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Abetting Mass Prison Escape: A Defense

David W. Frank

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"But the angel of the Lord by night opened the prison doors, and brought them forth, and said, Go, stand and speak in the temple to the people all the words of this life."

The Acts of the Apostles 5:19–20

I. INTRODUCTION

There is no reason not to believe that at any moment any person in a United States prison will be attacked, beaten, raped, tortured, tormented, or killed.[1]

The condemned are at all times in imminent danger.[2] Officials administrating their confinement will not protect them,[3] and legislators

* J.D., Ohio Northern University College of Law, 2013. I thank Janyl Relling and Marlon Baquedano for their exhaustive advice and editing preparing my article and this volume for publication. My article is dedicated to Rick Bays of Chillicothe, Ohio.

1 *See infra* Part II. *See also* FRANZ KAFKA, IN THE PENAL COLONY 197 (Willa Muir & Edwin Muir trans., Schocken Books 1st ed. 1961) (1919) ("[T]he explorer interrupted him: 'He doesn't know the sentence that has been passed on him?' 'No,' said the officer again, pausing a moment as if to let the explorer elaborate his question, and then said: 'There would be no point in telling him. He'll learn it on his body.'").

who control the penal system under which inmates suffer will not permit reforms to ensure their safety.[4] Even if the U.S. attempted either solution, the resulting measures would not address the immediate violence that threatens all incarcerated persons.

It must be concluded based upon the conditions of confinement in the U.S. that prisoners cannot simultaneously remain incarcerated[5] and ensure their own physical safety.[6] It must further be assumed that the U.S. will never recognize the jeopardy prisoners face as an issue of

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[2] *Id*. *See, e.g.*, JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, VERA INST. OF JUST., CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS iii (2006), http://www.vera.org/sites/default/files/resources/downloads/Confronting_Confinement.pdf ("Every day judges send thousands of men and women to jail or prison, but the public knows very little about the conditions of confinement and whether they are punishing in ways that no judge or jury ever intended; marked by the experience of rape, gang violence, abuse by officers, infectious disease, and never-ending solitary confinement.").

[3] *See, e.g.*, People v. Unger, 66 Ill. 2d 333, 343 (1977) (Underwood, J., dissenting) (Judge who wished to punish escapee for fleeing prisons where he was raped and threatened with death nevertheless acknowledged that U.S. prisoners face "brutal and unwholesome problems" and a "frequency of sexually motivated assaults.").

[4] Further, the few legal protections prisoners might have are unsecure. For instance, most states have long failed to comply, or openly refused to comply, with federal legislation intended to curb mass sexual violence in prisons under the provisions of the Prison Rape Elimination Act of 2003, 42 U.S.C. §§ 15601–09 (2012) and its implementing rules, the Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2012). *See* Letter from Hon. Reggie B. Walton et. al, Comm'rs, Prison Rape Elimination Act Comm'n, to Eric J. Holder, U.S. Att'y Gen. (Nov. 12, 2014), http://www.hrw.org/sites/default/files/related_material/2014_US_PREA.pdf [hereinafter *Prison Rape Elimination Act Comm'n*]. Governors are now rushing to promise that their states will come into compliance "in future years" in order to maintain federal funding for their state prison systems. Memorandum from the U.S. Dep't. of Just., List of State Certification & Assurance Submissions to Utilize Dep't of Just. Grants to Achieve Full Compliance with the Nat'l Standards to Prevent, Detect, and Respond to Prison Rape, (July 29, 2015) (on file with author) https://www.bja.gov/Programs/15PREA-AssurancesCertifications.pdf.

[5] U.S. Supreme Court Justice Harry Blackmun observed that the "atrocities and inhuman conditions of prison life in America are almost unbelievable." U.S. v. Bailey, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting). Fear of such violent conditions is what motivates most prison escapees. *See* Richard F. Culp, *Frequency and Characteristics of Prison Escapes in the U.S.: An Analysis of Nat'l Data*, 85 THE PRISON JOURNAL 270, 272 (2005).

[6] *See infra* Part II. *See also, e.g.*, SpearIt, *Manufacturing Social Violence: The Prison Paradox & Future Escapes*, 11 BERKELEY J. AFR.-AM. L. & POL'Y, 84, 103–04 (2009) ("The very substratum of the prison is violence. At its base, forced restraint and detainment are themselves the building blocks of prison violence. Such captivity invariably is linked to physical/sexual, psychic, and symbolic forms of institutional violence. Whether it comes from inmates or guards the prison is described as a locus of extreme violence, repression, and control.").

concern[7] to the extent that it would properly react to the implications and facts of the issue by immediately and conclusively protecting all it detains.[8]

Because the government will neither immediately protect nor immediately release its prisoners, others must act.[9] These individuals, defined by law as "rescuers," would be those who both free prisoners and accept legal responsibility for the necessary acts of deliverance.[10]

Fortunately, rescuers may raise the defense of third-party duress if prosecuted for freeing prisoners.[11] Rescuers can, and should, use this as a defense to their alleged crimes—and should also use it deliver the whole of the U.S. penal population from captivity.[12] In this article, I present my argument for this position.

First, I show that the nature of violence permeating the U.S. penal system allows rescuers to presume all prisoners are under imminent threat of danger. Next, I note that while duress as a defense is available to prison escapees, courts rarely allow or consider it, and are unlikely to change their position. Third, I argue that because all prison escapees are entitled to the duress defense, the weight of law permits and should be more widely recognized as permitting, the defense of third-party duress for the act of rescue and any assistance that aids and abets escape. Finally, I conclude with the suggestion that the state of the U.S. penal

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[7] Any recognition in contemporary history of the problem of prison violence is undercut by a national fear and contempt of the imprisoned, which is a discrete afflicted underclass. As the U.S. Department of Justice acknowledged, "[P]rison rape is often the subject of jokes; in public discourse, it has been at times dismissed by some as an inevitable—or even deserved—–consequence of criminality." 77 Fed. Reg. 37106 (June 20, 2012). *See also* LEO TOLSTOY, RESURRECTION 447 (Rosemary Edmons trans., Penguin Group, 1st ed. 1966) (1899) ("'All this happened,' Nekhlyudov said to himself, 'because all these people – governors, inspectors, police-officers and policemen – consider that there are circumstances in this world when man owes no humanity to man.'").

[8] *See infra* Part III.

[9] *See Bailey*, 444 U.S. at 422 ("It is society's responsibility to protect the life and health of its prisoners.").

[10] The act of rescue is defined as "the unilateral deliverance of the prisoner by another person." *See also* People v. Bishop, 202 Cal. App. 3d 273, 280 (Cal. Ct. App. 1988).

[11] *See infra* Part IV, Section A. I will use "duress" generally to refer to all affirmative defenses i.e., duress, necessity, justification, choice of evils, compulsion, that a prisoner or her rescuer might raise to excuse the crime of escape or rescue. These terms are used somewhat interchangeably in case law to present the question of whether escape or rescue was excusable. For simplicity, I will also, unless otherwise stated, use "prison" to refer to any carceral institution e.g., local jail, state prison, federal prison, detention center and "prisoner" to refer to any incarcerated individual e.g., inmate, prisoner, detainee, prisoner of war.

[12] *See infra* Part II.

system places a moral responsibility on non-prisoners to rescue prisoners.

II. THE DANGER OF U.S. PRISONS

The United States holds its prisoners in environments where the danger of imminent violence is real at all times. The harm may be inflicted through a direct violence of the body – i.e., assault, rape, torture, death – or through less conspicuous infliction of a violence of the person – i.e., sexual degradation, medical neglect, solitary confinement, and the suffering caused by the erasure of the social and civil self. Both forms are attacks on the humanity of a person. It is because of this violence, unabated, that prisoners are driven to act.

The U.S. operates the largest penal system on earth.[13] It incarcerates more people,[14] and a larger percentage of its people,[15] than any other nation.[16] More than one in every 100 adults[17] is locked inside of one of more than 5,000 prisons.[18]

Most of these more than two million prisoners are poor,[19] racial minorities,[20] or both.[21] The majority of those sent to prison are convicted

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[13] *See* ROY WALMSLEY, INT'L CTR. FOR PRISON STUDIES, WORLD PRISON POPULATION LIST 1 (10th ed. 2013), http://www.apcca.org/uploads/10th_Edition_2013.pdf.

[14] *See id*. at 1, 3 (reporting that out of the 10.2 million prisoners in the world, 2.24 million are in the U.S.).

[15] *Id*. (U.S. incarceration rate is 716 people per 100,000).

[16] *Id*. at 1–6 (The U.S. leads all countries including China, Russia, and North Korea in the number of people it imprisons. It leads all countries in its incarceration rate). Additionally, individuals are admitted more than 12 million times annually to U.S. prisons. TODD D. MINTON & DANIELA GOLINELLI, U.S. DEP'T OF JUST., JAIL INMATES AT MIDYEAR 2013 - STATISTICAL TABLES 4 (2014), http://www.bjs.gov/content/pub/pdf/jim13st.pdf; ELIZABETH A. CARSON, U.S. DEP'T OF JUSTICE, PRISONERS IN 2013 2 (2014), http://www.bjs.gov/content/pub/pdf/p13.pdf. Nearly 7 million people in the U.S. are under some form of correctional supervision. LAUREN E. GLAZE & DANIELLE KAEBLE, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE U.S., 2013 2 tbl.1 (2013), http://www.bjs.gov/content/pub/pdf/cpus13.pdf.

[17] THE PEW CTR. ON THE STATES, ONE IN 100: BEHIND BARS IN AMERICA 2008 5–7 (2008), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2008/one20in20100pdf.

[18] *Id.*

[19] DORIS J. JAMES, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PROFILE OF JAIL INMATES, 2002 9 (2004), http://www.bjs.gov/content/pub/pdf/pji02.pdf (documenting that a majority of jail inmates had been making less than $1,000.00 a month in the previous year, about a third were unemployed, and about fifteen percent (15%) had been homeless). "[J]ails have become massive warehouses primarily for those too poor to post even low bail or too sick for existing community resources to manage." RAM

of nonviolent offenses.[22] The majority of those confined in local jails – three out of five – have been convicted of no crime at all.[23] Further, many entering prison, and most being held, have a serious mental illness.[24] The majority are medically diagnosable substance users.[25]

The constant physical danger American prisoners face is astonishing. The reported violent assault rate is at least ten times greater inside of prison than on the outside,[26] and is likely much higher.[27] The government

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SUBRAMANIAN ET AL., VERA INST. OF JUST., INCARCERATION'S FRONT DOOR: THE MISUSE OF JAILS IN AMERICA 2 (2015), http://www.vera.org/sites/default/files/resources/downloads/incarcerations-front-door-report.pdf.

[20] MINTON & GOLINELLI, *supra* note 16 (showing that more than sixty percent (60%) of jail inmates were racial minorities, and of that population more than half were African-American); CARSON, *supra* note 16 (showing that of state and federal prisoners more than 65 percent were racial minorities and of that population about fifty-five percent (55%) were African-American). One in nine young African-American men is incarcerated. THE PEW CTR. OF THE STATES, *supra* note 17, at 6.

[21] Bruce Western & Becky Pettit, *Incarceration & Soc. Inequality*, 139 DAEDALUS 8 (2010), http://www.mitpressjournals.org/doi/pdf/10.1162/DAED_a_00019. "[W]e have also made some progress in our treatment of the poor and disadvantaged. But the big, glaring exception to both these improvements is how we treat those guilty of crimes. Basically, we treat them like dirt. And while this treatment is mandated by the legislature, it is we judges who mete it out." Jed S. Rakoff, Judge, U.S. Southern District of New York, "Mass Incarceration and the 'Fourth Principle,'" Speech at Harvard Law School (Apr. 10, 2015), https://clp.law.harvard.edu/ assets/KeynoteAddress_Judge_Jed_S_Rakoff.pdf.

[22] CARSON, *supra* note 16, at 15–17.

[23] MINTON & GOLINELLI, *supra* note 16, at 7 tbl.3.

[24] DORIS S. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 9 (2006), http://www.bjs.gov/content/pub/pdf/mhppji.pdf (finding that a majority of those incarcerated had "mental health problems," particularly in female facilities where three-fourths of the population was found to have such issues); Seth J. Prins, *Prevalence of Mental Illnesses in U.S. State Prisons: A Systematic Review*, 65 PSYCHIATRIC SERVICES 862, 866–67 (2014) (observing the particularly high rate of schizophrenia and post-traumatic stress disorder among prisoners as compared to the general population).

[25] Redonna K. Chandler et al., *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301(2) J. AM. MED. ASS'N 183, 183–84 (2009).

[26] The non-prison assault rate was about 325 in 100,000 people as of 2000. U.S. DEP'T OF JUST., FED. BUREAU OF INVESTIGATION, CRIM. JUST. INFO SERV. DIV., CRIME IN THE U.S. 2012, tbl.1, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls (last visited May 27, 2016). The prison assault rate was about 4,250 people in 100,000 as of year 2000, including assaults against staff victims but not including staff assaults against prisoner victims. JAMES J. STEPHAN & JENNIFER C. KARBERG, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000 9–10 (2003), http://www.bjs.gov/content/pub/pdf/csfcf00.pdf. *See also* Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588

simply does not collect,[28] report,[29] or maintain[30] regular data on prison violence, nor has it actively sought to monitor it,[31] with the exception of the specific crimes of homicide and rape.[32] It is well understood by Americans both imprisoned[33] and free[34] that confinement condemns the incarcerated to a world of "nearly infinite violence."[35]

(2007) (referencing a survey of fourteen state prisons finding one in five prisoners reported being physically assaulted within the previous six months).

[27] James M. Byrne & Don Hummer, *Myths and Realities of Prison Violence: A Review of the Evidence*, 2 VICTIMS & OFFENDERS 77, 79–80 (2007) (observing that an analysis of studies puts the number of inmate-on-inmate assaults at least ten times higher than government estimates and that inside prison "violence—and the threat of violence—is a routine way of life" (citations omitted) (internal quotation marks omitted) http://faculty.uml.edu/jbyrne/byrne_hummer_victims_offenders_07.pdf; *see also* Karen F. Lahm, *Inmate-On-Inmate Assault: A Multilevel Examination of Prison Violence*, 35 CRIM. JUST. & BEHAV. 120, 120–21 (2008), http://www.ash-college.ac.il/.upload/Dr%20 Edith%20Gotesman/Inmate-on-Inmate%20Assault.pdf (arguing that inmate-on-inmate assaults may actually be increasing, particularly in light of longer mandatory sentences and cuts to educational, vocational, and wellness programs in prison).

[28] Half of all U.S. states claimed zero of its prisoners were assaulted from 1995 to 2000. GIBBONS & KATZENBACH, *supra* note 2, at 25.

[29] Ten percent (10%) of states refused to reveal their prisoner assault figures from 1995 to 2000. *Id*.

[30] The U.S. Department of Justice's Bureau of Justice Statistics does not regularly collect and report data on non-fatal U.S. prison assaults. *Id.* at 24.

[31] State prison violence data is unreliable in the view of the federal Bureau of Justice Statistics. *Id.* at 13. This is due not only to states' reporting patterns but also to prisoners' fear of retaliation for reporting violence. *See, e.g.*, *Bailey*, 444 U.S. at 422 ("[G]uards frequently participate in the brutalization of inmates. The classic example is the beating or other punishment in retaliation for prisoner complaints or court actions."); U.S. v. Lopez, 885 F.2d 1428, 1431 (9th Cir. 1989) (warden responding to prisoner's complaints by "threatening her life, intimating that she might not live long enough to take her case before the parole board, and by remarking that 'accidents happen in prisons every day.'"); ERICA GAMMILL & KATE SPEAR, THE PRISON JUST. LEAGUE, CRUEL & UNUSUAL PUNISHMENT: EXCESSIVE USE OF FORCE AT THE ESTELLE UNIT 6 (2015), https://static.texastribune.org/media/documents/Cruel__Usual_Punishment_-_PJL_Final.pdf (reporting disabled and elderly prisoners at a Texas facility who suffered "missing teeth, busted skulls, broken bones, ruptured eyeballs and prolonged hospitalizations" did not file grievances out of fear of retaliation for reporting staff violence against them).

[32] *See generally* U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2013 - STATISTICAL TABLES (2015), http://www.bjs.gov /content/pub/pdf/mljsp0013st.pdf; U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., PREA DATA COLLECTION ACTIVITIES, 2015 (June 2015), http://www.bjs.gov/content/pub/pdf/ pdca15.pdf (collecting data pursuant to the Prison Rape Elimination Act).

[33] *See, e.g.*, Jennifer Gonnerman, *Before the Law: A Boy Was Accused of Taking a Backpack. The Courts Took the Next Three Years of His Life*, THE NEW YORKER (Oct. 6, 2014), http://www.newyorker.com/magazine/2014/10/06/law-3?src=mp; Jennifer Gonnerman, *Kalief Browder, 1993–2015*, THE NEW YORKER (June 7, 2015), http://www.newyorker

The epidemic of prison rape also continues. Recent modest and generally voluntary controls to combat the crime are swiftly being dismantled.[36] More than one million U.S. prisoners have reported being raped since the beginning of the modern drug war,[37] a rate at least ten times greater than the non-prison population.[38] Individual cases illustrate the horror of these crimes,[39] approximately half of which government officers perpetrate.[40] Despite these statistics, most states have not demonstrably cooperated with national legislation addressing prison rape, and several states have outright refused to comply.[41] Such brutality led former U.S. Supreme Court Justice Harry Blackmun to condemn

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.com/news/news-desk/kalief-browder-1993-2015 (profiling a teenage inmate who suffered beatings, solitary confinement, and other inhumane conditions at New York City's Rikers Island jail for three years without being convicted of a crime, before being released and later committing suicide); Michael Winerip & Michael Schwirtz, *Even as Many Eyes Watch, Brutality at Rikers Island Persists*, N.Y. TIMES (Feb. 21, 2015), http://www.nytimes.com/2015/02/22/nyregion/even-as-many-eyes-watch-brutality-at-rikers-island-persists.html?_r=0.

[34] Approximately eighty-five percent (85%) of Americans say they would fear for the physical safety of a person if they knew she was imprisoned. GIBBONS & KATZENBACH, *supra* note 2, at 29.

[35] Christopher Glazek, *Raise the Crime Rate*, N+1 (Winter 2012), https://nplusonemag.com/issue-13/politics/raise-the-crime-rate/.

[36] *See Prison Rape Elimination Act Comm'n*, *supra* note 4 (decrying efforts by both federal and state legislators to stop implementation of the Prison Rape Elimination Act).

[37] "The total number of inmates [as of 2003] who have been sexually assaulted in the past twenty years likely exceeds 1,000,000 . . . . Members of the public and government officials are largely unaware of the epidemic of prison rape and the day-to-day horror experienced by victimized inmates." 42 U.S.C. §§ 15601(2), (12) (2012).

[38] Approximately ten percent (10%) of former state prisoners reported they were sexually victimized while incarcerated. ALLEN J. BECK & CANDACE JOHNSON, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SEXUAL VICTIMIZATION REPORTED BY FORMER STATE PRISONERS, 2008 8 (2012), http://bjs.gov/content/pub/pdf/svrfsp08.pdf. Approximately one percent (1%) of adults and adolescents not incarcerated report sexual victimization. JENNIFER TRUMAN ET AL., U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., CRIM. VICTIMIZATION, 2012 2 (2012), http://www.bjs.gov/content/pub/pdf/cv12.pdf.

[39] *See, e.g.*, Matt Farley, *Mother Sexually Assaulted by Guard While in Custody Sues Arapahoe County Sheriff*, FOX 31 DENVER (Sept. 24, 2014, 1:16 PM), http://kdvr.com/2014/09/24/mother-sexually-assaulted-by-guard-while-in-custody-sues-arapahoe-county-sheriff/ (inmate who had just given birth forced to perform oral sex on male guard while her newborn is in the room).

[40] RAMONA R. RANTALA ET AL., U.S. DEP'T OF JUSTICE, BUREAU OF JUST. STAT., SURVEY OF SEXUAL VIOLENCE IN ADULT CORRECTIONAL FACILITIES, 2009–2011 - STATISTICAL TABLES 1 (2014), http://www.bjs.gov/content/pub/pdf/ssvacf0911st.pdf.

[41] *See Prison Rape Elimination Act Comm'n*, *supra* note 4. *See also*, Nick Wicksman, *Arizona Again Fails to Comply with Prison-Rape Prevention Laws*, CRONKITE NEWS SERV., June 17, 2015, http://www.azcentral.com/story/news/local/arizona/2015/06/17/arizona-compliance-prison-rape-elimination-act/28868225/.

these conditions from the bench as "the equivalent of torture and [] offensive to any modern standard of human dignity."[42]

Death is also a reality for those incarcerated. Thousands die in U.S. prisons every year,[43] a number greater than the entire given prison population of many small nations.[44] Suicide is the leading cause of death in local jails.[45] Disease is ithe leading cause in state prisons, often as a result of conditions where wounded and sick prisoners are left to deteriorate and suffer.[46] Capital punishment keeps thousands awaiting death[47] and has taken the lives of more than one thousand prisoners since its reimplementation in the U.S.[48] Even if the death penalty were abolished, the substitute sentence of life imprisonment—a living death—

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[42] *Bailey*, 444 U.S. at 423 (alternation in original).

[43] MARGARET E. NOONAN & SCOTT GINDER, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2012 - STATISTICAL TABLES 8 (2014), http://www.bjs.gov/content/pub/pdf/mljsp0012st.pdf (approximately 4,300 state prisoners and local inmates died while incarcerated in 2012).

[44] The more than sixty-five countries include Ireland and Norway. *See* WALMSLEY, *supra* note 13.

[45] The rate is 40 per 100,000. NOONAN & GINDER, *supra* note 43, at 2. This is more than triple the suicide rate outside of jail. Jiaquan Xu et. al., *Deaths: Final Data for 2013*, 64 NAT'L VITAL STAT. REPORTS 32 tbl.9 (2016), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf.

[46] *See, e.g.*, S. POVERTY L. CTR. & ALA. DISABILITIES ADVOC. PROGRAM, CRUEL CONFINEMENT: ABUSE, DISCRIMINATION AND DEATH WITHIN ALABAMA'S PRISONS (2014), http://media.al.com/news_impact/other/Alabama%20Prison%20Report_final.pdf (revealing the status of medical care in Alabama prisons where the state employs fifteen doctors for the entire 25,000-person prison population).

[47] There are more than 3,000 prisoners on death row, the majority of them racial minorities. *See generally* NAACP LEGAL DEFENSE & EDUC. FUND, DEATH ROW U.S.A. (2014), http://www.deathpenaltyinfo.org/documents/DRUSAFall2014.pdf.

[48] *Id*. at 4. *See, e.g.*, Ed Pilkington, *Death Row Inmate Glenn Ford Released 30 Years after Wrongful Conviction*, THE GUARDIAN (Mar. 12, 2014, 12:56 AM), http://www.theguardian.com/world/2014/mar/12/death-row-inmate-glenn-ford-released-30-years-after-wrongful-conviction (reporting that 144 prisoners who have been sentenced to death since executions were approved to restart in 1976 have been exonerated, including one man who spent thirty years on death row); Ken Daley, *Exonerated Convict Glenn Ford Succumbs to Lung Cancer at 65*, THE TIMES-PICAYUNE (June 29, 2015 1:21 P.M.), http://www.nola.com/crime/index.ssf/2015/06/exonerated_convict_glenn_ford.html (discussing the case of a man who died the year following his exoneration without compensation from the state). Standards to ensure that those who are executed will not suffer a painful and lingering death are inadequate. Andy Rossback, *Executioners vs. Veterinarians Which Do We Kill More Humanely, Our Pets or Condemned Prisoners?* THE MARSHALL PROJECT (April 28, 2015, 2:10 P.M.), https://www.themarshallproject.org/2015/04/28/executioners-vs-veterinarians?utm_medium=email&utm_campaign=newsletter&utm_source=opening-statement&utm_term=newsletter-20150429-169.

[49] would leave prisoners in conditions amounting to torture for the rest of their lives.[50] The conditions inmates face in confinement constitute a total violence against the human body.

Aside from the quantifiable violence of assault, rape, and death, prison also inflicts violence, bodily harm, and suffering through the staging of sexual degradation,[51] the mutilation resulting from medical mistreatment,[52] the anguish of solitary confinement,[53] and the trauma caused by the total loss of social and civil selfhood.[54] Unfortunately, American society considers this violence deserved or at the least

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[49] As of 2012, one out of nine U.S. prisoners—more than 150,000 people—are serving life sentences (a majority of whom are racial minorities). ASHLEY NELLIS, THE SENT'G PROJECT, LIFE GOES ON: THE HISTORIC RISE OF LIFE SENTENCES IN AMERICA 5 (2013), http://sentencingproject.org/doc/publications/inc_Life%20Goes%20On%202013.pdf. As Pope Francis observed, "Life imprisonment is a hidden death penalty." Francis X. Rocca, *Pope Francis Calls for Abolishing Death Penalty and Life Imprisonment*, CATH. NEWS SERV., Oct. 23, 2014, http://www.catholicnews.com/data/stories/cns/1404377.htm.

[50] *See* U.N. COMM. AGAINST TORTURE, CONCLUDING OBSERVATIONS ON THE THIRD TO FIFTH PERIOD REPORTS OF THE U.S. OF AMERICA (2014), http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_COC_USA_18893_E.pdf.

[51] *See, e.g.*, Gov. Rick Perry, Letter to U.S. Att'y Gen. Eric Holder, (Mar. 28, 2014), http://www.tdcjunion.com/research/rick_perry_letter.pdf (notifying the U.S. Attorney General that the State of Texas would continue, in violation of PREA standards, to permit prison staff to inspect nude prisoners of the opposite sex); Alysa Santo, *Texas: The Prison Rape Capital of the U.S.*, NEWSWEEK (June 20, 2015, 2:28 PM), http://www.newsweek.com/texas-prison-rape-capital-us-344729.

[52] *See, e.g.*, S. POVERTY L. CTR. & ALA. DISABILITIES ADVOC. PROGRAM, *supra* note 46. These conditions exist despite the U.S. Supreme Court's conclusion that deliberate indifference to prisoners' medical needs is cruel and unusual punishment that violates the Eight Amendment of the U.S. Constitution. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976).

[53] Between 80,000 and 100,000 prisoners are isolated in solitary confinement in the U.S. as of 2014, where they are caged in small rooms that they can rarely leave or access human contact, sometimes for months, years, and even decades on end. *See* THE LIMAN PROGRAM, YALE L. SCH. ASSOC'N OF ST. CORR. ADMIN., TIME-IN-CELL: THE ASCA-LIMAN 2014 NAT'L SURV. OF ADMIN. SEGREGATION IN PRISON ii (Aug. 2015), https://www.law.yale.edu/system/files/area/center/liman/document/asca-liman_administrativesegregationreport.pdf. *See also* U.N. COMM. AGAINST TORTURE, *supra* note 50, at ¶ 14 ("Furthermore, [the Committee] is concerned about the use of solitary confinement for indefinite periods of time, and its use against juveniles and individuals with mental disabilities. The full isolation for 22–23 hours a day in super-maximum security prisons is unacceptable.").

[54] *See, e.g.*, James E. Robertson, *Houses of the Dead, Warehouse Prisons, Paradigm Change, and the Sup. Ct.*, 34 HOUS. L. REV. 1003, 1014–15 (1997) ("Seemingly powerless to combat the rampant violence and pervasive idleness that often accompanies incarceration, the warehouse prison operates without the pretense that it does anything other than store and recycle offenders.").

necessarily inevitable.[55] Nowhere else but prison may the state relegate human beings to such conditions.[56]

Without litigation, prisoners would have no governmental protection from violence in prison. At every administrative[57] and judicial level[58] prisoner complaints are ignored.[59] The federal government has intentionally and almost entirely foreclosed the possibility of successful lawsuits that would enforce prisoners' human and constitutional rights.[60] Courts give defference to jailors and prison administrators.[61] Even where relief is formally granted, it does little to assist prisoners, let alone reform the penal system.[62]

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[55] *See* SpearIt, *supra* note 6, at 85 ("As public vengeance and victim's rights have become orthodoxy in punishment, prisoner's rights have diminished in turn."); KAFKA, *supra* note 1, at 192. ("The officer, anxious to secure himself against all contingencies, said: 'Things sometimes go wrong, of course; I hope that nothing goes wrong today, but we have to allow for the possibility.'").

[56] *See, e.g.*, Emily Le Coz, *Walnut Grove: 1 Riot; 2 Reactions*, THE CLARION-LEDGER (Apr. 11, 2015, 8:40 PM), http://www.clarionledger.com/story/news/2015/04/11/walnut-grove-riot-reactions/25646805/ (discussing private Mississippi prison arguing it required no special monitoring after it allowed a riot from which it can be seen in video footage that "prisoners take turn urinating on the motionless body of the man they had beaten with [a] microwave.").

[57] *See Unger*, 66 Ill. 2d at 343.

[58] The prosecution of violent prison officials is rare and newsworthy. *See, e.g*., Caurie Putnam, *N.Y. Prison Guards Resign, Avoid Prison in Plea Deal Over Inmate Beating*, REUTERS, March 3, 2015, 3:23 PM, http://www.reuters.com/article/usa-newyork-attica-idUSL1N0W41P020150302 (For the first time ever, New York State secured guilty pleas from officers for the crime of non-sexual assault of a prisoner).

[59] *See, e.g*., U.S. v. Bifield, 702 F.2d 342, 345 (2d Cir. 1983) (prisoner urinating blood, vomiting, and afflicted with kidney stones refused all medical care).

[60] The Prison Litigation Reform Act (PLRA) makes it nearly procedurally impossible for the average prisoner to bring, allege, and recover from a civil rights action based upon the conditions of her incarceration because of the exhaustion of administrative remedies requirement. 42 U.S.C. § 1997(e) (2012). Until recently, a prisoner who was sexually assaulted but did not sustain a demonstrable physical injury had no claim. *Id*. at § 1997(e)(e). Prisoners and prosecutors are well aware of the futility of prisoner civil rights suits. *See, e.g*., Sean O'Sullivan, *Ex-Prosecutor Turned Prisoner Accuses Guards of Abuse*, THE NEWS JOURNAL (May 29, 2014, 12:55 AM), http://www.delawareonline.com/story/news/local/2014/05/28/ex-prosecutor-turned-prisoner-accuses-guards-abuse/9676935/.

[61] The conditions, retaliation, and lack of protection prisoners suffered in the most significant U.S. prison escape case were "typical." *Bailey*, 444 U.S. at 426 n.6 (Blackmun, J., dissenting) (citations omitted) "Respondent Bailey filed suit in the Superior Court of the District of Columbia to 'stop the administrators from threatening my life.' Bailey testified that the suit caused the guards to threaten him in an attempt to persuade him to withdraw the action, to beat him, and to transfer him to the mental ward. *Id.* Bailey's suit subsequently was dismissed with prejudice." *Id.*

[62] *See* STEPHAN, *supra* note 18, at 3; *see also supra* note 18, at 14 tbl.6 (showing more than one in ten prisoners are already in a facility under corrective court order in 2005).

Consequently, prisoners cannot find safety from danger through the channels they are prescribed to pursue. Reforms to litigation practices and legislation are regularly discussed, but neither has been effective. States deny liability. The public rejects culpability. Reformers ask captives to wait when they cannot afford to wait; therefore, prisoners must seek safety by other means.

III. THE DURESS OF PRISONERS

All of those incarcerated in the United States must be universally entitled to raise the affirmative defense of duress if prosecuted for the crime of prison escape. The elements of duress are met under this circumstance because the U.S. penal system places all prisoners in imminent threat of danger, provides no legal remedy to ensure their safety, and assures all incarcerated that if they do not immediately abandon confinement, they risk the infliction of grave and permanent harm. Regrettably, modern prison escape is generally rare, dangerous, and, even where successful, brief. Despite the conditions of the U.S. penal system, courts now construe the duress defense as unavailable to escapees in almost every case.

A. All Escapees Entitled to Duress Defense

Departing from official custody absent explicit permission is generally illegal under federal and state law. Escape is a crime likely to be prosecuted vigorously. Nevertheless, hundreds of prisoners attempt to flee confinement every year. Any prisoner in the U.S. should be entitled to raise duress as a defense to such a charge. Prisoners have historically been able to cite duress where imminent violence leaves them with no other recourse but escape. Courts have constructed and construed the elements of this defense differently, but prisoners' own constant concern in these situations has remained the same: danger.

Thousands of people incarcerated in the U.S. since the beginnings of the modern drug war in the last quarter of the 20th century have attempted to escape prison in order to protect their physical safety.[63] They have done so by various means. By far the most common course of action is to simply walk away from a prison site, generally at a low-security facility.[64] Other common methods of escape include climbing out a prison window and scaling the barrier of a prison fence.[65]

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63 *See infra* Part III. Section B.

64 *Id*. *See also, e.g.,* Dean Narciso, *Escaped Inmate Caught After 22 Years on the Lam*, THE COLUMBUS DISPATCH (Dec. 19, 2014), http://www.dispatch.com/content/

The use of violence is uncommon at any stage of prison escape.[66] This is true even though most prisoners are fleeing out of desperation for self-preservation.[67] The violent dangers jeopardizing self-preservation include assault, rape, and murder. The feared violence is often brutal: in 1997 a man was killed in a federal super-maximum security prison cell in Colorado where his attackers, following the murder, were found "draping his intestines over the cell's clothesline and throwing his liver at investigating guards."[68]

Escape, the single avenue available to prisoners to secure their personal safety, is illegal throughout the U.S. under state and federal law. It is punishable by additional years in prison, likely in the same penal regime the given prisoner had sought to escape.[69] Statutes are particular in the types of punishments for the variety of escape they categorize.[70] The general distinction is that escape through violence or by one considered violent is more harshly punished than escape by nonviolence or by one considered nonviolent.[71] For instance, under federal law, convicted felons and enemy internees may receive five additional years for escape, while prisoners confined for misdemeanor offenses or during extradition proceedings may not receive more than one year for the same crime.[72]

Provisions of individual state statutes reveal the collective national anxiety over perceived potential dangers of prison escape. A prisoner in Kentucky, for instance, is guilty of attempted escape when she is

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stories/local/2014/12/18/prison-escapee-caught.html (prisoner convicted of grand theft walked away from work detail at dairy farm); *Unger*, 66 Ill. 2d at 362 (prisoner convicted of auto theft walked away from work detail at farm).

65 *See, e.g. Bifield*, 702 F.2d at 344 (prisoner escaped through open window in adjoining cell); *Bailey*, 444 U.S. at 398 (prisoners escaped through open window).

66 *See infra* Part III. Section B; *but see, e.g.*, Elisha Fieldstadt et. al, *Three Inmates Back in Custody After Alabama Jail Escape*, NBCNEWS.COM, Dec. 14, 2014, http://www.nbcnews.com/news/us-news/three-inmates-back-custody-after-alabama-jail-escape-n268101 (inmates overcame jailer, sprayed him in the face with Lysol, and took his keys); William M. Rashbaum & Benjamin Mueller, *Richard Matt, Escaped Prisoner in New York Manhunt, Is Fatally Shot*, N.Y. TIMES (June 26, 2015), http://www.nytimes.com/2015/06/27/nyregion/new-york-escaped-prisoners.html?action=click&contentCollection=N.Y.%20%2F%20Region&module=RelatedCoverage&region=Marginalia&pgtype=article (reporting that escaped prisoner chased during massive manhunt shot at a camping trailer before being killed by pursuing officers).

67 Culp, *supra* note 5, at 272.

68 Brief for Appellant (en banc) at 5, U.S. v. Haney, 318 F.3d 1161 (10th Cir. 2003) (No. 98-CR-224-D), 2002 WL 32513516.

69 *See infra* notes 71–74.

70 *Id.*

71 *See, e.g.*, ALASKA STAT. § 11.56.300-330 (2014); CAL. PENAL CODE § 4530 (Deering 2015); IND. CODE § 35-44.1-3-4 (2015); LA.STAT. § 14:110 (2015).

72 18 U.S.C. §§ 751(a), 756 (2012).

discovered hiding inside the walls of the prison.[73] In Nevada, an official may kill an escapee where it is deemed necessary for recapture.[74]

To defend against a charge of criminal escape, a prisoner may elect to argue that she acted under duress. This defense – and other similar defenses such as necessity, justification, choice of evils, and compulsion – excuses the crime of escape where a prisoner has no choice but to flee incarceration to protect herself from imminent threat of serious harm faced in prison.[75] As argued above, all U.S. prisoners face such danger.

However, in order to qualify to raise the duress defense, escapees must meet a high standard of proof. They must in most cases meet the often-cited elements of a test articulated by the 1974 California State appellate court decision in the case of *People v. Lovercamp*.[76] The *Lovercamp* test requires that an escapee demonstrate that she (1) faced a specific threat of imminent violence; (2) could not obtain relief from prison officials; (3) could not obtain relief from courts; (4) did not use violence to ultimately escape; and (5) immediately reported to correctional officials following escape and reaching safety.[77]

Although the apparent intent behind this heightened threshold test was to narrow the applicability of the duress defense, all escapes carried out today nonetheless fall within the scope of duress.[78] Any U.S. escapee can meet the first three prongs of the *Lovercamp* test as a result of the conditions of confinement in the country: (1) all U.S. prisoners are in imminent threat of danger; (2) prison officials will not or cannot

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[73] KY. REV. STAT. § 520.015(1)(a) (2014).

[74] NEV. REV. STAT. § 200.140(3)(a) (2014).

[75] "Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils . . . . Modern cases have tended to blur the distinction between duress and necessity." *Bailey*, 444 U.S. at 409–10.

[76] People v. Lovercamp, 43 Cal. App. 3d 823, 831–32 (1974).

[77] *Id*. The State of Washington provides a codification of this defense. WASH. REV. CODE § 9A.76.110(2) (2001) ("It is an affirmative defense to a prosecution under this section [first degree escape] that uncontrollable circumstances prevented the person from remaining in custody or in the detention facility or from returning to custody or to the detention facility, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to remain or return, and that the person returned to custody or the detention facility as soon as such circumstances ceased to exist."). *Lovercamp* is still, after more than forty years, the case most cited where an affirmative defense is raised to prison escape. *See Bailey*, 585 F.2d at 1098–1100 (D.C. Cir. 1978).

[78] *See Lovercamp*, 43 Cal. App. 3d at 831–32.

appropriately redress prisoner complaints; and (3) courts will not or cannot effectively, timely, or consequentially, intervene in such a way to protect prisoners' safety.[79]

The conditions of incarceration in the U.S also allow all prison escapees to meet the fourth and fifth prongs of the *Lovercamp* test – the requirements that escape be accomplished without violence and that escapees report back to correctional officials after reaching safety.[80] To the fourth element, most prison escapes are accomplished nonviolently.[81] Any prisoner would only need to continue the statistical pattern of nonviolent escape in order to meet this element.[82] Addressing the final element of the defense, prisoners can appropriately argue that under the standards of the defense they are never required to physically report to prison without a guarantee they will not be incarcerated. As shown above, to surrender to the U.S. penal system is to forfeit one's safety.

Because of the conditions of their confinement, all U.S. prisoners should be entitled to raise the affirmative defense of duress against criminal charges of escape. Once the facts of these conditions are demonstrated at trial, the burden of proof would then shift back to the prosecution to attempt to deny or explain the state of confinement. The only question left for a court would be, as Justice Blackmun raised, "whether the prisoner should be punished for helping to extricate himself

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[79] *See supra*, Part II. *See also* Rakoff, *supra* note 21; Maurice Chammah, *In the Execution Business, Missouri is Surging*, THE MARSHALL PROJECT (Aug, 31, 2015, 7:15 AM), https://www.themarshallproject.org/2015/08/31/in-the-execution-business-missouri-is-surging#.vZzNJh66z (Missouri Supreme Court Chief Justice Mary Russell denying any responsibility for the increasingly number of people executed in her state, stating "It's required by law that the Supreme Court shall set execution dates . . . "It's not that we agree or disagree with the death penalty.").

[80] *See infra* note 81.

[81] "Most escapes involve simple plans and the exploitation of inattentive staff or defective security technology. For the most part, escapes from secure custody do not involve the use of violence against prison staff (only 8.3% involved violence), and only 6.3% of escapees commit additional crimes in the community in the course of escaping." Culp, *supra* note 6 at 288. The most well-known prison escape case in U.S. Supreme Court history involved nonviolent escape. *See Bailey*, 444 U.S. at 398 ("The prosecution's case in chief against Bailey, Cooley, and Walker was brief. The Government introduced evidence that each of the respondents was in federal custody on August 26, 1976, that they had disappeared, apparently through a cell window, at approximately 5:35 [AM] on that date, and that they had been apprehended individually between September 27 and December 13, 1976.").

[82] It should be noted that nonviolent prison escape is a victimless crime. *See* Monu Bedi, *Excusing Behavior: Reclassifying the Federal Common Law Defenses of Duress and Necessity Relying on the Victim's Role*, 101 J. CRIM. L. & CRIMINOLOGY 576, 596 (2011) ("Unlike the cases of self-defense or provocation, here there is no person that suffers any harm. Indeed, effectuating these crimes does not even require the presence of another person.").

from a situation where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions."[83]

B. Few Escapees Granted Duress Defense

Courts in practice, however, nearly always construe the elements of the *Lovercamp* test to prohibit escapees from explaining why they were forced to flee the dangerous conditions of incarceration.[84] The apprehension on the part of courts to allow escapees the defense appears to arise not from escapees' claims, but from a fear that granting it—even rightly so—would lead to an insurrection and assault on the safety of the general public.[85] This fear is understandable but unfounded.[86]

To prevent an escapee from raising the duress defense at trial, a court will usually deny the escapee's request by finding that she has failed to meet the final element of the *Lovercamp* test.[87] Courts regularly say the efforts of the escapee to surrender, without taking into consideration the conditions from which the prisoner fled, was not sufficiently exhaustive or absolute.[88] In a U.S. Second Circuit Court of Appeals case, for example, a federal prisoner fled a facility which refused him all medical care to treat his kidney stones.[89] This condition caused the prisoner, Daniel Bifield, to vomit, urinate blood, and suffer severe pain.[90] On appeal from his conviction for escape, Bifield tried to persuade the court that he intended to surrender to authorities once he finished receiving off-site medical care. The court was unconvinced.[91] In the same year, Jackie Watts escaped a North Carolina state prison where he had been assaulted and threatened with death by a prison officer.[92] Watts reported the problem to the superintendent who responded by telling Watts to "get

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83 *Bailey*, 444 U.S. at 424.

84 *See* Judith Zubrin Gold, *Prison Escape and Defenses Based on Conditions: A Theory of Social Preference*, 67 CAL. L. REV. 1183 (1979). *See also* KAFKA, *supra* note 1, at 192 ("Now just have a look at this machine," [the officer] added at once, simultaneously drying up his hands on a towel and indicating the apparatus . . . ."[U]p till now a few things still had to be set by hand, but from this moment it works all by itself.").

85 *See* Wayne H. Michaels, *Have the Prison Doors Been Opened? - Duress and Necessity as Defenses to Prison Escape*, 54 CHI. KENT. L. REV. 913 (1978) (The courts have feared a "rash of escapes" rationalized by allegations of prison horrors.).

86 Culp, *supra* note 5, at 288.

87 *See* Michaels, *supra* note 85.

88 *See id.*

89 *Bifield*, 702 F.2d at 345.

90 *Id.*

91 *Id.* at 346.

92 State v. Watts, 298 S.E.2d 436, 437 (1982).

out of [his] office."[93] At his trial for escape, Watts argued that he planned to report back to prison once he reached safety.[94] The prosecution offered no proof this was untrue.[95] Nevertheless, a state appeals court found that his request to raise the duress defense had been "properly refused."[96]

Executing a successful prison escape is itself increasingly rare, dangerous, and difficult. Despite one of the greatest rises in imprisonment in modern history, the already low escape rate over the past few decades has dropped.[97] Less than four tenths of one percent (0.4%) of prisoners ever escape, the great majority of whom are quickly recaptured.[98] Further, few of the small number of escapes are from traditional prisons where most prisoners serving long sentences are held. Most escapes are walkaways from low-security facilities or unsecured work-release sites.[99] Despite sensational media portrayals,[100] most escapees are nonviolent offenders who do not use violence during escape or outside prison once they have escaped.[101] This is notable, as most are fleeing out of fear for their physical safety.[102]

Individual state studies reflect that escapes are infrequent and usually short-lived.[103] Elaborate escapes from well-fortified facilities followed by intensive manhunts are rare.[104] For instance, despite recent high-profile escapes[105] in the State of New York between 2006 and 2010, only

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93 *Id*.

94 *Id*.

95 *Id*.

96 *Id*.

97 Culp, *supra* note 5, at 279 (stating that the rate dropped from 1.4 escapes per 100 inmates in 1988 to a rate of 0.4 in 1998).

98 *Id*. at 279, 287.

99 *Id*. at 278.

100 *See generally* Sofia Fisher et al., *Exploratory Study to Examine the Impact of Television Reports of Prison Escapes on Fear of Crime, Operationalised as State Anxiety*, 56 AUSTL. J. PSYCHOL. 181 (2004).

101 Culp, *supra* note 5, at 288 ("Most escapes involve simple plans and the exploitation of inattentive staff or defective security technology. For the most part, escapes from secure custody do not involve the use of violence against prison staff (only 8.3% involved violence), and only 6.3% of escapees commit additional crimes in the community in the course of escaping.").

102 *Id*. at 272 ("[I]nmates' self-reported internal prison issues (rather than problems in the external world) as the prime motivation for escaping—inmate concern with pending administrative reclassification decisions was the most frequently cited reason.").

103 *See infra* notes 106–08.

104 *See id.* at 287; *but see* William K. Rashbaum, *New York Prisoner's Keys to Escape: Lapsed Rules, Tools and Luck*, N.Y. TIMES (July 20, 2015), http://www.nytimes.com/2015/07/21/nyregion/in-new-york-prison-escape-patience-timing-and-luck-for-david-sweat.html?_r=0.

105 Kirk Semple, *Manhunt Over and Patrols Gone, Calm and Quiet Return to Dannemora*, N.Y. TIMES (July 5, 2015), http://www.nytimes.com/2015/07/06/nyregion/manhunt-over-and-patrols-gone-calm-and-quiet-return-to-dannemora.html.

ten people escaped from prison, most of whom were nonviolent prisoners who simply walked away from low-security environments but were quickly recaptured within a few days.[106] In South Carolina, the number of escapes in 2014 was less than ten percent of what it was in the early 1990s, the majority of which were from low-level facilities.[107] In Florida, almost all recent escapees are from work-release programs, most of who are recaptured within one day.[108]

Because the apparatus of the penal system administers both their confinement as well as protection during confinement, U.S. prisoners threatened with danger are left in an impossible position. Prisoners who seek to alter their confinement to protect their own safety are directed to rely on jailors and judges whose primary function is to keep those assigned to prison confined. At times, however, a defense to escape has been permitted when the dangers prisoners face are too explicit to be politely ignored. It is a remedy nearly always construed as inapplicable to all but the rarest escapes. Consequently, prisoners are abandoned in warehouses of violence from which relief is constantly assured but illusory, and from which the only true remedy is an act punishable by additional years of incarceration within the same system they had been forced to escape. Others, therefore, must work to implement the necessary means of deliverance.

IV. THIRD-PARTY DEFENSE

The penal system and the laws which fortify it deny prisoners the recourse of escape, the only effective and available means of protection against the conditions of incarceration in the United States. Fortunately, the weight of law permits a third-party duress defense for those who rescue incarcerated persons from prison. Such a defense would excuse the actions of those not in duress themselves, but who unilaterally aid the escape of prisoners who are. In the U.S. today, the class of those reasonably believed to be in duress includes all who are imprisoned. Therefore, being that successful escape absent outside intervention is nearly impossible and even where achieved rarely excused, the rescuer's act and aim, legal and physical, is deliverance.

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106 JAMES A. LYONS, ST. OF N.Y. DEP'T OF CORR. SERV., DIV. OF PLAN., RESOLUTION & EVALUATION, INMATE ESCAPE INCIDENTS 2006–2010 6–8 (2011), http://www.doccs.ny.gov/Research/Reports/2011/Inmate_Escape_Incidents_2006-2010.pdf.

107 S.C. DEP'T OF CORR., INMATE ESCAPES FROM S.C. DEP'T OF CORR. FACILITIES BY FACILITY SECURITY TYPE, FY 1990–2014 1 (2015), http://www.doc.sc.gov/pubweb/research/SystemOverview/Escapes1990-2014.pdf.

108 FLA. DEP'T OF CORR., ANN. REP. FY 2012–2013 47 (2013), http://www.dc.state.fl.us/pub/annual/1213/AnnualReport-1213.pdf.

Rescuers can immediately begin to correct the problem of prisoners' general inability to achieve and defend escape. Unconstrained by the near-total physical and social boundaries subjecting prisoners, rescuers are free to coordinate, gather resources, and execute plans. After escape is complete and where necessary to defend the legality of a given escape, rescuers can accept legal responsibility on behalf of prisoners and defend their acts of deliverance with the affirmative defense of third-party duress. Through such direct and legal action, rescuers can contribute to the success of many escapes while preserving the ability, where needed or desired, to defeat charges against themselves.

A. Rescue in the U.S.

Rescue, the unilateral deliverance of a prisoner by another individual, is generally prohibited under both federal and state law.[109] Federal laws against abetting rescue are more extensive than federal laws proscribing the act of escape itself. For instance, it is illegal to assist escape,[110] instigate escape,[111] permit escape,[112] conceal a prisoner who has escaped,[113] provide contraband to aid escape,[114] trespass onto federal prison land (which may be for the purpose of assisting escape),[115] and assist a condemned prisoner escape in order to prevent her execution.[116] The final crime carries the greatest punishment – up to twenty-five years imprisonment.[117]

State laws similiarly prohibit rescue.[118] For instance, many states, like the federal government, impose harsher penalties on rescue in accordance with the perceived danger of the given prisoner.[119] Like the federal government, states also have particular prohibitions reflecting

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109 People v. Bishop, 202 Cal. App. 3d 273, 280 (Cal Ct. App. 1988).
110 18 U.S.C. § 752 (2012).
111 *Id*.
112 18 U.S.C. § 755 (2012).
113 18 U.S.C. § 1072 (2012).
114 28 C.F.R. § 511.11 (2015).
115 18 U.S.C. § 1793 (2012).
116 18 U.S.C. § 753 (2012).
117 *Id*. ("Whoever, by force, sets at liberty or rescues any person found guilty in any court of the U.S. of any capital crime, while going to execution or during execution, shall be fined under this title or imprisoned not more than twenty-five years, or both.").
118 *See generally* LA. STAT. 14 § 111 (2004); MASS. GEN. LAWS ch. 268, § 17 (2008); MICH. COMP. L. §§ 750.183, 199 (2004); NEV. REV. STAT. § 212.100–30 (2013); N.M STAT § 30-22-11 (1978); OHIO REV. CODE § 2921.35 (2004); OKLA. STAT. tit. 21, §§ 441, 521, 532 (2002); 18 PA. CONS. STAT. § 5121(b) (2015); R.I. GEN. LAWS. §§ 11-25-6–9 (2013); S.C. CODE ANN. §§ 16-9-420–30 (2003); TENN. CODE ANN. § 39-16-607 (2014); VA. CODE ANN. §§ 18.2-473–76 (2014).
119 *See* CAL. PEN. CODE § 4550 (2011) (imposing, like the federal government, a heightened penalty for assisting in the escape of a prisoner sentenced to death).

specific anxieties surrounding prison rescue. In Missouri, aiding prison escape with a deadly weapon raises the crime from a misdemeanor to a felony.[120] In Nebraska, loitering near a prison in and of itself is illegal.[121] In Virginia, an officer who refuses to incarcerate a prisoner is guilty of a misdemeanor.[122] In bordering West Virginia, not only is a person who aids a prisoner in escape guilty of a crime, but so too is a person who "persuades, induces or entices or attempts to persuade" a prisoner to escape.[123]

Historically, rescuers have assisted freeing prisoners by various, typically nonviolent means.[124] Forms of rescue have included transporting escapees from prison sites, providing prisoners with implements for escape, and otherwise arranging for flights from authority.[125] For at least the last century in the U.S., these nonviolent means have been the most common forms of rescue. To name a few representatively undramatic cases, a man in 1939 aided an inmate named Strickland by delivering saws to the jailhouse window.[126] The man waited for Stickland to extend a broom out the window "then placed the saws on the broom straw and Stickland withdrew the broom into the jail, thus acquiring the saws."[127] In 1994, Anthony DeStafano drove the getaway van for his brother, Philip, who was being held by the federal government at a local jail.[128] Philip scaled the barbed wire fence with the

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120 MO. REV. STAT. § 575.230 (2011).

121 NEB. REV. STAT. § 28-914 (2008) (A person engages in loitering where she has "an unauthorized conversation with or passes any unauthorized message or messages to any inmate of such institution, or fails or refuses to leave the immediate vicinity of a penal institution when ordered to do so by a peace officer or correctional official.").

122 VA. CODE § 18.2-476 (2014).

123 W. VA. CODE § 61-5-8 (2014).

124 *See infra* note 125.

125 *See, e.g.*, U.S. v. Stone, 13 F. App'x 342 (6th Cir. 2001) (man guilty of assisting sister's escape from a Kentucky federal prison where he rode in the car in which she escaped); U.S. v. Mavridis, 114 F.3d 1192 (7th Cir. 1997) (attorney providing client hacksaw blades to cut through county jail window); U.S. v. Smithers, 27 F.3d 142 (5th Cir. 1994) (man acknowledging he sent his fugitive brother money after allegedly arranging for a vehicle stocked with clothes and supplies to be stationed outside the federal Texas prison from which he escaped); U.S. v. Vowiell, 869 F.2d 1264 (9th Cir. 1989) (man helped fellow prisoners secure bolt cutters, getaway car, and driver to escape federal California prison); Merrill v. State, 42 Ariz. 341 (1933) (man delivering acid to inmate to cut through cell bars); Baker v. State, 19 Ala. App. 437 (Ala. Ct. App. 1923) (man left saws to be concealed in a book and delivered to his inmate brother); People v. Webb, 127 Mich. 29 (1901) (man giving inmate's attorney two books filled with saws for delivery).

126 Cook v. State, 134 S.W.2d 258, 259 (Tex. Crim. App. 1939).

127 *Id*. at 260.

128 U.S. v. DeStefano, 59 F.3d 1 (1st Cir. 1995).

help of another inmate and departed from the facility.[129] "Realizing that the guards had not yet discovered his departure, [Philip] discarded his distinctively colored prison shirt and sauntered across a parking lot to [Anthony's] van."[130] In 2015, a New Jersey woman wired $200 to an escapee, who used the money to temporarily escape to flee the country.[131]

The violence used in a minority of U.S. prison rescues has been generally limited to the threat of force necessary to achieve escape, even as far back as the 19th century. For instance, during the middle of the century, a rescuer named Hamilton Hilton along with a group of men set out to free Christian Comfrey from a Missouri county jail.[132] The rescuers gathered and did "in a violent and turbulent manner, in furtherance of said purpose, rescue and set at liberty the said Christian Comfrey from the lawful custody of the said Allen C. Gunter, against the peace and dignity of the state."[133] Less than twenty years later in Texas, a man led a band of rescuers to free his son, Henry Williams, and other inmates from the local jail.[134]

> "On the night in question, five men entered the lower apartments of the jail, by unbolting unlocked doors. When they were confronted by the jailer, they covered him with firearms, and compelled him to precede them upstairs and open the prison cells. They then took the prisoners and the jailer to a neighboring thicket, where they provided themselves and Henry Williams with horses, dismissed the other prisoners, and released the jailer."[135]

Some prison escapes do, though uncommon, end more violently. For instance, a convicted murderer, Carl Bowles, escaped from federal custody in 1974 with the assistance of five co-conspirators.[136] Bowles was found by law enforcement, chased from a forest bunker, and, while on the run after a shootout with police, kidnapped and murdered an

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129 *Id*. at 2.
130 *Id*.
131 Jeff Goldman, *N.J. Woman Spared Prison for Aiding Drug Dealer's Escape, Report Says*, N.J. ADVANCE MEDIA, Feb. 3, 2015, 10:44 AM, http://www.nj.com/bergen/index.ssf/2015/02/nj_woman_spared_prison_for_aiding_drug_dealers_escape_report_says.html.
132 State v. Hilton, 26 Mo. 199 (Mo. 1858).
133 *Id*. at 200.
134 Williams v. State, 5 S.W. 655 (Tex. App. 1887).
135 *Id*.
136 U.S. v. Eaglin, 571 F.2d 1069 (9th Cir. 1977).

elderly couple.[137] In another case, George Sutton freed his son Cicero from the custody of an Indiana deputy by the name of Van Robertson.[138] Sutton allegedly aided his son's escape by "drawing and pointing a shotgun on and at said Van Robertson, and attempting to shoot him with said gun, and by holding and striking one Gerry Preggy, who was then and there attempting to assist said Van Robertson in restraining and keeping said Cicero Sutton in said custody."[139] Notwithstanding these cases, the implementation of violence during any phase of a prison escape, either inside a prison or among the general public, is uncommon.[140]

Rescuers have implemented generally nonviolent tactics to rescue prisoners for at least two centuries in the U.S. Despite the danger of conflict with law enforcement, they have continued to aid their family, friends, and associates. The larger looming danger—harsh criminal sentences if discovered for their aid—also does not deter rescuers such that they have the possibility of redress.

B. Third-Party Defense

Like the prisoners they seek to assist, rescuers are entitled to raise duress as an affirmative defense to the escape-related crimes that may be charged against them.[141] Rescuers in this situation may argue that, although they themselves were not under threat of imminent danger, the prisoners they rescued were. Because the prisoners they sought to rescue were in imminent threat of danger, rescuers can step into the shoes of the threatened prisoners and raise the defense of duress just as these prisoners themselves would. Such a defense would be critical to any group or movement advocating for an immediate protection of prisoners threatened by the violence of the U.S. penal system.

This third-party duress defense available to rescuers operates similarly to other third-party affirmative defenses. A non-threatened actor may raise the affirmative defense to a criminal charge in the same manner as would the actually threatened individual. An example of this is a Good Samaritan who sees a stranger being attacked by an assailant and fights off the assailant on behalf of the stranger. The theory behind third-party defenses is to encourage, or at least permit, action by those who hold a privileged status in relation to the endangered individual.

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137 *Id*. at 1072–73.
138 State v. Sutton, 84 N.E. 824 (Ind. 1908).
139 *Id*.
140 Culp, *supra* note 5, at 288.
141 *See infra* notes 142, 154 and accompanying text.

This is true in the context of prison escape, where the rescuer appears to be permitted a greater scope of actions than the actual victim.

The two leading U.S. cases on third-party duress as applied to prison escape illustrate the potential breadth of the defense. The first is the cinematic *U.S. v. Lopez*.[142] In the case, Ronald McIntosh was charged with aiding a prison escape.[143] Upon learning of the threat of danger to his girlfriend, Samantha Lopez, he hijacked a helicopter and rescued her directly from inside the gates of a federal prison in Northern California.[144] Issues began to arise after Lopez discovered and reported problematic financial practices at the prison. The prison responded by beating her, threatening her with death, covering her cell with blood, and promising to attack her with acid.[145] Ten days after the escape, McIntosh and Lopez were arrested while purchasing wedding rings.[146]

At trial, the court refused to allow McIntosh to raise third-party duress as a defense to the charge of aiding escape. It found that McIntosh could not use the defense as a justification because Lopez herself could not raise duress as a defense to her charge.[147] Because Lopez failed to immediately surrender to authorities and did not therefore satisfy the elements of the *Lovercamp* test, McIntosh was barred from raising the defense on her behalf.[148] McIntosh was convicted of aiding escape, and Lopez convicted of escape.[149]

On appeal, the U.S. Court of Appeals for the Ninth Circuit proposed an expansive view of third-party duress which can be employed in future efforts to protect prisoners.[150] The court said that rescuers, such as McIntosh, should not have to prove the final *Lovercamp* element demonstrating that prisoners themselves, such as Lopez, had immediately surrendered to authorities after safely escaping.[151] While the trial court's error on this point was not enough to reverse McIntosh's conviction, the Ninth Circuit set out a more proper third-party duress test: (1) the rescuer feared that the prisoner faced an immediate threat of serious bodily harm; (2) the fear was reasonable and well-grounded; (3) the rescuer had no reasonable and legal alternative to rescue; and (4) the escapee made a bona fide good faith effort to surrender to authorities after reaching a

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142 U.S. v. Lopez, 885 F.2d 1428 (9th Cir. 1989), *overruled on other grounds by* Schmuck v. U.S., 489 U.S. 705 (1989).
143 *Id.*
144 *Id*. at 1430–32.
145 *Id*. at 1431–32, 1432 n.3.
146 *Id*. at 1431.
147 *Id*. at 1431–32.
148 *Lopez*, 885 F.2d at 1431–32.
149 *Id.* at 1434.
150 *Id.* at 1434–35.
151 *Id*.

position of safety.[152] Under this test, a rescuer is able to raise the third-party affirmative defense by showing only that the rescued prisoner faced serious imminent harm and had no recourse other than rescue for protection.[153] All U.S. prisoners satisfy both conditions and would therefore allow any rescuer to raise the affirmative defense.

The potential scope of a rescuer's affirmative defense of third-party duress is further expanded by the second key case on the issue. In *U.S. v. Haney*, a panel in the U.S. Court of Appeals for the Tenth Circuit ruled that Robert Haney acted under third-party duress when assisting a friend's escape from a Colorado federal prison in 1997.[154] The facts of the case surround the threat of danger to Haney's friend, Tony Francis, who had been incorrectly identified as a white supremacist on national television.[155] In a time when rival federal prison gangs divided along racial lines selected targets from enemy gangs and known informants for strategic assassination, the identification marked Francis for death.[156] Fellow prisoners assured Francis of his fate and advised him to arm himself or seek protection from officers or white prison gangs.[157]

Francis could not find protection because he in fact was not a white supremacist, gangs would not help him.[158] As a former convicted bank robber and escapee who was a target of law enforcement, prison officials were not interested in offering him assistance.[159] However, even if the prison had attempted to keep Francis safe, taking advantage of the protection could have been fatal. In many prisons, any individual who requested protective custody was assumed by fellow prisoners to be a jailhouse informant.[160] In Francis' prison, this dynamic left targets of racial gang violence in danger both in general population, and while in protective custody.[161]

Francis' dilemma was this: due to prison overcrowding, protective custody cells were regularly double or triple booked and for security

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152 *Id*.
153 *Id*.
154 U.S. v. Haney, 287 F.3d 1266 (10th Cir. 2002), *vacated on reh'g en banc on other grounds*, 318 F.3d 1161 (10th Cir. 2003) (No. 00-1421).
155 *Id*. at 1267–68.
156 *Id*.
157 Appellant's En Banc Brief at 1–6, U.S. v. Haney, 318 F.3d 1161 (10th Cir. 2003). *See also* Alan Prendergast, *Marked for Death*, DENVER WESTWORD (May 25, 2000, 4:00 AM), http://www.westword.com/2000-05-25/news/marked-for-death/full/.
158 *Id*.
159 *Id*. Francis suspected prison officials planted the story in the media that he was a white supremacist gang member to retaliate against. That belief has not been officially verified, however.
160 *Id*.
161 *Id*.

reasons, members of the same race would always be housed together – black prisoners with black prisoners, white prisoners with white prisoners. However, if a prison gang member was housed in a cell with an individual of the same race who was suspected of being a prison informant, that gang member was expected to attack and even kill the suspected informant for his betrayal to the race.[162]

Only one person would help Tony Francis find safety – his fellow prisoner, Robert Haney. After listening to Francis' plight Haney, a convicted bank robber, concluded Francis had no option but to attempt escape—so he orchestrated the plot.[163] Haney apparently did so with no concern for his own safety and little interest in escaping himself.[164] Haney and Francis proceeded to collect materials from around the prison to fashion into tools including a rope made of belts and a ladder composed of bed sheets.[165] The men hid the instruments around the prison yard, and, one evening, dressed in black, attempted escape from arguably the most fortified prison in U.S. history. [166]

Unsurprisingly, both Francis and Haney were caught before they even scaled the fence, and were subsequently charged with various federal escape crimes.[167] Surprisingly, a jury recognized both men's duress defenses and acquitted them of escape.[168] However, Haney was not allowed to raise third-party duress defense to his additional charge of possession of escape paraphernalia.[169] He was convicted of this crime and sentenced to [an additional] thirty months.[170]

On appeal from his conviction of possession of escape paraphernalia, a Tenth Circuit panel used Haney's third-party duress argument to set out a new more liberal standard for the defense.[171] First, the panel of judges found that the trial court should have instructed the jury to consider whether Haney acted under third-party duress when possessing materials meant to help Francis escape an imminent threat of serious harm.[172] Second, as stated in the opinion by former Oklahoma Attorney General

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162 *Id*.

163 Appellant's Opening Brief at 12–22, U.S. v. Haney, 287 F.3d 1266 (10th Cir. 2002) (No. 00-1421).

164 *Id*.

165 *Id*. *See also* Appellee's Answer Brief at 3–4, U.S. v. Haney, 287 F.3d 1266 (10th Cir. 2002) (Nos. 00-1421, 00-1429).

166 *Id*.

167 *Haney*, 287 F.3d at 1269.

168 *Id*.

169 Appellant's Opening Brief at 22, U.S. v. Haney, 287 F.3d 1266,1266 (10th Cir. 2002) (No. 98-CR-224-D).

170 *Id*.

171 *Haney*, 287 F.3d at 1270, 1275.

172 *Id*. at 1275–76.

Robert Harlan Henry, Haney satisfied each element of a newly articulated three-prong test in order to raise third-party duress as a defense to prison escape crimes.[173]

The new third-party duress defense standard was this: A defendant rescuer only need demonstrate: (1) the endangered prisoner faced an immediate threat of harm, (2) the defendant rescuer possessed a well-grounded fear the threat would be executed, and (3) the threat could only be averted by fleeing incarceration.[174] Further, this defense should be available to all rescuers, imprisoned or free.[175] Echoing Justice Blackmun's earlier collective indictment of U.S. society,[176] the panel of judges stated, "The principle underlying the duress defense is one of hard-nosed practicality: sometimes social welfare is maximized by forgiving a relatively minor offense in order to avoid a greater social harm."[177] And, while the Tenth Circuit sitting *en banc* reversed the panel on a procedural issue,[178] this articulation of the duress defense is still available to rescuers and would be of assistance in the case of criminal trial.

Further, case law reinforces the Tenth Circuit panel's conclusion that the availability of third-party duress should be based on the actions and beliefs of the rescuer, regardless of the actions, beliefs, or even identity of the third party. Critical to the case of prison rescue, the perceived danger, blameworthiness, reform, culpability, status, capital, or notoriety of the third party are not relevant. Rather, considerations should be based on the danger presented to the defendant, the defendant's reaction, and, in many respects, what ought to be done.[179]

For instance, the case of *U.S. v. Newcomb* concerned Harold Newcomb, a convicted felon who was indicted in 1991 after police found

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173 *Id*. at 1275.

174 *Id*. at 1270, 1275.

175 *Id*. at 1271 ("The federal case law is apparently uniform in extending the duress defense to threats against third parties.").

176 *Bailey*, 444 U.S. at 424. Justice Blackmun condemned the punishment of escapee in a situation "where society has abdicated completely its basic responsibility for providing an environment free of life-threatening conditions."

177 *Haney*, 287 F.3d at 1270.

178 U.S. v. Haney, 318 F.3d 1161 (10th Cir. 2003) (holding that the affirmative defense was not properly raised at trial court level).

179 *Compare* U.S. v. Newcomb, 6 F.3d 1129 (6th Cir. 1993) (holding that "the justification defense should be understood to apply when a defendant is acting out of a desire to prevent harm to a third party . . . .") *with* U.S. v. Cornelius, 696 F.3d 1307, 1323–24 (10th Cir. 2012) (holding that an escapee is not entitled to claim the defenses of duress or necessity unless he demonstrates that, given the imminence of the threat, violation of §751(a) was his only reasonable alternative). *See also Cornelius*, 696 F.3d at 635.

him with an unregistered sawed-off shotgun and four shotgun shells.[180] Newcomb told police he had the contraband because he had taken it from his girlfriend's son when the young man announced an intention to murder "someone."[181] For his part, "Newcomb acknowledged he had no fear of personal harm . . . . [H]e felt, however, an obligation to prevent [the young man's] imminent violence toward an *unknown third party*."[182] Newcomb argued he was acting under duress, but nevertheless was convicted by the trial court.[183]

On appeal, the U.S. Court of Appeals for the Sixth Circuit overturned his convictions based on his argument that the circumstances of perceived danger justified his actions on behalf of a potential victim.[184] His actions, the court said, should have been ruled justified because society could objectively find his unlawful acts necessary to prevent a grave imminent harm to another.[185] This was true, even though a third-party victim was not actually identified and only assumed to exist, or eventually exist, based on the actions of the perpetrator.[186] This representative case is helpful in framing the argument for rescue around the question of whether a defendant's actions to prevent the anticipated harm are excusable in light of the gravity of the expected harm.

Because of the broad applicability of third-party duress, all rescuers may invoke the defense to excuse themselves of criminal liability for their actions.[187] Case law, typified by *Haney*, demonstrates the rescuer may effect the escape where (1) the prisoner is threatened with the imminent danger of violence, (2) the rescuer reasonably believe the violence may be executed, and (3) the danger cannot be abrogated other than by leave from prison.[188] Because the conditions of the U.S. penal system justify the defense for any rescue, it may also serve as an instrument in any strategy toward mass deliverance.[189]

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180 *Newcomb*, 6 F.3d at 1130–31.
181 *Id*. at 1131.
182 *Id.* (emphasis added).
183 *Id.*
184 *Id.*
185 *Id*. at 1135.
186 *Newcomb*, 6 F.3d at 1135.
187 *See supra*, note 11.
188 *Haney*, 287 F.3d at 1270.
189 Aside from case law, a handful of U.S. state statues permit escape or aiding escape in limited circumstances. In North Carolina, the statute that proscribes aiding and harboring escapees does not apply to the escapee's immediate family members. N.C. GEN. STAT. § 14-259 (1994). In at least three states, a prisoner defending her act of escape may raise the argument that she was detained without legal authority. *See* NEB. REV. STAT. § 28-912(3) (2015); N.J. REV. STAT. § 2C:29-5(d) (2013); OHIO REV. CODE § 2921.34(B)(2) (2008).

The physical, sexual, and personal threats U.S. prisoners face allow rescuers to reasonably assume all prisoners of the U.S. penal system face immediate threat of violence, executable at any time, for which guards, jailors, lawyers, judges, legislators, and public executives cannot or will not offer relief.[190] Rescuers' calculations in rising to offer this relief should be based not on the parsing of the often facially and necessarily limited knowledge of an isolated individual,[191] but on the gravity of the threat presented by the perpetrator, particularly in light of past and ongoing acts of violence.[192] An analysis as to how and by whom a threat is posed, to whom the threat may be surmised as being directed, and what inferences a rescuer may draw from the implications of violence for those unable to guard against the shadows of danger cast in penitentiary halls would then focus the satisfaction of the elements of third-party duress on the universal conditions of the nation's prisons.

Ultimately, only one strategy can effectively bring relief to those suffering under U.S. incarceration—the emptying of prisons through mass rescue. That this but only this is the form of collective redress available to prisoners is true for a confluence of reasons, including the public desire to keep prisoners captive at any cost. Rescue is also the form of relief available to prisoners because non-prisoners, and those presentable as the social or moral equal of non-prisoners, have at times been allowed limited grants to act on behalf of prisoner suffering under duress. The public's general wish to foreclose all relief to prisoners is periodically contoured by these moments of social history in which popular causes are taken up and extensions of compassion to certain underclasses rationalized and made vogue.[193] The effect of most reforms, however, is abrogated by counter-reformers who in the stated interest of order, and coded language of counter-reform, introduce their own measures claiming they are not in any way doing away with reform but

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190 *See supra* Part II.

191 Danger is often made known to prisoners by "[a]n atmosphere of terror created by unspoken threats." This may rightfully be definite evidence of immediate danger to a prisoner but, because it is not necessarily how threats of death and serious bodily harm are communicated outside of prison, courts reject such evidence as speculative. *See* Gold, *supra* note 84, at 1187.

192 *Newcomb*, 6 F.3d at 1135.

193 *See, e.g.*, Jordan J. Paust, *The Absolute Prohibition of Torture and Necessary and Appropriate Sanctions*, 43 VAL. U. L. REV. 1535 (2009) (discussing the reintroduction of torture despite international law conventions); Colin L. Anderson, Note, *Median Bans, Anti-Homeless Laws and the Urban Growth Machine*, 8 DEPAUL J. FOR SOC. JUST. 405 (2015) (discussing the recriminalization of homelessness and vagrancy in the U.S.); Nikole Hannah-Jones, *Segregation Now: Investigating America's Racial Divide*, PROPUBLICA (Apr. 16, 2014, 11:00 PM), https://www.propublica.org/article/segregation-now-full-text (discussing school resegregation (referencing Brown v. Board of Education of Topeka, 347 U.S. 483 (1954))).

simply curbing the excesses of certain radicals, opportunists, and those weak in resolve or morality.[194] Therefore, the conditions of the U.S. penal system paired with the deprivation of legal and political remedies insist upon direct action by rescuers as the only method of immediate relief to prisoners.[195] It cannot be otherwise.

V. CONCLUSION

Prisoners are under imminent threat of violence and no jailor, lawyer, court, legislator, or act of self-help will likely grant them effective relief. Non-prisoners who proceed independently, however, have both the resources to deliver the incarcerated from captivity as well as a theory of justification to legally defend their own acts. These unincarcerated individuals are ideally situated and, perhaps, morally compelled to come to the assistance of prisoners.

The danger of the U.S. penal system is as stated. The duress of its prisoners was described. The helplessness of these prisoners has been given above. The only path, legal and tactical, to secure prisoners' immediate safety must be mass rescue.

Then, if it is conceded vengeance and fear are improper reasons to either confine or fail to come to the aid of prisoners, it is likely the state of the U.S. penal system places moral responsibility on those unincarcerated to immediately begin rescue of all prisoners of the nation until all jails are emptied. Actual knowledge of the state of U.S. prisons and notification of the availability of the third-party duress defense places potential rescuers on notice of their responsibility.

This position, and the defense of rescue generally, will likely be criticized on grounds that it would, among other things, endanger the public and subvert the ability to punish those thought to have committed crimes. I strongly disagree with the first criticism and happily concede the second. To the first point, escapees are highly unlikely to engage in violence when they are compelled to flee. The relatively few instances of violence that do occur following prison escapes are generally the result of conflict between escapees and law enforcement attempting to reincarcerate them. A strategy of rescue that systematizes operations and

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194 *See supra* note 193.

195 TOLSTOY, *supra* note 7, at 426 ("But the boy with the long thin neck, who had watched the procession of prisoners without taking his eyes off them, came to a different decision. He knew without any doubt – he was quite sure, for he had the knowledge straight from God, that these people were just the same as he and everyone else was, and therefore something wicked had been done to them, something that ought not to be done, and he was sorry for them, and horrified not only at the people who were shaved and fettered but at the people who had fettered and shaved them.").

better insulates escapees from police scrutiny and pursuit would reduce such conflicts and lead to greater safety for all parties. To the second point, should the U.S. at some future time develop a program for the adjudication of wrongdoing not based in the brutalization of the human person, that program at that point may be considered. Until then, justice should be done, though the heavens may fall.