The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases

Lance N. Long

Ted Hamilton*

* Lance N. Long is a Professor of Law at Stetson University College of Law. Ted Hamilton is a co-founder and staff attorney with Climate Defense Project and a Ph.D. student in Comparative Literature at Yale University. We are grateful to Professor Ellen Podgor for her comments and suggestions. We thank Kaley Witek and Kai Su for their research assistance. We acknowledge and thank Stetson University College of Law for its support of this Article. Parts of this article were taken from the authors' article *Washington v. Brockway: One Small Step Closer to Climate Necessity*, 13 MCGILL INT'L J. SUSTAINABLE DEV. L. & POL'Y 1, 57 (2017).

I. INTRODUCTION

Leonard Higgins is, by his own admission, "the least likely person" to be a climate activist.[1] An IT manager for the State of Oregon for more than thirty years, he had little experience or inclination towards activism. Upon retiring, he wanted to do something meaningful with his remaining years. After attending a few workshops and conferences addressing climate change, he found his calling as an environmental activist.[2] Shortly thereafter, he locked himself to a megaload in eastern Oregon, blocked an oil train in Anacortes, Washington, participated in the Flood Wall Street protest in New York City, and on October 11, 2016, was one of the five valve turners in the Shut It Down action across Washington, Montana, North Dakota, and Minnesota that effectively shut down Canadian tar sands flowing into the United States for several hours.[3]

Leonard's reason for shutting down the tar sands pipeline in Montana was to "put [himself] in the way of the harm that [was] being done."[4] He wanted to "take action that [had] a chance of making a difference."[5] Leonard was arrested and charged with Criminal Trespass to Property,[6] a misdemeanor, and Criminal Mischief,[7] a felony.[8] Despite submitting an offer of proof and a nineteen-page memorandum that addressed all of the relevant elements of the proposed necessity defense[9] and included, in the words of the Twelfth Judicial District Court of Chouteau County, Montana, an assertion "that his actions are excusable because as a part of a climate change organization, direct action was necessary to prevent global warming,"[10] the court denied Leonard's motion without addressing its merits.[11] Instead, the court claimed that Leonard was seeking publicity and trying to put "U.S. energy policy on

1. Ghostsofevolution, *Leonard Higgins - What Can I Do About Climate Change?*, YOUTUBE (May 14, 2017), https://www.youtube.com/watch?v=glqLWSImYoE.

2. Interview with Leonard Higgins (Aug. 27, 2014).

3. *About The Action*, SHUT IT DOWN, (last visited Nov. 7, 2018) http://www.shutitdown.today/shut_it_down.

4. Ghostsofevolution, *supra* note 1.

5. *Id*.

6. Mont. Code Ann. § 45-6-203(1)(b) (2018).

7. *Id*. § 45-6-101.

8. Order Denying Defendant's Defense of Necessity at 1, Montana v. Higgins, DC-16-018 (12th Jud. Dist. Ct. April 11, 2017).

9. Daniel A. Boucher, Petition for Writ of Supervisory Control and Motion for Stay of Proceedings, Higgins v. Twelfth Judicial District Court, 4, App. B, OP 17-0296 (May 18, 2017).

10. Order Denying Defendant's Defense of Necessity at 2, Montana v. Higgins, DC-16-018 (12th Jud. Dist. Ct. April 11, 2017).

11. *Id*. at 3.

trial," which the court was not going to do.[12] The court then claimed that because it was denying Leonard's motion, his proffered witnesses were irrelevant.[13] Deprived of his theory of the case, Leonard was convicted in November 2017 of criminal trespass and criminal mischief, given a three-year suspended sentence, and required to pay $4,280 in restitution and court fees. (He is appealing the conviction). Judge Boucher's refusal to even consider a defendant's fundamental right to have a jury hear a necessity defense, although more cavalier than most, is typical of the attitude of American courts toward climate change necessity defenses.

On the one hand, the decision to deny Higgins his defense is striking given the close fit between the common law necessity defense's elements[14] and the typical case for climate direct action, as we will summarize below. In brief, the ongoing and future harms caused by global warming far outweigh any harm caused by nonviolent protest; legal means have failed to address the problem; and civil resistance has proven to be successful in changing government policy. On the other hand, however, the judge's denial is entirely consistent with U.S. courts' persistent reluctance to allow defendants to present climate necessity evidence or to send the defense to a jury.

At a time when the imminence of harm has never been greater and the lack of reasonable alternatives more obvious, there is a strong case to be made for the viability—and doctrinal validity—of the climate necessity defense in climate protest cases. Viewed purely as an evidentiary matter, the argument for putting the defense before a jury is generally compelling. Nonetheless, state and federal courts continue to rely upon a variety of principles and assumptions to bar jury consideration of the defense, or, in most instances, to even block the presentation of necessity evidence. This Article makes the argument for the defense in the common law necessity tradition and explains the errors of courts in denying it, suggesting two related reasons for their obstinance: first, an overreliance on pretrial evidentiary rulings in the interest of purported efficiency, and second, a belief that climate change, and climate protest in particular, is a political issue that does not belong in the courtroom.

Part II of this Article focuses on the attempted uses of the necessity

12. *Id.* at 2.

13. *Id.*

14. A standard version of the common law necessity defense was described in *United States v. Maxwell*: "The necessity defense requires the defendant to show that he (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relationship between his acts and the harm to be averted, and (4) had no legal alternative but to violate the law." 254 F.3d 21, 27 (1st Cir. 2001).

defense in climate change civil disobedience cases, and reviews the mostly unsuccessful attempts of asserting the defense in climate change cases. These attempts reflect courts' failure to respect the role of the jury in criminal cases, to follow well-established common and statutory law, and to adequately understand the phenomenon of climate change.

Part III provides context for these decisions by reviewing the history and development of the common law of necessity from its ancient roots focusing on natural forces to its expanded use addressing new threats to humanity—including the well-developed, but always controversial, political necessity defense. It also compares the main variations of the necessity defense and discusses how those differences affect the use of the defense.

Part IV argues that American courts' errors in their analyses of the climate necessity defense stem from two overarching problems in judicial philosophy. First, courts inappropriately use pretrial evidentiary hearings and motions to deny defendants' constitutional rights, citing a purported interest in judicial efficiency. Second, courts generally have a reflexive reluctance to engage issues of climate science and political process, demonstrating a basic misunderstanding of climate science and a conservative vision of the courts' role vis-à-vis grassroots political action.

These two overarching problems of judicial philosophy produce six common analytic errors at the level of doctrine. The first four of these common errors involve the failure to properly interpret and apply the elements of the necessity defense: (1) misinterpreting and misapplying the imminence requirement of the necessity defense; (2) to the extent that such a requirement is relevant, misunderstanding the role of a "reasonable alternative" in connection with the necessity defense; (3) ignoring the stark difference in harm between peaceful civil disobedience and climate change; and (4) refusing to recognize the efficacy of climate civil disobedience as a means of addressing the harm from climate change. The fifth error is imposing a non-element, the dichotomy of direct or indirect civil disobedience, on climate necessity defendants. The sixth, and perhaps the most serious, common error is ignoring or misunderstanding climate defendants' Sixth Amendment right to a jury trial of their affirmative defense of necessity and, instead, substituting the judgment of the court on factual issues. Part V concludes the article with an appeal to courts to reconsider the errors of recent court decisions, and to follow the Supreme Court requirement of allowing defendants a meaningful opportunity to present a complete defense.

II. ATTEMPTS TO ASSERT THE CLIMATE NECESSITY DEFENSE

In recent years, climate activists have increasingly used the climate necessity defense to advance their cause and to deal with the legal repercussions of civil disobedience.

As of the writing of this Article, the climate necessity defense had been attempted at least twenty-one times in the United States.[15] In an ongoing case in Washington, a judge allowed presentation of the defense after a pre-trial showing of evidence; the prosecution requested a writ of review and an intermediate court reversed the judge's decision, but a final resolution is pending appeal.[16] Another ongoing case in New York involving presentation of necessity evidence in a bench trial is awaiting a decision.[17] In Minnesota, a judge initially allowed presentation of the climate necessity defense in a written ruling that was upheld by the state supreme court; on the eve of the trial, the judge partially reversed himself, then rendered the question moot by dismissing all charges after the prosecution had rested its case and before the defense attempted to present necessity evidence.[18] In eleven of the twenty-one cases, defendants were barred from presenting the defense and were convicted by a jury. In three instances, a judge found the defendants guilty after a bench trial, and in the other cases, the charges were dropped before trial, the jury was permitted to hear necessity evidence before the court decided that no necessity instruction would be given, or (in an administrative hearing), the hearing officer found the argument for necessity uncompelling and fined the defendants.

Before any attempted American climate necessity case, the "Kingsnorth Six," Greenpeace activists in England, asserted the English version of the necessity defense and were acquitted by reason of "lawful excuse" after scaling a chimney at a coal plant and painting the prime minister's name on it, causing the plant to close for four days.[19] The

15. *See* CLIMATE DEFENSE PROJECT, *Climate Necessity Defense Case Guide* (May 22, 2018), https://climatedefenseproject.org/resources/. Court documents cited in this section are available from the Climate Defense Project upon request.

16. Washington v. Taylor, No. 6Z0117975 (Spokane Cty. Dist. Ct., Wash. Oct. 16, 2017).

17. Dean Kuipers, *Three Ways to Combat Climate Change Through the Courts,* THE ATLANTIC (Oct. 30, 2018), https://www.theatlantic.com/ideas/archive/2018/10/three-ways-combat-climate-change-through-courts/574315/.

18. Order Following Pretrial/Settlement Conference and Order Following Defendant's Motion to Reconsider, Minnesota v. Klapstein, No. 15-CR-16-413 (9th. Jud. Dist. Ct., Clearwater Cty., Minn. Oct. 3 and 5, 2018); Mark Hand, *Judge Shoots Down Climate Necessity Defense at Last Minute, Yet Acquits Pipeline Protesters*, THINKPROGRESS (Oct. 10, 2018), https://thinkprogress.org/pipeline-protesters-cleared-of-charges-but-robbed-of-chance-to-present-climate-defense-in-court-cdd5e3da995b/.

19. John Vidal, *Not Guilty: The Greenpeace Activists Who Used Climate Change as a Legal Defence*, THE GUARDIAN (Sep. 10 2008) http://www.theguardian.com/environment/2008/sep/11/

English "lawful excuse" justification provides more latitude than most versions of American necessity: defendants must prove that they (1) damaged property to protect property belonging to another; (2) believed the property was in immediate need of protection; and (3) believed the means of protection were reasonable in light of the circumstances.[20] The Kingsnorth Six argued that damaging the coal plant was necessary to protect polar ice caps, Inuit territory, and British coastal regions, among other property, and their evidence was supported by testimony from Dr. James Hansen and others regarding the effects of climate change and the lack of legal alternatives.[21]

The first American climate necessity defense was offered by Tim DeChristopher in 2009**.** Posing as a bidder, DeChristopher disrupted a Bureau of Land Management (BLM) auction for oil and gas drilling rights to several parcels of pristine red rock country in south eastern Utah, resulting in charges of false statement and violation of the Federal Onshore Oil and Gas Leasing Act.[22] The federal District Court of Utah granted the prosecution's motion in limine to bar the necessity defense, and DeChristopher lost his appeal to the Tenth Circuit in 2012.[23] The courts' opinions emphasized that a legally sanctioned auction could not be a legally cognizable harm, that the defendant could not avert the threatened harm by himself, and that he had legal alternatives to violating the law, including bringing a lawsuit.[24] DeChristopher was convicted and served twenty-one months of a two-year sentence.[25] His protest and defense, which received significant media attention and support from a former national BLM director (who was one of DeChristopher's lawyers),[26] contributed to an investigation into lack of proper environmental assessment prior to the auction and the cancellation of all drilling leases in the area.[27] Therefore, despite the

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activists.kingsnorthclimatecamp.

20. Criminal Damage Act 1971, c. 48, § 5(2)(b) (Eng.).

21. Vidal, *supra* note 19.

22. United States v. DeChristopher, 695 F.3d 1082, 1087-88 (10th Cir. 2012).

23. *Id.*

24. *Id.*; United States v. DeChristopher, No. 3837208, 2009 WL 3837208, at *5 (D. Utah Nov. 16, 2009).

25. Brian Maffly, *Activist Tim DeChristopher to be Freed After 21 Months in Custody*, SALT LAKE TRIB. (April 17, 2013), http://archive.sltrib.com/story.php?ref=/sltrib/news/56159854-78/dechristopher-tim-bidder-prison.html.csp.

26. Brandon Loomis, *DeChristopher Goes on Trial, but Does he Have a Defense?*, SALT LAKE TRIB. (Feb. 27, 2011), http://archive.sltrib.com/story.php?ref=/sltrib/home/51289931-76/dechristopher-auction-trial-judge.html.csp.

27. *Bush-Era Energy Drilling Leases in Utah Canceled*, NBCNEWS.COM (Feb 4., 2009), http://www.nbcnews.com/id/29017638/ns/us_news-environment/t/bush-era-energy-drilling-leases-utah-canceled.

courts' conclusion to the contrary, DeChristopher's act of civil disobedience actually prevented the development of specific fossil fuel projects, arguably satisfying the element of a "sufficient causal relationship."

In 2012, activists affiliated with the Michigan Coalition Against Tar Sands locked themselves to tar sands pipeline construction equipment at an Enbridge Energy site and were charged with felony resisting and obstructing an officer and misdemeanor trespass.[28] Offering an "environmental necessity" defense, the defendants presented evidence in their pre-trial briefs of the harm caused by the large Enbridge oil spill on the Talmadge Creek and Kalamazoo River in 2010, the failure of Enbridge to meet deadlines for spill clean-up, and the failure of the EPA and the Michigan Department of Environmental Quality to enforce the terms of the clean-up agreement, as well as climate change harms.[29] Nevertheless, the trial court denied presentation of the defense and the defendants were convicted by a jury and sentenced to time served and five years' probation, and ordered to pay more than $34,000 in restitution.[30] An intermediate appeal was denied, but the Michigan Supreme Court recently ordered the prosecution to respond to the defense's motion for leave to file an appeal.[31]

In 2013, Ken Ward and Jay O'Hara used a lobster boat to block a coal shipment to the Brayton Point power plant in Somerset, Massachusetts, resulting in four misdemeanor charges.[32] The court denied a pre-trial motion by the prosecution to secure an appeals court ruling on the admissibility of necessity evidence, and the defense was prepared to call expert witnesses on climate science, the regulation of greenhouse gases, and civil disobedience. On the day of trial, the prosecutor dropped all charges in exchange for $2,000 in restitution from each defendant and delivered a dramatic speech outside the courthouse praising the defendants and calling for increased action to address climate change.[33]

The following year, a protester against the Keystone XL pipeline was charged in Oklahoma with two misdemeanor counts of obstructing

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28. State v. Carter, Nos. 321352 & 322207 at 1 (Mich. Ct. App. Dec. 10, 2015).

29. Motion and Brief of Defendants Barbara Carter and Lisa Leggio to Present Expert Witness and to Raise the Defense of Environmental Necessity, State v. Carter, No. 13-000917-FH at 2-7, (Jan. 29, 2014).

30. CLIMATE DEFENSE PROJECT, *supra* note 15.

31. *Id.*

32. Jess Bidgood, *Charges Dropped Against Climate Activists*, N.Y. TIMES (Sep. 8, 2014), https://www.nytimes.com/2014/09/09/us/charges-dropped-against-climate-activists.html?_r=1.

33. *Id.*

an officer.[34] The judge orally denied the necessity defense after pre-trial briefing (which had included references to the atmospheric trust doctrine[35]) and excluded evidence related to climate change, including an affidavit from Dr. James Hansen. The defendant was able to argue for the justification of his actions during jury sentencing and was sentenced to no jail time.[36]

In 2015, the New York City Criminal Court blocked necessity evidence during a bench trial of activists who had participated in the blockade of Broadway during the 2014 Flood Wall Street protest.[37] The court found that climate change is a "grave danger" but not a "present, immediate threat of injury"[38] and that the defendants' targeting of financial institutions had no clear connection to an imminent emergency. Nevertheless, the court acquitted the protesters on First Amendment grounds because the police officers' order for the protesters to disperse was constitutionally overbroad.[39]

The 2016 "Delta 5" case in Snohomish County, Washington, was the first time that climate necessity evidence was presented to a jury. The defendants had been charged with criminal trespass and obstructing or delaying a train after erecting a human-occupied tripod over railway tracks in a Burlington Northern-Santa Fe yard in Everett, Washington, blocking trains carrying Bakken crude oil.[40] In a rather convoluted procedure, the court denied the defense's motion to raise necessity, then reversed itself after the defendant made a motion for reconsideration arguing that—as opposed to previous political necessity cases—the defense was prepared to call experts on the lack of reasonable legal alternatives.[41]

At trial, six witnesses testified regarding the science and local effects

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34. Michael Sheehan, *The Necessity Defense: On the Trial of Alec Johnson*, TERRAIN.ORG (Mar. 15, 2015), http://www.terrain.org/2015/nonfiction/the-necessity-defense-on-the-trial-of-alec-johnson/.

35. Trial Br. Regarding the Necessity Defense at 21-24, *State v. Johnson*, No. CM-2013-96, (Dist. Ct. of Atoka Cty., Okla. Oct. 23, 2014).

36. Sheehan, *supra* note 34.

37. Kate Aronoff, *The "Flood Wall Street 10" Fought the Law and Won*, TRUTH-OUT.ORG (Mar. 12, 2015), http://www.truth-out.org/news/item/29618-the-flood-wall-street-10-fought-the-law-and-won.

38. Transcript at 5, People v. Shalauder, No. 2014NY076969 (N.Y. Crim. Ct., New York Cty. Mar. 4 2015).

39. *Id.* at 6.

40. Ted Hamilton, *Can Breaking the Law Be a Legal Defense?*, THE DAILY BEAST (Jan. 25, 2016), http://www.thedailybeast.com/articles/2016/01/25/can-breaking-the-law-be-a-legal-defense.html.

41. Transcript of Reconsideration Hearing at 28, State v. Brockway, No. 5053A-14D (Snohomish Cty. Dist. Ct., Wash. Jan. 6, 2016).

of climate change, the particular effects of leaking crude oil, the rail company's history of safety violations and punishing whistleblowers, and the connection between the protest and reform in the company's safety practices.[42] At the close of evidence, the court granted a renewed prosecution motion to exclude the defense, finding that climate change was not a cognizable harm because of its diffuse nature and that the defendants had reasonable legal alternatives available to them.[43] Without a necessity instruction, the jury acquitted on the obstruction charge and convicted on trespass.[44]

Later that year, two activists who had suspended themselves from a Shell Oil vessel in Bellingham, Washington that was bound for drilling operations in the Arctic faced Coast Guard administrative penalties for violating a safety zone.[45] Over objection from the charging unit, the hearing officer allowed counsel to argue necessity based on analogy to "public necessity" trespassing cases in other administrative hearings and to draw from the public trust doctrine. Nevertheless, the officer found that the defendants had failed to meet the elements of necessity as defined by the Ninth Circuit and issued penalties of around $5,000.[46]

In December 2016, a judge in a bench trial in Cortlandt, New York heard necessity evidence related to a protest in which the nine defendants blocked the entrance to a construction lot for the Algonquin Incremental Market pipeline near the Indian Point nuclear plant.[47] Witnesses testified regarding the pipeline's public safety risks, the vulnerability of the nuclear plant, and the lack of legal alternatives. In his decision, the judge deferred to the Federal Energy Regulatory Commission's findings regarding the safety of the pipeline and found there was no direct link between the protest and aversion of the threatened harm. The defendants were convicted of disorderly conduct.[48]

Other climate necessity attempts have stemmed from a protest at the

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42. Transcript of Proceedings, Vol. 3, at 33-125, State v. Brockway, No. 5053A-14D (Snohomish Cty. Dist. Ct., Wash. Jan. 13, 2016).

43. Transcript of Proceedings, Vol. 4 at 87, State v. Brockway, No. 5053A-14D (Snohomish Cty. Dist. Ct., Wash. Jan. 14, 2016).

44. Hamilton, *supra* note 40.

45. Coast Guard Final Assessment Letter Against Chiara D'Angelo, Activity No. 5169347, U.S. Dep't of Homeland Security, U.S. Coast Guard Hearing Office (May 17, 2016) (on file with author); Coast Guard Final Assessment Letter Against Matthew Fuller, Activity No. 5169346, U.S. Dep't of Homeland Security, U.S. Coast Guard Hearing Office, (June 13, 2016) (on file with author).

46. Coast Guard Final Assessment Letter Against Chiara D'Angelo, *supra* note 45; Coast Guard Final Assessment Letter Against Matthew Fuller, *supra* note 45.

47. People v. Bucci et al., No. 15110183-92, 2-3 (Cty. of Westchester Just. Ct., N.Y. Dec. 1, 2016).

48. *Id.* at 13.

Montana State Capitol to protest coal mining;[49] a blockade of tracks used for coal transport at a BNSF facility in Bellingham, Washington;[50] interference with construction of a natural gas pipeline in Vermont;[51] occupation of a BNSF rail yard in Anacortes, Washington, to protest crude oil transport;[52] and a blockade of a construction site for a fracked gas power plant in Wawayanda, New York.[53] The defense was defeated in these cases either by pretrial decision or through a bench trial in which the judge simultaneously ruled on the defense and issued a guilty verdict. A case involving a blockade of BNSF rails in Spokane, Washington is ongoing, with the prosecution appealing the judge's pre-trial order allowing the defense.[54]

In a significant set of ongoing cases, five activists responding to a call to action from the Standing Rock anti-pipeline protest camp in North Dakota simultaneously turned off valves controlling the flow of tar sands oil from Canada through pipelines in Minnesota, North Dakota, Montana, and Washington, and all prepared climate necessity defenses to the array of felony and misdemeanor charges they faced.[55]

The first trial for the so-called "Shut It Down" actions involved felony charges of burglary and criminal sabotage against Ken Ward, the same protester involved in the Lobster Boat Blockade. After receiving notice of the defense's intent to argue necessity, the prosecution filed a motion in limine to preclude necessity defense-related evidence, to which the defense responded with a brief and a list of expert witnesses prepared to testify regarding climate science, energy economics and tar sands, and the effectiveness of civil disobedience.[56] At the pre-trial hearing, the judge denied the necessity defense because he found that Mr. Ward had legal alternatives to his act of protest and because of concerns that the trial would turn into a referendum on the science of climate change; in his oral ruling, the judge called the question of the

49. City of Helena v. McKinlay, No. 2012-NT-4385 *et seq.* (Helena Mun. Ct., Mont., Jan. 29, 2013).

50. City of Bellingham v. Alexander, No. CB0075354 (City of Bellingham Mun. Ct., Wash., Mar. 18, 2013).

51. Vermont v. Gardner, No. 2700-7-17 (Chittenden Sup. Ct., Vt., Feb. 28, 2017).

52. Washington v. Claydon, No. 6Z0595647 (Skagit. Cty. Sup. Ct., Wash., Mar. 23, 2017).

53. People v. Cromwell, No. 15120561 (Town of Wawayanda Just. Ct., N.Y., May 20, 2017).

54. Washington v. Taylor, No. 6Z0117975 (Spokane Cty. Dist. Ct., Wash., Apr. 24, 2017).

55. Sam Levin, *Judge in Environmental Activist's Trial Says Climate Change is a Matter of Debate*, THE GUARDIAN (Jan. 31, 2017), https://www.theguardian.com/environment/2017/jan/31/environmental-activist-trial-judge-questions-climate-change-ken-ward.

56. Response to the State's Motion to Preclude Necessity Defense and to Strike Witnesses at 1-8, State v. Ward, No. 16-1-01001-5 (Skagit Cty. Superior Ct., Wash., Jan. 23 2017).

effects of global warming a matter of "tremendous controversy."[57]

Mr. Ward proceeded to trial, testifying about his beliefs and motivations and winning judicial notice of several charts depicting the causes and risks of climate change. The trial ended in a hung jury.[58] The prosecution then decided to retry Mr. Ward, and the judge enforced his earlier denial of necessity defense despite a motion for reconsideration. A new jury hung once again on the sabotage charge but convicted on burglary; Mr. Ward is currently appealing.[59]

In North Dakota, Michael Foster, who turned a valve to shut down the Keystone 1 Pipeline, was convicted of criminal mischief, criminal conspiracy to commit mischief, and criminal trespass and sentenced to three years' imprisonment with two years suspended, while an activist who filmed the action was convicted of two charges, after the judge denied presentation of necessity evidence.[60]

In Montana, in the Higgins case, the trial judge summarily denied the defense with a brief opinion that failed to address the defense's arguments regarding climate change and accused Higgins of trying to "shift responsibility" to the government.[61]

On the other hand, Shut It Down activists in Minnesota secured a significant victory when a trial judge in Clearwater County issued the first written opinion in a U.S. jury trial allowing presentation of the climate necessity defense.[62] Noting that "Minnesota's standard for the necessity defense is high," the judge found that the defendants had made a *prima facie* showing that they faced an "emergency situation where the peril is instant, overwhelming, and leaves no alternative but the conduct in question."[63] The prosecution appealed the order, arguing that presentation of necessity evidence would have a "critical impact" on its case. The Minnesota Appeals Court and the Minnesota Supreme Court denied the appeal and upheld the trial court's decision.[64] On the eve of trial, however, the trial judge partially reversed himself and contradicted

57. Levin, *supra* note 55.

58. Leah Sottile, *Trial of Oregon Climate Activist Ends in Hung Jury*, WILLAMETTE WEEK (Feb. 1, 2017), http://www.wweek.com/news/courts/2017/02/01/trial-of-climate-change-activist-ends-in-hung-jury/.

59. CLIMATE DEFENSE PROJECT, *supra* note 15, at 6.

60. *Id.* at 5.

61. Montana v. Higgins, No. DC-16-18 (12th Jud. Dist. Ct., Choteau Cty., Mont. Apr. 11, 2017).

62. Order and Memorandum, Minnesota v. Klapstein, No. 15-CR-16-413 (Ninth Jud. Dist. Ct. Clearwater Cty., Minn. Oct. 11, 2017).

63. *Id.* at 5 (quoting State v. Johnson, 289 Minn. 196, 199 (1971)).

64. Minnesota v. Klapstein, No. A17-1649, (Minn. Ct. App. Apr. 23, 2018), *review denied* 2018 WL 1902473 (Minn. Ct. App. July 17, 2018).

his earlier characterization of the necessity defense, barring most expert testimony and finding that the defendants' protest was "indirect civil disobedience"[65] (see discussion of this term in Part IV.E below). The defense was prepared to re-litigate the issue as it presented its case and offered evidence; however, after the prosecution rested its case, the judge found that there was insufficient evidence to support the charges and dismissed the case.[66]

Similarly, Reverend George Taylor, an activist in Spokane, Washington, secured a preliminary victory in October 2017 after winning court approval to present a climate necessity defense at his trial for charges stemming from a blockade of oil and coal train tracks. His pre-trial showing of necessity evidence included live testimony from a climate expert, an expert on civil disobedience, and an expert on emergency response.[67] In her ruling allowing the defense, Judge Debra R. Hayes focused on the Taylor's constitutional right to present a defense and noted that "the Necessity Defense has been allowed in numerous civil disobedience cases in other state court [*sic*] on a case-by-case basis."[68] Acknowledging that the defense was not "officially recognized" in cases of civil disobedience in Washington but that it had been allowed in several such cases, Judge Hayes held that Taylor had met the burden of proof on all four elements of the defense by a preponderance of the evidence.[69] The prosecution has appealed the decision and further pre-trial litigation is expected.[70]

In March 2018, 13 defendants who had been arrested in a protest against the West Roxbury Lateral Pipeline in Boston had their charges reduced to civil infractions by the prosecution on the eve of trial. Having prepared a full necessity defense but deprived of a jury trial, the defendants requested that the court find them "not responsible" by reason of necessity, a position to which the judge assented. This marked the first instance in the United States of climate activists winning acquittal by reason of necessity, albeit not in the context of a criminal trial and without a jury verdict.[71]

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65. Order Following Pretrial/Settlement Conference and Order Following Defendant's Motion to Reconsider, Minnesota v. Klapstein, No. 15-CR-16-413 (9th Jud. Dist. Ct., Clearwater Cty., Minn., Oct. 3 and 5, 2018).

66. Hand, *supra* note 18.

67. Findings of Fact and Conclusions of Law at 5-8, Washington v. Taylor, No 6Z0117975 (Dist. Ct. Spokane Cty., Wash., Mar. 13, 2018).

68. *Id.* at 9.

69. *Id.* at 9-11.

70. CLIMATE DEFENSE PROJECT, *supra* note 15, at 5.

71. Natasha Geiling, *Judge rules civil disobedience a 'necessity' to prevent climate change*, THINKPROGRESS (Mar. 28, 2018), https://thinkprogress.org/roxbury-pipeline-protest-necessity-

III. THE COMMON AND STATUTORY LAW OF NECESSITY

Attempts by climate activists to use the necessity defense build off a common law pedigree stretching back centuries.[72] Initially applied to situations where violating the law was necessitated by the physical forces of nature,[73] its scope has expanded in modern times to include human-caused harm, including harm caused by the state and by government officials.[74] The defense has been successfully invoked in some environmental civil disobedience cases.

A. *Development of the Necessity Defense*

In 1550, an English court acquitted a merchant for dumping cargo to prevent his ship from capsizing in a storm. Although his acts constituted destruction of property, the court found that the extreme circumstances necessitated his decision.[75] Through the centuries, courts have recognized more circumstances meriting a necessity defense.[76]

The necessity defense differs from the duress defense:

> 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.[77]

In most jurisdictions, the requirement of harm from natural or physical forces no longer exists.[78] Even in jurisdictions recognizing the distinction, climate civil disobedience would be subject to the necessity defense because the harm, although arising from human actions, is from

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72. *See* Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 291 (1974).

73. United States v. Bailey, 444 U.S. 394, 410 (1980).

74. *See* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 26–27 (2003).

75. *See* Reniger v. Fogossa, 75 Eng. Rep. 1 (Ex. Ch. 1551) ("[A] man may break the words of the law, and yet not break the law itself. . . . And therefore the words of the law . . . will yield and give way to some acts and things done against the words of the same laws, and that is, where the words of them are broken to avoid greater inconveniences, or through necessity.").

76. Arnolds & Garland, *supra* note 72, at 291-93.

77. *Bailey*, 444 US at 409–410.

78. WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIM. L. § 10.1(a) (3d ed., Oct. 2018). *See also* CLIMATE DEFENSE PROJECT, *Political Necessity Defense Jurisdiction Guide*, https://climate defenseproject.org/wp-content/uploads/2017/02/CDP-Jurisdiction-Chart.pdf.

natural causes, not threats of imminent harm or death from a person.[79]

In the twentieth and twenty-first centuries, the defense has been commonly asserted in marijuana use, driving under the influence, and prison escape cases. Although the defense differs from state to state, it generally requires the following elements:

> The necessity defense requires the defendant to show that he (1) was faced with a choice of evils and chose the lesser evil, (2) acted to prevent imminent harm, (3) reasonably anticipated a direct causal relationship between his acts and the harm to be averted, and (4) had no legal alternative but to violate the law . . . .[80]

Some state variations include an inquiry as to whether a defendant caused the situation that led to a competing choice of harm, and whether the defense has been excluded or modified by the legislature.[81] But the essential elements of an actor choosing the lesser of two harms when faced with imminent peril is almost universal.

The necessity defense has not been definitively established in federal courts by the Supreme Court or by all circuit courts:[82]

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79. *See* LAFAVE, *supra* note 78.

80. United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001). *See also* MODEL PENAL CODE § 3.02 (AM. LAW INST. 2001): "Justification Generally: Choice of Evils (1) Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and (b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and (c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear. (2) 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 in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability."

81. *See e.g.* 18 PA. CONS. STAT. § 503 ("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* N.J. STAT. ANN. § 2C:3-2 ("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"). The Model Penal Code section on necessity includes a provision excluding the defense "[w]hen 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." MODEL PENAL CODE § 3.02 (AM. LAW. INST. 2001). A similar requirement has been adopted by some courts. *See*, *e.g.*, United States v. Capozzi, 723 F.3d 720, 726 (6th Cir. 2013); United States v. Gant, 691 F.2d 1159, 1162-3 (5th Cir. 1982); Jones v. City of Tulsa, 857 P.2d 814 (Okla. Crim. App. 1993). Because this test is easily met by the typical protest defendant—the relevant "situation" requiring a choice of evils usually involves a pressing crisis of national or global concern that the defendant is not responsible for creating—this element is not further discussed in this article.

82. *See Maxwell*, 254 F.3d at 27; United States v. Quilty, 741 F.2d 1031 (7th Cir. 1984);

> [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.[83]

Nevertheless, the necessity defense provides a "safety valve"[84] that permits a jury of citizen-peers to decide whether, in certain cases, breaking the law reaches a better societal result than technical adherence to the letter of the law. Allowing a citizen jury to make that decision provides

> 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.[85]

Despite the importance of allowing a jury to impose its morality on law, the necessity defense may give rise to concerns about jury nullification. Jury nullification permits a jury to acquit a defendant in the face of contrary evidence of a defendant's guilt according to a court's instructions.[86] The jury's power to acquit has been recognized at least since John Peter Zenger's libel trial in 1735.[87]

The necessity defense is a principled and organized version of nullification, which requires juries to follow formal instructions before they can acquit a defendant in contravention of criminal law. A jury must still deliberate and consider the defense, but in so doing it assures that the law is fairly and equitably applied—especially if political issues are raised. As legal scholar Roscoe Pound noted at the beginning of the century, "Jury lawlessness is the great corrective of law in its actual

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United States v. Kabat, 797 F.2d 580 (8th Cir. 1986); United States v. Dorrell, 758 F.2d 427 (9th Cir. 1985).

83. United States v. Oakland Cannabis Buyers Coop, 532 U.S. 483, 490 (2001) (internal citations omitted).

84. People v. Gray, 571 N.Y.S.2d 851, 866 (Crim. Ct. 1991).

85. Commonwealth v. Hood, 389 Mass. 581, 597 (1983).

86. United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (stating that it is "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.").

87. *Id.*; *see also* William R. Glendon, *The Trial of John Peter Zenger*, 68 N.Y. ST. B.J. 48 (1996).

administration."[88]

The tension between the letter of the law and the jury's duty to correct the application of justice when it departs from the popular conscience brings to light conflicts between the institutional administration of the law and the jury's perception of fairness. For example, why should juries, who generally decide factual rather than legal questions,[89] be permitted to veto established common law or criminal statutes?

One answer could be that the modern division of responsibilities between judge and jury was never intended to remove the jury's ultimate responsibility for determining guilt or its role in providing the layperson's perspective on the fair administration of justice—especially where a defendant is acting not out of self-interest but for the good of others. Another answer is found in the jury's role in providing a counterbalance against the state's use of criminal law to suppress unpopular opinion and dissent.[90] This role was understood during the drafting of the Constitution,[91] and was critical in the formulation of the right to a jury trial in the Sixth Amendment.[92]

The necessity defense is consistent with our system of justice, even though the courts have drifted towards legislative deference. Legislators themselves recognize the importance of a contextual approach to justice by, for example, providing reduced sentences for mitigating factors.[93] This contextual approach is also found in the concept of prosecutorial discretion, which considers appropriate charges based on fairness, efficiency, and even political sensitivities,[94] and in the equitable

88. Roscoe Pound, *Law in Books and Law in Action,* 44 AM. L. REV. 12, 18 (1910).

89. *See* Alan W. Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 177 (1972).

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

91. *See* Shaun P. Martin, *The Radical Necessity Defense*, 73 U. CIN. L. REV. 1527, 1541–42 (2005).

92. U.S. 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 . . . .").

93. *See e.g.* FLA. STAT. § 921.0026 (West 2018) ("(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 . . . .").

94. James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981) (explaining the extent and nature of prosecutorial discretion).

discretion of judges over sentencing.[95] The same discretion should be ensconced in a jury's ability to uphold the law while considering the need to mitigate the effects of the law out of social concerns for promoting the greater good.

Justifiable concerns do exist for the potential of a jury using the necessity defense to acquit perpetrators of serious crimes. For example, the killing of African Americans in the South in expectation of acquittal (a Jim Crow practice that continues to this day),[96] as well as the murder of abortion doctors or adherents of Islam, could be excused by sympathetic local majority juries.[97] These possible negative externalities can be easily avoided by disallowing the necessity defense for violent crimes, as some states have done.[98] Such a limitation prohibits acquittal where there is a likelihood of a jury countenancing violent crime.[99]

Once violent crime is removed from the equation, a jury's ability to appropriately consider the necessity defense is, and should be, as integral to the administration of justice as other discretionary acts by a prosecutor or a judge. Curtailing jury discretion, but not judicial or prosecutorial discretion, improperly skews the administration of justice envisioned by the Sixth Amendment framers. History has shown that juries are able to correctly exercise their discretion and choose the lesser of two evils as well as judges and prosecutors.

Finally, as a matter of policy, the necessity defense promotes societal good when those who act to minimize harm in urgent situations are absolved from breaking the law for a higher good:

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95. *See* Mosi Secret, *Wide Sentencing Disparity Found Among U.S. Judges*, N.Y. TIMES (Mar. 5, 2012), http://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.").

96. Michael Hoffheimer, *Codifying Necessity: Legislative Resistance to Exacting Choice-of-Evils Defenses to Criminal Liability*, 82 TUL. L. REV. 191, 231 (2007).

97. 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*, N.Y. TIMES (Nov. 29, 2015), 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*, N.Y. TIMES (Sept. 17, 2016), www.nytimes.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.

98. *See* Martin, *supra* note 91, at 1533 n.21.

99. The high risk of acquittal for homicide should be distinguished from cases of extreme circumstances where defendants face death from starvation, drowning or some other unusual circumstance presenting an imminent likelihood of death. *See generally*, John Alan Cohan, *Homicide by Necessity*, 10 CHAPMAN L. REV. 119 (2006).

> [T]he 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.[100]

B. *Recent Uses of the Necessity Defense*

Almost a century ago, the necessity defense began to be asserted in the United States as a defense to harm that arose apart from "natural circumstances."[101] In particular, civil disobedients charged for opposing war, nuclear power and arms, illegal government action, and supporting civil rights, began using the defense[102] and soon discovered that juries accepted their arguments about the social good accomplished by their illegal actions and that the juries would often acquit defendants based on the necessity defense.

An often-cited early and controversial case was the Bisbee Deportation Case. In 1917, a sheriff and a posse of 1,000 men in Bisbee, Arizona arrested over 1,000 International Workers of the World union members in Arizona and deported them to New Mexico.[103] A posse member was tried for kidnapping and asserted the necessity defense, arguing that the striking union miners threatened not only the security of the country (World War I was ongoing), but the life and property of the residents of Bisbee, Arizona. The jury agreed that the harm of the deportation was less than the avoided threat.[104]

Later in the twentieth century, the necessity defense was used by protesters concerned about the dangers of nuclear power. In 1970, eighty-two protesters blocked the entrance to a nuclear power plant in Oregon.[105] 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

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100. LAFAVE, *supra* note 78, at 523–24.

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

102. See Quigley, *supra* note 74, at 26–37.

103. Editorial, *The Law of Necessity as Applied in the Bisbee Deportation Case*, 3 ARIZ. L. REV. 264 (1961).

104. *Id.* at 279.

105. Robert Aldridge & Virginia Stark, *Nuclear War, Citizen Intervention, and the Necessity Defense*, 26 SANTA CLARA L. REV. 299, 310–311 (1986) (discussing State v. Mouer, No. 77-246 through 77-324 (Columbia Cty. Dist. Ct., Dec. 12-16, 1977)).

verdict.[106]

The necessity defense has also been asserted for acts of civil disobedience against wars and covert involvement by the United States government in foreign wars from World War I to the present.[107] One of the most notable uses of the defense occurred in 1987, when Abby Hoffman, Amy Carter, and thirteen other people occupied an administration building at the University of Massachusetts and sat in a road blocking busses carrying arrested protestors from the building. The defendants were protesting illegal conduct by the Central Intelligence Agency in Central America and were acquitted of trespass and disorderly conduct charges stemming from their occupation.[108]

The judge instructed the jury on the necessity defense, and the jury acquitted all defendants 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."[109] The attorney for the state admitted that the jury believed the defense:

> "If there is a message, it was that this jury was composed of middle America," Mr. Ryan said. "It was a great jury for us. They weren't kids. There were a couple of senior citizens. And they believed the defense. Middle America doesn't want the C.I.A. doing what they are doing."[110]

Finally, the necessity defense has been successfully asserted to reduce the adverse effects of air pollution on bicyclists and pedestrians. In *People v. Gray*, defendants were protesting the dangers of air pollution to bikers and pedestrians on the Queensboro Bridge in New York City and were charged with disorderly conduct for blocking the entrance of a bridge roadway.[111] The prosecution agreed to allow the defendants to present a necessity defense in exchange for the defendants agreeing to not contest the elements of the crime. The judge acquitted the defendants in a nonjury trial, finding that they had proven all

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106. *Id.* at 311 (citing a letter from Betty Stein to Robert Aldridge, one of the attorneys in *State v. Mouer*, *supra* note 105).

107. *See* Quigley, *supra* note 74, at 24–25 (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).

108. Matthew L. Wald, *Amy Carter Is Acquitted over Protest*, N.Y. TIMES (Apr. 16, 1987), https://www.nytimes.com/1987/04/16/us/amy-carter-is-acquitted-over-protest.html.

109. *Id.*

110. *Id.*

111. People v. Gray, 571 N.Y.S.2d 851, 852-53 (Crim. Ct. 1991).

elements of the necessity defense and "the People [had] not disproved the elements of the necessity defense . . . beyond a reasonable doubt."[112]

The four above examples are illustrative of the fact that juries (and judges) tend to acquit when they actually hear a political or environmental necessity defense.[113] However, in most civil disobedience trials where defendants invoke the necessity defense, judges have ruled as a matter of law that the defense is not applicable even where evidence and testimony is proffered. Consequently, most civil disobedients are convicted, and political necessity cases are often resolved on technical grounds rather than on the merits.

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 balance of power in the person of the judge. It also contravenes the purposes of the Sixth Amendment right to a jury trial: a basic requirement of due process.[114] As discussed in Part IV.F below, community participation in criminal justice through the jury is a check on the use of the legal system to clamp down on dissent. A randomly selected jury's diversity of opinion and lack of a personal stake in the outcome of a trial can temper the biases of the judge. Therefore, jury deliberation helps to guarantee a fair trial for the accused, and allows non-specialists to engage in the socially important practices of condemnation and punishment in a manner that better reflects society's values.

Lay participation is especially appropriate in cases of political necessity, where a defendant's necessity argument depends upon her assessment of social harms and appropriate action to avert them because such issues concern the general interests of the public, of which jurors are representatives, and they require minimal legal sophistication.

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112. *Id.* at 871.

113. *Id.* (noting "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 74, at 26–41 (reviewing dozens of state court civil disobedience cases where necessity defense was presented to jury and defendant(s) were acquitted or charges 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; Bernard D. Lambek, *Necessity and International Law: Arguments for the Legality of Civil Disobedience*, 5 YALE L. & POL'Y REV. 472, 473 (1986) ("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.") (footnote omitted).

114. *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 U.S. 145, 148 (1968) (footnotes omitted).

Whether or not a threat existed, whether it was imminent, whether there were options available to prevent it, and whether a defendant's action were reasonable, are questions decided by context-specific inquiry, not by legal precedent. In other words, they are absolute questions of fact—the classic purview of the jury.

Furthermore, essential—and uniquely American—democratic considerations mandate 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."[115] This endowment of authority expressed the belief that citizen-juries could enhance social good (maybe beyond what was in the best interests of the powerful) by contravening legislative enactments, regardless of the juries' conformity to republican procedures: "[E]ven 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."[116] Retrospective approval of illegal behavior via jury participation in necessity cases deliberately blurs the line between politics and law—a common law exception to the rule of law. Judges negate the jury's intended purpose when they seek to contain the disruptive potential of this exception.

While the necessity defense has been allowed at times in state courts, federal courts have generally refused to allow a jury to consider the necessity defense in civil disobedience cases.[117] This disdain for the defense at the federal level stems in part from judges' general discomfort with the appearance of political controversy in criminal trials. However, the belief that political controversy must be avoided in criminal cases is at odds with a firm American tradition of using courts, and criminal cases in particular, to advance and debate political arguments.[118] The legal system is one of the primary arenas for citizen participation in American government. As such, legal arguments should be considered protected political expression, and judicial decisions to exclude a politically-based defense strategy must be made with the protection of free speech in mind.[119] Furthermore, as noted above, the necessity defense deals with the precise problem of when the letter of

115. Martin, *supra* note 91, at 1600–01.

116. *Id.* at 1547.

117. *See* Quigley, *supra* note 74, at 37–41.

118. *See* Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477, 493-510 (2004).

119. *Id.* at 510-11.

the law should be relaxed to further the interests of society. Such a problem naturally invites political controversy, which cannot then be used to block consideration of the matter at hand.

Federal judicial resistance in this area is evident in *United States v. Schoon,* a Ninth Circuit decision that precludes the use of the necessity defense in almost all political civil disobedience cases by distinguishing between "direct" and "indirect civil disobedience."[120] *Schoon*'s flawed logic is further discussed below in Part IV.E.

IV. THE CASE FOR CLIMATE NECESSITY—AND WHERE THE COURTS ARE GETTING IT WRONG

There is a strong case to be made for the doctrinal validity of a standard climate necessity defense and for courts to allow climate activists to present it, even if the ultimate question of guilt must be decided by a jury. In this Part, we analyze each element of the defense, how the typical climate defendant might satisfy it, and the doctrinal errors that courts commit in assessing them. To be sure, there is room for debate about whether particular actions do in fact satisfy the elements. For example, there may be insufficient evidence that a largely symbolic protest was in fact calculated to ameliorate the targeted harms to the climate. From a practical point of view, however, the crucial question is whether the evidence is sufficient to warrant a jury instruction on the necessity defense, not whether the existence of necessity has been conclusively demonstrated at the outset. Given the generally low bar for sending a defense to the jury, this question appears easily resolved.

The typical climate necessity argument is straightforward. The ongoing effects of climate change are not only imminent, they are currently occurring; civil disobedience has been proven to contribute to the mitigation of these harms, and our political and legal systems have proven uniquely ill-equipped to deal with the climate crisis, thus creating the necessity of breaking the law to address it. As opposed to many classic political necessity defendants, such as anti-nuclear power protesters, climate activists can point to the existing (rather than speculative) nature of the targeted harm and can make a more compelling case that their protest activity (for example, blocking fossil fuel extraction) actually prevents some quantum of harm produced by global warming.

Why, then, has the climate necessity defense fared so poorly in U.S. courts? The first reason for judicial resistance to the climate necessity

120. United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991).

defense is an excessive and unwarranted reliance on pretrial hearings and motions to exclude evidence at trial. Courts have broad discretion to resolve evidentiary matters so as to avoid irrelevant or distracting matters at trial.[121] This discretion is limited, of course, by defendants' constitutional right to present a defense.[122] Motions in limine—which were first developed as a defense tool to preemptively block prosecutors from bringing in embarrassing and irrelevant character evidence—ask judges to rule on the admissibility of evidence (including witnesses) prior to trial so as to avoid excessive objections and interruptions in front of the jury.[123] Originally used as a precise tool to secure pretrial rulings on discrete pieces of evidence, motions in limine have in recent decades been transformed into a prosecutorial bludgeon to eliminate parts or even the entirety of a defense theory of the case.[124]

The efficiency benefits of this practice are questionable. The motion in limine process often involves several rounds of briefing, hearings, and even expert testimony, resulting in a mini-trial that in certain cases may take precedence over the trial itself.[125] More importantly, this process impinges on defendants' rights to present a full defense and to have their guilt determined by a jury,[126] as discussed below in Section IV.F.

Judges in climate necessity cases have relied on this pretrial exclusionary process for two primary reasons. First, judges are concerned that their trials will be dominated by legally irrelevant matters, often (mis)informed by the incorrect idea that the common law necessity defense is unavailable in protest cases.[127] The second reason, however, goes beyond mere judicial efficiency; it is clear from the vast majority of recorded denials of the defense that judges have a discomfort with, and even a distaste for, political issues in the courtroom, especially

121. *See* Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 384 (2008) ("In deference to a district court's familiarity with the details of the case and its greater experience in evidentiary matters, courts of appeals afford broad discretion to a district court's evidentiary rulings.").

122. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) (holding the hearsay rule should not be invoked "mechanistically to defeat the ends of justice" when "constitutional rights directly affecting the ascertainment of guilt are implicated").

123. Luke Shulman-Ryan, *Evidence—The Motion in Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State's Civilly Disobedient*, 27 W. NEW ENG. L. REV. 299, 319-22 (2005).

124. *Id.* at 322-23.

125. Douglas L. Colbert, *The Motion in Limine in Politically Sensitive Cases: Silencing the Defendant at Trial*, 39 STAN. L. REV. 1271, 1314-15 (1987).

126. *Id.* at 1317-21.

127. *See* City of Helena v. McKinlay, No. 2012-NT-4385, at 3 (City of Helena, Mont. Mun. Ct. Jan. 29, 2013) ("As applied to this case, the fact the protesters have not been yet successful in the political realm, the court of public opinion or the courts in general does not mean the alternative of violation of law is a new, open option.")

climate change. This allergy to political controversy is most obvious in the *Higgins* denial, in which the judge wrote that "the energy policy of the United States is not on trial, nor will this Court allow Higgins to attempt to put it on trial."[128] It is also clear in more measured disquisitions on the inappropriateness of debating climate change in the judicial forum, as in *City of Bellingham v. Alexander*.[129] In each denial, it is clear that judges are imposing a higher evidentiary burden on defendants whose cases involve matters of political controversy. In the interest of purported judicial efficiency, "politics" is equated with "irrelevance," and activist defendants are effectively faced with a presumption of inadmissibility.

This heightened scrutiny of the political aspect of the climate necessity defense is inappropriate for three reasons. First, criminal process guarantees are not loosened when a case presents political questions. No law or doctrine allows courts to adjust evidentiary rules based on the potential controversy of a proffered argument. While climate change may be an issue that demands legislative and executive resolution, it likewise demands judicial resolution if it involves judicial questions like the necessity of violating one law to promote a higher value. If anything, defendants' rights should be more vigorously enforced in such instances, given the long American tradition of using courts for political expression.[130] Second, courts' focus on the politics of climate change distracts from the scientific issues involved in climate necessity cases. There may well be political disagreement over the realities and effects of climate change, but there is little scientific disagreement, as the Supreme Court has noted.[131] Even if there *were* disagreement, however, defendants have the right to present their side of the case, rather than having the entire discussion mooted as irrelevant. By conceiving climate change only in its partisan guise, judges abdicate their duty to engage with the evidence and banish the matter from their

128. Montana v. Higgins, No. DC-16-18, 2 (12th Jud. Dist. Ct., Choteau Cty., Mont. Apr. 11, 2017)

129. City of Bellingham v. Alexander, CB0075354 (City of Bellingham, Wash. Mun. Ct. Mar. 18, 2013) (examining various political possibilities for addressing climate change and the specific debates surrounding a coal export terminal on the Pacific).

130. *See* Lobel, *supra* note 118.

131. *See* Massachusetts v. E.P.A., 549 U.S. 497, 499 (2007) ("The harms associated with climate change are serious and well recognized . . . [T]he relevant science and a strong consensus among qualified experts indicate that global warming threatens, *inter alia*, a precipitate rise in sea levels by the end of the century, severe and irreversible changes to natural ecosystems, a significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences, and an increase in the spread of disease and the ferocity of weather events.").

courtrooms entirely.[132]

Third, and most fundamentally, it is in the very nature of the necessity defense to question the social benefit of applying the letter of the law. Like other affirmative defenses, necessity simply would not exist in the common law were courts not given the discretion, and the obligation, to evaluate when an exception to the normal application of a criminal statute is warranted. The elements of the defense are meant to facilitate judgment in such difficult cases, not to avoid the central question. By appealing to political controversy as a means of excluding necessity evidence, judges reject the purpose of the necessity defense itself.

Overreliance on the motion in limine and discomfort with climate change and politics explain courts' reluctance to allow the climate necessity defense. This reluctance in turn produces six common jurisprudential errors in the analysis of the defense:

1. On the "choice of evils" element, judges ignore the enormous difference between harms resulting from peaceful protest activity and those resulting from climate change.
2. On the causation element, judges fail to grasp the causal connection between civil disobedience and preventing climate change harms.
3. On the imminence element, judges often misinterpret and misapply the required showing of imminence.
4. On the alternatives element, judges impose an overly harsh test and exaggerate the element's importance.
5. Judges rely on a dubious distinction between direct and indirect civil disobedience.
6. Finally, judges often ignore and undermine climate defendants' Sixth Amendment rights to a jury trial.

A. *Choice of Evils*

A basic requirement of the necessity defense is that the defendant acted to prevent a greater harm.[133] This element is sometimes referred to

132. *See* Motion Hearing Verbatim Report of Proceedings at 18, Washington v. Ward, No. 16-1-01001-5 (Skagit Cty. Sup. Ct., Wash. Jan. 24, 2017) ("[T]he trial would focus on the existence and the severity of the climatic change, and that's not what we are here to do. That's not what superior court is here to do. That's for the legislative arena, not for the judicial arena to debate that.").

133. *See* United States v. Bailey, 444 U.S. 394, 410 (1980) (holding a defendant may assert the defense "if he reasonably believed that criminal action 'was necessary to avoid a harm more serious than that sought to be prevented by the statute defining the offense'" (quoting United States v. Bailey, 585 F.2d 1087, 1097-98 (D.C. Cir. 1978))).

as choosing the "lesser evil."[134] The analysis of this element requires a simple balancing: necessity justifies criminal action "where the social benefits of the crime outweigh the social costs of failing to commit the crime."[135]

The typical climate necessity defendant will argue that the minimal harms caused by their nonviolent trespass or blockade—usually public safety expenditures or lost corporate profits—are clearly outweighed by the harms of global climate change. Framed in this way, the question is easily decided. Climate change effects are already disastrous and deadly, and will only grow in severity. President Obama has described global warming as "a peril that can affect generations" and "one of [the] most severe threats" that "will impact every country on the planet."[136] Clearly, these harms are greater than any harm caused by nonviolent protest.

Some judges considering the climate necessity defense agree. For example, in the 2016 "Delta 5" case, the judge found at the close of evidence that the defendants had demonstrated that "the harm sought to be avoided was greater than the harm resulting from a violation of the law,"[137] while in *People v. Cromwell*, the judge found that "[t]here is no doubt that global warming is a threat to our environment and it would be unreasonable to argue that this threat is not a more serious harm than a relatively brief disruption of traffic."[138]

Some courts, however, have decided that it is simply inappropriate to compare local acts of protest to the global problem of climate change. One source of this alleged inappropriateness is the long-term, pervasive nature of climate change. In *People v. Shalauder*, the court found that this "type of generalized and continuing harm is not the present, immediate threat of injury" required by law,[139] conflating the balancing element with the imminence element. Another source of the alleged inappropriateness is the presumed scientific uncertainty surrounding climate change effects; as the federal district court in *United States v. DeChristopher* wrote, "a harm or evil that may or may not occur is insufficient for purposes of the necessity defense."[140]

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134. United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001).

135. United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991).

136. President Barack Obama, Remarks by the President at the United States Coast Guard Academy Commencement (May 20, 2015).

137. Verbatim Transcript of Proceedings, vol. 4 at 88, State v. Brockway, No. 5053A-14D (Snohomish Cty. Dist. Ct., Wash. Jan. 14, 2016).

138. People v. Cromwell, No. 15120561, at 5 (Town of Wawayanda, N.Y. Just. Ct. May 20, 2017).

139. Excerpts of Transcript of Proceedings at 5, People v. Shalauder, No. 2014NY076969 (N.Y. Crim. Ct., New York Cty. Mar. 4, 2015).

140. United States v. DeChristopher, 2009 WL 3837208, at *3 (D. Utah Nov. 16, 2009); *see*

Finally, courts have found that the political controversy surrounding climate change makes balancing impossible, either because courts should not rule on the issue or because a decision that climate change is a greater harm would imply that governmental inaction is partly responsible.[141] Another way to describe the presumed impossibility of balancing climate change harms against those of nonviolent protest is to say that climate change is not a "legally cognizable harm" for purposes of the necessity defense.[142] Such a finding clearly relies upon the second of the two major philosophical reasons for denying the defense that we identified above: discomfort with the science and politics of climate change in the courtroom.

At least one commentator has suggested adapting Learned Hand's famous formula for negligence to the necessity harms balance: *A* is greater or lesser than *p* multiplied by *H*, where "A = the gravity of the harm of the action taken by the defendant; H = the gravity of the harm that might result from no action; and p = the probability that H will occur."[143] The formula does not provide an answer to the question of what balance is appropriate; instead, it focuses attention on the importance of assessing the gravity of the harms under consideration as well as the probability that the targeted harm will occur.

Applied to a typical climate necessity case, the value of *A* will generally be low: harms are generally limited to public inconvenience and loss of profit. The value of *p* will be 1: climate change is already occurring. The value of *H* is much more difficult to determine. Global climate change harms are enormous, but most of them will occur regardless of a single act of civil disobedience. However, activists may specify that their targeted harm is something smaller, such as climate change effects in a particular region or the quantum of global warming

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also Motion Hearing Verbatim Report of Proceedings at 16, Washington v. Ward, No. 16-1-01001-5 (Skagit Cty. Sup. Ct., Wash. Jan. 24, 2017) ("I know there's tremendous controversy over the fact whether [climate change] even exists and even if people believe that it does or doesn't, the extent of what we are doing to ourselves, our climate, and our planet.").

141. *See DeChristopher*, 2009 WL 3837208, at *3-4 ("[T]he court agrees with . . . the Ninth Circuit in that the court does 'not sit to render judgements upon the legality of the conduct of the government at the request of any person who asks us to because he happens to think that what the government [is] doing is wrong . . . .'" (quoting United States v. May, 622 F.2d 1000, 1009 (9th Cir. 1980)); *see also* Motion Hearing Verbatim Report of Proceedings, Washington v. Ward, *supra* note 132, at 19.

142. *DeChristopher*, 2009 WL 3837208, at *4. The legal cognizability issue frequently arises in cases involving necessity defendants offered by anti-abortion protesters, in which courts generally find that abortion is not a legally cognizable harm. *See*, *e.g.*, State v. Rein, 447 N.W.2d 716, 717 (Minn. Ct. App. 1991). Climate necessity defenses are distinct: whereas abortion is a constitutionally protected activity, the harms of climate change enjoy no such protection.

143. Joel H. Levitin, *Putting the Government on Trial: The Necessity Defense and Social Change*, 33 WAYNE L. REV. 1221, 1253 (1986).

resulting from a particular pipeline or export facility. To attempt even a rudimentary accounting of *H*, the potential effect of the protest on these harms must first be assessed (*see* Part IV.C). In general, though, because the probability of climate change harms is one hundred percent, this analysis suggests that courts should almost always find that activists made the correct balancing.

This sort of consequentialist arithmetic runs the risk of distracting from the moral question at the heart of the climate necessity defense: whether activists should be punished for attempting to address the climate crisis through civil disobedience.[144] It does, however, help to clarify two points: first, that courts' exclusion of climate change evidence in necessity cases often stems from a vague or inadequate understanding of the targeted harms, and second, that necessity defendants would benefit from specifying the exact nature of the harm—ideally including harms that are local and easier to relate to—and emphasizing the certainty of their occurrence.

B. *Causation*

Necessity defendants must show that they reasonably believed that their actions would avoid or minimize the targeted harms.[145] Some courts define the required state of mind with regards to the causal nexus as "reasonable" or "objectively reasonable" belief,[146] while others simply require that the relationship exist.[147] Notably, the Model Penal Code does not list a separate element for the casual nexus, leaving it implicit that a causal relationship is anticipated when a defendant "believes" it "necessary to avoid a harm or evil."[148]

Courts considering political necessity defenses often find that defendants lacked such an objectively reasonable belief. In *Schoon*, for example, the Ninth Circuit found that there could be no causal relationship between protesters spilling simulated blood on the floor of an IRS office and the cessation of American support for military

144. *See* John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 402 (1999) (arguing that a focus on the balance of harms misplaces attention from the central question of culpability presented in necessity cases).

145. United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001) (holding a defendant must show that he "reasonably anticipated a direct causal relationship between his acts and the harm to be averted . . . .").

146. *See*, *e.g.*, United States v. May, 622 F.2d 1000, 1008-09 (9th Cir. 1980); *In re* Eichorn, 69 Cal. App. 4th 382, 389 (Ca. Ct. App. 1998); Toops v. State, 643 N.E.2d 387, 390 (Ind. Ct. App. 1994).

147. *See*, *e.g.*, *Rein*, 447 N.W.2d at 717 ("[T]he defense exists only if . . . there is a direct, causal connection between breaking the law and preventing the harm.").

148. MODEL PENAL CODE § 3.02 (AM. LAW INST. 2017).

atrocities in El Salvador because another actor such as Congress would need to act in order to attain the desired result.[149] Similarly, in *Maxwell*, the First Circuit decided that a protester's interruption of naval exercises could have no effect on the presence of American Trident submarines in the Caribbean,[150] and in *State v. Marley*, the Supreme Court of Hawai'i held that protesters' occupation of the office of a defense contractor could not foreseeably halt the contractor's production of war materials.[151] Finally, in *Andrews v. People*, the Colorado Supreme Court ruled that protesters at a nuclear weapons plant had not established that their demonstration would terminate production at the plant.[152] In each of these instances, courts conducted their own factual analysis of the anticipated causal relationship with little attention to the defendants' state of mind about that relationship.

It should be noted that these factual rulings are often premature and fail to adequately account for the long-term effects of civil disobedience, which often works in tandem with other social pressures to change policy. For example, the *Schoon* court dismissed the idea that a single protest could change American policy in El Salvador. Shortly after the defendants' protest, however, public pressure caused Congress to cut most military aid to El Salvador, making it at least arguable that the activists had succeeded in their stated goal.[153]

Other courts and commentators have suggested that the "reasonable belief" inquiry must focus on a defendant's actual beliefs rather than whether or not the criminal action actually succeeded in its stated object. *People v. Gray*, the air pollution protest case from New York City, is notable for being one of the few written opinions allowing the defense and for its nuanced discussion of the causal relationship between acts of civil disobedience and policy change.[154] The court cited the defendants' evidence that civil disobedience had succeeded in changing municipal transportation policy in the past and decided that it was reasonable for the defendants to believe that obstructing traffic might lead to the reopening of a pedestrian and bicycle lane. Focusing on the defendants' states of mind at the time of their protest, the court criticized the judicial tendency to impose an "an after-the-fact requirement of an immediate

149. United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1991).

150. *Maxwell*, 254 F.3d at 28.

151. State v. Marley, 509 P.2d 1095, 1109 (Haw. 1973).

152. Andrews v. People, 800 P.2d 607 (Colo. 1990).

153. *See* James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CAL. L. REV. 351, 373 (1993) ("The court should not examine, with hindsight, whether an act will bring about a certain result, but rather, whether an act could reasonably have been anticipated to do so before the fact.").

154. People v. Gray, 571 N.Y.S.2d 851, 861 (Crim. Ct. 1991).

relationship [that] constitutes a rule of per se unreasonableness" and held that "a defendant's reasonable belief must be in the necessity of his action to avoid the injury. The law does not require certainty of success."[155]

In a more recent drunk driving necessity case, the Alaska Supreme Court made a similar point: "courts consider the defendant's reasonable beliefs at the time, even if those beliefs are mistaken, rather than objectively weighing all potential alternatives. The implausibility of a defendant's story, or any weakness in the evidence supporting that story, is not a relevant consideration."[156]

Although lacking an explicit requirement of a causal relationship, the Model Penal Code version of the defense includes a comment supporting the focus on the defendants' belief rather than on the court's own assessment of the nexus: "[t]he actor's reasonable belief in the necessity is sufficient . . . Questions of immediacy and alternatives have bearing, of course, but only on the genuineness of a belief in necessity."[157] In a concurrence for the Pennsylvania Superior Court in *Commonwealth v. Berrigan*, in which anti-nuclear arms protesters were allowed to present the necessity defense (the decision was later overturned by the state supreme court), Judge Edmund Spaeth suggested that courts hesitate before rushing to a conclusion on a causal nexus:

> Appellants do not assert that their action would *avoid* nuclear war (what a grandiose and unlikely idea!). Instead, at least so far as I can tell from the record, their belief was that their action, *in combination with* the actions of others, *might accelerate a political process* ultimately leading to the abandonment of nuclear missiles. And *that* belief, I submit, should not be dismissed as "unreasonable as a matter of law." A jury might-or might not-find it unreasonable as a matter of *fact.* But that is for a jury to say, not for a court.[158]

Whether a court adopts an objective test for the causal nexus or one depending on the defendant's belief, the standard of proof should always be relaxed at the pre-trial offer stage. In other words, courts should not simply interpose their own judgment about the eminently factual question of what constitutes a sufficient causal relationship between civil disobedience and avoidance or minimization of the targeted

155. *Id.* at 862.

156. State v. Greenwood, 237 P.3d 1018, 1024 (Alaska 2010).

157. MODEL PENAL CODE § 3.02 cmt. at 10 (AM. LAW INST. 1980).

158. Commonwealth v. Berrigan, 472 A.2d 1099, 1115 (Pa. Super. Ct. 1984) (Spaeth, J., concurring), *rev'd*, 501 A.2d 226 (Pa. 1985).

harm.[159] As with the balancing of harms element, however, the causal nexus question depends in large part upon how the targeted harm is defined: if the defendants are tasked with proving that their protest was anticipated to avoid global warming, they will face an impossible test, while proof will be easier if the question is whether or not their action contributed to a minimization of harm from a particular source of fossil fuel extraction or emissions.

In *North Dakota v. Foster*, a case involving a Shut It Down activist who temporarily halted the flow of tar sands oil through a pipeline, the court adopted the nexus element articulated in *United States v. DeChristopher*, requiring "a direct, causal relationship between the defendant's action and the avoidance of harm."[160] Summarizing the defendants' offer of proof, the court wrote that the activists "posit that preventing the burning of tar sands oil and shutting down the pipeline system 'is an integral part of wider emissions reductions necessary to stabilize the climate.'"[161]

With no discussion of specific facts, the court found the chain of causation that would "directly lead to a shutdown of production of tar sands oils or an end to pipeline operations" "tenuous and uncertain," denying the defendants the defense.[162] This discussion is instructive for, on the one hand, recognizing that a climate necessity causation argument must proceed by steps in an inferential chain (a single protest does not stop global warming, but it can end processes that contribute to global warming) while, on the other, imposing a strict requirement of direct causation that rules out the efficacy of civil disobedience altogether.

Climate necessity defendants have attempted to show that their actions could at least contribute to the minimization of global warming harms by pointing to the historical efficacy of civil disobedience in combatting social ills and by securing expert affidavits or testimony regarding the effect of climate protest in particular on policy change.[163] As with the facts of the harms of climate change, climate activists could seek judicial notice of the historical experience of movements for civil

159. *See* Part IV.F (desrcibing evidentiary standards and the constitutional right to present a defense).

160. Memoranda Decision and Order Granting Motion in Limine at 2, North Dakota v. Foster, No. 34-2016-CR-00187 (Northeast Jud. Dist. Ct. Pembina Cty., N.D. Sep. 29, 2016) (quoting United States v. DeChristopher, 695 F.3d 1082, 1096 (8th Cir. 2012)).

161. *Id.* at 5.

162. *Id.*

163. *See, e.g.,* Defense Response to State's Motion in Limine to Exclude the Necessity Defense at 22-26, *Foster*, No. 34-2016-CR-00187 (previewing testimony by Professor Tom Hastings and Dr. James Hansen on the effectiveness of civil disobedience and citing the role of civil disobedience in President Obama's decision to deny a permit to the Keystone XL Pipeline).

rights, women's suffrage, and other issues, which prove that civil disobedience has a demonstrated causal connection with the avoidance or minimization of social harms.[164]

They can also point to definite instances of the success of climate protest. President Obama rejected the permit for the Keystone XL permit in large part because of the wave of civil disobedience that had opposed the project.[165] Tim DeChristopher—whose climate necessity argument was denied—succeeded in protecting a large swathe of wilderness in Utah after oil leases in the area were canceled following his disruption of a Bureau of Land Management lease auction.[166] In 2014, the owners of a coal-fired power plant in Massachusetts announced the plant's closing in what many saw as capitulation to public pressure generated by the Lobster Boat protest the previous year.[167] In 2015, Shell canceled its Arctic drilling program after Shell No! activists drew attention to its risks.[168]

Another, perhaps more convincing argument presented by necessity defendants is that any protest action which succeeds in blocking the combustion of some quantum of fossil fuels thereby prevents at least a small amount of harm.[169] This argument is compelling because every little bit of greenhouse gas emissions degrades the atmosphere and has definite if ultimately undecidable consequences of human and natural health, consequences which could be exponentially ramified given the climate system's feedback loops and possible warming tipping points.[170] Given that these harms are certain and—even when minor—greater than those caused by civil disobedience,[171] climate civil disobedience

164. *See* Quigley, *supra* note 74, at 60.

165. *See* Ben Adler, *The Inside Story of how the Keystone Fight was Won*, GRIST (Nov. 6, 2015, https://grist.org/climate-energy/the-inside-story-of-how-the-keystone-fight-was-won/; Suzanne Goldenberg and Dan Roberts, *Obama Rejects Keystone XL Pipeline and Hails US as Leader on Climate Change*, THE GUARDIAN (Nov. 6, 2015), https://www.theguardian.com/environment/2015/nov/06/obama-rejects-keystone-xl-pipeline.

166. *Bush-Era Energy Drilling Leases in Utah Canceled*, *supra* note 27.

167. Dave Eisenstadter, *Lobster Boat Blockade: Two Activists Stand Trial After Helping Close Down a Coal Plant*, Occupy (Sep. 5, 2014), http://www.occupy.com/article/lobster-boat-blockade-two-activists-stand-trial-after-helping-close-down-coal-plant#sthash.D0ZNgbDX.dpbs (explaining how Jay O'Hara's and Ken Ward's blockade of a coal freighter helped shut down the Brayton Point Power Station and thereby decreased fossil fuel burning).

168. *See* Terry Macalister, *Shell Abandons Alaska Arctic Drilling*, THE GUARDIAN (Sep. 28, 2015), https://www.theguardian.com/business/2015/sep/28/shell-ceases-alaska-arctic-drilling-exploratory-well-oil-gas-disappoints.

169. *See*, *e.g.*, Defendant's Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 26-27, State v. Klapstein, No. 15-CR-16-413 (9th Jud. Dist. Ct., Clearwater Cty. Minn. Feb 3, 2017)

170. *Id.* at 12.

171. *See* Part IV.A, *supra* (discussing the balancing of harms).

prevents harm.[172]

As with other doctrinal errors, the failure of courts to adequately define and analyze the relationship between protest and the minimization or avoidance of climate change rests in part on ignorance of or discomfort with climate science. It is inherently difficult, if not impossible, to directly connect a specific supply of fossil fuels to specific harms caused by global warming. But the complexity of climate change causation does not diminish the importance of each link in the causal chain. All new fossil fuel infrastructure must be blocked if international warming targets are to be met.[173] As such, preventing the construction of any individual pipeline or disrupting the sale of any individual drilling lease is necessary to avert severe climate change consequences.

Courts should therefore not look for definitive proof that a specific act of protest led to the avoidance or minimization of a specific harm: this is simply an unrealistic way of analyzing the phenomenon of climate change. Instead, courts should ask a more general question, to which the answer at this late hour of the climate crisis is clear: Is civil disobedience necessary to compel an adequate government response to global warming?

C. *Imminence*

A necessity defendant must usually show that she acted to prevent an imminent harm.[174] "Imminence" is difficult to define. Black's Law Dictionary has no entry for "imminence," though its definitions of "imminent danger" and "imminent hazard" associate the concept with immediacy.[175] The United States Supreme Court has defined a danger as imminent "if it 'threaten[s] to occur immediately.'"[176] Many courts

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172. *See* Eisenstadter, *supra* note 167.

173. OIL CHANGE INTERNATIONAL, THE SKY'S THE LIMIT: WHY THE PARIS CLIMATE GOALS REQUIRE A MANAGED DECLINE OF FOSSIL FUEL PRODUCTION 7 (2016), http://priceofoil.org/2016/09/22/the-skys-limit-report/.

174. *See e.g.*, United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001) ("The necessity defense requires the defendant to show that he . . . acted to prevent imminent harm . . . ."), Shaun Martin, *The Radical Necessity Defense*, 73 U. Cin. L. Rev. 1527, 1567 (2005) (As of 2005, 44 states included an imminence requirement in their necessity defense.).

175. *Danger – Imminent danger*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("1. An immediate, real threat to one's safety that justifies the use of force in self-defense. 2. *Criminal law.* The danger resulting from an immediate threatened injury sufficient to cause a reasonable and prudent person to defend himself or herself"); *Hazard – Imminent hazard*, *id.* ("An immediate danger; esp., in environmental law, a situation in which the continued use of a pesticide will probably result in unreasonable adverse effects on the environment or will involve an unreasonable danger to the survival of an endangered species.").

176. Meghrig v. KFC Western, Inc., 516 U.S. 479, 485 (1996) (quoting Webster's New

follow this trend of basing imminence of temporal immediacy[177] and often elide the imminence element with a requirement of an "emergency" situation or response.[178] Although the Model Penal Code notably does not include imminence as element of necessity,[179] appellate courts in some states that have adopted the Model Penal Code's version of the necessity defense nonetheless "construe their statutes as requiring that the threat be imminent or immediate."[180]

Imminence is an even thornier issue in environmental cases, given the diffuse, temporally extended, and often hard-to-perceive nature of pollution threats. As such, environmental law has developed flexible definitions of imminence. In *Burlington Northern & Santa Fe Railway. Co. v. Grant*, for example, the Tenth Circuit found that a tar-like by-product of an oil refinery could be an imminent hazard even though no one had yet been harmed by it: "an 'imminent hazard' may be declared at any point in a chain of events which may ultimately result in harm to the public . . . . Imminence, thus, refers to the nature of the threat rather than identification of the time when the endangerment initially arose."[181]

The imminence of climate change is both obvious and hard to describe. Unlike many speculative environmental hazards that are the subject of legal debate, many negative consequences of climate change are already occurring and measurable, and further injuries are certain to

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International Dictionary of English Language 1245 (2d ed.1934)).

177. See, e.g., State v. Green, 470 S.W.2d 565, 566-68 (Mo. 1971) (finding that credible threat of assault faced by escaped prisoner was not "imminent" because several hours remained between the defendant's escape and the planned attack).

178. *See*, *e.g.*,; Ark. Code Ann. § 5-2-604 (West 2018) ("Conduct that would otherwise constitute an offense is justifiable when: (1) the conduct is necessary as an emergency measure . . ."); versions of the latter formulation are also found in Col. Rev. Stat. Ann. § 18-1-702 (West 2018); Del. Code Ann. 11. I, § 463 (West 2018); Mo. Ann. Stat. §563.026 (West 2018); and N.Y. Penal Law § 35.05 (McKinney 2018); United States v. Seward, 687 F.2d 1270, 1276 (10th Cir. 1982) ("The defense of necessity does not arise from a 'choice' of several courses of action, it is instead based on a real emergency"); State v. Warshow, 138 Vt. 22, 24 (1979) ("[t]here must be a situation of emergency . . . . This emergency must be so imminent or compelling as to raise a reasonable expectation of harm"); Garcia v. State, 972 S.W.2d 848, 849-50 (Tex. Ct. App. 1998) ("Imminent harm occurs when there is an emergency situation.").

179. MODEL PENAL CODE § 3.02 cmt. on choice of evil at 10 (AM. LAW INST., Tent. Draft No. 8 1958) ("The actor's reasonable belief in the necessity is sufficient . . . Questions of immediacy and alternatives have bearing, of course, but only on the genuineness of a belief in necessity.").

180. Michael H. Hoffheimer, *Codifying Necessity: Legislative Resistance to Enacting Choice-of-Evils Defenses to Criminal Liability*, 82 Tul. L. Rev. 191, 235 (2007) ("Although Nebraska and Pennsylvania's statutes do not require that the threat of harm be imminent, appellate decisions in both those states construe their statutes as requiring that the threat be imminent or immediate.").

181. Burlington N. & Santa Fe Ry. Co. v. Grant, 505 F.3d 1013, 1020-21 (10th Cir. 2007) (citations omitted).

occur.[182] They can be seen both on the global level, as in the form of average sea level rise,[183] and locally, through such effects as pest invasion.[184] On the other hand, climate change harms are temporally distinct from necessity situations such as house fires or prison violence because of the long duration of the climate crisis. Climate change is hard to perceive through specific, temporally and spatially bound consequences, and its effects are often best identified through statistical trends rather than direct evidence of harm at a single location.

Courts analyzing the standing claims of plaintiffs seeking redress for injuries related to climate change have discussed these imminence issues at length. Most notably, the Supreme Court in *Massachusetts v. E.P.A.*, addressing Article III standing, found that the EPA's refusal to regulate greenhouse gas emissions was an "imminent" harm to Massachusetts thanks to the wealth of negative effects, including sea level rise that resulted from climate change.[185] The Court went on to note that "[t]he harms associated with climate change are serious and well recognized" and held that the fact that these harms were widely distributed did not minimize their significance at an individual or state-wide level.[186]

The finding in *Massachusetts v. EPA* is consistent with other courts' conclusions on climate change imminence. As early as 1990, the D.C. Circuit found in favor of the standing claim of a group of cities, states, and environmental groups who had sued the National Highway Traffic Safety Administration (NHTSA) for failing to address global warming in its Environmental Impact Statements for new fuel economy standards: "[n]o one, including NHTSA, appears to dispute the serious and imminent threat to our environment posed by a continuation of global warming."[187]

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182. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014 SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS at 2, 8 (2014), https://www.ipcc.ch/pdf/assessment-report/ar5/syr/AR5_SYR_FINAL_SPM.pdf ("Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems . . . Continued emission of greenhouse gases will cause further warming and long-lasting changes in all components of the climate system, increasing the likelihood of severe, pervasive and irreversible impacts for people and ecosystems").

183. *See* UNION OF CONCERNED SCIENTISTS, GLOBAL WARMING SCIENCE AND IMPACTS: SEA LEVEL RISE AND GLOBAL WARMING 1 (2014), http://www.ucsusa.org/global_warming/science_and_impacts/impacts/infographic-sea-level-rise- global-warming.html.

184. *See*, *e.g.*, MINNESOTA ENVIRONMENTAL QUALITY, MINNESOTA AND CLIMATE CHANGE: OUR TOMORROW STARTS TODAY, 5 (2015), https://www.eqb.state.mn.us/content/climate-change (most climate necessity defendants include local effects in their offers of proof).

185. Massachusetts v. EPA, 549 U.S. 497, 521 (2007).

186. *Id.* at 521-22.

187. Los Angeles v. N.H.T.S.A, 912 F.2d 478, 493-94 (D.C. Cir., 1990) (Wald, J., opinion of the court on NRDC standing and dissenting on the failure to issue an EIS).

Similarly, in *Connecticut v. American Electric Power Co., Inc.,* the Second Circuit discussed the "imminent injury" requirement of Article III standing and noted that the Supreme Court rested the requirement not on "a strict temporal requirement that a future injury occur within a particular time period" but rather "on the *certainty* of that injury occurring in the future."[188] The court went on to find that the plaintiffs—eight states, a city, and three land trusts suing electricity generators for harms resulting from greenhouse gas emissions—had sufficiently pled imminence thanks to the ongoing nature of climate change harms.[189]

More recently, in *Juliana v. United States*, the court found that plaintiffs bringing public trust and constitutional claims against the federal government for failure to ameliorate climate change had sufficiently demonstrated imminence by claiming climate change harms are "ongoing and likely to continue in the future."[190] Shortly before the *Juliana* case, the Superior Court of King County, Washington labeled global warming an "imminent threat" when considering a suit challenging the state environmental agency's failure to issue adequate greenhouse gas emissions regulations.[191]

The imminence analysis of these standing claims provides a blueprint for imminence analysis in necessity cases. In *People v. Gray*, the New York City Criminal Court considered a necessity argument very similar to a typical climate protest case.[192] Activists had trespassed on a vehicular lane on a bridge to protest the city's failure to ensure adequate air quality controls. In acquitting the defendants during a bench trial, the judge rejected the prosecution's argument that the imminence element required defendants to provide evidence that deaths from pollution were likely. Pointing to the wealth of scientific proof that air pollution is injurious to human health and that the city's efforts were inadequate to meet established targets, the court ruled that

> [u]nlike many of the cases in this area, where the harm sought to be prevented was perceived as too far in the future to be found

188. American Elec. Power Co., Inc. v. Connecticut, 582 F.3d 309, 343 (2nd Cir. 2009), *rev'd on other grounds*, , 564 U.S. 410 (2011) (citing Lujan v. Defenders of Wildlife*,* 504 U.S. 555,564 n. 2 (1992)) (emphasis in original).

189. *Id.* at 344.

190. Juliana v. United States, 217 F.Supp.3d 1224, 1244 (D. Or. 2016).

191. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 26, State v. Klapstein, No. 15-CR-16-413 (9th Jud. Dist. Ct., Clearwater Cty. Minn. Feb 3, 2017) (citing Order Affirming the Department of Ecology's Denial of Petition for Rule Making, Foster v. Wash. Dep't. of Ecology, No. 14-2-25295-1, 1 (Wash. Super. Ct. Nov. 19, 2015)).

192. People v. Gray, 571 N.Y.S.2d 851 (Crim. Ct. 1991).

> "imminent", the grave harm in this case is occurring every day. The additional pollution breathed by all New Yorkers (in a city that is already out of compliance with the minimal standards set by the EPA), as a result of the fact that more road space will be devoted to vehicles and its corollary that those hundreds of individuals who would otherwise bicycle or walk are discouraged from using nonpolluting forms of transportation is a concrete harm being suffered by the population at this moment . . . Indeed, to require that the ultimate result of the harm acted against be already occurring would place the actor in a Catch-22 situation; the longer the actor waits in order to satisfy the immediacy requirement, the less likely his action reasonably can be expected to effectively avert the harm, thus failing to satisfy another element of the defense. [193]

Similarly, climate necessity defendants have pointed to the wealth of scientific data regarding the ongoing and future harms of climate change to demonstrate the imminence of the threatened injury. For example, Alec Johnson, who blocked construction on the Keystone XL Pipeline in Oklahoma, presented a pre-trial brief that included information from the Intergovernmental Panel on Climate Change, news reports, and government agencies regarding the effects of global warming.[194] The defendants in *State v. Brockway*, the only case in which climate necessity evidence has been presented to a jury, offered testimony by Dr. Richard Gammon, a retired professor of oceanography and chemistry at the University of Washington, regarding local climate change effects like ocean acidification and lowered snow pack.[195] Likewise, in their pre-trial necessity brief, the Minnesota Shut It Down defendants presented nine pages of conclusions from climate scientists regarding the imminence and severity of climate change.[196] The judge in that case accepted this proof, noting that the state necessity defense requires an "emergency situation where the peril is instant, overwhelming, and leaves no alternative but the conduct in question."[197] In many climate necessity cases, defendants have been prepared to call

193. *Id.* at 858, 859.

194. Trial Brief Regarding the Necessity Defense at 9-20, State v. Johnson, No. CM-2013-96 (Dist. Ct. of Atoka Cty., Okla. Oct. 23, 2014).

195. Transcript of Proceedings Vol. 3 at 45-46, State v. Brockway, No. 5053A-14D (Snohomish Cty. Dist. Ct., Wash. Jan. 13, 2016).

196. Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 11-19, State v. Klapstein, No. 15-CR-16-413 (9th Jud. Dist. Ct., Clearwater Cty., Minn. Feb 3, 2017).

197. Order and Memorandum at 5, State v. Klapstein, No. 15-CR-16-413 (Ninth Jud. Dist. Ct. Clearwater Cty. Minn. Oct, 11, 2017) (quoting State v. Johnson, 289 Minn. 196, 199 (1971)). The judge in *Washington v. Taylor* similarly accepted the defendant's assertion that climate change harms are imminent without further comment. Findings of Fact and Conclusions of Law at 10, Washington v. Taylor, No. 6Z0117975 (Dist. Ct. Spokane Cty Wash. Mar. 13, 2018).

Dr. James Hansen, the world's preeminent climate scientist, to testify to these facts.[198]

Climate necessity defendants have occasionally cited imminent harms beyond the typical ravages of global warming. For example, climate activists have begun to connect the climate necessity defense with the emerging "atmospheric trust" doctrine and the recently recognized constitutional right to a stable climate. In *State v. Johnson* and *State v. Klapstein*, for example, the pre-trial briefs cited as additional sources of imminent injury the state and federal governments' ongoing violations of their public trust and constitutional duties to protect the climate, as well as the proactive government support of continued fossil fuel extraction and combustion.[199] This "legal" (or "procedural") injury, in the form of the denial of rights secured by the state and federal constitutions, was offered in addition to the more typical imminent harms of climate change.

Given that climate change is ongoing and will continue into the future, climate necessity defendants are generally not faced with a situation that must be addressed within minutes or hours (although in some cases, such as DeChristopher's interference with the BLM auction or the anti-Shell protests that sought to block drilling ships bound for the Arctic, there is an immediate threat to the climate to be averted). While there is a definite "emergency" situation on a global level in the sense that swift action is needed to avert catastrophic consequences, local harms often appear less imminent because of their unpredictability, their slow development, or their problematic causation.[200]

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198. CLIMATE DEFENSE PROJECT, *supra* note 15 (Dr. Hansen testified in the Kingsnorth Six trial, was on the witness list for the "Lobster Boat Blockade," *State v. Carter,* and *State v. Klapstein* trials, and submitted an affidavit that was excluded in *State v. Johnson*).

199. Trial Brief Regarding the Necessity Defense at 21-24, State v. Johnson, No. CM-2013-96 (Dist. Ct. of Atoka Cty., Okla. Oct. 23, 2014); Defense Response to State's Memorandum in Opposition to Affirmative Defense of Necessity at 26, 28-31, State v. Klapstein, No. 15-CR-16-413 (9th Jud. Dist. Ct. Clearwater Cty., Minn. Feb 3, 2017).

200. The Kingsnorth Six court, explaining to the jury the requirements of the defense-of-property justification that is a close English equivalent to American necessity, helpfully distinguished the immediacy of harm and the immediacy of action to prevent it:

> [W]hen we talk about property that is in immediate need of protection that is not the same thing as saying that action has to be immediate in its taking and it is not the same thing as saying that the action that you do take has to be immediate in its effect . . . [T]he fact that the action you do take may be delayed and the efficacy of that action is delayed does not alter the fact, if it be the fact, that the property was in immediate need of protection.

Transcript of the Summing-Up at 18-19, R v. Hewke (2008), No. T20080116 (Maidstone Crown Ct.).

In general, courts considering climate necessity defenses have found that the threat of climate change is not imminent. In *U.S. v. DeChristopher*, for example, the District of Utah found that the "suggested consequences of the BLM lease sale," including increased greenhouse gas emissions leading to global warming, "were not certain to occur or immediately dangerous."[201]

Similarly, in *State v. Brockway*, the trial judge ruled prior to trial that evidence could be presented on the local impacts of climate change and crude oil safety violations, but that climate change overall could not be considered: "[T]he harms sought to be minimized or avoided as they relate to global climate change were not easily enough identifiable and measurable to allow a jury to adequately weight the harms . . . And so it became a matter of not being a legally cognizable harm."[202] Most strikingly, the trial judge in *State v. Ward* ruled that climate change was not an imminent harm because "there's tremendous controversy over the fact whether it even exists."[203]

Courts have also found that, while climate change may be an imminent harm, the specific target chosen by the protesters is not certain to cause injury, negating imminence. For example, the District of Utah found that in DeChristopher's case the "issuance of the oil and gas lease offered at the BLM sale was not certain to occur."[204] In the Coast Guard administrative hearing for one of the anti-Shell protesters, the hearing officer found that there was no imminent harm because "Shell did not have a permit to drill when [the protestor] entered the safety zone, there was no guarantee that Shell would get the permit, and there was no guarantee that shell [sic] would even find any oil or oil in sufficient quantity."[205] In *People v. Bucci*, the judge deferred to findings of the Federal Energy Regulatory Commission that the targeted pipeline posed no public health risk.[206]

These arguments are flawed for three reasons. First, it is scientifically incorrect to assert that climate change's harms are uncertain or remote. As the cases discussing the imminence requirement for standing demonstrate—and even if imminence is defined as *temporal or geographical immediacy* rather than *certainty of occurrence*—the

201. United States v. DeChristopher, 2009 WL 3837208, at 4 (D. Utah 2009).

202. Transcript of Proceedings Vol. 4 at 57-58, State v. Brockway No. 5053A-14D, (Snohomish Cty. Dist. Ct., Wash. Jan. 14, 2016).

203. Levin, *supra* note 55.

204. *DeChristopher*, 2009 WL 3837208 at *4.

205. Chiara D'Angelo Activity No. 5169347 at 5 (U.S. Dep't of Homeland Security U.S. Coast Guard Hearing Office May 17, 2016) (Coast Guard Final Assessment Letters).

206. People v. Bucci, No. 15110183-92, at 8 (Westchester Cty. Justice Ct. N.Y. Dec. 1, 2016).

effects of climate change are already occurring, are certain to grow worse, and are easily identifiable, if not fully knowable. Unless the term "imminence" is to be divested of meaning, climate change is imminent. Climate activists would be well-advised to seek judicial notice of the existence of climate change and the nature of its harmful effects, as several courts have already done.[207]

Second, courts have incorrectly focused the imminence analysis on discrete points in the causal chain, such as the imminence of harm from an individual pipeline rather than climate change overall. This focus inappropriately substitutes the second element, the reasonable anticipation of a causal nexus, for the first element, the imminence of the targeted harm. The fact that climate change causation is complicated, as is the case with other environmental hazards, is irrelevant to the question of whether climate change is imminent. Even where climate necessity defendants target more minor, potentially non-imminent harms such as Arctic oil spills, the fact that they *also* target imminent climate change suffices to satisfy the first element.

Third, courts contradict the purpose of the necessity defense—promoting socially beneficial behavior—by adding to the imminence element requirements that the targeted harms be exclusively local or immediately tangible. Combating climate change benefits society at the macro and micro levels even if some of the harms involved exist beyond a circumscribed area or time. Were the necessity defense available only for temporally and geographically restricted dangers, the doctrine would embody the perverse principle of approving behavior that averts lesser, local harms and condemning behavior that averts greater, global harms.

Climate change imminence would be better understood if courts recognized two distinct concepts of imminence, either of which would satisfy the imminence requirement of the necessity defense. The first is a traditional temporal imminence where climate change currently causes serious human harm and death that is demonstrable and at least provides a legitimate question of fact for a jury. The second is imminence in the sense of a pending and certain catastrophic harm that will be caused by climate change.

D. *Reasonable Legal Alternatives*

Necessity defendants usually must show that they had no reasonable

207. *See* BRENDA HEELAN POWELL, JOSEPHINE YAM, JUDICIAL NOTICE OF CLIMATE CHANGE, SYMPOSIUM ON ENVIRONMENT IN THE COURTROOM: EVIDENTIARY ISSUES IN ENVIRONMENTAL PROSECUTIONS AND HEARINGS (Canadian Institute of Resources Law) (Mar. 6-7, 2015), http://www.cirl.ca/files/cirl/brenda_heelan_powell_and_josephine_yam-en.pdf.

legal alternative to breaking the law.[208] The existence of legal options to address the harm obviously renders lawbreaking unnecessary, and debate on this element typically concerns whether such options in fact existed at the time of the protest, and to what extent they were capable of adequately addressing the targeted harm.

Some courts have adopted a strict stance that, because we live in an ostensibly functioning democracy, legal alternatives to civil disobedience are *always* available. In *Schoon*, for example, the Ninth Circuit wrote that "the 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."[209] (*Schoon*'s distinction between direct and indirect civil disobedience is discussed below in Part IV.E.)

This sort of formalist analysis concludes, without further investigation, that activists could always have resorted to legal means to address the problem. Many courts in climate necessity cases have reasoned along these lines; for example, in *North Dakota v. Foster*, the court found that "[r]easonable alternatives outlined in other jurisdictions include participation in the electoral process, public speeches, publication or release of information to the media, peaceful protests and petitioning Congress or the President . . . Defendants' offer of proof does not allow a reasonable person to conclude that none of these reasonable legal alternatives were available to Defendants on October 11, 2016."[210]

The primary question for this element, then, is what it means for a legal alternative to "reasonable" or "available."[211] In contrast to the dogmatic view that legal alternatives always exist (and are presumably reasonable), many courts have suggested that a viable alternative must have a significant chance of actually addressing the targeted harm. ("Reasonable must mean more than available; it must imply effective."[212]) In a recent case concerning a homeless person's argument

208. United States v. Maxwell, 254 F.3d 21, 27 (1st Cir. 2001).

209. United States v. Schoon 971 F.2d, 193, 198 (9th Cir. 2008).

210. Memoranda Decision and Order Granting Motion in Limine at 3, *North Dakota v. Foster*, 34-2016-CR-00187 (Northeast Jud. Dist. Ct. Pembina Cty., N.D. Sep. 29, 2016).

211. Not all version of common law necessity require that a legal alternative be "reasonable." Some require the absence of an "adequate legal alternative," *see*, *e.g.*, In re Eichorn, 69 Cal. App. 4th 382, 389 (1998); a "less offensive alternative," *see*, *e.g.,* State v. Hastings*,* 118 Idaho 854, 855 (1990), or simply a "legal alternative" with no qualification, *see e.g.*, State v. Roeder*,* 300 Kan. 901, 917 (2014).

212. Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 Stan. L. Rev. 1173, 1180 (1987).

that it was necessary to trespass in order to escape brutal winter temperatures, the Massachusetts Supreme Judicial court held that the defense "does not require a showing that the defendant has exhausted or shown to be futile all conceivable alternatives, only that a jury could reasonably find that no alternatives were available . . . so long as the defendant's evidence, taken as true, creates a reasonable doubt as to the availability of such lawful alternatives, the defendant satisfies [this element] . . . Our cases do not require a defendant to rebut every alternative that is conceivable; rather, a defendant is required to rebut alternatives that likely would have been considered by a reasonable person in a similar situation."[213]

The defendant's state of mind regarding the availability of alternatives may also be relevant. In *People v. Kucavik*, the Appellate Court of Illinois, in reversing the denial of a necessity instruction for a drunk driver, held that "[t]o require the defendant's conduct to be the 'sole' alternative to illegal conduct would render the language in the statute referring to the accused's reasonable belief meaningless."[214] The court noted that

> [i]f the trial court is permitted to determine that another "reasonable alternative" existed and therefore refuse to instruct the jury on the defense, then the accused's reasonable belief becomes irrelevant. Stated differently, [the state's necessity statute] creates both an objective and subjective test for the reasonableness of the accused's conduct under the circumstances . . . . The existence of other alternatives may lead a jury to find that, given her subjective belief and the circumstances she faced, defendant nonetheless did not act objectively reasonably. The trial court was required to leave these determinations to the jury. . . . [D]enying a defendant the opportunity to have the jury decide the reasonableness of her conduct should the trial court find that another reasonable alternative existed would take the objective factor and transforms [*sic*] it into the determinative test for the availability of the defense.[215]

When courts rule that legal alternatives are always available, they essentially decide that the necessity defense is never available in cases of political protest. Such a commitment to the existence of legal alternatives is clearly linked to the second of the overarching philosophical reasons for denying the necessity defense: a discomfort with politics (and the potential failures of institutional remedies) in the

213. Commonwealth v. Magadini, 474 Mass. 593, 599-601 (2016).

214. People v. Kucavik, 854 N.E.2d 255, 259 (Ill. App. 2006).

215. *Id.* at 259-60.

courtroom. As a factual matter, it fails to take a realistic view of how social change is accomplished.

Again, *People v. Gray*, the air pollution protest case from New York, is useful. Finding that the legal alternative requirement does not preclude the justification of civil disobedience altogether, the *Gray* court advised courts not to rule out the presentation of the defense simply because there is always a logical possibility of further legal action:

> It has been asserted that because a democracy creates legal avenues of protest, alternatives must always exist. In the opinion of this court, however, to dispense with the necessity defense by assuming that people always have access to effective legal means of protest circumvents the purpose of the defense. When courts rule as a matter of law that defendants always have a reasonable belief in other adequate alternatives, they are asserting that regardless of how diligent a party is in pursuing alternatives, no matter how much time has been spent in legitimate efforts to prevent the harm, no matter how ineffective previous measures have been to handle the emergency, the courts in hindsight can always find just one more alternative that a citizen could have tried before acting out of necessity.[216]

An analogy may be made to the necessity of illegal action in the case of a burning house. Suppose that your neighbor's house is on fire and that if you do not act within a few minutes the entire block will be consumed. Your legal option is to call the authorities and to wait for them to arrive, at which point it will be too late. Your illegal option is to break into your neighbor's home and extinguish the fire yourself. You choose the latter option. Even as you act to combat the fire (breaking laws against trespass and breaking and entering), the legal alternative continues to exist; however, it is never reasonable. Or, complicate the scenario by assuming that there *may* be time for the authorities to arrive before the block burns, but you are not sure. Do you have a reasonable legal alternative to breaking into your neighbor's home? Should a court assume that, because you have a telephone and a functioning municipal fire department, a legal alternative existed?

Applying this reasoning to the climate necessity defense, it is clear that climate activists can often make a compelling case for the absence of legal alternatives. Many defendants have offered proof of their own exhaustive attempts to address climate change through existing legal means, such as petitioning, testifying at legislative hearings, organizing, rallying, and personal reduction of fossil fuel use (these attempts often

216. People v. Gray, 571 N.Y.S.2d 851, 860-61 (Crim. Ct. 1991).

target the specific fossil fuel infrastructure later targeted in civil disobedience).[217] On an individual level, this evidence tends to show that legal alternatives are not available.

At a systemic level, defendants have offered expert evidence that decades of attempts to use executive, legislative, and judicial action to address global warming have failed to secure any adequate protections for the climate.[218] It is not difficult to prove that state and federal governments have failed to enact policies that even come close to imposing the sorts of emissions reductions that climate scientists say are necessary to avoid catastrophic warming. For example, the most ambitious federal regulatory effort to date, the Clean Power Plan, fell well short of internationally recognized targets for reduced emissions,[219] and the permitting and subsidization of fossil fuel extraction continues despite the need to end all fossil fuel development as quickly as possible.[220]

The notion that adequate legal alternatives exist to address climate change has become even more questionable under the Trump administration. With the effects of climate change more obvious than ever, the administration has turned to an active reversal of the climate change policy established under the Obama administration by encouraging fossil fuel burning and other actions certain to exacerbate climate change.

The major changes in environmental laws, regulations, and policies under the Trump administration include: halting a Department of Interior-funded mining health study;[221] issuing an executive order

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217. *See*, *e.g.*, Defendant's Memorandum on Necessity at 7-8*,* Montana v. Higgins, No. DC-16-18 (Twelfth Jud. Dist. Ct. Choteau Cty., Mont. Apr. 11, 2017) (listing years of legal activism to address climate change).

218. *See, e.g.,* Defense Response to State's Motion in Limine to Exclude the Necessity Defense at 26-28*,* North Dakota v. Foster, No. 34-2016-CR-00187 (Northeast Jud. Dist. Ct. Pembina Cty., N.D. Sep. 29, 2016).

219. Earth Institute, *What is the U.S. Commitment in Paris?*, STATE OF THE PLANET, EARTH INST., COLUMBIA UNIV. (Dec. 11, 2015), https://blogs.ei.columbia.edu/2015/12/11/what-is-the-u-s-commitment-in-paris/ (citing the United States' pledge to cut emissions by 24-28 percent by 2025, as compared to 40 percent in the European Union, 60-65 percent in China, and 33-35 percent in India, by 2030).

220. Declaration of Dr. James E. Hansen at 2, Juliana v. United States, 217 F.Supp.3d 1224, 1244 (D. Or. Nov. 10, 2016).

221. Lisa Friedman and Brad Plumer, *Coal Mining Health Study Is Halted by Interior Department*, N.Y. Times (Aug. 21, 2017), https://www.nytimes.com/2017/08/21/climate/coal-mining-health-study-is-halted-by-interior-department.html; *Statement Regarding National Academies Study on Potential Health Risks of Living in Proximity to Surface Coal Mining Sites in Central Appalachia*, NAT'L ACADS. OF SCI., ENG'G, & MED. (Aug. 21, 2017), http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=8212017&_ga=2.85687257.1979571121.1503258766-1869263420.1485459941.

hastening the environmental review process, and simultaneously revoking an Obama administration executive order that required federal projects to adhere to federal flood-risk standards (which incorporated rising sea levels anticipated by climate change);[222] severely reducing enforcement of environmental laws by the Environmental Protection Agency;[223] ending contributions to the Green Climate Fund and pulling out of the Paris Climate Accord;[224] cutting EPA funding for international climate change programs and research;[225] dismissing several scientific review board members in the EPA;[226] issuing an executive order to review Obama administration bans on gas and offshore oil drilling;[227] announcing a "back-to-basics" agenda at the EPA that emphasizes states' rights and the creation of coal-mining jobs;[228] issuing an executive order that counteracts the designation of national monuments under the Obama administration;[229] approving a permit for the Keystone XL Pipeline[230] (which had been rejected in 2015);[231] withdrawing a 2016 information request for the oil and gas industry to provide "more detailed information on sources of methane emissions and emission control devices or practices in use";[232] revoking a freeze on new coal

222. Exec. Order No. 13807, 82 Fed. Reg. 40,463, Sec. 6 (Aug. 15, 2017).

223. ERIC SCHAEFFER, ENVIRONMENTAL INTEGRITY PROJECT, ENVIRONMENTAL ENFORCEMENT UNDER TRUMP 1-2 (Aug. 10, 2017), https://www.environmentalintegrity.org/wp-content/uploads/2017/08/Enforcement-Report.pdf.

224. *Statement by President Trump on the Paris Climate Accord*, OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE (Jun. 1, 2017), https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/.

225. OFF. OF MGMT. AND BUDGET, AMERICA FIRST: A BUDGET BLUEPRINT TO MAKE AMERICA GREAT AGAIN 41 (Nov. 2017), https://www.whitehouse.gov/wp-content/uploads/2017/11/2018_blueprint.pdf.

226. Coral Davenport, *E.P.A. Dismisses Members of Major Scientific Review Board*, N.Y. TIMES (May 7, 2017), https://www.nytimes.com/2017/05/07/us/politics/epa-dismisses-members-of-major-scientific-review-board.html.

227. Exec. Order No. 13783, 82 Fed. Reg. 16093 (Mar. 28, 2017).

228. *EPA Launches Back-To-Basics Agenda at Pennsylvania Coal Mine,* U.S. E.P.A. (Apr. 13, 2017), https://www.epa.gov/newsreleases/epa-launches-back-basics-agenda-pennsylvania-coal-mine.

229. Exec. Order No. 13792, 82 Fed. Reg. 20429 (Apr. 26, 2017).

230. Brady Dennis and Steven Mufson, *As Trump Administration Grants Approval for Keystone XL Pipeline, an Old Fight Is Reignited,* WASH. POST (Mar. 24, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/24/trump-administration-grants-approval-for-keystone-xl-pipeline/?utm_term=.ac6ce1376f7c.

231. Jeff Brady, *U.S. State Department Issues Permit For Keystone XL Pipeline*, NPR (Mar. 23, 2017), https://www.npr.org/sections/thetwo-way/2017/03/23/521305788/state-department-set-to-certify-keystone-xl-pipeline-is-in-national-interest.

232. *EPA Withdraws Information Request for the Oil and Gas Industry,* U.S. ENVIRONMENTAL PROTECTION AGENCY (Mar. 2, 2017), https://www.epa.gov/newsreleases/epa-withdraws-information-request-oil-and-gas-industry.

leases on federal land;[233] approving construction of the Dakota Access Pipeline;[234] issuing an executive order that repealed a ban on offshore gas and oil drilling in the Atlantic and Arctic Oceans;[235] overhauling the EPA website to remove a significant amount of climate resources and references to climate change;[236] taking steps to eliminate the Clean Power Plan, an Obama-era plan that aimed to curb greenhouse gas emissions,[237] and, most recently, proposing a rollback of auto emissions standards.[238]

The Trump administration's regressive climate policies are not, of themselves, a reason for claiming the lack of a reasonable legal alternative. Rather, it is because his approach to changing regulations circumvents the political processes that provide legal avenues for the public to address climate change. The above-mentioned examples all effectively ignore or bypass public input to reach Trump's perverse policy outcomes. Several of his attempts to increase fossil fuel burning are being challenged in court, but Trump has embarked on a plan to pack the federal courts with conservative judges that have anti-environmental leanings.[239]

Another reason to extend the alternatives analysis beyond the simple identification of possible institutional remedies is the fact that regular individuals often have very little policy influence outside of civil disobedience. As research by Martin Gilens and Benjamin Page has shown, economic elites control policymaking at all levels, allowing the

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233. Devin Henry, *Trump Administration Ends Obama's Coal-Leasing Freeze*, THE HILL (Mar. 29, 2017), https://thehill.com/policy/energy-environment/326375-interior-department-ends-obamas-coal-leasing-freeze.

234. Letter from Paul D. Cramer, Deputy Assistant Sec'y of the Army, to Representative Raul Grijalva, Ranking Member of the U.S. House Comm. on Nat. Res. (Feb. 7, 2017), https://www.eenews.net/assets/2017/02/07/document_pm_05.pdf.

235. Exec. Order No. 13795, 82 Fed. Reg. 20815 (Apr. 28, 2017).

236. Toly Rinberg, Andrew Bergman, and Eric Nost, *EPA's Website Overhaul Continues*, ENVIRONMENTAL DATA & GOVERNANCE INITIATIVE (Oct. 20, 2017), https://envirodatagov.org/epas-website-overhaul-continues/.

237. *EPA Takes Another Step To Advance President Trump's America First Strategy, Proposes Repeal Of "Clean Power Plan,"* U.S. ENVIRONMENTAL PROTECTION AGENCY (Oct. 10, 2017), https://www.epa.gov/newsreleases/epa-takes-another-step-advance-president-trumps-america-first-strategy-proposes-repeal.

238. *The Safer Affordable Fuel Efficient (SAFE) Vehicles Proposed Rule for Model Years 2021-2026*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/regulations-emissions-vehicles-and-engines/safer-affordable-fuel-efficient-safe-vehicles-proposed (last visited Nov. 9, 2018).

239. Geoff Mulvihill, *Top Court Nominee Has Long Knocked Back Environmental Rules,* ASSOCIATED PRESS (Aug. 5, 2018) https://apnews.com/bd10346337914e269e386027e5eb4abe; Elizabeth Shogren, *Trump's Judges: A Second Front in the Environmental Rollback*, YALEENVIRONMENT360 (Aug. 28, 2017), https://e360.yale.edu/features/trumps-judges-the-second-front-in-an-environmental-onslaught.

profit motive to trump the public interest.[240] In such a situation, political activism without civil disobedience is less a viable alternative for action than a guarantee of delay and frustration—as suggested by the climate policies of the Trump administration, after years of legal activism to convince federal policymakers to act otherwise.

The case for the absence of reasonable legal alternatives in the context of climate policy rests on a final, crucial point: legal alternatives have *already* failed to address the problem. Climate change is not some future, far-off threat; it is already occurring and wreaking damage on a massive scale. In the burning house analogy, we are already watching the rest of the block catch fire. We should not ask whether it still makes sense to call the fire department—we should act immediately, whether legal or not, while still calling the authorities and marshaling all the help we can muster. In no sense would it be rational to argue that extra-legal action is not necessary: the exigency of the situation is staring us in the face. Legal alternatives may assist us in mitigating the harm, but they have proven inadequate in addressing it by themselves.

In addition to the irrationality of continuing legal efforts that have heretofore failed, it is axiomatic that with certain types of harm, the viability of a reasonable alternative is inversely related to the imminence of harm.[241] While no court has developed this rather obvious inverse relationship, in *People v. Pena*, where a trial court's refusal to allow consideration of the necessity defense was reversed, the court noted that "the more imminent the peril, the less likely the existence of an alternative course of action."[242] The Model Penal Code drafters took a similar view.[243]

Furthermore, in *United States v. Kabat*, the court addressed imminence via certainty as it relates to the fourth element of necessity—lack of reasonable alternatives.[244] The court implicitly recognized this inverse relationship when it stated that "[a] vital element of any necessity defense is the lack of a reasonable alternative to violating the law; that is, the harm to be avoided must be so imminent that, absent the defendant's criminal acts, the harm is certain to occur."[245]

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240. *See* Martin Gilens and Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSPECTIVES ON POL. 564, 565, 571 (2014), https://scholar.princeton.edu/sites/default/files/mgilens/files/gilens_and_page_2014_-testing_theories_of_american_politics.doc.pdf.

241. Laura J. Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 95-96 (1989).

242. People v. Pena, 149 Cal. App. 3d Supp. 14, 26 (App. Dep't Super. Ct. 1983).

243. Schulkind, *supra* note 241, at 95.

244. United States v. Kabat, 797 F.2d 580 (8th Cir. 1986).

245. *Id.*

While the harm in *Kabat* was not found to be imminent in that it involved the potential of harm if intercontinental ballistic missiles were launched, the imminent harm from climate change is currently occurring, and the catastrophic harm from climate change is imminent in the sense intended by the *Kabat* court: "the harm is certain to occur."[246] In such a situation, courts should recognize that the requirement of a reasonable legal alternative will almost never be found when harm is as imminent as it is with climate change. Any argument to the contrary must address the fact that, under the Trump administration, legal avenues for addressing or mitigating climate change are being foreclosed.

E. *Direct vs. Indirect Civil Disobedience*

Another major hurdle created by some judges in climate necessity cases is the imposition of a non-element: the requirement that civil disobedience be "direct" rather than "indirect." This distinction, analytically unclear on its own terms, upsets application of the traditional elements and disturbs the balancing of legal and social interests inherent in the necessity defense.

In *United States v. Schoon*, defendants had protested the United States' involvement in El Salvador by chanting, splashing fake blood on surfaces, and interfering with the operations of an Internal Revenue Service (IRS) office in Tucson, Arizona.[247] The defendants were convicted of obstruction and of failure to comply with police officer orders, and appealed to the Ninth Circuit. Rather than uphold the district court's denial of the defense on the specific facts of the case, the *Schoon* court held, as a matter of law, that the necessity defense never applied in such circumstances. The court contrasted *indirect* civil disobedience, where protesters violate a law that is not the target of their protest (for example, blocking a sidewalk to protest abortion), with *direct* civil disobedience, where the law violated is also the targeted policy (violating a racial segregation ordinance for city buses).[248] In cases of *indirect* civil disobedience, the court opined, three of the defense's elements cannot be satisfied: a government policy is not a legally cognizable harm, and so defendants fail to choose a lesser evil; abating the harm requires too many intervening steps, failing the causation test; and there is always a legal alternative in the form of congressional

246. *Id.*

247. United States v. Schoon, 971 F.2d 193 (9th Cir. 1992).

248. *Id.* at 196.

action.[249] On the other hand, the court found, necessity may be available for protesters engaging in *direct* civil disobedience because such conduct targets concrete harms resulting from the targeted law or policy.[250] In the case at hand, the court ruled that the defendants could not assert a viable necessity defense because their actions, which were intended to stop further bloodshed in El Salvador, did not challenge the laws under which they were charged: disturbing the operations of the IRS and failing to comply with an order of a federal police officer.[251]

Schoon's distinction has been picked up by many courts,[252] and is often cited by prosecutors or judges in climate necessity cases.[253] At the same time, it has been criticized by scholars on multiple grounds. As a preliminary matter, the court seems to have misapplied the necessity elements to the case before it.[254] Addressing the choice of evil prong, the court found that the defendants had targeted the United States' El Salvadoran policy and that this harm was "insufficiently concrete" to be legally cognizable.[255] The court's characterization was squarely contradicted by the defendants' argument that their protest was intended to stop or abate the torture and death of El Salvadoran citizens.[256] Rather than simply excluding evidence of these harms because they were associated with government policy, the court should have given the jury the opportunity to balance them against the harm posed by the defendants' conduct in the IRS office.[257] Similarly, the court ruled, without clear justification, that the defendants' causation argument was too attenuated, as any connection between the protest and cessation of the targeted harm would require intervening action by policymakers, the possibility of which was unclear.[258] However, shortly after the protest, Congress did in fact decide to slash military funding to the El Salvador government, which suggests that the protest contributed to policy change.[259] At the very least, then, the defendants had a colorable argument that they reasonably anticipated that their act of civil

249. *Id.* at 197-99.

250. *Id.*

251. *Id.* at 196.

252. *See*, *e.g.*, State v. Rein, 477 N.W.2d 716, 718 (Minn. Ct. App. 1991); State v. Cram, 157 Vt. 466, 471 (1991); United States v. Scranton, 25 F. Supp. 2d 1131, 1134 (D. Idaho 1997), *aff'd*, 165 F.3d 920 (9th Cir. 1998).

253. *See*, *e.g.*, Order Following Pretrial/Settlement Conference at 11, Minnesota v. Klapstein, No. 15-CR-16-413, (Ninth Jud. Dist. Ct. Clearwater Cty., Minn., Oct. 3, 2018).

254. *See* Cavallaro, *supra* note 153.

255. United States v. Schoon, 971 F.2d 193, 198 (9th Cir. 1992).

256. *See* Cavallaro, *supra* note 153, at 368.

257. *Id.* at 371.

258. Schoon, 971 F.2d at 198.

259. Cavallaro, *supra* note 153, at 373.

disobedience would be effective.

Analytically, *Schoon*'s distinction between indirect and direct civil disobedience based on the elements of the necessity defense is unconvincing. Contrary to the court's statements, political protesters rarely challenge the "mere existence" of a policy or law.[260] In fact, political necessity defendants usually proffer evidence of specific harms—such as injuries caused by climate change—that are the result of government policy. Thus the court's notion that "indirect" civil disobedience only involves "generalized" harms is incorrect.[261] On the causation and legal alternatives elements, the distinction between direct and indirect civil disobedience simply does not make sense: in both cases, some chain of events must follow in order to abate the harm (no protest results in immediate abatement) and there will always be some formal possibility, however unrealistic, that legislative action will solve the problem.[262] For example, in civil rights cases, touted by the *Schoon* court as paradigmatic examples of direct civil disobedience, protest behavior such as sitting in the front of a bus would not, by itself, 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.[263] Likewise, even when protesters *directly* target a harmful law, "congressional action can *always* mitigate this 'harm,' [and] lawful political activity to spur such action will always be a legal alternative."[264] Thus, the court's insistence on the exclusion of the defense because there are always legal alternatives would apply to all civil disobedience cases—not just indirect civil disobedience.[265]

Most problematically, the peculiar decision to single out indirectly related government policy as the *only* harm for which the necessity defense is unavailable contradicts the history of the common law doctrine, which is based on conjunctive elements for assessing whether

260. Schoon, 971 F.2d at 198.

261. *Id.* at 197.

262. *See* Cavallaro, *supra* note 153, at 367. The British Columbia Court of Appeal reached a similarly erroneous conclusion in a leading Canadian necessity case. *See* MacMillan Bloedel Ltd v. Simpson (1994), 111 D.L.R. 4th 368, para. 46 (Can. B.C. C.A.) (holding defendants in contempt for violating injunctions preventing them from further protests against logging operations and stating, contrary to previous Canadian law, that the necessity defense cannot be used when it seeks to "avoid a peril that is lawfully authorized by the law").

263. *See* Quigley, *supra* note 74, at 45–46.

264. *Schoon*, 971 F.2d at 198 (emphasis in original).

265. The *Schoon* court's description of civil rights cases is also misleading; over three thousand civil rights sit-ins actually involved prosecutions for trespass and similar violations—which, according to *Schoon*'s criteria, should be classified as indirect civil disobedience. *See* John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 116 (2007).

or not necessity justifies illegal conduct to avoid a greater harm, providing flexibility for each case.[266] While those who engage in indirect disobedience may face a greater challenge in proving the elements of the necessity defense, the unlikelihood of success is not a permissible reason to bar the presentation of the defense to a jury.[267]

Even though the underlying policy of the necessity defense is "to promote the achievement of higher values at the expense of lesser values,"[268] judges continue to deny the presentation of political necessity defenses to juries, contravening the defense's purpose with questionable legal justification. Realizing this contradiction between settled policy and judicial practice, the First Circuit declined to adopt *Schoon's* indirect-direct civil disobedience distinction in *United States v. Maxwell*.[269] Expressing similar reservations, the New York City Criminal Court wrote in *People v. Gray* that

> [i]n 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.[270]

Even under *Schoon*'s view of civil disobedience, however, most climate necessity defendants' actions qualify as "direct" civil disobedience. Whereas "indirect" civil disobedience aims merely to "prevent . . . the continued existence of a law or policy,"[271] most climate necessity defendants act to directly prevent the harms caused by climate change. For example, a temporary shut-down of tar sands oil flowing through the Enbridge lines, or blocking a road in order to prevent a "megaload" of drilling equipment from reaching the Alberta tar sands, directly averts some degree of harm. Given the phenomenon of the climate "tipping point," in which any given quantum of combusted fossil fuels could push the atmospheric system into irreversible instability, and considering that every bit of increased greenhouse gas emissions degrades the climate, such actions constitute direct civil disobedience.

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266. Quigley, *supra* note 74, at 6 ("[T]he 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").

267. *Id.* at 46.

268. LAFAVE, *supra* note 78, at § 10.1.

269. 254 F.3d 21, 26 n.2 (1st Cir. 2001).

270. 150 Misc. 2d 852, 855-56 (N.Y. Crim. Ct. 1991) (citations omitted).

271. United States v. Schoon, 971 F.2d 193, 198 (9th Cir. 1991).

Similarly, violating laws that protect the property and operations of fossil fuel corporations, as many civil obedients do, is not an "indirect" method that targets policies unrelated to the imminent harm; these laws enable activities that harm the world's climate and cause injury to the public. Climate change is enabled not only by the extraction and burning of fossil fuels, but also by laws that protect that harmful conduct. By openly violating some of those laws, climate disobedients directly challenge harmful laws.

F. *The Right to a Jury*

The jury's role, according to the Sixth Amendment, is unique. The jury aids in "expressing the conscience of the community"[272] and gives citizens the opportunity "to challenge the government's abuse of authority."[273] As stated by one scholar, "[p]re-trial preclusion of the right to admit evidence of the necessity defense strips the [defendant's] constitutional right to a jury. Such judicial action is contrary to the purpose of a trial by jury."[274] Protection for the defendant against judges and the government, the opportunity to challenge government misconduct, and the representation of laypeople in the application of the laws are fundamental underpinnings of the Sixth Amendment right to a jury.[275] In addition to stripping the Sixth Amendment of its democratic underpinnings, courts violate two basic rights guaranteed by the Sixth Amendment by failing to submit relevant evidence supporting a necessity defense to a jury: first, the requirement to have facts heard and determined by a jury, and second, the right to present a complete defense.

1. *The right to have facts heard by a jury*

Perhaps the most significant error of the courts in analyzing climate necessity defense cases is the failure to recognize that a defendant has a Sixth Amendment right to have a jury determine the facts of a necessity defense once the defendant has proffered evidence which creates a question of fact.

Generally, to be entitled to present the necessity defense to the jury, a defendant must meet an "entry-level burden of producing competent

272. Sam Kamin & Justin Marceau, *The Facts About* Ring v. Arizona *and the Jury's Role in Capital Sentencing*, 13 U. PA. J. CONST. L. 529, 532 (2011).

273. Quigley, *supra* note 74**Error! Bookmark not defined.**, at 65.

274. *Id.* at 66.

275. *Id*. at 69.

evidence."[276] The initial burden of proof for an affirmative defense is on the defendant.[277] In *State v. Hage*, the Minnesota Supreme Court held that

> [O]nce the state has met its burden of proving beyond a reasonable doubt every element of the crime charged, the state may, consistent with due process, impose upon a criminal defendant the burden of proving by a preponderance of the evidence that her conduct should be excused by some mitigating circumstance or issue.[278]

However, this burden is not high:

> "Some evidence" is evidence that, viewed in the light most favorable to the defendant, would allow a reasonable juror to find in the defendant's favor on each element of the defense. The "some evidence" burden is not a heavy one—as long as the defendant produces some evidence to support each element of the defense, any weakness or implausibility in that evidence is irrelevant and a matter for the jury, not for the court.[279]

The defendant's right to present evidence to the jury is a basic requirement of due process and is protected by the Sixth Amendment.[280]

At the pretrial motion stage, the court should consider only whether "some evidence" of the defense's elements has been presented. If it has,

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276. United States v. Maxwell, 254 F.3d 21, 29 (1st Cir. 2001).

277. *See*, *e.g.*, *id.* at 26; United States v. Gant, 691 F.2d 1159, 1165 (5th Cir. 1982); Stodghill v. State, 892 So. 2d 236, 239 (Miss. 2005).

278. 595 N.W.2d 200, 204-05 (Minn. 1999).

279. Greenwood v. State, 237 P.3d 1018, 1022-23 (Alaska 2010) (internal quotations omitted); *see also* Bozeman v. State, 714 So. 2d 570, 572 (Fla. Dist. Ct. App. 1998) ("[A] defendant is entitled to have his jury instructed on the law applicable to his theory of defense if there is any evidence presented supporting such a theory, even if the only evidence supporting the defense theory comes from the defendant's own testimony."); Commonwealth v. Magadini, 52 N.E.3d 1041, 1049 (Mass. 2016) ("In determining whether there has been sufficient evidence of the foundational conditions to the necessity defense, all reasonable inferences should be resolved in favor of the defendant, and, no matter how incredible his testimony, that testimony must be treated as true." (citation omitted)); Hoagland v. State, 240 P.3d 1043, 1047 (Nev. 2010) ("It is well established that a defendant is entitled to a jury instruction on his theory of the case, so long as there is evidence to support it, regardless of whether the evidence is weak, inconsistent, believable, or incredible." (citations omitted)); Wilson v. State, 777 S.W.2d 823, 825 (Tex. App. 1989) ("If the defendant produces evidence, from whatever source and of whatever strength, raising every element of the defense, then he is entitled to an instruction on the defense, and the State must disprove the defense beyond a reasonable doubt."); 75 AM. JUR. 2D *Trial* § 829 (1991) ("A motion for a directed verdict should be granted only where there is a total lack of evidence on an element, some element, or every element essential to a prima facie case.").

280. *See*, *e.g.*, Chambers v. Mississippi, 410 U.S. 284 (1973); *In re* Oliver, 333 U.S. 257 (1948).

it is inappropriate to bar the defendant from presenting the defense.[281] The defendant's right to have the jury make the final determination of the sufficiency of her evidence is especially crucial in affirmative defenses, where the defendant has already admitted to the charged conduct.[282]

2. *The right to present a complete defense*

The Sixth Amendment of the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."[283] In *Holmes v. South Carolina*, the Supreme Court held that the lower court's exclusion of a defendant's evidence of third-party guilt denied him of a fair trial.[284] In its opinion, the Court overturned the South Carolina Supreme Court's *Gregory* rule,[285] which allowed the exclusion of evidence of third-party guilt if the prosecution had strong forensic evidence of a defendant's guilt. The *Holmes* Court stated that, "by evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side . . . ."[286]

The Court further noted that the old *Gregory* rule was inconsistent with the right of criminal defendants to have "a meaningful opportunity to present a complete defense."[287] "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity

281. *See*, *e.g.*, *Greenwood*, 237 P.3d at 1022 ("If a defendant presents 'some evidence' of each of these elements, the defendant is entitled to a jury instruction on the necessity defense."); People v. Kucavik, 854 N.E.2d 255, 258 (Ill. App. Ct. 2006) ("The State is free to argue to the jury what it believes a reasonable person would have done under the circumstances defendant faced. That it may have a different view of reasonable behavior does not negate defendant's right to the instruction, or defendant's right to have the jury make the final determination."); State v. McCann, 541 A.2d 75 (Vt. 1987) (affirming trial court's denial of state's appeal of interlocutory order granting defense motion in limine to present necessity defense based on initial offer).

282. *See*, *e.g.*, Baird v. Commonwealth, 709 S.W.2d 458, 459 (Ky. App. 1986) ("in cases in which the defendant has confessed his commission of the act of which he stands accused but asserts a legal excuse or justification exonerating him of criminal intent, the trial court is bound to present that defense to the jury in the form of a concrete instruction").

283. Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (citing Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

284. *Id.*

285. The *Gregory* rule stated that evidence of a third-party's guilt that only casts suspicion upon another was inadmissible; defendant could only offer evidence that raised a "reasonable inference or presumption as to his own innocence." State v. Gregory, 16 S.E.2d 532, 534 (S.C. 1941).

286. *Holmes*, 547 U.S. at 331.

287. *Id*. at 324 (citing *Crane,* 476 U.S. at 690) (internal citations omitted).

to present a complete defense.'"[288]

The *Holmes* Court's reliance on *Crane*, where the Supreme Court overturned a conviction because the voluntariness of the defendant's confession was decided by a judge, emphasizes the *Crane* Court's articulation of the right to a jury:

> That opportunity [of jury consideration] would be an empty one if the State were permitted to exclude competent, reliable evidence . . . when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing."[289]

Analogously, by refusing civil disobedients the right to present evidence simply because the evidence of the underlying crime is strong (and, indeed, in many cases, uncontested), courts commit the error of the *Gregory* rule: they disallow presentation of a complete defense because of the strength of an underlying case. Not allowing a complete defense implicates the Court's warning against the illogical action of reaching a conclusion without considering the strength of the other side's evidence.

While a court may exclude relevant evidence if its probative value is substantially outweighed by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence,"[290] rules of evidence should not be used to disregard a criminal defendant's right to present a complete defense. Unless the state can show that all necessity defense evidence is invalid, under the reasoning of *Holmes* the wholesale exclusion of necessity defense evidence is unconstitutional.[291]

The Supreme Court has cited *Holmes* four times since it was decided, usually for the principle that while lawmakers generally have broad latitude in restricting the admissibility of evidence, those restrictions cannot implicate a defendant's right to a jury trial.[292] In

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288. *Id.* (citations omitted).

289. *Crane*, 476 U.S. at 690-91 (quoting *United States v. Cronic,* 466 U.S. 648, 656 (1984)).

290. FED. R. EVID. 403.

291. *Holmes*, 547 U.S. at 326 (citing Rock v. Arkansas, 483 U.S. 44 (1987) for the proposition that wholesale exclusion of a category of evidence (in that case, hypnotically refreshed testimony) is unconstitutional unless a court can repudiate *all* such evidence).

292. Pena-Rodriguez v. Colorado, 137 S. Ct. 855, 879 (2017) (Thomas, J., dissenting); Nevada v. Jackson, 569 U.S. 505, 509 (2013); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 340 (2009); Clark v. Arizona, 548 U.S. 735, 739 (2006).

Melendez-Diaz v. Massachusetts, discussing a defendant's ability to challenge a lab analyst's test results under the Confrontation Clause, and in *Nevada v. Jackson,* the Court reiterated defendants' constitutional right to have "a meaningful opportunity to present a complete defense."[293]

The reasoning of the *Holmes* line of cases is buttressed by the reasoning of the Court in *Apprendi v. New Jersey*, in which the Supreme Court held that (1) any fact, other than a prior conviction, which increases a criminal penalty beyond the statutory maximum, must go to the jury and be proved beyond a reasonable doubt; and (2) criminal defendants charged with a crime are entitled to a jury determination of guilt of every element of that crime beyond a reasonable doubt.[294]

While the facts of most climate necessity cases do not fall within the precise fact pattern of *Apprendi* and related cases in that they do not involve an increase of a penalty beyond a statutory maximum, the underlying reasoning of *Apprendi* does implicate the imposition of a sentence where it is only applied because of the absence of a viable defense. The *Apprendi* Court was not as concerned with the technical distinction between an element of a crime and a sentencing factor, or with whatever device was used to impose punishment, as it was with denying a defendant's right to jury consideration of any matter that might significantly alter punishment: "the relevant inquiry is one not of form, but of effect—does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?"[295]

Cases following *Apprendi* have expanded this reasoning. In 2005, the Supreme Court in *United States v. Booker* found two provisions of the Federal Sentencing Act unconstitutional because they were inconsistent with the Court's Sixth Amendment jury trial requirement.[296] The Court explained that sentencing schemes must not violate "the defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment."[297] In 2004, the Supreme Court in *Blakely v. Washington* said essentially the same thing.[298]

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293. *Jackson*, 569 U.S. at 509; *Melendez-Diaz*, 557 U.S. at 340 . *See also* Kenneth S. Klein, *Why Federal Rule of Evidence 403 Is Unconstitutional, and Why That Matters*, 47 U. RICH. L. REV. 1077, 1120 (2013) (arguing the *Holmes* court should have considered not only the defendant's right to present a defense but also his right to a jury trial in determining whether evidence was properly excluded).

294. 530 U.S. 466, 490 (2000).

295. *Id*. at 494.

296. 543 U.S. 220, 258 (2005).

297. *Id.* at 232.

298. 542 U.S. 296, 301-02 (2004).

Read together, the *Holmes* requirement of providing a defendant with "a meaningful opportunity to present a complete defense" and the *Apprendi* requirement of jury consideration for "any matter that might significantly alter punishment" constitute firm recognition by the Supreme Court of the right of climate necessity defendants to have their defense heard by a jury—unless all climate necessity defenses are determined to be completely lacking in merit.

The Minnesota Supreme Court recognized this principle in *State v. Brechon*, in which defendants were charged with trespass after protesting against the production of nuclear weapons at the Honeywell Corporation headquarters in Minneapolis.[299] The court held that it is "fundamental that criminal defendants have a due process right to explain their conduct to a jury."[300] A special concurrence by Justice Wahl emphasized this point, arguing that defendants must be free to testify regarding motive, whether or not this constitutes a defense.[301]

Similarly, In *Commonwealth v. O'Malley*, the Massachusetts Appeals Court reversed a grant of a motion in limine to exclude a defense and remanded the case for a new trial. [302] In *O'Malley*, the court discussed the principles behind the fundamental right to present a defense and noted that

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299. 352 N.W.2d 745 (Minn. 1984).

300. *Id.* at 751.

301. *Id.* at 752 (Wahl, J., concurring). The dissent in *State v. Rein* noted that *Brechon* protected the rights of protesters to testify before juries regarding the reasons for their acts of civil disobedience:

> With full knowledge of the clear political/protest nature of the acts of the *Brechon* trespassers, the Minnesota Supreme Court went out of its way in a carefully crafted opinion to protect the rights of those trespassers/protesters to tell a criminal jury what they were doing, why they were doing it, and why they felt they had a right to do it. The special concurrence pointed out that even though good motives might not be a full defense and the trespassers' explanations might be unavailing, they still had a right, as criminal defendants, to take the stand under oath and tell their story.

447 N.W.2d 716, 721 (Minn. App. 1991) (Randall, J., dissenting). The dissent also noted that the *Brechon* defendants did not specifically tailor defense to claim of right jury instruction, and that this was permissible:

> If the defendant's reasons for what happened are at odds with what the court instructs the jury is a legal defense to the charge, the prosecution is entitled to beat the defendant over the head with that in closing argument. That is the state's protection. The state should try criminal cases to the jury, not in chambers.

Id. at 722.

302. 439 N.E.2d 832 (Mass. App. 1982).

> [t]he notion of using a pretrial motion to test the adequacy of the entire defense case as a matter of law appears to be inimical to these principles . . . [t]he motion should be used, if used at all, as a rifle and not as a shotgun. That is, any such motion must be narrowly limited to focus on a discrete issue or item of anticipated evidence. It must not be used to choke off a valid defense in a criminal action or to "knock out" the entirety of the evidence supporting a defense before it can be heard by the jury. Likewise, neither counsel nor the judge should permit a criminal trial by jury to be converted into a trial by motion . . . . In the usual case, therefore, it is far more prudent for the judge to follow the traditional, and constitutionally sounder, course of waiting until all the evidence has been introduced at trial before ruling on its sufficiency to raise a proffered defense.[303]

After the evidence has been presented, the right to a jury instruction on necessity is equally important to the guarantees of due process. As in pretrial hearings on the defense, the defendant need only show some evidence of each element sufficient to allow a reasonable juror to believe that necessity existed, and the court should not interpose its own judgment as to the persuasiveness of the evidence.[304]

The constitutional right to present a complete defense was, for the first time, expressly articulated in a climate necessity defense case by the court in *Washington v. Taylor*.[305] The judge granted the defendant's motion to present a necessity defense at trial, stating in her conclusions of law that "[t]he U.S. Constitution provides criminal defendants a Constitutional right to present a complete defense, including the Affirmative Necessity Defense, when legally relevant."[306]

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303. *Id.* at 837-38 (citations omitted). *See also* Commonwealth v. Hood, 389 Mass. 581, 596 (1983) (Liacos, J., concurring) ("The use of such motions to prevent the defendant from introducing 'evidence on an available defense not only distorts the traditional application of motions in limine, but likewise raises serious constitutional questions relating to an accused's right to present a defense.' If the defendant's right to have his day in court is to be guaranteed, he must be given the opportunity to establish even a tenuous defense.") (citations omitted).

304. *See*, *e.g.*, Greenwood v. State, 237 P.3d 1018, 1022 (Alaksa 2010) ("If a defendant presents 'some evidence' of each of these elements, the defendant is entitled to a jury instruction on the necessity defense"); People v. Kucavik, 854 N.E.2d 255, 260 (Ill. App. 2006) ("The State is free to argue to the jury what it believes a reasonable person would have done under the circumstances defendant faced. That it may have a different view of reasonable behavior does not negate defendant's right to the instruction, or defendant's right to have the jury make the final determination.").

305. Findings of Fact and Conclusions of Law at 9, Washington v. Taylor, No. 6Z0117975 (Spokane Cty. Dist. Ct., Wash. Oct. 16, 2017) (this decision is currently under appeal).

306. *Id.*

V. CONCLUSION

With the ravages of climate change in full swing and state and federal governments failing to adequately respond to the crisis, climate activists like Leonard Higgins will continue to commit acts of civil disobedience aimed at preventing the spread of fossil fuel infrastructure. Progressive success in the use of the necessity defense by such activists, with recent decisions to acquit defendants on other grounds or to provisionally admit necessity evidence, indicate that judicial opinions regarding climate change and the procedural rights of political protesters are changing.

Activists, attorneys, and judges should recognize that the necessity defense promotes a healthy democracy and that it seeks to foreground the greater good in criminal process. When courts deny the presentation of a necessity defense even where admissible evidence exists, defendants' fundamental rights are violated and important issues of fact are excluded from the courtroom. Attention to defendants' Sixth Amendment rights and a better understanding of the common law pedigree of necessity will be crucial to cultivating a serious and much-needed treatment of climate change in criminal trials across the country.