

JURISPRUDENCE

The Right to Escape From Prison

A 1974 ruling bears revisiting as prisoners flee the COVID-19 pandemic.

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A guard tower at San Quentin State Prison in California, which has been ravaged by a severe COVID-19 outbreak. Justin Sullivan/Getty Images

Marsha Lovercamp and Linda Wynashe had been at the California Rehabilitation Center for 2½ months when they decided to escape. Jailed for compulsory drug treatment, the two women were harassed by a group of prisoners who demanded they either “fuck or fight.” They had already fought the group off once, and the guards wouldn’t help protect them. Lovercamp and Wynashe made a run for it. They were captured in the hayfield alongside the jail.

Lovercamp and Wynashe were tried and convicted for breaking out, but they appealed the verdict on the grounds of “necessity.” The other prisoners were going to rape them or beat them—they had no choice but to escape. In 1974, an appeals court agreed and overturned the conviction, ruling that Lovercamp and Wynashe didn’t break the law by breaking out of the jail, the same way a prisoner isn’t legally obliged to stay and die inside a burning prison.

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“We may assume that a prisoner with his back to the wall, facing a gang of fellow inmates approaching him with drawn knives, who are making it very clear that they intend to kill him, might be expected to go over the wall rather than remain and be a martyr to the principle of prison discipline,” the court wrote.

The ruling bears revisiting amid the pandemic. Prisons and jails across the U.S. are aflame with COVID-19, and dozens of prisoners have attempted escape to avoid catching the disease. In March, for example, nine women fled a minimum-security jail in South Dakota after a prisoner in their unit tested positive. No other prisoners ended up catching the disease at that point, but in September, a single positive test at the same jail quickly spread. Two weeks later, 105 of the 140 prisoners at the Pierre Community Work Center had contracted COVID-19.

The women who escaped back in March now face up to five years in prison on top of their original sentences. Like Lovercamp and Wynashe, they had good reason to get away from the jail. But *People v. Lovercamp* created a high bar to claim the right to escape: There had to be a specific, serious, and imminent threat to the prisoner’s safety; the prisoner had to have tried to seek help from prison authorities; the prisoner couldn’t use violence to escape; and the escaped prisoner had to turn themselves in immediately after they were safe from the threat inside the prison.

Lovercamp and Wynashe just barely fulfilled the criteria—they were caught too quickly to find out whether they would have turned themselves in. To properly pass the *Lovercamp*

test, the South Dakota prisoners were obliged to walk back into the same facility they had fled.

The logic of the *Lovercamp* ruling was born of three irreconcilable positions: Prisoners must be imprisoned; prisoners have a right to safety; prison authorities do not keep prisoners safe. The right to escape bridged the logical gap by making prisoners responsible for protecting themselves. Still, decriminalizing some escapes was more of a salve for society's conscience than an actual safeguard for endangered prisoners.

“Before ... we are exposed to the spectacle of hordes of prisoners leaping over the walls screaming ‘rape,’ we hasten to add that the defense of necessity to an escape charge is extremely limited,” the court wrote in its ruling, which is still cited today.

The *Lovercamp* precedent has occasionally helped people in custody. In 2013, for example, a man left handcuffed in the backseat of an overheated police car, his face smeared with dog feces and soaked with tear gas, kicked out the window because he was struggling to breathe. *Lovercamp* helped overturn his conviction for breaking the window. But the ruling has mostly been used against escaped prisoners because they failed to fulfill its stringent requirements.

A prisoner escaped because he had a staph infection in his eye and wasn't getting the medical care he urgently needed; he turned himself in to authorities five days later. A girl moved away to flee a coercive sexual relationship with a foster parent, violating the terms of her probation. An informant skipped town when he faced imprisonment because he credibly feared he would be killed by the prison gang he had informed on. The *Lovercamp* precedent helped uphold convictions in each of their cases.

The ruling recasts the systemic, ongoing dangers of imprisonment as stand-alone threats. *Lovercamp* and *Wynashe*, for example, could lawfully escape from the imminent violence they faced from a group of prisoners, but they were obliged to return immediately afterward because, in the court's imagining, the danger would have passed.

But prisons are systemically unsafe. Prisoners are six times more likely to have been sexually victimized than free Americans, and roughly half of the victimizations are inflicted by prison guards. Prisoners are contracting COVID-19 at four times the rate of people on the outside, and they are dying at twice the rate. Social distancing is generally impossible for prisoners, and many don't even have access to soap or masks. Yet courts have been mostly unwilling to sign off on the kind of formal, legal large-scale decarceration necessary to protect prisoners from COVID-19, opting instead for piecemeal releases that have kept the vast majority of prisoners behind bars.

Lovercamp might help a few prisoners, but it's designed to create exceptions that prove the rule. For example, the South Dakota prisoners have a plausible case. The September outbreak that ripped through the jail shows that the prisoners were in real danger back in March, explained Marc DeGirolami, a law professor at St. John's University: Given the speed of contagion, the jail might as well have been on fire. But even if the prisoners won a hypothetical case, the court would presumably tailor its ruling to the circumstances at the Pierre Community Work Center at that particular moment in time to ensure no other prisoners could use it to justify escaping.

"Based on the legal prongs laid out in *Lovercamp*, I think that there is a legal argument to be made [for the South Dakota prisoners]. Whether that legal argument would be successful, I think, is another question entirely based on the courts' tendency for self-preservation," said Jimmy Taylor, a law clerk with the Prisoners Legal Advocacy Network of the National Lawyers Guild. A defendant has to convince a judge to even permit them to raise a necessity defense, and judges often refuse. "That is an argument that strikes at the foundation of the criminal justice system."

Lovercamp is like a relief valve, addressing individual cases to relieve the moral pressure on the system as a whole. The judges in *Lovercamp* knew prison rape was a serious problem, but they were wary of "too much justice": If every prisoner who feared they might get raped could escape until the danger passed, prisons would empty out—a systemic solution to a systemic problem. The judges weren't interested in abolishing incarceration, however. Marsha Lovercamp and Linda Wynashe only got away with escaping because their circumstances were so unusually sympathetic—after all, they barely even made it over the fence. 📌

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