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Reexamining the Application of Duress and Necessity Defenses to Prison Escape in the Context of COVID19

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REEXAMINING THE APPLICATION OF DURESS AND NECESSITY DEFENSES TO PRISON ESCAPE IN THE CONTEXT OF COVID-19

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The classic example of the necessity defense involves a prisoner escaping from a burning prison. Surely, the law would not require them to stay in the prison when doing so would put their life at an immediate and grave risk. This example epitomizes the purpose of the necessity defense; society would rather the prisoner survive and leave prison than die ablaze while obeying the letter of the law. In recent years, the difference between the two justification defenses of necessity and duress has become blurred, especially in cases involving prison escape. Both are equally applicable, and both are relevant in the context of the COVID-19 pandemic, since prisoners may be forced to choose between the consequences of contracting a serious virus with access only to prison healthcare or committing a serious offense by leaving prison.

This Comment presents the legal background of the necessity and duress defenses with particular emphasis on their application to prison escapes. It critiques the United States Supreme Court's seminal decision regarding the application of these defenses to prison escapes. It also analyzes the framework under which such defenses may be raised in the context of COVID-19—both the potential problems and potential solutions. Overall, this Comment illustrates the reality of healthcare in the current prison system. With an aging population and inadequate access to healthcare and sanitation, prisoners need relief sooner rather than later, lest they be forced into the extreme option of fleeing the system altogether.

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INTRODUCTION

On March 23, 2020, nine prisoners escaped from the Pierre Community Work Center, a women's minimum-security institution in Rapid City, South Dakota, by walking through an exterior door late in the evening.[1] Within a few months, law enforcement captured each of the nine women.[2] At the time of their escape, only one prisoner at the center had tested positive for the COVID-19 virus.[3] Even so, other prisoners at the center believed the women

[1] Arielle Zionts, *One of Nine Escaped State Inmates Booked into County Jail After Possible COVID-19 Exposure*, RAPID CITY J. (Mar. 24, 2020), https://rapidcityjournal.com/news/local/crime-and-courts/one-of-nine-escaped-state-inmates-booked-into-county-jail-after-possible-covid-19-exposure/article_dde96057-ee4a-54c8-9238-fa766a86ce48.html [https://perma.cc/B4MN-9ET5].

[2] Danielle Ferguson, *Last of Nine Inmates Who Escaped from Women's Prison After COVID-19 Case Arrested in Sioux Falls*, ARGUS LEADER (Aug. 19, 2020, 10:51 AM), https://www.argusleader.com/story/news/crime/2020/08/19/last-inmate-who-walked-away-womens-prison-after-covid-19-case-arrested-sioux-falls/5605336002/ [https://perma.cc/4ZJZ-NP4W].

[3] Zionts, *supra* note 1.

escaped custody due to their fear of contracting the virus inside the prison walls.[4] Although escaping after one confirmed case may seem premature, the escapees' concerns were far from unfounded. On September 16, 2020, 102 of the 140 inmates in the institution had active COVID-19 cases.[5]

In November 2020, prisoners escaped from a second Rapid City minimum-security institution; this time, two men left the Rapid City Community Work Center approximately one day apart, on Friday and Saturday.[6] By Monday, the work center had forty-five active COVID-19 cases, and prisoners expected the number to increase rapidly.[7] While the men did not state their motive for leaving, other prisoners noted that the escapees feared contracting COVID-19.[8] The escapees at both Rapid City facilities risked up to five years in prison if convicted of second-degree escape.[9]

On April 1, 2020, another prisoner, Richard Cephas, escaped from federal prison in Butner, North Carolina.[10] Like those in Rapid City, he cited fear of contracting COVID-19 as the reason for his escape, despite the fact that the prison had not yet had its first positive test for the virus.[11] As a 55-year-old man with a medical condition, Cephas feared that he was especially susceptible to complications from the virus.[12] After three weeks outside of federal custody, he was captured.[13] On October 20, 2020, he was sentenced

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[4] Arielle Zionts, *Inmates, Loved Ones Describe Fear in Prison Where Woman Tested Positive for COVID-19*, RAPID CITY J. (Mar. 25, 2020), https://rapidcityjournal.com/news/local/inmates-loved-ones-describe-fear-in-prison-where-woman-tested/article_c1ffee9d-1007-5107-a37e-d2c40d94da95.html#tracking-source=home-trending [https://perma.cc/RMP3-HJHN].

[5] *Update: After Pierre Prison COVID-19 Outbreak, Mass Testing Was Conducted*, KOTA (Sept. 17, 2020, 11:11 AM), https://www.kotatv.com/2020/09/17/womens-minimum-security-prison-experiences-covid-19-outbreak/ [https://perma.cc/HV4R-V7NN].

[6] Arielle Zionts, *COVID-19, Escapes and Boarded-up Windows at the Rapid City Prison*, RAPID CITY J. (Nov. 9, 2020), https://rapidcityjournal.com/news/local/covid-19-escapes-and-boarded-up-windows-at-the-rapid-city-prison/article_19703be0-e5de-52ac-85a8-e043a027b2df.html [https://perma.cc/2RNE-R8KS].

[7] *Id.*

[8] *Id.*

[9] Ferguson, *supra* note 2.

[10] Josh Shaffer, *Inmate Says He Escaped N.C. Prison to Avoid COVID-19. Now, He Seeks Leniency*, GREENSBORO NEWS & REC. (Oct. 20, 2020), https://greensboro.com/news/state/inmate-says-he-escaped-n-c-prison-to-avoid-covid-19-now-he-seeks-leniency/article_ebdea1f6-12fc-11eb-a388-13b943192fba.html [https://perma.cc/8HDJ-6FAV].

[11] *Id.*

[12] *Id.*

[13] *Id.*

to eighteen months in prison for his escape to be served consecutively with his current sentence.[14]

The COVID-19 pandemic could create conditions where prison escape is the only viable method by which a prisoner can avoid substantial injury or death from infection. The correctional institutions in Rapid City and Butner suffered substantial outbreaks, and the majority of prisoners at some other institutions have been infected, resulting in thousands of deaths within the prison system at-large.[15] Further, the pandemic has placed a significant strain on the medical system, and prisons are far from immune.[16] In an overcrowded or medically understaffed prison, prisoners—particularly those who are especially susceptible to complications from the virus—may encounter a situation where their lives are at risk, and their legal options are insufficient to deal with the potential adverse health impacts. A prisoner may feel compelled to escape a prison during a pandemic, as some already have.

Escapees could potentially rely on the defense of duress or necessity to justify such an escape. These are affirmative justification defenses in which the defendant's conduct was criminal, but the situation required him to engage in criminal conduct as the lesser of two evils.[17] Essentially, these defenses excuse criminal conduct as legally and practically justified based on the circumstances.[18] From a policy perspective, these defenses reflect society's preference to avoid the worse of two outcomes, even when the better option is criminal.[19] Defendants have invoked the necessity defense in

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[14] Minute Entry, United States v. Cephas, No. 5:20-cr-00209 (E.D.N.C. Oct. 20, 2020), ECF No. 37.

[15] *See* U.S. DEP'T OF JUSTICE, PANDEMIC RESPONSE REPORT: REMOTE INSPECTION OF FEDERAL CORRECTIONAL COMPLEX BUTNER iv (Jan. 2021), https://oig.justice.gov/sites/default/files/reports/21-031.pdf; *Update: After Pierre Prison COVID-19 Outbreak, suora* note 5; *see also* Mary Van Beusekom, *Studies Detail Large COVID Outbreaks at US Prisons, Jails*, CTR. FOR INFECTIOUS DISEASE RES. & POL'Y (Apr. 5, 2021), https://www.cidrap.umn.edu/news-perspective/2021/04/studies-detail-large-covid-outbreaks-us-prisons-jails [https://perma.cc/YT9F-Y2TZ]..

[16] *See generally* Stacy Weiner, *Prison Should Not Be a COVID-19 Death Sentence*, ASS'N OF AM. MED. COLLS. (Aug. 27, 2020), https://www.aamc.org/news-insights/prison-should-not-be-covid-19-death-sentence [https://perma.cc/WM46-G294] (noting the frequency of COVID-19 infections in prisons and identifying conditions that make prisons particularly susceptible to outbreaks).

[17] 115 AM. JUR. 3D *Proof of Facts* § 309 (2010).

[18] *Id.*

[19] Wayne H. Michaels, *Have the Prison Doors Been Opened – Duress and Necessity as Defenses to Prison Escape*, 54 CHI.-KENT L. REV. 913, 919 (1978).

an effort to justify a wide variety of offenses,[20] including prison escape.[21] However, a prison escapee has not yet raised a justification defense in the context of COVID-19 or any other pandemic, so whether courts will permit this defense is untested.

Part I of this Comment will discuss the development of medical care in prisons, the current state of prison healthcare, and the risks posed by the spread of COVID-19 in these institutions. Part II will present the case law and policy rationales underpinning the duress and necessity defenses in U.S. law, especially as they relate to prison escapes. Part III will examine problems with the Supreme Court's decision to require a "bona fide attempt at surrender" as a prerequisite for presenting justification defenses to prison escapes and argue that this requirement usurps jury's indispensable role as fact-finder and unjustly requires escapees to return to prison while conditions are still dangerous. Finally, Part IV will apply the justification defenses to prison escapes in the context of COVID-19.

I. HEALTHCARE IN U.S. PRISONS & THE CONSEQUENCES OF COVID-19

By 1929, there were serious concerns regarding the spread of contagious diseases within prisons.[22] However, it was not until the 1970s that courts began to recognize a prisoner's right to medical care.[23] In *Campbell v. Beto*, the Fifth Circuit noted that courts could no longer "close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well-being."[24] *Campbell* involved a constitutional claim by a prisoner who was forced to work and denied medication despite a history of heart trouble that prison administrators recognized.[25] In ruling in the prisoner's favor, the court noted that federal courts had previously granted wide discretion to prison administrators in maintaining order and discipline, but "practices which result in the deprivation of basic elements of adequate

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[20] *See, e.g.*, United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 487 (2001) (seeking to apply the necessity defense to the manufacture and distribution of marijuana).

[21] *See* United States v. Bailey, 444 U.S. 394, 398 (1980).

[22] Hallie E. Mitnick, Note, Estelle v. Gamble *in a Post-Affordable Care Act World*, 13 CARDOZO PUB. L., POL'Y & ETHICS J. 797, 799 (2015).

[23] *See id*. at 800. Prior to this, courts had recognized that the Eighth Amendment must reflect "evolving standards of decency," but they did not extend these protections to include a right to medical care. Marc J. Posner, *The* Estelle *Medical Professional Judgment Standard: The Right of Those in State Custody to Receive High-Cost Medical Treatments*, 18 AM. J.L. & MED. 347, 348 (1992).

[24] 460 F.2d 765, 768 (5th Cir. 1972).

[25] *Id*. at 766–67.

medical treatment" violate constitutional guarantees.[26] As such, the Fifth Circuit opened the door for additional federal courts to find that institutions must provide a minimum standard of medical care to prisoners.

A. *ESTELLE V. GAMBLE*

Estelle v. Gamble was the first major judicial step in the development of a constitutional right to healthcare while incarcerated. On November 9, 1973, J.W. Gamble injured his back on a work assignment while incarcerated in the Texas Department of Corrections.[27] After working for a few hours, Gamble went to the prison hospital.[28] While he was initially granted work leave and accommodations, they were eventually revoked despite Gamble's continued complaints of severe symptoms that were exacerbated by manual labor.[29]

The Supreme Court ultimately remanded the case to determine whether Gamble's complaint sufficiently pled a violation by prison officials, as it noted that the Eighth Amendment provides protections against "more than physically barbarous punishments."[30] The Eighth Amendment encompasses punishments that violate "evolving standards of decency that mark the progress of a maturing society."[31] Most importantly, a showing of "deliberate indifference to serious medical needs" of prisoners violates the Eighth Amendment's prohibition on "unnecessary and wanton infliction of pain."[32] This is true when prison officials are unresponsive to prisoners' needs, or guards deny or delay necessary care.[33]

B. PRISON HEALTHCARE CHALLENGES: THE AGING PRISON POPULATION & COVID-19

After *Estelle*, prison healthcare improved considerably.[34] Even prior to the impending onslaught of prisoner litigation, many prisons improved

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[26] *Id.* at 768.

[27] Estelle v. Gamble, 429 U.S. 97, 99 (1976).

[28] *Id.*

[29] *See id.* at 99–100.

[30] *Id.* at 102, 108.

[31] *Id.* at 102.

[32] *Id.* at 104.

[33] *Id.* at 104–05

[34] *See* Maureen Mullen Dove, *Law and Fact of Health Care in Prisons*, 44 MD. BAR J. 4, 13 (2011).

standards of healthcare to avoid lawsuits.[35] These improvements included "more professionalism in correctional healthcare," "timely access to care," better qualified staff, and increased "continuity and coordination of care."[36]

Despite some post-*Estelle* improvements, both the federal and state prison healthcare systems are still unable to adequately meet the medical needs of prisoners today. Since the beginning of their incarceration, 13.9% of federal prisoners, 20.1% of state prisoners, and 68.4% of local jail detainees received no form of medical examination.[37] While more than 20% of prisoners were taking a prescription medication at the beginning of their incarceration, 26.3% of federal prisoners, 28.9% of state prisoners, and 41.8% of local jail detainees stopped taking these medications upon imprisonment.[38] From 2001 to 2016, mortality rates in both the state and federal prison systems increased; illness accounted for 88.3% of state prisoner deaths and 90.9% of federal prisoner deaths.[39]

Given that each year in prison reduces life expectancy by approximately two years,[40] an aging prison population poses significant challenges. In state prisons, the number of prisoners over the age of 55 increased by 400% between 1993 and 2013, while the total state prison population increased by approximately 62%.[41] Further, between 2001 and 2004, "[t]he death rate of inmates age 55 and older was over 3 times higher than that of inmates age 45-54, and 11 times higher than those age 35-44."[42] Though this increase in

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[35] William J. Rold, *Thirty Years After* Estelle v. Gamble*: A Legal Retrospective*, 14 J. CORR. HEALTHCARE 11, 18 (2008).

[36] ROBERT B. GREIFINGER, *Thirty Years Since* Estelle v. Gamble*: Looking Forward, Not Wayward*, *in* PUBLIC HEALTH BEHIND BARS: FROM PRISONS TO COMMUNITIES 1, 4 (Robert B. Greifinger, Joseph Bick & Joe Goldenson eds., 2007).

[37] Andrew P. Wilper, Steffie Woolhandler, J. Wesley Boyd, Karen E. Lasser, Danny McCormick, David H. Bor & David U. Himmelstein, *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666, 669 (2009). Often, prisoners stop taking these medications because the institution's "access to health care and the quality of that care are . . . deficient." *See id.* at 666.

[38] *Id.* at 669.

[39] E. ANN CARSON & MARY P. COWHIG, U.S. DEP'T OF JUST., MORTALITY IN STATE AND FEDERAL PRISONS, 2001-2016 1 fig.1 (2020), https://www.bjs.gov/content/pub/pdf/msfp0116st.pdf [https://perma.cc/5NGX-LAQK].

[40] Evelyn J. Patterson, *The Dose–Response of Time Served in Prison on Mortality: New York State, 1989–2003*, 103 AM. J. PUB. HEALTH 523, 525 (2013).

[41] E. ANN CARSON & WILLIAM J. SABOL, U.S. DEP'T OF JUST., AGING OF THE STATE PRISON POPULATION, 1993–2013 1 (2016). *Compare* TERRY L. SNELL, U.S. DEP'T OF JUST., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1993 11 (1995), *with* E. ANN CARSON, U.S. DEP'T OF JUST., PRISONERS IN 2013 4 (2014).

[42] The Aging Inmate Comm. of the Md. Bar Ass'n Corr. Reform Council, *Aging Inmates: Correctional Issue and Initiatives*, 44 MD. BAR J. 22, 24 (2011).

the prisoner mortality rate is partially attributable to an aging population, subpar prison healthcare also plays a substantial role.[43]

The aging prison population presents a difficult issue for prisons forced to deal with a COVID-19 outbreak. The risk of severe complications from COVID-19 increases with age, and elderly individuals are at the highest risk.[44] Traditionally, prison healthcare systems were designed to meet the needs of younger prisoners rather than the current aging population.[45] When beneficial programs are available, older prisoners face "knowledge deficits, feelings of futility, and insufficient motivation" about receiving treatment in the prison context.[46] As a result, male prisoners have an average "biological age" that is ten to fifteen years older than their chronological age, which means that they are prone to developing health problems fifteen years earlier than they would if they had not been imprisoned.[47] Despite elderly prisoners' particular need for healthcare amidst the COVID-19 pandemic, few prisons employ healthcare professionals with training in geriatrics or palliative care.[48] With an aging population and a lack of professionals prepared to provide care, prisons are a dangerous place to catch the virus.

C. THE SPREAD OF COVID-19 IN PRISONS

The spread of COVID-19 has posed a significant threat to society at-large, but it has spread even faster in prisons, causing grave problems. In both state and federal prisons, prisoners are four times as likely to contract the virus compared to the general population.[49] Prisoners are twice as likely to

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[43] *See generally* Meghan A. Novisky, *Avoiding the Runaround: The Link Between Cultural Health Capital and Health Management Among Older Prisoners*, 56 CRIMINOLOGY 643 (2018) (discussing inequities in prison healthcare and reasons prisoners often do not receive adequate care).

[44] *COVID-19 Risks and Vaccine Information for Older Adults*, CDC, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html [https://perma.cc/BS3L-7K8J].

[45] Raheleh Heidari, Tenzin Wangmo, Serena Galli, David M. Shaw & Bernice S. Elger, *Accessibility of Prison Healthcare for Elderly Inmates, a Qualitative Assessment*, 52 J. FORENSIC & LEGAL MED. 223, 227 (2017).

[46] Susan J. Loeb, Darrell Steffensmeier, & Frank Lawrence, *Comparing Incarcerated and Community-Dwelling Older Men's Health*, 30 W. J. NURSING RSCH. 234, 245 (2008).

[47] *Id.* at 235–36.

[48] Stephanie Grace Prost, Meghan A. Novisky, Leah Rorvig, Nick Zaller & Brie Williams, *Prisons and COVID-19: A Desperate Call for Gerontological Expertise in Correctional Health Care*, 61 GERONTOLOGIST 3, 4 (2021).

[49] KEVIN T. SCHNEPEL, COUNCIL ON CRIM. JUST., COVID-19 IN U.S. STATE AND FEDERAL PRISONS (2020), https://covid19.counciloncj.org/2020/09/02/covid-19-and-prisons/ [https://perma.cc/8GP6-8HVQ].

die from COVID-19 compared to the general population.[50] This is likely because prisoners more frequently suffer from a chronic illness and are older on average—both of which increase the chance of complications from infection.[51]

In the overcrowded conditions often present in prisons, prisoners cannot protect themselves against outbreaks. Though social distancing is an effective method of controlling the spread, prisons generally do not permit prisoners to self-isolate.[52] Even when prisons implement social distancing efforts, prisoners assert that these efforts often still involve close quarters.[53] This problem is compounded by the fact that prisons are frequently overcrowded. The United States prison population quadrupled between 1975 and 2015; in many prisons, this resulted in "prisoners sleeping in gyms and hallways or triple- and quadruple-bunked in cells."[54] Ventilation in prisons is generally poor, so prisoners are "constantly breathing recirculated air."[55] While prisoners can utilize sanitation methods available to them, many facilities do not permit prisoners to have "basic cleaning or sanitation supplies that contain alcohol," and some facilities do not provide "even the most rudimentary access to hygiene such as antimicrobial soap."[56] This has been exacerbated by the shortages of basic hygienic supplies including wipes, hand sanitizer, and disposable thermometer covers.[57] For a long time, prisons have been prone to disease outbreaks, largely due to chronically

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[50] *Id*.

[51] *See* Matthew J. Akiyama, Anne C. Spaulding & Josiah D. Rich, *Flattening the Curve for Incarcerated Populations — Covid-19 in Jails and Prisons*, 382 NEW ENG. J. MED. 2075, 2076 (2020).

[52] *Id*.

[53] *See* Christopher Blackwell, *In Prison, Even Social Distancing Rules Get Weaponized*, MARSHALL PROJECT (May 28, 2020, 10:00 PM), https://www.themarshallproject.org/2020/05/28/in-prison-even-social-distancing-rules-get-weaponized [https://perma.cc/9NZD-2FHV].

[54] AM. CIV. LIBERTIES UNION, OVERCROWDING AND OVERUSE OF IMPRISONMENT IN THE UNITED STATES 1 (May 2015), https://www.ohchr.org/Documents/Issues/RuleOfLaw/OverIncarceration/ACLU.pdf [https://perma.cc/SR84-LWUE].

[55] Sharon Dolovich, *Mass Incarceration, Meet COVID-19*, U. CHI. L. REV. ONLINE (Nov. 16, 2020), https://lawreviewblog.uchicago.edu/2020/11/16/covid-dolovich/ [https://perma.cc/3EAA-UK3M].

[56] Oluwadamilola T. Oladeru, Nguyen-Toan Tran, Tala Al-Rousan, Brie Williams & Nickolas Zaller, *A Call to Protect Patients, Correctional Staff and Healthcare Professions in Jails and Prisons During the COVID-19 Pandemic*, 8 HEALTH & JUST. 1, 2 (2020); Clark Neily, *Decarceration in the Face of a Pandemic*, CATO INST. (Apr. 30, 2020, 6:25 PM), https://www.cato.org/blog/decarceration-face-pandemic [https://perma.cc/NP9Y-KJCL].

[57] Bryn Nelson, *A COVID-19 Crisis in US Jails and Prisons*, 128 CANCER CYTOPATHOLOGY 513, 514 (2020).

unsanitary conditions.[58] Ultimately, prisoners are powerless to keep COVID-19 out of prisons. They cannot require prison staff and officials to take measures to prevent their own infection, and prison staff often bring the virus into the facilities.[59]

While many prisons have taken steps to prevent the spread of COVID-19, these policies are often inadequate or unrealized. Prisons have instituted a variety of policies, such as "establishing enhanced cleaning protocols; providing for the distribution of masks, gloves, and cleaning supplies; requiring isolation of the infected; limiting movement and transfers between facilities; and ordering residents to socially distance as much as possible."[60] Unfortunately, there is often a "yawning gap" between the announced policies and their implementation, as courts have found that prisons did not abide by their own stated standards.[61] Although courts have established some minimum standards of care for detainees through injunctive relief,[62] prisoners still face significant risks with no end in sight.

II. APPLICATIONS OF DURESS AND NECESSITY DEFENSES TO PRISON ESCAPES

In theory, there is a distinction between the affirmative defenses of duress and necessity. Generally, the necessity defense takes the form of justification; criminal acts are justified if they avoid a greater evil.[63]

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[58] Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 CLINICAL INFECTIOUS DISEASES 1047, 1048 (2007) (listing many examples of unsanitary conditions, such as inadequate general hygiene, hand hygiene, laundry, and housekeeping).

[59] *See, e.g.*, Joseph P. Smith, *Cumberland County Blames Corrections Officers for Bringing COVID into Jail*, DAILY J. (Oct. 29, 2020, 3:57 PM), https://www.thedailyjournal.com/story/news/2020/10/29/nj-cumberland-county-jail-coronavirus-covid-outbreak-blame-police-benevolent-association/6074799002/ [https://perma.cc/32GL-SZK2]; Jessica A. York, *Santa Cruz County Correctional Officer Party Under Investigation as Source of COVID-19 Outbreak*, SANTA CRUZ SENTINEL (Dec. 2, 2020, 10:34 AM), https://www.santacruzsentinel.com/2020/12/02/santa-cruz-county-correctional-officer-party-under-investigation-as-source-of-covid-19-outbreak/ [https://perma.cc/A9UB-XDH7].

[60] Dolovich, *supra* note 55, at 5.

[61] *Id.*; *see also* Ahlman v. Barnes, 445 F. Supp. 3d 671, 688 (C.D. Cal. 2020) (finding that compliance with the stated sanitation policies and procedures of California's Santa Ana Jail was "piecemeal and inadequate.").

[62] Mays v. Dart, 456 F. Supp.3d 966, 1017 (N.D. Ill. 2020). The court issued a preliminary injunction order requiring the sheriff to institute several measures to protect pre-trial detainees at Cook County Jail in Chicago, IL, including increasing access to soap, social distancing during jail intake, and providing facemasks to "detained persons who are quarantined." *Id.*

[63] *See* MODEL PENAL CODE § 3.02 (Am. L. Inst. 1962) (defining necessity as "[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater

Necessity involves a scenario where a defendant "chooses to act in a way that the law ultimately approves."[64] Duress takes the form of an excuse by acknowledging that the law does not approve of the criminal act but recognizing that the behavior resulted from coercion—it involves "a threat of harm made to compel a person to do something against his or her will or judgment . . . [which] practically destroys a person's free agency."[65] Given these definitions, necessity involves a response to external pressure from any source, whereas duress focuses on pressure from another person. While these defenses are historically distinct, recent decisions have blurred the line between them in the context of prison escapes, and they are often offered in tandem without practical distinction.[66] As they relate to prison escapes, this Comment will refer to them as "duress and necessity" or "justification" defenses in the interest of clarity.

Criminal defendants are not entitled to present justification defenses to the jury by default.[67] First, the court examines whether the defendant offered sufficient evidence that a "reasonable juror" could decide that the required elements are met.[68] In most cases, the court unilaterally determines that the defendant failed to meet this burden.[69] When the court decides that the defense is available, the jury decides whether it applies to the case at hand.[70] While jury instructions for these defenses vary considerably by jurisdiction and based on the nature of the offense,[71] a standard necessity instruction must

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than that sought to be prevented by the law defining the offense charged); *Necessity*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term as "a justification defense for a person who acts in an emergency that he or she did not create and who commits a harm that is less severe than the harm that would have occurred but for the person's actions.").

[64] *Duress*, BLACK'S LAW DICTIONARY (11th ed. 2019) (citing Thomas Morawetz, *Necessity*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 957, 959 (Sanford H. Kadish ed., 1983)).

[65] *Id.*

[66] *See* George L. Blum, *Duress, Necessity, or Conditions of Confinement as Justification for Escape from Prison*, 54 AM. L. REPS. 141; United States v. Bailey, 444 U.S. 394, 397 (1980). The distinction between justification and excuse defenses has faded in other contexts, as well. *See* Joshua Dressler, *Justifications and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1170 (1987).

[67] Kyle Bettigole, *Defending Against Defense: Civil Resistance, Necessity and the United States Military's Toxic Legacy*, 21 BOS. COLL. ENV'T. AFF. L. REV. 667, 672 (1994).

[68] Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 103–04 (1989); John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 112 (2007).

[69] Schulkind, *supra* note 68.

[70] *See* Cohan, *supra* note 68, at 112.

[71] *See* United States v. Westbrook, 896 F.2d 330, 337 (8th Cir. 1990) (stating that "the trial court has broad discretion in choosing the form and language of jury instructions.").

advise the jury that "they may acquit the defendant if they find that given all the circumstances the defendant reasonably believed the results of breaking the law would be a lesser evil than the result of keeping the law."[72]

For most of U.S. history, it was "well settled" that intolerable prison conditions did not justify prison escape under a duress or necessity defense.[73] Still, escapees offered a variety of related rationales for their offenses.[74] In 1965, the California Court of Appeals implicitly acknowledged that a justification defense may be available to escapees in *People v. Wester*.[75] In *Wester*, the defendant escaped from state prison and was captured two days later.[76] At trial, he argued that another prisoner forced him to escape, which he offered as an excuse for his actions.[77] The trial court instructed the jury that a prisoner whose departure was "influenced . . . by threats or menaces which create in his mind a fear of imminent and immediate danger . . . does not commit the crime of escape by such departure."[78] The appeals court approved of this instruction but noted that it "strains the imagination" to contemplate a situation where "a puny prisoner might fear for his life if a fellow convict demanded that he escape with him and backed the demand with threats of physical violence."[79] Despite the classic necessity example of escaping a burning prison, courts refused to allow justification defenses to prison escape.

A. STATE COURT: *PEOPLE V. LOVERCAMP* AND ITS PROGENY

In the early 1970s, state courts started to abandon the prohibition on justification defenses to prison escape. Nine years after its decision in *Wester*, the California Court of Appeals confirmed that the necessity defense was available to prison escapees in *People v. Lovercamp*.[80] The court outlined a specific factor test to determine whether the rationale behind an escape met

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[72] Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 299 (1975).

[73] State v. Palmer, 72 A.2d 442, 443–44 (Del. Ct. Gen. Sess. 1950).

[74] *See, e.g.*, State v. Cahill, 194 N.W. 191, 193 (Iowa 1923) (discussing an inmate subjected to a bread-only diet and cell infested with bugs and other vermin); Dempsey v. United States, 283 F.2d 934, 934 (5th Cir. 1960) (describing a diabetic inmate who claimed to require an immediate insulin injection, which was withheld from him).

[75] 46 Cal. Rptr. 699, 703 (Dist. Ct. App. 1965).

[76] *Id.* at 701.

[77] *Id.* at 703.

[78] *Id.*

[79] *Id*.

[80] People v. Lovercamp, 118 Cal. Rptr. 110, 116 (Ct. App. 1974).

the requirements of duress or necessity, which greatly influenced subsequent decisions in California and other states.[81]

In *Lovercamp*, two women escaped from a drug rehabilitation center after frequent threats of sexual violence; other women at the center challenged them to "fuck or fight."[82] Despite complaining to prison authorities, nothing was done.[83] Eventually, the defendants were forced to fight, after which the threats continued.[84] This caused them to fear for their lives, and they believed they had "no choice but to leave the institution in order to save themselves."[85] After their escape, they were "promptly captured."[86] The trial court did not allow the defendants present a necessity defense to the jury, and they were convicted of escape.[87]

In reversing the lower court's decision, the court of appeals determined that the defendants presented sufficient evidence to submit a necessity defense to the jury.[88] The court provided a set of requirements that a defendant must satisfy to successfully proffer a duress or necessity defense:

> (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.[89]

In establishing this test, the court was keenly concerned about the possibility of solidifying the availability of justification defenses in subsequent prison escapes cases.[90] In an attempt to prevent "the spectacle of hordes of prisoners leaping over the walls screaming 'rape,' [the court] hasten[ed] to add that the defense . . . [was] extremely limited in its application."[91] However, as long as the evidentiary requirements were

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[81] *Id.* at 111.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] People v. Lovercamp, 118 Cal. Rptr. 110 (Ct. App. 1974).
[87] *Id.*
[88] *Id.* at 115.
[89] *Id.* (footnote omitted).
[90] *Id.*
[91] *Id.*

minimally satisfied, "[w]hether any of the conditions requisite to this defense exist is a question of fact to be decided by the trier of fact . . . ."[92]

Following *Lovercamp,* other state courts applied justification defenses to prison escape.[93] However, state courts must consider legislative definitions of the justification defenses when there is a relevant statute.[94] As a result, some states have adopted portions of the *Lovercamp* test while altering or excluding factors that do not align with statutory directives.[95] In state court, defendants have had some success in presenting their duress and necessity defenses to the jury.[96]

B. FEDERAL COURT

To date, the Supreme Court has not explicitly adopted a singular definition of necessity or duress, though it has acknowledged the availability of the defenses.[97] Unlike in many states, neither duress nor necessity is defined by federal law, which gives federal courts broad discretion to determine the requirements for the defenses.[98] However, in *Dixon v. United States*, the Supreme Court utilized the district court's requirements for the duress defense and presumed their accuracy.[99] The defense required that:

> (1) The defendant was under an unlawful and imminent threat of such a nature as to induce a well-grounded apprehension of death or serious bodily injury; (2) the defendant had not recklessly or negligently placed herself in a situation in which it was

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[92] People v. Lovercamp, 118 Cal. Rptr. 110, 116 (Ct. App. 1974).

[93] *See* People v. Unger, 362 N.E.2d 319, 319 (Ill. 1977); Esquibel v. State, 576 P.2d 1129, 1131–32 (N.M. 1978), *overruled on other grounds by* State v. Wilson, 867 P.2d 1175 (N.M. 1994); State v. Horn, 566 P.2d 1378, 1380 (Haw. 1977); Commonwealth v. O'Malley, 439 N.E.2d 832, 835 (Mass. App. Ct. 1982); State v. Culp, 900 S.W.2d 707, 710 (Tenn. Crim. App. 1994).

[94] Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1275 (2008).

[95] *See Horn*, 566 P.2d at 1380 (replacing the requirement of "a specific threat of death, forcible sexual attack, or substantial bodily injury" with "specific and articulable conditions within the prison exist which seriously expose the prisoner to severe injury"); *Culp*, 900 S.W.2d at 710–11 (applying only the second and fifth elements of the *Lovercamp* test to comport with the state's statutory definition of necessity, which required only that "(1) [t]he person reasonably believes the conduct is immediately necessary to avoid imminent harm; [and] (2) [t]he desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct . . .").

[96] *See Culp*, 900 S.W.2d at 710–11; *Esquibel*, 576 P.2d at 1133.

[97] *See*, Schwartz, *supra* note 94, at 1260.

[98] *See* Schwartz, *supra* note 94, at 1263 n.16.

[99] Dixon v. United States, 548 U.S. 1, 6 n.2 (2006).

> probable that she would be forced to perform the criminal conduct; (3) the defendant had no reasonable, legal alternative to violating the law, that is, a chance both to refuse to perform the criminal act and also to avoid the threatened harm; and, (4) that a direct causal relationship may be reasonably anticipated between the criminal act and the avoidance of the threatened harm.[100]

The Ninth Circuit adopted a similar test in *United States v. Aguilar*, which several other circuit courts subsequently adopted.[101] This test requires defendants to show that

> "(1) [they were] faced with a choice of evils and chose the lesser evil; (2) that [they] acted to prevent imminent harm; (3) that [they] reasonably anticipated a direct causal relationship between [their] conduct and the harm to be averted; and (4) that [they had] no legal alternatives to violating the law."[102] In a previous case, the Circuit considered the requirements as they apply to prison escapes and noted that, because prison escape is a continuing offense, an escapee must "submit to proper authorities immediately after attaining a position of safety."[103]

In *United States v. Bailey*, the Supreme Court considered similar questions to *Lovercamp*: whether duress and necessity defenses are available in federal court to prisoners who flee prison to escape intolerable conditions and what these defenses require.[104] In *Bailey*, the prisoners escaped from a District of Columbia jail because the guards subjected them to beatings and death threats and set fires in their cellblock among other insufferable conditions.[105] One of the escapees also alleged that he received inadequate medical care.[106] After three-and-a-half months on the run, each escapee was recaptured by the authorities.[107] Two of the escapees attempted to justify their refusal to return to custody by alleging that the FBI was looking for them and intended to shoot them on sight.[108]

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[100] *Id.*

[101] United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989) (examining the application of the necessity defense to a scenario involving smuggling political refugees into the United States); *See also* United States v. Dorrell, 758 F.2d 427, 430–31 (9th Cir. 1985); United States v. Turner, 44 F.3d 900, 902 (10th Cir. 1995); United States v. Duclos, 214 F.3d 27, 33 (1st Cir. 2000).

[102] *Aguilar*, 883 F.2d at 693; United States v. Schoon, 971 F.2d 193, 195 (9th Cir. 1991) (reaffirming the *Aguilar* test).

[103] United States v. Michelson, 559 F.2d 567, 570 (9th Cir. 1977).

[104] United States v. Bailey, 444 U.S. 394, 409–11 (1980).

[105] *Id.* at 398.

[106] *Id.*

[107] *Id.* at 396.

[108] *See id.* at 428 n.7, 430 (Blackmun, J., dissenting).

Ultimately, the *Bailey* Court determined that the justification defenses were unavailable.[109] The Court stated that, "in the context of prison escape, the escapee is not entitled to claim a defense of duress or necessity *unless and until* he demonstrates that, given the imminence of the threat, violation of" the law is the "only reasonable alternative."[110] This violation continues until the escapee surrenders to the authorities; illegality does not stop after the initial breakout.[111] Because of this, for a necessity defense to go to the jury, the proponent must "offer evidence justifying his continued absence from custody as well as his initial departure."[112] Implicit in this assessment is a requirement that escapees make a "bona fide effort to surrender or return to custody as soon as the claimed duress or necessity had lost its coercive force."[113] During their long absence from custody, the prisoners never attempted to surrender, so they failed to satisfy this requirement.[114] As such, the Court did not consider whether the prisoners' initial escape was justified.[115]

In his dissent, Justice Blackmun argued that the majority's requirement that escapees attempt to surrender was improper; instead, an escapee only needed to justify his continued absence if recaptured.[116] Referring to the majority's requirement as "naive," the dissent argued that dangerous prison conditions may still exist at the time of recapture.[117] Blackmun argued that escapees "should be permitted to submit evidence to the jury to demonstrate that surrender would result in his being placed again in a life- or health-threatening situation."[118] Given the prisoners' proffered concerns related to their safety in returning to custody, Blackmun adamantly concluded that they "did indeed submit sufficient evidence to support a [jury] verdict of not guilty."[119] Some federal courts have required an attempt to surrender

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[109] *Id.* at 417.

[110] *Id.* at 410–11 (emphasis added).

[111] United States v. Bailey, 444 U.S. 394, 412-13 (1980).

[112] *Id.* at 394, 412.

[113] *Id.* at 413. The court also phrased this as a requirement of returning to custody at the "earliest possible opportunity." *Id.* at 415.

[114] *Id.* at 415.

[115] *Id.* at 412.

[116] *Id.* at 426.

[117] United States v. Bailey, 444 U.S. 394, 427 (1980).

[118] *Id*. at 427.

[119] *Id.* at 428.

immediately after escape in subsequent cases, legitimizing Justice Blackmun's concerns.[120]

III. *BAILEY*'S BONA FIDE ATTEMPT REQUIREMENT: FUNDAMENTAL FLAWS

Since *Bailey*, state courts and lower federal courts have been similarly unwilling to submit defenses of duress and necessity to the jury,[121] especially in cases involving prison escape. These decisions often focus on the failure of an escapee to make a "bona fide effort to surrender."[122] However, prior to *Bailey*, state courts which considered similar questions applied justification defense standards in more ambiguous terms that allowed juries to determine whether the threat inside the prison had abated while the escapee was on the run.[123] In doing so, these courts more closely followed the traditional definitions and rationales underlying duress and necessity defenses by acknowledging that prison conditions may still pose an imminent threat to escapees for the duration of their absence.

While the Supreme Court correctly noted that precedent established that an escapee must return once a threat has reasonably abated, it incorrectly rejected the respondents' assertion that a bona fide attempt at surrender should be "just one factor" in the analysis.[124] Escape from prison is a continuing offense that does not end until the escapee is caught or surrenders,[125] but imminent threats within prison walls can also continue after escape. In ruling that the defendant must have "surrendered or offered to surrender at their earliest possible opportunity,"[126] the Court did not explicitly answer the obvious question: what is the requirement to surrender if the prison is still dangerous when a prisoner is caught?

The *Bailey* Court did not specify a reasonable duration for an escape before this required attempt, merely that it must occur "as soon as the claimed

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[120] *See, e.g.*, United States v. Bifield, 702 F.2d 342, 346 (2d Cir. 1983); United States v. Capadona, No. 98-cr-00432-EWN, 2007 WL 9718019, at *2 (D. Colo. May 21, 2007).

[121] *See, e.g.*, United States v. Al-Rekabi, 454 F.3d 1113, 1126 (10th Cir. 2006).

[122] *See* People v. Scott, 551 N.E.2d 288, 293 (Ill. App. Ct. 1990) (holding that *Bailey* altered previous Illinois precedent by instituting the "indispensable" requirement of a bona fide effort to surrender); Craddock v. State, 424 A.2d 168, 170 (Md. Ct. Spec. App. 1981). Both cases quoted *Bailey* as authoritative on the requirement of a bona fide attempt to surrender.

[123] *See* People v. Lovercamp, 118 Cal. Rptr. 110, 115 (Ct. App. 1974); People v. Unger, 362 N.E.2d 319, 319–20, 323 (Ill. 1977).

[124] *Bailey*, 444 U.S. at 412.

[125] *Id*. at 413.

[126] *Id*. at 415.

duress or necessity ha[s] lost its coercive force."[127] The Court did not address what would occur if the prisoners were captured prior to the time that the threat had lost this coercive force, because the case involved a particularly long absence from custody.[128] As a practical application, the Court's interpretation may require an escapee to elude capture until the precise time that the threat has abated. Alternatively, allowing juries to decide whether the escapee returned at the requisite time without a hardline requirement of an attempt to surrender—as permitted by Michigan, California, Texas, and Massachusetts courts[129]—does not implicate these timing problems and better conforms to the traditional requirements for the justification defenses.

Several decisions—including *Lovercamp*—cite a simple public policy rationale justifying a strict standard of proof for duress and necessity defenses to prison escape: decisions favorable to prisoners will result in more escape attempts.[130] However, this is far from an inevitable consequence. A Michigan appeals court considered and rejected this possibility when allowing an escapee to present a necessity defense.[131] While the court noted that more escape attempts could theoretically result, it determined that the standard of proof required to obtain a jury verdict of not guilty was extremely high.[132] As the court predicted, it does not appear that prisoners have interpreted this ruling as an open invitation to escape. Between 2010 and 2017, there were an average of 0.75 escapes per year from Michigan Department of

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[127] *Id.*

[128] *See id.* at 396.

[129] *See* People v. Lovercamp, 118 Cal. Rptr. 110, 116 (Ct. App. 1974) ("Because the defendants were apprehended so promptly and in such close proximity to the institution, [the court] do[es] not know whether they intended to immediately report to the proper authorities at the first available opportunity."); People v. Pitcock, 184 Cal. Rptr. 772, 773 (Ct. App. 1982) (reaffirming *Lovercamp* post-*Bailey*); People v. Mendoza, 310 N.W.2d 860, 862 (Mich. Ct. App. 1981); Spakes v. State, 913 S.W.2d 597, 598 (Tex. Crim. App. 1996); Commonwealth v. Thurber, 418 N.E.2d 1253, 1257 (Mass. 1981).

[130] *See Lovercamp*, 118 Cal. Rptr. at 115 (limiting the scope of the decision for fear that *Lovercamp* would become "a household word in prison circles" resulting in "the spectacle of hordes of prisoners leaping over the walls screaming 'rape'"); People v. Noble, 170 N.W.2d 916, 918 (Mich. Ct. App. 1969) ("[I]t is easy to visualize a rash of escapes, all rationalized by unverifiable tales of sexual assault.").

[131] *See Harmon*, 220 N.W.2d at 215.

[132] *Id.* The court stated that any necessity claim "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."

Corrections facilities.[133] The availability of justification defenses does not mean that there is a reasonable expectation of success that would encourage reckless or unnecessary attempts.

In fact, there are significant legal and public policy arguments that favor loosening the *Bailey* requirements rather than maintaining a needlessly high bar. On a basic level, these defenses require the defendant to avoid a greater evil through criminal conduct,[134] and society should encourage individuals to engage in behavior that results in a better outcome. Domestic criminal law is founded on the assumption that individuals will "perceive what is 'right' and . . . act freely in accordance with that perception."[135] It is impossible for federal and state criminal codes to account for all possible scenarios in which individuals will have to make difficult choices. This is exemplified through the famous hypothetical situation involving escape from a burning prison; it is "common sense" that a prisoner should escape a burning prison rather than burn alive.[136] Just as courts should permit prisoners to contend that their escapes were necessitated by fire, avoidance of other serious injuries constitutes a strong policy rationale for the availability of the defense and, thus, a more lenient standard.

Justice Blackmun's *Bailey* dissent references another danger presented by the court's stringent requirement: it does not allow the jury to decide legitimate questions of fact, which are "routine grist for the jury mill."[137] Juries play a vital role in the criminal justice system, and their "fact-finding authority must extend to all facts that constitute elements of the criminal offense."[138] Instead of allowing the jury to determine whether the escapees' continued absence was justified based on their fear of deadly force upon their return, the *Bailey* Court determined that the escapees' statements and those of their witnesses were "[v]ague and necessarily self-serving."[139] This directly conflicts with the jury's established role as the "system's lie detector

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[133] MICH. DEP'T OF CORR., 2017 STATISTICAL REPORT C-83 tbl.C-5 (2019), https://www.michigan.gov/documents/corrections/MDOC_2017_Statistical_Report_644556_7.pdf [https://perma.cc/K8T2-X4GL].

[134] *See* United States v. Bailey, 444 U.S. 394, 398 (1980); *Lovercamp*, 118 Cal. Rptr. at 111.

[135] Susan Horan, *The XYY Supermale and the Criminal Justice System: A Square Peg in a Round Hole*, 25 LOY. L.A. L. REV. 1343, 1343 (1992).

[136] United States v. Kirby, 74 U.S. 482, 487 (1868).

[137] *Bailey*, 444 U.S. at 433 (Blackmun, J., dissenting).

[138] Welsh S. White, *Fact-Finding and the Death Penalty: The Scope of a Capital Defendant's Right to Jury Trial*, 65 NOTRE DAME L. REV. 1, 24 (1989).

[139] *Bailey*, 444 U.S. at 415.

at criminal trials."[140] The Court essentially usurped the jury's ability to decide whether this testimony met the basic requirements of the justification defenses by determining the credibility of their statements and reasonableness of their concerns. Judgments as a matter of law should be a "rare occurrence in criminal cases,"[141] and judges should practice restraint to avoid overstepping their role.

The Court's institution of a specific evidentiary requirement is both inappropriate and unnecessary. Alternatively, the Court could have made a surrender attempt a consideration in the analysis or required intent to surrender once the threat inside the prison had abated. Instead, it determined that an attempt to surrender was an "indispensable element" for justification defenses to prison escape.[142] This has had a considerable impact; some courts have been unwilling to allow prisoners to present evidence of continuing threats within the prison as justifications for their continued absence.[143] Notably, the Ninth Circuit requires that escapees make a bona fide attempt to surrender as soon as they reach an objective "position of safety."[144] In *United States v. Michelson*, the Ninth Circuit prevented the escapee from presenting a justification defense to the jury despite being beaten by a prisoner who later threatened his life, because he failed to report to the authorities after escaping.[145] As such, the circuit did not allow the jury to decide whether the escape was justified because the threat in the prison was ongoing, even though the escapee would presumably return to the control of the same prison authorities with the same prisoners who threatened him. This sets an unreasonably high bar for prisoners, as they must be objectively aware of the conditions inside the prison to know when surrender would no longer jeopardize their safety.

IV. JUSTIFICATION DEFENSES TO PRISON ESCAPE IN THE CONTEXT OF COVID-19

The ongoing COVID-19 pandemic presents a new scenario that will likely involve the presentation of justification defenses after attempts to escape an outbreak within a prison or obtain medical care outside the prison

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[140] George Fisher, *The Jury's Rise as Lie Detector*, 107 YALE L.J. 575, 581 (1997).

[141] *Bailey*, 444 U.S. at 435 (Blackmun, J., dissenting).

[142] *Id.* at 412–13.

[143] *See* People v. Scott, 551 N.E.2d 288, 291–93 (Ill. App. 1990). The court noted that the defendant made an offer of "proof as to the existence of a threat of death or substantial bodily injury," but since he presented no evidence of an effort to return to custody, he could not present a justification defense. *Id.*

[144] United States v. Lopez, 885 F.2d 1428, 1433 (9th Cir. 1989).

[145] United States v. Michelson, 559 F.2d 567, 568, 571 (9th Cir. 1977).

after infection. In claiming these defenses, defendants will face several significant hurdles to their success. Generally, federal courts have used the Ninth Circuit's *Aguilar* test, which requires defendants to show that they chose the lesser of two evils, acted to prevent imminent harm, reasonably anticipated the causal relationship, and lacked legal alternatives. This Comment will analyze these requirements separately. Additionally, the *Bailey* "effort to surrender" requirement most closely relates to the prevention of imminent harm, as it questions the defendant's motivation for continuing to elude the authorities, so it will be considered in the imminent harm section. State courts, and potentially federal courts, may choose to adopt the *Lovercamp* test. However, this test is adopted state by state, so the following analysis focuses on the test as many federal courts have adopted it.

A. CHOOSING THE LESSER OF TWO EVILS

The requirement that a defendant choose the lesser of two evils when justifying his actions inherently involves a balancing test between the harm avoided and harm caused by the criminal conduct. Courts rarely determine that the harm caused by the defendant outweighs the avoided evil,[146] but an escape in response to COVID-19 presents particular considerations. General considerations for the harm caused by criminal conduct include "the harm caused to persons, . . . the harm caused to property, . . . the harm caused to social institutions, [and] . . . the harm caused by disrupting the social order."[147]

While an escapee could cause nominal damage during a prison escape, the first two factors mostly contemplate the harm caused by the escapee's subsequent acts. There is a general prohibition on necessity defenses after engaging in violent acts during or after the prison escape,[148] so escapees are unlikely proffer justification defenses if they cause more than minute physical harm. The court will likely consider property damage caused during and after the escape if it exists.

The harm caused to social institutions and social order involves the inherent consequences of a prison escape. The *Lovercamp* court contemplated that one prison escape may encourage other attempts, and this weighed on its consideration of the extent of the escape's harm.[149] If a court

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[146] William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 49 (2003).

[147] Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 450 (1988).

[148] People v. Lovercamp, 118 Cal. Rptr. 110, 115 (Ct. App. 1974).

[149] *Id.*; *See also* People v. Richards, 75 Cal. Rptr. 597, 603 (Ct. App. 1969).

follows this reasoning, it could also consider the impact on society outside prison. An escape could cause panic or uneasiness, but this may depend on the characteristics of the offender (e.g., violent propensities) and public's knowledge (e.g., news coverage). Courts could liken this to felony gun possession, where they have similarly considered the risk of encouraging felons to possess guns in reliance on such defenses.[150] However, when courts consider the possibility of encouraging subsequent illegal acts, they broadly interpret the harm caused by justification defenses, considering that the risk of implicitly encouraging illegal behavior is present whenever a defendant proffers such a defense. Further, consideration of this risk arguably goes against the very essence of the necessity defense: encouraging individuals to choose the lesser harm, even when it involves criminal conduct. Nevertheless, these potential impacts are sometimes considered.[151]

The harm avoided by the prisoner is more straightforward: the negative consequences of COVID-19. There are a variety of personal characteristics that could influence the harm faced by the defendant, including age, chronic medical conditions, and access to adequate medical care.[152] A defendant with a heightened risk of complications from COVID-19 or in a prison with notably inadequate healthcare—or both—may have a better duress or necessity argument than an otherwise healthy defendant in a prison with exceptional medical care. Therefore, the extent of the harm that the escapee faced will largely depend on the facts of the case.

B. ACTING TO PREVENT IMMINENT HARM

There is no generally accepted, quantifiable standard for the imminent harm requirement. However, lack of medical care for an existing medical condition can garner a necessity defense instruction if the harm is great enough.[153] In *State v. Stuit*, a prisoner escaped in search of medical care due to a staph infection that had the "potential" to result in the loss of sight in his left eye. The prisoner had previously lost his right eye, so this would have

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[150] *See, e.g.*, United States v. Butler, 485 F.3d 569, 575 (10th Cir. 2007) (stating that it wished to avoid the "undesirable result" of allowing a justification defense to permit "a felon to possess a weapon for extended periods of time in reliance on some vague 'fear' of street violence.").

[151] *See, e.g.*, Commonwealth v. Markum, 541 A.2d 347, 350 (Pa. Super. Ct. 1988) (noting that allowing justification defenses to civil disobedience would "encourage criminality cloaked in the guise of conscience.").

[152] *COVID-19: People with Certain Medical Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html [https://perma.cc/DVB2-PCVF] (last updated Aug. 20, 2021).

[153] *See* State v. Stuit, 576 P.2d 264, 265 (Mont. 1978).

blinded him.[154] While he was eventually convicted, the trial court allowed the jury to hear his necessity defense, and the Montana Supreme Court upheld the instruction.[155] As COVID-19 infection could result in severe bodily harm or death, escapees seeking to avoid the virus could furnish similar claims,.

However, the escapee will need to show that the harm is not just theoretical. The *Stuit* defendant escaped after contracting a staph infection.[156] Similarly, COVID-19 escapees could show imminence through infection. The possibility of infection may also suffice if the outbreak is uncontrollable, especially because several prisons had infection rates upwards of two-thirds.[157] An escapee will also need to show that medical care within the institution cannot reasonably prevent complications.[158] It may be difficult to fulfill the imminence requirement if medical care is reasonably available, especially if the prisoner does not have underlying health conditions that are likely to cause significant issues. Even in San Quentin, where 28 of 2,243 infected prisoners died,[159] courts may not consider the risk of severe health consequences great enough for the average prisoner. However, even when death does not result, COVID-19 often causes significant health issues such as heart inflammation, impaired lung function, and kidney injury.[160] Upon infection, a prisoner can contend that these injuries are sufficiently imminent. Again, this is particularly true if a prison is unprepared, or a prisoner is vulnerable.

Bailey's requirement of an effort to surrender presents a significant hurdle for COVID-19 escapees, but it does not necessarily preclude them from presenting justification defenses. Single outbreaks in prisons can last

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154 *Id.*

155 *Id.* at 267.

156 *Id.* at 265.

157 Iris Lee & Sean Greene, *Tracking the Coronavirus in California State Prisons*, L.A. TIMES, https://www.latimes.com/projects/california-coronavirus-cases-tracking-outbreak/state-prisons/ [https://perma.cc/H5GP-V3AQ] (last updated Sept. 28, 2021).

158 *See* State v. Varszegi, 673 A.2d 90, 98 n.19 (Conn. 1996) (referencing the trial court's requirement that insufficient medical care must constitute an imminent threat of bodily harm); *see also* People v. Hocquard, 236 N.W.2d 72, 75 (Mich. 1975) ("[T]he defense of necessity is applicable to those situations where a prisoner had been denied requested medical care.").

159 Lee & Greene, *supra* note 1577.

160 *COVID-19: Post-COVID Conditions*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects.html [https://perma.cc/C9DQ-MQCD] (last updated Sept. 16, 2021). This is only a cursory list of the potentially debilitating health impacts caused by COVID-19. *See* Andrew E. Budson, *The Hidden Long-Term Cognitive Effects of COVID-19*, HARV. HEALTH BLOG (Mar. 4, 2021), https://www.health.harvard.edu/blog/the-hidden-long-term-cognitive-effects-of-covid-2020100821133 [https://perma.cc/MN2D-2JPY].

for a considerable amount of time,[161] and an escapee can contend that the termination of the imminent harm necessitates the end of an outbreak or implementation of proper preventative measures. Otherwise, escapees still risk infection by returning—the very harm they sought to avoid. As noted, this requirement warrants reconsideration, but it will require the escapee to present evidence that the harm was sufficiently significant and imminent upon his return to prison. An escapee can certainly contend that a COVID-19 threat within a prison "justif[ies] his continued absence from custody" per *Bailey*.[162] However, medical justifications for prison escape have thus far been limited to denial of required medical care,[163] and it is unclear whether a court would consider the risk of infection and subsequent complications sufficient to justify an escapee's continued absence.

C. REASONABLE ANTICIPATION OF THE DIRECT CAUSAL RELATIONSHIP

The third element of the test—reasonable anticipation of the direct causal relationship—does not generally cause problems for prison escapees. However, causal connections cannot be overly ambiguous. For example, no court has recognized that illegal forms of protest seeking to prevent a political harm satisfy this requirement, because it is unclear whether the protestor can reasonably expect the protest to prevent any harm.[164] Conversely, courts generally do not refuse to present justification defenses to prison escape to the jury on this basis when the causal connection to the escape is coherent. Insofar as the threat of COVID-19 is presented by incarceration and the defendant escaped to avoid the resulting harms, he likely reasonably anticipated the direct causal connection if the risk of infection is considerably more serious in the prison compared to the surrounding community. Even when the surrounding community has a high infection rate, an escapee may be able to contend that he was able to take better preventative measures outside of prison, such as social distancing, if such measures were not adequately available in the facility.

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[161] For example, it took two months for the outbreak in San Quentin to begin to slow. *See* Christina Farr, *San Quentin's Slow Recovery from Coronavirus Outbreak that Left Two-Thirds of Prison Infected*, CNBC (Aug. 28, 2020, 7:00 AM), https://www.cnbc.com/2020/08/28/san-quentin-prison-turns-to-volunteer-doctors-to-help-in-slow-recovery-from-coronavirus-outbreak.html [https://perma.cc/P8X4-BGRW].

[162] United States v. Bailey, 444 U.S. 393, 393 (1980).

[163] Lakin v. Stine, 80 F. App'x 368, 376 (6th Cir. 2003).

[164] Quigley, *supra* note 146, at 60–61.

Often, courts have interpreted this standard as overlapping with the imminence requirement,[165] which could pose problems for escapees who are not yet infected with COVID-19. In *United States v. Alston*, the court refused to allow the presentation of a necessity defense to possession of a firearm by a convicted felon where the defendant claimed that someone he testified against said he was going to "get [him]."[166] Because the defendant was not faced with imminent harm during the entire time that he possessed the weapon, the court found that the "causal relationship [between possession of the firearm and threatened harm was] attenuated at best."[167] Accordingly, a prisoner who has not yet contracted COVID-19 may have trouble meeting the causal connection standard if the imminence of infection is not constant. A prisoner could contend that risk of infection is constant and imminent if the circumstances in the prison are dire, as the majority of the prison population was infected at some prisons.[168] Depending on the situation and the application by the court, this argument may overcome this hurdle.

D. LACK OF LEGAL ALTERNATIVES

The requirement that the escapee has no legal alternatives to escape sets a high bar. The Sixth Circuit noted that "the keystone of the [justification defense] analysis is that the defendant must have no alternative—either before or during the event—to avoid violating the law."[169] The defendant cannot simply show that prison escape was the *best* option—it must be the *only reasonable* option. While the reasonableness of alternatives is not part

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[165] *See* United States v. Alston, 526 F.3d 91, 95–96 (3d Cir. 2008).

[166] *Id.* at 96, 98.

[167] *Id.* at 96. The court suggested that, since the defendant possessed the weapon for "over a month," there was not a causal connection during times when he was not in danger. *Id.* at 97.

[168] For example, nearly two-thirds of prisoners were infected at San Quentin State Prison during the summer of 2020. Weiner, *supra* note 16. Marion Correctional Institution, a state prison in Ohio, fared even worse, with eighty percent of the prison population testing positive. Sarah Volpenhein, *Ohio Prison Planned to Isolate Sick Inmates. But Then 80% Tested Positive*, MARION STAR (Apr. 30, 2020, 5:44 PM), https://www.marionstar.com/story/news/local/2020/04/30/marion-ohio-prison-planned-isolate-sick-inmates-80-tested-positive/3059217001/ [https://perma.cc/JNE2-G8CB].

[169] United States v. Singleton, 902 F.2d 471, 473 (6th Cir. 1990). The Supreme Court also noted that "if there was a reasonable, legal alternative to violating the law . . . the [justification] defenses will fail." United States v. Bailey, 444 U.S. 393, 410 (1980); *see also* United States v. Lewis, 628 F.2d 1276, 1279 (10th Cir. 1980).

of the traditional test, it is implied by the standard examples of necessity defenses, including prison escape.[170]

Conventionally, courts have hesitated to find that prison escape was the only reasonable alternative to imminent harm. In one particularly troubling decision, a prisoner escaped after another prisoner pressured him to "engage in homosexual activity."[171] The court determined that he had a reasonable and legal alternative to prison escape—"[t]he submission to sodomy"—even if administrative remedies were insufficient.[172] In determining whether his actions were reasonable, the court weighed the "the destruction of the general discipline of the prison" that could result from the escape against the harm caused by "submission to sodomy," and it affirmed the trial court's denial of a necessity defense instruction.[173]

Although recent decisions reflect a move away from this hardline stance, this requirement still presents problems for COVID-19 escapees, but they are not necessarily insurmountable. For a prisoner to show that he lacks reasonable alternatives, he must either exhaust his administrative and judicial remedies or show that his medical condition is urgent enough that he does not have time to use these methods.[174] To meet this standard, a prisoner who has not yet contracted COVID-19 will only need to exhaust his administrative and judicial remedies if they could reasonably prevent the harm. Legal alternatives to escape must be "reasonable," which means that the escapee had "a chance both to refuse to do the criminal act and also to avoid the

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[170] United States v. Schoon, 971 F.2d 193, 198 (9th Cir. 1991). The court stated that "the law implies a reasonableness requirement in judging whether legal alternatives exist." *Id*. In making this determination, the court relied on the traditional example of a prisoner escaping a prison fire. Such a prisoner technically has the option to wait and hope for rescue, but this is not a reasonable solution to the imminent harm.

[171] People v. Richards, 75 Cal. Rptr. 597, 599 (Ct. App. 1969). The court also stated that "it becomes [a prisoner's] duty to submit to the penalty" upon conviction. *Id.* at 603. It is important to note that the decision came down long before other cases explicitly acknowledging the existence of justification defenses to prison escape, such as *Lovercamp*, and this strict interpretation is unlikely to be followed now. Nevertheless, it illustrates the extent of the legal alternatives that courts have considered.

[172] *Id.* at 602.

[173] *Id.* at 602–04; *see also* Aderhold v. Soileau, 67 F.2d 259, 260 (5th Cir. 1933) (holding that, instead of escaping from prison to escape intolerable conditions, the defendant "was bound to question it only by regular and legal means").

[174] *See* Dempsey v. United States, 283 F.2d 934, 934 (5th Cir. 1960) (holding that a diabetic inmate's escape from prison in search of insulin did not meet this standard, because he had administrative and judicial remedies available to him); State v. Stuit, 576 P.2d 264, 266 (Mont. 1978) (affirming the trial court's necessity defense instruction where a prisoner escaped to avoid blindness caused by a severe staph infection).

threatened harm."[175] For example, in federal prison, prisoners could request compassionate release from the Bureau of Prisons (BOP) through the First Step Act, which allows for a reduction in sentence for "extraordinary and compelling reasons."[176] However, the BOP has thirty days to make a determination, and, in one prison, it approved only 1 of 836 applications asking for release due to COVID-19 susceptibility through July 2020.[177] After these thirty days, prisoners may petition the court for compassionate release.[178] Still, this may be too long to avoid contracting COVID-19 or suffering from complications if the prisoner is already infected. Such administrative remedies may be functionally unavailable.

Largely, the likelihood of meeting this requirement rests on the court's determination of the imminence of the risk. When there is a high infection rate in the prison or another circumstance, such as a cellmate developing symptoms during an internal outbreak, a prisoner can more readily meet this standard. This is especially true when the prisoner has risk factors for severe complications, given that they are more likely to suffer these harms if they take the time to resort to administrative remedies. In such circumstances, escape may be their only reasonable alternative.

CONCLUSION

COVID-19 presents a serious threat to prisoner health and safety, and prisoners may resort to escape as their only option. While the analysis may look different in states with statutory definitions of the duress or necessity defense, the current federal requirements are untenable. The *Bailey* decision requires escapees to make an effort to surrender. In doing so, the Court made an improper evidentiary determination for the jury and did not adequately account for situations where the threat inside prison continues longer than the escape. The Court should reconsider this requirement and permit lower courts to determine whether an escapee's actions were appropriate given the circumstances.

COVID-19 presents a situation where a threat may last for weeks or months, and escape may be a legally justified option for prisoners who meet the stringent requirements for the duress and necessity defenses. Largely,

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[175] *Bailey*, 444 U.S. at 410 (1980) (citing W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 28, 379 (1972)).

[176] 18 U.S.C. § 3582(c)(1)(A)(i).

[177] Taryn A. Merkl, *What's Keeping Thousands in Prison During Covid-19*, BRENNAN CTR. FOR JUST. (July 22, 2020), https://www.brennancenter.org/our-work/research-reports/reducing-jail-and-prison-populations-during-covid-19-pandemic [https://perma.cc/M2S3-YAX5].

[178] 18 U.S.C. § 3582(c)(1)(A).

prisoners' claims will depend on the severity and immediacy of the threat, and whether alternative legal remedies are reasonably available. Ultimately, prisoners should not assume that justification defenses excuse their escape attempts regardless of the circumstances, but courts should allow them to present these defenses when COVID-19 placed them in great peril.