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**SUPERIOR COURT OF WASHINGTON  
COUNTY OF SKAGIT**

STATE OF WASHINGTON, Plaintiff,

vs.

KENNETH WARD, Defendant.

NO: 16-1-01001-5

STATE'S SUPPLEMENTAL RESPONSE  
TO DEFENDANT'S MOTION TO  
RECONSIDER

2  
COMES NOW, The State of Washington, Skagit County, by and through the Skagit County Prosecuting Attorney and Sloan G. Johnson, Senior Deputy Prosecuting Attorney, and requests the Court deny the defendant's Motion to Reconsider with respect to a necessity defense. The State relies on previous briefing filed on this issue, as well as the supplemental authority and arguments herein.

**ARGUMENT/AUTHORITY**

A cursory review of the common law defense of necessity indicates very clearly that it only applies in cases involving imminent harm. Classic examples given in treatises and practical descriptions generally involve an imminent harm that requires immediate action to avoid serious injury or death in the moment: i.e. a fire in a prison that may justify the escape of incarcerated prisoners, a storm in the wilderness that threatens the lives of hikers who must then enter a dwelling for shelter and food, or a driver leaving the scene of an accident to get medical help for an injured and bleeding passenger. In these scenarios,

lives would have been lost immediately had these persons not committed the otherwise illegal acts.

Defense now claims that there is “ample basis” for this Court to determine that the “catastrophe Mr. Ward sought to avert was in fact imminent.” Given this grandiose depiction of impending doom, it seems that we are indeed fortunate to still be alive to argue the matter further more than six months after the defendant’s actions. In fact, the testimony at trial showed that nothing was “averted” by Mr. Ward’s actions. This is an important distinction in this case versus other necessity scenarios – the harm sought to be avoided was not avoided at all. Mr. Ward may have caused more environmental damage driving his Jeep to the scene from Oregon than he prevented by breaking into Kinder Morgan’s property and closing a valve.

Also in contrast to the classic examples of necessity defenses, the act of civil disobedience in this case was a **planned action**. The defendant and/or a co-conspirator called Kinder Morgan in advance of the burglary and sabotage to tell them what was going to happen. The concept of intent is completely different in this situation. No one in the above-mentioned scenarios **planned** to break the law. It was an unplanned reaction to a sudden and dire circumstance not previously known to the parties involved. A hiker can plan for an emergency situation with the ten essentials to help if conditions worsen, but it is not reasonable to assume that they would plan to break the law by breaking into a residence and procuring food and shelter in the event of a sudden and unforeseeable life-threatening situation. If they did, this would be a premeditated burglary rather than a necessity. If the illegal act was planned in advance, the necessity element fails.

In this case, the necessity defense is being promoted by the defense as more of a social movement than an actual legal defense. The Climate Disobedience Center, of which Mr. Ward is listed as a Founder (see attached), is promoting the necessity defense in civil disobedience cases on their website (see attached). Their belief is that their cause justifies breaking the law in order to call attention to the plight of the planet due to climate change. As their materials describe, the defense has not been successful, but their hope is that our legal system will soon “catch up to public opinion” and allow it. In the meantime, the Climate Disobedience Center cautions people to “Act accordingly. If you are not able to deal with the consequences of arrest, don’t risk it. Activism can take many forms, so be honest with yourself about how you can be most effective in fighting for a just and healthy world.”

The State agrees with the Climate Disobedience Center on the latter point. Activism can take many forms. Many of them are legal. By acknowledging this, they defeat their own argument that no reasonable legal alternative exists – a requirement for the necessity defense. There are numerous legal alternatives to criminal actions with respect to climate change, and the nature of climate change is not an instantaneous situation that can be averted with a single act, criminal or otherwise. Some would even argue that it is not a true threat to begin with, as there are clearly different sides to the issue. The fact that Mr. Ward has deemed his non-criminal efforts ineffective does not mean that he is completely out of alternatives. In addition, Mr. Ward chose a specific time and location to commit a crime. He intentionally created the situation.

The very purpose of civil disobedience is to break the law to bring attention to a cause or issue. Arrest and legal consequences are part of the process. To allow

defendants to try to avoid consequences based simply on their own beliefs in a social issue would lead to the slipperiest of slopes. The absurd results that would flow from allowing a necessity defense for any crimes relating to the protection of the environment would be rather shocking. The court is apparently being asked to let the defendant decide what constitutes the exhaustion of legal alternatives. If they had tried several things without success, would more drastic action such as hostage-taking or large-scale sabotage and destruction of businesses connected with the petroleum industry be deemed defensible under the necessity doctrine? Overpopulation is a serious global issue, contributing to climate change, poverty, disease, and starvation. Under the defense's rationale, it would seem that even homicide could be defended under the doctrine of necessity.

State v. Parker does discuss the necessity defense and circumstances that may justify it. However, that case involved unlawful possession of a firearm. The court went beyond the general purview of WPIC 18.02 in requiring that the defendant "reasonably believed he or another was under unlawful and present threat of death or serious physical injury." The Parker court was also concerned with an imminent threat. They did not find it in that case, nor is it present in the instant case. The Snohomish County trespass cases may be up for review, but at this time, there is no controlling authority requiring a necessity instruction in civil disobedience cases. Because the requirements cannot be met under the factual circumstances of this case, the motion to reconsider must be denied.

DATED this 5 day of MAY, 2017.



Sloan Johnson, WSBA #32745  
Senior Deputy Prosecuting Attorney



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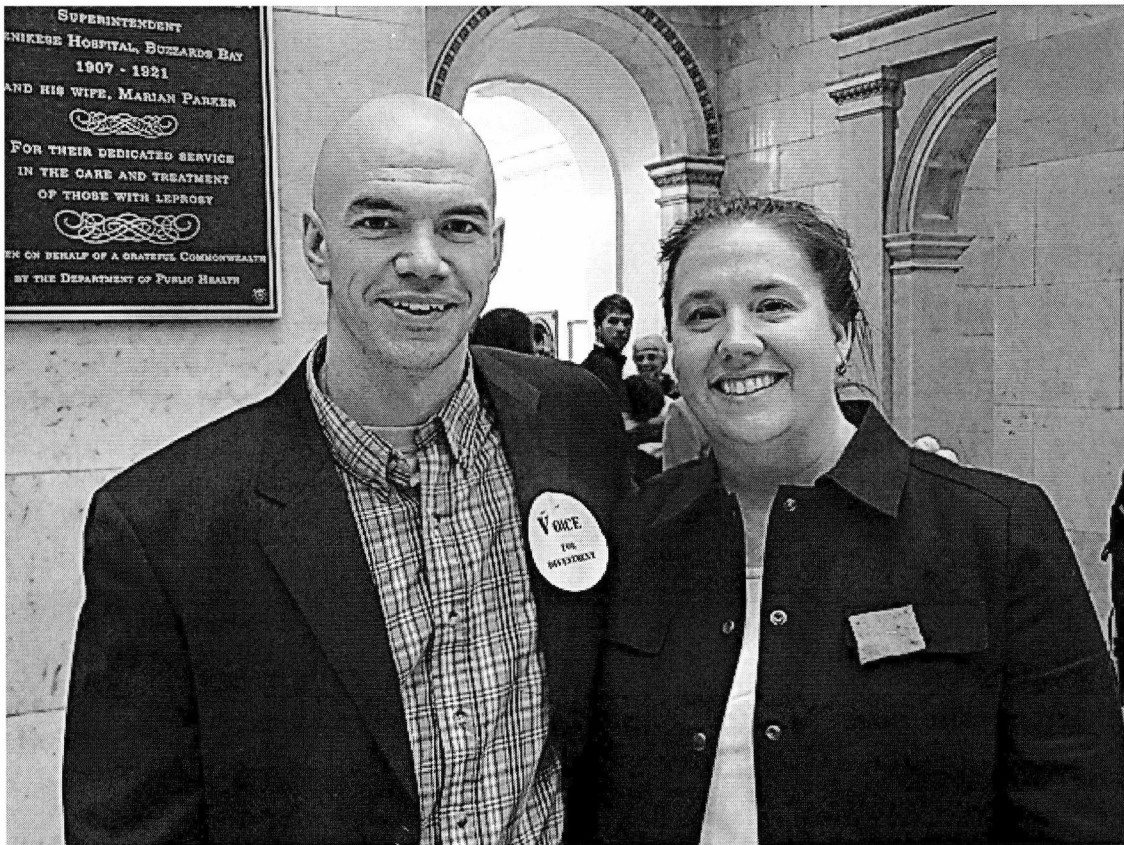
## Founders

Meet the founders of the Climate Disobedience Center, Tim Dechristopher, Marla Marcum, Jay O'Hara and Ken Ward.

**Tim DeChristopher**, as Bidder 70, disrupted an illegitimate Bureau of Land Management oil and gas auction in December of 2008, by outbidding oil companies for parcels around Arches and Canyonlands National Parks in Utah. His actions and 21 month imprisonment earned him a national and international media presence, which he has used as a platform to spread the urgency of the climate crisis and the need for bold, confrontational action in order to create a just and healthy world. Tim used his prosecution as an opportunity to organize the climate justice organization Peaceful Uprising in Salt Lake City. He continues the work to defend a livable future. **Read More.**

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*Tim DeChristopher and Marla Marcum at the MA State House*

**Marla Marcum** is a United Methodist committed to supporting people of all faiths and no particular faith to act boldly for justice. An experienced campaigner, trainer, pastor and lay leader, she brings two decades of social justice organizing experience with faith-based, youth, and grassroots groups. She supported the launch of Climate Summer, serving as its Director for five years, and is a Co-Founder of both Better Future Project and 350 Massachusetts. Marla has supported, organized, and participated in many direct action and civil disobedience efforts, including the Lobster Boat Blockade. Her current projects include organizing sustained nonviolent resistance to Spectra Energy's West Roxbury Lateral pipeline project with Resist The Pipeline and re-starting Climate Summer for 2017. Marla is passionate about leadership development and building supportive communities of resistance among unlikely allies. She calls both the Boston area and the Missouri Ozarks "home."

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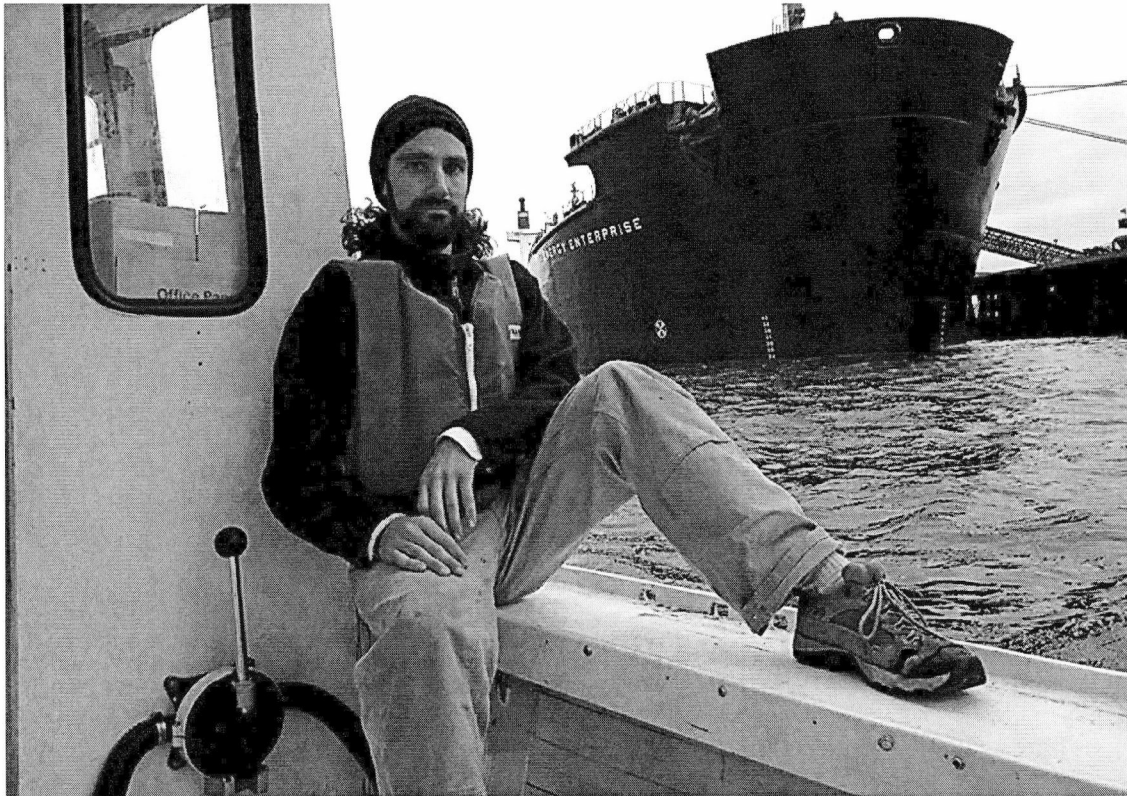
*Marla Marcum, Ken Ward, and Jay O'Hara*

**Jay O'Hara** is a Quaker and native of Cape Cod. In 2009, after moving to his hometown, he founded Climate Summer, a transformational program for student climate activists. In 2011 he co-founded the Young Adult Friends Climate Working Group to provide leadership to New England Quakers. Called to bolder action, in 2013 he, along with Ken Ward, blockaded 40,000 tons of coal destined for the Brayton Point power plant with their small white lobster boat named the "Henry David T" - the Lobster Boat Blockade. The ensuing legal proceedings garnered national attention. Most recently he co-led the faith based "Pipeline Pilgrimage". He currently lives in Vermont. **Read More.**

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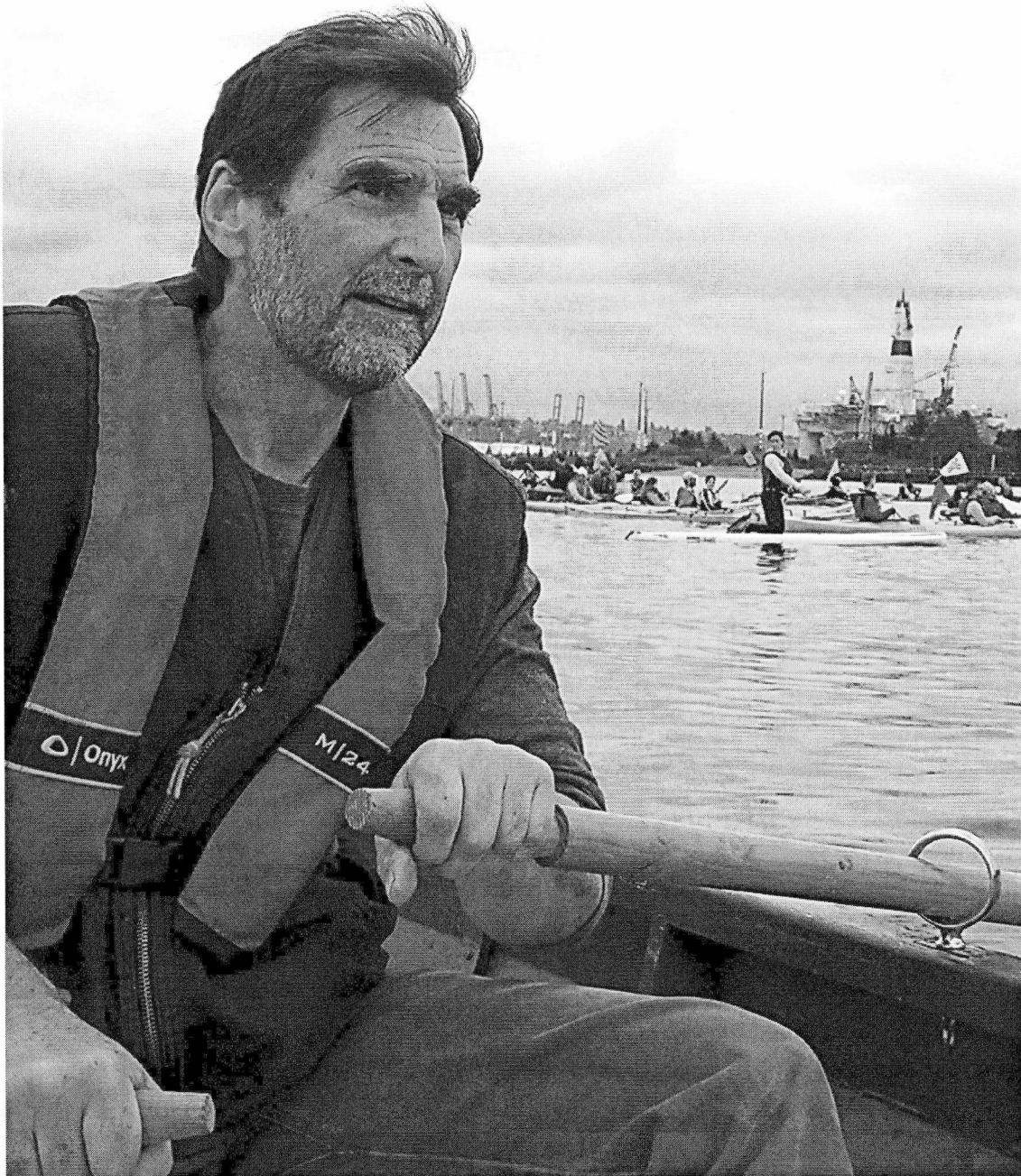


*Jay O'Hara next to the Energy Enterprise during Lobster Boat Blockade*

**Ken Ward** is the former Executive Director of New Jersey Public Interest Research Group (NJPIRG), Deputy Director of Greenpeace USA, President of the National Environmental Law Center and co-founder of Green Corps, the Fund for Public Interest Research and U.S. PIRG. After 20 years of professional activism he became an at-home dad for his now 15 year old boy, Eli, which afforded him the opportunity to read all then available science articles on climate. Realizing that the climate approach of US environmentalists is inadequate, he has spent the last 15 years pushing for a bigger, tougher climate strategy, summarized in the Bright Lines papers (2007). His recent work includes the Jamaica Plain Green House, which served as a regional hub for 350.org actions, Metro Boston Climate Defense, acting Director for Apeiron Institute for Sustainable Living, and, with Jay O'Hara, blockading a coal shipment at Brayton Point in 2013 with a lobster boat - the Lobster Boat Blockade. In October, 2016, Ken was one of five "Valveturners" in the Shut It Down action, which closed all five pipelines carrying tar sands oil from Canada into the US. Ken lives in Corbett, Oregon and is active in the Shell No! campaign.

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*Ken Ward during ShellNo! protest*

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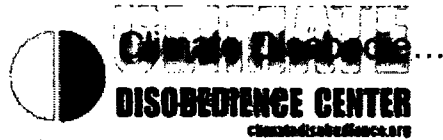
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## The Climate Necessity Defense: A Legal Tool for Climate Activists

*This guide is intended as an educational resource for climate dissidents. It offers information about the legal system and presents the experiences of certain environmental activists. Before planning any action, take stock of your situation, your community, and your capacity. If you are arrested, you are committing yourself to the federal and/or state criminal legal system, which may have consequences that include a conviction, jail, and/or probation. Act accordingly. If you are not able to deal with the consequences of arrest, don't risk it. Activism can take many forms, so be honest with yourself about how you can be most effective in fighting for a just and healthy world.*

**\*\* Please be aware that this guide is not legal advice and does not form an attorney-client relationship. \*\***

### What is the climate necessity defense?

The climate necessity defense is an **argument made by a criminal defendant to justify action taken on behalf of the planet**. It's offered by activists who have been arrested for protesting fossil fuel extraction and government inaction on climate policy.

The climate necessity defense is associated with the tradition of **civil disobedience** — the deliberate violation of the law to confront a moral problem. People who commit civil disobedience believe that they are obeying a higher moral law or code. Sometimes the existing criminal law doesn't align with this higher morality, and so disobedience is required in order to live morally. **Climate necessity defendants argue that their actions were not really illegal**: they were acting in the public interest, which the law protects. Instead of seeking a plea agreement or trying to win an acquittal, defendants offering the climate necessity defense **admit their criminal conduct but argue that it was necessary to avoid a greater harm**. The basic idea behind the defense — also known as a “choice of evils,” “competing harms,” or

“justification” defense — is that the impacts of climate change are so serious that breaking the law is necessary to avert them.

By admitting their conduct and asking a judge or jury to find them not guilty by reason of necessity, activists **draw attention to injustice** and the failure of the law to protect the planet.

Because the climate necessity defense asks people to make judgments about individual responsibility, legal obligation, and the good of society, it is essentially a **moral argument couched in the language of criminal law.**

## How does it work?

The rules governing the use of the necessity defense vary by state and by court. **Always check with a lawyer** to figure out which jurisdiction your case would fall under and what sorts of special requirements apply for attempting the defense.

In general, this is what the process looks like:

1. Arrest
2. Not guilty plea
3. Offer necessity defense to judge
4. Present defense to jury
5. Conviction or acquittal

**1. Arrest:** You're arrested while committing your act of civil disobedience. This is part of the process — you want to both prevent continued climate change and have a chance to **use the legal system to further your views.**

**2. Not guilty plea:** Within a short time after your arrest, you will face an **arraignment or preliminary hearing** to learn about the charges that the state is bringing against you — for example, trespassing at a private facility. Activists preparing for a climate necessity defense will plea **not guilty** to the charges.

**3. Offer necessity defense to judge:** After arraignment, the prosecution and the defense will start to prepare for trial. There will likely be a series of pre-trial hearings where lawyers will hash out various technical matters, like what sorts of evidence they want to present. During this stage, you and your attorney will tell the judge that you plan to present a climate necessity defense: this is called the **offer, proffer, or notice of intent to present a defense.**

The judge will probably hold a hearing on whether to allow your defense. You will present arguments about why the defense is acceptable and should go to a jury, and the prosecution will try to show that your defense of justification is unacceptable. **This is a crucial stage:** the judge gets to decide whether or not you have the right to argue that your crime was justified. Before your case ever gets to the jury, your

argument may be dismissed “as a matter of law”: in other words, because the judge doesn’t think your defense is appropriate. On the next page we explain the factors that play into this decision.

**4. Present defense to jury:** If the judge allows your defense to go forward, you’ll be all set to **go to trial**. You’ll finally have a chance to tell your side of the story and to present evidence about the dangers of climate change, the reasons behind your action, and why civil disobedience was required. Activists often bring in experts such as climate scientists to testify about the harms of global warming. Remember: you’ll be admitting that you technically broke the law, but you’ll be asking to be found not guilty because your actions were justified. This is your opportunity to educate the jury and to discuss the moral reasons behind your action.

**5. Conviction or acquittal:** Once you’ve finished your defense, the jury (or, in the case of a bench trial, the judge) will take time to deliberate. They’ll consider the evidence you’ve presented and the strength of your arguments for justification. Then you’ll find out whether you’ve been found **not guilty by reason of necessity**.

## What’s the argument?

You may have noticed that that the judge has lots of control at step ③: he or she can decide whether you’re allowed to present your necessity defense at all. To clear this hurdle, you’ll need to prove that a reasonable juror would accept your justification argument. This is a preview of the argument you’ll give to the jury at step ④. Although the exact requirements vary by jurisdiction — again, **always consult a lawyer** — the basic steps in the argument are as follows:

- You need to prove that you faced a **serious danger**. For example, a defendant might argue that burning coal poses a serious threat to humans and the planet. Most courts require defendants to present some evidence that this danger is **imminent** — in other words, that it is near and certain, rather than distant and speculative.
- Next, you need to demonstrate that you **reasonably expected** your illegal protest to avert this serious danger. For example, a defendant might argue that he believed that disrupting a gas lease auction would prevent increased drilling.
- You must also show that there were **no legal alternatives** to your criminal conduct — that **civil disobedience was necessary** because nothing else would work. For example, a defendant might argue that lobbying or signing petitions could not have prevented the construction of a pipeline, so she had to form a blockade.
- Finally, many courts require you to prove that there is **no public policy against your defense**. Basically, this requires you to show that there is no law saying that the necessity defense is unavailable for your specific charge. For example, there is rarely a law saying that trespassing can never be justified by necessity.

## So what's the point?

The legal technicalities of the climate necessity defense can get a bit complicated. But at its most basic level, the defense allows activists to **call attention to and explain the reasons behind their climate disobedience**. Because courts are public institutions designed to serve the common good, they can be an excellent forum in which to address society and educate people about climate change.

Traditionally, the American jury was seen as a democratic institution that gave ordinary citizens a voice in the criminal justice system. This is less true today, when most cases end in plea agreements and judges exercise enormous power over the types of arguments that defendants can present. But in the rare instances in which defendants are able to defend their conduct to a jury of their peers, **they enjoy tremendous success both in winning acquittals and in drawing attention to injustice**.

Climate activists are driven by concern for society and the planet. By presenting a necessity defense — that is, describing the dangers of climate change, the lack of effective legal remedies, and the importance of individual action — **activists in effect put the government on trial**. If such an argument succeeds, it sends a very powerful message about the need for political change and the value of personal initiative.

So while the necessity argument is technically a form of criminal defense, what's really happening when activists defend their climate disobedience is **democracy in action**, with citizens using the direct confrontation of a courtroom to discuss the most pressing issue of our time.

## Does it really work?

As of the writing of this pamphlet, the **climate necessity defense has succeeded only once**, in the United Kingdom in 2008. Although it hasn't yet worked in the United States, there's good reason to think it will soon.

As described earlier, an activist attempting a climate necessity defense will plead **not guilty** to her charges and will notify the judge that she wishes to present a necessity defense. The judge will decide **as a matter of law** whether to allow the activist to use the defense — that is, whether the criminal statute under which the activist has been charged allows the necessity defense at all, and whether a reasonable juror could possibly find the defense to be valid (step ③). Because judges enjoy a wide range of discretion at this stage in the criminal process, most attempts at the necessity defense have failed here, before the jury ever hears the activists' arguments.



So keep this in mind: **the climate necessity defense is a novel legal tool that hasn't yet succeeded in any court in the United States.**

But there's cause for hope. In the past, activists have been found not guilty by reason of necessity for protesting issues like **nuclear weapons, CIA recruitment, and apartheid**. Once they were able to describe their civil disobedience to a jury, protesters were often able to prove that their minor crimes of trespassing or disorderly conduct were justified in light of the serious injustices that they were facing. But in each case, it took the courts several years to catch up to public opinion and to allow the activists to present their necessity arguments to a jury. Luckily, it looks like courts are finally starting to reach this point in cases involving protests against climate change:

## Signs of hope . . .

In 2007, six activists painted the prime minister's name on the chimney of an English coal plant to draw attention to climate change. A year later, **a jury found that their actions were justified** because of the serious dangers posed by climate change. Because the jury thought that causing property damage to a coal plant was a relatively minor crime compared to the harms caused by global warming, the activists were acquitted.

In 2011, activist Tim DeChristopher attempted to use the necessity defense to justify his disruption of a federal gas lease auction in Utah. DeChristopher argued to the judge that the jury should hear about the government's illegal leasing practices and the large amount of carbon dioxide that would be released into the atmosphere if drilling were allowed. Rather than permit these arguments in the courtroom, the judge denied the defense as a matter of law (step ③ in the process described earlier). **But the attempt garnered international attention and inspired similar protests** — ultimately resulting in the cancellation of the leases and the successful conservation of pristine land.

In 2013, activists Jay O'Hara and Ken Ward used a lobster boat to block a coal shipment to a Massachusetts power plant. In the months following their arrest, it was announced that the coal plant was shutting down. The following year, the activists prepared a climate necessity defense for the jury, and their defense was approved by the judge — meaning they cleared step ③ allowing them to present a necessity case in court. But on the morning of their trial, **the prosecutor dropped all charges** and said that O'Hara and Ward's action was morally justified. This surprising turn of events indicated a reluctance to punish protesters for defending the climate and a growing acceptance of the reasoning behind the necessity defense.

In 2014, Alec Johnson faced trial for locking down to a piece of heavy machinery along the Keystone XL Pipeline route in Oklahoma. His protest and subsequent trial

**galvanized pipeline opponents across the country.** Although the judge rejected his necessity defense, resulting in a conviction on two minor charges, Johnson faced no jail time and his support team was able to cover the cost of his fines.

In 2015, eleven activists arrested during the Flood Wall Street protests in New York had their charges of disorderly conduct dismissed after refusing to obey police orders to leave the street. Once again, the judge in this case rejected the necessity defense at step ③, deciding that the protesters' actions were not reasonably expected to avert climate change. But in dismissing the charges for other reasons, the judge made a point of **noting the serious dangers posed by climate change and commended the activists' moral conviction.** In other words, the protesters were able to use the necessity defense to broadcast the issues they cared about and the necessity of civil disobedience, and they avoided any punishment for their protest.

What we learn from these cases is that, although the climate necessity defense has not yet been put before an American jury, **the courts are starting to come around.** In the Massachusetts and New York cases, the protesters' attempted use of the necessity defense drew attention to their cause, and their moral arguments eventually won out.

As our climate crisis worsens, drastic action is needed to force those in power to do something before it is too late. For activists convinced that civil disobedience is part of the solution, the climate necessity defense can be an important tool to defend and publicize their actions. And as soon as the first activist manages to successfully use the necessity defense at trial, **it will become a powerful precedent** for future defendants to justify their moral lawbreaking.

## **Okay, I want to try to use the defense. What should I do?**

The first thing to keep in mind is that **there are no guarantees when it comes to the legal system.** You very well may not be able to present the climate necessity defense at all. **You should only engage in civil disobedience if you are able to accept the full legal consequences of your behavior.**

You should also consider whether you are prepared to be a spokesperson for your cause. Because the climate necessity defense turns upon your personal motivations and convictions, you should **be ready to have your ideas and emotions scrutinized in court and in the media.** Make sure you are confident in your beliefs and that you are able to articulate the reasons why you have turned to civil disobedience.

And most importantly: **always consult a lawyer.** Attorneys can't give you advice about how to commit a crime, but you can ask them general questions about the law

of necessity. Have a sympathetic attorney on call for when you are arrested, and never speak to the police or prosecutors without your lawyer present.

With those points in mind, here are some practical considerations for activists interested in attempting the climate necessity defense:

- **Create a track record of legal efforts to solve the problem.** You'll have to prove in court that you made a good-faith effort to do everything short of committing civil disobedience. Learn the history of your campaign, collect evidence of past efforts to remedy the problem, and exhaust the traditional avenues of persuasion.

- **Know the law of your jurisdiction.** It's easier to argue necessity in certain places than in others, so learn the exact requirements of your jurisdiction. You should also familiarize yourself with what laws are in effect regarding the industry or government practice you're protesting, as the judge will want to know whether or not allowing your defense would conflict with established public policy.

- **Conduct your protest in a responsible manner.** The tradition of civil disobedience is based on non-violence and respect. In court, you'll be evaluated on the manner in which you conducted yourself during moments of high tension. Anything that suggests aggression or intolerance will look bad to a jury. Pay attention to the images you present, the language you use, and the arguments that you make.

- **Document your action.** You'll want definitive proof of what happened during your protest so that you can show the court and the jury that you acted responsibly — and to make sure that the police aren't the only ones telling your story. Have your support team photograph and film your action where possible, and create a written record immediately after the protest has ended.

- **Act like a good citizen.** Deliberately breaking the law is a highly controversial tactic, and any additional resistance you offer to the police, prison staff, or court employees will reflect negatively on your character. Allies turn up in unlikely places, so use your time in the criminal justice system to change minds, not to harden hearts. In court, conduct yourself accordingly: be respectful, act humbly, and demonstrate love for your fellow human beings.

And throughout your planning and defense, the Climate Disobedience Center is here to support you . . .

**The Climate Disobedience Center** is dedicated to confronting the climate crisis at the point of injury. We provide logistical and legal support for activists engaged in peaceful disobedience. Our goal is to create a community of climate dissidents prepared to put their bodies on the line for the planet.

If you're thinking about attempting a climate necessity defense, get in touch with us for organizing support and legal resources.

And check out our website, [climatedisobedience.org](http://climatedisobedience.org), for guidance and more information on activists who have attempted the climate necessity defense and to learn about our circle of resistance.



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