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Criminal Law—Escape—Defenses—Common Law Extension of Necessity—People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

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CRIMINAL LAW—ESCAPE—DEFENSES—COMMON LAW EXTENSION OF NECESSITY—*People v. Lovercamp*, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

People v. Lovercamp[1] allows, for the first time in California, the defense of necessity to a charge of felony prison escape where that escape was compelled by threat of death, forcible sexual assault, or substantial bodily injury. This represents a break with a strong line of decisional law. Prior to *Lovercamp*, the defense of necessity had never been applied to any criminal offense in California; nor had the defense of duress,[2] made applicable to all non-capital offenses by statute,[3] ever been successful in a prosecution for escape. In one stroke, then, the court applied a common law defense never before recognized in California to a crime which has never been subject to that or any related defense. While the court's reliance on the existence of such a defense at common law was unfounded, the initial creation of such a defense is an entirely appropriate judicial function under the power of the courts in this state to invoke and expand upon the common law,[4] provided no derogation of the statutory law results.[5]

I. ELEMENTS OF THE DEFENSE OF NECESSITY

Defendants Wynashe and Lovercamp were convicted of escape in the Superior Court, San Bernardino County.[6] Prior to the conviction, they had been confined in the California Rehabilitation Center as inmates for approximately two and one-half months. There they were constantly accosted by other inmates demanding sexual favors, and were threatened with physical violence when they refused.[7] They had repeatedly complained to the prison authorities, but to no avail. On the day of the

1. 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974).

2. Duress has been the defense generally allowed to criminal defendants in California when some form of coercion is involved. *See, e.g.*, People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974); People v. Otis, 174 Cal. App. 2d 119, 344 P.2d 342 (1959); People v. Martin, 13 Cal. App. 96, 108 P. 1034 (1910).

3. CAL. PENAL CODE § 26(8) (West 1970).

4. There is well-established precedent for the invocation of common law defenses in California, and such action is statutorily permissible. *See* notes 34, 40, 67-68 *infra* and accompanying text.

5. *See* note 34 *infra* and accompanying text.

6. People v. Lovercamp, 43 Cal. App. 3d 823, 825, 118 Cal. Rptr. 110, 111 (1974).

7. *Id.* They were told to "fuck or fight."

escape, the defendants once more were accosted and when they refused to submit were told that they "would see the group again."[8] At this point, the defendants feared for their lives and fled the institution, only to be captured moments later and yards away. At trial, the court rejected the defendants' offers of proof as to the threats made against them, their fear for their safety, and the reticence of the prison authorities to assist them.[9]

The defendants appealed their felony conviction, and the California Court of Appeal held that a "limited defense of necessity is available."[10] However, in recognizing the balance that must be struck in affording inmates such a defense,[11] the court severely limited the operation of this defense by requiring that the following conditions be met:

(1) The prisoner is faced with a specific threat of death, forcible sexual attack, or substantial bodily injury in the immediate future;

(2) There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;

(3) There is no time or opportunity to resort to the courts;

(4) There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape, and;

(5) The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.[12]

Collectively, these criteria represent a radical departure from statutory and case law in California with regard to prison escape. However, considered separately, they find varying degrees of support in prior decisional law. First, the court's allowance of such a defense under threats less than death and without provision, as in the past, that the commission of the act charged be demanded or requested of the accused appears to be in conflict with both statutory[13] and case law.[14] On the

8. *Id.*
9. *Id.*
10. *Id.* at 831, 118 Cal. Rptr. at 115.
11. *Id.* at 831-32, 118 Cal. Rptr. at 115.
12. *Id.*
13. CAL. PENAL CODE § 26(8) (West 1970).
14. The first escape case in California concerning the applicability of such a defense was People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929). That case involved a defendant who escaped from a remote mountain prison camp. He attempted to justify his escape by pointing out abominable prison conditions, alleging them to be so unsanitary as to be dangerous to life and health, and by giving proof as to "brutal" and "inhumane" treatment he had received at the hands of the prison personnel. *Id.* at 262, 279 P. at 1009. The court, in denying the validity of such a defense in California,

other hand, the criterion that the prisoner immediately turn himself in to proper authorities upon attaining a position of safety finds substantial support in *People v. Wester*.[15] There, the court, in considering the same type of defense as that in *Lovercamp*, held that a prisoner escaping involuntarily is still ". . . a prisoner, in contemplation of the law . . ." with duty to resubmit himself to custody.[16]

Second, the court's requirement that the prisoner have no time to complain to the authorities or, alternatively, that there be a history of futile complaints to prison authorities, accords with the practical realities of the prison situation,[17] and does no violence to prior decisional law.

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affirmed the trial court by holding that maintenance of prison discipline must take precedence over the prisoner's safety. *Id.* at 265, 279 P. at 1010.

The next escape case to arise on this point in California was People v. Wester, 237 Cal. App. 2d 232, 46 Cal. Rptr. 699 (1965). The defendant escaped from a prison camp and was apprehended by local authorities the following evening. He asserted as a defense that another prisoner had forced him to escape with him; he was, however, convicted of the offense of escape. On appeal, he cited as error the instruction given to the jury:

> If an inmate has departed the limits of his custody while influenced so to do by threats or menaces which create in his mind a fear of imminent and immediate danger and which are sufficient to show that he has reasonable cause to believe that his life will then and there be endangered if he refuses to so depart from the limits of his custody, and if he then believes that his life will be so endangered, he does not commit the crime of escape by such departure.

Id. at 237, 46 Cal. Rptr. at 703. The court of appeal, in finding this to be a sound instruction, qualified it by stating:

> It is conceivable, although it would be most unusual, that a puny prisoner might fear for his life if a fellow convict demanded that he escape with him and backed the demand with threats of physical violence. While the contemplation of such an eventuality strains the imagination, such a situation might possibly arise . . . .

Id. at 238, 46 Cal. Rptr. at 703. The court in *Wester* seemed to focus on the demand of a fellow inmate that the defendant escape with him, rather than recognizing a more general range of threats sufficient to invoke the defense.

People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969), echoed the sentiments expressed by the *Wester* court. The defendant had escaped from a prison camp, and was apprehended shortly thereafter. He asserted as a defense that he had been sodomized by fellow inmates and, as a result of his reporting these incidents to the prison authorities, he had been threatened with death by the same inmates. *Id.* at 770-71, 75 Cal. Rptr. at 599. The court, quoting extensively from *Whipple*, reinforced the position of that case and *Wester*, stating:

> The court properly rejected the evidence insofar as it was offered to show defendant's lack of capacity to commit the offense under provisions of Penal Code section 26 . . . . The statute, since it refers to the option to refuse or accept, contemplates that the threat or menace be accompanied by a direct or implied demand or request that the actor commit the criminal act.

Id. at 773, 75 Cal. Rptr. at 601.

15. 237 Cal. App. 2d 232, 46 Cal. Rptr. 699 (1965).

16. *Id.* at 237-38, 46 Cal. Rptr. at 703.

17. The peculiar realities that characterize life in a penal institution support this aspect of the opinion, in that many times guards are not available to protect the prisoner from assault by other inmates, either because of physical circumstance or sheer apathy.

But, at the same time, the requirement that there be no opportunity for the prisoner to resort to the courts[18] before the defense of necessity is allowed ignores the realities of the prison situation, as is aptly demonstrated by the case law dealing with the applicability of this defense to escape. In *People v. Whipple*,[19] the court discussed the fact that the defendant had not exhausted all of his remedies before resorting to escape, and recognized that in a situation where a prisoner is subjected to brutal and inhumane treatment by his jailers, his power to resort to the courts, and therefore his opportunity to resort, is virtually non-existent.[20] Indeed, even if the prisoner possesses the power to invoke a meaningful form of judicial protection, the time factor involved in such an appeal to the courts severely limits its effectiveness and, thus, its applicability to the prison situation. However, the *Lovercamp* court apparently felt constrained to limit the defense in such a manner in order to provide for the situation, difficult as it may be to imagine, where the defendant is faced with an immediate threat of a specific nature and able to resort to the courts for protection.[21]

Also, as was stated in Comment, *Duress and Prison Escape: A New Use for an Old Defense*, 45 S. CAL. L. REV. 1062 (1972):

> It might be argued that the threatened inmate should always seek the protection of the prison staff. Unfortunately, prison staffs are notoriously unqualified to deal with inmate behavioral problems, actually serving to multiply the effects of violent conditions.

Id. at 1072 (footnote omitted). In an early case involving necessity as a defense to escape (see note 14 *supra*) the court considered the defendant's failure to seek protection from the guards who were beating and abusing him. People v. Whipple, 100 Cal. App. 261, 265, 279 P. 1008, 1010 (1929). Even in this initial escape case the court recognized that a prisoner, if he were to be allowed such a defense, need not make a plainly useless request prior to escaping. Where the conditions of his confinement render such a gesture without substance, he need not make such a futile display in order to reserve his right to prove necessity. *Id.* at 266, 279 P. at 1010.

18. *See* note 12 *supra* and accompanying text. This requirement presumably refers to the prisoner's right to petition for a writ of habeas corpus. *See* People v. Richards, 269 Cal. App. 2d 768, 777, 75 Cal. Rptr. 597, 604 (1969). By way of understanding the true value of this opportunity to the prisoner in California, consider the language found in *In re* Riddle, 57 Cal. 2d 848, 852, 372 P.2d 304, 306, 22 Cal. Rptr. 472, 474 (1962):

> The courts are, and should be, reluctant to interfere with or hamper the discipline and control that must exist in a prison. Petitions containing such charges must be carefully scrutinized and the facts carefully weighed with the thought in mind that they are frequently filed by prisoners who are keen and ready, on the slightest pretext, or none at all, to harass and to annoy the prison officials and to weaken their power and control. . . . The burden of proof is, of course, on the petitioner . . . .

19. 100 Cal. App. 261, 279 P. 1008 (1929). See note 14 *supra*.

20. *Id.* at 266, 279 P. at 1010.

21. There is an apparent logical inconsistency here: if the threat is immediate, as it must be for the defense of necessity to apply, there will be, almost certainly, no time for the prisoner to file papers with the court, and if there is no immediate threat, but only a vague fear of future harm, there is no basis for either the petition or the defense.

Finally, the limitation imposed by the *Lovercamp* court, requiring the escape to be non-violent, is best considered a policy decision limiting the defense because it operates exclusively in the prison environment. In California, the defense of duress is applicable to all non-capital crimes[22] and, thus, it would be applicable to a simple assault[23] committed by a prisoner in connection with the escape as well as to the escape itself. In that the defense of necessity, unlike duress, is allowed here under a threat less than death, the court's imposition of this limitation may be properly viewed as an application of the balancing-of-evils test traditionally used in applying the defense of necessity at common law.[24] Thus, if violence against innocent persons were necessary to effect the escape, it is apparent that the *Lovercamp* court considers that to be an inherently greater evil than any consequence likely to result if the prisoner remains.

II. RECOGNITION OF COMMON LAW DEFENSES IN CALIFORNIA

The extension of the defense of necessity to a charge of escape may be desirable and warranted. However, because the defense of necessity had never before been recognized in California[25] and because no defenses had ever been recognized to a charge of escape[26] from a state

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Perhaps the court had in mind here a threat of the immediacy as conceived in Comment, *Duress and Prison Escape: A New Use for an Old Defense*, 45 S. CAL. L. REV. 1062, 1073-75, where it is pointed out:

> Tensions within the inmate social system affect use of the requirement of immediacy and imminency in the prison context.
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> . . . [T]he availability of weapons and the sudden and often senseless nature of attacks within the prison may create in the threatened inmate an ongoing apprehension which will linger far beyond the moment of actual threat.

22. CAL. PENAL CODE § 26(8) (West 1970).

23. It does not however apply to an aggravated assault by a life prisoner (*see* CAL. PENAL CODE § 4500 (West 1970)) as the defense is limited to non-capital offenses.

24. *See* W. LAFAVE AND A. SCOTT, HANDBOOK ON CRIMINAL LAW 382 (1972). This principle has been implicitly recognized in California. *See* People v. Richards, 269 Cal. App. 2d 768, 774-75, 75 Cal. Rptr. 597, 602 (1969).

25. People v. Whipple, 100 Cal. App. 261, 262-63, 279 P. 1008, 1009 (1929). There is, nationwide, only one major case on necessity, United States v. Holmes, 26 F. Cas. 360 (No. 15,383) (C.C.E.D. Pa. 1842). This case involved the defense of necessity to a charge of murder among castaways. The defendant, though allowed to introduce evidence on the defense of necessity, was nonetheless convicted with a recommendation of mercy by the jury.

A Michigan appellate court has allowed defendants threatened with homosexual assault substantially the same defense, although calling it duress and applying no specific criteria for the trier of fact. People v. Harmon, 220 N.W.2d 212 (Mich. Ct. App. 1974). The state of Michigan has no statute on either duress or necessity, and applies duress at common law.

26. People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969); People v.

penal institution in California, *Lovercamp* significantly departed from prior decisional law in recognizing the common law defense of necessity. There are a number of obstacles to this sort of free-wheeling implementation of a common law defense in California with which the court in *Lovercamp* did not deal.

In *People v. Whipple*,[27] the court stated:

> In this state the common law is of no effect so far as the specification of what acts or conduct shall constitute a crime is concerned. In order that a public offense be committed, some statute, ordinance or regulation prior in time to the commission of the act, must denounce it; likewise with excuses or justifications—if no statutory excuse or justification apply as to the commission of the particular offense, neither the common law nor the so-called "unwriten law" may legally supply it. . . . Although the "unwritten law" sometimes may be regarded by jurors as sufficient, and so accepted by them, in the law the principle is unknown and unrecognizable. The legal excuse or legal justification . . . may be found only in the statute. Nor, ordinarily, at least, will the "law of necessity" prove sufficient as a legal excuse.[28]

This assertion in *Whipple*, limiting criminal law defenses in California to those provided by statute, was unsupported by any authority[29] and must be regarded as that court's extension of Penal Code section 6, which provides in part:

> No act or omission, commenced after twelve o'clock noon of the day on which this Code takes effect as a law, is criminal or punishable, except as prescribed or authorized by this Code, or by some of the statutes which it specifies as continuing in force . . . .[30]

Lovercamp, by ignoring the Penal Code and expressly basing its decision on common law principle and precedent,[31] has impliedly held that common law defenses are applicable to some extent in California criminal law.

Notwithstanding the court's comments in *Whipple*, there is authority to support the use of common law by *Lovercamp*. It was stated in *In re*

Wester, 237 Cal. App. 2d 232, 46 Cal. Rptr. 699 (1965); People v. Whipple, 100 Cal. App. 261, 279 P. 1008 (1929).

27. 100 Cal. App. 261, 279 P. 1008 (1929).

28. *Id.* at 262-63, 279 P. at 1009.

29. *Id.* at 262, 279 P. at 1009; People v. Richards, 269 Cal. App. 2d 768, 775-77, 75 Cal. Rptr. 597, 602-04 (1969); People v. Harris, 191 Cal. App. 2d 754, 758, 12 Cal. Rptr. 916, 919 (1961). *See also* People v. Redmond, 246 Cal. App. 2d 852, 862, 55 Cal. Rptr. 195, 202 (1967); *In re* Narder, 9 Cal. App. 2d 153, 155, 49 P.2d 304, 305 (1955).

30. CAL. PENAL CODE § 6 (West 1970).

31. 43 Cal. App. 3d at 833, 118 Cal. Rptr. at 116.

Hudspeth[32] that "the common law is in force as law in this state in the absence of statutory provisions at variance with the common law."[33] Statutory support for such a proposition is to be found in the Civil Code, applicable by its terms to criminal courts, where it is provided:

> The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in *all* the courts of this State.[34]

Further, it is important to note that section 6 of the Penal Code deals only with the definition of crimes, and not with the definition or limitation of available defenses. It has been held in California that, absent statutory proscription, criminal procedure may be based on common law principles.[35] Moreover, certain other defenses have been applied in California in the absence of a statutory base.[36]

III. THE COMMON LAW NATURE OF THE DEFENSE OF NECESSITY

If California courts may apply the common law to determine defenses, the question then becomes one of whether or not the defense of necessity as it was implemented by the court in *Lovercamp* is truly a common law defense. In its decision, the court denominated the defense as *necessity*, citing the eminent Sir Matthew Hale, noted historian of the English common law.[37] Hale states: "If the prison be fired by accident, and there be a necessity to break prison to save his life, this excuseth the felony."[38] The court in *Whipple* also cited this passage from Hale, but noted, that "[t]he sole authority for such declaration of the common law is Coke's Second Institutes, 590, where, without the citation of either judicial or other authority in its support, the statement occurs that if 'A man imprisoned for petit larceny or for killing of a man

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32. 100 Cal. App. 478, 280 P. 179 (1929).

33. *Id.* at 479, 280 P. at 180. *Cf.* People v. Terrill, 133 Cal. 120, 65 P. 303 (1901).

34. CAL. CIV. CODE § 22.2 (West 1954) (emphasis added). This section is applicable to, and to that extent controls, the Penal Code. People v. Giles, 70 Cal. App. 2d Supp. 872, 881, 161 P.2d 623, 628 (1945). As was pointed out in McBride, *Something New, Non Statutory Crime?*, 44 CAL. ST. B.J. 579, 580 (1969), in discussing the Penal Code section: "Noting and approving general defenses to crime is substantially different from proclaiming the existence of non statutory crime."

35. People v. Giles, 70 Cal. App. 2d Supp. 872, 881, 161 P.2d 623, 628 (1945).

36. *See* text accompanying notes 67-68 *infra.*

37. 43 Cal. App. 3d at 826, 118 Cal. Rptr. at 112.

38. 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 611 (1736).

se defendendo, or by misfortune, and break prison, it is no felony . . . .' "[39]

It is a well-established rule that the courts generally possess the power to declare what the common law is.[40] It would be anomalous to allow the courts to apply their common law heritage, where statutorily permissible, without allowing them the power to adjust it where need dictates. Although there exists a close similarity between the defense hypothesized by commentators of the common law and the one applied by *Lovercamp*, it is evident that there exists no positive precedent or authority for the assertion that a defense of necessity existed at early common law.[41] If, however, the court possesses the power to apply the common law of California, it also possesses the implicit power to adjust the defense to modern circumstances and notions of justice.[42] Thus, credence must be given to *Lovercamp*'s assertion that the court is not creating "a new defense to an escape charge. We merely recognize, as did an English Court 238 years ago, that some conditions 'excuse the felony.' "[43]

39. 100 Cal. App. at 263, 279 P. at 1009.

40. *See* Dooling, *Capacity for Growth in the Common Law*, 25 CAL. ST. B.J. 231, 232 (1950), where this facet of the common law is aptly described:

> For those who are slavishly precedent-minded I can appeal to precedent, the precedent of the common law itself. The most superficial student of the history and growth of the common law—and the "most superficial" describes me perfectly —is impressed by the fact that its path is strewn with the bones of discarded precedents. Even Blackstone that high priest of the common law as it existed in his day qualified his statement of the binding force of precedents by concluding that they should not be followed if they are "flatly absurd and unjust."

Cf. Wheeler, *The Foundations of Constitutionalism*, 8 LOY. L.A.L. REV. 507, 531 (1975). Nor, in following the common law are the California courts bound to follow that common law created in England. It was held in Callett v. Alioto, 210 Cal. 65, 68-69, 290 P. 438, 440 (1930):

> It is true that English decisions rendered before the American Revolution are frequently referred to to determine a rule of the common law, but in this jurisdiction, and in many others, such English decisions are not conclusive.
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> This is so because judicial decisions do not themselves constitute the common law, but are merely evidence of the common law. Accordingly, it has been held, frequently, that in determining what the common law is, this court is not limited to a consideration of the English decisions, but can and should consider and weigh the reasoning of the courts of sister states. Stated in another way, the decisions of sister states constitute evidence of what the common law is, even if *contra* to the English decisions.

Lovercamp, consistent with this power to weigh and consider the decisions of sister states, did so, and relied heavily on a virtually identical holding by a common law Michigan appellate court. *See* People v. Harmon, 220 N.W.2d 212 (Mich. Ct. App. 1974).

41. 43 Cal. App. 3d at 833, 118 Cal. Rptr. at 116. It is noteworthy that the decision is based on English decisional law that never in fact existed. *See* text accompanying notes 37-39 *supra*.

42. *See* note 40 *supra*.

43. People v. Lovercamp, 43 Cal. App. 3d 823, 833, 118 Cal. Rptr. 110, 116 (1974).

IV. REPUGNANCY TO STATUTORY LAW

Given that the defense allowed in *Lovercamp* in its genesis is a common law defense, it is clear that it would nonetheless be beyond the court's power to allow such a defense if it is so directly opposed to the statutory law that "it is impossible that the two can exist and operate at the same time without infringing upon the province of each other."[44] A question arises in this respect when one examines section 26 of the California Penal Code, which provides, in part:

> All persons are capable of committing crimes except those belonging to the following classes:
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> . . . .
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> Eight. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.[45]

It has been held that this section states what is commonly known as the defense of duress.[46] Is the defense of duress, as applied by the California courts under the Penal Code, directly opposed to the defense of necessity, as conceived by the court in *Lovercamp*? Do each of these defenses so seriously infringe on the field of operation necessarily occupied by the other that they may not exist contemporaneously in California? In order to answer these questions a better understanding of the differences between duress and necessity is vital. Both the defense of duress and that of necessity are based on the notion that a person who commits what would otherwise be a criminal act under force or threat sufficient to instill in that person a reasonable fear of death or serious bodily injury should not be subject to criminal sanction.[47] In fact, duress was originally regarded as but one form of ne-

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44. Blevins v. Mullally, 22 Cal. App. 519, 527, 135 P. 307, 310-11 (1913); CAL. CIV. CODE § 22.2 (West 1954).

45. CAL. PENAL CODE § 26(8) (West 1970).

46. *See* note 2 *supra.*

47. The common law recognized a threat of either death *or* serious bodily injury as a sufficient basis for the defense of either necessity or duress. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 29 (1822), wherein it is stated:

> Another species of compulsion or necessity is what our law calls *duress per minas*; or threats or menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misdemeanors, at least before the human tribunal.

Contra, Comment, *Duress and Prison Escape: A New Use for an Old Defense,* 45 S. CAL. L. REV. 1062, 1064-65 (1972).

Certain crimes are excepted from the operation of this notion, for example it is commonly held that homicide committed on an innocent third person is never excused or

cessity.[48] It is limited by the requirement that the force, threat, or menace which compels the person to act must come from another *human being or beings.*[49] That is to say that the force may not be found simply in some perilous circumstance in which the person finds himself, but rather it must be the direct result of the conscious exertion of force upon the accused by another. Necessity, on the other hand, has been broadly described as any perilous or threatening circumstance which reasonably puts the person in fear of present and immediate death or serious bodily injury.[50]

Necessity also differs from duress in the manner in which each is held to apply. Duress is applicable if all the requirements of immediacy, reasonableness, and unavoidability are met.[51] Necessity requires the accused to meet these basic burdens and, in addition, that the courts apply a balancing-of-evils test.[52] This essentially consists of a determination that the evil or wrong avoided by the act charged against the accused is greater, or more evil, than the crime actually committed. It is unclear, however, exactly how this balancing of the evils is to be made, especially in close cases.[53] The fact that perilous circumstance

justified on the basis of duress or necessity. W. LAFAVE AND A. SCOTT, HANDBOOK ON CRIMINAL LAW 376 (1972). *Contra,* People v. Moran, 39 Cal. App. 3d 398, 114 Cal. Rptr. 413 (1974). This case held that since the defense of duress in California is limited to non-capital offenses (CAL. PENAL CODE § 26(8) (West 1970)), where capital punishment is abolished in California the defense therefore applies to *all* criminal offenses.

48. *See* 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 29 (1822). *See also* note 47 *supra.*

49. *See* People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969). In discussing the applicability of the defense of duress to persons threatened generally with sexual assault or other harm in prison, the *Richards* court stated:

> The statute, since it refers to the option to refuse or accept, contemplates that the threat or menace be accompanied by a direct or implied demand or request that the actor commit the criminal act. In this case there was no offer to show that anyone demanded or requested that the defendant escape.

Id. at 775, 75 Cal. Rptr. at 601.

In 1 W. BURDICK, LAW OF CRIMES 260-61 (1946) [hereinafter cited as BURDICK], the author distinguishes the two defenses at common law:

> Compulsion is sometimes distinguished from necessity by regarding the former as proceeding from some human agency, that is, a force exerted by one person upon another, the latter being some impelling natural force, caused by circumstances over which one has no control.

50. 269 Cal. App. 2d at 774-75, 75 Cal. Rptr. at 602; BURDICK, *supra* note 49, at 261.

51. The traditional test is set out in People v. Sanders, 82 Cal. App. 778, 785, 256 P. 251, 254 (1927).

52. *See* note 24 *supra.*

53. Perhaps the penalties fixed by the legislature for the various alternatives could, in the right circumstances, serve as such a guide. *See* Closing Brief for Appellants at 10-12, People v. Lovercamp, 43 Cal. App. 3d 823, 118 Cal. Rptr. 110 (1974), where it is argued that defendants might have committed, in either avoiding or submitting to the sexual advances of the other inmates, acts all of which would have been greater evils,

may take infinitely wider and more subtle form, coupled with the rather vague test under which necessity is applied, may in great part account for the paucity of decisions allowing such a defense.[54] Duress, though far from being a judicially favored defense, has fared better.[55]

Does the court's application of the defense of necessity to the situation in *Lovercamp* conflict with the traditional implementation of the defense of duress under the Penal Code? Although *Lovercamp* involved the threats of a group of inmates to the two defendants—that is, one human entity against another—the court in *Lovercamp* applied the defense of necessity, apparently with an eye to the prevalence of this situational aspect of prison life as some form of perilous circumstance.[56] The nature of the prison situation, where one is effectively prevented from avoiding many types of harm at the hands of other inmates, arguably may be characterized as a generalized circumstance, rather than a specific human threat. Provided the requirement of immediacy, as prescribed by the court, is met[57] this characterization of the threat may remove it from the specific type of threat included within section 26(8) of the Penal Code,[58] thereby preventing conflict between the two defenses. The fact that the two defenses are applied to different types of threats, combined with the court's limitation of necessity to prison escape—a crime not subject to the defense of duress—makes clear that the *Lovercamp* court is not creating a repugnancy or inconsistency in the criminal law of California.

It might be argued that in codifying the common law and excluding certain portions of that body of law, the legislature intended to exclude and prevent the defense by failing to incorporate it in the code. This would be consistent with the well-established rule of construction, *ex-*

that is, subject to harsher penalty than the crime of escape. In their brief appellants cite as examples CAL. PENAL CODE § 288(a) (West 1970) (sexual perversion, oral copulation—punishable by one to fifteen years); CAL. PENAL CODE § 220 (West 1970) (felonious assault—punishable by one to twenty years in state prison); CAL. PENAL CODE § 245(a) (West 1970) (assault by means of force likely to do great bodily injury—punishable by six months to life). These are to be compared to the maximum seven year penalty for conviction of the offense charged against the defendants in *Lovercamp*. CAL. WEL. & INST. CODE § 3002 (West 1970).

54. *See* note 25 *supra* and accompanying text.

55. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 443-44 (2d ed. 1960).

56. *See* 43 Cal. App. 3d at 828, 118 Cal. Rptr. at 113.

57. *See* Comment, *Duress and Prison Escape: A New Use for an Old Defense*, 45 S. CAL. L. REV. 1062, 1073-75 (1972). There it is argued that the immediacy requirement of duress should be construed and applied differently to the prison situation where there is very little likelihood that the prisoner will be able to avoid threatened harm at all.

58. CAL. PENAL CODE § 26(8) (West 1970).

pressio unius est exclusio alterius,[59] that is, to include one instance is to exclude all others. This contention fails for at least two reasons: (1) the defenses of duress and necessity were distinct, albeit similar, at common law, and (2) the Penal Code explicitly rejects the application of any such narrow construction to its provisions.

The Penal Code[60] has, without exception, been interpreted to embrace only the defense of duress, with all of its common law attributes[61] except those explicitly changed by the code.[62] Necessity has been expressly found to be unavailable under the code.[63] It certainly cannot be suggested rationally that the provision in the code for one defense found at common law in and of itself denies the availability of all other similar defenses not provided for in the code. This rule of construction should be perceived as one applicable to the internal consistency and breadth of the defense of duress, rather than as one applicable to the existence of the two separate defenses. Thus, if the defense of duress is provided by statute to be applicable only to non-capital crimes, this only limits the applicability of the defense of *duress* at common law to exclude capital crimes, and no more.

Finally, the Penal Code provides further direction. Penal Code section 4 provides:

> The rule of the common law, that penal statutes are to be strictly construed, has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice.[64]

It would seem that the California Supreme Court's recent comments in *Keeler v. Superior Court*[65] bear on the effect of this provision of the Penal Code. The court held that a criminal statute in California must be construed as favorably as possible for the defendant.[66] This policy must be operative in a court's decision regarding the threshold question of the applicability of a statute as well as its construction. Thus, in holding that necessity is a common law defense outside the ambit of the Penal Code, or any other penal statute, the *Lovercamp* court may

59. *See* Blevins v. Mullally, 22 Cal. App. 519, 527, 135 P. 307, 310-11 (1913).

60. CAL. PENAL CODE § 26(8) (West 1970).

61. *See* text accompanying note 51 *supra*.

62. *See* People v. Villegas, 29 Cal. App. 2d 658, 85 P.2d 480 (1938); People v. Sanders, 82 Cal. App. 778, 256 P. 251 (1927).

63. People v. Whipple, 100 Cal. App. 261, 262-63, 279 P. 1008, 1009 (1929). *See* People v. Richards, 269 Cal. App. 2d 768, 775-76, Cal. Rptr. 597, 602-03 (1969).

64. CAL. PENAL CODE § 4 (West 1970).

65. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

66. *Id.* at 631, 470 P.2d at 624, 87 Cal. Rptr. at 488.

very well have been applying the same logic as that expressed in *Keeler*.

Lovercamp is not the first decision to implement a common law defense in California in the absence of legislative sanction supporting the general power of California courts to do so. The California courts recognize both res judicata[67] and entrapment[68] as criminal defenses without the benefit of statutory support.

V. CONCLUSION

Although the court expressly predicated its decision in *Lovercamp* on the existence of such a defense at common law, inasmuch as there is scant authority, if any, for the defense at common law,[69] it follows the *Lovercamp* court was invoking its common law power to create a defense it considers to be required by "sound public policy" and "good morals." Thus, the court's motivation was clear, when it stated:

> In a humane society some attention must be given to the individual dilemma. In doing so the court must use extreme caution lest the overriding interest of the public be overlooked. The question that must be resolved involves looking to all the choices available to the defendant and then determining whether the act of escape was the only viable and reasonable choice available. By doing so, both the public's interest and the individual's interest may adequately be protected. In our ultimate conclusion it will be seen that we have adopted a position which gives reasonable consideration to both interests. While we conclude that under certain circumstances a defense of necessity may be proven by the defendant, at the same time we place rigid limitations on the viability of the defense in order to insure that the rights and interests of society will not be impinged upon.[70]

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67. People v. Beltran, 94 Cal. App. 2d 197, 202, 210 P.2d 238, 241 (1949).

68. People v. Benford, 53 Cal. 2d 1, 8-9, 345 P.2d 928, 933 (1959). The defense was founded on public policy:

> In California recognition of the defense is said to rest upon the broadly stated grounds of "sound public policy" and "good morals." . . . The precise nature of this public policy has not been spelled out in any California majority opinion concerning entrapment, but obviously California has recognized the defense for reasons substantially similar to those which caused this court, in *People v. Cahan* (1955), 44 Cal. 2d 434, 445-446 [282 P.2d 905, 50 A.L.R.2d 513], to adopt the rule that evidence obtained in violation of constitutional guaranties is not admissible, i.e., out of regard for its own dignity, and in the exercise of its power and the performance of its duty to formulate and apply proper standards for judicial enforcement of the criminal law, the court refuses to enable officers of the law to consummate illegal or unjust schemes designed to foster rather than prevent and detect crime.

Id. (citations omitted).

69. *See* text accompanying notes 37-39 *supra*.

70. 43 Cal. App. 3d at 827, 118 Cal. Rptr. at 112.

Lovercamp preserves the interests of the public in an orderly and efficient penal system while providing just treatment for prisoners who choose to escape rather than subject themselves to possible death, forcible sexual assault, or substantial bodily injury. By appropriately limiting the applicability of the defense to the situation of prison escape, and then only within rigidly defined limits, the court was able to avoid the vague, pervasive, and unpredictable aspects of the defense at common law.

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