From Lovercamp to a Prisoner's Right to Escape: An Inescapable Conclusion?

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INTRODUCTION

In a 1975 law review article, Professor Martin R. Gardner analyzed the California Court of Appeal's decision in People v. Lovercamp. The court held that a prisoner who escapes under threats of violent sexual assault can raise a defense of "necessity." Professor Gardner argued that this holding creates a right to escape for prisoners who are subjected to violent sexual assaults while incarcerated. Ultimately, the establishment of this right would lead to its use in habeas corpus proceedings brought by inmates to secure their release from incarceration when their personal security could not be guaranteed by the state. Thus, prisoners could demand either definite improvement by the state in providing for their security or their release from confinement.

One may be in sympathy with the commendable end Professor Gardner hopes to attain and still be troubled by the means he has chosen to reach it, namely, the novel step of asserting that the inmate has a right to escape. The purpose of this Comment is to offer a brief critique of Professor Gardner's ingenious and complex interpretation of Lovercamp. Particular emphasis will be placed on his use of Hohfeld's analysis of jural relationships.

* The author is indebted to Professors James B. Brady and Thomas D. Perry of the Philosophy Department of the State University of New York at Buffalo for their insightful criticisms of this paper.

3. See Gardner, supra note 1, at 144-52.
4. Wesley Newcomb Hohfeld was concerned with the confusion of fundamental legal concepts which resulted from inadequate and ambiguous legal terminology. This confusion of concepts would lead to the oversimplifying of complex legal problems and the overlooking of vital distinctions which, in turn, could produce erroneous resolutions of concrete legal questions. The broad and indiscriminate use in legal discourse of the term "right" so as to include privileges, powers, and immunities was a clear manifestation of a misleading ambiguity. Hohfeld responded to this ambiguity with a precise analysis of the fundamental legal concepts. According to Hohfeld, "right" in the strict sense refers to one's affirmative claim against another person. It is to be distinguished from the other fundamental concepts, most notably "privilege," which refers to one's freedom from the claim of another.

Hohfeld asserted that the fundamental legal concepts are sui generis and, therefore, are inappropriate terms for formal definition. He felt that the development of a
I. People v. Lovercamp

Marsha Lovercamp and another female inmate were confined in a state institution for the detention and treatment of drug addicts. Throughout their confinement they were threatened by a group of lesbian inmates who demanded their participation in sexual acts. Complaints to prison authorities were unavailing. On the day of the escape, they were again threatened by a group of ten or fifteen lesbian inmates and a fight ensued. Ms. Lovercamp was informed, after the fight, that she would "see the group again." The defendant and the other inmate feared for their lives and fled the institution. They were promptly recaptured a short distance away. Ms. Lovercamp sought to introduce evidence of this sexual intimidation at her trial for escape. The offer of proof was

scheme of "opposites" and "correlatives" for each of the eight fundamental concepts would facilitate an understanding of these concepts and of the distinctions among them. Hohfeld illustrated this scheme in the following table (read downward for the relations):

<table>
<thead>
<tr>
<th>Jural Opposites:</th>
<th>right</th>
<th>privilege</th>
<th>power</th>
<th>immunity</th>
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</thead>
<tbody>
<tr>
<td>no-right</td>
<td>duty</td>
<td>disability</td>
<td>liability</td>
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W. N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning 26, 35-64 (1964 ed.) [hereinafter cited as Hohfeld].

Professor Glanville Williams has pointed out an inadequacy in Hohfeld's scheme of rights and privileges and their respective correlatives. He maintains that for the scheme to be complete a distinction must be made between rights of positive content (obliging someone to act in a certain way) and rights of negative content (obliging someone to forbear from acting in a certain way). Thus the portion of the above table referring to rights and privileges should be expanded to include Williams' distinction as follows:

<table>
<thead>
<tr>
<th>Jural Opposites:</th>
<th>Positive Content</th>
<th>Negative Content</th>
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<tbody>
<tr>
<td>right</td>
<td>privilege not</td>
<td>duty</td>
</tr>
<tr>
<td>no-right</td>
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<tr>
<td>Negative Content</td>
<td>privileged not</td>
<td>duty</td>
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<td>right . . . not</td>
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Williams, The Concept of Legal Liberty, 56 Colum. L. Rev. 1129, 1135-39 (1956)
refused by the trial judge. Subsequently, Ms. Lovercamp was convicted of the crime of escape.⁵

The court of appeal reversed the conviction, holding that the trial court had erred in rejecting the defendant’s offer of proof and that a “limited” defense of necessity is available to such a defendant when certain conditions are present.⁶ This limited defense was found to be the proper way of balancing the individual interest of the inmate and the strong public interest against escapes⁷ in a manner that adequately protects both. The court concluded: “We have not formulated a new rule of law but rather have applied rules long ago established in a manner which effects fundamental justice.”⁸

II. PROFESSOR GARDNER’S ARGUMENT

Professor Gardner’s argument in support of the right to escape can be briefly analyzed as follows:

(1) The defense of necessity rests upon the “choice-of-the-less-er-evil” rationale. When a person, because of pressures from his surrounding environment, is forced to choose between violating the literal requirements of the law or complying with the law

⁵. CAL. WELFARE & INSTITUTIONS CODE § 3002 (West 1972): “Every person committed pursuant to this chapter or former Chapter II . . . of Title 7 of the Penal Code who escapes or attempts to escape from lawful custody is guilty of a crime.” Once the offer of proof was refused, the defendant was convicted more or less as a matter of course, since she did not deny committing the act of leaving custody with the general intent to leave (the elements constituting the crime).

⁶. [W]e hold that the proper rule is that a limited defense of necessity is available if the following conditions exist:
(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 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.

⁷. Such public interests include a need to prevent disruption of prison order and discipline, a concern about the danger to guards, police and prisoners resulting from escape attempts, and a desire to prevent the widespread public alarm that is occasioned by escapes. See State v. Palmer, 45 Del. 308, 310, 72 A.2d 442, 444 (1950).

⁸. 43 Cal. App. 3d at 827, 118 Cal. Rptr. at 112 (1974). The court later reiterated that feeling: “We do not conceive that we have created a new defense to an escape charge. We merely recognize, as did an English Court 238 years ago, that some conditions ‘excuseth the felony.’” Id. at 833, 118 Cal. Rptr. at 116 (1974).
and producing harm greater than the harm done by violating the law, in order to maximize social utility (which requires that the lesser evil be chosen), the person will have a defense against prosecution for the violation under the doctrine of necessity. This defense is generally viewed as justificatory.9

(2) Criminal defenses grounded on the concept of justification negative the \textit{actus reus} element of criminal responsibility.10

(3) Therefore, necessity negates the \textit{actus reus} of the crime.

Turning to \textit{Lovercamp}, Gardner asserts:

(4) Courts have the power to change, reaffirm or create new legal relationships by their decisions.

(5) The \textit{Lovercamp} court created a new rule that has changed the legal relationship between the inmate and the state: under certain limited conditions (those allowing for the applicability of the necessity defense11) an inmate can leave confinement with impunity.

(6) The critical issue then becomes: What is the extent of this change in the legal relationship? Gardner distinguishes between privileges and rights which result from a court’s exercise of its power. The importance of this distinction and of whether \textit{Lovercamp} supports a privilege only or also a right is better understood through the use of Hohfeldian analysis of rights, privileges and their correlatives.12 If only a privilege has been created, then when the \textit{Lovercamp} conditions are present one has no duty not to escape. However, this does not determine whether the inmate can be prevented from exercising this privilege or whether she subsequently can be reconfined in the same institution and serve the remainder of her original sentence. On the other hand, Professor Gardner argues that if a right to escape is created, then the state has a duty not to interfere with the inmate’s exercise of her right. Non-interference would obligate the state not to con-

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9. Gardner, \textit{supra} note 1, at 118.
10. Gardner, \textit{supra} note 1, at 116. This principle can be illustrated by considering the justificatory defense of self-defense. The \textit{mens rea} element of what would otherwise be a crime remains unaffected by the defense since the retaliating victim does have the intent to harm. When the requirements for the defense are met, however, the victim’s retaliatory attack on the aggressor is no longer considered wrongful conduct. In other words, the \textit{actus reus} is negated.
11. \textit{See} note 6 \textit{supra}.
12. \textit{See} note 4 \textit{supra}.
fine a prisoner in a setting in which she faces imminent threats of sexual assault, that is, when the right to escape exists. Finally, if a right to escape exists, then a remedy must be available for its violation. The remedy would be release from confinement when the state cannot meet its duty to confine free from sexual assaults.

(7) There are four bases or rationales that support the existence of the right to escape:

(a) Professor Gardner's primary argument for the existence of the right relates to the workings of the justificatory defense presented in paragraphs (1)-(3):

While Lovercamp clearly establishes the privilege of escape under specified conditions, the logic of the decision also entails the stronger interest of an inmate right to escape. Because escapes under the Lovercamp conditions are "justified," it follows that confinement in prison environments creating that particular choice of evils situation is unlawful. This assertion is explicated as follows: Escapes under the Lovercamp conditions are justified under the necessity doctrine. Justificatory defenses negate the actus reus of the crime. The crime of escape involves the intentional leaving of lawful custody. Since in Lovercamp situations there is no actus reus, the custody is not lawful. Therefore, such an inmate has no duty to remain in the conditions of his prior confinement and the state has no right to prevent escapes nor has it a right to continue a confinement that would justify escape.

(b) Further support for the establishment of the right emanates from the "general doctrine that it is unlawful for third persons to defend against, or prevent justified acts." Since the escape is justified and not unlawful, guards may not legally prevent it, and the state cannot subsequently confine in the same situation. Without special protection such a further confinement would be unlawful, especially where there is a great possibility of retaliation against the inmate for any "snitching" he may have done to authorities to prove that his escape was justified.
(c) If a prisoner is prevented by the state from justifiably escaping, he is denied his right to confinement free from sexual assault.

(d) Finally, Professor Gardner notes that various policy considerations support the view that Lovercamp implies the right to escape. The inmate's interests are recognized under conceptions of "civilized" treatment and fundamental justice. These interests require judicially enforceable remedies to insure confinement free from sexual assaults. These remedies necessitate not only short-term self-help (the privilege), but also the long-term aid that the right to escape will afford. If a humane society cannot countenance such conditions in a penal system, then the court has the responsibility to recognize the right to escape in such situations and to provide remedies for violations. Further, competing interests of the state are not injured, since those interests extend only to lawful imprisonment consistent with the purpose of the criminal sanction.\(^\text{16}\)

In sum, Professor Gardner concludes that Lovercamp implies a right to escape.\(^\text{17}\) The remainder of this Comment will critically examine whether such an inference is warranted. More specifically, Lovercamp and the rationales of paragraph (7) above will be analyzed in greater detail to determine if one justifiably could conclude that there is a "right to escape."

III. A CRITICISM OF PROFESSOR GARDNER'S ARGUMENT

The situation before the court in Lovercamp involved a number of Hohfeldian correlatives. A listing of these correlatives, along

\(^{16}\) Confine ment without protection from sexual assault, as indicated in paragraph 7 (a), is unlawful and is not consistent with the purpose of the criminal sanction, whether rehabilitation or retribution is the preferred rationale. Gardner, supra note 1, at 143.

\(^{17}\) It is apparent from even a cursory examination of his article that Professor Gardner is also attempting to say a good deal about the distinction between the defense of necessity and the defense of duress as they relate to Lovercamp and the argument for the right to escape. At best, his discussion of the distinction is unrelated to the main argument. At worst, he posits a difference in kind where one does not exist. It makes no difference to his argument if duress is found to be a subclass of necessity that, purely by historical accident, has been relegated to cases of threats from human rather than physical forces. Viewed this way, duress also would be a justificatory defense. Professor Gardner himself vacillates as to the significance of the distinction. At one point, he attests to its importance. Gardner, supra note 1, at 131 n.117. Later, he avows that the distinction is not of great consequence, the pertinent issue being whether the defense sounds in justification. Id. at 133. Accordingly, this Comment will refer to the defense as necessity, recognizing, however, that whichever term a court may choose to utilize, if it is taken to justify conduct and to be based on the choice-of-the-lesser-evil rationale, it is applicable to Professor Gardner's scheme.
with some commentary to clarify their meanings, is necessary to analyze critically Gardner's argument. This list will not exhaust the various relationships that may exist between the inmate and the state. Rather, it will contain correlatives particularly relevant to the issue addressed in Lovercamp and will serve as the basis for appraising additional correlative pairings and analogies as the analysis progresses. Finally, this section will examine each rationale catalogued in paragraph (7) of Part II to determine the soundness of Gardner's conclusion.

A. The Hohfeldian Correlatives

1. Right/duty relations:

Right of state that the defendant not escape from lawful confinement.

Duty of defendant not to escape from lawful confinement.

This relationship is derived from the California Welfare and Institutions Code's escape provision,\textsuperscript{18} which creates a duty on the part of the defendant not to escape from lawful confinement. The concept of legal duty can be described as a societal compulsion upon one to act or not to act for the benefit of another. Its basis is in laws that are by nature coercive.\textsuperscript{19} Its correlative, "right," signifies one's affirmative claim against another regarding the action of that other person.\textsuperscript{20}

The establishment of a duty generally is sufficient to establish the existence of a correlative right, in that the relation of the concepts is an expression of a single, uniform idea:

Any given single relation necessarily involves two persons. Correlatives in Hohfeld's scheme merely describe the situation viewed first from the point of view of one person and then from that of the other. Each concept must, therefore, as a matter of logic, have a correlative.\textsuperscript{21}

\textsuperscript{18} See note 5 supra.

\textsuperscript{19} Corbin, \textit{Forward} to W. N. Hohfeld, \textit{Fundamental Legal Conceptions as Applied in Judicial Reasoning} at ix (1964 ed.).


\textsuperscript{21} Id. at 10. See also Corbin, supra note 19, at ix; Brady, \textit{Law, Language, and Logic: The Legal Philosophy of Wesley Newcomb Hohfeld}, 8 \textit{Transactions of the Charles S. Pierce Soc'y} 246, 248 (1972) (referring to the correlative concepts as equivalents).
Some legal philosophers, however, declare that there are no rights in individuals correlative to the obligations imposed by the criminal law. They maintain that the test for the existence of a right correlative to an obligation is the control that an individual, whether or not a beneficiary of the obligation, has over the obligation:

The idea is that of one individual being given by the law exclusive control, more or less extensive, over another person's duty so that in the area of conduct covered by that duty the individual who has the right is a small-scale sovereign to whom the duty is owed. The fullest measure of control comprises three distinguishable elements: (i) the right holder may waive or extinguish the duty or leave it in existence; (ii) after breach or threatened breach of a duty he may leave it "unenforced" or may "enforce" it by suing for compensation or, in certain cases, for an injunction or mandatory order to restrain the continued or further breach of duty; and (iii) he may waive or extinguish the obligation to pay compensation to which the breach gives rise.

While the civil law recognizes such control on the part of individuals, the criminal law does not. There is, therefore, a distinction between duties from legal rules designed to prohibit conduct and duties from legal rules designed to create rights, with only the latter conferring correlative rights.

While the "control" theory suggests the concept of legal power and, therefore, may tend to obfuscate a discussion of the right/duty relation, it would not appear to exclude a right in-


23. This is opposed to the "benefit" theory expounded by Bentham, whereby the concept of a right correlative to a duty was defined in terms of the intended beneficiary of the obligation. Those adhering to the "control" or "choice" theory assert that benefit from the obligation is neither sufficient nor necessary for the existence of a right correlative to the duty. Hart, supra note 22, at 196.

24. Id. at 192. See also Marshall, supra note 22, at 235.


27. It is not clear whether the "control" or "choice" theory deprecates the attestations of Hohfeld and others (see note 19 supra) that logic demands that each concept have a correlative, or whether it does not attack the right/duty relation as such but rather contends that: (1) the true right/duty relation is between the state and individuals as duty-holders—there are no obligations to individuals and only the state, a collective whole, can suffer injury with respect to breaches of the criminal law; or (2) while the
herent in a "large-scale sovereign" such as the state. Indeed, the state places the duty on the inmate; he owes the duty to the state, and the state has control over the enforcement of the duty through its various agents (police, prosecutors and the courts).28 Litigation concerning the existence of the defendant's duty will also concern the propriety of the state's claim that the defendant refrain from acting in a certain way.

Further clarity is added to Hohfeld's concept of "right" by inquiring into the character of that concept. Bentham categorized rights as either claims for negative services, that is, another's abstaining from harmful action towards the right-holder, or claims for positive services, that is, useful action to be performed by another for the right-holder.29 Accordingly, the above right of the state is one for negative service.

Right of the inmate that the state reasonably provide for his security.

Duty of the state reasonably to provide for inmate security.

While at one time the state's obligations to a prisoner were thought to be minimal,30 both statutory law31 and case law32 indicate that individual may, strictly, have a right correlative to an obligation imposed by the criminal law, it is virtually naked and meaningless, since the powers necessary to enforce it are under the control of the state. As such, it may be better to speak of a citizen's duty to the state not to do X to another citizen, instead of a citizen's duty not to do X to another citizen, where X equals a crime.

28. Professor Gardner refers to the state as the "other party to the controversy." Gardner, supra note 1, at 135.

29. J. BENTHAM, Of Laws in General, in COLLECTED WORKS OF JEREMY BENTHAM 58-59 (1970) [hereinafter cited as BENTHAM]. See also Hart, supra note 22, at 176-77. Professor Williams refers to these as "rights of negative content" and "rights of positive content." Williams, supra note 4, at 1135.

30. "[The convicted felon] has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State." Ruffin v. Commonwealth, 62 Va. (21 Grat.) 790, 796 (1871).

31. CAL. PENAL CODE § 2652 (West 1970) (making it "unlawful to . . . allow any lack of care whatever which would injure or impair the health of a prisoner . . . ."), and id. § 2653 (making it punishable to be "guilty of wilful inhumanity . . . toward any prisoner in a state prison). See also N. Y. CORRECTION LAW § 46 (McKinney 1968) (requiring state commissioner of correction to protect and preserve the health of the inmate); 18 U.S.C. § 4042, (1970) (requiring prison administrators to provide for the safekeeping, care, subsistence, and protection of all federal prisoners).

32. Indeed, the State has a duty to assure inmate safety . . . . The persons in charge of our prisons . . . are obliged to take reasonable precautions in order to provide a place of confinement where a prisoner is safe from gang rapes and beatings by fellow inmates, safe from guard ignorance of pleas for help and safe from intentional placement into situations where an assault of one type or another is likely to result.
cate that at present the state is obliged to take reasonable steps to insure a prisoner's safety and well-being. The correlative right of the inmate is one of positive content and his claim against the state or prison officials would be a classic example of liability based on a failure to perform a service for which there was a legal duty to perform imposed by law. While widespread success in litigating the inmate's claim for the violation of the duty to protect has not been forthcoming, the claim would be fortified if the inmate could show a violation of constitutional prohibitions against cruel and unusual punishment. The "hands-off" doctrine would be abandoned, and release from confinement would be a possible remedy. However, prevailing on this constitutional issue may be problematic, particularly when a single, specific right (for example, the right to protection from sexual assault while imprisoned) is asserted, rather than a "totality of deplorable circumstances."

A great deal of caution must be exercised to guard against confusing the separate relations in situations where more than one correlative set exists. For example, in People ex rel. Brown v. 


33. See note 29 supra & accompanying text.

34. Cf. Model Penal Code § 2.01, Comment (Tent. Draft No. 4, 1955): "Liability for the commission of an offense may not be based on an omission unaccompanied by action unless . . . (b) a duty to perform the omitted act is otherwise imposed by law."

35. See Gardner, supra note 1, at 111-12.


37. Professor Gardner states: "[N]o case has specifically held that the inmate has a constitutional right to be free from homosexual assault." Gardner, supra note 1, at 112. Instead, such assaults are merely part of a totality of deplorable circumstances which have led courts to declare incarceration in some prisons to be cruel and unusual punishment. See cases cited id. n.9. But see Woodhous v. Virginia, 487 F.2d 889 (4th Cir. 1973) (per curiam) (holding that confinement in a prison where violence and terror reign is cruel and unusual punishment even if the particular inmate does not fear imminent sexual assault); Rubin, Introduction—Symposium: A Model Act for the Protection of Rights of Prisoners, 1973 WASH. U.L.Q. 551, 555 (section 2 of the Model Act reads: "The prevalence of homosexual assaults in all institutions . . . is a notorious violation of constitutional rights."
Johnston, the New York Court of Appeals stated that a “state’s right to detain a person is entitled to no greater application than its correlative duty to protect him from unlawful and onerous treatment.” There are two distinct sets of correlative at work in the statement: the right of the state that the inmate not escape/duty of the inmate not to escape, and the right of the inmate that the state reasonably protect him from unlawful and onerous treatment/duty of the state to protect the inmate from unlawful and onerous treatment. If such a remark is interpreted as involving only one set (the right of the state to detain/duty of the state to protect), the remark is obviously fallacious, since the right and duty may not attach to the same party in any single correlative pairing. But once the two separate correlative pairings are correctly identified, the policy judgment that must then be made—whether the state’s right to incarcerate should be limited by its duty to protect—is clearly exposed.

Right of the state to have prison officials prevent inmates from escaping from lawful confinement.

Duty of prison officials to prevent inmates from escaping from lawful confinement.

Concomitant to the state’s right that an inmate not escape from lawful confinement is a duty imposed on the responsible officials to prevent escapes. Indeed, failure to fulfill this obligation may result in severe sanctions.

2. Privilege/no-right relation:

Privilege of the responsible state officials to prevent inmates from escaping from lawful confinement.

No-right of defendant that responsible officials not prevent his escape from lawful confinement.

39. Id. at 485, 174 N.E.2d at 726, 215 N.Y.S.2d at 45-46.
40. CAL. PENAL CODE § 4533 (West 1970) (subjecting a prison warden, jailor or guard to up to 10 years imprisonment and a $10,000 fine for voluntarily permitting the escape of any prisoner in custody).
41. This Comment will retain the terminology of Hohfeld in preference to the other term in popular use, “liberty.” As Professor Williams indicates, both “privilege” and “liberty” present difficulties in their application. The former often cannot be detached from the common conception that it refers to a special favor (one not available to everyone)—which surely is not a correct description of the concept. The latter is frequently used to connote the philosophical idea of “free choice,” rather than “the opposite of duty.” See Williams, supra note 4, at 1131-32, 1139-49. Therefore, until their meanings as legal terms of art are firmly established, there may be confusion in using either term.
Since officials have a duty to prevent escapes, it follows that they are also privileged to prevent escapes; that is, they may act to stop the inmate and may return her to confinement.42 The inmate's correlative no-right means that she has no claim against these officials. Furthermore, the privilege is a "unilateral" one, that is, one occasioned by the liberty to do an act plus a duty to do the act, which, in turn, eliminates a privilege not to do the act.43

3. Power/liability relation:

Power of the court to change the existing legal relationship between the state and the inmate regarding the availability of an affirmative defense for escape prosecutions.

Liability of the state and the inmate that the court will change the existing legal relationship between them as regards the availability of an affirmative defense.

It has been said that "[the courts have] a power when a change in legal relations may take place due to 'some superadded fact or groups of facts' which are under [the court's] 'volitional control.' "44 Lovercamp illustrates this concept. The California Court of Appeal utilized its power to determine the nature of the legal relationship between the state and the inmate where the interplay of the relevant duties and privileges was uncertain:45 the defendant was obliged under the escape statute not to escape. Affirmative defenses like necessity, if established, would justify criminal conduct; however, the courts had also recognized the general rule that intolerable conditions of confinement do not justify escape.46 The

42. What is obligatory is also privileged. See Hart, supra note 22, at 175-76; Brady, supra note 21, at 248.
43. See Hart, supra note 22, at 182. A privilege is bilateral when the privilege-holder may either do an act (no duty not to do the act) or not do that same act (no duty to do the act). A bilateral privilege becomes unilateral when a duty is imposed upon the privilege-holder either to do the act or not to do the act, thereby destroying his choice. For a privilege and a duty to be compatible they must be of similar content and not of opposite tenor. Id.; Williams, supra note 4, at 1131. The guards' privilege to prevent escapes and their duty to prevent escapes are compatible and their combination results in a unilateral privilege.
44. Brady, supra note 21, at 252.
45. Bentham referred to these as "blanks" in the law or as "imperfect mandates" which are left to the power-holders to "fill up." Hart, supra, note 22 at 179.
court resolved the uncertainty regarding the legal relation by establishing a privilege to escape:

Privilege of defendant to escape from lawful confinement under specified conditions.

No-right of the state that defendant not escape from lawful confinement under specified conditions.

By declaring that its limited "defense of necessity to an escape charge is a viable defense," the Lovercamp court countermanded the duty otherwise imposed upon the defendant by the conjunction of the escape statute and the rule that intolerable conditions do not justify prison escape. The court's decision means that the defendant is under no duty not to escape where the proper conditions are present. Thus, this privilege to escape is a negation of a duty of negative content. These two negatives perform logically separate functions and, accordingly, "no duty not to escape" cannot be reduced to "duty to escape." Therefore, the court did not formulate a unilateral privilege such as the guards' privilege to prevent escapes. Professor Gardner may be asserting that a duty to escape exists, at least as a moral principle, when he speaks of the moral obligation to choose the lesser of two evils. However, it is by no means clear that there is a legal obligation to choose the lesser of two evils as well as no duty not to make such a choice. For example, does a man violate the criminal law by stopping for red lights when, because his wife is close to giving birth, he would be justified in running them?

47. This was an exercise of power even though itself subject to the legislature's power to adjust the relationship in the Penal Code. In addition, Lovercamp is an excellent illustration that Hohfeldian "liabilities" are not necessarily disadvantageous, in that the court's exercise of power created an advantageous privilege for Ms. Lovercamp.
48. 43 Cal. App. 3d at 831, 118 Cal. Rptr. at 115.
49. Bentham categorized legal rules that permit some action previously legally prohibited or obligatory as rules of "active permission" which "countermand." BENTHAM, supra note 29, at 57-58. See also Hart, supra note 22, at 174.
50. See note 6 supra.
51. It does not speak of the privilege not to escape. Since one always has a privilege to do what she has a duty to do, this latter privilege always existed under the coercive law. The defendant has, strictly speaking, a "bilateral" privilege. This privilege to do what one is obliged to do is often, however, a liberty to do a disadvantageous thing and is of little importance in the criminal law. As such, it seems linguistically odd, if not incorrect, to talk of the "privilege to pay taxes" or the "liberty not to escape." See Williams, supra note 4, at 1139; Hart, supra note 22, at 176, 182.
52. See Williams, supra note 4, at 1136.
53. See text accompanying notes 42-43 supra.
54. Gardner, supra note 1, at 140.
The state's correlative no-right precludes the possibility of a contention that the defendant breached a legal obligation by escaping under these circumstances.

*Right* of inmate that state *not* interfere with his exercise of his privilege to escape under the specified conditions.

*Duty* of state *not* to interfere with the inmate's exercise of his privilege to escape under the specified conditions.

Professor Gardner maintains that this relationship, dealing with the right to escape, emanates from *Lovercamp*. It is this additional relationship that forms the basis of the disagreement between this author and Professor Gardner.

**B. Critique**

The "right to escape" is a misnomer:

No one ever has a right to do something; he only has a right that someone else shall do (or refrain from doing) something. In other words, every right in the strict sense relates to the conduct of another, while a liberty and a power relate to the conduct of the holder of the liberty or power. A statement that a person has a right to do something generally means that he has a right in the strict sense not to be interfered with in doing it.55

In order to avoid confusion and the possibility of making fallacious statements concerning rights "in the broad sense," one must meticulously and correctly describe the various Hohfeldian relations. The concept that Professor Gardner seeks to assert is more precisely described as the inmate's right that the state not interfere with the exercise of the privilege to escape under the specified conditions, rather than by the phrase "right to escape." Furthermore, the former expression permits an easier formulation of the state's correlative duty so that one can understand its negative content and when this duty is to be performed.

The fundamental error that Professor Gardner makes in viewing *Lovercamp* as establishing a "right to escape" is his contention that the decision establishes a privilege that entails a right to escape.56 Privileges involve protection given to the privilege-

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55. Williams, *supra* note 4, at 1145 (emphasis added). See also Marshall, *supra* note 22, at 240 (characterizing liberty as a "right of action," and claim-right as a "right of recipience").

holder in the form of a refusal of legal redress when asked for by the person against whom the privilege is asserted; rights are the claims of the right-holder against another, vindicated by affirmative action of a court. Lovercamp involved a refusal of legal redress to the state for a breach of the criminal law by granting the limited defense of necessity to the defendant—a privilege to escape under specified conditions. The court did not, however, take any affirmative action regarding the state's conduct toward a prisoner making a privileged escape. A right that the state not interfere was not litigated in Lovercamp.

Can the right emerge from the privilege? First, the duty of the guards to prevent escapes from lawful confinement and their concomitant privilege to do so are not destroyed by the privilege afforded in Lovercamp: "[W]hen it is said that a given privilege is the mere negation of a duty, what is meant, of course, is a duty having a content or tenor precisely opposite to that of the privilege in question." The duty precisely opposite to the inmate's privilege established in Lovercamp is the duty of the prisoner not to escape from confinement under specified conditions. Consequently, though the privilege exists, the inmate still has no right that the guards not prevent his escape from lawful confinement under the specified conditions.

Thus, a privilege may exist without the privilege-holder having an accompanying right not to be interfered with in his exercise of the privilege. The privilege/no-right correlative set has legal significance by itself; it is not required to be tied to a right/duty relation. Therefore, it is fallacious to deduce the latter from the former. To be sure, there can be a right concomitant to the privilege, but the existence of such a right is not automatic. Rather, it "is ultimately a question of justice and policy, and it should be considered, as such, on its merits." Nowhere in its decision did the Lovercamp court conceive of an accompanying right. Nevertheless, Professor Gardner is willing to state: "Whether or not the court 'purported' to create a new inmate right

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57. Cook, Privileges of Labor Unions in the Struggle for Life, 27 Yale L.J. 779, 789-90 n.27 (1918) [hereinafter cited as Privileges of Labor Unions].
58. Hohfeld, supra note 4, at 59. Compare note 43 supra (a privilege and a duty of the same tenor are compatible).
59. See Hohfield, supra note 4, at 41-43; Brady, supra note 21, at 249-51; Privileges of Labor Unions, supra note 57, at 787; Hart, supra note 22, at 180; Williams, supra note 4, at 1143, 1150.
60. Hohfeld, supra note 4, at 43.
to escape, the logic of Lovercamp has this effect. . . . While Lovercamp clearly establishes the privilege of escape under specified conditions, the logic of the decision also entails the stronger interest of an inmate right to escape.” If the interpretation of Lovercamp in this Comment is correct, then clearly the only possible correlative logically implied by the decision is a no-right of the state that the defendant not escape under specified conditions. Professor Gardner, however, offers four reasons for concluding that a “ramification” of Lovercamp is the right to escape. Each will be dealt with in turn.

1. The offense of escape is intentional leaving of lawful custody. The justificatory defense of Lovercamp negates the actus reus, making the act lawful. Since the defendant’s leaving is lawful, the custody in that situation is unlawful. Therefore, the state has no right to prevent escape (opposite of privilege) and no right to continue unlawful confinement which would justify escape.

Professor Gardner performs some linguistic gymnastics with the term “lawful” in order to establish the source of his right. However, he errs on a number of fronts.

What purpose is served by utilizing the term “lawful”? “[I]f we are to be sure of our logic we must adopt and consistently use a terminology adequate to express the distinctions involved.”

The fundamental legal concepts depicted by Hohfeld are considered the “'lowest common denominators' in terms of which all legal problems can be stated, and stated so as to bring out with greater distinctness than would otherwise be possible the real questions involved.” The spirit of this statement is clearly missed by Professor Gardner when he focuses on the ambiguous term “lawful.” By choosing to speak of lawful conduct, rather than the privileged conduct permitted by Lovercamp, he has mud-
died the waters. Once the ambiguous term is injected, the discussion is linguistically contaminated and Gardner can then argue from the lawfulness of the inmates escape to the lawfulness of his claim not to be interfered with.

Furthermore, the ambiguous term obscures the determination of which concepts are of negative content and which concepts serve to negate them. Accordingly, Professor Gardner overlooks the fact that the privilege of Lovercamp is no duty not to escape from lawful custody under specified conditions (this being the negation of the actus reus). Instead, he asserts that because of the justificatory defense the escape was lawful and, therefore, the custody was unlawful. This is plainly inapposite; the negation of the duty of negative content does not go to the matter of the lawfulness of the custody but to the conditions under which a privilege to escape from lawful custody arises. Indeed, the majority of decisions hold that even if the inmate is illegally confined she may not escape, but must use the judicial process to determine the illegality and obtain freedom.

2. It is unlawful to defend against or prevent justified acts. This destroys the privilege of the guards to prevent escapes under the specified conditions and, therefore, seriously compromises their concomitant duty to do so.

This doctrine involves an area of the law which is less than clear. Professor Gardner refers to self-defense as an example of the doctrine at work.

Self-defense can be analyzed as follows:

Victim's (V's) right that aggressor (A) not assault him.
Duty of A not to assault V.
Privilege for V to prevent A's assault.
No-right for A that V not prevent the assault.

66. The "principle of linguistic contamination" describes "the tendency . . . to assume an identity of concepts from the identity of terms." Brady, supra note 21, at 247.
67. Annot., 70 A.L.R.2d 1430 (1960 & Supps.).
68. Gardner, supra note 1, at 140-41.
69. Id. at 140 n.154.
70. This discussion will focus on self-defense as it operates in tort law in order to avoid the difficulty of speaking about an individual's right in the criminal law context. See notes 22-25 supra & accompanying text.
71. V is privileged only to the extent of preventing the assault. If he goes beyond prevention, he is interfering with A's right not to be assaulted. See W. Prosser, Law of Torts § 19, 109-10 (4th ed. 1971).
Of course $A$ cannot defend against $V$'s exercise of his privilege. The reason is not, however, that $V$ has a concomitant right to assault, but rather that $A$'s so-called "defense" against $V$'s retaliatory conduct is a continuation of his breach of the duty not to assault $V$. A statement that $A$ may not defend against $V$'s justified act would, therefore, be inaccurate.

Accordingly, self-defense is not a persuasive analogy to the necessity defense. In the latter, $V$ has a right not to be assaulted and $A$ has a correlative duty not to assault $V$. With the justification provided by the necessity defense, however, $A$ has the privilege to assault; that is, $A$ is under no duty not to assault under specified conditions. $V$, unlike $A$ in the self-defense situation, is an innocent person who has not violated a right. While the privilege for $A$ means $V$ has no right that $A$ not assault him, the concomitant right of $A$ to assault does not necessarily follow. The question of whether in cases of necessity the one against whom the privilege is asserted must not interfere with the justified act should be recognized as one of policy and separate from the doctrines surrounding self-defense.

Over and above the self-defense analogy, the rationale behind the necessity defense is that acts which can be brought under the scope of the defense maximize social utility and thus are justifiable. Professor Gardner feels that one should be under a duty not to interfere with the maximization of social utility—the doing of the justified act. Support for this claim can be found in a seminal article by Francis H. Bohlen on privileges to interfere with property:

[1]In the Law of Torts, an act which, if done under ordinary circumstances, would make the actor liable for invasions of another's legally protected interests of which it is a legal cause, may be done for certain purposes without liability for some or all of such invasions. And the fact that the act is done for certain of the purposes may and usually does have a further effect: the person whose interests are threatened with invasion may lose his immunity from liability for any harm done to the actor in resisting the threatened invasion. Thus not only may the actor gain an immunity from liability, but he may gain a right to invade the other's interest, resistance to which makes the other liable to him.  

72. See text accompanying notes 59-60 supra.
73. Bohlen, Incomplete Privilege to Inflict Intentional Invasions of Interests of Property and Personalty, 39 HARV. L. REV. 307 (1927). See also id. at 316.
However, it is submitted that this doctrine should not hold in the same way for criminal as for civil justifications. Criminal justifications are tied to the notion of a defendant’s guilt and culpable conduct. Civil justifications are concerned with liability and determinations of how to allocate costs of the harm done. Society may view criminal and civil justifications differently. Furthermore, duties imposed by tort law may not be paralleled by duties imposed by the criminal law. Therefore, it is not clear that one has an obligation under the criminal law to maximize social utility by not interfering with a justified assault upon his person.\textsuperscript{74}

\textit{Lovercamp} is an even stronger case since, unlike \textit{V}, who had a right not to be assaulted, prison guards are under a duty to prevent escapes. Professor Gardner’s claim would set up contradictory duties for the guards. Resolution of this contradiction would involve a further investigation of the maximization of social utility and would not be governed by the maximization found to exist for the privilege to escape.

3. \textit{The inmate is denied his right to confinement free from sexual assault by the guards’ privileged action to prevent the defendant’s privileged escape.}\textsuperscript{75}

There are two separate correlative sets operating in this proposition, and no relationship between them is logically demanded. Strictly speaking, the inmate’s right that the state confine him free from sexual assault is denied only if the state does not so confine him. The issue is whether the prevention by the state of the inmate’s escape is an interference with his right to confinement free from sexual assault or whether that right is qualified by the state’s right that the prisoner not escape and the guards’ duty and privilege to prevent escapes. To be sure, rights can be qualified by

\textsuperscript{74} Indeed, Professor Bohlen qualified the doctrine to some extent even for tort cases:

\begin{quote}
It is unlikely that one threatened with bodily harm will be held to be deprived of his privilege to resist it because its infliction is obviously necessary to save the person attempting to inflict it from death or “serious” injury merely because the threatened harm is not itself “serious.” It is probable that the privilege of resistance will be lost only when the bodily harm threatened is out of all proportion small as compared with that which can only be prevented by its infliction [or where the personal injury is trivial and a property injury is great].
\end{quote}

\textit{Id.} at 323-24. \textit{But see} J. \textsc{Hall}, \textsc{general principles of criminal law} 434-35 (2d ed. 1960).

\textsuperscript{75} Gardner, \textit{supra} note 1, at 141. “[T]he right to incarceration free from sexual assault ultimately depends on the defense of necessity.” \textit{Id.} at 125.
other relationships. For example, one has a general right not to be interfered with while spending one's money as one pleases. This right, however, would be limited by duties placed on one not knowingly to spend it to purchase stolen goods. A determination that the "right to escape" does not exist is not a denial of the prisoner's right to be confined free from sexual assault. Rather, it is a determination that the prisoner must seek redress for the violation of that right through the judicial process and not by way of an unmanageable self-help remedy.

4. The public policy supporting civilized and humane treatment of inmates dictates that there be a right to escape under the Lovercamp conditions. 76

The inmate interests recognized under conceptions of civilized treatment and fundamental justice do not inevitably lead to a right that the state not interfere with an escape in order to protect other prisoner rights, such as confinement by the state with reasonable provisions for inmate safety and health. Once more, a prisoner's self-help remedy should not be preferred over judicial proceedings.

Professor Gardner is wrong when he reads Lovercamp as affording a self-help remedy as a matter of fundamental justice. 77 As a matter of fundamental justice and maximization of social utility, Lovercamp furnished an affirmative defense—a privilege which would be protected by a refusal of the court to convict. A self-help remedy, on the other hand, would relate to affirmative action by the court to vindicate the violation of a right. A violation of a right not to be interfered with in making an escape was not an issue before the Lovercamp court and, thus, one would be hard pressed to find a remedy flowing out of a case concerning such a violation.

The argument that a court cannot countenance a prison system characterized by its inhumanity and, therefore, should recognize the right to escape 78 is more of a plea to the courts to recognize the right than an illustration that the right is a "ramification" of the Lovercamp decision. Again, it must be stressed that the existence of a right is not proved merely by showing the existence of a privilege, even when the policy considerations for the privi-

76. Gardner, supra note 1, at 142.
77. Id.
78. Id.
lege furnish a strong reason for recognizing the right/duty cor-
relative set. Ultimately, the recognition of a right is a new and
separate policy decision involving, among other things, the impli-
cations of "non-interference" and the soundness of providing pris-
one self-help rather than improving existing judicial remedies.

Finally, an attempt to skirt this new policy judgment by say-
ing that no state interests are compromised since they extend only
to lawful incarceration is misleading. While there is a strong policy
against incarceration under unlawful circumstances, there are also
substantial state interests against escapes. It is one thing for a
prisoner to have his incarceration declared illegal and to be set
free by operation of the law; it is another thing for the prisoner
to protect his rights by self-help in violation of the law against
escapes. The legitimate policies against escapes would still be com-
promised. Lovercamp's narrow privilege to escape under specified
conditions was considered to have a minimal impact on societal
interests while recognizing the individual's interest in personal
security. The privilege, however, applies without regard to the
legality of the confinement. Therefore, the lawful/unlawful in-
carceration distinction is inapposite and confusing.

Conclusion

Professor Gardner's argument that a "right to escape" has
been created is unconvincing. Analyzing the Lovercamp case by
careful application of fundamental legal concepts resolves part of
the problem—it shows that the right alleged is not strictly implied
by the "logic" of the decision. This is only a partial resolution,
however. The analysis presented in this Comment only serves to
expose the policy decisions that must be made. Future courts
will have to come to grips with the "hard case" and decide whether
a "right to escape" is to be added to the array of prisoners' rights.

80. See note 7 supra.
81. 43 Cal. App. 3d at 827, 118 Cal. Rptr. at 112.
82. The privilege means that the inmate has no duty not to escape from lawful
confinement. It is the negation of a duty of negative content and cannot be rephrased
as a privilege to escape from unlawful confinement.
83. Gardner, supra note 1, at 139. "The difficulty is not so much in trying to
solve the problem 'merely by logic,' but in trying to solve it by false logic." Privileges of
Labor Unions, supra note 57, at 785.
84. See Brady, supra note 21, at 254-55.
One can imagine that it will be more advantageous to litigate the issue of inmate security (and the remedies for violation of the rights involved) directly rather than by way of escape prosecutions.

The privilege itself may appear emaciated and worthless without the concomitant right; it does not offer much to the inmate who is subject to sexual attacks. Still, the Lovercamp privilege offers the same thing that all other privileges offer: protection from another’s claim upon the privilege-holder for a breach of a duty.

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