



Climate Strike protesters marching across the Hawthorne Bridge in Portland, Oregon. Credit: [Eric C Gardner](#), 2019.

The first Earth Day, fifty years ago, was a product and catalyst of [political movements](#) that established bedrock environmental laws in the United States. Without decades of [political activism](#), there would be no Clean Air Act, Clean Water Act, or Endangered Species Act, nor would there be vigorous enforcement regimes to carry these laws out. We owe thanks for today's cleaner water and clearer air in part to the countless activists who have taken to the streets, pressured lawmakers, and raised consciousness about environmental issues.

We have failed, however, to limit greenhouse gas pollution. Despite [crystal clear](#) warnings from scientists, emissions rise at a staggering pace. Few countries produce more carbon pollution per person than the United States, and few governments have [abdicated responsibility](#) quite as brazenly as our own. For decades, our political and business leaders have given us [disinformation](#), [half-measures](#), [broken promises](#), and [denial](#). They have done so despite the incredible dangers threatened by climate change, and despite the fact that those most harmed will be those least responsible for causing it.

In response to persistent government inaction, some climate activists have turned to civil disobedience. [Civil disobedience](#) is a “public, non-violent and conscientious breach of the law,” done to instigate reform in law or official policies. It has a long history in U.S. politics,

from the Boston Tea Party to open defiance of the Fugitive Slave Act to student sit-ins against the Vietnam War. With this tradition in mind, climate activists have launched direct actions at fossil fuel companies and institutions with large carbon footprints, including [sit-ins](#) at universities; [impeding](#) construction of natural gas infrastructure; and [blocking](#) freight trains from moving oil to market. These actions often violate private property rights, and many participants [have been charged](#) with crimes ranging from misdemeanor trespassing to felony burglary—generating substantial press coverage in the meantime.

Broadly speaking, the practice of civil disobedients has been to acknowledge guilt and accept punishment by the state. By submitting to unjust punishment under unjust laws, activists can bring the current crisis into sharper focus. But in a curious legal development, some climate civil disobedients are alleging the “[climate necessity defense](#)”—that the perils of climate change are so severe, and U.S. democratic processes so unresponsive, that no option remains but civil disobedience. Perhaps more surprisingly, some of these defendants are winning their cases and avoiding convictions.

### **The Necessity Defense and Jury Nullification**

The climate necessity defense is a recent variation of the “[political necessity defense](#),” a strategy developed by anti-nuclear activists in the 1970s against criminal prosecution.<sup>[1]</sup> The strategy draws on the [necessity defense](#), long established at common law, which recognizes that, very rarely, the law must be broken in order to avoid a greater evil. The paradigmatic cases involve sailors who dump cargo to avoid shipwreck, prisoners who escape from a burning jail, or intoxicated people forced to drive because of an emergency. A judge or jury may find the defendant’s crime justified in such circumstances and acquit.

Prosecutors rarely bring charges in cases where a defendant could raise the necessity defense. Its use in court therefore serves as a check on abuses of prosecutorial discretion and arbitrary enforcement of the law. For this reason, the defense is often linked to the phenomenon of [jury nullification](#), where juries vote to acquit despite the requirements of the law or the overwhelming weight of the evidence. Judicial treatment of the political necessity defense and jury nullification are also marked by a shared anxiety: ordinary people, in an ad-hoc fashion, deciding for themselves which laws to follow and enforce.

### **Arguing Climate Necessity in Court**

The necessity defense “[require\[s\] a showing](#) that the defendant a) faced an imminent danger, b) took action to prevent that danger through less harmful means, c) reasonably anticipated that the action would prevent the danger, and d) had no reasonable legal

alternative to the action.” This is a tough standard for climate activists to meet, but by no means impossible. To give a rough sketch of the argument:

- *Imminence*: Scientists have shown, and courts have recognized, that climate change’s dangers are immediate, severe, and accelerating.
- *Lesser harm*: Climate change’s damages far exceed the property damage associated with these direct actions.
- *Causal relationship*: Civil disobedience is a core part of the country’s political experience and a proven mechanism for change.
- *No reasonable alternative*: State and federal governments have taken little action to reduce emissions and continue to subsidize fossil fuels despite decades of warnings.

When considering whether to allow this defense at trial, judges will ask whether the defendant has presented a genuine issue of fact that can be sent to the jury. In theory, this is a forgiving standard. Criminal defendants have a constitutional right to “a meaningful opportunity to present a [complete defense](#)” before the jury, and this should take precedence over countervailing values of efficiency and not confusing the issues. Furthermore, trial outcomes show the defense is compelling. When defendants can present the climate necessity defense, [the result is often](#) dismissal, mistrials, or mitigated sentencing.

But the climate necessity defense rarely makes it to trial. In most cases, it is excluded at pre-trial evidentiary hearings that find the defendants’ proposed factual showings insufficient as a matter of law: the evidence offered in support of climate necessity is too flimsy to send to the jury. Defendants encounter the most trouble on the third (*causal relationship*) and fourth elements (*reasonable alternatives*). Judges ruling to exclude often find the relationship between the direct action and climate change mitigation too attenuated, or that other legal channels remain for activists to make their voices heard.

### **Doctrinal Shortcomings of Climate Necessity**

Judges who so refuse get the outcome right but the analysis wrong. As summarized above, civil disobedients can make a plausible, if disputable, case of their innocence under the necessity defense, especially where they take steps to exhaust public processes on infrastructure projects. But I agree with [what others have argued elsewhere](#): civil disobedients, as a matter of law, should not be able to raise a political necessity defense against criminal prosecution.

I say this as someone reluctant to reach this conclusion. My basic problem is that I cannot come up with a rule for political necessity that isn’t sensitive to the substance of the

political cause. Civil disobedience is an ideologically neutral tactic. Acquitting climate civil disobedients who block an oil pipeline may seem righteous; acquitting a public official’s [refusal to issue marriage licenses](#) to gay couples is not. The role of necessity is to provide a limited defense in recognition that some situations—a flood, a fire, a medical emergency—require people to break the law to save themselves or others. It is not an invitation for juries to decide whether the goodness of a defendants’ politics completely overrides guilt of a politically motivated crime. Nor should it be: a criminal court is a non-representative body ill-equipped for open, democratic deliberation on political issues.

There’s also a theoretical problem for civil disobedients asserting necessity. Civil disobedience involves illegal acts committed *because* they are illegal. Breaking the law communicates an ongoing state of injustice and makes the call for reform more urgent. Admitting guilt and submitting to punishment, meanwhile, demonstrates the protestor’s commitment to lawfulness while drawing attention to the cause. “[By breaking the law](#) while accepting its punishment . . . civil disobedient[s] can accommodate both [their] individual moral viewpoint and [their] ethical bond to accede to the mandate of the community.” The necessity defense, on the other hand, asserts innocence of a crime done *despite* its illegality. Civil disobedients claiming necessity thus mischaracterize their motivation (i.e., mens rea) and contradict the [philosophical foundation](#) of the practice.

### **Conclusion: Reformulating the Defense**

The arguments raised under the climate necessity defense do, however, have a place in court, and it’s at the sentencing stage. The question of guilt is different from the question of punishment. In a retributive framework, just punishment requires an inquiry into the factual circumstances to ensure the punishment is proportionate to the culpability of the defendant. That inquiry, in turn, requires an assessment of the defendant’s motive for the act, the resultant harm, and the criminal act’s overarching context: in other words, the ground covered when asserting climate necessity.

The arguments marshaled in support of necessity would thus serve better as a structured petition for leniency. This recommendation would likely work in practice similarly to how climate necessity defenses are already treated by courts: they will gain traction with judges favorable to the protestors’ motives, and they will be sidelined by judges who are not. The advantage, though, is that this process better comports with the doctrine of necessity, the role of the courts, and the philosophical construction of civil disobedience. Activists, meanwhile, would retain access to a platform to argue for political change. Finally, individualized attention should always be paid to defendants when assessing punishment, so the procedure wouldn’t raise the impossible task of sorting legally cognizable political

causes from not.

Hopefully more courts will take it upon themselves to appropriately consider political necessity arguments in future criminal proceedings. More civil disobedience on climate change is certain to come.

[1] The first use in U.S. courts, however, was by a member of posse that, in 1917, [illegally rounded up](#) more than a thousand striking miners in Arizona and deported them by freight train to New Mexico. The defendant, charged with kidnapping, argued necessity because the strikes threatened capitalism and the U.S. war effort. He was acquitted.