a criterion contradicts basic common law necessity doctrine, which sanctions the least deleterious alternative, and undermines the foundation of the defense, which is the minimization of societal harm. A more rational restriction would be that the defendant not implement his escape with unreasonable force. If the defendant were to exert greater force he no longer would be entitled to legal protection. But a requirement of an escape without any force is unjust because it forbids the use of minimal force to prevent serious physical harm and condemns otherwise justifiable escapes.

The fifth requirement, that the prisoner surrender to the authorities following his escape, is extremely important, but the court’s insistence upon an immediate surrender is unreasonable. A prisoner who escapes, then turns around and surrenders himself, undoubtedly would be thrust back into the same environment from which he had escaped. The escape would be more likely to aggravate than resolve the inmate’s predicament. The defendant should be allowed a reasonable time to reach a point of safety and secure judicial protection before committing himself into custody. Nonetheless, if a prisoner is permitted to escape only to avoid a greater evil to himself, he is under a duty to minimize the harm further by reporting to the proper authorities as soon as is reasonably possible. An unjustified delay should be regarded as a

116. Accord, People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929); State v. Green, 470 S.W.2d 565 (Mo. 1971); LAFAVE & SCOTT, supra note 40, at 387.
117. The Lovercamp court’s characterization of the necessity defense as “extremely limited” suggests future restricted, and consequently often unjust, rejection of the defense in California. 43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115.
118. See generally LAFAVE & SCOTT, supra note 40, at 381-88.
119. Contra, A New Use, supra note 4, at 1067. The author argues that immediate surrender should be required to assure that the defendant acted in good faith and with the intent to avoid death.
separate offense of escape.\textsuperscript{120}

\textit{Subsequent Application of Lovercamp in Other States}

The \textit{Lovercamp} conditions clearly were designed by the court to restrict the necessity plea as much as possible. Yet, the mere allowance of the defense was a significant step. Whether the prison doors have been opened remains to be seen, but already there is a visible inclination in other jurisdictions to follow or extend \textit{Lovercamp} and allow some prisoners to offer justifications for their escapes.

In \textit{People v. Hocquard},\textsuperscript{121} a Michigan appellate court scrutinized an inmate’s escape following the prison authorities’ failure to deliver medical attention to the defendant for a painful back injury. The court concluded that a “very limited”\textsuperscript{122} defense of necessity was applicable to situations where a prisoner had been denied medical care.\textsuperscript{123} The court recited the five \textit{Lovercamp} standards, applied them to the facts, and concluded that the defendant was not entitled to submit the necessity defense to the jury because the record did not satisfy the third condition: that the defendant must have had no time to resort to the courts for help. Hence, the necessity defense was recognized but disallowed.

Similarly, in \textit{State v. Boleyn},\textsuperscript{124} the Supreme Court of Louisiana announced the availability of the necessity defense, but did not allow its submission to the jury. In that case the defendant’s evidence that he had been raped the night before the escape was considered an insufficient foundation for the defense because it merely established the first of the five defense requirements. The court held that all five \textit{Lovercamp} criteria must be met to allow submission of the “extremely limited”\textsuperscript{125} defense to the jury.

In \textit{State v. Worley},\textsuperscript{126} the necessity defense was applied to the denial of adequate medical treatment, but, once again, though the defense

\textsuperscript{120}. Just as the escapee is obligated to surrender at the first reasonable opportunity, the courts should ensure that, until the defendant’s claim is investigated, the defendant will not be returned to the same prison environment. The state owes the prisoner a duty to protect his personal security. \textit{See text accompanying notes 20-26, supra.}

\textsuperscript{121}. 64 Mich. App. 331, 236 N.W.2d 72 (1975).

\textsuperscript{122}. \textit{Id.} at 337, 236 N.W.2d at 75.

\textsuperscript{123}. The court acknowledged the recent precedent set in Michigan by \textit{People v. Harmon}, 53 Mich. App. 482, 220 N.W.2d 212 (1974), \textit{aff’d}, 394 Mich. 625, 232 N.W.2d 187 (1975), which accepted the defense of duress. \textit{See text accompanying notes 89-101 supra.} However, the \textit{Hocquard} court concluded that a necessity defense was more appropriate to the facts of the case.

\textsuperscript{124}. \textit{Id.} at 337, 236 N.W.2d at 75.

\textsuperscript{125}. \textit{Id.} at 97.

was acknowledged it was not permitted in that case to go to the jury. The defendant had escaped after being denied treatment for a severe case of poison ivy which had developed into rashes and open, running sores on the defendant's forearm. He was captured two years later. The South Carolina Supreme Court established six conditions which must be satisfied before the necessity defense can be available. These conditions essentially parallel those of Lovercamp. The defendant clearly did not satisfy the requirement of immediate surrender. The defense was obviously fraudulent, its factual foundation weak, yet the court used the opportunity to announce the availability of the defense. At the same time, the court reiterated the continuing concern of the judiciary for public safety and prison efficiency. Strict limitation of the necessity defense within the stated guidelines was imperative to "[protect] against assertions by those prisoners who would endanger prison life and public safety by escaping and fabricate charges of inhuman treatment or neglect as an afterthought to their flight from justice."

Hocquard and Worley indicate a willingness to extend the necessity defense to cases of escape from inadequate medical treatment. Whether the courts will allow the trend towards greater availability of the defense to encompass other manifestations of intolerable prison conditions, such as unsanitary facilities or brutal treatment, is presently unknown. No recent cases have considered those problems.

Recently, the Illinois Supreme Court did not feel compelled to severely limit the necessity defense in order to preserve the interests of society. The important case of People v. Unger was the first decision since Lovercamp to allow the necessity plea to reach the jury. Even more significant, however, was the court's opinion, which discarded

127. The six criteria are:
1) The prisoner must have informed prison officials of the condition, in writing, unless admitted by the prison officials, and have been denied professional medical care;
2) There must not be time to resort to the courts;
3) The escape must be without use or threat of use of force;
4) The escapee must promptly seek professional medical treatment;
5) The treating physician, or if he is unavailable, a physician responding to a hypothetical question, must testify the prisoner was actually in danger of death or immediate serious permanent bodily injury unless the prisoner was given prompt professional medical treatment;
6) After seeing the physician, the prisoner must immediately surrender himself to the authorities.

Id. at 554-55, 220 S.E.2d at 243.

128. Id. at 555, 220 S.E.2d at 244.


130. A few months later the necessity defense again reached the jury in Bavero v. State, 347 So. 2d 781 (Fla. App. 1977). While technically a necessity case, the Bavero decision was actually concerned with the issue of intent. Whether the defendant had escaped out of necessity was regarded merely as relevant to the question of whether the defendant had had the requisite willful intent to avoid lawful confinement.
much of the restrictive language applied to the defenses by previous courts, and provided defendants with maximum accessibility of the defense.

The facts of Unger parallel those of Harmon and Lovercamp: homosexual molestation, threats of future assaults, escape. According to the defendant's testimony, during the first two months of his imprisonment he was homosexually threatened by another inmate brandishing a six-inch knife. The defendant requested and received a transfer to the honor farm where, two weeks later, he was beaten and sexually assaulted by a gang of prisoners. He did not report this incident because he was told he would be killed if he did so. Several days later, a prisoner called the defendant and threatened to kill him that evening because the caller had heard that Unger had reported the assault. At that point, the defendant escaped. He was apprehended two days later in a motel room thirty miles from the penitentiary, still in prison attire, attempting to contact friends in Canada.

The defendant pleaded both duress and necessity to charges of escape, but the trial court allowed neither defense. The Illinois Appellate Court, citing Harmon, and failing, as did the Harmon court, to distinguish clearly between duress and necessity, reversed the trial court ruling and remanded to allow the defense to go to the jury. The Illinois Supreme Court affirmed the appellate court's decision, but specifically held that necessity was the proper defense to apply under Illinois law to prison escape cases.

While the decision may be viewed as a mere strict application of the Illinois necessity statute, since the alleged facts plainly were encompassed by the language of the statute, it is unlikely that the case would have been resolved the same way only a few years ago. In fact, previous Illinois appellate courts had rejected the duress argument because, among other reasons, the defendant had not been compelled by other inmates to escape. Such a common law interpretation of duress

134. The defendant's attempt to avoid homosexual encounters by requesting a transfer after he was first assaulted indicates that he was "without blame in occasioning or developing the situation." The evidence indicated that the defendant understood from the phoned threat that other inmates planned to kill him. He therefore "reasonably believed" that his escape was "necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct." The defendant, therefore, according to a strict interpretation of the necessity defense, was entitled to have the jury consider his defense.
was not required by Illinois law. The Unger court similarly might have barred the necessity defense by interpreting the necessity statute according to common law limitations, such as the restriction to non-human forces. The majority opinion acknowledged that "prison escapes induced by fear of homosexual assaults and accompanying physical reprisals do not conveniently fit within the traditional ambit of either the compulsion or the necessity defense." The court might have applied this argument as a basis for prohibiting the necessity defense. Instead, it chose to establish a new Illinois policy, in effect acknowledging and enlarging the civil rights of prison inmates.

In Unger the court concluded that duress was decidedly inappropriate because traditionally it involves a demand that the defendant perform the specific criminal act for which he is later charged, and certainly no prisoners had threatened Unger with harm if he would not escape. Rather, the defendant had voluntarily decided to escape in order to avoid evils which he considered more harmful. Necessity, therefore, which involved a choice of evils, was an appropriate defense.

Lovercamp and Unger Reconciled

The court in Lovercamp had emphasized that the defense must be extremely limited in order to protect the rights and interests of society. The Unger court concluded, however, that demanding absolute satisfaction of the five Lovercamp preconditions was overly restrictive. The majority felt that it could not hold that each of those elements must be present to establish a meritorious necessity defense. Instead, it chose to view those criteria merely as relevant factors to be used in assessing the weight and credibility of the defense, not its admissibility.

136. Ill. Rev. Stat. ch. 38, § 7-11 (1973) recognizes duress if the defendant "reasonably believes death or great bodily harm will be inflicted upon him if he does not perform such conduct." It does not require that the coercive force actually demand that the defendant perform that act. See note 31 infra.

137. 66 Ill. 2d at 340, 362 N.E.2d at 322.

138. Accord, People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969); State v. Pearson, 15 Utah 2d 353, 393 P.2d 390 (1964). In Pearson the court commented, "As much as one might commiserate with the defendant's plight, it remains the fact that he did not escape because he feared his life to be in danger if he refused to do so. His act of escape was the result of a voluntary decision of his own." Id. at 354, 393 P.2d at 391.

139. One commentator has argued that the five Lovercamp conditions which must be satisfied for the defense to be available are needed to avoid the "vague, pervasive, and unpredictable aspects of the defense at common law." 9 Loy. L.A.L. Rev. 466, 479 (1976).

140. See text accompanying note 114 supra.

141. Unger would have been barred from submitting a necessity defense if he had been required to satisfy the Lovercamp criteria. Unger did not complain to prison authorities following the first sexual attack, even though he had earlier requested and been granted a transfer from
In doing so, the *Unger* court adopted a more liberal approach to the problem of balancing prisoners' rights against societal interests than did previous courts. The *Unger* court apparently did not fear as much as previous courts the anticipated ramifications of widespread use of the necessity defense: threats to public safety and efficient prison operations. In contrast to earlier emphasis on the very limited character of the newly recognized defense, the *Unger* court placed no restrictions upon the availability of the defense other than the requirement of production by the defendant of some evidence to support his argument. The believability of the defendant's contentions and the ultimate success of the offered defense were questions which were to be submitted to the discrimination of the jury.

Justice Underwood, dissenting in *Unger*, expressed an "uneasy feeling" that the Illinois court may have tipped the scales too far in favor of prisoners' interests and consequently sown the "seeds of future troubles" by encouraging potential escapees and, thus, disrupting prison discipline. Whether the Illinois Supreme Court has opened a Pandora's Box of prison escape defense claims in Illinois remains to be seen.

Other courts are unlikely to embrace a policy which so greatly facilitates prison escape defenses. Undoubtedly the courts will be swayed by the ever-present fear of opening the "floodgates of litigation." Moreover, judicial recognition of prisoners' rights has not yet proceeded to the extent of outweighing other, more established, doctrines. Traditional notions of administrative autonomy, judicial abstention and strict prison discipline, as well as society's desire to remove criminals from public sight and public consciousness, remain firmly implanted in the judiciary's attitude towards prisoners, and are certain to prevail in most instances in the near future.

Undoubtedly, the courts will be concerned with the consequences of encouraging escape. Not all escapes are free from violence. An increase in escapes means an increase in injuries to prisoners and innocent people. Increased violence—assaults, gunfights, etc.—is apt to raise the level of tension within the penitentiaries, thereby further sub-

---

142. An Illinois defendant, in order to raise an affirmative defense such as necessity, must present some evidence thereon. ILL. REV. STAT. ch. 38, § 3-2 (1971). "Only very slight evidence" is necessary. 33 Ill. App. 3d at 771, 338 N.E.2d at 443.

143. 66 Ill. 2d at 343, 362 N.E.2d at 324.

144. *Id* at 343-44, 362 N.E.2d at 324.
verting discipline. Inmates who believe that there is a legal justification for their escape perhaps will be less reluctant to use violence to implement their exits.

For these reasons *Unger* is unlikely to have a profound impact upon other jurisdictions. The trend appears to be towards a very limited recognition of the necessity defense, restricted by the *Lovercamp* criteria or comparable qualifications. Most courts have expressed deep concern about swinging the pendulum too far in favor of the prisoners. They are unlikely to follow the Illinois approach of virtually unrestricted access to the necessity defense.

*Unger* indeed may have gone a little too far. While it is unlikely to incite a “rash of escapes,” it could contribute to an increase in illegitimate escape defenses, some of which, at least, are bound to succeed. Many defendants will be able to go straight from the prison gates to the jury. No threshold criteria are available to screen out obviously fraudulent claims and discourage potential escapees from gambling upon a successful escape, banking on their ability to persuade a jury.

On the other hand, other recent decisions which follow the seminal *Lovercamp* opinion do not go far enough to make the necessity defense available. These courts have been too cautious. Their long-cultivated fear of allowing any defenses to escape has resulted in the verbal recognition of a defense which in practice will be useless in all but the most extreme cases. The inevitable result can only be to exclude legitimate claims and unjustly relegate those prisoners to the horrors of homosexual molestation and other mistreatment.

The dichotomy of approaches to this issue easily can be reconciled. The conditions established by the *Lovercamp* court should be utilized to deter potential escapees and weed out illegitimate defenses, but the criteria should be modified. Instead of applying overly restrictive requirements of immediacy, the courts should adopt a standard of reasonableness. A defendant should be required to offer some evidence that (1) his escape was predicated upon a fear of attack within the reasonably near future, (2) there was no time for other legal remedies, (3) the escape was executed with reasonable force, and (4) the defendant afterwards surrendered within a reasonable period of time.

Such criteria would eliminate most frivolous and unsupported defenses, but would not exclude legitimate claims deserving of jury resolution. A judicial doctrine can be developed which recognizes that

certain circumstances justify one's decision to escape from prison, without defining those circumstances so narrowly as to inevitably preclude any utilization of that doctrine. While some illegitimate claims undoubtedly will get to the jury, allowing the fact-finding process to weed them out is more desirable than denying actual victims an opportunity to justify their escapes.

CONCLUSION

While the courts increasingly have acknowledged that prison inmates retain certain civil rights, they have denied until quite recently that a prisoner may be justified, under certain circumstances, in escaping from his confinement. In the last few years a number of state courts have ruled that escapees should not be punished if the circumstances of the escape fall within the limits of the common law notions of duress or necessity.

While a dramatic increase in the recognition of these defenses is unmistakable, most courts have emphasized that such defenses are extremely limited. So far, only a very few defendants have succeeded in getting their claims to the jury. Traditional fears of undermined prison discipline and courts deluged by unjustified claims of coercion continue to dominate judicial thought.

However, there is an increasing propensity towards regarding prisoners on a more humanistic level. There is no longer the same indifference to the plight of helpless prisoners subjected to inhumane and intolerable conditions. The recent shift in emphasis from the duress defense to necessity further signifies increasing judicial enlightenment and concern for prisoners' rights. Escapes from threats of homosexual attack are less frequently being viewed as acts committed without free will, compelled by an irresistible force which overcomes the mind of the escapee. The courts now are beginning to realize that such escapes are conscious choices intended to minimize social and individual harm and, therefore, acts which should be socially, morally, and legally condoned.

The unique "hands off" approach which in the past created a different legal standard for prisoners than for others in society appears to be waning. Yet, because of the peculiar circumstances of prison escape cases, there should be a different standard, although not the traditional one: the courts should establish some guidelines with which they can more accurately judge whether the duress or necessity defenses are justified. The recent *Unger* case may have gone too far to incite unjustified escapes and illegitimate defenses. On the other hand, the
Lovercamp holding is overly restrictive and will prevent legitimate claims from being heard by the jury. Standards of reasonableness would more equitably balance and protect the interests of the prisoners and society at large.

The recent acknowledgment of prison escape defenses raises some new issues beyond the scope of this note, and resurrections other questions for further attention. For example, what is the liability of a public officer or public body for the harm done by a prisoner permitted to escape? To what extent are prison authorities liable for injury to a prisoner caused by the assault of another prisoner? To what extent is the judiciary obligated to protect a justified escapee from being returned to the same, or a similar, environment, and how can this be accomplished? The courts increasingly will have to confront these issues as they are faced with a rising tide of prisoner grievance litigation.

Most of the recent escape cases have concerned homosexual assault. A few have extended to conditions of inadequate or denied medical treatment. The courts now should recognize that there is no justification for limiting escape defenses to these areas. Escape from any type of intolerable condition may be justified. Reliance on the traditional role of the jury and use of an equitable standard of reasonableness will adequately protect the public interest without sacrificing prisoners' rights.

WAYNE H. Michaels