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COMMENTARY

SHOULD INTOLERABLE PRISON CONDITIONS GENERATE A JUSTIFICATION OR AN EXCUSE FOR ESCAPE?

George P. Fletcher*

In the last five years, appellate courts have responded sympathetically to the claims of prisoners who have escaped to avoid the threat of physical violence and homosexual rape. *Lovercamp*¹ began the trend in 1974. Today the reports are replete with reversals directing trial courts to hear evidence bearing on the conditions that prompted the escape.

The courts have moved so quickly into this new field that they have had little chance to refine the underlying rationale for admitting the evidence. Appellate opinions, as well as several commentators, have sought to squeeze the new issue into one of three received doctrinal categories: (1) duress,² (2) necessity,³ and (3) the intent required for escape.⁴ The important preliminary question, however, is not which doctrinal label we should use, but whether the principle requiring consideration of the evidence is one of justification or of excuse. Does the threat of a homosexual rape render it right and proper for the defendant to escape from prison (a principle of justification)? Or is it rather that the impending violence negates the defendant's culpability for unlawful, unjustified escape (a principle of excuse)? This basic question influences the contours of the defense. Among the controversial

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1. *People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (4th Dist. 1974).

2. *People v. Harmon*, 394 Mich. 625, 232 N.W.2d 187 (1975); *People v. Luther*, 394 Mich. 619, 232 N.W.2d 184 (1975).

3. *People v. Unger*, 66 Ill. 2d 333, 362 N.E.2d 319 (1977).

4. *United States v. Bailey*, 585 F.2d 1087 (D.C. Cir. 1978), *cert. granted*, 440 U.S. 957 (1979).

questions that might be affected are (1) the relevance of the defendant's using force to effectuate his escape, and (2) the requirement that the defendant surrender after a successful escape.

My thesis is that the impending violence generates at most an excuse and not a justification. The threatened homosexual rape bears on the culpability of the prisoner in unlawfully escaping, not on the question whether his escaping is lawful and proper. If we could achieve a consensus on this basic rationale for the defense, we could then consider whether the label of "duress" or "necessity" appropriately describes the defendant's claim. Neither the term "duress" nor "necessity" is linked irretrievably to a theory of justification or excuse. Some people maintain, incorrectly in my view, that duress is a justification.⁵ The general trend, however, is to treat duress as an excuse.⁶ Similarly, there is considerable authority for the view that necessity functions as an excuse.⁷ Yet many writers refer to the issue of necessity, particularly the claim of lesser evils, as a justification.⁸ The confusion about the inner logic of duress and necessity renders it imperative that we first clarify the underlying principle of evidence bearing on intolerable prison conditions. Choosing the proper doctrinal label is a secondary matter.

This structuring of the inquiry departs sharply from a thoughtful study of the current prisonbreak cases published in the last issue of this *Review*.⁹ In an exhaustive Comment, David Dolinko argues that intolerable prison conditions should qualify as a claim of necessity rather than duress; and further, that the issue of necessity should function as a justification rather than an excuse. In my opinion, Dolinko is wrong, not only about the nature of the new defense, but more interestingly, in his methodology. Dolinko seems to think that a great deal turns on whether we call the new defense a matter of necessity or of duress. In my opinion, this is a trivial issue. On the other hand, Dolinko maintains that not much turns on whether we analyze the new defense

5. See W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 374, 378-79 (1972). Compare my attempt to refute this position in G. FLETCHER, RETHINKING CRIMINAL LAW 830-31 (1978) [hereinafter cited without cross-reference as RETHINKING].

6. RETHINKING, at 831.

7. The *Lovercamp* opinion relies on the label "necessity" and yet stresses "the individual dilemma" and the act of escape as "the only viable and reasonable choice available." 43 Cal. App. 3d 823, 827, 118 Cal. Rptr. 110, 112 (4th Dist. 1974). This reasoning reflects a theory of excuse. German law relies on the term "necessity" (*Notstand*) to express theories both of justification and excuse. See STRAFGESETZBUCH [STGB] §§ 34-35 (W. GER.).

8. Model Penal Code § 3.02 (Proposed Official Draft 1962); W. LAFAVE & A. SCOTT, *supra* note 5, at 381.

9. Comment, *Intolerable Conditions as a Defense to Prison Escapes*, 26 UCLA L. REV. 1126 (1979) [hereinafter cited without cross-reference as *Intolerable Conditions*].

as a theory of justification or excuse. In contrast, my view is that everything turns on whether the new defense is grounded in a rationale of justification or excuse. The elegance of Dolinko's argument merits a reply.

Before focussing on the core of our disagreement, I should like to underscore the common ground we share. We concur in approving the appellate courts' reversing convictions for escape based on the exclusion of evidence bearing on prison conditions. We agree that cabining the defense within rules of thumb such as the *Lovercamp* rule requiring surrender after a successful escape might well be arbitrary and unfair. We also converge in some basic judgments concerning the legitimacy of guards' resisting efforts to escape from threatened violence. Even if prisoners should not be convicted of escape in response to intolerable conditions, guards should be able to resist efforts to escape without incurring discipline or legal liability. We also agree, apparently, that if a guard assists a prisoner in escaping, she should be disciplined and perhaps held liable for the consequences of the escape. In the end, we disagree only on the question whether treating the escape as justified necessarily affects the legal analysis of resistance and facilitation of the escape.

Elsewhere I have argued that treating the escape as justified would entail (1) that no one is justified in preventing the escape, and (2) that other persons may properly assist the escaping prisoner.¹⁰ Dolinko disagrees with both of these implications. His view is that the justification of the escape bears no logical relationship to the justification of the guard's resisting the escape.¹¹ Both acts might be justified. Thus the issue is joined on an important jurisprudential point.

The point at issue is whether in the context of incompatible actions, both parties can be justified. The issue is one of conceptual consistency rather than policy. Yet the conceptual analysis has an impact on our continuing efforts to refine the criminal law. If nothing should turn on whether intolerable prison conditions generate an excuse or a justification, we should hardly be interested in the issue. For good reason or ill, American courts have been characteristically uninterested in the distinction between justifying and excusing criminal conduct.¹² But Dolinko himself has taken the first step by insisting that there is an important conceptual distinction between holding that an act is right and proper

10. RETHINKING, at 759-62.

11. *Intolerable Conditions*, at 1177-81.

12. For an analysis of Anglo-American efforts to suppress the distinction between justification and excuse, see Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974).

(justification) and concluding that the actor is free from responsibility for a wrongful act (excuse).¹³ The next step, which is the more difficult one, is to recognize that we can use the concepts of justification and excuse only when we are willing to accept the logical consequences of applying them to particular cases of conflict. In the context of prisonbreaks, the consequence of holding the escape justified is that the guards may not justifiably resist an escaping prisoner. If this consequence does indeed hold, then both Dolinko and I would agree that the escape can at most be excused.

I will make a nominally straightforward argument in favor of my position and then examine two claims that Dolinko makes in an effort to refute my analysis. The argument goes like this:

1. If X 's conduct C is justified, then X has a right to engage in C .
2. If X has a right to engage in C , then no one has a right to engage in conduct that is incompatible with C .
3. If no one has a right to engage in conduct incompatible with C , then no one would be justified in engaging in conduct incompatible with C .

It follows that if two people are making an effort to execute incompatible acts, both of them cannot be justified. Only one can have a right to engage in his desired act and therefore be justified in doing so.

The cornerstones of the argument are first, the concept of incompatible acts, and secondly, the alleged analytic connection between justification and rights. Acts are incompatible if they cannot be performed simultaneously. It is clear, for example, that two or more persons can simultaneously make an effort to shoot a wild fox. Therefore, the right of X to shoot the fox does not preclude the right of Y or Z to shoot the same fox. But the act of rape is incompatible with successfully resisting the same rape. And the successful resistance is incompatible with the rapist's overcoming the resistance. X 's scaling the prison wall is incompatible with Y 's holding X so that X cannot scale the wall. There might be some cases in which it would be more troubling to determine whether acts were incompatible or compatible. For the time being, we shall stick with these core situations.

How does one establish the alleged connection between justification and rights? The claim is one about the meaning of the word "justification." Etymology is of some moment. Justification derives from the word *jus* which means Right. Justification renders conduct right; and if it is objectively right, individuals surely have a personal right to engage in the conduct in question. The

13. *Intolerable Conditions*, at 1126 n.3 (relying on J.L. Austin).

same connection appears on the face of the German and Russian analogues to justification. *Rechtfertigung* means to bring into conformity with *Recht* or Right and *opravdanie* has the same meaning in Russian. Of course, neither etymology nor foreign counterparts generate more than a suggestion that justification entails a personal right to engage in justified conduct.

Perhaps we should shift the field of analysis, if only for a moment, and ask: What else could the concept of justification mean? What are the alternatives? One possibility is that a "justification" is simply a defense to liability; after all, the French often use the term *fait justificatif* to encompass all substantive defenses. Surely it could be the case that both the escaping prisoner and the resisting guard could have good defenses against liability, and therefore in this sense both are "justified" in their inconsistent use of force. If this were the meaning of "justification," then insanity would justify conduct and so would a mistake of law—where the claim of mistake of law was accepted. But if these defenses count as justifications, then we would lose all sense for the distinction between justification and excuse. If we wish to maintain that distinction, then we cannot use the term "justification" indiscriminately to include all issues bearing on the culpability of actors as well as the propriety of acts.

A more plausible suggestion would be that justified conduct is not necessarily right, but merely tolerable or permissible. A justified act would then appear to be something more than an excused act, but something less than one that the actor has a right to do. The concept of "permissibility" captures this middle position. It might be permissible for the prisoner to escape and also permissible for the guard to resist. Two persons engaged in incompatible conduct can both act permissibly. And thus, if a justification merely rendered conduct permissible, both the prisoner and the resisting guard might act justifiably. This is a powerful suggestion, but one that ultimately fails.

The ideal of the law is to suppress violence and to channel disputes into orderly processes. If the law were content to label conduct in self-defense as permissible, it would in effect encourage rather than suppress violence. Consider the case of a woman resisting rape. The only way she has to thwart the aggressor is to pull a razor blade from her purse and to slash at his limbs. He feels the pain and senses that his life is in danger. In the heat of the conflict, he cannot withdraw without risking a fatal wound. What may he properly do? Would it be permissible for him to respond by choking and killing the woman? After all, if his life is in danger, why should he not respond by killing in self-defense?

The resulting struggle would be one in which both the man and the woman were permissibly trying to kill each other.

Now let us suppose that a policeman comes upon the scene. Could he stop the fight? What right does he have to intervene if both parties are acting permissibly? Neither is doing the wrong thing in trying to kill the other. Why should the policeman stop either of them? Yet if he does not intervene, both of the combatants might kill or seriously wound the other. Our inescapable intuition is that the police officer, or indeed any third party, should be entitled to intervene in the interest of saving life.

But suppose that the only tactically feasible intervention would require killing the woman? That outcome of the fray would obviously be unjust. That the rapist began the cycle of escalation renders the moral positions of the two parties undeniably asymmetrical. Describing both of their actions as permissible obscures that basic asymmetry. The reason that we ought to describe the woman's defense as rightful, the reason that we ought to say that she has a right to resist, is precisely to capture that asymmetry in the moral conflict. Once we see that the woman has a right to resist, then it becomes clear that if the policeman knows the background of the struggle, he may properly intervene on one side and one side only—the side of the person exercising the right of defense.

The nub of the argument is that if our legal ideal is the suppression of violence, then we must employ a set of ideas that enables us to determine upon whose side we should intervene. The symmetry of permissible deadly force renders our interventions suspect, and if we do intervene, we can pick either side as the prevailing combatant. Perceiving the connection between justification and personal rights enables us to intervene to minimize injury and at the same time restricts our intervention so that we act justly.

If we accept the important connection between justification and personal rights, then we should turn to the second premise, namely that in a situation of conflict, at most one party can have a right to prevail. This would not be true in certain competitive situations. If two hunters disable a wild fox at the same moment, they would presumably have to split the carcass. But in cases of incompatible conduct, one and only one party must have a right to prevail. It is undoubtedly difficult in many cases to determine who has this superior right. If our principle is that self-defense applies only against wrongful or unjust aggressors, then we might well encounter factual problems in determining who the aggressor is. The simple factual issue of who started the fight might not lend itself to factual reconstruction. There might be difficulties of prin-

ciple in deciding whether someone who has provoked the fight is the aggressor or victim of the other's aggression. But to concede these difficulties is not to abandon the quest for the superior right in situations of conflict.

In modern legal thought, we are likely to confuse two distinct issues: (1) Can we reliably determine who has the superior right in a situation of forcible conflict? and (2) *Is* there a superior right that permits one and only one party to exercise force? I concede that we cannot always resolve the issues of fact and value in determining who has the right to resist aggression. But this difficulty provides little warrant for cynicism or nihilism about whether one party is acting rightfully and the other wrongfully.

The difficulty of scientific and philosophical inquiry does not render us nihilistic about whether one proposition is right and its negation wrong. Indeed, the conduct of inquiry—however imperfect it might be—presupposes that there is a right position. Indeed there would be no reason to pursue this disagreement with Dolinko unless we believed that in a jurisprudential controversy we could assess which position is right.

The question who is right in cases of moral and legal conflict is, in my opinion, no different from the question who is right in scientific and philosophical controversy.¹⁴ Both sources of inquiry are plagued with uncertainty. It is only the prosaic legal mind of the mid-twentieth century that infers from uncertainty that there is no issue worth being uncertain about.

Dolinko mounts two arguments in favor of his contention that in the case of incompatible acts, both parties to the conflict can be justified. The first argument challenges, in effect, the alleged connection between justification and rights;¹⁵ the second calls into question whether having a right to do an act *C* precludes another person from having a right to prevent *C* from occurring.¹⁶ The first argument rests on the persistent failure of American codes and commentators to recognize the distinction between claims of justification and claims of putative justification. The distinction is easily illustrated. If Allen wrongfully attacks Dan, the latter can respond and claim the justification of self-defense. If Dan reasonably believes that Allen is attacking him (when Allen is not in fact), Dan can respond and claim a putative justification, on the basis of his reasonable beliefs. The former is based on

14. Ronald Dworkin defends a similar position in Dworkin, *No Right Answer?*, in *LAW, MORALITY AND SOCIETY* 58 (P. Hacker & J. Raz eds. 1977). The view has no shortage of sophisticated critics. See H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 *GA. L. REV.* 969, 978-89 (1977).

15. *Intolerable Conditions*, at 1178-80.

16. *Id.* at 1180-81.

objective events; the latter, solely on the defender's beliefs. If reasonable beliefs could generate justification for harming another person, then we might indeed have the case of both parties to the fray acting justifiably. One party's justification could derive from the reasonable belief that he was being attacked; the imaginary aggressor's response would also be justified as self-defense.

How should we decide whether claims of putative justification are properly assimilated to claims of justification? So far as relevant authorities go, they are at a standoff. American statutes and text writers typically interweave the two issues;¹⁷ French, German and Soviet writers perceive the distinction between actual and putative justification and treat the latter as an excuse bearing on culpability for wrongfully attacking another.¹⁸ Let us leave the authorities to one side and attempt to assess whether as a matter of principle, mistaken beliefs, even reasonable beliefs, can render one's use of force right and proper.

Charles Fried offers us an argument about why beliefs should be sufficient to justify harmful conduct.¹⁹ We are fortunate that at least someone attempts to explain what is apparently a widely shared assumption. Fried recognizes that if his view is correct, we could "have a fight between two persons, both acting justifiably."²⁰ But this does not bother him, for this result "is a possibility in *any* theory which judges the morality of an action from the perspective of an actor's factual perceptions."²¹ Fried's cryptic comment invites extended diagnosis, for it would be of interest to figure out how a thoughtful philosopher could conclude that any theory of morality might justify harmful conduct solely on the basis of subjective perceptions. Perhaps Fried thinks that the problem of killing in self-defense lends itself to analysis under Kant's theory of the good will as the supreme moral value. But Kant would not seek to justify the punishment of an innocent person solely on the ground that legal officials believed him to be guilty. By like token, Kantian thought would stand opposed to, rather than in favor of, Fried's view that good intentions might justify killing an innocent person in self-defense. This speculation about the theory of morality that might underlie Fried's analysis is overdone, for it is clear that Fried himself does not treat killing as an act that can be justified solely on the ground of belief in the necessity of defensive force. He adds the requirement, as well he

17. See RETHINKING, at 762-63. For a critique of the Model Penal Code's confusion on this point, see Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 COLUM. L. REV. 914, 917-21, 960-61 (1975).

18. RETHINKING, at 766-67.

19. C. FRIED, *RIGHT AND WRONG* 48 (1978).

20. *Id.* at 48 n.*.

21. *Id.*

must, that the belief be nonnegligent.²² But if there were a morality that turned solely on the actor's actual perception, there would be no need for the qualification that the perception be non-negligent or reasonable.

Dolinko likewise reasons that mistaken beliefs, if reasonable, can justify harmful conduct.²³ Neither Fried nor Dolinko explains why this should be so. So far as "justified" means right, good or proper, one can only be puzzled by the air of inevitability with which they present this conclusion. Consider the difference in personal sentiments that follow upon justified self-defense as compared with putatively justified self-defense. If I have disabled an aggressor who was trying to injure me or a member of my family, I should feel that I have done the right thing. I would not be inclined to feel regret or remorse about the injury that I necessarily inflicted in repelling the attack. I would feel no need to apologize to the injured aggressor. Nor would it be appropriate to think about making amends. But if I have killed an innocent person who seemed, perhaps reasonably, to be attacking me, should I not feel differently about the harm done? The appropriate response would be at least to be concerned that I have saved my life at the expense of an innocent and unoffending person. It would be appropriate for me to apologize or to make amends. If I had done the right thing in acting on my reasonable beliefs, I should hardly feel it appropriate to make amends. But my remorse is appropriate for it is wrong, a great wrong, to kill an innocent person. The reasonableness of my mistake hardly alleviates the wrong in killing. My mistake might excuse my wrongdoing; it might check efforts to hold me criminally or tortiously liable. But my mistake hardly converts a wrongful act into one that is right and proper.

If the arguments for the view that reasonable but mistaken beliefs can justify conduct are so weak, one wonders why American legislators and commentators persist in lumping together cases of putative and actual justification. The reason might be that American observers of the criminal law fail to understand two distinct roles for subjective beliefs in the structure of self-defense and other claims of justification. One question is whether, in order to have a good justification, the actor must know and act with respect to the justifying circumstances. The consensus of Western law is that circumstances alone are not enough to justify conduct.²⁴ For example, the fact that *A* is attacking *B* is not sufficient to generate a justification for *B*'s injuring *A*. If *B* assaults *A* without knowing

22. *Id.* at 48.

23. *Intolerable Conditions*, at 1179 n.297 ("The proviso that your mistake is reasonable is added to forestall the objection that your mistaken belief as to my conduct cannot justify your attack.")

24. See RETHINKING, at 557.

of the attack, *B* is guilty of battery. A good claim of self-defense requires not only an actual attack, but an intent on the part of the defender to repel the attack.²⁵ A quite distinct issue is whether the intent alone (regardless of the actual circumstances) suffices to justify harmful conduct. That *B* must act with the proper intent does not imply that his intent alone is sufficient to justify injuring an innocent person. Those who fail to distinguish between putative and actual self-defense might well slip into their confusion by reasoning that if a justificatory intent is necessary, it follows that it is sufficient.

Now let us turn to the difficult question whether one party's having a right to engage in specified conduct precludes others from having a right to prevent him from doing so. Dolinko sees no difficulty in persons having incompatible rights. The pacifist may have a right not to kill; but the state may also have a right to conscript him into active military service.²⁶ The depressed man might arguably have a right to commit suicide, but his family has a right to intervene and prevent him from succumbing to his depression. The fetus may have a right to life, but the pregnant woman has a right to determine whether she will bear the fetus. These conflicts of plausible rights have always been with us; and so long as our legal system remains vital, they will be with us. But it does not follow that every right that appears plausible is a right in fact. The purpose of the legal system is precisely to resolve these conflicts based on plausible but inconsistent assertions of right. If the parties assert conflicting rights, then respect for their definition of the dispute requires that we search for the superior claim of right.

There is, to be sure, no formula for determining whether the fetus has a superior right to life or individuals have a superior right to commit suicide. We are engaged in a constant effort to render our legal system just. And we are condemned to never knowing whether in fact the system is as just as it can be. But maintaining this imperfect quest for justice is far superior to the cynicism of taking every plausible claim of right to be a right in fact.

There might obviously be cases in which moral rights conflict with legally established rights. Under the Fugitive Slave Act,²⁷ deprived slaveowners had an established right to regain possession of their slaves. The slaves, in contrast, had a moral right to retain their freedom. In this particular context, the legally estab-

25. See, e.g., *Josey v. United States*, 135 F.2d 809, 810 (D.C. Cir. 1943); *People v. Bratcher*, 29 Ill. App. 3d 202, 204, 330 N.E.2d 297, 299 (1975).

26. *Intolerable Conditions*, at 1180 n.298.

27. Fugitive Slave Act, ch. 60, 9 Stat. 462 (1850).

lished right took temporary precedence. But the message of history should encourage us to believe that in the long run, the morally superior right will prevail.

If we leave aside the distortions produced by legally recognized rights departing from moral rights, then we have to recognize that every decision about rights entails a judgment about whether other parties have a right to prevent the rightful conduct. We cannot affirm a right in the prisoner to escape and at the same time grant the guard a right to keep him in prison. Conversely, if the guard has a right to keep convicted felons in prison, the inmates cannot have a right to escape.

Some people may have doubts about whether guards have a categorical right to keep all felons in prison, but I do not. Any rule we fashion about a "right to escape" must apply to convicted murderers as well as to prisoners doing time for possessing marijuana. It is not the office of prison guards to determine whether on balance it would be better for society to let a prisoner escape. Their duty as well as their right is to enforce the order of the courts committing convicted criminals to prison.

There is one further confusion about prisoners' rights that we should dispel. There might well be cases in which prisoners have a right to better treatment than that which they receive. The proper way to assert that right is to frame a class action in the courts. The right to better treatment, however, does not entail the right to escape. Even if the courts should hold that if conditions in a particular prison were not improved, the warden would have to release the prisoners, it would not follow that the inmates could properly escape. The right to receive does not entail a right to take.

These arguments are designed to correct a jurisprudential misunderstanding about the nature of justification in the criminal law and the nature of rights generally. Nothing I have said implies that the prisoner escaping to avoid a homosexual rape should be convicted of escape and be sentenced to serve additional time. The escape is not the assertion of a right, but it might well be excused. Whether it is excused in fact depends upon whether we can fairly blame the prisoner for fleeing in the face of impending violence.

The fact is that in the specific context of escape to avoid impending violence, a theory of excuse would be more likely than a theory of justification to generate an acquittal. We can show this to be so by comparing the two types of claims on a number of specific issues.

Balancing Interests. A claim of justification requires that the

actor favor the superior interest; a claim of excuse might hold even if the costs of the defendant's act greatly exceed its benefits. In the past, claims of justification have foundered on the argument that the social cost of encouraging prisonbreaks is too great.²⁸ But the factor of social cost is less likely to defeat a claim of excuse. The focus in evaluating an alleged excuse is the blameworthiness of the defendant's conduct. If the pressure is sufficiently great, a person might act blamelessly in committing treason,²⁹ and even in killing an innocent person.³⁰ If these most serious crimes can be excused on the ground of overbearing pressure, then it is hardly an extension of the law to excuse escapes from prison under similar pressure.

Principled Limitations. The claim of justification based on lesser evils is subject to various limitations. So far as I know, no Western court has ever held or even suggested that direct killing might be justified on the ground of furthering a greater good. German courts would disregard the claim in any case in which the defendant's crime is an "inappropriate means" to avoid the danger.³¹ Admittedly, these principled limitations might not matter in an escape case, but the theory of excuse has the singular advantage of applying regardless of moral objections to the act. Even if the court regards escaping from prison as wrongful conduct, a theory of excuse permits the jury to hear evidence bearing on the defendant's having no reasonable choice but to commit the wrongful escape.

Imminence of the Risk. Both theories of justification and excuse require an imminent risk of harm. The Model Penal Code overlooked this requirement,³² but the courts and state legislatures have been quick to correct the omission.³³ There is every reason for courts to interpret the imminence requirement more stringently in cases of justification. The claim of lesser evils must be viewed as an instance in which the individual citizen dares to override the legislative judgment about what in general should constitute criminal conduct. That the risk be imminent insures

28. The leading case is *State v. Palmer*, 45 Del. 308, 72 A.2d 442 (1950). For other cases, see *RETHINKING*, at 828 nn.51-52.

29. See *Rex v. Steane*, [1947] 1 K.B. 997.

30. *Lynch v. Director of Public Prosecutions*, [1975] 1 All E.R. 913 (H.L.) (aiding and abetting homicide subject to excuse of duress); *but cf.* *Abbott v. The Queen*, 63 Crim. App. R. 241 (1976) (P.C.) (perpetrating homicide not subject to excuse on grounds of duress).

31. StGB § 34 (W. Ger.); see *RETHINKING*, at 787.

32. Model Penal Code § 3.02 (Proposed Official Draft 1962).

33. *Kroncke v. United States*, 459 F.2d 697, 700-01 (8th Cir. 1972); *COLO. REV. STAT.* § 18-1-702 (1978); *DEL. CODE ANN.* tit. 11, § 463 (1974).

that the individual will interpose his judgment against the legislature's only in cases of inescapable emergency.

In cases of excuse, the requirement of imminence should be applied more leniently, for the degree of impending danger is important only as it bears on the pressure driving the defendant to act. Take a case in which the defendant escapes from prison to avoid a persistent problem of unsanitary conditions. If the condition poses an ongoing risk to the defendant's health, an escape would be hard to justify; there would be no sudden emergency rendering recourse to legal channels an unreasonable alternative. But the ongoing threat of disease might generate a desperate response in the form of an escape, and if under the circumstances the defendant's reaction to the danger is sufficiently free from fault, he might well be excused. The German experience with the theory of excuse suggests this analysis,³⁴ and that experience could well guide our efforts to refine the problem of excused escapes.

Voluntariness of the Response. It is true that a justified act is one that may be freely chosen; a claim of excuse, in contrast, presupposes an unreflecting reaction, a will that is overborne. A freely chosen escape would not be excused. This restriction admittedly gives claims of justification a wider scope. In view of the requirement of an imminent risk, however, acts are justified only in emergencies that in fact restrict the voluntariness of the choice.

Surrender After an Escape. *Lovercamp's* rule of thumb requiring surrender after the escape derives from the assumption that if the defendant remains beyond the walls after avoiding the danger, he recommit the offense of "escape." The question posed therefore is how long and for what reason the original threat should provide a defense for intentionally remaining out of custody. On a theory of lesser evils, the defendant must surrender as soon as the danger to him falls below the danger to society that he poses by remaining at large. Any legal system would be properly embarrassed by asking the defendant to make that judgment, and thus to approach the issue as a matter of justification might well reinforce an absolute rule requiring surrender. A theory of excuse would be more accommodating, for as long as the threat of violence upon returning to prison influenced the defendant, he could arguably excuse his remaining at large.³⁵

34. Judgment of Supreme Court, July 12, 1926, 60 RGSt 318 (excused killing of father who had long terrorized family); Judgment of Supreme Court, Jan. 23, 1925, 59 RGSt 69 (excused arson of collapsing house received from housing bureau).

35. See *United States v. Bailey*, 585 F.2d 1087, 1100 (D.C. Cir. 1978), cert. granted, 440 U.S. 957 (1979).

Violence Against Innocent Persons. Claims of justification are often limited by the requirement that the defendant use only morally proper means. This is the reason that killing an innocent person does not lend itself to justification on the ground of lesser evils.³⁶ It is but a small extension of this requirement to exclude evidence of intolerable conditions if the defendant injures an innocent person in the course of escaping. But this rule of thumb has no place in a theory of excusably committing a wrongful escape. If killing an innocent person can be excused, then so can injuring an innocent guard. Of course, the injury must be unavoidable in executing the escape. Unnecessary injuries to innocent persons would exceed the scope of excusable conduct.

If the theory of excuse possesses all these advantages, one wonders why anyone would urge that the courts use a rationale of justification in explaining their decisions in an escape case. The primary advantages of a justification is that it (1) overrides the permissibility of resistance, and (2) permits other parties to aid the escaping prisoner. These are implications that both Dolinko and I wish to avoid. Yet without them, there is little basis for arguing the superiority of a rationale of justification.

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The approach of this Commentary has been to focus on the underlying rationale of the defense and to hold the question of terminology until the end. Now that I have argued for a theory of excuse, we should try to find the right label to describe the particular theory of excuse that crystallizes in the escape cases. The labels "duress" or "compulsion" would do, but some judges are properly confused in using these labels to describe a case in which the defendant avoids the threats of others, rather than complying with them. The resistance to the label "duress" might be even greater if the defendant escapes to avoid not threats, but persistently unsanitary or otherwise dangerous conditions of confinement.

The fact is that we need a set of three defenses: (1) duress to cover the cases of complying with threats, (2) lesser evils to cover the case of justified conduct to further the greater good, and (3) a third defense to cover the cases on nonculpable reactions to situations of danger. This third defense would encompass not only the escape cases but the problem pointed out some time ago by Kadish and Paulsen: the case of the driver who kills an innocent drunk in the roadway to avoid driving off a cliff.³⁷ This situation is not one of duress in an ordinary sense; and as the killing of an

36. See discussion at note 31 *supra*.

37. S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 570-71 (3d ed. 1975).

innocent person, it cannot qualify as lesser evil. We could call this third defense *se defendendo*, for an excuse by that name has ancient roots in the common law. If English labels are preferred, I would opt for the term "personal necessity" to capture the elements both of necessity and of the purely personal nature of the excuse.

Ironically, Dolinko and I concur on the word "necessity" in describing the right approach to the escape cases. But, of course, we differ on the meaning and significance of the word and the concept. By getting beyond the conventional labels of the law, we have brought important jurisprudential issues into focus. In a modest way, we have brought jurisprudence into the search for a just criminal law.