1979

Escape from Cruel and Unusual Punishment: A Theory of Constitutional Necessity

Cynthia R. Farina
Cornell Law School, crf7@cornell.edu

ESCAPE FROM CRUEL AND UNUSUAL PUNISHMENT: A THEORY OF CONSTITUTIONAL NECESSITY

A slightly-built twenty-year old prisoner is repeatedly subjected to homosexual rape. Fearing to report the incidents openly to guards where other inmates will overhear, the youth twice feigns suicide in order to speak to prison authorities in the more private setting of the infirmary. Both times officials tell him to fight or submit. He is indigent, and so unable to hire a lawyer; moreover, the law library at the prison is wholly inadequate to guide him in preparing a pro se petition to the court. One afternoon, several inmates warn him that they plan to come to his cell that night to rape him. A few hours later he escapes.[1]

A young black prisoner in a southern prison is attacked by a group of inmates the second night after his arrival. They decide to spare his life because they recognize a potential source of profit in "selling" him to other inmates for sexual services. The overcrowded prison is inadequately staffed with white guards from the surrounding rural area. Medical evaluation reveals that the prisoner has the mental ability of a five-year old child. One afternoon, after several weeks of forced prostitution, he joins another inmate in escaping from a work detail.[2]

A prisoner is confined in a strip cell in the prison's punitive segregation unit. The cell is furnished with a wash basin and commode; on some days a mattress is delivered for use that night. The one window is covered with a metal plate that blocks all air and natural light. A single lightbulb in the outer hallway–from which light could enter the cell through a two-inch peephole in the cell door–is seldom lit, leaving the hot, damp cell in total darkness except at mealtimes and for two hours on Fridays. The prisoner has no idea of the duration of his "sentence" in this unit, but he is aware that others have been kept here for months, even years, at a time. Unit guards have refused to obtain books from the prison's law library for him. Several times he has given guards written complaints to forward to the prison superintendent. He has received no response, and is doubtful that the messages even got through. One day, while being taken from the strip cell to his weekly shower, he escapes.[3]

I. INTRODUCTION

The inmate who escapes from a federal or state prison and seeks to introduce evidence of unconstitutionally cruel and unusual confinement conditions to defend her action is barred by the well-established rule that prison conditions alone, no matter how intolerable or inhumane, neither justify nor excuse escape. If she attempts to use the defense of necessity—a

---

[1] Hypothetical based upon State v. Green, 470 S.W.2d 565 (Mo. 1971), *cert. denied sub nom.* Green v. Missouri, 405 U.S. 1073 (1972).

[2] Hypothetical based upon Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978).

[3] Hypothetical based upon cases discussed in note 140 *infra.*

limited exception to this rule—the prisoner will be required to show that a specific, imminent threat of death or serious injury prompt her escape. Evidence of prolonged or repeated deprivation and mistreatment sufficient to prove a violation of the eighth amendment may not be sufficient to ground a necessity defense. Frequently, such evidence will fail to show that the prisoner's physical safety was gravely and immediately imperiled at a point in time very close to her escape.

The recent case of *United States v. Bailey*[4] may represent the beginning of a significant change in this area. In *Bailey*, the United States Court of Appeals for the District of Columbia Circuit reexamined the relevance of conditions of confinement to the imposition of criminal liability for escape. This reevaluation produced a theory of escape which suggests that, under certain circumstances, escape from unconstitutional conditions would not be punishable as a crime.

This Note explores the case for broadening the necessity defense to encompass escape from conditions violating the eighth amendment. Using *Bailey* as a starting point, it argues that recognized constitutional principles suggest that, when no other remedies are available or effective, escape from cruel and unusual punishment can be justified. After considering the theoretical support for this application of the necessity defense, this Note discusses some practical concerns in using the defense, concentrating first on the jury's role in determining whether conditions are constitutionally impermissible and then on some of the factors relevant to evaluating the presence of viable alternatives to escape.

II. The Traditional View of the Relevance of Prison Conditions to Escape

A. *The Rule That Prison Conditions Are No Defense*

In *Aderhold v. Soileau*,[5] the United States Court of Appeals for the Fifth Circuit enunciated a rule that has been approved by other federal circuits[6] and is consistent with similar holdings by many state courts:[7] illegality of imprisonment is no defense to the crime of escape.[8] Soileau contended successfully at trial that his escape was not a crime under the federal

---

[4] 585 F.2d 1087 (D.C. Cir. 1978), *cert. granted*, 99 S. Ct. 1497 (1979) (No. 78-990).

[5] 67 F.2d 259 (5th Cir. 1933).

[6] *See, e.g.*, United States v. Allen, 432 F.2d 939 (10th Cir. 1970) (per curiam); United States v. Haley, 417 F.2d 625 (4th Cir. 1969); Derengowski v. United States, 404 F.2d 778 (8th Cir. 1968); Lucas v. United States, 325 F.2d 867 (9th Cir. 1963); Mullican v. United States, 252 F.2d 398 (5th Cir. 1958); United States v. Jerome, 130 F.2d 514 (2d Cir. 1942), *rev'd on other grounds*, 318 U.S. 101 (1943).

[7] *See, e.g.*, People v. Jones, 163 Cal. App. 2d 118, 329 P.2d 37 (1958); People v. Hill, 17 Ill. 2d 112, 160 N.E.2d 779 (1959). For a more complete list, see Annot., 70 A.L.R.2d 1430, 1438 (1960).

[8] At times a distinction has been made between confinement patently without authority or pursuant to a judgment void on its face, and confinement under color of law. Some earlier cases have held that escape from the former type of confinement is not criminal. *See generally* Annot., 70 A.L.R.2d 1430, 1434 (1960).

escape statute[9] because he had been imprisoned under a sentence later found to be void for vagueness. The court of appeals reversed, holding that the statute did not distinguish between legal and illegal confinement, but rather forbade escape to "all 'who are confined in any penal or correctional institution pursuant to [the direction of the Attorney General],' without mention of the propriety of the confinement."[10] According to this interpretation, criminal liability under the escape statute is not predicated on the legality of the original imprisonment.[11] Thus, any evidence regarding error or irregularity in the initial conviction or commitment is immaterial to an escape prosecution. A logical extension of this rule would preclude evidence of conditions of imprisonment. If legality of confinement is not a prerequisite to imposing criminal liability for escape, it makes little difference whether the confinement is alleged to have been illegal from the outset because of a flaw in the conviction or sentence, or to have become illegal at some later point[12] because of unconstitutional prison conditions. *Aderhold* has therefore been cited as incorporating the corollary rule that intolerable conditions endangering the safety or life of an inmate are no defense to escape.[13] State courts, interpreting state escape statutes, have reached the same result.[14]

---

[9] Soileau was prosecuted under the Act of May 14, 1930, Pub. L. No. 71-218, ch. 274, § 9, 46 Stat. 327, the predecessor of the current federal escape statute, 18 U.S.C. § 751(a) (1976). Any distinction between the former and present statutes is irrelevant to the holding of *Aderhold*. Mullican v. United States, 252 F.2d 398, 404 (5th Cir. 1958). The current statute states:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or magistrate, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall, if the custody or confinement is by virtue of an arrest on a charge of felony, or conviction of any offense, be fined not more than $5,000 or imprisoned not more than five years, or both; or if the custody or confinement is for extradition or by virtue of an arrest or charge of or for a misdemeanor, and prior to conviction, be fined not more than $1,000 or imprisoned not more than one year, or both.

[10] 67 F.2d at 260.

[11] *See* Laws v. United States, 386 F.2d 816, 817 (10th Cir. 1967) (per curiam) (quoting Crawford v. Taylor, 290 F.2d 197, 198 (10th Cir. 1961) (per curiam)); Boydston v. Wilson, 365 F.2d 238, 241 (9th Cir. 1966). This interpretation appears to have the approval of the Supreme Court. In United States v. Jerome, 130 F.2d 514 (2d Cir. 1942), *rev'd*, 318 U.S. 101 (1943), the defendant, at his escape trial, attacked his original conviction on the grounds that entering a bank with intent to commit forgery was not a federal crime. The court of appeals upheld the original conviction and the escape conviction. Jerome appealed both issues. The Supreme Court agreed with him that intent to commit forgery was not a federal felony but refused to hear the escape issue, thus leaving that conviction while vacating the original sentence.

[12] *Cf.* Mullican v. United States, 252 F.2d 398, 403 (5th Cir. 1958) (one defendant's confinement, though originally legal, had become unlawful by the time of his escape because his sentence had expired 1½ months earlier; the court cited *Aderhold* to support his escape conviction).

[13] *See* Dempsey v. United States, 283 F.2d 934 (5th Cir. 1960) (per curiam).

[14] *See, e.g.*, State v. Palmer, 45 Del. 308, 72 A.2d 442 (1950) (extremely bad food, guard brutality and inadequate medical treatment); State v. Cahill, 196 Iowa 486, 194 N.W. 191 (1923) (pre-*Aderhold*) (solitary confinement in cell infested with bugs and vermin where toilet flushed contents out onto floor). *See generally* Annot., 69 A.L.R.3d 678, 692 (1976).

Within recent years several jurisdictions[15] have mitigated the harshness of the *Aderhold* rule[16] by allowing a prisoner to raise the defenses of duress or necessity when her escape meets certain criteria.[17] Through these defenses, the defendant can avoid criminal liability by proving that specific threats of homosexual or other violent attack prompted her escape. By permitting the prisoner to introduce evidence of certain types of threatening prison conditions, duress and necessity provide a limited exception to the rule that such evidence is immaterial. Neither defense, however, has been extended to escapees from prison conditions that violate the eighth amendment yet are not imminently life-threatening.[18] In denying these escapees either defense, the courts have failed to recognize the distinct theoretical bases of duress and necessity. As a result, the use of the necessity defense has been needlessly restricted.

B. *Necessity, Duress and the Misapplication of the Imminency Requirement*

A defendant who admits committing an act which violates the law can rely upon one of two distinct theories to assert that he should not be punished. He may claim either excuse or justification for his action.[19] A defense grounded in excuse focuses upon the actor's state of mind. The wrongfulness of the act remains undisputed but, for one reason or another, the actor is not blameworthy.[20] Duress, like involuntary intoxication and mistake, is characterized as an excuse.[21] Its essence is a compulsion that overpowered the defendant's judgment and self-restraint. The duress defense embodies the underlying rationale that "a person will not be held responsible for an offense he commits under threats or conditions that a person of ordinary firmness would have been unable to resist."[22]

---

[15] *See, e.g.*, People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974); People v. Harmon, 53 Mich. App. 482, 220 N.W.2d 212 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975). *See generally* Annot., 69 A.L.R.3d 678 (1976).

[16] The phrase "the *Aderhold* rule" will be used for the sake of brevity. It must be kept in mind that this encompasses both the core concept that illegality of imprisonment is no defense for escape and the corollary that conditions of confinement, no matter how intolerable, cannot justify escape. In addition, although *Aderhold* is the main statement of the rule for the federal courts, comments concerning it are meant to include reference to those states using a similar formulation.

[17] *See* text accompanying note 33 *infra*.

[18] The defendant in State v. Green, 470 S.W.2d 565, 566-67 (Mo. 1971), *cert. denied sub nom.* Green v. Missouri, 405 U.S. 1073 (1972), explicitly made an eighth amendment argument which the court ignored.

[19] *See generally* Gardner, The Defense of Necessity and the Right to Escape from Prison, 49 So. Cal. L. Rev. 110 (1975); Note, Duress and the Prison Escape: A New Use for an Old Defense, 45 So. Cal. L. Rev. 1062 (1972).

[20] Gardner, *supra* note 19, at 116-17. *See* United States v. Micklus, 581 F.2d 612, 615 (7th Cir. 1978); People v. Luther, 394 Mich. 619, 232 N.W.2d 184, 187 (1975). *See generally* Arnolds & Garland, The Defense of Necessity in Criminal Law, 65 J. Crim. L. 289, 289 (1974).

[21] Arnolds & Garland, *supra* note 20, at 290; Gardner, *supra* note 19, at 122.

[22] United States v. Bailey, 585 F.2d at 1097.

A defense grounded in justification focuses upon the propriety of the act itself. The actor intended to commit the act and accepts responsibility for it, but in the particular factual setting the act was neither morally nor legally wrong.[23] Necessity, like self-defense and defense of others, is characterized as a justification.[24] Its essence is a balancing of competing evils; the defendant's violation of the law is justified when his "compliance with legal commands would have produced a greater harm than non-compliance."[25] The necessity defense embodies the underlying rationale that "public policy favors the commission of a lesser harm (the commission of what would otherwise be a crime) when this would avoid a greater harm."[26]

In the context of criminal liability for escape, these two very different theories of defense have become hopelessly intertwined.[27] In part, this is because the escape situation does not fit either defense paradigm precisely. A classic duress case involves a compulsion exerted to force the defendant to do the very act that violates the law.[28] Rarely, however, does a prisoner claim that her tormentors threatened her with great harm for the express purpose of inducing her to escape.[29] A classic necessity case involves a threatening situation arising from the operation of natural forces such as fire or storm, rather than from human causation.[30] The prisoner, however, usually claims that fellow inmates or prison personnel created the danger that threatened her.[31] A further complication arises

---

[23] Gardner, *supra* note 19, at 116-17. *See* United States v. Micklus, 581 F.2d 612, 615 (7th Cir. 1978).

[24] *See* Arnolds & Garland, *supra* note 20, at 289; Gardner, *supra* note 19, at 119.

[25] Gardner, *supra* note 19, at 118.

[26] United States v. Bailey, 585 F.2d at 1098 (quoting W. LaFave & A. Scott, Handbook on Criminal Law 378 (1972)).

[27] Within the space of a year, four federal circuit courts of appeals have considered the availability of the two defenses to the crime of escape. The Ninth Circuit found that duress was the proper theory. United States v. Michelson, 559 F.2d 567, 568-69 n.2 (9th Cir. 1977). The Tenth Circuit treated the two defenses as synonymous. *See* United States v. Boomer, 571 F.2d 543 (10th Cir. 1978). The Seventh Circuit has recognized duress and appears ready to recognize a separate defense of necessity if it is properly raised at trial. *See* United States v. Micklus, 581 F.2d 612 (7th Cir. 1978). Only the District of Columbia Circuit has specifically recognized both defenses. *See* United States v. Bailey, 585 F.2d 1087 (D.C. Cir. 1978), *cert. granted,* 99 S. Ct. 1497 (1979) (No. 78-990).

[28] *See* United States v. Bailey, 585 F.2d at 1096-97 n.29; United States v. Michelson, 559 F.2d 567, 570 n.8 (9th Cir. 1977). The court in People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597, 601 (1969), refused to accept a prisoner's duress defense because "there was no offer to show that anyone demanded or requested that the defendant escape."

[29] Among the few "classic" duress cases are King v. State, 46 Ala. App. 635, 247 So. 2d 677 (1971) (defendant forced to leave during mass escape by fellow inmates who feared he would report them) and State v. Milum, 213 Kan. 581, 516 P.2d 984 (1973) (warden threatened in presence of others to kill defendant if he did not escape).

[30] Gardner, *supra* note 19, at 119. *See* United States v. Bailey, 585 F.2d at 1096 n.29; United States v. Michelson, 559 F.2d 567, 568-69 n.2 (9th Cir. 1977).

[31] The problem of which defense is properly raised in escape cases has been resolved differently by different jurisdictions. *Compare* People v. Unger, 66 Ill. 2d 333, 340, 362 N.E.2d 319, 322 (1977) (necessity is proper defense because choice of evils is involved; duress involves compulsion to perform the specific illegal act) *and* People v. Hocquard, 64 Mich. App. 331, 337 n.3, 236 N.W.2d 72, 75 n.3 (1975) (necessity is proper defense for

when one fact pattern will support both theories. For example, a prisoner might allege that she escaped while being assaulted by a group of inmates offering her the alternative of sexual submission or violence. She could argue either that this constituted compulsion that a person of ordinary firmness would have been unable to resist, or that her escape was necessary to avoid the greater harm of serious injury or gang rape.[32]

As a consequence of this confusion, one set of criteria has emerged to define the boundaries of both defenses. Most jurisdictions accept the requirements enunciated by the California court in *People v. Lovercamp*:[33] the escaped prisoner must show that (1) he was threatened with *imminent* death or severe bodily injury; (2) no opportunity existed to seek assistance from prison authorities and the court, or such request would have been futile; (3) he escaped nonviolently; and (4) he submitted to legal authority as soon as he was free from danger. In part, a failure to differentiate between the essential elements of the two defenses is justifiable. Inquiry into the severity of the threatened harm, the availability of alternative solutions less drastic than the unlawful act, and the continuation of the unlawful activity beyond the minimum required to achieve safety is appropriate to both duress and necessity. Less defensible, from a theoretical point of view, is an indiscriminate application of the imminency criterion—the requirement that the danger be "present, imminent and impending and of such a nature as to induce a well-grounded apprehension of immediate death or serious bodily injury."[34] The element of

---

denial of medical care because necessity arises from the pressure of physical forces) *with* United States v. Michelson, 559 F.2d 567, 568-69 n.2 (9th Cir. 1977) (duress is proper defense because necessity arises from nonhuman sources) *and* Stewart v. United States, 370 A.2d 1374, 1376 n.1 (D.C. 1977) (duress is proper; same reason).

[32] *Compare* People v. Harmon, 53 Mich. App. 482, 220 N.W.2d 212 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975) (homosexual attack constitutes duress) *with* People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974) (homosexual attack constitutes necessity).

[33] 43 Cal. App. 3d 823, 118 Cal. Rptr. 110, 115 (1974). Some jurisdictions consider the presence of all these elements to be prerequisites for raising either defense. *See, e.g.*, People v. Hocquard, 64 Mich. App. 331, 236 N.W.2d 72 (1975). If the defendant cannot offer evidence on each and every point, the defenses are unavailable and the jury will be instructed to disregard any evidence of threatening conditions that may have been introduced. Other jurisdictions take a more liberal position, *see, e.g.*, People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977), viewing these elements not as prerequisites to raising the defenses but as the factors most relevant to the jury's evaluation of the credibility of the prisoner's explanation.

[34] United States v. Bailey, 585 F.2d at 112 (Wilkey, J., dissenting). *See, e.g.*, United States v. Michelson, 559 F.2d 567, 569 (9th Cir. 1977); People v. Hocquard, 64 Mich. App. 331, 337, 236 N.W.2d 72, 75 (1975). *See generally* Annot., 69 A.L.R.3d 678, 684-86 (1976).

Some courts and commentators have observed that it is unrealistic to apply a strict imminency test for *either* defense in the context of escape because prison, by its very nature, imposes limits on the speed and methods with which a prisoner can react to danger. *See, e.g.*, United States v. Bailey, 585 F.2d at 1099 n.39; Note, A Reexamination of Justifiable Escape, 2 N. Eng. J. Pris. L. 205, 221 (1976).

For a more liberal reading of "imminency," see People v. Harmon, 394 Mich. 625, 626, 232 N.W.2d 187, 188 (1975), *aff'g* 53 Mich. App. 482, 220 N.W.2d 212 (1974), which specifically approved the holding of People v. Richter, 54 Mich. App. 598, 221 N.W.2d 429 (1974), that "what constitutes present, immediate and impending compulsion depends on

imminency may be central to the paradigm of duress, in which the pressure of an emergency situation overpowers the defendant and compels him to act in a way he would not have acted under normal circumstances,[35] but it is not essential to the paradigm of necessity, in which the defendant chooses voluntarily and intentionally, albeit under pressure, to perform the prohibited act in order to avoid what he perceives to be a greater evil.[36] Because the necessity defense turns on whether the harm avoided outweighed the violation of the law committed, the focus should be on the certainty and severity of the threatened danger, as well as on the effectiveness of alternative solutions to breaking the law. Temporal imminency is surely relevant, both to the reality of the harm and to the possible existence of less drastic remedies, but the absence of temporal imminency does not, in itself, prove either the absence of a real and severe danger or the presence of alternatives to escape.[37]

The practical consequence of linking the necessity defense to a strict temporal imminency requirement has been to effectively foreclose the defense to the prisoner who claims that escape was her only alternative to enduring conditions that violate the eighth amendment.[38] The result is bizarre. A prisoner who alleges a single, imminent threat in the course of an otherwise normal confinement may invoke the defense of necessity to justify her escape. A prisoner who suffered constant and prolonged mistreatment and cruelty but who cannot point to a specific, life-threatening incident immediately preceding her escape will automatically be denied

---

the circumstances of each case," and found that a 24-hour lapse between threat and escape did not, as a matter of law, remove the defense from the jury. In contrast, State v. Green, 470 S.W.2d 565 (Mo. 1971), *cert. denied sub nom.* Green v. Missouri, 405 U.S. 1073 (1972), found that a six-hour delay between threat and escape precluded a finding of imminency.

[35] In describing the rationale of duress, Justice Holmes stated: "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921).

[36] Gardner, *supra* note 19, at 120. *See* Glazebrook, The Necessity Plea in English Criminal Law, 30 Camb. L.J. 87, 88 (1972):

> The essence of the necessity situation is that the defendant had he chosen to, could have complied with the letter of the law, but decided not to do so because he thought that such compliance would in all probability result in a harm or evil as great or greater than that which would ensue from doing (or omitting to do) what prima facie is prohibited (or commanded).

[37] *See* Arnolds & Garland, *supra* note 20, at 290; Tiffany & Anderson, Legislating the Necessity Defense in Criminal Law, 52 Den. L.J. 839, 847 (1975). The following hypothetical graphically illustrates that nonimminent circumstances can give rise to a state of necessity:

> [A] cuckholded husband imprisons and chains his wife's latest lover in an abandoned cellar with the announced intention of killing him after the passage of sufficient time for the stir over his absence to quiet down, probably several months. Must the intended victim wait until the final moment when the husband is about to commit the fatal act, or may he kill the husband in self-defense at any time during the period of imprisonment he can succeed in laying hands upon him?

Id. at 847 (quoting S. Kadish & M. Paulsen, Criminal Law and Its Processes 497 (1969)).

[38] But note that, in at least one case, conditions violating the eighth amendment were found to constitute an "imminent danger to the health of each and every inmate." Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978) (section 1983 action for deprivation of eighth amendment and due process rights).

the defense, regardless of whether an alternate remedy was in fact available to her. The pure theory of necessity does not require such a result. Moreover, if the prolonged mistreatment violates eighth amendment rights, a theory of constitutional necessity may not permit it.

III. *United States v. Bailey:* PROVIDING A BASIS FOR A BROADER THEORY OF NECESSITY

A. *Redefining the Crime of Escape*

The three defendants in *United States v. Bailey* escaped from a District of Columbia jail and were recaptured several weeks later, having made no efforts in the interim to surrender to authorities.[39] In their defense they introduced evidence that fires had occurred frequently in the jail prior to the day of the escape; that two of the defendants had been beaten by prison guards three weeks earlier; and that the third defendant had been denied medical care.[40] The trial judge admitted the evidence but decided, before submitting the case to the jury, that the defendants' failure to return to custody or to explain their continued absence[41] prevented them from raising the defense of duress.[42] Having determined that the defendants could not take advantage of the exception offered by the duress defense, the trial judge followed the *Aderhold* rule and instructed the jury that conditions at the jail, no matter how burdensome or restrictive to the defendants, were neither a defense nor a justification for escape.[43]

Finding this instruction to have been error, the court of appeals reversed the conviction and remanded for a new trial.[44] In part, its opinion rejected the view that a return to custody, with the other *Lovercamp* criteria,[45] is an absolute prerequisite to invoking the defense, and adopted the more liberal view that the *Lovercamp* elements represent factors that the jury should consider in evaluating the credibility of the defendant's story.[46] More significantly, the court found that the instruction had "precluded the jury's consideration of evidence [of confinement conditions] that was relevant to an *essential element of the crime*."[47] To determine the relationship between prison conditions and criminal liability for escape,

---

[39] 585 F.2d at 1108. There was some evidence, disputed by prosecution witnesses, that one of the defendants had been in contact with the FBI. *Id.*

[40] *Id.* at 1091.

[41] *Id.* In his dissent, Judge Wilkey pointed out an additional obstacle to the defendants' invoking the necessity defense as traditionally defined—the absence of evidence of an *imminent* danger prompting the escape. *Id.* at 1110, 1117. This point apparently was not argued before the trial judge.

[42] At trial, defense counsel apparently chose to request only an instruction on duress. On appeal, however, the court considered the issue of an instruction on necessity to have been raised as well. *Id.* at 1097 n.32.

[43] *Id.* at 1091 n.9.

[44] *Id.* at 1105.

[45] *See* text accompanying note 33 *supra*.

[46] United States v. Bailey, 585 F.2d at 1099-1101.

[47] *Id.* at 1094 (emphasis added).

the court reexamined the nature of the crime. The resolution it reached forces a reevaluation of the rule that intolerable conditions are no defense to escape.

The essential elements of escape are: (1) a conviction;[48] (2) an "escape," defined simply as the voluntary, unauthorized departure from permitted bounds;[49] and (3) a link between the conviction and the escape—that is, the escape must have been from confinement arising out of the conviction alleged in the indictment.[50] The *Bailey* court refined the common interpretation of the second element.[51] It held that the legal definition of "escape" includes not only the voluntary, unauthorized departure from custody, but also the *intent to avoid confinement*.[52] Judge Wright explained:

> One who leaves custody without permission to see his mother who is ill or to improve his menu (assuming the prison fare is within reason) has an intent to avoid confinement since restricted contact with relatives and a reasonably limited choice of diet are normal incidents of confinement. . . . On the other hand, if a prisoner offers evidence to show that he left confinement *only* to avoid conditions that are not normal aspects of "confinement"—such as beating in reprisal for testimony in a trial, failure to provide *essential* medical care, or homosexual attacks—the intent element of the crime of escape may not be satisfied. When a defendant introduces evidence that he was subject to such "non-confinement" conditions, the crucial factual determination . . . is thus whether the defendant left custody only to avoid these conditions or whether, in addition, the defendant *also* intended to avoid confinement.[53]

The *Bailey* standard logically involves a two-step inquiry. As the threshold question, the jury should decide whether the conditions in which the defendant was imprisoned were normal incidents of confinement. To do

---

[48] In the case of escape from pretrial custody, the prosecution would present proof of a detention pursuant to legal process.

[49] For a review of the case law and commentators supporting this interpretation, see United States v. Bailey, 585 F.2d at 1122-25 (Wilkey, J., dissenting). For the contrary interpretation that the common law required an "intent to avoid the due course of justice," see Gallegos v. People, 159 Colo. 379, 386-88, 411 P.2d 956, 959-60 (1966) and cases cited therein.

[50] *See* United States v. Spletzer, 535 F.2d 950 (5th Cir. 1976); United States v. McCray, 468 F.2d 446 (10th Cir. 1972); Bayless v. United States, 381 F.2d 67 (9th Cir. 1967).

[51] The trial court had instructed the jury that a defendant "escaped" if he "without authorization did absent himself from his place of confinement." United States v. Bailey, 585 F.2d at 1094.

[52] *Id.* at 1093. This definition was initially formulated in United States v. Nix, 501 F.2d 516, 519 (7th Cir. 1974) (intoxication as a defense to escape; confinement conditions not at issue). For a review of cases determining whether intent is an element of escape, see Helton v. State, 311 So. 2d 381, 383 (Fla. Dist. Ct. App. 1975) (intoxication). The Florida court found that "[a] slight numerical majority exists in favor of the proposition that intent is not an element of the crime," but concluded that "justice and fairness" require that intent be included as an element. It noted that this conclusion "is buttressed by the line of cases which have recognized the 'narrow but time-honored defense of necessity.'" *Id.* at 383. Lewis v. State, 318 So. 2d 529 (Fla. Dist. Ct. App. 1975), *cert. denied*, 334 So. 2d 608 (Fla. 1976), followed the *Helton* rationale in a case of escape motivated by sexual assault.

[53] 585 F.2d at 1093 n.17.

so, it should evaluate evidence of prison conditions, including the "immediacy, specificity, and severity of any alleged threats or fears."[54] If the evidence reveals that the imprisonment was not unduly rigorous or dangerous, the jury can quickly dispose of the defendant's claim that he escaped to avoid "non-normal conditions."[55] If conditions are found to be non-normal, the jury must proceed to the next step: determining whether the defendant escaped only to avoid these conditions, or whether he merely used them as an excuse to escape permanently from all confinement.[56] Here, the jury should consider evidence of the "availability of viable alternatives to unauthorized departure" as well as the prisoner's decision "whether and when to return to custody."[57] Evidence of effective legal channels through which the defendant could have obtained relief from non-normal conditions without resorting to escape strongly implies that he intended something other than the alleviation of those conditions. Similarly, if the defendant's actions after escaping indicate a total renunciation of his duty to serve the remainder of his sentence rather than an attempt to seek protection from non-normal confinement in the future, the jury may infer that he intended to escape all confinement, normal or not.

B. *The Concept of Avoiding Non-Normal Confinement*

In sharp contrast to the *Aderhold* rule, this analysis of the nature of the crime makes evidence of prison conditions crucially important in an escape trial. Because an intent to avoid normal confinement is an essential element of the crime, proof of non-normal conditions may forestall a finding of criminal liability. *Bailey* does not explicitly define the contours of non-normal confinement. Logically, two general types of conditions would be included. The first is the emergency situation—for example, natural disaster, fire, or violent attack by other inmates—in which the prisoner's physical safety is gravely and imminently imperiled. There is nothing novel in suggesting that escape from this type of non-normal confinement may be justified. Most courts, regarding the common-law state of necessity as arising in just such situations, would admit evidence of confinement conditions in these circumstances.[58]

The second general type of non-normal conditions is confinement ac-

---

[54] *Id.* at 1094.

[55] This Note uses the phrase "non-normal conditions" to encompass what the *Bailey* court describes as " 'non-confinement' conditions"—those incidents of a prisoner's confinement that deviate from accepted penological norms. *See* section III-B *infra*.

[56] *Cf.* Matthews v. State, 288 So. 2d 712, 714 (Miss. 1974) (noting that "the doctrine of escape because of necessity is based upon intent—that is to say, whether or not the prisoner intended to escape lawful imprisonment, or intended to escape an impending danger . . .").

[57] 585 F.2d at 1094. *Cf.* Pittman v. Commonwealth, 512 S.W.2d 488 (Ky. Ct. App. 1974) (holding that evidence that the prisoner had only one month remaining on his sentence was relevant to the credibility of his claim that he escaped only to avoid violence arising from a gambling debt).

[58] *See* notes 33-34 *supra* and accompanying text.

companied by physical or psychological abuse and deprivation beyond that permitted by legal standards such as the eighth amendment.[59] This type of confinement is non-normal because it is illegal. Whether due to the actions of prison personnel directly, to their failure to protect the prisoner from the violence and perversity of other inmates, or to the physical condition of the penal institution, the defendant was confined under conditions that were unconstitutionally dangerous or severe.[60] Most, if not all, jurisdictions would hold that escape from this type of non-normal confinement cannot be justified.[61] In those jurisdictions, the fact that the confinement violates the eighth amendment is immaterial because, following the *Aderhold* rule, illegality of imprisonment provides no defense for escape. Moreover, under the prevailing view of necessity, the absence of imminency prevents the prisoner from pleading the defense in order to avoid the effect of *Aderhold*.[62] Here, *Bailey's* concept of non-normal confinement conditions works a fundamental change. In addition to encompassing conditions giving rise to *common-law* necessity, it goes further to include conditions giving rise to *constitutional* necessity—a set of circumstances in which the prisoner's eighth amendment rights are violated by the conditions of her imprisonment and escape has become her only recourse.

IV. The Theory of Constitutional Necessity: Justification for Escape Under Certain Circumstances

The eighth amendment[63] establishes the right of the prisoner to be free from cruel and unusual punishment.[64] Yet by precluding consideration, during an escape prosecution, of evidence that might reveal unconstitutionally severe conditions, the *Aderhold* rule appears to permit the government to nullify a prisoner's eighth amendment rights, once it has

---

[59] This Note is concerned only with the constitutional limitations imposed on punishment by the eighth amendment. There are, of course, other sources regulating the incidents of imprisonment. In addition to internal prison regulations, state constitutional and statutory law regulating the prisons vary in content and comprehensiveness from jurisdiction to jurisdiction. The duties of the Federal Bureau of Prisons are set out in 18 U.S.C. § 4042 (1976).

[60] For a more detailed discussion of what constitutes cruel and unusual punishment, see text accompanying notes 95-110 *infra*.

[61] Indeed, as Judge Wilkey asserts in *Bailey*, finding even a single case to the contrary is difficult. 585 F.2d at 1117 (dissenting opinion).

[62] This is not to imply that unconstitutional conditions might never arise in an emergency situation. The two categories are not mutually exclusive. However, most eighth amendment violations are not imminently life-threatening, and so would not be included within the prevailing concept of necessity. *See* text accompanying notes 33-34 *supra*; United States v. Bailey, 585 F.2d at 1117 (dissenting opinion).

[63] The eighth amendment commands that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII. The prohibition against cruel and unusual punishment applies to the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

[64] Holt v. Sarver, 300 F. Supp. 825, 827 (E.D. Ark. 1969). *See* Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973). "A prisoner has a right, secured by the 8th and 14th amendments, to be reasonably protected from constant threat of violence and sexual assault." *Id.* at 890.

imprisoned him, by the simple expedient of passing a law forbidding escape. A closer reading of *Aderhold* reveals, however, that the case is not an endorsement of absolute government power over prisoners. The court determined that "if [prisoners] consider their confinement improper, they are bound to take other means [than escape] to test the question."[65] The court assumed that other remedies were available to the defendant to test the constitutionality of his confinement. Therefore, it did not hesitate to discern in the escape statute a permissible legislative decision that the drastic self-help remedy of escape be foreclosed to prisoners. Read precisely, then, *Aderhold* is a statement about choice of remedies. Illegality of imprisonment will not justify escape where adequate remedies have been provided to protect the constitutional rights at stake.

As the *Aderhold* court recognized, the government's interest in assuring the uninterrupted confinement of convicted criminals is a vital and legitimate one, and escape is the most disruptive and dangerous method of challenging conditions of imprisonment. Furthermore, in most cases the escape prohibition will not condemn the prisoner to enduring cruel and unusual punishment for the duration of her sentence. When an eighth amendment violation does exist, habeas corpus and section 1983 civil rights actions[66] will usually provide orderly mechanisms for obtaining relief. Situations might arise, however, in which these approved remedial routes become unavailable or ineffective.[67] In such a case, escape—which suspends present confinement in intolerable conditions and enables the prisoner to elicit outside assistance in correcting the constitutional violation before she must serve the balance of her sentence—becomes the only opportunity to remedy cruel and unusual punishment.[68] *Aderhold* does not speak to this situation in which the institutional remedies provided by the legislature fail to afford redress to a particular prisoner. Consequently, it does not resolve the critical issue raised by such a case: whether an escape

---

[65] 67 F.2d at 260. *Accord,* State v. Davis, 14 Nev. 439, 444 (1880) ("A person confined by the law should be delivered by the law; and no other means can be justified in any case, until the officers in charge, and the law, refuse him relief . . ."). *See, e.g.,* Mullican v. United States, 252 F.2d 398, 403 (5th Cir. 1958); Whittaker v. Commonwealth, 188 Ky. 95, 97, 221 S.W. 215, 216 (1920). *See generally* Annot., 69 A.L.R.3d 678, 686-88 (1976).

[66] 42 U.S.C. § 1983 (1976).

[67] *See* section V-B *infra*.

[68] It is evident that escape is not, in the strictest sense, a "remedy" for the constitutional infringement. Unlike a successful petition for writ of habeas corpus or a civil rights action brought pursuant to 42 U.S.C. § 1983 (1976), escape does not, in itself, bring about the correction of the constitutional violation. Furthermore, even if a prisoner's escape is found to be justified, his original sentence is not commuted and he may well be returned to the very place from which he escaped. Escape is, however, remedial in two senses. Its immediate effect is to remove the prisoner from the intolerable conditions. More important, its ultimate effect is to give the prisoner who has been denied meaningful access to established legal remedies while in prison the chance to obtain outside assistance—from an attorney or a civil liberties organization—in initiating the judicial proceedings which can force correction of the violation. Thus, a justified escape is a remedy, even though it is a means to an end rather than an end in itself. For this reason, the prisoner's actions after his escape will have some bearing on the credibility of his claim that he escaped only to avoid non-normal confinement conditions. *See* note 94 *infra*.

statute can be applied to punish a prisoner for vindicating her right to be free from cruel and unusual punishment in the only way left open to her.

Aderhold acknowledges the legislature's freedom to balance competing societal interests and to deny the individual *one* of several possible means of vindicating a constitutional right. This is fundamentally different from sustaining the legislature's power to foreclose the *only* effective means of vindicating that right.[69] Although this precise question has seldom been addressed explicitly, the Supreme Court has indicated that there are constitutional limitations on the government's power to delimit the range of remedies available to protect individual rights. In *Brinkerhoff-Faris Trust & Savings Co. v. Hill,*[70] a state court had dismissed the plaintiff's suit for an injunction against collection of taxes, citing the company's failure to exhaust a particular administrative remedy. The Supreme Court, finding that this remedy had never in fact been available to this plaintiff, held that the dismissal violated due process by foreclosing the plaintiff's sole remedy for preventing uncompensated seizure of its property.[71] The Court stated: "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it."[72] Moreover, a law which on its face bars only one remedial avenue cannot stand if, due to the absence of other adequate remedies, it ultimately leaves a constitutional right without protection. In *Johnson v. Avery,*[73] the Supreme Court

---

[69] The maxim "where there is a right, there is a remedy" has been a fundamental theme since Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), in which Justice Marshall adopted the position that the existence of a right necessarily implies a remedy for its vindication: "The government of the United States has emphatically been termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." *Id.* at 163. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) (recognition of money damage remedy for violation of fourth amendment rights). "[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief." *Id.* at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)). *Cf.* Morales v. Schmidt, 340 F. Supp. 544, 554 (W.D. Wis. 1972), *rev'd on other grounds,* 489 F.2d 1335 (7th Cir. 1973) (in section 1983 suit challenging denial of mailing privileges, the court emphasized that the superiority of the legislature's ability to find facts does not relieve the judiciary of the responsibility to investigate the constitutional status of challenged prison conditions; judicial refusal to intervene is tantamount to telling a prisoner that, although his claim may be valid, the court will allow prison officials to deprive him of his constitutional rights).

[70] 281 U.S. 673 (1930). *See generally* Hill, Constitutional Remedies, 69 Colum. L. Rev. 1109, 1114 n.29 (1969).

[71] 281 U.S. at 679. *Brinkerhoff* involved a suit to enjoin the county treasurer from collecting taxes from the plaintiff. The state lower court denied relief on the grounds that the plaintiff had failed to seek an administrative remedy. Prior to the decision of the state supreme court in the plaintiff's case, however, resort to the state tax commission would have been futile; a previous court decision had established that the commissioner had no power to grant relief in such a case. After the state supreme court reversed its earlier position, the plaintiff could not return to appeal to the tax commission because the statute of limitations had run. Therefore, a denial of relief by the state court left this particular plaintiff without a remedy.

[72] *Id.* at 682; Graham & Foster v. Goodcell, 282 U.S. 409, 431 (1931) (dictum).

[73] 393 U.S. 483 (1969).

struck down a Tennessee prison regulation prohibiting inmates from assisting one another in preparing petitions for habeas corpus. The Court emphasized the regulation's practical impact. Because Tennessee could not constitutionally forbid indigent or illiterate prisoners from filing habeas corpus petitions, it could not adopt a rule which, "in the absence of any other source of assistance for such prisoners, effectively does just that."[74] While recognizing the state's legitimate concern about the effect of inmate "writ-writers" on prison discipline, the Court insisted that Tennessee could not prohibit a prisoner from using this means to exercise his right to petition for habeas corpus so long as it failed to provide "reasonably available alternatives."[75]

These cases reveal the basic principle that a law may not foreclose, either on its face or by its effect in the context of the case, all remedies for the protection of a right that the legislature has no power to take away. By establishing a core of protection[76] that exists regardless of the presence or content of federal or state statutes regulating the incidents of imprisonment, the eighth amendment creates a right to be free of conditions constituting cruel and unusual punishment which neither Congress nor a state legislature can abrogate. Just as these legislative bodies have no power to destroy this right directly, so they may not enact legislation that indirectly operates to foreclose all remedial avenues for vindicating this right. Therefore, existence of a state of constitutional necessity—non-normal conditions violating the eighth amendment for which the prisoner has no available or effective legal remedy—deprives the government of authority to punish the escapee for pursuing his sole remaining remedy.[77]

---

[74] *Id.* at 487.

[75] *Id.* at 488.

[76] "Just as certain rights—those of freedom of speech, press, assembly, religion, etc.—have been said to stand in a 'preferred position' under our Constitution, so also would I include within that group the right of the individual to be free from cruel and unusual punishment. . . ." Johnson v. Matthews, 182 F.2d 677, 684 (D.C. Cir.) (Bazelon, J., dissenting), *cert. denied,* 340 U.S. 828 (1950).

When, on petition for habeas corpus, the Court of Appeals for the Third Circuit set a black escapee free rather than return him to the atrocities of a Georgia chain gang, one judge expressed deep concern that, because Georgia chose to disregard the eighth amendment, "this court turns loose a convicted murderer among the law-abiding citizens of Pennsylvania." But the judge concluded, "I nevertheless bow to the exigencies of the situation; better it be that a potentially dangerous individual be set free than that the least degree of impairment of an individual's basic constitutional rights be permitted." Johnson v. Dye, 175 F.2d 250, 257-58 (3d Cir.) (O'Connell, J., concurring in part and dissenting in part), *rev'd per curiam,* 338 U.S. 864 (1949). *Cf.* People v. Hocquard, 64 Mich. App. 331, 336, 236 N.W.2d 72, 75 (1975) ("We reject public policy considerations that condone and sanction inhumane treatment of prisoners incarcerated in penitentiaries.").

[77] *See generally* Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1548-49 (1972):

> [I]f there were ever a case in which it could be established that a particular remedy was "indispensible" in the sense that no other remedial scheme could ever possibly prevent the substantive constitutional requirements from becoming a "mere form of words," then, and only then, would Congress be wholly without power to revise or replace that remedy.

Asserting the existence of a constitutionally based limitation on the government's power to impose criminal sanctions for escape under certain circumstances is at odds with the deep-seated judicial reluctance to provide a broader defense to the crime of escape. This reluctance stems from fear of encouraging escapes, with their concomitant threats to public safety and to the orderly and effective functioning of penal institutions.[78] The prisoners most likely to threaten society while at large, however, are those who seek to avoid any confinement, constitutional or not, permanently.[79] These prisoners will escape whenever possible, regardless of whether courts recognize the defense of constitutional necessity If, after capture, such prisoners decide to raise the defense, the jury's examination into conditions of their confinement and alternatives to escape should quickly sort out specious claims.[80] Moreover, concern for prison order and discipline should not obscure the fact that these are but means of achieving valid penological ends rather than ends in themselves.[81] Although society has a legitimate interest in having prisoners serve their full sentence without interruption, it cannot legitimately demand that this sentence be served in conditions that violate the Constitution. Whatever the merits of these arguments, however, expanding the scope of the necessity defense may in fact increase the number of escapes—both of inmates who act in a good-faith but mistaken belief that escape was justified, and of inmates who act in bad faith, calculating that they have at least a better chance of forestalling additional punishment upon recapture. Ultimately, then, the justifiability of judicial reluctance to recognize a broader defense depends upon society's commitment to preserving the constitutional rights of the individual.

There are some indications that our society is strongly committed to preserving core rights. To protect the privacy rights implicit in the fourth and fifth amendments a court may exclude evidence that clearly establishes guilt, setting free a defendant who has obviously violated the law rather than convicting him with the use of tainted evidence.[82] Justification for this exclusion has been found in the absence of other mechanisms by which the constitutional rights can be safeguarded.[83] In addition, a court may refuse to punish speech clearly outside the area protected by the first

---

[78] *See, e.g.*, State v. Palmer, 45 Del. 308, 310, 72 A.2d 442, 444 (1950); State v. Worley, 265 S.C. 551, 554, 220 S.E.2d 242, 243 (1975).

[79] *Cf.* United States v. Nix, 501 F.2d 516, 519 (7th Cir. 1974) (court recognized that one who had no intent to escape because he was intoxicated posed a lesser threat to society than a wilful escapee).

[80] *See* People v. Harmon, 53 Mich. App. 482, 488, 220 N.W.2d 212, 215 (1974), *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1975).

[81] *See, e.g.*, Morales v. Schmidt, 340 F. Supp. 544, 552 (W.D. Wis. 1972), *rev'd*, 489 F.2d 1335 (7th Cir. 1973), *rehearing en banc*, 494 F.2d 85 (7th Cir. 1974); Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971) (" 'Security' or 'rehabilitation' are not shibboleths to justify any treatment.").

[82] *See* Miranda v. Arizona, 384 U.S. 436 (1966); Mapp v. Ohio, 367 U.S. 643 (1961).

[83] *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966); Mapp v. Ohio, 367 U.S. 643, 655 (1961).

amendment in order to strike down a statute that may deter other, protected forms of expression by its overbreadth.[84] Although current legal thought seems to be retreating from the view that the exclusionary rule and the overbreadth doctrine are constitutionally required,[85] the explanation for this retreat appears to be a reappraisal of the usefulness of other techniques for protecting the rights involved rather than a repudiation of the idea that some effective form of protection is essential.[86]

The exclusionary rule and the overbreadth doctrine, like the concept of constitutional necessity, are defenses for those who have violated the letter of the law. Under all three theories, activity that is dangerous and disruptive may go unpunished and admittedly guilty persons may be exonerated because the court deems the constitutional violation committed by the government to be more serious than the statutory violation committed by the individual. In supervising prison systems found to violate constitutional standards, several courts have indicated that, if forced to choose between the continuation of such conditions and the very existence of penal institutions, these courts would exalt the prisoners' constitutional rights above the interest of the government in effective confinement.[87] In contrast, the constitutional necessity defense requires a much less drastic judicial response than that hinted at in the prison condition cases or that effected by the exclusionary and overbreadth rules. A court that recognizes the necessity defense does not set the prisoner free. She must still

---

[84] *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967); Keyishian v. Board of Regents, 385 U.S. 589 (1967); Aptheker v. Secretary of State, 378 U.S. 500 (1964).

[85] *See* Stone v. Powell, 428 U.S. 465, 486 (1976) (exclusionary rule); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (overbreadth doctrine).

[86] The Court in Stone v. Powell, 428 U.S. 465 (1976), denied habeas corpus relief to two state prisoners who claimed that evidence which should have been barred by the exclusionary rule was introduced at their trial. The Court's holding was grounded on the existence of other adequate protection for the constitutional right at stake: "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 482. Similarly, in Broadrick v. Oklahoma, 413 U.S. 601 (1973), in which the Court concluded that a significant "chilling effect" results only from statutes that are "*substantially* overbroad," the Court pointed out that a person may always protect her first amendment rights by attacking the statute as unconstitutional as applied. *Id.* at 615-16 (emphasis added).

In contrast, in cases involving constitutional necessity, the self-help remedy of escape has become the *only* means whereby the particular prisoner can vindicate her constitutional rights. Therefore, the narrowing interpretations of the exclusionary and overbreadth doctrines do not require rejection of this defense.

[87] *See* Gates v. Collier, 501 F.2d 1291, 1320 (5th Cir. 1974) ("if the State chooses to run a prison, it must do so without depriving inmates of the rights guaranteed them by the federal Constitution"); Pugh v. Locke, 406 F. Supp. 318, 331 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978) ("failure to comply with the minimum standards set forth in the order of the Court . . . will necessitate the closing of those several prison facilities herein found to be unfit for human confinement"); Holt v. Sarver, 309 F. Supp. 362, 385 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971) ("If Arkansas is going to operate a Penitentiary System, it is going to have to be a System that is countenanced by the Constitution of the United States.").

serve the remainder of her original term; the court merely declines to brand her escape criminal and to punish her further.

By refusing to punish the defendant for a justified escape, the court is warning the government that it subjects prisoners to unconstitutionally cruel and unusual punishment and deprives them of available and effective remedies at its peril.[88] In this way, the court can subtly pressure the government to fulfill, at the minimum, its obligation to ensure reasonably adequate remedies for all prisoners. If this obligation is met, prisoners should be able to force the correction of conditions that make escape justifiable. Public pressure on the legislature—the eventual result of a few well-publicized escape acquittals—might hasten this process. Thus, the ultimate result of broadening the necessity defense to encompass the state of constitutional necessity may be to add another force militating toward bringing prison systems into constitutional compliance.[89]

Under the constitutional necessity analysis, criminal liability for escape may not be imposed absolutely, without regard for the constitutionality of the confinement and the availability of other means of redress. To avoid such an imposition, a court must read some restriction into the language of the escape statute.[90] The *Bailey* court found such a restriction by redefining a previously recognized element of the crime. It read into the statutory element of "escape" the requirement of an "intent to avoid *normal* confinement." Although the court chose to rely on a statutory construction approach rather than explicitly employing a constitutional argument, the holding that evidence of prison conditions and alternatives to escape is relevant to an essential element of the crime suggests that the question of constitutional necessity may now be raised in an escape prosecution.[91]

---

[88] *See* People v. Harmon, 53 Mich. App. 482, 484, 220 N.W.2d 212, 213, *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1974) ("If our prison system fails to live up to its responsibilities . . . we should not, indirectly, countenance such a failure by precluding the presentation of a defense based on those facts.").

[89] *See id.* at 487-88, 220 N.W.2d at 215; United States v. Bailey, 585 F.2d at 1096.

[90] The statutory construction technique of reading a limitation into a facially overbroad criminal statute has been frequently used to uphold the statute's constitutionality. *See, e.g.*, United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) (federal statute prohibiting importation of obscene materials); Dennis v. United States, 341 U.S. 494 (1951) (Smith Act prohibiting advocacy of forcible overthrow of government); Screws v. United States, 325 U.S. 91 (1945) (federal statute prohibiting wilful deprivation under color of law of any federal constitutional or statutory right, privilege, or immunity).

[91] The factors that the *Bailey* court identified as the "major indicia of voluntariness and intent," *see* text accompanying notes 54-58 *supra*, are the same factors that will reveal the existence of constitutional necessity. Thus, even if subsumed into the issue of "intent to avoid non-normal confinement" rather than explicitly recognized as "constitutional necessity," the conjunction of eighth amendment and due process violations will be discovered under the *Bailey* approach. In fact, *Bailey* may sweep even more broadly. Within its framework, the prisoner could conceivably introduce evidence of conditions which are "non-normal" but not so severe as to violate the eighth amendment—for example, conditions violating state or federal prison statutes. *See* note 59 *supra*. Such non-normal conditions would not justify escape under the theory of necessity advocated by this Note because they do not involve rights of constitutional dimension. Rather, they violate rights created by the operation of state or federal statute, and the legislature which conferred those rights presumably would

A court willing to take an explicitly constitutional approach would not have to rely, as did the *Bailey* court, upon the construction of a single element of the crime, such as intent. Rather, the court could refuse to apply the escape statute to those cases in which the provision would work an unconstitutional result. A statute that simply prohibits the unauthorized departure from custody is indisputably valid as written so long as it is not applied to that particular combination of facts giving rise to constitutional necessity.[92] The government can permissibly invoke the standard escape statute to punish the prisoner whose imprisonment did not violate the eighth amendment and the prisoner whose imprisonment did violate the amendment but who chose to escape rather than pursue other legally sanctioned remedies open to her. That same statute, however, is not constitutional *as applied* to the case of the prisoner escaping from unconstitutional confinement because she had no other effective remedy for vindicating her rights. Under this approach, the defense of constitutional necessity provides a mechanism for evaluating the constitutionality of the statute's application to the particular facts of the case.[93]

---

have the power to take them away by prohibiting escape even when no other remedy is available.

[92] *See* Boddie v. Connecticut, 401 U.S. 371 (1970). There, the Supreme Court stated:

> Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.

Id. at 379 (citations omitted).

[93] Both the statutory construction approach and the unconstitutional-as-applied approach raise the issue of burden of proof allocation in an escape prosecution. Due process "protects the accused against conviction except upon proof beyond a reasonable doubt of *every fact necessary to constitute the crime* with which he is charged." *In re* Winship, 397 U.S. 358, 364 (1970) (emphasis added). The *Bailey* theory, in which the issue of constitutional necessity is subsumed in establishing the requisite criminal intent, clearly contemplates that the prosecution ultimately bears the burden of proving the absence of constitutional necessity. 585 F.2d at 1093-94. The effect of the unconstitutional-as-applied theory on burden of proof allocation is not so self-evident. It is certainly open to the interpretation that a claim of constitutional necessity properly constitutes an affirmative defense for which the defendant can be given the burden of proof. Arguably, however, this interpretation should be rejected.

The distinction between "facts necessary to constitute the crime" and affirmative defenses is not a sharp one. The Supreme Court has indicated that the test is not how the issue has traditionally been characterized, or whether the prosecution would be required to prove a negative. Mullaney v. Wilbur, 421 U.S. 684, 692-702 (1975). Rather, the rule seems to be that once a particular element has been identified—either explicitly by the statute, or by judicial construction of the statutory language—as one of the ingredients necessary to establish criminal liability for the offense, the defendant may not be burdened with proving facts to negate that element. *See* Patterson v. New York, 432 U.S. 197, 210-16 (1977). Thus, to a considerable extent, burdens of proof are allocated according to how the legislature chooses to define the crime.

The statutory elements of the crime of escape are *X*, a conviction, and *Y*, an unauthorized departure from custody. *See, e.g.*, note 9 *supra*. Under the theory advocated by this Note, there is an additional ingredient necessary before the government can impose criminal sanctions: *Z*, the absence of constitutional necessity. This ingredient is constitutionally mandated—the legislature could not choose to define the crime of escape in such a way that "escape under constitutional necessity" would be included. *See* Patterson v. New York, *supra*

V. IDENTIFYING CONSTITUTIONAL NECESSITY

The evaluation of a claim of constitutional necessity in an escape prosecution involves two crucial questions:

(1) Did the conditions of the defendant's imprisonment violate the eighth amendment?
(2) If so, did the defendant have access to effective alternative remedies less drastic than escape?

The following sections identify some types of evidence that may assist the jury in answering these two critical questions. The purpose, duration and extent of objectionable conditions will be key factors in the identification of eighth amendment violations. Determination of effective alternative remedies will involve inquiring into conditions prevalent in the legal system as well as those existing within the specific penal institution. In addition, evidence of the prisoner's post-escape conduct may help the jury evaluate his constitutional necessity claim. However, a prisoner's failure to return does not, in itself, lessen the probability that constitutional necessity exists in his case, and it should not automatically bar his attempts to establish the justification for his escape.[94]

---

at 210. Thus, whether or not the escape statute explicitly recognizes it, element *Z*—the absence of constitutional necessity—must be present to establish criminality.

If *X*, *Y* and *Z* are the set of "facts necessary to constitute the crime," due process prohibits adopting a procedure which effectively shifts the burden of proof to the defendant on issue *Z* by means of a presumption that *Z* exists once *X* and *Y* have been established. *See* Mullaney v. Wilbur, 421 U.S. 684, 701-04 (1975); Ashford & Risinger, Presumptions, Assumptions, and Due Process in Criminal Cases: A Theoretical Overview, 79 Yale L.J. 165, 174-77 (1969). That is, due process prohibits requiring the defendant to convince the jury of "not-*Z*." If the prosecution in an escape trial were required to prove only *X* (conviction) and *Y* (unauthorized departure from confinement) in order to establish its case, then there would be operating a presumption that proof of these facts establishes the last requisite element, *Z* (the absence of constitutional necessity). Giving the defendant the burden of proving constitutional necessity—proving "not-*Z*"—is thus a shift in burden of proof that is constitutionally impermissible.

Allocating the burden of proving the absence of constitutional necessity to the prosecution does not automatically require the government in every escape case to prove the constitutionality of the confinement before this element is even placed in issue by the defendant. A more reasonable scheme, suggested by the *Bailey* court, 585 F.2d at 1093-94, allows the prosecution to establish a prima facie case sufficient to go to the jury simply by presenting evidence of the conviction and the unauthorized departure. At that point, a limited presumption of constitutionality arises. If the defendant does not come forward with some evidence, *see* Mullaney v. Wilbur, 421 U.S. at 702 n.31, of non-normal conditions and the absence of alternatives to escape, the jury will be instructed that it may, as a matter of law, infer the absence of constitutional necessity if it believes the prosecution's case beyond a reasonable doubt. *See* Ashford & Risinger, *supra*, at 175 n.21. If the defendant *does* introduce such evidence, the inference of constitutionality no longer exists and the jury will be instructed that the prosecution must prove the absence of constitutional necessity beyond a reasonable doubt. This resolution is both a sensible way to conserve judicial resources and an acceptable use of presumptions. A limited presumption of constitutionality, which places on the defendant only the burden of production of evidence, does not have the same potential for violating due process guarantees as does a presumption that burdens the defendant with persuading the jury on the issue. *See* Mullaney v. Wilbur, 421 U.S. at 702 n.31. Once the presumption has served its purpose of forcing the prisoner to raise the constitutional issue by introducing sufficient credible evidence, it simply drops out of the case.

[94] Some courts have insisted that the immediate return to custody is a prerequisite to

A. *"Nor Cruel and Unusual Punishment Inflicted"*

The Supreme Court has stated that "[t]he basic concept underlying the eighth amendment is nothing less than the dignity of man. . . . [T]he words of the amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[95] This idea that the content of the amendment should parallel the emergence of more humane and enlightened societal attitudes concerning the methods and goals of penology is reflected in the standards that lower courts have applied in eighth amendment cases. Punishment is cruel and unusual if it is intolerable to fundamental fairness in light of developing concepts of elemental decency;[96] if it is "shocking or disgusting to people of reasonable sensitivity;"[97] or if it "offend[s] contemporary concepts of decency, human dignity, and precepts of civilization we profess to possess."[98] The jury, as a "significant and reliable objective index of contemporary values,"[99] is therefore a particularly appropriate body to evaluate whether conditions in which the prisoner was confined constituted impermissibly cruel and unusual punishment.[100]

---

raising the common-law necessity defense. *See* note 33 and accompanying text *supra*. Others, including the District of Columbia Circuit in *Bailey*, have regarded it as simply one factor relevant in determining the truth of the defendant's story. The latter view should be adopted in dealing with a claim of constitutional necessity. Escape from unconstitutional conditions is justified only insofar as it enables a prisoner to gain assistance in alleviating the conditions of his confinement. If his actions on reaching the outside world do not indicate any attempt to procure such assistance, the jury may find his explanation for the escape less credible. Making his return to custody a requirement for permitting his explanation to reach the jury at all is, however, unnecessarily severe. If the prisoner's story is true, he has been subjected to intolerable conditions with no possibility of redress through any institutional channels. Unlike the prisoner who escapes to avoid an emergency life-threatening situation, the prisoner who escapes to avoid cruel and unusual punishment may have little reason to believe that time will alleviate the danger and that return might be safe. Most eighth amendment violations, in contrast to emergency situations, are unlikely to dissipate quickly. Even under the impetus of court supervision, relief is often painfully slow. Consider that the history of prisoners' rights litigation in Arkansas has stretched out over fourteen years—beginning with Talley v. Stephens, 247 F. Supp. 683 (E.D. Ark. 1965)—and litigation over the scope of the remedy has only recently come to an end. *See* Hutto v. Finney, 437 U.S. 678 (1978). *Cf.* Pugh v. Locke, 406 F. Supp. 318, 324, 329 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978) (court finds that an order issued four years previously to provide medical and mental health care of minimum eighth amendment standards had not been carried out). Furthermore, the prisoner who has suffered cruel and unusual punishment may have ample reason to fear and distrust surrendering to corrections personnel. *See* notes 122-28, 135-54, and accompanying text *infra*. Although this fear, however justified, cannot release him from the obligation to serve the balance of his sentence, a jury might reasonably believe that it is fully consistent with his failure to turn himself in.

[95] Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

[96] Jordan v. Fitzharris, 257 F. Supp. 674, 679 (N.D. Cal. 1966). *See* Holt v. Sarver, 300 F. Supp. 825, 827 (E.D. Ark. 1969).

[97] Holt v. Sarver, 309 F. Supp. 362, 380 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971).

[98] Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974).

[99] Gregg v. Georgia, 428 U.S. 153, 181 (1976).

[100] *Cf.* Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1967):

Allowing the jurors' sense of decency and humanity to give depth to the bare words of the amendment does not mean that their judgment must be the product of unguided intuition. Specific and workable guidelines, distilled from recent cases dealing with deprivations of prisoners' rights, can be provided to assist the jury in determining whether confinement conditions were unconstitutionally severe. For example, the Supreme Court has emphasized that the punishment may not be "excessive." Excessiveness encompasses both "unnecessary and wanton infliction of pain," and punishment that is grossly out of proportion to the severity of the offense.[101] Similarly, the punishment may not inflict gratuitous suffering that serves no valid penological purpose.[102] The only permissible disciplinary purposes are the prevention of anti-social behavior during the period of confinement; deterrence of the prisoner from further anti-social behavior after his release; deterrence of others, by example, from anti-social behavior; and rehabilitation.[103] In addition to setting out these legitimate goals, the instructions to the jury should contain a reminder that not all treatment that might effectively deter crime is constitutionally permissible.[104]

[O]ne of the most important functions any jury can perform [in deciding whether to impose the death penalty] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Most eighth amendment litigation has occurred either in the context of habeas corpus proceedings in which the court acts without a jury, or section 1983 actions in which the prisoner-plaintiffs were requesting equitable relief. Thus, the role of the jury in identifying cruel and unusual punishment has not been precisely defined. In at least two cases, jury evaluation of an eighth amendment claim has been permitted, or at least contemplated. *See* Morris v. Travisano, 528 F.2d 856 (1st Cir. 1976) (challenging eighth amendment standard given in jury instruction); Howell v. Cataldi, 464 F.2d 272 (3d Cir. 1972) (directed verdict on eighth amendment issue). Juries are fully competent to identify cruel and unusual punishment which, like negligence and obscenity, is a mixed question of law and fact. Like "cruel and unusual punishment," "negligence" and "obscenity" are concepts that defy reduction to a hard and fast legal formula, yet the jury is trusted to supply content to their broad outlines through application of the particular facts before it. *See, e.g.,* Bailey v. Central Vermont Ry., 319 U.S. 350, 353-54 (1943) (negligence); Miller v. California, 413 U.S. 15, 24 (1973) (obscenity).

[101] Gregg v. Georgia, 428 U.S. 153, 173 (1976). *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976); Weems v. United States, 217 U.S. 349, 366-67 (1910).

[102] Estelle v. Gamble, 429 U.S. 97, 103 (1976).

[103] Pell v. Procunier, 417 U.S. 817, 822-23 (1974).

For pretrial detainees, "the only constitutional purpose for incarceration is detention itself . . . ." Brenneman v. Madigan, 343 F. Supp. 128, 136 (N.D. Cal. 1972). The President's Commission on Law Enforcement reported that "[d]etention facilities for unconvicted persons are usually the worst of all institutions and are operated under maximum-security conditions." President's Commission on Law Enforcement and Administration of Justice, Task Force Report VI: Corrections 24 (1966) [hereinafter cited as Task Force Report]. *See* Commonwealth *ex rel.* Bryant v. Hendricks, 444 Pa. 83, 280 A.2d 110 (1971). In a facility used to house pretrial detainees in addition to convicted criminals, the court found overcrowding, rain leaking in to soak bedding that was already filthy and cells infested with rats and roaches. "After the riot of July 4, 1970, a reign of cruel repression ensued. Prisoners were randomly selected for beatings by the guards. These beatings were administered with make-shift clubs [table legs, metal mop-wringers] and continued until blood was flowing from the victim." *Id.* at 94, 280 A.2d at 116.

[104] As one court stated:

The particular factual context in which the punishment is imposed may take on constitutional significance. A disciplinary practice not inherently cruel and unusual may become so by the manner in which it is applied.[105] Similarly, conditions which, taken individually, would not violate the eighth amendment may, in their cumulative effect, become cruel and unusual.[106] In an extreme case, conditions of imprisonment in an institution may become so intolerable that the confinement per se violates the Constitution, regardless of whether the defendant can specify barbarities directed at him individually.[107] In such a case, the prison may not palliate the eighth amendment violation by offering proof that conditions of the defendant's confinement were "better" or "no worse" than those prevailing elsewhere.[108] The amendment reaches not only the deliberate and intentional infliction of cruel and unusual punishment, but also those situations evincing "such callous indifference to the predictable consequences of substandard prison conditions that an official intent to inflict unwarranted harm may be inferred."[109] Where substandard conditions permit the occurrence of rampant violence within the prison population, the actions of other inmates, with or without the direct complicity of the prison staff, may constitute cruel and unusual punishment.[110]

Guidelines such as these provide a framework within which the jury can competently perform the task of determining the constitutional significance of non-normal conditions. If the jury finds that an eighth amendment violation has in fact occurred, it should then proceed to consider whether the defendant had effective alternate means of remedying the situation.

> Clearly, [the prison's explanation of "deterrence"] cannot be honored without qualification, since the more miserable life is made within the prison, presumably the more effective the deterrence. Thus, deterrence might be strengthened by a prison regime in which the intensely religious man would be denied access to religious books and services, in which any semblance of fairness would be stripped from disciplinary procedures, in which racial discrimination would be actively practiced, and in which homosexual assaults would be encouraged.

Morales v. Schmidt, 340 F. Supp. 544, 554 (W.D. Wis. 1972) *rev'd on other grounds,* 489 F.2d 1335 (7th Cir. 1973). *See* Landman v. Royster, 333 F. Supp. 621, 645 (E.D. Va. 1971).

[105] Holt v. Sarver, 309 F. Supp. 362, 380 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971).

[106] *See* Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974); Holt v. Sarver, 309 F. Supp. 362, 373 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971); Commonwealth *ex rel.* Bryant v. Hendricks, 444 Pa. 83, 97, 280 A.2d 110, 117 (1971).

[107] Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978); Gates v. Collier, 349 F. Supp. 881, 893 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974); Commonwealth *ex rel.* Bryant v. Hendricks, 444 Pa. 83, 97, 280 A.2d 110, 117 (1971).

[108] Holt v. Sarver, 300 F. Supp. 825, 828 (E.D. Ark. 1969).

[109] United States *ex rel.* Miller v. Twomey, 479 F.2d 701, 719-20 (7th Cir. 1973), *cert. denied sub nom.* Gutierrez v. Department of Pub. Safety, 414 U.S. 1176 (1974).

[110] Gates v. Collier, 501 F.2d 1291, 1308-10 (5th Cir. 1974). "The infliction of these physical injuries is no less intolerable because accomplished by the inmates with the assistance and acquiescence of the prison authorities, then [*sic*] if perpetrated by the prison superintendent alone." *Id.* at 1309. *See generally* Annot., 51 A.L.R.3d 111, 156-59 (1973).

B. *The Absence of Effective Alternative Remedies*

In *theory,* a state of constitutional necessity should never exist. If prison grievance procedures are ineffective to aid the prisoner, he should be able to vindicate his constitutional rights by petitioning the court for habeas corpus, injunctive relief, or a writ of mandamus, or by filing a complaint under 42 U.S.C. § 1983.[111] In *fact,* as the hypothetical cases at the beginning of this Note suggest, a prisoner in certain circumstances may be denied access to these remedies, or may be unable to use them effectively to protect himself from cruel and unusual punishment. Thus, an inquiry into alternatives to escape must proceed beyond a catalog of the types of relief available to prisoners as a class,[112] and must focus instead on the options that were available to the prisoner before the court.[113] Emphasis on actual remedies available to this particular defendant comports with the jurisprudential notion that criminal sanctions should be imposed on an individual only when his conduct under the circumstances was truly blameworthy.[114] Moreover, the Supreme Court has indicated that when constitutional rights are at stake a remedy must be available in fact as well as in theory.[115] Since the prisoner is in effect being required to exhaust all

---

[111] State prisoners have somewhat different remedies available than do federal inmates. The former may petition for habeas corpus—in federal court only if state remedies are exhausted or nonexistent, 28 U.S.C. § 2254 (1976)—and file actions for monetary or injunctive relief under section 1983. The latter have available habeas corpus, 28 U.S.C. § 2255 (1976), and an action for damages under the Federal Tort Claims Act. 28 U.S.C. §§ 1346, 2671-2680 (1976). *See, e.g.,* United States v. Muniz, 374 U.S. 150 (1963). Depending on the jurisdiction, writs of prohibition and mandamus, injunctions and contempt proceedings may also be available. *See generally* Goldfarb & Singer, Redressing Prisoners' Grievances, 39 Geo. Wash. L. Rev. 175 (1970).

[112] Justice Murphy, dissenting in Wolf v. Colorado, 338 U.S. 25 (1948), warned that "[a]lternatives are deceptive. Their very statement conveys the impression that one possibility is as effective as the next." *Id.* at 41. The failure of courts in the past to look beyond the *apparent* availability of alternatives to escape has resulted in decisions that are indefensibly insensitive to the plight of a particular defendant. *See, e.g.,* State v. Green, 470 S.W.2d 565 (Mo. 1971), *cert. denied sub nom.* Green v. Missouri, 405 U.S. 1073 (1972) (despite the fact that the defendant had been sexually assaulted twice and had received no redress from prison officials either time, the court determined that, in the six hours that had elapsed between the threat of a third gang-rape and the time the prisoner escaped, he could have avoided the harm by reporting the names of those threatening him to prison authorities). *Cf.* People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597, 602 (1969) (when faced with prisoner's claim of duress arising from threat of homosexual assault, court, construing escape statute, concluded that "[t]he submission to sodomy, abhorrent as it may be, falls short of loss of life"; therefore escape was not excusable).

[113] As one commentator has noted:

> As a prerequisite to supplying a remedy, the court must first determine that the implicated constitutional provision provides substantive protection to one in the position of the plaintiff. . . . [T]he fact that other persons in other situations may have access to remedies that will vindicate their rights under the constitutional provision in question should not preclude the judicial creation of remedies for a particular plaintiff who is without effective means of redress.

Dellinger, *supra* note 77, at 1551.

[114] *See, e.g.,* M. Bassiouni, Substantive Criminal Law 79-81 (1978); 1 E. McClain, Treatise on the Criminal Law § 1, at 1-2 (1974); J. Smith & B. Hogan, Criminal Law 4-8 (4th ed. 1978) (English law).

[115] In Wilwording v. Swenson, 404 U.S. 249 (1971) (per curiam), the federal district court

other remedies before he can justify his escape, he should be allowed to borrow a basic principle of exhaustion of remedies doctrine: a petitioner need not pursue an unavailable or futile remedy.[116]

In determining whether resort to prison authorities or to the courts would, in fact, have been an adequate remedy for the particular prisoner before them, the jury should examine the quality of the prison environment, including the physical facilities of the institution, the pattern of administrative policies and practices, and the behavior of inmates and staff. It should also consider the intellectual and psychological capacity of the defendant, which may significantly affect his ability to communicate his problem effectively while in that environment. Finally, it should be aware of obstacles inherent in the legally sanctioned remedies themselves, problems beyond the control of the prisoner and capable of endangering the success of even a meritorious claim for relief.

1. Resort to Prison Authorities

Out of a justifiable reluctance to interfere in the internal affairs of prison discipline, and in recognition that, as a practical matter, their "role in assuring inmate safety is limited,"[117] courts have uniformly emphasized that the prisoner must attempt to secure aid from prison officials.[118] Although this appears to be a sensible and easily available remedy for the prisoner, resort to prison authorities may in fact be dangerous or futile.

(a) *Fear of Inmate Retaliation.* If the source of the harm is other inmates, the prisoner may fear their violent reprisals if she is discovered to have gone to prison authorities for aid.[119] Evidence that officials generally

---

had dismissed a state prisoner's petition for habeas corpus because of his failure to exhaust all possible state remedies. The Supreme Court reversed the dismissal, noting that

> we are not referred to a single instance, regardless of the remedy invoked, in which the Missouri courts have granted a hearing to state prisoners on the conditions of their confinement. In these circumstances § 2254 did not require petitioners to pursue the suggested alternatives as a prerequisite to taking their claims to federal court.

Id. at 250. *See* Mapp v. Ohio, 367 U.S. 643, 655-56 (1961) (exclusionary rule is the "only effectively available way" to prevent constitutional rights from becoming a "form of words"); Wright v. McMann, 387 F.2d 519, 523 (2d Cir. 1967) (federal equity relief is appropriate for a state prisoner when no *adequate* state remedy exists; "money damages are small compensation for a man serving a potentially long sentence and complaining of debasing prison conditions which he has endured and fears he might have to endure again"); text accompanying notes 69-75 *infra*.

[116] Whether a petitioner has no adequate remedy "because in fact no remedy exists, or because every remedy is so limited as to be inadequate, or because the procedural problem of selecting the proper one is so difficult is beside the point." Marino v. Ragen, 332 U.S. 561, 569-70 (1947) (per curiam) (Rutledge, J., concurring) (federal review of state denial of habeas corpus).

[117] United States v. Michelson, 559 F.2d 567, 569 (9th Cir. 1977).

[118] *See, e.g., id.* at 569-70; State v. Green, 470 S.W.2d 565, 568 (Mo. 1971), *cert. denied sub nom.* Green v. Missouri, 405 U.S. 1073 (1972).

[119] *E.g.,* Pugh v. Locke, 406 F. Supp. 318, 325 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978) ("A cardinal precept of the convict culture is that no inmate should report another inmate to officials."). The President's Commission on Law Enforcement and the Administration of Justice, noted:

reacted slowly, or not at all, to inmate requests for protection, or evidence that they had little ability or desire to alleviate an endangered prisoner's plight would support the reasonableness of such fears.[120] The prisoner should not have to actually subject herself to the wrath of her fellow inmates before it can be concluded that this "remedy" was not available to protect her.[121]

(b) *Unsympathetic Prison Personnel.*[122] Prisons are often severely understaffed and overcrowded.[123] At a minimum, this may mean that over-

---

Distance between staff and inmates is accentuated by forces that operate unofficially through inmates. Because staff have nearly absolute authority to punish or reward, inmates are especially concerned with keeping many of their activities covert. Accordingly, whenever an inmate communicates with staff, he runs the risk of being accused by his fellows of informing on them and thus of suffering violent reprisals.

Task Force Report, *supra* note 103, at 46. *See, e.g.*, United States v. Micklus, 581 F.2d 612, 616 (7th Cir. 1978) (inmate witness testified "that stool pigeons don't last long in prison" and that they can be "gotten to" anywhere in the penitentiary); People v. Unger, 66 Ill. 2d 333, 362 N.E.2d 319 (1977) (defendant escaped the day he received phone call threatening death because caller thought he had reported prior sexual attacks); People v. Harmon, 53 Mich. App. 482, 485, 220 N.W.2d 212, 214, *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1974) (warden's testimony corroborates reasonableness of fears of inmate reprisals).

[120] Judge Seiler of the Missouri Supreme Court summarized evidence of grievance procedures at one Missouri prison as follows:

Inmate complaints could be sent to the prison administration by the use of . . . a written complaint transmitted through the intra-prison mail. It required several days to obtain any response to [such a complaint]. An inmate could complain directly to a guard. Because of the physical structure of the residential buildings, it would be difficult to complain to a guard without the other inmates being aware of this action. Administrative policy was not to investigate a complaint of physical abuse unless the assailant was identified. But if an inmate "snitched" . . . his life wouldn't be worth "a plugged nickel" . . . . Unless a guard witnessed an assault, the alleged assailant would be allowed to remain within the general population during the investigation. The victim of an assault could be removed from the general prison population. However, such an inmate would be confined to the "hole", which was the area used to discipline prisoners. The prison provided no other facilities for the protective custody of a threatened inmate.

State v. Green, 470 S.W.2d 565, 569 (Mo. 1971) (dissenting opinion), *cert. denied sub nom.* Green v. Missouri, 405 U.S. 1073 (1972). *See, e.g.*, Holt v. Sarver, 309 F. Supp. 362, 377 (E.D. Ark. 1970), *aff'd*, 442 F.2d 304 (8th Cir. 1971) (guards stationed outside of barracks provided no protection to inmates within who were left vulnerable to attack from other inmates); People v. Harmon, 53 Mich. App. 482, 484, 220 N.W.2d 212, 214 *aff'd*, 394 Mich. 625, 232 N.W.2d 187 (1974) (prisoner's request for protective custody had been denied by prison authorities).

[121] *See* Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978) (court emphasized that prisoner need not wait until he is actually assaulted to obtain relief).

[122] Factors such as low pay, poor education and difficult work situations contribute to the unsympathetic quality of many prison personnel. *See* Holt v. Hutto, 363 F. Supp. 194, 201-02, 213-14 (E.D. Ark. 1973), *aff'd in part, rev'd in part, and remanded sub nom.* Finney v. Arkansas Bd. of Correction, 505 F.2d 194 (8th Cir. 1974). Moreover, the institutional structure itself may harden guard attitudes and behavior. *See generally* Zimbardo, Psychology of Imprisonment: Privation, Power, and Pathology in Theory and Research in Abnormal Psychology, 270-87 (1975); Task Force Report, *supra* note 103, at 46.

[123] In one case, the court found that 3550 prisoners were crowded into prisons designed for 2267. The prisons had only 383 of the 692 guards that they needed to be adequately staffed. Pugh v. Locke, 406 F. Supp. 318, 322, 325 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied*, 98 S. Ct. 3144 (1978). *See* Kish v. County of Milwaukee, 441 F.2d 901, 902-03 (7th Cir. 1971) (jail had serious assault problems because of severe overcrowding); Costello v. Wainwright, 397 F. Supp. 20, 22, 38 (M.D. Fla. 1975), *vacated and remanded*, 539 F.2d 547 (5th Cir. 1976), *rev'd per curiam*, 430 U.S. 325 (1977) (10,300 prisoners in prison with normal capacity of 7,000;

worked guards do not have the time or resources to investigate and respond to prisoner complaints. Less innocently, it may also mean that guards come to rely on the power hierarchies within the inmate population to help maintain order.[124] Thus, prison personnel may prefer to make an uneasy alliance with a dominant group of inmates rather than to declare war on them. Either way, the young, weak, or passive prisoner, who is most likely to be terrorized by her fellows, is least likely to be able to elicit any help from the prison staff.

(c) *Guards as the Source of Harm.* Even more compelling than the situation in which corrections personnel are indifferent to the prisoner's problem is the situation in which the personnel *are* the prisoner's problem.[125] To require that the prisoner complain to higher prison authorities in such a case may be patently unrealistic.[126] If the abuse is blatant and widespread, it can fairly be inferred that these authorities knew of and at least tacitly condoned the activities of their subordinates.[127] Furthermore, the guards involved would inevitably hear of the inmate's complaint. A prisoner might reasonably believe that pursuing this "remedy" would lead only to further brutality.

The issue of available alternatives arises only after the jury has found that the defendant was in fact subjected to cruel and unusual punishment. This finding should add weight to the credibility of a prisoner's testimony that she feared making complaints to authorities or believed that such complaints would be useless. Furthermore, because this finding undermines the assumption that prison personnel were fulfilling their duty to protect the prisoner's safety,[128] it should raise doubts that they would

---

overcrowding creates "violence, brutality, disease, bitterness and resentment"); Jones v. Wittenburg, 323 F. Supp. 93, 95-96 (N.D. Ohio 1971) (jail with capacity for 150 holding 200 to 272 prisoners).

[124] *See* Berk, Organizational Goals and Inmate Organization, in Correctional Institutions 243-45 (1972). The Arkansas "trusty" system of using inmates in guard-like positions, which officially sanctioned and strengthened an inmate power hierarchy, was struck down as unconstitutional in Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971).

[125] In *Gates v. Collier,* the court found that guards routinely punished prisoners by, *inter alia,* administering milk of magnesia, turning fans on wet prisoners, handcuffing prisoners to fences and cells for long periods of time, shooting at and around inmates to keep them moving, and forcing inmates to assume and hold physically uncomfortable positions. 501 F.2d 1291, 1306 (5th Cir. 1974). *See* Landman v. Royster, 333 F. Supp. 621, 638-39 (E.D. Va. 1971).

[126] The defendants in Matthews v. State, 288 So. 2d 712 (Miss. 1974), alleged that they escaped after the sergeant of the prison camp had arranged to have them killed by another inmate in retaliation for circulating a food petition. The court advised: "Prisoners who are threatened should not take the law into their own hands, but should communicate their fears to the prison superintendent who in turn should keep lines of communication open to receive such information." *Id.* at 714.

[127] At the least, such abuse reveals a poorly administered prison system. Holt v. Hutto, 363 F. Supp. 194, 201-02 (E.D. Ark. 1973), *aff'd in part, rev'd in part and remanded sub nom.* Finney v. Arkansas Bd. of Corrections, 505 F.2d 194 (8th Cir. 1974).

[128] The right of the prisoner to be free from cruel and unusual confinement conditions creates a correlative duty in the government not to subject her to such conditions. Several cases, state and federal, have recognized a duty of care owed to the prisoner. *See, e.g.,* Woodhous v. Commonwealth of Virginia, 487 F.2d 889, 890 (9th Cir. 1973) (prisoner has

have responded to her requests for relief. Therefore, the prosecution should not succeed in countering a constitutional necessity claim merely by proving that the defendant did not complain to prison authorities before escape; rather, it should succeed only upon showing that resort to these officials would in fact have been a safe and reasonably effective remedy.[129]

2. Access to the Courts

The court remains the prisoner's ultimate protection from deprivation of constitutional rights by prison personnel. Recognizing this, the Supreme Court has emphasized that "access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed."[130] The state may not impose a filing fee for habeas corpus petitions,[131] nor may prison officials screen petitions to ensure that they are "properly" drawn.[132] A prison may not prevent inmates from helping one another with their petitions if it does not provide effective alternative assistance,[133] and it must provide a reasonably complete and accessible law library for inmate use.[134]

A prisoner caught in emergency, life-threatening conditions will have no chance to exercise this carefully defined right of access. Time, however, will rarely be a significant problem for the prisoner subjected to

---

eighth and fourteenth amendment right to be "reasonably protected" from violence and sexual assault); Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978) ("prison officials are under a duty to provide inmates reasonable protection . . ."); Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) ("It is the obligation of penitentiary officials to insure that inmates are not subjected to any punishment beyond that which is necessary for the orderly administration of [the prison]."); People v. Harmon, 53 Mich. App. 482, 484, 220 N.W.2d 212, 213, *aff'd,* 394 Mich. 625, 232 N.W.2d 187 (1974) ("the State has a duty to assure inmate safety").

Perhaps the assumption that prison officials *are* performing this duty should be called into question. Consider Gates v. Collier, *supra,* at 1321. In that case, one year after entering its decree, the district court found it necessary to appoint a federal court monitor to "check all the phases of prison administration, management and operation and to determine the degree of compliance." The court of appeals concluded that this appointment, "based upon inmates' motion alleging civil contempt by the state in failing to comply with the order, certainly casts doubt upon the good faith compliance asserted by the defendants." *See* Jones v. Wittenberg, 440 F. Supp. 60 (N.D. Ohio 1977) (six years after original court order was entered, report of the Special Master appointed by the court to investigate compliance reveals extensive failure by planners and prison personnel to implement court directives); note 94 *supra* (discussing the history of Arkansas litigation).

[129] *Cf.* Johnson v. Avery, 393 U.S. 483, 489 (1969) (state's allegation that "[t]here is absolutely no reason" to believe that prison officials would fail to assist a prisoner who notified them of his complete inability to petition the court falls "far short" of showing that Tennessee has not deprived some inmates of meaningful access to the courts).

[130] *Id.* at 485.

[131] Smith v. Bennett, 365 U.S. 708 (1961).

[132] *Ex parte* Hull, 312 U.S. 546 (1941).

[133] Johnson v. Avery, 393 U.S. 483 (1969). Wolff v. McDonnell, 418 U.S. 539 (1974), extended the holding of *Johnson v. Avery* to cover section 1983 actions as well as habeas corpus petition assistance.

[134] Bounds v. Smith, 430 U.S. 817 (1977); Younger v. Gilmore, 404 U.S. 15 (1971), *aff'g* Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970).

conditions violating the eighth amendment. Although some cases of cruel and unusual punishment may involve crisis situations, most will entail prolonged deprivation or repeated mistreatment that falls just short of the point where it imminently endangers life. Thus, evidence in support of a claim of constitutional necessity will tend to focus on other types of obstacles to effective access to the courts—obstacles created by the penal institution, obstacles arising from the incapacity of the individual prisoner and obstacles inherent in the legal remedies themselves.

(a) *Obstacles Created by the Penal Institution.* The careful protection that the Supreme Court has given to the right of access and the increasing willingness of the lower courts to intervene when prisoners' civil rights are being violated[135] does not change the reality of the prison situation: the institution exercises total control over its inmates. No other societal setting presents such an opportunity to blatantly disregard an individual's rights.[136] Moreover, an institution that violates a prisoner's eighth amendment rights may have no more respect for his right of access to the courts.

(1) Overt Denial of Access. An institution that interferes with the mailing of an inmate's legal material overtly denies him access to the courts.[137] Although the prison is unlikely to attempt to enforce a wholesale ban on legal mail, several cases have revealed a deprivation of mail privileges in connection with the use of solitary confinement or punitive segregation[138]—types of punishment particularly subject to abuse.[139] Policies less blatant than total restriction have included denying

---

[135] *Compare* McClosky v. Maryland, 337 F.2d 72, 74 (4th Cir. 1964) ("In the great mass of instances, however, the necessity for effective disciplinary controls is so impelling that judicial review of them is highly impractical and wholly unwarranted.") *with* Holt v. Sarver, 309 F. Supp. 362 (1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971) (court scrutinized essential aspects of the Arkansas prison system, including use of trusty guards, open barracks and isolation cells, and lack of a program of rehabilitation).

[136] *See* Morales v. Schmidt, 340 F. Supp. 544, 550 (W.D. Wis. 1972), *rev'd on other grounds,* 489 F.2d 1335 (7th Cir. 1973). Even a superficial review of prisoners' rights cases reveals two recurrent themes: gross violations of the most elemental standards of humane treatment, *see, e.g.,* notes 123-25 *supra* and 139 & 144 *infra,* and the failure by prison officials to implement, either totally or in part, court-ordered reforms. *See, e.g.,* notes 94 & 128 *supra.*

[137] *See* Finney v. Arkansas Bd. of Corrections, 505 F.2d 194, 210-12 (8th Cir. 1974), *aff'd sub nom.* Hutto v. Finney, 437 U.S. 678 (1978).

[138] In Landman v. Royster, 333 F. Supp. 621, 628 (E.D. Va. 1971), the court found that prisoners confined in solitary "could not initiate legal proceedings nor answer any letters save those concerning pending proceedings or family crises." *See* McDonnell v. Wolff, 342 F. Supp. 616, 620, 623 (Neb. 1972), *aff'd in part, rev'd in part,* 418 U.S. 539, 620 (1974) (one defendant stated that he was held in solitary for three weeks during which time he was not allowed to contact his court-appointed counsel regarding escape charges pending against him).

[139] Solitary confinement and punitive segregation present the optimum situation for interference with access to the courts. Furthermore, they are likely to be imposed and carried out in a way that violates the prisoner's constitutional rights. For example, consider the case of petitioner Melton in *Landman v. Royster,* summarized by the court as follows:

> On December 4, 1968, according to the defendant's records, Melton was jailed for the following reason: Offense: When E. Phillips #90872 was put in solitary he said might as well put him in. . . .

the prisoner in punitive segregation all access to law books,[140] severely restricting such access,[141] or prohibiting the prisoner from taking his own legal materials into solitary confinement.[142]

(2) Covert Denial of Access. The right of access to the courts is neither actual nor adequate if a prisoner's attempts to exercise it bring physical or psychological reprisals from prison personnel.[143] Cases involving inmates who were punished for initiating legal action have occurred with sufficient frequency that testimony of a prisoner's fear of official

---

[Melton] was not released until March 12, 1969. Until February 12 he received full rations only every third day. Meals the other days consisted of four slices of bread, served twice each day. During the first 32 days of "jail," a window was left open in Melton's cell and snow fell in on him.

333 F. Supp. 621, 643 (E.D. Va. 1971). *See generally* Benjamin & Lux, Constitutional and Psychological Implications of the Use of Solitary Confinement: Experience at the Maine State Prison, 2 New Eng. J. Pris. L. 27 (1975).

The worst excesses of the punitive isolation "strip cell" are retained by some state prisons in stubborn defiance of judicial prohibition. In 1967, the Supreme Court held that two weeks of confinement in a "windowless sweatbox" with no furnishings other than a hole in the floor for a toilet, no clothing, and only 12 ounces of thin soup and eight ounces of water per day was a "shocking display of barbarism which should not escape the remedial action of this Court." Brooks v. Florida, 389 U.S. 413, 414-15 (1967) (per curiam). Seven years later, the federal court in the Northern District of Indiana looked at punitive segregation in an Indiana prison and found that some prisoners were confined in small cells with solid cement walls, roof and floor; a window covered by a metal plate that kept out air and sunlight; extremely poor ventilation; and a toilet that had to be flushed from outside the cell. Inmates went for weeks at a time without showers, and remained in that unit for months, even years, at a time. The court held the conditions to be "shockingly inhumane," threatening to the sanity of the inmates and abhorrent to any attempt at rehabilitation. Aikens v. Lash, 371 F. Supp. 482, 496-98 (N.D. Ind. 1974), *aff'd in part, rev'd in part, and remanded with instructions,* 514 F.2d 55 (7th Cir. 1975), *vacated,* 425 U.S. 947 (1976).

[140] *See* Aikens v. Lash, 371 F. Supp. 482, 498 (N.D. Ind. 1974), *aff'd in part, rev'd in part, and remanded with instructions,* 514 F.2d 55 (7th Cir. 1975), *vacated,* 425 U.S. 947 (1976) (prisoners confined in conditions described in note 139 *supra* were denied access to any law books kept at the prison). Consider the following testimony given by an associate superintendent of a California prison in asserting that a prisoner in segregation could complain to him, via a written note, if the prisoner believed that a book was being wrongfully withheld from him:

Q. "If he gave a note to the Officer to give to you, let's say, . . . if the Officer took that note and threw it in the wastebasket, how would anyone ever find out about it?"
A. "Well, I wouldn't in all probability. But after a reasonable amount of time, if he didn't get any action, I would assume that he would protest to someone in Unit Staff."
Q. "And if that one in Unit Staff, that person chose to ignore it—"
A. "That would be it."
Q. "—he would have no recourse?"
A. "Well, he would have recourse, but if he couldn't get out past them, I don't know how he would make it."

Deposition of Robert M. Rees on November 15, 1971, Charles v. Patterson, No. C-71 1337 SAW (N.D. Cal. 1971), *quoted in* Bergesen, California Prisoners: Rights Without Remedies, 25 Stan. L. Rev. 1, 32 n.218 (1972).

[141] Johnson v. Anderson, 370 F. Supp. 1373, 1383 (D. Del. 1974) (prisoners in isolation permitted access to a single law book for a total of three to four hours per week).

[142] *See* Wright v. McMann, 387 F.2d 519, 522 n.4 (2d Cir. 1967); Zeigler & Hermann, The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts, 47 N.Y.U.L. Rev. 157, 181 (1972).

[143] Talley v. Stephens, 247 F. Supp. 683, 690 (E.D. Ark. 1965). The court pointed out that prisoner complaints about mistreatment by officials are more likely to produce reprisals than are habeas corpus petitions alleging error in conviction or sentencing.

retaliation should not be dismissed too lightly.[144] Given the absolute power that prison officials can exert over the inmate and the practical inability of a distant court to move swiftly to protect her (assuming that her petition in fact reaches the court and is recognized as presenting a colorable claim),[145] the chilling effect[146] of such covert denial of access should be a factor considered by the jury.

(3) Effective Denial of Access. A prison's failure to provide the prisoner with reasonable access to an adequately equipped law library effectively denies his access to the court.[147] Similarly, the mandate of *Johnson v. Avery* requires the prison either to allow inmates to assist one another or to provide adequate alternate sources of legal advice.[148] Any evidence a prisoner may produce indicating that he was denied access to library facilities or legal aid, or that such services were nonexistent or grossly inadequate,[149] would tend to negate the prosecution's assertion that judicial remedies were available.

---

[144] Landman v. Royster, 333 F. Supp. 621, 633-34 (E.D. Va. 1971), includes several instances of retaliation. That of petitioner Landman is most compelling:

—letter to newspaper: 20 days solitary confinement;
—letter to Governor: 150 days punitive segregation;
—Landman moved from penitentiary to prison camp the day before he was due to confer with a local attorney;
—six months later, Landman moved back to penitentiary; punitive segregation alternating with solitary confinement for "writ-writing";
—one day after court issued an injunction enjoining officials from denying inmates certain of their rights, Landman was returned to solitary for 40 days for conferring with another prisoner. During this time he was not able to contact his lawyer.

The court found that over 265 days of punitive confinement had been imposed on Landman in retaliation for his exercising the right to petition the court and for his assistance to other inmates. *See* Sostre v. Rockefeller, 312 F. Supp. 863, 869 (S.D.N.Y. 1970), *cert denied*, 404 U.S. 1049 (1972) (one day after prisoner was released from solitary confinement via court order he was charged with having dust on his cell bars and confined to his cell for several days; the court found this to have been in retaliation for his legal success and also found that Sostre's legal mail was interfered with, as harassment, because of his threat to file suit against the warden); Talley v. Stephens, 247 F. Supp. 683, 690-91 (E.D. Ark. 1965) (prisoner beaten by trusty guards and assistant warden and placed in special work detail under shotgun in reprisal for court action).

[145] *See* text accompanying notes 171-79 *infra*.

[146] Jones v. Wittenberg, 323 F. Supp. 93, 98 (N.D. Ohio 1971).

[147] *See* Bounds v. Smith, 430 U.S. 817 (1977) (unless adequate assistance from legally trained personnel is available); Younger v. Gilmore, 404 U.S. 15 (1971) (*aff'g* Gilmore v. Lynch, 319 F. Supp. 105 (1970), in which district court found that prison regulations excluding state and federal reporters and annotated codes from prison library denies access); Aikens v. Lash, 371 F. Supp. 482, 498 (N.D. Ind. 1974), *aff'd in part, rev'd in part, and remanded with instructions*, 514 F.2d 55 (7th Cir. 1975), *vacated*, 425 U.S. 947 (1976) ("scanty" law library is "wholly inadequate"). *Cf.* McDonnell v. Wolff, 342 F. Supp. 616, 622 (Neb. 1972), *aff'd in part, rev'd in part*, 418 U.S. 539 (1974) (seven hours per week in law library for independent research not enough).

[148] 393 U.S. 483 (1969). *See* Hooks v. Wainwright, 352 F. Supp. 163, 166 (M.D. Fla. 1972) ("the mere failure of the defendants to supply indigent inmates with sufficient legal services has been a direct cause of the inability of such inmates to pursue fully the available avenues of post-conviction relief and available avenues of relief for deprivations of civil rights").

[149] The Supreme Court has intimated that providing only sporadic contact with legal assistance, whether in the form of access to law books or access to lawyers, may be inadequate to ensure prisoners their right to petition the court. *See* Johnson v. Avery, 393 U.S. 483, 489 (1969). The requirement of providing regular access may be satisfied by arranging for periodic visits by public defenders or law students.

In addition, effective denial of access to the courts might arguably occur even if the prison library meets minimum standards and prison policy permits jailhouse lawyers to "practice." Both the requirement of access to legal resources and the emphasis on the availability of some type of legal advisor are based on the recognition that meaningful access to the courts involves more than the mere right to mail a petition.[150] As one court has emphasized:

> [O]nce before the court [the pro se] litigant is not *ipso facto* assured that he will be benefitted by a favorable decision, even though he may have a perfect case. . . . [I]t is clear that the *pro se* applicant is yet not guaranteed that his petitions and complaints will be fully considered by the courts, because of his disability to present meaningfully his case.[151]

Lack of access to legal materials, or the personal incapacity of the prisoner himself, obviously hampers his ability to present his case meaningfully, but the very conditions in which he is imprisoned may create an equally effective barrier. The prisoner who spends his days and nights in an overcrowded, dark, badly ventilated cell that stinks because the waste pipes leak constantly onto the floor on which the men sleep[152] may find it impossible to prepare a petition of sufficient coherence, organization and clarity to compel the attention of a court burdened with hundreds of other prisoner petitions. A few hours in the prison's legal library may be of little use to a prisoner who must return to the constant terror of open barracks where rampant sexual assaults, fights and stabbings "put some inmates in such fear that it is not unusual for them to come to the front of the barracks and cling to the bars all night."[153] The prisoner confined for an indeterminate period in a windowless, bedless eight by ten foot cell with ten or eleven other prisoners, many of whom are violently aggressive,[154] may be unable to work on his petition even if the prison permits him to keep his legal papers with him. In determining whether the prisoner should have been limited to pursuing his judicial remedies for eighth amendment violations, the jury should consider the very real physical, psychological and emotional effect that constant confinement in such conditions might have had on his ability to pursue those remedies with any degree of success.

(b) *Obstacles Arising from the Incapacity of the Individual Prisoner.* The Supreme Court has judicially noted that "[j]ails and penitentiaries include

---

[150] Knell v. Bensinger, 489 F.2d 1014, 1017 (7th Cir. 1973). *See* Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) ("access to the courts" means all that a petitioner might require to get a fair hearing of grievances alleged by him).

[151] Hooks v. Wainwright, 352 F. Supp. 163, 167 (M.D. Fla. 1972).

[152] Fact pattern taken from Jones v. Wittenburg, 323 F. Supp. 93, 95-96 (N.D. Ohio 1971).

[153] Fact pattern taken from Holt v. Sarver, 309 F. Supp. 362, 377 (E.D. Ark. 1970), *aff'd,* 442 F.2d 304 (8th Cir. 1971).

[154] Fact pattern taken from Holt v. Sarver, 300 F. Supp. 825, 831-32 (E.D. Ark. 1969) (describing isolation unit).

among their inmates a high percentage of persons who are totally or functionally illiterate, whose educational attainments are slight, and whose intelligence is limited."[155] The average prison contains a greater percentage of mentally and emotionally disturbed persons than does society as a whole.[156] Recognition of such facts led one district court to conclude that "[w]ithout the assistance of some third party, many prisoners in the state penitentiary would be totally incapable of preparing an intelligible petition, letter or request on their own behalf."[157] If the prison provides no program of legal assistance for inmates seeking post-conviction relief,[158] the prisoner with sub-standard intelligence or education must fall back on the assistance of fellow inmates to achieve any success in petitioning the court. Yet, even if such a prisoner has sufficient ability to articulate her problems, she may find it difficult to enlist the aid of a jailhouse lawyer. In all likelihood, the prisoner with writ-writing experience will have power and prestige in the inmate community;[159] the prisoner who is mentally deficient or grossly undereducated will be among the class of victims in that community.[160] The jailhouse lawyer may find little incentive, monetary or otherwise, to take the case.[161] Therefore, if the defendant presents evidence of serious mental or educational deficiency, the jury should

---

[155] Johnson v. Avery, 393 U.S. 483, 487 (1969) (footnote omitted). *See* Task Force Report, *supra* note 103, at 2 (revealing that the majority of felony prisoners in 1960 had less than an eighth grade education). The parties in one recent case stipulated that the average reading level of prisoners entering the Alabama prison system in the first quarter of 1975 was below the sixth grade level. Pugh v. Locke, 406 F. Supp. 318, 326 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978).

[156] Task Force Report, *supra* note 103, at 53 ("Even if they come from higher income areas, inmates tend to be the most maladjusted people in their groups."); Pugh v. Locke, 406 F. Supp. 318, 324 (M.D. Ala. 1976), *aff'd with modifications sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 98 S. Ct. 3144 (1978) (10% of the Alabama prison population are psychotic; another 60% are disturbed enough to require treatment).

[157] Johnson v. Avery, 252 F. Supp. 783, 784 (M.D. Tenn. 1968). The court went on to note that "the same incapacities (sub-standard intelligence, inability to write, etc.) which make it impossible for a prisoner to draft a meaningful habeas corpus petition also make it impossible for him to draft a letter which would be sufficient to arouse the attorney's interest." *Id.*

[158] Even if the prison does provide some measure of legal assistance, the system should be carefully examined to ensure that it actually reaches the mentally deficient or disturbed prisoner. The cases indicate that the needs of such prisoners are, at best, ignored and, at worst, responded to with violent repression. In Landman v. Royster, 333 F. Supp. 621 (E.D. Va. 1971), the court found that maximum security confinement had, in some cases, been used for "prisoners who were simply too feeble minded to adhere to the usual prison routine." *Id.* at 631. *See* Aikens v. Lash, 371 F. Supp. 482, 496 (N.D. Ind. 1974), *aff'd in part, rev'd in part, and remanded with instructions,* 514 F.2d 55 (7th Cir. 1975), *vacated* 425 U.S. 947 (1976) (prisoners with severe mental and emotional problems were confined in the conditions described in note 139 *supra,* and mace was sprayed in cells of noisy prisoners while all outer cell doors were shut, thus confining prisoners with the gas).

[159] *See* Johnson v. Avery, 393 U.S. 483, 499-500 (1969) (White, J., dissenting); Note, Constitutional Law: Prison "No Assistance" Regulations and the Jailhouse Lawyer, 1968 Duke L.J. 343, 346 (1968).

[160] *See, e.g.,* note 2 and accompanying text *supra.*

[161] *See, e.g.,* Spector, A Prison Librarian Looks at Writ-Writing, 56 Calif. L. Rev. 365 (1968).

consider, in light of the kind of assistance that realistically might have been available to her, whether she was incapable of successfully pursuing her legal remedies.

(c) *Obstacles Inherent in the Remedies Themselves.* One of the most difficult questions concerning the availability of judicial remedies will arise in the case in which a claim of constitutional necessity is made by a prisoner who escapes after his habeas corpus petition or section 1983 complaint was summarily denied or dismissed by the court. In such a case, the court must determine at the outset whether the defendant's prior contact with judicial relief precludes him from arguing that legal remedies were ineffective or unavailable to him. A prisoner may encounter several problems in employing legal procedures successfully to obtain effective relief. Procedural requirements and restricted access to counsel, coupled with the prisoner's ignorance of legal matters, may constitute significant obstacles. As distinguished from the problems discussed in the preceding sections which may interfere with the prisoner's initial access to the court, these are problems inherent in the legal remedies themselves. They may be sufficiently serious to justify allowing the defendant to raise a constitutional necessity claim despite nominal contact with a judicial remedy prior to his escape.

One court has described habeas corpus as "the easiest and most accessible way for the ignorant and impoverished to focus a court's attention on serious incursions of their rights."[162] For example, the federal habeas corpus statute requires the prisoner merely to file a brief statement of the facts of her imprisonment.[163] The federal district court in *Gilmore v. Lynch* took a more realistic view of the habeas requirements:

> The wording of the statute and the wishes of scholars notwithstanding, this Court takes notice that more than simple "facts" are needed in order to file an adequate petition for relief by way of habeas corpus. A prisoner should know the rules of venue, jurisdiction, exhaustion of remedies, and proper parties respondent. He should know *which* facts are legally significant, and merit presentation to the Court, and which are irrelevant or confusing. When the Return is filed, it is never without abundant citation to legal authority, and a proper traverse must take cognizance of these points. . . . The initial burden of persuading a judge that an evidentiary hearing is necessary lies with the prisoner; given the hundreds of petitions with which the courts are flooded, this burden is a heavy one . . .[164]

The prisoner who files a pro se complaint for damages or injunctive relief encounters even greater difficulties than the petitioner for habeas corpus. Unlike habeas corpus, which is a summary proceeding, a section 1983 action is a full-fledged civil proceeding. The prisoner complainant is

---

[162] Bryant v. Hendrick, 280 A.2d 110, 114 (Pa. 1971).

[163] 28 U.S.C. § 2242 (1976).

[164] Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971).

less likely to successfully steer his claim through the procedural complexities,[165] and more likely to be forestalled by the attorney for the opposition.[166] The liberal discovery available under the Federal Rules of Civil Procedure often goes unused by the unsophisticated prisoner. One study involving two hundred pro se complaints found that only thirteen prisoners—6.5% of the total—had even attempted to obtain discovery; of these, only two were successful in actually obtaining documents.[167]

Discussing the relative advantages and disadvantages of habeas corpus and section 1983 proceedings obscures a more fundamental problem: the average prisoner does not know enough about the range of remedies available to consciously select one over another. Two commentators, who served as pro se clerks for the Second Circuit, have pointed out that most prisoners submit a jumbled claim that combines elements of both types of action. This intermingling of issues frequently causes the court to ignore some part of the prisoner's claim.[168] Thus, the mere filing of the prisoner's claim with the court does not end her problems. Her ignorance of the necessary formalities often results in such elemental defects as failure to specifically identify the defendants, failure to sign papers and have them

---

[165] *See* Zeigler & Hermann, *supra* note 142. Of the 200 pro se complaints reviewed by the authors over a five-year period, one-quarter were still pending:

> The best demonstration of the helplessness of a pro se plaintiff can be made by investigating those fifty-one cases which are still pending. In six of the fifty-one, the plaintiff was not able to arrange to have the complaint served by the federal marshall; . . . . In six more cases, a complaint was filed and process was served, but no responsive pleading was forthcoming; the plaintiffs in these cases did not move for judgment by default. In fifteen of the fifty-one, answers were filed and nothing has happened since. These cases again demonstrate that pro se plaintiffs view a lawsuit as a summary proceeding and cannot proceed beyond the initial stages without help. In three other pending cases, the plaintiffs moved for assignment of counsel after the answer was filed, apparently realizing, however dimly, their inability to pursue the matter further alone. The motions were denied and the cases stagnated.

Id. at 204-05 (footnotes omitted). The denial of a motion for assignment of counsel is not appealable. *Id.* at 205 n.205 (citing Miller v. Pleasure, 425 F.2d 1205 (2d Cir.), *cert denied,* 400 U.S. 880 (1970)).

[166] Zeigler & Hermann, *supra* note 142, at 202. The authors point out: "An element of the strategy of opposition, particularly on the part of states' attorneys who must respond to many such actions, is to delay the case so that they can more effectively research their defenses." *Id.*

[167] *Id.* at 204 n.201. In five of these thirteen cases, discovery was denied either on motion of the defendant, or by the court; "in four others, the plaintiff requested discovery, the defendant objected or simply did not respond, and nothing further happened, indicating an ignorance on the plaintiff's part of how to force a response." *Id.*

[168] In a typical action of this sort, the pro se litigant attacks the constitutionality both of his conviction and of prison conditions. He demands release from illegal detention, money damages for deprivations suffered, plus a variety of injunctive and declaratory relief. . . . [I]f the "combined action" described above is processed as either a habeas corpus petition or a complaint, half the application inevitably gets lost. If, on the one hand, the filing is treated as a petition for a writ of habeas corpus, allegations concerning prison conditions or against specific prison officials are ignored, because no summons was issued and named defendants were not personally served. The claim for money damages is ignored because such relief is not allowed under the habeas corpus statute. On the other hand, if the "combined action" is characterized as a complaint, a summons is issued, and the parties are served, any attack on the constitutionality of the prisoner's conviction and request for release from detention is treated as an attempt to circumvent exhaustion requirements or to disguise the real purpose of the application.

Id. at 183-84 (footnotes omitted).

notarized, and failure to provide a sufficient number of legible copies for filing and service.[169] Her ignorance of substantive legal requirements and inability to communicate effectively in writing often results in a complaint or petition that is "a resentful proclamation of a violation of the litigant's 'rights,' punctuated with emotional distortions of the pertinent facts"[170]—a complaint or petition likely to be dismissed as rambling and conclusory.

It is not surprising, then, that studies of the fate of pro se petitions and complaints reveal a bleak picture. The Virginia Law Review asked federal judges what percentage of state prisoner habeas corpus cases were summarily dismissed in their districts. Of the 56 judges who had handled ten or more petitions in 1964, "43 summarily dismissed over 60 percent of the petitions; 35 dismissed over 75 percent; 25 dismissed over 85 percent; 17 dismissed over 90 percent; and 9 judges summarily dismissed 100 percent of the petitions."[171] A study of pro se petitions in the United States District Court for the Southern District of New York revealed that the use of summary dismissal seemed to be declining, but without a correspondent increase in the pro se petitioner's chance of success. In the fifty cases reviewed by the authors, not a single evidentiary hearing was ordered.[172] A similar pattern occurred in pro se complaints. Of two hundred pro se actions in the Southern District in a five-year period, only one plaintiff received any final relief. Two-thirds of the complaints were dealt with in a summary fashion, usually by a motion for failure to state a claim for which relief could be granted. In many of these cases, the defendants never even filed a responsive pleading.[173]

Thus, the obstacles to the average prisoner's success in obtaining relief without the assistance of counsel are formidable: they begin with her problems in identifying the nature and elements of her legal claim, continue with her difficulties in drafting an intelligible and legally sufficient pleading, and culminate in her inability to successfully counteract the inevitable motion to dismiss, carefully researched and prepared by the defendant's attorney.[174] The average prisoner cannot avoid these obstacles by hiring her own attorney because in all probability she is indigent.[175] Counsel might, of course, be appointed by the court. However,

---

[169] *Id.* at 179-80. Consider the problem of providing several copies of the complaint when access to a typewriter and duplicating machine is limited or nonexistent.

[170] *Id.* at 182.

[171] Note, The Burden of Federal Habeas Corpus Petitions from State Prisoners, 52 Va. L. Rev. 486, 493 (1966).

[172] Zeigler & Hermann, *supra* note 142, at 201.

[173] *Id.* at 201 n.190, 202. The plaintiffs fared no better on appeal. Of cases appealed to the Second Circuit in 1971, over 84% were summarily denied preliminary relief—with no assignment of counsel to argue the case. *Id.* at 242.

[174] *See* Bergesen, *supra* note 140, at 36.

[175] *See, e.g.*, Zeigler & Hermann, *supra* note 142, at 187 n.112 (in study of pro se complaints in the Southern District of New York, the authors found that 93% of the prisoners proceeded in forma pauperis and speculated that, in the category of collateral attacks by prisoners, the percentage proceeding in forma pauperis is even higher).

the Supreme Court has not yet held that there is a constitutional right to counsel at the outset of all post-conviction proceedings. "In most federal courts, it is the practice to appoint counsel [in such proceedings] only after a petition for post-conviction relief passes initial judicial evaluation and the court has determined that issues are presented calling for an evidentiary hearing."[176] The circularity of this "solution" is evident. The prisoner is not entitled to counsel unless she can show a colorable claim for relief, and she is unlikely to be able to make that showing without some professional assistance.[177] Moreover, the heavy workload caused by numerous prisoner petitions,[178] and the prevalent judicial belief that most of the petitions are, at best, frivolous exercises of idle prisoners and, at worst, malicious harassment of prison officials and the court[179] further diminishes the probability that counsel will be appointed.

The prisoner's obligation to use established legal channels is not obviated simply because successful pro se litigation is difficult. Clearly the jury should not find an escape justified whenever the defendant's sole explanation for failing to petition the court is a set of statistics showing that such attempts are usually futile. The problem differs, however, where the prisoner, prior to escape, *had* petitioned the court for habeas corpus but was summarily denied, or *had* filed a section 1983 complaint but was dismissed for failure to state a claim. In these circumstances, the prosecution may argue that escape is unjustifiable: the prisoner's prior inability to obtain relief from the court proves that he did not deserve it. Yet, because of the many difficulties inherent in presenting pro se claims of this type, the prisoner's failure to proceed past the summary stages of an action may reflect not the merits of his case, but rather his inability to engage the attention of a busy and skeptical court. Therefore, the fact that a prisoner was unsuccessful in obtaining judicial relief prior to escape should not raise a conclusive presumption that the escape is unjustifiable. At trial, the prisoner's court-appointed defense counsel can competently frame and present his case. The jury may then find that the prisoner did not, in fact, deserve relief, but in doing so it has established that the fault lay in the substance of his claim, not in the manner of its presentation.[180]

---

[176] Johnson v. Avery, 393 U.S. at 487-88 (citations omitted).

[177] Of 50 habeas corpus petitions studied in the Southern District of New York, not one evidentiary hearing was held. *See* text accompanying note 172 *supra*. Of 200 pro se complaints from that same district, counsel was appointed in only eight cases. Zeigler & Hermann, *supra* note 142, at 201, 205.

[178] *See, e.g.*, Burger, The State of the Judiciary—1970, 56 A.B.A.J. 929, 931 (1970) (12,000 petitions for habeas corpus filed by state prisoners in federal courts in 1970 alone).

[179] *See* Bergesen, *supra* note 140, at 38 & n.242. *See also* Morales v. Schmidt, 340 F. Supp. 544, 547 (W.D. Wis. 1972).

[180] Two federal judges have commented on the percentage of pro se post-conviction petitions that reveal a meritorious claim once given a chance to be properly presented. Judge Oliver, of Missouri, noted: "I have yet to find a judge, state or federal, who is not surprised to learn that almost half of all post conviction motions properly processed by evidentiary hearings in one metropolitan state trial court during less than a year's time resulted in the granting of some forms of relief to the petitioner." Oliver, Postconviction Applications

(d) *The Cumulative Effect: Lack of Meaningful Access to the Courts.* A thoughtful evaluation of recent prisoners' rights cases leads to the conclusion that mere permission to mail a letter to the judge of her choice does not by itself guarantee the prisoner meaningful access to the courts. The physical and psychological atmosphere of the penal institution, the abilities of the individual prisoner and the complexity of legal procedures may interact to create a barrier to effective access to the courts—a barrier which, while less apparent than that caused by an overt denial of communications privileges, is equally prohibitive. Although any one of the factors discussed above may not in isolation be sufficiently serious to result in effective denial of access to judicial remedies, the jury should be especially sensitive to the debilitating effects of a conjunction of several of these factors on a prisoner confined under conditions repugnant to the minimum standards of decency demanded by a civilized society.

VI. CONCLUSION

The traditional rule that intolerable conditions are no defense to the crime of escape has operated to preclude any serious inquiry into the remedial alternatives open to the prisoner before the court. Yet such an inquiry is essential to insure that the escape statute is not applied in a particular case to punish the prisoner for vindicating a constitutional right in the only way left to him. The common-law defense of necessity, as it has been linked to the requirement of an imminent life-threatening danger, is an insufficient protection for eighth amendment rights. Judicial recognition of constitutional necessity would provide a conceptual framework for determining when the absence of an adequate, legally sanctioned remedy justifies escape from cruel and unusual punishment. The fact that a claim of constitutional necessity may seldom be meritoriously or successfully invoked ought not to minimize the importance of recognizing that the government's deliberate infringement of a core constitutional right may give rise to a state of necessity as real as that created by natural disaster, homosexual rape, or violent attack. Justice Harlan, concurring in the Court's creation of a remedy to redress blatant governmental interference with the constitutional rights of the plaintiff before it, asserted that "[a]lthough litigants may not often choose to seek relief, it is important, in a civilized society, that the judicial branch of the Nation's government

---

Viewed by a Federal Judge—Revisited, 45 F.R.D. 199, 217 (1968). Judge Bazelon, commenting on the related area of petitions for leave to prosecute criminal appeals in forma pauperis, wrote:

> From September 1, 1957 through February 28, 1959, we decided 24 appeals in which we had granted leave to appeal in forma pauperis although the District Court had previously denied leave on the ground that the appeal lacked merit. *We reversed the convictions in 11 of these 24 cases.* In six of the other cases the convictions were affirmed by split decisions. Thus in 17 of the 24 cases at least one judge of this court thought the conviction should be reversed. In all 17 of these cases, the Government had opposed the petitions for leave to appeal in forma pauperis [on the ground that the appeal was plainly frivolous].

Jones v. United States, 266 F.2d 924, 926 (D.C. Cir. 1959) (footnotes omitted).

stand ready to afford a remedy in these circumstances."[181] Justice Harlan's comment is equally apposite in the context of justifying escape prompted by constitutional necessity: although defendants may not often deserve the relief sought, it is important, in a civilized society, that the court stand ready to afford a remedy in those cases in which they do.

CYNTHIA R. FARINA

[181] Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Harlan, J., concurring).