5 Ariz. J. Envtl. L. & Pol'y 1062

Arizona Journal of Environmental Law & Policy
April 3, 2015

Comment
Ian McCloskey[a1]

*1062 THE NEW NECESSITY: ENVIRONMENTAL ACTIVISTS' NOVEL TAKE ON THE ANCIENT CRIMINAL DEFENSE

The Henry David T.

On May 15, 2013, Jay O'Hara and Ken Ward navigated a small fishing boat named the "Henry David T." to block the steam ship "Energy Enterprise" from unloading 40,000 tons of coal at the Brayton Point Power Plant on the coastal border of Massachusetts and Rhode Island.[1] Later that year, prosecutors charged the pair with disturbing the peace, conspiracy, failure to act to avoid a collision, and negligent operation of a motor vessel in connection with the incident.[2] At trial, the pair's attorneys intended to present a novel variation of the ancient necessity defense,[3] arguing that the imminent threat of global climate change left them with no choice but to act as they did that morning.

Asked why they set out that morning, O'Hara, a fervent Quaker and environmental activist based in Cape Cod, said that given the imminent threat of rising sea levels[4] and increased global temperatures,[5] "I have to live my life in a way that shows, that lives in some way acknowledging the reality that's out there. And in this case that means having to do some pretty dramatic things to avert some pretty dramatic consequences."[6] Indeed, surveys of the scientific literature on global climate change are myriad and stoutly in affirmation that ***1063** humans are a substantial influence on that change.[7] O'Hara claimed that, because burning coal is the most substantial source of man-made atmospheric carbon dioxide, the Brayton Point power station represented an opportune locale to stage their protest.[8] On September 8 of this year, the Bristol County District Attorney opted to reduce the charges against the pair to fine-carrying civil violations on the day the trial was set to begin.[9] He issued a statement supporting the duo's efforts to protest the burning of coal and bring attention to global climate change, stating that, "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."[10] This resolution is far less severe than punishments faced by many other environmental activists in the United States fighting criminal charges. For example, Timmothy DeChristopher was barred from presenting a similar necessity defense to jurors after he interfered with an auction of land for the extraction of fossil fuels, resulting in DeChristopher serving twenty one months in prison from 2011 to 2013.[11] However, in cases where courts allow a justification-based criminal defense, such as the case from Kent, United Kingdom, where six Greenpeace activists were acquitted of criminal charges despite admitting to painting a message on a smokestack without permission, juries seem potentially sympathetic.[12] While the Brayton Point case may seem like either a comparatively just result, prudent consideration of judicial economy, or just political theatre, O'Hara's plea deprived criminal lawyers and environmental activists of a fairly unique chance to test whether the necessity defense could be successfully presented in U.S. courts. O'Hara's defense--and the plea it brought about--raises an interesting question about future invocations of the necessity defense in the context of environmental protection, where defendants argue political action on the subject has been insufficient, or nonexistent. In answering that question, I intend to briefly discuss a history of the necessity defense at ***1064** common law, what such a defense might look like in another hypothetical case, and the likelihood of success where the defendant alleges that his actions were justified in order to protect the environment.

What is Legal Necessity?

While the explicit origins of the necessity defense are not entirely clear, the principle underlying it pervades the history Western civilization. The 1551 case *Reninger v. Fagoss* may be the first clear enunciation of the doctrine at English common law, stating, "A man may break the words of the law, and yet not break the law itself [...] where the words of them are broken to avoid greater inconvenience, or through necessity, or by compulsion,"[13] and referring to examples as ancient as the Gospel of Matthew.[14] The doctrine has since been variously articulated by historical English[15] and modern American commentators.[16]

According to Massachusetts jury instructions on the necessity defense, four elements must be established for a successful claim. These are:

> (1) the defendant is faced with a clear and imminent danger, not one which is debatable or speculative;
>
> (2) the defendant can reasonably expect that his action will be effective as the direct cause of abating the danger;
>
> (3) there is [no] legal alternative which will be effective in abating the danger; and
>
> ***1065** (4) the Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue.[17]

Further, the necessity defense is generally distinguished at common law from the duress defense, which might also fit a set of similar criminal circumstances. A duress defense must include a credible, immediate threat of death or serious bodily injury,[18] while in a necessity defense, "the coercion must have had its source in the physical forces of nature."[19] It is important to note that Ward and O'Hara intended to raise necessity, rather than a duress defense.

Making the Necessity Case

Though the legislature had not precluded the necessity defense in the context of interfering with the operation of a coal power plant, none of the other three elements of the Massachusetts' jury instructions would have been particularly easy to prove. The defense intended to show an imminent danger, the first element of the defense, through the testimony of author and environmental activist Bill McKibben, who would testify as an expert witness.[20] His testimony would certainly speak to the notion that climate change was neither debatable nor speculative,[21] but may have struggled to show whether the dangers of climate change were truly "imminent." While climate change might fit the textbook definition of "ready to take place,"[22] the actual harm associated with climate change a few decades from now could easily be argued to be too remote to be called "imminent." Black's Law Dictionary fails to elucidate further precisely how the word "imminent" might be understood differently in and of itself in the legal context.[23] Therefore, the "imminence" of the dangers presented by global climate change is difficult to prove. That said, the broad dangers to humanity that are almost certain to take place in the coming decades due to global warming might very well ***1066** compel many American juries to at least consider relaxing the temporal boundaries of what might be considered "imminent," making this defense viable when its presentation is allowed.

The second element of Massachusetts instruction, that the defendant's actions are reasonably effective at remedying the danger of climate change, is likely the most difficult to overcome. While O'Hara and Ward attempted to prevent the delivery of 40,000 tons of coal, this amount appears paltry next to the 8.1 billion tons of coal the world consumed in 2013.[24] Would the brief blockade of the power plant port scuttle the global use of fossil fuels? Almost certainly not. Might it even make a substantive dent in their usage to satisfy the second element of the jury instruction? Again, almost certainly not. For this element to be satisfied, the defense would likely need to argue the rather tenuous notion that the publicity generated by the actions of Ward and O'Hara had a substantial impact on at least American energy policy. Thus, this element of the necessity

defense is very unlikely to be proven.

With respect to the third element of the necessity defense, that no other method would be effective at dealing with the problem, the defendants would likely have been forced to rely on their interpretation of the word "effective." Perhaps even more than the previous two elements, this third element may be determined by the political opinions of the jurors in any potential case. Environmental activists, such as the District Attorney in O'Hara's case, may agree that political action is unlikely to resolve the problem, in fact, as evidenced in his statement announcing the lessening of the charges.[25] However, other jurors may believe that the political process is the only way to resolve this pressing issue if it is to be resolved at all. The argument that political channels did not offer sufficient recourse to combat climate change could certainly be made, and might possibly be well received by the finder of fact with the right political leanings.

Conclusion

***1067** In this particular case, it would appear that had a trial gone forward, Ward and O'Hara would have very likely faced a conviction. Indeed, it is quite possible that the choice of the necessity defense was not one of legal strategy, but a decision made to generate publicity for their environmental agenda. However, while the uncontested facts[26] of this case do not lend themselves congruously to satisfying the aforementioned elements of the necessity defense, this act of protest does raise an intriguing question about how a similar necessity defense could be employed in future protests against insufficient political action against climate altering human actions. Upcoming cases, including the prominent pending case against Alec Johnson, the activist charged in Oklahoma in relation to protests of the Keystone XL pipeline,[27] will potentially shed more light on the viability of this defense. While the necessity defense today seems to be a difficult, albeit plausible, sell to juries, as climate change begins to substantively impact communities across the United States, it stands to reason the defense's odds of success will increase.

Footnotes

a1 Ian is a second-year law student at the James E. Rogers College of Law, where he serves as an Associate Editor on the Arizona Journal of Environmental Law & Policy. He graduated from Arizona State University in 2013 with a Bachelor of Science degree in Economics.

1 Ken Ward & Jay O'Hara, *The Action*, LOBSTER BOAT BLOCKADE, http:// lobsterboatblockade.org/the-action/.

2 Ken Ward & Jay O'Hara, *The Legal Case*, LOBSTER BOAT BLOCKADE, http:// lobsterboatblockade.org/the-legal-case/.

3 *Id.*

4 Andrea Thompson, *Melt of Key Antarctic Glaciers 'Unstoppable,' Studies Find*, CLIMATE CENTRAL (May 12, 2014), http:// www.climatecentral.org/news/melt-of-key-antarctic-glaciers-unstoppable-studies-find-17426.

5 *Future Climate Change*, UNITED STATES ENVTL. PROT. AGENCY (last visited March 2, 2015), http://www.epa.gov/climatechange/science/future.html.

6 Melinda Tuhus, *Jay O'Hara on climate activism and the trial that wasn't*, FREE SPEECH RADIO NEWS (September 19, 2014), http:// fsrn.org/2014/09/qa-jay-ohara-on-climate-activism-and-the-trial-that-wasnt/.

7 Gayathri Vaidyanathan, *How to Determine the Scientific Consensus on Global Warming*, SCIENTIFIC AMERICAN (July 24, 2014), http:// www.scientificamerican.com/article/how-to-determine-the-scientific-consensus-on-global-warming/.

8 In Re: Interstate Power & Light Company, Before the Iowa Utilities Board (November 5, 2007), *available at*

http://www.columbia.edu/~ jeh1/2007/IowaCoal_20071105.pdf (testimony of Dr. James E. Hansen).

[9] Jess Bidgood, *Charges Dropped Against Climate Activists*, N.Y. TIMES (September 11, 2014), http://www.nytimes.com/2014/09/09/us/charges-dropped-against-climate-activists.html?ref=earth.

[10] Wes Stephenson, *Charges Were Just Dropped Against These Climate Activists in the Most Stunning Way*, The Nation (September 8, 2014), http:// www.thenation.com/blog/181525/charges-were-just-dropped-against-these-climateactivistsmost-stunning-way.

[11] Ashley Powers, *Activist Who Faked Utah Energy Lease Bids Sentenced to Two Years*, L.A. TIMES (July 27, 2011), *available at* http:// articles.latimes.com/2011/jul/27/nation/la-na-oil-leases-20110727.

[12] John Vidal, *Not guilty: the Greenpeace activists who used climate change as a legal defence*, THE GUARDIAN (September 10, 2008), *available at* http:// www.theguardian.com/environment/2008/sep/11/activists.kingsnorthclimatecamp.

[13] Edward B. Arnolds & Norman F. Garland, THE DEFENSE OF NECESSITY IN CRIMINAL LAW: THE RIGHT TO CHOOSE THE LESSER EVIL, 65 The J. of Crim. L. & Criminology 289, 291 (1974) (*citing* [1551] 1 Plowd. 1, 75 Eng. Rep. 1.).

[14] *Matthew* 12: 3-7 ("[Jesus] answered, 'Haven't you read what David did when he and his companions were hungry? He entered the house of God, and he and his companions ate the consecrated bread--which was not lawful for them to do, but only for the priests. Or haven't you read in the Law that the priests on Sabbath duty in the temple desecrate the Sabbath and yet are innocent? I tell you that something greater than the temple is here. If you had known what these words mean, 'I desire mercy, not sacrifice,' you would not have condemned the innocent."') (New International Version).

[15] *See, e.g.*, W. Blackstone, Commentaries 1:120-41 (1765) ("Therefore if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, are totally void in law, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs.).

[16] *See, e.g.*, LaFave & Scott, Handbook on Criminal Law (1972) § 50, 387 (necessity arises with a choice "either do something which violates the literal terms of the criminal law and thus produce some harm or not do it and so produce a greater harm.").

[17] *Commonwealth v. Kendall*, 883 N.E.2d 269, 272-73 (Mass. 2008).

[18] *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984).

[19] *Id.* at 695.

[20] Bidgood, *supra* note 6.

[21] Vaidyanathan, *supra* note 7.

[22] *Imminent*, MERRIAM-WEBSTER'S ENGLISH DICTIONARY (2014).

[23] No entry for "imminent." *Black's Law Dictionary* (9th ed. 2009).

[24] Brad Plumer, *China is Burning Nearly as Much Coal as the Rest of the World Combined*, WASHINGTON POST (Jan. 19, 2013), http://

www.washingtonpost.com/blogs/wonkblog/wp/2013/01/29/china-is-burning-nearly-as-much-coal-as-the-restofthe-world-combined/.

[25] Bidgood, *supra* note 6.

[26] Ward & O'Hara, *supra* note 2.

[27] Jeremey Brecher, *Climate activist argues resistance is necessary to protect the public trust*, WAGING NONVIOLENCE (October 17, 2014), http:// wagingnonviolence.org/2014/10/public-trust-goes-trial/.