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# Necessity, Non-Violent Direct Activism, and the Stansted 15: Reasserting ‘Hoffmann’s Bargain’

Steven Cammiss, Graeme Hayes and Brian Doherty\*

Key Words: Necessity; Duress of Circumstances; Prevention of Crime; Protest; Non-Violent Direct Action.

## *Abstract*

In *Thacker and ors* the Court of Appeal overturned the convictions of the 'Stansted 15', due to a misdirection on the substantive offence. However, the court rejected their necessity defence, following *Jones*, as their actions were political, outweighing a desire to avoid a risk of death or serious injury; in a ‘functioning democratic state’ their claims should have been pursued through conventional means. This is a reaffirmation of what we call ‘Hoffmann’s Bargain’; in *Jones*, Lord Hoffmann noted that non-violent protestors who act proportionately can expect the state to act with restraint, but a necessity defence is unavailable. We argue that this rejection of the defence is mistaken and overly broad for direct action cases. It also fails to acknowledge *Valderamma-*

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*Vega*, where the Court of Appeal held that defendants who claim duress may act for different motives as long as one is the avoidance of death or serious injury.

### *Introduction*

On 29 January 2021 Lord Burnett CJ handed down judgment in *Thacker and ors*,<sup>1</sup> allowing the defence appeal of the ‘Stansted 15’. On 10 December 2018, after a ten-week trial at Chelmsford Crown Court in front of HHJ Morgan, the appellants had been convicted of an offence of ‘intentional disruption of services at an aerodrome’ so as to ‘endanger the safe operation of the aerodrome or the safety of persons’ under section 1(2)(b) of the Aviation and Maritime Security Act 1990 (hereafter ‘AMSA’).<sup>2</sup>

On the evening of 28 March 2017, the appellants had cut through the perimeter fence of Stansted airport and proceeded directly to a Home Office chartered Boeing 767 which was to be used in the deportation of 60 immigration detainees to West Africa. Erecting scaffolding poles to make a tripod, and then locking themselves on to one another at the base of the tripod and the nose wheel of the plane, the appellants successfully caused the flight to be cancelled. Further disruption was also caused, including the closure of the runway while authorities ensured that it

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<sup>1</sup> [2021] EWCA Crim 97; [2021] 2 WLR 1087.

<sup>2</sup> Our analysis of the Court of Appeal decision is supplemented by our ethnographic observation of the first instance trial. From this, we have taken excerpts of the trial judge’s rulings, witness testimony, and statements given by the appellants in police interviews. For a full description of our methods see, G. Hayes, S. Cammiss and B. Doherty (2020) ‘Disciplinary Power and Impression Management in the Trial of the Stansted 15’ 55(3) *Sociology* 561-581 at <https://doi.org/10.1177/0038038520954318> (last visited 11 October 2021). We also obtained a transcript of oral argument in the Court of Appeal.

was safe. Upon arrest, the appellants were charged with offences of aggravated trespass,<sup>3</sup> criminal damage,<sup>4</sup> and a breach of Stansted bylaws;<sup>5</sup> they had prepared defence statements with these charges in mind. The subsequent Crown Prosecution Service (CPS) decision to charge the appellants under AMSA, and the decision of the Attorney General to consent to the prosecution, broke new ground, being only the second time this terrorism-related offence has been charged.<sup>6</sup> This was an important development; the Court of Appeal's clarification of the terms of the offence is welcome, as it will discourage prosecutors and the Attorney General from further inappropriate use of this offence, given that it carries a maximum sentence of life imprisonment. This is itself a significant ruling. As the Court noted, AMSA was enacted to implement the state's obligations in International Law to create offences of universal jurisdiction; Parliament, they ruled, legislated to give effect to the Montreal Convention and Protocol.<sup>7</sup> The Protocol created offences aimed at dealing with acts of terrorism and resulted from the international community's response to the December 1988 Lockerbie bombing. The Court's decision should put an end to the use of this terrorism-related offence for non-violent protest cases.<sup>8</sup>

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<sup>3</sup> Criminal Justice and Public Order Act 1994, s68.

<sup>4</sup> Criminal Damage Act 1971, s1.

<sup>5</sup> Stansted Airport bylaws 1996, 3(17).

<sup>6</sup> For the first, see *L* [2003] EWCA 243.

<sup>7</sup> n 1 above, [43], [55] and [62].

<sup>8</sup> That the AG consented to the prosecution is open to criticism given that the requirement to provide consent is to guard against disproportionate prosecutions or to ensure that any prosecutions are in accordance with the state's international obligations. On the role of the AG's consent, see Law Commission (1998) *Consents to Prosecution, Report* at [https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/lc255\\_ConSENTS\\_to\\_Prosecution.pdf](https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2015/03/lc255_ConSENTS_to_Prosecution.pdf) (last visited 11 October 2021).

Nevertheless, the Court expressly declined to challenge the AG's granting of consent, only going so far as to note that, '[f]rom time-to-time prosecutors make errors of law and so too, with utmost respect, do Law Officers', n 1 above, [111].

However, the likely impact of the Court's ruling on future prosecutions of direct action protest cases lies more clearly in the terms of the Court's rejection of the appellants' defence of 'necessity'. In rejecting the defence, the court reaffirmed what we call 'Hoffmann's Bargain' from the Court of Appeal decision in *Jones*.<sup>9</sup> Perhaps the most quoted passage from *Jones* is the following:

civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account.<sup>10</sup>

This creates what we have termed 'Hoffmann's Bargain'. Protestors, if acting with restraint, can expect to be treated leniently by the police, the CPS, and the courts.<sup>11</sup> However, Lord Hoffmann emphasised that direct action protestors have to accept that they will be convicted. Any defence of necessity or the prevention of crime will not be available to protestors:

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<sup>9</sup> [2006] UKHL 16; [2006] WLR 772.

<sup>10</sup> *ibid* [89].

<sup>11</sup> Given the CPS decision to charge the appellants with a terrorism-related offence, we question the extent to which the bargain was initially adhered to in this case.

In a case in which the defence requires that the acts of the defendant should in all the circumstances have been reasonable, his acts must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process. In such circumstances, the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury.<sup>12</sup>

The appellants' case that HHJ Morgan should not have withdrawn the defence of 'necessity'<sup>13</sup> from the jury at first instance was rejected by the Court. This rejection, we will argue, has important implications for future prosecutions, particularly as the defence raised by the appellants was in many respects unlike necessity claims for other direct action protests. Necessity is usually based upon a balance of evils test: environmental protestors, for instance, may well claim necessity on the basis that their actions are designed to prevent environmental harm. Such claims are liable to fail, given that they concern unspecified dangers<sup>14</sup> which are not imminent, and that the protestors have alternative, conventional ways of raising their concerns.<sup>15</sup> The appellants in *Jones* failed in their necessity defence for their direct action protest against the 2003

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<sup>12</sup> n 9 above, [94].

<sup>13</sup> We will, following the legal practitioners in the case, refer to their defence as one of necessity even though it is probably better characterised as duress of circumstances. The practitioners routinely conflated the defences of necessity, duress of circumstances and the prevention of crime.

<sup>14</sup> Importantly, in *L & A* [2009] EWCA Crim 85; [2009] 2 Cr App Rep 11, the Court of Appeal did suggest that in limited circumstances a general, rather than a specific, risk of death or serious injury could form the basis of a necessity defence.

<sup>15</sup> See, for instance, the case of the 'Frack Free 3' where the trial judge removed the defence from the jury right at the start of the trial: *Roberts & Ors* [2018] EWCA Crim 2739; [2019] 1 WLR 2577.

Iraq war for these reasons.<sup>16</sup> Similarly, the ruling in *Shayler* focused upon the lack of imminent harm in finding the defence was not operative.<sup>17</sup>

The Stansted 15 case is different. While wider political beliefs undoubtedly motivated the appellants,<sup>18</sup> their defence focused upon the plight of particular detainees due to be deported on the flight. In this sense, their claims were more focused, identifying specific risks of death or serious injury to detainees which could reasonably be interpreted as imminent. In other words, their concerns fitted conventional understandings of the imminence requirement. Further, given what we know of Home Office immigration policy and practice, there is an arguable case that conventional avenues for raising grievances were not functioning effectively. As we will see, both these arguments were ultimately unsuccessful, at first instance and in the Court of Appeal. As a result, we question if a necessity defence can *ever* be successful in a trial of non-violent direct action activists in the UK, absent a perverse verdict of magistrates or jury. The Court, in accepting the arguments of Lord Hoffmann in *Jones*<sup>19</sup> and reaffirming Hoffmann's Bargain, is stating that politically motivated action cannot be imminent for the purposes of a necessity defence. This is a different interpretation of imminence than we would usually expect, and constitutes a significant development, as protestors can now routinely expect to be convicted because of their motivation.

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<sup>16</sup> n 9 above.

<sup>17</sup> [2001] EWCA Crim 1977; [2001] 1 WLR 2206.

<sup>18</sup> A. Tamlit, H. Brewer, L. Clayson and N. Sigsworth (2021) 'The Stansted 15 Have Won – What Can We Learn From Their Four-Year Legal Battle?' *Novara Media* at <https://novaramedia.com/2021/02/04/the-stansted-15-have-won-what-can-we-learn-from-their-four-year-legal-battle/> (last visited 11 October 2021).

<sup>19</sup> n 9 above.

*A short note on terminology*

It is important to reflect upon the terminology used both in the first instance trial and the subsequent appeal. For us, the ongoing reference to the appellants' defence as one of necessity conflated three separate defences of necessity, duress of circumstances, and the prevention of crime under section 3 of the Criminal Law Act 1967. This accords with the statement of Woolf LCJ in *Shayler*:

the distinction between duress of circumstances and necessity has, correctly, been by and large ignored or blurred by the courts. Apart from some of the medical cases like *West Berkshire* the law has tended to treat duress of circumstances and necessity as one and the same.<sup>20</sup>

This conflation of the three defences was affirmed in the Court of Appeal. While the third ground of appeal referred to all three defences, the appellants' submissions and the judgment all focused upon 'necessity'.<sup>21</sup> Yet, when examining necessity, the Court drew from cases that concern all three defences: necessity,<sup>22</sup> duress of circumstances,<sup>23</sup> and the prevention of crime.<sup>24</sup> Further, in affirming that a significant passage in *Jones* has wider application,<sup>25</sup> the Court is very much conflating all three defences. We will return to this distinction later, underscoring the consequences of this conflation for direct action defendants.

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<sup>20</sup> n 17 above, [55].

<sup>21</sup> n 1 above, [90].

<sup>22</sup> *Re A* [2001] Fam 147.

<sup>23</sup> *Martin* (1989) 88 Cr App Rep 343.

<sup>24</sup> n 9 above.

<sup>25</sup> n 1 above, [100].



### *The grounds of appeal*

The appellants argued 5 grounds of appeal:

1. HHJ Morgan misinterpreted the offence and did not place it in its rightful context as a terrorism-related offence.
2. Disclosure of the reasons for the Attorney General's consent should have been ordered; the prosecution should have been stayed as an abuse of process as the consent should not have been given.
3. The defences of necessity/duress of circumstances and the prevention of crime should not have been withdrawn from the jury.
4. HHJ Morgan's summing up lacked balance.
5. HHJ Morgan should have directed the jury not to draw adverse inferences from the 'no comment' interviews given upon arrest.

As noted, the appellants were successful on the first ground of appeal only. For the reasons outlined above, we will focus upon ground 3, offering some commentary on ground 1. We will not address grounds 2, 4 and 5, which were summarily dismissed by the Court.

### *The Court's interpretation of the AMSA offence*

The Court allowed the appeal due to HHJ Morgan's misdirection on the particulars of the offence.<sup>26</sup> The offence required that the appellants' actions intentionally disrupted the operation of the aerodrome, through the use of any 'device, substance or weapon' which endangered, or was likely to endanger, its safe use. The prosecution did not argue an actual specific risk, but rather that the appellants' actions caused likely endangerment; including one of the prosecution's claims that in dealing with the protest, anti-terrorism officers were unavailable elsewhere, increasing a risk of harm if there were a terrorist attack. For the prosecution, 'devices or substances' meant the scaffolding poles for the tripod, the metal tubes for the lock-ons, and the builder's foam used to fill the tubes.

The Court ruled that in accepting these interpretations, HHJ Morgan had misdirected the jury. For the Court, the terms 'device' and 'substance' had to be given a narrower meaning than their natural one. They had to be interpreted in a manner consistent with other provisions in AMSA, such that they 'must be intrinsically dangerous',<sup>27</sup> and 'must be inherently dangerous in order to be capable of causing the damage within contemplation'.<sup>28</sup> Disruption must be caused 'by means of' their use. Here, however, the runway was closed 'before the devices etc. were used in any way';<sup>29</sup> the disruption resulted from the appellants' presence, and not from the use of a given device or substance.

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<sup>26</sup> For more on this, see B. Krebs (2021) 'Intentionally Overcharged?: R v Thacker & Ors [2021] EWCA Crim 97' 85(3) *The Journal of Criminal Law* 232-235.

<sup>27</sup> n 1 above, [67].

<sup>28</sup> *ibid* [68].

<sup>29</sup> *ibid* [73].

Equally, HHJ Morgan had misdirected the jury on the question of endangerment: it was not enough to say that the appellants were merely ‘likely to endanger’ the aerodrome, due to possible (but ultimately nebulous) risks. The Crown had two thresholds to pass in order to satisfy this requirement:

The first is that the chances of the danger arising must transcend a certain degree of likelihood and the second is that it must be of a sufficient nature and degree to amount to endangerment, i.e. to something that may properly be described as a peril. The test is a composite one. In our judgment, the available evidence fell well short of meeting it...<sup>30</sup>

All of the risks identified by the prosecution or HHJ Morgan ‘were not likely perils within the meaning’ of the Act.<sup>31</sup> As a result, the Court suggested that HHJ Morgan ‘treated the offence as if it were akin to a health and safety provision’.<sup>32</sup> In conclusion, the Court made it perfectly clear that the case should not have been left to the jury on the evidence available; ‘[t]here was, in truth, no case to answer’.<sup>33</sup>

### *The defences*

At first instance the defendants sought to adduce evidence of three defences: necessity, duress of circumstances, and the prevention of crime. We will briefly outline the three defences and explore how they were raised at trial.

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<sup>30</sup> *ibid* [80].

<sup>31</sup> *ibid* [83].

<sup>32</sup> *ibid* [84].

<sup>33</sup> *ibid* [113].

Necessity is a justificatory defence that for many years was thought not to exist as a defence in England and Wales, despite reference to necessity in a number of medical treatment cases. Since the decision in *Re A*,<sup>34</sup> the existence of the defence is not in doubt. What remains in doubt is its scope. Recognition of the defence is largely due to the growth of the analogous defence of duress of circumstances and, as noted above, the caselaw often switches between the terms necessity and duress of circumstances.<sup>35</sup> Further, in some cases, the courts routinely refer only to necessity when they are undoubtedly dealing with cases of duress of circumstances.<sup>36</sup> As we will see, however, the defence of duress of circumstances is limited to averting imminent risks of death or serious injury. Necessity is not so limited. As noted in *Re A*, imminence, or an emergency, is not a necessary characteristic of necessity. Similarly, the risk to be averted need not be one of death or serious injury; a lower risk will suffice, so long as the defendant's actions are a proportionate and reasonable response to the risk. The defence is limited to the extent that the necessary action impacts upon the rights of others (a simple 'balancing of harms' is not sufficient) alongside a recognition that not to restrict the defence would leave defendants in a position where they could rely upon self-help, rather than legal processes.<sup>37</sup> Similarly, courts are slow to allow necessity defences where there is a legislative scheme governing the actions in question.<sup>38</sup>

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<sup>34</sup> n 22 above.

<sup>35</sup> See, for instance, *Shayler*, n 17 above. Furthermore, in *Shayler*, and other cases (such as *Quayle* [2005] EWCA Crim 1415; [2005] 1 WLR 3642), the court also uses the phrase, necessity by circumstances.

<sup>36</sup> See, for instance, *S & Anor* [2009] EWCA Crim 85; [2009] 2 Cr App Rep 11.

<sup>37</sup> A. P. Simester, J. R. Spencer, F. Stark, G. R. Sullivan and G. J. Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Oxford: Hart, 7<sup>th</sup> ed, 2019), 866-878.

<sup>38</sup> See, *Quayle*, n 35 above, and *CS* [2012] EWCA Crim 389; [2012] 1 WLR 3081.

Duress of circumstances is an excusatory defence that, as noted above, grew out of the defence of duress. For the defence of duress, the defendant must act in response to a direct and imminent threat of death or serious injury; in short, the defendant is told, commit this crime, or else. Duress of circumstances shares many of the features of duress but there is no need for a direct threat from another person; rather, the defendant is acting to avert an imminent threat of death or serious injury (from an external source), and the steps taken to avert this threat are no more than is necessary.<sup>39</sup> Duress of circumstances was developed in a number of driving cases,<sup>40</sup> expanded to other offences in *Pommell*,<sup>41</sup> and it is now widely regarded as synonymous with necessity.

Finally, the prevention of crime defence is to be found in section 3 of the Criminal Law Act 1967:

(1) A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

This has parallels with self-defence but is undoubtedly wider in its application. It appears simply to require the application of a broad standard of ‘reasonableness’ in assessing the defendant’s actions. As we will examine later, in *Jones* the House of Lords severely restricted the extent to which s3 could be relied upon in protest cases.<sup>42</sup>

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<sup>39</sup> Simester et al, n 37 above, 808-811.

<sup>40</sup> *Willer* (1986) 83 Cr App R 225, *Conway* [1989] QB 290 and *Martin*, n 23 above.

<sup>41</sup> [1995] 2 Cr App R 607.

<sup>42</sup> n 9 above.

At first instance, the appellants relied upon all three defences. Their actions were necessary to prevent harm to detainees, both on the plane and on their return to West Africa. We can separate their concerns into general concerns about the process and specific concerns about individual detainees. The defence case was that they were all at risk of unlawful harm, either from the state during the deportation process or from others on their return to West Africa. As one defendant stated in cross examination, ‘our action has always been on protecting two specific people we knew about, and two others, but there were also some wider concerns about the whole deportation process’.<sup>43</sup> Starting with general concerns, both in examination in chief and in their statements made upon arrest,<sup>44</sup> the appellants pointed to previous incidents where detainees had been subject to harm. For instance, one defendant when giving evidence used a series of cases and arguments to examine the harms and indignities caused by the deportation process, such as: Isa Muaza,<sup>45</sup> Adaronke Apata,<sup>46</sup> and the excessive use of restraints in deportation flights, leading to serious injury or death, with specific reliance upon the case of Jimmy Mubenga.<sup>47</sup> The defence case went beyond general claims; they had obtained, through the organisation *Detained Voices*, the narratives of two detainees who, the appellants claimed, provided credible stories of their risk of death or serious injury upon their return to West Africa. One defendant read from the *Detained Voices* website in their evidence in chief, outlining one of the cases:

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<sup>43</sup> Trial notes, Chelmsford Crown Court, 9 November 2018.

<sup>44</sup> Which were accepted as agreed facts and therefore supplied to the jury.

<sup>45</sup> <https://www.bbc.co.uk/news/uk-25433496> (last visited 11 October 2021).

<sup>46</sup> <https://www.independent.co.uk/news/uk/home-news/nigeria-gay-rights-activist-aderonke-apata-uk-asylum-granted-high-court-fake-sexuality-lesbian-lgbt-persecution-africa-a7888931.html> (last visited 11 October 2021).

<sup>47</sup> <https://www.bbc.co.uk/news/uk-england-23244203> (last visited 11 October 2021).

I am in immigration detention. I have been in Yarls Wood, the women's detention centre since September. I claimed asylum which was refused because of my sexuality. I am a lesbian which is not ok in Nigeria. I appealed, which was also refused. My lawyer has put in a second appeal to the Home office, and I am waiting. I have heard nothing back from them. My sister, who lives in London went to my MP's office. My MP has called the Home Office but they ignored her. My lawyer is working to help me in my situation. But I have still heard nothing from the Home Office, instead they have given me a deportation ticket for next week. Last week my friend called from Nigeria, she is looking after my 4 children in Nigeria. My ex husband called her, he is trying to take my children away from her. She has been forced to leave their home with my children. My ex-husband said he knows I am being deported next week. He is waiting for me. He is planning to kill me.<sup>48</sup>

This case, along with another, was referred to in some of the appellants' police interview statements. For example:

In terms of the specific cases of the people on the flight, Detained Voices have some specific cases that I am going to refer to. One of them is a young man younger than me whose family are here, his family in Nigeria have been killed by Boko Haram and he knew that Boko Haram wanted to kill him and so he was fearing for his life if he returned to Nigeria. He has already suffered many bereavements.<sup>49</sup>

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<sup>48</sup> Trial notes, Chelmsford Crown Court, 8 November 2018. The defendant was relying on this source:

<https://detainedvoices.com/2017/03/27/my-ex-husband-said-he-knows-i-am-being-deported-next-week-he-is-waiting-for-me-he-is-planning-to-kill-me/> (last visited 11 October 2021).

<sup>49</sup> Agreed facts, para 52(i). The case referred to is documented here: <https://detainedvoices.com/2017/03/28/post-deportation-statement-this-is-my-story/> (last visited 11 October 2021). The detainee in this story was actually deported before the appellants' action; in cross examination, the defendant accepted that she confused this case with another, but still maintained 'that the threat to his life was immediate' (trial notes, Chelmsford Crown Court, 7 November 2018).

Ultimately, none of these three defences were put to the jury. While HHJ Morgan allowed the defence to make its case on these points, he subsequently ruled, and directed the jury accordingly, that there was insufficient evidence to satisfy any of the defences. In essence, HHJ Morgan ruled that the risks were not imminent and they did not cause the defendants to act. Rather, their actions were driven by their political motivations, and the defendants would, therefore, have acted regardless of the risks to these particular detainees.

### *Necessity and the affirmation of Jones*

We noted, above, how duress of circumstances developed as an offshoot of the duress defence. We also noted how justificatory necessity is different from excusatory duress of circumstances. We argue that the development of necessity, as understood in the courts, has been hindered as a result of its duress associations. As Norrie notes, necessity defences open the possibility of a wider discourse around punishment and blame.<sup>50</sup> Drawing upon, *inter alia*, interpretations of the defence in the US,<sup>51</sup> Norrie suggests that necessity ‘has the potential to open up a whole area of political controversy for the law because it allows broader accounts and contextualisations of agency to be raised in the courtroom’.<sup>52</sup> Rather than a narrow evaluation as to whether the defendant performed ‘the act’ with the required ‘state of mind’, necessity could result in a widening of the court’s discourse to truly evaluate if the actions of the defendant are culpable, in a wider sense, taking their motivations into account. The trial would become, therefore, political:

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<sup>50</sup> A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge: CUP, 3<sup>rd</sup> ed, 2014), 214-218.

<sup>51</sup> On this, see S. Bannister and D. Milovanovic (1990) ‘The Necessity Defence, Substantive Justice and Oppositional Linguistic Praxis’, 18 *International Journal of the Sociology of Law* 179-198.

<sup>52</sup> n 50 above, 216.



Necessity as either justification or excuse thus relates conduct to grounds of action that go beyond the simple individual decision to do something. In so doing, it provides the basis for an alternative, *politically substantive*, account of ‘the facts’ to enter the courtroom and to challenge the law’s formalistic defence of the political and economic status quo.<sup>53</sup>

As a result of the Court’s decision, this possibility has been lost. The approach of the Court is to remove the defence whenever the motivation of the activists is considered ‘political’. Perhaps intentionally so, as to open up the space of the court to radical challenge and contestation is to take the law into an arena in which it is uncomfortable. Norrie describes this process as one of ‘decontextualisation’ (framing the crime as an individuated action divorced from a wider social context), a process which he regards as ideological as it ‘enables fault attribution to take place while silencing the opposing political and ideological reasons’ for action.<sup>54</sup> We saw this particularly in the first instance trial, with HHJ Morgan policing the ‘political’ statements of the defendants.<sup>55</sup>

We will now see how the Court, through the affirmation of *Jones*, has restricted the operation of the defence in direct action cases. We argue that the political context is important for two reasons. First, the Court uses the appellants’ political motivations against them, in order to question their other stated motivations; yet as we shall see, in duress cases, having a range of motivations is no bar to the operation of the defence so long as there is a threat of death or serious injury.<sup>56</sup> Second, we argue that the appellants’ political motivations are relevant factors

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<sup>53</sup> *ibid* 215. Emphasis added.

<sup>54</sup> *ibid* 235.

<sup>55</sup> Hayes et al, n 2 above, and Tamlit et al, n 18 above.

<sup>56</sup> *Valderamma-Vega* [1985] Crim LR 220.

for a trial court to consider, particularly given the well documented problems with Home Office policy and procedure.

In assessing the appellants' claims, the Court concentrated on what it described as the necessity defence, but in doing so drew upon cases from all three defences. This is largely in accordance with what we observed in the first instance trial. In withdrawing the defence of necessity, HHJ Morgan drew upon *Jones*, a case on prevention of crime. We outlined, above, the Court of Appeal decision in *Jones* and what we have referred to as Hoffmann's Bargain.<sup>57</sup> To recap, Lord Hoffmann, drawing upon the history of 'civil disobedience', argues that conventions are in place so that protestors who act 'with a sense of proportion' will be treated by the State 'with restraint'. However, the consequence of this is that the defence of necessity will not be available:

the apprehension, however honest or reasonable, of acts which are thought to be unlawful or contrary to the public interest, cannot justify the commission of criminal acts and the issue of justification should be withdrawn from the jury.<sup>58</sup>

This was largely regarded as *obiter*, as the Court in *Jones* dispensed with the appeals by avoiding the question of the prevention of crime altogether; the alleged crime – the crime of aggression in customary international law – was not a crime under domestic law, thereby section 3 of the 1967 Act did not apply. Nevertheless, the dicta gained currency and was cited with approval, for instance, in *R (DPP) v Stratford Magistrates' Court*.<sup>59</sup> Importantly, in the present case, the Court of

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<sup>57</sup> Text to n 9.

<sup>58</sup> n 9 above, [94].

<sup>59</sup> [2017] EWHC 1794 (Admin); [2018] 4 WLR 47.

Appeal accepted the prosecution's assertion that Hoffmann's observations applied more widely than s3 cases and were part of the ratio of the decision:

We accept that these passages are both of general application and binding on this court. Lord Hoffmann's analysis and observations formed part of the *ratio* of *Jones* and are not limited to the statutory defence under section 3 of the 1967 Act.<sup>60</sup>

The appellants' activities, therefore, 'had to be considered in the context of a functioning state governed by the rule of law'.<sup>61</sup> Rather than rely upon direct action, the appellants were to rely upon lawful and proper channels:

the United Kingdom has a developed system of immigration control created by an accountable democratic process and subject to Parliamentary scrutiny and judicial review. Immigration decisions may be challenged in the tribunals and the courts. Judges are routinely required to consider last-minute applications to restrain removal or deportation. We do not know what efforts each of those due to be on this flight had made to challenge removal directions or seek protection for their fundamental rights, but the appellants did not know either, save to a limited extent in respect of one prospective passenger.<sup>62</sup>

As a result, the Court rejected the appellants' argument, substantively agreeing with HHJ Morgan's conclusion that their actions were motivated by political considerations rather than their concerns for the welfare of specific detainees. In rejecting their argument HHJ Morgan stated:

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<sup>60</sup> n 1 above, [100].

<sup>61</sup> n 1 above, [101].

<sup>62</sup> *ibid.*

This is a case of direct action by a group of individuals who believe that the deportation process and the use of charter flights is objectionable and illegal. The reasonableness of the Ds actions must be considered in the context of a functioning state in which legal disputes can be peacefully submitted to the Courts and disputes over what should be law or government policy can be submitted to the arbitrament of the democratic process...

...it is no function of a jury to consider the legality or otherwise of Government policy when deciding whether an offence has been proved. For the jury to accept that the force used was reasonable in the circumstances would require them to accept that Government policy and system was objectionable and unlawful...

In this case I must objectively assess the s3(1) defence as action taken by a group of individuals after months of discussion and planning.<sup>63</sup>

The LCJ agreed, noting that the ‘real reason for halting this flight was that they believe that all removals and deportations are “illegal” in the sense in which they would choose to use the term’; the appellants were, therefore, ‘seeking to take the law into their own hands’.<sup>64</sup>

#### *Duress of circumstances and the risks to specific detainees*

We have noted above how the Court focused upon the political motivations of the appellants, following the approach of the trial judge. In so doing, the Court spent little time addressing the substance of the appellants’ claims as to the risks identified to particular detainees. For both HHJ Morgan and the Court, the planning and preparation involved in the action overrode the appellants’ claim to be acting so as to avoid death or serious injury to any of the detainees. HHJ Morgan, for instance, noted that these reasons did not cause their action; the real cause was their political beliefs. This, we would suggest, to all intents and purposes closes the door on any

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<sup>63</sup> Extracts from HHJ Morgan’s ruling on the defences, circulated to the legal team before being handed down.

<sup>64</sup> n 1 above, [102].

necessity defence to non-violent direct action protestors. There are two possible remaining avenues for the defence to be successful, but we would argue these are theoretical at best. The second of these is to challenge the ‘functioning state’ implicit within Hoffmann’s Bargain. But before assessing this we need to examine the first: spontaneous direct action.

Spontaneous direct action could occur in similar cases if protestors, say, became suddenly aware of identifiable risks to detainees and there was no prior planning of action. The problem here is that protest and direct action can only meaningfully be understood in the context of an activist ‘career’. For this type of *high risk* activism, where serious breaches of the criminal law occur, activists have to take a decision to participate in an activity that is so much more than joining a demonstration. Engagement in activism cannot solely be explained by attitudes; activists need to acquire skills and knowledge, or ‘activist human capital’.<sup>65</sup> Further, participation in *high risk* activism typically depends upon a ‘process of internalization’, or ‘a cyclical process of activism and deepening personal and ideological commitment to the movement’.<sup>66</sup> Crucially, this deepening identification is accomplished through repeating movement work, furthering the integration of the individual into ‘the role of activist and the subcultural “world” of the movement’.<sup>67</sup> Activism, therefore, characteristically results from the development of an activist identity and progression through various career stages; and the activist who is prepared to take high risk direct action is always already political. Direct action protestors who are prepared to commit serious breaches of the criminal law, while sharing many of the aims of those who may,

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<sup>65</sup> N. Van Dyke and M. Dixon (2013) ‘Activist Human Capital: Skills Acquisition and the Development of Commitment to Social Movement Activism’ 18(2) *Mobilization* 197-212, 198.

<sup>66</sup> D. McAdam (1986) ‘Recruitment to High-Risk Activism: The Case of Freedom Summer’ 92(1) *American Journal of Sociology* 64-90, 77.

<sup>67</sup> *ibid.*

for instance, join a demonstration, are more clearly and necessarily committed to their cause. In order to maximise their effectiveness, these protesters typically use devices such as the lock-on equipment and tripods which confused HHJ Morgan into misinterpreting AMSA. These devices make the removal of protestors by police more difficult, and effectively ensure that these protestors will ultimately be arrested.<sup>68</sup> For this, both devices and protestors have to be prepared in advance. Spontaneously joining this type of action, therefore, is very unlikely to be common.

The approach of the Court, here, also does not follow the duress case of *Valderamma-Vega*, where the Court of Appeal recognised that whilst an array of motivations may cause the defendant to act, the defence is still available as long as a threat of death or serious injury is operative.<sup>69</sup> Neither HHJ Morgan nor the Court appear to have considered that *both* political motives *and* the dangers to the detainees drove the appellants' action. This is all the more remarkable given the Court acknowledged that following the cancellation of the flight eleven detainees remained in the country with a further five having established their right to remain.<sup>70</sup> Clare Montgomery QC raised this point in oral argument (without, however, direct reference to *Valderamma-Vega*), and questioned if the appellants' motivations (here, the desire to gain publicity) should exclude the defence:

the fact that their motive may in addition include a desire bring publicity to this particular form of, as they would see it, disgraceful government behaviour, that does not disqualify them provided that have identified the core of the defence.<sup>71</sup>

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<sup>68</sup> B. Doherty (1999) 'Manufactured Vulnerability: Eco-Activist Tactics in Britain' 4(1) *Mobilization* 75-89.

<sup>69</sup> n 56 above.

<sup>70</sup> n 1 above, [28].

<sup>71</sup> Appeal hearing transcript, 26 November 2020, 38.

The Court's ruling leaves the status of *Valderamma-Vega* unclear; the Court did not refer to the case, let alone overrule it, but it appears that political motivations now override any concerns over risks of death or serious injury.

*Direct action and 'a functioning state governed by the rule of law'*

In affirming Hoffmann's Bargain, the Court of Appeal has severely restricted the availability of a necessity defence, in law, to direct action protestors.<sup>72</sup> Outside of *spontaneous* action (which is, as we have seen, highly unlikely), the only other means of successfully arguing the defence is if activists are able to challenge the fundamental basis of *Jones*; that of a 'functioning state'. As Norrie notes, the approach in *Jones* assumes 'underlying socio-political grounds and legitimating conditions, particularly around democracy, which must be maintained if Lord Hoffmann's repudiation of a necessity defence is itself to be legitimate'.<sup>73</sup>

At first instance, Tony Badenoch QC, counsel for the Crown, relied heavily upon the functioning state in his observations when addressing points of law and when cross examining the defendants. His use of the phrase became something of a running joke amongst us when commenting on the trial, a joke that we later discovered was shared by the defendants. We found it grimly ironic given the extent to which the Home Office immigration and deportation process is subject to critical examination. While we do not have the space here to fully document the dysfunctionality of the Home Office, we do want to provide a flavour of these criticisms.

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<sup>72</sup> We say, 'in law', as a perverse verdict remains a possibility.

<sup>73</sup> n 50 above, 213.

Since John Reid's claim in 2006 that the Department was 'not fit for purpose',<sup>74</sup> the Home Office has received extensive criticism. Commentary focuses upon a number of overlapping themes, all of which question the Court's acceptance that it constitutes the arm of a 'functioning state'. Most of these criticisms focus upon the creation of the 'hostile environment', designed 'to make life in the UK intolerable for those who were unlawfully resident',<sup>75</sup> and achieved through making access to a number of services (banking, housing, health, education, etc.) contingent upon proving lawful residency. As Yeo notes, this is the creation of an identity card scheme in all but name;<sup>76</sup> in order to access a range of services, we are increasingly being called upon to prove our status. The problem, however, is the policy conflates a lack of relevant paperwork with an absence of a legal basis to remain.<sup>77</sup> As the Windrush scandal showed, many with a legal basis to stay in the UK lack the relevant paperwork,<sup>78</sup> with the Home Office itself destroying much of the paperwork that could have proved this.<sup>79</sup> Further, the status of people can change due to the complexities of the system.<sup>80</sup> As a result, many have been mistakenly or unnecessarily caught up in the immigration and deportation system; Goodfellow argues the Windrush scandal 'was an almost inevitable consequence of the impossible system the government had constructed'.<sup>81</sup>

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<sup>74</sup> <https://www.theguardian.com/politics/2006/may/23/immigrationpolicy.immigration1> (last visited 11 October 2021).

<sup>75</sup> C. Yeo, *Welcome to Britain: Fixing Our Broken Immigration System* (Biteback Publishing, 2020), 36.

<sup>76</sup> *ibid* 35. Also see R. White (2019) 'The Nationality and Immigration Status of the "Windrush Generation" and the Perils of Lawful Presence in a "Hostile Environment"' 33(3) *Journal of Immigration Asylum and Nationality Law* 218-239.

<sup>77</sup> *ibid* 36. Also see White, n 76 above.

<sup>78</sup> *ibid* and White, n 76 above.

<sup>79</sup> M. Goodfellow, *Hostile Environment: How Immigrants Became Scapegoats* (London: Verso, 2<sup>nd</sup> ed, 2020), 4.

<sup>80</sup> *ibid* 5.

<sup>81</sup> *ibid* 3.



This leads us to the second criticism of the Home Office and immigration system; the checks and balances needed to ensure that the system operates well and that errors are corrected are not functioning. There are many factors that make it difficult for those within the system to exercise their rights, such as: the quality of decision making;<sup>82</sup> outsourcing of decision making;<sup>83</sup> the removal of legal aid<sup>84</sup> (particularly in a complex system that needs reforming and simplifying<sup>85</sup>); cuts to Home Office, UKBA, tribunal and court staff;<sup>86</sup> disorganised Home Office working practices (where, for instance, resources are shuffled to the latest political crisis);<sup>87</sup> increased application fees;<sup>88</sup> ineffective record keeping;<sup>89</sup> cuts in the grounds of appeal;<sup>90</sup> and ‘deport first, appeal later’ policies (for some decisions).<sup>91</sup> Importantly, there is evidence that the Home Office has been long aware of these failures, and the associated possibility of injustice, but has failed to act.<sup>92</sup> York argues that these failures collectively ‘create and perpetuate illegality’.<sup>93</sup>

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<sup>82</sup> Joint Committee on Human Rights, *Immigration Detention* HC 1484/HL 278 (2019).

<sup>83</sup> S. York (2018) ‘The “Hostile Environment” – How Home Office Immigration Policies and Practices Create and Perpetuate Illegality’ 32(4) *Journal of Immigration and Asylum and Nationality Law* 363-384.

<sup>84</sup> York, n 83 above; Yeo, n 75 above; and Goodfellow, n 79 above.

<sup>85</sup> Joint Committee on Human Rights, n 82 above.

<sup>86</sup> York, n 83 above.

<sup>87</sup> National Audit Office, *Home Office: Immigration Enforcement* HC 110 (2020); National Audit Office, *Home Office, Ministry of Justice and Foreign & Commonwealth Office: Managing and Removing Foreign National Offenders* HC 441 (2014).

<sup>88</sup> York, n 83 above; Goodfellow, n 79 above.

<sup>89</sup> Yeo, n 75 above.

<sup>90</sup> York, n 83 above.

<sup>91</sup> First introduced in section 94B of the Immigration Act 2014 and widened by the Immigration Act 2016. The Supreme Court, in *Kiarie and Byndloss* [2017] UKSC 42; [2017] 1 WLR 2380, declared the policy unlawful.

<sup>92</sup> Goodfellow, n 79 above, 4 and White, n 76 above, 239.

<sup>93</sup> n 83 above.

The government have encouraged or obliged large sections of the population to maintain this hostile environment. Banks, estate agents, NHS staff, and universities all have obligations to check everyone's status before providing their services. The rest of the population are encouraged to report suspicions around immigration status to the Home Office; Yeo reports that a number of MPs have reported constituents in this way.<sup>94</sup> This is ironic, given that one of the identified mechanisms of a 'functioning state' is to lobby one's MP for assistance.

Given the wide-ranging evidence of systemic Home Office failure, it is legitimate to question if the immigration process constitutes a 'functioning state governed by the rule of law'. At the very least, the belief of the appellants that the system was not fit for purpose appears to be a reasonable belief, honestly held. To put this in a legal context, we can see parallels with developments in the analogous defence of duress. The case of *Hudson and Taylor* is relevant here.<sup>95</sup> This concerned two witnesses (aged 17 and 19) who were due to give evidence concerning a fight in a pub. They were subject to numerous threats of violence to persuade them not to give evidence, with the issuer of the threats present in court on the day of the trial. The witnesses, as a result, lied in court and were subsequently charged with perjury. Their defence was one of duress, and the Court of Appeal rejected the trial judge's conclusion that the threat was not imminent as it could not be carried out there and then in the courtroom and they could seek police protection. The Court of Appeal accepted that the threats were still operative, as although they could not be carried out immediately, they 'could be carried out in the Streets of Salford the same night'. The Court were somewhat indulgent with the duty to seek effective protection and imminence requirements, given the age of the girls and their belief that police

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<sup>94</sup> Yeo, n 75 above, 45.

<sup>95</sup> [1971] 2 QB 202.

protection would be ineffective, and this has long been identified as something of an anomalous decision. Subsequent cases have tightened the scope of the defence in this regard,<sup>96</sup> interpreting both the imminence and the duty to seek help requirement more narrowly. This is part of an approach that is attempting to restrict the operation of the defence.<sup>97</sup> In other words, no matter how ineffective the legal process, defendants are expected to rely upon this. To draw upon duress, *Hudson and Taylor* would today be expected to go to the police, rather than perjure themselves, and then ‘take their chances’ on the streets of Salford that evening. Similarly, the appellants here would be expected to place their faith in the Home Office and appeals system, despite its obvious failings.

We are, here, touching upon a longstanding debate in legal theory, reaching back to Rawls if not beyond, concerning our duty to obey the law.<sup>98</sup> Rawls’ work, as a positivist liberal democratic theorist, is a useful starting point for this question; he could not, for instance, be described as a radical or critical theorist. We would expect Rawls, therefore, to be slow to justify knowingly breaking the law for political reasons. For Rawls, there is tacit consent to the social contract in democratic states; we have an obligation to obey the law, due to the benefits we receive from being part of society. Further, in systems of majority government, there ‘are bound to be mistakes’, but this does not necessarily lead to a repudiation of our obligations.<sup>99</sup> Rawls therefore asks, when ‘does the duty to comply with laws enacted by a legislative majority (or with executive acts supported by such a majority) cease to be binding in view of the right to defend one’s

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<sup>96</sup> *Hasan* [2005] UKHL 22; [2005] 2 WLR 709, *Batchelor* [2013] EWCA Crim 2638.

<sup>97</sup> Simester et al, n 37 above, 801.

<sup>98</sup> J. Rawls, *A Theory of Justice* (Oxford: OUP, 1971/1973).

<sup>99</sup> *ibid* 354.

liberties and the duty to oppose injustice?<sup>100</sup> Rawls' two dimensions of justice inherent in the social contract are important in assessing the limits to our duty to obey the law. Justice concerns both the *distribution* of resources and the *recognition* of citizenship rights. It is the latter, *recognition*, that leads to our release from an obligation to obey the law:

For Rawls, in a society which is liberal and democratic, and therefore 'nearly just', recognition is the key to the inclusion of minorities in the equitable distribution of resources; civil disobedience is therefore justified where it addresses failures of recognition, or to put it another way, failures in the distribution of citizenship rights.<sup>101</sup>

We are, according to Rawls, justified in breaking the law if we are seeking to maintain fundamental freedoms; 'we are not required to acquiesce in the denial of our own and other's basic liberties'.<sup>102</sup> This is an important part of the rule of law. Civil disobedience, in these circumstances, enhances the rule of law because it enriches the collective rights of minorities; 'civil disobedience used with due restraint and sound judgment helps to maintain and strengthen just institutions'.<sup>103</sup> Gardner makes a similar claim when he suggests that the necessity defence should be available for protestors when they act to 'vindicate a right'.<sup>104</sup>

Given the current status of immigration detainees, their 'othering' in mainstream media, the 'hostile environment' and the failures of the Home Office system, we can ask if the Court could

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<sup>100</sup> *ibid* 363.

<sup>101</sup> I. Sommier, G. Hayes and S. Ollitrault, *Breaking Laws: Violence and Civil Disobedience in Protest* (Amsterdam: Amsterdam UP, 2019), 132.

<sup>102</sup> Rawls, n 98 above, 355.

<sup>103</sup> *ibid* 383.

<sup>104</sup> S. Gardner [2005] 'Direct Action and the Defence of Necessity' *Criminal Law Review* 371-380, 377.

have approached their decision from this perspective. Would upholding the rights of the protestors to challenge the injustices of the system have actually enhanced the rule of law, in that it enhanced the rights of detainees which had been unlawfully restricted?

What is important here, we would argue, is that the *presumption* of a ‘functioning democratic state’ is accepted without question by the Court. We know this point was argued at appeal, where Clare Montgomery QC explicitly addressed the ‘functioning democratic state’. In her submissions, Montgomery questioned if ‘something other than simply reporting to the police or asking the Home Office to be kinder and gentler and to obey the law’ was sufficient to address the plight of the detainees.<sup>105</sup> She also noted that

there is no basis for a uniformed [sic] assumption about the adequacy of the provisions made by the State in every circumstance. That is because, as is notorious, there are some areas which are better policed or more adequately couched in protection than others.<sup>106</sup>

This is not, however, for Montgomery an invitation for protestors to police themselves and decide the extent to which they obey the law. Rather, whether the defence applies or not is to be determined by the jury; ‘this is quintessentially a jury question’.<sup>107</sup> Yet no discussion of this line of argument by Montgomery, which called for leaving the defence to the jury, appears in the Court’s judgment.

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<sup>105</sup> Appeal hearing transcript, 24 November 2020, 41.

<sup>106</sup> *Ibid* 48.

<sup>107</sup> *Ibid* 41.

We observed a similar refusal to entertain any questioning of the ‘functioning state’ in the first instance trial; the appellants sought to examine Home Office officials on the immigration system, but HHJ Morgan denied their request. He also policed the extent to which the defence, during examination in chief, were able to make ‘political’ statements in court on the efficacy of the immigration system. Returning to Rawls, this is problematic. One of his limitations on the appropriateness of civil disobedience is the normal legal and democratic process; you cannot jump to civil disobedience without first resorting to conventional processes. Nevertheless, this only goes so far; it is not a claim that ‘legal means have been exhausted’.<sup>108</sup> In other words, Rawls accepts that on some occasions further attempts to engage in a legal or democratic process are ‘fruitless’, as experience may make it clear what the outcome of those processes will be.<sup>109</sup> In denying the appellants an opportunity to question the state, the processes, both at first instance and on appeal, sought to eradicate the political questions the appellants raised in their action.<sup>110</sup> The defence were unable to question the presumption of the functioning democratic state, despite a litany of evidence that the British state, in this context, is anything but functioning. If a claim of necessity is summarily dismissed in this context, with no questioning of the effectiveness of the system, we question if it is ever likely that a necessity defence could be raised.

*Excusatory or justificatory ‘necessity’*

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<sup>108</sup> Rawls, n 98 above, 373.

<sup>109</sup> This was a claim made by the appellants in the trial.

<sup>110</sup> Ironically, however, their politics re-emerged when HHJ Morgan and the Court of Appeal ruled that they were motivated by politics, not a concern for the safety of detainees.

We noted above that the case continues an ongoing trend of conflating necessity, duress of circumstances and the prevention of crime. The Court, for instance, takes the treatment of the prevention of crime defence in *Jones* and extends its application to duress of circumstances and necessity. We think these distinctions matter, because this conflation has the potential to impact upon decision making. While we acknowledge that the distinctions are not straightforward,<sup>111</sup> we consider that both necessity and the prevention of crime defences are usually *justifications*, while duress of circumstances, having developed from duress, is an *excuse*.

We say this matters when thinking about the development of these defences. Gardner, for instance, commenting on *Shayler* and *Jones*, states that

[t]o the extent that the defendants in those cases wanted to raise a defence of justificatory necessity, the courts should have focused on this for what it is, rather than suppressing it in favour of its excusatory half-sister, duress of circumstances.<sup>112</sup>

Norrie also asserts ‘a tendency in the modern law to prefer excusatory to justificatory argument’.<sup>113</sup> The courts, for instance, when determining whether they should expand a defence of necessity, as they were faced with here, are asking if the conduct is *justified*. That is, the court is assessing whether the defendants were ‘doing the right thing’ and that it would be appropriate to do this again, in the future.<sup>114</sup>

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<sup>111</sup> See, for instance, Norrie, n 50 above.

<sup>112</sup> Gardner, n 104 above, 378.

<sup>113</sup> n 50 above, 202.

<sup>114</sup> *ibid* 201.

Assessing, however, whether a defendant acted as they did to avoid a threat of death or serious injury, is not to say that the defendant did the right thing and, therefore, was *justified*. Rather, we are asking if we can *excuse* them for their actions; they were ‘doing a wrong thing and asking for indulgence’.<sup>115</sup> This is a different question. In the way that we may wonder if the court in *Dudley and Stephens* likely misconstrued the defence’s claims as *justifying* murder<sup>116</sup> (and so were unlikely to hold the defence operated), we could ask if the Court here, in focusing upon the *justificatory* necessity defence, failed to acknowledge the appellants’ claim that they should be *excused*, given the risks of death and serious injury which some of the detainees faced.

This, is of course, speculative. It also places to one side the recent tightening of the duress defence in *Hasan*.<sup>117</sup> Nevertheless, how we ask the question matters, and the courts, in conflating all three defences, have framed the examination in a particular way. We are certainly not stating that defendants should prefer one type of defence over another; rather, we are saying that here, the Court, in perpetuating the conflation of these defences, is not fully addressing the claims of defendants. The appellants, for instance, could legitimately argue that they acted due to wider political motivations *and* to avoid an imminent risk of death or serious injury to detainees.

### *Conclusions*

In this note we have focused upon the Court’s reliance, reassertion, and arguable extension, of the House of Lords decision of *Jones*, underlining two key – and we believe deeply problematic – implications. First, in assessing whether direct action protestors are able to call upon a defence of

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<sup>115</sup> *ibid.*

<sup>116</sup> (1884) 14 QBD 273. Although interpreting the judgment is not straightforward; see, Norrie, n 50 above, 203-207.

<sup>117</sup> n 96 above.



necessity, the Court has slammed the door on the defence. We have speculated that, perhaps, the defence may still be available in two limited circumstances; spontaneous direct action, and where we can question the 'functioning democratic state'. For the first possibility, we recognise the practical limitations; to engage in direct action involving law breaking to this extent typically involves the nurturing of an activist identity and career. For the second, we identify the limitations imposed by this ruling: if the Court and HHJ Morgan were unwilling to even entertain the appellants' claims that the state, in this context, was failing, there appears little hope this would be a sustainable argument in any other context.

Second, we noted how Norrie sees potential in the necessity defence to fully contextualise action in the criminal trial. But in the first instance trial, HHJ Morgan, both in his policing of the defendants' statements and his ruling on necessity, closed down wider discussions on the efficacy of Home Office policy. He limited the extent to which the defence could truly explore, in the trial, their motivations for action. They were thus forced to focus upon an excusatory rationale, whilst their justificatory reasons, a balance of evils, were nevertheless reinterpreted as a 'political' motivation that denied the operation of the duress of circumstances defence.

In sum therefore, both HHJ Morgan and the Court of Appeal have failed to see what was different about the Stansted 15's claims. The appellants were arguing both justificatory and excusatory grounds; they had both a political justification and humanitarian reasons for their action. In the words of Gardner, they were acting to vindicate the rights of detainees. But they were also acting to avoid the risk of death or serious injury to others; and this second motivation has been lost in the Court's clamour not to entertain the first. This is important, as it appears that the Court is relying upon certain motivations as reasons to deny a defence, possibly effectively overruling *Valderamma-Vega*. What is particularly disturbing is that these motivations,

to quote from *Jones*, ‘vouch the sincerity of their beliefs’.<sup>118</sup> It is their aim to fight what they sincerely believe to be injustice that effectively ensures their conviction. As Norrie notes, the process operates so as to ‘decontextualise’ action; the label ‘political’ is used by the Court to denigrate action which seeks to uphold the legal rights of the detainees. In its conclusions, the Court is effectively outlawing the possibility of *any* systemic political critique as even partial basis for direct action, however well documented the democratic failings, however reasonably and sincerely held the activists’ belief, however restrained their conduct. This decision does little to affirm the importance of protest in challenging injustice.

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<sup>118</sup> n 9 above, [89].