Case Comment—*Washington v. Brockway: One Small Step Closer to Climate Necessity*

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1. INTRODUCTION

On September 2, 2014, Abby Brockway, Michael LaPointe, Patrick Mazza, Jackie Minchew, and Elizabeth Spoerri—who became known as the "Delta Five"—trespassed onto a rail yard owned by BNSF Railway (BNSF) in Everett, Washington. They erected a tripod and blocked trains carrying crude oil to protest government inaction on climate change and the special dangers of fossil fuel infrastructure expansion in Washington State. For this, each defendant was charged with second-degree criminal trespass and obstructing or delaying a train. The defendants stood trial in January 2016 and offered testimony based upon a necessity defense, which, at the close of evidence, was denied. The jury returned guilty verdicts on the trespass charge and not guilty verdicts on the obstruction charge. The trespass convictions are currently being appealed.

Washington v Brockway represents the latest attempt to use the *climate necessity defense* and the first time that a United States jury has heard necessity evidence in such a case. While allowing a jury to hear necessity defense testimony was a small step forward in this line of climate necessity jurisprudence, it could have been a giant leap forward if the court would have allowed the jury to consider the necessity defense testimony. Unfortunately, it did not, and this comment argues that the denial of the necessity defense was improper.

As other courts have previously done,[1] the Brockway court misapplied both the letter and the purpose of the law of necessity. The common law necessity defense allows juries to weigh whether defendants' balancing of harms was reasonable. In *Brockway*, not only did the court

[1] See e.g. *United States v Schoon*, 971 F (2d) 193 at 199–200 (1992) [*Schoon*]; and other cases discussed in Part 2.2, *below*.

impose too high of a burden of proof on the defendants, denying the jury the opportunity to consider the evidence, but the court also relied upon a misguided line of decisions that makes a false distinction between "direct" and "indirect" civil disobedience.[2] Courts must honor the purpose of the necessity defense by leaving the question of reasonableness to the jury—especially in cases with as much evidence was offered here by the defendants. Necessity offers a rare "safety valve",[3] whereby the people, not judges, may relax the letter of the law for greater societal benefit. The special urgency of climate change and the inability of our political and judicial systems to address this issue militate for greater acquiescence to jury deliberation in climate necessity cases.

In this comment, we will explain the background of the necessity defense, its applicability in environmental cases, and why it was erroneously excluded in *Brockway*. In Section 2, we review the background of the necessity defense, explain its development and expansion, and discuss why the necessity defense—especially in the context of climate change civil disobedience—does not improperly intrude on the legislative or political realms. In Section 3, we summarize the trial, and in particular, discuss the process that led the court to initially deny the introduction of necessity defense evidence, subsequently allow it, and then ultimately prohibit the jury from considering the necessity defense. In Section 4, we explain why the court erred by not allowing the jury to consider the necessity defense, and reiterate why democratic accountability and the seriousness of climate change require a different result from *Brockway*. In Section 5, we conclude our comment by summarizing our argument that the climate necessity defense should have been considered by the jury in the present case and should be allowed to proceed to juries in similar cases in order to restore the important democratic and societal justice policies that form the basis for the development of the necessity defense.

2. BACKGROUND OF THE NECESSITY DEFENSE

The necessity defense has existed for centuries under English common law.[4] While it has traditionally been applied to violations of criminal law necessitated by the forces of nature, in modern times it has been recognized as a defense for civil disobedience involving political issues,[5] and has been asserted numerous times in civil disobedience cases involving climate change.

2.1. The Common Law of the Necessity Defense

Necessity has served as a common law defense to violations of the law for centuries. As early as 1550, an English merchant caught in a storm was acquitted for dumping cargo to

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2 *Washington v Brockway* (13 January 2016), Snohomish 5053A-14D (Snohomish Co Dist Ct, Wash) (Transcript of Proceedings, vol 4 at 88–89) [Transcript of Proceedings vol 4].

3 *People v Gray*, 150 Misc (2d), 852 at 866 (NY City Crim Ct 1991) [*Gray*] ("[t]he defense does not legalize lawlessness; rather it permits courts to distinguish between necessary and unnecessary illegal acts in order to provide an essential safety valve to law enforcement in a democratic society", *ibid*).

4 See Edward B Arnolds & Norman F Garland, "The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil" (1974) 65:3 J Crim L & Criminology 289 at 291.

5 See William P Quigley, "The Necessity Defense in Civil Disobedience Cases: Bring in the Jury" (2003) 38:1 New Eng L Rev 3 at 26–27.

prevent his ship from capsizing. Even though his act was an illegal destruction of property, it was deemed permissible under the extreme circumstances.[6]

The policy motivation behind the defense is that society benefits when, facing urgent circumstances, individuals break the law for a higher purpose. As Wayne R. LaFave explains:

> One who, under the pressure of circumstances, commits what would otherwise be a crime may be justified by "necessity" in doing as he did and so not be guilty of the crime in question ....
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> … Rather, it is this reason of public policy: the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.[7]

The necessity defense is distinct from the defense of duress. As the United States Supreme Court has noted:

> Duress was said to excuse criminal conduct where the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.[8]

Today, the traditional requirement that the necessity defense involve physical forces and physical harm has been dropped in most, though not all, jurisdictions.[9] For climate-related actions, the necessity defense—rather than the defense of duress—is implicated because, although human actions contribute to climate change, the harms associated with climate change do not constitute imminent threats of bodily harm or death from another human.[10] Instead, the actor has determined that the illegal act or protest is the lesser of two evils when compared against the dire consequences expected to result from climate change. In modern times, the necessity defense has often been used in cases involving driving under the influence, marijuana use, and prison escape.[11] The defense is generally invoked under state law and typically includes the following elements: "(1) the defendant reasonably believed the commission of the crime was necessary to avoid … [an imminent] harm; and (2) the harm sought to be avoided was greater

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6 See *Reniger v Fogossa* (1816) 75 ER 1, Pl Com 10 (though the case is reported in 1816, it was decided in 1551).

7 Wayne R LaFave, *Criminal Law*, 4th ed (St Paul, Minn: West, 2003) at 523–24.

8 *United States v Bailey*, 444 US 394 at 409–410 (1980).

9 LaFave, *supra* note 7 at 529; see also Climate Defense Project, "Political Necessity Defense Jurisdiction Guide", online: <climatedefenseproject.org/wp-content/uploads/2017/02/CDP-Jurisdiction-Chart.pdf>.

10 LaFave, *supra* note 7 at 526.

11 Elizabeth O'Connor Tomlinson, "Proof of Necessity Defense in a Criminal Case" in *American Jurisprudence Proof of Facts*, 3rd ed (New York: Thomson Reuters, 2010) ss 8–9.

than the harm resulting from a violation of the law; and (3) the threatened harm was not brought about by the defendant; and (4) no reasonable legal alternative existed."[12] Important variations include whether the defendant "brought about the choice" between evils as well as situations where there has been a legislative decision to exclude the defense.[13]

Washington State recognizes the common law necessity defense.[14] Its articulation of the defense is substantially similar to the necessity defense in other cases: "[t]he defendant must prove by a preponderance of the evidence that: (1) he or she believed the commission of the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from the violation of the law, and (3) no legal alternative existed."[15] Recent opinions by the Court of Appeals of Washington emphasize the requirements that the defendant did not cause the choice between evils and that there was no legal alternative to the criminal behavior.[16] The Washington Practice Pattern Jury Instructions, Criminal also follow the standard common law rule.[17]

At the federal level, the Supreme Court of the United States has not firmly established whether a federal common law of necessity exists, though circuit courts have approved its use.[18] The Supreme Court noted:

> [I]t is an open question whether federal courts ever have authority to recognize a necessity defense not provided by statute … Even at common law, the defense of necessity was somewhat controversial … And under our constitutional system, in which federal crimes are defined by statute rather than by common law … it is especially so.[19]

Despite this uncertainty, the necessity defense provides the judicial system a valuable "safety valve"[20] by allowing the jury, composed of regular citizens, to make a case-by-case

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12 Washington Supreme Court Committee on Jury Instructions, *Washington Pattern Jury Instructions: Criminal*, 4th ed (New York: Thomson Reuters, 2015) at ch 18.02 [Washington]; see also *United States v Maxwell*, 254 F (3d) 21 at 27–29 (1st Cir 2001) [*Maxwell*]; Model Penal Code § 3.02 (American Law Institute, 2001).

13 See e.g. 18 Pa Cons Stat § 503(b) ("When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this section is unavailable"); see also NJ Rev Stat § 2C:3-2 (2013) ("Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear").

14 See *Washington v Kurtz*, 309 P (3d) 472, 474 (2013) [*Kurtz*] (upholding acquittal based on medical marijuana necessity defense); *Washington v Niemczyk*, 644 P (2d) 759, 807 (1982) (recognizing prison escape necessity defense).

15 *Washington v Jeffrey*, 889 P (2d) 222 at 225 (1995), citing *Washington v Gallegos*, 871 P (2d) 621 (1994).

16 See *Washington v White*, 152 P (3d) 364 at 366 (2007); *Washington v Parker*, 110 P (3d) 1152 (2005).

17 Washington, *supra* note 12 at ch 18.02.

18 See *Maxwell*, *supra* note 12; *United States v Quilty*, 741 F (2d) 1031 (7th Cir 1984); *United States v Kabat*, 797 F (2d) 580 (8th Cir 1986); *United States v Dorrell*, 758 F (2d) 427 (9th Cir 1985).

19 *United States v Oakland Cannabis Buyers Coop*, 532 US 483 at 490 (2001) [citations omitted].

20 *Gray*, *supra* note 3 at 866.

determination of when overarching moral concerns should override the technical letter of the law. Courts have held that jury deliberation is crucial to accord:

> a proper respect for the role of the jury in the criminal justice system. The essential purposes of the jury trial are twofold. First, the jury temper the application of strict rules of law by bringing the common sense judgment of a group of laymen to the case. Second, the jury stand as a check on arbitrary enforcement of the law.[21]

Because the necessity defense is essentially a means by which ethical considerations may trump legal formality, the judgment of laypeople, in the form of the jury, gains special importance against the discretion of expert judges. By allowing an escape from legal sanctions in the interest of the greater social good, the necessity defense invites a greater degree of democratic deliberation in the criminal legal process.

In this way, the necessity defense shares an affinity with jury nullification. Jury nullification occurs when juries acquit a defendant despite convincing evidence that the defendant is guilty under the court's jury instructions; such acquittals are usually based on moral and political considerations and are unreviewable.[22] United States courts have long recognized "the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence."[23] This power to contravene the letter of the law in favour of justice has been celebrated as a democratic check on the excesses of the state's monopoly over criminal enforcement as far back as the acquittal of publisher John Peter Zenger in a 1735 libel trial for insulting the Royal Governor of New York.[24] The necessity defense functions as a more formal version of nullification, with juries instructed on the elements that may lead them to find a defendant not guilty despite literal violation of a criminal statute. In both instances, jury deliberation is crucial to the equitable operation of the criminal law, especially where political issues are implicated.

However, this confrontation between the letter of the law and the conscience of the jury raises difficult issues involving institutional capacity, the rule of law, and fairness in the dispensation of criminal justice. One such issue asks why juries, who since the late nineteenth century have mostly been restricted to deciding questions of fact rather than questions of law,[25] should be allowed to override the mandates of the common law or criminal statutes.

One response is to push back on the modern division of labour in criminal trials. In the midst of a criminal justice system that for the general public is often difficult to understand and seemingly inflexible, the jury's very lack of legal expertise or experience represents a refreshing dose of community perspective and common sense, especially in the context of political trials where defendants have purported to act for the benefit of others. Another response for enhanced jury decision-making power is that juries are a counterweight to legislative and executive oppression, providing a brake on the

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21 *Commonwealth v Hood*, 389 Mass 581 at 597 (1983) [footnotes omitted].

22 See Nancy J King, "Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom" (1998) 65 U Chicago L Rev 433.

23 *United States v Moylan*, 417 F (2d) 1002 at 1006 (4th Cir 1969).

24 *Ibid*; William R Glendon "The Trial of John Peter Zenger" (1996) 68 NY St BJ 48.

25 See Alan W Scheflin, "Jury Nullification: The Right to Say No" (1972) 45 S Cal L Rev 168 at 177 [Sheflin].

government's use of the criminal law to suppress unpopular opinion or dissent.[26] This function was well recognized at the time of the American Revolution and the framing of the Constitution,[27] leading to the enshrinement of the right to a jury trial in the Sixth Amendment.[28]

Even in a system of legislative supremacy, the rigid application of rules is tempered by contextual considerations; the rules drafters themselves recognize this through provisions for reduced sentences based on a variety of factors.[29] More importantly, the application and effect of criminal law is strongly conditioned by the discretion of prosecutors, who frequently base charging decisions on reasons of equity, efficiency, or political sensitivity,[30] and by the personalities of judges, who enjoy enormous influence over sentencing.[31] Given such indeterminacy, granting juries the power to acquit admitted lawbreakers on a case-by-case basis poses no serious threat to the rule of law, and makes sense when the very question at issue is whether or not lawbreaking was justified by a concern for the greater good.

Another problem posed by jury empowerment and the necessity defense is the lack of an obvious limiting principle vis-à-vis the seriousness of the crime. For example, juries in the southern United States had a notorious history of acquitting killers of African Americans;[32] today, murderers of abortion doctors or Muslim persons might likewise seek acquittal from representatives of a sympathetic local majority.[33] The easiest way to account for this concern

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26 The jury's crucial role in enforcing commonly held ethical positions and avoiding government overreach has been extensively discussed, see *ibid* (discussing the role of the jury as the "conscience of the community" at 188); Jack B Weinstein, "Considering Jury 'Nullification': When May and Should a Jury Reject the Law to Do Justice" (1993) 30 Am Crim L Rev 239 at 244–245; *contra* Andrew D Leipold, "Rethinking Jury Nullification" (1996) 82 Va L Rev 253 (arguing that the power of nullification is overbroad and that its benefits are speculative).

27 See Shaun P Martin, "The Radical Necessity Defense" (2005) 73 U Cin L Rev 1527 at 1541–42 [Martin].

28 US Const amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed").

29 See e.g. Fla Stat § 921.006(2) ("Mitigating circumstances under which a departure from the lowest permissible sentence is reasonably justified include, but are not limited to: … (c) The capacity of the defendant to appreciate the criminal nature of the conduct … (g) The defendant acted under extreme duress or under the domination of another person").

30 James Vorenberg, "Decent Restraint of Prosecutorial Power" (1981) 94 Harv L Rev 1521 (explaining the extent and nature of prosecutorial discretion).

31 See Mosi Secret, "Wide Sentencing Disparity Found Among U.S. Judges," *NY Times* (5 March 2012), online: <www.nytimes.com/2012/03/06/nyregion/wide-sentencing-disparity-found-among-us-judges.html> ("A new analysis of hundreds of thousands of cases in federal courts has found vast disparities in the prison sentences handed down by judges presiding over similar cases, raising questions about the extent to which federal sentences are influenced by the particular judges rather than by the specific circumstances of the cases").

32 Michael Hoffheimer "Codifying Necessity: Legislative Resistance to Exacting Choice-of-Evils Defenses to Criminal Liability" (2007) 82 Tul L Rev 191 at 231.

33 Abortion and Islam are but two examples of highly divisive, polarizing political topics in the United States that lead to violent crimes against particular groups. See Liam Stack, "A Brief History of Deadly Attacks on Abortion Providers", *NY Times* (29 November 2015), online: <www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html>; Eric Lichtblau, "Hate Crimes Against American Muslims Most Since Post-9/11 Era", *NY Times* (17 September 2016), online: <www.nytimes.

is to forbid the use of necessity to justify murder or other violent crimes, as some states have done by statute.[34] This limitation disallows acquittal in circumstances where there is a high risk of jury approval of violent crime.

Where there is not such a great risk, the jury's balancing of harms can be relied on to defeat the defendant's proposed justification to the same degree as that of other discretionary steps of the criminal justice system, such as the prosecutor's charging decisions. Curtailing jury deliberation is thus unnecessary to avoid extreme cases of hypothetical acquittal based on far-fetched justification arguments. As the history of political necessity cases demonstrates, juries are generally quite capable of discerning the lesser of two evils.

2.2. The Political Necessity Defense

The necessity defense has been extended beyond "natural circumstances" in the United States for nearly a century.[35] It has been used as a defense in civil disobedience cases in connection with war protests, nuclear power and arms protests, civil rights protests, protests against illegal government action, and numerous other political issues.[36] And, when the defense is presented, it tends to be successful, with juries frequently finding in favor of the defendants.

An early United States example occurred in 1917, where a sheriff and a posse of 1,000 men in Bisbee, Arizona rounded up over 1,000 striking members of the International Workers of the World from Bisbee and deported them to New Mexico.[37] One member of the posse was tried and acquitted of kidnapping based on the necessity defense. The defense argued that the striking union posed a threat to the security of the nation and the life and property of the people of Bisbee, and the jury agreed that forced deportation was an appropriate response.[38]

Later examples involved protests against nuclear power and nuclear arms. In 1970, 82 people blocked the gates to a nuclear power plant in Oregon to protest the harms posed by nuclear power.[39] "At trial, defendants raised the choice of evils defense and, after five hours of deliberation, were acquitted by the jury. One jury member later told the defense lawyer that had the judge allowed them to consider the expert testimony presented, they would have only deliberated five minutes, instead of five hours, to reach the 'not guilty' verdict."[40]

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com/2016/09/18/us/politics/hate-crimes-american-muslims-rise.html>. While no jury has yet nullified a verdict based on sympathies to such actors, such an outcome would not be inconceivable in an area where such attitudes are commonplace.

34 See Martin, *supra* note 27, n 21.

35 See e.g. *Washington v Gorham*, 188 P 457 at 458 (Wash 1920) (holding that, as a matter of public necessity, a deputy sheriff may not be convicted of violating speed ordinances when required in performance of his official duties).

36 See Quigley, *supra* note 5 at 26–37.

37 "The Law of Necessity as Applied in the Bisbee Deportation Case", Editorial (1961) 3 Ariz L Rev 264.

38 *Ibid* at 279.

39 Robert Aldridge & Virginia Stark, "Nuclear War, Citizen Intervention, and the Necessity Defense" (1986) 26:2 Santa Clara L Rev 299 at 310–311 (discussing *State v Mouer* (12–16 December 1977), Columbia, Or 77-246 through 77-324 (Columbia County District Ct)).

40 Aldridge & Stark, *supra* note 39 at 311 (citing a letter from Betty Stein to Robert Aldridge, one of the attorneys in *State v Mouer*, *supra* note 39).

Protests against wars and United States government covert involvement in foreign wars have been a major focus of civil disobedience from World War I to the present.[41] In 1987, Abby Hoffman, Amy Carter, and 13 other people protesting illegal conduct by the Central Intelligence Agency in Central America were acquitted of trespass and disorderly conduct charges stemming from their occupation of the administration building at the University of Massachusetts.[42] The judge instructed the jury on the necessity defense, and after hearing testimony describing "assassinations, murders, campaigns of misinformation and other alleged activities by the agency and groups it supports in Central America and elsewhere," the jury acquitted the defendants.[43]

The necessity defense has also been successful in efforts to stop pollution for its adverse effects on bicyclists and pedestrians. In *People v Gray*, the defendants were charged with disorderly conduct for blocking the entrance of a bridge roadway.[44] The defendants were protesting the dangers of air pollution to bikers and pedestrians on the bridge. In exchange for stipulating to the elements of the crime, the prosecution agreed to allow the defendants to present a necessity defense. The trial was nonjury, and the judge acquitted the defendants, finding that the defendants had proven all elements of the necessity defense and "the People have not disproved the elements of the necessity defense in this case beyond a reasonable doubt."[45]

The four above examples were chosen to illustrate the fact that juries (and judges) tend to acquit when they actually hear a political necessity defense.[46] However,

> [i]n most civil disobedience trials, judges have ruled as a matter of law that the defendants' theory of justification is not applicable, and they have excluded all supporting evidence and testimony. The result has been conviction for most civilly disobedient defendants. In contrast, when the jury has been permitted to hear and consider the merits of the defendants' justifications, it has granted acquittals more often than not.[47]

Most political necessity cases are thus resolved on technical grounds rather than on the merits.

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41 See Quigley, *supra* note 5 (discussing civil disobedience within the contexts of World War II, the Vietnam War, nuclear disarmament, American military involvement in Central America, and the military occupation of Vieques, Puerto Rico at 24–25).

42 Matthew L Wald, "Amy Carter Is Acquitted over Protest", *NY Times* (16 April 1987), online: <www.nytimes.com/1987/04/16/us/amy-carter-is-acquitted-over-protest.html>.

43 *Ibid.*

44 *Supra* note 3 at 852–53.

45 *Ibid* at 871.

46 *Ibid* ("when the necessity defense is actually submitted to the trier of fact in such cases, defendants have usually been acquitted" and citing cases in support of its claim at 853); see also Quigley, *supra* note 5 (reviewing dozens of state court civil disobedience cases where a necessity defense was presented to a jury and the defendant or defendants were acquitted or charges were reduced and noting that the impact of the defense leads to acquittals. On the other hand, Quigley states that the federal courts, except in one instance, have refused to allow a jury to consider a necessity defense at 26–41).

47 Bernard D Lambek, "Necessity and International Law: Arguments for the Legality of Civil Disobedience" (1986) 5:2 Yale L & Pol'y Rev 472 at 473 [footnotes omitted] (footnotes citing other articles that have made similar claims and listing the published civil disobedience cases (as of 1987), where the author's research found acquittals for the civilly disobedient are contained in *ibid* at 473, nn 7–9).

This preemptive denial of the defense, usually on a motion *in limine* by the prosecution, contravenes the purpose of the defense and furthers an antidemocratic consolidation of balancing power in the person of the judge. The Sixth Amendment right to a jury trial is a basic requirement of due process.[48] As discussed above in Part 2.1, community participation in the criminal justice system via the jury is a check on the arbitrary use of the legal system to clamp down on dissent. Randomly selected individuals provide a diversity of opinion, and a jury's lack of personal stakes in the outcome of a trial may temper the biases of the judge. As such, jury deliberation not only helps to guarantee a fair trial for the accused, but also allows nonspecialists to engage in the socially important practices of censure and punishment in a manner that reflects society's values. The appropriateness of lay participation is especially pronounced in cases of political necessity, where the defendant's justification argument depends upon her assessment of social harms and action appropriate to avert them. These questions are fitting for a jury because they concern the general interests of the public, of which the jury are representatives, and entail a minimum of legal sophistication. Whether or not a given threat existed, its level of imminence, the options available to prevent it, and the reasonableness of a defendant's action are questions decided by context-specific inquiry, not by consulting precedent. In other words, they are consummate questions of fact—the classic purview of the jury.

There is likewise an important democratic justification, running counter to the idea of the rule of law, for jury involvement in political necessity cases. As Shaun P. Martin notes, the American revolutionary generation endowed the jury with unprecedented authority over the disposition of criminal cases precisely to counter the abuse of judicial process that had been a feature of British rule.[49] This empowerment was based upon the notion that local majorities, embodied by the jury, should be able to contravene legislative enactments, no matter their conformity to republican procedures: "even validly enacted democratic structures cannot properly control the activities of an individual who acts to obtain larger social goods, so long as this individual receives the subsequent approval of the masses as represented by a jury."[50] Therefore, the retrospective approval of illegal behavior via jury participation in necessity cases is a deliberate blurring of the line between politics and law—a common law exception to the rule of law. In seeking to contain the disruptive potential of this exception, judges negate its very purpose.

While civil disobedience cases have been allowed at times in state courts, the federal courts have refused to allow a jury to consider the necessity defense in a civil disobedience case, except in rare instances.[51] While the federal courts' disdain for the necessity defense does not preclude its use in state courts, unfortunately, as we argue was the case in *Brockway*, state courts have often adopted the flawed logic of the federal courts.

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48 See *Chambers v Mississippi*, 410 US 284 (1973); "[M]any of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects … the Sixth Amendment right to a speedy and public trial" *Duncan v Louisiana*, 391 US 145, 148 (1968) (footnotes omitted).

49 *Supra* note 27 at 1600–01.

50 *Ibid* at 1547.

51 See Quigley, *supra* note 5 at 37–41.

Decided in 1992, *United States v Schoon* is one of the primary federal cases that precludes the use of the necessity defense in almost all political civil disobedience cases, by holding that the necessity defense cannot be used for "indirect civil disobedience."[52] In *Schoon*, the defendants were part of a group of 30 people protesting United States involvement in El Salvador by chanting, splashing fake blood on surfaces, and otherwise interfering with the operations of an Internal Revenue Service (IRS) office in Tucson, Arizona.[53] Defendants were convicted of obstructing IRS activities and failing to comply with the orders of a police officer. The court found that the protestors' actions, intended to stop further bloodshed in El Salvador, constituted indirect civil disobedience (where the protestors break one law in order to challenge an unrelated law or policy), rather than direct civil disobedience (where the protestors are challenging the same law under which they are charged).[54]

Rather than uphold the district court's denial of the defense on the specific facts of the case, the court held that, as a matter of law, the necessity defense would always fail in cases of indirect civil disobedience. It reasoned that an indirect civil disobedient could never adequately prove the prongs of (1) avoiding a greater harm by committing the crime and (2) establishing a causal connection between the crime and avoiding the harm.[55] Most damningly, the court claimed that there are always legal alternatives to this sort of protest:

> The necessity defense does not apply to … indirect civil disobedience cases … [because] legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action. … [T]he harm indirect civil disobedience aims to prevent is the continued existence of a law or policy. Because congressional action can *always* mitigate this "harm," lawful political activity to spur such action will always be a legal alternative.[56]

The court cast some final aspersions on the use of the political necessity defense in strong terms that have proven convincing to subsequent courts:

> What these cases are really about is gaining notoriety for a cause—the defense allows protestors to get their political grievances discussed in a courtroom ....
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> Thus, we see the failure of any federal court to recognize a defense of necessity in a case like ours not as coincidental, but rather as the natural consequence of the historic limitation of the doctrine. Indirect protests of congressional policies can never meet all the requirements of the necessity doctrine. Therefore, we hold that the necessity defense is not available in such cases.[57]

The severe, and logically unsupportable, limitation of indirect civil disobedience in *Schoon* has been criticized by scholars on multiple grounds. The first is that the court's reasoning constitutes a misapplication of the defense's four prong test to the facts before it.[58] In evaluating

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52 *Supra* note 1 at 199–200.

53 *Ibid* at 195.

54 *Ibid* at 196.

55 *Ibid* at 197–99.

56 *Ibid* at 198 [emphasis in original].

57 *Ibid* at 199–200.

58 See James L Cavallaro Jr, "The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v Schoon" (1993) 81:1 Cal L Rev 351 at 367 [Cavallaro].

the first prong, the court characterized the "most immediate" harm caused by the United States' El Salvadoran policy to be the existence of the policy in itself and indicated that any harms suffered as a result of the policy would be "insufficiently concrete" to qualify as a legally cognizable harm.[59] This was in spite of the defendants' argument that the harm was the torture and death of El Salvadoran citizens.[60] Instead of an inaccurate and overbroad characterization of this and all other harms suffered in cases of indirect civil disobedience, a jury should have had the opportunity to evaluate these claims and balance the real-world harms associated with the policy against the harm presented by the defendants' conduct in the IRS office.[61]

Scholars have found similar weaknesses with respect to the court's analysis of the second and third prongs. Regarding the second prong, the court failed to consider the reasonableness of the defendants' expectations of changing the United States policy through their actions, and instead, dismissed all indirect civil disobedience as being unable to effectuate change because of its indirectness.[62] The court reasoned that the protest itself would not change the government's policy in El Salvador, but instead, a further act by Congress would be necessary before any changes could be implemented.[63] However, the court should have considered whether the defendants might have reasonably believed that their actions, combined with others around the country, would be successful in effectuating change, based on prior Ninth Circuit precedent.[64]

In analyzing the third prong, the court in *Schoon* stated, "legal alternatives will never be deemed exhausted when the harm can be mitigated by congressional action."[65] Here, the court's reasoning is inconsistent with the policy underlying the necessity defense, since the defense is meant to protect defendants who violate the law when that course of action is more reasonable than conforming.[66] The court precluded this result by misreading a *reasonable* legal alternative to mean *any* legal alternative. This conclusory analysis essentially bars the necessity defense in all civil disobedience cases, since petitioning Congress to change the law would always be an option. It also fails to consider the fact that this method of effectuating change may not be reasonable in light of time-pressured, life-or-death circumstances.[67]

The same conclusion has been reached by other critics who have found the *Schoon* court's policy of treating direct disobedience differently from indirect to be unconvincing. The court failed to provide its reasoning for deciding that the two classes of behavior should be treated disparately, and its arguments against allowing the defense for indirect disobedience would apply equally—and similarly unconvincingly—to direct disobedience.[68] For example, in civil

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59 *Schoon*, *supra* note 1 at 198.

60 See Cavallaro, *supra* note 57 at 368.

61 *Ibid* at 371.

62 *Ibid* at 373.

63 *Schoon*, *supra* note 1 at 198.

64 See Cavallaro, *supra* note 58 at 373.

65 *Schoon*, *supra* note 1 at 198.

66 See Cavallaro, *supra* note 58 at 376.

67 *Ibid* at 375–77.

68 See Cavallaro, *supra* note 58 at 367. A leading Canadian necessity case reached a similarly erroneous conclusion. See *MacMillan Bloedel Ltd v Simpson*, [1994] BCJ 670, 111 DLR (4th) 368 (defendants were held in contempt for violating injunctions preventing them from further protests against logging

rights cases, protest behaviours such as sitting at a lunch counter would not, in themselves, change the law being protested; as in the case of indirect civil disobedience, a change of public opinion followed by a change in congressional views would be required to actually effectuate changes to the law.[69] Likewise, even when protesters *directly* target a harmful law, the possibility of seeking legislative redress always exists, and so the court's insistence on the exclusion of the defense because of legal alternatives would apply to all protest cases.

Finally, the peculiar decision to single out indirectly harmful government policy as the *only* harm for which the necessity defense is unavailable contradicts the history of the common law doctrine, which offers elements for assessing whether or not a harm may be avoided by necessity, providing flexibility for each case.[70] While those who engage in indirect disobedience may have a harder time proving the elements of the necessity defense, the mere unlikelihood of success is not an adequate reason to bar the presentation of the defense to the jury.[71]

Therefore, although the necessity defense effectively allows civil disobedients "to promote the achievement of higher values at the expense of lesser values,"[72] judges continue to severely limit the presentation of the political necessity defense to juries, contravening the defense's purpose with questionable legal justification:

> In light of the strong constitutional considerations in favor of allowing defendants to have their defenses submitted to the trier of fact, the discrepancy between the low standard of production which some courts have articulated in theory … and the extraordinarily high standard ultimately imposed in many instances on civil disobedients who raise the necessity defense seems inappropriate.[73]

2.3. The Climate Necessity Defense

The necessity defense as applied to climate change is a subset of the political necessity defense. Procedurally the defense is identical, but factually, climate change arguably presents a much greater harm to human existence than other harms sought to be avoided in political necessity cases—even nuclear war. On the imminence prong, few scenarios of impending danger are more compelling than the dangers posed by climate change, making the balancing of minor criminal violations especially straightforward in climate protest cases. Government inaction is also particularly pronounced in the area of climate policy, justifying the sort of extralegal citizen action that the necessity defense is intended to protect. Average citizens are at least as well equipped as legal specialists to judge what sorts of political action are needed to prevent the climate change harms threatening them inasmuch as they share the same natural and political environment, and access to information about each. In the absence of serious legislative attention to the issue in the United States, there is a definite need for a democratic

operations: the British Columbia Court of Appeal held, contrary to previous Canadian law, that the necessity defense cannot be used when it seeks to challenge a valid law: "we do not believe the defence of necessity can ever operate to avoid a peril that is lawfully authorized by the law" at para 46).

69 See Quigley, *supra* note 5 at 45–46.

70 *Ibid* at 44 ("the defense is purposefully defined loosely in order to allow it to be applicable to all the myriad of situations where injustice would result from a too literal reading of the law" at 6).

71 *Ibid* at 46.

72 LaFave, *supra* note 7 at 524.

73 *Gray*, *supra* note 3 at 855–856 [citations omitted].

forum of the sort provided by deliberation on a climate necessity defense. While climate disobedients have embraced the defense as a way to publicize their actions and hold mini-referenda on climate harms, the cases described below illustrate that attempts to use the climate necessity defense thus far have largely been unsuccessful or have not proceeded to trial.

Although most attempts at asserting the climate necessity defense have not succeeded, there is a notable exception. In 2007, five Greenpeace activists climbed a smokestack in Kent, England and painted the word "Gordon" (for the then English Prime Minister Gordon Brown) in massive letters. The five plus one additional activist—together dubbed the "Kingsnorth Six"—were subsequently tried for causing £30,000 of criminal damage. The six were allowed to present a necessity defense and offered evidence by James Hansen, millionaire environmentalist Zac Goldsmith, and an Inuit leader from Greenland on the imminent dangers to the world's climate caused by coal-fired power plants. The six were acquitted of the charges.[74]

Subsequent cases in England did not fare as well. Two subsequent attempts to use the climate necessity defense were defeated by English judges in 2009: protestors who had closed down London's Stansted airport to protest its expansion were found guilty by a magistrate, while anti-coal activists who had taken over a coal train were prevented from presenting the defense to a jury.[75] Not surprisingly, in England, like the United States, the success of a political civil disobedience case depends largely on whether a jury hears the necessity defense.[76] But the Kingsnorth Six succeeded in inspiring other climate activists to target coal-fired power plants: the year after the English cases, 11 climate change activists in Virginia, citing the Kingsnorth Six as their inspiration, blockaded a coal-fired power plant being built by Dominion Resources, Inc. The 11 were arrested and charged with unlawful assembly and obstructing justice.[77]

Similarly, climate necessity defense cases in the United States have not fared well. In 2008, Tim DeChristopher, in a highly publicized act of civil disobedience, illegally disrupted an oil and gas auction for leases to drill on federal land in protected natural areas in Utah, which eventually led to the cancellation of the auction and preservation of pristine areas.[78] DeChristopher sought to assert a necessity defense in federal court, which the government

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74 *R v Hewke* (8–9 September 2008), No T20080116, Maidstone Crown Court, UK (Transcript of Summing-Up at 24–25, 44–45); *R v Hewke* (10 September 2008), No T20080116, Maidstone Crown Court, UK (Transcript of Verdict at 3–4).

75 Rachel Williams and John Vidal, "Stansted Protesters Sentenced to Community Service Amid Threat of £2m Damages Claim", *The Guardian* (7 January 2009), online: <www.theguardian.com/environment/2009/jan/08/activists-climatechange>; Helen Carter, "Drax Coal Train Hijackers Sentenced", *The Guardian* (4 September 2009), online: <www.theguardian.com/environment/2009/sep/04/drax-protesters-sentenced>.

76 See Chris Hilson, "Climate Change Litigation in the UK: An Explanatory Approach (or Bringing Grievance Back in)" in Fabrizio Fracchia & Massimo Occhiena, eds, *Climate Change: La Riposta del Diritto* (Naples: Editoriale Scientifica, 2010) 421.

77 Elana Schor, "In Echo of Kingsnorth Six, US Climate Change Activists Go on Trial", *The Guardian* (17 October 2008), online: <www.theguardian.com/environment/2008/oct/16/climatechange-energy-activists-dominion11>.

78 "About Tim DeChristopher" (2015) online: <www.timdechristopher.org/about> [About Tim DeChistopher].

opposed. Judge Dee Benson agreed with the government and blocked any evidence in support of the defense's four elements.[79]

First, the court found that DeChristopher did not face "a definite and or cognizable choice of two evils" because the targeted harm—degradation of natural resources and increased global warming from drilling on federal lands—may or may not have happened and, at any rate, a targeted harm cannot be premised on disagreement with government action.[80] Second, DeChristopher could not show imminent harm because the drilling leases were being contested and were not certain to occur.[81] Third, he could not show that he reasonably believed there was a causal relationship between his conduct and the anticipated harm because his actions "were more akin to placing a small pile of dirt in [a] fire's path."[82] And, finally, DeChristopher had other legal alternatives such as protests or an action to stop the lease process.[83] DeChristopher was convicted and spent 21 months in federal prison.[84] On appeal, the Tenth Circuit upheld the denial of the necessity defense, relying solely upon the existence of legal alternatives to DeChristopher's protest activity.[85]

The judge in the Michigan Coalition Against Tar Sands (MICATS) case also refused to allow a necessity defense. In 2013, three women, Barbara Carter, Lisa Leggio, and Vicci Hamlin, (the "MICATS Three") locked themselves with a "sleeping dragon"[86] to construction equipment at an Enbridge Energy tar sands oil pipeline construction. The three were arrested and charged with misdemeanor trespass and felony resisting arrest.[87] Enbridge had previously caused the largest inland oil spill in United States history that dumped over a million gallons of tar sands oil, polluting the Kalamazoo River and Talmadge Creek. The MICATS Three sought to argue that they were acting out of "necessity" to prevent another spill. The judge refused to allow the defense, stating that their act could only be "necessary" if they were stopping an actual oil spill in progress.[88] The jury found the MICATS Three guilty of all charges, and the judge immediately jailed the activists and revoked their bond.[89]

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79 *United States v Tim DeChristopher* (16 November 2009), 2009 WL 3837208 (Salt Lake City, Utah) (Memorandum, Plaintiff).

80 *Ibid* s 4.

81 *Ibid*.

82 *Ibid*.

83 *Ibid* s 5.

84 "About Tim DeChistopher," *supra* note 78.

85 *United States v DeChristopher*, 695 F (3d) 1082 at 1096–1097 (10th Cir 2012).

86 A "sleeping dragon" is a device commonly used by activists in which they secure themselves to infrastructure or other activists using handcuffs inside a pipe, making it difficult for police to remove them.

87 *People v Hamlin*, 2015 WL 8487591 (unpublished opinion).

88 Kevin Gosztola, "The Prosecution of Environmental Activists: District Attorney Sam Sutter Sets Bold Example for Other Prosecutors" (16 September 2014), *NYC Anarchist Black Cross* (blog), online: <www.nycabc.files.wordpress.com/2014/09/updates-16-sept-2014.pdf>.

89 *Ibid*.

Similarly, on Earth Day in 2013, Alec Johnson locked himself to construction equipment on the Keystone XL pipeline in Oklahoma and was arrested.[90] He sought, but was not allowed to present, a necessity defense.[91] Johnson was found guilty of all charges, and, "[a]lthough Johnson could have been sentenced to up to two years [of jail time] … he received no jail time and a fine of just over $1,000."[92]

Also in 2013, Jay O'Hara and Ken Ward used a small lobster boat to prevent a ship loaded with 40,000 tons of coal destined for a coal-fired power plant from entering a harbor in Massachusetts. The two were charged with disturbing the peace, conspiracy, failure to act to avoid a collision, and negligent operation of a motor vehicle. In an amazing turn of events,

> [t]he day the trial was set to begin, the Bristol County District Attorney [Sam Sutter] … announced that he was reducing the charge to a modest fine … Then he issued a statement in support of O'Hara and Ward's protest: "Climate change is one of the gravest crises our planet has ever faced. In my humble opinion the political leadership on this issue has been gravely lacking."[93]

While reducing the charges against O'Hara and Ward was a tremendous victory, especially combined with the district attorney's statement about the gravity of climate change, the agreement did preclude the defendants' planned necessity defense, which the judge had agreed to allow.[94]

Finally, on September 22, 2014, the day after the 300,000 person "People's Climate March" in New York City, which was a legal and permitted protest,[95] a relatively small group of about 1,000 people gathered near Wall Street for an unpermitted protest. The plan was to block Wall Street to protest the Wall Street Exchange's investment in, and support of, the fossil fuel industry. The action, dubbed "Flood Wall Street," was stopped by police who had barricaded the entrance to Wall Street. The protesters sat down at the barricades, blocking the traffic on a street intersecting with Wall Street. Most protestors left after police gave orders to leave the area. About 100 protesters stayed, and most were arrested and charged with disorderly

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90 See Jeremy Brecher, "A New Wave of Climate Insurgents Defines Itself as Law-Enforcers", *Common Dreams* (1 March 2016, beneath the header, "It has begun"), online: <www.commondreams.org/views/2016/03/01/new-wave-climate-insurgents-defines-itself-law-enforcers> [Brecher].

91 See *Oklahoma v Johnson* (23 October 2013), Atoka CM-2013-96 at 1 (Atoka County, Okla Ct, Trial Brief Regarding the Necessity Defence); Alec Johnson, "Blockadia on Trial: What the Jury Did Not Hear" (11 November 2014), *The Huffington Post* (blog), online: <www.huffingtonpost.com/alec-johnson/keystone-xl-blockade_b_6134732.html>.

92 Brecher, *supra* note 90 (beneath the header, "It has begun").

93 *Ibid.*

94 David Abel, "Bristol DA Drops Charges, Says Protestors were Right", *The Boston Globe* (08 September 2014), online: <www.bostonglobe.com/metro/2014/09/08/activists-drops-charges-case-blocked-coal-shipment-power-plant/sUpBpGxzxAz3E2Vr5RFQQM/story.html>.

95 Lisa W Foderaro, "Taking a Call for Climate Change to the Street," *The New York Times* (21 September 2014), online: <https://www.nytimes.com/2014/09/22/nyregion/new-york-city-climate-change-march.html?_r=0>.

conduct. All but 11 of the protesters "received adjournments in contemplation of dismissal, meaning that the charges would be dropped if they stayed out of trouble for six months."[96]

Eleven of the protesters refused the adjournment and took their cases to the Manhattan Criminal Court. The judge allowed one defendant to speak on the necessity defense, but ultimately decided against letting the defendants present the defense: "There is no doubt that climate change poses a grave danger to the planet generally, and currently, that delay in addressing it will compound the damage," he said, "[b]ut that type of generalized and continuing harm is not the present, immediate threat of injury as interpreted by [People v] Craig [a 1991 necessity case]."[97]

In the end, the defendants offered a First Amendment defense, arguing that the police officer's dispersal order was unconstitutional because it implied that protest on the sidewalk was an arrestable offense. The judge agreed, finding that "[t]he actual order given … was not narrowly tailored and did not afford defendants ample alternative channels for communication."[98] He acquitted all defendants.[99]

Despite the several attempts by various defendants to assert a climate necessity defense, illustrated in the cases above, no United States judge had let the defense be considered by a jury—until Judge Howard in *Brockway* agreed to let the Delta Five take a crack at it.[100]

3. SUMMARY OF TRIAL AND DENIAL OF THE NECESSITY DEFENSE

In *Brockway*, the Delta Five were charged with second-degree criminal trespass and with obstructing or delaying a train for their November 2014 trespass onto a railyard. Their purpose was to obstruct trains carrying crude oil in protest of the government's lack of action on climate change and the continued expansion of fossil fuel infrastructure in Washington State. This section describes the pretrial and trial actions of the parties and court in *Brockway*, including the attempted use of the necessity defense and the court's ultimate rejection of the defense. It also presents the court's reasoning for its flawed application of necessity precedent, which will be further analyzed in Section 4.

In the beginning, the chances of presenting the necessity defense looked dim for the Delta Five. During pretrial motions in *Brockway*, the court initially denied the defense's motion to

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96 Rebecca Nathanson, "Climate-Change Activists Consider the Necessity Defense", *The New Yorker* (11 April 2015), online: <www.newyorker.com/news/news-desk/climate-change-activists-consider-the-necessity-defense>.

97 *People v Shalauder*, (4 March 2015), New York 2014NY076969 (NYC Crim Ct) (Transcript of Proceedings, excerpts) at 5 [*People v Shalauder*].

98 *People v Shalauder* (5 March 2015), New York 2014NY076969 (NYC Crim Ct) (Transcript of Proceedings, excerpts) at 6.

99 *Ibid*.

100 See *American Electric Power Company Inc v Connecticut*, 564 US 410 (2011) (judicial resistance to the climate necessity defense shares some affinities with judicial resistance to climate change tort claims); *Native Village of Kivalina v ExxonMobil*, 696 F (3d) 849 (9th Cir 2012) (claims of injury against energy distributors and fossil fuel producers were denied based on the idea that the legislature, rather than courts, should fashion remedies for climate change—a point similar to the one made by trial judges that it is inappropriate for juries to resolve the political questions posed by necessity defendants).

present the necessity defense on grounds similar to those in the cases cited above.[101] The court reversed this position, however, due to the possibility that expert testimony would present evidence that defendants sought to avoid a legally cognizable harm and that they had no reasonable legal alternative.[102]

This dim outlook was realized when the Delta Five's initial attempt to employ the necessity defense was met with immediate opposition from both the prosecution and the court, based on their alleged inability to prove the elements of the defense. The defense's initial December 10, 2015, "Motion to Allow Affirmative Defense and to Call Expert Witnesses" presented Washington precedent on necessity but largely focused on the defendants' constitutional right to present a full defense of their choosing.[103] The motion also provided a preview of the expert testimony to be presented at trial.

The State motioned in opposition on December 19, 2015, arguing that no necessity defense was available due to legal alternatives that were available to Defendants. In response, the defense's December 23, 2015, reply indicated: "[a]rguments as to whether or not an instruction on necessity is warranted necessarily must follow the testimony so that the Court can assess whether or not some evidence was offered at trial to warrant including a jury instruction on that defense or any other proffered defenses."[104]

On January 6, 2016, the court denied the defense motion, stating first that the defendants faced no legally cognizable harm because the protest's impact was "pure speculation."[105] Second, the court found that the Defendants had reasonable legal alternatives to their blockade. Referring to a line of federal necessity cases, the court found that so long as the political process is open, no defense is available for protest activity because "congressional action can *always* mitigate [the] 'harm'" targeted by indirect civil disobedience.[106]

Immediately after the ruling, the Defendants filed a "Joint Defense Motion to Reconsider Order on Expert Witnesses" explaining that the court had erred in its order because "[i]n ruling that the defendants had not made out a prima facie case for necessity, the Court analyzed the issue of 'legally cognizable harm.' In doing so, this Court engaged in a factfinding without the benefit of testimony from experts, lay witnesses or the defendants."[107] The motion also argued

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101 *Washington v Brockway* (6 January 2016), Snohomish 5053A-14D (Snohomish Co Dist Ct, Wash) (Order Denying Defense Motion to Allow Affirmative Defense of Necessity and Expert Witness Testimony at 5–9) [Order Denying Defense Motion].

102 *Washington v Brockway* (7 January 2017), Snohomish 5053A-14D (Snohomish Co Dist Ct, Wash) (Transcript of the Reconsideration Hearing) [*Reconsideration Hearing Transcript*].

103 *Washington v Brockway* (9 December 2015), Snohomish 5053A-14D (Snohomish Co Dist Ct, Wash) (Motion to Allow Affirmative Defense and to Call Expert Witnesses at 5–8).

104 *Washington v Brockway*, (23 December 2015), Snohomish 5053A-14D (Snohomish Co Dist Ct, Wash) (Oral Argument, Respondent Reply in Support of Motion to Allow Affirmative Defenses and to Call Expert Witnesses at 1–2).

105 Order Denying Defense Motion, *supra* note 101 at 6.

106 *Ibid* at 9 (the court cited *United States v Quilty*, 741 F (2d) 1031 (7th Cir 1984), *United States v Montgomery*, 772 F (2d) 733 (11th Cir 1985), *United States v Dorrell*, 758 F (2d) 427 (9th Cir 1985), *United States v Aguilar*, 883 F (2d) 662 (9th Cir 1989), and *Schoon*, *supra* note 1).

107 *Washington v Brockway* (6 January 2016), Snohomish 5035A-14D (Snohomish Co Dist Ct, Wash) (Joint Defense Motion to Reconsider Order on Expert Testimony at 2) [Motion to Reconsider].

that the court's reliance on *Schoon* and *Washington v Aver*[108] was misplaced because neither case proffered expert testimony.[109] Finally, the defense claimed that the court had ruled that Defendants had not pursued other lawful means without hearing from Defendants as to what those lawful means may have been.[110] In sum, the defense objected to the court's removal of fact-finding authority from the jury and to its preemptive denial of the defense without having developed a record on the defense's key elements.

On January 7, 2016, the court heard arguments on the Defendants' motion to reconsider. During the hearing, the court expressed its concerns with both the "amorphous" nature of showing that the harm of stopping a train for eight hours is less than the global warming harms caused by the train (which Defendants' actions arguably prevented),[111] and the ability of Defendants to show that there were no reasonable legal alternatives to their protest, especially in light of the "per se" rule in the Ninth Circuit that states that there is always a reasonable alternative in an indirect civil disobedience case.[112] Defendants responded by reminding the court that under Washington law, it was the jury, not the judge who should decide whether Defendants met their burden of proof.[113] Defendants also argued that *Schoon* and *Aver* were both distinguishable on their facts from the present case because those cases did not present questions of fact that would be addressed by expert testimony.[114] The prosecution questioned the distinctions made by the defense and argued that the last minute nature of the motion to reconsider and the lack of a clear statement by the defense as to who would testify put the prosecution in a difficult position to effectively rebut the testimony.[115]

At the close of the hearing, Judge Howard reversed himself and granted Defendants' motion to present a necessity defense, stating that "I have been persuaded that this particular group of defendants are going to attempt to do something that no other group of defendants that I can see has achieved, which is lay a proper foundation for a necessity defense in an indirect civil disobedience case."[116] Despite allowing the defense to present its expert witnesses, the judge remained skeptical: "[t]hey have lined up people that they believe can do that. I have

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108 See *Washington v Aver*, 109 Wn (2d) 303 (1987) [*Aver*] (this Washington State Supreme Court case evaluating an attempted use of the necessity defense determined that a minimum standard of proof was required to address the prong but only determined it was not met because the defendants offered *no* expert testimony).

109 Motion to Reconsider, *supra* note 107 at 2.

110 *Ibid* at 3.

111 *Reconsideration Hearing Transcript*, *supra* note 102 at 3–5. It is interesting to note that Defendants' claims that they did not expect to stop global warming with this single event, but were confident that they would spur others to action, were realized by other groups similarly blockading the BNSF railways in Washington. See Phuong Le, "Protestors Block Train Tracks to 2 Washington Refineries", *Washington Times* (14 May 2016), online: <www.washingtontimes.com/news/2016/may/14/protesters-block-train-tracks-to-2-washington-refi/?page=all>.

112 *Reconsideration Hearing Transcript, supra* note 102 at 6–7.

113 *Ibid* at 6–7.

114 *Ibid*.

115 *Ibid* at 18–22.

116 *Ibid* at 28.

my doubts. It is a large hurdle, but I am going to give them a chance to do it."[117] The judge made a similar point at the close of the evidence at trial, indicating that he had allowed the necessity defense because Defendants

> believed that they could bring this case outside of, and distinguish this case from others throughout the country by presenting expert testimony regarding not only the harm sought to be averted by these acts, as they relate to global climate change, but also what was more compelling to me was an offer of proof that they would be able to show a change in local BNSF policy as a result of their protests.[118]

At trial, the Defendants supported the elements of their necessity defense by presenting substantial evidence related to the dangers of climate change and crude oil transport, BNSF's poor safety record and control over state regulatory bodies, and the inefficacy of past attempts at legal advocacy. Their necessity argument was based both upon the imminent dangers of climate change and the more local dangers of crude oil transport in Washington. Defense counsel argued that no reasonable alternatives to protest were available because of industry's capture of state agencies and legislatures.[119]

A variety of experts from several scientific and social fields of inquiry testified to the harms presented by the transport of crude oil. The scientists included Dr. Richard Gammon, a retired University of Washington professor of chemistry and oceanography, who testified about the local and regional impacts of climate change, such as reduction in snow pack, more severe weather events, wildfires, and adverse effects on fisheries.[120] Dr. Fred Millar testified about crude oil transport's inherent dangers, BNSF's poor safety record, and the state legislature's inaction on the issue.[121] Erik De Place, an energy researcher, testified about the expansion of fossil fuels transportation infrastructure (which could lead to 822 million metric tons of CO_2 emissions), and the secrecy, deception, and poor emergency response record of BNSF.[122]

Other witnesses included Defendant Abby Brockway, who testified about her own past legal advocacy, including writing to President Obama and her state and federal representatives and testifying at Department of Ecology hearings, as well as the fact that during the blockade she had carried in her backpack a petition to the Washington governor for a moratorium on new fossil fuel projects.[123] Dr. Frank James, a medical doctor, testified about the health impacts of crude transport and the proposed coal-shipping terminal in Bellingham, Washington.[124] Finally, Michael Elliott, a spokesman and lobbyist for the Locomotive Engineers and Trainmen labor union and a former BNSF employee who had been fired for whistleblowing on safety violations, testified about the incapacity of normal legal avenues such as lobbying to change

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117 *Ibid* at 28–29.

118 Transcript of Proceedings vol 4, *supra* note 2 at 57.

119 *Washington v Brockway* (11 January 2016), Snohomish 5053A-14D (Snohomish Co Dist Ct, Wash) (Transcript of Proceedings, vol 1 at 66–67).

120 *Washington v Brockway* (13 January 2016), Snohomish 5053A-14D (Snohomish Co Dist Ct, Wash) (Transcript of Proceedings, vol 3 at 33–56) [Transcript of Proceedings vol 3].

121 *Ibid* at 97–126.

122 *Ibid* at 8–32.

123 *Ibid* at 59–93.

124 Transcript of Proceedings vol 4, *supra* note 2 at 12–20.

company policy, and testified that the Delta Five protest had helped to defeat a BNSF proposal to cut crewmembers on trains, which would have resulted in increased safety risks.[125]

At the conclusion of the witness testimony and on a renewed motion from the prosecution, the court reconsidered the viability of the necessity defense and whether the jury should be given an instruction based on the defense. Judge Howard decided to deny the instruction and excluded all expert testimony related to the defense—essentially telling the jurors to ignore most of what they had heard. The judge's reasons for the denial were based on a narrow reading of the precedent governing "reasonable alternatives" and a desire to avoid politics in the courtroom: "[t]he legal issue to be decided is based on legal precedent, legal precedent in this state and frankly persuasive authority that is throughout the country."[126] Judge Howard seemed to sympathize with Defendants' position on the urgency of taking action to address climate change, even acknowledging society's need for energetic advocates in the face of political inaction, but continued, "I am bound by legal precedent no matter what my personal views may be on these topics."[127] After reaffirming the importance of precedent as a guide for citizens contemplating taking illegal actions, and relying on a flawed interpretation of that precedent, the court ultimately prevented the jury from considering the necessity defense, even after coming so far.

4. COMMENTARY AND ANALYSIS

Brockway is significant for two reasons. First, it represents the furthest reach of the necessity defense in a United States climate change case in that a jury actually heard testimony supporting the defense. Second, despite the court's rectification of its initial erroneous ruling, which had disallowed the necessity defense, the court ultimately refused to let the jury consider the defense based on the same errors that other courts have committed in connection with the necessity defense in political and climate necessity cases. The court's double reversal was especially troubling because the defendants proffered evidence that created an issue of fact that should have gone to the jury.

This commentary and analysis first discusses possible reasons for Judge Howard's deciding against, then for, and then against, jury consideration of the necessity defense and the small step forward that his actions may have on the climate necessity defense. It then explains the two reasons why the court's rationale for not allowing the defense was erroneous. First, the court misapplied the "imminence" and "reasonable alternative" prongs of the necessity defense. Second, the court applied the nonbinding and illogical "direct and indirect" dichotomy of *Schoon* and seemed to return to its initial determination that "the affirmative defense of necessity is unavailable in indirect civil disobedient cases."[128] Finally, the analysis suggests why the court's failure to follow the law is particularly egregious in this case.

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125 *Ibid* at 31–44.

126 *Ibid* at 87.

127 *Ibid* at 89.

128 Order Denying Defense Motion, *supra* note 101 at 9.

4.1. Why The Court May Have Done What It Did

Judge Howard seemed genuinely concerned about the inevitable and catastrophic results of climate change. Similar to the district attorney, Sam Sutter, who dropped the prosecution against Jay O'Hara and Ken Ward, Judge Howard in *Brockway* went on the record with his climate change views. Sutter stated to the press his reason for dropping the most serious charges against O'Hara and Ward and reducing the remaining to civil infractions: "[the agreement] was made with our concern for their children, the children of Bristol County and beyond in mind. Climate change is one of the gravest crises our planet has ever faced."[129] Judge Howard made a similar statement when he initially denied the Defendants' motion to present their necessity defense: "General harms by global warming are obvious—and potentially catastrophic—if government and individuals fail to act."[130] The court was even more direct in its insistence that the Defendants were on the right side of the climate change issue at the very moment it refused to instruct the jury on the necessity defense:

> Quite frankly, [the Defendants] are tireless advocates who we need in this society to prevent the kind of catastrophic effects that we see coming and that our politicians are ineffectually addressing, but that does not mean that this court will engage in politics and violate its obligation to adhere to legal precedent, which in this case overwhelmingly supports the state's position regarding the necessity defense.[131]

Maybe Judge Howard's initial decision (made the very next day) to allow necessity defense testimony was, at least in part, his way of letting the public and the jury hear why actions like those of the Defendants were needed even though he retained serious doubts as to whether he would ultimately let the jury consider the evidence. This scenario seems plausible in light of his statement made during the posttrial hearing shortly before he denied giving the necessity defense instructions to the jury:

> In other cases, at least that I am aware of, the defendants were not even able to present … their viewpoints in an effort to get this defense before the jury, and so I certainly hope that regardless of my ruling, there is some value seen in having been able to present in a public forum your points of view regarding these issues. I also would note that given the public attention that clearly is here today, that you have, regardless of whether you argued necessity or not, achieved much of what you sought to achieve.[132]

Based on his statements condemning the lack of action on climate change and his unprecedented decision to allow the jury to hear the necessity defense testimony, Judge Howard appeared inclined to support the Defendants' cause. Interestingly, in refusing to allow a jury instruction on the right to free speech under the Washington Constitution, he noted that giving such an instruction might invite "[jury] nullification."[133] Thus, Judge Howard felt bound by stare decisis and the rule of law to deny the defense. This triumph of (weak)

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129 Alison Nihart, "Charges Reduced; DA Makes Historic Statement in Support of Climate Action" (8 September 2014), *Lobster Boat Blockade* (blog), online: <www.lobsterboatblockade.org/2014/09/08/charges-reduced-da-makes-historic-statement-in-support-of-climate-action/>.

130 Order Denying Defense Motion, *supra* note 101 at 6.

131 Transcript of Proceedings vol 4, *supra* note 2 at 92.

132 *Ibid* at 87.

133 *Ibid* at 113.

precedent over personal conviction replays the recent history of political necessity: cabining of its radical democratic potential so as to preserve the predictability of elite management of the criminal justice system.

On the other hand, Judge Howard may have believed that the most important aspect of a trial stemming from a civil disobedience proceeding is the attendant media and public attention. After all, most civil disobedients are prepared to face the legal consequences of their actions. By letting the public hear the necessity defense, but not letting it be considered by the jury, he may have felt that he has provided a public forum for all of the Defendants' arguments without risking being overturned on appeal.

4.2. Erroneous Denial of Jury Consideration of the Necessity Defense

Despite allowing the jury to hear expert testimony establishing a necessity defense, the court failed to follow Washington law, which requires the court to instruct the jury on the defense where the testimony creates an issue of fact. Climate necessity defenses have often been defeated on the "imminence" or "no reasonable alternative" elements of the defense. *Brockway* was no different. In *Brockway*, the Defendants attempted to address the imminence problem by presenting a hybrid climate necessity defense that also addressed the imminence of harms from the crude oil corridor apart from climate change. The Defendants' strategy was effective because although the court initially found that the Defendants had not met that burden,[134] the court ultimately found that the Defendants stated a prima facie case for the applicable requirement under Washington law.[135] The court's rectification of its error also rectified its additional previous error of denying jury consideration of the reasonable alternatives prong of the necessity defense. When there is some evidence supporting the "no reasonable alternatives" prong, the jury should be allowed to decide whether the Defendants' judgment of necessity was correct.[136]

After extended discussion with prosecution and defense counsel, the court found that the Defendants had met the burden of proof on the first three elements of the necessity defense—a reasonable belief that their lawbreaking was necessary to prevent a harm, that this harm was greater than the harm resulting from their crimes, and that the Defendants had not brought about the threatened harm themselves—but had failed to meet their burden on the fourth element, the existence of no reasonable legal alternative.[137] As with many (but not all) courts considering political necessity defenses, Judge Howard implicitly defined reasonable legal alternative as *any* legal alternative, and, given that the "defendants in this case testified about other legal ways of achieving their goals they had attempted throughout their lives and continue to attempt now," such as lobbying, petitioning, and speaking at hearings, found that such alternatives existed.[138] In other words, the judge bracketed the questions of reasonableness and effectiveness that had been underscored by the Defendants, and denied the necessity instruction purely on the basis of the existence of legal alternatives to protest.

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134 Order Denying Defense Motion, *supra* note 101 at 6–7.

135 Transcript of Proceedings vol 4, *supra* note 2 at 88.

136 See *Gray*, *supra* note 3 at 852–53.

137 Transcript of Proceedings vol 4, *supra* note 2 at 88, 92.

138 *Ibid* at 91.

This excessively strict interpretation of the legal alternatives test rested on an incorrect treatment of necessity precedent. Judge Howard made much of the value of legal precedent: "it allows citizens, before they commit acts that could be interpreted as illegal, to go and research about what their options might be if they commit those acts within the legal system."[139] He characterized his decision (especially given the protest's "indirect" nature) as "bound by legal precedent no matter what my personal views may be on these topics."[140] This assessment ignores the large body of successful political necessity cases discussed above, which prove that, contrary to the judge's characterization, many necessity cases have gone to the jury despite the existence of *some* legal alternative. For example, as discussed in Section 2.2 above, deportation, restrictions on nuclear power, foreign wars, and air pollution control all could theoretically be addressed through legislative action. Furthermore, they had all been the subject of legal protests and other attempts urging change by the government; however, in each instance, the reality is that the issues were not being addressed by the political process, similar to today's issues of climate change.

More damningly, the court misapplied *Aver*, the only Washington State case it discussed in its final rejection of the defense, and departed from state precedent on the minimum evidence standard. In *Aver*, the state Supreme Court upheld a trial court's refusal to allow presentation of necessity evidence by a group of protesters who had blocked a train carrying nuclear materials. In a cursory discussion in that case, the Supreme Court found that the "defendants' offer of proof did not meet a minimum standard."[141] The *Aver* defendants had not presented *any* expert testimony related to the legal alternatives prong, a far cry from the many hours of testimony in *Brockway* related to the inefficacy of Defendants' past attempts at legal advocacy. In his discussion of *Aver*, Judge Howard himself acknowledged this distinction.[142] Nonetheless, the judge did not accept that the Defendants *had* cleared the "minimum standard of proof" hurdle discussed in *Aver*, but instead held that the Supreme Court precedent merely "stand[s] for the proposition that I do have within my discretion to deny the defense instruction,"[143] and thus decided that "no objective reasonable trier of fact could find that no reasonable legal alternative existed."[144]

Thus, despite recognizing that *Aver* set a "minimum standard of proof" test for reasonable legal alternative evidence and that Defendants in *Brockway* had produced several hours of testimony on this point, the court found that no juror could reasonably find this evidence sufficient, even though many past juries had found sufficient evidence even in the absence of expert testimony.

This exclusion of evidence is contrary to other Washington State precedents, as well. In *Washington v Otis*, the Court of Appeals in Washington reversed a trial court's exclusion of evidence in a medical marijuana case, holding that: "[a] defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving an instruction on the defense

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139 *Ibid* at 87.

140 *Ibid* at 89.

141 *Supra* note 108 at 311.

142 Transcript of Proceedings vol 4, *supra* note 2 at 90.

143 *Ibid* at 91.

144 *Ibid* at 92.

… In evaluating whether the evidence is sufficient to support such an instruction, the trial court must interpret the evidence most strongly in favor of the defendant."[145] Moreover, the Washington State Supreme Court has acknowledged the low burden for presenting an affirmative defense: in *Washington v Janes*, the Court reversed a denial of a jury instruction on self-defense (which the Court analogized to a necessity defense) and held that "the threshold burden of production for a self-defense instruction is low, [but] it is not nonexistent."[146] The *Brockway* court departed from this defendant-favorable, low-threshold standard: it concluded that *any* legal alternative to protest was reasonable, and simply substituted its own judgment of legal alternatives for those of the defense's experts.

Despite *Otis*'s requirement that the "trial court must interpret the evidence most strongly in favor of the defendant,"[147] the *Brockway* court appeared to do the opposite: the obstruction charge required that the obstructed train be operated in a "lawful manner," and even though the court acknowledged that the state had failed to present any evidence that the blocked train was operated "lawfully," it held that there was sufficient evidence for the jury to *infer* lawful operation.[148] So, despite allowing the jury to *infer* evidence that would help the prosecution, Judge Howard refused to use the same standard for the Defendants. The above-described testimony of Defendants painstakingly addressed the issue of reasonable legal alternatives. The Defendants then summarized this testimony in the post-trial hearing on the necessity defense, noting that the expert witnesses had described previous legal protests, legislative appeals, and media activity. While some of that action was effective, most was not, and all agreed that none of them were reasonable given the gravity of the situation.[149] As defense counsel noted, this meant that the court was using a lower burden of production for the prosecution than for the defense, despite state precedent clearly requiring the opposite result.[150]

In addition to this misapplication of state law precedent, the *Brockway* court evinced a troubling reliance on *Schoon*'s per se denial of the necessity defense for indirect civil disobedience. While the *Schoon* test is problematic on its own terms, the court's use of federal precedent to deny a necessity instruction appears to contradict Washington State precedent on the burden of production, further compounding the court's errors on this point.

4.3. Improper Reliance on "Direct" vs "Indirect" Distinction

Another rationale used by the court in its denial of the necessity defense was *Schoon*'s non-rule that disallows use of the necessity defense in cases where civil disobedients protest laws other than those that they have disobeyed. As explained in detail in section 2.2 above, *Schoon*'s rationale for excluding reasonable alternatives from indirect civil disobedience cases has been soundly criticized for several reasons, most significantly for its unsupportable distinction

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145 *Washington v Otis*, 151 Wn App 572 at 578 (2009) [citation omitted].

146 *Washington v Janes*, 121 Wn 2d 220 at 237 (1993).

147 *Washington v Otis*, 151 Wn App 572 at 578 (2009) [citation omitted].

148 Transcript of Proceedings vol 4, *supra* note 2 ("a juror could, based on circumstantial evidence presented by both sides in this case, determine that BNSF was operating the trains that they claimed were obstructed, lawfully, and so I will leave this to the jury" at 55).

149 *Ibid* at 60–78.

150 *Ibid* at 67–69.

between direct and indirect civil disobedience. The court also exaggerated the extent to which other courts adopt this per se rule.[151] Judge Howard understood that *Schoon* was not controlling, and made a point to remind the prosecution of that fact in the hearing on the motion to reconsider the necessity defense.[152] Furthermore, he recognized that Washington law in *Aver* implicitly rejects the per se analysis of *Schoon*:

> I will note that the Supreme Court did have an opportunity [in *Aver*] to simply find that the necessity defense is per se banned in all indirect civil disobedience cases and the court did not do that—again, one of the reasons why I did not decline to allow the defendants to present their witnesses in this case.[153]

In other words, the court recognized that *Aver*, like *Schoon*, could have created a per se rule, but instead implicitly requires a court to analyze each element, including reasonable alternatives. *Aver* adopted the reasoning of the Pennsylvania Supreme Court, which "held that defendants' offer of proof did not meet a minimum standard which would support a justification defense and, therefore, affirmed the defendants' convictions."[154] *Aver* then "similarly [held] that a necessity defense is not supported by the record in this case."[155] The *Aver* rule requires the court to perform an analysis (albeit cursory) of the entire necessity defense. The court's recognition of the differences between *Aver* and *Schoon* renders the court's statement at several points that it found *Schoon* to be persuasive[156] perplexing. While rejecting *Schoon's* per se rule, the court nevertheless seemed to follow *Schoon* by not letting the jury consider the substantial amount of testimony elicited on reasonable alternatives.

The Washington Supreme Court's opinion in *State v Kurtz* further emphasizes the court's error in not recognizing the issue of fact inherent in the Defendants' testimony on reasonable alternatives. In *Kurtz,* the Washington Supreme Court addressed the State's contention that the

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151 In an unreported 2014 case, a Massachusetts trial court allowed the necessity defense for defendants charged with trespass after a protest at a nuclear power plant—a classic instance of "indirect" civil disobedience. The defendants were found guilty and had their sentence of one day's imprisonment waived. See Frank Mand, "Pilgrim Protestors Sentenced: The Necessity Defense", *Wicked Local Plymouth* (25 March 2014), online: <plymouth.wickedlocal.com/article/20140325/NEWS/140327561>. Likewise, in *People v Shalauder*, discussion *above* in Section 2.3, the judge provided a thorough analysis of the defendants' necessity defense without relying on the "direct" versus "indirect" distinction, even though the protest clearly fell into the second category. See *People v Shalauder*, *supra* note 97 at 4–7. Evidently, the *Schoon* distinction is not a "per se" rule followed across the country.

152 *Reconsideration Hearing Transcript, supra* note 102 at 19:

> MR. STURDIVANT: I would say [*Schoon*] is controlling. I would ask you to hold --
> THE COURT: It is not controlling.
> MR. STURDIVANT: It is not controlling -- I would say it is on point.
> THE COURT: That would be a better way to put it. I want to make sure everyone knows that. I found it persuasive, but it is not controlling.

153 Transcript of Proceedings vol 4, *supra* note 2 at at 90–91.

154 *Aver*, *supra* note 108 at 311.

155 *Ibid* at 311.

156 See Order Denying Defense Motion, *supra* note 101 at 9 (initially adopting the *Schoon* per se rule for the reasonable alternative prong); *Reconsideration Hearing Transcript, supra* note 102 (finding that *Schoon*'s analysis is "persuasive" at 19); Transcript of Proceedings vol 4, *supra* note 2 at 87 (stating that authorities from other states not finding reasonable alternatives is "persuasive").

legalization of recreational marijuana provided a legal alternative to the defendant's unlawful possession of the drug, thereby precluding the necessity defense.[157] The court stated that the existence of a legal alternative cannot be determined a priori by the mere existence of a law, and that the trial court must consider the defendant's individual evidence regarding a viable legal alternative:

> [T]he mere existence of the Act does not foreclose a medical necessity defense but it can be a factor in weighing whether there was a viable legal alternative to a violation of the controlled substances law ....
>
> Here, the trial court did not consider whether the evidence supported a necessity defense … including whether Kurtz had a viable legal alternative … If the evidence supports the necessity defense, Kurtz is entitled to a new trial.[158]

Although Judge Howard did nominally consider legal alternatives and found that they existed, like the *Kurtz* trial court, the court here erred by not recognizing that the issue of fact should have gone to the jury. In essence, the court may not decide the question of legal alternatives based on a contextless test like direct-indirect civil disobedience.

4.4. Antidemocratic Effects of Denying Jury Consideration

By erecting barriers to jury consideration of the necessity defense, this court and others contravene the purpose of the defense and further an antidemocratic consolidation of balancing power in the person of the judge. The *Brockway* court assumed a typical posture of judicial restraint by claiming that its decision to exclude the defense was bound by precedent. Not only was this decision not determined by precedent, but the court's appeal to the few previous decisions on political necessity is especially inappropriate in the fact-intensive, jury-dependent area of necessity, an area of the common law that is intended to be responsive to particular circumstances and the judgment of a jury. Rather than deny the opportunity for the jury to consider the defense, the court should have allowed the jury to evaluate the evidence on its merits and determine whether, under the facts of *Brockway* and the elements of the necessity defense, the Defendants were justified in their actions. Instead, it cut off this valuable judicial "safety valve" and retained the power within the role of the judge.

The court also made much of its belief that it must avoid making a "political" decision, but by deciding for the jury which political alternatives are reasonable and which are not, the court made the ultimate political move. The basic rationale for the necessity defense is to allow nonlegal balancing of harms and benefits to trump the letter of the law. Where a defendant's actions are politically motivated, this requires a political judgment by the jury. Judges' denials of the necessity defense in such cases do not put the law above politics—they substitute elite political judgment for lay political judgment. Although it is encouraging that, in a first for the climate necessity movement, evidence on the necessity defense was presented to the jury, the court erred by cutting off the process too early and preventing the jury from considering that evidence by denying a jury instruction on the defense.

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157 *Supra* note 14 at 466, 479.

158 *Ibid* at 478–79.

4.5. Urgency of Climate Change and Applicability of the Defense

The special circumstances of climate change demand greater acquiescence to the necessity defense. On the imminence prong, few scenarios of impending danger are more compelling than the dangers posed by climate change, making the balancing of minor criminal violations especially straightforward in climate protest cases. Judge Howard's comparison of necessity defense cases where the necessity defense obviously should have been excluded,[159] with the factually complex and compelling arguments of climate change is a false analogy and is an abdication of the court's responsibility to follow the law. Government inaction is particularly pronounced in the area of climate policy, justifying the sort of extralegal citizen action that the necessity defense is intended to protect. Average citizens are best equipped to judge what sorts of political action are needed to prevent the climate change harms threatening them, but have had little or no opportunity to influence climate policy; thus, there is a definite need for a democratic forum of the sort provided by deliberation on a climate necessity defense.

5. CONCLUSION

The *Brockway* court's refusal to apply the doctrine of necessity, despite Judge Howard's apparent understanding of the lack of government action to address climate change, is perplexing and ultimately wrong. The court failed to apply Washington law to the imminence and reasonable alternative prongs of the necessity defense test, applied an incorrect evidentiary burden on the Defendants, and acknowledged as persuasive an incoherent direct-indirect civil disobedience distinction stemming from *Schoon*, which is implicitly prohibited by Washington law. By preventing the jury from considering the evidence presented so that its members could make a commonsense, community-minded determination of whether the Defendants satisfied the elements of the defense, these several errors closed off the "safety valve" of jury decision making that the necessity defense is designed to provide.

The ability to make use of the necessity defense, which has at its roots the purpose of promoting adherence to more important societal values rather than lesser ones, is sorely needed where our political systems are in serious disrepair. We need more, not less, democratic deliberation on the great issues of our time; debates over climate policy are particularly ill-suited to judicial hairsplitting and the law-politics distinction.

Despite its errors, the fact that the court allowed necessity testimony to be presented to a jury at all is a sign of society's growing attention to climate change and government's failure to address it; allowing a climate necessity defense to go to a jury would be a powerful signal that political action on climate change is more important than preventing juries from recognizing the morality of civil disobedience, and that the law is no longer always an impediment to proactive climate action.

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[159] Order Denying Defense Motion, *supra* note 101 at 5–6.