

[Article version with full citations, from *Criminal Justice Section Newsletter*, Winter 2024, published by the American Bar Association Criminal Justice Section.]

We Must Continue to Punish “Mere” Walkaway Prison Escapes

By T. Markus Funk

T. Markus Funk is a partner at Perkins Coie, who had served as a federal prosecutor in Chicago. Portions of this article are drawn from a longer-form analysis that will appear in the Oxford University Comparative Law Forum.

Some believe we should follow the examples of countries like Germany and Mexico that do not punish inmates who engage in nonviolent “walkaway” prison escapes. But compelling public policy considerations, including ensuring public safety, conserving taxpayer funds, and safeguarding the rule of law, must outweigh a prisoner’s desire to be free.

On the last day of August 2023, prison surveillance cameras [captured](#) 34-year-old convicted killer Danelo Cavalcante [escaping](#) his Pennsylvania maximum security prison by crab-walking up two walls separated by a five-foot hallway. Cavalcante was serving a life sentence for his [vicious](#) April 2021 stabbing murder of ex-girlfriend Deborah Brandão, an attack that took place in front of her two small children. He additionally is wanted in his native Brazil for felling a [friend](#) in a hail of bullets. (His 2018 decision to illegally enter the United States allowed him to avoid facing those murder charges.)

Cavalcante was and is a dangerous, ruthless, hardened criminal—which explains why his escape made [international news](#) during the two weeks he was able to evade recapture despite the ongoing [“intense manhunt.”](#)

The United States is a country grappling with broad criminal justice reform efforts, some of which are sensible, morally compelled, and overdue. But we should not follow the examples of countries like Germany, Switzerland, Mexico, The Netherlands, and Austria which do not outlaw nonviolent prisoner escapes such as Cavalcante’s.

Walkaway Escapes OK Because of the “Natural Desire to Be Free”

In the United States, as well as around the world, prison escapes such as Cavalcante’s occur with surprising regularity. With a [prison population](#) approaching 2 million (the United States [leads the world](#) in terms of its incarceration rates, with up to 400,000 individuals sentenced to state or federal prison each year, [followed by](#) China, Brazil, India, and Russia, respectively), the United States has about 2,000 escapes a year.

Hollywood has in fact developed its own genre of movies based on such prison breakouts, frequently featuring, for dramatic effect, wrongly convicted escapee-protagonists. Classics like *The Fugitive*, *Midnight Express*, and *The Shawshank Redemption* most immediately come to mind.

In the movies, as in the United States and most countries around the world, the price for getting caught is high. Recaptured escapees face years of additional jail time, as well as harsher conditions of confinement.

But some countries, including ones with advanced criminal justice systems, do not punish walkaway escapes not involving aggravating circumstances such as threatened or actual violence, bribery, theft, or property damage. In these countries, escapees like Cavalcante who make a nonviolent break for it will never face an additional day in prison (though prosecutors, of course, can still charge crimes committed during and following the escape).

German law exemplifies the logic used to justify this very lenient approach. The “urge to be free” (*der natürlichen Drang nach Freiheit*) is said to be so ingrained in human nature that a prisoner who, without violence, merely follows the innate “instinct to escape” is [insufficiently morally blameworthy](#) to justify additional escape charges. Irrelevant, moreover, are the number of prior escape attempts, the inmate’s criminal past and proclivity towards violence, and the resources required to return the escapee to custody.

Mexico similarly [recognizes](#) the desire for liberty and freedom as an essential part of human nature and, therefore, a basic human right. Supreme Court Justice Juventino Victor Castro y Castro [put it](#) this way: “The basic desire for freedom is implicit inside every man, so trying to escape cannot be considered a crime.”

Vastly Different Ways of Looking at Criminals (and Their Crimes)

To set the stage a bit, the comparative length of the average prison sentence in the United States is directly correlated with the comparative severity of our prison system. For example, in the United States, an [average](#) first-degree homicide sentence is 40.6 years; in France the average sentence for the same offense is 6.1 years and in Germany it is around 13 years. The [United States’ murder rate](#) is also more than double the world average.

Digging a bit deeper into the moral underpinnings of the United States’ approach to criminality, the U.S. justice system institutionally views felons as morally damaged individuals who, through their illegal conduct, have placed themselves [outside](#) of ordered society. [Symbolic](#) of perceiving criminals as “other,” in the United States convicts can temporarily or permanently lose [certain important civil rights](#), including the [right to vote](#), run for state office, sit on a jury, and possess a firearm.

In stark contrast, European and Scandinavian criminal justice systems [focus more](#) on the act and less on the actor. They are [less willing](#) to cleave convicted criminals from the very society that they consider at least partially to blame for the offenders’ unlawful conduct.

The stated focus, then, is on [rehabilitation and reintegration](#) into mainstream life. For example, prisoners wear their own clothes, as opposed to the prison-issued uniforms so ubiquitous in U.S. prisons. They also cook their own meals and are entitled to “[intimate](#)” (conjugal) visits.

Effective rehabilitation and mainstreaming in a calm, nonviolent, and generally more easygoing prison setting of course sounds wonderful. Problems arise, however, when reality and utopianism collide. Lawmakers, scholars, and the public alike are increasingly skeptical of this paragon of prison life.

Ever-rising [criminality](#), including violent and organized crime, has spread throughout Europe and Scandinavia. These accelerating crime rates, in turn, have stoked the population's growing fear of victimization—and, correspondingly, they have eroded the more empathetic, sympathetic, and arguably outdated conception of criminals as the victims of society who simply need a therapy-driven prison setting to be “cured” of their antisocial impulses. Today, in short, the case for a maximalist concern for a prisoner's desire to be free finds itself on shaky ground.

Defects in the “Human Frailty” Argument

The human frailty argument fails for several reasons. For one, democratic, rule of law-based justice systems, like the prisons that house those unwilling to comply with society's rules, are purpose-built to protect the public from convicted criminals like Cavalcante.

Notably missing from arguments in favor of legal escapes, moreover, is an appropriate recognition that escapes, no matter how nonviolent, are freighted with serious inherent risks and costs. First, necessary efforts to recapture the escapee place significant financial burdens on the taxpayer. And even though advocates like the Urban Institute [contend](#) that the public needn't “be worried about prison escapes,” courts throughout the United States have appropriately noted that escapees by their very nature operate under “[supercharged emotions](#).” They pose a significant threat to those assigned to recapture them, as well as to the public more generally.

Additionally, the reformers' appeal to human nature makes for a particularly treacherous slippery slope. If one accepts the “natural instincts made me do it” argument in escape cases, why not also apply it when, say, a parent harms the suspected abuser of her child? Or the person who steals to feed his family? Can one plausibly distinguish between those basic human instincts and the desire to avoid punishment by escaping prison following a lawful conviction for, say, child sexual abuse or homicide?

In the final analysis, our entire system of justice is premised on an expectation that we will [conform](#) our conduct to the law's requirements even when doing so is not easy. Whether viewed from a public policy, penology, or moral theory perspective, one searches in vain for a sound reason justifying giving escaped prisoners a pass while expecting restraint and self-control from the rest of us.

There is nothing wrong with taking a more empathetic approach to crime, questioning aspects of the United States' sentencing approach and carceral system, and recognizing that human nature can sometimes cause even the best-intentioned among us to make bad, sometimes criminal, decisions.

Nevertheless, it is folly for a well-run, democratic system of justice to permit a hardened lawbreaker like Cavalcante's desire for freedom to trump the justice system's need to ensure that convicts serve their lawfully imposed sentences and the public is protected. In a society governed by the rule of law, giving prosecutors the discretion to file criminal charges when warranted following escapes of all kinds deters would-be escapees and in so doing helps safeguard important communal, economic, and institutional interests.